IN THE SUPREME COURT OF FLORIDA

GARY LEONARD TILLMAN, :

Appellant, :

vs. : Case No. 74,756

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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STATEMENT OF THE CASE

A Hillsborough County grand jury returned a two-count indictment charging Gary Leonard Tillman, Appellant, with First Degree Murder and Armed Robbery. Pursuant to negotiations, a written plea agreement whereby Tillman pled guilty to both offenses was entered January 8, 1986. (R1568-82) A penalty trial was held in which the jury recommended and the trial judge imposed a sentence of death. On appeal to this Court, the sentence was vacated and a new penalty proceeding ordered (R1528-35); Tillman v. State, 522 So.2d 14 (Fla. 1988).

Back in the circuit court, Tillman moved to withdraw his guilty pleas. (R1583-6) After a hearing, this motion was denied on July 28, 1988. (R1466-90)

A jury was selected and a penalty proceeding held before the Honorable John Griffin on August 9 through 16, 1989. (R1-1452) By a vote of 8-4, the jury recommended that the court impose a sentence of death. (R1542) The judge followed the jury's recommendation after a sentencing hearing held August 18, 1989. (R1454-60)

In his written "Sentence", the circuit judge found two aggravating circumstances proved: § 921.141(5)(a), Fla. Stat. (under sentence of imprisonment) and § 921.141(5)(h), Fla. Stat. (especially heinous, atrocious or cruel). (R1548-9, see Appendix) The sentencing judge recognized Tillman's age of 21 and also noted the close ties between Appellant and his family as mitigating evidence to be considered. (R1549, see Appendix) How-

ever, he decided that the aggravating factors outweighed the mitigating factors. (R1549-50, see Appendix)

Appellant filed a Notice of Appeal on September 15, 1989. (R1551) The Public Defender, Tenth Judicial Circuit was designated as appellate counsel.

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

STATEMENT OF THE FACTS

A. State's Evidence

On August 31, 1983, Hillsborough County Sheriff's Detective Richard Kennedy encountered Marjory Shannon shortly after she had been stabbed. (R1158) Shannon was conscious and bleeding from the neck. (R1158) She responded to Detective Kennedy's questions with gestures. (R1159)

Dr. Larry Simpson testified that he was on duty at the emergency room of University Community Hospital when Marjory Shannon was brought in shortly after midnight on September 1, 1983. (R1170) Shannon was conscious, but somewhat delirious when she arrived at the hospital. (R1171) About four hours later, she was pronounced dead. (R1172)

Hillsborough County Chief Medical Examiner Peter Lardizabal performed an autopsy on the morning of September 1, 1983. (R1178) He counted fifty-nine separate wounds inflicted by a knife. (R1180) Over twenty of the wounds were to Shannon's hands; the doctor characterized them as defensive wounds. (R1188-9) He gave his opinion that loss of blood was the cause of death. (R1192-3) Without medical intervention, Shannon would have died from the multiple wounds within half an hour to one hour. (R1193)

Appellant's parole supervisor, James Sommerkamp, testified that Tillman was released from prison on parole in February, 1983. (R1167) He was still on parole when this homicide occurred. (R1167) Sommerkamp further testified that the offense for

which Tillman had been sentenced to prison was the burglary of a closed laundromat. (R1167-8) Tillman served thirteen months in prison for this burglary of a structure and was twenty years old when released on parole. (R1168-9)

B. Defense Evidence

When Appellant's mother, Betty Sheppard, was fifteen she was impregnated by her stepfather. (R1270) She considered having an abortion, but ultimately gave birth to Gary, the appellant. (R1271) Her stepfather, Jerry Lumpkin, was convicted of carnal intercourse and given a prison sentence for this conduct. (R1271,1306-7,1567)

A little over a year later, Appellant's mother married John Tillman, who adopted Gary. (R1272) Gary grew up without knowing the circumstances of his birth until after he had been arrested for the homicide of Shannon. (R1272-3, 1297-8) John Tillman died of cancer when Gary was four. (R1274) His mother did not remarry until 1981 when she married James Sheppard. (R1275)

Thus, Appellant grew up as the oldest of several children in a household where there was no father. His brothers and sisters, Sharon Denise Young, Melissa Howard, Tangela Kendrick, Alan Kendrick, Carol Kendrick and Thea Sheppard all testified at the penalty proceeding. (R1214-63) They related that their mother held down two jobs while they were growing up and didn't spend much time at home. (R1216,1225,1234,1239,1246) Because there was usually no man living in the household, Gary took

responsibility for seeing that his younger siblings were fed and handled problems which arose. (R1217,1225-6,1234-5,1240,1246-7) He saw that they got ready for school on time and helped them with their schoolwork. (R1225,1234-5,1247)

When Appellant reached his teenage years, he started to work outside the house. (R1220-1,1225,1232-3,1240,1276-7) He was employed as a grocery store bag boy, did yard work, picked oranges, and later worked six hours daily at a Holiday Inn for a year and a half. (R1276-8) With his earnings, he bought clothing for his brothers and sisters as well as himself and contributed money for household expenses. (R1217-8,1225,1236,1240,1246-7, 1276-7)

At age 17, Gary married Lynnette who already had a child from a previous union. (R1278) They later had a daughter of their own. (R1279) Appellant accepted his obligation to support his stepson and treated both children equally well. (R1207, 1279) The children, Frederick Gaines and Anquesha Tillman, both testified at the trial. (R1264-8) They said that they have maintained their relationship with their father by visiting him in prison about twice a month. (R1265, 1267)

Appellant dropped out of high school when he married, but later earned his equivalency degree while in prison on the burglary conviction. (R1221,1278,1285) After Tillman was released on parole, he looked for employment on a daily basis; but was unsuccessful in finding a permanent job. (R1208-9, 1281-2) He worked temporarily for a florist at the Valentine's Day holi-

day and picking fruit. (R1284,1295) Appellant became very frustrated and depressed because he couldn't adequately support his family without full time work. (R1208,1282-3) He believed that he was not getting employment because he admitted that he had a criminal record on the job applications. (R1213,1282)

Since Tillman was arrested in 1983 for this homicide, his family has stayed in touch by visits and letters. (R1218, 1226-7,1237,1248,1260-2,1287-8) He has expressed remorse for the killing. (R1286-9) None of his brothers or sisters has any criminal record at all. (R1219,1226,1236,1240-1,1245,1260,1274)

Dr. Robert Berland, a forensic psychologist, examined Tillman and administered the MMPI test to him on two occasions seven months apart. (R1315,1326) The doctor testified that the MMPI test was particularly reliable in identifying psychotic disturbance. (R1315-7) Tillman's test results showed consistent profiles of someone who is experiencing psychotic symptoms which could include delusions. (R1327)

Dr. Berland also administered the WAIS test which can measure brain damage as well as intelligence. (R1333-4) Tillman's test result showed a disparity between brain function in the left hemisphere and the right hemisphere, suggesting an impairment. (R1334) Considering also the diagnostic interviews, Dr. Berland concluded that an inherited mental disorder was the primary source of Tillman's mental problems. (R1334) He noted a genetic history of mental illness on both sides of Tillman's family. (R1334-5,1349-51)

Typically, when a mental disorder is inherited, the affected person will not start showing symptoms until his or her late teens or early twenties. (R1358-9,1375) At an earlier age, Tillman showed some signs of a possible mental disorder (R1340-1, 1360-1), but in the spring of 1983 clear symptoms of psychotic disturbance appeared. (R1361) Tillman would sit alone in a parked car for hours with a blank stare. (R1361) He was very withdrawn, not noticing people around him. (R1361) He experienced hallucinations of hearing his name called. (R1361) Also, he constantly accused his wife of infidelity which Dr. Berland said was characteristic of a paranoid disturbance. (R1362) Finally, Tillman had frequent episodes of sleeplessness where he would pace the floor night and day. (R1362-3) He moved in a nervous and agitated manner. (R1362-3)

Dr. Berland gave his opinion that Tillman was under the influence of extreme mental and emotional disturbance when he committed the homicide. (R1333,1369) While the doctor concluded that Tillman had some ability to appreciate the criminality of his conduct, he also concluded that Tillman's ability to conform his conduct to the requirements of law was substantially impaired. (R1332)

SUMMARY OF THE ARGUMENT

When Appellant moved to withdraw his guilty pleas before the new sentencing proceeding, the trial judge ruled that this Court's mandate and law of the case deprived him of authority to consider the motion. This was error because Tillman's motion relied upon different grounds for his plea withdrawal than had been presented in his prior appeal to this Court. The trial judge should have ruled on the merits of Appellant's motion.

Tillman's sentence of death is disproportionate. Although the state proved two aggravating circumstances, one of them (on parole from a non-violent offense) must be given only minimal weight. Tillman presented substantial evidence in mitigation; a potent reason to reduce his sentence to life imprisonment.

The prosecutor was permitted to strike three African-American prospective jurors from the panel after the trial court required him to state reasons for the excusals. Prospective juror Brown was struck for a reason not supported by the record and for a reason which was more applicable to two white jurors who actually sat on the jury. The prosecutor's use of defense counsel's reasons for excusing a white prospective juror to bootstrap an excusal of prospective juror Williams should have been deemed a pretext by the trial judge.

The trial judge instructed the jury in the bare statutory language of the especially heinous, atrocious or cruel aggravating circumstance. This language has been held unconsti-

tutionally vague by the United States Supreme Court. Although Florida capital juries are not the final sentencers, the great weight which the sentencing judge must accord to the jury's penalty recommendation means that the jury must be instructed on the limited construction given to this aggravating factor.

Dr. Berland testified about his mental evaluation of Tillman. He gave his opinion that Appellant met the criteria for statutory mitigating factors. There was nothing in the record to refute Dr. Berland's opinion. Consequently, the sentencing judge erred by failing to even address this mitigating evidence in his written sentencing order.

ARGUMENT

ISSUE I

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

After this Court ordered a new sentencing proceeding before a new judge and jury for Tillman in Tillman v. State, 522 So.2d 14 (Fla. 1988) (R1528-35), Appellant moved to withdraw his guilty pleas in the trial court. His written "Motion to Withdraw Previously Entered Pleas of Guilty" detailed several changes of circumstances which would make it inequitable to enforce the plea agreement at a time two and one-half years after its inception in January 1986. (R1583-6) A hearing was held before Circuit Judge Edward Ward on July 28, 1988. (R1462-91)

At this hearing, the State argued that this Court had decided in Tillman's prior appeal that specific performance of the plea agreement rather than withdrawal of the plea was the appropriate remedy for the State's breach. (R1474-5) Since this Court did not allow Appellant to withdraw his plea and ordered a new sentencing proceeding, the State contended that the trial judge was bound by the mandate of this Court and law of the case to deny Tillman's motion. (R1479-86)

Appellant's counsel argued that the question was whether an unfair disadvantage would be placed on the defendant if he was denied leave to withdraw his plea. (R1487) He submitted that once the case was remanded to the circuit court, the

trial judge had jurisdiction to entertain a motion for plea withdrawal. (R1487-8) If the State was allowed to have specific performance of the plea agreement, Appellant would be denied his federal constitutional rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (R1476-7,1478-9,1489-90)

The court denied Tillman's motion. (R1490) Although the judge gave no reason for his ruling, it would appear that he agreed with the State's contention that this Court's mandate and law of the case precluded entertaining any motion to withdraw the guilty pleas. Significantly, the State never contested the merits of Tillman's motion, only whether it was procedurally barred. When the motion was renewed immediately prior to trial, both counsel agreed that law of the case and this Court's mandate were the basis for the judge's earlier ruling. (R19-22)

A. The Trial Judge Had Authority to Consider the Merits of Tillman's Motion to Withdraw His Pleas

In vacating Tillman's death sentence and ordering a new sentencing proceeding, this Court wrote:

> At trial, Tillman made no motions to withdraw the guilty plea, despite knowledge that the agreement had been breached. While he did repeatedly object to the introduction of evidence beyond what the agreement specified, at no time, until this appeal, did Tillman ever move to withdraw that plea. Accordingly, we cannot allow him to do so now. Rather, we must remand this case for a new sentencing proceeding. In an abundance of caution, in order to avoid even the remote possibility that the trial judge could have been influenced by the inadmissible evidence, we

> order that the proceeding be conducted before a new judge, and pursuant to the dictates of the plea agreement.

522 So.2d at 16. While this language clearly denies Tillman the relief he requested on appeal (withdrawal of plea), it does not foreclose Tillman from later seeking to withdraw his plea on other grounds in the trial court. There was no reason to treat Appellant's "Motion to Withdraw Previously Entered Pleas of Guilty" any differently than any other motion to withdraw a plea before sentencing.

Fla.R.Crim.P. 3.170(f) controls here. It provides:

> (f) **Withdrawal of Plea of Guilty.** The court may, in its discretion, and shall upon good cause, at any time before a sentence, permit a plea of guilty to be withdrawn . . .

This rule was construed in Yesnes v. State, 440 So.2d 628 (Fla. 1st DCA 1983) as placing the burden on the defendant to establish good cause for withdrawing his plea. However, "the rule also allows, in the discretion of the court, withdrawal of the plea in the interest of justice, upon a lesser showing than good cause." Yesnes, 440 So.2d at 634. (e.o.)

At bar, the trial judge should have exercised his discretion to determine whether Tillman should be allowed to withdraw his plea. This Court should now remand this case to the trial court for an evidentiary hearing on Tillman's motion.

The situation at bar is on point to that presented in Harris v. State, 299 Md. 511, 474 A.2d 890 (1984). In a prior appeal, the Maryland court found that Harris's guilty pleas were entered voluntarily but that his death sentence had to be vacat-

ed. Accordingly, the court had remanded for a new sentencing proceeding. Harris v. State, 295 Md. 329, 455 A.2d 979 (1983).

On remand, Harris moved to withdraw his guilty pleas, alleging the new ground of ineffective assistance of counsel. The trial judge determined that he lacked authority to entertain the motion on the merits because the case had been remanded solely for resentencing. 474 A.2d at 892.

The Harris court held that a remand for resentencing places the defendant in the same position as he was prior to his initial sentencing. 474 A.2d at 892. Consequently, a motion to withdraw the pleas was authorized under the Maryland rule which closely resembles Fla.R.Crim.P. 3.170(f). Insofar as Harris offered different grounds for withdrawal of his pleas than had been considered in the prior appeal, the trial judge erred by not exercising his discretion and ruling on the merits. The Harris court ordered a remand for the trial judge to conduct an evidentiary hearing and rule on the merits of the plea withdrawal motion. 474 A.2d at 894.

B. Tillman's Motion to Withdraw His Guilty Pleas Relied Upon Grounds Not Considered in His Prior Appeal

Tillman's motion relies upon changed circumstances which operated to his detriment between the entry of his plea and the new penalty proceeding. When a defendant in good faith relies upon a plea agreement, "courts will not let the defendant be prejudiced as a result of that reliance." Nova v. State, 439 So.2d 255 at 259 (Fla. 3d DCA 1983).

One changed circumstance is that this Court's opinion in Tillman v. State, 522 So.2d 14 (Fla. 1988) alerts the trial court that additional evidence in aggravation exists which was sufficient to require this Court to order that a new judge preside over the new penalty proceeding. (R1583) Appellant contended below that any new judge assigned to hear the new proceeding could be prejudiced against Appellant for that reason alone. (R1469-70,1475-7)

A second changed circumstance also relates to the appointment of a new trial judge. When a defendant enters a negotiated plea, an implicit part of the bargain is that the judge who accepts the plea will impose sentence. See, People v. Arbuckle, 22 Cal.3d 749, 150 Cal.Rptr. 778, 587 P.2d 220 (1978). Since a Florida trial judge retains discretion to either accept the jury's penalty recommendation or to impose a different sentence, the defendant's perception of the judge's attitude toward the death penalty or the likelihood that the judge might impose a life sentence even if the jury recommended death clearly influences any decision to plead guilty in a capital case.

Another change of circumstances cited by Appellant was the intervening decision of the United States Supreme Court in Maynard v. Cartwright, 486 U.S. 356 (1988) which held that the Oklahoma death penalty aggravating factor of "especially heinous, atrocious or cruel" was unconstitutionally vague. (R1584) In his plea agreement, Tillman had expressly agreed that the State could try to prove the especially heinous, atrocious or cruel aggravat-

ing factor and that the jury could be instructed on it in the language of the Standard Jury Instructions. (R1568-9) In seeking to withdraw his plea, Tillman contended that he should not be bound to waive an attack on the constitutionality of this aggravating factor. (R1584)

Other changed circumstances cited by Tillman in his motion included a greater "tough on crime" attitude among the general public in Tampa since the prior trial and an improved economic climate which would make jurors less likely to empathize with Tillman's inability to find employment during the period before the homicide. (R1584) In short, the jury pool would likely be more pro-death penalty and less likely to give significant weight to a mitigating factor.

As previously argued, the trial judge should have considered the above changed circumstances and exercised his discretion in ruling whether to allow Tillman to withdraw his guilty pleas. Stated differently, the question is whether the State is entitled to specific performance of the plea agreement despite the changed circumstances. The appropriate guide for the trial judge's exercise of discretion is that stated by this Court in Scott v. City of Venice, 123 Fla. 772, 167 So. 654 (1936):

> The enforcement by a court of equity of a specific performance of a contract is not a matter of right in either party to such contract, but a matter for the exercise of a sound judicial discretion by the court, and should only be exercised when a decree for specific performance would be strictly equitable as to all the parties under the facts as they exist . . .

This Court should now remand Tillman's case to the circuit court for the trial judge to rule on the merits of Tillman's "Motion to Withdraw Previously Entered Pleas of Guilty." If Appellant is denied this hearing, he would be also deprived of his federal constitutional rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

ISSUE II

A SENTENCE OF DEATH IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL PENALTY DECISIONS OF THIS COURT.

This Court has always adhered to the proposition that a sentence of death is reserved for only the least mitigated and most aggravated of first degree murders. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.den., 416 U.S. 943 (1974). At bar, Tillman's offense is reprehensible but it does not belong among the worst of murders.

For purposes of comparison, this Court should focus on the decisions of Nibert v. State, Case No. 71.980 (Fla. December 13, 1990)[16 F.L.W. S3] and Hudson v. State, 538 So.2d 829 (Fla. 1989). Both Nibert and Hudson, like the case at bar, involve a slaying by multiple stab wounds. A unanimous court overturned Nibert's death sentence while a sharply divided court affirmed Hudson's.

Beginning the comparison with Nibert, both Tillman and Nibert stabbed their victim under circumstances suggesting an attempted robbery. However, in neither case was the State able to prove the course of a felony [§ 921.141(5)(d), Fla. Stat. (1983)] aggravating circumstance. In Nibert, the sole aggravating circumstance was heinous, atrocious or cruel [§ 921.141(5)-(h), Fla. Stat. (1983)]; at bar, Tillman has the additional aggravating circumstance of being on parole [§ 921.141(5)(a), Fla. Stat. (1983)].

The question is whether much weight should be given to Tillman's additional aggravating factor. In Songer v. State, 544 So.2d 1010 (Fla. 1989), the "under sentence of imprisonment" aggravating circumstance was called "almost total lack of aggravation." 544 So.2d at 1011. Moreover, the Songer court pointed out that since the facts showed that Songer walked away from work release rather than breaking out of prison, the aggravating factor was diminished. 522 So.2d at 1011. Where the defendant is on parole, as Tillman was, the § 921.141(5)(a), Fla. Stat. (1983), aggravating circumstance should receive minimal weight.[1]

The mitigating evidence presented at bar is different than that which Nibert had, but it is comparable in strength. Tillman did not have the abused childhood that Nibert had, but he had to shoulder the responsibility for taking care of his younger brothers and sisters from an early age. When he became old enough to work outside the home, he did so and contributed part of his earnings to support the household. Tillman made a positive contribution to the welfare of his family as detailed by the testimony of his mother, six brothers and sisters, and his two children. (R1214-1301) Even the sentencing judge found Tillman's "continued contact with his family and his apparent concern for them" to be a mitigating factor. (R1549, see Appendix)

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[1] It should also be noted that while Nibert was not under legal constraint at the time of his homicide, he did not qualify for the no significant prior criminal history mitigating circumstance.

As in Nibert, the trial judge at bar did not give any consideration to testimony by mental health experts. [2] This Court found in Nibert that the trial court should have considered the evidence of chronic alcohol abuse which led to Nibert's impaired capacity and mental disturbance. At bar, Dr. Berland presented unrebutted testimony that Tillman suffered from an inherited mental disorder of psychotic proportions. (R1325-7, 1334-5) He concluded that Tillman was under the influence of extreme mental or emotional disturbance and that his capacity to conform his conduct to the requirements of law was substantially impaired. (R1332-3, 1369-70)

Finally, Tillman, like Nibert, has shown much remorse for this homicide. (R1286-7) At twenty-one years old when the homicide was committed, Tillman was six years younger than Nibert. (R1281)

Turning now to a comparison with Hudson v. State, 538 So.2d 829 (Fla. 1989), we also find a homicide committed with a knife and two aggravating circumstances proved. However, one of Hudson's aggravating factors was the prior commission of a violent felony, a sexual battery. 538 So.2d at 830, 831. This is clearly a more aggravated criminal record than Tillman's parole from a laundromat burglary conviction. (R1167-8)

Similarly, the evidence produced by Hudson in mitigation did not measure up to that which Tillman presented. Hudson did show some evidence of mental disturbance and impaired

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[2] See also, Issue V, infra.

capacity which was given little weight. 538 So.2d at 831, fn 5. At most, it might have been comparable to Tillman's mental disturbance. Hudson's age of twenty-two is a year older than Tillman. However, Hudson did not have any positive contributions to present. Tillman's good character evidence of concern and support to his family over many years make his evidence in mitigation more compelling than Hudson's.

This analysis leads to the conclusion that the facts at bar are closer to those in Nibert than they are to Hudson. On this basis alone, this Court should declare Tillman's death sentence disproportionate. However, there is one revealing item of evidence yet to be mentioned. As the oldest of seven children in a family without a father and where there mother was out of the house at work most of the time, Tillman must have had a great influence on his brothers and sisters. None of them has ever been arrested for any crime whatsoever. (R1219,1226,1236,1240-1,1245,1260,1274) This would not be true unless Gary Tillman had set a good example while he was still living with his family and before the onset of his hereditary mental disturbance. This positive contribution to his family, and ultimately society, is a persuasive reason why his sentence should be reduced to life imprisonment.

ISSUE III

THE TRIAL JUDGE ERRED BY RULING THAT THE PROSECUTOR GAVE SATISFACTORY REASONS FOR HIS EXERCISE OF PEREMPTORY STRIKES AGAINST AFRICAN-AMERICAN PROSPECTIVE JURORS.

In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court held that prospective jurors cannot be rejected solely because of the color of their skin. If a party complains that the other party is exercising peremptory strikes on racially motivated grounds, the Neil court held that the trial judge must decide whether there is a substantial likelihood that the peremptory strikes were racially motivated. If the trial judge finds this likelihood, the party who exercised the strikes must give valid non-racial grounds for their exercise. Subsequently, the United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits exercise of peremptory challenges based solely on a juror's race. Batson v. Kentucky, 476 U.S. 79 (1986).

At bar, the prosecutor used his first peremptory strike to remove prospective juror Elaine Sherman, who, like Tillman, is African-American. (R836) Defense counsel objected, contending that the strike was racially motivated. (R836-7) The trial judge ruled that Appellant had not yet shown a strong likelihood that the peremptory was based on racial reasons. (R839-40)

Subsequently, the prosecutor used his third peremptory strike to excuse another African-American juror, Joe Brown. (R841) Appellant again objected and the trial judge then found

that the burden had shifted to the State to establish non-racial reasons for the excusals. (R841-2) The prosecutor gave reasons for striking both Sherman and Brown which will be examined in detail below. (R842-6) The trial judge accepted the reasons given as racially neutral and valid. (R845,848)

The prosecutor then objected to defense counsel's use of a peremptory strike to excuse Thomas Shaffer, a white male prospective juror. (R841) He argued that defense counsel's use of seven peremptory strikes against white prospective jurors indicated racially discriminatory motives. (R859-63) The trial judge required Appellant to give reasons for excusing prospective juror Shaffer. (R864-5) Reasons were given which the trial court accepted as racially neutral and valid. (R865-9)

The prosecutor then contended that the reasons given by defense counsel for Shaffer's exclusion would support a challenge against Robert Williams, an African-American prospective juror. (R869-70) The prosecutor struck prospective juror Williams and the trial judge found the reasons valid. (R869-71)

The question on appeal is whether the reasons given by the prosecutor for his excusal of three African-American prospective jurors satisfy the standards this Court developed in State v. Slappy, 522 So.2d 18 (Fla. 1988). The proffered reasons are acceptable only if they are "first, neutral and reasonable and, second, not a pretext." 522 So.2d at 22.

A. Prospective Juror Sherman

On voir dire, prospective juror Elaine Sherman disclosed that three of her brothers had been convicted for crimes which resulted in prison sentences. (R47-9) Two of them had murder convictions. (R47-8) This was the prosecutor's stated reason for excusing her by peremptory strike. (R842-4)

The problem with this reason is that there is no showing whatsoever why prospective juror Sherman would not be a fair and impartial juror. The State's reason relies upon a "guilt by association" type of speculation. If having a close family member convicted of a serious crime is a sufficient reason, might this not be stretched to include distant relatives? The prosecutor's reason for excusing prospective juror Sherman is at least questionable.

B. Prospective Juror Brown

Prospective juror Brown had retired from the army after twenty years service. (R359-60) He was then employed as a landscaping crew supervisor by the City of Tampa for sixteen years. (R359,375) He had served as a juror twice previously in civil cases. (R362)

While in the army, prospective juror Brown had been a defendant at a court-martial. (R361) The charge was indecent exposure and it occurred during the sixties. (R361) Brown retired at a rank of E-6, staff sergeant, with an honorable discharge. (R360)

When the prosecutor was required to state his reasons for excusing prospective juror Brown, he said that Brown did not appear "particularly intelligent." (R845) He also cited Brown's "criminal record" for indecent exposure. (R845)

The trial judge said he wasn't certain if Brown had been convicted or only charged with indecent exposure. (R847) Nonetheless, the court found that the prosecutor had furnished "a valid racially neutral reason for wanting to excuse Joe Brown for more than one reason." (R848)

With regard to intelligence as a ground for Brown's excusal, it would appear that neither the prosecutor nor the trial judge closely read this Court's opinion reversing Tillman's prior sentence. The Court said, "there is no requirement that jurors have college degrees to serve on a panel." Tillman, 522 So.2d at 17.

At bar, the record is equally lacking in support for the prosecutor's cited reason. A certain amount of intelligence is necessary in order to be accepted into the military. Brown's successful army career followed by many years of service as a supervisor for the City of Tampa show sufficient intelligence to serve as a juror. Moreover, Brown had previously served as a juror on two occasions. (R362) Perhaps if this trial had concerned a complex securities fraud conspiracy, the prosecutor's reason might have been valid. However, the jury's task at bar was relatively simple -- merely to weigh the mitigating evidence against the aggravating factors and recommend an appropriate sen-

tence. Perceived lack of intelligence was an invalid reason to excuse prospective juror Brown.

The second reason given, "criminal record," was also invalid. Although the circumstances of the alleged indecent exposure were not presented, it could well be urinating beside the highway. Certainly it was a petty offense which did not affect Brown's honorable discharge. Moreover, it happened over twenty years ago. (R361)

The greatest indication that the prosecutor's reason should be found a pretext is that he did not apply the same standard to white prospective jurors. Prospective juror Lowery had been arrested for driving with a suspended license "five or six years" ago. (R708) The police had initially stopped him for driving with an expired tag. (R709) The juror admitted that he was guilty of these minor offenses. (R709) Neither side excused Lowery and he served on the jury that heard this case. (R999)

Another white prospective juror, Paul Garris, served as an alternate juror. (R1149) Garris said that he hung out with trouble makers as a youth and had seen people get stabbed. (R1090) When he was sixteen or seventeen, he had been charged with a crime and placed on juvenile probation. (R1091-1) At the time of the trial, alternate juror Garris was thirty-two years old. (R1083)

In Slappy, this Court listed five factors, stating

> the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext:

. . .

> (5) a challenge based on reasons equally applicable to juror who were [sic] not challenged. 522 So.2d at 22.

At bar, the prosecutor found prospective juror Brown unacceptable because of a minor offense charged over twenty years ago. Yet he accepted white prospective jurors who had committed minor offenses more recently. The prosecutor's explanation for excusal of prospective juror Brown must be deemed a pretext.[3]

C. Prospective Juror Williams

Prospective juror Robert Williams, an African-American, had planned to go on vacation with his family to Atlanta during the week set for this trial. (R99-100) He said that his employer would agree to reschedule his vacation and that he could give his undivided attention to the trial. (R100-1,103,127-8) The juror hadn't planned to visit family members, only to see sights such as the Smokey Mountains which would still be there at a later date. (R118) He hadn't made any advance reservations where he would lose money if his vacation was postponed. (R102)

Initially, the prosecutor made no attempt to strike prospective juror Williams. When the trial judge required Appellant to state reasons for excusal of white prospective juror Shaffer, the prosecutor then jumped on those reasons as an excuse

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[3] "Thus, where the total course of questioning of all jurors shows the presence of any of the five factors listed in Slappy and the state fails to offer convincing rebuttal, then the state's explanation must be deemed a pretext." State v. Slappy, 522 So.2d at 23.

to strike the African-American prospective juror. (R869) The state explained to the trial judge:

> Mr. Williams was the individual who had a vacation planned.... He wanted to forego that vacation and stay here, exercise his civic duty as he saw it. That is commendable. But he is willing to forego all of that.... I am concerned that someone in that position is simply, I think Mr. O'Connor's phrase, too anxious to sit here and participate in a trial of this nature and to participate in this jury selection process. (R869-70)
>
> . . .
>
> Your Honor, if, in fact, that is a racially neutral reason for his excusal of Mr. Shaffer, I am not disputing it is, then this Court should accept, as my argument goes, that is a racially neutral reason of my excusal for Mr. Williams, which it is. (R870-1)

The trial judge found these reasons "racially neutral." (R871)

There are two basic problems with the prosecutor's "sauce for the goose is sauce for the gander" approach. First, it show that the prosecutor was specifically targeting African-American prospective jurors such that he intended to excuse Williams if he could come up with a plausible excuse. State v. Neil, 457 So.2d 481 (Fla. 1984) does not permit challenges to be exercised "solely because of the prospective jurors's race." 457 So.2d at 486-7. The prosecutor at bar was plainly not impressed with his own stated reason for excusing Williams. Moreover, the trial court never made the second finding required by Slappy that the proffered reasons were not a pretext. 522 So.2d at 22.

Second, the reason why Appellant excused prospective juror Shaffer was significantly different than the prosecutor's reason for excusing Williams. Shaffer said on voir dire:

> My grandmother is seriously ill in Pennsylvania. If she was to pass away, I would like to go there. If I can't, I would understand. (R449)
>
> . . .
>
> I don't know that she will pass away, first of all. I feel I should do my duty the best I can. I am willing to serve if I am selected. (R460-1)

As defense counsel noted, if the prospective juror were confronted with the actual event of his grandmother's death, it might "prey on his mind." (R865-6,868,871) If selected for the panel, he might become a dysfunctional juror during the course of the trial. By contrast, prospective juror Williams was able to calculate how much disappointment it would cause him to have to reschedule his vacation. His representation that it wouldn't bother him was entirely credible.

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment forbids racially discriminatory use of peremptory strikes. Under Batson, when the trial court finds a likelihood that the prosecutor was exercising peremptory strikes with a racial motivation, the prosecutor's burden is to provide "a neutral explanation related to the particular case to be tried." 476 U.S. at 98. The prosecutor's explanation at bar for the striking of African-American prospective jurors does not meet

this standard. Consequently, this Court should again reverse Tillman's death sentence and order a new penalty proceeding before a new jury.

ISSUE IV

THE TRIAL JUDGE'S INSTRUCTION TO THE JURY ON THE SECTION 921.141-(5)(h) AGGRAVATING CIRCUMSTANCE WAS CONSTITUTIONALLY INADEQUATE BECAUSE IT FAILED TO INFORM THE JURY OF THE LIMITING CONSTRUCTION GIVEN TO THIS AGGRAVATING CIRCUMSTANCE.

Although the plea agreement specified that the jury would be instructed on the especially heinous, atrocious or cruel aggravating circumstance (R1568-9), defense counsel objected at the charge conference to giving it. (R1394) Citing Maynard v. Cartwright, 486 U.S. 356 (1988), Appellant contended that the section 921.141(5)(h) aggravating circumstance was unconstitutionally vague in violation of the Eighth and Fourteenth Amendments. (R1394-5) The State cited this Court's decision in Smalley v. State, 546 So.2d 720 (Fla. 1989) which relied upon the differences between the Oklahoma death penalty statute and Florida's to hold that this aggravating circumstance was constitutional in Florida. (R1395-7) The trial judge overruled the defense objection and followed the specifics of the plea agreement. (R1397-1400)

Since the proceedings at bar, the United States Supreme Court has clarified the scope of Maynard v. Cartwright. In Walton v. Arizona, 110 S.Ct. 3047 (1990), the Court wrote:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our hold-

> ing in Maynard and Godfrey. But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. 110 S.Ct. at 3057.

The question which remains open is how Maynard impacts on Florida capital sentencing where the jury is not the final sentencer but its recommendation must be given great weight. Trial judges are limited under Tedder v. State, 322 So.2d 908 (Fla. 1975) in their power to override a jury recommendation of life imprisonment. Thus, the jury recommendation is a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17 at 20 (Fla. 1974).

When the jury is instructed, as at bar, in the bare language of the § 921.141(5)(h) aggravating circumstance, it may truly be said that "the jury's interpretation...can only be the subject of sheer speculation." Godfrey v. Georgia, 446 U.S. 420 at 429 (1980). Compare, Bui v. State, 551 So.2d 1094 at 1119-20 (Ala.Cr.App. 1988)(no error where jury instruction correctly followed the established limiting construction of HAC) with Shell v. Mississippi, 111 S.Ct. 313 (1990)(limiting construction of HAC given to the jury was constitutionally inadequate).

Even if this Court determines that the section 921.141-(5)(h) aggravating circumstance was proved by the evidence, this does not cure the instructional error. Properly instructed jurors might have given less weight to the aggravating circum-

stance had its application been better defined. Tillman's jury could well have changed their recommendation to life imprisonment. Had they done so, it is clear that under Cochran v. State, 547 So.2d 928 (Fla. 1989), this Court would not have permitted a jury override death sentence to stand.

Accordingly, Tillman's sentence of death is constitutionally unreliable under the Eighth and Fourteenth Amendments, United States Constitution because the jury was not given sufficient guidance in their sentencing recommendation. Appellant should be granted a new penalty proceeding before a new jury.

ISSUE V

THE TRIAL JUDGE ERRED BY FAILING TO CONSIDER UNCONTROVERTED MITIGATING FACTORS IN THE WEIGHING PROCESS.

Under Florida's trifurcated death penalty statute, the trial judge must make a reasoned, independent weighing of aggravating and mitigating circumstances before imposing a sentence of death. § 921.141(3), Fla. Stat. (1983); Ross v. State, 386 So.2d 1191 (Fla. 1980). The court must weigh "relevant factors and [reach] its own independent judgment about the reasonableness of the jury's recommendation." Rogers v. State, 511 So.2d 526 at 536 (Fla. 1987). To be consistent with the Eighth and Fourteenth Amendments to the federal constitution, the sentencing process must exhibit "responsible and reliable exercise of sentencing discretion." Caldwell v. Mississippi, 472 U.S. 320 at 329 (1985).

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court discussed the obligation of the sentencing judge with regard to mitigating evidence. If the facts alleged in mitigation are supported by the evidence and these facts are also of a nature which reduce a defendant's moral culpability for the homicide, then they must be weighed against the aggravating circumstances. "Judges may not refuse to consider relevant mitigating evidence." Rogers, 511 So.2d at 535 citing Eddings v. Oklahoma, 455 U.S. 104 at 115-6 (1982).

More recently, in Campbell v. State, Case No. 72,622 (Fla. December 13, 1990)[16 F.L.W. S1], this Court provided

specific guidelines for the sentencing court. As a preliminary requirement, the sentencing judge "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant." 16 F.L.W. at S2.

At bar, Appellant presented the uncontroverted opinion of Dr. Berland that he was suffering from an inherited mental disorder of psychotic proportions. (R1325-7,1334-5) Dr. Berland's opinion was based upon tests accepted as reliable by experts in the mental health field and confirmed by diagnostic interviews. (R1315-7,1333-4) Dr. Berland concluded that Tillman was under extreme mental and emotional disturbance when the homicide was committed, a statutory mitigating factor.[4] (R1333-,1369) Part of another statutory mitigating factor, substantially impaired capacity to conform his conduct to the requirements of law, was also found.[5] (R1332,1370)

The sentencing judge ignored this mitigating evidence in his discussion of "mitigating circumstances" in the written sentencing order. (R1549, see Appendix) This failure to address Appellant's proposed mitigating factors is reason alone under Campbell for this Court to remand this case for resentencing.

However, the sentencing judge at bar had the additional obligation to find that Tillman had established these mental mitigating factors. In Nibert v. State, Case No. 71,980 (Fla. December 13, 1990)[16 F.L.W. S3] this Court wrote:

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[4] § 921.141(6)(b), Fla. Stat (1983)

[5] § 921.141(6)(f), Fla. Stat. (1983)

> When 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. 16 F.L.W. S4.

As in Nibert, a mental health expert gave testimony about mitigating evidence pertaining to Appellant which was supported. Again, as in Nibert, "there was no competent, substantial evidence in the record to refute the mitigating evidence." 16 F.L.W. at S4. Accordingly, the sentencing judge at bar failed to properly include statutory mitigating factors in the weighing process.

If this Court does not accept Appellant's argument in Issue II that his sentence should be reduced to life imprisonment, this case should at least be remanded to the trial court for evaluation and reweighing of the aggravating and mitigating factors in accord with Campbell and Nibert.

CONCLUSION

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

As to Issue I - remand for an evidentiary hearing in the circuit court.

As to Issue II - reduction of sentence to life imprisonment.

As to Issues III and IV - remand for a new penalty proceeding before a new jury.

As to Issue V - remand for reweighing by the sentencing judge.

Respectfully submitted,

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