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IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,945

ROBERT PATTEN,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

BRIEF OF APPELLEE/CROSS-APPELLANT

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TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

CASES — PAGE

OTHER AUTHORITIES

TABLE OF CONTENTS

INTRODUCTION

Robert Patten, the appellant/cross-appellee was the defendant in the court below. The appellee/cross-appellant was the prosecution. In this brief, the appellant/cross-appellee will be referred to as "Appellant." The State of Florida will be referred to as "Appellee." The symbol "R" will be used to designate the record on appeal. The symbol "T" will be a reference to the transcript of proceedings. The record exhibits will be labeled "R. Exh." All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case and Facts as a generally accurate account of the proceedings at the trial level with such additions and exceptions as are set forth below and in the argument portion of this brief.

Appellee specifically notes the following additions:

1) On April 1, 1982, Appellant filed his Notice of Appeal to this Honorable Court from the order of the trial court adjudging guilt for murder in the first degree and imposing a sentence of death in the electric chair. (R. 569).

2) The State of Florida filed a Notice of Cross/Appeal, pursuant to the provisions of Fla.R.App. 9.140(c)(1)(H), on April 12, 1982 (R. 572).

3) The instant appeal and cross-appeal follow.

STATEMENT OF THE FACTS

Appellee accepts Appellant's Statement of the Facts as a generally accurate account of the proceedings at the trial level with such additions and exceptions as are set forth below and in the argument portion of this brief. Appellee specifically rejects those "facts" which are actually argument and assert that the trial court erred. Appellee notes the following facts:

Prior to Appellant's trial, a hearing was held to ascertain Appellant's competency to stand trial. (R.Exh.51-102). The trial court considered the eleven criteria enumerated in Rule 3.211, Fla.R.Crim.P. and found Appellant competent to stand trial (R. Exh.99). No evidence to the effect that Appellant had been previously found not guilty by reason of insanity was presented to the jury.

Appellant filed various pre-trial motions including his

Motion to Exclude Television Cameras, Electronic Media and Still Photographers During Pretrial and Trial Proceedings. (R.328-331). A hearing as to this motion was held before the trial court. State, defense and media interests were represented at the hearing. (See T.364-374). In support of his motion, Appellant filed an affidavit of counsel alleging that counsel had put his head down in the presence of cameras and had questioned their presence. (R. 328-334). Defense counsel also noted that the media presence made it "difficult" for him to assist in his defense. (R.334). No affidavits of doctors reaching a conclusion that presence of electronic media would render Appellant incompetent to stand trial were presented to the trial court. Appellant's ore tenus motion to appoint additional doctors to testify as experts as to this issue was denied, (T.373), yet no proffer was made to the effect that Appellant was unable to secure this necessary information from doctors who had already been appointed by the court to psychiatrically evaluate Appellant (T.373).

Appellant's pretrial motions also included a motion to suppress physical evidence found at 3025 S.W. 6th Street (Miami, Florida). (R.60-62A). Both parties stipulated to the testimony of Mrs. Maude Biggers, grandmother of the appellant and owner of the premises where the challenged

evidence was found. (R. Exh.46). The parties stipulated to Mrs. Biggers' statements to the effect that at the time of the murder in question, she was the sole owner and resident of the small, single family dwelling located at 3025 S.W. 6th Street, in Miami, Dade County, Florida. (R. Exh.46). Although Appellant, her grandson, had resided at this residence at various times in his life, he had actually moved out of the dwelling approximately one (1) year prior to September, 1981. (R. Exh.46, 47). Although Appellant would visit her and sleep there occasionally, Mrs. Biggers indicated that he considered the family of his girlfriend, Christine Castle, (The Castles) to be his "family". (R. Exh.47).

The dwelling has two entrances, a front and back door. Although at one time, Appellant had possessed a key to the back door, Mrs. Biggers regained possession of that key approximately one (1) year prior to September, 1981, when Appellant went to live with the Castle family. Appellant never had a key to the front door. His only means of gaining authorized admittance was when Mrs. Biggers was home. The door to a room in the house where Appellant had stayed at times only has a button lock which can be locked from the inside. The door to that room was normally kept open. (R. Exh.48).

The handgun seized at the dwelling did not belong to Mrs. Biggers. She hates guns and had communicated this fact to Appellant. According to suppression hearing testimony of Sergeant Richard Bohan, the area of the house where the gun was found was in a heating element, under a steel grating, located in the hallway of the house. (T.328). Mrs. Biggers' statements indicated that a short hallway leads from the living room of the small dwelling to the bathroom, running past doors to two bedrooms. (R.48).

Appellant's allegedly estranged girlfriend, Christine Castle, testified that at the time of the murder Appellant no longer lived with her and had told her that he was moving to his grandmother's house. (See T.311, 319). She had only seen him at his grandmother's house in July, 1981, two months prior to the murder and could not say whether Appellant was staying there. Appellant's grandmother did not permit Ms. Castle to enter her house. (T.311-312).

Testimony at Appellant's trial indicated that Appellant was driving a green, 1973 Volkswagen that had been stolen from Michael Joseph Snowden approximately two weeks prior to the murder in question. (T.859-863). Appellant was on Probation at the time (T.850), had been convicted of robbery in 1975, and had a gun in his possession. Officer Terry

Russell,the partner of the victim, Officer Nathaniel Broom, testified that on September 2, 1981, he and Officer Broom had observed Appellant commit a traffic violation. (T.1020-1022). Appellant had turned east onto a one-way street which permitted westbound travel. The officers pulled up behind the Volkswagen. Officer Broom exited from the vehicle and pursued Appellant as he fled through the adjacent apartment complex. (T.1020-1024). Numerous eyewitnesses observed this pursuit prior to hearing gunshots. George Preston Brown, Jr. testified that the victim stated "he has a gun" prior to the shooting. (T.938).

William Preston Stewart, Sr. observed a white man (identified as Appellant) hide behind a building, peek around the corner and fire several shots. (T.976-981). Various police officers subsequently found Nathaniel Broom lying on his stomach. The officers were unable to revive him (T.1039; 1056-62; 1075).

The Chief Medical Examiner for Dade County, Dr. Joseph Davis, conducted an autopsy of the victim's body. He found that Officer Broom had suffered from two gunshot wounds. One shot, the shot to his chest, ruptured his heart. The other wound was in his foot. Dr. Davis opined that the chest wound preceded the foot wound as no evidence of blood

was found near the foot wound. He reasoned that the wound to the chest had destroyed the ability of the officer's heart to pump blood to his foot. (T.1302-1310). Testimony also indicated that the "keeper" on the dead officer's police belt had been struck by a bullet. (See T.1302-1360).

Appellant's trial resulted in a jury verdict of guilty of first-degree murder. Witnesses who testified during the penalty phase hearings included Dr. Albert Jaslow and Dr. Edward Herrera. Dr. Jaslow testified that Appellant had an emotional disturbance, yet it did not reach the extent that it would have to in order to interfere with a person's ability. (T.1702). Dr. Herrera indicated that he did not see any reason why Appellant could not have appreciated the criminality of his conduct if he wanted to. (T.1707-1708). Both doctors also testified that they had been given the impression that Appellant was trying to feign ("fake") mental illness. (T.1701, 1709). Lay witness Christine Castle, testified that Appellant had told her that he had "fooled" doctors who examined him following the murder. (T.1715).

During the penalty phase, the jury advised the court that it was deadlocked six to six in its vote as to the sentence. (T.1773). The trial court instructed the jury to try to deliberate one more time and if no majority could be

reached, to recommend a life sentence (T.1781-2). The jury returned a 7-5 verdict to impose the death sentence. The trial court imposed the death sentence and entered a specific sentencing order complying with the requirements of §921.141, Florida Statutes. (R.559-568).

The trial court found that three aggravating factors had been proven and that there were no statutory or non-statutory mitigating factors. The finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, in accordance with the provisions of §921.141(5)(e), was predicated upon evidence which overwhelmingly demonstrated that the victim, police officer Nathaniel Broom, was killed for the purpose of avoiding lawful arrest. (See R.559-560). Although the court also found that the evidence showed that Officer Broom was killed to disrupt or hinder the lawful exercise of any governmental of the enforcement of laws under §921.141(5)(g), the Court declined to consider this finding as an aggravating circumstance so as not to have a "doubling" of factors, as discussed in Provence v. State, 337 So.2d 783 (Fla. 1976).

The trial court also found that an aggravating circumstance was proven by the fact that Appellant had previously

been convicted of a robbery. The third aggravating factor found was that the murder was committed in a cold and calculated manner without legal or moral justification. (R.559-568).

The trial court's order notes that the Court had reviewed the entire record, including the testimony and evidence in the trial and sentencing proceeding to determine whether there might possibly exist anything whatsoever of a non-statutory mitigating nature that could be considered by the Court in mitigation of the sentence. (R.563). Appellee respectfully reserves the right to raise additional facts in the argument protion of this brief.

POINTS INVOLVED ON APPEAL

Appellee respectfully rephrases Appellant's Points on Appeal as follows:

I

WHETHER THE STATE (APPELLEE) HAD TO INTRODUCE EVIDENCE TO ESTABLISH THAT APPELLANT WAS SANE AT THE TIME OF THE OFFENSE, WHERE NO EVIDENCE WAS INTRODUCED AT THE TIME OF THE TRIAL SO AS TO RAISE THE AFFIRMATIVE DEFENSE OF NOT GUILTY BY REASON OF INSANITY?

II

WHETHER THE TRIAL COURT ACTED SOUNDLY WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION TO EXCLUDE THE ELECTRONIC MEDIA?

III

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE, ALTHOUGH IT ERRED IN FINDING THAT APPELLANT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE SEARCHED PREMISES? (Appellant's Point III, Restated and Appellee's Point on Cross-Appeal).

IV

WHETHER THE TRIAL COURT PROPERLY CONDUCTED VOIR DIRE EXAMINATION AND PROPERLY DENIED APPELLANT'S MOTIONS FOR SEQUESTRATION OF THE JURY AND REMOVAL OF CERTAIN JURORS?

POINTS INVOLVED ON APPEAL CONTINUED

V

WHETHER THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING AS TO APPELLANT'S ASSERTION THAT A DEATH QUALIFIED JURY IS ALSO A GUILT PRONE JURY?

VI

WHETHER THE TRIAL COURT ERRED IN GIVING THE JURY AN "ALLEN CHARGE" DURING THE PENALTY PHASE OF THE TRIAL?

VII

WHETHER THE SENTENCE IMPOSED BY THE TRIAL COURT SHOULD BE TREATED AS A VALID "JURY OVER-RIDE" AND AFFIRMED?

VIII

WHETHER A PRESENTENCE INVESTIGATION REPORT IS MANDATORY IN CAPITAL CASES?

IX

WHETHER THE TRIAL COURT WAS REQUIRED TO ORDER THE JURY TO MAKE SPECIFIC FINDINGS AS TO EXISTENCE OF BOTH AGGRAVATING AND MITIGATING FACTORS?

POINTS INVOLVED ON APPEAL
CONTINUED

X

WHETHER THE TRIAL COURT PROPERLY MADE ITS DETERMINATIONS AS TO THE AGGRAVATING AND MITIGATING CIRCUMSTANCES?

XI

WHETHER THE DEATH SENTENCE IMPOSED BY THE TRIAL COURT SHOULD BE AFFIRMED?

XII

WHETHER THE REBUTTAL TESTIMONY OF EXPERT WITNESSES CALLED BY APPELLEE (THE STATE) DURING THE PENALTY PHASE WAS PROPERLY PERMITTED BY THE TRIAL COURT?

XIII

WHETHER SECTION 921.141, FLORIDA STATUTES IS EITHER UNCONSTITUTIONAL ON ITS FACE OR IN ITS INSTANT APPLICATION?

ARGUMENT

I

THE STATE (APPELLEE) DID NOT HAVE TO INTRODUCE EVIDENCE TO ESTABLISH THAT APPELLANT WAS SANE AT THE TIME OF THE OFFENSE, WHERE NO EVIDENCE WAS INTRODUCED AT THE TIME OF TRIAL, SO AS TO RAISE THE AFFIRMATIVE OF NOT GUILTY BY REASON OF INSANITY. (Restated).

Appellant contends that his prior adjudication of insanity required Appellee (the State) to establish his sanity as an essential element of its case. Appellee submits that Appellant's contention is legally erroneous. The State does not have to introduce evidence to establish that a defendant was sane at the time of the offense where no evidence was introduced at the time of trial so as to raise the affirmative defense of not guilty by reason of insanity.

It is important to remember that there is a clear legal distinction between the issue of insanity at the time of the offense and the competency of a defendant to stand trial. This Court has recently reiterated the criteria which are used in Florida for ascertaining whether a defendant is competent to stand trial. In Scott v. State, 420 So.2d 595, 597 (Fla. 1982), the court stated the following:

> The competency criteria for Florida are the same as those for federal cases: "whether [the defendant] has sufficient present ability to consult with his lawyer with a

> reasonable degree of rational under standing--and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960); Lane v. State, 388 So.2d 1022 (Fla. 1980). In order to determine this, it is the responsibility of the trial court to conduct a hearing for competency to stand trial whenever it reasonably appears necessary to ensure that a defendant meets the standard of competency. §918.15, Fla.Stat. (1979); Fla.R.Crim.P. 3.210 (1979).

In compliance with the above-enumerated criteria, the trial court conducted a full hearing prior to the trial as to the issue of whether or not Appellant was competent to stand trial (See R. Exh. 51-102). The record demonstrates that substantial, competent evidence was adduced at said hearing to support the trial court's ultimate finding. The trial court considered the eleven criteria enumerated in Rule 3.211, Fla.R.Crim.P. and found Appellant competent to stand trial. (R. Exh. 99). Thus, Appellant was judicially declared competent prior to the actual commencement of his trial.

The issue which is actually presented is whether the affirmative defense of insanity at the time of the offense (as opposed to competency to stand trial) was ever raised by Appellant and if so, whether the burden was ever shifted to the State requiring proof of sanity at the time of the offense.

In Patterson v. New York, 432 U.S. 197, 97 S.Ct. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), the United States Supreme Court declined to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Patterson, supra, makes it clear that so long as a jury is instructed that the State has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. Krzeminski v. Perini, 614 F.2d 121, 123 (6th Cir. 1980). The State may properly place the burden of proving affirmative defenses such as self-defense, extreme emotional disturbance or insanity upon the defendant. Krzeminski, supra at 123; Patterson, supra; Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977); Rivera v. Delaware, 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976), dismissing for want of a substantial federal question, 351 A.2d 561 (Del. 1976); Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 130 (1952).

The Constitution does not compel a State to adopt a burden shifting principle on the issue of criminal capacity. The burden of proving insanity could constitutionally remain at all times on the defendant. Stacy v. Love, 679 F.2d 1209 (6th Cir. 1982); Leland v. Oregon, supra.

In United States v. Collins, 690 F.2d 431, 434 (5th Cir. 1982), the Court stated that it had never defined the quantum of evidence necessary to constitute sufficiency for submitting the issue of sanity to a jury; instead, each case must be decided on its own facts, with careful attention to the weight of the evidence presented on both sides.

Patterson, supra, makes it clear that such a case by case analysis should be made based upon the State's own substantive law as to the burden of proving affirmative defenses. The United States Court of Appeals for the Fifth Circuit has held that when raised as a defense in a criminal case the issue of a defendant's sanity is for the jury, to be determined from all the evidence. United States v. Davis, 513 F.2d 320 (5th Cir. 1975). This language makes it clear that an affirmative defense is a defense which must be raised. Thus, any presumptions which attach as to the issue will not be invoked until such an issue is actually raised.

Florida law has always required some quantum of evidence prior to shifting the burden of proof as to sanity at the time of the offense to the State. The Florida standard for sanity at the time of the offense is the ability to distinguish right and wrong, the M'Naghten test. Ferguson v. State, 367 So.2d 631 (Fla. 1982); Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). A defendant's sanity at the time of

the offense is a factual question for the jury. Ferguson, supra at 435. See also Eason v. State, 421 So.2d 35, 37 (Fla. 3d DCA 1982). Thus, the issue becomes a fact question as to a defendant's affirmative defense.

The burden of proving insanity is on the defendant because he is presumed sane under the law. When he rebuts the presumption of sanity by presenting evidence of insanity sufficient to raise a reasonable doubt, the burden then shifts to the State to prove sanity beyond the reasonable doubt. Johnson v. State, 408 So.2d 813, 815 n. 2 (Fla. 3d DCA 1982); see also, Brock v. State, 69 So.2d 344 (Fla. 1954). Once there is testimony sufficient to present a reasonable doubt as to sanity at the time of the offense, the presumption vanishes and the burden is shifted. See, Blatch v. State, 216 So.2d 261 (Fla. 3d DCA 1968). Where defense evidence is insufficient to create a reasonable doubt as to sanity at the time of the offense, the presumption of sanity will not be overcome. Trotter v. State, 377 So.2d 34 (Fla. 1st DCA 1979).

The federal courts have held that at least "some evidence" must be introduced to weaken a defendant's presumption of sanity. See, e.g. United States v. Marable, 657 F.2d 75 (4th Cir. 1981); United States v. Henderson, 680 F.2d 659 (9th Cir. 1982); United States v. Coffman, 567 F.2d 960 (10th Cir. 1977).

Regardless of the amount of evidence which is needed to shift the burden of proof, an affirmative defense is clearly involved. The issue will not be presented where there is absolutely no evidence is raised before the jury. A defendant is not entitled to a court ruling on the minimal sufficiency of the prosecution's evidence as to a defense that the accused has not placed in issue. United States v. Myers, 692 F.2d 823 (2d Cir. 1982). This is especially true in light of the fact that the defense of insanity can be waived. See Scarborough v. United States, 683 F.2d 1323 (11th Cir. 1982).

It is true that a prior adjudication of insanity can be evidence of insanity. See e.g. Boone v. State, 183 So.2d 869, 871 (Fla. 1st DCA 1966); Hixon v. State, 165 So.2d 436, 439 (Fla. 2d DCA 1964). Yet the jury must be presented with some evidence to this effect. In fact, the jury instruction as to insanity clearly notes that if the evidence establishes that the defendant had been adjudged insane by a court, and restoration of legal sanity has not occurred, the jury should assume that the defendant was legally insane at the time of the commission of the alleged crime, unless the evidence convinces the jury otherwise. See, 3.04(b), Florida Standard Jury Instructions.

The issue of the general validity of the common evidentiary device of the presumption has been discussed by the United States Supreme Court in County Court of Ulster County, New York v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). In that case, the court noted that in criminal cases, the ultimate test of any device's constitutional validity is that the device must not undermine the fact finder's responsibility at trial.

Although the ultimate burden of proof in a criminal prosecution always remains with the prosecution, United States v. Manetta, 551 F.2d 1352 (5th Cir. 1977); Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895), the defendant must make the question of sanity an issue before the burden shifts to the state. The question must be in issue before the evidentiary device of a presumption comes into play.

In the cause sub judice, it was irrelevant whether or not there was in fact a prior adjudication of insanity. The appellant introduced no evidence of any kind to place sanity at time of the offense in issue. In fact no formal notice of intent to rely on an insanity defense was filed. Thus, regardless of whether the presumption was applicable in light of the trial court's finding that Appellant was "competent" to stand trial, Appellant did nothing to raise the

ultimate issue so as to shift the burden of proof to the State.

Moreover, the evidence adduced pursuant to the competency hearing (R. Ex. 50-100) as well as the psychological reports of the appointed doctors (See R. 553; 557) clearly demonstrate that had Appellant raised the issue of insanity, the State could have easily rebutted any presumption which may have followed. Even the defendant's girlfriend testified that Appellant felt he would be able to basically fool examining physicians. (See R. Exh. 90). The record does not demonstrate that had defense counsel sought to actually raise an insanity defense, there would have been affirmative evidence to support said theory of defense. Based upon this factor, it is unlikely that failure to raise insanity as a defense could be asserted as grounds for a ineffective assistance of counsel claim, see Holmes v. State, __So.2d___ (Fla. 1983)(Case No. 61,672; Opinion filed February 3, 1983) [8 F.L.W. 56].

The decisions which Appellant has relied upon are not controlling, as they are by the most part based upon the burden which the State bears as to competency to stand trial, not as to the burden of proof as to sanity at the time of the offense. It is apparent, that older decisions of Florida courts used the terms "incompetency" and

"insanity" interchangeably. Appellant had failed to demonstrate that the State failed to meet its burden of proof as to the elements of the charged offense. Prior to trial, Appellant was judically declared competent to stand trial. No evidence of insanity was presented to the jury, nor did Appellant seek to rely on insanity as a defense. Affirmance of Appellant's conviction is therefore mandated.

II

THE TRIAL COURT ACTED SOUNDLY WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION TO EXCLUDE THE ELECTRONIC MEDIA. (Restated)

The trial court acted soundly within its discretion in denying, after an expeditious hearing, Appellant's Motion to Exclude Television Cameras, Electronic Media, and Still Photographers During Pretrial and Trial Proceedings. (R. 328-331). Assuming arguendo that the hearing conducted by the trial court was not the equivalent of a full-blown, evidentiary hearing, Appellant's assertions are nonetheless without merit as Appellant's motion was insufficient to warrant a more extensive hearing.

Neither the United States Supreme Court nor this Court has found the presence of cameras in the courtroom to constitute a per se denial of due process. Jent v. State, 408 So.2d 1024 (Fla. 1981), citing to Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) and In Re Petition of Post-Newsweek Stations, Florida Inc., 370 So.2d 764 (Fla.) appeal dismissed, 444 U.S. 976, 100 S.Ct. 476, 62 L.Ed.2d 403 (1979). In order to have cameras excluded from a courtroom during trial, a defendant must show prejudice of constitutional dimensions. Jent, supra; Clark v. State, 379 So.2d 97 (Fla. 1979).

In Post-Newsweek, supra, this Court noted the test which must be applied in order to determine whether a trial court may properly exclude electronic media coverage:

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from cover-age by other types of media.
>
> 370 So.2d 764 at 779.

In Green v. State, 395 So.2d 535, 538 (Fla. 1981), this Court noted that it is the trial court's discretion that controls in applying the qualitatively different test. Any general effect resulting from notoriety will not suffice to trigger electronic media exclusion, Green, supra at 536.

The conduct of a fair trial is vested within the sound discretion of the trial court and it will not be reversed absent proof of abuse of that discretion. United States v. Fontenot, 628 F.2d 921 (5th Cir. 1980); See, Jent v. State, supra at 1029. The standard for determining abuse of judicial discretion was discussed in Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970), in an opinion written by Justice Overton, sitting as an associate judge. In that opinion, Justice Overton noted the following:

> Discretion is said to be abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that the discretion is abused only when no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.
>
> [Citations omitted]
> 232 So.2d at 211-212.

An application of this standard to the cause sub judice necessarily results in a conclusion that the trial court acted soundly within its discretion in denying the motion at issue.

The procedure for determining whether a qualitatively different test applies, while requiring a hearing, may not necessarily require an evidentiary one. Green, supra at 538. The trial court in many instances could have a hearing and make a decision on the basis of affidavits after all parties have had an opportunity to be heard. Id. In the instant cause, the trial court was apprised of the affidavit filed by defense counsel. (R. 334). State, defense and media interests were all represented at the hearing held pursuant to the motion. (See T. 364-374).

Although in Green v. State, supra, the Court determined that a full-blown evidentiary hearing was necessary as the competency issue was properly raised, Appellant's motion in the instant cause was insufficient to require the same result. The Green court noted that a proper motion should set forth facts that, if proven, would justify the entry of a restrictive order. General assertions or allegations are insufficient.

In Green, supra, trial proceedings had initially been postponed because three court-appointed psychiatrists had found the defendant incompetent to stand trial. Several months later, the doctors agreed that although still mentally disturbed, the defendant was competent to stand trial. Defense counsel subsequently moved for exclusion of electronic media from the trial asserting as grounds the history of mental illness and by affidavit, set forth the opinion of one of the court-appointed psychiatrists who had concluded the following:

> [A]ppearance of the electronic media in this case would adversely affect the defendant. Her anxiety and depression will be heightened and actively interfere with her ability to defend herself and to communicate with counsel.

Defense counsel in Green asserted that infusion of cameras into the courtroom would paralyze her with apprehension and consequently prevent her from defending herself.

The motion also included the report of the defendant's treating psychiatrist who had also concluded that the presence of the electronic media would adversely impact on the defendant's competency to stand trial.

Unlike Green, the motion and affidavit of counsel in the cause sub judice merely set forth conclusory allegations. The motion and affidavit merely asserted that counsel had put his head down in the presence of the cameras as well as questioning the reasons for their presence. (See R. 328-334). This behavior is clearly susceptible to an interpretation that it is a totally norman reaction. Defense counsel's allegations only indicate that the media presence made it "difficult" for him to assist in his defense, not that it precluded him from doing so. (See R. 334). Also dissimilar to Green, no affidavits of doctors reaching an affirmative conclusion that presence of electronic media would render Appellant incompetent to stand trial were presented to the trial court.

Although the trial court did not grant Appellant's ore tenus motion to appoint additional doctors to testify as experts as to this issue, (See T. 373), Appellant did not demonstrate that he was unable to secure substantive opinions as to this issue from the doctors that had already been appointed by the court to psychiatrically evaluate

Appellant. (T. 373). Moreover, a competency hearing had in fact been held in this case. (R. Exh. 50-102). Furthermore, had Appellant had substantive grounds which would have in fact supported exclusion of the media under the "qualitatively different" test, Appellant would have most likely known this at the time of the initial competency hearing. Counsel could have conducted inquiry of the doctors or lay witness as to the instant issue at that time.

In denying Appellant's motion, the trial court specifically noted that no doctor had at any time during the competency hearing indicated that there was any factual basis that would support the defense contention. (T. 374). The judge also noted that based upon the doctor's testimony, there was affirmative evidence that Defendant was malingering or acting inconsistent in order to create a basis upon which to have a ruling that he was psychotic or incompetent. It was specifically noted that all doctors were in agreement as to this question (regard).[1] The Court stated that it was denying the motion based upon the above-noted findings and in balancing of the public interests as opposed to Appellant's right to a fair trial. (T. 374). In light of the trial court's specific findings, it is clear that the court acted soundly within its discretion in denying

[1]Testimony of lay witness Christine Castle at the competency hearing was also consistent with the doctor's opinions. (See R. Exh. 90).

Appellant's motion to exclude the media from trial proceedings. The hearing conducted by the court was clearly adequate in light of the insufficiency of Appellant's motion.

III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE, ALTHOUGH IT ERRED IN FINDING THAT APPELLANT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE SEARCHED PREMISES (Appellant's Point III, Restated and Appellee's Point on Cross-Appeal).

Appellee submits that the trial court was correct in denying Appellant's motion to suppress physical evidence seized from 3025 S.W. 6th Street (Miami, Florida) pursuant to a warrant issued on September 4, 1981 (See R. 60-62A; R. Exh. 24-32). Appellee is currently challenging the trial court's determination that Appellant had a reasonable expectation of privacy in the area from which the evidence was seized. (T. 440). It is the defendant who bears the burden of proving that a challenged search is illegal and that he had an actual and reasonable expectation of privacy in the area searched. Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2856, 65 L.Ed.2d 633 (1980); Rakas v. Illinois, 439 U.S. 128, 130 n. 1, 99 S.Ct. 421, 424 n. 1, 58 L.Ed.2d 387 (1978). In the cause sub judice, Appellant clearly failed to meet this burden.

Appellee's position as to this claim is clearly supported by the stipulation testimony, which was presented to the trial court and considered (T. 441), of Maude Biggers, the grandmother of the appellant and the owner of the dwelling

dwelling where the search and seizure actually took place. Since this testimony took the form of a written stipulation, in reviewing this evidence, this Court is not required to accept the trial court's determination as to the credibility of the witness. This is true in light of the fact that the trial court did not observe the demeanor of the witness. Redondo v. Jessup, 426 So.2d 1146 (Fla. 3d DCA 1983).

The stipulation testimony of Mrs. Biggers indicates that at the time of the murder in question, she was the sole owner and resident of the small, single family dwelling located at 3025 S.W. 6th Street, in Miami, Dade County, Florida. (R. Exh. 46). Although Appellant, her grandson, had resided at this residence at various times in his life, he had actually moved out of the dwelling approximately one (1) year prior to September, 1981 (R. Exh. 46, 47). Although Appellant would visit her and sleep there occasionally, Mrs. Biggers indicated that he considered the family of his girl-friend Christine Castle (The Castles) to be his "family". (R. Exh. 47).

The dwelling has two entrances, a front and back door. Although at one time, Appellant had possessed a key to the back door, Mrs. Biggers regained possession of that key approximately one (1) year prior to September, 1981, when Appellant went to live with the Castle family. Appellant

never had a key to the front door. His only means of gaining authorized admittance was when Mrs. Biggers was home. The door to a room in the house where Appellant had stayed at times only had a button lock which can be locked from the inside. The door to that room was normally kept open. (R. Exh. 48).

The handgun seized at the dwelling did not belong to Mrs. Biggers. She hates guns and had communicated this fact to Appellant. The area of the house where the gun was found was in a heating element, under a steel grating located in the hallway of the house. (See T. 328). A short hallway leads from the living room of the small dwelling to the bathroom, running past doors to two bedrooms. (R. 48).

Although Christine Castle testified that Appellant no longer lived with her and had told her that he was moving to his grandmother's house (See T. 311, 319), her testimony was obviously conclusory. She had seen him at his grandmother's house in July, 1981, but could not say whether Appellant was staying there. Appellant's grandmother did not permit Ms. Castle to enter her house. (T. 311-312). Thus, her testimony does not contradict Mrs. Biggers' statements.

The fact that the dwelling where the challenged firearm was seized was owned by a blood relative of Appellant will

not suffice to meet his burden of proving that he did in fact have a reasonable expectation of privacy in the area of the dwelling where the firearm was actually seized.

In United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), two defendants, John Salvucci and Joseph Zackular, were charged with numerous counts of unlawful possession of stolen mail. They filed a motion to suppress checks which formed the basis of the indictment, on the grounds that the search warrant used to execute the search was inadequate to demonstrate probable cause. The checks were seized during a search of an apartment rented by defendant Zackular's mother. The court did not find that Zackular had standing based upon the fact that the general premises were rented by a blood relative, his mother. Instead, since both defendants had relied on "automatic standing" of which the court disapproved, the Court remanded the case to enable the defendants to establish that they had a legitimate expectation of privacy in the areas of Zackular's mother's home where the goods in question were seized. Id. at 448 U.S. 95.

Here, Appellant had officially moved out of his grandmother's home a year prior to the search. He no longer had a key to the premises. He had not been an overnight guest in the home since two weeks prior to the incident. (R. Exh.

46). Moreover, the gun itself was found in a common area of the house, the hallway near the bathroom. Furthermore, it was placed on a heating unit under a grating, an area which might readily be within the access of service personnel. Since Appellant did not have free access to the premises in general and had placed the gun in a common area of the dwelling it does not follow that he had a reasonable expectation of privacy in the particular area.

Appellant's status is at best that of a temporary guest. Even if Appellant is given greater status than that, he was not living at Mrs. Biggers' residence. In Mallory v. State, 409 So.2d 1222, 1224 (Fla. 2d DCA 1982), the Second District rejected a defendant's claim that he had an expectation of privacy in the area searched. The area in question was in the home of a close friend (for eight or nine years) of the defendant's. The defendant had been an overnight guest in the house several times. The owner had left the defendant a hidden key by which to enter the house at will, in the owner's absence and some of the defendant's effects were kept in the closet. Although there was evidence that the defendant had come and gone at will during the owner's absence, there was indication of permanence in the arrangement. The Court found that the friend's home was not a place of residence despite freedom of ingress and the fact that he kept personal belongings there. The court

found that despite the defendant's feeling that he was "welcome" in the friend's home, that he was not living there at the time of the search. This is clearly analogous to the instant case. Appellant had officially moved out approximately one (1) year prior to the search and had not stayed overnight during the two weeks prior to the search. Appellant was clearly not living on the searched premises. Being on the premises (or having been there) with the consent of the owner is not enough. See, e.g. Sims v. State, 425 So.2d 563 (Fla. 4th DCA 1982).

Appellant may contend that there are analogies between the instant cause and cases such as Shade v. State, 400 So. 2d 850 (Fla. 1981) and Brady v. State, 394 So.2d 1073 (Fla. 4th DCA 1981). Both of these cases are clearly distinguishable. In Brady, there was evidence that the appellant had not only stayed on the premises but moved her belongings into the apartment where the search was conducted in a manner so as to share the apartment at the time of the search. In Shade, supra, there was a conflict in the evidence as to whether Appellant was actually staying or living at his family's residence. Here, Appellant did neither.

In the instant case, the trial court erred in determining that Appellant had a reasonable expectation of privacy in the area searched. Appellant's motion to suppress

should have been granted on this basis. It is therefore submitted that this Court should affirm the trial court's denial of the motion to suppress without addressing the merits of his claims. Assuming arguendo that this Court should address Petitioner's claims as to this issue, affirmance of the denial of his motion to suppress should nonetheless result.

Appellee submits that the statement of facts contained in the affidavit for the challenged search warrant stated sufficient facts from which the issuing judge could reasonably conclude that the items sought would be found at the residenct of Appellant's grandmother, at 3025 S.W. 6th Street. (See R. Exh. 32). Probable cause for a search warrant is nothing more than a reasonable belief that the evidence sought is located at the place indicated by the policeman's affidavit. United States v. Dill, 693 F.2d 1012, 1014 (10th Cir. 1982); United States v. Williams, 605 F.2d 495 (10th Cir.) cert. denied, 444 U.S. 932, 100 S.Ct. 276, 62 L.Ed.2d 189 (1979).

An affidavit for a search warrant need not establish beyond a reasonable doubt that the objects sought will be found at the place sought to be searched, it is sufficient that the facts described in the affidavit warrant a

reasonable person to believe that the objects would be found. United States v. Maestas, 546 F.2d 1177, 1180 (5th Cir. 1977); United States v. Rahn, 511 F.2d 290, 293 (10th Cir. 1975). See also, Heape v. State, 369 So.2d 836 (Fla. 2d DCA 1979); Machado v. State, 363 So.2d 1132 (Fla. 3d DCA 1978); Bates v. State, 355 So.2d 128 (Fla. 3d DCA 1978); Churney v. State, 348 So.2d 395 (Fla. 3d DCA 1977).

When considering the issuance of a search warrant, a judge must exercise common sense judgement as to whether the facts establish probable cause. Bastida v. Henderson, 487 F.2d 860 (5th Cir. 1973). An officer presenting the facts may rely on probabilties based on his common sense deduction. State v. Williams, 374 So.2d 609 (Fla. 3d DCA 1979).

Great deference is accorded to magistrates' determinations on the question of probable cause. United States v. Flynn, 664 F.2d 1296, 1304 (5th Cir. 1982); United States v. Copeland, 538 F.2d 639, 641 (5th Cir. 1976). A magistrate's findings should be sustained in doubtful or marginal cases. United States v. Flynn, supra; United States v. Maestas, supra at 1180.

The Statement of the Facts attached to the warrant affidavit relates the actual facts of the murder which took

place on September 2, 1981 and notes that the initial stop of a white male was witnessed by Officer Terry Russell and states that after the shooting the same person took a car, at gunpoint, from Max Rhodes (a private citizen). The car that was initially stopped turned out to be stolen from one Michael Snowden on August 31, 1981. A photo line-up was made with Appellant's picture and witnesses positively identified Appellant as the individual who had shot Nathaniel Broom and had taken Max Rhodes' car. It is apparent from these facts that the source of this information is from private citizens and police sources. Police records were the source of the information that a fingerprint found in the green Volkswagen that had originally been approached by Officers Broom and Russell belonged to Appellant Robert Patten. Police records were also a source of the address of 3025 S.W. 6th Street. (R.Exh.32). It has been held that observations of government officials (police officers and support personnel obviously fit into this category) made in the course of duty are sources of information generally entitled to a presumption of credibility. United States v. Flynn, supra at 1304.

This information gave the swearing officer and the judge probable cause to believe that a crime had been committed and that Appellant had committed the crime. The

information provided by Mrs. Biggers supports a belief that Appellant had been on the premises between the time of the murder and the date of his arrest (See R.Exh.32). The fact that Appellant did not have the weapon in question on his person when arrested on that very day leads one to the reasonable belief that there was a nexus between the items sought and the home of the Appellant's grandmother.

The statements of the grandmother as to Appellant's presence on the premises after the murder and before his arrest, both on the same day, were also presumptively reliable as she could be considered a one-time, identified citizen-informer. In Barfield v. State, 396 So.2d 793 (Fla. 1st DCA 1981), the First District noted that if the state can present evidence showing that the informer is in fact a one-time informer, motivated not by the desire for pecuniary gain, but by the desire to further the ends of justice, no prior "track record" of the officer's good past performance need be submitted to have his information credited.

Thus, it is apparent that the judge's determination that there was probable cause to issue a search warrant should be upheld as should the trial court's denial of Appellant's motin to suppress physical evidence seized pursuant to execution of the warrant.

Assuming arguendo that this court should determine that the trial court erred in denying Appellant's motion to suppress, affirmance of his conviction should nonetheless result. Any error which may have occurred should be considered harmless. See §924.33, Fla. Stat.

The weapon's main function was to further identify Appellant as Officer Broom's killer. As there was overwhelming evidence of identity, without the gun, any error which may have occurred does not warrant reversal. Numerous witnesses and Officer Terry Russell observed Appellant's actions at the time of the incident. (See, e.g. T.967-984, 1018-1042). Preston Stewart, Sr. testified that he had observed Appellant hiding behind a building and then saw him peek around the corner and fire several shots at the victim. (T.976-981). In light of all the evidence adduced, reversible error has not been demonstrated.

IV

THE TRIAL COURT PROPERLY CONDUCTED VOIR DIRE EXAMINATION AND PROPERLY DENIED APPELANT'S MOTIONS FOR SEQUESTRATION AND REMOVAL OF CERTAIN JURORS. (Restated).

The trial court acted soundly within its discretion in conducting the voir dire examination of the potential jurors (veniremen) in the instant cause as well as in its rulings denying Appellant's motions for sequestration of the jury and removal of certain jurors. The trial court took adequate precautions throughout the trial to insure that Appellant received a fair trial.

Appellant initially contends that trial court abused its discretion as to its challenged rulings due to the fact that the instant cause involved the killing of a police officer and had received coverage by both newspapers and electronic media. Appellant has not borne his burden of demonstrating that actual prejudice has resulted. The defendant has failed to show that the trial setting was inherently prejudicial or that the jury selection process permitted an inference of actual prejudice. See, Dobbert v. Florida, 432 U.S. 282, 302-303, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). To demonstrate prejudice in a specific case a

defendant must show something more than juror awareness that the trial is such to attract the attention of broadcasters, Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 813, 66 L.Ed.2d 740 (1981); Murphy v. Florida, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975).

In Dobbert v. Florida, supra, at 432 U.S. 302, the United States Supreme Court quoted the following from its decision in Murphy v. Florida, supra:

> "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 guilt or innocence of an accused, wthout 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 799-800, 95 S.Ct. 2036, quoting from Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).
>
> 432 U.S. 302

In Gavin v. State, 259 So.2d 544, 546 (Fla. 3d DCA 1972) the Third District Court of Appeal noted that an impartial jury is not required to be totally ignorant of the facts and issues involved and may have formed some impression or

opinion as to the merits of the case, particularly in criminal cases.

Despite its importance, the adequacy of voir dire is not easily subject to appellate review. The trial judge's function as this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. Rosales - Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981). In neither instance can an appellate court easily second-guess the conclusions of the decision maker who heard and observed the witness, Id. Thus, the manner in which voir dire is conducted is a matter which lies within the discretion of the trial court. See, e.g.: Purdy v. Gulf Breeze Enterprises, Inc. 403 So.2d 1325 (Fla. 1981); Essix v. State, 347 So.2d 664 (Fla. 3d DCA 1977); Mizell v. New Langsley Beach, Inc., 122 So.2d 225 (Fla. 1st DCA 1976). See, also: Zamora v. State, 361 So.2d 776, 783 (Fla. 3d DCA 1978).

Rule 3.300(b), Florida Rules of Criminal Procedure provides that the court may examine each prospective juror individually or may examine the prospective jurors collectively. In the cause sub judice, the trial court commenced jury

selection by conducting a collective voir dire examination. (T.441). The Court noted at that point that it would permit outside (individual) interrogation if called for by an individual's response. (T.441, 445). During the initial collective voir dire, written questionnaires were distributed and the prospective jurors were questioned as to whether or not they had read, heard, seen or observed anything about the case. They were told that the case involved the death of Nathaniel Broom, who was a City of Miami Police Officer. (T.473). Some of the jurors indicated that they had heard about the case on television or had read about it in the newspaper. Most only asserted having "vague" knowledge about the case. No other specific facts were discussed as to this matter during collective questioning. (T.470-544). Those jurors who indicated that they had heard about the case were subsequently voir dired individually. (T.545).

The prospective jurors responses did not give the Court reason to believe that sequestration of the jury was necessary. Appellant has not in fact demonstrated any response which would support this position. The sole comment to which Appellant refers on page thirty-two (32) of his brief was the response of prospective juror Mrs. Kornblitt. (T.484). Once Mrs. Kornblitt indicated that she felt strongly about the killing of police officers (T.484, 485)

she was excused by the Court for cause. She did not state the basis for this belief. Appellant cannot therefore claim any prejudice based upon her response.

An examination of the entire voir dire testimony in its proper context reveals that the trial court allowed for sufficient inquiry so as to support its apparent determination that the jurors who were selected could try the case solely on the evidence presented in the courtroom. See, Manning v. State, 378 So.2d 274, 276 (Fla. 1979). See also, Maggard v. State, 399 So.2d 973, 976 (Fla. 1981); Paramore v. State, 229 So.2d 855, 858 (Fla. 1969). This Court in scrutinizing a cold record, must not "treat the words of prospective jurors as free floating icebergs unrelated to the voir dire examination as a whole". Darden v. Wainwright, __F.2d__, Case No. 81-8559, 11th Cir., Slip opinion filed February 14, 1983, at 1641, 1649.

The fact that five or less uniformed and other out of uniform officers were present is not sufficient to render the trial proceedings unfair. Moreover, the court also had a duty to take into account the rights of the police officers to be present as individual citizens. See, e.g. N.A.A.C.P. v. Clairborne Hardware Co., __U.S.__, 102 S.Ct. 3409, at 3438 __L.Ed.2d__ (1982).

Appellee submits that Appellant's contentions that the trial court erred in not dismissing jurors Cellentani, Gable and Dennis for cause are without merit. The jurors answered affirmatively to questions as to whether they would follow the law in the instant cause. (See, T.671, 758, 765, 767). The Court specifically noted that juror Dennis stated that he could be fair to both sides and would set aside other opinions. Mrs. Gable's responses responses, when reviewed in their proper context also support the trial court's determination that would decide the case on the merits. (See, T.758).

The challenged statements in the instant case are merely generalized opinions as to the death penalty and have been taken out of context. In Scott v. State, 411 So.2d 866 (Fla. 1982), this Court rejected the defendant's contention that the trial court erred in excusing for cause jurors who unequivocally stated that they would not recommend the death penalty under any circumstances. Here, there is a completely inverted situation, jurors Dennis and Cellentani did not state that they would unequivocally recommend the death penalty. They merely stated that they favored its imposition. These types of responses should be reviewed in their proper perspective in light of the juror's solemn responses that they would follow the law. See also; inverse situation in Gafford v. State, 387 So.2d 333, 335 n.2 (Fla. 1980).

The challenged responses currently at issue are clearly distinguishable from the response dealt with by this Court in Thomas v. State, 403 So.2d 371, 375 (Fla. 1981). In Thomas, one juror specifically stated that if a person was found guilty that he would not recommend any mercy in any event under any circumstances. Thus, the court determined that there was actual bias exhibited against that particular defendant. In the case at bar, none of the challenged jurors stated that they would fail to either in this case or under any circumstances recommend mercy. Appellee therefore submits that the trial court's rulings as to jurors Dennis and Cellentani and as to prospective juror Gable were proper as supported by the record. Affirmance of Appellant's conviction is therefore mandated. This is especially true in light of the fact that any possible error should not mandate reversal, as under Rose v. State, 425 So.2d 521 (Fla. 1982) the jury's actual recommendation in the instant cause will likely be treated s a recommendation for imposition of a life sentence. Thus, the jury or its members cannot be categorized as "death prone" where their ultimate recommendation will be treated to the contrary. See, e.g. Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981).

V

THE TRIAL COURT DID NOT ERR IN DENYING AN EVIDENTIARY HEARING AS TO APPELLANT'S ASSERTION THAT A DEATH QUALIFIED JURY IS ALSO A GUILT PRONE JURY. (Restated)

The trial court did not err in declining to hold an evidentiary hearing as to the assertions made in Appellant's Motion in Limine, wherein he sought a ruling enabling him to challenge for cause death qualified jurors as being guilt prone. [See T.412-413; 447; R.304-304(a)]. The trial court based its ruling as to the motion on the decision of this court in Dobbert v. State, 409 So.2d 1053, 1057 (Fla. 1982). In Dobbert, supra, this court rejected various claims based upon studies with results analogous to an assertion that the jury was guilty prone because it was death qualified.

Since the instant jury recommendation should be treated as a recommendation of life and not death, since advent of Rose v. State, 425 So.2d 521 (Fla. 1982), Appellant has failed to demonstrate that he had standing to challenge the trial court's ruling on this issue. In light of the initial six-six jury vote, Appellant cannot assert that the jury actually empaneled in the cause sub judice was "death prone". A similar position was taken by the Fourth District in its decision in Herman v. State, 396 So.2d 222 (Fla. 4th

DCA 1981), wherein a life sentence was imposed. In Herman, supra, the court found that since no death sentence was imposed, the appellant lacked standing to raise said issue on appeal, but, Cf. Nettles v. State, 409 So.2d 85 (Fla. 1st DCA 1982). The Herman court specifically asserted that a "death-oriented" jury is not, ipso facto, a "guilt-oriented" jury. Herman, supra at 228.

Even if this Court should ascertain that Appellant does have standing to raise this issue before this Court, no error has been demonstrated as to the merits of this claim. Assertions that exclusions of jurors opposed to the death penalty produces a jury that is death prone and guilt prone have been rejected by Courts of this state as well as various federal courts. See, e.g. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); see also; United States ex rel. Townsend v. Twomey, 452 F.2d 350 (7th Cir. 1972), cert. denied, 409 U.S. 854 (1972); United States ex rel. Clark v. Fike, 538 F.2d 750 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1977); Nettles v. State, supra. Appellant has failed to persuasively distinguish the above-noted issues from the instant case. There is no reason to accept Appellant's assertions that the studies which he sought to rely upon would necessitate a contrary result in the instant cause.

There is no requirement under Florida law that a trial court conducted a full evidentiary hearing as to motions raising this type of issue. Nor as Appellant has pointed out, has this court found that a separate penalty phase jury should be empaneled so as not to exclude jurors who are unalterably opposed to the death penalty from the guilt phase. Riley v. State, 366 So.2d 19 (Fla. 1979); Gafford v. State, 387 So.2d 333 (Fla. 1980). This Court has clearly held that death qualified jurors can properly reach decisions as to a defendant's guilt as well as recommend advisory sentences. Affirmance of the trial court's ruling as to this issue should therefore result.

VI

THE TRIAL COURT ERRED IN GIVING THE JURY AN "ALLEN CHARGE" DURING THE PENALTY PHASE OF THE TRIAL. (Restated).

During the penalty (sentencing) phase of the jury's deliberations, the Court was advised by note that the jury was deadlocked (six to six) in its vote as to the sentence. (T. 1773). The Court responded to this note and further inquiry by jury foreman Leroy Dennis by stating the following:

> THE COURT: Mr. Dennis, I have been through this many, many times, and the answer to your question is: I don't know what the law is, quiet frankly.
>
> As you pointed out, there is a contradiction in the jury charge and because of that, I would like to see if you can agree on one or the other on a majority based on what I just suggested.
>
> After trying it one more time, if you cannot resolve the six/six vote, then I want you to sign a recommendation for life imprisonment because that's what the jury charge says.
>
> If you can agree on a majority to either life or death, without trying to pressure you, by talking it over on e more time and agreeing one way or another, and I'm not suggesting any result, but if after trying one more time you can't agree and its still six/six, I will instruct you to go ahead and sign

that verdict form that includes life imprisonment without parole for 25 years. . ."

(T. 1781-2).

As the trial court noted by implication, at the time of the "Allen charge" of sorts, the law was not clear as to how a trial court is to resolve the problem presented by the inconsistencies between the life and death sentencing charges enumerated in the Florida Standard Jury Instructions.

Subsequent to the trial court's instruction in the instant cause, this Court clarified the law as to this issue in Rose v. State, 425 So.2d 521 (Fla. 1982). In Rose v. State, supra, the jury advised the trial court by note that it was tied six to six and that no one would change his mind at the moment. The court gave the jury an "Allen charge" in response. This Court noted that the trial judge should have advised the jury that it was not necessary to have a majority reach a sentencing recommendation because, if seven jurors do not vote to recommend death, then the recommendation is life imprisonment. Rose, supra at 525.

Appellee therefore submits that Appellant is correct in his assertion that the trial court erred in giving an "Allen charge" to the jury during the penalty phase in the cause sub judice. The sentence of death should nonetheless be

affirmed in the instant cause, as although a jury recommendation is to be accorded great weight, the ultimate decision as to whether the death penalty should be imposed rests with the trial judge. Johnson v. State, 393 So.2d 1069, 1074 (Fla. 1980); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied. In the present case, the trial court's sentencing order specifically sets forth the trial court's findings that two aggravating circumstances were present and that there were no mitigating factors. (R. 559-568). The order further recites the trial court's reasons for determining that death is the appropriate sentence in this cause. In light of the findings in the sentencing order, appellee therefore urges this Court to affirm the death sentence based upon the trial court's specific findings.

Assuming arguendo that this Court should decline to affirm the death sentence, it is submitted that the instant cause should not be remanded for re-sentencing by the trial judge, as Appellant has requested. In Rose v. State, supra at 525, this Court determined that the appropriate remedy for the instruction error also presented here was to remand the case for a new sentencing proceeding before a jury. Thus, if this Court should vacate the death sentence the case should be remanded to the jury.

Appellant's assertions to the contrary of this position are without merit. In particular, Appellant's reliance on the United States Supreme Court's decision in Bullington v. Missouri, 451 U.S. 430 (1981) is clearly misplaced. In Bullington, supra, the defendant was convicted of capital murder and received a sentence of life imprisonment. The defendant successfully moved for a new trial. At the second trial, the State of Missouri filed a notice of intent to seek the death penalty. The Supreme Court of the United States reviewed the case and held that the death sentence imposed pursuant to the second trial was barred by the Double Jeopardy Clause of the Fifth Amendment, as the first jury had sentenced him to life imprisonment.

In Dobbert v. State, 409 So.2d 1053 (Fla. 1982), this Court specifically noted that Bullington was clearly distinguishable from a Florida death case because of the substantial difference between the sentencing procedures of Florida and Missouri. As was the case in Dobbert, supra, the critical difference between the instant case and Bullington, is that the role of the jury in the Florida statutory scheme is purely advisory; under the statutory scheme at issue in Bullington the jury's recommendation was binding upon the judge. Dobbert v. Strickland, 532 F.Supp. 545, 556 (M.D. Fla. 1982). The advisory verdict of the jury cannot, therefore, be logically equated with an acquittal, as was the case in Bullington, Id.

It is therefore apparent that a remand to the jury is the proper remedy for this court to prescribe, should this Court decline to accept Appellee's position and affirm the death sentence based upon the trial court's sentencing order.

VII

THE SENTENCE IMPOSED BY THE TRIAL COURT SHOULD BE TREATED AS A VALID "JURY OVER-RIDE" AND AFFIRMED. (Restated).

In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court stated that in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person should differ[2]. The court, did not, however, stated that the trial court's sentencing order must trace the "magic words" of this test.

Although the trial court did not specifically recite in its order that the facts suggesting the death sentence are so clear and convincing that virtually no reasonable person should differ, the facts which are set forth in the order (See R. 558-568) and the trial court's independent findings are sufficient to support this conclusion. Appellee therefore suggests that for the reasons enumerated in Point VI of this brief, the trial court's order should be reviewed in accordance with Tedder, supra, and that such review will demonstrate that the death sentence imposed by the trial court should be affirmed.

[2]This is explained by the fact that the trial court did not have the benefit of this Court's decision in Rose v. State, 425 So.2d 521 (Fla. 1982) during the penalty phase of the instant case.

VIII

A PRESENTENCE INVESTIGATION IS NOT MANDATORY IN CAPITAL CASES. (Restated).

Appellant contends that a trial court which overrides a jury recommendation for life must order, if requested by a defendant, a presentence investigation report (P.S.I.). Appellee submits that this contention is clearly without merit as it is contrary to the well-settled law as to this issue. In his own argument, Appellant admits that although Rule 3.710, Fla.R.Crim.P. authorizes a presentence investigation report, it does not mandate it. Such authorization or denial is clearly a matter which lies soundly within the discretion of the trial court. See, Moody v. State, 418 So.2d 989 (Fla. 1982).

This Court has repeatedly held that a trial judge is not required to request a presentence investigation before sentencing a defendant and may therefore deny such investigation in capital cases. Buford v. State, 403 So.2d 943 (Fla. 1981); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979); Thompson v. State, 389 So.2d 197, 199 (Fla. 1980); Thompson v. State, 328 So.2d 1 (Fla. 1976). This court has correctly interpreted Rule 3.710, Fla.R.Crim.P. and Appellant has not established a valid reason why this court should suddenly depart from such well-entrenched authority.

Appellee therefore submits that the trial court acted properly within its discretion in declining to order a P.S.I. in the instant cause. Furthermore, even if this Court should remand this cause to the trial court the decision as to whether or not a P.S.I. should be ordered will still lie soundly within the discretion of the trial court.

IX

THE TRIAL COURT WAS NOT REQUIRED TO MAKE SPECIFIC FINDINGS AS TO EXISTENCE OF BOTH AGGRAVATING AND MITIGATING FACTORS. (Restated).

The jury is not required to make specific findings as to the existence of aggravating and mitigating circumstances, nor is a trial judge required to instruct a jury to do so. No such requirement is enumerated in §921.141, Fla.Stat. nor does case law mandate it. In Florida, the jury's function in the penalty phase of a capital case is purely advisory. The ultimate decision as to the imposition of the sentence rests with the trial judge. White v. State, 403 So.2d 331 (Fla. 1981).

Cases involving death sentences imposed pursuant to judicial over-rides of jury recommendations of life sentences have been affirmed by this Court without creating such a requirement. See, e.g. Dobbert v. State, 375 So.2d 1069 (Fla. 1979); Sawyer v. State, 313 So.2d 680 (Fla. 1975). Even Tedder v. State, 322 So.2d 908 (Fla. 1975) does not make any provision of this sort.

On the contrary, the Supreme Court of the United States, in Proffitt v. Florida, 428 U.S. 242, 250, 99 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976), upheld the validity of the Florida capital sentencing system and noted that the

court had previously pointed out that jury sentencing is not constitutionally required. The Court reasoned that judicial sentencing should lead, if anything to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. Moreover, it is the trial judge who must justify the sentence with written findings. It therefore follows that it would not serve any purpose under the statute and its interpretation to require the jury to make specific findings as to the aggravating and mitigating circumstances.

Appellant's general contention that the lack of specific findings makes it impossible to determine the validity of the jury instructions is without merit in light of the promulgation of the Florida Standard Jury Instructions. That is especially the case, in a situation such as the one sub judice where the instructions conform closely to the standard jury instructions.

Appellant's final assertion as to this issue is that lack of specific findings make it impossible to know if a majority of the jurors agree as to the existence or absence of aggravating and mitigating factors. Once again, Appellee notes that it is not the jury's function to reach either a

majority or unanimous decision as to which factors do or do not exist. The Florida system has provided the trial judge with this role.

Analogously, this Court has rejected a defendant's argument that had he had additional peremptory jury challenges, in order to strike "death-scrupled" jurors, the jury may have returned a unanimous life recommendation in lieu of a 10:2 life recommendation. The Court found this argument frivolous and noted that Florida's death penalty statute states that the jury's life or death recommendation shall be by a majority of the jury and that no different test is applied in reviewing a 10:2 as opposed to a 12:0 recommendation. Likewise, the statute does not provide for a different test should the jury make specific findings as to the existence or absence of aggravating and mitigating factors.

Since the trial court properly instructed the jury as to aggravating and mitigating circumstances in accordance with the provisions of §821.141, Fla.Stat. and the Florida Standard Jury Instructions, Appellant is not entitled to any relief as to this issue. The trial court's sentence should be affirmed. Should the cause be remanded to the jury, instructions that specific findings as to aggravating and mitigating circumstances would not be appropriate.

X

THE TRIAL COURT PROPERLY MADE ITS DETERMINATIONS AS TO THE AGGRAVATING AND MITIGATING CIRCUMSTANCES. (Restated).

The trial court properly determined that three aggravating circumstances were proved and that no mitigating circumstances, either statutory or non-statutory were present. (R. 561, 584). Appellant initially concedes that two of the aggravating circumstances were proper and challenges the third aggravating circumstance found pursuant to §921.141(5)(i), Fla.Stat. (1981). He asserts that the trial court erred in finding that the homicide in question was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Appellee submits that the trial court's finding pursuant to §921.141 (5)(i) is supported by the evidence. Appellant has correctly noted that this court stated in McCray v. State, 416 So.2d 804 (Fla. 1982), that this aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders. The Court goes on to state, however, that this description is not intended to be all-inclusive. See, Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981). The ambush-type killing of Officer Broom should not be excluded from this category. (See R. 561-562).

The evidence adduced at trial indicates that Officer Broom stopped Appellant in the course of his lawful duties. Appellant fled through an alley while in possession of a firearm. (See, e.g. 967-984, 1018-1042). Witness Preston Stewart, Sr. testified that he observed Appellant hide behind a building, peek around the corner and fire several shots. (T. 976-981). A later shot was fired wounding the victim in the foot. (See, T. 1301-1308). The Chief Medical Examiner for Dade County, Dr. Davis, stated that the first shot to wound Appellant burst open his heart. (T. 1308). The cessation of blood flow to the area of the foot wound is indicative of a time lapse allowing Appellant to formulate a cold, calculated and premeditated decision to take the life of Officer Broom, especially when viewed in conjunction with his actions of emerging from his hiding place and firing two shots into the officer's chest area. The record is devoid of any evidence which could legally or morally justify the actions taken by Appellant which directly resulted in the death of Officer Nathaniel Broom. These facts clearly show more than the bare level of premeditation necessary to sustain a first degree murder conviction. See, Jent v. State, supra at 1032; see also, Sireci v. State, 399 So.2d 964 (Fla. 1981). The trial court's finding as to this mitigating factor should therefore be upheld.

Appellant also claims that the trial court improperly considered the fact that the victim was a police officer as

an aggravating factor. (R. 560). The trial court's order specifically notes that it found three statutory aggravating circumstances. (R. 561). Obviously, one statutory factor is clearly supported by evidence to this effect, namely that the murder was committed to avoid lawful arrest. The court also carefully avoided doubling up as to this issue. (R. 568). The totality of the circumstnces should be taken into account when analysing whether the facts presented suggest that either death or life is the appropriate sentence. (See, e.g. Johnson v. State, 393 So.2d 1069, 1074 (Fla. 1980). The fact that the victim was a police officer was only one fact taken into account, it was not considered improperly.

Appellant goes on to assert that the trial court erred in determining that no statutory or non-statutory mitigating circumstances were present. There is no requirement that the court find anything in mitigation. The only requirement is that the consideration of mitigating circumstances not be limited to those listed in §921.141(6), Florida Statutes. Porter v. State, ___So.2d___(Fla. 1983) (Case No. 61,063; Opinion filed January 27, 1983)[8 F.L.W. 53]. Mere disagreement with the force (in terms of weight) to be given mitigating evidence is an insufficient basis for challenging a sentence. See, Porter v. State, supra at ___ So.2d___, 8 F.L.W. 54, See also, Quince v. State, 414 So.2d 185, 187 (Fla. 1982).

The trial court's sentencing order clearly reflects that the trial court considered Appellant's claims as to the mitigating factors enumerated in §§921.141(6)(b) and/or (f) and ascertained that Appellant had not proven the existence of these factors. (R. 562, 563). The decision of whether a particular mitigating circumstance in sentencing is proven rest with the jury and ultimately with the judge. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981); Lucas v. State, 407 So.2d 894 (Fla. 1979). Similar to Smith, supra and unlike Huckaby v. State, 343 So.2d 29 (Fla.) cert. denied, 434 U.S. 920 (1977), the trial judge in the case at bar did not ignore every aspect of the medical testimony regarding the appellant. The trial court in this case, as in Smith, simply found that the medical testimony did not compel application of any mitigating factors in sentencing. The court did not improperly refuse to consider certain mitigating factors, as was the case in Huckaby; the evidence presented regarding Appellant's mental state was considered. (See, R. 562, 563).

The Court opted to accept the testimony of Appellee's rebuttal witnesses which supported a finding that Appellant was not suffering from "extreme" emotional or mental disturbance at the time of the homicide. Dr. Jaslow testified to the effect that there were emotional disturbances, yet it did not reach the extent that it could have to in order to

interfere with a person's ability. (T. 1702). Dr. Jaslow's testimony as well as that of Dr. Herrera to the effect that he did not see my reason why Appellant could not have appreciated the criminality of his conduct if he wanted to (T. 1707-1708) clearly support the trial court's specific finding rejecting the two mitigating factors currently in question.

Furthermore, lay witness Christine Castle testified that Appellant had told her that he thought that he had "fooled" doctors who had examined him following the murder. (T. 1715). Both doctors also testified that they had been given the impression that Appellant was trying to feign mental illness. (T. 1701, 1709). It is therefore apparent that the record supports the trial court's rejection of the two statutory mitigating factors which Appellant contends should have been found.

Appellant's argument that the trial court erred in not finding the existence of non-statutory mitigating circumstances is not persuasive. The trial court specifically noted in its order that is had reviewed the entire record, including the testimony and evidence in the trial and sentencing proceeding to determine whether there might possibly exist anything whatsoever of a non-statutory mitigating nature that could be considered by the Court in mitigation

of the sentence. (R. 563). Neither Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 nor Florida cases applying the decision, See e.g. Simmons v. State, 419 So.2d 316 (Fla. 1982), require the trial court to make specific findings as to potential non-statutory mitigating factors. Lockett v. Ohio, supra at 438 U.S. 604, requires that the sentencer not be precluded from considering as a mitigating factors, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

The record in the cause sub judice and the trial court's sentencing order refute Appellant's assertion that that there is no indication that the court considered potential non-statutory mitigating factors. On the contrary, Appellant has not demonstrated that he was in any way precluded from proffering specific evidence to the Court and jury as to non-statutory mitigating factors. As no demontrable error has been presented as to the trial court's sentencing order, affirmance of the sentence is warranted.

XI

THE DEATH SENTENCE IMPOSED BY THE TRIAL COURT SHOULD BE AFFIRMED. (Restated)

The death sentence imposed by the trial court in the cause sub judice should be affirmed even if this court should treat the jury recommendation as a recommendation of life imprisonment. Although the advisory recommendation of the jury is accorded great weight, as Appellee has already noted in this brief, the ultimate decision on whether the death penalty should be imposed rests with the trial judge. White v. State, 403 So.2d 331 (Fla. 1981); Johnson v. State, 393 So.2d 1064 (Fla. 1980); Hoy v. State, 353 So.2d 826 (Fla. 1977).

Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. White v. State, supra at 403 So.2d 340; State v. Dixon, 283 So.2d 1 (Fla. 1973).

In this case, prior to imposing the death sentence, the trial court properly made the findings that the aggravating circumstances sufficiently outweighed the mitigating circumstances. The court found three aggravating circumstances and no mitigating circumstances (See R. 558-569) and the

record clearly supports this finding. Appellant has in fact conceded that the trial court properly found two of the three aggravating factors, namely that Appellant had been previously convicted of robbery and that the instant offense was committed to avoid lawful arrest. Even if this Court should find that the third aggravating circumstance, that the murder was committed in a cold and calculated manner, which Appellee submits is not the case, death would nonetheless be presumed due to the lack of mitigating circumstances. See, Ford v. Strickland, 696 F.2d 804, 813-815, 822-24 (11th Cir. 1983); Ford v. State, 374 So.2d 496 (Fla. 1979); Middleton v. State, __So.2d___(Case No. 60,021; opinion filed December 22, 1982)[8 F.L.W. 9]; Tafero v. State; White v. State, supra at 339; Armstrong v. State, 399 So.2d 953 (Fla. 1981); Antone v. State, 382 So.2d 1205 (Fla. 1980); Clark v. State, 379 So.2d 97, 104 (Fla. 1979); Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976).

Appellant contends that the majority of recent Florida cases where the death penalty has been upheld have involved the presence of aggravating factors that the crime was "heinous, atrocious and cruel" or was committed by one engaged in or accomplice to the commission or attempted commission of certain offenses (or flight from thereafter). Appellant is apparently asserting, by implication, that the

instant sentence is invalid because the facts do not support a finding of either of the above-noted aggravating circumstances. Neither Tedder v. State, 322 So.2d 908 (Fla. 1975), nor §921.141. Fla.Stat. require that either or both of the above-noted aggravating circumstances must be found in order to support imposition of the death penalty. Section 921.141 only requires a finding that sufficient aggravating circumstances exist as enumerated in subsection (5) of the statute and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In the cause sub judice, the facts show that the Appellant was driving a green, 1973 Volkswagen that had been stolen from Michael Joseph Snowden aproximately two weeks prior to the murder in question. (T.859-863). Appellant who was on probation at the time (T.850) and had been convicted of robbery in 1975, had a gun in his possession. Officer Terry Russell, the partner of the victim, Officer Nathaniel Broom, testified that on September 2, 1981, he and Officer Broom had observed Appellant commit a traffic violation. (T.1020-1022). Appellant had turned east onto a one-way street which only permitted west-bound travel. The officers pulled up behind the Volkswagen. Officer Broom exited from the vehicle and in the line of duty, pursued Appellant as he fled through the adjacent apartment complex.

(T. 1021-1024). Numerous eyewitnesses observed this pursuit prior to hearing gunshots. George Preston Brown, Jr. testified that the victim stated "he has a gun" prior to the shooting. (T. 938).

The trial court found, and record supports this finding, that Appellant subsequently fired three gunshots at Officer Broom. (R. 560). One struck his chest; one struck the "keeper" on his police belt and the third struck his left foot. (See T. 1302-1360). The Chief Medical Examiner for Dade County, Dr. Joseph H. Davis, conducted an autopsy of the victim's body. He found that Officer Broom had suffered from two gunshot wounds. One shot, the shot to his chest ruptured his heart. The other wound was in his foot. Dr. Davis opined that the chest wound preceeded the foot wound as no evidence of blood was found near the foot wound. He reasoned that the wound to the chest had destroyed the ability of the officer's heart to pump blood to his foot. (T. 1302-1310).

In Cooper v. State, supra, the defendant or his companion fired two shots at a police officer who had stopped them as they fled from the robbery of a grocery store. Here, Appellant was stopped by Officer Broom who sought to perform his duty as a law enforcement officer. Although Appellant initially fled the scene, the evidence indicates that such

as was the case in Cooper, he made the conscious decision to shoot and kill Officer Broom in the performance of his duty. Although this Court rejected the trial judge's determination that the murder was especially heinous, atrocious and cruel, the Court found that imposition of the death penalty could not be avoided since there were three aggravating circumstances and no mitigating circumstances. Cooper, supra at 1141. This is essentially the situation in the present case.

This Court also upheld a sentence of death in Ford v. State, supra, where the defendant was confronted by a police officer on the scene of a robbery. Ford shot at the policeman three times, wounding him fatally. The Court found that numerous aggravating circumstances were present and that thee were no mitigating circumstances. Likewise, death sentences were affirmed in Tafero v. State, supra, where rapid shots were fired at two state troopers who had approached the car in which Appellant and his companions were located in at a rest stop on Interstate 95.

In Raulerson v. State, 358 So.2d 826 (Fla. 1978), the death penalty was also affirmed in a case involving the murder of a police officer, where aggravating circumstances outweighed the mitigating circumstances.

Although the above noted cases do not by the most part involve situations where there is a recommendation of life, they nonetheless present standards by which to assess the facts of the instant case. In Sawyer v. State, 313 So.2d 680 (Fla. 1975), this Court upheld a jury over-ride where the death of the victim was caused by a gun that discharged during the course of the defendant's holding of the victim in a liquor store robbery. That killing was no more heinous then the instant murder, yet this Court properly determined that under the totality of the circumstances, death was the appropriate sentence. Likewise, death is clearly the appropriate sentence under the facts of this case.

XII

THE REBUTTAL TESTIMONY OF EXPERT WITNESSES CALLED BY APPELLEE (THE STATE) DURING THE PENALTY PHASE WAS PROPERLY PERMITTED BY THE TRIAL COURT. (Restated).

Appellant initially contends that the testimony of Doctors Jaslow Herrera during the penalty phase of his trial violated his Fifth and Sixth Amendment rights, as interpreted by the Court in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, __L.Ed.2d__ (1981). Appellee submits the instant case is clearly distinguishable from Estelle v. Smith, supra for several reasons.

The initial distinction between Estelle v. Smith, and this case is the difference between the Florida death penalty statute and the system provided for, and the statute and procedure followed in Texas. This distinction was clearly pointed out by this Court in the recent decision of Hargrave v. State, __So.2d__(Fla. 1983)(Case No. 61,869; Opinion filed January 13, 1983) [8 F.L.W. 28] The Hargrave court noted the following:

> One difference between the two cases is the difference between the Florida and Texas death penalty statutes. In a Texas penalty proceeding the jury must answer at least two, and sometimes three, questions after convicting a defendant of murder 2. One of these questions, concerning the probability of the defendant's

> constituting a continuing threat of violence to society, is central to Estelle v. Smith. Florida, on the other hand, has nothing similar to that provision in its death penalty statute.
>
> __So.2d___; [8 F.L.W. 28] [footnote omitted].

Secondly, in Estelle v. Smith, supra, the defendant neither initiated a psychiatric evaluation nor attempted to introduce psychiatric evidence. Although in the cause sub judice, the Court appointed psychiatrists to evaluate Appellant, defense counsel was fully aware that the Court had appointed doctors to evaluate Appellant. Defense counsel's motion for competency hearing acknowledges this fact. (R. 42, 43). Moreover, unlike Estelle, supra at 101 S.Ct. 1877, where defense counsel was not notified in advance as to the nature of the examination, the motion filed by counsel in the instant cause indicates that she was aware of the nature of the examination. Counsel had been appointed on September 3, 1981. (R. 42). Doctor Jaslow examined Appellant on September 30, 1981 (T. 1696) and Dr. Herrera saw him on September 29, 1981 (T. 1706). Thus, Appellant's Sixth Amendment claims are also without merit in the instant cause.

There can be no doubt that unlike Estelle and similar to Hargrave. (See 8 F.L.W. 28, 29 n. 6). Appellant himself

introduced psychiatric evidence during the penalty phase of his trial. The testimony in question was only introduced to rebut psychiatric testimony as to the issue of whether or not Appellant was under the influence of extreme mental or emotional disturbance at the time of the murder.

The distinctions between Florida law and Texas law, which give Texas juries a sentencing role that is not merely advisory, also render Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982) inapposite. Contrary to the Court's decision in Gholson, supra, Appellee submits that the decision of the Supreme Court of the United States in Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 1 (1971) is analogously applicable to the issue presented herein. If it does not violate a defendant's right against self-incrimination to impeach evidence which he has presented, namely his testimony, with prior inconsistent statements which have been held otherwise inadmissible, it follows that the State should be entitled to impeach evidence which he has presented, based upon an examination including his making of statements, with evidence of inconsistent testimony and conclusions.

In fact, Gholson specifically notes, supra at 675 F.2d 741, n. 6, that the United States Court of Appeals for the Fifth Circuit had not addressed the question of whether a

defendant who agrees to be examined by a psychiatrist of his own choosing and calls that psychiatrist to testify waives his Fifth Amendment privilege in either Gholson or in its decision in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979) (the lower court's decision in the case Smith v. Estelle). That is precisely the situation presented herein and it is apparent that the question should be answered affirmatively.

Appellant also contends that the rebuttal testimony of Drs. Jaslow and Herrera constituted a violation of Rule 3.211 (e), Florida Rules of Criminal Procedure. Appellee submits that this assertion is erroneous. Neither the actual reports of the doctors nor the transcript of the competency hearing were presented to the jury. Moreover, since Appellant actually placed the information in the reports at issue by producing testimony of his own psychiatrist it follows that the State should be permitted to rebut said testimony as he has in effect waived any interest which he has in maintaining confidentality as to matters concerning his mental state. Appellant therefore operatively waived any protections with which the rule was actually designed to provide a defendant.

In sum, Appellant has failed to demonstrate any error mandating reversal of his sentence. Thus, this claim as to

this issue do not entitle him to relief. The sentence imposed by the trial court should therefore be affirmed, notwithstanding those claims.

XIII

SECTION 921.141, FLORIDA STATUTES IS NEITHER UNCONSTITUTIONAL ON ITS FACE NOR IN ITS INSTANT APPLICATION. (Restated).

Appellant has failed to demonstrate that Section 921.141, Florida Statutes is either unconstitutional on its face or as applied to the instant case. In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) the Supreme Court of the United States upheld the constitutionality of §921.141, Fla.Stat. The guidelines set out in the statute are not vague nor are they overbroad. The purpose for the guidelines enumerated in the statute is to specifically prevent imposition of the death penalty in an arbitrary or capricious manner.

Although the Court in Proffitt, supra, specifically reviewed §§921.141(5)(c) and (h), it considered the validity of the totality of the guidelines. In Proffitt, the Court noted:

> On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in Furman. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the

individual defendant. He must inter alia, consider whether the defendant acted under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor acccomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of several enumerated felonies, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike those considered by a Georgia sentencing jury, see Gregg v. Georgia, 428 U.S., at 197, 96 S.Ct. at 2936, the sentencing judge must focus on the individual circumstances of each homicide and each defendant. . . .

Under Florida's capital sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not. Gregg v. Georgia, 408 U.S. at 188, 96 S.Ct. at 2932, quoting Furman v. Georgia, 408 U.S. at 313, 92 S.Ct. at 2764 (White, J. concurring). On its face the Florida system thus satisfies the constitutional deficiencies identified in Furman."

428 U.S. 251 at 254.

In Proffitt, the Court also considered the validity of the mitigating factors enumerated in the statute. Moreover, the Court noted that process of weighing the aggravating against the mitigating circumstances led to the conclusion that the trial court's sentencing discretion is guided and channeled by a system focusing on each homicide and each particular defendant. The Court stated:

> The directions given to judge and jury by the Florida Statute are sufficiently clear and precise to enable to various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed."
>
> 428 U.S. 251 at 254.

In the instant cause, the trial court properly considered the facts of the instant homicide and followed the valid statutory guidelines for considering the appropriate sentence for this particular defendant (Appellant). As the trial court specifically noted in its sentencing order, its finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, in accordance with the provisions of §921.141(5)(e), was predicated upon evidence which overwhelmingly demonstrated that the victim, police officer

Nathaniel Broom was killed for the purpose of avoiding lawful arrest. (See R. 559-560). Although the Court also found that the evidence showed that Officer Broom was killed to disrupt or hinder the lawful exercise of any governmental of the enforcement of laws under §921.141 (5)(g), the Court declined to consider this finding as an aggravating circumstance so as not to have a "doubling" of factors, as discussed in Provence v. State, 337 So.2d 783 (Fla. 1976). The victim in the instant cause was a police officer who was on duty and engaged in enforcing the law at the time when he was killed. There can be no doubt that the instant case falls clearly within the provisions of either section (e) or (h). Appellant's reference to recent cases involving silencing of witnesses is unpersuasive. There can be no doubt that the trial court properly and constitutionally applied §921.141 to the facts of the instant case.

Furthermore, Appellant's challenge to §925.141(5)(i), Fla.Stat. is without merit. In Combs v. State, 403 So.2d 418. 421 (Fla. 1981), this Court found no error in the application of §921.141(5)(i), Florida Statutes, which became effective July 1, 1979, as an aggravating circumstance. The Court noted that the addition by the legislature of paragraph (a)(1) to §921.141(5), in fact only reiterates in part what is already present in the elements of premeditated murder with which the petitioner had been charged and which

which the evidence clearly supports. Likewise, appellant was charged with premeditated murder and the evidence relied on by the court (See, R. 560-561) clearly supports the finding that said provisions is applicable to the instant case. Contrary to appellant's assertion, application of factor (i) does not create a mandatory death sentence for all first degree murders, as the Florida Statutes provide that murders other than those which are premeditated are also capital, first degree murders. See §§782.04(1)(a) 2 and 3, Fla.Stat.

Thus, it is apparent that Appellant's assertions as to this point are without merit. This Court is therefore urged to affirm the sentence of death based upon the trial court's valid application of §921.141(5), which is constitutional on its face, to the instant cause.

CONCLUSION

Based upon the foregoing reasons and citations of authority, Appellee/Cross-Appellant submits that the judgment and sentence of the trial court should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE/CROSS-APPELLANT was furnished by mail to WILLIAM L. RICHEY, Esq., VALDES-FAULI, RICHARDSON & COBB, P.A., One S.E. Third Avenue, 1401 AmeriFirst Building, Miami, Florida 33131 and PETER M. SIEGEL, Esq. and RANDALL C. BERG, JR., Esq., Florida Justice Institute, Inc., One S.E. Third Avenue, 1401 AmeriFirst Building, Miami, Florida 33131, this 21 day of April, 1983.

Calianne P. Lantz

CALIANNE P. LANTZ
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ss/