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OF

ON APPEAL TO THE SUPREME COURT OF APPEAL OF FLORIDA

ROBERT D. GLOCK, II,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Appeal No. 65,380

REPLY BRIEF OF APPELLANT

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

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AUTHORITIES CITED

Federal cases:

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POINT 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

Appellee, the State of Florida, has argued that, in the Court below, there was no confusing or improper evidence submitted nor was Appellant denied full opportunity to confront and cross-examine the witnesses against him. This contention is not supported by the record on Appeal.

The Circuit Judge, below, found that

> "...neither of these defendants acted under extreme duress or under the substantial domination of another person. Psychologists for both defendants testified that in their opinions, it was only the unique chemistry created by the association of these two defendants that allowed or caused them to commit this murder. Each psychologist also testified that each defendant was dominated in this murder by the other.
>
> This court is convinced that without the ego support given by each of these defendants to the other, that neither of them would have had the personality strength to have committed this murder, or the crimes leading to the murder, alone.

> However, there is no evidence, other than the rationalized opinions of these two psychologists, to support any finding that either of these defendants dominated the other. They were both about the same age and the same intelligence. They both had about the same education. They were both raised in middle class surroundings. The opinions by the two psychologists that each respective defendant was dominated by the other are simply devoid of credibility..." (R305 A7)

Although Appellant's expert, Dr. Mussenden, acknowledged on cross examination that it would be pure speculation to say whether the two co-defendants "needed each other" or were "able to support each other" or had entered upon a "destructive association" with each other (R2262-2263) the Court adopted just such a speculation.

The opinion of Dr. Mussenden that Appellant was a follower (R2260), self destructive and not prone to be destructive toward others (R2258) was supported by the testimony of Appellant's sister (R2277) and step-mother (R2233-2234) and was not contradicted by any testimony relevant to Appellent's case. But the Court did not find this credible, a conclusion which could only have been reached by balancing testimony indicating that Appellant was dominated by Puiatti against testimony that Puiatti had been dominated by Appellant. No expert had examined both men.

Appellee correctly observes that neither Defendant, in closing, argued substantial domination by another. Appellant suggests that trial counsel for both defendants were placed

in a dilemma: due to the fact that each had presented testimony that his defendant was dominated by the other, any reference to that mitigating factor would necessarily draw attention to and invite comparison with the contradictory testimony of expert witnessess for the other defendant. The right to argue substantial domination by another had been, as a practical matter and through no action by the prosecutor, removed from the strategic arsenal of both co-defendants' attorneys.

Appellee asks how Bruton vs. United States 391 US 123, 20 L.Ed. 2nd 476, 88 S. Ct. 1620 could be applicable in this instance when that case deals with the admissibility of a confession of a co-defendant implicating the defendant when the confessor did not testify. The answer is found in the basic nature of expert testimony regarding an individual's psychological condition. Such testimony is necessarily founded upon what the person being examined has told the learned expert.

> "Illness, particularly mental illness, although often capable of being proved by extrinsic evidence, is considered more susceptible to proof by evidence based on interviews with the defendant and requiring his cooperation"
> Parkin vs. State (Fla 1970) 238 So2d 817

This Court's opinion in Parkin (supra) correctly characterizes the responses given to a psychiatric examiner as "testimonial ulterances". Clearly, the testimony of a

psychiatrist or psychologist as to a defendant's mitigating circumstances under Section 921-141(6)(e) Fla. Statutes is to some extent the "testimonial utterance" of the defendant himself. This can be clearly illustrated from the testimony given by Dr. Meadows as a witness for Mr. Puiatti:

> "I think it's in his (Puiatti's) nature to be easily influenced. I think it's a very scary thing for him to do anything which causes somebody else to disprove or to stand up for himself against them and as I understand it, from the way events were transpiring, he was being leaned on rather heavily by the co-defendant". (R2348) (emphasis supplied).

Mr. Puiatti, whose statements were apparently the foundation of Meadows' charge that Appellant had "leaned" on his companion in crime, was not subject to being questioned by Appellant's counsel.

The fact that Dr. Meadows was cross-examined is no more significant than the fact that the postal inspector in Bruton (supra) was subject to cross-examination regarding the confession of Mr. Bruton's co-defendant.

Had the expert testimony been like that in Hargrave vs. State (Fla 1979) 366 So2d 1, where the expert examined both defendants, the problem would not have existed. In a somewhat similar way, the problem in Bruton (supra) would not have existed had Mr. Bruton and his co-defendant made a simultaneous confession to the postal inspector. In the absence of an expert who was in the same relationship to both co-defendants and had equal stand-

ing to testify about each of them, there is a Bruton problem under the facts in the case here Appealed.

The Court below erred in not granting severance at the penalty phase of the trial.

POINT II. WHETHER JUDICIAL PROCEEDINGS CONDUCTED ON A NONJURIDICIAL DAY ARE VALID

Appellee argues that this point was not preserved for Appeal, under Rule 3.570 Florida Rules of Criminal Procedure. If convening court and charging a jury on Sunday were discretionary matters that could be invoked or waived by the court or by stipulation, then lack of objection at the trial level would indeed deprive Appellant of any right to complain on Appeal. The point, however, is a fundamental one. It goes to the authority of a Florida Court to convene on a non-juridicial day. Nothing could be more fundamental to a court's proceedings than the authority to proceed and, as this Court has observed:

> "Only in the rare case of fundamental error is the defendant's right to Appeal preserved without a contemporaneous objection"
> State vs. Jones (Fla 1979) 377 So2d 1163

It is the law of Florida that "In the absence of statutory provisions to the contrary ... the offices of the courts are not open on Sundays ...." Brooks vs. Miami Bank and Trust (Fla 1934) 155 So 157; see also 83CJS Sunday §51, 85 ALR 2d 596; 50 Am Jur

Sundays & Holidays §73; 49 Fla Jur 2d Sunday & Holidays §10; Higginbotham vs. State (Fla 1924) 101 So 233; Barnes vs. State (Fla 1914) 67So 131 and Hodge vs. State (Fla 1892) 10 So 556.

The legislature has seen fit to enact statutes granting courts the power in specific circumstances to authorize service of process and execution of judgment on Sundays. §48.20 Florida Statutes. The legislature has also empowered courts to authorize execution of search warrants on Sundays. §933.101, Florida Statutes.

The legislature, however, has gone no further. The Statute enabling County Courts to be open at all times "for reception of voluntary pleas of guilty" specifically excepts Sundays. §34.131, Florida Statutes.

Appellee argues that Rule 3.540, Rules of Criminal Procedure is applicable to the situation here considered. That Rule does not grant nor purport to grant any authority for a Court to convene on Sunday. It grants no power to charge a jury. It allows only the giving of "additional or corrective instructions: and the receipt of a verdict. It is silent as to receipt of a jury's penalty recommendation.

The language of the rule follows the language of case law and, in light of the case law, clearly refers to proceedings carried past midnight on Saturday. If the language of the rule is interpreted as having the force of statute, it permits certain

proceedings begun on Saturday to carry through the night into daylight hours on Sunday, such continuation past dawn being prohibited under common law. See Barnes vs. State (Fla 1914) 67 So 131 and Harrison vs. Bayshore Development Company (Fla 1926) 111 So 128.

Florida Statutes, Chapter 2 (formerly a part of the Florida Constitution) adopts the common law of England as of July 4, 1776. At common law, courts were not empowered to conduct business on Sunday. III Blackstone's Commentaries 277. In the absence of a statute making Sunday a day on which Courts may convene and proceed with their business, Sunday remains dies non juridicus in Florida. Bacon vs. State (Fla 1886) 22 Fla. 46; Hodge vs. State (Fla 1892) 10 So 556. Barnes vs. State (Fla 1914) 67 So 131; Higginbotham vs. State (Fla 1924) 101 So 233; Gilhooley vs. Vaughn (Fla 1926) 110 So 653; Harrison vs. Bayshore Development (supra) Brooks vs. Miami Bank and Trust (Fla 1934) 155 So 157.

It was a fundamental error for the Court below to convene, to charge the jury and to receive a penalty recommendation on Sunday.

POINT III. WHETHER EXCLUSION, AT THE TRIAL STAGE, OF PROSPECTIVE JURORS OPPOSED TO THE DEATH PENALTY WAS ERROR?

Appellee correctly observes that this Court has rejected the argument that a defendant is entitled, in the guilt or innocence phase of trial, to a jury drawn from a cross section of the community which includes persons with such scruples as to make them irrevocably committed against voting for the death penalty. Riley vs. State (Fla 1978) 366 So2d 19; Gafford vs. State (Fla 1980) 387 So2d 333; Caruthers vs. State (Fla 1985) ___ So2d ____ 10 FLW 115.

Appellant argues that it would be appropriate to reconsider this matter in light of the findings and reasoning of the Federal Court in Grigsby vs. Mabry (U.S. Dist. Ct. ED Ark 1983) 569 F. Supp 1273 as that case notes

> "...evidence shows that persons who favor the death penalty are predisposed in favor of the prosecution and are uncommonly predisposed against the defendant." Grigsby vs. Mabry (supra)

Under the Florida practice of bifurcated trial in capital cases, a greater degree of fairness would be achieved if jurors at the guilt or innocence phase were not questioned as to their opinions regarding the death penalty, but only as to their ability to fairly consider the quilt or innocence of the accused.

The administration of justice in capital cases under Florida law would be improved by adoption of the reasoning of the Federal Court in Grigsby (supra).

POINT IV. WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER?

Appellee argues that this case is similar to Mills vs. State ___ So2d ___ 10 FLW 45 where

> "...Mills held a knife to Lawhon's throat, took a shotgun from the trailer, and forced Lawhon outside and into Mills' truck. Fredrick drove while Mills kept the shotgun aimed at Lawhon. Mills made several comments to Lawhon clearly implying that he would be killed when they reached their destination. They stopped in a deserted area where Mills tied Lawhon's hands behind his back and hit him on the back of the head with a tire iron. As Fredrick and Mills were about to leave, Lawhon jumped up and ran away. Mills chased after Lawhon and killed him with a shotgun blast at close range..."
> Mills vs. State (supra)

In the case here considered, however, the decision to kill came after the victim had been released and the co-defendants had begun driving away. Very little time transpired between the fatal decision and the final shot. The victim had not begun to walk away from the release point when the two men returned. Clearly, she had not enough time to decide which way to walk nor, when she saw her stolen car returning, was she sufficiently apprehensive to run away or seek one of the numerous hiding places

offered by a Florida orange grove in August. She ran only after the shooting had begun (R1689-1690, 1704, 1724, 1915-1916).

In similar manner this case is distinguished from the factual situations in the various cases cited by Appellee. In Middleton vs. State (Fla 1982) 426 So2d 548, the killer, shotgun in hand, sat by the sleeping victim for an hour or more, contemplating her death. In Stano vs. State ___ So2d ___ 9 FLW 475 the victims were beaten and stunned before being taken on a half-hour automobile rides to their places of death. In Troedel vs. State ___ So2d ___ 9 FLW 511 there was a specific finding that the killer was "trigger man" in a carefully planned "execution style" murder. In Burr vs. State ___ So2d ___ 10 FLW 126 the defendant had an established plan of action which included shooting the victim: over a period of weeks he had robbed three other convenience stores and shot three other clerks. In Smith vs. State (Fla 1983) 424 So2d 726 the killing was planned long before the abduction and rape which preceeded the victim's death. In Clark vs. State (Fla 1983) 443 So2d 973, the killing of the victim was part of the robbery plan because of her ability to identify Clark, a former employee. Card vs. State (Fla 1984) 453 So2d 17 is another instance where the victim's death figured as an original part of the robbery plan because of her prior knowledge of the killer.

Appellant suggests that Appellee misread Kennedy vs. State (Fla 1984) 455 So2d 351. There, the trial Court found the aggravated circumstance of cold, calculated premeditation only in the case of one of the gun fight victims, the law enforcement officer. This Court found

> "...that the trial court erred in finding that one of the murders was heinous, atrocious and cruel, and was committed in a cold, calculated, and premeditated manner..."
> Kennedy vs. State (supra)

The facts of the case here considered do not meet the standard which this Court has set in determining the heightened degree of premeditation necessary to find that the killing was done in a "cold, calculated and premeditated manner". The lower Court's sentence would accordingly be reversed.

POINT V. WHETHER THE TRIAL COURT ERRED IN NOT REGARDING THE DEFENDANT'S CONFESSIONS AND THEIR POTENTIAL FOR REHABILITATION AS MITIGATING CIRCUMSTANCES?

Appellee argues that this question goes only to the weight given the evidence by the Court below. The question is not one of the weight to be given nonstatutory mitigating factors, but of whether they are factors in mitigation to be weighed alongside aggravating factors. The Court below held that they were not (R307-308).

The significance of McCampbell vs. State (Fla 1982) 421 So2d 1072 to Appellant's argument is that this Court has acknowledged that potential for rehabilitation is a valid mitigating circumstance, to be considered alongside Appellant's lack of prior criminal record as another mitigating factor to be balanced against the aggrivating factors argued by the State in the Court below and found to weigh against Appellant.

Appellee also argues that Washington vs. State (Fla 1978) 62 So2d 658 supports the State's position in the cause here considered. The significance of that decision is not that the Court declined to speculate upon Mr. Washington's motives but that it recognized that a confession can be a valid mitigating factor. While the factual situation in the case here considered bears some

superficial resemblance to the situation in Washington (supra), there are significant differences, particularly apparent when considering what sort of case the State could have proven against Appellant had he and his co-defendant stood mute from the time of their arrest.

The Court below erred in not giving Appellant's confession and his potential for rehabilitation the full status of factors in mitigation.

Respectfully submitted this 16th day of July, 1985.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Appellant has been furnished by U.S. Regular Mail to the Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, this 16th day of July, 1985.

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