SUPREME COURT OF FLORIDA

WILLIAM REAVES,

Appellant,

-vs-

STATE OF FLORIDA

Appellee.

CASE NO. 71,148

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

I. In this issue Appellant demonstrates that the prosecutor in this case, Bruce Colton, previously represented him in one prior criminal case and conferred with him on another. In this case, the prior two cases were used against Appellant and explored at length in the sentencing phase and were used to establish an aggravating factor. Many of the facts and issues discussed in the two prior cases were either identical or similar to those in the guilt phase of this trial. Appellant argues that his prosecution by his former lawyer under these circumstances was a violation of due process and rules of ethics.

II. In this issue Appellant demonstrates that he submitted a required instruction on Third Degree murder to the court, and that the facts of the case required the giving of same. Prejudice resulted in that the instructions represented his theory of the case and the jury was therefore precluded from considering his defense.

III. In this issue Appellant demonstrates that a black prospective juror was peremptorily excused by the State. The trial court failed to make the inquiry as to the State's reasons, or evaluate the reasons the State volunteered into the record. The record establishes that the two reasons volunteered by the State were simply a pretext for discriminatory exclusion.

IV. In the sentencing phase, the trial court allowed evidence "going behind" two nonviolent convictions to establish that they were violent. These two convictions, for conspiring to commit robbery and grand larceny, were the same referred to

in Issue I, wherein Bruce Colton represented or conferred with Appellant, and one of which resulted from a plea entered pursuant to Bruce Colton's advice. Appellant argues that the State should be precluded from introducing evidence contradicting the actual convictions and that Bruce Colton's previous representation of him in these cases precludes their use, or his involvement in them, in this case.

V. Appellant argues in this issue that his proffered evidence narrowly and specifically establishing his help in 1973 in foiling a jailbreak and saving a jailer from harm should not have "opened the door" to evidence of his prior behavior in incarceration through the years. The trial court's contrary ruling essentially deprived Appellant of the opportunity to prove same.

VI. Appellant argues that the facts of the case do not establish any "additional acts" by him in this murder to cause the victim increased or extended suffering, and that, therefore, the case is not "especially heinous, atrocious, or cruel" as a matter of law.

PRELIMINARY STATEMENT

The State of Florida was the Plaintiff in the Trial Court below and will be referred to as the State or the Appellee. The Appellant was the Defendant and will be referred to as the Appellant or the Defendant.

The following symbols will be used:

"R"	The Record on Appeal
R1420, Conf.	Appellant's confession which is attached to Volume X

All emphasis has been added by Appellant unless otherwise indicated.

ARGUMENT

I. THE CONTINUED PROSECUTION OF APPELLANT BY HIS FORMER PUBLIC DEFENDER WAS FUNDAMENTAL ERROR AND PER SE VIOLATION OF DUE PROCESS WHERE SUCH PROSECUTION INVOLVED ISSUES AND FACTS IDENTICAL OR RELATED TO THOSE IN PRIOR CASES AND TO THE CONFIDENCES REVEALED IN SAME, WHERE AGGRAVATING FACTOR WAS ESTABLISHED WITH CONVICTION OBTAINED PURSUANT TO FORMER ATTORNEY'S ADVICE, AND WHERE THERE WAS CREATED AN OVERWHELMING APPEARANCE OF IMPROPRIETY.

Appellee devotes a great deal of time in the State's answer brief incorrectly asserting that Appellant has not proven that confidences were exchanged during the prior attorney-client relationship between prosecutor Bruce Colton and William Reaves. The record of the disqualification hearing clearly indicates through the unrebutted testimony of William Reaves, the existence of such confidences relating both to the facts of the two prior cases and to several other issues addressed at this trial:

> Q Okay. You already stated that you discussed your case with James Long in Martin County. Did you also discuss your Martin County case with Mr. Colton up here in Indian River County?
>
> A It came up, sir.
>
> Q Okay. Did you discuss the facts of--of that case with Mr. Colton?
>
> A Yes Sir.
>
> Q Okay. Did you also discuss the facts of the charge in which, you know, in Indian River County in which you were convicted of grand larceny?
>
> A Yes sir.
>
> Q Okay. Did--did you mention--did you mention that you had a drug problem to Mr. Colton at that time--
>
> A Yes sir.
>
> Q --which he was representing you?
>
> A My whole case was centered around drugs at that time so it was mentioned in Martin County and it was also mentioned in Vero Beach.
>
> Q And did you--did you advise Mr. Colton that you had, in fact,

served in Vietnam and had been in combat?

A Yes sir, I had.

Q Okay. Did Mr. Colton visit you in the County Jail?

A Yes, he did. (R 1968,1969)

Q Did you--it reflects in the pre-sentence investigation that you advised your V.A. officer that you had--were emotionally unstable and that you had a problem with drugs. And--ad it's your testimony here today that you also discussed these matters with Mr. Colton?

A Yet, it had been discussed.

Q Okay. Did Mr. Colton--did you also tell Mr. Colton about an incident in Martin County in which you helped foil a--an escape from a--the jail down there?

A Yes sir, that was discussed also. That was--

MR. BARNES: And I would--I would note for the Court that Mr. Colton did bring that to the Court's attention in the pre-sentence investigation in that case. I don't have any further questions.

BY MR. BARNES:

Q Let--let me just ask you this. Did you expect those communications with Mr. Colton, you know, to remain private? Were they between the two of you? Attorney/client?

A Yes sir. (R 1971)

It is obvious from the authorities cited in both Appellant's initial brief and Appellee's answer brief that there are no cases, statutes, or ethical rules which address the specific fact situation here. Contrary to Appellee's assertion, State v. Bryan, 227 So2d 221 (Fla. 2dDCA 1969) is not "directly on point" since it did not involve prosecution of a defendant by his own lawyer, but rather that lawyer's employer. Therefore, the test advocated over and over by Appellee, that is, that Appellant must show actual confidences which were actually used against him, simply does not apply. Although this Court has adopted such a test where imputed disqualification is urged, as in Bryan, [see State v. Fitzpatrick, 464 So2d 1185 (Fla. 1985), and Thompson v. State, 246 So2d 760, 763 (Fla. 1971)] it does not apply to our analysis since Bruce Colton personally

prosecuted this case from start to finish. The latter two cases have made it clear that the test for disqualification and due process violations is much different where the defendant's attorney acts in the same or related matter.

This Court has held that there is a per se due process violation where a former defender turned prosecutor either 1.) acts directly against his former client in a related matter, or 2.) provides information or assistance for those who would so act, State v. Fitzpatrick, 464 So2d 1185 (Fla. 1985); Thompson v. State, 246 So2d 760 (Fla. 1971). Both of these prohibitions were violated by Bruce Colton's continued prosecution of this case long after Appellant raised his objections pre-trial, as were the rules of ethics cited in Appellant's initial brief.

None of the authorities cited by Appellant or Appellee have involved a capital case--where a defendant's entire life and character are eventually delved into by the parties, and weighed by the jury. However, Appellant submits that when prior character issues and crimes are offered into evidence and used in either aggravation or mitigation, the disqualification rules of due process and ethics should apply just as if these issues and crimes were being contested for the first time. Since aggravation and mitigation facts have to be proven pursuant to Section 921.141, Florida Statutes (1985), and since human life is literally at stake, it defies both logic and notions of fair play to apply lesser standards as Appellee suggests. The uniqueness of capital proceedings require also that a prosecutor not be allowed to stand before a jury and plead for the death penalty for his ex-client, especially where, as here, his own legal advice to the client has resulted in the exi stence of an aggravating factor. The appearance of impropriety should be judged, as urged by Justice Ehrlich in his dissent in Fitzpatrick, supra at 1188-89, by its effect on "the public at large." It is hard to imagine an act which could erode the public's and criminal defendant's trust in lawyers more than that described above. Contrary to Appellee's assertions, Appellant did not claim in his brief that the fact of Bruce Colton's former repre-

sentation was revealed to this jury, but rather warned of the potential danger.

Appellant urges that a very simple rule, consistent with this Court's prior holding and with the Rules of Ethics, be adopted -- no defendant shall be personally prosecuted in a capital case where the State is seeking the death penalty, by a lawyer who has previously represented him.

Appellant respectfully requests this Court reverse his conviction and order a new trial.

II. THE TRIAL COURT'S REFUSAL TO GIVE A THIRD DEGREE MURDER INSTRUCTION, WHICH REPRESENTED APPELLANT'S THEORY OF DEFENSE AND WHICH WAS SUPPORTED BY THE EVIDENCE, WAS REVERSIBLE ERROR.

Because the facts of the case and the trial court's written findings at R 2528 (quoted in our initial brief on page 20) clearly support this instruction being given pursuant to this Court's decision in Green v. State, 475 So2d 235 (Fla. 1985), Appellant will reply only to Appellee's assertion that the error was harmless.

The "one step-two step" test for harmless error determination in lesser included offense issues is based solely on "jury pardon" rationale. In State v. Abrear, 363 So2d 1063 (Fla. 1978) this Court emphasized that the jury must be "given a fair opportunity to exercise its inherent "pardon" power by returning a verdict of quilty as to the next lower crime." Id at 1064. In the case at bar, Appellant concedes that if this 3rd Degree Murder instruction had been requested purely for "pardon" purposes, the error in not giving it might be harmless. However, Abrear does not stand for the proposition that failure to give an instruction two steps removed is automatically harmless. Instead, this Court stated that "reviewing courts may properly find such error to be harmless." Id at 1064. It should be remembered that the Court in Abrear was merely clarifying an earlier holding which intimated that failure to instruct on lessers could never be harmless Appellant does not believe from reading Perry v. State, 522 So2d 817 (Fla. 1988), cited by Appellee, that this Court has intended to now intimate that "two step" errors are always harmless. This type of analysis simply would not allow appropriate appellate review of instances such as this where, rather than relying on any "pardon", the defendant's entire theory and strategy at trial is directed to an instruction amply supported by the evidence. Harmless error, of course, could always be shown where a defendant's defense is a theory inconsistent with the instruction. To argue that jurys return lesser verdicts only because

of a "pardon power" is an insult to both the presumption of innocence, and the intelligence of jurors.

In this case Appellant admitted being the killer, admitted the killing was unlawful, and did not challenge the vast majority of the evidence. The only real issue was premeditation. Unfortunately, when it came time to give the jury a choice of legal verdicts, there were none given which were both consistent with the evidence and consistent with Appellant's defense.

The bottom line is that in this case the killing of this police officer was either premeditated or it was not. The jury may have believed the defendant's confession where he insisted that he did not shoot until the officer pulled his own gun (R 1402, Conf. 7,8,13,3J,38,41) and that he fired because he "panicked", was "paranoid", and believed that the officer at that point was going to try to shoot <u>him</u>. (R 1402 Conf. 8). Other evidence did establish that the officer had his own gun in hand when first discovered (R 977), and that he fired three shots from it (R 1500). The jury may also have believed that the defendant did not shoot the officer out of "ill will, hatred, spite, or an evil intent", an element of second degree murder. In his confession the defendant stated "I've never met a finer officer in my life" (R 1402 Conf. 2-3). Other evidence indicated that the officer referred to Appellant over the radio as "this gentleman" (R 1030) and that immediately preceding the shooting, there was no indication from the officer that there was trouble (R 948).

The failure of the trial court to give Appellant's timely requested third degree murder instruction deprived him of a defense as surely as if he had claimed self-defense and the self-defense instruction had not been given. By its failure to give the requested instruction, the trial court violated the defendant's right to a Fair Trial and to Due Process under the U.S. Constitution. It therefore can not be considered harmless error.

III THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN APPROPRIATE INQUIRY INTO THE STATE'S PEREMPTORY CHALLENGE OF BLACK JUROR, OR EVALUATION OF STATE'S VOLUNTARILY OFFERED REASONS FOR SUCH EXCLUSION, DESPITE LIKELIHOOD OF DISCRIMINATION.

Appellant submits that this issue was not waived. It was clear at the trial level that Appellant objected to the juror's exclusion. The prosecutor, when attempting to compare a white woman's excusal to juror Gammon's excusal stated:

> "For the record, I think it should reflect that the prospective juror excused by the State falls into that class of persons as Mrs. Gammon that was excused previously on appropriate challenge which was objected to by the defense." (R397)

Appellant went far beyond merely objecting--he listed specific reasons supported by the record to support his belief that the juror was improperly challenged because of her race (R 327-328). To Appellant's knowledge, this Court has never held that to preserve an objection to the exclusion of one juror, there needs to be a Motion to Strike the entire jury panel. Although the defendants in State v. Neil, 457 So2d 481 (Fla. 1984) and State v. Slappy, 13 F.L.W. 184 (Fla. March 10, 1988) both moved to strike the jury panel, this Court in Neil held that a defendant need only "make a timely objection and demonstrate on the record that...there is a strong likelihood that they have been challenged solely because of their race." Id at 486. The burden is then shifted to the trial court to make the necessary inquiry and "if the party has been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool." Id at 487.

Appellant submits that the procedure utilized by the court in the case at bar can hardly be termed an "inquiry." The court asked not one question of the prosecutor, nor did it evaluate on the record the credibility of the prosecutor or his asserted reasons for excusal.

In Slappy, supra, the Court made it clear that the reasons offered by the prosecutor during a proper inquiry must be neutral and reasonable and

supported by the record. The reasons offered by the prosecutor in this case fail this test. Unlike the teacher's "liberalism" which was found to be neutral and reasonable in Slappy, the idea of a "grandmother syndrome" is preposterously unreasonable. Appellee has cited no psychological, political, or legal basis to establish the existence of such a phenomenon. If this Court recognizes the legitimacy of the "grandmother syndrome", then surely the "sister", "brother", "father", "mother", "aunt", "uncle", and "grandfather" syndromes are lurking in the wings. Such an explanation is nonsense and serves only to conceal racial motivations. Appellant submits that the only other explanation, that the Appellant's mother was a domestic worker, is an unreasonable explanation, since there is no reason to believe that a juror would sympathize with the defendant because the juror is employed in the same line of work as the defendant's mother.

Both of the State's reasons for challenging Mrs. Gammon fail Slappy's second test--that the reasons are not a pretext and that they are supported by the record. As the Court stated in Slappy, supra, "the utter failure to question..the challenged [juror] on the grounds alleged for bias...renders the State's explanation immediately suspect...If [she] indeed possessed this trait, the State could have established it by a few questions, taking very little of the Court's time." Id at 186. Here of course, no effort was made by the prosecutor to determine whether Mrs. Gammon would be affected to the slightest extent by the fact that she was elderly and without children, or that she was employed in a manner similar to the defendant's mother (if indeed Appellant's mother was a domestic worker). Therefore, as in Slappy, the State's reasons must be viewed as pretext.

By not conducting the required inquiry and by failing to dismiss the jury pool, which would have been necessitated by said inquiry, the trial court violated the defendant's right to an impartial jury under Article I, §16, Florida Constitution, and the Equal Protection clause of the U.S. Constitution. Appellant urges this Court to reverse his conviction and order a new trial.

IV. RESENTENCING IS REQUIRED BECAUSE OF THE ERRONEOUS PRESENTATION OF EVIDENCE TO SUPPORT, AND THE ACTUAL FINDING OF, THE AGGRAVATING FACTOR OR PRIOR CONVICTION OF CAPITAL CRIME OR VIOLENT FELONY.

Appellee has not cited any case where a conspiracy conviction or a grand larceny conviction was held to satisfy the legal requirements of this aggravating factor. Instead, Appellee cites a case involving an attemped arson conviction, Brown v. State, 473 So2d 1260 (Fla. 1985), as authority for the proposition that despite the inherently nonviolent elements to conspiracy and grand larceny, they can be proven violent. Common sense tells us that, unlike conspiracy or grand larceny, attempted arson may very well be life-threatening and consist of direct contact between the defendant and a human victim, the test set forth by this Court in Lewis v. State, 398 So2d 432 (Fla. 1981).

The logical, unacceptable extension to Appellee's argument (and a very short extension at that) would allow proof of this factor even though the conviction for conspiracy and grand larceny were returned as lesser or alternative jury verdicts in robbery cases, with acquital on the robbery charge.

Appellant's ethical and due process challenges to this factor based on his prior representation by the prosecutor, Bruce Colton, in these same two criminal cases, are barely addressed by Appellee. Appellee simply asserts (incorrectly) that the record does not reveal the passage of confidences to Bruce Colton (see discussion in Issue I of this brief). Appellant concedes Appellee's other assertion that the State did not use any of the confidences exchanged, but this point is largely irrelevant since the test for due process and ethics analysis is whether Bruce Colton acted adversely to his former client in the same or substantially related matter. Finally, Appellee conveniently ignores in this issue, as in the first, the fact that the grand larceny conviction was obtained after Bruce Colton's advice to Appellant to enter a plea.

It is not enough that this Court invalidates the finding of this aggravating factor. The evidence used to establish this factor was so prejudicial that a

new sentencing hearing is required.

V. THE TRIAL COURT ERRED IN RULING THAT MITIGATING EVIDENCE SHOWING THAT ON ONE OCCASION THE DEFENDANT HELPED TO FOIL A JAIL BREAK AND SAVE A JAILER FROM PHYSICAL HARM, "OPENED DOOR" TO EXTENSIVE HISTORY OF POOR BEHAVIOR DURING INCARCERATION, THEREBY ESSENTIALLY PRECLUDING APPELLANT'S PRESENTATION OF THAT MITIGATING EVIDENCE TO JURY.

The record is clear, as documented in Appellant's initial brief, that the trial court ruled that the evidence proffered by Appellant regarding his assistance during the Martin County jailbreak, would open the door to rebuttal on the general issue of whether he was a "model prisoner." Because it was that ruling that caused Appellant to decide against presenting his evidence, Appellant submits that the ruling in effect precluded same, in violation of the Eighth Amendment to the U.S. Constitution, Skipper v. South Carolina, 476 U.S. 1 (1986).

VI. THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

In Brown v. State, 13 F.L.W. 317 (Fla. May 12, 1988), this Court disapproved the trial court's finding of this factor despite the trial court's findings that the victim, a police officer...

> "...attempted to arrest Edward Cotton and Morris Lavon Brown. During the course of this arrest, Morris Lavon Brown, assaulted the police officer, fought him to the ground. During the Course of the struggle, the Defendant Morris Brown shot James Arthur Bevis in the arm with his own service revolver. According to the testimony of the medical examiner, this shot left the victim virtually paralyzed on that side of his body. The arm that was shot was useless in defending himself...it is clear that Morris Lavon Brown, after having shot James Bevis in the arm and knocking him to the ground, stood over him and pointed his service revolver at him. This Court can barely conceive the agony that James Bevis must have been going through at this point. Laying on his back, holding his injured arm, and looking up to see the six foot, two hundred pound, Morris Lavon Brown, pointing a .357 magnum revolver in his face...The pain in his arm was excruciating, according to the medical testimony. And what did Defendant Brown do at this point? He had the arresting officer down where he could not harm Brown any more. All Brown needed to do was to flee the scene and he could have gotten away with his crime. But he didn't. While the victim was begging for his life, the Defendant Brown shot him twice in the head. Once from the side near the ear, and once directly in the face." Id at 319-320

Unlike the victim in Brown, the officer in this case 1.) was never disarmed, 2.) was drawing his own gun when shot, 3.) was actually able to return fire and, 4.) was not shot at point-blank range.

It is incomprehensible that a killer should be rewarded with his life when he kills in such a calculated and efficient manner that his victim never has a chance for medical intervention to save his life, but when he kills in a panic and therefore is unable to place the shots as expertly, he should be sentenced to death.

The United States Supreme Court ruled in Booth v. Maryland, 96 L Ed 2d 440, that "victim impact statements" are unconstitutional in capital cases partly because they "could result in imposing the death sentence because of

factors about which the Defendant was unaware and that were irrelevant to the decision to kill". Id at 450 . Appellant submits that in cases such as this where the killer does not intentionally cause prolonged suffering such as through torture, and does not evidence any satisfaction or enjoyment of the suffering, a victim's suffering after a shooting cannot constitutionally be used to establish this aggravating factor.

Appellant submits that under the theory of proportionality, Florida case law does not support the finding of this factor, and to the extent that Florida allows a victim's unintended suffering to establish it, it is violative of the Eighth Amendment to the Federal Constitution. Appellant requests this Honorable Court to grant him a new sentencing hearing.

CONCLUSION

Based on the arguments and authorities cited herein, Appellant requests this Court to reverse his conviction and order a new trial, reverse his sentence of death for a new sentencing hearing, or reverse his sentence of death and order that a sentence of life imprisonment without parole for twenty-five (25) years be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. MAIL to Richard Bartman, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, and to William Reaves, #040002, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 12th day of August, 1988.

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