IN THE SUPREME COURT OF FLORIDA

ARTHUR BARNHILL, III,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC00-547
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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_____	)	

REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

The appellant relies on the Statement of Case and Statement of Facts contained in his Initial Brief as an accurate, neutral, and complete statement of the relevant facts in this case. The Statement of the Case and Facts contained in the Appellee's brief does not state with any specificity which facts the state believes were omitted in or disputed from the Appellant's version, and an examination of the state's version reveals nothing more than a general restatement of the facts, with certain important facts noticeably missing:

On page 12 of the Answer Brief, the state attempts to corroborate the testimony of Michael Jackson (his third different, conflicting version of events), by noting testimony of Jeslyn Whitlock that she saw Michael walking alone in a direction away from the victim's house. However, that testimony does not corroborate Michael's since Jeslyn was certain that the time frame she saw him walking alone was between 12:30 and 1:00 p.m., a fact the state's version of events conveniently overlooks. This evidence then, instead of corroborating Michael's testimony, directly contradicts it, since Michael claims to have been with Barnhill at that time still at church. (Vol. 16, R 2434, 2441)

On page 13 of appellee's brief, the state claims that Dr. Eisenstein "admitted there was a large degree of leeway in determining Appellant's level of impairment," and that the appellant "could be faking." The appellant submits that the state is misreading this testimony. A correct reading of the testimony reveals that Dr. Eisenstein, in discussing degrees of impairment, was answering a general question of the state about sociopaths and specific predictions of future violent behavior, and was *not* speaking about the defendant specifically. (Vol. 15, R 2167-2168) Further, the doctor took into account all factors of the multitude of testing on the defendant to determine, contrary to the state's assertion, that "Mr. Barnhill was ***not someone who on the whole battery of tests was showing faking behavior***." (Vol.

15, R 2182) (emphasis added)

Similarly, in the same footnote on page 12 of the state's brief, the appellee also omits the fact that witnesses told Investigator Cable that they could *not* positively identify one of the persons as Michael Jackson, and one of the witnesses, Trish Vaughn, said that the person she saw looked most like Jelani Jackson, not Michael. (Vol. 20, R 3185-3186)

The state also makes the misleading assertion that "Dr. Gutman did not diagnose Appellant as having frontal lobe impairment." (Answer Brief, p. 13) However, again, a *complete* reading of the testimony of Dr. Gutman indicates that, not being a psychologist, he "would not make that diagnosis" which utilized tests performed not by psychiatrists, but rather psychologists. Dr. Gutman specifically stated that he was *not* disagreeing with Dr. Eisenstein's diagnosis: "So I do not disagree with him and I can't interpret the data, raw data, because I'm not schooled in that area of expertise." (Vol. 17, R 2590-2592)

SUMMARY OF ARGUMENT

Point I. The trial court erred in denying the motion to disqualify itself. The motion, swearing that the defendant feared that he would not receive a fair penalty phase trial and fair sentencing determination where the court had previously expressed the opinion that the defendant was lying, bordering on perjury, was legally sufficient. The trial court had to recuse itself.

Point II. The court erred in denying two strikes for cause of potential jurors who had indicated strong convictions about the imposition of the death penalty. The court's attempted rehabilitation by asking leading general questions as to whether they could be fair was totally insufficient to establish their impartiality.

Point IV. The trial court abused its discretion in denying the defendant's motion for a continuance. Defense counsel's expert witness was unavailable to testify at the scheduled commencement of the penalty phase trial due to medically necessary surgery. The trial court's solution, over the defense objections, of permitting the defense to perpetuate the doctor's testimony via videotape was totally inadequate since the doctor was to rebut the state's medical examiner on material issues related to aggravating circumstances. This was impossible to do, since the medical examiner had not yet testified. When the medical examiner

testified to new opinions not previously disclosed, the defendant had no way to rebut those opinions without his live witness. The defendant suffered irreparable harm since the jury did not get to hear what the rebuttal evidence from the defense expert would have been.

Point V. The trial court committed fundamental error in adjudicating and sentencing the defendant on both robbery of the victim's car keys and grand theft of the automobile, where the taking was in one continuous act. Even where the defendant has entered a no contest plea to both charges, where the plea was not negotiated and the state did not give up any rights, the issue can be raised for the first time on appeal.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR DISQUALIFICATION WHERE THE COURT, IN A MOTION HEARING, DECLARED THAT THE DEFENDANT'S TESTIMONY AT THAT HEARING AMOUNTED TO PERJURY, THEREBY CREATING THE WELL FOUNDED FEAR IN THE DEFENDANT'S MIND THAT HE WOULD NOT RECEIVE A FAIR AND IMPARTIAL PENALTY PHASE TRIAL AND SENTENCING IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

As recounted in the Initial Brief, the trial court, at the conclusion of the motion to suppress hearing, went on a tirade about the truthfulness of the defendant, Arthur Barnhill, who had testified at the hearing as to his temporary residence in New York City, calling it "a totally unbelievable explanation" and claiming "it about borders on perjury," (Vol. 6, R 733-734) which comments formed the basis for a sworn motion to disqualify the judge, claiming a well-founded fear that he could not receive a fair and impartial penalty phase trial and sentencing. (Vol. 2, R 232-235)

The state misquotes the case of ***Deauville Realty Co. v. Tobin***, 120 So.2d

198, 201 (Fla. 3rd DCA 1960), claiming it states "when a judge observes a witness testify and reaches a conclusion that the witness is unworthy of belief, there is no reason why the judge should not say so, provided it is out of the presence of the jury." (Answer Brief, p. 25) However, this case merely states that a judge may make such a comment ***after*** the trial is completed and such a statement is not a ground to grant a new trial in a coram nobis action, where no objection or motion for new trial was raised at the trial level concerning such a comment. ***Id***. Further, the case continues, the formation of a prejudice during and as a result of a party's testimony may operate to disqualify that judge from hearing any later trial of that case. ***Deauville***, 120 So.2d at 201-202. So, the ***Deauville*** case, and others sought to be distinguished by the state, provides no support for the state's contention and, in fact, mandates the defendant's position. Under these cases, the court's comments show the formation of a prejudice which would operate to disqualify the court from hearing the later penalty trial of Mr. Barnhill.

As shown in the Initial Brief, the remarks about the defendant's veracity in the instant case cannot be dismissed as merely announcing an adverse judicial ruling, which would be insufficient to warrant disqualification, as the state attempts. They are much more. The statement by the court that it feels a party has lied and committed perjury in a case indicates bias against the party, supporting recusal. ***See***

Initial Brief of Appellant, pp. 35-41. The motion to disqualify was legally sufficient to show that Arthur Barnhill had a well-grounded fear that he would not receive a fair penalty phase trial and life or death determination at the hands of this trial judge, the legal standard for a motion to disqualify. Reversal is mandated for a new penalty phase trial before a different, impartial judge.

POINT II.

THE TRIAL COURT ERRED IN REFUSING TO STRIKE TWO JURORS FOR CAUSE, WHO, WHILE INDICATING THEY COULD FOLLOW THE LAW, NONETHELESS EXPRESSED DEEP-ROOTED PERSONAL BELIEFS IN FAVOR OF THE DEATH PENALTY, GIVING RISE TO DOUBTS ABOUT THEIR IMPARTIALITY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

The state maintains that the court correctly denied the defense attempts to strike two jurors for cause after they had expressed deep-rooted personal beliefs in favor of the death penalty and that they would give greater weight to aggravators than to mitigators, merely because of the court's general and leading "rehabilitation" of these jurors that they could generally "follow the law." Answer Brief, pp. 31-32. This argument simply ignores the case law cited in the initial brief (and never addressed by the appellee) that a declaration by a juror simply that he or she can follow the law, especially in response to leading questions, is *not* determinative if other statements give rise to doubt the juror's impartiality. ***See*** Initial Brief of Appellant, pp. 43-45, and the cases cited therein.

The prospective jurors here were, under these cases, not adequately

rehabilitated simply by their promise to "follow the law." There has been "manifest error" committed by the trial court in denying the challenges for cause and requests for additional peremptories. The appellant's death sentence cannot stand; a new penalty trial is required.

POINT IV.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A CONTINUANCE IN ORDER TO OBTAIN THE LIVE TESTIMONY OF ITS EXPERT WITNESS DEPRIVING HIM OF HIS RIGHT TO A FAIR TRIAL AND TO SECURE WITNESSES IN HIS BEHALF UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

The state claims that any error in denying the continuance so that Dr. Feegel could be present to give live testimony to rebut the state's witness would be harmless since the prosecutor would have been able to make the same argument to the jury, even if Dr. Feegel would have been able to provide for the jury the missing rebuttal testimony. (Answer Brief, pp. 40-41) This argument misses the whole point: If the continuance had been granted to allow Dr. Feegel to present his testimony live after the state's medical testimony, the defense would have had the opportunity to refute this questionable testimony with Dr. Feegel's expertise and thus would have had fuel to argue to the jury to reject Dr. Gore's unfounded opinion. Without this, the defense was left with no ammunition to refute this salient and harmful testimony.

The state to a degree recognizes this by its statement, "Admittedly, Appellant

could not counter this argument to the jury by presenting Dr. Feegel's rebuttal testimony . . . ." (Answer Brief, p. 41) However, the state continues, since the rebuttal affidavit from Dr. Feegel was presented to the court at the *Spencer* hearing, and since the court did not utilize this factor in finding the aggravator of heinousness, any error was likewise harmless. (Answer Brief, p. 41) This argument is faulty since it fails to recognize the effect of Dr. Gore's unrebutted testimony on the jury in its finding for death and the weight such a finding carries in the death penalty process. Salient testimony that the victim had the "pee scared out of him" certainly could have had a great impact on the jury's finding of heinousness and its resultant recommendation of death, which recommendation is tainted because the defense was precluded from presenting to that jury the rebuttal testimony of Dr. Feegel. That is the harm. When Dr. Gore surprised the defense with his conjecture regarding this supposed evidence of fear, Barnhill was unable to rebut this striking testimony which the prosecutor featured prominently in his closing argument regarding HAC,[1] and the defense was doomed with the jury on the question of fear. Had a continuance been granted and Dr. Feegel been presented live, his rebuttal of

[1] The state claims only one brief mention of this before the jury (Vol. 20, R 3277; Answer Brief, p. 41), ignoring an additional prosecutorial argument on this factor to the jury at Vol. 20, R 3278; half of the state's argument on HAC surrounded this "peeing out of fear" issue.

this item would have allowed the opportunity to cure the damaging blow to the defendant's case. Because of the court's palpable abuse of discretion in denying this continuance, reversal for a new trial is necessary.

POINT V.

THE TRIAL COURT ERRED IN ADJUDICATING AND SENTENCING THE DEFENDANT TO BOTH ROBBERY OF THE VICTIM'S KEYS AND THEFT OF HIS AUTOMOBILE IN VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The state argues that this point should be rejected simply because, under a strict ***Blockburger*** analysis, each of the offenses requires proof of an element that the other does not. (Answer Brief, pp. 43-44) Such argument ignores the law of Florida that this analysis under ***Blockburger v. United States***, 284 U.S. 299 (1932), is not the final determinative test for a double jeopardy violation. ***See Sirmons v. State***, 634 So.2d 153, 154 (Fla. 1994) (Kogan, J., concurring).

Double jeopardy prohibits a defendant for being convicted of the offenses of both grand theft of an automobile and robbery of the victim's car keys, where the taking, as here, is one continuous episode. When a robbery is accomplished by a defendant entering a residence and taking car keys along with other property and then proceeding immediately to the stolen vehicle, only one taking has occurred. ***See*** Initial Brief, p. 61 and the cases cited therein. The grand theft charge and sentence thereon must be vacated here.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the Initial Brief, the appellant requests that this Honorable Court reverse the sentence of death as to Points I through IV, and VI, and remand for a new penalty phase trial before a new jury; as to Point VII, vacate the death sentence for an imposition of life imprisonment, and, as to Point V, vacate the conviction and sentence for grand theft.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Stephen D. Ake, Assistant Attorney General, 2002 North Lois Avenue Suite 700, Westwood Center, Tampa, FL 33607; and Mr. Arthur Barnhill, Inmate # 992634, Union Correctional Institution, P.O. Box 221, Raiford, FL. 32083, this 25th day of July, 2001.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14pt.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER