IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
SEP 17 1990
CLERK, SUPREME COURT
By ______ Deputy Clerk

CHARLES LEWIS BURR,

Appellant,

v. CASE NO. 71,234

STATE OF FLORIDA,

Appellee.

______________________________/

ON REMAND FROM THE
UNITED STATES SUPREME COURT

ANSWER BRIEF OF APPELLEE ON REMAND

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STATEMENT OF THE CASE

Burr was indicted by the Leon County grand jury on October 29, 1981, and was charged with murder in the first degree and robbery with a firearm. The State filed a notice of intent to rely on similar fact evidence on April 6, 1982, and in response thereto, Burr filed a motion in limine on May 26, 1982. The motion in limine was denied by Judge J. Lewis Hall, after a pretrial hearing, wherein the trial court found a sufficient basis to allow the similar fact evidence to be presented at trial, but made it clear that the ultimate decision regarding the admissibility of the evidence would rest with the trial judge.

During the trial, no reference to the similar fact evidence was allowed during opening statement at the first phase of the trial. After a number of witnesses had testified on behalf of the State, similar fact evidence was proffered to the court and, after argument by counsel, the evidence was deemed relevant and admissible.

Following the close of the State's case in chief, Burr moved for a judgment of acquittal, which was denied. The jury found him guilty as charged on both counts. During the sentencing phase of the trial, the State presented no additional evidence. Burr presented several witnesses in mitigation. After arguments and instructions, the jury returned a recommendation of life imprisonment. The court, however, sentenced Burr to death on the first degree murder charge and sentenced Burr to ninety-nine years imprisonment for the armed robbery, retaining jurisdiction of the first-third of that sentence. In imposing

death, the trial court found three statutory aggravating factors and nothing in mitigation.

The Florida Supreme Court affirmed the conviction and sentence on direct appeal in **Burr v. State**, 466 So.2d 1051 (Fla. 1985), **cert. denied**, 474 U.S. 879 (1985). In 1987, a Governor's death warrant issued setting Burr's execution. At such time, Burr filed for relief in the circuit court pursuant to Fla.R.Crim.P. 3.850. Relief was denied by the circuit court and this Court affirmed said denial in **Burr v. State**, 518 So.2d 903 (Fla. 1987), **cert. granted, Burr v. Florida**, ____ U.S. ____, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988). The United States Supreme Court summarily vacated the opinion of the Florida Supreme Court and remanded the case to the court for consideration in light of its opinion in **Johnson v. Mississippi**, 487 U.S. 1201, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988).

Supplemental briefing was ordered by the Florida Supreme Court and further oral argument set to discuss the applicability of **Johnson v. Mississippi, supra**, to the instant case. On August 31, 1989, in **Burr v. State**, 550 So.2d 444 (Fla. 1989), the Florida Supreme Court vacated the death sentence and remanded the cause to the trial court for a new sentencing determination without the need for a new jury to be empaneled. Because the jury recommended a life sentence, the Florida Supreme Court remanded to the trial court to reconsider the aggravating circumstances versus any mitigating circumstances without the influence of the similar fact evidence. The State sought rehearing asserting that the similar fact evidence was not

admitted in violation of **Johnson v. Mississippi, supra**, and also asserted that the underlying facts of the robbery for which an acquittal resulted were properly before the trial court at sentencing. Rehearing was denied November 15, 1989, without opinion.

On February 13, 1990, the State filed its petition for writ of certiorari to the Supreme Court of Florida in the United States Supreme Court, asserting:

> On remand from this Court in **Burr v. Florida**, ____ U.S. ____, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988), the Florida Supreme Court erroneously applied **Johnson v. Mississippi**, ____ U.S. ____, 108 S.Ct. 1981, 100 L.Ed.2d 525 (1988), in vacating the death sentence and ordering a new sentencing proceeding.

On June 11, 1990, the United States Supreme Court granted the State's petition for writ of certiorari and "the judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of **Dowling v. United States**, 493 U.S. ____ (1990). **Florida v. Burr**, ____ U.S. ____, 110 S.Ct. 2608 (1990).

On August 1, 1990, this Court set forth a briefing schedule on remand from the United States Supreme Court in the instant cause.

STATEMENT OF THE FACTS

The following testimony was adduced at the trial held June 9 and 10, 1982:

Domita Williams identified Burr as the man who picked her up at her house at about 6:30 a.m. in order to take her to work on August 20, 1981. (R 830). By that date, Willialms and Charlie

Burr had been going together for two or three weeks and were talking of marriage. (R 832, 856). Burr went inside Williams' house and fifteen or twenty minutes later, or shortly before 7:00 a.m., the couple left the house on Mount Sinai Road, heading towards Tallahassee on Highway 27. (R 833-834). About 7:00 a.m., Burr pulled into the parking lot of a Suwannee Swifty convenience store and waited until Williams went inside. (R 834). Williams knew the victim, who was the store clerk, as "Steve" because she had stopped at this convenience store before. (R 834). No one besides the clerk was in the convenience store while she and Burr were there, and no one was in the parking lot area. (R 835). About five or ten minutes later, Williams came out of the store with a cheeseburger and Kit-Kat candy bar she had purchased. (R 834, 850). Burr then got out of the car and went inside the store. (R 835). Williams began eating her sandwich. She could see the upper part of Burr and the victim from the car. (R 836). After hearing a gunshot, she looked p and saw Burr but not the victim. (R 836, 837, 852, 853). Burr then returned to the car, smiling. Williams was crying because "he [Burr] had shot Steve" and she had "never witnessed anything like that before . . ." (R 837). Burr asked Williams what was wrong. Williams testified that Burr was wearing blue jeans and a "Master Red" shirt at the time (R 838), and further identified State's exhibit number one as being Burr's shirt. (R 839). Williams noticed a pistol-type handgun imprint in Burr's pocket. (R 838).

Williams further testified that after the incident at the convenience store, she and Burr drove to an apartment where Burr was staying with Katrine Jackson and her family. (R 840). Williams sat down and told Katrine Jackson and Tanny Footman, a cousin of Williams, who were present at the apartment, what had happened at the store and what she had seen. (R 840).

Subsequent to the apartment visit, Williams was taken to work at Sunland by Burr and once there, she told her supervisor, Katherine Haygood, about the incident at the store, but she did not tell the truth about what happened. (R 8410. Williams never contacted the police. (R 842). Williamls worked at Sunland August 20 and 21. (R 842). On August 21, she and Burr drove to Melbourne in his car. (R 843). Before they left, Burr picked up a cardboard box containing about twenty-five handguns. (R 844). Williams was present when Bur subsequently sold these handguns in Melbourne. (R 844).

Williams specifically stated that she did not drive her mother to work on August 20, 1981, and that her mother had driven her own car to work on that day. (R 845). She also testified that someone, not named at the time, had tried to get her to change her testimony, but that her testimony before the jury was true. (R 845).

On cross examination, it was established that Williams was afraid of Burr and apparently feared for her baby. (R 856, 857). Williams denied telling her mother or anyone else that she had lied in her statement to Sgt. Charlie Ash, an investigator with the Sheriff's Department, and that her mother was lying about August 20, 1981. (R 858-861).

On redirect examination, Williams explained her fear of Burr and testified that he did not run out of the store after the shooting, nor did he drive away rapidly from the store. (R 863).

Kim Miller, a regular customer, testified next. He stopped at the Suwannee Swifty at about 7:00 a.m., on August 20, 1981, and found the body of Stephen Harty, the clerk, lying over an open safe. (R 866, 871). He dialed the 911 emergency number at 7:09 or 7:10 a.m. (R 868). He identified State's exhibit number two as being a photo of the victim in the condition he found him. The crime scene was not disturbed prior to the authorities arriving. (R 867).

Robert Bailey, a paramedic, responded to Kim Miller's 911 call, and discovered the victim to have a bullet wound behind the left ear and determined him to be dead. The victim appeared to be on his knees. (R 871). Miller's call came in at 7:09 a.m. (R 870).

Deputy Ray Wood secured the area thereafter and did not allow the area to be disturbed. (R 874).

Johnny McCord, a supervisor for Suwannee Swifty, testified that $252.75 was missing from the store's register and safe. (R 877, 878).

Bill Gunter, a crime scene technician, described the store for the jury via photographs. (R 881, 882). He also identified State's exhibit number five as being bullet fragments removed from the victim's head. He received those from Dr. Wood during the autopsy. (R 887-889).

Charlie Ash, Jr., an investigator with the Leon County Sheriff's Office, testified that he arrested Burr on September 29, 1981, after conducting an investigation. He also recovered Burr's "Master Red" shirt from Domita Williams. (R 903).

Sam Bruce, another sheriff's investigator, recovered two .22 caliber bullets from the apartment where Burr was staying prior to his arrest. (R 905-906). Burr's counsel stipulated to the admissibility of the bullets. (R 908, 909). Donna Cormier testified only in order to provide the chain of custody of the "Master Red" shirt and it was admitted into evidence. (R 910).

Don Champagne, a firearms examiner for the Florida Department of Law Enforcement, testified that the fragments removed from the victim's head were the remains of a .22 caliber bullet. (R 913). The fragments were entered into evidence. (R 914).

Katrine Jackson verified Domita Williams' prior testimony. On August 20, 1981, Williams came to the apartment and was tense and nervous. Burr acted abnormally later in the day. Williams told her about what she had seen happen at the store earlier that morning. (R 921-922). Jackson allowed officers to search Burr's room on September 29, 1981. (R 921. 922). On cross examination, however, Jackson testified that Williams had not told her that she had been at the convenience store with Burr. (R 923). The first indication that the trial would taken unexpected paths occurred at this point; Jackson's testimony surprised the prosecutor. (R 924-956). Jackson eventually took the stand again and admitted she lied on cross examination. (R 956-957).

Jackson then testified that Williams did tellher about what Burr did at the convenience store the morning of August 20, 1981. (R 957-958).

Dr. Thomas Woods' deposition ws read to the jury by agreement. Dr. Woods performed the autopsy on Steve Harty, the victim. (R 964). He found a bullet wound behind the left ear. (R 965). The autopsy revealed that the shot was fired from close range and that the gun's relative position to the victim's head, slightly to the left, and probably pointed downward somewhat. (R 966). Death was rapid and no purposeful motion on the part of the victim would have been likely after the shot was fired. (R 967-968). Dr. Woods' findings were consistent with the victim being shot while on the floor. (R 969).

At this point in the trial, the similar fact evidence was proffered and deemed admissible by the trial court. (R 975-1042).

Emil Farrell worked at a Majik Market convenience store in Palm Bay, which is in the vicinity of Melbourne. (R 1050). On Saturday evening, August 22, 1981, he got a phone call at home from someone asking him who was working at the store the next morning. (R 978). Farrell replied that he was. The next morning, Sunday, August 23, Farrell received another phone call asking who was working. He again said he was. (R 1051).

At about 8:00 a.m., Burr went into Farrell's store and stood by the microwave until the store was empty. He approached Farrell and asked him if his name ws Farrell. When Farrell said yes, Burr asked him if he had ever seen him. Farrell said no.

Burr then pulled out a gun and said, "I'm going to kill you. Open the register." (R 1051, 1052). Burr had brought several items to the register area prior to pulling the gun. (R 1052). He told Farrell two more times to open the register. Without getting any money and without any provocation on Farrell's part, Burr shot Farrell twice with a small caliber gun. (R 1052-1053, 1060).

With Burr still inside the store, Farrell ran outside and asked a customer, who had just driven up, for help. (R 1055). The man fled and Burr ran out of the store, jumped into a rather small, old blue or green car, and left. (R 1058). This occurred three days after the Harty murder. Farrell identified Burr from among many photographs shown to him. (R 1056, 1057).

James Griffin worked in a Majik Market convenience store in Port Malabar, also near Melbourne, Florida. (R 1061). Griffin was preparing for clean-up late in the evening on August 28, 1981, and was by himself in the store when Burr came in. (R 1061-1062). Burr pulled out a small caliber handgun and said, "Give me all your money and don't be a fool." (R 1063). After Griffin had given him the money, Burr stepped back and shot Griffin once in the abdomen. Griffin said he "would get him for this" and turned. Burr than shot him in the left elbow and left in a brown or maroon car. (R 1063, 1065). This occurred eight days after the Farrell shooting.

Lloyd Lee worked in a 7-11 convenience store in Melbourne. About midnight on September 8, 1981 (twelve days after the Harty murder), Lee was alone in the store. Burr came in, picked up

some items, and came to the cash register. (R 1069-1070). As Lee rang up the items, Burr pretended to reach for a wallet, but pulled a small caliber gun instead. (R 1069-1070). After getting the money, he told Lee to "be cool", then turned to leave. He turned back, however, and shot Lee twice. (R 1070). The shooting was without provocation. (R 1071). Burr walked rapidly away. (R 1072). Lee identified him from hundreds of photographs. (R 1073). The State rested. (R 1076).

The defense's case began with testimony from a series of customers who arrived at the Suwannee Swifty store on August 20, 1981, from shortly after 7:00 a.m. until approximately 7:10 a.m. all saw Steve Harty alive.

Clarence Lohman arrived about 6:50 a.m. and left right after 7:00 a.m. (R 1078). As he was leaving, two other cars drove up. (R 1078). Vincent Prichard drove up around 7:00 a.m. As he left the store, he saw a black man wearing glasses walk towards the store, stop, then walk away. (R 1082-1083). A tall young man drove up as Prichard drove off. (R 1083). Although Prichard drove away, two minutes later he drove past the store, after he had picked up some men. (R 1086). As he drove by, he saw Kim Miller, a friend of his, pull into the parking lot of the store. (R 1086).

John Thompson pulled into the store about six minutes after 7:00 a.m. and parked next to a blue Ford. (R 1102). When he went inside, he saw Harty, who was acting unusual, as if he had something else on his mind. (R 1106). Another man, not resembling Burr, stood at the back of the store by the cooler.

(R 1109). He acted suspiciously, like he was just passing time. (R 1116).

Minnie Pompey, Domita Williams' mother, testified that on August 20th, Williams drove her to work about 6:30 a.m. (R 1156). Pompey worked at a day care center about a 20-minute drive from where she lived, and that morning, Pompey punched in a 6:56 a.m. (R 1157). Williams stayed for a few minutes to put her child into the center, and about five or ten minutes after 7:00 a.m., she started on the 20-minute trip back home. (R 1158).

Shortly after 7:00 a.m., Ruth Grant and her daughter, Valerie, were heading west toward Florida State University along Highway 27. They passed the Suwannee Swifty and saw several police cars there. (R 1194). A short time later, they saw an ambulance heading towards the Suwannee Swifty and, seconds later, Domita Williams, a relative of theirs, passed, also apparently heading home. (R 1195).

Domita Williams then took the stand for the defense and recanted her previous testimony. (R 1266-1286). She testified that August 20, 1981, was the first day she had to report to work at the Sunland Training Center in Tallahassee. (R 1269). Because she did not have a car of her own, she drove her mother to work so she could use her mother's car. (R 1269). As she returned home, she passed by the Suwannee Swifty store and saw several police cars there. (R 1270). She was at work by 9:00 a.m., and about 5:00 p.m., she saw Burr and he stayed with her that evening. (R 1271-1272).

On cross examination, the following was revealed:

Williams disputed that she had ever told Katherine Haygood, her supervisor, that she had been in the Suwannee Swifty the morning of the robbery/murder (R 1136, 1137; **compare** to 1286-1288); she admitted her mother was pressuring her to change her testimony (R 1288); she never saw the ambulance Ruth and Valerie Grant claimed they saw at the same time they saw Domita in her mother's case (R 1289); she admitted that when she gave her original statement to Charlie Ash, she knew Katrine Jackson and Tammy Footman had previously given statements (R 1290-1291); she could not explain the "cheeseburger store" away . . . how it cropped up in everyone's statements (R 1292-1294); she was aware that "[m]urder, you get the chair" and "[p]erjury, I don't know what you can get" (R 1294); she admitted to saying threats were made when she gave her testimony (where no threats were made) was consistent with her statement (R 1296, 1297); she acknowledged that her grand jury testimony (where no threats were made) was the same (R 1297-1298); she acknowledged discussing her expected trial testimony with the prosecutor the Friday before the trial (where no threats were made) and it was the same (R 1298-1299); she acknowledged that Mr. Meggs had never threatened her or acted mean to her (R 1299); she verified that although Mr. Modesitt used strong language, Mr. Meggs only emphasized "the importance of telling the truth" (R 1302); she stated that "after [she] found out they didn't have any evidence against [Burr]", that at that point she decided to "tell the truth" (R 1203-1304); that Mr. Meggs calmed her down and she agreed that her original

statement was true (R 1304-1305); she told Mr. Meggs that she was scared and people were trying to persuade her to change her testimony and Mr. Modesitt apologized to her (R 1305); she acknowledged that she received a call from defense counsel after her original trial testimony and but for that call she did not "think" she would have returned and recanted her original testimony (R 1307); she emphasized once again that she was scared of Burr, for herself, and for her baby (R 1307, 1308); and she denied ever discussing the Suwannee Swifty incident in the presence of Burr and Darrell Footman (R 1309; **compare** to 1140-1144).

Leola Powell testified as the first rebuttal witness. She saw Burr's car at Williams' house between 6:30 a.m. and 7:00 a.m. on August 20, 1981. (R 1335). At 7:45 a.m., the car was gone. (R 1336, 1337).

Tammy Footman's testimony was proffered because it agreed that she had heard the previous days' testimony, but not Williams' recantation. (R 1320, 1322, 1324, 1325, 1342, 1352). Burr's counsel suggested the proffer and at its conclusion, admitted the testimony was "along the lines of her statement". (R 1325, 1351). Footman was allowed to testify and in the process verified Katrine Jackson's prior testimony and specifically stated that Williams told her the "cheeseburger store" the morning of the incident. (R 1357, 1358-1361).

Ray Wood testified that the ambulance was already at the Suwannee Swifty when he arrived at 7:21 a.m. on the morning of the robbery/murder and that no ropes were strung until at least 7:30 a.m. (R 1367-1369).

Charlie Ash was recalled and imparted the details of his investigation. (R 1370-1373). He knew Williams had information after talking with Katrine Jackson and Tammy Footman, but he never told Williams what they had stated. (R 1376-1378). Williams' mother was hostile (R 1375), and he got no response fromher whenhe asked how she knew if her daughter knew something about the Suwannee Swifty incident. (R 1374, 1375). Ash denied ever threatening Domita Williams. (R 1375). The taped interview he conducted with Williams was played for the jury for the purpose of determining the atmosphere of that statement. (R 1382, 1386). The State rested and all testimony concluded.

SUMMARY OF ARGUMENT

Dowling v. United States, 493 U.S. ____, 100 S.Ct. 668 (1990), authorizes the use of similar fact evidence in the instant case. The Court's erroneous conclusion that said admissions were error, albeit harmless, must be corrected. Since the similar fact evidence was admissible, the trial court, the sentencer, properly considered this evidence at both the guilt and penalty phases of Burr's capital murder trial.

ARGUMENT

DOWLING v. UNITED STATES, 493 U.S. ___, 110 S.Ct. 668 (1990), SUPPORTS THE STATE TRIAL COURT'S DETERMINATION THAT THE SIMILAR FACT EVIDENCE PRESENTED IN BURR'S CASE WAS PROPERLY ADMITTED

In **Burr v. State,** 550 So.2d 444, 446 (Fla. 1989), the court concluded:

> . . . Evidence of the collateral act for which Burr received an acquittal is inadmissible under **Johnson.** However, considering that the evidence of this collateral act was in addition to other evidence of guilt, we believe its admission, though erroneous, was harmless, that the error did not contribute to Burr's conviction in this case. **State v. DiGuilio,** 491 So.2d 1129 (Fla. 1986).

Similar fact evidence does not require a conviction or an acquittal in order to permit the use of that evidence. **Dowling v. United States,** 493 U.S. ____, 110 S.Ct. ____, 107 L.Ed.2d 708 (1990) (collateral estoppel does not bar the use of evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted). **See also Huddleston v. United States,** 485 U.S. ____, 99 L.Ed.2d 771 (1988) (similar fact evidence may be admitted, "if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act"). In **Johnson v. Mississippi, supra,** the court, in considering the propriety of the death penalty based on evidence of the "conviction", emphasized the distinction between an aggravating factor supported by a subsequent invalidated "conviction", rather than an aggravating factor supported by the underlying conduct giving rise to the conviction. The court held that evidence of the underlying conduct may be considered by the

sentencing authority even when the conviction itself may not. **Johnson v. Mississippi,** 108 S.Ct. at 1986, citing **Zant v. Stephens,** 462 U.S. 862, 887, n.24 (1983).

In **Burr v. State,** 518 So.2d 903 (Fla. 1987), an overturned conviction was not the basis upon which the death penalty was bottomed. Rather, similar fact evidence presented in the guilt portion of Burr's trial established information upon which the trial court could look to in ascertaining whether the murder constituted the aggravating factor of cold, calculated and premeditated. **See Burr v. State,** 518 So.2d at 905. Justice Shaw's opinion concurring in result only, and §921.141(1), Fla.Stat. (1981).

Evidence regarding Burr's criminal acts was proffered and deemed admissible by the trial court at the guilt phase of Burr's trial. That evidence was presented to show common-scheme, **modus operandi** and identity of Burr as the culprit in the instant robbery/murder case. At the penalty phase, the State presented no additional evidence in aggravation. The State made no further mention of the similar fact evidence admitted at trial during the guilt phase. Rather, defense counsel made the only references to the similar fact evidence during his closing remarks. Those references to the jury were to disregard the State's introduction of other crimes presented because, at trial, the State "would have prosecuted Burr for those crimes had they had sufficient evidence." Pursuant to **Dowling v. United States, supra,** the use of similar fact evidence at the guilt portion of Burr's trial was proper. Equally, reliance on that evidence was proper at the

penalty phase. Here, as in all admissions of similar fact evidence, the State was required to demonstrate facts and evidence sufficient to support a conclusion that Burr committed other acts or misconduct. As evidenced by the penalty phase transcript, none of the aggravating factors utilized to support the death penalty **were singularly premised** on the similar fact evidence. **See**, however, Justice Barkett's dissenting opinion, **Burr v. State**, 518 So.2d at 907-908.

In **Burr v. State**, 550 So.2d at 446, the court observed:

> . . . The evidence that Burr had committed crimes similar in nature and method to the crime he was alleged to have committed in this case was relevant to establish identity and intent. **Burr**, 466 So.2d at 1053. A conviction for other crimes, wrongs or acts, has never been a prerequisite for the admission of evidence of those acts, so long as the evidence is relevant to some issue other than bad character or propensity. §90.404(2)(a), Fla.Stat. (1981). Therefore, it is not relevant during the guilt phase that the convictions were not obtained against Burr for the other three crimes. Evidence of the collateral act for which Burr received an acquittal is inadmissible under **Johnson**. However, considering that the evidence of this collateral act was in addition to other evidence of guilt, we believe its admission, though erroneous, was harmless.

This determination of error occurred because, subsequent to Burr's trial (similar fact evidence was admitted), Burr was acquitted of one of the robberies and the State **nolle prossed** another, leaving only one conviction. The court, in **Burr**, 550 So.2d at 446, reasoned that, albeit the admission of similar fact evidence at the guilt phase was harmless error beyond a reasonable doubt, the court could not say "beyond a reasonable

doubt, that the consideration of this evidence did not contribute to the sentence, particularly in light of the jury's recommendation of life." The court further concluded:

> We reject the notion that the one instance of collateral conduct for which Burr was acquitted was merely cumulative of the other two instances presented at trial. We have no way to determine the weight given each witnesses' testimony. As the reviewing court, it is not our function to weigh the credibility of each witness, but rather, it is that of the trial judge. Nor can we determine whether the one improperly admitted instance of collateral conduct was determinative of the outcome.

550 So.2d at 446.

As evidenced by the United States Supreme Court's decision in **Dowling v. United States, supra,** (and remand to this Court based on that decision), it is clear in the first instance this Court misapplied **Johnson v. Mississippi, supra,** thus finding the admission of similar fact evidence, which resulted in an acquittal, error, albeit harmless error, as to guilt. **Johnson v. Mississippi, supra,** was never intended to undercut the availability or use of similar fact evidence either at trial or at the penalty phase with regard to evidence in support of statutory aggravating circumstances or to negate tendered mitigating evidence. Indeed, other courts have recognized and appreciated the dichotomy herein set forth. For example, in **Richardson v. Johnson,** 864 F.2d 1536, 1541-1542 (11th Cir. 1989), that court, in reviewing a challenge as to effective assistance of counsel, observed:

> . . . Even if the sentencing judge could not rely on these North Carolina convictions because they were unconstitutionally

obtained, evidence of Richardson's past criminal "activity" would have been admissible if the sentecing judge had found such information reliable. **See Tucker v. Kemp**, 762 F.2d 1480, 1487 (11th Cir.) (en banc), **vacated**, 474 U.S. 1001, 106 S.Ct. 517, 88 L.Ed.2d 452 (1985), **reinstated**, 802 F.2d 1293 (1986), **cert. denied**, 480 U.S. 911, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987) (when sentencing, court can consider evidence of criminal indictments and even evidence of criminal activity for which no charges have been filed if evidence is reliable); **Cf. Williams v. Lynbaugh**, 814 F.2d 205, 207-08 (5th Cir.), **cert. denied**, ____ U.S. ____, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987) (evidence of 'unadjudicated criminal conduct', confirmed by witness, is admissible in capital sentencing trial).[11]

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[11] Contrary to Richardson's suggestion at oral argument that **Johnson v. Mississippi** (cite omitted) weakens the precedential of **Tucker v. Kemp**, we find that **Johnson** supports this Court's language in **Tucker**. In **Johnson**, the Supreme Court reiterated its conclusion that sentencing may not be based on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process' (cites omitted). The court emphasized the distinction between a conviction subsequently rendered invalid and the underlying conduct that gave rise to the conviction, suggesting that evidence of underlying conduct may be considered by the sentencing authority even when the conviction itself may not be. **Id.**

864 F.2d at 1541-1542. **See also Jones v. Butler**, 864 F.2d 348, 364-365, 370 (5th Cir. 1988), citing and distinguishing **Johnson v. Mississippi, supra**, and **Edwards v. Scroggy**, 841 F.2d 204, 212-214 (5th Cir. 1988).

The sentencer, the trial judge, did not consider evidence that was revealed to be materially inaccurate. As reflected by the factual recital presented at trial, Charles Lewis Burr was

the perpertrator of three other robberies, and this similar fact evidence admitted at trial went unchallenged. It was unimportant to the sentencer to know the results of the subsequent prosecutions because it was Burr's criminal conduct during the course of these three robberies, not his convictions, that was the basis of the sentencer's determination that this evidence was applicable. Nothing resulting from **Johnson v. Mississippi, supra**, erodes the integrity of the trial judge's assessment that death was the appropriate sentence. Indeed, because **Dowling v. United States, supra**, controls, there was no error in the admission or the consideration of similar fact evidence.

Burr asserts in his brief on remand, "the question is whether unadjudicated criminal conduct can be the evidentiary basis for imposing a death sentence". The State would submit the answer is yes because the real question is whether unadjudicated criminal conduct can be the evidentiary basis for imposing a death sentence when that death sentence is based on aggravating factors proven in part by the admission of valid similar fact evidence.

This is the fourth time this Court has the **Burr** case before it. On two previous occasions, specifically, on direct appeal and on appeal from the denial of a Rule 3.850, this Court has affirmed the trial court's override of the jury's recommendation. In **Burr v. State**, 550 So.2d 444 (Fla. 1989), on remand from the United States Supreme Court, the court vacated the override because "we cannot say, beyond a reasonable doubt, that the consideration of this evidence did not contribute to the

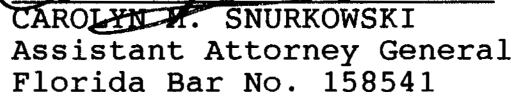
sentence, particularly in light of the jury's recommendation of life." The court was wrong in its assessment with regard to the similar fact evidence error. Having found no basis in the past to justify a vacation of the jury override **sub judice**, the State would submit that this Court must reinstate the death penalty in light of **Dowling v. United States, supra**.

CONCLUSION

Based on the foregoing, the State would urge this Court to reinstate the death penalty against Charles Lewis Burr.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Steven L. Seliger, Esq., 16 North Adams Street, Quincy, Florida 32351, this 17th day of September, 1990.

CAROLYN M. SNURKOWSKI
Assistant Attorney General