IN THE SUPREME COURT OF FLORIDA

NEWTON CARLTON SLAWSON,

Appellant,

v.

Case No. 75,960

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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FLORIDA STATUTES:

STATEMENT OF THE CASE

Your appellee accepts the Statement of the Case as set forth in the brief of appellant at pages 1 - 2 as a substantially accurate reflection of those matters which occurred below.

STATEMENT OF THE FACTS

A Motion to Suppress Hearing was held on October 30, 1989, before the Honorable Gasper Ficarrotta, Circuit Judge. The defense and state stipulated that the defendant was initially advised of his Miranda rights at approximately 12:05 a.m. on April 12, 1989. He had been taken into custody at approximately 10:30 p.m. on April 11, 1989 (R 1843).

Daniel Grossi, Tampa Police Department detective, testified that he was a homicide detective who became involved in an investigatian involving the death of Peggy Wood, Gerry Wood, Glendon Wood and Jennifer Wood (and a baby boy Wood) (R 1846). He went to the scene of the homicides, 2101 North 64th Street in Hillsborough County, Florida, and observed the bodies of the victims, other than the body of Peggy Wood (who was at the hospital) (R 847). He then returned to the detective division and participated in an interview with the defendant, the interview commencing shortly after midnight (R 1847). Detective Grossi, along with Detective Bell, proceeded to interview the defendant. When they first went into the room, they advised Mr. Slawson that they were investigating a homicide and at that paint, the defendant inquired, "What about an attorney?" This

statement was taken as a question by the officers (R 1851 - 1852). The next thing that was said was that the officers would explain to the defendant about an attorney and Detective Bell read the consent to be interviewed form to the defendant. Detective Bell read it to the defendant slowly, stopping at the end of each sentence. At the end of the form being read to him, the defendant signed it and indicated that he understood it. Detective Bell signed it and Detective Grossi signed it as a witness (R 1852). When Detective Bell stopped at the and of each sentence, the defendant indicated that he understood the questions (R 1853). At this time, the defendant was very cool, very unemotional, and very respectful during the interview (R 1853).

The defendant, when sked whether he had ingested any alcoholic beverages earlier in that evening, replied that he had about four beers throughout the night (R 1853 - 1854). Detective Grossi could not smell any alcohol on the defendant's breath, nor did the defendant appear to be intoxicated or under the influence (R 1854). When the defendant was asked whether he had ingested any drug (marijuana, cocaine or anything like that), the defendant replied that he had not (R 1855).

During the course of the interview, the defendant at no time indicated that he didn't want to talk anymore (R 1855). He did not request an attorney prior to the end of this first interview (R 1855). During this interview, the defendant was not promised anything in order to get him to make the statement or to keep

talking and was not threatened or abused in any fashion (R 1856). The defendant also signed a consent to search or a waiver of search warrant at 12:45 a.m. (R 1857). The defendant made no subsequent statements concerning an attorney at this time (R 1858 - 1859).

Randy Bell, Tampa Police Department Detective, testified that he also participated in the instant investigation (R 1863). He also went to the crime scene and eventually arrived at the Tampa Police Department with Detective Grossi (R 1864). Detective Bell also indicated that when advised that the detectives wished to speak to the defendant concerning the homicide that occurred at 2101 North 64th Street, the defendant asked a question, "What about an attorney?" (R 1867). Detective Bell then read the defendant a rights form, but the defendant was not questioned prior to the reading of the rights form (R 1867). Detective Bell stated that he advised appellant of his rights question by question, for example, he advised the defendant of his right to remain silent and then asked the defendant whether he understood that, to which the defendant replied in the affirmative. The defendant was then advised that if he gave up the right to remain silent anything he said could be used against him in court. The defendant was then again asked if he understood that and he replied in the affirmative (R 1868 - 1869). The defendant was advised that he had the right to talk to a lawyer before answering any of the officers' questions. Detective Bell again stopped and asked the defendant if he

understood and the defendant did (R 1869). The defendant was also advised that if he could not afford to hire a lawyer one would be appointed for him without cost and before any questions. The defendant acknowledged that he understood that portion (R 1869). The defendant was further advised that he had the right to invoke any of his rights at any time during the interview. Detective Bell then read: "I Newton Carlton Slawson have had these rights read to me. I understand them and I am willing to talk to you at this time.'' The defendant acknowledged that he understood and stated that he was willing to talk to the officers. The waiver was signed by the defendant and initialled by Detective Bell (R 1869 - 1870) In addition to reading the rights, the defendant was given an opportunity to look at it and read it himself prior to signing (R 1870).

Prior to reading the defendant his rights, Detective Bell observed the defendant was basically pretty quiet and did not give any indication that he was under the influence of alcohol at the time (R 1870 - 1871). The defendant, upon inquiry, stated that he had four beers but that he had not taken any type of drugs (R 1871). The defendant responded appropriately to all statements made by the officers (R 1871 - 1872). During no point in the interview process was the defendant threatened in any fashion or promised anything in return for his statements (R 1873). During no portion of the interview did the defendant ever state that he didn't want to talk anymore or that he wanted an attorney (R 1873).

Detective Bell also testified that the defendant signed a consent to search his motel room and that the defendant was not threatened or promised anything in order to induce his consent **(R 1874 - 1875).**

Detective Bell then asked the defendant if he would like his statement on tape. At that time the defendant again asked, "What about an attorney? (R 1875 - 1876). At this point, the interview was concluded (R 1876).

No further testimony was adduced at the motion to suppress admissions hearing. After argument of counsel, the motion to suppress was denied by the trial judge (R 1917).

Trial commenced on Wednesday, March **7,** 1990 before the Honorable Robert H. Bonanno, Circuit Judge (R 17). The evidence adduced at trial is **as** follows:

On April 11, 1989, the defendant murdered Gerald Wood, his wife, Peggy Williams Wood, and their two children, Jennifer, age four, and Glendon, age three. **Also** lost was the eight month fetus of a baby boy which **Peggy** Wood **was** carrying and which was removed or expelled from the body of **Peggy** Wood subsequent to a fifteen inch incision made upon Peggy Wood's abdomen **(R** 466, **473).** At the time of their death, the Wood family was living in a garage apartment located a very short distance from where Peggy Wood's parents, **the** Williams, lived in Tampa (R 466).

Curtis Williams, the seventeen-year-old brother of Peggy Williams Wood (R 490 - 491), testified that he had never seen or

heard of Newton Slawson prior to 7:00 p.m. on April 11, 1989 (R 492 - 493). At that time, the defendant pulled up in a Nova while Curtis was working on his truck, which was approximately 15 feet from the window of the Wood's apartment (R 493 - 494). Curtis' brother, Ronnie, was helping work on the truck and was asked by the defendant, "Where is Gerald?" As Ronnie answered, "Upstairs," Gerald came to the window and the defendant asked Gerald if he wanted a beer. Gerald replied negatively, but motioned the defendant upstairs. The defendant remained in the apartment approximately five minutes and left in his vehicle (R 494 - 495). Curtis remained outside for a couple of minutes, then went into the house for about an hour, and then left to go to a friend's house. He returned home at around 10:00 p.m. (R 495). Later in the evening Curtis got hungry and went to the back room where the refrigerator was located. As he was shutting the refrigerator door the back door opened and his sister Peggy was laying there on the steps. Curtis saw that she was badly hurt and bleeding and Curtis yelled for his mother. Wilma Williams, the mother of Curtis and Peggy, told Curtis to call 911 and he did so (R 496). Curtis then went upstairs to the garage apartment, saw blood, and went back down stairs. A little later, Curtis, accompanied by his father, went back up to the garage apartment (R 497). When they went into the apartment they saw the blood and Mr. Williams asked his son where Gerald and the kids were. Curtis didn't know, but he went into the children's room and saw Jennifer and Glendon laying on the floor. Curtis

lifted Glendon's shirt and observed a hole in his chest. Glendon appeared to be dead. Although he didn't check on Jennifer, he knew she was dead. Curtis told his father, who reacted in shock. Curtis and his father then found Gerald laying on the couch and Curtis attempted CPR, but it didn't work. Curtis lifted Gerald up and noticed that Gerald had a "slashed knife wound in the back of his back." (R 500)

Ronald Williams, the twenty-one-year old brother of Peggy Williams Wood, described the initial encounter with the defendant when Ronald was working with Curtis on Curtis' truck. Ronald went back into his house prior to the time the defendant originally left the garage apartment (R 506). Approximately 8:30 that evening, Ronald heard "a real loud bang", like somebody had dropped something. Ronald went outside to check to see what happened but didn't see anything. At that time he could hear his niece and nephew playing upstairs in the bedroom. Approximately 8:45 p.m., that evening, Ronald took a nap but was awakened approximately 9:40 p.m., by his mother and others crying. Ronald came out and saw his sister laying on the back porch. Prior to April 11, 1989, Ronald smoked a joint with his brother-in-law, the defendant, and a friend of the defendant, That was the only occasion Ronald saw the defendant smoke marijuana, and Ronald never saw the defendant use cocaine (R *509).*

Wilma Williams, Peggy Williams Woods mother, testified that her daughter lived with her husband Gerry and their two children in an apartment over the garage at 2101 North 64th Street in

Tampa. In April of 1989, Peggy was eight and a half months pregnant (R 515 - 516). At approximately 8:15 p.m. on April 11, 1989, Gerry came downstairs and borrowed a power saw because he was fixing cabinets upstairs in the apartment. Peggy came down and talked with her mother at approximately 8:45 p.m. Peggy did a load of wash and took another load out of the dryer and back to the apartment. Mrs. Williams later heard a sound as if someone was "beating the stuffings out of our trucks, one of our trucks with an iron pipe." (R 521) Ronald went outside to check and said he didn't see anything. A few minutes past 9:25 p.m., Curtis said he was hungry and Mrs. Williams told him to look in the refrigerator. A few minutes later, Curtis called Mrs. Williams and said, "Momma, it's Peggy." Peggy was lying on the back steps at the back door and was observed to have blood on her arm, Mrs. Williams picked up her daughter and cradled her and Peggy said, "He killed Gerry and the kids." (R 523) Her mother asked, "Who did, Baby?" and Peggy said, "Newton did it. Newton killed Gerry and the kids." (R 524) Peggy repeated that more than one time until she lost consciousness. The emergency personnel arrived in just a few minutes, but before that Peggy apparently thought she was going to die because she said that she wanted to be with all of them and they should be cremated (R 524).

Royce Grant, a fire fighter who is certified as an emergency medical technician, responded to 2101 North 64th Street in Tampa on April 11, 1989. The dispatch came in as an OB/GYN or

childbirth call (R 529). Mr. Grant's unit arrived at the scene within four minutes of the call and arrived at approximately 9:40 p.m. (R 529 - 530) Upon arrival, Mr. Grant observed a young lady lying on the steps covered with a blanket laying in another woman's arms. The blanket was removed and Mr. Grant observed the victim was "cut from the pubis to stern, and it was stretched completely open." The woman's internal organs were "hanging out to some degree," (R 530) The woman was very weak and semiconscious, and at one point she lost her vital signs (R 530 - 531). Mr. Grant assisted the paramedics, Randy Byrd and Steve Hodge, when they arrived. Efforts were made to push the blood up to the vital organs and to help the victim to breath (R 531 - 532). The victim was transported to a grocery store parking lot where a hospital helicopter could land and transport the victim (R 532). Cornelle Arrington, also a fire fighter and EMT, arrived with Royce Grant and also observed the female victim who had "an incision or a slash laceration from the sternum down to the pubic area." Mr. Arrington also observed that the victim's internal organs "were out and very visible" (R 536). Someone in the crowd that had gathered said that there were "more of them and that they needed help." Mr. Arrington went through the house searching for more patients, but did not find any. After the search of the house, Mr. Arrington exited and was told by a group of people that the other victims were upstairs and were all dead. Mr. Arrington asked whether the perpetrator was still in the area and someone in the crowd replied, "No, Newt left," (R 537 - 538)

Mr. Arrington then described for the jury what he found in the garage apartment with respect to the status of the victims located therein (R 539 - 552). Included within his description was testimony concerning a blood trail that went up the stairs, the hallway, and around the coffee table ending in a spot to the right of the couch. At the foot of the couch was found the unborn child, It appeared that the mother may have been at this location (R 544 - 545)

James Byrd and Lieutenant Richard Brown, paramedics with the Tampa Fire Department, also testified concerning their arrival and activity at the scene of the murders (R 558 - 572). Mr. Byrd described that the state's exhibit 25 (R 2115), a picture of Peggy Woad, was "cleaned up" inasmuch as Ms. Wood's internal organs had been "out of her, . . . kind of just hanging there," (R 561, 563 - 564)

Detective Douglas Burkett, Tampa Police Department testified that he was working on an off-duty assignment the evening of April 11, 1989, when he heard a radio call dispatch a BOLO describing a vehicle and a suspect in connection with a homicide (R 573 - 574). When Detective Burkett finished his off-duty job, he went to the scene of the homicide and he observed a vehicle matching the description of the suspect vehicle pull out. Detective Burkett observed that the driver was "scrooched down". Detective Burkett put his blue light on but the suspect continued to proceed east bound. The defendant was eventually pulled over by Detective Burkett (R 575 - 576). The defendant without being

asked told Detective Burkett that a weapon, a .357, was in the car (R 577). The defendant acted in a polite demeanor when arrested (R 578).

Detective Rick Childers, Tampa Police Department, testified as to his presence at the crime scene and his observation of his findings at that crime scene (R 603 - 611) He also testified at to his participation in the search of the defendant's vehicle (R 611 - 623). Detective Childers described some of the items contained in state's exhibit number 57, the magazine found in the defendant's vehicle. On page 10 of the magazine was some writing which said, "The best fuck is a murdered fuck." (R 619) On pages 28, 30 and 85, there were ink drawings of incisions on photographs of females (R 620). Detective Childers further testified concerning the chain of custody pertaining to certain items of evidence in this case (R 621 - 635).

Johnny Wells, a neighbor of the Wood family identified the murdered individuals (R 646 - 647).

Dr. Charles Diggs, Associate Medical Examiner for Hillsborough County, Florida, was qualified as an expert in the field of forensic pathology (R 657). He testified concerning the autopsy he conducted on the four murdered members of the Wood family as well as upon the fetus being carried by Peggy Wood. Dr. Diggs found two forms of trauma to the body of Gerald Wood. A gunshot wound was described which passed through the heart and left lung. This wound was the mechanism of death. The wound found was consistent with the gun being placed up against the

skin or clothing and fired (R 671 - 673) Dr. Diggs also described a stab wound located under the upper, mid abdominal area which was a postmortem wound (R 674 - 675). Although Dr. Diggs could not establish the time frame, he did establish that cocaine and marijuana metabolites were contained in the blood and urine samples obtained from Gerald Wood (R 677). Dr. Diggs found two gunshot wounds on the person of Peggy Wood. The first gunshot wound was located over the right abdomen approximately 19 inches below the level of the right shoulder (R 678 - 679). The second gunshot wound was on Ms. Wood's back located about 11-1/2 inches below the level of the right shoulder (R 680 - 681) Dr. Diggs also described the longitudinal incision which extended from the base of the sternum down to the pelvic area. There were also several cutting type wounds on the interior front of the right thigh (R 683 - 684). Peggy Wood was alive when all of these waunds occurred to her (R *685).* Dr. Diggs testified that the cause of death of Peggy Wood waa the gunshot wounds to the abdomen and to the back (R 686). Dr. Diggs also described the presence of two gunshot wounds which were located on the body of the fetus (R 687). Several lacerations on the body of the fetus were also described (R 688). A gunshot wound to the back of the fetus was the cause of death (R 690). The gunshot wound to Mrs. Wood and the fetus were consistent with being caused by the same bullet (R 690). Glendon Wood was killed by a single gunshot wound to the lower part of the interior chest which passed through the heart, diaphragm, liver, pancreas, and "all of the

important organs of the body'' (R 696 - 698). The gunshot was fired at close proximity (R 697 - 698). Jennifer Wood also died from a gunshot wound fired at close proximity (R 700 - 704).

Joseph Hall, Senior Crime Laboratory Analyst with the Florida Department of Law Enforcement was qualified as an expert in the field of firearms identification (R 715). Mr. Hall testified that the bullets and fragments extracted from the victims were identified as having been fired by the defendant's gun (R 716 - 727).

Mary Cortese, a Crime Laboratory Analyst, serology section, of the Florida Department of Law Enforcement, was qualified as an expert in the field of serology (R 730). The four murder victims each had a blood type of "O" (R 731 -732). Blood type "O" was also found on the barrel of the defendant's gun (R 733).

Steven Starq, a latent print examiner with the Hillsborough County Sheriff's Office was qualified as an expert in the field of fingerprint identification (R 741). No prints on the defendant's gun or the knife had any comparison value (R 739 - 740). Richard Estes, a chemist with the Florida Department of Law Enforcement, was qualified as an expert in the field of drug identification (R 744). He testified as to the findings of five milligrams (a very minute amount) of cocaine in a pipe that was found at the murder scene (R 745). It was identified as crack cocaine (R 746).

Detective Dan Grossi testified as to his interview of the defendant and the defendant's statements. The defendant told

Detective Grossi that he had had four beers earlier in the day on April 11, 1989, and that he had taken no drugs (R 768). The defendant stated that Gerald Wood wanted to sell him drugs but that Peggy Wood said not to because the defendant might have been with the police. Upon arrival at the Woods' residence, the defendant brought with him a six inch knife and a .357 Colt revolver. When he came into the house, Mr. Wood allegedly asked the defendant to put the gun in the bathroom so that the children couldn't get to it. After Peggy Wood told her husband not to sell the defendant drugs, the defendant went into the bathroom to retrieve his pistol. When he came back into the living room, Gerald Wood had gotten up and had the defendant's knife in his hand. The defendant stated that was when he shot Gerald Wood, and that he meant to shoot Gerald Wood. The defendant then stated that he went into the bedroom and shot the two children. The defendant then went back into his story and stated that when he shot the children, Peggy Wood was screaming to the defendant from the couch. The defendant stated he walked over to the couch and shot Peggy Wood. At this point he was going to try and save the baby. He took the knife from Gerald Wood's hands and inserted it into Mrs. Wood's stomach and cut up. As he was cutting, the baby popped out (R 769 - 771). The defendant also stated that he wanted to leave the Woods' apartment but the door was padlocked (R 774). During cross examination, Detective Grossi related how the defendant kept changing his stories (R 776).

At this point, the state rested (R 782).

The defendant, Newton Carlton Slawson, testified in his own behalf. The defendant believed he did kill the members of the Wood family but he did not remember doing it (R 790). The defendant believed he was slipped a drug in a beer he was having (R 790). The defendant stated that he had previously made a commitment to overhaul the carburetor in Gerald Wood's vehicle. However, the defendant wanted to leave for North Carolina on April 12, 1989, and he could not carry out his commitment. Therefore, he went to Gerald Wood's house carrying a six pack of beer as a peace offering for being unable to complete the commitment (R 792). The defendant testified that he had a beer in the Wood's residence and then was offered a second beer. At that time, Gerald Wood, according to the defendant, took out a small brown bottle and said it was crack cocaine. He was going to cut some and he asked the defendant if he wanted some. The defendant replied, "No, ... My poison's alcohol," and the second beer was offered to the defendant (R 799 - 800). The defendant then testified that the second beer was already open and that the defendant chugged it down and began to feel add. He alleged that his mouth, lips, tongue and throat went numb and that he started to hear things. At this point he was not sure of his memory (R 801). The defendant is sure that he tried to leave, but that the door was padlocked from the inside (R 801). After everyone in the family had been shot, the defendant discovered that it was not locked (R 801 - 802). The defendant

stated that he believed that Peggy Wood was dead and that he tried to save the baby by slitting Peggy Wood open. The defendant was able to observe that damage was done to the child and that the baby was not going to live (R 804 - 805). The defendant testified that he went home, reloaded his gun and meant to use it on himself if he had shot the Woods. He decided to go back to see if he killed the Woods, but upon arrival there he noticed blue and red lights and a crowd and he realized that he did the murders (R 806 - 807). The defendant testified that he was on his way to commit suicide when he was arrested by the police (R 807). The defendant testified that he had previously seen a Navy psychologist concerning pictures of dismembered people he had been drawing since he was eleven years of age. The psychologist said that the drawings were good because it helped the defendant "actualize and realize your aggressive tendencies." (R 811) The defendant testified that he draws pictures when he is angry, upset and can't sleep. He then destroys the pictures and feels better (R 814 - 815). After being attacked by a man with a pool cue, the defendant started carrying a firearm regularly (R 814 - 815). The defendant initially testified that it was approximately a month after the murders, after the results of the urinalysis showed cocaine in his urine, that he believed that cocaine had been slipped into his beer. However, on cross examination, the defendant also testified that it was only three days after the murders in a conversation with Dr. Maher that he had stated he had been drugged (R 822 - 823). Also on cross

examination, the defendant stated that as little as three days prior to the murders, he drew the pictures in the magazine dealing with disemboweling women. This was something the defendant dreamed about and thought about for thirty-five years (R 853). On cross examination, the defendant acknowledged that his reconstruction of the events did not match the evidence (R 852). Indeed, throughout cross examination the defendant stated his "faulty memory" was the reason for contradictions between the evidence and his recollections.

Dr. Sidney Merin was qualified as an expert in the field of clinical psychology (R 878). Dr. Merin personally saw the defendant on four occasions (R 879 - 880). Dr. Merin reviewed depositions of other mental health experts, police reports, witness reports, hospital records from the military, a psychological report from the military, letters written by the defendant, a statement from the defendant's uncle and some autopsy reports (R 880). The police reports included the defendant's statement to the police. Based upon a review of the materials, psychological testing, and Dr. Merin's examination of the defendant, Dr. Merin concluded that at the time the defendant actually killed the Wood family, for just a few moments, the defendant did not have the ability to form a premeditated attempt to kill (R 881). Dr. Merin believed that there were two conditions that caused the defendant to be unable to form the intent, the intake of cocaine, and the combination of cocaine and the defendant's type of personality (an individual who had

significant obsessions and psychological problems) (R 881). However, the defendant did not meet the Florida designation of insanity defense (R 886 - 887). Basically, Dr. Merin believed that the the stimulating effects of cocaine caused the defendant to react in a frenzy (R 915). On cross examination, Dr. Merin stated his belief that the defendant would not have disemboweled Peggy Wood had he not fantasized about this activity for many years (R 928). Dr. Merin also testified that the defendant is a very bright person (with an I.Q. 122), that the defendant had no measurable brain impairment and that the defendant had no diminution of brain function based upon any long-term use of substances (R 932). Although Dr. Merin had seen the defendant on several occasions prior to January 25, 1990, it was not until this date that the defendant said anything about numbness in his throat (R 933). Although the tests given by Dr. Merin did not indicate that the defendant was faking, Dr. Merin did find other evidence of malingering (R 935 - 936). Dr. Merin acknowledged that many of appellant's stories were not consistent with each other. What he told the police was not necessarily what he told to Dr. Merin (R 944 - 945). Dr. Merin conceded that it is a possibility that the defendant's motive in telling Dr. Merin certain stories was to convince Dr. Merin of the defendant's cocaine intoxication (R 947). People charged with crimes sometimes exaggerate their psychological symptoms in order to benefit themselves in some way (R 947).

The defense next called Dr. Michael Maher, a psychiatrist who was qualified as an expert in the field of forensic psychiatry (R 958). Dr. Maher reviewed police reports, witness reports, depositions, medical documents and files complied during the defendant's military service, a report from a Navy psychiatrist, the deposition of Dr. Merin with particular reference to his test results and clinical evaluation of the defendant, and a deposition of Dr. Samenow, the state's mental health expert (R 959 - 960). Based upon his review of the materials and his interviews (Dr. Maher saw the defendant five times over the course of one year for a total of more than six hours), Dr. Maher concluded that the defendant did nat have the capacity to premeditate, to consciously think about and reflect and take the actions of shooting and killing a human being. The condition that prevented the defendant from forming that intent was caused by a combination of two factors, the defendant's general personality structure and mental state and cocaine and alcohol intoxication. The murders, in Dr. Maher's opinion would not have occurred but for the presence of both of these factors (R 960 - 961). The combination of these factors resulted in an acute reactive psychosis, a limited period of time where the defendant was in a state of extreme emotional and mental distress where his brain was not functioning in a normal manner resulting in an inability to be in touch with reality (R 962). Dr. Maher opined that absent the cocaine, the defendant would have been able to form the premeditated intent to kill (R 967). The

defendant did not meet the test for a Florida insanity defense (R 971). On cross examination, Dr. Maher conceded that in relating his stories, the defendant was inconsistent and, indeed, at times lied (e.g., R 1079). Dr. Maher acknowledged on cross examination that there is a possibility that the defendant's motive in telling different stories was an attempt to convince the doctor that the defendant was involuntarily intoxicated (R 1088). If Dr. Maher learned that the defendant was not involuntarily intoxicated, Dr. Maher would seriously reconsider his conclusions (R 1089).

Wayne Morris was next called by the defense and was qualified as an expert in the field of chemistry, but was not found by the court to qualify as an expert in toxicology (R 1123 - 1124). Mr. Morris concluded, based upon experiments he conducted and the process of preparing an article to ,be published, that a ratio of homococaine[1] to cocaine greater that .2 indicates that cocaine was mixed with alcohol outside the body, whereas a ratio lower than a .1 indicates that the process occurred inside the body (R 1159 - 1160). The defendant's ratio was determined to be .231 leading to Mr. Morris' conclusion that the defendant ingested cocaine which had come into contact with alcohol prior to entering the body (R 1160 - 1161). NO homococaine was found in the urine sample obtained from the

[1] "Homococaine" is a term used to describe the compound which is formed by the combination of cocaine and alcohol.

deceased Gerald Wood (R 1162). Mr. Morris opined that the ratio of homococaine to cocaine in the defendant's urine sample indicates that there is an inconsistency to drinking and ingesting cocaine simultaneously as opposed to ingesting cocaine which had already been mixed with alcohol (R 1163).

At this point the defense rested (R 1189).

As its first witness in rebuttal, the state called Dr. Stanton Samenow, a clinical psychologist who was qualified as an expert in the field of psychology by the court (R 1199). Dr. Samenow was part of the longest in-depth research treatment study ever done of offenders in North America. This study was conducted for a total of seventeen years and was a study of 255 people (R 1201). As a result of that research project, Dr. Samenow came to several conclusions. One is that when an attempt is made to reconstruct the mental state of a defendant in a criminal case after the fact, it is extremely difficult and virtually impossible to do. This is because what the criminal tells a mental health expert is often very different from what the facts were before, during and after the crime (R 1202 - 1203). Results of the study were not what Dr. Samenow expected. In that study there were subjects who had been adjudicated by the courts as not guilty by reason of insanity and they were interviewed when they were no longer in legal jeopardy. To his surprise, Dr. Samenow found that they were not mentally ill, but the insanity defense had been a charade by which they calculatingly were able to get into a hospital rather than *go* to

prison and from there attempt to work their way out of the hospital (R 1203 - 1204). These findings are published in "The Criminal Personality", volumes one and two (R 1204). Dr. Samenow reviewed the entire contents of Dr. Merin's file, Dr. Merin's deposition, and Dr. Maher's deposition (R 1204 - 1205). Based upon his prior experience and research and upon all the interviews of the defendant as set forth in the depositions of the defense's mental health experts, Dr. Samenow could not formulate the conclusion that the defendant was unable to form a specific intent to kill (R 1205 - 1206). Based on all the materials reviewed by Dr. Samenow, there is no indication that the defendant has a mental illness (R 1208 - 1209). Based on the defendant's history, Dr. Samenow found that the defendant has a "credibility problem," This was apparent to Dr. Samenow because of the different stories the defendant told different people at different times (R 1209 - 1210). Although Dr. Merin and Dr. Maher opined that the defendant could not formulate a specific intent to kill at the time of the murders due to an apparent cocaine intoxication and the defendant's underlying personality disorder, Dr. Samenow was not able to reach the same conclusion because, in his opinion, attempting to reconstruct the defendant's mental state at the time of a crime cannot be done with any validity or reliability (R 1210 - 1211). On cross examination and in response to defense counsel's query, "Is it fair to say that your basic position is that mental health defenses are a sham?", Dr. Samenow opined that the insanity

defense and the impairment defense is essentially a charade (R 1224). Dr. Samenow's view was arrived at reluctantly because he had started his study with the opposite view (R 1224).

The state next called Carl "Tater" Beasley as a witness in rebuttal. Beasley testified that he worked with appellant at a manure factory, and in early February, 1989, appellant came to Beasley's home and requested Beasley to obtain some crack cocaine for appellant. Beasley and the defendant went to Grant Park where the crack was purchased. They then went to Gerry Wood's house where the defendant broke a piece off a rock of crack cocaine and smoked it (R 1237 - 1241). In early March, 1989, appellant brought a "young boy'' to Beasley's home to purchase marijuana (R 1241). On the Sunday prior to the murders, appellant went to Beasley's home, after which they both went to Beasley's brother's home where they smoked marijuana. On this occasion appellant appeared differently than he ever did; appellant had shaved off all his hair and beard (R 1242).

The state recalled Richard Estes, previously qualified as an expert chemist, to testify in rebuttal. He testified that he conducted tests on the empty beer cans found in the Wood's apartment and determined that there was no indication of cocaine found in those cans (R 1264). Mr. Estes testified that if cocaine was present he should have been able to see some indication of it, but he found nothing (R 1264 - 1265).

Betty Buchan was qualified as an expert in the field of forensic toxicology (R 1281). She is the director of forensic

laboratory services with the Hillsborough County Medical Examiner's Office, and also serves as Chief Toxicologist and as Assistant Administrator of the Medical Examiner's Office (R 1280). She found cocaine and cocaine metabolites in the fluid samples of the defendant and Gerald Wood (R 1280, 1282). Ms. Buchan opined that the defendant took cocaine anywhere from as soon as one hour prior to his specimen being obtained or as long as eight hours prior to the specimen being obtained (R 1283). With respect to the ratio of cocaine to homococaine of .231 in the defendant's urine, Ms. Buchan, contrary to the defense expert, Wayne Morris, opined that you cannot say that cocaine was dissolved in alcohol prior to ingestion. Ms. Buchan explained that the ratio is simply a measurement of the amount of the two substances and it does not relate to where the homococaine came from (R 1286). Ms. Buchan completely disagreed with the statement that homococaine is formed in the body only at low levels, again contrary to the testimony of the defense expert (R 1287). In the opinion of Ms. Buchan, the paper coauthored by Mr. Morris was insufficient to be able to say where the sources of homococaine came from (R 1288). Ms. Buchan also opined that homococaine cannot be formed by simply dropping cocaine in a cool or cold can of beer (R 1300).

Dr. Mark Montgomery, Director of the Toxicology Laboratories in the Tampa V.A. Hospital and Professor of Toxicology at the University of South Florida, was qualified as an expert in the field of biochemical toxicology (R 1321). Dr. Montgomery was

familiar with the results of the tests conducted by Betty Buchan on the blood and urine of Gerald Wood and the defendant. In his opinion, Dr. Montgomery believed the defendant's ingestion of cocaine could have been as recent as one hour prior to the obtaining of the sample, more likely somewhere between one and twelve hours prior to the obtaining of the sample, and it could have been as long as 60 to 72 hours prior to the samples being obtained (R 1322). There is no way to tell within that period of time when the defendant was actually feeling the effects of the cocaine (R 1323). Dr. Montgomery was asked a hypothetical question containing the factual scenario described by appellant with respect to his ingesting the cocaine. In Dr. Montgomery's opinion, if someone drank a beer in which amounts of cocaine sufficient to cause intoxication had been dissolved and that beer was consumed in a very rapid fashion, it would take at least 20 to 30 minutes before that person would feel the effects of the cocaine (R 1323 - 1324). Asked the same hypothetical question, Dr. Montgomery stated that it would be highly unlikely that a person drinking that beer would feel a tingling feeling in their mouth, lips or throat (R 1325 - 1326). Dr. Montgomery further testified that there is absolutely no way to tell whether cocaine has been mixed with alcohol inside or outside the body where the cocaine to homococaine ratio was .231 (R 1328). The paper coauthored by the defense expert, Mr. Morris, was discredited by Dr. Montgomery (R 1329 - 1333). Dr. Montgomery also opined that it was absolutely meaningless that homococaine was found in the

defendant's urine, but no homococaine was found in the Gerald Wood's blood or urine with respect to a possible source of homococaine found in the defendant (R 1335).

The state then rested it rebuttal case (R 1348 - 1349).

The state presented no additional witnesses or evidence in the penalty phase. The first witness called by the defense was Tulley Lynn Newton, the defendant's mother. She testified that when the defendant was between five and ten she physically abused the defendant by whipping him and by locking him in a closet. The defendant's mother testified that she took all her anger and frustrations out on the defendant (R 1560 - 1561).

William Newton, the defendant's uncle, testified that the defendant was capable of acts of kindness and that he could be a friendly person, as did Charles Hazen, Vanessa Sellers, and Joseph Boyer, friends of the defendant (R 1564 - 1581).

Dr. Robert Berland was the final witness adduced by the defense at the penalty phase.[2] He was qualified as an expert in the field of forensic psychology (R 1590). Dr. Berland opined that the defendant was under the influence of an extreme mental or emotional disturbance at the time he killed the Wood family (R 1591). Dr. Berland was unable, based upon insufficient

[2] Dr. Berland is no stranger to this Honorable Court. See e.g., Henry v. State, 574 So.2d 66, 71 (Fla. 1991).

information, to form an opinion as to whether the defendant could appreciate the criminality of his conduct. However, Dr. Berland opined that the defendant was substantially impaired in his ability to conform his conduct to the requirements of law (R 1591 - 1592). On cross examination, Dr. Berland testified that he first saw the defendant on February 19, 1990 (the trial in this cause commenced on March 7, 1990) (R 1670).

SUMMARY OF THE ARGUMENT

As to Issue I: The failure of appellant to object or otherwise complain at trial pertaining to the testimony of the state's mental health expert precludes appellate relief. Alternatively, the state's mental health expert offered proper expert testimony to rebut appellant's contentions.

As to Issue II: The trial judge did not err in denying appellant's motion to suppress statements. The most that can be said concerning appellant's question, "What about an attorney?" is that it was an unequivocal request for counsel. Law enforcement officers are permitted to ask further questions to clarify an equivocal request for counsel. In the instant case, the giving of Miranda warnings and, specifically, advising the defendant that he had the right to an attorney without cost during any questioning, was a reasonable method to clarify appellant's intentions.

As to Issue 111: The trial court did not consider any nonstatutory aggravating circumstances in imposing the death sentences upon appellant. The trial court permissibly considered the circumstances of the prior capital felonies in assessing the weight to be given that aggravating factor.

As to Issue IV: Appellant's proportionality challenge to three of the four death sentences imposed in the instant case should fail. The trial court, as permitted by law, gave minimal weight to the mitigation propounded by appellant and gave properly enhanced weight to the aggravation existing in this

case. Death sentences are warranted for these most indefensible of crimes.

As to Issue V: In severely diminishing the weight to be accorded the mitigating circumstance of no significant prior history of criminal history, the trial judge validly considered appellant's history of illegal drug use.

As to Issue VI: Appellant has properly conceded that the law in the State of Florida supports rejection by the trial court of certain special penalty phase jury instructions.

ARGUMENT

ISSUE I

WHETHER THE FAILURE TO OBJECT AT TRIAL PRECLUDES APPELLANT FROM ATTACKING, ON APPEAL, THE PROPRIETY OF EXPERT TESTIMONY PRESENTED BY THE STATE.

As his first point on appeal, appellant takes issue with a portion of the content of the testimony of the state's mental health expert, Dr. Stanton Samenow, a clinical psychologist who was qualified as an expert in the field of psychology by the trial court. Appellant candidly concedes that no objection or other form of challenge was lodged in the trial court with respect to Dr. Samenow's testimony. Generally, in order for an issue to be preserved for further review by an appellate court, that issue must first be presented to the trial court and the specific legal argument or ground to be argued on appeal must be part of that presentation. See e.g., Tillman v. State, 471 So.2d 32 (Fla. 1985), citing Steinhorst v. State, 412 So.2d 332 (1982), and Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979). In the instant case, the failure to present the specific objection in an argument during the guilt phase of trial as now presented on appeal precludes appellate review. Appellant's contention that the need for objection was obviated in the instant case (where the error is purportedly fundamental in nature) is without merit and, as will be discussed below, appellant's point must fail.

At the outset, it must be observed that appellant's primary contention (i.e., Dr. Samenow's opinion that mental impairment defenses, which intoxication is one, are a charade, does not conform to the purpose of expert testimony since it does not assist in an understanding of any factual issue; appellant's brief at page 9) is an oversimplified conception of what occurred at trial. In his direct testimony, Dr. Samenow testified as to the findings of the longest in-depth research project ever done of criminal offenders in North America. After studying hundreds of criminals who attempted to use insanity or mental impairment defenses, the conclusion was reached that it is virtually impossible to reconstruct the mental state of a defendant in a criminal case after the fact. This conclusion was reached because the criminal often tells the mental health expert facts which were often very different from what actually occurred. In this context, Dr. Samenow testified that the insanity defense had been a charade by which criminal defendants calculatingly were able to get into a hospital rather than go to prison (R 1203). On cross examination, Dr. Samenow stated, in response to defense counsel's question, that the insanity defense and the impairment defense are essentially charades (R 1224). Your appellee posits, however, that this statement has to be read in context with the entirety of Dr. Samenow's testimony. It is clear that Dr. Samenow was offering his opinion based upon the results of a very extensive study, and his conclusions did not demean the legal existence of the mental impairment defense, but rather, were

offered to explain a position held by some experts which was different from the view expressed by the experts produced by the defense. One of the defense experts, Dr. Merin, acknowledged that it is a "minimally common" view in the field of psychology that it is futile to attempt to reconstruct mental states (R 922). Indeed, defense counsel was aware of Dr. Samenow's opinion and views with respect to reconstructing a defendant's mental state. After argument concerning the defense request to ask Dr. Merin questions on direct examination more appropriate for surrebuttal, a request to which the state acceded defense counsel propounded Dr. Merin's opinion pertaining to the "minimally common" view that it is futile to attempt to reconstruct mental states. Thus, rather than lodge an objection to Dr. Samenow's testimony, defense counsel attempted to attack the opinions of the state's expert and, therefore, should not be heard on appeal to contest that which was not contested below.

Even had appellant made proper abjection to the testimony of Dr. Samenow, appellate relief would not be forthcoming. "The trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify and, unless there is a clear showing of error, its decision will not be disturbed on appeal." Johnson v. State, 393 So.2d 1069, 1072 (Fla. 1980). This Court in Johnson also determined that expert testimony is admissible if that testimony pertains to a disputed issue and that issue is beyond the ordinary understanding of the jury. Id. These principles are applicable

in the instant case. One of the defense experts, Dr. Merin, acknowledged that it is difficult to reconstruct an individual's mental state at a specific time (R 916 - 918). Dr. Merin also testified that he did find evidence of malingering (faking), and that many of appellant's stories were not consistent with each other. What appellant told the police was not necessarily what he told to Dr. Merin. Indeed, Dr. Merin conceded that it is a possibility in that telling Dr. Merin certain stories appellant was trying to convince Dr. Merin of appellant's alleged cocaine intoxication. Dr. Merin acknowledged that people charged with crimes sometimes exaggerate their psychological symptoms in order to benefit themselves in some way (R 944 - 947). The other mental health expert called by the defense in guilt phase, Dr. Michael Maher, conceded on cross examination that in relating some of his stories, appellant was inconsistent and at times lied. Dr. Maher also acknowledged that there is a possibility that appellant's motive in telling different stories at different times was an attempt to convince the doctor that appellant was involuntarily intoxicated at the time of the commission of the murders (R 1079 - 1088). Thus, Dr. Samenow's testimony was especially relevant in the instant case. His findings based upon a long-term study indicated that criminal defendants often tell a mental health professional matters which will aid a particular defense. For this reason, Dr. Samenow, and those other mental health professionals who worked on the long-term study, concluded that it is virtually impossible to reconstruct a defendant's

mental state at the time of the crime. Dr. Samenow's opinion testimony was proper rebuttal to the evidence presented by the defense in their case in chief, especially with regard to the concessions made by the defense mental health experts upon cross examination. Dr. Samenow's testimony was an aid to the jury in enabling them to understand a disputed issue which was beyond the ordinary understanding of the jury.

In Gifford v. Galaxie Homes of Tampa, Inc., 223 So.2d 108, 111 (Fla. 2nd DCA 1969), the court cited with approval a theory that has been explained in II Wigmore on Evidence, 3d Ed. 9673, p. 795:

> . . . It is still the sole province of the jury to accept or reject the testimony of the expert witness, regardless of how respectable and qualified that witness may be, and the jury is in no wise bound by the expert's conclusions, any more than it is bound by the testimony of any other witness.

In accordance with this theory, Dr. Samenow's expert opinion was properly before the jury and it was the jury's decision as to what weight would be accorded that opinion vis-a-vis the opinions of the defense mental health experts. It is no wonder that no objection was made by the defense below as to this testimony.

Appellant's attempt to have this Honorable Court determine that fundamental error occurred with respect to Dr. Samenow's opinion is particularly unavailing. Specifically, appellant s reliance upon Carter v. State, 469 So.2d 194 (Fla. 2d DCA 1985, is totally misplaced, In Carter, the trial judge had improper Y instructed the jury on the "duty to retreat" in one's own home.

The Second District Court of Appeal held that where a trial judge gives an instruction that is an incorrect statement of the law and, therefore, misleading ta the jury, and the effect of that instruction is to negate a defendant's only defense, fundamental error has been committed. In the instant case, however, we are not dealing with judicial instruction. There is no claim, nor could there be, that the jury was improperly instructed on the appellant's defense of intoxication. Rather, the claim is made that the testimony of the state's expert witness somehow totally negated the only defense of appellant. This is patently false where the defense attempted through Dr. Merin to rebut the views expressed by Dr. Samenow and where the jury was properly instructed on the intoxication defense. The ability of the jury as finder of the facts to accept or reject the testimony of the conflicting mental health experts was not infringed in any manner. The jury had the ability to choose between, for example, Dr. Merin's testimony that, although difficult, it is possible to reconstruct a defendant's state of mind and Dr. Samenow's opinion that it is virtually impossible to do so. Appellant has failed to establish that error, if any, was fundamental thereby obviating the need for objection. No error has been made to appear and, thus, appellant's first point must fail.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS ADMISSIONS OF THE STATEMENTS.

As his next point on appeal, appellant contends that the trial court erroneously denied a motion to suppress statements. It is axiomatic that a trial court's order denying a defendant's motion to suppress comes to the appellate court clothed with the presumptian of correctness, e.g., McNamara v. State, 357 So.2d 410 (Fla. 1978), and a reviewing court must interpret the evidence in the light most favorable to sustaining the trial court's ruling. State v. Riehl, 504 So.2d 798 (Fla. 2nd DCA), review denied, 513 So.2d 1063 (1987). As will be discussed below, the trial court correctly denied appellant's motion to suppress.

The facts pertaining to appellant's motion to suppress were developed at a hearing below and are set forth in the Statement of the Facts, supra, commencing at page 1 of this brief. Basically, appellant's contention revolves around a statement made by him prior to questioning by law enforcement officers. After the police officers advised appellant that they were investigating a homicide, the defendant inquired, "What about an attorney?" The unrebutted testimony of the police officers, Detectives Grossi and Bell, reveals that this statement was taken as a question by the officers (R 1851 - 1852). Immediately thereafter, it was determined that the officers would explain to appellant about an attorney and, to effect this purpose,

Detective Bell read a consent to be interviewed form to appellant. Specifically, the defendant was advised that he had the right to talk to a lawyer before answering any of the officer's questions. Detective Bell stopped and asked the defendant if he understood, and the defendant replied in the affirmative (R 1869). Appellant was next advised that if he could not afford to hire a lawyer one would be appointed for him without cost and before any questioning. Appellant also acknowledged that he understood that portion of the rights (R 1869). The defendant was then advised that he had the right to invoke any of his rights at any time during the interview. The defendant acknowledged that he understood all of his rights and he stated that he was willing to talk to the officers. The written waiver was signed by the defendant and the officers (R 1852 - 1853, 1869 - 1870). Your appellee submits that these facts support the rejection of appellant's motion to suppress.

In his brief, appellant sets forth his position clearly, that is, no efforts should have been made to secure any statements or admissions from appellant once appellant stated, "What about an attorney?" (Appellant's brief at page 11). Appellant thus takes the position that his statement was an unequivocal request to have counsel present prior to any questioning. This is an unreasonable interpretation of the facts. Rather, "Appellant did not express a desire to deal with the police only through counsel. His statements . . . were at most equivocal requests to consult with counsel, The officers

were not prohibited from initiating further communication for the purpose of clarifying appellant's request." Waterhouse v. State, 429 So.2d 301, 305 (Fla. 1983).

If appellant's question, "What about an attorney?" was an unequivocal indication of his right to counsel prior to proceeding to any questioning, the rule announced in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), would apply. However, appellant's question was, at best, equivocal and, therefore, Edwards does not apply. Rather, the police officers had the right to further inquire of appellant concerning his actual wishes with respect to counsel. See Cannady v. State, 427 So.2d 723, 728 (Fla. 1983). Your appellee submits that reading appellant his Miranda rights and ascertaining that appellant understood those rights was the appropriate response to appellant's equivocal statement mentioning an attorney.

Aycock v. State, 528 So.2d 1223 (Fla. 2d DCA 1988), is very similar to the instant case. There, the defendant, after being given Miranda warnings but prior to any questioning by police officers, stated that he was far from home and no local attorney would come talk to him so he might as well cooperate. Thus, the defendant in Aycock misapprehended the fact that an attorney could have been made available to him. The Second District Court of Appeal held that in this situation, "The officers were faced with an invocation of defendant's right to counsel or, at the least, an equivocal invocation of the right which 'put the police

officers on notice that the only permissible further questioning would be questions attempting to clarify . . . [his] request for counsel.'" Aycock, Id., at 1223, citing Long v. State, 517 So.2d 664, 667 (Fla. 1987). After the defendant made his statement, he was given Miranda warnings for a third time. He was specifically advised that he had the right to talk with a lawyer at that time and have him present while being questioned. The defendant replied that he understood his rights and he thereafter signed a written waiver of his Miranda rights. Questioning by the police officers ensued. In the instant case, an analogous situation was presented. Prior to any questioning appellant, after asking his question concerning an attorney, was advised of his Miranda rights. He was specifically advised of his right to counsel and his right not to proceed with questioning without counsel. Appellant acknowledged that he understood his rights and he executed a written waiver and consent to be interviewed. The court in Aycock held that the trial judge had properly denied the defendant's motion to suppress because the officers had properly clarified the defendant's wishes concerning an attorney and because the defendant signed a written waiver after being readvised of his Miranda rights. The same results should obtain in the instant case.

Also similar to the instant case is Valle v. State. 474 So.2d 796 (Fla. 1985). There, when interrogating officers arrived and advised they were going to conduct an interview, the defendant stated that he had spoken with an attorney and was

advised not to sign anything nor to answer any questions. The officers then stated that it was appellant's constitutional right to refuse to speak but they had come in the hopes that the defendant would talk with them. This Honorable Court held that the defendant's statement was at most an equivocal indication of his Miranda rights but that the interrogating officers were permitted to initiate further communications for the purpose of clarifying the defendant's wishes. As in the instant case, Valle signed a written waiver and this Court observed, "The fact that at no time **before,** during, or after questioning did appellant request an attorney, convinces us that he made a voluntary, knowing and intelligent waiver of his Miranda rights." Valle, id. at 799. The same is true in the instant case and, again, the same result should obtain.

In Long v. State, supra, the defendant, during the midst of interrogation by police officers, stated that "I think I might need an attorney.'' Interrogation continued without cessation. The court held that Edwards permitted continued questioning for the sole purpose of clarifying the equivocal request. In Long, however, the investigating officers did not attempt to clarify the equivocal request for counsel but continued to interrogate the defendant and obtained a confession. Contrarily in the instant case, the officers did not commence interrogation. Rather, they clarified appellant's equivocal statement concerning an attorney and only after appellant was adequately and properly advised of his Miranda rights did questioning continue.

Detectives Grossi and Bell acted in a constitutional matter sub judice.

Inasmuch as the Tampa Police officers validly clarified appellant's equivocal questioning concerning an attorney, the trial court properly denied appellant's motion to suppress.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY RELYING UPON A NONSTATUTORY AGGRAVATING CIRCUMSTANCE WHEN SENTENCING APPELLANT TO DEATH.

In this case, the defendant murdered four members of a family. In the trial court's findings as to the aggravating circumstances, the trial judge found that "an aggravating circumstance as to each such murder is the conviction of the other three First Degree Murders" (R 2157). Further into his order when discussing the weighing process undertaken, the trial judge noted with respect to the prior violent capital felonies that they included the murder of two helpless and defenseless young children (R 2162). Appellant contends that the trial judge, based upon the foregoing matters contained within his written judgment, order and sentence, impermissibly relied on a nonstatutory aggravating circumstance, ta-wit: "the prior convictian of a capital felony was of a capital felony whose victims were helpless and defenseless young children'' (Appellant'sbrief at pages 17 - 18). Appellant contends that he "is unable to discover any authority for the proposition that the weight to be accorded the aggravating circumstances contained in *Chapter 921.141(5)(b) Fla. Stat.* is somehow increased, or that the circumstance is somehow enhanced by the helplessness, the defenselessness or age of the victims of the prior capital felony" (Appellant's brief at page 18). However, as will be discussed below, there is authority to support the trial judge where he increased the weight of an aggravating circumstance based upon the circumstances of that factor.

The trial judge did not consider the helplessness and defenselessness of the murdered children as a nonstatutory aggravating factor. Rather, the trial judge validly considered the circumstances and facts of appellant's prior convictions for capital felonies. For the convenience of this Honorable Court, the following excerpt of the trial court's order pertaining to the court's finding of the prior violent capital felonies is set forth:

STATUTORY AGGRAVATING CIRCUMSTANCES

> 1. The Defendant has been convicted of four counts of First Degree Murder in this case. As such, an aggravating circumstance as to each such murder is the conviction of the other three First Degree Murders.
>
> The evidence demonstrates that Gerald Wood, the husband of Peggy Wood and father of Glendon and Jennifer Wood, was murdered by a single shot to the middle of his back. Glendon Wood, age three, was murdered from a single shot to his chest. Jennifer Wood, age four, was murdered by a single shot to her back. All of the above shots were fired from close range.
>
> Peggy Wood, mother of Glendon and Jennifer Wood, was murdered by a shot to her back, a second shot to her lower front abdomen and by a disembowelment which not only contributed to her death but removed an unborn fetus from her body.
>
> Not only the fact of a prior conviction but the facts of the capital offenses for which the defendant has been convicted are appropriate for consideration herein. (R 2157 - 2158; emphasis supplied)

The trial judge correctly determined that he was permitted to consider the facts of the capital offenses committed by appellant. In Brown v. State, 473 So.2d 1260, 1266 (Fla. 1985), this Honorable Court determined that the appellant therein had

misread this Caurt's holding in Mann v. State, 420 So.2d 578 (Fla. 1982). This Court specifically held that "evidence of the circumstances of the previous offense may be considered" citing Mann v. State, 453 So.2d 784 (Fla. 1984). See also, Stewart v. State, 558 So.2d 416, 419 (Fla. 1990). Thus, in the instant case, the trial judge, based upon the precedent established in this Court, validly considered the circumstances of the other capital felonies. Consideration of those circumstances led the trial court to give great weight to the aggravating Circumstance set forth in *Florida Statute 921.141(5)(b)*.

Inasmuch as the trial judge properly considered the circumstances of a statutory aggravating circumstance, the trial judge did not improperly rely upon a nonstatutory aggravating factor. Appellant's point must fail.

ISSUE IV

WHETHER THE DEATH SENTENCES IMPOSED FOR THE MURDERS OF GERALD WOOD, GLENDON WOOD AND JENNIFER WOOD ARE PROPORTIONALLY WARRANTED.

In his fourth point on appeal, appellant contends that three of the four death sentences imposed upon appellant were not warranted where the mitigating circumstances quantitatively outnumber the aggravating factors. Appellant cites Hargrave v. State, 366 So.2d 1 (Fla. 1978), and concedes that "the propriety of a sentence imposed as per Chapter 921.141 Florida Statutes is not a function of merely tabulating aggravating versus mitigating circumstances" (Appellant's brief at page 19). Appellant thus presents a proportionality claim for resolution by this Honorable Court. For the reasons expressed below, your appellee asserts that the death penalty imposed in the instant case are proportionately warranted.

In his brief, appellant contends that the trial court found two statutory and two nonstatutory mitigating circumstances. However, in all candor, the trial judge found three statutory mitigating circumstances, Contrary to appellant's appellate contentions, and as will be more fully discussed under Issue V, infra, the trial court did find as a statutory mitigating circumstance the fact that appellant had no significant prior history of criminal activity. Apparently, appellant's confusion stems from the fact that the trial court in his written order set forth matters arising from the evidence which tended to negate this mitigating circumstance. However, it is clear from the

trial court's order that he found no significant prior history of criminal activity, but that mitigating circumstance was accorded minimal weight in the court's weighing process. Thus, this Honorable Court's proportionality analysis must take into account all the findings of the trial judge.

With respect to the death sentences imposed for Gerald, Glendon and Jennifer Wood, appellant correctly notes that one aggravating circumstance was weighed against quantitatively greater mitigating circumstances. But, as appellant correctly observed, this is not the end of the relevant inquiry. The trial court's weighing process must be examined by this Court when deciding whether the death sentences imposed in this case are proportianally warranted, Your appellee asserts that, from the face of the trial court's order, it can be seen that the trial court accorded minimal weight to the mitigating circumstances propounded in this case. Setting forth the statutory mitigating circumstances, the trial judge used language indicating that minimal weight was attached to those factors (R 2160). As asserted above, the finding of no significant prior history of criminal activity was extremely diminished by evidence of appellant's illegal drug use (and, again, this will be discussed in more detail under Issue V, infra.). The trial judge did list the two "mental health''statutory mitigating factors, but stated they existed only according to the opinion of the psychologist

produced by appellant at the penalty phase, Dr. **Robert** Berland.[3] The trial judge's qualification as to the finding of the statutory mental mitigators indicates that the these too were given little weight. Indeed, it appears that the trial judge, even before the issuance of the opinion in Campbell v. State, 571 So.2d 415 (Fla. 1990), complied with the dictates of Campbell by setting forth in his written order each mitigating circumstance proposed by the defendant. The same is true with **respect** to the findings of the nonstatutory mitigating circumstances propounded by the defendant. Again, the trial court qualified his findings by stating that there was testimony from the defense witnesses to support the mitigating factors. However, with respect to all mitigation found by the trial court in the instant case, "the relative weight given each mitigating factor is within the province of the sentencing court." Campbell, Id. at 420. An examination of the trial court's order reveals that the mitigation was given minimal weight when viewed with **respect** to the aggravation (R 2161 - 2162). The trial judge found that the statutory and nonstatutory mitigating circumstances were clearly outweighed by the aggravation sub judice.

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[3] Dr. Berland was not able to form an opinion as to whether the defendant could appreciate the criminality of his conduct, thereby further diminishing the finding of the mitigating circumstance set forth in Chapter 921.141(6)(f), Fla. Stat.

The instant case must be contrasted with other cases which, upon first blush, might appear to support a reversal of the three death sentences at issue based upon proportionality grounds. In both Smalley v. State, 546 So.2d 720 (Fla. 1989), and Songer v. State, 544 So.2d 1010 (Fla. 1989), this Honorable Court vacated death sentences where one aggravating circumstance was weighed against multiple mitigating factors. However, these cases can be distinguished from the instant case. In both Smalley and Songer, only one murder was committed, whereas in the instant case four murders were committed by the defendant. In Songer, this Court determined that it may have been the least aggravated and most mitigated case to undergo proportionality analysis, and in Smalley, this Court determined that the entire picture of mitigation and aggravation demonstrated that the death penalty was not warranted. In the instant case, however, the mitigation was not substantial as evidenced by the trial court's findings. The mitigation was outweighed by the commission of four murders.

In Songer, this Court determined that the gravity of the one aggravating factor found therein was somewhat diminished. In the instant case, however, the one aggravating circumstance is materially enhanced as discussed under Issue III, supra. In Smalley, this Court cited State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), for the proposition that "the aim [in proportionality analysis] is to assure that capital punishment is inflicted only in 'the most aggravated, the most indefensible of crimes.'"

Smalley, supra at 722 - 723. Measured by this standard, the murders committed by appellant in the instant case are among "the most indefensible of crimes."

Your appellee submits that the trial court's order indicates that he gave minimal weight to the mitigation propounded by appellant. The trial court's order also reflects a deliberative weighing process (as do the jury findings with respect to each of the counts) which should not be disturbed on appeal. The facts of the instant case demonstrate that death is a proportionally warranted punishment for the deaths of Gerald, Glendon and Jennifer Wood.

ISSUE V

WHETHER THE TRIAL COURT MAY DIMINISH THE EFFECT OF THE NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY MITIGATING FACTOR BY RELYING UPON APPELLANT'S USE OF ILLEGAL DRUGS.

As asserted immediately above under Issue IV, the trial court did find the statutory mitigating circumstance of no significant history of prior criminal activity. It is understandable how appellant may believe that the trial court totally negated this mitigator by virtue of his findings with respect to this circumstance. However, rather than totally negating the mitigating circumstance, the trial court in his findings expressed reasons why the factor should be given minimal, almost infinitesimal, weight. For the reasons expressed below, the trial court's treatment of this mitigating circumstance was proper.

In his argument, appellant contends that the trial court could not use admissions and statements made by appellant to mental health experts as a basis for the court's diminishment of the applicability of the no significant history of prior criminal activity mitigating factor. Pour appellee submits that such evidence is proper for consideration by a trial judge when weighing aggravating and mitigating circumstances. Any evidence which has probative value may be considered in a penalty proceeding. *Florida Statute 921.141(1).* Additionally, testimony concerning appellant's use of illegal drugs was adduced during the state's rebuttal case (e.g., R 1237 - 1242).

Appellant's contention that the use of illegal drugs is not a crime under Florida law so as to be considered to negate or diminish the mitigating factor of no significant history of prior criminal activity is simply without merit. Obviously, the voluntary use of illegal drugs requires the user to be in illegal possession of same.

This Honorable Court has upheld the fact that a sentencing judge may consider criminal activity not resulting in convictions as negating new statutory mitigating circumstance of no significant history of prior criminal activity. Walton v. State, 547 So.2d 622, 625 (Fla. 1989), cert. denied, 493 U.S. 1036, 110 S.Ct. 759, 107 L.Ed.2d 775 (1990); Quince v. State, 414 So.2d 185 (Fla. , cert. denied, 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155 (1982 ; Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979). Your appellee submits that this Honorable Court's decision in Washington, Id. is on point with the situation presented sub judice. In Washington, the defendant's confession to one of the murders contained statements that the defendant had committed a series of burglaries and had sold the stolen merchandise to the murder victim. Although defense counsel in Washington argued that prior convictions are required to negate the mitigating circumstance of no significant history of prior criminal activity, this Court held that §921.141(6)(a), Fla. Stat., makes no reference to conviction and, therefore, convictions need not be shown in order to show past criminal history. Sub judice,

appellant, in his statements and admissions to his mental health experts, admitted to a significant history of illegal drug use. In addition to these admissions, testimony was adduced at trial to show appellant's involvement with illegal drugs. In accordance with the precedent of this Honorable Court, this evidence was permissible to show that appellant did, indeed, have a significant history of prior criminal activity. Certainly this evidence was sufficient to permit the trial judge to severely diminish the effect of appellant's seeming lack of prior criminal history.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUESTED SPECIAL PENALTY PHASE INSTRUCTION NUMBERS 3 THROUGH 8.

As his final point on appeal, appellant concedes that, based upon Florida law, the trial court correctly denied the defense request for special jury instructions. Appellant's position is correct. For example, see Stewart v. State, 558 So.2d 416, 420 (Fla. 1990) (trial court is not required to delete "extreme" or "substantial" from the standard jury instructions pertaining to mitigating circumstances); King v. State, 514 So.2d 354 (Fla. 1987) ("lingering doubt" is not a proper mitigating circumstance in Florida). The trial court's rejection of appellant's special penalty phase instructians should be affirmed by this Honorable Court.

CONCLUSION

Based on the foregoing reasons, arguments, and of authories, 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 Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 31st day of January, 1992.

Robert J. Krauss
OF COUNSEL FOR APPELLEE.