IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON,

Appellant,

v.

Case No. 78,336

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellant, in his preliminary statement, states that he intends to rely on his brief in case number 78,337, in addition to the 100 pages of argument set forth in the initial brief of appellant filed in the instant case. Clearly, this is in contravention of the rules of appellate procedure which limit the length of the initial brief to 100 pages. Furthermore, the blanket adoption of the brief in the other case fails to identify which claims or facts are relevant to the instant case. The undersigned assistant attorney general is assigned to the instant case only and, therefore, has only limited knowledge of the facts or issues raised in case number 78,337. Without an identification of the specific claims raised and arguments presented in support thereof, both the undersigned and this Court are left to guess now, and in the future, as to whether a claim has been fairly presented. "It is well-settled that, in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points on appeal." Rodriquez v. State, 502 So. 2d 18 (Fla. 3d DCA), citing, Singer v. Borbua, 497 So. 2d 279 (Fla. 3d DCA 1986). The state also maintains that any claims not specifically raised in the initial brief in this case have been waived.

Accordingly, absent a motion by appellant to permit the filing of what amounts to at least a 200 page brief (on page 100 of the brief in case number 78,337 Johnson lists numerous

arguments that he would raise but for the page limitation) and order by this Court granting same, the undersigned will rely upon the rules of appellate procedure and respond only to those issues raised by appellant in this brief.

SUMMARY OF THE ARGUMENT

Appellant alleges that the confession should have been suppressed because the officers diluted the Miranda warnings during the polygraph, that they did not scrupulously honor his request to end the interrogation, that the confession was coerced and, finally, that the confession was taken in violation of Johnson's Sixth Amendment right to counsel. It is the state's position that the trial court properly denied the motion to suppress after reviewing the totality of circumstances. This ruling comes to this Court clothed with a presumption of correctness and a ruling on voluntariness should not be overturned unless it is clearly erroneous. Johnson has failed to show error in the trial court's refusal to grant his motion to suppress.

Johnson also challenges the validity of the search warrant authorizing the search of his apartment. Specifically, Johnson claims that (1) the warrant was not supported by probable cause and (2) the items listed as things to be seized were of such a general nature as to authorize a general exploratory search. It is the state's position that since Johnson voluntarily consented to the search of his residence and since consent is an exception to the warrant requirement, any error in the issuance or execution of the warrant is clearly harmless beyond a reasonable doubt. Furthermore, a review of the affidavit and warrant supports the trial court's finding that probable cause existed and that the warrant was sufficiently particularized as to the items to be seized.

Appellant contends that the trial court committed reversible error when it refused to dismiss prospective juror Lahiff for cause based on her response to voir dire questioning on her views concerning the imposition of death. It is the state's position that the trial court properly refused the defense request to dismiss Lahiff for cause. Lahiff satisfied the trial judge who was present to assess her demeanor, as well as her responses to the questions as presented. The refusal to dismiss Lahiff for cause was based on a factual determination that was within the trial court's discretion and Johnson has failed to show an abuse of that discretion.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS CONFESSIONS.

On October 11, 1988, at 9:45 p.m., Appellant, Emanuel Johnson was arrested by Officer Castro for the murder of Iris White. (R 459-61) At the time he was taken into custody, Castro read Johnson the Miranda warnings. (R 460-61) Johnson was then driven to the Sarasota Police Department, and turned over to Detectives Sullivan and Sutton. Johnson was advised he was under arrest for a homicide and was read his Miranda warnings for a second time before any questioning began. (R 485-86) Johnson stated that he understood his rights and agreed to speak with the detectives. (R 474, 717)

Johnson was interviewed for approximately two hours by Detectives Sullivan and Sutton during which time Johnson volunteered information concerning his knowledge of the victim Iris White. During this time period, Johnson agreed to take a polygraph test. (R 485-86, 1237)

Johnson was turned over to polygrapher Sergeant Stanton. (R 488, 620) Sergeant Stanton explained the testing procedure and the related forms to Johnson. (R 582, 589, 593) Johnson signed a notification of rights form, which advised him of his Miranda rights, and a voluntary consent to polygraph examination in which he consented to the administering of the test and the monitoring or reporting of the testing procedure. (R 6765 - 66) At the

conclusion of the first polygraph test, Sergeant Stanton asked Johnson "How are you doing?" Johnson responded, "I'm tired, but let's go on." Johnson then reviewed and signed a second notification of rights form and a voluntary consent to polygraph examination form. (R 6767 - 68)

At the conclusion of the second test, Sergeant Stanton reviewed the results and informed Johnson that he had failed the polygraph exam. (R 607-09) Sergeant Stanton then interviewed Johnson for approximately 45 minutes before Detectives Sutton and Sullivan joined the interview. Detectives Sullivan, Sutton and Stanton testified that there no one made any threats or promises to coerce Johnson into confessing. (R 475) Specifically, Johnson was not threatened with burglary charges or offered assistance with an insanity defense. The officers also testified that Johnson stated that he was tired, but never in the context of desiring to stop. The officers testified that Johnson used his reference to being tired as a defense mechanism to change the direction of the interview. (R 616, 656) Johnson never expressed a desire to stop the interrogation and never stated that he did not wish to talk to the detectives. (R 927) At approximately 3:30 a.m., Johnson confessed to the homicide of Iris White and Jackie McCahon. (R 491, 496, 611, 746-47, 765) After giving a full confession, Johnson agreed to do a taped statement for the record. Johnson was then taken to county jail at 5:00 a.m.

Prior to trial, Johnson filed a motion to suppress his confession based upon alleged violations of the Fifth and Sixth Amendment. After conducting an evidentiary hearing on this motion, the trial court denied the motion to suppress. (R 6988 - 89)

Now on appeal, appellant alleges that the confession should have been suppressed because the officers diluted the Miranda warnings during the polygraph, that they did not scrupulously honor his request to end the interrogation, that the confession was coerced and, finally, that the confession was taken in violation of Johnson's Sixth Amendment right to counsel. It is the state's position that the trial court properly denied the motion to suppress after reviewing the totality of circumstances. This ruling comes to this Court clothed with a presumption of correctness. Medina v. State, 466 So. 2d 1046 (Fla. 1985). A ruling on voluntariness should not be overturned unless it is clearly erroneous. Bonifay v. State, 18 Fla. Law Weekly S464 (Fla. September 2, 1993); Thompson v. State, 548 So. 2d 198 (Fla. 1989). Johnson has failed to show error in the trial court's refusal to grant his motion to suppress. Accordingly, appellant is not entitled to relief.

Initially, Johnson alleges that the use of the polygraph examination during the course of the interrogation only served to dilute the Miranda warnings. He contends that because the officers did not restate the Miranda warnings after the polygraph examination was concluded, the prior warnings were deprived of

their positive ability to counteract the allegedly coercive interrogation environment. Appellate counsel speculates that Johnson "might" have thought his discussions with the officer were only a "aid" to the "investigation" and would not be incriminating evidence in a court of law. Essentially, he is asking this Court to reweigh the evidence despite a well supported factual ruling by the trial court and to apply stricter demands upon the interviewing officer's than is demanded by the constitution.

The United States Supreme Court has made it clear that the Constitution does not require that Miranda warnings be regiven after a defendant has been given a polygraph examination. Wyrick v. Fields, 549 U.S. 42 (1982). The Court in Wyrick specifically rejected the lower court's adoption of a *per se* rule requiring the giving of Miranda warnings after a polygraph examination. The Supreme Court criticized the lower court for failing to review the totality of the circumstances as required by Edwards v. Arizona, 451 U.S. 477 (1981). In general a review of those cases where the use of a polygraph examination in the obtaining of confession was challenged, the courts have generally concluded that where the defendant has been given his Miranda warning and understood same, the mere giving of a polygraph examination does not vitiate those warnings. See Riviera v. State, 547 So. 2d 140 (Fla. 4th DCA 1989); Wyrick v. Fields, supra; Green v. State, 437 So. 2d 784 (Fla. 2nd DCA 1983); Croney v. State, 495 So. 2d 926 (4th DCA 1986). Johnson was repeatedly advised of his

constitutional rights prior to the polygraph and voluntarily waived those rights.

Johnson's reliance on United States v. Gillyard, 726 F.2d 1426 (1984) to support his claim of error is misplaced. In Gillyard the federal appellate court upheld the trial court's ruling that under the totality of the circumstances that the government had failed to establish that Gillyard had properly waived his Miranda rights. The important distinction between Gillyard and the instant case, however, is that the trial court in Gillyard had granted the motion to suppress. As a ruling on the motion to suppress comes clothed with a presumption of correctness, the appellate court was limited in its standard of review. As such the court stated:

> "The district court might have determined under the totality of circumstances the defendant had properly waived his Miranda rights. But the district court did not. It properly applied the totality of the circumstances test repeated many times in Wyrick and found no valid waiver." Id at 1429.

In the instant case, however, the trial court reviewed the evidence before it and found that under the totality of the circumstances, the evidence clearly showed that the defendant understood his Miranda rights and voluntarily and intelligently waived same. The facts before the court below showed that Johnson was advised of his constitutional rights at least four times before he gave his confession: (1) the time of his arrest, (2) prior to the interrogation, (3) prior to the polygraph

examination and for the fourth time during the polygraph examination.[1] The failure to give Miranda warnings a fifth time does not demand a finding that the confession was not freely and voluntarily given, simply because appellant took a polygraph examination before making the confession. The waiver signed by the appellant clearly expresses that he understood that he had the right to remain silent, that anything he said could be used against him in a court of law, that he had the right to talk with an attorney and have the attorney present while he was being questioned, that if he wanted an attorney and he could not afford one, that an attorney would be appointed free of charge and, finally, that at any time he could decide to exercise his rights and not answer any questions or make any statements. (R 6766) The use of the polygraph examination during this interrogation did not vitiate those warnings or in any way dilute them. Johnson clearly understood that he had the right to remain silent, that he had the right to an attorney and that the evidence would be used against him. The officers testified and the trial court found that Johnson clearly understood that everything he said could and would be used against him in a court of law. As the trial court's ruling is well supported by the record, it should be presumed correct.

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[1] Detective Sutton testified that Miranda warnings were also contained in the consent to search residence form that Johnson signed prior to giving the confession. (R. 525)

Johnson also contends that he made several requests to end the interrogation which were at least equivocal and ultimately became unequivocal. He contends that the confession should have been suppressed because the police officers did not even attempt to clarify these requests much less honor them. Again, Johnson is asking this Court to reweigh the evidence and ignore the ruling by the trial court. The trial court conducted a hearing on this issue and specifically found, "The defendant at no time made an equivocal or unequivocal request to stop the questioning." (R 6988) The testimony is clear and uncontradicted that Johnson never expressed a desire to stop the interview and that even though Johnson stated that he was tired, he did so only as an effort to divert the direction of the interview. As this Court held in State v. Rowell, 476 So. 2d 149 (Fla. 1985):

> "It is clear that Rowell never exercised his right to remain silent when arrested; the officer testified to this. A fragmented statement, a phrase taken out of context, or the failure to answer a specific question while answering others, is inadequate to sustain the claim that one exercised his right to remain silent. The totality of the circumstances surrounding an officers interviews with a suspect as well as the full context of the officer's testimony must be considered when determining whether one's Fifth Amendment right against self-incrimination was invoked." Id. at 150

A review of the totality of the circumstances shows that Johnson voluntarily and freely participated in the interrogation. The trial court's finding that Johnson never attempted to invoke

his right to remain silent comes to this Court clothed with the presumption of correctness and this Court must interpret the evidence and all reasonable inferences and deductions in a manner most favorable to sustain the trial court's ruling. McNamara v. State, 357 So. 2d 410, 412 (Fla. 1978). As such, appellant's attempts to take statements out of context and applying inferences that were not found by the trial court does not support a claim that the defendant exercised his right to remain silent.

Johnson also contends that his confession should have been suppressed because the statement was not voluntarily given. He contends that the officers used coercive tactics in obtaining the confession. Specifically, he urges that the officers misled Johnson about the evidence, that the polygraph was a setup, that the officers suggested leniency, that they attacked his sexual frailty, and that the officers made promises. He claims that this coupled with the surroundings of the interrogation room and the skill of the officers overbore his will and coerced a confession from him. Each of these claims was rejected by the trial court and a review of the record supports the trial court's ruling.

It is interesting to note that Johnson's own expert Dr. Richard Ofshe, a social psychologist and Berkeley professor, who specializes in police influence and interrogation techniques and was characterized by the trial judge in State v. Sawyer, 561 So. 2d 278, 289 (Fla. 2d DCA 1990), as "the only true expert on

thought control at the hearing." (Initial brief of appellant page 19), testified on cross-examination that if one did not believe Johnson's statement that there was no promise of an insanity plea, no threat of 100 years in jail for the burglaries he committed and no request to stop the interrogation, that the interrogation techniques and the methods used by the police officers in the instant case would fit into the ordinary definitions of a common interrogation and would generally be regarded as acceptable. He further stated that there was nothing wrong whatsoever with the interrogation techniques. (R 726 - 27) Dr. Ofshe also admitted that the detectives had denied that any promises or threats had been made or that Johnson had ever requested the interrogation to stop. (R 1133) And finally, Dr. Ofshe admitted that it was hard to know when Johnson was lying and that the only time you could believe Johnson was when there was supporting facts that made it probable that he was telling the truth. Dr. Ofshe noted that Johnson was motivated to and did lie about certain things. (R 1167) Dr. Ofshe also testified that when he was interviewing Johnson that it was his opinion that Johnson was trying to tell him things that would make his situation sound like Sawyer. (R. 1153)

As the trial court clearly did not believe Johnson's claim that the officers had made promises or threats and as each of the officers adamantly denied making promises or threats to Johnson during the interrogation, the evidence supports the court's finding that the confession was not coerced and was voluntarily

given. As such, this Court should uphold the trial court's ruling on this issue. Bonifay v. State, supra.

Finally, Johnson asserts that the interrogation was in violation of his Sixth Amendment right to counsel. He contends that by finding probable cause to arrest, obtaining an arrest warrant, ordering that Johnson not be released on bail, and searching his house, the state instituted judicial proceedings to which the right to counsel attached. To support this proposition, Johnson relies on this Court's decision in Traylor v. State, 596 So. 2d 957 (Fla. 1992).

Traylor argued to this Court on appeal that the confessions he made concerning a Florida offense while he was being held in Alabama for another murder were obtained in violation of his right to counsel because he had been charged by information with the Florida crime on June 11th and was not interrogated until August 22. This Court noted, however, that when the police initiated questioning on August 22nd, Traylor had not retained or requested appointment of counsel on the Florida charge. Thus, this Court held that the question to be determined was whether the police, prior to initiating questioning, adequately informed Traylor of his Section 16 rights and the consequences of waiver, and then obtained a valid waiver. Id. at 972. This Court noted that prior to questioning Traylor the police informed him of his rights, including the following:

> "Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before you make a statement

> or before any questions are asked of you and to have the lawyer with you during questioning. If you cannot afford to hire a lawyer, one will be appointed for you before any questioning, if you wish."

This Court found that Traylor was adequately informed of his rights, that he was expressly told that he had the right to have a lawyer's assistance prior to and during questioning and that if he could not afford a lawyer, one would be appointed. Additionally, this Court found that he was apprised of the consequences of his waiver, that anything he said could be used against him in a criminal prosecution. Traylor's waiver of his Section 16 rights concerning the Florida crime was thus knowing, intelligent and voluntary. Id. at 973.

In the instant case, Officer Kenneth Frank Castro testified that when he initially arrested Johnson, that he read him his Miranda rights as follows:

> 1. You have the right to remain silent.
>
> 2. Anything you say can and will be used against you in a court of law.
>
> 3. You have a right to talk to a lawyer and have him present with you while you are being questioned.
>
> 4. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish.
>
> 5. You can decide at any time to exercise these rights and not answer any questions or any statements. Do you understand each of these rights I've explained to you? Having these rights in mind, do you wish to talk to us now? (R 460 - 61)

Johnson was then taken to the Sarasota Police Department where he was questioned by Detectives Sutton and Sullivan. (R 470) Detective Sutton testified that when they got Johnson in the interview room Detective Sullivan read Miranda warnings from the State Attorney's card to Emanuel Johnson. Sutton testified that Sullivan told Johnson:

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. (R 474)

Sullivan then asked Johnson if he understood each of these rights as explained and Johnson indicated that he did understand the rights. Johnson was then asked if having these rights in mind did he wish to talk and he indicated that he did want to talk to the police officers. (R 474) Sutton testified that Johnson appeared to understand these rights and that there were no promises or threats made to him at the time those rights were read. Johnson was coherent and at no time during the interview did he request an attorney or indicate in any manner that he did not want to talk. (R 475)

Sutton also testified that he was present during the polygraph examination. Sergeant Stanton began the interview by explaining the test to Johnson, as well as presenting Johnson with written Miranda warnings and a written consent for the

polygraph. Sutton saw Johnson sign the consent forms for Sergeant Stanton. (R 489) The written consent form states:

> I understand that I have the right to remain silent. I understand that anything I say can be used against me in a court of law. I understand that I have the right to talk to an attorney and have him present with me while I am being questioned. I understand that if I want an attorney and cannot afford one, that an attorney will be appointed to represent me, free of charge, before any questioning. I understand that I can decide at any time to exercise these rights and not answer any questions or make any statements. By affixing my signature I indicate that I understand each of these rights as stated above, and that any questions I have concerning the rights have been satisfactorily answered. (R 6766)

Accordingly, Johnson, as was Traylor, was adequately informed of his rights in that he was expressly told that he had the right to have a lawyer's assistance prior to and during questioning and that if he could not afford one would be appointed and he was sufficiently apprised of the consequences of the waiver in that anything he said could be used against him in a criminal prosecution. Johnson's waiver of his Section 16 and Sixth Amendment rights was thus knowing, intelligent and voluntary.

Johnson also contends that the waiver failed to comply with the specific requirements of Rule 3.11(d)(4). The rule provides that a waiver of counsel made out of court shall be in writing with not less than two attesting witnesses. The witnesses are required to attest to the voluntary execution of the waiver. In the instant case, the record shows that Johnson signed a

voluntary waiver of his constitutional right to remain silent and his right to counsel prior to making the confession. Although, this written waiver was only signed by Sergeant Stanton, it was attested to at the evidentiary hearing by both Sergeant Stanton and Detective Sutton. (R 489, 6766). As such the waiver sufficiently complied with the requirements of the 3.11(d)(4). Any violation of the technical requirements of the rule with regard to the number of signatures on the written waiver are clearly harmless in light of the testimony of both officers that they saw Johnson sign the waiver.

Furthermore, even if the waiver was not sufficient to find a valid waiver of the Sixth Amendment right to counsel, it is the state's position that Johnson's Sixth Amendment right to counsel had not attached at the time of interrogation. Under both Florida and federal law, the Sixth Amendment right to counsel attaches only when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment or preliminary hearings; an arrest warrant does not constitute a formal judicial proceeding. Peoples v. State, 576 So. 2d 783, 786 (Fla. 5th DCA 1981); McHaney v. State, 513 So. 2d 252, 253 (Fla. 2nd DCA 1987); United States v. Langley, 848 F.2d 152, 153 (11th Cir. 1988) (defendant's Sixth Amendment right to counsel attaches only after the government initiates adversarial judicial proceedings, mere filing of a complaint and the issuance of a warrant for the defendant's arrest does not meet this test); see also, Patterson v. Illinois, 487 U.S. 285 n. 9 (1988) (a

surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any Miranda violation as long as the 'interrogation' was not in a custodial setting). In the instant case, Johnson was arrested pursuant to a warrant for his arrest. The indictment for first degree murder was not filed until November 4, 1988. (R 6277-78). As such, at the time of the interrogation, formal judicial proceedings had not been initiated against Johnson and his Sixth Amendment right to counsel had not attached.

Based on the foregoing, the state urges this Court to uphold the lower court's denial of the motion to suppress and affirm the court's finding that this confession was knowing, intelligent and voluntary.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE SEIZED FROM THE DEFENDANT'S HOME.

Johnson also challenges the validity of the search warrant authorizing the search of his apartment. Specifically, Johnson claims that (1) the warrant was not supported by probable cause and (2) the items listed as things to be seized were of such a general nature as to authorize a general exploratory search. It is the state's position that since Johnson voluntarily consented to the search of his residence and since consent is an exception to the warrant requirement, any error in the issuance or execution of the warrant is clearly harmless beyond a reasonable doubt. Furthermore, a review of the affidavit and warrant supports the trial court's finding that probable cause existed and that the warrant was sufficiently particularized as to the items to be seized.

First, with regard to the consentual nature of the search, Detective Paul Sutton testified at the hearing on the motion to suppress that at 12:20 a.m. Johnson signed a consent to search residence form and that the form included Miranda warnings. (R. 525). The search of Johnson's residence was conducted two hours later. Thus, although the officers had already obtained a search warrant,[2] the search could have been conducted without it as Johnson had waived any expectation of privacy in the residence.

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[2] The search warrant was signed at 12:02 a.m. (R. 1203)

Norman v. State, 379 So. 2d 643 (Fla. 1980) (Among established exceptions to search warrant requirement is search conducted pursuant to consent); State v. Gonyo, 578 So. 2d 445 (Fla. 2DCA 1985) (Officer not required to obtain search warrants for defendant's home where defendant had consented to search); Wilson v. State, 470 So. 2d 1 (Fla. 1DCA 1984) (Warrant requirement of Fourth Amendment may be waived by voluntary consent to search). Candidly, this argument was not presented to the court below and did not serve as the basis for the trial court's ruling. Nevertheless, the law is clear that a correct ruling of a trial court should be sustained even if incorrect reasons are assigned to the ruling. Smith v. Philips, 455 U.S. 209 (1982); Stuart v. State, 360 So. 2d 406 (Fla. 1978); Trenary v. State, 423 So. 2d 458 (Fla. 2DCA 1982); Hamelmann v. State, 113 So. 2d 394 (Fla. 1DCA 1959). Accordingly, even if this Court should find that any error was committed in the issuance or the execution of the warrant, trial court's denial of the motion to suppress should be affirmed.

Furthermore, even if Johnson had not consented to the search, the search was properly conducted under a valid search warrant. In general courts are directed to the practical, common sense approach in considering if the totality of the circumstances as set forth in the application and affidavit demonstrate a fair probability that evidence of a crime will be located if a search warrant is issued. Illinois v. Gates, 462 U.S. 213 (1983). The process of determining probable cause, as

the name implies, deals with probabilities rather than certainties. Schmitt v. State, 563 So. 2d 1095, 1098 (Fla. 4th DCA 1990), affirmed as to this ground, 590 So. 2d 404 (Fla. 1991). In addition, because affidavits are drafted by non-lawyers in the midst and haste of a criminal investigation, technical requirements of elaborate specificity are not required. Id. Finally, a magistrate's finding of probable cause is entitled to great deference, and cannot be disturbed absent a clear abuse of discretion. Id; State v. Panzino, 583 So. 2d 1059 (Fla. 5th DCA 1991). When reviewed in this light,, the affidavit for the search warrant for the defendant's house clearly meets the probable cause standard found by both the magistrate and trial court below. This finding was within the trial court's discretion and appellant has failed to show an abuse of that discretion.

Appellant also contends that the affidavit's failure to specify that fibers were collected at the scene or elsewhere does not give probable cause for the warrant to authorize the seizure of fibers for forensic comparison value. He also contends that the search warrant affidavit omitted material facts which undermined the finding of probable cause. These "facts" included the fact that different fingerprints were found on a lamp near the body and that the front door was opened. None of these "facts" undermines confidence in the probable cause finding nor changes the evidence that the defendant's own fingerprints were found on a window which was forcibly opened and from which muddy

footprints were found leading from the outside the window, across the bed and onto the floor. The denial of a motion to suppress comes to this Court clothed with the presumption of correctness and this Court must interpret the evidence and all reasonable inferences in a manner most favorable to sustain the trial court's ruling. McNamara v. State, supra. Accordingly, the trial court's finding of probable cause should not be overturned simply because appellant has drawn alternative inferences from the evidence.

In addition, even if some question existed as to probable cause, the affidavit is not so clearly lacking in probable cause as to render the detective's reliance on it to be unreasonable. Therefore, the officer's good faith in the execution of the warrant would preclude suppression under United States v. Leon, supra.

Johnson's claim that the warrant failed to particularly describe the items to be seized and therefore permitted a general exploratory search is similarly unpersuasive. In addition to bloody clothing, the warrant in this case authorized the officer to seize "hair, fiber, tissue, or any other items of forensic comparison." (R 4669 - 79) Johnson argues that these items are too generic and left too much to the discretion of the executing officers. Appellant argues that allowing a search based on the phrase "hair, fiber, tissue, or any other items of forensic comparison," would be akin to allowing the officers to seize every item in the apartment because it could have had hair on it.

Obviously, the warrant limited the search to only those items that have potential forensic comparison value such as clothing or items that could have been at the scene of the crime.[3] Under Johnson's reasoning there can never be a valid warrant for blood, fibers, fingerprints or any other evidence of a scientific nature. The direction in the warrant to seize fibers of potential forensic value, while self-limiting, would necessarily include any clothing worn by the defendant at the time of the murder. As appellant concedes, there were no eyewitnesses to the murders who could specify which shirt Johnson wore at the time of the murder. Nevertheless, it was probable that Johnson was wearing one of the shirts found in his apartment at the time of the murders. As such, the shirts could, and did, contain "fibers of potential forensic value." This was clearly set forth in the warrant and did not give the officers unbridled discretion in the search of the apartment.

The particularity requirement must be given reasonable interpretation consistent with the type or character of the property sought. Carlton v. State, 449 So. 2d 250, 252 (Fla. 1984). When a more exact description is impossible, it is proper for the court to weigh the practical necessity of law enforcement against the particular rights of one whose possessions are to be

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[3] Johnson also contends that since the only clothing to be seized by the warrant was blood-stained clothing, the two t-shirts seized, which were not blood stained, should have been excluded. Whether a black or red shirt contains traces of blood is a matter to be determined by a laboratory, as it may not be readily apparent to an officer on the scene.

searched. United States v. Bloom, 753 F.2d 999 (11th Cir. 1985). Despite the use of terms such as hair, fiber and tissue in this case the warrant was sufficiently particular as to the items to be seized to pass constitutional scrutiny. See United States v. Holzman, 871 F.2d 1496 (9th Cir. 1989) (upholding warrant to search for "cash, jewelry, bonds and notes obtained through this broad scheme."); State v. Moorman, 744 P. 2d 679 (Ariz. 1987) (upholding warrant to search for pillow cases, knives, receipts, blood stains "and any other evidence" where later properly construed to be limited to evidence of murder).

The cases cited by Johnson do not mandate a finding that the warrant in this case was invalid as a general warrant. For example, Johnson states that the warrant herein was "no better than" that in Perez v. State, 521 So. 2d 262 (Fla. 2nd DCA 1988) (appellant's initial brief, page 93). In Perez the court held that the trial court should have granted the defendant's motion to suppress a video tape recorder which was seized pursuant to a warrant authorizing a search for guns and cocaine. The holding was based upon a finding that the VCR was not within the scope of the warrant and was not subject to seizure under the plain view doctrine because there was no reason to believe it was stolen. Perez did not find that the entire warrant was invalid simply because an object beyond its scope was seized.

Johnson also cites to Polakoff v. State, 586 So. 2d 385 (Fla. 5th DCA), review denied, 593 So. 2d 1053 (Fla. 1991). The Fifth District recognizes that Polakoff demands a stricter

particularity requirement than the federal courts and at least one other appellate district court in Florida. State v. Knuckolls, 617 So. 2d 724 (Fla. 5th DCA 1993). In State v. Show Case Products Inc., 501 So. 2d 11 (Fla. 4th DCA 1986), the district court upheld a warrant for seizure of business records and equipment similar to that found overbroad in Polakoff. The court noted that the particularity requirement is met as long as the warrant enables the searcher to reasonably ascertain and identify the items authorized to be seized.

Johnson suggests that proof that the police in this case conducted a general exploratory search "was in the pudding" since the police seized many other items such as business cards, receipts, a watch, a cable television box, pellet gun, a black shoulder holster, a video tape, and miscellaneous papers, etc. The mere fact that some items may have been improperly seized does not mean that the warrant was not sufficiently particular. United States v. Saunders, 957 So. 2d 1488 (8th Cir. 1992). Further, as previously noted, even if the warrant was not sufficiently particular, the officers' good faith precluded suppression on these facts.

Johnson has failed to establish any error in the trial court's denial of his motion to suppress the evidence from his home pursuant to the search warrant. Therefore, even if he had not consented to the search, Johnson is not entitled to relief on this issue.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE PROSPECTIVE JUROR LAHIFF FOR CAUSE.

Appellant contends that the trial court committed reversible error when it refused to dismiss prospective juror Lahiff for cause based on her response to voir dire questioning on her views concerning the imposition of death. It is the state's position that this is a matter within the discretion of the trial court and Johnson has failed to show an abuse of that discretion.

In Penn v. State, 574 So. 2d 1079 (Fla., 1991), this Honorable Court rejected a similar claim and held that it was not an abuse of the trial court's discretion in refusing to excuse prospective jurors for cause because they ultimately demonstrated their competency by stating that they would base their decisions on the evidence and the instructions. In Penn, as in the instant case, a prospective juror indicated that he strongly favored the death penalty, but on further questioning he said he would follow the law as instructed.

Prospective juror Lahiff stated that she could follow the law and that she would base her decision on the facts and the law. (R. 3496, 3503-04) Ms. Lahiff's statements do not indicate a juror that has made up her mind and would impose the death penalty in all cases of first degree murder.

In the instant case, Lahiff satisfied the trial judge who was present to assess her demeanor, as well as her responses to the questions as presented. The refusal to dismiss Lahiff for

cause was based on a factual determination that was within the trial court's discretion and Johnson has failed to show an abuse of that discretion. See Valdes v. State, 18 Fla. Law Weekly S481, S483 (Fla. September 9, 1993); Lusk v. State, 446 So. 2d 1038 cert. denied, 469 U.S. 873 (1984).

Furthermore, even if the court should have grant dismissed Lahiff for cause, the failure to do so was harmless. In Hall v. State, 614 So. 2d 473 (Fla. 1993) this Honorable Court rejected a similar claim stating:

> "To show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." *Pentecost v. State*, 545 So. 2d 861, 836 n. 1 (Fla. 1989); *Trotter v. State*, 576 So.2d 691 (Fla. 1990). Although Hall claimed the he would have excused Cavanaugh, the record discloses that, even though Cavanaugh had seen a newspaper headline about Hall's resentencing he did not read the article and that Cavanaugh did not hear what some jurors were talking about in the hallway. We have previously held that the competency of a challenged juror is a mixed question of law and fact, the resolution of which is within the trial court's discretion. *Singer v. State*, 109 So. 2d 7 (Fla. 1959). Hall has shown no abuse of discretion in the trial court's refusal to grant him more peremptory challenges, and there is no merit to this issue."

Id. at 476

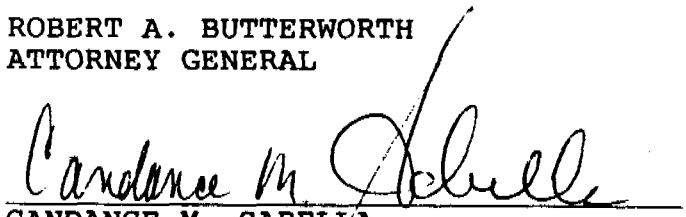
Similarly, in the instant case, although defense counsel asked for more peremptories *and identified* prospective jurors McDowell, Ostenburg and Seymour as objectionable, a review of their responses does not support such a claim. Accordingly, there is no merit to this point on appeal.

CONCLUSION

Based on the foregoing arguments and citations to authority, this Court should affirm the judgment and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 13 day of December, 1993.

OF COUNSEL FOR APPELLEE.