IN THE SUPREME COURT OF FLORIDA

ANDREA HICKS JACKSON,

Appellant,

vs.

CASE NO. 1,4973

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Andrea Hicks Jackson, the criminal defendant below, will be referred to as "Appellant." Appellee, the State of Florida, the prosecuting authority below, will be referred to as "Appellee."

References to the record on appeal, Volumes I through IV, which contain the legal documents filed in this cause, will be designated "(R-)." References to the record on appeal, Volumes V through XV, which contain the transcript of testimony and proceedings at trial, will be designated "(T-)."

All emphasis is supplied by Appellee.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts as being supported by the record. Additional facts deemed relevant and necessary to a disposition of the various legal issues raised will be included in the argument portion of the Appellee's brief.

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT WHEN THE STATE REBUTTED THE PRIMA FACIE CASE OF DISCRIMINATION AGAINST BLACKS AND WOMEN WITH REGARD TO THE SELECTION OF THE GRAND JURY FOREMAN.

Appellant argues that the grand jury indictment returned against her violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution because the grand jury foreman selection process in Duval County has systematically excluded blacks and women. Appellant further contends that the evidence submitted by the state failed to rebut the prima facie case of the systematic exclusion of members of her race and sex from the position of grand jury foreman. Appellee would submit that this argument is meritless in light of Hobby v. United States, 468 U.S. ___, 82 L.Ed.2d 260, 104 S.Ct. ___ (decided July 2, 1984), and Andrews v. State, 443 So.2d 78 (Fla. 1983).

In Hobby, the United States Supreme Court noted that the responsibilities of a federal grand jury foreman are essentially clerical in nature and stated:

> As the Court of Appeals noted, the impact of a federal grand jury foreman upon the criminal justice system and the rights of persons charged with crime is 'minimal and incidental at best.' 702 F.2d, at 471. Given the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly

> constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness. Simply stated, the role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment.

82 L.Ed.2d at 266.

The Florida Supreme Court came to the same conclusion seven months earlier in Andrews where it ruled:

> The Florida foreman plays no more significant a part in the proper administration of justice than does the federal grand jury foreman. He administers oaths to witnesses, appoints one of the members of the jurors as clerks to keep minutes of the proceedings, appoints interpreters to translate language of witnesses, and either he or an acting foreman signs the indictment. §§905.22, 905.13, and 905.15, Fla. Stat. (1981); Fla.R.Crim.P. 3.140(f). Therefore, even if there had been discrimination in the selection of the grand jury foreman in Leon County, which there was not, it would not have justified quashing the indictment and certainly does not require setting aside the conviction.

443 So.2d at 83. Appellee submits that the decisions in Hobby and Andrews are dispositive of this issue because the foreman in the instant case was selected from a properly impaneled grand jury and is given only clerical duties to perform.

Even if this Court were to retreat from its finding

that a Florida grand jury foreman does not by nature have a significant influence over the panel, it must still find for Appellee because there has been no showing of discrimination in the selection process. At a pre-trial hearing, Appellee presented the testimony of Judges Richard S. Powell, Clifford B. Shepard, and Major B. Harding, those responsible for the selection of foremen between 1966 and 1983. Chief Judge Shepard, who impaneled Appellant's grand jury, delineated the criteria used in choosing a foreman:

> Q. What type of criteria do you use when you select the foreperson of the grand jury?
>
> A. Well, what I look for really is somebody with some leadership ability, either somebody that is in their job or has been supervising people, has been - I look to see if they are paying attention to what we are doing here or whether- and try to assess them for mental astuteness and education and basically leadership ability, whether they - I think they are capable of making a grand juror and assessing excuses that a grand juror may want to be excused for a reason and, of course, we don't have to have all twenty three there every time.
>
> You have to have a quorum. I think eighteen is a quorum, so some of them don't have to come every time if they have a legitimate excuse. I try to select a foreman that could evaluate excuses as to whether or not to let them off or not and it's the vice foreman I use the same criteria. The vice foreman, his duties is to fill in when the foreman may be for some reason couldn't be at a particular meeting.
>
> Q. Okay. In selecting the foreperson of the grand jury is either race or sex ever something that you consider?

A. No.

Q. How about in the selection of the grand jury, is either race or sex?

A. No, sir. I don't even know when I get in the courtroom who is going to be there, whether there will be thirty five blacks or thirty five whites. I have nothing to do with that. I tell them to send me the first thirty five off the list or the last thirty five off the list. Conceivably if they were all black we would have an all black grand jury. They could be an all white grand jury. That's no consideration at all because the list - the voter registration list is not indicated - I don't guess the computer indicates one as black or white or group them as black or white, but it's a complete selection of the - from the petit jury panel off the voter registration, what ever order that registration comes out that's the way they report for jury duty and grand jury duty.

(R-432-433). Clearly, Appellee met the necessary burden of proof enunciated in Andrews, 443 So.2d at 81, and United States v. Perez-Hernandez, 672 F.2d 1380, 1387-88 (11th Cir. 1982). As stated by the Eleventh Circuit in Perez-Hernandez:

> The government's rebuttal case below consisted entirely of testimony of eight district judges involved in the foreman selection process for the years in questions. Each judge testified that he acted independently of the other judges in choosing a grand jury foreman, although each employed similar guidelines in making a selection. These guidelines generally consisted of four separate factors: (1) occupation and work history; (2) leadership and management experiences; (3) length of time in the community; and (4) attentiveness during the jury empanelment. These factors

> directly relate to the ability to perform the administrative functions and duties of a grand jury foreman. This is not then a case in which arbitrary and unrelated criteria operated to excluded distinct groups from a position.... We can think of no better criteria for determining which grand jury member is best able to serve as foreman.

672 F.2d at 1387-88. The criteria used by the federal judges in Perez-Hernandez and by the trial judge in Andrews are substantially the same as those used in the instant case. See also, United States v. Holman, 680 F.2d 1340 (11th Cir. 1982).

Thus, Appellant has failed to demonstrate an abuse of the trial court's discretion in denying her motion to dismiss the grand jury indictment.

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS IN LIMINE AND MOTIONS FOR MISTRIAL WHICH WERE BASED ON THE INTRODUCTION OF EVIDENCE TO A COLLATERAL CRIME FOR WHICH APPELLANT WAS ACQUITTED.

Appellant argues that the trial court improperly allowed the state to introduce the testimony of Carl Lee, Jr., a taxicab driver who picked up Appellant several hours after the murder of Officer Bevel. Appellant had previously been tried for the attempted murder of Mr. Lee and was acquitted. Appellant contends that Mr. Lee's testimony implied the commission of a collateral offense for which she had been acquitted, and thus, should have been excluded under the Williams Rule. Williams v. State, 110 So.2d 654 (Fla.), cert. den., 361 U.S. 847 (1959). Appellee submits that the trial court properly admitted that portion of Mr. Lee's testimony which was relevant, while excluding evidence relating to the elements of the crimes for which Appellant was previously acquitted.

In Straight v. State, 397 So.2d 903 (Fla.), cert. den., 454 U.S. 1022 (1981), this Court cited Williams for the rule that evidence of criminal activity not charged is admissible if relevant to an issue of material fact, and further stated:

PAGE(S) MISSING

> The federal decisions have made clear that the rule of collateral estopped in criminal cases is not to be applied with the hypertechnical and archaic approach of a nineteenth century pleading book, but with realism and rationality. Where a previous judgment of acquittal is based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleading, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'

397 U.S. at 444. Moreover, this Court cited Ashe for the same proposition:

> Thus, the Ashe rule forbids the admission in a subsequent trial of evidence of an acquitted collateral crime only when the prior verdict clearly decided in the defendant's favor the issue for which admission is sought. From Ashe we know the double jeopardy clause of the Fifth Amendment of the United States Constitution does not forbid the admission of all evidence of acquitted collateral crimes, but only that evidence which the state is collaterally estopped from introducing.

State v. Perkins, 349 So.2d 161, 163 (Fla. 1977).

Clearly, the evidence in question is admissible under Ashe and Perkins, especially since the testimony does not relate to necessary elements of the crimes for which Appellant had been acquitted. In both Ashe and Perkins, the evidence sought to be admitted had been an issue of fact found in favor of the defendant in the previous trial. (In Ashe, the witnesses at the subsequent trial

had been unable to identify the accused at the trial in which he was acquitted, while in Perkins, the state attempted to introduce evidence of a rape for which the defendant had been acquitted.) Here, Appellant does not deny she was in the cab, that she had an altercation with the driver, and that the driver threw her gun out of the cab. The trial court made certain that the jury heard no testimony that Appellant shot at the cab driver or other evidence that Mr. Lee was ever in fear:

> [THE COURT:] Alright, look, I'm prepared to rule, if everyone stipulates to the facts.
>
> MR. WHITE: Yes, sir.
>
> THE COURT: I think my recollection, I don't have it before me, is that the - some of the lesser included charges were aggravated assault, simple assault. I don't remember what we went through. Those matters have been before the jury, I think she was acquitted, however, I think that the testimony will let me qualify that I am going to allow the cab driver to testify as to picking her up, as to where he took her, as to their having disagreements.
>
> He can testify in his testimony that he saw the gun in her waistband, but as to her attempting to pull that gun on him, I can't allow that. That goes to aggravated assault.
>
> MR. AUSTIN: Can he testify he took the gun away from her Your Honor?

He is not going to testify to any fear. She had her - his testimony will be that she had her hand on the gun in her waistband, and he took it away from her, threw it away.

THE COURT: They can testify that she had a disagreement as to where they were to go. He can testify to the truth, they had a disagreement, I can't remember, bus station or South Side or something like that. And that during that disagreement, he saw a gun in her waistband, and that somehow he threw the gun outside of the car. But, I don't want her having pulled- I don't want her having pulled the gun on him because that's been litigated.

MR. AUSTIN: I understand.

THE COURT: So, if he testifies he noticed a gun, and that he grabbed the gun and threw it outside of the car, that doesn't - she is not forced to defend anything, that's the truth. And that's how I am going to rule.

(T-851-853). Therefore, the trial court protected Appellant against undue prejudice by limiting the scope of the testimony to facts which were uncontested in the previous trial.

Not only did the prosecution show that Mr. Lee's testimony was relevant to showflight, but Appellant has failed to produce the necessary record of the prior trial which would show that the facts proven in the instant case, to wit: her presence in the taxicab and possession of a firearm, were decided adversely to the State in the prior proceeding. That is her

obligation under Ashe and Perkins, and she has failed to carry her burden of showing that the trial court committed error in admitting the evidence complained of.

Based upon this Court's decision in Straight, supra, the lower court should be affirmed on this issue. Heiney v. State, 447 So.2d 210 (Fla. 1984), cert. den., ___ U.S. ___, 36 CrL 4042, (Case Number 83-6994, October 15, 1984); Welty v. State, 402 So.2d 1159 (Fla. 1981).

ISSUE III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL BASED UPON THE ADMISSION OF TESTIMONY INFERRING APPELLANT'S PRIOR CRIMINAL CONDUCT.

Appellant claims the trial court improperly denied her motion for mistrial when a prosecution witness testified Appellant told her she had shot Officer Bevel because "she wasn't going back to jail." (T-1292). Appellant alleges that the jury was unfairly prejudiced against her by reason of their knowledge of the unrelated crime. Appellee submits that Appellant's claim is meritless.

It is well settled that evidence of other crimes is admissible in a criminal trial if relevant to prove anything other than the bad character of the defendant or his propensity to commit the crime charged. Williams v. State, 110 So.2d 654 (Fla. 1959). Appellant's statement establishes her motive for committing the murder and is, thus, clearly relevant. Appellee would also suggest that even if the relevancy of the testimony were not established, Appellant's claim should be dismissed because of a failure to demonstrate prejudice to her case in light of the overwhelming evidence of guilt. Smith v. State, 424 So.2d 726, 731 (Fla. 1982).

In Smith, the defendant had objected to testimony

concerning the theft of gasoline and a .22 caliber rifle occurring shortly before the commission of the crime for which he was on trial. As stated by this Court:

> The theft of the gasoline was part of the res gestae of the criminal episode. See Smith v. State, 365 So.2d 704 (Fla. 1978), cert. den., 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); Ashley v. State, 265 So.2d 685 (Fla. 1972). The evidence was connected in that it showed how appellant and his accomplices were able to get around to commit the crimes and it showed motivation in that it suggested their need for money.
>
> The theft of the rifle is not so connected with the crimes charged. That it occurred the same night is not enough to bring it within the res gestae. Although the evidence was irrelevant, appellant has failed to show how he was prejudiced. The testimony concerning the theft of the rifle was insignificant compared with the whole of the evidence of appellant's guilt of the crime charged. Since appellant has failed to show how the jury's decision could have been influenced by this one irrelevant statement, we find the error to be harmless. See State v. Wadsworth, 210 So.2d 4 (Fla. 1968).

424 So.2d at 731. Not only does Appellant's statement that she killed the officer to avoid going back to jail establish the mens rea necessary for a conviction of first degree murder, Appellant has failed to show undue prejudice in the face of her argument that she committed only a second degree murder. Id. at 731.

In a case directly on point, this Court ruled that evidence of collateral crimes which is relevant to show

motive for the crime in issue is admissible. Heiney v. State, 447 So.2d 210 (Fla. 1984), cert. den., ___ U.S. ___, 36 CrL 4042 (Case Number 83-6994, October 15, 1984). Heiney had shot his roommate in the abdomen during an argument and then fled town upon learning that the victim was in critical condition and that the shooting was being investigated. The defendant eventually murdered Francis May, Jr., and used his car and credit cards in furtherance of an escape. 447 So.2d at 211. At the trial for the murder of May, Heiney sought to exclude evidence of the collateral crime of shooting his roommate in Texas. This Court stated as follows:

> It was relevant to show motive for the subsequent crimes and to establish the 'entire context' of the crimes charged. This evidence is relevant to show that Heiney's desire to avoid apprehension for the shooting in Texas motivated him to commit robbery and murder in Florida so that he could obtain money and a car in order to continue his flight from Texas.

447 at 214. Likewise, Appellant's desire to avoid returning to jail evidenced a motive for the killing and was properly admitted for its relevance.

A trial court has wide discretion concerning the admission of evidence, "and unless an abuse of discretion can be shown, its rulings will not be disturbed." Welty v. State, 402 So.2d 1159 (Fla. 1981). For the above stated reasons, the lower court should be affirmed.

ISSUE IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE WAS SUFFICIENT TO ESTABLISH MURDER IN THE FIRST DEGREE.

At the close of the state's case and at the close of all of the evidence, Appellant moved for a judgment of acquittal asserting insufficient proof of premeditation and lack of proof of an escape from lawful custody. The trial court properly denied the motions.

It is well settled that when a criminal defendant moves for a judgment of acquittal, "he admits the facts adduced in evidence and every conclusion favorable to the appellee which is fairly and reasonably inferable therefrom." Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. den., 428 U.S. 911 (1976), reh. den., 429 U.S. 874 (1976). In reviewing the sufficiency of the evidence to support a jury verdict of guilt:

> ... [I]t is not the function of an appellate court to re-try the case or to substitute its judgment for that of the jury... [I]f the evidence is wholly insufficient to justify a verdict of guilt, or if the facts established by the evidence do not constitute the offense of which the defendant stands convicted it is the duty of the appellate court to so declare and to reverse a judgment of guilty based on such verdict. In performing this function

> the appellate court in order to give the proper weight to a jury verdict approved by the trial court must assume that the jury believed that credible testimony most damaging to the defendant and drew from the facts established those reasonable conclusions most unfavorable to the defendant.

Parrish v. State, 97 So.2d 356, 357-358. Accord, Lynch v. State, 293 So.2d 44 (Fla. 1974); Brown v. State, 294 So.2d 128 (Fla. 3rd DCA 1974); Matrascia v. State, 349 So.2d 735 (Fla. 3rd DCA 1977). Furthermore, the test to be applied to a motion for judgment of acquittal by both a trial and an appellate court is not whether the totality of the evidence, in the opinion of the court, fails to exclude every reasonable hypothesis of innocence, but whether a jury might reasonably so conclude. Jackson v. Virginia, 443 U.S. 307 (1979); Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969); Peek v. State, 395 So.2d 492 (Fla. 1980), cert. den., 451 U.S. 964 (1981); Rose v. State, 425 So.2d 54 (Fla. 1982). Here, the jury could have reasonably concluded from the evidence that Appellant shot Officer Bevel with premeditation in the commission of a felony.

Citing Ramsey v. State, 442 So.2d 303 (Fla. 5th DCA 1983), reveiw granted, Case Number 64,776, Appellant contends she was not a prisoner "being transported to or from a place of confinement" as contemplated by the language of

§944.40, Fla. Stat. (1981), which defines the offense of escape:

> Any prisoner confined in any prison, jail, road camp, or other penal institution, state, county, or municipal, working upon the public road, or being transported to or from a place of confinement who escapes or attempts to escape from such confinement shall be guilty of a felony of the second degree...

However, in order to properly interpret the statute, the definition of "prisoner" must be considered:

> (5) "Prisoner" means any person who is under arrest and in the lawful custody of any law enforcement official, or any person convicted and sentenced by any court and committed to any municipal or county jail or state prison, prison farm, or penitentiary, or to the custody of the Department, as provided by law.

§944.02(5), Fla. Stat. (1983). Appellee would rely on the authority of State v. Akers, 367 So.2d 700 (Fla. 2nd DCA 1979), which was decided as follows:

> We acknowledge that prior to the amendment of these statutory provisions in 1971, only persons who were convicted and sentenced could violate the provision of §944.40, Fla. Stat. (1969). Brochu v. State, 258 So.2d 286 (Fla. 1st DCA 1972). Florida courts have interpreted the present escape statute to include confinement after arrest but prior to conviction and sentencing. Estep v. State, 318 So.2d 520 (Fla 1st DCA 1975). Such confinement is not limited to confinement in jail. Johnson v. State, 357 So.2d 203 (Fla. 1st DCA 1978). For conviction under the escape statute, the state need show only (1) the right to legal custody and (2)

> a conscious and intentional act of the defendant in leaving the established area of such custody. Watford v. State, 353 So.2d 1263 (Fla. 1st DCA 1978).

367 So.2d at 702. Akers had been arrested and handcuffed on a charge of disorderly intoxication. When the arresting officer was distracted by a third person, Akers ran from the scene and was apprehended two blocks away. As stated by the court:

> We do not believe that the legislature perceived that the phrase found in §944.40 'being transported to or from a place of confinement...' should be interpreted as meaning that a defendant must be in a penal institution at the time of escape. To do so might result in allowing a 'prisoner' to simply walk away after he was lawfully arrested and in lawful custody without penalty. Such a strained result, to say the very least, is contrary to both the intent and the meaning of this statutory prescription.

367 So.2d at 702.

In Ramsey, the suspect "had not been handcuff, had not been placed in the police car and the officer had not announced that he was taking him to jail." 442 So.2d at 305. The Fifth District Court of Appeal concluded that the question as to when the "transportation" of a prisoner begins is a factual issue to be determined by the jury, and noted that its decision was in conflict with Akers. Appellee submits that Akers is the better opinion, especially in light of Chief Judge Orfinger's specially concurring

opinion in State v. Iafornaro, 447 So.2d 961 (Fla. 5th DCA 1984). There, under a fact situation similar to Ramsey, the court cited Ramsey as controlling on the basis of stare decisis. However, the Chief Judge further explained:

> I concur in the affirmance only because we are bound by the decision of this court in Ramsey v. State, cited in the per curiam decision. Were I free to do so, however, I would vote to reverse.
>
> * * * *
>
> In disagreeing with Akers because there had been no showing that the prisoner was being 'transported' to a place of confinement, Ramsey does not address the question of when and by what means 'transportation' begins. Does transportation of a prisoner necessarily begin only when he is handcuffed? Or does it begin only when he is placed in the patrol car? Must the patrol car begin to move before 'transportation' begins? I pose only some of the difficult questions, but I believe that the Akers rationale eliminates them and makes resolution of the problem much simplier both for the courts, the prosecutors and defendants. Since a suspect does not become a 'prisoner' until he is placed under arrest, and since he cannot be transported to a place of confinement until he becomes a prisoner, unless the facts clearly show that the officer had no intention of taking him from the scene, 'transportation to a place of confinement' begins at the time the suspect is placed under arrest, because that is the very first step in the process. Even though not yet physically restrained, one who has been placed under arrest has had his liberty restrained in that he is not free to leave. His confinement has thus begun and if he escapes from lawful custody, he may be properly charged with escape. The fact that he may also be charged with resisting arrest does not effect the result, because oftentimes a single act violates two or more criminal statutes.

447 So.2d at 962-963. It should also be noted that under the

Ramsey rationale, a suspect who has been arrested and handcuffed by a policeman without a patrol car would not be in violation of §944.40 were he to leave the officer's custody while being led to jail- certainly, an irrational result.

In McGee v. State, 435 So.2d 854 (Fla. 1st DCA 1983), the arrestee was taken before a county judge for a first appearance when he suddenly jumped up from his seat and ran out of the courtroom pursued by bailiffs shouting warnings to stop. McGee had been incarcerated in the county jail before entering the courtroom, however, under the strict reading of §944.40 enunciated in Ramsey, there was no escape because McGee was not being "transported to or from a place of confinement." Appellee submits that such a finding would have been ludicrous and, in fact, the point was not worthy of discussion. 435 So.2d at 857-858.

Even if this Court were to find Ramsey to be controlling, it should find that Appellant escaped while being transported to a place of confinement. As stated in Ramsey, the suspect: "had not been placed in the police car and the officer had not announced he was taking him to jail. As a result, transportation of the prisoner had not yet begun." 442 So.2d at 305. In the instant case, Appellant had been placed in the police car and had been told by Officer Bevel that she was being taken to jail. (T-976-977, 1085). Thus, because Appellant

had been placed inside of the car, the most common mode of transportation for prisoners, her subsequent actions to flee custody are clearly violative of §944.40 and the trial court properly instructed the jury on felony-murder.

Likewise, the jury could have reasonably concluded Appellant was guilty of first degree murder based on the substantial evidence of premeditation.

The testimony reveals that immediately before firing six bullets into the victim's head and body, Appellant said, "You made me drop my keys." Officer Bevel backed up and bent down as if to pick up the keys, at which point Appellant fired the shots into his head at point-blank range. (T-951, 957, 1221). There where no keys found at the scene of the crime, (T-1162-1163), which means Appellant had the presence of mind to pick up the keys after killing the officer or, in the alternative, no keys were dropped to begin with. It is reasonable to assume Appellant had concealed the murder weapon on her person, otherwise, Officer Bevel would have disarmed her before placing her in the car. According to one eye-witness, Officer Bevel acted like a "gentleman" during the incident:

> Q. Now, before the shooting, how was Officer Bevels or Officer Bevel acting from what you could see or hear?
>
> A. He was very, very kind to her. And he was just being a perfect gentleman. He was very calm. He just seemed like he really was trying to help

her, he was really concerned about what had happened. He was trying to help her.

(T-1052-1053). The evidence further indicates that Appellant killed Officer Bevel because she did not want to return to jail. (T-1292-1293). Appellee submits that the heat of passion defense to first degree murder should not be based upon the killer's aversion to lawful imprisonment.

The factfinder was presented with substantial evidence that Appellant was acting methodically and with premeditation on the night in question. After vandalizing her car Appellant removed the battery, spare tire and license plate. (T-938 939, 1083). Officer Burton B. Griffin testified that when he arrived at the scene Appellant was acting coherently and politely:

Q. Alright, and how was she acting at this point?

A. Normal.

Q. Okay, was she acting polite or -

A. She was polite.

* * * *

Q. What happened next?

A. Well, at the time, we asked her to provide ownership of the vehicle, and she went and looked in the glove compartment and around the front of the car, front seat of the car. And she didn't find anything. She said, "Well, my bill of sale must be in my apartment."

Q. During this time, did she have any trouble talking, answering, speaking?

A. No. No, sir, she was very coherent and polite. She acted like she wanted to cooperate as far as providing us information about the car.

(T-1011-1012). It was only after Appellant was told she was under arrest that she became violent and struggled to avoid being placed in the squad car. (T-948-951). Barring unusual circumstances, the heightened emotion which accompanies a violent resistance to lawful custody cannot support the heat of passion theory.

Appellant cites the case of Forehand v. State, 171 So. 241 (Fla. 1936), as having an analogous fact situation. In fact, the circumstances were quite different as can be adduced from the following excerpt:

> There was much swearing and abusive language and other disorderly conduct, of which the accused was guilty, but it is entirely possible, even probable, that the assault by Pledger [the victim] upon the accused with the blackjack aroused the latter's passion which reached its climax when he beheld his brother on the ground under Pledger, who, to the probably distorted imagination of the accused, was inflicting personal injury upon the brother of the accused.
>
> The accused, having taken from Pledger the pistol which the latter carried in his holster, fired at the two persons upon the ground. The fact that one of these persons was the brother of the accused and was in the danger of being struck by a bullet from the pistol in the hands of the accused seems to us to indicate the presence of a blind and unreasoning passion which momentarily obscured the reason of the accused and displaced any capacity

> to form a premeditated design to kill Pledger. The extreme and eminent danger in which Lonnie Forehand was placed when lying upon the ground under Pledger seemed to have had no influence whatsoever upon the momentarily mad and enraged defendant, who in all the evidence, cannot be said to have had any ill feeling or cause of quarrel against his brother.

171 So. at 244. These facts are in no way comparable to those at bar, especially in light of the evidence that Appellant had the mental capacity to set a fatal trap for the victim: when Officer Bevel reacted to her statement about dropping the keys, Appellant, acting quickly, had just enough time to produce the weapon from its place of concealment and fire into the top of his head. Appellant's actions immediately after the killing are also indictive of her presence of mind in that after showering and having her clothes washed and dried (there was blood on her clothes and body) she used a taxicab to effect her escape. Appellee submits that Appellant was thinking clearly before, during, and after the murder of Officer Bevel, and that she formed the intent to kill upon realizing she was returning to jail.

Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, the nature and manner of the wounds

inflicted, previous threats directed at the deceased by the accused, and the actions and demeanor of the latter prior to and subsequent to the alleged homicide. Larry v. State, 104 So.2d 352 (Fla. 1958); Buford v. State, 403 So.2d 943 (Fla. 1981), cert. den., 104 S.Ct. 372 (1982); Preston v. State, 444 So.2d 939 (Fla. 1984). Appellee submits that it was proper for the trial court to allow the jury to determine whether or not the evidence indicated a premeditated design to commit the murder. Larry, supra. The lower court should be affirmed on this issue.

ISSUE V

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON SELF-DEFENSE.

Appellant argues that the trial court erred in giving the jury an instruction on the principles of self-defense because it was not raised as an affirmative defense, thus leading the jury to believe Appellant had failed in proving a defense. This is an unique claim, however, Appellee submits that the facts in proof could have raised in the minds of the jurors the excuse of self-defense. Moreover, Appellant's claim is unsupported by case law and, even if it were, there has been no showing whatsoever of prejudice.

Considering the evidence presented at trial, it would not have been unreasonable for laypersons unfamilar with the law of self-defense to have concluded that Appellant acted in such a manner. There was testimony to the effect that Appellant was being manhandled by Officer Bevel. (T-950). Appellant is 5'5 and weighed 123 lbs. at the time, while Officer Bevel was 5'11 and weighed 210 lbs. Witnesses to the shooting testified that during the struggle to place Appellant in the squad car she said "You're hurting me," and "You made me bump my head." (T-1051, 1075). While Appellant was washing and drying her clothes Shirley Freeman notice scratches and welts on Appellant's back. (T-1305-1306).

Appellee submits that because of this evidence of pain suffered by Appellant it was proper for the jury to be instructed on self-defense to avoid their creation of a maverick brand of justifiable homicide. Furthermore, the case law cited by Appellant is unconvincing because of dissimilar fact situations. In Hopson v. State, 168 So. 810 (Fla. 1936), the trial court mistakenly told the jury that the accused had invoked the defense of self-defense for the shooting of his wife even though he had actually claimed the shooting was accidental and unintentional. 168 So.2d at 811. In the case at bar, the trial judge never told the jury Appellant was claiming self-defense. In fact, it was incumbent upon the court to further explain the Justifiable Homicide instruction which had been requested by Appellant. (T-1429-1430, 1469). Appellee submits that Appellant did not want the self-defense instruction because it precluded the jury from seriously considering such a theory in light of the facts.

The other cases cited by Appellant are also inapplicable. Johnson v. State, 46 So. 154 (Fla. 1908), deals with a prosecutor's remarks concerning an alibi defense which was never raised by the accused, while in Bayshore v. State, 437 So.2d 198 (Fla. 3rd DCA 1983), the prosecutor introduced statements made to a police officer by the defendant in order to imply an alibi defense which was later discredited.

Neither of these cases deal with an instruction by the trial court. Moreover, the evidence that a struggle had occurred and that Appellant was hurt physically was elicited from eye-witnesses, not from Appellant.

Finally, even if this Court finds the self-defense instruction to have been unnecessary, there has been no showing of undue prejudice in light of the overwhelming evidence of first degree murder. Because the trial court was merely explaining the Justifiable Homicide instruction requested by Appellant, this claim should be dismissed.

ISSUE VI

THE PROSECUTOR'S ARGUMENTS DID NOT DEPRIVE APPELLANT OF HER RIGHT TO A FAIR TRIAL.

Appellant argues that statements made by the prosecution during closing argument at both the guilt and penalty phases of the trial were improper and unduly prejudiced her case. Appellee submits that the arguments complained of were not improper when considered in light of all of the proceedings, and that even if this Court were to conclude otherwise, Appellant has failed to demonstrate reversible error in light of the overwhelming evidence of first degree murder.

In Blair v. State, 406 So.2d 1103 (Fla. 1981), this Court upheld the well settled standard that inflammatory statements made by the prosecution will only be grounds for reversal if they were of such a nature so as to poison the mind of the jurors or to prejudice them so that a fair and impartial verdict could not be rendered. 406 So.2d at 1107, quoting Oliva v. State, 346 So.2d 1066, 1068-1069 (Fla. 3rd DCA 1977), cert. den., 434 U.S. 1010, 98 S.Ct. 719, 54 L.Ed.2d 752 (1978). The decision also noted that the comments complained of:

> ... Did not 'materially contribute to this conviction,' Zamot v. State, 375 So.2d 881, 883 (Fla. 3rd DCA 1979)

were not 'so harmful or fundamentally tainted so as to require a new trial,' Smith v. State, 354 So.2d 477, 478 (Fla. 3rd DCA 1978); and were not so inflammatory that they 'might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise...' Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. dismissed, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977).

406 So.2d at 1107. This Court further stated:

As we noted in Paramore v. State, 229 So.2d 855, 860 (Fla. 1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972), 'it will not be presumed that... [jurors] are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel.'

406 So.2d at 1107.

In a more recent ruling this Court noted:

[P]rosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether 'the error committed was so prejudicial as to vitiate the entire trial.' [Cobb v. State, 376 So.2d 230 (Fla. 1979)]. The appropriate test for whether the error is prejudicial is the 'harmeless error' rule set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the court in United States v. Hastings, ___ U.S. ___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary actions. Reversal of the conviction is a separate matter; it is the duty

> of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

State v. Murray, 443 So.2d 955, 956 (Fla. 1984). Generally, a prosecutor is given considerable latitude in presenting arguments on the merits of a case, and logical inferences from the evidence are permissible. As stated by this Court:

> Their discussion of the evidence, so long as they remain within the limits of the record, is not to be condemned merely because they appeal to the jury to 'perform their public duty' by bringing in a verdict of guilty.

Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. den., 82 S.Ct. 1155 (1962). Moreover, the alleged improper comments must be considered in the context in which they were made, White v. State, 415 So.2d 719 (Fla. 1982), cert. den., 103 S.Ct. 1 (1983), and each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made. Darden v. State, 329 So.2d 287 (Fla. 1976), cert. dismissed, 97 S.Ct. 1671 (1977). Appellee submits that while certain statements made by the prosecution might be considered improper when taken out of context, the trial judge is in the best position to determine whether a new trial should be granted under the circumstances. Paramore v. State, 229 So.2d 855 (Fla. 1969) modified, 92 S.Ct. 2857 (1972).

More importantly, Appellant fails to show how the alleged prosecutorial misconduct has rendered the trial fundamentally unfair in light of the overwhelming evidence of premeditated murder. Blair, supra; Murray, supra. Appellee would also assert that the jury returned a recommendation for the death penalty, in spite of the alleged prejudicial comments, because of the three aggravating factors and the lack of a significant mitigating factor.

Thus, Appellant has failed to demonstrate that the trial court committed reversible error in denying her motions for mistrial. This Court should affirm the lower court's rulings because the verdict and sentence are supported by the record.

ISSUE VII

THE TRIAL COURT PROPERLY ALLOWED INTO EVIDENCE THE TESTIMONY OF SHERIFF CARSON AS BEING RELEVANT TO THE DETERMINATION OF APPELLANT'S PENALTY.

It is Appellant's argument that Sheriff Dale Carson's testimony concerning the hinderance of local law enforcement as a result of Officer Bevel's murder should have been excluded from the guilt phase of the trial because it failed to demonstrate that Appellant intended to hinder law enforcement. Appellee would suggest that Appellant's motive had been determined during the guilt phase of the trial and that Sheriff Carson's testimony was relevant as evidence of whether or not a disruption of law enforcement had actually occurred.

In Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. den., 455 U.S. 983, 71 L.Ed.2d 694, 102 S.Ct. 1492 (1982), this Court ruled that a single set of circumstances, such as the premeditated murder of a law enforcement officer, may support two aggravating factors for purposes of sentencing, to wit: that the homicide was committed for the purpose of avoiding a lawful arrest and that it was committed to disrupt or hinder law enforcement. There, the defendant and a companion were asked by two highway patrolmen to exit their

car because one of the patrolmen had spotted a hand gun in the car. A struggle ensued and the defendant, a parolee at the time, shot and killed the two officers before taking their car for purposes of escape. This Court found the following aggravating factors to be justified:

> 4. The Murders were committed by MR. TAFERO for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody. Evidence presented to this Court indicated beyond any reasonable doubt that MR. TAFERO was on parole and he had indicated to his friends that he would never again go back to prison and that this desire to avoid any future imprisonment was one of the reasons that MR. TAFERO was personally armed with an automatic pistol on most occassions.
>
> 5. The Murders were committed to hinder the lawful enforcement of the laws of this State. The victims of these murders, two law enforcement officers, were attempting to enforce the laws of this State after discovering various firearms and various types of drugs and controlled substances in the automobile in which the Defendant was a passenger.

403 So.2d at 362. Thus, the motive for the escape and resulting disruption of law enforcement had been established earlier and was a proper factor for sentencing purposes. Likewise, in the case at bar, it was unnecessary at the penalty phase for the prosecution to establish Appellant's intent to hinder law enforcement when the motive for the killing had already been established.

The sole purpose for the introduction of Sheriff Carson's testimony was to demonstrate the extent of the disruption and hinderance of law enforcement in Duval County resulting from the murder of a police officer. The expert testimony enabled the jurors to better understand how this particular homicide, as opposed to the killing of a private citizen, affected the community as a whole.

Thus, when Sheriff Carson's testimony was considered in conjunction with the finding that Officer Bevel was killed with premeditation, the aggravating factor in issue was properly established. The lower court should be affirmed. Tafero, supra.

ISSUE VIII

THE TRIAL COURT PROPERLY RESTRICTED THE SCOPE OF THE MITIGATING CIRCUMSTANCES.

Appellant argues that mitigating factors were impermissibly restricted through comments of the prosecutor during voir dire and by the trial court's refusal to allow into evidence the testimony of a member of the victim's family during the penalty phase of the hearing. Appellee contends that these claims are meritless.

During voir dire the prosecution made the following statement:

> [MR. STETSON:] Alright, and another important question, you'll be asked to apply the law, the judge will tell you to apply the law of this case. He'll tell you what that law is. And he'll tell you it's your duty, you have to follow the law of the case. And as I've mentioned, the defendant is a woman, will the fact that she's a woman have any influence upon your determination, keeping in mind that the State will be seeking the death penalty in this case? If anyone feels that that might influence this verdict, please raise your hand now.
>
> There's nothing wrong with feeling like that, but I need to know about that now.
>
> Alright, so, in other words, the judge is not going to tell you that it's a mitigating factor that she's a woman, it has nothing to do with it.

MR. WHITE: Your Honor, I object to that. I don't think it's proper voir dire. We're not talking about the penalty phase.

THE COURT: That will be overruled.

Go ahead Mr. Stetson.

MR. STETSON: The judge is not going to tell you that you're to feel sorry for her or to give her mitigation simply because of the fact she's a woman. So, will ya'll be able to give us a verdict, a fair and true verdict, regardless of her sex? Will each of you be able to do that?

(T-3671-3672). At that point, Appellant objected for a second time and both attorneys approached the bench for a discussion on the issue. The trial court explained that it was proper for the prosecution to determine whether a verdict would be returned on the evidence or upon the fact that Appellant was a woman. The judge further instructed the prosecutor to rephrase his inquiries. (T-672-675). Appellee submits that for purposes of the guilt phase of the hearing, the term "mitigating" was properly utilized. The prosecution referred to the rendering of a "verdict" immediately before and after making the statements objected to. Apparently, Appellant presumes that a jury of laypersons will automatically recognize "mitigating" as a legal term relating only to the penalty phase of a murder trial. Appellee would submit that Appellant has taken the prosecutor's statement out of

context and that even if members of the jury panel had been misled during voir dire, defense counsel took full advantage of its opportunity during the penalty phase to emphasize Appellant's motherhood as a mitigating factor. (T-2044-2046, 2050).[2]

After the testimony of the victim's brother, Reverend Jessie Bevel, Jr., was proffered by defense counsel, the trial court determined the evidence to be irrelevant. Appellant's dependence upon Lockett v. Ohio, 438 U.S. 586, 604 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), is unpersuasive because these cases deal with consideration "of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for sentence less than death." Thus, the court correctly declined to admit Reverend Bevel's testimony since it failed to "relate to anything mitigating about the Defendant or her character." (T-1881). The trial court also noted that because Reverend Bevel was not necessarily speaking for his entire family, the prosecution would have been afforded the opportunity to call family

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[2] See Issue XI where Jacobs v. State, 396 So.2d 713 (Fla. 1981), is distinguished.

members in favor of capital punishment, merely confusing the jury. Appellee submits that the trial court's reasoning was an adequate basis for excluding the testimony and that the judge fulfilled his duty by considering the proffered evidence. Eddings v. Oklahoma, 102 S.Ct. 869 (1982).

The trial court should be affirmed because Appellant has failed to show reversible error.

ISSUE IX

THE TRIAL COURT PROPERLY FOUND THAT THE HOMICIDE WAS COMMITTED BOTH FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST AND TO DISRUPT OR HINDER THE ENFORCEMENT OF LAW.

Appellant further argues that the trial court improperly utilized one set of facts to support the finding of two aggravating factors for sentencing purposes. Appellee would again cite Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. den., 455 U.S. 983 (1982), as being dispositive on this issue.

In Tafero, this Court determined that the premeditated murder of a law enforcement officer supported two aggravating factors: that the homicide was committed for the purpose of avoiding a lawful arrest, and that it was committed to disrupt or hinder law enforcement. (See Issue VII). Tafero was convicted of the premeditated murder of two highway patrolmen. These facts are distinguishable from Sims v. State, 444 So.2d 922 (Fla. 1983), a case cited by Appellant, in that Sims had shot and killed an off duty sheriff's deputy after being wounded in an exchange of gunfire. The victim had interrputed Sims' armed robbery of a pharmacy. 444 So.2d at 923. Premeditation was not found to be an aggravating factor. In both Tafero and the instant case,

the accused were convicted of the premeditated murder of law enforcement officers who were performing their legal duties without the use of their weapons. The other cases cited by Appellant are also inapplicable because none deal with the murder of a policeman.

Appellee would also suggest that a consolidation of the two aggravating factors urged by Appellant would not render the sentence inappropriate in light of the other aggravating factor and the questionable mitigating factor.[3] (R-603-605). §921.141, Fla. Stat. (1983), does not call for a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum, but requires a weighing of those factors. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. den., 94 S.Ct. 1951 (1974); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. den., 100 S.Ct. 239 (1979).

For the above stated reasons, this Court should affirm the lower court's ruling as being proper, Tafero v. State, supra, or as being harmless error. Hargrave v. State, supra.

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[3] The other aggravating factor was that the homicide was committed in a cold, calculated and premeditated fashion, while the only "mitigating" factor was Appellant's lengthy list of conflicts with the law. (R-603-605).

ISSUE X

THE TRIAL COURT PROPERLY FOUND THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Appellant asserts that the trial court erred in finding that the homicide was committed in a cold, calculated, and premeditated manner, and argues that the evidence was insufficient as a matter of law to support such a finding. Appellee disagrees with this assertion.

The facts supporting the trial court's determination that the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification were stated as follows:

> The evidence indicates this defendant was armed throughout this entire event or armed herself when she went to her home to obtain the papers relating to the car. It further indicates that when she produced the pistol on the unsuspecting officer, she made no attempt to disarm him or escape without the necessity of deadly force, but decided to shoot six (6) times at point blank range into his body. The decision was as coldly and premeditatedly made as was her removal of the battery, spare tire and license plate from the just damaged car. For this, there can be no moral or legal justification.

(R-603). While these facts alone are sufficient to support a finding of the factor in issue, Appellant's statement about her keys is even more indictitive of premeditation,

calculation and planning. Moreover, Officer Bevel acted like a gentleman while trying to maneuver Appellant into the squad car, and even attempted to locate Appellant's keys for her. (T-951, 957, 1052-1053). Shortly after the shooting, Appellant said she had killed the policeman to avoid returning to jail. (T-1292-1293). Such is clearly an indication that she intended to commit the crime.

Appellee asserts that the trial court's findings are amply supported by the record, and as such, should not be disturbed. The importance of the direct evidence supporting this aggravating factor cannot be over emphasized.[4] Appellee urges this Court to affirm on this issue. Middleton v. State, 426 So.2d 548 (Fla. 1982), cert. denied, 103 S.Ct.3573 (1983).

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[4] Eyewitnesses said that Officer Bevel was acting like a gentleman, (T-961,1053), and that Appellant fired the shots after the victim bent over to pick up her keys. (T-951,1069).

ISSUE XI

THE DEATH SENTENCE IMPOSED UPON APPELLANT IS CONSTITUTIONAL BECAUSE IT IS FOUNDED UPON SUBSTANTIAL AGGRAVATING CIRCUMSTANCES AND UPON THE ABSENCE OF SIGNIFICANT MITIGATING CIRCUMSTANCES.

Appellant argues that the trial court improperly refused to consider evidence of mitigating factors in its decision to impose the death penalty. Appellant also contends that the trial court should not have considered two of the three aggravating circumstances. Appellee submits the trial court did, in fact, take into consideration evidence presented in mitigation during the penalty phase of Appellant's trial, and merely gave it little weight.

Based upon the validity of the "hinder law enforcement," and "cold, calculated, and premeditated" aggravating circumstances [ISSUES VII, IX, and X], and in light of Appellant's consession that she was avoiding lawful arrest, the trial court properly considered all three aggravating factors.

In Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982), the United States Supreme Court stated that in determining whether or not to impose a death sentence, a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. 455 U.S. at 114.

Citing this case, Appellant alleges that the trial court refused to consider evidence offered in mitigation. Appellee proposes that Appellant has mistaken the trial court's decision not to give the mitigating factors any significant weight as a total lack of consideration of those factors.

The sentencer may determine the weight to be given those relevant mitigating factors and, "[i]n some cases, such evidence properly may be given little weight." 455 U.S. at 115. In the case at bar, the trial court never refused, as a matter of law, to consider the evidence presented in mitigation. The fact that little weight or credence was given to the evidence submitted by Appellant during the trial's sentencing phase in no way constitutes an abuse of discretion. "So long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." Pope v. State, 441 So.2d 1073 (Fla. 1983), cert. den., 104 S.Ct. 2361.

The trial court's Findings Supporting Sentence,(R-600), reveals that some weight was given Appellant's lack of a history of violent criminal activity, in spite of a substantial number of convictions and encounters with the law. Thus, this factor was considered. Appellant cites Shue v. State, 366 So.2d 387 (Fla. 1978), for its

holding that a victim of child abuse should be allowed to present that fact in mitigation, however, there has been no showing of child abuse in Appellant's past other than the one incident when she was molested on the way home from school at the age of eleven. (T-1844). Because Shue was the victim of a physically abusive father during his childhood, the case is inapplicable here. Appellant further states that her role as a mother of two small children should be a mitigating factor. The case cited for this proposition is distinguishable, however, because the mother was caring for her children at the time she committed the crime. Jacobs v. State, 396 So.2d 713 (Fla. 1980). Appellant was not living with her family when the crime was committed, (T-1139-1141), and there is no evidence that she was caring for her children at that time. Appellee would further submit that Appellant has failed to demonstrate that the trial court refused to consider her exhibitions of remorse at committing the crime. (T-2121-2122).

Appellant's argument that the punishment of death is too great for the crime committed when compared with other similar crimes is also meritless because the cases cited involved the single aggravating factor of avoiding arrest. (Appellant's brief at 48). As stated earlier, the trial court properly consider three aggravating factors

in sentencing Appellant.

Appellant has failed to demonstrate the trial court's refusal to consider evidence offerred in mitigation and has also failed to show an abuse of discretion in not giving the evidence, other than the lack of a history of violent crime, any weight whatsoever. This claim should be dismissed. Eddings, supra; Pope, supra.

ISSUE XII

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION IN LIMINE AND MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE.

Appellant suggests that the trial court's denial of her motion for individual and sequestered voir dire and motion in limine seeking to preclude group questioning of prospective jurors regarding their attitudes toward the death penalty denied her right to be tried by an impartial jury. Appellee disagrees.

Appellant cites Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), appeal pending, Case Number 83-2113 ___ F.2d ___ (8th Cir. 1984), for the proposition that the trial judge reversibly erred in refusing to impanel jurors who opposed the death penalty for the guilt phase of the trial. However, Grigsby is inconsistent with this Court's decisions in Riley v. State, 366 So.2d 19 (Fla. 1978), cert. den., ___ U.S. ___, 74 L.Ed.2d 294 (1982), and Gafford v. State, 387 So.2d 333 (Fla. 1980), which hold that jurors who oppose the death penalty may properly be excluded from the guilt phase of a capital trial. See also Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Grigsby is also at odds with this Court's decision in Lusk v. State, ___ So.2d ___ (Fla. 1984), 9 F.L.W. 39, which affirms that

the defense may dismiss for cause only those jurors who show actual prejudice towards the defendant, as opposed to those whose bias is merely implied by their membership in a certain group.

Likewise, Grigsby is inconsistent with the United States Supreme Court's earlier decision of Witherspoon v. Illinois, 391 U.S. 510, 518 (1968), in which the Court declined to give judicial notice "that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction," and Smith v. Phillips, 455 U.S. 209 (1982), where it was held that the defense must show the actual prejudice, rather than the implied bias, of a juror in order to receive a new trial. Grigsby is also contrary to the Supreme Court's subsequent decisions of Maggio v. Williams, ___ U.S. ___, 78 L.Ed.2d 43, 47 (1983), affirming the foregoing interpretation of Witherspoon in vacating a stay of execution on what was essentially a Grisby claim, and Sullivan v. Wainwright, ___ U.S. ___, 78 L.Ed.2d 210, 212 (1983), denying a stay upon the petitioner's claim "that the jury that convicted him was biased in favor of the prosecution" and indicating that this claim has properly been found "meritless" by both the state and federal courts. See also Woodard v. Hutchins, ___ U.S. ___ (1984), 34 CrL 4156, in which Justice Brennen dissented from the

vacating of a stay of execution on the ground that the defendant had alleged a Grigsby claim. Grigsby has also been rejected by the Fourth Circuit, Keeten v. Garrison, ___ F.2d ___ (4th Cir. 1984), 35 CrL 2420, reversing Keeten v. Garrison, 578 F.Supp. 1164 (W.D. N.C. 1984), and by the Supreme Court of Arkansas, Rector v. State, 1659 S.W.2nd 168 (Ark.).

Thus, Grigsby has already been rejected by most of the courts which have considered the issue.

In Davis v. State, ___ So.2d ___, (Case Number 63,374, October 4, 1984), this Court stated that "[t]he granting of individual and sequestered voir dire is within the trial court's discretion." Stone v. State, 378 So.2d 765 (Fla. 1979), cert. den., 449 U.S. 986 (1980); Jones v. State, 343 So.2d 921 (Fla. 3rd DCA), cert. den., 352 So.2d 172 (Fla. 1977). Appellee submits that the voir dire conducted at trial was sufficient to secure an impartial jury and that Appellant has failed to demonstrate otherwise.

This Court should dismiss the claim presented by Appellant in Issue XII as being meritless.

CONCLUSION

WHEREFORE, Appellee submits that the judgment and sentence appealed from must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been forwarded to Ms. Glenna Joyce Reeves, Post Office Box 671, Tallahassee, Florida 32302, by hand delivery, this 31 day of October, 1984.

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