

IN THE SUPREME COURT OF FLORIDA

CHARLES LEWIS BURR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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CASE NO. 71,234

**FILED**  
SID. J. WINTER  
OCT 2 1990  
CLERK, SUPREME COURT  
By *[Signature]*  
Deputy Clerk

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ON REMAND FROM THE  
UNITED STATES SUPREME COURT

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REPLY BRIEF OF APPELLANT ON REMAND

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TABLE OF CONTENTS  
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	Page Number
TABLE OF CONTENTS .....	i
TABLE OF CITATIONS .....	ii
ARGUMENT .....	1-3
DOWLING V. UNITED STATES IS INAPPOSITE TO THE CONSTITUTIONAL REQUIREMENT OF AN ACCURATE AND RELIABLE DEATH SENTENCE PROCEEDING.	
CONCLUSION .....	3
CERTIFICATE OF SERVICE .....	4

TABLE OF CITATIONS

=====

CASES CITED	PAGE NUMBER(S)
BURR V. STATE, 550 So. 2d, 444 (Fla. 1989) .....	1
DOWLING V. UNITED STATES, 493 U.S. _____ (1985) .....	1
GREGG V. GEORGIA, 428 U.S. 153 (1976) .....	3
HARICH V. WAINWRIGHT, 844 F. 2d 1464 (11th Cir. 1988) (en banc) .....	2
JOHNSON V. DUGGER, ___ F. 2D___, 4 FLW Fed. C. 1363 (11th Cir. 1990) ...	3
STATE V. PERKINS, 349 So. 2d 161 (Fla. 1977) .....	1
ZANT V. STEPHENS, 462 U.S. 879 (1983) .....	3

ARGUMENT

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DOWLING V. UNITED STATES IS  
INAPPOSITE TO THE CONSTITUTIONAL  
REQUIREMENT OF AN ACCURATE AND  
RELIABLE DEATH SENTENCE PROCEEDING.

The State's beginning premise is partially correct; Dowling removes any federal constitutional barrier to the admissibility of the similar fact evidence admitted in this case in the guilt or innocence phase of the murder trial. But see State v. Perkins, 349 So. 2d 161 (Fla. 1977) (Florida prohibits the admissibility of any information relating to criminal activity for which a person has been found not guilty).

It is simply not true, as articulated by the State, that "none of the aggravating factors utilized to support the death penalty were singularly premised on the similar fact evidence." (Answer Brief of Appellee, page 18). This Court has already held directly to the contrary as to two of the three aggravating factors. Burr v. State, 550 So. 2d 444, 446 (Fla. 1989)

This is so because there is no evidence that portrays how the killing of Steve Hardy at the Suwanee Swifty convenience store took place. The sentencing judge simply extrapolated from the testimony of the three robbery/ attempted murder victims in Brevard County a description of

how he believed Steve Hardy must have died.

The murder of Steve Hardy was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Of this, can there be any doubt? (TR-320)

The answer is, of course, there is doubt. Nowhere does the record disclose any behavior of Burr consistent with the definition of this aggravator. See Harich v. Wainwright, 844 F. 2d 1464, 1469 (11th Cir. 1988) (en banc).

The arrest avoidance aggravator was similarly premised totally on similar fact evidence.

The execution of Steve Hardy was committed by Charlie Lewis Burr for the purpose of avoiding or preventing a lawful arrest for the armed robbery of Steven Hardy. By his conduct during the thirteen-day period which began with Steve Hardy's pitiless murder, Charlie Burr gave a forceful expression to the first principle of the code of the lawless that "dead men tell no tales." That Emil Farrell, James Griffin and Lloyd Lee live to identify him is no testimonial to his marksmanship. That they did not join Steve Hardy in the bounds of death can only be attributed to the grace of the benevolent creator.

(TR-319). The record is, once again, completely devoid of any material information as to Burr's motivation for killing Hardy.

The trial judge simply drew conclusions not supported

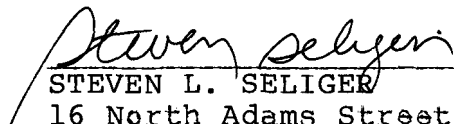
by any evidence before him. These erroneous conclusions were premised on Burr's conduct exhibited in crimes allegedly occurring after Steve Hardy's death and for which the State of Florida could not prove when put to the test.

The ultimate question is whether Mr. Burr received a fundamentally fair and accurate sentencing proceeding. See *Zant v. Stephens*, 462 U.S. 879, 887-888 (1983). The misuse of the similar fact evidence "significantly undermines the accuracy of a sentence which imposes a punishment 'unique in its severity and irrevocability.'" *Johnson v. Dugger*, \_\_\_ F. 2d \_\_\_, 4FLW Fed C 1363, 1374 (11th Cir. 1990), citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

CONCLUSION

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This Court should not disturb its decision that Mr. Burr's death sentence should be vacated. The Court must go further and direct the trial court to impose a life sentence.

  
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CERTIFICATE OF SERVICE  
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I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this 15<sup>th</sup> day of October, 1990 to Ms. Carolyn N. Snurkowski, Counsel of Record, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

  
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STEVEN L. SELIGER