SUPREME COURT OF FLORIDA

WILLIAM REAVES,

Appellant,

v.

STATE OF FLORIDA,

APPELLEE.

CASE NO. 71,148

corrected

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Broward County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The following symbols will be used:

"R"	Record on Appeal
"AB"	Appellant's Initial Brief
"AC"	Appellant's confession which is attached to Volume 10

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts to the extent that it is a nonargumentative and accurate presentation of the facts below, with such additions and exceptions as appear below and in the argument portion of the brief.

1. According to Appellant's confession, Deputy Richard Raczkowski pulled up to the Zippy Mart Store near to where Appellant was standing. Appellant asked the officer how was he (the officer) doing. (AC.3). The officer asked Appellant to step over here, and asked Appellant did he (Appellant) use the 9-11 number. (AC.3). Appellant answered "yes", and explained that he had ran out of funds. After Appellant gave the deputy his name, the deputy ran a check on Appellant, and found that here were no outstanding warrants on Appellant. After this, Appellant and the deputy talked. Appellant stated that he had not met a finer officer in his life. The deputy then placed a call to assist Appellant in getting a taxi.

Appellant's gun then fell out of his red shorts (AC.3). When Appellant tried to pick up the gun, Deputy Raczkowski stepped on Appellant's hand (AC.3). The deputy attempted to pick up the gun. Appellant said, "Give me the gun." (AC 6). When the deputy stepped on the gun, Appellant put his hand on the deputy's knee, and pushed the deputy's knee up

hand on the deputy's knee, and pushed the deputy's knee up (AC.11). Appellant also pushed the deputy in the throat area (AC.35). Appellant got the gun and told the deputy, "Officer, I'm not gonna' give you my gun." (AC.35).

Deputy Raczkowski then started to back up (AC. 35). When the deputy backed to the front of his patrol car, the deputy turned and started to run. (AC. 35). Appellant then raised his gun and started to shoot at the deputy's back (AC. 37)). The deputy was approximately fifteen (15) feet away from Appellant when Appellant commenced to shoot. (AC. 39). Appellant continued to shoot his gun until it was empty. (AC. 40). After Appellant fired about four shots, the deputy fell face down. (AC. 41). After he fell, the deputy fired about two shots from his gun.

2. Howard Whitaker, who was delivering papers in the area of the Zippy Mart at the time of the shooting, testified that Deputy Raczkowski kept repeating, "get an ambulance, get help." When Whitaker examined the deputy's back, his hand became soaked with blood. (R. 968). Whitaker stated that the deputy appeared to be in shock. (R. 969). The deputy's skin was pale and clammy, sort of whitish-grayish. The deputy was in much pain, moving his head back and forth. (R. 978). Whitaker had to hold the deputy's head to stabilize it. (R. 978).

3. Sgt. Kenneth Hamilton testified that when he arrived at the crime scene, he saw Whitaker bending down and assisting Deputy Raczkowski. (R. 1074). Hamilton knew that the victim was

in serious trouble when he saw the amount of blood on and about the deputy. He put a compress on the deputy's wound. (R. 1076). Deputy Raczkowski asked Hamilton to take him by the hand. (R 1079). When Hamilton asked Raczkowski who did it, Raczkowski replied, a black male about 5'7", 175 lbs, wearing red shorts, T-shirt, and white sneakers. (R. 1079). The deputy was hurting.

4. Appellee takes exception with Appellant's opinion concerning the testimony of Erman Eugene Hinton. Except for minor details, the testimony of Hinton was not impeached. Hinton testified that he did not receive anything from the State in exchange for his testimony. (R. 1228-1229). Hinton testified that Appellant came to his residence on the morning of the shooting. Appellant was wearing red shrts and a white T-shirt. (R.1162). Appellant knocked on Hinton's window and asked Hinton to open the door and let him in. When Hinton opened the door, Appellant said, "I done fucked up, I done fucked up. "I just shot a cop. I just shoot a cracker." (R.1163-1164). Appellant asked to take a shower and to change clothes. (R. 1166). Hinton gave Appellant some clothing. Appellant stripped, and then took a shower (R. 1167). Hinton put the clothes that Appellant took off in a bag, and later threw the bag in the woods. (R. 1169). Hinton subsequently showed the deputies where he threw the bag with clothes. (R. 1170).

Appellant described to Hinton in details how he shot the deputy. Appellant told Hinton that when his gun fell to the

ground, the deputy put his foot on the gun. (R. 1179). Appellant stated that he then hit the deputy under the throat. The deputy fell back and Appellant stated that he then picked up the gun (R 1180). According to Hinton, Appellant stated that he put the gun in the deputy's face as the deputy attempted to pull out his gun, and said, " I wouldn't do that if I were you." Appellant told Hinton that the deputy then said, "don't shoot me" don't kill me man. You can leave. Please don't kill me, don't shoot." (R. 1181). The deputy raised both hands, and started backing away. When the deputy backed to the end of the car, he turned around and started running (R. 1183). Appellant told the deputy, "one of us got to go, me or you." (R. 1183). Appellant shot the deputy as the deputy was running away from Appellant. (R. 1185).

5. Alexander Hall, an undercover agent with the Dougherty County Sheriff Department in Albany, Georgia, testified that he was dispatched to the bus station in Albany between 10:30 p.m. and 11:15 p.m. (R. 1302). Appellant got off the bus and approached him. Appellant asked Hall, who was not wearing a uniform, where he (Appellant) could get some marijuana and coke. (R. 1308). Appellant told Hall that he (Appellant) had some "stuff" that he wanted Hall to try. (R. 1309).

Appellant then asked Hall to follow him into the restroom of the bus station. Appellant was carrying a Penny shopping bag. (R. 1310). Once inside the restroom, Appellant put the bag on the floor in front of him, and pulled out a .380

automatic weapon. (R. 1311). Hall became suspicious that Appellant could be the black male for whom he was looking. (R. 1312). Appellant then put weapon back into bag, and brought out a small bag of cocaine rocks. (R. 1313) Appellant then handed Hall about a twenty-dollar rock. Hall told Apellant that he needed to go into the stall. (R. 1313). Hall then went into the stall, got out his weapon, and went back out (R.1313). Hall then identified himself as a police officer. Appellant attempted to grab Hall's weapon. The weapon discharged. Appellant was hit in the forehead area, and Appellant fell to the floor. (R.1314). After a brief struggle, Hall gained control of Appellant, and seized the items in Appellant's possession. (R. 1314). Appellant's bag contained one hundred and thirty-two (132) grams of cocaine, the .380 weapon, and one pair of men's slacks. (R. 1316).

6. Dr. Leonard Walker, a pathologist, performed an autopsy of Deputy Raczkowski's body. Dr. Walker found four bullet wounds on the body. (R. 1448). Three of the bullet wounds were in the deputy's back. (R. 1448). The fourth bullet wound entered the back of the deputy's left arm. (R. 1453). All three of the bullets that entered the deputy's back had fatal potential, according to Dr. Walker. (R. 1460-1461). Dr. Walker testified that the bullet wounds inflicted upon the deputy were not the type that would kill instantly. (R. 1463). The wounds would cause the victim to lanquish for some time period. Dr.

Walker testified that Deputy Raczkowski bled internally into all three internal major body cavities. (R.1463). The deputy suffered progressively impaired breathing, breathing blood from the wounded areas into the non-affected areas. (R. 1464).

7. Daniel Nippes, a criminologist, testified that there was no gunpowder residual on the victim's clothing, which indicated that the shots were fired from more than four feet away from the victim. (R. 1524).

SUMMARY OF THE ARGUMENT

POINT I

Although the State Attorney had represented Appellant fourteen years earlier in an unrelated charge, the State Attorney's prosecution of Appellant did not violate due process or the rules of ethic where it was not established that there were confidential communications between Appellant and the State Attorney.

POINT II

The trial court did not err in refusing to give an instruction on third-degree murder where the elements of third-degree murder were not alleged in the indictment, and the evidence at trial did not support the giving of the instruction.

POINT III

Appellant did not demonstrate a strong likelihood of discrimination concerning the peremptory challenge of a single black juror by the State. However, the State volunteered racially neutral reasons for the exclusion of the black juror.

POINT IV

There is support in the record for the trial court's finding as an aggravating factors that Appellant had committed prior violent felonies. Although the two prior felonies, grand larceny and conspiracy to commit armed robbery, were not per se violent, the State presented evidence during the sentencing hearing of the circumstances underlying the two prior felonies, which revealed that violence was involved in the commission of the felonies.

POINT V

The trial court did not preclude Appellant from presenting mitigating evidence concerning Appellant's alleged assistance in foiling a jail break. Since the opportunity never presented itself, it is pure speculation what evidence the trial court would have allowed to rebut this mitigating evidence. The trial court's ruling that the State could rebut this mitigating evidence was proper.

POINT VI

There is support in the record for the trial court's finding as an aggravating factor that the murder was especially

heineous, atrocious, or cruel. The victim was shot four times in the back as he fled for his life. The victim was aware of his impending death and suffered extreme mental and physical anquish. The medical examiner testified that the victim's wounds were such that he had a progressive impairment in his ability to breathe.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE STATE ATTORNEY WHERE NO CONFIDENTIAL INFORMATION OBTAINED FROM THE STATE ATTORNEY'S PRIOR REPRESENTATION OF APPPELLANT WAS USED IN THE TRIAL. (Restated)

Appellant argues that his right to due process was violated by the prosecution of Appellant by an attorney who had represented him in an unrelated charge. Appellee submits that the record reveals that no due process violation or ethical conflict occurred where no confidential information acquired in the prior representation was used in the trial.

In Thompson v. State, 246 So.2d 760, 763 (Fla. 1971), this Court held that trial judges will be given wide latitude in the exercise of their discretion in dealing with allegations concerning conflicts of interest deriving from an attorney prosecuting a former client. In determining whether an attorney's prosecution of a former client violates due process, this Court in Thompson adopted the following test, which was first enunciated in State v. Bryan, 227 So.2d 221 (Fla. 2d DCA 1969):

> "We hasten to add, however, that a public defender owes his clients, the

> same high standard of fidelity imposed by the Canons of Ethics on other members of The Bar. His duties in this respect are twofold. First, he may not act against his client in any case or matter in which he formerly represented him. Second, he may at no time use against a former client any confidential information acquired by virtue of the previous attorney-client relationship.
>
> Applying these principles here, the State Attorny can only be disqualified if it were shown that as Public Defender he had actually gained confidential information from a prior attorney-client relationship with the defendant, which information would be usable in the new matter to defendant's prejudice.

Thompson, id at 763, quoting from Bryan v. State supra.

The Bryan test is consistent with the rules of ethic on the subject. Rule 4-1.9 of the Rules Regulating the Florida Bar provides the following in regards to an attorney's duty to a former client:

> 4-1.9 Conflict of interest; former client. A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultaton; or
>
> (b) Use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client

> or when the information has become generally known .
>
> Comment:
>
> After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this rule. The principles in rule 4-1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.
>
> . . .
>
> Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

The Florida Bar Re Rules Regulating the Florida Bar, 494 So.2d 977, 1041 (Fla. 1986). To determine whether the interests of the present client and former client are adverse, Rule 4-1.9 refers back to Rule 4-1.7. Paragraph (a) of Rule 4-1.7 provides that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless (1) [t] he lawyer reasonably believes the representation will not adversely affect the lawyer's

responsibilities to and relationship with the other client; and (2) [e]ach client consents after consultation." Rules regulating the Florida Bar, id, at 1036-1037. However, paragraph (a) is subsequently clarified as to apply "only when the representation of one client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised." Id

The following rules are consistent with the Bryan test, which this Court adopted in Thompson v. State, supra. Applying the Bryan test and the rules regulating the Florida Bar to the present case, the record reveals that the trial court properly exercised its discretion in not disqualifying the State Attorney. After the appropriate hearing on the motion to disqualify, the tial court rendered the following ruling:

> With regard to the findings of fact it is unrebutted that Mr. Colton did represent the Defendant approximately fourteen years ago. With-- within the meaning of the applicable authority cited there is a total absence in the record of any indication of any specific confidential information supplied to this Defendant. There is no showing of anything other than personal traits were disclosed to Mr. Colton. It is also unrebutted that all of the information that was supplied became a matter of record in the pre-sentence investigations which the Court has examined. The fact of the conviction itself would, of course, not be confidential. It's a matter of public record. And under applicable Florida Statutes the details of that--

> of that offense may very well be a matter of sentencing, but certainly not at cross examination.
>
> In order--under the applicable tests it is obvious from a factual standpoint that these matters are unrelated and involve cases that are totally distinct and occurring over a fourteen year period of time.
>
> There has been no showing of any confidential communicatons that Mr. Colton received from the Defendant. The Defendant quite candidly testified that he could not recall any information other than what was in the pre-sentence investigation was disclosed to Mr. Colton.
>
> Under the applicable law again it was recited in--cited Bryan and Thompson again as being the controlling cases. There has to be a clear showing that the Defendant actually gained or that he--that he is assistant--Assistant State Attorney or State Attorney actually gained confidential information from a prior attorney/client relationship with the Defendant which would be usable in the new matter to the Defendant's prejudice. I simply see no--no showing of that. And I find as a matter of law that the--the matters are unrelated factually. So Mr. Colton is not acting against his former client with regard to a factual matter. There's--and there's been no showing of confidential communication. I will therfore deny the motion to disqualify the State Attorney and his office from this case. (R. 2003-2004).

The evidence presented at the hearing supports the trial court's findings of fact. Appellant admitted that he could not recall discussing anything with Mr. Colton that was not

revealed in the Pre-Sentence Investigation (PSI) report. (R. 979). Appellant had discussed all of the information concerning his drug dependency and emotional disturbance with the Department of Corrections officer. (R.1974). Thus, even if it was conceded that Appellant had discussed the information contained in the PSI with Mr. Colton, this information did not constitute confidential communication because it was revealed to other sources, and the information was merely general information concerning Appellant's drug dependency and emotional state.

Mr. Colton did not recall representing Appellant. (R. 1985). Mr. Colton had no knowledge of the prior case or of any confidential communication made to him by Appellant. (R. 1986). Mr. Colton testified that his comments in the PSI report could have been based on information from Mr. Long and Mr. Wikinson, other assistant public defenders who were representing Appellant. (R. 1988). Mr. Colton also pointed out that Mr. Wilkinson did the preparation for a lot of cases where he (Colton) would represent the defendant in court. (R 1988-1989). Mr. Colton stated that the did not bring any files with him when he left the Public Defenders's Office, and made nothing available to the State Attorney's Office from his representation of clients at the Public Defender's Office.

It was not established at the hearing on the motion to disqualify that Mr. Colton was in possession of confidential communications with Appellant. The only evidence presented on

this question was comments attributed to Mr. Colton in a PSI report. Since the information in the PSI had been revealed to other sources and amounted to only general information concerning Appellant, the trial court properly determined that this evidence did not support the disqualification of the State Attorney. Under both the Bryan test and the rules of ethic, disqualification is required only if the prosecutor is in possession of confidential communications from the former client. As quoted previously, rule 4-1.9 of the Rules regulating the Florida Bar does not preclude a lawyer from using generally known information about that client when later representing another client. Rules Regulating the Florida Bar, supra, at 1042. The information contained in Appellant's PSI report, since it had been revealed to other sources and dealt with general aspects of Appellant's background, fell into the category of "generally known information."

Most of the Florida cases in this area of law deal with the question of whether an entire State Attorney Office must be disqualified where an accused original counsel joins the staff of the State Attorney's Office. See e.g. State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985); Surrett v. State, 251 So.2d 149 (Fla. 2nd DCA 1971); Thompson v. State, supra. In these cases, the courts have held that the entire State Attorney Office does not have to be disqualified and due process is not violated, as long as the original counsel does not provide confidential

information to the attorney[s] who actually prosecute the case.

However, a Florida case directly on point with the present case is State v. Bryan, supra. In Bryan,as in the present case, an attorney who had formerly represented an accused in an unrelated matter actually prosecuted the accused. The Bryan court held that "the mere fact that the State Attorney was formerly the Public Defender when the defendant was tried for a prior crime and represented by the Public Defender's office does not, without more, disqualify him from prosecuting the defendant for a different, subsequent crime." Consistent with Rule 4-1.9, the Bryan court ruled that the confidential knowledge required to disqualify a State Attorney "must go beyond general information about defendant's personal characteristics tactically useable in any subsequent trial against him." Id, at 223. According to the Bryan court, a prosecutor could not be disqualified on the basis of general knowledge of defendant's traits, foibles, and the area of his strength, friendship and the like.

The information contained in Appellant's PSI report falls within the definition of general information provided in Bryan. Since this Court in Thompson approved the test formulated by the Bryan court, Bryan is controlling authority for this Court in resolving this issue.

A federal case on point with the present case is Havens v. State of Indiana, 793 F.2d 143 (7th Cir. 1986). Although the Havens court recognized that the better course of action would

have been for the prosecutor to recuse himself, the court concluded that no violation of due process resulted from the prosecution of an accused by his former counsel. In reaching this conclusion, the Havens court noted that the defendant's earlier charges, of which he was represented by the prosecutor, was unrelated to the new charge. The Havens court also determined that the defendant failed to prove that, by reason of the former confidential relationship between the prosecutor and him, the prosecutor acquired special knowledge of the facts that were used against the defendant at trial. Although the prosecutor used information concerning the defendant's background in the cross-examination of the defendant, the Havens Court determined that anyone who prosecuted the defendant would have had access to this background information.

As in Havens, the information that Appellant alleged Mr. Colton had access to was background information which would have been accessible to anyone who prosecuted the case. Appellant could not recall any confidential information that he had provided to Mr. Colton during the prior representation which was not contained in the PSI report, or which was not revealed to other sources. Thus, as the defendant in Havens, Appellant failed to prove that Mr. Colton acquired special facts during the prior representation that was used against him in the trial. Appellant's drug problem and Vietnam experience was general information.

Appellant's reliance on Young v. State, 177 So.2d 345 (Fla. 2d DCA 1965) is misplaced. In Young, the defendant's attorney became a prosecutor in the same case in which he had had prior dealings with the defendant. Unlike in Young, Mr. Colton represented Appellant during the entry of a plea in a wholly unrelated case fourteen years prior to the murder charge.

Without identifying any confidential exchanges between Mr. Colton and he, Appellant makes the bare assertion "that the confidences exchanged in the 1973 attorney-client relationship between himself and Bruce Colton and the legal acts and issues with which they were concerned, are so interwoven with the case at bar that they are either the 'matter' as defined in Rule 401.11 [sic], 'substantially related' matters referred to in Rule 4-1-9, or 'related' matters referred to by the court in Fitzpatrick, id, at 1188." (AB.19). However, since Appellant does not identify only confidential communications, this assertion is meritless. As Appellee has shown, the statements attributed to Mr. Colton in the PSI report was of a general nature and accessible to the public.

Appellant also contends that it was extremely prejudicial for the jury to be aware that a defendant is being prosecuted by his former attorney (AB. 17). However, the jury was never informed that Mr. Colton represented Appellant in the prior case. Thus, from the standpoint of the jury, Mr. Colton never presented an appearance of professional impropriety. Appellant

appears to be grabbing for straws.

Even if it was conceded that the trial court erred in not disqualifying the State Attorney, such error did not affect the outcome of the trial, and thus, was harmless beyond a reasonable doubt. State v DiGuilio, 491 So.2d 1129 (Fla 1986). During the guilt phase of the trial, the record reveals that Mr. Colton did not use any information relating to the prior case against Appellant. Mr. Colton did not have to cross examine Appellant, since Appellant selected not to testify. In the initial brief, Appellant does not identify a single instance during the guilt phase of the trial in which Mr. Colton used information concerning the 1973 case against Appellant.

Moreover, Mr. Colton did not use any information concerning the 1973 case in the penalty phase. Although the trial court used the 1973 conviction as an aggravating factor, only the conviction itself and the general facts underlying the conviction was used to support this aggravating factor.[1] The record does not reveal, nor does Appellant identify in his brief, any confidential communications between Mr. Colton and Appellant that was used during the penalty phase of the trial.

Since Appellant has not demonstrated a reversible error, his coviction should be affirmed.

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1 Appellee will discuss this issue in Point V.

POINT II

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE REQUESTED INSTRUCTION ON THIRD-DEGREE MURDER WHERE THERE WAS NO EVIDENCE TO SUPPORT SUCH INSTRUCTION.

Appellant contends the trial court erred in not instructing the jury on third degree murder where there was evidence to support the instruction. In the instant case, during the charge conference, the trial court declined to instruct on third degree murder because it found nothing in the indictment or proof which would support this instruction. Appellee maintains that the trial court correctly refused to instruct on third degree murder where there was no basis in the indictment or proof for such an instruction.

In Green v. State, 475 So.2d 235, 237 (Fla. 1985), the Florida Supreme Court recognized that due to the amendment of Fla. R. Crim. P. 3.490, an instruction on all lesser degrees of murder is no longer required. As both Green v. State, supra, and Johnson v. State, 423 So.2ds 614 (Fla. 1st DCA 1982) point out, prior to October 1, 1981, Fla. R. Crim. P. 3.490 provided that when the information or indictment charges an offense which is divided into degrees, the court shall in all such cases charge the jury as to the degrees of the offense, even if there was no evidence of the lesser degree. However, by amendment effective October 1, 1981, Rule 3.490 was amended so as to provide that the judge "shall not instruct on any degree as to which there is no

evidence". Thus, under this revised rule, as well as the revised jury instructions in criminal cases, a jury instruction on third degree murder was required only if there is evidence to support that offense. See, In The Matter Of Use By Trial Courts Of Standard Jury Instruction In Criminal Cases, 431 So.2d 594 (Fla. 1981).

Third degree murder is a category two lesser-included offense to first-degree murder. See, The Florida Bar Re-Standard jury Instructions, 508 So.2d 1221 (Fla. 1981). In determining whether to instruct the jury on a category two lesser-included offense, the trial court must first determine whether the elements of the lesser-included offense is alleged in the accusatory pleading, and then must determine whether the evidence supports the allegation of the lesser-included offense. State v. Baker, 456 So.2d 419 (Fla 1984). In the instant case, the indictment charged Appellant with first degree premeditated murder. Appellant was not charged with Resisting Arrest With Violence nor was it in any way alleged that the murder occurred during the course of this offense. An accusation supporting an instruction on third degree murder was not present sub judice. Under Baker, supra, both the accusation and the proof must be present to require a category two jury instruction. See, White v. State, 412 So.2d 28 (Fla. 2nd DCA 1982) (to be a lesser included offense, the greater offense must allege all elements of lesser offense and proof must support allegations of lesser

offense); Stone v. State, 402 So.2d 1222 (Fla. 5th DCA 1981) (to determine whether an offense is a lesser included offense, it is necessary to look at the allegations of the information and, where appropriate, proofs at trial). Since the indictment did not allege the elements of third-degree murder, the trial court correctly refused to charge the jury on this offense. See Herrington v. State, 13 F.L.W. 1106 (Fla. 4th DCA MAY 11, 1988)

Appellee also maintains that there is no basis in the record to support an instruction on third degree murder. In his taped confession, Appellant clearly reveals that his intent was to kill Deputy Raczkowski, rather than merely to resist arrest. Appellant admitted that he shot the deputy in the back, as the deputy was running away from him (AC. 7, 11,37). The deputy was fifteen feet away from Appellant when Appellant fired the first shot. The deputy was not shooting at Appellant. (AC.8). Appellant admitted that he fired seven shots at the deputy, emptying his gun. (AC.13). Appellant then had no more ammunition. The medical examiner testified that four of the shots hit Deputy Raczkowski in the back. (R. 1448). Three of the bullets that entered the duputy individually caused fatal injuries. (R. 1463). Erman Hinton testified that, immediately after the shooting, Apellant came to his house and described the shooting. (R 1163-1164). Appellant told Hinton that the deputy had begged for his life prior to the shooting. (R. 1181-1183). Appellant then told the deputy that "one of us got to go, me or

you," according to Hinton. (R. 1183).

The preceding evidence conclusively reveals that Appellant intended to kill the deputy, not to resist arrest. Thus, a third-degree murder instruction was not warranted where the evidence did not indicate that Appellant committed an offense other than the homicide. Green v. State, supra; Williams v. State, 427 So.2d 775 (Fla. 2nd DCA 1983). See also Scurry v. State, 506 So.2d 4 (Fla. 2nd DCA 1987); Cave v. State, 476 So.2d 180, 186 (Fla. 1985).

Even if it was conceded that the trial court erred in not giving the requested instruction, such error was harmless beyond a reasonable doubt where it did not affect the outcome of the trial. As Appellant reluctantly concedes, a harmless error determination is applicable to the failure to instruct on a lesser included offense two or more steps removed from the charged offense. State v. Abreau, 363 So.2d 1063 (Fla. 1978). See also Perry v. State, 522 So.2d 817 (Fla 1988)(failure to give third-degree murder instruction was harmless error).

Applying a harmless error test to the present case, the record reveals that the failure of the trial court to instruct the jury as to third-degree murder did not affect the outcome of the trial. First, Appellant provided the jury overwhelming evidence to convict him of premeditated first-degree murder in his own confession. As noted supra, Appellant admitted in his confession that he fired seven shots at the back of the deputy,

as the deputy ran away from him (AC. 7,11,13). Hinton testified that Appellant told him that the deputy was begging for his life prior to the shooting. (AC. 1181-1183). Appellant was fifteen feet away from the deputy when the first shot was fired. The medical examiner testified that four of the seven shots entered the deputy's body, three of which individually caused fatal injuries. (R 1448). Daniel Nippes, a criminologist, testified that there was no gunpowder residue on the deputy's clothing, which indicated that the shots which killed the deputy were fired from more than four feet away. (R.1524).

Premeditation can be inferred from the manner in which a killing occurs. Fratello v. State, 496 So.2d 903 (Fla. 4th DCA 1986). Where the evidence showed that Appellant fired seven shots at the back of a fleeing victim, the jury had overwhelming evidence to infer premeditation on the part of Appellant. It is immaterial that the incident occurred over a brief period of time, since there is no prescribed length of time which must elapse between the formation of the purpose to kill and the execution of the intent. Provenzano v. State, 497 So.2d 1177 (Fla. 1986), cert. denied 107 .Ct 1912, 95 L.Ed. 2d 518, U.S.____(1987). Where there is overwhelming and conclusive evidence in the record for the jury to convict Appellant of premeditated first-degree murder, the trial court's failure to give an instruction on third-degree could not have affected the outcome of the trial.

Appellant argues that he was prejudiced by the failure to give the requested instruction because it related to his theory of defense. However, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense only if there is trial evidence to support the theory. Gardner v. State, 480 So.2d 91 (Fla. 1985). The calling of the proposed instruction a "theory of defense" does not automatically force a court to give it. See United Sates v. Silverman, 745 F.2d 1386 (11th Cir. 1984). As discussed previously, there was no evidence to support the giving of a third-degree murder instruction. Therefore, even through Appellant calls the instruction his theory of defense, the failure to give the instruction did not constitute prejudicial error.

The cases relied upon by Appellant are distinquishable from the present case. In Bryant v State, 412 So.2d 347 (Fla. 1982), this Court determined that there was evidence to support the proposed instruction on an independent act. Likewise, in Gardner v. State, 480 So.2d 21 (Fla. 1985), this Court determined that there was evidence to support the proposed instruction on voluntary intoxication. Unlike in Bryant and Gardner, there was no evidence to support a third-degree murder instruction where the evidence did not indicate an underlying offense.

In arguing that this Court should not apply the one step-two step test in the present case, Appellant relies on State v. Bruns, 429 So.2d 307 (Fla. 1983). However, this reliance is

misplaced. Rather than eliminating the step approach in determining whether omitted instructions on lesser-included offenses are reversible errors, this Court in Bruns reaffirmed this approach. This Court found reversible error in Bruns because the trial court did not instruct the jury on petit larceny, a step below the charged offense of robbery. Although the trial court had instructed the jury on attempted robbery, this Court in Bruns determined that attempts were placed in a category separate from lesser-included offense. Resultingly, this Court determined that petit larcency rather than attempted robbery was one step removed from the charged offense of robbery. The failure to instruct on petit larceny was, therefore, reversible error.

Since Apellant has not demonstrated that the trial court erred in failing to instruct as to third-degree murder, Appellant's conviction should be confirmed.

POINT III

THE TRIAL COURT CORRECTLY DETERMINED THAT APPELLANT DID NOT MAKE A PRIMA FACIE SHOWING OF THE SELECTIVE EXCLUSION OF A BLACK JUROR. (Restated)

Appellant argues that the trial court did not conduct an adequate inquiry into the State's preemptory challenge of a black juror. However, the record refutes Appellant's claim. Although the trial court initially stated that it did not believe an inquiry was necessary (R 323), an inquiry followed after the prosecution volunteered an explanation for the challenge of the black juror. This inquiry consumes seven pages of the trial record. (R. 322-239). In this inquiry, the trial court addresses all the concerns involving the challenge of black jurors which this Court has deemed to be important. After the inquiry, the trial court reached the following conclusion:

> THE COURT: For the record, I appreciate the candor of all of Counsel.
>
> Under Slappey versus State, which is found at 510 Southern Second, 350, with regard to point one, the challenged juror is a member of an identifiable racial group. However, the--I feel that, as I've said before, I do not believe that there has been a prima facie showing of selective exclusion.
>
> For the record, though, based

> explanation of the selection. There was no difference in the questioning of this jury in regard to the other panel.
>
> I find that the reasons of the--for the challenge were related to the facts of this case and there has been no disparate treatment.

(R 328-329). In its ruling, the trial court properly applied the test first formulated by this court in State v. Neil, 457 So.2d 481 (Fla. 1984), and refined in State v. Slappy, 13 F.L.W. 184 (Fla. March 10, 1988).

Appellant only requested below that the trial court inquire as to the State's reason for the exercise of a peremptory challenge against Mrs. Carrie Gammon, the black juror. Since the trial court conducted such an inquiry, Appellant has no reason to complain. Appellant did not move to strike the jury panel, as the defendants in Neil and Slappy. Therefore, the issue of whether Appellant was tried by an improperly impaneled jury was not preserved for appellate review.

However, even if it was conceded that the issue of whether the jury was impaneled in a racially selective manner is preserved, the record reveals that Appellant did not make a prima facie showing that a likelihood of discrimination existed.

In State v Neil, 457 So.2d 481 (Fla. 1984), this court set forth a new manner in which the exercise of peremptory challenges was to be examined for racial bias. Under Neil, the initial presumption is that peremptories were exercised in a nondiscriminatory manner. If a party is concerned about the

exercise of peremptory challenges, Neil requires that party to make a timely objection and demonstrate on the reocrd that the challenged persons were members of a distinct racial group and that there is a strong likelihood that the challenges were being exercised solely on the basis of race. Neil, supra, at 486. The trial court is required to hold an inquiry only if it decides that the complaining party has shown a likelihood of a discriminatory exercise of peremptories. In such case, the burden shifts to the complained- about party to show that the questioned challenges were not exercised solely on the basis of race. Id.

The record herein reveals that Appellant did not satisfy the first prong of Neil-he did not demonstrate that the challenged persons were members of a distinct racial group and that there was a strong likelihood that the peremptory challenges were being exercised solely on the basis of race. When Appellant voiced his complaint, the State had exercised only three peremptory challenges. (R. 323). Two were used on white persons and the remaining one was used on Mrs. Gammon, a black person. Other than Mrs. Gammon, the only other black member of the panel was challenged for cause because of conscientious objections to the death penalty and an indication that he could not follow the law. (R. 327). Where only one black juror was challenged, there certainly was not a pattern of the systematic exclusion of Blacks from the panel. In the cases that have come up to this

court on this issue, the complaints were based on the State engaging in a pattern of using peremptory challenges to strike numbers of a distinct minority. See State v Neil, supra; Parker v State, 476 So.2d 134 (Fla. 1985); State v Slappy, supra.

Appellee is aware that this Court, in dicta, stated in Slappy that the "issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other." Slappy, supra. However, it logically follows that a complaining party would have a difficult task in demonstrating a strong likelihood of discrimination where there is not a pattern of the selective exclusion of members of a distinct minority.

In the present case, the record reveals that Appellant objected to the challenge of Mrs. Gammon merely because she was black. The record does not reveal that the State singled Mrs. Gammon out for special questions, or questioned her in a perfunctory manner. In the initial brief, Appellant even recounts the questions that the Court and the State posed to Mrs. Gammon. As in Parker v. State, supra, the record does not reveal the requisite likelihood of discrimination to require an inquiry by the trial court and a shifting of the burden to the State. Nothing occurred prior to the voir dire of Mrs. Gammon or during the voir dire that demonstrated a likelihood of discrimination. By objecting to a single challange of a black juror, Appellant appears to interpret Neil and Slappy to require an inquiry each

time that the State challenges a black or minority juror. Clearly, this Court in Neil and Slappy did not intend that an inquiry should follow every challenge of a minority juror.

As in Parker v. State, supra, the questions which the State asked Mrs. Gammon were normal voir dire questions. Moreover, the State did not display a pattern of using peremptory challenges to exclude members of a distinct minority. Therefore, the trial court correctly concluded that Appellant did not demonstrate a prima facie case of discrimination. Resultingly, the State was not required to give an explanation for the challenge of Mrs. Gammon, nor was the trial court required to conduct an inquiry. Neil, supra.

However, even if it was conceded that Appellant met the initial burden of demonstrating a strong likelihood that Mrs. Gammon was challenged solely because of her race, the prosecution satified its burden of rebutting the inference of discrimination by providing racially neutral explanations for the exclusion of Mrs Gammon. First, the prosecution was concerned that because of her age and absence of a child, Mrs. Gammon might view Appellant as the child that she never had (the grandmother syndrome). (R. 326). Secondly, Mrs. Gammon was in the same profession as Appellant's mother-both were domestic workers. The prosecution was concerned that Appellant's mother would be called to testify for Appellant and that Mrs. Ganmon would identify with her because of their common work background. (R.327).

In Slappy, this Court adopted, from the court below, five factors which should be considered to determine whether the state's reasons were supported by the record or were impermissible pretext:

> (1)alleged group bias not shown to be shared by the juror in question, (2)failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror who were not challenged.

None of these factors were present in the instant case. Appellee has already demonstrated that the first three factors were not present in the instant case. As to factor four, the reasons were related to the facts of the case. Mrs. Gammon was questioned about her employment and family background, the grounds alleged for bias. In Slappy, this Court recognized that the function of the trial court in determining the existence of reasonableness is not to substitute its judgement for that of the prosecutor, but merely to decide if the state's assertions are such that some reasonable pesons would agree. Id. Appellee submits that reasonable persons would agree that a childless elderly female might come to view a defendant as the child she never had, or may be bias toward a defendant whose mother shared the same profession. It should be noted that the prosecution challenged

another elderly female, Mrs. Jensen, who could have identified with Appellant in a manner similar to Mrs. Gammon. (R. 397).

As to factor five, whether the reasons were equally applicable to juror who were not challenged, the prosecution challenged the only other juror whom these reasons could have applied to, Mrs. Jenson. (R. 397). In the initial brief, Appellant lists middle-aged or older men whom the State did not challenge in an effort to contest the credibility of the prosecution's reasons. However, Appellant misses the point of the State's concern. All of the jurors listed by Appellant have children and none were a "domestic." The State was concerned that since Mrs. Gammon was childless, she may view the defendant as the child that she never had, or feel favorably toward Appellant because of an identification with his mother.

Since Appellant has not demonstrated reversible error, his conviction should be affirmed.

POINT IV

THE TRIAL COURT'S FINDING THAT THE MURDER WAS HEINOUS, ATROCIOUS OR CRUEL IS SUPPORTED BY EVIDENCE IN THE RECORD

Appellant argues that the facts of the case do not suppport the trial court's finding that the murder was heinous, atrocious, or cruel. Appellee disagrees.

The aggravating factor of heinous, atrocious, and cruel requires evidence that the killing was so unnecessarily torturous, conscienceless or pitiless as to set the crime apart from the norm of capital felonies. Hardwich v. State, 13 F.L.W. 83 (FLA. February 4, 1988); State v. Dixon 283 So.2d 1, 9 (Fla. 1973). The mindset or the mental anguish of the victim is an important factor in determining whether this aggravating circumstance applies. Jackson v State, 522 So.2d 802, 810 (Fla. 1988); Phillips v. State, 476 So.2d 194, 196 (Fla. 1985); Adams v. State, 412 So.2d 1257, 1265 (Fla. 1983). The record in the present case reveals that the murder was set apart from the norm of capital felonies by the consciencelessness displayed by Appellant and the mental anguish suffered by the victim, Deputy Raczkowski.

According to Appellant's own confession, he was able to recover his gun after it fell from his pants. (AC.35). Appellant then pointed the gun at the deputy. Eugene Hinton testified that Appellant told him Deputy Raczkowski pled for his

life. (R.1181). While Appellant had the gun pointed at him, the deputy backed up alongside the car. (AC 35). When the deputy reached the end of the car, he turned and ran, with his back to Appellant. (AC 37). As the deputy fled, Appellant fired seven shots at the back of the deputy. (AC 40). Three of the shots entered the deputy's back, and one entered the back of the deputy's arm. (R.1448-1453). It is hard to imagine a more cruel and conscienceless act than shooting a person in the back as the person flees for his life. The fact that the deputy ran away from Appellant reveals that the deputy was under extreme mental anguish from the awareness that Appellant was going to kill him.

The deputy also suffered extreme mental and physical anguish as a result of the wounds inflicted upon him. Appellant fled after the shooting, leaving the deputy to die a slow death on the pavement. Mr. Whitaker, who arrived shortly after the shooting, testified that Raczkowski repeatedly asked him to get an ambulance. (R.968). Whitaker testified that the deputy appeared to be in shock and was in a great deal of pain. (R. 978). Deputy Kenneth Hamilton also testified that Raczkoski was in a great deal of pain. (R.1079). Raczkowski asked Hamilton to take his hand. (R.1079). Leonard Walter, the medical examiner, testified that the wounds received by Raczkowski were not the type of wounds that killed instantly. (R.1463). Instead, the wounds caused a progressively decrease in the ability of the deputy to breathe. (R.1464). According to Walker, the deputy

literally drowned in his own blood.

Appellant argues that the killing paled in comparison to the ferocity of the murder in Parker v. State, 476 So.2d 134 (Fla. 1985). However, the mental anguish suffered by Deputy Razakowski as he fled for this life with a .380 caliber automatic weapon pointed at his back was comparable to that of the victim in Parker. Although the action occurred over a brief time period, as compared with the murder in Parker, the fact that the deputy turned his back and ran is proof that the deputy was under extreme mental anguish.

Appellant's reliance on Cooper v. State,336 So.2d 1133 (Fla. 1976) is misplaced. As Appellant recognizes, the defendant in Cooper killed the police officer instantly with two shots to his head after confronting the officer. Unlike the officer in Cooper, Deputy Raczkowski had time to experience extreme mental anguish and to be aware of his impending death, as evidence by the deputy attempt to flee. Moreover, unlike in Cooper, Appellant shot Deputy Raczkowksi in the back as the deputy was running away from him.

The trial court clearly did not err in finding that the murder was heinous, atrocious and cruel. However, even if it was error for the court to apply this aggravating factor, the error was harmless beyond a reasonable doubt. Barclay v. Florida, 463 U.S. 939, 958, 77 L.Ed.2d 1134, 1149 (1983);Vaught v. State, 410 So.2d 147, 151 (Fla. 1982); Hargrave v. State, 366 So.2d 1, 5

(Fla. 1979). Even if the aggravating factor of heinous, cruel, and atrocious was not applied, the remaining aggravating factors would outweigh the lone nonstatutory mitigating factor. The trial court found two other aggravating factors: (1) Appellant had committed prior violent felonies and (2) the murder was committed to avoid arrest. The lone nonstatutory mitigating circumstance found by the court was Appellant's military service in active combat. (R. 2527-2530). Appellant waived all the statutory mitigating circumstances. Appellant does not even contest one of the aggravating factor, that the killing was committed to avoid arrest.[2] Since the record does not show any thing particularly mitigating concerning Appellant's military experience, this mitigating circumstance cannot outweigh the remaining aggravating factors, even if heinous, atrocious, and cruel was disapproved as an aggravating factor. Meeks v. State, 410 So.2d 147, 151 (Fla. 1982).

Since Appellant has not demonstrated that the mitigating circumstances outweighed the aggravating circumstances, his sentence of death should be affirmed.

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[2] Even if both the other two aggravating factors were disapproved, this aggravating factor alone would outweigh the mitigating circumstance of Appellant's military experience.

POINT V

THE TRIAL COURT'S FINDING AS AN AGGRAVATING FACTOR THAT APPELLANT HAD BEEN CONVICTED OF A PRIOR VIOLENT FELONY IS SUPPORTED BY FACTS IN THE RECORD.

Appellent argues that the trial court erred in admitting evidence of Appellant's convictions for two prior felonies because the evidence violated due process and because the convictions in evidence were not legal for a capital crime on violent felony as required by Section 921.141 (5)(6), Florida Statutes (1985). Appellant claims lack merit.

As to Appellant's claim that his prior felonies did not fit the definition of violent felonies for purposes of Section 921.141, Appellant misinterprets Brown v. State 473 So.2d 1260 (Fla. 1985). Appellant mislabels as dicta one of the central holding of Brown that evidence of the circumstances of an offense may be considered in determining whether a prior felony is violent for purpose of Section 921.141. In reaching this conclusion, this Court in Brown was resolving one of the issues in the case. See also Stano v State, 473 So.2d 1282, 1282 (Fla 1985), relying on Mann v State, 453 So.2d 784(Fla. 1984), cert, denied ____U.S._____, 105 S.Ct 940, 83 L.Ed. 2D 953 (1983); Elledge v. State 346 So.2d 998 (Fla. 1977). Appellant's suggestion that this Court should consider the statutory elements of some offenses and rule them to be per se nonviolent for

purposes of this aggravating factor is inconsistent with the holding of Brown, that the circumstances of the offense should be considered.

In the present case, the State produced testimony concerning the circumstances of Appellant's prior felony convictions. As to the Martin County Felony, which appellant pled guilty to, Bruce Edward Haver testified that he was working at hotel when two men came up to his counter. (R. 1766). One of the men had a gun and said, "Hit the floor or I'll blow your head off." The two men then tied up Mr. Haver. (R. 1767). One of the men pressed the gun against the top of Mr. Haver's head. The other man then attempted to open the register, but was unable to do so (R. 1767-1768). Eventually, the men got the money out of the register. The men eventually left the hotel, according to Haver. (R. 1771). Mervin M. Waldron testified that he arrested Appellant for the robbery of the hotel in Martin County. (R. 1777). The State also introduced a certified copy of Appellant's conviction for conspiracy to commit robbery in regards to the Martin County incident. (R. 1777-1778).

Jim Attkinson, an officer in the Indian River County Sheriff's Office, testified as to the robbery of the Holiday Inn in Indian River County, Florida. Officer Attkinson testified that Appellant, after his Miranda rights were read, admitted that Ricky Buckner and he had robbed the Holiday Inn with guns. (R. 1787-1788). During the course of the robbery, Buckner had asked

Appellant, "Do you want to shoot [the victim] now? (R.1788). Officer Attkisson testified that Appellant was convicted of grand larceny as a result of this incident. (R.1789). The State introduced a certified copy of Appellant's conviction for this offense. (R.1789).

The preceding testimony was sufficient to support the trial court finding as an aggravating factor that Appellant had committed prior violent felonies. The circumstances underlying these felonies reveal that they were life threatening crimes in which the perpetrator came into direct contact with a human victim. See Lewis v. State, 398 So.2d 432, 438 (Fla. 1981). Although the crimes of which Appellant was convicted was not per se violent crimes when their statutory elements are examined, the circumstances underlying these crimes, as revealed by the testimony during the sentencing hearing, involved the intent to commit a crime of violence and violence was involved in the course of their commission. See Johnson v. State, 465 So.2d 499, 505 (Fla. 1985).

Appellant's reliance on Lewis v. State, supra, is misplaced. In Lewis, this Court did not discuss the circumstances underlying the offense of grand larceny. Therefore, Lewis cannot be controlling authority for this case, where the circumstances underlying the grand larceny reveals that the commission of the offense involved violence.

Appellant's reliance on the doctrine of collateral

estoppel is also misplaced. By relying on the circumstances underlying the prior crimes, the State was not "relitigating facts necessarily establish against it in a previous proceeding." (AB.32). As noted previously, it is permissible for the State to rely on the circumstances underlying an offense to show that violence occurred in the commission of the offense, although the elements of the offense are nonviolent. See Brown v. State, supra; Johnson v State, supra.

As to Appellant's claim that evidence of his prior offense violates due process and the rules of ethics, this issue was discussed in Point I, where Appellee demonstrated that Mr. Colton was not in possession of any confidential communications gained from his representation of Appellant in the Indian River County case. Although this case was used to support the aggravating factor of a prior violent felony, the State did not rely on any confidential communications between Appellant and Mr. Colton to establish this offense. Therefore, as demonstrated in Point I, there was no due process or ethical violations. For the purpose of sentencing, the Indian River County offense was established by general information accessible to the public. See Bryan v. State, supra.

Appellant has not demonstrated that the trial court erred in finding as an aggravating factor that Appellant had committed prior violent felonies. However, if this aggravating factor is disapproved, the remaining aggravating factors would

outweigh the lone nonstatutory mitigating circumstance- Appellant's military experience in Vietnam. See Barclay v. Florida, 463 U.S. 939, 77 L.Ed. 2d 1134, 1149 (1983); Vaught v. State, 410 So.2d 147, 151 (Fla. 1982). In addition to this aggravating factor, the trial court found as aggravating factors (1) that the dominant motive for the murder was to avoid arrest and (2) that the capital felony was heinous, atrocious, and cruel. Appellant does not even contest the first aggravating factor. Appellant waived all the statutory mitigating factors. Since Appellant did not present anything particular mitigating about his military experience, this lone nonstatutory mitigating circumstance could not outweigh the remaining aggravating factors, even if the aggravating factor of the commission of a prior violent felony was disapproved.

Since Appellant has not demonstrated reversible error, his sentence of death should be affirmed.

POINT VI

THE TRIAL COURT PROPERLY RULED THAT THE STATE COULD PRESENT EVIDENCE TO REBUT A NONSTATUTORY MITIGATING CIRCUMSTANCES. (Restated).

Appellant argues that the trial court precluded him from presenting mitigating evidence to the jury. However, the record refutes this claim. The trial court did not rule that Appellant could not present evidence of his assistance in foiling a jail break. The decision not to present this evidence was a tactical decision on the part of Appellant's trial counsel. Moreover, contrary to Appellant's representation, the trial court never ruled that testimony concerning Appellant's assistance in foiling the jail break would open the door to extensive history of poor behavior during incarceration. Rather, the trial court correctly ruled that the State could present any evidence to rebut the nonstatutory mitigating circumstance. (R. 1745).

Since the decision not to present this mitigating evidence was made by Appellant, this issue cannot be properly raised on appeal. Moreover, since the opportunity never presented itself, it is pure conjecture what specific evidence the trial court would have allowed to rebut this nonstatutory mitigating factor. Reversible error cannot be predicated on conjecture. Ford v. Wainwright, 451 So.2d 471, 472 (Fla. 1984).

In ruling that the State could rebut this statutory mitigating factor, the trial court made a correct ruling. As

the trial court determined, evidence that Apellant was a model prisoner was character evidence, and once a defendant put his good character into evidence, the state can rebut this evidence. Marvin v State, 371 So.2d 1062 (Fla. 1st DCA 1979); Section 90.404 (1)(a), Florida Statutes, (1985); Tuff v. State, 408 So.2d 724 (Fla. 1st DCA 1982). Butler v. State, 376 So.2d 937 (Fla. 4th DCA 1979)

Since Appellant has not demonstrated a reversible sentencing error, his conviction should be affirmed.

CONCLUSION

WHEREFORE based on the foregoing argument and authorities cited therein, Appellee respectfully requests this Honorable Court AFFIRM the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished by United States Mail to: CLIFFORD H. BARNES, ESQUIRE, Barnes & Yacucci, Attorneys at Law, 200 S. Indian River Drive, Suite 201, The Legal Centre, Fort Pierce, Florida 34950 this 11th day of July, 1988.

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