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AUG 27 1990

CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

CHARLES LEWIS BURR,

*

Appellant,

*

vs.

*

CASE NO. 71,234

STATE OF FLORIDA,

*

Appellee.

*

*

ON REMAND FROM THE
UNITED STATES SUPREME COURT

INITIAL BRIEF OF APPELLANT ON REMAND

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TABLE OF CONTENTS
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	Page Number
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
DOWLING V. UNITED STATES IS INAPPOSITE TO THE CONSTITUTIONAL REQUIREMENT OF AN ACCURATE AND RELIABLE DEATH SENTENCE PROCEEDING.	
CONCLUSION	12
CERTIFICATE OF SERVICES	13

TABLE OF CITATIONS

=====

CASES CITED	Page Number(s)
BURR V. STATE 466 So.2d 1051 (Fla. 1985)	1, 3, 10
BURR V. STATE 474 U.S. 879 (1985)	2
BURR V. STATE 518 So.2d 903 (Fla. 1987)	1, 2, 8, 11
BURR V. STATE 550 So.2d 444 (Fla. 1989)	1, 3, 8
DOWLING V. U.S. 493 U.S. ____ (1990)	3, 4, 5, 7, 12
EUTSY V. STATE 541 So.2d 1143 (Fla. 1989)	9
FLORIDA V. BURR ____ U.S.____, 110 S.Ct. 2608 (1990)	1, 3, 5
FURMAN V. GEORGIA 408 U.S. 238 (1972)	7
GRIFFIN V. STATE 474 So.2d 777 (Fla. 1985)	10
HARDY V. STATE 529 So.2d 1083 (Fla. 1988)	10
HUDDLESTON V. U.S. 485 U.S. 681 (1988)	7
JOHNSON V. MISSISSIPPI 487 U.S. 1201, 108 S.Ct. 1981 (1988)	2, 11
MENENDEZ V. STATE 368 So.2d 1278 (Fla. 1979)	9
PERRY V. STATE 522 So.2d 817 (Fla. 1988)	10

RENETA V. STATE 522 So.2d 825 (Fla. 1988)	10
RILEY V. STATE 336 So.2d 19 (Fla. 1978)	9
ROGERS V. STATE 511 So.2d 526 (Fla. 1987)	9, 10
OTHER CITATIONS		
FEDERAL RULES OF EVIDENCE Rule 404(b)	4, 5, 6
SUPREME COURT PRACTICE (6th Edition 1986) R. Stern, E. Gressman and S. Shapiro	4

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, *Florida v. Burr*, ___U.S.___, 110 S.Ct. 2608 (1990), of this Court's opinion vacating Mr. Burr's sentence of death and remanding to the trial court for further proceedings. *Burr v. State*, 550 So.2d 444 (Fla. 1989).

The prior opinion of this Court was in response to a directive from the United States Supreme Court to reconsider this Court's decision denying Mr. Burr's motion for post-conviction relief. *Burr v. State*, 518 So.2d 903 (Fla. 1987).

This is the fourth time this Court has considered this case.

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*, 474 U.S. 879 (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 certiorari and remanded in light of *Johnson v. Mississippi*, 487 U.S. 1201, 108 S.Ct. 1981 (1988).

This Court then determined that the death sentence should be vacated and remanded to the trial court for a new sentencing proceeding. Burr v. State, 550 So.2d 444, 446 (Fla. 1989). The State petitioned the United States Supreme Court to review this decision, which it did, remanding the case to this Court for reconsideration in light of Dowling v. U.S. Florida v. Burr, ___U.S.____, 110 S.Ct. 2608 (1990).

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 550 So.2d 444 (1989).

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 *Dowling v. United States*, 493 U.S. ____ (1990), on the continuing validity of Mr. Burr's death sentence. *Dowling* permits, under Rule 404(b), Federal Rules of Evidence, in the guilt-innocence phase in a federal prosecution, the use of information pertaining to a crime for which the defendant has previously been acquitted. *Dowling* does not address the issue of whether such evidence can be used to provide the evidentiary foundation to support a death sentence.

In addition, it is time for this Court to recognize that Mr. Burr, based on the facts contained in this record, does not deserve a sentence of death.

ARGUMENT

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DOWLING V. UNITED STATES IS
INAPPOSITE TO THE CONSTITUTIONAL
REQUIREMENT OF AN ACCURATE AND
RELIABLE DEATH SENTENCE PROCEEDING.

A.

" . . . Dowling sheds absolutely no light on the question whether a post-trial acquittal should render collateral evidence inadmissible at a sentencing hearing in a capital case." Florida v. Burr, ___ U.S. ___, 110 S.Ct. 2608, 2612 (1990) (Stevens, J. dissenting).

Dowling v. United States, 493 U.S. ___, 110 S.Ct. 668 (1990) dealt with the admissibility, under Rule 404(b), Federal Rules of Evidence, of testimony pertaining to a crime for which Dowling had already been found acquitted. In 1985, Dowling was arrested and ultimately convicted for armed robbery of a bank. During this robbery, Dowling wore a ski mask. Two weeks after this bank robbery, a woman named Vera Henry reported that a ski-masked Dowling had attempted to rob her in her home. Ms. Henry identified Dowling as the robber as a result of her unmasking him during the robbery. Mr. Dowling was tried and found not guilty of this crime.

The United States called Ms. Henry to testify as a

witness in the bank robbery case. The district court admitted the testimony under Rule 404(b). This rule reads:

OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, plan, knowledge, identity or absence of mistake or accident.

Ms. Henry's testimony was admitted for two purposes. "First, [the government] believed that Henry's description of Dowling as wearing a mask and carrying a gun similar to the mask and gun carried by the robber of the [bank] strengthened the Government's identification of Dowling as the bank robber." The second purpose had to do with tying Dowling to another person allegedly involved in both robberies.

After Ms. Henry testified and again during final instructions, the trial judge told the jury that Dowling had been acquitted of the Henry robbery.

The United States Supreme Court ultimately upheld the admissibility of Ms. Henry's testimony. It did so because of the general proposition "that an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." Dowling v.

U.S., 110 S.Ct. at 672, citing *Huddleston v. U.S.*, 485 U.S. 681, 688 (1988).

In addition, that Court held that it was not "fundamentally unfair" to admit Ms. Henry's testimony, "especially in light of the limiting instructions provided by the trial judge . . ." *Dowling*, 110 S.Ct. at 674.

The similar fact evidence in Mr. Burr's case was introduced to establish his identity. It was not introduced in support of any aggravating circumstance. Contrary to the *Dowling* case, the jury did not have the benefit of an instruction telling them that Mr. Burr had been acquitted of the Lloyd Lee robbery and attempted murder.

B.

Mr. Burr's case raises a significantly different issue. Simply put, the question is whether unadjudicated criminal conduct can be the evidentiary basis for imposing a death sentence. The answer is no.

Furman v. Georgia, 408 U.S. 238, 313 (1972) determined that the death penalty was not constitutional because there was "no meaningful basis for distinguishing" people who got death sentence from those who did not. The Florida response was to create a list of aggravating circumstances, the presence of one or more of these circumstances presumptively

sufficient to support a death sentence. Any one of these factors must be established beyond a reasonable doubt. In Mr. Burr's case, "the trial judge found as aggravating circumstances that the murder was committed to avoid arrest, that it was committed during the course of a robbery, and that it was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Burr v. State, 550 So.2d 444, 446 (Fla. 1989).

This Court has previously determined that "there was no evidence of two of the three aggravating factors other than the collateral crimes evidence." In a footnote to this statement, the Court left open the question "on the issue of the weight, if any, evidence of collateral acts should be given in proving the aggravating circumstances in a particular case." Burr v. State, 550 So.2d 444, 446, note 1 (Fla. 1989). It seems apparent that this Court should now address this issue.

C.

The record in this case is clear that the cold, calculated aggravator cannot be proven beyond a reasonable doubt. Burr v. State, 550 So.2d 444, 446 note 2 (Fla. 1989), citing Burr v. State, 518 So.2d 903, 907-908 (Fla.

1987)(Barkett, J. dissenting). Rogers v. State, 511 So.2d 526, 533 (Fla. 1987) requires that the State must prove "heightened premeditation" in that the murder was accomplished in a 'calculated' manner." Eutsy v. State, 541 So.2d 1143, 1147 (Fla. 1989).

The medical examiner testimony is decidedly insufficient. There was no other direct evidence as to how the murder at the convenience store occurred. The trial judge did not identify in the record why this aggravator was appropriate, instead stating enigmatically: "The murder of Stephen Harty was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Of this, can there be any doubt?" To the contrary, the record is completely silent on any evidence distinguishing this killing from any ordinary murder.

Similarly, the arrest avoidance aggravator was not established in this case.

This particular factor requires clear proof beyond a reasonable doubt that the killing's dominant or only motive was the elimination of a witness. Riley v. State, 336 So.2d 19 (Fla. 1978); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979).

Rogers v. State, 511 So.2d 526, 533 (Fla. 1987).

In determining whether the State has proven the aggravator, the trial judge may not "[presume] this intent

based solely on the circumstances of the murder. . . "

Rogers, at 533. Further, the facts the victim offered no resistance and because he was the only eyewitness "do not require a finding that the victim was killed to avoid arrest." Griffin v. State, 474 So.2d 777, 781 (Fla. 1985). As in Griffin, (also a convenience store robbery), there is no direct evidence as to why Burr killed Harty. Perry v. State, 522 So.2d 817, 820 (Fla. 1988). Neither is there any evidence that Hardy knew or recognized Burr. Compare Hardy v. State, 529 So.2d 1083, 1087 (Fla. 1988) where the defendants knew the victims and there was specific discussion that the victims had to die to avoid identifying the defendants; and Remeta v. State, 522 So.2d 825, 828-829 (Fla. 1988), where the defendant's statement that he "took the witness out" was sufficient to establish an aggravating factor.

Essentially, the trial judge extrapolated from the similar fact evidence "that the pattern of [Burr] shooting store clerks during the commission of robberies exhibited an intent to eliminate witnesses." Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985).

The danger of permitting aggravating factors to be proven in this manner is demonstrated by Justice Barkett.

Under this novel approach,
aggravating factors could be
proved merely by showing that

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they existed in collateral crimes committed by the accused, whether or not they actually existed in the crime charged in the indictment.

Burr v. State, 518 So.2d 903, 908 (Fla. 1987), cert. granted, 487 U.S. 1201 (1988).

D.

Above all else, the United States Supreme Court has required that the information used in the death sentencing process be accurate and reliable. Johnson v. Mississippi, 486 U.S. 578 (1988). Permitting the use of information which later proves to be unreliable results in constitutionally unacceptable capriciousness being injected into the process.

CONCLUSION

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Dowling should not alter this Court's latest pronouncement in Mr. Burr's case. Unreliable information should not be permitted to infect the procedure for selecting which convicted capital offenders are to be executed.

The facts of Mr. Burr's case support this Court's intention in imposing a life sentence.

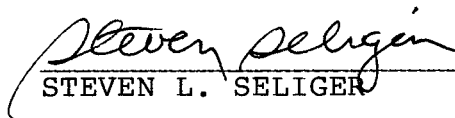


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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this 27th day of August, 1990 to Ms. Carolyn N. Snurkowski, Counsel of Record, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050.



STEVEN L. SELIGER