IN THE SUPREME COURT OF FLORIDA
Case No. SC01-2315

DEANDRE BAKER,

Petitioner,
v.

STATE OF FLORIDA,

Respondent

RESPONDENT'S ANSWER BRIEF

ON CERTIFIED CONFLICT FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the defendant and the State of Florida was the prosecution in the trial court below. In this brief, the parties will be referred to as the "petitioner" and the "State" respectively.

The following symbols will be used:

"A" refers to the petitioner's Appendix to his Initial Brief.

"IB" refers to the petitioner's Initial Brief

For example, page one of the petitioner's Appendix to his Initial Brief. would appear as (A-1).

STATEMENT OF THE CASE AND FACTS

The petitioner entered a plea of guilty to third-degree murder and leaving the scene of an accident. (A-51). The petitioner was sentenced to twelve point one (12.1) years in prison. (A-53). The petitioner filed a motion for post-conviction relief from the conviction for third-degree felony murder which was summarily denied by the trial court. The Fourth District Court of Appeals affirmed the decision of the trial court in Baker v. State, 793 So. 2d 69 (Fla. 4th DCA 2001), and certified conflict with Lester v. State, 737 So. 2d 1149 (Fla. 2d DCA 1999). The petitioner then sought to invoke the discretionary jurisdiction of this Court. This Court has postponed its decision on jurisdiction. (Order dated December 11, 2001).

The State relies on the facts stated as follows by the Fourth District Court of Appeals in Baker v. State, 793 So. 2d 69 (Fla. 4th DCA 2001):

> Appellant confessed to police that he and a friend took an abandoned truck from an alley. They knew the truck had been stolen because the ignition was out. Appellant began driving, made a right turn, and turned again across a median in front of the decedent's motorcycle, causing a fatal collision. Appellant and his friend fled on foot, but eventually surrendered themselves to the police.
>
> Appellant contends that his plea was involuntary, because he was misled into believing that he could be convicted of a felony murder when, under Lester v. State, 737 So. 2d 1149 (Fla. 2d DCA 1999), he could not.

The petitioner was fifteen at the time of the offense. (A-40). He was treated as an adult because adult sanctions were more appropriate for a case of this nature. (A-41).

The petitioner confessed on tape as follows:

> B: Yeah! Ah, man the guy who I was with that came in earlier.
> G: ... What's his name?
> B: Anthony.

(A-59)

> .....
>
> G: .....Where did Anthony go?
>
> B: He ran too.

(A-62)

> So. Ah we had got stranded on Ah 8th. So, we had saw this truck in the alley, the windows all halfway down....So we needed a ride home. So we went and got in the truck to ride home. So we was coming down "S" and turned at the light by KFC (Kentucky Fried Chicken). So we was coming cross _____. And the motorcycle man was coming, speed'n and I panicked and I, I was, I was nervous and I lost control and he just smashed in front of us...

(A-60).

SUMMARY OF THE ARGUMENT

There is simply no conflict between this case and Lester. This case can be resolver without reference to Lester. The State's argument that there is no conflict is now supported by the petitioner who has conceded, in his initial brief, that his taking of the truck from the alley was an independent act of theft, and, that the resolution of Lester has no bearing on the merits of the petitioner's petition. The petitioner even goes so far to state that Lester was wrongly decided.

If this Court reaches the merits of this case, the State submits there is absolutely no reason, either from a policy or a legal standpoint, to treat the theft of the car, the short drive that immediately followed and the fatal collision as something less than felony murder. There was a close enough nexus between the theft and the killing to support a conviction for felony murder.

ARGUMENT

THERE IS NO CONFLICT BETWEEN BAKER AND LESTER

On March 27, 2000, the petitioner filed his 3.850 motion alleging that he entered the plea of guilty to third degree murder because he "was mislead to believe that 3rd degree murder was the only charge he could lawfully be charged/convicted for." The petitioner claimed his trial attorney was ineffective for his failure to argue that he could not be convicted of third-degree felony murder under Lester v. State, 737 So. 2d 1149 (Fla. 2d DCA 1999)[1].

In its response to the motion, the State argued that the evidence in this particular case, including the petitioner's own confession, supported the conclusion that the killing was part of the same incident as the felony, i.e., the defendant's grand theft of the previously stolen truck, therefore the petitioner could have been convicted as charged, citing to Jones v. State, 502 So. 2d 1375 (Fla. 4th DCA 1987) (evidence was sufficient to conclude killing was part of same incident as felony and thus supported third degree murder conviction where defendant was fleeing in stolen truck, lost control of the truck, drove over the boulevard median and hit an oncoming car, killing the driver), and Parker v. State, 570 So. 2d 1048, 1051 (Fla. 1st DCA 1990) (under

[1]The opinion in Lester v. State, 737 So. 2d 1149 (Fla. 2d DCA 199) was issued June 25, 1999, or 17 days prior to the petitioner entering his plea of guilty on July 12, 1999.

felony-murder statute, factors to be considered in determining whether there has been a break in the chain of circumstances include the relationship between the underlying felony and the homicide in point of time, place and casual relationship; in case of homicide during flight, most important consideration is whether fleeing felon has reached place of temporary safety). Therefore, there was no ineffective assistance of counsel in this case. The trial court summarily denied relief by order of November 7, 2000, which adopted and incorporated by reference the State's Response and the exhibits contained therein.

The petitioner filed his notice of appeal December 8, 2000. Without first requiring a response from the State, the Fourth District Court of Appeals issued its opinion July 25, 2001, affirming the denial of post conviction relief **and** certifying conflict with Lester.

The issue before the appellate court was whether the trial court's summary denial was correct. The appellate court found that the denial should be affirmed because, since the petitioner's theft of the truck constituted a theft separate and apart from the original theft of the truck, the grand theft of the truck moments before the fatal collision was sufficient to support his conviction of felony murder. The appellate court's analysis was the same analysis made in the trial court although the trial court

citied to Jones, and Parker, instead of to Williams.[2]

The State filed a motion for rehearing of the Fourth District's opinion asserting that since the propriety of the trial court's order denying post conviction relief could be affirmed without taking into account the **facts** in Lester, there was no conflict. The Fourth District denied the motion for rehearing. However, the State stands by the assertions in the motion for rehearing and respectfully requests this Court to dismiss the instant case based on the fact that there is no conflict between these two opinions. The State's argument that there is no conflict is now supported by the petitioner who has conceded, in his initial brief, that his taking of the truck from the alley was an independent act of theft, and, that the resolution of Lester has no bearing on the merits of the petitioner's petition. The petitioner even goes so far to state that Lester was wrongly decided.[3]

The facts in Lester are as follows. The defendant was driving a car in Tampa around 10:00 a.m. that had been stolen the evening before by someone else. A passenger in the car testified that he assumed that the defendant knew that the car was stolen because it had no ignition and the defendant had started it with a screwdriver. As the defendant and his friend were driving around, they saw a police car. The

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2. Williams issued February 7, 2001; three months after the trial court's ruling in this case.

[3] See the petitioner's initial brief at pages 2-4, and 8-9.

defendant believed that he had been spotted by the police and took off at high speed from a red light. The defendant ran three stop signs before he collided with another car. The driver of that car later died. The Second District Court of Appeals determined that the defendant was not fleeing the scene of the crime and that the fatal collision was too remote in time and place from the initial theft of the car the night before. Thus, the court vacated the judgement and sentence for third degree murder.

The Second District, unlike the Fourth District in Baker, did not consider whether the defendant's use of the car the day after the theft was itself a theft from which to commence the felony murder chain of circumstances, As the Fourth District stated in Williams:

> *Lester* fails to take into account that the defendant's use of the car the day after the initial taking was a violation of the grand theft statute apart from any crime committed the day before by another. Under *Lester's* facts, it makes no sense to begin the felony murder "chain of circumstances' with the original theft committed by another, instead of from the defendant's felonious conduct immediately preceding and during the fatal accident.

State v. Williams, 776 So. 2d 1066, 1077 (Fla. 4th DCA 2001).

The Fourth District in Baker, adopted this reasoning to certify conflict with Lester. Now that the petitioner has conceded that his taking of the truck from the alley was an independent act of theft, and, that the resolution of Lester has no bearing on the merits of the petitioner's petition, there is simply no conflict between the instant

case and Lester.

The issue before the appellate court, in the instant case, was the propriety of the trial court's summary denial of the post conviction motion, which was not the issue in Lester. The issue before the Lester court was the sufficiency of the evidence to support the conviction, a wholly different issue. Therefore it cannot be said that the appellate court's ruling on the denial of post conviction relief, in the instant case, is in conflict with Lester, which ruled on the sufficiency of the evidence to support the third degree felony murder conviction.

This Court, in Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975), made it clear that its "jurisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law to produce a different result in a case which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves **substantially the same facts** as a prior case. In this second situation, the facts of the case are of the utmost importance." [emphasis added]. See also Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983) ("cases which are cited for conflict that are distinguishable on their facts will not vest this Court with jurisdiction"). The State maintains that the Fourth District Court of Appeal's opinion of July 25, 2001, in the instant case, is not in **direct and express conflict** with the

decision of the Second District Courts of Appeal in Lester, because, as the Fourth District itself made clear in its opinion, the two cases are factually distinguishable. Even the petitioner, in his initial brief to this Court, now agrees that the resolution of Lester is not determinative of the outcome of this case.

Further, the Lester Court did not apply the Parker rule of law to its facts as the Fourth District did here and in Williams. Moreover, because this Court does not have the Lester record before it, (and neither did the Fourth District), it cannot be said that the facts are identical, and the Lester Court erred in not applying the Parker rule to its facts as the Fourth did here and in Williams. Therefore, as this Court has stated, if the two cases can be factually distinguished, or the same rule of law was not applied in the two cases, the cases are not in conflict. Johnston, 442 So. 2d at 950. Thus, the Fourth District erred in certifying conflict between the instant opinion and Lester, because the cases are factually distinguishable, the same rule of law is not being applied to both cases, and the district courts each ruled on different issues being presented for consideration on appeal, i.e., Lester = sufficiency of the evidence and Baker = denial of post conviction relief.

Finally, in his 3.850 motion, the petitioner alleged that his attorney was ineffective for not arguing he could not be convicted of third degree murder under Lester. As shown above, the defense attorney had case law from this district (Jones

v. State, 502 So. 2d 1375 (Fla. 4th DCA 1987) based on which he could properly recommend to the petitioner that he take the plea. Simply because Lester issued 17 days before the petitioner entered his plea of guilty, the existence of Lester did not make the defense attorney ineffective. As has already been pointed out, Lester can be distinguished on the facts. But even if Lester were a change in the law, which clearly it is not, because the petitioner entered his plea of guilty without reserving any issues for appellate review, and his conviction became final, he could not now take advantage of the Lester decision to reverse that conviction on collateral review. As recently stated by this Court in Mitchell v. Moore, 786 So. 2d 521, 529 (Fla. 2001):

> In order for an advantageous decisional change to be fully retroactive to *final* cases on collateral review, it must be of constitutional nature, a "sweeping change of law" of "fundamental significance" constituting a "jurisprudential upheaval[ ]." *Witt v. State*, 387 So.2d 922, 925, 929, 931 (Fla. 1980); *see State v. Callaway*, 658 So.2d 983 (Fla. 1995). A mere "evolutionary refinement" will not abridge the finality of judgments because to do so would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt*, 387 So.2d at 929-30.

For Lester to have been a change in the law that would allow the petitioner to take advantage of its ruling on collateral review, Lester would have had to come from this Court, and would have had to have been of fundamental significance constituting

a jurisprudential upheaval. Lester meets none of the requirements, thus, Lester could not have been used by the trial court or the appellate court to reverse the petitioner's conviction, see, Mathis v. State, 692 So. 2d 156 (Fla. 1997) (*Gray* abolished the crime of attempted felony murder. *Gray* does not apply retroactively to those cases where the convictions had already become final before the issuance of the *Gray* opinion); Nelms v. State, 596 So. 2d 441 (Fla. 1992) (The Supreme Court in *Spencer* determined that the Palm Beach County administrative order was unconstitutional because it systematically excluded a significant portion of the black population from the eastern district jury pool. Then in *Moreland*, the Supreme Court determined that *Spencer* was not a major constitutional change of law which could be raised for the first time in a post conviction motion. Therefore, in *Nelms* the Supreme Court held Nelms could not take advantage of *Spencer* to have his conviction reversed since his conviction had been affirmed three years prior to *Spencer* being decided by the Supreme Court); State v. Glenn, 558 So. 2d 4 (Fla. 1990) (*Hall* held the legislature had no intent of punishing a defendant twice for the single act of displaying a firearm or carrying a firearm while committing a robbery. Because Glenn's conviction had become final prior to the Supreme Court's ruling in *Hall*, he could not obtain relief in a post conviction claim that he was improperly convicted of multiple crimes arising from a single transaction); State v. Safford, 484 So. 2d 1244 (Fla. 1986) (In *Neil* the

Florida Supreme Court abandoned a previously used test for determining the use of peremptory challenges. In Safford, the Supreme Court held that *Neil* was not to be applied to those cases where the original trial and appellate processes were completed when Neil became effective, thus it was not to used via 3.850 motions in collateral attacks on final judgments).

The State submits that, under the rationale of the above cited cases, the petitioner could not have used Lester to attempt to have his conviction reversed via collateral attack. Thus, the denial of the motion for post conviction relief was properly affirmed by the Fourth District. Nelms v. State, 596 So. 2d at 442 (Defense counsel cannot be held ineffective for failing to anticipate the change in the law). In addition, the petitioner has now conceded that Lester has no bearing on the case at bar. Clearly, there is no conflict between this case and the case cited by the Fourth District as the basis for certifying conflict to this Court.

THE PETITIONER WAS PROPERLY CONVICTED OF FELONY MURDER

If this Court proceeds with this instant case, the State argues as follows. This Court has stated that the purpose of the felony murder statute:

> is to protect the public from inherently dangerous situations caused by the commission of the felony.....

Parker v. State, 641 So. 2d 369, 376 (Fla. 1994). (citation omitted).

The Fourth District has added a gloss to this statement:

> Another, more realistic, view is to focus on the punitive aspect of the statute and conclude that the felony murder law is primarily result-oriented in its enhancement of punishment for dangerous conduct connected with a felony that causes the death of another.

State v. Williams, 776 So. 2d 1066, 1070 (Fla. 4th DCA 2001).

In the case at bar, there is absolutely no reason, either from a policy or a legal standpoint, to treat the theft of the car, the short drive that immediately followed and the fatal collision as something less than felony murder. The petitioner was fifteen years old when he stole the truck: not even old enough to have a driver's license, or the training that accompanies it. He then turned into the path of a motorcyclist, killing the rider. This was certainly an inherently dangerous situation stemming from the petitioner's felony, the theft of the truck, and from the fact that he was fifteen years old, unlicenced and should not have been driving under any circumstances.

For the felony murder rule to apply, it is not enough that the underlying crime be connected "in some way" to the fatality. As the Fourth District has stated in Baker v. State, 793 So. 2d 69, 70 (Fla. 4th DCA 2001), relying on State v. Williams, 776 So. 2d 1066, 1072 (Fla. 4th DCA 2001):

> If the [felony murder] rule is to have any deterrent effect, it must not be extended to killings which are collateral to and separate from the underlying felony. Moreover, requiring a close nexus between the initial taking and the killing is particularly appropriate given that the felony murder rule is "a legal fiction in which the intent and the malice to commit the underlying felony is 'transferred' to elevate an unintentional killing to ....murder."

(Citations omitted)

This "close nexus" can be broken if there is what this Court has called "a break in the chain of circumstances" between the felony and the killing. Parker v. State, 641 So. 2d 369 (Fla. 1994). In Parker, there was no such break in the chain of circumstances because the defendant murdered his victim while fleeing from a robbery. There was a close enough nexus between the felony and the killing.

A "break in the chain of circumstances" can occur if the defendant manages to reach a place of safety after the commission of the felony but before the victim's death. Williams v. State, 776 So. 2d 1066 (Fla. 4th DCA 2001). The petitioner has made much of the fact that he was not fleeing and was not being chased or pursued. Therefore, he contends that the felony was complete as soon as he drove off in the truck, relying on cases such as Allen v. State, 690 So. 2d 1332 (Fla. 2d DCA 1997). In Allen, the court held that the fact that the defendant was driving a stolen car when the fatal accident happened was not enough to establish felony murder even though the accident happened a short time after the defendant stole the car. The defendant was

not fleeing and, therefore, there was a break in the chain of circumstances. The victim's death was independent of the felony.

The State disagrees with the petitioner's interpretation of the law. It is true that, as in Allen, Florida Courts have unfortunately tended to concentrate overly on the issue of flight without acknowledging that there are other factors in determining whether there is a close nexus between the felony and the death. It is easy to become focused on flight because flight from a police car as at a high rate of speed is so obviously not independent of the felony; it is an inherently dangerous situation and a fatal car accident is a predictable result. State v. Williams, 776 So. 2d 1066, 1070 (Fla. 4th DCA 2001). Therefore, it is logical for the Courts to determine that, once a defendant has reached a place of safety, there is a break in the chain of circumstances because, now, there is no close nexus between the felony and the killing.

On the facts in Allen v. State, 690 So. 2d 1332 (Fla. 2d DCA 1997), that Court was able to determine that, because the defendant was not fleeing, there was not a close enough nexus between the felony and the killing. However, this does not mean that a defendant can claim he is innocent of felony murder just because he was not "in flight." There are other inherently dangerous situations arising from a felony justifying a determination that there was a close enough nexus between the felony and the killing.

Florida Courts focus on time, distance and the causal relationship between the

underlying felony and the killing to determine whether there is a close enough nexus between the felony and the killing to support a felony-murder conviction. State v. Williams, 776 So. 2d 1066, 1070 (Fla. 4th DCA 2001), citing Parker v. State, 641 So. 2d 369 (Fla. 1994). In this instant case, the fatal crash was not collateral to or separate from the underlying felony. The petitioner and his friend stole the truck because their car had broken down and they needed some way to get home. Unfortunately, the pair, who were both unlicenced and under the minimum driving age, did not let the fact that they could not drive (either from a legal or a practical view) stand in their way. They either did not think to call a friend or relative or take the bus, or they did not care that they were putting others in danger by driving without training or a license.

> So. Ah we had got stranded on Ah 8th. So, we had saw this truck in the alley, the windows all halfway down....So we needed a ride home. So we went and got in the truck to ride home. So we was coming down "S" and turned at the light by KFC (Kentucky Fried Chicken). So we was coming cross _____. And the motorcycle man was coming, speed'n and I panicked and I, I was, I was nervous and I lost control and he just smashed in front of us...

(A-60).

As the victim's father succinctly put it:

> Well, the only thing I can say concerning Mr. Baker, he was acting as an adult because this wasn't a bicycle he was stealing. Would he still have the same frame of mind if he was riding a bicycle in traffic he have when

he stole the vehicle...

(A -32).

This is the crux of the matter in this case: it was a fifteen year old stealing a truck and driving it without a license to get home. The petitioner was still "engaged in the perpetration" of the felony because he had stolen the car to get home and had not reached that place yet. This was all one continuing criminal episode. On these facts, there was a sufficient nexus between the theft and the fatal crash. It is thus immaterial whether the petitioner was fleeing or not. There simply was no break in the chain of circumstances. A motorcyclist needlessly died because an unlicenced, under-age juvenile thought that they could, with impunity, steal a truck to drive home just because they happened to be stranded somewhere. On this record, the Fourth District correctly affirmed the summary denial of the petitioner's motion for post conviction relief below. This Court should not reverse the Fourth District.

CONCLUSION

Because the petitioner's claim is meritless and because there is also no conflict between Lester and the case at bar, this petition should be dismissed or denied without further ado.[4]

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[4]The State would briefly note that this case involves the summary denial of a Rule 3.850 motion. Even if this Court agrees with the merits of the petitioner's argument, this Court should not, as the petitioner requests in his initial brief, set aside the petitioner's plea and conviction but simply should

Respectfully submitted,

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reverse the Fourth District and remand the cause for the attachment of the record refuting the petitioner's claims or for the holding of an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief" has been furnished by U.S. mail this _____ 2002, to:

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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this document, in accordance with Rule 9.210 of the Florida Rules of Appellate Procedure, has been prepared with 14 Point Times New Roman.

_____
Of Counsel