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

# INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The appellant in this capital case is William Sweet. The record on appeals consists of 28 volumes. References to the transcript of the trial and other proceedings will be by the usual letter "T." References to the record will be by the letter "R."

## STATEMENT OF THE CASE

An amended indictment filed in the circuit court for Duval County on March 21, 1991 charged William Sweet with one count of first degree murder, three counts of attempted first degree murder, and one count of burglary with an assault or battery (R 182-86). He pled not guilty to those charges (Volume 5, p. 7), and over the next several months he and the state filed several motions or notices relevant to this appeal:

> a. Three motions in limine to prevent the defendant from arguing or introducing evidence regarding 1) the insufficiency of the allegations in the indictment regarding felony murder, 2) the sentences Sweet faced if convicted of the non-capital offenses, 3) the nature of the offenses pending against Solomon Hansberry, a state witness, and 4. the drug usage of the victim (R 179-180, 193-205, 206-207, 219). The court granted all of these requests (R 181, 260, 261, 262).
>
> b. Pro se Motion to Dismiss (R 151-152, 189-190), which the state traversed (R 153).
>
> c. Motion to suppress out-of-court identification of Sweet by one of the victims (R 215-16). Granted (T 656).

Sweet was tried before the honorable Frederick Tygart and was found guilty as charged on every count (R 354-58). He proceeded to the penalty phase of the trial, and after hearing further evidence from the state and defense, the jury recommended death by a 10-2 vote (R 370).

The court followed that vote, and it sentenced Sweet to death. In aggravation, the court found:

> a. The defendant was previously convicted of a felony involving the use or threat of use of violence.

b. The murder was committed for the purpose of avoiding or preventing a lawful arrest.

c. The murder was committed during the course of a burglary.

d. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R 391-404).

In mitigation, the court found that Sweet lacked "parental guidance in his formative years as a teenager." (R 406)

On the other convictions, the court found Sweet to have been an habitual violent felon, and he sentenced him to four consecutive life sentences with a mandatory minimum sentence of fifteen years on each of the non-capital crimes (R 386-89).

This appeal follows.

## STATEMENT OF THE FACTS

Marcine Cofer sold cocaine from her apartment in Jacksonville (T 530). On June 6, 1990 she was there and "kind of sleepy" when she heard someone knocking on her door. Thinking it was her boyfriend, she opened it and three men, two of whom she recognized (T 530), barged in (T 529). They beat her, shot a gun and threw her onto the floor where they stepped on her. They demanded to know where money, jewelry, and the cocaine were, and once they found it, they left (T 529). Although Cofer never identified Sweet as one of her robbers, the defendant, in a joking manner, sometime after the robbery told a friend of Cofer's that he had robbed Cofer, had had her robbed, or denied doing the crime at all (T 911-13).

Cofer called the police and reported the robbery. About three weeks later, on June 26, a policeman brought her to the police station to look at some photographs (T 532). After doing so, the officer returned her to her apartment, and when he dropped her off several people apparently were milling about (T 604). Sweet walked past her and acted rude (T 545-46).

That evening Cofer was in her apartment, and because she was afraid, having been robbed almost three weeks earlier, she asked if some neighbor children, Felicia and Sharon Bryant, could stay with her (T 508). Apparently their mother, Mattie Mae Bryant, agreed because shortly the two girls and their baby sister showed up and came inside (T 508).

Sometime during the evening Cofer went to her bedroom to sleep, and the girls stayed in the living room, watching TV.

About 1 a.m. Sharon woke Cofer up and told her that someone had kicked the front door "real hard." (T 508) She dozed off, but Sharon returned a few minutes later and said someone was turning the porch light off and on and opening and closing Cofer's bedroom window (T 509). Cofer got out of bed, went to the living room, and looked out the peephole in the front door. She saw the defendant, who called her by name and told her to open the front door (T 509, 511).

Scared, Cofer asked Sharon to get her mother, and she did so by banging on the bathroom wall, which was also the wall of her mother's apartment. A few minutes later, Mattie Bryant came into Cofer's apartment. They decided they would go to Bryant's home, and they lined up at the front door, prepared to go (T 514-15). Cofer had a .25 caliber gun, which did not work, and Mattie had a knife (T 515, 518). Felicia opened the door to leave, but Sweet stepped inside with a pair of pants over his head (T 516). He immediately began shooting a gun he had. The women scattered, but Cofer was hit in the thigh (T 516), Sharon "in the butt (T 631), Mattie in the hip and ankle (T 733), and Felicia was shot twice in the abdomen (T 687-88). After having fired six shots, Sweet left the apartment (T 786). He was arrested a day later at his home (T 843-50). While in a booking cell, he told another inmate that "If I knew this was going to happen, I would have killed them all." (T 943)

Felicia Bryant died from her wounds (T 687).

## SUMMARY OF THE ARGUMENTS

Sweet presents two guilt phase and four penalty phase arguments for this court to consider. In the first issue, the defendant claims that the trial court erred in failing to conduct the hearing required by Faretta v. California, when he unequivocably requested to "fire" his lawyer and go to trial. Instead, the court was more concerned about having this court reverse Sweet's conviction if it allowed him to be his own lawyer. It made little inquiry of whether Sweet knowingly and intelligently wanted to go to trial without a lawyer.

At trial, the court admitted evidence of a robbery of Marcine Cofer about three weeks before the murder. It did so under the theory that Sweet inadvertently killed Felicia Bryant instead of Cofer because he wanted to silence Cofer. Such a theory was built on several inferences, which not only were not proven, but which also did not unalterably point to this motive.

The court said Sweet committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Yet that the victim was Felicia Bryant rather than Cofer is evidence that the killing was not methodically planned. Also, the virtual random shooting and non-life threatening injuries suffered by Cofer and the other victims, except for Felicia, is proof that Sweet had not calculated plan to kill Bryant.

The court also said Sweet killed Felicia to avoid lawful arrest. While that is a possibility, the state did not present

the strong evidence required that this was the only or dominant motive for the murder. This conclusion follows when it is realized that Sweet did not methodically kill everyone in the apartment. Instead, he apparently fired random shots. Moreover, when he left, he must have known that Cofer and the other victims were alive. Such knowledge negates the conclusion that he killed Felicia knowing that others, and particularly Cofer were alive when he left her apartment.

The court, over defense objection, admitted evidence of Sweet's prior conviction of possession of a firearm by a convicted felon to establish his record of having a prior violent felony conviction. That was error because that crime is not one of inherent violence, and Sweet was never charged or convicted for any violent crime out of which the possession charge arose.

Finally, the court, finding Sweet to be an habitual violent felony offender, sentenced him to four consecutive live sentences with the provision that on each sentence he had to serve a minimum mandatory sentence of fifteen years. This court's opinion in Daniels v. State, Case No. 77,853 (Fla. February 20, 1992) prohibits the stacking of minimum mandatory sentences arising out of the same criminal episode. Likewise, the court erred ordering Sweet to serve his life sentences consecutively. Such terms of imprisonment must be served concurrently.

## ARGUMENT

### ISSUE I

THE COURT ERRED WHEN IT FAILED TO GRANT SWEET'S PERSONAL REQUEST TO GO TO TRIAL AND WHEN IT FAILED TO ADEQUATELY INQUIRE WHETHER HE WANTED TO REPRESENT HIMSELF.

During one of the several pretrial hearings in this case, counsel for Sweet asked the court to continue the case so he could finish his preparations for trial (T 25). Sweet objected to the continuance; instead he wanted to "go ahead and go to trial." (T 26) The court, interpreting this request as one to represent himself, told Sweet that if he desired to represent himself, they could go to trial "this week." (T 26) Sweet, somewhat unsure of what that meant, wanted his lawyer to "go with [him]", but the court told the defendant that he was not ready. It also told Sweet that he could either have a lawyer or represent himself, and Sweet, when faced with those alternatives said that if his counsel could not represent him "today and go to trial" then he would "take my chances and just go ahead and go to trial." (T 28)

After some further questioning about Sweet's motives for wanting to go to trial so quickly, the court asked the defendant the following:

> THE COURT: Well, Mr. Sweet, I don't think you're capable of representing yourself because you don't understand anything that happens at a trial, do you? Have you been through a jury trial before?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Where was that?

THE DEFENDANT: Judge Olliff's court with Mr. Bledsoe.

THE COURT: Who was your lawyer?

THE DEFENDANT: Richard Deen.

THE COURT: What happened there?

THE DEFENDANT: They dropped the case. I got time for another case. I got put in the jail house.

THE COURT: So they dropped the case and you didn't go to trial.

THE DEFENDANT: I went all the way through trial but it was mistrial. The jury had deliberated. They didn't come up with a verdict.

THE COURT: Mr. Sweet, under the circumstances I'm afraid that if I don't grant Mr. Gazaleh's [defense counsel's]; motion for continuance and proceed to trial I'm going to waste everybody's; time because the Supreme Court is going to send it right back here to be tried again and you're not going to get this thing dispose. It's going to take longer.

(T 29-30).

Undeterred, Sweet reiterated his desire to go to trial, even if it meant representing himself.

THE DEFENDANT: Excuse me. Can you fire him and can we go to trial then? I cannot wait, set here for the first of the year.

THE COURT: I don't want to try your case twice, Mr. Sweet. I only want to try it once.

THE DEFENDANT: I'm ready to go to trial. If we talking about the first of the year that ain't that much time to get no case going. Go ahead and fire him and then we go to trial.

THE COURT: We'll set the case for January the 14th for jury trial.

MR. GAZALEH: Thank you, Your Honor.

(T 31-32).[1]

From this dialog, Sweet clearly wanted to go to trial, with or without the assistance of counsel, and the trial court erred in not properly inquiring if Sweet desired to represent himself. Its cursory inquiry pertained only to tangentially relevant issues, and nowhere did the court ask any questions or make any determination that the defendant knowingly and intelligently waived his right to counsel so that he could represent himself as required by Faretta v. California, 422 U.S. 806, 95 C.T. 2525, 45 L.Ed.2d 562 (1975) and Rule 3.111(d) Fla. R. Crim. P.

The first question, however, is whether Sweet unequivocally requested to represent himself because he must do so before the trial court has the obligation to make the Faretta inquiry. Hardwick v. State, 521 So.2d 1071, 1073 (Fla. 1988). Fortunately, in this case, Sweet repeatedly told the court that he not only wanted to go to trial immediately, but that he was willing to do so without a lawyer. His last words to the court nicely captured this sentiment. "Go ahead and fire him [defense counsel] and then we go to trial." (T 31) In Hardwick, this court said that such efforts to remove counsel was good evidence the defendant wants to represent himself.

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[1]Sweet made a similar request two months later. He wanted a new lawyer and a speedy trial (T 51-55). The court denied both requests (T 55).

"We recognize that, when one such as appellant attempts to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self representation." Id. at 1074. (cite omitted, emphasis supplied.) In this case, the defendant's repeated desires to be rid of his lawyer indicates, in an unequivocal way that he wanted to represent himself.

The trial court itself realized this when, in response to Sweet's request, it said, "If you want to fire him [defense counsel] and represent yourself that's your privilege." (T 27) Thus, the trial court recognized what the law also dictates: Sweet had clearly requested to represent himself.

The only remaining question focuses on the court's inquiry into whether Sweet knowingly and intelligently wanted to represent himself. The answer to that question is governed by the Faretta, supra, and Rule 3.111(d) Fla. R. Crim. P.

In Faretta, the nation's high court held that a defendant must be allowed to represent himself if he knowingly and intelligently waived the benefits of counsel.

> Although a defendant need not himself have the skill and experience of a lawyer in order [to] competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that `he knows what he is doing and his choice is made with eyes open.'" Id. at 835.

The court also specifically ruled that a defendant's technical proficiency in the rules of evidence or procedure could not enter into the determination of the validity of the waiver. The trial judge should focus, in short, upon ascertaining

whether the defendant was "voluntarily exercising his informed free will" by choosing to represent himself. Id.

Rule 3.111(d) provides more details to guide the court:

> (2) A defendant shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into accused's comprehension of that offer and his capacity to make that choice intelligently and understandingly has been made.
>
> (3) No waiver shall be accepted where 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.[2]

In this case, the court asked Sweet if he had any witnesses subpoenaed (no), if he knew who the state was going to call as witnesses against him (the state had no witnesses), and if he had been through a jury trial before (T 28-29). As to this last question, Sweet said that he had, but the case had been "dropped" because the jury was deadlocked. Even though Sweet may have lacked the experience of a lawyer, and may have not realized what the state was prepared to prove, he nevertheless knew what he wanted to do, even after the court had questioned him regarding his preparation for trial. As the United States Supreme Court has emphasized, technical

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[2]To the extent, the rule gives some emphasis to the defendant's familiarity with the courts, i.e. "experience," it improperly demands more than Faretta identified was within the scope of the court's inquiry.

competence is irrelevant; the only issue is whether the defendant is making his decision with his "eyes open." The court's questions did not determine that issue, and not only was the inquiry actually made largely irrelevant, focussing upon Sweet's legal skills, it avoided the issues mandated by the rule and case law.

Nowhere did the court ask how old the defendant was, his level of education, or his mental status, all pertinent and required by Rule 3.111(d) and implied by Faretta. At no time did the court point out the dangers and disadvantages of self representation or that he would be giving up certain rights and would not be able to demand a new trial because his own ineffectiveness. Faretta, at 835; Jones v. State, 449 So.2d 253, 256 (Fla. 1984).

The court obviously was concerned that the defendant was making a bad decision by choosing to represent himself because this was a capital case. "If you want to fire him and represent yourself that's your privilege. But I think it's probably a short walk to the electric chair to do that and that you're going to have lawyers working against you." (T 27) The possibility of Sweet receiving a death sentence, however, is not a factor the court should have considered because this court has affirmed such penalty for several defendant's who have represented themselves. Diaz v. State, 513 So.2d 1045 (Fla. 1987); Muhammad v. State, 494 So.2d 969 (Fla. 1986); Johnston v. State, 497 So.2d 863 (Fla. 1986); Jones v. State, 449 So.2d 253; Downs v. State, 572 So.2d 895 (Fla. 1991). Even

where the stakes are so high, this court has consistently refused to let the state force the defendant to follow a course he does not want to take.

Assume, however, that the court had made an adequate inquiry. Is there anything in Sweet's answers showing that he could not represent himself? The court had already found Sweet competent to stand trial (R 314).[3] In Muhammad, supra, this court held that if a defendant was competent to stand trial, he was competent to represent himself. "If one may be intellectually incompetent in legal skills yet waive counsel, then no standard of mental competency beyond competence to stand trial is required. Id. at 975. In Hamblen v. State, 527 So.2d 800 (Fla. 1988), the defendant waived his right to counsel, and this court approved that choice, following a rationale that closely followed that of the United States Supreme Court in Faretta: "In the field of criminal law, there is no doubt that `death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies." Hamblen, at 804. Thus, if Sweet was competent to decide to represent himself, and there was no evidence or inquiry to show that he was not, the trial court

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[3]The appellant's mental competency was obviously material, and the court would have been justified in denying Sweet's request to represent himself if he had had a history of mental problems. Johnston v. State, 497 So.2d 863 (Fla. 1986).

had no discretion, but it was required by law to allow him to do so.[4]

The trial court, thus, made two errors. It conducted an inadequate Faretta inquiry as to Sweet's knowing and intelligent waiver of his right to counsel. Assuming, on the other hand, that the truncated inquiry was adequate, the court erred in not letting the defendant represent himself because the evidence, what there is, shows the defendant wanted to persist in his course despite the problems the court presented him with if he was his own lawyer.

This court should reverse the trial court's judgment and sentence and remand for a new trial.

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[4]The only discretion the court has in matters such as this are to determine what the "facts" were. It has no discretion regarding whether to let a defendant represent himself once it has determined that he has knowingly and intelligently made the decision to represent himself.

ISSUE II

THE COURT ERRED IN ADMITTING EVIDENCE COFER HAD BEEN ROBBED THREE WEEKS BEFORE THE MURDER OF BRYANT AND THAT SWEET MAY HAVE PARTICIPATED IN THE EARLIER CRIME.

The state's theory about Sweet's murder of Felicia Bryant originated in a robbery of Marcine Cofer that had occurred about three weeks before the murder. Three men had come to Cofer's apartment and by deceptively claiming to be her boyfriend had been allowed to come inside (T 529). Once there, they hit Cofer and demanded to know where her money, jewelry and cocaine were (T 529). They wanted the drug because Cofer sold the stuff (T 530). She could identify only two of the robbers, "Funky Larry" and "Vince," but there is no evidence that they were ever arrested, at least by June 26, the night of the murder.

Because Cofer thought the police would drop her case, she initially did not tell them of her drug dealing (T 534-35). They did not ignore her, however, and on June 26 a policeman took her to a police station to look through some pictures to identify her assailants (T 528-29). The officer returned her to her apartment, and when he dropped her off, Sweet happened to walk by. Cofer said hello, but the defendant acted rude to her (T 545-46). Later that night, Sweet allegedly shot Bryant.

Sweet, under the state's theory, obviously mistakenly shot Bryant instead of Cofer to silence Cofer about the earlier robbery. While that theory has attraction, it can be sustained, and the evidence of the robbery admitted, only if we

ignore the potholes of inferences that occur along the road to admitting the evidence of the June 6 crime. There are so many inferences the state asked the court to accept in admitting this evidence, that its theory collapses under their accumulated weight.[5]

Evidence of Sweet's alleged earlier bad acts is ostensibly admitted under the authority of section 90.404(2) Fla. Stat. (1991):

> (2) OTHER CRIMES, WRONGS, OR ACTS.-
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

The ideal situation for admitting evidence of a prior bad act, such as a robbery, to prove the motive for committing a subsequent murder, occurred in Mackiewicz v. State, 114 So.2d 684 (Fla. 1959). In that case, two policemen found the defendant in a hotel and asked him why he was there. A scuffle ensued in which Mackiewicz shot one of the officers, killing him. Later, he told a jail cellmate that he had shot the victim because he thought they "were on to him" for an earlier robbery. This court had no problem admitting this evidence

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[5]The state referred to this robbery during its opening statement and closing argument (T 499, 1023, 1051-52, 1056-58).

because it was relevant to the the defendant's motive for shooting the law enforcement officer. Id. at 688.

In this case, to get to a similar situation as in Mackiewicz, the state had several inferences to overcome. First, Sweet had to know that Cofer had reported the robbery. Second, Cofer had to know that the defendant was one of the robbers. Third, Sweet had to know that Cofer either told the police he was one of her assailants or that she had identified him as such. Finally, he had to know that the police would arrest him for the robbery. If we accept all these inferences, then we can infer that the defendant wanted to kill Cofer to avoid prosecution for the robbery. For several reasons, this pyramid of reasons collapses into a rubble of speculative suggestions.

As to the first inference, that Sweet knew Cofer had reported the robbery, there is no evidence to support that conclusion. As Cofer readily acknowledged, she was afraid the police would not have listened to her story once they learned she was a drug dealer. Sweet could very well have used similar logic to conclude that after three weeks Cofer had not reported the crime.

Second, there is no evidence Cofer believed Sweet was one of the assailants. Although she identified two of her attackers, she never said who the third person was (T 530). Sweet could reasonably have concluded that she did not believe he was the unknown robber. Also there is no evidence that the two robbers she recognized had been arrested, which, if they

had, would have reasonably raised Sweet's concern that he might be next.

That he could have safely believed that he had nothing to fear from Cofer would have been reinforced by their chance encounter on June 26. When Cofer saw Sweet that day, she did not immediately turn to the police officer who had returned her to her home and say "That's him. That's one of the men who robbed me." Instead, she merely "spoke to him" and did nothing that would have raised any suspicion by Sweet that Cofer thought he had robbed her (T 545). There is thus no evidence or reasonable inference from such proof that Sweet believed Cofer had told the police about either the robbery or his participation in it. No reasonable basis exists from which Sweet could have believed he was about to be arrested for the June 6 robbery. It is, thus, unreasonable to infer that he killed Felicia Bryant instead of Cofer to silence the latter.

Finally, that Sweet did not kill Cofer, his supposed victim, supports the conclusion that he did not murder Bryant because he wanted to silence Cofer. The logical inference from the state's theory is that if Sweet was willing to kill one person who could identify him for robbing her, he surely would have murdered everyone who could have identified him in the murder of Cofer. That he did not coldly kill everyone in Cofer's apartment, strongly argues in favor of the defendant killing Bryant for reasons other than those the state wanted inferred from the earlier robbery.

The state, however, has a more fundamental problem than simply whether the inferences were justified by the evidence. There simply are too many of them, as listed above, the jury had to accept to connect the June 6 robbery with the later murder. This court has consistently rejected the pyramiding or concatenation of inferences. Decidue v. State, 131 So.2d 7 (Fla. 1961). Where conclusions of the ultimate fact are based upon circumstantial evidence, as they were here, and they are susceptible of more than one conclusion, as they were also here, the resulting logical framework collapses. It is too weak to justify admitting the questioned evidence. C.f., Hall v. State, 500 So.2d 661 (Fla. 1st DCA 1986); Benson v. State, 526 So.2d 948 (Fla. 2d DCA 1988).

In this case, the only way the court could justify admitting the robbery evidence was by accepting the inferences discussed above. Not only were they based on circumstantial evidence, but, as shown, they could have had either a neutral interpretation or certainly a different one than the state imputed. Consequently, because this conclusion results only if the state's version of the several inferences is accepted, there is no reasonable belief that Sweet killed Felicia Bryant because Cofer knew he had robbed her and had reported that fact to the police.

All this evidence did was raise the specter of the defendant's bad character and parade it before the jury. It was therefore inadmissible in the guilty phase of the trial. Of course the argument is that this evidence, even if

erroneously admitted, was only a harmless mistake. Had the jury not heard the evidence of the robbery, it may not have believed Sweet premeditatedly killed Bryant because of the almost random shooting inside the apartment. It was, instead, an act imminently dangerous to another and thus only a second degree murder. Section 782.04(2) Fla. Stat. (1991). The jury may have also concluded the burglary was not a causal contributor to Bryant's death since the group in Cofer's apartment opened the door so they could leave. Bryant v. State, 412 So.2d 347, 350 (Fla. 1982). Thus, if Sweet was guilty of first degree murder, it was only on a premeditation theory, and if so, admitting the evidence of the earlier robbery could not have been harmless beyond a reasonable doubt because it ostensibly provided a motive for the murder.

Even if the evidence was harmless in the guilt portion of the trial, it was unfairly prejudicial in the penalty phase of the trial because there is no way this uncharged crime could have been admitted. "Hearing about other alleged crimes could damn the defendant in the jury's eyes and be excessively prejudicial." Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986).

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

## ISSUE III

THE COURT ERRED IN FINDING THAT SWEET COMMITTED THE MURDER OF FELICIA BRYANT IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In sentencing Sweet to death, the court found that he had committed the murder in a cold, calculated and premeditated manner. In justifying that conclusion, the court said:

> 1. Sweet's motive was to eliminate Cofer as a witness to the June 6 robbery.
>
> 2. He had ample opportunity to plan the killing.
>
> 3. He chose a time (1:30 a.m.) and place (Cofer's apartment) so that there would be no witnesses.
>
> 4. When he entered the apartment, he had partially covered his face and began shooting immediately upon entering. The reason he covered his face was the he probably had seen Mattie Bryant enter the apartment before he came back for the last time.
>
> 5. The knowledge of the second person's presence did not deter him.

(R 403-404).

Closer analysis of the court's justification reveals that it erred in finding that Sweet had the required heightened premeditation necessary for this aggravating factor to apply. Rogers v. State, 511 So.2d 526 (Fla. 1987).

The first problem arises not from what the court said but from what it omitted. Sweet did not kill Marcine Cofer, the person the court went to great effort to show was Sweet's intended victim. He shot, instead, Felicia Bryant, a girl who

by fortuity happened to be at the apartment when Sweet entered. There is no evidence that he knew her or had any reason to want her dead. As to that victim, this murder was not cold, calculated, and premeditated.

Obviously, the sentencing court relied upon a transferred intent theory to find this aggravating factor, and this court has approved this justification for applying the cold, calculated aggravator to defendant's who do not kill their originally intended victims. In Provenzano v. State, 497 So.2d 1177 (Fla. 1986), the defendant was determined to kill the two policemen who had arrested him for disorderly conduct. Breathing out threats and purchasing guns and ammunition, he went to court the day his case was scheduled. When a bailiff refused to let him carry his knapsack which had his guns into the courtroom, he left the bag in his car and returned to court carrying a concealed shotgun, assault rifle, and pistol. As the defendant approached the bench, the bailiff was ordered to search Provenzano, at which point he pulled out a gun and shot the policeman. The defendant then chased and shot another guard. He fled the courtroom, and taking a "military stance" in the hallway yelled that he was going to kill everyone. He partially succeeded in that threat by killing another bailiff who had responded to the gunfire.

Finding that this murder was cold, calculated, and premeditated, this court court said:

> Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim. Rather, as the

> statute indicates, if the murder was committed in a manner that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable.

Id. at 1183.

Thus focussing upon the manner in which Sweet committed this murder reveals that it was a haphazard killing. First, unlike Provenzano there were no repeated threats to kill anyone. Second, when he stuck his foot in the door, he immediately began shooting his gun with no apparent aiming or deliberation. Except for Felicia Bryant, everyone else was shot in either the hip, butt, ankle or thigh (T 516, 631, 687-88, 733). Such quick, chaotic firing, as evidence by the places the other victims were hit does not indicate a cold, calculated killing. If Sweet wanted to kill in such a manner, he certainly could have done so by having all the victims lie on the ground and then methodically shooting each one. Contrary to the court's finding, he had enough ammunition to have done so because there were four people in Cofer's apartment and Sweet fired six shots (T 516). Thus, analyzing this killing by looking at the manner in which the murder was accomplished does not show it to have been done in a cold, calculated and premeditated manner.

More recent cases, such as Rogers v. State, 511 So.2d 526 (Fla. 1987) have required cold, calculated murders to show more planning than normally done in capital felonies. "`[C]alculation consists of a careful plan or prearranged design." Id. at 533. Accord. Amoros v. State, 531 So.2d 1256

(Fla. 1988). Apparently that is the theory relied on by the trial court because it tied several pieces of evidence together to form a loose patchwork rationale to find the cold, calculated and premeditated aggravating factor. Yet, the court's rationale, like a worn coat, has too many holes to be of service.

Consider first that the court said Sweet chose the time and place to kill Cofer so there would be no witnesses. Yet in the next sentence, the court also said Sweet covered his face because he "probably had seen Mattie Bryant go into the apartment just before he came back for the last time." (T 403-404). So much for choosing a time and place for there to be no witnesses.

Second, Sweet, in the court's words, "wore a piece of cloth partially covering his face." (T 403-404) Witnesses said this "piece of cloth" was a pair of pants the defendant had somehow draped over his head (T 517, 665). It was not a very good mask because at least two of the victims recognized Sweet (T 515, 624). Cofer especially had no trouble identifying him because he had been kicking her door, opening and closing the windows to her apartment, and turning the porch light off and on for several minutes before he came inside (T 514). When Cofer looked out the peephole in the door, she clearly saw Sweet (T 509). If Sweet chose a time and location to minimize the risk of being discovered, what he did immediately before entering the apartment and how he "disguised" himself certainly

refute any notion that he had made any "careful plan or prearranged design" to kill.

Moreover, that he "began shooting immediately without saying a word" suggests more a depraved mind consistent with second degree murder than one who had carefully planned to kill the person who could identify him. Afterall, if he really wanted to kill Cofer, he would not have simply taken what amounted to potshots at his victims. Also, when he left the apartment, he must have known that there were some victims alive (T 943). If Sweet wanted to kill Cofer because she could have recognized him as one of her assailants in a robbery, it stands to reason that he would have killed Cofer and everyone else in the apartment because they could, and as it turned out, did, identify him as the one who committed a murder and three attempted murders. That he left several witnesses evidences little planning, and certainly not the degree of prearranged design required by this court to justify a finding of the cold, calculated, and premeditated aggravating factor. C.f. Rembert v. State, 445 So.2d 337 (Fla. 1984).

The court, therefore, erred in finding this factor, and compounding its error, it instructed the jury on it. Thus, the jury, as the court did, could have erroneously based its recommendation in part or in whole upon finding this factor applied to Sweet's case. This court should therefore reverse the trial court's sentence and remand for a new sentencing hearing before a new jury.

ISSUE IV

THE COURT ERRED IN FINDING THAT SWEET COMMITTED THE MURDER FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

In sentencing Sweet to death, the court found that he had killed Felicia Bryant to avoid or prevent his arrest for the robbery of Marcine Cofer (R 399-402). As evidence supporting this aggravating factor, the court said:

> a. Sweet had told Manuela Roberts that he had robbed Cofer, but he later also recanted that claim and instead averred that he had "only had his men do it."
>
> b. Solomon Hansberry, a jail cell companion of Sweet's when he was arrested, recounted that Sweet had told him "I did all this shit for nothing. If I had known that, I would have killed them all."
>
> c. Sweet first shot Cofer then the others.
>
> d. At no time did Cofer know Sweet was involved in the robbery and assault of June 6, 1990. The defendant, however, had seen her talking to a policeman on June 26.

(R 399-402).

While these facts may suggest that Sweet killed Bryant to avoid his arrest for the June 6 robbery of Cofer, they do not show that they were the dominant motive as required by law. Menendez v. State, 368 So.2d 1278 (Fla. 1979). In enacting Section 921.141 Fla. Stat. (1989), the legislature intended that the factor allowing murders committed to avoid lawful arrest to aggravate a capital felony to a death sentence apply primarily to killings of police officers. White v. State, 403 So.2d 331 (Fla. 1981). This death sentence justification need not apply exclusively to this class of victims; and if a court

wants to apply it to other persons, then the dominant motive for the killing must be to avoid arrest. The proof of this intent must be very strong, and the mere fact that someone is dead does not support finding this aggravating factor. Riley v. State, 366 So.2d 19 (Fla. 1979). An absence of another rationale likewise cannot be the evidence of the defendant's intent: the state, by positive proof must show that the defendant's primary reason for committing the killing was to eliminate a witness. Some cases will illustrate how difficult a burden this is for the state to carry.

In Garron v. State, 528 So.2d 353 (Fla. 1988), one of the defendant's victims was trying to call the police for help when she was killed. Her murder was not to avoid lawful arrest. Similarly, in Livingston v. State, 565 So.2d 1288 (Fla. 1990), the defendant robbed a clerk at a convenience store and after killing her, he said that he was going to get the other clerk who had hidden in the back of the store. He fired a shot through the door of the closet in which she was hiding but did not kill her. The murder was not committed to avoid lawful arrest.

In Menendez v. State, 368 So.2d 1278 (Fla. 1979), the victim was found lying on the floor of his jewelry store with his hands outstretched in a supplicating manner. Menendez had killed the victim with a gun which had a silencer on it. While these facts certainly suggest that the defendant committed the murder to avoid lawful arrest, they also did not amount to the "very strong evidence" this court has required.

On the other hand, in Lopez v. State, 536 So.2d 226 (Fla. 1988), the defendant and an accomplice entered a house, and once inside they shot (but did not kill) one victim and murdered her son. Lopez used a silenced gun to do so, and what made this case different than Menendez was his unambiguous statement that he could not afford to leave any witnesses. This court found that he committed the murder to avoid lawful arrest.

If the trial court's theory justifying this aggravating factor was that Sweet killed Bryant to avoid arrest for an earlier robbery, there is other evidence which compels an equally valid notion that that was not his dominant motive. Before the murder, the defendant had, for several minutes or maybe an hour, been harassing Cofer. He had kicked her door, called out her name, opened and closed her windows, and turned her porch light on and off (T 514). Cofer was justly scared, and if there had been no subsequent shooting, it would be clear that Sweet was warning her not to go to the police.

This conclusion does not change when the shooting is considered. Sweet did not calmly execute the people in Cofer's apartment. No, instead as soon as the door was opened a bit, he stuck his foot inside and immediately began a wild fusillade, hitting Cofer, the person he allegedly wanted killed, in the thigh. Except for Felicia Bryant, all the others were hit in equally non life threatening areas. Clearly, Sweet was intending to further intimidate Cofer, which explains his curious statement that "I did all this shit for

nothing. If I had known this was going to happen, I would have killed them all." (T 943) This is strange because of the pronoun "this." What does it refer to?

The only reasonable antecedent for that word is his killing of Felicia Bryant, so that what Sweet said was that "If I had known [that I would be arrested for killing Felicia Bryant], I would have killed them all." At least two conclusions become immediately obvious. First, when Sweet left Cofer's apartment he not only did not know he had killed Bryant, he thought they (including Cofer) were alive. Second, his primary purpose in shooting was to harass Cofer, not to kill her or anyone else.

If the defendant's dominant motive in killing Bryant was to avoid arrest, then leaving Cofer alive, and knowing that he had done so, defeats the very purpose in committing the homicide. In Rembert v. State, 445 So.2d 337 (Fla. 1984), Rembert left a bait and tackle shop where he had beaten the elderly victim and stolen some money knowing that the victim was still alive. This court rejected the trial court's finding that he had killed the victim, who had died, to avoid lawful arrest. "The victim was alive when Rembert left the premises and could conceivably have survived to accuse his attacker. If Rembert had been concerned with this possibility, his more reasonable course of action would have been to make sure that the victim was dead before fleeing." Id. at 340.

Similarly here, Sweet must have known that several of his victims, including Cofer, were alive after his shooting spree.

If witness elimination were his dominant motive, he would have insured that they and especially the earlier robbery victim were dead before he left.

That the victims were knowingly left alive supports the notion that Sweet's dominant motive was not to kill Cofer to avoid arrest. At least there is not the very strong support that such was the defendant's intent which this court has required. Moreover, because the evidence supporting this aggravating factor is insufficient, the court should not have let the state argue it as an aggravating factor, nor should it have instructed the jury that it could have considered such in justifying a death recommendation. This court should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

ISSUE V

THE COURT ERRED IN FINDING THAT SWEET'S PRIOR CONVICTION FOR POSSESSION OF A FIREARM BY A CONVICTED FELON QUALIFIED AS A PRIOR VIOLENT FELONY.

During the sentencing portion of Sweet's trial, the court, over defense objection (T 1192, 1197-98), let the State introduce evidence that the defendant had a prior conviction for possession of a firearm in support of the aggravating factor that he had a prior conviction for a violent felony. In 1988, Sweet was involved in a fight with a Mr. Reeves, during which Sweet hit Reeves with a sawed off shotgun (T 1224). Although no policeman saw the altercation, an officer found the weapon in a nearby alley. Sweet was never charged with the aggravated battery of Reeves, but he was found guilty of possession of a firearm by a convicted felon (T 1192).

The state argued, and the court accepted, that because the facts underlying the possession charge involved violence, the crime became one of violence. The primary support for that ruling came from this court's opinion in Johnson v. State, 465 So.2d 499, 505 (Fla. 1985). In that case, Johnson argued that a previous burglary conviction was not inherently violent, so that the jury could consider it as a prior violent felony conviction. Reducing the force of that argument to this case, however, was Johnson's concurrent conviction for robbery, which, as defense counsel admitted, arose out of the burglary conviction. "It follows that this burglary possessed some of

the attributes that set robbery apart as an inherently violent crime." Id. at 505.

Johnson, in turn relied upon Mann v. State, 453 So.2d 784, 786 (Fla. 1984) in which, upon resentencing, the state introduced the charging document to show that the defendant had tried to commit a sexual battery upon a woman after burglarizing her home. The burglary, this court said, involved violence because the facts of that crime showed that the underlying crime the defendant intended to commit once he had entered the house was one of violence. Significantly, however, this court added this caveat:

> However, simply to instruct the jury at the sentencing phase of a capital felony trial that burglary is a felony involving the use or threat of violence for purposes of applying the aggravating circumstance in section 921.141(5)(b), without making clear that this depends on the facts of the burglary, is error.

Id.

As to this latter point, the court in this case did what this court said it could not do: it simply told the jury that possession of a weapon by a convicted felon was a crime of violence.

> For the purposes of this case, the crimes of . . . possession of a firearm by a convicted felon, . . . are felonies involving the use of violence to some person.

(T 1271-72).

The court, contrary to this court's instruction in Johnson, never told the jury that it had to consider Sweet's

possession conviction in light of the facts in which he committed that crime. That was error.

On a different level, the court also erred in admitting evidence of this prior conviction. Johnson and Mann both involved burglaries during which the defendants committed violent crimes. In one sense, the violence of the crime the defendant intended to commit inside the residences attached to the burglary. That is, the burglary became violent because the intent to commit a violent crime inside the home tainted the burglary. As a practical matter, one cannot separate into discrete, analytical compartments the permeating violence.

Such cannot be said of possession of a firearm by a convicted felon, which is crime solely because of the status of the defendant as a convicted criminal. Resorting to Latin, it is a malum prohibitum offense, unlike burglary and the underlying felonies in Johnson and Mann which were malum in se crimes. This court cannot, therefore, say that the possession offense "possessed some of the attributes that set robbery apart as an inherently violent crime." Johnson, at 505.

With particular reference to this case, Johnson and Mann have even less relevance. Here, unlike those cases, there was no conviction or even a charge for the underlying offense which was supposed to make the crime Sweet was actually convicted of committing violent. The state, in its closing, focussed, not upon the possession charge, but upon the beating of Reeves, which apparently was some time removed from when the police saw the defendant leave the alley in which he had left the shotgun

(T 1259). Therefore, unlike burglary and the attendant crimes, there was no inherent connection between the possession charge and the beating, and the evidence used to convict the defendant of the former crime may not have been linked in any relevant way with the earlier beating. The court erred in letting the jury consider that they could consider the possession of a firearm by a convicted felon as a violent crime.

## ISSUE VI

THE COURT ERRED IN IMPOSING FOUR FIFTEEN YEAR MINIMUM MANDATORY SENTENCES WHEN THE OFFENSES FOR WHICH SWEET WAS SENTENCED AROSE OUT OF THE SAME INCIDENT.

The court imposed four consecutive life sentences on Sweet for the three attempted murders and the burglary convictions. It was able to do this because it found him to be an habitual violent felony offender (T 1312-14). Additionally, the court imposed consecutive minimum mandatory 15 year prison terms for each count (T 383-89). These latter sentence enhancements were error.

This court's opinion in Daniels v. State, Case No. 77,853 (Fla. February 20, 1992), 17 FLW S 118 controls this issue. In that case, this court, answering a certified question from the First District Court of Appeal, held that the sentencing court cannot impose consecutive fifteen year minimum mandatory sentences for first-degree felonies committed by an habitual violent felony offender for offenses arising out of the same incident. In that case Daniels committed a burglary while armed, sexual battery with a deadly weapon, and armed robbery, all of which arose out of a single episode. Each crime is a first degree felony, but upon finding that the defendant was an habitual violent felon, the court gave him an enhanced sentence of three consecutive terms of life in prison without the possibility of parole for fifteen years.

This court, relying upon the rationale articulated in Palmer v. State, 438 So.2d 1 (Fla. 1983), viewed the fifteen

year minimum mandatory portion of the sentence as an "enhancement" of the statutorily authorized penalty. Because the legislature had not directed that such enhanced penalties could be served consecutively, the rule of lenity, section 775.021(1) Fla. Stat. (1991), required the court to order these additional punishments to be served concurrently.

Thus, in this case, applying Daniels means that the court erred in ordering the fifteen year minimum mandatory sentences to be served consecutively.

Daniels, however, has broader application than just limiting mandatory sentences. The underlying life sentence in that case as well as here was an "enhancement." That is, in this case, attempted murder is a felony of the first degree, and the punishment for that crime is "a term of years not exceeding 30 years." Section 775.082 Fla. Stat. (1991). Section 775.084(4)(a)(1) enhances that punishment to life in prison with no provision that the multiple sentences be served consecutively. Under the Daniels rationale, the court could not impose the four life sentences consecutively. They must be served concurrently. The court in this case, therefore, erred in sentencing Sweet to serve four consecutive life sentences with each offense also having a minimum mandatory sentence of fifteen years.

## CONCLUSION

Based upon the arguments presented here, the appellant, William Sweet, respectfully asks this honorable court to either reverse the trial court's judgment and sentence and remand for a new trial, reverse the trial court's sentence and remand for a new sentencing hearing, or reverse the trial court's life sentences and order they be served concurrently.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy has been mailed to appellant, WILLIAM EARL SWEET, #100063, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 7th day of April, 1992.

DAVID A. DAVIS