IN THE SUPREME COURT OF FLORIDA

MELVIN E. DANIELS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,357

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and appellant, and respondent was the prosecution and the appellee in this cause of action which arose in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County, and which was subsequently appealed to the Fourth District Court of Appeal.

In the brief the parties will be referred to by name.

The symbol "R" will denote the Record on Appeal.

All emphasis in this brief is supplied by respondent unless otherwise indicated.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case to the extent that it presents accurate, non-argumentative recitation of proceedings in the trial court, with the following additions and/or clarifications:

On November 17, 1983, Petitioner, Melvin Eugene Daniels, was informed against for kidnapping (Count I), burglary of a structure (Count II), and attempted sexual battery (Count III) (R 732). The offenses occurred and Mr. Daniels was arrested for them on July 10, 1983 (R 493, 499). On that date, Mr. Daniels was on probation as a result of a conviction for burglary of a structure, Seventeenth Judicial Circuit, Case No. 82-11172 (R 721). The victim of the kidnapping and sexual battery was Lillie Mae Runyons, then age 48, who suffered a stroke on or about August 2, 1983 (R 104). As a result of the stroke, the victim was very confused and had very poor communication skills (R 37). The victim received speech therapy following the stroke and on May 9, 1984, the victim was improved to the point that she was able to appear before the court to be examined upon her capability to testify (R 222). During the victim's recuperation, the State was granted extensions under the speedy trial rule to April 1, 1984 (R 736), May 2, 1984 (R 737), and May 16, 1984 (R 741). Following a lengthy hearing upon Petitioner's motion to dismiss, the trial court found exceptional circumstances did exist to form the basis for the extensions under the speedy trial rule. The trial judge found:

> There was unexpected incapacity. There was unforseeable and unavoidable absence of the alleged victim in the case whose presence or testimony, especially testimony, is uniquely necessary for a full and adequate trial. (R 143, 144).

The court further stated:

> [A]t this time I don't think that there is anything I can do except to find exceptional circumstances do exist under conditions one and three of the rule, which would be 3.191(f), and I am instructing the State that I will ratify Judge Cocalis' order, and at this time I'm going to extend it further to April 1st. (R 145).

The foregoing finding in the orders granting extensions were made and rendered over petitioner's objections which were continuously made throughout the course of the proceedings (R 9, 11, 12, 26, 147, 154, 156, 177, 280).

The trial judge held a competency hearing regarding the victim on May 9, 1984 (R 178-276). During this hearing Bonnie Beck, the victim's speech pathologist, testified to the victim's condition as follows:

> Q. To what extent is she still aphasic?
>
> A. She is aphasic.
>
> Q. Can you define aphasic for the Court?
>
> A. Aphasic is an inability to process language, to say words, to communicate your needs.
>
> Q. How does that manifest itself in Miss Rynyon's case?

A. She cannot communicate.

Q. Does it also manifest itself on occasion where she would say yes and mean no, or say no and mean yes? Certainly, you have seen that numerous times over the period of time you have treated her?

A. Yes.

Q. That is one manifestation in Miss Runyons' case.

Based upon that knowledge, that that type of aphasia exists in Miss Runyons' case, based upon my previous question to you dealing with complexities of the issues of this case, regardless of how simply phrased, the having to think, having to relate memory into events and time patterns, and degree of offenses, isn't it possible, or isn't it even certain that there will be a certain amount of aphasia in her testimony where she will give a response and that response will not be accurate?

A. I can't agree with that. Yes, she can get confused. She may say the wrong word, but I think until you have talked to her you get a feeling for an individual, and she can relate what is going on around her to a very good accuracy. (R 213-215).

The experienced trial judge, who presided in the trial of Kaelin v. State, 410 So.2d 1355 (Fla. 4th DCA 1982), denied petitioner's motion to exclude the testimony of the victim, Lillie Mae Runyons. The trial judge explained his reasoning on the record as follows: "[N]aturally the credibility of the witness, just like any other witness, whether they have a disability or not, is up to the jury. Whether or not she is answering questions truthfully or not is up to the jury. Whether she can remember is

up to the jury. Whether she is making mistakes or whether she is lying is up to the jury." (R 261).

The petitioner renewed his objection to the victim's testimony being admitted not only at this point, but also at trial (R 339-340).

Defense counsel's renewed motion to find Miss Runyons incompetent, and the judge's response thereto follow:

> MR. GAETA: Judge, at this time, I'd again like to renew my motion to find Miss Runyons incompetent based upon the direct examination testimony presented during the course of the examination just now. On numerous occasions as the film will reflect and I'm hoping the record will also reflect that she gave negative responses. Then positive responses all in response to repeated cueing, repeated questioning by Mr. Dupree.
>
> We don't have any indication as to the reliability of those answers. It's almost like anytime Mr. Dupree was suprised by an answer he'd go on on the same question and she'd always change her mind.
>
> We don't have any guarantee as to reliability.
>
> THE COURT: My interpretation she wasn't - We have had the problem about a shake of the head the wrong way.
>
> MR. DUPREE: The aphasic problem.
>
> THE COURT: Or a quick answer which obviously she hasn't answered that way in the past which necessitates going over it again to make sure she understands it. I don't think he's told her what to say. I think the

record should be clear that she seems to understand everything that's being said.

MR. GAETA: My impression is that no matter what the answer would be that if you repeat the questions enough she is going to give an opposite answer.

THE COURT: I don't believe that to be true at all. I think she's doing terrific. I deny your request; deny your motions.

MR. GAETA: I'd also move for a mistrial at this time.

THE COURT: Deny that (R 379-380).

During the pretrial hearing, the State, through the prosecutor, advised the court of an error of drafting Count III of the Information relating to the attempted sexual battery under Fla. Stat. §794.011. The prosecutor requested the permission of the court to change the statute cited from §794.011(4)(a) to §794.011(4)(b) and also to modify the language therein to add "He would have to threaten her to use force or violence likely to cause personal injury or serious harm to the victim." (R 293-295). Following a lengthy discussion, the trial judge refused to permit the State to amend the Information to allege a charge under Fla. Stat. §794.011(4)(b) and instead directed that the Information be changed to show the charge being under Fla. Stat. §794.011(5). The court then stated, "However, I still think you ought to add in and I don't see any prejudice to the defense - just add in the term and thereby used physical force and violence not likely to cause serious personal injury." (R 300).

In response to a defense objection, in which defense counsel stated: "Certainly the defense position would have been that the testimony introduced in trial would not have been able to substantiate the charged as alleged in Count III," the trial judge stated: "It still would constitute a lesser offense, possibly." (R 301). The trial judge then granted the State's motion to amend, overruling the defense objection (R 301). The defense counsel never made a motion to dismiss Count III as originally alleged until after the prosecutor had brought the problem to the attention of the Court and to the attention of defense counsel (R 296).

During the trial, Dr. Amos Stoll was qualified as an expert in neurosurgery (R 304), and, regarding the fitness of Lillie Mae Runyons to testify, was asked the following questions and gave the following responses:

> Q. In regard to her language function itself, would she be able to correct herself when she gave what she knew to be an incorrect response?
>
> A. Yes, she could.
>
> Q. In other words, if she says - you mentioned the fact she was aphasic, that is, she might say something wrong one time and mean something else. Is that a fair statement of what aphasic is?
>
> A. That's correct.
>
> Q. But she'd be able to correct herself if she knew it would be an incorrect response?
>
> A. Yes, she could correct herself. She could also communicate nonverbally. She could shake her head and when she shakes

her head and says no, it's probably incorrect because she meant to say yes. So you have other cues coming in, leads.

Q. Assume for a moment she does shake her head up and down yes and says the word no, would she be able to correct that response if given the time to do so?

A. She might make an expression saying she's frustrated - that is not what I wanted to say and then say yes. Yes, she could do that. (R 315).

Later on during the trial, Deputy Sheriff Youngberg was questioned by the prosecutor as follows:

Q. While outside did Mr. Daniels make any statements to you?

A. He did. (R 500).

A sidebar conference followed. The deputy was then asked if he gave the Miranda warnings and he responded that he did. The deputy was then asked:

Q. Did he indicate he wanted to speak to you?

Then, according to the transcript the deputy answered:

A. He stated he didn't want to make a statement. I wasn't prepared to take a full statement. (R 501).

At this time the jury left and another sidebar conference was held. There was a difference of opinion noted on the record as to exactly what the deputy had said. Following a discussion the trial judge asked the witness:

THE COURT: You say he did want to make a statement?

The deputy then responded:

WITNESS: Yes, your honor.

The judge then denied the defense motion for a mistrial (R 502).

The jury was called back and the question was repeated as follows:

> Q. (By Mr. Dupree) You stated that while outside Mr. Daniels indicated he wanted to make a statement to you; is that correct?
>
> A. Yes, he did.

Later, the defense counsel renewed his motion for a mistrial based upon the deputy's statements in response to Mr. Dupree's questions that his client did not want to make any statement.

The court responded:

> THE COURT: The officer said he didn't say that. That was cleared up. He said I didn't say did not. I said did make a statement (R 631).

The defense counsel attempted to present an exculpatory statement made by the defendant by bringing it in through the testimony of a prosecution witness. However, the trial court ruled that, "Whatever Mr. Daniels told him under this Fagan case is hearsay. If you want to put Mr. Daniels on the stand, you can call Officer Youngberg to corroborate it if you want, I guess, but at this point I'll sustain the objection." (R 536). The court cited Fagan v. State, 425 So.2d 214 (Fla. 4th DCA 1983).

At the conclusion of the evidence, the jury returned a verdict of guilty as to each count alleged in the Information (R 746-748). The petitioner was immediately adjudged guilty of those offenses (R 749). On June 13, 1984, the trial judge, using as his basis the jury's finding of guilt beyond a reasonable doubt,

revoked petitioner's probation on the trespassing offense, Seventeenth Judicial Circuit, Case No. 82-11172, and imposed a sentence of one year in prison to run concurrent with the kidnapping charge (R 760). The court gave petitioner credit for all the time that he served on the trespass charge before he was sentenced on May 5, 1983 and he also gave petitioner credit for the time that he served in jail awaiting trial on the kidnapping, attempted sexual battery and burglary charges (R 721). The court later stated: "If it goes beyond 364 days then anything additional should be applied to this case." This statement referred specifically to the new charge, Case No. 83-12137. (R 728). As the trial court stated:

> He is only entitled to one case the way I understand the law. That's why I said he gets all the credit towards the misdemeanor case that he was placed on probation for in 82-11172 which would include the time he initially spent in jail on that charge and whatever time he spent since being arrested on this new charge, 83-12137. (R 728).

The written sentencing order reflected no credit for the time spent in jail awaiting trial on the kidnapping, attempted sexual battery and burglary charges was given to Mr. Daniels on any of the felony sentences imposed (R 759-760). However, the sentencing order does indicate that jail credit should be considered in Case No. 82-11172 CF (R 760).

The written sentencing orders properly indicate that the sentence on Count II is to run concurrent with the sentence set

forth in Count I and the sentence on Count III is to run concurrent with the sentence set forth in Counts I and II (R 759, 760).

Based upon the aggravating circumstances presented at the sentencing hearing, the trial judge, after hearing evidence in mitigation presented by the petitioner and appellant's girlfriend, sentenced petitioner to be incarcerated with the Division of Corrections for 22 years on the kidnapping charge, and to 5 years incarceration for the burglary and for 5 years incarceration for the attempted sexual battery (R 727).

The District Court of Appeal of the State of Florida, Fourth District, on June 12, 1985, affirmed petitioner's convictions but reversed for resentencing and ordered the trial court to apply credit for time served not only to Case No. 82-11172 (violation of probation), but also to the sentence in the instant case, holding the sentences were concurrent.

STATEMENT OF THE FACTS

Petitioner, Melvin Eugene Daniels, was, on July 10, 1983, a twenty-seven year old black male with a nice physique who had a nice girlfriend who cared about him (R 724). On that date petitioner approached Lillie Mae Runyons, a forty-eight year old beat-up, broken-down black woman who looked about age sixty-eight (R 722). Ms. Runyons, the victim, testified that she was leaving the Blue Flame Bar and was walking to the Embassy Club when two men in a black pickup truck stopped and she asked them for a ride to the Embassy Club (R 344-348). Because a street was blocked the driver of the truck told Lillie Mae that he knew another way to the club, but Lillie Mae never was taken to the Embassy Club that night (R 349, 350). When she told the two men that they were not going the right way to the Embassy Club she was told to shut up (R 350). She was forced out of the truck, struck on the back and was knocked down (R 351, 352). The victim said there was a small man in the truck and a large man. She identified the petitioner, Melvin Eugene Daniels, as the large man who tried to rape her and took her into an abandoned house after dragging her from the spot where the truck stopped to a vacant house owned by the Uniied States Drug Enforcement Agency (R 374). Along the way Lillie Mae Runyons was struck in the left side of her face (R 357), broke the window of a neighboring house with a lawn sprinkler head (R 358), and screamed for help while trying to get away from petitioner (R 359). Petitioner dragged the victim into the vacant house and ripped her clothes off, tearing her shirt (R 365).

He then took off her pants and underpants and then removed his own clothes (R 365, 366). The victim testified that petitioner said he was going to hurt her and that he threatened to kill her (R 366). Petitioner rubbed his penis all over the victim's face, put his fingers in her ears and in her nose and hit her in the face (R 367, 368). All the while the victim was screaming for help (R 368). When the police arrived, Lillie Mae Runyons was naked as was petitioner (R 370).

Ms. Runyons testified that she did not want to have sex with the petitioner. She also testified that she had a five dollar bill stuck in her bra which was found in the front yard of the vacant house by a deputy sheriff. The deputies arrived after being called by a neighbor, who lived across the street, who had been awakened by the victim's screams and who saw petitioner dragging and beating the victim (R 434). The neighbor recognized petitioner and identified him in the courtroom at the time of his testimony because petitioner had repaired the roof on his house three years before the incident, and had returned three months before the incident to inquire if the repairs were holding up (R 478, 489).

The petitioner testified that he did not want to have sex with the victim but that he walked over two miles with her to a house. He did not know whose house it was and he did not have any permission to enter the house (R 650). Petitioner testified that the victim's clothes were already mussed up from arguing with another man (R 649), and that he did not notice the cuts on the

bridge of her nose, the bruises and the cut on her nose, or the other scratches on her face (R 656). Petitioner testified that he was not sexually attracted to the victim but that he took her to the vacant house to have "consentual sex" with her. He also said that he followed her over two miles on foot (R 658).

Excluding expert witnesses who testified to the competency and disability of the victim, and the police forensic personnel who testified to the custody of the real evidence introduced, the victim, the two neighbors, two deputy sheriffs and the petitioner himself all testified to place the petitioner at the scene of the crimes, and, after evaluating the evidence presented, the jury returned its verdict of guilty as to the charge of kidnapping, the charge of burglary, and the charge of attempted sexual battery (R 689, 746, 747, 748).

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT PROPERLY CREDITED PETITIONER WITH ALL BUT 15 DAYS TIME SERVED PRIOR TO SENTENCING?

POINT II

WHETHER THE TRIAL COURT PROPERLY PERMITTED THE STATE TO AMEND THE ATTEMPTED SEXUAL BATTERY CHARGE CONTAINED IN COUNT III OF THE INFORMATION?

POINT III

WHETHER THE TRIAL COURT'S DECISION TO ALLOW THE VICTIM TO TESTIFY PLACING THE RESPONSIBILITY FOR DETERMINING THE WEIGHT DUE HER TESTIMONY WITH THE ULTIMATE TRIER OF FACT, THE JURY, AND THE TRIAL JUDGE'S DECISION BASED UPON FIRST HAND OBSERVATIONS SHOULD BE DISTURBED?

POINT IV

WHETHER THE CONTINUANCES GRANTED IN THIS CASE DUE TO THE VICTIM'S ILLNESS WERE PROPER UNDER THE PROVISIONS OF FLA.R.CRIM.P. 3.191?

POINT V

WHETHER PETITIONER'S ASSERTION THAT THE TESTIMONY OF A POLICE INFRINGED UPON PETITIONER'S RIGHT TO REMAIN SILENT IS ERRONEOUS AND WHETHER THERE WAS ERROR IN THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL UNDER THESE CIRCUMSTANCES?

POINT VI

WHETHER THE TRIAL JUDGE PROPERLY EXCLUDED IN-ADMISSIBLE HEARSAY EVIDENCE WHEN DEFENSE COUNSEL ATTEMPTED TO ELICIT IT UPON CROSS-EXAMINATION OF THE STATE'S WITNESS?

SUMMARY OF ARGUMENT

POINT I

Petitioner received credit for all but 15 days of his time served in jail from the date of his arrest to the date of sentencing. The trial judge clearly stated to which sentence the credit should apply. The petitioner is not entitled to multiple credits when, as here, he has numerous charges which arose from multiple incidents of criminal conduct.

POINT II

The change to Count III of the Information, as permitted by the trial court, did not prejudice petitioner as the only consequence of the change was to reduce the charge to a lesser included offense which was not so unlike the initial charge, which petitioner's counsel stated he was prepared to defend upon anyway, and did not embarrass or unduly burden the petitioner in the preparation of his defense or in the pursuit of discovery.

POINT III

The victim, although disabled by a stroke, was still able to comprehend the meaning of the oath, was able to tell the truth from falsehood, and was able to recall the events upon which she testified as determined by the trial judge during pretrial and trial testimony.

POINT IV

The continuances granted by the trial court resulted from the stroke suffered by the victim less than 30 days following

the offenses, which incapacitated the victim who was, naturally, uniquely necessary for a full and adequate trial, and, were also based upon showings by the State that the victim would, after rehabilitation and speech therapy, become available at some later time, which circumstances are fully contemplated by Fla.R.Crim.P. 3.191(f).

POINT V

On the face of the trial transcript there is no reason to find that petitioner was in any manner prejudiced by testimony of a deputy sheriff, which testimony, although arguably understandable as a comment upon the petitioner's right to remain silent when taken out of context, was most likely a slip of the tongue of the witness, as he testified when asked by the court, which response was supported by the witness' earlier and subsequent answers indicating petitioner did not remain silent but actually provided statements to the witness.

POINT VI

The introduction of a inculpatory portion of petitioner's statement, at exception to the hearsay rule, did not require the trial court to permit defense counsel to introduce exculpatory portions of the same statement upon cross examination when there was no guarantee of their truthfulness or any other exception for their admission under the hearsay rule.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY CREDITED PETITIONER WITH ALL BUT 15 DAYS TIME SERVED PRIOR TO SENTENCING.

At the time of his arrest on the instant charges, Petitioner Daniels was on probation for trespassing in Case No. 82-11172

On July 10, 1983 petitioner was arrested on the instant charges and was held on the instant charges for 15 days, until July 25, 1983, when a warrant was issued for Daniels for violation of probation in Case No. 82-11172. On July 25, 1983 petitioner was ordered held with no bond for violating his probation, pending a hearing on the violation.

No bond hearing was ever requested, nor was one ever held, regarding the instant charges (in either Case No. 83-7244, or as refiled Case No. 83-12137). (R 765).

On June 13, 1984, Daniels was found to have violated his probation in Case No. 82-11172. (R 721). He was sentenced to be incarcerated with the Department of Corrections for a period of one year, and given credit for all the time he had served on Case No. 82-11172 before he was sentenced, on May 5, 1983, and he was also given credit on Case No. 81-11172 for the time he was in jail awaiting, as the court stated, the trial on the instant charges (although Daniels was not being held on the instant charges, but rather was being held pursuant to the "no bond" order resulting from the violation of his probation). (R 721).

Petitioner was thereafter sentenced to 22 years incarceration for the kidnapping count, 5 years for the instant burglary count, and 5 years for the sexual battery count. (R 727). The trial court declared the sentences for the burglary and sexual battery convictions would run concurrent, together with the sentence in Case No. 82-11172. (R 728).

As there was never a bond hearing on the instant charges, it appears the only legal reason petitioner was incarcerated before his trial was his violation of his probation in Case No. 82-11172 which resulted in an order of no bond. Petitioner was not kept in pre-trial confinement upon the instant charges and therefore is not entitled by any legal right to have the time he spent in jail upon the trespassing offense committed in 1982 applied to both that sentence and the instant sentences for his 1983 kidnapping, burglary and sexual battery.

Daniels has already received credit for all the time served in jail before sentencing, with the exception of the 15 days from July 10, 1983, until July 25, 1983.

The District Court's opinion incorrectly states:

> However, as to that one year sentence, the trial court gave Daniels credit for the time he had already served on that particular charge, plus credit for the time he had served in jail awaiting trial in the instant case.

As respondent has indicated above, petitioner did not serve any time in jail which could be attributed to the instant case, except

the fifteen days from July 10, 1983 until July 25, 1983.

Although the record does not indicate how many days petitioner spent in jail before he was sentenced initially in Case No. 82-11172, if he had spent more than 41 days in jail before sentencing in that case he would have completed serving that sentence before the sentence was imposed upon him on June 13, 1984. Thus, petitioner's sentences cannot logically be considered concurrent, despite being labelled as such by the trial court (at R 721). To do so would be to give Daniels credit for time he served before his May 5, 1983 sentencing on the 1982 trespassing conviction against the instant sentence which is punishing him for crimes not even committed until July 10, 1983.

The rule set in Miller v. State, 297 So.2d 36 (Fla. 1st DCA 1974), states:

> When a defendant is held in jail to answer for multiple charges or cases, the first sentencing judge who sentences him to jail or to the state prison shall give him credit on the sentence or sentences in that case for all time spent in jail between the date of his arrest in that case and the date of such sentence even though the defendant may have also been held to answer for other charges during some or all of such time.

Miller at 38.

The trial court first sentenced petitioner for violating his probation, and did give him credit in Case No. 83-11172 for all the time Daniels spent in jail between the time of his arrest in Case No. 83-11172 and the date of the sentencing. As petitioner did not request a bond hearing on the instant charges, and from the record it appears

none was ever held, he was clearly being held only upon the violation of probation and should receive only what he did receive (which was credit for time served in Case No. 83-11172), plus 15 days credit from July 10, 1983 through July 25, 1983, when he was incarcerated because of the instant charges.

Further, the District Court's opinion relied upon three cases from the Second District Court of Appeal as authority for their decision that petitioner should receive credit against all presentencing time served in all of his cases. However, respondent would have this Honorable Court take notice of the following distinguishing characteristics of these cases:

1. Kinney v. State, 458 So.2d 1191 (Fla. 2nd DCA 1984), Kinney was sentenced concurrently for attempted murder and grand theft. Upon remand for resentencing the trial court sentenced him consecutively and credited him with time served to only one of the sentences (the attempted murder sentence). Upon the subsequent appeal the appellate court vacated the grand theft sentence and remanded for a concurrent sentence with directions to credit time served to Kinney in order to keep the grand theft sentence equal in time with the attempted murder sentence which already had been credited with time served. In the instant case, petitioner's offenses were not charged in the same Information.

2. Martin v. State, 452 So.2d 938 (Fla. 2nd DCA 1984). Relies upon Bevins v. State, 412 So.2d 456 (Fla. 2nd DCA 1982), which simply remanded a case for resentencing in accordance with the record, resolving what appears to be merely a scrivener's error

between the numerals 226 and 266. The court in Martin cites Miller v. State, supra, for the proposition that a defendant is not entitled to pyramid presentence jail time on multiple charges.

3. Blackwell v. State, 449 So.2d 1296 (Fla. 2nd DCA 1984), relies upon Martin, supra, for the proposition that all concurrent sentences should be credited for presentencing jail time credit in equal amounts. Respondent suggests that petitioner's trespassing offense, committed at least a year before the instant crimes, is not susceptible of being interpreted as being a concurrent conviction and is not a concurrently sentenced crime either as described in Blackwell. The District Court cited, as contrary authority, Shepard v. State, 459 So.2d 460 (Fla. 3rd DCA 1984). Respondent strongly suggests that the line of cases preceding Shepard display much better reasoning and follow a more logical approach to the issue of crediting pre-sentence jail time. See Green v. State, 450 So.2d 1275 (Fla. 5th DCA 1984); Amlotte v. State, 435 So.2d 249 (Fla. 5th DCA 1984); aff'd on other grounds, 456 So.2d 448 (Fla. 1984); Torres v. State, 436 So.2d 324 (Fla. 5th DCA 1983); Miller , supra, (Fla. 1st DCA 1974).

Respondent notes the Second District appears to have approached the Shepard reasoning in its opinion in Yohn v. State, 461 So.2d 263 (Fla. 2nd DCA 1984), distinguishing Blackwell, supra, and Martin, supra, from situations such as the instant case where a defendant is charged at different times with a series of offenses for which he is incarcerated.

The Third District continues to follow Shepard in Hopkins

v. State, 463 So.2d 521 (Fla. 3rd DCA 1985).

The Fourth District opinion, in Thompson v. Wainwright, 447 So.2d 383 (Fla. 4th DCA 1984), indicates a defendant has a fundamental right to receive credit for time served in jail prior to sentencing, but, the District Court also recognized the basic prohibition against pyramiding such jail time by crediting each of defendant's sentences with the full time the defendant spends in pre-sentence confinement, pursuant to Miller, supra. Unlike in Thompson, petitioner Daniels has received credit for his time served pursuant to his incarceration for violation of his probation. Petitioner should not be permitted to pyramid his time into multiple credits, especially where, as here, he was not (except for 15 days) incarcerated because of the instant charges, but because he violated his probation stemming from a crime committed a year earlier.

Respondent therefore urges this Honorable Court to recognize that petitioner is not entitled to credit for jail time served upon both his violation of probation sentence and his substantive offense sentences, because the sentences were not concurrent and because the trial court was not required to give petitioner credit upon both of the sentences pursuant to Fla. Stat. §921.161 (1983). Cf. Wallace v. State, 10 F.L.W. 2716 (Fla. 5th DCA Dec. 12, 1985).

ARGUMENT

POINT II

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO AMEND THE ATTEMPTED SEXUAL BATTERY CHARGE CONTAINED IN COUNT III OF THE INFORMATION.

This Honorable Court, speaking in State v. Phillips, 463 So.2d 1136 (Fla. 1985), addressed the problem of the sufficiency of an Information. The Court quoted Fla.R.Crim.P. 3.140(o), which provides:

> Defects and variances. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.

The Court interpreted this statute as follows:

> Any defect in the Information filed is clearly one of form, not of substance, as evidenced by the fact that both parties were willing and able to proceed to trial in circuit court on the charge of felony petty theft. There is no claim that the information is 'so vague, indistinct and indefinite as to mislead the accused or embarrass [her] in the presentation of [her] defense.' Neither is there any 'danger of a new prosecution of the same offense.' This Court has, in recent years, recognized these two considerations as the primary rationale for the common-law 'four corners of the charging document' rule. With increased discovery in criminal trials, we have found these

> protections to be afforded defendants without the ridged application of the rule. See e.g., Tucker v. State, 459 So.2d 306 (Fla. 1984); York v. State, 432 So.2d 51 (Fla. 1983); Sparks v. State, 273 So.2d 74 (Fla. 1973).

In the instant case, there is no question that the information specifies a certain time, place and certain activity (R 732). However, certain aggravating language was omitted from Count III as originally contained in the Information. The petitioner was aware of the statute under which he was charged and, according to his defense counsel, he was prepared to defend upon that charge and objected to the charge being modified.

> MR. GAETA: I do have an objection to that. I am strenuously objecting to any amendment to Count III as it stands. My defense is predicated partially on the way that had been alleged. (R 300, 301).

As the trial judge noted, "It still would constitute a lesser offense, possibly." (R 301).

It appears that the petitioner, if he was affected at all by the amendment, was benefited by the reduction of the degree of the charge and was relieved of the burden of presenting a defense upon additional facts. As the Fifth District Court of Appeal stated in Gray v. State, 404 So.2d 388 (Fla. 5th DCA 1981):

> An information alleging improper form material and relevant ultimate facts which, if proven, would establish all of the constituent elements set forth in a constitutionally sufficient statutory criminal offense ought to be sufficient to charge that offense.

That court, in following Lee v. State, 397 So.2d 684 (Fla. 1981) found a statute constitutional on the basis that it is sufficiently

definite to convey a definite warning as to the conduct proscribed, measured by common understanding and practice. The Information in this case, both originally and as amended by the trial court, conveys a definite warning as to the conduct proscribed, and, as the defense counsel stated he was prepared to defend upon the charge, this court need look no further to conclude that the charge as contained in the original Information was understandable.

There is no demonstration that the petitioner was mislead or precluded from conducting discovery and, if anything, was alerted to conduct even more diligent discovery than was eventually necessary to fully prepare his defense.

> Where the information clearly charges an offense a mere error in the citation of the statute does not require reversal unless the error would prejudice the accused.

Youngker v. State, 215 So.2d 318 (Fla. 4th DCA 1968); King v. State, 336 So.2d 1200 (Fla. 2nd DCA 1976). Under the foregoing authority any error in amending the charge contained in Count III of the Information was not adversely prejudicial to petitioner and does not require reversal or remand.

ARGUMENT

POINT III

THE TRIAL COURT'S DECISION TO ALLOW THE VICTIM TO TESTIFY PLACED THE RESPONSIBILITY FOR DETERMINING THE WEIGHT DUE HER TESTIMONY WITH THE ULTIMATE TRIER OF FACT, THE JURY AND THE TRIAL JUDGE'S DECISION BASED UPON FIRST HAND OBSERVATIONS SHOULD NOT BE DISTURBED.

As indicated in the petitioner's statement of the case, the trial judge had the opportunity to carefully consider the competency of Lillie Mae Runyons to testify concerning the incidents of July 10, 1983. Numerous expert witnesses were called before the court to testify as to Lillie Mae's intelligence, memory and understanding. The trial court found Lillie Mae Runyons competent to testify in her own fashion, by responding to leading questions by both sides, that she exhibited a capability of knowing what the oath is, that she knew she was in court to tell the truth and, as a consequence of paointing out the defendant during the competency hearing the trial judge was able to find that she could recall the incidents of July 10, 1983 (R 267, 268). Further, the victim was able to respond to several questions beyond a mere yes or no answer.

The opinion of the District Court in Kaelin v. State, supra, a similar case in which the same trial judge admitted the testimony of a 32 year old mentally retarded woman, is a close and well-reasoned precident for the affirmance of the decision of the trial court judge to permit the victim to testify. As that court then stated: "The prerequisites of competency have been

universally recognized. A witness must have sufficient intelligence to understand the nature and obligations of the oath and the ability to perceive, remember and narrate the incident." (citation omitted). As in Kaelin, supra, Lillie Mae Runyons was limited in her ability to relate the circumstances of her kidnapping and assault, however, there was no testimony that her intelligence was affected by the illness but only her communicative abilities. As with Claire in Kaelin, there is no doubt that the defense of petitioner was made more difficult by the limitations of Lillie Mae's communicative ability. Yet this record is also showing a comprehensible narrative when one views the sum of Lillie Mae's testimony.

Lillie Mae Runyons was thoroughly interrogated regarding her understanding of the obligations of the oath. As mentioned before, there was no reason to question her intelligence, but only her ability to communicate was impaired.

The trial judge had the opportunity to view the witness, both at the competency hearing and during her testimony before the jury. He under took such inquiries as would be effective to disclose her capacity and intelligence. These "impressions" that may be validly drawn only from close hand personal observation cannot be "photographed into the record" for later study by the appellate courts.

Kaelin, supra; People v. Parks, 41 N.Y. 2nd 36, 390 NYS 2nd 848, 359 NE 2nd 358 (1976).

As in Kaelin, supra, this record on appeal amply demonstrates that the trial judge closely observed Lillie Mae Runyons interrogation and was satisfied that she was competent to testify. The affliction of the victim did not make Lillie Mae Runyons so deficient that the admission of her testimony was a clear abuse of discretion. Accordingly, the judgment and sentence of the trial court must be affirmed.

ARGUMENT

POINT IV

THE CONTINUANCES GRANTED IN THIS CASE DUE TO THE VICTIM'S ILLNESS WERE PROPER UNDER THE PROVISIONS OF FLA.R.CRIM.P. 3.191.

Fla.R.Crim.P. 3.191(f) provides:

> (f) Exceptional Circumstances. As permitted by this Rule, the court may order an extension of time or continuance where exceptional circumstances are shown to exist; exceptional circumstances shall not include general congestion of the court's docket, lack of diligent preparation or failure to obtain available witness, or other forseeable delays.
>
> Exceptional circumstances are those which as a matter of substantial justice to the accused of the State or both require an order by the court. Such circumstances include (i) unexpected illness or unexpected incapacity or unforseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial; ...(iii) a showing by the State that specific evidence or testimony is not available despite diligent efforts to secure it, but will become available at a later time; provided not mare than two ntinuances shall be granted on this ground; ... (Fla.R.Crim.P. 3.191(f).

"The Rule contemplates that the running of the time allowed for a speedy trial shall be tolled when exceptional circumstances exist. The Rule sets forth several examples of such circumstances, but the Rule also specifies that those examples are not the exclusive grounds for granting extensions of time." State v. Felton, 348 So.2d 1214 (Fla. 4th DCA 1977).

Lillie Mae Runyons suffered a stroke less than one month following the kidnapping and attempted sexual battery perpertrated by petitioner. The stroke was not shown to be a result of the attack, but was shown to be most likely the result of a preexisting condition aggravated by the victim's lifestyle and obesity. The stroke left Lillie Mae unable to speak and she was unable to afford immediate speech therapy, which could have made her better able to speak more quickly. Due to her poor financial condition, she was unable to afford transportation to the speech clinic as often as was necessary and she had to rely upon HRS personnel to transport her to the clinic (R 103).

Following an evidentiary hearing on February 8, 1984, the trial court ratified the earlier order of a judge acting in the trial judge's absence and stated,:

> I at this time find exceptional circumstances, and I feel that exceptional circumstances did exist at the time Judge Cocalis entered her order although I will for the record substantiate the defense's position that no testimony was taken at that time.
>
> MR. GAETA: Judge, if I could -
>
> THE COURT: Excuse me, and I do feel that from what I've heard there was unexpected illness. There was unexpected incapacity. There was unforseeable and unavoidable absence of the alleged victim in the case whose presence or testimony, especially testimony, is uniquely necessary for a full and adequate trial.
>
> I will also find under the other tests that a showing by the State that specific evidence or testimony is not available has been met, and I agree that they have made efforts to secure it, but from the testimony we have heard that it's obvious they can't secure it at this time.

> I also find that although the conditions in the rule says that, under 3, that the testimony will become available at a later time, definitely will, has not been shown. However, under circumstances of where a stroke victim becomes involved, which we have here, and I think it is unforseeable, all we can deal in is possibilities, and based on the doctors experience and his expertise he indicates with some therapy, maybe in 60 or 90 days, she will be able to answer questions. Maybe not in full sentences. Maybe not even understanding full sentences.
>
> At that time you may make a request that your constitutional right to confrontation has been deprived, which I am sure you will, and maybe you will be correct at that time. Maybe at that time I will exclude her as a witness, but at this time I don't think that there is anything I can do except to find exceptional circumstances do exist under conditions 1 and 3 of the rule, which would be 3.191(f), and I'm instructing the State that I will ratify Judge Cocalis' order, and at this time I'm going to extend it further to April 1st. (R

A continuance granted upon such an exceptional circumstance extends the speedy trial period. State v. Felton, supra.

The District Court's language in State v. Felton, supra, is fully applicable to the circumstances of Lillie Mae Runyons. As that court then said:

> It seems to us that the circumstances in the case at bar constitute exceptional circumstances warranting the two extensions the court granted. The witness had given a sworn statement inculpating the appellees and she had identified them from photographs. ... The Rule provides that exceptional circumstances are those which as a matter of substantial justice to the accused

> are the State require an order by the court. We think substantial justice to the State required the orders in this case. Felton, supra at 1216.

Under such circumstances there is a clear showing that the trial court's continuance of the case over petitioner's objection, especially in light of the victim's need for rehabilitive speech therapy to permit her to testify at trial, was fully justified.

ARGUMENT

POINT V

PETITIONER'S ASSERTION THAT THE TESTIMONY OF A POLICE WITNESS INFRINGED UPON PETITIONER'S RIGHT TO REMAIN SILENT IS ERRONEOUS AND THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL UNDER THESE CIRCUMSTANCES.

During the direct examination of the deputy sheriff who arrested petitioner, the following occurred:

> Q. What was done with Mr. Daniels after you left the house?
>
> A. He was taken to the - directly after leaving the house or?
>
> Q. Well, right in that general time?
>
> A. He was taken. He was asked to step outside while Deputy Oswald questioned the black female that was inside.
>
> Q. While outside did Mr. Daniels make any statements to you?
>
> A. He did. (there followed a sidebar conference, followed by testimony of the witness regarding the Miranda warnings.) (R 499, 500).
>
> Q. Did you ask Mr. Daniels if he understood? At the end of the Miranda rights form there is a statement to the effect knowing your rights as I have given them to you, do you wish to speak to me? Did you ask Mr. Daniels that?
>
> A. I did.
>
> Q. Did he indicate he wanted to speak to you?
>
> A. He stated he didn't want to make a statement. I wasn't prepared to make a full statement.

MR. GAETA: Judge, can we approach the bench?

THE COURT: Take the jury out, please. (Thereupon, the jury exited the courtroom.)

MR. GAETA: Judge, at this time the defense would move for a mistrial in that this deputy has made a direct comment upon my client's right to remain silent; totally prejudicial.

MR. DUPREE: [Prosecutor]: He said he wanted to make a statement.

THE COURT: He did?

MR. DUPREE: He said he did want to make a statement.

MR. GAETA: That's not what I heard.

THE COURT: That's not what I heard.

THE COURT REPORTER: That's not what I heard.

THE COURT: That's not what Rose heard.

MR. GAETA: May we have the record read back?

(Thereupon, the court reporter read the requested portion of the record as above recorded.)

THE COURT: You say he did want to make a statement?

THE WITNESS: Yes, your honor.

THE COURT: The officer indicates that what he said was that he did want to make a statement. Not that he didn't. Otherwise I probably would have granted the motion.

MR. GAETA: May the record also reflect that I heard didn't, the court heard didn't, as well as the court reporter.

THE COURT: It doesn't make any difference.

MR. DUPREE: I heard did but I talked to him before. That's probably because of the way he speaks.

(There followed a discussion by the prosecutor of the court and defense counsel.)

THE COURT: Bring the jury.

MR. GAETA: Is my motion noted for the record?

THE COURT: Yes. I have to deny it. I was ready to grant it but the officer says that's not what he said so I guess some of us didn't understand him. We'll correct that.

(Thereupon, the jury was seated in the jury box.)

Q. (by Mr. Dupree) You stated that while outside Mr. Daniels indicated he wanted to make a statement to you; is that correct?

A. Yes, he did.

From the foregoing it is obvious that the error complained of in petitioner's argument did not occur but that the witness, who stated he was tired, may have mumbled or otherwise unclearly stated his answer. However, as the jury immediately heard the correct answer, there was no harm resulting to the petitioner if, in fact, the witness did misstate his answer at page 501, line 13 of the record. This is especially true in light of the question

and answer of the same witness as recorded at page 500 lines 5, 6, 7 of the record, where the question was asked: "While outside did Mr. Daniels make any statement to you?" To which the witness responded, "He did."

In light of a full review of the transcript, which is not included in petitioner's brief, there is no ground for finding error.

ARGUMENT

POINT VI

THE TRIAL JUDGE PROPERLY EXCLUDED INADMISSIBLE HEARSAY EVIDENCE WHEN DEFENSE COUNSEL ATTEMPTED TO ELICIT IT UPON CROSS-EXAMINATION OF THE STATE'S WITNESS.

On direct examination, the prosecutor elicited testimony from Deputy Sheriff Youngberg that petitioner had stated, "That he met the black female at another location. A friend of his had dropped him off at the house. He had entered the house and under the pretense of having some sort of relationship." The deputy also testified that petitioner did indicate that the house was not his (R 504, 505). These inculpatory statements were properly admissible hearsay as they were statements against the interest of the defendant.

On cross-examination, defense counsel attempted to introduce exculpatory statements made by petitioner to the witness who was the arresting officer (R 516). The State properly objected and cited Fagan v. State, 425 So.2d 214 (Fla. 4th DCA 1983), which states in pertinent part:

> Fagan was prevented from having the arresting officer testify as to an exculpatory statement made by Fagan at the time of his arrest...It did not fit into any of the three exceptions namely, res gestae, statement against penal interest and admissions of a party opponent. The statement was made a substantial time following the commission of the offense without indicia of spontaneity or excitement, it was exculpatory and is self-serving rather than contrary to Fagan's interests. There was no

> corroboration or other basis for its truthfulness and reliability. It's admission would be contrary to the rules of evidence.

Following this test, as well as §90.801(1)(b)(c) and §90.801(2) Fla. Stat. (1983) the trial court properly excluded evidence of exculpatory statements which defense counsel attempted to introduce through cross-examination of the arresting officer.

Petitioner attempts to distinguish Fagan by stating that in Fagan the defendant did not testify in his own defense but that petitioner Daniels did take the stand. However, the trial judge told defense counsel, "If your client wants to take the stand, you can get it in."..."so you will have to wait until your side of the case." (R 517, 518). The court heard extensive argument by the defense counsel regarding why the hearsay evidence should be admitted, and the trial judge clearly stated his findings in the record that the statements were not res gestae, excited utterances, nor statements against penal interest (R 519, 520). Petitioner did not elect to call the deputy sheriff as a corroborating witness following petitioner's testimony.

Under these circumstances no error is shown.

CONCLUSION

WHEREFORE, Respondent requests this Honorable Court deny the petition, and, alternatively, grant the petition for the limited purpose of ordering a remand for resentencing only to credit petitioner with the 15 days credit to which he may be entitled for incarceration based upon the instant charges from July 10 through July 25, 1983, pursuant to Shepard, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to TATJANA OSTAPOFF, ESQ., Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 8th day of January 1986.

Of Counsel