IN THE SUPREME COURT OF FLORIDA

ANTHONY WASHINGTON, :

Appellant, :

vs. : Case No. 80,537

STATE OF FLORIDA, :

Appellee. :

_____ :



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

# REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 234176

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

## TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

## TABLE OF CITATIONS

TABLE OF CITATIONS (continued)



OTHER AUTHORITIES

## PRELIMINARY STATEMENT

Appellant, Anthony Washington, will rely upon his initial brief in reply to the arguments presented in the State's answer brief as to Issues IV, VI and IX.

## STATEMENT OF THE CASE AND FACTS

Appellee states on page 3 of its brief that "David Mizell testified that appellant approached him about a watch on August 18, but he did not purchase the 'old lady's watch', Robert Leacock did (R 2298-2301)." However, Mizell did not positively identify Appellant in court as the person who approached him about a watch; Mizell testified only that Appellant "looked like" the person who tried to sell him a watch. (R 2289-2290) And Mizell's knowledge that Leacock bought the watch was gleaned solely from what Leacock told him (R 2291), and was therefore hearsay.

Appellee also states on page 3 that "Robert Leacock testified that he bought a watch from Anthony Washington (R 2294)." However, like Mizell, Leacock failed to render a positive in-court identification of Appellant as the person from whom he purchased the watch; Leacock indicated only that he "believed" Appellant was the person, and that Appellant "looked like him." (R 2294-2295)

On page 4 of its brief, Appellee states that "[Detective Michael] Darroch showed appellant's photo to Leacock and the latter said that was the person who sold him the watch (R 2329)." Darroch's testimony in this regard was inconsistent with Leacock's testimony; Leacock testified that he "wasn't sure" when he was shown the photograph whether it depicted the person who sold him the watch. (R 2296-2297)

Also on page 4, Appellee says that at the disciplinary hearing at the work release center "on the 29th Washington asked if he was being charged with <u>the</u> murder (R 2362)[,]" and says that "Donald

Lamar also testified that appellant asked [Corrections Officer Edward] Duncan on the 29th if he was being charged with the murder." [Emphasis supplied.] The testimony actually was that Appellant asked Duncan if was being charged with murder, not with the murder. (R 2362, 2367) Appellee's inaccurate rendering of the facts might lead this Court to the erroneous conclusion that Appellant was asking specifically if he was being charged with killing Alice Berdat.

## ARGUMENT

### ISSUE I

APPELLANT WAS DEPRIVED OF HIS RIGHTS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS WHEN THE STATE PEREMPTORILY EXCUSED A BLACK PROSPECTIVE JUROR WITHOUT PROVIDING A VALID RACIALLY-NEUTRAL EXPLANATION FOR THE EXCUSAL.

On page 14 of its brief, Appellee states as follows:

> Appellant argues that juror Lake also had given answers indicating her inability to follow the law. Indeed, she did (R 2087-89). And Lake was not black and she was excused peremptorily by the prosecutor (R 2214). This confirms the valid racially-neutral reasons for excusal.

This paragraph indicates that Appellee has badly misconstrued Appellant's argument. The point Appellant was making in his initial brief was that Prospective Juror Lake had given answers on voir dire showing that she was clearly disqualified from serving on Appellant's jury, whereas Prospective Juror Johnny L. Welch, unlike Lake, did <u>not</u> give answers indicating that his jury service might be impaired by his views on capital punishment. The peremptory striking of Lake was thus justified, while the peremptory striking of Welch, who was black, was not.[1]

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[1] Appellee accuses Appellant on page 14 of its brief of being "confused." Appellant is not confused, but this adjective could perhaps aptly be applied to Appellee in its misunderstanding of Appellant's argument.

## ISSUE II

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE THAT WAS SEIZED FROM HIM, AS THE STATE DID NOT CARRY ITS BURDEN OF PROVING THAT APPELLANT'S CONSENT WAS KNOWINGLY AND VOLUNTARILY GIVEN.

State v. Manning, 506 So. 2d 1095 (Fla. 3d DCA 1987), which Appellant cited on page 35 of his initial brief, and which Appellee cites on page 18 of its brief, does not support Appellee's position that the trial court properly denied Appellant's motion to suppress. In Manning, which dealt with a confession, the police misrepresented some of the evidence that they had against Manning. However, significantly, Manning was informed that he was a suspect in the crime under investigation. Unlike in Anthony Washington's case, the police did not conceal the fact that Manning was a suspect in a particular matter in order to obtain incriminating evidence. The Manning court referred to two separate inquiries that must be made in determining whether a waiver of the Fifth Amendment privilege against self-incrimination is valid, citing the opinion of the Supreme Court of the United States in Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986):

> The first is whether the waiver was a free choice on the part of the defendant and not the product of intimidation, coercion, or deception. The second is whether the waiver was made with a full awareness of the nature of the right being abandoned and the consequences of its abandonment.

506 So. 2d at 1096 [emphasis supplied]. In Appellant's case, Detective Darroch employed deception by informing Appellant only

that he was a suspect in the sexual battery at the Residence Inn; by deliberately employing a strategy of concealing from Appellant that he was also a suspect in the Alice Berdat homicide, Darroch rendered Appellant incapable of being fully aware of the consequences of providing blood and hair samples. Appellant ultimately admitted having sex with the woman at the Residence Inn, and so may have felt when he consented to the taking of his blood and hair that he had nothing to lose if it was going to be used solely in the investigation of that incident.

Colorado v. Spring, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987), which Appellee cites on page 18 of its brief for the proposition that "mere silence by law enforcement officials as to the subject matter of an interrogation is not trickery sufficient to invalidate a suspect's waiver of Miranda rights," is equally unavailing. Detective Darroch did not merely remain silent regarding why he was requesting samples of Appellant's blood and hair; he affirmatively told Appellant that these items would help prove or disprove that Appellant committed the sexual battery at the Residence Inn. In Spring the Court pointedly noted:

> In this case, we are not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation and do not reach the question whether a waiver of Miranda rights would be valid in such a circumstance.

93 L. Ed. 2d at 967, footnote 8. In the instant case, this Court is confronted with the circumstance not present in Spring, namely,

an affirmative misrepresentation as to the scope of Darroch's investigation.[2]

What the federal court of appeals had to say in United States v. Bosse, 898 F. 2d 113, 115 (9th Cir. 1990) regarding the obtaining of consent to enter a residence is equally applicable in the context of the consent obtained by Darroch to invade Appellant's bodily integrity by taking hair and blood samples:

> Special limitations apply when a government agent obtains entry [to a suspect's residence] by misrepresenting the scope, nature or purpose of a government investigation. "[A]ccess gained by a government agent, known to be such by the person with whom the agent is dealing, violates the fourth amendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation." United States v. Little, 753 F.2d 1420, 1438 (9th Cir.1984). As the Fifth Circuit Court of Appeals said in SEC v. ESM Government Securities, Inc., 645 F.2d 310 (5th Cir.1981):
>
> > When a government agent presents himself to a private individual and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.

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[2] In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Court noted that "...[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege [against self-incrimination]." 16 L. Ed. 2d at 725 [emphasis supplied].

> A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent. United States v. Phillips, 497 F.2d 1131, 1135 n. 4 (9th Cir.1974). Thus we have disapproved the entry of federal narcotics agents accomplished with the assistance of local law enforcement officers who knocked on the suspect's door and asked permission to investigate a fictitious robbery. "The occupants were led to believe that they were admitting officers to investigate a burglary when, in fact, the officers and agents were entering to arrest Phillips." Id. at 1135.

Similarly, in United States v. Bailey, 726 F. 2d 1301, 1304 (8th Cir. 1984), the court noted that misrepresentations about the nature of an investigation may be evidence of coercion, and that the misrepresentations may even invalidate consent [Bailey involved consent to enter an apartment] "if the consent was given in reliance on the officer's deceit. [Citations omitted.]" Appellant Anthony Washington's consent to the taking of his blood and hair was given in reliance upon Darroch's representations that it would be used in the investigation of the incident at the Residence Inn. Appellant was not informed of its potential use in the other, more serious case in which he was a suspect, the Berdat homicide, and so his consent could not have been knowingly and intelligently given.

With regard to the issue of inevitable discovery posited by Appellee, its contention that the police would have been able to obtain a blood sample from Appellant "based on the evidence gained regarding appellant's sale of the watch and his involvement in the Weigers' rape" (Brief of the Appellee, p. 19) is pure speculation. The record fails to show what investigative techniques the police

would have employed if they had failed to gain Appellant's consent to the taking of his hair and blood. (Compare with Craig v. State, 510 So. 2d 857 (Fla. 1987), cited by Appellee at page of 19 of its brief, in which this Court cited rather extensive testimony that had been presented at the suppression hearing regarding the normal investigative measures that would have been set in motion that would have resulted in the finding of the evidence in question.) The evidence regarding Appellant's sale of the watch, even apart from the questionable identifications of Appellant rendered by the witnesses to this event, certainly did not establish his guilt of homicide, and there was no testimony that this evidence would have led the police to obtain a blood sample from Appellant. Appellant's "involvement in the Weigers' rape" at the Residence Inn provides an even weaker basis for alleging inevitable discovery. Detective Darroch essentially conceded that the samples obtained from Appellant on September 5, 1989 became irrelevant to the Weiger's rape on September 19 when Appellant admitted having sex with the woman; Appellant's admission is why Darroch did not submit the samples for analysis in the rape case. (R 1825) Once Appellant admitted having sex with the woman at the Residence Inn, there was no need for the samples of his hair and blood, according to the State's own witness, and so Appellant's "involvement in the Weigers' rape" would not have led the police to take samples from him.

## ISSUE III

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATION OF APPELLANT MADE BY STATE WITNESS ROBERT LEACOCK, AS THE PROCEDURE WHICH RESULTED IN THE IDENTIFICATION WAS UNDULY SUGGESTIVE.

Gorby v. State, 630 So. 2d 544 (Fla. 1993), cited by Appellee on page 21 of its brief, is inapposite. It involved an identification from a photographic lineup, not an identification from a single picture, a photographic "show-up," as was used in this case.

One of the identification procedures used in Blanco v. State, 452 So. 2d 520 (Fla. 1984) did involve a show-up, but the witness identified only the jogging suit and general profile of the person he had seen, and so any prejudice to the defendant was minimal. Furthermore, Appellant suggests that a show-up of the type used in Blanco, where the actual physical person of the suspect is exhibited to the witness for identification, may be more reliable than exhibition of a single photograph, due to the inherent limitations of photography and the two-dimensional nature of the image being viewed.

## ISSUE V

INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO ESTABLISH THAT IT WAS APPELLANT WHO PERPETRATED THE OFFENSES AGAINST ALICE BERDAT.

On page 30 of its brief, Appellee says: "When Washington returned to the work release center he was told to pack his clothes and was handcuffed and Washington asks 'Are you guys charging me with murder?' He subsequently made a second statement 'You guys are treating me like I killed somebody.' (R 2626-28)" From the context in which Appellee discusses these statements, one would think that Appellant made the remarks quoted immediately upon returning to the work release center on the morning Alice Berdat was killed. However, they were not made on August 17, 1989, when Berdat was killed, but on August 29, 1989, when Appellant returned to the Largo Community Correctional Center after completing his workday. (R 2352-2353, 2357, 2362, 2367, 2370)

On page 31 of its brief, Appellee states that "both Mizell and Leacock testified that appellant in court looked like the person who stole the watch (R 2290, 2294). [Emphasis supplied.]" This is apparently a typographical error, but, for the sake of clarification, the testimony of Mizell and Leacock was that Appellant looked like the person who sold the watch; they said nothing about it being stolen. (R 2288-2300)

## ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING ANTHONY WASHINGTON TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS THE APPROPRIATE SENTENCE WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

Williams v. State, 622 So. 2d 456 (Fla. 1993), cited by Appellee on page 40 of its brief, Coleman v. State, 610 So. 2d 1283 (Fla. 1992), cited by Appellee on page 42 of its brief, and Robinson v. State, 610 So. 2d 1288 (Fla. 1992), cited by Appellee on page 44 of its brief, all involved the same incident. There were four murder victims; this fact alone distinguishes these cases from the instant case. In Porter v. State, 429 So. 2d 293 (Fla. 1983), cited by Appellee on page 42 of its brief, there were two victims, unlike in the instant case.

Appellee says that in Brown v. State, 473 So. 2d 1260 (Fla. 1985), an override case, the same aggravating factors were present as are present in Appellant's case. (Brief of the Appellee, p. 45.) What Appellee fails to state is that the aggravating circumstance of pecuniary gain was also present in Brown (but was not found in Appellant's case), and that, unlike in Appellant's case, both the trial court and this Court found no aggravating circumstances.

On page 45 of its brief, Appellee cites Stevens v. State, 419 So. 2d 1058 (Fla. 1982), an override case in which the victim, a convenience store clerk, was abducted, raped, mutilated and

strangled. Apart from the fact that this crime was obviously more heinous than the one for which Appellant was convicted, involving as it did the additional elements of kidnapping and mutilation, this Court agreed with the trial court's finding of "a total lack of mitigating circumstances." 419 So. 2d at 1065. In Appellant's case, the trial court found at least some mitigation; she merely disagreed with Appellant's jury as to the weight that mitigation should receive.

On page 47 of its brief, Appellee states that Appellant "was presumably drug free for the year he spent in prison when this crime occurred (R 1587)." Apart from exhibiting naivete by assuming that prisoners have no access to drugs, this statement is inaccurate, as Appellant was on work-release status at the Largo Community Correctional Work Release Center (not locked up in prison) at the time of the instant homicide. He went to work daily, and at least potentially had access to drugs when he was away from the center.

On page 48 of its brief, Appellee repeats the assumption of the trial court that after Appellant allegedly attempted to "choke/strangle" Mary Beth Weigers a second time during the incident at the Residence Inn, he "left with the mistaken notion she too was dead (R 1591)." This is, of course, pure speculation; no proof was adduced as to Appellant's state of mind when he left the Residence Inn.

With regard to the question of Appellant's age as a mitigator, which is discussed by Appellee on page 49 of its brief, Appellant

would note that in Echols v. State, 484 So. 2d 568 (Fla. 1985), the trial judge refused even to submit the matter of the defendant's age to the jury as a statutory mitigating circumstance, whereas the court below did instruct Appellant's jury on this factor (R 2741), thus indicating that the court thought that it was proper for the jury to consider Anthony Washington's age of 32 in mitigation, and to give it such weight as the jury deemed appropriate.

The facts of the crime in Neary v. State, 384 So. 2d 881 (Fla. 1980) were quite similar to those involved in Appellant's case. The body of the 66 year old victim was found half-clothed underneath a foldout bed. She had been raped and strangled. The trial court imposed a sentence of death over the jury's life recommendation, but this Court reduced to the sentence to life. Appellant's death sentence likewise should be reduced to life.

In Hallman v. State, 560 So. 2d 223 (Fla. 1990), which Appellant cited on page 66 of his initial brief, this Court reduced to life a death sentence imposed over a jury's life recommendation, even though there were no statutory mitigating circumstances, and "no single facet of Hallman's penalty phase evidence was particularly compelling..." 560 So. 2d at 226. Similarly, while there may not have been a single factor established below that in and of itself compelled a life recommendation, the mitigating evidence, taken as a whole, provided an adequate basis for the jury's penalty verdict.

Finally, Appellant would note that this Court has invalidated death sentences imposed over jury recommendations of life in a

number of cases involving murders which were at least as heinous as the one involved herein. For example, in Huddleston v. State, 475 So. 2d 204 (Fla. 1985), the defendant initially struck the victim several times with his elbows, knocking her to the floor. The victim began screaming and struggling, whereupon Huddleston struck her on the head with a chair. He then began to strangle her. When he noticed that the victim was not only still alive, but conscious, Huddleston took a steak knife and stabbed her repeatedly in the chest, neck and back. He finally had to stop when the knife blade bent. Noticing that there was some movement left in the victim's body, he stabbed her with a butcher knife until she died. The trial court found only one mitigating circumstance (no significant history of prior criminal activity), but this, along with other mitigating evidence appearing in the record, was enough for this Court to vacate the death sentence. In Brown v. State, 367 So. 2d 616 (Fla. 1979), the victim was beaten about the head, shot, and finally drowned. In McKennon v. State, 403 So. 2d 389 (Fla. 1981), the defendant murdered his employer by beating her head against the floor and wall, strangling her, slicing her throat, breaking 10 of her ribs, and stabbing her. The only mitigating circumstance was the defendant's age of 18. This Court found that there was a rational basis for the jury's recommendation and reduced the sentence to life imprisonment. In Welty v. State, 402 So. 2d 1159 (Fla. 1981), the defendant stole the victim's car and stereo, then returned, struck the victim several times in the neck, and set fire to his bed. And in Jones v. State, 332 So. 2d 615 (Fla. 1976), the

victim was sexually assaulted, stabbed more than 38 times, and finally bled to death. If the appellants in these cases were entitled to have their sentences reduced to life, then certainly Appellant is similarly entitled.

## ISSUE VIII

THE COURT BELOW ERRED IN SENTENCING APPELLANT AS AN HABITUAL VIOLENT FELONY OFFENDER AND IMPOSING CONSECUTIVE 15 YEAR MINIMUM MANDATORY PRISON TERMS FOR THE NON-CAPITAL OFFENSES OF BURGLARY AND SEXUAL BATTERY.

The main thrust of the State's argument is that Appellant's issue has not been preserved for appellate review by appropriate objections in the trial court. (Brief of the Appellee, pp. 52-55) However, in State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984), this Court discussed the purpose for the contemporaneous objection rule, and then stated: "The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge." Furthermore, a defendant cannot, even by agreement (that is, a plea bargain) confer upon the trial court authority to impose an illegal sentence. Williams v. State, 500 So. 2d 501 (Fla. 1986). Therefore, mere failure to object certainly does not confer authority on the court to impose an illegal sentence. In Watkins v. State, 622 So. 2d 1148, 1149 (Fla. 1st DCA 1993), the court stated the applicable legal principle succinctly: "[N]o contemporaneous objection is required to appeal from an illegal sentence. [Citation omitted.]" (Watkins involved one of the same errors present in the instant case, imposition of an habitual violent felony offender sentence in reliance upon an improper prior predicate felony, one not enumerated in section 775.084(1)(b)1. of the Florida Statutes.)

Appellee quotes remarks of defense counsel which Appellee interpets as a concession that "the trial court could permissibly impose consecutive habitual sentences," but notes that counsel was objecting "on double jeopardy and due process grounds, in the event this Court changed the double jeopardy jurisprudence." (Brief of the Appellee, pp. 52-53) However, trial counsel for Appellant did not address the question of whether consecutive minimum mandatory sentences could be imposed where the offenses for which Appellant was being sentenced arose from a single episode; such sentences are prohibited, as this Court made clear in Daniels v. State, 595 So. 2d 952 (Fla. 1992). (See also the other cases cited in Appellant's initial brief on page 71.) Furthermore, in Hale v. State, 630 So. 2d 521 (Fla. 1993), which was decided after Appellant's sentencing below, this Court extended the rationale of Daniels, holding that once a defendant's sentences for multiple crimes committed during a single criminal episode are enhanced by use of the habitual offender statutes, the total penalty cannot be further increased by running the sentences consecutively. And, finally, whatever defense counsel may have said about running the sentences consecutively could not confer authority upon the court to impose illegal sentences. If the defendant himself cannot waive the illegality of his sentence by agreeing to it, then certainly his attorneys cannot do so. See Trott v. State, 579 So. 2d 807 (Fla. 5th DCA 1991).

The State also argues that any error in habitualizing Appellant on the life felony of sexual battery with physical force likely to cause serious personal injury "must be deemed harmless in

light of the accompanying burglary sentence and the imposition of a sentence of death on the murder count." (Brief of the Appellee, p. 55) Regardless of what Appellant received on the other counts, his sentence of life with a minimum mandatory 15 years for the sexual battery, to run consecutive with his same sentence for burglary, cannot be harmless, as it is a more severe sentence than he would have received if he had not been illegally habitualized for this offense, and one never knows what might become of the sentences for burglary and murder in the future.

## CONCLUSION

Appellant, Anthony Washington, respectfully renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of March, 1994.

Respectfully submitted,

Robert F. Moeller

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 234176
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

RFM/ddv