IN THE SUPREME COURT OF FLORIDA

SHANA BARNES,

Petitioner,

Case No. SC06-662

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Shana Barnes, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

The record on appeal consists of nine volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief on the Merits. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as being generally supported by the record.

SUMMARY OF ARGUMENT

ISSUE I.

This Court in Young v. State, 645 So.2d 965 (Fla. 1994), ruled that a videotape depicting an interview with the victims, even when the videotape is admitted into evidence, could not be permitted into the jury room during deliberations. However, this Court set out a well-recognized exception to that general rule relating to evidence of a confession of a criminal defendant. Many jurisdictions have applied this common rule to permit the jury to use transcripts of a criminal defendant's admissions during deliberations. This rule applies here. While the form of the exhibit admitted here was not a typical transcribed admission of a defendant, the State asserts that the basis for the admission of Petitioner's prior testimony in evidence controls its proper use as an exhibit, rather than the form of the evidence. The reasoning of the courts, including this Court in Young, which except incriminating admissions from the general rule excluding transcripts into the jury room, does not become inapplicable merely because the defendant's admission was made at a prior trial. The rule permitting such admissions into the jury room should not depend on the form of the admission.

ISSUE II.

This Court accepted jurisdiction in this matter to review only one issue. The State believes that this Court did not intend to hear other issues in this case.

ARGUMENT

ISSUE I

DID THE DISTRICT COURT OF APPEAL ERR IN RULING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING WRITTEN EXCERPTS OF APPELLANT'S PRIOR TRIAL TESTIMONY ON THE GROUND THAT THE EXCERPTS CONSTITUTED SWORN ADMISSIONS? (Restated)

Standard of review

Whether to allow a jury to have access to the exhibit of a confession in the jury room is within the sound discretion of a trial judge. Thomas v. State, 878 So.2d 458 (Fla. 5th DCA 2004). Such a decision should be affirmed only if the court abuses that discretion.

The trial court's ruling

Prior to trial, Petitioner filed a "Motion in Limine Concerning Prior Testimony of [Petitioner]" (II 205-213). The motion alleged that the State intended to introduce her prior trial testimony at trial. Petitioner acknowledged that her prior testimony was admissible against her as an admission, citing State v. Billie, 881 So.2d 637 (Fla. 3d DCA 2004), but argued that she was entitled to "redaction of improper material included in the testimony" (II 205). Petitioner then indicated 81 separate portions of the prior testimony to which she objected and moved to exclude (II 207-213).

The court held a lengthy hearing on this motion, sustaining, by the count of undersigned counsel, 50 of Petitioner's objections to the prior testimony (II 385-400, III 401-484). During this hearing, the State indicated that it planned to have the prior testimony read to the jury, but also that it planned to have the prior testimony, with the redacted portions removed, transcribed and admitted as an exhibit (II 389). Petitioner indicated that she would object to the admission of an actual transcript of the prior testimony, arguing that the State should only be permitted to read the prior testimony into the record at trial. The State argued that the prior testimony should be treated like any other sworn admission by the defendant, which could be transcribed and admitted into evidence (II 391). The court deferred ruling until trial (II 393). At trial, the court overruled Petitioner's objection (VI 429).

After Petitioner's heavily-edited prior testimony was read to the jury, the State moved for the admission of the transcript (VIII 641-642). Petitioner reiterated her objection that transcribing her prior testimony unduly emphasized it over everything else (VIII 642). The prosecutor argued that what was read to the jury was not "actual testimony;" it was simply publishing a sworn admission by the defendant to the jury (VIII

642-643). Thus, the State argued, Petitioner's complaint that the court was allowing the admission of a transcript of her trial testimony was an inaccurate characterization. The court admitted the exhibit on the following grounds:

> On the issue of state's quintuplet A for identification, while we are on the subject, I did in the previous ruling and I will again consider this to be not testimony in the trial but a sworn statement from [Petitioner] containing admissions. It was made of course under oath and with counsel present in a situation where she voluntarily gave the testimony after being apprised of her rights and with all the procedural and substantive safeguards requisite for such a statement to be admissible. And I allowed it on that basis.
>
> I think the state could have just offered it as an exhibit and gotten it admitted that way. But they certainly have the right to offer an admissible document into evidence and then publish it to the jury which is what they did.
>
> It was not [Petitioner] sitting here and testifying live to the jury. It was just the reading or the publishing of this document. So I do think it is a different situation from the state wanting to transcribe the testimony of their lead detective and send it back to the jury room with the jury.
>
> So I will overrule again the objection to its admission.

(VIII 644-645).

The District Court of Appeal's ruling

On appeal, Petitioner argued that the trial court's ruling above constituted reversible error. The District Court ruled as follows:

> Appellant next argues that the trial judge erred by allowing the jury to take an exhibit containing portions of Appellant's prior testimony into the jury room. Appellant argues that this constituted error because the jury might have placed greater emphasis on Appellant's prior testimony than it did on other witness testimony. *See Young v. State*, 645 So.2d 965 (Fla. 1994). We review the admission or exclusion of evidence for an abuse of discretion. *See McBride v. State*, 913 So.2d 696 (Fla. 1st DCA 2005). The trial judge properly admitted the statements in question as an exhibit of numerous admissions made by the Appellant. *See Delacruz v. State*, 734 So. 2d 1116, 1122 (Fla. 1st DCA 1999) (finding that defendant's prior statements, whether exculpatory or not, were admissible against defendant as admissions under section 90.803(18), Florida Statutes (citing Charles W. Ehrhardt, *Florida Evidence* § 803.18, at 733-34 (1999 ed.))). The fact that the State published the exhibit to the jury does not turn the exhibit into "testimony." Accordingly, the trial judge acted within his discretion to allow the jury to take the exhibit into the jury room. *See* Fla. R. Crim. P. 3.400(a)(4) (permitting the judge to allow "all things received into evidence other than depositions" into the jury room).

Barnes v. State, 922 So. 2d 380, 382 (Fla. 1st DCA 2006).

Merits

Petitioner claims that the trial court erroneously permitted the jury to take the transcribed statements into the jury room, arguing that the evidence constituted either a "deposition" or "trial testimony," and that the jury is not permitted access to such matters.

Florida Rule of Criminal Procedure 3.400(a)(4) permits the court, at its discretion, to allow "all things received into evidence other than depositions" into the jury room. In Young v. State, 645 So.2d 965 (Fla. 1994), this Court discussed the circumstances under which the jury may take evidence consisting of recorded statements to the jury room. During the trial in Young, the videotaped Child Protection Team interviews of the victims were admitted into evidence pursuant to section 90.803(23), Florida Statutes, and viewed by the jury at trial. During jury deliberation, the jury had the bailiff bring the videotapes and video equipment into the jury room. Young at 966.

This Court held that the videotaped interviews should not have been permitted into the jury room during deliberations. In making this ruling, this Court distinguished the videotaped interview from evidence of confessions:

> [B]ecause written confessions traditionally have been permitted in the jury room, most courts have held that the trial judge has the discretion to allow jurors to listen

> to audiotapes of confessions during their deliberations. *See* Jonathan M. Purver, *Annotation, Permitting Documents or Tape Recordings Containing Confessions of Guilt or Incriminating Admissions to be Taken Into Jury Room in Criminal Case*, 37 A.L.R. 3d 238 (1971). Presumably, the same rule would be applicable to videotaped confessions.
>
> We see a significant distinction between videotaped confessions and videotapes of interviews of children suspected of having been sexually abused. Confessions are statements against the declarant's interest which are only permitted into evidence after a determination that they have been freely and voluntarily given. When introduced to prove sexual abuse, the videotaped interviews of children are self-serving in the sense that they are testimonial in nature and assert the truth of the children's statements. They are more akin to depositions de bene esse in which testimony is preserved for later introduction at the trial. We share the view of the district court of appeal that allowing a jury to have access to videotaped witness statements during deliberations has much the same prejudicial effect as submitting depositions to the jury during deliberations.

Young at 967.

At least one other Florida court has distinguished a videotaped confession from a videotaped deposition based specifically upon this language in Young. Thomas v. State, 878 So.2d 458 (Fla. 5th DCA 2004) (ruling that the decision of whether to allow a jury to have access to a videotaped confession in the jury room was within the sound discretion of the trial court). It was this distinction between confessions

and the videotaped interview in Young on which the District Court here based its ruling: the disputed evidence constituted an incriminating admission in accordance with Young. This conclusion was correct, was consistent with Young, and explains why none of the cases Petition cites applies herein.

First, it must be recognized that Petitioner acknowledged from the outset that her testimony at the prior trial was admissible at this trial as an admission (II 205), an assessment with which the trial court correctly agreed. See Harrison v. United States, 392 U.S. 219 (1968)(As a "general evidentiary rule," "a defendant's testimony at a former trial is admissible in evidence against him in later proceedings"); State v. Billie, supra (the defendant's testimony at a prior trial is admissible against the defendant at the retrial, as an admission pursuant to section 90.803(18), Florida Statutes). See also Addison v. State, 653 So.2d 482 (Fla. 5th DCA 1995)(defendant's out-of-court confession to a detective, which was taped and then transcribed into a written document and used as evidence against appellant at trial, was admissible pursuant to section 90.803(18)).

Petitioner's acknowledgment forecloses any argument before this Court that the disputed exhibit did not constitute

admissions by her, admissible pursuant to section 90.803(18), Florida Statutes.

As this Court noted in Young, confessions are "statements against the declarant's interest," and are therefore accorded different treatment than other evidence, in particular, whether they can be taken into the jury room as exhibits. The Illinois Supreme Court detailed the reasons why written confessions may be taken into the jury room while other types of written evidence, such as depositions or dying declarations, may not:

> The reasons for excluding [depositions and dying declarations] from the jury room are (1) that the statements of a deponent might be given undue emphasis beyond the scope of ordinary testimony if the jury were allowed to review such recorded statements during their deliberations, and (2) that dying declarations, which are admitted into evidence as a hearsay exception, are not subject to cross-examination and should therefore be accorded no greater emphasis than present practices achieve. Nor have such persons been physically present at the trial where the jury would be able to observe them and evaluate the probative value of their testimony. **Conversely, a signed confession which has been shown by the State to be free from coercive conditions is among the strongest kinds of physical evidence the prosecution may produce, and when the tests of admissibility have been met and the defense afforded the full opportunity to point out any circumstances which may go to undermine the credibility of the confession in the eyes of the jury, there appears to us no valid reason to preclude the written confession from going to the jury room along with other**

> **exhibits which the trial judge may deem proper.** Particularly is this true now that the *Escobedo* (378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758) and *Miranda* (384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602) rules afford additional safeguards against the possibility of coerced confessions coming before a jury. Nor, in our opinion, is there a logical reason to distinguish between a written confession and other physical evidence of a concededly damaging nature such as murder weapons, bloodstained clothing or gruesome photographs insofar as their presence in the jury room is concerned. In our judgment all should be governed by the general rule governing exhibits of physical evidence which may be taken to the jury room if the sound discretion of the trial judge dictates that they bear directly on the charge. In the absence of an abuse of that discretion to the prejudice of defendant, its exercise will not be disturbed on appeal.

People v. Caldwell, 236 N.E.2d 706, 714 (Ill. 1968)

The majority of jurisdictions follow this rule, distinguishing written confessions from other written forms of evidence, such as depositions, see generally Jonathan M. Purver, *Annotation, Permitting Documents or Tape Recordings Containing Confessions of Guilt or Incriminating Admissions to be Taken Into Jury Room in Criminal Case*, 37 A.L.R. 3d 238 (1971). While allowing jurors access to written confessions carries the same risk as deposition that the written statements might be given "undue emphasis beyond the scope of ordinary testimony," the risk is deemed outweighed by the nature of the evidence.

Many jurisdictions have specifically applied this rule to transcriptions of statements admitted under the hearsay exception regarding admissions by the defendant. See e.g. United States v. Camargo, 908 F.2d 179, 182 (7th Cir. 1990) (Trial court did not err by permitting the transcripts of tape-recorded conversations to be used during jury deliberations); State v. Kennedy, 592 P.2d 1288, 1293 (Ariz. Ct. App. 1979) (Trial court did not err in allowing the jurors to take the transcripts of the audiotapes admitted as admissions of the defendants into the jury room); People v. Fujita, 117 Cal. Rptr. 757, 768 (Cal. Ct. App. 1974)(Trial court did not err in permitting the jury to take transcripts of tape-recorded phone conversations that were admitted as admissions of the defendants); People v. Miller, 829 P.2d 443 (Colo. App. 1991) (Transcript of a defendant's confession, which has been admitted into evidence, may be taken into the jury room during deliberations so long as the defense is given an opportunity to point out any circumstances that may undermine its credibility); Holloway v. State, 809 So.2d 598, 608 (Miss. 2000) (Trial court did not err in allowing a transcript of an audiotaped recording of the defendant's statement to be taken into the jury room during deliberations); State v. Ahmadjian, 438 A.2d 1070, 1082 (R.I. 1981)(Trial court did not err in allowing transcripts of

conversations that were the product of wiretaps and electronic surveillance to be used by the jury during their deliberations once they have been properly admitted as a full exhibit); Bigham v. State, 148 S.W.2d 835, 840 (1941)(Transcribed notes of a conversation which allegedly occurred at the time a bribe was made, admitted without objection as a State's exhibit, were properly furnished to the jury upon request); State v. Forrester, 587 P.2d 179, 185-86 (Wash. Ct. App. 1978), approved, State v. Frazier, 661 P.2d 126 (Wash. 1983)(Trial court did not abuse its discretion when it admitted a typed transcript of the defendant's tape-recorded confession and allowed the jury to examine the transcript during their deliberations, along with the tape-recording itself); State v. Dietz, 390 S.E.2d 15, 28-29 (W. Va. 1990)("[I]n a criminal case it is not reversible error for a trial court to allow a document, such as a transcript, a written statement, or a tape recording, which contains a confession or incriminating statement, and which has already been admitted into evidence, to be taken into the jury room for the jury's use during deliberations").

Petitioner cites Fuller v. United States, 873 A.2d 1108, 1117-1118 (D.C. 2005), for the proposition that transcripts of trial testimony cannot be given to the jury. While it is unclear whether the government in Fuller attempted to admit the

transcripts as admissions pursuant to the hearsay exception, the State acknowledges that some jurisdictions find that the risk that the jury might give undue weight to a transcribed admission does outweigh the legitimate reasons for permitting them into the jury room. The Fuller court argued that the "risk that the jury might give undue weight to some testimony because it is available in transcript form over jurors' recollection of other, untranscribed trial testimony is heightened where the transcript is of the testimony of the defendant, because a defendant's admissions normally carry particular force with a jury." Fuller at 1117. To the extent that the Fuller court is explicitly applying this principle to prior statement admitted as admissions of a criminal defendant, the State contends that this reasoning is at odds with the majority of jurisdictions, as expressed by the Illinois Supreme Court in People v. Caldwell. The acknowledged risk that a jury may "give undue weight to some testimony because it is available in transcript form over jurors' recollection of other" is properly deemed to be subordinate to the legitimate purposes for admitting transcripts of defendants' confessions. This court should not adopt the reasoning of Fuller.

The cases above apply the exception set forth in Young to permit the jury to take exhibits of transcripts of statements

that have been admitted as admissions of the defendant into the jury room. The District Court below reached the same conclusion here. Obviously, the form of the exhibit admitted here was not a typical transcribed admission of a defendant. However, the State asserts that the basis for the admission of Petitioner's prior testimony in evidence controls its proper use as an exhibit, rather than the form of the evidence. The reasoning set forth in People v. Caldwell, supra, as well as the other cases cited above, does not become inapplicable merely because the defendant's admission was made at a prior trial. The rule permitting such admissions into the jury room should not depend on the form of the admission.

In any event, while Petitioner's admissions were made in the course of trial testimony, nothing about the presentation of the evidence to the jury indicated that it was a trial transcript. The trial court took great care to conceal the fact that the admissions came during a trial proceeding. This bears no resemblance to Janson v. State, 730 So.2d 734 (Fla. 5th DCA 1999), where the court simply allowed the jury to read the transcripts of the testimony of two of the trial witnesses. The District court correctly recognized this key distinction.

Although relegated to a footnote in the initial brief, Petitioner does specifically address the fact that this case

involves a defendant's recorded admissions, arguing that "a transcript of a tape recorded statement played to the jury is not admissible in evidence for the jury's use during deliberations," citing Grimes v. State, 244 So.2d 130 (Fla. 1971); Waddy v. State, 355 So.2d 477 (Fla. 1st DCA 1978); and Duggan v. State, 189 So.2d 890 (Fla. 1st DCA 1966 (IB 20). These cases do not apply here. Those cases concerned authentication of questionable transcripts which may or may not have accurately reflected the statements, under the "best evidence rule." This concern is not present here.

Because the exhibit was admitted as an admission of the defendant, the general rule disallowing transcripts does not apply. For this reason, Janson v. State, supra; St. Azile v. King Motor Ctr., Inc., 407 So.2d 1096 (Fla. 4th DCA 1982); Gills v. Angelis, 312 So.2d 536 (Fla. 2d DCA 1975); and Schoeppl v. Okolowitz, 133 So.2d 124 (Fla. 3d DCA 1961); do not apply and do not conflict with the District Court's ruling. As noted, Janson involved a court permitting the jury to read the transcripts of the testimony of two of the trial witnesses. St. Azile, Gills, and Schoeppl all involve depositions taken in civil cases. None relate to the issue in this matter. Florida Rules of Criminal Procedure 3.400 specifically prohibits depositions from going to the jury room. Many of the jurisdictions which permit

transcripts of defendant confessions likewise prohibit the use of depositions in the jury room. See e.g. Holloway v. State, supra. The fact that Florida likewise prohibits depositions in the jury room does not alter this conclusion. The decision below conflicts with none of these rulings.

Nor do the decisions from other jurisdictions Petitioner cites compel a different ruling.[1] In State v. Solomon, 87 P.2d 807 (Utah 1939), the district attorney used the transcript from an earlier trial to impeach a witness, and then asked for those portions of the transcript to be given to the jury. Instead, the court merely gave the jury the entire trial transcript with "slips" indicating the relevant testimony. Obviously, the trial transcript was not admitted as an admission of the defendant. Portions of the transcript had been used to impeach a witness (not the defendant). This ruling has no bearing on the issue presented here.

State v. Carter, 888 P.2d 629 (Utah 1994), concerned a constitutional challenge to a state statute which declared that "all exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing proceedings" are admissible in a remanded capital sentencing proceedings. Id. At 641. Such transcripts were admissible

[1] The State addressed Fuller v. United States, supra, above.

without any basis supporting their admissibility. This case has no bearing on a situation where the transcript reflects a statement of the defendant which is admitted solely because it constitutes an admission.

In conclusion, transcripts of admissions of a criminal defendant, unlike other transcripts, may be taken by the jury to the jury room. The trial court applied this correct rule to the transcript at issue here, which was explicitly admitted as an admission of the defendant. The reasons for allowing such evidence apply with equal force to admissions given during the course of a prior trial. For these reasons, the District Court did not err in affirming the trial court's ruling.

Harmless error

Even if this Court determines that the trial court erred in permitting the jury to take the transcript into the jury room, such error was harmless beyond a reasonable doubt in this case. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). First, the State contends that the transcript was not particularly prejudicial to Petitioner. While the State did use the transcript in closing to point out some minor inconsistencies in Petitioner's statements, a review of the entire transcript shows that it provided Petitioner an excellent opportunity to present her version of the events without subjecting herself to cross-

examination. Like the prosecution, Petitioner made numerous references to the transcript in her closing as well. The jury did not decide this case on Petitioner's testimony from the prior trial.

The second reason why any possible error regarding the transcript is harmless relates to the weakness of Petitioner's defense at trial. The facts adduced at trial showed that Petitioner, who was sitting in an idling car with the garage door up, shot the victim, who was standing outside of the car, in the face. Petitioner claimed that she acted in self-defense, that she used deadly force to prevent not the imminent use of deadly force against her, but to prevent the imminent commission of an "applicable forcible felony" under section 776.041, Florida Statutes. The only "applicable forcible felonies" that Petitioner could present to support her claim that she shot Greg Barnes to prevent the imminent commission of a forcible felony were aggravated assault and felony battery. The State contends that neither of these crimes provides a sufficient basis to support a self-defense claim. Simple logic shows that these two particular felonies should never furnish the basis for a claim of self-defense, and that the evidence here did not support their use as a predicate for a deadly-force claim.

1. *Aggravated assault*

Aggravated assault is an assault (a) with a deadly weapon without intent to kill; or (b) with an intent to commit a felony. § 784.021, Fla. Stat. "Assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. § 784.011, Fla. Stat. Using the crime of aggravated assault as a forcible felony for purpose of a use of deadly force in self-defense claim is, to say the least, problematic. First, in order for this defense to prevail, the defendant would have to show not that deadly force was necessary to prevent the imminent commission of death, great bodily harm, or another felony against her, but only that she had to use deadly force to prevent the imminent commission of a threat to her. Petitioner here is saying that she had to shoot Greg Barnes because she believed that he may threaten her (not hurt her, just threaten her). While the State acknowledges that aggravated assault is included in statute that lists forcible felonies, § 776.08, Fla. Stat., the State has been unable to find a single case in Florida jurisprudence where deadly force was deemed to be justified to prevent nothing more than an

imminent threat to the defendant. The State attributes this failure to the fact that the premise defies common sense.

Second, even if aggravated assault did furnish a logical basis for a self-defense claim, the evidence failed to support it here. Petitioner admitted that Greg Barnes was unarmed when she shot him, so there is no evidence that he threatened her with a deadly weapon. Moreover, Petitioner failed to identify any felony with which Greg Barnes threatened her, other than felony battery (which is similarly unsupportable, as argued below). In short, there was simply no evidence whatever that Appellant shot Greg Barnes because he was about to commit an unlawful threat against her.

2. *Felony battery*

Using the crime of felony battery as a predicate for the justifiable use of deadly force may be even more questionable than the crime of aggravated assault. Felony battery is a battery that causes great bodily harm, permanent disability, or permanent disfigurement. § 784.041, Fla. Stat. In other words, felony battery is a simple battery that has an aggravated battery result. Felony battery is differentiated from aggravated battery in that aggravated battery requires the defendant to intend great bodily harm, permanent disability, or permanent disfigurement; whereas felony battery only requires

that a simple battery result in great bodily harm, permanent disability, or permanent disfigurement. See § 784.041.

Felony battery is not included in the list of "forcible felonies" in section 776.041, Florida Statutes. The obvious reason is that felony battery is a crime where the defendant intends only to commit a simple battery but unintentionally causes great bodily harm, etc. Petitioner claimed that felony battery should be classed as a forcible felony because the statute allows for "any other felony which involves the use or threat of physical force or violence against any individual." § 776.08, Fla. Stat. If this statute is read to include all simple batteries that are converted to felonies based on some other circumstance, it would extinguish logical limitations of the use of deadly force in self-defense. A simple battery on a law enforcement officer is a felony. § 784.07(2)(b), Fla. Stat. Under Petitioner's reasoning, a law enforcement officer may use deadly force to prevent the imminent commission of a simple battery upon him or her, because such a battery would be a felony. A simple battery upon a person 65 years of age or older is a felony. § 784.08(2)(b), Fla. Stat. Under Petitioner's reasoning, a person 65 years of age or older may use deadly force to prevent the imminent commission of a simple battery upon him or her, because such a battery would be a felony. A

simple battery by a person with a prior battery conviction is a felony. § 784.03(2), Fla. Stat. Under Petitioner's reasoning, a person may use deadly force to prevent a simple battery by a person with a prior battery conviction, because such a battery would be a felony.

In short, Petitioner's self-defense claim was based on extraordinarily flimsy grounds. Under no logical construction of self-defense law could a person seriously claim entitlement to self-defense to prevent the commission of only an aggravated assault or a felony battery. Even if a person could make such a claim, not a shred of evidence supported it. It clearly appears that the trial court here gave the self-defense instruction out of an abundance of caution and not because it was adequately supported by the law or the evidence. Accordingly, even if the transcripts here were erroneously admitted, the admission was harmless beyond a reasonable doubt.

ISSUE II

DID THE DISTRICT COURT OF APPEAL ERR IN RULING THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION FOR SECOND-DEGREE MURDER? (Restated)

This court accepted jurisdiction of this case "as to the First District Court of Appeal's opinion with respect to permitting the jury to take an exhibit into the jury room." The State interprets this Order as limiting briefing on this case to the issue presented. Accordingly, the State will not answer Issue II of Petitioner's initial brief. If the State has misinterpreted this Court's order, it respectfully requests the opportunity to file an amended brief, as this Court determines.

CONCLUSION

Based on the foregoing, the State respectfully submits that the decision of the District Court of Appeal reported at Barnes v. State, 922 So.2d 380 (Fla. 1st DCA 2006) should be approved, and the judgment entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Louis K. Rosenbloum, Esq., 4300 Bayou Blvd., Suite 36, Pensacola, FL 32503, by MAIL on May 11, 2007.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
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Attorney for State of Florida