IN THE SUPREME COURT OF FLORIDA

BARRY GILBERT O'CONNELL,

APPELLANT,

-VS-

STATE OF FLORIDA,

APPELLEE.

CASE NO. 64,565

BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

ANDREA SMITH HILLYER
ASSISTANT ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32301
(904) 488-0600

COUNSEL FOR APPELLEE

TOPICAL INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

OTHER

PRELIMINARY STATEMENT

Appellee adopts the Preliminary Statement contained in appellant's brief.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement of the Case and Facts provided on pages one through four of appellant's initital brief as being a substantially accurate summary of those facts presented. Since appellant is not challenging the sufficiency of the evidence, appellee reserves the right to bring forward additional facts, if necessary, in response to any future claims of insufficiency of evidence. A review of the facts shows, however, that any such claim of insufficiency of the evidence would fail. See Rose v. State, 425 So.2d 521 (Fla.1982), cert.den., 103 S.Ct. 1883 (1983); Tibbs v. State, 397 So.2d 1120, cert.granted, 454 U.S. 963, aff'd., 102 S.Ct. 2211; and Heiney v. State, 447 So.2d 210 (Fla.1984). Facts relevant to the issues on this appeal will be presented in the argument sections, as needed.

ISSUES ON APPEAL

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO ARE IN FAVOR OF THE DEATH PENALTY; IN REFUSING TO ALLOW ADDITIONAL PEREMPTORY CHALLENGES; IN GRANTING THE STATE'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO WERE OPPOSED TO THE DEATH PENALTY; AND IN REFUSING TO ALLOW DEFENSE COUNSEL AN OPPORTUNITY TO EXAMINE THE JURORS CHALLENGED FOR CAUSE BY THE STATE WHERE DEFENSE COUNSEL HAD UTILIZED ALL HIS PER-EMPTORY CHALLENGES AND THE COURT DETERMINED THE JURORS' STATEMENTS INCAPABLE OF CREDIBLE REHABILITATION.

ISSUE II

THE INTRODUCTION OF EVIDENCE OF APPELLANT'S FLIGHT DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL.

ISSUE III

THE TRIAL COURT DID NOT ERR IN SENTENCING APPELLANT TO DEATH.

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO ARE IN FAVOR OF THE DEATH PENALTY; IN REFUSING TO ALLOW ADDITIONAL PEREMPTORY CHALLENGES; IN GRANTING THE STATE'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO WERE OPPOSED TO THE DEATH PENALTY; AND IN REFUSING TO ALLOW DEFENSE COUNSEL AN OPPORTUNITY TO EXAMINE THE JURORS CHALLENGED FOR CAUSE BY THE STATE WHERE DEFENSE COUNSEL HAD UTILIZED ALL HIS PER-EMPTORY CHALLENGES AND THE COURT DETERMINED THE JURORS' STATEMENTS INCAPABLE OF CREDIBLE REHABILITATION.

ARGUMENT

A. Introduction.

Appellant contends the trial court erred in denying his challenges for cause with respect to three prospective jurors (McAnally, Burmeister, Lindsay), and erred in granting the State's challenges for cause with respect to two prospective jurors (Poniatowski, Caristi). Appellant also assigns error to the trial court's refusal to grant appellant additional peremptory challenges and refusal to allow appellant to examine the two prospective jurors excused on challenge by the State.

In order to facilitate review, appellee (as did appellant in his brief) has summarized the entire voir dire examination; selected portions concerning the individual prospective jurors will be included later in this brief.

A Chronological Summary of the Voir Dire Examination

The State Attorney, Mr. Hensel, first questioned the prospective jurors (R 30-115); near the end of his initial questioning by the State, Mr. Hensel explained the procedure for sentencing in death cases (R 100-104) and inquired whether anyone had any religious, moral or philosophical opposition to the imposition of the death penalty, and whether anyone felt that under no circumstances could they recommend imposition of the death penalty in a first degree murder case (R 104). Apparently no jurors responded in the affirmative at that time. Shortly thereafter a bench conference was held; the trial court mentioned four names of prospective jurors whom the court considered susceptible to challenges for cause. Prospective Jurors Solice, Harmon, and Johnson were excused based on challenges for cause by the defense (R 117,119). Solice was challenged because she stated she could not put aside information about the case received from her husband, who knew one of the victims, and because she stated she could not be fair and impartial due to a prior experience where her children were victims of a crime (R 46-48, 80-81, 113). Prospective Jurors Harmon and Johnson were excused because of outside concerns (work obligations) which would affect their state of mind (R 7,9,29,109-111). The State challenged for cause prospective juror Hulse, a schoolteacher who stated she was needed for orientation that week (R 10). Hulse stated whe was prosecuted by the State Attorney's Office and felt that experience would affect her ability to be fair and impartial (R 65). Hulse also stated that defense counsel's wife

was a very good friend of hers, but added that would not affect her ability to be fair and impartial (R 75-76). Defense counsel objected to the excusal of Hulse and requested an opportunity to further voir dire Ms. Hulse (R 118).

Jury selection resumed the next day. Defense counsel objected to the trial court's excusal of prospective juror Hobbs due to a dental appointment (R 124). Defense counsel explained the bifurcated nature of the trial and sentencing and examined the venire (R 124-206). At the conclusion of his examination the trial court announced at the bench conference that instead of entertaining challenges to the entire venire, the court would randomly call fifteen names to be seated and subject to challenges, with replacements being called in the same manner (R 208). During the bench conference defense counsel challenged for cause prospective jurors Wasden, Wester and Burgess on the ground they were committed to automatic imposition of the death penalty (R 211-213). Defense counsel challenged for cause prospective juror Kirksey on the basis she was related to a witness (R 211); however, the State stipulated it would not call that witness to testify at trial (R 212). Finally, defense counsel challenged for cause prospective juror Burmeister "on the basis of her feelings about probably imposing the death penalty for anyone convicted of first degree murder." (R 213). All five challenges were denied (R 211-213).

The fifteen prospective jurors (Hinkle, Wasden, McAdams, Parker, Wester, McKinney, Bellamy, Kirksey, McNair, Burmeister,

Anderson, Sundie, Johnson, Burgess, Towne) were then individually examined by the State (R 214-64) and then by defense counsel (R 264-277, 288-299). Afterwards, defense counsel challenged for cause prospective juror Burgess on the ground of inability to accept mitigation testimony by psychologists (R 300). This challenge was granted (R 300). Defense counsel challenged for cause prospective jurors Kirksey and McAdams on the basis that they felt the death penalty was proper for double homicide or premeditated homicide (R 301). These challenges were denied (R 301). Defense counsel then exercised peremptory challenges on Kirksey (R 301), and Wasden (R 301). Prospective jurors Rupp, McIntosh, and Bennett replaced excused prospective jurors Burgess, Kirksey and Wasden. The State individually examined the three new prospective jurors (R 302-310) as did defense counsel (R 310-321). At the bench conference defense counsel peremptorily challenged prospective juror McKinney (R 322), which elevated prospective juror Rupp to the primary twelve. Defense counsel then peremptorily challenged prospective juror Rupp (R 322), which elevated prospective juror McIntosh to the primary twelve. Defense counsel then challenged for cause prospective juror McIntosh, which was granted by the court (R 322). Prospective juror Burmeister was challenged for cause by defense counsel on the ground that "she said anyone convicted of premeditated murder should automatically get the death penalty." (R 323). This challenge was denied (R 323). Defense counsel challenged for cause prospective juror McNair on the same ground, "automatic death penalty", (R 323) this was likewise denied (R 323). Defense

counsel added another ground to his challenge to McNair, and the challenge was granted (R 324).

Prospective jurors Wong, Lindsay, Settlemire and Blanchard replaced excused prospective jurors McKinney, Rupp, McIntosh and McNair. The State examined the four new prospective jurors (R 325-343) as did defense counsel (R 343-354). Defense counsel then peremptorily challenged prospective juror Burmeister (R 354); the State peremptorily challenged prospective juror Parker (R 354). Defense counsel challenged for cause prospective juror Lindsay because "she felt like the death penalty should automatically be imposed for premeditated killings" (R 355). This challenge was denied by the court (R 355). Defense counsel peremptorily challenged prospective juror Johnson (R 355); the State unsuccessfully challenged prospective juror Wong for cause (R 355), and then exercised a peremptory challenge on Wong (R 355).

Prospective jurors Hatcher, Marshall, Jennings and Hill replaced excused prospective jurors Burmeister, Parker, Johnson and Wong. The State examined the new prospective jurors (R 355-368) as did defense counsel (R 368-379). [During a bench conference held concerning the examination of prospective juror Hill, the State's challenge for cause of Hill was granted (R 371)]. Defense counsel exercised peremptory challenges on prospective jurors Lindsay and McAdams (R 379). At this point defense counsel had only two peremptory challenges remaining. The State (R 381-393) and defense counsel (R 393-410) examined the remaining prospective jurors of the venire; Williams, McClain, Weaden,

McAnally, and Landsgaard. Defense counsel peremptorily challenged prospective juror Anderson and the State peremptorily challenged prospective juror Blanchard (R 411). Defense counsel requested the court to grant the defense an additional ten peremptory challenges (R 411). The court denied the request and defense counsel noted his objection (R 411). The State exercised peremptory challenges on prospective jurors Hatcher and McClain (R 412). Defense counsel challenged prospective juror McAnally for cause on the ground he had an automatic view on the death penalty (R 412); this challenge was denied and defense counsel exercised his last peremptory challenge on McAnally (R 413). Defense counsel challenged for cause prospective juror Landsgaard (R 413); this was denied. The State peremptorily challenged prospective juror Weaden (R 413), which left only eleven prospective jurors (Hinkle, Wester, Bellamy, Sundie, Towne, Bennett, Settlemire, Marshall, Jennings, Williams, Landsgaard). The State had four peremptory challenges remaining. The court sent the eleven jurors home and called up another panel of twenty prospective jurors (R 414-419).

The court, after examining preliminarily the twenty new prospective jurors, excused four (Jackson, Salter, Rappa, and Collins). (R 419-430). Court was recessed until the next morning (R 430-431). The State (R 432-483) examined the remaining prospective jurors (Poniatowski, Caristi, Clayton, Ridings, Martin, Crill, Keyes, Peacock, Denmon, Ross, Plack, Merro, Miller, Jensen, Sarricks, Hagen). At the end of the State's examination, the trial court decided to let the State exercise its peremptory

challenges first since that would narrow the number of jurors for defense counsel to challenge for cause, since the defense had no more peremptory challenges (R 483-484)[1]. The State peremptorily challenged prospective jurors Clayton and Denman (R 484). The State challenged for cause prospective juror Caristi:

> THE COURT: Opposed to the death penalty and would not impose it under any circumstances. Granted.
>
> DEFENSE COUNSEL: Note my objection, Judge. I haven't had an opportunity to voir dire.
>
> THE COURT: That's right. And as I pointed out before, they wouldn't impose it under any circumstances, they would not be heard to change their minds in an hour.

(R 485). The State challenged for cause prospective juror Poniatowski on the same ground; the court granted the challenge and defense counsel again objected on the same ground (R 485).

Defense counsel challenged for cause prospective juror Miller on the ground he felt the death penalty appropriate; the court overruled this challenge and told defense counsel he would

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[1] The trial court explained:

--You are at a position, your are the only one with any peremptory challenges left. Some of these people that Terry-- I don't believe could rehabilitate under any stretch of the imagination because I wouldn't accept a change of moral values between now and the hour he gets through. Some of them may come off, and we may eliminate this panel for cause. Since you are the only one with peremptory challenges left, I will put your panel out, and as I indicated, we will start at the bottom, and come up the road. If you are going to now exercise any of your peremptory challenges, that will eliminate those Terry [defense counsel] will have to talk to. So, let me let you look, and have a view of the entire panel.

(R 484).

be able to examine Miller (R 486). Defense counsel challenged for cause prospective juror Peacock on the basis of his affiliation with the prosecution; the court reserved ruling until defense counsel could examine Peacock (R 486). Defense counsel challenged for cause prospective juror Ridings; this challenge was granted (R 487).

Defense counsel then examined the remaining jurors: Crill, Plack, Sarricks, Martin, Jensen, Ross, Hagen, Miller, Peacock, Mello and Keyes (R 488-538). At the beginning of the bench conference, defense counsel renewed his request for additional peremptory challenges; the court denied the request (R 539). Juror Keyes was not challenged for cause and thus became the twelfth juror (R 539). Selection of the alternate juror (Jensen) followed (R 540-551).

Thus, the jury consisted of: Hinkle, Wester, Bellamy, Sundie, Towne, Bennett, Settlemire, Marshall, Jennings, Williams, Landsgaard, Keyes and Jensen.

B. The trial court erred in denying appellant's challenges for cause to prospective jurors who would automatically recommend the death penalty; and in refusing to allow additional peremptory challenges.

McANALLY

After Mr. Hensel examined Mr. McAnally (R 393), as set out on page 11 of appellant's brief, defense counsel again questioned Mr. McAnally (not set out in appellant's brief) (p. 406-408):

MR. TERRELL: Okay. And, Mr. McAnally, how about you, sir? You, as I recall, indicated before that you had some view that you thought the death penalty should be used automatically where a person was convicted?

PROSEPCTIVE JUROR: Not automatically. I just believe in the death penalty, if a man is guilty.

MR. TERRELL: You remember us talking about these alternative kinds of first degree murder? You think that the death penalty should be used anytime anybody is convicted of first degree murder, depending on which or which kind of first degree murder they are convicted of?

PROSPECTIVE JUROR: Well, it might--there might be some difference there; I don't know.

MR. TERRELL: You know the two kinds of premeditated murder, and then this felony murder idea; you understand those a little bit?

PROSPECTIVE JUROR: Right.

MR. TERRELL: There will be more explaining to you, more fully, as we go along here. Do you see any difference between the two in your view of whether a person convicted of one kind of first degree murder or the other should get the death penalty?

PROSPECTIVE JUROR: Yes. Where a man has premeditated. That's the kind I feel is guilty, and should get the death sentence.

MR. TERRELL: Okay. Taking that into account, and I gather you are using the new understanding of what premeditated means; is that right?

PROSPECTIVE JUROR: Right.

MR. TERRELL: So, under any premeditated killing, when you have made that determination that the person did premeditatedly kill another, you think the death penalty is proper in that case?

PROSPECTIVE JUROR: Sure do.

MR. TERRELL: Do you think there could be any showing made to you that would get you to vote for a life sentence for a person convicted of premeditated killing?

PROSPECITVE JUROR: Sure. If after the evidence is weighed.

MR. TERRELL: What have you decided or thought in your own mind it might take?

PROSPECTIVE JUROR: No, sir.

MR. TERRELL: How about in the idea of this felony murder thing, do you think you would be inclined to vote for the death penalty in that case?

PROSPECTIVE JUROR: No, sir.

MR. TERRELL: Do you have the ability to tell these prosecutors at the end of the case, and after you have heard all the witnesses, and the testimony, and seen the pictures, looked at the bullets or whatever, that you could tell them they haven't proved their case, and return a verdict of not guilty?

PROSPECTIVE JUROR: If they haven't proved it.

(emphasis supplied).

Immediately subsequent to the completion of defense counsel's examination of McAnally, a bench conference was held wherein the following occurred:

MR. TERRELL: I would challenge Mr. McAnally for cause on the basis of relating to--He initially indicated he had an automatic view on the death penalty, under any circumstances, and then he, after some explanation of the difference in premeditation, indicated that he thought it was proper in all premeditated cases.

THE COURT: You and Mr. Hensel have done such a good job of educating Mr. McAnally, I think he has finally seen the light, and I have notations down here that he will obviously weigh the evidence before he comes up with any decision. So, your challenge is denied.

(R 412-413).

BURMEISTER

Relevant portions of the voir dire examination not set out in appellant's brief include the following:

At page 176 (examination by defense counsel):

MR. TERRELL: Okay. So, If I am not misphrasing you, anytime there is a premeditated killing, to you it's kind of automatic death penalty? And Ms. Burmeister, how about you?

PROSPECTIVE JUROR: I think there is a difference, and I did not understand what you--before, what you meant by premeditation. My preconceived notion of what premeditation was, was a carefully thought out plan, you know. I am going to go rob this person and I am going to go ahead and kill her, so that I can't--or him, so that I can't be identified or just because he had totally planned to do it. Okay. I can see a difference in an attempted robbery with a gun, and something happening that makes him instantly decide that he's got to kill her or just does.

MR. TERRELL: Okay. Have you thought about what it would take to make you decide whether it fit into the one category of being the--going in and killing or something happening?

PROSPECTIVE JUROR: On your part?

MR. TERRELL: Yes.

PROSPECTIVE JUROR: What would you have to do to make me decide that?

MR. TERRELL: Right. Do you think that I should have to show you that it was one or the other?

PROSPECTIVE JUROR: No. I think the prosecution could do that, also.

MR. TERRELL: Okay.

PROSPECTIVE JUROR: I think I can decide.

MR. TERRELL: Do you understand that it is their responsibility to show and prove each and every element of the crimes charged?

PROSPECTIVE JUROR: Yes, I understand.

MR. TERRELL: And we have absolutely no burden to show anything. And if they fail to show something, then you can't hold it against us; you have to hold that against them. If they don't prove up each and every element or answer every question that you have, along those lines, doesn't go against the defendant. That's not the way our system works. Are you comfortable with that idea?

PROSPECTIVE JUROR: Not totally comfortable; no. I think that if a person is innocent, that you should be able to show why he was innocent. I just think that would help the case a whole lot.

MR. TERRELL: Okay. Let me see if I can put this in the right way. Have you ever known of a situation where something occurred, say, out in the woods or something, and you found out about the aftermath later on. But, you don't really know what let up to it. Have you ever heard of something like that happen? I am using a real broad something. It could be a tree falling out in the woods.

PROSPECTIVE JUROR: Okay.

MR. TERRELL: --for instance. And you went out there, and you saw the tree had fallen in the woods, but you didn't know what let up to it.

MR. TERRELL: Now, you would try to reason through it, I would suspect, on what led up to it; is that right? Is that what you are telling me?

PROSPECTIVE JUROR: If it was of enough concern to me, I would want to reason it out.

MR. TERRELL: I am putting it into that category, where it was of enough concern. If you were in a lawsuit, and make it kind of a criminal case, where someone was accused of somehow getting that tree on the ground, and that person has denied it by entering a plea of not guilty, would you make them prove that it wasn't an accident or something like that?

PROSPECTIVE JUROR: No.

MR. TERRELL: Would you make the State prove that it was an intentional, purposeful act?

PROSPECTIVE JUROR: Yes.

MR. TERRELL: Okay. Now, what if there is no way to show it? If the person who was accused is not guilty, and wasn't even there, and he can't show what happened out there in the woods, and there is no way for him to, would you hold that against him?

PROSPECTIVE JUROR: No.

(R 176-179). Defense counsel challenged Mrs. Burmeister for cause on the basis of her feelings about probably imposing the death

penalty for anyone convicted of first degree murder." (R 212-213). The court overruled this challenge (R 213).

Later, after the State questioned Ms. Burmeister (as explained in appellant's brief, p. 12), defense counsel re-examined Ms. Burmeister:

> MR. TERRELL: Ms. Burmeister, how about you? How do you feel about this death penalty stuff?
>
> PROSPECTIVE JUROR: I certainly don't think--I certainly think it should be carried out, and probably now, in the turn of events, probably will be. But, I think it's also a probability that it might not.
>
> MR. TERRELL: Okay. Do you feel like that would enter into your judgment?
>
> PROSPECTIVE JUROR: No.
>
> MR. TERRELL: If you are put into that position?
>
> PROSPECTIVE JUROR: No.
>
> MR. TERRELL: So, you would think that if I recommend it, and the person ends up getting sentenced to death, then they would be executed?
>
> PROSPECTIVE JUROR: Yes.

(R 275-276).

Defense counsel again challenged Mrs. Burmeister for cause because:

> She said anyone convicted of premeditated murder should automatically get the death penalty. And, in addition, she felt the cost of incarcerating a person over a long period of time overrode any qualms she had about giving a death penalty.

(R 323). The court denied the challenge (R 323).

LINDSAY

Appellant has included the relevant portions of the examination of prospective juror Lindsay on pages 13-14 of appellant's brief.

* * *

Appellee agrees that an accused has a right to a jury composed of impartial persons and that a challenge for cause should be granted when the juror is shown to harbor bias against the accused in the sentencing aspect of a capital case. Thomas v. State, 403 So.2d 371 (Fla.1981), Crawford v. Bounds, 395 F.2d 297 (4th Cir.1968)[2]. The State also enjoys the right to

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2 Appellant relies on three Texas cases, Pierce v. State, 604 S.W.2d 185 (Tex.Cr.App.1980); Cuevas v. State, 575 S.W.2d 543 (Tex.Cr.App.1978)), Smith v. State, 573 S.W.2d 763 (Tex.Cr.App. 1977), in stating that an accused has the right to a jury who can and will "consider the full range of punishment." The Florida courts, similarly, have only said that the venireman must not be unable to "recommend mercy in any required sentencing phase under any circumstances", Thomas v. State, 403 So.2d 371 (Fla.1981), and not be "irrevocably committed to voting for the death penalty if the accused is found guilty of murder and is therefore unable to follow the judge's instructions to weigh the circumstances" Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). Appellee would draw this Court's attention to the fact that the Texas cases cited by appellant were decided under a Texas law that allows the defense to challenge for cause a juror who is biased or prejudiced against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof, or as the punishment therefor. Article 35.16(c)(2), V.A.C.C.P. Florida employs a different law governing challenges for cause. See Sections 913.03 and 913.13, Florida Statutes (1983).

an impartial jury, and impartiality requires not only freedom from jury bias against the accused, but freedom from jury bias for the accused and against the prosecution. Spinkellink v. Wainwright, 518 F.2d 582, 596 (5th Cir.1978). Here, appellant claims the court erred in denying his challenges for cause to three prospective jurors on the basis of bias due to the jurors' alleged predilection to impose the death penalty. Appellee submits that: 1) appellant has not shown the existence of manifest error, and 2) appellant has not shown that the examination of the three prospective jurors revealed that they would automatically vote in favor of the death penalty regardless of the evidence or circumstances before them or that their attitude in favor of the death penalty would prevent them from making an impartial decision as to the guilt of appellant.

In denying appellant's challenges for cause to the three prospective jurors, the trial court implicitly found that the three prospective jurors were "impartial" or "unbiased" towards appellant. The law is settled that the competency of a challenged juror is a mixed question of law and fact and is to be determined by the trial judge in his discretion. Manifest error must be demonstrated before the judge's decision will be disturbed. Christopher v. State, 407 So.2d 198 (Fla.1981), cert.den., 456 U.S. 910, 102 SoCt. 1761, 72 L.Ed.2d 169; Singer v. State, 109 So.2d 7 (Fla.1959); Hawthorne v. State, 399 So.2d 1088 (Fla.1st DCA 1981). The decision whether to excuse for cause is committed to the discretion of the court. United States v. Butera, 677

F.2d 1376 (11th Cir.1982), cert.den., 103 S.Ct. 735. "It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial." Reynolds v. United States, 98 U.S. 145, 156. Impartiality is not a technical conception, it is a state of mind[3]. See Irwin v. Dowd, 366 U.S. 717, 757, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The trial judge had the advantage of personal observation of the veniremen, and of their demeanor and manner of answering; factors not discernible from the cold record on appeal. As stated in Skipper v. State, 400 So.2d 797 (Fla.1981) cause remanded, 420 So.2d 877:

> "In our view the trial judge, who observed the manner and demeanor of the juror, and heard his statements, could properly have determined that no disqualification of the juror was shown. Section 913.03, Florida Statutes. Appellant has a heavy burden of showing an abuse of discretion."

Furthermore, the challenger must show the actual existence of such an opinion or bias in the mind of the juror as will raise the presumption of partiality, or else the juror need not necessarily

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3 Section 913.03(10), Fla.Stat., provides as a ground for challenging for cause an individual juror:

> (10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he declares and the court determines that he can render an impartial verdict according to the evidence.

be set aside and it will not be error for the court to refuse to excuse the juror. Reynolds v. United States, supra; Irwin v. Dowd, supra. The trial court did not err in denying appellant's challenges for cause because appellant failed to make the requisite showing of partiality or inability to follow the law; in other words, appellant failed to ask the necessary questions, as will be discussed later in this section.

Appellant challenged the three prospective jurors on the ground they were automatically committed to imposition of the death penalty in first degree murder cases. However, a review of the entire voir dire examination shows that these three jurors never indicated unequivocally that they would automatically vote for the death penalty regardless of the evidence and under any circumstances. The jurors never said they were inalterably opposed to recommending life sentences for convicted murders. The jurors' statements indicated a tendency in favor of the death penalty, but that by itself is insufficient to justify excusal for cause.

Appellee recognizes that where a prospective juror states he would impose nothing less than the death penalty, or render no other verdict than one requiring the death penalty, that an excusal for cause is justified. Stroud v. United States, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919), 251 U.S. 380, 40 S.Ct. 176, 64 L.Ed. 317 (1920). A venireman who believes that the death penalty should automatically and in every case flow from conviction of first degree murder must be excused. Alvord v. Wainwright, 564 F.Supp. 459 (M.D.Fla.1983).

This issue is the "mirror image" of the issue decided in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and has been considered by this Court in Fitzpatrick v. State, 437 So.2d 1072 (Fla.1983). In Fitzpatrick, four veniremen were challenged for cause by the defense on the ground of bias in favor of the death penalty: Two of the veniremen stated the death penalty was appropriate for anyone who committed a murder, one felt death proper if there were eyewitnesses to the murder, and one felt death should be imposed anytime a police officer is shot in the line of duty. These answers were given in response to defense counsel's general questions about the death penalty. The State explained to the veniremen about Florida's death penalty law and asked if they could follow the court's instructions and weigh aggravating and mitigating circumstances, to which all answered in the affirmative. This Court distinguished Thomas v. State, 403 So.2d 371 (Fla.1981) [veniremen stated he could not recommend any kind of mercy under any circumstances if defendant convicted of murder], explaining that the veniremen in Fitzpatrick only indicated a tendency towards favoring the death penalty, as opposed to being inalterably against recommending life sentences for convicted murderers. This Court then applied the "mirror image" of Witherspoon:

> Witherspoon requires that veniremen who oppose the death penalty be excused for cause only when irrevocably committed before the trial to voting against the death penalty under any circumstances or where their views on capital punishment would interfere with finding the accused guilty. We find that the same standard should be applied when excusing for cause a venireman who is in favor of the death penalty. A judge need not excuse such a person unless he or she is irrevocably committed

> to voting for the death penalty if the defendant is found guilty of murder and is therefore unable to follow the judge's instructions to weigh the aggravating circumstances against the mitigating circumstances.

437 So.2d at 1075-6. Thus, as the converse on a Witherspoon challenge, the court need not excuse the venireman unless the venireman makes unmistakably clear 1) that he would automatically vote for imposition of the death penalty without regard to any evidence that might be developed at the trial, or 2) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt or innocence.

This case differs from Thomas v. State, 403 So.2d 371 (Fla.1981) where the trial court erroneously denied the defendant's challenge for cause of a juror who admitted he could not recommend any mercy in any required sentencing phase under any circumstances. In Thomas, after the juror stated he would impose death if guilt was proven, defense counsel asked the juror if he could recommend mercy, in any event, to which the juror replied "no." Defense counsel repeated the question as to a recommendation of mercy in any event and again received "no" as an answer. When the state attorney attempted to rehabilitate, the juror stated that under no circumstances would he recommend mercy. The important distinction between Thomas and the present case is that appellant's defense counsel generally failed to ask the prospective jurors whether they felt that the would "under no circumstances consider the possibility of mercy." See Poole v. State, 194 So.2d 903 (Fla.1967)[4].

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[4] See Patterson v. Com., 283 S.E.2d 212 (Va.1981), cited by appellant; where the Court, in holding that veniremen biased in favor of the

Appellant's defense counsel asked juror McAnally (right before challenging him for cause!) if he thought there could be any showing which would make him vote for a life sentence for a person convicted of premeditated murder. McAnally replied "Sure. If after the evidence is weighed." It is clear that McAnally was not irrevocably committed to voting for the death penalty, was not unable to recommend mercy under no circumstances, and was able to follow the judge's instructions as to weighing the aggravating and mitigating circumstances. It is clear there was no error in refusing to grant appellant's challenge for cause to prospective juror McAnally.

Appellant's defense counsel never asked Burmeister whether she could never recommend mercy, under any circumstances, where a defendant is found guilty of premeditated murder. Burmeister's responses to the questions propounded on voir dire reveal nothing more than a general tendency in favor of the death penalty. Just prior to the defense's second challenge to Burmeister, Burmeister answered no to the defense question of whether her belief in the death penalty would enter into her judgment (R 275-276). Likewise, Lindsay's responses evidenced nothing more than a belief in or tendency to favor the death penalty. The State Attorney asked whether Lindsay could follow the instructions

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death penalty can be eliminated for cause, recognized that the following question should have been asked: "Do you feel that regardless of the facts or circumstances that in every case of murder the death penalty should be imposed", since that question explores the venireman's predilection for imposing the death penalty.

and comply with the weighing process previously explained to the venire in order to determine the appropriateness of the death penalty; Lindsay replied "I believe so." (R 335). Later, defense counsel asked Lindsay about her feelings on the death penalty, and asked:

> DEFENSE COUNSEL: Do you think it should be given in all cases like that, regardless of any of what may have gone into it?
>
> LINDSAY: I believe so.
>
> DEFENSE COUNSEL: Now, in deciding the question of guilt or innocence, do you understand we are in a situation where my client has entered a plea of not guilty? He has denied that he's the one that has done these things?
>
> LINDSAY: Uh-huh.
>
> DEFENSE COUNSEL: Do you feel like it would be required for him to come forward and prove innocence in any way?
>
> LINDSAY: No, I don't think so.
>
> DEFENSE COUNSEL: Okay. Do you understand what we talked about earlier, that sometimes it's just not possible to prove innocence?
>
> LINDSAY: Uh-huh.
>
> DEFENSE COUNSEL: And there is no legal obligation. As a matter of fact, it's a legal right and privilege that we all share that makes the prosecutors prove guilt?
>
> LINDSAY: Well, I think you just have to listen to all the evidence, and then you have to decide.

(R 348-349) (emphasis supplied). Defense counsel never asked Lindsay whether she could never recommend mercy in such cases, etc. Lindsay's answers indicated she could obey the law and weigh the circumstances, and that she could determine guilt or innocence based on the evidence alone.

These challenged jurors did not indicate they had a preconceived opinion as to the guilt or innocence of appellant; nor did they believe they had a duty to recommend death in every case where an accused is found guilty of first degree murder; and nor did they indicate that they could never recommend mercy in such cases, under any circumstances. Instead, these jurors indicated only that they had no conscientious scruples against the death penalty and that in a proper case they would recommend the death penalty, which is valid under the law. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). "In other words, the veniremen indicated only that they would be willing to perform their civic obligation as jurors and obey the law." Spinkellink v. Wainwright, supra at 594. Defense counsel here did not ask enough questions to demonstrate that the veniremen's previously expressed tendency in favor of the death penalty would cause the veniremen 1) to automatically vote for imposition of the death penalty without regard to any evidence that might be developed at trial, or 2) to be unable to make an impartial decision as to the appellant's guilt or innocence.

In any event, appellant's contention that the court's failure to grant the challenges requires reversal of both the conviction and sentence is without merit. Even if the trial court had erred, which it did not, the only relief permissible would be reversal of the sentence and not the conviction of guilt. Witherspoon v. Illinois, supra; Thomas v. State, 403 So.2d 371 (Fla.1981), J. Alderman concurring in part, dissenting in part. This is true especially since the challenged jurors were not

challenged on the basis their views on the death penalty would taint the determination of guilt or innocence. A jury qualified by unconstitutional standards respecting punishment is not necessarily biased with respect to a defendant's guilt. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

Finally, it is important to note that based upon this record, if the converse situation had occurred, i.e., the veniremen had expressed opposition to the death penalty and the State had asked the questions asked by defense counsel in this case, the State could not have excused them for cause under Witherspoon because there would be an insufficient showing. Appellant has not shown that the trial court erred in denying his challenges, as appellant did not develop the questioning far enough to show justification for excusal.

Appellant additionally asserts that the court committed reversible error in forcing appellant to exhaust his peremptory challenges on persons who should have been excused for cause, because of the effect of abridging the right to exercise peremptory challenges. Specifically, appellant states that three of his peremptory challenges were used on McAnally, Burmeister, and Lindsay after appellant's challenges for cause to those three veniremen were denied.

Appellant's argument that he lacked a sufficient number of peremptory challenges is premised on the assumption that he

unnecessarily used three of them to excuse McAnally, Burmeister and Lindsay. However, since the trial judge did not abuse his discretion in refusing to excuse those three for cause, there is no basis for holding that appellant was unconstitutionally denied additional challenges. Fitzpatrick v. State, supra.

Appellee agrees that some courts have recognized that "as a general rule it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges." United States v. Nell, 526 F.2d 1223 (5th Cir.1976); Williams v. State, 440 So.2d 404 (Fla.1st DCA 1983); Leon v. State, 396 So.2d 203 (Fla.3rd DCA 1981). However, there can be no error in the trial court's exercise of its lawful discretion unless appellant first shows that his peremptory challenges were used on persons who should have been excused for cause. In other words, appellant must show that a sitting juror was unqualified and should have been excused for cause upon motion of appellant. See Leon v. State, supra, [appellate court found juror should have been excused for cause]; Williams v. State, supra, [appellate court found juror should have been excused for cause due to bias]. In Lusk v. State, No. 59,146 (Fla., Jan. 26, 1984), 9 F.L.W. 39, this same issue was raised, and although this Court declined to reach the issue since Lusk had not exhausted his peremptory challenges, this Court nevertheless explained:

> Furthermore, a review of the jury selection transcript discloses no sitting juror who appears unqualified

> and who should have been excused. No proof has been submitted by Lusk that casts any doubt on the conclusion that Lusk was convicted by a fair and impartial jury.

9 F.L.W. at 40. Appellant has failed to show he was prejudiced by being required to accept an objectionable juror because of the denial of his challenges for cause to McAnally, Burmeister and Lindsay, and the resulting use of his peremptories. See, Rollins v. State, 148 So.2d 274 (Fla.1963); Wheeler v. State, 362 So.2d 377 (Fla.1st DCA 1978), cert.den., 99 S.Ct. 1254, 440 U.S. 924, 59 L.Ed.2d 478.

Appellant points to three sitting jurors upon whom he would have exercised peremptory challenges if the trial court had granted additional peremptory challenges. Two of these, Wester and Landsgaard, were challenged for cause by appellant; the challenges were denied. (R 211,413). The third, juror Keyes, was not challenged for cause by appellant; however, just prior to discussing Keyes in the bench conference appellant renewed his request for additional peremptory challenges (R 539).

Juror Wester was challenged for cause by appellant on the stated ground, "He is committed in fact to the death penalty." (R 210-211). Prior to appellant's challenge of Wester, appellant examined Wester:

> (At 162-163)
>
> DEFENSE COUNSEL: Does it make any difference whether it's a finding of guilt for one or two people?
>
> * * *
>
> PROSPECTIVE JUROR WESTER: I don't feel that it necessarily carries the death sentence, but I do feel

that it's wrong to have laws that completely eliminate the death sentence, under any circumstance.

(At 183-184)

DEFENSE COUNSEL: Mr. Wester, how about you, sir?

PROSPECTIVE JUROR WESTER: If we had arrived at a guilty verdict, and if the prosecution had shown that it was one form of premeditation, in which I would call it cold blooded and planned, and then if the defense offered no reasons to disprove that, then I would lean towards the death penalty.

DEFENSE COUNSEL: Okay. Under those circumstances or situation like that can you conceive any set of ideas or possible evidence, like family background or anything like that that could get you to change your mind any way or would you still probably recommend the death penalty, if no evidence was put on about what occurred?

PROSPECTIVE JUROR WESTER: No. The prosecution would have to prove a second time, without a doubt that he purposely went on and, in cold blood, and killed. After he was found guilty, we would have to show that he planned premeditated to do it.

DEFENSE COUNSEL: Okay. All right.

PROSPECTIVE JUROR WESTER: And then other factors could be weighed against what the prosecution had showed.

It is clear from the above that the trial court did not err in denying appellant's challenge for cause to Juror Wester, and thus appellant's claim that he would have used a peremptory on Wester is without merit, as there is no showing that Wester should have been excused for cause.

Appellant unsuccessfully challenged Juror Landsgaard for cause "on the basis of his affiliation with law enforcement, . . . his association with the State Attorney's office." (R 413). Landsgaard, a retired FBI special agent, was questioned by appellant as to his dealings with the State Attorney's office:

DEFENSE COUNSEL: You indicated that you had some dealings before with Mr. Johnson, and some of the other prosecutors, Mr. Golden, the State Attorney here.

PROSPECTIVE JUROR LANDSGAARD: As far as I recall, I think I may be interviewed Mr. Johnson once or twice in a reference type outfit type investigation.

DEFENSE COUNSEL: All right. How about any of your contacts with Mr. Golden?

PROSPECTIVE JUROR LANDSGAARD: Did the same thing.

(R 397). Landsgaard stated that he could put aside his contacts and decide the case based on the evidence only (R 397). Landsgaard also indicated that prior to three years ago he had ocassionally come across two witnesses (deputies) in the course of his work (R 395). Again, appellant has not shown that this juror should have been excused for cause. Peri v. State, 412 So.2d 367 (Fla. 3rd DCA 1981).

Finally, appellant never challenged Juror Keyes for cause (R 522) and thus appellant cannot show that Keyes should have been removed for cause. Appellant has not submitted any proof that casts doubt on the conclusion that he was convicted by a fair and impartial jury. Lusk v. State, supra.

C. The trial court did not err in granting the State's Challenges for Cause to Prospective Jurors opposed to the death penalty and in refusing to allow defense counsel an opportunity to examine the excluded jurors.

Appellee first submits that the issue of whether prospective jurors Caristi and Poniatowski were excluded in violation of Witherspoon v. Illinois, supra, has not been preserved for

appellate review. The record clearly shows that defense counsel objected to the lack of opportunity to voir dire the challenged jurors; defense counsel did not object on the basis that he felt the jurors' responses were insufficient to justify exclusion under Witherspoon. Defense counsel's objection shows that he was only objecting to the lack of opportunity to examine the jurors; it is obvious from the record that if defense counsel had truly wanted to examine those jurors he would have disagreed with the trial judge's characterizations of the jurors' responses concerning the death penalty, thereby putting the trial judge on notice of putative error in excluding jurors in violation of Witherspoon. The rationale for requiring a specific objection under these circumstances was explained by this Court in Maggard v. State, 399 So.2d 973 (Fla.1981), cert.den., 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598:

> If a defendant does not want a prospective juror to be excused on the basis of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), he should make his objection known before the juror is excused. This is not an unreasonable requirement in view of the fact that it is certainly possible that the defendant himself does not want the particular juror to serve and is perfectly content to have the juror excused for cause by the court so that he will not have to use one of his peremptory challenges. Additionally, if the defendant were allowed to raise this point for the first time on appeal, he would be in a position to "sandbag" the trial court and the State by giving the appearance by his silence that he concurs in the court's excusal for cause of a particular juror. He could then proceed, awaiting the outcome of the trial, secure in the knowledge that if he receives the death sentence it would be set aside on appeal. We affirm our prior holdings in Brown v. State, 381 So.2d 690 (Fla.1980), that where no objection is made before the trial court, defendant is in no position to raise this point on appeal.

399 So.2d at 975.

Also see Rose v. State, 425 So.2d 521 (Fla.1982), cert.den., 103 S.Ct. 1883; Paramore v. State, 229 So.2d 855 (Fla.1969), vacated in part, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751. This Court cannot speculate as to what the trial judge would have done had defense counsel objected on the basis he felt the jurors' answers were not unequivocal, etc. In fact, by not disagreeing with the trial judge's characterizations ("opposed to the death penalty and would not impose it under any circumstances" and "She said she would not recommend the death penalty under any circumstances, and she was religiously and morally opposed to it" [R 485]) defense counsel acquiecsed to the rulings by not pointing out to the judge that he felt there was a serious Witherspoon problem. Cf. King v. State, 390 So.2d 315 (Fla.1980), cert.den., 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825. This Court should not indulge in a presumption that a trial court would have made an erroneous ruling had a specific objection been made and authorities cited contrary to his understanding of the law. Lucas v. State, 376 So.2d 1149 (Fla.1979).

Once the State clearly establishes a potential juror's unequivocal opposition to the death penalty, as here, it is then incumbent upon the defendant to make an objection specifying why the juror should not be dismissed and to request further questions that would clarify any perceived ambiguity or equivocating by the juror. McCorquodale v. Balkcom, 721 F.2d 1493 (11th Cir.1983). In any event, if this Court reaches the merits of this issue, appellee submits the exclusion was not a Witherspoon violation and was not an abuse of discretion, as both jurors indicated

they were opposed to the death penalty under any circumstances. See Stewart v. State, 420 So.2d 862 (Fla.1982), cert.den., 103 S.Ct. 1802, reh.den., 103 S.Ct. 3009; Smith v. State, 407 So.2d 894 (Fla.1982) and cases cited therein; and Scott v. State, 411 So.2d 866 (Fla.1982).

Appellant cites to Burns v. Estelle, 592 F.2d 1297 (5th Cir.1979) adhered to en banc 626 F.2d 396 (1980) in support of his claim that jurors Caristi and Poniatowski were prematurely excused in violation of Witherspoon. However, in Burns the juror was deemed prematurely excused because the required showing under Witherspoon had not been made, whereas further questioning of the juror may have revealed that she could lay her views aside or may have made unmistakably clear that her attitude toward the death penalty would prevent her from making an impartial decision as to guilt. In the present case jurors Caristi and Poniatowski were excused after the requisite showing was made, and thus the excusal was not premature. As intimated by the trial judge, further questioning would serve no purpose, for once a person has unequivocally stated opposition to the death penalty under any circumstances, any further questioning is unnecessary and not required. Appellee can find no authority expressly requiring a trial court to allow rehabilitation once the requisite showing under Witherspoon has been made, and where defense counsel does not object on the basis of Witherspoon. Indeed, further questioning as to the jurors' views on the death penalty would have been unreasonably repetitious and argumentative. Once it became evident that jurors Poniatowski and Caristi were

subject to exclusion under Witherspoon, coupled with the fact that Caristi did not want to serve on the jury for other reasons (her son works in a convenience store), the court acted within its discretion in excusing them without allowing defense counsel an opportunity to question them further. It is settled law that the trial judge has a wide latitude in the exercise of his discretion with respect to the qualification of jurors, and, in exercising such discretion he may reasonably control voir dire examination in the interest of orderliness and in the dispatch of trials. Slaughter v. State, 301 So.2d 762 (Fla.1974), cert. den.,420 U.S. 1005, 95 S.Ct. 1448, 43 L.Ed.2d 763; Kalinosky v. State, 414 So.2d 234 (Fla.4th DCA 1982); Essix v. State, 347 So.2d 664 (Fla.3rd DCA 1977).

Finally, if this Court does find the trial court erred during voir dire and committed a Witherspoon violation, appellant is at most only entitled to a reversal of sentence, not conviction of guilt. Witherspoon v. Illinois, supra. Appellee knows of no reported case wherein a judgment of guilt was set aside and a new trial ordered because a prospective juror was improperly excused in violation of Witherspoon, supra, and appellant has not cited to any such decision[5]. See Witt v. Wainwright, 714 F.2d 1069 (11th Cir.1983), cert.granted; and Darden v. Wainwright, 725 F.2d 1526 (11th Cir.1984), pet. cert.pending.

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5 Appellant cites to Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark.1983) as support for his claim the conviction of guilt should be reversed. However, Grigsby is not final as said decision has been appealed to the Eighth Circuit. Grigsby is also in direct

D. The conduct of the voir dire in this case did not amount to a denial of due process and a departure from the essential demands of fairness.

Appellant contends the overall conduct of the voir dire amounted to a denial of due process and a departure from the essential demands of fairness. For the reasons discussed earlier, appellee asserts that an evaluation of the entire voir dire testimony of the empaneled jurors will disclose that appellant was convicted by a fair and impartial jury duly qualified to serve. A defendant in a criminal case is not entitled to any particular juror or jury; he is entitled only to qualified jurors. Picott v. State, 116 So.2d 626 (Fla.1960), appeal dismissed, cert.den., 364 U.S. 293, 81 S.Ct. 106, 5 L.Ed.2d 83; North v. State, 65 So.2d 77 (1953), aff'd, 346 U.S. 932, 74 S.Ct. 376, 98 L.Ed. 423, reh.den., 347 U.S. 924, 74 S.Ct. 513, 98 L.Ed. 1078; Porter v. State, 388 So.2d 18 (Fla.4th DCA 1980).

The conduct of voir dire of prospective jurors is a matter directed to the sound discretion of the trial judge, subject to the essential demands of fairness. United States v. Booher, 641

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conflict with Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. (1978) and Smith v. Balkcom, 660 F.2d 573 (5th Cir.1981) and thus should not be followed by this Court. Also, appellant did not offer any evidence that jurors in Florida who believe in the death penalty are "prosecution prone" assuming such is capable of being proven by methods other than implication. Implied bias is not a basis upon which to find the denial of a fair and impartial jury. See Smith v. Phillips, 435 U.S. 209 (1982).

F.2d 218 (5th Cir. Unit B 1981). Of course this discretion is limited by the demands of due process, which means that a criminal defendant is entitled to an impartial jury which will render a verdict based exclusively upon the evidence presented in court and not on outside sources. United States v. Gerald, 624 F.2d 1291 (5th Cir.1980). Appellant has not shown that he was convicted by a jury within which there was a partial or unqualified juror. In United States v. Gerald, supra, the court explained:

> In harmonizing the trial court's broad discretion in the conduct of the jury voir dire with the due process requirement that the jury be impartial, an appellate court must independently evaluate the voir dire testimony of the empaneled jurors, see Irwin v. Dowd, supra, 366 U.S. at 723, 81 S.Ct. at 1643, 6 L.Ed.2d at 756, and decide whether there is a "reasonable assurance that prejudice would be discovered if present." United States v. Delval, supra, 600 F.2d at 1102, quoting United States v. Nell, 526 F.2d 1223, 1229 (5th Cir.1976). The trial court's decision will "not be lightly overturned." United States v. Carroll, 582 F.2d 942, 946 (5th Cir.1978) (and cases cited therein).

624 F.2d at 1296.

The trial court's proper excusal for cause of Poniatowski and Caristi, without a specific objection by defense counsel as to the excusal being unjustified by the questions asked and answers received, does not constitute a denial of due process simply because defense counsel was not afforded a chance to examine the two excluded jurors. Again, if defense counsel had informed the trial judge that defense counsel believed the excusal to constitute a violation of Witherspoon, the trial judge would probably have allowed defense counsel to further examine the two jurors, or perhaps the trial judge would have examined the two

jurors. It is pure speculation to assume what the court would have done had the objection stated the claim now raised on appeal. And, a ruling of a trial court restricting the examination of jurors on voir dire will not be invalidated by a claim grounded solely on speculation or conjecture. See Foley v. Revlon, Inc., 200 So.2d 627 (Fla.3rd DCA 1967); Mizell v. New Kingsley Beach, Inc., 122 So.2d 225 (Fla.1st DCA 1960).

ISSUE II

THE INTRODUCTION OF EVIDENCE OF APPELLANT'S FLIGHT DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL.

ARGUMENT

A. Trial Proceedings

The circumstances surrounding appellant's motion for mistrial should be examined in full:

> STATE: Okay. State's Exhibit 48?
>
> OFFICER JONES: State's Exhibit 48 reflects the right and front--front and left side of the vehicle, which was in pursuit, and reported stolen.
>
> DEFENSE COUNSEL: Your honor, may we approach the bench?
>
> THE COURT: Gentlemen, you all step up her, please? Just have a seat.
>
> (Whereupon a bench conference was held outside the hearing of the jury
>
> DEFENSE COUNSEL: Your honor, I will object, and move for mistrial, based on the statement of the officer. It violated the court's ruling on the motion in limine, where the State purported to show the stolen vehicle.
>
> THE COURT: Mr. Hensel?
>
> STATE: Judge, I would ask for an instruction to the jury, as opposed to granting the Motion for Mistrial.
>
> THE COURT: Mr. Hensel, I just knocked out Exhibits 46 and 47 because it shows Escambia County, Florida, license plates, and there is no way this man could have acquired those, and also have a set of Virginia plates between the time he sold this Barracuda and he went and bought himself a Cadillac. However, he acquired that Cadillac to avoid creating any inference of that kind, that it belonged to somebody else. I know that's the reason I sustained his objection to him.

> I am going to take your Motion for Mistrial under advisement, and I will, at the present time, instruct the jury to disregard any gratuitous comments of speculation by this officer as to how any items in his possession were required.
>
> DEFENSE COUNSEL: Your Honor, it's my belief that such an instruction is not adequate.
>
> THE COURT: No. I know your belief is not adequate. You have your motion on the record, Mr. Terrell. That's all that is necessary.
>
> THE COURT: Ladies and gentlemen, you are going to disregard any speculation by this witness as to how any property came into this defendant's possession, how it's described in any of those photographs, any gratuitous remarks by the witness, as to how the automobile or license tags or gun or anything else came into his possession, to be stricken, and entirely disregard that.

(R 825-827).

Later, as explained by appellant on page 52 of his brief, the trial court heard extensive argument by the State on why this unsolicited voluntary response was not grounds for a mistrial. (R 993-1000). The court then heard a recital of what the proffered testimony of Carolyn Ward, the Cadillac saleswoman, was expected to show (R 1000-1005). The State then reasserted its position that no reversible error occurred and that the curative instruction was sufficient (R 1005). After hearing defense counsel's argument (see page 52-53 of appellant's brief), the trial court denied the motion for mistrial (R 1006).

B. The trial court did not err in permitting the State to introduce evidence of the car chase in which appellant attempted to outrun the police.

Appellee submits that the evidence of the car chase and subsequent capture of appellant was relevant evidence properly

admitted by the trial court. This evidence was relevant because it proved that appellant possessed the gun used in the charged crimes.

Appellee disagrees with appellant's perception of the evidence and assumption that the jury considered such evidence as proof of anything other than possession of the gun. Appellant contends the court erred in admitting this evidence because it portrayed appellant as a person of bad character, strongly suggested he was involved in other criminal activity, and created a misleading inference that appellant's attempt to elude the police showed consciousness of guilt of the charged murders. Appellant characterizes this evidence as "flight evidence."

Appellant incorrectly assumes that this evidence was tendered and admitted for the purpose of showing flight from which the consciousness of guilt could be inferred.

It is true that the State offered the evidence of the Carolyn Ward incident and subsequent chase and arrest of appellant to show evidence of flight (R 557); however, the trial court granted appellant's Motion in Limine as to the Carolyn Ward incident. Appellee would point out that evidence of the Carolyn Ward incident and the chase and apprehension of appellant should have been admitted to show flight for the same reasons discussed in Heiney v. State, 447 So.2d 210 (Fla.1984), in that it was relevant to show that appellant's desire to avoid apprehension for the convenience store murders motivated him to

sell his Barracuda convertible, steal a Cadillac and abduct Carolyn Ward, so that he could obtain a different car and continue his flight. See Heiney, Id. This evidence was relevant also to a material issue of fact, see Ruffin v. State, 397 So.2d 277, cert.den., 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981) [relevant to issue of identity, in linking appellant with murder weapon and explaining how appellant and murder weapon were apprehended]. However, since the trial court prohibited the State from introducing evidence of the Carolyn Ward incident, the State was forced to only introduce the chase and arrest evidence, which was crucial to linking appellant with the murder weapon. It is clear from the trial court's ruling that the evidence of the chase and arrest was allowed to be introduced for the purpose of showing recovery of the murder weapon (R 567), on essential element of the State's case. The jury was never instructed on evidence of flight; there is nothing in the record which indicates the jury considered this evidence as inferring a consciousness of guilt.

Appellant discusses in depth the law concerning admissibility of evidence of flight; appellee does not dispute appellant's recitation of the rules propounded by courts faced with flight evidence. However, appellee disagrees with appellant that such is applicable here, since the jury was totally ignorant of the law on flight evidence. It is pure speculation to even suggest that the jury evaluated this evidence as evidence of flight and then drew permissible or impermissible inferences from such evidence when the jury was never instructed on flight evidence

or inferences from flight or consciousness of guilt, etc. Flight is only a circumstance of guilt, to be considered by a jury under an appropriate charge. Williams v. State, 268 So.2d 566 (Fla.3rd DCA 1972). The rule is that when a suspected person in any manner endeavors to escape, or evade a threatened prosecution, by flight, concealment, resistance to lawful arrest, or other ex post facto indication of a desire to evade prosecution, such fact may be shown in evidence as one of a series of circumstances from which guilt may be inferred, the relevance of such evidence being based on the consciousness of guilt inferred from such actions. Mackiewicz v. State, 114 So.2d 684 (Fla.1959), cert.den., 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879, reh.den., 362 U.S. 992, 80 S.Ct. 1083, 4 L.Ed.2d 1024; Daniels v. State, 108 So.2d 755 (Fla.1959). Also see Straight v. State, 397 So.2d 903 (Fla.1981), cert.den., 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418, reh.den., 454 U.S. 1165, 102 S.Ct. 1043, 71 L.Ed.2d 323.

The cases cited by appellant concern situations where the defendant on appeal contends the trial court erred in instructing the jury on flight. United States v. Myers, 550 F.2d 1036 (5th Cir.1977); United States v. Borders, 693 F.2d 1318 (11th Cir.1982); United States v. Beahm, 664 F.2d 414 (4th Cir.1981). In Beahm, supra, there was evidence that the defendant fled, but no evidence that he was aware that he was the subject of a criminal investigation. The Beahm court determined that the instruction given the jury constituted reversible error since it allowed the jury

to draw an inference of guilt from flight without "awareness"; the proper instruction would have allowed the jury to consider the flight immediately after the commission of a crime or after being accused of a crime, thus meeting the "awareness" requirement. In Myers, supra, the court ruled it was error to instruct the jury that they could infer consciousness of guilt from an alleged flight which was without support in the record. A flight instruction is improper unless the evidence is sufficient to furnish reasonable support for all four of the inferences set out in Myers. In Borders, supra, the court recognized that the probative value of flight evidence is substantially weakened if the suspect was not aware at the time of flight that he was the subject of a criminal investigation for the particular crime charged. In Borders, the court decided the flight evidence was properly admitted and the instruction given correctly cautioned the jury that it was up to them to determine whether the evidence proved flight and the significance, if any, to be accorded such a determination. Finally, in United States v. Howze, 668 F.2d 322 (7th Cir.1982) the defendant moved to suppress evidence of his flight; the trial court ruled against him, and on appeal the court remanded the issue, recognizing that "when there is no immediacy between the flight and the crime, the court must be certain there is evidence that a defendant knows he is being sought for the specific crime charged and not some other crime or event." Howze at 325. But see Shorter v. United States, 412 F.2d 428 (9th Cir.1969) [failure of government to present evidence that defendant knew he was being

sought for particular offense charged did not preclude admission of evidence of defendant's flight], and United States v. Ramon-Perez, 703 F.2d 1231 (11th Cir.1983) [time delay may lessen the probative value of the evidence, but does not render it inadmissible].

It is clear from the above cases that the proper focus of concern is not on whether the jury was exposed to evidence of flight, but whether the evidence of flight warranted an instruction on flight and whether the jury was properly instructed as to the permissible inferences it could draw from evidence of flight. Since the jury in this case was never instructed that they could infer consciousness of guilt from evidence of flight, or for that matter, could infer anything from the evidence of flight, it is mere speculation to presume that the jury even considered the evidence of the car chase and arrest as anything other than evidence relevant to location of the murder weapon. In other words, there is no indication that the jury considered this evidence as being evidence of flight, or that impermissible inferences were drawn from this evidence. The instant record renders such a presumption mere conjecture and reversible error cannot be predicated upon conjecture. Sullivan v. State, 303 So.2d 632, 635 (Fla.1974). This Court should presume that the jury acted properly as to matters which necessarily inhered in its verdict, Lacy v. State, 387 So.2d 561 (Fla.4th DCA 1980), and interpreted the evidence according to the instructions given by the trial court.

In any event, if this Court decides that this evidence was indeed evidence of flight, the admission of this evidence was not error since this evidence was relevant to an issue of material fact: the linking of appellant with the murder weapon after the charged crimes had been committed (the State possessed other evidence linking appellant to the murder weapon prior to the time the charged crimes were committed). The trial court has wide discretion in areas concerning the admission of evidence, and its ruling on the admissibility of evidence will not be disturbed unless an abuse of discretion is shown. Welty v. State, 402 So.2d 1159 (Fla.1981); Booker v. State, 397 So.2d 910, cert.den., 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). Appellant has not shown the trial court abused its discretion in allowing the State to introduce the relevant evidence of the apprehension of appellant and the murder weapon via the car chase.

C. The trial court did not err in denying appellant's Motion for Mistrial.

A motion for mistrial is addressed to the sound discretion of the trial court and should be granted only in cases of absolute legal necessity. Wilson v. State, 436 So.2d 908 (Fla.1983); Salvatore v. State, 366 So.2d 745 (Fla.1978), cert.den., 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); Flowers v. State, 351 So.2d 764 (Fla.3rd DCA 1977). A motion for mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 230

(Fla.1979); Perry v. State, 200 S. 525 (1941). A mistrial is not appropriate where the State does not disobey any rule of procedure or of fundamental fairness. De La Cova v. State, 355 So.2d 1227 (Fla.3rd DCA 1978). If the alleged error does no substantial harm and causes no material prejudice, a mistrial should not be declared. Improper remarks can be cured by ordering the jury to ignore them unless they are so objectionable that such instruction would be unavailing. Breedlove v. State, 413 So.2d 1, cert.den., 103 S.Ct. 184, reh.den., 103 S.Ct. 482 (1981). Also see United States v. Klien, 546 F.2d 1259 (5th Cir.1977), reh.den., 550 F.2d 42.

The inadvertent, unsolicited statement by Officer Jones that the Cadillac had been reported stolen was not sufficient to require reversal for the failure to declare a mistrial, given the trial court's adequate and fully curative instruction. See Moore v. State, 418 So.2d 435, (Fla.3rd DCA 1982); Riley v. State, 367 So.2d 1091 (Fla.3rd DCA 1979) and Williams v. State, 354 So.2d 112 (Fla.3rd DCA 1978). At best, appellant's contention that Jones' testimony evidenced to the jury another crime for which he was not being tried is mere speculation and conjecture, see Dunn v. State, 341 So.2d 806 (Fla.3rd DCA 1977), upon which reversible error cannot be predicated. Sullivan v. State, supra. Appellant has not shown that the trial judge abused his discretion in refusing to grant a mistrial; nor has appellant shown that the curative instruction was incapable of obviating any alleged prejudicial effect of the inadvertent, unsolicited statement.

ISSUE III

THE TRIAL COURT DID NOT ERR IN SENTENCING APPELLANT TO DEATH.

ARGUMENT

Appellant contends the trial court improperly considered an aggravating circumstance appellant claims is not supported by the evidence, and erred in failing to consider appellant's emotional disturbance as a non-statutory mitigating factor. Appellant also reasserts the standard claims that Florida's death penalty statutes are unconstitutional.

The trial court instructed the jury that it could consider the following aggravating circumstances, under Section 921.141(5), Florida Statutes:

* * *

> b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> * * *
>
> d) The capital felony was committed while the defendant was engaged, or was on accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
>
> e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> * * *

i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The trial judge, in his written findings in support of the death sentence, touched on each of the above enumerated aggravating circumstances (R 1590).

Appellant challenges only one of the aggravating circumstances, that the murders were committed for the purpose of avoiding or preventing arrest. In Riley v. State, 366 So.2d 19 (Fla.1978) and Menendez v. State, 368 So.2d 1278 (Fla.1979), this Court held that although the aggravating circumstance concerns primarily the killing of law enforcement officers, it could validly be applied when the victim was not a law enforcement officer if the dominant motive for murder was the elimination of witnesses. Appellant points to Clark v. State, ___ So.2d ___ (Fla.1983), Case No. 62,126, Opinion filed Dec. 22, 1983, [1984 F.L.W. 1] in support of his argument that the State failed to prove the requisite intent to avoid arrest, and contends that the State's anticipated argument of "no other motive" is merely a "logical inference". Appellee disagrees; the only inference to be drawn from the facts of this case is that appellant killed the store clerks because he did not want to leave any witnesses to his crimes. There was no evidence of any struggle or surprise movements by the clerks; appellant shot both clerks in the back at close range. The clerks were employed with the understanding they were not to resist in situations of robbery. The evidence clearly shows that after the clerks handed over the money

appellant eliminated the clerks. The only possible reason for coolly killing the clerks was the elimination of eyewitnesses. There is no other "logical inference", and thus the State met its burden of proof.

Assuming arguendo this Court determines the trial court improperly considered this challenged aggravating circumstance, the sentence of death remains valid because three other aggravating circumstances were properly found and no mitigating circumstances are present. When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factors which might override the aggravating factors, death is presumed to be the appropriate penalty. White v. State, 403 So.2d 331 (Fla.1981), cert.den., 103 S.Ct. 3571 (1983); State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943 (1974). If there are no established mitigating circumstances, the striking of an invalid aggravating circumstance does not necessarily mean that resentencing is required. Francois v. State, 407 So.2d 885 (Fla.1981), cert.den. 458 U.S. 1122 (1982). If this Court finds the evidence insufficient to support the challenged circumstance, reversal of sentence is not warranted since there remains three valid aggravating circumstances and no mitigating circumstances. See James v. State, ___ So.2d ___ (Fla.1984), Case No. 62,557, Opinion filed June 1, 1984, [1984 F.L.W. 199]; Demps v. State, 395 So.2d 501 (Fla.), cert.den., 545 U.S. 933 (1981); Shriner v. State, 386 So.2d 525 (Fla.1980), cert.den., 449 U.S. 1103 (1981); Ellidge v. State, 346 So.2d 998 (Fla.1977).

Appellant claims the court erred in failing to accord any weight to a nonstatutory mitigating factor; evidence of appellant's mental or emotional disturbance, and impairment of his capacity to conform his conduct. However, the record is clear that the trial court considered the evidence presented by appellant in mitigation and expressly referred to such evidence in the written findings:

> The defendant's chronological and mental age of thirty-four was such that it offers no excuse or mitigation for his crimes. Although the defendant had some emotional confusion in his life and was separated from his family, there is no evidence that he was under the influence of extreme mental or emotional disturbance.

(R 1590-1591). It is evident that the trial judge did not believe that the evidence presented by appellant in its totality rose to the level of mitigation. See Lusk v. State, ___ So.2d ___ (Fla.1984), Case No. 59,146, Opinion filed Jan. 26, 1984 [1984 F.L.W. 39]. It is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it. The trial court did not err in finding that no statutory or nonstatutory mitigating circumstances existed. Lusk v. State, supra; Daugherty v. State, 419 So.2d 1067 (Fla.1982), cert.den., 103 So.Ct 1236 (1983); Riley v. State, 413 So.2d 1173 (Fla.1982).

Finally, as to appellant's reassertion of his claim(s) that Florida's death penalty statute is unconstitutional, this issue has been determined and Florida's death penalty has been upheld as constitutional. See Proffitt v. Florida, 428 U.S. 242,

96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), reh.den., 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed.2d 158; Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978), cert.den., 440 U.S. 976 (1979).

CONCLUSION

Based on the above arguments in response to appellant's contentions, appellee respectfully requests this Court to affirm the judgment of guilt and sentence of death of appellant.

Respectfully submitted,

JIM SMITH
Attorney General

Andrea Smith Hillyer

ANDREA SMITH HILLYER
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded to Mr. Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 13th day of June 1984.

Andrea Smith Hillyer

Andrea Smith Hillyer
Assistant Attorney General