IN THE SUPREME COURT OF FLORIDA

CLINTON LAMAR JACKSON,

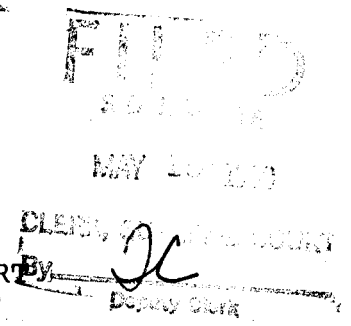
Appellant,

vs. Case No. 71,564

STATE OF FLORIDA,

Appellee.

_____/



ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MICHELE TAYLOR
Assistant Attorney General
Florida Bar #: 0616648
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

COUNSEL FOR APPELLEE

/sas

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OTHER AUTHORITIES:

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STATEMENT OF THE CASE AND FACTS

Appellee agrees with appellant's Statement of the Case and Facts, but offers the following evidence from the record which deserves special emphasis:

Shortly after 5:00 p.m., on January 17, 1984, paramedics arrived at the Davis Hardware Store, located at 3600 - 18th Avenue South in St. Petersburg (R 527, 532). The fifty-three year old store owner, Herbert Phillibert, lay dying (R 533). He had been found on the floor minutes earlier by two customers who had entered the store shortly before its five o'clock closing time (R 521). Mr. Phillibert was barely alive, groaning, and unable to speak (R 520-522). No one witnessed the actual event that precipitated his death, and he was unable to tell anyone what happened before he died.

A bullet aimed at his body's vital areas had entered the right side of his chest, without striking his arm, and traversed the body, striking the aorta, the liver, and a kidney (R 579-580). The path of the bullet was slightly downward, lodging just beneath the skin on the left side of the body (R 580, 582). Police arrived quickly and secured the scene (R 545). Examination of the victim's clothing revealed no stippling or gunpowder residue, indicating that the fatal shot was fired from a distance of approximately three feet or more (R 582). The body lay a few feet away from the store's cash register (R 546). The register drawer was open, the till left askew and empty by the

robbers, except for a one dollar bill (R 546). A five dollar bill was clutched in the victim's hand (R 523). Coins were scattered on the floor around the register (R 546).

While there were no eyewitnesses, two ladies (Dolores Flournoy and Elma Lindsey) working at a day care center a short distance away had seen two black males in their twenties run from the area of the hardware store to a black pickup truck and flee the scene (R 611-612, 624, 626). The ladies observed the men around five o'clock and heard the ambulance siren five or ten minutes after (R 626). They did not see the men well enough to identify them, but later positively identified the truck (R 625). The truck belonged to Bennie Phillips, the boyfriend of Clinton and Nathaniel Jackson's mother (R 827). Appellant was seen driving the truck the afternoon of the murder, with a passenger at his side (R 660-662). Appellant was seen driving the truck toward the hardware store around 4:45 p.m. and was seen driving quickly away from the direction of the store shortly after 5:00 p.m. (R 661, 662). Appellant's fingerprints were found on the driver's side of the truck while Nathaniel's were found on the front and passenger side (R 714-715). Nathaniel's still-moist palm print was found on the back of the cash register at the scene of the crime (R 693-694, 703).

The testimony further showed that Melvin Jones, a cabinet maker in business with Bennie Phillips, had asked appellant to buy some supplies at Davis Hardware one afternoon several days before the robbery (R 663). Appellant returned with the

supplies, and informed Jones that the owner was there alone and that appellant planned to "knock your buddy over down at the store" (R 664). A firearm was seen under the driver's seat in the black pickup truck shortly before the murder, but was missing afterward (R 666, 872).

The day after appellant's arrest, he was visited in jail by his mother, Marsha Jackson (Marsha Williams) and Bennie Phillips (R 831). Phillips paid little attention to the conversation and walked around the jail while appellant and his mother talked (R 832). Freddie Williams, a prisoner sitting next to appellant in the visitation area, testified about substantial parts of the conversation which he overheard: appellant told his mother that the victim had been shot because, "We had to do it because he had bucked the jack" (R 732). Williams testified that although "bucked the jack" could mean different things, his interpretation is that a robbery victim resists the robbers (R 732). Appellant also told his mother to tell Nate to get rid of the gun, and if he was questioned by the police to say he had been at Phillip's Body Shop the entire day of the murder (R 733). Testimony during the penalty phase revealed that Marsha Jackson confirmed these details to investigating detectives and told Phillips she had done so because she thought the visiting room was bugged (R 1096-1097). Mrs. Jackson told Detective Kappel that during the conversation at the jail, appellant admitted being involved with the robbery and murder (R 1096). She told the detective that her son (appellant) had to do it because "the guy bucked the jack" (R

1096). She also said she felt that Nathaniel was being held by the victim and her son Clinton had to shoot [the victim] to gain the release of her other son (R 1097).

During the guilt phase of the trial, the state moved to use the prior recorded testimony of witness Melvin Jones due to Jones' unavailability (R 485). Scott Hopkins, an investigator for the State Attorney's Office for the Sixth Judicial Circuit, testified concerning the state's efforts to locate Jones and secure his presence at the trial (R 486). Mr. Hopkins has been employed as an investigator for fourteen years, and is a bonded law enforcement officer able to serve subpoenas and execute arrest warrants (R 486). The investigator's testimony revealed the following:

Efforts to locate Melvin Jones began on April 29, 1987 (R 487). Mr. Hopkins checked the post office, the utilities, the welfare, and unemployment. The only contact with Jones' family was through his wife, who informed authorities that Jones had moved out four months ago. Jones had an aunt who did not know where he was. Jones had previously responded to a voice pager, but did not respond in this case (R 487). Jones could not be reached by voice pager or through the pager company (R 487). When Mr. Hopkins was asked if he made any additional efforts, he responded:

> "Yes. When the last trial was continued, May 5, the defendant's mother had indicated to his attorney that she could find Melvin and Bennie Phillips, who is the second witness we were looking for. She had specifically asked

> that we not get involved, that we allow her to find them, because we would inhibit her efforts. So, the ball was basically in their court." (R 487-488)

On May 5, 1987, the morning the trial was first scheduled to begin, defense counsel moved for a continuance in order to locate Melvin Jones and Bennie Phillips (A 8)[1]. Counsel explained that the defense had just learned of a possible address for Jones' girlfriend's grandmother, and requested time to investigate this lead. Counsel stated, "We believe we can assist the state" (A 8). Counsel also requested that the state temporarily refrain from its investigation because of a fear that the witnesses would not come forward or cooperate (A 12-13). The trial court granted the motion for continuance and asked the state to "lay off any search" until May 8, 1987 (A 13-14). At that time, if Miss Jackson hasn't supplied any helpful information, the state would be allowed to proceed with the investigation (A 14).

Mr. Hopkins received a call shortly after, telling him that Bennie Phillips and Melvin Jones were living together, and gave an automobile tag number. The tag number eventually led to Bennie Phillips' but not Jones (R 488). Phillips did not know where Jones could be found, so Mr. Hopkins rechecked the possible leads in Pinellas County with negative results (R 488). Mr. Hopkins spoke with Jones' probation officer in March and learned

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[1] Undersigned counsel is simultaneously filing a Motion to Supplement the Record with this brief. The supplemental transcript will be attached as an appendix and will be referred to by the symbol "A" followed by the appropriate page number.

that the officer has obtained warrants for Jones' arrest for a violation of probation and had so advised Jones. The probation officer had no contact with Jones after that, and did not know where Jones could be located (R 489).

Jones did eventually contact Mr. Hopkins, after Bennie Phillips agreed to reach Jones via voice pager (R 489). Jones telephoned the investigator at his office and said he would call Mr. Hopkins later in the day to find out when he needed to testify. However, Jones did not call again, and he would not tell Mr. Hopkins where he was (R 490). The investigator testified that he has been unable to serve the witness subpoena although he has followed up on all possible leads, including the information and assistance offered by appellant's mother, Mrs. Jackson (R 490).

On cross-examination, Mr. Hopkins stated that he went back to Melvin Jones' aunt's house many times to get vehicle tag numbers, although he did not "stake out" the house as is commonly understood (R 491). He explained there was no justification for a stakeout at Jones' wife's house because Jones was not reported to be there and was not seen by the neighbors (R 492). When defendant counsel asked if Jones was around, the investigator responded, "Everyone is around, but he is on the run. He knows there is seventeen warrants." (R 492). The trial court granted the state's motion to use prior recorded testimony, stating on the record:

> I am going to grant the state's motion. It appears there has been reasonable effort, and it is -- there are seventeen warrants outstanding. It is obvious, he doesn't want to really appear, because apparently his freedom is in jeopardy. I think his [investigator's] efforts are reasonable. (R 498).

Melvin Jones was scheduled to testify the following day, June 24, 1987. Prior to commencement of the proceedings on that day, the Assistant State Attorney informed the court that Jones called Mr. Hopkins the day before. Jones indicated he was on the other side of Plant City someplace, but would not disclose his specific location (R 638). Jones was told to appear in the State Attorney's Office at 8:00 a.m. that morning, but did not show up (R 638). Scott Hopkins took the witness stand again and testified that Melvin Jones refused to divulge his specific location (R 645-646). Mr. Hopkins also stated on cross-examination that he did not put out a BOLO (Be on the lookout) on Melvin Jones; this was unnecessary in light of the seventeen outstanding arrest warrants (R 647). Mr. Hopkins had never known anyone to put out a BOLO for a witness (R 648). The trial court denied the defense motion to continue (R 649), stating:

> THE COURT: Seems to me reasonable effort has been made and the witness pointed out this is most difficult. The motion remains to be denied. The Court finds he made reasonable efforts to attempt to obtain him. He remains unavailable. We will proceed. (R 649).

SUMMARY OF THE ARGUMENT

As to Issue I: There was substantial, competent evidence which indicated that an armed robbery occurred inside the hardware store, and that force and violence preceded or was contemporaneous with the taking of the victim's money. Even if appellant remained outside the store, which is clearly not the case, he would be guilty as an aider and abettor in the armed robbery and first degree murder.

As to Issue II: The evidence was sufficient to convict appellant of both first degree premeditated murder and felony murder. Premeditation was established by appellant's admission, "We had to do it because [the victim] had bucked the jack," and other physical evidence which showed that the shooting was not the result of accident or reflex.

As to Issue III: It was established to the satisfaction of the trial court that the state made a diligent effort to locate Melvin Jones prior to trial. Jones was reluctant to appear in court due to several outstanding arrest warrants and refused to divulge his location.

As to Issue IV: The trial court did not abuse its discretion in denying the defense motion for continuance the morning of the trial. The state's witness, Melvin Jones, was previously declared unavailable by the court, and defense counsel was unable to insure the court if or when efforts to locate Jones would be successful. The value to the defense of the alleged new impeachment evidence was speculative. Even so, appellant was not

precluded from introducing impeachment evidence even though Jones' prior recorded testimony was used.

As to Issue V: Melvin Jones' testimony regarding threats made by third persons was properly admitted to show his motives for testifying, not to suggest that the threats came from appellant, as the court so instructed the jury.

As to Issue VI: The prosecutor properly commented on the defense failure to call appellant's mother as a witness, pursuant to the rule enunciated in Michaels v. State. The mother, Marsha Jackson, was competent and available to the defense but unavailable to the state because of the parent/child relationship. Moreover, as she was a participant in the conversation at the jail, her testimony was material and would have elucidated the matter for the trier of fact. Defense counsel was not entirely precluded from responding by the court. Rather than attempting to explain or justify the mother's absence, defense counsel improperly proceeded to refer to alleged witnesses not called by the state.

As to Issue VII: There was sufficient evidence to indicate that appellant and his brother fled the scene of the crime immediately after the robbery and murder. The trial court properly instructed the jury that evidence of flight is a circumstance which might be considered together with all other circumstances of guilt.

As to Issue VIII: Defense counsel failed to preserve this issue for review by not specifically requesting an instruction on

grand theft or third degree murder. Even if this alleged error is preserved, however, such error is harmless. The jury in this case was instructed on first and second degree murder and returned a conviction for first degree murder.

As to Issue IX: Evidence presented during both phases of the trial indicated that appellant was the triggerman in the robbery and murder. Consequently, the principles established in Enmund and Tison do not apply. However, even if appellant did not carry the firearm, there was sufficient direct and circumstantial evidence to show appellant was a major participant and acted with a "reckless indifference to human life," as required in Tison. The jury was properly instructed as to this issue, and the trial court made the requisite written findings.

As to Issue X: The death penalty is not disproportionate to the facts of this case. The court found two valid aggravating circumstances and no mitigating circumstances. Even without the second aggravating factor, however, the death sentence remains appropriate because the murder occurred during the commission of an armed robbery.

As to Issue XI: The evidence in this case sufficiently established that the dominant motive for the murder was to eliminate the only eyewitness, Herbert Phillibert. Appellant had contact with the victim prior to the offense and was therefore identifiable; the two young robbers could have overpowered the unarmed victim with physical force; a single shot was aimed at the victim's vital areas; appellant later tried to coordinate

false alibis with his brother. Moreover, this aggravating factor was established at appellant's first trial and left intact by this Court.

As to Issue XII: The state was properly allowed to argue appellant's lack of remorse because appellant "opened the door" to this area of inquiry by testifying in mitigation that he was sorry the victim was dead.

ARGUMENT

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE ARMED ROBBERY CONVICTION. (As stated by Appellant).

There was substantial, competent evidence to support the conclusion that appellant and his brother took money from the victim, Herbert Phillibert, and in the course of the taking, used "force, violence, assault, or putting in fear." **F.S. 812.13(1) (1987).** Aside from the evidence that appellant threatened to "knock your buddy over" (R 664), and his admission that he and his brother had to shoot the victim because he "bucked the jack" (R 732), physical evidence from the crime scene amply supported the view that the violence or intimidation preceded or was contemporaneous with the taking of the money from the cash register. Royal v. State, 490 So.2d 44, 46 (Fla. 1986). The victim was found approximately eight feet from the register, clutching a five-dollar bill in his hand (R 523, 546). The cash register was open and held only one dollar. Change was scattered on the floor (R 546).

Appellant claims that although the evidence could indicate an armed robbery occurred, it is equally reasonable to infer that a theft occurred, with the shooting taking place during an escape. This position is untenable, however, in light of the factual circumstances surrounding the offense. The standard to be applied to support a conviction based on circumstantial

evidence is that the evidence must be "inconsistent with any reasonable hypothesis of innocence." McArthur v. State, 351 So.2d 972, 976 n. 12 (Fla. 1977). The reasonableness of a defense theory is a determination for the jury and where there is substantial, competent evidence to support the jury verdict, such a determination should not be disturbed by the court. Heiney v. State, 447 So.2d 210, 212 (Fla.), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984). The jury was entitled to reject the theft theory in this case as unreasonable and find instead that Herbert Phillibert was shot by appellant as he struggled to retain his last five dollars.

The same principles apply to contradict the defense view that only appellant's brother, Nate, was inside the hardware store. Appellant's statement, "We had to do it . . .," coupled with evidence of Nathaniel's palm print on the cash register and the nature of the bullet wound clearly indicate that appellant held a gun on Mr. Phillibert while Nathaniel robbed the till. Even if the evidence was inconclusive as to who actually possessed the gun, however, appellant is still guilty as an aider and abettor. Hall v. State, 403 So.2d 1321, 1323 (Fla. 1981). Appellant planned the commission of this crime, as evidenced by his statement to Melvin Jones, "I'm going to knock your buddy over down at the store" (R 664). In addition, appellant was seen driving toward the hardware store before the robbery and was seen running with his brother away from the crime scene. He attempted to create an alibi for himself and cautioned his brother to get

rid of the gun (R 733). At the very least, the jury could conclude that appellant aided and abetted his brother in the commission of the armed robbery and is therefore responsible for all of his brother's acts in furtherance of the criminal scheme. Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973).

ISSUE II

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE MURDER CONVICTION. (As stated by Appellant).

Appellee first contends that appellant failed to preserve the above issue for review because the motion for judgment of acquittal did not fully set forth the grounds upon which it was based, as prescribed by **Rule 3.380(b)** of the **Florida Rules of Criminal Procedure**. See e.g., Patterson v. State, 391 So.2d 344 (Fla. 5th DCA 1980); G.W.B. v. State, 340 So.2d 969 (Fla. 1st DCA 1976), cert. denied, 348 So.2d 948 (Fla. 1977). Defense counsel argued in the motion merely that the circumstantial evidence was insufficient to eliminate every reasonable hypothesis of innocence, and that the trier-of-fact would be impermissibly piling inference upon inference (R 882-883). Counsel never specifically argued the lack of sufficient evidence to support a finding of premeditation in order to convict for first degree premeditated murder.

Assuming, arguendo, that the motion for judgment of acquittal was sufficient to preserve this issue, appellee submits that the direct and circumstantial evidence was sufficient to find appellant guilty of both first degree premeditated and felony murder.

In Issue I, appellee has set out the facts which indicate beyond a reasonable doubt that an armed robbery occurred inside the hardware store, and that appellant was a major participant, if not the ringleader. There is also sufficient evidence that

appellant killed the victim, Herbert Phillibert, with premeditation. The trial court properly instructed the jury on the elements of premeditation (R 1012-1013). In Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), this Court held:

> Premeditation can be shown by circumstantial evidence. Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence of absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned.

Applying the above criteria to the case at bar, it is apparent that appellant murdered with premeditation. Appellant's statement to his mother that "We had to do it," along with the evidence that appellant or his brother brought a loaded gun into the hardware store, armed the gun at a vital area of the victim's body, and shot the unarmed victim from a distance of three feet or more, shows that the decision to shoot was a conscious, intentional act, and not the result of accident or reflex. See also, Griffin v. State, 474 So.2d 777, 780 (Fla. 1985). Appellee

submits that the evidence indicated appellant was the triggerman in this offense. However, even if Nate was the one who shot the victim, appellant could be convicted as a principal to the crime of premeditated first degree murder pursuant to **§777.011, Florida Statutes (1987)**; Hall v. State, infra. Thus, the evidence amply supports the conviction in this case for both first degree premeditated murder and felony murder.

ISSUE III

IT WAS ERROR TO ADMIT MELVIN JONES' PRIOR TESTIMONY BECAUSE IT WAS NOT ESTABLISHED THE STATE MADE A DILIGENT EFFORT TO LOCATE HIM AND DEFENDANT HAD NO OPPORTUNITY TO CROSS-EXAMINE JONES ON CRUCIAL IMPEACHMENT MATTERS AT THE FIRST TRIAL. (As stated by Appellant).

The responsibility for evaluating the adequacy of the state's showing of unavailability rests with the trial judge in this case, and his determination of the issue should not be disturbed on appeal unless an abuse of discretion clearly appears. Stano v. State, 473 So.2d 1282 (Fla. 1985); Outlaw v. State, 269 So.2d 403 (Fla. 4th DCA 1972), cert. denied, 273 So.2d 80 (Fla. 1973). In Stano, the victim's parents testified at the first trial, but adamantly refused to testify at the second trial even though faced with fines and possible imprisonment. The trial court there properly declared the two witnesses to be unavailable and allowed their former testimony into evidence. 473 So.2d at 1286. In Outlaw, a missing eyewitness could not be located after a diligent search which involved contacting the witness' friends, former employer, family, and landlord. Finding that the state laid a proper predicate as to unavailability, the trial court allowed the use of testimony from a preliminary hearing. 269 So.2d at 404.

The circumstances in the instant case are similar. The state made a reasonable effort to locate Melvin Jones by checking with public agencies, family members, and friends, and by following up all available leads, including those provided by

defense witnesses. The record indicates that when the trial was continued on May 5, 1987, appellant's mother asked the state, through defense counsel, to allow her to find Jones and Phillips on her own, probably because she expected to have greater success owing to her relationship with the witnesses (R 488). In response to appellant's request, the court directed the state to "lay off" the investigation for a period of three days to allow the defense to locate Melvin Jones (A 13-14). This fact completely vitiates appellant's argument that the state was lax in its pursuit of the unavailable witness or that the state improperly delegated its responsibilities. In any event, the investigator later received information which led to contact with Bennie Phillips and then Melvin Jones (R 488). At all times, the investigator diligently maintained his efforts to serve Jones with a subpoena and secure his presence at this trial.

No BOLO was put out and no formal stakeouts were ordered because these actions would have been fruitless. Considering Jones was facing numerous arrest warrants, it was clear he was reluctant to appear as a witness. Jones was "on the run" and did not wish to be found. Consequently, any further inquiry regarding his social security number, criminal records and the like were unlikely to prove helpful. The law requires only that the state use due diligence in securing the attendance of witnesses. The state's efforts in this case were more than adequate; therefore, the trial court did not abuse its discretion in finding Melvin Jones to be unavailable and allowing the use of his prior recorded testimony.

ISSUE IV

IT WAS ERROR TO DENY DEFENDANT'S MOTION FOR CONTINUANCE TO ALLOW HIM TIME TO FIND MELVIN JONES. (As stated by Appellant).

A trial judge is vested with broad discretion in ruling on a motion for continuance and, by virtue of his closeness and intimacy with the circumstances of the case, should not be reversed by this Court unless there is a clear showing of a palpable abuse of judicial discretion. Acree v. State, 153 Fla. 561, 15 So.2d 262 (1943); Holman v. State, 347 So.2d 832 (Fla. 3d DCA 1977). Moreover, requests for a continuance in a criminal case must be more closely and rigidly reviewed than in a civil case because of the greater temptation to seek delay in a criminal case. Moore v. State, 59 Fla. 23, 52 So. 971 (1910).

In this case, appellant asked for a continuance on the morning of trial in order to try to locate a state witness, Melvin Jones (R 497). Appellant has previously been granted a continuance for the same purpose on May 5, 1987 (A 1-15). The trial court had already granted the state's motion to use Melvin Jones' prior recorded testimony from the first trial, finding that Jones was unavailable and that the state's efforts in locating this witness were reasonable (R 498). (See discussion under Issue III above).

Appellant was unable to give the court any indication if or when Melvin Jones might be available (R 502-503; 510-511). As noted by the court, Jones was a reluctant witness and did not

desire to be found because of seventeen outstanding warrants (R 498, 639).

Furthermore, defense counsel did not sufficiently demonstrate that his client would be prejudiced by proceeding without Jones' live testimony. Jones testified at the first trial that he didn't expect to "get a deal" on his then pending violation of probation charges by testifying for the state (R 667, 669). The possibility that Jones may have later received a sentence below the recommended guidelines on those charges does not prove that he lied about his earlier expectations. The reasons underlying the sentence in the violation of probation case are speculative at best; the sentence may have resulted from factors totally unrelated to the testimony in the instant case. Furthermore, defense counsel declined to introduce the guidelines scoresheet itself, in spite of the court's suggestion that he do so, because he claimed defense could not lay a predicate and would "lose opening and closing" if any documentary evidence was used (R 502). The decision not to introduce the sentencing documents must be regarded as tactical, because impeachment evidence is admissible pursuant to **§90.806(1)** of the **Florida Evidence Code**, which provides:

> (1) When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement is admissible, regardless

> of whether or not the declarant has been afforded an opportunity to deny or explain it.

See, State v. Hill, 504 So.2d 407, 410 (Fla. 2d DCA 1987), wherein the court noted that attacking the credibility of prior testimony which is being produced at a later hearing by evidence of subsequent contradictory statements seems to have been contemplated by **§90.806(1), Florida Statutes.**

Furthermore, defense counsel did attack Jones' credibility in cross-examination during the first trial. Counsel questioned Jones thoroughly about an alleged benefit received as a result of testifying for the state in another murder trial (R 667-668), and the seven or eight charges then pending against Jones for grand theft and writing bad checks (R 668-669).

Granting the defense motion for continuance in the above circumstances would have prejudiced the state by causing an indefinite delay in the trial proceedings. There was no abuse of discretion by the trial court.

ISSUE V

IT WAS ERROR TO ADMIT MELVIN JONES' TESTIMONY ABOUT THREATS MADE AGAINST HIM FOR TESTIFYING WHEN THE THREATS WERE NOT LINKED TO DEFENDANT. (As stated by Appellant).

The testimony concerning third party threats made to Melvin Jones was admitted to show motive for testifying, and not on the issue of appellant's guilt (R 669-671). Defense counsel "opened the door" to this evidence by implying during cross-examination that Jones willingly testified as a state witness because he expected to get a beneficial deal in this own pending case (R 669). The statements regarding the threats by third persons were offered to show that Jones was not anxious to testify.

Most important, defense counsel requested and received from the court the following curative instruction prior to admission of the testimony:

> THE COURT: Ladies and gentlemen of the jury, the next questions that will be asked by the State Attorney that would be to Mr. Jones will be to threats that he will testify to. This testimony is not offered in any way to suggest that those threats came from Mr. Jackson, the defendant in this case. They are simply to show motive or lack of motive on behalf of the witness to testify (R 673).

The case at bar is distinguishable from State v. Price, 491 So.2d 536 (Fla. 1986), in several aspects. The evidence of threats in Price was admitted as anticipatory rehabilitation by the state to explain the witness' prior inconsistent statements and concerned direct threats to kill the witness. Id. Here,

however, the threats were overheard indirectly by Jones or made by unidentified persons in jail (R 674-676). Furthermore, Melvin Jones clearly testified that none of the threats came from appellant, Clinton Jackson (R 679, 682). In light of the above facts, appellee submits that the prejudicial impact of the third-party threats to Melvin Jones, if any, does not outweigh their probative value.

ISSUE VI

IT WAS ERROR TO ALLOW THE STATE TO ARGUE TO THE JURY THAT IT COULD INFER FROM THE FACT THAT DEFENDANT'S MOTHER DID NOT TESTIFY THAT HER TESTIMONY WOULD BE HARMFUL TO DEFENDANT AND TO PRECLUDE DEFENDANT FROM RESPONDING TO THIS ARGUMENT. (As stated by Appellant).

In State v. Michaels, 454 So.2d 560 (Fla. 1984), this Court explained the rule in Jenkins v. State, 317 So.2d 90 (Fla. 1st DCA 1975), and Buckrem v. State, 355 So.2d 111 (Fla. 1978), regarding comments on a defendant's failure to produce certain witnesses:

> . . . . The basis for the rule is that the trier of fact is entitled to hear relevant evidence from available and competent witnesses. When such witnesses are equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness. Here, however, the witness was the daughter of the defendant. She was not "equally available" to the prosecution because of the parent-child relationship which would normally bias her toward supporting her father's defense.

454 So.2d 562. In Michaels, the defendant was convicted of manslaughter in the death of his daughter's former live-in boyfriend. A heated altercation occurred in a local bar, and the daughter was present at the scene with her father and the victim. Her testimony would have been highly relevant as to the reasonableness of the defendant's theory of defense.

Federal courts have also stated the rule's applicability to the defense's failure to call available witnesses either in

rebuttal of the state's case or in support of the defense's own contentions. For instance, in United States v. Tramunti, 513 F.2d 1087 (2nd Cir. 1975), the prosecutor was allowed to respond to defense counsel's suggestions that a witness had fabricated testimony as to statements of the defendant by stating that the defendant should have called his brother, an alleged participant in the conversation, to rebut the testimony if it were indeed false. Similarly, in United States v. Pelusio, 775 F.2d 161 (2nd Cir. 1983), it was held proper for the prosecutor, in a wrongful possession of a firearm case, to comment on the defendant's failure to call his brother as a witness; the brother had recently purchased the firearm in question and might have corroborated the defense that the defendant had "nothing to do with the gun." Id. at 168.

The general "Buckrem-Michaels" rule in Florida, as restated in Martinez v. State, 478 So.2d 871 (Fla. 3d DCA 1985), is that "an inference adverse to a party based upon the party's failure to call a witness is permissible when it is shown that the witness is peculiarly within the party's power to produce and the testimony would elucidate the transaction." Id. at ____. Here, appellant's mother was not available to the state by virtue of the parental relationship. Marsha Jackson's competency and availability to the defense was established by the testimony of Detective Feathers, acknowledged by the defense in closing argument and confirmed by her subsequent testimony in the penalty phase. Moreover, as the only other known and available witness

to the inculpatory statements made by appellant in jail, and as a witness (unlike Freddie Williams) who was privy to both sides of the conversation, she certainly could be expected to elucidate defense claims that Williams fabricated his testimony or "misheard" or misinterpreted appellant's words (R 741, 743, 744, 749, 793).

Appellant relies on a series of cases which predate this Court's Michaels opinion. This reliance would seem misplaced, since at least three of the decisions, Trinca v. State, 446 So.2d 719 (Fla. 4th DCA 1984); Romero v. State, 435 So.2d 318 (Fla. 1983), pet. for rev. denied, 447 So.2d 888 (Fla. 1984) and Bayshore v. State, 437 So.2d 198 (Fla. 3d DCA 1983), rely on lower court opinions which Michaels specifically overruled and appear to be of dubious validity. Two remaining cases, Brown v. State, 524 So.2d 730 (Fla. 4th DCA 1988) and Kindell v. State, 413 So.2d 1283 (Fla. 3d DCA 1982), are clearly factually inapposite. Both involve situations where the prosecutor misled the jury by indicating the defense had made assertions which they had not and by commenting on the defense's failure to call witnesses who had no relevant testimony and could not have "elucidated the transaction."

The appellant suggests the court further erred by refusing to allow the defense to respond to the prosecutors. The record does not reflect such a prophylactic prohibition by the trial court. Rather, after defense counsel improperly characterized legitimate state argument as a "smokescreen" and implied that the

state's burden of proof required it to call the mother as an available witness to corroborate Williams' testimony, the court sustained the state's objection that the mother was not "equally available." Rather than arguing alternative justifications of the defense's failure to call the mother or pointing to facts in the record which would justify a different inference, defense counsel attempted to create an inference against the state for the failure to call other witnesses who might have corroborated Williams' testimony. These comments were improper under Michaels because it was not known if other witnesses heard the statements or whether such witnesses were available; in addition, these witnesses would have been equally available to the defense.

Because appellant's mother possessed relevant, material knowledge of the conversation in the jail, which would have elucidated the transaction, and because she was available to the defense but unavailable to the state due to the parental relationship, the prosecutor's comment on the failure of the defense to produce the mother as a witness was entirely proper.

Even if this Court finds that the trial court erred in allowing the comments, however, such error is harmless. First, the Assistant State Attorney prefaced his remarks by emphasizing to the jury that the defendant never has the burden of proof (R 980, 981). Second, there was ample evidence of appellant's guilt, and no possibility that reference to the testimony of appellant's mother affected the jury's verdict. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986); Romero v. State, infra.

ISSUE VII

IT WAS ERROR TO INSTRUCT THE JURY THAT DEFENDANT'S FLIGHT COULD BE CONSIDERED A CIRCUMSTANCE INDICATING A CONSCIOUSNESS OF GUILT. (As stated by Appellant).

Two state's witnesses, Delores Flournoy and Emma Lindsey, saw two black males in their early twenties run from the direction of the hardware store and get into a black pickup truck near the scene of the robbery at approximately 5:00 p.m. (R 611-612, 624, 626). The witnesses could not identify the black males, but they did help identify the truck, which was later found to be the one borrowed from Bennie Phillips by appellant (R 829). Shortly after 5:00 p.m., when the murder and robbery occurred, Melvin Jones saw that same truck, driven by appellant, headed away from the hardware store exceeding the thirty-five mile per hour speed limit (R 662-663). These facts are sufficient to support the finding that appellant fled the scene of the crime. This is not a case, as appellant claims, of flight standing alone as evidence of appellant's guilt. Whitfield v. State, 452 So.2d 548, 549 (Fla. 1984). The trial court properly instructed the jury that:

> . . . evidence of flight or concealment raises no presumption of guilt, but it is, nevertheless, a circumstance which you might rightfully consider together with all other circumstances, and give such weight thereto as you see fit in light of all the other evidence and the law as given to you by the Court. (R 62, 1021-1022).

The flight instruction given here did not unduly influence the jury to conclude that appellant fled out of a sense of guilt or give undue weight to the fact that he left the scene of the crime. Instead, the court clearly instructed that if flight was found, it could be taken into account with all the other evidence. See, e.g., Proffitt v. State, 315 So.2d 461 (Fla. 1975); Haywood v. State, 466 So.2d 424 (Fla. 4th DCA 1985).

ISSUE VIII

IT WAS ERROR TO FAIL TO INSTRUCT THE JURY ON THIRD DEGREE MURDER BECAUSE THE EVIDENCE SUPPORTED THE CHARGE AND THE INSTRUCTIONS GIVEN FAILED TO ADEQUATELY DEFINE THE VARIOUS DEGREES OF HOMICIDE. (As stated by Appellant).

Appellant failed to preserve the trial court's alleged error in failing to instruct the jury on the elements of third degree murder because appellant failed to make a distinct objection on such grounds before the jury retired, as required in **Rule 3.390(d), Florida Rules of Criminal Procedure.** Castor v. State, 365 So.2d 701 (Fla. 1978).

During the charge conference, the following exchange took place:

> MR. HOFFMAN (defense counsel): Judge, we would like all of category one and category two of lessers. We would ask for category one and category two.
>
> THE COURT: What are we talking about?
>
> MR. HOFFMAN: Let me just read it. Category one is second degree manslaughter and category two would be attempting a battery, aggravated assault and battery. (R 902).

Not only did appellant fail to specifically request a third degree murder instruction, he agreed to an instruction on petit theft, rather than grand theft, as a lesser offense of armed robbery (R 1010, 1019). A conviction of third degree murder requires that the accused be engaged in the perpetration of any felony not enumerated in the second degree felony murder statute.

Section 782,04(4), Florida Statutes (1987). Appellant here was charged with and convicted of armed robbery (R 1-2, 3-4).

Even if this Court finds that appellant properly preserved the issue and that the failure to give the requested instruction constitutes error, such error is harmless. In Perry v. State, 522 So.2d 817 (Fla. 1988), this Court held that any error in failing to instruct on third degree murder in a first degree murder prosecution is harmless, even if there is evidence to support such an instruction, where the jury was instructed on second degree murder but returned a conviction for first degree murder Id. at 819-820. The trial court in the instant case properly instructed the jury on the elements of second degree murder (R 1015-1016). The Perry court cited State v. Abreau, 363 So.2d 1063 (Fla. 1978), an earlier decision of this Court which explained:

> Only the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible. Where the omitted instruction relates to an offense two or more steps removed, . . . reviewing courts may properly find such error to be harmless. Id. at 1064.

In a recent case directly on point, the Second District Court of Appeal held that because the evidence in that case supported a charge of grand theft and the charge was included in the indictment, the trial court erred in failing to give the requested instruction on grand theft as well as the instruction regarding third degree murder. However, the failure constituted

harmless error because the offense of grand theft is two steps removed from robbery with a firearm, the offense at conviction. Torres v. State, No. 87-708 (Fla. 2d DCA, Feb. 1, 1989) [14 F.L.W. 366, 367]. The Torres court further held that absent the grand theft instruction, there is no basis for the third-degree felony murder instruction. 14 F.L.W. at 367. The same principles apply in the instant case. The trial court's failure to instruct on third degree murder was not erroneous in the absence of a specific request for a third degree murder or grand theft instruction. Even if the instructions had been requested, however, no harm resulted due to the jury's verdict of robbery with a firearm (R 1042).

ISSUE IX

THE DEATH PENALTY IS UNCONSTITUTIONAL AS APPLIED BECAUSE THE EVIDENCE CONCERNING DEFENDANT'S PARTICIPATION IN THE CRIME AND HIS STATE OF MIND AT THE TIME IS INSUFFICIENT UNDER ENMUND AND TISON. (As stated by Appellant).

Appellee submits, as the trial court found, that evidence presented at both phases of the trial in this case revealed beyond a reasonable doubt that appellant was the triggerman in the armed robbery (R 153). Consequently, the principles enunciated by the United States Supreme Court in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and Tison v. Arizona, 481 U.S. __, 95 L.Ed.2d 127, 109 S.Ct. 1676 (1987), do not apply. See also, Jackson v. State, 502 So.2d 409 (Fla. 1986), cert. denied, 107 S.Ct. 3198 (1987).

However, even if it was not conclusively shown that appellant was the gunman, there was sufficient evidence to support a finding that appellant was a major participant in the armed robbery and evinced a "reckless indifference to human life," as required by Tison. In Enmund, supra, the Supreme Court held that a defendant convicted only of felony murder could not be sentenced to death unless he intended to kill or contemplated that lethal force be used. The Supreme Court has since modified this standard to require that the defendant be "substantially involved" in the felony committed and to have acted with "reckless indifference to human life." The trial court properly instructed the jury according to the principles of Tison, and

made the necessary explicit written finding, including the factual basis for the finding in its sentencing order (R 150-153, 1179-1180). Jackson v. State, 502 So.2d at 413.

Appellant's statement, "I'm going to knock your buddy over down at the store," indicated his intent to commit the robbery (R 664). The admission to his mother that "We had to do it, he bucked the jack," shows appellant's intent to use lethal force (R 732). Nathaniel's still-moist hand print on the back of the cash register, combined with the angle and placement of the bullet wound, indicate that Nathaniel was rifling the till while appellant held the gun on the victim (R 579-580, 582, 693-694). The totality of this and other evidence was sufficient to satisfy the Tison requirements, in the event the verdict was based on a felony-murder theory.

ISSUE X

THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THE CASE. (As stated by Appellant).

The trial court found two valid aggravating circumstances and no mitigating circumstances in this case. When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factors which might override the aggravating factors, the death penalty is presumed to be appropriate. See, e.g., Jackson v. State, 502 So.2d 409 (Fla. 1986); White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

The trial court found the following two aggravating factors:

AGGRAVATING CIRCUMSTANCE ONE

THE CRIME FOR WHICH DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS ENGAGED OR AN ACCOMPLICE IN THE CRIME OF ROBBERY, WAS COMMITTED FOR FINANCIAL GAIN, AND THAT THE DEFENDANT HAD BEEN PREVIOUSLY CONVICTED OF A VIOLENT FELONY.

AGGRAVATING CIRCUMSTANCE TWO

THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.
(R 152-153).

Appellant challenges the finding of the second aggravating factor (see Issue XI), and the court's rejection of mitigating factors. Appellee maintains that the second aggravating factor

(murder was committed for purpose of avoiding arrest) is valid and supported by the evidence (see discussion under Issue XI). However, even if the second factor is held to be invalid under the facts of this case, the death sentence remains the appropriate penalty. The jury recommended death in this case by a vote of ten to two. Even if the trial court erroneously considered circumstance two as aggravating, this error does not effect the process of weighing the aggravating against the mitigating circumstances because "there are no mitigating circumstances to weigh." Armstrong v. State, 399 So.2d 953, 963 (Fla. 1981). As in Armstrong, the murder in this case took place during the course of an armed robbery. Where an intentional murder is committed during a robbery and there are no mitigating circumstances, a sentence of death is appropriate. Armstrong, supra.; Maxwell v. State, 443 So.2d 967 (Fla. 1983); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

As to the absence of mitigating factors, the trial court wrote in its findings that it considered all statutory mitigating circumstances and other aspects of appellant's character or record and other circumstances of the offense, and could find "nothing that rises to the level of either statutory or nonstatutory mitigation." (R 154). It is within the province of the trial court, not this Court, to decide if any particular mitigating circumstance has been established and how much weight it should be given. Hudson v. State, Case No. 70,093 (Fla. Jan.

19, 1989) [14 F.L.W. 41]; Toole v. State, 479 So.2d 731 (Fla. 1985). Appellant has not demonstrated that the trial court abused its discretion in this regard. Therefore, the death penalty imposed in the instant case is not disproportionate.

ISSUE XI

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THE MURDER WAS COMMITTED TO AVOID OR PREVENT ARREST BECAUSE IT WAS NOT ESTABLISHED THAT THE DOMINANT MOTIVE FOR THE KILLING WAS TO ELIMINATE A WITNESS. (As stated by Appellant).

As appellant correctly stated, in order for a witness-elimination motive to support finding the avoidance of arrest circumstances when the victim is not a law enforcement officer, "[p]roof of the requisite intent to avoid arrest and detection must be very strong." Riley v. State, 366 So.2d 19, 22 (Fla. 1978). It must be shown that the dominant motive for murder was the elimination of witnesses. Menendez v. State, 368 So.2d 1278 (Fla. 1979). However, it is not necessary that intent be proved by evidence of an express statement by the defendant or an accomplice indicating their motives in avoiding arrest, Routley v. State, 440 So.2d 1257 (Fla. 1983) cert. denied, 468 U.S. 1220, 82 L.Ed.2d 888, 104 S.Ct. 3591 (1984), nor is it required that this be the only motive for the murder.

In Riley v. State, supra, this Court found this factor to be established by evidence that the victim, who knew the defendant, was shot and killed during a robbery; the victim was bound and gagged after one of the perpetrators expressed a concern over possible subsequent identification. In Bolender v. State, 442 So.2d 833 (Fla. 1982), cert. denied, 461 U.S. 939, 77 L.Ed.2d 315, 103 S.Ct. 2111 (1983), the defendants had robbed the victims of drugs, held and tortured them, then disposed of the bodies by

setting fire to the vehicle in which they were located. The court found this factor established since the defendants' intent in killing the victims was partially to prevent the defendants from being identified. See also, Martin v. State, 420 So.2d 583 (Fla. 1982), cert. denied, 460 U.S. 1056, 75 L.Ed.2d 937, 103 S.Ct. 1508 (1983); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, 459 U.S. 882, 74 L.Ed.2d 148, 103 S.Ct. 182 (1982); Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 60 L.Ed.2d 666, 99 S.Ct. 2063 (1979). In Washington, this Court considered evidence that the murderers wrote matters on the wall to mislead the police into thinking the murder was committed by the homosexual lover of the victim. Thus, facts occurring after the homicide may be considered. In this case, appellant instructed his brother to get rid of the gun and attempted to concoct a false alibi after the murder was committed. And, in Clark v. State, 443 So.2d 973 (Fla. 1983), cert. denied, 81 L.Ed.2d 356, 104 S.Ct. 2400 (1983), this factor was established by evidence that the defendant shot a robbery victim who was confined to her chair due to a physical disability and who had previously cashed paychecks for the defendant. Although the defendant in that case told a cellmate that one of the victims could identify him, the most persuasive evidence of motive appears in this Court's analysis: "Because of her physical condition she was helpless to thwart further taking of [her and her husband's property], hence, no other motive is readily apparent." Id. at 977.

In its written findings, the trial court in this case quoted from the state's sentencing memorandum, which summarized the compelling factual circumstances:

> "In the instant case, the defendant was in the store a week before the murder and would have had contact with the victim, The defendant told Melvin Jones he was going to rob his "buddy" at the hardware store. He picked a business operated by a single owner/employee. The defendant and his brother parked in a alley behind a church so their vehicle would not be seen.
>
> . . . . No warning shot was fired, nor did they try to subdue the unarmed victim (as they easily could have) with physical force .... A single shot was fired at a vital area of the body .... There were no eyewitnesses to the crime other than the murder victim. This evidence further shows that the defendant gave instructions to his brother to get rid of the gun; it was never found. He attempted to coordinate false alibis' with his brother through his conversations with his mother." (R 154).

Judge Beach found this factor at appellant's first trial, and the finding was left intact by this Court, which addressed the sentencing issues for the benefit of the trial court upon remand. This Court found that only the heinous, atrocious, or cruel and cold, calculated, and premeditated factors to be unsupported by the facts of the case. Jackson v. State, 498 So.2d 906 (Fla. 1986).

The fact that this aggravating circumstance was not found to be valid in the trial of the brother, Nathaniel Jackson, is not controlling. Different evidence exists in the two cases. This Court stated, in Nathaniel's case, that evidence adduced at trial

revealed neither Nathaniel nor Clinton knew the victim. Jackson v. State, 502 So.2d 409, 411 (Fla. 1987). In this case, however, it was established through testimony that Clinton had prior contact with the victim, and was therefore at risk of being identified (R 664). Appellee submits that it was Clinton, not Nathaniel, who made the decision to rob the sole proprietor who was alone in the store. Clinton, not Nathaniel, actually committed the murder. Therefore, Clinton's motives in pulling the trigger are at issue in this case.

Clearly, the avoidance of arrest was a dominant factor in the planning and execution of the crime. This is not a case where the shooting may have occurred simply to allow the two men to escape the scene with their lives. Cf. Armstrong v. State, 399 So.2d 953 (Fla. 1981), cert. denied, 464 U.S. 865, 78 L.Ed.2d 177, 104 S.Ct. 203 (1983). Rather, the intentional killing was carried out to prevent the victim from capturing appellant's brother and prevent the victim from identifying appellant, with whom he had prior contact.

This case does not call for speculation. Evidence of the surrounding circumstances leads to the inescapable conclusion that appellant gunned the victim down for the dominant purpose of avoiding apprehension.

ISSUE XII

IT WAS ERROR TO ALLOW THE STATE TO ARGUE TO THE JURY DEFENDANT'S LACK OF REMORSE AND FAILURE TO ACKNOWLEDGE GUILT. (As stated by Appellant).

Appellee acknowledges that lack of remorse should be considered neither as an aggravating factor nor as an enhancement of an aggravating factor in a capital case. Huff v. State, 495 So.2d 145, 153 (Fla. 1986). However, in this case, appellant "opened the door" to this line of inquiry by testifying that he was very sorry that the victim, Herbert Phillibert, was dead (R 1138). Walton v. State, 481 So.2d 1197 (Fla. 1985). While defense counsel insisted that remorse would not be presented as a mitigating factor (R 1149), he nevertheless elicited direct testimony from appellant that he was sorry Mr. Phillibert was dead. Thus, the prosecutor's argument on the issue of remorse during the penalty phase related to an inference reasonably drawn from the evidence. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). Furthermore, appellant was not prejudiced, because defense counsel was allowed to use that same evidence on appellant's behalf in closing argument:

> PROSECUTOR: All I am simply suggesting, Judge, is that I am at this point entitled to let the jury know that this statement I am sorry Mr. Phillibert is dead is no more than that. It is not remorse, and I am entitled to tell the jury. It does in the establishing of remorse.
>
> DEFENSE COUNSEL: I can talk about that statement then, too?

THE COURT: Sure. (R 1149-1150).

The record clearly indicates that lack of remorse was not offered as an aggravating factor; rather, the prosecutor properly rebutted the existence of remorse after defense counsel "opened the door" by eliciting testimony on the issue. Therefore, the trial court did not err in allowing the state's argument.

CONCLUSION

Based upon the foregoing facts, arguments and citations of authorities, appellee respectfully requests this Honorable Court to affirm the judgment and sentence of the lower court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Michele Taylor

MICHELE TAYLOR
Assistant Attorney General
Florida Bar #: 0616648
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard J. Sanders, Esquire, 2728 - 52 Street South, Gulfport, Florida 33707, this 17th day of May, 1989.

Michele Taylor

OF COUNSEL FOR APPELLEE