IN THE SUPREME COURT OF FLORIDA

DONALD LENNETH BANKS,

Appellant,

v. **CASE NO. SC08-1741**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 271543
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8517

ATTORNEY FOR APPELLANT

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INITIAL BRIEF OF APELLANT

PRELIMINARY STATEMENT

This is a capital case. DONALD LENNETH BANKS, was the defendant in the trial court and will be referred to in this brief as either "appellant," "defendant," or by his proper name.

References to the seventeen volumes of the Record on Appeal will be by the volume number in Arabic numbers followed by the appropriate page number, all in parentheses.

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Duval County on December 15, 2005, charged Donald Banks with one count of first-degree murder and robbery with a knife (1 R 18). The State also filed a notice that if Banks were convicted of the murder it would seek imposition of a death sentence (1 R 30). Finally, it filed a notice that it intended to introduce evidence of "other crimes, wrongs, or acts" Banks had allegedly committed (4 R 591).

Banks filed several guilt or penalty phase motions that are relevant to this appeal:

1. Motion to prevent introduction of evidence of the "other crimes, wrongs or acts" the State intended to prove at trial (5 R 801). Denied (5 R 803).

2. Motion for individual and sequestered voir dire, for evidentiary hearing and to tax costs (4 R 612-17). Denied (7 R 1273).

3. Motion to prevent introduction of videotape of a prior felony Banks had committed (5 R 843). Denied (5 R 845).

Banks proceeded to trial before Judge Hugh Carithers on only the murder charge, and the jury, after hearing the evidence, arguments, and instructions on the law, found the defendant guilty of that offense (5 R 832).

He proceeded to the penalty phase. Both sides presented additional evidence. The jury after it had heard this evidence, arguments, and further instructions, recommended, by a vote of 10-2, that the court impose a death sentence on Banks (5 R 855). The jury also answered a special interrogatory that beyond a reasonable doubt

they had concluded that the defendant played a significant role in the homicide of the victim (5 R 848).

The court followed that recommendation and sentenced the defendant to death. Justifying that punishment, it found that he first qualified for a death sentence because he had a substantial involvement in the murder (6 R 994). It then found in aggravation that:

1. Banks had been previously convicted of a violent felony.
2. The murder was especially heinous, atrocious, or cruel.
3. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6 R 994-98).

The court found in mitigation that the defendant:

1. Has a low IQ.
2. Has a deficit in his brain.
3. Has anti-social personality traits.
4. Was not the only participant in the murder.
5. Had a difficult youth.

(6 R 999-1000)

Banks filed a motion for a new trial and supplemental motion for a new trial (5 R 832, 857), which the court denied (5 R 834, 858).

This appeal follows.

STATEMENT OF THE FACTS

Sometime during the day of March 10, 2005 a car belonging to Linda Volum was involved in a hit and run accident in Jacksonville (9 R 254). Four black men were in the car, and they fled after the crash (9 R 261). The police determined that Volum owned the vehicle, and when a sheriff's deputy went to her house he found her nude body lying on the bedroom floor (9 R 256). She had been stabbed fourteen times[1]. Many of the wounds were superficial (10 R 542), but she had two or three fatal ones to the heart, one to her lung, and one potentially fatal one to her liver (10 R 558, 562).[2] Some of the cuts showed she had tried to defend herself (10 R 552). She also suffered some blunt force trauma to her arm, hips, and leg (10 R 553, 556). She had a .20 percent blood alcohol content, and the medical examiner detected a small amount of cocaine in her blood as well (10 R 563, 572). She had died between midnight and 4 a.m. (10 R 558).

Without any dispute, Donald Banks knew Volum, and had been to her house many times. As it turned out Banks sold crack cocaine, and she was one of his customers (11 R 630). As often happens, however, she had problems paying for the drugs. She frequently pawned her laptop computer or gave it or jewelry to Banks (11 R 634-35). Occasionally she traded sex for cocaine (11 R 632). She also let him use

[1] When the police moved her body, they found a knife and a "crack pipe" underneath it (9 R 288-89).

[2] Ms. Volum's liver was severely damaged from her chronic alcoholism (10 R 569).

her house from which he sold drugs, and this meant that people would come there at "all hours of the night." (9 R 270, 273; 11 R 631, 632) He also used her car (11 R 638).

In particular, on the night of the murder, Banks was at Volum's house. Both of them were drunk and/or high, and during the evening he cut three or four of his fingers on the crack pipe the police found underneath her (11 R 640-42, 668).[3] He used a towel to staunch the blood, and he eventually put band aids on the wound (11 R 642). He also had cut his leg two, three, or four days earlier, for which he eventually had to have professionally taken care of (11 R 642, 682-84).

On the night of the murder Banks was at Volum's house selling drugs (11 R 641), and during that time Volum and Banks had sex two or three times (11 R 641). [4] Business apparently went well because in the early morning hours of March 10, he had to get some more cocaine from his supplier-a man known only as "Bo"- on the northside of Jacksonville (11 R 644). Bo, however, showed up at Volum's house,[5] and some time later he and Banks left. Volum let him use her car, and she gave him her debit card so he could get some money for her (11 R 644, 655, 665).[6] When he

[3] Blood was found on the crack pipe, but the police never had it analyzed (9 R 330).
[4] Banks had difficulty remembering what happened because he was, as he admitted, "high" that evening (11 R 637)
[5] Volum knew Bo, and he had been at her house at least twice before March 10 (11 R 646-46).
[6] She was too drunk to go herself (11 R 647).

repeatedly tried to use it, however, the various ATMs denied him access to her account (9 R 259).[7]

The two men returned to Volum's house some time later, and Banks sold some more cocaine. Eventually, he walked home, leaving Volum alone with Bo (11 R 646). To pay for the drugs Banks had given her, she put her computer in a pillowcase and gave or "loaned" it to him (11 R 650).

According to Sudi Johnson, his girlfriend, Banks arrived home driving a small compact car (9 R 351). He gave the computer to her, and when he pulled it out of the pillowcase she saw some bloodied clothes underneath (9 R 353).[8] When asked about them he said "I just murked somebody," which is slang for he had just murdered someone (9 R 353). He also told her that he had gone into Volum's house wearing only his underclothes, and he used a crack pipe as a prop to lead the police to think the murder was drug related (9 R 360-61).

Later, a local television station reported the murder, Banks saw it, turned to Johnson, and said "I did that." (9 R 358) When asked how he had done it, he said he had put the victim in a "choker hold" and then stabbed her from behind. During the

[7] Apparently, the ATMs denied Banks because Volum had no money or insufficient funds in her account (11 R 666).
[8] They were boxer shorts and a white T shirt (9 R 354).

killing, he missed one time and cut himself, and indeed when he came home he was limping, and his leg was bleeding (9 R 355, 359).[9]

Reluctant to believe Banks (9 R 361), Johnson waited two weeks before she called the police (10 R 579), who eventually arrested him (10 R 583).

When she asked him why he had killed Volum, the defendant said it was "a murder pay-back." (9 R 359). At trial he denied saying that or that he had killed her, and he attributed Johnson's testimony to his treating her "wrong." That is, he had given her no money (11 R 677-78).[10]

[9] He later went to a hospital for it to be treated (9 R 358).

[10] At trial, Banks said Johnson lied that he had told her that he had killed Volum. She did that, he said, because "It's a money thing." That is, he owed her money or rather he "I'm not giving her the money she wanted." (11 R 654)

SUMMARY OF THE ARGUMENT

ISSUE I. Prospective juror Constantio said that his daughter with whom he lived had been robbed at gunpoint about 6 weeks before Banks' trial. The court refused to excuse him for cause, and that forced the defendant to peremptorily challenge him. He should not have had to do that because there was a reasonable possibility that Mr. Constantino could not be fair and impartial not only in determining the defendant's guilt or innocence but whether he should be sentenced to death. Recent violent crimes committed against one's child naturally raise the specter that verdicts of guilt and death have been tainted by the concerns for that loved one and anger at those who had committed the violent assault against him or her.

ISSUE II. The State peremptorily challenged Mr. Laws and Mr. Ford (who were African Americans) because they were single and rented. The court, without any assessment of that reason for excusing them, summarily allowed the challenges to stand. That was error because they were not race neutral, and they were pretextual. That is, the State never said why being single and renting a house had any significance on who should decide the defendant's fate**.** That failing explains, in part, the court's error when it did not analyze the totality of the circumstances to determine if the reasons the state gave were pretextual or not genuine.

ISSUE III. At trial the State presented evidence that several pieces of evidence taken from the scene of the murder matched Banks' DNA. It did not,

however, present any statistical evidence to give that evidence meaning. That failure clearly violated this Court's decisions in Brim v. State, 695 So.2d 268 (Fla. 1997) and Butler v. State, 842 So.2d 817 (Fla. 2003), which require this "second step" in order for the jury to consider testimony that the evidence matched the defendant's DNA.

ISSUE IV. During cross-examination of Sudie Johnson, the State's key witness, counsel asked her questions about her delay in telling the police that Banks had admitted killing Volum. Specifically he asked "[Did you] change your mind because you found out that he and Ms. Volum had sex? To this leading question, she responded "No, that wasn't the reason. The reason was from the previous - - I supported Mr. Banks all the way up until I seen the tape of him stabbing Mr. William Johnson from the first --." The trial court denied Banks' motion for mistrial, finding that the defendant had invited her response. That was error because his leading question prompted only a yes or no answer, and it was not a direct or fair response to what he had asked. What Ms. Johnson said was volunteered and unresponsive to the question asked.

ISSUE V. During the penalty phase, the State presented a video showing Banks stabbing Mr. William Johnson, ostensibly to show the details of the crimes involved in that incident in support of the aggravator that he had prior convictions for violent felonies. Although this evidence may have had some relevance, its prejudicial value significantly outweighed whatever relevance it may have had. This type of

visual exhibit, especially when it showed a violent crime, has a peculiarly strong tendency to inflame juries, and in this it case should have been excluded. This is particularly true because the State had other evidence that could have accomplished the same goal as the video.

ISSUE VI. In justifying sentencing Banks to death the court found the murder to have been cold, calculated, and premeditated without any pretense of moral or legal justification. It supported that conclusion by relying on his admission that he had killed Linda Volum as a "murder pay back," and he had taken off his clothes before killing her. Those facts may show the murder to have been calculated and premeditated, as this Court has defined those terms, but the evidence fails to show the murder was also, and necessarily, cold. The facts show this to have been a frenzied attack, as evidenced by Banks stabbing himself. He was also high on cocaine on the night of the murder. The evidence, thus, fails to show calm reflection on his part, which means he did not coolly commit the murder.

ARGUMENT

ISSUE I:

THE COURT ERRED IN REFUSING TO GRANT BANK'S CAUSE CHALLENGE TO PROSPECTIVE JUROR CONSTANTINO WHICH FORCED HIM TO USE A PEREMPTORY CHALLENGE TO KEEP HIM OFF HIS JURY, A VIOLATION OF HIS FIFTH, SIXTH , AND FOURTEENTH AMENDMENT RIGHTS.

During voir dire, Banks sought to excuse a Mr. Constantino because of his inability to render an impartial verdict as required by the law of this State. Singleton v. State, 783 So.2d 970, 973 (Fla. 2001). The court refused to allow that cause challenge (8 R 190), and that, in turn, forced the defendant to use one of the 10 peremptorily challenges given him to keep this prospective juror off his jury (8 R 198). As a result, he later exhausted them, requested more, and specifically identified those members of the venire he would have excused (8 R 199). The trial court, rather than granting any extra challenges, denied that request (8 R 200). He also told the court after the jury had been selected that he "did not accept the jury as it's composed, based on our objections and our request for the additional peremptory." (9 R 216). Banks, thus, has clearly preserved this issue for review. Trotter v. State, 576 So.2d 691, 693 (Fla. 1990). Busby v. State, 894 So.2d 88 (Fla. 2005). Indeed, although this Court reviews these type of issues for an abuse of discretion, Pentecost v. State, 545 So.2d 861 (Fla. 1989),[11] the defendant's persistence in satisfying every

[11]In Salgado v. State, 829 So.2d 342, 344-45 (Fla. 3rd DCA 2002), the Third District recognized that issues of juror competence raised a question of mixed law

demand this Court has required to preserve his objection to Constantino should prompt it to give much closer scrutiny of what the trial court did than it might do for other alleged trial errors.

When questioned, Mr. Constantino, revealed that his daughter with whom he lived had been robbed at gunpoint a month and a half before trial. When the court asked if "anything around you in your life has happened that might affect your ability to be fair in this case," (8 R 91) Mr. Constantino, replied:

> PROSPECTIVE JUROR: Yeah, my daughter was held up at gunpoint and robbed.
> THE COURT: Was she living with you at the time.
> PROSPECTIVE JUROR: Yes—well, no, I'm living with her right now. I'm retired so—
> THE COURT: You were sharing a residence.
> PROSPECTIVE JUROR: Yes, sir.
> THE COURT: So this obviously had a lot of impact on you.
> PROSPECTIVE JUROR: Yeah.
> THE COURT: How long ago was that?
> PROSPECTIVE JUROR: About a month and a half.
> THE COURT: Okay. It's recent. Have they arrested the person?
> PROSPECTIVE JUROR: No, haven't heard. Don't know.
> THE COURT: How might that affect you in
> PROSPECTIVE JUROR: It's won't affect me, no sir.

(8 R 92-93)

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and fact. Accordingly, this Court must give the trial court's evaluation of the facts the due deference implied by an abuse of discretion standard, but it is free to reach its only conclusion about what those facts legally mean.

Banks later sought to excuse Mr. Constantino for cause, but the court denied that challenge:

> MR. ELER[Defense counsel]: NO. 32, Mr. Constantino, No. 32, daughter was held up and robbed about a month and a half ago and he initially started (sic) I hope I can, I can, he did say that, but again, for the same grounds as Ms. Jackson,[12] Judge, the relative and close in time frame, the fact he's got a daughter may be around the victim's age in this case, I'd move for cause on him.
>
> MR. MIZRAHI[the prosecutor]: I have the same objection.
>
> THE COURT: All right. That challenge is denied.

(8 R 190)

As mentioned, Banks moved to excuse Mr. Constantino for cause, but the prosecutor objected and the court denied the challenge (8 R 190).[13]

The jury system of justice traces its roots back three quarters of a millennium to a time when those chosen to determine an accused's guilt or innocence had knowledge of the facts of the case. Stephen Landsman, "A Brief Survey of the Development of the Adversary System," 44 Ohio St. L. J., 713, 722 n. 17 (1983);

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[12] Ms Jackson told the court told the court that "My God-brother was brutally murdered on April 19, one month ago tomorrow." (8 R 93). Banks sought to have her excused for cause, but State objected, noting that it saw no reason to strike her for cause. The court denied the challenge (8 R 189). The correctness of that ruling is not an issue on appeal because a jury was selected before her name came up during the use of peremptory challenges.

[13] In Busby, cited above, this Court specifically rejected the argument that a defendant had to show an objectionable juror actually served. Once the defendant has met the requirements of Trotter, and shown that he had to improperly use a peremptory challenge on a prospective juror who should have been excused for cause a Sixth Amendment violation of his right to a fair and impartial jury has been established.

Ellen S. Sward, "Values, Ideology, and the Evolution of the Adversary System," 64 Ind. L. J., 303, 322 n. 16 (1999). That approach worked, perhaps, in small communities where everyone knew everyone and everyone minded his neighbor's business. It collapsed, however, as society evolved and became larger and more complex, and it did so for obvious reasons. One juror may know the "facts" but others did not. Hence, his recollection, correct or not (because there was no way to measure its accuracy) would tend to become the "facts" on which the rest of the jury based its verdict. Confidence in the results, thus, ebbed. Hence, over the last two hundred years, at least, the American justice system has moved toward the ideal that the jury should know nothing about the facts of the crime the State has charged the defendant with committing. Landsman, cited above, at 713. The court, utilizing the rules of evidence, "filters" the evidence every juror hears so that when they deliberate, they all have the same facts on which to reach a just verdict. Thus, jurors who are relatives of the defendant or the victim, are routinely excused from serving on the jury, as are others who might have first hand knowledge of the facts of a case.

Yet, this "sanitizing" goes beyond excluding those prospective jurors who might know the facts of a case. It extends to those who might have some bias or prejudice for or against the victim or the defendant. For example, Mothers Against Drunk Driving would naturally have a difficult time passing on the guilt or innocence of a person charged with driving while intoxicated. Our system of justice has moved

so far from the early forms that it now rests on the unchallenged prerequisite of juror impartiality. Carratelli v. State, 832 So.2d 850 (Fla. 4th DCA 2002). Hence, a court should excuse a prospective juror if "there is any reasonable doubt about the juror's ability to rend an impartial verdict." Singleton, cited above. (Emphasis added.) A court should excuse a member of the venire if there is reasonable doubt about his or her impartiality, not only as to guilt, but in a capital case as to the appropriate sentence of life or death.

In this case, there is no evidence Mr. Constantino had any knowledge of the facts of this case. The problem arises from the obvious and understandable emotional impact his daughter's violent encounter had on him. That the robbery had taken place in the recent past only emphasizes the legitimate concern the court should have had about this member of the venire. After all the proverb or truism that "Time heals all wounds," does not quite apply when the event is a crime of violence that had happened in the very recent past. And its effects linger longer when the violence happens to a loved one, and particularly one's child. Indeed, the robbery's effect may very well have waned by the time of Banks' trial if Mr. Constantino had been robbed, but when one of our children is violently assaulted, the fear lingers. The closer the emotional ties the greater the likelihood a reasonable doubt exists that the prospective juror, despite assurances of impartiality, will harbor some fear or anger at the

defendant. Rodriquez v. State, 806 So.2d 559 (Fla. 3rd DCA 2002)(Assurances of impartiality does not remove the taint of earlier comments.)

The Third District Court of Appeals' decision in White v. State, 579 So.2d 784, 785 (Fla. 3rd DCA 1991) reflects this concern. In that case, the State had charged White with selling cocaine within one thousand feet of a school zone. During jury selection, one of the prospective jurors, a Ms. Castellano said "she might not be an impartial juror since she had two children, taught Sunday school, and loved children." She also said she would probably be fair and could acquit the defendant if there was no proof beyond a reasonable doubt of his guilt. Believing she had been sufficiently rehabilitated, the court denied the defendant's cause challenge, and he then peremptorily excused her.

On appeal, the Third DCA said the court erred in not excusing her for cause. "While the trial judge tried to rehabilitate juror Castellano, her answers raised a reasonable doubt as to whether she could be fair and impartial." Id. Citations omitted. Because the State had accused White of selling cocaine within 1,000 feet of a school and Castellano had a strong love for children, a reasonable doubt existed, though she said she could be fair, that her understandable and commendable love for children might influence her impartiality because of the nature of the crime White had been charged with committing.

Similarly, in this case, even though Mr. Constatino said that his daughter being robbed six weeks earlier would have no affect on determining Banks' guilt, a reasonable doubt has to exist that given the understandable affections, concerns, and worries parents have for their children he could not have been fair and impartial.

But, what makes the trial court's ruling more troubling is that here, unlike the situation in White, this jury had to determine more than the defendant's guilt or innocence. It had the sublimely more difficult task of recommending the appropriate punishment for Banks. Sentencing, more so than guilt determinations, involves a stronger danger of emotional responses, The possibility that jurors will give sway to outrage, anger, and vengeance requires even closer scrutiny during voir dire. Indeed, Florida gives the trial judge the sentencing responsibility, not the jury, specifically to prevent understandable emotional desires from imposing a death sentence. "Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). Responses that may not create a reasonable doubt in a non capital case may raise a red flag when death is a possible sentence.

Even if Mr. Constantino could have impartially assessed the defendant's guilt, a reasonable doubt still existed or should have existed of whether he could have similarly fairly recommended a life or death sentence. The recent robbery-a violent felony- of his daughter and the legitimate emotional responses that it justifiably

created within this father raised a reasonable doubt of his ability to fairly and impartially recommend the appropriate sentence for Banks. Moreover, as to that specific inability, the court's rehabilitation was non existent.

This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial. Alternatively, if the court decides Mr. Constantino could have fairly passed on the defendant's guilt but not his sentence, it should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE II

THE COURT ERRED IN ALLOWING THE STATE TO PEREMPTORILY EXCUSE TWO BLACK MALES FOR REASONS THAT WERE NOT RACIALLY NEUTRAL, A VIOLATION OF BANKS' FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

During jury selection, the State peremptorily challenged two black men, and Banks objected to it using those challenges on them. The court conducted the hearing mandated by this Court in Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996), and then summarily denied or overruled the defendant's objections in each case (8 R 191-93, 197-98). That was error, and this Court should review the correctness of those rulings under a clearly erroneous standard of review. Nowell v. State, Case No. SC06-276 (Fla. Dec 30, 2008).[14]

I. The relevant facts

The State peremptorily excused two black prospective jurors, Ford and Laws, and when called on the matter, tried to present race neutral, non pretextual reasons for doing so.

[14] In Nowell, this Court also said: "that the appropriate standard of appellate review for determining the threshold question of whether there is a likelihood of racial discrimination in the use of peremptory challenges is abuse of discretion." Hoskins v. State, 965 So.2d 1, 7 (Fla.2007) (quoting Jones v. State, 923 So.2d 486, 490 (Fla.2006); accord Files v. State, 613 So.2d 1301, 1304 (Fla.1992).

MR. MIZRAHI[prosecutor]I: Your Honor, the State will strike juror No. 9, Mr. Ford, second peremptory.

MR. ELER[defense counsel]: Judge, we'd ask for a race neutral reason.

MR. MIZRAHI: Your Honor, Mr. Ford's biographical information is identical to that as Mr. Walker's. They're both - - Mr. Walker, for the record, is a white male. Mr. Ford, I believe, is a black male. They both are single and both - - while Mr. Walker does live with his parents, Mr. Ford is single, he is a young male with very little ties to the community. In addition, when I asked Mr. Ford about the principal and one of the instructions, oh, about motive, Mr. Ford didn't really seem to be paying attention to my question. I had to repeat it a couple of times to get an answer out of him. And it's for all those reasons I struck him.

THE COURT: All right. I will allow the challenge to stand. That's the State's second.

(8 R 191-192)

* * *

MR. MIZRAHI: The State will strike No. 20, Mr. Laws, same reason. Single, rents.

MR. ELER: And, Judge, once again, we'd object to those reasons, because you're single and rent doesn't mean he's not suitable. For the record he is another black male excused from the jury.

THE COURT: Well, he is black. Is there any case law on this?

MR. MIZRAHI: Whether a single and renter is sufficient. I can find some. I would also point out for the record that juror No. 2, Mr. Wells, is also a black male.

MR. ELER: Your Honor, for the time being I can withdraw my peremptory challenge and go through and see if we get a jury panel and I can inform the Court of any case law that I have found. I'll withdraw that.

(8 R 192-193)

* * *

MR. MIZRAHI: I'm prepared to readdress juror No. 20. They exercised their peremptory challenge. The State would rely on Cobb v.

> State, which is found at 825 So.2d 1080. Your Honor, in this particular case the State challenged the juror for cause, it was a black male, on the basis of the age of the juror as well as the fact that the juror was a student and the Court held that that was a race neutral reason.
>
> Obviously the Court has to make that determination as to whether or not the reason is genuine. And I would point out to the Court that there are three single renters on the panel. The State has stricken all three, juror No. 3, juror No. 9, and juror No. 20.
>
> THE COURT: All right. Anything else on that subject?
>
> MR. ELER: Well, just he's not a student, he's a law-abiding citizen working at a Toyota dealership detailing cars, has a two year old son, lives on the westside, Judge, and he happens to be an African-American, and so I - - I distinguish that case. I don't have that case in front of me. I'm sure that's what it held, but, once again, Judge, we object for the record.
>
> THE COURT: All right. I will allow the challenge and that is the State's fourth.

(8 R197-198)

II. The law on the use of peremptory challenges.

The law in this area, as it has developed over the years, is simple and straightforward. Potential jurors have an equal protection right under both the state and federal constitutions "to jury selection procedures free from stereotypical presumptions that reflect and reinforce patterns of historical discrimination." Rivera v. State, 670 So.2d 1163, 1165 (Fla. 4th DCA 1996) (citing J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994)), Moreover a party cannot exclude a specific member of the venire because of his or her race. See Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). In particular, this means that peremptory challenges may not be used to exclude

prospective jurors solely because of their race or ethnicity. See State v. Alen, 616 So.2d 452 (Fla. 1993); State v. Neil, 457 So.2d 481 (Fla. 1984).

In determining whether a party improperly used a peremptory challenge this Court begins its analysis with the assumption it exercises those challenges in a nondiscriminatory manner. This Court also defers to the trial court's decision about the use of the challenge because it is in the best position to assess the genuineness of the reason advanced But, as this Court has also said, "deference does not imply abandonment or abdication of judicial review," Dorsey v. State, 868 So.2d 1192, 1200 (Fla.2003) (quoting Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)), because "[d]eference does not by definition preclude relief." Miller-El, 537 U.S. at 340.

Beyond these generalities, this Court in Melbourne, cited above, created a specific test for trial courts to use in determining if a party has improperly used a peremptory challenge.

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3).

Melbourne at 674.

Significantly, in determining if the party has used an ostensibly race neutral reason pretextually, or if its justification is genuine or not, it must provide some logical nexus between the reason given and the facts of the case. For example, in Nowell, cited above, this Court ultimately found that the prosecutor had improperly used a peremptory challenge to excuse a Mr. Ortega. However, it apparently did not disapprove one of the reasons it gave -- Mr. Ortega's age -- for challenging him. "He appears young and of a similar age to the defendant. I would think that Mr. Ortega would relate to the defendant based on age." Although this Court noted that it had never held that age was a "legitimate race neutral reason for a peremptory challenge," several District Courts had apparently done so, and in Nowell, the court approved the lower court's action because the prosecutor had provided at least some minimally logical or reasonable excuse for exercising the challenge on Mr. Ortega.

Thus, what emerges from Nowell is the requirement that the prosecutor must provide some reason that the facts of the particular case justify excusing a particular member of the venire. That is, in that case, the prosecutor thought "Mr. Ortega would relate to the defendant based on age." Whether he would or not in fact so identify with Nowell was irrelevant. The State had a legitimate or genuine belief that he might, and that was enough to allow the challenge.

Similarly, the prosecutor in Acoff v. State 756 So.2d 208, 209 (Fla. 4th DCA 2000), provided a race neutral link between the prospective juror and the defendant. "The subject juror was a single, full-time working mother with five children who might sympathize with a potential defense witness who also was a single mother with four children." Accord, King v. Byrd, 716 So.2d 8321, 833-34 (Fla. 4th DCA 1998)(Prosecutor gave a race neutral reason that the challenged prospective juror, a single mother of twin five year girls, might identify with plaintiff in a medical malpractice case involving brain damage of a child during birth.)

III. Applying this law to the facts of this case

In this case, the State never provided any similar logical connection between Mr. Laws' or Mr. Ford's marital status and that they rented houses and what type of juror it did or did not want. That was its step 2 burden under Melbourne, which it failed to carry for both prospective jurors.

A. Mr. Laws.

The crucial part of what we know about Mr. Laws comes from the court's inquiry during the early part of voir dire:

> My name is James Laws. I was born January 20th, 1986. I live on the westside. I have been living in Jacksonville for my whole life. I'm employed by Toyota as a detailer. Single. I have a two year old son that lives at home. I rent my home. And never served on a jury. Never served on a jury.

(8 R 109).[15] Based on those bland responses, the State sought peremptorily to excuse him because was single and he rents (8 R 192). But without providing any reason or explanation why those two facts somehow have some significance in selecting a jury in this case, it failed to carry the burden this Court in Melbourne said it must when challenged.

Maybe the link appeared because Banks apparently lived rent-free with his girlfriend (5 R 899, 9 R 350). That fails because but it reasonably appeared that Ms. Volum also rented the apartment she lived in (9 R 265). Moreover, it is hard to believe any juror would have any particular tendency to identify with the defendant simply because they both rented.

Likewise, both the defendant and the victim appeared to be single, so no logical nexus appears because Laws was single. Maybe by being single and renting the State meant that those combined factors indicated they had "very little ties to the community" (8 R 192) and therefore somehow they would not take their duty as a juror seriously. If so, that is speculative, and more than speculative it is pretextual.

[15] He also said he believed he was qualified to serve; that he had a cousin who was in jail, and that would have no affect on ability to serve; that he thought crime was to a "large extent" illogical; and that on a scale of 1-10 he supported the death penalty as a 5 (8 R 20, 129,138). Most of the prospective jurors, including those who sat, gave similar answers.

Moreover, countering the "very little ties to the community" rationale, Mr. Laws, although single and a renter, had lived in Jacksonville all his life (8 R 109), had a two-year-old son that lived with him, and he had job at a car dealership.

Further, this excuse or justification is speculative because millions of Americans rent, not because they want to but because they cannot afford a home. There is no basis in reason, logic, or equal protection, to assume that because they pay rent rather than a mortgage they are somehow indifferent to their community, and it denies those members of society any opportunity to serve on a jury simply because they chose to rent or they could not afford mortgage, at prime or sub prime rates.

Thus, not only was the State's justification not race neutral, when all the other relevant circumstances are also considered, Nowell, cited above, the State's justification became pretextual or not genuine.

So, not only did the prosecutor fail to carry its burden to provide a race neutral reason for excusing Mr. Laws, the justification he did supply was not genuine.

B. Mr. Ford

Similar to Mr. Law, Mr. Ford gave a short biographical sketch of himself.

> My name is Anthony Ford. Date of birth 10/1/87. Live on the northside. Stay in Jacksonville. 20 years, all my life. Work at J. R. Dent Systems pouring concrete. Single, no children. I do pay rent and never served on a jury.

(8 R 106).

What Banks argued concerning the State's use of a peremptory challenge on Mr. Laws applies to Mr. Banks, but the State also challenged him because of his responses when it questioned him. Yet, that reason, like being a single renter fails under even a mild scrutiny.

What the prosecutor referred to was the following colloquy between him and Mr. Ford:

> MR. MIZRAHI: Now, you are to consider motives in your deliberations, you know, why is this person telling us what they're telling us, but that the State does not have to prove a motive to the crime? You'll be okay with that?
>
> PROSPECTIVE JUROR: I think so.
>
> MR. MIZRAHI: Mr. Ford, what do you think?
>
> PROSPECTIVE JUROR: Yes.
>
> MR. MIZRAHI: So you're not going to have any problem if the State does not show you why?
>
> PROSPECTIVE JUROR: If they don't show me why?
>
> MR. MIZRAHI: Yeah, if the State does not show you why a crime occurred, you're not going to have any problems with that? You're hesitating and I understand you're hesitating. It's difficult for a juror to render a verdict, especially a verdict that's as important as this verdict, first degree murder case. We've already talked about death penalty issues. The State is not required to show you why the defendant committed the crime, only that he committed it. What do you think about that?
>
> PROSPECTIVE JUROR: I don't have any problems with it.
>
> MR. MIZRAHI: Okay. So you would be able to follow the laws the Judge instructs you?
>
> PROSPECTIVE JUROR: Yes.
>
> MR. MIZRAHI: And would not require the State to show you why? Yes?
>
> PROSPECTIVE JUROR: Yes.
>
> MR. MIZRAHI: I'm just doing this for the court reporter. Just so we can get it all down.

(8 R 136-38)

The record shows, contrary to the State's assertion, that Mr. Ford was paying attention. What caused him to "hesitate," if he did so, was the prosecutor's confusing question. He asked about motive, not only of the defendant but of witnesses. That mixing of "apples and oranges" had to boggle the mind. So, if Mr. Ford hesitated he had some justification for doing so.

Moreover, Mr. Ford was not a lawyer, but a laborer who worked at pouring concrete. Should we expect him to give snappy answers? In fact, the prosecutor would have had greater justification for peremptorily excusing him if he had done so. Instead, here we have a man who presumably knew little about the law, being asked serious, significant questions. Reflection-call it hesitation if you will-would seem to be a desirable quality. Even if he had "very little ties to the community" his hesitation indicated he intended to take his duties as a juror seriously.

Thus, as with Mr. Law, the totality of the circumstances reveals that the prosecutor's explanation or justification for excusing Mr. Ford was pretextual or not genuine.

IV. The court's burden

Finally, step 3 of the Melbourne test requires the trial court to consider "all the circumstances surrounding the strike" and decide if it was pretextual or not. That is, the trial court, even though or because this Court defers to it, has the burden to make an analysis and based on it reach a decision. Id. At 764-65 ("[T]he trial court's decision turns primarily on an assessment of credibility and will be affirmed unless clearly erroneous.")

In this case, the court in both challenges to the State's use of peremptory challenges against Mr. Laws and Mr. Ford, simply allowed the challenges "to stand." (8 R 192, 198). It never did the assessment this Court required in Melbourne. Nowell ("[T]he judge must consider all the relevant circumstances to determine whether the justification is genuine. . . .") If this Court defers to the lower court's exercise of its discretion, it has to have some reason for doing so. That is, the trial court must provide an analysis that supports its ruling. Fiat rulings, such as those done in this case, do not satisfy the third "assessment" step of the Melbourne analysis.

The court, therefore, erred in allowing the State's peremptory challenges of Mr. Laws and Mr. Ford to stand. This Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE THAT VARIOUS PIECES OF EVIDENCE MATCHED BANKS' DNA WITHOUT ALSO REQUIRING IT TO PRESENT EVIDENCE AS TO THE SIGNIFICANCE OF THAT MATCH, A VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

This issue focuses on the procedure a party must follow if it intends to introduce DNA evidence at trial. As such, this Court's opinion in Brim v. State, 695 So.2d 268 (Fla. 1997) and Butler v. State, 842 So.2d 817, 817, 827 (Fla. 2003) control. In Brim, this Court established that method:

> We today clarify and emphasize that the DNA testing process consists of two distinct steps. In Hayes v. State, 660 So.2d 257 (Fla. 1995), we took judicial notice that DNA methodology conducted properly would satisfy the Frye, test. Id. At 264. This first step of the DNA testing process relies upon principles of molecular biology and chemistry. In oversimplified terms, the result obtained through this first step in the DNA testing process simply indicate that two DNA samples look the same. A second statistical step is needed to give significance to the match.

Id. at 269.

In Butler, it reiterated that two step process:

> DNA testing requires a two-step process, one biochemical and the other statistical. The first step uses principles of molecular biology and chemistry to determine that two DNA samples look alike. The second step uses statistics to estimate the frequency of the profile in the population.

In particular, this issue focuses on the second step. That is, Banks had no objection to the testimony of Dr. James Pollock, the expert who presented the DNA testimony, saying that the various samples he tested had DNA that "matched" the defendant's DNA. Bolin v. State, 869 So.2d 1196, 1201, 1202 (Fla. 2004)(No error for expert to say DNA samples matched.) Banks does object, however, to the State's refusal to present evidence to satisfy the second step, and the court's willingness to overlook that necessary evidence.

This Court should review this issue under a de novo because Banks argues that the court erred, as a matter of law, in excusing the State from presenting evidence of the statistical significance of the DNA matches.

I. How the issue arose.

Banks raised the issue pretrial by way of a "Motion in Limine to exclude novel Scientific Evidence." (4 R 625). At the hearing on the motion, Banks put the State and Court on notice that if the prosecution intended to present DNA evidence, it needed to follow the two step process this Court had established in Brim and Butler, cited above. In particular he told the court that he had learned that the State had no intention of presenting statistical evidence, and if that were true, it was doing so at "own peril." (7 R 1272). The court, rather than ruling on the motion, agreed with Banks that it could defer any decision until trial.

At trial, the prosecution qualified Dr. Pollack as an expert in DNA analysis (10 R 457), and he testified that he had processed several pieces of evidence for evidence of DNA. Many of them matched the DNA of Banks because they had "13 points, 13 locations" that were the same (10 R 460). Specifically, this expert found matches between Banks' DNA and the following exhibits that had blood on them:

1. towel
2. Band-Aid box
3. Tile cut out from the kitchen (on seven points or loci matched Banks)
4. Tile cut out (10 loci matched)(Linda Volum's blood was also found)
5. Band-Aid(12 loci)
6. plastic bin lid(3 loci belonged to Banks. Volum's blood was also identified.)

(10 R 477-82)

Dr. Pollock also found Banks' DNA in several samples taken from Volum's body:

1. genital swabbings
2. vulva vaginal swabs
3. anal rectal swabs

(10 R 484-85)[16]

Before Dr. Pollack presented this testimony, Banks objected.

> MR. ELER: Objection, Your Honor. Can we approach or the objection is predicate.

[16] Dr. Pollock admitted that there were "many, many items that we did not examine." (10 R 493) Specifically, he did not make DNA comparisons with swabbings taken from Volum's car. There is also no evidence of any DNA samples taken from the knife or crack pipe found underneath Volum's body (9 R 330, 10 R 511). Similarly, although many hair samples were taken from either the car or murder scene, no DNA analysis was done of them (9 R 240, 310, 317, 338, 10 R 471). Finally, there is no evidence of any of Banks' blood found on Volum's body.

THE COURT: Yeah, you can approach. I'm not sure I understand the objection.

MR. ELER: Yes, sir. Judge, the objection would be a predicate. I think at this point they're going to try to admit the results of the delayed typing in the case-in-chief against Mr. Banks and the Court is aware I've filed a motion in limine, and kind of reserved ruling on some of the issues to be raised at trial before they enter that, and I think they need to establish a predicate, Your Honor, regarding population statistics, regarding how they come up with their numbers and what bases they do before the actual numbers get admitted. So that's the objection.

MR. MIZRAHI: Well, I haven't asked the number questions yet. I will do so. If I intend on doing those number questions. Right now I was just asking --

THE COURT: The first submit you had, I understand, was a full profile so I think we all know that's coming in. I don't know what the answer would be on this. So you might go ahead and lay the predicate at this point at least as to how the statistical analysis works.

MR. MIZRAHI: Frankly I wasn't even going to ask him the question about statistics. I was going to say did you develop a match from this to this, they're all loci.

MR. ELER: And I'm not trying to litigate the Brim case and the prodigy, but I think in Brim and the other cases there's two prongs there's the analytical phase which they've gone to and they've extracted and they've got profiles and then there's the comparison to the population statistics and the databases and usually back in the old day we'd get Dr. Tracey here from Miami to argue that.

THE COURT: Yeah, I understand. So are you saying as to this you're going to have a match at all 13 loci?

MR. MIZRAHI: Yeah.

THE COURT: You know, I'm inclined to let it in. I can't imagine how it's objectionable.

MR. ELER: Well, normally what they would do, Judge, and I'm anticipating the testimony is they would say, well, we run it through a computer program, Pop Stats and I'm not sure Mr. Pollock has the background for the population.

THE COURT: One in 14, one in 14 quadrillion, he does have it. He had it two weeks ago. I'm pretty sure he has it now. I've heard him a lot of times.

MR. ELER: Yes, sir.

THE COURT: He can give you the statistical analysis. He's done it.

MR. MIZRAHI: If I ask those questions, I'll put the proper predicate, but I haven't got to them.

MR. ELER: Okay. I didn't want to draw an objection if I go into it beyond the scope of direct.

THE COURT: I won't have any problem with that.

MR. ELER: Thank you.

THE COURT: All right. Proceed, please.

(10 R 474-76)

Significantly, note that the State, true to what Banks had told the court at the hearing on his motion to exclude, refused to put on any testimony regarding the statistical significance of Dr. Pollack's testimony. Note also, that Banks told the court that the prosecutor needed to follow the two step process outlined in Brim. Specifically, if he failed to present any statistical evidence as required by that case he did so at its own peril.

II. The law on this issue

As mentioned at the beginning of this issue, this Court's opinions in Brim and Butler establishes the procedure a party must use if it intends to introduce DNA evidence. Specifically, even though an expert may say two DNA samples match, that testimony gains relevance only if the "second statistical step … give[s] significance to a match." Brim at 269. This second step is critical because an expert may say two people match because they have similar characteristics, for example, ten fingers, two eyes, and a nose but without any statistical evidence to show the significance of these

"13 loci" the testimony has no importance. Indeed, it tends to confuse the jury into giving his testimony of the match more significance than it deserves. The statistical evidence provides the crucial context for the conclusion of the match. Thus, in the example, expert testimony of the statistical commonness of people who have 10 fingers, two eyes, and a nose would render the "match" virtually meaningless because the great majority of humanity have those "loci." On the other hand, had those 13 common points been three fingers, five thumbs, three eyes, and two noses, the statistical evidence of persons having those characteristics would have made a match much more significant because presumably very few humans have that odious combination of fingers, thumbs, eyes, and noses.

Brim and Butler, moreover, continue to be the law in Florida on this issue. Gibson v. State, 915 So.2d 199 (Fla. 4th DCA 2005)("As to this [statistical] analysis, a properly qualified expert must testify as to the qualitative or quantitative estimates demonstrating the significance of the DNA match.").

Most of the cases that focus on Brim's second step concern whether the expert was really an expert in statistics. For example, in Gibson, the State's expert was not because she could not "explain what method she used, nor did she demonstrate any knowledge of the authorities pertinent to the database." Id. at 202; accord. Perdomo v. State, 829 So.2d 280, 282-83 (Fla. 3d DCA 2002); Hudson v. State, 844 So.2d 762 (Fla. 5th DCA 2003).

III. Applying this law to this case.

No case has dealt with the situation presented by this issue, where the State blatantly (and despite warnings that it acted at its "own peril") refused to present evidence to satisfy the Brim and Butler second step. Those cases, nonetheless, provide the crucial guidance in resolving the problem. Specifically, in Brim, this Court said, "A second statistical step is needed to give significance to the match." Brim, cited above at 269.

Without any question, the State in this case did not, indeed refused to, satisfy the demands of Brim and Butler. That failure or refusal plainly was a significant omission, and the court's error in excusing the prosecutor from complying with the clear dictates of those cases was similarly obvious and significant.

This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN DENYING BANKS' MOTION FOR MISTRIAL WHEN, ON CROSS EXAMINATION, SUDIE JOHNSON IMPLICATED THE DEFENDANT IN AN UNCHARGED STABBING, A VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State called as its star witness, Banks' girlfriend, Sudie Johnson. On direct examination, she told the jury about the defendant giving her Volum's computer and repeatedly admitting that he had killed Volum (9 R 353, 358). Her credibility, however, had problems. She did not report the murder for two weeks (10 R 579), and, after his arrest, she continued to write the defendant letters or talk to him on the telephone (9 R 378, 11 R 676).

On cross-examination, the defendant sought to discredit her by raising the specter that she had fabricated her story, or lied about what he had told her.

> BY MR. ELER[defense counsel]:
>
> Q But for a whole year into it, while you were communicating with him in the jail, you felt he wasn't?
>
> A No.
>
> Q Did you change your mind?
>
> A Yes.
>
> Q Change your mind because you found out that he and Ms. Volum had sex?
>
> A No, that wasn't the reason. The reason was from the previous - - I supported Mr. Banks all the way up until I seen the tape of him stabbing Mr. William Johnson from the first - -
>
> MR. ELER: Objection, Your Honor. May we approach?
>
> THE COURT: Yes, sir.

(Counsel for the State and Defense and court reporter approached the bench for a side-bar conference out of the hearing of the jury, where the following proceedings were had :)

MR. ELER: At this time, Judge, I'd move for a mistrial based on the statement of stabbing another victim. It's not related to anything in this case.

MR. MIZRAHI: Your Honor, he walked right into that when he kept asking and kept asking and kept asking.

THE COURT: You sure did. Boy, did you ask for that answer.

MR. ELER: I didn't ask about any other crimes, Judge, I asked about when she changed her mind.

THE COURT: You kept asking her why she stayed with him. You asked her if the reason she stopped being with him was because she had learned about it and she eventually told you why she stopped supporting him. I'll be glad to give you a curative instruction on this subject, but I don't think it's grounds for a mistrial.

MR. ELER: I don't think it was an invited comment, Judge.

THE COURT: Well, I know that you don't. I think that it was.

MR. ELER: I don't know what kind of curative instruction that I could ask for that would cure it.

THE COURT: I'd be glad to tell them to disregard the last remark.

MR. MIZRAHI: Well, my only point to that, I think he's going into a long cross-examination about why she stayed with him. I think she's entitled to give the answer as to when she broke off the relationship and why. I'm certainly not going to argue it at all in my closing. I mean I won't do that.

THE COURT: I hope not.

MR. MIZRAHI: I'm just saying I think the answer is a legitimate answer.

MR. ELER: Well, Judge, I don't know how to phrase a curative instruction. If the Court is denying my motion for mistrial, then I'd ask for, I guess, a curative instruction and the Court instruct the jury to disregard the last comment of Ms. Johnson.

THE COURT: All right. I will give that, but I think you probably better move along to another subject because you've clearly opened the door to this and I would not expect to hear any argument about it in closing argument.

* * *

THE COURT: Ladies and gentlemen, please disregard the last remark made by this witness. All right.

(9 R 376-81)

Allegations of other crimes are inadmissible unless relevant under section 90.404 Fla. Stats (2008). That is virtually black letter law, and if the prosecutor had elicited Johnson's testimony incriminating Banks in some other uncharged crime the court would have granted his motion for mistrial because the evidence had relevance only to exhibit the defendant's bad character or propensity to commit crime. Czubak v. State, 570 So.2d 925, 928 (Fla. 1990). It had no tendency to prove any contested issue. Moreover, the error would have prompted a new trial because the wrongful admission of collateral crimes evidence is presumptively harmful. Castro v. State, 547 So.2d 111, 116 (Fla. 1989).

But Johnson implicated Banks in another, irrelevant crime on cross examination, so the question becomes whether the trial court correctly concluded that he had invited her objectionable response.

The invited error doctrine precludes a party benefiting from an error it has created. "Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." Goodwin v. State, 751 So.2d 537, 544 (Fla. 1999); See Norton v. State, 709 So.2d at 89, 94 (Fla. 1997); Terry v.

State, 668 So.2d 954, 962 (Fla.1996); Czubak v. State, supra; Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). In the situation, such as we have here, a witness's response to defense counsel's question is not necessarily invited if it is unresponsive to counsel's question. Czubak, at 962. Said or asked another way, is the objectionable answer a "fair response" to the question asked by counsel? If the witness's answers directly follow from it, the error is invited. Norton v. State, 709 So.2d 87, 97 (Fla. 1997).

Thus, in this case the argument focuses on Ms. Johnson's answer to counsel's narrowly phrased question of whether she had changed her mind about Banks' innocence because he had discovered he had cheated on her. Was it unresponsive to what he had asked or a fair or direct response to it? Some cases in which this issue arose will help guide the analysis.

In Norton, cited above, Detective Childers testified on direct examination by the prosecutor that Norton had removed carpeting from his car. On cross-examination, defense counsel asked why he had done that:

> Q. And at 9:45 his car is in front of his house, and you're saying at that point the carpets were gone?
> A. The carpet is gone when I see it, yes, sir.
> Q. And there's thirty minutes in between, right?
> A. Yes, sir.
> Q. Well, twenty-nine and a few seconds, 9:16 to 9:45. Do you agree that that's the time frame that Johnnie Norton is allegedly accused of taking all the carpets out of his car and disposed of them?
> A. No, sir.
> Q. Took them out before?

A. No, sir.
Q. So why is he buying carpet cleaner?
A. That you'll have to ask him.

Id. at 93-94.

Defense counsel objected to "That you'll have to ask him" as a comment on Norton's right to remain silent. This Court, however, found that his lawyer had invited the police officer's response.

> [T]he defense counsel in the instant case, in an unsuccessful attempt to make a point on cross-examination, merely received a direct answer in response to his question. By probing the witness as to why appellant bought carpet cleaners when there were no carpets in his car, a question to which only appellant would know the answer, defense counsel invited the witness' response.

Id. at 94.

In Terry v. State, 668 So.2d 954 (Fla. 1996) defense counsel sought to find out on cross examination of a police detective how or why the police had ruled out numerous suspects:

> Q [defense counsel]: Do you know Audron Butler?
> A [Detective Ladwig]: Yes, I do.
> Q: And how do you know Audron Butler?
> A: Audron Butler provided information in several armed robberies that had been going on at the time, that developed Mr. Terry and Mr. Floyd as suspects in this case also.

This Court found, as did the trial court, that Terry had invited the detective's answer, and it was a fair response to his question.

Finally, in Czubak, Dorothy Schultz, a state witness said on cross-examination that Czubak was an escaped convict. This Court found that revelation was clearly inadmissible. It also was not an invited error:

> On cross-examination defense counsel was attempting, with some difficulty, to elicit from Schultz whether she suspected that Czubak killed Peterson before Detective Pierce suggested it to her. Counsel could not have anticipated that Schultz would respond by stating that Czubak was an escaped convict. The response was volunteered and totally irrelevant to the question posed.

Id. at 928.

Questions that invite damning responses tend to be open ended. "How do you know Audron Butler?" and "Why is he buying carpet cleaner?" fail to guide the witness's responses, and allow for him or her to wander into forbidden testimonial territory. Leading questions, as are permitted on cross-examination, however, channel those responses to yes or no answers. The opportunity for a witness, thus, is severely controlled by that type of question.

And, in this case, that is the type of question Banks asked of Johnson. "[Did you] change your mind because you found out that he and Ms. Volum had sex?" (9 R 378). To that simple, leading question Johnson should have given only a yes or no answer. Counsel never asked her a "why she had changed her mind" for the obvious reason that such an inquiry would have prompted her to explain her answer, something Banks obviously wanted to avoid. Thus, her answer to Banks' question was the product of her own initiative. What she said was not a direct or fair response

to the question he had asked. In short, as in Czubak, what Ms. Johnson said was volunteered and irrelevant to the question asked. And, as in that case, the trial court erred in denying the defendant's motion for mistrial.[17]

This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

[17] In this case, the court, of course, gave a curative instruction, but in Czubak, this Court found that even if the court had similarly given such guidance to the jury, reversible error would have remained. "We reject the state's argument that Czubak was required to ask for a curative instruction. A curative instruction would not have overcome the error here." Czubak. fn at 928.

ISSUE V

THE COURT ERRED IN ALLOWING THE STATE TO PRESENT, DURING THE PENALTY PHASE OF BANKS' TRIAL, A VIDEO SHOWING HIM COMMITTING AN ARMED ROBBERY ON A MR. WILLIAM JOHNSON, OSTENSIBLY TO SUPPORT THE AGGRAVATING FACTOR THAT THE DEFENDANT HAD A PRIOR CONVICTION FOR A VIOLENT FELONY, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Before trial, Banks filed a "Penalty Phase motion to prohibit videotape of prior felony." (4 R 759-760). The objected-to videotape showed him stabbing the victim, Mr. William Johnson, of an armed robbery he committed at a convenience store (12 R 799). Banks apparently had been charged and convicted of that offense, and at the trial for the robbery the State had used a "story board," which it wanted admitted along with the videotape at the penalty phase part of the trial in this case(12 R 800, 805).

At the hearing on his motion, Banks reiterated his pre trial objection to the video (12 R 798, 801). Relying primarily on this Court's decision in Singleton v State, 783 So.2d 970, 976 (Fla. 2001) and to a lesser extent on Rhodes v. State, 547 So.2d 1201 (Fla. 1989), the court excluded the storyboard, but allowed the videotape (4 R 845, 12 R 806-807, 13 R 848-49). Accordingly, during the penalty phase, the jury saw the video, again over defense objection (14 R 871).[18] The court erred in

[18] A copy of the video is included with the two volumes of exhibits that were sent to this Court as part of the record on appeal, and it is identified as "State exhibit #1."

admitting the videotape, and this Court should review this issue under an abuse of discretion standard of review.

I. What the video shows.

The video lasts about three minutes, and it shows the victim, William Johnson, park his car at a convenience store and go inside. Once there, he waits for a clerk to help him, and as he leaves, Banks comes in but quickly leaves behind Johnson. As the victim walks to his car, apparently putting his wallet in his back pocket, the defendant comes out of the store approaches Johnson from the rear, quickly stabs him, and runs away. It is unclear if he took anything from him. Johnson stumbles to the front of the car and falls to the sidewalk. He is holding his arm, blood is spurting from it, and as he turns his back to the camera, we can see that he has also been stabbed in the lower back because there is a blood stain on his shirt.

II. The law on admitting videos of crimes in the penalty phase part of a capital trial.

Briefly, there is no law on the specific issue presented by this case, but this and other courts of the State have dealt with similar problems. Fundamentally, of course, relevancy guides the analysis, Burns v. State, 609 So.2d 600 (Fla. 1992)(Photographic evidence), but whether evidence is relevant depends on the purpose it is offered to support. If, for example, the State wanted to show the video of the stabbing during Banks' trial for attempted second degree murder, armed

robbery, and aggravated battery that arose from what the video showed there would be no question as to its relevancy or admissibility. It would, paraphrasing the language of Section 90.401, Fla. Stat. (2008), tend to prove a material fact, that Banks had stabbed Johnson.

The relevancy of the video becomes more problematic when the State seeks to admit such evidence during the penalty phase of a capital trial. In that situation, the State, as it did here, sought to introduce the evidence to establish the aggravating factor that "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Section 921.141(5)(b) Fla. Stat. (2008). But, without any question, Banks had a prior conviction for the attempted murder, armed robbery, and aggravated battery of Mr. Johnson. Indeed, he stipulated to the convictions for those crimes (Vol. 2 of exhibit volumes, page 125). Notwithstanding that admission, the law allows the State to present evidence of the underlying facts and circumstances of those crimes. Reynolds v. State, 934 So.2d 1128, 1148-50 (Fla. 2006). But, it allows their admission with a caveat:

> In Rhodes v. State, 547 So.2d 1201 (Fla.1989), this Court noted that evidence concerning the circumstances of a prior felony conviction involving the use or threat of violence is admissible during the penalty phase of a capital trial. See id. at 1204-05; see also Duncan v. State, 619 So.2d 279, 282 (Fla.1993). However, this Court cautioned that there are limits on the admissibility of such evidence, emphasizing that "the line must be drawn when [evidence of the circumstances of the prior offense] is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value." Rhodes, 547 So.2d at 1205.

Dufour v. State, 905 So.2d 42, 73-74 (Fla. 2005).

This "prejudice outweighs the probative value" limit to admitting clearly relevant evidence has particular sensitivity to video presentations

> When a videotape is proffered into evidence, the trial court must be ever mindful that the "artificial recreation of an event may unduly accentuate certain phases of the happening, and because of the forceful impression made upon the minds of the jurors by this kind of evidence, it should be received with caution." Grant v. State, 171 So.2d 361, 363 (Fla.1965) (quoting People v. Dabb, 32 Cal.2d 491, 197 P.2d 1, 5 (1948)), cert. denied, 384 U.S. 1014, 86 S.Ct. 1933, 16 L.Ed.2d 1035 (1966)

Some examples will show how this Court has dealt with this issue in light of this law.[19]

In Reynolds v. State, 934 So.2d 1128, 1148-50 (Fla. 2006), the victim of Reynolds' prior violent felonies described the events surrounding them, and as part of that testimony she necessarily included other crimes for which he had not been convicted. That testimony was admissible this Court held because although it included crimes for which he had not been convicted, it "provided the jury with details surrounding Reynolds' prior conviction, which were essential in assisting the

[19] The trial court thought this Court's opinion in Singleton, cited above, had more significance that Rhodes because it was "newer." (13 R 848). Singleton involved the issue of whether the jury should have seen a video of the defendant wearing jail clothing and handcuffs when questioned. This Court found that defense counsel had not preserved the issue, and even if it had, the brief view of the defendant in jail clothing did not outweigh its probative value. Singleton is factually distinguishable from the situation presented by this case, and has no significance to resolving this issue.

'jury in evaluating the character of the defendant and the circumstances of the crime. . . ."

More on point, in Dufour v. State, 905 So.2d 42, 63 (Fla. 2005), the prosecutor introduced photographs of injuries a murder victim in Mississippi had suffered to assist in explaining the nature and manner in which the wounds were inflicted. They were relevant, and their prejudicial value did not outweigh their relevancy.

On the other hand, in Cave v. State, 660 So.2d 705, 708-709 (Fla. 1995), the police

> staged a video re-enactment of portions of the crime. The video dramatized the route taken when Cave and his accomplices kidnapped the victim and drove her to the location where the murder was committed. The video was approximately eighteen minutes in duration and filmed in hushed tones. Its conclusion began with the car stopping along the side of the road, the sound of car doors opening, a gun shot and a flash of light, and the sound of car doors closing. The video finally concludes with a view of the car driving down the highway with its rear lights slowly fading from view.

Even though the video may have had some relevancy establishing the crimes for which Cave was being resentenced, "the video was irrelevant, cumulative, and unduly prejudicial . . ." Id.

Finally, in Taylor v. State, 640 So.2d 1127, 1134 (Fla. 1st DCA 1994), the State used a clay head to describe the impact and nature of wounds that caused the victim's death. The prosecution also used a young woman of the same height, weight, and general features and coloring as the victim and who wore a nightgown

similar to the one worn by her when killed. The First District was troubled by the use of the clay head because although it was used to describe the cause of death, that was not an issue. More significantly, the feminine appearance of the head "was certain to evoke an emotional response in the minds of the jurors." More troubling, the relevancy of the surrogate resembling the victim was outweighed by its prejudicial impact "of this appeal to the emotions of the jurors."

III. This case.

In this case, the jurors must similarly have had a powerful emotional reaction to the video as they watched Banks rush up to Johnson, brutally stab him in the back and then flee into the night. They could only helplessly watch as Banks rushed up to Williams, brutally attack the man and then leave him profusely bleeding. The video must have had left a strong emotional reaction among the jurors, or at least some of them.

Of course, the video was relevant, but that probativeness was significantly outweighed by its graphic, emotional appeal. Moreover, the State did not simply show the video and move on to other topics. It became a feature of its closing argument:

> I mean the defendant today admitted he was a robber, so it's not just those. It's not just those two robberies. It's the one robbery that you saw the brutality of that man, that 13 days after Linda Volum was

> dead he kept coming. He kept plunging knives into the citizens of Jacksonville, this one into a 67 year old man's back into his back.
>
> * * *
>
> This is who he is. This is his character. By his actions you shall know him. Not by what he says but by what he does. You do not plunge knives into the backs of people over the age of 65 and take their wallets. Never even gave Mr. Johnson the chance to peacefully hand over his money. Didn't even give him that opportunity.
>
> This stabbing took place just a block or so away from Hare Avenue where this defendant lived and just two blocks or so away from where Linda Volum lived within a tine neighborhood in Arlington. We got a window into this defendant's soul and we know what kind of character he has, and I submit to you there can be no greater aggravation.

(14 R 931)

The video, thus, became a basis for urging the jury to return a death recommendation, which it did. Duncan v. State, 619 So.2d 279, 282 (Fla. 1993) (Error harmless because no further reference made to the erroneously admitted photograph, and it was not urged as a basis for a death recommendation.)

Making this error particularly significant and reversible, the State had other, less prejudicial evidence to prove the defendant's character. Initially, it wanted to present a storyboard used at Banks' trial for the attempted murder, robbery, and aggravated battery as well as the video (12 R 805). The court, however, gave the State the option to use the video or the story board, "but not both." (12 R 807). In short, the video was unnecessary, and, given its strong emotional impact, highly prejudicial.

Thus, the court erred in admitting the video at the Banks' penalty phase hearing, and that error was so egregious that this Court should reverse his sentence of death and remand for a new sentencing hearing.[20]

[20] Banks points out that the measure of harmlessness is lower for penalty phase errors in this case because even if not all the jurors had not been swayed by the video, some may have, and where the State needed only seven jurors (and not 12) to recommend death, the harm caused by the video may have been more serious than if it needed a unanimous death recommendation.

ISSUE VI

THE COURT ERRED IN FINDING THE MURDER TO HAVE BEEN COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF BANKS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In justifying sentencing Banks to death, the court found that he had murdered Linda Volum in a cold, calculated, and premeditated manner. After providing a legal description of the analysis it was to use, it said it justified finding the CCP aggravator because:

> Here, besides the physical evidence which connected the defendant to the crime, he also confessed to his girlfriend many of the facts and circumstances surrounding the murder. Some of those wee verified by the physical evidence at the crime scene, an several could not have been known by the defendant unless he had been present at the murder. Among the circumstances of the crime detailed by the defendant was that it was a "murder pay-back", reflecting the defendant's heightened premeditation. The defendant even removed his outer garments before entering the victim's residence, from which the Court can only conclude that he coldly calculated they might otherwise be damaged or bloodied during the attack. . . . The Court finds that the aggravating factor cold, calculated, and premeditated have been proven beyond a reasonable doubt. The Court gives this aggravator great weight.

(17 R 1015-16)

Under the facts of this case, the murder was not cold, calculated, and premeditated as this Court has defined that phrase. This Court should review these issues under an abuse of discretion standard of review.

This Court has aided a trial judge faced with the daunting task of exercising its limited discretion when it seeks to justify the taking of a human life particularly as it applies the cold, calculated, and premeditated aggravating factor. Specifically, in Jackson v. State, 646 So.2d 84, 89 (Fla. 1994), and more recently in Lynch v. State, 841 So.2d 362, 372 (Fla. 2003), this Court provided the analytical approach for the sentencing judge to use:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), ...that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), ... that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.

Jackson v. State, 646 So.2d 85, 89 (Fla. 1994); accord, Lynch v. State, 841 So.2d 362 (Fla. 2003)(Citations omitted, emphasis in opinion). Significantly, the court's sentencing order must provide facts that support each part of the CCP aggravator. That is, facts and analysis, as presented in the sentencing order, must show the murder to have been cold and calculated and premeditated. Failure to prove any element of this aggravator means that just like failing to prove an element of a crime, the State has not carried its burden to prove this aggravator beyond a reasonable doubt.

In this case, the trial court relied on two facts to prove this aggravator. Specifically, the murder was CCP because (1) Banks said it was a "murder pay-

back," and (2) he took off his outer clothes before entering the victim's residence (17 R 1015).

Banks' statement that the homicide was a "murder pay-back," despite its vagueness and absence of any other facts to give it meaning or context,[21] probably is sufficient to justify finding the "heightened premeditation" prong of the Jackson analysis. Likewise, removing his outer clothes before going inside also supports this element.

It may also provide some justification for the required "calculated" aspect. That is more problematic because if he took off his clothes so they would remain unbloodied, (17 R 1016), that rationale should have extended to his underclothes, which did have blood on them, according to what Sudie Johnson saw (9 R 353). Moreover, under facts more probative of the heightened premeditation and calculation prongs, this Court in Geralds v. State, 601 So.2d 1157 (Fla. 1992) rejected the court's finding the murder was CCP. It did so because the defendant in that case used a weapon of convenience found at the scene rather than getting one ahead of time, and the victim was initially bound, thus indicating there may not have been a

[21] Indeed, if this was a drug related murder, the "murder pay-back" motive lacks any convincing power. Linda Volum was a crack cocaine addict, and she regularly bought the drug from Banks (11 R 630). Significantly, although she occasionally did not have the money to buy it, she always seemed to find some to pay off her drug debts (11 R 632, 634-35). Banks never saw her as a problem from that perspective, or any other, as far as this record shows (11 R 663, 665). Thus, the "murder pay-back" reason hangs out in the legal ether without any connection to or between Volum or Banks.

prior "plan to kill." This was so, even though the defendant waited out of sight, bought gloves, a change of clothes, asked the victim's kids when family members would be around the house, bound the victim, and then stabbed her.

In this case, the steak or paring knife used as the murder weapon could have been one Volum had (7 R 324, 10 R 581). No evidence even faintly suggests Banks brought it with him. Thus, despite the two facts the court used to justify the CCP aggravator, the more egregious facts of Geralds, minimizes their significance.

Other evidence, moreover, weakens the significance of those aspects of the CCP aggravator. On the night of the murder, Banks was high on drugs and drunk (11 R 640-41). "I sold drugs, had got high and had sex, basically. . . . .I'm not fully sure [how many times I had sex with Volum that night] because I was intoxicated, but I know I had sex." (11 R 641) Intoxication-either by drugs or alcohol-negates this aggravator. White v. State, 616 So.2d 21, 25 (Fla. 1993)("White committed this offense 'while he was high on cocaine' leads us to find that this aggravating factor was not established beyond a reasonable doubt. . . .")

A major problem, however, arises from the "cold" element of the CCP analysis. If that prong requires the killing to have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage, neither fact directly supports the conclusion that this murder was cold. Indeed, Banks

somehow stabbed himself in the leg (9 R 353, 359) during the assault, a fact that exhibits a frenzied attack rather than a methodically committed murder.

The lower court, therefore, failed to justify sentencing Banks to death because the murder, based on the facts it presented in its sentencing order, do not justify its finding that it was cold, calculated, and premeditated.

This Court should, therefore, reverse the court's sentence of death and remand for resentencing.

V. CONCLUSION

Based on the arguments presented here, Donald Banks respectfully requests this Honorable Court reverse the trial court's judgment and sentence and remand for a new trial, or reverse the court's sentence and remand for a new sentencing hearing with or without a jury.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to , Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and **DONALD LENNETH BANKS, #**A-J29603, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of March, 2009. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 271543
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8517

ATTORNEY FOR APPELLANT