IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON,

Appellant,

v. Case No. 78,337

STATE OF FLORIDA,

Appellee.

# BRIEF OF THE APPELLEE

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## STATEMENT OF THE CASE AND FACTS

Appellant was charged by indictment with the first degree murder of Jacqeuline McCahon and also with burglary (R 6210 - 11; R 6214). Trial by jury resulted in guilty verdicts (R 8121 - 22) Following a penalty phase proceeding, the jury recommended a sentence of death by a vote of ten to two (R 8531). The trial court concurred with that assessment and imposed a sentence of death, finding three aggravating factors (prior felony convictions involving force or violence, homicide while engaged in commission of a burglary, and HAC) and finding fifteen weak mitigating factors, all of which were outweighed by each of the aggravating factors (R 8790 - 94). Johnson now appeals.

In the guilt phase below the state introduced the testimony of Officer William Oats who on September 22, 1988 observed a white female laying on the sidewalk next to a chain link fence; there was quite a bit of blood in the chest area; her eyes were wide open. There were no signs of life (R 4865 - 66). A knife blade lay nearby (R 4866). The area was taped off, including the apartment at 1321 - 4th Street because the woman was known to most of the police. No one went into the apartment at that time (R 4868). Officer Robert Smith recognized the victim as Jackie McCahon; he knew her from prior visits to the apartments she managed (R 4920). Initially, they did not know whether her apartment was involved in the crime scene (R 4923). A dog was inside and after 4:00 in the morning an Animal Control Officer took custody of the dog. (R 4924). Sergeant David Harrington, a

crime scene technician, testified that they began to process the interior of the apartment after removal of the dog (R 4947). He identified photos of the crime scene (R 4952). Blood spots appeared in photos of the apartment interior (R 4966). Jocelyn Reams, a technician under Sergeant Harrington, described the processing of the scene as well as the lasering of the victim's body at the morgue (R 5009). Physical evidence was recovered from the victim's apartment (R 5010). The victim's fingerprints were on the phone (R 5014). A knife was recovered in a search of a field on October 12 (R 5015), across the street from where the victim's body was found. Madeline Luzier, a technician, collected a set of keys and a knife blade on the sidewalk next to the victim's body (R 5049). Detective B.J. Sullivan spoke with appellant at the police station on the evening of October 11, 1988 (R 5061). After giving Miranda warnings, Johnson agreed to speak to them. No information about the McCahon homicide was given to defendant (R 5067). Appellant admitted knowing the victim (R 5069). He resided diectly across the street from her and he paid the rent to her each week (R 5070). McCahon had previously evicted him but he said he left on good terms (R 5071). Johnson said he had seen the body of a white female on the sidewalk but did not find out who it was until the following day (R 5074). Johnson said he lived with a woman named Bridget. Appellant also described having seen a white male at the McCahon apartment (R 5074 - 77). The white male was using the phone near the entrance way (R 5078). The

witness did not threaten appellant or make any promises (R 5083). He did not hear any threats by Sergeant Stanton. Appellant did not complain about Stanton or Sutton (R 5084). When Sullivan told appellant he thought he had a problem with women, Johnson responded that he had "this pressure" (R 5085). Appellant then explained the McCahon homicide and admitted he was responsible. He claimed he knocked on the McCahon door asking to use the phone because his wife was getting ready to have the baby. When she opened the door, he grabbed her around the neck and throat and choked her to semiconsciousness. He took a knife from the kitchen and began stabbing her. He also took three twenty dollar bills from her residence (R 5086 - 87). Sullivan took a taped statement from appellant, Exhibit 48, which was played to the jury (R 5088 - 90). Johnson admitted cutting the phone line (R 5091). Johnson also explained how the knife blade ended up on the sidewalk outside the residence; he said that after he left the initial assault inside her residence he went to his residence and when the victim staggered to the sidewalk area (he had already gotten rid of the knife he originally used) he grabbed one of his own knives from the apartment, ran outside to where she was standing and "stabbed her a lot". He discarded the knife handle in some bushes or weeds nearby (R 5103 - 04). Sergeant Jerry Lacertosa received information about a knife handle from Detective Sullivan which he had learned from appellant (R 5178). On October 12, he went to the field and found the knife (R 5180). Subsequently, on October

18, a knife handle was discovered (R 5184). F.B.I. fingerprint specialist Leonard Dreibelvis examined the knife blades and no prints were found (R 5201 - 5210). Technician James Tutsock was able to lift latent prints from the telephone (R 5222). Special agent William Tobin with the F.B.I., a forensic metallurgist, opined that the two pieces were once one knife (R 5244). Sergeant Bruce Whitehead, an expert in bloodstain pattern interpretation (R 5255) explained his findings. Blood appeared on the numbers 9 and 1 on the phone (R 5278). Detective Paul Sutton interviewed the victim's friend Philip Saumell but there was no facts or evidence to show he stabbed her. Similarly, he interviewed Jessie Phillips and Daniel Underwood (R 5295 - 96). Sutton interviewed appellant; there were no threats or promises; there was no offer of a plea of insanity. He did not yell at appellant or physically threaten him (R 5298 - 99). Appellant admitted killing the victim and stealing money (R 5304). Officer Stanton similarly testified to appellant's admission (R 5353 - 5370). Officer S.J. Sapp testified to Johnson's admissions and the recovery of the knife (R 5387 - 97). Dr. William Clack, medical examiner, testified the victim had nineteen stab wounds in the chest, neck, face and wounds in the right hand and left arm. Twelve of the chest wounds were potentially fatal (R 5436 - 37). There were defensive wounds on the back of the left elbow (R 5438). The victim could have remained conscious for several minutes (R 5440). At the penalty phase, the state introduced the testimony of Lawanda

Giddens, who testified that appellant attacked her on May 28, 1988 (R 5868), the testimony of Kate Cornell who was stabbed by appellant in January of 1988 (R 5875), Dr. Clack who described the injuries to murder victim Iris White (R 5882 - 83) and Detective B. Sullivan testified to appellant's admissions in the Iris White case (R 5889 - 94). The state also introduced Johnson's judgments of convictions in the Giddens, Cornell and White cases (R 5869, 5877, 5893).

## SUMMARY OF THE ARGUMENT

I. The trial court correctly denied the motion to suppress on the basis that the arrest was illegal and that evidence was obtained as fruit of the poisonous tree. The police acted in good faith in the effort to obtain an arrest warrant; there was sufficient probable cause to effect the arrest and appellant's subsequent admissions were voluntarily given.

II. The trial court correctly denied the motion to suppress statements and admissions as they were given freely and voluntarily after full Miranda warnings and not in violation of any constitutional right.

III. There is no reversible error presented in the deputy clerk's swearing in of prospective jurors prior to voir dire examination.

IV. The lower court did not err in denying appellant's challenge that the grand jury was improperly qualified. Clerk Buttorff testified to the procedures used in her experience but did not know about the grand jury in the Emanuel Johnson case.

V. The trial court did not err reversibly in delaying the trial for three weeks after selection of the jury. The jurors obeyed the court's directive not to read newspaper accounts or watch television about the appellant and there is no basis to presume prejudice.

VI. The trial court correctly denied challenges for cause to jurors Hanaway and Pullman. These jurors expressed the view they could follow the law.

VII. Appellant's assertion of discrimination in the jury venire was refuted by the testimony of clerk Loretti regarding the random selection.

VIII. The trial court did not act improperly in scheduling the trial dates or in denying defense requests for continuances. No abuse of discretion has been shown and the court correctly ruled that appellant had been provided discovery to prepare his case for trial.

IX. Appellant's claim that appellate counsel has been rendered ineffective by this Court's one-hundred page limit on briefs is meritless.

## ARGUMENT

### ISSUE I

WHETHER THE ARREST WAS ILLEGAL AND THE JUDGE SHOULD HAVE SUPPRESSED ITS FRUITS.

For reasons inexplicable to appellee, appellant refers in his brief to the record on appeal in the prosecution of the Iris White homicide. Since appellee believes that this Court was correct in Jackson v. State, 575 So. 2d 181, 193 (Fla. 1993), when it said, " . . . this Court decides cases solely based on the record under review. We must blind ourselves to facts not presented in this record", appellee will refer to the instant appellate record (the McCahon homicide).

A. Factual Background - At the hearing on the motion to suppress held on May 29, 1990 (R 9 - 228), police officer Kenneth Castro testified that he came into contact with appellant Johnson at 9:48 p.m. on October 11, 1988 (R 30). Earlier, at 8:00 p.m., he had a conversation with Detective Redden who showed him a photo of appellant and told him arrest warrants were being signed as they spoke. She mentioned there had been a fingerprint hit on the defendant for the homicide. Redden told Castro to arrest Johnson if he saw him but not to spread the word because they wanted to wait until the warrants were signed (R 32 - 33). Castro saw Johnson walking on Central Avenue, asked his name and took him into custody. Castro gave him Miranda warnings but did not question him and told him detectives would explain at the police department (R 35 - 37).

Detective Paul Sutton secured the arrest warrants on October 11, took them for review and signature by Judge Silvertooth at 9:15 p.m. at his residence, then got on the radio to notify units that he had obtained the arrest warrant (R 45 - 46; 57). The back page of the arrest warrant had a place to swear that the information was true to the best of your knowledge and he thought the judge read from the back page (R 100). Detective Brenda Redden was given information at a detectives' meeting that the police were in the process of getting an arrest warrant signed and a photo of black male suspect Emanuel Johnson was handed out (R 108 - 110). Sergeant Lacertosa told her the arrest warrant was being prepared and a fingerprint hit was taken from one of the victim's residence. and provided Johnson's name and that there was a fingerprint hit (R 111 - 112). She also took a Negro pubic hair, obtained at one of the crime scenes in the investigation, to the laboratory (R 114). Sergeant Gerald Lacertosa testified that he was investigating the McCahon - White homicides and on October 11, received a positive identification on a fingerprint lifted from the scene of the homicide at the Iris White residence, matching that of appellant Johnson. He began preparing arrest and search warrants (R 124 - 25). Iris White was an elderly female who sustained multiple stab wounds, found lying on her back in her bedroom. The scene indicated a sexual assault - nightgown pulled above the waist, legs spread, naked. Pubic hairs of another were on the inside of her thigh. Vaginal smears revealed the presence of sperm confirming the

sexual assault (R 126 - 27). The lab reported the hair was Negroid. The victim's purse was found near a fence at a location between the victim's and defendant's residence (R 128 - 29).

Similarities between the two homicides included the method of attack, numerous stab wounds around the chest and neck area of the victims; the two white females lived in close proximity within six blocks of each other. They believed both crimes were committed by the same perpetrator. They knew Johnson was living near the corner of 4th Street and Coconut Avenue (R 132). Dirt was found at the foot of the bed in the White residence. They appeared to be bottom footprints and the perpetrator had been on top of the victim (R 133 - 34). He and the other detectives discussed the probable cause at their meeting and the detectives left that meeting knowing the probable cause determination to arrest the defendant had been made (R 152 - 53).

Defense witness Yvette McNab, the F.D.L.E. lab analyst, reported back that regarding the hair samples taken from the left arm and inner thigh, Item 33 (from the inner left arm) was dark brown 'typical of Negroid pubic hair" suitable for comparison purposes and Item 35 (from the inner left thigh) contained a hair typical of Negroid pubic hair suitable for comparison purposes and a hair fragment - Negroid body hair - not suitable for comparison purposes. She did not report to the police the hairs came from a Negroid male (R 161).

Virginia Casey found hairs on the body of victim White and made comparison of latent print on the window with appellant's

print (R 166). Latent prints found on the nightstand were of no value - they did not have enough points of comparison (R 169). Other prints were of value and did not belong to Johnson or the victim (R 171). The screen on the window was cut in an "L" shape; there was a dirt area below the window. The window itself had four fingerprints, showing some type of smearing, as if someone had pushed the window open. There was dirt on the bedspread on the bed underneath this window similar in color to the dirt outside the window (R 173). Detective Sutton added that the dirt on the cover of the bed was consistent with someone having stepped there; the dirt on the inside was consistent with that on the outside (R 180) He opined that the window was the point of entry (R 184). Officer Zavos arrested appellant in March of 1988, and Johnson was fingerprinted (R 189, 194).

B. The unsworn warrant - The lower court concluded that the arrest warrant upon which the defendant Johnson was arrested was not supported by a valid affidavit and was thus invalid at the time of its execution (R 635). With all due respect, appellee submits that the lower court erred. The trial court relied on Collins v. State, 465 So. 2d 1266 (Fla. 2d DCA 1985).

In Collins the police officer presented the affidavit and search warrant to the issuing magistrate but was never placed under oath. Id at 1267. In the instant case Detective Sutton was sworn and signed the affidavit in the presence of notary Sherry Lynn Vail (R 6266 - 6267). And Sutton gave an oath before Judge Silvertooth (R 106, R 100). Collins forms no impediment.

The lower court also cited State v. Rodriguez, 523 So. 2d 1141 (Fla. 1988), wherein this Court held that for purposes of a motion to dismiss under Rule 3.190(c)(4) the jurat containing the language "to the best of his knowledge" was defective and in essence no oath at all. See also Scott v. State, 464 So. 2d 1171 (Fla. 1985) (similar jurat held insufficient by a movant in a Rule 3.850 Petition).[1] Quite apart from the fact that the two situations are different (a petitioner under Rule 3.850 and a movant under 3.190(c)(4) have personal knowledge of the facts alleged whereas an officer making application for a search or arrest warrant often has no personal knowledge but must rely on information furnished by other officers, laboratory personnel, confidential informants, etc.), any Fourth Amendment law relating to police - warrant activity is governed, in Florida, by United States Supreme Court decisions. Fla. Const. Art. I, Section 12, Bernie v.State, 524 So. 2d 988 (Fla. 1988), Perez v. State, ___ So. 2d ___, 18 F.L.W. S 361 (Fla. 1993).

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[1] There was no violation of State v. Johnson, 553 So. 2d 730 (Fla. 2d DCA 1989). Here, Sutton was placed under oath by Vail. Bonilla v. State, 579 So. 2d 802 (Fla. 5th DCA 1991) is inapplicable; there, the good faith exception was held to be unavailable when there was no indicia of probable cause in the affidavit to support the warrant. State v. Tolmie, 421 So. 2d 1087 (Fla. 4th DCA 1982) is inapposite; the officer sub judice did sign the affidavit. While these decisions emphasize the importance of compliance with the pertinent statutes, appellee notes that Rule 3.121(b) instructs that no arrest warrant shall be dismissed because of any defect as to form in the warrant. Any defect in the instant case is only to form. Moreover F.S. 901.02 does not require any particular format regarding an oath.

Appellant disingenuously argues that, "Four justices of this Court now believe that the 1982 amendment to article I, section 12, of the Florida Constitution only requires this Court to follow the United States Supreme Court cases that were in effect in 1982. Perez v. State, 18 Fla. Law Weekly S 361 (Fla. June 24, 1993)". Brief, p. 11. Appellant implies, or the reader is left to infer, that now the law is that only decisions in effect in 1982 must be followed under Article I, section 12.

Some commentary is appropriate. In Bernie v. State, 524 So. 2d 988 (Fla. 1988) a majority of this Court (McDonald, Shaw, Kogan, Willis, Ehrlich, McDonald, Shaw) held that the 1982 amendment to Article I, section 12 of the Florida Supreme Court was intended to be applied to all United States Supreme Court decisions regardless of when they were rendered. The Court rejected the contrary views of Justices Overton and Barkett. In Perez v. State, supra, a majority of the Court, speaking through Mr. Justice Grimes,reaffirmed Bernie.

> "By reason of the 1982 amendment to Article I, section 12 of the Florida Constitution, this Court is bound to follow the United States Supreme Court's interpretations of the Fourth Amendment and to provide no greater protection than those interpretations."
>
> (18 F.L.W. S 361)

Justices Shaw and Kogan now assert that they previously erred and would join Justice Barkett's view. Justice Overton, although he disagreed at the time with the Bernie decision, concurred with Justice Grimes, McDonald and Harding on the basis

of stare decisis. In United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677 (1984), the Supreme Court held that the exclusionary rule should not be applied to deter objectively reasonable law enforcement activity. Here, detective Sutton acted reasonably and in good faith in presenting his probable cause affidavit for Johnson's arrest warrant; the fact that a judicial determination subsequently is made that there was a technical defect in the wording of the jurat should not invalidate his good efforts. See also Massachusetts v. Sheppard, 468 U.S. 981, 82 L.Ed.2d 737 (1984).

But even if the Court should agree with the trial court, affirmance is required on the alternative ground explained, infra.

C. Facts omitted from the arrest affidavit - The trial court found in his order denying relief:

> At the hearing, officers investigating the homicide of Iris White testified that an outside screen had been cut. Footprints were found in a sandy area beneath the cut screen. The window had been pushed open and the defendant's prints were found outside of the window The prints were smudged upwards, as if made while opening the window. The cover on the daybed beneath the open window was ruffled and had dirt on it. Dirty footprints led away from the window and towards the victims' bedroom. The victim was found in her bed, and there was dirt on the victim's legs and sheets. An autopsy revealed the victim had been sexually assaulted and sperm was found in her vagina. Unknown hairs were found on the victim's thigh. These hairs were later identified as black pubic hairs. The victim died as a result of multiple stab wounds, and the knives located within her home did not appear to match these wounds.

> Additionally an unidentified fingerprint was found on the victim s nightstand adjacent to her bed. The victim's front door was open and slightly ajar.
>
> The affidavit in support of the search warrant did not include any reference to the unidentified print on the nightstand, the open front door, or the location of the defendant's fingerprint. Additionally, the affidavit included the conclusion that the unknown hair were black male public hairs. There is no evidence that the affiant knowingly and intentionally made false statements. The affiant concluded that the black pubic hairs belonged to a male since the victim had been sexually assaulted and sperm was found in her vagina. If the word "male" is deleted from the affidavit, it is still sufficient to support the issuance of a valid search warrant.
>
> The failure of the affiant to disclose the location of the defendant's print and the underlying basis for concluding that this was the point of entry, did not invalidate the search warrant. Additionally, the failure to include any statements concerning the unidentified print on the nightstand did not invalidate the search warrant.
>
> (R 6352 - 53)

D. Arrest without probable cause --

The trial court's order, quoted above, adequately answers appellant's claim.[2]

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[2] Appellant urged below that the officers erroneously concluded that the lab had reported confirming that Negroid male pubic hairs were found on victim Iris White when the lab really had concluded only that it was a Negroid pubic hair, the sex of which was unmentioned. It is not clear whether appellant was urging that the police should have informed a judge that it was possible the assailant was a black female who also had provided an external source of semen to deposit in the victim's vagina but if so that is an unreasonable hypothesis to impose on law enforcement or the judiciary.

Appellant cites a Texas decision Jefferson v. State, 783 S.W. 2d 816 (Ct. of Ap. Tex. 1990) wherein an officer relied on an unsubstantiated tip from an unidentified informer two months after a homicide that suspect Glenn lived at a certain apartment complex. The Court reversed because the state had relied on an arrest pursuant to warrant but could not produce the warrant as state law required. Additionally, the prosecutor had conceded there was no probable cause for the arrest leading to the incriminating statements and the officer did not attempt to obtain an arrest warrant for murder or burglary, did not believe he had probable cause, and when the accused was given Miranda warnings he was told he was in custody only on traffic warrants.

In contrast, no serious claim can be made that there was lacking probable cause to believe there was a burglary. Negroid pubic hairs were found on the victim, she had been sexually assaulted, a screen was cut on the window, appellant's fingerprint were on the window where the police believed the point of entry occurred, dirt similar to that outside was found inside the window and evidence of a footprint found on the victim's bed. Her purse was found near a fence between her house and appellant's residence.

Appellant cites a number of decisions dealing with the situation where the presence of a fingerprint on an item was found insufficient as a sole basis to support a conviction.[3] And

[3] The only other example cited is Thompson v. State, 551 So. 2d 1248 (Fla. 1st DCA 1989), where the officer exceeded the scope of

indeed if Judge Owens had impaneled a jury on October 11, 1988, to present to them only the information available to Detective Sutton and Sergeant Lacertosa, the force of appellant's argument would carry more weight.

Even an acquittal or dropping of the charges does not mean the arrest was invalid. Marx v. Gumbinner, 905 F.2d 1503 (11th Cir. 1990). An arrest need only be supported by probable cause, not necessarily a prima facie case. Davis v. State, 602 So. 2d 606 (Fla. 2nd DCA 1992). It is not necessary to eliminate all possible defenses in order to establish probable cause for an arrest. State v. Riehl, 504 So. 2d 798 (Fla. 2d DCA 1987). Probable cause defines radically different standard than beyond a reasonable doubt and while arrest must stand upon more than suspicion, the arresting officer need not have in hand evidence sufficient to convict. United States v. Pantoja-soto,739 F.2d 1520 (11th Cir. 1984). Probable casue standard for law enforcement officer to make legal arrest is whether officer has reasonable grounds to believe arrestee has committed felony; standard of conclusiveness and probability is less than that required to support conviction. Blanco v. State, 452 So. 2d 520 (Fla. 1984).

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an investigatory pat-down under Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889 (1968).

E. Officer Castro and the fellow officer rule - Numerous courts in the State of Florida have recognized the fellow officer rule. See Routly v. State, 440 So. 2d 1257 (Fla. 1983) (mere fact officer not privy to statement of eyewitness to murder given to other officers did not render the arrest unlawful for lack of probable cause); Crawford v. State, 334 So. 2d 141 (Fla. 3d DCA 1976) (officer is not required to have sufficient first hand knowledge to constitute probable cause, rather it is sufficient if the officer who initiates the chain of communication either has first hand knowledge or receives his information from some person who seems to be telling the truth); State v. Harrington, 307 So. 2d 466 (Fla. 2d DCA 1974) (officer who has probable cause may communicate this fact to another officer who may be in position to make arrest); Nelson v. State, 188 So. 2d 353 (Fla. 3d DCA 1966); Owen v. State, 560 So. 2d 207 (Fla. 1990) (probable cause to arrest found where officer who stopped defendant had been given photograph and was specifically alerted to watch for defendant in his known habitat); Polk v. Williams, 565 So. 2d 1387 (Fla. 5th DCA 1990).

In the instant case, the trial court ruled:

> 2. The evidence presented at the hearing disclosed that the Sarasota Police Department was investigating the murder of Iris White. On October 11, 1988, Sergeant Lacertosa, the sergeant in charge of crimes against persons, called a meeting of the members of this unit to discuss the probable cause for the arrest of Emanuel Johnson. A positive fingerprint match to the defendant, obtained at the alleged point of entry was the principle basis for probable cause. Photographs of the

> defendant were given to the detectives. They were further advised that an arrest warrant was being obtained. After the meeting, Detective Redden discussed the breakthrough with Officer Castro and showed him the photograph of the defendant. Det. Redden did not specifically request Officer Castro to arrest the defendant.
>
> Officer Castro subsequently returned to his patrol zone, observed the defendant, and arrested the defendant Prior to the actual arrest, an arrest warrant had been obtained but Officer Castro was unaware of the warrant. (This is the arrest warrant which was found invalid because it was not supported by a valid affidavit.) When making the arrest, Officer Castro did not have sufficient first-hand knowledge to constitute probable cause.
>
> The "follow officer" or "collective knowledge" rule validates a warrantless arrest if the officer initiating the communication had probable cause. Whitley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 568, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); Carroll v. State, 497 So. 2d 253 (Fla. 3 DCA 1985); State v. Harrington, 307 So. 2d 466 (Fla. 2 DCA 1975). This rule does not require that the arresting officer receive a specific request to arrest the defendant. Carroll v. State, supra.
>
> In our case, the initiating officers, Sergeant Lacertosa and Detective Redden, had probable cause to arrest Emanuel Johnson. The warrantless arrest by Officer Castro of the defendant, Emanuel Johnson was valid.

(R 6351 - 52)

The trial court's determination on a motion to suppress evidence comes to the appellate court clothed with a presumption of correctness. See McNamara v. State, 357 So. 2d 410 (Fla. 1978); Savage v. State, 588 So. 2d 975 (Fla. 1991); Owen v. State, 560 so. 2d 207 (Fla. 1990); Henry v. State, 586 So.2d 1033

(Fla. 1991); Medina v. State, 466 So. 2d 1046 (Fla. 1985); R. Jones v. State, 612 So. 2d 1370 (Fla. 1992).

Appellant contends that Officer Castro was not informed the warrants had been signed by a BOLO report over the radio, but whether or not he knew the exact timing of the signing (and it appears that his arrest of Johnson occurred after the warrant was signed), he had been told by Detective Redden that the warrants were being prepared for signing, was told the identity and given a photo of appellant and was told a fingerprint hit of Johnson were established. Castro's impression was that he had been told by Redden to effectuate an arrest if he saw the defendant but not to broadcast it to others (R 32 - 33) That Redden did not recall requesting the arrest is of no moment since a specific request to arrest is not required. Carroll v. State, 497 So. 2d 253, 260, n. 9 (Fla. 3d DCA 1985). The point simply is that the information possessed by Lacertosa, Sutton and Redden is imputed to Castro. Johnson may not challenge Castro's actions unless the information available to those officers lacks sufficient probable cause.[4] Officer Castro, based on the information furnished to him by Detective Redden, had a sufficient nexus to make the arrest, unlike the situation in D'Agostino v. State, 310 So. 2d

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[4] Appellant's suggestion that either Redden or Castro was lying is uncalled for. That witnesses may differ in their perceptions and recollections of an event is a common occurrence, as the law well recognizes; indeed, it is one reason prosecutors do not charge all defense witnesses with perjury upon obtaining a conviction of a defendant.

12 (Fla. 1975), where probable cause was lacking. See also United States v. Webster, 750 F.2d 307, 323 (5th Cir. 1984):

> [13-14] Probable cause to arrest exists where the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *United States v. Preston*, 608 F.2d 626, 623 (5th Cir. 1979), *cert. denied*, 446 U.S. 940, 100 S.Ct. 2162, 64 L.Ed.2d 794 (1980) (quoting *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327 (1959)). That is not to say, however, that the arresting officer himself must have personal knowledge of all the facts constituting probable cause for an arrest. The Government correctly points out that 'probable cause can rest upon the collective knowledge of the police, rather than solely on that of the officer who actually makes the arrest, when there is 'some degree of communication between the two.'" *United States v. Ashley*, 569 F.2d 975, 983 (5th Cir.), cert. denied, 439 U.S. 853, 99 S.Ct. 163, 58 L.Ed.2d 159 (1978).
>
> It is equally clear, however, that we will not allow the collective knowledge doctrine to be used as a subterfuge to evade probable cause requirements. Cf. *Whiteley v. Warden*, 401 US. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) (Government may not bootstrap probable cause from innocent act of police officer following instructions to arrest). We have applied what has been loosely labelled the collective knowledge doctrine in two distinct types of cases: (1) those where the arresting officer has no personal knowledge of *any* of the facts establishing probable cause, but simply carries out directions to arrest given by another officer who does have probable casue, *e.g., United States v. Impson*, 482 F.2d 197 (5th Cir. *cert. denied*, 414 US.S 1009, 94 S.Ct. 371, 38 L.Ed.2d 246 (1973); *United States v. Allison*, 616 F.2d 779 (5th Cir.), *cert. denied*,449 U.S. 857, 101 S.Ct. 156, 66 L.Ed.2d 72 (1980); and (2) those where the arresting officer has personal knowledge of facts which

standing alone do not establish probable cause but, when added to information known by othe rofficer sinvolved in the investigation, tips the balance in favor of the arrest, *e.g.*, *United States v. Nieto*, 510 F.2d 1118, 1120 (5th Cir.), *cert. denied*, 423 U.S. 854, 96 S.Ct. 101, 46 L.Ed.2d 78 (1975); *United States v. Agostino*, 608 F.2d 1035, 1037 (5th Cir. 1979). In the former cases, the officer who issues the directive must himself have probable cause to arrest. *Weeks v. Estelle*, 509 F.2d 760, 765 (5th Cir.), *cert. denied*, 423 U.S. 8972, 96 S.Ct. 139, 46 L.Ed.2d 103 (1975); *United States v. Simpson*, 484 F.2d 467, 468 (5th Cir. 1973). In the latter cases, the "laminated total" of the information known by officers who are in communication with one another must amount to probable cause to arrest. *United States v. Edwards*, 577 F.2d 8383, 895 (5th Cir.) (en banc), *cert. denied*, 439 U.S. 968, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978); *Agostino*, 608 F.2d at 1037.

## ISSUE II

WHETHER APPELLANT'S CONFESSION AND ADMISSIONS SHOULD HAVE BEEN SUPPRESSED.

A. Factual Background -- Following a lengthy evidentiary hearing on the defendant's motion to suppress statements, admissions or confessions, the trial court found:

> "1. The evidence established that the defendant was advised of his Miranda rights and that the Defendant freely, voluntarily, knowingly and intelligently waived those rights.
>
> 2. The evidence established that the confession of the defendant was not the product of coercion. The court rejects the testimony of Richard Ofshe, and finds that his opinion does not demonstrate that the confession of the defendant was the product of coercion.
>
> 3. The defendant at no time made an equivocal or unequivocal request to stop the questioning.
>
> 4. The defendant was not denied access to the court.
>
> 5. The defendant was not denied his right to counsel."

(R 6827)

Circuit Judge Silvertooth correctly considered that appellant's statements to detectives were made freely and voluntarily after a knowing and intelligent waiver of constitutional rights (R 6828).

The trial court's conclusions were amply supported by the evidence. Arresting officer Castro read Johnson his Miranda rights who said he understood them; appellant did not ask for an

attorney nor did he express a desire not to speak to the police (R 457 - 462). Detectives Sutton, Stanton and Sullivan uniformly gave uncontradicted testimony that appellant was given Miranda warnings at the station and he seemed to understand his rights, no promises or threats were made, appellant did not request an attorney or indicate he did not want to talk to the police, did not appear to be on drugs or drunk (R 472 - 475, 47, 482, 486, 489, 490 - 491, 4696, 500 - 01, 503 - 05, R 585 - 86, 599 -600, 611 - 15; R 714 - 17, 750, 767, 770, 772, 774). Psychologist Dr. Sidney Merin opined that appellant's level of fatigue that night was not great enough to have blocked or confused his memory (R 1278), that he was able to understand Miranda warnings and the forms he signed and there was no indication the length of time of the interviews had any effect on the defendant. There were no disorganized thought processes (R 1295 - 97). Psychiatrist Dr. Sprehe opined that appellant was fully competent on the date of his arrest with normal intelligence and ability to process information (R 1322 - 23). Appellant was able to read and understand what he read and the verbal representations (like Miranda warnings) made to him (R 1324). The length of interrogation had no real effect on defendant, there was no evidence of fatigue in his voice and Sprehe opined the confession was not the result of any psychological coercion (R 1324 - 26).

Appellant did not testify at the suppression hearing. No witness present at the interrogation testified that Johnson was threatened or coerced. Appellant offered the testimony of social

psychologist Dr. Ofshe who believed the defendant's unsworn version of the interview and believed appellant was coerced (R 1126). But Ofshe acknowledged that the defendant was a liar and manipulator and that if the alleged promises and threats were not made the confession was not coerced (R 1125, R 1152, 1166). Ofshe's opinion was based on the defendant's credibility and is pure speculation and conjecture, fully warranting rejection by Judge Silvertooth (R 6827). Defense witness Dr. Afield thought the defendant was retarded and could not understand the nature of his rights when read to him but this testimony was contradicted by the defendant's own expert Dr. Ofshe who stated the defendant could and undoubtedly did understand Miranda warnings (R 792, R 1149 - 50) as well as Drs. Merin, Sprehe and DeClue who thought the tests administered to the defendant did not show him to be retarded (R 1295, R 1323, R 1357).

A trial court's ruling on a motion to suppress evidence is presumed correct. McNamara, supra, Savage, supra, Owen, supra, Henry, supra, Medina, supra, Jones, supra.

B. Castro's Arrest -- Appellant argues that the confession followed an alleged illegal arrest.[5] Appellee relies on the

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[5] Additionally, this argument does not seem to have been preserved for appellate review by submission to the lower court. In his motion to suppress statements, admissions or confessions appellant contended that he was illegally arrested without probable cause on October 11, 1988 (R 6237). He did not assert that Castro's arrest was illegal for noncompliance with the Florida Statutes. If appellant did not present this argument below, he is precluded from initiating it here. Steinhorst v. State, 412 So. 2d 902 (Fla. 1990).

argument provided below in the prosecutor's memorandum of law (R 6922 - 23):

> "V. Illegal Arrest
>
> The fact that an officer informed arrestee that there was a warrant outstanding for his arrest sufficiently complied with the statute requiring officer making arrest by warrant to inform arrestee of cause of arrest. Conti v. State, 540 So. 2d 934 (Fla. 1st DCA 1989)
>
> In Manning v. State, 506 So. 2d 1094 (Fla. 3rd DCA 1987), the Court found that a defendant could knowingly and voluntarily waive his Miranda rights through [sic] he was not immediately informed that he was under arrest, where he was aware of import of questions leveled at him during the interrogation. See also Colorado v. Spring, 107 S.Ct. 851 (1987), where the court held that mere silence by law enforcement officials as to subject matter of interrogation is not "trickery" sufficient to invalidate suspect's waiver of Miranda rights.
>
> In the present case, the Defendant was arrested on the basis of a warrant and on probable cause and the Court has previously ruled the arrest valid. The testimony of Detective Sullivan also clearly establishes he was informed of the nature of the charges against him prior to any questioning."

Appellant announces his disagreement with Conti v. State, 540 So. 2d 934 (Fla. 1st DCA 1989) and asks this Court not to follow it. Appellee agrees with Conti and asks the Court to accept it:

> Decisions in Florida and in other jurisdictions indicate a standard of substantial compliance with arrest statutes such as section 901.16. *City of Miami v. Nelson, 186* So. 2d 535 (Fla. 3d DCA 1966), *cert. denied,* 194 So. 2d 621 (Fla. 1966) (fact that a person to be arrested is not informed of the

> cause of the arrest until subsequent thereto does not necessarily deprive him of his rights); *United States v. Robinson*, 325 F.2d 391 (2d Cir. 1963) (substantial compliance test, eschewing a "ritualistic" approach); *Holt v. State*, 357 P.2d 574 (Okl. Cr. 1960), *cert. denied*, 366 U.S. 716, 81 S.Ct. 1659, 6 L.Ed.2d 846 (1961)(the failure of an officer to expressly inform of cause of arrest will not render arrest illegal where a person arrested knew officer and knew he was acting in official capacity); *People v. Maddox*, 46 Cal.2d 301, 294 P.2d 6 (1956), *cert. denied, 352* U.S. 858, 77 S.Ct. 81, 1 L.Ed.2d 65 (1956) (failure to inform of cause of arrest is unrelated and collateral to the securing of evidence incident to the arrest).

(text at 935)

C. Noncompliance with F.S. 907.04 --

Appellant points to the testimony of Detective Sutton that he was not familiar with F.S. 907.04 (and did not feel this situation fit the requirements of the statute -- R 548). To the extent that appellant is urging some defect in the procedures following his arrest on the Iris White homicide he should -- if he chooses -- assert that complaint on the Iris White appeal, Case No. 78,33; In any event, it is immaterial whether Johnson was taken to the Sheriff or the police department for the interview with Miranda warnings and the subsequent voluntary confession. If appellant is suggesting that there was some deliberate effort to delay or deny him his first appearance hearing under Rule 3.130, R.Cr.P. as the prosecutor argued below:

> "All of the officers testified there was no discussion or plan to delay the Defendant's attendance at the hearings. Additionally, defense witnesses testified the Defendant was returned to the jail in time to attend the

> hearings and that persons who do arrive late are frequently added on to the First Appearance Docket."
>
> (R 6914)

See also testimony of Detective Sullivan at R 972, 976, testimony of Sergeant Lacertosa at R 1215, testimony of Cindy Dunlap at R 963, testimony of Detective Sutton at R 499 - 500).

And the lack of a first appearance within twenty-four hours (on the Iris White charge) does not affect a confession obtained after a defendant is advised of his rights and a confession is voluntary with no indication the delay induced the confession. Keen v. State, 504 So. 2d 396 (Fla. 1987); Williams v. State, 466 So. 2d 1246 (Fla. 1st DCA 1985).

Appellant argues that the officers did not have probable cause to arrest Johnson for the McCahon offenses and were able to use trickery and the coercive effect of custodial interrogation to obtain confessions to these crimes. Johnson ignores the testimony below by Detective Sutton that defendant brought up the McCahon case when the police actually intended to start the interview with the White case (R 479), appellant told polygraph examiner Robert Stanton that he was a suspect in both the White and McCahon cases (R 580), and Detective Sullivan testified that the police planned to start asking about victim White but that appellant surprised them by starting on McCahon (R 718). Moreover, there was no coercion, as all present so testified.

D. The Desire to get a shot -- After appellant had given his oral and taped confessions to the murder of Jackie McCahon

and while being escorted to the county jail, Johnson volunteered that he would like a shot. Detective Sullivan thought he meant a shot of liquor and asked him what he meant and Johnson explained he would rather end it with a shot than face the chance of the electric chair. Sullivan did not respond (R 764 - 65). Sullivan repeated the incident to the jury at trial (R 5101). Similarly, detective Sutton testified at the suppression hearing -- but presumably did not repeat it at trial -- that Johnson asked if he could get a shot and made it clear that he was talking about a lethal injection (R 499 - 500). This contention appears to be procedurally barred.[6]

Appellant contends that the statement was part of the previous interrogation and flowed from it; that he would not have said he feared the electric chair if he had not confessed to two murders and other crimes. Appellee responds that this subsequent volunteered and voluntary statement after having already given a free and voluntary confession confirms and corroborates the state's position and refutes the absurd contention Johnson presented to the jury that he was simply given the details by the police to confess to a crime he did not commit. Innocent men do

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[6] Appellant did not urge this particular ground below; if appellant did not urge the "get a shot" comment as something to be suppressed, the claim should be deemed procedurally barred. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990).

not announce a concern about the electric chair and declare a preference for lethal injection.

In Phillips v. State, 612 So. 2d 557 (Fla. 1992), this Court held that police-initiated questions, after the appointment of counsel at first appearance violated the right to counsel and rendered the statements received inadmissible. Phillips does not aid Johnson since appellant gave his voluntary statements to police prior to the first appearance and the appointment of counsel and never requested counsel.

Appellant contends that although he was the one who initiated this dialogue, this Court should construe the incident as part of a continued interrogation. Clearly, it was not and appellant's effort to stretch his interpretation on this Procrustean bed must fail. Sullivan initially was confused and thought he might be requesting alcohol and when Johnson explained with a clarifying answer to Sullivan's inquiry, Sullivan did not pursue the matter. In no sense can this be deemed part of a continuous interrogation. And Sullivan was not on notice that Johnson would give incriminating responses -- relying on his own experience with alcohol he thought Johnson was inquiring about a beverage.

Appellant contends that Sullivan should have provided Miranda warnings anew. He need not have since the exchange was not a custodial interrogation. See Rhode Island v. Innis, 446 U.S. 291 (1980).

Appellant cites Lornitis v. State, 394 So. 2d 455 (Fla. 1st DCA 1981), but there the police request to the defendants to identify personal items in the cargo area must be deemed to have anticipated that compliance with the request would produce the incriminating responses. Here the police would not reasonably know that Johnson's apparent request for a drink would lead to an additional incriminating response.

Appellant claims that an identical situation occurred in Kight v. State, 512 So. 2d 922 (Fla. 1987). There, this Court held there was no violation of Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378 (1981) "because it was Kight who initiated the conversation outside the property room when he made the unprovoked statement to Detective Weeks that he was not afraid of the chair." Ibid. at 926. This Court added that Kight was entitled to a fresh set of warnings before further interrogation in connection with the Butler homicide. (Appellant Johnson was given renewed Miranda warnings when questioned after being brought back from the County jail on the 12th of October R 767). While the Court deemed the officers "What chair?" inquiry was reasonably likely to elicit an incriminating response -- there is nothing unclear about being "afraid of the chair" -- unlike Johnson's request for a shot -- the Kight court also found the remark harmless in light of the defendant's subsequent admissions after Miranda warnings.

Finally, Johnson argues, the statements on the way to the jail were the fruit of the poisonous tree and tainted because

"the cat was already out of the bag." Appellee responds there was no poisonous tree to yield fruit -- appellant had voluntarily admitted his crimes knowingly after complete Miranda warnings and there was no subsequent interrogation on the way to the jail for the purpose of receiving additional incriminating evidence. Detective Sullivan was understandably confused about the apparent request for alcohol and could permissibly ask Johnson what he meant (unlike Kight).

Appellant cites Anderson v. State, 487 So. 2d 85 (Fla. 2d DCA 1986) where then-Judge Grimes held that suspect who had requested counsel initially upon having been given Miranda warnings and who did not initiate subsequent interrogations was entitled to have his confession suppressed. Appellee has no disagreement with the principle applied there but it has no applicability here when the uncontradicted testimony of all present during the interview which led to Johnson's confession insisted there was no request for counsel (R 474, 491, 500, 599, 611, 717, 767, 770). Nor was there any coercion (R 474, 482, 486, 489, 496, 501, 503, 586, 612 - 613, 716, 750, 771).

E. The statement and knife obtained after police talked to Johnson following his appearance in jail -- Appellee relies on the summary provided by the prosecutor in his post-hearing memo below:

> The Defendant was taken to the county jail at 5:00 a.m.. After two hours, during which time the Defendant was fed and had the opportunity to sleep, the Defendant was returned to the police department for the

> purpose of executing a search warrant on his person. As he was escorted back to the police department, he was again read his Miranda warnings by Detective Sullivan and again acknowledged and waived those rights. After the Search Warrant was completed, the Defendant was interviewed for approximately 15 minutes and made additional admissions to Detectives Sullivan and Sapp.
>
> The Defendant was returned to the jail by 8:30 a.m., but was not taken to First Appearance Hearings on October 12th. The testimony is clear that there was no police action to deny the Defendant the opportunity to attend First Appearances. All of the officers testified there was no discussion or plan to delay the Defendant's attendance at the hearings. Additionally, defense witnesses testified the Defendant was returned to the jail in time to attend the hearings and that persons who do arrive late are frequently added on to the First Appearance Docket.

(R 6913 - 14)

As urged, supra, in this brief the officers testified there was no attempt, plan or effort to keep Johnson away from his first appearance hearing. Detective Sutton testified that after the confession to the McCahon and White homicides at about 4:00 a.m., appellant mentioned being a night person (R 509). Detective Sullivan also testified that when he and Sapp went to the jail at about 7:15 a.m., to bring Johnson to the police department for a search warrant he asked Johnson if he were tired and whether he got any sleep; Johnson replied that he was not tired, he was a night person (R 756). The purpose for taking Johnson to the criminalistic section was that it was a sterile environment for taking hair or blood samples. That took until

8:15 a.m. (R 767). Sullivan then interviewed him and asked questions about the knife used in the McCahon homicide and Johnson was escorted back to the county jail (R 768 - 770).[7]

Detective Sapp went to the jail between 7:15 and 7:30 a.m. to bring Johnson back to the police department to execute a search warrant and to clear up some minor points (R 1248). This interview lasted about fifteen minutes, from 8:15 to 8:30; they received information about the knife blade and handle which was later recovered. Johnson was returned to the county jail about 8:30 a.m. (R 1249 - 50).

Defense witness Cindy Dunlop testified that appellant had his first appearance hearing on October 13, she did not recall the time first appearances started on October 12 and there was nothing to prevent his appearance on October 12, after being brought back to the jail at 8:45 a.m. (R 962 - 65).

With respect to the statement received on the morning of the 12th after the police returned to the county jail, appellant argues that it should have been suppressed because (1) it was a denial of his due process rights to counsel under Haliburton v. State, 514 So. 2d 1088 (Fla. 1987), (2) Johnson's right to counsel under the Constitutions and Rule 3.111 when he was booked into jail at 4:48 a.m., (3) the subsequent statement about the knife constituted a fruit of the poisonous tree from the prior

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[7] He also asked about a couple of unrelated homicides which appellant denied.

alleged illegal interrogation, (4) the second statement occurred after the Sixth Amendment right to counsel had attached and the Fifth Amendment principles of Michigan v. Mosley, 423 U.S. 96 (1975) were inapplicable and (5) the police allegedly exploited the delayed first appearance to induce the second statement. All the assertions are meritless. (1) In Haliburton, supra, an attorney retained on behalf of the accused was at the police station requesting to speak to him. This Court found that failure to inform the accused deprived him of information essential to a knowing and intelligent waiver of counsel. Here, there was no deception regarding Johnson's attorney desiring to speak to him -- he had no attorney and didn't request one.

The instant case is closer to Harvey v. State, 529 So. 2d 1083 (Fla. 1988), where this Court found no Haliburton violation. See also Bruno v. State, 574 So. 2d 80 (Fla. 1991).

(2) There was no testimony presented below that the officers when picking up Johnson at the jail to get the samples for warrant were aware of any attempt by counsel or a representative of an effort by an attorney to reach Johnson. This claim is meritless.

(3) Appellant continues to rehash his argument that he would not have answered these questions about the knife but for the earlier interrogation. Appellant did not testify below and the testimony of those who did was that appellant testified voluntarily after full Miranda warnings.

(4) There was no Sixth Amendment violation of right to counsel. Appellant seeks to distinguish Michigan v. Mosley, 423 U.S. 96, 46 L.Ed.2d 313 (1975). But Johnson did not invoke the right to remain silent at all (R 6913 - 14).

(5) Lastly, appellant argues that "police exploited the delayed first appearance to induce the second statement." (Brief, p. 34). They did not. As stated, supra, there was no effort, intention or attempt to delay the first appearance hearing. Sullivan and Sapp retrieved Johnson at the jail to execute a search warrant and briefly asked a few clarifying questions about McCahon and the knife and promptly returned him to the jail where he could have been added on to the first appearance hearing. Johnson cites Anderson v. State, 420 So. 2d 574 (Fla. 1982), where in a post-indictment trip from Minnesota to Florida -- after initiation of adversary proceedings -- which covered four days preventing his being taken before a judicial officer within twenty-four hours of his arrest the police obtained an incriminating statement.

In the instant case, as explained in Owen v. State, 596 So. 2d 985 (Fla. 1992), there was no Sixth Amendment right to counsel on the McCahon homicide "Because the questioning session during which he confessed took place prior to this first appearance." Id. at 989.

With respect to the knife recovered following appellant's October 12 admission, appellant compares the instant case to State v. LeCroy, 461 So. 2d 88 (Fla. 1984). There, the court

approved the admissibility of a statement by a murder suspect after Miranda rights were given where under the totality of circumstances it was clear the statement was voluntarily given. However, the Court also ruled that the defendant's admission of the location of the revolver after requesting an attorney required a remand for consideration of the independent source or inevitable discovery doctrines. Finally, a subsequent statement after a request for counsel and without Miranda warnings was held properly suppressed. Since all of the witnesses who were present below testified that Miranda warnings were given and there was no request for counsel, LeCroy is of no avail (R 767).

## ISSUE III

WHETHER A CLERK IMPROPERLY SWORE, QUALIFIED AND EXCUSED JURORS IN THE ABSENCE OF THE JUDGE.

At the beginning of jury selection for appellant's trial in the Katherine Cornell case, the defense objected that the seated panel had not been sworn. The court responded that they had been sworn in the jury holding room (R 2093). The defense objected that it was the court's obligation to swear the jury. Deputy Clerk Rebecca Adcock testified that it was her function to qualify and swear in the jury (R 2097). The group of thirty on this panel were sworn in in the jury waiting room (R 2097 - 98). Approximately eighteen people were excused from the venire. One black person was in the venire and still being held - None were excused (R 2099). The court denied the defense objection (R 2101).

At the subsequent jury selection proceeding for the Lawanda Giddens' trial, the defense again complained about the deputy clerk having sworn the jury panel. Deputy clerk Lisa Mae Loretti testified she was trained by her supervisor Cheryl Bottorff on giving the oath and asking seven qualifying questions (R 2959). She recited the seven questions asked (R 2961 - 62)[8] The only

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[8] A. The first question: Are each of you over the age of 18?

The second question: Were you each summoned by your proper name? The third question: Are you each residents of the State of Florida and Sarasota County?

The fourth question: Neither the Governor, or any cabinet

person excused that morning was a pregnant woman. Loretti swore in the panel (R 2962 - 63). The court denied the defense motion (R 2965).

Prior to jury selection in the Iris White trial, the defense again objected to the jury panel being sworn by the deputy clerk (R 3405). During the jury selection process in May 6, 1991, Cheryl Bottorff again testified that she was the supervisor of the jury and witness office and this jury panel was qualified by a deputy clerk in the office and the oath was administered by a deputy clerk (R 3412). A panel of 50 was randomly selected by a computer. No judge was present during that procedure (R 3413).

Prospective juror Ms. Merchant had not read or heard anything about the McCahon case and she could make a decision based on the evidence (R 3959 - 60). When the court told her the schedule for trial she replied that she wouldn't be able to stop working at night and she sleeps during the day (R 3962). She was a single parent with three children and she has a baby-sitter

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officer, nor any sheriff or his deputy, municipal police office, clerk of court, or judge shall be qualified to serve as a juror.

Is there anyone in this room filling one of the above-mentioned positions?

The fifth question: Have you ever been convicted of a crime and not restored to your civil rights?

The sixth question: Are there any criminal charges pending against you of which you are aware?

The seventh question: Are you each duly qualified electors of Sarasota County?

when she works (R 3963). When asked if she thought the death penalty were appropriate she said, Not really (R 3963). Without objection she was excused by the court because of financial hardship (R 3969).

Finally, on May 8, 1991, at the jury selection for the McCahon trial, juror Romecki indicated that he had been charged with petty theft, had pled guilty and paid a fine; he seemed uncertain if he was adjudicated (R 4110). He had filled out the questionnaire but no one asked him about the incident (R 4111). The defense objected that the jury selection was not right; the court disagreed, observing that no one would have been that thorough with anyone and if he didn't respond, the court asked if the defense were asking to excuse Romecki and when the defense responded in the affirmative, the court did so pursuant to F.S. 40.013(1), even though no adjudication had been established (R 4115).

Appellant can obtain no relief under State v Singletary, 549 So. 2d 996 (Fla. 1989). There, this Court held that in the future no questioning of prospective jurors in a criminal case may take place outside of the presence of a trial judge. The Court explained that the expediency of juror selection outside the presence of a judge must yield to judicial supervision of all questioning and the exercise of peremptory challenges. Id. at 999. Singletary is not implicated sub judice as the record affirmatively reflects the presence of Honorable Andrew Owens, Circuit Judge in the jury selection and voir dire examination in

the jurors selected for the Katherine Cornell, Lawanda Giddens, Jackie McCahan and Iris White trials (R 2080 - 2320, R 2937 3357, R 3412 - 4298).

Appellant cites F.S. 92.50(1) as implying that judges must swear in prospective jurors but it does not clearly specify that only judges may do so and that they may not delegate to deputy clerks as part of their administration.[9] And it would be absurd to suggest that the prospective jurors during their lengthy voir dire participation did not believe they were under oath.

In Remeta v. State, 522 So. 2d 825 (Fla. 1988), this Court rejected a defense contention that the trial court had erred in not obtaining an express personal waiver from defendant for his absence during the general qualification of the jury. The Court reasoned that counsel for a defendant does not ordinarily participate in this type qualification process - in many instances counsel and the defendant are not present because this preliminary qualification occurs days prior to the trial.

Appellant cites Rule 3.300 but that rule does not specify that a trial judge may not delegate to a clerk the responsibility to initially swear in jurors prior to the full voir dire examination conducted in the presence of the trial judge and respective counsel. The trial court did not abuse its discretion

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[9] The trial court alluded to an administrative order from Judge Smith regarding the swearing in of the jurors (R 2956 - 57). See Attached Exhibit 1.

in permitting the clerk to swearing prospective jurors and then presiding over the voir dire examination and ruling upon all the peremptory and for cause challenges interposed.[10]

Appellant is not aided by Gilliam v. State, 514 So. 2d 1098 (Fla. 1981) wherein the trial court erred by refusing the defendant the right to challenge jurors because of his nonparticipation in jury selection. Here, appellant was allowed to challenge jurors for cause and peremptorily throughout the voir dire examination.[11]

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[10] The trial court had stated that the procedure it was following with the prospective jurors sworn in the jury holding room and then sworn again prior the start of trial -- was the only method it had used for eight years (R 2093 - 94).

[11] A general qualification of the jury is not a critical stage in the proceedings requiring the presence of the accused. Henderson v. Dugger, 925 F.2d 1309, 1316 (11th Cir. 1991); Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986), cert. denied, 484 U.S. 905, 108 S.Ct. 248, 98 L.Ed.2d 206 (1987).

## ISSUE IV

WHETHER THE COURT SHOULD HAVE DISMISSED THE INDICTMENT OR AT LEAST REQUIRED AN EVIDENTIARY HEARING ON THE CLAIM THAT THE GRAND JURY WAS IMPROPERLY QUALIFIED.

On May 14, 1991, appellant filed a motion to dismiss indictment and motion to challenge grand jury panel (R 8057 - 64) and on May 31, 1991, Circuit Judge Andrew Owen denied these motions (R 8077 - 8078; R 4806).

At a hearing on May 16, 1991 (following the trial in appellant's assault upon Lawanda Giddens), the trial court heard the testimony of Cheryl Bottorff (R 4740 - 4754) and the argument of trial defense counsel that there should have been a court reporter to make a record; and the court denied the motion (R 4755 - 4760; R 4806). The trial court correctly denied the motion. See Antone v. State, 382 So.2d 1205, 1214 (Fla. 1981) (more than mere conclusory statements are necessary to sustain a challenge that the grand jury was improperly selected); Thompson v. State, 565 So. 2d 1311, 1313 (Fla. 1990) (no statutory duty to record grand jury proceedings nor do we find any constitutional basis to impose such a duty in all cases).

Additionally, appellant's challenge was untimely since made in May of 1991, after the grand jury had returned the indictment against him. Florida Statute 950.05; Seay v. State, 286 So. 2d 532 (Fla. 1973); Porter v. State, 478 So. 2d 33, 36 (Fla. 1985). Moreover, the petit jury's guilty verdict should render harmless any error in the grand jury proceedings. United States v.

Mechanik, 475 U.S. 66, 89 L.Ed.2d 50 (1986); Porter v. Wainwright, 850 F.2d 930, 941 (11th Cir. 1986).[12]

Witness Cheryl Bottorff testified that the procedure in 1988 for qualifying jurors for service on the grand jury was that they were selected randomly from voter registration rolls where they are summoned and appear for jury duty (R 4740). She identified the grand jury list of eighteen persons selected and served in 1988. She did not know how those people were selcted because at that time they were qualified under the Court's Administrator's Office (R 4742). She could not say whether a judge was present when those eighteen persons were qualified to serve. The witness had a set of questions used in her office given to her by the Court Administrator's Office (R 4743), but she couldn't say what was asked since she was not present (R 4744) (Exhibit B was marked for identification but not admitted into evidence) (R 4745). She had no records as to the judge that dealt with that grand jury. She started qualifying jurors in August of 1981; they would swear in the jurors with a prospective oath and ask them the seven qualifying questions on Exhibit B (R 4746). No judge is prsent. After their selection, they are sent to another room and given instructions by the judge (R 4747).

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[12] The state may rely on the timeliness argument since a trial court's ruling may be sustained for any reason which is supported by the record and the record discloses that the challenge was untimely. See Smith v. Phillips, 455 U.S. 209, 71 L.Ed.2d 78 n. 6 (1982); Caso v. State, 524 So. 2d 422 (Fla. 1988); Combs v. State, 36 So. 2d 93 (Fla. 1983); Stuart v. State, 360 So.2d 46 (Fla. 1978).

It was her understanding that the judges, through administrative order have delegated to the clerk's office the qualifying of the jury (R 4749). In the normal course of her experience a judge is present during the oath to the grand juries and appoints the foreperson and vice-foreperson. When the true bill comes back, the judge signes it. She wouldn't know what happened in a particular case unless her name was on the indictment (R 4752 - 53).

The Bottorf testimony establishes that there was substantial compliance with the law, if indeed, the same procedures she testified occurred during the grand jury action on Mr. Johnson (which she did not know).

## ISSUE V

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN DELAYING THE TRIAL APPROXIMATELY THREE WEEKS FOLLOWING VOIR DIRE.

Prior to the beginning of the trial on June 3, 1991, the defense asked for a change of venue based on pretrial publicity, complaining that the jury had been selected a month earlier (R 4813). The motion for change of venue was denied (R 4815). The defense complained that they had not had the opportunity to voir dire the jurors regarding the potential convictions in the other cases and the court denied the motion to strike the panel (R 4817). The court granted the defense request to ask the jury if they'd heard anything about Johnson since they last convened (R 4826 - 27). The court then addressed the assembled jurors:

> There are a couple things that I'd like to review with you before we begin. And that is that when we recessed the last time I asked each of you not to read or listen to or have any discussions with anyone pertaining to this case.
>
> And so I ask each of you if anyone has in fact read any articles pertaining to this case since we were last here in court, if they would please hold up their hand.
>
> THE JURY: (No affirmative response.)
>
> THE COURT: Okay. So all of you followed those directions and didn't read anything pertaining to this case or have any discussions with anyone about anything pertaining to this case since we've last left; is that correct?
>
> THE JURY: (Affirmative response.)
>
> THE COURT: Have any of you heard anything about Mr. Emanuel Johnson since we've last left this courtroom?

THE JURY: (No affirmative response.)

THE COURT: So would I be correct, then, in stating that any verdict that you would render in this case would be an impartial verdict based solely on the evidence presented at trial?

THE JURY: (Affirmative response.)

THE COURT: Is that correct?

THE JURY: (Affirmative response.)"

(R 4837 - 38)

Previously, after the jury had been selected on May 9, 1991, the trial court instructed:

" . .. There are just a couple of things I'd like to very briefly review with you before excusing you.

That is that, as you can see, we've gone to great lengths here to be sure that we pick a fair and impartial jury. And it's very important that during this period, while we're in recess until we actually begin the presentation of evidence, that each of you remain fair and impartial. And that's very important, in that you don't read the section A of the newspaper, look at the headlines, or the Metro section. So that each person, when you actually hear in this courtroom and my instruction on the law.

Additionally, I would ask you not to watch the news reports, or anything on the radio or television that may or may not pertaining to this case, during the period that you are in recess.

Also, utmost importance is that you not have any discussions with friends or anyone about this case or what occurred here.

Once the case is concluded, you can talk to your heart's content about it. But I would ask you, until that time, not to discuss with

anyone what occurred here, your likes of the attorneys, dislikes, the individuals that are going to be witnesses, et cetera, so that every one of you, when you come back and say that, and truthfully, I'm sure that you will, each of you will be able to, that my decision was based upon the evidence that I heard here in the courtroom. And you can look the State in the eye and tell them that, I based my decision on the evidence that I heard here in the courtroom. And you can look Mr. Johnson in the eye and tell him the same thing, and walk out of here and know that you based your decision on the evidence you heard in this courtroom, and that our system works,. And it can only work with fine people such as yourself who are willing to make the sacrifice and serve as jurors.

Right now, we plan to start this trial on June the 3rd, the reason that I had your phone numbers and so forth, that would be at 9:00 a.m. in this courtroom.

I will verify that, and from time to time I may drop you a letter, just to remind you of the date, and to please not read or listen to any reports concerning this case.

Do any of you have any questions before we recess at this time? And if something should arise, that's a good idea, as to how you could reach the court. And of you have -- how many would need the number written down, or need something to write with?

(R 4292 - 93)

* * *

PROSPECTIVE JUROR STAUBE: What did you mention about June 17th.

THE COURT: Okay. Well, we anticipate starting the trial on June the 3rd. And of course, nothing, as you can see, is ever precisely accurate in the court system. We anticipate at this time that it will take five days to present the evidence in the

> case. Now, assuming that happens, again, at this point I have no idea of what verdict you may reach. If you do return a verdict of guilty of premeditated first degree murder and we go to the penalty phase, it's going to take us approximately a week to schedule witnesses and so forth, because we don't' know if we need to have them here or not. So the, on the 17th, if it was necessary we would be starting the penalty phase. But we're uncertain, at this point we just don't' know, so we don't' want to go to the expense of involving the witnesses until we know.
>
> PROSPECTIVE JUROR STRAUBE: I'll just figure the month of June.
>
> THE COURT: We anticipate the penalty phase will take approximately three days.
>
> Well, I certainly hope that all of have you a great week. It's been a pleasure to work with you. In fact, it's a privilege to work with each one of you and I really look forward to seeing all of your smiling faces back on June the 3rd. And I hope during the interim that you have a very pleasant few weeks. And get well rested, and we'll tackle this on June the 3rd.
>
> (R 4297)

The jury returned its verdicts of guilty in the instant case on June 7, 1991 (R 5758). The Court announced it would bring the jury back for penalty phase on Monday, June 17, and the defense requested some court time on Friday, June 14 (R 5760 -60). The court then apologized to the jury for the leaky roofs that were being retarred, told them to return for the penalty phase on Monday June 17, and "I would ask each of you to please not read or listen or have any discussions with anyone about this case or anything pertaining to Emanuel Johnson so that, as you have done throughout this trial, you will be able to state to the court

that any decision you make is fairly and impartially rendered based upon the evidence received in the courtroom" (R 5762).

The jury returned on the 17th, heard penalty phase testimony and prior to final penalty arguments on June 18th the jury affirmatively responded to the court's inquiry that they had followed the court's direction of the previous night not to read or listen to anyone about Emanual Johnson (R 6038). A day earlier, on June 17th, the court had inquired:

> " And I know that we were off last week. And can each one of you say to the Court that at this time during that period that you didn't read anything pertaining to this case, have any discussions with anyone about this case, read anything about Emanual Johnson or have any discussions with anyone about Emanuel Johnson?
>
> So all of you can say that the decision that you're going to make concerning, decision you make concerning the guilt or innocence and the decision that you're going to make upon this penalty portion of the trial is based upon the evidence that's been presented here in court?
>
> THE JURY: (Indicating affirmatively)":
>
> (R 6013)

The trial court denied a motion for new trial following argument by defense counsel, and the prosecutor, that the court had repeatedly asked the jurors about publicity and that the defense was allowed to voir dire jurors about other crimes and chose not to (R 6128 - 29, R 6131).

The record reflects that after the Cornell trial the lower court was concerned about the number of juries that would have to

be selected (depending on whether charges would be consolidated), the number of days the trials on the various offenses would take and the traveling and scheduling of the necessary witnesses (people coming in from out of state, etc.). To accomplish these goals, the court decided to take two weeks court time selecting the juries for the Giddens, White and McCahon trials, have the juries return for the respective trials and set the travel arrangements appropriately for the witnesses. Additionally, there were pretrial motions still to be resolved (R 2940 - 49).

Any complaint that Johnson may urge regarding the McCahon jury's exposure to the media and being influenced in their verdict or penalty recommendation after selection but prior to hearing testimony is refuted by the trial court's directives to the jurors and examination of them on their return. The jury appropriately indicated they had followed the court's instructions and had not been tainted. Appellant cites R 2684 and 2954 as examples of newspaper articles a juror may have seen but those cites reflect a portion of the voir dire exam in April - well before the McCahon jurors were examined and presumably the lengthy voir dire of the McCahon potential jurors covered any concern about newspaper publicity. Appellant cites Derrick v. State, 581 So. 2d 31 (Fla. 1991), but there, as here, the trial judge had instructed the jury on several occasions to avoid media coverage or other discussion and any error was cured by the jurors subsequently acknowledging they read nothing.

The complaint by Johnson that he could not voir dire the McCahon jury regarding any knowledge they may have of appellant's other crimes upon Cornell, Giddens and White ignores the fact that he could have made such inquiry -- if he wanted to -- when initially selecting the McCahon jury.[13]

While it is true that Johnson was not permitted the opportunity to voir dire the jurors upon their return to hear the case, the court's inquiry was satisfactory. Derrick, supra. Appellant cites Kelley v. State, 371 So. 2d 163 (Fla. 1st DCA 1979), but that opinion does not reflect a trial court's admonition to jurors to avoid learning about other matters or the court's inquiry to determine whether his directive was obeyed; additionally, that case provided a factor of a juror independently approaching the bench and reciting a belief that a fair trial was impossible.

Appellant relies on Moses v. State, 535 So. 2d 350 (Fla. 4th DCA 1988), which dealt with the trial court's limiting defense voir dire questioning during the selection of the jury. Appellant was not so limited by the trial judge sub judice and counsel was allowed to ask what he wanted in the selection of the

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[13] This argument by Johnson is also somewhat inconsistent with his earliler reliance on cases such as Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977), which warned of the dangers of jurors being exposed to other offenses by the defendant.

McCahon jury; he was simply not permitted to start the process anew after the jury had been selected.

Johnson claims that he was limited also in his voir dire by not being able to inquire regarding potentially changing defense theories such as insanity. But when counsel was conducting voir dire he could ask what he wanted. The claim of possibly switching to an insanity defense is particularly specious since the defense had formally abandoned and withdrew its insanity defense (R 8053) prior to initial voir dire of the McCahon jury. In any event changing judgments of trial strategy frequently occur -- both by prosecution and defense -- yet no one would urge that voir dire must start again.

Appellant mentions as a third objection that it made things difficult for jurors who had travel plans or other unexpected events. If this is a complaint about selection of the McCahon jury, counsel does not grace us with a record cite. If it is a complaint lodged below only in the selection of the White jury, it is irrelevant to the instant appeal.[14]

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[14] Appellant seems to be arguing at pages 63 and 64 of his brief that he is entitled to discharge in the Iris White case. Appellee submits that is an issue to be urged, if at all, in the appellate brief attacking the judgment and sentence in the White case, Florida Appeal Case No. 78,336. The undersigned counsel for appellee is addressing only challenges to the McCahon judgment and sentence -- Appeal Case No. 78,337 and declines to aid and abet appellant's effort to mix the two appeals to avoid this Court's order regarding the length of briefs.

Appellant relies on McDermitt v. State, 383 So. 2d 712 (Fla. 3d DCA 1980), wherein the court found an unreasonable delay of fifty-five days on the state's request for continuance in an effort to obtain a witness from New York. No good cause was shown to warrant a continuance, the state had already had three prior continuances and the state would not be rewarded for doing indirectly what it could not do directly.[15] Armstrong v. State, 426 So. 2d 1173 (Fla. 5th DCA 1983) similarly involved a jury separation of some fifty-two days during trial. To the extent that the case is interpreted as meaning that only a potential or possibility of prejudice suffices for the awarding of a new trial at any separation of the jury -- irrespective of trial judge admonition and obedience by the jury to that admonition -- appellee submits the decision is erroneous.

In Livingston v. State, 458 So. 2d 235 (Fla. 1984), after the presentation of all the evidence, the final arguments and instructions to the jury, the jury began its deliberations on a late Friday afternoon. The trial judge allowed them to separate and go home for the weekend. This Court opined:

> [2] Where the jury has not been sequestered during trial, the judge has the discretion to allow the jury to separate after taking of all the evidence and the giving of instructions and before they begin

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[15] Appellant is not aided by Raines v. State, 65 So. 2d 558 (Fla. 1953), where the jury was separated with no instruction regarding communicating with others.

deliberating. Fla. R. Crim. Pro. 3.370(b). There is no requirement of sequestration prior to final retirement for deliberations. *Simmons v. State*, 214 So. 2d 729 (Fla. 3d DCA 1968). But thereafter, especially in a capital case where there has been extensive pretrial publicity, we believe that different principles should apply.

[3] There is no automatic rule requiring sequestration of the jury during the trial of a capital case, the matter being a discretionary one to be governed by the necessities of each such proceeding. *Ford v. State*, 374 So. 2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). However, to allow the jurors to disperse for a weekend after they have begun their deliberations raises serious questions about their ability to reconvene and resume deliberations completely free from outside influences.

(emphasis supplied) (text at 237).

* * *

[5, 6] We therefore find that the trial court erred and that the error prejudiced appellant's right to a fair trial. We hold that in a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after being ultimately unable to do so. A separation of the jurors after commencement of deliberations will generally be grounds for a mistrial, save for exceptional circumstances of emergency, accident, or other special necessity. Such a strict rule appears to be necessary in order to keep the attention of the jurors properly focused and concentrated on their deliberations.

(emphasis supplied) (text at 239).

The instant case does not come under the Livingston rule: the McCahon jury had not yet been sworn, had heard no evidence in

the trial, listened to no argument by counsel, received no instructions on the evidence and law by the court and had not yet begun its deliberations. See Hernandez v. State, 572 So. 2d 969, 972 (Fla. 3d DCA 1990) wherein the court ruled:

> [5-7] Defendant also contends that he is entitled to discharge under the rule announced in *McDermott*, owing to separation of the jury between the time it was selected and the commencement of the evidentiary portion of the trial. The circumstances present here fall far short of those involved in *McDermott* and we conclude that defendant is not entitled to discharge.[2,3] We therefore reverse the convictions and remand for a new trial.
>
> [2] The record is scanty on the exact reasons for the continuance in the present case. There is a suggestion that the delay was occasioned principally because the court desired first to reach two civil cases which had been rolled over from earlier trial dates.
>
> A separation between the selection of the jury and the commencement of the actual trial is highly undesirable and should be avoided wherever possible. While we are entirely sympathetic with the trial court's desire to reach civil cases carried over from earlier dates, absent a bona fide emergency or some genuinely exigent circumstance, the court ordinarily should proceed with the criminal trial. The record is not clear on whether such circumstances existed in the present case.
>
> *McDermott* indicates that in extreme cases such as the 55-day hiatus involved in that case, a discharge may result. *McDermott* also indicates that where there are shorter periods of delay, prejudice will not be presumed but must be shown in order to obtain relief. There has been no showing of prejudice with respect to the eleven-day delay involved in the present case, see *Compo v. State*, 525 So. 2d 505, 506 - 07 (Fla. 2d

DCA 1988), but if there were, then the remedy (except in the extreme case represented by *McDermott* itself) would be a new trial. See *Armstrong v. State*, 426 So. 2d 173 (Fla. 5th DCA 1983). As a new trial has been ordered on the basis of *Richardson*, further consideration of the jury separation issue in this case is not needed.

[3] After final submission of the cause to the jury, the question of separation is governed by Rule 3.370(b), Florida Rules of Criminal procedure, as construed in such decisions as *Livingston v. State*, 458 So. 2d 235 (Fla. 1984), and *Ulloa v. State*, 486 So. 2d 1373 (Fla. 3d DCA 1986); *see also* §918.06, Fla.Stat. (1989).

And in Compo v. State, 525 So. 2d 505 (Fla. 2d DCA 1988), the court affirmed a conviction, noting:

> [1] A trial commences for speedy trial purposes upon the swearing of the jury panel for voir dire examination. *Moore v. State*, 368 So. 2d 1291 (Fla. 1979); *Stuart v. State*, 360 So. 2d 406 (Fla. 19790. Here, the voir dire examination of the first group of prospective jurors began and was completed within the time limit established by the speedy trial rule. Compo is, therefore, considered to have been "brought to trial" within the period required by the rule. *State v. Vukojevich*, 392 So. 2d 297 (Fla. 2d DCA 1980). Under a circumstance such as the present where the speedy trial rule has been complied with but there has been an interruption in the progress of the trial, other considerations come into play. *See McDermott v. State*, 383 So. 2d 712 (Fla. 3d DCA 1980). These considerations include the length and reason for the delay, the defendant's assertion of his right to proceed to trial, and possible prejudice to the defendant. Any such prejudice must be demonstrated by the defendant and cannot be presumed. *Id.* at 714. As stated in *McDermott*, these factors should be examined in each individual case with a purpose of striking a balance between society's interests and the rights of the accused.

> [2] We find that Compo has demonstrated no prejudice resulting from the lapse of twelve days between the initial jury selection and completion of the trial that affected his convictions, since a new trial with a new jury was initiated to avoid any possible influence that the news accounts may have had upon a decision of the previously selected jury panel.[2] Without such a showing of prejudice, Compos's conviction must be affirmed.
>
> (text at 506 - 507) (emphasis supplied)

Appellant's list of imagined hypothesis -- that the jury might have convicted because the jury have seen a headline in another case, etc., rather than on the evidence where the appellant confessed his crime in great detail providing details to the police about which they were unaware corroborated by physical evidence is to borrow a phrase from Judge Learned Hand in Steckler v. United States, 7 F.2d 59, 60 (2nd Cir. 1925) in another context "to consider too curiously, unless all verdicts are to be upset on speculation."

Appellant's claim must be rejected.

## ISSUE VI

WHETHER THE JUDGE SHOULD HAVE EXCUSED FOR CAUSE PROSPECTIVE JURORS HANAWAY AND PULLMAN.

There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Cook v. State, 542 So. 2d 964 (Fla. 1989).

During jury voir dire examination, prospective juror Hanaway stated that he had no information regarding the McCahon homicide (R 3628), that any decision he would make would be based solely on the evidence and the court's instructions (R 3630). He advocated the death penalty but "it's hard to say without hearing what anything else is" and it's "very tough. It's a decision that I don't know if I could tell you right now, I would have to hear the aggravating factors and everything." He would try to keep an open mind (R 3631 - 32). He didn't know "without hearing the actual circumstances". He acknowledged that he would listen to the mitigating evidence and the instructions of the court and "the law concerning the decision has to be made" (R 3634). When asked if he would follow the law, he answered, "If so instructed, I would have to, yes, sir" (R 3634). Pullman would not base a decision on anything in the paper (R 3643). She could follow the law (R 3644). She believed in the death penalty "but I would have to be absolutely sure, without a reasonable doubt, before I would put that sentence onto somebody." She could envision circumstances where death would be appropriate and where a life sentence would be appropriate (R 3645). She would

follow the law (R 3646). When asked what was appropriate for someone found guilty of first degree murder, she answered "It would depend on the circumstances of the particular case" (R 3647). She didn't believe it would be difficult to follow the law about listening to mitigating evidence (R 3648). On further questioning by the court concerning considering all the evidence, she replied that she'd have to do that -- she couldn't just sentence someone to death; she'd hear everything and decide what's appropriate (R 3650). The defense challenged Pullman for cause, the request was denied (R 3651) and the defense exercised a peremptory challenge to excuse Pullman (R 4168).

Appellant's contention that a potential juror must be disqualified for cause because he "favors" or "advocates" the death penalty is meritless or it would result in the automatic exclusion of the seventy percent of the population who support the death penalty. The real question is whether the prospective juror can decide the case according to the evidence presented and the law as instructed by the judge. Juror Hanaway's answers to the inquiries at R 3628 - 38 repeatedly affirm that he would. It is not improper for a juror to respond when asked if he would find it <u>impossible</u> to recommend a life sentence, to answer that "it depends on the mitigating circumstances and everything" (R 3638). That defense counsel could elicit a confused answer to a single question does not render the juror disqualified:

> "Q. Well, let me ask you this: Do you think it's really appropriate to look at things about the defendant's background as opposed

> to looking at the crime that the defendant committed?
>
> THE COURT: In the second part, now, not in the first part. Prospective Juror Hanaway: In the sentencing?
>
> THE COURT: Right.
>
> PROSPECTIVE JUROR HANAWAY: Oh, okay. Like I tried to explain earlier, I believe in the death penalty and I would prescribe the death penalty in first degree murder, premeditated murder."

In subsequent voir dire examination the prosecutor was asking the panel a series of questions about whether the standard should be the same in a murder case as opposed to another type of case:

> Mr. Denney: Do you think it should be higher because it's a first degree murder case?

(R 4051)

Appellant then takes the colloquy with Hanaway out of context. The prosecutor was inquiring about the reasonable doubt standard in the guilt phase of a murder trial as opposed to a non-murder trial:

> MR. DENNEY: Do you think there is anything less noble about finding somebody guilty if the State has proved its case than not guilty?
>
> PROSPECTIVE JUROR MILIANO: No.
>
> MR. DENNEY: How about you, Mr. Hanaway, how do you feel about that?
>
> PROSPECTIVE JUROR HANAWAY: About the nobility of the case?
>
> MR. DENNEY: Well, using the same standard, no matter what type of case it is.

PROSPECTIVE JUROR HANAWAY: Trying the case, I can see the same type of standard, but the sentencing would have to be different.

MR. DENNEY: And the Court has already told you though that what we're going to start out with, we're going to try the guilt or innocence in this case, then we'll get to the other phase.

Now, how do you feel, do you think that you can use reasonable doubt standard? Do you think you're going to increase it, make it all doubt?

PROSPECTIVE JUROR HANAWAY: I don't think you can have a -

MR. DENNEY: Okay.

PROSPECTIVE JUROR HANAWAY: I don't think it could be complete, without actually everyone being there to watch it.

MR. DENNEY: What do you think about giving both sides a fair trial?

PROSPECTIVE JUROR HANAWAY: Well, it's up to the State to present its case.

MR. DENNEY: Okay.

PROSPECTIVE JUROR HANAWAY: That's what the trial is about.

MR. DENNEY: If we prove our case.

PROSPECTIVE JUROR HANAWAY: It's the State's burden to prove the case.

MR. DENNEY: Right. And case, do you think we're entitled to have that fair trial also?

PROSPECTIVE JUROR HANAWAY: Yes.

MR. DENNEY: And would that mean that you could come back with a guilty verdict if the State proves its case?

PROSPECTIVE JUROR HANAWAY: Yes.

(R 4052 - 53)

Hanaway could regard appellant as innocent prior to the trial (R 4136). Defense counsel renewed the challenge for cause to Hanaway citing only the juror's business hardship, attending a family baptism out of town later in the month and a friendship with the Court Administrator. The request was denied (R 4165 - 66).

Juror Pullman repeatedly stated that she could follow the law (R 3643), would have to be "absolutely sure" before sentencing someone to death (R 3644 - 46) and that it 'would depend on the circumstances of the case (R 3647) and that she'd have to hear everything - she couldn't just sentence someone to death - to decide what's appropriate (R 3651). Appellant in essence contends that since he elicited a single affirmative answer to his question regarding an automatic penalty, that confused response negates her prior and subsequent answers to the questions posed. The prosecutor correctly noted that the totality of her answers demonstrated that she would not automatically vote for any penalty and the court correctly rejected the challenge for cause because of ambiguity in some of the questions (R 3651)

Both this Court and the United States Supreme Court have recognized the primary role played by the trial judge in evaluating the responses given by prospective jurors during the lengthy and ambiguous interrogations on voir dire. See

Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985) quoting from Marshall v. Lonberger, 459 U.S. 422, 74 L.Ed.2d 646 (1983):

> "As was aptly stated by the New York Court of Appeals, although in a case of rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . .. To the sophistication and sagacity of the trial judge the law confides the duty of appraisal. Boyd v. Boyd, 252 NY 422, 429, 169 NE 632, 634.'"

(83 L.Ed.2d at 858).

See also A. Green v. State, 583 So. 2d 647, 652 (Fla. 1991) (Because the trial judge sees and hears the prospective jurors, he or she has the ability to assess the candor and the credibility of the answers given to the questions presented. Clearly, the trial judge is in the best position to determine if peremptory challenges have been properly exercised); Johnson v. State, 608 So. 2d 4, 8 (Fla. 1982) (deference must be paid to thejudge's determination of a prospective juror's qualifications).

The cases relied upon by appellant are either supportive of the state or distinguishable. Hamilton v. State, 547 So. 2d 630 (Fla. 1989) (jurors' responses when viewed together establish she did not presume the defendant was innocent; asserted she had fixed opinion as to guilt or innocence even after affirmatively responding she could hear the case with an open mind); Penn v. State, 574 So. 2d 1079 (Fla. 1991) (Okay for

juror to strongly favor the death penalty and agree to follow law as instructed; no abuse of discretion in refusing to excuse jurors for cause where they ultimately demonstrated competence by stating they would base decision on the evidence and instructions); Moore v. State, 525 So. 2d 870 (Fla. 1988) (juror who said his belief about the insanity defense would probably prevent him from following court's instruction on the issue should have been excused); Connell v. State, 480 So. 2d 1284 (Fla. 1985) (trial court erred in refusing to allow the defense opportunity to examine death-scrupled jurors and error not to excuse for cause jurors who would automatically recommend death). Hill v. State, 477 So. 2d 553 (Fla. 1985) (juror acknowledged presumption in favor of death penalty in this case before hearing evidence).

The trial court did not abuse its discretion in determining from the totality of the questions and answers that jurors Hanaway and Pullman could be impartial and correctly denied challenges for cause.

## ISSUE VII

WHETHER APPELLANT DEMONSTRATED DISCRIMINATION IN THE JURY VENIRE.

During the jury selection for Johnson's trial on the Kate Cornell offenses the following colloquy occurred:

> MR. METCALFE: Only other concern I have, Judge, just for the record -
>
> THE COURT: Yes, sir.
>
> MR. METCALFE: - that the black venire person that was in this panel at the beginning of this case has now been excused without this Court's order, and it's a concern to me that Mr. Johnson is the only black person in this courthouse today, it seems, and I feel for him. If I was a white person and all the prospective people in the courthouse were black I would begin to question the fairness of the proceeding. And to me that one black venire person now has gone home, and I'm sure tomorrow the odds are we're going to have no prospective black venire people on this jury.
>
> THE COURT: Well, it's all done randomly by a computer, and I'm sure that the thirty that were selected were done randomly, and the computer as far as I know is color blind and that's what happened and we had the thirty and we did not get through those thirty today and reach the remaining fourteen that were held over, so it was nothing that was done with any intention of excusing any black individual.
>
> MR. METCALFE: Thank you, Judge.

(R 2196 - 97)

A week later, on April 29, 1991, during the jury selection for the Lawanda Giddens trial, the defense challenged the panel:

> MR. TEBRUGGE: Judge, the motion pretty well speaks for itself. There is no additional allegations that we would make orally to the motion.
>
> THE COURT: All right, at this time, the Court having reviewed your motion, and you are correct, that there are no blacks seated on this panel and none on the initial 30 that were brought over the last time, I would concur, but I do not feel that they are being excluded improperly, and that is done purely on a random basis by computer, and, so, therefore, I would deny your challenge to the panel.

(R 3152 - 53)

On the following day, defense counsel renewed the motion representing that another attorney had told him there were three or four blacks on a panel of twenty-three jurors and no blacks were called asked the deputy clerk if she were responsible for the manner in which jurors were sent down and was told it was a random pick by Lisa (R 3181).

At a bench conference, defense counsel significantly stated, "I just need to put something on the record for Mr. Johnson" (R 3181), who was concerned that there had been no mention of the Amendments to the Constitution (R 3182). Lisa Mae Loreti testified that approximately 78 jurors reported for jury duty on Monday and that she had selected the thirty jurors for the Emanuel Johnson voir dire by a random computer selection (R 3183). About five of the 78 were black (R 3184). The court denied the defense motion (R 3184).

Appellant filed a motion to challenge the jury panel on May 7, 1991 regarding the McCahon trial (R 8054 - 55). Appellant

argued thatthere was a persistent pattern of discrimination against potential black jurors and the court denied the motion (R 3585 - 86, R 8054). The defense subsequently suggested that a jury be selected from people who have driver's licenses in Sarasota County and the court denied the motion ruling, "I feel that the jury is selected as constitutionally mandated, randomly from registered voters at this time." (R 4793 -94). Appellant's contention that there was systematic discrimination was refuted by the testimony of clerk Loreti that the jurors had been selected at random by the computer (R 3182 - 84).

## ISSUE VIII

WHETHER THE TRIAL COURT IMPROPERLY CONSOLIDATED CHARGES, ACCELERATED THE TRIAL DATES AND DENIED CONTINUANCE MOTIONS MERELY TO GIVE THE STATE MORE AGGRAVATING CIRCUMSTANCES.

Approximately thirty-nine months after appellant's assault upon Kate Cornell, thirty-five months after his attack on LaWanda Giddens, thirty months after the murder of Jackie McCahon and thirty months after the killing of Iris White, the prosecutor apparently took the harsh measure of requesting the trial court to advance the cases on the trial docket and set a trial order (R 7914 - 15). The state requested that the order of trials be set in chronological order by date of offenses. It is understandable that appellant now on death row for the two homicides would prefer not to have been held accountable; the state offers no apology.

On the same day, April 11, 1991, appellant filed a motion to disqualify Judge Gilbert Smith and a motion for continuance on the non-homicide case (R 7885 - 91). On April 15, 1991, Judge Smith ordered the trials to occur in chronological order by the date of the offenses (R 7937 - 38) and entered an order recusing himself (R 7939 - 40). The cases were reassigned to Judge Andrew Owens.

On April 16, 1991, a hearing was held on the state's motion to compel defense witness Dr. Afield to complete his examination of defendant and the court agreed to hear the defense motions for continuance the following day (R 1557 - 71).

On April 17, 1991, after listening to arguments by the defense and the prosecution that the other side was attempting to orchestrate the order of trials (R 1573 - 1612), the court opined that it was clear the defense in setting the demand for speedy trial was attempting to set a homicide case for trial first so no aggravating factors could be introduced and the state similarly preferred the homicide cases to be last. To resolve the dilemma, the court denied the motion for continuance, ruling that both sides had ample time to prepare since January of 1988 (R 1615 - 16). The court decided that the appropriate order of trials would be the Cornell trial (Case 88-3202), the Giddens, followed by McCahon and White but that it would take White out of order if necessary for speedy trial purposes (R 1689 - 90).

On April 30, 1991, appellant filed a motion for continuance of the McCahon trial contending that he would not be ready for the upcoming voir dire of the McCahon jury. Johnson claimed that he had received additional discovery material from the state on April 11, and that the matters could not be investigated prior to the scheduling jury selection in the McCahon case (R 7984 - 89). The court listened to argument on April 30, 1991 (R 3358 - 81). The prosecutor represented there had been continuing discovery and to insure that everything had been done the state sent some material on April 11, whether previously furnished or not; the state further argued there was no prejudice since the witnesses had been deposed (R 3363 - 65). The prosecutor explained that the discovery rules had changed, requiring the furnishing of all

police reports (R 3366). The court agreed to allow the prosecutor to demonstrate there was no prejudice to the defense and the parties agreed to select the jury on the Iris White case prior to the McCahon jury and the court reserved ruling (R 3380 - 81).

The court heard continued argument on May 1, and May 3, 1991.[16] The prosecutor noted that except for two instances the defense knew about the information and witnesses and that in any event the witnesses could be made available for deposition (WR 3896 - 97). He argued the two exceptions added nothing (R 3897 - 3900). The state urged that the defense knew about Underwood and Phillips (WR 3902) and there wasn't any new information (WR 3903). The prosecutor reiterated that most of the information had been provided, most of it more than once (WR 3906). The court after reviewing the material ruled:

> " . . . I have had an opportunity very briefly to look at the very thorough and outstanding preparation by the Public Defendant's office on behalf of Mr. Johnson and the State's willingness to make all of these people available if there is any additional discovery pertaining to these matters that the defense wishes to pursue, I

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[16] The transcripts of hearing on this issue are contained in the Iris White record, Florida Supreme Court Case No. 78,336 at pages 3395 - 3451 and pages 3896 - 3910. Appellee asks the Court to consider the excerpts from that record. See accompanying motion. Appellee will refer to those excerpts as "WR"followed by the appropriate page number. After hearing argument on May 1, the court deferred ruling when the state agreed to make witnesses available for redeposition (WR 3398 - 3451).

> would deny the motion for continuance in Case Number 88-3200 and 88-3438, both dealing with Jackie McCahon."
>
> (WR 3910)

Thereafter, on June 3, 1991, after selection of the McCahon jury, the defense renewed the motion for continuance, the state responded that the defense had known about the evidence about Underwood and Saumell and the knife the F.B.I. had. Additionally, the defense had only availed itself of the opportunity to depose one person, Detective Sapp, after the state had offered to make all available. The court denied the motion (R 4818 - 4823).

Appellant contends that the judge scheduled cases and denied continuances "in order to create aggravating circumstances for the state". (Brief, p. 87). That is not true. The court decided that both sides had ample time to prepare and the order of trial should be the same chronologically as in the offenses committed (Cornell, followed by Giddens, followed by McCahon followed by White -- unless it became necessary to do White before McCahon) (R 1615 - 16, 1689 - 90). If appellant is implying that he had a right to some form of immunity that the Cornell, Giddens or White judgments not be used against him for aggravating purposes, the nature and origin of such immunity is not made clear. If appellant is contending that he did not have sufficient time to prepare for trial on this offense, the lower court specifically ruled to the contrary.

Appellant implies that the issue of whether the confession should be suppressed was not resolved until January 1991, and therefore that he should not begin to prepare until then; but competent trial counsel does not postpone his trial preparation for more than two years on the mere hope that he may prevail on a motion to suppress, especially where as here all who were present testified the confession was voluntary and non-coercive and where Johnson was kind enough to provide details in the confession previously unknown to law enforcement authorities. Moreover, whatever value the hired gun, eyewitness identification expert might have been for the non-homicide cases of Giddens or Cornell has nothing to do with the instant prosecution of the McCahon murder, for which there was no eyewitness (and the death penalty can stand irrespective of whether the Giddens or Cornell judgments are stricken as aggravators) (R 8790 - 8794).

Furthermore, while appellant ostensibly argues that two and one-half years' preparation for trial constitutes a rush to judgment, he does not specify why the trial court was wrong and abused his discretion in concluding -- after looking at the material presented -- that appellant could proceed to trial without a continuance. He alludes to a report that Jessie Phillips had bragged of icing McCahon with another individual. At the hearing on May 3, 1919 (WR 3896 - 3910), the prosecutor pointed out that the material about Jessie Phillips and Sawmill was brought up in Detective Sutton's police report and deposition and:

> "They also talked about we tracked down Daniel Underwood and also Jessie James Phillips, a black male who accompanied Underwood and Daniel. Underwood's name also comes up later . . . .
>
> This was the deposition that Mr. Hockett took, where they said they investigated both of them and they determined where they had been that night, and none of the information turned out to be relevant to the investigation." (WR 3900)
>
> * * *
>
> " . . . and I will introduce these depositions and police reports into evidence, and I could read them all for the next hour about the information in these reports about Daniel Underwood, about Jessie Phillips, about the way they went out in the car and did a burglary that night, these men were completely investigated. Mr. Hockett knows all about this information. He knows all about these people." (WR 3902)

The prosecutor also referred to the Sutton deposition and police report detailing Phillips' account for his actions on September 21 and 22 (WR 3904).

The trial court noted a report of Officer Tatikis dated September 26, 1988, stating they received a phone call form Phil Sawmill, who said a black female hooker (didn't remember her name) stated that Jessie Phillips bragged of icing Jackie (WR 3909 - 10). Despite the prosecutor's offer to have any officer available for redeposition (WR 3907), Johnson chose only to depose Detective Sapp (R 4823).[17]

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[17] Appellant makes reference in his brief to the state's alleged violation of the rule regarding listing witnesses for the testimony of Robert Smith. A Richardson hearing was held (R 4876 - 4917). Smith was inadvertently omitted from the list of

Appellee further notes that appellant was fully able to present at trial his thesis that another perpetrator committed the offense. See defense closing argument at R 5678 - 79; 5682 - 85; testimony of detective Larry Kimball R 5576 - 5588, testimony of detective Robert Korich, R 5589 - 5603, as well as the cross-examination of detective Sapp R 5399 - 5400, 5404 - 05, 5416 - 21; and of detective Sutton R 5307 - 5339.

Appellant's claim is without merit.

Finally, appellant makes the frivolous contention (if indeed it is seriously made) that he was denied the constitutional right to speedy trial for the McCahon homicide; not only was he constantly waiving speedy trial under the rule (R 6502, 6511, 6568), he was also asking for continuances as late as June 3, 1991, seeking to delay his inevitable accountability for this homicide. That claim must be rejected.[18]

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witnesses to testify (R 4882, 4885), the court permitted the defense to immediately take Smith's deposition (R 4895 - 4909). The court determined that the limited purpose for offering the Smith testimony and that in light of the fact it was not really disputed that the victim Jackie McCahon was dead -- that the violation was trivial (R 4916 - 17).

[18] Again, any claim Johnson may urge regarding the Iris White homicide must be asserted, if at all, on that appeal.

## ISSUE IX

THE COURT'S PAGE LIMITATIONS ON BRIEFS HAS NOT UNCONSTITUTIONALLY DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Appellant finally complains that this Court's one-hundred page limit for briefs submitted by appellant renders him ineffective. The claim is a spurious one, as the Court can readily determine that counsel for appellant is acting as a capable advocate, as evidenced by the eight prior issues vigorously argued. Effective appellate counsel need not urge every conceivable point, for as the Court observed in Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989):

> Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points." Id. at 1167.

That appellant has found it difficult to squeeze in a Tennessee v. Middlebrooks issue or to repeat the thirty page argument from the brief of Taylor v. State, Case No. 80,121 regarding the need for a substantial majority in penalty phase recommendation neither makes counsel ineffective nor otherwise adds merit to those insubstantial, meritless contentions.

The instant case presents yet another example of a defense attorney advocating for his client by urging his own ineffectiveness. See Antone v. Dugger, 465 U.S. 200, 205, 79 L.Ed.2d 147, 152 (1984) (Applicant contended that insufficient time allowed to counsel to prepare first habeas petition should

be considered on whether presentation of new claims constituted abuse of the writ').[19]

Appellant chose to comply with this Court's order by devoting pages one through ninety-seven to issues I through VIII. His failure to provide a written argument in support of the claims itemized at page 99 of hls brief constitutes a procedural default. In Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1991), this Court declared:

> "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues and these claims are deemed to be waived."

Accord, Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990; Roberts v. State, 568 So. 2d 1255 (Fla. 1990); see also Rodriguez v. State, 502 So. 2d 18 (Fla. 1987); Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So. 2d 958 (Fla. 4th DCA 1983) (when points, positions, facts and supporting, authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy . . . it is not the function of the court to rebrief an appeal).

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[19]As indicated in the attached Motion to Strike Appendix appellant's attachment of the Appendix constitutes a blatant and flagrant attempt to ignore this Court's page limitation on briefs; the Appendix should be stricken.

## CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the judgment and sentence of the trial court should be affirmed.

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 Stephen Krosschell, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 10th day of December, 1993.

OF COUNSEL FOR APPELLEE.