

IN THE SUPREME COURT OF FLORIDA

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CHARLES LEWIS BURR

Appellant,

vs.

CASE NO. 71,234

STATE OF FLORIDA,

Appellee.

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ON REMAND FROM THE
UNITED STATES SUPREME COURT

SUPPLEMENTAL BRIEF OF APPELLEE ON REMAND

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STATEMENT OF 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 (R 1-2). The State subsequently filed a notice of intent to rely on similar fact evidence on April 6, 1982. (R 37-38). In response thereto, Burr filed a motion in limine on May 26, 1982 (R 43-52).

The motion in limine was denied by Judge J. Lewis Hall after a pre-trial hearing. (R 355-394). Judge Hall found 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. (R 391-394).

During the trial, no reference to the similar fact evidence was allowed during opening statement (the State agreed to refrain from mentioning it) at the first phases of the trial. (R 481-484). After a number of witnesses had testified on behalf of the State, similar fact evidence was proffered to the court (R 975-1014) and after argument by counsel (R 1015-1040), the evidence was deemed relevant and admissible. (R 1040-1042).

Burr also filed a motion to dismiss the indictment on May 28, 1982, alleging racial discrimination in the selection of grand jury foremen in Leon County. (R 53-54). Counsel thereafter entered into a stipulation with regard to various facets of the selection of grand jury foremen in Leon County since 1955. (R 72). The motion to dismiss was ruled upon by Judge J. Lewis Hall, Jr., prior to trial. The motion was denied

without argument or testimony beyond that contained in the supplemental record on appeal. (R 269, 355-358).

Following the close of the State's case-in-chief, Burr moved for a judgment of acquittal which was denied. (R 1077). The jury found him guilty as charged on both counts. (R 290-292). During the sentencing phase of the trial, the State presented no additional evidence. Burr presented several witnesses in mitigation. (R 435-451). After arguments and instructions, the jury returned a recommendation of life imprisonment. (R 292). The court, however, sentenced Burr to death on the first degree murder charge, as well as to 99 years imprisonment for the armed robbery, retaining jurisdiction over the first third of that sentence. (R 321-322). In so doing, the trial judge found three statutory aggravating factors and nothing in mitigation. (R 311-320).

Thereafter followed a direct appeal to the Supreme Court of Florida, which court affirmed both the judgment of conviction and the sentence of death. Burr v. State, 466 So.2d 1051 (Fla. 1985). A subsequent petition for writ of certiorari to the Supreme Court of the United States was denied on October 7, 1985.

Burr was denied clemency and a first death warrant was signed on August 24, 1987.

On October 1, 1987, the circuit court held a hearing on the motion for post-conviction relief filed by Burr and on the Answer and Motion for Summary Dismissal filed by the State.

On October 6, 1987, all relief was denied.

Burr filed his notice of appeal, and on December 10, 1987,

the Florida Supreme Court affirmed said denial. That Court concluded Burr was procedurally barred from raising the issue regarding collateral crime evidence because it had been previously addressed on direct appeal. The Court further noted:

With the exception of the collateral crime issue, no new information has been made available to this Court which would warrant a revisitation of those issues.

However, Burr has agreed that his subsequent acquittal of one of the crimes to which witnesses testified at his trial, and the nolle pros 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 subsequent acquittal, clearly, at the time the Williams, (110 So.2d 654 (Fla.), cert denied, 361 U.S. 847 1959.) rule evidence was admitted, it was not error to do so. This much had been settled on direct appeal. There is no reason to suggest that the subsequent acquittal changes that admissibility subsequent to the trial. This Court will not render evidence retroactively inadmissible.

Burr v. State, 518 So.2d 903 (Fla. 1987), rehearing denied, February 10, 1988.

Certiorari review was sought in the United States Supreme Court and on June 20, 1988, that court granted certiorari review and ordered the cause remanded to the Florida Supreme Court to review the cause in light of Johnson v. Mississippi, 486 U.S. _____ (1988).

The instant brief is in response to that remand.

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, Williams 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 15 or 20 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 while 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 up 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 Tammy Footman, a cousin of Williams, who were present in 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 her the truth about what happened. (R 841). Williams never contacted the police. (R 842). Williams 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 25 handguns. (R 844). Williams was present when Burr 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 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 re-direct 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 Steve Hardy, 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 his 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 prove 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's 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 he had been at the convenience store with Burr. (R 923). The first indication that the trial would take 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 tell her about what Burr did at the convenience store the morning of August 20, 1981. (R 957-958).

Dr. Thomas Wood's deposition was read to the jury by agreement. Dr. Wood performed the autopsy on Steve Hardy, 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 would have been behind 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. Wood's 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 oven until the store was empty. He approached Farrell and asked him if his name was 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 Hardy 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 no 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 then shot him in the left elbow and left in a brown or maroon car. (R 1063, 1065). This occurred eight days after the Hardy murder and five 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 Hardy 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 any 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 Hardy 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 Hardy, who was acting unusual, as if he had something else on his mind. (R 1106). Another man, not resembling the Burr, stood at the back of the store by the cooler. (R 1109). He acted suspiciously, like he was just passing the time. (R 1116).

Minnie Pompey, Domita Williams's 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 at 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, 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 or 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 car (R 1289); she admitted that when she gave her original statement to Charlie Ask she knew Katrine Jackson and Tammy Footman had previously given statements, but did not know the content to their statements (R 1290-1291); she could not explain the "cheeseburger story" 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 saying to threats were made when she gave her testimony (where no threats were made) was consistent with her statement (R 1296, 1297); she acknowledges 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 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 that they didn't have any evidence against [Burr]," that at that point she decided to "tell the truth" (R 1303-1304); 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 had 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 R 1140-1144).

Leola Powell testified as the first rebuttal witness. She saw Burr's car at Williams's 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 was agreed that she had heard the previous day's testimony, but not Williams's 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 story" 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's mother was hostile (R 1374) and he got no response from her when he 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

Johnson v. Mississippi, 486 U.S. ____ (1988), does not control because the similar fact evidence presented at the guilt portion of the trial and available for consideration at the penalty phase was not capricious or constitutionally impermissible) but rather valid, admissible evidence relevant to Burr's character and the circumstances of the crime.

ARGUMENT

WHETHER THE UNITED STATES SUPREME COURT DECISION IN JOHNSON v. MISSISSIPPI, 486 U.S. ____ (1988), HAS ANY IMPACT ON EITHER THE JUDGMENT OR SENTENCE IN THE INSTANT CASE.

The United States Supreme Court without illumination granted Burr's petition for writ of certiorari review and remanded the cause to this Court for further consideration in light of Johnson v. Mississippi, 486 U.S. ____ (1988). A comparison of the Johnson case to the instant facts reveals that Johnson is neither authority for or controlling sub judice.

In Johnson, supra. the Mississippi court, contrary to Burr, relied totally on an earlier New York conviction to support the imposition of the sentence. Reliance was based on the fact that Johnson served time, therefore, the correctness of the judgment did not matter. The United States Supreme Court observed:

Contrary to the opinion expressed by the Mississippi Supreme Court, the fact that petitioner served time in prison pursuant to an invalid conviction does not make the conviction itself relevant to the sentencing decision. The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct-the document submitted to the jury proved only the facts of conviction and confinement, nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense; indeed, it would be perverse to treat the imposition of

punishment pursuant to an invalid conviction as an aggravating circumstance. (Emphasis added).

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 has available in ascertaining whether the murder constituted the aggravating factor of cold, calculated, and premeditated. See: Justice Shaw's opinion (concurring in result only) Burr v. State, 518 So.2d at 906 and Section 921.141(1), Florida Statutes (1981).

As recognized in Huddleston v. United, 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."

Sub judice, evidence regarding Burr's criminal acts were proffered and deemed admissible by the trial court at the guilt phase of Burr's trial. (TR-975-1042). Said evidence was presented to show common scheme, modus operandi and identity of Burr as the culprit in the instant robbery/murder case. See Amoros v. State, _____ So.2d _____ (Fla. Decided Sept. 15, 1988, Case No. 68,840).

The State presented no additional evidence in aggravation at the penalty phase of the trial. Moreover, the State made no further mention of the similar fact evidence admitted at trial during the penalty phase of the proceeding. Rather, defense counsel made the only references to the similar fact evidence

during his closing remarks. (R-463,466). 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 (the State) had sufficient evidence."

The use of similar fact evidence at the guilt portion of Burr's trial was proper. See Burr v. State, 466 So.2d 1051 (Fla. 1985); Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959); Huddleston v. United States, supra. and Amoros v. State, supra. Equally, reliance on said evidence was proper at the penalty phase. See Sec. 921.141(3), Florida Statutes. Moreover, neither reference to nor reliance on the similar fact evidence was made by the State at the penalty phase. Further, even if a reference was made to prior criminal misconduct at the penalty phase, the State did not rely on those factors to support the imposition of the death penalty.

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 in Burr v. State, 518 So.2d 903, 907-908 (Fla. 1987).

The court in Johnson v. Mississippi, supra. answered the question: . . . whether allowing Burr's death sentence to stand although based in part on a vacated conviction violates this

principle, [death penalty cannot be supported or based on "caprice" or "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862 (1983).] In Burr the reasons relied upon by the court to impose the death penalty were not based on caprice or constitutionally impermissible factors. Rather, the jury and the trial court had before them detained information from live witnesses who positively identified Burr as the perpetrator of other similarly circumstanced robbery contemporaneously committed to the instant crime.

On direct appeal Burr did challenge the priority of utilizing similar fact evidence during the guilt portion of his trial but neglected to discern the instant error as it pertained to the penalty phase of his trial. The issue was raised for the first time in collateral litigation at which time the trial court and the Court in Burr v. State, supra, concurred that the matter was procedurally barred. The application of the procedural barred doctrine was based on the State's continuous application here and in all other similarly circumstanced cases that where claims could have or should have been raised on direct appeal, they are barred from further review via collateral litigation. Burr v. State, 518 So.2d at 905.

Lastly, unlike Johnson v. Mississippi, supra., the jury was not permitted to consider evidence that "has been revealed to be materially inaccurate." As reflected by the factual recital contained in the statement of the facts, the similar fact evidence admitted during the trial went unchallenged.

Eyewitnesses from other robberies of convenience stores within days of the instant offense, recited a similar fact scenario for those robberies and positively identified Burr as the perpetrator. The evidence was neither misleading nor inaccurate. The fact that the State unsuccessfully prosecuted Burr in one case and nolle prossed other robbery charges had nothing to do with the accuracy or correctness of the similar fact evidence presented the jury herein or considered by the sentencing court. See also Smith v. Wainwright, 568 F.2d 363 (5th Cir. 1978), wherein the court rejected the assertion that any infirmity existed in the judgment and sentence that resulted. United States v. Wyatt, 762 F.2d 905 (11th Cir. 1985), citing Smith with approval.

It is imperative confusion not exist between the use of an "invalid conviction" (Johnson), and the use of admissible similar fact evidence supported by competent evidence (Burr).

CONCLUSION

BASED ON THE FOREGOING, Appellee would respectfully submit the United States Supreme Court decision in Johnson v. Mississippi, supra, has no impact on the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mr. Steven L. Seilger, Counsel for Appellant, 229 East Washington Street, Quincy, Florida 32351 by U.S. Mail this 19th day of September, 1988.



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