IN THE SUPREME COURT OF FLORIDA

JASON DIRK WALTON,

Appellant,

vs. Case No. 65,101

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

JASON DIRK WALTON, will be referred to as the "Appellant" in this brief. The STATE OF FLORIDA will be referred to as the "Appellee." The record on appeal contains (18) volumes and (1) supplemental volume and will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The appellee, the State of Florida, accepts the statements of the case and facts as set forth in the initial brief of the appellant with such corrections or additions as set forth in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

As to Issue I:

The trial court properly denied appellant's Motion to Suppress his confession. Initially, it is doubtful whether appellant has properly presented this point for review by this Honorable Court either on the theory of an estoppel or on the basis that appellant failed to specifically object to the issue he now presents before this Court. As to the merits of the Motion to Suppress, it is apparent that appellant initiated the conversations with police officers and validly executed a written waiver of his rights to counsel and to remain silent. Also, appellant never expressed the desire to discontinue his conversations with the police officers.

As to Issue II:

The trial court properly denied appellant's Application for Disqualification of Judge. All documentation required to be submitted with a Motion for Recusal was not done so within the time frame contemplated by Florida Rule of Criminal Procedure 3.230(c) and, therefore, appellant's motion was untimely. The Motion to Disqualify was also facially insufficient inasmuch as appellant offered no allegations to show that he had a well-grounded fear that the trial court was impartial. The fact that the trial court presided over the trial of a co-defendant at which evidence was presented tending to inculpate appellant does not indicate that the trial court has prejudged appellant's case or is prejudiced against appellant.

As to Issue III:

The trial court properly excluded a venirewoman where that prospective juror's views expressed during voir dire evidenced her inability to follow the instructions that would be given by the trial court. Where a juror is unable to return a recommendation of death unless the State proves the defendant's guilt by a standard greater than beyond a reasonable doubt, that juror's views prevent or substantially impair the performance of the duties of that juror in accordance with his instructions and his oath.

As to Issue IV:

The trial court did not err by permitting the State to introduce evidence of a co-defendant's confession during the guilt phase of appellant's trial. Defense counsel raised only a hearsay objection and the evidence introduced was clearly not hearsay inasmuch as it was introduced to show what the contents of an affidavit were, and not for the truth of those contents. Also, appellant never raised the Bruton issue in the trial court which he now asserts in his brief before this Honorable Court. He is thus precluded from obtaining appellate review. Also, should appellant be permitted to pursue this issue in this Court, the instant record reveals that appellant "opened the door" to the testimony that he is now objecting to inasmuch as he attempted to elicit the same information.

As to Issue V:

Appellant is barred from obtaining appellate review or relief with respect to his issue concerning the introduction

during penalty phase of statements made by the co-defendants. Appellant never raised a specific objection concerning the Bruton issue which was the predicate for this Court's opinion in Engle v. State. Additionally, the record of the instant cause reveals that appellant has waived any objection he might have had where a co-defendant was offered for cross-examination purposes at sentencing but appellant advised that cross-examination would not mitigate anything for appellant.

As to Issue VI:

The trial court did not err by failing to instruct the advisory jury that appellant's age could be considered as a mitigating circumstance. The court preliminarily denied the request for an instruction on age being considered as a mitigating circumstance but appellant never requested the court to give that instruction subsequent to the presentation of evidence at the penalty phase. Also, it is absolutely clear that appellant's age of 24 was not a mitigating circumstance and no instruction should be required.

As to Issue VII A:

The evidence adduced during the guilt phase and the penalty phase of appellant's trial supports a finding that a kidnapping of an eight year old child occurred with the intent to terrorize the boy's father. Therefore, the trial court properly found the aggravating circumstance that the capital felony was committed while the defendant was engaged or was an accomplice in the commission of a kidnapping.

As to Issue VII B:

The undisputed evidence shows that one of the victims identified appellant during the course of the criminal episode. Therefore, the trial court properly found as an aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

As to Issue VII C:

The trial court properly found as an aggravating circumstance that the capital felonies were especially heinous, atrocious, or cruel. The victims were laid face down with their hands bound, in a helpless condition, and were aware of their impending death. The precedents of this Honorable Court reveal that the facts of the instant murders were especially heinous, atrocious, and cruel.

As to Issue VII D:

The trial court did not double two aggravating circumstances. The court validly found that appellant had committed another capital felony and also found that appellant committed murders which were especially heinous, atrocious, and cruel. Inasmuch as the court's findings as to heinous, atrocious, and cruel focused upon the nature of the murders and not the murders themselves, the court committed no error in finding separate aggravating circumstances.

As to Issue VII E:

The trial court heard evidence of appellant's drug-related history and of a burglary committed by appellant. That testimony was sufficient to warrant the rejection of the mitigating

circumstance that appellant had no significant history of prior criminal activity.

As to Issue VII F:

The trial court considered lack of remorse only insofar as to negate possible mitigating circumstances. There is no prohibition to the trial court considering lack of remorse in that context.

As to Issue VII G:

The trial court specifically determined that there are no mitigating circumstances in the instant case. Such a finding reflects that the evidence was found to be not mitigating, not that the trial court failed to consider all the evidence presented.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS WHICH ALLEGED THAT APPELLANT'S CONFESSION WAS UNCONSTITUTIONALLY OBTAINED.

As his first point challenging the validity of his conviction of murder in the first degree, appellant contends that his confession was obtained in a constitutionally impermissible manner. For the reasons expressed below, appellant's first point has no merit.

Initially, your appellee would assert that it is questionable as to whether appellant has properly preserved his first point for appellate review by this Honorable Court. In order to appeal the denial of the pretrial Motion to Suppress it is necessary to lodge an objection to the introduction of the subject matter of the Motion to Suppress (sub judice, appellant's confessions) at trial. Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983); Sims v. State, 402 So.2d 459 (Fla. 4th DCA 1981). The instant record reveals that appellant attempted to renew his Motion to Suppress at trial (R 2120, 2139). However, the record also reveals that appellant should be estopped from raising the denial of his Motion to Suppress in this appeal. The following colloquy occurred between counsel and the trial court during trial when the subject of the confessions was raised:

> MR. O'LEARY (defense counsel): No, no. He refused to talk, and a Laura Melvin got appointed, a public defender. She told him to shut up. She told Halliday not to talk to him and took him to Citrus for the rest of

> the afternoon and then took him to Pinellas County. And ten minutes on the road, he voluntarily waived everything and signed a waiver.
> MR. CROW (Assistant State Attorney): I understand that.
> THE COURT: How do you want to handle it?
> MR. CROW: For the record and for the jury, it's my understanding that you wanted the jury to know that.
> MR. O'LEARY: That he waived an attorney and volunteered, yes.
> MR. CROW: Well, that initially, the initial delay was after counsel was appointed.
> MR. O'LEARY: Yes, yes.
> THE COURT: So there is no objection to his going into that at this time?
> MR. O'LEARRY: No.
> ... (R 2113, emphasis supplied)

Thus, it appears that defense counsel acknowledges that appellant "voluntarily waived everything and signed a waiver" but then subsequently announced that he was renewing his Motion to Suppress. Appellant should not be permitted to maintain such an inconsistent position and is, therefore, estopped from obtaining appellate review of his motion to suppress. See McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971). Appellant cannot advise the court that the jury should know that appellant waived an attorney and yet be permitted to challenge that waiver in this appeal.

Assuming arguendo that this Honorable Court determines that appellant is not estopped from raising the denial of his Motion to Suppress in this appeal, it is still apparent that this point has no merit. In his brief, appellant is primarily relying upon the theory that his statement, "Well, yes, I would like to but I really don't want to" (R 2747), is indicative in some manner that he did not wish to submit to interrogation (Appellant's brief at

page 14). This argument was neither raised in appellant's Motion to Suppress (R 92-93) nor by argument of counsel at the hearing on appellant's Motion to Suppress (R 2829-2846). This Honorable Court has previously recognized that in order for an argument to be cognizable on appeal it must be the specific intention asserted as the legal ground for the motion in the trial court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Having failed to present this issue in its present form to the trial court appellant is precluded from obtaining appellate review.

Appellant acknowledges in his brief that he was the one who initiated conversation with the police officers in the automobile (Appellant's brief at pages 13 and 14). Thus, disposition of this issue on the merits is controlled by the substantial body of Florida law which, in essence, stands for the proposition that a criminal defendant can waive the presence of counsel even though he has indicated a prior desire to have counsel. Henderson v. State, ___So.2d___ (Fla. 1985), Case No. 63,094, Opinion Filed January 10, 1985 [10 F.L.W. 43]; Jennings v. State, 413 So.2d 24 (Fla. 1982), after remand, 453 So.2d 1109 (Fla. 1984); Delap v. State, 440 So.2d 1242 (Fla. 1983); Waterhouse v. State, 429 So.2d 301 (Fla. 1983); Jackson v. State, 359 So.2d 1190 (Fla. 1978); Witt v. State, 342 So.2d 497 (Fla. 1977), cert. denied, 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed 2d 294, rehearing denied, 434 U.S. 1026, 98 S.Ct. 755, 54 L.Ed 2d 774 (1978). A valid waiver of counsel is effective even though the defendant is represented by counsel and the officers are aware of that fact. Ferguson v. State, 417 So.2d 631 (Fla. 1982); Waterhouse, supra; Witt, supra. The trial court specifically found that appellant was fully and

repeatedly informed of his right to have counsel present during any interrogation and of his right to remain silent but that appellant initiated the conversations in the automobile, a written waiver of counsel was excuted by appellant, and the statements were freely and voluntarily given by appellant (R 2845-2846). The trial court's determination of factual matters presented at a motion to suppress hearing comes to this Honorable Court clothed with the presumption of correctness, and evidence and reasonable inferences and deductions derived therefrom must be interpreted in a manner most favorable to sustain the trial court's ruling. McNamara v. State, 357 So.2d 410 (Fla. 1978); Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, __ U.S.___, 104 S.Ct. 1329, 79 L.Ed 2d 724 (1984). The trial court's findings sub judice were correct. Additionally, although apellant contends that he has a situation governed by the decision in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed 2d 378 (1981), such a contention is without merit. It is apparent as per the findings of the trial court that appellant initiated the conversations with the police officers in the automobile. At that time, appellant also executed a written waiver of his right to remain silent and his right to have counsel present during any questioning. The police officers subsequently interviewed appellant in the jail four days later. Once again, appellant was given his Miranda Rights and again appellant executed a written waiver of rights (R 2754). Appellant's contention that this was an initiation of conversation by the police officers so as to invoke the principles of Edwards is simply mistaken. Appellant

had already validly waived his rights to counsel and to remain silent (in the automobile enroute to Pinellas County). No construction of Edwards requires police officials to refrain from conversing with a defendant once that defendant has executed a valid waiver of his rights. Because appellant had validly waived his rights, the police officers were free to converse with appellant until such time as appellant might have reinvoked his right to remain silent and his right to counsel. Appellant having failed to reinvoke his rights, there was no constitutional prohibition to the officers again conferring with appellant, especially in light of the fact that appellant was readvised of his rights and executed a valid written waiver.

Although appellant should be precluded from arguing in this Honorable Court that his remarks required the officers to cease interrogation because of his failure to present that specific issue to the trial court, your appellee is compelled to note that appellant has misconstrued his own statements and has taken then totally out of context. During direct examination by the Assistant State Attorney at the motion to suppress hearing, Detective Halliday was questioned as to whether appellant would permit a taped statement to which the appellant responded, "Well, yes, I would like to but I really don't want to" (R 2747). Appellant immediately responded that he didn't want it tape recorded but that he wanted to talk with the officers and "fish around" (R 2747-2748). It is absolutely apparent that appellant never expressed the desire to discontinue his conversations with the police officers (R 2748). Appellant's first point is totally without merit.

ISSUE II

WHETHER THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION FOR DISQUALIFICATION OF TRIAL JUDGE.

As his second point, appellant contends that the trial court erroneously denied the Motion to Disqualify the Trial Court. For the reasons expressed below, appellant's point must fail.

Initially, your appellee would assert that the Motion for Disqualification filed in the instant cause was untimely so as to require the trial court to deny the motion. Admittedly, the timeliness of the motion was not addressed at the hearing on appellant's Motion to Disqualify but we offer the question to this Honorable Court as an alternative ground for upholding the trial court's ruling. Rule 3.230(b), Florida Rules of Criminal Procedure provides that motions to recuse shall be in writing, certified by counsel of record to be in good faith and accompanied to by at least two supporting affidavits. Appellant's Application for Disqualification of Judge and Memorandum in Support Thereof was filed on January 27, 1984 (R 196-198). Inasmuch as trial commenced on February 7, 1984, appellant's Application for Disqualification was filed "no less than ten days before the time the case is called for trial." Florida Rules of Criminal Procedure 3.230(c). However, the supporting affidavits were not filed until January 31, 1984 (R 199-206) and the certificate of good faith was not filed until February 1, 1984 (R 208) and, therefore, these documents were not filed at least ten days before trial. Inasmuch as the actual

Motion to Disqualify must be accompanied by the affidavits and the certificate of good faith your appellee would assert that Florida Rule of Criminal Procedure 3.230(c) has not been complied with. Obviously, a motion which is not accompanied by at least two affidavits or a certificate of good faith is facially insufficient warranting the denial of a motion to disqualify. Therefore, inasmuch as the documentation required to complete the motion to disqualify was not submitted within the time frame contemplated by Rule 3.230(c) it is apparent that the motion should have been denied as untimely filed.

Assuming arguendo that the Motion to Disqualify was in proper form and timely filed, its allegations must also be sufficient to demonstrate that appellant had a well founded fear that he could not receive a fair hearing from the trial judge. See State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977) (bare allegations of prejudice are not sufficient to require a judge to disqualify himself). Furthermore, mere conclusory allegations will not suffice. Jones v. State, 411 So.2d 165 (Fla. 1982). Your appellee would respectfully submit that an examination of the allegations contained in the motion sub judice clearly demonstrates their legal insufficiency.

In his Application for Disqualification appellant merely alleged that because the trial court presided at a co-defendant's trial one month prior to the commencement of appellant's trial, the trial court was "psychologically predisposed" to harm appellant's defense. Appellant reasons that because the trial

court was exposed to certain evidence offered at the co-defendant's trial which inculpated appellant the trial court might be psychologically predisposed to reject appellant's defense that his co-defendant's were the culpable parties. Such allegations are clearly insufficient. A motion for disqualification is deemed sufficient only if the facts allege a well grounded fear that he will not receive a fair trial at the hands of the judge. Livingston v. State, 441 So.2d 1083 (Fla. 1983). Here, appellant did not have a "well grounded" fear that the judge might be impartial. It is apparent that both the trial court and the prosecuting attorney were aware that the jury rejected the co-defendant's defense in less than a hour and made three recommendations of death against the co-defendant (R 2857, 2870). Furthermore, appellant has offered no citation of authority to the effect that a trial court is prejudiced merely by listening to the evidence adduced at the trial of a co-defendant. A judge is not subject to disqualification if he makes pre-trial rulings adverse to a defendant. Wilson v. Renfroe, 91 So.2d 857 (Fla. 1957). Such a situation in analogous to the instant cause because the trial court has previously heard evidence pertaining to the case but that is not, in and of itself, sufficient to warrant the conclusion that the trial court has pre-judged the case or is prejudiced against appellant. Therefore, the trial court properly denied the motion for disqualification because it was legally insufficient.

Also, an examination of the instant record clearly shows that appellant received a full and fair trial on charges. When

an appellant seeks his remedy for denial of a motion to recuse through appeal rather than prohibition, your appellee would argue that it is possible and appropriate to examine the trial record to determine whether the appellant did indeed receive a fair trial. Justice Boyd, with whom then Chief Justice and now Justice Alderman concurred, dissented in Livingston v. State, supra, and stated:

> ...When a trial judge's denial of a motion for disqualification is brought before the appellate court for review by means of a pre-trial petition for writ of prohibition, the courts tend to apply the rule strictly and inquire only into the sufficiency of the motion and supporting affidavits to state a well-grounded fear of partiality. See e.g. Bundy v. Rudd; Dickenson v. Parks; State ex rel Allen v. Testa, 414 So.2d 38 (Fla. 3rd DCA 1982); Jackson v. Korda, 402 So.2d 1362 (Fla. 4th DCA 1981); State ex rel Zacke v. Woodson, 399 So.2d (Fla. 5th DCA 1981); State ex rel Aguiar v. Chappelle, 344 So.2d 925 (Fla. 3rd DCA 1977). On the other hand, when defendants wait until after their trials to seek review of the orders of denial in conjunction with their appeals, the appellate courts tend to evaluate the claims of pre-judice on the merits. See e.g. Jones v. State, 411 So.2d 165 (Fla.), cert. denied, 103 So.Ct. 189 (1982); Tafero v. State, 403 So.2d 355 (Fla. 1981); cert. denied 455 U.S. 983 (1982); Mikenas v. State, 367 So.2d 606 (Fla. 1978); Dempsey v. State, 415 So.2d 1351 (Fla. 1st DCA) review denied 424 So.2d 761 (Fla. 1982); Van Fripp v. State, 412 So.2d 915 (Fla. 4th DCA 1982); Yesbick v. State, 408 So.2d 1083 (Fla. 4th DCA) review dismissed, 417 So.2d 331 (Fla. 1982).

Livingston v. State, supra, at 1089. Your appellee would reiterate, however, that even if this Honorable Court should determine that it cannot examine the trial record and evaluate whether appellant received a fair trial, appellant's argument

on this issue must fail based on the facial insufficiency of the Motion to Disqualify.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY GRANTING THE STATE'S MOTION TO EXCUSE A JUROR FOR CAUSE.

As his third point, appellant contends that his death sentence should be vacated because the venirewoman Nellie Batten was excused for cause because of the views she expressed during voir dire. Appellant's point is without merit.

In the United States Supreme Court's most recent exposition of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 28 L.Ed 2d 776 (1968), Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 58 (1980), Justice White, joined by five justices, opined:

> ...[T]he state [has a] legitimate interest in obtaining jurors who could follow their instructions and obey their oaths. (448 U.S. at 44)

Justice White then proceeded to examine several cases and summarized the law as follows:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views on capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The state may insist, however, that jurors will consider and decide the facts impartially and consciencously apply the law as charged by the court. (448 U.S. at 45; emphasis added)

It is apparent that a review of the voir dire examination of Ms. Batten leads to the inescapable conclusion that the trial court correctly excused her for cause.

Throughout the entire voir dire examination of Ms. Batten she consistently evidenced her inability to follow the

instructions that would be given by the trial court. She specifically stated that in order to impose the death penalty the State would have to prove the defendant's guilt beyond every possible doubt (R 1910). She further stated that she could follow the court's instructions except that the standard would be greater than beyond a reasonable doubt (R 1910). Ms. Batten also advised that the only way she could return a recommendation of death would be if the State established that the defendant was the actual triggerman (R 1918). Defense counsel's attempts to rehabilitate Ms. Batten failed with respect to having Ms. Batten deviate from her views that the State had to prove appellant's guilt by a standard exceeding "beyond a reasonable doubt". Ms. Batten advised defense counsel that she would have to be "real sure" before she could return a recommendation of death and that the State would have to prove that appellant was "really guilty" (R 1930). Defense counsel then inquired of Ms. Batten whether she was capable of returning a recommendation of death if the State had met "its burden" to which Ms. Batten replied that she thought so (R 1930). It is absolutely apparent that, according to Ms. Batten, the State could only meet "its burden" by showing that appellant was "really guilty" by proving it beyond every possible doubt. Therefore, Ms. Batten was absolutely unable to apply the law that would be charged by the court.

The competency of a challenged juror is to be determined by the trial court in his discretion and the trial court's decision will be disturbed only where manifest error is present. Christopher v. State, 407 So.2d 198 (Fla. 1981). No manifest

error is present sub judice. The trial court properly granted the State's motion for excusal for cause inasmuch as the venire-woman was unable to follow the law. The trial court was able to observe Ms. Batten's demeanor and was able to determine that Ms. Batten would be unable to impartially follow the law. As the Court concluded in Adams v. Texas, supra:

> ...[T]he State may bar from jury service that those whose beliefs about capital punishment would lead them to ignore the law or violate there oaths. (448 U.S. at 50)

With the exclusion of Ms. Batten and Ms. Tenney (another venire-woman excused for cause) appellant was tried by an impartial jury and the sentence of death eventually imposed upon appellant should be affirmed.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY PERMITTING THE INTRODUCTION INTO EVIDENCE OF STATEMENTS OF A CO-DEFENDANT WHICH APPEARED IN THE AFFIDAVIT ATTACHED TO APPELLANT'S ARREST WARRANT.

Appellant next argues that the trial court erred by permitting the State to introduce evidence of a co-defendant's confession during the guilt phase of appellant's trial. For the reasons expressed below, appellant's point must fail.

During defense counsel's cross-examination of Detective John Halliday, Detective Halliday was questioned as to the contents of the arrest warrant and the affidavit attached thereto (R 2170-2171). Reference to the warrant and the affidavit was made with respect to how appellant might have acquired information that his co-defendants were accusing appellant of actually being the triggerman in the triple homicide. Information supplied in the affidavit was obtained from the confession of a co-defendant, Terry Van Royal (R 3-4). On redirect examination, the State again questioned Detective Halliday as to the actual contents of the affidavit to which defense counsel lodged a hearsay objection (R 2181, 2187-2190). The trial court ruled that the contents of the affidavit were not hearsay (R 2182-2184). The court permitted the testimony concerning statements made by the co-defendant and gave a cautionary instruction to the jury that they were to consider that the contents of the affidavit were not being introduced for their truth but rather so that the jury would know what the affidavit says (R 2185). The trial court's

ruling was correct and no error is present here.

The sole objection lodged by appellant below was a hearsay objection. The trial court correctly ruled that the affidavit was being introduced only insofar as its contents were concerned and not as to the truth thereof. Defense counsel advised the court that he raised the issue in a limited sense as to "how my client got the knowledge of being accused of being the shooter of all three dead men" (R 2184). The trial court then advised that for that purpose the contents of the affidavit were relevant and defense counsel expressly agreed with the court (R 2184-2185). For the same reason, the contents of the affidavit were not hearsay inasmuch as they were not offered to prove the truth of the matter asserted. Rather, they were offered merely to show what the contents were. In actuality, the State never concluded that appellant was the triggerman and, in fact, told the jury that Van Royal's statements weren't true (See R 2399).

In this appeal, appellant also attempts to raise a Bruton confrontation issue.[1] However, appellant never raised this specific issue before the trial court and he is, therefore, precluded from obtaining appellate review. Steinhorst v. State, supra. Nevertheless, it is apparent that this issue is without merit. The record makes it unmistakably clear that appellant "opened the door" to the testimony concerning the contents of the affidavit inasmuch as he attempted to question Detective Halliday

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[1] Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed 2d 476 (1968).

concerning same during cross-examination. Appellant cannot seek the information and then complain because the State was able to elicit it from the detective. Thus, appellant's point must fail.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY PERMITTING THE INTRODUCTION INTO EVIDENCE OF STATEMENTS MADE BY APPELLANT'S CO-DEFENDANTS DURING THE PENALTY PHASE.

As his next point, appellant contends that his death sentence should be vacated where the trial court permitted introduction into evidence of certain statements and confessions made by appellant's co-defendants during the penalty phase. In support of his proposition, appellant relies exclusively upon this Honorable Court's decision in Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied, ___U.S.___, 104 S.Ct. 1430, 79 L.Ed.2d 753. In Engle, this Honorable Court determined that the trial court's consideration of a co-defendant's confession unconstitutionally denied defendant the opportunity to cross-examine and confront the co-defendant. Notwithstanding the legal holding in Engle, appellant is not entitled to have his death sentence vacated on this point.

Once again, it is questionable as to whether appellant has properly preserved this issue for appellate review. Although defense counsel registered an objection to the use of the co-defendants statements (R 2511, 2517), the original objection was merely a general objection, and the second objection was apparently a hearsay objection. The trial court understood the objection to be on the basis of hearsay (R 2522). Such an objection was properly overruled inasmuch as our capital sentencing statute permits the introdution of hearsay evidence provided that the defendant is accorded a fair opportunity to

rebut any hearsay statements. Florida Statute 921.141(1). If appellant had been so inclined, he himself could have taken the stand to rebut the evidence which was introduced through his co-defendants' statements. Thus, appellant was not precluded from rebutting the evidence contained in the co-defendants' statements, although he was unable to confront his co-defendants where trial counsel stipulated that both witnesses were unavailable (R 2510-2511). It was, therefore, incumbant upon appellant to register a specifc objection concerning the Bruton problem discussed in Engle, supra. In order to have preserved this issue for appellate review, appellant should have made the specific contention asserted now in his brief as the legal ground for his objection before the trial court. Steinhorst, supra. This Honorable Court should not presume that, had the proper objection been made below, the trial court would have made erroneous ruling. Lucas v. State, 376 So.2d 1149 (Fla. 1979).

The record of the instant cause reveals another compelling reason as to why appellant should be precluded appellate relief on this point. At the sentencing hearing, the following colloquy occurred:

> MR. CROW: (prosecutor) Judge, I just wanted to reiterate the availability of Mr. McCoy. We had that witness transported. He is here. If there is any Cross-Examination for this proceeding, Mr. O'Leary had indicated to me that he wasn't going to pursue that.
> MR. O'LEARY: (defense counsel) As I indicated earlier, we are not going to call him today, right.
> MR. CROW: No. We are just making him available to you.
> MR. O'LEARY: I don't think he can mitigate anything for me.

THE COURT: You are just making the offer for the record and renewing it?
MR. CROW: I didn't know if he had discussed this with his clients.
THE COURT: Have you had an opportunity to discuss this with your client? Do you want to do that?
MR. O'LEARY: Yes, I'll do that.
(Thereupon, a pause in the proceedings took place.)
MR. O'LEARY: Yes, Judge, I've had a chance to talk with him and he doesn't want me to pursue it.

(2694)

The above-quoted colloquy demonstrates that appellant waived any objection he might have had as to the introduction of the co-defendants' statements. Defense counsel expressely acknowledged that cross-examination of Mr. McCoy would not be able to mitigate anything for appellant. Defense counsel also advised the court that appellant himself did not wish to pursue cross examination of Mr. McCoy. Thus, your appellee would assert that appellant has personally waived any objection he might of had to the introduction of the co-defendants' statements. With respect to the statements made by Mr. Cooper, appellant made no request at sentencing for an opportunity to cross-examine Cooper and, as noted above, appellant failed to preserve this point for appellate review. Thus, appellant's point must fail.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE ADVISORY JURY THAT APPELLANT'S AGE COULD BE CONSIDERED AS A MITIGATING CIRCUMSTANCE.

Appellant now contends that the trial court erred by failing to instruct the jury that age could be considered as a mitigating circumstance. For the reasons expressed below, appellant's point must fail.

Initially, it must be noted that the trial court did not absolutely deny appellant the instruction to the jury as to age being considered as a mitigating circumstance. When first raised in the jury instruction conference by defense counsel, the trial court determined that "absent anything else" an instruction on age would not be appropriate (R 2497). The court also advised defense counsel that if the evidence adduced at the penalty phase brought out something further it was still possible to give the instruction on age (R 2497-2498). Subsequent to the presentation of evidence at the penalty phase, the trial court and counsel reviewed the trial instructions and defense counsel acknowledged that the instructions were proper (R 2621-2622). Your appellee would assert that no evidence was adduced during penalty phase which would have warranted instruction on age being considered as a mitigating factor.

In Songer v. State, 322 So.2d 481 (Fla. 1975), this Honorable Court determined that "one is considered an adult responsible for ones own conduct at the age of 18 years." Id. at 484. In Songer, this court upheld the death sentence of a 23

year old. See also Peek v. State, 395 So.2d 492 (Fla. 1980) (19 years of age properly not considered as a mitigating circumstance); Washington v. State, 362 So.2d 658 (Fla. 1978) (26 years of age properly not considered as a mitigating factor); Sullivan v. State, 303 So.2d 632 (Fla. 1974) (25 years of age properly not considered as a mitigating circumstance). Sub judice the jury had been informed during trial that appellant was 24 years of age and that his three co-defendants were teenagers. The trial court did instruct the jury that they could consider any aspect of the defendants character or record as a mitigating circumstance (R 2677). Indeed, defense counsel during closing argument to the jury in the penalty phase acknowledged that appellant went into the Armed Forces as a teenager and came out a man (R 2671). Therefore, inasmuch as there were no circumstances beyond the mere fact of appellant's 24 years of age which would have supported a finding as to age being a mitigating circumstance, the trial court did not err.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY APPLIED THE FLORIDA DEATH PENALTY STATUTE, §921.141, FLA. STAT. (1983), IN IMPOSING THE DEATH PENALTY UPON APPELLANT.

Appellant lastly contends that the trial court improperly applied the Florida death penalty statute by erroneously finding three inapplicable aggravating circumstances, by doubling two aggravating circumstances, by injecting the element of lack of remorse into the weighing process, and by excluding several mitigating circumstances. Your appellee contends otherwise and would assert that the trial court properly applied Section 921.141 and validly imposed three death sentences upon appellant.

A.

Whether the Trial Court Erred in Finding as an Aggravating Circumstance that the Capital Felony was Committed in the Course of a Kidnapping.

As his first attack on the propriety of the trial court's penalty weighing process appellant asserts that the trial court erred in finding as an aggravating factor that the capital felony was committed in the course of a kidnapping. He contends that because the offense of kidnapping was not proven beyond a reasonable doubt the trial court improperly considered the aggravating circumstance set forth in Florida Statute 921.141(5)(d). Your appellee contends otherwise and would assert that the kidnapping of 8 year old Chris Fridella was proven beyond a reasonable doubt.

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The jury was instructed that before they could find kidnapping as an aggravating circumstance the State must establish beyond a reasonable doubt that appellant forcibly, secretly or by threat confined, abducted or imprison another person; to-wit: Chris Fridella against his will and without lawful authority and that this was done with the intent to inflict bodily harm upon or terrorize the victim or another person (R 2675). The trial court found that Chris Fridella was kidnapped and confined with intent to terrorize his father, Steven Fridella (R 359). The court further found:

> It is clear from the evidence that CHRIS FRIDELLA was under the age of thirteen (13) years; that his confinement in the bathroom was without the consent of his parent and legal guardian and that confinement in segregation when he was moved from the bedroom to the bathroom was inpart done to terrorize his father or reduce or make it less likely that the father would resist during the course of the particular events. (R 359).

Appellant contends that the foregoing factual findings were not supported by the evidence. He focuses attack on the fact that there was no direct evidence that Chris Fridella was threatened or that Steven Fridella was threatened with harm to his son. Appellant primarily bases his argument on the fact that during testimony adduced from Detective Halliday it was determined that the little boy was put in the bathroom so that no harm would come to him (R 2131). Appellant's self-serving statement as to the intent underlying the separate confinement of the eight year old boy was apparently not given much credence by either the jury or the trial court. In his findings, the trial court apparently

discounted that statement and relied upon other factors to find that the kidnapping was done in part to terrorize the boy's father and reduce or make it less likely that the father would resist during the criminal episode. The State argued during the penalty phase that the kidnapping was a "a very, very powerful lever...because... no parent, no person who has a child could ever endanger that child's life by resisting men with shotguns because they new Chris' life hung on a balance" (R 2639). It is significant to note that during his argument at the penalty phase, defense counsel never attempted to rebut or refute the assertions by the State that the kidnapping was done to terrorize the murder victims. Additionally, evidence was adduced at the penalty phase to show that Steven Fridella was begging for his son's life immediately to the murders (R 2557). It was entirely permissible for the jury and, ultimately the trial court, to view the evidence and conclude that circumstances surrounding the kidnapping permitted the inference that the kidnapping was done with the intent to terrorize the little boy's father. The trial court did not err by finding that the capital felonies committed by appellant were done so during the course of the kidnapping.

B.

Whether the Trial Court Erred in Finding as an Aggravating Circumstance that the Capital Felony was Committed for the Purpose of Avoiding Arrest.

Appellant does not dispute that the State proved beyond a reasonable doubt that one of the victims, Gary Petersen, recognized appellant in spite of the fact that appellant was

wearing a mask. The trial court so found and additionally noted that after appellant was recognized a conscious decision was made that the victims would be executed (R 358-359, 360). Appellant relies on the trial court's purportedly contradictory findings and on the fact that the aggravating circumstance set forth in Florida Statute 921.141(5)(e) is not present unless it is clearly shown that the dominant or only motive for the murder would be elimination of witnesses pursuant to this Court's holding in Menendez v. State, 368 So.2d 1278 (Fla. 1979). Your appellee would assert, however, that the trial court properly found that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

The trial court did not make contradictory findings. In his specific finding as to the aggravating circumstance set forth in Florida Statute 921.141(5)(e) the court concluded that the risk of arrest in part added to the motivation for the victims murder (R 360). The court also noted that "the events were sligthly different" and made reference to his subsequent findings that the murders were committed in a cold, calculated and premeditated manner (R 360). Thus, the trial court expressly recognized that the death and execution of each victim was coldly planned, premeditated and calculated prior to appellant's entry into the victims premise but nevertheless also concluded that the risk for arrest was partial motivation for the murders.

Inasmuch as the trial court recognized that risk of arrest in part added to the motivation for the victims' murder, the

ultimate question becomes whether it is essential to show that risk of arrest was the dominant or only motive for the murder per this Honorable Court's decision in Menendez, supra. In Routly v. State, 440 So.2d 1257 (Fla. 1983), this Honorable Court distinguished Menendez by focusing upon the fact that in Menendez it was not apparent as to what events preceded the actual killing. In the instant case, however, we do know that appellant was recognized by one of the victims. Also, this court has previously upheld the finding of the aggravating factor set forth in Florida Statute 921.141(5)(e) where it was not shown that the dominant or only motive for murder was the elimination of witnesses. In Bolender v. State, 422 So.2d 833 (Fla. 1982), this court upheld the finding that murders were committed for the purpose of avoiding or preventing a lawful arrest where the victims were murdered partially to prevent retaliation but also to prevent arrest. Id. at 838. Therefore, although the murders of the three victims in the instant cause were committed in part because of the fear of recognition and risk of arrest, proof of the requisite intent to avoid arrest and detection is very strong in light of the undisputed fact that one of the victims recognized the appellant. The trial court, therefore, properly found the existence of the aggravating circumstance set forth in Florida Statute 921.141(5)(e).

C.

Whether the Trial Court Erred in Finding as an Aggravating Circumstance that the Murders were Especially Heinous, Atrocious, or Cruel.

Appellant next contends tht the trial court improperly found that the murders were especially heinous, atrocious, or cruel. He relies upon Cooper v. State, 336 So.2d 1133 (Fla. 1976), wherein this Honorable Court held that the aggravating circumstance set forth in Florida Statute 921.141(5)(h) was improperly found where the victim was killed instantaneously. In the instant case, however, there was testimony adduced during trial that two of the victims could have lived for up to two minutes after being shot (R 2052, 2070-2072), while death to the third victim might have been instantaneous if the shot to that victim's head was the first shot fired at that victim (R 2071). Unlike Cooper, there was no evidence that the victims died instantaneously and without pain. However, more factors are present in this case to uphold the trial court's finding that the murders were especially heinous, atrocious, or cruel.

The trial court specifically found that the victims were laid face down and their hands were bound. They were in a helpless condition and were aware of their impending death (R 360). In Jones v. State, 411 So.2d 165 (Fla. 1982), this Honorable Court upheld the finding that the murder was especially heinous, atrocious, or cruel where the defendant therein ignored the victim's plea to be spared and shot him to death in the style of an excution. Id. at 169. In the instant case, testimony was

presented by the State which showed that one of the victims was begging for his life at the time he was executed (R 2557). In Steinhorst v. State, supra, three victims were bound and gagged and confined in a small van with the body of an already murdered victim. There, as in the instant case, the victims were not blindfolded and they were able to feel their impending death. Here, as in Steinhorst, the terror experienced by the last remaining victim is unimaginable. Similarily, in Routly v. State, supra, this court distinguished Cooper, supra, and noted that the aggravating factor set forth in Florida Statute 921.141(5)(h) has been upheld even where the victim died instantaneously. This court determined that before such an instantaneous death occurred, the victim was subjected to agony over the prospect that death would soon occur. Also, in White v. State, 403 So.2d 331 (Fla. 1981), cited by appellant in his brief at page 35, this Honorable Court upheld the finding of the aggravating factor set forth in Section 921.141(5)(h) where six victims were slaughtered. See also Henderson v. State, supra. Thus, it is apparent that a review of a precedents established by this Honorable Court concerning heinous, atrocious, and cruel capital felonies mandates affirmance of the trial court's finding of this aggravating factor at the case at bar.

D.

Whether the Trial Court Erred by Finding the Presence of Two Aggravating Circumstances Based Upon the Same Facts.

Appellant next argues that the trial court improperly

doubled two aggravating circumstances where the court found that appellant was previously convicted of another capital felony and that the capital felonies were heinous, atrocious and cruel. He argues that those two aggravating circumstances are supported by the same facts and, therefore, cannot stand. Appellant is simply mistaken and his point is totally without merit.

Appellant fails to observe that the trial court's findings with respect to the aggravating circumstance of heinous, atrocious and cruel was not limited merely to the fact that three persons were slaughtered. As discussed immediately above, the court found that the victims were laid down on the floor with their hands bound in a helpless condition and were made aware that they were about to be killed. The court was primarily concerned with the horror, fear and terror prior to death experienced by the victims. In other words, the trial court's findings with respect to whether the crimes were heinous, atrocious or cruel focused upon the manner in which the victims were killed and the native of the murders and not simply on the fact that three persons were slaughtered. Therefore, it is absolutely clear that the trial court did not improperly double the aggravating circumstances.

E.

Whether the Trial Court Erred by Rejecting the Mitigating Circumstance that Appellant has No Significant History of Prior Criminal Activity.

For several reasons, appellant contends that the trial court

improperly rejected the mitigating circumstance that appellant had no significant history of prior criminal activity. At the outset, it must be observed that it is absolutely irrelevant that appellant had no prior criminal convictions. The mitigating circumstance set forth in Florida Statute 921.141(6)(a) does not require convictions in order to show past criminal history. Washington v. State, supra at 666-667. Thus, it was still permissible for the State to offer evidence in rebuttal to show that appellant had, indeed, a significant history of prior criminal activity.

Appellant concedes that evidence was adduced to show that appellant sold two ounces of marijuana to a friend (R 2608-2609). At the time appellant sold these two ounces to John Soul, Mr. Soul observed that appellant had approximately half a pound of marijuana (R 2609). The State also adduced evidence that appellant was in possession of seven bales of marijuana obtained during a burglary of the Citrus County Sherriffs Department warehouse (R 2607-2608). Appellant had, along with co-defendant Richard Cooper, committed that burglary (R 2608). Appellant argues that this testimony was inadmissible hearsay and that his right to confrontation was contravened by admission of that evidence. However, appellant made no specific objection on the basis of a lack of confrontation, nor did appellant object that the evidence adduced violated the precepts of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1971). Appellant made no Gardner challenge inasmuch as it appears that defense

counsel was provided with Mr. Soul's name (R 231). In any event, inasmuch as our death penalty statute permits consideration of hearsay evidence and because appellant failed to raise the proper objection or show that he was denied the opportunity to rebut the hearsay evidence, the trial court properly considered appellant's drug-related history and the burglary.

Appellant also argues that the trial court applied an improper standard in rejecting the mitigating circumstance of no significant history of criminal activity. Appellant has simply miscontrued the court's statements. Contrary to appellant's argument, the trial court did not require appellant to establish that he had committed "absolutely no prior criminal act of any kind" (R 362). The court was merely noting that even if the mitigating circumstance was established it would in no way be of sufficient weight to overcome the aggravating circumstances already found by the court.

The criminal activity established by the State at the penalty phase was sufficient to enable the trial court to find that appellant had a significant criminal history. However, even if this Honorable Court should deem otherwise, it is apparent that the trial court has already established that the existence of that mitigating circumstance would in no way have affected the imposition of the death penalties inasmuch as the establishment of that mitigating circumstance could not outweigh the aggravating circumstances.

F.

Whether the Trial Court Erred by Referring to the Absence of Remorse when Rejecting Mitigating Circumstances.

Appellant next contends the trial court erred by considering appellant's lack of remorse. He argues that the trial court improperly weighed lack of remorse and, in essence, treated the lack of remorse as an aggravating circumstance. In so contending, appellant relies on this Honorable Court's decision in Pope v. State, 441 So.2d 1073 (Fla. 1983). In Pope, this court determined that lack of remorse may not be considered as an aggravating circumstance or in enhancement of a proper statutory aggravating circumstance. However, in Agan v. State, 445 So.2d 326 (Fla. 1983), this Honorable Court determined that it is permissible to consider lack of remorse to negate mitigation. That is precisely what the trial court has done sub judice. While service in the Armed Forces might have resulted in a mitigating circumstance being established, that mitigating circumstance was negated by appellant's lack of remorse. Such a finding is sanctioned by this court's holding in Agan. No error is present here.

G.

Whether the Trial Court Erred by Failing to Consider Relevant Non-Statutory Mitigating Circumstances.

Appellant lastly complains that the trial court failed to consider certain non-statutory mitigating circumstances. For the reasons expressed below, appellant's point has no merit.

Pursuant to the United States Supreme Court opinions in both Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), appellant was allowed to present and argue any factor he felt was mitigating. The jury was instructed to consider any other aspect of appellants character or record or any other circumstance of the offense (R 2677). The jury recommended three sentences of death by votes of 11-1, 11-1, and 12-0. The trial court after hearing all of the evidence and arguments also indicated that "there are no mitigating circumstances" (R 357). In Smith v. State, 407 So.2d 894 (Fla. 1981), this court relied on the decision in Lucas v. State, supra, wherein this court determined:

> ...The jury and the judge heard the testimony, and apparently concluded that the testimony should be given little or no weight in their decisions. We find nothing in the record which compels a different result. (Smith at 902)

There is no reason to believe the trial court did not follow his own instructions and consider all evidence presented in mitigation.

In Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983), the court held:

> ...The fact that the sentencing order does not refer to the specific types of non-statutory "mitigating" evidence petitioner introduced indicates only the trial court's finding the evidence was not mitigating, not that such evidence was not considered. (Texted at 1524)

Sub judice, the trial court found that there were no mitigating

circumstances and such a finding reflects merely that the evidence was not mitigating, not that the trial court failed to consider all the evidence presented. See also Davis v. State, ___So.2d___ (Fla. 1984), Case No. 63,374, Opinion Filed October 4, 1984 [9 F.L.W. 430]. The trial court committed no error.

Inasmuch as the trial court properly applied the Florida death penalty statute, the three death sentences imposed upon appellant were constitutionally rendered.

CONCLUSION

Based upon the foregoing reasons, arguments, and authorities, the convictions and sentences of death imposed upon appellant should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Regular Mail to Gary R. Peterson, Hall of Justice Building, 455 N. Broadway Avenue, Bartow, FL 33830 this 23rd day of January, 1985.

Robert J. Krauss

OF COUNSEL FOR APPELLEE.