

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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JERRY HALIBURTON,

Appellant,

CASE No. 64,510

v.

STATE OF FLORIDA,

Appellee.

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APPELLANT'S REPLY BRIEF

**FILED**  
SID J. WHITE  
SEP 19 1964  
CLERK, SUPREME COURT  
By *[Signature]*  
Chief Deputy Clerk

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES	ii
STATEMENT OF THE FACTS	1
POINTS INVOLVED	2
ARGUMENT I	3-4
ARGUMENT II	5-6
ARGUMENT III	7
ARGUMENT IV	8-9
ARGUMENT V	10-12
ARGUMENT VI	13
ARGUMENT VII	14
ARGUMENT VIII	15
ARGUMENT IX	16
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF CASES

	<u>Page</u>
<u>Castle v. State</u> 305 So.2d 795 (Fla. 4 DCA 1974). . . . .	8
<u>David v. State</u> 369 So.2d 943 (Fla. 1979). . . . .	8,9
<u>Gains v. State</u> 417 So.2d 719 (Fla. 1 DCA 1982). . . . .	8,9
<u>Grant v. State</u> 194 So.2d 612 (Fla. 1967). . . . .	11,12
<u>Haddock v. State</u> 379 So.2d 194 (Fla. 5 DCA 1980). . . . .	3
<u>In re Standard Jury Instructions in Criminal Cases</u> 432 So.2d 594 (Fla. 1981). . . . .	15
<u>Jackson v. State</u> Case 62,723, Opinion filed May 10, 1984. . . . .	10
<u>Jamason v. State</u> Case 63,571, Opinion filed August 30, 1984 . . . . .	5
<u>Jamason v. State</u> 447 So.2d 892 (Fla. 4 DCA 1983). . . . .	5
<u>Jenkins v. State</u> 385 So.2d 1356 (Fla. 1980) . . . . .	5
<u>Keeten v. Garrison</u> 578 F.Supp. 1164 (W.D.N.C. 1984) . . . . .	16
<u>Mills v. State</u> 407 So.2d 218 (Fla. 1981). . . . .	3
<u>Pait v. State</u> 112 So.2d 380 (Fla. 1959). . . . .	7
<u>Saxon v. State</u> 225 So.2d 925 (Fla. 4 DCA 1969). . . . .	14
<u>State v. Bolton</u> 383 So.2d 924 (Fla. 2 DCA 1980). . . . .	8
<u>State v. Craig</u> 237 So.2d 737 (Fla. 1970). . . . .	5

Table of Cases, Cont.

Page

Walker v. State

390 So.2d 411 (Fla. 4 DCA 1980). . . . . 3

White v. State

365 So.2d 199 (Fla. 2 DCA 1978). . . . . 8

STATEMENT OF THE FACTS

Appellant has the following additions and corrections to the State's version of the facts.

Teresa Cast was not so clear on how her favorite tank top was left behind as the State claims. She did not remember the last time she wore it, and only assumed it was dirty (R 1125).

Freddie Haliburton conceded on cross that he was not close to his family or to Appellant. He was not talked to on family confidences (R 1805-1806).

POINTS INVOLVED

- I THE COURT ERRED IN APPLYING APPELLANT'S WAIVER OF SPEEDY TRIAL ON THE BURGLARY CHARGE TO THE SUBSEQUENT HOMICIDE INDICTMENT AND DENYING APPELLANT'S MOTION FOR DISCHARGE.
- II THE COURT ERRED IN REFUSING TO SUPPRESS STATEMENTS OBTAINED FROM APPELLANT WHILE HIS ATTORNEY WAS OUTSIDE BEING DENIED ACCESS.
- III THE COURT ERRED IN REFUSING TO STRIKE THE JURY VENIRE AFTER THE PROSECUTOR CALLED ATTENTION TO APPELLATE REVIEW OF THE SENTENCE.
- IV APPELLANT'S PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED BY A REQUEST BY A STATE WITNESS THAT HE BE ASKED WHERE SHE HAD BEEN WITH HIM AND THE PROSECUTOR'S ARGUMENT THAT HE "STONEWALLED" WHEN ARRESTED.
- V THE COURT ERRED IN REFUSING TO DECLARE A MISTRIAL FOR CUMULATIVE IRRELEVANT AND PREJUDICIAL EVIDENCE SUGGESTING WRONGDOING.
- VI THE COURT ERRED IN REQUIRING DEFENSE COUNSEL TO PROCEED WITH CROSS-EXAMINATION OF A CRITICAL WITNESS WHEN HE WAS TOO TIRED TO DO SO PROPERLY.
- VII THE COURT ERRED IN ALLOWING THE STATE TO USE A POSED AND PREJUDICIALLY GORY PHOTOGRAPH FOR IDENTIFICATION.
- VIII THE COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT ON CIRCUMSTANTIAL EVIDENCE.
- IX THE COURT ERRED IN STRIKING PROSPECTIVE JURORS FOR CAUSE FOR SCRUPLES AGAINST THE DEATH PENALTY.

ARGUMENT I

THE COURT ERRED IN APPLYING APPELLANT'S  
WAIVER OF SPEEDY TRIAL ON THE BURGLARY  
CHARGE TO THE SUBSEQUENT HOMICIDE INDICT-  
MENT AND DENYING APPELLANT'S MOTION FOR  
DISCHARGE.

The State would harmonize decisions by reading Haddock v. State, 379 So.2d 194 (Fla. 5 DCA 1980) and Walker v. State, 390 So.2d 411 (Fla. 4 DCA 1980) as involving separate criminal episodes. The effort fails.

Haddock may have arguably violated more than one statute in the course of his fight with an intruder, but it was hardly more than one episode. All he did was chase the intruder 340 feet before the fight ended. In like manner, Walker's flight from the scene of his accident is part of the same episode. In light of Mills v. State, 407 So.2d 218 at 221 (Fla. 1981), a crime is not ended so quickly.

Appellant maintains that Haddock forbids a new charge after speedy trial runs out, even with a waiver. It is rightly decided for all the reasons expressed in Appellant's main brief and essentially unanswered by the State, and should be followed.

Appellee's plea for symmetry is also misguided. The time that speedy trial starts to run, under Rule 3.191 (a)(4), R.Crim.P., refers expressly to custody for the conduct or criminal episode. There is no similar language in (a)(1), (d)(2), or (d)(3), all of which refer expressly or implicitly to persons charged with a crime.

If any symmetry is appropriate, it should make it just as impossible to waive on an unfiled charge as it is to reinstate it. Since the latter is not possible, the former should not be either. Appellant should have been discharged on Count I.

## ARGUMENT II

THE COURT ERRED IN REFUSING TO SUPPRESS  
STATEMENTS OBTAINED FROM APPELLANT WHILE  
HIS ATTORNEY WAS OUTSIDE BEING DENIED ACCESS.

The State relies most heavily on State v. Craig, 237 So.2d 737 (Fla. 1970), a case well known to the undersigned. This Court reversed rulings that the Miranda warning was defective because it mentioned counsel for the future and that an express waiver was required after some indication of a desire for counsel. There was no issue as to counsel demanding that questioning cease or being refused access, so this Court could hardly have addressed it. Further, culling facts from a dissenting opinion is simply not valid, Jenkins v. State, 385 So.2d 1356 at 1358 (Fla. 1980).

Whatever the law was in 1970, it is now clear that counsel cannot be kept from his client. As this Court well knows from this case and from Jamason v. State, Case No. 63,571, Opinion of this Court filed August 30, 1984, counsel is routinely kept out at the West Palm Beach Police Department. Jamason v. State; supra, addresses primarily the contempt question, but it does approve the decision in Jamason v. State, 447 So.2d 892 (Fla. 4 DCA 1983), so should lay to rest at least one of Appellee's defenses. Since the attorney retained by a spouse in that case had enough standing to get Melody's oral Writ of Habeas Corpus, the attorney retained by Appellant's sister was likewise qualified.

Appellant does not say known counsel must be present to be waived, as Appellee implies. What he does say is that in this case, his counsel did more than just make his representation known. Police should have stopped at each step--the attorney's telephonic request, his arrival and demand to see his client, and the Judge's telephonic order. It did not do any of the three in time to avoid reversible error.

ARGUMENT POINT III

THE COURT ERRED IN REFUSING TO STRIKE THE  
JURY VENIRE AFTER THE PROSECUTOR CALLED  
ATTENTION TO APPELLATE REVIEW OF THE  
SENTENCE.

Appellee's effort to distinguish Pait v. State,  
112 So.2d 380 (Fla. 1959) fails for two reasons. First of  
all, what the prosecutor said in Pait was just as much a  
correct statement of the law as was the instant comment, so  
that is no distinction at all. Secondly, the Pait comment  
was reversible not because the State was portrayed as a  
procedural underdog, but because the reference to appellate  
review permitted the jury to "disregard their own responsi-  
bility in the matter and leave it up to the Supreme Court"  
(112 So.2d at 384). Thus, the State's second point is a  
distinction without a difference. Appellant's convictions  
must be reversed just as was Pait's.

ARGUMENT IV

APPELLANT'S PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED BY A REQUEST BY A STATE WITNESS THAT HE BE ASKED WHERE SHE HAD BEEN WITH HIM AND THE PROSECUTOR'S ARGUMENT THAT HE "STONEWALLED" WHEN ARRESTED.

Appellee defends this point by denying that the comments impinged his right to remain silent and by denying responsibility for the first violation. Neither defense works.

The first was not an oblique comment like those involved in Gains v. State, 417 So.2d 719 at 724 (Fla. 1 DCA 1982), ("not once has anyone explained to us") or State v. Bolton, 383 So.2d 924 at 926 (Fla. 2 DCA 1980), ("he [defense counsel] never told you what his defense was"), each of which addressed arguments of defense counsel. Rather, it was a direct call upon Appellant to testify and nothing less. Thus, it was more like the conduct condemned in David v. State, 369 So.2d 943 (Fla. 1979).

Perhaps because he assisted the prosecutor, counsel for the State is unduly defensive of the prosecution performance. However, it does not matter. Appellant's right was nonetheless violated, White v. State, 365 So.2d 199 at 200 (Fla. 2 DCA 1978). The one thing which Appellant's questioning did not do in any way was to invite the outburst which occurred. Castle v. State, 305 So.2d 795 (Fla. 4 DCA 1974) is not in point, because there the answer which impli-

cated Castle's rights was responsive to the question. This answer was not.

The use of the term "stonewalling" was more oblique and may have simply been an unfortunate choice of words by the prosecutor. Nonetheless, it is, in common understanding, a suggestion of silence sufficient to meet either David, supra, or Bolton, supra, or Gains, supra.

Either comment requires reversal.

ARGUMENT V

THE COURT ERRED IN REFUSING TO DECLARE A  
MISTRIAL FOR CUMULATIVE IRRELEVANT AND  
PREJUDICIAL EVIDENCE SUGGESTING WRONGDOING.

The State's answers to this point are not convincing. It overlooks the harm and improper prejudice and finds relevancy where there is none.

The fact that Appellant was the neighborhood burglar hardly says he has a prior arrest or conviction record. His taped statement that he always gets caught is ambiguous at best, especially since he said no one was ever there (R 1704-1708). Only Freddie's reference to his getting out made it clear. Nonetheless, if that were the only incident, it might be harmless. But there was so much more, and not just the reminder implicit in use of the old fingerprints.

Whatever Appellant may have said to his brother months after the incident about a desire to kill others, it relates at most only to his state of mind then, not at the time of the crime. It was no more relevant than the evidence condemned in Jackson v. State, Case No. 62,723 (Opinion of this Court filed May 10, 1984).

For the same reason, Sharon Williams' claim that Appellant used a knife was not relevant. Appellant did object at the Motion in Limine (R 474-476). Surely he did not have to go through a futile renewal at trial to have review in a case of this magnitude.

Appellant does not concede that an attack on police thoroughness at the crime scene allows the State to prove that it got a warrant to search Appellant's room (an invalid one at that) or to prove that it did seize his clothing. But even if that is a legitimate inquiry, the State transcended any bounds of propriety by asking about blood stains it could not even type as human on Appellant's tennis shoes. The trial Judge recognized as much when he excluded the exhibit, but it was already too late to wash away the prejudicial implication.

The cumulative effect cannot be ignored so casually as the State would have it. Where the only issue before the jury was guilt or innocence on the homicide and burglary charges, Appellant was portrayed as a homicidal maniac who went around using his knife on people constantly and thinking about killing with it the rest of the time. This goes well beyond any effect of Appellant being the neighborhood burglar.

It is not inappropriate to remind the State of the words of the late Justice Drew in Grant v. State, 194 So.2d 612 at 615-616 (Fla. 1967):

"The rules which govern the trial of persons accused of crime in our courts are the result of hundreds of years of experience. With their manifold faults, they have proven to be man's best protection against injustice by man. Many a winning touchdown has been called back and nullified because someone on the offensive team violated a rule by which the game was to be played. The test in such

a case is not whether the infraction actually contributed to the success of the play but rather whether it might have. Surely where life is at stake, the penalty cannot be less severe." (Emphasis by the Court)

ARGUMENT VI

THE COURT ERRED IN REQUIRING DEFENSE COUNSEL TO PROCEED WITH CROSS-EXAMINATION OF A CRITICAL WITNESS WHEN HE WAS TOO TIRED TO DO SO PROPERLY.

The State persists in calling this a defense ploy to prepare for a Rule 3.850 motion. Appellant persists in noting that it was raised at a time when it would have been so easy to just recess for the night and avoid the problem. It was designed to avoid a Rule 3.850, not foster one.

## ARGUMENT VII

THE COURT ERRED IN ALLOWING THE STATE TO USE A POSED AND PREJUDICIALLY GORY PHOTOGRAPH FOR IDENTIFICATION.

Once again counsel for Appellee is unduly defensive. His continued reliance on the availability of other, more damaging photographs, remains meaningless. Whether more gruesome but relevant pictures have been admitted in other cases is likewise irrelevant.

The issue is not whether Appellant's rights could have been violated worse, but whether they were violated at all. They were here because the photograph which was used was not relevant. It did not accurately depict the scene as the first officer found it, and it was not used for medical testimony. The only real use made of the picture was to produce the shocked reaction by identification witnesses, and that was error, Saxon v. State, 225 So.2d 925 at 927 (Fla. 4 DCA 1969).

Appellant must also note that defense counsel can hardly be faulted for not knowing, in his initial objection, when the medical examiner looked at Exhibit 1 (R 1496), that he would make no further use of it. When he discovered that the State's constant assertion that it would be used was not so, he followed the proper procedure and moved at that time (R 1858-1860).

ARGUMENT VIII

THE COURT ABUSED ITS DISCRETION IN REFUSING  
TO INSTRUCT ON CIRCUMSTANTIAL EVIDENCE.

Appellant recognizes the discretion this Court  
posited in trial judges on this issue, In re: Standard  
Jury Instructions in Criminal Cases, 432 So.2d 594 at 595  
(Fla. 1981). Appellant simply says that there can be such  
a thing as an abuse of that discretion, and if it did not  
occur here, it never will.

ARGUMENT IX

THE COURT ERRED IN STRIKING PROSPECTIVE  
JURORS FOR CAUSE FOR SCRUPLES AGAINST THE  
DEATH PENALTY.

Appellant would simply note that the conviction  
orientation of death qualified juries has been established  
again, in Keeten v. Garrison, 578 F.Supp. 1164 (W.D.N.C.  
1984).

Appellant will rely on his prior brief as to the  
remaining points.

CONCLUSION

For the reasons set forth in his main brief, Appellant submits that he should be discharged on the homicide charge and awarded a new trial for each and all of the many errors which permeated his trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to Russell S. Bohn, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 17th day of September, 1984.

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