IN THE

SUPREME COURT OF FLORIDA

BURLEY GILLIAM, JR., Appellant,	)	
v.	)	CASE NO. 66,850
STATE OF FLORIDA, Appellee.	)	

DIRECT APPEAL FROM THE CIRCUIT COURT
DADE COUNTY, FLORIDA
CASE NO. 82-14766

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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IV

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V

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THE TRIAL COURT ERRED IN ALLOWING EVIDENCE AND TESTIMONY CONCERNING PHOTOGRAPHS AND MODELS WHICH FORMED THE BASIS OF DR. SOUVIRON'S EXPERT OPINION THAT BITE MARKS WERE CAUSED BY BURLEY GILLIAM.

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IX

THE COURT FAILED TO INSTRUCT THE JURY AS TO ALL NECESSARILY LESSER INCLUDED OFFENSES OF CAPITAL MURDER, AND MR. GILLIAM DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER ON THE RECORD, THUS REVERSAL IS AUTOMATICALLY REQUIRED UNDER HARRIS V. STATE.

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BECAUSE OF ACTIONS AND INACTIONS BY THE PROSECUTORS AND BY THE TRIAL COURT, FUNDAMENTAL ERRORS OF CONSTITUTIONAL SIGNIFICANCE OCCURRED DURING MR. GILLIAM'S TRIAL, AND THE CUMULATIVE EFFECT OF THE CONSTITUTIONAL ERRORS DENIED MR. GILLIAM HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

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THE COURT ABUSED ITS DISCRETION IN ARBITRARILY REQUIRING AN ADVISORY JURY SENTENCING RECOMMENDATION, OVER MR. GILLIAM'S OBJECTION.

XII

THE COURT ABUSED ITS DISCRETION IN FAILING TO ORDER A PRESENTENCE INVESTIGATION REPORT PRIOR TO SENTENCING BURLEY GILLIAM TO DIE IN THE ELECTRIC CHAIR.

SUMMARY OF THE ARGUMENTS

There are two quirks which distinguish the trial of the instant case from others and must necessarily underlie consideration of each of the separate legal issues raised herein.

First, BURLEY GILLIAM behaved throughout the trial in an unusual manner which can be characterized as falling into two categories, (1) drowsiness/sleeping during his trial and (2) inappropriate/irrational responses to his situation. The Court appointed only one psychologist, who had examined him in 1983, but was able to see him for only 5 brief minutes before the trial in 1985. Nonetheless, the psychologist found him competent to stand trial.

But he testified that he was unaware that Mr. GILLIAM was, at the time of the 1985 exam and at the time of trial, taking certain prescription medicines. The expert testified that those medications can affect competency. The well-known side effects of those medicines include drowsiness, stupor, and staggering. Yet no further evaluation was conducted, despite defense requests. Mr. GILLIAM's behavior continued to be aberrant throughout the trial and sentencing proceedings.

Without following the procedures set out by this Court in _Hill_ and by the United States Supreme Court in _Drope_ and _Pate_, the trial court concluded that Mr. GILLIAM was "faking" incompetence.

To compound matters, the Court refused to replace appointed counsel when Mr. GILLIAM requested, and Mr. GILLIAM was

therefore in a position of trying this capital case pro se with standby counsel.

The trial court erred (1) in failing to follow the proper evaluation and hearing procedures to determine his competency before and during trial and/or during the sentencing phase; (2) in failing to make proper inquiry and apply the proper standard to determine competency to waive assistance of counsel; (3) in failing to properly ascertain if Mr. GILLIAM voluntarily waived counsel; (4) in failing to ascertain that the waiver of the jury instruction on lesser included offenses as made knowingly and intelligently, given Mr. GILLIAM's mental condition; (5) in failing to order a presentence investigation report, given Mr. GILLIAM's pro se status; and (6) in failing to grant Mr. GILLIAM's request for a bench hearing on sentencing, rather than a jury recommendation. All of these issues are tied into the questions of competency and self-representation.

The Court further erred in refusing to allow Mr. GILLIAM to backstrike potential jurors. The State claims that Mr. GILLIAM, by his behavior, (1) waived participation and (2) failed to utter the appropriate talismanic words to exercise a peremptory challenge. This Court in Rivers v. State, 458 So. 2d 762 (Fla. 1984), set forth the rule that a trial judge must allow backstriking before the jury is sworn. And as for the State's response, again, Mr. GILLIAM's mental condition and self-representation must be considered.

The Summary of Arguments found in Appellant's Initial Brief accurately summarizes the remainder of the issues.

The format of Appellant's Reply Brief follows his Initial Brief, issue by issue, for convenient reference. Each argument addresses only those matters raised in the State's Answer Brief. [1/]

1/ The State's Brief contains numerous slanderous remarks against undersigned counsel, especially accusing her of misconstruing the record. (R. 2, 26, 56-57, 68, 77, 80, 87, 88, and 89). After careful thought and through the use of great personal restraint, undersigned counsel has decided to avoid succumbing to the State's tactics because it distracts from the strong merits of the issues in the instant case. Appellant's Initial Brief is carefully referenced to the record and this Reply Brief further references to the record where necessary.

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING AND REFUSING TO HOLD A PATE HEARING TO DETERMINE WHETHER BURLEY GILLIAM WAS COMPETENT TO STAND TRIAL OR BE SENTENCED, THUS VIOLATING APPELLANT'S RIGHTS GUARANTEED UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS AS WELL AS FLORIDA'S STATUTES AND RULES.

A. TRIAL PROCEEDINGS.

The State in its Answer Brief implies that Appellant is making "much ado about nothing" regarding the trial court's assessment, without benefit of an examination and hearing, that Mr. GILLIAM was competent to stand trial. The State, however, conceded that "the trial court believed Appellant to be faking" (Appellee's Answer Brief at page 56). The State concluded that Mr. GILLIAM's "alleged 'irrational' behavior was an act . . . all of Appellant's antics were either purely obstructionist or intended for jury consumption" (Appellee's Answer Brief at page 36). Based upon the foregoing a priori conclusion, the State argues that the court was justified in failing to order a full competency evaulation and Pate [2/] hearing.

The threshold question is whether the trial judge followed the procedure mandated by this court in Hill v. State, 473 So.2d 1253 (Fla. 1985), in arriving at the conclusion that Mr. GILLIAM was "faking" rather than incompetent? The trial court did not get any positive assistance from Dr. Haber, because he was unable to speak with Mr. GILLIAM for more than five

2/ Pate v. Robinson, 383 U.S. 75, 96 S.Ct. 836, 15 L.Ed. 2d 815 (1966).

minutes and therefore failed to perform the required competency examination. Dr. Haber reported to the trial judge that he was unable to conduct a complete exam, [3] and would rely upon his opinion and written report that he had submitted over one year earlier, since no additional information had been brought to his attention. The State relies heavily upon the three written psychological reports [4] submitted one year prior to trial. [5]

The trial judge, however, totally overlooked Dr. Haber's further elaboration which was elicited during cross-examination, regarding a significant change in circumstances which had occurred during the intervening year. Certain medications had been prescribed for Mr. GILLIAM. The State has not contested the fact that these medicines may cause stupor, confusion, drowsiness, mental dullness and staggering, and that chronic use may lead to addiction and withdrawal effects." (See,

3/ The state has chosen not to respond to Subpart A.5d of Appellant's Initial Brief regarding the inadequacy of Dr. Haber's exam. This court has recently acknowledged that an exam should include data obtained from independent sources. Mason v. State, 489 So. 2d 734, 737 (Fla. 1986).

4/ The state misstates the record when it argues that "Appellant stipulated to the content of those reports" (Appellee's Brief at page 57). The record clearly reflects that the state's counsel stipulated only that it was unnecessary to put the court appointed doctors on the stand because counsel stipulated that their testimony would be consistent with their respective written reports. Trial counsel specifically explained that he was not stipulating to the content of the reports (R. 9-12).

5/ See this court's order of August 6, 1986 holding that the admissability of these reports will be determined after oral argument.

Appellant's Initial Brief at page 30 for additional details). Indeed, Dr. Haber testified that those medications might affect one's competency. But Dr. Haber testified that he was unaware that Mr. GILLIAM was <u>now</u> taking those medications. He had not considered that in his earlier opinion.

Upon being advised that Mr. GILLIAM was taking medication which "might affect competency", the trial judge had a duty under <u>Hill</u>, <u>supra</u>, to direct a full competency examination. This was a substantial change in condition for which the trial court could find no assistance in the written reports prepared one year earlier.

The trial court committed reversible error in making a conclusion as to competency without a complete mental examination and a subsequent <u>Pate</u> hearing.

Instead, the State hypothesizes that during those times that Mr. GILLIAM was asleep during the trial, (R. 453-462), the court was correct in jumping to the conclusion that he was "in his manipulative mode, and not sick at all" (Appellee's Brief at page 55).

This court has unequivocably stated that neither the trial court nor the appellate court can speculate on the causes of behavior which gives reasonable ground to believe competency is at issue. <u>Hill</u>, <u>supra</u>. Where, as here, reasonable grounds to suspect competency exist, a <u>Pate</u> hearing is required.

The court below flagrantly violated the procedure enunciated by this court in <u>Hill</u>, <u>supra</u>, and therefore a new trial is mandated.

B. PENALTY PROCEEDINGS.

The United States Supreme Court has recently reiterated the historical importance of safeguarding mentally incompetent individuals from sentencing or execution. Ford v. Wainwright, ___ U.S. ___, 106 S.Ct. 2595, ___ L.Ed. 2d ___ (1986). The Supreme Court, in Ford, held that the due process procedures regarding competency must be of heightened sensitivity in capital cases such as the instant one.

Here, the State has chosen not to respond to Appellant's assertion that the court committed reversible error in failing to order a mental competency examination prior to the penalty phase or sentencing. (See Appellant's Initial Brief at pages 45-52). The only reference the State makes to this argument is in a footnote as follows:

> Finally, Appellant's description of the penalty phase is a great distortion of the record. One only needs to read the record to see that what took place was anything but the travesty Appellant has clumisly described it to have been.

Appellee's Brief at page 56, note 6.

The State of Florida cannot even attempt to make an argument that Mr. GILLIAM received a full and fair due process sentencing hearing in the trial court.

Mr. GILLIAM is confident that a review of the sentencing proceedings will leave no doubt that, at a minimum, this court must reverse the sentences and remand for a Pate hearing as to the sentencing proceedings.

The United States Court of Appeals for the Eleventh Circuit has stated that while behavior, similar to that in the instant case, which encourages imposition of the death penalty is not ipso facto an indication of incompetence, it certainly "raises serious doubt as to . . . competency". Goode v. Wainwright, 704 F.2d 593, 601 n. 6 (11th Cir. 1983).

At Mr. GILLIAM's sentencing hearing, the court refused to order a competency evaluation despite Mr. GILLIAM's request that the jury sentence him to death. Nor did the trial judge order Mr. GILLIAM evaluated as he inappropriately smiled during imposition of the death sentence.

The trial court utterly ignored the procedures required by Pate under the circumstances existing at the sentencing hearing below.

II

MR. GILLIAM DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHT TO BE REPRESENTED BY COUNSEL AT EITHER THE TRIAL OR SENTENCING HEARING, AND THE COURT'S FAILURE TO ASCERTAIN HIS COMPETENCY VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The question at issue here is whether a proper inquiry was made or the proper standard applied to determine if Mr. GILLIAM was competent to waive trial counsel, even if he was competent to stand trial.

The State's Brief relies upon a case which does not stand for the proposition for which it is cited. The State

erroneously argued (at pages 60-61 of its Brief) that the United States Court of Appeals for the Eleventh Circuit has rejected the requirement of a separate standard to determine competency to waive counsel. For this proposition, the State cites Stinson v. Wainwright, 710 F.2d 743 (11th Cir. 1983).

However, the issue was different in Stinson. The court, in Stinson, declined to deviate from its precedent in Malinauskal v. United States, 505 F.2d 649 (5th Cir. 1974), which rejected the contention that a higher standard of competency was required to enter a guilty plea than to stand trial. That question regarding entry of guilty pleas is not at issue here. The issue here is whether the court properly ascertained by inquiry and use of the proper standard whether Mr. GILLIAM was competent to waive his right to the assistance of counsel to proceed with trial.

In Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), the Eleventh Circuit specifically declined to address whether a higher standard should be used to measure competency to waive counsel, stating, "We need not and do not decide whether the Rees test, which related to a defendant's desire to withdraw his petition for certiorari, applies to the issue of competence to waive counsel." Id. at 598. Therefore, the State's reliance on Stinson is misplaced.

It is the State's further position that since three experts found Mr. GILLIAM was competent to stand trial one year earlier, that he was therefore competent to waive his right to counsel one year later.

This argument does not hold water because at the time that those three experts examined Mr. GILLIAM, they were not instructed to evaluate his ability to represent himself. The purpose of the examination was solely to determine sanity at the time of the offense and competence to stand trial in 1983. The record is totally devoid of any testimony in 1983 from any expert or others regarding Mr. GILLIAM's competency to waive assistance of counsel and proceed pro se.

Likewise, in 1985, Dr. Haber was not asked nor did he volunteer his opinion regarding Mr. GILLIAM's competency to waive counsel. (R. 183-192). Dr. Haber merely stated that other than his 1983 examination, he only observed Mr. GILLIAM for five minutes in the courtroom and spoke with him through the jail bars for five minutes in 1985. Dr. Haber conceded that he did not perform a complete competency examination. (R. 188). There is no record evidence that Dr. Haber asked BURLEY GILLIAM even one question pertaining to his competency to waive counsel and proceed by himself at the capital trial or sentencing proceedings.

Upon what, then, did the trial court rely in making its determination of competency to waive counsel? No further evaluation by a physician was conducted despite testimony that Mr. GILLIAM was under the influence of certain prescription medicines that Dr. Haber testified might affect competence. Indeed, the court sua sponte, suggested that since Dr. Haber was only a psychologist rather than a physician, the he was unqualified to testify about the effects of these drugs.

Nevertheless, the trial court failed to appoint a psychiatrist to provide the necessary opinion as to whether the medicines affected Mr. Gilliam's competence to waive counsel.

Instead, the court made a finding of fact based upon its own interactions with Mr. GILLIAM that he was in "his uncooperative phase." (R. 204). The procedure followed by the court below ignored the mandate set forth by this court in Hill and by the United States Supreme Court in Drope [6/] and Pate. The trial court's error is of critical importance and requires reversal because, as the United States Supreme Court has made unmistakably clear, there must be adequacy and reliability in the fact finding procedures of competency. Ford v. Wainwright, ___ U.S. ___, 106 S.Ct. 2595, _____. In disclosing the closely analagous situation of the procedure for determining a person's competency at the time of implementation of the death sentence, the Court stated:

> Yet the lodestar of any effort to devise a procedure must be the overwhelming and dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the fact finding determination. Mistakes are high, and the "evidence" will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and using the experts responsible for producing that "evidence" be condusive to the formation of mutual, sound and professional judgment as to the prisoner's ability to comprehend the nature of the penalty. . . .

Ford v. Wainwright, 106 U.S. at 2606.

6/ Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

"Fidelity to these principles [of accurate fact finding] is the solemn obligation of a civilized society", according to the United States Supreme Court. Ford v. Wainwright, supra at 2606.

Here there was no inquiry into Mr. GILLIAM's competency to waive counsel despite the reasonable grounds warranting such exam and despite standby counsel's requests.

The cloud created by the question of Mr. GILLIAM's competence to stand trial further compounded the question of his voluntariness of his waiver of counsel. Appellant's request was for substitution of other counsel, not to represent himself. The court found that by his behavior he had waived the right to appointment of counsel and therefore had the choice between either (1) retaining present court-appointed counsel or (2) involuntarily proceeding pro se. (R. 172) It was under this hobson's choice that Mr. GILLIAM agreed to represent himself. He never waived his right to appointed counsel. C.f., Dorman v. Wainwright, ____ F.2d ____, Case No. 85-3512 (11th Cir. op. filed Sept. 9, 1986).

His convictions must be reversed and Appellant retried since no due process was afforded him regarding waiver of counsel, especially since the United States Supreme Court recently emphasized that procedural safeguards to determine competency should, indeed, be heightened in capital cases. It goes without saying that the sentences must, at a minimum, also be reversed.

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE CONDUCT OF THE JURY SELECTION PROCESS.

A. AUTOMATIC REVERSAL OF THE CONVICTION IS REQUIRED BECAUSE JUROR BACKSTRIKING WAS PROHIBITED

No basis exists for the State's claim that "the record . . . is not at all clear that Appellant ever attempted to 'backstrike' any juror." (Appellee's Brief at page 67). The record unequivocably reflects Mr. GILLIAM's request to exercise his peremptory challenges (R. 438-439; 453-562) to the prospective jurors prior to the swearing of the panel or any individual. Appellant quotes the relevant colloquies in his Initial Brief at pages 80-81.

The State claims that Mr. GILLIAM's request to the court was defective, first, because it was "tardily", and "untimely and improperly made." (Appellee's Brief at page 67). This claim flies in the face of this court's line of cases which clearly enunciate the doctrine that a trial court may not prevent a party from striking veniremen by exercise of the peremptory challenge before the party has had an opportunity to view the panel as a whole. Recently this court unequivocably reenforced, in Tedder v. Video Electronics, Inc., _____ So.2d _____, 11 F.L.W. 306 (Fla., July 10, 1986), that well established principle that "trial judges cannot limit the use of peremptory challenges by restricting or preventing backstriking'". Id. at 307.

In Tedder, supra, the court quoted with approval Judge Hurley's special concurrence in Grant v. State, 429 So.2d 758 (Fla. 4th DCA 1983):

> The right to the unfettered exercise of " peremptory challenges - which, I believe, includes the right to view the panel as a whole before the jury is sworn - is an essential component of the right to trial by jury, a right that "is fundamental to the American scheme of justice." (cite omitted) Given the importance of the right and the grievousness of the error, I would opt for the automatic reversal as the only remedy which will fairly deter the conduct in the future (cite omitted).

Tedder, supra at 307 quoting Grant v. State, supra at 760-61.

Mr. GILLIAM had a right to view the panel as a whole before exercising any of his challenges.

In the instant case the State argues on appeal that because Mr. GILLIAM did not move to strike any jurors at earlier stages of the voir dire proceedings, but rather waited to view the panel assembled, that his motion to strike was somehow "untimely." Of course, this argument falls flat on its face in light of this court's clear mandate that the trial judges cannot, under the guise of discretion, enforce procedures which limit backstriking so as to defeat a party's right to view the panel as a whole.

Likewise, there is no merit in the State's response that Mr. GILLIAM waived his right to challenge prospective jurors by peremptory challenge. Assuming, arguendo that the court properly found that Mr. GILLIAM waived his presence at side bar conferences or waived his opportunity to challenge jurors during the sequential questioning process, that would be the limit and extent of that waiver.

By the same reasoning applied by this court in Rivers, [7] and Jones, [8] it would also be an abuse of discretion for a trial judge to find that Mr. GILLIAM, by his lack of participation in the disapproved procedure, also waived his fundamental right to view the prospective venire as a whole before exercising his challenges.

Also meritless is the State's next response that Mr. GILLIAM's motion to strike was inartfully phrased and therefore null and void or not preserved for review. Mr. GILLIAM was proceeding pro se, and cannot be held to precise form to the detriment of substance. To invoke a constitutional right, "a defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to his request". Dorman v. Wainwright. ___ F.2d ___, Case No. 85-3512 (11th Cir. Sept. 2, 1986) ____ at 5134.

He had already advised the trial judge that he did not know how to strike or how many challenges he had (R. 232; 410-411). The trial court advised Mr. GILLIAM that he merely need to say to the judge, "I don't want the first juror, I don't want the second or third or whoever" (R. 410).

Mr. GILLIAM followed the trial judge's directions, when before any jurors were sworn, he requested to "strike the whole jury" . . ."I want to rid of as many as I can" (R. 438-439).

7/ Rivers v. State, 458 So. 2d 762 (Fla. 1984).

8/ Jones v. State, 332 So. 2d 615 (Fla. 1976).

There was no misunderstanding by the trial judge as to what Mr. GILLIAM was requesting. At that point Mr. GILLIAM had ten peremptory challenges left and, of course, he could make challenges for cause also. The court advised him that he had missed or waived his opportunity and no backstriking would be allowed. The court denied his request before Mr. GILLIAM could elaborate which of the ten jurors he wanted to remove by peremptory challenges and which two, if any, for cause. Mr. GILLIAM had an absolute right to exercise his ten peremptory challenges at that time prior to the swearing of the panel. The trial court deprived Mr. GILLIAM of a fundamentally fair trial. This court must reverse the convictions and remand for a new trial.

IV

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATE'S WARRANTLESS SEIZURE OF PHYSICAL EVIDENCE FROM THE TRUCK IN BURLEY GILLIAM'S POSSESSION AND CONTROL, WHERE THE TRUCK WAS NOT ABANDONED AND THE SEARCH WAS NOT VALIDLY CONSENTED TO.

Appellant's Initial Brief sufficiently rebuts the State's arguments with regard to standing and consent to search. At the time of the search, the truck hardly could be said to be abandoned. By the State's logic that if a person does not return to a mechanic the following day, he has abandoned his property. But the State can cite no authority for this false statement of the law.

Likewise, the State's reliance on Nix v. Williams, 467 U.S. 431 (1984), is misplaced. The State's argument is circular because it was the State's unlawful search of the truck which fueled the arrest of Mr. GILLIAM. If the police had not arrested him based upon evidence obtained from the unlawful search of the truck, he could have reclaimed the vehicle and it would not have been abandoned.

V

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATEMENT MADE BY MR. GILLIAM WHICH WAS OBTAINED ILLEGALLY.

The State takes issue with the fact that BURLEY GILLIAM was taking medication and needed his medication during his interrogation by Detective Merritt. The record is crystal clear on this point. Detective Merritt's testified that he knew that BURLEY GILLIAM was taking medication (R. 700, 717-718; 719), although the Detective denied that he actually threatened Mr. GILLIAM with its deprivation in exchange for a statement. (R. 709; 720).

VI

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL OR STRIKE THE MEDICAL EXAMINER'S OPINION THAT CERTAIN MARKS ON THE DECEDENT'S HEAD WERE CAUSED BY THE STOMPING OF A SNEAKER, SINCE THE WITNESS CONCEDED THAT SHE WAS NOT AN EXPERT IN THIS AREA.

The State argues that the objection below was not made contemperaneously with the testimony. The timing of objections was discussed and agreed to below so that the jury would not have

to be asked to leave the courtroom repeatedly, and so standby counsel would not disrupt the proceedings. Regarding this particular objection to Dr. Roa's testimony the court had specifically asked standby counsel to postpone objecting until told otherwise:

> **The Court:**. . .All right. Before the jury comes back, Mr. Adelstein, you indicated before. . .I had asked that you wait until the recess as to anything you wanted to put on the record at Mr. GILLIAM's request. Now would be an appropriate time to do it before the jury comes back.

R. 956.

Whereupon standby counsel proceeded to state objections on behalf of Mr. Gilliam as to the testimony of Dr. Roa about her experiment with the sneakers.

VII

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE AND TESTIMONY CONCERNING PHOTOGRAPHS AND MODELS WHICH FORMED THE BASIS OF DR. SOUVIRON'S EXPERT OPINION THAT BITE MARKS WERE CAUSED BY BURLEY GILLIAM.

Appellate counsel relied upon the recitations made in the record-on-appeal by Appellant's standby counsel. The State waived its argument that trial counsel was untruthful below, because the State failed to bring the deposition cited on appeal to the attention of the trial judge. The State's arguments that there was a dispute as to facts, strengthens Appellant's position that a Richardson hearing should have been held.

VIII

THE COURT ERRED IN FAILING TO CONDUCT A RICHARDSON HEARING WHEN COUNSEL LEARNED FOR THE FIRST TIME DURING TRIAL THAT TWO WITNESSES HAD IDENTIFIED SOMEONE OTHER THAN MR. GILLIAM AS HAVING BEEN THE DRIVER OF THE TRUCK AT THE SCENE OF THE MURDER.

The State's argument on appeal proves rather than disproves Mr. GILLIAM's point that the court erred in failing to hold a Richardson [9/] hearing regarding testimony of Mr. Beloff and Mr. Burroughs.

Both witnesses testified that they had identified the driver of the truck in a police photo display, but did not see that individual in the courtroom at trial (R. 606-609; 614). Both witnesses were shown a copy of the photo display, which contained Mr. GILLIAM's photo, but each witness said that he had picked someone who was not pictured in the set provided to defense counsel (R. 609; 614).

The trial judge interpreted this testimony to mean that the witnesses merely could not remember the man they had picked out. However, the court refused to allow even minimal inquiry of those witnesses.

Where information can be construed in more way than one, a Richardson hearing is required to determine whether the accused has been prejudiced. The trial court erred in refusing to hold such a hearing.

9/ Richardson v. State, 246 So. 2d 771 (Fla. 1971).

IX

THE COURT FAILED TO INSTRUCT THE JURY AS TO ALL NECESSARILY LESSER INCLUDED OFFENSES OF CAPITAL MURDER, AND MR. GILLIAM DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER ON THE RECORD, THUS REVERSAL IS AUTOMATICALLY REQUIRED UNDER HARRIS V. STATE.

In Harris v. State, 437 So.2d 387 (Fla. 1983), this court held that a capital defendant, as a matter of due process, is entitled to have the jury instructed on all necessarily lesser included offenses. This court found that the right was sufficiently integral to due process in the capital context to require a personal, as well as knowing and intelligent waiver established on the record. Accord, Jones v. State, 484 So. 2d 577 (Fla. 1986).

The colloquy which occurred here was a far cry from the probing questions which the trial judge asked in the Harris case.

In Harris, the trial court asked the defendant if his attorney had explained the advantages of instructing the jury on lesser included offenses. Then the judge in Harris explained it, again, himself on the record.

In contrast, Mr. GILLIAM's standby counsel advised the court that he was having trouble communicating with Mr. GILLIAM and had only attempted to discuss the significance of this waiver with him (R. 1014-1025). Unlike the Harris case, the trial judge here focused his colloquy on whether anyone had threatened or forced Mr. GILLIAM to waive this fundamental right. The record only reflects that the waiver was, in that sense, voluntary.

court should be sensitive to matters which, under normal circumstances, would be unremarkable, but, as here, required the trial judge to exercise discretion. It was clear the Mr. GILLIAM "twisted in the wind" (R. 1116) by trying the case to a jury pro se. Whether or not Mr. GILLIAM was clinically incompetent, he was unmistakenly at a disadvantage in conducting a sentencing hearing pro se before a jury. He did not even try. He merely ensured what he believed would be his sentence if he conducted a sentencing hearing before a jury.

If the trial judge had properly taken into consideration all of the circumstances, he would have granted Mr. GILLIAM's request to be sentenced without a jury recommendation. It is more likely that Mr. GILLIAM could have meaningfully participated in a bench hearing to determine the sentence.

As the Supreme Court emphasized in Ford v. Wainwright, 105 S.Ct. at 2604, supra, it is the opportunity of the defendant to offer evidence which is the key to the heightened due process procedures required in capital cases. In essence, by foreclosing Mr. GILLIAM's right to a sentencing hearing before a judge, without the jury, the trial court precluded Mr. GILLIAM from participating in a way that he was able. A new sentencing hearing is required as to the count of first degree murder.

XII

THE COURT ABUSED ITS DISCRETION IN FAILING TO ORDER A PRESENTENCE INVESTIGATION REPORT PRIOR TO SENTENCING BURLEY GILLIAM TO DIE IN THE ELECTRIC CHAIR.

As discussed in Issue XI above, Mr. GILLIAM was unable and did not offer any evidence in mitigation of his sentence and under the unique circumstances of this case, especially since Appellant proceeded pro se, the court abused its discretion in failing to order a presentence investigation report.

The instant facts differ from those in Rose v. State upon which the State relies, because in Rose it was a second PSI that as at issue, not a first.

CONCLUSION

Based upon the foregoing as well as Appellant's Initial Brief, this court should reverse BURLEY GILLIAM's convictions for first degree murder and sexual battery, or at least the conviction for first degree murder, and remand for a new trial. At a minimum a new sentencing hearing should be ordered for both convictions or at least regarding the death sentence.

Respectfully submitted,

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