IN THE SUPREME COURT OF FLORIDA

WILLIAM EARL SWEET,

Appellant,

v. CASE NO. 78,629

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND THE FACTS

The Appellant's statement at pages (4) and (5) of his brief is accepted. The State would set forth the following additional facts as they pertain to each point on appeal.

Facts: Issue I

The first point on appeal addresses the issue of whether Mr. Sweet should have been allowed to go to trial without counsel.

The Appellant was originally represented by the Office of the Public Defender, which withdrew due to a conflict of interest. (R 143). Attorney Fred Gazalah discovered that he, too, had a conflict and moved to withdraw. (R 149). Attorney Charles Adams was appointed (and accepted by Mr. Sweet). (R 150). Eventually two attorneys (Adams and Moore) came to represent Mr. Sweet.

This appeal stems from an incomplete representation of the events that transpired on November 5, 1990. At the time, Mr. Gazalah was representing Mr. Sweet.

Mr. Gazalah wanted additional time to investigate the case. (T 25). Mr. Sweet opposed any continuance but was not opposed to having counsel. (T 26). In fact, Sweet said:

> "I don't want to file for continuance. You told me on the 24th that this was going to be my trial. I want to make sure -- I want to go to trial this week with Mr. Gazalah. I'm not -- he filed motions to continue. I'm not willing to. I want to go ahead and go to trial." (T 26).

The Appellant clearly said he wanted to go to trial **with**, not without, counsel. The Court, not Sweet, brought up the option of going to trial without counsel. (T 26). When it did, Sweet replied:

"Can't he go with me?" (T 27).

Again, this cannot be characterized as an unequivocal demand to proceed **pro se**.

The ensuing colloquy found Sweet still trying to go to trial "today" and with counsel. In fact, Sweet said:

> "If that's the case I want to go ahead and pick the jury today and go ahead and elect Mr. Gazalah." (T 27).

On the next page, Sweet offered to proceed **pro se** "If he don't want to represent me." (T 28). Thus, Sweet accused counsel of not wanting to represent him; rather than rejecting counsel himself.

Sweet's desire for a quick trial was founded upon the belief that the state had not amassed enough evidence to convict him, thus making a speedy trial tactically desirable, (R 28), when Sweet manifested substantial ignorance regarding the workings of a trial and a total lack of preparation. (T 28-31). The court "overruled" Sweet's objection to the continuance. (T 31). Sweet's reply was to "go ahead and fire him and then we go to trial." (T 31).

Three weeks later, November 28, 1990, Mr. Gazalah moved to withdraw due to a conflict of interest. (T 37). Mr. Sweet requested a new lawyer (T 37) and Mr. Adams was appointed. (T 37). Sweet then asked for leave to act as co-counsel with Mr. Adams so that he could move to dismiss the charges for lack of prosecution. (T 38).

Sweet accepted Mr. Adams but filed a motion for speedy trial. When Adams needed more time to prepare, Sweet withdrew

the motion. (T 62). Also, "on advice of counsel," he withdrew his motion to dismiss. (T 63).

Facts: Issue II

The Appellant correctly asserts that Mr. Sweet's intended victim, originally, was Marcene Cofer.[1]

On June 6, 1990, Cofer was attacked and robbed by three men. (T 529-30). She was only able to identify two of the attackers ("Funky Larry" and "Vince") (T 530).

On June 26, 1990, the police contacted Ms. Cofer and, in fact, were seen talking to her (by Mr. Sweet) in front of her apartment. (T 533). Later that night, Sweet burst into Cofer's apartment and shot everyone in sight, killing Felicia Bryant. (T 515).

The Court allowed the state to supplement this evidence with testimony from Ms. Manuella Roberts. (T 910 **et seq.**). Ms. Roberts testified that Sweet confessed to either participating in or arranging the June 6, 1990, attack upon Marcene. (T 912). Sweet named "Funky Larry" as a participant and said Larry was the one who cut Ms. Cofer's face (above the eye). (T 912)

Sweet, in jail, told Solomon Hansbury that he believed that "Funky Larry" (again, a known robber) would be blamed for the murder. (T 943). Sweet did not expect to be identified, stating "If I knew this would happen I would have killed them all." (T 943).

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[1] We do not agree that Felicia was killed "by accident" as alleged in Sweet's brief. We note that the victim's name appears as "Marcine" and "Marcene" in the record.

Facts: Issue III

The trial court's findings on the issue of whether this murder was cold, calculated and premeditated (R 403-404) were supported by the following facts:

(1) Sweet's motive was to eliminate Ms. Cofer as a witness to the June 6, 1990 robbery. (R 403).

(2) Sweet attempted to break in and, when the opportunity arose, stepped inside. (R 403).

(3) Sweet had ample time to plan his attack. (R 403). Sweet chose the time and place so there would be no witnesses. (R 403).

(4) Sweet also wore a mask (R 404) and began shooting at once. (R 404). The sole purpose of entry was to kill people without being identified. (R 404).

Facts: Issue IV

As noted above, the motive for the killing was witness elimination, thus supporting the finding of murder "to avoid arrest." (R 400-402).

Facts: Issue V

The trial judge found that Mr. Sweet had committed not one, but several, prior violent felonies. Sweet (armed with sections of a cement block) committed an armed robbery on a Mr. Smith in 1988. (R 398). Sweet also participated in a violent (jail) riot and battered a law enforcement officer in 1989. (R 399). The contemporaneous felonies were also considered. (R 388). The only prior violent felony complained of on appeal was Sweet's conviction for possession of a firearm by a convicted felon. In that case, Sweet beat up someone, using a sawed-off shotgun as a club. The crime was violent even though the formal charge was "possession." (R 399).

Facts: Issue VI

Five separate crimes were committed against four separate victims. In addition, Sweet had recent convictions for three other (unrelated) violent crimes. (R 398-399).

SUMMARY OF ARGUMENT

The Appellant has failed to show a legal or factual basis for relief as to his convictions and sentence of death. He is not entitled to "correction" of his non-capital sentences.

Regarding his first claim, Mr. Sweet never requested leave to proceed **pro se** and was not deprived of a proper "Faretta inquiry."

Regarding claim two, the trial court correctly admitted evidence relevant to Sweet's motive.

The trial court was clearly correct in applying the "cold-calculated-premeditated" and "avoid arrest" statutory aggravating factors' and clearly did not err in relying upon Sweet's numerous convictions for prior violent felonies.

His non-capital sentences were imposed according to clear legislative intent and should not be reversed.

ARGUMENT: ISSUE I

THE TRIAL COURT DID NOT ERR IN APPOINTING COUNSEL FOR THE DEFENDANT IN THE ABSENCE OF ANY CLEAR AND UNEQUIVOCAL REQUEST TO PROCEED WITHOUT COUNSEL.

The Appellant is not entitled to relief under **Faretta v. California**, 422 U.S. 806 (1975) because:

(1) The Appellant did not make an unequivocal demand to represent himself.

(2) The Appellant did not manifest an ability to knowingly or intelligently waive counsel.

(3) The Appellant ultimately changed his mind and went to trial with counsel.

We will address these issues in order:

(1) UNEQUIVOCAL DEMAND

By any fair or contextual reading of the record, Mr. Sweet did not want to proceed without counsel. Mr. Sweet, misinterpreting the state's "failure to take depositions" as proof that the state "has no evidence," demanded an immediate trial. (T 25-29). In doing so, however, Sweet insisted that he wanted Mr. Gazalah to represent him. **(Id.)**. The comment regarding "firing" Gazalah, taken in context, was an expression of a desire to go to trial at once and by any means necessary. It was not an expression of any desire to actually proceed **pro se**.

The federal courts and this Court have consistently held that a **Faretta** inquiry, and the discharge of counsel, is **not** required when the alleged request for self-representation is equivocal. **Faretta, id.; Chapman v. United States**, 553 F.2d 886 (5th Cir.1977); **Brown v. Wainwright**, 665 F.2d 607 (5th Cir.1982); **Watts v. State**, ___ So.2d ___, 17 FLW S27 (Fla.1992); **Hardwick v. State**, 521 So.2d 1071 (Fla.1988).

Since the record does not reflect a clear and unequivocal request for self-representation, Sweet is not entitled to relief.

One other point should be made. Sweet's **actual** desire was for an immediate trial (with counsel) to exploit a perceived weakness in the state's case. By injecting a "Faretta" issue,

the Appellant suggests that the trial court had no option other than to discharge counsel and allow Sweet to manipulate the docket. Of course, on appeal Mr. Sweet could then allege (on this record) that he **wanted** counsel but was forced to waive his constitutional rights. This Court has repeatedly held that **Faretta** cannot be used to manipulate the courts. **Jones v. State,** 449 So.2d 253 (Fla.1984); **Waterhouse v. State,** ___ So.2d___, 17 FLW S132 (Fla.1992).

(2) ABILITY TO WAIVE COUNSEL

Mr. Sweet is correct in asserting that one can waive counsel, even if one is not an attorney, so long as the defendant is mentally competent. He errs, however, in contending that this maxim compels any trial judge to allow any competent defendant to proceed **pro se** on demand.

Rule 3.111(d)(3), Fla.R.Crim.P. states:

> "No waiver shall be accepted when it appears that the defendant is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or complexity of the case, or other factors."

In this case, Sweet wanted an immediate trial, assisted by counsel but without counsel if necessary, on the basis of a profound perceptual error. Sweet mistakenly felt that the state was unprepared for trial (and therefore beatable) because it had not taken depositions. Sweet thought the absence of depositions meant that the state had no witnesses.

This error could not be fairly ignored by the Court. Furthermore, Sweet's error was compounded by the fact that no defense witnesses had been subpoenaed for trial and that the

defense - including Sweet - was totally unprepared to try the case.

These circumstances clearly fell "among the other things" recognized as justifying the denial of a **Faretta** motion. **Johnston v. State**, 497 So.2d 863 (Fla.1986); **Hardwick v. State**, 521 So.2d 1071 (Fla.1988). While Sweet was not required to be "a lawyer," **see Muhammed v. State**, 494 So.2d 969 (Fla.1986), he was required to make a decision "with understanding." **See Muhammed, id**; and **Massey v. Moore**, 348 U.S. 105 (1954).[2]

Sweet alleges, however, that the Court erred reversibly by not conducting a formal "Faretta" hearing **per se**. This elevation of form over substance ignores the fact that, in those cases where the record speaks for itself, no formal hearing is necessary. **Bundy v. Dugger**, 850 F.2d 1402 (11th Cir.1988).

It would have been fundamentally unjust to allow Sweet to go to trial unprepared, without witnesses, and under the delusion that the state had no witnesses. Sweet clearly did not appreciate his situation. That, plus the equivocal nature of his "request," precludes relief.

(3) ACCEPTANCE OF COUNSEL

The concept of harmless error applies to **Faretta** cases in which the defendant ultimately accepts counsel and goes to trial. **Bundy v. Dugger**, 850 F.2d 1402 (11th Cir.1988). Here, Sweet never really wanted to go to trial alone, he accepted

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[2] The hearings in question were held on November 5 and 28, 1990. At the time no competency evaluation had been performed. In May 1991, Sweet was evaluated and found to be sane and competent. That, however, is a "factor" that was not available in 1990. (R 312-314).

representation by attorneys Adam and Moore, he withdrew his **pro se** motions at counsel's request (T 62, 63) and went to trial.

Mr. Sweet's appeal offers an argument without a rational remedy. Sweet has not alleged or shown that, given a new trial, he would proceed **pro se**. In point of fact, our record indicates that Sweet would probably ask for the assistance of counsel for any new trial. Therefore, other than as a vehicle to abuse the system, Sweet's "Faretta" claim is pointless and any error was harmless. **State v. DiGuilio**, 491 So.2d 1129 (Fla.1986).

ARGUMENT: ISSUE II

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE RELATING TO THE MOTIVE FOR THE APPELLANT'S CRIMES.

On April 11, 1991, the state filed a factual stipulation with the trial court outlining Mr. Sweet's connections with the June 6, 1990 robbery and the events of June 26 and 27, 1991. (R 240).

On May 21, 1991, on the first day of trial, the defense raised an oral motion in limine to exclude this evidence as prejudicial. (T 458-78). Argument was permitted and the motion was denied. The Appellant preserved the issue with additional objections during trial.

The Appellant, after confessing that evidence of motive is admissible under § 90.404, Fla. Stat. (1990),[3] argues that the "Williams Rule" evidence at bar should have been excluded because

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[3] **See Williams v. State**. 110 So.2d 654 (Fla.1959); **Mackiewicz v. State**, 114 So.2d 684 (Fla.1959).

it was circumstantial and because it also "prejudiced" him during the penalty phase.

The evidence, as summarized in the stipulation and shown by the record, was as follows:

(1) Marcene Cofer was a drug dealer.

(2) On June 6, 1990, she was robbed by three men, two of whom she knew as Vince and "Funky Larry." She could not identify the third.

(3) On June 26, 1990, Marcene went with the police to review mug shots.

(4) When she was brought back to her apartment by the police, she was seen by Mr. Sweet, who was "rude" to her.

(5) That night Sweet came to her apartment and committed the shooting at bar. (This is not stipulated beyond the mere fact that the shooting took place).

(6) Sweet told Manuella Roberts that he participated in the June 6, 1990 robbery or that he "had it done."

(7) Sweet told Solomon Hansbury (after his arrest) that he thought "Funky Larry" (a robber) would be blamed for the shooting and that he would have killed everyone had he thought he would be arrested. (T 943).

On appeal, Sweet contends that this evidence does not qualify as "Williams Rule" evidence because it is "circumstantial" and, in turn, requires the "stacking of inferences."

This evidence was "circumstantial" but was augmented by two key factors ignored by Sweet's brief. First, Sweet's admission of guilt to Manuella Roberts regarding the prior robbery is not "circumstantial" evidence. It is direct evidence which corroborates the remaining circumstantial evidence. Second, Sweet was positively identified as the gunman, thus linking him to both the June 6 and June 26-27 crimes.

Circumstantial evidence is, by its very nature, evidence which requires the trier of fact to draw conclusions. The rule of admissibility governing such evidence is that each individual piece of circumstantial evidence is **not** required to be able, standing alone, to establish guilt. **State v. Fischer**, 387 So.2d 473 (Fla. 5th DCA 1980). In fact, the jury is specifically allowed to consider the defendant's conduct before and after the crime in assessing motive and intent. **Cooper v. Wainwright**, 308 So.2d 182 (Fla. 4th DCA 1975); **Pace v. State**, ___ So.2d___, 17 FLW S205 (Fla.1992).

Citing old or easily distinguishable cases, Mr. Sweet retreats into the semantic morass of contrasting "the stacking of inferences" with the use of circumstantial evidence. We submit that Mr. Sweet's theory, if accepted, would offend the evidence code by essentially prohibiting the use of circumstantial evidence simply because such evidence requires the use of "inferences." The law is clearly contrary to Sweet's position. "Motive," "intent" and other essentially intangible elements of a criminal offense (such as "agreement") may be proven by circumstantial evidence. **State v. Fischer, supra; Manner v. State**, 387 So.2d 1014 (Fla. 4th DCA 1980); **Borders v. State**, 312 So.2d 247 (Fla. 3rd DCA 1975); **Cooper v. Wainwright, supra; Randolph v. State**, 463 So.2d 186 (Fla.1984).

Circumstantial evidence must be sufficient to exclude any reasonable hypotheses of innocence. The operative word is "reasonable," **Huff v. State**, 495 So.2d 145 (Fla.1986) and the state is not required to offer evidence that refutes lesser

hypotheses. Of course, the issue of what is "reasonable" is to be decided by the jury - not an appellate court, **Huff v. State, id; Songer v. State**, 322 So.2d 481 (Fla.1975), so appellate speculation (such as Mr. Sweet's brief) is irrelevant.

Mr. Sweet says that no inferences can be drawn from the June 6 robbery because he was not charged or convicted for that offense. A conviction was not necessary, **see, e.g., Randolph v. State, supra; Cotita v. State**, 381 So.2d 1146 (Fla. 1st DCA 1980), particularly when, as here, the motive for the murder was to eliminate a witness and thus avoid prosecution.

Second, Sweet alleges that Cofer's failure to identify him when they met on the street (with the police present) somehow removes any motive which could be inferred from the robbery. This contention ignores the fact that three men were involved in the June 6 robbery, and Cofer's identification of **anyone** could result in the arrest of **everyone**. Therefore, Sweet could not rely upon this "fact." In this regard, we would note Sweet's comment to Solomon Hansbury that he wanted "Funky Larry" (a known participant in the June 6 robbery) to take the fall for any shooting of Ms. Cofer.

Third, Sweet opines that the mere act of meeting with the police did not "prove" Cofer was even reporting the robbery. This suggestion illogically ignores the fact that Ms. Cover was a crack cocaine dealer who arguably had little desire for police contact - particularly at her home.

Since Sweet was positively identified as the shooter, and thus was linked to both the June 6 and June 26 crimes, this case

is unlike **Hall v. State**, 500 So.2d 661 (Fla. 1st DCA 1986). In **Hall**, the defendant asked the victim for money before the victim was killed but was not linked to the shooting.

Sweet's cited case of **Benson v. State**, 526 So.2d 948 (Fla. 2nd DCA 1988) also fails to support his position since **Benson** specifically **allows** the "stacking of inferences" when certain circumstantial inferences have been established beyond a reasonable doubt. Here, we know that Ms. Cofer was robbed, we know three men did it, we know Sweet saw her talking to the police and we know that Sweet attacked her and her guests that very night. We also have direct admissions against penal interest to third parties by Mr. Sweet. Little, if any, "stacking" was necessary in this case.

Finally, Sweet contends that proof of motive should not have been permitted because it prejudiced him during the penalty phase. This argument was rejected in **Randolph v. State, supra**, and is not worthy of further discussion. The fact that guilt phase evidence "prejudices" a defendant at a future sentencing is not grounds for exclusion. **Randolph.**

The evidence at bar was valid Williams Rule evidence which established the defendant's motive for attacking Ms. Cofer's apartment. No other reasonable interpretation of the evidence has even been suggested, much less established. Since the "circumstantial" evidence at bar was augmented by direct evidence in the form of admissions and eyewitness testimony, the trial court did not err in allowing the defendant's motive to be established by partially circumstantial "Williams rule" evidence.

ARGUMENT: ISSUE III

THE TRIAL COURT WAS CORRECT IN FINDING THAT THIS MURDER WAS COLD, CALCULATED AND PREMEDITATED.

Although Felicia Bryant was the victim of "transferred intent," that fact does not preclude a finding of cold, calculated and premeditated murder. **Provenzano v. State**, 497 So.2d 1177 (Fla.1986). The key to any review of this factor is the level of preparation, not the success or failure of the plan. **Provenzano, id.**

It is clear from the record that evidentiary support exists for this factor even if Mr. Sweet would interpret the evidence in a different manner.

First, Sweet's motive was to eliminate a potential witness in a pending robbery investigation. Although Ms. Cofer could not identify Sweet, she knew his partners. Witness elimination is a factor supporting the application of CCP. **See Herring v. State**, 446 So.2d (Fla.1982); **Rogers v. State**, 511 So.2d 526 (Fla.1987); **Stokes v. State**, 548 So.2d 188 (Fla.1989); **Rutherford v. State**, 545 So.2d 855 (Fla.1989); **Routly v. State**, 440 So.2d 1257 (Fla.1983).

Second, prior to the killing, Sweet procured a gun and a mask. This corresponds to similar preparations in **Lamb v. State**, 532 So.2d 1051 (Fla.1988); **Maharaj v. State**, ___ So.2d ___, 17 FLW S201 (Fla.1992); **Remeta v. State**, 522 So.2d 825 (Fla.1988); and **Koon v. State**, 515 So.2d 1253 (Fla.1987).

Third, Sweet opted to murder his intended victim late at night, to minimize the chance of detection (so that "Funky Larry" would be accused).

Fourth, upon entering the apartment Sweet immediately began shooting, thus proving that his intent all along was to kill.

Fifth, Sweet had ample time to consider and plan the assault. **See Rutherford v. State**, 545 So.2d 853 (Fla.1989).

Offering nothing more than a strained interpretation of the record, Sweet alleges:

(1) Although "transferred intent" applies, it shouldn't be applied because the shooting was "haphazard."

Sweet argues (at pg. 24) that not everyone died, so therefore, anyone who did die was not murdered with premeditation. This is nonsense. There is no nexus between "intent" and "shooting skill" and Sweet cites no authority for the proposition.

Felicia Bryant was the first person confronted by Sweet as he kicked open the door and started firing. Since the apartment was Ms. Cofer's, it is only logical to assume that Sweet expected her, not Bryant, to be at the door. Thus, the fact that she received the fatal shots was not entirely haphazard.

(2) "No one else died."

Again, all facts and inferences must be taken in favor of the sentence. **Shapiro v. State**, 390 So.2d 344 (Fla.1980).

The fact that other occupants of Cofer's apartment survived their wounds has no logical nexus with the question of whether Sweet planned the attack. The defendant was convicted, after all, of three counts of attempted murder and the applicability of the CCP factor has never been contingent upon the success of the plan.

It should be noted, however, that Sweet told Solomon Hansbury that he expected "Funky Larry" to take the blame for the attack. (R 401). Again, if this is true then it indicates that Sweet, who wore a mask, was primarily concerned with Ms. Cofer.

At (R 404) the Court noted that Sweet, upon entering Cofer's apartment (with a loaded six-shot revolver) may have found more people than he expected. Thus, Sweet had insufficient ammunition to finish his victims. Again, this "error" does not defeat application of the CCP factor.

(3) "The defendant didn't select the time because he saw a witness."

Again, a "logical" non-sequitur appears on page 25 of the brief. Sweet selected the time of his attack without having any "psychic foreknowledge" that Mattie Bryant would go to Cofer's apartment. Sweet saw Mattie, left, came back and shot everyone. The presence of an unforeseeable circumstance does not defeat CCP and, once again, Sweet cites to no authority for his proposition.

The CCP factor was properly applied to the only logical inferences that can be drawn from this record.

ARGUMENT: ISSUE IV

THE TRIAL COURT DID NOT ERR IN FINDING THAT THIS MURDER WAS COMMITTED TO AVOID OR PREVENT ARREST.

On page 27 of his brief, Sweet confesses that the aggravating factor found by the trial court was supported by the evidence and, in particular, the four conclusions drawn from the record by the trial court. In contesting the applicability of the "avoid arrest" factor, Sweet simply offers a jury argument suggesting his own, alternative, view of the evidence.

Not one shred of evidence or argument has ever been offered to show why Sweet would attack Ms. Cofer other than to eliminate her as a witness. Not once has Sweet ever alleged any animosity towards Felicia Bryant or any reason for murdering her as an alternative to witness elimination. All we have been "offered" is the illogical and untenable notion that Sweet simply burst into Cofer's home and shot it up for absolutely no reason. All of Sweet's "haphazard shooting" arguments fail to address the central point: Why was Sweet there in the first place?

The answer, as found by the trial court, was witness elimination to head off his foreseeable arrest.

Sweet's intent to kill a person (or persons) who could possibly cause his arrest is at least as well established as similar intent in **Antone v. State**, 382 So.2d 1204 (Fla.1980); **Harvey v. State**, 529 So.2d 1083 (Fla.1988) and **Kokal v. State**, 492 So.2d 1317 (Fla.1986). **Kokal** is particularly significant since there, as here, the victim presented no threat to the defendant **except** as a potential witness. The same held true in **Harmon v. State**, 527 So.2d 182 (Fla.1985) and in **Routly v. State**, 440 So.2d 1257 (Fla.1983). Again, while the prospect of identification cannot, standing along, prove this factor, Sweet's statement to Hansbury can combine with the other evidence to do so. **See Lopez v. State**, 536 So.2d 226 (Fla.1988); **Routly, supra; Swafford v. State**, 533 So.2d 270 (Fla.1988).

Sweet's brief concludes by suggesting that the trial judge should have weighed the evidence **prior** to allowing the state to argue and then precluded the state from arguing for this factor

unless the court had already prejudged the case in the state's favor. (Brief at 31). This unusual proposition ignores the (confessed) existence of supporting evidence and is simply too untenable to merit serious discussion.

ARGUMENT: ISSUE V

THE COURT DID NOT ERR IN FINDING THAT SWEET HAD PRIOR CONVICTIONS FOR VIOLENT FELONIES.

It should be noted at the outset that the statutory aggravating factor of "prior conviction for violent felony" was supported by several prior convictions for robbery and battery (as well as the conviction for attempted murder) in addition to the "possession" charge challenged here. Therefore, even if Mr. Sweet could prevail on this minor point, the applicability of this statutory aggravating factor and the propriety of his sentence would not in any way be affected. **Bundy v. State**, 538 So.2d 445 (Fla.1989); **Johnson v. State**, 465 So.2d 499 (Fla.1985).

Johnson, id., relying upon **Mann v. State**, 420 So.2d 578 (Fla.1982) and **Mann v. State**, 453 So.2d 784 (Fla.1989), held that certain felonies that are not violent **per se** can qualify for consideration if the underlying facts support a finding that the crime was violent. In our case, Sweet's "possession" of a gun involved his use of the gun as a club to beat his victim. Facially, therefore, the consideration of this factor by the sentencer was proper.

Although the Appellant did not raise the issue, we would note that **Johnson** requires the court, when including a possibly "nonviolent" felony in its instructions on "violent" prior

convictions, to instruct the jury that it must find that the particular felony was "violent" (based on its facts) prior to weighing it. This special instruction was not given in this case, but we submit that any error was harmless given Sweet's many other violent felony convictions for armed robbery, riot, battery and attempted murder. **Johnson, id; Bundy, supra.**

ARGUMENT: ISSUE VI

THE APPELLANT IS NOT ENTITLED TO RECONSIDERATION OF HIS NON-CAPITAL SENTENCES.

Mr. Sweet was convicted of three additional counts of attempted first degree murder and one count of burglary (while armed) "with assault or battery."

The attempted murders were all first degree felonies under § 777.04, Fla. Stat. and were punishable under § 775.082, .083 or .084, Fla. Stat.

Pursuant to §§ .082, these felonies were punishable by 30 years imprisonment or, when authorized by statute, "life." In this instance, since it is undisputed that Sweet is an habitual violent offender, §§ .084(4)(b)(1) requires a sentence of "life" with no eligibility for parole for fifteen years.

The armed burglary conviction also constituted conviction of a "felony punishable by life" under § 810.02(2)(a) and (b), Fla. Stat. Thus, again, under § 775.084(4)(b)(1), Sweet faced life in prison without possibility of parole for fifteen years.

Mr. Sweet now contends that the "rule of lenity" (Brief, pg. 37) precludes the imposition of consecutive minimum mandatory sentences and, in addition, relies upon **Daniels v. State,** ___ So.2d___, 17 FLW S118 (Fla.1992).

Mr. Sweet's reference to the so-called "rule of lenity" (cited by him as § 775.021(1), Fla. Stat.) is misplaced. Section 775.021(4)(b), not §§ (1), contains the controlling statement of Legislative intent. Subsection (4)(b) says:

> "The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent."

Of course, Section 775.021(2) states:

> "The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides."

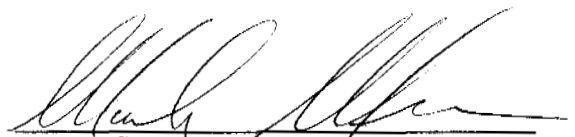
Since the Legislature has also taken the trouble to set forth rules of construction as well as legislative intent, the "close call" of **Daniels v. State,** ___ So.2d___, 17 FLW S118 (Fla.1992) clearly went the wrong way. No statutory exception exists to prohibit the imposition of consecutive minimum mandatory sentences for each one of Sweet's crimes. Thus, under Section 775.021(2), the trial court properly sentenced Mr. Sweet.

CONCLUSION

The Appellant is not entitled to relief except as conceded by the state.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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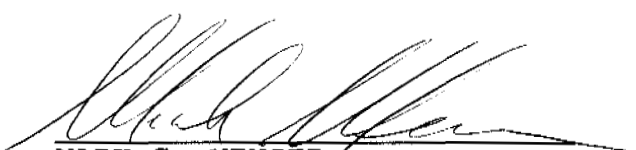
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301 this 18th day of May, 1992.



MARK C. MENSER
Assistant Attorney General