IN THE SUPREME COURT OF FLORIDA

GARY LEONARD TILLMAN,

Appellant,

v. Case No. 74,756

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

OF COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

FLORIDA STATUTES:

PRELIMINARY STATEMENT

Gary Leonard Tillman, will be referred to as the "appellant" herein. The State of Florida will be referred to as the "appellee." The record on appeal, consisting of thirteen volumes and one supplemental volume will by referred to by the symbol "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

As to Issue I: In the opinion of this Honorable Court which reversed and remanded this case for a new sentencing, it was expressly held that appellant would not be allowed to withdraw his plea. Appellant's attempt to withdraw his plea before the trial court was, therefore, properly rejected where appellant was seeking to have the trial court deviate from the clear mandate of this Court. In any event, even if the trial court had authority to deviate from the mandate of this Court, a proposition which your appellee does not concede, the reasons stated in appellant's motion to withdraw his guilty pleas were wholly inadequate to support the requested relief.

As to Issue II: The death sentence imposed in the instant case is not disproportionate to other like cases based upon the aggravating and mitigating circumstances in existence in this case. Based on the factors presented in the instant case, the jury and trial court concluded that death was the appropriate sentence and this Honorable Court should not disturb that finding.

As to Issue III: The prosecutor exercised peremptory challenges in a nondiscriminatory fashion in the instant case. The reasons supplied to the trial court were all racially-neutral and, although the reasons did not rise to the level of a challenge for cause, they were more than sufficient to demonstrate that the prosecutor was not exercising challenges in a discriminatory fashion.

As to Issue IV: Appellant's constitutional challenge to the heinous, atrocious, or cruel aggravating circumstance based upon Maynard v. Cartwright has been consistently rejected by this Honorable Court and the same result should obtain in the instant case.

As to Issue V: The mental health testimony presented by a defense expert was controverted to the extent of vigorous cross examination by the prosecutor. This was the only method of rebuttal permitted the state under the terms of the stipulation and plea agreement. The trial court order indicated that he considered all mitigating circumstances and, therefore, it follows that the trial court considered that testimony for what it was worth. Where a trial court considers all mitigating evidence, the imposition of a death sentence is not improper.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEAS.

As his first point on appeal, appellant contends that the trial court erroneously denied appellant's motion to withdraw his previously entered pleas of guilty. This position is advanced notwithstanding the clear mandate of this Honorable Court. In the previous opinion entered in this case by this Court which vacated appellant's death sentence and remanded this cause for a new sentencing proceeding, this Court specifically addressed the question of whether appellant would be permitted to withdraw his plea. This Court held that appellant had not moved to withdraw his guilty pleas before the trial court even after repeated objections to the introduction of evidence beyond the scope of the plea agreement. This Court held that appellant could not refrain from attempting to withdraw his pleas until appeal and, consequently, this Court remanded this case for a new sentencing proceeding. Tillman v. State, 522 So.2d 14, 16 (Fla. 1988). This Court's holding was based in part upon analysis of the United States Supreme Court decision in Santobollo v. New York, 404 U.S. 257 (1971), wherein the Court remanded the case to a New York state court to determine the appropriate remedy, either plea withdrawal or specific performance of the agreement. Thus, this Court when faced with the question of permitting withdrawal of the plea or requiring specific performance of the agreement

clearly and succinctly held that appellant would not be allowed to withdraw his plea. The trial court, by denying appellant the opportunity to move to withdraw his pleas, was acting in accordance with the mandate of this Honorable Court. The trial court did not err.

A. The Law of the Case Doctrine Required the Trial Court to Reject Appellant's Attempt to Circumvent Clear Mandate of this Honorable Court.

As aforementioned, this Honorable Court refused appellant his requested appellate remedy of being permitted to withdraw his guilty pleas. This Court's ruling is clear and not subject to interpretation. Hence, the trial court had no authority to grant appellant's request to permit withdrawal of the guilty pleas where this Honorable Court has entered an order and a consequent mandate which directed the trial court to do a certain thing, that is, to conduct a new sentencing proceeding. The proceedings in the trial court were limited by the directions and the judgment of this Honorable Court. See, Bruner Enterprises, Inc. v. Department of Revenue, 452 So.2d 550 (Fla. 1984) (lower courts cannot change the law of the case as decided by highest court hearing case).

In Milton v. Keith, 503 So.2d 1312 (Fla. 3d DCA 1987), the court relied on the decision of this Court in State ex rel. Budd v. Williams, 152 Fla. 189, 11 So.2d 341 (Fla. 1943), for the proposition that a circuit court, after affirmance by the Supreme Court, is without jurisdiction to alter the decision of the higher court without first having authority from the Supreme

Court to do so. In Milton v. Keith, the court observed that "once an appellate court affirms an order, judgment or decree, the trial court looses all authority to change, modify, nullify or evade that order, judgment or decree." Milton v. Keith, supra, at 1313. Finally, it was held that:

> . . . once a mandate issues to the trial court, and the order appealed becomes the appellate court's order or decree, the trial court's role becomes purely ministerial; its function is limited to implementing and effectuating the appellate court's order or decree.

Milton v. Keith, supra at 1314.

In Greene v. Massey, 384 So.2d 24 (Fla. 1980), this Court held:

> Although the district court of appeal is without authority to overrule or modify either conclusions of fact or interpretation of law reached by this Court, it may in subsequent proceedings pass on issues which have *not* necessarily been determined and become the law of the case. *Goodman v. Olsen*, 365 So.2d 393 (Fla. 3d DCA 1978). (text at 27)

In the instant case, the issue of whether or not this cause should have been remanded for resentencing or whether upon remand appellant could have been permitted to withdraw his plea has already been determined by this Honorable Court. The trial court is without authority to evade the clear mandate of this Court.

In Goodman v. Olsen, 365 So.2d 393 (Fla. 3d DCA 1978), the court observed that when a case is before the Supreme Court of Florida, the complete record is before that Court. It must be assumed that all pertinent facts of record were taken into

consideration. The Court further determined that "the facts remain unchanged and whether or not we agree with the conclusions reached, this court is without authority to alter either conclusions of fact or interpretations of law reached by the Supreme Court." Id. at 396. As noted in Goodman, an appellate court which rendered the decision which has become the law of the case has the power to reconsider and correct its own decision. See also, Preston v. State, 444 So.2d 939 (Fla. 1984); Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965). In the instant case, however, no attempt was made by appellant subsequent to the trial court's refusal to deviate from the mandate of this Court to apply to this Court for reconsideration of the decision not to allow withdrawal of the plea. This could have been accomplished via an extraordinary writ and the failure to apply to this Court precluded the trial court from deviating from the mandate of this Court.

B. Even if the Trial Court Could Deviate from the Clear Mandate of this Court by Entertaining Appellant's Motion to Withdraw his Pleas, the Grounds Alleged to Permit Withdrawal are Insufficient and Would Not Support the Requested Relief.

Even if the trial court had the authority to entertain appellant's motion to withdraw his pleas, or even if appellant had applied to this Honorable Court for permission to seek withdrawal of his guilty pleas before the trial court, the grounds alleged in his motion to withdraw previously entered pleas of guilty were wholly insufficient to support the requested relief. Appellant's first two "changed circumstances" revolve

around the fact that a new judge was required by this Court's mandate to preside over the new penalty proceeding. Appellant alleges that a new judge could be prejudiced because he was alerted by this Court's previous opinion in this cause that there was additional evidence in aggravation and that the appointment of a new judge violates the "implicit" part of the bargain that the judge who accepts the plea will impose sentence. These contentions bespeak appellant's lack of confidence in the decision of this Honorable Court previously rendered in this cause. As discussed in Goodman, supra, in the prior appeal this Honorable Court had all facts and circumstances before it and certainly this Honorable Court was aware of any consequences arising by virtue of the previous opinion. This Court is certainly aware of the axiomatic proposition that judges are capable of disregarding that which should be disregarded. See Harris v. Rivera, 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981). These "changed circumstances" cited by appellant in his motion to withdraw his pleas were certainly contemplated by this Honorable Court when it decided that a new judge should be appointed in an abundance of caution to prevent the possible influence of inadmissible evidence. Inasmuch as these considerations were within the scope of this Honorable Court's previous opinion herein, they do not support the withdrawal of the validly entered guilty pleas.

Appellant cited as another "changed circumstance" the decision of the United States Supreme Court in Maynard v.

Cartwright, 486 U.S. 356 (1988). However, as this Court is well aware, the constitutionality of Florida's heinous, atrocious, or cruel aggravating circumstance has been repeatedly upheld by this Court. This issue will be discussed infra under Issue IV. At this point, however, it is sufficient to note that where the underlying basis of appellant's constitutional argument has no validity, it is not a factor which could support a withdrawal of a guilty plea.

Lastly, appellant relies on some rather specious "changed circumstances" pertaining to the "tough on crime" attitude among the population in Tampa since the prior trial and upon the purportedly improved economic climate which would make jurors less likely to empathize with appellant's inability to find employment prior to the homicide (allegedly a mitigating circumstance). Your appellee will not debate the allegations that the population in Tampa has a greater "tough on crime" attitude at this time rather than at the time of the prior trial. This notion is speculative at best and does not reflect a valid reason for permitting withdrawal of the guilty plea. In any event, your appellee posits that withdrawing a guilty plea and proceeding to trial before a population supposedly "tough on crime" is antithetical to appellant's position. Also, it is difficult to comprehend appellant's position that there is at this time an "improved economic climate." This Honorable Court can take judicial notice of the recessionary trends and unemployment figures which reflect a downturn in the economy so

as to obviate appellant's reason for withdrawing his guilty pleas.

Your appellee submits that none of the "changed circumstances" cited in his motion to withdraw previously entered pleas of guilty would have warranted that relief. In any event, your appellee further submits that the trial court was required to follow the mandate of this Honorable Court and the nature and quality of the "changed circumstances" is a moot point. The trial court did not err in denying appellant's motion to withdraw his guilty pleas.

ISSUE II

WHETHER THE SENTENCE OF DEATH IMPOSED IN THE INSTANT CASE IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL PENALTY DECISIONS OF THIS HONORABLE COURT.

Upon conviction of murder in the first degree the only sentencing options are death and life imprisonment. A proper analysis of the appropriateness of the sentence of death in any given case must begin with whether there are aggravating circumstances present. For without any aggravating circumstances death is never appropriate. See, *Section 921.141, Florida Statutes*. Sub judice, the trial court found two aggravating circumstances present, to-wit: the capital felony was committed by a person under sentence of imprisonment[1], and the capital felony was especially heinous, atrocious or cruel.[2]

At the new sentencing proceeding testimony was adduced from appellant's brothers and sisters (R 1214 - 1263), from appellant's mother (R 1269 - 1300), and from Dr. Robert Berland, a forensic psychologist (R 1307 - 1383). The jury heard all of this testimony and was properly instructed on the mitigating factors; a death recommendation was returned by a vote of 8 - 4 (R 1542). The trial judge next had to determine which aggravating and mitigating factors were established and weigh

---

[1] *Section 921.141(5)(a), Florida Statutes.*

[2] *Section 921.141(5)(h), Florida Statutes.*

them to determine the appropriate sentence. As has often been said by this Honorable Court, this is not a counting process, but a careful weighing of all of the circumstances involved in the case. See, e.g., State v. Dixon, 283 So.2d 1, 10 (1973). This Court has never held that any particular aggravating circumstance must be found in order to justify imposition of a sentence of death.

If the circumstances of a case warrants it, one or two aggravating circumstances can outweigh one or more mitigating circumstances. In his brief, appellant attempts to short-thrift the "under sentence of imprisonment" aggravating circumstance by relying upon Songer v. State, 544 So.2d 1010 (Fla. 1989). However, in Songer, the "under sentence of imprisonment" aggravating factor was the only one found by the trial court. This is not the case sub judice. The trial court also found that appellant committed the capital felony in an especially heinous, atrocious, or cruel manner. The factual basis for the heinous, atrocious, or cruel aggravating factor is not challenged in this appeal. Moreover, with respect to the "under sentence of imprisonment" aggravating factor, it must be considered that appellant committed the heinous murder only 204 days after he was placed on parole (see R 1425).

The instant case is neither one of "domestic violence" nor one where a jury override is present, two lines of cases in which this Honorable Court has consistently reversed based upon a proportionality analysis. Rather, both the jury and the judge

heard all of the pertinent evidence, nothing improper was thrown into the weighing process and both concluded that despite some mitigating evidence, this was an aggravated murder deserving a sentence of death.

Appellant's comparison of this case to Nibert v. State, 16 F.L.W. S3 (Fla. December 13, 1990) (corrected opinion), does not hold up under closer analysis. Appellant attempts to equate the substantial evidence of mitigation discussed in Nibert with the mitigation present in the instant case. However, Nibert had been physically and psychologically abused for many years of his youth. Nibert was also a chronic alcohol abuser who lacked substantial control over his behavior when he drank (and had been drinking heavily on the day of the murder). Evidence was adduced in Nibert to support the notion that the defendant had a good potential for rehabilitation when he was in a structured environment which enabled his mental condition to improve because alcohol was no longer a factor in Nibert's life. None of these factors are present in the instant case. It is not reasonable to suggest, as appellant does, that taking responsibility in a family unit is comparable to a childhood punctuated by physical and psychological abuse.

Your appellee strenuously disagrees with the conclusion reached by appellant that the trial judge at bar did not give any consideration to testimony of a mental health expert. This matter will be discussed fully below in Issue V. At this point, however, it should be noted that the trial court's written order

indicates that he "considered all of the mitigating circumstances offered by the defense in contemplating a life sentence rather than the death penalty . . ." (R 1549). The testimony of Dr. Berland, the defense mental health expert, was vigorously contested by the state even though the state, by virtue of the stipulation agreement, was forbidden from producing expert rebuttal testimony.[3] As appellant concedes in his brief, the type of mental health mitigating evidence presented at bar was only comparable to the type of mitigation presented in Hudson v. State, 538 So.2d 829 (Fla. 1989).

In Nibert, this Court found that evidence showed that Nibert felt "a great deal" of remorse. Tillman, however, did not show "a great deal" of remorse, but rather evidence was adduced from his mother, obviously an interested party, that Tillman had shown some remorse (R 1286 - 1287). Tillman at the time of the murder was twenty-one years of age, one year older than Hudson and, in the instant case, the trial court found that Tillman was a mature twenty-one year old (R 1549). In contrasting the instant case with Nibert and Hudson, it appears that the instant case is more comparable to Hudson. What appellant is attempting to have this Court do sub judice, as did the defendant in Hudson, is to reweigh the evidence and come to a different conclusion as did the trial court. This Honorable Court has determined that it

---

[3] This matter will also be discussed in Issue V, infra.

does not reweigh or reevaluate evidence presented as to aggravating and mitigating circumstances.[4] Hudson v. State, supra, at 831, citing Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); see also Freeman v. State, 563 So.2d 73, 77 (Fla. 1990). Based on the factors presented in the instant case, the jury and trial court concluded that death was the appropriate sentence in this case. This Honorable Court should affirm that decision.

---

[4] With respect to the aggravating circumstances found by the trial court in the instant case, it should be mentioned that those were the only two aggravating circumstances permitted to be discussed under the stipulation agreement. There is no doubt that additional aggravation existed which, in all probability would have been found absent the restrictions of the plea agreement. This Honorable Court reversed originally because the prosecutor had mentioned that the defendant was on probation for a strong-armed robbery in Palm Beach County. Additionally, when appellant was indicted for the instant murder, a second count of the indictment charged, and appellant pled guilty to, an armed robbery of a different victim. Thus, at the very least, appellant could have had additional aggravation but for the restrictions in the plea agreement.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE PROSECUTOR GAVE RACIALLY-NEUTRAL REASONS FOR THE EXCUSAL OF SOME OF THE PROSPECTIVE BLACK JURORS.

As his third point on appeal, appellant contends that the trial court erred by ruling that the assistant state attorney gave satisfactory reasons for his exercise of peremptory challenges of black prospective jurors. This claim is premised upon this Honorable Court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984), wherein it was held that peremptory challenges cannot be exercised solely because of a prospective juror's race. In the instant case, objection was made by the defendants when the prosecutor exercised his first peremptory strike to remove Ms. Sherman, an African-American. Objection was made but the trial court ruled that appellant, a black man, had not yet shown a substantial likelihood that the peremptory challenge was based on racial reasons (R 836 - 840). The third peremptory challenge exercised by the prosecutor was against another African-American juror, Mr. Brown. Objection was again made and the court ruled that the burden shifted to the state in order to establish neutral, non-racial reasons for the excusals (R 841 - 842). The prosecutor offered reasons and the trial court ruled the reasons were racially neutrally and valid (R 842 - 848). The valid reasons given by the prosecutor will be discussed below.

Thereafter, the assistant state attorney objected to the defense use of seven peremptory strikes against white prospective

jurors. The prosecutor stated that use of these challenges indicated a discriminatory motive and the trial court required appellant to give reasons for excusing prospective white juror Mr. Shaffer (R 859 - 865). Defense counsel gave reasons for exercising the peremptory challenge which were found to be racially neutrally and valid by the trial court (R 865 - 869). Interestingly, the trial court did not require defense counsel to give valid racially neutral reasons for excusing peremptorily the six prior white perspective jurors although, candidly, the state made no request for the defense to do so.

The state then exercised a peremptory challenge against Mr. Williams, a black prospective juror. After supplying reasons, the trial court found that those reasons were valid and racially neutral (R 869 - 871). The reasons given by the prosecutor for exercising peremptory challenges against the three African-American perspective jurors were valid because they were racially-neutral and demonstrated that the prosecutor was not utilizing peremptories in an effort to exclude prospective jurors solely because of race.

Perspective juror Ms. Sherman was excused because she advised that three of her brothers had been convicted for crimes which resulted in prison sentences. One of her brothers was convicted of first degree murder and was sentenced to life imprisonment and one of her other brothers might have pled to a lesser included offense of first degree murder (R 842 - 843). This is obviously a valid non-racial reason for exercising a

peremptory challenge. At this point, it must be observed that appellant, not unlike many defendants before this Honorable Court and before appellate courts throughout this state, confuses the true meaning of Neil and its progeny. In Neil, this Court specifically said, "[t]he reasons given in response to the Court's inquiry need not be equivalent to those for a challenge for clause." Neil, supra at 487. In his brief, appellant complains because no showing was made by the prosecutor that prospective juror Sherman would not be a fair and impartial juror. This is simply not the test when considering a Neil reason for exclusion. Peremptory challenges are still that, and the prosecutor does not need to give a reason which rises to the level of a challenge for cause. It is apparent on its face that excusing a perspective juror because her brothers were convicted of murder is a valid, neutral reason not related to the race of the juror. In the instant case, appellant was being tried for murder and he believes that he is entitled to prevent the state from excusing a juror who might very well in her mind place her brothers in the place of appellant during the course of the sentencing proceeding. The state does not have to bear the risk that a perspective juror may be lenient because she could see her brother in place of the appellant. The state does not have to bear the risk that a particular juror might be sympathetic to the defense because her close relatives had a judicial experience similar to appellant.

Appellant on appeal also challenges the trial court's ruling in favor of the validity of the prosecutors reasons for peremptorily striking prospective juror Brown. The prosecutor's reasons were that Mr. Brown did not appear "particularly intelligent" and that he was charged with indecent exposure while in the service and was, hence, a defendant in a court martial procceding (R 845). In his brief, appellant asserts that the first ground for excusal, the lack of intelligence of the perspective juror, is invalid because the record revealed that Mr. Brown had sufficient intelligence to serve as a juror. As this Court observed in the first opinion in this cause, "there is no requirement that jurors have college degrees to serve on a panel", Tillman v. State, 522 So.2d at 17, but this is not the end of the inquiry. In his response to the prosecutor's assertions, defense counsel stated with respect to Mr. Brown, "Whether he is intelligent or not is a judgment call." (R 847) In Reed v. State, 560 So.2d 203, 206 (Fla. 1990), this Court held:

> Within the limitations imposed by *State v. Neil*, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. *State v. Slappy*. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved.. . . (emphasis supplied)

Thus, where even defense counsel notes that the prospective juror's intelligence was a "judgment call", it is not unreasonable for the trial court to find, based upon the

prospective juror's demeanor, that venire person's intelligence was lacking to such an extent that he could not adequately function as a juror. However, the primary basis upon which Mr. Brown was excused was the fact that he was a defendant in a court martial. It cannot be reasonably argued that a prospective juror who has been a defendant in a criminal proceeding such as a court martial would not be a juror who the state would wish to empanel in any case, much less a penalty phase of a capital trial. The focus of appellant's attack is the fact that a juror and an alternate juror had difficulties with the law previously and these white jurors were not excused. Initially, it must be observed that no claim of "pretext" was made by appellant below. Apparently during the course of voir dire in the instant case, it was not apparent that different standards were being applied to perspective black jurors vis a vis prospective white jurors. Your appellee submits that if, indeed, there was a basis for an argument that the excusal of juror Brown was a pretext in light of allegedly similar treatment of perspective white jurors, this matter should have been brought to the attention of the trial court. Cf. Floyd v. State, 569 So.2d 1225 (Fla. 1990) (the failure to object to a prosecutor's race-neutral reason for excusal or the factual existence of the reason precludes appellate review of a Neil issue). In any event, should this Honorable Court determine that this claim is preserved for review, your appellee submits that the court martial of Mr. Brown was a sufficient race-neutral reason for excusal. One of the

white prospective jurors was guilty of "minor offenses" (appellant's brief at page 25), pertaining to an expired tag and a suspended drivers's license, and the other prospective white juror was placed on juvenile probation as a result of a bar fight (R 708 - 709; R 1090 - 1091). Certainly, the degree of severity of being a defendant in a court martial is much greater than committing minor traffic offenses or engaging in a bar fight when one is sixteen years of age. Thus, there is a reasonable basis for a peremptorily challenging a juror who had been a defendant in a criminal-related case. Regardless of the severity of the indecent exposure charge, Mr. Brown was still a participant in the criminal process and the participation alone is sufficient to permit a peremptory challenge by the state.

The defense also challenged the prosecutor's peremptory challenge of Mr. Williams, a black prospective juror who had planned to go on vacation with his family during the week set for trial (R 99 - 100). Appellant appears concerned with the timing of this challenge rather than the actual content thereof. The challenge was made after the defense offered similar reasons for their excusal of a prospective white juror, Mr. Shaffer. Although recognizing that the reasons for peremptorily striking Mr. Shaffer by the defense and Mr. Williams by the state were similar (appellant's brief at page 27), appellant nevertheless contends that the judge erred by permitting the peremptory challenge to stand. Appellant's contention that the timing of the peremptory challenge of Mr. Williams exhibits a "targeting"

of black perspective jurors is without merit. If the prosecutor did, indeed, wish to "target" African-American perspective jurors, he could have done a better job considering the fact that two black persons were empaneled to hear this sentencing phase. Although the empaneling of black jurors is not dispositive of the Neil question, it is certainly indicative of a prosecutor who is not "targeting" black jurors. Secondly, the reason for excusal of Mr. Williams was that he had planned a vacation and, therefore, his mind may not be on the trial or, alternatively, the prospective juror was "too anxious to sit here and participate in a trial of this nature and to participate in this jury selection process." (R 870) This latter reason was given by the prosecutor and was the same reason previously given by the defense (R 870). It should also be observed that in his brief, appellant focuses on comparison between the situations of Mr. Shaffer, the prospective white juror, and Mr. Williams, the perspective black juror. What appellant neglects to discuss in his brief is that there was another perspective white juror, a Mrs. Barnes, who also had a vacation planned. During the course of the voir dire, defense counsel stated "I would then have major serious reservations about how she would feel based on her repeated restricted opportunity for a vacation period during the summer." (R 698). Defense counsel was concerned that if Mrs. Barnes remained on a jury it was not possible to gauge how she would respond when the vacation is "going out the window" (R 698 - 699; R 867 - 868). Concern about the attitude of a

prospective juror who would forego a vacation in order to sit on a jury, although not rising to the level of a challenge for cause, certainly is a race-neutral reason for the exercise of a peremptory challenge.

Your appellee respectfully submits that, when viewing the voir dire proceedings as a whole in the instant case, the prosecutor exercised his peremptory challenges in a manner which was nondiscriminatory and the trial court's rulings in this matter should be upheld by this Honorable Court.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN HIS INSTRUCTION TO THE JURY PERTAINING TO THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

As his next point on appeal, appellant presents a claim which has been before this Court many times. He alleges that the instructions to the jury on the especially heinous, atrocious, or cruel aggravating circumstance were unconstitutionally vague in light of the United States Supreme Court decision in Maynard v. Cartwright, 486 U.S. 356 (1988). In the trial court, the prosecutor cited to the trial judge the decision of this Honorable Court in Smalley v. State, 546 So.2d 720 (Fla. 1989), wherein this Court reviewed our heinous, atrocious, or cruel aggravating circumstance in light of Maynard v. Cartwright. Your appellee will not repeat this Court's analysis found in Smalley, but would rather rely on the Court's analysis and holding in that decision.

In an attempt to evade the clear holding of Smalley, appellant cites Walton v. Arizona, 497 U.S. ____, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), for the alleged proposition that a question remains open as to how Maynard impacts upon the Florida sentencing scheme. Appellant has clearly ignored the multitude of cases decided by this Court subsequent to the rendition of the decision in Walton v. Arizona. Each of the following cases has rejected appellant's present claim of unconstitutionality of the heinous, atrocious, or cruel aggravating circumstance. Robinson

v. State, 16 F.L.W. S107, S110 n. 6 (Fla. January 15, 1991); Trotter v. State, 16 F.L.W. S17, S18 (Fla. December 20, 1990); Hitchcock v. State, 16 F.L.W. S23, S26 n. 2 (Fla. December 20, 1990); Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990). See also, Randolph v. State, 562 So.2d 331, 339 (Fla. 1990), wherein this Honorable Court held that the claim presently advanced is a meritless claim warranting no discussion.

Your appellee submits that appellant's fourth claim has been raised many times and consistently rejected by this Honorable Court. The same result should obtain in the instant case.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY FAILING TO CONSIDER MITIGATING FACTORS WHEN HE IMPOSED THE DEATH PENALTY.

As his final point on appeal, appellant contends that the trial court erred by failing to consider mitigating factors when he weighed the aggravating and mitigating circumstances to determine whether death was the appropriate penalty. The basis of appellant's claim revolves around the fact that, concededly, the trial court made no mention in his order of the testimony of Dr. Robert Berland, the defense mental health expert who testified in this case. Relying upon this Honorable Court's decision in Campbell v. State, 16 F.L.W. S1 (Fla. December 13, 1990), appellant contends that this cause must be remanded to the trial court for evaluation and reweighing of the aggravating and mitigating circumstances. Your appellee submits that under the facts of this case such a result need not obtain and this Honorable Court should affirm the sentence of death imposed by the trial court.

Appellant's basic premise is that the mental health testimony was uncontroverted but was not considered by the trial court. This is not a correct reflection of what occurred below. Dr. Berland's testimony was, indeed, controverted via strenuous cross examination by the prosecutor. For example, one of the conclusions reached by Dr. Berland was that appellant's psychotic ailment was hereditary in nature (R 1349). However, all information obtained concerning the purported inherited ailment

came from an investigator in the public defender's office. No verification was made whatsoever (R 1349 - 1352). A review of the entire cross examination by the state reveals that Dr. Berland's conclusions were questioned quite thoroughly. In addition, it should be observed that Dr. Berland is no stranger to this Honorable Court. In Henry v. State, 16 F.L.W. S58, 59 (Fla. January 3, 1991), this Court held that "the prosecution was properly allowed to elicit from defense expert, Dr. Robert Berland that 98% of his clientele consisted of criminal defendants and that 40% of his practice consisted of first degree murder defendants represented by the Hillsborough County Public Defender's Office." This same type of impeachment testimony was elicited sub judice (R 1364 - 1369). Significantly, cross examination of Dr. Berland by the state was the only method available to the state with which to controvert or rebut the conclusions of the expert. The plea agreement and stipulation under which both parties were operating clearly provided that the state was not permitted to use expert witnesses in the instant case. Paragraph (5)(m) of that stipulation provided:

> (m) In the event this Stipulation and Plea Agreement is not formed or fulfilled for any reason, the state may not use, for any purpose, in conjunction with any future trial or proceeding of whatever type, kind, or description, any of the psychologists or psychiatrists referred to herein (R 1569).

As this Court is well aware, this cause was originally remanded to the trial court for the new sentencing proceeding based upon a breach of the plea agreement by the state. Upon that breach,

subsection (5)(m) of the stipulation came into effect. It was for this reason alone that the state did not present an expert in rebuttal. The prosecutor stated that if the agreement was interpreted differently he certainly would have called an expert (R 1378).

Not only was Dr. Berland's testimony challenged by the state on cross examination, but it appears that the trial court also considered the mental health mitigating evidence when he deliberated over the imposition of sentence. The trial court's order under the heading "MITIGATING CIRCUMSTANCES" specifically stated that, "the court has considered all of the mitigating circumstances offered by the defense in contemplating a life sentence rather than the death penalty for the defendant TILLMAN" (R 1549). It is certainly unreasonable to suggest that after extensive direct, cross, and redirect examination of Dr. Berland, the trial court failed to take this testimony into consideration. Your appellee submits that merely because a mental health expert testified does not necessitate a finding that mitigating circumstances have been established. In Bates v. State, 506 So.2d 1033, 1034 (Fla. 1987), this Court held as follows:

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

See also, Hudson v. State, supra at 831, citing Roberts v. State, 510 So.2d 885 (Fla. 1987) (trial court may accept or reject expert testimony just as the testimony of any other witness may be accepted or rejected). In the instant case, where the trial court expressly stated that he considered all of the mitigating circumstances proposed by the defendant it is reasonable to presume that the trial court rejected expert's testimony.

Your appellee respectfully submits that although this Court's laudable goal is to seek uniformity and clarity in capital sentencing, Campbell may go too far by requiring trial judges to weigh mitigating factors even where those factors may carry infinitesimal weight or do not ameliorate the enormity of a defendant's guilt. Cf. Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984). There is no authority, statutory or precedential, which mandates a finding in mitigation. Indeed, prior decisions of this Court dictate the opposite, to-wit: there is no requirement that the trial court find anything in mitigation. See Porter v. State, 429 So.2d 293, 296 (Fla. 1983). Nothing in the Constitution precludes a sentencer from assigning no weight to a mitigating factor which has been fully considered. Previously, this Honorable Court has left the matter of finding or not finding a mitigating circumstance to the sound discretion of the trial court as long as all of the evidence was considered. See, e.g., Hill v. State, 549 So.2d 179, 183 (Fla. 1989); Lopez v. State, 536 So.2d 226, 231 (Fla. 1988); Bryan v. State, 533 So.2d 744, 749 (Fla. 1988); Kight v. State, 512 So.2d 922, 933 (Fla.

1987); Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982). Campbell does not expressly recede from these precedents, and no good cause for such action is made to appear. In the instant case, where the trial court expressly stated that he considered all proposed mitigating evidence, and where the weight to be ascribed Dr. Berland's testimony was within the province of the trial court, this Honorable Court should affirm the trial court's order. The decision of this Honorable Court in Campbell, a decision which post-dates the trial proceedings held in this case by more than two years, does not call for a remand in light of the peculiar circumstances in the instant case as outlined above.

CONCLUSION

Based upon the foregoing reasons, argument and authorities, the judgment and sentence of death imposed by the trial court should be affirmed by this Honorable Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar ID#: 0238538
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Douglas S. Conner, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 18th day of March, 1991.

OF COUNSEL FOR APPELLEE.