IN THE SUPREME COURT OF FLORIDA

PAUL BEASLEY JOHNSON,

Appellant,

v.

Case No. 72,694

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I - Appellant contends that the trial court erred in excusing two prospective jurors for cause because each of them was not sufficiently questioned concerning whether his or her feelings on the death penalty "would prevent or substantially impair the performance of his duties as a juror".

It is the state's position that not only was this issue not preserved for appellate review but, that the inquiry was sufficient and the finding was within the trial court's discretion.

As to Issue II - On appeal, Johnson claims that he should have been permitted to voir dire individual jurors who had read a newspaper article on Johnson's new trial to determine if they were excusable for cause. This is not the same argument that was presented below. Accordingly, as to that portion of the argument that was not presented to the trial court, appellee asserts that it is procedurally barred from appellate review.

Appellant also argues that the trial court's refusal to allow him individual voir dire precluded him from making intelligent use of his peremptory challenges. Recently, in Mu'Min v. Virginia, infra., the United States Supreme Court rejected this identical claim. The Court held that since peremptory challenges are not required by the Constitution the trial court's failure to allow further questioning was not a deprivation of a constitutional right. This Honorable Court has also consistently held that whether to grant individual voir dire is a matter that within the trial court's discretion.

Given that there was not extensive pretrial publicity in the case and given that the jurors were thoroughly examined by a court prosecutor and defense counsel on the issue, the trial court did not abuse its discretion in denying individual voir dire.

As to Issue III - Appellant contends that during the jury selection process and during the cross examination of state witness Shayne Wallace, the trial court erroneously interjected itself into the trial and rebuked defense counsel before the jury. The state contends that, when viewed in context of the entire proceeding, the comments by the trial court were within the Court's discretion and that appellant has failed to show an abuse of that discretion.

As to Issue IV -- Appellant contends that the trial court's ruling upon reconsideration of the motion to suppress was incorrect. He contends that the decision in Maine v. Moulton, changed the standard of review and that he was able to prove that the state intentionally moved jailhouse informant James Leon Smith in the cell next to the defendant in order to obtain information in violation of the defendant's right to counsel. It is the state's contention that neither of these claims is supported by the facts or law.

First, as the trial court found below, the evidence presented at the 1987 evidentiary hearing did not change the original factual basis. (T 7440) This is a factual finding of the trial court that is entitled to a presumption of correctness.

Accordingly, as the factual basis supporting the motion to suppress was unchanged, the trial court correctly denied the motion to suppress.

Appellant further alleges that the standard for review has been changed by the United States Supreme Court's holding in Maine v. Molton, supra. This position is wholly without merit, In Maine v. Molton, as in this Court did in Johnson v. State, supra, the Court specifically relied on its holding in Henry to reverse the case. Further, the "must have known" standard set forth by appellant was taken from a quote in Maine v. Molton quoting Henry. Thus, the underpinnings of this Court's decision in Johnson remains unchanged.

As to Issue V -- Appellant argues that the trial court erred in allowing James Smith to testify that Johnson told Smith that Johnson could play like he was crazy and they would send him to the crazy house for a few years and that would be it. Appellant claims the admission of this statement, as well as the prosecutor's comments on the statement, deprived Johnson of a fair trial on the issue of not guilty by reason of insanity because it suggests the Johnson would be released in a few years if found not guilty by reason of insanity.

This claim is procedurally barred as it was not presented to the trial court below. For an issue to be cognizable on appeal, it must be presented with specificity to the court below.

Additionally, the trial court's ruling regarding the admissibility of this statement was correct.

Even if this testimony was improperly admitted over a proper objection, error, if any, was waived by counsel's failure to object to the prosecutor's statements on this issue during closing argument and was harmless in light of the overwhelming evidence of the defendant's guilt.

As to Issue VI -- This issue has also not been preserved for appellate review. Appellant claims herein that the trial court incorrectly precluded him from eliciting testimony from Roy Gallemore, who had been the probation officer of informant James Smith, that the favorable recommendation Smith got in his 1981 sentencing on violation of probation was a reward for Smith's information against Johnson.

As to Issue VII -- Appellant contends that the trial court erroneously precluded him from presenting the testimony of former public defender investigator Dwight Donahue. He alleges that Donahue should have been able to testify concerning his opinion as to whether Johnson was under the influence of drugs when he was questioned shortly after his arrest.

Appellant contends however, that the limited scope of the examination did not constitute a waiver of attorney/client privilege and rendered it unnecessary to provide the state with Donahue's notes from that initial meeting.

As the state pointed out to the court below, for the state to be able to effectively cross examine the investigator even on the limited issue of his observation, it would be necessary to determine at what points in the conversation the defendant's eyes became wild or when he appeared hyper or excited.

This is a matter that was in the trial court's discretion and appellant has failed to show an abuse of that discretion. And, again, error, if any, was harmless.

AS to Issue VIII -- Appellant contends that the trial court erred in refusing to give his specially requested instruction concerning Williams Rule evidence.

This evidence was presented by the defense in support of his own insanity defense. Accordingly, as the state did not introduce this evidence in order to establish the bad character of the defendant, the defendant is not prejudiced by the failure to give this instruction.

Even if the instruction should have been given, the failure to do so was harmless.

As to Issue IX -- Appellant contends that because he waived the statutory mitigating circumstance of no significant history of prior criminal activity, the prosecutor should have been precluded from questioning defense witnesses concerning their knowledge of the defendant's prior criminal history.

The state contends that the evidence was not presented in anticipatory rebuttal, but instead, was presented during cross examination of defense witnesses to rebut the mitigating factor of lack of the capacity to appreciate the criminality of his conduct. This Court has consistently held that where the evidence is relevant to rebut a mitigating factor, that it is permissible. Since the evidence was relevant to rebut a statutory mitigating factor that was presented to the jury, it was properly admitted.

As to Issue X -- Appellant contends that he has a constitutional right to speak to his sentencer, without subjecting himself to cross examination by the state. The sentencer in the State af Florida is the trial judge. The defendant was not precluded from speaking to the trial judge prior to sentencing without subjecting himself to cross examination. However, during the course of the penalty phase, if the defendant wishes to take the stand and testify, he must necessarily subject himself to cross examination.

As to Issue XI - The sentences in the instant case were properly imposed. However, even if this Honorable Court should find that certain mitigating factors should have been considered, the mitigating evidence presented was still clearly outweighed by the valid aggravating factors. Accordingly, the sentences were properly imposed and should be upheld by this Honorable Court.

As to Issue XII - Initially, it is the position of the state that this Court's order denying the motion to reconstruct the record constitutes law of the case and should not be revisited at this time. Further, appellee contends that it was incumbent upon defense counsel to ensure that these items were included in the record and that this Court's denial of the motion was proper. Finally, a review of the items that appellant contends he was precluded from raising based upon this Court's denial of his motion to recanstruct the record does not support appellant's claim that he was denied meaningful review of alleged errors.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY STRIKING PROSPECTIVE DANIELS AND BLAKELY FOR CAUSE BASED UPON THEIR VIEWS ON THE DEATH PENALTY.

Appellant contends that the trial court erred in excusing two prospective jurors for cause because each of them was not sufficiently questioned concerning whether his or her feelings on the death penalty "would prevent or substantially impair the performance of his duties as a juror" as required by Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). It is the state's position that not only was this issue not preserved for appellate review but, that the inquiry was sufficient and the finding was within the trial court's discretion. During voir dire prospective juror Daniel and Blakely were excused based upon their affirmative response to the following question:

> "In a case where a defendant has been found guilty of first degree murder, is your feeling about the death penalty such, having had a chance to think about it for a moment now, all of you, is your feeling about the death penalty such that you could not, under any circumstances that you can think of, vote for [sic] impose a sentence of death upon a defendant? If that's the case, raise your hand." (T 177)

Neither the prosecutor nor defense counsel questioned these two prospective jurors any further on the issue. At the challenge conference, the court excused for cause these two jurors along with four other prospective jurors based upon their

statements that they could not impose death under any circumstances. (T 451)

This Honorable Court in Mitchell v. State, 527 So.2d 179 (Fla. 1988), rejected a similar claim. Mitchell contended that the trial court erred in excusing four prospective jurors for cause because each of them was not sufficiently questioned concerning whether his feelings on the death penalty "would prevent or substantially impair the performance of his duties as a juror" as required by Wainwright v. Witt, supra. This Court noted that although the prosecutor's questioning of the prospective jurors was brief, a review of the voir dire record supported the conclusion that the jurors' views towards the death penalty would have substantially impaired, if not totally prevented the proper performance of their duties as jurors. This Court further noted, quoting Laro v. State, 464 So.2d 1173, 1178 - 1179 (Fla. 1985), that it would make a mockery of the jury selection process to allow persons with fixed opinions to sit on jury. To permit a person to sit as a juror after he has honestly advised the court that he does not believe that he can set aside his opinion is unfair to the other jurors who are willing to maintain open minds and make a decision based solely upon the testimony, the evidence, and the law presented to them. Mitchell, supra at 180. Further, in Mitchell, as in the instant case, defense counsel must have believed that the jurors had adequately expressed their views because he made na request to further interrogate them.

This Court rejected a similar claim in Gunsby v. State, 574 So.2d 1085, 1088 (Fla. 1991). In Gunsby, the trial judge preliminarily questioned the venire concerning, among other things, whether their strong feelings for or against the death penalty would render them unable to fairly decide the case. The trial court excused members of the venire who affirmatively stated that they would be unable to discharge their duties as jurors. This Court found that Gunsby's failure to object to the procedure used by the trial judge and his failure to make further inquiries of the proposed jurors constituted a waiver of the right to challenge excusal of these potential jurors.

Similarly, in the instant case, defense counsel did not object to the procedure used by the prosecutor and did not attempt to further inquire of the prospective jurors. Further, after the state had moved to excuse these jurors for cause, defense counsel did not request the opportunity to further question the prospective jurors.

Appellant suggests that counsel was somehow precluded from further questioning these prospective jurors. This claim is wholly without basis. Counsel was allowed a lengthy voir dire of all of the prospective jurors and was at no time precluded from asking of prospective jurors Daniels or Blakely.[1] Thus, while

[1] Subsequently, counsel for appellant asked for the opportunity to further voir dire a prospective juror on his position on the death penalty and permission was granted by the court. (T 1034 - 1035)

counsel objected to the excusal of the prospective jurors Daniels and Blakely, he waived appellate review by failing to explore their objections further.[2]

Further, even if this claim were properly before this Honorable Court, the excusal of jurors is a matter within the discretion of the trial court. Appellant has failed to show an abuse of that discretion. In Wainwright v. Witt, supra the United States Supreme Court noted that the Adams[3] standard does not require that a jurors bias be proved with "unmistakable clarity". The Court held that this is because determinations of juror bias cannot be reduced to the question-and-answer sessions which obtain results in the manner of a catechism. The Court noted that there will be situations where, despite lack of clarity in the printed record, the trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law. The Court further noted that this is why deference must be paid to the trial judge who sees and hears the juror. Id. at 425 - 426. The court, in the instant case, found that under the circumstances there was an

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[2] And, in fact, the record shows that defense counsel did question prospective jurors Daniels and Blakely individually prior to the court's ruling. (T 330 - 332, 361 - 362, 380, 384, 391, 393, 404 - 406, 429) Accordingly, the state urges this Honorable Court to find that Johnson has waived appellate review of this claim.

[3] Adams v. Texas, 448 U.S. 38 (1980).

unequivocal statement by prospective jurors Daniels and Blakely that they could not impose death. (T 451) This is a matter that was within the trial court's discretion and these has been no abuse of that discretion. See also Randolph v. State, 562 So.2d 331, 337 (Fla. 1990).

Appellant also contends that this Court's opinion in Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990), suggests that a single question addressed to the jury as a group is insufficient to exclude a juror for cause. This is a misapplication of the holding in Sanchez-Velasco, wherein this Honorable Court held that the question "Do you have any philosophical, moral, religious or conscientious scruples against the infliction of the death penalty in a proffered case'' was insufficient alone to disqualify a prospective juror. This Court noted that the question to be answered is whether a prospective juror could put his personal convictions aside and vote to recommend the death penalty where the law requires it. Thus, this Court's decision in Sanchez-Velasco was based upon the text of the question presented not the fact that it was a single question. Further, a3 appellant noted, this Court affirmed in Sanchez-Velasco in light of the trial court's further questioning as to whether each venire person could put his personal convictions aside and vote to recommend the death penalty where the law required it. This is the same question put to the jurors in the instant case. Accordingly, in Sanchez-Velasco, as in the instant case, the jury was asked the proper question and those

who unequivocally found that they could not follow the law were properly excused.

Appellant also contends that since prospective Daniels and Blakely made no response to the prosecutor's initial inquiry about a "fixed and settled opinion against the death penalty'' and did not respond to defense counsel's inquiry about opinions or some attitudes concerning the death penalty, that it was never established that prospective jurors Daniels and Blakely were even opposed to capital punishment. First, the trial court required the prosecutor to restate the question to the jury because it was not clear if the question was meant for the entire panel or only selected jurors. Upon this clarification, Daniels and Blakely responded. As for the failure to respond to defense counsel's question, the record shows that defense counsel stated:

> "Some of you have already expressed attitudes concerning the death penalty ~~and I'll~~ try not to talk to those who have already expressed that. Others have not, and I wish to ask each of you a simple question which is to express to me **and** to the Court your attitude concerning the death penalty." **(T 332)**

Thus, Daniels and Blakely may have felt the questions were not directed to them because they had already expressed their opinions. Apparently, defense counsel did also because he asked them no further questions.

Further, since defense counsel did not object to the method used by the prosecutor nor attempted to inquire of Daniels and Blakely further, the record does not show whether .prospective

jurors Daniels and Blakely indeed responded to the question by a show of hands.[4]

[4] The record shows that some prospective jurors raised their hands in response to defense counsel's question. (T 332)

ISSUE 11

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO HAVE INDIVIDUAL VOIR DIRE FOR PROSPECTIVE JURORS WHO ADMITTED TO HAVING READ PRETRIAL PUBLICITY.

After Johnson's second trial ended in a mistrial based upon juror misconduct, the Honorable Judge Randall G. McDonald granted the Johnson's motion to disqualify him from sitting as the trial judge and for change of venue. (R 708) The case was transferred to Alauchua County where retired Judge Wayne Carlisle was assigned to try the case. (R 710) At a pretrial conference, appellant moved for individual voir dire on certain topics including exposure to pretrial publicity. (T 32) Judge Carlisle, noting that there had been no press the week before trial, nevertheless, told defense counsel he would consider the motion if it became a problem. (T 19, 26, 32)

The day of trial, the court noted that there had been an article in the newspaper on Saturday, two days previously, on the case. (T 116) At that time counsel did not renew his request for individual voir dire nor did he argue to the court that the pretrial publicity was such that it would unduly prejudice the defendant in the selection of the jury. Nor did counsel at any time move to have the article in the newspaper included in the record.

The trial judge asked the first panel of prospective jurors whether they had been exposed to any publicity about this case. Five of the prospective jurors raised their hands in response to

the question. (T 130) Of these five prospective jurors, Mary McNeely was excused for cause because she affirmatively stated that she did not feel she could set aside what she had read or heard about the case in order to render a fair and impartial decision based upon the evidence. (T 131) She was excused for cause without objection by the state or appellant. The court further questioned the remaining four prospective jurors and indicated an inclination to ask these individuals to step down because of their views. (T 134 - 135) The prosecutor, in light of the number of prospective jurors, objected to the court's excusing the jurors for cause and requested the opportunity to question them further. (T 135) The prosecutor noted that if their position remains unchanged, then the state would *go* along with the court's position but that he would like to see if they understood the proposition before they were excused. The court agreed to the request, noting that if a juror said they had reservations as to whether or not they could follow the law then they would be excused. (T 135) The only objection defense counsel had to this procedure was that the prosecutor could not get into the specifics in front of the other prospective jurors. (T 135) He at no time objected to the prosecutor being able to ask further questions, Upon further explanation, prospective jurors Stewart, Haenel and Harber said that they could put what they had heard aside. Defense counsel did not object to their not being excused for cause. Prospective juror Kearney was excused for cause upon further questioning. (T 139)

Now on appeal, Johnson claims that he should have been permitted to voir dire individual jurors who had read the newspaper article to determine if they were excusable for cause. This is not the same argument that was presented below. Accordingly, as to that portion of the argument that was not presented to the trial court, appellee asserts that it is procedurally barred from appellate review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Clark v. State, 363 So.2d 331 (Fla. 1978). During the jury selection process below, defense counsel on several occasions unsuccessfully moved for individual voir dire of prospective jurors who had read about the case. (T 436 - 437 - 440 - 443, 470 - 471, 755 - 758, 841, 1000 - 1002, 1178 - 1180, 1219) Counsel argued that individual voir dire was necessary for him to make intelligent use of his peremptory challenges. At no time did defense counsel argue that prospective jurors were excusable for cause simply based upon knowledge of the case gained through the article in the newspaper. Thus, to the extent that appellant is now arguing that such jurors should have been stricken for cause, that claim is procedurally barred and cannot be bootstrapped by the request for individual voir dire for peremptory challenges. Ieffeteller v. State, 495 So.2d 744, 747 (Fla. 1986).

Assuming, arguendo, that this issue had been properly preserved for appellate review, there is no merit to the claim, Appellant relies on Weber v. State, 501 So.2d 1379 (Fla. 3d DCA 1987); Cappadona v. State, 495 So.2d 1207 (Fla. 4th DCA 1986);

Reilly v. State, 557 So.2d 1365 (Fla. 1990), to support his position that it was prejudicial for jurors to be exposed to information that the defendant was previously convicted of the very offense for which he is on trial. These cases are readily distinguishable. Each of these cases has to do with juror misconduct during the course of the trial. As the court noted in Weber v. State:

> "An inquiry designed to elicit a simple yes or no response to the question of whether the information will influence the jurors' verdict or whether the juror is capable of putting the information out of his mind is much too perfunctory to be accepted in any case, much less one in which, as here, juror disobedience of the court's previous instructions has lead to the receipt of the prejudicial information. In such a case, jurors are likely to believe that an answer indicating that they are able to carry on their duties despite their receipt of the prejudicial information is expected by the court in expiation ~~of the~~ sin of having disobeyed the court's instructions and having caused ~~the~~ predicament that could lead to possible mistrial." Id. at 1384. (emphasis added)

The Court further noted that exposure of sitting jurors to this prejudicial material does not ipso facto require that a mistrial be granted or that jurors so exposed be stricken. Instead, such exposure raises the presumption that jurors will no longer be able to fairly consider the issue of the defendant's guilt, a presumption which may be overcome if the jurors are specifically and meaningfully admonished in the strongest terms and with solemnity befitting their oaths, and where the jurors assure the court that the information which has wrongfully come

to them absolutely will play no part in their verdicts. Id. at 1383.

In the instant case, this information did not come wrongfully to the jurors and the jurors were very strongly and thoroughly examined regarding any influence the articles would have on their ability to render a fair and impartial verdict. And, apparently defense counsel was satisfied with these assurances in that he did not move to have these jurors excluded for cause and in fact, objected to prospective juror Haenel (who had read the article and had been rehabilitated by the state in the initial round of voir dire), being struck for cause on another issue.[5]

Further, this type of information is subject to the harmless error analysis even when it has come in through juror misconduct. Teffeteller v. State, supra; Weber v. State, supra. Given the overwhelming evidence of appellant's guilt in the instant case, any prejudice that may have resulted from the jurors' knowledge of the prior conviction, was certainly harmless.[6]

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[5] Prospective juror Haenel was subsequently struck for cause because of her position on the death penalty over the objection of defense counsel. (T 446)

[6] As appellant's counsel did not move to have the article included in the record, we have no knowledge of the exact contents of the article. This argument assumes that the article carried information concerning the prior conviction that was consistent with the articles previously printed prior to the change of venue.

Appellant also argues that the trial court's refusal to allow him individual voir dire precluded him from making intelligent use of his peremptory challenges. This argument was preserved for appellate review in that counsel motioned the court for an individual voir dire, used all of his peremptory challenges and sought additional peremptory challenges which he stated he would use to exclude such people. Nevertheless, appellant is not entitled to relief on this point,

Recently, in Mu'Min v. Virginia, 500 U.S. **, 114** L.Ed.2d **493, 111** S.Ct. ____ (May **30,** 1991), the united States Supreme Court rejected this identical claim. Mu'Min argued to the Court, as Johnson does herein, that he was entitled to individual voir **dire** of prospective jurors in order to intelligently use peremptory challenges. In Mu'Min as in the instant case, he was concerned with potentially prejudicial publicity that the prospective jurors had been exposed to prior to the commencement of trial. The Court rejected this claim and held that since peremptory challenges are not required by the Constitution the trial court's failure to allow further questioning was not **a** deprivation of a constitutional right.

> "Whether a trial court decides to put questions about the content of the publicity to a potential juror or not, it must make the same decision at the end of questioning: Is this juror to be believed when he says he has not formed an opinion about the case? Questions about the content of the publicity to which jurors have been exposed might be helpful in assessing whether a juror is impartial. To be constitutionally compelled, however, it is not enough that such questions

> might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair. See Murphy v. Florida, **421** U.S. **794, 799, 44** L.Ed.2d **589, 95** S.Ct. **2031** (1975)."

Mu'Min v. Virginia, **114** L.Ed. at **506.**

The Court further noted that the trial court's findings of juror impartiality may "be overturned only for 'manifest error'". Patton v. Yount, **467** U.S. **1025, 1031, 81** L.Ed.2d **847, 104** S.Ct. **2885 (1984).** The Court noted that in Mu'Min the trial court was not confronted with a waive of public passion engendered by pretrial publicity that might well have required more extensive examination of potential jurors than it undertook. Similarly, in the instant case, the record shows that only one article appeared in the local newspaper.

The Court also rejected the **ABA** standards that appellant urges this Court to adopt. These standards require interrogation of each juror individually with respect to what the prospective juror has read or heard about the case, if there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material. These standards are also based on a substantiative rule that renders a potential juror subject to challenge for cause, without regard to his state of mind, if he has been exposed to and remembers "highly significant information''or "other incriminating matters that may be inadmissible in evidence.'' In rejecting these standards the Court stated:

> "That is a stricter standard of juror eligibility than that which we have held the Constitution to require. Under the ABA standard, answers to questions about content, without more, could disqualify the juror from sitting. Under the constitutional standard, on the other hand, '[t]he relevant question is not whether the community remembers the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.' Patton, supra, at **1035,** 81 L.Ed.2d **847, 104** S.Ct. **2885.** Under this constitutional standard, answers to questions about content alone, which reveal that a juror remembered facts about the case, would not be sufficient to disqualify a juror. 'It is not required . . . that the jurors be totally ignorant of the facts and issues involved.' Irvin, **366** U.S., at 722, **6** L.Ed.2d **751, 81** S.Ct. **1639."**

Mu'Min v. Virginia, **114** L.Ed.2d 493 at **509.**

This Honorable Court has also consistently held that whether to grant individual vair dire is a matter that was within the trial court's discretion.

> "The granting of individual and sequestered voir dire is within the trial court's sound discretion. Davis v. State, **461** So.2d 67, **69** (Fla. **1984);** Stone v. State, 378 **So.2d 765, 768** (Fla. 1979), cert. denied, **449 U.S. 986, 101** S.Ct. **407, 66** L.Ed.2d 250 **(1980).** Randolph has not shown an abuse of discretion by the trial court that warrants reversal. Davis, **461** So.2d at **70.** See also Cummings v. Dugger, 862 F.2d **1504, 1508 - 09 (11th** Cir.) (noting that that preferred approach in the face of extensive pretrial publicity is to conduct individual examination, although declining to require individual voir dire in all cases where there is substantial pretrial publicity."

Given that there was not extensive pretrial publicity in the case and given that the jurors were thoroughly examined by a court prosecutor and defense counsel on the issue, the trial

court did not abuse its discretion in denying individual voir dire.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN CONTROLLING THE CONDUCT OF COUNSEL DURING THE COURSE OF THE TRIAL.

Appellant contends that during the jury selection process and during the cross examination of state witness Shayne Wallace, that the trial court repeatedly interjected itself and rebuked defense counsel before the jury. He contends that these actions on the part of the trial court denied him a fair trial.

Appellant recognizes that Florida courts have traditionally allowed the trial judge wide discretion in the conduct of jury selection and the trial itself. Wilkerson v. State, 510 So.2d 1253 (Fla. 1st DCA 1957). He contends, however, that this discretion is abused when the court makes derogatory comments or repeatedly interjects himself into the proceedings to rebuke defense counsel.

The state contends that when viewed in context of the entire proceeding, the comments by the trial court were within the Court's discretion and that appellant has failed to show an abuse of that discretion. See Occhicone v. State, 570 So.2d 902 (Fla. 1990); Robinson v. State, 520 So.2d 1 (Fla. 1988).

In United States v. Cortez, 757 F.2d 1204, 1208 (11th Cir. 1985), the Court similarly rejected a claim that the trial judges' conduct was prejudicial to the defendant and deprived him of a fair trial, stating :

> The record indicates that while counsel was interrupted on various occasions by the trial court, none of those interruptions exceeded

> the bounds of judicial propriety. The comments were in response to acts of defense counsel and were used to instruct, elicit facts, or clarify. Furthermore, the court's comment when the jury was present were brief, and not directed to the jury, and the jury was instructed not to consider the court's comments as evidence. The trial court's comments did not deprive defendant of a fair trial. Id. at 1208.

In the instant case, the record shows that prior to the jury selection process the trial court instructed both the state and the defense as to how he expected voir dire to be conducted. The court told counsel that he expected them to ask group questions where possible. He told them he did not want them to just ask individual things or "repeat, repeat, repeat, repeat" things that can be answered by one question. He warned counsel that if they did get into questions of this nature that by the time they reached the second prospective juror that he was going to stop them and say to the jury "would all do that", and "if anybody can't do that, show me their hand". (T 41) He again instructed them on the following day, prior to the voir dire, that he would expect them to stick to relevant questions and that he didn't want to get involved in collateral matters. (T 111 - 114) There was no objection by counsel nor request for clarification. The record also shows that during the course of voir dire that the court attempted to keep things organized and clear and without hesitation directed the prosecutor to clarify questions. (T 173) And, at the hearing on the motion for a new venire, the prosecutor concurred with the Court's assessment that any

problems that had resulted were a result of defense counsel's failure to follow the court's instructions and that the court was acting in a fair and impartial manner without unduly prejudicing the defendant. The state noted that contrary to defense counsel's assertion that the court was out of line in responding to a question that Mr. Shearer had asked of the jury, that Mr. Shearer was the one who first raised his own hand in response to his own question about would anybody "druther not be here". He further noted that the entire courtroom raised their hands at that time, more or less at Mr. Shearer's prompting. (T 314)

The court clearly indicated that it had certain preferences as to how voir dire should be conducted. It is clear that where a group question on an issue was submitted to the jury and if any juror made a response that suggested further inquiry was appropriate, that the court did in fact allow inquiry from both sides. Where the attorneys followed that procedure, as the court requested, the court had no reason to make any rulings concerning the voir dire.

It is also equally clear from the record that Mr. Shearer and Mr. Norgard had no intention of following the courts' instructions in that regard, that they continually and repeatedly ignored the court's direction and attempted to do what they wanted to do in voir dire, rather than conduct a voir dire that at the same time was both meaningful and within the court's direction. (T 315) The court simply asked the attorneys to follow a logically progressive pattern in its asking of questions

so that there was no unnecessary repetition and that there was no unnecessary questioning about matters that would really not be useful to the proper exercise of peremptory challenges. This is clearly within the court's discretion.

Similarly, with regard to the cross examination of state witness Shayne Wallace, the record shows that the trial judge's comments during the course of the cross examination were in response to repeated objections by the state to defense counsel's cross examination on questions that had been repeatedly asked and answered. Again, the trial court was acting within its discretion in trying to control the proper use of cross examination. None of the rebukes were in front of the jury and the defendant has suffered no prejudice by the court's control of the trial.

Accordingly, appellant has failed to show that the court abused its discretion.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS WHICH WERE OBTAINED BY JAIL HOUSE INFORMANT JAMES LEON SMITH.

Appellant has requested this Honorable Court to revisit its prior opinion in the instant case wherein this Honorable Court affirmed the trial court's ruling denying appellant's motion to suppress. Johnson v. State, 438 So.2d 774, 776 (Fla. 1983). The motion to suppress was originally filed in August of 1981. Prior to trial in 1987, the Court agreed to reconsider the motion to suppress and to hear additional testimony from James Leon Smith (the jail house informant) and James Still (a fellow inmate). (T 7397) Based upon the evidence adduced at this hearing and upon the opinion of the United States Supreme Court in Maine v. Multon, 474 U.S. 159 (1985), appellant contends that the trial court's ruling upon reconsideration of the motion to suppress was incorrect. He contends that the decision in Maine v. Multon changed the standard of review and that he was able to prove that the state intentionally moved Smith in the cell next to the defendant in order to obtain information in violation of the defendant's right to counsel. It is the state's contention that neither of these claims is supported by the facts or law.

First, as the trial court found below, no new or credible evidence was presented at the 1987 evidentiary hearing that was sufficient to support the motion. (T 7440) This is a factual finding of the trial court that is entitled to a presumption of

correctness. Johnson v. State, supra at 776; Owen v. State, 560 So.2d 207 (Fla. 1990). The trial court heard the witnesses and was in the best position to determine the credibility of these witnesses. Further, since no evidence was presented that was sufficient to change the factual basis of the motion, the state contends that this Court's original review of his motion constitutes law of the case.

James Leon Smith testified that he approached the police officers after the defendant had given him information that no one encouraged him to get information from the defendant and that no one had made any promises to him. He testified, however, that the prosecutor did send a letter to the judge informing the judge of Smith's assistance at the original trial. (T 2057, 2068 - 76) He also testified that in the past that when he had informed the police of statements made to him by other defendants, the only compensation he had received was favorable statements in his P.S.I. from the police officers. (T 2068) Smith also testified contrary to the representation of appellant, that when he first met the defendant, he was in general population. It was at this time that the defendant had made the statements to him. (T 7399) Sometime after he had informed the police of the statements made to him by the defendant, he was transferred from general population into an isolation cell block where the defendant was housed. (T 739 - 05) He was originally placed in a cell behind the defendant's. From that cell he could talk to Johnson through the vents. (T 7404) Shortly thereafter he traded cells with

James Still. (T **7405)** Smith testified that Still was only in his new cell a few hours because he was being transferred to general population. (T 7405) Smith also testified that he was moved into isolation because he was causing problems in general population. (T 7408) Smith testified that he was only in the first cell long enough for them to transfer Still out to general population; that it was only a matter of a few hours. (T **7409)**

James Still's testimony was slightly inconsistent with Smith and slightly inconsistent with Still's own testimony. He was not sure of the dates of when he was transferred; he was not sure of how long he was in a particular cell and he admitted that he had been transferred out of this isolatian cell because he was being sent back to general population. He returned from general population a few days later because he complained of the smoke and at that point he was put in a different cell. Thus, despite Still's testimony that for no reason they moved him from one cell block to another, the fact is that there was a reason for the move in that he **was** being transferred to general population.

The evidence produced at the evidentiary hearing also showed that the cell Smith was initially put into was unlivable because of a prior fire. Thus, the evidence presented explained why Smith was placed in the cell that he was and why there was this "switching of the cells".

Accordingly, it was within the trial court's discretion to disregard any suggestion made by Still that there was no reason for **the** move. Further, clearly the evidence does not support a

contention by the defendant that the transfers were done intentionally in order to put him next to the defendant. There was no evidence presented originally or at the subsequent evidentiary hearing to support this conclusion. Accordingly, as the factual basis supporting the motion to suppress was unchanged, the trial court correctly denied the motion to suppress.

Appellant further alleges however, that the standard for review, has been changed by the United States Supreme Court's holding in Maine v. Moulton, supra. This position is wholly without merit. In Maine v. Moulton, as in this Court did in Johnson v. State, supra, the Court specifically relied on its holding in Henry to reverse the case. Further the "must have known" standard set forth by appellant was taken from a quote in Maine v. Moulton quoting Henry. Thus, the underpinnings of this Court's decision in Johnson remains unchanged.

This Court recently held in Maqueira v. State, Case No. 74,913 (Fla. August 29, 1991), that where an informant was never asked for his cooperation nor was he planted with the intent to gather evidence and where his assistance was of his own volition and where the first contact with police officers occurred after defendant had initially confessed to inmate, there is no support for an allegation that the informant was acting as an agent of the state. Maqueira v. State, supra, citing Michael v. State, 437 So.2d 138 (Fla. 1983) (inmates not government .agents even though they had been used as informants previously where first

contact with police officers about the instant investigation occurred after defendant confessed to inmates, cert. denied, 465 U.S. 1013 (1984); Barfield v. State, 402 So.2d 377 (Fla. 1981)(cellmate not government informant where he was not paid or acting pursuant to government instruction and approached authorities on his own initiative after inculpatory statements were made to him). See, also Muehleman v. State, 503 So.2d 310 (Fla. 1987). There is absolutely nothing in this record to support a contention that the police officers deliberately planted Smith in order to obtain confessions in violation of defendant's right to counsel.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY ALLOWING STATE WITNESS JAMES SMITH TO TESTIFY ABOUT JOHNSON'S SPECULATION IF AN INSANITY DEFENSE WAS ACCEPTED BY THE JURY.

Appellant argues that the trial court erred in allowing James Smith to testify that Johnson told Smith that Johnson could play like he was crazy and they would send him to the crazy house for a few years and that would be it. Appellant claims the admission of this statement, as well as the prosecutor's comments on the statement, deprived Johnson of a fair trial on the issue of not guilty by reason of insanity because it suggests the Johnson would be released in a few years if found not guilty by reason of insanity.

This claim is procedurally barred as it was not presented to the trial court below. For an issue to be cognizable on appeal, it must be presented with specificity to the court below. Steinhorst, supra; Castor, supra.

When the state sought to introduce this statement on redirect examination defense counsel raised the following objection:

> "Your Honor, I did not specifically question him, first of all, from his written notes. I simply asked him what he recalled Mr. Johnson saying. And so I object on that ground.
>
> Second of all, this issue has been raised before and ruled upon, as to what the state would be allowed to ask on this issue." (T 2095)

Thus, the first objection went to the scope and relevance of the cross-examination. The court found that counsel had 'opened the door' and that it was admissible under the rule of completeness.

As for the second part of the objection, it is not clear as to what prior ruling defense counsel was referring. The only prior ruling the undersigned can find in the record was during the trial in 1987. At that time defense objected to the admission of this statement as a violation of the attorney/client privilege and based upon relevancy. (T 6748) However, that objection was overruled and that was before another judge. Again, it is incumbent on defense counsel to clearly and specifically present his objections to the court in order to preserve an issue far appeal

Additionally, the trial court's ruling regarding the admissibility of this statement was correct. Appellant concedes that part of this statement was properly admitted under the rule of completeness, but contends that the reference to the possible sentence the defendant would get was an improper denigration of the insanity defense. To the contrary, this complete statement was necessary to explain Johnson's motive for "playing crazy". Absent the admission of this complete statement, the jury would not be able to assess the evidence in its entire context.

Even if this testimony was improperly admitted over a **proper** objection, error, if any, was waived by counsel's.failure to object to the prosecutor's statements on this issue during

closing argument and was harmless in light of the overwhelming evidence of the defendant's guilt.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY SUSTAINING THE STATE'S OBJECTION TO APPELLANT'S EXAMINATION OF ROY GALLEMORE IN REGARD TO HIS RECOMMENDATION CONTAINED IN THE PRESENTENCE INVESTIGATION OF INFORMANT AND KEY STATE WITNESS JAMES SMITH.

This issue has also not been preserved for appellate review. Appellant claims herein that the trial court incorrectly precluded him from eliciting testimony from probation officer Roy Gallemore, that the favorable recommendation Smith got in his 1981 sentencing on a violation of probation was a reward for Smith's information against Johnson.[7] Defense counsel inquired of Gallemore:

> Q. Did the fact Mr. Smith got concurrent time, was that in any way related to any recommendation that you have made on his behalf?

(T 2193)

After the trial court sustained the state's objection, defense counsel stated he had no further questions at the time. There was no proffer presented to the court as to what Gallemore's testimony would have been nor did counsel abject to the state's contention that this was privileged information contained within the P.S.I.. This Court has consistently held that an issue is not preserved for appellate review where

[7] There is nothing in the record to support appellant's contention that this would have been the content of Roy Gallemore's testimony.

appellant merely acquiesces in the Court's ruling without argument or citations to authority contrary to the Court's understanding.

Further, it is incumbent on defense counsel to preserve an issue for appellate review to present a proffer of what the precluded testimony would have been. Based on the record before this Court there is no basis upon which this Court can determine if there was relevant evidence excluded.

Appellant also claims that this evidence was necessary in order to impeach James Smith's testimony that no one went to bat for him in April of 1981. However, the record shows that when Mr. Smith was questioned about the sentencing of April of 1981, as to whether anyone went to bat for him at that time, he stated that he did not believe *so.* (T 2057 - 2058) Absent affirmative denial by Smith, this testimony was improper impeachment evidence.

Assuming this issue was preserved for review, the trial court correctly ruled that to permit Gallemore to answer the question would require the witness to disclose the contents and circumstances of a presentence investigation, which violates ***Rule*** 7.12 of the ***Florida Rules*** *of* ***Criminal Procedure.*** Appellant argues that the confidentiality of a presentence investigation report under Florida law cannot outweigh the defendant's due process right to have the information contained therein disclosed to him. However, each of the cases that appellant relies on to support this contention, refer to the presentence investigation of the

defendant. The presentence investigation sought to be introduced in the instant case was in the instant case James Smith's, not Paul Beasley Johnson. Under these circumstances the defendant's due process rights do not outweigh the need for confidentiality.

Even if this evidence should have been admitted and was properly preserved for appellate review, the error in the instant case was harmless. As previously noted, Smith did not state that no one went to bat for him in April of 1981. To the contrary, he simply stated that he did not believe so. Smith readily admitted however, that at subsequent sentencing that he was given favorable recommendations based upon his cooperation in the instant case. Thus, the jury was not denied access to information concerning the benefits Smith reaped in return for informing on Johnson.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY NOT PERMITTING TESTIMONY FROM **DEFENSE** WITNESS DWIGHT DONAHUE UNLESS APPELLANT WAIVED HIS ATTORNEY/CLIENT PRIVILEGE AND PROVIDED THE **STATE** WITH DISCOVERY **OF** PRIVILEGED COMMUNICATIONS.

Appellant contends that the trial court erroneously precluded him from presenting the testimony of former public defender investigator Dwight Donahue. He alleges that Donahue should have been able to testify concerning his opinion as to whether Johnson was under the influence of drugs when he was questioned shortly after his arrest. Donahue's testimony was proffered to the court below during the 1987 trial. During the first proffer Donahue testified that the defendant looked like he might possibly be on drugs because he was hyper and his eyes appeared wild. (T 6913) In the second proffer Donahue simply stated:

> A. His physical appearance was, during our conversation, eyes were very wide, at times during the conversations his eyes were very wide open, his head would move sharply back and forth, twitching more nervously. (T **6916)**

Subsequently, Donahue stated that he did not recall observing these things about Johnson before the interview began. (T 6919) The state objected to the admission of this testimony, contending that Donahue could not be effectively cross examined unless his notes were provided as discovery and that any testimony by Donahue on this meeting constituted a waiver of the attorney/client privilege. (T 2410) Appellant contends however,

that the limited scope of the examination did not constitute a waiver of attorney/client privilege and rendered it unnecessary to provide the state with Donahue's notes from that initial meeting.

Appellant recognizes, however, that this Honorable Court has held in Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984), that a defendant may not selectively elicit testimony in his favor while blocking inquiries which would not be beneficial to him. Id. at 1247. In Delap, the defendant sought to introduce public defender investigator Coppock to testify that the defendant had denied making any statement that he had not been offered psychiatric help or that he had been advised of his rights. The trial court ruled that the prosecutor could properly ask on cross examination whether the investigator had asked the defendant about a statement wherein the defendant had told the chief of police that he had confessed because he trusted and liked the chief of police. This Court agreed that when a party ceases to treat the matter as confidential, that it loses its confidential character and that the defense's presentation of a part of the conversation waived the attorney/client privilege and allowed the state to delve into the remainder of the conversation concerning that subject.

Similarly in Hoyas v. State, 456 So.2d 1225 (Fla. 3d DCA 1984), the Third District Court of Appeals held that having testified on direct examination to part of the privileged communication, appellant was not entitled to object to disclosure

of the remainder of his conversation with his attorney on the subject of what he told him about the crime and his role in it.

Nevertheless, appellant attempts to distinguish the instant case by having the investigator testify solely as to his observations of the defendant without delving into the actual conversation that took place. Appellant contends that this limitation should necessarily limit the state to cross-examining only on the investigator's observations. As the state pointed out to the court below, for the state to be able to effectively cross examine the investigator even on the limited issue of his observation, it would be necessary to determine at what points in the conversation the defendant's eyes became wild or when he appeared hyper or excited. Clearly, it is relevant as to whether the defendant was just generally hyper or if only became excited when he was talking about how he had murdered these three innocent individuals. Without being able to put the observation in context, the evidence could be misleading. This is especially true in light of Donahue's statement that Johnson did not appear hyper before the interview began. **(T 6919)**

Further, appellant's position that there is some distinction between the observations of the investigator and the conversations he had with the defendant, is unsupported by the law. Appellant relies on Affiliated of Florida v. U-Need Sundries, 397 So.2d 764 (Fla. 2nd DCA 1981), to support this position. The Second District Court of Appeals in Affiliated of Florida, merely held that the defendant's presentation of non-

privileged matters through a particular witness does not open the door to privileged communications with that same witness.

Whereas, in the instant case, appellant does not contend that the investigator's observations were not privileged; they only seek to draw a distinction between observations and conversations. Authorities agree that communications do not have to be verbal in nature in order to be privileged. Ehrhardt, Florida Evidence 8502.5 (2d Ed. 1984). Clearly, Johnson felt free to expose his emotions to the investigator in accordance with the privilege. Whereas, with Detective Elliott, Johnson displayed no emotion. (T 2034 - 2037) Accordingly, any evidence that Johnson's eyes were wild and that he appeared hyper while telling his account of his killing spree, obviously falls within this privilege and is waived by counsel's presentation of part of this interview.

Appellant also contends that even when a privilege is waived it is limited to the subject at hand. Accordingly, he contends the state had no right to discovery of the notes. The state at no time attempted or argued that it should be allowed to present evidence from these notes; rather, it only sought to use these notes in order to effectively cross examine the witness upon his observations and his opinion as to the defendant's level of intoxication.

Accordingly, this is a matter that was in the trial court's discretion and appellant has failed to show an abuse of that discretion. And, again, error, if any, was harmless.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON THE LIMITED USE OF COLLATERAL CRIME EVIDENCE.

Appellant contends that the trial court erred in refusing to give his specially requested instruction concerning Williams Rule evidence.

Appellant relies on Rivers v. State, 425 So.2d 101 (Fla. 1st DCA 1982), review denied, 436 So.2d 100 (Fla. 1983), Lowe v. State, 500 So.2d 578 (Fla. 4th DCA 1986), to support his claim that he is entitled to a Williams Rule evidence instruction. In each of these cases the introduction of past crimes evidence was by the state. In the instant case, the evidence concerning Johnson's drug use was presented by the defense in support of Johnson's insanity defense. Accordingly, as the state did not introduce this evidence in order to establish the bad character of the defendant, the defendant is not prejudiced by the failure to give this instruction.

Further, even if the instruction should have been given, it was clearly harmless in light of the evidence of the instant case. The only issue presented to the jury was whether the defendant was insane at the time of his commission of the crime. There was no question of identity or that the defendant actually did commit the crime. Accordingly, the only thing that this evidence could have been considered towards was the defendant's insanity. As this was the purpose for the defendant introducing the evidence, no prejudice resulted to the defendant. It is

beyond a reasonable doubt that the failure to give this single instruction was harmless.

ISSUE IX

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE JOHNSON'S PRIOR CRIMINAL RECORD WHILE CROSS EXAMINING DEFENSE WITNESSES DURING THE PENALTY PROCEEDING.

Appellant contends that because he waived the statutory mitigating circumstance of no significant history of prior criminal activity, the prosecutor should have been precluded from questioning defense witnesses concerning their knowledge of the defendant's prior criminal history. To support this proposition, the appellant relies on this Court's decision in Maqqard v. State, 399 So.2d 93 (Fla.), cert. denied, 454 U.S. 1059 (1981) and Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986), wherein this Honorable Court held that it was improper to allow the state to present evidence of past criminal activity to rebut the existence of the mitigating factor of lack of prior criminal record where the defense had expressly waived any reliance on lack of prior record and had affirmatively represented to the court that it would not attempt to show such a mitigating factor.

The state contends that the instant case is readily distinguishable from both Maggard and Fitzpatrick, in that in the instant case, the evidence was not presented in anticipatory rebuttal, but instead, was presented during cross examination of defense witnesses to rebut the mitigating factor of lack of the capacity to appreciate the criminality of his conduct. This Court has consistently held that where the evidence is relevant to rebut a mitigating factor, it is admissible.

In Parker v. State, 476 So.2d 134 (Fla. 1985), the appellant argued that the trial court erred in allowing the state to present evidence of appellant's prior criminal history during the cross examination of a mental health professional who was qualified as an expert by the appellant. Appellant presented the testimony of a clinical psychologist who testified that appellant was a passive, non-aggressive individual. During cross examination, the state made inquiry concerning the case history the psychologist had used in formulating his opinion and specifically asked him about criminal offenses related to him by the appellant. This Court found that it was proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a **proper** basis.

Similarly, in Muehleman v. State, 503 So.2d 310 (Fla. 1987), this Court held:

> The presentation of the previous crimes in Parker through cross examination is functionally equivalent to the evidence here presented in rebuttal. In the instant case, unlike in Maggard, the trial court exercised its discretion in admitting the testimony not to rebut a phantom, waived mitigating factor, but to expose the jury to a more complete picture of those aspects of the defendant's history which **had** been put in issue. . . . The trial court admitted the testimony cancerning the other crimes in rebuttal to the defense's expert testimony, presented in mitigation, that Muehleman lacks substantial capacity to plan in advance and execute crimes. Id. at 316.

In light of the relevance of the evidence in rebutting specific evidence presented by the defense, this Court found no abuse of discretion in Muehleman.

Similarly, in the instant case, the trial court did not abuse its discretion in allowing the state to cross examine the experst who testified that Johnson was under extreme mental and emotional disturbance at the time of the killings and that due to the level of intoxication on amphetamines, Johnson's capacity to conform his conduct to the requirements of the law was substantially impaired as well as his capacity to appreciate the criminality of his conduct. (T **3447,** 3459 **- 3460, 3481 - 3483, 3492 - 3494)** This evidence **was** relevant to establish the experts' basis for their opinions and to rebut the claim that this was a recent problem that was the result of the defendant's drug use. In accordance with this Court's decision in Muehleman and Parker, since the evidence was relevant to rebut a statutory mitigating factor that was presented to the jury, it was properly admitted.

Further, even if the evidence **was** improperly admitted, the jury had been previously made aware of prior bad acts of the defendant. Thus, the admission was harmless. The sentences imposed were well supported by the record.

ISSUE X

WHETHER THE TRIAL COURT ERRED BY REFUSING TO ADMIT APPELLANT'S PROFFERED ALLOCUTION INTO EVIDENCE BEFORE THE PENALTY JURY.

Appellant contends that the trial court should have allowed him to present a videotape wherein he apologized for his actions and asked the jury to recommend that his life be spared. (T 3531; S 2 - 4) Appellant contends that he has a constitutional right to speak to his sentencer, without subjecting himself to cross examination by the state. To support this proposition appellant cites to several cases from other jurisdictions. It is important to note that unlike Maryland and unlike New Jersey, the sentencer in the State of Florida is the trial judge. The defendant was not precluded from speaking to the trial judge prior to sentencing without subjecting himself to cross examination.

However, during the course of the penalty phase, if the defendant wishes to take the stand and testify, he must necessarily subject himself to cross examination.

Johnson contends that he did not want to testify and subject himself to cross examination because he did not want evidence of his prior criminal history to be presented. And, the only way this was to be avoided is if his statement of allocution was accepted.[8] In other words, the defendant wanted all of the

[8] This is, of course, only true if the scope of direct opened the door to an examination of these crimes. Otherwise such inquiry is limited. Torres-Arboledo v. State, 524 So.2d 403, 408, cert. denied, 488 U.S. 90 (Fla. 1988).

benefits of testifying without any of the possible detriments of subjecting himself to the fact-finding process. There is no support in Florida law for the defendant's claim and the trial court did not abuse its discretion in refusing to allow the tape to be presented to the jury. See also Torres-Arboledo 524 So.2d 403 (Fla. 1988), cert. denied, 488 U.S. 90 (1988).

ISSUE XI

WHETHER THE SENTENCING JUDGE PROPERLY WEIGHED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

The defendant was convicted and sentenced for three first degree murders. For each of these murders the trial court found four aggravating factors and no mitigating factors. Appellant challenges the findings as to several of the aggravators, as well as the court's failure to find any mitigating factors. These will be addressed in the order as presented by the trial court.

A. AGGRAVATING FACTORS

1) Prior Violent Felony

Appellant does not challenge the trial court's finding of this aggravating factor as to Counts I, II or 111.

2) During the Course of a Robbery

The trial court found that this was established for each of the three murders. Appellant does not challenge this finding.

3) Avoiding or Preventing Lawful Arrest

This aggravating factor was found only for count 111, the murder of Deputy Burnham. Appellant does not challenge this finding.

4) Pecuniary Gain

The trial court found this applicable to Counts I and 11, the Evans and Beasley murders. Appellant does not challenge this finding with regard to the Evans murder, but correctly contends that this was an improper doubling as to the Beasley murder. As this aggravating factor is consumed by the finding

that the murder was committed during the course of a robbery, there are three valid aggravating factors remaining for the Beasley murder. Accordingly, even striking this one aggravating factor, the sentence is still validly supported by three aggravating factors and no mitigating factors.

5) Heinous, Atrocious or Cruel

The jury was instructed on this aggravating factor only as to Counts I and 11, but the court found the evidence insufficient to establish this aggravating circumstance,

6) Cold, Calculated and Premeditated

The trial court found that this aggravating factor was applicable to all three counts. The trial court also found as to all three counts that "before blazing his evening trail," the defendant told his friends he would shoot if he had to, to obtain money for drugs. This Court previously held in Johnson v. State, 438 So.2d 774 (Fla. 1983), that the defendant's statement that he would not mind shooting people to obtain money combined with the facts of the case, supported the finding of cold, calculated and premeditated. Id. at 779. See, also, Bruno v. State, 574 So.2d 76 (Fla. 1991); Jones v. State, 569 So.2d 1234 (Fla. 1990); Brown v. State, 565 So.2d 304 (Fla. 1990).

With regard to the Evans murder the court found that after receiving one gunshot wound to the cheek which would not have killed him, it was apparent from the evidence that after Evans fell to the ground, Johnson turned him over and administered a fatal blow in execution style at close range to his head. (T 830)

The trial court also found, as to Darrell Beasley, that the evidence supported a finding of cold, calculated and premeditated. The trial court specifically found that the victim was marched off to a field some forty to fifty feet. The court found that the victim was probably ordered to kneel down where a gun was placed at close proximity to his head and he was killed in an execution-style manner with a gunshot wound to the head. These facts combined with the defendant's acts in obtaining a gun and stating that he would kill if he had to, also supports a finding of cold, calculated and premeditated. See, Johnson v. State, supra at 779.

The trial court also found cold, calculated and premeditated to be supported by the evidence concerning the murder of Deputy Burns. Appellant does not appear to be challenging this finding and this Court has previously found that the murder of Deputy Burns was committed in a cold, calculated and premeditated manner. The court found that it was clear that there was some scuffle for the gun and that there was a blow to the head and wounds to the legs of the deputy. It appears from the evidence that the defendant took the gun and at close proximity fired the fatal blow to the victim in an execution style.

B. MITIGATING CIRCUMSTANCES

1) Extreme Mental or Emotional Disturbance

The trial court found that this mitigating circumstance was not present in the instant case. The court noted that while there was evidence to show that the defendant was under the

influence of drugs at the time of the alleged offenses and that there was evidence to show that the defendant had been a regular drug user; the evidence also clearly showed that he was not under extreme mental or emotional disturbance because of the use of these drugs based on the observations of him before and after the murders. The trial court found that based on his actions and the events that took place during the course of the commission of these crimes, the defendant knew and understood his actions, and that his actions, although they may have been enhanced by the use of drugs, were not such to place him under the influence to the extent of causing any extreme mental or emotional experiences, The trial court also rejected the doctors' testimony in this regard as the doctors' testimony was based primarily on the self-serving statements of the defendant some nine months after the event took place. Cf. Hardwick v. State, 521 So.2d 1071 (Fla. 1988).

Appellant contends that the trial court's rejection of this mitigating factor was improper in that the trial court should not have rejected the doctors opinions because they were based primarily on conversations with the defendant. Appellant contends that psychiatric opinions are necessarily based on after the fact analysis and that it would indeed be unusual for a psychiatrist to be able to provide an eyewitness account of the defendant's appearance while he was committing a homicide. The state agrees that it would indeed be unusual for a psychiatrist to be able to provide an eyewitness account of the defendant's

appearance while he was committing a homicide, but, nevertheless, that an analysis based solely upon self-serving statements made by the defendant some nine months after the crime is insufficient in and of itself to require the finding of a mitigating factor as a matter of law. In Mason v. State, 489 So.2d 734 (Fla. 1986) this Court remanded the case to the trial court for further evidentiary hearings where the psychiatrist's testimony was based solely upon conversations with the defendant.

The evidence in the instant case was not uncantroverted and, furthermore, was found to be incredible by the trial court based upon evidence af the defendant's actions prior to and during the commission of the crimes. This is clearly a matter within the trial court's discretion and he did not abuse that discretion by failing to find that this was a mitigating circumstance. See, e.g., Hill v. State, 549 So.2d 179, 183 (Fla. 1989); Lopez v. State, 536 So.2d 226, 231 (Fla. 1988); Bryan v. State, 533 So.2d 744, 749 (Fla. 1988); Kight v. State, 512 So.2d 922, 933 (Fla. 1987); Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982). Further, the court's order complies with the dictates of this Court's decision in Campbell v. State, 571 So.2d 415 (Fla. 1990). The court expressly reviewed and rejected evidence based upon a credibility determination. The trial court is not bound by the findings of expert witnesses.

In Bates v. State, 506 So.2d 1033, 1034 (Fla. 1987), this Court held as follows:

> . . . Contrary to Bates' contention, on the other hadn, the fact finder (in this case the trial court) had great discretion in considering the weight to be given expert testimony and need not be bound by such testimony even if all the witnesses are presented by onloy one side. *United States v. Esle*, 743 F.2d 1465 (11th Cir. 1984). In other words, expert testimony ordinarily is not conclusive even when uncontradicted. *United States v. Alvarez*, 458 F.2d 1343 (5th Cir. 1972). (emphasis supplied)

See also, Hudson v. State, supra at 831, citing Roberts v. State, 510 So.2d 885 (Fla. 1987) (trial court may accept or reject expert testimony just as the testimony of any other witness may be accepted or rejected).

2 & 3) The Capacity of the Defendant to Appreciate the Criminality of his Conduct or to his Conduct to the Requirements of the Law.

The trial court also rejected both of these proposed mitigating factors. Again the court found the defendant was able to appreciate the criminality of his conduct by his actions in each of the three murders. As to Count I the court considered the defendant's actions in burning or committing the arson of the taxicab after the murder of the taxicab driver as evidence of Johnson's capacity to appreciate the criminality of his conduct. Although doctors argued to the contrary, it was the court's finding based on this evidence the defendant had the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law and that they were not substantially impaired by his use of drugs. See, Provenzano v. State, 497 So.2d 1177 (Fla. 1986).

As to Count 11, the trial court similarly found that the defendant's actions in marching the defendant to a field, taking his wallet and sifting out any incriminating evidence that might be found, such as identification and photographs, showed the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Similarly, as to Count III, the defendant was alert enough to jump out of the ditch, distract the officers while attempting first degree murder on them. He was able to return fire and dodge their bullets, escaping from their attempts to subdue him. This, together with testimony and evidence that was presented as to the events leading to Deputy Burns death, shows that the defendant had the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Appellant contends, nevertheless, that this evidence was substantial and uncontroverted and accardingly, the trial court was bound to find the existence of this mitigating factor. Again, the trial court is not bound by the findings of expert witnesses. Expert witnesses' testimony is to be analyzed just as any other witness and his credibility or findings may be rejected by the trial court. The evidence in the instant case was inconsistent with the findings of the defense experts and it was within the trial court's discretion to reject these proposals, Cf. Smith v. State, 515 So.2d 182 (Fla. 1987).

4 & 5) Committed While Under the Influence of Druqs and Druq Dependency

The trial court rejected both of these proposals as mitigating factors. The court found that while there was evidence that the defendant used drugs on a large scale, that this did not contribute to the commission of the crimes in the instant case. While the court recognized that there was evidence that the defendant had a drug dependence and that he had been doing drugs while he committed his crime, it was the court's opinion that these is no mitigating circumstance under this condition. This is again a matter within the trial court's discretion. He clearly evaluated the evidence and rejected it as a mitigating factor.

Appellant contends that since the evidence was overwhelming and unrefuted as to his drug dependency, that the trial court was bound to find this as a nonstatutory mitigating Circumstance. Where the fact itself is not mitigating, neither Nibert nor Campbell require a trial court to find it as mitigating simply because there is overwhelming and unrefuted evidence to support it. Johnson's drug abuse is a criminal actio not a mitigating factor. The type of mitigation this Court found as valid in Campbell, was limited to factors beyond the control of the defendant. Campbell, at 419 n. 4. None of these factors encompass intentional criminal actions of the defendant. Under these circumstances, the trial court's rejection of the drug use was not an abuse of discretion.

7. Abused Childhood

The trial court found that the evidence failed to establish any mitigating circumstance under this condition. The Court found that even though the defendant's childhood may not have been a happy one, it did not mitigate his conduct in the instant case. The trial court's finding again shows that he considered the evidence before him and did not find it of sufficient import to require the finding of a mitigating circumstance. This is a valid nonstatutory mitigating which was considered by the sentencing judge and rejected.

The sentences in the instant case were properly imposed. However, even if this Honorable Court should find that certain mitigating factors should have been considered, the mitigating evidence presented was still clearly outweighed by the valid aggravating factors. Accordingly, the sentences were properly imposed and should be upheld by this Honorable Court.

ISSUE XII

WHETHER APPELLANT WAS DENIED HIS RIGHT TO PREPARATION OF THE ENTIRE RECORD OF THE CONVICTION AND SENTENCE FOR REVIEW BY THIS COURT.

Initially, it is the position of the state that this Court's order denying the motion to reconstruct the record constitutes law of the case and should not be revisited at this time. Further, appellee contends that it was incumbent upon defense counsel to ensure that these items were included in the record and that this Court's denial of the motion was proper. Finally, a review of the items that appellant contends he was precluded from raising based upon this Court's denial of his motion to reconstruct the record does not support appellant's claim that he was denied meaningful review of alleged errors.

First, appellant contends that this Court's refusal to allow reconstruction of the proposed special jury instructions by defense counsel precludes review of the requested instruction on heinous, atrocious or cruel. Appellee is at a loss to explain why this issue could not be raised upon the record before this Honorable Court. It is clear that the trial court was presented with a request to have the jury instructed on the appellate meanings of the terms heinous, atrocious or cruel. (T 3405) This motion was denied by the trial court and the standard jury instruction was given. (T 3407 - 3411) Further, even if this issue had been presented to this Honorable Court based upon the record before it, appellant recognizes that this Court in Smalley

v. State, 546 So.2d 720 (Fla. 1989), has held that Maynard v. Cartwright, 486 U.S. 356 (1988), is inapplicable to Florida capital procedure. Accordingly, the trial court's denial of the request was proper.

Appellant also contends that he was hampered in his presentation of other issues in this brief. The issues he claims were affected and the material denied to appellant were:

Issue II(a) Written peremptory challenges exercised during voir dire (to show which party excused with jurors by peremptory strike during voir dire). Appellant does not explain why he needed this information or what difference it made in the context of this case. The state has already conceded in Issue II that the defense counsel used all of his peremptory challenges and requested more.

(b) Newspaper articles in the Gainesville Sun which were read by prospective jurors (to show prejudicial publicity). This item was not included in the record because defense counsel did not choose to make it an exhibit in the case or ask that it be included in the record. Under these circumstances it was entirely inappropriate to remand a case every time defense counsel fails to deem it necessary to include something in the record. Further, as appellant argued in Issue 11, the gist of the article was put on the record.

Issue III -- Tape recordings made by court reporter during the jury's selection proceeding of April 4, 1988 (to show laughter directed at defense counsel by perspective jurors after

numerous interruptions by the trial judge). Again this issue was fully presented to this Court on appeal and there was no challenge to appellant's statement that laughter did occur during the selection of prospective jurors. The argument in the instant case is not hampered by the lack of the requested transcript.

Issue IV -- The transcript of the testimony heard August 28, 1981, on the motion to suppress which was read and considered by the trial judge in the instant case. (T 7440) The trial judge in the instant case was faced with a previous ruling on this motion to suppress and was presented additional evidence. The basis for the prior ruling was fully set out by this Court's opinion in Johnson v. State, supra. Accordingly, the failure to include the transcript of that testimony in the record does not preclude review as that testimony is not at issue, only the additional testimony that was presented to the trial court. This additional testimony was insufficient to support a granting of a motion to suppress and, accordingly, the motion was denied by the trial court. This Court is well aware of the facts that were presented initially having affirmed the trial court's initial denial of the motion to suppress, thus appellant has suffered no prejudice.

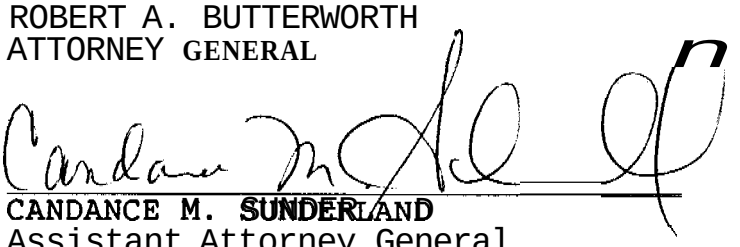
Based on the foregoing, appellee requests this Honorable Court to deny appellant's requested relief of a new direct appeal after completion of an appellate record, as there is nothing that appellant was precluded from properly arguing to this Honorable Court.

CONCLUSION

Based upon the foregoing facts, arguments and citations of authority, the judgment and sentence of the lower court should be affirmed.

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. Regular Mail to Megan Olson, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 25 day of September, 1991.

OF COUNSEL FOR APPELLEE.