IN THE SUPREME COURT OF FLORIDA

CHARLIE THOMPSON, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 70-401

FILED
NOV 1988
CLERK, SUPREME COURT
By
Deputy Clerk

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

BRIEF OF APPELLEE

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(As stated by Appellant)

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(As stated by Appellant)

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(As stated **by** Appellant)

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(As stated **by** Appellant)

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(As stated **by** Appellant)

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(As stated **by** Appellant)

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(As stated by Appellant)

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(As stated by Appellant)

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(As stated by Appellant)

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(As stated by Appellant)

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(As stated by Appellant)

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(As stated by Appellant)

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(As stated by Appellant)

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(As stated by Appellant)

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STATEMENT OF THE CASE AND FACTS

FACTS SURROUNDING JUDGE BONNANO'S SERVICE ON THIS CASE

Prior to trial, appellant moved to disqualify the Honorable Robert H. Bonnano from presiding over any further proceedings in the case. (R. 1335) It alleged that he was a county judge and that his assignment to preside over criminal justice division C was contrary to Payret v. Adams, 500 So.2d 136 (Fla. 1986) Appellant also filed an amended motion to disqualify Judge Bonnano. (R. 1340-42) It contained a number of exhibits showing Bonnano's appointment to serve as a temporary circuit judge. (R. 1343-59) The substance of the motion was that Bonnano was not acting as a temporary circuit judge. (R. 1342)

The Chief Judge of the circuit heard the request to disqualify Judge Bonnano's assignment to clearly distinguishable from the situation presented in Payret. The court found that Bonnano's appointment had "never extended to the full ponoply of circuit court matters." (R. 1346) He found that Bonnano had Bonnano had been assigned to hear only a limited class of circuit court cases unlike the judge in Payret. The court also took judicial notice of crisis threatening the criminal justice system in the circuit which required the aid of county court judges in managing the circuit court's criminal case load. (R. 1436)

Prior to trial, appellant renewed the motions that had previuosly been considered and ruled on by Judge Bonnano. (R. 8-16) Circuit Judge Graybill pointed out that his actions rendered the complaint about Bonnano moot as he as a circuit judge had

ruled on the motions. (R. 17)

BONNANO, COUNSEL AND THE APPELLANT

Just prior to trial, counsel told the court that appellant wished to be heard on the renewal of the pulbic defender's motion to withdraw. (R. 11) At the close of the argument, Mr. Alldredge added that appellant "had some things he would like to address the court on." (R. 11-12) This came at the end of a renewal of the public defender's motion for leave to withdraw. The court ruled that appellant could not make any statement regarding the motion to withdraw. (R. 12) He then addressed appellant telling him that he had presided over many trials handled by both the prosecutor and Mr. Alldredge and Mr. O'Connor and that he had highly competent counsel representing him. (R. 12) The court also assured appellant that he intended him to have a fair and impartial trial. (R. 12)

After the jury had been sworn and excused to go to lunch, the court announced that he would listen to whatever appellant had to say. (R. 582-83) The court instructed counsel to give appellant the option of either making his statement in chambers without the presence to the television cameras or in open court in the presence of the cameras. (R. 583-84) Apparently, appellant elected to make his statement in open court. (R. 584)

Mr. Alldrege set the state for appellant by reminding the court that he had filed a motion for leave to withdraw which had been denied and informing the court that appellant had informed them that he wanted to represent himself. (R. 585) The court

then addressed appellant. He reminded appellant that anything he said could be held against him. He told appellant that he had an absolute right to speak through his attorney and that would not be held against him personnaly. (R. 585) After several exhanges in which the trial court made it clear that he was not going to discharge the public defender and appoint a private attorney, the appellant started articulating his concerns for the trial judge. (R. 586)

Appellant first told Judge Graybill that his counsel was "talking against him in the courtroom." (R. 585) The judge asked him to expand on this. Appellant responded "Was talking against me and I asked Judge Bonnano, would he appoint me private attorney, and Mr. Benito jumped up and said that I just wanted a private attorney to beat the case, and Judge Bonnano denied it." (R. 586-87) The court then informed appellant that there were no facts before him which would justify discharge of the public defender and that he was, in fact, represented by highly competent counsel. He asked appellant if there was anything else that he wished to add. (R. 587) Appellant asked "why he got up and talked against me at the time." (R. 587) The court asked who was talking against him. (R. 587) Appellant said that **"he"** did in Judge Bonnano's courtroom. (R. 587) Judge Graybill reminded appellant that they were not in Judge Bonnano's courtroom. And, he told him that Mr. Alldrege and Mr. O'Connor had been appointed to protect his rights and guarantee him a fair trial. (R. 587-88) The court closed by telling appellant that he would not

discharge counsel and asked appellant if he had anything further to say. (R. 588) Appellant replied that he did not. (R. 588)

Under this point, petitioner contends that the trial court erred in denying his motion to discharge counsel. The motion characterizes that counsel as ineffective. The point is without merit on several grounds. The trial court conducted an adequate inquiry into appellant's request for yet another lawyer. Appellatn made no showing that his counsel was not effective either at the time of his motion for a new lawyer or at the motion for new trial hearing, a hearing that became a de facto evidentiary hearing on petitioner's claim that he had not received the effective assistance of counsel.

It is well settled that an accused does not have the right to the appointment of any particular lawyer. Thomas v. Wainwright, 767 F.2d 738 (11th Cir.) cert. denied 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1985) When a defendant asks to discharge his appointed counsel, the court is obliged to examine the reasons given to determine their adequacy. Johnson v. State, 497 So.2d 863, 867 (Fla. 1986); Williams v. State, 427 So.2d 768, 770 (Fla. 2d DCA 1983).

Examination of the record shows that the trial court gave careful consideration to each complaint articulated by the appellant at the time of his hearing and thereafter. An inquiry on an apparently substantial complaint about counsel is sufficient if it addresses the reasons set out in the defendant's complaint about counsel. Johnson v. State, 497 So.2d 863, 867

(Fla. 1986); Kott v. State, 518 So.2d 957, 958 (Fla. 1st DCA 1988).

Appellant that he made a prima faci showing of racially discriminatory use of peremptory challenges by the state and that the state and that the court erred in not conducting any further inquiry than it did. While this claim presents subsissues that may be debatable to a certain extent, they are not dispositive as this record clearly demonstrates a racially neutral reason for the state's excusing both jurors one, Ms. Haygood, and 12, Ms. Walker. During the court's initial voir dire of the panel, they both revealed that they had family members who had been charged with a drug offense. (R. 28, 29) At the time of their excusal by the prosecutor they were the only ones with such connections who would have been seated to try appellant's case if they had not been excused. The state also contends that appellant both lacked standing and that he failed to show "a strong likelihood that these jurors had been challenged solely because of their race.''

State v. Neil, 457 So.2d 481 (Fla. 1984) clarified ~~sub nom.,~~ State v. Castillo, 486 So.2d 565 (Fla. 1986) makes it clear that a prospective juror can not be excused solely to the basis of race. And, State v. Slappy, 522 So.2d 18 (Fla. 1988) require the state to bear the burden of proof that the peremptory challenges were not used in a discriminatory was once the issue is properly raised. A failure to demonstrate a "strong likelihood'' of discriminatory use of peremptory challenges ends the matter and the trial court need not make any further inquiry. Parker v.

State, 476 So.2d 134, 138 (Fla. 1985). As noted in Woods v. State, 490 So.2d 24, 26 (Fla. 1986), the simple exclusion of a substantial number of potential black jurors is not a sufficient basis for concluding that the trial court committed reversible error in not conducting a further inquiry. ~~See also~~ McCloud v. State, 517 So.2d 56, 58 (Fla. 1st DCA 1987) ~~but see~~ Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987) (objection to striking sole member of defendant's race sufficient to trigger inquiry).

This appellant did not make that showing.

It is that state's position that the trial court was correct in its assessment of appellant's lack of standing to question the prosecutor's use of preemptor challenges in view of the fact that he ws not black. Pursuant to Batson v. Kentucky, 476 U.S. 79, 96, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the struck juror must be of the same race as the defendant for that defendant to start making a prima facia case. Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987) contra Castillo v. State, 466 So.2d 7,n.l (Fla. 3d DCA 1985).

Even if he had standing and called the court's attention to the excusal of prospective black vernire members, he certainly failed to make the showing required for more inquiry than the trial court conducted. Contrary to appellant's assertion, the trial court did more than simply brush aside the objection on the basis of standing. After, some discussion of standing the trial court renewed its question to appellant's counsel asking why he was raising the matter. He could state no more than the two

excluded jurors were black. The facts of this case surely militate against any finding that there was any likelihood of a racially discriminatory motive in the exercise of the state's peremptory challenges. The defendant was not black. Other blacks sat on the jury. (R. 100) And, pursuant to Taylor v. State, 491 So.2d 1150, 1151 (Fla. 4th DCA 1986) it appears that there was a strong valid reason for the exercise of the preemptories, both had relatives charged with drug offenses.

ON THE CONFESSION ISSUE

Wasko v. State, 12 F.L.W. 123 (Fla. March 5, 1987) (collecting cases).FACTS SURROUNDING JUDGE BONNANO'S SERVICE ON THIS CASE

Prior to trial, appellant moved to disqualify the Honorable Robert H. Bonnano from presiding over any further proceedings in the case. (R. 1335) It alleged that he was a county judge and that his assignment to preside over criminal justice division C was contrary to Payret v. Adams, 500 So.2d 136 (Fla. 1986) Appellant also filed an amended motion to disqualify Judge Bonnano. (R. 1340-42) It contained a number of exhibits showing Bonnano's appointment to serve as a temporary circuit judge. (R. 1343-59) The substance of the motion was that Bonnano was not acting as a temporary circuit judge. (R. 1342)

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court found that Bonnano's appointment had "never extended to the full panoply of circuit court matters". (R. 1346) He found that Bonnano had been assigned to hear only a limited class of circuit court cases unlike the judge in Payret. The court also took judicial notice of crisis threatening the criminal justice system in the circuit which required the aid of county court judges in managing the circuit court's criminal case load. (R. 1436)

Prior to trial, appellant renewed the motions that had previously been considered and ruled on by Judge Bonnano. (R. 8-16) Circuit Judge Graybill pointed out that his actions rendered the complaint about Bonnano's moot as he as a circuit judge had ruled on the motions. (R. 17)

THE COURT, COUNSEL AND THE APPELLANT

During the course of the hearing on Appellant's counsel's motion to withdraw predicated on Bonnano's remarks, Judge Bonnano addressed appellant asking if he had anything he wanted to say about the public defender's motion to withdraw. (R. 1103) Appellant responded, "Yes, I would like for him to file for a private attorney because I don't think that the public defender is supposed to be on no capitol [sic] case like this." (R. 1103) The court and appellant then engaged in an colloque about what appellant wanted which resulted in appellant's telling the court that he would cooperate with counsel if counsel would cooperate with him. (R. 1104) Appellant's counsel finally asked him whether he had anything else he wanted to say. Appellant renewed his request for a "street lawyer." (R. 1105)

Just prior to trial, counsel told the court that appellant wished to be heard on the renewal of the public defender's motion to withdraw. (R. 11) At the close of the argument, Mr. Alldredge added that appellant "had some things he would like to address the court on." (R. 11-12) This came at the end of a renewal of the public defender's motion for leave to withdraw. The court ruled that appellant could not make any statement regarding the motion to withdraw. (R. 12) He then addressed appellant telling him that he had presided over many trials handled by both the prosecutor and Mr. Alldredge and Mr. O'Connor and that he had highly competent counsel representing him. (R. 12) The court also assured appellant that he intended him to have a fair and impartial trial. (R. 12)

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absolute right to speak through his attorney and that would not be held against him personally. (R. **585)** After several exchanges in which the trial court made it clear that he was not going to discharge the public defender and appoint a private attorney, the appellant started articulating his concerns for the trial judge. **(R. 586)**

Appellant first told Judge Graybill that his counsel was "talking against him in the courtroom." **(R. 586)** The judge asked him to expand on this. Appellant responded "Was talking against me and I asked Judge Bonnano, would be appoint me private attorney, and Mr. Benito jump up and said that I just wanted a private attorney to beat the case, and Judge Bonnano denied it." (R. **586-87)** The court then informed appellant that there were no facts before him which would justify discharge of the public defender and that he was, in fact, represented by highly competent counsel. He asked appellant if there was anything else that he wished to add. (R. **587)** Appellant asked "why he got up and talked against me at that time." **(R.587)** The court asked who was talking against him. (R. **587)** Appellant said that "he" did in Judge Bonnano's courtroom. (R. **587)** Judge Graybill reminded appellant that they were not in Judge Bonnano's courtroom. And he told him that Mr. Alldredge and Mr. O'Connor had been appointed to protect his rights and guarantee him a fair trial. (R. **587-88)** The court closed by telling appellant that he would not discharge counsel and asked appellant if he had anything further to say. (R. **588)** Appellant replied that he did not. **(R. 588)**

At the close of the charge conference, appellant's counsel Mr. Alldredge, asked the court to listen to a statement appellant wished to make. (R. **826)** The court then advised appellant that anything he said might be used against him. (R. **827)** The appellant then announced that he wanted to have a private attorney because he was not satisfied with the way he was being represented. (R. **827)** Appellant did not elaborate on the source of his dissatisfaction. (R. **827)** The court denied the request or motion. (R. **827)** Appellant's counsel then asked him whether there was anything else he wanted to talk to the judge about. And, when appellant did not respond he said, "Let the record reflect that the defendant doesn't have anything else to say." (R. **827)** When the Judge asked the baliff to return the jurors to the courtroom, the appellant announced, **"I'm** getting back up, this is my life you all are playing with. I'm going to stand up when the jury comes back in." (R. **827-828)** Appellant then reiterated his position after counsel advised him against standing up. (R. **828)** After the jury entered the courtroom, appellant stated, "I have a right to make a statement." (R. **828)** After an interjection by counsel, appellant said, "They're taking all my rights, man." (R. **828)** Apparently, the court called a recess and excused the jury because the record shows a recess and the jury leaving but has no directions recorded from the court. The court then cautioned appellant that interruptions, displays or the creation of a scene could possibly prejudice his case. (R. **829)** The court then asked appellant if

he understood and appellant gave a negative indication. (R. 829-830) The court then reminded appellant that he had sat through the trial without causing a scene. And, it told appellant that his attorney would argue for him and that was the way things were going to be. (R. 830) The court then had the baliff return the jury to the courtroom. (R. 830) On the jury's entry back into the courtroom, appellant made his speech about wanting a private attorney. (R. 830) The court then sent the jury out again. This time the court told appellant that if he was wrong about a private attorney, that his case would have reversed on appeal but that he was going through the trial with his appointed counsel. (R. 831) When appellant responded that he was not, the court then asked him whether he wanted to be removed from the courtroom during the presentation of the final arguments. (R. 831) Appellant persisted in his request for a private attorney and said that he wanted the jury to stop. (R. 8f32) The court asked again whether appellant would sit quitely and listen to final arguments or whether he wanted to voluntarily go back to the lockup to wait the results of the trial of the case. (R. 832) Appellant again expressed his concern that it was his life that was at stake and the court asked him again what he wanted to do. (R. 832) On further questioning, the appellant first said that he did not know what he wanted to do. (R. 833) And, then after another question by the court appellant said that he would prefer to go back. (R. 833) The court then question him again asking if he wanted to go back into the lockup and not listen to the

closing arguments. (R. 833) Appellant responded, "Until I get me a private attorney." (R. 833) The court then asked if that was what he wanted to do. (R. 833) Appellant responded that he knew that the public defender was not representing him properly because he had told him that an appeal would be filed in ten years. (R. 833-834) The court reminded appellant that was not what he was asking and reminded him that he had the right to be present and listen to his attorneys. (R. 834) Appellant interrupted the trial court at that point asserting that he had the right to a private attorney. (R. 834) The court reminded appellant that he had already ruled on that motion and would be reversed on appeal if that ruling was wrong. (R. 834) Appellant responded that he wanted a new trial. (R. 834) The court then returned to asking appellant about whether he wished to remain in the courtroom or leave. (R. 834) Appellant responded that the wanted a private attorney. (R. 834) When asked once again about whether he would listen quietly, appellant responded, "You send me on back in the back." When the court said, "Pardon?" the baliff responded, "He wants to go back." (R. 835) When counsel asked for a cautionary instruction the court told appellant's counsel to draft it. (R. 835)

While counsel was drafting the proposed instruction, the court interrupted to ask about the possibility of making the proceedings available to appellant in the lockup through the medium of video. (R. 836) The record does not reflect whether this ever became a reality. After further discussion, the court

took a recess. (R. 839) After the recess the attorneys stipulated to the instruction to be given and Mr. Alldrege renewed both the motion he had made to withdraw before Judge Bonnano and the argument he had made pursuant to that motion. (R. 840) When the jury returned, the court instructed the jury on appellant's absence and then the closing argument commenced. (R. 841)

After the jury had been instructed, finished its deliberations and returned its verdict, the court considered its option in announcing the jury's verdict to appellant. (R. 902-903) The court finally decided to tell the baliff to advise appellant that the jury had reached a verdict and that the court was requesting that he return to the courtroom. The court told the appellant that he would come to being him in and that if he refused to report that fact. (R. 903) The prosecutor raised his concern for security at that point. (R. 904) After some further discussion about the absence of baliffs and the fact to have the clerk pulbish the verdict to appellant while he was still in the lockup. (R. 905)

When the proceedings recommenced the following Monday, the defense presented two oral motions, one asking for leave to withdraw and the other asking for another competency evaluation. (R. 914) After listening to both the state and appellant counsel, the court announced:

> THE COURT: The Court has observed Mr. Thompson throughout this entire trial. The Court is also aware of the fact that Mr.

> Thompson feels that he is entitled to have the public defender discharged as his court appointed attorney, and that he feels that he is entitled to have a private lawyer appointed to represent him.
>
> I have advised Mr. Thompson that his Motion to Discharge the Public Defender has been denied by Judge Bonnano and has also been denied by myself, and that his request for private counsel is denied and that if Judge Bonnano was wrong, and if I was wrong and that he should have had the public defender discharged and a private attorney appointed, that that would be addressed in the appellante court.
>
> And if the appellate court agreed with Mr. Thompson, he would be granted a new trial.
>
> I do not find that Mr. Thompson is mentally incompetent at this time, nor do I find that he is unable to assist counsel.
>
> Obviously, Mr. Thompson is still displeased with the fact that he does not have private counsel.
>
> Is that correct, Mr. Thompson?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Your sole position is that you think your entitled to a private attorney appointed by the court instead of your court appointed public defender?
>
> THE DEFENDANT: **Yes,** sir.

The court then turned its attention to appellant and asked if he had correctly stated his position, that he was displeased with his counsel and that he wanted private counsel appointed. Appellant responded that "yes" the court had understood his position and his only complains was his belief that he was entitled to the services of a private attorney. (R. 917)

Appellant interrupted the prosecutor during his argument during the penalty phase to question the proof of his guilt and accuse the posecutor of killing the victims. (R. 1024) The court excused the jury and reminded appellant that it was his duty to sit quietly while the prosecutor made his argument. (R. **1024-1027)** At the close of a the jury's recess, counsel again asked the court to find appellant to be incompetent to proceed. (R. **1027)** The court immdediately denied the motion and found that appellant was very competent and knew exactly want he was doing. (R. **1027)** Appellant did not thereafter again interrupt the proceedings. (R. 1023)

THE TESTIMONY ABOUT THE APPELLANT'S MENTAL HEALTH

The state presented the testimony of two psychiatrists on the question of appellant's competency to stand trial, Dr. Gonzalez (R. **1126-1157)** and Sprehe **(R. 1271-1291).** Appellant stituplated to their qualifications in both cases. (R. 1128) (Gonzalez) and (Sprehe). Both reached the conclusion that appellant as competent to stant trial. (R. 1129) (Gonzalez) and **1273** (Sprehe).

Gonzalez found his mood to be free of any abnormality and that he was well oriented as to time, place and person and that his memory was not imparied in so far as he could explore it. (R. **1130)** He said that appellant explained the roles of various court participants in the process to him. Gonzalez reported that appellant told him that he Public Defender was "defending him, helping him." (R. **1130)** Gonzalez went on to say that he and that

appellant denied commiting the offense and that he was with his children at their grandmother's at the time of the offense. (R. **1131)**

On cross examination, Gonzalez testified that he had used a typical psychiatric interview that used at the competency scale as well as a psychiatric clinical examination as well as obtaining a history and doing a mental status examination. (R. **1132)** Gonzales testified that dispite his apparent bordeline intelligence he was intelligent enough to communicate with counsel. **(R. 1133-1134)** Gonzalez testified that he found no evidence of a paranoid disorder. (R. **1134)** The witness stood by his conclusions. And was very explicit in his testimony that appellant had told him that his attorney was helping him. **(R. 1139)** In his final testimony, Gonzalez repeated his conclusion that appellant was not suffering from any mental disease or defect. (R. 1141)

Sprehe first stated that he had examined appellant to see if was competent to stand trial and to assist counsel in his defense. **(R. 1272)** He state, "It was my opinion that he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and he has a rational factual understanding of the proceedings." (R. **1273)** When asked to tell the court about what his interview with appellant revealed, Sprehe gave the following information. Appellant claimed not to know anything about the charge because he was not there. He was going to use an alibi defense and that he was not

going to use an insanity defense because he had a clear and head at the time. (R. 1273) Appellant made it clear that he understood he was charged with shooting two people and that one of the possibilities was that he could get the electric chair. He made it clear that he understood the adversary nature of the legal process in that he had been through the criminal courts on more than one occasion. (R. 1273) Appellant told him that he had understood the Miranda warning he had received. He said taht he had given a confession but was presently repudiating it. (R. 1274) He said that he understood that he could have a lawyer and that they could use whatever he said against him. Because of his prior experience in the criminal justice system he was "thoroughly aware of what goes on in courts." (R. 1274) He told Sprehe that he remembered being at his children's mother's house and that there were witnesses who would testify to such a state of affairs. When questioned about his statement to the police, appellant told Sprehe that he had been using cocaine heavily and that he had hurt. He denied, however, that he was using cociane on the day of the murder. (R. 1275) On discussing his relationship with his attorney, appellant told Sprehe that he felt that his attorney was competent but that he wanted another attorney as he thought that his attorney was against him in court sometimes. (R. 1276) Sprehe continued with his assessment saying that he thought that despite this he though that he had the ability to assist counsel in finding a defense and realistically challenging prosecution witnesses. He was also of the opinion

that appellant could manifest appropriate courtroom behavior, could testify relevantly, was motivated to help himself and had the capacity to discuss incarceration prior to trial. (R. 1276)

On cross examination, Sprehe told counsel that he had conducted a mental status examination of the appellant. (R. 1277) He described it as an objective evaluation of a person while they talked to you. He said it included an evaluation of attention, concentration, orientation, streme of speech, effect [sec], which is a display of emotionality, judgment, insight and then any psychotic manifestation such as hallucinations, illusions, obsessions, etcetera. (R. 1277) On the matter of the vis orm the mother, Sprehe testified that it was unclear to him whether this was dream of hallucination. (R. 1279) While agreeing that a hallucination could be a symptom of psychosis, hfe said that it could be a symptom of grief. (R. 1279) He said that such a reaction would be appropriate for a person in appellant's position. (R. 1280) He also pointed out that there was the third possibility that appellant was malingering as there were no other signs of psychotic thinking. (R. 1280) He said that the matter of seeing his mother was inconnection with a statement to the effect that he dreamed alot. (R. 1281) Sprehe was explicit in his finding of no finding of organic brain damage on the mental status examination. (R. 1283) When counsel suggest that this was not a very sensitive tool, the expert disagreed pointing to information he had received a week earlier at a professional conference. (R. 1284) When counsel suggested that

there was evidence of paranoid thinking associated with evidence of hallucination that suggested some type of psychosis, Sprehe responded:

> A. Well, would lend credence but let me explain that I think there's a simpler explanation. Mr. Thompson does not want to use an insanity defense and he hears his lawyer making various comments about his mental status which he interprets misunderstandingly as talking against him and he doesn't want to hear that sort of thing said about him. And so I think that's what he means when he says that you're talking against him.

The witness continued his explanation by observing that appellant was very clear that he did not want to use an insanity defense and did want to use an alibi defense and understood the difference. (R. 1287) He said that the though the simple explanation more nearly correct because appellant would go on to say that Alldredge seemed to be a competent lawyer. (R. 1288)

Dr. Bergland, a forensic psychologist formerly with the Florida State Hospital, testified first for the appellant. (R. 1143-1157) Bergland interviewed appellant for several hours on several occasions and gave him some psycholigical tests. (R. 1114-1145) He testified that appellant should be found incompetent to stand trial. (R. 1146) He said he reached this conclusion on the basis of his testing data, his clinical interview and a diagnostic interview which addressed the "issue contained in the rule." (R. 1146) He said that appellant had a flat effect, not showing emotion whether it was appropraite or inappropriate. (R. 1147) He said that appellant's low intellect

was patently observable. (R. 1147) He said that he use the WAIS to assess appellant's intellectual functioning. (R. 1148) Bergland did not assign any degree of reliability to these findings in this testimony. He said that this testing revealed a borderline to mild mental disorder. When asked about whether appellant displayed any evidence of hallucination, appellant described an occasion when appellant mention someone dead visiting him in his cell and that when he looked up he saw tears running down appellant's face. (R. 1149) It was his assessment that this was not a fake attempt. (R. 1149) Bergland continued and said that appellant described a pattern of hallucination typically seen in someone with and organic psychosis. (R. 1151) The trial court had ordered a NMR scan to detect brain damage but the results of that testing are not a part of this record. (R.1111) When asked about the criteria embodied in Rule 3.211, Bergland responded that appellant understood the mechanics of the court process witht the possible exception of the plea bargaining process. (R. 1151) He said that his testing indicated brain damage that cause a psychosis. (R. 1152) He said that appellant was a candidate for the Baker Act. (R. 1153) He said that the time he spent with appellant showed a genuine district of his attorney. (R. 1153) It was his opinion that appellant could not "a trusting working relationship with his attorney." (R. 1153) Bergland thought this was of his mental disease or disorder. (R. 1153)

Cross examination established that Bergland was able to communicate with appellant. (R. **1155)** When confronted with the fact that appellant apprehended the elements of an alibi defense and asked whether this was rational, Bergland did not answer the question. (R. **1156)** When asked whether he though appellant was incompetent because he has visions of his mother, Bergland responded, "No. Because he thinks his attorney is out to get him." (R. **1156)** He said that his experience with appellant must have been different that Gonzalez had on the matter of whether his attorney.

Appellant also presented the testimony of Dr. Maher a forensic psychiatrist. (R. **1157-1165)** Maher interviewed appellant for two hours and reviewed various records relating to him. (R. **1159**) He found appellant's mental capacity substantial inhibited in two respects and that the combination of those two problems rendered him unable to assist his attorney in preparing **a** defense. (R. **1159)** He said that they rendered him unable to help his attorney and because they affected his motivation to help himself in the legal process. (R. **1159-1160)** He said that appellant suffered from borderline mental retardation, an organic personality syndrome with paranoid traits and a substance abuse disorder. (R. **1160)** It was his opinion that the combination of the personality syndrome with its paranoid features and his borderline retardation rendered him unable to competently assist his attorney in his attorney.

On cross examination, Maher agreed that it was a fair assessment of his position that because he was stupid and did not trust his attorney that he was not competent to stand trial. (R. **1163)**

Petitioner offered the testimony of both of his experts during the penalty phase of the trial. Dr. Maher testified first. (R. **951-980)** He testified that appellant was not insane. (R. **958)** He told the jury that he found appellant to be functionally in the borderline mentally retarded range. (R. **959)** And, he said that he had found appellant to be suffering from an organic personality syndrome. (R. **961)** He told the jury that appellant suffered from psychotic thought patterns meaning that at times he would grossly misunderstand and distort what was going on around him. (R. **962)** It was his conclusion that appellant was under the influence of an extreme mental or emotional disturbance at the time of the offense. (R. **965)** He said that appellant was always suffering under a degree of distress. (R. **965)** He compared appellant's mental condition at the time of the offense as being like a normal person having their life or something important in their life threatened. (R. **965)** Maher also thought that appellant's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. (R. **965)** It was his assessment that appellant was the one who felt threatened at time of his crimes and killed in spite of his knowledge that what he was doing was against the law. (R. **966)** He said that

appellant had little choice but to react to the circumstances in which he found himself in an impulsive, hostile and murderous way. (R. 967) Given his with a lot against him and never had the opportunity to make the best of it. (R. 969)

On cross examination, the prosecutor challenged the expert's conclusions in light of the content of the tape. (R. 972-973) When question about why he did not kill at the cemetary office and what light that shed on his appreciation for the criminality of his conduct, Maher's response was that the killing was impulsive. (R. 974) He did not believe that appellant had planned to kill when he went to the office. (R. 974) Nor, did he believe that appellant had formed the intent to take them to a secluded area and kill them. (R. 976) He did not think that the tape showed that appellant killed the woman because she had slaped him and he was mad at her. (R. 977) He thought that appellant always function at a diminished level and that at times it would be more severe than others. (R. 978)

Dr. Bergland also found appellant sane at the time of the offense. (R. 988) He was of the opinion that appellant suffered from a biologically based psychotic disturbance. (R. 989) Based om the tests performed he was of the opinion that appellant was on the borderline between mild mental retardation and borderline intellectual functioning. (R. 992) He read the tests as indicating brain damage on the left side of appellant's brain. (R. 993) He thought that appellant was psychotic. (R. 993-994) He thought the brain damage was of long standing. (R. 995)

Bergland was of the opinion that while appellant could appreciate the criminality of his conduct his ability of conform his conduct to the requirements of the law was substantially impaired. (R. 1002)

On cross examination, Bergland agreed that the study of mans' mind was an inexact science. (R. 1004) He discussed several explanations as to differences in various experts conclusions. (R. 1004) He thought that appellant's interpretation of the events surrounding the murder was more the result of his paranoid thinking that his low intelligence. (R. 1006-1007) He did not recall that appellant had told the police that he had forced the victims into the car. (R. 1007) In describing his understanding of appellant's mental processes at the time of the offense he conceeded that appellant knew that he was in danger of being caught. (R. 1010) Nor, would Bergland dispute that appellant knew he would be introuble if he were caught. (R. 1012) He agreed that the evidence showed that appellat planned the killing but thought that appellant's psychotic reasoning explained why he did what he did. (R. 1013) And, Bergland agreed that however distorted appellant's reasoning might have been he had enough judgment to try and protect himself. (R. 1015)

VOIR DIRE

On the first day of voir dire the prosecutor asked propective jurors to indicate whether they or a member of their family had ever been charged with a crime. (R. **49)** Mr. Brooks

was one of the prospective jurors who answered affirmatively. (R. 60) He said that he had been arrested a couple of months earlier. (R. 61) The prosecutor exercised a preemptor challenge to excuse him from service. **(R. 317)** The appellant points out that the state did not exercise a peremptory challenge to excuse prospective juror Manning another prospective juror who had a criminal charge in his past. Counsel for the appellant exercised a peremptory challenge to excuse him prior to the prosecutor's peremptory challenge to excuse prospective juror Hilda Williams. **(R. 321)**

Under questioning by appellant's counsel, Bell revealed that his uncle had killed his wife some ten years ago in Hillsborough County and that the local state attorney's office prosecuted him for the offense. **(R. 238-239)** He had previously told the prosecutor that the uncle had gone to jail for the offense. (R. 60) When questioned about his decision to excuse this juror, Benito first pointed out that he had left Tyler, another black person on the jury. (R. **333)** After an argument as to whether he should be forced to explain his decision to exclude Bell, the court asked appellant's counsel whether Bell had said that a family member had been charged with murder. **(R. 335)** Appellant's counsel replied that it was clear that the prospective juror's mother brother had killed his wife. (R. **336)** Benito again asked how they could say that he had been systematically excluding blacks. **(R. 337)** After the trial court asked appellant's counsel whether he would be comfortable with a juror knowing that his

uncle had killed someone. Appellant's counsel responded that he would want more information. (R. 338) At that point, the prosecutor interjected that he was not comfortable with the fact that Bell was the brother of one of the state's witnesses. (R. 338) The trial court found at that point that the state was not systematically excluding blacks from the jury. (R. 339)

The state can not agree that juror King said that she had a brother in law who had been convicted of drug smuggling. What she said was that her brother in-law had been charged with a drug related problem and that he had pled guilty and received probation. (R. 452)

When asked about his decision to exclude Tyler, the prosecutor first alluded to the fact that he had been in jail. He next told the court that he was uncomfortable with the juror despite his assurance that he could be fair and impartial. (R. 537) Ne noted that Tyler had been in jail in ;the 50's and that it was his recollection of his school work that black people had not been treated very fairly during that era. He also called attention to the fact that when question initially, he mentioned only a DWI charge and not the assault charge he had revealed on his questionaire. (R. 538) After hearing from appellant's counsel, the trial court ruled, "The Court finds that the state has a reasonable basis for exercising a peremptory challenge as to Mr. Tyler." (R. 539) At that point the prosecutor stated his willingness to advance someone else who was black into the jury pool. (R. 539)

Appellant's argument urges that the state used its peremptory challenges against five prospective jurors who were not Witherspoon excludables illegally on the ground that their general opposition to capital punishment. Appellant did not object that this was an illegal basis for exclusion of these jurors to the court below. Nor, did he raise any but a Neal/Batson tyle objection to the state's use of peremptory challenges.

With regard to Mr. Olson, the trial court reject **a** challenge for cause because that he believed in aggravating and mitigating options and that he would follow the court's instructions. (R. 305) He did not say that he would not be able to follow the court's instructions. (R. 306)

With regard to Mr. Rakata, the trial court denied the challenge for cause stating, "But he did not say that he could not be fair and impartial. He said he would have a difficult time. Denied for cause." (R. 301)

THE FACTS SURROUNDING THE STATEMENT

Detective Childers testified about the circumstances surrounding appellant's statement. He state that he had read the rights from to appellant before questioning him. He stated that appellant had been in custody for an hour and forty-five minutes before questioning and that the questioning at about fourt o'clock in the afternoon. (R. 1170) As noted earlier this was not appellant's first contact with the criminal justice system and he had told Dr. Sphere that he understood his right to an

attorney and his right to remain silent at the time of his interview with the police. Childers demonstrate how he read the rights from to appellant. (R. 1117) He said that he paused after each question. He asked appellant if he understood and appellant said that he did. (R. 1172) He said that he talked with appellant about two to two and a half hours after expalining his rights to him. (R. 1173) He said that he did not experience any difficulty in communicating with him. (R. 1173) The officer testified that appellant initially gave hims an alibi for time of the offense. (R. 1174) After this portion of the interview that took him to and secured his consent to the taking of hair fingernail scraping and fingernails. (R. 1174) Childers then told a lesser technique which would reveal whether a person had fired a firearm. And, had someone from the Pinellas County Sheriff's Office bring the equipment over. (R. 1174) They demostrated that the lesser would not harm him. (R. 1175) Childers testified that after supplying goggles that would help appellant see "berium" he ran the light over appellant arm and pointed out several illuminated areas. (R. 1176) Whitfield, the officer working the apparatus then asked appellant whether he wanted to talk to the detectives. (R. 1176) After the lesser test, detective Childers took appellant to Sgt. Price's office and mad a statement admitting his involvement. (R. 1178) On cross examination Childers testified that at no time did appellant ask for an attorney. (R. 1184)

Appellant also presented the testimony of Dr. Maher. He testified that there was no way that appellant could have comprehended in any meaningful way the waiver of rights from he signed. (R. **1189)** He was also of the opinion that appellant did not understand that he had the right to remain silent in the face of the questioning and have an attorney appointed for him. (R. **1192)** He though that the machine might have been coercive. (R. **1194)** On cross examination, he had to agree that coming up with an alibi after being accused of murder was not the work of a two year old. (R. **1198-1199)** The doctor also had to agree that he had the right to remain silent and not answer questions and that it was possible that he understood he could have an attorney present. (R. **1200, 1201)** The doctor also said that they did not know whether appellant was acting reasonably or rationally at the time fhe formulated the alibi. (R. **1202-1203)** The court then listened to the tape and received the rights from into evidence. (R. **1205)** The court reporter's transcription of the tape appears at (R. **1206-1225).**

Appellant presented the testimony of Dr. Bergland next. (R. **1226)** He thought that appellant would have trouble understanding the consent form. (R. **1228)** He said that just because appellant said that he understood taht did not mean that he did. (R. **1230)** He thought that the tape was evidence that appellant did not understand his rights. (R. **1232)** It was his understanding of the tape that appellant knew that he could have and attorney but that the cost of one meant that he could not have one present. **(R. 1235)**

After listening to the argument of counsel, the trial court denied the motion subject to the caveat that if he heard the "yeah" then he would suppress the balance of the statement. (R. 1253-1254) The trial court denied the motion in its entirety. (R. 1339)

SUMMARY OF THE ARGUMENT

I.

1. Bonnano was not serving as a de facto circuit judgae addording to the findings of fact below.

2. There is no basis in the record for appellant's conclusion that anything Bonnano said cause appellant not to cooperate with counsel. This is not case where there was deliberate interference with appellant's right to counsel.

3. Appellant claim to an evidentiary hearing has been procedurally defaulted.

4. The trial court conducted an appropriate inquiry into appellant's claims fo racially motivated excusals. And, there is adequate support in the record to support the trial court's ruling in this regard. The Gray v. Mississippi, challenge has been procedurally defaulted and is without merit.

5. The trial was in the best position to evaluate appellant's challenges for cause. And, the record shows no abuse of discretion in its application of the appropriate standard.

6 & 7. Appellant did not make a clear an unequivocal request to represent himself. The trial court explored his reasons for dissatisfaction with counsel and found no sufficient basis for counsel's discharge.

8. Appellant has procedurally defaulted a challenge to the state's expert. The facts show that the trial court's decision on competency was correct.

9. Appellant asks this court to substitute its judgment for that of the fact finder on the question of whether he made an equivocal request for counsel. Any pressure appellant felt to confess came from within and there is no prohibition against using technology to confront an accused with his falsehood. The evidence before the trial court including appellant's prior experience with the criminal justice system and his telling Dr. Sprehe that he understood his rights support the trial court's decision not to suppress his statements.

10. Appellant did nto remain silent and there was nothing for the state to comment on.

11. Appellant voluntarily left the courtroom his lawyer acquiesed and draft an instruction saying he had an absolute right to be absent. His absence did not efefct the fairness of the trial and he made no effort to reclaim presence until after the jury was gone and security was too weak to let him out.

12. Testimony about appellant's trial behavkior at the penalty phase was irelevant because his behavior was not evidence.

13. The court has authoritatively rejected appellant's Caldwell claim.

14. The fact finder was not obliged to believe appellant's expert's interpretation of the evidence of heightened premeditation in the face of contradictory evidence. The facts are simply inconsistent with self defense.

15. The crime was henious atrocious and cruel because of the extended period of time the victims were in fear for their lives. And, the Maynard v. Catwright, analysis is not applicable in Florida on its face.

16. It is well settled taht unscored capital convictions support departure and that where there have been such departures this court finds that regardless of any techical error the sentence would have been entered.

17. Focusing on an abstraction missess the point. But, the question remains open before the Supreme Court.

18. Appellant takes as established that which was indispute adn asks the court to move along on a never ending path of review in the proportionally analysis he advances. The correct analysis shows that the punishment was proportionate to the offense and the offender.

ARGUMENT

ISSUE I

DESPITE HIS REPEATED "TEMPORARY" APPOINTMENTS TO THE CIRCUIT BENCH, COUNTY JUDGE BONNANO LACKED JURISDICTION TO PRESIDE OVER THIS CAPITAL CASE.
(As stated by Appellant)

ISSUE II

THE TRIAL JUDGE POISONED THE RELATIONSHIP BETWEEN THOMPSON AND HIS PUBLIC DEFENDER AND THEN REFUSED TO APPOINT NEW COUNSEL.
(As stated by Appellant)

ISSUE III

THE TRIAL COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING ON WHETHER THE TELEVISION CAMERA IN THE COURTROOM WOULD INHIBIT THE CANDOR OF PROSPECTIVE JURORS ABOUT THEIR RACIAL BIAS AND ON WHETHER THE CAMERA WOULD INCREASE THE CHANCE OF A GUILTY VERDICT.
(As stated by Appellant)

ISSUE IV

THE PROSECUTOR DID NOT PROPERLY EXPLAIN WHY HE PEREMPTORILY CHALLENGED FOUR BLACK JURORS, BECAUSE (1) HE GAVE NO REASONS AT ALL FOR EXCLUDING ONE BLACK JUROR, (2) THE REASONS HE GAVE FOR CHALLENGING SOME BLACK JURORS ALSO APPLIED TO WHITE JURORS WHOM HE DID NOT CHALLENGE, AND (3) "WEAKNESS" ON THE DEATH PENALTY IS AN ILLEGAL REASON FOR EXCLUSION.
(As stated by Appellant)

ISSUE V

THE COURT SHOULD HAVE EXCUSED THREE JURORS FOR CAUSE RATHER THAN FORCED THE DEFENSE TO USE PEREMPTORY CHALLENGES; ONE PROSPECTIVE JUROR AND BUSINESS CONNECTIONS WITH THE VICTIMS WHICH WOULD HAVE INFLUENCED HER JUDGMENT, A SECOND JUROR WOULD AUTOMATICALLY HAVE BEEN IN FAVOR OF DEATH FOR ALL PERSONS CONVICTED OF PREMEDITATED MURDER, AND A THIRD JUROR WOULD

HAVE BEEN IMPROPERLY INFLUENCED BY GORY PHOTOGRAPHS.

(As stated **by** Appellant)

ISSUE VI

THE TRIAL COURT FAILED TO MAKE THE CONSTITUTIONALLY MANDATED INQUIRY WHEN THE DEFENDANT REQUESTED THAT HE BE ALLOWED TO REPRESENT HIMSELF OR, ALTERNATIVELY, THAT NEW COUNSEL BE APPOINTED FOR HIM.

(As stated **by** Appellant)

ISSUE VII

THE TRIAL JUDGE IMPROPERLY FAILED TO DETERMINE WHETHER THOMPSON HAD GOOD CAUSE TO BE DISSATISFIED WITH HIS LAWYER.

(As stated **by** Appellant)

ISSUE VIII

THE TRIAL COURT PREDICATED THE ORIGINAL COMPETENCY DECISION ON INVALID EVIDENCE: MOREOVER, THE COURT SHOULD HAVE HELD A SECOND COMPETENCY HEARING BECAUSE EVENTS AT TRIAL GAVE REASONABLE GROUNDS FOR BELIEVING THAT THOMPSON AND BECOME INCOMPETENT DURING THE COURSE OF THE TRIAL.

(As stated **by** Appellant)

ISSUE IX

THE TRIAL COURT IMPROPERLY ADMITTED AS EVIDENCE THOMPSON'S TAPED STATEMENT TO THE POLICE, BECAUSE THE POLICE (1) DID NOT INSURE THAT THOMPSON UNDERSTOOD HIS RIGHTS AND INTELLIGENTLY WAIVED THEM, (2) COERCED HIS CONFESSION BY USING A LASER ON HIM, AND **(3)** DID NOT SCRUPULOUSLY HONOR HIS DESIRE FOR THE ASSISTANCE OF COUNSEL.

(As stated **by** Appellant)

ISSUE X

THE STATE IMPROPERLY COMMENTED ON THOMPSON'S RIGHT TO SILENCE AND RIGHT TO COUNSEL BY INTRODUCING THOMPSON'S STATEMENT THAT HE HAD ASKED FOR A LAWYER BUT COULD NOT AFFORD ONE.

(As stated **by** Appellant)

ISSUE XI

THOMPSON WANTED TO BE ABSENT FROM THE COURTROOM ONLY DURING CLOSING ARGUMENTS; HE DID NOT WAIVE HIS RIGHT TO BE PRESENT WHEN THE JURY RETURNED ITS VERDICT AND WAS POLLED.
(As stated **by** Appellant)

ISSUE XII

DURING THE PENALTY PHASE, THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW THOMPSON TO REBUT AND TO MITIGATE THE ADVERSE INFERENCES THAT THE JURY AND THE COURT MIGHT HAVE DRAWN FROM HIS COURTROOM CONDUCT.
(As stated **by** Appellant)

ISSUE XIII

FLORIDA'S STANDARD JURY INSTRUCTIONS IMPROPERLY MINIMIZE THE CAPITAL SENTENCING JURY'S ROLE DURING THE PENALTY PHASE, AND, THEREFORE, THE TRIAL COURT SHOULD HAVE READ TO THE JURY A REQUESTED INSTRUCTION WHICH WOULD HAVE EMPHASIZED THE JURY'S IMPORTANT ROLE.
(As stated **by** Appellant)

ISSUE XIV

THE KILLINGS WERE NOT COLD AND CALCULATED, BECAUSE (1) THE EVIDENCE WAS SUSCEPTIBLE TO THE CONCLUSION THAT THE KILLINGS WERE NOT COLD AND CALCULATED, **(2)** THE KILLINGS WERE COMMITTED WITH A PRETENSE OF LEGAL JUSTIFICATION, AND **(3)** THE INTENT NECESSARY FOR THE KIDNAPPINGS COULD NOT JUSTIFY A FINDING OF THIS AGGRAVATING CIRCUMSTANCE.
(As stated **by** Appellant)

ISSUE XV

THE KILLINGS WERE NOT HEINOUS, ATROCIOUS, OR CRUEL, BECAUSE THE EVIDENCE DID NOT SATISFY A CORRECT UNDERSTANDING OF THE VAGUELY DEFINED AGGRAVATING CIRCUMSTANCE.
(As stated **by** Appellant)

ISSUE XVI

THE SCORESHEET WAS INCORRECT AND THE REASON FOR DEPARTURE INVALID.
(As stated **by** Appellant)

ISSUE XVII

EXECUTING THE MENTALLY RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

(As stated **by** Appellant

ISSUE XVIII

THE SENTENCES OF DEATH IN THIS CASE ARE DISPROPORTIONATE BECAUSE THOMPSON SUFFERED FROM MENTAL RETARDATION, BRAIN DAMAGE, MENTAL ILLNESS, A LOW EMOTIONAL CAPACITY, AND AN IMPOVERISHED UPBRINGING; IN ADDITION, THE KILLING PROBABLY OCCURRED UPON REFLECTION OF ONLY A SHORT DURATION.

(As stated **by** Appellant)

ARGUMENT

I.

Appellant's argument is without merit on two grounds. The circuit court found as a matter of fact that Bonnano had not be acting as a de facto circuit judge. the assignment had been limited in type and of limited duration. This brings the case within the ambit of the limitations of Payret v. Adams, 500 So.2d 136 (Fla. 1986). And, appellant had a circuit judge rule on his motions. Before the commencement of trial, Judge Graybill adopted all of Bonnano's rulings as his own.

11.

Appellant's argument offers no basis for reversal. His argument pushes the record for more that it will support in characterizing it as an attack on counsel's competency. All that Judge Bonnano did say was that if Alldredge would put his time problem in writing then he would appoint private counsel. (R. 1384-1385) Bonnano did not suggest that Alldredge was incompetent or was working to the detriment of appellant's interest. Appellant was present for the continuance hearing on January 9, 1987 and heard his counsel represent the progress that counsel had made in following up his leads and in what remained to be done. (R. 1392-1396) And, there was extensive discussion about following up on leads and developments in the case during that hearing.

The case law to which appellant's argument points is readly distinguishable. Unlike the situation presented in Commonwealth

v. Manning, 373 Mas. 438, 367 N.E.2d 635 (1977) no one went behind counsel's back to try and convince appellant to become an informer by telling him his lawyer was no good. Nor, unlike the situation in People v. Moore, 57 Cal. App.3d 437, 129 Cal. Rptr. 279 (1976) was there any attempt to dissuade appellant from contact with his attorney or false implication's of inadequacy and disbarment. At worst, Judge Bonnano displayed impatience. Appellant's argument offeres no basis for reversal much less dismissal of the charges.

By no stretch of the imagination can Bonnano's remarks be stretched into a threat to take out anger against appellant's counsel by his conduct of the trial. This case is no Walberg v. Israel, 766 F.2d 1071 (7th 1985). Even if Bonnano's comments could be classified that way, appellant got a trial in front of a different judge, the relief granted in Walberg.

It is simply unfair to say that Bonnano induced appellant not to cooperate with his counsel. Alldredge's comments during the January 9 hearing show that appellant was cooperating.

111.

Appellant has procedurally defaulted his television claim. The trial court correctly denied it on the ground that it was late. Judge Graybill made it very clear that counsel could have anticipated television coverage earlier than the commencement of trial at 3:00. (R. 6-8) The trial judge also found no evidence that anyone would be prejudiced by the presence of the camera. He left it open for counsel to show prejudice if it might

develop. (R. 6) Appellant did not make that claim during trial. Appellant offers post hac claims of prejudice.

Appellant's argument's attack on Maxwell v. State, 443 So.2d 967 (Fla. 1983) was not presented to the court below and is not appropriate here for the first time. Even if it were, it would have to be found to be without merit. It is sadly out of touch with the realities of criminal practice. It is easy to anticipate when there is going to be media coverage. Reporters will have been hanging around for the pretrial proceedings. It is unlikely that defense counsel is going to tip off a radio or television station if they have already been covering a case. Should media attempt to evade notice, then it is a simple thing to call this to the trial court's attention. Appellant's argument is a make weight and should be rejected as much.

IV.

State v. Neil, 457 So.2d 481 (Fla. 1984) clarified ~~sub nom.,~~ State v. Castillo, 486 So.2d 565 (Fla. 1986) makes it clear that a prospective juror can not be excused solely of the basis of race. And, State v. Slappy, 522 So.2d 18 (Fla. 1988) require the state to bear the burden of proof that the peremptory challenges were not used in a discriminatory way once the issue is properly raised. A failure to demonstrate a "strong likelyhood" of discriminatory use of peremptory challenges ends the matter and the trial court need not make any further inquiry. Parker v. State, 476 So.2d 134, 138 (Fla. 1985). As noted in Woods v. State, 490 So.2d 24, 26 (Fla. 1986), the simple exclusion of a

substantial number of potential black jurors is not a sufficient basis for concluding that the trial court committed reversible error in not conducting a further inquiry. ~~See also~~ McCloud v. State. 517 So. 2d 56, 58 (Fla. 1st DCA 1987) but see Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987) (objection to striking sole member of defendant's race sufficient to trigger inquiry).

This appellant did not make that showing. The trial court went further than it had to in inquiring of the prosecutor. Reference to the statement of fact in this brief shows that the factual basis for appellant's claim the blacks were excluded where white's with similar characteristics were not simply is without merit.

Appellant's attack on the state's use of its peremptories other than for racial purposes has been procedurally defaulted by the failure to present the claim to the court below. The state submits that Justice Powell and the dissenters in Gray v. Mississipi, 481 U.S. ____, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) were eminently correct in their assessment of the constitutionality of the use of the state's peremptory challenges to exclude death penalty opponents who were not other wise Witherspoon v. Illinois, 391 U.S. 510 (1968) excludables.

V.

Review of a trial court's decision not permit a challenge for cause is pursuant to an abuse of discretion standard. As trial court's enjoy broad discretion in ruling on challenges for cause. Singer v. State, 109 So.2d 7, 23 (Fla. 1959) The question

of whether a given juror should be stricken for cause is a mixed question. More recently this court has characterized the question of the application of the Singer standard for excusal as a mixed question upon which the trial court's ruling must not be disturbed absent manifest error. Hill v. State, 477 So.2d 553, 556 (Fla. 1985).

As the supplemental statement of fact in this brief shows Judge Graybill found that each of these jurors would act on the basis act on the basis of the law and the evidence. This case does not show the kind of strong commitment to preexisting conditions which this court has found to justify reversal. To follow appellant's line of reasoning would be an open invitation to abuse these jurors had no preconceived and strongly held commitment to ideas that would automatically reject appellant's defense as was the case in Moore v. State, 525 So.2d 870 (Fla. 1988).

VI. & VII.

Appellant's claim that there is Faretta California, 422 U.S. 806 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) error in this record is without merit because it lacks factual support. Appellant never claimed the right to self representation. His lawyer said that he had mentioned self representation to him but when he had hsi opportunity to address the court he did not ask to represent himself. He asked instead for private counsel. The trial court conducted an appropriate inquiry about his dissatisfaction with counsel an found no basis for discharge of counsel.

Appellant attempts to fashion some type of per se reversible error applicable to the facts of this case out of Hardwick v. State, 521 So.2d 1071 (Fla. 1988); 863 (Fla. 1986) and Jones v. State, Johnson v. State, 449 So.2d 253 (Fla. 1984). But, reference to these cases shows that the trial court acted properly. Appellant made it very clear that he wanted a private attorney from start to finish of his trial.

It is well settled that an accused does not have the right to the appointment of any particular lawyer. Thomas v. Wainwright, 767 F.2d 738 (11th Cir.) cert. denied 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1985) When a defendant asks to discharge his appointed counsel, the court is obliged to examine the reasons given to determine their adequacy. Johnson v. State, 497 So.2d 863, 867 (Fla. 1986); Williams v. State, 427 So.2d 768, 770 (Fla. 2d DCA 1983). Bonnano had heard the public defender's motion to withdraw predicated on appellant's desire for private counsel ad found it to be without merit. As this court observed in Johnson v. State, 497 So.2d at 868 citing Thomas general loss of confidence or trust standing alone will not support withdrawal of counsel. A fair reading of the record shows that the court did give appellant an opportunity to state his problems with counsel. Graybill also heard appellant's complaints. He never did set forth an adequate basis for discharge of counsel.

VIII

Appellant's point is without merit as it treats that which was in conflict as resolved in his favor. As the review of the

mental health testimony shows there was conflict over appellant's mental health. His doctors found him to be paranoid and suffering with brain damage. The two other doctors did not. Appellee sees the gist of the defendant's expert opinion about a lack of competency to stand trial as the paranoia not the mental retardation. And, there was sharp conflict between the experts as to the existence of this condition. And, it is clear that Judge Graybill was sensitive to the issue and watched for signs of imcompetency.

Appellant argees that a fifth expert was mandated under Section 916.11 (1)(d) Florida Statutes (1985). But, appellant did not make this point to the court below. It has, accordingly, been waived. Cf. DeOleo-Valdez v. State, No. 71,760 (Fla. October 13, 1988) [13 F.L.W. 6181.

IX.

Appellant argues that his statement should have been suppressed on three grounds, that he did not make a voluntary intellegent waiver of his rights, the use of the laser was coercive and that the police did not honor his desire for counsel. Each point is without merit.

Appellant's argument correctly recognizes it is to the totality of the circumstances that the trial court must look in evaluating a claim that as statement or confession should be suppressed. The trial court's ruling comes before the reviewing court with a presumption of correctness. And the reviewing court is not to subsitute its decision for that of the trial court even

though it might have found the facts differently. Wasco v. State, 505 So.2d 1314 (Fla. 1987).

Much as appellant's argument tries to distinguish them, Kight v. State, 512 So.2d 922 (1987) and Ross v. State, 386 So.2d 1191 (Fla. 1980) show why the trial court's ruling on voluntariness and intelligence should not be disturbed. Appellant was no stranger to the criminal justice system. This is a relevant circumstance in a court assessment of the admisability of statement or confession. Fare v. Michael C., 442 So.2d 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) He had told Sprehe that he understood his right to counsel and to remain silent. The state attorney's cross examination of appellant's experts showed just how little value their conclusion on the issue of voluntariness and intelligence were.

There was nothing coercive about the use of the laser to examine appellant for evidence of having shot a gun. Whatever pressure appellant felt arose within him. This court has made it clear that when this is the case, there is no improper psychological coercion. Thomas v. State, 456 So.2d 454 (Fla. 1984) Even if the police had lied to appellant this would not have been enough to support a finding of improper coercion Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) cited in Martin v. Wainwright, 770 F.2d 918, 927 (11th Cir. 1985).

In advancing his Edward v. Arizona, 451 U.S. 477 (1981) claim appellant is asking the court to substitute its judgment

for that of the fact finder. The trial court made it clear that it would listen to the tape and that if it found an Edward violation it would suppress everything that came after appellant's statement about counsel. The trial court denied the motion apparently finding that after listening to the tape there had been not even an equivocal invocation of the right to counsel. This court is not to substitute its evaluation of the evidence for that of the fact finder on that issue.

X.

Appellant complains that the state commented on his exercise of his rights. As established in the previous arguments, appellant neither exercised his right to remain silent nor his right to counsel.

XI.

Appellant voluntarily left the courtroom. And, his counsel had the jury instructed that he had an absolute right to leave. His counsel was present and his counsel acquiesced in his absence from the rendition of the verdict and the polling of the jury. (R. 897) His absence was not at any stage where his presence was critical to a fair trial. And, appellant had no effort to reclaim his right to be present for these proceedings. Illinois v. Allen, 397 U.S. 337 (197?). This case is distinguishable from Sommeralls v. State, 37 Fla. 162, 20 So. 242 (1896) because counsel participated with appellant's apparent acquience. It does not have the same invited error component as this trial has.

XII.

Appellant's claim that he should have been allowed to present evidence about his courtroom behavior during the penalty phase is without merit because it rests on the erroneous assumption that a jury can consider such evidence in its deliberations. The jury was instructed that it was to look only to the evidence. (R. 1490)

XIII.

Appellant's argument correctly recognizes that his claim of error under Caldwell v. Mississippi, 472 U.S. 320 (1985) is without merit under Combs v. State, 525 So.2d 853 (1988).

XIV.

Appellant asks the court to substitute its judgment for that of the trial coaurt on the question of whether the murders were cold calculated an paremeditated. His argument relies on Harmon v. State, 527 So.2d 182, 188 (Fla. 1988) But, the evidence here supports the conclusion that this was a planned robbery murder in which appellant removed his victims to a more private place to carry out his plan to kill. Neither thejudge nor the jury was obligated to accept appellant's expertise interpretation of the evidence where as here there was a reasonable explanation to rebut it. Unlike other case this is a case where the claim of self defense is contradicted by the record. The famale victim had been incapacitated by his stab wound before the fatal shot had been fired. And there was not even a claim fo self defense with regard to the famale victim.

XV.

As appellant correctly recognizes he waived his Maynard v. Cartwright, 486 U.S. ____, 108 **S.Ct.** ____, 100 L.Ed.2d 372 (1988) claim by his failure to raise it below. Even if it had been raised it would have to be found to be without merit. The decision expressly distinguishes the Florida Statute. And, focusing as it does on the victim's state of mind it was clearly appropriate as both victim's were held in fear for their lives at least from the time of their removal from the cemetery office.

XVI.

It is clear beyond all doubt that regardless of any scoresheet error that there might have been the trial court would have departed to the maximum extent allowed by law. The existence of unscored capital felonies is a more that sufficient basis for that decision. See e.g. Torres-Arboledo v. State, 524 So.2d 403, 414 (Fla. 1988).

XVII.

The jury did not recommend and the judge did not sentence an abstraction to death. They had the conflicting information about the appellant's intellegence and emotional development before them. If the United States Supreme Court decides Penry v. Lynaugh, against the state, then that will be the end of the matter. But, this court should not let people's ideas about abstractions control over the measured consideration of this particular offender adn his offense that was the product of the process below.

XVIII.

Appellant invites this court to climb on board a never ending train of trying to compare this case with other reported cases. That is not the way to conduct a proper proportionality review. It is an open invitation to never ending controversy. If a propoetionality review is to be conducted it is to see whether the sentence is proportionate to the offense and the offender. The aggravating factors were clearly established. The mitigating factors were not of the type that can be accorded great weight for to do so demeans the millions of other citizens who labored unde the same or similarly difficulties without the destructive consequences this offender showed. It is not without reason that the Officer Krumpke defense of West Side Story is a joke. The court should not allow itself and the law to become a target of mockery by following appellant line of argument on the proportionality of his death sentences.

CONCLUSION

Based on the foregoing reasons and arguments and authorities this court should affirm the lower court's decision.

Respectfully submitted,

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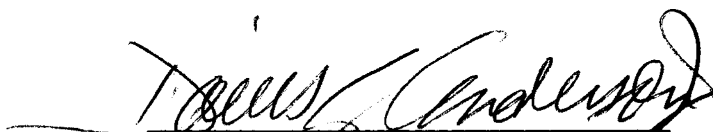
ATTORNEY GENERAL



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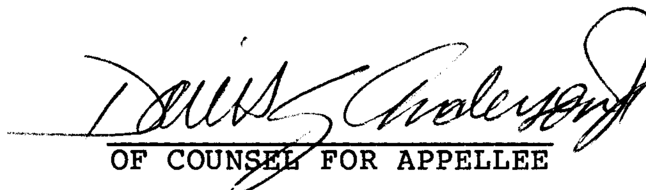
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Stephen Krossell, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830 on this 22d day of November, 1988.



OF COUNSEL FOR APPELLEE