IN THE SUPREME COURT OF FLORIDA

CHARLES LAMOND PRIDGEN, :

Appellant, :

vs. : Case No. 69,699

STATE OF FLORIDA, :

Appellee. :

_____ :

FILED
SID J. WHITE
JAN 29 1988
CLERK, SUPREME COURT
By
Deputy Clerk

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "S". Other references will be as denoted in appellant's initial brief.

This reply brief is directed to a few specific points made by the state in its answer brief. In view of the length of the main briefs in this case, appellant will rely primarily on his initial brief to counter the arguments advanced by the state.

ARGUMENT

ISSUE II

APPELLANT'S DUE PROCESS RIGHT NOT TO BE TRIED WHILE INCOMPETENT WAS VIOLATED BY THE TRIAL COURT'S DENIAL OF DEFENSE COUNSEL'S MOTION TO CONTINUE THE PENALTY PHASE OF THE TRIAL, AND BY HIS FAILURE TO CONDUCT A COMPETENCY HEARING WHEN PRESENTED WITH REASONABLE GROUNDS TO BELIEVE THAT APPELLANT'S MENTAL CONDITION HAD DETERIORATED TO THE POINT WHERE HE WAS NO LONGER COMPETENT TO STAND TRIAL.

The state's position as to this Point on Appeal is that, at the point in time during the penalty phase when the trial court denied defense counsel's motion to suspend the proceedings pending a determination (pursuant to Fla.R.Crim.P. 3.210 and 3.211) of appellant's present competency to stand trial, the totality of the circumstances were insufficient to

raise any bona fide doubt as to appellant's competency (S.65, 67,71); hence, no further evaluation and no competency hearing were necessary. Appellant agrees that the correct legal issue to be addressed here is whether there were reasonable grounds[1/], based on the information available to the trial court at the time, to believe that appellant's mental condition[2/] might have deteriorated to the point where he was no longer competent to stand trial, but he emphatically disagrees with the state's position that no such doubt existed during the penalty phase. To the contrary, the evidence and circumstances before the trial court (set forth at p.94-110 of appellant's initial brief) - including, but not limited to, the updated medical opinion of Dr. McClane that appellant was probably incompetent at the present time; that he had a serious mental illness; that he was inadequately motivated to help himself on the basis largely of

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1/ See e.g. Scott v. State, 420 So.2d 595, 597 (Fla. 1982); Kothman v. State, 442 So.2d 357, 359 (Fla.1st DCA 1983) (test is "whether there is reasonable ground to believe that the defendant may be incompetent, not whether he is incompetent") (emphasis in opinions).

2/ As both Dr. McClane and Dr. Ainsworth recognized over a month prior to trial, appellant's mental condition was precarious to begin with [see appellant's initial brief, p.94-96]. Both doctors concluded that appellant was, on balance, competent at that time, but both also expressed reservations about his competency. McClane observed that appellant may become "overtly psychotic" when under stress, and Ainsworth recommended that appellant be given an extra dose of antipsychotic medication prior to any testimony he might give. [While the record does not indicate whether or not this was done, to borrow the state's rhetorical style (see S.25), query whether the difference between appellant's rather lucid guilt-phase testimony and his overtly psychotic penalty-phase monologue might lie in the amount of psychotropic chemicals ingested prior to the former].

his mental illness; that he was acting irrationally in terms of his decision making process; and that he was actively suicidal, "clearly civilly committable", and badly in need of psychiatric treatment (R.985-86, 996) - plainly established, at the very least, that there was bona fide doubt as to appellant's present competency.

The most telling flaw in the state's argument is this: If, as the state insists, there was not even a bona fide doubt as to appellant's competency at the point in the penalty phase when the trial court denied defense counsel's motion, why then did the trial court, sua sponte, five days later, appoint three experts to examine appellant for his competency to be sentenced? [See appellant's initial brief, p.106-110]. The record does not indicate that any additional information came to the trial court's attention in the interim. The explanation for the trial court's course of action can be found in his comments at the end of the first competency-for-sentencing hearing on July 5, 1985. After hearing the testimony of Drs. McClane, Ainsworth, and Dee, as well as the testimony of attorney Fredericks that in the penalty portion of the trial appellant would not communicate with him at all, the trial court found (contrary to the opinion of all three doctors) that appellant had been competent for both the guilt phase and penalty phase. The court continued:

> Be that as it may, having ruled that he was competent during these proceedings, the sole evidence before me is that he has deteriorated. Dr. McClane gave a stronger offering about deterioration at the first proceedings. In fact, it

> was this trend of deterioration that persuaded me not to reopen or to open up or extend, whichever might be correct, the bifurcated proceedings.
>
> Be that as it may, my present order is that he be transferred to Florida State Hospital and then -- and there examined with appropriate reports being sent here and that he be treated if treatment is necessary and predictably following treatment, sentenced.

(R1146-1147)

In other words, the trial court took Dr. McClane's testimony in the recess of the penalty phase that appellant's mental condition had deteriorated, and used that "trend of deterioration" as a reason not to conduct any further inquiry into appellant's competency before proceeding with the penalty phase; as a reason not to order a hearing as mandated by Rules 3.210 and 3.211 when there is reasonable ground to believe the defendant lacks the present ability to rationally consult with his attorney. Instead, the court elected to go forward and obtain a penalty recommendation from the jury that afternoon, apparently fearing that if he suspended the penalty phase for a competency hearing, appellant's mental condition might deteriorate even further.

The point of all this is, not only did the totality of the circumstances establish reasonable grounds to believe that appellant's mental condition might have deteriorated to the point where, during the penalty phase, he was no longer competent to stand trial, but also - subjectively - the trial judge himself had bona fide doubts concerning appellant's present competency, but chose to defer acting upon those doubts

until it was too late to afford any protection against appellant's being tried (as to penalty) while incompetent. In his inaction, the trial court violated the mandatory requirements of Rules 3.210 and 3.211 and the constitutional principles of Pate v. Robinson, 383 U.S. 375 (1966).

Two more brief points need to be made. The first concerns the state's reliance on the recent decision in Gilliam v. State, ___ So.2d ___ (Fla. 1987)(case no. 66,850, opinion filed November 5, 1987)(12 F.L.W.563). Some time prior to trial, Gilliam discharged his court appointed attorney, which resulted in a delay of nearly a year. He was examined by three experts, each of whom found him competent to stand trial. On the eve of trial, Gilliam insisted on discharging his second court appointed attorney. The trial court again appointed an expert, who subsequently testified that Gilliam refused to cooperate with the examination, but that he nevertheless remained competent to stand trial. This court, rejecting Gilliam's argument on appeal that the trial court erred in refusing his request for further evaluation, noted that "[t]he defense offered no evidence to support its second allegation of incompetence", and also observed that "[w]here a defendant attempts to thwart the process by refusing to cooperate, the court has no duty to order a futile attempt at further examination" Gilliam v. State, supra, 12 F.L.W. 564. Thus, Gilliam is similar to Muhammad v. State, 494 So.2d 969, 972-973 (Fla. 1986), and completely different from the instant case. Here (unlike Gilliam and Muhammad) there is no evidence

that appellant ever refused to cooperate with any expert's effort to examine him. Here (unlike Gilliam and Muhammad) there was substantial evidence before the trial court, at the time he refused to order competency proceedings pursuant to Rules 3.210 and 3.211, which established a bona fide doubt as to appellant's competency. Here (in stark contrast to Gilliam and Muhammad [3/]), the only expert testimony as to appellant's present competency was that he was probably incompetent, as well as irrational, suicidal, civilly committable, and seriously mentally ill.

In its effort to discount the persuasive impact of State v. Bauer, 245 N.W.2d 848 (Minn. 1976), the state first suggests that Minnesota employs a special competency standard of its own invention (S.70). To the contrary, while the Minnesota statute is indeed worded in a slightly different manner, a reading of

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3/ In Gilliam, the updated expert opinion of one of the examiners was that Gilliam remained competent, notwithstanding his refusal to cooperate. Under those circumstances, this Court held that no further examination was required. See Muhammad (at 972-73), citing Ross v. State, 386 So.2d 1191 (Fla. 1980) for the proposition that (at least under the former version of Rule 3.210, see appellant's initial brief, p.123-24 and n.73) an unequivocal finding of competency by one expert is sufficient, and it is not error to refuse to appoint a second expert when the defense fails to present evidence that a further examination is needed. In the present case, the only expert who testified concerning appellant's present competency in the penalty phase (Dr. McClane) was rather strongly of the opinion (though he could not at that point say so to a medical certainty) that appellant's already precarious mental condition had deteriorated to the point where he was probably no longer competent to stand trial. In view of this testimony, and especially in light of the accompanying circumstances, the defense clearly established, at minimum, that appellant's present competency was genuinely in doubt, and that further examination was needed.

Bauer (including the very footnote cited in the state's brief) amply demonstrates that that decision is based on the constitutional principles of Dusky, Pate, and Drope. See 245 N.W.2d at 850 n.1 and 854-58. Secondly, the state misleadingly suggests that the Minnesota Supreme Court retreated from Bauer in State v. Swain, 269 N.W.2d 707 (Minn. 1978). Such is not the case. The significant difference between Bauer and Swain is not, as the state would have it, the fortuity that there was a successor trial judge in Bauer. That is merely a fact; mentioned in passing in Swain but not critical to either decision. The constitutionally significant difference between the two cases is, rather, that in Swain there was no evidence before the trial court to suggest that the defendant was incompetent. 269 N.W.2d at 719-20. Thus the dichotomy between Swain and Bauer is somewhat analogous to the dichotomy between Gilliam and the instant case. In Swain and Gilliam there was simply no evidence suggesting incompetency from which it could be said that further evaluation was needed. In Bauer and the instant case, on the other hand, there was substantial evidence before the trial court that the respective defendants might well have deteriorated to the point of incompetency, and further inquiry was constitutionally required. As the Minnesota court stated (and as this Court has also recognized, in Lane v. State, 388 So.2d 1022, 1025 (Fla. 1980)):

> Drope [v Missouri] recognizes the possibly transient nature of an individual's competency and impliedly rejects reliance on prior findings of competency to foreclose further inquiry in light of present evidence suggesting

> incompetency. As therein stated: 'Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.'

State v. Bauer, supra, at 856 n.9.

Accord, Lane v. State, supra; Holmes v. State, 494 So.2d 230, 232 (Fla.3d DCA 1986); Pouncey v. United States, 349 F.2d 699, 700 (DC Cir. 1965); State v. Spivey, 319 A.2d 461, 471 (N.J. 1974).

Taking an additional swipe at Bauer, the state prefaces one of its comments by saying "Not to dwell on Minnesota law where our own state has been quite articulate as [to] the issues raised ..." (S.70). First of all, this is an issue of federal constitutional law, as well as one of state substantive and procedural law, and appellant has relied heavily (though far from exclusively) on Bauer as well-reasoned persuasive authority. While Bauer is admittedly not on "all fours" with the instant case on its facts, the circumstances of that case are more analogous to those involved here than any other decision undersigned counsel was able to find, and certainly more analogous than any of the decisions mentioned in the state's brief. However, appellant agrees with the state's observation that Florida courts have been quite articulate as to the importance of protecting defendants from being tried while incompetent, and the need for full compliance with the procedures set forth in Fla.R.Crim.P. 3.210 and 3.211 which are designed to effectuate that protection. If the state wishes to confine the discussion

to Florida law, that alone more than amply demonstrates that the trial court committed reversible error in failing to order competency proceedings under Rules 3.210 and 3.211 when the events in the penalty phase unfolded as they did. See e.g. Lane v. State, 388 So.2d 1022 (Fla. 1980); Scott v. State, 420 So.2d 549 (Fla. 1982); Hill v. State, 473 So.2d 1253 (Fla. 1985); Holmes v. State, 494 So.2d 230 (Fla.3d DCA 1986); Kothman v. State, 442 So.2d 357 (Fla.4th DCA 1983); Marshall v. State, 440 So.2d 638 (Fla.1st DCA 1983).

ISSUE IV

THE TRIAL COURT FAILED TO TAKE ADEQUATE MEASURES, BEFORE ALLOWING APPELLANT TO CONDUCT HIS OWN DEFENSE IN THE PENALTY PHASE, TO ENSURE THAT HIS CHOICE WAS INTELLIGENTLY AND UNDERSTANDINGLY MADE.

The state's argument on this point is an exercise in form over substance. The state asserts that appellant did not waive his right to counsel in the penalty phase, and therefore there was no need for the court to comply with the requirements of Faretta v. California, 422 U.S. 806 (1975) (S.78-85). (And, presumably, under the state's theory, no need to comply with the requirements of Westbrook v. Arizona, 384 U.S. 150 (1966) either; although the state does not even mention the Westbrook issue (which is discussed in appellant's initial brief, p135-142)). The state's argument ignores the reality of how this penalty phase was conducted. Appellant personally assumed control of his own defense, delivering his

own summation to the jury, and making the decisions on how to conduct the trial which are ordinarily (i.e. absent a waiver) reserved to the independent professional judgment of counsel. See Jones v. Barnes, 463 U.S. 745, 751 (1983); Strickland v. Washington, 466 U.S. 668 (1984); Cave v. State, 476 So.2d 180, 183 n.1 (Fla. 1985). Defense counsel were relegated, at best, to the role of standby counsel. 4/ The trial court recognized that the course of action appellant was insisting upon was tantamount to no representation at all, and that under these circumstances "it's necessary for me to determine whether you truly understand the consequences of your actions" (R942). Appellant's position is that the inquiry which followed was insufficient to satisfy the constitutional requirements of Faretta (Point IV-A) and Westbrook (Point IV-C); and also that the trial court abused his discretion in failing to recognize that special circumstances existed which would (and did) cause appellant to be deprived of a fair penalty trial if allowed to conduct his own defense (Point IV-B, see Fla.R.Crim.P. 3.111(d)(3); Johnston v. State, 497 So.2d 863, 868 (Fla. 1986); Cappetta

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4/ And the presence of standby counsel has never been held to obviate the need for full compliance with the principles of Faretta. See e.g. Goode v. State, 365 So.2d 381 (Fla. 1978).

v. State, 204 So.2d 913, 918 (Fla.4th DCA 1967)[5/]). The state now attempts to sidestep all of these arguments by indulging in the fiction that appellant did not conduct his own defense, but instead continued to be represented by counsel. To the contrary, in Smith v. State, 407 So.2d 894, 900 (Fla. 1981) the capital defendant "wanted to make the closing argument at the sentencing phase of his trial rather than have his attorney do so." Smith was "strongly urged" to allow his attorney to make the summation, but he insisted on doing it himself. This course of action amounted to an exercise of the right to self-representation, and a waiver of the right to counsel in the penalty phase. However this Court found that Smith's trial judge had

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5/ The state suggests that appellant's reliance on the Fourth DCA opinion in Cappetta may be misplaced, in light of this Court's reversal of that decision in State v. Cappetta, 216 So.2d 749 (Fla.1968). However, as the state sort of recognizes, the reversal was on the other grounds [see Scott v. State, 345 So.2d 414, 416 (Fla.2d DCA 1977)], and the 4th DCA opinion in Capetta remains good law (and has been cited as such) for the proposition for which appellant quoted it (at p.134 n.83 of his initial brief). In fact, Cappetta says essentially the same thing as Rule 3.111 (d)(3) ("No waiver [of counsel] shall be accepted where it appears that the defendant is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or complexity of the case, or other factors"). See Johnston v. State, 497 So.2d 863, 868 (Fla. 1986) (Rule 3.111 (d)(3) "contemplates that a criminal defendant will not be allowed to waive assistance of counsel if he is unable to make an intelligent and understanding choice because of, inter alia, his mental condition"). See also Ausby v. State, 358 So.2d 562 (Fla.1st DCA 1978)(citing 4th DCA Capetta); Robinson v. State, 368 So.2d 674, 675 (Fla.1st DCA 1979)(citing 4th DCA Capetta); Keene v. State, 420 So.2d 908, 910 (Fla.1st DCA 1982)(citing Ausby and Robinson); Williams v. State, 427 So.2d 768, 771 (Fla.2d DCA 1983)(citing 4th DCA Cappetta, Robinson, and Rule 3.111(d)(3)).

fulfilled his obligation as enunciated in Faretta, so the waiver in that case was properly accepted.[6/] In the present case, appellant assumed control of his own defense to as great, if not to a greater, extent than did Smith; the trial court's perfunctory inquiry met neither the requirements of Faretta nor Westbrook; and the acceptance of appellant's waiver of counsel was also an abuse of discretion under Rule 3.111(d)(3).

One final comment made in the state's brief must be addressed. The state observes:

> There is a presumption that fundamental rights are not waived. Fitzgerald v. Wainwright, 440 F.2d 1049, 1051 (5th Cir. 1971) citing Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 146 (1938). A request to forego counsel must be clear and unequivocal. Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982).

(S.82)

Appellant fully agrees with this principle of law. The state, however, has attempted to use it in an way that is thoroughly misleading. The import of Brown v. Wainwright, supra, and any number of other similar decisions, is that a defendant who fails to timely and unequivocally assert his right to self-representation in the trial court will not later be heard to complain on appeal or collateral attack that he was denied his right to self-representation.

6/ Note that there was no suggestion in Smith that the defendant might have been mentally incompetent to waive counsel, or to stand trial. Compare Westbrook and the other decisions cited at p.135-142 of appellant's initial brief.

As stated in Brown (at 610), "Because of the important and well-recognized benefits associated with the right to counsel [citations omitted] it is pre-eminent [over the right to self-representation] in the sense the right [to counsel] attaches unless affirmatively waived." The state, standing the principle of Johnson v. Zerbst on its head, seems to be arguing that, since there is a presumption that fundamental rights are not waived, a trial court is free to let a defendant handle his own trial without complying with Faretta or Westbrook, as long as the defendant's request to do so is unclear or equivocal. Properly understood, the presumption that fundamental rights are not waived means that the trial court must fully comply with the applicable procedures to ensure that the defendant is capable of making a rational and understanding choice, before accepting a waiver. Faretta; Westbrook; Fla.R.Crim.P. 3.111(d)(3). In the state's myopic view, the presumption that fundamental rights are not waived seems to mean that there is no need to worry about the protections which must be afforded before accepting a waiver of the right to counsel, as long as we call it by some other name.

ISSUE V

ASSUMING ARGUENDO THAT APPELLANT IS DEEMED NOT TO HAVE WAIVED HIS RIGHT TO COUNSEL, THEN DEFENSE COUNSEL'S FAILURE TO CALL AVAILABLE WITNESSES IN MITIGATION OR TO MAKE ANY ARGUMENT AGAINST A DEATH SENTENCE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AS A MATTER OF LAW.

Defense counsel refrained from calling available witnesses in mitigation, and presented no argument against a death sentence, because it was their perception that appellant had assumed control of his own defense in the penalty phase. Undersigned counsel believes that defense counsel's perception was accurate; i.e., that appellant (with the trial court's permission) exercised his right to self-representation, and counsel were placed, at best, in a "standby" role. (See Issue IV]. However, assuming (very much arguendo) that the state's position on Issue IV is correct, that "Mr. Pridgen did not waive his right to counsel, in fact he remained represented" (S.82), then that representation was patently ineffective as a matter of law and on the face of the record. See Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). Counsel have both the authority and the duty to exercise their independent professional judgment on behalf of the client. See Strickland v. Washington, 466 U.S. 668 (1984). Obviously, unless there has been a waiver of counsel [see Smith v. State, supra], closing argument is a prime responsibility of the attorney. Similarly, decisions regarding whether or not to call particular witnesses are ordinarily entrusted to counsel, not to the client. See e.g. Fuller v. Wainwright, 238 So.2d 65, 66 (Fla. 1970). Therefore, if (as the state maintains) appellant remained represented by counsel, then counsel were obligated to exercise their own judgment on these matters, rather than blindly defer to appellant's demands. This is particularly true in light of the fact that both attorneys believed that appellant was irrational and incompetent.

The state says a Rule 3.850 hearing is necessary. What for? Contrary to the state's suggestion that strategy or tactics might have accounted for counsel's inaction (S.86), it is absolutely clear from the record as it stands that if counsel had felt free to exercise their independent professional judgment, they would have called the witnesses (including Dr. McClane) to establish mental or emotional mitigating circumstances, and they would have made an argument to the jury asking them not to recommend death (see R940,944,963, 1003-1004,1013-1014). Under these circumstances, to require a Rule 3.850 proceeding would be a waste of judicial resources. See Blanco.

The state's other argument on this point is ever further off base. After contending (in Issue IV) that appellant did not waive his right to counsel, the state turns around in Issue V and contends that appellant did waive his right to effective counsel, by refusing to cooperate with them. However, appellant's non-cooperation (which counsel believed was the product of his psychiatric illness) in no way interfered with counsel's ability to present the mitigating testimony of Dr. McClane and appellant's parents and brother, nor did it prevent counsel from making a closing argument based on that mitigating evidence. The only thing that prevented counsel from actively representing appellant was their belief (shared by all concerned) that appellant had taken over his own defense. If that belief was mistaken, then counsel's representation fell somewhere between ineffective and nonexistent.

The state closes its argument on this point with the following comment:

> To rebut any assertion that [appellant's] refusal to cooperate was caused sub judice by any mental illness, Dr. McClane himself testified that it was Mr. Pridgen's depression over the verdict which reinforced his mistrust of the legal system and pushed him into total non-cooperation with his attorneys. (R992,996)

(S.87)

In framing this as an "either-or" proposition, as if mental illness and depression over the verdict were mutually exclusive phenomena, the state has resorted to the out-of-context record reference. Dr. McClane did indeed state that depression over the verdict may have been the "extra factor" (R992) or "extra element" (R995) "to push him into total noncooperation... [and], as I've said, marginal if not complete and unequivocal incompetence to be motivated to help himself and to assist his attorneys" (R995-96). However, Dr. McClane made it perfectly clear that he was referring to "[i]ncompetence in the sense of inadequately motivated to help himself and to assist his attorneys in his own defense on the basis largely of mental illness" (R986). Dr. McClane further expressed the opinion that appellant had a serious mental illness (R985); that he was badly in need of psychiatric treatment (R985); that he was "clearly civilly committable" (R985); actively suicidal (R985-86); that he was "close to the breaking point emotionally" (R985); that he was irrational in his decision making (R986,996), and that he was probably, at that point, incompetent to stand trial (R986,996). In view of

all this, the state's claim that Dr. McClane's testimony acknowledging the additional effect of appellant's reaction to the verdict[7/] operated "[to] rebut any assertion that refusal to cooperate was caused sub judice by any mental illness" is nothing short of doublespeak.

ISSUE X

THE TRIAL COURT ERRED IN IMPOSING A DEATH SENTENCE BASED IN SUBSTANTIAL PART ON AGGRAVATING FACTORS WHICH WERE EITHER UNSUPPORTED BY THE EVIDENCE OR INVALID AS A MATTER OF LAW.

Appellant's reply brief on this point will address only parts B (under sentence of imprisonment), C (previous conviction of a violent felony), and D (avoid lawful arrest). As to part E (cold, calculated, and premeditated) he will rely on his initial brief.

B. Under Sentence of Imprisonment

Once again, the state's penchant for quoting out of context surfaces, as follows:

> Under the very dictates of Peek, supra, cited by the appellant, probationary status may be considered as an aggravating circumstance as set forth in §921.141(5)(a), "If the order of probation

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7/ Also worth noting here is Dr. McClane's caveat, in his initial pre-trial competency evaluation, that appellant may become "overtly psychotic" when under stress (R1579). Presumably, the jury's guilty verdict caused appellant considerable stress, as well as depression, and could well have aggravated his pre-existing psychiatric condition. The state's insistence on treating appellant's depression as if it negated the existence or the seriousness of his mental disorder is completely at odds with the testimony actually given by Dr. McClane (R982-96).

> includes as a condition a term of incarceration and the capital felony is committed while the defendant is or should be incarcerated" Id. at 499 [emphasis supplied by the state]. Since Mr. Pridgen committed the instant crime during the three year period where his prison sentence was withheld, appellee would assert that the appropriate showing has been made to support this factor.

(S.121)

What Peek actually says is this:

> Probation is a sentence alternative but is not generally considered to be a sentence of imprisonment. An exception arises, however, if the order of probation includes as a condition a term of incarceration and the capital felony is committed while the defendant is or should be incarcerated. We find that the phrase "person under sentence of imprisonment" includes (a) persons incarcerated under a sentence for a specific or indeterminate term of years, (b) persons incarcerated under an order of probation, (c) persons under either (a) or (b) who have escaped from incarceration, and (d) persons who are under sentence for a specific or indeterminate term of years and who have been placed on parole. Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase "person under sentence of imprisonment" as set forth in section 921.141(5)(a). Consequently, this aggravating circumstance was improperly found in the instant case.

Peek v. State, 395 So.2d 492, 499 (Fla. 1981).

See also Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982); Ferguson v. State,417 So.2d 639, 646 (Fla. 1982).

Appellant was neither incarcerated nor was he an escapee at the time of the homicide, and the (5)(a) aggravating circumstance was improperly found.

C. Previous Conviction of Violent Felony

There are two alternative methods of proving this aggravating circumstance, neither of which was satisfied in this case. This Court has held that, in order to establish the (5)(b) aggravating circumstance, the conviction must disclose on its face that the felony involved the use or threat of violence to the person. Mann v. State, 420 So.2d 578,581 (Fla. 1982). In other words, the judgment of conviction will suffice if the offense is one which necessarily involves the use or threat of violence. Alternatively, the state can prove this circumstance by introducing the charging document, so that the trial court and this Court can determine whether it alleged, and whether the jury convicted the defendant of, a crime of violence. Mann v. State, supra, 420 So.2d at 581; see also Mann v. State, 453 So.2d 784 (Fla. 1984)(appeal on resentencing). However, the latter method obviously does not work if the jury did not convict the defendant as charged in the information or indictment, but instead convicted him of a lesser included offense. In the present case, the Lake County jury did not convict appellant of the charged offense of armed robbery (which necessarily involves the use or threat of violence); it convicted him of attempted robbery (which does not necessarily involve the use or threat of violence; see Mercer v. State, 347 So.2d 733 (Fla. 4th DCA 1977), and appellant's initial brief, p.163-67).

The state in its brief seems to acknowledge, or at least does not dispute, appellant's contention that neither of the two established methods of proof were satisfied (S121-123). Instead, the state concocts an inventive and specious argument, based upon extrinsic evidence (clearly improper, under Mann, to prove the aggravating factor) which was never introduced before the jury[8/] in either phase of the trial, and in which the state basically attempts to go behind the Lake County jury's verdict by claiming that they should have convicted appellant as charged. Specifically, the state argues that certain statements made by appellant to Dr. McClane during his pre-trial competency evaluation amount to an admission that the Lake County crime was actually a completed robbery. From this non-evidence, the state argues:

> Appellee would assert that this clearly rebuts appellant's assertions herein and shows that notwithstanding the jury's verdict of guilty on the lesser included of attempted robbery clearly the facts of this case as related by Mr. Pridgen to Dr. McClane and obviously considered by the trial court showed that Mr. Pridgen did in fact enter a used car lot armed with a shotgun, tied up the victim and stole money and a car. It is therefore evident that even though the jury in the Lake County case returned with a conviction on a lesser included offense, the information and the allegations therein fully support this aggravating

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8/ Nor could it have been.

> factor and the facts of the crime as filled in by Mr. Pridgen himself in his conversation with Dr. McClane and contained in Dr. McClane's report clearly supports the finding of this aggravating factor.

(S123)

The state's position is not only patently inconsistent with the case law [Mann I; Mann II; Oats v. State, 446 So.2d 90, 94-95 (Fla. 1984), see especially Barclay v. State, 470 So.2d 691, 695 (Fla. 1985) (a conviction of breaking and entering does not, on its face, prove a prior conviction of a violent felony; information derived solely from a PSI does not prove this factor beyond a reasonable doubt, and it cannot be upheld)], it is also riddled with constitutional and other complications. First of all, if appellant was not advised that his statements during the court-ordered competency examination could be used against him to establish aggravating factors in the penalty phase of his trial, the state's use (on appeal[9/]) of these statements to construct a basis for the "prior conviction of a violent felony" circumstance violates Estelle v. Smith, 451 U.S. 454 (1981). Secondly, the state's proposed approval of the aggravating factor based on what the state thinks the Lake County jury should have convicted appellant of, as opposed to

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9/ Clearly there was no reason for defense counsel to register an Estelle v. Smith objection below; since, to the best of his knowledge, Dr. McClane's competency report was not being used for this purpose. The State's current reliance on the statements in McClane's report is strictly an appellate-level device to circumvent its failure in the trial court to meet the standard of proof required by Mann.

what it did convict him of, violates the principle, recognized in all forms of sentencing, that a sentence may not be enhanced based on the trial court's finding of facts which are expressly or implicitly inconsistent with a jury's verdict.[10/] See e.g. Owen v. State, 441 So.2d 111,1113-14 (Fla.3d DCA 1983)(retention of jurisdiction over parole); Borrell v. State, 478 So.2d 1185, 1187-88 (Fla.4th DCA 1985) (sentencing as habitual offender); Callaghan v. State, 462 So.2d 832 (Fla.4th DCA 1984)(guidelines departure); Berry v. State, 458 So.2d 1155 (Fla.1st DCA 1984) (traditional discretionary sentencing). See especially Fletcher v. State, 457 So.2d 570, 571 (Fla.5th DCA 1984)(defendant was charged with robbery and convicted of grand theft; trial court's finding that defendant used or threatened force to accomplish the theft was inconsistent with the jury's verdict, and was an improper consideration in sentencing because "[c]onstitutionally a defendant should not be punished (sentenced) for conduct of which he has been acquitted"). Whether the state agrees with the Lake County jury or not, the fact remains that appellant was acquitted of the charged offense, and convicted of a lesser crime which does not disclose on its face [Mann] that it involved violence [e.g. Mercer].

The final, and perhaps the most significant, problem with the state's reliance on Dr. McClane's report to establish the aggravating circumstance is the fact the the jury never heard this "evidence". That being the case, where, under the

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10/ Either in the case in which sentence is to be imposed, or in a prior case which is being used for enhancement purposes.

state's theory, was the evidentiary basis for the jury to be instructed that it could consider this aggravating circumstance in deciding whether to recommend the death penalty? The error infected not only the trial court's sentencing order, but also the jury's penalty recommendation [see appellant's initial brief, p.166-67], and a new penalty trial before a newly impaneled jury in required. See Perry v. State, 395 So.2d 170, 175 (Fla. 1980); Trawick v. State, 473 So.2d 1235, 1240-41 (Fla. 1985).

D. Avoid Lawful Arrest

In his initial brief (at p.167), appellant stated that it appears that the trial judge found that the murder was committed for the purpose of avoiding or preventing arrest only because he could think of no other purpose. The state takes issue with that observation (S123), but then turns around and says essentially the same thing itself: "[It] should be noted in the instant case that the victim was in fact tied and subdued during the course of the burglary and the robbery sub judice and there appears to be no other plausible reason for the victim's murder other than avoidance of lawful arrest" (S124).

In addition to the fact that this does not approach the level of proof needed to establish the (5)(e) aggravating circumstance [see e.g. Riley v. State, 366 So.2d 19 (Fla. 1978); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979); Rembert v. State, 445 So.2d 337, 340 (Fla. 1984); Rivers v. State, 458 So.2d.762, 765 (Fla. 1984); Doyle v. State, 460 So.2d 353, 358 (Fla. 1984); Caruthers v. State, 465 So.2d 496, 499 (Fla. 1985)],

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Attention Ms. Erica M. Raffel, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, FL 33602, by mail this 27th day of January, 1988.

Steven L Bolotin

STEVEN L. BOLOTIN