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IN THE SUPREME COURT OF FLORIDA

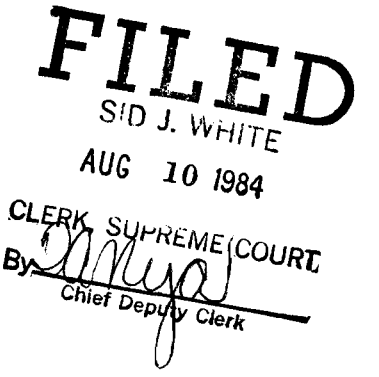
ANDREA HICKS JACKSON,

Appellant,

v. CASE NO. 64,973

STATE OF FLORIDA,

Appellee.



ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, as referred to in this brief, was the defendant below. Appellee, the State of Florida, was the prosecuting authority.

The record on appeal consists of fifteen volumes: Volumes I through IV will be referred to as "R," while Volumes V through XV will be referred to as "T."

II STATEMENT OF THE CASE AND FACTS

An indictment charged that on May 17, 1983, appellant committed murder in the first degree of Gary Bevel. (R-10). [Due to the anticipated length of this brief, the following is not intended to be a complete summary of the evidence presented at trial. Further facts of the case, as they relate to the particular issue raised, will be set forth in the appropriate section of the argument.]

On the afternoon of May 17, 1983, appellant drove her vehicle, which she purchased as is April 2nd, to the used car lot requesting that the carburetor be fixed. When the dealer refused, appellant left angry. (T-1020-1029). Around 10:00 p.m., appellant's neighbors observed her breaking the windows of her car. (T-937-939,991,1063,1083). The police were called.

Officer Bevel was the first officer to arrive and Officer Griffin arrived there shortly thereafter. (T-939-942,999). After appellant advised them that someone had destroyed the windows of her car, upon their request, appellant produced her bill of sale from her apartment. (T-1010-1012). Officer Griffin left Bevel to write out a criminal mischief report on the vehicle. (T-1013). Witnesses overheard Officer Bevel ask appellant if she wanted a wrecker called. (T-944,1053). In response to a call from Bevel and at his direction, the vehicle was towed to Rocket Motors. (T-1030-1040).

Thereafter, Officer Bevel was told by Anna Allen and her sister, Gina, that appellant had broken the windows from her car. (T-945-946,991). As Bevel approached appellant, she demanded to know where her car was. (T-948,1048,1067). Bevel then advised appellant that she was under arrest for filing a false complaint. (T-948-949,1048-1049,1067,1084). Appellant verbally and physically resisted him. (T-949-950,960,971,1050,1072,1085). Officer Bevel opened the rear door of his car and, in the continuing struggle, shoved her inside. (T-950-951,969,976-978,1068,1072). Appellant was then overheard to say "you're hurting me" and you made me drop my damned keys." (T-951,1051,1069,1075,1086). Officer Bevel appeared to move backwards and appellant then fired her gun repeatedly. (T-951,957,969,1052,1069-1070,1073, 1086). Appellant them pushed Bevel from her and ran. (T-957,981,1052,1070).

When officers arrived, Officer Bevel, who was wearing a bullet-proof vest, was observed with the upper part of his body lying on the back seat of his car. (T-1116,1146,1234). He was pronounced dead on arrival at the hospital. (T-1154). An autopsy revealed four gunshot wounds in the head, a gunshot wound on the left back and one on the right shoulder. (T-1188). Cause of death was multiple gunshot wounds to the head. (T-1192). In the opinion of the medical examiner and the firearms examiner, the wound over the right eyebrow was fired at close, if not contact, range. (T-1188,1211, 1337c-1338).

Between 1:30 and 2:00 a.m., appellant arrived at the house of Shirley Freeman. (T-1288-1289). Appellant, who had blood on her clothing which she thereafter washed, told Ms. Freeman that she had shot a cop five or six times because "she wasn't going back to jail" and since she didn't like men touching her. (T-1291-1294). Appellant had a small .22 handgun in her possession. (T-1294-1295). Appellant left the house around 3:30 to 4:30 a.m. by taxicab, apparently taking the gun with her. (T-1296-1297). Carl Lee, Jr., a taxicab driver, testified that he picked appellant up from the Freeman house. During the ride, a struggle ensued over the gun. (T-1317-1325).

Appellant was arrested around 5:00 a.m. at her husband's apartment, which had been the vicinity of the shooting. (T-1326-1327,1349-1356,1363-1364). A small caliber handgun, which ballistics testing showed fired the shots, was found in a clothes basket inside the apartment. (T-1329-1331, 1335-1337b). The trigger pull of the weapon was 6 pounds, single action and 14 pounds, double action. (T-1342).

At the close of the state's case, appellant's motion for judgment of acquittal was denied as was her renewed motion for judgment of acquittal. (T-1419,1422).

Following jury instructions (T-17-8-1733), the jury returned a verdict of guilty of murder in the first degree. (T-1740-1741).

Following the penalty phase, the jury recommended imposition of the death penalty. (T-2069, R-587). The trial judge imposed the death sentence finding as aggravation that the crime was committed to avoid arrest, that the crime was committed to hinder law enforcement, and that the crime was cold, calculated and premeditated. (R-599-607).

Notice of appeal was timely filed. (R-610).

III ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AFTER SHE ESTABLISHED AN UNREBUTTED PRIME FACIE CASE OF DISCRIMINATION AGAINST MEMBERS OF HER RACE AND SEX WITH REGARD TO THE SELECTION OF THE GRAND JURY FOREMEN EMPANELED IN DUVAL COUNTY, THEREBY VIOLATING THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant, a black female, sought to dismiss the grand jury indictment returned against her on the basis that the grand jury foreman selection process had systematically excluded blacks and women (R-116-118). Appellant contends the denial of her motion was erroneous and as a result she has been denied her Sixth Amendment right to a fair-cross-section of the community and her Fifth and Fourteenth Amendment right to a grand jury untainted by invidious discrimination.

In Castaneda v. Partida, 430 U.S. 482, 494 (1977), the Supreme Court summarized the requirements for proving an equal protection violation:

> The first step is to establish that the group is one that is a recognizable, distinct class, ... Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time . . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

To rebut such a prima facie case, the government must prove the absence of discriminatory intent. Id. at 497-98. In Duren v. Missouri, 439 U.S. 357, 364 (1979), the elements of a prima facie violation of the fair-cross-section requirement were set out:

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

In order to rebut such a prima facie case, the government must establish a

significant governmental interest justifying imbalance of classes. Id. at 367-68.

The first part of the prima facie test under Castaneda or Duren is clearly satisfied here because both black persons, Strauder v. West Virginia, 100 U.S. 303 (1879), and women, Taylor v. Louisiana, 419 U.S. 522 (1975), constitute recognizable, distinct classes. The evidence presented by appellant established a significant underrepresentation of both blacks and women as grand jury foremen.[1] The grand jury foremen selection procedure as established by Section 905.08, Florida Statutes (1981) is susceptible of abuse. See Rose v. Mitchell, 443 U.S. 545 (1979). Since appellant has satisfied the three requirements to establish a prima facie case, the burden of proof shifted to the government to rebut the presumption of unconstitutional action. Appellant submits the state failed in this burden.

Appellant is cognizant of this Court's decision in Andrews v. State, 443 So.2d 78 (Fla.1983), where testimony similar to that presented here[2] was found sufficient to rebut the presumption of discrimination. Appellant submits, however, that that conclusion should be reconsidered in light of Guice v. Fortenberry, 722 F.2d 276 (5th Cir. 1984). There, the rebutting evidence

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1 The statistical data reflected that from 1966 through the spring of 1983 there have been 848 grand jurors with a total of 37 grand jury foremen. Of those 848 grand jurors, 195 or 23% were black. Only 2 of the foremen, or 5.5% were black. Of the total, 378 or 45% were female. Only 1 of the foremen, or 2.7% were female. (R-116). The voter registration list reflected that during this period of time black voters constituted 23%. (R-397). For the time period from 1981 to 1983, women comprised 55% of the registered voters. (R-397). The 1960, 1970 and 1980 census showed women comprised 52% of the population of Duval County. (R-398). The underrepresentation of women as foremen was statistically significant at the .0001 level, one out of 10,000 chance of happening, or a binomial standard deviation of 6.0017. (R-404,408). The underrepresentation of blacks as foremen was significant at the .0256 level or a binomial deviation of 2.5436. (R-410-411). See also (R-460-465).

2 The state presented the testimony of Judges Shepard, Harding, and Richardson. (R-424-476). Each judge denied that selection of the foreman was based upon race or sex. (R-433,451,476). The criteria used included leadership ability, community involvement, and managerial experience. (R-432,451,458, 473).

consisted of the testimony of Judge Adams that he selected as foreman the individual whom he believed to be best qualified for the position, regardless of race. His selection procedure was highly subjective, and for the most part, he relied upon his personal knowledge of the qualifications of potential foremen. There was no indication of any systematic attempt to obtain objective information about the qualifications of members of the grand jury venire. In finding that this testimony was insufficient to overcome the presumption of discrimination, the court distinguishing United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982), stated:

> The record in this case, unlike Perez, shows that there were no objective criteria or guidelines under which Judge Adams operated in his selection of grand jury foremen. Although his testimony was replete with "affirmations of good faith" in the performance of his duties, it also revealed that his approach to the selection process was necessarily subjective and biases. We believe, as do our colleagues on the Eleventh Circuit, that "testimony from . . . alleged discriminators should be viewed with a great deal of judicial scrutiny." United States v. Perez-Hernandez, 672 F.2d at 1387.

Id. at 281. Here, as well, the rebuttal testimony should be held inadequate. To the extent that Andrews is based upon a conclusion that the Florida grand jury foreman is constitutionally insignificant, appellant seeks reconsideration of that issue for the reasons set forth in the dissents in Andrews and Hobby v. United States, __U.S.__ (1984)(35 Cr.L. 3185).

ISSUE II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS IN LIMINE AND MOTIONS FOR MISTRIAL AND IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF A COLLATERAL CRIME FOR WHICH APPELLANT HAD PREVIOUSLY BEEN ACQUITTED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At appellant's trial, the state introduced the testimony of Carl Lee, Jr. Mr. Lee, a taxicab driver, had picked up appellant at 4:20 a.m. on May 17th from Shirley Freeman's house for the purpose of taking her to the Southside area or to the bus station. During the ride, appellant had fallen asleep, so Mr. Lee stopped the cab. Mr. Lee then testified as follows:

> As a last resort, I went back to the shoulder and nudged again. At that time, she awoke. Her hand went into the crotch of her pants. My reaction was just to grab over and gain control of her hand. I pulled her hand out, and when I did, there was a small caliber handgun in her hand, which I took and forced into the floorboard of the car. After getting the gun into the floorboard of the car, I reached over and opened the door, got the gun out of her hand and threw it out of the car. After that, we got out of the car. I ran and picked up the gun and threw it as far as I possibly could. At that time, she ran towards the gun. I got back into the car, put it in reverse, and was backing up.

(T-1321-1322). Appellant unsuccessfully sought to preclude admission of this testimony since appellant had previously been tried as a result of the gun incident and had been found not guilty. (R-365-371, T-349-381,841-855,1324-1325). Since Mr. Lee's testimony implied the commission of a collateral offense for which appellant had been acquitted, the admission of such testimony was prejudicially erroneous.

In State v. Perkins, 349 So.2d 161 (Fla.1977), this Court reviewed the decision of the Fourth District Court of Appeal in Perkins v. State, 332 So.2d 649 (Fla. 4th DCA 1976), which had held that the admission of evidence of crimes for which a defendant has been acquitted is barred from admission into evidence under the guarantee against double jeopardy in the Fifth Amendment to the United States Constitution. While disagreeing with this holding of the Fourth District, this Court, relying in part upon Wingate

v. Wainwright, 464 F.2d 209 (5th Cir. 1972) and Blackburn v. Cross, 510 F.2d 1014 (5th Cir. 1975), held that notions of fundamental fairness required the exclusion of evidence of acquitted crimes. This Court noted:

> We agree with Wingate that it is fundamentally unfair to a defendant to admit evidence of acquitted crimes. To the extent that evidence of the acquitted crime tends to prove that it was indeed committed, the defendant is forced to reestablish a defense against it. Practically, he must do so because of the prejudicial effect the evidence of the acquitted crime will have in the minds of the jury in deciding whether he committed the crime being tried. It is inconsistent with the notions of fair trial for the state to force a defendant to resurrect a prior defense against a crime for which he is not on trial. Therefore, we hold that evidence of crimes for which a defendant has been acquitted is not admissible in a subsequent trial.

State v. Perkins, supra at 163-164. Accord, Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984); United States v. Keller, 624 F.2d 1154 (3d Cir. 1980); United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979); State v. Little, 350 P.2d 756 (Ariz. 1960); Asher v. Commonwealth, 324 S.W.2d 824 (Ky. 1959); People v. Milano, 399 N.Y.S. 2d 226 (1977); State v. Holman, 611 S.W.2d 411 (Tenn. 1981); State v. Kerwin, 340 A.2d 45 (Vt. 1975). See also, State v. Wakefield, 278 N.W.2d 307, 308-309 (Minn. 1979), where the Minnesota Supreme Court noted:

> The general judicial hostility toward evidence of other crimes is well known and justifiable.
>
> * * *
>
> Restricted categories and procedural safeguards, however, do not eliminate prejudice to the defendant nor free him from the necessity to defend against such evidence. We can find no justification for requiring a defendant to bear these burdens when, as here, he has been tried and acquitted of the other charge. . . . [I]t is a basic tenet of our jurisprudence that once the state has mustered its evidence against a defendant and failed, the matter is done. In the eyes of the law the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime. It is our view that the admission into a trial of evidence of crimes of which the defendant has been acquitted prejudices and burdens the defendant in contravention of this basic principle and is fundamentally unfair. Therefore, we conclude that under no circumstances is evidence of a

> crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that other offense.

[Emphasis supplied].

Under the foregoing cases, Carl Lee's testimony concerning the struggle over the gun should not have been admitted into evidence since appellant had previously been acquitted of these crimes. Appellant must be awarded a new trial.

ISSUE III

THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR MISTRIAL WHEN TESTIMONY INFERRING PRIOR CRIMINAL CONDUCT ON THE PART OF APPELLANT WAS IMPROPERLY INTRODUCED AT HER TRIAL, THEREBY DEPRIVING HER THE FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Florida law has consistently deemed inadmissible evidence tending to show that the accused was arrested, suspected, charged, or convicted of crimes for which the accused was not on trial, the theory being that a jury is bound to be unfairly prejudiced against the accused by reason of their knowledge of the unrelated crime. Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977). Accord, Kelly v. State, 371 So.2d 163 (Fla. 1st DCA 1979); Harmon v. State, 394 So.2d 121 (Fla. 1st DCA 1980); Clark v. State, 337 So.2d 858 (Fla. 2d DCA 1976); Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973). This prohibition also stems from the fundamental principle that unless a defendant has first chosen to place his good character in issue, the state is not permitted to attack his character. E.g., Jordan v. State, 171 So.2d 418 (Fla. 1st DCA 1965); Andrews v. State, 172 So.2d 505 (Fla. 1st DCA 1965); Layton v. State, 348 So.2d 1242 (Fla. 1st DCA 1977); Roti v. State, 334 So.2d 146 (Fla. 2d DCA 1976); Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977); Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979); Wilt v. State, 410 So.2d 924 (Fla. 3d DCA 1982); Perez v. State, 434 So.2d 347 (Fla. 3d DCA 1983).

In Mann v. State, 22 Fla. 600, 606-607 (1886), the Supreme Court explained the rationale of this prohibition as follows:

> It is a well settled rule of law that the prosecution cannot call witnesses to impeach the character of the defendant unless the defendant put it in issue. Particular acts of his, or commission of other crimes in no way related to the one on trial, cannot be proved against him. Evidence of the bad character of the defendant, as a foundation

> upon which to raise the presumption of guilt in the particular case, is not permitted. Every case must be tried on its own merits, and be determined by the circumstances connected with it, without reference to the character of the party charged, or the fact that he may be suspected of having been guilty of committing other crimes than the one charged.
>
> * * *
>
> It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English speaking people that you cannot blacken the character of a party who is on trial for alleged crime. Prisoners ordinarily come before the court and jury under manifest disadvantages....It is quite inconsistent with the fairness of trial to which every man is entitled that the jury should be prejudiced against him by any evidence except what relates to the issue; above all, should it not be permitted to blacken his character to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care.

"Those fundamental principles of law laid down in 1886 are as applicable today as they were at the time they were rendered and are necessary to give credence to the constitutional presumption of innocence..." Jordan v. State, supra at 422.

Appellant contends she is constitutionally entitled to a new trial because evidence of other crimes, relevant only to disparage her character and to show propensity to commit crimes, was introduced at her trial, thereby denying her the right to a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution. Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981); United States v. Alphonso, 552 F.2d 605 (5th Cir. 1977).

The state presented the testimony of Shirley Ann Freeman. Ms. Freeman testified that in the early morning hours of May 17th, appellant arrived at

her house and told her that she had shot a police officer. (T-1287-1292). Ms. Freeman testified that appellant had stated that she shot the officer because "she wasn't going back to jail." (T-1292). Appellant objected to the improper inference that appellant had been in jail before, requested a mistrial, and requested a curative instruction, all of which were denied. (T-1293-1294). Since the fact that appellant had previously been in jail was not relevant to any issue involved here, and even assuming any relevance, since the prejudicial effect of this testimony outweighed its probative value, Section 90.403, Florida Statutes (1981), the erroneous admission of this prejudicial evidence requires a new trial.

In Bates v. State, 422 So.2d 1033 (Fla. 3d DCA 1982), a police officer testified that the victim had told him that the accused had stated to her that he had been in prison before. The court reversed indicating that the state may not impugn the character of an accused unless the accused first puts his character into issue at trial. The court held the defendant's mistrial motion should have been granted and indicated that the error was not cured by the trial judge's curative instruction. In Chapman v. State, 417 So.2d 1028 (Fla. 3d DCA 1982), reversal of the defendant's conviction was ordered where witnesses "alluded" to prior crimes committed by the defendant, although such crimes were not specifically identified. In Harris v. State, 427 So.2d 234 (Fla. 3d DCA 1983) a police officer testified that the defendant had a "prior felony past." In concluding that the trial court committed reversible error in denying the defendant's motion for mistrial, the court noted that the testimony was "utterly inadmissible" as its sole relevance was to attack the defendant's character or to show his propensity to commit crime. Further, the court noted:

> [T]he presentation before a jury of testimony inadmissible, as here,...has generally been considered classic grounds for a mistrial given its usual devastating impact upon a jury.

Id. at 234.

The fact that the reference to prior crimes was in the form of an admission by the defendant does not render the testimony relevant. In Jackson v. State, __So.2d__ (Fla. 1984) [9 FLW 175], a state witness, Dumas, testified about an occasion when Jackson had pointed a gun at him and boasted of being a "thoroughbred killer" from Detroit. In finding that this testimony was impermissible and prejudicial, this Court noted:

> Likewise the "thoroughbred killer" statement may have suggested Jackson had killed in the past, but the boast neither proved the fact, nor was that fact relevant to the case sub judice. The testimony is precisely the kind forbidden by the Williams rule and Section 90.404(2). As the Third District Court of Appeal said in Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert.denied, 348 So.2d 953 (Fla. 1977):
>
> > [t]here is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

Id. at 176. Accord, Dillman v. State, 411 So.2d 964 (Fla. 3d DCA 1982); Curry v. State, 355 So.2d 462 (Fla. 2d DCA 1978).

The testimony presented here clearly inferred prior criminal conduct on appellant's part and denied her the right to a fair trial. The prejudicial impact of this improper testimony was exacerbated by the prosecutor's repeated references to it in his closing arguments. (T-1590,1612,1613,1647). A new trial must be awarded.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENTS OF ACQUITTAL SINCE THE EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO ESTABLISH MURDER IN THE FIRST DEGREE.

The state's case of first degree murder rested upon alternate theories of either premeditated murder or first degree felony-murder -- a killing in the course of an escape. At the close of the state's case and at the close of all the evidence, appellant moved for a judgment of acquittal asserting insufficient proof of premeditation and insufficient proof of an escape. (T-1383-1397,1412-1416,1418-1419,1422). Appellant's motions were erroneously denied.

A. Felony-Murder -- (Escape).

Section 944.40, Florida Statutes (1981) defines the offense of escape as follows:

> Any prisoner confined in any prison, jail, road camp, or other penal institution, state, county, or municipal, working upon the public roads, or being transported to or from a place of confinement who escapes or attempts to escape from such confinement shall be guilty of a felony of the second degree. . . .

In Ramsey v. State, 442 So.2d 303 (Fla. 5th DCA 1983), review granted Case No. 64,776, the court held, upon facts analogous to those herein, that the offense of escape had not been committed. Mr. Ramsey was stopped for several traffic violations. While writing up the citations, the deputy learned that there were outstanding capiases for Mr. Ramsey. Ramsey was informed of the capiases, placed under arrest, and instructed to put his hands on the trunk of the patrol car. Ramsey then turned around and said, "No way!" and ran from the scene. The Fifth District concluded Ramsey could not be guilty of the offense of escape since the evidence did not show that he was "being transported to . . . a place of confinement." In rejecting the State's contention that the fact that Ramsey was a prisoner in lawful custody at the time he departed was sufficient to constitute an escape, the court noted:

> If section 944.40 were intended to encompass situations such as the one before us, then the legislature would have provided in the statute that any prisoner who escapes from lawful arrest is guilty of escape. This it did not do. Instead, it required that the escape, in order to come within the confines of the statute, occur while the prisoner is being transported. It follows then that the legislature intended to punish conduct other than fleeing from the custody of an arresting officer. Interpreting the statute in this way, the question as to when the "transportation" of a prisoner begins becomes an important one and is normally a factual issue to be determined by the jury. Here, however, the facts were not in dispute. Ramsey had not been handcuffed, had not been placed in the police car and the officer had not announced that he was taking him to jail. As a result, transportation of the prisoner had not yet begun.
>
> * * *

Id. at 304-305.

The evidence at trial showed that Officer Bevel had advised appellant that she was under arrest for filing a false report. (T-948,1048,1067,1084, 1100). Appellant had been told to get into the patrol car and had been partially shoved into the back seat. (T-949,951,1068-1069,1085,1102-1104). As in Ramsey, the facts, however, did not reveal that appellant was "being transported to a place of confinement" at the time of the shooting. At most, the facts established only a resistance to arrest rather than an escape. Since the evidence was thus legally insufficient to establish escape, the trial court reversibly erred in denying appellant's motions for judgment of acquittal on this ground and further erred by instructing the jury on felony-murder (escape). (T-1430-1431,1711-1713,1735). Since appellant's request for a specific verdict was denied (T-1502), it is impossible to determine whether the jury's general verdict was based upon the improper finding that the death occurred during the commission of an escape. For that reason, appellant's murder conviction must be reversed and remanded for a new trial where the jury is properly instructed. Stromberg v. California, 283 U.S. 359 (1931); Sandstrom v. Montana, 442 U.S. 510 (1979).

B. Premeditation.

In Sireci v. State, 399 So.2d 964, 967 (Fla.1981), the Court defined premeditation as follows:

> Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Weaver v. State, 220 So.2d 53 (Fla. 2d DCA), cert. denied, 225 So.2d 913 (1969). Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Hernandez v. State, 273 So.2d 130 (Fla. 1st DCA) cert. denied, 277 So.2d 287 (1973). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence of absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. Larry v. State, 104 So.2d 352 (Fla.1958).

Moreover, premeditation is something more than an intent to commit a homicide. Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980). More than an intent to kill must be demonstrated in order to establish premeditation. Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983).

While premeditation may be proved by circumstantial evidence, Spinkellink v. State, 313 So.2d 666 (Fla.1975), the Court recently noted in Brumbley v. State, __So.2d__ (Fla.S.Ct. No. 56,006, opinion filed June 14, 1984) (1984 F.L.W. 239) that where, as here, premeditation is sought to be proved by circumstantial evidence, that evidence must not only be consistent with premeditation, but must also be inconsistent with any reasonable hypothesis that there was not premeditation. Appellant contends the evidence presented here failed to establish to the exclusion of a reasonable doubt that a "purpose to kill was definitely formed and definitely acted upon an appreciable length of time prior to the commission of the act which resulted in the taking of human life." Forehand v. State, 126 Fla. 464, 469, 171 So. 241 (1936).

In Forehand v. State, supra, the defendant was charged with first-degree

murder arising from the death of Pledger, a deputy sheriff, during a quarrel outside a nightclub. Prior to the homicide, the defendant and several others had been involved in a fight. The murder occurred when Pledger attempted to remove the defendant and his brother from the area. The defendant struck Pledger in the fact, Pledger returned the blow with a blackjack, and in the ensuing struggle, the defendant seized a pistol from Pledger and fired it four or five times. Noting the rule in Whidden v. State, 64 Fla. 165, 59 So. 561 (1912), the Court stated:

> [A] well defined purpose to kill may be induced, compelled or constrained by anger of such degree as for the moment to cloud the reason and momentarily obscure what might otherwise be a deliberate purpose by its impelling influence . . . .
>
> * * *
>
> As the element of premeditation is an essential ingredient of the crime of murder in the first degree it is necessary that the fact of premeditation uninfluenced or uncontrolled by a dominating passion sufficient to obscure the reason based upon an adequate provocation must be established beyond a reasonable doubt before it can be said that the accused was guilty of murder in the first degree as defined by our statute.

Forehand v. State, supra, 126 Fla. at 469, 471. This Court held that the evidence was not legally sufficient to exclude a reasonable doubt as to the existence of a premeditated design to take the life of Pledger since the facts suggested the possibility of "the presence of a blind and unreasoning passion which momentarily obscured the reason of the accused and displaced any capacity to form a premeditated design to kill Pledger." Id., 126 Fla. at 472. Accord, Tien Wang v. State, supra; Clay v. State, 424 So.2d 139 (Fla. 3d DCA 1983).

The evidence showed that prior to the arrival of the officer, appellant was extremely upset with her car. (T-963-965,1042,1091-1092). From the time Bevel announced that appellant was under arrest until the shooting, there had been a continuous struggle. (T-950-951,976-978,1050-1051,1072, 1085). As in Forehand, the evidence here is as consistent with the hypo-

thesis that appellant acted in the heat of passion as it is with the hypothesis that she acted with a premeditated design. For that reason, appellant's conviction must be reduced to one for second-degree murder.

ISSUE V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, OVER APPELLANT'S OBJECTIONS, AS TO THE PRINCIPLES OF SELF-DEFENSE WHERE THAT AFFIRMATIVE DEFENSE WAS NOT RAISED BY APPELLANT AND WHERE THE EFFECT OF THAT INSTRUCTION WAS TO NULLIFY THE DEFENSE PRESENTED AND TO VITIATE THE APPELLANT'S PRESUMPTION OF INNOCENCE, IN VIOLATION OF THE RIGHTS TO TRIAL BY JURY AND DUE PROCESS OF LAW, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

From the commencement of the trial, appellant made clear her intent to rely, as her defense, upon the inadequacy of the state's proof of first degree murder. (T-910-911). See Wright v. State, 363 So.2d 617 (Fla. 1st DCA 1978) (recognizing historic right to rely as a defense upon inadequacy of the state's proof). Although the affirmative defense of justifiable use of deadly force was never interposed and although the evidence did not, in fact, support it,[3] over repeated defense objections (T-1462-1482,1487-1491,1535-1540,1653-1666,1704,1735,2078-2080), the trial judge instructed the jury on this inapplicable defense (R-546-548, T-1717-1721). Since the instructions were not based upon facts in proof, and since these misleading instructions tended to induce the jury to believe that appellant was obligated to raise some affirmative defense and that if this defense were not proven, appellant had no defense at all, prejudicial error was committed.

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[3] Even the prosecutor recognized this:

> I know why they don't want it, the instruction clearly points out she wasn't in self-defense, but I think the State has a right to the instruction.

(T-1463)

In Hopson v. State, 127 Fla. 243, 168 So. 810 (1936), the giving of an instruction on self-defense was held to constitute reversible error. The defendant therein was charged with the offense of assault with intent to commit murder in the first degree. His defense was predicated upon his claim that the shooting was accidental and unintentional, i.e., excusable. Although there was no evidence supporting the theory that the defendant shot his wife in self-defense, the jury was charged on the law of self-defense. This Court held that the giving of a charge not applicable to the facts in evidence constituted reversible error, noting:

> It is well settled in this, and other, jurisdictions that, "Upon the trial of a case at law in the several courts of this State, the judge presiding upon such trial should charge the jury only upon the law of the case, that is, upon some point or points of law arising in the trial of the cause." Sec. 2696 R.G.S., 4363 C.G.L.
>
> In the case of Bradley v. State, 82 Fla. 108, 89 Sou. 369, we held: "Charges of the court must be based upon facts in proof, and if not so based upon the facts in proof, it is error to give them, and the court below erred in giving the quoted charge,". . . .
>
> In Hisler v. State, 52 Fla. 30, 42 Sou. 392, we held: "Charges which state correct abstract propositions of law should not be given to a jury when they are not applicable to the facts of the case being tried."

Id. 127 Fla. at 245-246. See also, People v. Wright, 232 N.Y.S.2d 767 (1962); State v. Pendry, 227 S.E.2d 210 (W.Va. 1976); State v. Bennett, 203 S.E.2d 699 (W.Va. 1974). Here, as in Hopson, since the facts did not support self-defense and since appellant did not claim the shooting was in self-defense, the giving of these instructions were likewise erroneous. The error here is also analogous to that in Johnson v. State, 55 Fla.46, 46 So.154 (1908). The defendant therein was convicted of murder in the first degree and was sentenced to death. He had denied that he had been present at the time of the killings, but had not interposed an alibi defense. Over the

defendant's objection, the prosecutor had argued to the jury:

> The defendant has not accounted for himself from the time he left the home of William Davis, up to 2:30 o'clock that night. An alibi is a good defense if properly connected so as to satisfy the jury of the whereabouts of the defendant, but there is a great break in the pretended alibi.

Id., 55 Fla. at 50. In reversing for a new trial, this Court noted that since an alibi defense had not been raised by the defendant, the prosecutor's argument was highly improper. See also, Bayshore v. State, 437 So.2d 198 (Fla. 3d DCA 1983) (prosecutor's argument concerning defendant's failure to call father as alibi witness prejudicial error "because the whole issue of alibi was raised by the state" and "the prosecutor's comments may have led the jury to believe that appellant had the burden of proving his innocence". Id. at 199-200).

Since the improper instructions tended to denigrate appellant's defense and unconstitutionally inferred that appellant had the burden to establish her innocence, a new trial is required.

ISSUE VI

APPELLANT WAS DEPRIVED OF HER RIGHT TO A FAIR TRIAL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE REPEATED IMPROPER, INFLAMMATORY ARGUMENTS MADE BY THE PROSECUTOR.

During his closing arguments at both the guilt and penalty phases of the trial, the prosecutors repeatedly made blatantly illegitimate comments and prejudicial appeals to the jury. Taken as a whole, the egregious prosecutorial misconduct so infected the proceedings as to deny appellant due process of law, depriving her the constitutional rights to a fair trial and to an impartial jury. United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2d Cir. 1973); Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983); Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983). Although a prosecutor is permitted wide latitude in closing argument, the litany of prosecutorial anathema prejudicial to appellant employed here far exceeded acceptable norms of decency in prosecution and fairness in presentation.

Prosecutorial improprieties "beg[a]n at the beginning" of the guilt phase arguments and went on "to the end"[4] of the penalty phase, virtually unrestrained by the trial judge. Within his opening breath, the prosecutor argued:

> [W]e're here today . . . because the crime of first degree murder . . . has been committed. And our society and government under which we live demands protection for people like patrolmen, police officers.

(T-1588). Appellant's objections, request for a curative instruction, and motion for mistrial were denied (T-1588-1589), and the prosecutor continued:

> Our society and government under which we live demands protection for people like patrolmen, Police Officer

[4] Lewis Carroll, Alice's Adventures in Wonderland, ch. 11, "'Where shall I begin, please your Majesty?' he asked. 'Begin at the beginning,' the king said, gravely, 'and go on til you come to the end: then stop.'"

> Gary Bevels, who would be gunned down by people like the Defendant in this case, and their most precious and private possession, their lives, taken as a result of the clear criminal act of the Defendant.

(T-1590). That these arguments were improper is unquestionable.

Caselaw firmly establishes that arguments to the jury to determine guilt or innocence, not based upon the evidence presented, but for its symbolic value as a message to the criminal community regarding violence is so egregious that reversal is compelled. E.g., Russell v. State, 233 So.2d 154, 155 (Fla. 4th DCA 1970) (prosecutorial argument that "he should be made to pay for that crime because if we don't have that, we are going to have a breakdown in society and we are going to have people getting stabbed all over Orange County" highly prejudicial); Simmons v. Wainwright, 271 So.2d 464, 465-466 (Fla. 1st DCA 1973) (prosecutorial argument that "And this is where it stops, right in this Courtroom -- tell Charlie Simmons and the rest of that roguey bunch down there -- gang would be a better word -- to stay out of this county, go out of here, and convict him today on all four charges" highly inflammatory); Reed v. State, 333 So.2d 524, 525 (Fla. 1st DCA 1976); McMillian v. State, 409 So.2d 197, 198 (Fla. 3d DCA 1982) (prosecutorial argument that "if you want to let Larry McMillian walk out of here, if you want to let this kind of horrible crime go on in Dade County, Florida" prejudicial error); Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982) (prosecutorial argument referring to crime on the rampage in community condemned); Hines v. State, 425 So.2d 589, 591 (Fla. 3d DCA 1983) (prosecutorial argument that "I am asking you to tell the community that you are not going to tolerate the violence that took place in Sewer Beach" reversible error); Salazar-Rodriguez v. State, 436 So.2d 269, 270-271 (Fla. 3d DCA 1983) (prosecutor's argument that "if you all condone what happened in Hialeah on September 22, 1981, well there is the front door. You can all walk them right through that front door" error); Perdomo v. State, 439 So.2d 314 (Fla. 3d DCA 1983). The prosecutor's argument herein is likewise inflammatory

since it sought to incite the fears of the jurors for the safety of their community, e.g., Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968); Russell v. State, supra; Smith v. State, 273 So.2d 414 (Fla. 2d DCA 1973); Porter v. State, 347 So.2d 449 (Fla. 3d DCA 1977); Sims v. State, 371 So.2d 211 (Fla. 3d DCA 1979); Gomez v. State, 415 So.2d 822 (Fla. 3d DCA 1982), and improperly focused the jury's attention upon facts far beyond the scope of the issues being tried. See Washington v. State, 343 So.2d 908 (Fla. 3d DCA 1977).

The prosecutor's inflammatory tactics then shifted to vitrolic attacks upon the defense. The prosecutor argued:

> Their job is to represent the Defendant. But, I submit to you, ladies and gentlemen, that they have completely failed in their desperate attempt to show you any kind of doubt, whatsoever, that this Defendant is guilty of murder in the first degree.
>
> * * *
>
> [T]he Defense finally has done their job, but I submit to you they have completely failed to show any type of doubt, whatsoever, that the Defendant is in fact, guilty of premeditated and felony murder, murder in the first degree.

(T-1592-1593). Appellant's timely objection and motion for mistrial were denied. (T-1592-1593). Subsequently, in the guilt phase argument, the prosecutor reiterated the same theme:

> They've had a very difficult chore in this case. They've tried to make a silk purse out of a sow's ear.--

(T-1668-1669). Appellant's motion for mistrial was again denied. (T-1670). [See also (T-2013), where, during penalty phase, prosecutor again disparaged defense counsel -- "They will confuse you, but they don't do anything to clarify what your job is under our system of justice"].

Arguments which tend to cast aspersions on the motives and tactics of defense counsel have been repeatedly condemned as highly improper as well as unethical. E.g., Adams v. State, 192 So.2d 762 (Fla. 1966); Reed v. State, supra; Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977); Carter v. State,

356 So.2d 67 (Fla. 1st DCA 1978); Melton v. State, 402 So.2d 30 (Fla. 1st DCA 1981); Cooper v. State, 413 So.2d 1244 (Fla. 1st DCA 1982). The prosecutor's arguments were particularly egregious in that they improperly conveyed to the jury that appellant had the burden to come forward with a defense and prove her innocence. See Gilbert v. State, 362 So.2d 405 (Fla. 1st DCA 1978); Dixon v. State, 430 So.2d 949 (Fla. 3d DCA 1983); Bayshore v. State, 437 So.2d 198 (Fla. 3d DCA 1983). Due process requires that the state bear the burden of establishing beyond a reasonable doubt every fact necessary to constitute the crime with which a criminal defendant is charged. In re Winship, 397 U.S. 358 (1970). There is absolutely no duty imposed upon a defendant to prove his innocence, Mabery v. State, 303 So.2d 369 (Fla. 3d DCA 1974), but rather he has the historic right to rely for a defense on the inadequacy of the state's proof. Wright v. State, 363 So.2d 617, 620 (Fla. 1st DCA 1978). Appellant's motions for mistrial should have been granted since the prosecutor's misstatement of law unfairly may well have tipped the scales against appellant.

The prosecutor's prejudicial oratory culminated at the penalty phase of the trial. Since these deliberate, extensive, and highly prejudicial remarks deprived appellant the right to have the question of the appropriate penalty to be imposed upon her determined in a fair and impartial manner, free from prejudicial and inflammatory statements, her death sentence must be reversed so that she can be afforded the fair and impartial determination of this issue to which she is constitutionally entitled. Teffeteller v. State, 439 So.2d 840 (Fla.1983); Singer v. State, 109 So.2d 7 (Fla.1959); Pait v. State, 112 So.2d 380 (Fla.1959); Grant v. State, 194 So.2d 612 (Fla. 1967); Hance v. Zant, supra; Brooks v. Francis, supra.

The prosecutor made a blatant appeal to the sympathy of the jury for the victim by displaying to them a photograph of the victim in life in juxtaposition with an unduly gruesome facial photograph of the victim taken

at the morgue (Exhibit 20) while arguing "that's what she did." (T-1990-1991). Such an appeal to the emotions and sympathies of the jury, not relevant to any of the aggravating circumstances on which the jury was to be instructed, is clearly prohibited. Singer v. State, supra; Breniser v. State, 267 So.2d 23 (Fla. 4th DCA 1972); Knight v. State, 316 So.2d 576 (Fla. 1st DCA 1975); Harper v. State, 411 So.2d 235 (Fla. 3d DCA 1982); Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983). The prosecutor's misconduct also included flagrant misstatements of law. In arguing against a finding of the amply supported nonstatutory mitigating circumstances, Mr. Austin, no stranger to penalty phase proceedings, asserted:

> If you take Andrea Hicks Jackson's character in its totality and apply all of the law and all of the evidence that you've got in the trial to her character in its totality, you would find that it is an aggravating circumstance and not a mitigating circumstance. We've proved her character, and we've proved it bad beyond a reasonable doubt. And we've proved it, finally, beyond the exclusion of a reasonable doubt--

(T-2004). As Mr. Austin well knew, since, in a maneuver reminiscent of Howard Cosell or Louis Farrakhan, he immediately denied saying it when caught, Florida law explicitly provides that "[t]he aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose," Miller v. State, 373 So.2d 882, 885 (Fla.1979) and unquestionably condemns use of the absence of a mitigating circumstance as aggravation, Pope v. State, 441 So.2d 1073, 1078 (Fla.1984). Accord, Purdy v. State, 343 So.2d 4 (Fla.1977); Mikenas v. State, 367 So.2d 606 (Fla.1979); McCampbell v. State, 421 So.2d 1072 (Fla.1982); Drake v. State, 441 So.2d 1079 (Fla.1984). Additionally, the prosecutor repeatedly sought to improperly limit the scope of mitigating circumstances. (T-1997-1999,2011). See Mines v. State, 390 So.2d 332 (Fla.1980). Misstatements of law by prosecutors are clearly prejudicial. Pait v. State, supra; Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983).

Prosecutorial improprieties reached their apogee in the repeated ex-

hortations to impose the death penalty, not based upon arguments relevant to statutory aggravating circumstances, but rather based upon the fact that the victim was a police officer and that society owes a special duty to protect policemen in general. The prosecutor argued:

> Gary Bevel was a policeman. I submit to you, the Legislation put two similar aggravating factors, escape from custody to prevent a lawful arrest and to interfere with law enforcement, because law enforcement people, policemen, are put on that street as point men for society, and they're entitled for this kind of protection by the law. You can consider their total role in government of going out and enforcing the laws, and someone trying to escape from them, and consider that, and consider both of those aggravating factors, and give them both great weight.
>
> I submit to you that killing a police officer . . . is enough to outweigh all of these mitigating factors, if they all exist, and none of them do, but that one of taking the life of the point man for self-satisfaction --
>
> * * *
>
> Did it to disrupt governmental function? You heard the Sheriff testify what it did. Every police car, hundreds out there rushing around to the scene, trying to help out a calling comrade.
>
> You've got about a hundred out there missing in an 804 square miles at one time, almost 600,000 people at any one time. And when something happens to one, it disrupts all of them at that moment.
>
> Then rushing to the hospital, them leaving, the police trying to find out what happened to our comrade, fellow police officer.
>
> The next day, the marshalling for ceremony, and then the long-range factor: Apprehension when you get up to a car, everytime you get up to a car, "I'm going to get killed." Everytime you interview someone, "Am I in jeopardy?" The awful part of going, leading your life, leaving your family -- . . . Even interfering with your personal life, for goodness sakes.
>
> Governmental function, long-range effect when you kill a police officer, a man. Society -- determined to be order out there, to be able to go about your business, freedom, society determines we are to be represented by that policeman shot six times in the head needlessly, senselessly, wantonly, evilly.

[Emphasis supplied] (T-1979-1981).

> But, I'll repeat, and this is not backtracking, what I just said is not backtracking at all, but if you found one or two or three, and you find that Gary Bevel was shot -- Patrolman Gary Bevel was shot in the head six times, no pretension of any moral justification, in cold blood by a woman who merely didn't want to take a ride down to the police station, lawful arrest, all right, which you've already determined, if you find that those things happened that could, in Jacksonville, Florida, intrude on the conscience of this community, it would be enough for recommendation of death for this woman, if with all of the mitigating factors, you can say this outweighs it because we're not going to have it.

[Emphasis supplied] (T-2008).

* * *

> That set of facts cries out that it is to be vindicated, society is right to stand behind Patrolman Gary Bevel. Society -- as I said before, you know, police officers have a special duty. I think you have a right to take note of it in deliberating in the case. Society must have them, at least, present to have order. Without that thin line of blue out there that we talk about, a hundred policemen, 840 square miles, 600,000 people, a hundred men that society's determined to be -- to be free from fear and have the orderly society --

* * *

> And when you strike one of them down, senselessly, needlessly, wantonly, willfully, intentionally, with all meanness that this woman manifested, the only appropriate, the only way society can show its outrage for that act is to recommend a sentence of death in the case, ladies and gentlemen.

[Emphasis supplied] (T-2014-2015). The foregoing arguments were undoubtedly improper and highly prejudicial.

The underlying theme of the prosecutor's emotional pleas was that death should be imposed based solely upon the non-statutory aggravating circumstance that the victim was a police officer. See Miller v. State, supra. The prosecutor's arguments improperly played upon the fears of the jury concerning the safety of their community and the danger of crime in general. E.g., Chavez v. State, supra; Russell v. State, supra; Smith v. State, supra; Porter v. State, supra; Sims v. State, supra; McMillian v. State, supra; Harris v. State, supra; Gomez v. State, supra; Hines v.

State, supra; Salazar-Rodriguez v. State, supra; Perdomo v. State, supra; Tefteller v. State, supra. The remarks also tended to cause subjective identification with the crime and the victim on the part of the jurors, which have been consistently condemned and found to constitute reversible error as destroying the right to a fair trial. E.g. Barnes v. State, 58 So.2d 157 (Fla.1952); Adams v. State, supra; Grant v. State, supra; Lucas v. State, 335 So.2d 566 (Fla. 1st DCA 1961); Wheeler v. State, 425 So.2d 109 (Fla. 1st DCA 1983); Bullard v. State, 436 So.2d 962 (Fla. 3d DCA 1983). In short, the remarks made here totally deprived appellant her right to a fair trial on the penalty issue. Due to the repeated instances of prosecutorial misconduct here, appellant must be awarded a new trial or a new penalty hearing.

ISSUE VII

THE TRIAL COURT PREJUDICIALLY ERRED IN OVERRULING APPELLANT'S REPEATED OBJECTIONS TO THE TESTIMONY OF SHERIFF DALE CARSON SINCE THAT TESTIMONY WAS NOT RELEVANT TO ANY STATUTORY AGGRAVATING CIRCUMSTANCE, AND THEREFORE RENDERED APPELLANT'S PENALTY PHASE HEARING VIOLATIVE OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 921.141(5)(g) establishes as an aggravating circumstance that "the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." This circumstance is applicable only where the offender's motive at the time of the killing was the disruption or hindrance of the lawful exercise of government or law enforcement. State v. Dixon, 283 So.2d 1, 9 (Fla.1973). Cf., Phippen v. State, 389 So.2d 991 (Fla.1980) (finding that murders were committed for pecuniary gain patently erroneous where no evidence indicating defendant murdered his parents to relieve himself of credit card debt); Simmons v. State, 419 So.2d 316 (Fla.1982) (finding that murder was committed for pecuniary gain improper even though evidence showed a possible expectation of monetary benefit since there was not sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt); Menendez v. State, 368 So.2d 1278 (Fla.1979) (finding that murder was committed for the purpose of avoiding or preventing a lawful arrest requires, at least where victim is not a law enforcement officer, a clear showing that the dominant or only motive for the murder was the elimination of witnesses); Armstrong v. State, 399 So.2d 953 (Fla.1981) (proof of requisite intent to avoid arrest and detection must be very strong). During the sentencing portion of this trial, over appellant's repeated and vehement objections and motions for mistrial (T-1812-1816,1827,1828,1830,1832-1833,1835,1836-1837,2084-2087), the trial court allowed the state to introduce the testimony of Sheriff Dale Carson for the purported purpose of showing the aggravating circumstance of Section 921.141(5)(g). Sheriff Carson testified as

follows:

Q Sheriff, what is the population of Duval County; do you know?
A It runs between 650 to 600,000, along in there. (sic)
Q Between 550 or 600?
A Along in there; yes, sir.
Q What are the square miles; do you know?
A 840.
Q 840 square miles? Sheriff Carson, how many uniform patrolmen do you have employed in the Sheriff's Department?
A 759.

* * *

Q Sheriff, how many -- do you know how many uniform patrolmen were on duty between the hours of 11:30 p.m. and 12:30 a.m. -- 12:30 being on May the 17th, 1983, would you be able to tell me how many patrolmen were on duty at that time?
A There were a hundred and one on duty after midnight on May the 17th, and prior to that, we had about the same number, plus 24 other officers. So, at the time of the -- of the crime, it was a hundred and one patrolmen, a hundred and one uniformed officers.
Q I see. They were patrolling 840 square miles?
A Yes.
Q Are you familiar with the record of Patrolman Gary Bevel?

* * *

Q Sheriff Carson, in carrying out his duties in making arrests, performing of just duties, generally, as a patrolman, what was Gary Bevel's reputation in the department?

* * *

Q Do you know his reputation in the department as a policeman?
A Yes, I do.
Q And what were they?
A It was an excellent reputation, his sufficiency reports were outstanding, and he was very well liked in the department, one of our best patrolmen.

* * *

Q Sheriff Carson, on May the 17th, 1983, Patrolman Gary Bevel was shot and killed, what was the impact of that on your department?

* * *

THE WITNESS: Well, it had a tremendous impact at the beginning, of course, you have all of the officials wanting to know what happened.
And we have them assigned to beats, and they're supposed to stay in those beats, but it's disruptive, and many of them come to the hospital to try to find out what happened, calling their wives, making sure their wives know they weren't the ones who were killed.
It's a disruptive force, and it -- it upsets everyone, of course. And it has a force -- an effect that lasts long after that original effect.
BY MR. AUSTIN:
Q Well, let me ask you, then, the immediate impact is disruption of a hundred and one patrolmen?

A Right, the county isn't as well protected as it was before because of them getting off their beats and coming to the scene.
Q What is -- weeks and months immediately following the death and shooting and killing of Gary Bevels, what is the impact on the department and on the community?
A Well, I think the department becomes closer, and they begin to look at every situation with more suspicion than they had before that they might get hurt.
I think it -- the public is not treated, sometimes, as courteously as I would like for them to be. I think there are traffic stops, when they make stops with guns in their hand, a few things like this. They just become more alert and more concerned about their safety.
Q Do they -- didn't they have a tendency to overreact when some of their people are killed?
A I would say that they are extra cautious, and that would be considered an overreaction to many things.
Q Is that especially true when a vehicle is stopped?
A Yes, it is.

* * *

Q Has this episode had any effect on the attitude of the patrolmen that are employed by you in arresting female suspects? And in what way?

* * *

THE WITNESS: We have a situation where -- when an officer arrests a person, before they're placed in the back of the car to take them to jail, if they're to be searched. This is very difficult when it comes to the arrest of a female because, usually, all they can do is maybe look at their pocketbook. They can't do the pat down search that they should do on other people.
It's a difficult thing for the patrolman to understand, I think, but the situation just is that you just can't search a female, a male officer can't search a female, a male officer can't search a female like they really should. And that, of course, is a morale problem we have.
BY MR. AUSTIN:
Q It causes a morale problem in the department?
A Yes.
Q What effect, if any, Sheriff, does the Defendant and an officer like Gary Bevel -- Bevel -- Gary Bevel have on the crew? What effect will it have? Has it had an effect?
A Well, it has in this particular case, as you know, we're short on minority officers. We don't have what we should have, we have about less that 10 percent, we should have about 20.
In this last class, we had -- we had openings for about 20 black officers, and we were taking them from the jail, as we have in the past. We were able to get, I think --
Q What do you mean, "taken from the jail"?
A The way we had been, we were recruiting; now, we're just taking officers after they had served time in Corrections, and we found that that was the best way.
Q They became a correctional officer before becoming a police officer?
A Yes, before becoming a police officer.
Q Go ahead.
A And we needed about 20 to bring us up to -- up to what's required, where we wanted to get spaces for these black officers,

> and there's -- we just couldn't get that many out of Corrections. We talked to several personnel, we talked to, I'd say, four or five in Corrections who would make excellent police officers, and they said they did not want to become police officers because of what had happened to Gary. I sent some black officers --
> MR. AUSTIN: Recruiting effects law enforcement?
> * * *

(T-1826-1835). Sheriff Carson's testimony, which did not, by any stretch of the imagination, tend to show the motive of the killing, but which rather dealt solely with the incidental effects of the killing upon the police department, had absolutely no relevance to the penalty issue. Since Carson's testimony prejudicially injected into appellant's penalty hearing issues much broader than allowed, a new sentencing hearing is constitutionally required.

Since "[t]he aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose", Miller v. State, 373 So.-2d 882,885 (Fla.1979), this Court has consistently held that evidence offered by the state for the purpose of aggravating the crime is inadmissible unless it tends to establish one of the aggravating circumstances listed in Section 921.141(5), Florida Statutes (1981). E.g., Provence v. State, 337 So.2d 783 (Fla.1976); Perry v. State, 395 So.2d 170 (Fla.1981); Odom v. State, 403 So.2d 936 (Fla.1981). When evidence not relevant to a specified aggravating circumstance has been presented, the error totally infects the penalty phase and mandates a new penalty hearing before a newly impaneled jury. Elledge v. State, 346 So.2d 998 (Fla.1977); Perry v. State, supra; Maggard v. State, 399 So.2d 973 (Fla.1981).[5]

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[5] The Third District has cogently noted:

> [W]hile the existence of other aggravating circumstances will sustain the imposition of the death penalty without the need for further fact-finding where "only the manner in which it was considered by the court in its findings of fact" is challenged, Mikenas v. State, 407 So.2d 892 (Fla.1981); see also Smith v. State, 407 So.2d 894 (Fla. 1981), where the challenge is to the admission of evidence of aggravating factors, see Elledge v. State, 346 So.2d 998 (Fla.1977), or to the exclusion of evidence of mitigating factors, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the existence of other aggravating circumstances does not obviate the need for a further recommendation from the jury.

Tafero v. State, 406 So.2d 89, 95 n. 13 (Fla. 3d DCA 1981).

Since Sheriff Carson's testimony was not relevant to any statutorily specified aggravating circumstance, a new penalty hearing before a newly impaneled jury is required. The prejudicial impact of Carson's testimony -- the immediate effect of the killing being that the entire city was not protected from criminal activity; the long-lasting effect of the killing being mistreatment of citizens due to police overreaction; and difficulties in minority recruitment of police officers -- is readily apparent and was not left unexploited by the prosecutor.[6] The disruption to the police force as a result of the killing had no relevance to appellant's culpability or to the issue of her punishment. The testimony, deliberately placed before the jury, was designed to fervently appeal to the fears of the jurors concerning the safety of their community. This highly inflammatory testimony rendered appellant's sentencing hearing fundamentally unfair and constitutionally intolerable. Hance v. Zant, 696 F.2d 940 (11th Cir. 1983); Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983). Appellant therefore must be awarded a new sentencing hearing.

[6] See infra, Issue VI, pp. 26-28, where the prosecutor relied upon Carson's testimony to support his highly inflammatory appeal for imposition of the death penalty.

ISSUE VIII

THE TRIAL COURT ERRED IN IMPERMISSIBLY RESTRICTING THE SCOPE OF THE MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Lockett v. Ohio, 438 U.S. 586, 604 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) hold that under the Eighth Amendment the sentencing authority may "not be precluded from considering, 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 less than death." Those decisions "make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it." People v. Robertson, 655 P.2d 279, 301 (Cal. 1983); People v. Easley, 671 P.2d 813 (Cal. 1983). See also, State v. Quinlivan, 499 P.2d 1268 (Wash. 1972); Romine v. State, 305 S.E.2d 93, 100-101 (Ga. 1983); Cofield v. State, 274 S.E.2d 530, 542 (Ga. 1981). As the plurality opinion in Woodson v. North Carolina, 428 U.S. 280, 304 (1976) emphasized:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.

[Emphasis supplied]. By various rulings throughout appellant's trial, the court violated the Lockett/Eddings admonitions. The cumulative effect of the trial court's errors rendered appellant's sentencing trial constitutionally intolerable.

During voir dire, the prosecutor inquired:

> And as I've mentioned, the Defendant is a woman, will the fact that she's a woman have any influence upon your determination, keeping in mind that the State will be seeking the death penalty in this case? If anyone feels that that might influence this verdict, please raise your hand now.

* * *

> All right, so, in other words, the Judge is not going to tell you that it's a mitigating factor that she's a woman, it has nothing to do with it.

(T-671). Appellant's objection to this improper voir dire was overruled, and the prosecutor continued his inquiries in the same vein:

> The Judge is not going to tell you that you're to feel sorry for her or to give her mitigation simply because of the fact she's a woman.

(T-672). Appellant again objected since the prosecutor's remarks constituted a misstatement of law, requested a curative instruction, and moved for a mistrial, all of which were denied. (T-672-674). Because the prosecutor was improperly allowed to extract promises by the jurors to follow a totally inaccurate statement of law, appellant is entitled to a new trial, or at a minimum, a new penalty phase.

Voir dire is designed to ascertain whether prospective jurors can be fair and impartial and free of all interest, bias or prejudice. To that end, "[h]ypothetical questions having correct reference to the law of the case that aid in determining whether challenges for cause or peremptory are proper, may . . . be propounded to veniremen on voir dire examination." [Emphasis supplied]. Pope v. State, 84 Fla. 428, 438, 94 So. 865 (1922). It is, however, well-settled that "it is not proper to propound hypothetical questions purporting to embody testimony that is intended to be submitted, covering all or any aspects of the case, for the purpose of ascertaining from the juror how he will vote on such a state of the testimony." Dicks v. State, 83 Fla. 717, 719, 93 So. 137 (1922). See also, Smith v. State, 253 So.2d 465, 470-471 (Fla. 1st DCA 1971); Harmon v. State, 394 So.2d 121 (Fla. 1st DCA 1980); Saulsberry v. State, 398 So.2d 1017 (Fla. 5th DCA 1981). In the present case, the prosecutor was improperly allowed to obtain a pre-commitment from the prospective jurors that they would not consider appellant's

sex as a mitigating factor.[7] Not only was this prejudgment improper, it was particularly prejudicial since not based on a correct principle of law. This Court has expressly recognized that the fact that the defendant "was the mother of two children for whom she cared," as is appellant, is a mitigating circumstance. Jacobs v. State, 396 So.2d 713 (Fla.1981). By extracting promises from jurors on voir dire, the prosecutor effectively and unconstitutionally led the jury to erroneously believe that they were required, as a matter of law, to disregard as mitigating factors the fact that appellant was a woman and the mother of two young children. This is impermissible.

During the penalty phase of appellant's trial, the trial judge again impermissibly restricted mitigating evidence. Appellant profferred the testimony of Jessie Bevel, Jr., the oldest brother of the victim, Gary Bevel, which was to the effect that the victim's family did not seek appellant's execution but rather sought mercy for her. (T-1872-1876). Although recognizing "it's very valued by myself," the trial court refused to allow this testimony to be presented to the jury. (T-1879-1881). This ruling was violative of the Eighth Amendment since this plea for mercy by the victim's family was clearly a relevant consideration to the question of whether death is an excessive punishment for the offense. Further, the testimony was certainly relevant to rebut the prosecutor's assertions that the death penalty was required for its retributive effect. (T-2008,2014-2015).

In Romine v. State, supra, the defendant's death sentence was vacated because similar evidence was excluded from the jury's consideration. The

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[7] During closing arguments at the penalty phase, the prosecutor stressed this prior commitment:

> And you told me the first day on voir dire, Monday, a week ago, that you wouldn't take into consideration sex . . . . You wouldn't take into consideration the fact anything other than the evidence and the law that came to you in the case.

(T-1960-1961).

defendant therein was convicted for the murder of his father. At the penalty hearing, the defendant sought to present the testimony of his grandfather, father of the victim, that he did not wish defendant executed. In reversing the death sentence imposed, the Georgia Supreme Court noted:

> Ralph's testimony that he did not wish to see his grandson die would have been admissible in mitigation and the trial court's opinion to the contrary was wrong. Moreover, Ralph's testimony would have been particularly significant because he was closely related not only to the appellant but also to the victims; unlike the mother in Cofield, Ralph wasn't viewing the case solely from appellant's perspective, and his opinion might well have been given considerable importance by the jury.

Id. at 101. Here, as well, Jesse Bevel's opinion might well have been given considerable importance by the jury, and his testimony should have been admitted.

Since mitigating evidence was improperly excluded from appellant's trial and since the scope of the mitigation was impermissibly restricted, appellant must be awarded a new sentencing hearing.

ISSUE IX

THE TRIAL COURT ERRED IN FINDING BOTH THAT THE HOMICIDE WAS COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST AND THAT THE HOMICIDE WAS COMMITTED TO DISRUPT OR HINDER THE ENFORCEMENT OF LAW AND ERRED IN ALLOWING THE PROSECUTOR TO ARGUE AND IN INSTRUCTING THE JURY AS TO BOTH CIRCUMSTANCES IN SUPPORT OF THE DEATH SENTENCE.

In imposing the death penalty upon appellant, the trial court found as an aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (R-602-603). §921.141(5)(e), Fla. Stat. (1981). As a separate aggravating circumstance justifying imposition of the death penalty, the trial court found that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (R-603). §921.141(5)(g), Fla. Stat. (1981). Appellant contends the trial court improperly utilized the same aspect of the offense to find the presence of these two distinct statutory aggravating circumstances, and that a new sentencing trial is therefore required.

In Provence v. State, 337 So.2d 783 (Fla.1976), this Court disapproved the "doubling up" of aggravating circumstances based on the same aspect of a defendant's criminal conduct. This Court has consistently held that it is error to find as separate aggravating circumstances that the murder was committed to hinder law enforcement and to avoid arrest where both are supported by the same essential feature of the defendant's crime. Sims v. State, 444 So.2d 922 (Fla.1983); Francois v. State, 407 So.2d 885 (Fla.1981); White v. State, 403 So.2d 331 (Fla.1981); Welty v. State, 402 So.2d 1159 (Fla.1981); Clark v. State, 379 So.2d 97 (Fla.1979). Under the foregoing cases, the trial judge's finding of both circumstances here was clearly erroneous.

The trial judge's misapprehension of this basic principle also prejudicially affected the jury's recommendation. As noted, supra, [Issue VII] due to the trial judge's erroneous construction of the aggravating circumstance established by Section 921.141(5)(g), the jury was allowed to hear

the testimony of Sheriff Carson concerning the effect of the killing upon law enforcement. Based upon this improper evidence, the prosecutor was then allowed, over objection, (T-1911-1916,1922-1926) to extensively argue that both avoid arrest and hinder law enforcement should be considered by the jury as separate circumstances in aggravation. (T-1972,1976-1981,2008). Over objection (T-1911-1916,1922-1926,2062), the jury was instructed that both circumstances could be found (T-2053-2054) and appellant's requested instruction on the prohibition of "doubling" these circumstances was denied. (R-575, T-1926,2062). In Tedder v. State, 332 So.2d 908 (Fla.1975), the Court held that great weight must be accorded a jury recommendation for life. It is inconsistent with the holding in Tedder for a prosecutor to be permitted, over timely objection as was made in this case, to argue that it should consider as separate factors in aggravation such factors that the court could not consider in imposing the sentence. To permit the argument to be made to the jury, and instructions to that effect to be given the jury, and then to accord any weight to a jury recommendation for death, greatly erodes the right of the defendant in a capital case, provided by Section 921.141, Florida Statutes (1981), to have a jury pass upon the question of sentence. In Singer v. State, 109 So.2d 7 (Fla.1959), this Court held that a defendant has the right to have the question of sentence in a capital case determined by the jury free of improper statements by the prosecutor just as he has a right to have the question of his guilt or innocence of the charge so determined. Appellant believes that it is not possible to reconcile the principle of law in Singer v. State, supra, with the argument made and instructions given her jury that it should consider duplicative factors in reaching its sentencing verdict. See Grizzell v. Wainwright, 692 F.2d 722 (11th Cir. 1982). Accordingly, this case is analogous to Elledge v. State, 346 So.2d 998 (Fla.1977), wherein it was stated that when an unauthorized aggravating factor is put into the equation, which

could have tipped the scales of the weighing process improperly in favor of death, a new sentencing proceeding must be held. Ample evidence was presented to the jury as to mitigating circumstances. Although a death recommendation was returned, the jury verdict form reflects that mitigation was found. (R-587). Since appellant's request for a specific verdict was denied (T-1956-1958), this Court cannot know that this impermissible aggravating factor did not affect the jury's weighing process. Appellant must therefore be afforded a new sentencing trial.

ISSUE X

THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION AND FURTHER ERRED IN ALLOWING THE PROSECUTOR TO ARGUE THIS CIRCUMSTANCE AND IN INSTRUCTING THE JURY AS TO THIS CIRCUMSTANCE IN SUPPORT OF A DEATH SENTENCE.

In imposing the death penalty upon appellant, the trial court found as an aggravating circumstance that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R-603). §921.141(5)(i), Fla. Stat. (1981). This finding cannot stand, however, because the evidence was insufficient as a matter of law to establish this circumstance.

Assuming, arguendo, that appellant's conviction was based upon a premeditation theory supported by competent evidence, it is clear that simple premeditation is not sufficient to support a finding of the aggravating circumstance defined by Section 921.141(5)(i), Florida Statutes. Rather, the evidence must show beyond a reasonable doubt that there was a "heightened degree of premeditation, calculation, or planning." Richardson v. State, 437 So.2d 1091, 1094 (Fla.1983); see also White v. State, 446 So.2d 1031, 1037 (Fla.1984). "Proof of this aggravating circumstance requires a showing of a state of mind beyond that of the ordinary premeditation required for a first-degree murder conviction. Maxwell v. State, 443 So.2d 967, 971 (Fla. 1984); see also, Jent v. State, 408 So.2d 1024, 1032 (Fla.1981); Washington v. State, 432 So.2d 44, 48 (Fla.1983). In Preston v. State, 444 So.2d 939, 946 (Fla.1984), this Court stated:

> The level of premeditation needed to convict in the guilt phase of a first-degree murder trial does not necessarily rise to the level of premeditation required in section 921.141(5)(i). This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator.

[Emphasis supplied]. The facts in the present case simply do not justify a

finding of "cold, calculated and premeditated manner."

The facts reveal that appellant shot Officer Bevels while struggling with him to avoid arrest. The state's evidence did not show that appellant formulated a plan to kill the officer prior to the struggle, nor was there any indication of a substantial period of time for reflection. Washington v. State, supra (CCP improperly found where defendant shot officer four times during struggle since evidence did not show a prior plan to kill victim); Harris v. State, 438 So.2d 787 (Fla.1983) (CCP improperly found where no evidence that murder was planned); Maxwell v. State, supra at 971 (factor improperly found where defendant shot victim during robbery even though "evidence showed that appellant killed Donald Klein intentionally and deliberately" since no showing of any additional factor to show CCP); Blanco v. State, __So.2d__ (Fla.1984) (Case No. 62,371 and 62,598) [9 F.L.W. 215] (CCP improperly found where defendant shot victim seven times during scuffle since "subsequent shots followed quickly and do not show any heightened premeditation, calculation, or planning"). Contrast, Hill v. State, 422 So.2d 816 (Fla.1982) (CCP found where testimony showed that defendant intended to rape and then murder the victim and this decision made substantially before the time that he picked her up); Middleton v. State, 426 So.2d 548 (Fla.1983) (CCP upheld where defendant's confession indicated that he sat with a shotgun in his hands for an hour, looking at the sleeping victim and contemplating killing her). Nor did the state show a lengthy, methodic, or involved series of atrocious events preceding the shooting which would establish "heightened" premeditation. Contrast, Jent v. State, supra (CCP found where evidence showed lengthy series of events which included beating, transporting, raping, and setting victim on fire); Bolender v. State, 422 So.2d 833 (Fla.1982) (CCP upheld where defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died); Harich v. State, 437 So.2d 1082 (Fla.1983) (CCP upheld where de-

fendant held victim at gunpoint, ordered her to undress, raped her, transported her and then shot her); Justus v. State, 438 So.2d 358 (Fla.1983) (CCP upheld where defendant abducted victim, transported her to desolate area where she was raped and then murdered); Routly v. State, 440 So.2d 1257 (Fla.1983) (CCP upheld where defendant at gunpoint bound and gagged victim, transported victim in trunk of car and then shot him); Squires v. State, 450 So.2d 208 (Fla.1984) (CCP upheld where defendant abducted victim, shot victim in shoulder with shotgun, and while victim screaming in pain, defendant shot victim four more times with another weapon); Card v. State, __So.2d__ (Fla.1984) (Case No. 61,715) [9 F.L.W. 217] (CCP properly found where defendant abducted victim, after having cut her fingers, transported her to a secluded area, had her get out of car, and then cut her throat). Rather, here even more so than in Richardson v. State, supra, where the victim died from massive head injuries with multiple fractures caused by a large instrument as well as some type of cutting instrument, the facts show that "the murder was extemporaneously committed for the purpose of avoiding a lawful arrest", which evidence does not show beyond a reasonable doubt that there was any heightened degree of premeditation, calculation, or planning. Id. at 1094. See also, McCray v. State, 416 So.2d 804 (Fla.1982). The trial judge's finding of this factor was clearly erroneous.

This error also affects the jury's recommendation. Appellant objected to an instruction on this factor since the evidence did not support it. (T-1931-1932). Her objection was overruled as was her request that the jury be instructed on the meaning of the cold, calculated and premeditated factor. (R-583, T-1932-1934). The prosecutor extensively argued this inapplicable aggravating factor to support imposition of the death penalty. (T-1973,1979, 1981-1993). In light of the extensive mitigating circumstances presented to the jury, this Court cannot know that the erroneous instruction on this ag-

gravating circumstance did not affect the jury's advisory sentence. Appellant must be awarded a new sentencing trial.

ISSUE XI

THE DEATH SENTENCE IMPOSED UPON APPELLANT IS UNCONSTITUTIONAL INVIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT IS FOUNDED UPON THE ABSENCE OF PROPER MITIGATING CIRCUMSTANCES, UPON IMPROPER AGGRAVATING CIRCUMSTANCES, AND BECAUSE WHEN COMPARED WITH PAST CAPITAL CRIMES THIS PUNISHMENT IS TOO GREAT.

It is clear that:

> Just as the state may not be statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence . . . .

Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982). It appears from the trial court's sentencing order that the judge improperly refused to consider amply supported evidence of mitigating factors which clearly militated against the impositon of the death penalty. (R-600-607). Testimony presented at both the trial and penalty phases revealed that Andrea Jackson is a 25-year old woman, who was a B-C student in school. (T-1839-1841). Although she did not complete her high school education at Walfson High School, she subsequently earned her diploma at night and later received a two year degree in computer repairing engineering. (T-1841-1842). While growing up, Andrea assisted her mother by babysitting her younger brothers and sister. (T-1843). Although Andrea had a normal childhood at home, at the age of ten, she was sexually assaulted, and this experience had continuing adverse effects upon her. (T-1844). At the age of 17, Andrea married Sheldon Jackson and the two had two children, Sheldon, Jr., aged five and Michael, aged three. (T-1845). Due to marital problems, Andrea began to drink. (T-1846). When drinking, Andrea would become emotional and would use profanity, which was generally not in her character. (T-1846). Andrea always made provisions for the care of her children. (T-1846-1848). During the month of May, Andrea's mother noticed that she seemed very upset and disturbed since she was out of a job and was having difficulties at home. (T-1848-1849). According to Shirley Freeman, after the shooting, Andrea

was nervous and very remorseful over the shooting. (T-1301-1302). Her sorrow over the shooting was reiterated in her statement to the trial judge. (T-2121-2122). The presentence investigation report reflects that although Ms. Jackson had several misdemeanor convictions for traffic violations and worthless checks, she had never before committed an act of violence. (T-2102-2105, R-603-605). The trial judge's sentencing order fails to reflect that he gave any consideration to these proper mitigating factors. See, e.g., Lightbourne v. State, 438 So.2d 380 (Fla.1983) and Washington v. State, 432 So.2d 44 (Fla.1983) (lack of past history of violence is mitigating factor); Shue v. State, 366 So.2d 387 (Fla.1978) (abuse as child is mitigating factor); Jacobs v. State, 396 So.2d 713 (Fla.1980) (defendant the mother of two small children is mitigating factor); Pope v. State, 441 So.2d 1073 (Fla.1983) (defendant's remorse is mitigating factor). Since the trial court violated Eddings, the death sentence must be vacated.

As noted previously, the trial judge's imposition of the death sentence was based upon his finding of three aggravating circumstances -- "avoid lawful arrest", "hinder law enforcement", and "cold, calculated and premeditated." In view of the invalidity of the "hinder law enforcement" and "cold, calculated and premeditated" aggravating circumstances [Issues VII, IX and X], the only valid aggravating circumstance in this case is that the murder was committed for the purpose of avoiding arrest. (R-602). The trial judge found in mitigation the fact that the victim's family sought mercy and as noted, failed to consider the ample mitigating factors set forth above. The single aggravating circumstance properly weighed against the mitigating circumstances present does not justify imposition of the death penalty. Appellant's sentence should therefore be reversed. Halliwell v. State, 323 So.2d 323 So.2d 557 (Fla.1975); Blair v. State, 406 So.2d 1103 (Fla.1981); Menendez v. State, 419 So.2d 312 (Fla.1982); Rembert v. State, 445 So.2d 337 (Fla.1984). Further when appellant's crime is compared to other similar ones, as required by Brown v. State, 392 So.2d 1327 (Fla.1981), the punishment of death is simply

too great.[8] Jacobs v. State, supra; Washington v. State, 432 So.2d 44 (Fla. 1983). Appellant's sentence must be reduced to life.

[8] Of all the cases involving shootings of a police officer, this Court has never upheld the imposition of the death penalty based upon the single aggravating factor of avoiding arrest. Songer v. State, 322 So.2d 481 (Fla. 1975); Cooper v. State, 336 So.2d 1133 (Fla.1976); Raulerson v. State, 358 So.2d 826 (Fla.1978); Ford v. State, 374 So.2d 496 (Fla.1979); Fleming v. State, 374 So.2d 954 (Fla.1979); Tafero v. State, 403 So.2d 355 (Fla.1981); Fitzpatrick v. State, 437 So.2d 1072 (Fla.1983); Johnson v. State, 438 So.2d 774 (Fla.1983); Jones v. State, 440 So.2d 570 (Fla.1983); Sims v. State, 444 So.2d 922 (Fla.1984).

ISSUE XII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE AND MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE THEREBY VIOLATING APPELLANT'S RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to trial, appellant filed a motion for individual and sequestered voir dire (R-71-75) and a motion in limine (R-76-79, 120-364) seeking to preclude group questioning of prospective jurors regarding their attitudes toward the death penalty. Both motions were denied by the court. These rulings denied appellant her right to be tried by an impartial jury. Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983); Hovey v. Superior Court of Alameda County, 616 P.2d 1301 (Cal. 1980).

IV CONCLUSION

For the reasons set forth in Issues I, II, III, V, and XII, appellant requests a reversal of her conviction and a remand for a new trial. For the reasons set forth in Issue IV, appellant seeks a reversal of her conviction and a reduction to second degree murder. Due to the errors enumerated in Issues VI, VII, VIII, IX, X, and XI, appellant's death sentence must be vacated and reduced to life or alternatively, the cause must be remanded for a new sentencing trial before a newly impaneled jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to HENRI C. CAWTHON, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to appellant, ANDREA HICKS JACKSON, #279567, Post Office Box 8540, Pembroke Pines, Florida 33024 on this 10th day of August, 1984.

GLENNA JOYCE REEVES