IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON,	:	
Appellant,	:	
vs.	:	Case No. SC00-979
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER O236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "SB". Appellant's amended initial brief will be referred to as "IB".

ARGUMENT

ISSUE I (Juror Robinson)

Under Prosecution

Instead of focusing on the arcane legal distinction between civil contempt and criminal contempt -- a distinction which courts and scholars have called "elusive" and unworkable[1] -- the important fact under Lowrey and Reese[2] is that juror Robinson was facing incarceration for her failure to appear and her failure to pay the costs imposed on her misdemeanor conviction. Moreover, she had every reason to know she was facing incarceration, since she was notified in writing that failure to pay on time or appear in court would result in a warrant for her arrest (5/849). That knowledge, in all likelihood, was her motivation for concealing the fact of her prior conviction on voir dire. Ms. Robinson would have no reason to know or care whether the purpose of her incarceration would be deemed punitive (criminal contempt) or

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[1] See United Mine Workers v. Bagwell, 512 U.S. 821, 827 n.3 (1994); Parisi v. Broward County, 769 So. 2d 363, 364 and n.5 (Fla. 2000).

[2] Lowrey v. State, 705 So. 2d 1367 (Fla. 1998); Reese v. State, 739 So. 2d 120 (Fla. 3d DCA 1999).

coercive (civil contempt) or just to hold her until the hearing because it was the only way to be sure she'd show up. See also Blackiston v. State, 772 So. 2d 554 (Fla. 5th DCA 2000), quoting chapter 98-247, Section 2 Laws of Florida ("Uncollected fines, fees, and court costs are more than lost revenue; they represent a court order ignored, an unobeyed sentence, and the punished going unpunished"). Since the arrest warrant commanded all Florida sheriffs to arrest Tracy Robinson if found in their county, "to answer a complaint found against the above named defendant by the State Attorney for the County of Hillsborough . . . "(5/787), the reasoning of Lowrey and Reese applies to this case -- Ms. Robinson could easily be motivated by her own circumstances within the criminal justice system to try to curry favor with the prosecution. As recognized in Lowrey, 705 So. 2d at 1369-70, ". . . the integrity and credibility of the justice system is patently affected", and that is exponentially true in the instant capital case where the jury foreperson Robinson (in addition to still being under prosecution for her noncompliance with her prior misdemeanor sentence) turned out not only to be a scofflaw, but also a liar under oath (or at least an intentional material concealer, which amounts to the same thing), and very possibly a user of cocaine and marijuana during her service on appellant's jury.

Concealment

A juror's personal involvement in the criminal justice system is certainly material to her service as a juror in any criminal trial, and all the more so in a capital trial. See Massey v. State, 760 So. 2d 956 (Fla. 3d DCA 2000). Where, as here, the juror's involvement is ongoing and she remains subject to sanctions including incarceration, the materiality is magnified. If Tracy Robinson had disclosed her conviction, not only would she not have served on this jury, but investigation would have revealed the outstanding capias and she would have been arrested. Since she had been forewarned that failure to appear or to pay the costs imposed would result in her arrest, that in fact is the likely motive for her concealment.[3]

The state, citing Birch ex rel. Birch v. Albert, 761 So. 2d 355 (Fla. 3d DCA 2000), also argues that the second (concealment)

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[3] The state argues that Ms. Robinson's prior conviction was insufficiently "material" to this case, because defense counsel initially objected to her removal from the jury after she was arrested for drug possession; therefore (the state infers) the defense wouldn't have peremptorily challenged her if she had disclosed her conviction (SB19). Aside from the speculation, the other problem with the state's theory is that the reason defense counsel initially objected to Ms. Robinson's excusal is that he had previously moved to excuse both alternates (because of what counsel felt was their inappropriate contact with and expressions of sympathy for the victim's father after the guilt phase verdict was returned. Obviously, counsel could not have known during voir dire that something would happen later which would cause him to have a problem with the alternates, and thus there is no basis to assume that he would not have challenged Ms. Robinson peremptorily or for cause. And he may not even have had a chance to make that decision, because the state in all probability would have challenged her first. Either way, her involvement in the criminal justice system was material and she would not have been on this jury had she answered the question honestly.

and third (due diligence) prongs of the DeLaRosa[4] test were not satisfied, due to the lack of "follow-up" questioning by both the prosecutor and defense counsel (SB18-21). In Birch, the trial judge asked the jurors whether they had ever been a party to a lawsuit. The judge described the litigation history he sought as "like arising out of a car accident or anything like that." All of the potential jurors responded by mentioning only personal injury suits and a dissolution/custody action. Juror Ferrer-Young responded that she had been injured in a worker's compensation case, but that "it was not a suit." No follow-up questions were asked by the judge or counsel for either party. After the verdict, the defendant moved for a new trial based on the assertion that Ms. Ferrer-Young had been sued in county court for nonpayment of a $1000 anesthesiologists bill. (When Ferrer-Young filed a third party complaint against the insurer, the claim was immediately paid and the lawsuit was voluntarily dismissed). A new trial was granted, but that ruling was reversed on appeal; the Third DCA explained:

> Information is considered concealed for purposes of the three part test where the information is "squarely asked for" and not provided. See Mazzouccolo v. Gardner, McLain & Perlman, M.D., P.A., 714 So. 2d at 536; Bernal v. Lipp, 580 So. 2d 315, 316 (Fla. 3d DCA 1991); see also Mitchell v. State, 458 So. 2d 819 (Fla. 1st DCA 1984) (in order for a juror to be held to have concealed information, the question propounded must be straight-forward and not reasonably susceptible to misinterpretation). Here, Ferrer-Young squarely answered the asked questions

[4] DeLaRosa v. Zequeira, 659 So. 2d 239 (Fla. 1995).

> and there was no follow-up inquiry requesting information on her entire litigation history.
>
> The fact that the defendant did not follow up on the information Ferrer-Young provided is significant for two reasons. First, because a juror's answer cannot constitute concealment, where the juror's response to a question about litigation history is ambiguous, and counsel does not inquire further to clarify that ambiguity. [Footnote and citations omitted].
>
> And second, because defense counsel did not diligently discover this information. Given ample opportunity to do so, defense counsel failed to inquire further about Ferrer-Young's litigation history, or follow-up on her responses about the workers' compensation claim. Therefore, any failure to disclose additional prior legal proceedings was due to the defendant's lack of due diligence and thus cannot constitute active concealment on the part of the juror. [Footnote and citations omitted].

761 So. 2d at 358.

The contrast with the instant case could hardly be any clearer. The prosecutor's question was not ambiguous and not susceptible to misinterpretation, and neither was juror Robinson's answer. The information was squarely asked for and not provided:

> MR. PRUNER [prosecutor]: These jury forms ask very broad questions and, of course, this is where we're getting into that area where I'm not trying to embarrass anyone or intimidate anyone, but it asks, have you or any member of your family or any close friends ever been accused of a crime. That's what I want to go into now.
>
> I want to ask who was the person, what relationship was it to you; if it wasn't you, whether you felt that person, whether it was you or someone else, was treated fairly in the process and whether you think that inci-

dent or experience would prevent you from being a fair and impartial juror.

Before I move out, did I miss anybody else about prior jury service, though?

[Prospective jurors indicating negatively.]

MR. PRUNER: Mr. Diaz, we've talked to you about that already, right?

MR. DIAZ: Yes, sir.

(7/125-26)

[Mr. Diaz had volunteered, earlier in voir dire, that he had been a defendant in a jury trial in Hillsborough County six years before, though this experience would not make him an unfair or unfit juror (6/49-51)].

The prosecutor then turned to prospective juror Robinson:

MR. PRUNER: Ms. Robinson, who was that person?

MS. ROBINSON: My son's father.

MR. PRUNER: Okay. Did you follow along with that person's involvement in the criminal justice system, keep up with his case?

MS. ROBINSON: Oh, yeah.

MR. PRUNER: Was this in Hillsborough?

MS. ROBINSON: Uh-huh.

MR. PRUNER: Do you have an opinion whether that person was treated fairly or unfairly?

MS. ROBINSON: It was fair.

MR. PRUNER: Is there anything about your knowledge of his experience that would prevent you from being a fair and impartial juror?

MS. ROBINSON: No.

MR. PRUNER: Thank you.

(7/126-27).

Other jurors who had indicated in their questionnaires that they or someone they were close to had been accused of a crime were then questioned on this subject. Several mentioned relatives (7/127-35), and one juror, Mr. Sansoni, answered the question the way Tracy Robinson would have if she hadn't been concealing her own criminal involvement to protect herself:

> MR. PRUNER: Could you tell me who that person was, or what relationship?
>
> MR. SANSONI: About ten years ago, I got accused. It was related to my sister-in-law's divorce. She had been accused -- my sister-in-law had been accused, my brother had been accused and then they dropped it.
>
> MR. PRUNER: Sounds like a bloody mess.
>
> MR SANSONI: Other than that, on my wife's side, she has two brothers. One is in jail. The other one keeps getting in and out. The rest of the family is fine.

(7/133)

Ms. Robinson was sitting right there, but she didn't amend her answer. [Contrast Birch, 761 So. 2d at 358, n.7 ("Interestingly none of the jurors mentioned any commercial disputes when questioned as to whether they had been a party to a lawsuit.")] Given the direct and unambiguous question, and the answers given by jurors Diaz and Sansoni, it is outside the realm of possibility that juror Robinson "simply did not think that the questions posed by counsel applied to [her]." See DeLaRosa v.

Zequeira, supra, 659 So. 2d 241. She was concealing the information, and the record in this case even reveals the probable motive for her to conceal it.

That being the case, what "follow-up" question was defense counsel supposed to ask to satisfy the state's notion of due diligence? Should he have asked Ms. Robinson (and every other juror who mentioned a relative's criminal involvement, since he had no reason to suspect her as opposed to any of the other jurors), "Are you sure you weren't accused of a crime?" It's hard to imagine a more effective way to alienate the entire jury before the trial starts. Moreover, requiring this kind of repetitive and confrontational "follow-up" questioning would result in endless California-style voir dire proceedings, assuming that trial judges would even let it happen. See Stano v. State, 473 So. 2d 1282, 1285 (Fla. 1985); Leamon v. Punales, 582 So. 2d 8 (Fla. 3d DCA 1991); King v. State, 790 So. 2d 1253 (Fla. 5th DCA 2001) (trial court has discretion to limit repetitive and argumentative voir dire questioning).

Timeliness of the Motion to Interview Juror Robinson

The state claims that defense counsel's motion to interview juror Robinson was untimely, and "[a]s such, the trial court was without jurisdiction to entertain the motion" (SB21-22, and 18 n.2). The state is wrong, and the cases it relies upon -- State v. Bodden, 756 So. 2d 1111 (Fla. 3d DCA 2000) and Beyel Brothers, Inc. v. Lemenze, 720 So. 2d 556 (Fla. 4th DCA 1998) -- do not

support its position. The only relevant jurisdictional time limit is that a motion for new trial must be made within ten days after rendition of the verdict, and (as the state acknowledges) that was done. Contrast State v. Bodden, supra, 756 So. 2d at 1112-13 (defendant's motion for new trial filed nearly three months after verdict was untimely, and since Rule 3.590(a) is jurisdictional it cannot be extended by the parties or the trial court).[5] Everything else that occurred as the fabric of juror Robinson's deception and misconduct unraveled, was done within the time period when the motion for new trial was pending. The trial court had the discretion to consider defense counsel's arguments and rule on the merits; she did rule on the merits (by denying the amended motion for new trial and the motion to interview juror Robinson), and under the circumstances of this capital case it would have been an abuse of her discretion if she had refused to rule on the merits. See, generally, Savoie v. State, 422 So. 2d 308, 311-12 (Fla. 1982); Gaines v. State, 770 So. 2d 1221, 1226-27 (Fla. 2000).

A motion for new trial has a ten day jurisdictional time limit, but in the discretion of the trial court it may be amended while the original timely motion is pending. Fla.R.Crim.P. 3.590 (a); see Salyers v. State, 705 So. 2d 1025, 1026 (Fla. 5th DCA 1998). Conversely, a motion for new trial cannot be amended

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[5] Significantly, the appellate court granted Bodden a new trial anyway, based on ineffective assistance on the face of the record for counsel's failure to timely file his otherwise meritorious motion for new trial. 756 So. 2d at 113-14.

after the original timely motion has been disposed of. State v. Snyder, 453 So. 2d 546 (Fla. 3d DCA 1984) (second motion for new trial could not be treated as a belated amendment under Rule 3.590(a) to first motion for new trial, because second motion "was filed long after the trial court had determined the first motion by granting it"). A motion for a juror interview is ancillary to a claim of juror misconduct raised in a motion for new trial. See Fla.R.Crim.P. 3.600(b)(4); Sconyers v. State, 513 So. 2d 1113, 1115 (Fla. 2d DCA 1987); Roland v. State, 584 So. 2d 68, 69-70 (Fla. 1st DCA 1991); cf. Bernal v. Lipp, 562 So. 2d 848, 849 (Fla. 3d DCA 1990); Beyel Brothers v. Lemenze, supra, 720 So. 2d at 557-58. Fla.R.Civ.P. 1.431(h) provides a ten day non-jurisdictional time limit, which may be extended for good cause, but -- as recognized in Roland v. State, supra, 584 So. 2d at 69 -- that rule "do[es] not apply in the criminal sector, and no comparable rule of criminal procedure exists." Nevertheless, a considerable body of caselaw establishes that a criminal defendant may request a juror interview to support an allegation of juror misconduct,[6] and since there is no specific time limit, it follows that a request is timely if it is made before a timely motion for new trial has been ruled upon. In fact, even the civil rule, with its non-jurisdictional ten day time frame, has

[6] See e.g., Wilding v. State, 674 So. 2d 114, 118 (Fla. 1996) (once initial showing of juror misconduct was made, inquiry of the jurors was proper); Sconyers v. State, supra, 513 So. 2d at 1115 and 1117; Roland v. State, supra, 584 So. 2d at 69-70; Jenkins v. State, 732 So. 2d 1185, 1187 (Fla. 3d DCA 1999); Forbes v. State, 753 So. 2d 709 (Fla. 1st DCA 2000).

basically been interpreted that way. See Bemel Brothers v. Lemenze, supra, 720 So. 2d at 558 (motions to interview were untimely where "defendants did not move to interview the juror until almost three months after the rendition of the verdict, after the trial court had already ruled on the motion for new trial"). Similarly, in U.S. Fire Insurance Co. v. Bellefeuille, 723 So. 2d 847, 848-49 (Fla. 4th DCA 1998), the motion for juror interview was filed six weeks after the motion for new trial was denied and two weeks after the notice of appeal was filed. In holding that the request was untimely, the appellate court said:

> Rule 1.431(h), governing motions for interviewing jurors, has the same ten day period for filing as Rule 1.530(b) has for serving motions for new trial. Obviously, the rules contemplate that under normal circumstances inquiries into juror misconduct will be concluded by the time post-trial motions are determined. We conclude that there is a distinction between cases such as Lurie v. Auto-Owners Insurance Co., 605 So. 2d 1023 (Fla. 1st DCA 1992) where evidence of juror misconduct was called to the attention of a party, and the present case, in which a defendant initiated an investigation on its own in the hopes of uncovering an impropriety.

The Need for an Inquiry Into Juror Robinson's Drug Use During the Trial

In the instant capital case, there was no "fishing expedition"; if anything, the fish jumped into the boat. The facts giving rise to a reasonable concern that juror Tracy Robinson may have been under the influence of crack cocaine and marijuana during appellant's trial were not developed by anyone connected

with the defense, but by law enforcement officers who arrested her for possession of those drugs, and who allegedly smelled marijuana in the apartment occupied by her (and not by her boyfriend) at the time of her arrest. The same probable cause which existed to arrest her was also probable cause to trigger the need for an inquiry as to whether she was using crack cocaine or marijuana while serving as a juror in this capital case. That is especially true in light of the timing of her arrest; on the night following the first day of the penalty phase, and only five days after the jury's guilt phase deliberations and verdict. While it is true that her arrest does not conclusively establish that she was actually using these drugs during the trial, it doesn't have to -- that is the reason for the trial judge to conduct an inquiry. See Snook v. Firestone Tire and Rubber Co., 485 So. 2d 496, 498-99 (Fla. 5th DCA 1986) ("Contrary to Firestone's arguments, Snook does not have to conclusively establish that the alleged incident occurred and actually prejudiced his case . . . . [I]t is only necessary to establish a basis for an inquiry"). Under the circumstances of this case, once the trial judge learned of juror Robinson's mid-trial drug arrest it was incumbent upon her to pursue the matter further, whether sua sponte or based on the defense's oral request or its written motion. See Young v. State, 720 So. 2d 1101, 1104 (Fla. 1st DCA 1998).

A criminal defendant has a due process right to an unimpaired jury and judge. Jordan v. Massachusetts, 225 U.S. 167

(1912); Tanner v. United States, 483 U.S. 107 (1987); United States v. Hall, 989 F.2d 711, 714 (4th Cir. 1993); Summerlin v. Stewart, 267 F. 3d 926, 948-56 (9th Cir. 2001). Both the five Justice majority (483 U.S. at 110) and the four dissenting Justices (483 U.S. at 115) in Tanner clearly and expressly recognized this right. As discussed in appellant's initial brief, the narrow issue in Tanner is whether Congress, in enacting Federal Rule of Evidence 606(b) (which, as Professor Ehrhardt has noted, is significantly and intentionally different from §90.607(2)(b)) and in light of the legislative history of 606(b) (in which Congress "specifically understood, considered, and rejected" an alternative version which would have allowed juror testimony on, inter alia, juror intoxication), could constitutionally preclude juror testimony concerning jurors' drug and/or alcohol intoxication. By a 5-4 vote, and over a strongly worded and well reasoned dissent, the U.S. Supreme Court held that Congress could constitutionally do so. That is a far cry from saying that a state is compelled to do so, nor does the Tanner opinion purport to engraft Federal Rule of Evidence 606(b) on those states -- like Florida -- which have not adopted it, and which in fact have chosen not to adopt it. See Ehrhardt, Florida Evidence, §102.1 (2001 Ed.). Nor does Tanner overrule the body of pre-and-post Tanner Florida caselaw recognizing that in this state juror intoxication is overt misconduct which can be the subject of inquiry and which, if established, will vitiate a verdict (see IB 52-54,58,62). Devoney v. State, 717 So. 2d 501

(Fla. 1998), relied on by the state (SB21-22) has absolutely nothing to do with drug use or intoxication, and is not controlling precedent (see IB 62-63, n.7).

Appellant therefore believes he has shown that the federal rule's preclusion of juror testimony regarding drug use or intoxication does not apply in Florida. But what if this Court concludes (based on Devoney or otherwise) that it does apply in Florida; would that be constitutionally permissible? Appellant submits that, under the circumstances of this capital case, it would not be. Tanner was a non-capital case, and (in addition to the federal legislative history) the majority's holding is largely based on the importance of finality of jury verdicts. 438 U.S. at 120-21. See Devoney, 717 So. 2d at 504 (Devoney is also a non-capital case, it was also decided by a single vote margin over a strong dissent, and it expressly limits Wilding v. State, 674 So. 2d 114 (Fla. 1996) noting, inter alia, that Wilding was capital case). Given that all nine members of the U.S. Supreme Court recognized in Tanner that there is a due process right to an unimpaired jury, and given that both the U.S. Supreme Court and this Court have consistently recognized that "death is different" and a heightened degree of due process protection must be afforded in both the guilt and penalty phases of a capital trial,[7] it is reasonable to believe that Tanner

[7] See e.g., Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring); Allen v. Butterworth, 756 So. 2d 52, 59 (Fla. 2000); Fitzpatrick

would be decided differently in the context of a capital case. The finality of the penalty would have to be weighed against the finality of the verdict, and -- especially in a case like this one where the juror's probable drug use came to light during the trial itself, not as a result of some "fishing expedition" but as a consequence of an arrest made by law enforcement, the importance of protecting appellant's due process rights must prevail. To do otherwise -- to hold that a capital defendant is constitutionally entitled to jurors who are not using crack cocaine and marijuana during his trial, while at the same time blocking him from establishing that this occurred -- would be "tantamount to giving a right without a remedy, which in legal currency is worth nothing." Lamar-Orlando, Etc. v. City of Ormond Beach, 415 So. 2d 1312, 1321 (Fla. 5th DCA 1982). See also Shields v. Gerhard, 658 A. 2d 924, 928 (Vt. 1995) ("The common law, which provides a remedy for every wrong, provides a remedy for violation of a constitutional right"; neither the legislature nor the courts have the power to deprive individuals of a means by which to vindicate their constitutional rights).

Finally, this Court should consider the well reasoned decision of the Ninth Circuit Court of Appeals in Summerlin v. Stewart, 267 F.3d 926 (9th Cir. 2001), holding that the habeas petitioner (from an Arizona murder conviction and death sentence)

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v. State, 527 So. 2d 809, 811 (Fla. 1988); Arbalaez v. State, 738 So. 2d 326, 331 (Fla. 1999) (Anstead, J., concurring); Swafford v. State, 679 So. 2d 736, 740 (Fla. 1996) (Harding, J., concurring, joined by Justices Kogan, Shaw, and Anstead).

was entitled to an evidentiary hearing on his claim that the trial judge's alleged use of and addiction to marijuana deprived him of due process:

> We conclude from Jordan's and Tanner's articulations of a defendant's right to a mentally competent tribunal that Summerlin had a clearly established constitutional right in 1982 to have his trial presided over, and his sentence of life or death determined by, a judge who was not acting at that time under the influence of, or materially impaired by, a mind-altering illegal substance such as marijuana.

267 F. 3d at 950.

[Jordan, Tanner, and United States v. Hall, supra, 989 F. 2d at 714, all recognize that the right to a mentally competent tribunal applies to jurors as well as judges].

The Summerlin court cogently wrote:

> The experts tell us that we can tolerate a certain number of insignificant parts of arsenic in our drinking water and a certain irreducible number of insect parts in our edible grain supplies, but we need not, and we should not, similarly tolerate a single drug addicted jurist whose judgment is impaired, especially in a case involving life and death decisions. Neither should we put to death any prisoner so condemned by such a wayward judge.
> It is difficult to gainsay the importance of enforcing with efficient and sensible sanctions the core due process guarantees in our Constitution. To look the other way in the face of certain serious constitutional deficiencies is to render those guarantees "`a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties." [Citation omitted].

267 F. 3d at 955.

. . .

> Furthermore, and not surprisingly, this case is fact specific. It is not about prescription drugs or painkillers or a jurist grieving about the loss of a child. It is about uncontroverted allegations of illegal drug use, of crimes, and of addiction to an illegal mind-altering substance, one that distorts perceptions and degrades judgment. In the vernacular, it is a substance that with chronic abuse render smart people average and average people stupid. If it is against the law to drive a vehicle under the influence of marijuana, surely it must be at least equally offensive to allow a judge in a similar condition to preside over a capital trial.
>
> The Constitution may not entitle everyone to the wisdom of Solomon, but it does at a minimum entitle everyone to judicial judgment not impaired by mind-altering illegal drugs. We see no cause to be concerned about the stability of the justice system by pausing here to make sure that the Constitution has been respected and that the State will not take life without due process of law.

267 F. 3d at 956.

In the instant case, while it involves the jury foreperson rather than the judge, it also involves cocaine in addition to marijuana (and there are good reasons why the former is always a felony while the latter can be a misdemeanor). Also the instant case is much more time-specific than Summerlin; here, the juror was actually arrested for possession of cocaine and marijuana during the capital trial itself.

Considering the strong indications (developed by the police, not defense counsel) of juror Robinson's probable cocaine and marijuana use during the trial, considering the highly addictive and mind-altering effects of crack cocaine (which are not necessarily apparent to an observer) (see IB57-58), and

considering also that she had a warrant out for her arrest and she (apparently intentionally) concealed her prior conviction on voir dire, there is just too much arsenic in the drinking water of this capital trial to allow appellant's conviction and death sentence to stand.

ISSUE II (Individual Voir Dire)

The Issue on Appeal

The state claims that appellant's (supposed) assertion that the trial court denied his request for individual voir dire is "factually inaccurate" (SB26-27). As the state correctly points out (and as appellant made equally clear in his initial brief), the trial court indicated (albeit in a somewhat confusing manner) that she would allow individual voir dire of those jurors who had knowledge of the case from the media (SB16-17, see IB80-83,88-91). The problem is not that the trial judge made a ruling denying individual voir dire; if she had done that this case would be squarely controlled by Bolin and Kessler[8] (since the overwhelmingly intense, prejudicial, and inadmissible publicity was as bad if not worse than in those cases, see IB71-80,90) and -- appellant submits -- it would be a slam dunk reversal on this issue. Rather, the problem is that -- while the defense attorneys and the judge, through their comments, motions, and rulings throughout the pretrial and voir dire proceedings, made it clear that they all understood the need to individually

[8] Bolin v. State, 736 So. 2d 1160 (Fla. 1999); Kessler v. State, 752 So. 2d 545 (Fla. 1999).

examine the publicity-exposed jurors about what they knew or thought they knew from the media -- when push came to shove nobody did it. Thus, while the destructive impact on appellant's right to an impartial jury is the same as in Bolin and Kessler, the legal issue is much more complicated and hybrid. Appellant's position, in descending order, is (1) the trial judge, having an affirmative obligation to ensure the seating of a fair and impartial jury [see Bolin, 737 So. 2d at 1166; Kessler, 752 So. 2d at 551; cf. Clark v. State, 601 So. 2d 284, 286 (Fla. 3d DCA 1992)] had more than enough information before her showing that individual voir dire of the publicity-exposed jurors was necessary, and she erred in allowing this capital jury to be empaneled and sworn without it; (2) defense counsel was ineffective on the face of the record by failing, for no discernible tactical reason, to protect appellant's right to an impartial jury by individually examining the publicity-exposed jurors (as he had been told he could do, and as the defense had hitherto asserted the constitutional need and right to do), and (3) at the very minimum, any affirmance of appellant's conviction and death sentence should be without prejudice to his raising this facially sufficient claim of ineffective assistance by Rule 3.850 motion.

Timing of the Publicity

As just discussed, the trial judge's ruling that she would allow individual examination of those jurors who had been exposed

to the media coverage was the correct one; her error (and defense counsel's) was in not following through. The state now argues that the judge would have been within her discretion had she denied the motion for individual voir dire (SB27-28). Not surprisingly, the state has nothing to say about the content of the publicity in this case, but contends only that it "occurred sufficiently prior to the trial so as to preclude a need for individual voir dire" (SB28).

First of all, even if it were true that all of the publicity occurred a year or more before the trial, that might mean that fewer members of the venire would remember it than if it had occurred yesterday, but individual examination of those jurors who did remember it would still be necessary. See Bolin, 736 So. 2d at 1166 and n.2 (stating that trial courts must ascertain whether prospective jurors possess inadmissible and prejudicial information from the media, and noting that retrial might have been avoided "if the court had taken the time to determine what facts fewer than ten venirepersons knew about Bolin's case based on the news accounts they had read"). Given the sensational nature and the sheer volume of the coverage in this case, the amount of inadmissible and outrageously prejudicial information and innuendo conveyed, and the relentless hammering on appellant's criminal record, his prior imprisonments, and his sexual proclivities, it would have been an abuse of discretion to deny individual examination of those jurors who had knowledge of the case from the media. Contrast Kalinosky v. State, 414 So. 2d

234 (Fla. 4th DCA 1982) (cited by the state at SB30-31) (newspaper articles on drug cases "were of a general nature and did not involve pre-trial publicity directed specifically at appellants' case").

Moreover, the state's assumption that there was no prejudicial publicity near the time the jury was selected and the trial took place is factually inaccurate. As early as the hearing on the motion for a gag order, the judge stated that she'd seen some of the newspaper articles and TV news broadcasts, and "the concern seems to be the tact in which the media has taken to report some information that certainly is not going to be admissible in trial . . ." (SR59). She further stated ". . . if anything is going to affect Mr. Johnston's right to a fair trial [it's] going to be those kind of comments and that kind of information that's coming out that I don't think I have any control over. All I can say is, it's going to make things very difficult to get a jury if it keeps up" (SR59). Well, it kept up, and after reading the feature article entitled "A `Side of Evil'" the judge granted appellant's motion for individual voir dire on (inter alia) the jurors' knowledge of the case through publicity (4/629-30, 19/1931-32). At the beginning of jury selection the defense (perhaps unnecessarily) renewed its motion for individual voir dire, saying, "We would like to do it totally, but we would especially like to do it on the publicity, pretrial publicity part" (6/8). This time, inexplicably, the judge said, "Well, that's denied" (6/8), but she left the door

open to individual questioning at the bench in the event that particular jurors indicated they had knowledge of the case (6/8-9). Defense counsel called the court's attention to the fact that there was publicity at the time of trial:

> Your Honor, yesterday, in yesterday's St. Pete Times there was a great big old story about it.
>
> THE COURT: That doesn't surprise me a bit. They just love to prejudice every panel we get over here.
>
> MR. REGISTRATO: Yes, ma'am.
>
> THE COURT: If they all read it, then we'll all talk about it.

(6/9).

But they didn't talk about it, and nobody ever asked the eight publicity-exposed jurors when they had read, seen, or heard reports about the case, or whether they had read yesterday's St. Pete Times article (see 7/172,176-83,209-10).

Even during the trial itself, in making the decision to sequester the jury during deliberations, the trial judge noted that appellant's prior record has "been in every newspaper article every time. The press has tried their darndest to get that before the jury" (14/1243).

Clearly, then, the "timing" of the publicity did not obviate the need for individual examination of those jurors who had been exposed to it; just the opposite is true and the trial judge knew it.

As recognized in a different context in Clark v. State, 601 So. 2d 284, 286 (Fla. 3d DCA 1992), trial judges "should be more

vigilant and less deferential in the [jury selection] process in order to preserve and protect the integrity of jury trials". Bolin and Kessler also place an affirmative obligation upon trial judges to ensure jury impartiality in trials preceded by intense and sensational media coverage, by ascertaining whether the jurors exposed to the publicity have inadmissible and highly prejudicial information about the case. In the instant case, the trial judge knew she needed to do this, and she said she would do it, but she didn't. That does not excuse defense counsel's equally egregious omission, but there was judicial error as well and that can and should be remedied on direct appeal.

Ineffective Assistance

Most of the state's argument revolves around what defense counsel didn't do (SB27,28,30,31). Appellant believes that it is pointless to apportion fault; the failure to ascertain what these jurors knew from the publicity resulted from a combination of judicial error, attorney error, and probably some confusion over the judge's ruling. Reversal on direct appeal -- based either on judicial error or ineffective assistance on the face of the record -- would be the fairest and most expeditious remedy; it would avoid "legal churning" in postconviction proceedings (and it would have the additional salutary effect of mooting out the morass of legal problems created by Tracy Robinson's service on this jury).

Alternatively, and at the very least, any affirmance of appellant's conviction and death sentence should be without prejudice to his ability to obtain relief for his counsel's ineffectiveness in postconviction proceedings. Where it is alleged that the acts or omissions of counsel during voir dire deprived the defendant of his right to be tried by a fair and impartial jury, that is a facially sufficient claim of ineffective assistance of counsel, and unless the allegations are conclusively refuted by the record, the defendant is entitled to an evidentiary hearing under Rule 3.850.[9] In Thompson v. State, 796 So. 2d 511 (Fla. 2001), a capital case, this Court reversed the summary denial of Thompson's 3.850 motion, holding that as to three of his claims he was entitled to an evidentiary hearing. One of these was an allegation of counsel's defective performance on voir dire. This Court focused its attention on Thompson's claim that trial counsel was ineffective for failing to challenge juror Wolcott (who had extreme difficulty accepting the notion that a defendant has a right not to testify) for cause or excuse her peremptorily. Ms. Wolcott eventually served on the jury, and Thompson did not testify. In the postconviction proceedings, the trial court summarily denied relief, concluding that even if counsel's performance was deficient, no prejudice resulted

[9] See Black v. State, 771 So. 2d 583 (Fla. 4th DCA 2000); Fernandez v.State, 758 So. 2d 1199 (Fla. 4th DCA 2000); Monson v. State, 750 So. 2d 722 (Fla. 1st DCA 2000); Miller v. State, 750 So. 2d 137 (Fla. 2d DCA 2000); Baber v. State, 696 So. 2d 490 (Fla. 4th DCA 1997); Powell v. State, 673 So. 2d 119 (Fla. 4th DCA 1996); Gibbs v. State, 604 So. 2d 544 (Fla. 1st DCA 1992); Romano v. State, 562 So. 2d 406 (Fla. 4th DCA 1990).

(apparently based on the theory that the evidence was more than sufficient to sustain the two first degree murder convictions). On appeal, this Court disagreed with both the trial court's reasoning and result:

> Primarily, the trial court's conclusion is misdirected in this analysis. The issue is not whether the evidence was sufficient to support the convictions; the real issue is whether, as a result of counsel's performance, the panel which made that ultimate determination was composed of jurors who held the fact that Thompson exercised a fundamental constitutional right against him. [Citations omitted]. . . . Notwithstanding this fact we cannot foreclose the possibility that counsel's failure to challenge juror Wolcott for cause was the product of some reasonable tactical decision. Accordingly, we remand for an evidentiary hearing to permit the trial court to evaluate any evidence as to why, if for any reason, defense counsel did not seek this juror's removal.

796 So. 2d at 517 (footnote omitted).

In Chattin v. State, 800 So. 2d 665 (Fla. 2d DCA 2001), Chattin's trial counsel had failed to properly preserve for appellate review meritorious challenges for cause to two prospective jurors who had indicated a clear unwillingness to follow the law on voluntary intoxication. On direct appeal, the Second DCA affirmed Chattin's conviction without prejudice to raising any appropriate issue on a 3.850 motion. When Chattin then filed such a motion, alleging trial counsel's ineffectiveness, "[t]he trial court inexplicably denied this claim finding that it was not cognizable in a rule 3.850 motion". Reversing for an evidentiary hearing and citing Thompson, the Second DCA said:

> Chattin's trial counsel initially challenged the jurors for cause but failed to demonstrate that he used all his peremptory challenges, that he requested additional peremptory challenges but that request was denied, and that an objectionable juror was seated. The likelihood that this was a reasonable tactical decision is more remote than the likelihood that trial counsel's failure to challenge the juror for cause in Thompson was based on tactical concerns, especially given the fact that the jurors in the present case indicated unwillingness to follow the law regarding the specific defense Chattin employed at trial. However, pursuant to Thompson, we reverse that portion of the trial court's order denying this claim, and we remand for an evidentiary hearing.

The trial attorney in Chattin had also failed to preserve his apparently meritorious objection to the state's peremptory challenge of an African American juror by failing to renew his objection before the jury was sworn. The Second DCA held that this issue was also cognizable on a 3.850 motion, and remanded for an evidentiary hearing "to determine whether counsel's failure to preserve the objection to the peremptory strike was the product of a reasonable tactical decision." 800 So. 2d at 666.

In the instant case, undersigned counsel has tried and failed to come up with an arguable tactical reason for trial counsel -- after the defense had assiduously documented the need for individual voir dire by compiling numerous newspaper articles and summaries of television news reports; after the defense had secured a pretrial ruling allowing individual voir dire on publicity; after renewing the motion on the morning of jury selection saying "we would especially like to do it [individual

voir dire] on the publicity, pretrial publicity part" (6/8); and after again obtaining a ruling which appeared to allow this -- to then choose not to do it. Not only that, defense counsel actually allowed two of the prospective jurors who had been exposed to the publicity to serve on appellant's capital jury, and said to one of those jurors, when he acknowledged that he recalled something, "I don't want to know what you think the details are because I don't want you to say this in front of the other people" (7/179). Absent any conceivably legitimate tactical reason for his failure to protect appellant's right to an impartial jury in a trial where appellant's life was on the line, where counsel and the judge were all very much aware of just how toxic the publicity had been, and where Bolin, Kessler, and the trial court's rulings in this case gave him the right to individually examine the publicity-exposed jurors, this is one of those rare cases where prejudicial ineffectiveness can be shown on the face of the record. In light of the devastating publicity described at p. 71-80 of appellant's initial brief, counsel's defective performance in jury selection amounted to a breakdown of the adversary process. Alternatively and at the least, appellant should be afforded the opportunity to prove this facially sufficient claim in an evidentiary hearing pursuant to Rule 3.850. Thompson; Chattin; Black; Fernandez; Monson; Miller; Baber; Powell; Gibbs; Romano.

ISSUES III and IV (Extreme Mental or Emotional Disturbance)

Preservation

To appeal the denial of a requested jury instruction on a mitigating circumstance, "[t]he contemporaneous objection rule is satisfied when, as here, the record shows that there was a request for an instruction, that the trial court understood the request, and that the trial court denied the specific request." Toole v. State, 479 So. 2d 731, 733 (Fla. 1985), citing Thomas v. State, 419 So. 2d 634 (Fla. 1982). See also Franqui v. State, __So. 2d__ (Fla. 2001) [26 FLW S695, 697]. Once the trial court refused to instruct the jury on the extreme mental or emotional disturbance mitigator, it would have been futile and maybe even counterproductive to try to argue it to the jury (see SB32-33). See Thomas; Spurlock v. State, 420 So. 2d 875 (Fla. 1982); State v. Heathcote, 442 So. 2d 955 (Fla. 1983) (after request for instruction has been made and denied, issue is preserved and counsel need not make further futile objections or pursue useless course of action). As for counsel's supposed failure to "identify" or "propose" extreme mental or emotional disturbance as a mitigator for the trial court to consider, Florida's death penalty statute does that by enumerating it as one of only seven statutory mitigating factors, and defense counsel further identified it as a factor to be considered in this case by requesting a jury instruction on it. The state's reliance, in arguing for a procedural default, on Campbell v. State, 571 So.

2d 415, 419 (Fla. 1990) and Lucas v. State, 613 So. 2d 408 (Fla. 1992) is misplaced (see SB32-33,35-36). Nonstatutory mitigating factors need to be identified because they are not enumerated in the statute and because (as long as they pertain to the circumstances of the crime or the character or background of the defendant) they are virtually limitless. As explained in Lucas v. State, 568 So. 2d 18, 23-24 (Fla. 1990):

> Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not too much to ask if the court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances.

The same point was emphasized in Consalvo v. State, 697 So. 2d 805, 818 (Fla. 1996):

> Unlike statutory mitigation that has been clearly defined by the legislature, nonstatutory mitigation may consist of any factor that could reasonably bear on the sentence. The parameters of nonstatutory mitigation are largely undefined. This is one of the reasons that we impose some burden on a party to identify the nonstatutory mitigation relied upon.

Therefore, there was no requirement (and certainly no waiver implicit in not doing so) for defense counsel to "identify" the statutory mitigator of extreme mental or emotional disturbance in his sentencing memoranda or at the Spencer hearing, especially after the trial judge refused even to instruct the jury on that mitigating factor. The question simply is whether there was evidence in the penalty phase from which the jury, if properly

instructed, could have found the statutory mitigating factor of extreme mental or emotional disturbance. The other question is whether there was evidence in the penalty phase and the Spencer hearing to require the judge to find and weigh -- or at the very least to discuss and explain her reasons for rejecting[10] -- the extreme mental or emotional disturbance mitigator.

The Evidence

The state asserts that "absolutely no evidence was presented during either the penalty phase or the Spencer hearing in support of this particular mitigator" (SB32, see 33,34), and that "Appellant provided no evidence during the penalty phase from either lay witnesses or the experts concerning his mental or emotional state at the time of the murder" (SB40)(emphasis in state's brief). The state is wrong. Drs. Krop (a clinical psychologist specializing in neuropsychology) and Wood (a professor of neurology specializing in neuropsychology and brain imaging) each testified -- based both on the neuropsychological testing administered by Dr. Krop and the PET Scan administered by Dr.

[10] A trial court may reject a claim that a mitigating circumstance has been proven, provided the record contains competent substantial evidence to support the rejection. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Mahn v. State, 714 So. 2d 391, 401 (Fla. 1998). See Franqui v. State, __ So. 2d __ (Fla. 2001)[26 FLW S695,607] ("The sentencing order reveals that the trial court expressly considered in great detail whether Franqui's family history . . . was a mitigating circumstance. Indeed, the trial court made extensive findings and explained its reasoning for rejecting Franqui's family history as a mitigating circumstance. Based upon our review, we find that competent substantial evidence supports the trial court's conclusion").

Wood -- that appellant suffers from brain damage; specifically frontal lobe impairment (17/1658-60, 1662-63; 16/1498-1500, 1509-11). His measured frontal lobe brain activity is below the bottom one percent of the normal scale, which, Dr. Wood explained, means that out of 100 randomly selected people, appellant's frontal lobe activity would be worse than the worst of them (16/1498,1509-10).[11] This condition correlates with poor judgment, impulsivity, and disinhibited behavior; Dr. Wood analogized it to a person driving a car without good brakes (16/1509-11). There was no doubt in Dr. Wood's mind that appellant is less able to exercise judgment or control his impulses than normal people are (16/1509). [Similarly, Dr. Krop testified that people with frontal lobe damage are impulsive. They react to situations or stimuli without much deliberation or thinking, and they have difficulty controlling or stopping their behavior once it gets started (17/1660-62)].

Dr. Michael Maher, a psychiatrist, concluded that appellant, while competent to stand trial, suffers from significant mental illness (17/1594-95), and that his mental health problems are related to the frontal lobe brain impairment which is evident on the PET Scan (17/1596-99). As a consequence of his frontal lobe abnormality:

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[11] These findings, Dr. Wood stated, were corroborated by appellant's medical and behavioral history, including his hospitalization at age 14, and the medical treatment he was receiving in 1997 in the months prior to the Coryell homicide (16/1499,1509).

> . . . [the] normal ability to inhibit an urge, to stop a feeling or a desire or a thought from being put into action, into behavior is significantly impaired. So when he has a strong urge, anger, jealousy, humiliation, rage, it is much more likely that urge is going to be carried into action and not stopped or inhibited by the frontal lobe and the functioning of the frontal lobe.

(17/1599).

In Dr. Maher's opinion, appellant's capacity to control a negative or angry thought, or to respond within appropriate limits to feelings of rejection or humiliation, is very much less than a normal person's (17/1603-04). In addition to, and related to, his brain impairment, appellant suffers from a dissociative disorder and from seizure activity (17/1601-03,1607). A dissociative disorder "is a psychiatric disorder in which some aspect or part of a person's total personality or awareness" is at times absent or unavailable to him (17/1607). Dr. Maher was of the opinion that the crime in this case was the result of a dissociative episode which was triggered by appellant's approach to and rejection by Leanne Coryell in the apartment complex parking lot (17/1609). In Dr. Maher's opinion, the dissociative episode was not severe to the point where he didn't know who he was or who she was or what the likely result of his actions would be, but he did think it was "to the point where he didn't have the capacity to appreciate in a fully human way what he was doing and what was happening" (17/ 608).

Dr. Harry Krop was recalled in the Spencer hearing, where he further elaborated on the effects of appellant's significant

frontal lobe impairment (see 21/2266-67). The frontal lobes play a key role in regulating behavior and controlling impulses (21/2269-70). People with this disorder tend to overreact, become very impulsive, and use very bad judgment, particularly in stressful situations, and Dr. Krop testified, "that's what I think was certainly operating on the day this incident occurred" (21/2272-73). In Dr. Krop's opinion, the interaction of appellant's psychosexual disorder and his organic brain damage "resulted in what I would consider a serious emotional disorder occurring at the time of the offense" (21/2273).

The state makes the back-up argument that the judge considered this evidence as nonstatutory mitigation (SB37). First of all, that wouldn't cure the error in failing to instruct on, find, weigh, or consider the statutory mental mitigator, which -- as recognized in Santos v. State, 629 So. 2d 838, 840 (Fla. 1994) -- is one of the weightiest factors in making the life or death decision. Secondly, how did he consider the evidence as nonstatutory mitigation? As the state points out, he gave it no weight and no explanation (SB37, see IB 98, n.13). While Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) allows the sentencing judge to find that a mitigating factor exists but accord it no weight, this is proper only when the sentencer determines "in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case." 768 So. 2d at 1055. Where, as here, there is substantial unrebutted evidence of an important mitigator and the judge

provides no reason for giving the mitigator no weight, the principles of Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) and Walker v. State, 707 So. 2d 300, 318-19 (Fla. 1977) are violated, as is the Eighth Amendment. See Eddings v. Oklahoma, 455 U.S. 114, 115 (1982). See also Woodel v. State, __ So. 2d __ (Fla. 2001) [26 FLW S14, 18] (trial court cannot summarily dispose of mitigation).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court reverse his convictions and death sentence and remand for a new trial [Issues I and II], and reverse his death sentence and remand for a new penalty phase trial and/or resentencing [Issues III and IV].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Kimberly Nolen Hopkins, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of December, 2002.

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Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number O236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

SLB/ddj