

IN THE SUPREME COURT OF FLORIDA

CLERK OF THE SUPREME COURT  
STATE OF FLORIDA  
AUG 20 1993  
CLERK OF THE SUPREME COURT  
STATE OF FLORIDA

CHARLES LEWIS BARR,  
Appellant,

\*

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vs.

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CASE NO. 71,234

STATE OF FLORIDA,  
Appellee.

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ON REMAND FROM THE  
UNITED STATES SUPREME COURT

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INITIAL BRIEF OF APPELLANT ON REMAND

BY: STEVEN L. SELIGER  
229 East Washington Street  
Quincy, Florida 32351  
(904) 875-4668

Attorney for the Appellant

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PRELIMINARY STATEMENT

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The record of the initial trial and appellate proceedings is before this Court. Burr v. State, 466 So.2d 1051 (Fla. 1985). The substantive information subsequent to this is found in the following documents:

(1) motion for post-conviction relief;\*

(2) the State's answer and Motion for Summary Dismissal;\*

(3) the Appellant's Memorandum of Law filed with the trial court;\*

(4) the Order on Motion for Post-Conviction Relief;  
and

(5) the transcript of the hearing held on October 1, 1987 on the motion and the state's response.

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\*These items have attachments and are part of the record on appeal.

STATEMENT OF THE CASE AND FACTS

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I. STATEMENT OF THE CASE

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A. Nature of the Case.

This case is before this Court on remand from the United States Supreme Court, Burr v. Florida, 468 U.S.\_\_\_\_\_, 108 S.Ct. 1981 (1988), of this Court's opinion affirming the summary denial of Mr. Burr's motion for post-conviction relief. Burr v. State, 518 So.2d 903 (Fla. 1987).

B. Course of the Proceedings.

Mr. Burr was indicted by a Leon County grand jury for the first-degree murder and robbery with a firearm of Steve Harty. On June 11, 1982, Mr. Burr was convicted as charged. Three days later, the trial jury recommended a life sentence for the first-degree murder proceeding.

On June 21, 1982, the trial court overrode the jury recommendation of life and sentenced Mr. Burr to death. Mr. Burr also received a 99-year sentence for the robbery conviction.

The convictions and sentences were appealed to this Court, Burr v. State, 466 So.2d 1051 (Fla. 1985), and affirmed. Rehearing was denied on April 26, 1985 and this Court issued its mandate on June 3, 1985.

A timely petition for writ of certiorari was filed in the United States Supreme Court and ultimately denied. Burr v. Florida, \_\_\_\_\_ U.S. \_\_\_\_\_, 106 S.Ct. 201 (1985).

Mr. Burr's case was considered by the Governor and Cabinet of Florida for executive clemency. Clemency was denied and the Governor signed a death warrant and scheduled an execution date for the week of October 22-29, 1987. The actual execution date was set for October 23, 1987.

Mr. Burr then filed a motion for post-conviction relief, pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The trial court denied this motion and, after staying the execution, this Court affirmed the denial. Burr v. State, 518 So.2d 903 (Fla. 1987). The United States Supreme Court granted cert, 108 S.Ct. 2840 (1988), and remanded in light of Johnson v. Mississippi, 486 U.S. \_\_\_\_\_, 108 S.Ct. 1981 (1988).

C. Disposition in the Lower Tribunal.

This case is on remand from the United States Supreme Court.

II. STATEMENT OF THE FACTS

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The facts of this case are set out in this Court's opinion, Burr v. State, 466 So.2d 1051 (Fla. 1985), and the appellate briefs filed as part of that appeal and which are a part of the record in this case.

For purposes of this brief, the relevant facts are contained in Mr. Burr's motion for post-conviction relief and subsequent memorandum of law, and the State's response.

SUMMARY OF THE ARGUMENT

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This case is once again before this Court to determine whether it is affected by a decision issued by the United States Supreme Court after the judgment was entered in this matter. See R. Stern, E. Gressman and S. Shapiro, Supreme Court Practice, Section 5.12, p. 279 (6th ed. 1986).

The issue on remand is the effect of Johnson v. Mississippi, 486 U.S. \_\_\_\_\_, 108 S.Ct. 1981 (1988) on Mr. Burr's first-degree murder conviction and resulting death sentence. Johnson requires that a death sentence not be predicated on evidence that is constitutionally irrelevant and unreliable. Like Johnson, Mr. Burr was sentenced to die based on information that later proved to be untrustworthy. Unlike Johnson, Mr. Burr's conviction also relied heavily on this same information.

This Court must now revisit the previous treatment of this issue to specifically account for the evidence which Johnson says cannot be used. In doing so, this Court must find that Mr. Burr's conviction and sentence must be vacated.



ARGUMENT

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JOHNSON V. MISSISSIPPI REQUIRES  
THIS COURT TO VACATE MR. BURR'S  
FIRST-DEGREE MURDER CONVICTION  
AND RESULTING SENTENCE OF DEATH

In Johnson v. State, 477 So.2d 196 (Miss. 1985), Johnson was sentenced to death, in part, on an aggravating factor wholly dependent on a prior criminal conviction.\* Subsequent to the direct appeal in the case, Johnson successfully had the prior conviction vacated and the New York indictment was ultimately dismissed. Johnson came back to court, arguing that the use of evidence, properly admitted at the time of the sentencing proceeding but now inadmissible, rendered the death sentence invalid. For a variety of reasons, the Mississippi Supreme Court determined that a subsequent change in the admissible nature of evidence could not be the basis for a finding that the death sentence was improperly imposed. Johnson v. State, 511 So.2d 1333 (Miss. 1987).

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\*Florida has a similar provision. Section 921.141(5)(a), Florida Statutes (1987).

In this case, the Court held that his subsequent acquittal of one of the crimes to which witnesses testified at his trial, and the nolle prosequere of another renders the evidence of those acts inadmissible. This Court has held that evidence of collateral offenses which have been nolle prossed is admissible. Holland v. State, 466 So.2d 207 (Fla. 1985). As to the time the Williams [footnote omitted] rule evidence was admitted, it was not error to do so. This much has had been settled on direct appeal. There is no reason to suggest that the subsequent acquittal changes the admissibility subsequent to the trial. This Court will not render evidence retroactively inadmissible. (emphasis supplied).

Burr v. State, 518 So.2d 903, 905 (Fla. 1987).

Johnson v. Mississippi, 486 U.S. \_\_\_\_\_, 108 S.Ct. 1981 (1988) requires this Court to reevaluate the effect of the subsequent acquittal on Mr. Burr's conviction and sentence.

It should be noted that there is no procedural bar to this Court's consideration of this issue. The matter was raised on direct appeal by way of a motion to supplement the record. This Court denied the motion without comment. It was

raised again at the first opportunity available to Mr. Burr, in the motion for post-conviction relief. Florida, like Mississippi, has long allowed a collateral attack on a conviction when the conviction was used either as (1) an element of the offence, State v. Davis, 203 So.2d 160, 162 (Fla. 1967)(possession of a firearm by a convicted felon) or (2) to enhance a sentence, Lee v. State, 217 So.2d 861, 864 (Fla. 4th DCA 1969)(recidivist, or second offender, statute).

Once the procedural obstacle is surmounted, the merits are easily dealt with in Mr. Burr's case. Everyone agrees that evidence used to convict and sentence him, later became inadmissible. After the conviction and sentence were final in Leon County, Mr. Burr was taken to stand trial in Brevard County for the three criminal charges that were the basis for the Williams rule evidence during his trial. Mr. Burr, after a trial by jury, was found not guilty of the charges relating to Lloyd Lee. The state attorney's office then nolle prossed the charges relating to Emil Farrell. Although there is no specific information as to the reason for the dismissal, it is not wild speculation to conclude

that the prosecution thought its case against Mr. Burr was less than rock solid after the Lee acquittal.

Further, there is no question that this evidence was perceived as relevant and significant in finding Mr. Burr guilty and sentencing him to death. This Court, on direct appeal, determined that the similar fact evidence was relevant as to identity and intent to kill. Burr v. State, 466 So.2d 1051, 1053 (Fla. 1985). The prosecutor stressed the similar fact evidence during closing argument in the guilt/innocence phase of the trial.

Folks, this is an important proceeding for Steve Harty. It is an important proceeding for Emil Farrell. Its an important proceeding for James Griffin. Its important for Mr. Lee.  
(emphasis supplied)

(T-1509).

Mr. Lee, when asked if he had "any questions in your mind" as to whether Mr. Burr was the assailant, testified

No questions at all, sir. I'm sure as to he is the one that shot me as I am sitting here talking to you.

(T-1073).

At sentencing, the similar fact evidence was used to prove the aggravating circumstance that the "murder was committed for the purpose of avoiding a lawful arrest," Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985) and that the murder was cold, calculated and of heightened premeditation.\*

There is no doubt that the use of this evidence fatally infected both the truth finding process in the guilt/innocence stage and the reliability requirement of the penalty phase.

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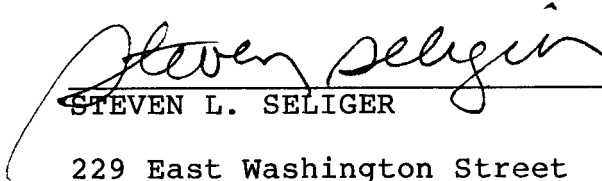
\*For an excellent discussion of the lack of evidentiary support for the proposition that this was an execution-style murder, see Burr v. State, 518 So.2d 903, 907-908 (Fla. 1987). Justice Barkett, dissenting.

CONCLUSION

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Based on the foregoing analysis, this Court should vacate Mr. Burr's conviction for first-degree murder and death sentence and remand to the trial court for a new trial.

Respectfully submitted,

  
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STEVEN L. SELIGER

229 East Washington Street  
Quincy, Florida 32351  
(904) 875-4668

Attorney for the Defendant

CERTIFICATE OF SERVICE  
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I HEREBY CERTIFY that a copy of the foregoing has been sent by United States Mail to Mr. Richard E. Doran, Ms. Elizabeth Masters, Ms. Carolyn M. Snurkowski, Assistants Attorneys General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this 25<sup>th</sup> day of August, 1988.

  
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STEVEN L. SELIGER