IN THE SUPREME COURT OF FLORIDA

GEORGE WALLACE BROWN, :

Appellant, :

vs. : Case No. 78,007

STATE OF FLORIDA, :

Appellee. :

:

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

REPLY BRIEF OF APPELLANT

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STATEMENT OF CASE

Appellant objects to any attempts by appellee to alter, restate, misrepresent or emphasize any portion of the proceedings mentioned in the statement of case of appellant's original brief. Appellant maintains his original statement of case is true and correct and there is no need for appellee's reinterpretations.

STATEMENT OF FACTS

Florida Rule of Appellate Procedure 9.210(c) provides that, in an answer brief, "the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." See Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984); Overfelt v. State, 434 So.2d 945, 949 (Fla. 4th DCA 1983). "This simple, concise statement plainly means that the appellee's answer brief shall not contain a reiteration of the statement of the case and . . . facts stated in appellant's brief, but shall only state wherein appellee disagrees with appellant's statement and supplement that statement to the extent necessary to correct any material misstatements and omissions in appellant's statement." Metropolitan Life and Travelers Ins. Co. v. Antonucci, 469 So.2d 952, 954 (Fla. 1st DCA 1985).

In its brief in this case, Appellee has not indicated any true disagreement with the Appellant's statement of the facts. With few exceptions, every piece of evidence in Appellee's statement was mentioned in Appellant's statement. The Appellee merely edited the Appellant's statement of facts, omitting all mitigation evidence. Thus, Appellee's statement includes only unfavorable penalty phase testimony taken out of its context.[1] Appellee has added a few pieces of additional evidence which add more detail to the facts stated by

[1] Compare Appellee's statements at page 9 with Appellant's statement at pages 12 through 15.

Appellant and are apparently intended either to make Brown appear more guilty[2] or evil[3] or to make the crime seem more horrible.[4] Most of the additional facts were apparently submitted merely to influence this Court on an emotional level.

If the Appellee is offering its statement of the facts as an alternative to the Appellant's statement and is representing it as a summary of the evidence presented at trial, then the Appellant wishes to make clear that the state has presented a grossly distorted picture which omits or trivializes all of the evidence favorable to the Appellant.

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[2] For example, Appellee included Detective Ore's testimony that on the trip back from Colorado appellant mentioned a shooting incident at his next door neighbor Bobby Dobbins, but Ore later found that the address of 1607 North Texas Avenue in Orlando did not exist. (R. 995, 1002) (See brief of Appellee at 8) Appellee also refers to Appellant allegedly "fearing he would be hit with a murder rap," and manifesting feelings of being "leery of being caught." (brief of Appellee at 2 and 3)

[3] For example, Brown's failure to repeat his explanation he gave to Judy Etherington after she noticed he had "a lot of blood on him" and told her he had been in a fight at a bar, (brief of Appellee at 8), adds detail to Appellant's alleged attempt to conceal gory participation the murder (brief of Appellant at 5)(R. 786-787, 1416, 1419). Also note appellant's unfounded argument "that the body was more hidden that he (appellant) would have wanted to admit" (Appellant's answer brief at 19).

[4] For example, Appellee's bland report of a crime scene technician going to the crime scene "in the early morning hours of May 2, 190(sic)" and photographing "the whole area at different angles" and making a videotape of the crime scene was the prosecutions mask of bogus relevance at trial, when in truth the actual photographs of the deceased were not relevant to any issue in the case. (See brief of Appellee at 6) In reference to gruesome photographs, former Justice England once admonished prosecutors to "strive for a system in which juries convict alleged criminals solely on the basis of proof, without resort to the horror of particular crimes." Funchess v. State, 341 So.2d 762, 765 (Fla. 1976), cert. denied, 434 U.S. 878, 98 S.Ct. 31, 54 L.Ed.2d 158 (1977).

ARGUMENT

ISSUE I

THE COURT ERRED DENYING DEFENSE MOTION FOR DIRECTED VERDICT REGARDING FIRST DEGREE MURDER BECAUSE OF INSUFFICIENT PREMEDITATION EVIDENCE.

Contrary to Appellee's contention, there is considerable "question" whether Appellant committed a robbery for felony purposes in lieu of first degree premeditated murder. To warrant a conviction for robbery, it is imperative that the intent to steal exist at the time of taking. Stevens v. State, 265 So.2d 540, 541 (Fla. 2nd DCA 1972) citing Bailey v. State, 199 So.2d 726 (Fla. 1st DCA 1967.) Although the district court in the Bailey case pointed out that the prosecutor could circumstantially prove intent by showing the accused's continue possession after the taking, the Stevens court considered the victim's apparently casual familiarity with the alleged robber to require a retrial even though Stevens apparently retained the subject property. Appellant would concede that Bailey did not cause actual permanent physical harm to his robbery victims, and Steven's victim only complained of giving the money after that defendant choked her. A robbery could not have occurred "beyond a reasonable doubt" because of the circumstances surrounding Horace Brown's death, and Appellee should have been required to prove premeditated murder. (Appellee's answer brief at 13)

Appellant is aware of this court's position that the state may proceed on theories of both premeditated and felony murder when only premeditated first-degree murder is charged. O'Callaghan v. State, 429 So.2d 691 (Fla. 1983). Also, jury verdict forms do not require specific choice between those legal theories. Haliburton v. State, 561 So.2d 248 (Fla. 1990), petition for cert. den., --- U.S. ---, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991). However, in so doing this court may not suggest that Appellant involuntarily waive his constitutional right to prepare for and present a defense for each specific crime charged. Amend. VI, U.S. Const. and Amend. XVI, U.S. Const.

The question of sufficient premeditation evidence was recently addressed in

Jackson v. State, 575 So.2d 181 (Fla. 1991):

> Sireci v. State, 399 So.2d 964, 967 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The state relies on Sireci and Griffin v. State, 474 So.2d 777, 780 (Fla.1985), cert. denied, 474 U.S. 1094, 106 S.Ct. 869, 88 L.Ed.2d 908 (1986), to argue that the murder here was premeditated. However, that reliance is misplaced. In Sireci, premeditation was proved with evidence that the defendant clubbed the victim over the head with a wrench, then stabbed and cut the victim fifty-five times in the chest, head, back, and extremities, and finally slit his throat. In Griffin, premeditation was supported by evidence that Griffin used a "particularly lethal gun"; the bullets were of a special type designed to have "a high penetrating ability"; there was no sudden provocation caused by the victim; and Griffin fired two shots into his victim at close range. Griffin, 474 So.2d at 780. Those facts are completely distinguishable from the instant case where there is no evidence to indicate an anticipated killing, and where all of the evidence is equally and reasonably consistent with the theory that Phillibert resisted the robbery, inducing the gunman to fire a single shot reflexively, not from close range, with an unidentified type of weapon and bullet. There is no evidence of a fully-formed conscious purpose to kill. Moreover, there is no evidence in this record that Jackson fired the shot that killed Phillibert.

575 So.2d at 186. Appellant maintains that the facts of the Jackson case are sufficiently similar to the facts of his case to apply as governing precedent to the issue of premeditation and that this court should not accept Appellee's invitation to assume evidence sufficient to support premeditation.

ISSUE II

THE COURT ERRED DENYING DEFENSE MOTION TO SUPPRESS CERTAIN VIDEO AND PHOTOGRAPHS OF THE BODY AND CRIME SCENE.

Appellee suggests that new issues asserted on appeal and allegedly not presented by Appellant at trial. For instance, Appellee recommends that only a verbalized comment of "gruesome" in Appellant's initial brief is a totally new contention. (Appellee's answer brief at 22-23). Appellant's objection to the inadmissibility of photographic evidence pertained to what the court actually viewed (R. 861-864) prior to overruling (R. 864), not on all verbal interpretation and comments that could have been made while actually viewing the tendered photographic material. Appellant humbly requests this court to personally review all photographic materials submitted into evidence and erroneously shown to the jury.

Clearly, "how easily discoverable or not the body was" is not a relevant issue for a murder trial contrary to Appellee's submitted reason for the video tape. (Appellee's answer brief at footnote 2, page 23) Florida courts have referred to "easily discoverable" issues related to statute of limitation application to latent versus patent defects in damage suits (See Kala Investments, Inc. v. Sklar, 538 So.2d 909 (Fla. 3rd DCA 1989)), medical malpractice cases (See Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976)), or an insured's action against insurer to recover on marine insurance policy for sinking of vessel (See Reliance Ins. Co. v. Brickenkamp, 147 So.2d 200, 91 A.L.R.2d 1290 (Fla. 2nd DCA 1962). This is an irrelevant and inappropriate basis for admitting evidence in a criminal case, and more particularly in a first degree murder death row case where the burden of proof and the foreseeable death penalty are very different from the above cited civil matters.

ISSUE III

THE COURT ERRED FAILING TO GRANT DEFENSE MOTION TO COMPEL DISCOVERY AND TESTIMONY FROM GAINESVILLE TASK FORCE OFFICERS REGARDING SERIAL MURDERS AND PARTICULAR SUSPECTS.

Appellee has failed to answer appellant's Issue III. (Appellee's answer brief at 24). Appellee attempts to lump both Issue III and Issue IV together the answer to Issue IV. This court should not respond favorably to an Appellee's failure to respond to specific issues raised on appeal. (See Cain v. Cain, 549 So.2d 1161 (Fla. 4th DCA 1989)). As in the Cain case this court should require

> appellee's responsibility to support the ruling of the trial court or concede error and assist the appellate court through the medium of a responsive brief under Fla.R.App.P. 9.200. See also Slomovic v. Ves Carpenter Contractors, Inc., 292 So.2d 60 (Fla. 4th DCA 1974).

Id. at 1163.

ISSUE IV

THE COURT ERRED GRANTING STATE'S MOTION IN LIMINE PROHIBITING DEFENDANT FROM COMPLETING COMPULSORY PROCESS OF SUBPOENAED OFFICERS IN TESTIFYING TO OTHER PROBABLE SUSPECTS AND SIMILAR MURDERS.

Appellee cites only one additional case, State v. Savino, 567 So.2d 892 (Fla. 1990), not previously mentioned by Appellant under this Issue. (See Appellee's answer brief at 28-29). Appellee fails to quote the holding of the case, which immediately follows the answer brief's quote in the reported text:

> In this case the trial judge found that the wife's alleged abuse of a one-month-old child, in a different state, in a different marriage, and in a different manner was not sufficiently similar to be admissible in Savino's trial for the death of her six-year-old child. We see no abuse of discretion in this ruling.

Id. at 894. Appellant continues to maintain that all of the similarities enumerated in his initial brief combined with the following undisputed facts applied in the dissimilar light of Savino will continue to reveal that Appellant was denied compulsory process: (1) Appellant was not familiar with, related to, or least of all married to, any of the putative murder suspects in the Gainesville murders; (2) The murders in Gainesville were not "alleged" murders, but fully manifest murders with real victims; (3) The quantum of information, response and police investigatory communication was very large as reported in the news media, compared to a one-time report of child abuse; (4) The Gainesville murders took place in this state, although other similar murders were investigated in other states; (5) the publicly reported "manner" in which the Gainesville murders were perpetrated was sufficiently similar to warrant testimony of the police officers.

ISSUE V

THE COURT ERRED FAILING TO SUSTAIN DEFENSE OBJECTION AND CURE ERROR WHEN STATE WITNESSES SAID GEORGE BROWN WAS ARRESTED FOR AN UNRELATED WARRANT, IN VIOLATION OF §90.404, FLORIDA STATUTES.

The cases cited by Appellee, wherein comments concerning the defendant's prior criminal record did not require the granting of a mistrial, are clearly distinguishable from the case at hand because they did not involve defendants who were "on the run from an outstanding warrant for an unrelated felony" at the time of the offenses for which they were on trial. See Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Johnston v. State, 497 So.2d 863 (Fla. 1986); Ferguson v. State, 417 So.2d 639 (Fla. 1982). Public opinion of an "outlaw running from a felony warrant" is like that of an "escaped convict" in that either way he is a desperate and dangerous felon. This is far different from a comment indicating that the defendant was incarcerated at some time in the past.

There is no requirement that defense counsel request a curative instruction when it would not alleviate the error.[5] When the comment is of such nature that it might affect the defendant's right to a fair trial, a motion for curative instruction would just be superfluous. Millett v. State, 460 So.2d 489, 492 (Fla. 3d DCA 1984); cf. Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989) (motion for curative instruction not required); State v. Murray, 443 So.2d 955, 956 (Fla. 1984) (prosecutorial remarks require reversal only when errors are so basic to fair trial that they cannot be treated as harmless). In the case at hand, once the jurors learned that Brown was a fugitive running from the law, no instruction would have erased the comment from their minds. In fact, an instruction would only have drawn further attention to it.

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[5] Only an objection and motion for mistrial are required to preserve an objection for appeal. Clark v. State, 363 So.2d 331, 335 (Fla. 1978); see also Simpson v. State, 418 So.2d 984, 987 (Fla. 1982) (where timely objection is made to an improper comment and objection is overruled, thus rendering futile a motion for mistrial, the issue is properly preserved for appeal).

Appellee argues further that the trial court's finding that the comments in testimony and closing argument were unobjectionable, invited and useful to Appellant was not judicial error. (Brief of Appellee at 38 - 39) The only authority cited near these claims in Appellee's answer brief suggests that even if the trial court abused its discretion by allowing these comments in evidence, this would not constitute fundamental error per Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). In the Sanford case this court used Oklahoma, New Mexico, and Texas appellate decisions to hammer out a fundamental error loadstar test when questions are raised as to the constitutionality under the Florida Constitution of a statute, which had omitted right to attorney fees for a successful claimant under that statute's remedies sections. Id. at 137. There is no apparent basis for using that same fundamental error analysis as to Fifth Amendment or Miranda rule violations under decisional law interpreting the United States Constitution. See Amend. V, U.S.Const., Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Appellee compared this case to Malloy v. State, 382 So.2d 1190 (Fla. 1979), in which this Court did not find improper admission of irrelevant collateral crime evidence, because

> It was one incident in a chain of chronological events which began with the termination of the party at the Surrett residence at approximately 12:30 a. m. and concluded with the delivery of the victims' property to the appellant's bedroom at 5:30 a. m. back at the Surrett premises. In addition, the circumstances of the lounge incident do not establish all the elements of a crime and, consequently, the question of the admissibility of prior criminal acts is not present.

Id. at 1192. The presumption of harm to Malloy was rebutted because of the totality of the evidence against Malloy, included two participating co-defendants, Houston and Robinson, who,

> after negotiating pleas, testified for the prosecution. They related that they and the appellant, accompanied by a friend, left the Surrett party about midnight and drove to a lounge in Lakeland. When they arrived at the parking lot of the lounge, the group noticed that two persons were arguing and the appellant assertedly told them to "shut up." When they did not, the appellant allegedly got out of the car and began to pull out a rifle which was on the front seat. Subsequent to this incident, they dropped off their friend and proceeded to a restaurant to eat breakfast. While there, the three formulated a plan to steal some stereo equipment from the victims, Leo Eggering and Ronald Cole.

Id. at 1191. This is far different from our case in which there was no eyewitness or co-defendant confession. Brown's defense was that he did not commit the crime. The evidence against him was all circumstantial.

Appellee cites Salvatore v. State, 366 So.2d 745 (Fla. 1978) as precedent for the proposition that trial courts must not sua sponte declare mistrial unless an absolute necessity exists. (Appellee's brief at 42) This court's law of the Salvatore case was based on a limited exception to the "general rule" that "it is improper for the State to disclose during trial that another defendant had been convicted." Id. at 749. Appellant contends Salvatore is inapplicable to Appellee's and trial court's apparently draconian requirement that defense counsel "clean up" Appellee's mess before, during or after witness Lackey's, witness Ore's and prosecutor's continued insidious subterfuge of Appellant's unprotected constitutional rights. If the court will not protect Appellant's constitutional right, who will? Appellant's legal counsel could only object to and argue against error.

Appellee listed a partial string cite to several 1992 first-degree murder decisions by this court. (Appellee's answer brief at 43) At the conclusion of the Gore decision this court held:

> The cumulative effect of the numerous similarities between the two crimes is the establishment of a unique modus operandi which points to Gore as the perpetrator of the Roark homicide.

Gore v. State, 599 So.2d 978, 17 Fla. Law Weekly S247 (Fla. 1992). Appellant contends that there were no similarities between the manifestly fabricated Osceola grand theft auto charge, for which appellant was arrested under an apparently bogus Osceola warrant, and the actual possession of Horace Brown's automobile which Appellee attempted to prove at trial. Therefore Gore is inapplicable.

Via Marshall v. State, 604 So.2d 799, 17 Fla. Law Weekly S 459 (Fla. 1992) Appellee alludes to harmless error and impliedly compares Appellee's blatant us of innuendo based on the bogus outstanding warrant with the Marshall court's "admitting evidence of gambling slips found in Marshall's

cell six months after the murder and evidence that Marshall's nickname in prison was 'Uzi'." Id. at 804. In Richardson v. State, 604 So.2d 1107, 17 Fla. Law Weekly S241 (Fla. 1992), Appellee inapplicably alludes to trial court's harmless error in not declaring a mistrial when the prosecutor asked the jury during closing argument that they "show Richardson as much pity as he showed his victim." Id. at 1109. Mann v. State, 603 So.2d 1141, 17 Fla. Law Weekly S220 (Fla. 1992) does not apply to this issue prejudicial error as to comments on unrelated crimes, because in Mann this court only found there was "no comment on silence" when an officer observed "We went [to the hospital] to question Mr. Mann and, of course, there was no statement given." Id. at 1142-1143.

Contrary to Appellee's reference, Thompson v. State, 595 So.2d 16, 177 Fla. Law Weekly S78 (Fla. 1992) does not address this issue, but does directly apply in Appellant's favor under Issue VII of this appeal regarding reversible error for Miranda violations.[6]

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[6]The Thompson case is discussed further under Issue VII in this reply brief.

ISSUE VI

THE COURT ERRED FAILING TO GRANT DEFENSE MOTION IN LIMINE AND OBJECTIONS REGARDING PROSECUTOR'S DEATH QUALIFYING QUESTIONS.

Appellee offers no new or different authority to contradict case authority cited by Appellant in his initial brief under this Issue. (See Appellee's answer brief 44 - 47) Appellee attempts to factually distinguish Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986) from the prosecutorial abuses in the voir dire in this trial. Appellant concedes Waters has been applied in only two subsequently reported Florida cases: Neither Rosso v. State, 505 So.2d 611, 614, 12 Fla. L. Week. 1024 (Fla. 3rd DCA 1987), nor Huff v. State, 544 So.2d 1143, 1144, 14 Fla. L. Week. 1419 (Fla. 4th DCA 1989) involve voir dire objections to prosecutorial impropriety. However, the prosecutor in the Rosso opening statement made a "call to prejudice" by suggesting Rosso had the requisite intent to shoot the victim and fabricated a lack of intent by reason of insanity. Rosso at 614. Likewise, Appellee may not excuse the prosecutor's misconduct during voir dire where the evidence of Rosso's premeditated intent "was extremely equivocal and far from "overwhelming." See Rosso at 613; Issue I of Appellant's initial brief and of this reply brief.

ISSUE VII

THE COURT ERRED FAILING TO GRANT DEFENSE MOTION TO SUPPRESS DEFENDANT'S PRE-MIRANDA STATEMENTS TO OFFICERS AND SUBSEQUENT TAINTED STATEMENTS TO OTHER OFFICERS AFTER MIRANDA WARNING.

Appellee mistakenly referred to Thompson v. State, 595 So.2d 16, 177 Fla. Law Weekly S78 (Fla. 1992) as applicable to Issue V of this appeal. That decision applies in Appellant's favor under this issue regarding reversible error for Miranda violations. This court reversed and remanded for new murder trial because:

> We recognize, of course, that the erroneous admission of statements obtained in violation of Miranda is subject to harmless error analysis. See Caso; Kight v. State, 512 So.2d 922, 926 (Fla.1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988). Nevertheless, we find the admission of Thompson's confession in this case constituted reversible error. We cannot state, beyond a reasonable doubt, that the impermissible admission of the confession did not affect the jury's verdict. See Caso; State v. DiGuilio, 491 So.2d 1129, 1138 (Fla.1986).

Id. at 18. Thompson's specifically denied understanding under a improperly modified Miranda warning was that he was entitled to appointed counsel, even if he could not afford one. Id.at 17 - 18. Similarly, the time between Miranda warning, waiver and statement, as in this case should be a crucial requirement for a knowing waiver of right to silence. See Henry v. State, 586 So.2d 1033 (Fla. 1991). In Henry the trial court's suppression of pre-Miranda warning statement was upheld (Id. at 1035), whereas the trial court's refusal to suppress similar statements to witness Hess while (contrary to Appellee's brief at 49) undeniably in custody should be manifest error. Also contrary to the Detective Ore's failure to give Miranda warnings to Appellant during the first statements made to him and instead relying on Investigator Lackey's previous day's warnings, "Henry received Miranda warnings prior to making his other statements." Id. at 1035.

Interestingly, none of the cases cited by Appellee to support the state's argument under this issue are cited in the Thompson case. Id.; Appellee's answer brief 48 - 49. Appellant maintains that his statements without proper Miranda safeguards more nearly apply to Thompson and the

requisite "scrupulously honored" right to remain silent per Michigan v. Mosley, 423 U.S. 96, 104, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975), than to the line of cases cited by Appellee. See Id.

ISSUE VIII

THE COURT ERRED FAILING TO GRANT DEFENSE MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL PER RULE 3.191, FLORIDA RULES OF CRIMINAL PROCEDURE.

Appellant maintains he did not knowingly or voluntarily waive his right to speedy trial. See, 3.191 Fla.R.Crim.P. (1991), Art. I, Sec. 16, Fla. Const. His Hobson's choice was similar to that described by Justice Ehrlich in his dissenting opinion in Hill v. State, 467 So.2d 695 (Fla. 1985):

> I dissent because the majority decision ignores the clear and controlling language of the rule.
>
> Failure to hold trial within the speedy-trial period may not be attributed to the accused unless the accused or his counsel take some action which delays the progress of the trial. Hammock v. State, 330 So.2d 522 (Fla. 1st DCA 1976). Therefore, when the defendant or his counsel moves for and is granted a continuance, or if a continuance is required because of circumstances chargeable to the defendant, the 180-day speedy trial limit is waived. Eire v. Kaney, 393 So.2d 649 (Fla. 5th DCA 1981). In the present case the state argues that the withdrawal of petitioner's counsel one week before the scheduled trial date made the court-ordered continuance necessary and that the delay is thus attributable to the defendant.
>
> The withdrawal of counsel, without more, does not necessarily cause a delay, nor does it constitute a waiver of speedy trial. State v. J.H., 295 So.2d 698 (Fla. 1st DCA 1974). There has been no showing below that the motion for withdrawal was frivolous, filed for delay, or that it was caused by the conduct of the accused. Fulk v. State, 417 So.2d 1121 (Fla. 5th DCA 1982). Indeed, the record reflects that petitioner's initial attorney diligently represented him but was forced to withdraw once the conflict of interest became unavoidable. Furthermore, the conflict itself was beyond defendant's or defense counsel's ability to prevent. It is the policy of the Public Defender's office to assign one attorney to co-defendants regardless of the potential for conflict. When conflict arose in this case the defendant, through no fault of his own, was forced to choose between preserving his right to speedy trial or exercising his right to trial at all. I cannot agree that this withdrawal is conduct by the defendant or his counsel which necessarily delays trial and thus the failure to proceed is not attributable to the accused within the meaning of the rule 3.191(d)(3)(ii). Ehn v. Smith.
>
> Moreover, even if I were to accept the majority's holding on the defense's responsibility for any delay, the record fails to show that any delay was necessary. There was no showing that defendant and his new counsel could not have proceeded to trial on the original date. According to rule 3.191(e), Florida Rules of Criminal Procedure.
> A person is unavailable for trial if ... (2) the person or his counsel is not ready for trial on the date trial is scheduled. A person who has not been available for trial during the term provided for herein is not entitled to be discharged. No presumption of nonavailability attaches, but if the state objects to discharge and presents any evidence tending to show nonavailability, the accused then must by competent proof establish availability during the term.
> (Emphasis supplied.)
>
> Thus the initial burden is on the state to come forward with evidence that the accused was not prepared for trial. Stuart v. State,

360 So.2d 406 (Fla.1978). Such evidence could include, for example, a demonstration by the state that the defendant was still engaged in discovery at the close of the speedy trial period. Christopher v. State, 369 So.2d 97 (Fla. 2d DCA 1979). In this case, however, there has been no showing that the defendant was not prepared for trial on the originally scheduled date. Instead, the trial court apparently presumed that the defense was not prepared and on its own motion postponed the proceedings. The proper procedure for the trial court is to inquire of the defendant and his counsel as to whether or not they are ready for trial. The defendant is thus given the opportunity to decide whether to proceed or to request a continuance and thus waive his right to the protection of the speedy-trial rule. If the defendant is not prepared for trial, the judge may then properly continue the proceedings, and the defendant will not be entitled to discharge at the close of the speedy-trial period. Brownlee v. State, 427 So.2d 1106 (Fla. 3d DCA 1983).

Therefore, I would hold that withdrawal of counsel is not per se equivalent to a motion for continuance, and because the state presented no evidence of unavailability, petitioner was entitled to discharge under rule 3.191.

SHAW, J., concurs.

Id. at 696-697. Appellant humbly requests this court to re-examine Justice Ehrlich's dissent as persuasive and recognize Appellant's entitlement to discharge under Rule 3.191.

ISSUE IX

THE COURT ERRED BY FAILING TO APPOINT SEPARATE COUNSEL TO REPRESENT APPELLANT DURING PENALTY PHASE.

Contrary to Appellee's conclusion Appellant's argument for appointing separate counsel is more compelling than in Durocher v. State, 604 So.2d 810 (Fla. 1992) and at least as compelling as the basis for appointment of separate counsel for penalty phase in Klokoc v. State, 589 So.2d 219 (Fla. 1991). Appellee's suggestion that ineffective assistance of counsel, violative of the Sixth Amendment is more appropriately addressed from a Rule 3.850 petition. (Appellee's answer brief at 57), But see, Amend. VI, U.S.Const., 3.850 Fla.R.Crim.P. (1993) Surely, it would have been a "more appropriate vehicle" for the courts to tender the additional trial counsel before and not after a treacherously difficult and manifestly inadequately defended trial. The Appellant could have then rejected the offer as in Durocher or accepted the offer as recommended in Klokoc.

Appellant does not know whether this court, in its administrative capacity over the Florida judiciary, as well as the Supreme Court to decide application of Florida law in death penalty cases, has investigated and reported on the issue: Whether death row defendants represented by two defense counsel were statistically more frequently spared from the death penalty than those represented by only one attorney. Obviously, if the answer is yes, Appellant is a member of a suspect class of indigent death penalty defendants, which was not offered the opportunity to have equal protection under the law as enjoyed by those privileged defendants who receive greater protection of their legal rights, including diminished exposure and likelihood of suffering the death penalty, as well as due process of the law before their life is taken. Amend. XIV U.S. Const., Art. I, Sec. 9, Fla. Const.

ISSUE X

THE COURT ERRED INSTRUCTING JURORS ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR.

Cases cited by Appellee to support heinous, atrocious and cruel aggravating circumstances focus on victims' particularly large numbers of stabbings certain characteristics not present in this case: Nibert v. State, 508 So.2d 1 (Fla. 1987)(seventeen wound, some of which manifested victim's conscious defensive attempts to ward off attack), Floyd v. State, 497 So.2d 1211 (Fla. 1986)(twelve stab wounds which also manifested the victim's conscious attempt to defend while being stabbed), Haliburton v. State, 561 So.2d 248 (Fla. 1990)(thirty-one stab wounds some of which were indiscriminately inserted in a tortuous manner about victims body), Preston v. State, 607 So.2d 404 (Fla. 1992)(nude, mutilated body found next day in an open field a few miles from victim's store with multiple stab wounds and lacerations resulting in her near decapitation, HAC partially based on Preston's attempt to avoid arrest). Horace Brown suffered no more than three non-defensive wounds. Contrary to Appellee's interpretation of the evidence, there was no evidence Horace Brown was capable of feeling pain at the time of the stabbings.

The Preston case and the factually related HAC cases mentioned therein are particularly distinguishable based on this court's recited analysis:

> We have upheld the application of this aggravating circumstance in cases similar to this one, where a robbery victim was abducted from the scene of the crime and transported to a different location where he or she was then killed. See, e.g., Swafford, 533 So.2d 270 (defendant robbed gas station then took attendant to remote area where he raped and shot her); Cave v. State, 476 So.2d 180, 188 (Fla.1985) (victim was kidnapped from store and taken thirteen miles to a rural area and killed after robbery), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986); Martin v. State, 420 So.2d 583 (Fla.1982) (defendant robbed convenience store, abducted store employee, sexually battered and then stabbed her), cert. denied, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983). The only reasonable inference to be drawn from the facts of this case is that Preston kidnapped Walker from the store and transported her to a more remote location in order to eliminate the sole witness to the crime.

Preston at 409. Contrary to the prosecutors innuendos and Appellee's vague argument, Appellant's conduct viewed in the light most favorable to the state's evidence does not support HAC aggravating circumstances in this case.

ISSUE XI

THE COURT ERRED BY DRAWING INFERENCES TO IMPLY COLD, CALCULATED AND CRUEL AGGRAVATING CIRCUMSTANCES NEITHER SUPPORTED BY THE EVIDENCE NOR INSTRUCTED TO THE JURY.

Appellee erroneously assumes that sentencing judge's logic finding HAC cannot erroneously surface in the statutory domain of CCP. This court has aptly ventured into this reason of sentencing logic:

> In his fourth point, appellant argues that the trial court erred in finding that this murder was especially heinous, atrocious, or cruel. In support of this finding, the trial court stated:
> (h) The capital felony was especially heinnous [sic], atrocious, and cruel. The defendant exhibited a lack of remorse by taking the wounded victim to a remote area, probably still alive, rather than taking some action which could result in her getting medical attention for the injury, thus reflecting a cold and calculating conscienceless act.
>
> We agree with appellant that this finding does not comport with prior decisions of this Court defining the parameters of the heinous, atrocious, or cruel aggravating factor. Lack of remorse is clearly improper as an aggravating factor or enhancement of an aggravating factor. Pope v. State, 441 So.2d 1073 (Fla.1983). Failure to get medical attention for the victim does not make a murder especially heinous, atrocious, or cruel. Teffeteller v. State, 439 So.2d 840, 846 (Fla.1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); Tedder v. State, 322 So.2d 908, 910 (Fla.1975). Nor can the defendant's acts after the victim is unconscious support this aggravating circumstance. See Jackson v. State, 451 So.2d 458 (Fla.1984); Clark v. State, 443 So.2d 973 (Fla.1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). Our cases make clear that where, as here, death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstance does not apply. Jackson v. State, 502 So.2d 409 (Fla.1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); Fleming v. State, 374 So.2d 954 (Fla.1979).

Id. at 930-931.

ISSUE XII

THE COURT ERRED BY FAILING TO FIND AND ADEQUATELY WEIGH TWO STATUTORY MENTAL MITIGATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE.

Gunsby v. State, 574 So.2d 1085, 16 Fla. L. Week. 114 (Fla. 1991), cited by Appellee, turned on one nonstatutory mitigating factor, that Gunsby is mildly retarded and intellectually functions on a third or fourth grade level. Id. at 1088. However, his death sentence was found to be proportionately correct, because two death sentence reversal cases were dissimilar: Livingston v. State, 565 So.2d 1288 (Fla.1988) and Fitzpatrick v. State, 527 So.2d 809 (Fla.1988)(both without disputes among experts considering the extent of the mental disabilities of the defendant); and Wilson v. State, 493 So.2d 1019 (Fla.1986)(heated domestic confrontation combined with mental disability). Id. at 1090. Unlike Gunsby and vastly more similar to the Livingston and Fitzpatrick cases, Appellant presented expert testimony from Dr. Dee and the Appellee presented no conflicting or dissimilar evidence. For the same reason, Appellant's mitigation evidence does not suggest application of the general assumption that "mental health experts often reach different conclusions," which Appellee concludes as precedent in Engle v. Dugger, 576 So.2d 696 (Fla. 1991). Dr. Dee's testimony was unequivocal, unreserved, unrebutted, competent, and substantial. Therefore the other cases cited by Appellee are also inapplicable. (Appellee's answer brief 65-66.) The trial courts rejection of Appellant's mitigating circumstances because the court apparently thought Dr. Dee's opinions were based on "speculation" were dissimilar to the "mere speculation" rejection upheld in Ponticelli v. State, 593 So.2d 483, 16 Fla. Law Week. S669 (Fla. 1991) because

> Ponticelli had not discussed his mental processes or any of the details of the offense with Dr. Mills, and the only evidence to support Dr. Mills' opinion was Ponticelli's use of cocaine and the description of his hyperactivity on the evening of the murders, although there was no evidence of drug use on the evening of the murders.

Id. at 490-491. Dr. Dee's opinion was based on far more credible interviews and review of Appellant's history, than Dr. Mills had provided in Ponticelli.

ISSUE XIII

A SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THE COURT HAS REDUCED THE PENALTY TO LIFE.

Appellee sarcastically misconstrues Appellant's argument. (Appellee's brief 67) Appellant does not concede that any or "only" three aggravating circumstances were properly found by the sentencing judge. Appellee avoids addressing Appellant's claim that the sentencing judge failed to weigh any mitigation against its three aggrevators and that Appellant does not concede to any of the three aggravating circumstances. Appellant does not concede that his argument under this issue is "meritless." (Appellee's brief at 68)

Appellee suggests that some of the cases Appellant cited in his initial brief for this issue contained death sentence reversals for either jury override or domestic dispute reasons. The question of proportionality of the imposition of the death penalty in Florida does not require this court to find the sentencing judge abused discretion by imposing a sentence so excessive as to shock the judicial conscience, See Woosley v. United States, 478 F.2d 139 (8th Cir.1973). However, a judge who follows a predetermined policy or "mechanistic approach" for determining a sentence in a particular type of case does not exercise sound discretion "after consideration of all the circumstances surrounding the crime." Woosley, 478 F.2d at 143. Appellant does not suggest this court must review the sentencing judge while looking for blatant abuse of discretion, but instead avoid any possible "mechanistic approach" that leads to disproportionate sentencing of death.

The United States Supreme Court has interpreted the final clause of the Eighth Amendment as prohibiting not only barbaric punishments, but also sentences that are disproportionate to the crime committed. Solem v. Helm, 463 U.S. 277, 284, 103 S.Ct. 3001, 3006, 77 L.Ed.2d 637 (1983); Amend. VIII, U.S. Const.

> [W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the

> types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional.

463 U.S. at 290, 103 S.Ct. at 3009-10 (footnote omitted).

> [A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

463 S.Ct. at 292, 103 S.Ct. at 3011. This is a minimum standard as to proportionality, from which the Florida Constitutional protections may be expanded or at least more specifically "fleshed out." See, Art. I, Sec. 17, Fla. Const. Appellee would simplistically suggest that this court has only to mechanically follow limited guidelines as to "sentences imposed on other criminals in the same jurisdiction" of the State of Florida, but this court should also apply "the sentences imposed for commission of the same crime in other jurisdictions." Id. There is no indication in reported case law whether courts regularly review how all other states have proportionally sentenced defendants to death.

The Solem v. Helm criteria to consider the gravity of the offense should not be mechanically viewed as three (if there are that many) absolute and equally weighted aggravating circumstances versus three or more (Appellant has shown several more in his initial brief) absolute and equally weighted mitigating circumstances. See Woosley. The harshness of the death penalty has been characterized as extreme, irreversible, and "different." See Justice Barkett's dissent, Eutzy v. State, 541 So.2d 1143, 1147-1148 (Fla. 1989).

ISSUE XIV

THE COURT ERRED BY FAILING TO FIND UNREBUTTED NON-STATUTORY MITIGATION WHICH WAS CLEARLY ESTABLISHED BY THE EVIDENCE.

Appellee fails to provide any additional legal argument or case precedence other than what Appellant anticipated from Appellee in Appellant's initial brief. Demeanor and credibility of the trial witnesses is traditionally not reviewed by appellate courts. See Shaw v. Shaw, 334 So.2d 13, 16 (Fla.1976). However, the sentencing judge expressed reservations only as to Mrs. Lumey and not as to Dr. Dee's unrebutted and competent expert testimony. The record reflects uncontradicted and competent evidence to support the non-statutory mitigating circumstances mentions in Appellant's initial brief.

> Lockett and its progeny hold that the eighth amendment requires individualized determinations of sentences in capital cases. Accordingly, "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986), quoting Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). See also Lockett v. Ohio, 438 U.S. at 604, 98 S.Ct. at 2964 (1978) (plurality opinion).

Riley v. Wainwright, 517 So.2d 656, 657, 12 Fla. L. Week. 457 (Fla. 1988) citing Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

CONCLUSION

For above reasons, GEORGE WALLACE BROWN, respectfully requests this Court to grant a judgment of acquittal or to reverse his conviction and remand for a new trial for second-degree murder because the state failed to prove the murder was premeditated. If the Court does not grant this relief, Appellant requests this Court reverse and remand for new trial based on other errors discussed in this brief. As a lesser alternative, Appellant asks this Court to vacate his sentence of death and remand for imposition of life sentence or, if none of the above is granted, to award him a new penalty trial and sentencing.

CERTIFICATE OF SERVICE

I certify copy has been mailed to Office of Attorney General, Ste. 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, this 22 day of August, 1993.

Respectfully submitted,

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