IN THE FLORIDA SUPREME COURT

OTTIS ELWOOD TOOLE,

Appellant/Cross-Appellee,

v. CASE NO. 65,378

STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

REPLY BRIEF OF APPELLANT AND ANSWER BRIEF OF CROSS-APPELLEE

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I PRELIMINARY STATEMENT

The answer brief of appellee and initial brief of cross-appellant will be referred to herein by the use of the symbol "AB". Appellee/cross-appellant will be referred to throughout this brief as appellee or the state. Other references will be as denoted in appellant's initial brief. This reply brief of appellant and answer brief of cross-appellee is directed to Issues III, IV, VII and VIII; appellant will rely on the arguments advanced in his initial brief as to Issues I, II, V and VI.

II STATEMENT OF THE FACTS

Appellant submits this statement of facts relevant to the issues raised by the State in Issue VII of the cross-appeal:

On January 4, 1984, appellant's counsel filed a motion to prohibit the state from challenging for cause those prospective jurors who have reservations about capital punishment, but whose reservations would not affect the verdict in any manner. In the motion, defense counsel suggested two alternatives for the jury selection: (1) to impanel two juries, one to decide the issue of guilt or innocence, the other to recommend the penalty, or (2) to allow jurors with reservations about the death penalty to sit on the jury deciding guilt or innocence and then excuse those jurors for cause at the penalty phase, replacing them with alternate jurors who have no such reservations (R 46-48). The court did not rule on appellant's motion prior to the commencement of the jury selection.

Jury selection began with individual voir dire examination of the prospective jurors on April 23, 1984. One prospective juror, Ellis Ervin, stated on direct examination by the state that he could not under any circumstances vote for the death penalty (T 156-157). In response to questions by the defense, Mr. Ervin stated that he could vote for a guilty verdict if the state proved its case beyond a reasonable doubt, but he could not recommend the death penalty (T 158). The state challenged the juror for cause

and appellant objected to the challenge. The trial court inquired of the state what the effect would be if the court denied the challenge for cause permitting Mr. Ervin to serve on the jury at the guilt phase and replacing him with a death qualified juror at the penalty phase. The state objected because the juror "would not give the State a fair trial in the initial stage" (T 159-163). The trial court denied the challenge for cause, making the distinction between the unanimous verdict required for guilt or innocence and the majority verdict required for a penalty phase. The court reasoned:

> It seems to me that since the State isn't required to reach unanimity among the jurors as to the penalty phase there is no great mischief working.

(T 163-164). The court rejected the prosecutor's argument that the state would be prejudiced and found:

> I have before me a record in which a prospective juror has stated unequivocally without hesitation that he would be able to determine guilt or innocence and would, indeed, vote guilty if the evidence was proved in the case beyond a reasonable doubt and all other matters we question jurors and in all of the other instructions I give them where we are told to presume that they are going to do their duty and follow the instructions, the Court just finds that with this juror there is no reason to believe that he would not vote guilty, notwithstanding the possibility of the death sentence.

(T 167). The court denied the challenge for cause (T 168) and indicated his intention to

> select an alternate juror who will hear all of the evidence of the trial

> just as keenly as Mr. Ervin if he were selected and at the conclusion of the first stage of the trial if guilt was found then Mr. Ervin would be excluded and an alternate who could impose the death penalty would be positioned in his place insofar as the compliance with the law.

(T 169). The state again objected to this procedure (T 169).

When the individual voir dire examination resumed, the state unsuccessfully attempted to challenge for cause four additional jurors who expressed convictions against the death penalty, but who unequivocally stated they could be fair and impartial on the question of guilt or innocence despite the possibility that appellant could receive a death sentence.[1] These challenges were denied, the trial court iterating his intention to replace each juror with a death qualified alternate at the penalty phase (T 193, 369-370, 382, 529). The state successfully challenged for cause seven prospective jurors whose convictions against the death penalty would have affected their ability to be fair and impartial at the guilt phase of the trial.[2]

1/ Bobbie Sheffield (T 184-193); Evelyn Hopkins (T 363-370); Juanita Bennett (T 377-382); Michael Brandon (T 521-529).

2/ Mae Deen Jackson (T 341-347); John Perry (T 371-375); Rachel Thompson (T 406-411); Jeraldine Walker (T 420-422); Richard Jones (T 523-536); Joseph Gamble (T 539-542); and Ellis Ervin (T 661). During the general voir dire examination the following day, Mr. Ervin expressed reservations about sitting on the jury in a death case (T 653). In chambers, the trial court questioned Mr. Ervin, who equivocated on his ability to return a fair and impartial verdict knowing that appellant could be subject to a death sentence, and the court granted the state's challenge for cause (T 655-661).

While the jury selection was in progress on April 24, 1984, the state filed a petition for writ of mandamus and/or prohibition in this Court, seeking to compel the trial judge to excuse for cause those prospective jurors who could not vote to impose the death penalty or, in the alternative, to prohibit the trial court from denying the state's challenges for cause. State ex rel. Edward Austin v. Honorable James L. Harrison, Case No. 65,218. The state simultaneously filed a motion for stay of the proceedings on the ground that unless the proceedings are stayed, the issue will become moot and the state will be denied its right to secure a fair and impartial jury. By order dated April 24, 1984, this Court denied the petition for writ of mandamus and/or prohibition in a brief order stating, "The court has not addressed the issue presented on the merits."

At conclusion of the voir dire examination, the state renewed its challenges for cause to jurors Sheffield, Witten[3], Hopkins and Brandon, which challenges were again denied (T 673). The state peremptorily challenged both Ms. Sheffield and Ms. Hopkins, in addition to two other jurors, Mr. Prime and Ms. Hall (T 674-675, 678), and then accepted the jury (T 678). The trial court then addressed the state attorneys:

> Are you two aware that you are leaving Bennett on there who is one of the ones that said she could not impose the death penalty?
>
> MISS WATSON: Right we know that.
>
> * * *

3/ Mr. Witten was not previously challenged by either the state or the defense (T 332-339).

> MR. STETSON: Judge, if we leave a WITHERSPOON excludable on the jury we should have an alternate later replace that juror?
>
> THE COURT: Yes, the first one.

(T 678-679). The state subsequently did challenge Ms. Bennett, "even though her husband was a fireman," but then recanted the challenge and accepted her as a juror (T 681). The court agreed to seat three alternate jurors:

> The number one alternate will be the one who takes the position of Mrs. Bennett. If all of them serve she will take Mrs. Bennett's place. . . . So, all of the alternates will be WITHERSPOON approved.

(T 682-683). Mr. Brandon was struck for cause as an alternate juror (T 683).

When the proceeding reconvened on May 11, 1984, for the penalty phase, the court sua sponte, over the objection of both appellant and the state, replaced Ms. Bennett with an alternate juror (T 1189-1190). The state objected on the grounds that:

> First of all, I don't think there is anything that gives the Court the authority to do that, anything in Florida law and, secondly, I think the Defendant is entitled to have the jury that heard this case and determine his guilt by deliberating also determine his penalty.
>
> I know that the law provides in the case of a reversal of the penalty stage where it has to be reheard that an entire panel be struck or that new jurors be called, but I don't think the sort of situation we have here is one contemplated in the law.
>
> Additionally, I have objections because I think that that jury should maintain, I mean it should be maintained as a whole. I think that bringing a person who didn't deliberate with them may reraise the issue of guilt and may needlessly distract the jury from its purpose which is to go

back and determine his sentencing phase. I feel very strongly about it.

(T 1190). The trial court overruled the objections, adhering to his previous ruling to replace the juror with the first alternate juror (T 1190-1191).

III ARGUMENT

ISSUE III

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY, PURSUANT TO APPELLANT'S REQUEST, ON TWO STATUTORY MITIGATING CIRCUMSTANCES, THEREBY RENDERING APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL.

At the charge conference at the penalty phase, appellant's counsel specifically requested instructions on the two mitigating circumstances under Section 921.141(6)(b) and (e). After hearing the arguments of counsel, the trial court refused to give the requested instructions (T 1315-1321). Appellee's contention that this issue is not preserved because appellant failed to object to the trial court's rulings is meritless.

In Thomas v. State, 419 So.2d 634 (Fla. 1982), this Court held that the objectives of the contemporaneous objection rule are satisfied where the record shows, clearly and unambiguously, that the request for an instruction was made and that the trial court clearly understood the request and, just as clearly, denied that specific request. Accord, Skipper v. State, 420 So.2d 877 (Fla. 1982); Spurlock v. State, 420 So.2d 875 (Fla. 1982). This is the precise situation envisioned in Thomas. Clearly, appellant requested the instructions, the court was aware of the grounds for the requested instructions and further argument would have been futile and thus was unnecessary.

Appellee's arguments on the merits are likewise without merit. Under appellee's rationale, the existence of mitigating circumstances would have to be established before the trial court is required to instruct the jury on those circumstances. This is not the law. When the defendant offers

any evidence tending to show the existence of a particular mitigating circumstance, the mitigating circumstance must be submitted for the jury's consideration. Lockett v. Ohio, 438 U.S. 586 (1978). See State v. Stokes, 304 S.E.2d 184 (N.C. 1983). Lockett holds that the Eighth and Fourteenth Amendments require that the sentencing judge or jury

> not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604 (emphasis in original and emphasis added).

In his sentencing order, the trial judge recognized that "[t]he circumstances of Florida Statute 921.141(6)(b), 921.141(6)(e), and 921.141(6)(f) may be present in the evidence" (R 182). The trial court was not necessarily required to agree with the medical experts that appellant's mental or emotional impairment and pyromania rose to the level of establishing these mitigating circumstances, but he was required to submit the issue to the jury. The failure to instruct on the relevant mitigating factors effectively required the jury to disregard much of the evidence which appellant presented. Eddings v. Oklahoma, 455 U.S. 104 (1982).

Appellee's interpretation of Section 921.141(6)(e) is too restrictive. Appellee would have this Court construe duress as being only the external domination of another individual and not relating to the mental condition of the defendant. Such a construction has never been applied to

this mitigating circumstance, see, e.g., Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983); Miller v. State, 373 So.2d 882 (Fla. 1979), and would be inconsistent with the clear language of the statute. The statute does not equate duress with domination of another person; the section plainly reads "under extreme duress or under the substantial domination of another person."

Appellee further labors under the same misconception with regard to Sections 921.141(6)(b) and (f) that flaws the trial court's sentencing order. See Issue IV, infra. There are not discrete, bright lines distinguishing these two mitigating factors. The factors do overlap and the same evidence can be considered as supporting both. See Mann v. State, 420 So.2d 578 (Fla. 1982); Mines v. State, 390 So.2d 332 (Fla. 1980); Huckaby v. State, 343 So.2d 29 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla. 1977). Appellant agrees with appellee that the fact that there are two mitigating circumstances does not mean both are always present (AB 18). However, where there is evidence which could support both, it is for the jury to decide whether each mitigating circumstance is established. The error here is that the trial judge foreclosed the jury from making that determination.

Appellee further argues that there was no error because the trial court did not refuse to admit any evidence and was not required to find that the evidence constitutes mitigation (AB 20). This argument again misses the point. Whether the evidence constitutes a mitigating circumstance was for the jury to decide after it received proper instruc-

tions. The trial court was not required to find that the circumstances were established by the evidence, but he was precluded from limiting the jury's consideration to only those mitigating circumstances which he deemed appropriate. See Washington V. Watkins, 655 F.2d 1346, 1374-1375 (5th Cir. 1981), where a similar argument was addressed and rejected.

Appellee purports to believe that, even in the absence of specific instructions, the jury could still consider the evidence presented by the defense at the penalty phase as mitigation under the catch-all provision for non-statutory mitigating factors. Contrary to this belief, the jury cannot be presumed to give full consideration to mitigating factors unless it is informed of its ability to do so. Jury instructions, not the argument of counsel, serve the function of informing the jury of the law. Taylor v. Kentucky, 436 U.S. 478 (1978); Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981). Where the instructions to the jury in the penalty phase of a capital trial fail to adequately inform the jury about the nature and function of mitigating circumstances, those instructions are constitutionally deficient. Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983); see also, Gregg v. Georgia, 428 U.S. 153, 192-193 (1976).

By refusing to give the jury specific instructions on the statutory mitigating circumstances which were supported by the evidence and which were requested by the defense, the trial court not only failed to adequately guide the jury in its consideration of these circumstances, he also subtly denigrated the evidence in mitigation presented by the defense and implied to the jury that it was worthy of little weight, thereby violating the constitutional principles of Lockett v. Ohio.

As this Court observed in Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983):

> It is the defendant's right to have a jury advisory opinion, and absent a voluntary and intelligent waiver of that right, a judge may not frustrate this important jury function. Lamadline v. State, 303 So.2d 17 (Fla. 1974). We cannot condone a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors after all parties have agreed on the appropriate evidence to be considered. (emphasis added).

The trial court's refusal to instruct the jury on the applicable mitigating circumstances under Section 921.141 (6)(b) and (e) skewed the weighing process in the sentencing porceeding and renders appellant's death sentence unconstitutional. Appellant is entitled to a new sentencing proceeding before a properly instructed jury.

ISSUE IV

THE TRIAL COURT ERRED IN FAILING TO CONSIDER UNREBUTTED MENTAL MITIGATION BECAUSE OF THE COURT'S MISAPPREHENSION AND MISAPPLICATION OF THE LAW.

Appellant has not argued, as appellee asserts, that simply because evidence is submitted, the sentencer is required to find that evidence establishes the existence of a mitigating circumstance (AB 22). Appellee has plainly misconstrued this issue on appeal.

Eddings v. Oklahoma, 455 U.S. 104 (1982), held that the limitations placed by the trial court upon the mitigating evidence it would consider violated the principles of Lockett v. Ohio, supra.

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.

455 U.S. at 113-114 (emphasis in original). The Court in Eddings found that

> The trial judge stated that 'in following the law,' he could not 'consider the fact of this young man's violent background.' . . . There is no dispute that by 'violent background' the trial judge was referring to the mitigating evidence of Eddings' family history. From this statement it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that as a matter of law he was unable to even consider the evidence.

Id., at 112-113 (emphasis in original).

In the instant case, as in Eddings, the trial court's sentencing order makes it clear that Judge Harrison did not consider the evidence in mitigation and find it qualitatively

lacking; rather he placed strained limitations on the evidence by applying the wrong legal standards and attempting to fit the eivdence into legal pigeonholes, thereby finding as a matter of law that the mitigating factors did not exist. The trial court's misapplication of the law in considering the evidence in mitigation violates Lockett and Eddings. Appellant's death sentence must therefore be reversed.

ISSUE VII

THE TRIAL COURT CORRECTLY REFUSED TO EXCUSE FOR CAUSE PROSPECTIVE JURORS WHOSE CONVICTIONS AGAINST THE DEATH PENALTY WOULD NOT AFFECT THEIR ABILITY TO BE FAIR AND IMPARTIAL AS TO GUILT OR INNOCENCE.

The state's first issue in its cross-appeal poses a recurring question of the propriety of challenging for cause prospective jurors who have conscientious scruples against the death penalty, but who can be fair and impartial as to guilt or innocence. Without exception, the trial court below excluded for cause all prospective jurors who, for one reason or another, could not be fair and impartial as to the question of guilt or innocence.[4] However, the trial court refused to exclude for cause those prospective jurors who were able to impartially determine guilt or innocence but who had conscientious scruples against or were otherwise opposed to capital punishment. Appellant maintains that there was no error on this point and that even if there were error, it was waived or harmless under the circumstances.

Initially, it should be noted that appellee has never

4/ One prospective juror, Mr. Mills, was excused for cause after he stated he could not return a verdict of guilty of first degree murder based on the theory of felony murder, even though he favored the death penalty (T 254-262). Juror Hamons was excused for cause because of his reservations about finding anyone guilty of first degree murder (T 300-311). Mr. Coffie was excused because of his extensive knowledge about appellant and inability to disregard that knowledge (T 326-330). The court excused Juror Jaquet because of his personal feelings about the defendant and the case (T 356-360). The court sustained the state's challenges for cause to seven jurors, Jackson (T 341-347), Perry (T 371-375), Thompson (T 406-411), Walker (T 420-422), Jones (T 523-536), Gamble (T 539-542), and Ervin (T 661), whose convictions against the death penalty would affect their ability to be fair and impartial at the guilt phase of the trial.

claimed that the state or appellant was denied an impartial jury with all members able to determine both guilt and sentence.[5] The state below expressly accepted the jury without exhausting its peremptory challenges and, in fact, accepted Ms. Bennett as a juror after unsuccessfully attempting to challenge her for cause.

In order for the state to prevail on this issue, it must appear not only that the peremptory challenges were exhausted, but that some objectionable person sat on the jury, who otherwise would have been excluded by a peremptory challenge. Lusk v. State, 446 So.2d 1038 (Fla. 1984); Young v. State, 85 Fla. 348, 96 So. 381 (1923). See also, Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981); Jenkins v. State, 380 So.2d 1042 (Fla. 4th DCA 1980). The requirement of exhausting peremptory challenges to preserve for appellate review the improper denial of a challenge for cause is nearly a century old. In Green v. State, 40 Fla. 191, 193-194, 23 So. 851 (1898), the Court held:

> It is unnecessary for us to consider whether this ruling [overruling defen-

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5/ At the time the trial court excused Juror Bennett in the penalty phase, the court noted that the state's fears that the juror would not be able to find appellant guilty of first degree murder were unfounded: "She's [Mrs. Bennett] indicated in this case at any rate that that's not so. This jury did return the verdict of first degree murder exposing Mr. Toole to the death penalty, and I recall during the jury polling I observed Mrs. Bennett who answered unequivocally that she had returned a verdict of first degree murder" (T 1191).

> dant's challenge for cause] was or was not erroneous, because the record shows that when his challenge for cause was disallowed the defendant peremptorily challenged the proposed juror, and it does not show that defendant objected to any other juror tendered him, or that his peremptory challenges were exhausted at the time the jury was sworn. . . . [W]e are entirely satisfied that a defendant suffers no injury in such a case unless it is made to appear that his peremptory challenges were exhausted before the jury was sworn.

The court reaffirmed this holding five years later in Peadon v. State, 46 Fla. 124, 127, 35 So. 204 (1903):

> Even if the overruling of [the defendants'] challenge for cause was erroneous, which we do not decide, it can not avail the defendants here for the reason that it appears that they rid themselves of the obnoxious talesman by a peremptory challenge, and it is not made to appear whether or not their quota of peremptory challenge was exhausted before the filling of the jury panel. If such challenges were not so exhausted they were not harmed by the disallowance of such challenge for cause.

Accord, Hicks v. State, 138 So.2d 101, 103 (Fla. 2d DCA 1962). That rule has been consistently applied by the Courts of this state ever since.

Thus, the error, if any, does not rise to the level of reversible error in view of the fact that the state's peremptory challenges were not exhausted. As this Court held in Lusk v. State, supra at 1041:

> We need not reach this issue since . . . Lusk indeed had not exhausted his peremptory challenges. See Young v. State, 85 Fla. 348, 96 So. 381 (1923). Furthermore, a review of the jury selection transcript discloses no sitting jury 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.

The state is equally bound by this holding.

Moreover, the state, having accepted Ms. Bennett as a juror (with six peremptory challenges remaining), and having opposed her removal for the penalty phase, has waived any right to complain. See Porter v. State, 160 So.2d 104, 109 (Fla. 1963)(lack of objection to trial judge's father as a juror constitutes waiver of right to challenge). Consequently, appellant submits that this issue has not been properly preserved for appeal, and, in any event, any purported error is irrefragably harmless.

On the merits, the state argues that the trial court erred as a matter of law in refusing to grant the state's challenges for cause of prospective jurors who were opposed to the death penalty, notwithstanding the fact that the jurors stated they could be fair and impartial in deciding guilt or innocence. To the contrary, there is no justifiable basis, under Floirda law and procedure, for the disqualification of jurors on the ground of their inability or unwillingness to impose a death sentence.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court for the first time imposed constitutional limits on the ability of the states to remove potential jurors from capital juries on the basis of their opposition to the death penalty. The Court held that by permitting the removal for cause of jurors based merely on their general scruples against capital punishment, Illinois had denied the defendant his due process right to an impartial

jury on the issue of sentence. Although restricting the use of challenges for cause to remove capital jurors based merely on general opposition to the death penalty, the Witherspoon Court did not condemn all challenges for cause based on opposition to capital punishment. The Court included the caveat that nothing in the opinion bore upon the power of the state to remove venirepersons who made it

> unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

391 U.S. at 523.

Witherspoon thus places constitutional limits on the exclusion of jurors in capital cases; it does not itself authorize the removal of any jurors. See Adams v. Texas, 448 U.S. 38, 48 (1980):

> Witherspoon is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude. . .

The source of the state's power to exclude exists as a matter of state law. In Florida, that power is conferred by Section 913.13, Florida Statutes, entitled "Jurors in Capital Cases," which provides:

> A person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case.

The plain meaning of Section 913.13 authorizes removal for cause only when a juror's scruples would have an impact upon the determination of guilt. The statute does not authorize

the removal of a juror on the basis of his or her inability or unwillingness to vote in favor of imposing the death penalty. Since, under Florida law, a juror may be challenged for cause only upon one of the grounds enumerated in the statute, Section 913.03, Florida Statutes, and since the additional provision applicable to jurors in capital cases permits disqualification only if the juror's opposition to the death penalty would preclude him from finding a defendant guilty of the charged offense, Section 913.13, Florida Statutes, it is clear that neither the Florida legislature nor the United States Supreme Court in Witherspoon has authorized the removal for cause of jurors in capital cases whose opposition to the death penalty would not preclude them from finding the defendant guilty of a capital offense, but who could not or would not vote for the imposition of a death sentence. See Williams v. State, 228 So.2d 377, 380 (Fla. 1969); vacated, 408 U.S. 941 (1972), quoting, Boyington v. State, 74 Fla. 258, 261, 76 So. 774 (1917)(construing predecessor to Section 913.13):

> The statute does not disqualify a person 'to serve as a juror on the trial of any capital case' merely because he may have 'conscientious scruples against the infliction of capital punishment for murder.' To be disqualified under the statute to serve as a juror in the trial of a capital case, the 'opinions' of the person must be 'such as to preclude him from finding any defendant guilty of an offense punishable with death.'

See also, Bush v. State, 9 FLW 503 (Fla. November 29, 1984)

(Juror's attitude toward death penalty would clearly prevent her from rendering an impartial decision on guilt or innocence).

When Witherspoon was decided by the Supreme Court, Florida employed a unitary death penalty procedure, wherein a juror who opposed capital punishment could frustrate a possible death sentence by voting to acquit the defendant. See, e.g., Piccott v. State, 116 So.2d 626 (Fla. 1959). Under the present system of bifurcated trials to determine the issues of guilt and penalty, there is no logical reason to exclude potential jurors whose beliefs would not preclude a finding of guilt but would prevent a recommendation of death, especially since the jury renders merely "an advisory sentence" to the court, by majority (rather than unanimous) vote. Section 921.141(2,3), Florida Statutes. See Johnson v. State, 393 So.2d 1069, 1074 (Fla. 1980); Proffitt v. Florida, 428 U.S. 242 (1976). The trial court is free to impose a death sentence notwithstanding a jury's life recommendation, or he may impose a sentence of life imprisonment nothwithstanding a jury's death recommendation. Upon finding a knowing and intelligent waiver by the defendant, the trial court may even, in its discretion, dispense altogether with a penalty proceeding before the jury. Palmes v. State, 397 So.2d 648, 656 (Fla. 1981). Since, under Florida law, the jury merely makes a recommendation to the judge which the court is not bound to follow, and the jury's recommendation need not be

unanimous, the application of Section 913.13 to exclude only those jurors whose opposition to the death penalty would affect their ability to render an impartial verdict would not frustrate the state's interest in imposing the death penalty in an appropriate case. Certainly, the state's interest in securing a fair and impartial jury on the issues of guilt and sentence were not frustrated in the instant case. This application of Section 913.13 is consistent not only with the plain meaning of the statute but also with the logic and structure of the death penalty statute.[6]

Constitutional considerations also mandate this construction of Section 913.13. In Witherspoon v. Illinois, supra, at 517-18, the Court declined to adopt the petitoner's contention that death-qualified juries are partial to the prosecution on the issues of guilt or innocence, noting that "the data adduced by the petitioner . . . are too tentative and fragmentary" to establish that death-qualified juries tend to be guilt prone. The Court specifically pointed out that its conclusion was reached "[in] light of the presently available information." Id., at 518. Witherspoon was decided in 1968.

In 1984, the evidence that death-qualified juries tend to be guilt-prone is no longer tentative or fragmentary.

6/ Presumably, if the Florida legislature had wanted to exclude all potential jurors with opposition to the death penalty, and not just those whose beliefs would preclude a finding of guilt, it would have amended section 913.13 to authorize their removal when the death penalty statute was rewritten.

Extensive research [the various studies are discussed at some length in Grigsby v. Mabry, 569 F.Supp. 1273, 1291-1305 (E.D. Ark. 1983)] has confirmed that what trial lawyers and judges have intuitively known all along is in fact true:

> Here the fireside inductions clearly support the contentions of petitioners. If asked, "Does the removal of all prospective jurors with adamant objections to the death penalty result in a jury more prone to convict?" Trial lawyers and judges will answer, "yes, of course." If asked, "Does the usual process of death qualification itself, as observed time and again, prejudice the defendant? The answer, "yes, clearly."
>
> Yet it is always possible that our dearly held "fireside induction" may be proved to have been in error, to be nothing more than professional superstition. And the U.S. Supreme Court in Witherspoon itself counsels against embracing per se rules based upon judicial notice or intuition without the benefit of empirical studies.
>
> The research has been done. The studies have been introduced into evidence and explained. What do they show? They prove that what we "knew" all along is in fact true. The trial lawyers and judges could have been wrong but in this case at least they were right.

Grisby v. Mabry, 569 F.Supp 1273, 1322 (E.D. Ark. 1983) (emphasis added). In Grisby, the court held that the exclusion, in a capital case, of jurors who are opposed to the death penalty but who could be fair and impartial on the question of guilt or innocence is constitutionally impermissible. Based on "solid scientific data, reason, and common sense," 569 F.Supp at 1293, the court recognized the

the "guilt-proneness" of death qualified juries, finding:

> All of petitioners' experts testified as to the relationship between death penalty attitudes and other criminal justice related attitudes. All agreed that the empirical evidence and data made it clear, in their professional opinions, that persons excluded by the process of death qualification share sets of attitudes toward criminal justice system that set them apart and distinguish them collectively from those not excluded by that process. All were also of the opinion that death-qualified jurors are more prone to favor the prosecution, to be hostile to the defendant, to regard significant constitutional rights lightly, and to make adverse judgments concerning minority groups than persons who adamantly oppose the death penalty (i.e., are not "death qualified"). Petitioners' experts were convinced that death-qualified jurors differ systematically from those excluded under Witherspoon standards.

Id., at 1293. The court continued:

> To summarize, death qualification skews the predispositional balance of the jury pool by excluding prospective jurors who unequivocally express opposition to the death penalty. The evidence, . . ., clearly establishes that a juror's attitude toward the death penalty is the most powerful known predictor of his overall predisposition in a capital criminal case. That evidence shows that persons who favor the death penalty are predisposed in favor of the prosecution and are uncommonly predisposed against the defendant. The evidence shows that death penalty attitudes are highly correlated with other criminal justice attitudes. Generally, those who favor the death penalty are more likely to trust prosecutors, distrust defense counsel, to believe the state's witnesses, and to disapprove of certain of the accepted rights of defendants in criminal cases. A jury so selected will not, therefore, be composed of a cross section of the community. Rather, it will be composed of a group of persons who are uncommonly predisposed to favor the prosecution, a jury "organized to convict."

Id., at 1304.

The District Court in Grigsby concluded that the exclusion of persons who adamantly oppose the death penalty but could be impartial at the guilt-innocence phase is unconstitutional, and further concluded that "most of the state's legitimate interest can be accomodated by requiring completely bifurcated trials in capital cases - with one jury to determine the guilt [or] innocence of the defendant and another to determine the penalty if the defendant is convicted. The court observed:

> [T]he State's principal interest in preserving death qualification or the death qualification process boils down to a question of efficiency and money. The State simply does not want to pay the expense of having two separate juries, one to determine guilt and the other, if necessary, to determine penalty.
>
> If such a bifurcated system were established, would it mean that in every case in which the State sought the death penalty two separate juries would have to be impaneled? The answer is, obviously, no.

Id., at 1319.

The instant case perfectly illustrates that point. The trial court's procedure below did not necessitate the impaneling of two separate juries, nor did it involve any additional time or expense. As the Grigsby court noted, a second jury would need to be impaneled only if the guilt phase resulted in a conviction of capital murder, and only if the state continued to seek the death penalty and to insist upon its consideration by a fully death qualified jury.[7] Here, the

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7/ Under Arkansas' capital sentencing procedure, unlike Florida's, the jury must be unanimous in order to impose a death sentence; if the jury does not unanimously agree to the death sentence and to all written findings required by the statute, the judge must impose a sentence of life imprisonment. Arkansas Criminal Code (1977) §41-1302.

State did not insist upon a fully death-qualified jury at the penalty phase, but rather sought to maintain the jury as a whole for the sentencing proceeding.[8] Indeed, under Florida's death penalty statute, where the jury renders only an advisory opinion which need not be unanimous, the trial court was not compelled to replace Ms. Bennett with a death-qualified alternate. Where, as here, there is only one death-scrupled juror on the jury which just convicted the defendant of first degree murder, the state might well prefer to have the same jury hear the penalty phase notwithstanding the fact that there will be one automatic "life" vote. The prosecutor would simply be in the position of having to convince seven out of the eleven other jurors that the circumstances of the case warrant a death sentence, and that is a far less onerous burden than most states (which require that a death verdict be unanimous) impose at the outset. Finally, since it is the judge, and not the jury, who makes the ultimate decision to impose or not to impose a death sentence, and who makes the findings of fact in support of his decision, even twelve jurors opposed to the death penalty cannot block a sentence if the trial court is thoroughly convinced that that is the only appropriate penalty.

The bifurcated juries contemplated in Grigsby is

8/ As noted in the Statement of Facts, the state expressly wanted "to have the jury that heard this case and determine his guilt by deliberating also determine his penalty. * * * I think that bringing in a person who didn't deliberate with them may reraise the issue of guilt and may needlessly distract the jury from its purpose which is to go back and determine his sentencing phase" (T 1190).

problematic. See, e.g., Richardson v. State, 437 So.2d 1091 (Fla. 1983), where the penalty phase jury had not heard the evidence of guilt. On the other hand, the procedure employed below, where death-qualified alternates were selected to replace those guilt phase jurors who adamantly opposed the death penalty, creates no additional burden and avoids the problem of relitigating the issues of guilt at the penalty phase. Although, as previously stated, this procedure was unnecessary in light of the nature of the jury's majority advisory sentence, neither was it an abuse of discretion.

In Newton v. State, 178 So.2d 341 (Fla. 2d DCA 1965), involving a prosecution for second degree murder, a juror was selected who was statutorily disqualified to serve. The juror was under prosecution for a crime and was represented by the defendant's appointed attorney. After the jury panel had been sworn but before any evidence was presented, the trial judge on its own motion discharged the juror and substituted an alternate. The district court held that while the state could have successfully challenged the juror and waived its rights by failing to formally object, such waiver did not affect the trial judge's authority or discretion to discharge the juror for lack of statutory qualifications and substitute an alternate on his own motion. The Court further recognized:

> [N]o complaint is made here that the alternate who served was not qualified. A defendant is entitled to have only qualified jurors but he is not entitled to have any particular juror serve.

178 So.2d at 345. Accord, Bailey v. Deverick, 142 So.2d 775, 777 (Fla. 2d DCA 1962).

As recognized by this Court in Singer v. State, 109 So.2d 7 (Fla. 1959), competency of a challenged juror under Florida law is a question of mixed law and fact to be determined by the trial judge in his discretion and the decision of the trial judge will not be disturbed unless the error is manifiest. Accord, Christopher v. State, 407 So.2d 198 (Fla. 1981); Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979). In an attempt to establish manifest in the court's rulings below, appellee has totally ignored the sole statutory provision governing the removal of jurors in capital cases and has misinterpreted Witherspoon as constituting a ground for disqualifying death scrupled jurors for cause.[9] Judge Harrison, who observed the manner and demeanor of the prospective jurors, and heard their statements, could properly determine whether a disqualification existed. Since there was no statutory authority for excusing the challenged jurors for cause, it cannot be said that the trial judge abused his discretion or erred as a matter of law.

For the reasons discussed herein, appellant submits that the trial court's rulings were clearly correct, both as

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9/ See Adams v. Texas, supra, at 48 n. 6, citing Texas cases erroneously referring to Witherspoon as a ground for "disqualifying" prospective jurors. The Florida cases relied upon by appellee fall into this same category. See, e.g., Jackson v. State, 366 So.2d 754, 755 (Fla. 1978)(trial judge properly "followed the dictates of Witherspoon"); Witt v. State, 342 So.2d 497, 499 (Fla. 1977)(citing Witherspoon for assertion that it is "proper" to exclude certain jurors).

a matter of Florida statutory construction and as a matter of state and federal constitutional law. Appellant further submits that the state's failure to exhaust its peremptory challenges, acceptance of Ms. Bennett as a juror and objection to her removal at the penalty phase constitute a waiver of any right to complain on appeal. The state, like the defense, is not entitled to have any particular juror serve; they are entitled to have only qualified jurors, and no complaint is made here that the jurors who served in both phases were not qualified.

Finally, even if the state's position were well taken, a ruling in favor of the state would not alter the validity of appellant's conviction and sentence. Basically, the state is inviting this Court to issue an advisory opinion in the cross-appeal to govern the jury selection in other capital cases unrelated to this case. The state has waived its objections to the selection of the jury below and the issue sought to be presented is moot. Marion County Hospital District v. Akins, 435 So.2d 272, 273 (Fla. 1st DCA 1983):

> It is a long-standing rule of appellate jurisprudence that the court will not undertake to resolve issues which, though of interest to the bench and bar, are not dispositive of the particular case before the court.

Unless the instant judgment of conviction is reversed, this Court should decline the state's invitation. Bour v. Sherman, 113 Fla. 730, 152 So. 3 (1934); Walker v. State, 9 FLW 2213 (Fla. 3d DCA October 16, 1984). However, should appellant's

conviction be reversed for the reasons advanced on the main appeal, appellant submits this Court should strictly apply Section 913.13 and hold that the trial court did not err in denying the state's challenges for cause of jurors whose conscientious scruples against the death penalty would not prevent them from making an impartial decision as to guilt or innocence. On the other hand, a reversal of only the sentence herein would not necessitate a ruling on the state's cross-appeal since the trial court below ruled that the jury at the penalty phase would be death qualified and a remand for a new penalty phase proceeding would require that a new penalty jury be impaneled.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN SUPPRESSING APPELLANT'S STATEMENTS TO SERGEANT VIA ON OCTOBER 18, 1983.

Appellee complains first that the trial court erred in entertaining appellant's motion to suppress because it was untimely filed and no cause was established for the failure to file it prior to trial. Appellee's procedural default argument is uncompelling because the trial court did have discretion to entertain appellant's motion during trial, heard the proffer of testimony and arguments of counsel and ruled on the merits of the motion. Savoie v. State, 422 So.2d 308 (Fla. 1982).

Florida Rule of Criminal Procedure 3.190(i)(2) provides:

> The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(Emphasis added). In Savoie v. State, supra, this Court construed the identical provision in Fla.R.Cr.P. 3.190(h)(4) and held that the rule

> is designed to promote the orderly process of trial by avoiding the problems and delay caused when the trial judge must interrupt trial, remove the jury from the courtroom, and hear argument on a motion to suppress that could easily have been disposed of before trial. [Citation omitted]. Also, when the rule is complied with, the state is afforded an opportunity to appeal the ruling of a trial judge in the event the evidence is suppressed; when the judge rules at trial to suppress evidence, the state is foreclosed from appealing that decision. See Fla.R.App.R. 9.140(c)(1)(B).

> Rule 3.190(h)(4) does not, however, require that all motions to suppress be heard before trial. Rather, the rule expressly grants the trial judge discretionary authority to entertain either a motion to suppress or an objection to the introduction of certain evidence made during the course of trial. This discretionary authority is necessary in order to avoid the sixth amendment ramifications which might result from the application of an absolute waiver rule against a defendant whose counsel failed to comply with the requirements of rule 3.190(h). Likewise, the rule does not affect the inherent power of the trial court to reconsider, while the court has jurisdiction of the case and upon appropriate motion or objection by either counsel, a ruling previously made on a motion to suppress.

422 So.2d at 311-312 (emphasis added). The court concluded:

> In exercising the discretionary authority granted by the rule to decide whether to hear a motion to suppress made during the course of a trial, the judge must balance the rights of the defendant to due process and effective assistance of counsel with the rights of the state to have an opportunity to appeal an adverse ruling on the motion to suppress. However, once the decision is made to hear the motion on the merits, we find the issue of waiver is no longer before the court. We conclude, therefore, that, in the circumstances of this case, once the trial judge interrupted the trial and conducted a hearing on the merits of the motion to suppress, waiver was no longer a proper ground for denying the motion.

Id., at 312. The holding of Savoie is applicable to the case at bar.

A trial court's ruling as to the voluntariness of a confession comes to the reviewing court with the same presumption of correctness that attaches to jury verdicts and final judgments. DeConingh v. State, 433 So.2d 501 (Fla.

1983), cert. denied, 104 S.Ct. 995 (1984); Stone v. State, 378 So.2d 765 (Fla. 1979); McNamara v. State, 357 So.2d 410 (Fla. 1978). Since the trial court granted the motion to suppress, the record must be viewed in the light most favorable to appellant. State v. Williams, 371 So.2d 1074 (Fla. 3d DCA 1979). The burden of proof must be on the prosecution to show that a defendant's extrajudicial statements are voluntarily made. Brewer v. State, 386 So.2d 232 (Fla. 1980); Houck v. State, 421 So.2d 1113 (Fla. 1st DCA 1982).

On proffer, Sergeant Via testified that he arrived in Jacksonville on the evening of October 17, and arranged to interview appellant the following morning at the sheriff's office. When he arrived at the sheriff's office, he was told that appellant was at the courthouse for a hearing. Sergeant Via, Lieutenant Cummings and Detective Terry proceeded to the courthouse and met appellant in the holding cell. Via told appellant that the officers were there to question him. The officer acknowledged that appellant's counsel "was also present in this area" (T 928-929, 934). He testified:

> When Mr. Toole started relating details to us, Mr. Washington stepped in and cautioned Mr. Toole about any statements about this case to any police officers and after that I believe Mr. Washington turned and walked away, I don't know whether he left the immediate area or what, but Mr. Toole disregarded that advice and continued with details.

(T 929). First, it should be noted that the officers were there for the express purpose of questioning appellant. Although appellant's statements were not given in direct response to interrogation, the statements were clearly induced by the officers' presence and continued discussion of the

case. See Rhode Island v. Innis, 446 U.S. 291 (1980); Neal v. State, 451 So.2d 1058 (Fla. 5th DCA 1984); State v. Echevarria, 422 So.2d 53 (Fla. 3d DCA 1982); Jones v. State, 346 So.2d 639 (Fla. 2d DCA 1977). There is further no evidence that appellant was ever advised of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), when the officers approached him in the holding cell and said they were there to question him.

In Edwards v. Arizona, 451 U.S. 477 (1981), the United States Supreme Court held that whether an accused has knowingly and intelligently waived his right to counsel is a separate determination from whether he has voluntarily consented to being questioned:

> [A]lthough we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, . . ., the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when the accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.

451 U.S. at 484.

Of course, a statement voluntarily given to law enforcement officers after a defendant has been fully informed of his rights waives the protection of Miranda when the right to counsel has not been invoked. See, e.g., Waterhouse v. State, 429 So.2d 301 (Fla. 1983). In Waterhouse, relied

upon by appellee, this Court refused to adopt a per se rule requiring police to notify the defendant's attorney before communicating with the defendant. The Court held:

> The fact that an accused is represented by counsel does not preclude his waiver of the right to have counsel present when talking to law enforcement officers.

429 So.2d at 305. The Court expressly found that Waterhouse "had invited the officers to return, was warned of his rights, and knowingly waived his right to have counsel present." Id., at 305-306. Here, unlike Waterhouse, appellant did not invite the officers to the courthouse and was never warned of his rights. Furthermore, appellant's counsel was present and there is no showing that appellant expressly or voluntarily wiaved his right to counsel. Simply stated, appellant's constitutional rights were not sufficiently protected under the standard set forth in Edwards. DelDuca v. State, 422 So.2d 40 (Fla. 2d DCA 1982).

The totality of the circumstances reflected by the record in this case supports a reasonable finding, which is necessarily implicit in the trial judge's decision to grant the motion to suppress, that appellant did not expressly or voluntarily waive his right to counsel. The officers knew that appellant was represented by counsel, that he was in court for a hearing in this case, and that his attorney was in the immediate vicinity. The detectives were simply not free to ignore appellant's right to counsel by ignoring the implications of counsel's advice to remain silent and

by pretending that counsel's presence had nothing to do with their interrogation. Judge Harrison correctly found that

> [O]ne of the greatest principles of this criminal justice system of ours has been assaulted by police officers who are sincere in attempting to do their duty, but have nevertheless come close to undermining the right of effective assistance of counsel. I cannot appreciate officers continuing in the presence or even coming to seek to talk to a defendant who is represented by an attorney without the consent of that attorney and with that attorney present and telling that defendant to not speak to those officers, it approaches a defiance of that principle to me, certainly an attempt to circumvent and to undermine the right to counsel.
>
> * * *
>
> The officers . . . sought him out and the Court views their visit to this courtroom and to the holding cell here as an urgency to get to him and that they certainly sought him out; therefore, the last statement, that of October I believe it's the 18th will not be admitted.

(T 952-953). The officers' failure to scrupulously honor appellant's right to counsel mandated that the evidence be suppressed.

Assuming arguendo that appellant's statements were erroneously suppressed, they would nonetheless be inadmissible in any subsequent proceeding of this cause. Appellee argues that the evidence was relevant to the issue of premeditation in the guilt phase and the aggravating circumstance of cruel, heinous or atrocious in the penalty phase (AB 41). First degree murder can be proven by establishing a premedi-

tated murder or homicide during the commission of a felony. Section 782.04(1)(a), Florida Statutes. An allegation of premeditated murder, such as in this case, will support a prosecution under both theories. Knight v. State, 338 So.2d 201 (Fla. 1976). Appellant was prosecuted under both theories. Since the jury expressly found appellant guilty of felony murder, thereby acquitting him of premeditated murder, see Hawkins v. State, 436 So.2d 44 (Fla. 1983), the subsequent introduction of appellant's confession at the guilt phase to prove premeditation would be barred by the double jeopardy clauses of the United States and Florida Constitutions. Amendments V, XIV, U.S. Const; Art. I §9, Fla. Const. See Bullington v. Missouri, 451 U.S. 430 (1981)(State is not entitled to relitigate issues of fact in respect to the death penalty which have been decided adversely to the state at trial). See also, Davis v. State, 9 FLW 2469 (Fla. 3d DCA November 20, 1984).

The state has further failed to show how the evidence would be relevant to the aggravating factor of heinous, atrocious or cruel at the penalty phase. This aggravating circumstance applies to the manner of killing and not to the defendant's state of mind. See, e.g., Michael v. State, 437 So.2d 138 (Fla. 1983); State v. Dixon, 283 So.2d 1 (Fla. 1973). As noted by appellee, Mr. Sonnenberg was passed out in a bed when appellant set the fire and there is no indication that he was aware of his impending death. Herzog v. State, 439 So.2d 1372 (Fla. 1983); Middleton v. State, 426

So.2d 548 (Fla. 1982); Simmons v. State, 419 So.2d 316 (Fla. 1982).

Appellant therefore maintains that the trial court correctly suppressed appellant's statements to Sergeant Via on October 18, 1983, and, in any event, the statements would be inadmissible at a subsequent trial or penalty phase of this cause.

IV CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, as well as in the initial brief, appellant respectfully requests this Court grant the following relief:

Reverse his conviction and sentence of death and remand for a new trial under Issues I and II;

Reverse his death sentence and remand the cause for a new sentencing hearing under Issues III, IV, V and IV;

Affirm the trial court's rulings under Issues VII and VIII.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Reply Brief of Appellant and Answer Brief of Cross-Appellee has been furnished by hand delivery to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to appellant, Ottis Elwood Toole, #090812, Leon County Jail, 2825 Municipal Way, Tallahassee, Florida 32304 on this 18th day of January, 1985.

Paula S. Saunders
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