IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,318

ROBERT PATTEN,

Appellant,

vs.

THE STATE OF FLORIDA

Appellee.

****

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

****

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS
CONTINUED

TABLE OF CITATIONS

INTRODUCTION

Appellee, **the State** of **Florida,** was the prosecution in the trial court and Appellant, **Robert Patten,** was the defendant. The parties will be referred to as they stood in the trial court. The symbol "R" will designate the **3849** page record on appeal. All emphasis is as in original unless otherwise specified.

STATEMENT OF THE CASE

The State accepts the defendant's Statement of the Case as accurate.

STATEMENT OF THE FACTS

The State rejects the defendant's Statement of the Facts as incomplete, and offers instead the following comprehensive summation of the evidence presented during the penalty phase proceeding below.

STATE'S CASE

The State presented the following witnesses during its case-in-chief:

Carolyn Beaver Behrens

Behrens was the defendant's probation officer at the time of the murder, having been assigned his case on April 24th, 1981 (the murder occurred 9/21/81). She told the defendant he could not possess a firearm, nor violate any law. She specifically told him that if he violated probation, he would be facing a five year prison term. (T.845). If the defendant possessed a firearm, being a convicted felon, and if he was in possession of a recently stolen vehicle, he could be charged with these crimes, and have his probation violated based on the new charges. (T.849-851). He could thus receive five years for violating probation plus additional time for the new charges. (Id.).

Henry Nelson

At 9:00 a.m. the morning of the murder, the defendant came into Nelson's convenience store and attempted to sell Nelson a handgun. The defendant unloaded the gun before handing it to Nelson. The defendant wanted $70.00 for the gun. Nelson wasn't interested because the gun had no trigger hammer (T.854-56), so the defendant and his companion departed.

During his conversation with the defendant, they were only two feet apart. Nelson has seen numerous people in his store who were under the influence of drugs or alcohol, and the defendant is not one of them. (T.859).

Leroy Williams

Williams' testimony from the initial trial was read into the record.

Williams and friend Henry "Gator" Butler were walking together the morning of the murder when the defendant approached them in a blue Volkswagon, and asked them if they knew where he could sell a gun. (T.865). Williams told the defendant he could find a buyer, and both Williams and Butler entered the Volkswagon. The defendant was concerned about Butler coming as well, so he ordered Williams to drive while he occupied the front passenger seat, with Butler in the rear. (T.866). The defendant did not want to be driving with someone behind him. (T.868). The defendant said he wanted to sell the gun for $60.00, and would give Williams a $20.00 commission.

They drove to a grocery store and the defendant and Williams went inside. The defendant tried to sell the owner his gun, a .38 revolver with no hammer. The defendant unloaded the gun, spun the cylinder and stated: "see, its practically new." The bullets were .38 hollow points with steel jackets. (T.873).

Williams spent a total of two to two and a half hours with the defendant that morning. (T.874).

After the owner declined to buy the gun, the defendant reloaded. He then attempted to sell the owner a gold bracelet, without success. The defendant carried the gun in his waistband. (T.877). The defendant then took over the driving, and drove the trio to the Overtown area of Miami. They proceeded down 3rd Avenue, then right onto 11th Street. Williams realized they were going the wrong way on a one-way street, and told the defendant, who attempted to turn the car around. Williams yelled, "Hey, there's a police car," and the defendant responded "Oh, Oh, hell. I'm hot. The car's hot. We got to go." (T.881).

The defendant pulled the Volkswagon into a courtyard and stopped. Butler jumped out of the front seat and ran. Williams started to exit the rear seat, but saw the gun in the defendant's hand, which caused Williams to hesitate. (T.883). Butler and the defendant then ran into a hallway that led out onto the sidewalk.

The police car contained a black male and a white female officer, and the black male officer chased after the defendant and Butler. (T.886). Williams then exited the Volkswagon, by which time the police car had driven off. He then heard approximately four gunshots.

Williams sees people who are high on drugs and alcohol every day of his life. Williams can differentiate between the

effects of depressants, such as quaaludes and heroin, which cause a drowsy appearance, and cocaine, which creates a very up tempo appearance and attitude, combined with glassy eyes. The defendant had none of these symptoms and appeared normal. (T.892). Williams also has observed numerous people intoxicated by alcohol, and the defendant did not appear to be under the influence of alcohol. (T.893).

Williams was subsequently arrested on an unrelated charge and his case is pending. The prosecutor has made a single promise regarding the pending case, that if Williams honors his subpoena and testifies truthfully, he will let the judge in William's case know that fact. (T.894).

When the defendant was driving on 1-95, he was travelling in excess of 80 m.p.h. (T.899). Prior to turning onto the one-way street, he almost hit a stop sign because he was driving so fast (T.900), which sign was located in the middle of the road.

Maxim Rhodes

Rhodes was repairing a washing machine, on the opposite side of 1-95, at the time of the shooting. The defendant came up behind him and yelled "Whose car," and "where's the keys to the car." (T.923). The defendant was referring to Rhodes' Oldsmobile. The defendant pulled out a gun from his waistband,

pointed it at Rhodes and said "I want the keys, I want the keys." (T.925). Rhodes told the defendant the keys were in the open trunk, and the defendant grabbed them, started the car and backed out, then drove away. (T.926). The defendant had appeared very excited and had yelled at Rhodes. (T.931). The defendant acted extremely frightened, as opposed to being high on drugs. (T.932).

Frocene Pope

Pope observed the defendant rob Rhodes of his vehicle. (T.936). The defendant told Rhodes if he didn't turn over the keys he would die. (Id.) The defendant had to back the car up a long distance before going forward. The defendant backed out slowly, in a straight line. (T.939).

Officer Terry Russell

Russell was the victim's partner, and they wore uniforms and drove a marked unit the day of the murder. (T.942). They observed the defendant's green Volkswagon turn the wrong way onto 11th Street. The Volkswagon turned into the courtyard of a complex, and Russell, who was driving, followed. He saw the defendant standing outside the driver's door, and saw a black male exit the front seat and another in the back seat. (T.944, 45). The defendant hesitated for a moment, made eye contact with him, then ran through the alleyway leading to 11th Street.

Officer Broom jumped out and gave pursuit. (T.948). Officer Russell then tried to cut the defendant off with his vehicle, but lost sight of the chase. He then heard three or four gunshots. He tried to call Broom on the radio, but his battery was dead.

While searching for his partner, he observed the defendant underneath the 1-95 overpass. The defendant then hid behind some concrete pillars, then took off running. (T.953). Officer Jones, in another unit, then radioed that the defendant had run up the embankment onto 1-95. Officer Russell then exited his vehicle and chased the defendant across the congested 1-95 traffic, but got stuck on the median, and the defendant escaped. (T.954, 55). He then recrossed 1-95, and saw Officer Fowler jumping a fence behind the complex where the Volkswagon had stopped. Near the alleyway on the opposite side of the fence, Officer Broom was located face down on the pavement. (T.56, 57). The shots he heard occurred in rapid succession. (T.962).

George Preston Brown

Brown lived in the aforementioned apartment complex, on the second floor. He saw the defendant run from 11th Street onto 3rd Avenue, and through the alley below his window. A police officer was running behind the defendant. (T.966). Brown then heard gunshots, ran downstairs, and saw the defendant running onto 11th Street. The officer was no longer chasing him. During

the chase he heard the officer yell that the defendant had a gun. **(T.968).** Brown then found the officer lying face down near the alley. **(T.971).** There was three or four shots which occurred "pretty rapidly." **(T.973).**

William Curry

Curry's testimony from the original trial was read into the record. Curry was walking his dog in a field near the murder scene. He heard two shots, then saw the defendant run into the field, slip and fall, then turn and run in the other direction. **(T.980).** Curry then returned to his apartment complex, and saw a police officer lying face down next to the building **(T.982, 83),** where there is a dead-end alley. **(T.989, 90).**

Officer Bernard Fowler

Fowler was the officer who discovered Officer Broom's body. He was lying face down. Fowler got to the body by jumping the fence beside the dead-end alley. Officer Broom was not breathing, and when Fowler rolled him over, Fowler observed a bullet wound in his chest. **(T.995).** Fowler began CPR, until Fire Rescue arrived. Officer Broom could not be revived.

Preston Stewart

Stewart was visiting his friend Laville at Laville's shoe shop, the back door to which is located in the dead-end alley described above. He was standing just inside the rear door when he saw the defendant run past the doorway. (T.1034-36). Stewart had a very clear view down the alley. He saw that the defendant had a gun in his hand, which really grabbed Stewart's attention. Stewart told Laville to watch out, because the man in the alley had a gun. The man then reversed himself and came back to the corner of the building (at the entrance to the alley), peeked around the corner, raised his gun and fired twice. Stewart could not see who or what the defendant was shooting at, but had a clear view of the defendant in the alley. (T.1037, 38). After the defendant shot twice, he jumped over the fence adjacent to the alley. (T.1039).

Just before shooting, the defendant put one foot past the corner of the building, raised the gun with both hands, and fired two rapid shots from an upright position. (T.1041).

The defendant had originally been headed down the alley. He stopped and turned back toward the entrance to the alley, the entrance being formed by the corner of the building. When he turned the defendant was looking directly at Stewart, who was standing just inside the rear door of the shoe shop. The

defendant stared at Stewart for a few seconds, then walked to the entrance of the alley, looked around the corner, stepped around the corner with one foot, balanced himself, and fired two shots. (T.1042). Stewart has no idea what the person the defendant shot at was doing, and it is possible the defendant's target had fired simultaneously. (T.1043).

Tech. Richard Badali

Badali was the lead crime scene technician. He prepared the crime scene sketches and took photographs. (T.1140). He located a projectile on the ground in the alley, along with some fragments, and a ricochet mark on the rear screen door of the shoe shop. (T.1141). The projectile was found at the bottom of the doorway, along with a woodchip from the door. Badali recovered Officer Broom's radio. (T.1145). Officer Broom's gun was similarly recovered and it contained five live rounds and one spent projectile, indicating Broom had fired once. (T.1148). Officer Broom's bullets were unjacketed, as was the projectile which struck the door. Another jacketed projectile, which could not have been fired by Officer Broom, was located in the yard area outside the alley.

There was a bullet hole in the bottom of Officer Broom's shoe. (T.1153). Badali confiscated Officer Broom's beeper for analysis. He was provided with the murder weapon, which he

processed for fingerprints. The gun appeared to have been wiped clean, as there were no smudges or partial prints or indications it had been handled in any way. (T.1155). There were two live rounds and three empty chambers. The rounds were jacketed hollow point, similar to the projectile he recovered in the yard area outside the alley. (T.1156).

Technician Sarnow recovered two hypodermic syringes, a yellow needle holder, some cotton and a spoon in the Volkswagon, which were not sent to the lab for analysis. (T.1158).

Robert Hart

Hart is a police firearms examiner. The defendant's gun (recovered under the floorboards of the defendant's grandmother's house, see below) fired the two projectiles removed from Officer Broom's body and the projectile Tech. Badali found in the yard outside the alley. (T.1177, 78). The defendant's gun is a .38 caliber Smith and Wesson revolver. The two projectiles from Officer Broom's back and foot are definitely .38 caliber steel jacketed hollow point. The projectile found on the ground, in the yard outside the alley, had a deformed nose from striking Officer Broom's beeper, but is consistent with the other two. (T.1179, 80). The damage to the beeper is consistent with the damage to this third projectile. **(Id).**

The projectile which struck the door of the shoe shop was unjacketed, and consistent with the rounds in Officer Broom's gun, though it was too mutilated for comparisons. More importantly, Hart determined that the mutilation could not have occurred simply from striking the door: it had to have struck another object first then ricocheted into the door, possibly the wall of the building which forms the side of the alley opposite the doorway. (T.1185).

Detective Richard Bohan

He reached Officer Broom just as Officer Fowler had, by jumping the fence adjacent to the alley. He located the bullet wound to Officer Broom's chest. He assisted Fowler in administering CPR. After Fire Rescue arrived he took over the investigation. Technician Sarnow lifted prints from the Volkswagon, and the computer identified them as Robert Patten's. (T.1192). Detective Bohan prepared a photo line-up, and the various witnesses picked out the defendant, including eyewitness Preston Stewart. One of the defendant's last known addresses was the Bali Hai Hotel, where he was arrested at 5:00 p.m. that same day.

Detective Bohan spent over two hours with the defendant that evening. While he was filling out the arrest form, the defendant picked up the written bulletin the police had issued,

and stated, "Murder of a Miami Police Officer. "Oh Shit, I'll fry for this." (T.1196). A bit further on, as he watched the arrest report being prepared, the defendant stated, "That is the last one you'll do on me. I dealt my last deal on this one." (Id). Later on, when Lt. Murphy came into the room, the defendant stated. "Oh, sure. Everybody wants to look at the cop killer. Keep the door closed." (T.1197).

At 6:45 p.m., a technician arrived to take hand swab tests of the defendant, to detect gunshot residue. The defendant stated " I know what that's for. That's for ballistics to see if I fired a gun, but you won't get anything." (T.1198), (the defendant had taken a shower at this grandmother's, see below).

The drug paraphernalia in the Volkswagon is used for injecting drugs. He did not see track marks on the defendant's arms, but did see some scratches. He did not order the defendant tested for drugs because the defendant was acting in a normal manner. (T.2204).[1] He has seen needle or "track" marks, and the scratches on the defendant's arm did not appear to be such. (T.2207).

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[1] The clerk went from page 1199 to page 2200, which certainly speeded up matters considerably, although page 2200 should be page 2214 and a half.

Dr. Joseph Davis

Dr. Davis performed the autopsy on Officer Broom. The bullet which struck Officer Broom in the left chest passed through his left lung and through the heart, literally shredding that organ. (T.2224). There was no stippling on the entrance wound or Officer Broom's shirt. (T.2227). The path of the bullet was slightly downward, which is consistent with Officer Broom being bent forward slightly at the moment he was shot. (T.2229).

Officer Broom was also shot on the bottom, sole area of his left foot. (T.2230). There was no blood in the wound, indicating the shot to the heart occurred first. (T.2231). The foot wound is consistent with Officer Broom being face down on the ground, with his feet facing the shooter, at the time he was shot in the foot. (T.2231). Assuming Officer Broom fired his gun after being shot in the heart, this could have been a conscious effort, because he would remain conscious for a few seconds, or a reflexive action. Assuming it was a wild shot, it would more likely have been a reflexive act. (T.2232).

Lt. Ernest Vivian

Lt. Vivian was the lead detective. The Oldsmobile the defendant stole from Maxim Rhodes was found three blocks from the defendant's grandmother's house. (T.2240). When the defendant

was arrested at 5:00 p.m., he was not wearing the same clothes as at the time of the murder, which occurred at 10:00 a.m. Lt. Vivian learned from the defendant's sister, Dyane Swartz, that the defendant had gone to his grandmother's after the murder, where he acted extremely nervous, and attempted to locate the twelve o'clock news, which was not yet on. The defendant had gone into the bedroom, then the bathroom, then spent a short period in the back of the house. He then left with his dog, saying he was going to buy a motorcycle part. (T.2242, 43). The defendant was subsequently arrested 35 blocks away, near the Bali Hai Hotel, still in possession of his dog.

A search of his grandmother's house located the murder weapon, under a heating grate on the floor which was covered by a rug. (T.2244).

The defendant's girlfriend, Christina Castle, lived at the Bali Hai Hotel. She told Lt. Vivian that she and the defendant had a fight at approximately 3:30 a.m. the morning of the murder, and that the defendant was high on drugs when he left. (T.2250). When the defendant was being booked at the jail, Lt. Vivian noticed what appeared to be old track marks, such as a heroin addict would have. (T.2253).

Perlean Cruse

Cruse was the victim of the defendant's 1975 armed robbery, the conviction of which established, along with the armed robbery of Maxim Rhodes in the instant case, the "prior violent felony" aggravating factor. Cruse was a cashier at a convenience store, and the defendant pointed a large handgun at her head and demanded the money, which she gave him. (T.2259). She subsequently identified the defendant at a live line-up.

Larry Waire

Waire was the robbery detective in the 1975 case. When apprehended, the defendant had a twelve-gauge flare gun, which would burn a very large hole in a person. The defendant initially denied involvement, but later confessed. Waire was present when the victim identified the defendant at a live line-up. (T.2262-64). The State then introduced a certified copy of the judgment and sentence. (T.2265). THE STATE THEN RESTED.

DEFENSE CASE

Dyane Swartz

Swartz is the defendant's sister, and eight years his senior. Prior to the defendant's birth the family lived in

California, where her father was a test pilot. Her mother caught her father being unfaithful, which resulted in her mother attempting suicide by driving into a tree. Her mother, formally sweet and kind, became a nervous wreck. She and her father fought constantly, with her father refusing her mother's demand for a divorce. One night her father broke down the door and raped her mother, and she became pregnant with the defendant. Her mother didn't want the child and wanted to abort it (T.2277, 78), but her grandfather, a pharmacist, convinced her not to.

The defendant was born black and blue, and her mother said "Oh, my god. I have a Negroid child." (T.2279). When the defendant was six weeks old, they moved to Miami and stayed with her grandparents. Her mother and father were fighting constantly. Her mother would not hold the baby and wanted nothing to do with him. (T.2280). When her grandmother held him, her mother would grab him back and say, "Don't be nice to him.''

Her father returned to California and Swartz, the defendant and their mother stayed with their grandmother in Miami for three years. (T.2282). Her mother would slap the defendant in the face when he cried, throw him across the bed, spit on him and call him ugly names. (T.2283). When the defendant was three, their mother became pregnant, and married their stepfather, Mr. Halloran. The sight of the defendant revolted their mother.

Their mother would burn the defendant with hot coffee and cigarettes, and on thousands of occasions threw objects at him, such as food, frying pans, coat hangers. She also choked him on a regular basis. (T.2285, 86). She abused him in some way every single day. The defendant lived off and on with his grandmother for six or seven years. (Id). The defendant would stare into space, and you would have to yell to get his attention. The defendant began stealing when he was four or five. (T.2287). One day the defendant gave his mother a stolen bracelet, and when she learned it was stolen she beat him.

The defendant would sneak into his mother's room and steal her pills. He would use her diet pills and stay up all night running around. (T.2289). When the defendant was seven or eight he began walking with a limp, for which his mother would beat him with a stick and yell at him to stop limping. After three months she took him to the doctor, who diagnosed a hip disease. He was put in a body cast and had to be tutored at home. (T.2290). He was in this original cast for ten months, and his mother would leave him in his darkened bedroom with no food and without emptying his bed pan. This occurred because her mother would go to bed for two or three days straight and not attend to him. (T.2291). She also beat the defendant and tried to strangle him during this period.

After the cast was removed, he injured his hip during a fall at a darkened movie theater, to which his grandmother had taken him. The defendant pleaded not to be put back in the cast, but was for an additional six months. (T.2293). During this period he was able to move around somewhat, and would again steal from them. Her mother regularly put a knife to the defendant's throat and said, "I could kill you real easy, you know, real fast. " (Id). She would curse him and threaten to kill him in his sleep or poison him, and would curse the day he was born. (T.2294). One day Swartz saw rat poison in the kitchen, and when Swartz told her mother they had no rats, only mice, her mother replied, "We have Bobby, don't we?" (T.2295).

The defendant had a hard time keeping friends because he would steal from them. After the second cast was removed the defendant lived on and off with his grandparents. When the defendant was twelve Swartz left town, and returned two years later. The defendant was in a boy's home at that time. (T.2296). Her grandmother told her that three boys at the home had raped the defendant. (T.2297). She visited the defendant once in that home, and the next time she saw him was in the detention center in Gainesville.

Swartz saw the defendant twice in August and September 1981, just prior to the murder. Her mother would not let the defendant in their house, so she had to leave with the defendant

to see him. The second occasion was when the defendant came to her husband's business, and appeared high on drugs. He sat down in a chair and stared at her gold jewelry, like he was in a trance. (T.2298).

When the defendant was eight months old, Swartz came home and saw their grandmother holding the defendant, who had a cast on his leg, and her mother told her the defendant fell out of bed. (T.2304, 05).

One Thanksgiving dinner her mother stuck the defendant in the arm with a fork, then left the room. Swartz saw the defendant sniffing glue on one occasion, the only time she personally saw him using drugs other than his mother's pills.

On cross-examination, Swartz stated that when the defendant was at her husband's business, a few weeks before the murder, it was easy to tell he was on drugs. (T.2312, 13). Her mother attempted to breast feed the defendant, as she did her other children, but she was too nervous. (T.2313, 14). She rewrote her deposition because it was "cut-up, mixed-up and all totally wrong, out of order. (T.2315). She even rewrote some of the prosecutor's questions.

The defendant was never hospitalized for any of his mother's abuse. The defendant has no permanent scarring, because

the coffee her mother threw wasn't hot. (T.2317). The defendant's grandmother in Florida, (where he lived all but the first six weeks of his life, see above) loved the defendant very much, was protective of him, and spoiled him rotten. (T.2318). The grandmother ignored the other children and gave all her attention to the defendant. During the defendant's early years, he lived half of the time with his grandmother and half with his mother. (T.2318). When the defendant had to go back in the cast, he suffered a sort of nervous breakdown.

When the defendant was three, Bill Halloran married their mother. Halloran was a general manager at a car dealer and made a good living. They had plenty of food, clothing and other amenities (T.2321, 22), and they lived in a four bedroom, two bath house. (T.2310).

The prosecutor then asked why Swartz remembered so many more episodes of abuse, including the threats with a knife, after her deposition. She started to respond (T.2323, 24), at which point court was recessed. When cross-examination resumed (T.2370), the prosecutor explored a new area. Swartz is actually over nine years older than the defendant, and left their home and moved to Jacksonville when she was eighteen, when the defendant was nine years and one month old. (T.2372).

Out of the first three and a half years in Miami, the defendant spent three of those years living with his grandmother. (T.2376). At the end of this period the defendant was almost four. The family then rented a house for six months, and the defendant would stay there during the week, and spend weekends at his grandmother's. (T.2377, 78). At this point their natural father died and left insurance money, and they moved into the four bedroom, two bath house described above. The defendant lived there, along with his mother, stepfather (Bill Halloran), and Swartz, until the second cast was removed, when the defendant was eight, and at that point the defendant went to live with his grandmother (Mimi). He was living with his grandmother when Swartz lived in Jacksonville. When she returned to Miami after two years, she was twenty and he was eleven (T.2384, 85), and he had been sent to a boys home for getting into trouble.

After the defendant was released from the boys home, he lived with his grandmother for a year or two, until he got in trouble again and was sent to detention in Gainesville. At no time did the defendant return to his mother's home to live. (T.2386). Swartz would visit the defendant at his grandmother's house, where he lived until being sent to Gainesville. The defendant escaped from Gainesville and came to her house in Homestead very briefly. The next time she saw him was in prison in 1977 or '78. (T.2388).

When the defendant would steal, he would deny he did it. She doesn't consider him a liar or con artist, although he had many problems. His mother's abuse made him uptight, insecure and frightened. (T.2391).

After the defendant's arrest in this case, he told her she was the only person who could help him, and that "Well, you may be a star. You may be on T. V." (T.2394). The defendant also told her what happened the day of the murder: The defendant was driving down a one-way street and a police car pulled in behind him. The car was stolen, and he was scared, because he didn't want to go back to prison. He and his companion ran, but the officer chased the defendant. All of a sudden he ran into a fence and was trapped, and was scared to death. Then everything started to occur in slow motion. He turned around and everything went black. The next thing he knows, he is standing there looking at himself. He watches himself as his hands come up holding a gun and its pointed at this cop. The defendant is trying to stop the action and get himself and the cop to stop and talk about this. His gun goes off and the cop falls. The defendant freaked out, and floated over the fence, then he is running and sees he has a gun in his hand. He sees a car stopped at a stop light. He opens the door and orders the man out, who looked like he was going to have a heart attack. The defendant realized he still had the gun in his hand. The defendant starts

to drive, but everything is unfamiliar, like a foreign country. (T.2396-2408).

Swartz stated she did talk to Lt. Vivian after the murder, but denies telling him that the defendant was the way he was because of the way his grandmother treated him. She then backtracked and said she might have said both her mother and grandmother were responsible. (T.2410). In 1981 when she talked to Dr. Toomer, several months after the murder, she did not tell him her brother was born a blue baby because, she was still in shock. (T.2413). The defendant's tutor never saw the wounds on the defendant's neck because his mother made him wear a T-shirt. His teachers at school never reported seeing any injuries, though they said he would space out and not pay attention in class. (T.2417).

Colleen Parker

The defendant's mother is married to her father, Bill Halloran. She lived with the defendant for six months, 12/68-6/69, at the four bedroom, two bath home where the defendant's mother lived with Bill Halloran. At Easter dinner they were waiting to say grace, and the defendant started to eat. His mother told him to stop, but he continued eating, so she took the carving fork and jabbed him in the back. (T.2424). The defendant's mother (Betty) used excessive profanity.

During that six months period there was constant discord and profanity. Betty was violent toward her father, and she threw scotch in Parker's face. She dug her fingernails into Bill Halloran's face, and Bill ran into the bedroom and locked the door. Betty had the defendant run to the garage for a hammer, with which she demolished the door. (T.2425). Betty used profane language toward her, and when she complained to her father, Bill told her to lock herself in her room. (T.2426).

Betty treated the defendant, as well as herself, as an outcast. She would say, "I hate you. I wish you were never born.'' **(Id).** Once the defendant's sister hit him, but Betty blamed it on the defendant. Betty picked the defendant up by the neck once, until he said "Mom, please, I can't breathe." (T.2427). One time she heard Betty say, "Bobby, aren't you glad I didn't slit your throat last night." (T.2428). On one occasion Betty could not be awakened, so Bill took her to the hospital. The defendant snuck out that night and stole and wrecked a golf cart. When the police came she told them to take the defendant to a Christian foster home so he wouldn't be ruined. (T.2429).

On cross-examination, she stated that Betty did buy her some nice clothes and help her learn about make-up and styling her hair. (T.2436). She was sixteen and the defendant eleven or twelve, and they got along well together, and spent a lot of time

with him. (T.2439). She never saw the defendant use alcohol or drugs or appear to be under the influence of alcohol or drugs. (T.2441). The defendant did occasionally skip school to hang out with his friends. (T.2443, 44).

The defendant told her what happened the day of the shooting: He was going the wrong way on a one-way street and the police tried to stop him. He and his two companions took off, and one officer chased him. He ran behind a shopping center, and when he turned around the cop had his gun drawn. The defendant told the cop to drop the gun, but the officer fired instead. The defendant then shot twice, and he thinks one shot hit the officers belt and ricocheted into his foot. He then stole a car, and was arrested while walking his dog. (T.2445, 46).

She never saw the defendant burned with cigarettes or hot coffee, nor hit with a belt, wire hanger, frying pan or iron. Her above testimony is the only instances of abuse she saw. (T.2449).

Dr. Harry Krop

Dr. Krop is a psychologist who specializes in forensic psychology. (T.2480). He evaluated the defendant twice. The first was a two hour evaluation 12/28/88, the second a 4 1/2 hour evaluation 1/17/89. Most of these interviews were devoted to

psychological testing. (T.2492). He conducted neurological testing to determine the presence of brain damage, although a complete neuropsychological evaluation would have taken 20-25 hours. He conducted a full intellectual evaluation, including Weshler's Adult Intelligence Scale (WAIS), the Aphasia screening test, Bender-Gestalt test and background procedure for that test, the finger tapping test, a test to assess tactile sensation, a right/left orientation measure, and finally the Wechler's Memory Scale, Form I. (T.2493).

Dr. Krop reviewed an extensive amount of background material, including the depositions of some twenty witnesses in this case, including the defendant's sister Dyane Swartz, and stepsister, Colleen Parker. He reviewed the trial transcript and The defendant's psychiatric reports from various institutions. He interviewed Swartz, Parker, the defendant's brother, his mother, and his stepfather. (T.2495).

According to Dyane Swartz, the defendant was a blue baby, indicating possible oxygen deprivation during delivery. His family environment was extremely unstable, rejecting, and physically and emotionally abusive, and he clearly was an unwanted child. (T.2496). All of these negative factors resulted from his mother's treatment of him. Although his mother denied any physical abuse of the defendant, she expressed severe hostility and rejection toward the defendant. The stepfather,

Bill Halloran, also tended to minimize the physical abuse aspect, but all the family members agreed he was not given normal attention and support, and that he suffered extreme emotional abuse. (T.2497).

The defendant's mother appears to have had serious psychological problems, and was diagnosed as schizophrenic, severely neurotic and highly disturbed. The defendant himself received little professional psychological help while growing up. He spent eight sessions with a social worker, who reported some good results, but the mother terminated the sessions. (T.2498). The defendant was a kleptomaniac from an early age, and began using drugs at an early age. This rebellious, antisocial behavior further aggravated the hostility of his mother. This vicious cycle shaped and molded his personality. The defendant never received the treatment he needed. (T.2500). All of these factors created a good likelihood of later criminal behavior. (T.2501).

A significant factor was his drug abuse, which according to information he received, included injecting heroin and cocaine in the year prior to the murder, and which was particularly severe in the final three months of that period. (Id). It is unclear how much alcohol he was consuming, although that did not appear to be his drug of choice. The defendant took drugs at an early age, pills he stole from his mother, and once swallowed a

pill in front of his mother, to get attention. (T.2503). This occurred in 1971, when the defendant was 14, and was described as a "suicide gesture" by the Doctor at the hospital, where the defendant was taken by his mother. The report suggests his mother had choked him during a fight prior to the ingestion of the pill.

The neurological and intellectual testing revealed average intellectual ability, although he scored much higher on the performance I.Q. (118, above average) than on the verbal I.Q. (89, low average), which can indicate possible organity in certain areas, but which can also be explained by his lack of formal education, or other factors. (T.2507). The rest of the neurological testing was within normal limits. The defendant in fact has superior skills in certain motor and perception areas. The tests do not rule out organicity nor do they provide evidence that it exists, other than the verbal/performance I.Q. discrepancy. (T.2508).

The defendant's EEG in 1978 was, according to the report, mildly abnormal. (T.2509). In 1976 Dr. Guerreio diagnosed psychotic organic brain syndrome, in 1977 Dr. Castiello diagnosed organic brain syndrome, and in 1978 Dr. Mutter indicated "soft signs" of organicity (T.2509), which Mutter states may have resulted from drug abuse. All of the above factors indicate the defendant may have some brain damage, which would be consistent with his history of drug use. (T.2510).

Dr. Krop's first diagnosis is substance abuse. His second is an antisocial personality disorder. His third is a possibility of organic personality syndrome, which is a cluster of personality traits including poor impulse control, shifts in mood, and unpredictable acting out. (T.2510, 11).

In terms of mitigating factors, the first is his neglected and abusive upbringing. The second is his history of drug abuse. The third is long-standing emotional problems, possibly associated with organicity. The defendant may have had acute psychotic episodes induced by his drug use. The fourth factor is his especially heavy drug use during the three month period prior to the murder, (Dr. Krop never indicated the source of this information), which would have accentuated his other problems, and resulted in poor impulse control and impaired judgment at the time of the offense. (T.2511, 12). The first three factors relate to his mental state at the time of the offense.

The emotional problems are mitigating because they resulted from his needs to escape and to get attention, even if it was negative attention. (T.2513). JoAnn Tosch, the social worker who saw the defendant eight times, strongly recommended the defendant receive residential treatment, and that the mother receive intensive treatment as well. (T.2515). A report by

Doctor Golden in 1969, when the defendant was twelve, diagnosed the defendant as "a budding sociopath with chronic behavioral difficulty with mother and schools. No evidence of neurotic or psychotic episodes." Impression: Adjustment reaction of childhood, character disorder development." Dr. Golden recommended residential treatment for the defendant and psychotherapy for his mother." (T.2516).

The reports from the Florida Baptist Children's home indicate that at the age of eleven the defendant was too disturbed for a normal school setting, and recommended hospitalization. (T.2518). In 1976, when the defendant was 19, Dr. Cantor, at South Florida Hospital, found the defendant to be in a psychotic state, both incompetent and insane, although he could not tell if the psychosis was drug induced or ongoing (T.2520), although due to its disappearance with time, it was probably drug induced. (T.2521). All the psychiatrists who treated him during this period agreed he had suffered a psychotic break. (T.2522).

Dr. Krop has not detected any signs of malingering by the defendant, however the reports from 1981, at the time of the trial, indicate the defendant "probably" was malingering at that time. (T.2523, 24). Dr. Krop asked the defendant about that period, and the defendant said that prior to trial in 1981 he tried to take advantage of his prior mental health problems.

This is common in people with antisocial personality disorder, in that they try and manipulate the system. (T.2524).

At the time of the crime, due to his history and severe drug abuse during that period, the defendant was not thinking "particularly rationally." (T.2525). He was not psychotic, he knew what he was doing and that it was wrong, but his condition prevented him from seeing beyond his immediate self-serving needs, i.e. to escape. He simply was unable to consider the long term options and consequences. (T.2526).

Dr. Krop does not believe the defendant suffered an "extreme mental or emotional disturbance" at the time of the offense. His ability to conform his conduct to the requirements of law was not substantially impaired, rather he was suffering from very impaired judgment and poor impulse control. (T.2526-28).

Cross Examination of Dr. Krop

Dr. Krop has testified in forty-five death penalty cases, all as a witness for the defense. (T.2534). The defendant was not insane at the time of the offense, as he knew what he was doing was wrong. (T.2537). The defendant was not under the influence of an extreme mental or emotional disturbance. (T.2541). The defendant's ability to appreciate the criminality

of his conduct, and conform his conduct to the requirements of law, was not substantially impaired. (T.2543).

The 1978 EEG report, prepared by Doctor Foosner, did not contain the raw data. It stated the EEG showed a mild abnormality. Dr. Krop doesn't believe any EEGs were done after 1978. (T.2552). The CAT scan is a more sophisticated detector of organicity. No such test was done here nor was there any other physiological testing done on the defendant. (T.2556).

In 1975 the defendant received a four year sentence for armed robbery. He escaped, and when he was found he was in a stolen car, totally incoherent on drugs. His condition when found caused him to be found insane as to the grand theft auto charge. (T.2559). This occurred in 1977, and as a result the defendant was sent to a State hospital.

The defendant told Dr. Krop he had been using drugs prior to the murder. The most prominent feature of the defendant's personality are the antisocial characteristics. (T.2638). Dr. Krop then reviewed the various criteria for antisocial personality disorder under the DSM-III, and the defendant satisfied seven of twelve, with only three being necessary for a finding of this diagnosis. (T.2640, 41).

Dr. Krop was aware that while in State prison in **1985**, the defendant stabbed another inmate with a mirror **(T.2644)**, and considered this incident in arriving at his opinion. Dr. Krop does not know if the defendant was using drugs in prison, prior to that attack, but the defendant does have the potential to be violent when not under the influence of drugs. **(T.2645)**. Dr. Krop cannot say the defendant would not have killed Officer Broom had he been drug free. Had the defendant been drug free, his antisocial personality would not in itself have been mitigating. **(T.2646)**. However his abusive upbringing contributed heavily to that antisocial behavior, which is mitigating. **(T.2647)**.

Dr. Krop read the depositions of the State witnesses who were with the defendant during the two hours prior to the murder, and who testified the defendant was not high on drugs. Krop states that they are only laymen, and didn't witness the shooting, when the adrenaline would have accentuated the effects of the drugs. **(T.2648)**. It is possible the defendant was using drugs and displayed no outward signs that a laymen could detect. **(T.2649)**.

The defendant has not had any psychological problems since his incarceration in **1982**, at least according to the records. In **1987** one report indicated the defendant may be malingering in an effort to obtain medication. **(T.2650**, 51).

Dr. Krop spoke with the defendant's brother, Ron, just prior to his testimony. Ron reported the mother was extremely vengeful and hostile, and took this hostility out on the defendant. Ron had to stop his mother from hitting or choking the defendant on several occasions. Ron avoided the mother's hostility by being very passive, but the defendant was rebellious and this drew the mother's wrath. (T.2653). Ron is not aware of any incidents where the defendant was burned with cigarettes or beaten with iron hangers or other objects. (T.2653, 54). When Dr. Krop asked the defendant about the mother's physical abuse, the defendant tended to minimize its severity. (T.2655).

The defendant gave Dr. Krop yet another version of events as to how the shooting occurred: The officer was trying to stop the defendant from going the wrong way on a one-way street. The defendant knew he would get in serious trouble if caught, because he was carrying a gun. The defendant ran into a walled-in area without an exit. He was about to throw his gun on the roof of the building when the officer shot at him, barely missing his head. He did not hear the officer yell anything prior to firing. The defendant turned and fired twice, the second shot striking the officer's belt. As the officer fell, the defendant believes the officer fired again, striking himself in the foot. (T.2656).

Dr. Krop read and relied on a letter from Gateway Residence, Inc. (the prosecutor had read the letter to the Judge

during argument on its admissibility) (T.2623-26), which was admitted as State's exhibit #73. Dr. Krop also reviewed a sworn statement of Christina Castle, the defendant's girlfriend at the time of the murder. Castle stated the defendant told her that he escaped from a road gang, and that when he was caught he acted mentally ill so he would not be sent back to prison, and that he was successful, as he was put in a State hospital. (T.2661). Dr. Krop states that the defendant may well have been referring to when he escaped from his four year armed robbery sentence, and then was found in a stolen car in a supposed drug stupor (after which several doctors determined he had a psychotic break, and found him to be incompetent to stand trial and insane at the time of the grand theft auto offense, see above). (T.2661, 62).

Norman Echelberry

Defense counsel read Echelberry's testimony from the initial trial. He was the Communications Officer for Miami Police Department, and testified as to the contents of certain radio messages transmitted after the murder. Officer Russell first reported his partner missing at 9:51 a.m. (T.2691). The defendant was spotted crossing 1-95 at 9:54 a.m. (T.2695). Sgt. Dillon reported the robbery/theft of the Oldsmobile at 9:59 a.m. This broadcast stated that the victim reported the defendant's eyes were bulging and he looked extremely high on something. (T.2696).

Dr. Jethro Toomer

Dr. Toomer is a psychologist. In all of the capital cases he has testified in, he has testified for the defendant. (T.2704, 05). Dr. Toomer was retained in 1981 to evaluate the defendant in terms of possible mitigating factors. (T.2709). He met the defendant for five hours in 1981, reviewed records, and spoke with Dyane Swartz, Colleen Parker and Kelly Halloran. In the six months prior to the instant resentencing, he spent another four to five hours with the defendant. (T.2711).

In October, 1981 he conducted a psycho-social evaluation to assess the defendant's background, upbringing, experience, emotional and personality development, etc. He administered the Bender Gestalt test in 1981, but the defendant refused further testing. (T.2713). In the last six months he readministered the Bender and also gave the Rivitz Debeta (phonetic) test. The Bender shows "soft signs" of organicity, indicating further testing is essential to assess possible brain damage. (T.2715). In the last six months Toomer has reviewed numerous reports and other documents relating to the defendant's history.

As the first mitigating factor, Toomer cites the defendant's abusive childhood. (T.2718). This abusive environment created a significant chance that the defendant would

adopt maladaptive behaviors that would conflict with societal norms. (T.2720, 21).

The second mitigating factor is the defendant's drug abuse since an early age, including the ingestion of a barbituate in 1971 when he was fourteen, which the treating physician labeled a suicide attempt (T.2723), as well as reports citing LSD use, glue sniffing, heroin, and cocaine. As for drug use at the time of the offense, the defendant reported heavy drug use in the month prior to the murder, was described by a witness as high on drugs immediately after the murder, and was reported by his girlfriend to have used drugs earlier that morning. The defendant also told him he was taking drugs after he left his apartment early that morning, after a fight with his girlfriend over his drug use. He continued taking drugs until two to three hours prior to the murder. (T.2726, 27). There was drug paraphernalia in the Volkswagon, and his jail card recorded fresh track mark. (T.2728).

The third mitigating factor is his psychological disorders: schizophrenia, antisocial personality disorder, and drug induced psychosis. (T.2729). These diagnoses are found in the various psychological reports (these reports are described above by Dr. Krop). These disorders manifested themselves at an early age, and are lifelong disorders. (T.2730). The abuse and lack of love and support prevented the proper development of

internal controls, i.e., a sense of right and wrong, and this resulted in antisocial behavior and other maladaptive behaviors, such as drug abuse. (T.2732). The records also indicate a diagnosis of organic brain syndrome, possibly as a result of drug abuse. (T.2735, 36).

Dr. Toomer believes that the defendant's antisocial personality disorder is itself a mitigating factor, because it resulted from negative influences in his environment. (T.2737, 38). The disorder causes a pattern of maladaptive behaviors, of which the instant murder is but one example. (T.2739).

The next mitigating factor is that the defendant was acting under an extreme emotional or mental disturbance, which is based on the defendant's ongoing problems, described above, and especially his heavy drug use on the day of the offense. (T.2740).

The final mitigating factor is that the defendant's ability to conform his conduct to the requirements of law was substantially impaired, which is based on all of the factors stated above. (T.2741, 42).

Dr. Toomer did not find any obvious signs of malingering in 1981, although he noted other doctors found such evidence. This would not be unusual, because malingering is an attempt to

con or manipulate, which is typical of an antisocial personality disorder. (T.2743). Dr. Toomer found no evidence of active psychosis or delusions in 1981. (Id).

Cross-Examination of Dr. Toomer

It is "likely" that one of the factors that motivated the defendant to shoot Officer Broom was his fear of going back to jail. (T.2765). The defendant knew he was on probation, driving a stolen car, in possession of a gun, and that he would go to jail if apprehended. (T.2766). He knew what he was doing was wrong (T.2767), in regard to the gun and car, but at the time he killed Officer Broom, he did not know right from wrong, and hence was legally insane. (T.2769). However in 1981, he testified the defendant did know right from wrong, but that he could not conform his conduct to the requirements of law. (T.2771). He then explained that his 1981 testimony did not refer to the exact moment the defendant shot Officer Broom. (T.2772-75).

The defendant meets most of the criteria for antisocial personality disorder under the DSM-III. (T.2777, 78). This disorder is very prevalent in today's society, and many with this disorder are capable of conforming to the requirements of law. The defendant meets eleven of the twelve criteria under the DSM-111. (T.2780).

In 1981, Dr. Toomer testified that the factual basis for finding the statutory mitigating factors of extreme disturbance, and substantially impaired capacity, was the same. (T.2798).

The defendant took drugs voluntarily, and Dr. Toomer did not find the defendant to be addicted to drugs. (T.2801). He does not know the quantity of drugs the defendant used when growing up. He believes the defendant used drugs two to four hours before the instant offense (T.2801), at a convenience store, but he does not know the drug, amount or method of ingestion. (T.2802). The sole basis for this belief is the defendant's statement that he used "drugs" at a convenience store two to four hours before the murder. (T.2803). Dr. Toomer is not aware of the testimony of the people who were with him before the murder, Leroy Williams and Henry Nelson, the owner of the convenience store, who stated the defendant did not appear to be on drugs, and that the defendant did not take drugs nor leave their presence at the store. (T.2804).

In October 1981, a month after the murder, Dr. Toomer did not observe any track marks on the defendant's arm. (T.2806). Dr. Toomer did not find that the defendant had a substance abuse disorder under the DSM-III. (Id). Dr. Toomer never asked the defendant if he was under the influence of drugs at the time of the murder. (T.2811).

The defendant has not had an EEG since 1978, and it would be helpful to have a more recent one. (T.2816). The Bender is not a neurological test, but rather a screening device that indicates physiological neurological testing should be done. Dr. Toomer then described the defendant's Bender results, and stated that to his knowledge, these physiological tests were never performed. (T.2816-21). The defendant scored slightly above average on the intelligence test Toomer administered. (T.2825).

It would not change Toomer's opinion to learn that the defendant lied to him when he said he was trapped in a dead end, that he fired only two shots, and that he took the same Volkswagon to his grandmother's house. (T.2836-39).

The defendant did not report any abuse by his mother, but that is typical for the antisocial personality disorder. (T.2849).

Dr. Toomer does not know if the defendant still suffers from brain damage.

On redirect, Dr. Toomer stated that people with tolerances to drugs can be under the influence but still appear normal. (T.2859, 60).

Robert Sarnow

Sarnow was the lead crime scene technician. Sarnow produced a plastic eyeglasses case containing the drug paraphernalia found in the Volkswagon. (T.2879). The case and paraphernalia were not processed for fingerprints. (T.2880). The owner of the vehicle, when he claimed it, denied ownership of the case and its contents. The case was on the seat of the Volkswagon. (T.2882, photos at T.3758, 3760). It was the front passenger seat (where Leroy Williams was sitting). (T.2883).

STATE'S REBUTTAL CASE

Dr. Edward Herrera

Dr. Herrera is a psychiatrist. He has testified in the field of forensic psychiatry hundreds of times, but in only a handful has he testified as to mitigating evidence at capital sentencing proceedings, each time for the State. (T.2940). In most criminal cases he is appointed by the court, and in this case he was appointed by the court in 1981, and examined the defendant September 29, 1981, four weeks after the murder. (T.2942). He reviewed certain records relating to the defendant prior to the examination. He found the defendant to be competent to stand trial, and found no evidence of mental illness. (T.2943).

The defendant was not under the influence of an extreme mental or emotional disturbance at the time of the offense, and his ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was not substantially impaired. (T.2944). At the time of the interview the defendant was malingering, in that he was trying to trick Dr. Herrera by providing false information. The records indicated he had done the same thing in the past. (T.2945). Dr. Herrera found absolutely no evidence of any mental illness. (T.2948).

A mental illness is a disease, whereas a personality disorder is a classification based on the continuous pattern of a person's behavior. (T.2949). The two are totally different. Usually a patient must be observed over time to diagnose a personality disorder, although the M.M.P.I., and especially the M.C.M.I. test, can detect a personality disorder in many patients. (T.2951).

An individual with an antisocial personality disorder does not have a well developed sense of values, and does not feel bound by the laws and norms of society. Dr. Herrera does not believe an antisocial personality disorder is a mitigating factor, as virtually all prison inmates have this disorder. (T.2954).

During his 1981 interview the defendant did not provide him with any information on his drug use, either in terms of history or at the time of the offense. The jail records indicate that he did not suffer withdrawal symptoms after his arrest. (T.2958). The defendant did not have any signs of brain damage, and indeed his answers appeared to constitute a calculated effort to mislead and confuse him. (T.2958). Dr. Herrera did review a report from an EEG which indicated some type of abnormality. (Id). However, the discharge report from that treatment center did not mention the EEG, indicating the defendant's doctors did not attach much importance to the EEG. Abnormal EEGs are common, and can be a temporary result of medication or drug abuse. (T.2959).

As to Dr. Krop's and Toomer's theory that the defendant's abused upbringing caused his antisocial personality disorder, there is no studies or evidence supporting this connection. The direct causal connection they draw is pure speculation. Children from supportive homes develop antisocial personalities as well. The defendant had the capacity to make a rational choice at the time of the murder, and there is nothing to indicate the defendant was overcome by rage or panic at the time of the murder. (T.2961).

Cross Examination of Dr. Herrera

He was court appointed in **1981** to determine competency and sanity, then was retained by and testified for the State at the original **1982** sentencing. His only meeting with the defendant was in September of **1981**. In his opinion, drugs are not a mitigating factor unless the defendant is under the influence at the time of the crime.. **(T.2964)**. The defendant would not have to be completely intoxicated for drug use to be mitigating.

Dr. Herrera does not agree that the defendant has suffered genuine psychotic episodes in the past, because each time, he was treated following one of these alleged psychotic episodes, the diagnosis was the same; antisocial personality disorder, not mental illness. He may have temporarily exhibited some psychotic symptoms due to drug intoxication, but they always disappeared after a few days. **(T.2966-2970, 2985)**. Such temporary drug induced psychotic periods do not represent a true mental illness. Long term drug abuse is not, in itself, a mitigating factor. **(T.2988)**.

As to the time of the murder, the evidence suggests that the defendant was acting rationally after the murder, which would not be the case if he was experiencing a drug induced psychotic break at the time of the murder. Except in the case of alcohol, such breaks last for several days. **(T.2990-2992)**.

Dr. Herrera was not aware the defendant was driving in a "crazed manner'' just prior to the offense, or that a witness said the defendant was extremely high, and had bulging eyes, just after the murder, or that the Volkswagon contained intravenous drug paraphernalia. If accurate, such evidence does raise the possibility of some degree of intoxication at the time of the offense. (T.2996).

The defendant did exhibit poor judgment and impulse control at the time of the murder. A person who is abused in childhood could certainly turn to drugs, but many children in the defendant's situation do not. Dr. Herrera does not see any connection between the childhood abuse and the murder of Officer Broom. The defendant simply didn't want to get caught. If he was intoxicated it may have reduced his impulse control, but there is no way to connect the defendant's emotional development with the murder of Officer Broom. It is total speculation. (T.3002-05).

On redirect, Dr. Herrera stated that when he visited the defendant at the jail September 29th, he spoke with the jail psychiatrist who had been treating the defendant since his arrest. He reported no evidence of drug psychosis nor, as stated above, drug withdrawal symptoms. Poor judgment and impulse control are characteristics of an antisocial personality disorder. (T.3011).

Lt. John Brooks

Then Sgt. Brooks observed the defendant after the murder. At 4:30 p.m., six and a half hours after the murder, he was present when the defendant was arrested walking his dog (T.3038), and transported to the homicide office. Prior to this time he had been trained to recognize people under the influence of various drugs, and had considerable contact with such individuals. He had also received training in the symptoms of drug withdrawal and had observed persons experiencing withdrawal. (T.3039, 40). At the time he observed the defendant the afternoon of the murder, he detected no signs of drug intoxication or withdrawal. (Id).

Lt. Brooks is currently in charge of the largest street narcotics unit in the southeast United States. He has taken numerous narcotics related courses, and regularly observes persons under the influence of heroin, cocaine, speedballs, quaaludes, amphetamines, barbituates, marijuana and alcohol. He has also seen people experiencing withdrawal symptoms from these drugs. (T.3042).

Lt. Brooks has a clear picture in his mind of his observations of the defendant during and after his arrest. (Id). Applying his additional experience since 1981, the defendant did

not appear to be under the influence of drugs, or undergoing withdrawal symptoms, at that time. **(T.3043).**

On cross-examinations, Brooks stated that not all drug users exhibit withdrawal symptoms, and that you can have a serious drug problem and still not suffer withdrawal. **(T.3046).**

Carolyn Behrans

She was the defendant's probation officer. When she conducted her initial introductory interview of the defendant in April **1981,** she asked the defendant about the periods he spent in State hospitals. She does not remember his exact words, but her clear understanding of the defendant's explanation was that he had wanted to go to these institutions because it was easier time and less time than going to prison, and that, basically, he faked his way into these hospitals as an alternative to prison. **(T.3048, 49).**

On cross-examination she stated that some people with deviant personality types will deny their mental problems *so* as to appear normal. **(T.3050).**

On redirect, she stated that she saw the defendant two days after the murder, and the defendant appeared normal. **(T.3053).**

Dr. Charles Mutter

Dr. Charles Mutter is a psychiatrist specializing in forensic psychiatry. In 1978 he was appointed by the Court to evaluate the defendant in relation to his 1976 auto theft case. (.3076). At that time he found the defendant had a chronic drug abuse problem, with soft signs of organicity which may have been drug induced. (T.3077, 78). He found the defendant to be competent to stand trial, and that he was sane at the time of the armed robbery.

He saw the defendant again on September 26th, 1981, in order to evaluate competency and insanity in the instant case. He did a complete psychiatric evaluation on both occasions. Prior to the instant resentencing, Dr. Mutter reviewed a large volume of reports and records, spanning the defendant's lifetime, including numerous mental health records, family members depositions, trial testimony, etc. (T.3080, 81).

An antisocial personality disorder is a long-standing personality disturbance. A person with this disorder sets his own rules, and fails to learn from prior experience. He (or she) is usually at reasonable intelligence, and is able to rationalize his antisocial behavior. He manipulates other people for his own benefit and refuses to accept responsibility for his behavior.

(T.3082). Many are con artists, fakers and liars, and blame others for their own problems. They know the rules of society, but simply don't care and ignore them. (Id). This is a conscious, deliberate process, and they could obey the law if they wanted to. They will usually do whatever they believe they can get away with. (T.3083). They know their conduct is wrong, they just don't care.

In 1981 Dr. Mutter did not detect obvious signs of malingering, i.e., false symptoms of mental illness. The defendant claimed he was under the influence of drugs when he committed the murder, and he attempted to rationalize his behavior. It appears that in the past the defendant did malinger, which may have resulted in skewed, i.e., more serious diagnoses by his doctors. (T.3085).

In 1978 his mental status exam revealed "soft," very subtle indicators of organicity. However, there were times the defendant was evasive and guarded concerning certain information. (T.3087). His finding of soft signs of organicity was also based on a 1978 EEG report, indicating slight abnormality. There are much more sophisticated physiological tests for organicity, including CAT scans, and magnetic resonance imaging. There are also neuropsychological tests.

At the time of the offense, the defendant was not under the influence of an extreme mental or emotional disturbance. He was under stress, because he knew his probation would be violated if caught, and he may even, according to his statement, have been under the influence of drugs, but the entire record nevertheless does not support the finding of this mitigating factor. (T.3089, 90). As for the defendant's drug use at the time of the offense, there is nothing in the defendant's prior or subsequent behavior to indicate serious intoxication or impairment. (T.3091).

The defendant's ability to appreciate the criminality of his conduct, and to conform his conduct to the requirements of law, was not substantially impaired. (T.3092). Dr. Mutter took the defendant's history of drug abuse into consideration in arriving at his conclusions.

In 1981 the defendant had good short term memory, which is not consistent with brain damage. (T.3096). Dr. Mutter took the defendant's abused childhood into consideration, but in no way did it influence his conscious choice to kill Officer Broom rather than be caught. The abusive childhood certainly has predictable influences on later functioning and reasoning, such as a basic mistrust of other people. Many abused children develop mental illness, but that certainly is not the case with the defendant. The defendant was certainly abused by his mother, but there is no connection between that abuse and the defendant's action in killing Officer Broom. (T.3098).

Cross-Examination of Dr. Mutter

It is obvious that evidence of child abuse weighs on the side of mitigation. (T.3104). Mitigating evidence can be anything relating to disadvantages the defendant suffered prior to the crime. The defendant's emotional and physical abuse is mitigating (T.3109), but not as to the statutory mitigating factors. (T.3110, 11). Many people who are abused learn from it and become extremely compassionate adults. Other people react the other way, and use their abusive background as an excuse to reject societal norms and do whatever they feel like. (T.3111).

The defendant has no mental illness. He reacted to early trauma by not caring about anyone or anything but himself. He knows what he is doing is wrong, but doesn't care. He manipulates and places blame on others. There are numerous other reactions the defendant could have had to the early abuse. The defendant refuses to accept responsibility for his actions, and that is his choice. (T.3114).

During the 1981 interview, the defendant said he was using cocaine, heroin, dilloudid (a narcotic), amphetamines and quaaludes at the time of the offense. When Dr. Mutter asked how much and to what degree, the defendant became guarded and evasive. (T.3118). The defendant said he took heroin and cocaine

intravenously, but would not say how much or when. (T.3122). Dr. Mutter took the possibility of drug use, prior to the murder, into consideration in arriving at his opinions. (T.3124). The defendant had no memory loss concerning the events the day of the murder, which is inconsistent with heavy drug or alcohol use. (T.3126).

DEFENDANT'S LETTER TO THE COURT

After the jury returned its recommendation, the defendant was given an opportunity to present any additional matters to the trial court. The defendant then read a letter he had prepared for the trial court in lieu of a final statement. (T.3301). The defendant states he is extremely sorry for what happened on September 2, 1981. He never intended to harm or shoot anyone. He was scared and high, but he must accept the fact that he made the wrong decision. He wishes he could change what happened, for the benefit of Officer Broom's friends and family, but he cannot. (T.3302).

ISSUES PRESENTED

I

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO HAVE THE JURY MAKE SPECIFIC FINDINGS AS TO WHICH AGGRAVATING AND MITIGATING FACTORS IT FOUND.

II

WHETHER THE FACT THAT THE PROSECUTOR TOLD THE JURORS, DURING OPENING ARGUMENT, THAT KILLING A POLICE OFFICER IN THE LINE OF DUTY WAS AN AGGRAVATING FACTOR, DENIED THE DEFENDANT A FAIR TRIAL.

III

WHETHER THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

IV

WHETHER THE TRIAL COURT ENGAGED IN IMPROPER "DOUBLING" OF AGGRAVATING FACTORS.

V

WHETHER THE TRIAL COURT ERRED IN NOT FINDING MENTAL HEALTH MITIGATING FACTORS, AND IN FINDING THAT THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING.

VI

WHETHER IT IS IN THE "INTEREST OF JUSTICE" THAT THE DEFENDANT'S DEATH SENTENCE BE REDUCED TO LIFE IMPRISONMENT.

VII

WHETHER THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT.

SUMMARY OF ARGUMENT

Florida's sentencing statute does not provide, as do some states, that the jury make specific findings as to aggravating and mitigating factors. In Florida, this function rests solely with the trial court, subject to review by this Court.

In opening statement the prosecutor, without objection, argued to the jury that the aggravating factor of killing a police officer in the line of duty, adopted after the instant murder, would apply to this case. The State had taken this position in its response to the defendant's pretrial motion in limine, which motion was denied with leave to renew. When it was renewed at the charge conference, prior to closing, the trial court reversed itself and held this factor inapplicable. The State submits that the trial court's initial ruling was correct, as the application of this factor would not violate the ex post facto clause. In any event, the trial court told the jury repeatedly that what the lawyers say is not the law, and that only the judge can instruct on the law. In his opening statement defense counsel stated it disagreed with the State's description of the aggravating factors, and that the jury should rely on the court's instructions. In its closing the State did not argue the existence of this aggravating factor, and the defendant stressed in its closing that the fact that the victim was a police officer was not, in itself, an aggravating factor. Finally, and most

significantly, the jurors were not instructed on this aggravating factor, and were twice instructed not to consider in aggravation any factors except those on which they were instructed.

The defendant's prosecutorial misconduct claim is as frivolous as the day is long, and then some. Virtually none of the matters raised were objected to, which is understandable given that only a handful were objectionable. All the attorneys in this cause were extremely well prepared, exhibited great skill, and conducted themselves in a dignified and professional manner, and in a spirit of mutual cooperation and respect. The defendant's attempt to recast the prosecutor as the head bishop of the Spanish Inquisition is as amusing as it is preposterous.

The trial court specifically stated in its sentencing order that it was merging the aggravating factors of "avoiding a lawful arrest" and "disrupting a governmental function'' (even though it could have found the defendant killed Officer Broom for two separate reasons; to avoid arrest for stealing the Volkswagon, and to prevent the government from violating his probation, both for the car theft and possession of a firearm). This claim is thus without merit.

There was ample evidence from which the trial court could conclude that no mental health mitigating factors had been established, including the State's two experts, and in relation

to the two statutory mental health mitigators, one of the defendant's own experts as well. The trial court's decision that the aggravating factors outweighed the mitigating factors was likewise fully supported by the record.

The State submits that "the interests of justice" is not a cognizable point on appeal, but that whatever these interests are, they would best be served by an affirmance of the sentence entered below.

Finally, Florida's death penalty statute, and the death penalty in general, is not cruel and unusual punishment.

ARGUMENT

I

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO HAVE THE JURY MAKE SPECIFIC FINDINGS AS TO WHICH AGGRAVATING AND MITIGATING FACTORS IT FOUND.

It is certainly commendable that the defendant has taken it upon himself to attempt to rewrite Fla. Stat. 921.141(2) & (3). However, the State respectfully asserts that perhaps such revisions should await legislative action. Pending such developments, the instant claim should be steadfastly rejected. The logistics of a vote on each aggravating and mitigating factor, including nonstatutory mitigating factors, and how such vote tallies would be converted to a final recommendation, is the stuff of which nightmares are made.

II

THE FACT THAT THE PROSECUTOR TOLD THE JURY IN OPENING THAT THE AGGRAVATING FACTOR OF KILLING A POLICE OFFICER IN THE LINE OF DUTY APPLIED TO THIS CASE, DID NOT DENY THE DEFENDANT A FAIR TRIAL.

The defendant totally misrepresents the factual circumstances underlying this claim, and a detailed factual analysis is thus mandated.

Prior to trial the defendant filed a motion in limine which sought, among other things, to prohibit the State from relying on aggravating factor 921.141(5)(J), that the victim was a law enforcement officer engaged in the performance of his official duties. This motion is not contained in the record, however the State's Response thereto (R.3470-74), and the defendant's rebuttal (R.3478-3482), are contained therein. In its response the State argued that even though the murder occurred prior to the adoption of this aggravating factor, no ex post facto violation would occur (R.3473, 74) because the fact that the victim was a police officer, acting in the line of duty, was always a legitimate circumstance the jury could consider under 921.141(5)(e) (avoiding lawful arrest) and/or (g) (disrupt governmental function). Thus the defendant is not "disadvantaged" under Miller v. Florida, 482 U.S. 423 (1987), since the fact that the victim was a police officer acting in the

line of duty was already weighed into the aggravating balance, and although the number of aggravating factors is increased by one, the total aggravating weight is the same.[2]

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[2] The Eleventh Circuit recently adopted this argument in relation to the aggravating factor of cold, calculated and premeditated, adopted in 1981. Prior to 1981, this Court approved the finding of heinous, atrocious or cruel based on heightened premeditation. See Vaught v. State, 410 So.2d 147, at 151 (Fla. 1982), and cases cited therein, especially Alvord v. State, 322 So.2d 533 at 540 (Fla. 1975). The State argued in Francis v. Dugger, 908 F.2d 696 (11th Cir. 1990), that the adoption of CCP merely split HAC into its component parts, heightened premeditation and heightened cruelty, and thus although a number was added, nothing was added to the weighing process. The Eleventh Circuit agreed stating:

> 1. "Cold, Calculated, and Premeditated" and the Ex Post Facto Clause
>
> Francis contends that the trial court's application of the aggravating circumstance "cold, calculated, and premeditated'' violated the ex post facto clause, article I, section 10 of the United States Constitution. (The Florida Legislature added this statutory aggravating factor to the list after the murder occurred but before Francis' conviction.) In *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the Supreme Court set out the test for determining whether a statute is ex post facto: "two critical elements must be present; first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" 482 U.S. at 430, 107 S.Ct. at 2451 (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981). We hold that no ex post facto violation occurred because the application of the aggravating circumstance "cold, calculated, and premeditated" did not disadvantage Francis. As the district court reasoned:

Apparently, according to defense counsel, the trial court had denied the motion in limine prior to trial, in chambers, with leave to renew it later. (T.2915, 16). Defense counsel did not renew his challenge to (5)(J) until the charge conference, prior to closing argument. (T.2910-2916). The trial court ultimately reversed its earlier ruling, and held that (5)(J) was inapplicable because it was adopted after the murder. (T.2978).

> [T]he facts on which the trial judge relied in applying the 'cold, calculated, and premeditated'' factor were the same facts underlying application of other aggravating factors, such as 'hindering law enforcement' and 'especially atrocious and cruel.' Francis argues that the retrospective application of this factor adversely affected his sentence because the trial judge mistakenly enumerated three, rather than two aggravating factors. The Florida sentencing scheme is not found on 'mere tabulation' of aggravating and mitigating factors, but relies instead on the weight of the underlying facts. *Herring v. State*, 446 So.2d 1049, 1057 (Fla. 1984).... [I]t was proper for [the trial court] to consider those specific circumstances in sentencing.
>
> *Francis v. Dugger*, 697 F.Supp. at 482.

Id. at 704, 705

The State's first point is that the State's reliance on **(5)(J)** during opening was in total good faith, and that the trial court's initial ruling was correct under Francis and Miller, supra. The second point is that defense counsel could have renewed its motion prior to opening, because defense counsel certainly new where the State was coming from (the prosecutor had specifically stated he would be relying on **(5)(J)** prior to voir dire. (T.244). The third point is that defense counsel did not object during the State's opening when the prosecutor stated the evidence would support a finding of **(5)(J).** (T.803). Thus the issue is not preserved. Fourth, defense counsel stated in his opening that the prosecutor's list of aggravating factors was inaccurate, and reminded the jury that the instructions come from the judge, not the lawyers. Fifth, the trial court repeatedly told the jury that what the lawyers said was not the law, that the law would come solely from the trial court. (T.404, 406, 417, 428, 3272, among others). Sixth, in its closing argument the State did not mention **(5)**(J)**,** and in its closing defense counsel specifically told the jury that the victim's status as a police officer was not, in itself, an aggravating factor. Finally, the trial court did not instruct the jury on **(5)(J),** and instructed the jury twice that they could only consider the aggravating factors on which they were instructed by the Court. (T.3267, 3274). In short, both the tenor and substance of the instant claim are devoid of merit.

The defendant cites numerous tid bits of transcript, wholly out of context, all of which are apparently intended to convey the impression that the prosecutor was somehow placing two much reliance on the fact that the victim was a police officer. None of these cited actions of the prosecutor drew an objection, and rightly so. As for the prosecutor's repeated use of the term "murder" in relation to the first degree premeditated murder of Officer Broom, perhaps at oral argument defendant's current counsel can offer an equally clear, accurate and succinct alternative. This complaint is typical of the defendant's accusations against the prosecutor, i.e., groundless, and a massive waste of good timber.

The victim's status as a police officer was the major facet of this sentencing proceeding. It was not Nathaniel Broom the individual, but rather Officer Broom the police officer who was murdered, murdered so the defendant would not be arrested for new crimes, and spend five years in prison for an old crime for which he was on probation. The prosecutor played the hand the defendant dealt him, and played it fairly and by the book.

III

THE DEFENDANT WAS NOT DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

The defendant's current counsel seems unable to grasp the most essential concept of appellate law: preservation. He plows through the transcript and yanks out whatever seems to offend his own ideas of prosecutorial propriety, without any regard to whether an objection was interposed by defendant's trial counsel. The State has no alternative but to address each instance cited by the defendant although two words cover virtually all of them: **NO OBJECTION!!**

As to the prosecutor asking prospective jurors what they thought about the more liberal concealed weapons permit law, there was no objection, and four jurors thought it was a good law. **(T.279, 284, 286, 290, 292, 293).** The defendant's accusation that the prosecutor was thereby attempting to condition the jurors to hate the defendant, is pure bunk. A reading of the entire voir dire shows that the prosecutor proceeded in a fair, totally appropriate manner, and the defendant's attempts to paint him as a vicious, justice-smashing zealot are absolutely 100% nonsense.

As for the prosecutor's stressing that the defendant had already been found guilty, there were no objections **(T.293, 639),**

defense counsel also stressed that the defendant's guilt was not to be questioned in this proceeding (T.508), and the bottom line is, the prosecutor did nothing improper.

As for the fact that the prosecutor mentioned, no less than three (3) times, that the defendant murdered Officer Broom, the State is sure that this Court is suitably impressed with such semantic bombshells.

Turning to the prosecutor's statement in voir dire, that sympathy should not play a role in deliberations, not only was there no objection (T.383, 384), defense counsel totally agreed with the prosecutor. (T.426, 427). As for the prosecutor's explanation of circumstantial evidence (T.386-388), there was no objection, and the prosecutor's explanation was accurate.

The defendant next complains that during voir dire, the prosecutor stated that if the State proves aggravating factors, and the jury finds no mitigating factors, the jury "could" recommend death. (T.404). Defense counsel objected, and the prosecutor's explanation was indeed missing a key word, in that the State must first prove sufficient aggravating factors. The trial court responded by stating:

> THE COURT: Well, let me tell you the problem that we are all having here.

> I will tell you what the law is. The attorneys can ask you questions. You will hear the law from me.
>
> At the end of the case I will tell you everything you need to know about the law and I will have it for you in writing, in addition to that, so you will know everything you need to know about the law.
>
> (T.404)

The State would note there was nothing further said by defense counsel at this point, and that the defense counsel's objection did not remind the State that it was omitting the word "sufficient." The above cycle was repeated shortly thereafter (T.406, 407), and once again the defense counsel's objection did not appraise the prosecutor that he was omitting the word "sufficient." Both the court and prosecutor stressed to the jury that what the attorneys said was not the law, that the law came only from the judge.

A bit further on the prosecutor again omitted the word "sufficient," and for the first time defense counsel's objection included a specific and accurate basis, that Fla. Stat. 921.141(2) (and the standard instructions), require the jurors to initially find sufficient aggravating factors before embarking on a weighing process. (T.417). The trial court again stresses to the jury that what the lawyers say is not evidence, and states that it might as well read the instruction now. Defense counsel states that might not be a bad idea, and the prosecutor states

"Go ahead". (Id). The next entry in the record is the Judge inquiring of the prosecutor "Any other questions? (T.418). It appears that a portion of the transcript is missing, but that is just a guess.

What is not a guess is that defense counsel never asked for a curative instruction or a mistrial. Also a certainty is that the prosecutor's omission of the word "sufficient" was an unintentional slip of the tongue, because after defense counsel finally appraised the prosecutor of his specific miscue, the prosecutor subsequently inserted the word "sufficient" in his voir dire. (T.676-678). In sum, the defendant's objections, with the exception of his final one, were inadequate. The issue was also not properly preserved because there was no request for curative instruction or mistrial.[3] Finally, the prosecutor's slip-up could have had absolutely no effect on the outcome of this case.

As for the State tendering the panel and then exercising backstrikes (T.542), the prosecutor stated it was tendering the panel "at this time." This is the same language used by defense counsel ("at this point the defense accepts the jury, T.545), after which both sides exercised backstrickes without objection.

See Clark v. State, 363 So.2d 331, 335 (Fla. 1978), and more recently Brown v. State, 550 So.2d 527 (Fla. 1st DCA 1989), and Wilson v. State, 549 So.2d 702 (Fla. 1st DCA 1989).

It is clear that both parties and the trial court understood these were tentative tenderings subject to backstriking.

Turning to the prosecutor pointing his finger at the defendant (T.565, 66), the judge noted he observed no disrespect by the prosecutor, the prosecutor promised not to point at the defendant in the future, and that was the end of that.

As to the prosecutor's comments concerning expert witness (T.661, 662), there was no objection, because there was nothing improper in the prosecutor's line of questioning.

The prosecutor's "will never change'' comment, relative to the defendant's conviction (T.667, 668), was not objected to and accurate. As to the prosecutor's questions as to whether the jurors could recommend death even though there was only one victim, as opposed to a serial killer, this proper line of questioning was not objected to. (T.672, 673). The only reason the prosecutor "dragged" Ted Bundy's name out was because juror Ms. Jay, whom he was questioning, had told the judge initially that Ted Bundy got what he deserved, and the prosecutor was trying to discover if Bundy was the only type of killer for whom this juror could recommend death. **(Id).**

In opening the prosecutor reviewed statements the defendant made following his arrest six hours after the murder,

which indicated he knew he had killed a police officer. These statements were totally relevant to show he knew his victim was a police officer, and that the defendant was acting rationally and coherently a short time after the murder. The defendant's exact words are at T.1196-98.

As for State witness Preston Stewart's testimony that the defendant jumped the fence and ran into the field after the murder (T.1037), that is exactly what Stewart saw the defendant do. The fact that it "implies" the defendant could have jumped the fence initially, instead of ambushing Officer Broom, is an extremely reasonable and indeed compelling implication, one which is totally relevant to whether the defendant made a conscious decision to end the pursuit, and thereby prevent his arrest, by killing Officer Broom.

Technician Badali's testimony was essential to the jury's understanding of what occurred at the time of the murder. Pardon the State if it endeavored to show the jury how the murder occurred. The defendant's argument, that by showing what occurred, the State was somehow claiming that the murder was especially heinous, atrocious or cruel (a factor about which the jurors never heard a word), is hard-core nonsense. The jurors need to know how the shooting occurred because they cannot operate in a vacuum, and because the circumstances of the offense demonstrate that the defendant ambushed Officer Broom to avoid

apprehension, arrest for new crimes, and violation of probation for old crimes.

At pages 55-57 of his brief, the defendant recites several incidents during cross-examination where the prosecutor editorialized and or injected his own assessment of the evidence: "Now, I got the feeling" (T.2317), "because I am a little confused, see?" (T.2322), "...I didn't get that impression" (T.2323), "I got kind of the impression you were characterizing the defendant as a liar and con artist" (T.2390), "That is all I wanted to hear you say" (T.2405), "This is all I want to find out" (T.2410), "Just so we have a record" (T.2434), "I am puzzled. I think you have changed answers today" (T.2524), "I have to disagree with you there" (T.2649), "because I don't recall seeing one" (T.2664), "I was left with that impression," and "That's fine". (T.2843).

As to all of the above cited instances, there was no objection by defense counsel. All of the above extraneous utterances were objectionable, because the prosecutor's job is to ask questions during cross-examination, and to wait until closing argument to comment on the answers he received. The trial court's "bad habits" admonishment to the prosecutor (T.2682) demonstrates that had defense counsel objected, the objection certainly would have been sustained, followed by a painful (for the prosecutor) admonishment in front of the jury. However

defense counsel let the comments slide, and whether that was a deliberate strategy or not is not relevant to this proceeding. Nor do the above comments show bad faith on the prosecutor's part. A review of this entire record reveals that the prosecutor operated in the utmost good faith throughout. He simply has an unfortunately very common bad habit, which is not by any means germane to the role of prosecutor. The long and short of it is that the issue of these comments was not preserved for review in this proceeding.

The defendant raised two other comments in his brief. At the top of page 56, the defendant describes where the prosecutor asked the defendant's sister if any other family members had visited the defendant since 1982. (T.2446). There was no objection to this question, because it was totally proper. Numerous family members, several of whom did not testify, provided the defense experts with detailed information on the defendant's life, and it was totally proper for the prosecutor to attempt to learn what contact these family members had with the defendant in the past seven years.

Apparently the instant record is so devoid of legitimate issues that the defendant's only course of action is a mindless and wholly unwarranted character assassination of the prosecutor.

The final comment cited is during closing argument, where the prosecutor argued that the defendant is attempting to avoid responsibility for the murder. **(T.3154).** There was **no** objection (and indeed there were no objections by either side during closing) because the prosecutor's argument was totally proper. The prosecutor was referring specifically to the mitigating factors the defendant was advancing as an explanation for the murder, i.e., the child abuse and drug abuse and its effects on the defendant. The prosecutor's entire attack on the defendant's mitigating presentation, an attack supported by the State's experts, was that the abuse of the defendant by his mother and his drug abuse did not lead to the murder of Officer Broom, and hence should not reduce or mitigate his responsibility for that offense. In any event, there was no objection.

At the bottom of page 57 and top of page 58 of his brief, the defendant cites several excerpts from the prosecutor's closing argument. The defendant does not state what he dislikes about these arguments. The State would note that the excerpts appear accurate, that there were no objections (T.3154, 55, 65, **88, 3208,** 09), and that the arguments were all proper.

The defendant concludes with an alleged violation of Caldwell v. Mississippi, **427** U.S. **320 (1985).** Since this claim is indicative of the quality of all the defendant's attacks on the prosecutor, perhaps this Court should consider the following:

MR. ROSENBAUM: Again, I want to emphasize, although your verdict in this phase is only a recommendation, the Judge gives it very, very great weight.

The judge is the ultimate sentencer and he can accept your recommendation or reject it, but let me assure you he gives it very great weight, so your recommendation is extremely important.

(T.405, 406).

IV

THE TRIAL COURT DID NOT DOUBLE THE AGGRAVATING FACTORS OF "AVOID ARREST" AND "DISRUPT GOVERNMENTAL FUNCTION."

The trial court specifically stated in its sentencing order that, as to these two aggravating factors:

> The Court specifically considers these events as only one (1) aggravating circumstance and does not give it a "doubling effect." Suarez v. State, 481 So.2d 1201 (Fla. 1985); Provence v. State, 337 So.2d 783 (Fla. 1976); White v. State, 403 So.2d 331 (Fla. 1981).
>
> (R.3838).

The defendant's allegation that the trial court was "covering his tracks" (defendant's brief, p. 60), is baseless dribble, though certainly par for the defendant's course.

In terms of background, the defendant asked the trial court to force the State to elect between "avoiding a lawful arrest" and "disrupting or hindering a lawful government function," and further requested that the jury be instructed on only one of these factors. In rejecting the defendant's request, the trial court expressly relied on Suarez v. State, 481 So.2d 1201 (Fla. 1985), wherein this Court held that the jury should be instructed on all aggravating factors supported by the evidence. The trial court noted (as the State argued in closing, T.3207),

that the evidence showed the defendant murdered Officer Broom for two separate reasons; to avoid arrest for new charges, and to prevent his probation from being violated (with an attendant 5 year sentence) in a prior case. (T.3017, 3018).

In its sentencing memorandum the State suggested that, although these two aggravating factors were supported by different facts,[4] "in an abundance of caution," the court should merge them into a single factor. (R.3809). That is precisely what the court did, and its order is entirely proper in this regard.

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[4] Citing Tafero v. State, 403 So.2d 355, 362 (Fla. 1981), Ford v. State, 377 So.2d 502 (Fla. 1979), and Raulerson v. State, 358 So.2d 826, 833 (Fla. 1978).

V

THE TRIAL COURT DID NOT ERR IN FINDING THAT NO MENTAL HEALTH MITIGATING FACTORS EXISTED, AND THAT THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING.

As for the statutory mental health mitigating factors of "extreme mental or emotional distress" and "substantial impairment," the defendant's own expert, Dr. Krop, stated these two factors did not apply (T.2526, 28), as did Drs. Herrera (T.2944), and Mutter. (T.3089, 3092). Given these opinions, and the defendant's actions prior to and after the murder, the trial court was entitled to find that these factors were not present. See Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). This is not a case where the defendant's evidence of these factors was "unrefuted." Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990).

Turning to the nonstatutory mitigating factors, the trial court found that the defendant did have an abused childhood and used drugs, though not to the extent claimed by the defendant. (R.3839). The court rejected the nonstatutory mitigating factors regarding alleged mental impairments, because it was contradicted by evidence of malingering, and testimony the defendant was simply antisocial. (Id). These findings are supported by the testimony of the State's experts and other evidence, as discussed below. At this point the State will briefly summarize the

evidence of malingering, as it was obviously given great weight by the trial court, and rightfully so.

In 1975 the defendant was convicted of armed robbery of a convenience store, and sentenced to four years imprisonment. In 1976 the defendant escaped by leaving a work gang. When recaptured, he was in a stolen car and was charged, in Dade County, with dealing in stolen property. On September 3, 1976, Judge Jaffe ordered the defendant evaluated for competency and sanity (R.3748), Circuit Court Case No. 76-7657 (Case No. 76-22523 was the original County Court case number, the defendant having been transferred to Circuit Court, R.3744).

The defendant was examined in the Dade County Jail on September 9, 1976, by Dr. Sherwood Cantor. His report is at R.3745-47 (pages are out of order). Based on the defendant's seemingly foggy mental state, self-reports of tripping on LSD at the time of the offense, and being visited by the devil in his cell at night, etc., Dr. Cantor found the defendant insane and incompetent and presently psychotic, and recommended involuntary hospitalization. Based on the report the trial court found the defendant incompetent and ordered his commitment (R.3742) on September 13, 1976.

The defendant was admitted to South Florida State Hospital. On December 6, 1976, the defendant was evaluated by

Dr. Guerrero. Based on the defendant's self-reports of visual hallucinations for the past month, and "intense" use of LSD the past 2 or 3 years, the defendant's disorientation, lack of recent memory, "dulled" intellectual capacity and lack of insight, the defendant was diagnosed as having "Psychotic Organic Brain Syndrome associated with Drug or Poison Intoxication." (R.3741).

On February 16, 1977, the defendant was evaluated by Dr. Ceballos (R.3740), who found:

> REASON FOR FURTHER HOSPITALIZATION: This patient has been treated with the full range of hospital programs including psychotherapy and medication, (present medication, Trilafon 8 mgm BID and Trilafon 16 mgm QUS, Vistaril 50 mgm QUS, and Cogentin 2 mgm BID). His mood and behavior are very labile and he changed suddenly from a pleasant and cooperative patient to a negativistic one. His attitude is at times infantile, and very superficial, lacking insight into his condition. He shows inappropriate affectivity. He admits auditory hallucinations, but doesn't want to elaborate. His affect is flat. For that reason, we feel that at this point, patient is not in a position to aid in legal counseling.
>
> FURTHER TREATMENT PLANNED: We plan to keep Mr. Patton on psychotropic medication of the type of a major tranquilizer and have him attend well structured activities and individual and group therapy.
>
> (Id).

Five days later, the defendant was given psychological tests by Dr. Bernal, who found:

> Tests Administered:
>
> House-Tree-Person, Rorschach and M.M.P.I. tests and Interview.
>
> Results and Interpretation:
>
> Patient was oriented in all three spheres, his speech was coherent and goal directed. Past memory was impaired, but present memory was adequate. House-Tree-Person tests showed signs of hostility, aggressivity, frustration, paranoia and organicity. Rorschach test showed evident alterations of concept formation with a lot of bizarre answers. M.M.P.I. test showed excessive rigidity, his defenses are down. In spite of this, patient showed malingering, his extreme high scores in the area of schizophrenia, paranoia and depression appear in the other tests and the clinical impression is the same. Also the patient is still an adolescent, the malingering that showed does not invalidate the profile interpretation of this test.
>
> Diagnostic Impression:
>
> 294.3 Organic Brain Syndrome with drugs associated with Schizophrenia, paranoid type.
>
> (R.3739)

Based on Dr. Ceballo's findings, the trial court ordered continued commitment. (R.3738).

On April 21, 1977 Dr. Reinoso filed a report (R.3734, 35) which reviewed the prior evaluations and diagnosis, including the

diagnosis, at admission, of Psychotic Organic Brain Syndrome. The disposition board found the defendant competent on 3/30/77, and Dr. Reinoso recommended the defendant be returned to court because he was competent. Dr. Reinoso's diagnosis: antisocial personality with drug dependence. Based on the above the defendant was returned to the Dade County Jail.

On April 27, 1971 the defendant was examined by Dr. Castiello. Dr. Castiello diagnosed the defendant as schizophrenic, paranoid type, with a well entrenched pattern of antisocial behavior. This diagnosis of mental illness was based in part on the following information:

> Regarding his plans for the future, the defendant indicated that he has been in contact with President Carter and had tried to get in contact with ex-president Eisenhower *so* he could be assigned to a farm supported by the government in Mississippi where they grow marijuana. He talked at length as to how valuable his experience with drugs could be to the country and the more the defendant talked, the more disorganized and loose his speech became. Gross delusional material was elicited and obviously the defendant is in very poor contact with reality, trying to maintain a facade of sanity but hardly able to do so whenever he is under pressure.
>
> (R.3731, 32).

Dr. Castiello evaluated the defendant for competency and sanity at the time of the crime (dealing in stolen property, for

being in possession of a stolen car when recaptured). Dr. Castiello found the defendant incompetent and, based on Dr. Cantor's initial evaluation after the defendant's recapture **(T.3745-47,** see above), found the defendant was insane. Dr. Cantor's finding of insanity was based on the defendant's self-report of "tripping" on LSD at the time and his "vague and amnesic" memory of that period, although he does remember that he didn't steal the car because he had permission to use it from the owner. **(T.3747).** It was also based on the defendant's "bizarre, hallucinating and delusional'' behavior when brought to the jail after the murder, including self-reports of hearing voices, that people were trying to kill him, that one of the guards is the devil and trying to make him go mad, etc. **(T.3746).**

Based on Dr. Castiello's report of incompetency, the defendant was readmitted to South Florida State Hospital on May **19, 1977.** The defendant was brought before the Disposition Board on **10/31/77.** On November **1, 1977,** Dr. Hahn prepared a final summary, finding the defendant to be competent and recommending he be returned to court. Dr. Hahn's diagnosis: Antisocial Personality Disorder with drug dependence. **(R.3728-29).**

Dr. Ceballos filed a final report on November **15, 1977 (R.3725, 26),** which mirrored the report of Dr. Hahn. It also noted the defendant had been in a fight recently, and that the defendant was very much concerned that if sent back to the court, he would be returned to prison. **(R.3726).**

Upon his return to the Dade County Jail, Judge Fuller ordered another evaluation for competency and sanity. **(R.3724)** The defendant was examined for this purpose on January 14, **1978**, by Dr. Mutter. **(R.3720, 21).** The defendant related an accurate family history and history of his arrests, sentences and hospitalization. The defendant said he thinks he had a "nervous breakdown" when recaptured in **1976**, and doesn't remember what happened. Dr. Mutter found no evidence of mental illness but strong indications of drug dependence: "Diagnostic impression is chronic drug abuse. There are soft signs of organicity, which may have been caused by his drug abuse." **(R.3720).** He found the defendant competent to stand trial and sane at the time of the offense.

Dr. Castiello also evaluated the defendant for competency and sanity after his second discharge from South Florida Hospital (R.3697-99), which occurred November **30, 1977.** Dr. Castiello noted that since his return to the Dade County Jail, the defendant refused to take the medication prescribed by the doctors at South Florida Hospital. The defendant had a vague recollection of being examined by Dr. Castiello earlier that year (April), and when confronted with information he had provided at that time, the defendant seemed surprised, and stated he had no memory of these earlier statements. **(R.3697).** The defendant did not take his medication, it upset his stomach. He would only take the same medication he had been getting at the hospital.

The defendant was anxious to be released so he could move to California, and vaguely talked of a good job he had waiting for him in California. The defendant denied any present symptoms, and stressed that all he wanted was to get out of Florida. The defendant displayed no signs of mental illness, and was competent to stand trial. However, based (solely) on Dr. Cantor's report, and in the absence of evidence to the contrary, the defendant was insane at the time of the offense. (R.3698). Dr. Castiello still believes the defendant has a "chronic major psychiatric illness."

Based on the above reports, Judge Fuller found the Not Guilty by Reason of Insanity, and he was committed to the North Florida Evaluation and Treatment Center. The admission evaluation, (R.3700-03) March 14, 1978, states that there is no evidence of psychosis, hidden psychotic traits, identity or goal confusions. The defendant has an inadequate personality but good intelligence and attitude. Because defendant reported memory gaps, testing for organicity was recommended. (R.3700).

Dr. Feussner performed an EEG on April 14, 1978. (R.3704). Since all the experts at trial referred to this report, the findings are worthy of note:

ANALYSIS: Throughout the record there are episodes of

	disorganization which appear to be related to a superimposed 3-5 Hz rhythm which occurs most frequently in the posterior temporal occipital areas. During drowsiness, attenuation of the background rhythm and voltage occurs. Aroused responses, vertex sharp wave and sleep spindle activity occurs indicating light sleep.
HYPERVENTILATION:	Produced a modest build up with persistence of temporal sharp abnormalities for two minutes post hyperventilation.
PHOTIC STIMULATION:	Produced a bilateral driving response, no activation.
IMPRESSION:	Mildly abnormal EEG. A bitemporal mild dysrhythmia occurs intermittently and the response to hyperventilation is somewhat prolonged. The findings are non-specific but may indicate a mild degree of cortical dysfunction in the temporal areas. There is no suggestion of a progressive process.

On May 5th, 1978, Dr. King prepared a report on the defendant's progress. (R.3706-07). In the history segment, Dr. King notes that the defendant reported a good relationship with his grandmother, who was responsible for the majority of his upbringing after rejection by his mother. The defendant's attitude and participation in programs is excellent, and he shows good motivation to respond to treatment and improve his ability to act responsibly and overcome his drug abuse.

Diagnosis: Antisocial Personality with Immature Dependent Characteristics. No symptoms of mental illness, but needs to develop improved ability to choose appropriate alternatives. Further treatment recommended. Based on this recommendation, continued hospitalization was ordered. **(R.3708-10).**

On June 6, **1979,** the defendant's clinical social worker, Judith McBride, prepared a report **(R.3713, 14),** in which she reports the defendant's excellent progress in his program for behaviorally disordered individuals. She states that the defendant is ready to assume responsibility for his behavior, and to be returned to the community via a residential facility, i.e., halfway house. Diagnosis: Antisocial Personality with Immature - dependent characteristics.

It is unclear from the record what happened to the defendant after his release from the North Florida Treatment Center. His original sentence for armed robbery, in **1975,** was four years in prison followed by four years probation. There is a handwritten medical report prepared November **4, 1979,** which appears to be a discharge report from North Florida Treatment Center, and which notes the defendant has been discharged to a halfway house. **(R.3717, 18).** It also notes that the results of the **4/14/78** EEG were non-specific, with no suggestion of a progressive process, and that the result did not indicate a need for treatment. **(R.3717).**

Having outlined the above history, one factor is crystal clear: the findings of the defendant's incompetence, insanity, organic brain syndrome (which incidently were all made prior to the EEG), and mental illness, are all predicated on self-reports of the defendant and his own bizarre behaviors after his incarceration and during hospitalization.

Carolyn Behrens became the defendant's probation officer in April of 1981. During their initial meeting, the defendant told her that he faked his way into the State hospitals because it was easier time (certainly easier than a road gang) and less time than being in prison. (T.3048, 49). The defendant's girlfriend, Christina Castle, testified in a sworn statement that the defendant told her that after his recapture, following his escape from the road gang, he acted mentally ill so he would not be sent back to prison:

> A. He said one time that he had escaped from a road gang and that they came to look him up. He played like he was sick *so* he could them--put him in a mental hospital instead of going back to prison.
>
> Q. But did he indicate to you that he had ever really had any mental problems?
>
> A. No.
>
> (R.3649)

Dr. Bernal first detected the defendant's malingering in February of 1977 (R.3739, see above), though he stated it did not alter his diagnosis of Organic Brain Syndrome and Paranoid Schizophrenia. Dr. Herrera testified that when he interviewed the defendant in September of 1981, the defendant exhibited blatant malingering, his answers being a calculated effort to mislead and confuse him. (T.2958). Dr. Mutter's review of the defendant's records reveal that the defendant probably has malingered in the past, and this probably has skewed the diagnosis of his prior doctors. (T.3085). Additionally, in his 1981 interview he attempted to learn if the defendant took drugs prior to the murder. The defendant stated he took a whole slew of different drugs, but when Mutter asked how much and when, the defendant became guarded and evasive and would not answer. (T.3118, 3122).

All four experts, Drs. Krop, Toomer, Herrera, and Mutter, agreed the defendant had an antisocial personality, and that the defendant would con, lie, and manipulate the system and individuals to his own end. The trial court's rejection of the propounded mental health mitigators was founded upon the fact that the defendant is a malingerer, and hence the reports from his hospitalization, claiming major mental illness and organic brain syndrome, are unreliable.

Turning specifically to brain damage, Dr. Krop did not testify the defendant had brain damage, rather he testified his testing revealed a possibility of brain damage, that sophisticated physiological tests (CAT scan, resonance imaging) were necessary to determine brain damage, and that most of his neurological testing (with the exception of the verbal/performance discrepancy on the IQ test) was normal. (T.2507, 08, 2511, 2556). Dr. Toomer stated his testing showed "soft signs" of organicity, and that further testing was needed. (T.2715). Dr. Mutter also found "soft signs" of organicity in 1978, however even this nebulous finding must be qualified because the defendant was evasive and guarded as to certain important area. (T.3087). A CAT scan, magnetic resonance imaging, and other neuropsychological testing are needed to make a diagnosis of brain damage. (Id).

Based on all of the above, the trial court had substantial, competent evidence on which to find that the defendant did not suffer from mental illness or an organic disorder, and that his true problem is an antisocial personality and drug abuse. If the defense experts feel an antisocial personality disorder (which Dr. Herrera states applies to almost all prison inmates) is mitigating, they are entitled to their opinion. Drs. Mutter and Herrera disagreed, and the court was entitled to disagree as well.

All the experts agreed that drug impairment at the time of the offense would be important, especially if it was severe. The State presented the persons who were with the defendant prior to and after the murder, showing the defendant was not intoxicated or impaired from drugs. The defendant's actions were rational and highly goal oriented before and after the murder. The defendant's sister, Dyane Swartz, testified that when the defendant visited her at her business a few weeks before the murder, it was readily apparent the defendant was on drugs. The defendant told Dr. Toomer he used drugs at a convenience store before the murder, but the defendant's companion and the owner of the store contradicted this. When Dr. Mutter tried to get the details of the defendant's drug use that day, the defendant became evasive and wouldn't be specific. In short, there is no credible evidence of drug impairment, and competent and substantial evidence of no such impairment, at the time of the offense.

What is left is the abuse by the defendant's mother. The trial court was certainly entitled to find it was not as severe as the defendant claims. Dyane Swartz' horror stories were in large part exaggerations, as shown by the testimony of Colleen Parker and Ron Patten (via Dr. Krop). The defendant also spent the majority of the time with his grandmother, who was very loving and supportive. The defendant certainly had emotional problems and developmental problems, as evidence by the reports

concerning his childhood. (R.3657-3695), which incidently do not contain reports of physical abuse, and indeed there is no documentation regarding such abuse. He also began and continued to abuse drugs. However, as Dr. Mutter testified, and as the trial court found, there is no direct connection between abuse by his mother and the instant crime.

There is no question the defendant's upbringing affected who and what he was when, on September 2, **1981**, at the age of **24**, he shot and killed Officer Broom so he would not have to go back to jail. Upbringing is a part of all of us. But there are also concepts such as free will, self-improvement, change. The defendant received treatment for over three years from professionals who knew about his upbringing and personality disorder, and did all they could to correct it. The defendant in fact made great progress and, at the age of twenty-two, was released back into society. The defendant was given every opportunity to reform and become a productive member of society. He chose not to do so. The jury balanced the entire picture and came back **11** to 1 for death.

The trial court found his upbringing a mitigating factor, but of insufficient weight to counteract the aggravating factors. There is no way this sentence is disportionate. The trial court applied its reasoned judgment, with due regard for the strong jury recommendation. The sentence should thus be affirmed.

VI

THE DEATH SENTENCE SHOULD NOT BE REDUCED BASED ON THE INTERESTS OF JUSTICE.

The defendant relies on the initial 6 to 6 vote by the original jury, an issue which resulted in the instant resentencing. Patten v. State, 467 So.2d 975 (Fla. 1985). This issue is not before this Court, and has already been decided in Patten. The defendant is certainly unlucky to have had his trial occur before this Court's decision in Rose v. State, 425 So.2d 521 (Fla. 1983), however bad luck is not grounds for setting aside the instant sentence.

VII

THE DEATH PENALTY IS NOT CRUEL AND UNUSUAL PUNISHMENT.

Enough said.

CONCLUSION

This sentence of death entered below is proper, and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to LEE WEISSENBERN, ESQ., Old House, 235 N.E. 26th Street, Miami, Florida 33137 on this 6th day of December, 1990.

RALPH BARREIRA