IN THE SUPREME COURT OF FLORIDA

GARY L. TILLMAN,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 68,506
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

GARY L. TILLMAN will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal which consists of ten (10) volumes will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement of the Case and Facts as stated in Appellant's brief with such exceptions as outlined in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

As to Issue I: No breach of the written plea agreement occurred when the Assistant State Attorney mentioned a probation for a strong-armed robbery which occurred in Palm Beach County. The reference to that probation occurred during a sentencing proceeding and was not made during the proceeding conducted in accordance with Chapter 921.141(1), Florida Statutes. The strong-armed robbery probation was not offered to support any aggravating circumstance and, in fact, the trial court only considered those aggravating circumstances permitted under the written plea agreement. Also, even had there been a minor breach of the plea agreement Appellant is not entitled to withdraw his guilty plea. No motion was ever offered to the trial court to withdraw the plea and, in fact, Appellant constantly reaffirmed his guilty plea.

As to Issue II: The record of the instant case reveals that the trial court satisfied himself that Appellant entered his guilty plea freely and voluntarily with full knowledge of its contents. Where no motion to withdraw the plea was ever filed before the trial court and where the written plea agreement specifically delineates all constitutional rights being waived by Appellant, there is no basis for permitting Appellant to withdraw a validly entered plea of guilty.

As to Issue III: Appellant's contention that the trial judge's statements during voir dire diminished the jurors' sense of responsibility has not been preserved for appellate review

inasmuch as no objection was ever made before the trial court to any of those comments. Also, a review of the record reveals that during individual voir dire of the prospective jurors the proper role of the jury was established during questioning. The jury, in keeping with Florida's capital sentencing scheme, was informed of the advisory nature of their sentencing decision and the importance of that role was communicated to the prospective jurors.

As to Issue IV: The exclusion of a significant number of black potential jurors is insufficient in and of itself to support a claim that the State utilized peremptory challenges against prospective black jurors solely on the basis of their race. The record in the instant case reveals that there were reasons other than race advanced by both the trial court and the Assistant State Attorney to support the use by the State of peremptory challenges.

As to Issue V: The trial court's instructions to the jury conveyed that the jury was to follow the instructions and law as given by the court. In any event, where a charge conference was held and Appellant made no objection to a certain portion of the instructions, the instructions were given to the jury, and then Appellant complained as to a portion of the instructions, this "invited error" will not support appellate reversal. Even when read in combination with certain jury instructions, certain statements made by the prosecutor during closing argument did not act to unduly prejudice Appellant. This is especially true

considering that Appellant made no objection nor made a motion for a mistrial with an attendant request for curative instruction.

As to Issue VI: Appellant was not entitled to a mistrial based on purportedly irrelevant and prejudicial questions asked of defense witnesses on cross-examination. Rather, the questioning of the prosecutor was directly relevant to contradict matters which Appellant had elicited upon direct examination. Where Appellant "opened the door" concerning certain matters, the State is permitted to attempt to discredit testimony concerning those matters.

As to Issue VII: The record reveals that the trial court considered all evidence offered in mitigation by Appellant. Merely because the trial court does not find the mitigating evidence to be established does not mean that the trial court failed to consider that evidence. Also, the trial court did not consider any aggravating circumstance which was barred by the plea agreement. Where the trial court considered only those matters appropriate for consideration under the written plea agreement no error is presented.

ARGUMENT

ISSUE I

WHETHER THE PROSECUTOR BREACHED THE WRITTEN PLEA AGREEMENT ENABLING APPELLANT TO WITHDRAW HIS GUILTY PLEA.

As his first point on appeal, Appellant contends that the prosecutor breached the written plea agreement thereby permitting Appellant to withdraw his guilty plea. For the reasons expressed below, Appellant's point is without merit and must fail.

The main thrust of Appellant's first issue concerns certain statements made by the Assistant State Attorney at the sentencing hearing before the trial judge. Prior to imposition of sentence, the Assistant State Attorney stated:

> . . . He is on probation for a case that was transfered from Palm Beach County, which has a docket number of 81-4343-Y-AO2, where he is on probation for a strong-armed robbery, that he be sentenced to a consecutive 15 years in the Florida State Prison. . . .
>
> (R.968)

Defense counsel then made a motion for mistrial on the basis that the prosecutor abrogated the plea agreement when he mentioned the strong-armed robbery probation (R.968-969). The basis for defense counsel's argument is based upon the following provisions of the written plea agreement:

> 5) During the proceeding referred to in Paragraph 3 hereof:
>
> (a) The State shall only present evidence that the capital felony was especially heinous, atrocious, or cruel, and that the capital felony was committed by a person under a sentence of imprisonment, in accordance with Chapter

> 921.141(5)(h) and (a), Florida Statutes.
> (b) The State shall not allude to or make any argument upon any aggravating circumstances contained in Chapter 921.141(5), Florida Statutes, except for those referred to in Paragraph 5(a) above.
>
> * * *
>
> (p) In sentencing the Defendant upon the conviction and adjudication for the crime charged in Count I of said Indictment, the Court may only consider
>
> (1) Those of the aggravating circumstances referred to in Paragraph 5(a) hereof, which have been proven by the State beyond a reasonable doubt.
>
> (R.1205, 1207)

However, it is significant to note that the "proceeding" referred to in paragraph three was defined as follows:

> 3) No sentences shall be imposed upon said convictions and adjudications until after the rendition of an advisory sentence by a jury in a proceeding conducted in accordance with Chapter 921.141(1), Florida Statutes. (emphasis added)
>
> (R.1205)

Based upon these provisions of the stipulations and plea agreement, your Appellee strongly maintains that no breach of the plea agreement occurred by virtue of the prosecutor's mention of a probation for a strong-armed robbery.

It is clear by virtue of the provisions of the plea agreement set forth above that the State was precluded from attempting to show any aggravating circumstances other than that the capital felony was especially heinous, atrocious or cruel, and that the capital felony was committed by a person under a sentence of imprisonment. It is equally clear that no evidence

or testimony pertaining to any aggravating circumstance not authorized by the plea agreement was submitted during the proceeding conducted pursuant to Florida Statute 921.141(1). Rather, the prosecutor's statement occurred in the sentencing hearing subsequent to the jury's rendition of the advisory sentence. The stipulation and plea agreement also provided that in sentencing Appellant the trial court could only consider the aggravating circumstances referred to in paragraph 5(a). The instant record is abundantly clear that the trial court only considered as factors in aggravation those matters specifically permitted under the plea agreement (R.972, 975-976). The question of the court's consideration of any impermissible aggravating factors is discussed more fully under Issue VII-B, infra.

Additionally, it is clear that the statement made by the prosecutor was not made to support aggravation of Appellant's sentence. Although defense counsel argued that the prosecutor mentioned the strong-armed robbery as a factor to be considered by the court in determining whether to impose the death sentence upon Appellant (R.969), it is clear that, as the prosecutor asserted, any argument as to aggravation was based only upon the two factors permitted by the plea agreement (R.969). The other probation was mentioned by the Assistant State Attorney only for the purpose of determining whether the court could impose a sentence for the underlying offense which arose in West Palm Beach. In ruling on these matters, the trial court made it clear

that not only was he not going to consider the matter of the strong-armed robbery, but he was also not going to consider the robbery that was Count II of the Indictment filed in the instant case as a factor in aggravation (R.972-973).

Inasmuch as the prosecutor did not present any argument, evidence or testimony concerning an aggravating factor other than those specifically permitted under the plea agreement, it is apparent that the prosecutor did not breach the agreement. Nevertheless, it is clear that even had there been a minor breach of the agreement, Appellant would not be entitled to the relief which he now seeks in this court. Apparently as an appellate after-thought, Appellant is seeking to withdraw his validly entered plea of guilty. Appellant never moved the trial court to withdraw the guilty plea. To the contrary, Appellant steadfastly maintained that he was entitled to the benefits of his plea bargain and, several times, reaffirmed his guilty plea. When the prosecutor made his comment concerning the strong-armed robbery, Appellant moved for a mistrial and asked the court to reconvene another jury to reinstitute the proceedings consistent with the guilty plea (R.969). Appellant also moved the trial court to recuse itself as an alternative to the denial of the motion for mistrial (R.971). The record is abundantly clear in portraying an Appellant who did not wish to withdraw his guilty plea. In Lee v. State, 501 So.2d 591 (Fla. 1987), this Honorable Court held:

> It has been held that when a sentencing court has received and approved a plea of guilty

> entered upon a bargain for a prosecutor's recommendation of a certain sentence, any utterance contrary to that recommendation by representatives of the State Attorney's office constitutes a breach of that agreement, and mandates withdrawal of the plea upon defendant's request. Wood v. State, 357 So.2d 1060. (emphasis supplied; text at 592).

Appellant, having never asked the trial court for permission to withdraw his guilty plea is now precluded from seeking that relief on appeal.

Appellant also contends that certain matters which arose during the course of the penalty proceeding constituted breaches of the plea agreement. Your Appellee submits that none of the matters complained-of support a prosecutor's breach of the agreement. Appellant first complains that testimony was given by Dr. Simpson concerning an attempt to resuscitate and to start intravenous procedures (R.738). This statement was an unsolicited comment by a witness and did not describe any procedures which were prejudicial to Appellant's position. Also, when defense counsel objected to the testimony he moved for a mistrial but again did not move to withdraw the guilty plea (R.739).

Appellant next complains that the prosecutor breached the agreement when cross-examining the defense psychologist. The prosecutor asked Dr. Merin whether he had ever spoken to individuals in the like position of the Appellant, those individuals with criminal records (R.849). Counsel moved for a mistrial on the basis that the term "criminal records" indicated that Appellant had been convicted of more than one offense.

However, the record is clear that the prosecutor was referring only to those crimes which were presentable under the plea agreement (R.850). The jury was certainly aware that Appellant had committed prior offenses inasmuch as the State was permitted to introduce evidence of a prior burglary. Again, Appellant only moved for a mistrial and a curative instruction and did not move to withdraw his plea (R.850).

Finally, Appellant contends that the court erred by permitting rehabilitation testimony by a psychologist to rebut statements made by Appellant's mother. Your Appellee asserts that there was no abuse of the trial court's discretion in interpreting the plea agreement to permit rebuttal only by an expert as to any evidence submitted by the defense. It is clear that a second State rebuttal witness was precluded from testifying by virtue of the agreement (R.893). Once again, with respect to this alleged breach of the agreement, Appellant never moved to withdraw his plea. A review of the proceedings below compels but one conclusion - Appellant never intended to withdraw his guilty plea and, instead, constantly reaffirmed that guilty plea and only sought remedies consistent with a guilty plea. Therefore, Appellant's first point must fail.

ISSUE II

WHETHER THE TRIAL COURT FAILED TO PROPERLY ADVISE APPELLANT OF THE CONSTITUTIONAL RIGHTS HE WAS WAIVING BY PLEADING GUILTY THEREBY PERMITTING APPELLANT TO WITHDRAW HIS GUILTY PLEA.

As his second point, Appellant contends that the trial court failed to adequately advise Appellant of the constitutional rights he was waiving when pleading guilty. Appellant therefore concludes that his plea of guilty should be vacated. For the reasons expressed below, Appellant's point is without merit.

Appellant complains because the trial court did not specifically ask the questions provided under Florida Rule of Criminal Procedure 3.172(c). Appellant does acknowledge that the trial court ascertained that Appellant voluntarily waived his right to a jury trial (R.1392; Appellant's brief at p. 20). However, Appellant contends that the trial court reversibly erred by failing to mention the other rights being waived under both the Rule of Criminal Procedure and addressed in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Your Appellee submits, however, that the circumstances of the case sub judice compel affirmance on Appellant's Point II.

During the plea colloquy, the trial court specifically asked Appellant under oath whether he understood everything contained in the stipulation and plea agreement. The court also was advised by Appellant that defense counsel had discussed every provision of the plea agreement (R.1389-1390). The plea

agreement specifically provided, inter alia:

> 6) Gary L. Tillman specifically acknowledges and says the following:
>
> * * *
>
> (c) That he understands that he has the absolute right to be represented by an attorney at every stage of the proceedings against him and if he cannot afford to hire legal counsel, then an attorney will be appointed to represent him at no cost. That he has a right to have his guilt or innocence determined during a jury trial and to have the assistance of an attorney at that trial. That he has the right to compel the attendance of witnesses in his behalf, the right to confront and cross-examine the witnesses against him, and the right not to testify or incriminate himself. He understands that by pleading guilty to these offenses, there will be no trial by jury to establish his guilt or innocence but only a proceeding to determine what penalty he should receive for the First Degree Murder of Marjorie Shannon. He further understands that the penalty he receives for that crime can only be one of two lawful penalties, death by electrocution, or life in Florida State Prison with no possibility of parole for twenty-five years. He understands that by pleading guilty he is giving up his right to a trial by a jury of his peers as to his guilt or innocence.
>
> (R.1207)

Appellant makes no mention in his brief of the provisions of the plea agreement as set forth immediately above. Florida Rule of Criminal Procedure 3.172(i) provides that the failure to follow any of the procedures in Rule 3.172 shall not render a plea void absent a showing of prejudice. It is abundantly clear, therefore, that no prejudice ensued to Appellant when he had reviewed the written plea agreement with his attorneys for

approximately forty-five minutes immediately prior to appearing before the court (R.1384). Based upon Appellant's representation that he understood everything in the agreement, and based upon the fact that Appellant had reviewed the document with counsel for forty-five minutes, the function of Rule 3.172 has been effected in that the trial court was able to satisfy himself that the plea was voluntarily entered.

The written plea agreement specifically provided that there is a factual basis for the charges laid in the Indictment and that Appellant is in fact guilty of the offenses (Paragraph 6 (a) & (b) of the written plea agreement at R.1207). Therefore, Paragraphs 6 (a), (b), and (c) of the written plea agreement satisfy the dictates of Rule 3.172 in that the trial court was able to satisfy himself that the plea was, indeed, entered voluntarily.

The instant record, therefore, is wholly sufficient to show that Appellant was aware of all the consequences of his plea.

Additionally, it must be noted that Appellant made no motion to withdraw his guilty plea before the trial court. As related above in Issue I, Appellant consistently reaffirmed his guilty plea and wished to proceed in accordance with that guilty plea. There is no indication in the instant record that the plea was entered in any manner but freely and voluntarily with full knowledge of its contents. Inasmuch as a guilty plea is never a substitute for a motion to withdraw a plea, Robinson v. State, 373 So.2d 898 (Fla. 1979), Appellant is not entitled to appellate relief.

ISSUE III

WHETHER THE TRIAL JUDGE PROPERLY STATED TO THE JURY THEIR ROLE AS BEING ADVISORY FOR THE PENALTY PHASE.

Appellant's argument that the judge's statements diminished their sense of responsibility has not been preserved for appellate review. There was no objection made before the trial court to any of these comments. Appellee, therefore, suggests the procedural default principle as outlined by the Supreme Court in Wainwright v. Sykes, 433 U.S. 72 (1977) is applicalbe to this case. It has long been the law in this State that a party cannot raise on appeal an issue he has not presented to the trial court. See, e.g., Lucas v. State, 376 So.2d 1149 (Fla. 1979) and Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Any argument by Appellant that procedural default is not applicable to this claim is not well founded. In both Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), the Supreme Court and the Eleventh Circuit discussed procedural default. Before addressing the merits of the claim in Caldwell, the court first looked at the State's argument that the defendant had failed to comply with a State procedural rule and whether that failure was the basis of the State court's decision. The Eleventh Circuit also looked at the State's procedural default argument in Adams. Although the Adams court found the cause prong of cause and prejudice to be met because of a significant

change in law, it is clear that Wainwright v. Sykes principles are valid considerations on Caldwell claims.

The Supreme Court decided Caldwell on June 11, 1985. Appellant's sentencing hearing was conducted January 13, 1986 thru January 17, 1986. Unlike Adams, there is no claim here that the basis for the claim was not known when the case was in the trial court. Compare, Footnote 17 in Harich v. Wainwright, ___ F.2d ___ (11th Cir. 1987, Case No. 86-3167, decided March 18, 1987).

This issue can also be dismissed on the merits. However, Appellee urges this Court to address and rule on the procedural default argument. In collateral proceedings the federal courts will not accept procedural arguments unless the issue was disposed of in State court on that basis. The court in Caldwell said:

> The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. See Ulster County Court v. Allen, 442 U.S. 140, 152-154, 60 L.Ed.2d 777, 99 S.Ct. 2213 (1979). Moreover, we will not assume that a state court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Michigan v. Long, 463 U.S. 1032, 1040-1041, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the

> decision." Id., at 1041, 77 L.Ed.2d 1201, 103 S.Ct. 3469.
>
> (text at 86 L.Ed.2d at 238)

Thus, it is of vital importance to have a ruling on procedural default, if it exists as maintained by your Appellee, to preserve the claim in federal court.

This Court in Darden v. State, 475 So.2d 217, 221 (Fla. 1985) and Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986) addressed the scope of the Caldwell decision in the context of the Florida sentencing procedure. In Mississippi, the jury makes the ultimate decision as to the appropriate sentence, life or death, for one convicted of capital murder. However, in Florida, the jury's role, while important and an integral part of the process, is advisory. When a Florida jury is told its sentencing function is to advise the court of the appropriate sentence, this is a correct statement of the law. And, this Court has indicated it is not error to inform the jury of the limits of its sentencing responsibility. Ibid.

While the Eleventh Circuit found Caldwell applicable to Florida cases, that court in Harich v. Wainwright, supra, has adopted the same approach to these claims as the Florida Supreme Court. In Harich, the jury was told at several points of the advisory nature of their sentencing decision. The court found no Caldwell violations and said:

> The prosecutorial and judicial comments in this case did not minimize the role of the jury. The statements went no further than explaining to the jury the respective functions of the judge and jury. The jury was told to listen to the evidence, weigh the

> aggravating and mitigating circumstances, and render an advisory opinion as to the applicability of the death penalty in this case. Nothing was said which would imply to the jury that its recommendation was superfluous or that the importance of the jury's decision was lessened by the fact that it was only a recommendation.

The same is applicable to this case.

The jury, in keeping with Florida's capital sentencing scheme, was informed of the advisory nature of their sentencing decision. The fact that two (2) prospective jurors questioned the purpose of their role does not change the law. The jury was also told the importance of their attention to the aggravating and mitigating evidence in reaching a decision. The prosecutor at one point says:

> Because it is advisory doesn't mean -- ultimately, Judge Alvarez will have to make the decision -- doesn't mean that you cannot take this seriously, because your verdict, your recommendation is given great weight.
>
> (R.129)

The prosecutor had a similar comment in response to a question by prospective juror 16 (R.130).

It is important to note several other factors. On the second day of jury selection one of the defense attorneys went to great lengths to explain to the jury the advisory system and its purpose (R.199-204). After one or two prospective jurors had voiced concern, counsel stated the jury would have to give due consideration to this recommended sentence and their decision could not be arbitrarily overlooked (R.200-201). Additionally, at the beginning of individual voir dire the juror was again told

his recommendation would be given great weight (R.304, 325).

As a final note, Appellee would point out that prospective juror number 39, Steven Betancourt, who had some question concerning his role did not sit on the jury (R.709-710). Prospective juror number 16, Mr. Hackett, did participate as a member of the empanelled jury. However, it was clear from the individual questioning of Mr. Hackett that he came to understand the importance of the jury's role at sentencing (R.459, 464-465).

In summary, the record demonstrates this issue should not be considered by this Court since there was no objection to the comments by the court or the prosecutor in the proceeding in the trial court. The procedural default principle of Wainwright v. Sykes is applicable here. Secondarily, the statements made to the jury that their sentencing decision would be advisory were not erroneous but an accurate reflection of the law. See, Section 921.141, Florida Statutes.

ISSUE IV

WHETHER THE TRIAL COURT CONDUCTED A PROPER INQUIRY AS TO WHETHER THE STATE UTILIZED PEREMPTORY CHALLENGES AGAINST PROSPECTIVE BLACK JURORS SOLELY ON THE BASIS OF RACE.

As his fourth point, Appellant contends that the trial court failed to conduct a proper inquiry into the question of whether the State utilized peremptory challenges against prospective black jurors solely on the basis of race. Your Appellee asserts that, as discussed below, the State exercised peremptory challenges against prospective black jurors for reasons other than race.

In State v. Neil, 457 So.2d 481 (Fla. 1984), this Honorable Court established the following test for analyzing a claim that prospective jurors have been excused in a discriminatory manner:

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective juror's race.
>
> (text at 486-487)

Your Appellee submits that Appellant has failed to meet the Neil test.

While Appellant has shown that four prospective jurors who were challenged belong to a "distinct racial group", it is clear that he has failed to demonstrate "a strong likelihood" that these prospective jurors were challenged solely on the basis of their race. It is the State's position that the record before this court does not reveal the requisite likelihood of discrimination to require an inquiry by the trial court and a shifting of the burden to the State. However, even if defense counsel met this burden, an examination of the proceeding reflects nothing more than a normal jury selection process. Cf. Parker v. State, 476 So.2d 134 (Fla. 1985).

The exclusion of a significant number of black potential jurors is insufficient in and of itself to warrant reversal of a trial court's determination not to make inquiry. State v. Neil, supra at 487, note 10. This is so because the reasons for excusing such persons may be readily apparent to the judge and others in attendance at the voir dire. Ibid.; Woods v. State, 490 So.2d 24 (Fla. 1986).

In the case at bar, the prosecutor exercised a peremptory challenge against prospective black jurors Reba Colvin and Frances Price. No objection was made by defense counsel as to the exercise by the State of the peremptory challenges. When the State exercised a peremptory challenge against Harold Bolden, another prospective black juror, defense counsel, in essence,

moved the court to make a finding that the State was systematically striking blacks. The trial court then placed on the record the reasons the jurors should have been challenged and none of these reasons had anything to do with the race of the prospective jurors (R.570-571). The trial court further stated that there is no substantial likelihood that the prospective black jurors were being systematically excluded (R.572-573). Thus, in accordance with the Neil decision, the trial court made the requisite finding concerning whether there was a substantial likelihood of systematic exclusion based solely on race and, where there was no likelihood of exclusion by virtue of race, the State was not required to announce its neutral reasons for excluding the prospective jurors.[1] With respect to the peremptory challenges exercised by the State with respect to prospective jurors Colvin, Price and Bolden, it is clear that these venirepersons were excluded for reasons other than their race.

Thereafter, the State challenged Charleston Randolph, a black male. The Neil motion was renewed and the court asked the prosecutor to respond. The Assistant State Attorney gave the following reasons for exercising a peremptory challenge to

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[1] Although not required to do so, the record reveals several reasons other than race which could have been advanced by the State in exercising a peremptory challenge to jurors Colvin, Price and Bolden. Ms. Colvin stated that she did not understand the concept of aggravation or mitigation nor did she "really" believe in the death penalty (R.492-493, 496). Ms. Price was opposed to the death penalty (R.508). Mr. Bolden did not believe in capital punishment "too much" (R.487), nor did he at first understand the concept of aggravation or mitigation (R.481-482).

prospective juror Randolph:

> MR. OBER: Judge, after lengthy conversation with Mr. Randolph, he indicated first he had no knowledge whatever of what "aggravating" meant, what "mitigating" meant. He indicated he could follow the law. He indicated he was against the death penalty twice, did not believe in it. He is on probation for a crime. He has a background of a broken home. He is not sure whether his father died. Those are the reasons I am striking Mr. Randolph.
>
> (R.627)

The trial court excused prospective juror Randolph as a State peremptory strike (R.629).

Appellant does not contend that the trial court erred in excluding prospective juror Randolph based upon the State's peremptory challenge. Indeed, Appellant acknowledges that "at least some of the reasons given by the prosecutor for exercising a peremptory strike against prospective juror Randolph appear to be valid ones." (Appellant's brief at pp. 30-31). Instead, Appellant contends that when the trial court asked the prosecutor to state reasons for the challenge to prospective juror Randolph the prosecutor should have also been required to place reasons on the record as to why the previous black prospective jurors were peremptorily struck. However, Appellant did not complain below as to the failure of the State to explain the prior peremptory challenges. Additionally, the prosecutor was ready, willing and able to read reasons into the record as to why he exercised peremptory challenges to the three prospective black jurors (R.571). In any event, as set forth above in footnote 1, reasons for exclusion of the prospective jurors appear in the record

which are not related to the race of the venirepersons.

Appellant also complains that the comments of the trial court reflect that the precepts of Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567 (1881), were violated. In Neal, the United States Supreme Court rejected the uniform exclusion of the black race from juries solely because blacks were disqualified by want of intelligence, experience or moral integrity. In the case at bar, the reasons advanced for exclusion of the prospective black jurors related solely to the characteristics of the challenged persons other than race. The reasons given for exclusion need not be equivalent to those for a challenge for cause. The prosecutor need only show that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race. State v. Neil, supra, at 487. Sub judice, it is apparent that the State challenged the prospective black jurors on reasons other than the race of those jurors. Significantly, the State accepted Mr. Watkins, a black man, for service on the jury (R.569, 710). Where the record reveals that neutral reasons were advanced by the State and the trial court for striking the prospective black jurors, reasons other than race motivated the peremptory challenges. Under the circumstances, your Appellee would submit that no error is present here.[2]

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[2] In Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986), the court noted that since the Neil decision, neither this Honorable Court nor any Florida District Court had specifically found a reason given by a prosecutor for the peremptory challenge of a juror to be unacceptable.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT "NO ONE OF US HAS A RIGHT TO VIOLATE THE RULES WE ALL SHARE".

As his fifth point on appeal, Appellant contends that the trial court erred by giving Standard Jury Instruction 2.09. As edited by the trial court and submitted to the jury, the instruction given is as follows:

> In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For centuries we have agreed to a constitution and to live by the law. No one of us has a right to violate the rules we all share.
>
> (R.948)

Defense counsel objected and merely stated: "I understand that insofar as it pertains to a Phase One. But it has been conceded here that this man violated the rules we all share." (R.948). A defense motion for a mistrial and a request for curative instruction was denied (R.949). Appellant now complains that this instruction was erroneous and, coupled with purportedly prejudicial prosecutorial comments, a new penalty phase is required. Your Appellee asserts that no error is present here.

A. The Court's Rendition of Standard Jury Instruction 2.09.

At the outset, it is imperative to note that objection was made to the trial court's instruction only after that instruction had been given to the jury. The court made it clear in the

record that Standard Jury Instruction 2.09 was discussed by counsel during the charge conference. The court specifically noted that defense counsel requested only that the middle paragraph of Rule 2.09, the paragraph pertaining to the finding of a verdict, be excised (R.950). It is inconceivable that no objection be made to the giving of a certain instruction until that instruction has been read to the jury and then the giving of that instruction is urged as error on appeal. This is "inviting error" and should not be sanctioned by this court. Cf. McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971).

Also, it is clear that Appellant never specifically apprised the trial court of his objection to the giving of the instruction. Appellant merely stated that it was applicable to a penalty phase. No reason was advanced before the trial court as is now advanced in Appellant's brief. This court does not presume that a trial court would have made an erroneous ruling had the proper objection been made. Cf. Lucas v. State, 376 So.2d 1149 (Fla. 1979). Also, in order for an issue to be preserved for further review by an appellate court, that issue must first be presented to the trial court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved. Tillman v. State, 471 So.2d 32 (Fla. 1985), citing Steinhorst v. State, 412 So.2d 332 (Fla. 1982), and Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979). It is clear, therefore, that this issue has not been preserved for appellate review.

In any event, it is clear that this court has noted that the comment "no one has a right to violate the rules we all share" cannot reasonably be taken as a comment on the defendant's guilt. Pope v. Wainwright, 496 So.2d 798, 802 at n.2 (Fla. 1986). Your Appellee submits that the comment cannot reasonably be taken as a death penalty-urging instruction. Rather, in accordance with Pope, the trial court noted that the comment is nothing more than an admonition to the jury to follow the instructions and law as given by the court (R.949).

B. The Prosecutor's Closing Argument.

Appellant complains that certain comments made by the prosecutor during closing argument when read with the instruction "no one of us has a right to violate the rules we all share" impermissibly prejudiced Appellant. Appellant is entitled to no relief on this point.

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), a case relied upon by Appellant in his brief at page 35, this Court determined that the prosecutor therein overstepped the bounds of proper argument on at least three occasions. One of the statements made was similar to the now complained-of comments of the prosecutor in the instant case, that is, argument concerning the victim's final pain, terror and defenselessness. Here, as in Bertolotti, the prosecutor's comments were directly relevant to the question of whether the State had proved the aggravating circumstance of heinous, atrocious and cruel homicide. However,

unlike Bertolotti, defense counsel herein did not make objection to the comments of the prosecutor. There was no motion for a mistrial nor a request for curative instruction. Even where counsel does move for mistrial and requests a curative instruction as in Bertolotti, reversal is not ordinarily mandated. It is only when prosecutorial comment is so egregious that a new penalty phase would be warranted. Sub judice, the prosecutor's comment, being relevant to an aggravating circumstance, was not outrageous and was not calculated solely to inflame the passions of the jury.

Appellant further complains about the prosecutor's statements concerning the penalty to be imposed upon Appellant. Once again, no objection was made to the comments of the prosecutor. In any event, the statements complained-of are merely comments on the evidence and what the evidence shows the appropriate penalty to be. In no way could the remarks of the prosecutor be reasonably construed in conjunction with the trial court's instructions as mandating a death penalty recommendation.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO ASK PURPORTEDLY IRRELEVANT AND PREJUDICIAL QUESTIONS ON CROSS-EXAMINATION OF DEFENSE WITNESSES.

Appellant argues that he is entitled to a new penalty phase hearing because the prosecutor allegedly asked improper questions during the cross-examination of two defense witnesses. Wide latitude is permitted on cross-examination in a criminal proceeding; the scope and limitation of cross-examination lies within the sound discretion of the trial court and is not subject to review except for clear abuse of discretion. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The scope of cross-examination is set forth in §90.612, Florida Statutes (1985). Subsection (2) provides:

> Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters.

See also, Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982). For the following reasons, the trial court did not abuse its discretion in allowing the prosecutor to cross-examine two of the defense witnesses relating to matters brought up on direct examination.

A. The Prosecutor's Mention of the Work Release Program.

During the direct examination of defense witness Thomas

Hills, Jr., the defense sought to establish that Appellant had worked at various odd jobs when he was a teenager, prior to his incarceration for burglary. During the months following Appellant's release from jail on the burglary offense, Tillman did not obtain employment; and, according to defense witness Hills, Appellant felt that he was unable to get a job because of his prior record. On direct examination, witness Hills acknowledged that he had worked for the successful real estate development business owned by his father, a former electronics engineer for Honeywell.

On cross-examination, witness Hills conceded that neither he nor his father ever attempted to give Appellant any type of employment (R.811). The prosecutor then sought to discredit Hills' suggestion that the only obstacle to Appellant's employment was Tillman's prior record. Witness Hills acknowledged his general familiarity with the Work Release Program and, over objection, the prosecutor questioned Hills about the availability of employment opportunities, such as those connected with the Work Release Program, to individuals who have a criminal record. The prosecutor's line of questioning was entirely appropriate on cross-examination because it was in direct response to Appellant's self-serving suggestion that he was precluded from obtaining employment solely because of his criminal record. The prosecutor's questioning concerning the Work Release Program was merely offered as an example of the fact that a criminal record does not ipso facto preclude an individual

from thereafter securing gainful employment. Significant by its absence from Appellant's argument is the answer which was given by witness Hills to the prosecutor's questioning. Taken in context, the record shows:

> [Prosecutor] Q. Isn't it a fact, Mr. Hills, that Mr. Tillman, instead of being unable to find employment because of whatever reason he chose to tell you, that he just didn't care to work?
>
> [Defense Witness Hills] A. No, sir.
>
> Q. Isn't that a fact?
>
> A. No, sir.
>
> (R.815)

(End of Cross-Examination)

Examining the record as a whole, it is clear that Appellant's claim, i.e., that the jury was misled by the prosecutor's questioning, is wholly without merit. Furthermore, on redirect examination, the defense reiterated Appellant's efforts to secure employment and Hills' testimony refuted the State's suggestion that Appellant really did not care to work.

During cross-examination of defense psychologist, Dr. Sidney Merin, the psychologist testified, without objection, that he had conversed with Appellant regarding Appellant's employment habits, Appellant had worked at a number of odd jobs during his lifetime and Appellant appeared "motivated to work" (R.848). Then, over defense counsel's objection, the prosecutor inquired of Dr. Merin whether he had previously come into contact with individuals who, like Appellant, were able to seek and obtain employment despite their parole status. On this point, Dr. Merin answered "Yes"

(R.853-854). The cross-examination of Dr. Merin was relevant and appropriate at trial to refute Appellant's own allegations that he could not find employment solely because of his parole status. The trial court sub judice did not abuse its discretion in allowing the prosecutor, on cross-examination, to discredit the defendant's excuse for unemployment.

B. Mention of Possibility of Parole and Appellant's Behavior Under Stress.

On direct examination, Dr. Merin opined that, during an extended period of incarceration, Appellant would not commit any future acts of violence. Given the obviously violent circumstances surrounding the instant murder, the prosecutor inquired of Dr. Merin, without objection, how he could rationalize this optimistic prediction with the violent behavior exhibited by Appellant in 1983. Conceding that it was "hard to justify" (R.854), Dr. Merin predicted that if Appellant were placed in a controlled environment where there was a considerable reduction in stress, then Appellant's violent characteristics would not emerge (R.855). When the State attempted to inquire of Dr. Merin whether Appellant might exhibit the same violent characteristics shown in 1983 should he be away from the structured environment, the defense objected and moved for a mistrial. The determination of whether to grant a mistrial is within the sound discretion of the trial court. Doyle v. State, 460 So.2d 353 (Fla. 1984). A mistrial is only appropriate where the error committed was so prejudicial as to vitiate the entire

trial. Duest v. State, 462 So.2d 446, 448 (Fla. 1985); Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). If an alleged error does no substantial harm and causes no material prejudice, a mistrial should not be granted. Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). Here, a mistrial was not warranted inasmuch as it was the Appellant himself who initiated the inquiry into the likelihood of his future behavior. Having invited the comments, Appellant cannot seek reversal on this ground. Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979); Clark v. State, 363 So.2d 331 (Fla. 1978); Castle v. State, 305 So.2d 794 (Fla. 4th DCA 1975), aff'd, 330 So.2d 10 (Fla. 1976); Jennings v. State, 457 So.2d 587 (Fla. 3d DCA 1984).

Despite having the benefit of Dr. Merin's favorable testimony regarding the likelihood of Appellant's future behavior in a structured setting, Appellant thereafter sought to prohibit the State from cross-examining Dr. Merin about the likelihood of Appellant's behavior away from a controlled environment. Given the fact that Appellant sought to establish, via Dr. Merin's testimony, that he would probably not be violent in the future, Appellant cannot credibly argue that the State was precluded from cross-examining Dr. Merin in order to impeach his favorable speculation. Once the defense "opened the door" on this subject, the State was authorized to cross-examine the witness on this

point. §90.612(2); Walton v. State, 481 So.2d 1197 (Fla. 1985).

The cases upon which Appellant relies are clearly distinguishable. In Teffeteller v. State, 439 So.2d 840 (Fla. 1983), this Court condemned the "inexcusable prosecutorial overkill" demonstrated when the prosecutor repeatedly made "needless and inflammatory" comments that the defendant would kill again, probably the two witnesses who testified against him, and maybe others. In Grant v. State, 194 So.2d 612 (Fla. 1967), the prosecutor argued to the jury "Do you want to give this man less than first degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?". Finding "no conceivable basis in the record upon which such remarks could be predicated", this Court condemned the prosecutor's highly prejudicial comments. Id., at 615.

In Miller v. State, 373 So.2d 882 (Fla. 1979), the trial court improperly considered a non-statutory aggravating circumstance in imposing the death penalty, the possibility that the defendant might commit similar acts of violence if he were to be released on parole. In the instant case, unlike the foregoing situations, the prosecutor did nothing more than cross-examine the defense witness on a subject initiated by the defendant.[3]

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[3] During the prosecutor's questioning of Dr. Merin, the following cross-examination was interrupted by the defense counsel's objection: "So, you are saying, if he were paroled in twenty-five years, he would again have those --" [Objection] (R.855). Following the bench conference, the prosecutor confirmed that Dr. Merin's prediction was only speculation and he inquired whether the defendant was violent now (R.857). At no time did the prosecutor argue to the jury that Tillman was "likely to kill again". Cf. Teffeteller, supra.

ISSUE VII

WHETHER THE WRITTEN SENTENCING ORDER REVEALS THAT THE TRIAL COURT GAVE INADEQUATE CONSIDERATION TO MITIGATING EVIDENCE AND THAT AN AGGRAVATING CIRCUMSTANCE BARRED BY THE PLEA AGREEMENT ENTERED INTO THE WEIGHING PROCESS.

As his final point on appeal, Appellant presents a two-fold argument concerning the provisions of the written sentencing order entered by the trial court (R.1352-1357). For the reasons expressed below, Appellant's final point must fail.

A. The Trial Court's Consideration of the Mitigating Evidence.

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 properly instructed as to mitigating circumstances (R.944-945). The jury deliberated and recommended a sentence of death by a vote of 10-2. The trial court after hearing all the evidence and arguments indicated that none of the mitigating circumstances were applicable in the instant case (R.1355). 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.
>
> (text 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, 461 So.2d 67 (Fla. 1984). The trial court committed no error.

B. The Purported Consideration of an Aggravating Circumstance Barred by the Plea Agreement.

Appellant contends that the trial court considered certain matters which were without the parameters of the written plea agreement. For the reasons expressed below, Appellant's point is without merit.

Appellant first complains that the court considered the aggravating circumstance of prior convictions for a violent felony. The basis for the court's notation of this aggravating circumstance was merely to negate the mitigating circumstance of lack of significant history of prior criminal activity (R.1353). The previously committed violent felony referred to by

the trial court was the armed robbery count for which Appellant was sentenced contemporaneously with the first degree murder conviction (R.1353). Obviously, the trial court has to be aware of that armed robbery conviction when it arises in the same proceeding as the murder. The court's written order specifically finds as aggravating factors however, only the two factors provided for in the written plea agreement. It is axiomatic that judges are capable to disregarding that which should be disregarded. Harris v. Rivera, 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981). Additionally, a trial court may be "aware" of such factors but if he does not "consider" such factors in arriving at a sentence no error is present. Alford v. State, 355 So.2d 108 (Fla. 1977), cert. denied, 436 U.S. 935, 98 S.Ct. 2835, 56 L.Ed.2d 778 (1978). It is apparent from the court's sentencing order that only aggravating circumstances permitted by the plea agreement were "considered" by the trial court in the determination of the sentence to be imposed upon Appellant.

Appellant also contends that the trial court impermissibly considered a felony probation of which the sentencing judge was supposed to be unaware. This claim is totally belied by the record. The probation mentioned by the trial court concerned probation for the burglary which was permitted under the plea agreement (R.971, 973, 1353). It is clear, therefore, that the trial court considered only those matters appropriate for consideration under the written plea agreement. There is no error present here.

CONCLUSION

Based on the foregoing reasons, arguments and citations of authorities, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas Connor, Assistant Public Defender, Hall of Justice Building, Post Office Box 1640, Bartow, Florida 33830, this 22nd day of April, 1987.

Robert J. Krauss

OF COUNSEL FOR APPELLEE