IN THE SUPREME COURT OF FLORIDA

DERRICK TYRONE SMITH,

Appellant,

v.

Case No. 76,491

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I: The court did not err by denying defense counsel's motion to withdraw. There was no legal basis to require withdrawal of a defense attorney who, pursuant to the canons of ethics, refuses to offer testimony which that attorney knows or has reason to believe is perjurious. Where appellant never made a request to act pro se, and where no grounds were even alleged which would support the notion that defense counsel was acting in an ineffective manner, appellant is entitled to no relief.

As to Issue II: The trial court correctly determined that a discovery violation did not necessarily occur where it was alleged that the state failed to disclose the precise criminal record of a defense witness. The law in the State of Florida is clear that the state is not required to assist the defense in the preparation of its case. The defense has the responsibility to obtain the criminal records of its own witness where those records are certainly readily accessible from the clerk's office. As an alternative ruling, the trial judge correctly determined that even if a discovery violation had been committed no prejudice ensued to the defense. The fact that the defense witness had been previously convicted of felonies was placed before the jury.

As to Issue III: The trial court did not err by admitting evidence of a robbery which was committed by appellant some twelve hours after the homicide. The evidence of the robbery was

relevant to show both motive and possession of the same weapon used in the commission of offenses. Evidence of other crimes is admissible where, as here, relevancy is established. Bryan v. State, 533 So.2d 744 (Fla. 1988).

As to Issue IV: The state did not conceal any "deal" made to procure the testimony of Melvin Jones. The jury was apprised of the "deal" which was made, namely, that the state attorney would speak in his behalf after he offered testimony at appellant's first trial. Appellant basis his argument on the pure speculative notion that there "must have been" a more inclusive deal which has been concealed. No evidence of this was offered by appellant and his claim is the type of "fishing expedition" more appropriate, if at all, for a 3.850 motion to vacate judgment and sentence.

As to Issue V: Appellant's attack upon the proportionality of the death sentence imposed in the instant case is, in essence, a request for this Honorable Court to reweigh the mitigating factors in favor of appellant. The trial judge undertook a deliberative review of all aggravating and mitigating factors and her conclusion is supported by the record. The trial judge did not err by finding that the mitigation was outweighed by two aggravating factors.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW.

As his first point on appeal, appellant contends that he was denied his right to self-representation and was also deprived of his right to an inquiry as to whether appointed counsel was rendering effective representation. The facts of the instant case do not support appellant's contentions and, therefore, for the reasons expressed below, appellant's first point must fail.

Appellant's entire first claim is based on the purported notion that his dissatisfaction with appointed counsel automatically triggered the need for trial court inquiry into the issues of self-representation and effective assistance of counsel. This contention is totally belied by the record. On November 6, 1989, some six months prior to the commencement of the retrial in this cause, a hearing was held on defense counsel's motion to withdraw (R 351 - 363). The motion to withdraw alleged but one reason, that irreconcilable conflicts had arisen between defense counsel, Richard Sanders, and the defendant because the defendant wanted his attorney to present testimony that defense counsel knew or reasonably believed to be perjurious (R 86). After discussion with counsel, the trial court ruled that no grounds to withdraw had been set forth (R 358). Apparently, the defendant wished to have two "alibi" witnesses testify at trial, but defense counsel, based upon his

discussions with his client, had reason to believe that the alibi testimony was perjurious. Pursuant to the canons of ethics, defense counsel felt constrained to offer false testimony before the court (R 356 - 357).

After the conclusion of the hearing, appellant on the same day wrote a letter to the trial judge which, in its entirety, stated the following:

> Dear Judge Luten,
>
> I don't now how to file legal motions so all I can do is address you in a manner that I do and that's straightforward. Today you denied a motion which my lawyer filed to withdraw from my case. I can't understand all that was said but I do know that something isn't quite right. Richard Sanders and myself don't see eye-to-eye on many matters pertaining to this case. He used as a reason for withdrawing our different views on the matter of 2 witnesses. Judge Luten the state has offered a plea bargain that if I don't except [sic] will leave me in the position of going back on "Death Row" if found guilty. I know its not justice to be threatened with dying on the strength that I choose to exercise my right to go to trial and not agree to a plea bargain that's not really feasible.
>
> I wrote to you in March of this year explaining my discomfort with Richard Sanders representing me that uneasiness has only greatened. I'm on trial for my life and I feel it's only right that I be afforded the opportunity to be able to fight on equal terms. What I'm saying is Glen Martin and Mary McKeown are experienced trial lawyers. Richard Sanders told me my case was the first murder case he's handled, he's outclassed and it shows more and more as time passes. I don't want Richard Sanders representing me on this particular case and it's obvious that he and I have a conflict of interest. I relayed to you in my earlier letter that I don't want

> to be like a lamb lead to slaughter and that's how I feel with Richard Sanders representing me. I feel that a trial with him representing me is a mere formality. I ask that you reconsider your decision to deny his motion to withdraw. Thank-you!"

(R 92 - 93)

Based solely on the letter as set forth above, appellant contends that the trial court had a duty to permit appellant to proceed pro se and also to determine whether defense counsel was affording appellant effective representation. These contentions are without merit.

It should be observed that the letter to Judge Luten set forth above was <u>not</u> the first time appellant expressed dissatisfaction with his appointed counsel. On July 26, 1987, appellant had written to the administrative judge in the Sixth Circuit requesting that his present counsel be discharged and another lawyer appointed (R 50). A motion to withdraw was subsequently filed by defense counsel which alleged irreconcilable differences "which the attorneys for the defendant cannot ethically disclose" (R 51 - 52). The court granted the motion to withdraw (R 54) and new co-counsel were appointed on August 19, 1987 (R 55). Richard Sanders was eventually appointed to represent appellant on August 24, 1987 (R 56). It is axiomatic that a criminal defendant is not permitted to have an attorney of his choice. Yet, appellant in the instant case was permitted to change counsel during these retrial proceedings and he was still not satisfied.

The record in the instant case reveals that appellant never asked to represent himself. Thus, appellant's contention that an inquiry pursuant to Faretta v. California, 422 U.S. 806 (1975), was required is without merit. In Bowden v. State, 588 So.2d 225, 229 (Fla. 1991), this Court held that "because the alleged requests for self-representation were at best equivocal, Bowden was not entitled to an inquiry on the subject of self-representation . . .." In the instant case, as compared to Bowden, there was not even an equivocal request for self-representation. An inquiry by the court under Faretta is required only where there is a "clear and unequivocal" assertion of the right to self-representation. See Raulerson v. Wainwright, 732 F.2d 803 (11th Cir.), cert. denied, 469 U.S. 966 (1984). Thus, where the record reveals that there was no request whatsoever to represent himself, appellant's contention that he was denied a Faretta inquiry by the trial court is wholly without merit. In a different context, the defendant in Capehart v. State, 583 So.2d 1009 (Fla. 1991), wrote a letter to the trial judge immediately after guilty verdicts were rendered in the guilt phase which requested that new counsel be appointed for the penalty phase. However, Capehart never requested the opportunity to represent himself. Although this Court held that the better course would have been for the trial judge to inform Capehart of the self-representation option, there was no error in denying Capehart's request for a new attorney. Similarly in the instant case, where appellant gave no indication that he wished to

represent himself and, thus, never invoked his right to self-representation, no Faretta inquiry was necessary. Bowden, supra.

Appellant's further contention under this point is also without merit. He contends that inquiry was necessary to determine if Mr. Sanders was affording appellant effective assistance of counsel. Appellant points to his letter to Judge Luten as setting forth grounds sufficient to trigger an inquiry into the effectiveness of Mr. Sanders representation. Your appellee strongly disagrees with this theory and asserts that there were no grounds even alleged in appellant's letter which mandated an inquiry. The "conflict of interest" mentioned by appellant in his letter can only refer to that "conflict" previously brought to the trial judge's attention. That is, the fact that appellant wished to present perjurious testimony. Indeed, appellant never relented on this attempt to procure fraud upon the court as evidenced by the fact that the matter was again raised at trial immediately before the defense was to present its case (R 1234 - 1250). However, appellant has never alleged that there was an actual conflict of interest. Cf. Cuyler v. Sullivan, 446 U.S. 335 (1980) (a mere possibility of conflict of interest does not rise to the level of a Sixth Amendment violation). As the trial court correctly determined, allowing Mr. Sanders to withdraw would only place the problem on another attorney's shoulders in that appellant's request to present

perjurious testimony would still be extant.[1] Also, appellant's reference to Mr. Sanders' "lack of experience" certainly does not supply grounds to warrant an inquiry as to effectiveness. This Court has many times been presented with records of capital cases in which a defense attorney is trying his first capital homicide. It is ridiculous to assert that all attorneys trying their first capital case are per se ineffective. Where appellant has not alleged sufficient grounds, or even a reasonable basis, to support a claim of ineffectiveness, there is no constitutional right to obtain a different attorney. Thus, appellant's reliance upon Hardwick v. State, 521 So.2d 1071 (Fla.), cert. denied, 488 U.S. 871 (1988), is misplaced where appellant in the instant case has never even alleged sufficient grounds to even require an inquiry into effectiveness of counsel. The only factual basis presented by appellant concerned the conflict pertaining to the possible presentation of perjurious testimony. The trial judge made sufficient inquiry into this area and her ruling was correct. As in Bowden, supra at 230, "It is apparent from the record that any problems with the representation were caused by [appellant's] refusal to cooperate with counsel" with respect to whether or not perjurious testimony should be offered to the court. Appellant's insistence upon suborning perjury should not

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[1] Although speculative, it is certainly possible that the irreconcilable differences which the prior attorneys for appellant could not ethically disclose in their motion to withdraw dealt with the same subject matter.

compel a finding that he has been denied his constitutional rights.

Inasmuch as appellant never invoked his right to self-representation and inasmuch as no reasonable grounds were even alleged as to the purported ineffectiveness of counsel, appellant's first point must fail.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY "NOT FINDING THAT THERE IS NECESSARILY A DISCOVERY VIOLATION" OR, ALTERNATIVELY, BY FINDING AFTER THE CONDUCT OF A RICHARDSON HEARING THAT NO PREJUDICE ENSUED TO APPELLANT.

Appellant's second claim is premised upon the notion that the prosecutor has a duty to disclose in discovery prior convictions of a defense witness. In other words, appellant seeks to place on the state an affirmative obligation to assist in the preparation of the defense case. Logic, common sense, and legal precedent do not countenance such a result.

In the instant case, defense called Larry Martin as its only witness in the guilt phase of trial (R 1235 - 1269). Upon conclusion of direct examination, the state asked to approach the bench and advised the court and defense counsel that in cross examination the state would present the judgments and sentences for the eight felony convictions obtained against Larry Martin. This was a result of questioning on direct examination by defense counsel where the witness Martin testified that he had been convicted "a couple times" of a felony (R 1260 - 1261). Defense counsel objected to the use of the prior judgments and sentences and opined that the state should be permitted to ask Mr. Martin whether he had eight felony convictions. As an aside, defense counsel stated that, "I have never been provided with any of this in discovery either." (R 1261) The trial judge stated, "It would not have been provided in discovery, in all candor. It's your witness." (R 1261) When cross examination commenced, the

state asked whether it was a fact that Mr. Martin had been convicted eight times as a felon, to which the witness replied, "I couldn't say. . . . I do not know." (R 1263) A bench conference ensued at which time defense counsel advised the court that he had talked to his witness and was aware of the felony convictions, but neither he nor the witness knew how many convictions had been obtained (R 1263 - 1264). The trial court then ruled that "There is [not] necessarily a discovery violation", but if there was one there was no prejudice (R 1263 - 1265). The witness was then shown the copies of the judgments and sentences, and after reviewing same acknowledged that he had eight felony convictions (R 1265 - 1266).

Based on the foregoing factual scenario, appellant now contends that there was a discovery violation where the state failed to disclose the felony judgments and sentences of the defense witness Larry Martin. The trial judge correctly ruled that there was not necessarily a discovery violation. "A defendant is properly allowed discovery as to the criminal records of the State's witnesses to the extent that the information is in the actual or constructive possession of the State . . .." Yanetta v. State, 320 So.2d 23, 24 (Fla. 3d DCA 1975). Similarly, in Comer v. State, 318 So.2d 419, 420 (Fla. 3d DCA 1975), the court noted that a prosecuting attorney must disclose to the defense "any record or prior criminal convictions of the persons whom the prosecuting attorney intends to call as witnesses at the trial . . .." Thus, there is no duty upon the state to help the defense prepare its own case.

Perhaps the lead case in this area is State v. Crawford, 257 So.2d 898 (Fla. 1972), wherein this Honorable Court cited with approval the following from the decision in State v. Gillespie, 227 So.2d 550 (Fla. 2d DCA 1969):

> . . . [T]he underlying principle supporting the whole idea of criminal pretrial discovery, as gleaned from the cases and well-reasoned commentaries, is *fairness*. But no intelligent concept of fairness has ever been advanced which would require one side of a judicial controversy to prepare the case for his adversary, or to furnish such adversary with evidence favorable to him when such evidence is otherwise reasonably available . . .. (257 So.2d at 899)

This Court in Crawford continued by observing that:

> . . . the prosecuting attorney should not be required to actively assist defendant's attorney in the investigation of the case. Discovery in criminal cases is tended to be heavily weighed in favor of the defendant, and it would be contrary to the general principle of advocacy, as well as fairness itself, to require the prosecuting attorney to perform any duties on behalf of the defendant in the preparation of the case. (257 So.2d at 900)

In conclusion, this Court held that disclosure may be required by the state of "any record of prior criminal convictions of defendant or of persons whom the prosecuting attorney intends to call as witnesses. State v. Crawford, 257 So.2d at 901. In State v. Coney, 294 So.2d 82, 87 (Fla. 1974), this Court explained Crawford thusly:

> The requirement of *Crawford* as to the prosecuting attorney securing the information for defense counsel arises only upon a showing that defense counsel has first exerted his own efforts and resources and has

> pursued and concluded other available means and remedies available to him to obtain such information.

See also, Yanetta, supra; Comer, supra.

Appellant's reliance upon Smith v. State, 500 So.2d 125 (Fla. 1986), is misplaced. Although this Court in Smith held that there is neither a "rebuttal" nor "impeachment" exception to the *Richardson* Rule, this notion was discussed in the context of state witnesses. Indeed, the citations in Smith pertain to cases dealing with state rebuttal witnesses or the impeachment of state witnesses. As observed by this Court in Smith, it is the defendant's ability to prepare for trial which must be considered as the predicate as to whether a discovery violation had even occurred. In the instant case, preparation of the defense did not depend upon disclosure of a defense witness' criminal record. It is the obligation of the defense to prepare its own witnesses and, in accordance with the authorities cited above, it is incumbent upon the defense to obtain those matters which are readily accessible to it. Certainly, the criminal record of one's own witness is something which could be obtained by due diligence by defense counsel.

More recently, this Court has had occasion to discuss the principles involved under this issue. In Hansbrough v. State, 509 So.2d 1081, 1084 (Fla. 1987), this Court succinctly summarized the applicable issues:

> . . . While the state cannot withhold material evidence favorable to an accused, it is not the state's duty to actively assist

> the defense in investigating the case. *State v. Coney*, 294 So.2d 82 (Fla. 1973). The defense has the initial burden of trying to discover impeachment evidence, and the state is not required to prepare the defense's case. *Medina v. State*, 466 So.2d 1046 (Fla. 1985). This is especially true when the evidence is as accessible to the defense as to the state. *See James v. State*, 453 So.2d 786 (Fla.), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984).

Therefore, the trial court correctly ruled that there was not necessarily a discovery violation when the state did not disclose the past criminal record of a defense witness. It was incumbent upon defense counsel to prepare his own case and he would have had access to the criminal records on file in the clerk's office.

The trial judge alternatively ruled that even if there was a violation, no prejudice ensued to appellant. Indeed, defense counsel had on direct examination brought out the fact that the defense witness had been previously convicted of felonies and the state only clarified the number thereof. Appellant's contention that Larry Martin's credibility was diminished merely because of the number of previous felony convictions is wholly without merit. Larry Martin's credibility was placed in question by virtue of a rebuttal witness offered by the state (R 1270 - 1271).

Inasmuch as the trial court correctly ruled that no discovery violation occurred because the defense was able to have access to prior convictions of its own witness, no error appears.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF A ROBBERY COMMITTED BY APPELLANT SOME TWELVE HOURS AFTER THE HOMICIDE WHICH WAS RELEVANT TO SHOW MOTIVE AND POSSESSION OF THE SAME WEAPON USED IN THE COMMISSION OF BOTH OFFENSES.

Over defense objections, the trial court permitted Marcelle Debulle to testify that he and his wife were robbed at gunpoint by appellant in their St. Petersburg motel room just twelve hours after appellant committed the homicide of the cab driver (R 1191 - 1203). The trial court denied appellant's motion in limine to exclude this evidence, apparently accepting the state's argument that the evidence was probative both of motive and possession of the same gun during both offenses (R 292). For the reasons expressed below, the trial court's ruling was correct and appellant's third point must fail.

Florida Statute 90.404(2)(a) provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Admissibility of this type of evidence was further explained by this Court in Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), cert. denied, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989):

> . . . Evidence of "other crimes" is not limited to other crimes with similar facts. So-called similar fact crimes are merely a

> special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contains similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant. . . . The only limitation to the rule of relevancy are that the state should not be permitted to make the evidence of other crimes the feature of the trial or to introduce the evidence *solely* for the purpose of showing bad character or propensity, in which event it would not be relevant, and such evidence, even if relevant, should not be admitted if its probative value is substantially outweighed by undue prejudice. Our later case law reiterates the controlling importance of relevancy. . . .

This Court in Swafford v. State, 533 So.2d 270, 275 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989), observed that, "[s]ince Williams we have acknowledged many times its basic teaching that evidence showing collateral crimes or wrongful acts is admissible if it is relevant for any purpose other than to show the bad character or criminal propensity of the accused" (citations omitted). As will be discussed below, an examination of the evidence now complained-of by appellant reveals that such evidence was relevant for purposes other than to show bad character or criminal propensity.

Initially, your appellee submits that appellant's contention that there must be significant similarities between the offenses so as to permit the introduction of the Debulle robbery is wholly without merit. Similarities between the acts must be so unique

or unusual when similar fact evidence is introduced to prove identity, plan or pattern. *Read's Florida Evidence Volume I, p. 268d.* As will be discussed below, the state was not attempting to prove identity, plan, or pattern. Rather, the evidence complained-of by appellant was highly relevant with respect to proving appellant's motive to obtain money one way or the other and to show that appellant possessed the same gun during the commission of both offenses. Thus, the state was not introducing evidence of other crimes wherein uniqueness may have been an issue, but rather the state was introducing direct evidence tending to prove material facts in issue.

In addition, it is not error to admit evidence which establishes the entire context in which an offense was committed. Ruffin v. State, 397 So.2d 277 (Fla. 1981); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Smith v. State, 365 So.2d 704 (Fla. 1978); Ashley v. State, 265 So.2d 685 (Fla. 1972). Relevant evidence is admissible even though it may point to a separate crime, McCrae v. State, 395 So.2d 1145 (Fla. 1980), or be prejudicial. Sireci v. State, 399 So.2d 964 (Fla. 1981).

The facts of the instant case support the application of the above-discussed principles. The Debulle robbery was part of an ongoing criminal episode which commenced with the events and plans leading up to the attempted robbery and murder of Jeffrey Songer and culminated when appellant finally completed a successful robbery. The evidence adduced at trial indicated that appellant stated that he was going to "hustle some money" (R 921,

1028, 1125). The evidence of the Debulle robbery was certainly relevant to show appellant's motive in obtaining money.

Mr. Debulle also described the gun that appellant was carrying during the robbery (R 1195). His description matched the description of a gun which was traced from appellant's uncle (R 891 - 894, 1228 - 1232), to appellant. The blue or blue-black barreled gun with a brown handle owned by Mr. Cone was in the possession of appellant when he tried to sell it (R 913 - 914), and when appellant had it the evening prior to the Songer homicide and the Debulle robbery (R 897, 899, 978 - 987, 993 - 997, 1018, 1027, 1118 - 1121, 1124, 1126, 1140 - 1141, 1143 - 1145, 1181). Thus, where the evidence showed that the gun used by appellant in the Debulle robbery was similar to the one which was used to kill Jeffrey Songer, the state was entitled to introduce this relevant evidence. The instant case should be contrasted with State v. Lee, 531 So.2d 133 (Fla. 1988), a case cited by appellant, wherein this Court determined that because the defendant therein had used a gun during a bank robbery did not establish that he used a gun during the charged offenses under review. In the instant case, however, the testimony indicated that a weapon was used in both offenses, indeed, the gun was used to pistol-whip Mr. Debulle during that robbery. Thus, the evidence admitted correctly by the trial judge was relevant to show the entire context of appellant's plan to rob and his use of the same weapon during both offenses.

Finally, as in Ruffin, supra, it cannot be said that the Debulle testimony became a feature rather than an incident of appellant's trial. Having demonstrated that the challenged evidence was clearly relevant for several reasons it is submitted that the trial court did not err in denying the motion in limine and allowing Debulle to testify at trial. The state did not introduce the Debulle robbery merely to show appellant's propensity to commit an armed robbery, but rather, the evidence was introduced to show that appellant intended to commit a robbery and, during a relatively short time span, managed to accomplish his task. Even if it was error to admit this testimony of the Debulle robbery, a proposition with which your appellee strongly disagrees, any error would be harmless beyond a reasonable doubt. The state's evidence at trial showed, beyond a reasonable doubt that appellant was the only person to shoot at Jeffrey Songer. Appellant's third point must fail.

ISSUE IV

WHETHER APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS EXAMINE A STATE WITNESS WAS VIOLATED.

As his fourth point on appeal, appellant contends that the trial court allowed the state to conceal the terms of prior sentencing agreements with the state and Melvin Jones, a state witness in the instant trial. This contention is wholly without merit and, for the reasons expressed below, appellant's fourth point must fail.

The gist of appellant's complaint revolves around the incorrect notion that defense counsel was unable to adequately cross examine Melvin Jones concerning the "deal" he had with the state vis-a-vis his testimony in the instant case. Appellant's claim asserted on direct appeal is one more appropriate for a motion to vacate pursuant to *Florida Rule of Criminal Procedure 3.850*, the appropriate vehicle if appellant believes that there is an undisclosed deal. The record of the instant case, however, reveals exactly what Melvin Jones obtained from the state:

> BY MR. SANDERS:
>
> Q. Now, Mr. Jones, when up for sentencing on all these charges, the state attorney came and testified on your behalf based on the fact that you had come forward with this information, is that correct?
>
> A. Yes, it is.
>
> Q. And you did, in fact, get a break on your sentence as a result of the state attorney's actions, is that correct?

A. Well, from my side, I don't think so, but you can say so. (R 1000)

Thus, the record reveals that the only "deal" which Mr. Jones obtained that the state attorney was to speak in his behalf at his sentencing subsequent to the testimony rendered in the first Derrick Tyrone Smith case. Indeed, the record reflects that no "deal" was given to Melvin Jones for his testimony at the trial which is the subject of the instant appeal, and he would not appear without benefit of a subpoena (R 1060).

In the instant case, the record reveals the "deal" and there is simply no evidence to show that any other "deal" existed. Appellant on appeal is merely speculating that there must have been some other "deal" which simply has not been revealed. Yet, the record reflects no attempt to obtain disclosure of that deal because, indeed, defense counsel was well aware of the facts surrounding the testimony of Melvin Jones. The record also reveals that although the state attorney spoke in his behalf, Melvin Jones did not believe that he got a deal. Thus, from the witness' perspective, he was undoubtedly disappointed at the result of his sentencing, but this in no way indicates that any further consideration was given to Mr. Jones in exchange for his testimony.

The record reveals that Melvin Jones was most adequately cross examined by defense counsel as to any bias or prejudice existing (R 991 - 993; 997 - 1000; 1002 - 1006). There is simply no evidence in this record which would support a claim under

Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). The record reveals the "deal" (the state attorney was to speak on behalf of Melvin Jones at his sentencing) and any further supposition about a more inclusive deal is pure speculation and is appropriately the subject of a 3.850 motion.

Nor is the fact that the trial judge prevented cross examination concerning Melvin Jones' testimony in the Clinton Lamar Jackson case cause for reversal of the instant conviction. Defense counsel was attempting to engage in a "fishing expedition" merely because Melvin Jones happened to offer testimony in another capital case. During the proffered examination, defense counsel questioned Mr. Jones on facts of which defense counsel was certainly aware (Mr. Sanders did the appeal for Clinton Jackson; R 1059) and Melvin Jones was an eye witness in that case. As the prosecutor noted in the instant case, Melvin Jones was sentenced after his testimony in both the first Smith and the Clarence Jackson trial and the state attorney did, in fact, appear on behalf of Mr. Jones. This is the only "deal" which was made and it was presented for the jury's consideration with respect to the credibility of Melvin Jones. Appellate reversal cannot be predicated upon speculation of a more inclusive deal where there is no evidence to indicate that one ever existed. Cf. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

Your appellee respectfully submits that the facts as adduced at trial do not support appellant's claim. The "deal" received

by Melvin Jones was heard by the jury and they were able to adequately evaluate the credibility of the witness. Even if error were made to appear, such error would be harmless beyond a reasonable doubt. Appellant's contention that harmless error cannot be shown because defense counsel was not permitted to "fully develop" his attack upon Jones' credibility is totally belied by the record. Extensive cross examination revealed that Melvin Jones had contact with law enforcement and the state attorney's office prior to his presentation of his testimony at the first Smith trial (R 991 - 993; 997 - 1000; 1002 - 1006). Thus, the jury was adequately able to assess the credibility of Melvin Jones and any purported error in the restriction of Melvin Jones' testimony is harmless beyond a reasonable doubt.

ISSUE V

WHETHER THE DEATH SENTENCE IMPOSED IN THE INSTANT CASE WAS PROPORTIONALLY WARRANTED.

As his final point on appeal, appellant contends that his death sentence is not proportionally warranted. In so doing, appellant details the evidence presented in mitigation and opines that the mitigation is sufficient to outweigh the aggravating factors found in this case (the homicide was committed while the defendant was engaged in committing or attempting to commit a robbery, and the defendant has been previously convicted of a felony involving the use of force). Apparently, appellant attempts to have this Court reweigh the mitigating factors and come to a conclusion different than the trial judge. However, "the relative weight given to each mitigating factor is within the province of the sentencing court." Campbell v. State, 571 So.2d 415, 420 (Fla. 1990). Thus, this Honorable Court should decline appellant's invitation to reweigh the balance of the aggravating and mitigating factors.

The trial court's sentencing memoranda (R 230 - 235) reveals that the dictates of Campbell were followed by the trial judge and she expressly set forth all the nonstatutory mitigation propounded by appellant. Merely because appellant opines that the mitigation was sufficient to outweigh the aggravation it does not mean that the death sentence imposed in the instant case is disproportionate. The trial judge in her order discussed the mitigation and also showed why some of those factors were to be

accorded very little weight. For instance, although the trial court found that the defendant had no significant history of prior criminal activity, the trial judge observed that the defendant had committed other violations of the law, albeit of a nonviolent nature. The court also observed that appellant has continued in a course of illegal conduct. Thus, although finding no significant history of prior criminal activity, the trial judge justifiably accorded this mitigator very little weight. The only other statutory mitigator upon which comment needs to be made is that of "age". In his brief, appellant contests the trial court's failure to find age of the defendant (20 years) as a mitigating factors. The trial court correctly determined that there was "nothing more" coupled with the age to indicate that this should act as a mitigating factor in the instant case. See Garcia v. State, 492 So.2d 360 (Fla. 1986).

With respect to the nonstatutory mitigating factors considered by the trial judge, it is clear that she accorded them such weight as was reasonable under the facts of this case. The trial court's order (R 233 - 235) reveals that she accorded such weight to the mitigating factors as each warranted.

In his brief, appellant opines that the death penalty in the instant case is disproportionate in that this case is similar to Livingston v. State, 565 So.2d 1288 (Fla. 1988). This contention is without merit. The mitigators in Livingston included severe beating and other physical abuse and significant neglect. This Court observed that those beatings might have resulted in a

lessened intellectual functioning on Livingston's part. In the instant case, however, appellant did not have this type of mitigation present. Rather, he was raised by God-fearing relatives who attempted to give him a good home environment. The mitigation in the instant case is simply not the same level as that found in Livingston.

Appellant also compares the instant case with McKinney v. State, 579 So.2d 80 (Fla. 1991), Lloyd v. State, 524 So.2d 396 (Fla. 1988), and Proffitt v. State, 510 So.2d 896 (Fla. 1987). Reliance upon these authorities is totally misplaced where in each of those cases nonstatutory mitigating factors existed which outweighed only one aggravating factor. In the instant case, of course, two aggravators were found by the trial judge.

The trial judge in the instant case engaged in a deliberative weighing process and the results thereof should not be disturbed by this Honorable Court. The trial judge followed the law and appellant was accorded an individualized sentencing process. The trial court's weighing of the aggravating and mitigating factors is supportable in the record and, therefore, the death sentence imposed in this case should be affirmed.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, appellee would ask that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 21st day of August, 1992.

OF COUNSEL FOR APPELLEE.