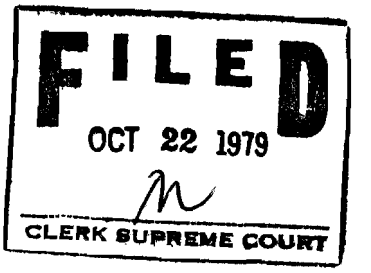
IN THE SUPREME COURT OF FLORIDA



JESSIE JOSEPH TAFERO,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

CASE NO. 49,535

ANSWER BRIEF OF APPELLEE

On Appeal from the Circuit Court
of the Seventeenth Judicial Circuit,
In and For Broward County, Florida

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PRELIMINARY STATEMENT

Appellee, the State of Florida, was the Prosecution and Appellant, Jessie Joseph Tafero, was the Defendant in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. In this brief, the parties are referred to as they appear before this Honorable Court as well as by their proper names.

The following symbols are utilized throughout this Answer Brief of Appellee:

"R" followed by a volume and page number refers to a part of the nine-volume Record on Appeal consisting of documents and pleadings filed in the case and the transcript of trial proceedings;

"SR" followed by a volume number denotes a reference to the four-volume Supplemental Record on Appeal; while

"S" describes the one-volume Supplemental Record consisting of seventy-two (72) pages.

STATEMENT OF THE CASE

The State of Florida accepts the Statement of the Case as recited on page one of Appellant, subject to the following exception:

The jury deliberated for less than four hours prior to reaching their unanimous verdicts of guilty on all counts (RI 99-100; RII 150-153; S 37-38).

STATEMENT OF THE FACTS

Appellee does not accept the Statement of the Facts recited on pages one through nine of Appellant's brief. Consequently, the State of Florida outlines the facts as they were adduced at trial.

Pierce M. Hyman, a truck driver employed by Pilot Freight Carriers, was driving his tractor-trailer northbound on Interstate 95 (I-95) on the morning of February 20, 1976 (RIII 14-15). Due to a malfunction of the trailer clearance lights, Hyman decided to stop the truck and correct the problem (RIII 16-17). He pulled into a rest area alongside the highway, south of the Palm Beach County line (RIII 17), and stopped the truck approximately one hundred fifty feet (150') behind a Florida Highway Patrol (FHP) vehicle (RIII 18-19). Hyman noticed a green Camaro automobile parked next to the right side of the patrol car (RIII 18-19).

Hyman observed several individuals outside the cars. One, a uniformed FHP Trooper (later identified as Phillip A. Black) (RIII 100-101), was leaning over at the driver's side door of the Camaro (RIII 21-22). The other individual, wearing a white T-shirt and light pants (later identified as Donald Irwin) (RIII 128-130, 133-134), was standing between the two cars, approximately six feet behind the Trooper (RIII 22-24). A third man was standing about three to four feet away from the front of the Camaro (RIII 23-24).

The truck driver observed the Trooper approach the patrol car and speak into the radio microphone (RIII 24-25). At the same time, a man with a goatee, wearing brown pants and a jacket, exited from the driver's side of the Camaro and stretched himself (RIII 25-27). The Trooper then took that man (later identified as Jessie Joseph Tafero) (RIV 282-285) by the shoulder and directed him to the patrol car (RIII 28-29). The man in the white T-shirt assisted the Trooper in pushing Tafero down on the hood of the patrol car (RIII 29). The Trooper then pulled his gun (RIII 29). At this point, the man in front of the cars (Rhodes) had his hands up in the air (RIII 30). The Trooper's companion in the white T-shirt grabbed the man wearing the jacket and held his left arm, forcing him over the hood of the patrol car (RIII 30).

All of a sudden, Hyman heard a single shot pierce the morning silence (RIII 31). The Trooper reeled back toward the patrol vehicle and cried out, "Oh, God, I'm shot." (RIII 31). When Hyman heard the shot, the man in front of the Camaro still had his hands in the air, and the man in the jacket was still struggling with the Canadian, who was wearing the white T-shirt (RIII 32). There was a short pause, and then Hyman heard "several shots fired in rapid succession" (RIII 31-32). The Trooper went down, and the Canadian (Irwin) fell as well (RIII 33). The man in front of the Camaro still had his hands in the air while the shots were being fired (RIII 32, 38). Hyman could not tell where the shots came from, but thought they came from the back of the Camaro (RIII 33).

When the firing stopped, the man in front of the Camaro got into the driver's side of the patrol car (RIII 33). The man in the brown jacket (Tafero) opened the door on the passenger's side of the FHP vehicle and then helped a woman and two children out of the Camaro. A baby was first handed to the man wearing the jacket, who put the baby inside the patrol car. The woman and another child, a boy, entered the rear passenger area of the police cruiser (RIII 33-34, 56). The car then sped off in a northerly direction (III 40-41).

Trucker Hyman immediately radioed a call for help on his CB radio, and then walked toward the two bodies (RIII 42). The State Trooper was near the Camaro door while the Canadian was facing in the opposite direction (RIII 43). Within a very short time period, a FHP vehicle arrived. The State Trooper surveyed the scene and sped off in the direction of the assailants (RIII 43-45). Shortly thereafter, a second Trooper arrived at the scene. Others arrived soon afterwards (RIII 45).

Robert McKenzie, also a tractor-trailer driver but one employed by Food Fair, pulled into the same I-95 rest stop on the morning of February 20, 1976, at 7:10 a.m. (RIII 59-62). McKenzie intended to stop for his fifteen minute break (RIII 62). He saw a FHP vehicle parked next to a small, 2-door car (RIII 63-64). The Trooper was standing at the open door of the Camaro reading a piece of paper (RIII 63-68). In the driver's seat was a man wearing a brown jacket who was talking to the Trooper (RIII 63). Another man, wearing a white T-shirt, was positioned next to the Trooper, and a fourth man in a blue shirt was standing in front of the car (RIII 64-65).

McKenzie observed the man in the brown jacket walk away from the Camaro and over to some nearby trees. The Trooper then stooped down and appeared to be talking to someone else inside the car (RIII 68-69). The man in the brown jacket returned to the car and sat down, only to stand up again and put a suitcase on the roof of the car (RIII 72-72). The man in the brown jacket seemed mad (RIII 71). Trooper Black snatched the attache case and put it into his patrol car (RIII 72-73).

At approximately 7:25 a.m., another tractor-trailer arrived, and McKenzie began his departure from the area (RIII 73). As McKenzie approached the two cars, he saw a person with long hair sitting in the back seat of the Camaro (RIII 73-74). At that time, Trooper Black attempted to search Tafero, which began a struggle between the two (RIII 75-76). Black pushed Tafero to the car, and was assisted by Irwin, in the white T-shirt, who held Tafero up against the patrol car (RIII 75-76). Trooper Black took his own gun out, which resulted in Rhodes, who had gone to the back of the cars, putting his hands up in the air (RIII 76-80). McKenzie at this time had passed the scene, and was looking through his side-view mirror (RIII 82). Suddenly, the sound of several gunshots pierced the air. The Trooper fell, followed by the man in the white T-shirt (Irwin) (RIII 81). At the time of the shots, Rhodes' hands were always up in the air (RIII 81). McKenzie, very scared at this point, "took off." As he did so, that same Trooper vehicle sped by. The truck driver saw Rhodes driving the car and Tafero in the front passenger seat (RIII 83).

James Clark was the first FHP Trooper to arrive on the scene shortly after the shooting. His arrival time was 7:38 a.m. (RIII 96, 98). There, he saw the lifeless bodies of Black and Irwin lying in a pool of blood next to a green Camaro (RIII 100). At the scene, Clark observed a small Derringer laying by the left front wheel of the Camaro (RIII 101). Trooper Black's weapon was nowhere in sight (RIII 100-101). Clark radioed for assistance and then drove off in an attempt to apprehend the patrol car that had fled from the rest area (RIII 102). He returned to the crime scene later that day (RIII 106).

As Clark exited from the rest area, Trooper G.E. Odom entered. At the scene, he saw the two bodies near the green Camaro (RIII 112-121). A small handgun was observed near the left front tire of the Camaro, but Black's issued firearm was not in sight (RIII 121, 123).

Corporal Robert Grieve of the Ontario Provincial Police identified a photograph of one of the bodies as that of Donald Robert Irwin (RIII 133-134).

Detective Harold Hoak, a Broward Sheriff's Office (BSO) crime scene investigator, arrived at the rest area at 8:11 a.m. (RIII 139-140). He took photographs of the scene as he found it, and otherwise proceeded to "process" the area (RIII 140-142, 143, 166-167). He saw a small loaded Derringer near the car, together with two live .22 caliber rounds and a beige Stetson hat (RIII 145). Approximately two or three feet from this same area was a plastic baggie containing a brown leafy substance suspected to be marijuana (RIII 147). Underneath the body area was a copper jacket from a projectile of

some type (RIII 146). Under Irwin's left foot area was a small aluminum foil wrapper-type substance containing a white powder (RIII 146). Inside the Camaro, Hoak found two spent casings lying on top of a jacket in the front seat area (RIII 147, 148-150), and seventeen (17) live .22 caliber bullets within a bag (RIII 147-148). He also found a bayonet and hatchet (RIII 153) as well as eighteen (18) live rounds (RIII 153-154). Six of the bullets were hollow points, while six others were KTW armor piercing 9mm. projectiles (RIII 154).

Hoak continued to examine the scene by searching a sixty to seventy-five foot (60-75') area around the car (RIII 143). This exhaustive scrutiny took more than one hour, and revealed several pieces of physical evidence (RIII 144), including a Taser holding device (RIII 153). Next to the right (passenger) front fender of the Camaro was another spent casing (RIII 148). After Hoak completed the processing of the scene, the Camaro was towed to a closed location for further examination (RIII 142, 155). Within the car's trunk was a white receipt showing that Sonia Linder purchased two Smith & Wesson Model 39, nine millimeter automatic pistols, serial numbers A-187854 and A-234895 (RIII 156). The small Derringer was identified by serial number 8985 (RIII 498). The Trooper's handcuffs were also found on the ground at the scene (RIII 145). Hoak also processed the Camaro for fingerprints (RIII 142). In the course of his examination, he determined that the passenger door of that vehicle was jammed shut (RIII 142).

Abdullah Fatteh, a Deputy Medical Examiner for Broward County, testified as to the cause of death and location of the

wounds (RIII 188). He identified pictures of Black and Irwin which depicted the wounds and helped describe their location (RIII 197-198). Fatteh observed that Trooper Black had been shot four times (RIII 194). One bullet entered the rear of Black's head, travelled through the brain, and exited toward the right ear (RIV 215). Although the projectile left the body, the copper jacket remained lodged under Black's skin and was recovered (RIII 199). The second bullet (not numbered in the order of shooting, but simply for reference purposes) (RIV 221) entered the left side of the decedent's neck and exited on the right side, then re-entered the body and travelled through the right armpit (RIII 199-200); (RIV 215). The third shot was a shoulder wound, and both the bullet and copper projectile were recovered. This bullet was lodged behind the spine in the neck (RIII 200; RIV 215). The fourth shot was another shoulder entry, and the bullet was recovered in the decedent's arm (RIV 202, 215). The cause of death was gunshot wounds of the head and neck (RIII 195).

The body of Donald Irwin evidenced a gunshot wound near the right eye. The bullet travelled through the decedent's neck and re-entered at the bottom of the neck, where it was recovered (RIV 207-208, 216). The path of the bullet caused Dr. Fatteh to conclude that the gun was positioned at a point higher than the decedent's head at the time of discharge (RIV 209). A second wound was at the top of Irwin's left shoulder (RIV 207-216). Cause of death was the gunshot wound to the head (RIV 205). Dr. Fatteh was of the opinion that all the shots were fired at a distance in excess of two feet (RIV 203-204).

Walter Norman Rhodes, Jr., a co-defendant who had pled guilty to two lesser counts of murder and received life sentences (RIII 12; RIV 336), also testified for the Prosecution. About one week before the murders, he had met with Tafero in Miami (RIV 241). Appellant asked Rhodes to allow his wife (Linder) and two children to stay at Rhodes' apartment in Fort Lauderdale for several days (RIV 241-242). Rhodes agreed. For the next several days, up to the time of the shooting, Rhodes drove Appellant to various places in Miami so that Tafero could sell cocaine and marijuana (RIV 247-249). During that time, Tafero carried an attache case and a 9mm. automatic (RIV 243, 250). On the night of February 19, 1976, Rhodes, Tafero, Linder, and the two children spent the night at the rest area in question in a friend's green Camaro (RIV 265-266). Before he went to sleep, Rhodes placed a 9mm. gun that he had borrowed from Linder on the floorboard of the car (RIV 267-269).

Rhodes next recalled being awakened by a FHP Trooper whose car was parked parallel to the Camaro. Rhodes observed the Trooper looking into the window while opening the car door, at which time the uniformed officer picked the 9mm. from the floorboard (RIV 267-270). Trooper Black asked Rhodes whose gun it was, and Rhodes answered that it was his own (RIV 271). Black placed the gun in his patrol car and then asked for Rhodes' driver's license and car registration (RIV 271-272). At that time, Rhodes saw Tafero, who was also sitting in the front seat, pass another 9mm. gun to Sonia Linder, sitting in the rear, through the middle of the bucket seats (RIV 274). Trooper Black,

who had returned to the patrol car, called Rhodes over to the vehicle and asked for the name of Rhodes' parole officer and why he was on parole. Rhodes responded that he had been convicted of two assaults (RIV 274-275).

With that, Black ordered Rhodes to stand in front of the car and then proceeded to question Tafero, who was still sitting in the Camaro (RIV 278). Tafero indicated that he had no identification (RIV 278). Sonia Linder, meanwhile, began going through her purse in order to produce her own identification (RIV 278). As Linder was looking through her purse, Black picked up a bag of "grass" and threw it on the ground (RIV 279).

Trooper Black then retrieved a shoulder holster from the rear floor area. He immediately ordered everyone out of the Camaro and demanded that they bring all weapons (RIV 280). Tafero was taking too long a time to respond to Black's command, which caused the Trooper to "assist" him (RIV 281). This assistance led to a struggle between the officer and Tafero. Finally, Tafero was pushed up against the patrol car and held there by Irwin (RIV 281-283). Black, drawing his firearm, said that if anyone moved, they would be dead (RIV 283-284). Rhodes immediately put his hands up in the air and turned around (RIV 284). Trooper Black then went to his vehicle to talk on his police radio. When he returned to the Camaro, a struggle between Tafero and Black ensued (RIV 284-285). Rhodes suddenly heard two shots, the second of which was louder than the first, and did not sound like that of a 9mm. automatic (RIV 285-286). Rhodes turned

toward the direction of the shots and saw Sonia holding a 9mm. gun with both hands (RIV 286). Tafero grabbed the gun from Linder and fired directly at the Trooper four times, then at Irwin twice (RIV 287-288). As the victims went down, Tafero yelled that they were going to take the patrol car. Tafero took Black's gun, picked up several spent shells from the ground, and assisted Linder and the children into the back seat of FHP-390 (R289-292).

The group sped along I-95 to the first exit, and then arrived at Century Village. Tafero located a Cadillac and together with Rhodes, proceeded to commandeer it and the driver, stating that they had a baby that needed hospitalization (RIV 293-295). The Cadillac, which was driven by Rhodes, approached a police roadblock. Although he tried to manuever around it, Rhodes crashed into a tractor-trailer blocking the way (RIV 297). Many shots were fired, and Rhodes was hit in the leg and left hand (RIV 297-298). After being taken from the car and handcuffed, Rhodes was transported to a hospital (RIV 299).

June Turk, a FHP radio dispatcher, was working on the day in question and recognized Trooper Black's voice over the police radio (RIV 337-339). A continuous tape recording of all radio communications is made and maintained (RIV 338). That tape (Exhibit 39) was played for the jury (RIV 345). The serial number of the 9mm. gun taken from Rhodes by Trooper Black was A-187854 (RIV 347).

Joseph Marhan, a member of the BSO Technical Section, arrived at Century Village at 8:25 a.m. on the day in question (RIV 359-360). In parking space number 2107, he saw FHP-390, Trooper Black's patrol car (RIV 360, 366). He took pictures of the vehicle, which were admitted into evidence (RIV 358-374). While processing the car, he saw a dart in the weather stripping of the auto's right rear window (RIV 360, 363-364). Marhan noticed a hole in the metal trim on the right side of the windshield, and recovered a copper band from the windshield wiper well (RIV 361, 365, 370, 372). The vehicle was further processed for fingerprints (RIV 374-376).

FHP Trooper Wayne Ale was riding in a patrol car with Trooper Sword on the morning of February 20, 1976 (RIV 389-390). The two were on the lookout for a late model Cadillac with a Landau roof believed to be driven by the persons involved in the killing of Black and Irwin (RIV 391). Ale sighted the Cadillac directly ahead of the patrol car, travelling toward a police roadblock (RIV 391-393). The Cadillac attempted to run the roadblock, but instead crashed into a vehicle blocking the roadway (RIV 393). Police immediately surrounded the vehicle and removed several persons from the car. Tafero, wearing a "leather-type" jacket, was searched and handcuffed (RIV 394-396). Rhodes was removed from the vehicle (RIV 396). Sonia Linder and her two children were also taken from the Cadillac. Trooper Ale observed co-defendant Sonia Linder approach Tafero and bend down toward him. It appeared to Ale that Linder whispered something to Tafero and kissed him on the cheek or facial area (RIV 396).

Leonard Levinson, the owner of the hijacked Cadillac, testified that Tafero approached him at Century Village and forced him, at gunpoint, to hand over his car keys (RV 409). Tafero explained that his sick child had to be taken to the hospital (RV 409). Rhodes drove the car, while Levinson and Appellant were seated in the rear. Appellant assured Levinson that they would cause no harm to him and would release him as soon as possible (RV 413-415). Even though Rhodes was driving, Tafero gave the directions (RV 415). During the drive, Tafero took some money from Levinson (RV 416-417). Levinson also noticed Tafero loading a gun that he had, taking bullets from within a briefcase (RV 419).

Corporal Jack Harden of the Florida Highway Patrol, was at the roadblock when the Cadillac crashed (RV 457, 461-462). He assisted in securing the area. In doing so, he removed a 9mm. gun from Rhodes' waistband. The serial number of that weapon was A-187854 and it contained eight rounds of ball ammunition (RV 463-466). Ronald Orloff of the Palm Beach Sheriff's Office removed a 9mm. automatic from Tafero. That serial number was A-234895. The weapon was fully loaded (RV 480-483).

Tafero was taken to the Delray substation of the Palm Beach Sheriff's Office after he was apprehended. D/S Benny Green attempted to swab Tafero's hands to determine whether the suspect had discharged any weapons (RV 515-516). Although Green eventually swabbed Tafero's hands, Appellant resisted his efforts (RV 518).

William Monroe testified regarding atomic absorption tests. Monroe's conclusion regarding the swabs taken from Tafero

was that the results were consistent with his having discharged a weapon or having handled a recently discharged weapon (RV 545). Rhodes' test results were also consistent with his having discharged a weapon (RV 546). However, Mr. Monroe's opinion might be altered if Rhodes had been wounded in his left hand, since that is where the heaviest concentration of lead was (RV 548).

During processing of the crime scenes, various amounts of suspect marijuana and cocaine were seized. Upon chemical examination, these substances were determined to be contraband (RVI 619-636).

Ellis Marlowe Haskew, a federal prisoner in the witness-protection program,testified that Tafero was at his apartment on January 1, 1976 (RVI 641-642). While there, Tafero mentioned that he had no intention of returning to prison (RVI 642).

Finally, Dennis Grey, a BSO Criminalist, testified concerning his expert examination of various items of physical evidence seized. He test-fired the 9mm. automatic firearm, serial number A-234895 which had been taken from Tafero, and concluded that at least three KTW armor-piercing casings which had been found at the scene were fired from that gun (RVI 661-674). In addition, two copper ammunition jackets taken from Black's body and one from Irwin's body were all determined to have been fired from that same weapon (RVI 661-674). Grey could not make positive firing matches with the other pieces of ammunition (RVI 661-674).

The Criminalist also test-fired the 9mm. automatic from within the Camaro (RVI 676). The casings, which eject to the right rear of the gun at a 54° angle, either landed on the

front floorboard of the Camaro, or exited through the open passenger's window on the right side (RVI 676-677). In response to a hypothetical fact situation, Grey stated that if that same 9mm. automatic had been fired from in front of the Camaro or behind it, the discharged casings would land further away from the car (RVI 678). Grey further examined the trajectory of the bullet hole in FHP-390, Trooper Black's vehicle, and determined that the bullet entered the metal post at an upward trajectory. He also demonstrated by means of a drawing that the origin of the bullet if the two vehicles were parked parallel to each other as indicated from the earlier testimony would be the area of the Camaro (RVI 681-683).

At the conclusion of these witnesses, the Prosecution rested its case. The defense did likewise without presenting any evidence.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I

WHETHER APPELLANT RECEIVED THE FAIR TRIAL TO WHICH HE WAS CONSTITUTIONALLY ENTITLED?

II

WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTIONS?

III

WHETHER THE TRIAL COURT CORRECTLY ALLOWED THE PROSECUTION TO CALL ELLIS HASKEW AS A WITNESS?

IV

WHETHER EVIDENCE FAVORABLE TO THE ACCUSED WAS WITHHELD FROM APPELLANT?

V

WHETHER COLLATERAL FACT EVIDENCE WAS PROPERLY ADMITTED AT TRIAL?

VI

WHETHER THE PROSECUTION SHOULD HAVE BEEN PERMITTED TO PROCEED ON DUAL THEORIES OF FELONY-MURDER AND PREMEDITATION?

VII

WHETHER APPELLANT WAS LIMITED IN HIS RIGHT TO PARTICIPATE IN HIS OWN DEFENSE?

VIII

WHETHER THE TRIAL JUDGE WAS REQUIRED TO RECUSE HIMSELF ON APPELLANT'S PRO SE MOTION?

IX

WHETHER THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO RECALL TWO PROSECUTION WITNESSES WAS AN ABUSE OF DISCRETION?

X

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S REQUEST TO TAKE A POLYGRAPH EXAMINATION THAT WOULD BE ADMISSIBLE AT TRIAL?

XI

WHETHER THE EXCLUSION BY THE COURT WITHOUT OBJECTION BY APPELLANT OF ONE VENIREMAN WAS ERROR?

XII

WHETHER THE FAILURE OF THE STATE TO SPECIFY AGGRAVATING CIRCUMSTANCES CONSTITUTES A DENIAL OF DUE PROCESS?

XIII

WHETHER THE EXECUTION OF APPELLANT'S DEATH SENTENCE IS CONSISTENT WITH THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT?

XIV

WHETHER APPELLANT'S TRIAL, ADJUDICATION, AND SENTENCE FOR ROBBERY VIOLATE THE DOUBLE JEOPARDY CLAUSE?

ARGUMENT

POINT I

APPELLANT RECEIVED THE FAIR TRIAL TO WHICH HE WAS CONSTITUTIONALLY ENTITLED.

In his first point on appeal, Appellant suggests that the "explosive atmosphere" surrounding his trial resulted in a denial of a fair trial in light of the asserted refusal of the trial judge to implement preventative or remedial measures. The bulk of Appellant's argument is that the heavy media coverage, together with Appellant's mistreatment while in jail caused his guilt to be presumed. The State of Florida maintains that such an argument is erroneous both as a matter of law and as applied

to this case. The point must necessarily be rejected.

The standard by which media publicity of a criminal prosecution must be measured in determining whether an accused can receive a fair trial was articulated by the Supreme Court of the United States in Murphy v. Florida, 421 U.S. 794, 799-800 (1975):

> The constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 US at 722, 6 L Ed 2d 751, 81 S Ct 1639. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
>
> > "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id., at 723,6 L Ed 2d 751, 81 S Ct 1639.
>
> At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." Ibid.

Neither the voir dire of the prospective jurors nor any other portion of the trial reflects that those selected to try this case were unable to lay aside any impressions or opinions which arose as a result of pretrial publicity and to remain impartial.

This Court recently had an occasion to apply the Murphy standard to a change of venue claim. In Thomas v. State, 374 So. 2d 508, Case No. 51,692 (Fla., July 26, 1979), this Court refused to require that venue be changed in the face of massive publicity of the case. There, fifty-four of the fifty-six veniremen questioned during voir dire had heard or read about the "Ski Mask Gang" or the crimes for which the accused was on trial. Fifty-three of those individuals had not formed an opinion as to the defendant's guilt.

In this case, the entire transcript does not even approach the circumstances raised and approved in the Thomas decision, and certainly does not justify Appellant's claim of a pervasive community prejudice. Of the prospective jurors in this case, four did not recall hearing or reading anything at all about the case (RVII 179-181, 182-185; RVIII 285, 302, 303-306) and three others did not hear anything that would affect their verdict (RVIII 209, 212, 252, 276). All jurors affirmed that they would decide this case on the evidence alone and would disregard any news accounts relating to the case (RVII 62, 96-97, 110-111, 112-113, 129, 133-135, 139, 144, 149-153, 153-156, 157-158, 175; RVIII 205-206, 214, 231, 253, 260-264, 311). There is no danger whatsoever that biased persons participated in the determination of Appellant's guilt or in recommendation of the death penalty.

Appellant also suggests that it was error for the trial court to refuse to sequester the jury. Such is not the case. Rule 3.370(a), Fla.R.Crim.P., leaves any decision concerning sequestration to the trial judge's discretion. Appellant has made no showing that there was any abuse in this case. At trial, Appellant's motion to sequester was supported only by the recollections of his counsel:

> We have some other motions, Judge, that probably ought to be ruled on before we proceed. The next one would be a Motion to Sequester the Jury.
>
> It is our position, in this particular matter, that this jury, once sworn, should be sequestered until, one, they either reach a verdict; or, two, they announce they are unable to reach a verdict.
>
> I would say, in support of this motion, that there is no question that, if ever a jury ought to have been sequestered, it is in this case because there will be, throughout this trial, a great deal of publicity, and a great deal of talk and chatter, both on radio, television, and newspapers.
>
> I have no desire to ask the Court for a gag order on the press, because I believe in the First Amendment.
>
> On the other hand, I also believe in the defendant's right to a fair and impartial jury, in order to try these issues; and I think that the appropriate remedy would simply be to sequester this jury, once he is sworn.

(RIII 7-8). Appellant's written motion to sequester is similarly insufficient in that it raises general allegations with nothing

to support them (RI 58). The failure to bring forth specific facts to demonstrate the existence of unfair or unduly pervasive media coverage of the trial or events preceding it require a complete rejection of this argument. Ford v. State, ___So. 2d ___, Case No. 47,059 (Fla., July 18, 1979); Agrella v. State, 372 So. 2d 487 (Fla. 3d DCA 1979). The Honorable Judge Futch recognized that Appellant had not demonstrated any specific need for sequestering the jury. The trial judge did, however, state that he would instruct the jury regarding their consideration of outside materials, and that he believed the instruction would be adequate (RIII 9).

Appellant also supports his "prejudicial atmosphere" argument by recalling his severe treatment at the hands of the police while in jail (SRIV 14-18). While such mistreatment is unfortunate, if indeed it did occur, it has no bearing on the instant case. There is nothing in the record to suggest that either members of the jury or the community generally were aware of such mistreatment. Similarly, Appellant has not come forward with any reason as to why such a situation unduly prejudiced his trial. Rather than being of concern to this Court on a direct appeal, the issue of police brutality is properly the function of a civil lawsuit pursuant to 42 U.S.C. §1983.[1]

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[1] Appellant raised such a claim in a federal civil rights action. That case was, however, voluntarily dismissed at Appellant's request after two days of trial. Tafero v. Stack, Case No. FL76-6383-Civ-JLK, Southern District of Florida.

Even though the record fails to substantiate any claim of a prejudicial trial atmosphere, Appellant attempts to assert that the trial judge did nothing to reduce the potential for prejudice. Such is not the case. In the first place, if there was no likelihood of having a fair trial in Broward County, why didn't Appellant move for a change of venue? The answer, quite simply, is that it was not impossible to select an impartial jury as a matter of law or fact. McArthur v. State, 351 So. 2d 972, 973-974 n.2 (Fla. 1977). Secondly, the trial judge permitted Appellant three additional peremptory challenges (RVIII 234) even though only a total of ten challenges was required. §913.08, Fla. Stat.; Fla.R.Crim.P. 3.350. In so doing, Judge Futch found that the additional challenges were sufficient. No showing of any prejudice has been made by Appellant to justify interfering with the court's discretion. Knight v. State, 338 So. 2d 201 (Fla. 1976); Johnson v. State, 222 So. 2d 191 (Fla. 1969); Blackwelder v. State, 100 So. 2d 834, 836 (Fla. 1st DCA 1958). Furthermore, when all the peremptories were exhausted, Appellant made no request for additional challenges (RVIII 319).

In further support of this argument Appellant utilizes two trial episodes in an attempt to "bootstrap" to a conclusion that the trial surroundings were unfair. First, Appellant claims that news accounts of the trial and a speech by the Attorney General concerning this case caused an irreversible taint. Such is certainly not the case. There was never even an allegation that any juror heard such comments or read such reports. In fact, defense counsel specifically declined to make that assertion (RV 448-452). Moreover, the trial court inquired of the jurors

at that time whether they had read or heard anything about this case, to which they responded negatively (RV 456). The record thus resolves any intimation of the jurors being tainted.

The second post hoc circumstance is the fact that courthouse flags were flown at half-mast one day of the trial (RIV 347-349). The purpose of that action was to honor all dead officers (RIV 351-354), although when one of the jurors asked, the bailiff correctly responded that he didn't know the reason (RIV 355). The State of Florida maintains that such a showing of respect for deceased police officers could have no prejudice on this case. After all, the jury knew full well that two police officers were killed and that Tafero was charged with their murders. Even if the jurors knew the reason for the flags being at half-mast - the record indicates that they did not - that fact added nothing impermissible to their knowledge of the case, any more than the reading of the grand jury indictment. In short, these circumstances did not impact on Appellant's trial to any degree.

Throughout the trial, the judge repeatedly cautioned the jury not to see, read, or hear anything about the case, except for the evidence received in the courtroom (RI 60; RIV 232; RV 448; RVI 635, 705, 719; RIX 320-321). Each member of the jury assured the court and parties that they would decide Appellant's guilt on the basis of the evidence presented (RVIII & RIX). Not only does the record before this Court demonstrate that Appellant was given the fair trial to which he was entitled, Lackos v. State, 326 So. 2d 220 (Fla. 2d DCA 1976),

but Appellant has also failed to prove the existence of any improper influence. Dobbert v. Florida, 432 U.S. 282 (1977); Hoy v. State, 353 So. 2d 826 (Fla. 1977); Dobbert v. State, 328 So. 2d 433 (Fla. 1976). The resulting convictions must accordingly be affirmed.

POINT II

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTIONS.

In this point Appellant contends that the evidence introduced at trial is not sufficient to support convictions for the murders of Trooper Phillip Black and Constable Donald Irwin, the robbery, or the kidnapping of Leonard Levinson. Appellant's argument in the brief is certainly written in the light most favorable to the defendant. The focus of the brief is on the testimony of co-defendant Rhodes and suggests, in typical jury argument format, that Rhodes' testimony is not worthy of belief. As can be seen by this Court's examination of the trial proceedings and the summarization in Appellee's brief, the evidence of Appellant's guilt is not only substantial, but is without the slightest doubt.

A. THE MURDERS OF BLACK AND IRWIN

There is no conflict that FHP Trooper Black and Constable Irwin were murdered on the morning of February 20, 1976. The sole question concerns who perpetrated the murders. The resolution of that question focuses on three persons: Rhodes, Tafero (Appellant), and Linder. The State's evidence demonstrated, through the testimony of many witnesses, that Appellant and Linder committed the reprehensible acts. The jury, after hearing all the evidence, found Appellant guilty of the murders as charged. This Court must do likewise.

The law applicable to appellate review of a jury's verdict is very familiar to this Court. The reviewing court must consider the testimony and physical evidence in the light most favorable to the State. In so doing, all inferences reasonably drawn from the facts are to be examined in an effort to uphold the verdict. As long as there exists substantial evidence from which a jury might reasonably find that the accused is guilty beyond a reasonable doubt, the verdict and judgment will be affirmed. Byrd v. State, 297 So. 2d 22 (Fla. 1974); Lynch v. State, 293 So. 2d 44 (Fla. 1974); Tegethoff v. State, 220 So. 2d 399 (Fla. 4th DCA 1969). This Court has clearly stated that it is within the province of the jury to determine the weight of the evidence, the credibility of the witnesses, and to decide disputes and potential conflicts appearing in the testimony. Wood v. State, 19 So. 2d 872 (Fla. 1944); see also Shiver v. State, 327 So. 2d 251 (Fla. 4th DCA 1976). When the evidence in this case is viewed in this light, the verdicts returned by the jury must be affirmed.

The testimony rejects any claim that Rhodes fired any shots whatsoever. First, two disinterested witnesses, both truck drivers, testified that Rhodes was standing at the Camaro at the time of the shooting and had his hands raised up in the air. When the gunshots rang out, Rhodes still had his hands up in the air (RIII 30-33, 79-83). Rhodes' empty hands were plainly visible.

This reconstruction of the last moments of the victims' lives is plainly corroborated by the testimony of co-defendant Rhodes. He related that at the time of the shooting, he was positioned in front of the vehicles with his hands raised up in

the air (RIV 285). Rhodes did see Tafero fire the gun after co-defendant Linder had fired the initial shots (RIV 286-288).

The physical evidence introduced at trial also excludes Rhodes as the killer. The State's Criminalist testified that the 9mm. automatic, which expelled the projectiles that snuffed out the lives of Black and Irwin, and which was found on Appellant's person, ejected cartridge casings to the right rear of the gun at a 54° angle (RVI 676). Yet, no cartridge casings were found anywhere near Rhodes (RIII 143-148). Also, two spent casings were found inside the Camaro on the front floorboard (RIII 147, 148-150). Expert reconstruction of events demonstrated that these spent projectiles could not have come from where Rhodes was standing, but rather came from the inside or next to the Camaro (RVI 676-677). Finally, the bullet hole in the frame of the Trooper's car, which was made by a 9mm. KTW armor-piercing projectile entered at a slightly upward trajectory and was moving toward the front of the vehicle (RVI 681-683), exactly from the place where Tafero and Linder were positioned.

The trial testimony points to Linder as the person initially firing the shots, with Tafero then taking over to finish off the victims. Rhodes, the only eye witness having full knowledge of the events, provided very clear testimony as to Tafero's actions. Rhodes' testimony is certainly consistent with that of truck drivers Hyman and McKenzie. They were both sitting approximately one hundred fifty feet away during the altercation, and McKenzie was actually driving away, looking through his side-view mirror when the shots rang out. It is obvious from their testimony that, while they saw a great deal of what occurred, things happened so

fast that they were not able to follow every action. But several very important points were made. First, Rhodes' hands were in the air at all times. Second, Tafero was struggling with the police when the first shot (or shots) were heard. Third, there was a pause, and then several more sequential shots were fired from the direction of the Camaro. The record shows who fired those shots - Jessie Joseph Tafero.

The physical evidence corroborates that Tafero shot Black and Irwin while standing at the front seat of the Camaro. When Tafero fired, the shots entered at a downward angle (RIII 198-210). This position is corroborated by the fact that witness Hyman observed Trooper Black reeling toward the vehicle when the first shot was heard, and then attempting to regain his balance (RIII 31-32).

The testimony related above, even in its excerpted form for purposes of bringing to this Court's attention the major evidence adduced at trial, establishes by substantial, competent evidence that Jessie Joseph Tafero is guilty of the first-degree murders of Phillip Black and Donald Irwin. Stanley v. State, 357 So. 2d 1031 (Fla. 3d DCA 1978); Quick v. State, 342 So. 2d 850 (Fla. 2d DCA 1977); Shockey v. State, 338 So. 2d 33 (Fla. 3d DCA 1976). The evidence, including the testimony of the accomplice (Rhodes), the physical evidence, Appellant's own statement that the victims were "only cops" and considerable circumstantial evidence is sufficient to support the findings that Tafero was guilty as charged by being the actual perpetrator. Smith v. State, 365 So. 2d 704 (Fla. 1978).

The facts at trial also warrant a finding that Appellant was guilty of these murders under the felony-murder rule (see section B infra) as well as by being an aider and abettor. Should this Court consider the defense argument that Linder actually did the shooting, the evidence shows that Tafero intended to participate in the murders. He gave the gun to Linder initially (RIV 274). He retained the gun after the murders, and he quite readily "master-minded" their flight from the area. Thus, the first-degree murder convictions should be affirmed. Smith v. State, supra: Shockey v. State, supra.

B. THE ROBBERY

There is no question that Tafero took Trooper Black's gun and participated in the theft of his car. Contrary to Appellant's position that any taking occurred after the murders were completed, the evidence sufficiently supports the State's theory and proof that the murders were committed so that the three could flee from the scene by taking the FHP vehicle. Since Trooper Black had already radioed the license plate of the Camaro, the only way that Appellant and the others could get away was to kill the officers and take the car. The force used was contemporaneous with the taking, see Mims v. State, 342 So. 2d 116 (Fla. 3d DCA 1977), and the proof satisfies all the elements of robbery. Since the robbery was also one basis for the murders, the felony-murder rule is applicable.

C. KIDNAPPING OF LEVINSON

Leonard Levinson testified that Tafero accosted him at gunpoint and deprived him of freedom for the purpose of effectuating Tafero's escape. Even if Levinson was mistaken and Rhodes initially approached the victim, Tafero is quite clearly guilty of kidnapping. He was a perpetrator in both act and intent and as such is equally guilty of this offense. State v. Guyton, 331 So. 2d 392 (Fla. 4th DCA), cert. denied, 336 So. 2d 1182 (Fla. 1976); Butts v. State, 286 So. 2d 28 (Fla. 2d DCA 1973).

POINT III

THE PROSECUTION WAS CORRECTLY PERMITTED TO CALL ELLIS HASKEW AS A WITNESS.

Appellant suggests that the State of Florida violated the rules of discovery when they called Ellis Marlowe Haskew as a witness during trial. This position is based on what Appellant terms a "late filing" of Mr. Haskew's name on a witness list. Appellant contends that the remedy for such a discovery violation should have been the exclusion of the witness at trial or the granting of a defense continuance to allow time for investigation.

Rule 3.220(a)(1)(i), Fla.R.Crim.P., requires that the Prosecution file the "names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged ..." The State's duty to disclose is continuing, which requires that additional witnesses and material must be promptly disclosed as soon as that information becomes known. Fla.R.Crim.P. 3.220(f); Anderson v. State, 314 So. 2d 803 (Fla. 3d DCA 1975).

The State complied with this continuing mandate, and furnished the defense with additional witnesses and material throughout the pre-trial period (SRI 10-16, 30, 31-32, 33, 34, 35-36, 37-38, 39-45, 46, 47, 48, 49, 50-51, 52, 53-54, 55, 56, 57-58, 59, 60-80, 81, 82, 83, 84). The name and address of Ellis Marlowe Haskew was furnished to defense counsel on May 10, the day that trial began (RIII 3-5; SRI 84). During a hearing regarding the circumstances surrounding this disclosure, the

trial court listened to the prosecutor explain that he had just found out about this witness and immediately advised defense counsel. The trial court ruled that defense counsel would have an opportunity to speak with or depose the witness prior to his testifying (RIII 5-7). At no time did defense counsel request that the witness be excluded.

Mr. Haskew was not called to testify until May 14, 1976, the fifth day of trial (RVI 635-636). Yet, defense counsel had not even attempted to depose the witness during that interim, even though the defense team had a court-appointed investigator (SRIV 12) and defense counsel's associate was co-counsel of record (RI 52). The trial judge did, nevertheless, give counsel an opportunity to interview the witness before Haskew was to testify (RVI 637). After the defense interview, counsel for the parties presented their respective positions to the court, who then allowed the witness to testify (RVI 637-641).

The circumstances of this case call for a rejection of Appellant's claim that the State committed a discovery violation. The Prosecution fully satisfied its duty to promptly disclose the names of witnesses as they are known. This type of continuing disclosure was specifically approved by this Court in Ezzell v. State, 88 So. 2d 280 (Fla. 1956) (en banc). Moreover, defense counsel, or someone acting on his behalf, had five days in which to attempt to depose this witness or otherwise gather background information about him. Finally, defense counsel was permitted to speak with the witness prior to his testifying and did cross-examine him. Thus, the factual setting of this case comports with both the letter and the spirit of the discovery rule.

Should this Court decide that a discovery violation did occur, permitting the witness to testify was still permissible. When reviewing a noncompliance with discovery rules, the test is whether or not a defendant is prejudiced by the violation. Lucas v. State, ___ So. 2d ___, Case No. 51,135 (Fla., June 14, 1979); Smith v. State, 319 So. 2d 14 (Fla. 1975). It lies within the broad discretion of the trial judge to determine this fact after making an adequate inquiry into the circumstances surrounding the noncompliance. In Richardson v. State, 246 So. 2d 771, 775 (Fla. 1971), this Court held:

> The trial court has discretion to determine whether the non-compliance would result in harm or prejudice to the defendant, but the court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances. We think that the District Court of Appeal for the Fourth District has succinctly stated the burden that the Rule places both upon the prosecuting attorney and upon the trial court in the following quoted extract from its opinion in Ramirez v. State, supra: [241 So.2d 744 (Fla. 4th DCA 1970)]
>
> > The point is that if, during the course of the proceedings, it is brought to the attention of the trial court that the state has failed to comply with Rule 1.220(e) CrPR, the court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances. Without intending to limit the nature of scope of such inquiry, we think it would undoubtedly cover at least such questions as whether the state's violation was inadvertent or wilful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial.

The judge in this case permitted witness Haskew to testify only after a Richardson inquiry into the surrounding circumstances of the alleged noncompliance. Therefore, Appellant's argument is not well-taken. The record before this Court demonstrates that the State's noncompliance was not willful, since the Prosecution disclosed the witness as soon as his identity was known. Pons v. State, 278 So. 2d 336 (Fla. 1st DCA 1976). The violation was trivial at most, since the witness did not testify as to any material element of the crime, but only as to a potential motive, and was somewhat cumulative to the testimony given by Heikki Riuttanen (RIV 349-358). The third factor, the effect on Appellant's ability to prepare for trial, is also minimal in that defense counsel had adequate opportunities to depose the witness and otherwise investigate his information. And, since Haskew's testimony did not go to the heart of the case, no paramount prejudice resulted.

This Court ruled similarly in Cooper v. State, 336 So. 2d 1133 (Fla. 1976), in holding that the trial court did not abuse his discretion in allowing an unlisted state ballistics expert to testify. In light of the circumstances of this case, there was no necessity for the judge to grant Appellant a continuance. It is axiomatic that a motion for continuance is addressed to the sound discretion of the lower court. Cooper v. State, supra; Raulerson v. State, 102 So. 2d 281 (Fla. 1958); Tilghman v. State, 51 So. 2d 785 (Fla. 1951).

Of course, all testimony offered against an accused is prejudicial. The law relative to this question focuses on the prejudice emanating from the fact of a discovery violation.

The above-related facts clearly show that no unfair or improper prejudice resulted. Mobley v. State, 327 So. 2d 900 (Fla. 3d DCA 1976). Defense counsel was able to cross-examine and impeach this witness. The veracity of a five-time convicted felon (RVI 643) was for the jury to determine. This appellate issue is without merit.

POINT IV

NO EVIDENCE FAVORABLE TO THE ACCUSED WAS WITHHELD FROM APPELLANT.

Tafero claims error because of a failure on the State's part to provide him with evidence upon which impeachment of witness Haskew could be based. Appellee vigorously contests this claim. First, this matter has never been presented to the trial court for initial examination. Consequently, it cannot be a proper issue on direct appeal. North v. State, 65 So. 2d 77 (Fla. 1952) (en banc). While the issue might be a proper matter for a post-appeal writ of error coram nobis, see Hallman v. State, 371 So. 2d 482 (Fla. 1979), it cannot be considered now.

Should this Court decide to address this question, the single conclusion to be reached is that no reversible error is present. Appellant never made a specific request for any of the evidence that he now claims was suppressed. Thus, Brady v. Maryland, 373 U.S. 83 (1963), is inapplicable to the case. A

specific request is one which gives the prosecutor notice of exactly what the defense desires. United States v. Augurs, 427 U.S. 97, 106 (1976). (Compare Williams v. Dodd, 400 F. 2d 797 (5th Cir. 1968) for examples of specific requests.)

In addition, applying United States v. Augurs, supra. to this case, the omission of any evidence as to attorneys fees did not deprive Appellant of a fair trial, since its disclosure to the jury would not serve to create a reasonable doubt as to guilt that did not otherwise exist. Hallman v. State, supra; Smith v. State, 364 So. 2d 876 (Fla. 3d DCA 1978). Even the United States v. Diecidue decision upon which Appellant so heavily relies [(448 F. Supp. 1011 (M.D. Fla. 1978)] held that the very same omission under identical circumstances would not have affected that verdict. Accordingly, this point should be dismissed.

POINT V

COLLATERAL FACT EVIDENCE WAS PROPERLY ADMITTED AT TRIAL.

Appellant raises several instances wherein testimony of collateral offenses were admitted into evidence. He claims that, in every instance, the testimony had no probative value and was merely an impermissible assault on his character, which had not been put in issue. A review of the record demonstrates the relevance and admissibility of the testimony.

Specifically, the State was permitted to present evidence that Tafero was on parole and that a parole violation warrant had been issued (RIV 300, 349-353, 356-358) as well as Tafero's drug deals during the days immediately prior to the murders (RIV 248-249, 259). The Prosecution's single, limited purpose in producing this evidence was to demonstrate Appellant's possible motive for killing two law enforcement officers (RIV 233; RVIII 328).

The fact that Tafero was selling contraband while an outstanding warrant had been lodged against him, coupled with his desire not to return to prison, are valid pieces of evidence from which the conclusion can be reached that Appellant had a reason for killing any police officer who stood in his way. Indeed, the Camaro in which Tafero and his companions were sleeping contained various amounts of marijuana and other drugs, the possession of which is a criminal violation which could result in parole revocation. Chapter 893, Fla.Stat.; § 949.10 Fla.Stat.(1975).

Moreover, the jury knew that Tafero was not on trial for any act not charged (RII 147).

The law in this jurisdiction is well-settled that evidence of other crimes or bad acts is admissible if it casts light on the character of the act under investigation by showing either motive, intent, absence of mistake, common scheme, identity, or a system or pattern of criminality, such that the evidence of the other crimes would have a relevant or material bearing upon some essential aspect of the offense then being tried. Williams v. State, 110 So. 2d 654 (Fla. 1959); Ashley v. State, 265 So. 2d 685 (Fla. 1972). The key test for determining admissibility of other crimes is relevancy, notwithstanding its prejudicial impact. Ashley, supra; Thomas v. State, 358 So. 2d 114 (Fla. 3d DCA 1978). Of course, testimony as to collateral offenses, although relevant, must be limited such that it does not become a feature of the trial. Wilson v. State, 330 So. 2d 457 (Fla. 1976); Smith v. State, 344 So. 2d 915 (Fla. 1st DCA 1977). Quite obviously, the testimony in question consisted of but a small portion of a more than 700 page trial transcript. Compare Wilson v. State, supra, with Green v. State, 228 So. 2d 397 (Fla. 2d DCA 1969).

The case of Smith v. State, 365 So. 2d 704 (Fla. 1978), recently decided by this Court, puts to rest any claim of error regarding the introduction of collateral evidence in this case. There, in a first-degree murder trial, the prosecution was permitted to adduce proof of a second murder, because of its relevance to illustrate the criminal context in which the first murder occurred. Similarly, in this case Tafero's earlier criminal

activity with Rhodes was relevant as to why the Camaro was at the rest area and why Appellant would have a reason for killing the policemen. Thus, the inclusion of this evidence is proper. See, e.g., Jacobson v. State, ___So. 2d ___, Case No. 78-312 (Fla., 3d DCA, October 9, 1979).

Appellant cites Smith v. State, 344 So. 2d 915 (Fla. 1st DCA 1977), for the proposition that a three-pronged test must be applied in considering the admissibility of collateral fact evidence. What Smith really indicated was that there were three factors to balance in determining at what point the State may have gone too far in its presentation of such matters. The first consideration, relevancy, has already been discussed. Appellant contends that motive was not relevant because the State was proceeding under a felony-murder theory. Yet, in Point II Appellant takes the position that the murders could not be founded on an underlying felony. Thus, Appellant's relevancy argument is incorrect. The jury was instructed on motive (RII 136) which was clearly in issue.

The second factor in Smith is necessity. In this case, the prosecution of this case compelled the introduction of motive testimony. Without a motive, why would Tafero kill two police officers. Moreover, Appellant's clear motive shed needed light on the State's theory that Tafero and Linder actually perpetrated the killing. Finally, the third consideration is whether the testimony in question directly related to any material issue in the case, or was it more inclined to demonstrate the bad character of the accused. As previously discussed, the collateral evidence was not a feature, but was approached as any

other relevant piece of testimony.

As to the testimony regarding Appellant's possession of the 9mm. automatics, the teflon-coated bullets, or the Taser, these were all directly related to the killing of Trooper Black and Constable Irwin. The KTW ammunition was fired into the victims by the 9mm. automatic in Tafero's possession; Tafero's prior possession of the projectiles and the weapon is certainly relevant to the issue of whether he participated in the shooting. The testimony as to the Taser was permissible since that weapon was shot at Officer Black's FHP vehicle by someone in the green Camaro. This point on appeal therefore has no merit.

POINT VI

APPELLANT WAS NOT DENIED DUE PROCESS WHERE THE PROSECUTION WAS PERMITTED TO PROCEED ON DUAL THEORIES OF FELONY-MURDER AND PREMEDITATION.

Appellant argues that it was prejudicial to allow the State to proceed simultaneously on theories of felony-murder and premeditation. Although this issue has been settled by this Court in Knight v. State, 338 So. 2d 201 (Fla. 1976), Appellant attempts to distinguish that controlling precedent; such attempt is to no avail.

In Knight, this Court clearly and without hesitation announced that in a first-degree murder prosecution, the State is permitted to introduce evidence to prove its case under either felony-murder or premeditation. Appellant has presented no substantial grounds to warrant the announcement of a new rule. Tafero

was on notice as to the nature of the charge against him and the time and place of the crime. Through discovery, he was able to determine the precise facts that the State was going to introduce. No further specificity was required, especially in light of the fact that first-degree murder is fully proved by premeditation, felony-murder, or aider and abettor. Section 777.011, Fla.Stat. (1975); Hite v. State, 364 So. 2d 771 (Fla. 2d DCA 1978); Shockey v. State, 338 So. 2d 33 (Fla. 3d DCA 1976), cert. denied, 345 So. 2d 427 (Fla. 1977). Obviously Appellant knew how to prepare for trial. He made a thorough opening statement to the jury (RVIII 347), he cross-examined all the witnesses, and he argued strenously against the State's case during his final statement. The appellate allegation that Tafero was hindered in the preparation of his defense is untenable.

Another case decided by this Court, State v. Pinder, ___So. 2d ___, Case No. 55,369 (Fla., July 5, 1979), supports the position taken by the State herein. There, the accused was charged with premeditated murder, but the conviction was obtained upon proof of felony-murder. The first-degree murder conviction was upheld on that basis. Similarly, in this case, the allegation and proof comported with notions of due process.

Nor does the procedure utilized in this case prejudically impact on the sentencing phase of Appellant's trial. The State's presentation at that time was extremely brief (S 47) and contained nothing unknown to Appellant. The fact that the defense made no presentation whatsoever (S 54)is indicative of the fact that he would not have presented mitigation evidence under any circumstances.

Furthermore, the State points out that the instant objection to the form of the indictment was never presented to the trial court by way of a motion to dismiss (RI 43-48) or at any other point during trial. His apparent failure to raise an objection to the charge precludes this belated claim of error. Castor v. State, 365 So. 2d 701 (Fla. 1978); Clark v. State, 363 So. 2d 331 (Fla. 1978); Lewis v. State, 93 So. 2d 46 (Fla. 1956), appeal dismissed, cert. denied, 355 U.S. 16 (1957).

POINT VII

APPELLANT WAS NOT LIMITED IN HIS RIGHT TO PARTICIPATE IN HIS OWN DEFENSE.

Appellant argues that it was "apparent from the outset of these proceedings and should have been apparent to the trial judge that Appellant intended to actively participate in his own behalf" (Initial Brief at 34). Nothing, however, is "apparent" since Appellant at no time prior to trial requested that he be allowed to function as co-counsel in his own behalf.

Although Appellant correctly notes that he filed many pro se motions prior to trial, the record reflects that defense counsel actually filed all the defendant's pro se motions (RVIII 325). During a pre-trial colloquy, neither Appellant nor counsel advised the court of any outstanding motions that had not been ruled upon (RVIII 323-326). At no time was Appellant denied the right to participate in his own defense. Even though Appellant alleges that he was excluded from a pre-trial conference, the

record before this Court does not clearly support that assertion (RVIII 324-325) and Appellant never even objected to any exclusion, if such in fact occurred.

Contrary to Appellant's unsupported assertion, there is no constitutional authority for hybrid representation at trial. Hooks v. State, 253 So. 2d 424 (Fla. 1971); Powell v. State, 206 So. 2d 47 (Fla. 4th DCA 1968); United States v. Daniels, 572 F.2d 535 (5th Cir. 1978); United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); United States v. Bennett, 539 F.2d 45 (10th Cir. 1976); United States v. Shea, 508 F.2d 82 (5th Cir. 1975). See also Goode v. State, 365 So. 2d 381 (Fla. 1978). Furthermore, Appellant never made a pre-trial request to act as co-counsel. Cf. Tait v. State, 362 So. 2d 292 (Fla. 4th DCA 1978). His failure to request permission well in advance of trial to act as co-counsel is fatal to his claim of error.

As to any limitation of Appellant's ability to prepare his defense, the State of Florida maintains that the trial judge did everything possible to see that the defense was prepared for trial. In addition to court-appointed counsel, an investigator was assigned to assist counsel in preparing the case (SRIV 12). The various motions filed by Appellant were ruled upon. Appellant, as a pre-trial detainee accused of first-degree murder and for whom counsel was appointed, cannot claim that he is entitled to the very same treatment as a free citizen. Indeed, incarceration necessarily includes certain restrictions on one's person. See Bell v. Wolfish, ___U.S.___, 60 L.Ed.2d 447, 99 S. Ct. 1861 (1979). Tafero certainly was not entitled to free and unfettered access to a law library. Wells v. State, 358 So. 2d 1113 (Fla. 4th DCA 1978). The other contentions must similarly be rejected.

Any trial preparation could have, and should have, been done by appointed counsel or the investigator. Appellant has never stated, either at trial or on appeal, that defense counsel failed in any respect or that he was dissatisfied with counsel's services.

In sum, Tafero had a fair trial and was not deprived in any manner of a constitutional right to participate in his own defense.

POINT VIII

THE TRIAL JUDGE WAS NOT REQUIRED TO RECUSE HIMSELF ON APPELLANT'S PRO SE MOTION.

Appellant, on his own behalf, filed an unsworn motion requesting that the presiding judge recuse himself from the trial of this case. The grounds for the motion were that Judge Futch had at one time been a highway patrolman, was on personal terms with "witnesses for the State," and had presided over co-defendant Rhodes' plea proceedings (RI 72-74). Judge Futch denied the recusal request for the reasons that the motion was untimely filed and insufficient as a matter of law (RVIII 325). That ruling was correct.

Rule 3.230, Fla.R.Crim.P., provides the method of moving to disqualify a judge from a criminal case. That rule requires that the written motion for disqualification be filed at least ten days prior to trial and be accompanied by at least two affidavits setting forth the facts relied upon to show the grounds for disqualification. A motion that is untimely filed, Skipper v. State, 114 Fla. 312, 153 So. 853, appeal dismissed, 293 U.S. 517 (1934),

or contains insufficient supporting affidavits, State ex rel. Sagonias v. Bird, 67 So. 2d 678 (Fla. 1953), is to be denied, and cannot be used as a basis for appeal. A.S. v. State, 275 So. 2d 286 (Fla. 3d DCA 1973). Tafero clearly failed to comply with these necessary requisites in that the motion was made on the day of trial and was not supported by any affidavits. Further, since he was represented by counsel, the motion should not have been made by Appellant himself. State ex rel. Schmidt v. Justice, 237 So. 2d 827 (Fla. 2d DCA 1970).

The disqualification motion was also insufficient in substance. The test of the sufficiency of an affidavit of disqualification for prejudice is whether or not the sworn statement shows that the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the presiding judge. State ex rel. Brown v. Dewell, 131 Fla. 566, 179 So. 695 (1938). The facts and reasons given in the sworn affidavits must tend to show personal bias or prejudice. The rule is not intended as a vehicle to oust a judge who has made adverse pre-trial rulings. Suarez v. State, 95 Fla. 42, 115 So. 519 (1928).

No personal bias or prejudice has been demonstrated in this case. The fact that Judge Futch may have been a highway patrol officer at some distant time in the past does not raise any claim of bias or prejudice against the accused. Suppose that the victim killed was a lawyer. Would that mean that all judges, having been lawyers at one time, would be required to disqualify themselves upon request? Of course not. Tafero's unsupported and vague allegation that the judge was on personal terms with state witnesses is also insufficient. The motion

does not state who those witnesses were and how any acquaintance would prejudice the judge against the accused. Lastly, the fact that Judge Futch presided over Rhodes' plea proceedings hardly raises any personal animus against Tafero. In sum, no reason was presented to warrant disqualification of the trial judge. See United States v. Archbold-Newball, 554 F.2d 665 (5th Cir.), cert. denied, 434 U.S. 1000 (1977).

POINT IX

THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO RECALL TWO STATE WITNESSES WAS NOT AN ABUSE OF DISCRETION.

At the close of the State's case-in-chief, after the prosecutor announced that the State of Florida had rested its case, defense counsel requested permission to recall two Prosecution witnesses, Rhodes and McKenzie, for impeachment purposes (RVI 702-703). The trial judge denied the request, but stated that Appellant could call these witnesses during the defense case (RVI 702-703). Appellant declined, and rested his case without presenting any evidence (RVI 717). Defense counsel's reason for the recalling of the witnesses is that, since he didn't know what Rhodes was going to say during his examination, counsel wasn't able to examine witness McKenzie as to what Tafero was doing during the shooting (RVIII 357-359). The reason asserted for the recall motion is insufficient and forms no basis for a claim of error.

Re-examination of any witness is within the discretion of the trial judge. Royal v. State, 127 Fla. 320, 170 So. 450 (1936); McCoggle v. State, 41 Fla. 525, 26 So. 734 (1899); see also Johnson v. United States, 207 F. 2d 314 (5th Cir. 1953), cert. denied, 347 U.S. 938 (1954). In Bryant v. State, 117 Fla. 672, 158 So. 167 (1934), this very question was approached from the opposite position. That is, the State, after the defense rested, desired to recall a defense witness for further examination to lay a foundation for impeachment. This Court clearly held that in such a situation the ruling on the question was "within the sound discretion of the court..."

No abuse of that discretion has been shown. Appellant knew who every State witness was, and was given an opportunity to depose them all. Cross-examination of each witness was thorough, and went into the very areas that defense counsel boldly asserted needed to be re-examined in light of later testimony. Appellant had an opportunity to call any witness during his own case; he refused that opportunity. Moreover, Appellant's position is considerably suspect in that his request for re-examination was made after the close of the State's case, when any need for re-examination would have been known after Rhodes' testimony, which concluded more than two days earlier. As no abuse of discretion has been shown and no limitation of defense cross-examination occurred, this point must be rejected; Ford v. State, ___So. 2d___, Case No. 47,059 (Fla., July 18, 1979); Coxwell v. State, 361 So. 2d 148 (Fla. 1978).

POINT X

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S REQUEST TO TAKE A POLYGRAPH EXAMINATION THAT WOULD BE ADMISSIBLE AT TRIAL.

Appellant filed a pre-trial motion requesting that he be allowed to take a polygraph examination (RI 61-62, RIII 10). While Appellant placed no restrictions whatsoever on the conduct of the test, the motion agreed to waive any objection to its admissibility if he desired to offer it into evidence (RI 62, paragraph 10). There was no stipulation by the parties accompanying the motion that the results of any polygraph examination could be used as evidence. The trial judge, somewhat perplexed by the request, stated that he knew of no authority allowing him to order Tafero to take a polygraph (RIII 10). Defense counsel agreed, stating that "You don't have any authority, Judge." (RIII 10). Accordingly, the judge denied the motion.

A polygraph test is not admissible into evidence absent a joint stipulation of both parties. Codie v. State, 313 So. 2d 754 (Fla. 1975). A trial judge clearly has no authority to require the state to make arrangements for a defendant to be given a polygraph examination without the state's consent. State v. Jones, 281 So. 2d 220 (Fla. 4th DCA 1973); see also Roth v. State, 368 So. 2d 1310 (Fla. 3d DCA 1979). Nothing, however, prevented Appellant from having a polygraph administered by an individual of his own choosing for use in trial preparation. In fact, Appellant could most likely have secured the services of a detection of deception examiner employed by or on contract with the local

public defender's office. The record does not show that such was even attempted. Moreover, Appellant could easily have used the services of a private examiner. See §§ 493.40-493.56, Fla.Stat. (1975).

POINT XI

THE EXCLUSION BY THE COURT OF ONE VENIREMAN WAS NOT ERROR.

During the voir dire proceedings, Judge Futch employed a very reasoned and liberal approach to the questioning, excusing, and empanelling of the jurors. Recognizing that the trial would be long and complex, it appears that the judge was willing to excuse those jurors who felt they could not devote the needed time and attention to the case. Such a posture by the trial court in excusing jurors in order to secure an impartial trial has been specifically approved by this Court. Knight v. State, 338 So. 2d 201, 203 (Fla. 1976). Neither counsel for the defense or the prosecution objected at any time to this procedure.

Consistent with this approach, Judge Futch excused Mrs. Garretson due to her belief that she couldn't "wrestle with the capital punishment thing" (RVII 24-25). The judge's action was taken with the full consent and permission of defense counsel, who stated: "We won't object, your Honor" (RVII 25). Now on appeal Appellant contends that the court's action was reversible error.

It is well-settled that a party cannot lead a court into error and then claim reversal on appeal. Smith v. State, ___So.2d

___, Case No. 77-1598 (Fla. 3d DCA, October 9, 1979). In this case, the exclusion of Mrs. Garretson is as if it were done at Appellant's insistence, given his position of no objection. Consequently, this Court must reject the claim of error. See generally Spenkelink v. State, 350 So. 2d 85 (Fla.), cert. denied, 434 U.S. 960 (1977); Spinkellink v. Wainwright, 578 F. 2d 582, 591 (5th Cir. 1978).

Moreover, the exclusion of potential juror Garretson was not a violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). She was not challenged due to her views on capital punishment. Rather, she was excused with everyone's consent because she felt uncomfortable sitting on a murder case (RVII 24), much the same as if a juror felt uneasy or inadequate sitting on a rape or burglary case. By acting with the parties' permission, Judge Futch in effect saved the defense and the State from using their limited number of peremptory challenges. No reversal of Tafero's sentence can follow.

POINT XII

THE FAILURE OF THE STATE TO SPECIFY AGGRAVATING CIRCUMSTANCES WAS NOT A DENIAL OF DUE PROCESS.

A. NO DENIAL OF DUE PROCESS DUE TO THE FAILURE TO BE GIVEN ADVANCE NOTICE OF THE AGGRAVATING CIRCUMSTANCES.

Tafero argues that he is entitled, as a matter of law, to specific notice of the aggravating circumstances which the State intends to prove at the sentencing phase. This position is

without merit. This Court, as well as the Fifth Circuit, has clearly disposed of this issue contrary to Appellant's position. Menendez v. State, 368 So. 2d 1278, n. 21 (Fla. 1979); Spinkellink v. Wainwright, 578 F. 2d 582, 609 (5th Cir. 1978). Moreover, the record in this case does not appear to contain any request on Appellant's part for advance notification. Appellant's motion to dismiss the indictment did not raise this question. Accordingly, the argument should be rejected.

B. JURISDICTION TO IMPOSE THE DEATH SENTENCE.

Appellant argues that in order for the trial court to have jurisdiction to impose the death sentence, a listing of the aggravating circumstances must be contained in the indictment. This argument is without merit. First, Appellant never raised this matter before the trial court. While a motion to dismiss the indictment was filed (RI 43-48), this motion was insufficient to raise the matter which is raised herein. As such, this question is not open for further review. Fla.R.Crim.P. 3.191(c); State v. Barber, 301 So. 2d 7 (Fla. 1974); Spinkellink v. Wainwright, supra; Wainwright v. Sykes, 433 U.S. 72 (1977).

Tafero cites no case law, federal or state, which requires the State to list aggravating circumstances in the indictment. Appellant had reasonable notice of the charge against him. All statutory and procedural requirements were satisfied. The trial court had competent jurisdiction.

POINT XIII

APPELLANT'S DEATH SENTENCE IS CONSISTENT WITH THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

A. THE AGGRAVATING CIRCUMSTANCES WERE SUFFICIENTLY PROVEN.

Aggravating factors tendered against a defendant must be proven beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1 (Fla. 1973). Each aggravating factor found by the trial court met the required burden of proof.

The court found six statutory aggravating circumstances to exist and no mitigating factors whatsoever (RII 172-176). Judge Futch initially found that both murders were committed by a person under a sentence of imprisonment since Tafero was on parole and a fugitive from justice.[§921.141(5)(b)], Fla.Stat. (1975). The evidence was clear that Tafero was on parole and, in fact, a warrant for violation of parole had been issued. This is quite clearly a proper consideration; the identical situation was approved in Aldridge v. State, 351 So. 2d 942 (Fla. 1977). Appellant's reliance on Ford v. State, ___ So. 2d ___, Case No. 47,059 (Fla., July 18, 1979), is obviously inappropriate due to the inherent differences between probation and parole.

The second aggravating factor, prior convictions for violence or threats § 921.141(5)(b), is not challenged on appeal. Indeed, a conviction for assault with intent to commit rape and another for breaking and entering and assaulting persons therein (S 47), are certainly sufficient. See Henry v. State, 328 So. 2d 430, 431 (Fla. 1976).

Tafero was also found to have created a great risk of death to many persons[§921.141(5)(c)],in that, during his escape from the murders, he kidnapped an individual at gunpoint and, together with his companions, attempted to run a police roadblock and caused an accident. Since these circumstances immediately followed the murders committed by Appellant and must be considered in light of the murders in order to have any meaning whatsoever, they were properly a part of the res gestae of the crime and properly includable as an aggravating factor. Elledge v. State, 346 So. 2d 998 (Fla. 1978). The facts themselves are quite similar to those in Ford v. State, ___ So. 2d ___, Case No. 47,059 (Fla., July 18, 1979), in which this Court approved the same aggravating circumstance.

The capital felony was also committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. §921.141(5)(e), Fla.Stat. (1975). The evidence was quite clear that Tafero killed two law enforcement officers so that there would be no possibility he would be returned to prison. The facts certainly warrant this finding. Riley v. State, 366 So. 2d 19 (Fla. 1978); Sullivan v. State, 303 So. 2d 632 (Fla. 1974).

The murders were also committed to disrupt or hinder the enforcement of laws[§921.141(5)(g)],in that the two officers were attempting to enforce the firearms and controlled substances provisions of Florida law. The killings under these circumstances clearly come within this statutory aggravating factor. That provision is obviously designed to effectuate a clear public policy that individuals cannot murder public safety officers merely because the police are investigating those individuals for possible criminal violations.

The consideration of factors (e) and (g) do not constitute the impermissible "doubling up" prohibited in Provence v. State, 337 So. 2d 783, 786 (Fla. 1976). Provence held that two aggravating factors based on the same aspect of the crime, such as robbery-murder and pecuniary gain, can only be considered as one aggravating circumstance. This Court very clearly limited its holding to those cases where the same aspect of a defendant's crime is always a cumulation of aggravating circumstances. The instant case does not come within the Provence rationale. While it is true that in some instances the two analytical concepts could combine automatically, it cannot be said, as in Provence, that circumstance (g) always occurs in a witness-killing case, or vice-versa. For example, a homicide can occur in connection with a robbery whereby a witness was killed so that the felon could avoid detection. Yet, that situation would not include a killing to prevent the enforcement of laws. Similarly, a police officer could be killed during a jailbreak, clearly justifying a category (g) factor, while not engaging in a witness killing. In accordance with the reasoning of this Court in Washington v. State, 362 So. 2d 658 (Fla. 1978), this sentencing determination was appropriate.

The final factor was the heinous, atrocious, and cruel nature of the murders. §921.141(5)(h). Trooper Black was shot four times with armor-piercing ammunition and Irwin, an unarmed individual, was shot twice. Appellant showed no reaction at all to the killings, dismissing his victims as "only cops" (RVI 647). Thus, the execution of two individuals, one of whom certainly posed no danger to Appellant, by shooting them many times with tremendously powerful ammunition and seemingly dismissing his victims as "only cops"justifies a finding of this factor. Ford v. State,

supra; Hargrave v. State, 366 So. 2d 1 (Fla. 1978); Harvard v. State, ___ So. 2d ___, Case No. 47,052 (Fla., April 17, 1977); Sullivan v. State, 303 So. 2d 632 (Fla. 1974).

In conclusion, since the jury recommended a sentence of death, there were no factors in mitigation, and the aggravating circumstances outweighed any mitigating circumstances (since none existed), the sentences of death are presumed and appropriate. Ford v. State, supra; Hargrave v. State, supra; Gibson v. State, 351 So. 2d 948 (Fla. 1977).

B. THE TRIAL JUDGE DID NOT LIMIT CONSIDERATION OF MITIGATING FACTORS.

Appellant never attempted to present any evidence in mitigation, and none exists in the record. The judge found none to be present in this case. Appellant cannot belatedly attempt to raise any non-existing mitigating factor. See generally Douglas v. State, 373 So. 2d 895, 896 (Fla. 1979). Moreover, Florida's death penalty statute and procedure does not limit consideration of non-statutory mitigating circumstances. Spinkellink v. Wainwright, 578 F.2d at 620-621; Songer v. State, 365 So. 2d 696 (Fla. 1978).

C. APPELLANT WAIVED HIS RIGHT TO PRESENT EVIDENCE IN MITIGATION.

Appellant, represented by competent counsel, declined to present any evidence at his sentencing phase (S 47-61). His tactical decision was identical to that made during trial: to present no evidence. The failure of the trial judge to inquire into his reasons therefor was never raised in the lower tribunal, and Appellant has presented no authority mandating an inquiry.

This point is spurious. See Wainwright v. Sykes, supra.

D. THE DEATH SENTENCES WERE APPROPRIATE.

Tafero clearly participated in the needless murders of two law enforcement officers. On the authority of Songer v. State, 322 So. 2d 481 (Fla. 1975), and Cooper v. State, 336 So. 2d 1133 (Fla. 1976), the death sentences are proportionate to the crimes. See also Songer v. State, 365 So. 2d 696 (Fla. 1978). Taylor v. State, 294 So. 2d 648 (Fla. 1974), relied upon by Appellant, is not controlling in that there was no eye witness to the shooting and that defendant's culpability was shown wholly by circumstantial evidence. Tafero's prosecution is not even remotely similar.

That co-defendant Rhodes received life sentences in return for his guilty pleas to second-degree murder is not in violation of Slater v. State, 316 So. 2d 539 (Fla. 1975). The facts show that Rhodes never fired a single shot at the officers; his culpability was certainly not equal to that of Tafero and co-defendant Linder, who both received the death penalty. Appellant's punishment is proportionate. Smith v. State, 365 So. 2d 704, Case No.49,245 (Fla., November 9, 1978); Salvatore v. State, 366 So. 2d 745 (Fla. 1978); Barclay v. State, 343 So. 2d 1266 (Fla. 1977); Witt v. State, 342 So. 2d 497 (Fla. 1977); Meeks v. State, 336 So. 2d 1142 (Fla. 1976).

E. THE DEATH PENALTY STATUTE PROVIDES SUFFICIENT GUIDELINES FOR WEIGHING THE STATUTORY FACTORS.

The United States Supreme Court, in Proffitt v. Florida, 428 U.S. 2421 (1976), stated that Florida's death penalty statute

provides sufficient instructions as to the relative weights to be applied to aggravating and mitigating factors.

F. THE DEATH PENALTY STATUTE IS CONSTITUTIONAL.

The arguments raised by Appellant were rejected in Fleming v. State, ___ So. 2d ___, Case No. 50,005 (Fla., June 14, 1979), and Spinkellink v. Wainwright, supra.

POINT XIV

APPELLANT'S TRIAL, ADJUDICATION, AND SENTENCE FOR ROBBERY IS NOT DOUBLE JEOPARDY.

This issue is disposed of by State v. Pinder, supra, wherein this Court held that where premeditation is charged, but the only evidence to sustain the conviction is furnished by proof that the killing occurred as the result of a felony-murder, a defendant may not be convicted and punished for both the felony-murder and the underlying felony. In this case, proof of premeditation is sufficient to warrant convictions for both the murders and the robbery.

CONCLUSION

Based on the foregoing, the State of Florida respectfully requests that this Court affirm Appellant's judgments and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished, by courier/mail, to Craig S. Barnard, Esquire, Office of the Public Defender, 319 Clematis Street, West Palm Beach, Florida 33401, this 19th day of October, 1979.

Benedict P. Kuehne
Of Counsel