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IN THE SUPREME COURT OF FLORIDA

PAUL BEASLEY JOHNSON,

Appellant, :

vs. Case No. 72,694

STATE OF FLORIDA, :

Appellee.

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

DOUGLAS S. CONNOR
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

	PAGE NO.
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	5
SUMMARY OF THE ARGUMENT	20, 20a-20c
ARGUMENT	21
ISSUE I	
THE TRIAL COURT ERRED BY STRIKING PROSPECTIVE JURORS DANIELS AND BLAKELY FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.	21
ISSUE II	
THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO HAVE INDIVIDUAL VOIR DIRE OF PROSPECTIVE JURORS WHO ADMITTED TO HAVING READ PREJUDICIAL PRETRIAL PUBLICITY.	29
ISSUE III	
APPELLANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S REPEATED INTERJECTIONS AND REBUKES OF DEFENSE COUNSEL BEFORE THE JURY.	35
ISSUE IV	
THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS WHICH WERE OBTAINED BY JAILHOUSE INFORMANT JAMES LEON SMITH IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.	41

TOPICAL INDEX TO BRIEF (continued)

ISSUE V

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. 47

ISSUE VI

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 PRE-SENTENCE INVESTIGATION OF INFORMANT AND KEY STATE WITNESS JAMES SMITH. 53

ISSUE VII

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. 56

ISSUE VIII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON THE LIMITED USE OF COLLATERAL CRIME EVIDENCE. 60

ISSUE IX

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE JOHNSON'S PRIOR CRIMINAL RECORD WHILE CROSS-EXAMINING DEFENSE WITNESSES BECAUSE UNDER THE CIRCUMSTANCES IT HAD NO PROPER RELEVANCE AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR. 62

TOPICAL INDEX TO BRIEF (continued)

ISSUE X

THE TRIAL COURT ERRED BY REFUSING TO ADMIT APPELLANT'S PROFFERED ALLOCUTION INTO EVIDENCE BEFORE THE PENALTY JURY. 67

ISSUE XI

THE SENTENCING JUDGE ERRONEOUSLY WEIGHED IMPROPER AGGRAVATING CIRCUMSTANCES AND FAILED TO WEIGH ESTABLISHED MITIGATING CIRCUMSTANCES. 72

ISSUE XII

APPELLANT WAS DENIED HIS RIGHT TO PREPARATION OF THE ENTIRE RECORD OF THE CONVICTION AND SENTENCE FOR REVIEW BY THIS COURT. 83

CONCLUSION 86

APPENDIX

1. Trial Court's Sentencing Order, "Finding of Fact" (R828-33) A1-6

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CASES	PAGE NO.
Adams v. Texas, 448 U.S. 38 (1980)	25
Affili ed of Florida v. U-Need Sundries, 397 So.2d 764 (Fla. 2d DCA 1981)	59
Bates v. State, 465 So.2d 490 (Fla. 1985)	76, 80, 81
Brown v. State, 381 So.2d 690 (Fla. 1980)	72
Brown v. State, 526 So.2d 903 (Fla. 1988)	80
Campbell v. State, 571 So.2d 415 (Fla. 1990)	77, 79
Cannon v. State, 91 Fla. 214, 107 So. 360 (1926)	57
Cappadona v. State, 495 So.2d 1207 (Fla. 4th DCA 1986)	33
Chambers v. Mississippi, 410 U.S. 284 (1973)	54
City of Orlando v. Newell, 232 So.2d 413 (Fla. 4th DCA 1970)	57
Dailey v. State, 406 N.E.2d 1172 (Ind. 1980)	49
Davis v. Alaska, 415 U.S. 308 (1974)	54
Davis v. Georgia, 429 U.S. 122 (1976)	25
Delap v. State, 440 So.2d 1242 (Fla. 1983)	57, 58
Duque v. State, 460 So.2d 416 (Fla. 2d DCA 1984)	57

TABLE OF CITATIONS (continued)

E. B. v. State,
531 So.2d 1053 (Fla. 3d DCA 1988) 57

Eddings v. Oklahoma,
455 U.S. 104 (1982) 80

Elledge v. State,
346 So.2d 998 (Fla. 1977) 80

Engle v. State,
438 So.2d 803 (Fla. 1983) 81

Evalt v. United States,
359 F.2d 534 (9th Cir. 1966) 49

Fitzpatrick v. Wainwrisht,
490 So.2d 938 (Fla. 1986) 65, 66

Fuselier v. State,
468 So.2d 45 (Miss. 1985) 26, 27

Gardner v. Florida,
430 U.S. 349 (1977) 53

Giglio v. United States,
405 U.S. 150 (1972) 55

Giglio v. Valdez,
114 So.2d 305 (Fla. 2d DCA 1959) 36

Gray v. Mississippi,
481 U..S. 648 (1987) 25

Green v. United States,
365 U.S. 301 (1961) 68

Hamblen v. State,
527 So.2d 800 (Fla. 1988) 75

Harmon v. State,
527 So.2d 182 (Fla. 1988) 77

Harris v. State,
306 Md. 344, 509 A.2d 120 1968) 69

Herring v. State,
446 So.2d 1049 (Fla. 1984) 75

TABLE OF CITATIONS (continued)

Hitchcock v. Dugger,
481 U.S. 393 (1987) 70

Holiva v. State,
532 S.W.2d 293 (Tex.Crim.App. 1975) 26

Hovas v. State,
456 So.2d 1225 (Fla. 3d DCA 1984) 58

Hunter v. State,
314 So.2d 174 (Fla. 4th DCA 1975) 36

Jackson v. State,
530 So.2d 269 (Fla. 1988) 68

Johnson v. State,
408 So.2d 813 (Fla. 3d DCA 1982) 49

Johnson v. State,
438 So.2d 774 (Fla. 1983) 45, 73

Jones v. State,
385 So.2d 132 (Fla. 4th DCA 1980) 36

Keane v. State,
357 So.2d 457 (Fla. 4th DCA 1978) 36

Lavado v. State,
469 So.2d 917 (Fla. 3d DCA 1985) 33

Lavado v. State,
492 So.2d 1322 (Fla. 1986) 34

Lockett v. Ohio,
438 U.S. 586 (1978) 67, 70

Lockhart v. McCree,
476 U.S. 162 (1986) 26

Lowe v. State,
500 So.2d 578 (Fla. 4th DCA 1986) 61

Maggard v. State,
399 So.2d 973 (Fla. 1981) 64

Magwood v. Smith,
791 F.2d 1438 (11th Cir. 1986) 79

TABLE OF CITATIONS (continued)

Maine v. Moulton,
474 U.S. 159 (1985) 45

Maynard v. Cartwright,
486 U.S. 356 (1988) 84

McCrae v. State,
549 So.2d 1122 (Fla. 3d DCA 1989) 40

Morey v. State,
72 Fla. 45, 72 So. 490 (1916) 50

Muehleman v. State,
503 So.2d 310 (Fla. 1987) 64

Mulford v. State,
416 So.2d 1199 (Fla. 4th DCA 1982) 52

Napue v. Illinois,
360 U.S. 264 (1959) 55

Nibert v. State,
574 So.2d 1059 (Fla. 1990) 77, 80

Nowitzke v. State,
572 So.2d 1346 (Fla. 1990) 49

O'Connell v. State,
480 So.2d 1284 (Fla. 1985) 31

Parker v. State,
476 So.2d 134 (Fla. 1985) 64

Penry v. Lynaugh,
109 S.Ct. 2934 (1989) 70

People v. Criscione,
125 Cal.App.3d 275, 177 Cal.Rptr. 899 (1st Dist. 1981) 49

People v. Davis,
794 P.2d 159 (Colo. 1990) 70

People v. Dubrin,
232 Cal.App.2d 674, 43 Cal.Rptr. 60
(Cal.2d Dist.Ct.App. 1965) 59

People v. Sorenson,
231 Cal.App.2d 88, 41 Cal.Rptr. 657 (3d Dist. 1964) 50

TABLE OF CITATIONS (continued)

People v. Wilson,
123 Ill.App.3d 798, 463 N.E.2d 890 (1st Dist, 1984) 50

Pollard v. State,
444 So.2d 561 (Fla. 2d DCA 1984) 40

Pope v. State,
84 Fla. 428, 94 So. 865 (1922) 31

Porter v. State,
564 So.2d 1060 (Fla. 1990) 74/75

Preston v. State,
444 So.2d 939 (Fla. 1984) 76

Procacci v. Seitlin,
497 So.2d 969 (Fla. 3d DCA 1986) 59

Provence v. State,
337 So.2d 783 (Fla. 1976) 72

Randolph v. State,
562 So.2d 331 (Fla. 1990) 30

Register v. State,
121 Fla. 9, 163 So. 219 (1935) 48

Reilly v. State,
557 So.2d 1365 (Fla. 1990) 33

Rivera v. State,
545 So.2d 864 (Fla. 1989) 73

Rivers v. State,
425 So.2d 101 (Fla. 1st DCA 1982) 61

Robinson v. State,
487 So.2d 1040 (Fla. 1986) 65

Rogers v. State,
511 So.2d 526 (Fla. 1987) 76, 81

Rogers v. State,
514 N.E.2d 1259 (Ind. 1987) 61

Sanchez-Velasco v. State,
570 So.2d 908 (Fla. 1990) 27

TABLE OF CITATIONS (continued)

Saperito v. State,
490 N.E.2d 274 (Ind. 1986) 52

Shell v. Mississippi,
498 U.S. __, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) 84

Singer v. State,
109 So.2d 7 (Fla. 1959) 31

Skipper v. South Carolina,
476 U.S. 1 (1986) 81

SmallBY v. State,
546 So.2d 720 (Fla. 1989) 84

State v. Dixon,
283 So.2d 1 (Fla. 1973) 67, 68, 81

State v. Makal,
104 Ariz. 476, 455 P.2d 450 (1969) 49

State v. Zola,
112 N.J. 384, 548 A.2d 1022 (1988) 69

Steinhorst v. State,
412 So.2d 332 (Fla. 1982) 50

Sumner v. Shuman,
483 U.S. 66 (1987) 82

United States v. Emery,
682 F.2d 493 (5th Cir. 1982) 61

United States v. Henry,
447 U.S. 264 (1980) 45

United States v. Pendas-Martinez,
845 F.2d 938 (11th Cir. 1988) 52

United States v. Winston,
447 F.2d 1236 (D.C.Cir. 1971) 51

Wainwright v. Witt,
469 U.S. 412 (1985) 25

Weber v. State,
501 So.2d 1379 (Fla. 3d DCA 1987) 32

Wilkerson v. State,
510 So.2d 1253 (Fla. 1st DCA 1987) 35

Williams v. State,
68 So.2d 583 (Fla. 1953) 48

Witherspoon v. Illinois,
391 U.S. 510 (1968) 25

OTHER AUTHORITIES

U.S. Const. amend VI 25,28,40,45,46,52,54,55,59,85
U.S. Const. amend VIII 40,67,70,71,80,81,84
U.S. Const. amend. XIV 25,28,40,52,55,59,70,71,79,81,84,85

Art. I, § 9, Fla.Const. 31,40,52,55,59,70
Art. I, § 16, Fla.Const. 31,40,52,55,59,70
Art. I, § 17, Fla.Const. 40

Fla.R.App.P. 9.140(b)(4)(A) 83
Fla.R.App.P. 9.200(b)(4) 83
Fla.R.Crim.P.3.712 53

§ 2.01, Florida Statutes (1987) 69
§ 921.141(4), Florida Statutes (1985) 83
§ 921.141(5)(d), Florida Statutes (1981) 72
§ 921.141(5)(f), Florida Statutes (1981) 72
§ 921.141(5)(i), Florida Statutes (1981) 73
§ 921.141(6)(a), Florida Statutes (1981) 62,64,65
§ 921.141(6)(b), Florida Statutes (1981) 78,79
§ 921.141(6)(f), Florida Statutes (1981) 78,79

§ 90.106, Florida Evidence Code 40
§ 90.107, Florida Evidence Code 61
§ 90.108, Florida Evidence Code 50

§ 90.404(2)(b)2, Florida Evidence Code 61
§ 90.610, Florida Evidence Code 68

ABA Standard for Criminal Justice 8-3.5(a) 32
ABA Standard for Criminal Justice 8-3.5(b) 32
Cleary, McCormick on Evidence, § 56 (3d edition 1984) 51
2 Wigmore Evidence, §228(1), (Chadbourn rev. 1979) 60
7 Wigmore Evidence §2113 (Chadbourn rev. 1978) 51

PRELIMINARY STATEMENT

The record on appeal consists of documents filed with the clerk, transcripts of courtraom proceedings, and a supplemental transcript of a proposed exhibit. References to the documents from the clerk's file will be designated "R", followed by the appropriate page number. References to the transcripts will be designated "T" followed by the appropriate page number. The prefix "S" will be used for the supplemental transcript.

STATEMENT OF THE CASE

A Polk County grand jury indicted Paul Beasley Johnson, Appellant, on April 17, 1981 for three counts of first degree murder, two counts of robbery with a firearm, two counts of attempted first degree murder, kidnapping and arson. (R77-82) The case proceeded to trial and Johnson was convicted as charged on all counts. (R329-32) The jury recommended and the trial court imposed three sentences of death. (R351-3,354-7,370-2)

On appeal to this Court, the convictions and sentences were affirmed. Johnson v. State, 438 So.2d 774 (Fla. 1983). (R411-21) Subsequently, in state habeas proceedings, the writ was granted and a new trial ordered. Johnson v. Wainwright, 498 So.2d 930 (Fla. 1986). (R458-61)

In a hearing held prior to the retrial on October 8, 1987, Appellant moved to suppress statements allegedly made to James Smith. (T7395) The original motion considered in 1981 was supplemented with additional testimony. (T7395-7440) The trial judge considered the transcript of the hearing held August 28, 1981 as well as the live testimony in denying the motion to suppress statements. (T7435,7440)

Retrial in Polk County began on October 12, 1987 before Circuit Judge Randall G. McDonald and a jury. (T3666) On October 29, 1987, the court declared a mistrial based upon juror misconduct and the agreement of both parties that a mistrial was mandated. (T7162, 7167-8) Subsequently, on November 12, 1987, Judge McDonald granted Appellant's motions to disqualify him from

sitting as the trial judge and for change of venue. (R708) The case was transferred to Alachua County. (R708) Retired judge Wayne Carlisle was assigned to try the case. (R710)

In a pretrial hearing held January 22, 1988, Judge Carlisle ruled that all rulings previously made by Judge McDonald in this case would be treated as law of the case. (T7362-3) The case proceeded to trial on April 4 through 26, 1988. (T100-3625) Prior to commencement of the second day of jury selection, defense counsel moved to strike the venire due to the court's rulings and conduct during the voir dire process. (R295-314) The court denied this motion (T319) and also the follow up written Motion for Mistrial Due to Jury Selection Errors. (R741-3)

During the guilt or innocence phase of the trial, the court denied Appellant's six special requested jury instructions. (R776-81,T3095-3105) The jury returned verdicts finding Johnson guilty as charged on all nine counts. (R810-14,T3350-51)

The trial proceeded to a penalty phase where in place of Johnson taking the stand, defense counsel requested that a video-tape made by Johnson and expressing his views towards the sentencing be shown to the jury. (T3531-3) After viewing the tape, the court ruled that it was not proper evidence in mitigation. (T3539-40) Defense requested special penalty instructions were rejected by the court. (R3400-21) The jury returned three recommendations of death by votes of 8-4, 9-3, and 9-3. (R815,T3616)

A sentencing hearing was held April 28, 1988. (T3626-51) After hearing argument, the court adjudged Johnson guilty of

three counts of first degree murder, two counts of robbery with a firearm, two counts of attempted first degree murder, kidnapping and arson. (T3647-8) Three consecutive sentences of death were imposed, followed by consecutive sentences of life, fifteen years, fifteen years, life, thirty years and thirty years. (T3648-50, R816-27)

In his written sentencing order, '"Finding of Fact", the sentencing judge found that aggravating circumstances § 921.141(5)-(b),(5)(d) and (5)(i) were applicable to all three of the capital felonies. (R828-31, see Appendix) He further found that aggravating circumstance § 921.141(5)(e) applied to the slaying of Deputy Burnham and that aggravating circumstance § 921.141(5)(f) applied to the Evans and Beasley killings. (R829-30, see Appendix) The court rejected evidence of the statutory mental mitigating circumstances § 921.141(6)(b) and (6)(f). (R831-2, see Appendix) The court further found that there were no non-statutory mitigating factors proven. (R832-3, see Appendix)

Appellant's written Motion for New Trial (R751-2) was denied on May 23, 1988. (R750) Appellant filed his Notice of Appeal and the Public Defender, Tenth Judicial Circuit was appointed as appellate counsel. (R840-1)

Pursuant to Article V, Section 3 (b)(1) of the Florida Constitution and Fla.R.App.P. 9.030(a)(1)(A)(i), Paul Beasley Johnson, Appellant, now takes appeal to this Court.

STATEMENT OF THE FACTS

A. Events of January 8-9, 1981

In January, 1981, Paul Johnson, Appellant, resided with his wife Cheryl and their four-year-old son in Eagle Lake. (T2267-8) On Thursday, January 8, 1981, Appellant came home in the late afternoon with some crystal methedrine, also referred to as "crank". (T2272) Johnson and his wife were habitual drug users who injected crystal methedrine frequently and abused a variety of other drugs as well. (T1838-40,2277,2282) On this particular afternoon, they each injected "crank" at least twice. (T2274-5) Paul Johnson took larger doses than his wife did. (T2275)

In the evening, the Johnsons visited Shayne and Rick Carter at their trailer where the adults all injected some more crystal meth. (T1781-3,2279-84) Shayne Wallace (formerly Carter) testified that Paul Johnson injected himself three times. (T1784) They also smoked some marijuana. (T2283) Cheryl Johnson noted that Appellant was sweating and that he took off his shirt although it was not warm in the trailer. (T2285-6) She testified that her husband typically reacted this way when he used a large amount of crystal msth. (T2285-6)

Later in the evening, Paul Johnson left the Carters' trailer saying that he was going to fix the heater (at the Johnson residence) and to get some more crank, according to Cheryl Johnson. (T2288-90) Richard Carter, however, testified that Johnson said he was going to get some more drugs and that he might "steal something or rob something." (T1951) Shayne Wallace claimed that

Appellant said he was going to get money for more drugs and "if he had to shoot someone, he would have to shoot someone." (T1784)

About 11:15 p.m., the dispatcher of Winter Haven Cab Company sent out a taxicab driven by William Evans to pick up a fare at the Continental Theater. (T1404-7) Evans radioed back to the dispatcher at 11:30 p.m., saying that he had picked up the passenger. (T1409) There was no contact after that until about 11:55 when a strange male voice kept repeating "8 to base". (T1410-1) The stranger then said that the driver had been knocked out and that he was going to stop and get water to revive him. (T1412-3) Later he said that he had hit the driver. (T1413) The stranger asked the dispatcher's permission to pick up two passengers and drive them to Eloise. (T1413) He said that the oil light had come on and ha was going to stop at the 7-11 to get oil. (T1420)

The dispatcher testified that she heard conversation from the stranger until 2:00 a.m. (T1414) However, it was not continuous because the taxicab would be driven outside of the radio range and then return. (T1414)

At one point, the surrogate driver reported his location as near a billboard advertising a building supply company. (T1413) The dispatcher was familiar with that billboard. (T1413) At another time, the person said he was on Cypress Gardens Boulevard. (T1414) About 1:45 a.m. the dispatcher received a telephone call from someone who she believed to be the same person who had commandeered the taxicab. (T1426,1430) He asked if the

cab company had a driver named Frank. (T1426,1430) The final message came over the radio at 2:00 a.m. when the dispatcher heard "8 to base" and "I'm gone". (T1414)

The witness described the voice she heard over the radio and telephone as incoherent (T1426) and "thick tongued". (T1428) In her opinion, it sounded like the person was high on drugs. (T1415, 1426-8)

The body of William Evans, the taxicab driver, was found January 14, 1981 in an orange grove east of Winter Haven. (T1669-70,1732,1748) He had been shot twice in the face. (T1672) One shot lodged in Evans' cheek and had been fired from a distance, according to Dr. Luther Youngs, the medical examiner. (T1672,-1684) It was unlikely that this wound would have bean fatal. (T1676) The other gunshot wound perforated the victim's brain; it was fired from close range (12-18 inches); and it would have caused immediate unconsciousness. (T1674-5)

The taxicab was located a little over a mile from where Evans' body was found. (T1732) The cab had been driven off the road into an orange grove in a zig-zag fashion. (T1486,1502) A fire had been started under the driver's seat of the cab, causing extensive smoke damage to the vehicle. (T1524-7)

Returning to the events of the early morning hours of Friday, January 9, 1981, Inez Rich, a hostess at Kissing Kuzzins restaurant in Lakeland saw Johnson in the restaurant. (T2660-2) Johnson was going from table to table sitting down with various

parties that he knew. (T2664-6) His eyes were glassy and he appeared to be on drugs. (T2664-5)

In the parking lot of Kissing Kuzzins, Appellant approached Amy Reid and Ray Beasley as they were getting into their automobile. (T1443-4) He said that his car had broken down and asked them for a ride. (R1444) Eventually, they agreed to drive Johnson to a friend's house an Drane Field Road for ten dollars. (T1446) As they drove, they smoked marijuana. (T1449-50) They made several wrong turns. (T1447) Johnson then asked Ray Beasley, the driver, *to* stop because he needed to relieve himself. (T1447) Appellant got out, went to the rear of the car; than he came back to the driver's side and said something to Beasley. (T1447-8) Beasley went behind the car with Johnson. (T1448) Amy Reid looked back and saw Johnson holding a gun pointed at Beasley. (T1448) She lacked the car doors, got into the driver's seat and drove away. (T1448)

At a Farm Stores convenience store, Amy Reid telephoned the Sheriff's Office. (T1448) Deputies Clifford Darrington and Samuel Allison responded around 3:45 a.m. (T1550-1,1576-7) They drove Reid to the site where she had left Appellant and Beasley, but found nothing there. (T1554-6,1578) Back in the patrol car, they heard a radio transmission from Deputy Theron Burnham, who said he had encountered a possible suspect about one mile away on Drane Field Road. (T1556,1579)

When Deputies Darrington and Allison and Amy Reid arrived at this location, they saw Deputy Burnham's patrol car running with

the parking lights on and the door open. (T1557-8,1580) As they stopped, a man crossed in front of their car through the headlights, saying "an officer's been shot." (T1559,1580-1) The individual went to the driver's side front door, pulled a revolver and fired two shots in the direction of Deputies Allison and Darrington. (T1559,1581-2) The officers were not hit. (T1561, 1582) They returned fire as the suspect ran across a field and into some trees. (T1561-2,1582)

Deputy Allison found Deputy T. A. Burnham in a ditch on the edge of the field. (T1583) Burnham's revolver was missing, he had wounds on his leg and chest; and he wasn't breathing. (T1563, 1584) At the later autopsy, associate medical examiner Wilton Reavis found three separate gunshot wounds in Burnham's body. (T1767) Two of the waunds were to the left thigh; the bullets passed completely through the leg. (T1766-7) The other shot entered the victim's chest near the right armpit, passed through two major blood vessels, and lodged in the vertebral column. (T1764-5) The projectile taken from Burnham's spine appeared to be .38 caliber. (T1765,1719) This wound could have caused immediate paralysis, resulted in massive hemorrhage, and was the cause of death. (T1768)

The body of Ray Beaaley was later discovered off Airport Road seven-tenths of a mile from where Deputy Burnham's body was located. (T1624) Beasley's body could not be seen from the road; it was just on the other side of a barbed wire fence in an area of weeds. (T1626,1928) There were coins in Beasley's pants

pockets, but no bills. (T1627) Plastic wallet inserts with Beasley's identification were found about sixty feet from the body. (T1630,

1931) No wallet was ever found. (T1931)

Medical examiner Dr. Youngs testified that Beasley was killed by a single gunshot wound to the head. (T1666-9) The shot was fired at close range and would have caused immediate unconsciousness. (T1667,1669)

Friday afternoon, Cheryl Johnson bought a newspaper at a convenience store. (T2298) The headline story reported the killing of the deputy and included a police sketch af the suspect. (T2298-9) She and the Carters discussed whether the sketch looked like her husband and she worried that he might be responsible. (T2299-2300)

Richard Carter testified that Appellant telephoned the trailer around this time. (T1955) Cheryl Johnson talked to her husband and became very upset. (T1955) Carter got on the phone with Johnson and asked him if he had done the killings reported in the newspaper. (T1955-6) Johnson replied, "If that's what it says." (T1956)

Johnson asked Carter to pick him up at the Suncrest Motel and to bring him a shirt. (T1956-7) Carter agreed and drove to this location with Guy Gordon and Cheryl Johnson. (T1957-8) Paul Johnson got into the car and changed shirts. (T1958) His old shirt was thrown out the window as they drove away because the

description of the suspect in the newspaper included a similar flannel shirt. (T1958,2305-6)

On the drive back to the Carters' trailer, Richard Carter said that he overheard Cheryl Johnson ask her husband, "You killed him, too?" (T1960) Appellant replied, "I guess so." (T1960)

Back at the trailer, Johnson described the encounter with Deputy Burnham. (T1961) When the deputy told Johnson to put his hands on the car, Johnson hit the deputy with his gun. (T1961-2) There was a struggle between Johnson and Deputy Burnham; Johnson "came out on top." (T1962)

While Johnson was in jail awaiting trial, another inmate, James Leon Smith, was moved next to his cell after Smith had told law enforcement officials that he could get additional information from Johnson. (T2071-2) Smith testified at trial that Johnson told him that he killed a cab driver and burned the cab to destroy fingerprints. (T2054) Smith said that Johnson admitted taking about one hundred dollars from Beasley, and shooting him while he was on his knees. (T2055) The sheriff's deputy was shot during a struggle between Johnson and the deputy. (T2055)

Johnson also told Smith that he had injected 1 1/2 grams of crystal methadrine at the time of this incident. (T2091,2093) Johnson described himself as "flipped out" when he committed the shootings. (T2091-3) Over Appellant's objection, Smith was also permitted to testify that Johnson said "he could play like he was

crazy, and they would send him to the crazyhouse for a few years and that would be it." (T2095,2097)

Smith admitted that he was hoping for some benefit by testifying against Johnson. (T2074) After testifying against Johnson at the 1981 trial, Smith's prison sentence of seven years was vacated. (T2076-9) Smith's former probation officer, Ray Gallemore, testified that Smith's reputation for truthfulness was poor. (T2190)

B. Insanity Defense

Dr. Thomas Muther, a pharmacologist, testified concerning the effects of amphetamines on the human nervous system. (T2217-57) He stated that crystal mcth or methamphetamine was very similar chemically to amphetamine and acted similarly as a stimulant to the brain. (T2227-8) Amphetamines taken in high doses stimulate release of a chemical in the brain which precipitates psychosis. (T2229)

Dr. Muther stated that the upper range of a standard dose of amphetamine under medical supervision would be forty milligrams. (T2233) For a chronic user, a dose of one hundred to two hundred milligrams could cause psychosis, although individual tolerances vary greatly. (T2245-6) A person who had previously experienced a drug-induced toxic psychosis would be more susceptible to respond psychotically in the future. (T2247) When someone takes enough amphetamine to produce psychosis, the psychotic effects

last about six to twelve hours after ingestion before they disappear. (T2243-4)

Several of Johnson's acquaintances from the period before the homicides testified concerning his use of drugs. At this time, Johnson worked as a carpenter; he also sold drugs to support his own habit. (T2270,2291-2,2358-9,2705) The witnesses said that Johnson took a wide variety of drugs with them, in large quantities, according to what was available. (T2694-5,2701-3,2724-5,2730-2) One witness said that Johnson usually took more drugs "than anybody else, you know, just liked a big dose." (T2695) Another witness called himself a drug addict in 1981, "about as bad as you could get." (R2710) However, Johnson "was a little worse than I was." (T2710)

In March, 1980, the police were called to the Davis Brothers Motel in Bartow where Johnson was ranting and raving in the parking lot. (T2370,2379,2383) Johnson had no shirt on, his pants were undone, and he was yelling obscenities. (T2370-1, 2379, 2383-4) He told the officers that he was the "Incredible Hulk"' and "Jesus". (T2379,2384) The police transported him to Polk General Hospital and "Baker-acted him." (T2373,2380,2384)

At the hospital, Johnson was taken in through the emergency room where they put him under restraints on a stretcher. (T2395-6) He was then transported to the psychiatric unit. (T2397) The hospital record showed that the admitting physician's rule-out diagnosis was paranoid schizophrenia. (T2400-1) The final

diagnosis was toxic psychosis due to substance abuse. (T2847)

Four mental health experts testified; two for the defense and two in rebuttal for the State. All of these expert witnesses agreed that ingesting a sufficient quantity of crystal methadrine could cause psychosis rising to the level of legal insanity. (T2468,2801-2,2894,2989) The area of disagreement was whether Johnson's mental impairment at the time of the homicides was more accurately described as amphetamine delirium (which could meet the criteria for legal insanity) or amphetamine intoxication (which would not). (T2453-4,2498-9,2512-7,2798,2809-10,2814-5,2904-7,2986-7)

Dr. Thomas McClane, a psychiatrist, noted Johnson's bizarre conversations over the two-way radio with the cab dispatcher as consistent with a diagnosis of amphetamine delirium. (T2459-64, 2479-81) He testified that the strength of the psychosis determines whether a person loses the ability to know right from wrong. (T2476 -7)

By a standard of more likely than not, Dr. McClane gave his opinion that Johnson was legally insane when he shot the taxi driver. (T2453-4) However, he believed that Johnson was probably sane when he robbed the driver and kidnapped him. (T2485-7) The doctor relied upon Johnson's prior intent to commit a robbery in distinguishing the offenses and also surmised that he was becoming more psychotic during the course of the night. (T2486-8)

With regard to the homicide of Ray Beasley, Dr. McClane gave an opinion that Johnson was not aware of whether it was right or wrong at the time. (T2498-9) However, on the prosecutor's cross-examination, the psychiatrist changed his opinion based upon circumstantial evidence of possible planning and cover-up behavior connected with this homicide. (T2609-10)

By "a small margin" Dr. McClane concluded that Johnson was insane when he shot Officer Burnham and attempted to shoot the other two deputies. (T2516-8) His opinion rested in part upon Johnson's bizarre behavior of running through the headlights of the second patrol car and making statements to the deputies before shooting. (T2513-4)

Dr. Walter Afield agreed that Johnson met the legal criteria for insanity when he committed the offenses. (T2798-2821) Dr. Afield pointed to the 1980 episade where Johnson had a toxic psychosis and concluded that the large dosage of crystal rnethadrine which Jahnson took before these events caused a similar reaction. (T2800-01) The doctor explained that a toxic psychosis caused by amphetamines is not usually apparent to lay persons. (T2812-3) It is certainly possible for a person suffering from toxic psychosis to engage in conversation. (T2813-4) Violence is usually a symptom of toxic psychosis. (T2816)

In rebuttal for the State, Dr. Gary Ainsworth testified that while Johnson was "highly intoxicated" he did not suffer from a "mental disturbance of psychotic proportion." (T2883) He gave an

opinion that Johnson was not legally insane when the offenses were committed. (T2881)

On cross-examinatian, Dr. Ainsworth agreed that a person suffering from amphetamine delirium could be legally insane. (T2906) Dr. Ainsworth admitted that he was looking for a delusional thought disorder rather than delirium when he examined Johnson. (T2907,2930,2967-8) He also admitted that several major criteria for a diagnosis of delirium were present in Johnson's case. (T2927-30) He said, however, that even if he had made a diagnosis of delirium, he would still have concluded that Johnson was not legally insane. (T2930)

Dr. Robert Coffer testified that he found a significant difference between the March, 1980 incident where Johnson suffered toxic psychosis and the events in this case. (T2985-6) There were no eyewitness accounts here that described Johnson as out of control. (T2987) While the doctor did not rule out the possibility that Johnson was psychotic (T3026-7), he found it more likely that Johnson's judgment was impaired by amphetamine intoxication. (T3021) Individuals with toxic psychasis are not usually capable of purposeful behavior; rather they lose cantrol of themselves, according to Dr. Coffer. (T3027-8)

C. Penalty Phase

During the penalty phase, Dr. Gary Ainsworth, who had previously testified as a state witness in the guilt or innocence

phase, testified for the defense. (T3446-77) Dr. Ainsworth gave his opinion that Johnson was severely intoxicated on amphetamines when he committed the homicides. (T3447) Johnson suffered from extreme mental or emotional disturbance when the crimes occurred. (T3459) His capacity to appreciate the criminality of his conduct was somewhat impaired; his capacity to conform his conduct to the requirements of law was substantially impaired. (T3459-60)

On cross-examination, the prosecutor asked Dr. Ainsworth, over defense objection, whether Johnson had ever shown ability to conform his conduct to the requirements of law. (T3468-9) The doctor replied that it was questionable; although from age 24 to 29 Johnson was able to avoid incarceration. (T3469-3472)

Dr. Thomas McClane testified again during penalty phase. (T3477-88) Agreeing with Dr. Ainsworth, he said that a person who came from a family of alcoholics would have a greater tendency to become drug dependent. (T3480,3456-8) Dr. McClane gave his opinion that Johnson was under extreme mental and emotional disturbance at the time of the killings. (T3481) In the context of the capital felonies, his ability to appreciate the criminality of his conduct was substantially impaired as was his capacity to conform his conduct to the requirements of law. (T3482-3) Dr. Walter Afield also testified that these statutory mitigating factors existed, (T3492-4)

On cross-examination, the prosecutor asked Dr. McClane whether Johnson had, since the age of sixteen, shown "indifference to the criminality of his conduct" and whether there were "at least seven instances" prior to the incidents at bar. (T3486) The psychiatrist agreed that Johnson had previous criminal behavior. (T3486)

Dr. Afield was asked over objection whether Johnson had at least seven prior incidents of criminal behavior. (T3496) The doctor replied that he didn't know the number of occasions but that Johnson had prior criminal conduct. (T3496-7)

Several of Johnson's relatives testified about his childhood. (T3500-26) Johnson's father was an itinerant construction worker with a drinking problem. (T3503-4,3521-2) His mother took poor care of him, finally abandoning him when Johnson was only an infant. (T3505,3512-3) The paternal grandparents adopted Johnson and raised him in Auburndale, Florida. (T3506-8,3514-7) However, the grandfather, Calvin Johnson, also had an alcohol problem. (T3524-5) When the grandfather lost one of his legs, Appellant became less obedient and spent much of his time away from home. (T3517-8,3526)

D. Sentencing

In arguing that the sentencing judge should impose life sentences for the homicides, defense counsel pointed out that the jury's recommendation was tainted by the prosecutor's reference to seven prior convictions. (T3633) The statutory mitigating

circumstance of no significant prior criminal history had been waived by Appellant. (T3633) The sentencing judge rejected all of the testimony in mitigation and he imposed sentences of death. (T3645-8)

SUMMARY OF THE ARGUMENT

During jury selection, the prosecutor inquired of the full panel whether there wore any who didn't think that they could vote to sentence the defendant to death. Among the responses were two prospective jurors, Daniels and Blakely, who raised their hands. They were never asked any other questions regarding whether their attitudes toward capital punishment would impair their ability to sit. They were excused for cause over defense counsel's objection. The State failed to carry its burden to show that the two prospective jurors were excludable for cause.

A newspaper article mentioning that Johnson had previously been convicted and sentenced to death appeared shortly before trial. Many of the prospective jurors had seen this article. Those who stated they had formed a fixed opinion as to guilt were excluded for cause. However, defense counsel was not permitted individual and sequestered voir dire of prospective jurors who initially said that they could remain impartial. Thus, Appellant could neither develop challenges for cause baaed upon the prejudicial publicity nor make an intelligent exercise of his peremptory strikes absent further inquiry of the affected jurors. The trial judge also allowed more leeway to the prosecutor to rehabilitate prospective jurors who initially said that they doubted their ability to be impartial.

The cumulative effect of numerous interjections by the trial court in rebuke of defense counsel during voir dire and during

cross-examinatian of the State's key witness denied Johnson a fair trial. An impartial trial cannot occur when the trial judge disparages defense counsel in front of the jury because the client suffers prejudice.

Prior to trial, the court agreed to revisit Appellant's motion to suppress statements based upon the availability of a previously unavailable witness. Further testimony was also taken from jailhouse informant James Leon Smith. With the additional testimony, it is clear that Smith should have been considered to be a state agent because the Sheriff's department must have known that Smith would attempt to elicit incriminating statements from Johnson in violation of the Sixth Amendment. Johnson's statements to Smith should have been suppressed.

The prosecutor was erroneously allowed to elicit testimony and to make argument that Johnson was presenting an insanity defense because he thought that "they would send him to the craeyhouse for a few years, and that would be it." The jury should not be permitted to speculate about the disposition of a defendant found not guilty by reason of insanity.

Jailhouse informant Smith denied on direct examination that he received any benefit at his sentencing for his information against Johnson. Defense counsel wanted to rebut this testimony with testimony from Smith's former probation officer who would have disclosed the favorable recommendation he included in

Smith's presentence investigation. Upon the State's abjection to disclosure of contents of a presentence investigation, the court erroneously refused to allow the probation officer ta give his testimony.

An investigator from the Public Defender's Office was a prospective witness who would testify that he interviewed Johnson shortly after his arrest and observed that Jahnson appeared to be under the influence of drugs. The trial court ruled that the investigator could not testify unless he provided the State with discovery of the notes he took at this interview. Because the investigator was only going to testify to observations of physical appearance and demeanor, the attorney-client privilege should have barred access to defense work product.

During the course of the guilt or innocence trial, reference was made to prior bad acts committed by Johnson. Defense counsel requested a special jury instruction modeled on the standard "Williams Rule" jury instruction. The trial court erred in failing to give this instruction.

During penalty phase, the prosecutor was allowed to cross-examine defense witnesses about Jahnson'a prior criminal record despite the defense waiver of the section 921.141(6)(a) mitigating circumstance. He argued Johnson's prior nonviolent record as a reason to reject mitigating circumstances and to recommend sentences of death. comparison of this Court's decisions in this area show that reversible error occurred.

Prior to trial, Johnson videataped a statement in allocution for presentation to the jury in the event that he declined to take the witness stand. The court did nat permit this allocution. Although this issue is one of first impression in Florida, courts from several other jurisdictions have permitted allocution in capital cases.

The sentencing judge erroneously doubled the robbery aggravating circumstance with the pecuniary gain aggravator. The cold, calculated and premeditated aggravating circumstance was not proven by the evidence in these homicides. The judge arbitrarily failed ta find the statutory mental mitigating circumstances were proved despite the substantial and uncontroverted evidence from the mental health experts. He also failed to recognize established nonstatutory mitigating factors. Accordingly, the trial court should reweigh the proper aggravating and mitigating circumstances.

On appeal to this Court, appellate counsel requested material which he believed essential to a complete record. This Court's denial in part of his motion to supplement the record and his motion to reconstruct the record has caused him to be unable to brief at least one issue and hampered his presentation of other issues included in this brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY STRIKING PROSPECTIVE JURORS DANIELS AND BLAKELY FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

Near the commencement of voir dire, the prosecutor asked the panel of prospective jurors:

> MR. ATKINSON: Now, understanding that that may be one of the issues in this case, is there anyone here today who has a fixed and settled opinion against the death penalty? If so, raise your hand . . . , (T166)

Four prospective jurors responded in the affirmative and were further questioned individually by the prosecutor (T166-9). Later, the prosecutor inquired of the full panel:

> 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 on a defendant? If that's the case, raise your hand.
> (Some prospective jurors raised their hands.)
>
> MR. ATKINSON: All right. Now, in addition to our four previous jurors, we also had a positive response from - Mr. Daniels, is that correct?
>
> PROSPECTIVE JUROR DANIELS: Um-hmm.
>
> MR. ATKINSON: Thank you, sir, and from - is it Ms. Blakely?
>
> PROSPECTIVE JUROR BLAKELY: (Nods head.)

MR. ATKINSON: Thank you very much. (T177)

However, the prosecutor did not ask any follow-up questions of prospective jurors Daniels and Blakely regarding their attitudes toward the death penalty.

The record reflects that prospective jurors Daniels and Blakely responded to many questions on other subjects (T182-3,201-6,208-9,250,256,258-9,263,330-2,361-2,379-80,383-4,393-4,404-6, 429). When defense counsel tried to inquire into the prospective panel members' attitudes concerning the death penalty, the court permitted him only to ask the full panel:

> THE COURT: Rephrase your question.
>
> MR. SHEARER: Let my try it, then, as a raise of hands questions: How many of you on jury panel have some opinions or some attitudes concerning the death penalty?
>
> (Some prospective jurors raised their hands.) (T332)

Neither prospective juror Daniels nor prospective juror Blakely raised a hand (T333-45). Consequently, defense counsel was unable to clarify whether prospective jurors Daniels and Blakely truly held attitudes toward capital punishment which would substantially impair their abilities to serve as jurors.

At the challenge conference, the prosecutor challenged seven of the prospective jurors, including Daniels and Blakely, based upon their attitudes toward capital punishment (T443-5). Defense counsel agreed that four of these challenges were proper (T445-6). With regard to prospective jurors Daniels and Blakely, defense counsel objected to their excusal and the following transpired:

THE COURT: All right. Now, your next one is Mr. Daniels?

MR. SHEARER: Yes, Mr. Daniels, I believe Juror No. 47, we object to the State's challenge for cause. The defense does not believe that Mr. Daniels stated anything to indicate that he would not follow the law or stated that he had any feelings about the death penalty to where ha could not vote for death. I recall no statements by Juror Daniels.

THE COURT: I'm having difficulty recalling anything on Hr. Daniels as well, in that regard, He stated that he had no opposition, per se, to the death penalty; that he would follow the law; and I don't recall him making any statements that would prevent him from returning a recommendation of death in the event the first stage of the trial resulted in a guilty verdict. Now, I'm talking about my recollection now.

MR. ATKINSON: I understand, Your Honor. As to both Daniels and Blakely, I would just state this on the record. After we approached the bench and the Court asked me to rephrase the question and I went back and phrased the question if there was anyone here who could not impose a sentence of death in any case, no matter what the facts and circumstances, raise your hand, Ms. Blakely and Mr. Daniels were the two who raised their hands in addition to the other jurors we talked about, and I made note of that and that's my recollection of what happened.

MR. NORGARD: Our understanding, though, Your Honor, is that's all he did, though. He didn't ask them any questions regarding their ability to follow the law.

THE COURT: I Understand, but I do recall that there was a raised hand, without comment, but that when -- after the bench conference when I told you to rephrase the questions because there was doubt or at least some reservation as to whether or not you were addressing this to the entire panel or only those who had made previous expressions, you did, in fact, go back and ask if there

was anyone on the jury whose opposition to the death penalty was such that it would prevent them from recommending the death penalty. You did do that, and it was -- there was -- they did hold up their hands.

All right. And it was Mr. Daniels and the lady seated right next to him, the elderly lady.

MR. ATKINSON: Ms. Blakely.

MR. SHEARER: I didn't get to Blakely, but my objection is the same, which is Juror No. 361.

THE COURT: Yes, sir.

HR. SHEARER: And we recall her making no statement that she could not fallow the law or no statement she could not impose death. Whether there was a hand held in response to any particular question, I don't know, but even if there was, I would submit that that is an insufficient statement for vair dire purposes to disqualify a person for cause, saying that they held up their hand one time.

THE COURT: Well, in answer to a question to hold up their hand, my note shows that Ms. Blakely and Mr. Daniels both held up their hand to the question.

My notes do not show that they made any verbal statements.

* * *

MR. SHEARER: The last thing I would say on that is that if there was indeed a holding of hands as the Court has held as far as these two people, that the holding up of a hand is, at best, an equivocal statement and is not an unequivocal statement that a person cannot follow the law, and that there may have been other reasons far the person being -- holding up their hands, such as to ask a question or to want to be probed further concerning their feelings, and that this cannot be considered unequivocal affirmation of an inability to follow the law.

> THE COURT: Counsel, I took it as being unequivocal because when asking the question, he said if you have that opinion, raise your hand, and they both raised their hand, and that's the same as saying I do, I do.
>
> MR. SHEARER: I have nothing further.
>
> THE COURT: And it shows, the record shows that those two did.
> All right. Your challenge fax cause as to the six individuals -- wait, one, two, three, four, five -- seven individuals ta which you've addressed it is granted, Mr. Atkinson, and the defense objection to the granting of your challenge for cause as to Ms. Haenel, Mr. Daniels and Ms. Blakely is overruled. (T447-52)

The exclusion from a capital jury of any juror who is qualified to serve requires that the sentence of death be vacated. Gray v. Mississippi, 481 U..S. 648 (1987); Davis v. Georgia, 429 U.S. 122 (1976). In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court held that the Sixth Amendment right to an impartial jury and Fourteenth Amendment due process are violated when all jurors apposed to capital punishment are struck for cause from a capital jury. As refined in Adams v. Texas, 448 U.S. 38 (1980), the applicable proposition of law is:

> a juror may not be challenged for cause based upon his views about capital punishment unless these views could prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

448 U.S. at 45. Accord, Wainwriaht v. Witt, 469 U.S. 412 (1985).

As Justice Rehnguist has explained:

> It is important to remember that not all who oppose the death penalty are subject to re-

> moval for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Gray v. Mississippi, 481 U.S. at 658 (1987), quoting from Lockhart v. McCree, 476 U.S. 162 at 176 (1986).

The burden of proof that a prospective juror is excludable far lack of impartiality rests with the party seeking exclusion. Wainwright v. Witt, 469 U.S. 412 at 423 (1985). The question at bar is whether under the facts of this case, a simple non-verbal response to group questioning is sufficient to disqualify potential jurors from sitting in a capital case.

In Fuselier v. State, 468 So.2d 45 (Miss. 1985), the Supreme Court of Mississippi had occasion to address this issue. A prospective juror stood up when the prosecutor inquired:

> Are there any of you that just could not vote the death penalty no matter what the facts or what the circumstances are? No matter what?

468 So.2d at 54. This prospective juror was asked no further questions. The Fuselier court held that the juror's excusal for cause was error because no further voir dire was developed.1

Specifically applying the Adams-Witt teat, the court wrate:

> A clear showing that a juror's views would prevent or significantly impair the performance of his or her duties requires more than a single response to an initial inquiry.

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[1] See also Hovila v. State, 532 S.W.2d 293 (Tex.Crim.App. 1975)(Cursory verbal examination of prospective jurors insufficient to demonstrate their inability to sit).

468 So.2d at 55.

The facts at bar are on point with Fuselier and even more compelling. Prospective jurors Daniels and Blakely made no response to the prosecutor's inquiry about "a fixed and settled opinion against the death penalty" (T166). Neither did they respond to defense counsel's inquiry about "opinions or some attitudes concerning the death penalty" (T332). Thus, it was never established that prospective jurors Daniels and Blakely were even opposed to capital punishment.

Secondly, as defense counsel painted out, raising a hand to the question propounded by the prosecutor was an ambiguous response. Asking jurors who are likely uninformed of the law with regard to capital sentencing to imagine circumstances under which they would vote to impose death could generate confusion. The question asked by the prosecutor at bar is less straight forward than that asked by the Mississippi prosecutor in Fuselier. Certainly, prospective jurors Daniels and Blakely did not indicate inability to follow the court's instructions nor that they would disobey their oaths.

A recent decision of this Court, Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990), provides an instructive comparison. In Sanchez-Velasco, the trial judge asked a general screening question of prospective jurors regarding scruples against the death penalty. This Court agreed that the initial question "was not adequate by itself"' to disqualify potential jurors. 570 So.2d at 915. However, no reversible error was committed because

follow-up questions were asked af all jurors who indicated opposition to the death penalty. No juror was excused unless he or she indicated unequivocally that he or she could not follow the law.

Indeed, perhaps the most significant aspect af the voir dire at bar is that the prosecutar asked follow-up questions of the first four prospective jurors who indicated "a fixed and settled opinion against the death penalty" (T166-9), but declined to question prospective jurors Daniels and Blakely. Under the guidelines set up by the trial judge for voir dire, questions were to be put to the entire panel for a show of hands (T195). If a prospective juror responded, ha or she could be questioned individually (T195). Therefore, it would have been proper and consistent for the prosecutor to clarify the views toward the death penalty held by prospective jurors Daniels and Blakely by further questioning. Maybe the prosecutor did not want to clarify the views of these jurors because further questioning would have revealed that they were not excludable for cause.

Under these circumstances, it was error for the trial judge to hold that the prosecutor had met the burden of showing that prospective jurors Daniels and Blakely were disqualified. Given defense counsel's opposition to the jurors exclusion, the trial court should at least have permitted further questioning. On this record, Appellant's sentence of death should be vacated because it was imposed in violation of his Sixth and Fourteenth Amendment rights to an impartial jury and due process of law.

ISSUE II

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

Prior to commencement of roir dire, defense counsel moved for individual sequestered voir dire on certain topics including exposure to pretrial publicity (T32). Counsel cited the need not only to determine whether there were grounds for a cause challenge but also for counsel to have sufficient information about a juror's publicity exposure in arder to make an intelligent exercise of peremptory challenges (T34) The trial judge stated that he would make rulings as the need arose during jury selection (T35).

The judge noted that there was an article in the newspaper on Saturday (two days previously) about the case (T116). This article disclosed that Johnson had previously been convicted and sentenced to death for the offenses (T440-1). The State agreed that anyone who read the article would probably know that this was a retrial from a previous conviction and death sentence (T756).

The trial judge asked the first panel of prospective jurors whether they had been exposed to any publicity about this case (T130). Several acknowledged that they had (T130). One of these prospective jurors insisted that she could not set aside what she had read and was excused for cause (T131-2) Four other prospective jurors expressed doubts about their ability to be impartial

(T132-4). The court allowed the prasecutor to further examine these four prospective jurors with the result that only one of them was excused far cause (T136-40). The other three agreed to the court's statement that they wauld put aside what they read and would base their verdict on the evidence presented at trial (T140).

In the subsequent portion of jury selection, twelve other prospective jurors acknowledged that they had read about the case (T150-1,232,234-5,260-1,481-3,614,676-7,803-5,938-9,955-6,1141-3, 1184-5). All of these prospective jurors gave ritual assurances that they could be impartial jurors. Only one of them was later excused for cause on the ground that his comments indicated that he had already formed an opinion as to guilt (T605-6).

On several occasions, defense counsel unsuccessfully moved for individual voir dire of prospective jurors who had read about the case (T436-7,440-3,470-1,755-8,841,1000-2,1178-80,1219). Appellant exhausted his peremptory strikes and his motion for additional peremptories was denied (T1221). Defense counsel represented that he would use additional peremptory challenges if they were granted (T1222).

Appellant recognizes that whether individual sequestered voir dire is allowed falls within the sound discretion of the trial court. Randolph v. State, 562 So.2d 331 (Fla. 1990). There are, however, limits to this discretion. Creating a double standard whereby the prosecutor is allowed more opportunity on voir dire than defense counsel has been held by this Court to

constitute a due process violation. O'Connell v. State, 480 So.2d 1284 (Fla. 1985).

At bar, the trial judge created a double standard when he required defense counsel to accept at face value the statements of prospective jurors that they could be fair and impartial despite their exposure to prejudicial publicity. By contrast, the prosecutor was allowed to question the four prospective jurors who initially indicated doubts that they could set aside what they had read about the case (T132-9). Three of these prospective jurors were rehabilitated (T140). Thus, the prosecution was given an advantage in the voir dire process.

Florida courts have traditionally viewed meaningful voir dire of prospective jurors as necessary to the impartial jury guaranteed by Article I, sections 9 and 16 of the Florida Constitution. In Pope v. State, 84 Fla. 428, 94 So. 865 (1922), this Court wrote:

> The examination of jurors on the voir dire in criminal trials . . . should be so varied and elaborated as the circumstances surraunding the jurors under examination in relation to the case on trial would seem to require, in order to obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice.

94 So. at 869. Noting that pretrial publicity often destroys the impartiality of the public from which the jury is selected, this Court observed in Singer v. State, 109 So.2d 7 (Fla. 1959) that

> a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence.

109 So.2d at 24.

The American Bar Association Standards far Criminal Justice address exposure of prospective jurors to publicity. Standard 8-3.5(a) provides in part:

> If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors. (2d edition 1980)

The nature of the publicized facts is also of utmost significance. ABA Standard 8-3.5(b) provides in part:

> A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence . , . shall be subject to challenge far cause without regard to the prospective juror's testi-mony as to state of mind.

Exposure to the newspaper report that Johnson was previously convicted and sentenced to death for these crimes falls within this category. The Third District reversed a conviction in Weber v. State, 501 So.2d 1379 (Fla. 3d DCA 1987) where the jury learned that the defendant had previously been convicted of the same offense for which they were trying him. The Weber court wrote:

> Courts which have confronted the discrete issue posed by the present case have uniformly concluded that the prejudice arising from the exposure of jurors to information that the defendant was previously convicted of the very offense for which he is on trial is so great that neither an ordinary admonition of the jurors nor the jurors' ritualistic assur-

> ances that they have not been affected by the information can overcome it.

501 So.2d at 1382. A newspaper article which disclosed the prior conviction for the first-degree murder the accused was charged with was also grounds for reversal in ~~Cappadona v. State~~, 495 So.2d 1207 (Fla. 4th DCA 1986). The Fourth District termed juror exposure to the newspaper article "an intolerable dilution of the presumption of innocence to which he [the accused] was constitutionally entitled." 495 So.2d at 1208.

Another relevant decision is that of this Court in Reilly v. State, 557 So.2d 1365 (Fla. 1990). In Reilly, a prospective juror had heard that the defendant confessed to the murder. This confession was suppressed prior to trial and, thus, would not be in evidence. Although the prospective juror gave all the right answers on the inquiry into whether he could be impartial, this Court held that it was reversible error not to exclude him for cause. The Reilly court termed it "unrealistic to believe that . . . he could have entirely disregarded his knowledge of the confession." 557 So.2d at 1367.

At bar, Johnson should have been permitted to voir dire individual jurors who had read the newspaper article to determine if they were excludable for cause. Failure to permit individual voir dire also caused defense counsel to exercise peremptory strikes without being able to make an intelligent determination as to whether the prospective juror was biased against Johnson.

The inadequacy of a juror's general agreement that he can follow the law and serve impartially was considered in Lavado v.

State, 469 So.2d 917 at 919-21 (Fla. 3d DCA 1985) (J. Pearson, dissenting). Judge Pearson wrote that it was an abuse of discretion to preclude defense counsel from inquiring about the attitude of prospective jurors to a voluntary intoxication defense. On review by this Court, Judge Pearson's opinion was adopted as the majority opinion which held that the defendant was denied his right to a fair and impartial jury. Lavado v. State, 492 So.2d 1322 (Fla. 1986).

Johnson was similarly denied his constitutional right to a fair and impartial jury when defense counsel was not permitted to inquire beyond the prospective jurors' statements that they could be impartial despite their exposure to prejudicial publicity. Johnson's convictions and sentences should now be reversed and a new trial ordered.

<u>ISSUE III</u>

APPELLANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S REPEATED INTERJECTIONS AND REBUKES OF DEFENSE COUNSEL BEFORE THE JURY.

On the morning after the commencement of voir dire proceedings in this trial, Johnson moved the court to strike the jury venire (T294-5). Counsel cited several reasons which could be summed up as unreasonable restriction of voir dire (T296-306)(see also Issue 11, *supra*.). Of equal importance was the court's continual interruptions of defense counsel during voir dire, causing the prospective jurors to react with laughter and generally undermining defense counsel's credibility before the jury (T306-10). Appellant concluded that the venire should be struck because a fair and impartial trial could not be obtained before them (T313-4). The court denied the motion (T319).

Thereafter, the court continued to interrupt defense counsel's voir dire. He also interjected himself into the trial by answering questions for witnesses and commenting an their credibility. Counsel's written "Motion for Mistrial Due to Jury Selection Errors" (R741-3) and "Motion for New Trial'' (R751-2) set forth some af these instances.

Florida courts have traditionally allowed the trial judge wide discretion in the conduct of jury selection and the trial itself. <u>Wilkerson v. State</u>, 510 So.2d 1253 (Fla. 1st DCA 1987). However, this discretion is abused when the court makes derogatory comments or repeatedly interjects himself into the proceedings

to rebuke defense counsel. Wilkerson; Keane v. State, 357 So.2d 457 (Fla. 4th DCA 1978). The defendant is denied a fair trial when the judge shows animosity towards defense counsel because the client suffers the prejudice. See, Giglio v. Valdez, 114 So.2d 305 (Fla. 2d DCA 1959).

In Hunter v. State, 314 So.2d 174 (Fla. 4th DCA 1975), the Fourth District wrote about the importance of the trial court's demeanor in achieving an impartial trial:

> The single most dominant factor in the administration of a trial is the conduct of the judge; the manner in which he exercises control over such proceedings is reflected through his remarks and comments. Guiding a trial is a constant challenge to the ability and integrity of the trial judge; it is a task, the difficulty of which is too often taken for granted. Invariably there may be instances where conduct of counsel is such as to try the patience of the court. The trial judge must be equal to the task; and should endeavor to avoid the type of comment or remark that might result in inhibiting counsel from giving full representation to his client or that might result in bringing counsel into disfavor before the jury at the expense of the client.

314 So.2d at 174-5. In Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980), the same court reversed the defendant's conviction because the trial judge failed to heed their direction in Hunter and interrupted defense counsel in a hostile manner before the jury.

The comments by the trial court at bar far exceed those found reversible error in Jones. Space limitation in this brief permits only a few of the numerous instances to be identified. From the time that defense counsel introduced himself to the

venire, the court showed impatience and almost continually interrupted him. When counsel asked his first question of a prospective juror, the following transpired:

> Ms. Zimmerman, how do you feel about being here today?
>
> THE COURT: Wait a minute, wait a minute. Haw does she feel about what?
>
> MR. SHEARER: Being here today.
>
> THE COURT: Counsel, that's not relevant to whether or nat Ms. Zimmerman could be a fair and impartial juror.
> I tried to cover that in a way that if everybody had their druthers, they'd probably druther be somewhere else.
>
> PROSPECTIVE JUROR BLAKELY: That's right.
>
> THE COURT: They're here because they were summoned to be here under our system that we must use in the trial of a case, and 1 assume each of you - I have to assume as a result of my inquiries Friday that everyone is here because they recognize their responsibility to serve if they can reasonably do so.
> Have I misquoted anyane from my understanding?
> (No response.)
>
> THE COURT: And -- but I'll permit you to ask them all if you believe in the jury system.
> Do you believe that the system is a fair system, and a proper system under our laws, the jury system?
> (No audible response.)
>
> THE COURT: All right.

(T185-6)

Another example of the tenor of the court's interruptions occurred when counsel was trying to find out about the attitude of prospective jurors towards the criminal justice system:

Have any of you ever written a letter to the editor of a newspaper?

(Prospective Juror Stewart raised her hand.)

MR. SHEARER: Had -- Well let me ask this: Did it have anything to do with the criminal justice system?

PROSPECTIVE JUROR STEWART: (Shakes head.)

HR. SHEARER: Would any of you say you have an interest or a strong interest in reading about the criminal cases part of the newspaper?

THE COURT: Counsel, I don't understand your question. Do y'all understand -- do you go to it like you would go to the obituary column and see who is among the late departed? The older you get, the quicker you turn to that. But do any of you have such a special interest, as counsel is trying to put this, in the crime, that that's the first thing you go to before you pick up the paper and read it in a routine manner?

THE PROSPECTIVE JURORS: (Shake heads.)

THE COURT: Do you just read it in a routine manner as a general rule? Start here, and if you find something you enjoy, you go to where it is continued to, if you can find it in this new one. But--

All right. I believe that's general readership and interest in their newspaper - some in more than one, and that's wise.

(T264-5) Defense counsel complained to the court that the interruptions were embarrassing him in front of the venire and that prospective jurors were encouraged to treat his questions as

jokes instead of taking them seriously (T265-6). The court accused counsel of abusing the voir dire process (T266).[2]

The trial judge showed more sarcastic antagonism towards defense counsel during the hearing on the motion to strike venire -e.g. (T303-4). After the court denied the motion to strike the venire, he cantinusd to badger defense counsel's voir dire. For example:

> MR. SHEARER: Fair enough. Thank you, Ms. Blakely.
> 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 would 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.
>
> THE COURT: Counsel, rephrase the question.
> MR. SHEARER: My question is -- and 1'11 proffer it to Ms. Alridge first.
> What is your attitude concerning the death penalty?
>
> THE COURT: Rephrase your question.
>
> MR. SHEARER: Let me ask you this next: Do you have an attitude or same attitudes concerning the death penalty?
>
> THE COURT: Rephrase your question.
>
> MR. SHEARER: Let me try it, than, as a raise of hands question: How many of you on jury panel have some opinions or some attitudes concerning the death penalty?
>
> (Some prospective jurors rained their hands.)

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[2] Other interruptions prior to Appellant's motion to strike the venire occurred at transcript pages 194-8, 211-3, 222, 226-7, 235-8, 254-5, 273-4, 275-7, and 282-5,

(T332)

The court's attitude later manifested itself during defense counsel's cross-examination of the State's key witness, Shayne Wallace. The judge repeatedly interrupted defense counsel's attempts to impeach her with prior inconsistent statements (T1833,1849,1855-6,1861-4,1870,1873-4,1880-2). Counsel moved for a mistrial based upon the court's comments during the cross-examination because they amounted to comment upon the evidence and credibility of the witness (T1939-40). See, section 90.106, Florida Evidence Code. The judge denied the motion for mistrial, stating that defense counsel was "abusing [his] cross-examination" (T1940).

Similar behavior by the trial court was found reversible error in McCrae v. State, 549 So.2d 1122 (Fla. 3d DCA 1989). It is also important that the cumulative effect of all the court's interruptions and rebukes be considered as to the fairness of Johnson's trial. See e.g., Pollard v. State, 444 So.2d 561 (Fla. 2d DCA 1984). The result was the denial of a fair and impartial trial as guaranteed by the Sixth, Eighth and Fourteenth Amendments, United States constitution as well as the corresponding provisions of Article I, sections 9, 16 and 17 of the Florida Constitution. Johnson should now be granted a new trial.

ISSUE IV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEXENTS WHICH WERE OBTAINED BY JAILHOUSE INFORMANT JAMES LEON SMITH IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

On October 8, 1987, prior to trial, Appellant requested the trial judge to reconsider a Motion to Suppress Statements originally filed in August 1981 (T7395-6,R160-2). The court agreed to hear additional testimony from James Leon Smith (the jailhouse informant) and James Still (a witness who was unavailable in 1981).[3] (T7397)

James smith testified that while he was incarcerated in Polk County Jail, he was moved from the general population cells to the isolation cell block where Appellant was being held (T7399-7400). This transfer took place after Smith contacted detectives in regard to some conversations between Johnson and himself (T7399-7400). When asked whether he had suggested his transfer within the jail, Smith gave noncommittal answers:

> Q. Now, you testified previously that the movement of you from one cell to another was not something you initiated but was something that the sheriff's department or the jail officials did to you; is that correct?
>
> A. I think that's what I testified to. (T7400)

* * *

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[3] See T7432-4.

Q. And you never asked anybody to put you in an isolation or semi-isolation cell, did you?

A. I don't think so.

Q. And no detective ever suggested to you before it happened that they were going to do that, did they?

A. I don't think so. (R7408)

Smith further testified that when he was first transferred to the semi-isolation area, he was placed in a cell that was not next to Johnson's (T7403-4). From this cell, it would only be possible to talk through the ceiling vents to Johnsan (T7403-4). Within a few hours, Smith was switched into the cell directly beside Johnson's; he and inmate James Still were shuffled into each other's cell (R7403-5). The Polk County Sheriff's Department was responsible for the move (T7405-6).

Former jail inmate James Still testified that he had been held in the same semi-isolation cell from September until March (T7412-5). Johnson had resided in the cell next to his for a month or more (T7418). When Smith was brought into the cell-block, he was first placed in the cell lettered "C" on the defense exhibit diagram (T7419). Then all of the inmates in the block were switched to different cells in what Still characterized as "musical chairs" (T7420). The informant, Smith, ended up side by side with Appellant Johnson (T7420).

On cross-examination, witness Still said that he had talked with defense counsel only recently and not before the original

1981 trial (T7427). Still said he remembered the incident because he was "moved out of a goad cell" and

> all at once they go to doing this switching around thing, then you just start hearing things over the vine of what's happening, it starts you to wondering. And I wasn't born yesterday. (T7428)

On redirect examination, Still clarified that he heard rumors about "snitching" on the "vine" (T7431). Because the State's objection was sustained, Still was not permitted to state the substance of what he heard (T7431-2).

Defense counsel noted that at the previous suppression hearing, the court ruled the evidence insufficient to establish that Smith was a state agent (T7437). On appeal, the Florida Supreme Court wrote in its opinion that "a close question" was presented in affirming the trial court ruling. With the additional evidence of the cell switching, defense counsel contended that the court should rule that Smith was an agent of the Polk County Sheriff's Department (T7438-9). The prosecutor argued that there was no evidence "that the sheriff's office investigative arm was responsible far the shifting of the cells'' (T7439). The court considered the additional information but adhered to its prior denial of the motion (T7440,R653).

Some of the factual background presented the first time this motion was heard in 1981 needs to be considered with relation to the additional testimony in this record. As presented in this

Court's opinion in the prior appeal [4] [438 So.2d 774 at 776 (Fla. 1983)]:

> The inmate, smith, had worked as an informant for the sheriff's department several months prior to the incidents at issue here. After meeting Johnson by chance and having a casual conversation with him, Smith contacted the detective. he had previously worked for and told him what Johnson had said. This detective contacted the two detectives working on Johnson's case, who also spoke with Smith. Smith was moved to several different cells and eventually wound up in one next to Johnson's cell. He took notes on his conversations with Johnson and turned them over to the detectives handling Johnson's case.
>
> At the hearing on the suppression motion Smith and the three detectives testified that Smith talked to Johnson an his own initiative, without any prompting from the detectives. The detective that Smith originally contacted said they he had told Smith that it might be in Smith's best interest to write down what Johnson said. Smith, on the other hand, testified that he decided to take notes, solely on his own, because he had trouble remembering things. The other detectives stated that they had not told Smith to talk to Johnson or to take nates. Smith testified that he thought he had been moved to the isolation cell next to Johnson's because he had been injured and because he had had a bad argument with a counselor.

Two features are particularly significant here. First, Smith was a veteran informant. In 1976, he had assisted law enforcement and received benefits in his sentencing (T2065-7). In 1980, Smith also assisted another law enforcement officer, Ben Wilkerson, and obtained favorable consideration at sentencing

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[4] Appellant's motion to supplement the record on appeal with the transcript of the August 28, 1981 motion hearing was denied by this Court on April 24, 1990.

(T2067-9). At the time Smith started his conversations with Johnson, he had already bean sentenced to seven years in prison and was facing additional prison time on three other charges (T2061-4). The law enforcement officers involved in Johnson's case "kind of acted like" they wanted information about Johnson (T2071-2). Smith testified that he "was hoping" that he would benefit by testifying against Johnson (T2074). In fact Smith did benefit; all of his prison sentences were later vacated after he contacted the former prosecutor and the circuit court heard a motion to mitigate sentence (T2075-80).

Secondly, the switching of cells, brought out by the additional testimony at bar, is compelling circumstantial evidence that the Polk County Sheriff's Office arranged to place Smith where he would have access to Appellant. Although the detectives did not "prompt" Smith to talk to Johnson, this was also true in United States v. Henry, 447 U.S. 264 at 271, fn.O (1980)(informant told not to initiate conversations about the charges).

At the time this Court considered Appellant's Sixth Amendmsnt claim in his original appeal [Johnson v. State, 438 So.2d 774 (Fla. 1983)], the applicable inquiry was whether the State "intentionally creat[ed] a situation likely to induce [the accused] ta make incriminating statements without the assistance of counsel." United States v. Henry, 447 U.S. at 274. In the more recent decision of Maine v. Moulton, 474 U.S. 159 (1985), the Supreme Court focused on "knowing exploitation by the State

of an opportunity to confront the accused without counsel being present" as the core of a Sixth Amendment violation. 474 U.S. at 176. In other words, Johnson no long needs to show that the state intentionally brought Smith into contact with Johnson, but only needs to prove knowing exploitation of an opportunity ta acquire information from Johnson withaut counsel being present. The Moulton court explained the knowledge requirement:

> Direct proof of the State's knowledge will seldom be available to the accused. However, as Henry make clear, proof that the State "must have known'' that its agent was likely to abtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation. See 447 US, at 271.

474 U.S. at 176, fn.12.

Viewed from the "must have known" standard, the Polk County Sheriff's Department "must have known" that Smith would try to obtain information from Johnson; he had offered to do so. Because Smith was a veteran informant, the Polk County Sheriff's Department "must have known" that they did not need to make specific promises to Smith; a little encouragement would suffice. Finally, the Sheriff's Department "must have known" that housing Smith in the cell with the best access to Johnson would likely lead to surreptitious confrontation and obtaining incriminating statements.

Accordingly, Johnsan's alleged statements to Smith should have been suppressed by the trial judge. Johnson's convictions and sentences should now be vacated and a new trial ordered.

ISSUE V

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.

Over Appellant's objection, the prosecutor was allowed to elicit the following testimony on redirect examination of state witness James Smith:

> Q. Mr. Smith, do you recall if Mr. Johnson, during the time you were talking to him in February of 1981, made a specific statement to you--
>
> * * *
>
> Q. (Continuing) -- about what kind of defense he might have and what might happen to him? Do you remember if he made such a statement, first of all?
>
> A. Yes, sir, I think I remember it.
>
> Q. Do you remember it verbatim?
>
> A. I believe so.
>
> Q. What do you recall him telling you in that respect?
>
> A. He said he could play like he was crazy, and they would send him to the crazy-house for a few years and that would be it. (R2096-7)

The prosecutor featured this alleged statement by Johnson in his closing argument:

> MR. ATKINSON: Thank you, Your Honor. If it please the Court. Counsel. Good afternoon, ladies and gentlemen.
>
> He could play like he was crazy, and they would send him to the crazy house for a few

> years, and that would be it. February 1981, the words of Paul Johnson. (R3271)
>
> Paul Johnson did not see Dr. Afield until August of 1981. There would be nothing in the police reports, I suggest to you, that could ever tell Mr. Smith in February of 1981 that this statement would be important to anybody. But it was one of those that Mr. Johnson made, and Mr. Smith remembers it still: He could play like he was crazy, and they would send him to the crazy house for a few years, and that would be it. (R3274)

This emphasis on the possible consequences (going to the crazy-house for a few years) of a not guilty by reason of insanity verdict deprived Johnson of a fair trial.

In Williams v. State, 68 So.2d 583 (Fla. 1953), the prosecutor told the jury in his closing argument that if they found the defendant not guilty by reason of insanity, he [the defendant] would have a short stay in the insane asylum before being released to commit another homicide. On appeal, the Attorney General conceded that the argument was reversible error and this Court agreed. In another decision of this Court, Register v. State, 121 Fla. 9, 163 So. 219 (1935), the trial court's response to a jury question about whether the defendant would be released if acquitted by reason of insanity

> invited the jury to pursue its obvious purpose of considering a matter outside the evidence and issues in the case, in order to arrive at a verdict.

163 So. at 220. The Register court reversed the conviction because the trial judge's response suggesting that a dangerous defendant would be set free '"seriously prejudice[d]" the defense. 163 So. at 221.

While reversing on other grounds, the Third District noted in Johnson v. State, 408 So.2d 813 (Fla. 3d DCA 1982) that the prosecutor's comment during closing argument that "it was 'unheard of* for a person to spend more than two years in the state hospital system if found insane' was prejudicial error. 408 So.2d at 816. This, of course, is the identical impermissible speculation which was introduced in the case at bar.

Recently, in Nowitzke v. State, 572 So.2d 1346 (Fla. 1990), this Court found reversible error when the prosecutor led the jury to believe that a not guilty by reason of insanity verdict would put the defendant on the streets within eight months. Writing that "the disposition of an insane defendant is neither the concern nor the responsibility of the jury", the Nowitzke court found Nowitzke was "'greatly prejudiced" and "'deprived . . . of a fair trial." 572 So.2d at 1354-5.

Cases from other jurisdictions are in accord with these Florida decisions. In determining whether the defendant was sane at the time the offense was committed, the jury should not be permitted to speculate about the disposition of an insane defendant or the difference between hospitalization and imprisonment. State v. Makal, 104 Ariz. 476, 455 P.2d 450 (1969). See also, People v. Criscione, 125 Cal.App.3d 275, 177 Cal.Rptr. 899 at 906-7 (1st Dist. 1981); Dailey v. State, 406 N.E.2d 1172 (Ind. 1980). Prosecutorial argument which invites the jury to base their verdict on protecting society rather than the question of sanity has been held fundamental error. Evalt v. United States,

359 F.2d 534 (9th Cir. 1966); People v. Sorenson, 231 Cal.App.2d 88, 41 Cal.Rptr. 657 (3d Dist. 1964).

The remaining question at bar is whether, as the trial judge ruled (T2095-6), defense counsel "opened the door" to Smith's testimony. On cross-examination, defense counsel elicited admissions from Smith that Johnson told him about his drug use before this incident, said he "had flipped out" and blamed the drugs for loss of control (T2088-93). The prosecutor contended to the trial judge that the "rule of completeness" would permit introduction of the rest of Johnson's conversation with regard to the subject matter of insanity (T2094-5).

The prosecutor was probably correct with regard to the first part of Johnson's statement, i.e., that "he could play like he was crazy." The "rule of completeness" refers to section 90.108 of the Florida Evidence Code,[5] Johnson's statement about playing crazy arguably has some bearing on the authenticity of his insanity defense. However, Johnson's speculation that he might only spend a few years in the "crazyhouse" was entirely irrelevant.

In People v. Wilson 123 Ill.App.3d 798, 463 N.E.2d 890 at 895 (1st Dist. 1984), the court wrote:

> The principle of allowing an adverse party to complete a conversation does not give the

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[5] Although conversations are excluded from the scope of section 90.108, the sponsors note to the section cites Morey v. State, 72 Fla. 45, 72 So. 490 (1916) for the analogous treatment of conversations. See also, Steinhorst v. State, 412 So.2d 332 at 338 (Fla. 1982).

> party an automatic right to introduce material which is otherwise inadmissible.

The "rule of completeness" has its basis in removing a misleading impression which would result from considering only a part of the whole. It should not be used as a subterfuge to inject prejudice through the back door.[6]

Commentators on evidence agree that the right to introduce the remainder of a conversatian is limited. McCormick states that "the remainder must be otherwise admissible evidence." E. Cleary, McCormick on Evidence, §56 (3d Edition 1984). Wigmore writes:

> This right of the apponent to put in the remainder is universally conceded, for every kind of utterance without distinction; and the only question can be as to the scope and limits of the right.
>
> The ensuing controversies are in effect concerned merely with drawing the line so that the apponsnt shall not, under cloak of this conceded right,, put in utterances which do not come within its principle and would be otherwise irrelevant and inadmissible. In the definition of the limits of this right, there may be noted three general corollaries of the principle an which the right rests, namely:
>
> (a) No utterance irrelevant to the issue is receivable;
>
> (b) No more of the remainder of the utterance than concerns the same subject, and as explanatory of the first part, is receivable;
>
> (c) The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.

7 Wigmore Evidence 52113 (Chadbourn rev. 1978), (e.o.).

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[6] See, United States v. Winston, 447 F.2d 1236 at 1240 (D.C. Cir. 1971).

Since Johnson's speculation that he would only spend a few years in the craeyhouse was otherwise inadmissible as irrelevant to the issue of insanity, the "rule of completeness" does not make it admissible. The prosecutor's use of it in closing argument ensured that the error would be prejudicial.

In Mulford v. State, 416 So.2d 1199 (Fla. 4th DCA 1982), the court held that a letter should have been admitted into evidence with reference to the defendant's previous conviction edited out. More on point to the issue at bar, the Indiana Supreme Court in Saperito v. State, 490 N.E.2d 274 (Ind. 1986) approved the deletion from a defendant's letter (soliciting an alibi witness) a reference to his expected sentence if convicted. In holding that a limited defense use of a state investigator's report did not make the entire report admissible, the Eleventh Circuit in United States v. Pendas-Martinez, 845 F.2d 938 (11th Cir. 1988) discusses the federal caselaw regarding the "rule of completeness."

In conclusion, even if defense counsel's cross-examination of James Smith which elicited some of Johnson's statements about being "flipped out" on drugs opened a door, the trial judge should have limited what came thraugh the door. Allowing the prosecutor to infect the jury with the possibility that Johnson would return to society after a few years in the "crazyhouse" denied Johnson a fair trial under Amendments VI and XIV of the federal constitution and Article I, sections 9 and 16 of the Florida Constitution.

ISSUE VI

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 PRE-SENTENCE INVESTIGATION OF INFORMANT AND KEY STATE WITNESS JAMES SMITH.

Roy Gallemore, who had been the probation officer supervising James Smith, testified as a defense witness (T2185-94). His testimony was important in two aspects to impeachment of Smith's credibility. First, Gallemore testified that Smith's reputation in the community for truthfulness was poor (T2190). Second, Appellant wanted Gallemore to testify that the favorable recommendation Smith got at his 1981 sentencing on violation of probatian was a reward for Smith's information against Johnson (T2192-3). Gallemore's testimony would have impeached Smith's denials on direct examination that anyone "[went] to bat" far him at his April 1981 sentencing (T2057-8).

Defense counsel inquired of Gallemore:

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

(T2193) The State objected to disclosure of the recommendation, citing Fla.R.Crim.P.3.712, which limits access to the contents of a presentence investigation report (T2193). The court sustained the State's objection (T2193).

In Gardner v. Florida, 430 U.S. 349 (1977), the Court held that in a capital case, the confidentiality of a presentence

investigation report under Florida law could nat outweigh the defendant's due process right to have the information contained therein disclosed to him. At bar, defense counsel was not even requesting that the pressntence investigation report be disclosed to the jury; he only wished to question the preparer of that report about his recommendation. Significantly, the witness himself did not claim a privilege of non-disclosure.

The result of the trial court's erroneous ruling was that an effective line of impeachment af both Smith's credibility and his motives for testifying against Johnson was foreclosed. The situation at bar is analogous to that considered by the United States Supreme Court in Davis v. Alaska, 415 U.S. 308 (1974). In holding that the Sixth Amendment right of confrantation was paramount to the State's statute shielding the record of a juvenile offender, the Davis court wrote:

> defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. 415 U.S. at 318.

Although Davis dealt with impeachment of a witness by cross-examination rather than impeachment by testimony from another witness, the essential error is allowing the credibility of a important state witness to be shielded from a damaging inquiry.[7]

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[7] See also, Chambers v. Mississippi, 410 U.S. 284 (1973) (violation of due process to apply "mechanistically" a state evidentiary rule).

Another analogous case is that of Napue v. Illinois, 360 U.S. 264 (1959). In Napue, the United States Supreme Court held that a due process violation occurs when false testimony, even if relevant only to the credibility of a state witness, is introduced into evidence. The violation in Napue was false testimony by a state witness that the prosecutor had not promised him a recommendation for reduction of sentence. This denial of benefit for testimony is comparable ta the situation at bar where Smith denied receiving a favorable recommendatian at his 1981 sentencing (T2057-8). The facts at bar are also comparable to those of Giglio v. United States, 405 U.S. 150 (1972), where the Court reversed because a state witness testified falsely that the prosecutor had not promised him immunity in return for his cooperation.

Appellant was entitled to have the jury hear about all the benefits Smith reaped in return for informing on Johnson. The jury might have assessed the credibility of Smith's testimony differently had defense witness Gallemore been permitted to disclose the favorable recommendation he had provided to Smith, Accordingly, Johnson was denied his right to a fair trial and due process of law under the Sixth and Fourteenth Amendments, United States Constitution and his corresponding rights under Article I, section 9 and 16 of the Florida Constitution. He should now be granted a new trial.

ISSUE VII

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.

At trial, Appellant wanted to call as a witness Dwight Donahue, who had been a defense investigator (T2407-8). Donahue had interviewed Johnson shortly after his arrest and observed his demeanor (T2407). Specifically, Donahue would testify that Johnson appeared to be under the influence of drugs (T2407). This testimony would have corroborated Appellant's theory of defense and contradicted the testimony of state witness Detective George Elliott.[8] The State contended that Donahue could not be effectively cross-examined unless his notes were provided as discovery (T2410). Appellant invoked the attorney-client privilege in refusing to turn over Donahue's notes (T2410-11).

In the October 1987 proceeding, which ended in a mistrial, Judge McDonald heard argument and ruled that Donahue could not testify unless the State was provided with discovery of his notes (T6798-6811,6905-9). Donahue's testimony was proffered for the record in two versions; in the first version, he would have testified to his apinion that it was probable that Johnson was under the influence of drugs (T6909-13). In the second, Donahue

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[8] Elliott testified that he observed Johnsan far about an hour after his arrest and during the lineup (T2034-6). He said that he didn't think Johnson was under the influence of anything (T2037).

merely would have testified to Johnson's physical appearance at the interview -- i.e., that his "eyes were very wide" and that hi5 head moved "sharply back and forth, twitching more nervously" (T6915-6). After review of the transcript from this prior proceeding, Judge Carlisle adhered to the prior ruling (T2419-10,2433).

As a general rule of law, it is error to exclude testimony which corroborates an accused's defense. Duque v. State, 460 So.2d 416 (Fla. 2d DCA 1984), rev.den., 467 So.2d 1000 (Fla. 1985); E. B. v. State, 531 So.2d 1053 (Fla. 3d DCA 1988). The opinion of a lay witness is admissible evidence where the intoxication of another is in question. Cannon v. State, 91 Fla. 214, 107 So. 360 (1926); City of Orlando v. Newell, 232 So.2d 413 (Fla. 4th DCA 1970). Thus, the sole question at bar is whether Donahue's proffered testimony opened the door to discovery of privileged communications,

In Delap v. State, 440 So.2d 1242 (Fla. 1983), cert.den., 467 U.S. 1264 (1984), a defense investigator testified to statements made by the defendant during a polygraph examination. On cross- examination, defense counsel unsuccessfully tried to invoke the attorney-client privilege as to inquiry about other statements the defendant might have made during the examination. In finding no error, this Court held that a defendant may not selectively elicit testimony in his favor while blocking inquiries which would not benefit him.

A similar issue arose in Hoyas v. State, 456 So.2d 1225 (Fla. 3d DCA 1984), where the client voluntarily testified at trial to a statement he made to his former attorney. The Hoyas court held that the client waived the attorney-client privilege by this testimony. Consequently, there was no error in forcing the former attorney to testify as a state rebuttal witness and impeach his former client.

What distinguishes the case at bar from Delap and Hoyas is that defense investigator Donahue did not offer to testify to any verbal communications by Johnson. His proffered testimony related solely to his observations about Johnson's physical appearance and demeanor. Certainly he could be cross-examined with regard to his ability to make accurate observations and the basis for his opinion without delving into the privileged verbal communications between Johnson and himself. In other words, the trial judge should have ruled that the attorney-client privilege would be waived as to all observations about Johnson's behavior but not as to verbal statements. Therefore, Donahue's notes were not subject to discovery in so far as they contained verbal statements by Johnson or other work-product unrelated to Donahue's observations,

The Third District, in discussing the scope of a waiver of the attorney-client privilege, wrote:

> a waiver is limited to the communications or subjects in question. It is analogous to the rule that limits cross-examination to the matters brought out on direct. In re Estate of Marden, 355 So.2d 121 at 127 (Fla. 3d DCA 1978).

A California decision, People v. Dubrin, 232 Cal.App.2d 674, 43 Cal.Rptr. 60 at 64 (Cal.2d Dist.Ct.App. 1965) draws the same conclusion that cross-examination about privileged matters which ate waived is limited to the scope of the witness's direct examination testimony. See also, Procacci v. Seitlin, 497 So.2d 969 (Fla. 3d DCA 1986) and cases cited therein.

In Affiliated of Florida v. U-Need Sundries, 397 So.2d 764 (Fla. 2d DCA 1981), the court quashed a trial court order which would have permitted discovery of a confidential memorandum prepared by the appellant's accountant. Although the accountant testified to matters occurring at a meeting between the two parties, the accountant-client privilege remained intact with regard to the memorandum.

The same result should be reached at bar. The notes taken by defense investigator Donahue did not form the basis for his opinion that Johnson was under the influence of drugs; his visual observations were the basis. Accordingly, the State only had the right to cross-examine Donahue about these observations.

The exclusion of Donahue as a defense witness denied Johnson his federal constitutional rights under the Sixth and Fourteenth Amendments (compulsory process, due process) as well as the correspanding rights under Article I, sections 9 and 16 of the Florida Constitution. He should now be granted a new trial.

ISSUE VIII

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

During the charge conference in the guilt or innocence phase of the trial, Appellant's counsel requested the following special jury instruction:

> The Defendant, Paul Johnson, is on trial only for those nine crimes alleged in the information in this case, as I have read them to you. Although the evidence in this trial has included references to wrongful acts or crimes allegedly committed by Paul Jahnson in the past, you are to remember that he is not on trial for such alleged acts. References to those alleged, past acts were introduced only as they relate, if at all, to the opinions of the expert psychiatric witnesses who have testified. You are prohibited from considering these references to alleged, past acts as evidence that Mr. Johnson had a bad character or that his past shows a likelihood to commit criminal conduct.

(R779) This special jury instruction is tailored after the standard "Williams Rule" jury instruction' to fit the circumstances of the case at bar. The trial judge declined to give any instruction on past wrongful acts, calling it "improper" (T3096).

Extensive evidence of Johnson's prior involvement with illegal drugs had been admitted because his defense was insanity. When a defendant pleads insanity, as Dean Wigmore stated "any and all conduct of the person is admissible into evidence." 2 Wigmore Evidence, §228(1), (Chadbourn rev. 1979). This includes

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Fla.Std.Jury Instruct.(Crim.), 1987, p.50

evidence of prior criminal acts. Rogers v. State, 514 N.E.2d 1259 (Ind. 1987); United States v. Emery, 682 F.2d 493 (5th Cir.), cert.den., 459 U.S. 1044 (1982).

When past wrongful acts are admitted into evidence, the jury should be cautioned against drawing the impermissible inference that the defendant is more likely to be guilty in the present case because of his involvement in past crimes. Thus, Section 90.404(2)(b)2 of the Florida Evidence Code provides with regard to other crimes or wrongful acts:

> 2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited propose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information. (e.s.)

Clearly, the trial judge at bar had an affirmative duty under this section of the Evidence Code[10] to give a limiting instruction to the jury. Johnson requested instruction set forth the applicable law and should have been given.

In Rivers v. State, 425 So.2d 101 (Fla. 1st DCA 1982), rev. den,, 436 So.2d 100 (Fla. 1983), reversible error was faund where the trial court refused the defendant's request for a limiting instruction on collateral crime evidence. Another case on point is Lowe v. State, 500 So.2d 578 (Fla. 4th DCA 1986). Accordingly, this Court should now reverse Appellant's conviction and order a new trial.

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[10] See also Section 90.107.

ISSUE IX

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE JOHNSON'S PRIOR CRIMINAL RECORD WHILE CROSS-EXAMINING DEFENSE WITNESSES BECAUSE UNDER THE CIRCUMSTANCES IT HAD NO PROPER RELEVANCE AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR.

Prior to the penalty proceeding, defense counsel waived several of the statutory mitigating circumstances including section 921.141(6)(a) (no significant history of prior criminal activity). (R3398) When the prosecutor cross-examined Johnson's first penalty phase witness, Dr. Gary Ainsworth, he proceeded:

> Q. All right. Well, you indicated that it was your opinion that Mr. Johnson's ability to conform his conduct to the requirements of law was substantially impaired?
>
> A. Yes, I did.
>
> Q. Let me ask you a couple of questions about that.
>
> A. Okay.
>
> Q. Isn't it a fact, sir, that based upon your understanding of Mr. Johnson's history, that he has never shown an ability to conform his conduct to the requirements of law?

(T3468) After defense counsel's objection was overruled, the cross-examination continued:

> A. (Continuing) Unfortunately, Mr. Johnson's ability historically to conform in his conduct to the requirements of the law would be questionable. But adding the factor of drugs in, it was nil.
>
> Q. All right. So isn't it a fact, then, based on the history that you had of Mr. Johnson, that you were already aware, irre-

spective of his use, that, in fact, he never showed an ability to conform his conduct to the requirements af law?

A. I was acutely aware of Mr. Johnson's personality defects.

Q. All right. And isn't it a fact that if we used the term, appreciate the criminality of our conduct to mean that we are deterred by the potential of getting in trouble, then based on your history of Mr. Johnson, you knew he had never shown any appreciation of the criminality of his prior conduct, correct?

A. No. There was a period in Mr. Johnson's life, I believe, that is detailed in my report, after he had bean in jail for a while, that he was able to straighten up and fly right for a period of several years.

(T3469-70)

The prosecutor expanded on this theme while cross-examining Dr. Walter Afield:

Q. And so isn't it a fact, sir, that you were aware that before January 8th, 1981, Mr. Johnson had shown on at least seven occasions, an indifference to the criminality of his conduct?

MR. NORGARD: Your Honor, I would abject to that question on the same grounds previously raised.

THE COURT: Objection's overruled.

A. I don't know about the seven occasions. I know he has had problems appreciating the criminality of his act before.

Q. Isn't it a fact that on the same number of occasions, he has, in fact, failed to conform his conduct to the requirements of law?

A. Absolutely. Sure.

(R3496)

In Maggard v. State, 399 So.2d 973 (Fla.), cert.den., 454 U.S. 1059 (1981), this Court held that the State cannot introduce a defendant's record of prior nanviolent criminal activity when the defendant expressly waives reliance on the section 921.141-(6)(a) mitigating circumstance (no significant history of prior criminal activity). This Court distinguished Maggard in two subsequent decisions, Parker v. State, 476 So.2d 134 (Fla. 1985) and Muehleman v. State, 503 So.2d 310 (Fla.), cert.den., 484 U.S. 882 (1987).

In Parker, no error was faund because the defense psychologist testified that he considered the defendant's prior criminal history in reaching his opinion that the defendant was a passive individual. The Parker Court found inquiry an cross-examination proper "to determine whether the expert's opinion has a proper basis." 476 So.2d at 139.

Similarly, in Muehleman, a defense expert presented an opinion that the defendant cauld not plan crimes in advance. Testimony about Muehleman's prior crimes was admitted to rebut this defense evidence. This Court found a proper relevant basis for admission of the prior offenses and stated the test for evaluating similar claims:

> We must consider the evidence admitted, any prejudice accruing to the defendant therefrom, and the purpose for its admission,

503 So.2d at 316.

At bar, there was no proper predicate to make the alleged seven prior criminal acts committed by Johnson admissible. The

testifying mental health experts relied upon Johnson's history of drug use, not prior criminal activity, in concluding that the statutory mental mitigating factors existed. Therefore, this case is not like Parker. It is also not like Muehleman because the prosecutor's cross-examination in no way tended to rebut the existence of the mitigating factors.

Clearly, the prosecutor intended the jury to use the mention of Johnson's prior criminal record as evidence of criminal propensity. His closing argument demonstrates this:

> And as the experts have admitted in giving you a -- their opinion to you today, their review of Mr. Johnson's history leads them to understand the fact is his judgment ain't never been any good, The fact is, he's never been able to conform his conduct to the requirements of law. The fact is he's been indifferent to the criminality of his conduct. The fact is he just didn't give a darn.

(T3565)

In Robinson v. State, 487 So.2d 1040 (Fla. 1986), this Caurt observed that the State cannot be permitted to "do by one method something which it cannot do by another." 487 So.2d at 1042. At bar, the prosecutor could not have put on evidence about Johnson's prior nonviolent criminal record in its case in chief because the section 921.141(6)(a) mitigating factor had been waived. It was equally improper under the circumstances to allow reference to prior crimes on cross-examination of defense witnesses. This case is most comparable to Fitzpatrick v. Wainwriaht, 490 So.2d 938 (Fla. 1986) where this Court wrote:

> The erroneous permitting of anticipatory rebuttal by the state directed at a statutory mitigating factor reliance upon which had been waived by the defense in effect allowed the state to present improper nonstatutory circumstances in aggravation. It undermined the defendant's main theory and strategy of defense at sentencing: i.e., the attempt to show that the defendant was suffering extreme mental and emotional disturbance and had impaired capacity. The error enabled the state to undercut that defense by depicting the defendant as an experienced criminal in a way not sanctioned by our capital felony sentencing law.

490 So.2d at 940.

In accord with Fitzpatrick, this Court should now vacate Johnson's death sentences and order a new penalty proceeding before a new jury.

ISSUE X

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

During the penalty trial, Johnson declined to testify as a witness. (T3531) However, he had prerecorded on videotape a statement apologizing for his actions and asking the jury to recommend that his life be spared. (T3531, S2-4) Defense counsel requested that this statement in allocution be played for the jury. (T3531)

As legal grounds, defense counsel pointed to the common law right of a defendant to speak to his sentencer. (T3532,3538) Counsel also argued that Eighth Amendment cases such as Lockett v. Ohio, 438 U.S. 586 (1978) established the capital defendant's right to have any relevant evidence in mitigation considered by the sentencer. (T3533,3538) The trial judge viewed the video-taped statement and ruled that Johnson would have to take the stand and be subject to cross-examination if he wished to make a statement to the jury. (T3539-3540) As a result, the jury never heard Johnson speak in his own voice to express his remorse and his hope that he could be sentenced to life imprisonment.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court specified that the defendant could choose to testify in a penalty proceeding. If he did testify, "he [would be] protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning

possible aggravating circumstances." 283 So.2d at 8. The Dixon Court did not consider the possibility of a statement in allocution before the jury.

At bar, the trial court's ruling initially appears to be in accord with Dixon. However, this ignores the substance of Johnson's proposed statement which does not dispute any facts or otherwise lend itself to cross-examination. It is merely a showing by Johnson that he is able to feel remorse for his actions and an expression of hope that he can do some good for his son if the jury spares his life. (S2-3)

Strategically, one important reason why Johnson would not testify as a witness was to prevent the prosecutor from questioning Jahnson about his prior nonviolent felony convictions. This Court, in Jackson v. State, 530 So.2d 269 (Fla. 1988), cert.den., 488 U.S. 1050 (1989), held that a defendant who testifies in a penalty proceeding may properly be asked about prior convictions as impeachment of credibility under section 90.610 of the Florida Evidence Code. As previously pointed out in Issue IX, Johnson tried to avoid having the jury hear about his prior record by waiving the "no significant criminal history" statutory mitigating circumstance. Thus, the prejudice of having the jury hear about his prior record could only be avoided if his statement in allocution was accepted.

In Green v. United States, 365 U.S. 301 (1961), the United States Supreme Court detailed the long history of allowing a criminal defendant to speak personally to his sentencer and to

ask for mitigation of punishment. The Green caurt held that such allocation must be allowed, but relied upon the federal rules rather than the constitution as a legal basis.

Several states have recognized the defendant's right to allocute in a capital case. In Harris v. State, 306 Md. 344, 509 A.2d 120 (1968), the Court of Appeals of Maryland traced the common law right of allocution through the various changes undergone in different states. The Maryland court noted that the right of allocution was originally secured to Maryland citizens by a common law saving provision in the Maryland Declaration of Rights. 509 A.2d at 125. Based upon this common law right and public policy of providing the sentencer with all relevant information that would suggest mitigation, the Harris court held that it was reversible error to refuse a defendant the right to allocute in a capital case before the jury when he provides an acceptable proffer.

Section 2.01, Florida Statutes (1987), is the comparable common law savings provision in Florida. On this ground alone, this Court could now find that Johnson's sentence should be vacated and a new penalty trial held.

In State v. Zola, 112 N.J. 384, 548 A.2d 1022 (1988), cert. den., 489 U.S. 1022 (1989), the defendant argued that the right of allocution had a constitutional basis. Although the New Jersey Supreme Court declined to find that the right of allocution was a constitutional right, the court nevertheless held that a capital defendant may make "a brief unsworn statement in miti-

gation to the jury at the close of the presentation of evidence in the penalty phase." 548 A.2d at 1046. The Zola court wrote:

> Whatever the Constitution permits, it bespeaks our common humanity that a defendant not be sentenced to death by a jury 'which never heard the sound of his voice.'

548 A.2d at 1045.

More recently, a decision from the Calorado Supreme Court leaves open the possibility that the Eighth and Fourteenth Amendments, United States Constitution, support a defendant's right to allocution in a capital case. The defendant, in People v. Davis, 794 P.2d 159 (Colo. 1990), was allowed to allocute before the jury. However, relying on Hitchcock v. Dugger, 481 U.S. 393 (1987), he complained of a jury instruction which labelled the unsworn statement of the defendant "not evidence." The Davis court agreed that the jury must be allowed to consider the defendant's allocution in mitigation, but found that "reasonable jurors would have properly understood [the instruction to mean] that they should consider fully the statement offered by the defendant in allocution." 794 P.2d at 193.

At bar, defense counsel relied upon Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny in asserting Johnson's federal constitutional right to present all mitigation (T3533). Counsel also relied upon Article I, sections 2, 9, and 16 of the Florida Constitution as supporting Johnson's right to allocution (T3538). The most recent of the Lockett line af cases, Penry v. Lynaugh, 109 S.Ct. 2934 (1989), is alsa the most emphatic in holding that the capital sentencer must be permitted to consider and give

effect to anything mitigating which relates to the defendant's background, character or circumstances of the offense. Because the capital sentencing decision calls for a "reasoned moral response" to the defendant and his offense, Appellant contends that any procedural right of cross-examination by the State cannot take priority over the defendant's right to present himself as a human being with feelings and ask the jury for mercy.

In conclusion, there are three possible bases far a holding that Johnson should have been permitted to present allocution to his penalty jury. The first basis would be survival of the common law right to allocution into the context of the present day capital trial. The second is simply public policy recognizing the shared humanity of the defendant and allowing him to speak for himself to the jury as a matter of state law or court rule. Finally, Appellant urges this Court to accept a basis in the Eighth and Fourteenth Amendments, United States Constitution, and corresponding provisions in the Florida Constitution, for a capital defendant's right to speak on his own behalf to the jury. He should not be subject to cross-examination unless he speaks of factual matters which could be disputed. Accordingly, Johnson should now be granted a new penalty proceeding before a new jury where all of the mitigation is considered before recommending sentence.

ISSUE XI

THE SENTENCING JUDGE ERRONEOUSLY WEIGHED IMPROPER AGGRAVATING CIRCUMSTANCES AND FAILED TO WEIGH ESTABLISHED MITIGATING CIRCUMSTANCES.

A. The Written "Findins of Fact" Relies on Improper Aggravating Circumstances

1. Finding of Pecuniary Gain Aggravating Factor [§ 921.141(5)(f)]

The sentencing judge at bar found this aggravating circumstance applicable to both Counts I and II (the Evans and Beasley slayings). As to Count 11, this was erroneous because the only felony committed in the course of the Beasley shooting was robbery (R830, see Appendix). This Court has consistently held that robbery and pecuniary gain refer to the same aspect of the defendant's crime. See e.g., Provence v. State, 337 So.2d 783 (Fla. 1976), cert.den., 431 U.S. 969 (1977). Consequently, it was improper doubling to find both aggravating circumstances of section 921.141(5)(d) and (f) applicable to Count II (R829-30).

The case authority relied upon by the sentencing judge, Brown v. State, 381 So.2d 690 (Fla. 1980) is inapposite with regard to the Beasley slaying. In Brown, the murder was accompanied by the felony of rape as well as robbery. Thus, the Brown situation is similar to that of Count I at bar where Evans was shot in the course of robbery, kidnapping and arson. This Court previously approved application of the pecuniary gain aggravator

to the Evans homicide. Johnson I, 438 So.2d 774 at 779 (Fla. 1983), cert.den., 465 U.S. 1051 (1984).

2. Finding of Cold, Calculated and Premeditated Aggravating Factor [§ 921.141(5)(i)]

Although this Court found in Johnson I that this aggravating circumstance applied to all three homicides, Appellant contends that under current standards, it applies to none of them.

A. Theron Burnham

In Johnson I, this Court approved the CCP finding on the basis that "prior to starting out for the evening, Johnson stated that he would not mind shooting people to obtain money and that the deputy was shot three times.'' 438 So.2d at 779. The evidence showed that Burnham was shot with his own revolver during a struggle (T1563,1584,1719,1961-2).

This Court's later decision in Rivera v. State, 545 So.2d 864 (Fla. 1989) is directly on point here. When a police officer tried ta arrest Rivera, there was a struggle during which Rivera took the officer's gun, Rivera fired five shots at the officer, hitting him three times and killing him. This Court reversed the trial court's CCP finding, noting that the killing was spontaneous rather than pursuant to "a careful plan or prearranged design." 545 So.2d at 865. The requisite level of heightened premeditation for application of the aggravating factor wa5 not reached.

The same is true at bar. Johnson's motive for shooting Burnham was probably to avoid arrest. As in Rivera, the killing occurred during a struggle where the officer was shot three times

with his own gun. While the sentencing judge speculated that the fatal shot was fired "in an execution style" (R831, see Appendix), the same was true in Rivera. 545 So.2d at 865 ("the officer was shot while he was kneeling on the floor with his hands upraised"). The sentencing judge's finding that the homicide of Officer Burnham was cold, calculated and premeditated should be reversed.

B. Darrell Ray Beasley

The trial court's sentencing order relied upon circumstantial evidence that Johnson may have forced Beasley to walk at gunpoint from the side of the road for forty or fifty feet to a field (R830, see Appendix). Beasley was killed by a single gunshot wound to the head which was fired at close range (T1666-9, R830, see Appendix).

The problem with the sentencing judge's finding is that there is no evidence that Johnson planned to kill Beasley before he started to rob him. When Amy Reid last saw Beasley, before she drove off, Johnson was pointing a gun at him behind the car (T1448). Johnson's intent may well have been to rob Beasley of his money and the automobile, leaving Reid and Beasley stranded on foot in a deserted area.

In Porter v. State, 564 So.2d 1060 (Fla. 1990), this Court stated that the manner of killing may demonstrate the requisite "heightened premeditation" for application of the CCP aggravating factor; however,

> the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began.

564 So.2d at 1064 (e.s.) At bar, it would be only speculative to infer that Johnson intended to kill Beasley from the time he pulled the gun on him. It is likely that Reid's driving away in the car which left Johnson to escape on foot from his robbery victim inspired the killing.

Indeed, the facts at bar closely parallel those of Hamblen v. State, 527 So.2d 800 (Fla. 1988). Hamblen had originally intended only to rob the proprietress of a clothing shop. However, when the victim pressed a silent alarm button, he became infuriated. Hamblen marched the victim to a dressing room where he shot her once in the back of the head. This Court struck the trial court's finding of CCP aggravating circumstance in Hamblen and should do the same at bar with regard to the Beasley homicide.

C. William Evans

The sentencing judge found the CCP aggravating circumstance applicable based upon the evidence that Evans was shot twice. The first shot, fired from a distance, would not have been fatal; the second and fatal shot was fired at close range (T1672-6, R830, see Appendix). The court termed this second shot "an execution style" killing (R830, see Appendix).

The facts at bar are very close to those in Herring v. State, 446 So.2d 1049 (Pla.), cert.den., 469 U.S. 989 (1984). Herring shot a convenience store clerk during a robbery. After

the clerk had fallen to the floor, Herring shot him again with a deliberate intent to kill him. The Herring court approved the trial court's CCP finding.

However, in Roaers v. State, 511 So.2d 526 (Fla. 1987), cert. den., 484 U.S. 1020 (1988), this Court specifically receded from the Herring decision. 511 So.2d at 533. The Rogers court held that "a careful plan or prearranged design to kill" must be proved for application of the CCP aggravating circumstance. 511 So.2d at 533.

At bar, there is no evidence of a careful plan nor of a pre-arranged design to kill. Johnson's communications over the radio to the taxicab dispatcher were disoriented and haphazard. Johnson spoke of stopping to get water to revive the knocked-out driver (T1412-3). During the two hours where Johnson was aim-lessly driving the cab and talking on the radio, he never men-tioned any intent to kill the driver.

The facts at bar are similar to some other cases where a planned robbery turned into an abduction and homicide. In Bates v. State, 465 So.2d 490 (Fla. 1985), the defendant abducted a woman from her office, attempted a sexual battery and stabbed her to death while robbing her. This Court struck the trial court's CCP finding. Again in Preston v. Stat,, 444 So.2d 939 (Fla. 1984), this Court held that evidence of a convenience store robbery followed by the kidnapping and eventual slaying of the clerk was insufficient to support the CCP aggravating circum-stance.

As a final case for comparison, the defendant in Harmon v. State, 527 So.2d 182 (Fla. 1988), shot the victim at close range in an execution style during a robbery. This Court found the facts of the killing "susceptible to conclusions other than finding it was committed in a cold, calculated, and premeditated manner." 527 So.2d at 188. In particular, Harmon, like Appellant, did not mention killing anyone before the event and he may have become frightened in the course of robbing the victim.

Accordingly, this Court should now reverse the sentencing judge's finding that the Evans' homicide was cold, calculated and premeditated.

B. The Written "Finding of Fact" Erroneously Failed to Give Any Weight to Established Mitigating Circumstances

In Campbell v. State, 571 So.2d 415 (Fla. 1990), and Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court established guidelines to promote uniformity in the addressing of mitigating evidence by sentencing judges. The judge "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." Campbell, 571 So.2d at 419. "[W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert, 574 So.2d at 1062.

At bar, three psychiatrists testified during the penalty phase with explicit contemplation of the statutory mitigating

circumstances of sections 921.141(6)(b) and (f), Florida Statutes (1981). Two of the psychiatrists, Dr. Thomas McClane and Dr. Walter Afield, had previously testified that Johnson was legally insane during the guilt or innocence phase. In the penalty phase, Dr. McClane testified that he found the insanity issue "a difficult call," but he was "very confident" about his opinion that Johnson was suffering from an amphetamine-induced delirium (T3479). Both doctors agreed that Johnson was under the influence of extreme mental or emotional disturbance when the homicides were committed (T3481,3492). They also agreed that Johnson's ability to appreciate the criminality of his conduct while committing the capital felonies was Substantially impaired (T3482-3,3493). Johnson's capacity to conform his conduct to the requirements of law was also substantially impaired (T3482-5,3593-4).

The third psychiatrist who testified was Dr. Gary Ainsworth, a state witness in the guilt or innocence phase. Dr. Ainsworth testified to his opinion that Johnson was "severely intoxicated on amphetamines" when he committed the homicides (T3447). He also stated that "within reasonable medial certainty the elements of delirium were demonstrated (T3448-9). Dr. Ainsworth concluded that Johnson was suffering from an extreme mental or emotional disturbance (T3459). He gave his opinion that Johnson's capacity to appreciate the criminality of his conduct was "somewhat impaired" but his ability to conform his conduct to the requirements of law was "substantially impaired" (T3459-60).

The prosecutor's cross-examination of the three psychiatrists did not essentially contest the existence of the statutory mental mitigating circumstances. Rather, the prosecutor questioned the doctors as to whether Johnson had ever shown any capacity to appreciate the criminality of his conduct or to conform to the requirements of law (T3468-9,3472,3486,3495-8).

Given this substantial and uncantroverted evidence, the trial court should not have rejected the doctors' opinions because they were "based primarily on . . . conversation[s] with the defendant some nine months after the event took place" (R831, see Appendix).

Psychiatric opinions are necessarily based upon after-the-fact analysis; 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. Under the criteria set forth in Campbell, supra, and Nibert, supra, the trial judge erred in not finding that the statutory mitigating circumstances of § 921. 141(6)(b) and (f) were proved.

The error was also of federal constitutional magnitude. In Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986), the court held that capital sentencing standards under the Eighth and Fourteenth Amendments, United States Constitution, precluded a state court from failing to find the existence of mental mitigating factors in the face of compelling evidence that they were present. The uncontroverted opinions at bar as to the existence of the mental

mitigating factors were arbitrarily rejected by the sentencing judge in violation of the Eighth and Fourteenth Amendments.

Treated as separate nonstatutory mitigating circumstances both in the jury instructions (T3610) and the court's sentencing order (R832-3) were Johnson's commission of the crimes while under the influence of drugs and his disorder of drug dependency. The evidence as to bath was overwhelming and unrefuted. Perhaps these factors tend to merge with the statutory mental mitigating circumstances; however, since the trial judge agreed to consider them separately, he should have found them both proved. Nibert; Campbell.

The other proposed mitigating circumstance was Johnson's deprived childhood. Here again, Johnson produced substantial and uncontroverted evidence that his parents abandoned him while he was an infant (R3505-06,3512-13) and that he was raised by an alcoholic grandfather who became disabled when Johnson was a teenager. (R3517-8,3524-6) This is valid nonstatutory mitigation which should have been considered by the sentencing judge. Nibert; Brown v. State, 526 So.2d 903 (Fla. 1988); Eddings v. Oklahoma, 455 U.S. 104 (1982).

C. The Trial Judge Should Reweigh the Evidence and Resentence Johnson

Because of the large number of mitigating factors which were not considered by the trial court as well as the erroneously found aggravating Circumstances, this Court should remand this case for reweighing by the trial court. In Elledge v. State, 346

So.2d 998 (Fla. 1977), this Court reversed for resentencing when invalid aggravating circumstances were considered and there was mitigating evidence. Accord, Bates v. State, 465 So.2d 490 (Fla. 1985). While this Court has also conducted harmless error analysis rather than ordering the trial court to reweigh the proper factors, this is only appropriate when the trial court's error is relatively minor, See e.g., Rogers v. State, 511 So.2d 526 (Fla. 1987), cert.den., 484 U.S. 1020 (1988).

A capital defendant is entitled to an individualized sentencing determination under the Eighth and Fourteenth Amendments, United States Constitution. Skipper v. South Carolina, 476 U.S. 1 (1986). Under the Florida capital statute, the trial judge weighs the penalty evidence as a separate step of the capital procedure. State v. Dixon, 283 So.2d 1 (1973). The constitutional guarantees of due process are fully applicable to this sentencing process before the judge. Engle v. State, 438 So.2d 803 (Fla. 1983).

When the sentencing judge refused to find anything in mitigation despite the production of substantial evidence, he was in fact denying the defendant the individualized sentencing required by the Eighth and Fourteenth Amendments, United States Constitution as well as the Florida statute. If this Court were to hold that the error in weighing the penalty evidence was harmless because a triple homicide dictates death sentences, it would be analogous to mandatory capital sentencing. The United States Supreme Court has continually rejected any mandatory

capital sentencing scheme and insisted upon guided discretion for capital sentencers. Sumner v. Shuman, 483 U.S. 66 (1987).

Accordingly, this Court should now vacate Johnson's sentences of death and remand this case for the trial court to reweigh the proper factors in aggravation and mitigation.

ISSUE XII

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

Section 921.141(4), Florida Statutes (1985) specifies that capital cases receive automatic review by the Supreme Court of Florida "of the entire record." Fla.R.App.P. 9.140(b)(4)(A) also specifies "the complete record."

On April 3, 1990, Appellant served a motion for leave to supplement the record on appeal to this Court. This Court granted the motion in part on April 24, 1990. The Clerk of the Circuit Court stated that items 2 and 3 of this Court's order to supplement were not found in the clerk's files on March 12, 1991.

Accordingly, Appellant moved to reconstruct the record pursuant to Fla.R.App.P. 9.200(b)(4) in order to have the missing items 2 and 3 included in the record. Although the Attorney General did not object to this motion, this Court denied it by order dated April 16, 1991.

The lack of a complete record has prevented Appellant from briefing at least one issue that he would have otherwise included in this initial brief. Lack of a complete record has also hampered Appellant's ability to cite relevant parts of the proceedings in support of issues which he has included in this brief.

The issue which appellate counsel would certainly have otherwise briefed concerns the trial court's denial of Appel-

lant's specially requested penalty jury instruction on the especially heinous, atrocious or cruel aggravating circumstance. It is clear from the record on appeal that defense counsel offered specially requested jury instruction "No.1" which would define the terms heinous, *atrocious* or cruel for the jury (T3405-7). Counsel argued that these words needed definition in order to pass constitutional muster (T3407). The trial judge declined to give the requested instruction (T3411).

The United States Supreme Court held in nard v. Cartwriaht, 486 U.S. 356 (1988) that, standing alone, the terms "heinous, atrocious or cruel" arc unconstitutionally vague under the Eighth and Fourteenth Amendments, United States Constitution. Later in Shell v. Mississippi, 498 U.S. __, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990), the Court held an expanded definition of the terms in a jury instruction still failed to adequately inform the jury.

Counsel recognizes that this Court held in Smalley v. State, 546 So.2d 720 (Fla. 1989) that Maynard is inapplicable to Florida capital procedure. Nonetheless, if not prevented by lack of the text of Johnson's proposed jury instruction, appellate counsel would have urged this Court to recede from Smalley. He also would have preserved Johnson's claim on this issue for federal review.

Other items which Appellant unsuccessfully requested for inclusion in the record on appeal have hampered his presentation

of the issues in this brief. The issues affected and the material denied to Appellant are:

ISSUE II - (a) Written peremptory challenges exercised during the voir dire (to show which party excused which jurors by peremptory strike during voir dire); (b) Newspaper article in the Gainesville Sun which was read by many prospective jurors (to show prejudicial publicity).

ISSUE III - Tape recording made by court reporter during the jury selection proceedings of April 4, 1988 (to show laughter directed at defense counsel by prospective jurors after numerous interruptions by the trial judge).

ISSUE IV - Transcript of testimony heard August 28, 1981 which was read and considered by the trial judge in ruling on Johnson's pretrial motion to suppress statements (T7440) (large part of the evidence relied upon by the trial judge in denying Appellant's motion is not available for argument on appeal).

The cumulative effect of the denial of a complete record to Appellant is to deny him effective assistance of appellate counsel on this appeal in violation of the Sixth and Fourteenth Amendments, United States Constitutian. Certainly, had these materials been in the record on appeal, counsel would have been deficient if he did not raise the jury instruction issue and use the other requested materials which belonged in the record in support of his arguments. As to relief on this issue, Appellant would request that a new direct appeal be ordered after preparation of a complete record.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Paul Beasley Johnson, Appellant, respectfully requests this Court to grant him the following relief:

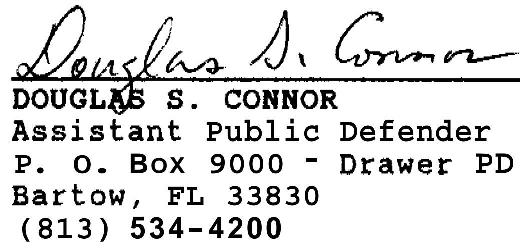
As to Issues II through VIII - a new trial;

As *to* Issues I, IX and X - vacation of death sentence and a new penalty trial;

As to Issue XI - remand for resentencing before the trial court.

As to Issue XII - a new appellate proceeding with a complete record.

Respectfully submitted,



DOUGLAS S. CONNOR
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

APPENDIX

	PAGE NO.
1. Trial Court's Sentencing Order, "Finding of Fact" (R828-33)	A1-6

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

-vs-

PAUL BEASLEY JOHNSON,

Defendant.

CASE NO. 88-448-CF-A

(TRANSFER FROM POLK COUNTY)
(CASE NO. CF 81-0112-A1-XX)

FINDING OF FACT

The defendant, Paul Beasley Johnson was indicted by the Grand Jury of Polk County, Florida, for three counts of First Degree Murder, two counts of Robbery, Kidnapping, Arson, and two counts of Attempted First Degree Murder. A trial by jury was held in Alachua County, and the defendant was found guilty of three counts of First Degree Murder, two counts of Robbery with Firearm, Kidnapping, Arson, and two counts of Attempted First Degree Murder. In a separate proceeding held on April 26, 1988 a majority of the trial jury recommended to the Court that the death penalty be imposed as to all three offenses of First Degree Murder. In making the following findings of fact and conclusions of law the court has taken into consideration only the testimony and evidence produced at trial' and no other factors.

As to Count One, Two and Three of the Indictment, wherein the defendant was convicted of First Degree Murder, the Court makes the following findings of fact. In doing so the court will use those aggravating and mitigating circumstances upon which the jury was instructed in accordance with the instruction conference and established by the evidence. The statutory aggravating circumstances not used were waived by the State and the statutory mitigating circumstances not used were waived by the defense.

A. WHETHER THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.

Finding: (Counts I, II and 111) It is the Courts opinion that this aggravating circumstance is present in this case. The

defendant was contemporaneously convicted in Alachua County; Florida, on April 22, 1988, of two charges of Attempted First Degree Murder both of which were entered by the jury prior to sentencing. The Court finds this to be an aggravating circumstance in accordance with Lucas v. State, Fla., 376 So. 2d 1149 (1979).

B. WHETHER CRIMES FOR WHICH THE DEFENDANT IS TO BE SENTENCED WERE COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT THE CRIMES OF ROBBERY, ARSON AND KIDNAPPING.

Finding: (Count I) This aggravating circumstance is present in this case. The Court finds that the facts of this case, as to Count One, do establish that the capital felony was committed while the defendant was engaged in the commission of, attempt to commit or flight after committing or attempting to commit a robbery, arson and kidnapping.

(Count II) This aggravating circumstance is present in this case. The Court finds that the facts of this case, as to Count Two, do establish that the capital felony was committed while the defendant was engaged in the commission of, attempt to commit or flight after committing or attempting to commit a robbery.

(Count III) This aggravating circumstance is present in this case. The Court finds that the facts of this case, as to Count Three; do establish that the capital felony was committed while the defendant was engaged in flight after committing a robbery.

C. WHETHER THE CRIMES FOR WHICH THE DEFENDANT IS TO BE SENTENCED WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

FINDING: (COUNT I, 11) This aggravating factor is not present in Counts I & II. There is no evidence that either murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(Count III) This aggravating factor is present in this Count III. The evidence shows that Deputy Burnham was in the process of arresting the Defendant when he turned on the officer and killed him.

D. WHETHER THE CRIMES FOR WHICH THE DEFENDANT IS TO BE SENTENCED WERE COMMITTED FOR FINANCIAL GAIN.

Finding: (Counts I and II only) This aggravating circumstance is present in the Evans and Beasley murders. The capital felonies were committed €or pecuniary gain. The Court finds the William Evans murder was in conjunction with a kidnapping and arson and the Beasley murder was in conjunction with a robbery, thus in accordance with the holding in Brown v. State, Fla., 381 So. 2d 690 (1980), that the evidence surrounding the murder in Count I and Count II justifies this to be an aggravating circumstance.

(Counts III) This aggravating circumstance is not present in this murder.

E. WHETHER THE CRIMES FOR WHICH THE DEFENDANT IS TO BE SENTENCED WERE ESPECIALLY WICKED, EVIL, ATROCIOUS OR CRUEL. (COUNTS I & II ONLY).

Finding: (Counts I & 11 only). It is the opinion of the Court that the evidence is insufficient to establish an aggravating circumstance under this condition.

F. THE CRIMES FOR WHICH THE DEFENDANT IS TO BE SENTENCED WERE COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Finding: (Counts I, II and III) This aggravating circumstance is present in this case. (Count I) The Court does find that this capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral OK legal justificaiton. The Court finds that the record is clear as to William Evans. One gun shot in the cheek would not have killed him. It was apparent from the evidence that he fell to the ground, was turned over and the fatal blow was administered in an execution style, at close range to his head.

(Count II) As to Darrell Beasley, the victim was marched off to a field some forty to fifty feet. There is some evidence indicating that he was probably ordered to kneel down. The gun was placed at close proximity to his head and he was killed in an execution manner with a gunshot wound to the head.

(Count III) **As** to Deputy Burnham, it is clear there was some scuffle for the gun and there was a blow to the head and wound to the legs. 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. Also before blazing his evening trail the defendant told his friends he would shoot if he had to, to obtain money for drugs. The evidence also indicates that he then went to his own home to get his pistol which he did in fact use.

The Court makes the following findings of fact **as** to Mitigating Circumstances:

A. WHETHER THE CRIMES FOR WHICH THE DEPENDANT IS TO BE SENTENCED WERE COMMITTED **WHILE** THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

Finding: (Counts I, II and III) This mitigating circumstance is not present in this case. There Is evidence tending to show that the defendant was under the influence of drugs at the time of the alleged offenses. There is also evidence to show that the defendant had been a regular drug user. However, the evidence also shows that he clearly was not under extreme mental or emotional disturbance because of the use of these drugs based on observations of him after and before the murders. Based on his actions and physical events that took place during the course of the commission of these crimes, it is clear that 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 as to place him under the influence to the extent of causing any extreme mental or emotional disturbance. The Court specifically notes that while the doctors' testimony in this regard is to the contrary, the doctor's testimony was based primarily on his conversation with the defendant some nine months after the event took place.

B & C. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS, CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

Finding: (Count I) This mitigating circumstance is not

present in this case. The defendant in this capital felony was able to appreciate the criminality of his conduct by hi3 actions and by his burning OK committing arson of the taxi cab after the murder of the taxi cab driver. Although the doctors have presented argument as to the defendant's use of drugs, it is this Court's finding that based on the 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 they were not substantially impaired by the use of drugs.

(Count II) This mitigating circumstance is not present in this case. The defendant's action in marching the victim, Darrell Beasley, to a field, taking his wallet and sifting out any incriminating evidence that might be found such as I.D. and photographs show the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were not substantially impaired by the use of drugs.

(Count III) This mitigating circumstance is not present in this case'. Immediatley after the capital felony was committed on Deputy Burnham, the defendant was alert enough to jump out of a 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 the testimony and evidence that was presented as to the events leading to Deputy Burnham's death, shows that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired.

D. WHETHER AT THE TIME THE CRIMES WERE COMMITTED THE DEFENDANT WAS UNDER THE INFLUENCE OF DRUGS.

Finding: The Court finds there are no mitigating circumstances under this condition. (See findings in A, B & C above).

E. WHETHER AT THE TIME OF THE CRIMES THE DEFENDANT SUFFERED A DISORDER OF DRUG DEPENDENCY WHICH CONTRIBUTED TO HIS COMMITTING HIS CRIMES.

Finding: The defendant in this case used drugs on a large scale whether he needed to or not. He apparently depended on drugs to attain a state of euphoria. However, this desire to feel good perhaps even reach a point where his inhibitions were or may have been lowered cannot be said to be a contributing factor in committing the crimes in this case. Euphoria notwithstanding, the defendant knew what he was doing and was able to distinguish right from wrong as well as the criminality of his conduct. It is the Courts opinion that there is no mitigating circumstances under this condition.

F. WHETHER THE DEFENDANT SUFFERED EMOTIONAL ABUSE OR HANDICAP DURING CHILDHOOD.

Finding: The evidence fails to establish any mitigating circumstance under this condition and the Court is of the opinion that none exists. While his childhood may not have been a happy one such does nothing in mitigation of his conduct in this case.

G & H. ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR BACKGROUND AND (H) ANY OTHER ASPECT OF THE OFFENSES.

Finding: It is the opinion of the Court that there ate no mitigating circumstances under these conditions.

CONCLUSIONS OF THE COURT.

The Court has carefully considered the recommendation of death by the jury, the aforesaid aggravating and mitigating circumstances and its findings with respect thereto. The Court concludes that there are sufficient aggravating circumstances which exist to justify the sentence of death. The Court further concludes that there are insufficent mitigating curcumstances, statutory or otherwise, to justify the imposition of a Life sentence.

DONE and ENTERED in Open Court at Gainesville, Alachua County, Florida this 28th day of April, 1988.

WAYNE M. CARLISE
CIRCUIT JUDGE (RETIRED)

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 3d day of July, 1991.

Respectfully submitted,

DOUGLAS S. CONNOR
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

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