ON APPEAL TO THE SUPREME COURT OF APPEAL OF FLORIDA

ROBERT D. GLOCK, II,

Appellant,

vs.

Appeal No. 68,380

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLANT

Appeal from a Death Sentence imposed by the Circuit Court, Sixth Circuit.

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For purposes of the brief, Appellant, Robert Glock, will be referred to as "Appellant". His co-defendant below, Carl Puiatti, will be referred to as "Mr. Puiatti". References to the record on appeal will be in parenthesis with the letter "R" followed by the appropriate page number or numbers. References to the Appendix will also be in parenthesis with the letter "A" followed by the appropriate page number.

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STATEMENT OF THE FACTS

On August 16, 1983, in an orange grove at Townsend Road, Pasco County, Florida, two schoolgirls discovered the dead body of a woman and reported their discovery to law enforcement officers. (R1662-1666). The ensuing investigation identified the woman as Mrs. Sherilynn Richie and determined that she had been killed by gunshot wounds (R1669-1723, 1827-1829). The wounds had been caused by a .38 calibre pistol, identified at trial as the same pistol found on August 20, 1983, in the glove box of a vehicle stopped on the New Jersey turnpike by Trooper William Moore of the New Jersey State Police (R1738-1750, 1752-1757). The vehicle's occupants were the Appellant, Robert Glock, and his co-defendant in the court below, Carl Puiatti (R1771-1772).

The day before, in Columbia, South Carolina, Appellant had pawned a citizen's band radio known to have been in Mrs. Richie's possession at the time of her abduction (R1887-1891). Earlier, they had pawned some of the woman's jewelry in Orlando, Florida (R1938-1939).

Trooper Moore's initial reason for stopping the vehicle was that its license plate was illegible, a violation of New Jersey law (R1770). Neither occupant of the vehicle could produce a valid driver's license and, when Mr. Puiatti opened the glove box in search of the vehicle's registration papers, Moore observed the butt of a handgun and proceeded to search the vehicle and arrest

its occupants for illegal possession of weapons (R1771-1778). They were first advised of their constitutional rights at that time (R1785-1787).

While being held in Morristown, New Jersey, Appellant and Mr. Puiatti were questioned by New Jersey authorities, who had by then learned that the vehicle was reported stolen and it's owner a homicide victim (R1789-1795). Advised again of his rights, Appellant stated that he had taken the vehicle at knife point, released its owner "some ways down the road" and then proceeded to pick up Puiatti and head for New York. (R1797). Puiatti, during this initial questioning, told a similar story (R1799).

The next day, at the Burlington County Jail, after arrival of detectives from the Pasco County Sheriff's Office, Appellant was again, advised of his rights and questioned a second time. This time he confessed that, acting with Mr. Puiatti, he had participated in the killing of Mrs. Richie. Mr. Puiatti, being told by the detectives that Appellant had "given a statement" about the killing, made a confession similar to Appellant's. Both of these confessions were repeated that evening and tape-recorded (R1802-1806, 1830-1833).

Appellant and Mr. Puiatti both signed consent-to-search forms regarding the vehicle (1806-1807). The resulting search discovered a number of items pertaining to the decedent (R1850-1853). After being returned to Florida, both Appellant and Mr. Puiatti assisted investigating officers at the crime scene (R1842-1844).

These initial confessions involved a variance, each blaming the other as to who had proposed the killing and as to who fired

which of the shots (R1865-1867).

Later, on August 24, 1983, Appellant and Mr. Puiatti made a joint statement, in the presence of Sheriff's detectives and a court reporter. (R1905-1944). This confession described how the two captured Mrs. Richie and her car, at gunpoint, at a shopping mall near Bradenton and forced her to withdraw $100.00 through her bank's drive-in teller, they then proceeded to an orange grove near Dade City, where Mrs. Richie was released with her purse and some other belongings. In this joint confession, Puiatti stated and Appellant agreed that, after driving away, they turned around at Appellant's suggestion and returned for the purpose of killing Mrs. Richie. According to the joint confession, Puiatti fired first then turned the car around to drive past the woman again, when Appellant shot her. On seeing that she was still standing, they drove past a third time and Appellant shot her again. They also admitted pawning Mrs. Richie's jewelry, in Ocala, and the c.b. radio from her automobile, in Columbia, South Carolina, on their way North. They also admitted that the butt of their pistol had been visible to Trooper Moore when Mr. Puiatti opened the glove box. The joint confession also recited Appellant's and Puiatti's acknowledgments that they had been advised of their rights and were under no threats or inducements.

Appellant and Mr. Puiatti were indicted by a Pasco County Grand Jury and tried before the Circuit Court, Sixth Circuit. On Friday, March 23, 1984, the jury found both men guilty of murder in the first degree, of kidnapping and of robbery with a firearm (R268-271, 2105-2108). On Saturday, March 24, 1984, the court

and jury convened for the penalty phase of the trial and received evidence in mitigation (R2118-2381). This included testimony of a psychiatrist and another psychologist who had examined Mr. Puiatti (R2143-2228, 2324-2350). The court reconvened on the afternoon of Sunday, March 25, 1984 when counsel delivered closing arguments regarding the penatly phase of the trial. The court charged the jury as to the penalty phase and the jury returned a recommendation that the death penalty be imposed (R272-275, 2383-2459). A pre-sentence investigation report was ordered (R276) and on May 4, 1984, both men were sentenced to death for the murder of Mrs. Richie. (R292).

STATEMENT OF THE CASE

Following the arrest of Appellant and his voluntary return to Florida, a special public defender was appointed, Robert Trogolo, who promptly moved to have grand jury proceedings reported. The motion was denied as was a motion to set bond. The Grand Jury indicted Appellant for first degree murder (R4-18).

Discovery was demanded and received and Appellant's counsel filed a series of motions; for payment of psychiatrist's fees, for daily trial transcript, to limit voir dire and preclude certain challenges, for notification whether the State intended to seek the death penalty, for bill of particulars as to agrivating circumstances, and for inspection of the list of witnesses before the Grand Jury. There was also a demurrer to the indictment, and a series of motions to dismiss it or alternately to strike the death penalty from consideration. (R22-86).

An adversary preliminary hearing was held on October 27, 1983 (R90-91, 2622-2683) after which Appellant was bound over to the Sheriff's custody (R87). A plea of Not Guilty entered the following day. Time was reserved for the filing of additional preliminary motions. A motion by the State, to require defense counsel to coordinate depositions, was denied (R92-95).

Appellent's counsel filed motions for production of police reports, for preservation of evidence and for disclosure of certain types of information pursuant to Brady vs Maryland, for disclosure

of impeaching information, and for a list of the witnesses to be called by the State during the second phase of the bifurcated trial (R98-107). The State moved to quash certain subpoenas and for protective order. This last motion was heard November 18, 1983 and was granted only as to out of State law enforcement officials (R108-109).

On November 23, 1983, more motions were filed on Appellant's behalf. These were motions to compel certain discovery, for statement of particulars, for individual and confidential voir dire, for leave to propound certain questions during voir dire and for sequestration of the jury (R112-125). Appellant's counsel additionally filed motions in limine to prohibit the State's Attorney from commenting upon pre-trial motions and rulings while in the jury's presence, from referring to which witnesses did or did not submit to polygraph examination (R126-128). Appellant also moved for a continuance, which was granted (R143).

A motion for advancement of costs was responded to by the State formal objection. The State also moved that all matters brought before the court be so brought by written motion (R132-134).

On December 5, 1983, the court denied Appellant's demurrer and motions to dismiss the indictment. Also denied were the motions for notification whether the death penalty would be sought, for limitation of the State during voir dire and to preclude certain challenges. The motion for daily transcript was denied without prejudice. Defense motions for psychiatrist's fees, for police reports, for preservation of evidence for Brady materials for advancement of costs, and to compel records were

granted. The motion for a list of the State's penalty phase witnesses was granted with qualifications as was the motion for appointment of experts. Rulings on other motions were deferred (R135-136, 141-146, 319-337).

A motion was filed for payment of fees to a psychologist of Appellant's selection for assistance at sentencing. This was granted as was a second motion for continuance (R137-139, 143).

On February 23, 1984, a motion for severance was filed (R167-169). This motion was heard by the court below on March 2, 1984 (R567-617) and denied with an opinion (R178-180). Appellant's motion to supress (R171-174) with amendments (R182-186, 205-206) was also denied after a evidentiary hearing and extensive argument in March 1984 (R207-209, 338-703). Heard at the same time were a number of other motions including a just filed motion to empanel separate juries for each party of the bifurcated trial. This motion was denied along with motions to prohibit impeachment, to increase preemptory challenges and for sequestration and individual voir dire of the jury (R708-767). Other motions were granted or taken under advisement (R207-209, 338, 566).

The jury trial began Monday, March 19, 1984. The first three days were occupied with voir dire (R775-1622). Opening arguments (R1638-1661) and most of the State's witnesses (R1661-1882) were heard on Thursday. On Friday, March 23, motions for mistrial, were heard and denied (R1883-1885). Following testimony of the State's last witnesses (R1887-1895) the motion to sever was again renewed and denied. The joint confession of Appellant and Mr. Puiatti was read into the record (over objection) by the

court reporter who had transcribed it (R1895-1944). At this point, the State rested (R1949).

Appellant moved for acquittal and also renewed motions for severance (R1902-2006). The motions were denied and the case proceeded to final argument, no witnesses being called by the defense. Appellant's attorney spoke first, then counsel for Mr. Puiatti, then the State, then Puiatti and finally Appellant (R2012-2065). The jury returned verdicts of guilty on all three charges (R270, 2105-2109). In anticipation of the second phase of the trial, motions for sequestration of the jury were renewed along with motions to sever (R2110-2113). The motions were again denied.

On Saturday, March 24, the court convened for the penalty phase of the bifurcated trial. The State presented no evidence in aggrivation, relying upon the facts as set forth during the trial. The defense presented a number of witnesses (R2143-2313). Relatives of Appellant testified as to his traumatic childhood and Dr. Gerald Mussenden provided expert testimony as to Appellant's psychological condition. Mr. Puiatti also had witnesses to testify as to his background as well as a psychiatrist and a psychologist. Dr. Mussenden's expert opinion was that Appellant is easily dominated by others (R2250, 2260). Mr. Puiatti's psychiatrist and psychologist experienced a similar opinion about him (R2170-2174, 2346).

At the latter part of the day, the court held a conference on the jury instructions and announced that it would recess until the afternoon of the following day (R2357-2381).

On Sunday, March 25, 1984, during daylight hours, the court reconvened (R228, 2385; A) briefly discussed jury instructions with counsel and proceeded to closing argument as to penalty (R2388-2441). The jury was charged by court (2442-2450) and proceeded to deliberate upon whether to impose the death penalty. By a vote of eleven to one, the jury returned an advisory verdict of death (R271, 2451-2452). The jury was then discharged (R2456-2457). At the request of counsel, a pre-sentence investigation was ordered and the case set for sentencing in April (R276, 2457-2459). The court then adjourned (R228, 2459; A).

On April 11, 1984, the court heard the State's motions to strike defense motions for new trial and for acquittal.

Also in April, the court denied defense motions for new trial and for acquittal. On May 16, 1984 it issued its order setting out findings (R301-311) in support of the death sentence which had been imposed on May 14, 1984 (R284-292, 2556-2620).

The court concluded that agrivating circumstances existed: that the murder was committed for the purpose of avoiding arrest, that it was committed for pecuniary gain and that it was committed in a cold, calculated and premeditated manner (R301-303; A). The court also found a statutory mitigating circumstance in Appellant's case in that he had no significant prior criminal record. In finding that neither defendant acted under the substantial domination of another, the court observed that each psychologist testified that the defendant he had examined was dominated by the other. The court concluded that the psychologist's

opinions in this matter were "devoid of credibility" (R305, A7). The court also declined to find the two men's ages to be significant despite psychologist's testimony that they "function at about 10-12 years of age" (R307, A9). The court did consider non-statutory mitigatory factors in favor of both Appellant and Mr. Puiatti in that they both confessed and both showed signs of being capable of rehabilitation. It declined to give these factors the weight of mitigating circumstances, however (R307-308, A10-11).

This appeal timely followed.

Appellant concedes that the guilt phase of the trial was conducted in accordance with Florida law as set forth in the various decisions cited in the record by the court below. In making this concession, Appellant would reserve the right to join in any argument made in the companion case, Puiatti versus the State of Florida based upon matters overlooked or misunderstood by Appellant's Appeal counsel.

The issues on this appeal are concerned with the propriety of imposing the death sentence, Appellant having repeatedly confessed his guilt in the murder of Mrs. Richie. The issues are whether the law and the facts of this case required severance of defendants during the penalty phase of the trial and whether the advisory verdict recommending Appellant's execution is valid, having been reached during judicial proceedings conducted during daylight hours of a non-juridicial day.

QUESTIONS PRESENTED

I. WHETHER DENIAL OF SEVERANCE CONSTITUTED ERROR WHERE CO-DEFENDANTS IN A CAPITAL CASE EACH PRESENT EVIDENCE OF SUBSTANTIAL DOMINATION BY THE OTHER AS A FACTOR IN MITIGATION?

II. WHETHER JUDICIAL PROCEEDINGS CONDUCTED ON A NONJURIDICAL DAY ARE VALID?

QUESTION: WHETHER DENIAL OF SEVERANCE CONSTITUTED ERROR WHERE CO-DEFENDANTS IN A CAPITAL CASE EACH PRESENT EVIDENCE OF SUBSTANTIAL DOMINATION BY ANOTHER AS A FACTOR IN MITIGATION?

ARGUMENT

After the jury had rendered its verdicts of guilty in the court below, Appellant's counsel again renewed his motion to sever (R2113). In denying this motion, the court below observed

> "I gave that very serious consideration when it was first brought to the consideration of the court, I'm even more convinced after the trial than I was at the time that severance is not necessary to afford both defendants a fair trial and I don't see anything that would cause any difference in the penalty phase" (R2114)

The argument on this renewed motion raised the prospect of each defendant "facing an accuser other than the State" and Appellant's counsel specifically suggested the mitigating factor of "substantial domination by another" under Chapter 921.141 (6)(e) Florida Statutes, as the area wherein the co-defendants' respective interests would become so opposed as to require severance.

While there appear to be no cases other than Hargrave vs State (Fla 1979) 366 So2d 1 dealing directly with the question of severance on a basis of opposed and conflicting mitigating circumstances under Chapter 921.141, there are certain general and basic principles which would apply.

Severance at the sentencing phase of a bifurcated trial would, as at the guilt determination phase, be a matter within the sound discretion of the court, and, as Justice Thornal of this court observed:

> "His decision will not be disturbed absent a showing of abuse of discretion or some significant resultant damage to the defendant who seeks a separate trial."
> Roberts v State (Fla 1964) 164 So2d 817, see also Manson v State (Fla 1956) 84 So2d 272

The rule has long been recognized that antagonistic defenses justify a severance unless the record shows lack of injury. Suarez v State (Fla 1928) 115 So 519.

This court observed in State v Dixon 238 So2d 1 that the legislative intent behind Chapter 921.141, Florida Statutes was that the death penalty be imposed "only for the most aggrivated, the most indefensible of crimes" and in this regard, the sole purpose of establishing a separate penalty hearing was "to provide the convicted defendant with one final hearing before death is imposed." At this second hearing, the State continues to bear the burden of proving aggrivating circumstnaces beyond a reasonable doubt, but the defendant is given opportunity to introduce any mitigating circumstances with probative value, regardless of admissibility under ordinary rules of evidence. Dixon (supra) Chapter 921.141 (1) Florida Statutes.

Consideration of aggrivating factors is strictly limited to those factors set forth in the Statute Menendez v State (Fla 1979) 368 So2d 1278, Miller v State (Fla 1979) 373 So2d 882. Mitigating factors, however, are not regarded with the same restriction and the court below correctly considered defense argument in favor of certain non-statutory mitigating factors (R307-308, A9-11).

The case here considered differs dramatically from Hargrave (supra) in that there was no testimony from a psychiatrist or psychologist who had examined both defendants. Instead, the court and jury below appear to have used expert testimony that Mr. Puiatti was dominated by Appellant to balance and cancel expert testimony that Appellant was dominated by Mr. Puiatti (R307-308, A 7). The case here appealed is also distinguished from Stevens vs State (Fla 1982) 419 So2d 1058 where there was an admission by Stevens to his court appointed psychiatrist that the robbery and kidnapping and the mutilation of the victim's corpse had been his idea.

The significance of the court below having rejected the mitigating factor of substantial domination in the absence of an expert who had examined both co-defendants is enhanced by the fact that the court found Appellant to have no significant prior criminal activity (R304, A 6). In Dixon (supra) this court held

> "...the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance."

The statute does not comprehend a mere tabulation of agrivating circumstances against mitigating ones Dixon (supra) Hargrave (supra). Hence, where Appellant was found to have no significant record of prior criminal conduct, the use of testimony of experts who had not examined Appellant as a factor to contradict expert testimony that Appellant was dominated by another person is clearly an error which carried substantial injury to Appellant.

The court below did not instruct the jury not to consider Mr. Puiatti's expert testimony with regard to Appellant and, even had such insturction been given, it would not have cured the error. Everett vs U. S. 281 F2d 429, Reddick v State (2 DCA 1966) 190 So2d 340.

Questions regarding severance are generally tied to the right to confront and cross examine witnesses Proffitt vs Wainwright 685 F2d 1227. In the case here considered, each co-defendant's counsel was able to cross examine the other's witnesses, but as to the question of whether one co-defendant substantially dominated the other, the right to cross-examine a witness whose testimony would be held against a defendant was substantially diminished by the fact that no expert testifying as to domination had examined both defendants. Appellant suggests that this clearly violates the standards set forth in Bruton vs United States 391 US 123, 20 L ed 2d 476, 88 S. Ct. 1620.

Cases involving the death sentence are regarded with closer scrutiny than other cases, with presumptions against the propriety of death. As Justice Brennan of the U. S. Supreme Court observed in Furman vs Georgia 480 U S 238, 33 L ed 2d 346, 92 S. Ct. 2726.

> "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." Furman (supra)
>
> "...Indeed, the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different in kind

> from any other sentence a State may legitimately impose."
> Gardner v Florida 430 US 349, 41 L Ed 2d 393, 97 S Ct 1197

Appellant contends that the court below should have granted severance for the penalty phase of the trial when, at the close of the guilt phase, it was made apparent that both defendants intended to claim the mitigating factor of substantial domination by another person. As the U.S. Supreme Court observed in Enmund v Florida 458 US 782, 73 L Ed 2d 1140 102 S. Ct. 3368

> "...We insist on individualized consideration as a constitutional requirement in imposing the death sentence (authorities cited) which means that we must focus on relevant facets of the individual offender."

In the absence of expert testimony from a psychiatrist or psychologist who had examined both defendants, the jury which considered Appellant's mitigating circumstances should not have been allowed to hear expert testimony in support of a contradictory and exclusive mitigating circumstance in favor Appellant's co-defendant. The court below erred in not allowing severance at the penalty phase of the trial and should accordingly be reversed.

QUESTION: WHETHER JUDICIAL PROCEEDINGS CONDUCTED ON A NON-JURIDICAL DAY ARE VALID?

ARGUMENT

It is a general rule of American law that a judge or magistrate has no authority, absent a permissive statute, to hold court or conduct a trial on Sunday. 83 CJS Sunday §51, 85 ALR 2d 596; 50 Am Jur Sundays and Holidays §73. This rule has long been recognized as the law of Florida. Bacon v State (Fla 1886) 22 Fla. 46. As this court has observed,

> "The rule is well settled that a judgment and sentence entered on Sunday is void. As the judgment is reversed on other grounds, we need say no more on this point, as it is not probable that a circuit judge will hereafter hold court on Sunday."
> Higginbotham v State (Fla 1924) 101 So. 233

That Sunday is not a juridical day was acknowledged at Common Law by the maxim Dies Dominicus non est juridicus, stated by Black's Law Dictionary (4th ed.) as having been noted in Lord Coke's commentary on Littleton. The maxim was cited with favor by this court in Hodge v State (Fla 1892) 10 So. 556, Barnes v State (Fla 1914) 67 So 131, and Brooks v Miami Bank and Trust (Fla 1934) 155 So 157.

Sir William Blackstone indicates that the principle that courts have no power to convene or perform judicial functions on Sunday may have originated with the terms of court established by King Alfred and was "certainly settled" in the time of Henry III

> "But though many of the return-days are fixed upon Sundays, yet the court never sits to receive these returns til the Monday after and

> therefore no proceedings can be held or judgment can be given, or supposed to be given, on the Sunday."
> III Blackstone's Commentaries 277

The substance of Blackstone's statement has been acknowledged as the law in Florida.

> "In the absence of statutory provisions to the contrary, the law does not contemplate that judicial process, writs, or notices shall be made returnable on Sundays, since Sundays are dies non juridicis, nonjudicial days, and the offices of the courts are not open on Sundays, therefore returns or appearances cannot in law be made in response to judicial process, writs or notices. What cannot legally be done is not required by law to be done."
> Brooks (supra)

The principle has even been extended to Saturdays in Dade County where, by Special Act, Saturday is a legal holiday. North Beach Investments vs Sheikewitz 1 Fla Sup 3.

It is clear that the prohibition against judicial activities on Sunday applies only to judicial acts and not to those purely ministerial functions which merely happen to be associated with judicial proceedings 85 ALR 2d 596. Hodge v State (supra) Op Atty Gen (1948) 48-21. Hence the receipt of a verdict on Sunday and even a court's answering of questions propounded by juries during deliberation on Sunday have been regarded as purely ministerial acts, at least in situations where the case was submitted to the jury before midnight on Saturday. 85 ALR 2d 596. 30 Fla Jur Sundays and Holidays §8. Stone vs. United States 64 F. 667 affirmed 167 U.S. 177, 42 L ed 127 Ball vs United States 140 U.S. 118, 35 L ed 377.

In considering the lack of capacity of Florida Courts to function on Sunday, this court has noted that the rule stands

separate and apart from the body of law dealing with "Blue laws" or Sunday closing statutes and ordinances. Where the latter is concerned, Sunday is a "Natural day" of twenty-four hours, but

> "...dealing with the question of the authority of judicial tribunals to function on Sunday,... as there was no statute controlling the matter in this state, it was needful to revert to the rule under the common law, both as to what judicial function might be performed on Sunday and what period of time was included in Sunday considered as dies non juridicus, and it was there held that Sunday dies non juridicus extended from sunrise to sunset on the day Sunday. An entirely different rule obtains, however, in defining Sunday as referred to in statutes prohibiting the performance of labor and certain acts on Sunday which are entirely lawful at any other time; and we that, in applying these statutes, the great weight of authority in this country is, and we think logically and rightly is, that the period covered by the designation "Sunday" is the natural day existing between 12 o'clock midnight at the end of Saturday and 12 o'clock midnight beginning of Monday."
> Gillooley v Vaughn (Fla 1926) 110 So 653
> see also Harrison v BayShore Development (Fla 1926) 111 So 128

In Barnes (supra) this court upheld a verdict received and sentence passed at about 2:30 o'clock a.m. on a Sunday, where the jury had begun its deliberations before midnight, Saturday. Justice Cockrell explained why this and other cases where a verdict was received on Sunday did not contravene the rule that judicial activity on Sunday is void

> "In the olden days it was difficult to fix the exact time when midnight arrived, while sunrise was of easy observation. Again, in holding courts during the daylight those in attendance were kept from public workship and the exhibition of secular activity was offensive to those engaged in religious duties. These and perhaps other considerations prevented the application of the prohition to the courts

> who were unable to finish their serious labors by the midnight hour."
> Barnes v State (Fla 1914) 67 So 131

Justice Buford stated the rule succinctly in Harrision v BayShore Development Co. (supra)

> "Under the Common Law the period of time included within the prohibition of judicial proceedings on Sunday is from sunrise to sunset, and this rule has been adopted as the law in this state."

The principle that Florida courts can not function on Sunday, through a matter separate and apart from Sunday closing laws and governed by separate rules, bears some similarity to prohibitions against Sunday commercial activity in that both are legitimate exercises of the soverign power, founded in the need to procted the health, safety and general welfare of citizens from the "evils attendant upon uninterrupted labor" Henderson v Antonacci (Fla 1952) 62 So2d 5 Op Atty Gen 69-124. The mere fact that the day chosen as a day of rest is Sunday does not conflict with constitutional provisions respecting the separation of church and State. McGowan v Maryland (1960) 366 U.S. 420, 6 L ed 2d 393 81 S Ct 1101.

At the time of the American Revolution, the setting aside of Sunday as a day of rest was recognized as a civil matter rather than an ecclesiastical rule

> "For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship,

> is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the inductrious workman to pursue his occupation in the ensuing week with health and cheerfulness..." IV Blackstone's Commentaries 63

This observation was quoted with favor by Chief Justice Warren, speaking for the U. S. Supreme Court in McGowan (supra) as was a similar comment by Justice Field

> "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependant, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."
> SoonHing v Crowley 113 U.S. 703, 28 L ed 1145, 5 S Ct 730

It should be noted that the question of judicial proceedings on Sunday goes to the inherent power of courts to function on that day, absent a statute giving specific authorization. Court proceedings on Sunday are not merely voidable, they are null and void and cannot be legitimized by specific or tacit consent of the parties. In Hodge (supra) this court specifically noted and declined to invoke a written agreement between the State and Mr. Hodges' attorney to take "no advantage or exception by reason of such verdit having been rendered on the sabbath."

In the case here considered, it is clear from the record that during the second or penalty phase of the bifurcated trial, the court recessed at 6:00 P.M. on the evening of Saturday, March 24,

1984 (R227) and reconvened at 2:00 P.M. on Sunday, March 25, 1984 (R228) (See also R2381-2384). As reflected in the transcript (R2384-2459) and the court minutes (R228, A12) this was not a situation wherein a court convened on Saturday continued its work past midnight without recess, but a series of judicial acts performed in the early afternoon of Sunday, March 25, 1984. The court formally reconvened, the jury was returned to the courtroom, counsel for the parties delivered their respective closing arguments, the court recessed at 3:33 P.M. and reconvened at 3:45, the jury again returned and was formally charged by the court and retired to deliberate. Awaiting call of the jury, the court recessed, to reconvene a third time at 5:14 P.M. when the jury returned verdicts calling for imposition of the death penalty (R271). The jury was polled by the court and excused from further service. The court proceeded to hear and grant requests for pre-sentence investigation (R276). The court then recessed at 5:25 P.M.

There is no doubt that the death sentence imposed upon Appellant was founded upon and resulted from a series of judicial acts performed during daylight hours on a nonjuridicial day. Those judicial acts (and consequently the sentence founded upon them) are void as a matter of Florida law. Appellant's sentence should be reversed.

CONCLUSION

The court below erred in not granting severance as to the penalty phase of the trial. Expert opinions based upon psychological examination of one co-defendant were used against the other in the absence of an expert who had examined both men. As a consequence neither was accorded his statutory right to present evidence of substantial domination by another person. In addition, the advisory verdict recommending the death sentence was invalid as a matter of law, being the product of judicial proceedings on a nonjuridicial day. The jury which heard the evidence has been discharged. The death sentence imposed upon Appellant should be reversed and the case remanded with instructions to impose a sentence of life imprisonment.

Respectfully submitted this 8th day of March, 1985.

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