IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,850

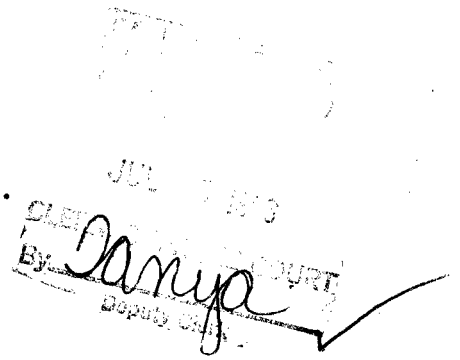
BURLEY GILLIAM, JR.

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.



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AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

Burley Gilliam will be referred to as "appellant." The prosecution will be referred to as "appellee" or "State."

The symbol "R" will signify the record on appeal appearing in Volumes IV and V. The symbol "S.R." will refer to the supplementary record filed by appellee in this case in a separate motion to supplement the record. It consists of certain medical reports and a short deposition of one expert witness.

The symbol "Tr" will refer to pages of transcript contained in Volumes I, II, and III. "S.Tr." will refer to pages of transcript contained in the orange colored "Supplemental Transcripts of Proceedings." Appellee will also be referring to additional supplemental transcripts which are numbered so as to follow those pages found in the Supplemental Transcript. Said transcripts have been submitted along with the previously mentioned motion to supplement the record.

STATEMENT OF THE CASE

Appellant was found guilty of first degree murder and sexual battery. He was sentenced to death. This appeal follows.

STATEMENT OF THE FACTS

Appellant's version of the facts is objected to as a gross distortion of the record. No attempt will be made to point out specific deficiencies in appellant's factual rendition. Instead, appellee will supply the Court with its own version of this case, in the hope that all events will be presented in their true light.

For the sake of clarity, this part of appellee's brief will contain only an introduction, an exposition of the basic procedural history of the case, and the evidence elicited at trial. Any factual analysis germane to procedural issues raised by appellant will be included in the corresponding "Argument" sections where necessary.

INTRODUCTION

Joyce Marlowe died on June 8, 1982, at the hands of a killer who exhibited extreme cruelty and vile abandon.

The murder took place in rural Dade County, at night, along the shore of a lake. Miss Marlowe was beaten and kicked. She was bitten on the face, chin and breast. The nipple of her left breast was literally ripped off and left dangling by what was described by the medical examiner as a painful "drag bite" inflicted during her struggle to free herself.

Miss Marlowe was then sexually assaulted with a large, blunt instrument. Words are inadequate to describe the intensity of the torture she endured. Suffice it to say that what then transpired went beyond the pale of even the most animalistic behavior imaginable.

Finally, she was strangled to death.

The medical examiner was unequivocal in stating that all injuries were inflicted prior to death, that all injuries were extremely painful, and that the victim was in fact conscious at all times prior to the moment of her death. The victim was even conscious during the strangulation itself. (Tr. 1090).

The evidence of guilt adduced at trial was nothing short of overwhelming. It took the jury 51 minutes to return its verdict of guilt, and 18 minutes to come back with unanimous recommendation of death.

PROCEDURAL HISTORY

Appellant fled to Texas. He was arrested there on June 15, 1982 and brought back to Florida a few days later. He was indicted on July 8, 1982. The charges were first degree murder, sexual battery, and grand theft. (R. 1134). Assistant Public Defender Art Koch was appointed to represent him.

Mr. Koch began trial preparation. By November 4, 1983 he had filed a Motion for Determination of Competency. (R. 1325). The trial court appointed three experts and ordered them to evaluate the appellant and render written reports on their findings. (R. 1327). This was done.

The court held a hearing on November 28, 1983 to rule on the competency matter. During that hearing, Mr. Koch made known the possibililty that his client might choose to enter an insanity plea at some later date, depending on the

outcome of certain neurological tests yet to be performed. (Tr. 5-7).[1] The contents of the reports of Drs. Haber, Jacobson, and Mutter were stipulated to by the appellant. (Tr. 10-11). All three doctors judged appellant both sane at the time of the offense and competent to stand trial. Appellant presented no evidence at the hearing. The court found him to be competent. (Tr. 12). A trial date of February 6, 1984 was set. (Tr. 146).

A hearing was held on January 14, 1984 to discuss appellant's recently filed motion to discharge Mr. Koch. (R. 1339). Appellant complained that Mr. Koch was not spending enough time on his case and that "materials" were being withheld from him by Mr. Koch. The court advised the appellant that he should reconcile his differences with his attorney. It appeared that the court was successful. (S. Tr. 91-92).

Another hearing concerning Mr. Koch's continued representation of appellant was held on February 2, 1984. Appellant had refused to cooperate with the Public Defender's Office, and had even allegedly threatened one of Mr. Koch's

[1]Those tests were performed, and no insanity defense was ever presented. Mr. Koch never brought up appellant's alleged "lack of competency" again.

assistants. (S.Tr. 52). The court was again able to convince appellant that he should proceed with Mr. Koch as his attorney. (S.Tr. 51). Appellant was warned that the trial would take place as scheduled. (S.Tr. 54).

Appellant's first trial began a few days later (as scheduled) on February 6, 1984. (R. 1137). It ended the next day during jury selection when appellant fired Mr. Koch. (R. 1138).

The trial court began a long search for an attorney acceptable to the appellant, who suggested several possible candidates. The court even went so far as to contact those people, but all refused the appointment. Finally, Stuart Adelstein and William Surowiec agreed to take the case, and appellant accepted them as his attorneys. (R. 1351). The date was March 13, 1984.

Adelstein and Surowiec filed a motion to withdraw as counsel based on the open belligerence and uncooperativeness of their client. A hearing was held on October 31, 1984 to discuss that motion. (S.Tr. 1-12). The trial court was again able to elicit promises from the appellant concerning cooperation with his attorneys. (S.Tr. 10). The appellant was also reminded of the January 25, 1985 trial date, and warned that if he again fired his attorneys or caused their

withdrawal the court would not find any replacement for them. (S.Tr. 11).

A hearing was held on January 10, 1985 concerning this same issue and the court again kept Adelstein and Surowiec on the case. (S.Tr. 13-21).

Adelstein and Surowiec filed still an other motion to withdraw. An emergency hearing was held on January 21, 1985 to discuss the matter. Appellant expressed his firm desire that his attorneys be fired. (Tr. 153). His primary complaint revolved around his continuing belief that he had not been supplied with all the "materials" of his case. Mr. Adelstein refuted that. (Tr. 154, 155). The court, in an effort to placate the appellant, told him to prepare a list (returnable the next day) of all the material he was "missing". (Tr. 160, 162). The court promised that it would make sure that the items on that list were turned over to him. (Tr. 163).

At the hearing held the next morning appellant told the court of his petulant refusal to prepare such a list. (Tr. 167). Mr. Adelstein informed the court that appellant wished to represent himself (Tr. 170), and requested the corresponding colloquy be performed. Appellant also told the court that he wished to represent himself. (Tr. 171,

172, 176). Mr. Adelstein moved that either Dr. Jacobson or Dr. Haber be ordered to perform a competency evaluation of appellant. (Tr. 174). Dr. Haber was so ordered. (Tr. 179, 180; R. 1371). The court also made an inquiry into whether or not the appellant understood the importance and consequences of his choice to represent himself. (Tr. 174-176).

At the hearing held the next day, it was learned that Dr. Haber went to see the appellant the previous evening, and that appellant refused to allow Dr. Haber to conduct a full evaluation of him. The interview lasted less than five minutes. (Tr. 186). Dr. Haber was nonetheless able to express his belief that the appellant was competent.

The court then proceeded to inquire as to the voluntariness of appellant's decision to go to trial without an attorney. (Tr. 194-197; 200-209). Trial was scheduled to begin the following Monday, January 28, 1985, just as the court had emphasized and warned on numerous occasions prior to appellant's decision to fire his attorneys. (Tr. 155, 161, 162, 163, 167, 168, 178, 179, 193; S.Tr. 11, 18). Adelstein and Surowiec were ordered to remain as standby counsel.

THE EVIDENCE

The State called seventeen witnesses. Appellant presented no evidence. Dorothy Ballard was the first witness called.

A corpse was discovered alongside a lake in northern Dade County on June 9, 1982. At that time Officer Ballard was a crime lab technician assigned to the Metro-Dade Mobile Crime Lab Unit. She was dispatched to investigate.

When Ballard arrived she saw that approximately 156 feet of sandy terrain separated the lake from the roadway. She alighted from her vehicle and walked around the sandy area, proceeding along the edge of the lake until she reached a partially clad corpse (Tr. 466), which was lying in some weeds on an embankment a few feet from the water's edge.

Ballard testified that her inspection of the area revealed tire marks left in the sand by a vehicle which had apparently been stuck there. (Tr. 474). Ballard also testified about a shoe and sock she had found at the scene, approximately 84 feet from the body, and near the area of the tire impressions. (Tr. 476).

The witness then proceeded to describe the condition of the corpse (Tr. 484-486), the drag marks left in the ground by the corpse (Tr. 486-487), and physical evidence which indicated that strangulation was the cause of death. (Tr. 499-500).

Ballard described the bite marks left on the victim's body (Tr. 503, 504, 505), and the trauma found in the area of the rectum. (Tr. 506).

Shelton Merritt, a homicide detective with Metro-Dade Police, was the next witness to testify. (Tr. 512). He described finding certain items of personal property at the crime scene--a woman's purse, business cards, papers, a ten dollar bill, and jewelry items. (Tr. 516). He also described a shoe. (Tr. 517).

Cathy Gordon was called as a witness (Tr. 539), and testified that she was the bartender of the Orange Tree Lounge in June of 1982. It was her job to hire the Lounge's employees, and she was the person who hired the victim, Joyce Marlow, as a dancer. (Tr. 540).

Gordon testified that on June 8, 1982 Miss Marlowe was working a double shift at the Lounge, and that she (Gordon) had observed Miss Marlowe converse with a patron at the bar.

Gordon testified that this patron had spent approximately three hours talking to Miss Marlowe. (Tr. 545).

At one point Miss Marlowe told Gordon that she needed something to eat, and that the man with whom she had been talking at the bar had offered to take her to a restaurant to get a meal. Gordon spoke with the man, who confirmed what Miss Marlowe had said. Gordon then gave Miss Marlowe permission to leave. (Tr. 547-548).

Gordon described the man (Tr. 547), said that he had been there for approximately five hours, and that he was not drunk. (Tr. 548).

Miss Marlowe collected up her tips and salary of approximately $500 (Tr. 549) and left with the man. Gordon made a positive in-court identification of appellant as that man. (Tr. 550-551).

The fourth witness was Jeff Sherrie. He testified that he met the appellant on June 8, 1982 inside the Orange Tree Lounge. The two men engaged in conversation. Sherrie saw the appellant leave with Miss Marlowe. (Tr. 555-556). This witness also made a positive in-court identification of appellant. (Tr. 554).

Appellant chose to cross-examine Mr. Sherrie (Tr. 558-559), and in the process of trying to impeach his testimony, effectively admitted to being in the Lounge that night. (Tr. 559).

John Parmenter followed as a witness. He testified that he was a homicide detective with Metro-Dade Police. He began his involvement in the case by tracking down the tow truck used to remove the stranded vehicle from the area where the murder took place. (Tr. 594). His investigation led him to an Amoco station twenty-three blocks from the murder scene. He was shown a work order that was written up on the truck. (Tr. 595). He stayed at the Amoco station overnight to see if anyone came back to claim the truck, but no one did. (Tr. 596). He also interviewed Mr. Sherrie, who picked out a photograph of the appellant. (Tr. 598).

Appellant cross-examined Parmenter, and in the process identified himself as the man on the photograph picked out by Mr. Sherrie. (Tr. 601).

Brad Beloff was called to the stand. He was with his girlfriend and another man near the lake when the three of them walked over to where a truck was stuck in the sand. (Tr. 604). Beloff stated that a man asked him if he could help him in removing the truck. Beloff described that man.

(Tr. 605). The man appeared to be nervous, and finally was able to persuade Beloff to help him pull the truck out of the sand in exchange for a fee. (Tr. 606).

Beloff and a couple of his friends were finally able to pull the truck out of the sand, but the truck would not respond to their attempts to get it jump-started once on the roadway. (Tr. 607).

On cross examination it was brought out that the witness could not make an in-court identification of the man he helped that night. (Tr. 609).

Sandy Burroughs testified that he was on the lake fishing on the evening of June 8, 1982 when he heard a woman screaming. (Tr. 611). About a half hour later, he went to where his friend Mr. Beloff was trying to pull a truck out of the sand. (Tr. 611). He described the man he saw there (Tr. 612), and related that he was very nervous, saying repeatedly, "I got to get out of here." (Tr. 613). Burroughs' testimony corroborated that of Beloff regarding the attempts to remove the truck from the sand and to get it started. Burroughs left when a police officer arrived.

Appellant was able to establish on cross-examination that this witness was also unable to make an in-court identification of the man he spoke to that night. (Tr. 614).

Alfred Morris then testified that on June 8, 1982 he got a call to tow a disabled truck. When he arrived at the scene he observed the truck, a police officer, and a man. (Tr. 620). That man told Morris that he needed to get the truck fixed, and it was towed to an Amoco gas station.

This witness was also unable to identify in court the man he spoke to that night (Tr. 622), although he did describe him. (Tr. 620).

Armando Rego testified that he was employed at the Amoco gas station in question in June of 1982 (Tr. 624), and that he was present when a tow truck brought in a truck for repairs. The man who arrived with the truck signed a repair work order. (Tr. 626). Rego then called a taxi for the man. (Tr. 628).

The next witness was Freddie King. He testified that he was a cab driver in June of 1982, that he picked up a man at an Amoco gas station in the early morning hours of June 9, 1982, and that he transported him to the bus station. He said the man was smoking Marlboros. He made a positive in-court identification of the appellant as that man. (Tr. 654, 655).

Walter Burch took the stand and testified that he worked for the Tri-State Motor Transit Company as a security

officer. (Tr. 658). Tri-State was the lessee of the truck left at the Amoco station. He described the relationship between that truck and the appellant. (Tr. 660-661). The appellant was the driver assigned to the truck in question.

Officer Dorothy Ballard was recalled by the State as a witness. (Tr. 664). She testified that on the day following the discovery of the corpse she was ordered to respond to the Amoco gas station by Detective Merritt. (Tr. 664). Her job was to photograph a truck which had been towed to the station from the area of the murder.

Ballard seized property which was inside the truck, the most important items being the mates of the shoe and sock she had found at the murder scene the day before (Tr. 667), and other personal papers and effects. The left shoe was found at the scene and the right shoe was found in the truck. (Tr. 668-669).

Shelton Merritt was recalled as a witness. (Tr. 726). He testified that he called Texas police to help locate the appellant (Tr. 730), that the appellant was arrested in Texas on the morning of June 15, 1982, and that he went to Texas to continue the investigation later that same day. He met with the appellant the next day, June 16, 1982. (Tr. 734). Merritt interviewed the appellant in the Tarrant

County Jail, advising him of his Miranda rights and informing him of the purpose of the interview. (Tr. 736). The appellant proceeded to confess:

> "THE WITNESS: * * * * He said he was in a topless bar and he called it the "Titti Bar," with a girl. He remembers the barmaid being a short, stock girl named Cathy, who looked Indian.
>
> He said he was drinking real heavy and tipping the girls real heavy. He was drinking Budweiser and smoking Marlboro cigarettes.
>
> He said the girl had a leopard wrap around type dress he was dancing with, and he sat next to some young boy who he remembered was down from up north, the boy, and he said he didn't remember his name but he remembers that the kid had a new Camaro and he was very proud of his car.
>
> He said that the dancer in the leopard skin wrap-around came up to him at one point and asked him to take her to dinner or take her out and they left the bar together.
>
> They headed south towards the Oasis Truck Stop and he said he didn't turn into the truck stop; he kept on going, and he said they drove around several hours and remembers her telling him she was from Atlanta and had only been down in Fort Lauderdale for a couple of weeks and that she was in need of money.
>
> He stopped at a convenient store and picked up two six-packs of Budweiser and they continued to drive.

He doesn't know how he got to the lake in the Opa Locka area but he remembers getting his truck stuck in the sand. As they were stuck in the sand they sat there and drank a couple of more beers and the girl decided she wanted to go swimming, and they went down to the lake and they both took their clothes off and she started all of a sudden in the water, started ducking him under the water and that he could not swim too well, and he started to duck her back. He said that he grabbed her by the shoulders and held her under the water, apparently too long and she stopped moving and he knew she was dead.

He said he drug her out of the water and pushed her up on the bank and tried to push the water out of her by pushing on her chest, and at that point he knew she was dead and there was nothing he could do.

He went back to his truck which was still stuck in the sand and he said two or three white males came over to try to help him get his truck out and they couldn't do it. He said he got into their Dodge vehicle and they took him to a gas station where he called AAA Wrecker and they were not able to get him out the sand either, and he said the guy wouldn't charge him for it.

He said next he went to, there was somebody driving by in a four wheel drive vehicle that had blue, metal flake paint and that car pulled him out of the sand and he was unable to start his vehicle when he got on the roadway.

He said, left sitting on the roadway, a male police officer came by and put out flares for him, and

a few minutes later a female police officer came and called him a wrecker.

The guy that pulled him out of the sand charged him $20 to pull him out.

The wrecker arrived and took him to a gas station, which he thought was an Amoco. The Cloverleaf Amoco has a Tom Thumb type convenience store behind the station, a convenience store, 7-Eleven type store behind the gas station, and he said, I think he said he signed a work order to have the vehicle fixed and sat around there a little while and panicked and got a taxi cab and went to the Trailways Bus Station and caught a bus to Orlando.

When he got to Orlando he cashed a check on his Tri-State Motor Company and advanced the check and ended up going to Nashville or Memphis, one or the other, and enroute to there, he was sitting next to a girl enroute to Chattanooga, Tennessee. He went to Conway, Texas hitchhiking and ended up in Oklahoma City where he rented this room.

He went down to the Fort Worth, Texas area to contact his inlaws, and when he got down there is when he got arrested by the detectives.

* * * *

A. There were two more points to what he told me before, that I forgot to mention.

Q: What did he tell you?

A: He told me he didn't rob the girl and didn't take her money and

> the the other thing was that he didn't have sex with her because when he was drinking he couldn't get an erection."
>
> (Tr. 745-750).

The next witness was Emma Smith, the appellant's mother-in-law. She testified that Texas police officers came to her house looking for the appellant. A few days later, on June 16, 1982, the appellant telephoned her. During that conversation, the appellant admitted to her that he had "murdered a girl in Florida." (Tr. 760-761).

Detective Sharp of the Fort Worth Police Department testified that he arrested the appellant on June 15, 1982. Appellant was taken to see Detective Merritt the next day, with Sharp being present during parts of their meeting. (Tr. 770-775).

Ray Jordon of the Fort Worth Police Department then testified and related how the appellant was arrested. (Tr. 792-794).

The next witness was Frank Norwitch, documents examiner for the Metro Dade Police Department. He testified that the signature appearing on the truck work order left at the Amoco gas station was that of the appellant. (Tr. 805-808).

Dr. Valerie Rao, the medical examiner, was the next witness to testify. Among other things, Dr. Rao testified that:

a) there were scratch marks on the victim's neck consistent with manual strangulation (Tr. 867-868);

b) three areas of the body showed deep bite marks (nipple, chin, and ear area)(Tr. 871);

c) the bite on the breast had torn off the nipple. That bite was a painful "drag bite" (Tr. 873-874);

d) the arms, wrist and shin showed bruises (Tr. 875, 876) which were consistent with having been in a struggle;

e) the victim had been struck in the head and lower lip, probably punched (Tr. 877);

f) the victim had been stomped in the head by the person who was wearing the shoes found at the scene and in the truck (Tr. 883-888, 896);

g) a large blunt instrument was inserted into the victim's vagina, causing hemorrhaging and abrasions. The abrasions and hemorrhaging extended up and into the bladder (Tr. 880-881);

h) the anal opening (sphincter muscle) was violently torn in all directions (Tr. 880);

i) all injuries were very painful (Tr. 873, 874, 889);

j) all injuries were inflicted prior to death (Tr. 874, 875, 881, 889, 890);

k) the victim's lungs were free of fluids, ruling out drowning as the cause of death (Tr. 893); and

l) the cause of death was strangulation (Tr. 890, 891).

Dr. Richard Souviron followed Dr. Rao as a witness. Dr. Souviron is both a dentist and assistant medical examiner for Dade County. He is an expert in the field of dental identification.

Dr. Souviron testified that bite mark evidence is used to determine whether the person who inflicts a bite has a gap in his teeth, whether his teeth are crooked, what the arch size of the teeth is, what the relative positions of the biter and his victim were, and the time the bite was inflicted. (Tr. 905-906).

Dr. Souviron made a plaster model of appellant's teeth and carefully compared the bite marks found on the victim to that model. (Tr. 925). He concluded that those bites were left by the appellant. (Tr. 939, 941, 942, 945, 946, 950). He also said that it was impossible to find two identical sets of teeth, and that appellant's teeth were of an unusual configuration. (Tr. 925).

The State rested. (Tr. 959). The appellant called no witnesses. (Tr. 997, 1002). The appellant gave a brief closing statement to the jury. (Tr. 1007-1009). The State waived oral argument. (Tr. 1010).

The Court instructed the jury (Tr. 1031-1054), and deliberations began. Exactly fifty-one minutes later (Tr. 1058) the jury returned a verdict of guilt on the first degree murder and sexual battery charges. (Tr. 1059, 1060). Appellant was acquitted of theft.

THE PENALTY PHASE

Dr. Rao (the medical examiner) was the only witness called by the State during the guilty phase. Her testimony begins on page 1087 of the transcript and ends on page 1090.

DIRECT EXAMINATION BY MS. DANNELLY:

Q: Would you state your name, please.

A: Dr. Valerie Rao.

Q: Have you previously offered testimony in this cause, Doctor?

A: Yes.

Q: Drawing your attention to the nature of the testimony, I would like to draw your attention to several injuries that have been inflicted upon the person of Joyce Marlowe. At this time I would like you to begin first with the injuries to the area, the anal region of Joyce Marlowe and I would like you to inform the members of this jury first, of the nature of that injury and in terms of the way that injury was inflicted and the substantial results of that injury.

A: Yes. The anus, as you aware, is a very tight sphincter and when this sphincter is ruptured, when a victim who has been sodomized-- I have to explain it to you this way so you will be able to understand it. An anus-scope is inserted. It is a plastic or metal which has a diameter of approximately this size. It is lubricated and inserted to examine for injury. The patient who lives complains of tremendous-- the patient alive complains of tremendous pain, and some of the children start to cry, and there is no injury inflicted. The sphincter is intact and everything is okay but there is pain with that insertion depite the lubrication.

In the case of the deceased, her sphincter was ruptured in every

dimension, up, down, around, either side and it was in fact gaping. So, the force that was applied to that particular area was tremendous to rupture, break the anal sphincter.

Q: Doctor, do you have an opinion as to what type of object or size of an object that was inflicted upon Joyce Marlowe's anal area?

A: It was a considerable size. It was a blunt weapon, not a knife. It was something rather large to have caused the sphincter to break open.

Q: Did the victim suffer as a result of the infliction of that injury?

A: Yes.

Q: Was there a great amount of bleeding as well?

A: Yes.

Q: Turning your attention to the injury to the breast of Joyce Marlowe, was the nipple severed?

A: Almost severed. It was hanging off, most of the skin and it was joined in the small region.

Q: Would you explain to the members of the jury, please, what an erectile tissue is?

A: Yes. The nipple is one of the most sensitive areas of the body, both in men and women. The nerve supply there is very abundant and I'm sure you are all aware that it can be made erectile from pressure, touching that area; extremely

sensitive. The same nerves are also responsible for supplying sensory sensations, pain, touch. These are all, it is very, very abundant with these nerves.

Q: Did Joyce Marlowe suffer as a result of the injury that was inflicted to her nipple?

A: Yes.

Q: Doctor, please describe for the members of the jury the nature of the cause of death to Joyce Marlowe. Was it a slow or quick death, strangulation?

A: Strangulation is not instantaneous because basically what it is, you are starving the person from air. When you and I are breathing unconsciously, really, so if you are trying to block off the air and a person is hungering for the air, over a period of time, a few minutes in which she is struggling against the pressure being exerted to cut off the air to her body.

Q: Would the victim be aware by virtue of your testimony, regarding her strangling, of the attempts to strangle her?

A: Yes.

MS. DANNELLY: I have no further questions.

The appellant took the stand and asked for a death sentence. (Tr. 1096).

The jury retired at 1:25 p.m. to deliberate and ended deliberations at 1:43 p.m., recommending death by a vote of 12-0. (Tr. 1111).

SUMMARY OF THE ARGUMENT

I

Appellant's claim of a Pate violation is without merit. He was afforded two separate competency hearings and produced no evidence at them. He also failed to exhibit any behavior during trial indicative of the need to submit him to further evaluation.

II

Appellant failed to show any bona fide doubt about his competency to proceed pro se. Since he was clearly mentally competent at all times, it was unnecessary to afford him any special consideration upon accepting his waiver of counsel.

Appellant's waiver was totally free of error. He was made aware of all the ramifications of proceeding pro se.

III

Appellant waived the right to participate in jury selection by his obstructionist behavior. The court gave him three chances to participate, and he rejected each overture.

Even if he did not waive participation, the overwhelming nature of the evidence against him renders any error harmless.

The trial court's comments to the jury were not at all indicative that the court was expressing its belief that appellant was guilty.

IV

Appellant had no standing to object to the search of the vehicle. Consent to search was validly given by the lessee. Appellant also abandoned the truck upon fleeing the jurisdiction. In any event, it was without a doubt inevitable that the evidence found in the truck would have been recovered by other means.

V

Appellant's confession was volunteered to police. No evidence was proffered to the contrary.

VI

Appellant's request for a mistrial was properly rejected, where the medical examiner merely sought to

qualify her own opinion as to the cause of the injury inflicted upon the victim. To argue that reversible error occurs whenever an expert places a caveat in his or her opinion is ludicrous.

VII

Appellant's claim of a Richardson violation regarding plastic overlays is totally specious. Evidence submitted by appellee shows that appellant was duly informed of the existence of those overlays before trial. His failure to make any attempt to discover them cannot be blamed on the State.

VIII

Appellant's claim that some witnesses picked out some "mystery suspect" from photo line-ups is incorrect. No second suspect ever existed. Appellant is simply misconstruing the record below.

IX

Appellant clearly and without doubt waived his right to have certain lesser included offenses read to the jury.

X

Appellant's claim that "cumulative errors" served to deprive him of a fair trial is totally without merit. There was no prosecutorial misconduct, no abuse of discretion in not giving him a continuance, no "overreaching" by the State, and no error in introducing the copy of appellant's Texas rape conviction during the penalty phase.

XI

The trial court has the option of asking the jury for a recommended sentence. Appellant has not shown how the court abused that discretion by asking for one here.

XII

The trial court did not abuse its discretion by not ordering a presentence investigation report. The court was already aware of many details of appellant's background.

ARGUMENT

I

THE APPELLANT WAS INITIALLY FOUND COMPETENT TO STAND TRIAL, AND NOTHING OCCURRED DURING TRIAL THAT COULD REASONABLY HAVE INDICATED THE NEED TO CONDUCT ANOTHER COMPETENCY EVALUATION OF HIM.

A cogent analysis of this issue requires a detailed look at the entire record. Due to the nature of the subject matter and volume of the record, appellee recognizes the need to proceed with this issue in an organized manner. Accordingly, the following steps will be taken:

1) the appellant will be profiled,

2) a general overview of the trial will be presented with an eye to those aspects having a bearing on appellant's competency,

3) events germane to the issue of competency will be presented in chronological order and in some detail,

4) the legal standard which governs this issue will be stated, and

5) the actions of the appellant will be analyzed in light of that standard.

A PROFILE OF BURLEY GILLIAM

Appellant was thoroughly examined by three experts in November of 1983. All three doctors agreed: appellant was sane at the time he committed his crimes and competent to stand trial for those crimes.

The evaluations submitted to the trial court by the doctors have been made part of the record. (S.R. 1-12). Appellee submits the following summaries of those evaluations. First, Dr. Jacobson:

> Thirty-five year old caucasian male; ninth grade education; previously incarcerated in Texas for rape; suffered head injury while in Texas prison; possible seizure disorder which could be a ruse or possibly related to alcohol withdrawal; admits to having lied in the past about having "seizures"; history of drug and alcohol abuse; receiving anti-convulsive medication; has briefly seen a psychiatrist in the past; capable of carrying on a rational and goal-directed conversation, but seeks to change the subject if not to his liking; irritable with no hallucinations; aware of the charges and penalty if convicted; able to describe the role of judge and state attorney; able to relate to his attorney; can testify relevantly; motivation to help himself is acceptable; coping well with stress of incarceration; does not suffer from mental disorder; sane at time of offense; competent to stand trial now.

Dr. Mutter observed:

> Ninth grade education; served time in Texas for rape; claims epilepsy from head injury; counselled by psychiatrist while incarcerated in Texas; history of drug and alcohol abuse; receiving anti-convulsive medication; conscious suppression of information, would not discuss details of case; no mood swings; has organized thought processes, goal directed; no hallucinations or delusions; understands role of judge, jury, prosecutor, and his attorney; understands charges and possible penalty; sociopathic personality; sane at the time of offense and competent to stand trial now.

Finally, Dr. Haber:

> Ninth grade education; claims "brain damage" from a beating received while incarcerated in Texas; takes anti-convulsive medication; history of drug and alcohol abuse; denies having had mental problems; no hallucinations; not informative during interview, providing no details of the crime; logical and coherent responses; no mood or though disturbances; has a sense of humor; resigned to prison life; aware of the charges and adversary nature of the system; can aid in own defense; sane at the time of offense and competent to stand trial now.

Appellant was seen as a man clearly lacking any characteristics indicative of incompetency. There was nothing

remarkable about him. The trial court accordingly adjudged him competent. (Tr. 12).

Dr. Haber had a second opportunity to evaluate appellant. It came fourteen months later, in January of 1985. He stated that after observing the appellant:

> "* * * interacting with the Court and with His Honor, obviously comprehending everything that went on, showing considerable alertness as to his rights and what he wants to do and doesn't want to do * * * although [the appellant was] uncooperative, it was apparent to [Dr. Haber] that the subjective strong role, highly opinionated, antagonistic, but quite coherent, rational, aware of what he was doing and intent to do exactly what he wanted to do and nothing else [was the] essence of competency. ***"
>
> (Tr. 191).

These observations by Dr. Haber of appellant and his behavior were made on the very eve of trial. The picture provided the trial court showed a man who had not changed one bit since he was first evaluated. This was a sane, competent individual who insisted on having things his way. He was articulate, strong, rational, and coherent. In Dr. Haber's words, appellant's "subjective strong role" was "the essence of competency."

GENERAL OVERVIEW OF THE TRIAL

Appellant's competency was virtually a non-issue below. It came up when Art Koch moved the trial court for a mental examination of his client in November of 1983, a full seventeen months after appellant's arrest and return to Florida. Experts appointed by the court returned their findings. They came to identical conclusions. The issue was apparently resolved, and Mr. Koch did not raise it again.

The next people to have close contact with appellant were Stuart Adelstein and William Surowiec. They were his attorneys for ten months, from March of 1984 to January of 1985. They also failed to bring any eccentric behavior to the court's attention during their incumbency which would have indicated that appellant was in need of evaluation.

Appellant's "problems" arose from his uneasy relationships with his attorneys. His recurring complaint over the twenty-nine months before his trial was that he was not allowed access to all the "materials" filed in the case. He also wanted to assume a more active role in his defense. It is important to point out that during all the hearings called to discuss withdrawal of counsel (and there were several), at no time did any attorney communicate his belief that the appellant was in any way incompetent. On the

contrary, all attorneys maintained that their relationships with their client simply deteriorated as he gradually refused to cooperate with them any longer. This general uncooperativeness always seemed to become more acute the closer the case was to trial.

Appellant's trial lasted five days. During that time he was totally in charge of his faculties. His allegedly "irrational" behavior was an act. The record is full of statements by the trial court referring to how the appellant would completely compose himself and behave normally the minute the jury left the courtroom. All of appellant's antics were either purely obstructionist or intended for jury consumption. Appellant's condition was perfectly stable and unremarkable during the twenty-nine months prior to his trial. He underwent no change during the five days his trial lasted.

KEY EVENTS IN DETAIL

Appellant has made reference to several statements or incidents in order to point out that he was incompetent, or at least deserving of a competency evaluation. Appellee will not follow that example of taking matters out of context. Instead, appellant's conduct will be broken down into manageable periods of time and viewed logically. While it is impossible to discuss everything which took place

below in this brief, appellee will attempt to analyze hearings, colloquies, and appellant's performance relative to contemporaneous objections and cross-examination during trial. Appellee will also catalog those instances during trial where appellant was allowed to confer with his standby counsel. In the end, it will become clear that nothing ever occurred to indicate the need to submit appellant to a competency evaluation. Appellant was fully competent to stand trial.

EARLY HEARINGS

The record contains transcripts of the following hearings:

a) November 28, 1983. Hearing on appellant's competency and motions to suppress (Tr. 1-149);

b) January 14, 1984. Hearing on withdrawal of Art Koch from the case (S.Tr. 70-94);

c) February 1, 1984. Hearing on withdrawal of Koch (S.Tr. 22-35)

d) February 2, 1984. Hearing on withdrawal of Koch (S.Tr. 36-56);

e) February 7, 1984. Hearing on withdrawal of Koch (S.Tr. 57-68);

f) March 13, 1984. Hearing on appointment of Adelstein (R. 1347-1357);

g) October 31, 1984. Hearing on withdrawal of Adelstein (S.Tr. 1-12);

h) January 10, 1985. Hearing on withdrawal of Adelstein (S.Tr. 13-21);

i) January 21, 1985. Hearing on withdrawal of Adelstein (Tr. 150-164);

j) January 22, 1985. Hearing on withdrawal of Adelstein and self-representation (Tr. 165-182); and

k) January 23, 1985. Hearing on competency and self-representation (Tr. 183-211).

Those hearings are summarized as follows:

NOVEMBER 28, 1983:

Art Koch stipulated to the contents of the experts' reports on appellant's mental condition after first consulting with his client. (Tr. 8-10). He would not go so far as to actually stipulate that appellant was competent, but he offered no evidence to the contrary and presented no dissuasive argument to the court. At the end of the hearing he stated that "the issue of competency has been determined". (Tr. 147). Appellant did not testify.

January 14, 1984:

Appellant engaged in prolonged colloquies with the court. He was upset that Mr. Koch had not provided him with all the pleadings and depositions in his case. Mr. Koch stated that the friction present in their relationship was

due exclusively to appellant's desire to make decisions as to how his case should be handled. (S.Tr. 80-81). Appellant is revealed as someone aware of his rights and the seriousness of the charges. He was rational and coherent. There was not a hint of incompetence present.

February 1, 1984:

Mr. Koch reported a further breakdown in communications with his client. Koch made no suggestion that this was due to incompetence. Appellant was not present.

February 2, 1984:

With his trial date fast approaching, appellant reiterated his feelings that Mr. Koch was not giving him effective representation. At one point he asked, "How can I go to trial with a Public Defender that tells me that he says I can't beat your case? There's no sense in my trying to fight it. How can I go to trial with somebody like that?" That remark alone should erase any doubt as to appellant's thought processes--he was rightfully concerned about his case and aware of what he faced. Later on appellant showed that he was going to fight the system: "Look. I would prefer death over life with a mandatory 25. Okay? But I'm not going to kill myself either. I'm going to make the Court, the law do it." (S.Tr. 53). Appellant

again came across as a very coherent and rational person fully aware of the process to which he was being submitted.

February 7, 1984:

After Mr. Koch's firing, appellant behaved in his usual aggressive manner, making pertinent requests-- "Judge Mastos, I would like the material on my case that the prosecutors got. I think I'm entitled to that." Appellant was consistent in that he wanted to be fully informed of all details of his case. He continued to behave rationally and coherently.

March 13, 1984:

Appellant began with his complaint of lack of cooperation from his former attorney regarding case materials. He stated that he would be happy to go to trial with Mr. Adelstein if he could have his "materials". (R. 1351). Adelstein accepted the appointment with the caveat that he needed to have the appellant's cooperation, which was promised. (R. 1354).

October 31, 1984:

Mr. Adelstein reported appellant's lack of cooperation. Adelstein cited appellant's fit of anger with him.

Appellant eventually conceded that he was satisfied with Adelstein (S.Tr. 9-10), and that he had just lost his temper.

January 10, 1985:

Appellant continued to withhold cooperation from his attorneys. The problem was apparently over Adelstein's failure to provide medical reports to his client. (S.Tr. 17). Appellant also made known his fear of being assaulted in jail (S.Tr. 18, 19), and requested special treatment.

January 21, 1985:

Appellant's second trial date was near. He was now adamant that he wanted to fire his attorneys. The court explained the ramifications of that decision. The court also ordered appellant to prepare a list of the material he was "missing". (Tr. 160).

Appellant did not talk at any length with the court. The important aspect of this hearing is that Adelstein never mentioned that appellant was in need of a mental evaluation. In fact, Adelstein mentioned a recent conversation between himself and appellant concerning the testimony of Dr. Souviron, the expert who performed dental experiments. (Tr. 154). Adelstein did not indicate any inability on the

appellant's part to converse or understand what was going on. The logical conclusion one is forced to draw is that Adelstein had no trouble communicating even the most technical of details to his client. The only problem appears to be appellant's desire to be uncooperative.

January 22, 1985:

Appellant again expressed his desire to fire his attorneys. When the court informed him that such a move would mean self-representation, appellant opted for self-representation. Adelstein moved to have Dr. Haber examine appellant. The court stated, "But, you know, this court is assuming he is competent, I have no reason to doubt it." The court and Adelstein went on to state that they only considered the mental evaluation as a Faretta precautionary move to make sure the waiver of counsel was valid. (Tr. 176-178). The State did not oppose the motion, since the evaluation was going to be performed that evening and no delay would occur. (Tr. 177). Under those circumstances, appellant was ordered evaluated.

January 23, 1985:

Dr. Haber began the hearing by erasing any doubts about appellant's competency. (Tr. 191).[2] Appellant then engaged

[2]Appellant barely mentions the fact that he refused to allow Dr. Haber to conduct a complete evaluation of him. (con't.)

in long and detailed conversation with the court over waiver of counsel. Appellant was his usual coherent and rational self. He warned the court of the dangers of returning him to the general prison population and he demanded access to the law library. (Tr. 198-200).

Appellant's pre-trial demeanor was characterized by several qualities. Appellant was assertive about his rights, aware of his situation, and determined to do everything he could to help himself. He was to continue unchanged through the rest of the trial.

THE TRIAL

The first day of trial began in mid-afternoon (Tr. 217) and ended at approximately 6:00 p.m. (Tr. 369). What happened during those four hours was a microcosm of the trial as a whole.

Appellant began by personally[3] making a series of motions before the court. There were motions for:

His tactics were transparent; he did not fool Haber or the court. (Tr. 189).

[3]In this part of the brief "apppellant" will refer to Burley Gilliam personally. The actions taken by standby counsel will not be emphasized, as only appellant's behavior is the object of scrutiny. Distinctions will be made if and when standby counsel's actions merit discussion.

1) sequestration of witnesses (Tr. 217)

2) continuance (Tr. 221)

3) examination of exhibits (Tr. 222, 230)

4) administration of medication (Tr. 222)

5) appointment of an investigator (Tr. 222)

6) time to research legal issues (Tr. 228, 229)

7) special treatment by jail personnel (Tr. 230, 231)

These exchanges between appellant and the court were themselves uneventful. The important thing about them is the fact that they took place. Appellant assumed a strong role. The jury was brought in at 2:18 p.m. (Tr. 232).

The court and state attorney addressed the panel for a total period of approximately ninety minutes (Tr. 275), and a recess was taken. Appellant received his medication while the panel was present. (Tr. 276-277). Appellant claimed to be very tired due to having stayed awake the previous evening reading his materials. (Tr. 281). The jury returned and the State continued voir dire. (Tr. 282-303).

Appellant's voir dire was preceeded by a very interesting exchange. (Tr. 303-306). He demanded that the jury be excused so that he could consult with his standby counsel without the jury knowing it. Appellant came across as very alert and effective. He finally got his way. (Tr. 309).

Standby counsel at that time pointed out that appellant had apparently "nodded off" during voir dire for a period of twenty-one minutes. (Tr. 312). The court believed him to be faking. (Tr. 312). Appellant later admitted to having slept only "five hours in the last four days". (Tr. 316). He had also claimed not to have slept the night before. (Tr. 281). His fatigue was obviously self-induced to coincide with the start of trial.

The court and appellant engaged in a colloquy about whether appellant planned to ask the panel any questions on voir dire. (Tr. 317-319). Their discussion continued when the panel returned (Tr. 320), appellant complaining of the lack of opportunity to prepare. The court was unsuccessful in attempts to get appellant to exercise voir dire challenges. (Tr. 320-328).

Although certainly uncooperative regarding his participation in voir dire, appellant was nevertheless perfectly coherent and consistent in the positions he took with the court. There was nothing to suggest anything even remotely abnormal about him.

The State resumed voir dire. (Tr. 328-361). Before appellant was to begin his turn all parties retired to the hallway outside the courtroom for a conference. (Tr. 363).

Appellant slumped to the floor and appeared tired. He told the court again, "I'm exhausted. I have not had any sleep in four days and I tried to explain that to you before and you didn't want to listen so I don't even want to be here sitting and talking". (Tr. 365). When asked the nature of his problem, the appellant answered that he had a headache, was tired, and had not slept in the last four days. (Tr. 366-367). The court finally ordered that appellant be examined that evening in "Ward D," which is the prison section of a local hospital. (Tr. 368).

The parties returned to the courtroom and the jurors were sent home for the day. (Tr. 370). Appellant underwent a complete change in demeanor once the jury left. He immediately began to complain about the bailiff looking at his trial materials. (Tr. 371-372). When asked if he still needed to be examined, the appellant answered that he refused to go to Ward D. (Tr. 372). The court cancelled the medical examination after noting the "miraculous recovery of the appellant". (Tr. 372-373). It was obvious that appellant was putting on an act, and that he fooled no one.

Day Two:

Appellant began the second day by announcing that he refused to take his medication. (Tr. 380-381). He then

engaged in a lengthy colloquy with the court similar to the one of the previous day. (Tr. 389-405). This colloquy was more spirited, however. Appellant showed aggressiveness and clear thinking. He was fully able to express himself and refused to be intimidated. His mind was very clear.

Voir dire was resumed. (Tr. 405). Appellant was uncooperative throughout, refusing to exercise challenges and even walking out of side bar conferences. (Tr. 409-411; 430). Voir dire ended and a lunch recess was taken. (Tr. 434). Appellant then agreed to take his medication.

When trial resumed after lunch appellant moved to strike the panel. (Tr. 438). The court found that he had waived his challenges and trial resumed. The State made its opening statement (Tr. 444-452). Appellant then went into his act, appearing to be asleep. The court excused the panel (Tr. 452), and said to a corrections officer, "All right Mr. Gilliam. Angel, see if he is breathing, will you, please, because I guess this is probably trance time now. Now that the trial has begun it is time to sit in trance." (Tr. 452, 453). The court then recounted the act appellant had put on the night before in the hallway just before court was adjourned. The jury was brought back and the first witness was called. (Tr. 462).

Appellant was fully alert during the first witness' testimony. (Tr. 463-511). He made objections and conferred with his attorneys on numerous occasions. His colloquies with the court were as normal as they had ever been. He apparently believed it in his best interest not to feign sleep any more; he stayed awake during the remainder of the trial.

Appellant was very effective during the testimony of the next witness, beginning with the making of three valid objections to his testimony. (Tr. 513, 514, 515). Appellant also was clear when complaining about how exhibits were introduced. (Tr. 517, 519, 520, 521, 523). He showed no signs of not be totally alert and in control of himself.

Appellant continued to make proper objections during the rest of the afternoon. (Tr. 552, 556). He even conducted cross-examination (Tr. 558, 559), showing no signs of abnormal behavior whatsoever.

When the jury was excused for the day appellant engaged in another spirit exchange with the court over discovery material, witness lists, and the testimony of a witness whose testimony was the subject of a previous motion to suppress. (Tr. 561-574).

Day Three:

Appellant was extremely alert and coherent on this day. He made dozens of timely objections, conferred with counsel frequently, engaged in aggressive conversation with the court, and conducted excellent cross-examinations of several witnesses.

Appellant began with his usual comments and motions to open the session. (Tr. 574-591). His cross-examinations of Beloff (Tr. 608-609), Burroughs (Tr. 613-615), Morris (Tr. 622), King (Tr. 655-657), Burch (Tr. 662-663), and Merritt (Tr. 714-720; 752-756) were all well done, Merritt's in particular. Although he was unable to "break" Merritt by trying to get him to admit that his (appellant's) confession was less than voluntary, appellant did make a strong attempt. When appellant broke into tears upon failing in his efforts, it reflected nothing more than an emotional catharsis at a critical juncture of his trial. He quickly recovered his composure, as evidenced by the timely and proper objections posed during the testimony of the next witness. (Tr. 758-759). Appellant also made numerous objections to the testimony of Officer Sharp. (Tr. 763-770).

The day ended as it began with appellant engaging the trial court aggressively and effectively for several minutes. (Tr. 810-831).

Day Four:

Day four was characterized by lengthy colloquies between the court and appellant. Only two witnesses testified.

The day began as all others had. Appellant made his standard motions and complaints about trial preparation. (Tr. 837-839; 847-855).

During the medical examiner's testimony appellant was attentive, making numerous objections and conferring with standby counsel. (Tr. 857-896). Appellant in fact made timely objections every time an exhibit was introduced into evidence.

The afternoon session began with a lengthy discussion between the Court, standby counsel, the State, and appellant. (Tr. 956-1002). Appellant was rational, coherent, and aggressive. There was nothing indicative of any problem whatsoever.

Appellant gave a closing argument to the jury. (Tr. 1007-1010). He denied his guilt and claimed that he was a drug addict. He alleged that the court had treated him unfairly. Trial was adjourned.

Day Five:

Appellant's behavior was again normal. The day was taken up by jury instructions, deliberations, the penalty phase, and sentencing. Appellant said very little.

When the jury returned its guilty verdict appellant sought to waive the penalty phase. (Tr. 1065). This was in keeping with his previous statement made eleven months earlier (S. Tr. 53) regarding the sentence he wished to receive if convicted. The court summed up appellant's condition on pages 1067 and 1068:

> "THE COURT: Again through my eyes, having been the presiding judge, if I felt there was something wrong with Mr. Gilliam I would order an evaluation. I wouldn't hesitate for a minute. There is nothing wrong with him. He is perfectly lucid. He is sitting here. This is the end of the line in a long and protracted process but I don't think Mr. Gilliam, that, that I'm going to allow you to waive the penalty phase. * * * * * (Tr. 1069-1070).

Appellant resumed his combative posture immediately, insisting on the necessary materials corresponding to the penalty phase. (Tr. 1071-1076).

Appellant chose to address the jury. The court conducted an inquiry into this matter. (Tr. 1092-1094). Appellant then asked the jury to sentence him to death (Tr. 1096) because he did not "want to spend the rest of [his] life in prison."

THE LEGAL STANDARD

Florida Rule of Criminal Procedure 3.211 provides that a defendant is competent to stand trial if he has the sufficient present ability to consult with his lawyer and if he has a rational, as well as factual understanding of the proceedings against him. Rule 3.210 in turn states that the trial court is obligated to hold a hearing to determine a defendant's mental condition whenever it has "reasonable grounds" to believe that the defendant may not meet that level of competence. Hill v. State, 473 So.2d 1253 (Fla. 1985). Appellant argues extensively that the trial court failed to follow the dictates of Hill and the cases cited therein[4] by failing to hold a hearing into his competence.

Appellant's reliance of Hill, Pate and Drope is misfounded. Those cases deal with the duty of a trial court to order competency hearings when there are reasonable grounds

[4]Bishop v. United States, 350 U.S. 961 (1956); Dusky v. United States, 362 U.S. 402 (1960); Pate v. Robinson, 383 U.S. 375 (1966), and Drope v. Missouri, 420 U.S. 162 (1975).

to suggest incompetency. In every one of those cases the defendants were never granted hearings (even though they had requested them) and in spite of the fact that there were reasonable grounds suggesting incompetency.

In the case at bar appellant was afforded two separate competency hearings, one early on in the proceedings and one on the eve of trial. At his first hearing appellant stipulated to the contents of the reports of three experts who stated that he was one hundred percent competent to stand trial. At his second hearing appellant produced no evidence, either testimonial or otherwise, suggesting incompetence. It is very hard for appellee to see how appellant can logically claim a Pate violation under these circumstances. The trial court, after all, granted both his motions for a hearing.

Appellee submits that this issue is controlled by the cases of Thompson v. State, 389 So.2d 197 (Fla. 1980); Ross v. State, 386 So.2d 1191 (Fla. 1980), and LaPuma v. State, 456 So.2d 933 (Fla. 3d DCA 1984), review denied, 464 So.2d 555 (Fla. 1985). According to those cases the proper question becomes whether appellant can point to any particular circumstance that had caused his mental condition to change since he was originally examined and found competent. An "abuse of discretion" standard is employed. The record reflects no change whatsoever in appellant's mental

condition, and no abuse of discretion below. Appellant was competent during the twenty-nine months prior to trial, and he was no different during the five days of trial.

ANALYSIS OF THE LAW AND FACTS

Appellant was thoroughly examined by three experts. The written reports filed by those experts were read by the trial court, undoubtedly giving it valuable insight into appellant's mental makeup. (Tr. 12). Appellant was given a clean bill of health. (S.R. 1-12). He was also exposed in those reports as a malingerer and a liar when it came to his medical condition. (S.R. 2, 9).

Appellant was in regular contact with the trial court after the competency evaluations were done. The court had many opportunities to observe him over time and saw nothing abnormal or different about his condition.

Appellant was also visited countless times by his own attorneys. They never reported anything indicating lack of competency to the trial court.

Appellant's behavior was consistent throughout the many months before trial. He was aggressive, coherent, and demanding. He behaved logically and rationally.

Appellant requested (Tr. 174) and was given an examination on the eve of his second trial by Dr. Haber. That updated report also gave appellant a clean bill of health, confirming (no doubt) what the trial court had believed all along.[5]

His behavior at trial was identical to his pre-trial behavior. The only incidents cited by appellant even remotely worthy of comment here deal with his fatigue and alleged "sleeping" during the first and second days of trial. The trial court's reaction to this conduct was to offer to have appellant examined by a medical doctor. That offer was of course rejected immediately when appellant learned that he could not dictate the terms of that examination to the court. (Tr. 372). Appellant was obviously in his manipulative mode, and not sick at all. As for appellant's fatigue, that was explained by appellant himself-- he had simply stayed awake the night before reading his trial materials. (Tr. 281). It must also be pointed out that even when allegedly "fatigued" appellant

[5]The trial court did not order this examination because it doubted appellant's competency to stand trial. It was ordered in an abundance of caution to both ensure that the Faretta inquiry would be free of error (appellant's own attorney made that point, Tr. 176-178, especially lines 1-4 of page 178 where Adelstein indicates the reason behind his request for the evaluation), and to bury any question of incompetency once and for all before trial got under way. The trial court gave appellant every imaginable opportunity to come forth with evidence of incompetency. He just failed to take advantage of those opportunities. The trial court cannot be faulted for appellant's failure to "make his case" in this regard.

lost none of his coherence. He remained well-oriented, aggressive, and rational. His "impairment" was not only self-induced, but physical as opposed to mental in character, if it existed at all. The trial court believed appellant to be faking. The record shows that appellant's alleged bouts with fatigue both came (coincidentally) when the state was doing voir dire or opening statement. Appellant always seemed to "recover" when it was convenient for him to do so. He was putting on a show for the judge and jury. He gave up that act when the trial court refused to be taken in.[6]

Where are the "particular circumstances" or abuse of discretion required by Thompson in this case? They do not exist. What does exist is a record of behavior fully consistent with the expert evaluations rendered near the beginning of the proceedings.[7] The reports contained

[6]The other "examples of irrational behavior" cited have taken completely out of context. The claim that appellant was "obsessed with his own death" is patently ridiculous. He was not "more concerned with his lunch" than he was about the trial. He merely sought to obtain all the special privileges he could while he could. Appellant was manipulative. Examples of bad lawyering on appellant's part do not indicate that he was self-defeatist. The record shows that appellant sought every legal advantage possible throughout his trial. Finally, appellant's description of the penalty phase is a gross distortion of the record. One only needs to read the record to see that what took place was anything but the travesty appellant has clumsily described it to have been.

[7]Appellant's claim in his brief that "there was very little medical evidence developed in this record" (Brief of

information indicating that appellant was prone to lie about his medical condition. (S.R. 9). They also mentioned that his "symptoms" could very well have been a ruse. (S.R. 11). What the court saw and heard merely confirmed those reports. This case is nearly identical to La Puma, supra. Appellant's claim is without merit.

ANALYSIS UNDER PATE

Let us suppose that appellant was never afforded a competency hearing below. Even if that were true, appellant would have no basis in law for his claim of a Due Process violation. The reason is that appellant never exhibited the behavior or charactistics which trigger the need to hold a Pate competency hearing in the first instance.

Appellee believes Kaplany v. Enomoto, 540 F.2d 975 (9th Cir. 1976), cert. den. 429 U.S. 1075, Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979), cert. denied, 100 S.Ct. 487, Jordan v. Wainwright, 457 F.2d 338 (5th Cir. 1972); Walker v. State, 384 So.2d 730 (Fla. 4th DCA 1980); Sailer v. Gunn,

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appellant, page 29) is untrue. The transcript itself mentions the reports submitted to the court. (Tr. 1-12). Those reports contain information regarding appellant's "epilepsy" and "history of serious personality disturbances" that appellant cites in his brief. Appellant really never had epilepsy or any mental problems. Remember, appellant stipulated to the content of those reports.

548 F.2d 271 (9th Cir. 1977); and Collins v. Housewright, 664 F.2d 181 (8th Cir. 1981), to be controlling here. Those cases closely examine the requirements of Pate under circumstances nearly identical to ours: negative psychiatric reports, coherent behavior, defendant's failure to come forward with medical opinion indicating incompetency, lack of a history of mental illness, unsubstantiated claims by defense counsel of their client's incompetency, the court's opportunity to observe the defendant, etc. They all agree that Pate does not mandate a hearing under our circumstances. One reading of those cases shows how Pate is applied and how baseless appellant's claim really is.

CONCLUSION

In sum, Appellant was not really entitled to any competency hearing, either before or during his trial. Even though not required to, the trial court granted two motions for competency hearings. The evidence adduced at those hearings showed beyond any doubt that appellant was one hundred percent competent to stand trial. His condition did not change during trial. There was no error.

II

APPELLANT KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO BE REPRESENTED BY COUNSEL.

COMPETENCY TO WAIVE COUNSEL

Appellant chose to fire his attorneys and represent himself. His second competency-related issue on appeal concerns his ability to comprehend the import of that decision to opt for self-representation.

Appellant nows argues that he was entitled to a competency hearing at the time he made that decision, and that the legal standard used to measure his competency should have been higher than that of mere competency to stand trial.[8]

The seminal case in this area of the law is Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 249 (1966). The various federal courts that have interpreted Westbrook have come to fall into two camps. The first camp[9] has determined that Westbrook requires the trial

[8]Appellant was of course given this hearing. He produced no evidence there, nor did he raise any objection to the standard applied by Dr. Haber at that hearing.

[9]Made up of the Ninth, Second, and D.C. Circuits: Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); Konigsberg v. Vincent, 526 F.2d 131 (2d Cir. 1975), and United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976).

court to adopt two different competency standards in appropriate cases. By "appropriate cases" it is meant those cases where there first exist reasonable grounds to doubt the defendant's competence. One standard would apply to the defendant's general competency to stand trial. A second, more exacting standard would be applied if that "appropriate defendant" were to choose to waive a particular fundamental right (such as the right to counsel or the right to a trial by jury) after having been found competent to stand trial. The cases make no distinction between the waiver of counsel standard and the waiver of any other fundamental right. Evans v. Raines, 534 F.Supp. 791 (U.S.D.C. Ariz. 1982). They are interchangeable for our purposes.

The second camp[10] maintains that Westbrook does not require the use of two separate competency standards. That camp holds that if a defendant is competent to stand trial he is ipso facto competent to waive a constitutional right without further inquiry into his competency. The Eleventh

[10]Made up of the First, Third, Fifth, Sixth, Seventh, Eighth, Tenth Circuits and Eleventh Circuits: Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978); United States ex rel. McGough v. Hewitt, 528 F.2d 339 (3rd Cir. 1975); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1974); United States v. Harlan, 480 F.2d 515 (6th Cir. 1973); United States ex rel. Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981); White Hawk v. Solem, 693 F.2d 825 (8th Cir. 1982); Wolf v. United States, 430 F.2d 443 (10th Cir. 1970), and Stinson v. Wainwright, 710 F.2d 743 (11th Cir. 1983).

Circuit is in this camp. Stinson v. Wainwright, 710 F.2d 743 (11th Cir. 1983).

Only one Florida case, Bryant v. State, 373 So.2d 380 (Fla. 1st DCA 1979), appears to address the question. That court was apparently guided by the minority (Sieling) federal position but did not specifically adopt that point of view. The question of which standard should apply to this case however, need not be decided.[11] Even if judged under Sieling, appellant simply does not meet the "reasonable grounds" requirement of that case.

LEGAL ANALYSIS UNDER SIELING

The threshold question under Sieling is always whether there was a "substantial question" of incompetency, "bona fide doubt" or "reasonable grounds" to suggest incompetency below. If there was none, then the determination of the validity of the waiver by the appellant can be assessed with an assumption that he was mentally capable of making his decision to waive counsel. Absent that substantial

[11]Appellee would urge this Court to adopt the majority federal position, should it be necessary to do so. See United States ex rel. Heral v. Franzen, supra, for the policy reasons why.

evidence, appellant is presumed competent, and only a Faretta[12] inquiry is necessary. Sieling.

The Ninth Circuit has decided at least three cases factually analogous to the case at bar. They are Sailer v. Gunn, 548 F.2d 271 (9th Cir. 1977); Darrow v. Gunn, 594 F.2d 767 (9th Cir. 1979), and Spikes v. United States, 633 F.2d 144 (9th Cir. 1980). The previously cited Florida case, Bryant, is also on point here.[13] The previously mentioned case of Evans v. Raines, is also illustrative, and useful for comparison purposes. The defendant in Evans was found competent to stand trial but incompetent to waive counsel. That defendant suffered from severe mental disorders not present here. Those cases hold that substantial evidence of incompetency is not present where:

> a) there was no history of irrational behavior or mental illness,
>
> b) there were no psychiatric reports casting doubt on the defendant's competency,
>
> c) the defendant acted rationally in the court's presence, and
>
> d) the attorneys did not genuinely question their client's competency.

[12]422 U.S. 806 (1975).

[13]Dr. Haber's second evaluation is of importance, as it serves to parallel the facts of Bryant perfectly.

Given those factors, the case law holds that no competency hearing is required prior to the trial court's accepting a waiver of counsel. That is exactly the case here. The trial court was not obligated by Pate, Westbrook, or Sieling to hold the competency hearing that it did in fact hold on the eve of trial. Even though Sieling calls for a more exacting standard regarding one's ability to properly waive a fundamental right, it does not call for the application of that standard when all indications are that the defendant is competent. It is therefore academic to decide whether or not appellant's second competency hearing was adequate to properly measure his competency under Sieling.[14] There was no error.

LEGAL ANALYSIS UNDER MAJORITY POSITION

If this issue is viewed through the prism used by the majority of federal courts, the result is obvious: appellant was competent to waive counsel, and no further inquiry was necessary.

[14]Even if one assumes that appellant was not evaluated under the Sieling competency standard at the second hearing, that fact would be meaningless. The hearing can be looked at simply as further proof that a Sieling issue had never been triggered in the first place. Dr. Haber's unhesitating evaluation provided the court with another sound reason not to doubt appellant's competency. Sailer, Darrow, Bryant, Spikes.

THE WAIVER OF COUNSEL

Appellant has raised a related issue in his brief dealing with the supposed non-voluntary nature of his waiver of counsel. It is not clear just what appellant is arguing here; no specific inadequacies are pointed out. The court's inquiries into the voluntariness of the waiver of counsel were quite detailed. In fact, the trial court conducted three separate inquiries on this matter. (Tr. 170-178; 193-197; 200-209). If that were not enough, the trial court even offered to allow the appellant to retract his decision to represent himself on the second day of trial! (Tr. 381, 382). The record reflects that the court tried its best on several occasions to talk appellant out of proceeding pro se, warning him of all the dangers he was facing. He was even warned of the Rule 3.850 ramifications of his decision. Appellant cannot point to one single inadequacy in the Faretta inquiries.

Appellant's claim that he was unable to proceed with one of the Faretta inquiries because he had not had his medication that morning is unconvincing. First of all, neither appellant nor his counsel made anything more than a perfunctory comment about this matter at the start of the hearing. Secondly, appellant's performance during that hearing was completely normal. (Tr. 193-210). There is

absolutely nothing in the record to indicate any impairment whatsoever in appellant's faculties. The hearing lasted but a few short minutes, and appellant behaved as he had always done. Number three, the trial court was on notice that the medication was of dubious importance to appellant. (S.R. 9). Four, appellant was wont not to take his medication by his own volition. (Tr. 380, 381). Five, if appellant's medicine did anything to him, it made him less alert. (Tr. 381). Appellant would refrain from taking his medication in order to be more perceptive. Six, neither appellant nor his attorneys alleged that appellant was unable to understand what he was doing at that hearing because he had not been given his medication. Finally, it is just unconceivable that this trial court would have continued if appellant was in any way impaired. This point is meritless.

Appellant's argument regarding his waiver of counsel at the beginning of the penalty phase is also hard to understand. Even a cursory reading of the record (Tr. 1062-1076) reveals that appellant was adament that he wanted to continue pro se.

It is also important to note here that the trial court did not allow Mr. Adelstein or Mr. Surowiec to withdraw from

the case. They were present at all times, making numerous objections, suggestions, and motions on behalf of appellant. Appellant was constantly consulting with them. He was never really without legal representation at any time.

III

NO REVERSIBLE ERROR TOOK PLACE DURING JURY SELECTION.

A: BACKSTRIKING

Appellant raises the point that error took place below due to the trial court's alleged refusal to allow the "backstriking" of prospective jurors before they had been sworn. (Tr. 438-439). The record, however, is not at all clear that appellant ever attempted to "backstrike" any juror.

Appellant tardily announced to the court that he wanted "to strike the whole jury." (Tr. 438). The court denied his motion to "strike the panel". (Tr. 439). This motion was certainly untimely and improperly made. Fla.R.Crim.P. 3.290. The court was correct in denying it.

Whether or not appellant ever actually moved to exercise a peremptory challenge against any particular juror below is not at all clear. His motion to strike the panel as a whole was denied. After that denial, appellant only expressed his desire to "get rid" of as many jurors as he could. (Tr. 439). He never moved to strike any specific juror or jurors. If appellant was moving to exercise challenges, he was very imprecise and ambiguous about it.

The court could very well have interpreted his entire colloquy with appellant to have been an attempt to strike the panel as a whole. At best it was a motion to strike the panel followed by a mere declaration of appellant's desire to make challenges. He never followed up with a motion to strike, and the alleged "failure to allow backstriking" issue was arguably not even presented below. Appellant has read it into the record.

Even if one assumes that appellant made a timely and proper motion to exercise a peremptory challenge, it is clear from the facts that appellant waived his right to do so. It is conceded that a defendant would normally have the right to exercise his peremptory challenges at any time before the jury is sworn. It is appellee's position, however, that this right may be waived, and that appellant waived it in his case.

Appellant on three consecutive occasions stubbornly refused the trial court's invitations to participate in side bar conferences specifically convoked in order to exercise peremptory challenges. Appellant knew full well the purpose of these side bars. He refused to take part in them. The court found that this conduct--transparently designed to disrupt the trial--had evolved into a waiver of appellant's right to participate in jury selection.

Appellant was aware that the trial court was predisposed to interpret his antics as a waiver. (Tr. 317, 319, 326, 327, 328, 410-11, 431). Appellant was even warned by his own counsel that what he was doing could and would be construed unfavorably by the court. (Tr. 327). Appellant continued with his obstructionist tactics in spite of the warnings. The record reveals that appellant:

> 1) walked out of the first side (Tr. 326-328),
>
> 2) walked out of the second side bar and refused the court's order that he remain (Tr. 409-411), and
>
> 3) refused to even take part in the third side bar. (Tr. 430).

The trial court spoke for the record after appellant's first refusal to cooperate:

> "THE COURT: He has obstructed this Court in an attempt to pick a jury. He has now left the side bar on his own and returned to his own table and sat down, so the Court finds that he has indeed waived his right to ask questions of the jury and he has waived his right to participate in the jury selection.
>
> * * * *
>
> Accordingly, as the trial judge, I'm finding a waiver at this time of Mr. Gilliam's participation in the jury selection. * * * [This] is merely a continuing attempt on his part to obstruct and block the orderly progress of this trial. So, State, let's go." (Tr. 328-329).

The court did not follow through on this matter, however. It allowed appellant two more chances to exercise challenges. Finally, after the third episode, the court found waiver again, and the court announced that fact to appellant:

> "THE COURT: Okay. Would you approach the side then with the attorneys.
>
> THE DEFENDANT: No, sir, I will not.
>
> THE COURT: You will not?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Okay. Participating at the side bar is being waived by Mr. Gilliam." (Tr. 430-431).

The court again spoke for the record:

> "* * * * The Defendant has now refused to participate in the side bar selection and accordingly, the court finds he is deemed to have waived his rights to participate. I don't feel that I can force him to participate, so accordingly, he is not present and is adamantly refusing to participate in his own trial." (Tr. 431).

It is important to note that appellant did <u>not</u> challenge the court's interpretation of his actions when the court announced in open court that it had found waiver. (Tr. 431). This is a strong indication that the court was

correct in its findings. It also serves to preclude appellate review of the waiver question. Appellant had the opportunity to set the record straight and he let it pass. He is estopped from arguing that the finding of waiver was incorrect.

Appellant's acts can also be analyzed under another theory. Appellant voluntarily and without permission excused himself from crucial segments of his trial. By refusing to attend the side bars, appellant effectively absented himself from a part of his trial. It was the equivalent of leaving the courtroom entirely. During appellant's "absence," the court on two occasions spoke at length about the waiver it had observed. (Tr. 328-329; 431). As this Court has recently held in Peede v. State, 474 So.2d 808 (Fla. 1985), even capital defendants can waive their presence at trial. Appellant did just that. He cannot now complain of acts which took place in his absence, in this instance the trial court's finding of waiver to participate in jury selection.

Appellant cites Rivers v. State, 458 So.2d 762 (Fla. 1984), and Jackson v. State, 464 So.2d 1181 (Fla. 1985) as controlling authority over this issue. Appellee recognizes the strong language in those cases in favor of the unfettered right to exercise peremptory challenges at any

time before the jury is sworn. In response appellee would simply tell this Court that there is no question that appellant would have been allowed to strike any juror at any time had he simply taken part in the side bars as requested. The trial court even postponed the swearing of jurors for that purpose after it had found waiver from appellant's first refusal to participate. (Tr. 329). This was a trial court conscious of giving appellant every conceivable opportunity to exercise his rights if he would only choose to do so. It reluctantly found a waiver of his rights.

Appellee would also argue that Rivers and Jackson involved cases where the trial court had prohibited backstriking as a matter of policy. Those courts were not faced with a defendant who consciously sought to frustrate the progression of the trial. In the case at bar the trial court had no anti-backstrike policy. It simply refused to allow any challenges after a valid waiver had taken place. There was no error under any standard.

Even if there was error, appellant has not shown that its presence justifies reversal of his conviction. This Court has found the backstriking issue to be subject to the harmless error rule where the evidence of guilt is overwhelming. Jones v. State, 332 So.2d 615 (Fla. 1976), and more recently in Rivers, supra. Behold the overwhelming nature of the evidence adduced:

Appellant was positively identified by two people in the lounge as being the person who left with the victim. Two witnesses who came to help the driver of the stranded truck at the murder scene described a man who fit appellant's description. The same is true of the driver of the tow truck that removed the truck and the attendant at the Amoco gas station. The driver of the cab who picked up the operator of that truck at the Amoco station identified the appellant as the man he took to the bus station. A handwriting expert matched appellant's handwriting with that appearing on the work order left at the gas station with the truck. The trucking company executive testified that the truck in question was operated by the appellant. Appellant himself admitted to Detective Merritt that he:

1) picked up the victim,

2) took her to the lake,

3) killed her there,[15]

4) got his truck stuck in the sand,

5) was helped by some passers-by,

6) was towed to a gas station,

7) signed a work order to have the truck repaired, and then

8) took a taxicab to the bus station.

[15]Appellant contended that she had merely drowned while playing in the water. The medical examiner categorically ruled this out.

While in Texas appellant called his mother-in-law and admitted that he murdered the victim. Finally, irrefutable scientific evidence showed that appellant's teeth positively matched the bite marks left on the victim's chin, face, and breast. Appellant presented no evidence at trial. The jury returned a guilty verdict in fifty-one minutes.[16]

Appellee contends that the evidence of guilt was simply overwhelming, and that under the authority of Jones and Rivers any error committed during selection was rendered harmless.

B: PRESENCE OF APPELLANT WHILE CHALLENGES WERE EXERCISED

Appellant claims reversible error because the State was allowed to exercise challenges outside his presence. This is indeed a frivolous argument in view of the fact that appellant voluntarily and without permission chose not to attend the side bar conferences when challenges were exercised. Peede, supra.

[16]Appellant was convicted of murder and sexual battery; he was acquitted of grand theft. Considering that the jury had to elect a foreman, discuss the case, go over the instructions and agree that there was not enough evidence to convict for theft, the appellant's fate must have been sealed on the very first ballot.

The court's sua sponte excusal of jurors for their inability to speak and understand English or because of their inability to take time off from work was not error. North v. State, 65 So.2d 77 (Fla. 1952); Calloway v. State, 189 So.2d 617 (Fla. 1966).

C: COMMENTS ON APPELLANT'S GUILT

Any reading of the trial court's supposed "comments on appellant's guilt" during jury selection or at other times shows how utterly innocuous those "comments" really were.

Error did not take place upon the court's off-handed question to the schoolteacher during voir dire. (Tr. 259). To argue that the court indicated its belief in appellant's guilt is absurd. If any conceivable harm took place it was certainly cured by the court's later explanation to and inquiry of the panel. Not one juror responded when the court asked if the comment had had any bearing on the case. (Tr. 282). This point is frivolous.

IV

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE.

STANDING

Appellant was the driver of a truck which was under lease to the Tri-State Motor Company. He did not own the truck. He did not lease the truck. He did not even work for Tri-State. He certainly did not have the ability to veto Tri-State's authorization to search the truck. (Tr. 96, 97, 98). Appellant simply had no standing to object to the search. He had no legitimate expectation of privacy in the truck. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Appellant also failed to meet his burden of proof at the suppression hearing by not even proffering any evidence of a subjective expectation of privacy in the truck. Rawlings v. Kentucky, 488 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). The trial court recognized the standing issue as crucial as soon as the hearing was over. (Tr. 137).

CONSENT TO SEARCH

Appellant makes the rather bizarre claim that the lessee of the truck did not have the authority to consent

to a search of the truck. In order to sustain this claim appellant has misstated the facts concerning who had "control" over the truck in Florida (see appellant's brief, page 89). The truth is that the lessee never relinquished control over the truck. (Tr. 114).

Appellant also claims that Mr. Burch was not authorized to give consent to search. This claim is also false. (Tr. 109).

Even if not able to give consent, Tri-State and Burch certainly had the apparent authority to do so. Under those circumstances, the search was valid. Flanagan v. State, 440 So.2d 13 (Fla. 1st DCA 1983).

ABANDONMENT

Appellant gave up any expectation of privacy he may have had in the truck when he fled to Texas. He told the mechanic that he would be back the next day. When he did not arrive, police obtained consent from Tri-State to search the truck. This case is analogous to Jones v. State, 332 So.2d 615 (Fla. 1976). Appellant abandoned the truck, and the search was proper.

INEVITABLE DISCOVERY

Police were standing guard over the truck appellant had left behind. They made a good faith effort to obtain consent to search the truck. Even if that consent was invalid, there is no doubt that the police would eventually have been able to obtain access to the truck's contents. All they had to do was either:

> a) wait a little longer for abandonment to be even more clear cut,
>
> b) wait until after obtaining consent from the lessor, or
>
> c) get permission to search from the mechanic who was the custodian of the truck.

Under the test of Nix v. Williams, 467 U.S. 431 (1984) the search was valid. All that has to be shown is that discovery was inevitable by a preponderance of the evidence. This case meets the Nix standard.

V

THE TRIAL COURT CORRECTLY ADMITTED APPELLANT'S CONFESSION INTO EVIDENCE.

Appellant was allowed to move to suppress his statements to Detective Merritt on the third day of trial. (Tr. 695).[17] A hearing was held outside the presence of the jury. (Tr. 695-720). Detective Merritt was the only witness who testified.

Merritt testified that he advised appellant of his Miranda rights, and that appellant then requested an attorney. (Tr. 698). Appellant then immediately and without any intervention from Merritt changed his mind about needing to speak to a lawyer. He agreed to talk to Merritt and gave a confession.

Appellant tried to impeach Merritt. (Tr. 710-720). He was unsuccessful in getting Merritt to alter his version of the events surrounding the confession. (Tr. 717). Appellant did not testify or present any evidence.

In his brief (pages 94, 95) appellant seems to imply that evidence was introduced at the hearing regarding his

[17]Appellant had moved to suppress earlier, but that motion was withdrawn. (Tr. 15).

use of medication, his need for medication at the time of his confession, and that he was only given medication in exchange for his confession. Appellee strongly objects to this perversion of the truth. There was no evidence forthcoming as to any of these matters. Appellant is trying to argue "facts" that never got into the record.

Appellant's confession was not tainted. He volunteered all his statements to Detective Merritt. There was absolutely no evidence to the contrary.

VI

IT WAS NOT ERROR TO DENY APPELLANT'S MOTION FOR A MISTRIAL BASED ON THE ADMISSION OF THE MEDICAL EXAMINER'S TESTIMONY.

Appellant's claim of objectionable testimony was not preserved for appellate review. The supposedly improper testimony by the medical examiner was admitted without any objection by appellant. (Tr. 888). The objection came a full seventy pages of testimony after the fact. (Tr. 958). The non-contemporaneous nature of this objection is quite clear. In fact, appellant raised this objection after the lunch recess had ended. (Tr. 956). Appellant cannot be allowed to "preserve" error by objecting hours after an event takes place.

Furthermore, the testimony which came in was not improper. It was simply opinion testimony by an expert witness as to the cause of an injury appearing on the victim's body. Dr. Rao's statement "I'm not an expert on shoes * * *" was simply her own caveat regarding her testimony, and she is certainly allowed to qualify any opinion she might give. It is difficult to see how appellant can claim error by an expert's own qualification of her findings. The jury was free to accept or reject the doctor's findings, just as it may accept of reject any other evidence offered to it.

If any error was committed here it was certainly harmless. The importance of this evidence was really quite minor in view of the overall evidence of guilt. Appellant left other distinguishing marks on his victim that tie him to the crime scene.

VII

IT WAS NOT ERROR TO ADMIT TESTIMONY AND EVIDENCE CONCERNING PHOTOGRAPHS AND MODELS USED BY THE STATE'S EXPERT WITNESSES.

It is axiomatic that Richardson [18] hearings are only required when there in fact has been a discovery violation. Bush v. State, 461 So.2d 936 (Fla. 1985). The first order of business in any Richardson situation would be to determine whether there has been such a violation.

Appellant claims a discovery violation concerning the introduction of certain photographs with clear plastic overlays attached. These overlays contained numbers and lines which Dr. Souviron used to show how the marks on the victim's body corresponded to appellant's teeth.

Appellant makes the statement in his brief that the State did not disclose these overlays during discovery. (Appellant's brief, page 102). During the trial, appellant's counsel responded to the court's question surrounding these overlays by saying, "We didn't even know these existed." (Tr. 902).

[18] 246 So.2d 771 (Fla. 1971).

The plain truth of the matter is that Dr. Souviron told Mr. Adelstein twice during the deposition of January 18, 1985 that he had prepared the overlays as part of his preparation for trial. Mr. Adelstein was either being disingenuous with the trial court or suffering from a convenient lapse of memory. The deposition reads:

> "Q: Now that we have the model [of appellant's teeth] and the photographs of Mr. Gilliam what did you do next?
>
> A: Did some acetate tracings.
>
> Q: Just tell me everything you did after that.
>
> A: I did some acetate tracings.
>
> * * * *" (S.R. 57).
>
> Q: What did you do from 12-7 to 12-13, if anything?
>
> A: Well, I already told you. I poured the models.
>
> Q: Okay.
>
> A: And then I made acetate tracings. I did microscopic analysis of the bite. I did the, used the acetate overlays. I made clay and wax impressions of the teeth, compared those with the bite marks and did the direct transfer technique, used illumination." (S.R. 62).

Appellant's claim of a discovery violation is pure fiction. Dr. Souviron told Mr. Adelstein about the overlays; Adelstein simply did not follow up on them. The

State cannot be faulted for appellant's own lack of diligence. State v. Counce, 392 So.2d 1029 (Fla. 4th DCA 1981). This is a specious issue.

VIII

NO RICHARDSON VIOLATION OCCURRED CONCERNING THE SUPPOSED IDENTIFICATION OF A SECOND SUSPECT.

Appellant's second discovery-related issue suffers from the same infirmity as does his first. Appellant's claim that witnesses had identified some "mystery suspect" from police photo line-ups is incorrect. Appellant has grossly misconstrued the facts of this case.

Brad Beloff did not say that he had identified someone other than appellant as the man he saw at the lake the night of the murder. Sandy Burroughs [19] did not say that either (Tr. 608-609; 614). Those witnesses merely indicated that they could not remember the man they had picked out. The trial court pointed this fact out to defense counsel when an alleged discovery violation was raised:

> "MR. ADELSTEIN: However, Your Honor, they indicated that they either picked out somebody or made a tentative identification of somebody.
>
> THE COURT: They didn't say that. They didn't say that. I didn't hear anything to the effect that they picked out anybody." (Tr. 642).

[19]By the way, Mr. Burroughs is not the "girlfriend" of Mr. Beloff, contrary to what appellant may contend in his brief.

Appellant is simply misconstruing the record. There was no discovery violation at all here.

Even if there were some conceivable violation, the court did stop to analyze it and determine the extent of prejudice accruing to appellant as a result. This was an adequate Richardson inquiry. Baker v. State, 438 So.2d 905 (Fla. 2d DCA 1983). This point is meritless.

IX

NO ERROR ATTENDED THE JURY INSTRUCTIONS.

Appellant begins the discussion of this issue by again misconstruing the record and taking statements out of context. Appellee strongly objects to that. The dialogue involving the court and appellant on pages 1001-1003 of the transcript has practically nothing to do with the charges to be read to the jury. The "right the court waived on his behalf" (appellant's brief, pages 111) was not waived at that time; it was waived by appellant the next day.

Appellant also states that the colloquy on pages 1020-1021 is the only evidence of an inquiry into the waiver of certain lesser included offenses. That is also untrue: See Tr. 1023-1025.

Appellant's waiver of some of the lesser included offenses was nearly a carbon copy of the waiver found in Harris v. State, 438 So.2d 787 (Fla. 1983) and approved by this Court. It was therefore completely valid. There was no error.

X

NO ERRORS TOOK PLACE WHICH COULD EVEN REMOTELY BE CALLED FUNDAMENTAL.

It is rather difficult to respond to the claims made by appellant in this part of his brief. The reason for that difficulty lies in the fact that these claims are not merely frivolous--they are truly ludicrous. Appellee will nonetheless state the following:

1. "Prosecutorial Misconduct"

Appellant apparently assumes that a defendant in a criminal case is entitled to have the State tell him the order in which State witnesses are to be called. If there is such a rule, appellee is not aware of it.

Appellant also apparently believes that no one is actually going to read the record of this case. It is quite clear that appellant either frustrated every attempt to supply him with the gratuitous witness list (Tr. 683-684) or that he was already in possession of the list when he asked for it. (Tr. 830). Appellant was simply being manipulative and annoying.

2. Continuance

Appellant had twenty-nine months to prepare his case. He was repeatedly told by the trial court that if he fired his attorneys (for the second time) on the eve of trial that he would get no further continuances.

3. "Overreaching" by the State

Appellant makes the claim that evidence which had no probative value should not have been admitted into evidence. It is quite difficult to see how evidence which is non-probative can result in any kind of prejudice to appellant. The evidence complained of concerned three witnesses who could not identify the appellant. Appellant is in effect complaining of evidence which was beneficial to him. That is ludicrous.

4. The Penalty Phase

Appellant's claim of prejudice resulting from the introduction into evidence of a certified copy of his Texas conviction for rape is groundless. The appellant was fully aware of his prior conviction. It would be impossible to prejuduce him by simply introducing proof of that conviction.

XI

THE COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING AN ADVISORY JURY SENTENCING RECOMMENDATION.

Appellant concedes that the trial court has the discretionary power to order an advisory sentencing hearing. There is absolutely no argument forthcoming as to how the trial court's action below (ordering said hearing) evidenced an abuse of that discretion. This issue is frivolous, as appellant's desires (regarding waiver) are not determinative below. The trial court decides whether or not to proceed in these situations. Since appellant has shown no abuse of discretion, there was no error. Palmes v. State, 397 So.2d 648 (Fla. 1981); Thompson v. State, 389 So.2d 197 (Fla. 1980).

XII

THE COURT DID NOT ABUSE ITS DISCRETION IN NOT ORDERING A PRESENTENCE INVESTIGATION REPORT.

As a factual prelude to this issue, appellee would simply remind the Court that there was extensive medical evidence generated below. The court was able to "know Mr. Gilliam as an individual." The three psychiatric reports provided extensive details on appellant's life.

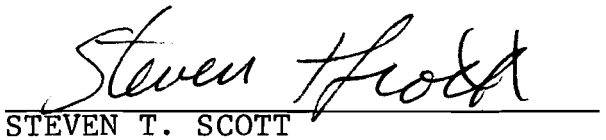
Appellee submits that this issue is controlled by Rose v. State, 461 So.2d 84 (Fla. 1984), and that no error took place.

CONCLUSION

Based on the foregoing, both the conviction and sentence should be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



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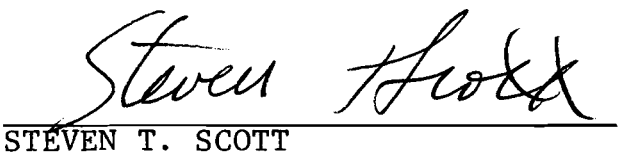
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to SHARON JACOBS, Attorney for Appellant, Coconut Grove Bank Building, Suite 305, 2701 South Bayshore Drive, Miami, Florida 33133, on this 24th day of July, 1986.



STEVEN T. SCOTT
Assistant Attorney General

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