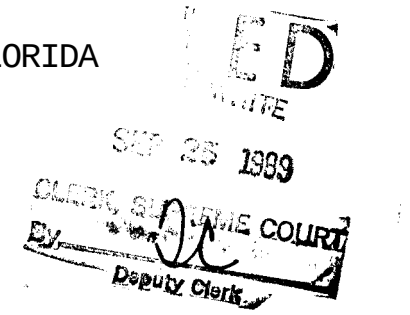
IN THE SUPREME COURT OF FLORIDA



MELVIN TROTTER,
Appellant,

v.

STATE OF FLORIDA,
Appellee

Case. No. **70,714**

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

ANSWER BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

I. Appellant failed to show any prejudice arose from the allegedly improper denials of challenges for cause. It is not enough merely to exhaust peremptory challenges and to seek an additional challenge without demonstrating that the additional challenge is necessary to remove an objectionable juror. The fundamental rationale for permitting appeal of voir dire issues is to protect the defendant from being tried by a panel on which an objectionable juror had to be accepted. In this case, defense counsel did not state that he found any juror on the panel which served who was objectionable, nor does the record show any juror to be objectionable.

Juror Woods did not remember any prejudicial elements of the news story until informed of those elements by defense counsel, over the objection of the state. Even after she was prompted on the contents of the story, the questioning shows she had formed no preconception about the case, or, if she had, she was able to set it aside. The court and counsel have an obligation to inform jurors of their role in a trial, and that educating process, as shown in this record, does not amount to the overbearing persuasion complained of by appellant.

Knowledge of an attempted plea bargain where the defense is not that the defendant didn't kill, but to what degree is the defendant culpable. Sirhan.

Juror Schmidt successfully resisted the leading questions of the defense and established he was able to set aside any preconceptions. Also, he did not remember much of the news coverage.

Jurors Bradshaw and Beighle each clearly stated four separate times they would be able to set aside any preconceptions, and the trial judge was in the best position to determine their reliability on this assertion.

11. The defendant failed in his burden to allege or show prejudice resulting from the de minimus telephone contacts. The contact occurred during the interim between the charge to the jury and the start of deliberations. The rule of Livingston should apply only after the deliberations actually begin,

III. The assistant state attorney recalled nothing of his representation of Trotter seven years earlier in a minor, unrelated case. The constitution does not require disqualification of an attorney under such circumstances.

IV. This Court should not interfere with the trial judge's determination that juror Burse could not serve. In the face of an equivocal record, the trial judge's ruling must be given deference, as he was better able to observe the mien and demeanor of the juror.

V. Appellant waived the issue of whether community control constitutes "imprisonment." Issues relating to aggravating and mitigating factors may be waived, and frequently are for tactical reasons. Whether the instant waiver was tactical or oversight is not appropriate for direct review, although the record clearly suggests tactical reasons for the waiver. Even if not waived, community control is "a harsh and more severe alternative to" probation, and has been held to fall between incarceration in a county jail and incarceration in a state prison. It has also

been equate to probation, which has been held to be "imprisonment" for purposes of capital sentencing.

VI. The drawings were a nonessential part of appellant's penalty phase strategy. Defense counsel didn't even know Trotter drew until the day of the hearing, and apparently had not seen them until Trotter produced them in the courtroom. Counsel was free to argue the fact of the drawings, and other matters related to the drawings, but he didn't mention any of that in his argument. The error was harmless or cured when the jury received the drawings. The error, if any, was further ameliorated because defense counsel had the opportunity to argue the drawings to the judge at sentencing, but only mentioned "artistic ability" in passing, an argument he could have made equally as validly to the jury.

VII. The challenge to the instruction was not preserved as no objection was registered at trial. This Court has already addressed the issue adversely to appellant in Smalley.

VIII. The facts enumerated in support of the aggravating factor of heinous, atrocious, or cruel, more than support the circumstance, regardless of the store/home analogy. The critical factor is not the victim's ownership of the store, but her long-term and close connection to the place of her evisceration, a circumstance equally applicable to a lifelong and faithful employee. This sets the killing apart from those occurring in chain convenience stores or other impersonal public places.

ARGUMENT

ISSUE I

NO ERROR IS SHOWN IN THE JURY SELECTION PROCESS RELATING TO PREJUDICIAL PUBLICITY

A. NO PREJUDICE SHOWN

Appellant relies on Hill v. State, 477 So.2d 553 (Fla. 1985), cert, denied, ___ U.S. ___, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988), for the principle that merely requesting an additional peremptory challenge is sufficient to show prejudice resulting from erroneous denial of a motion to excuse for cause. This is simply not the case.

In the final sequence of jury selection, the state accepted the panel of twelve jurors, including the twelfth juror, Semons. R1199-1200. At the time the state accepted the panel, four jurors remained in the venire. R1200. After the state accepted the panel, defense counsel made the following motion:

> We're moving for an additional peremptory challenge. We feel that, one, in the interest of justice, we should be permitted it; and secondly you know, had we not had to use up a peremptory on Mrs. Woods, I think we would have been entitled to exercise more discretion in picking the jury.
>
> So we're simply asking the court for one additional peremptory challenge.

R. 1200. The judge denied the motion. Both the state and the defense accepted the next juror in line, Beachy, as the alternate juror. R1200.

Logically, faced with the state's acceptance of the panel, the only way the defendant could have used an extra peremptory challenge would have been to strike juror Semons or to back-strike, if the *judge* would have permitted that. However, defense

counsel made no attempt to exclude Semons for cause at any point during the voir dire. Nor did he attempt to have Semons excluded for cause after his motion for a peremptory challenge was denied. Defense counsel expressed no dissatisfaction with Semons, or with any other juror remaining on the panel. A review of every statement by Semons during voir dire fails to suggest any reason she was objectionable, either for a peremptory strike or for cause.[1]

The situation, therefore, is one where defense counsel

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1. Individual voir dire: **R761** (Semons says she scanned an article about the trial the night before, but didn't remember anything); **R762-63** (Semons hadn't read much about the case, wouldn't let it influence her as a juror); **R764** (no opinion about the death penalty); **R766** (could impose death penalty); **R767** (apparenlty enthusiastic response to proposition that life imrisonnent might be proper penalty in some cases, not necessarily death--"Oh, yes . . . That's right . . . Yes."); **R768** (understands that death is imposed in more serious cases); **R770** (reasserts she could vote for death); **R772** (reasserts minimal recollection of newspaper story); **R774-75** (life imprisonment more appropriate than death if defendant is mentally distrubed or in a blind rage, not knowing what he was doing); **R783** (defense has **no** challenge to Semons at close of group interview, but individual interview as to her exposure to the newspaper article ensues); **R784-87** (Semons voir dired alone about article - states she only scanned one article the day before, recalled reading an article at the time fo the murder, but recalled no details--unable even to recognize Trotter's name until informed that was the name of the defendant, R786--and further asserted ability to set aside any recollection from the paper--defense has no objection at close of individual voir dire, no challenge for cause).

General voir dire: **R861** (personal introduction at start of general voir); **R876** (reasonable doubt standard acceptable to Semons); **R905-06** (no problem serving as juror for two weeks, except for missing Bingo); **R915** (people should be held accountable for their actions--response is consistent with other jurors in "roll call" poll of most or all jurors on this issue); **R938** (justice should be color blind--consistent with "roll call" responses); **R1054-56** (general interview with defense counsel -- defense counsel asks all the jurors whether they smoke -- Semons does); **R1058** (Semons notes her husband has been honored for his work in voactional rehabilitation); **R1096** (Semons explains presumption of innocence in her own words -- comment about wanting to hear both sides of the story provokes prolonged voir dire of entire panel regarding burden of proof, R1097 et seq,); **R1127-28** (state should prove all elements of a crime beyond a reasonable doubt); **R1137** (if state proved a defendant probably did a crime, he might be guilty, but not of first degree murder); **R1179** (Semons says she could stick to a decision if she thought she was right); **R1187** (Semons would be willing to serve on this jury, amidst varied responses ranging from enthusiasm to distaste in "roll call" poll).

sought an additional peremptory strike, but without indicating he found any juror specifically objectionable at the time of the motion, In fact, it may well be that defense counsel sought the additional strike solely to preserve the unsuccessful challenge for cause of juror Woods, as she was expressly mentioned in the motion. This had the potential of creating the illogical Hobson's choice discussed in the note infra, Upon winning the motion for an additional peremptory, defense counsel would have been compelled to strike Semons since Hill purportedly requires exhaustion of all peremptories and denial of a request for more. But Semons was an especially attractive defense juror since she showed apparent enthusiasm for the option of life imprisonment rather than death if the killer was in a blind rage, R774-75, the precise defense raised here. Had appellant stricken Semons and won an additional peremptory, he would have been forced to strike Beachy, the alternate who was accepted despite defendant's option to strike, and seek an additional peremptory challenge.

Forcing a defendant to exercise a peremptory challenge when the court erroneously denies a challenge for cause is not, alone, reversible error. Withers v. State, 104 So.2d 725 (Fla. 1958) (no error where challenged jurors were dismissed by peremptory challenge and defendant had not exhausted peremptory challenges when jury was finally accepted).

This is so even when the defendant ultimately exhausts his peremptory challenges. In Rollins v. State, 148 So.2d 274 (Fla. 1963), the defendant exhausted his peremptory challenges. With one seat remaining to be filled, the defendant voir dired a final juror but did not move to strike the juror for cause. The juror

was seated on the panel. This Court held that the defendant "has not shown that he was thereby required to accept an objectionable or unqualified juror after he exhausted his peremptory challenges," 148 So.2d at 275-76. The Court examined the nature of the voir dire of the final juror, and found nothing "objectionable or unqualified" about the juror, So too, Semons is neither objectionable or unqualified in this case, based on the unfettered voir dire defense counsel undertook, nor did defense counsel move to strike her for cause. [2]

With this historical background, the decision in Anderson

2. In Longshore v. Fonrath Chevrolet, Inc., 527 So.2d 922 (Fla. 4th DCA 1988), the Fourth District looked to Rollins for guidance in determining what constituted an "objectionable juror" for purposes of showing prejudice for an improper denial of a challenge for cause. Rollins set the base line for jurors subject to striking for cause. However, the Longshore court then noted the subsequent decision in **Hill** and, based on the principle that additional peremptory challenges would have to be sought and denied, concluded that an "'objectionable' juror is one subject to challenge either for cause or peremptorily.

The Longshore decision would appear to lend support to the view that **Hill** requires merely seeking additional peremptory challenges, without an attempt to exercise such challenges on a juror. However, the distinction the Longshore court concerned itself with was unnecessary to its decision. If a final juror is seated who should have been stricken for cause, then the seating of that juror is, alone, sufficient to reverse for a new trial, regardless of any prior errors in denying challenges for cause. This, of course, presumes that the defense preserved the issue of striking the final juror for cause by moving to do so. Absent a motion to strike for cause, the court should assume that the defendant waived the strike, either for tactical reasons or because of attorney error, an issue which is not cognieable on direct appeal. Removing the "for cause" factor from the definition of an "objectionable" juror, the Longshore rationale is reduced to that of all other cases--i.e. error has occurred if the defendant is forced to accept a juror he would have stricken had he had an additional peremptory challenge, It is easy to determine that the complaining party in Longshore would have stricken the jurors he was forced to accept, because "counsel for appellants stated on the record that he would have peremptorily challenged jurors eleven and twelve but could not" because the court had denied challenges for cause earlier in the jury selection. 527 So.2d at 923.

All the state asks is that the defense be forced to seek striking of a specific juror, either by challenging for cause or by noting for the record that a certain juror or jurors would have been stricken but for exhaustion of peremptory challenges.

v. State, 463 So.2d 276 (Fla. 3d DCA 1984), review denied, 475 So.2d 693 (Fla. 1985), cert. denied, ___ U.S. ___, 108 S.Ct. 2870, 101 L.Ed.2d 905 (1988), is compelling:

> Although we agree that the trial court erroneously denied the defendant's motion to challenge for cause the prospective juror . . . no reversible error is made to appear because (1) the defendant exercised a peremptory challenge on this juror and consequently the juror did not sit on this case as did the challenged juror in Leon v. State [396 So.2d 203 (Fla. 3d DCA), review denied, 407 So.2d 1106 (Fla. 1981)], and (2) the defendant exhausted his peremptory challenges, but made no showing below, as required by Young **v.** State, **85** Fla. **348, 354, 96 So. 381, 383 (1923),** "that the jury finally impanelled contained at least one juror objectionable to the defendant, who sought to excuse him [the juror] peremptorily but the challenge was overruled." Stated differently, the defendant has failed to demonstrate that "he was prejudiced by being required to accept an objectionable juror because of the denial of the challenge for cause . . . [which] he is required to do in order to show reversible error." Rollins **v.** State, **148** So.2d **274,** 276 (Fla. **1963).**
>
> Indeed, under circumstances identical to those in the instant case, where the defendant exhausted his peremptory challenges but did not attempt to exercise and was never denied a peremptory challenge on a single member of the jury who actually served on the case, the Florida Supreme Court has held that the erroneous denial of a challenge for cause on a prospective juror who, in fact, did not serve on the jury, as here, cannot constitute reversible error. Rollins v. State, supra; Young v. State, supra; McRae **v.** State, 62 Fla. 74, 57 So. 348 (1911). The theory behind these cases is that a defendant has in no way been harmed by such a ruling where he makes no complaint below about, and in no way seeks to strike, any juror who actually served on his case.

463 So.2d at 277 (emphasis added).

There is no indication that this Court intended in Hill to recede from the historical precedent cited in Anderson, i.e. that the defendant must seek to strike a juror to preserve a prior erroneous denial of a challenge for cause. In fact, the language of Hill is entirely consistent with Anderson:

> Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.

Hill, 477 So.2d at 556 (emphasis added). Given the prior case law cited in Anderson, the emphasized language in Hill requires the defendant to seek to strike a specific juror. It is not enough that a defendant merely seek an additional peremptory challenge to exercise on some hypothetical juror at a later point in the selection process, or that he seek an additional challenge purely on technical grounds, to preserve a prior denial of a challenge for cause.[3] The purpose of allowing challenges is to offer the parties an opportunity to exclude jurors they would prefer not serve. If a party has no objection to any sitting juror, then no amount of irregularity in the challenge process

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3. Such an interpretation places a defendant in an illogical and tenuous position. Seeking a "hypothetical" peremptory challenge to preserve a challenge for cause may result in the jury being empanelled with the defendant having failed to exhaust his peremptory challenges by virtue of the reserved challenge. Such a defendant would risk losing his right to appeal the prior erroneous strike by doing the very act he thought would preserve it. A defendant would, therefore, be forced to exercise the "hypothetical" challenge in order to exhaust, possibly forcing him to exclude an otherwise acceptable or even desirable juror.

Besides the illogic of such a Hobson's choice, such a rule also encourages hypertechnical trial practice. If a defendant is forced to exercise a peremptory challenge to exclude a jury who should have been stricken for cause, but is unable to point to a single juror ultimately seated on the panel whom he found objectionable, then he cannot claim to have been denied a fair and unbiased jury,

One could also foresee a situation where the defendant strikes unobjectionable jurors to preserve an issue regarding a challenge for cause, only to find the court's patience at an end after running out of pereaptories just before an objectionable, but not challengeable for cause, juror is seated. If the initial challenge for cause issue does not prevail on appeal, the defendant has been subjected to a trial before a jury with an objectionable juror forced upon him by the necessity of a gambit gone sour.

should require retria .

Appellant relies on Weber v. State, 501 So.2d 1379 (Fla. 3d DCA 1987), in arguing error in failure to strike for cause because of exposure to news stories about a plea offer, Appellant's Initial Brief at 23. However, the Third District still requires that a defendant, subjected to an erroneous denial of a challenge for cause, show "he was then forced to accede to an objectionable juror because he had by then exhausted his remaining peremptory challenges." Farias v. State, 540 So.2d 201, 203 (Fla. 3d DCA 1989); Smith v. State, 516 So.2d 43 (Fla. 3d DCA 1987); Jefferson v. State, 489 So.2d 211 (Fla. 3d DCA), review denied, 494 So.2d 1153 (Fla. 1986); Leon v. State 396 So.2d 203 (Fla. 3d DCA), review denied, 407 So.2d 1106 (Fla. 1981).

District court decisions subsequent to Hill have likewise been forced to qualify the putative holding of Hill that exhaustion and a motion for additional peremptory challenges are the sine qua non of preserving erroneous denial of a challenge for cause. In Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986), review denied, 506 So.2d 1043 (Fla. 1987), the state argued that the defendant failed to preserve a challenge for cause issue because he failed to expressly move for additional peremptory challenges. "It is not enough, says the state, that defense counsel made reference to the exhaustion of his challenges and then stated that he would like to challenge juror number 25." 501 So.2d at 43. The district court rejected the state's argument:

> In Hill the defendant did move for additional

> peremptory challenges after exhausting his original peremptories. But even though that was the factual context of Hill, no prior or subsequent case that we have found contains such a condition precedent for appealing the denial of challenge for cause provided all peremptory challenges were exhausted,

501 So.2d at 43. Accord, Longshore v. Frontrath Chevrolet, Inc., 527 So.2d **922** (Fla. 4th DCA **1988).** The Auriemme court found no case subsequent to Hill requiring a motion for additional peremptory challenges as a condition precedent, However, this Court has, on one occasion, followed Hill by holding that a motion for additional peremptory challenges after exhausting the allotted number was sufficient to preserve a challenge for cause issue. Moore v. State, 525 So.2d **870** (Fla. **1988).** The state urges, however, that Moore was over-simplified and must have had record facts not addressed in the opinion showing the defendant had been forced to accept a juror he found objectionable. Subsequent to Moore, this Court reasserted fundamentals when it declined to address a challenge issue:

> [Appellant] has demonstrated no prejudice on this issue. When the court denied these challenges for cause, he had numerous peremptory challenges remaining, but chose not to exercise any on these two people, To show reversible error, a defendant must show that all peremptories have been exhausted and that an objectionable juror had to & accepted. Rollins v. State, **148** So.2d 274 (Fla, 1963). See also Nibert v. State, **508** So.2d **1** (Fla. **1987).** [Appellant] cannot meet this test.

Pentecost v. State, 14 F.L.W. 319, 320 n.1 (Fla. June **29, 1989).**

In other words, it is not enough merely to seek a hypothetical right to strike. The principle still holds true that the defendant has to show he was deprived of the right to exclude a juror he would have peremptorily stricken. Perhaps the most compelling example of this is in Hill itself, where defense

counsel preserved his objection not only by seeking additional peremptory challenges but by challenging for cause all remaining prospective jurors. 477 So.2d at 555.

In the instant case, defense counsel made no such assertion. He merely requested an additional peremptory strike because "I think we would have been entitled to exercise more discretion in picking the jury. So we're simply asking the court for one additional peremptory challenge." This is simply not enough to demonstrate that a jury objectionable to the defendant, i.e. one he would peremptorily strike given free choice, sat on this jury,

B. NO ERROR IN REFUSING TO STRIKE JUROR WOODS

> There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Appellate courts consistently recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors. In fact, it has been said:
>
> > There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empanelling of a jury.
>
> United States v. Ploof, 464 F.2d 116, 118-19 n.4 (2d Cir.), cert. denied **sub nom**, Godin **v.** United States, 409 U.S. 952, 93 S.Ct. 298, 34 L.Ed.2d 224 (1972).

Cook v. State, 542 So.2d 964, 969 (Fla. 1989).

Regarding juror Woods, the state first notes an error by omission in the factual rendition of Woods' voir dire as offered by appellant. Appellant asserts that "When asked her reaction to reading that defense counsel was attempting to plead Appellant guilty to first-degree murder in exchange for a life sentence,

prospective juror Woods said that she put the paper down at that point." Appellant's Initial Brief at 20. Appellant neglects to add that, given this response, defense counsel informed Woods that

> That was the first paragraph of the article that stated that [the fact of a plea bargain attempt].
>
> Prospective Juror Woods: Then I did not read that part of it, As I said, I was skimming over it when I recognized that this was the case that was going to be tried this morning.

R88-89.

Thus, juror Woods was not aware of the plea negotiations until defense counsel told her about them. The problem is particularly egregious since the state had, only a short while before, objected to precisely this scheme:

> Mr. Seymor [Assistant State Attorney]: I'm going to object to this.
>
> [Defense counsel, without waiting for the court's ruling on the objection, makes sure the record shows Woods recalled reading about the victim's family opposing a life sentence, a fact suggested to Woods by defense counsel's leading question. The judge then overrules the objection.]
>
> Mr. Seymor: I think what we're doing now is, we're feeding her things from the article and then asking whether she's read them, and we're about to get into a situation where we have given her material on what [sic] to base a challenge at this point.
>
> The Court: Ordinarily, I would agree with you. And I would certainly admonish counsel, as I have already done, not to bring out specifics. . . .

R86-87. Defense counsel then stopped questioning Woods, only to renew the questioning at **R89** when defense counsel fed Woods the information about the plea negotiations. The "contamination," if any, was induced by defense counsel and the necessity of striking Woods is rightfully chargeable to the defense.

However, there was no necessity to strike Woods. The questioning, **R83-90,** clearly shows Woods recalled little from the

article. While she scanned it, she did not recall reading the headline of the story, **R84**. Without prompting, she recalled that the article said Trotter was charged with murder and that the weapon was a knife, **R85**. She also remembered that the family thought Trotter was guilty. **R85**. Given that the defense was that Trotter acted in a sudden rage, none of this information was harmful. It was only when defense counsel prompted Woods that she agreed that she remembered one more thing . . . that the family wanted the death sentence imposed, despite defense counsel Dubensky's effort to have them agree to a life sentence. **R86**.

The trial court effectively inquired into the effect of this knowledge on Woods' ability to serve on the jury. She recalled nothing which would affect her ability to serve. **R87**. Nothing that she recalled from the article would affect her ability to presume Trotter's innocence and to hold the state to the burden of proving guilt beyond a reasonable doubt. **R88**. When prompted by defense counsel about any conclusions she drew from the victim's family's desire for the death penalty, Woods said that was a personal matter, that any victim family would naturally want the maximum penalty. **R89**.

Judge Dakan ruled thus:

> I think her responses are such that even though she indicates she didn't read it, I'm satisfied that that would not have an effect on her. And I would deny the challenge for cause.

R91. Judge Dakan observed Woods' demeanor as she listened to him explain the presumption of innocence and burden of proof, He was in the best position to evaluate whether she was able to comprehend the law and to set aside any bias which the isolated scan-

ning or a news story might have engendered. In fact, the voir dire shows no bias engendered, even when pressed about Woods' reaction to the attitude of the victim's family.

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, **366** U.S. **717, 722-23, 81** S.Ct. **1639,** ____, **6** L.Ed.2d **751, 756 (1961).** In this case, appellant failed to even show that Woods had had time to form an impression or opinion. The voir dire certainly shows than any nascent impression or opinion could be set aside, just as Woods was able to view the victim's family's anguish in the proper perspective.

The test of an impartial jury is not whether the prospective jurors know about the case from press reports, but whether the knowledge created prejudice. Davis v. State, **461 So.2d 67** (Fla. 1984), cert. denied, **473 U.S. 913, 105** S.Ct. **3540, 87** L.Ed.2d **663 (1985).** In Davis, four jurors who had knowledge of the news reports in that case ultimately served on the jury. **473 U.S.** at ___, **105 S.** Ct. at — , **87** L. Ed.2d at **664,** The pretrial publicity revealed that the defendant "had failed a lie detector test, that he had a history of violent crime, that he was on parole at the time of his arrest, that he had admitted being in the

victim's home around the time of the murders, and that particular pieces of evidence appeared to link petitioner to the crime." **473** U.S. at ___, **105 S.** Ct. at ___, **87** L. Ed.2d at **663,** Despite this, this Court held that "[a]ll who served on the jury, however, indicated affirmatively that any prior knowledge could be set aside, that they could serve with open minds, and th t they could reach a verdict based on the law and evidence presented at trial." **461** So.2d at **69.** Juror Woods stands in precisely the same position.

Appellant attempts to rely on the ABA Standard for Criminal Justice **8-3.5** a) (2d ed. **1980)** as establishing some sort of requirement as to how the lack of prejudice is to be elicited. However, the commentary to the standard notes that the rationale for the standard is not uniformly accepted by social scientists. This may explain why the standard itself has not been adopted by most, if not all, state and federal courts. See generally the notes appended to Commentary, ABA Standard for Criminal Justice **8-3.5** (2d ed. **1980).**

> This caution [against relying on voir dire as "the greatest legal engine ever invented for the discovery of truth," 5 Wigmore, Evidence section **1367 (3d** ed. 1940)] is attributable to at least three distinct but closely related factors: **(1)** inadequate understanding of the way pretrial publicity influences the thought processes of prospective jurors; (2) the tendency among a significant number of prospective jurors to underplay the importance of exposure to prejudicial publicity and to exaggerate their ability to be impartial;' and **(3)** persistent concern about the ability of attorneys and trial judges to discern bias, particularly at the subconscious level, even when the prospective juror is being completely candid.[5] Although these empirical and perceptual limitations cast doubt on virtually every policy choice in these standards, this doubt is certainly more intense in connection with voir dire than other procedures.

> 4. [Citation to two supporting authorities] **Other authorities reject this view.** See, e.g., H. Kalven & H. Zeisel, The American Jury 492-499 (1966); Simon, [Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coveraae? 29 Stan. L. Rev. 515 (1977)] at 528.
>
> 5. . . . .
>
> There are commentators who adhere to Wigmore's faith in voir dire. . . . [See also Lexington Herald-Leader Co. v. Meias, 660 S.W.2d 658 (Ky. 1983) (voir dire is effective and is "particularly important" in a capital case), cited in pocket part to the ABA Standards] There is also evidence that defense attorneys can effectively mobilize the expertise of social scientists to get the most favorable jury possible. . . . The high costs, however, place this technique far beyond the reach of the ordinary criminal defendant.

Commentary, ABA Standard for Criminal Justice 8-3.5 p. 8-44 (2d ed. 1980) (emphasis added, footnote deleted). While the procedures provided by the standard may be laudable, the commentary notes that the extreme to which jury selection can be taken may beyond the monetary reach of most defendants. Strict adherence to the standard could, likewise, be beyond the monetary reach of the state. This is a policy decision since the standard is far beyond what is constitutionally required. Cf. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980)--relating to effective assistance of counsel--"are guides to determining what is reasonable, but they are only guides," not constitutional minima. 466 U.S. at 688-89, 104 S.Ct. at ___, 80 L.Ed.2d at 694).

Appellant also rails against voir dire which allegedly "convince[s] the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty." Stand-

ard 8-3.5(a). But nowhere is such overbearance to be found in this record. Rather, the court's explanations of the law, in eliciting jurors' understanding of their role and the necessity of setting aside preconceptions, etc., is wholly consistent with this advice from the First District:

> It must be remembered that prospective jurors, as a rule, have only passing acquaintance with the immutable concepts that govern the conduct of criminal trials. Those who toil in that vineyard day in and day out presumably have an in-depth understanding of "reasonable doubt," "circumstantial evidence," "presumption of innocence," "burden of proof" and the like and tend to assume that other people are possessed of the same understanding. Such is not necessarily so. Before lay citizens can reasonably be asked if they will "follow the law," they must be given at least a thumbnail word sketch, in understandable terms, of the law they will be instructed to follow if they actually serve as jurors. The type of inquiry we envision should also include explication of the juror's role in the context of the overall trial and how it relates to the roles of the other participants. The responsibilities of the various participants in the process should also be explained.
>
> With respect to an equivocating potential juror, if, after appropriate additional inquiry and explanation, the venireman's post-inquiry responses, considered in light of his earlier expressions, do not persuade the court beyond a reasonable doubt that he could be fair and impartial, he should be excused for cause either upon a motion by a party or upon the court's own motion. If the court is satisfied beyond a reasonable doubt that the prospective juror meets the Singer/Hill test, he should so state on the record. Such a determination, one way or the other, will not be overturned on appeal unless error is manifest.

Tenon v. State, 14 F.L.W. 1349, 1350 (Fla. 1st DCA June 2, 1989).

Appellant's reliance on Weber v. State, 501 So.2d 1379 (Fla. 3d DCA 1987), and Cappadona v. State, 495 So.2d 1207 (Fla. 4th DCA 1986), are misplaced. Both of these cases address situations where the jurors learned of prior convictions for the crimes in prior trials. Knowledge of the fact of a prior trial does not

fatally and per se contaminate a jury.

> It is not uncommon that jurors become aware that the case before them may have been previously tried as a result of references to prior testimony. There is no indication that the jurors knew what had occurred at appellant's previous trial. We conclude that the judge made the appropriate response [telling the jury not to consider why the defendant was being retried] and committed no error in denying appellant's motion for mistrial.

Jennings v. State, 512 So.2d 169, 174 (Fla. 1987), cert. denied, ___U.S. ___, 108 S.Ct. 1061, 98 L.Ed.2d 1023 (1988). Knowledge of plea bargaining is a far cry from knowledge of a prior conviction in a case. There appears to be no case where knowledge of plea negotiations is alone dispositive of a challenge for cause.

Reliance on Irvin is likewise misplaced. A review of the catalog of prejudicial publicity noted by the Supreme Court at 366 U. S. at 725-27, 81 S. Ct. at ____, 6 L.Ed.2d at 757-59, shows that the plea negotiation was a de minimus factor, compared to the other facts reported, such as one sheriff's promise to devote his life to securing the defendant's execution in Kentucky if Indiana, where the trial was held, failed to do so. See also Davis v. State.

Finally, appellant attempts to show juror Woods challengeable for cause because of her statements during the general voir dire. However, a review of the entire interaction with the jury about the burden of proof and, specifically, the defendant's burden, R1097-1120 et seq., reveals that the entire venire was wrestling with the concepts. The record also shows that the educating process counseled by Tenon was working perfectly to inform the jurors of their role in the proceedings. Juror Woods, of course, cleared up any doubt about her competence when she

concluded her statements at R1120 showing she understood the role of cross-examination in presenting a defense to a jury. She further stated, later in voir dire, that "I'm going to listen to what the judge says," R1131, indicating her understanding of the necessity of setting aside external influences or personal views and deciding the case solely on the law and the facts presented at trial.

Even examining her final response in the exchange at R1119-20 in isolation, juror Woods' statement does not demonstrate the sort of misunderstanding which has been found to require striking for cause. In Hamilton v. State, 14 F.L.W. 403 (Fla. July 27, 1989), for instance, a juror initially stated she had a preconceived opinion of the defendant's guilt and that the defendant would have to produce evidence to prove his innocence. She later said she could hear the case with an open mind, but subsequently reasserted her belief in his guilt. This Court concluded that a witness who persists in retaining a preconceived opinion of guilt should be stricken for cause.

In the instant case, on the other hand, juror Woods never asserted a preconceived opinion of guilt, Rather she said she would want to hear 'the defendant's side of things before deciding the case. In the pages of the record leading up to her statements, defense counsel had been dealing with the issue of a defense wherein no defense witnesses are called. Mrs. Woods said

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4. The defense in Hamilton preserved the issue for appeal by initially allowing the juror to remain on the panel, but, after exhausting its peremptory challenges, seeking an additional peremptory expressly to strike this juror.

she would be able to render a guilty verdict if the state proved guilt beyond a reasonable doubt, but she qualified that **by** saying that the defendant should have a chance to present "something in his behalf," even after the state had met its burden.

In other words, juror Woods would bend over backwards to allow the defendant to attempt to dispel the conclusion, beyond a reasonable doubt, that he was guilty. Her statement that "if both attorneys are presenting the law to me and the facts from both the State and the defendant, to me I feel like I have a more fair decision if I hear his side of it," suggests merely that she would appreciate hearing the defendant's opening statement and closing argument. All of her comments are grounded on her initial statement, that she would feel more comfortable rendering a guilty verdict if she were able to here something from the defendant, even after the state had proven its case beyond a reasonable doubt. This is not the same as the assertion of the juror in Hamilton that the defendant would have to prove his innocence.

Compare this also with the juror's unequivocal assertion in Gibson v. State, 534 So.2d 1231, 1232 (Fla. 3d DCA 1988), that if the defendant did not testify, "[Defense Counsel:] You would not find him not guilty? . . . . [The juror:] Right." In the instant case, Woods said she would like to hear something from the defense, which would include argument and cross-examination. Nowhere did Woods say she could not find appellant innocent if he didn't testify or if the state failed to prove its case beyond a reasonable doubt,

C. JURORS SCHMIDT, BRADSHAW, AND BEIGHLE

Despite yeoman effort by way of leading questions to have juror Schmidt disqualify himself, Schmidt made it abundantly clear, at length, that he would be able to set aside any preconceptions he might have developed from his spotty recollection of news reports of the case. R532-33:

> Mr. Slater [defense counsel]: . . . .
> Isn't it true it's going to be difficult for you to put that aside, just judge this case upon what's presented; or don't you think that if you've got a question maybe later on down the line as to guilt or innocence and nothing's been presented about these facts that you've read about, that that might sway you in your decision? Very honestly?
> Prospective Juror Schmidt: I don't know. I don't think so. I don't believe everything I read in the paper but, you know, I got to read something, right?
> Clarify it a little more before I answer it.
> Mr. Slater: Let's say in the trial in this case, there are certain real important facts about either the defendant or about the case that you feel you read about and it was never presented here in the trial but you at least know, from all the articles you've read, apparently took place.
> Don't you think that could have some bearing on your decision as to guilt or innocence; maybe have a stronger bearing as to whether or not you'd sentence him to life or death?
> Prospective Juror Schmidt: No, that wouldn't have any bearing on it. I'll tell you why I don't feel that way.
> If that was true in the paper, he'll bring it out. I'm positive he'll bring it out in the trial. Then, if he doesn't bring it out, then I wouldn't believe it because it -- you know, I would disregard it, what I read, then.
> See what I'm saying? So that -- I don't know how else to explain it to you. I'm sure he'll bring it out in trial if it was true. If it wasn't, then it won't come out. That's the way I feel.

R532-33. Defense counsel pressed on, inquiring whether Schmidt understood that things might have happened which would be inadmissible.

> Mr. Slater: You know your statement before -- that if they didn't present it at trial, it didn't take

place -- you know that's not in fact true?
The Court: That's not what he said Mr. Slater,
Prospective Juror Schmidt: That's not what I said.
The Court: What he said was that if it didn't come out, he won't believe it.
Prospective Juror Schmidt: Yeah, that's what I was trying to say.

R535. The state reviewed with Schmidt his testimony in voir dire that he understood that the state had the burden to prove Trotter's guilt, that he didn't believe everything he read in the newspapers, and that he could set aside what he had read. Based on that, Schmidt agreed that he could make a decision at trial based solely on the evidence he heard in the courtroom. R540. In other words, Schmidt "indicated affirmatively that any prior knowledge could be set aside, that [he] could serve with [an] open [mind], and that [he] could reach a verdict based on the law and evidence presented at trial." Davis, 461 So.2d at 69.

As for juror Bradshaw, the state effectively rehabilitated him in fairly extensive questioning, R751-54, wherein Bradshaw at least four times asserted he would, one way or another, be able to set aside what he may have read in a decide solely on what was shown at trial. Defense challenge on Bradshaw was perfunctory, and the court found his responses "very appropriate." R755.

Juror Beighle repeatedly stated that she would be able to set aside what she had read and rely solely on the evidence and law presented at trial. R433 (twice); R435 (twice). Beighle's comments about the death penalty were invited by defense counsel, who elicited the statements without bothering to inform her of the process which occurs in a penalty phase. Despite defense misleading, Beighle state she would have to decide the penalty

issue based on the facts, proven "beyond a shadow of a doubt." R434. She subsequently said she would follow the law, R435. Given that defense counsel failed to inform Beighle of the penalty procedure, the statement that she would follow the law should more than suffice to ensure that she could set aside any preconception she might have developed.

D. JURORS AND PUBLICITY

The state commends to this Court the lengthy but comprehensive annotation on juror exposure to publicity. Annot., **46** A.L.R.4th 11 (1985). The annotation establishes the principles that exposure to nonprejudicial accounts do not render a juror incompetent, section 6; that a juror is not disqualified where he reads a prejudicial account but cannot recall the prejudicial matters, section 9(b); that evidence of overwhelming guilt renders exposure harmless, section 12; that exposure to reports of a plea of guilty or no contest is permissible where the plea is consistent with the defense, the jurors cannot remember the account, or the evidence is overwhelming, sections 29(b), (c) and (d); that exposure to reports of a plea or attempt to plea to a lesser charge do not disqualify jurors per se, where they can set aside knowledge of the fact, or, in People v. Sirhan, 7 Cal. 3d 710, 102 Cal. Rptr. 385, 497 P.2d 1121, cert. denied, 410 U.S. 947, 93 S.Ct. 1382, 35 L.Ed.2d 613 (1972), where the defense, as in this case, was simply what degree of culpability the defendant was subject to, section 30(a); and that jurors are not disqualified if they adequately assert they have not been influenced by exposure to accounts of a defendant's criminal record, s. 37.

ISSUE II

THERE IS NO ERROR REGARDING ALLEGEDLY EXTRANEOUS INFLUENCES IN THE JURY ROOM.

Appellant contends that the trial court erred in failing to conduct a sufficient inquiry to determine whether the jury was subjected to outside influence during the course of its deliberation and that such error deprived him of his right to an impartial jury. The State disagrees.

Defense counsel became aware that the jury had deliberated in a room containing a working telephone and several law books which included a copy of the Florida Standard Jury Instructions. Counsel issued subpoenas for the jurors and bailiff to determine if the telephone and material were actually used. The trial court quashed the subpoenas, but held a hearing on the matter after defense counsel procured an affidavit from juror Morris stating that the telephone had been used.

Morris testified that, including herself, only three people used the phone. R2588, 2594-95. She further testified that the calls were made before deliberations, and that the jurors only informed their spouses that they would be coming home late. **(R. 2587, 2594-5).** She stated that at no time were the law books ever used. **(R 2599).** The trial court reinstated his previous denial of appellant's motion for new trial.

Florida Rules of Criminal Procedure 3.600(b)(2) and (3) provide that a trial court shall grant a defendant's motion for new trial when the jury received any evidence out of court, or

where the jury separated without leave of court after retiring to deliberate and the substantial rights of the defendant were prejudiced thereby. When a defendant's motion sets forth a prima facie showing of improper influence, the trial court should allow the defendant an opportunity to interview the juror(s) and prove that he is entitled to the relief for which he prays. Sconyers v. State, 513 S.2d 1113, 1116 (Fla. 2d DCA 1987). The trial court should, however, limit the interview as narrowly as possible to determine if such grounds do exist. Id, at 1117.

Rule 3.370(b) actually permits the court to allow the jury to separate after submission of the cause. While Rule 3.370(b) provides no test for error if impropriety occurs during the separation, presumably the prejudice of substantial rights requirement of Rule 3.600 would be applicable. Both rules appear to derive from former section 920.05, Florida Statutes, which this Court interpreted to impose on the defendant the burden of alleging and proving prejudice of substantial rights. Webb v. State, 62 So.2d 410 (Fla. 1953).

Rule 3.270 has been abrogated in capital cases in Livingston v. State, 458 So.2d 235 (Fla. 1984). This Court held that

> in a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged . . . . A separation of the jurors after commencement of deliberations will generally be grounds for a mistrial, save for exceptional circumstances of emergency, accident, or other special necessity. Such a strict rule appears to be necessary in order to keep the attention of the jurors properly focused and concentrated on their deliberations.

458 So.2d at 239 (emphasis added).

In the instant case, the jury deliberations had not actually begun, albeit the jury had gone back to the jury room. As a

matter of common sense, the court must recognize a brief period between the end of the charge to the jury and the beginning of deliberations. Where there is a momentary separation of the jurors before the jury retires to deliberate and there is no evidence that the jurors were subject to any extraneous influence during that separation, then there is no requirement that the defendant be granted a new trial. Compare Gonzales v. State, 503 So.2d 425 (Fla. 3d **DCA 1987)** (holding that new trial not required in appellant's conviction for first-degree murder where juror separated from rest of jury to eat lunch with wife after jury had been charged but before deliberation where trial court's inquiry revealed that juror had spoken to no one during his absence).

This Court has recognized at least one common sense exception to Livingston, in Brookings v. State, 495 So.2d 135 (Fla. 1986), where the defendant was held to have waived objection to an overnight separation when counsel agreed to it. Beyond waiver, however, this Court found that the trial judge admonished the jury prior to the separation, then, on reconvening, inquired of the jury and was assured they had abided by the admonitions. In other words, this Court applied a test of prejudice. Thus, even when the jury separates in violation of Livingston, relief will not be granted absent a showing of prejudice.

Sub judice, the trial court allowed defense counsel to interview Ms. Morris. The interview revealed that some jurors used the telephone before deliberation, but that the calls were limited to telling spouses and baby-sitters that the jurors would be coming home late. The interview also revealed that none of

the law books were ever used by the jury. Since this interview adduced absolutely no evidence that the jury received any evidence out of court, or that the jury separated without leave of court, then it can hardly be said that appellant's substantial rights were prejudiced thereby. The burden is on appellant to allege that he suffered prejudice to some substantial right. None was alleged, and none was shown.

ISSUE III

THERE WAS NO NEED FOR THE ASSISTANT STATE ATTORNEY TO BE DISQUALIFIED.

Appellant argued below in an effort to disqualify Assistant State Attorney Seymour that Mr. Seymour had personally represented Trotter on a violation of probation for a burglary charge some seven years earlier while in the Public Defender's Office. R2242. Mr. Seymour responded that if there were any genuine conflict he would walk away from the case in a heartbeat. R2249. He explained the violation of probation charge on which he had represented Trotter -- Trotter had accepted the offer made by the judge and there had been no contested hearing. R2249-50. Seymour had no recollection of a co-defendant Williams. R2251. Seymour added that he had no recollection of Trotter, R2252, and that he had no recollection of anything learned personally that he would use in the penalty phase in this case, R2253. The court denied relief ruling:

> I'm going to deny the motion. Having reviewed the affidavit and basically the testimony or representations of the attorneys I really don't think there's even an appearance of impropriety relating either from his direct representation in the V.O.P. or in the fact that he was the head of the office, absent any specific showing by Mr. Trotter of any specific conversations or confidential information which he gave to Mr. Seymour that would be prejudicial. So upon those findings I would deny the motion.

R2257.

The trial court correctly denied the motion. As appellant correctly points out it has been held that allowing an attorney who represented a defendant on previous unrelated

charges to serve as prosecutor did not deprive the defendant of due process of law. Havens v. State of Indiana, 793 F2d 143 (7th Cir. 1986).

As the trial court found, and appellant apparently does not contest it, there was no special knowledge or information Seymour had obtained to use in the present prosecution. Cf. United States v. Hosford, 782 F2d 936 (11th Cir. 1986). See also Aldridge v. State, 503 So.2d 1257 (Fla. 1987) (prosecutor's prior representation of a state witness when prosecutor was a public defender did not deprive the accused of a fair trial); Meggs v. McClure, 538 So.2d 518 (Fla. 1st DCA 1989) (disqualification of a state attorney must be done only to prevent the accused from suffering prejudice he otherwise would not bear -- an entire office need not be disqualified because of the appearance of impropriety).

Appellant criticizes the prosecutor's cross-examination of appellant at penalty phase. R1927. In context it should be noted that on his direct examination Trotter had talked about his mother and her influence in his life (she drank heavily and was abusive, R1914-15). It was entirely appropriate for the prosecutor to inquire and limit the impact of the testimony presented by appellant that it was his mother's behavior rather than his own that should be blamed for Mrs. Langford's death.

ISSUE IV

JUROR BURSE WAS PROPERLY EXCUSED FOR CAUSE.

Appellant complains in this appeal only that excusing prospective juror Burse for cause violated the precepts of Witherspoon v. Illinois, **391 US 510, 88** S.Ct. **1770,** 20 L.Ed.2d **776 (1968),** and Wainwright v. Witt, **469 US 412, 105** S.Ct. **844, 83** L.Ed.2d **841 (1985).** Appellee disagrees. The pertinent portion of the colloquy between prosecutor and prospective juror Burse included the following:

> Mr. Seymour [Assistant State Attorney]: Mr. Burse, the other issue we need to discuss here is the matter of the death penalty. The penalty for first-degree murder, if you were to convict this man as presently charged, is a death sentence or life -- or life sentence. And there would be a second stage of the proceedings and then you would have to render an opinion as to what the sentence should be.
>
> How do you feel about the death penalty?
>
> Prospective Juror Burse: I don't know.
>
> Mr. Seymour: You've never been called upon to recommend the death sentence before?
>
> Prospective Juror Burse: No, sir.
>
> Mr. Seymour: Do you think you could do so?
>
> Prospective Juror Burse: I don't know. I honestly don't know.
>
> Mr. Seymour: Do you have any personal or religious convictions against the imposition of a death sentence?
>
> Prospective Juror Burse: No.
>
> Mr. Seymour: I take it -- I don't mean to put words in you mouth, but I take it you're a little bit uncomfortable with the concept?
>
> Prospective Juror Burse: Yes. I don't hunt and I don't kill, so I don't know. That would be something that would have -- the circumstances -- I'm not sure how it would be.
>
> Mr. Seymour: The law in this State -- and none of us passed those laws. We're here because the legislature said this is the law of this State and these are the penalties of first-degree murder. And the law is not on trial nor are your personal convictions, incidentally.
>
> And the legislature, when they set up this statutory scheme, set up a list of criteria, aggravating

circumstances and mitiga ing circumstances. You'll be given evidence and argument on the aggravating circumstances versus the mitigating circumstances, And after you hear this, then you have to engage in a weighing process; which weighs more heavily, which is the appropriate penalty in this case.

Do you think that you could follow the law in that regard if you found the aggravating circumstances outweighed the mitigating circumstances; when death is the appropriate sentence in this case, could you so vote?

Prospective Juror Burse: I don't know.

Mr. Seymour: Can you assure us that you could give it your best effort to follow the law in that situation?

Prospective Juror Burse: Yes.

Mr. Seymour: Let me ask you this question. You have some problems with the death sentence, with the death penalty?

Prospective Juror Burse: I don't have any problems with that. I only have the problem of my conviction being that.

Mr. Seymour: You have some problems with your being able to vote for that? That being the case, you might have?

Prospective Juror Burse: I don't know, I might have some problems with that.

R 97-99.

One of the legacies of Wainwright v. Witt is that the trial judge rather than an appellate court is in the best position to gauge the responses given during an inquiry by prospective jurors:

> This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 424-26, 105 S.Ct. at ___, 83 L.Ed 2d at 852-853 (emphasis added, footnote deleted).

> Last Term, in Patton [v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 842 (1984),] we held that a trial judge's finding that a particular venireman was not biased and therefore was properly seated was a finding of fact subject to section 2254(d). We noted that the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations were entitled to deference even on direct review; "[t]he respect paid such findings in a habeas proceeding certainly should be no less." Id., at **1038**, **81** L.Ed 2d **847**, **104** S.Ct. **2855.**

469 U.S. at 428, 105 S.Ct. at ___, 83 L.Ed 2d at 854 (emphasis added, footnote deleted).

> As we stated in Marshall v. Lonberger, [459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983)] at [459 U.S] 434, 74 L.Ed 2d 646, 103 S Ct. 843:
>
> > "As was aptly stated by the New York Court of Appeals, although in a case of rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. , . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." Boyd v. Boyd, 252 NY 422, 429, 169 NE 632,634.

469 U.S. at 434, 105 S.Ct. at — , 83 L.Ed 2d at 858.

In the instant case, the trial court could permissibly conclude, based on the answers given at R97-99 and based on the demeanor of the prospective juror that his attitude would prevent or impair his performance of duties as a juror and was subject to being stricken. Witt, 469 U.S. at 423, 105 S.Ct. at ___, 83 L.Ed.2d at 851.

The trial judge properly decided that the juror's ex-

pressed views would substantially impair his ability to follow the law, R139, despite a seemingly unequivocal response given at R126. See also Davis v. Maynard, 869 F 2d 1401, 1408-1409 (10th Cir. 1989). In Creamer v. Bivert, 214 Mo. 473, 113 SW 2d 1118, 1120, where the appellate court in another context noted poetically:

> He sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or the sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien.
>
> The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as the honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

ISSUE V

APPELLANT WAIVED COMPLAINT THAT COMMUNITY CONTROL CANNOT SUPPORT THE AGGRAVATING FACTOR OF BEING UNDER A SENTENCE OF IMPRISONMENT AT THE TIME OF THE MURDER. COMMUNITY CONTROL IS IMPRISONMENT FOR PURPOSES OF THIS AGGRAVATING FACTOR.

There appears to be little law in Florida addressing the question of whether a defendant can waive objection to an aggravating factor in a capital sentencing proceeding. However, the one case which holds that waiver is possible demonstrates solid policy reasons for permitting waiver. Tafero v. State, 459 So.2d 1034 (Fla. 1984). See also Steinhorst v. State, 412 So.2d 332 (Fla. 1982) (capital appellant limited to ground raised in court below in challenging trial court ruling).

Defense counsel completely waived all objection to using the community control sentence to support the "sentence of imprisonment" aggravating factor. In conferring with the judge prior to the beginning of the penalty phase, the state prepared a copy of Trotter's conviction and sentence for robbery and burglary. Defense counsel objected to the burglary charge showing on the copy, as burglary was not necessarily a crime of violence. The state acceded to deleting the burglary conviction. R1887-96. Defense counsel then stipulated to the robbery conviction. R1897.

When the state conducted direct examination of Trotter's community control officer, defense counsel objected to the state inquiring into Trotter's terms and conditions of community control. R1901. Defense counsel argued that "... the only thing

he can testify to is, he was on community control. Anything further is irrelevant on aggravating circumstances." R1902. The state responded that the conditions of community control were relevant to prove "this is in fact incarceration under -- is it [921.141]5B?" The Court corrected the state -- "5A". Id. Defense counsel then responded "I think you've already proved that." Id.

Later, in the charge conference, defense counsel did not object to including the section on "sentence of imprisonment" in the instructions to the jury. R2155, R2168. During the state's closing argument, where the state urged that community control was the same as prison, designed to reduce prison overcrowding, defense counsel did not object. R2177. In the defendant's closing argument, counsel argued, not that community control was not imprisonment, but that the punishment was so light that the robbery for which Trotter was convicted must not have been very serious. R2195-96. [Trotter and an accomplice kicked in a victim's door and robbed him. R1888.] The trial judge instructed the jury on the aggravating factor, R2204, and the jury retired without objection from the defense, R2210.

In Tafero, this Court wrote:

> At the instant evidentiary hearing [in a collateral proceeding] Tafero's trial counsel admitted knowing about this alleged confession [Tafero claimed another person had confessed to the crimes which supported the aggravating factor that Tafero had been convicted of a violent felony] and stated that he did not introduce it at sentencing because doing so would have allowed the state to delve into the incidents. This claim, therefore, does not constitute newly discovered evidence. Tafero's counsel's tactical decision not to bring up this matter does not constitute ineffective assistance of counsel, and we hold that Tafero waived introducing

this confession.

459 So.2d at 1036. This Court also held that Tafero waived complaint that the instruction on mitigation incorrectly limited the jury to considering only statutory mitigating factors. Id.

Tafero thus stands for the proposition that a capital defendant can waive objection to errors relating to both aggravating and mitigating factors in the penalty phase. While the question of whether waiver on the community control issue was tactical or the result of ineffective assistance of counsel is premature on direct appeal, the record here suggests a tactical decision by counsel to stipulate to the robbery in order to limit evidence about the prior violent felony, a circumstance similar to the tactical decision in Tafero. A defendant should always have the option of waiving objection to application of an aggravating factor. Having the power to waive gives the defendant flexibility in bargaining with the state over what evidence will be presented to the jury in the penalty phase, or even what mitigating factors the state will acquiesce to being presented.

Should this Court decide to overrule Tafero, the state also urges that, for purposes of capital sentencing, community control is imprisonment. As appellant's argument clearly demonstrates, there is no definitive law or decision on this point. Appellant marshals the case law supporting his proposition, but the state urges that the case law to the contrary controls.

The closest this Court has come to the issue was in State v. Mestas, 507 So.2d 587 (Fla. 1987). A criminal defendant was subject to a recommended sentence of any "nonstate prison sanction" under the guidelines. The trial court imposed a sentence

of five years probation, the first two years to be served on community control as a condition of probation. This Court held:

> Community control, which is a harsh and more severe alternative to ordinary probation, is a departure sentence when the guideline call for any "nonstate prison sanction."

507 So.2d at 588.

Logically, if community control is not a "nonstate prison sanction", then it must be a "state prison sanction," i.e. "imprisonment." While appellant may respond that this is a facile argument grounded in semantics, the First District saw fit to critique the logic of Mestas using this logic. The issue was whether a defendant could be sentenced to serve time beyond a year in a county jail as a condition of probation for a felony conviction consecutive to jail time on a misdemeanor conviction. The court held that the defendant could not even have been sentenced to community control for the felony because the recommended range was "any nonstate prison sanction." The court cited to Mestas and appended the following footnote to the citation:

> 2. The notion that imposition of community control is equivalent to state prison sanction and is, presumably a more serious deprivation of one's liberty than incarceration in county jail, which is permissible as any nonstate prison sanction, is difficult to understand.

Kline v. State, 509 So.2d 1178, 1182 n.2 (Fla. 1st DCA 1987) (emphasis added). Of course, a defendant sentenced to incarceration in a county jail who kills a fellow inmate, or who kills someone while escaped, would be subject to the "sentence of imprisonment" factor. If community control is a more severe sanction, falling between imprisonment in the county jail and imprisonment in the state prison system, then surely the framers

of the capital sentencing statute intended that one serving community control be considered to be under "sentence of imprisonment." One subjected to the harsh conditions of community control, who is free from the prisons not as an act of grace but to relieve prison crowding, should be subjected to the same elevated punishment as one who kills within prison or jail walls, or while free after escape.

This Court has already held that one who is free from prison but under more restrictive control than probation is subject to this aggravating factor, i.e. a defendant on parole. Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984); Jones v. State, 411 So.2d 165 (Fla.), cert, denied, 459 U.S. 891, 103 S.Ct. 189, 74 L.Ed.2d 153 (1982); Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981) (all cases holding that defendants on parole were "under sentence of imprisonment"). Parole, like community control, is a form of imprisonment involving substantial limitations on the defendant's freedom, but less than, for instance, actual incarceration in a county jail.

The Second District has concluded that community control is the same as parole for purposes of determining a defendant's Fourth Amendment rights. In Braxton v. State, 524 So.2d 1141 (Fla. 2d DCA 1988), a defendant on community control was subjected to a warrantless search of his home.

> While the product of a warrantless search of a jail inmate's cell is admissible in evidence, the product of a warrantless search of a probationer's home is not admissible to prove a new criminal offense.

> Community control is "a harsh and more severe alternative to ordinary probation," Mestas . . . , but for present purposes we do not equate community control with incarceration. For these purposes we think community control should be considered akin to parole. A parolee does not, by accepting parole, give up his Fourth Amendment rights.

524 So.2d at 1141 (citations deleted, emphasis added). Granted, Braxton is not dispositive of the instant issue, but it illustrates the flexibility with which the courts deal with the conceptual differences between community control, parole, and probation.

Perhaps the simplest route to resolving the instant problem is to look to Black's Law Dictionary 681 (5th ed. 1979) (emphasis added):

> Imprisonment. The act of putting or confining a man in prison. The restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion. It is not a necessary part of the definition that the confinement should be in a place usually appropriated to that purpose; it may be in a locality used only for the specific occasion; or it may take place without the actual application of any physical agencies of restraint (such as locks or bars), as by verbal compulsion and the display of available force. Every confinement of a person is an "imprisonment," whether it be in a prison, or in a private house, or even by forcibly detaining one in the public streets. . . .

Certainly, community control or house arrest, where the offender is confined to his home except for specific instances where his community control officer authorizes him to be elsewhere constitutes "confinement . . . without the actual application of any physical agencies of restraint . . . in a private house . . . ." With the advent of the new radio monitoring devices, confinement to the house will be reinforced with the modern equivalent of locks and bars. The fact that the offender is allowed to leave

the home on occasion does not diminish the fact that he is under a sentence of imprisonment in his house, any more than a work-release prisoner's freedom to leave confinement for work affects his status as being under a sentence of imprisonment.

In addition, the error, if any, was invited by the defendant and was harmless error.

ISSUE VI

THERE WAS NO ERROR REGARDING THE DRAWINGS.

The drawings were a de minimus part of defense counsel's strategy for mitigation. Defense counsel did not even know Trotter had made drawings in jail until the day of the sentencing hearing. **R1922.** He apparently did not even see the drawings until Trotter produced them in the courtroom. Id. Trotter told the jury he did the drawings for other inmates. Id. The drawings themselves do not reflect a Van Gogh talent. **R3090.**

There is no proffer that defense counsel planned to call expert witnesses to testify to appellant's talent or value to the world of art. This observation is not made facetiously -- a defendant with a recognized talent perhaps unique and of value to society might have a ground for complaint if the evidence of his talent were excluded from the penalty phase, or if his counsel were deprived of the opportunity to argue the matter to the jury.

In the instant case, no error occurred. The jury was made aware of the fact that Trotter believed he had some self-worth in his art abilities, and that other inmates liked his work enough to request drawings. If anything, excluding the drawings from the jury's view could have aided Trotter, in the sense that the jury could have speculated that his talent was greater than the sketches in the record show.

The argument that defense counsel was deprived of the chance to argue about the drawings is specious. Trotter also mentioned he had some talent with mechanical things, simultaneously with

his testimony about his artistic bent. R1921-22. Defense counsel did not argue this matter in his close, just as many other minor details presented in the penalty phase were not specifically argued. If the artwork was important to the defense, defense counsel most assuredly would have argued the facts that were properly in the record at the time of his argument -- the fact of the existence of the artwork, Trotter's feelings about it, and the fact that other inmates thought enough of it to ask for drawings. All of that would have been admissible. Appellant cannot sand bag, if he truly believes the artwork was important, by not arguing what was permissible to argue, and then complaining that exclusion of the artwork deprived him of a critical element of closing argument.

Of course, any error whatsoever was cured when the judge permitted the artwork to go to the jury during the deliberations. If anything, it was error to allow the artwork to go to the jury, error prejudicial to the state.

Any residual error is cured by the simple fact that the trial judge had the opportunity to view the artwork at every stage of the proceeding, and to hear argument before he announced his decision. Defense counsel only mentioned the drawings in passing ("he has mechanical, he has artistic ability . . . ," R2281), and argument he could have made equally as well to the jury.

ISSUE VII

THE INSTRUCTION ON HEINOUS, ATROCIOUS, OR CRUEL REMAINS VALID AFTER MAYNARD V. CARTWRIGHT.

A month after appellant served his brief, this court specifically addressed this issue and rejected the argument. Smalley v. State, 14 F.L.W. 342 (Fla. July 6, 1989). Also, appellant waived the issue by failing to raise it at trial. R1743-44 (two special instructions requested by defense granted, one relating to intent denied -- no mention of the instant issue).

ISSUE VIII

THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Appellant glosses over the facts relied on to support the aggravating factor that the murder was heinous, atrocious, or cruel. In the sentencing hearing, the judge stated his reasons for finding this aggravating factor:

> And finally, the court has considered and does find that this crime was especially wicked, evil, atrocious and cruel, the court noting the number of stab wounds, the depths of them and particularly the slashing wound which resulted in basically a disembowelment; and also the fact that she did live for some time after which appears to be, at least in some cases, a matter to be considered. And for those reasons, the court does find that that aggravating factor has been proven.

R2959-60. The judge then enumerated and discussed mitigating reasons and why the aggravating factors outweighed them. R2960-61. Only then did he mention, in passing, the fact that the victim was killed in her store, her life-long business.

The sentencing order states:

> **(4)** The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, and cruel. Virgie Langford was killed in the store which she owned and ran for many years. As with every proprietor, her store was no doubt her second home. She was stabbed seven times and disemboweled. She was alive for a considerable time after the attack, and was aware of her terrible condition. The victim was seventy years old and met her death at the hands of a healthy, muscular young man who obviously could have subdued his victim with little effort. The number and force of the stabbings greatly exceeded that needed to subdue this robbery victim. The defendant clearly was "utterly indifferent to the suffering" of Virgie Langford. State v. Dixon, **283** So.2d **1** (Fla. **1973).**

R2863-64.

Appellant's errs in his reliance on Teffeteller v. State,

439 So.2d 840 (Fla. 1983), and Demps v. State, 395 So.2d 501 (Fla. 1981), for the principle that "prolonged suffering and survival from the knife wounds," Appellant's Initial Brief at 67, is insufficient to support this aggravating factor. In Teffeteller the victim, walking home after jogging on the beach, was accosted in the street and shot in the abdomen. He died in surgery after surviving two or three hours. In rejecting this fact as supporting the heinous, atrocious, or cruel circumstance, this Court held:

> The criminal act that ultimately caused death was a single shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

439 So.2d at 846 (emphasis added). The relatively impersonal act of firing a single shot from a shotgun at some distance from the victim, despite the fact that it inflicted a painful and slow-killing wound, is easily distinguishable from a frenzied knife attack at close range where multiple deep wounds were inflicted, one of them an eight inch long gash which disemboweled the victim.

In Demps, the victim was a fellow inmate. He was found bleeding from multiple stab wounds and died after some period of survival. However, this Court's rejection of the heinous, atrocious, or cruel factor was summary . . . "[w]e do not believe this murder to have been so 'conscienceless or pitiless' and thus set 'apart from the norm of capital felonies' as to render it 'especially heinous, atrocious, or cruel.'" 395 So.2d at 506 (footnotes and citations deleted). This constitutes the entire

discussion in Demps of the heinous, atrocious, or cruel factor. The facts of the stabbing were not well-developed either.

This Court apparently has receded from Demps, as at least two subsequent prison stabbing deaths were held to be heinous, atrocious, or cruel. Lusk v. State, 446 So.2d 1038 (Fla. 1984) (victim stabbed in back three times in prison lunchroom); Morgan v. State, 415 So.2d 6, 12 (Fla,), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982):

> Under established precedent interpreting the capital felony sentencing law, the third aggravating circumstance [heinous, atrocious, or cruel] is also supported. The evidence showed that death was caused by one or more of ten stab wounds inflicted upon the victim by appellant [in the victim's cell during sleeping hours]. See Rutledge v. State, 374 So.2d 975 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Foster v. State, 369 So.2d 928 (Fla.), cert, denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979).

Age and sex of the victim are not necessarily impermissible factors in considering whether a particular murder was heinous, atrocious, or cruel. In addition, recent cases suggest that multiple stabbing of a conscious, resisting, victim who survives the attack at least long enough to see it to its conclusion, is sufficient to support heinous, atrocious, or cruel. Turner v. State, 530 So.2d 45 (Fla. 1987), cert. denied, ___ U.S. ___, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989) (killer pursued and cornered his victim, then stabbed and cut her to death despite her pleas); Perry v. State, 522 So.2d 817 (Fla. 1988) (victim beaten and stabbed repeatedly in her home); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (thirty stab wounds, some defensive, showing victim survived to suffer the effects of the repeated goring);

Nibert v. State, 508 So.2d 1 (Fla. 1987) (seventeen knife wounds, some defensive indicating victim was conscious throughout the stabbing); Floyd v. State, 497 So.2d 1211 (Fla. 1986) (twelve wounds to the torso and one defensive wound to the hand, indicating victim was conscious during the stabbing, although she died with minutes thereafter); Johnston v. State, 497 So.2d 863, 871 (Fla. 1986) (citations deleted):

> The medical examiner testified that the victim, an 84-year-old woman who had retired to bed for the evening, was strangled and stabbed three times completely through the neck and twice in the upper chest. The medical examiner's testimony also revealed that it took the helpless victim three to five minutes to die after the knife wound severed the jugular vein. The court also mentioned, correctly, that the victim was in terror and experienced considerable pain during the murderous attack. The heinous, atrocious or cruel aggravating circumstance was properly applied in this circumstance. Cf. Wright v. State, 473 So.2d 1277 (Fla. 1985) (multiple stab wounds on the body of a 75-year-old woman), cert. denied, ___ U.S. ___, 106 S.Ct. 870, 88 L.Ed.2d 909 (1986) . . . .

Even without the fact of the location of the stabbing, the remaining facts clearly support this aggravating circumstance. The observation about the location of the killing is, at worst, mere surplusage. If this Court is unable to dismiss the language as surplus, then the language cited by appellant from Breedlove v. State, 413 So.2d 1, 9 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982), that murder in one's bed at home is "far different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place," does not render the instant fact a nonstatutory aggravating factor. The judge went to extra lengths to explain how the small store was the functional equiva-

lent of the victim's home.

Appellant's attempt to argue that such a ruling constitutes an impermissible distinction between store owners and store clerks is inapposite. What was important was not Virgie Langford's ownership, but her emotional ties to the store. She was interrupted while eating her lunch or a snack, as the overturned bowl of cantaloupe showed. A clerk with long term employment in a small store such as this would have an equivalent emotional connection to the location. This is a far cry from a victim who works in a chain convenience store, with its attendant high employee turnover and impersonal atmosphere, surely the sort of store this Court had in mind in the incidental language of Breedlove.

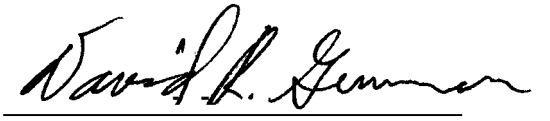
Even if the challenged fact was erroneously included in the sentencing order, the error is harmless. The remaining facts supporting the heinous, atrocious, or cruel circumstance are more than sufficient. The remaining aggravating factors also outweigh the mitigating factors. Further, the store/home analogy was drawn at the sentencing hearing after the judge's discussion of the mitigating factors, and may be considered to merely be a refutation of some aspect of the nonstatutory mitigating factors urged by the defendant.

CONCLUSION

Based on the arguments and citations herein, this Court should affirm the conviction and sentence.

Respectfully submitted,

ROBERT A, BUTTERWORTH
ATTORNEY GENERAL



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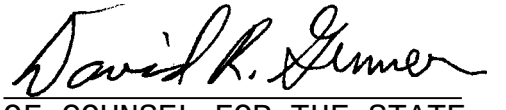
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas S. Connor, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this date, September 22, 1989.



OF COUNSEL FOR THE STATE