IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner/Cross-Respondent,

v.

Case No. 73,822

ROLAND SMITH,

Respondent/Cross-Petitioner.

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

REPLY BRIEF OF THE PETITIONER/CROSS-RESPONDENT

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SUMMARY OF THE ARGUMENT

I. The respondent/cross-petitioner (hereinafter referred to as the "respondent") was not entitled to an instruction on the defense of excusable homicide since the respondent did not request such an instruction or object to the trial court's failure to give the instruction. Although the trial court has the responsibility to give proper jury instructions, a defendant has the burden to request a more complete charge when a court fails or neglects to charge the jury on some phase of the evidence. In addition, since there was little if any evidence presented to support a defense of excusable homicide, any error in the trial court's failure to provide a defense instruction on its own initiative is clearly harmless.

II. The trial court's failure to give the long form excusable homicide definition as part of its instruction on manslaughter does not amount to fundamental error. The jury was not deprived of its opportunity to "pardon" the respondent by convicting him of manslaughter, since it was correctly instructed on the positive elements of that offense. This Court has previously held that it is not fundamental error to give an incomplete jury instruction on manslaughter when a defendant is convicted of second degree murder. Any error in the manslaughter instruction in this case is particularly harmless since it did not negate the respondent's defense of justifiable homicide.

111. The trial court did not err in declaring Ms. Estes to be a court witness and admitting into evidence various prior statements by Ms. Estes. Since the question of self defense was the only relevant issue, Ms. Estes proved to be an adverse witness when her testimony changed to say Cascio had acted aggressively toward the respondent and that the respondent had repeatedly asked Cascio to leave before the respondent shot him. Because Ms. Estes had told the story several times without Cascio's aggression or the respondent's request to leave, the prosecutor could not vouch for her credibility and the court did not err in calling her as a court witness. Whereas Estes was properly called as a court witness, cross-examination with her prior inconsistent statements was proper.

Neither did the court err in allowing introduction of her statement at the state attorney investigation as substantive evidence as it had been given under oath in a proceeding as formal as a deposition. **As** defense counsel failed to ask that the evidence of collateral crimes be redacted from the statement, and as that evidence was relevant to Estes' credibility and motive to testify, no error was committed in the admission of Estes' statement.

IV. The court did not err in denying a mistrial when a state witness allegedly commented on the respondent's right to remain silent. The questions and answers were not fairly susceptible of being construed as comments on the respondent's right to remain silent as the respondent was speaking

spontaneously, and the prosecutor was simply establishing the facts and pointing out the inconsistencies in the respondent's exculpatory statements. Even if the questions are considered improper, they were clearly harmless because the jury heard elsewhere (the respondent, Deputy Cosimi, and Officer Troy) that the respondent had not told anyone that he acted in self defense.

V. The trial court did not err in denying a mistrial when the prosecutor showed autopsy photographs to Ms. Estes. The defense theory was to present the victim as a villain and they did such a good job that the tears of the young girl could not possibly have elicited sympathy for him. Also, with the evidence presented, Estes' tears could not have affected the outcome of this case, so the respondent is not entitled to relief on this issue.

VI. The court did not err in prohibiting defense witnesses from testifying as to specific acts of violence by the victim. The judge properly limited the corroborating evidence of the victim's reputation and prior acts of violence as being cumulative, repetitive, irrelevant, and remote. In addition, the prosecutor did not cross-examine the respondent's story on Cascio, so the jury heard the unimpeached version of why the respondent feared Cascio. Therefore, any improper limitation was harmless.

ARGUMENT

ISSUE I

WHETHER THE FAILURE TO GIVE THE LONG FORM INSTRUCTION ON THE DEFENSE OF EXCUSABLE HOMICIDE WAS FUNDAMENTAL ERROR WHEN THE SHORT FORM EXCUSABLE HOMICIDE INSTRUCTION HAD BEEN GIVEN, WHEN THE DEFENDANT HAD NEITHER REQUESTED THE LONG FORM INSTRUCTION NOR OBJECTED TO THE GIVING OF THE SHORT FORM INSTRUCTION, AND WHEN THAT DEFENSE WAS SUPPORTED BY THE EVIDENCE.

The respondent argues that fundamental error occurred because the trial court gave an erroneous and misleading instruction that went to the heart of the respondent's defense. However, the record disputes the respondent's assertion that an erroneous and misleading defense instruction was given, and the record also strongly refutes the assertion that excusable homicide was the heart of the respondent's defense.

In this case, there was no excusable homicide instruction given or requested as a defense instruction. The arguably misleading short form instruction was given during the court's charge to the jury on the offense of homicide. This is the distinction noted by the district court between the instant case and Bagley v. State, 119 So.2d 400 (Fla. 1st DCA 1960), which "escapes" the respondent's counsel (respondent's brief, p. 21). In Bagley, as in Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945), the trial court attempted to instruct the jury on a particular defense without a request from defense counsel, and, in doing *so*, gave an incomplete or incorrect instruction. The

instant case does not involve the giving of an inaccurate defense instruction since excusable homicide was not requested or given as a defense instruction.

The propriety of giving the long form excusable homicide instruction as part of the definition of the offense charged and the propriety of giving the same instruction as a defense instruction are separate issues which require different considerations, which is precisely why the district court certified two different questions to cover the separate factual situations which may necessitate the giving of the excusable homicide instruction. The respondent's brief repeatedly mixes the two contexts which may require the instruction, for example, arguing that "the giving of the manslaughter instruction requires the complete definition of justifiable and excusable homicide" (respondent's brief, p. 20) in addressing the certified question of whether fundamental error occurred in the failure to give excusable homicide as a defense instruction.

The fact that the short form excusable homicide instruction was given, as noted in the certified question, is only relevant once the determination has been made that it was error to omit excusable homicide as a defense instruction, since the giving of the instruction elsewhere in the jury charge may defuse (or exacerbate) any possible prejudice resulting from the lack of a defense instruction. See, Tobey v. State, 533 So.2d 1198 (Fla. 2d DCA 1988); Banda v. State, 536 So.2d 221 (Fla. 1988)(cases which mix contexts requiring the excusable homicide instruction in

rejecting claims of fundamental error). For example, if a reviewing court decides that the failure to give a defense instruction of excusable homicide was error, the fact that the instruction as given earlier in the charge was arguably misleading might have some weight in determining the effect of the error on the jury. However, the initial focus presented by the first certified question should be whether the failure to give a defense instruction of excusable homicide, regardless of whether or not any form of excusable homicide was given in conjunction with the manslaughter instruction, amounts to error.

The respondent boldly asserts that excusable homicide was the heart of his defense. The district court found that there was evidence to support the defense of excusable homicide. However, even if some evidence arguably supported an excusable homicide defense, the "heart" of respondent's defense was clearly self defense. The respondent's brief repeatedly emphasizes that his defense was self defense (respondent's brief, pp. 20, 21, 26), and even explicitly states that "the issue here was not accidental or unintentional shooting" (p. 26). In this regard, the respondent exhibits a common misunderstanding about the excusable homicide instruction, by more or less equating it with a self defense instruction. For example, the respondent's brief characterizes the instant case where no excusable homicide defense instruction was given as presenting a factual situation involving "a misleading instruction on self defense" (p. 21).

Excusable homicide includes those killings which occur by accident and misfortune in certain situations, while self defense is encompassed in the definition of justifiable homicide, which sets parameters on the reasonable use of force in defending oneself or others. **§§782.02, 782.03 Fla. Stat. (1985).** The only factual situation arguably encompassed by the excusable homicide definition which applies to the facts of this case is a homicide committed by accident and misfortune in the heat of passion, upon sudden and sufficient provocation. This Court recognized many years ago that the "heat of passion" state of mind is inconsistent with the theory of self defense. In Disney v. State, 72 Fla. 492, 73 So. 598 (1916), this Court stated:

> A killing in the "heat of passion" occurs when the state of mind of the slayer is necessarily different from that when the killing is done in self defense. In the heat of passion the slayer is oblivious to his real or apparent situation. Whether he believes or does not believe that he is in danger is immaterial: it has no bearing upon the question. He is intoxicated by his passion, is impelled by a blind and unreasonable fury to regress his real or imagined injury, and while in that condition of frenzy and distraction fires the fatal shot. In that condition of mind, premeditation is supposed to be impossible, and depravity which characterizes murder in the second degree absent.

73 So. at 601.

The respondent's testimony and defense counsel's arguments to the jury clearly indicate that the respondent's defense was justifiable rather than excusable homicide (R. 887-893, 1014, 1311-1319). Defense counsel's closing argument clearly focused

on the theory of self defense (R. 1311-1319). The respondent testified that he was well aware of the victim's history of violence, and he asked him to leave the house because he noticed his mood was changing, which he had noted in the past to be a signal for violence (R. 887). The respondent nicely asked the victim to leave, and then noted that the victim was wearing a jacket although it was eighty two degrees outside (R. 888). The respondent thought the victim had a gun, as he "always did" and the respondent grabbed his own gun (R. 889). The respondent deliberately loaded the gun and cocked it in front of the victim (R. 925). When the respondent asked how he was feeling at the time, he answered as follows:

> I would think if a man asked me to leave his home, I would honor it and leave. If a guy wouldn't leave his home and he was scared of this guy, and he thought he had a gun because he always did before, and he tried to defend him you know to protect himself with something, you would think the guy would just kind of go. Okay. He didn't. He kept coming and he's walking slow and he's looking at me in the eye, and I mean, I saw that look in his eye, like the night he attacked me before. Just that look.
>
> He comes at me and he says: I'm going to stuff that gun in your mouth, punk. He goes: right here. Right here. (indicating.) In other words, "right here," wasn't meaning, you know, to shoot in his mouth. He was showing me where he was going to stuff it in my mouth on him. "Right here. Right here." I'm just like this. I'm backing up. There is really not -- I'm right here. He's coming in closer and I go this way and come around this way, and he comes real close and I push him off like this. I'm surprised, surprised he doesn't get it out of my hand right then.

> I guess because my arm is longer and I got him pushed away, the circle comes around this way, and he comes at me and I yell: Stop. Stop. And then I fired.

(R. *890-891).*

Thus, according to the respondent's version of the murder, the respondent had carefully reflected upon the victim's history of violence, the probability that the victim was carrying a gun, and he made a rational decision to shoot the victim when the victim continued to approach the respondent in a threatening manner. The respondent never testified that the gun went off accidentally or that he didn't mean to shoot the victim.

Even if the evidence arguably supported an excusable homicide defense, as noted by the district court, the trial court does not have the burden of combing through the evidence to determine which defense instructions may be appropriate. Although it is true that the trial judge has a duty to give complete and accurate instructions, this duty does not relieve defense counsel of the burden of determining which instructions should be given consistent with the theory of defense. To require a trial court to determine strictly from the evidence and without any input from defense counsel which defense instructions should be given would not only place an unrealistically severe burden on trial judges, as noted by the district court below, but would also abrogate **Rule** 3.390, **Florida Rules of Criminal Procedure,** and would allow trial courts to improperly invade the province of defense counsel as to this responsibility. If defense counsel

makes a strategic decision that he does not want to emphasize a weak excusable homicide defense when there is a much more plausible self defense argument to be made, the trial court does not have the right to override this strategy and give an unwanted instruction. None of the cases cited by the respondent require the trial court to make the initial determination of which defense instructions are appropriate from the evidence, as part of the court's duty to give correct and accurate instructions, or relieve defense counsel from the burden of requesting a more complete instruction when the court has omitted a charge necessary to the defense. Bagley, supra.

The respondent argues that if the burden was on defense counsel to request a proper excusable homicide instruction, then he was provided ineffective assistance of counsel at trial in that the excusable homicide instruction was not requested. However, as explained above, this can simply be attributed to a strategic decision not to emphasize a less plausible and inconsistent defense.[1] The heart of respondent's defense was clearly justifiable homicide, and defense counsel insured that

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[1] Foreman v. State, 47 So.2d 308 (Fla. 1950), offers an example of unusual facts which support a mixed defense of justifiable and excusable homicide. The defendant was being threatened by and tried to shoot one man, but accidently killed an innocent bystander instead. This Court noted that the defendant's version was "justifiable so far as the defense of himself against the assault of the man was concerned, excusable so far as missing the man and killing another." 47 So.2d at 309.

the jury was completely and accurately instructed on that defense (R. 1014).

Since defense counsel did not request an excusable homicide defense instruction, and the trial court correctly and accurately instructed the jury on the defense instructions requested, including the heart of the respondent's defense, no fundamental error has been demonstrated on these facts. Even if some error is found due to the district court's determination that some evidence was presented to support an excusable homicide defense, it was not fundamental since the respondent's primary theory of defense was not negated. As in Disney, supra, there is "nothing in these charges which precluded the jury from considering the evidence as to self defense." 73 So. at 599. Therefore, the respondent is not entitled to relief on this issue.

ISSUE II

WHETHER THE FAILURE TO GIVE THE LONG FORM INSTRUCTION ON THE DEFENSE OF EXCUSABLE HOMICIDE WAS FUNDAMENTAL ERROR WHEN A DEFENDANT WAS CONVICTED OF SECOND DEGREE MURDER, WHEN THE TRIAL COURT HAD FOLLOWED THE STANDARD JURY INSTRUCTIONS AND GIVEN THE SHORT FORM INSTRUCTION ON EXCUSABLE HOMICIDE AT THE OUTSET OF THE HOMICIDE INSTRUCTIONS AND HAD GIVEN NO FURTHER INSTRUCTION ON EXCUSABLE HOMICIDE IN CONNECTION WITH ITS INSTRUCTION ON MANSLAUGHTER.

Case law requires the long form excusable homicide instruction to be given in conjunction with the definition of manslaughter, so as to avoid the arguably misleading short form definition of excusable homicide. Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987). Since the trial court gave the short excusable homicide instruction in this case, it is clear that some error occurred. The focus of the second question certified by the district court requires an analysis to determine whether the error was harmless or fundamental.

The respondent cites the following cases as support for his position that the trial court's failure to properly instruct the jury on the next-step lesser included offense "constitutes fundamental per se reversible error": Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986); State v. Abreau, 363 So.2d 1063 (Fla. 1978); Reddick v. State, 394 So.2d 417 (Fla. 1981); and Wheat v. State, 433 So.2d 1290 (Fla. 1st DCA 1983) (respondent's brief, p. 25). None of these cases address the proposition for which they are cited. Abreau, Reddick and Wheat involve the denial of a

requested instruction on a lesser included offense, so fundamental error was not at issue. Abreau did not establish a "per se" rule according to how many steps separate the offenses but focuses on whether the jury had the opportunity to "pardon" a defendant. The two-step rule of Abreau is not to be applied blindly, without regard to the facts of a particular case. Acensio v. State, 497 So.2d 640 (Fla. 1986). Alejo held that the failure to define justifiable homicide, excusable homicide, and culpable negligence in conjunction with a manslaughter instruction amounted to fundamental error because the instruction was not sufficiently complete and accurate to prevent misleading the jury and negating the defendant's theory of defense. Simply because some cases have announced a "per se reversible" rule and others have found this error to be fundamental on certain facts does not support the broad assertion that this error is always fundamental. In fact, the respondent's insistence on a "per se" rule indicates his concern that the facts of the instant case would not support such a finding on their own.

The failure to properly instruct the jury on the next-step lesser included offense does not necessarily amount to fundamental error. In State v. Bryan, 287 So.2d 73 (Fla. 1973), cert. denied, 417 U.S. 912, 94 S.Ct. 2611, 41 L.Ed.2d 216 (1974), this Court found that there was no fundamental error in the giving of a manslaughter instruction without defining some of the elements of that offense even though the defendant was convicted of second degree murder. Bryan noted that "[w]hat is important

is that sufficient instructions -- not necessarily academically perfect ones -- be given as adequate guidance to enable a jury to arrive at a verdict based upon the law as applied to the evidence before them." 287 So.2d at 75.

It is well settled that the doctrine of fundamental error is only to be applied in rare cases presenting a jurisdictional error or when the interest of justice provide a compelling demand for its application. Smith v. State, 521 So.2d 106 (Fla. 1988). In the area of jury instructions, fundamental error may be found when an inadequate instruction is so flawed as to deprive a defendant of a fair trial. Id. This occurs when an inaccurate instruction either negates a defendant's theory of defense or misleads the jury on the elements of an offense. When the erroneous instruction involves a lesser included offense from that charged, the issue is whether the jury was deprived of its inherent "pardon power". State v. Abreau, supra.

Since the instruction at issue in this case did not negate the respondent's primary theory of defense, justifiable homicide, the dispositive question for consideration herein is whether the jury was deprived of its opportunity to pardon the respondent by convicting him of manslaughter. In its finding of fundamental error below, the district court found that the jury might have convicted the respondent of manslaughter if it had been correctly instructed on that offense, and, therefore, the incorrect instruction deprived the jury of that opportunity.

The fact that the jury had the opportunity to convict the respondent of manslaughter is demonstrated by the verdict form, which specifically lists manslaughter as a lesser included offense (R. 1241). Compare, Acensio, supra. In addition, the jury was instructed that the respondent would be guilty of the lesser included offense of manslaughter if the state proved beyond a reasonable doubt that the victim's death was caused by the act of the respondent, unless the killing was either justifiable or excusable homicide (R. 1361). Since, as the district court found, the jury could not have concluded that the respondent acted justifiably or excusably by returning a verdict of second degree murder, it is not possible that an arguably inaccurate definition of excusable homicide could have affected the jury verdict in this cause.

It should be noted that this case is factually distinguishable from Ortagus, supra, and Segars v. State, 537 So.2d 1052 (Fla. 3d DCA 1989), since the trial judge in this case did in fact instruct the jury that the respondent would not be guilty of manslaughter if the killing was a justifiable or excusable homicide (R. 1361). In those cases, the jury was instructed on the offense of manslaughter without the trial judge even making reference to the defenses of justifiable and excusable homicide.

In addition, it is apparent on the facts of this case that the jury could and would have convicted the respondent of manslaughter even if they had been misled about the definition of

excusable homicide. The problem with the short form excusable homicide instruction is that it seems to suggest that a homicide can never be excusable if a deadly weapon is used. Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983). In fact, the error in the use of that instruction was compounded in this case because the defense attorney argued to the jury during his closing remarks that the phrase, "without any dangerous weapon being used," actually qualifies the entire instruction, when in fact the use of a dangerous weapon only negates the sudden combat method of excusable homicide (R. 1306, 1309-1310, 1343). Id. However, that argument demonstrates the harmlessness of the short form excusable homicide in this case. The jury was told that, since the respondent used a dangerous weapon, if the jury found that the circumstances fit the definition of excusable homicide but for the dangerous weapon, they must convict the respondent of manslaughter (R. 1306, 1343). By convicting the respondent of second degree murder, the jury obviously rejected the theory that this was manslaughter because the facts amounted to excusable homicide but a deadly weapon was used. The jury was also instructed that the respondent was guilty of manslaughter if he used excessive force to defend himself (R. 1361), but the verdict obviously rejected this theory as well.

In conclusion, the jury necessarily considered and rejected that the murder of Cascio by the respondent was excusable homicide, justifiable homicide, manslaughter because it amounted to excusable homicide but a deadly weapon was used, manslaughter

because the respondent used excessive force in defending himself, manslaughter because the death of Cascio was caused by an act of the respondent, and manslaughter because the depravity required for second degree murder was missing. The jury was instructed, correctly or incorrectly, on all of these theories, but chose to convict the respondent of second degree murder. If the jury had convicted the respondent of manslaughter, fundamental error would be obvious since it would be impossible to know whether the jury based their verdict on a correct understanding of law or the misunderstanding that excusable homicide with a deadly weapon amounts to manslaughter. The jury in this case was not deprived of the opportunity of exercising its pardon power, but the danger with the short form excusable homicide instruction was that the jury had too many opportunities to convict the respondent of manslaughter, including if the killing was legally excusable. Since the jury rejected manslaughter as either a correct or incorrect verdict, the short form excusable homicide instruction could not possibly have affected their verdict of second degree murder. Therefore, any error in giving the instruction was clearly harmless beyond any reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The district court's order for a new trial on this issue should be reversed.[2]

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[2] In a footnote, the respondent argues the following jury instructions should also be corrected on remand: the failure to give an instruction on culpable negligence: a "confusing" instruction on retreat: and the giving of an instruction on flight. However, both courts below agreed that there was no evidence to support a culpable negligence instruction, so it was

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DECLARING MS. ESTES TO BE A COURT WITNESS AND ALLOWING THE STATE TO UTILIZE HER PRIOR STATEMENT, COMPLETE WITH COLLATERAL CRIMES COMMITTED BY THE APPELLANT, AS SUBSTANTIVE EVIDENCE.

The respondent also takes issue with the trial court for calling Ms. Estes as a court witness. As will be shown below, the court did not abuse its discretion in this matter and the respondent is not entitled to relief.

The Florida Rules of Evidence allow judges to call court witnesses.

> (1) The court may call witnesses whom all parties may cross-examine.

Fla. Evid. Code Rule 90.615(1). The general rule permits the trial court to call a witness if his or her expected testimony conflicts with prior statements. Jackson v. State, 498 So.2d 906, 908 (Fla. 1986).

This general rule allowing the calling of court witnesses has been clarified in Brumbley v. State, 453 So.2d 381 (Fla. 1984).

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not required. Reed v. State, 531 So.2d 358 (Fla. 5th DCA 1988). The retreat instruction was given as directed by the standard jury instructions in any self defense case. Fla. Std. Jury Instr. (Crim), 3.04(d). The flight instruction was justified by the respondent's acts of fleeing the scene into the neighborhood, refusing to come out of his neighbor's house, and disposing of the murder weapon. This behavior clearly indicates "... a desire to avoid detection or capture", Shively v. State, 474 So.2d 352, 353 (Fla. 5th DCA 1985), as opposed to creating a momentary, temporary delay in capture. Compare, Payne v. State, 14 F.L.W. 771 (Fla. 1st DCA March 28, 1989).

> It is within the discretion of the court to call a witness as a court witness on motion of a party on the ground that the witness has become uncooperative, McCloud v. State, 335 So.2d 257 (Fla. 1976), or because the moving party does not wish to vouch for the credibility of the witness, Enmund v. State, 399 So.2d 1362 (Fla. 1981), reversed on other grounds, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

453 So.2d at 384.

A court's witness may be impeached by prior inconsistent statements if that witness' in-court testimony proves adverse, i.e., "actually harmful" to the impeaching party. Brumbley at 384. Implicit in being considered harmful to the interest of the impeaching party is that the testimony of the witness is relevant, material, and necessary to the factual question in issue. Jackson at 908.

The court did not abuse its discretion in calling Ms. Estes because the state reasonably did not wish to vouch for her credibility as her testimony was expected to be, and indeed turned out to be, adverse.

As admitted by the respondent, there was no question Smith shot John Cascio, so the main issue at trial was the reason for the shooting (respondent's brief , p. 3). The reason espoused by Smith was self defense. Only two people saw the shooting, Smith and Estes. When Estes was first interviewed by Detective Kinsella immediately after the shooting she reported that Smith approached Cascio only once and was armed on that first approach. The victim indicated "right here, right here": the respondent

raised the gun to the side of Cascio's head and shot. The victim was just standing there (R. 791-792). Estes later dictated her statement to the detective's secretary. This time she said Smith stood and asked "what did you do?" to which the victim replied "what, what". The respondent approached the victim once, grabbed Cascio by the shirt and pushed him while holding the gun (R. 782). Noting subtle changes in her story, Detective Kinsella asked that Estes give a sworn statement to the state attorney the next day (R. 796).

At the state attorney investigation, Estes told this version: Smith came once to the victim, only once, and had the gun in his hand. Cascio kiddingly said, "right here, right here" then Smith put the gun to the side of Cascio's head and a shot went off (R. 757-758). Right before the trial, at a preliminary hearing, Estes' story changed. She indicated the victim acted violently and that Smith was not armed at first when he made several requests for Cascio to leave.

In her first three statements Estes never indicated any acts of aggression or violence by victim Cascio. Yet, in her last statement after several intervening phone calls with the respondent to, admittedly, "get the story straight," Estes indicated Cascio shoved the defendant repeatedly, refused to leave, and acted violently. She also said that the respondent was not armed when he first approached the victim.

At trial, Estes testified to the following: Smith was sitting at the kitchen table acting normally when Estes and

Cascio entered (R. 581). Smith walked over to Cascio without a gun in his hand (R. 583, 389, 592). Before getting the gun, Smith specifically asked Cascio to leave (R. 543); when he got the gun, Smith approached Cascio, told him to leave again, and then grabbed him by the shirt (R. 593-595). Cascio then supposedly said, "Why don't you put your gun where your mouth is?", made a corresponding gesture, and Smith responded with another request for Cascio to leave (R. 597-599). After Smith put the gun to Cascio's head, they nudged one another in a "get away from me type deal," they then both stood there and Smith shot Cascio (R. 600-601).

In arguing his motion to have the court call Estes as its own witness, the prosecutor brought forth many smaller differences between her expected testimony and her prior statements, such as, the number of beds in the house, the length of Estes and Smith's sexual relationship, and the seconds that passed between putting the gun to Cascio's head and firing. While there were inconsistencies in these and many other aspects of Estes' testimony, like whether Smith could tell Estes was upset by something that transpired between Estes and Cascio and why Estes fled after the shooting, the changes in her stories about the actions and words of Smith and Cascio are the ones that justified calling her as a witness and cross-examining her with prior statements.

In Estes' first statements, Cascio did nothing and was not asked to leave: in her trial testimony Cascio refused to leave,

taunted Smith, and acted aggressively. Smith approached twice and did not arm himself until Cascio refused to leave. Since the necessary factual question was whether Smith acted in self defense, Estes had become adverse in that her testimony was harming the state's case in a relevant, material way.

Defense counsel's attempts, both at trial and on appeal, to explain the inconsistencies by claiming the same questions were not asked or Estes was told to stick to the basics or Estes had been threatened with perjury, are not supported by the record. Detective Kinsella simply told Estes to tell the truth and that he needed to know the facts before interviewing her the first time (R. 788-790). Prior to the dictated statement, he told her to tell the truth and said he wanted the complete story (R. 794-795). She told the story to Kinsella's secretary in narrative form and took advantage of the opportunity to read and correct the transcript of her story (R. 780-781). Prior to the state attorney's investigation, she was sworn and told to tell the truth and to tell everything (R. 797). At the preliminary statement (where her story changed), the prosecutor repeatedly told her to tell the truth (R. 799-800). He did tell her that the system breaks down without the truth, but never told her what version of the story to tell (R. 706-707). A reading of the state attorney investigation (R. 737-770) establishes that Estes was in no way coerced or limited in that telling of the story.

This case differs from <u>Kingery v. State</u>, 523 So.2d 1199 (Fla. 1st DCA 1988) in that the inconsistencies in this case go

directly to whether Smith gave Cascio the opportunity to leave, whether Cascio acted aggressively toward Smith and whether Cascio's actions justified fear that Cascio would use the gun he reputedly carried. Because Estes' testimony was harmful and contrary to what she'd said all along, the judge did not abuse his discretion in calling her as a court witness and allowing her to be cross-examined with prior inconsistent statements. In addition, any error in allowing this evidence was clearly harmless since the same testimony was admitted through Detective Kinsella and his secretary (R. 268-270, 583-605, 609, 779-811). London v. State, 13 F.L.W. 2498 (Fla. 4th DCA Nov. 16, 1988). Furthermore, the sworn statements to the state attorney were substantially the same, and those statements were properly admitted as substantive evidence.

As for the failure to instruct the jury to consider these statements only as impeachment, the district court found that the defense attorney rejected efforts of the court to make some kind of instruction. Rather, he preferred not to bring attention to the statements in the form of an instruction. The judge followed his wishes: he cannot now be heard to complain.

The Florida Rules of Evidence permitted utilization of the investigation statement. **Fla. Evid. Code Rule 90.801(2)(a)** provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:

(a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition.

"The prior statement may be used as substantive evidence." **Fla. Evid. Code Rule 90.801, Sponsors' Note.** Neither a reading of the Rule, nor case law supports the respondent's argument that the statement does not fit the parameters of the Rule.

At the state attorney investigation, the declarant was put under oath subject to the penalty of perjury. The interview was the equivalent of a deposition in that the declarant was put under oath and then questioned by the prosecutor in the presence of a court reporter. There is no requirement either a neutral magistrate or opposing counsel attend depositions and Estes was a witness, not a criminal defendant so the absence of the defendant's attorney is insignificant.

While statements made to law enforcement officers during investigation do not fit the definition of a "proceeding" as required in **Rule 90.801(2)(a),** State v. Delgado-Santos, 497 So.2d 1199 (Fla. 1986), statements made to the state attorney, under oath, before a court reporter do. See, Delgado-Santos v. State, 471 So.2d 74, n. 6 (Fla. 3d DCA 1985), aff'd 497 So.2d 1199 (Fla. 1986), and Diamond v. State, 436 So.2d 364 (Fla. 3d DCA 1983). In Diamond, the court found the fact that the statement was a "written statement under oath taken by a state attorney" decisive. Because Estes' prior statement was inconsistent and

given under oath at a formal proceeding equivalent to a deposition, the court did not err in allowing it in as substantive evidence.

The respondent lastly argues about the evidence that Smith used drugs. The defense attorney knew that the state attorney investigation included statements of drug use by the defendant, but did not move to exclude that particular evidence prior to its admission. The judge sought to make sure the jury knew they could not convict Smith of murder because he'd done drugs in the past. The state suggested a Williams'[3] rule instruction (collateral crimes admitted for limited purposes) to offset possible effects of the testimony about drug usage. The defense wanted to "think about it" (R. 008-1011). The judge finally instructed the jury:

> The evidence has established the defendant at some point in time consumed some illegal drugs or substance. That consumption is not at issue in this trial and should not be considered as evidence that the defendant did or did not commit the crime charged.

(R. 1367

There is no doubt the statement was admissible. **Fla.** Evid. Code Rule 90.614(2) provides:

> Extrinsic evidence of a prior inconsistent statement made by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is

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[3] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

> afforded an opportunity to interrogate him on it, or the interests of justice otherwise require. If a witness denies making or does not distinctly admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

While Estes did not deny making the prior statement she did not distinctly admit making it. She instead contended that the questions asked were not the same (R. 584), the state attorney said she'd remember better (R. 603), and the state attorney threatened her with perjury (R. 705). Since none of these assertions are true (as can be determined by reading the statement) the judge did not err in admitting the statement. Moreover, the comment on drugs was relevant to the credibility of Estes and any possible motive to lie. It was also relevant to disprove her assertion that she was limited by the state attorney as to what she could testify to. The defense attorney could have moved to redact the statement where it mentioned prior drug use. He did not. The absence of contemporaneous objection, coupled with the presence or a jury instruction on the significance of drug consumption, preclude relief on this argument.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL WHEN A STATE WITNESS WAS ALLOWED TO COMMENT ON THE APPELLANT'S RIGHT TO REMAIN SILENT.

The respondent requests a new trial due to the prosecutor's comments on his right to remain silent. To assess whether the comments were susceptible of being construed as ones on the appellant's right to silence, it is helpful to go to the beginning of the conversation.

> *Q.* [PROSECUTOR] At that time, did you hear him make any spontaneous statements to yourself and Deputy Cosimi?
>
> A. [WITNESS KERSCHNER] He continually said that, "you've got the wrong person. I haven't done anything."
>
> *Q.* Did he indicate to you shortly thereafter that he had done something, to Deputy Cosimi?
>
> A. Yes, he did.
>
> *Q.* What did he tell you at that point?
>
> A. He told myself and Deputy Cosimi that, "I just shot someone. He was going for my daughter."
>
> *Q.* Now what, if anything, did this Roland Smith say at that time, of being frightened of the victim of this case? What, if anything at all?
>
> DEFENSE COUNSEL: Objection.

(R. 495). A discussion ensued about whether the questions were permissible. The prosecutor promised to be careful to avoid

questions as to physical confrontation, being in fear and having to seek treatment or aid (R. 496). The questions and objections reflected in the respondent's brief ensued.

Because the respondent was spontaneously speaking, questions about the conversation were not comments on the right to remain silent, but were questions on the facts. Should, however, this Court construe the questions as comments on the right to remain silent, the state contends they were not so suggestive as to amount to improper comment. "The test to determine whether the prosecution's remarks amount to comment upon the defendant's right to remain silent is whether the remark is fairly susceptible of such a determination by the jury." State v. Kinchen, 490 So.2d 21 (Fla. 1985).

The risk involved in such a comment is the possibility that the exercise of the right to remain silent could lead to an inference of guilt. This comment does not suggest to the jury that Smith was guilty since he, at the same time, admitted the shooting. In this case, the comment does not suggest anything about the defendant's guilt and is not probative evidence of a tacit admission.

The respondent's reliance on the giving of Miranda warnings in the cases cited by the district court as a critical distinction is not persuasive. The constitutional right to remain silent does not begin or end with Miranda warnings.

Even if the comment might be improper, it is subject to a harmless error analysis. State v. Marshall, 476 So.2d 150 (Fla.

1985). The prosecutor did not ask the defendant himself if he had kept quiet, but rather, asked a detective what was said and what was not said, unlike the comment in Hosper v. State, 513 So.2d 234 (Fla. 3d DCA 1987). In this trial, the questioning of witnesses about the details of their testimony as compared to prior statements was commonplace so the questions of Detective Kerschner were in no way outstanding.

Had the prosecutor not asked this detective whether the respondent had mentioned being afraid of the victim or about the victim being sexually aggressive to his daughter or acting in self defense, the jury would have heard it elsewhere. The defendant testified that all he said on arrest was that he'd shot someone and that he was a good guy (R. 906-907). He admitted never telling anyone he'd shot in self defense (R. 930). Deputy Cosimi testified that Smith said he'd shot someone who was going after his daughter (R. 411). Officer Troy testified that Smith said he'd had to shoot because the victim was trying to steal his daughter (R. 996).

Because the comment was not a comment on the defendant's right to remain silent, and because it was not such that the jury would construe it as a comment on the right to remain silent, and because the jury was made aware of what the defendant did and did not say, there is no reasonable possibility the outcome of this trial would have been different had the comments not been made. Therefore, the respondent is not entitled to relief on this issue.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR SHOWED MS. ESTES AUTOPSY PHOTOS.

The respondent's next assertion is that he is entitled to a new trial because the prosecutor showed three photos of the deceased victim to Ms. Estes, who burst into tears. However, as conceded by the respondent, the photos were admissible. Instead, he takes issue with the effect of Estes' outburst on the jury. "The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error." Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d (1979). Likewise, Estes' outburst was insufficient by itself to elicit sympathy for the victim.

Defense counsel expended considerable effort in making the victim a villain. He made sure the jury knew Cascio had numerous convictions, had been to prison, and was reputedly affiliated with the Mafia. They knew Cascio had told people he's witnessed and participated in mob executions, carried a gun and had used it on at least one occasion. Counsel tried to make Cascio out to be the aggressor in his own murder. It is doubtful that the tears of one confused, little girl who'd had eight stepfathers, one of whom she was having sex with, and who had, by her promises, somewhat caused the murder in question could have moved the jury to sympathy for this victim.

And while the respondent would like to think this was a close case as to self defense, a review of the evidence shows otherwise. There is no doubt that Smith had been convinced by the sentencing hearing that Cascio had twenty-five prior convictions for chop-shopping, had participated in federal racketeering offenses and had spent time in prison. Undoubtedly, he also thought Cascio carried a gun and had used it on occasion. He'd read in the paper Cascio was rumored to be in the Mafia. Smith had even been in a physical fight with Cascio, and knew Cascio's mood to change due to drinking. Smith had witnessed Cascio be declared a habitual criminal and danger to society and heard a prosecutor say he'd pulled a gun on a cop and was implicated in the execution/suicide of another. However, evidence of the day of the murder fails to support the theory that Smith shot Cascio in self defense.

Knowing he was drinking, Smith allowed Cascio to come into his house. Smith even brought him a bottle of Scotch on the way home. There is no indication that Smith was aware that Cascio was putting the moves on Estes. In fact, Smith entrusted his stepdaughter to "Uncle Johnny's" care when he allowed them to go alone to make a phone call. Estes testified that Smith was acting normally on their return to the house. Smith testified that he thought Estes was acting upset, but ascribed it to the phone call she had made.

Then, <u>supposedly</u>, Smith started asking Cascio to leave and Cascio refused. It was Smith who first approached Cascio, even

suspecting Cascio had a gun. Allegedly Smith then got the gun which he had loaded while telling Cascio to get out. Cascio taunted him saying, "I'm going to stuff that gun in your mouth." The respondent was surprised Cascio didn't take the gun away, but merely pushed him. Instead of de-escalating the scene, Smith yelled, "Stop. Stop." as Cascio approached. Then he shot him. ("Supposedly" and "allegedly" because even in her new-favorable-to-the-defendant edition of the story, Estes' testimony contradicts the respondent's story. Certainly, her prior versions are in disagreement with this telling.) At 6' 2-1/2" tall and 180 pounds, Smith was 4-1/2" taller and 15 pounds heavier than Cascio. There is no testimony that Cascio ever made a move that could have been interpreted as reaching for a gun.

Had Cascio been approaching the respondent when shot, the bullet would have ended up in the stairwell. It's resting place in the cabinet and Cascio's wounds belie this theory. After the shooting, Smith hid some drug paraphernalia, changed clothes, ran to two neighbors' houses and called his attorney before calling the police. He also threw away the murder weapon and got a second gun from a bedroom which he then replaced.

Though the evidence <u>might</u> support a finding Smith was reasonably afraid of Cascio, it does not support a finding that Cascio's actions warranted the use of deadly force. Accordingly, a few inconsequential tears over photos of a body shot in the head cannot possibly have affected the verdict in this case. Any error in showing those photos is therefore harmless. <u>See State v. DiGuilio</u>, <u>supra</u>.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN PROHIBITING DEFENSE WITNESSES FROM TESTIFYING AS TO SPECIFIC ACTS OF VIOLENCE ON THE VICTIM'S PART.

The respondent also takes issue with the limitation of the testimony on prior violent acts of the victim. It is clear from the respondent's recitation of the evidence the court allowed (respondent's brief, **p.** 42) that the jury was well aware that Smith knew Cascio had a reputation for violence and that he had even been the object of prior violent acts by the victim. However, he urges that the court erred in not allowing witnesses to corroborate this evidence.

The judge has the right to exercise reasonable control over the presentation of evidence. Fla. **Evid. Code Rule 90.612.** He did not abuse his discretion in limiting questions on Cascio's prior violent acts because the testimony was cumulative, remote, and not relevant to the victim's reputation for violence or violent acts.

Smith testified that Cascio had implied Captain Donahue's death had been an assassination Cascio witnessed. Donahue's involvement/convictions in racketeering are not relevant to any acts of violence by Cascio without proof Cascio killed Donahue himself. Cascio's reputed connection with Mafia was already before the jury. The aggravated assault at LaCave was remote in time and cumulative as far as acts of violence. Verdi's testimony was also remote and cumulative. Fivecoat did testify

that Cascio had a reputation for being violent if crossed, carrying a firearm, being in the Mafia and trying to convince people he was tough and potentially dangerous. Ms. Smith's testimony on the altercation between Smith and Cascio some months prior to the murder was cumulative as Smith testified to this incident at length.

The possible prejudice to the state from much of the foreclosed evidence was a danger that the jury would find that because Cascio was in the Mafia he was violent. As a matter of fact, many Mafia people do not engage in acts of violence; Cascio ran a chop-shop and his Trafficante connections were through gambling. Without proof that Cascio actually participated in executions and assassinations, such testimony was not relevant.

Additionally, while the corroborating evidence might have been nice, the nature of the state's cross-examination did not warrant needlessly cumulative or repetitious corroboration. Smith was not challenged at all on what he knew, suspected or feared about Cascio. Neither was he impeached with prior inconsistent statements. The jury had before them the untainted version of how Smith came to be afraid of Cascio.

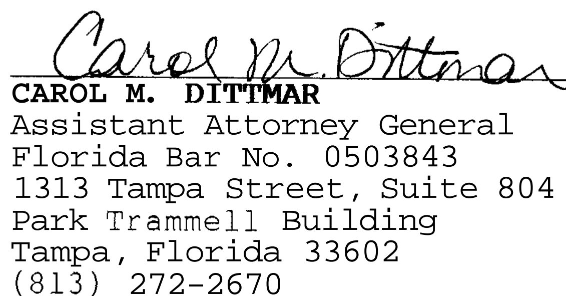
Lastly, while evidence of prior violence and reputation was important, it was less crucial to the jury than evidence about the incident itself. None of the excluded testimony went to Cascio's actions and Smith's fear immediately preceding the murder.

This is not a case like Hager v. State, 439 So.2d 996 (Fla. 4th DCA 1983) or Burk v. State, 497 So.2d 731 (Fla. 2d DCA 1986) where the defendant was precluded from presenting *any* evidence of their knowledge of the victim's reputation and prior violent acts. Rather, this is a case where the judge exercised his discretion to limit cumulative, irrelevant, repetitive and remote corroborative evidence. His decision was not error because the jury was well aware of Cascio's reputation, prior acts and Smith's fear of him and the respondent was not prejudiced. Accordingly, the respondent is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing arguments and citations of authority, the petitioner/cross-respondent respectfully requests this Honorable Court to reverse the district court's order for a new trial and 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 has been furnished by U.S. regular mail to DEBORAH K. BRUECKHEIMER, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida, this 25th day of May, 1989.

CAROL M. DITTMAR

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