IN THE SUPREME COURT OF THE

STATE OF FLORIDA

FILED

FEB 2 1983

SID J. WHITE
CLERK SUPREME COURT
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Chief Deputy Clerk

ROBERT PATTEN,	)	
	)	
Appellant,	)	CASE NO. 61,945
v.	)	
	)	Appeal from the Eleventh
STATE OF FLORIDA,	)	Judicial Circuit
	)	
Appellee.	)	Capital Case
	)	

INITIAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF CASE AND FACTS

This is an appeal from a sentence of death after conviction for the killing of a police officer. Defendant was also convicted of armed robbery, grand theft and a probation violation. As to the robbery, he was sentenced to 110 years incarceration. He received five years for the grand theft and five years for the probation violation, all sentences to be served consecutively. The court retained jurisdiction, pursuant to Fla. Stat. §947.16(2) (R. 558-568).

A. Pre-Trial Activities:

Robert Patten was arrested on September 2, 1981, the day of the alleged offenses. Private counsel was appointed on September 4, 1981 (Tr. 3). On September 25, 1981, the court announced it was considering a late November trial date (Tr. 30). At that time four doctors were appointed for purposes of conducting a competency examination. The courtroom was filled with police officers - the court noted that it would not be intimidated (Tr. 31).

The defense gave notice of intent to rely on the defense of insanity on October 1, 1981 (Tr. 35), and echoed the courts call for a competency hearing (Tr. 36). The competency hearing was held October 9, 1981. The state admitted it knew that Robert Patten had previously been declared incompetent, and had previously been found not guilty by reason of insanity. It therefore conceded its burden as to competency (Tr. 47). The defendant was found competent to stand trial (Tr. 91-93).

On February 12, 1982, motions to suppress oral statements and illegally seized evidence were heard (Tr. 193-359). No error is alleged with respect to the rulings concerning defendant's oral statements. The search and seizure facts and issues are found in Section III of this brief.

The court refused to hold an evidentiary hearing on defendant's request to exclude the media (Tr. 373-374). This error is discussed in Section II of this brief. Based on the appearance of a highly prejudicial newspaper article the day before trial, which characterized the Broom shooting as the year's most shocking murder (Tr. 408), motions for individual voir dire and sequestration of the jury were renewed (Tr. 410). The defense also moved for a ruling that the A.L.I. - Model Penal Code test for insanity, rather than the M'Naghten test, be utilized (Tr. 410-411). The defendant further moved to prohibit voir dire on the issue of the jurors' opinions of capital punishment, or in the alternative, a hearing on the issue of whether a death qualified jury is also a guilt prone jury (Tr. 411-413). All motions were denied (Tr. 441, 448). The court also denied the request for a presentence investigation if a first degree murder conviction was returned (Tr. 449).

B. Trial:

At 3:25 p.m. on February 16, 1982, the trial commenced with jury voir dire (Tr. 455) and adjourned at 6:30 p.m. (Tr. 615). The court agreed to permit individual voir

dire of the prospective jurors only as to pre-trial publicity and agreed to use certain juror qualification questionaires prepared by defense counsel (Tr. 616). Voir dire resumed the following day about 8:15 a.m. (Tr. 616, 623). Jury selection was completed that morning, taking only seven hours in all (Tr. 820).

The defense renewed its motions for additional peremptory challenges, for sequestration of the jury, and to ban the exclusion of death scrupled jurors. Objection was made to the state's systematic exclusion, by use of peremptory challenges, of all death scrupled jurors not excluded for cause (Tr. 817-818). Defense counsel specifically noted the presence of a picket at the courthouse in making the request that the jury be sequestered (Tr. 820). Jury selection errors are considered in Section IV of this brief.

The trial commenced with opening statements by both state and defense. Defense counsel indicated that the issue for the jury was premeditation (Tr. 848). As a result, the evidence is essentially uncontroverted. It demonstrates that Robert Patten was on probation on September 2, 1981 (Tr. 854) and knew that if he were arrested he would face incarceration (Tr. 854-855).

Michael Snowden testified that his car had been stolen (Tr. 860) two days before Officer Broom's death (Tr. 863). He also testified that the drug paraphernalia and marijuana cigarettes found in the car were not his (Tr. 864). Witnesses then described the events of September 2, 1981.

After various police officers described the physical setting, several eye witnesses described the events. Charles Mortimer saw a black police officer chasing a "white fellow" (Tr. 926). They ran into an alley. Thereafter the witness heard several shots (928). Although the witness had identified the defendant from a photo spread on the day of the crime, he could not identify him in court, instead identifying an intern from the State Attorney's Office (Tr. 930-931). Other eyewitnesses gave similar testimony (Preston, Tr. 936-939; Eaton, Tr. 943-946; Curry, Tr. 952-956). None of these witnesses actually saw the shooting. Preston Stewart saw the defendant fire three shots, but he could not see who was being shot at (Tr. 972-973).

Officer Terry Russell, who was Officer Broom's partner on the tragic day (Tr. 1019), described the two police officers' activities. They were on patrol and saw a green Volkswagen turn the wrong way onto a one-way street (Tr. 1021). They gave chase, the Volkswagen stopped, and the occupants, two black males and one white male, fled on foot (Tr. 1023). Officer Broom chased the white male (Tr. 1028). Officer Russell lost sight of all the participants, and while circling the area in the police car, heard four shots (Tr. 1029). She did not see the shooting. She did see Robert Patten running west under I-95 (Tr. 1033).

Leroy Williams testified about Robert Patten's activities the morning of the shooting. He and Henry Butler were approached by defendant, who was driving a green Volkswagen.

They had never seen Patten before. Patten wanted help in selling a gun (Tr. 1081). Williams and Butler accompanied Patten to a grocery store where the manager refused to buy the gun (Tr. 1087). Thereafter, they all got back into the car and drove to the encounter with Officer Broom. Williams testified he saw a police car approaching and said, "Hey, there's a police car." (Tr. 1093). Patten replied, "Oh, hell, I'm hot. The - - car's hot. We got to go." (Tr. 1094). Patten and Butler fled - followed shortly by Williams. Subsequently, Williams heard four gunshots (Tr. 1099). Henry Butler testified in a similar manner (Tr. 1119-1126) although he only heard two gunshots (Tr. 1126). Both indicated that Patten appeared normal that day. Butler testified that Patten said he wanted to sell the gun to obtain some drugs (Tr. 1133).

After the shooting, defendant ran to a "wash house" and took a car at gunpoint (Tr. 1157). Defendant had approached Maxime Rhodes and Charles Roubicheck, who were repairing one of the washing machines (Tr. 1160). Rhodes testified that Patten said, "Whose car is this?" "Whose car is this and where's the keys? Whose got the keys?" (Tr. 1162). After repeating the questions several times, Patten pulled a gun from inside his pants and demanded the keys (Tr. 1163). Roubicheck told Patten the keys were in the trunk. Patten got the keys, started the car, and left (Tr. 1164). Charles Roubicheck corroborated the testimony concerning the taking of the car (Tr. 1172-1178).

Robert Patten's fingerprints were found on the Volkswagen (Tr. 1236). He was arrested about 5:30 p.m. on the day of Officer Broom's killing (Tr. 1074) while walking his dog in the vicinity of the Bali Hai Motel (Tr. 1228-29) and taken to Miami Police Headquarters. He was held there for some 2.5 hours (Tr. 1064). During this time, the defendant picked up a wanted bulletin, read it, and said: "Murder of a Miami Police Officer, oh, shit, I'll fry for this." (Tr. 1068). Thereafter, as the police completed their booking procedure, he said, "That's the last one you will write on me. I guess I dealt my last deal with this one." (Tr. 1069). And later, "Oh yeah, you all come to look at the cop killer." (Tr. 1070). Finally, the police, although knowing it was too late to test to see if a firearm was fired by the defendant, did so anyway. While being prepared for the test, the defendant said, "I know what that's for, that's for ballistics to see if I fired a gun, but don't worry, you won't find anything." (Tr. 1071).

Trial then continued on February 19, 1982. Detective Richard Bohan described the execution of a search warrant at 3025 S.W. 6th Street, Miami. It resulted in the recovery of the gun which fired the bullets that killed Officer Broom (Tr. 1326-1327). The gun was found under a heating grate, which had been covered by carpet (Tr. 1274). The legality of that search is addressed in Section III. No fingerprints were found on the gun (Tr. 1283).

Dr. Joseph H. Davis, the Dade County Medical Examiner, then described his autopsy of Officer Broom. Three bullets

struck Officer Broom. One struck his belt and did not penetrate the body (Tr. 1317). One shot passed directly through Officer Broom's heart and lungs, killing him almost instantly (Tr. 1319). It was probable that when that shot was fired, the individuals were facing each other at some unknown distance of more than 18 inches (Tr. 1304-1305). How far away could not be determined (Tr. 1359). There was also a gunshot wound of the foot. The doctor indicated that wound could have been made with the victim laying face down with his feet toward the shooter (Tr. 1307). Because there was no blood associated with the foot wound, the doctor opined that the chest wound occurred first, destroying the ability of the heart to pump blood - and thereafter the foot wound occurred (Tr. 1307-1308). He told the jury his opinion of what probably happened:

> Well, including the wound that I observed, it would indicate that the victim was probably shot first in the heart and turned, got just a few feet away, collapsed because he only had few seconds of consciousness left after the gunshot wound to the heart, and collapsed and the second shot struck his foot after he was prone or face down and collapsed in the yard in this particular position as you laid out. (Tr. 1309)

The court recessed about noon, Friday, February 19, 1982. Motion to sequester was denied (Tr. 1378). One witness for the state was heard Monday morning, February 22, 1982.

At the close of the state's case, defendant moved for acquittal, arguing specifically that the state had failed to prove premeditation and failed to prove intent to per-

manently deprive with respect to the robbery. The motion was denied, as were renewals of all previously filed motions (Tr. 1417-1418). Thereafter, closing arguments were had (Defense: Tr. 1436-1449 and 1485-1495) (State: Tr. 1449-1485). The jury began deliberating after lunch, and returned guilty verdicts on all counts about 3:50 p.m. (Tr. 1528-1529).

C. Penalty Phase:

The sentencing phase of the trial primarily concerned itself with the mental and emotional state of the defendant, both in terms of statutory and non-statutory mitigating factors.

The state established, and it was not contested, that Robert Patten had been convicted of robbery in 1975, at age 18. The state did not offer evidence of any other aggravating factor, although it relied upon the fact that the murder was committed to avoid or prevent lawful arrest, a factor that the defendant does not contest. It also argued that the homicide was committed to disrupt or hinder the lawful exercise of a governmental function - a factor the trial court properly rejected as a doubling up. Finally, the state argued that the murder fit the "cold and calculated" aggravating factor - a factor the trial court erroneously found to exist. This error is discussed in Section X of this brief.

The defendant, in mitigation, relied upon the interrelated factors of commission of the murder while "under the influence of extreme mental or emotional disturbance" [Fla.

Stat. §921.141(6)(b)] and that the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired" [Fla. Stat. §921.141(6)(f)]. In addition, the defendant relied upon non-statutory mitigating factors relating to his family background, upbringing, history of being subject to child abuse, and the likehood of his making a good adjustment to prison life.

In support of mitigating factors, the defendant produced Dr. Jethro Tumer, a psychologist (Tr. 1630), who directs the Graduate and Community Counseling Program at Florida International University (Tr. 1631). He concluded that Robert Patten lacked the ability to conform his conduct to the requirements of the law and that he was under the influence of severe emotional disturbance at the time of the offense (Tr. 1633).

Dr. Tumer described his extensive review of Robert Patten's background, including his mother's mental problems which resulted in her commitment (Tr. 1635), Robert Patten's status as an "unwanted child" (Tr. 1635) and his birth as a "blue baby", thereby complicating an already difficult family situation (Tr. 1636). His relationship with his mother was not good, being "characterized by what we would call basically a lack of holding, caressing and touching and various aspects of physical abuse involving cursing, spitting on the child, throwing the child against the wall and situations like that." (Tr. 1636). His father died when Robert Patten was about age two (Tr. 1636).

The earliest clinical records of Robert Patten date from age three. They indicated hatred of him by his mother, her need for intense psychiatric care, and resultant acting out by defendant (Tr. 1631). At age six it was discovered that Robert Patten suffered from a degenerative bone disease. His mother, believing he was faking, beat him (Tr. 1638). After proper diagnosis, he spent over a year in a body cast, apparently continuing all the while to suffer physical abuse at the hands of his mother (Tr. 1638). As a result, two days after removal of his body cast, his leg was broken, and he was forced back into the body cast for more than eight months (Tr. 1639). During this period of time he began taking pills, uppers and downers (Tr. 1639).

Eventually, Robert Patten returned to school. Kleptomania, and other problems, resulted in expulsion (Tr. 1640).

By age ten, Robert Patten had been formally evaluated. One psychiatrist diagnosed him as emotionally disturbed and recommended separation from his mother. Another diagnosis recommended hospitalization (Tr. 1641). The public schools had nothing to offer (Tr. 1641). The abuse continued through age 14, at which time Robert Patten was evaluated by the Children's Psychiatric Center. His mother used choking as a disciplinary device. Robert broke down whenever the subject of his mother was approached during treatment. He also suffered a barbiturate overdose. Again hospitalization was recommended, but not implemented by his mother (Tr. 1642).

In 1976, defendant was charged with receiving stolen property. By order of the Honorable Richard S. Fuller, defendant was committed to South Florida State Hospital on September 16, 1976, because he was incompetent to stand trial (R. Exh. 300). His commitment was continued at the six months' review (R. Exh. 293-294). He was returned to court on April 14, 1977 (R. Exh. 301). Judge Fuller recommitted him to South Florida State Hospital on April 29, 1977 (R. Exh. 303). Six months later he was returned to court (R. Exh. 304). Thereafter, on February 6, 1978, he was acquitted by reason of insanity (R. Exh. 312-313; Tr. 47).

On September 18, 1979, Robert Patten was conditionally discharged from the North Florida Evaluation and Treatment Center and sent to the Gateway residence, a half-way house in Jacksonville (R. Exh. 312-313). In December of 1979, the Conditional Order of Discharge was modified to allow Robert Patten to reside with his grandmother in Miami (R. Exh. 320-321).

Throughout this period, the diagnostic pattern continued. In 1976 he was found incompetent to stand trial because he was psychotic with an underlying schizophrenic process. He suffered a nervous breakdown (Tr. 1643). In 1976, while at South Florida State Hospital, he was diagnosed as having psychotic organic brain syndrome. Such individuals function in a way that is considered unusual, abnormal and not in keeping with accepted standards (Tr. 1645-1646). In January 1977, he was diagnosed as suffering from paranoid schizophrenia (Tr. 1647). A month later,

another psychiatrist at South Florida State Hospital agreed that paranoid schizophrenia was still present and that signs of organic brain damage existed (Tr. 1648). In 1978, the North Florida Evaluation and Treatment Center, after reviewing an electroencephalogram, also found there were signs of brain damage (Tr. 1643). A summary outline of the chronology of the events relating to Robert Patten's psychological state is found in the Record at pages 554-557.

Dr. Tumer concluded that Robert Patten was subjected to the "most horrendous" case of sustained child abuse in his experience. In his opinion, at the time of the offenses, Robert Patten "was an emotionally disturbed individual, seriously disturbed emotional individual. At that point, he was incapable of any kind of rational functioning and even though he knew the requirements of the law, what was right and what was wrong, he was unable to conform his actions to the requirements of the law and to act on that knowledge of right or wrong." (Tr. 1649).

During cross examination, the state inquired whether Robert Patten could appreciate the criminality of his conduct. The doctor answered:

> A. I'm of the opinion: If we were to ask Mr. Patten, "Mr. Patten, do you know that it's wrong to do X," that he would say yes, but that's not what we are talking about.
>
> What I'm saying is: That a person can know and understand and appreciate the rightfulness or whatever with regard to a particular act whether it's right or wrong.
>
> What I am saying is: That the knowledge and the ability to act on that knowledge are two

different things and Mr. Patten did not have and does not have the ability to act on that knowledge. (Tr. 1655-1656).

Q. You're just telling us: Even though he knows it's wrong, he can't help himself?

A. That's correct. I guess a fitting analogy is one involving a compulsive overeater. You know it's wrong, but that piece of German chocolate cake is there and you eat it. (Tr. 1658).

Also during cross, the state confirmed that Robert Patten's emotional disturbance was an on-going process, something that never left him (Tr. 1659).

The defense also called Dr. Brad Fisher, an expert in the field of psychology and prisoner classification (Tr. 1673). He met with Robert on three separate occasions, for a total of 12 hours (Tr. 1674). He agreed that Robert Patten was unable to conform his conduct to the requirements of the law (Tr. 1677). He was then asked how Robert Patten was likely to adapt to long term imprisonment and responded that Robert Patten functions best in a structured environment (Tr. 1676-1680). On redirect, the following transpired:

Q. Doctor Fisher, in view of the mental and emotional conditions and disturbances noted in Robert Patten over a period of time from, I believe, the age of three until the end of 1979, anyway, would you have any reason to believe that his basic or underlying mental or emotional state when you first saw him was substantially different or any different from his mental or emotional state on September 2nd?

A. No. That would be pretty inconsistent with the general information which indicates a

> chronic and long standing major thought disorder, so that you may have a period of remission frequently due to the medication, but you're not going to have sort of like an entirely different person on a certain set of times. (Tr. 1686-1687).

In rebuttal, over objection, the state offered the testimony of two of the doctors who were court-appointed for the purpose of determining Robert Patten's competency to stand trial. Dr. Albert C. Jaslow testified that Robert Patten was able to conform his conduct to the requirements of law when and if he so desired (Tr. 1700). Ironically, his example was that Robert Patten obeyed traffic laws. This Court should note that it was Robert Patten's driving the wrong way down a one-way street that triggered the entire incident.

The doctor was of the opinion that Robert Patten was attempting to fake signs of mental illness (Tr. 1701). Nevertheless, when asked by the state whether he thought Robert Patten was under the influence of extreme mental or emotional distress, he responded:

> A. I don't doubt that there was emotional disturbances. I think any type of behavior such as that of which he has been accused is indicative of mental disturbances, but not to the extent that it would have to interfere with a person's ability if he wanted to control it. (Tr. 1702).

Dr. Jaslow met with Robert Patten once, for a period of 30 minutes (Tr. 1703). He had reviewed only a limited number of Robert Patten's extensive medical records (Tr. 1704). On cross, he confirmed the existence of severe emotional disturbance:

Q. I believe you have testified that even within the amount of time you spent with Mr. Patten, that it was your conclusion that he did suffer from a severe type of emotional disturbance; is that correct?

A. Oh, I don't doubt that he had emotional involvement with a drug history and so on, certainly. (Tr. 1704).

The state also called Dr. Edward Herrera, who saw Robert Patten once for less than an hour (Tr. 1710), and reviewed medical records (Tr. 1706). He saw no signs of any mental disease (Tr. 1707) and believed that Robert Patten could appreciate the criminality of his conduct and conform his conduct to the requirements of law (Tr. 1708). He felt that the defendant was trying to fake mental illness (Tr. 1709).

The state also called Christine Castle, the defendant's girlfriend. She testified that Robert Patten told her that he thought he fooled the doctors (Tr. 1715). She offered a lay person's opinion that Robert Patten had severe mental and emotional problems (Tr. 1716).

Dr. Tumer also discussed the state's position that Robert Patten was faking. He testified that the faking effort is itself representative of an underlying psychosis, and that given Robert Patten's condition, he could do nothing else but pretend (Tr. 1644-1645). Dr. Jaslow's admission that Robert Patten suffered severe emotional distress is quite consistent with this viewpoint. Unfortunately, Dr. Herrera was not asked similar questions, by either the state or the defense.

The court refused to grant a request that the jury be asked to return specific findings with respect to the aggravating and mitigating circumstances (Tr. 1618). The defense properly preserved its objection. It will be discussed in Section IX of this brief.

The jury returned with a six to six recommendation (Tr. 1773). The court refused to accept the jury's vote as a recommendation for life (Tr. 1778). After a modified Allen charge, the jury returned with a seven to five recommendation for death (Tr. 1785). Defendant argued that six to six was a recommendation for life, and objected to the modified Allen charge (Tr. 1774, 1775, 1778). This error is discussed in Section VI of this brief.

Defendant's motions for a new trial, relief pursuant to Fla. R. Crim. P. 3.620, and for judgment of acquittal (R. 532-546) were all denied (Tr. 1795). The court, finding the jury to have recommended death, imposed the death penalty. The sentence was reduced to writing (R. 558-568).

Timely appeal was taken (R. 569). The state cross-appealed (R. 572).

I.

DEFENDANT'S PRIOR ADJUDICATION OF INSANITY REQUIRED THE STATE TO ESTABLISH HIS SANITY AS AN ESSENTIAL ELEMENT OF ITS CASE

Robert Patten, prior to the commission of the offenses at issue in this case, had been adjudged insane by a Florida Court (R. Exh. 306-307) and his competency never judicially restored. His history of mental illness is detailed in the

statement of facts. The state and court knew of his prior insanity acquittal (Tr. 47). A competency hearing, at which the state conceded its burden (Tr. 48), found the defendant competent to stand trial (Tr. 91-93). The defendant gave notice of intent to rely on the defense of insanity (Tr. 35), discovery was had thereon (Tr. 101, 129), and the court denied defendant's motion to adopt the A.L.I. - Model Penal Code definition of insanity in place of the M'Naghten rule (R. 313).[1/]

At trial, the state produced no evidence of any kind to establish defendant's sanity at the time he committed the alleged offenses. The defense also introduced no evidence concerning sanity. Defendant's motion for acquittal at the close of the state's case argued there was no proof of premeditation, but did not specifically raise the issue of the state's failure to establish Robert Patten's sanity (Tr. 1416). The issue was specifically raised and overruled in defendant's motion for a new trial (R. 535).

One who has been adjudged insane is presumed to continue so until the state establishes, at trial, that his sanity has returned. Corbin v. State, 129 Fla. 421, 176 So. 435 (1937); Acree v. State, 15 So.2d 262 (Fla. 1943); Perkins v. Mayo, 92 So.2d 641 (Fla. 1957); Emerson v. State, 294 So.2d 721 (Fla. 4th DCA 1974); Alexander v. State, 380 So.2d 1188 (Fla. 5th DCA 1980); Livingston v. State, 383

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1. For some unknown reason the written notice of intent to rely on the defense of insanity does not appear in the record. Nevertheless, it is clear that the state was aware of the notice.

So.2d 947 (Fla. 2d DCA 1980); King v. State, 387 So.2d 463 (Fla. 1st DCA 1980). This unbroken line of authority required the state to prove at trial that Robert Patten was competent at the time of the alleged offenses.

At trial, the state and court apparently confused the requirement of a competency hearing with the need to prove sanity at the time of the offenses. The doctors who testified opined that Robert Patten was competent for the purpose of standing trial (Jacobson, Tr. 55; Jaslow, Tr. 66; Herrera, Tr. 70). None of them were asked or gave their opinion as to Robert Patten's sanity at the time of the alleged offenses. The difference between a competency hearing and proof at trial to overcome the presumption of continued insanity is made clear in this Court's opinion in Wells v. State, 98 So.2d 795 (Fla. 1957). In Wells a competency hearing was held and the trial court determined that the defendant was competent to stand trial. This Court reversed the conviction, finding that the state, at trial, failed to overcome the presumption of continuing insanity.

In Corbin v. State, supra, this Court reversed a conviction because of the trial court's failure to instruct the jury that if the defendant has previously been adjudged insane, and his competency never judicially restored, it would be presumed that the defendant's insanity continued unless overcome by evidence presented to the jury (176 So. at 435). To the same effect is Johnson v. State, 118 So.2d 234 (Fla. 2d DCA 1960). Recently, in Eason v. State, ____ So.2d ____ (Fla. 3d DCA, 7 FLW 2274), the court concisely

noted that the "presumption is one which attends all stages of the criminal proceeding." In Eason the court held that the state met its burden at the competency hearing and at trial. Based on the decided cases, the trial court should have granted defendant's motion for acquittal at the close of the state's case for failure of proof.

The state may contend that defendant failed to adequately inform the court of his position. However, unlike Wells v. State, 417 So.2d 772 (Fla. 3rd DCA 1982), here both the state and court were aware of defendant's previous adjudication of insanity. It is not the defendant's burden to help the state establish its case. When the state fails to meet its burden, the defendant is not required to remind the state of its omission. Rather, the defendant is entitled to acquittal.

Even if this Court must find fundamental error because defendant did not advise the state or the court of the state's failure to meet its burden of proof, this Court's decided cases compel a reversal. It is established law that no person may be tried, convicted or sentenced while insane. Horace v. Culver, 111 So.2d 670 (Fla. 1959). A conviction obtained while a defendant is legally insane violates due process. Pate v. Robinson, 383 U.S. 381 (1966); Drope v. Missouri, 420 U.S. 179 (1975). The insanity defense is of constitutional magnitude, particularly where the issue, as here, is one of intent. State ex. rel. Boyd v. Green, 355 So.2d 789 (Fla. 1978). Nor, of course, can a defendant

waive the defense of insanity prior to judicial restoration of competency. Alexander v. State, supra.

This Court has previously reversed convictions obtained where the state failed to meet its burden of proof in overcoming the presumption of continued insanity. This rule even applies where the defendant has pled guilty. For example, in Horace v. Culver, supra, the defendant, having previously been adjudicated incompetent, pled guilty to subsequent charges. Reversing, this Court said:

> The decided cases adequately dispose of the contention that any burden might rest upon the disabled party in such circumstances to inform the court or formally plead his status. An accused cannot, under our law be tried, sentenced or executed while insane, and the ignorance or good faith of the court and prosecuting officers does not serve to validate a proceeding conducted in violation of this precept. (111 So.2d at 671, fn. omitted)

To the same effect is Dixon v. Cochran, 142 So.2d 5 (Fla. 1962); cert. denied, 371 U.S. 866 (1962); Yates v. Wainwright, 151 So.2d 832 (Fla. 1962) and Livingston v. State, supra.

Wells v. State, supra, is particularly instructive. It was a death case where the state argued that its failure to rebut the presumption of continuing insanity was not properly preserved. This Court noted the "absolute finality in an executed sentence of death" (90 So.2d at p. 801) and went on to hold:

> It has been argued by the State, albeit not with great vigor, that the questions which we have discussed and decided here were not properly preserved for this Court's consideration. We must concede that they were not presented as clearly and concisely as they should have been presented

> but in appeals where the death penalty has been imposed, we feel it our duty to overlook technical niceties in the interests of justice. This liberality is not only warranted under our inherent power but is expressly contemplated by Sec. 924.32(2) F.S. 1955, F.S.A., which provides that: "Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not." The statute is particularly apropos to this case. (98 So.2d at p. 801-802).

The rule is firmly established in this state that a person, once adjudicated insane, continues in that status until adjudicated otherwise. As a result, the state bears the burden of proof beyond a reasonable doubt that defendant was sane at the time of the offenses. Defendant gave notice of intent to rely upon the defense of insanity. He was required to do nothing more. The burden was on the state to prove him sane beyond a reasonable doubt. Absent such proof, particularly where a specific intent crime is involved, defendant cannot be convicted.

The state having completely failed to meet its burden of proof to rebut the presumption of continuing insanity, defendant is entitled to a judgment of acquittal. Burks v. United States, 437 U.S. 1 (1978); Tibbs v. Florida, 102 S. Ct. 2211 (1982).

II.

THE TRIAL COURT WAS REQUIRED TO HOLD AN EVIDENTIARY HEARING TO DETERMINE IF EXCLUSION OF ELECTRONIC MEDIA WAS NECESSARY

Defendant moved to exclude all television cameras, electronic media, and still photographers from the trial.

He requested an evidentiary hearing to substantiate his claim that the presence of the media would adversely effect his ability to assist counsel (R. 328). In support of the motion for an evidentiary hearing, defense counsel submitted an affidavit detailing defendant's inability to concentrate and assist his counsel because of the distraction caused by continued media coverage (R. 334). Defendant's request for the appointment of a doctor to medically document his difficulties was denied (Tr. 373). The court utilized the evidence adduced at the earlier competency hearing to find that the presence of the media would not be a problem (Tr. 334).

It was prejudicial error for the court to refuse to grant the requested evidentiary hearing. As a result of that error, television cameras were present during most of the proceedings. Up to the time of defendant's motion, cameras had been present whenever defendant appeared (Tr. 366). During the first day of trial, including jury selection, cameras were not present (Tr. 904). They were present for almost all of the second day's proceedings (Tr. 923), causing counsel to note, when the trial resumed on the third day, that when the cameras were present defendant "was highly excited and nervous and unable to concentrate" (Tr. 1255-1256).

The cameras were also present during most of the third day of trial (Tr. 1370), and on the fourth day during closing argument and the return of the verdict (Tr. 1537). After the jury's guilt finding, counsel noted defendant's

inability to testify at the penalty phase because of his emotional and mental condition (Tr. 1574 - 1576). The record is silent as to whether cameras were present during the penalty phase testimony. They were present during sentencing. (Tr. 1794).

Television coverage of trials in Florida is generally permitted. In re Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979). The trial court "may exclude electronic media coverage upon a finding that said coverage will have a substantial effect upon a particular individual which will be qualitatively different from the effect on members of the public in general and will be qualitatively different from coverage by other types of media." 370 So.2d at 779. Where television coverage will render an otherwise competent defendant incompetent, the qualitatively different test is met and the electronic media should be excluded. State v. Green, 395 So.2d 532 (Fla. 1981). At stake is the constitutional right to a fair trial. Chandler v. Florida, 449 U.S. 560 (1981). If presence of the electronic media will, in fact, cause a "special or identifiable injury", the defendant, upon a proper showing, is entitled to an evidentiary hearing.

The court denied the requested hearing. Yet, the record is clear that Robert Patten has a long history of mental and emotional disturbance, including a previous adjudication of insanity without a judicial restoration of competency. Even the doctors who opined that he was competent to stand trial admitted that Robert Patten was emotion-

ally disturbed (Tr. 1704). But more to the point, the doctors who appeared at the competency hearing were not asked to evaluate the defendant in terms of the possible effect of media exposure, did not evaluate him for that purpose, and never testified on the subject. To rely on these doctors' irrelevant testimony, as the trial court did, is to rely upon non-existent evidence.

This case is not unlike Green v. State, supra. Here too, the court failed to assess defendant's competency in the face of television coverage. Again, as in Green, counsel noted her problems of communication. The court substituted its observations for that of competent medical testimony, and continued on.

Because no hearing was held, we cannot know whether defendant received a fair trial. Although the media has a constitutional right of access - a right which creates a presumption of openness, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the defendant's right to a fair trial is more important than the media's right of access. The Miami Herald Publishing Co. v. Lewis, ____ So. 2d _____ (Fla. 1982, 7 FLW 385). In other words, if the trial court is to err, it should err on the side of defendant's right to a fair trial. Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

In light of the competing interests, this Court has prescribed a hearing, at which time the parties, including the media, have the opportunity to adduce competent evidence. A discussion among counsel and the court is not a

permissible substitute. State v. Palm Beach Newspaper, Inc., 395 So.2d 544 (Fla. 1981). The court prevented defendant from meeting his "burden of producing evidence and proving by a greater weight of the evidence that closure is necessary." The Miami Hearld Publishing Co. v. Lewis, supra. The trial court's summary denial of defendant's request for a hearing was error. State v. Green, supra.

The court's error can only be remedied by the granting of a new trial. State v. Green, supra. That is so because at this late date a remand for a competency hearing would not protect defendant's due process right to a fair trial. Drope v. Missouri, supra; Pate v. Robinson, supra; Dusky v. U.S., 362 U.S. 402 (1960).

III.

THE SEARCH WARRANT FOR DEFENDANT'S RESIDENCE FAILED TO ESTABLISH PROBABLE CAUSE THAT THE ITEMS TO BE SEARCHED FOR WOULD BE FOUND AT THE LOCATION TO BE SEARCHED

Three search warrants were executed. Only one of them is challenged.[2/] It resulted in the recovery of the gun that was allegedly used to kill Officer Broom. The gun, and ballistics tests of that gun, were introduced at trial. Its

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2. One warrant was directed at the Bali Hai Motel, 1350 S.W. 2nd Avenue, Miami, Florida. Upon the state's express representation that none of the items seized at that location would be offered in evidence at trial, the challenge to that warrant was not pursued (Tr. 276). The other two warrants were directed at 3025 S.W. 6th Street, Miami, Florida, the house of defendant's grandmother, where defendant resided from time to time. The first warrant, issued September 4, 1981, and executed the next day (R. Exh. 24) is at issue here. The second warrant issued a month later for the same premises (R. Exh. 34) is not at issue because the state did not use any of the evidence seized pursuant to that warrant at trial (Tr. 1374-1375).

importance was stressed during the state's closing argument (Tr. 1451). Eventually, the ballistics tests played a crucial role in the court's erroneous determination that the murder was committed in a "cold and calculated" manner.

The search warrant was invalid because the affidavit upon which it was issued shows no probable cause to believe that the items to be searched for will be found at the place to be searched. The affidavit, after briefly describing the homicide and the identification of Robert Patten as the perpetrator, states that police department "records provided 3025 S.W. 6th Street, Dade County, Florida as an address" for the defendant. The affidavit goes on to state that at some unstated time after the homicide, defendant visited the premises, and that at 5:15 p.m. (some seven hours after the crime) defendant was arrested at 1350 S.W. 2nd Avenue - some 35 city blocks away. When arrested, he did not have the gun in his possession and he was wearing different clothing. Nothing in the affidavit accounted for the whereabouts of the defendant during the seven hours between the shooting and the arrest. The affidavit failed to note when the defendant visited the premises, whether at the time of the visit he was wearing the same clothing he had on at the time of the shooting, and whether he carried anything into the premises.

This was a search of a private residence in which, as the court found, the defendant had an expectation of privacy (Tr. 440). Fla. Stat. § 933.18 (1981), permits the issuance of a search warrant for a private dwelling only upon the

"sworn proof by affidavit of some creditable witness . . . which affidavit should set forth the facts . . ." upon which probable cause is based. Otherwise, the warrant is invalid. State v. Wolff, 310 So.2d 729 (Fla. 1975). The affidavit must demonstrate probable cause to believe that the items to be seized will be found at the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547 (1978). The difficulty with the warrant utilized herein is that it establishes absolutely no nexus between the items searched for and the place searched.

That the police have probable cause to arrest does not, without more, establish cause to search the house of the person arrested. "The facts supporting the warrant must show probable cause to believe that the criminal objects are presently in the place to be searched . . . and, it cannot follow in all cases, simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence (citations omitted)" United States v. Valenzuela, 596 F.2d 824, 828 (9th Cir. 1979), cert. denied, 441 U.S. 965 (1979).

This Court has frequently upheld the rule that the affidavit must specify the underlying facts which establish probable cause if a private dwelling is to be searched. State v. Wolff, supra. In each case where the requisite nexus was found, the facts establishing probable cause went far beyond the assertion that the defendant had visited his residence at some unstated time after the crime. The eyewitness information found in Blair v. State, 406 So.2d

1103 (Fla. 1981), is typical. Other recent cases have shown a similar nexus. Antone v. State, 382 So.2d 1205 (Fla. 1980), cert. denied, 449 U.S. 913 (1980); Neary v. State, 384 So.2d 881 (Fla. 1980); State v. Gieseke, 328 So.2d 16 (Fla. 1976); Findlay v. State, 316 So.2d 33 (Fla. 1975).

Explicit in these decisions is the fact that arrest, without more, provides insufficient probable cause to search the residence of the person arrested. The need for nexus has been often recognized. The affidavit must establish some basis other than the arrest of the defendant. United States v. Valenzuela, supra. State v. Powers, 388 So.2d 1050 (Fla. 4th DCA 1980); State v. Dominguez, 367 So.2d 651 (Fla. 2d DCA 1979); Gelis v. State, 249 So.2d 509 (Fla. 2nd DCA 1971); Bates v. State, 355 So.2d 128 (Fla. 3d DCA 1978). Only the First District Court of Appeal has failed to appreciate the fact that arrest, without more, does not establish probable cause. State v. Malone, 288 So. 2d 549 (Fla. 1st DCA 1974); Swartz v. State, 316 So.2d 618 (Fla. 1st DCA 1975). Malone held that probable cause existed to search the defendant's residence for an item missing from a murder victim's body. Swartz permitted a similar search. In neither case was any nexus shown between the items searched for and the place searched. Both Malone and Swartz were wrongly decided. They are contrary to the overwhelming weight of authority, both in Florida and elsewhere.

In United States v. Lockett, 674 F.2d 843 (11th Cir. 1982) a search warrant detailed the defendant's probable involvement in the purchase of dynamite, his implied

threats, and the bombing of a building owned by his former employer. In suppressing a search at his residence, the court held:

> Missing is a critical link in the chain of facts and circumstances which would lead to a reasonable belief that dynamite was improperly stored at Lockett's Sweetwater address. The affidavit set forth no facts from which the magistrate could infer that dynamite was located at that particular place. It is true that the nexus between the object to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation. . . . . It is equally true that a search will be upheld if "the facts described in the affidavits warrant a reasonable person to believe that the objects sought would be found." . . . . Nevertheless, there still must be a "substantial basis" to conclude that the instrumentalities of the crime will be discovered on the searched premises.

674 F.2d at 846 (citations omitted). In United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970), an affidavit established that Flanagan was a thief, and was arrested while in possession of stolen property. It concluded with the belief that the remainder of the stolen property not in his possession at the time of arrest would be found at his residence. In suppressing the fruits of the search, the court held:

> In this instance the affidavit revealed no factual observations by the informants that the stolen goods were at Flanagan's residence. Nor did it state any conclusions of informants to that effect. The inference that the goods were, or might be, at Flanagan's residence was entirely the District Attorney's. The affidavit contained nothing, either in the limited recital of the District Attorney's personal knowledge (that Flanagan was a known felon) or communications from informants (factual or conclusory) that the missing goods were where the District Attorney said they might be, other than that the house was said to be Flanagan's residence. . . . There were

> no informer's facts or conclusions about the location of the goods . . . The statement, even if reliable, that a named person who is a known felon has committed a burglary, plus possession by the suspect of some of the proceeds when arrested, does not without more authorize the issuance of a warrant to search the residence of the accused miles away.

423 F.2d at 747.

Flanagan is instructive for another reason. The court thought it was worth noting that Flanagan had several residences. In the case sub judice, the police had some six addresses for Robert Patten (Tr. 322). They prepared search warrants for several, including 1350 S.W. 2nd Avenue, the location where Robert Patten was arrested. These warrants were, in fact, general, exploratory warrants, directly in contravention of the Fourth Amendment. The police had absolutely no information that would tend to establish the existence of the items to be seized at the place searched. Robert Patten might have disposed of the gun and clothes he was wearing at any of the addresses, or anywhere else. There was no probable cause to suspect any particular location. For a search warrant to be issued, there must be reason to suspect a particular location. For the foregoing reasons, the items seized should be suppressed.

IV.

THE COURT ABUSED ITS DISCRETION BY LIMITING INDIVIDUAL VOIR DIRE, REFUSING TO SEQUESTER THE JURY DURING VOIR DIRE AND TRIAL, FAILING TO ALLOW DEFENDANT ADDITIONAL PEREMPTORY CHALLENGES AND REFUSING TO REMOVE FOR CAUSE DEATH PRONE JURORS

Robert Patten was tried for murder of a police officer. The state demanded the death penalty. Death cases are

different. The trial court refused to recognize that fact. Despite the nature of the crime, the extensive newspaper publicity, the electronic media coverage, a demonstration at the courthouse, the police officers in the courtroom, the racial tension in Dade County, and a variety of other factors, the court consistently ruled as if it were trying a simple civil action. It abused its discretion with respect to five separate - although related - matters concerning jury selection and service. The five errors were:

1. Failure to permit individual voir dire of the jury.
2. Failure to sequester the jury during voir dire.
3. Failure to permit additional peremptory challenges.
4. Failure to sequester the jury during trial.
5. Failure to excuse death prone jurors for cause.

The first four items call for the exercise of sound and reasoned discretion. Because they are so interrelated, they will be considered together. The fifth item is primarily a matter of law, although discretion has some role to play. It will be discussed separately.

A. Jury Selection and Service Issues.

Fla. R. Crim. P. 3.300 authorized the judge to permit individual or collective voir dire of the jury. The trial judge refused individual voir dire (Tr. 441) except as to pre-trial publicity (Tr. 545). One of the first jurors

questioned during collective voir dire was well aware of the case and stated, "I feel very strongly about the killing of police officers." (Tr. 484). Her opinion was so fixed, she could "absolutely" not set it aside (Tr. 485). Nevertheless, counsel's renewed motion for individual voir dire was denied (Tr. 486). Fla. R. Crim. P. 3.350(e) authorizes the Court, in the interest of justice, to grant additional peremptory challenges. Prior to jury selection, the court refused to rule, saying that counsel should "Take it at side-bar at the expiration of all other challenges." (Tr. 450). During the course of voir dire the court, in response to a request for a ruling said, "Figure you got 10." (Tr. 563). When counsel exhausted her peremptory challenges, the court denied additional peremptories (Tr. 749).

During voir dire, a total of 45 potential jurors were examined - 26 of them had some knowledge of the case, and seven of them served on the jury.[3] All jurors with scruples against the death penalty were removed. Twelve potential jurors expressed the opinion that the death penalty should be automatic in at least some murder cases. All defense motions to remove those jurors for cause were denied.[4] The defense struck two by peremptory chal-

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3. Jurors Harrington (Tr. 624), Levy (Tr. 585), Jondahl (Tr. 631), Dennis (Tr. 635), Butterfield (Tr. 638), Smith (Tr. 774), and Hubbard (Tr. 778).

4. Jurors Alden (Tr. 755), Merchant (Tr. 757), Cochran (Tr. 762), Dennis (Tr. 765) and Cellentani (Tr. 767). Jurors Feldman (Tr. 768-769) and Binkley (Tr. 756) were removed for other cause.

lenge.[5] The state struck none. Five of the death prone jurors served.[6] The defense exhausted all peremptory challenges (Tr. 768). Thereafter Jurors Smith and Hubbard, two of the twelve death prone jurors, as well as the alternates, were first called for voir dire.

The trial court also refused repeated requests to sequester the jury (Tr. 410, 820, 1045). Again, this was a matter for the court's discretion. Fla. R. Crim. P. 3.370(a). In light of the publicity surrounding this case, the court's refusal was an abuse of discretion.

From day one this case was different from the ordinary case - and therefore attracted significant attention. The electronic media were present most of the time. Newspaper coverage was extensive. Some of the articles were submitted with defendant's initial motion for individual voir dire and sequestration (R. 209-227). A supplement to that motion presented a current public opinion survey demonstrating the strength of feeling in Dade County that death was the appropriate penalty for a cop killer (R. 242-272). Newspaper coverage was continuous through trial (R. 323-327) and sentencing (R. 522). The day before trial commenced the Miami Herald carried a story about homicides in the City of Miami, noting that a law enforcement spokesman characterized the Nathaniel Broom shooting as the most shocking of the murders that occurred in the city (Tr. 408). Two days

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5. Jurors Gable (Tr. 768), Alden (Tr. 755).

6. Jurors Cochran (Tr. 762), Dennis (Tr. 765), Cellentani (Tr. 767), Smith (Tr. 790) and Hubbard (Tr. 792).

before the sentencing phase, the Herald ran another damaging story about a police killer who was about to be paroled (R. 521). Another story erroneously noted that Robert Patten was on parole at the time he shot Officer Broom (Tr. 1572). The judge noted that he saw two or three articles about the case during the course of the trial.

On the first day of the trial, while jurors were awaiting voir dire, a demonstrator appeared outside the courthouse. A witness described the scene:

> There was a van parked at the curb in front of the Justice Building that had large signs on the back end of it and one on the left-hand side with a picture of an electric chair and with what appeared to--what appeared to be a plastic cape across it with a sign stating: Mandatory death penalty for all cop killers.
>
> The man had a sign that he was carrying around and also an American flag that was hung upside down from the roof. (Tr. 648-649)

One of the death prone jurors, who was not excused for cause, saw the demonstration (Tr. 655). The demonstrator also appeared in front of the building later (Tr. 1559). Immediately before the jury was sworn-in the courtroom filled with spectators - primarily out of uniform police officers (Tr. 796). Previously, uniformed police officers had filled the courtroom (Tr. 31), although during the actual trial the maximum number of uniformed police officers appearing as spectators never exceeded five (Tr. 1538). At sentencing there were eight uniformed police officers and some 70 other spectators present (Tr. 1974).

It must be conceded that every act complained of lies within the sound judicial discretion of the court. But this is not the answer. Rather, it is the issue. For the question is whether the court properly exercised its discretion - not whether it had the right to exercise discretion. The difference is critical.

In State v. Reed, ____ So.2d ____ (Fla. 4th DCA 1982, 7 FLW 2384) the trial court exercised its discretion to refuse a continuance when witnesses could not appear. The District Court held that "the presumption of correctness ordinarily attributed to the finding of the trial court does not apply here because there were no findings of fact." Here too, there were no findings of fact, just denials of requests. Such action constitutes an abuse of the court's power. "Judicial discretion is not an unregulated power." Matire v. State, 232 So.2d 209, 210 (Fla. 4th DCA 1970); Carolina Portland Cement Co. v. Baumgartner, 99 Fla. 987, 128 So. 241 (1930). For the trial court to simply refuse repeated requests, made in light of an extensive record of pre-trial publicity and trial media coverage, was clearly arbitrary, unreasonable and unjust.

Where the nature and extent of the publicity surrounding a case raises the possibility of prejudice, cursory questioning of potential jurors is not enough. Individual voir dire is called for. U.S. v. Davis, 583 F.2d 190 (5th Cir. 1978). The defendant is a white man accused of shooting a black policeman. The riots following the McDuffie verdict were still fresh in the minds of most people in Dade

County. The conviction of a prominent black leader, Johnny Jones, before the same trial judge, was similarly fresh.

The case received widespread publicity. It took place at a time when the whole city suffered from paranoia regarding crime and disrespect for authority. It brought with it the racial undertones of a white suspect killing a black policeman.

The abuse of discretion is apparent with respect to the individual voir dire claim. The state did not oppose the request. It would have required more time for jury selection - but the seven hours actually consumed (Tr. 820) is a very short time in a first degree murder case involving a black police officer shot by a white defendant in a racially polarized city. The abuse is similarly apparent with respect to the court's failure to sequester the jury during voir dire and during trial - a common practice in capital cases - especially where the defendant is charged with murdering a police officer.

The failure to grant additional peremptory challenges is particularly unfair. The state, through a combination of challenges for cause and peremptory challenges, was able to remove every juror who expressed scruples against the death penalty. By contrast, the defense was forced to accept a jury that included five jurors who, to one extent or another, believed that the death penalty was automatically appropriate.

This Court has repeatedly held that the issues raised here must be determined by the trial court's exercise of

sound discretion. In Knight v. State, 338 So.2d 201 (Fla. 1976) this Court held that there was no abuse in denying additional peremptory challenges in light of the trial court's express finding that the pervasive pre-trial publicity had not prejudiced the defendant and because the trial judge was extremely liberal in excusing jurors for cause. In the case sub judice, no such finding was made. Moreover, the court was anything but liberal in excusing jurors for cause. Examine, for example, the trial court's rulings on challenges for cause to Jurors Alden (Tr. 755), Merchant (Tr. 757), Gable (Tr. 757-758), Cochran (Tr. 760-761), Silvio (Tr. 762-763), Dennis (Tr. 764-765) and Cellantini (Tr. 767). See also Dobbert v. State, 328 So.2d 433 (Fla. 1976), aff'd, 432 U.S. 282 (1977). Robert Patten, unlike Dobbert, did not have his jury sequestered, and did not receive 32 peremptory challenges. Some of these jurors may not have been excludable for cause. But there was enough of a question raised to prompt a judge applying liberal rules of cause to excuse each of them.

B. Failure to Exclude Death Prone Jurors:

Defendant exhausted his peremptory challenges. The court rejected challenges for cause to Jurors Dennis and Cellentani, who actually served on the jury. The court also rejected a challenge for cause as to Juror Gable, who was removed by defendant's use of a peremptory challenge.

Jurors Dennis and Cellentani should have been removed, as a matter of law, because of their view that death was the

appropriate penalty in a premeditated murder case. Juror Cellentani said:

> MS. CELLENTANI: I believe pre-meditated murder should get the death penalty regardless of whether it's a police officer or an ordinary person (Tr. 745).

The judge rejected the challenge, on the ground that Juror Cellentani said "she would follow the law" (Tr. 767). Juror Dennis' response to whether the death penalty should automatically be imposed was similar:

> MR. DENNIS: Pre-meditated murder and rape.
>
> MR. LYONS: You think it ought to be automatic in every case when a person is found guilty?
>
> MR. DENNIS: Found guilty (Tr. 744).

Juror Dennis' status as a former military policeman (Tr. 681) certainly explains his opinion that premeditated murderers should always receive the death penalty. The court overruled defendant's disqualification for cause motion, stating that Juror Dennis had said: "He could be fair to both sides and set aside any opinions he had." (Tr. 765).

The record indicates that at no time did either juror respond in the manner indicated by the court or in any similar manner. The state asked no questions of these two jurors about whether they could follow the law concerning imposition of the death penalty or whether they could set aside any opinions they might have about the death penalty. The defense asked no such questions. The court asked no such questions. None of the collective questions addressed to the jury by either party, or by the court, dealt with the

issue of whether the death penalty should be automatically imposed. As a result, the record unequivocally shows that two jurors held the view that death is required for premeditated murder.

A juror who favors automatic imposition of the death penalty is not qualified to serve. He is not impartial since he cannot recommend mercy or weigh mitigating circumstances. Thomas v. State, 403 So.2d 371 (Fla. 1981). Since defendant exhausted his peremptory challenges, failure to exclude these jurors for cause mandates reversal. Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981).

Juror Gable presents a more difficult problem. She is the mother of Judge Ellen Morphonios Gable. Futhermore, Judge Gable's husband is a police lieutenant (Tr. 611). Juror Gable had served on juries before (Tr. 614), including a Federal Grand Jury that defense counsel appeared before in her capacity as an Assistant United States Attorney (Tr. 712). She was aware of the Broom killing, noting:

> I don't remember the Defendant's name and I don't remember the circumstances, because when a thing like that happens, right away, and you can understand this, you think, "Well, where is my son? Where is he? is he all right?" Then everything kind of gets caught up. You go along with your life, whatever. I cannot honestly remember anything about the case. (Tr. 611).

Not surprisingly, she favored the death penalty (Tr. 666) and viewed the killing of a police officer as more serious than the usual crime (Tr. 734). Nor did she believe that people sentenced to death would actually die (Tr. 745-746). In spite of her background, she claimed that she could be

fair to the defendant and decide the case on its merits. The trial judge accepted that claim:

> THE COURT: She indicated about ten times that she could be fair to everybody. I mean: The cold record is replete with that. If you are moving for cause, it's overruled. The woman is obviously--it's a mixed bag for both sides. She knows you, and on the other hand, you know, she has some involvement with law enforcement, but she has repeatedly said that that fact has no bearing and she's her own woman and I believe her. I believe she's her own woman. She will do what she thinks is right. If you want to use a peremptory, it's up to you. No cause on Gables. (Tr. 758).

Although perhaps a close question, defendant deserved the benefit of the doubt on his motion to disqualify Juror Gable for cause. "Where there is any reasonable doubt as to a juror's possessing the requisite state of mind so as to render an impartial verdict, the juror should be excused... and the defendant given the benefit of the doubt." Leon v. State, supra, at 205 (citations omitted). Blind acceptance of the juror's claim to impartiality cannot be squared with the record. Singer v. State, 109 So.2d 7 (Fla. 1959).

The challenge to Juror Gable should have been sustained. The trial judge's reference to the "cold record" speaks volumes. Given all the factors involved, his refusal to remove Juror Gable was a blatant abuse of discretion.

V.

THE COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER A DEATH QUALIFIED JURY IS ALSO A GUILT PRONE JURY

Defendant requested a pre-trial evidentiary hearing to establish that persons opposed to capital punishment consti-

tute a distinct class within the community, and that a jury composed of persons who believe in the death penalty is more prone to convict than a jury which is composed of a fair cross-section of the community. Defendant also requested funds for expert witnesses to help establish the contention. Supporting documentation was submitted by Professor Hans Zeisel, who detailed six independent studies which firmly established the relationship between death qualified jurors and propensity to vote for guilt or to reject a lesser included offense. An article by psychologist Courtney Mullin, and her qualifications, were also submitted as a proffer of the kind of testimony that would be offered at an evidentiary hearing (R. 304-304a; 354-399). The court denied the request for a hearing (Tr. 447).

The issue here is exclusion for cause during the guilt phase of jurors who oppose the death penalty. The starting point, as the court noted in Witherspoon v. Illinois, 391 U.S. 510, 521 (1968), is that a state "may not entrust the determination of whether a man is innocent or guilty to a 'tribunal organized to convict'." In Nettles v. State, 409 So.2d 85 (Fla. 1st DCA 1982) the court grudgingly accepted the premise that a death qualified jury might be improperly guilt prone but rejected the claim for lack of proof. By contrast, here the court refused to even grant a hearing on the issue. In both United States ex rel. Townsend v. Twomey, 452 F.2d 350 (7th Cir. 1972), cert. denied, 409 U.S. 854 (1972) and United States ex rel. Clark v. Fike, 538 F.2d 750 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1977), the

courts held that the empirical studies were still too fragmentary and tentative. But unlike this case, the defendants in Twomey and Fike were allowed to attempt to prove their contentions. Indeed, Twomey succeeded at the District Court level. 322 F. Supp. 158 (N.D. Ill. 1971).

More recently, in Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980), aff'g., 483 F. Supp. 1372 (E.D. Ark 1980), the court found the evidence on the issue sufficiently serious to warrant a hearing. Robert Patten requested a similar hearing in order to prove that death qualified jurors are more likely to convict - and particularly more likely to convict of a higher degree of murder - the very issue tendered to the jury.

The issue presented to the jury at the guilt phase concerned the degree of murder. The difference between first degree and second degree murder is often a close question. The evidence may well have justified the jury's verdict. But the jury could also have reasonably returned a verdict of second degree murder. Unlike other states, Florida's death penalty law has a built in mechanism for permitting impartial guilt determinations and impartial penalty determinations. Fla. Stat. §921.141(1) (1981), permits a separate penalty phase jury when necessary. In Riley v. State, 366 So.2d 19 (Fla. 1979) and Gafford v. State, 387 So.2d 333 (Fla. 1980), this approach was rejected. However, neither case involved a record which demonstrated the prejudice defendant here seeks to prove. Defendant is entitled to a hearing.

VI.

THE COURT ERRED IN FAILING TO ACCEPT AS A RECOMMENDATION FOR LIFE THE JURY'S SIX/SIX DECISION

In the instant case, like the recent case of Rose v. State, _____ So. 2d _____ (Fla. 1982, 7 FLW 533), the jury returned with a six to six decision. The court refused to accept that decision. Over objection, the court gave a modified Allen charge, and sent the jury back to deliberate. Thereafter, the jury returned with a seven to five vote for death.

The court gave the Florida Standard Jury Instruction with respect to sentencing (Tr. 1769). The jury received the case at 3:55 p.m. (Tr. 1770) and returned at 6:30 p.m. (Tr. 1771) with a note to the court stating it had reached a six to six vote, and asking: "what now?" (Tr. 1773).

At this point, the jury had done precisely as instructed. Its vote being six to six, it had rendered a recommendation for life. Over defense objection (Tr. 1778), the court then proceeded to give its version of the jury deadlock charge (Tr. 1779-1780). The Jury Foreman then inquired whether a majority vote was required for a life recommendation (Tr. 1780). The court responded that it did not know what the law was, that the jury should continue deliberating, and that if a majority could not be reached it would accept the six to six vote (Tr. 1781-1782). Thirty minutes later (Tr. 1783) the jury returned with a seven to five recommendation for death (Tr. 1785).

In forcing the jury to reconsider its decision, the court erred. A six to six recommendation is, as the Jury Instructions state, a recommendation for life. Defense counsel so argued (Tr. 1774-1775). The state agreed (Tr. 1775). When the jury sent its note, it had completed its task. Nothing remained for the jury. The court should simply have accepted the decision. It was error to tell them to continue deliberating.

Rose v. State, supra, would seem to definitively answer defendant's argument with respect to the jury recommendation during the penalty phase. Nevertheless, out of an excess of caution, counsel will briefly discuss the error that the trial court made in the absence of the guidance furnished by the Rose decision. Thereafter, counsel will note the appropriate remedy for the trial court's error.

A. Acceptance of the Six/Six Recommendation:

This Court approved the Florida Standard Jury Instructions given in this case. Presumably, the distinguished committee which prepared the Instructions, and this Court when it approved the Instructions, understood that the burden was on the state to persuade a majority to vote for death. The state failed to meet its burden. It was not for the court to tell the jury to "try again".

Before Rose, this Court had never before considered the effect of a six to six jury recommendation. Logically, since the state bears the burden of proof beyond a reasonable doubt as to the existence of at least one aggravating

factor, or of aggravating factors sufficient to overcome mitigating factors, in order to achieve a death recommendation, a six to six recommendation is nothing more than a rejection of the state's case. It must be remembered that the defendant has no burden of persuasion. The defendant does not have to establish any mitigating factors in order to avoid a death recommendation; nor does the defendant have to prove mitigating factors beyond a reasonable doubt. Since the state bears the burden of proof, the jury's six to six recommendation is a recommendation for life.

Under Florida's prior capital punishment law, conviction of first degree murder carried a presumption of death unless a majority of the jury recommended mercy. A six to six decision was a verdict for death. Watson v. State, 190 So.2d 161 (Fla. 1966), cert. denied, 389 U.S. 960 (1967). The initial 1972 revision of the death penalty statute retained the Watson rule. It provided that: "Where the jury is the trier of fact a recommendation to mercy shall require the affirmative vote of a majority of the jury." Laws of Florida, Ch. 72-72 (1972). Subsequently, because of Furman v. Georgia, 408 U.S. 238 (1972), the current death penalty statute was enacted. Laws of Florida, Ch. 72-724 (1972). All references to "mercy" and any provisions concerning the vote of the jury were deleted. Fla. Stat. § 921.141(2) (1981), requires a jury recommendation. It is silent with respect to whether the recommendation must be unanimous or by majority vote. In Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976), this court held

that a recommendation by majority vote for death was permissible.

The current law reverses the presumption of death. It is the state that must attract at least seven votes. The jury must find by a majority vote, and beyond a reasonable doubt, the existence of one or more of the statutory aggravating factors. If not, there is no basis for imposition of the death penalty. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). If the state cannot attract at least seven votes, the state has not carried its burden of proof. Six to six is not a hung jury. It is a jury that has not agreed with the state.

There is no reference in the statute to how many votes are required. Fla. Stat. § 921.141(3) (1981) authorizes the trial judge to override a recommendation of a majority of the jury. It must do that in order to permit judge sentencing, as opposed to jury sentencing.

In both Beck v. State, 396 So.2d 645 (Ala. Sup. Ct. 1981) and Miller v. State, 229 S.E.2d 376 (Ga. Sup. Ct. 1976), the courts held that if the jury cannot agree on a sentence of death, their decision must be considered a recommendation for life. Although the statutory sentencing schemes are different in both states, the principal that a jury that does not find death finds life remains the same.

It was an error for the trial court to refuse to accept the recommendation. The case must be remanded to the trial court for sentencing in accordance with the rule of Tedder v. State, 322 So.2d 908 (Fla. 1975).

B. Remedy:

Rose v. State, supra, holds that a six to six decision constitutes a recommendation for life. The jury returned such a decision. The trial judge has no authority to reject a jury decision that is permitted by the jury instructions. Defendant is entitled to the benefit of that decision. Therefore, the only appropriate remedy is remand for resentencing by the judge, without a new jury proceeding.

The requested remedy is the only appropriate remedy for two reasons. First, this Court time and time again has employed this remedy for judge sentencing error. See, e.g., Porter v. State, 400 So.2d 5 (Fla. 1981); Ross v. State, 386 So.2d 1191 (Fla. 1980); Lucas v. State, 417 So.2d 250 (Fla. 1982); Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Here, the error is the judge's. The jury properly returned its recommendation. The judge erred in not accepting it. On remand, the starting point for a new sentencing proceeding must be the jury's recommendation for life.

The second reason why the only appropriate remedy is a new sentencing utilizing the jury's life recommendation is that a new jury proceeding would constitute double jeopardy. Inherent in the Rose decision, and as defendant here argues, is the requirement that the state bears the burden of proof on the issue of aggravating factors sufficient to outweigh mitigating factors. The jury's recommendation means that the state has failed to carry its burden.

It is not entitled to a second chance. Burks v. United States, supra; Tibbs v. Florida, supra.

The same rule applies when the jury's choice is between life and death. The issue has been decided. Once a jury has decided for life, a new proceeding cannot be held that will permit a jury to decide for death. Bullington v. Missouri, 451 U.S. 430 (1981). That the jury only recommends, rather than having the final say, is constitutionally irrelevant. Sonne v. State, 609 S.W.2d 762 (Tex. Ct. Crim. App. 1980); Ward v. State, 236 S.E.2d 365 (Ga. Sup. Ct. 1977).

VII.

THE TRIAL COURT FAILED TO COMPLY WITH TEDDER IN OVERRULING THE JURY'S RECOMMENDATION OF LIFE

Robert Patten must be resentenced. The trial judge's wrong conclusion that the jury had recommended death meant that he failed to set forth the reasons for overruling the jury recommendation, as required by Tedder v. State, supra. The trial judge's action lacks the procedural rectitude required for imposition of the death sentence. By finding that the jury recommended death, the trial judge avoided the difficult problem of demonstrating that the jury's life recommendation was so unreasonable that no reasonable man could differ. In opting for this way out, against the advice of the state that the court deem the jury to have recommended life (Tr. 1797), the trial judge failed to comply with Tedder. The procedural and substantive burden

on the trial judge is different, and greater, when the jury recommends life. Not only must the trial judge find that one or more aggravating factors exist, and that those factors are not outweighed by mitigating factors, he must also specifically find, with reasons, that the jury's recommendation is not reasonable, and that no reasonable man could differ from that interpretation of the evidence.

The trial judge made no effort to make such findings either orally at sentencing or in his written sentencing order. This alone compels a remand for a new sentencing proceeding.

VIII.

BEFORE A TRIAL JUDGE OVERRULES A JURY RECOMMENDATION FOR LIFE IT MUST ORDER, IF REQUESTED BY THE DEFENDANT, A PRESENTENCE INVESTIGATION REPORT

Defendant asserts that failure to honor a request for a presentence investigation report when the jury recommends life violates the constitutional imperative for informed and invidualized sentencing. Eddings v. Oklahoma, 102 S.Ct. 869 (1982). On remand, if the trial judge does not abide by the jury's life recommendation he should, before imposing sentence, order a PSI.

Fla. R. Crim. P. 3.710 authorizes, but does not mandate, a PSI in death cases. This Court has refused to make a PSI mandatory upon request of the defendant. That decision is wrong and should be overruled. At a minimum, a trial court refusing to order a PSI, should be required to

articulate sound reasons for such refusal. Here the trial court refused to order a PSI because the defendant had previously been convicted of a felony and placed on probation (Tr. 1789). In the context of whether death is appropriate, the trial court's articulated reason for refusing the PSI request cannot stand analysis.

A presentence investigation is a valuable method for informed sentencing. This Court has recognized its usefulness by mandating its preparation in certain instances. Fla. R. Crim. P. 3.710. Consider the incongruity of requiring informed sentencing for the less serious offenses and permitting uninformed sentencing for the ultimate penalty. The unfairness seems all the more apparent when the judge overrides the jury's recommendation.

A presentence investigation is particularly critical where non-statutory mitigating factors are at stake. The report may well be the only useful vehicle for developing a meaningful way to analyze the weight of such factors. Absent the report, the trial court and this Court may well be left in the dark.

Moody v. State, 418 So.2d 989 (Fla. 1982), holds that the decision to order a presentence investigation in a capital case lies within the sound discretion of the trial court. Discretion means more than absolute deference to the trial judge's yes or no on a particular request. Perhaps, in some death penalty cases a PSI would serve no useful purpose. It is submitted that in any case where the judge overrides the jury recommendation it is an abuse of discre-

tion to refuse a request for a PSI. The cases which have upheld the trial court's refusal to order a PSI have usually involved death penalty recommendations affirmed by the trial judge. Thompson v. State, 389 So.2d 197 (Fla. 1980); Hargrave v. State, 366 So.2d 1 (Fla.), cert. denied, 444 U.S. 919 (1979); Jackson v. State, 366 So.2d 752 (Fla. 1979), cert. denied, 444 U.S. 885 (1979); Thompson v. State, 328 So.2d 1 (Fla. 1976). One involved a capital case where the death penalty was not sought. State v. Perwin, 405 So.2d 970 (Fla. 1981). Only Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 102 S.Ct. 1039 (1982), involved a jury override. A significantly different situation is presented when the trial judge decides to override the jury's recommendation. The individualized consideration mandated by Eddings v. Oklahoma, supra, and Lockett v. Ohio, 430 U.S. 586 (1978), is hardly possible where the court refuses to avail itself of the one device specifically designed to help achieve individual consideration.

IX.

THE COURT ERRED IN REFUSING TO REQUIRE THE JURY TO MAKE SPECIFIC FINDINGS AS TO THE EXISTENCE OF BOTH AGGRAVATING AND MITIGATING FACTORS

If this case is remanded for a new sentencing hearing with a new jury, the Court should resolve the issue of whether the jury should be instructed to itemize their findings with respect to both aggravating and mitigating factors. Defendant's request for such an instruction was denied (Tr. 1618, 1710). Failure to require the jury to

specify leads to three serious problems. First, where the judge overrules the jury, it makes it impossible for this Court to rationally review the decision in accordance with the standard of Tedder v. State. Rather, as will be shown below, this Court is forced to, and frequently does, substitute its own judgment for that of the trial court.

Second, the lack of specific findings makes it impossible to determine if the jury instructions, particularly the definitions of the aggravating and mitigating factors, are really vague and inadequate, as frequently contended and always rejected by this Court. The jury returns a general verdict. Because of that, there is no way to compare their findings with the evidence and determine whether the jury instructions give meaningful guidance.

Finally, lack of specific findings mean that it is impossible to know if a majority of the jurors agree on the same aggravating and mitigating factors. It is possible that seven jurors can vote for death, and that each juror can believe, beyond a reasonable doubt, that a different aggravating factor exists. Likewise, it is possible for the jurors to disagree on the mitigating factors and still render a decision. As a result, each juror may be voting for life or death based on different factors. The Standard Jury Instructions do not instruct the jury that they must agree with each other on specific factors. Indeed, the jury is told that its advisory sentence need not be unanimous, and that it is voting on life or death, without first

agreeing to any particular aggravating or mitigating factors. If the jury had been instructed to return specific findings none of these problems would exist.

The jury recommendation is entitled to great weight. "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 could differ". Tedder v. State, supra, at 910. "This court has repeatedly emphasized that the death penalty statute does not contemplate a mere tabulation of x numbers of aggravating and y numbers of mitigating circumstances, but rather contemplates a reasonable weighing of those circumstances to determine whether the death sentence is appropriate." White v. State, 403 So.2d 331, 336 (Fla. 1981). The problem is knowing what to weigh. For the jury recommendation to have "great weight," the court must know what factors the jury relied upon.

The jury is entitled to consider a broad range of non-statutory mitigating factors. Without specific inquiry of the jury, both the trial court and this Court can only speculate as to what the jury deemed important. Thus, the trial court can reject the existence of a mitigating factor the jury found to be important - perhaps of overriding importance. This Court can do the same. As a result, deference to the jury recommendation becomes meaningless.

The review problem exists in all cases. However, it is most acute when the jury recommends life and the judge

imposes death. Without specific jury findings, meaningful appellate review is non-existent. The court is simply guessing at what are the important factors. For example, in Halliwell v. State, 323 So.2d 557 (Fla. 1975), the court was forced to speculate on the existence of both aggravating and mitigating factors. A similar difficulty was evident in Welty v. State, 402 So.2d 1159 (Fla. 1981). The speculation forced upon the Court is also evident in McCampbell v. State, ___ So.2d ___ (Fla. 1982, 7 FLW 492), where this Court, in rejecting a death sentence imposed after a jury recommendation for life, said:

> From an objective review of the record, it appears the jury could have been influenced in its recommendation for life imprisonment by the following factors: (1) appellant's exemplary employment record; (2) appellant's prior record as a model prisoner; (3) the positive intelligence and personality traits detailed through the testimony of Dr. Yarbrough which showed the appellant's potential for rehabilitation; (4) appellant's family background; and (5) the disposition of the co-defendants' cases.

Rejection of the trial court's weighing process without knowledge of what the jury deemed important was also evident in Barfield v. State, 402 So.2d 377 (Fla. 1981), where the trial judge, in overruling the life recommendation of the jury, failed to note a wide range of mitigating factors the jury might have found relevant. This Court noted four factors which could have led to the jury's recommendation. A similar situation existed in Jacobs v. State, 396 So.2d 713 (Fla. 1981). Assumptions concerning

jury decision making were also evident in Neary v. State, supra; Malley v. State, 382 So.2d 1190 (Fla. 1979), and Goodwin v. State, 405 So.2d 170 (Fla. 1981). In each of these cases, the Court's speculation concerning what factors influenced the jury worked no prejudice because of the sentence reduction.

By contrast, the lack of specific findings by the jury is highly prejudicial when this Court sustains a judge's override of the jury's recommendation for life. This problem was apparent in Gardner v. State, 313 So.2d 675 (Fla. 1975), rev'd, 430 U.S. 349 (1977). In Gardner the jury recommended life, the trial judge overrode the recommendation, and it was left for the dissent to note that the jury was justified in finding a mitigating factor.

A number of other cases have also involved issues with respect to whether a statutory or non-statutory mitigating factor existed. Without the benefit of the jury decisional basis, the Court, with one or more dissents, has upheld the death sentence. See, e.g., Adams v. State, 412 So.2d 850 (Fla. 1982); Miller v. State, 415 So.2d 1262 (Fla. 1982); Buford v. State, supra; Zeigler v. State, 402 So.2d 365 (Fla. 1981); Johnson v. State, 393 So.2d 1069 (Fla. 1981); Hoy v. State, 353 So.2d 826 (Fla. 1977).

Without specific jury findings, application of the Tedder standard cannot be done consistently with the standard of review enunciated in Brown v. Wainwright, 392 So.2d. 1327, 1331-1332 (Fla. 1981). It is submitted that,

contrary to Brown, this Court does precisely what it there condemned. Indeed, it can do nothing else without knowing the basis for the jury's recommendation. As a result, neither the trial court nor this Court can perform its function when a jury recommendation is not honored by the trial judge.

Fla. Stat. §921.141(2) certainly does not prohibit requiring the jury to return specific findings. Indeed, at least one court, in reviewing its own statute, assumed Florida's capital punishment law required specific findings. State v. Rook, 283 S.E. 2d 732 (N.C. 1981). The death penalty statutes in most states require specific findings. See, e.g., Stevens v. State, 280 Ga. 734, 278 S.E. 2d 398 (1981); State v. Sonnier, 402 So.2d 650 (La. Sup. Ct. 1981); Gall v. Commonwealth, 607 S.W. 2d 97 (Ky. 1980); State v. Johnson, 257 S.E. 2d 597 (Sup. Ct. N.C. 1979). In State v. White, 395 A.2d 1082 (Del. Sup. Ct. 1978), the court imposed a requirement of specific jury findings in the face of statutory silence.

The individualized sentencing mandated by the United States Supreme Court, and by this Court, cannot be meaningfully implemented, at least where the trial judge overrides the jury recommendation, without asking the jury for specific findings. To not ask is to force speculation and conjecture. It leads to four to three decisions upholding the death penalty, on the grounds that no reasonable man could differ. Johnson v. State, supra.

X.

THE COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED IN A "COLD AND CALCULATED" MANNER AND IN REJECTING THE EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING FACTORS

Because this case must be remanded for resentencing consistent with Tedder v. State, supra, this Court must review the trial courts use of improper statutory and non-statutory aggravating factors and the rejection of statutory and non-statutory mitigating factors.

A. Aggravating Factors:

1. Statutory: The trial court properly found two aggravating factors. Robert Patten had previously been convicted of robbery, an aggravating factor, pursuant to Fla. Stat. §921.141(5)(b) (1981). He commited the instant offense to avoid lawful arrest. Fla. Stat. §921.141(5)(e) (1981).

The court erred in finding that the "homicide . . . was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Fla. Stat. §921.141(5)(i) (1981). In order to prevent this statutory factor from creating a mandatory death sentence in all premeditated murder cases, this Court has limited its scope. Mere premeditation is not enough. Thus, Combs v. State, 403 So.2d 418 (Fla. 1981), describes subsection (5)(i) as a limitation which inures the benefit of the defendant. Combs involved a plan and design to lure the victim to death in a remote area - not a spur of the moment killing, as in Robert Patten's case.

In McCray v. State, 416 So.2d 804, 807 (Fla. 1982), the court noted that this "aggravating circumstance ordinarily applies to those murders which are characterized as executions or contract murders, although that description is not intended to be all inclusive." McCray makes it clear that this factor requires more than actual intent to kill developed by the defendant at the scene of the crime. Hill v. State, ___ So.2d ___ (Fla. 1982, 7 FLW 324) also demonstrates that the defendant must make up his mind to commit the offense substantially before the event. See also Middleton v. State, ___ So.2d ___ (Fla. 1982, 8 FLW 9). An increased level of premeditation is required, hardly the situation when the entire event takes place in three to five seconds.

Certainly Robert Patten had no preconceived plan to kill Officer Broom. The evidence shows that the defendant was attempting to sell the gun at the very time the tragic event took place. There is absolutely no evidence of any plan, design, or intent to kill Officer Broom, or any arresting officer, prior to the actual event. The jury found that once at the scene, Robert Patten did intend to kill. That establishes premeditation - it does not establish a cold and calculated manner. The extra element of premeditation that subsection (i) looks to is before the fact decision-making. That type of decision-making was not present in this case. The factor does not apply.

2. Non-Statutory Aggravating Factor: The overwhelming fact which permeates this case is that Robert Patten

murdered a police officer. The victim's status as a police officer was mentioned to the jury over and over again during the state's closing argument in the guilt phase of the trial (Tr. 1451, 1453, 1456, 1457, 1458, 1459, 1463, 1464, 1478, 1481, 1484). It was similarly mentioned over and over again during the penalty phase (Tr. 1729, 1733, 1734, 1735). Yet, the jury's verdict was six to six, a recommendation for life.

The trial judge was determined that a "cop killer" not escape the death penalty. Although he proclaimed in his written sentencing order, an order that seems more political than judicial, that he considered only the statutory aggravating factors, it is apparent from the "compelled" "observations" that the victim's status as a police officer weighed heavily in the judge's sentencing. Thus, he stated:

> I pose but one question for consideration: If the courts of this county cannot protect and ensure justice to the Nathaniel Brooms of this world, how can we expect the Nathaniel Brooms to protect us? (R. 565)

The use of police status as a non-statutory aggravating factor is apparent in two other aspects of the sentencing. The strained application of the "cold and calculated" factor demonstrates the court's overriding concern that the death penalty be imposed. The court's outright rejection of statutory mitigating factors relating to the defendant's mental and emotional state, and his capacity to appreciate the criminality of his act (See Section B.1., infra), as well as the total failure to even discuss the possible

existence of non-statutory mitigating factors (See Section B.2., infra), all demonstrate the court's singular intent that the killer of a police officer receive the death penalty. The individualized application of that penalty was bypassed. Unlike some states, Florida does not make the killing of a police officer in the line of duty a reason for the imposition of the death penalty. Fleming v. State, 374 So.2d 954 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977). It was improper for the trial court to do that very thing.

B. Mitigating Factors:

1. Statutory: Defendant contends that two inter-related statutory mitigating factors were clearly present, to wit:

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The trial court's rejection of these factors is not supported by the record. The sentencing order stated: "The defendant's experts opined, based upon Patten's previous psychiatric history and child abuse, that he was under extreme emotional disturbance. The state's experts offered contrary opinions." (R. 562).

The court's statement is inaccurate. One of the state's experts, Dr. Jaslow, agreed that the defendant

suffered from severe emotional distress (Tr. 1704). The other never answered the question. Further, to accept the court's position requires rejection of a twenty year history of mental disturbance, diagnosed by a variety of state institutions and doctors, and private institutions and doctors.

This case is not unlike Huckaby v. State, 343 So.2d 29, 33-34 (Fla. 1977), cert. denied, 434 U.S. 920 (1977), where the court noted:

> The trial judge ignored every aspect of the medical testimony in this case when he found that no mitigating circumstances existed. There was almost total agreement on Huckaby's mental illness and its controlling influence on him. Although the defense was unable to prove legal insanity, it amply showed that Huckaby's mental illness was a motivating factor in the commission of the crimes for which he was convicted. Our review of the record shows that the capital felony involved in this case was committed while Huckaby was under the influence of extreme mental or emotional disturbance, and that while he may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired. These findings constitute two mitigating circumstances which should have been weighed in determining his sentence.

The rejection is all the more improper in light of the jury recommendation for life - a recommendation which could only have been based on the defendant's mental condition and related non-statutory mitigating factors. Quince v. State, 414 So.2d 185 (Fla. 1982); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976).

This Court's duty is to review the record. Defendant is confident that such review will demonstrate the over-

whelming evidence of defendant's mental problems. The trial court's outright rejection relates directly to its intention to impose the death penalty on a "cop killer".

2. Non-Statutory: The trial court rejected the existence of non-statutory mitigating factors without discussion (R. 563). Lockett v. Ohio, supra, requires the court to consider, as a mitigating factor, 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 other than death. Eddings v. Oklahoma, supra, held that evidence of a difficult family history, including beatings, and emotional disturbance, is relevant and must be weighed. Because Eddings was young, the court held the evidence to be particularly relevant, although it might be entitled to lesser weight in other cases. But, contrary to Eddings, here the evidence was given no weight - indeed, it was not even discussed.

Non-statutory mitigating factors are sufficient to outweigh statutory aggravating factors - at least where the jury recommends life. Gilvin v. State, 418 So.2d 996 (Fla. 1982). Among the factors to be considered are defendant's potential for rehabilitation - and consequently, the likelihood of his making a proper adjustment to prison life. Simmons v. State, 419 So.2d 316 (Fla. 1982); McCampbell v. State, __ So.2d __ (Fla. 1982, 7 FLW 492). The record must show that the court at least considered the factors. Moody v. State, supra.

Notwithstanding this Court's ruling on the need for specific jury findings, the law is clear that the judge must make specific findings. That obligation extends to all aggravating and mitigating factors. A fortiori, if our statute encompasses all mitigating factors, it requires the sentencing judge to make specific findings of fact with respect to any factors in the record and to specifically weigh those factors. The issue is not whether, after proper consideration, the judge would deem the non-statutory mitigating factors not to outweigh the aggravating factors. Rather, the issue is whether the sentencing judge has met his statutory obligations. Here, he has not.

XI.

THERE IS NO BASIS TO OVERRULE THE JURY'S RECOMMENDATION FOR LIFE

Utilizing the Tedder standard, death is disproportionate. In the interest of judicial economy, rather than remand for a new sentencing, this Court should reduce defendant's sentence to life in prison without the possibility of parole for twenty-five years.

This request is based upon counsels' review of the 118 death cases decided after Dixon, up to and including decisions of October 28, 1982. Cases were reviewed if the court reached a final decision on life or death, and if it was reasonably apparent from the decision what aggravating and mitigating factors were at issue. Of the 118 cases, 86 affirmed the death penalty and 32 reduced it to

life. Examination demonstrates several common threads that harmonize the decisions. The most important one is whether the murder was "especially heinous, atrocious or cruel." Fla. Stat. §921.141(5)(h) (1981). This factor was found in 77 cases.

In 25 cases the trial judge's override of a jury recommendation for life was reversed. Of those 25 cases, only 8 involved a finding of heinousness. In 13 cases the jury override was affirmed. Of these 13, only one, Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. denied, 436 U.S. 914 (1977) lacked a finding of heinousness.

Only 15 cases have imposed a death penalty without a finding that the crime was heinous. Six involved multiple killings. Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied, 102 S. Ct. 1492 (1982); Riley v. State, 413 So.2d 1173 (Fla. 1982); Daugherty v. State, __ So.2d __ (Fla. 1982, 7 FLW 438); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Zeigler v. State, supra; Jackson v. State, 359 So.2d 1190 (Fla. 1978). One was reversed by the United States Supreme Court, Enmund v. State, 399 So.2d 1362 (Fla. 1981) rev'd, 102 S.Ct. 3368, (1982). Four others imposed the death sentence for a variety of reasons. Only one involved a jury recommendation override. Sawyer v. State, supra. The other three imposed the death sentence in agreement with the jury's recommendation of death. Meeks v. State, 339 So.2d 186 (Fla. 1976); Shriner v. State, 386 So.2d 525 (Fla. 1980); Demps v. State, 395 So.2d 501 (Fla. 1981). Each

involved far more serious conduct than evident in the case sub judice. The final three cases are different. In each, the defendant murdered a police officer. In each, the jury recommended the death penalty. The first, Songer v. State, supra, involved a defendant who was an escapee at the time of the murder and who shot a police officer to avoid apprehension. In Cooper v. State, supra, the defendant murdered a police officer while attempting to escape after a robbery. In addition, he had previously been convicted of robbery. The last, Antone v. State, supra, was a contract murder of a suspended police detective.

Two police shooting cases have not upheld the death sentence. Walsh v State, 418 So. 2d 1000 (Fla. 1982) and Jacobs v. State, supra. Significantly, both involved jury recommendations for life, and the possibility of non-statutory mitigating circumstances - even though two police officers were killed in Jacobs.

The second common thread is aggravating factor (d). In the 86 cases where the death penalty was upheld, this factor was present 61 times. In the 25 cases upholding the death penalty in the absence of this factor, 18 involved a finding that the crime was "especially heinous, atrocious or cruel". A death sentence has only been affirmed seven times in the absence of one or both these factors. Three involved multiple murders, Tafero v. State, supra, Dougherty v. State, supra, and Zeigler v. State, supra. One, Demps v. State, supra, involved the murder of one prison inmate by

another, already serving time for two other murders. Downs v. State, 386 So.2d 788 (Fla. 1980), cert. denied, 450 U.S. 922 (1981), was a contract murder for hire. So was Antone v. State, supra. The only other case to impose the death sentence in the absence of these two factors was the early case of Songer v. State, supra.

With two exceptions, mitigating factors are almost always absent when the death penalty is upheld. The mitigating factors of no prior criminal record [§921.141(6)(a)] and age [§921.141(6)(g)] seem not to matter. Other than these two factors, only four cases have upheld the death penalty where other mitigating factors may have existed. Dougherty v. State, supra, involved four murders and a weak claim to non-statutory mitigating factors. Scott v. State, 411 So.2d 866 (Fla. 1982), involved a similarly weak claim of non-statutory mitigating factors and four aggravating factors including parole status at the time of the crime, previous conviction of murder, the murder committed while engaged in a robbery, and cruelty. Quince v. State, supra, involved a finding of "substantial impairment of capacity to appreciate the criminalty of his act or to conform his conduct to the law." That factor was given little weight in view of the fact that only one of five experts believed it applicable. By contrast, there were three aggravating factors, including commission of the murder during the commission of a rape and heinousness. Only Adams v. State, 412 So. 2d 850 (Fla. 1982), upheld a death sentence, with

two justices dissenting, in the face of a finding that the murder was committed while the defendant was under the influence of extreme mental or emotional distress. Adams also involved three aggravating factors and two other mitigating factors. The aggravating factors included commission of the murder during a rape or kidnapping and an "especially heinous, atrocious or cruel" murder.

The common threads which appear in the cases upholding the death penalty are absent where the death penalty has been vacated. The existence of aggravating and mitigating factors is much more diverse. Of course, the one clear factor is the jury recommendation for life, made in 25 of the 32 cases vacating the death sentence. Thus, a life recommendation by the jury has been upheld in the face of two execution type murders in both Stokes v. State, 403 So.2d 377 (Fla. 1981), and Malloy v. State, 382 So.2d 1190 (Fla. 1979); a torture murder, Swan v. State, 322 So.2d 485 (Fla. 1975); the creation of great risk of harm to others by setting a fire to cover a murder, Welty v. State, supra; murder and attempted murder, Williams v. State, 386 So.2d 538 (Fla. 1980); two murders, Phippen v. State, 389 So.2d 991 (Fla. 1980); the murder of two police officers, Jacobs v. State, supra; the execution-style killing of a security guard, McCampbell v. State, supra; and the murder of a deputy sheriff, Walsh v. State, supra.

In light of these cases, because the jury recommended life, to permit the judge to override the recommendation would be contrary to the principles of Tedder, dispropor-

tionate to the offense committed, and constitute an arbitrary, capricious and standardless imposition of the death penalty.

XII.

THE TESTIMONY OF THE DOCTORS ON BEHALF OF THE STATE DURING THE PENALTY PHASE VIOLATED DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS AND RULE 3.211(e).

At the penalty phase, Doctors Jaslow and Herrera testified for the apparent purpose of demonstrating that Robert Patten was not suffering from extreme emotional distress and was suffering from no mental disease or defect which would limit his ability to appreciate the criminality of his act. That testimony should not have been admitted. It should not be admitted for any purposes at resentencing.

The use of Jaslow's and Herrera's testimony at the penalty phase of the trial violated the mandate of Estelle v. Smith, 451 U.S. 454 (1981). It is also expressly contrary to the confidentiality provisions of Fla. R. Crim. P. 3.211(e). Since the defendant made no use of the doctors' reports, in whole or in part, it was error to allow the doctors to testify based on their examination. Their testimony was in direct violation of the provisions of Rule 3.211(e).

The trial court, on its own motion, and at the request of the state, appointed four doctors on September 25, 1981, to examine Robert Patten for the purpose of determining his competency to stand trial. The court stated that the examination would include the question of sanity at the time

of the offense (Tr. 30). No written order was ever entered.[7/] At the time the court acted the defendant had neither requested a competency hearing or given notice of intent to rely upon the defense of insanity.

Information obtained by the examining doctors can only be used for the purpose for which it was obtained. It is not admissible for other purposes. Parkin v. State, 238 S.2d 817 (Fla. 1970), cert. denied, 401 U.S. 1189 (1971). The rule applies to sentencing proceedings, Booker v. State, 397 So.2d 910 (Fla. 1981), cert. denied, 102 S.Ct. 493 (1982). The sentencing hearing for Robert Patten did not involve the issue of competency or sanity. It involved entirely different issues of mental condition. The doctors were not appointed to conduct examinations for that purpose - their testimony on that issue was improper.

The Supreme Court in Estelle indicated that evidence flowing from compelled examinations might not violate the Fifth Amendment's prohibition against self-incrimination in two circumstances. The first is where the defendant asserts the insanity defense and introduces supporting psychiatric testimony. 101 S.Ct. at 1874. That did not happen here.

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7. No written order appears in the Record. Apparently, no such order was ever entered. The doctors examined defendant almost immediately: Dr. Jacobson and Dr. Mutter on September 28, 1981, Dr. Herrera on September 29, 1981, and Dr. Jaslow on September 30, 1981. Defendant's first indication of intent to rely on the defense of insanity was given subsequent to these examinations, as was defendant's motion for a competency hearing (R. 42).

The defendant gave notice of intent to rely on the defense of insanity but introduced no supporting evidence-the state having the burden of proof on that issue.

The second circumstance is where the defendant is given Miranda warnings and waives his right to remain silent. The record is silent with respect to whether defendant was given such warnings-and waiver cannot be presumed.

Finally, Fla. R. Crim. P. 3.210(b) and Estelle require that defense counsel be notified of proposed psychiatric examinations. Because the trial court entered no written order appointing the doctors, defense counsel had no advance notice. Nor were the doctors advised to inform defense counsel of when they proposed to examine the defendant, or told to give defendant Miranda warnings prior to their examinations.[8/] Further, defendant must be advised of the uses the state might make of the examination and warned with respect to each stage where use is possible. Battie v. Estelle, 655 F.2d 692 (5th 1981). In Battie the defendant had requested a psychiatric examination to determine his competency to stand trial and his sanity at the time of the

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8. When defense counsel learned of the appointment of the doctors, she immediately notified each doctor that she wanted to be present. By then, the examinations of Doctors Jacobson and Mutter had already occurred. The examinations of Doctors Jaslow and Herrera took place on September 30 and September 29, respectively. Defense counsel's law clerk attended both examinations. However, there was no opportunity to properly advise and prepare the defendant - in direct violation of the holding in Estelle.

commission of the crime. The state used the testimony of the examining doctors during the penalty phase in support of the imposition of the death penalty. The court pointed out the need to distinguish the different uses made of psychiatric testimony and the fact that different rules of admissibility may apply at different stages of the trial. It held that since the defense did not request the examination for purposes of the penalty phase, the defendant was entitled to Miranda warnings. In their absence, as here, the opinions of the doctors were not admissible.

Nor, in light of the Miranda violation, is the testimony of the doctors admissible in rebuttal. It might have been admissible for impeachment if the defendant testified. Harris v. New York, 401 U.S. 222 (1971). It is not admissible to impeach or rebut the doctors who testified on defendant's behalf. Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982).

The instant case is distinguishable from Hargrave v. State, ____ So.2d ____ (Fla. 1983, 8 FLW 28). Robert Patten, unlike Hargrave, did object to the state's use of the doctors (Tr. 1689 - 1691). Indeed, he specifically raised Estelle v. Smith as one ground for his objection (Tr. 1610). Moreover, while Hargrave was seeking retroactive application of Estelle, Robert Patten's psychiatric exam and trial occurred many months after the Estelle decision. Yet, the trial court, at all stages of the

proceeding, failed to accord the defendant the protection to which he was entitled. If this case is remanded for a new sentencing procedure, with or without a jury, the testimony of the two doctors should be excluded.

XIII.

SECTION 921.141 IS UNCONSTITUTIONAL ON ITS FACE AND IN ITS APPLICATION IN THAT IT IS VIOLATIVE OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, §2, §9 AND §17 OF THE FLORIDA CONSTITUTION.

A. The statutory and procedural methods for instructing the advisory jury fail to provide specific and detailed guidelines sufficient to assure that the death penalty will not be imposed in a capricious and arbitrary manner.

B. The decisions by this Court on the definition and application of aggravating and mitigating circumstances have been contradictory, vague and overbroad in their interpretation, and have failed to give specific and detailed guidance sufficient to assist the trial court in determining whether or not the death penalty should be imposed.

C. The revision of Article 5 of the Florida Constitution, effective in April of 1980, substantially reduced this Court's review of non-death penalty criminal cases, thereby depriving the court of an adequate basis for measuring the proportionality of sentences imposed.

The United States Supreme Court held in Proffitt v. Florida, 428 U.S. 242 (1976), that the Florida capital

sentencing procedures were constitutional on their face. Procedures for imposition of the death penalty will only withstand constitutional attack if they assure that the death penalty will not be imposed in an arbitrary or capricious manner. The death penalty procedures used in Florida do not provide that assurance.

In Godfrey v. Georgia, 446 U.S. 420 (1980), the Supreme Court held that Georgia had adopted such a broad and vague construction of its death statute as to violate the Eighth and Fourteenth Amendments of the United States Constitution. Accordingly, a death penalty statute may meet constitutional requirements if it has been adequately limited by judicial interpretation so that it provides clear and objective standards and specific and detailed guidance. Neither the Florida Statutes, nor the Standard Jury Instructions approved by the Court, nor the decisions construing the statutes, nor the Florida review procedures, satisfy these requirements.

In Proffitt the Supreme Court only specifically considered sections 921.141(5)(c) and (h). Aggravating circumstances (e) and (g) are so vague and overbroad as to render consistent application impossible. Aggravating circumstance (e) relates to a capital felony committed to avoid lawful arrest or to effectuate an escape from custody, and circumstance (g) involves the disruption of the lawful exercise of any governmental function or the enforcement of laws. Examination of recent cases reveals that the silencing of a

witness has been considered as giving rise to aggravating circumstances (e) and (g), Meeks v. State, supra; as giving rise only to circumstance (e), Knight v. State, supra; and as giving rise to no aggravating circumstance, Gibson v. State, 351 So.2d 948 (Fla. 1977), cert. denied, 436 U.S. 951 (1977).

Section 921.141(5)(i), added by Chapter 79-353 (1979), is unconstitutional because it makes the death sentence presumptively proper for all murders of the first degree. Premeditated and felony murders are now automatically aggravated offenses. As a result, Florida has in essence created a mandatory death sentence for all first degree murders. Such a mandatory provision is in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 17, of the Florida Constitution. Roberts v. Louisiana, 431 U.S. 633 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); Shue v. State, 366 So.2d 387 (Fla. 1978); Purdy v. State, 343 So.2d 4 (Fla. 1977), cert. denied, 434 U.S. 847 (1977); State v. Dixon, supra.

The mitigating circumstances enumerated in the statute are vague as well. The qualifying adjectives used to describe the circumstances foster an arbitrary application. Court decisions, and the Standard Jury Instructions, give virtually no guidance to the jury. Likewise, this Court's decisions have failed to give the trial court judge any detailed guidance defining aggravating and mitigating

circumstances or explaining how the balancing process is to occur.

For example, in Halliwell v. State, supra, the Court found as a mitigating circumstance the defendant's "emotional strain" at the time he beat his mistress' husband to death. But in Hargrave v. State, supra, the Court found no mitigating mental impairment, in spite of the defendant's history of "mental abnormalities."

This Court, time and time again, relying on Dixon and Proffitt, has upheld Florida's death penalty. The per curiam opinion in Zant v. Stephens, 102 St. Ct. 1856, 1857 (1982) is particularly appropriate. The Court noted that the validity of Georgia's death penalty depended on its meeting the concerns expressed in Fuman, and stated: "Our review of the statute did not lead us to examine all of its nuances." (Emphasis added.)

Here too, like Georgia, Florida now has a track record. It is time to fully examine that record in light of the death penalty standards of the United States Supreme Court. The track record, for the reasons previously indicated, does not pass.

CONCLUSION

Each section of this brief notes the precise relief requested. In summary, because the state failed to establish defendant's sanity, an acquittal is in order. The other guilt phase errors require a remand for a new trial. Finally, the penalty phase errors merit reduction of sentence to life imprisonment without possibility of parole for twenty five years. Otherwise, defendant must be resentenced, based on the jury's recommendation for life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 28th 31ST day of January, 1983, to Assistant State Attorney Arthur Berger, State Attorneys' Office, 1351 N.W. 12th Avenue, Miami, Florida and Assistant Attorney General Callianne Lantz, Attorney General's Office, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.