IN THE SUPREME COURT OF FLORIDA
CASE NO. 74-318

ROBERT PATTEN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Appellant was the Defendant below. In this brief he will be referred to as "Def." or "Robt." Appellee was the Plaintiff below and will be referred to herein as "State." The following abbreviations will be used: "ASP" will stand for "anti-social behavior;" "AC will stand for the term aggravating circumstances of factors; "MC will stand for the term mitigating circumstances of factors; "Defense" will stand for defense counsel and "State" will also refer to the "prosection;" "SA for "State Attorney;" "MPD" will stand for Miami Police Department; and "MDP" will stand for the Metro Dade County Police Department. "DCJ" will stand for the Dade County Jail. "O" will be used to refer to "Officer" before Officer Broom's name. "DK refers to the "date of the involved killing" and most importantly, the abbreviation "DS" will be used to refer to the date of the shooting of O. Broom. Other abbreviations will be clear where used. The symbol "R" will stand for the Record On Appeal. The symbol "T" together with the date thereof and the page number will stand for the Transcript of Trial.

STATEMENT OF CASE AND FACTS

This appeal is from a death sentence imposed following a jury verdict recommending such, which jury only heard the penalty phase of the trial. An earlier jury had heard both the guilt phase and the sentencing phase, and while the Supreme Court affirmed the finding of premeditated murder it reversed the death sentence imposed and remanded the case to the trial court for a new sentencing trial. This appeal is from that resentencing trial.

At a pre-trial hearing, Defense raised the question whether the resentencing matter should be accomplished by a jury or whether the court itself should determine the matter by reviewing the 6 to 6 vote at the sentencing phase of the prior trial in light of the fact that although Defense had gone into federal court on the involved Double Jeopardy question, the essence of what happened there is that the U.S. Court of Appeals for the Eleventh Circuit had put the issue back before the State trial court below. (T-4/30/89-4-l0).

The court thereafter made the following rulings: Defense's Motion to Adopt Previously Filed Motions and Defense's Motion to Renew Previously Filed Motions were granted; the following Defense motions were denied: Motion to Suppress including motion to suppress substantial evidence, motion to suppress statements; motion to suppress tangible evidence; the motion for statement of aggravating circumstances; the motion to adopt the earlier motion to dismiss the indictment was granted but the substantive motion was denied; the motion to declare Section 921141 as unconstitutional, motion for individual voir dire; the motion for requestration of jurors; the motions declaring Florida statutes and the penalty sentencing proceeding unconstitutional were allowed to be renewed but were denied; the motion regarding challenge for cause were renewed and denied, but it can be

raised by Defense on an individual basis; motion for pre-trial ruling on insanity testing to be applied at trial was denied without prejudice; motion to prohibit SA and law enforcement comments to the media was granted except with respect to press regarding scheduling; motion regarding not allowing cameras in the courtroom was renewed but denied; and the motion to have jury view the scene and motion regarding aggravating circumstances were denied (T-4/24/89-l-l3).

The court also made the following additional rulings: the Defense motion for impeaching evidence was granted; the Defense motion for non-disclosure of prior jury's recommendation and sentence was granted; Defense's motion to exclude probation officer's testimony will be denied based upon the prior trial judge's previous ruling; ruling was reserved on Defense's motion to exclude victim character evidence and evidence of prior conviction beyond fact of prior conviction; and the court, in effect, reserved ruling on Defense's motion to exclude uniformed officers from courtroom; it reserved also on Defense's motion to exclude certain aggravating circumstances; and ruling was reserved on Def's motion to prevent prosecutor from mentioning victim's race after State said it wouldn't mention it in voir dire on opening, but the fact that a "black officer was chasing (a) white fellow" is relevant and that would photograph or photographs showing the officer and, in this regard, State said "It is already in evidence. It is in the appellate record" (T-4/24/89-l3-l8).

The court thereafter began individual questioning of members of the voir dire panel relative to their feelings on the death penalty. At a bench conference the court said that it did not go into the profession of the victim, "because I am uncomfortable about asking that, taking that away from you because that would be a factor that the State would have to prove, the position of the victim." Defense then stated, "The position of the victim as a police officer, sir, is not an aggravating factor in this case, because the statute was amended subsequent to the time this crime occurred." State replied that, "(T)he status of the police office is going to come out. There's no way they can avoid that if it goes to the other two aggravating circumstances" (T-4/24/89-97-99). Thereafter the court voir dired a new panel of prospective jurors as to how the victim's being a police officer would affect their thinking and 23 prospective jurors gave their individual views on this subject (T-4/24/89-113-189). During a bench conference State objected to the excusing for cause of a prospective juror based on his answers as to how he felt about the victim being a police officer and State argued that "the three AF's relate to police officers and their functions..." (T-4/24/89-207). State then voir dired panel members and questioned panelists as to their views on a new law making it "a lot easier to get a permit to carry a concealed firearm." He then said: "what do you think about the new law which makes it easier for people to get a license to carry a handgun concealed?" Most of the panelists questioned by the prosecutor agreed this was a bad law. State told the panel

"I'm talking about carrying one on the streets concealed in your purse, in your coat, things like that. I'm not talking about your home" (T-4/24/89-252,255).

Thereafter the prosecutor launched into a tirade about the Def. being guilty, "...and will always be guilty of killing O. Broom, a City of Miami police officer. That will not change. He is stuck with that for the rest of his life..." When Defense objected at sidebar to the prosecutor's tone of voice and manner of speech, the prosecutor responded that he still had "a bunch of death penalty stuff to bring up. The Court then said: "You mean conditioning?" State's response to the court's recognition of what he was trying to accomplish, was that he was just trying to make sure that the service of this jury wouldn't work a hardship on the jurors (T-4/24/89-254-260).

State thereafter suggested to the court that the rules of law go against human nature. He then stated: "Twelve members of this community decided he was guilty of this crime." (T-4/24/89-266).

PJ Romer then asked if the jury which tried the case shouldn't you have been the one to decide the penalty? At this juncture the court stated to the PJ's that in some lst degree murder cases State seeks the death penalty and in some it does not. Defense objected to this, contending that it prejudiced the jury to believe this first degree murder case, as opposed to other first degree murder cases, is more serious especially when coupled with State's having told the panel that l2 jurors found Def. guilty. The argument then returned to the question of whether the prior jury had actually voted (during the penalty phase) 6 to 6 or **7** to 5 with State saying "It was never formal," and Defense arguing that "normally..the jury is not told 'by the way, in some first degree murder cases the State seeks it in other first degree murder cases the State doesn't'." The court said it disagrees; that he tells every jury this, and "usually the Defense likes that." (T-4/24/89-256-272). Defense requested that the court give an instruction explaining the history of the 6-6 and 7-5 votes, and the giving of the "Allen" charge. State then said "...in all their petitions for habeas corpus, they tried to impress upon the court that it was a 6-6 recommendation and jeopardy should attach.."(and) "(T)hat jeopardy should attach and they have failed because the court said, since it was not put down in a formal verdict and it was just a note by the foreperson while the jury was deliberating, it was not formalized in a verdict," and that therefore, to instruct this jury they had a verdict of 6-6 is error in light of the interpretations of all the appellate courts and the courts that have heard the writs for habeas corpus, because the only recommendation is the 7-5 recommendation." (T-4/24/89-276-286)

Following legal argument on the double jeopardy question, the court stated: "...if it came out life and it gets reversed, I don't think you could do it because of double jeopardy."

The following colliguy occurred between the court and Defense:

> "Defense: Well, they would like to leave it twelve-nothing, I'm sure---it was the jury recommendation and sentence and now we are back for it.

> The Court: I think the State is legally right...but all of the jury studies that have been done of jury psychology, states that these unspoken psychological concerns that are with these people and there nagging questions, we don't even think of, are taken back with the jury room and they become a major focus...
> Defense: What is wrong with letting these people know the truth?...
> State: They're not entitled to know the truth. There's nothing in the rules of evidence for it." (T-4/24/89-298-302)

The court then ruled that it would not allow Defense to inform the panel of the 6-6 original division of the prior jury during the penalty phase (T-4/24/89-309,310).

The court then denied Defense's motion to preclude certain AC's saying: "..I cannot preclude the State from presenting aggravating circumstances. At the end I decide which ones go to the jury...Later on I decide whether it fits or not." (4/24/89-324)

Defense then stated it had set forth in one of its motions in liminie that State should not be allowed to exercise the preemptory challenges against a juror who is competent to sit on the panel." State then moved to have Defense precluded from arguing anything about the deterrent effect or lack thereof by the electrocution process of imposing the death penalty. The court ruled with State on both motions (T-4/24/89-324-328).

The court then gave its instruction to the panel to try to answer the PJ's earlier questions as to why jury that tried the case didn't decide the penalty. He specifically instructed them:

> "this case is being tried many years after the fact by a different jury than the jury which found the Defendant guilty...in order to find someone guilty beyond and to the exclusion of every reasonable doubt, the 12 jurors who are selected have to decide them unanimously."
> (T-4/24/89-3-5)

State then told the panel that the rules of evidence are not necessarily followed during the sentencing trial; that "we can have some witnesses summarized to save time"; that "you have to make sure that juror number 13---sympathy---doesn't go back there with you; that "would anyone have a problem in following the law that circumstantial evidence is just as good as direct evidence if you believe the evidence"; that "In Florida, there is only one crime where death is a possible penalty..and that is first degree murder"; that "at the trial phase...the State has to prove beyond a reasonable doubt that the Def. killed O. Nathanial Broom and the standard of proof was beyond and to the exclusion of a reasonable doubt; and that it is the same standard in every criminal case..." (T-4/25/89-15-26).

In an effort to justify State's contemplated summarizing of testimony, State also explained to the panel that "normally" the same jury that hears the trial also does the sentencing recommending (T-4/25/89-27).

State then told the panel:

> "Again, the sole purpose of this jury, just to make sure it is crystal clear, is that you are to make a recommendation to the judge, who is the ultimate sentencer, of what the proper

> punishment should be for the death of Officer Nathaniel Broom. That is it..I am not underplaying that but...the jury is going to instruct you that he is guilty and he always will be and that might present a problem for any of you." (Emphasis added) (T-4/25/89-28-33)

State then told the panel that if it found the applicability of one AC and the absence of any MC's, it must recommend death and following a Defense objection, the court advised the panel that he will tell the jury what the law is (T-4/25/89-35-37).

After minimizing the jury's role during his continued voir dire, despite the court's instruction, State again purported to tell a prospective juror what the law is (T-4/25/89-38-39). Defense thereafter objected to State's contention that the jury must recommend death if it finds one AC and no MC's, and the court tried to cure this State misstatement by telling the panel that what the attorneys say is not the law, etc., but State turned right around and proceeded to secure a commitment from PJ Rebustiller to vote for death if he should find that the AC's outweigh the MC's (T-4/25/89-39,40). In another commitment-seeking question to a prospective juror, State stated that "the law requires" the jury to vote death if there are either no mitigating factors or "there are mitigating factors but they are outweighed by the AC's." Defense objected that the statute requires "sufficient aggravating factors". The court said that it would immediately tell the jury what the law is but then it failed to do *so* (T-4/25/89-51).

After additional voir diring State announced it tendered the panel by stating "we are going to tender the panel at this time;" it then later said it hadn't tendered the panel; and after the court acknowledged that the State wanted "to play the game," it allowed State to continue exercising peremptory challenging (T-4/25/89-175-179).

Defense thereafter told the court (outside the presence of the jury) that "yesterday" the prosecutor, "walked over to the Def. like this and shook his hand -- his finger in the Def's face...and that I respectfully request the prosecutor be requested not to approach the Def. and shake the finger in the face..." To this the prosecutor replied: "I think all I did was turn, outstretch my hand and point to him, since he looks like one of the attorneys, to make sure they weren't confusing Mr. Richey and Mr. Fine with Mr. Patton". State then told the court, "Mr. Patton seems to go through many physical changes since the arrest on Sept. 2, 1981, his appearance at the trial in 1982, his appearance here and with his return from Florida State Prison, is drastically different than it is today..." Defense then moved to have State prohibited from "pointing the way they did yesterday" and the court responded to same as follows:

> "The Court: I don't think there is any issue, especially in a sentencing phase. You all said he is guilty. There is really no point. I take the State's representation as being true, in the sense that Defendant is seated between both lawyers and in a suit, so that is understood as such, and since there is not going to be any need for the prosecutor to distinguish him from the other, you won't do it aaain, riaht. Mr. Rosenbaum. unless vou ask mv

permission if you think it is appropriate." (T-4/25/89-201)

Thereafter still another group of panelists were voir dired by the court and after it finished, the prosecutor told the panel that "all 12 jurors agreed that this Def. killed Officer Nathaniel Broom and that was satisfied by the Court and he is here today." (T-4/25/89-271,272)

State thereafter told the panel:

> "The fact that the victim was a police officer may be one of the circumstances that the court instructs you that you might weigh." (T-4/25/89-283,284)

State thereafter told the panel, "...in a criminal case experts have a little more leeway than other witnesses" (T-4/25/89-289). Thereafter State tried to precondition the panel to not believe the Defense psychologists by demeaning the manner in which they were involved in the case (T-4/25/89-289-297).

Thereafter State asked a PJ:

> "....Going back to the death penalty issue, then I will conclude, the judge has already told you that the Defendant has been convicted of the murder of O. Nathaniel Broom and that is a fact that you must accept and not look behind it. Mrs. Shaw, could you accept that fact?" (Mrs. Shaw, of course, answered yes)(Emphasis added)(T-4/25/89-300)

Thereafter the following State-Prospective Jurors colliguy occurred:

> "Mr. Rosenbaum: Mr. Taylor, could you accept that fact?
> Mr. Cruz: That he's convicted of first degree murder.
> Mr. Rosenbaum: And that will never change.
> Mr. Cruz: Yes. He did it, *so,* yeah.
> Mr. Rosenbaum: Mrs. Van Wyck, can you accept that?
> Ms. Van Wyck: Yes,sir.
> Mr. Rosenbaum: Mrs. Jovino?
> Ms. Jovino: Yes.
> Mr. Rosenbaum: Mr. Stowers?
> Mr. Stowers: Yes.
> Mr. Rosenbaum: Mrs. Edery?
> Ms. Edery: Yes.
> Mr. Rosenbaum: Mr. Reyes?
> Mr. Reyes: Yes." (T-4/25/89-300-301)

And then the prosecutor asked PJ Mrs. Van Wyck if she could vote to recommend death even though the Def. wasn't a serial killer (T-4/25/89-304-306). When it came time for Defense counsel to again participate in the voir dire process, he felt compelled

--obviously in light of some of the State's voir dire questions

--to tell PJ Ms. Chang the following:

> "I respectfully suggest to you that a few moments ago the prosecutor indicated to you that killing a police officer was, itself, an aggravating factor. I suggest the judge will give you the law in that situation and you will find the obstruction of justice is a mitigating factor under different types of circumstances, the killing of a police officer, per se -- listen to the judge and the law the judge gives you with regard to these issues." (T-4/25/89-333)

State began voir diring panelists again and again he attempted to precommit the PJ's to not return a verdict based on sympathy (T-4/25/89-321). The jury was sworn (T-4/28/89-22).

In its opening statement, State argued, in pertinent part:

> "...No problem, just shot a police officer, murdered a police officer, robbed an individual of his car at gunpoint...take a shower...walk my dog." (T-4/26/89-42)

The prosecutor then told the jurors that "(B)ack at the police station", Robt. was overheard saying:

> "Murder of a police officer? Oh shit. I'll fry for this one....That's the last one you'll write on me. I guess I dealt my last deal on this one...Oh, yeah. I guess you all came to look at the cop killer. I know what that's for (the police were swabbing his hands). It's for bolistics (sic) to see if I fired a gun. Don't worry, you won't find anything." (T-4/26/89-43,44)

The prosecutor then further argued to the jury:

> "We will prove these four aggravating circumstances from the evidence that you will hear today and possibly also tomorrow, from the witnesses that will take the stand. Remember, I gave you an overview of the evidence and the jury, that had found the Defendant guilty of first degree murder." (T-4/26/89-48)

State also argued to the jury in its opening statement its contention as to the MC's Defense would be claiming (T-4/26/90-48,49).

Following Defense's opening argument, State called its first witness, Carolyn Behrens, who was a probation officer in 1981, who testified: she first met Robt. on April 24, 1981, and conducted the initial probation interview with him; she advised Robt. of the terms of his probation, which she enumerated to the jury; she told Robt. he would be facing a 5-year jail term if he violated his probation; she saw Robt. again in June, 1981, and in September, 1981, after he had been arrested for the "murder" (the quote is the prosecutor's) of O. Broom; he looked then the way he looked in the photograph mat-ked SE 6-1 (Defense stipulated to the introduction of SE 6-I); two of the conditions of Robt's probation were that he couldn't possess a gun and that he couldn't violate any laws, and that if he had been arrested for being in a stolen vehicle that would be a new charge and a violation of probation (T-4/26/90-73-95).

The next State witness was Henry Nelson who was a store manager at 5351 N.W. 27th Avenue on the DS. He testified as follows: on the DC a black man and a white man came into his store trying to sell a gun; the white guy had the gun and wanted $70.00, but he wasn't interested in the gun because it didn't have a trigger hammer; the white man was "kind of skinny" and tall, and had bushy long hair, and that he picked his photo out of a line-up; that the gentleman sitting in the middle "looks similar to the white man;" and that the white man did not appear to be under the influence of drugs (T-4/26/89-97-I06).

The State next read into evidence the testimony of Leroy Williams from the prior trial of Robt., Williams having since died. Williams' testimony was: a white guy came to him wanting to know where he could sell a gun; "we" assisted the white guy in trying to sell the gun for $60.00 out of which he would give us $20.00; they were headed toward Overtown and that Robt. went into a grocery store with the 38 calibre gun with hidden hammer; that the gun marked SE 2 looked like that gun; Robt. said in the grocery store, "I never sell a loaded gun"; the man did not buy the gun; he was with the white man 2 1/2 hours; Robt. put the bullets back in the gun and unsuccessfully tried to sell the man some gold items; he put the gun back in his waistband; after they drove away from the store Robt. turned right and they went up 3rd Avenue; he told Robt. they were going down a one-way street; and that Robt. said, "I'm hot and the car is hot" (T-4/26/89-106-125).

Williams' prior testimony continued: Robt. drove the car into a courtyard and "Mr. Butler" jumped out of the car and that he started to get out, too, but that he saw a gun pointed toward him held by Robt. so he stayed in the car; "Gator", i.e., Butler, and Robt. ran through the hallway; he saw a police car when it passed with a white lady and a black male in it; the black male got out and started running the same way that Robt. did but that he was lying down in the car and didn't see "exactly what she did"; Robt. told him the car had been stolen when the police car came up; after Robt. and then the policeman ran into an alleyway, he didn't see them again; that, "(I)t was a wall like a wall"; he heard "about four" sounds that sounded like gunshots; he met Gator in the street; even though the police were looking for him he didn't turn himself in that day but when he did he told them about what had happened because he was afraid and he did not kill a policeman; he had used drugs and he knows when someone is high on cocaine or heroin; and Robt. looked normal; Robt. didn't tell him why he wanted to see the gun; on September 18th he got arrested "for something totally unrelated...to this incident" and he had been in jail ever since awaiting trial; State had told him that he would---in return for him testifying in Robt's trial—"tell the judge in his case that he had given such testimony as a respective (sic) citizen and that was it"; and no other promises were made to him; he had never seen Robt. before the DK; that Robt. was driving "pretty fast" and that when Robt. made the turn onto 3rd Avenue, he almost hit the stop sign in the middle of the street; the car was still in the process of going "backward" down the street when Robt. got out of it; he was across the street with the VW when he heard the shots and he heard what sounded like one shot followed by three shots; and that when the police came and got him, he was told he wouldn't be charged with anything (T-4/26/89-125-145).

Defense counsel thereafter advised the court that he was "dumfounded" that the prosecutor had read from Williams' testimony his description of the victim as being black person in light of the fact that the court had

previously ordered State to not have it brought to the jury's attention that O. Broom was black. State countered by contending that such ruling only applied to live witnesses. The court ultimately again directed State to "be careful whenever you see the word 'black' or anything close to it in any transcript or before a witness says it" but it did nothing about the State's reading of Leroy Williams prior testimony and the referring therein to O. Broom being black. The court thereafter said "I don't think the one word 'black' will make a difference in this case, I can tell you that." Defense counsel thereafter advised the court that his concern about attention being called to the fact that O. Broom was black was based upon the Miami area racial problems" in the last seven, right years...." (T-4/26/89-150-161).

State's next witness was Maxim Rhodes, who testified: he was repairing washing machines on the DS at 850 N.W. 4th Avenue, Miami; he was in "the wash house" repairing a washing machine when he heard a man yelling, "whose car," and "where's the keys to the car"; this man, whom he said he identified at "the first trial" had long hair, was thin and "rather tall"; this man kept yelling "who had the keys" and pointed a gun at him, saying he wanted the keys; he thought he pulled the gun from his waistband; he told "Charlie" to give him the keys which were in the trunk; the man got into the car and after fumbling for the ignition key finally got the car started and started to back out; after he called the police they came to the wash house; and that he subsequently picked Robt. out of a photo lineup (T-4/26/89-l6l-l72).

On cross, witness Rhodes evaded answering Defense's questions whether he told police -- apparently supposedly when he telephoned them -- that the man who stole the car was extremely high on something and that his eyes were both bulging (T-4/26/89-l76).

State next called O. Terry Russell of the MPD. He testified: "we" observed a green VW turn onto llth Street "going the wrong way"; he was driving the police vehicle and that he backed up, "..(T)o stop him reference driving the wrong way down a one way street"; as they turned into the courtyard, they noticed a W.M. "standing on the walkway of the apt. complex in front of the green VW..."; a B.M. exited that vehicle and there was another B.M. still in the vehicle; the W.M. was hesitating and that for a moment he and the W.M. had eye contact; the W.M. then began running through the courtyard and that "O. Broom at that point jumped out of the police unit...started chasing on foot"; he observed "the W.M. then turning left on llth Street onto 3rd Avenue, around the building"; "the last time I saw them they were going south, made a left"; "I heard three or four shots being fired"; he stopped another police unit which placed the description of what had happened over the radio; "as I was going west on llth Street from 3rd Avenue towards the 1-95 overpass" ..."I observed the W.M. again...running through this courtyard"; "he sees me...at this point he hides behind a concrete pillar that holds up the

expressway and he is starting to hide from me"; "he starts running south towards 10th Street again; he got out of his car and went down 10th Street; O. Jones observed "a W.M. who we were chasing and that he runs up an embankment and that "Robt. Patton is able to cross southeast on 1-95, which time it is quite early"; he saw O. Fowler "jumping a fence ..located.. behind this apt. complex next to this church; he returned to the scene of the involved crime and saw Broom lying face down; that other officers were turning Broom and trying to administer "CPR-mouth to mouth"; and regarding the gunshot explosions; "(I)t was rapid fire...(T)hat is what I testified originally." (T-4/26/89-176-206)

State's next witness was Preston Brown, Jr., who testified: he was looking out of his bedroom window at 11th Street and 3rd Avenue when he saw "them" running into an alley; "I heard a few shots and then I ran out onto 11th Street and out to 3rd Avenue" and "...saw the Def. coming out from behind the church onto 11th Street"; he was trying to notify the officer that he saw the Def."; when the officer was chasing Def. he heard the officer say that "he has a gun"; and he was not able to identify the face of the person he saw running that morning (T-4/26/89-206-215).

He further testified that after he "went back the "other officer" was "back there...laying down behind the steps" (he demonstrated such on one of State's photos) (T-4/26/89-215).

On cross by Defense, Brown testified: regarding the gunshots he wasn't sure if there were two and two or three and one and he admitted that he stated in his 1981 statement that there were three shots fired without any gap (T-4/26/89-217,219).

State next read into evidence the deposition of William Curry, whom it said "is deceased also." His testimony was, in pertinent part, as follows:

> "that as I as walking my dog I heard a couple of shots and then automatically I saw a Caucasian fellow run down the field and he slipped and he fell and he turned around and he ran back in the other direction; that .. I couldn't see his features that good, but I know that he had blonde hair and he was tall and he was slim; that (H)e didn't get anywhere close to me. I did not get a good enough look at his fact to be able to identify him...I heard two loud shots, heavy shots and I know they were extremely loud. By me being in the service I know heavy artillery when I hear it...I knew it was gunshots...I tried to make it home as fast as I can, because I didn't want to get annihilated and hurt in the field...I seen a police officer..(H)e was on the side of the building. He was lying down...The officer was right here near the stairs...(H)e was shot there...The body was down here...It had to be down here because here's the sidewalk (T-4/26/89-220-231).

State's next witness was MPD O. Bernard Fowler who testified that he found O. Broom lying on the ground and not breathing. He said further that he observed what appeared to be a bullet wound to the chest and that he began to administer CPR until Fire Rescue arrived (T-4/26/89-236-241).

During a sidebar conference Defense counsel stated the following:

"One issue is that believe Mrs. Broom is coming into the courtroom, as is her right. I want her to be able to be here. I believe she is the lady who, when she comes in, is being brought by several other ladies coming all the way across the courtroom, sitting right behind the Defendant over here in this section. She became emotional in the last testimony and I don't blame her. It's a terrible situation. She had to get up and leave the courtroom. I would request the State talk to the ladies and have her sit in the back if this happens." (Note: Mrs. Broom is Officer Broom's mother)(T-4/26/89-249,250)

Defense counsel then objected to eight uniformed police officers being in the courtroom and the court noted that this was "the largest number we have had until now..." Defense then stated that "corrections officers are here to..," and the court responded by saying, "I don't want to say don't count." State noted that there were 48 seats in the courtroom. Defense then told the court that it had the right to exclude uniformed officers, "to insure a fair trial to the Def. and the due process of the law" and that "(B)ecause this is Miami, Florida, where we have had a number of police officers murdered within the last 12 months, it has become an emotional issue." (T-4/26/89-251-259). Thereafter State noted there were four uniformed officers in the courtroom and the court added that they were seated in two different rooms (T-4/26/89-272,273).

. State then called its next trial witness, Preston Stewart, who testified: he was hanging around at 3rd Avenue and 11th Street at a shoe shop on the DS; that he saw a slender white man with shoulder length hair; and thereafter, upon State's request, he then spent the next four pages describing the topography of the immediate environs around the shoe shop, referring to State's diagram and two photos (T-4/26/89-277-280). He described Robt. coming around a corner with a gun in his hand, firing the gun twice, and then jumping the fence. He said he didn't see who Robt. was shooting at (T-4/26/89-281-282). Thereafter the following exchange occurred between State and Stewart:

"A. Okay. He walked out and put one foot around the corner of the bldg. and he stopped, and he looked. Then he backed up, like this, and he did just like this, bam, bam.
Q. Indicating he used both hands?
A. He used both hands to hold the gun?
Q. In an upright stance?
A. He did just like this and he shot twice." (T-4/20/89-285)

On cross by Defense, Stewart said:

"...(H)e looked at me for a couple of seconds and stood there and stared at me for a couple of seconds. He turned around, walked back to the corner of the bldg. and attempted to go around and he stopped and backed up, got his balance and shot twice....He had one foot behind it (i.e., the corner), because I guess he saw something." (T-4/25/89-286)

On a subsequent trial day, another colliguy occurred betweem the court and counsel regarding the victim's mother, Mrs. Broom, being in the courtroom (T-4/27/89-35-37).

State's next witness was MPD I.D. Tech. Richard Badali, the lead crime scene technician, who testified: "we" found a projectile and fragments on the ground; there was a green screen door, "on the back of the building that had what appeared to be a ricochet on it"; he didn't find any projectiles or fragments therefrom in the door; he identified photos of the door, of the alley, of Broom's radio, and of blood he found; Broom's gun contained five live rounds and one spent casing, which he said indicated the round had been fired; the projectiles from Broom's gun were unjacketed, as was the alleged ricochet bullet; further back from the corner he found a jacketed projectile; another one showed the alley, another one showed Broom's shirt and that "hole right here...looks like where the projectile went in"; that another exhibit was O. Broom's left shoe and that the little indentation on the bottom with circles around it is a bullet hole; another exhibit was "a belt beeper with beepers on it; that on Sept. 4, 1981, he received a handgun from Det/Tech. Filio Morton for processing for latent fingerprints and that there weren't any because "(T)he weapon appeared to have been wiped clean...(but)...I found no smudges indicating it had been handled"; that O. Broom's gun was a five shot while Robt's was a six shot; the live rounds he found in Robt's gun "were similar to the projectile I collected from the backyard," i.e. "the jacketed hollowpoint"; and that in order to tell if there was any drug residue on the involved drug paraphernalia, testing therefrom would have to be done (T-4/27/89-37-64).

The court then announced that he would not exclude all uniformed police officers from the courtroom but that it would require that there be no more than 9 uniformed officers in the courtroom at any one time and it added, "(T)hat is the most there has been." The court also directed that the uniformed officers inside the courtroom could not all be in one section and that they could not be more than 50% of the spectators present (T-4/27/89-64-70).

State then announced that it would call as witnesses, "this witness, the victim and the detective in the 1975 armed robbery this Def. has been convicted of"...and that it had certified copies of "the information, the judgment, the fingerprints and the sentence." State explained the purpose in his putting these witnesses on (in addition to the record of the conviction, etc., being introduced) was *so,* "...the jury can get the flavor of what happened." (T-4/27/89-74)

The next State witness was Robert Hunt, a MDPD criminologist specializing in firearms, who testified: it was the finding of the lab exam that three projectiles (one of which having been removed from O. Broom's shoe, one of which having been removed from O. Broom's back, and the last of which having been found at the scene of "the murder" [the quoted words were spoken by the prosecutor] "were all fired from this particular Smith & Wesson revolver" (this answer was in response to a totally leading question); that he could distinguish between

projectiles fired from "that gun" as versus those fired from a gun exactly like that gun based on studies; that while he could not state conclusively that the damage to the belt beeper "is consistent with the deformation on the nose of the bullet, the damage...the damage to the bullet is consistent with having been made by the beeper"; and with reference to the difference between the two types of projectiles found in this investigation- "...the bullets from O. Broom's gun are composed entirely of lead, while the other bullets are a lead center inside a copper outer shell or jacket" (T-4/27/89-81-86).

Immediately thereafter the following exchange occurred:

> "Q. So the copper jacket, once that projectile is expended, would be missing from the type of projectiles in O. Broom's gun?
> A. That is correct." (T-4/27/89-86)

The next State witness was Det. Bohan who was another officer who came to the scene. He testified to seeing a uniformed officer lying face down and what his investigation consisted of, what other officers did, and that the various witnesses picked Robt. out of photo line-ups. He said Def. was arrested outside of Bali Hai Hotel, 1050 S.W. 2nd Avenue; that he met with Def. at 5:30 p.m. at the station where they spent 2 1/2 hours together; that when Def. saw the wanted poster he said, "murder of a Miami Police officer. Oh shit. I'll fry for this"; that later Def. said as Det. Martinez was filling out the arrest report, "This is the last one you'll do on me. I dealt my last deal" and that later Def. said: "Oh, sure. Everybody wants to look at the cop killer..."; and that when def's hands were swabbed the same day, Def. said, "I know what that's for...that's for ballistics to see if I shot a gun, but you won't get anything (T-4/27/89-90-101).

On cross of O. Bohan testified: he never had drug paraphernalia tested to see if it was "dirty"; he first saw Robt. 7 1/2 to 8 hours after the shooting; he didn't see track marks on Robt's arms but he did see scratches, "I believe on his left forearm"; he didn't remember receiving information about a radio transmission on the DS that the offender had taken a vehicle from a citizen "and that subj. appeared to be extremely high on something and his eyes were bulging;" that "we" didn't know if Robt. had scratched his arm on a fence or from drugs; that "He acted normal to me; and that he didn't take Robt's blood or urine because there was no probable cause for a search warrant authorizing such (T-4/27/89-101-108). On recross Bohan said he was aware that intoxication by drugs and/or alcohol is a mitigating circumstance or a defense to the crime of homicide; the scratches on Robt's arms were not the same as track marks; the photo showing same was to document that he wasn't beaten (rather than to show track marks); he did not ask Def. if any of the paraphernalia was his because "I could not ask him any questions"; and he wasn't aware that when the DCJ booked Def. they listed fresh track marks as being on his arms on the jail card (T-4/27/89-108,109).

During a court-counsel colliguy that followed, with reference to Def's 1975 armed robbery conviction, Defense advised the court that it had, "....moved to limit this to the paperwork from that prior conviction. In this regard, Defense told the court: "They can do it within limits. But, I don't think you can do it with witness after witness. You begin to exacerbate it...you build it up." (T-4/27/89-II9) State told the court, "(T)he Supreme Court prefers the witnesses to be available. We put the witnesses." (T-4/27/89-II8-I20). Thereafter Defense objected "to the entire process" contending that documents would be sufficient to establish the prior conviction and argued that, "...it ought to be narrowly limited to the description of the facts.." In this regard Defense reminded the court that the identity of the Def. "has been agreed to by us agreeing to the document" and by Defense's admitting it in the opening statement (T-4/27/89-I2I,I2I).

State next called Dr. Joseph Davis, the Dade County Medical Examiner who testified as to the details of the autopsy he performed on O. Broom. Thereafter State asked the following questions and Dr. Davis gave the following answers:

> "...If the Defendant was somewhere peeking around the corner and Officer Broom was coming this way and if the Defendant was peeking around the corner, he is holding the gun like this and fires the shots, do you have an opinion as to how the trajectory then could be entering higher and exiting lower, rather than straight through and through?
> A. Yes.
> Q. Could you please tell us that?
> A. It is my opinion it would indicate to me that the officer, assuming they are both standing on the same level, both the shooter and the victim, it would indicate that the officer was bent forward somewhat as opposed to being straight upward." (Emphasis added) (T-4/27/89-I32)

Dr. Davis thereafter testified: another projectile entered Broom's left foot; the bullet hole on the foot "indicates that it came from below and that it indicates that the foot" was angled slightly rearward...more toward the ankle as opposed to being more towards the front of the foot..."; he found no blood on the foot wound because, in his opinion, the heart had stopped pumping blood because it "had already been shredded by the bullet.." "...the blood had stopped flowing into that area..(I)t stopped being pumped into that area at the time the shot was fired"; that in his opinion the chest wound occurred first; that the receiving of that foot wound was consistent with O. Nathaniel Broom lying face down with his feet towards the shooter (this answer was in response to another State leading question); that assuming that O. Broom had been holding a gun in his hand with his finger on the trigger and that he received the type of chest wound that he did, two things "would" have caused his gun to fire, "conscious effort to fire the gun because the person that gets shot in the heart still has a few seconds of consciousness left before the lack of blood to the brain takes effect;" or it could be reflexive type of shot where the surprise, coupled with the pain of gunshot wound, could cause the hand just to reflexively press on the

trigger"; that O. Broom's shot was more than likely a wild or reflexive shot than a carefully aimed shot; and "quite frequently we see people who have been shot with fatal injuries and (A)s long as it does not involve the nervous system itself, quite frequently they will move and be found at some distance from the point of the original shooting." (T-4/27/89-l36)

The next State witness was MPD Homicide Lt. N. Vivian, who testified: he went to where Maxim Rhodes' Cadillac was discovered ...at N.W. 30th Avenue and 9th Street in the parking lot of a large high rise building; the Def's grandmother's house was three blocks from this location; that car was stolen and recovered; he got a SW for the grandmother's house, which was located at 3025 S.W. 6th Street in Miami; that Def. was not wearing the same clothes as at the time of the shooting; he talked with Def's sister, Dyane Swartz, before obtaining the warrant; he told her about Def's gun and said we wanted it "so that nobody else would be hurt by the gun"; Swartz called back and told Bruce Roberson of Homicide that Def. had come there on DS before noon and was very nervous and "trying to find the noon news on the television"; that Def. had changed clothes and took a dog to go get a motorcycle part in the afternoon; that Def. was arrested at Bali Hai Motel at 1320 S.W. 2nd Ave. a couple of miles away from the grandmother's house and he believed Def. had the dog with him; they found Def's gun at the grandmother's house hidden under a heating or A.C. grate when they executed the SW; that blood samples, along with tube of blood were taken from Def. by Dr. Davis and were secured at the scene and, "(T)he comparison of the blood found at the scene matched the tube of blood that was taken from O. Broom. On cross Vivian said: Def's sister cooperated; it came to his attention that Ms. Christine Castle told police that Def. left her presence "high on drugs that morning" after they had some type of argument; in her statement Castle said Def. left her at 3:30 a.m; that no tests were done with reference to the drug paraphernalia and no tests were done to find fingerprints; and that after implying he did not remember seeing track marks on Def's arms, Vivian admitted to testifying on deposition that he did find what he thought were old track marks from Robt. being a heroin addict; that he didn't know why the jail wrote down: "fresh track marks;" and (on redirect and in response to another State leading question) that Defense never requested that they run a drug analysis on the paraphanalia from the VW, and there was no way for them to determine who owned the paraphanalia (T-4/27/89-l40-l58).

The next two State witnesses, Cruise and former MDPD L. Waire, testified as to the details of the 1975 Farm Stores robbery by Robt. (T-4/27/89-l6l-l68). The State then rested (T-4/27/89-l63-l68).

Defense's first witness was Robt's sister, Dyane Swartz. She testified: her (and Robt's) father was a test pilot and that their mother had caught him in the act of being sexually unfaithful and that thereafter the mother ran a car into a tree trying to kill herself; that she had, "lost my mother"; the father wouldn't agree to a divorce.

Thereafter their mother became pregnant with Robt. from being raped by the father; when Robt. was born he was black and blue and the mother thought he was "a negroid child"; the parents fought constantly; the mother wouldn't hold Robt., wanting to not go near him or have anything to do with him; when the grandmother would hold Robt., such made the mother angry; she was eight years old at this time; that there came a time when the father took the children "back to California" because the mother wanted a divorce and when they returned after 2 l/2 to 3 years the mother was pregnant and the father was devastated; the mother would beat "Bobby...I mean she would slap him in the face if he cried or wake her up, throw him across the bed, spit on him, call him ugly names....." (T-4/27/89-l80-l86).

Swartz said that this abusive conduct toward Robt. on the part of the mother began when he was an infant; "...From day one she always treated him the same. No love"; "Bobby would freeze and stare and not move for several seconds...I would call his name solftly...He wouldn't hear me...If I said it louder, he would blink his eyes and look at me and be perfectly normal"; when the mother was 3 l/2 months pregnant (again) she married the step-father; the mother would throw hot coffee at Robt. and burn him with cigarettes; she saw the mother throw hot coffee, frying pans, coat hangers, and other objects at Robt. thousands of times; Robt. was "too frightened....he just took it and didn't say a word;" the mother choked him all the time; some such act or incident of verbal abuse occurred every day; the mother said she hated Robt. and she wished he'd never been born; she called him, "you clock sucking, motherfucking motherless bastard"; Robt. never behaved as a normal child and he would freeze and stare and would sneak into "our rooms" and steal things; Robt. stole from other people; the mother took a lot of pills including diet pills and her pills were all over the house and Robt. would ingest them, particularly the diet pills; when Robt. was 7 l/2 or 8 years old he walked with a limp and the mother would beat him with a stick and tell him to quit limping and to walk straight; after that "we" cried and begged her to take him to a doctor and she did *so* and it was determined that he had "Perthes" (sic) of the hip" resulting in Robt. being put into a body cast; thereafter I to 3 times a month the mother would take a lot of drugs and stay home 2 or 3 days at a time and she would find Robt. in a closed room with "a filled urinal"; after Robt. was taken out of the body cast he tripped and fell and then begged to not be put back into a body cast but nevertheless such was done although he was in that second body cast a shorter period of time than was originally the case, to-wit: the shorter period being 6 or 7 months; that Robt. continued "to pilfer" the rooms; and that one day while doing such "he got wedged in" and urinated on himself and screamed to be taken out of the body cast (T-4/27/89-l86-l96).

Swartz further testified: the mother would put a knife to Robt's throat and would tell him she could kill him; she threatened to poison his food; she compared Robt. to a rat; when she was l8 and Robt. was l2 she ran away

from home; for awhile Robt. went to live with his grandmother but that that didn't work out and he returned to "home"; she married a sailor and when she came home 2 or 3 yrs. later the grandmother told her Robt. was in a boy's home in Kendall and that she visited him there; the grandmother told her that Robt. had been raped by three other persons in the boy's home; when she next saw Robt. he was in a detention center in Gainesville; shortly before the killing of Broom, Robt. drove over to her husband's business on a motorcycle and he was staring at her like he was in a trance and staring at "the gold jewelry"; that thereafter he blinked his eyes like he recognized her and smiled and went back to his chair and that she had never seen him move before when he was staring; at an Easter Day dinner gathering of the family the mother had stuck a fork into Robt's hand; and on another occasion the mother caught Robt. sniffing glue (T-4/27/89-196).

On cross State asked Swartz if either she or another brother, Ronny, had ever been arrested and she answered both questions, respectively, "no" and not "to my knowledge" (T-4/27/89-214). Part of a subsequent question asked Swartz by State was: "Now, you told us about a time a week beofre the Def. murdered O. Brown..." (T-4/27/89-215). In another question posed to Swartz, State---in trying to impeach her with reference to prior deposition statements---referred to the court reporter in the presence of the jury as "being mainly used by Defense attorneys" and as being "very good at what he does" (T-4/27/89-217,218). Thereafter the State said to Swartz:

> "**Q. Now, I** aot a feelinq from your testimony that the physical abuse suffered by the Defendant was extreme." (T-4/27/89-220) (emphasis added)

Thereafter the following State questions and Swartz answers appear:

> "The night that your mother found that, at that party---because I am a little confused. see? I took Colleen Parker's deposition. too. and I am aettina two different stories. Mavbe thev're the same. I iust want to make sure.
> A. All right.
> Q. Colleen said that-----you said today that your mother went into one of the back rooms and found your father being unfaithful?
> A. Yes, sir.
> Q. With another woman?
> A. She---I didn't say that.
> Q. Was it with another woman?
> A. My mother said it was another man.
> Q. Okay. That is what Colleen said. but durina vour deposition I didn't aet that impression. (Emphasis added)(T-4/27/89-225-226)

The State next had introduced in evidence the judgment and conviction from the prior trial in the instant case (T-5/1/89-15,16).

On further cross by State, Swartz said she changed the spelling of her first name from D-I-A-N-E to D-Y-A-N-E because she didn't like who she was; that the "bursas of the hip" started when Robt. was between 7 and 9 years

of age and that she thought he was limping in the 7th grade; he was "very, very small"; that she thought he was in the bodycast for 22 months; that Robt. ran away from the detention center in Gainesville and showed up at her apt. in Homestead; and that the next time she saw him thereafter was in 1977 or 1978 when Robt. was in the DCJ (T-5/l/89-47-55). The following exchange then occurred:

> Q. He would tell you stories. He would lie to you that he didn't steal it, he found it; things like this, right?
> A. Right.
> Q. In fact, I aot kind of the impression you were characterizina the Defendant as a liar and a con artist type person.
> A. No. My brother had many problems." (Emphasis added) (T-5/l/89-55)

Swartz described an incident wherein Robt. gave his mother some jewelry with the mother giving him "half a hug" but thereafter beating him when she found out the jewelry was stolen (T-5/l/89-55,56). She said that Robt. told her with reference to the shooting of Brown, that he ran because he was in a stolen car, because he didn't want to go back to prison and because he was scared. Swartz said Robt. told her the following:

> (W)e were running and all of a sudden I ran into a fence. It was a wall. I don't know what it was and I couldn't go any further and I couldn't get over the wall. I'm running towards it. I know I'm trapped. I was scared to death, i.e., as I'm running towards the wall, all of a sudden everything got very slow. It was slow motion. What I'm going to tell you now is going to sound very crazy (or weird). I turned around. Everything was very black. The next thing I'm standing there and I'm looking at myself. And now I have had it. You know, I have had hallucinations before. I blacked out before, but I never have had this happen to me before. I'm standing there looking at myself. "God, it was the weirdest thing I ever experienced in my life. I was just in a stare. I was staring straight ahead and I looked at my face and I looked down and I followed my arms and I had a gun in my hand and then I turned my head, like I'm in the middle -- I turned my head to see what I'm looking at, what I am pointing the gun at and there is this copy, Oh God, this is a heavy situation. Why don't we talk about it...this, let's be cool...I'm trying to talk to these guys. I know this is weird, Dyane, but I'm trying to talk to him and I'm in the middle and I'm trying to get these guys to talk about this and to stop this. All of a sudden I hear a gun and then I hear him fall. I will never forget that sound. I will never forget the sound that he made, and then I looked and I saw him lying there. I went 'God.' I freaked. I turned around. The wall, the fence, whatever it was, I don't know---I just floated over it, floated over it. I'm not sure what happened. I then hit the ground...I don't know if I stayed there for awhile. I don't know what happened, but the next thing I remember is, I'm running again. God, I'm *so* tired of running. I'm running and I'm running and as I'm running I'm looking down at my hand and, Dyane, I've got a gun in my hand. Oh, shit, I've got a gun in my hand. What the hell is going on here...(T-5/l/89-62-67).

Thereafter the following exchange took place between State and Swartz:

> "Q. I haven't stopped reading your answer yet. You have gone on for pages and pages without my interrupting and I am still going on. If you want, I will read you the beginning of your deposition where I told you you can recess at any time. It is okay to take your deposition. If you don't understand my questions, please repeat it. I will repeat it and rephrase it.
> A. Mr. Rosenbaum---
> Q. You had an opportunity to say anything you wanted to say.
> A. I was giving you a lot of detailed information and I left things out. I'm not perfect.
> Q. That is all I wanted to hear you say. My question to you was very simple. What you just told us wasn't in the deposition because you neglected to tell us then, right?

A. I just didn't put everything in there. (Emphasis added) (T-5/I/89-69,70)

Thereafter State continued to read to Swartz answers she had purportedly given in her deposition as to Robt's continuing chronology to her of what occurred after the shooting and as a part thereof the following exchange occurred:

> "Q. Okay. It's at a light or a stop sign. It's not parked and it's running. And he says: 'I don't know, but it's running and I go around the car and I open the door and there is this guy and I said, 'Get out' and the guy starts to scare me and he grabs his heart and he goes, 'Ohh, ohh, ohh, ohh.'".
> A. No. It's -- well, he was, like, having a heart attack. He was going, 'Ahh, ahh, ahh.'
> Q. I am trying to do the chanaes vou made in the deposition. 'His eyes were bulging out of his head and he was just looking at me. I thought he was going to have a heart attack.' Then you said: 'Well, Bobby, you had a gun in your hand' and he said: 'Oh, yeah. I just wanted this guy out of the car. I wanted the car. I got in the car and I'm driving.'
> A. Mr. Rosenbaum --
> Q. Yes?
> A. He didn't say, 'Oh, yeah.' He had forgotten he had a gun in his hand. I said: 'Bobby --' he didn't know why the man was so frightened of him. I said: 'Bobby, you have a gun in your hand.' He goes: 'Oh, oh yeah.' He had forgotten that.
> Q. I said: 'Oh, yeah.' I'm not readina this rehearsina for a play, ma'am.
> A. Sir, I should have never even put that in there. I was trying to be so totally honest with you and you are just looking for points to get me on." (Emphasis added) (T-5/I/89)-7I,72)

Thereafter this exchange occurred:

> "Q. Did you talk to a detective the day your brother was arrested or the day after?
> A. I think I might have talked to two or three. They called me back.
> Q. That is all I am asking you: Yes or no?
> A. Yes, I did.
> Q. That is all I want to find out.
> A. All right." (Emphasis added) (T-5/I/89-74,75)

Defense next called Colleen Parker, Robt's step sister and Swartz's half sister (Colleen's father was married to Robt's mother). She testified: she lived at the same house as Robt. from December, 1968, to June, 1969; the mother stabbed Robt. in the back with a carving fork at an Easter or other holiday dinner; the mother used profane language; that "I found out what it was like to live in discord...and violence"; on one occasion the mother, who drank a lot and took pills, couldn't be awakened by her and had to be taken to the hospital; on another occasion the mother took a door apart with a hammer to get at her father; the mother swore at her and threw scotch in her face; that "(W)hen I was there I felt that, like Bobby and I were both outcasts...I wasn't a Patten and he wasn't accepted"; that the mother would frequently tell Robt. "I hate you...I wish you were never born"; a deceased sister of Robt's, to-wit: Kelly (who subsequently committed suicide) hit Robt. once and when Robt. told the mother about it, the mother blamed Robt. and picked him up by his throat; one morning the mother put a knife to Robt's throat; on another occasion Robt. stole a golf cart; and that she unsuccessfully pleaded to have him put in a foster Christian home (T-5/I/89-76-95).

On its cross of Parker, State asked her if she was forced to resign from the St. Petersburg Police Reserve, which she denied and then felt compelled to answer in considerable detail (T-5/I/89-95-99). In connection therewith the following exchange occurred between State and Parker:

> "Q. Now, you quit from the Saint Petersburg Reserve in 1984, right, February?
> A. I believe that is correct.
> Q. And in April of '84 you left Vitaglia?
> A. That is correct.
> Q. And the reason you left Vitaglia wasn't over the Tobey Wastewater. was to
> A. I had a conflict with the comptroller.
> Q. With the comptroller?
> A. Yes.
> Q. And that had nothing to do with you being a police reserve officer, did it?
> A. No, sir. I left the reserve.
> Q. It had nothing to do with changing the access to the computer system *so* people could get to the Tobey documents?
> A. No, sir. I didn't do that.
> Q. Just so we have a record. Now, you had some -- let's talk about your experience with the Defendant's mother, called Betty? (Emphasis added)(T-5/I/89-98,99)

Thereafter the following questions were asked by State of Parker and she gave the following answers:

> Q. Today you mentioned about the Easter dinner.
> A. Yes.
> Q. You said that Betty stuck the Defendant in the back with the fork?
> A. Yes.
> Q. Not in the hand, not in the arm, but in the back?
> A. I remember the back, sir.
> Q. So if someone said it was the arm or the hand. they would be mistaken?
> A. I don't know they would be referring to the same incident.
> Q. That could be true, but it was an Easter dinner. That is the usual ritual there. Easter dinners?
> A. I was only there for Easter dinner once, other than the six months I lived there. (Emphasis added)(T-5/I/89-I02,I03)

Parker testified as follows on cross by State: Robt. is "a wonderful artist"; she didn't recall seeing Robt. use any alcohol or drugs the six months they lived in the same house; Robt. skipped school (T-5/I/89-I03). She said Robt. told her about the shooting of Broom as follows: when he and the two persons who were driving with him got stopped, he took off one way and they took off another; one officer who chased him and another chased them and that Robt. ran behind "like a strip shopping center" and turned around and the officer was behind him with his gun drawn; Robt. told the officer to drop the gun and that the officer fired at him and he fired back at the officer; "to the best of my recollection", Robt. fired two shots; Robt. admitted to her that he had killed Broom; Robt. told her that the second bullet possibly ricocheted off the belt, or something, and hit the officer's foot; and that when Robt. was arrested he was walking a dog by his grandmother's house (T-5/I/89-109-II0).

State then asked the following question and Parker gave the following answer:

> "Q. Now, since the Defendant has been convicted in 1982 of the murder of Officer Broom, I think you are the only family member that has gone up to visit him, right?

A. I know that I went to visit him. don't know whether any other family members have." (T-5/1/89-110)

In response to specific State inquiries, Parker said she never saw pots of coffee being thrown at Robt. by the mother nor did she see the mother hit him with a belt or a wire hanger but she said she saw the mother throw an iron at him (T-5/1/89-113).

Defense then called psychologist Dr. Harry Krop who explained his understanding of MC's and said he had examined Robt. to determine if any existed (T-5/1/89-144-148). He was then voir dired by State, which was more an effort to show that he was defense-minded in death penalty cases rather than that he lacked proper qualifications (T-5/1/89-148-154).

On direct, Dr. Krop testified: determining the existence of MC's is basically a jury and a legal determination; he had met with Robt. on two occasions, for 2 hours Dec. 28, 1988, at the DCJ and for 4 1/2 hours Jan. 17, 1989; he did some interviewing of Robt. both times but that on the second meeting he "predominantly" did psychological testing; that "(S)ince there was some question...whether Mr. Patten may have suffered some brain damage in the past" he did "a full intellectual evaluation" including "the standardized test referred to as the Wechler's Adult Intelligence Scale, revised version known as WAIS...the Aphasia Screening Test, Bender-Gestalt, the background procedure of the Bender, the finger tapping test, a test to assess tactile sensation---a right/left orientation measure, and the Wechler's Memory Scale, Form I"; he reviewed records furnished him by State and Defense, which involved another 15 hours; he understood Robt. was a black and blue baby, "which sometimes indicates that he may have been lacking oxygen at birth"; and that "(I)t appears...that Mr. Patten arrives from an extremely unstable, rejecting, and I would say abusing---both physically and emotionally---environment...(H)e was clearly an unwanted child"; he spoke with Robt's mother on the phone and that while the mother claimed she did not treat Robt. differently from the other children," she made it very clear...that she still had tremendous feelings of hostility towards him and clearly indicated to me that she has rejected him"; that the stepfather "tended to minimize the physical abuse"...."certainly all the family members support the fact that Mr. Patten was a rejected child who did not receive the appropriate attention that one typically gets from a parent and also was extremely emotionally abused;" and that there were indications from the psychiatric reports that he reviewed that the mother had "some very serious psychiatric problems, "including her having been diagnosed as "schizophrenic," "severely neurotic," "one of the most disturbed women..." and "may even be hopeless" (T-5/1/89-148,162).

Dr. Krop further testified: Robt. "did not have very much help in terms of professional intervention" and that the mother had terminated sessions for Robt. with a social worker; Robt. was "a kleptomaniac" from a very

young age; he began using drugs from a very young age deriving from his unstable and abusive situation; this set in motion a series of events including "the stealing behavior", "some other antisocial acts", leading to further "regression" and further hostility on the part of the mother, and then further "acting out" and "rebellion against authority" on Robt's part with the result that by the time Robt. was **3** years old, "we have this vicious cycle which developed" (T-5/I/89-I62-I63).

He said that Robt. was taken out of the home when he was II and "was in foster homes"; that he eventually returned to the home with the above described vicious cycle continuing and escalating; and that "I think the most important thing is to look at the vicious cycle which developed, which eventually shaped and molded his personality, from the time he was a young child" (T-5/I/89-I63,I64). He further testified: "I think the other significant aspect of his behavior was the extensive drug abuse";--he used speed, heroin and cocaine combination "quite extensively" and drinking, but probably more drugs than drinking; Robt. indicated he used drugs since he was **6** or **7** years old...he took his mother's pills; he made a suicide gesture by taking a pill in front of his mother; and in this regard, he referred to a notation in a letter-report of a Dr. Winston reciting the suicide gesture occurring in I97I (T-5/I/89-I65-I68). He said the results of his testing were as follows: Robt's was of overall average intellectual ability; his nonverbal I.Q. level was **118,** which is in the upper 50% of the population; his verbal I.Q. level was **89;** and that this significant difference of **30%** indicates that, "one, at least, has to suspect that there may be some organic reason or brain damage that is causing the discrepancy, although there are other possibilities.."(T-5/I/89-I70,I7I).

Dr. Krop also testified that the rest of his neuropsychologicaltesting results were within normal limits and that he exhibited superior intelligence in working with his hands (T-5/I/89-I72). He said that on **4** or 5 occasions Robt. was diagnosed as having various evidence of brain damage"; that he had an EEG in **1973,** which showed "at least mild abnormality..."; that Dr. Guerro in **1976** diagnosed him as having a psychotic organic brain syndrome; that in **1977** Dr. Castiello indicated he had an organic brain syndrome; and that in **1978** Dr. Mutter indicated "soft signs of organicity"...which may have been caused by drug abuse" (T-5/I/89-I72-I74). He added that the existence of organic brain damage could not be definitely ascertained except "by opening up the brain and looking at it" (T/5/I/89-I74).

Regarding his requested opinion "regarding MC's in this case," Dr. Krop testified that he reached three different psychological diagnoses, to-wit: (I) Substance Abuse; **(2)** Antisocial Personality Disorder; and **(3)** Possible Organic Syndrome (T-5/I/89-I74,I75). He further testified: the Kleptomania was evidence of acute psychotic episodes which involved losing touch with reality; the interaction of the various things that were going

on when the shooting of Broom occurred, with the longstanding personality disturbance that he showed, would have resulted in impaired judgment and poor impulse control; that Robt. used drugs to try to cope with problems and his feelings of inadequacy and to get attention "elsewhere"; that a behavioral program set up in 1989 by a Ms. Tosch showed that Robt. "could respond to positive attention if given the opportunity; and that...I think for the most part he didn't really have that opportunity; that the report of Dr. Golden when Robt. was 14 (or 12) recites that his history is "(T)hat of a budding sociopath with chronic behavioral difficulties with mother and schools..(N)o evidence of neurotic or psychotic symptoms"; that Dr. Golden said Robt. was having difficulty adjusting to his circumstances; that on February 7,1982, Robt. was referred to the Florida Baptist Children's Home because his mother said he was out of control; that Mr. Halloran (his stepfather) took both Robt. and his mother to the Mental Health Clinic; that "(T)he child had been stealing and setting fires since the age of three and has kleptomania and pyromania symptoms"; that "(T)he principal verified these symptoms and stated the child could not attend...normal public schools even for emotionally disturbed children"; and that "Mrs. Halloran should be in a mental hospital and Mr. Robt. Patten should be hospitalized, if possible" (T-5/1/89-176-182).

Defense thereafter showed Dr. Krop a series of commitment orders and evaluations regarding Robt's staying in the S. Fla. State Hospital; and he testified therefrom as follows: that Dr. Canton's report of September, 1976 showed that Robt. was found in a psychotic state while in a work program at the Lake City Road Camp; that "(H)e was eventually determined to be psychiatrically unable to know right from wrong because of his psychotic state and determined to be both incompetent to stand trial and also...I believe, found insane at the time of the offense but Dr. Canton indicates he was not sure whether this was a result of the drugs or an ongoing psychotic situation; that "(H)is impression was that it as probably more drug induced"; that there were a series of other psychiatric and psychological evaluations from the S. Fla. State Hospital with the same effect; that "...at least two of the psychiatrists diagnosed him as having a psychotic organic brain syndrome associated with the drug abuse"; that all of these records and the records of the No. Florida Evaluation and Medical Center form a part of his opinion in this case; that Dr. Foosner indicates a mildly abnormal EEG in April, 1978; that he, i.e., Dr. Krop, saw no evidence of malingering during "the current evaluation"; that "I think Mr. Patten was coherent and showed no abnormalities in terms of his thinking process, or other evidence of being out of touch with reality....So, I saw no evidence he was trying to malinger"; that it was his impression that Robt. was malingering at the time of trial in 1981---and when he talked to Robt., "he acknowledged that he had taken advantage of the fact that he was probably crazy in the past and probably, again, drug induced, although he didn't make that clear; that it is consistent with his overally personality disorder for him to take advantage of the fact that he did have serious

emotional problems in the past," and probably at times he was psychotic; but that he was not saying that Robt. was psychotic, or that he didn't know right from wrong, or that Robt. didn't know what he was doing; rather, that "I would say at the time that he was involved in this incident, i.e., the killing of Broom, because of the drug use interacting with all those other personality deficiencies that I talked about before, I think that he probably acted in a way without thinking particularly rationally." And that while he was not extremely mentally disturbed at the time, he was engaged in behavior which was consistent with his personality (T-5/I/89-I82-I96).

On cross examination of Dr. Krop, State after attempting again to discredit his testimony by developing its thesis that he was solely or almost solely a witness on the defense side of death penalty cases, began a procedure of questioning him from "this board here" where it apparently had written the headings "insanity," "statutory mitigating," and "mitigating" (T-5/I/89-200). State then specifically elicited testimony from Dr. Krop on cross that at the time of the involved crime Robt. was sane, that he knew what he was doing, that he knew the consequences of his act; and that Dr. Toomer---the second of the Defense psychologists and who had yet to testify before this jury--was wrong in having testified on deposition that Robt. was insane at the time of the involved incident (T-5/I/89-200-204).

State then asked Dr. Krop if MC 6.B. (i.e., Def. was under the influence of extreme mental or emotional disturbance) applied ---although this witness had already testified on direct that it did not---and he, of course, repeated this testimony and, in response to a specific State question, he said he disagreed with Dr. Toomer in this regard (T-5/I/89-204-206).

State followed the same procedure with reference to Statutory MC 6.F. (i.e., the capacity of the Def. to appreciate the criminality of his conduct or to conform his conduct to the essential requirements of the law was substantially impaired), and Dr. Krop testified that, "it is my opinion that he was not substantially impaired at the time." State then said:

> "Q. So this one (i.e., MC 6.F) doesn't exist either" (T-5/I/89-207,208).

Dr. Krop testified that Robt's MC situation falls into "this realm...any other aspect of the Def's character or records or any other circumstance of the offense" (the quoted language is from State), and he said that the four elements thereof are drug abuse, abusive environment (childhood and adolescence), various emotional problems throughout his life including the possibility of organicity existing, and his actual mental state at the time of the offense (T-5/I/89-208-2I0).

State then stated as follows to Dr. Krop in the presence of the jury:

> "Q. I'm just puzzled. I think you have changed answers today, but I'm sure you will help me through it..." (T-5/I/89-2II)

State then cross-examined Dr. Krop from his depo. to try to make the point that the latter had there stressed Robt's education deprivations more than he had the possible organicity, With reference to the 1978 EEG, Krop agreed that it was "mildly abnormal." He said that "...when a EEG shows some organicity, I believe most neurologists would agree it is a reliable test." He agreed that a cat-scan is "a more sophisticated test" (T-5/I/89-211-217).

Thereafter the court denied Defense's obj. to State's question to Dr. Krop as to whether the latter had talked to a neurologist, the basis of the objection being that such question would appear to impose upon a Defense an improper unlawful burden of proof. Dr. Krop testified: that he believed Robt. was adjudicated insane between 1976 and 1978 and that this adjudication had nothing to do with the 1975 armed robbery case (T-5/I/89-222,223).

State then asked a question as to whether Robt. had escaped from prison and whether "when he was found in this stolen car, he was *so* whacked out on drugs that that was the basis for the insanity acquittal?" (T-5/I/89-223). After Dr. Krop answered this question in the affirmative, State repeated the question again. Thereafter the following exchange occurred between State and Dr. Krop, to-wit:

> "*Q.* And he was sent to a hospital right?
> A. Yes.
> *Q.* Now, he was adjudicated insane there for that case. Do drugs have an effect on his social personality?....
> A. Sure."

With reference to Robt's condition at the time of the involved crime, Dr. Krop said:

> "My impression was, that his---he, perhaps, was more suspicious. He perhaps was more hyper, vigilant, and also, his judgment, that is, in terms of considering all the opinions, was impaired. Again, not to----in a psychotic state or not to a severe state, but certainly, to some degree, compared to the normal person." (T-5/I/89-225,226)

With reference to the involved shooting Krop said he thought that in conjunction with the other emotional variables, Robt's being on drugs would be important (T-5/I/89-227). State then said to Krop in front of the jury that he had sent him a disciplinary report covering Robt. while he was in prison, and Defense objected to State being allowed to go into matters occurring subsequent to the happening of the involved crime in Sept., I98I (T-5/I/89-227).

At this point the prosecutor repeated his early advices to the court that he was not feeling well and describe the medication he was taking.

There followed a lengthy bench argument as to whether State could ask Krop about an incident that occurred on Nov. 18, 1985, when Robt. allegedly "stuck another inmate with a small piece of mirror twice, cutting anther inmate.." (the quotes are from State) (T-5/I/89-222-240). In this regard, State told the court:

> "There is case law which will allow subsequent bad acts or uncharged bad acts to be admissible if it goes to impeachment only, rebuttal.." (T-5/l/89-243)

Defense argued that State wanted to have Dr.Krop testify about this subsequent incident to enable it to then contend that here was a subsequent instance of violence caused solely by Robt's antisocial personality without any drug use having been involved, etc., and in response to the court's inquiry as to whether that was what State was saying, State responded:

> "That is one of the reasons. We have a right to test the expert who is giving an opinion as to what he bases that opinion on so the jury can see what it is based on. In addition, in this case it is more important because they are the ones screaming that drugs made him do it." (T-5/l/89-26l)

Defense counsel then countered, saying:

> "So the record is clear, Your Honor, what is going to happen here -- they are going to bring up subsequent violent acts in 1985, four years after the crime, in order to show what is happening and make it relate, because they want to bring it up to talk about his fourth mitigating factor, which involved drugs and violence together...The incredible prejudicial effect on this jury -- considering whether 25 years imprisonment without parole is appropriate or the death penalty -- is overwhelming....The prejudicial impact tremendously outweighs the probative value, tremendously, in a case like this." (T-5/l/89-268,269).

The State responded as follows:

> "I don't think it does. I think, in light of everything that has come out about the Defendant's past -- I don't think one act in 1985 is aoina to make **any** difference to the **jury.** We don't have the case in which this was the first crime bv the Defendant that he ever committed and once he aot in **prison** he was a bad bov ever since. He has been a bad bov from the aqe of three, is what we are aettina from the Defendants, anvwav, and I don't see how the **impact---the** relevant evidence will be outweighed bv the Dreiudicial value in this case. I think it is very relevant in this case." (Emphasis added)(T-5/l/89-269)

State then raised the further argument that if Robt. had been charged and convicted of the mirror cutting incident, such could have been introduced against him as an AC because it occurred prior to the sentencing date but the Defense's response to this was, "It is limited to convictions (T-5/l/89-27l,272).

The court ruled on the matter adversely to Defense and offered Defense the solace of a cautionary instruction but Defense declined such on the basis that it would just further highlight the evidence of the subsequent bad act. In making this ruling, the court also stated that it didn't make any difference whether the evidence of the subsequent bad act would come in on State's rebuttal or otherwise because, "(T)he issue is the same as to admissibility...." (T-5/l/89-273-280).

The court also rejected Defense's argument as to the propriety of State bringing to the jury's attention that no cat-scan was done (T-5/l/89-282).

Over Defense objections, State was allowed to have introduced in evidence the letter of Gateway Residence, Inc., of November 30, 1979, to Dade Circuit Judge Richard Fuller (T-5/1/89-293).

Also over Defense's objection, the court said it would allow State to have introduced in evidence as "proper rebuttal" a letter written by Robt. during the pendency, or in connection with, the 1975 armed robbery case, wherein he wrote to the judge requesting a contact visit with his family. Defense pointed out to the court that Dr. Krop had never seen this letter. The court then qualified this ruling, saying he would allow the letter in "provided there is a proper predicate" (T-5/1/89-293-299).

On continued cross of Dr. Krop by State, he was asked and answered for the third time that MC 6.F. does not apply, and he was again asked and answered that he did not agree with Dr. Toomer in this regard (T-5/1/89-301-302). State then tried to make the point either that Dr. Toomer, the doctor who interpreted the EEG, was not a neurologist or that State had not shown him to be a neurologist. State once again referred to "the murder" of O. Nathaniel Broom in front of the jury (T-5/1/89-308). State then questioned Dr. Krop regarding the 1985 mirror cutting incident and after reading a description of that incident from the involved report to Krop, State asked him:

> **Q.** How does this incident of violence, which occurred in the prison -- how does this influence your opinion here on the non-statutory mitigating factors that existed back on September 2nd, 1987." (T-5/1/89-309)

Dr. Krop answered as follows:

> "**A.** Well, I'm not sure of, in terms of when you say how it influenced an individual -- Mr. Patton, or otherwise, certainly has the potential of engaging in possibly violent behavior when he is not on drugs. First of all, we don't know whether he was on drugs at the time that he committed the particular act at Florida State Prison. Mr. Patton reported to me that he had been using drugs at Florida State Prison, not to the same extent, obviously, and perhaps not the same drugs -- primarily marijuana. But, I don't know what he was **on** at the time that that other incident occurred."

At this juncture in the trial, State began questioning Dr. Krop concerning psychological reports written during the period 1982 through 1988, thus going far beyond the court's earlier ruling that he could go into one subsequent incident, to-wit: the 1988 mirror cutting incident. In this regard, the prosecutor said as follows to Krop in the presence of the jury:

> "....I have one here that was given -- let me just give you the different dates -- psychological assessment dated January 14, 1986. You said okay. There was another psychological assessment on December 3rd, 1985. It said the Defendant is bright, reading materials on a high level, talks a lot with other inmates, has a problem sleeping, up half the night writing letters. There is another psychological assessment on November 8, 1985. 'I'm all right. No problems.' Another psychological assessment on August 23, 1984. It says the inmate is okay, however, he is malingering and the inmate requests 'call-out' claiming pressure and they say there may be a mixed substance abuse in relation, because of his malingering, faking, trying to get drugs. Do you agree with that one?" (T-5/1/89-314)

Dr. Krop answered the last question as follows:

"I don't know what his behavior was like. I agree, as well, as Mr. Patton's own self- report, that there has been no evidence of any kind of psychosis since he has been in Florida State Prison. *So,* I am sure the records would also indicate that." (T-5/l/89-3l4,3l5)

Immediately thereafter the following exchange between State and Dr. Krop took place:

"Okay. He has had clear psychologicals since he has been incarcerated, right?
A. Since he has been incarcerated in Florida State Prison, yes.
Q. Since February of l982?
A. Yes." (T-5/l/89-3l5)

Thereafter the following occurred between State and Dr. Krop in the presence of the jury:

"Q. Now, you said you spoke to Defendant's mother, Defendant's step-father, and Defendant's brother, Ron?
A. Yes.
Q. And you told me about that, for the first time this morning, right?
A. That is correct.
Q. When did you speak to them?
A. I spoke to Mrs. Halloran, that is the mother, on Tuesday---I believe Tuesday or Wednesday of this week. I have tried to get in touch with them.
Q. Today is Monday.
A. I'm sorry, last week.
Q. Why did you wait until this morning to call me to tell me you finally made contact?
A. I was in town and I called you. (Emphasis added) (T-5/l/89-3l4-3l6)

The prosecutor then asked Dr. Krop:

"Q. I heard you tell us, briefly, what your summaries were of the conversations with Defendant's mother and Defendant's step-father, but I didn't hear much of anything about what Defendant's brother, Ron. told you." (Emphasis added) (T-5/l/89)

Dr. Krop then said that the brother, Ron, had told him, "...the mother was a revengeful person and that she was very hostile and she took out her hostility on Mr. Patton, the Def., rather than the other members of the family;" that Ron had to "step in a number of times when...the mother was either hitting Robt. or strangling him or choking him; and that Robt. was "more rebellious and, therefore, would take the brunt of the punishment from her" (T-5/l/89-3l7).

Thereafter the following colliguy occurred betweent State and Dr. Krop:

"Q. What happened when he pulls -- the officer pulls the trigger on his gun a second....
A. According to Mr. Patton ---
Q. What did he tell you?
A. He told me that he believes the officer, the police officer shot himself in the foot.
Q. In the bottom of the foot? Okay. I don't have that much more." (Emphasis added) (T-5/l/89-32l)

With reference to the aforedescribed letter Robt. had sent to a judge requesting a contact visit with his family, the prosecutor said:

"By Mr. R...
Q. And in his letter, here, this certified copy of the letter from the court file, written by Robert Patton to Judge Weaver asking him---this is on the armed robbery case, where he robbed the milk lady here." (Emphasis added (T-5/l/89-322,323)

Dr. Krop said that that letter would not change his opinion about Robt. because he is fairly close to his sister and step-sister and "tends to play down the abuse and that certainly is not inconsistent for an individual who has been abused." (T-5/I/89-323)

With reference to Robt's "girl friend," Christine Castle, having testified on depo. that Robt. told her after he escaped from a road gang, "(H)e played like he was sick **so** they put him in the mental hospital, etc." (this quote is from State), Dr. Krop testified that such did not have any effect on his opinion and that, "I do not feel that Mr. Patton has a psychotic history with the exception of, perhaps, the incident in which he was on drugs...." (T-5/I/89-324,325).

The following questions and answers occurred thereafter:

> "Q. Did you ever see any reports from a qualified psychologist or psychiatrist as to the Defendant's mother's mental condition and if **so,** could I please see them?
> **A.** There were reports that indicated that she was in need of hospitalization. I don't think they did a formal evaluation of her or diagnosed her.
> **Q.** One that was read before on direct was one from a principal, a Mr. Guywood (phonetic) or something, a principal of a school. I am talking about, did you see anything from a psychiatrist or **a** psychologist that indicated that she had any mental disease or disorder?
> **A.** I believe there was a psychiatrist.
> Q. If **so,** I would like to see it, <u>because I don't recall seeina one.</u>" (Emphasis added) (T-5/I/89-328).

The court then noted that six uniformed officers in the courtroom at that time and Defense said the number was seven (T-5/2/89-6).

Defense then read to the jury the prior sworn testimony of Officer. N. Echelberry, a police communications officer, who testified to the jury that there were different police radio messages concerning the involved crime. The following colliguy occurred:

> "**Q.** Can you please tell me what that broadcast said?
> **A.** The victim, that the offender took the vehicle from, said that the subject appeared to be extremely high on something. His eyes were both bulging." (T-5/2/89-l8)

Defense next called Dr. Jethro Toomer, a psychologist. State voir dired Dr. Toomer which examination consisted entirely of questions designed to demonstrate not his lack of qualifications but his being defense-minded in criminal cases, etc. (T-5/2/89-26,27).

Dr. Toomer testified: he first met with Robt. in Oct., **1981,** and that at that time he was asked to look at records to ascertain "whether or not there were any MC's with regard to the **32** charges which he was facing at the time"; he met with Robt. at that time for 5 hours; he spoke with all three of Robt's "sisters", Swartz, Parker, and Kelly Halloran; and that he met with Robt. again on **4** occasions during the past 6-month period "going back to Dec., 1988, which altogether took **4** to 5 hours (T-5/2/89-3l-33).

Dr. Toomer said he rendered Robt. the Bender-Gestalt Designs Instrument exam and the Rivitz Debeta exam. He said the Bender-Gestalt Designs Instrument test is designed to point out deficits in intellectual functioning, personality functioning and as a screening device for brain damage or organicity and that, "(I)t indicates that further testing would have to be done to determine the nature and extent of any subsequent or any existing brain damage." (T-5/2/89-35,36)

Dr. Toomer further testified: that Robt's use of drugs began at 5 or 6; that Dr. Cantor's report describes him as using LSD; that Dr. Mutter mentioned heroin-cocaine utilization, and that there was "drug abuse" from age 5 to **7** to age 24 in 1981; that Robt. was using toxic substances during the 3 to 4 week period preceding the date of the involved crime; and that on the day before the involved crime he was described **as** "high" and "also had a very serious altercation in his apartment before the incident occurred, as a result of his utilizing toxic substances, being somewhat out of control" (T-5/2/89-39-49). He referred to the drug paraphernalia found in the car being driven by Robt. and the fresh track marks; "the varied diagnoses and the personality disorders" Robt. had suffered from over the course of his life;' that he was described as being a schizophrenic and a budding sociopath at age 12; that Dr. Golden found, "....adjusted reaction of childhood" in Aug. of 1969 to Robt's "maladaptive behavior...in...a dysfunctional family unit; that social worker Joann Torch had made reference to Robt's stealing and said that Robt's problems stemmed from his mother's problems and that the mother needed therapy; that the mother always insisted that there was something congenitally wrong with Robt. who was born a blue baby; and that at l9 he was diagnosed as having an organic brain syndrome and that at times as suffering from "organicity attendant to his drug utilization and drug abuse; and that Dr. Foosner interpreted the "brain scan" as showing mild abnormalities" (T-5/2/89-38-58).

Dr. Toomer described Robt's "antisocial personality" as another MC and said it was a life long disorder and that persons suffering from such disorder "engage in what we call maladaptive patterns of behavior" (T-5/2/89-59-61). He said he believed that Robt. was operating under the influence of an extreme or mental disturbance coupled with the drug utilization and that his ability to comply with the requirements of the law were substantially impaired by drugs (T-5/2/89-6l,63). He further testified as follows: that he found no signs of malingering in l98l or 1982; that malingering is a characteristic of ASP; and that he found no signs of an active psychosis or delusions in 1981 but that he did find behavioral signs and depression (T-5/2/89-6l-66).

The court next announced the number of uniformed officers in the courtroom (T-5/2/89-69,70).

Picking up where he left off during his "voir dire" of Dr. Toomer, the prosecutor again tried to make the point that the doctor always testified for the Defense, etc. (T-5/2/89-7l,72). The said doctor then testified on cross:

that in addition to finding the presence of MC's 6-B and 6-F, i.e., he found that he had **ASP;** that he gave no diagnosis in "the first trial" because he was not asked to do *so;* that Robt. may have acted out of fear of going to jail at the time of the involved crime; that he knew it was wrong to be in possession of a stolen car; and that he knew the consequences of his acts (T-5/2/89-78-9l).

Thereafter the following exchange between State and Dr. Toomer occurred:

> "**Q. At** the time he murdered Officer Broom, did he know the difference between right and wrong?
> **A.** No. He did not.
> Q. He did not?
> **A.** He did not.
> Q. So what you are saying, then, is the Defendant was insane when he killed O. Broom.
> **A.** Yes...
> **Q.** He (Dr. Krop) doesn't agree with you, Doctor.
> **A.** That is correct?
> Q. In fact, do any of the doctors agree with you....
> **A.** I'm not sure. I'm not sure." (Emphasis added) (T-5/2/89-9l-93)

Dr. Toomer thereafter testified as follows:

> "...What I am saying to you is, the nature of the **ASP** disorder is such that behavior tends to break down when the individual is faced with unanticipated or anticipated stresses. So, that person, at a particular point in time on a particular day within a particular realm of hours, or whatever, can know the difference between right and wrong." (T-5/2/89-96,97)

He described the characteristics of **ASP** as listed by or in "DSM-3" as follows: continually violating the rights oi others, lying, stealing, resisting authority, truancy, using drugs, and the failure to accept social norms (T-5/2/89-99). He said that under DSM-3, one only needs to have 3 of l2 criteria to qualify as having **ASP** and that Robt. had ll of the criteria (T-5/2/89-l02). He said that Robt. knew right from wrong but that he could not act on that knowledge (T-5/2/89-l04). He said that the abnormal behavior of one with **ASP** continues until the stress is removed and that Robt's history is full of examples where the **ASP** disorder has broken down (T-5/2/89-ll0,lll).

State then asked the following hypothetical question:

> "Was the Defendant acting in an antisocial manner, and I just want you to assume these facts in my question, as if this were true. He took the gun. He shot O. Broom with it and he hid it and wiped the fingerprints clean. He hid it inside the house." (T-5/2/89-lll,ll2)

In response thereto, Toomer conceded that Robt. was acting naturally when he stole the car at gunpoint after the involved crime and thereafter obeyed all the traffic laws while passing the police but he said that this conduct was "very consistent with the antisocial personality disorder...the stresses had been removed" (T-5/2/89-112,113). He said that he does not mean that having **ASP** would always constitute a MC but that it would under the facts of this case (T-5/2/89-ll3,ll4). He said the basis for the MC's 6B and 6F being applicable to Robt. is, "the extreme mental and emotional disturbances with regard to that particular statutory MC"...plus..."other factors we

have already alluded to...I see them as all being related, whether they are based on the same thing...." (T-5/2/89-114-119). He further testified: that he did not see any evidence of an active psychosis in 1981 but that he did see symptomatology characteristic of psychosis; and that he didn't "necessarily" consider Robt. to be an addict in that he didn't know how often he used drugs, but that---based upon what Robt. told him---he believed Robt. used drugs 2 to 4 hours before the involved crime (T-5/2/89-119-124).

Dr. Toomer said his notes referred to Robt. having said that "he is coming down from heroin, cocaine, everything from pot to heroin.." and "at this time shows no sign of psychosis or withdrawal" and that they also referred to Robt's earlier incident of trying to commit suicide by "a barbiturate overdose" in response to an altercation with his mother (T-5/2/89-135,136).

He said the basis of his opinion that the two statutory MC's are applicable is that "there is soft signs of organicity present with the Defendant," and he said he based this on the 1978 EEG and the other reports (T-5/2/89-137). He said the Bender-Gestalt screening devices indicated the soft signs of organicity (T-5/2/89-139). He said that Dr. Krop's neuropsychological testing was not the same thing as the Bender-Gestalt test; that it couldn't be ruled out that the organicity was caused by drugs and that he thought the drugs were a contributing factor; that Robt. didn't try to malinger with him in 1988-1989, but that he did malinger in 1981; and that the "conning phenomenon" is part of the antisocial personality disorder.

In subsequent questions the prosecutor twice made reference to the fact that Robt. "murdered" O. Broom (T-5/2/89-159,160).

State then propounded some hypothetical questions to Dr. Toomer, asking him to assume therein that Robt. had lied to him when he said there was a dead end at the place where he ran to and from where he shot Broom; that Robt. lied when he said he fired only two shots; and that he omitted to tell Dr. Toomer that "he robbed another person of his car and went to his grandmother's house" after he shot O. Broom. The doctor said that assuming the truth of these alleged facts, such would not change his opinion (T-5/2/89-159-164). Thereafter the following exchange occurred:

> "A. That (i.e.,organicity could be due to the fact that the Defendant was born a blue baby) could be a contributing factor.
> Q. That could be?
> A. Could be.
> Q. That is speculation on your part?
> A. Yes.
> Q. I was left with that impression.
> A. Yes.
> Q. So you are just speculating as to that?
> A. Yes. I---you know.

Q. That's fine." (Emphasis added) (T-5/2/89-166)

The doctor further testified: there was nothing in the records reciting that Robt. was a blue baby; Robt's situation was "the most horrendous" case of child abuse he had ever seen; and that he now sees a relationship between Robt's childhood and the way he is, but he didn't come to that conclusion until after the trial (T-5/2/89-166-174).

In further questioning of Dr. Toomer, State brought out that Robt's family did not testify at the first trial and "that the other doctors didn't testify about the Def's childhood.." (T-5/2/89-175). The prosecutor also included in his questioning of Dr. Toomer his contention that the only way Robt. could have learned "of these new details and gathered this insight is from listening to you testify about his (being) badgered..." (T-5/2/89-175). Toomer said he didn't know if Robt. still had the brain damage (T-5/2/89-176).

The next Defense witness was police crime scene technician Sarnow who testified regarding finding the drug paraphanalia in the car. On cross by State the following exchange occurred with Technician Sarnow:

> "Q. Have you been involved in other cases where police officers have been killed?
> A. No, but I have been where they were shot at.
> Q. But not killed?
> A. No.
> Rosenbaum: Nothing further." (T-5/2/89-199)

The court indicated it would refuse to include in the jury charge---as desired by Defense---language drawing a distinction between Robt's long term drug abuse and his drug use on the date of the involved crime, and it based this ruling on what it described as to the differences in testimony between Defense witnesses, Drs. Krop and Toomer (T-5/2/89-226,227,229,230).

Defense thereafter requested an instruction but saying:

> "You are not permitted to use the same facts to support more than one A.C., therefore you are not permitted to weigh separately and cumulatively A.C.'s -- cumulative." (T-5/2/89-230)

In this regard, Defense argued that State had submitted two cumulative AC---proposed instructions, i.e., to avoid arrest and to disrupt or hinder the lawful exercise of any governmental function, and Defense also argued against the "law enforcement officer engaged in the performance of his official duties" as being "ex post facto and not allowed in this case" (T-5/2/89-233). State concurred that "the killing of a police officer in the performance of his duties" was not added to the list of AC's until 1981, but it argued that such didn't matter because such factor was impliedly in existence before approved by the legislature (T-5/2/89-233-237).

Thereafter appeared an unbelievable colliguy which occurred between court and State:

> "Mr. Rosenbaum: Judge, nothing probably going to make a difference.
> The Court: You never know.

Mr. Fine: *So* they won't do their rebuttal?
Mr. Rosenbaum: You never can tell. No. We have to give something, for your Honor to make the order, about the recommendation of death -- we need to put on rebuttal. Also, you have to have something to base your order on. That is probably the only reason we are going through with it." **(T-5/2/89-237)**

The State then stated it had a chart for each AC with each one being "totally separate" and, in this regard, it stated:

"In this case if you find different aspects of the offense supportive (of) A.C.'s; you can find one or two. I don't think you find all three. I don't think you can find the police officer and one separately." **(T-5/2/89-241)**

State argued that the court should charge the jury of the killing of a police officer, etc., AC even though it didn't exist in 1981 and that in doing the actual sentencing, it could consider AC 5(i) (the capital felony...was committed in a cold, calculated, and premeditated manner, etc.) even though State hadn't argued it to the jury because the court had the power to find the applicability of an AC that wasn't submitted to the jury **(T-5/2/89-245,246).**

The court then noted that "there has never been a factual determination (by a jury) that AC's or an AC did or did not exist" and that, "...When they come back, they come back with life or death. They don't tell me why, right? *So,* what difference does it make?" **(T-5/2/89-247)**

Court then announced it will give AC's: "to disrupt or hinder lawful exercise of government function" and "crime was committed for purpose of avoiding or preventing a lawful arrest" but that it would not give the "killing of a police officer in the performance of his duties" because it would be a 1983 AC instruction in a 1981 case.

The following colliguy between the court and Defense then occurred:

"Def: ...you give great deference to the recommendations of the jury.
The Ct: I certainly do.
Mr. Fine: The law is very clear how important that is.
The Ct: But they don't have to tell me which A.C. they find.
Mr. Fine: Of course, they don't, but it would be error for them to consider separately and include in their weighing, two factors, two A.F.'s; supported by identical facts.
Ct: State says two things. First of all, they are going to show me they can consider it separately and second of all, that the law says I can give it. That is a pretty powerful argument....
Mr. Fine: That is why I am saying although I object to both of them going in, if you decide to put both of them in, what you would need to tell the jury is: If they come from the same set of facts, you can't consider it double.
The Ct: But it doesn't really matter, because I am the one who -- decides that.
Mr. Fine: It sure does matter, because you are giving great deference to what they do and if they improperly weigh, because they are adding another A.C. when it is improper, because it is based on the same set of facts, we have a tainted jury recommendation.
The Ct: I will think about that.
Mr. Richey: ...The second thing is, let's say you are not going to give these, but give two others and they are duplications. We ask for a special verdict form giving the jury a list and asking them to tell in what A. they find and C. they find.
The Ct: There is no case law...

> Mr. Richey: I understand....Under Tedder standards and all other standards, the importance of the jury verdict is very, very substantial...so if you are going to double up, we would like a special verdict form.
> The Ct: The motion for special verdict form is denied right now, and I will think about it overnight." (T-5/2/89-252-259)

State then began a rebuttal case and called as its first witness, Edward A. Herrera, M.D., who testified as follows: he met with Robt. on Sept. 29, 1981, to determine his competency to stand trial and his sanity at the time of that crime and that he found him both competent and sane; he had reviewed records; in his opinion Robt. was not under influence of extreme mental or emotional disturbance at the time of the involved crime; "psychiatrically" he did not find that Robt. lacked the capacity to appreciate the criminality of his conduct; that Robt. was trying "to sort of fool me"; he usually takes about an hour to conduct a psychiatric exam; he has evaluated "literally thousands" of persons; he found no evidence that Robt. was suffering from mental illness; he was familiar with Dr. Krop's opinion that Robt. was suffering from "a mixed personality disorder"; he found no evidence that Robt. was suffering from schizophrenia; that "a compulsive personality disorder" would be hard to diagnose after one meeting (T-5/2/89-261-276).

Thereafter the following exchange occurred between State and Dr. Herrera:

> "Q. Okay, Doctor, would you consider that to be a M.C., the fact that somebody has been diagnosed as an ASP?
> A. Well, if that was the case, I suppose that basically usually all the inmates at every jail would have to -- you know, would have M.F.'s; because most of them have ASP's." (T-5/2/89-276,277)

Dr. Herrera further testified: he didn't remember asking Robt. regarding drug use but that he always does this and he noted the drug use in the records he was furnished; he reviewed all the records (he was vague at first concerning whether he had reviewed the depositions of the sisters but gave the authoritative "I have reviewed all the records" answer in response to a totally leading State question), and that after stating "Yes" that he had discussed drug use with Robt. after being asked concerning this by State in another leading question, he immediately thereafter said he didn't remember (T-5/2/89-278-279).

Dr. Herrera then said: that Robt. really did not help him "on that", i.e., drug use, "if I remember correctly"; that "apparently", "this man, upon admission, he was not either psychotic or not intoxicated or whatever;" he was suffering from no withdrawal symptoms; that there was no evidence of organicity or brain damage but "that is my clinical impression" and he said that Robt. may have misled others but not him; that Robt. was trying to confuse him; that Robt. had an abnormal EEG but that he, i.e., Dr. Herrera, didn't attach much importance to that and that it's not unusual to find abnormal EEG's (this answer was in response to another totally leading State question); and "that (T)o my knowledge---okay..(T)here is no study or any evidence to connect any particular

type of upbringing and the consequence, to antisocial personality"...." no study...(T)hat is just pure conjecture and speculation" (T-5/2/89-279-283).

Thereafter Herrera said: "If I recall correctly, he was an adult when he killed O. Broom" (T-5/2/89-283). He further testified: that he saw no psychiatric reason why Robt. didn't have the capacity to make a choice; he saw no documents indicating Robt. was in a rage when he killed Broom; Robt. was sane and competent at the time of the involved crime; that although he was court-appointed at the trial, he did not occupy the status at the involved sentencing and he conceded he was hired by State to testify as to the presence or absence of M.C.'s; he never met Robt. except for 45 minutes in 1981; he agreed with Defense that "it is not necessary to find that someone is incompetent, insane, or totally intoxicated to find that MC's were present;" that "anything counts" and that I didn't find anything; and (again for the umpteenth time) that he was sane and competent at the time of the involved crime; he disagreed with Drs. Canton and Castillo that Robt. had a disorder in 1971, which necessitated his being put into a hospital; that true psychiatric episodes can be triggered by drug abuse but there was nothing in the records furnished him to indicate that such was the case with Robt.; and that he also disagrees with Dr. Guerrio in this regard (T-5/2/89-283-290).

However, with reference to the report of Dr. Caballos wherein it was concluded that on Feb. 16, 1977, Robt. had a psychosis with drug or poison intoxication associated with ASP, Dr. Herrera testified:

> "...he may have had some of these things, but these things are short-lived but he added: 'Now, you are talking about drug induced psychosis.' When you remove the drug, you know, after a few days the psychosis is gone, especially if you treat the psychosis symptoms." (T-5/2/89-292)

The court then announced several rulings: State's request for a jury instruction that the victim was law enforcement officer engaged in his duties was denied; Defense's request for an instruction that the jury could not use the same facts to support more than one AC and that "therefor,(sic) you are not permitted to weigh separatively and cumulatively AC's supported by the same facts..." was denied; and Defense's request that the jury be instructed as to the MC's being relied upon by Defense, whether or not they are specifically enumerated in the statute, was denied (T-5/3/89-301).

Dr. Herrera further testified that he could not rule out the possibility of past short duration psychotic episodes or mental illness on Robt's part although he didn't think that such had occurred but, if it did, it did "not constitute the sort of chronic mental illness that, in my mind, would constitute a MC; that he understood Robt. had been using drugs since he was approximately 13 years old; that "if I recall" Robt. was not showing acute symptoms of drugs or substance intoxication when he got to the jail because he had a sufficiently clear mind to make

statements; when asked to acknowledge whether a person can appear more rational 10 or more hours after ingesting drugs, etc., he would only agree that there was different lengths for different drugs; he remembered seeing on Castle's statement that at 3:00 a.m. on the date of the DS Robt. was very high; he was aware of the depo. testimony of Williams that Robt. was driving crazy, i.e., at about 80 mph and that when he turned off 1-95 he almost hit something; he didn't recall anything about either a police radio call at 10:00 a.m., that a witness had observed Robt. and that he was extremely high and his eyes were bulging or about the police having found drug paraphernalia in the car Robt. had driven; he was aware that fresh track marks had been allegedly found on Robt. on Sept. 3rd at 8:45 p.m., but that he took that "with a grain of salt and that even if there had been fresh track marks, such wouldn't change his opinion but that nevertheless, the presence of the fresh track marks "...certainly might constitute grounds for suspecting this man many have been intoxicated"; that deciding as to the existence or not of **MC's** was not a matter limited to psychiatric concepts of insanity or competency to stand trial; that he agreed that Robt. exercised poor judgment in the DS and in the 1975 crime (T-5/2/89-301-361; T-5/3/89-14-22).

Dr. Herrera declined to answer whether Robt's long history of child and personal abuse, both emotional and physical, were contributing facts to his long history of drug use and which contributed to his failure to exercise proper judgment and impulse control (T-5/3/89-20-23).

He further testified: that he didn't see any connection between Robt's pulling the trigger and his compulsive childhood behavior; that it seemed to him Robt. simply didn't want to be caught; that Robt. may have been on some drugs with his impulse not being what it otherwise would have been; that he believed a person's emotional development can influence future behavior; that the mother's behavior was peculiar according to the two sisters; that the length of drug induced psychosis varies depending on the drug and the drug user and that can clear in 10 or 15 days; that he saw Robt. on Sept. 29, 1981 (or 27 days after the crime); that I would "maybe not" or "probably not" have detected it; and that I didn't recall the items I mentioned above from the trial (T-5/3/89-23-29).

On redirect of Dr. Herrera by State and in response to another State leading question, he stated that while poor judgment and poor impulse control are characteristics of **ASP,** he still was not of the opinion that **ASP** constituted a **MC** (T-5/3/89-31-36).

The court again declined Defense's request that it not give the two overlapping **AC's** charge for the reason that only the judge's ruling is reviewable from doubling. Defense renewed its objection to the court's refusal to delineate between Robt's general drug use and his drug use on the DS (T-5/3/90-44-55).

The next State rebuttal witness was O. John Brooks, who was currently a narcotics officer but was a homicide officer and one of the arresting officers on the DS. In response to a State leading question, he said he was able to recognize persons on various types of drugs and during withdrawal therefrom, and that he was not under the impression that Robt. was under the influence of narcotics when he was arrested (T-5/3/89-56-60). Then after having O. Brooks list his qualifications as a narcotics officer, State asked him to reflect back on his "newly acquired" knowledge and based thereupon to (again) tell the jury whether Robert was under the influence of drugs. The answer was, of course, "no" (T-5/3/89-62,63). On cross he said the involved crime was committed at 9:00 to 9:30 a.m., and that he didn't see Robt. until 4:30 p.m. (the same day). He sort of conceded that by the time he saw Robt. the "under the influence" and "withdrawal" periods would have been over (T-5/3/89-64-66).

The next State rebuttal witness was Robt's probation officer. She said that after the DS, she met Robt. on Apr. 24, 1981, and that "(H)e gave me understanding that he had gone in to make an easier time instead of going to prison and that he knew that if you could get into a mental institution, you would do less time----it would be easier, and that he had basically faked his way into it"; that she had no psychological or psychiatric education or experience; she didn't see the records of the mental health professionals, including the five psychiatrists, but that she had seen "some of the information referring to that"; and that she didn't talk to any of the doctors; and that he didn't appear to have any psychological problems when she saw him two days after he was arrested (T-5/3/89-67-89).

The jury charge conference then resumed and Defense again requested a special verdict form (as to what AC's and MC's the jury would find apply, etc.), and the court again denied such request (T-5/3/89-75).

State next called Dr. Charles Mutter, a psychiatrist, as its next rebuttal witness. He said he practiced "forensic psychology and hypnosis." He said that he first saw Robt. in 1978 for an offense different than the involved crime and that he believed he was court appointed at that time (T-5/3/89-93-97).

The following exchange then occurred between State and Dr. Mutter:

> "Q. Did you arrive at an opinion back in 1978?
> A. Yes I did.
> Q. What was that opinion?
> A. Well, on that particular charge, when I saw him I felt that he had a problem of chronic drua abuse and there were some soft sians of oraanicitv which mav have been caused by the drua abuse. But, I felt he was competent to aid counsel and he knew right from wrong.
> Q. So he was sane?
> A. Yes....
> A. ...I saw him and I did a complete psychiatric evaluation." (Emphasis added) (T-5/3/89-97,98)

Dr. Mutter thereafter testified that his second evaluation of Robt. was on Sept. 26, 1981, "for the murder of O. Broom" and that, in connection therewith, he reviewed various records and materials, and that people with ASP understand what the rules are but don't care (T-5/3/89-99).

The following was asked and answered:

> "Q. All right, Doctor, would you consider that to be a MC?
> A. Well, I think MC's or AC's are a decision for the jury to decide. But, if you are asking me is it a type of disorder that really makes this person *so* impaired that they really don't know what is going on, the answer is no. They really know what is going on. In fact, they manipulate what is going on in their environment to their own benefit." (T-5/3/89-103)

Thereafter State continued to question its own witness as to his opinion as to the presence or absence of MC's and even though he responded by saying he was not a lawyer, State asked the following question and received the following answer:

> "Q. Is the jury limited? Is it your understanding the jury is limited to only the statutory mitigating circumstances?
> A. I don't know anything about that. I am not a lawyer. That is the judge's----
> Q. Okay, Doctor.
> A. ----description to the jury." (T-5/3/89-104,105)

Mutter further testified: that he didn't find any frank evidence of malingering; that Robt. claimed he was under drugs at the time of the shooting; and that there was no "frank evidence" Robt. was trying to convince him he was mentally ill (T-5/3/89-105,106).

State then asked the following question:

> "Q. You have indicated earlier, when you saw the Defendant back in 1978, he (sic) noted that he miaht have soft signs of organicity?" (Emphasis added)(T-5/3/89-105,106)

Subsequently Dr. Mutter testified: "I felt there miaht be soft signs..." (T-5/3/89-106).

State then asked Mutter if there were "more sophisticated" methods for testing for organicity and he said "yes" and referred to the Cat Scan and the M.R.I. tests (T-5/3/89-107).

The following exchange then occurred:

> "Q. Did you reach an opinion in 1981 as to his condition when he murdered O. Broom?
> A. You mean my opinion about his insanity at the time?
> Q. Yes sir.....
> A. It was my opinion that he did know right from wrong and he understands the nature and consequences of his acts at the time of the offense." (T-5/3/89-108)

He said that Robt. was not under extreme mental or emotional distress at the time of the shooting but that he was "certainly under emotional stress" and that he had anxiety because of the taking of drugs and the violation of his probation (T-5/3/89-108-110). He further testified: that "assuming arguendo" (these are State's words) Robt. was under the influence of drugs, such would not change his opinion, and that it was his opinion that Robt. was

not under the influence of drugs because there was no reference in the jail records to "drug psychosis" or to "a toxic drug reaction" (T-5/3/89-110,111).

Thereafter State again used the term "murdered" in another question to Mutter and in his answer "Mutter" also said "murdered" (T-5/3/89-111).

Dr. Mutter then testified that it was his opinion that Robt. "did have the capacity to appreciate the criminality..." and that he had the ability to conform to the requirements of the law (T-5/3/89-112).

In response to another leading question, amongst a series of leading questions, Mutter said that if a person "does 5 or 8 of the 10" (the quotes are the prosecutor's) on the Bender-Gestalt test, that would not indicate to him that such person has signs of organicity because such would not be clinically significant. More specifically he said:

> "...One test alone does not make a diagnosis. It may be suggestive. ***So*** that there has to be a consistent pattern of organic defect." (T-5/3/89-114)

Thereafter Dr. Mutter testified:

> "If you are organic brain damaged and you have a defect, it is gone. It doesn't come and go. If you have brain damage, it is damaged. It doesn't come back. That wouldn't make sense." (T-5/3/89-115)

Mutter allowed that there were indications that Robt. suffered from child abuse but thereafter --- and in response to another State leading question --- he testified the child abuse did not influence his shooting of Broom. He then testified: a lot of people are abused and don't kill anyone, and that "it is nonsense" that his mother made him do it (T-5/3/89-115-118).

On cross by Defense, Dr. Mutter testified: that he interviewed Robt. for "about an hour 7 1/2 years ago on competency and insanity; that on March 27, 1989, he was contacted by the SA's office and he was told there was a new statute with AC's and MC's and was asked to review additional records to determine the applicability of any MC's; that he thought the statute contained all the MC's a jury could consider; and that other than the two involved statutory MC's he considered were Robt's age at the time and his childhood abuse, but that after reviewing the testimony of the sisters, he rejected the child abuse as a MC, although he conceded that child abuse is "absolutely" a MC to be considered (T-5/3/89-131).

He then gave the following answer: "Every human is responsible ***for*** his *own* behavior, unless he is so mentally ill that he cannot control his behavior because of a major mental disorder." (T-5/3/89-132,133). Mutter added that Robt. acted as a sociopath and that they won't assume responsibility; he said that Robt. did not tell him "the Devil made him do it"; Robt. had a chronic drug problem; Robt. was "guarded and evasive" when he

asked him what drugs and how much he used; he believed there were reports supporting a drug psychosis; he saw no results of blood tests; and that Robt. did tell him he was taking heroin and cocaine intravenously but he didn't tell him how much and when (T-5/3/89-l33-l42).

Completing his cross-examination testimony, Dr. Mutter testified, in pertinent part, as follows:

> "I believe that he did have some needle track marks, which also made me have the opinion that this man was a drug abuser"...."... it might influence my opinion that he may have been under the influence of some drugs. I can't say exactly how much or to what degree....So, that certainly is a possibility and this was something that I already concluded when I took this into consideration"..."Sure, I took it into consideration and I don't think that it is mitigating"...."whatever happened as a result of this is his choice. That is voluntary. That is his responsibility." (T-5/3/89-l42,l43)

The State then rested (T-5/3/89-l47). The court then ruled that Defense could argue to the jury that Robt. was already serving a l20 year sentence for the previous convictions arising out of this overally criminal incident, but without being able to talk to the jury about the possibility of consecutive sentencing (T-5/4/89-l0,ll,l4,l5).

The Court then refused to grant Defense's request that it take judicial notice of everything in the court file on this case for the stated reason that everybody had rested (T-5/4/89-ll3).

State then began its closing argument and opened same by telling the jurors:

> "I won't be able to answer what Mr. Richey says...what I would like to start first is, I would like to go over the Defense case first, MC's. You have to be reasonably convinced that there are MC's....(T-5/4/89-l7)

The prosecutor then argued:

> "He still will not accept full responsibility for gunning down Officer Nathaniel Broom on September 2, 1981" Today, seven years, eight months and two days after the premediated murder of Officer Nathaniel Broom.."..he still has not accepted full responsibility .. (18).."...I don't get to hear what they say, *so* I bring things up. I am speculating they may say that O. Broom made them do it.. (18, 19)...'Then they relate to Ms. Christine Castle. She is not here, no transcript." ER ;(29) .."..There are a hundred thousand abuse cases in Florida every year and there are many kids that get hospitalized if it gets that bad....(49).."..But, it happens on a large basis, again, in Florida --- a hundred thousand cases of child abuse a year. Nationally, God knows. It's really a shame."..."abuse doesn't make people into murderers.".(5l)..."They found the people that they wanted to examine the defendant. They hired them and brought them in. Yeah, we retained Dr. Herrera and Dr. Mutter, but they were appointed by Judge Scott...we didn't choose them. We didn't seek them out..."(54)

Thereafter State argued to the jury: the two mental mitigating factors "just aren't there," that "you" should just ignore them; that "this" is not going to the standard of reasonably convincing; that Dr. Mutter told "you" that organicity is permanent "(S)o, organicity, (l)t just doesn't exist"; "(D)on't give him a bonus for violating the law again and again"; that the jury should consider the 1985 or 1986 mirror cutting incident; that it should consider the AC reading, " the Defendant has been convicted of another capital felonv or of a felony involving the use or

threat of violence to some person"; that "we have before you two of those, because after he killed O. Broom he robbed and threatened to kill Maxim Rhodes. It happened after the murder. This is one. Here is the judgment and sense. Here is the judgment in this case"; that "you are not to take into account the grand theft, the stealing, the golf cart, and all the other stuff you heard about. This restricted to violent felonies; But, there were two previous convictions for violent felonies.."; that...(M)urdering law enforcement officer makes this first degree murder worse than others; that Defense will argue he's already sentenced to l20 years but, "what is l20 years in the State prison system? It's Parole Board. There is gain time. There is prison overcrowding"; and that it takes 7 to vote for death because 6 to 6 is a life recommendation; and that the victim is dead because of Robt. (T-5/4/89-54-79).

Defense then made its argument to the jury; the jury was instructed as to the law; it retired to consider its verdict; and it returned a verdict recommending death by ll to I (T-5/4/89-80-l57). This appeal follows.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO SUBMIT TO THE JURY A SPECIAL VERDICT FORM WHEREON THE JURY WOULD BE REQUIRED TO SPECIFY WHICH AGGRAVATING AND MITIGATING CIRCUMSTANCES IT FOUND APPLICABLE AND HOW IT WEIGHED THE AGGRAVATING CIRCUMSTANCES VERSUS THE MITIGATING CIRCUMSTANCES ?

II.

WHETHER PATTTEN WAS DEPRIVED OF A FAIR ADVISORY SENTENCING TRIAL AND OF THE DUE PROCESS OF LAW BY THE PROSECUTION'S CONTENDING TO THE JURY THAT HE SHOULD BE SENTENCED TO DEATH BECAUSE HE WAS GUILTY OF COMMITTTING THE AGGRAVATING CIRCUMSTANCE OF KILLING A POLICE OFFICER WHILE IN THE PERFORMANCE OF HIS OFFICIAL DUTIES WHEN THAT STATUTORY AGGRAVATING CIRCUMSTANCE WAS NOT YET IN EXISTENCE AT THE TIME OF THE INVOLVED CRIME.

III.

WHETHER THE DEATH PENALTY DEFENDANT ROBERT PATTTEN WAS DENIED A FAIR SENTENCING TRIAL BY THE PROSECUTORIAL MISCONDUCT OF THE STATE'S PROSECUTORS?

IV.

WHETHER THE TRIAL COURT ERRED IN BASING ITS IMPOSITION OF THE DEATH PENALTY UPON TWO SEPARATE STATUTORY AGGRAVATING CIRCUMSTANCES BECAUSE THEY EACH REFER TO THE SAME ASPECT OF DEFENDANTS CONDUCTQ

V.

WHETHER THE TRIAL COURT ERRED IN ITS FINDING THAT NO MITIGATING CIRCUMSTANCES EXISTED WITH REFERENCE TO DEFENDANTS MENTAL STATE AND THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED ANY MITIGAT1NG CIRCUMSTANCES?

VI.

WHETHER IT IS IN THE INTEREST OF JUSTICE THAT THE DEATH PENALTY IMPOSED UPON ROBERT PATTEN BE MODIFIED TO A LIFE SENTENCE WITH NO PAROLE FOR TWENTY-FIVE YEARS?

VII.

WHETHER THE DEATH PENALTY IMPOSED UPON ROBERT PATTEN SHOULD BE REDUCED TO A LIFE SENTENCE WITH A TWENTY-FIVE YEAR MANDATORY SENTENCE BECAUSE THE DEATH PENALTY IS CONSTITUTIONALLY INFIRM IN THAT IT VIOLATES THE NO CRUEL AND UNUSUAL PUNISHMENT PROVISIONS AND THE DUE PROCESS PROVISIONS OF THE FEDERAL AND STATE CONSTITUTIONS.

SUMMARY OF ARGUMENT

The court below erred in refusing to submit to the jury a special verdict form whereon the jury would be required to specify its findings as to aggravating and mitigating circumstances and how it weighed them, etc., and as a result thereof the jury's verdict had no real meaning to the trial court because it was totally conclusory in nature and the court below admitted that it didn't matter what the jury decided with respect to aggravating and mitigating circumstances.

The defendant was denied a fair sentencing trial by continuous and repeated instances of prosecutorial misconduct before the jury and the court which was especially prejudicial because the sentencing jury below did not hear the trial.

The court below erred in basing its imposition of the death penalty upon two separate statutory aggravating circumstances, i.e., 6b and 6f, because in this case the same conduct of the defendant was relied upon by State to prove the applicability of each of these aggravating circumstances.

The trial court erred in its finding that no mitigating circumstances existed with reference to defendant's mental state and that the aggravating circumstances outweighed any mitigating circumstances.

The Defense's two psychologists and the more credible of the State's two psychiatrists, plus voluminous reports of the psychiatrists, reasonably established the Defendant demonstrated soft signs of organicity, or organic brain damage which was permanent, and the evidence of Deft's years long drug abuse and his having been a badly abused child was clear and convincing. This should have been found to have outweighed the aggravating circumstances relied upon by the State.

For all the reasons argued in other portions of this brief and because a prior jury announced to the court it had voted 6 to 6 in the first sentencing phase trial, it is in the interest of justice that Defendant's death sentence be reduced to life with 25 years mandatory under the statute.

The imposition of the death penalty is cruel and unusual punishment and violates the due process right under both the federal and state constitutions.

ARGUMENT

I.

THE TRIAL COURT ERRED IN REFUSING TO SUBMIT TO THE JURY A SPECIAL VERDICT FORM WHEREON THE JURY WOULD BE REQUIRED TO SPECIFY WHICH AGGRAVATING AND MITIGATING CIRCUMSTANCES IT FOUND APPLICABLE AND HOW IT WEIGHED THE AGGRAVATING CIRCUMSTANCES VERSUS THE MITIGATING CIRCUMSTANCES.

There is an apparent infirmity in Florida'a death penalty determining procedure that, in turn, has infected the process of death being chosen over life in the sentencing hearing from which this appeal was taken, and it is this Deft's contention that it is of constitutional dimensions.

In State v. Dixon, 283 So.2d I (l973), the landmark case in which the constitutional validity of Florida's post Furman v. Georaia, (408 US 238 [l972], death penalty was upheld, this Court said of the Furman decision, to-wit:

> "The Supreme Court of the United States in Furman v. Georgia, 408 **U.S.** 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (l972), and subsequent decisions struck down the previously existing death provisions of the several states with the possible exception 'of a very few mandatory statutes' (See 408 U.S. 417, n. 2, 92 S.Ct. 28l8), by holding: '[T]he imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments' (Emphasis supplied) (pp. 239-240, 92 S.Ct. p. 2727).....
> Two points can, however, be gleaned from a careful reading of the nine separate opinions constituting Furman v. Georgia, supra. First, the opinion does not abolish capital punishment, **as** only two justices---Mr.Justice Brennan and Mr. Justice Marshall—adopted that extreme position. The second point is a corollary to the first, and one easily drawn. The mere presence of discretion in the sentencing procedure cannot render the procedure violation of Furman v. Georgia, supra; it was, rather. the aualitv of discretion and the manner in which it was supplied that dictated the rule of law which constiutes Furman v. Georaia, supra." (Emphasis added)

The infirmity or apparent infirmity in the Florida death penalty law, i.e., F.S. 92l141, is that it does not require the advising jury to report to the sentencing court what decisions it reached with respect to the involved aggravating and mitigating circumstances, even though the jury is mandated in the statute to base its "advisory sentence" upon the existence of and the weighing of aggravating and mitigating circumstances. Instead, the jury simply advises the judge as to its opinion as to whether the Def. should be given death or life, etc.

The court, however, in the event that it decides the death penalty is to be imposed, is required to "set forth in writing its findings upon which the sentence of death is based as to the facts: (a) (T)hat sufficient AC's exist....and (b)(T)hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

But that is not all the court is required to **do,** for it has the further responsibility---imposed upon it not by the legislature but by this Court---to give great weight to the jury's recommendation. Tedder v. State, 322 So.2d 908 (Fla.1975); Stevens v. State, 419 So.2d 1058 (l982), cert. den. 459 US 1228; McCrae v. State, 395 So.2d ll45 (l980), cert. den., 454 **US** 1041, et al. And the reason why the jury's recommendation must be given great weight by the

sentencing court is because that recommendation reflects "the conscience of the community." Richardson v. State, 437 So.2d 1091 (1983); Tedder v. State, supra.

But the court in this case can only surmise what determinations the jury made with respect to the claimed aggravating and mitigating circumstances---and there were two or more of each being claimed. In other words, the jury's recommendation was totally conclusory in nature and the facts on which it was based were known only to the jurors.

The reason why Def. termed this infirmity in Florida's death penalty process "apparent" is because in the instance of this case, the court below had the opportunity to cure this infirmity by granting Defense's request for special verdict forms to be used specifying what the jury's findings would be with respect to the presence and/or absence of aggravating and mitigating circumstances, etc. It refused to do so. (TR-5/2/89-255-259; 5/3/89-75).

As was stated above on this point, F.S. 921141 is crystal clear in its mandate as to what the advisory sentencing jury is to do, to-wit: based upon its findings with respect to the existence of "sufficient aggravating circumstances," and the existence of "sufficient mitigating circumstances", and how they weigh against each other, it is to recommend either life or death to the court.

It therefore logically follows that the court needed to know what decisions the jury reached with respect to these factual determinations it was supposed to make or the court if it was to meaningfully fulfill its responsibility to give great deference to the jury's recommendation, which recommendation may well have been, at least in part, based on considerations other than the involved claimed aggravating and mitigating circumstances. And in this case there was much that came out during the involved sentencing trial that had nothing to do with the claimed aggravating and mitigating circumstances that this jury could have in whole or in part based its verdict on.

First and foremost in this regard was the constant harping by State from the beginning to the end of the sentencing trial about the victim, O. Broom, being a police officer in the performance of his duties. In this regard, Robt's undersigned counsel will forthrightly state at the outset of his discussion of this subject that yes, of course, the jury had to be informed that Broom was a police officer in the performance of his duties when he was shot and killed because that was what happened.

This matter is being dealt with separately herein but suffice it to say here that although the prosecutors in this case knew full well that the statutory mitigating circumstance of killing a police officer in the performance of his duties wasn't added to F.S. 921141 by the legislature until 1983---or two years after the date of the killing involved

herein---they nevertheless set out to make this the main theme of their case, even after the court advised them it would not instruct the jury as to such aggravating circumstance.

And then there was another aggravating circumstance that wasn't even being claimed as being applicable that was impliedly argued to the jury by the State, to-wit: that "the capital felony was especially heinous, atrocious or cruel." This, too, is being argued under a separate point.

There just was no reason for the court to have turned down Defense's request for a special verdict. Such is routinely done in automobile personal injury trials to make sure that the plaintiff doesn't recover damages where the jury would decide such plaintiff had not suffered a permanent injury. There the litigants are fighting about money; here they were fighting about life or death of a human being. Can there be any doubt but that life and death litigation is the more important...that in life or death litigation no stone should be left unturned to insure that a just result is achieved.

By simply submitting to the jury a special verdict form wherein the jury could indicate its findings with respect to the involved aggravating and mitigating circumstances and how it weighed them, the great gap in Florida's statutory death penalty procedure could have been closed and it is this Deft's contention that therefore he was denied a fair trial and the due process of the law under the federal and state constitutions by both the statutory deficiency and by the court's failure to seize the moment to cure that deficiency in this case.

It was perhaps prophetic that before the case reached the point where the court announced its decision to not grant Defense's request for a special verdict form, and in response to State's argument that in passing sentence the court could consider matters that weren't argued to the jury, the court said:

> "When they came back, they come back with life or death. They don't tell me why, right? So what difference does it make?" (T-5/2/89-247)

The court should have followed the procedure set forth in Rush v. State, 37 CrL 2097 (Del.Sup.Ct.,1981), and the fact that the Delaware statute mandates the use of the special verdict form while the Florida statute is silent on the point in no way diminishes the constitutional dimensions involved in this point.

II.

PATTEN WAS DEPRIVED OF A FAIR ADVISORY SENTENCING TRIAL AND OF THE DUE PROCESS OF LAW BY THE PROSECUTION'S CONTENDING TO THE JURY THAT HE SHOULD BE SENTENCED TO DEATH BECAUSE HE WAS GUILTY OF COMMITTING THE AGGRAVATING CIRCUMSTANCE OF KILLING A POLICE OFFICER WHILE IN THE PERFORMANCE OF HIS OFFICIAL DUTIES WHEN THAT STATUTORY AGGRAVATING CIRCUMSTANCE WAS NOT YET IN EXISTENCE AT THE TIME OF THE INVOLVED CRIME.

The central theme of State's case---that Robert Patten had committed the worst kind of killing of all---the killing of **a** police officer while in the performance of his duties—began during State's voir dire questioning---as a part of the jury conditioning process—by the prosecutor. To be sure, the ostensible purpose of this line of voir dire questioning was to weed out prospective jurors who would vote death solely because a police officer was the victim but that that was not really what the State had in mind was borne out when the prosecutor told the jury in opening statement.

> "Finally, folks, the fourth aggravating circumstance **is** that the victim of the crime for which the defendant is to be sentenced was a law enforcement officer engaged in the performance of his official duties. There is no question Officer Broom was a law enforcement officer engaged in the performance of his duties. He was pulling over the defendant for driving the wrong way on a one-way street and it cost him his life." (T-4/26/89-47)

Without any possible question, State knew, when it made this argument to the jury, that the aggravating circumstance of killing a police officer while in the performance of his duties, had not been made a part of **F.S.** 921.141 by the legislature until 1983 because it said during the voir dire examination, " "(T)he status of the police officer is going to come out...(T)here is no way that they can avoid that." (4/24/89-97-98). **So** with no concern whatsoever as to whether it was walking all over Deft's right to not be subjected to an ex post factor law, State categorically told the jury that it would prove the applicability of the killing of a police officer AC to Robt. Such a lack of concern was clearly denied when State said during voir dire, to-wit: "(T)he fact that the victim as a police officer may be one of the circumstances that the court instructs you that you might weigh." (T-4/25/89-283;284)

Thereafter the court, which had not yet ruled on Defense's objection to the police officer-AC being asserted by State, added to the confusion in this area, albeit out of trying to assist in the picking of a jury that would be fair to Def., by itself voir diring a second panel of prospective jurors if they would vote to recommend death solely because the victim was a police officer. The court received a mixed bag of answers from 22 prospective jurors resulting in the matter of a police officer being killed in the line of duty by Def. This was the sole subject discussed in 84 pages of the transcript in this case (T-4/24/89-129-213).

Thereafter the prosecutor said the following (to a prospective juror):

> "....going back to the death penalty issue, then I will conclude, the jury has already told you that the defendant has been convicted of the murder of Officer Nathaniel Broom and that is a fact that you must accept and not rook behind it. Mrs. Shaw, could you accept that fact?" (T-4/28/89-380)

And thereafter an obviously frustrated Defense counsel said the following to a prospective juror:

> "I respectfully suggest to you that a few moments ago the prosecutor indicated to you that killing a police officer was, itself, an aggravating factor. I suggest the judge will give you the law in that situation and you will find the obstruction of justice is a mitigating factor

under different types of circumstances, the killing of a police officer, per se -- listen to the judge and the law the judge gives you with regard to these issues." (T-1/25/89-333)

In its opening statement State told the jury:

"No problem, just shot a police officer, murdered a police officer, robbed an individual of his car at gunpoint...take a shower...walk the dog." (T-4/26/89-89)

He also told the jury in opening statement that "Robert was overheard" muttering to himself about the fact that he had "murdered" a police officer and that he was "a cop killer." (T-4/26/89-43,44)

Not long after the trial itself began, Defense counsel noted that there were eight uniformed police in the courtroom. This issue continued to come up throughout the trial with the court or one of the counsel periodically announcing in the record how many uniformed policemen were in the room at the time. Eventually the court made a ruling restricting the number of uniformed officers who could be in the courtroom at one time and restricting them to a percentage of all spectators present. It was Defense's position that no uniformed police officers should be allowed in the courtroom at all and it was the State's position that there should be no restrictions in this regard and both sides cited legal authority for their positions but none of those cases involved a situation as here where the State was relying upon the AC of killing a police officer while in the performance of his duties but that that particular AC had not yet been added to the law by the legislature as of the date of the involved crime and in the context of the situation in this case the comings and goings and presence of uniformed police officers in the courtroom throughout the trial aggravated in the severest manner the impact of the State's concerted campaigns to secure a death verdict against Def. on the major premise that he was a cop killer.

Another too frequent occurrence throughout the trial of this case that further exacerbated State's prosecution of the involved ex post facto AC was State's repeated use of language in front of the jury that Def. had "murdered" a police officer. It is specifically Deft's contention in this regard that State went far beyond that which was necessary to make reference to the nature of the crime that had occurred and particularly in light of the serious question that State knew that it was at least questionable as to whether AC applied.

Another instance of State's totally unnecessary injection of this inapplicable AC into the trial was the following colliguy between State on its cross examination of Defense witness Crime Scene Technician Sarnow, to-wit:

"Q. Have you ever been involved in other cases where police officers have been killed?
A. No, but I have been where they were shot at.
Q. But not killed?
A. No.
Mr. Rosenbaum: Nothing further." (T-5/2/89-207)

Still another instance of State's lackadaisical attitude as to whether its constant hammering to the jury that Def. murdered a police officer, etc., violated his fair trial and due process rights, was its responding to Defense's arguments that such was an ex post facto law situation by arguing that although it conceded the killing a police officer AC was not added until 1983, such really didn't make any difference because such AC was impliedly in existence before it became a part of the statutory law (T-5/2/89-233-237).

If a state, i.e., the statute, limits the factors which may be weighed in the sentencing determination to statutory aggravating factors, then only those factors may be argued and emphasized to the jury. Zant v. Steehens, 462 U.S. 862 (1983); Barclay v. Florida, 463 U.S. 939, 954 (1983); California v. Ramos, 463 U.S. 992, 998-999 (1983); and Brooks v. Keme, 762 F.2d 1383, 1408 (llth Cir., en banc; 1985). And where a state utilizes the concept of AC's and MC's in its death penalty sentencing statutory scheme, AC's are limited by the statute. Proffitt v. Florida, 428 U.S. 242 (1976).

The trial court correctly followed this body of law when it finally ruled that it would not charge as to "the killing of a police officer in the performance of his duties" AC for the reason that such would be a 1983 instruction in a 1981 case (T-5/2/89-247-259; 5/3/89-301), but it is Deft's contention that this ruling was too little, too late, and that such did not deter State one iota from continuing to hammer the killing of a police officer theme.

The prosecutor really slammed it home in his final argument when he told this jury that: "Murdering (a) law enforcement officer makes this first degree murder worse than others...." (T-5/4/89)

Not only was this argument inexcusably outrageous in light of the court's ruling that it would not charge as to the police-killing AC, it was the same type of argument that was found constitutionally infirm in Brooks v. Keme, 762 F.2d 1383 (llth Cir.1985), where the prosecution had "exhorted the jury to impose the death sentence because the def. was a member of the broad criminal element" terrorizing American society. In the instant case, State's clear argument was that Def. was "a cop killer" and it is Deft's contention that that argument is just as infirm as was the argument in Brooks. The court further stated in Brooks that "it would be clearly improper...to urge the imposition of death because of the race, religion, sex or social status of the victim...(A)ny reference to such potentially prejudicial characteristics must be undertaken only with the greatest of care and only when the reference is relevant to some legitimate issue in the case" (Brooks, supra, at 1409).

Further, juries must not "treat all persons convicted of a designated offense...as members of a faceless undifferentiated mass to be subjected to the blind infliction of the penalty of death" but instead should treat the Def. as a "unique individual." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The State Attorney's office was very unlike Columbus when he set sail to find India and didn't know where he was going while he was going nor where he was when he got somewhere. These prosecutors knew precisely where they were going with the killing of a police officer business and their blatant beating of this drum and, as well, the court's failure to do anything meaningful about it violated Robt's fair trial, due process and right to justice rights all over the place and it was prejudicially harmful to him in the extreme.

III

DEATH PENALTY DEFENDANT ROBERT PATTEN WAS DENIED A FAIR SENTENCING TRIAL BY THE PROSECUTORIAL MISCONDUCT OF THE STATE'S PROSECUTORS.

Unfortunately for Rob., the misconduct of the State in trying to get the jurors to recommend death was just part of a pattern of prosecutorial misconduct involved at the appealed from sentencing trial. This pattern began to emerge during the voir dire questioning when State questioned prospective jurors as to how they felt about, "this new law which makes it easier for people to get a license to carry a handgun concealed." After several pages of this prosecutorial voir dire posturing and jury conditioning, this prosecutor then capped it off by stating:

> "It's not buying one that's easier to do . I'm talking about carrying one on the streets concealed in your purse, in your coat, things like that. I'm not talking about your home" (T-I/24/89-254-255).

This so-called "new law" had nothing whatsoever to do with this trial. Def. was not charged with violating such law and State's reference thereto was nothing less than a not *so* thinly veiled effort to get the potential jurors predisposed from the outset to hate Robt. And, of course, State got off to a good start in this regard by getting almost all the prospective panelists he questioned about "the new law" to agree that it was a bad law (T-4/24/89-242-282).

Then State moved on to a whole new fertile field of improper jury conditioning when it launched into a voir dire tirade about Def. being "guilty and will always be guilty of killing O. Broom, a City of Miami Police Officer" and that "(T)hat will not change"..."He is stuck with it for the rest of his life" (T-4/24/89-254-260). And at a later point in its voir diring, State told a new group of panelists that "all I2 jurors agreed that this def. killed O. Broom and that was ratified by the court and he is here today" (T-4/25/89-27l,272).

As was the case with State's misarguing the police-killing AC, Def. concedes that the fact that Def. killed---or even "murdered"---O. Broom is a fact of this case and cannot reasonably have been kept from this jury, but such counsel also contends here, as he did with respect to inapplicable police killer AC, that State's manner of referring to the killing O. Broom by Def. was more than just a matter of referring to a fact in the case; it was, rather, an undisguised effort to get this jury to recommend death <u>because</u> of the <u>fact of the act of killina itself</u>. If

language similar to that quoted above had only come from the prosecutor's mouth once during a hotly contested sentencing trial such might be attributed to a prosecutorial slip of the tongue due to the heat of battle, but it is hard to ascribe this as the cause of this argument when it happened no less than three times throughout voir dire and the trial (T-2/24/89-254-260; T-4/25/89-28-33; 300-301).

It is not an aggravating circumstance that Def. killed O. Broom; rather, it is the fact that Def. was found guilty of the first degree killing of Broom that gives rise to the sentencing proceeding set forth in F.S. 921.141---which statute was passed in order to put into effect a new death sentencing procedure that would not be---as the previous one was--- violative of the no arbitrariness and capriciousness rule of the 8th and 14th Amendments. Thus, it is not enough alone and by itself that Def. was guilty of the first degree murder of which he was convicted, and under the current procedure the State must have proven beyond and to the exclusion of every reasonable doubt that "sufficient aggravating circumstances" exist, limited to the one's enumerated in the statute, and that if the Defense proves by its required and lesser burden that "sufficient mitigating circumstances' exist, that the AC's outweigh the MC's.

This is the issue in a Florida death penalty sentencing advisory trial. The U.S. Supreme Court has not required that each of the states adopt an AC-MC system of dealing with a death penalty sentencing, and in states---like Georgia---which have elected to not use the AC-MC system, "constitutional relevancy" is the test, but it is not the test in Florida.

The representatives of the people of Florida in carrying out the supposed will of the people chose between the two systems and it is the State's responsibility to go by the more restrictive rules imposed upon it by this choice. In this case, the prosecutor went to the absolute other extreme and literally tried to shock this jury into voting to recommend death and, in this regard, and in addition to its above instances of misconduct, State was guilty of the following:

State's efforts to precondition the jury on voir dire to not have sympathy play a part in its deliberations an to consider circumstantial evidence the same as direct evidence should have not been countenanced by the court (T-4/25/89-15-26).

State should not have told one of the voir dire panels that, "...the judge is going to instruct you that he is guilty and he will always be and that might present a problem for any of you" (T-4/25/89-28-33).

State should not have told the prospective jurors that if it found one AC applicable and the absence of any MC's, it "must" recommend death (T-4/25/89-35-37) because that is not what the statute says! That is not the law. An experienced death penalty case prosecutor should be presumed to know that it is not the law. The

statute is clear as to the fact that the initial inquiry is not whether an AC exists but, rather, "sufficient" AC's exist. And the court should not only have not countenanced this material misstatement of the law, it should have---even if Defense hadn't immediately objected, which it did---instructed the jury that State's statement in this regard was an incorrect statement of the law. Telling the panel that what the attorneys say is not the law just wasn't enough.

But State was simply undeterred by Defense's objections and it forthwith thereafter proceeded to seek a prospective juror's commitment to vote for death if he should find that the AC's outweigh the MC's **(T-4/25/89-40-5l)**. When Defense again objected, the court said it would immediately tell the jury what the law is but it did not do so. And thereafter State attempted to make it appear that it was trying to be evenhanded by asking a prospective juror if he could vote life if he found either that there were no mitigating factors or that the MC's outweighed the AC's, but this statement still did not correct State's earlier misstatement of the law, i.e., the omission that State must prove "sufficient AC's" and to this extent State again misstated the law by not stating it fully.

And this is what happens when lawyers start telling prospective jurors what the law is and this whole procedure should have not occurred and once it started it should have been stopped. A man was on trial for his life and the law should have solely come from the lawgiver!

State should not have taken the position that it had not tendered the panel **(T-4/25/89-l78)** when, in fact, it had tendered the panel **(T-4/25/89-l75)**.

State shouldn't have made a big flourish before the prospective jurors of shaking his finger at Def. and then after essentially denying that he did so, to give the court and Defense counsel the lame-brained excuse that he was only outstretching his hand and pointing at Def. to make sure the panelists weren't going to confuse a def. who had the audacity to cut his long hair, clean himself up, and come to his death sentencing trial in a suit, with one of his defense lawyers. And with reference to Def. having changed his appearance from the hippie-like person who killed O. Broom to the obviously neat appearing person sitting between his lawyers, there was no need whatsoever for State to have to have ever referred to this, but it did so---and pointedly so---at several points in voir dire and the trial and this was nothing less than another effort to have this jury penalize Def. in the death recommending process for something other than an AC and it was unfair in the extreme.

One wonders how this prosecutor looked in his earlier days!

And State shouldn't have attempted to demean in advance--- during the voir dire process---the expectant testimony of Defense's expert witnesses, i.e., Drs. Krop and Toomer, by trying to precondition the jury to not believe them because they "weren't there when something happened"...that they just..."have talked to

people...interviewed people after the fact...yet are able to render an opinion back in time as to the condition of a person at the time we are talking about" (T-4/25/89-294,295).

And State shouldn't have told P.J. Ms. Cruz that it "will never change" that Def. had been convicted of first degree murder (T-4/25/89-300-301). But more importantly State shouldn't have even thought about asking prospective juror Mrs. Van Syck if she could recommend death even though Def. wasn't a serial killer, and to add insult to injury State shouldn't have thereafter dragged the name of Ted Bundy into the discussion (T-4/25/89-305,306).

This was incredibly awful prosecutorial misconduct and one wonders how a prosecutor could have been so mean-spirited to try to raise the suggestion that the death penalty should be imposed on Def. even though he was not a serial killer.

And State should not have told the jury in opening statement as to Deft's alleged mutterings after he was arrested as to having murdered a police officer and as to being a cop killer. THAT HAD NOTHING TO DO WITH THE PRESENCE **OR** ABSENCE **OF** ANY AC BEING CLAIMED AS APPLICABLE BY STATE!

State should have not elicited from its witness, Preston Stewart, testimony about Def. being able to jump the fence to get away after he shot O. Broom, implying that Def. could have jumped the fence to have avoided shooting O. Broom (T-4/26/89-281-282). Whether Def. could have jumped the fence and thereby avoided shooting O. Broom might have been relevant evidence if State had been claiming the applicability of the AC that "the capital felony was especially heinous, atrocious, or cruel" but there was no such State contention.

So, here again, State was advancing an argument for an AC that it wasn't even claiming applied.

And likewise State led its next witness, I.D. Tech. Badali through the most minute details of how the shooting of O. Broom occurred, including where he found projectiles and fragments; how many bullets remained in O. Broom's gun; where the blood was in the alley; identifying for the jury the bullet hole in O. Broom's shoe and that the bullet apparently entered the shoe from its bottom side, that the bullets from O. Broom's gun were unjacketed; that there was a bullet mark on Broom's belt keeper; that Broom's gun was a five shot while Deft's was a six shot; that the live rounds he found in Broom's gun were similar to the projectiles he "collected from the backyard," etc.

Just as Defense conceded that there was no impropriety in State making reasonable reference (to the jury) that Broom was a police officer, etc., it concedes here that a reasonable presentation of how the shooting occurred is relevant simply because it is part of what happened but it is simply beyond argument but that the State went far beyond a simple presentation of how the shooting occurred and intentionally, willfully and

purposefully tried to inflame the passions of this jury by trying to convince it that Def. killed O. Broom when he didn't have to and that even after he shot Def. through the heart, he shot at him again as---according to State's contention---is evidenced by the fact that a bullet entered the bottom of the officer's shoe.

If State had wanted to in part to base its case for death upon the theory that the manner in which the killing incident occurred was "especially heinous, atrocious or cruel," it should have contended that that AC applied. But State did not *so* contend and it is Deft's contention that it made that choice because it knew that its evidence could not sustain such a decision and while there's nothing wrong with State having made that choice, there's something terribly wrong with State nevertheless aggressively presenting the same evidence to bolster the evidence it presented in support of the AC's it was straight forwardly claiming applied.

Just as the State in a death penalty sentencing trial is precluded from the consideration of non-statutory aggravating circumstances (Pope v. State, 441 So.2d 1073 [Fla.1983]), *so* is it barred from basing its case upon evidence which would be relevant under a statutory AC's when that AC is not charged by the State. In a death penalty sentencing trial in Florida, the charges are the AC's the State claims are applicable and the Def. is entitled to be informed of the nature and cause of the accusation against him under the Sixth Amendment to the U.S. Constitution and Art. I, Sect. 16, Constitution of the State of Florida.

If there had been any indication on the part of Defense that it was going to try to create a lingering doubt in this jury's mind as to the guilt of Def., then perhaps there would have been some justification for State's presenting anticipatory evidence as to his guilt but there was never any indication whatsoever that Defense intended to do this and, to the contrary, Defense conceded at several points in the trial that Def. was guilty of the involved first degree murder. Under these circumstances, Def. respectfully submits State stepped over the bounds of fairness in trying to convince this jury of the alleged heinousness of Deft's acts.

At a later point, State asked Deft's sister Dyane Swartz:

> "Now, you told us about a time a week before the defendant murdered Officer Broom." (T-4/27/89-215)

In another question posed to Swartz---in trying to impeach her with reference to prior deposition statements---referred to the court reporter---in the presence of the jury---as "being mainly used by defense attorneys" and as being "very good at what he does" (T-4/27/89-217,218). Thereafter the following State question was posed to Swartz:

> "*Q.* Now. I aot a feeling from your testimony that the physical abuse suffered by the defendant was extreme. **Was** the defendant ever hospitalized for any of these beatings, throwing, hitting, getting hit with an iron, scalding with hot coffee, cigarette burns, all these other things that you just told us about -- was he ever hospitalized for those?

A. No. He was never hospitalized." (Emphasis added)(T-4/27/89-220)..."The night that your mother found that, at that party--because I am a little confused. see? I took Colleen Parker's deeosition. too. and I am aettina two different stories. Mavbe thev're the same. I just want to make sure." (Emphasis added)(T-4/27/89-225)

And shortly thereafter State told Swartz, "Okay. That is what Colleen said, but during your deposition I didn't get that impression" (T-4/27/89-225,226).

Expressions by the prosecutor of personal statements, opinions and beliefs during the presentation of evidence can be extremely prejudiced and unfairly exploit the prosecutor's standing and prestige with the jury as well as impair the objective detachment that should separate the attorney from the cause for which he argues. ABA Standards for Criminal Justice, Section 3-5.8(b)(2d ed.1982). People v. Allen, 425 N.Y.S.2d I44 (1980).

Thereafter State's opinion expressing questions of Swartz continued and included the following:

"Q. He would tell you stories. He would lie to you that he didn't steal it, he found it; things like this, right?
A. Right.
Q. In fact, I got kind of the impression you were characterizing the Defendant as a liar and a con artist type person.
A. No. My brother had many problems." (T-5/I/89-55)

Subsequent thereto State remonstrated Swartz for allegedly having "gone on for page and pages without my interrupting you"..., and then the following was said:

"A. Mr. Rosenbaum---
Q. You had an opportunity to say anything you wanted to say.
A. I was giving you a lot of detailed information and I left things out. I'm not perfect.
Q. That is all I wanted to hear you sav. My question to you was very simple. What you just told us wasn't in the deposition because you neglected to tell us then, right?
A. I just didn't put everything in there." (Emphasis added)(T-5/I/89-69,70).

And thereafter there was this exchange between these two:

"Q. Did you talk to a detective the day your brother was arrested or the day after?
A. I think I might have talked to two or three. They called me back.
Q. That is all I am asking you: Yes or no?
A. Yes, I did.
Q. That is all I want to find out.
A. All right. (Emphasis added)(T-5/I/89-74,75)

Then in a subsequent exchange between State and Deft's other sister, Colleen Parker, which went, in pertinent part, as follows:

"Q. Now, you quit from the Saint Petersburg Reserve in 1984, right, February?
A. I believe that is correct.
Q. And in April of '84 you left vitaglia?
A. That is correct.
Q. And the reason you left Vitaglia wasn't over the Tobey Wastewater, was it?
A. I had a conflict with the comptroller.
Q. With the comptroller?
A. Yes.
Q. And that had nothing to do with you being a police reserve officer, did it?
A. No, sir. I left the reserve.

Q. It had nothing to do with changing the access to the computer system so people could get to the Tobey documents?
A. No, sir. I didn't do that.
Q. Just so we have a record. Now, you had some -- let's talk about your experience with the Defendant's mother, called Betty? (Emphasis added)(T-5/l/89-98,99).

Thereafter the following was said by and between State and Parker:

"Q. Now, since the Defendant has been convicted in 1982 of the murder of Officer Broom, I think vou are the onlv familv member that has aone up to visit him, riaht?
A. I know that I went to visit him. I don't know whether any other family members have." (Emphasis added)(T-5/l/89-ll0)

What possible relevancy could this outrageous State question have except to try to poison the waters against this Def. a little bit more. How much more unfair could this prosecutor have been than to try to make it look like that Def. is such a useless creature than only one member of his family would visit him in prison.

Thereafter while cross-examining another Defense witness, Dr. Krop, State said:

"Q. I'm iust puzzled. I think vou have chanaed answers today, but I'm not sure you will help me through it..."(Emphasis added)(T-5/l/89-2ll)

The worst instance of State's continuing series of comments during its questioning of witnesses is probably contained in the following exchange between it and Defense's witness, Dr. Krop, to-wit:

"Q. People that see druggies every day of their lives and probably se more people doped up than you will ever see, you don't think they could tell?
A. I am not sure he would have demonstrated the effects of that.
Q. I have to disaaree with vou there. Let's go to another area." (Emphasis added)(T-5/l/89-3l3).

And thereafter the following exchange between State and Dr. Krop occurred:

Q. What happened when he pulls -- the officer pulls the trigger on his gun a second...
A. According to Mr. Patton --
Q. What did he tell you?
A. He told me that he believes the officer, the police officer shot himself in the foot.
Q. In the bottom of the foot? Okav. I don't have that much more." (Emphasis added)(T-5/l/89-321)
"Q. Did you ever see any reports from a qualified psychologist or psychiatrist as to the Defendant's mother's mental condition and if so, could I please see them?
A. There were reports that indicated that she was in need of hospitalization. I don't think they did a formal evaluation of her or diagnosed her....
Q....I am talking about, did you se anything from a psychiatrist or a psychologist that indicated that she had any mental disease or disorder?
A. I believe there was a psychiatrist.
Q. If so, I would like to see it, because I don't recall seeina one." (Emphasis added)(T-5/l/89-328)

Finally it became apparent to the court that the prosecutor's conduct had gotten totally out of hand and the following was said between the court and the prosecutor:

"Mr. Richey: There is a discussion of police recordings and tapes from the police department, which we can't find.
The Court: There is no objection?
Mr. Rosenbaum: I can't answer yes or no. I just wanted to qualify.

> The Court: There is another bad habit that you've aot that you are aoina to eliminate. You are going to call the next witness, who is Dr. Toomer?
> Mr. Richey: Yes, sir.
> The Court: I don't want anv editorializina. Ask the auestion. No personal opinions. Mav be it's because vou were tired and sick vesterdav, but, I understand. Just ask the auestion -- leave that for closina araument. Personal opinions are not even appropriate at closing araument. If not, I will interrupt vou, without an obiection from the defense. I just have to do it that wav." (Emphasis added) (T-5/2/89-4)

The court should have clamped down on this prosecutor, with or without objection from Defense, long before the matter went as far as it did, but more importantly the expressions of the prosecutor's personal opinions should never have occurred in the first place.

But this prosecutor was not to be deterred. During his subsequent cross-examination of Defense witness, Dr. Toomer, the following exchange occurred:

> "A. That (i.e. organicity could be due to the fact that the Defendant was born a blue baby) could be a contributing factor.
> ***Q.*** That could be?
> A. Could be.
> ***Q.*** That is speculation on your part?
> A. Yes.
> ***Q.*** I was left with that impression.
> A. Yes.
> ***Q. So*** you are just speculating as to that?
> A. Yes. I---you know.
> ***Q.*** That's fine. (Emphasis added) (T-5/2/89-166)

After that when State was questioning its own witness, psychiatrist Dr. Charles Mutter, it threw in another "when he murdered O. Broom question" (T-5/3/89-108).

In its final argument, State said, in pertinent part:

> "He still will not accept full responsibility for gunning down O. Nathaniel Broom on Sept. 2, 1981"..."He still has not accepted full responsibility..." (T-5/4/89-28)

This argument was patently improper and the prosecutor---as an experienced capital case litigator---either knew this or should have known it.

In Trawick v. State, 473 So.2d 1235,1240 [Fla.1983]), this Court said:

> "The trial judge's findings also referred to appellant's lack of remorse as an aggravating factor after allowing testimony and argument on lack of remorse to go to the jury. Lack of remorse is not a statutory aggravating circumstance nor was it relied upon here merely as evidence of some valid aggravating circumstance. Se McCampbell v. State, 421 SO.2d 1072 (Fla.1982). Moreover, we have held that under that statute it is error to consider lack of remorse for any purpose in capital sentencing. Pope v. State, 441 So.2d 1073 (Fla.1983)"

The prosecutor made the following arguments to the jury:

> "....I don't get to hear what they say, *so* I bring things up. I am speculating thev mav say that Officer Broom made them do it..." (T-5/4/89-18,19)

> "...then they relate to Ms. Christian Castle. She is not here, no transcripts..." (T-5/4/89-29)

> "...But, it happens on a large basis, again, in Florida -- a hundred thousand cases of child abuse a year. Naturally, God knows. It's really a shame...abuse doesn't make people into murderers..." (T-5/4/89-5l)

> "The third one is: The defendant has been previously convicted of another capital felony, or of a felony involving the use or threat of violence to some person." (T-5/4/89-72)

> "So those aggravating factors have been proven beyond and to the exclusion of a reasonable doubt. There they are. Those three aggravating are there. He killed Officer Broom, but do you know what he really did? He really killed a uniform, because it didn't matter. It didn't matter that it was Officer Broom in that uniform. It could have been Terry Russell, his partner. It could have been any uniform, not just City of Miami cops --County, Florida Highway Patrol. I didn't matter. The uniform, the authority is what threatened him. That is what made him kill and that is what makes this crime, the murder of a law enforcement officer trying to do his job, trying to keep law and order, trying to protect and serve the public -- that is what makes this first degree murder worse than others. It is the type of murder that cries out and demands the death penalty." (T-5/4/89-73)

And, finally, State minimized or trivialized the role of the jury in the sentencing phase of this capital case in violation of the proscription of Caldwell v. Mississippi, 427 U.S. 320 (1985)(T-4/25/89-35-37).

It is hard to imagine a case where there was worse prosecutorial misconduct than this one. While a prosecutor clearly has a duty of vigorously prosecuting the def., he is expected to exercise it with great discretion.

In Kirk v. State, 227 So.2d 40,42 (1969):

> "It is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused *so* that he shall receive a fair and impartial trial. The trial judge must protect the accused from improper or harmful statements, or conduct by a witness or by a prosecuting attorney during the course of a trial. It is also the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. Tribue v. State, Fla.App.l58, l06 So.2d 630. The prosecuting attornev in a criminal case has an even areater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His dutv is not to obtain convictions but to seek justice. and he he must exercise that responsibility with the circumspection and dianitv the occasion calls for. His case must rest on evidence not innuendo. If his case is a sound one, his evidence is enouah. If it is not sound. he should not resort to innuendo to aive it a false appearance of strenath. Cases brouaht on behalf of the State of Florida should be conducted with a dianitv worthv of the client." (Emphasis added).

Those lofty goals were sadly lacking in this case and it is especially saddening that such happened in a case where a person's life was at stake.

IV

> THE TRIAL COURT ERRED IN BASING ITS IMPOSITION OF THE DEATH PENALTY UPON TWO SEPARATE STATUTORY AGGRAVATING CIRCUMSTANCES BECAUSE THEY EACH REFER TO THE SAME ASPECT OF DEFENDANT'S CONDUCT.

Despite the objections of Defense, the jury was charged, in pertinent part, to consider the applicability of two statutory AC's, to-wit: AC 5(e)["the capital felony was committed for the purpose of avoiding or preventing a

lawful arrest or effecting an escape from custody"], and 5(g) ["the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law] (T-5/2/89-245,250; T-5/3/89-44-55).

Defense had vigorously opposed this being done because of the rule prohibiting the "doubling of **AC's,**" etc., but the court's reaction to this was that no jury had ever made a factual determination that an **AC** or **AC's** were applicable in any death penalty case and that: "...When they came back, they came back with life or death. They don't tell me why, right? So, what difference does it make?" (T-5/2/89-247)

Furthermore, the court refused Defense's oft-asserted request that a special verdict form be submitted to the jury upon which it could specifically recite its findings as to applicable **AC's** and **MC's** and how they weighed with respect to one another for the stated (by the court) reason that "there is no case law." (T-5/2/89-230-233; 252-259; 5/3/89-44-55;75)

Then in its own sentencing order the court found (as a finding of fact) that both **AC** 5(e) and 5(g) were applicable in the following language:

> "The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, including preventing a lawful arrest by victim Officer Nathaniel Broom and hindering the probation officer's function." (R-3838)

However, having thus found the applicability of these two **AC's,** the court then covered its tracks by reciting: "The court specifically considers these events as only one (l) aggravating circumstance and does not give it a "doubling effect."

The rule prohibiting "doubling" in Florida's death penalty sentencing procedure is embodied in this Court's decision. Thomas v. State. 456 So.2d 454 (1984); Francois v. State, 407 So.2d 885 (1981) [the same two **A.C.'s** under discussion in this appeal were also doubled by the trial courts in both Thomas and Francois]; White v. State, 403 So.2d 331 (Fla.1981); Weltv v State, 402 So.2d ll59 (Fla.1981); and Hararove v. State, 366 So.2d I (Fla.1979).

In Provence v. State, 337 So.2d 283 (Fla.l976), one of the decisions relied upon by the court below for its recitation that it, "....specifically considers these events as only one **AC** and does not give it a 'doubling effect'," the court briefly reviews the historical basis for the use of the **AC-MC** methodology in capital sentencing in the following language (at p. 780):

> "We recognize that the constitutional parameters of the trial judge's discretion in the area of sentencing are wide indeed. See Spect v. Patterson, 386 U.S. 605, 608, 87 S.Ct. 1209, l8 L.Ed.2d 3267 (1967); Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93L.Ed. 1337 (1949). But Section 921.141, Florida Statutes, intended as it was to meet the constitutional infirmity of capital sentencing procedures explored in Furman v. Georaia, 408 U.S. 238, 92 S.Ct.

2726, 33 L.Ed.2d 346 (l972), is desianed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible. Section 92l.l4l(5), Florida Statutes, states that '(a)ggravating circumstances shall be limited to the following' and then proceeds to list eight circumstances (a)-(h)...." (Emphasis added)

Another instance of the court below covering its tracks in its sentencing order is the totally conclusory language that "the AC's...outweigh any possible MC's." And, likewise, it appears to be trying to cover two bases at one time with its recitation that "it gives great weight to the jury's recommendation of death based on the following aggravating circumstances." Perhaps if it had submitted the requested verdict form to the jury, it could have made this sentence be meaningful by having it read, "based upon the findings of the jury as to the claimed AC's and MC's; and its opinion that the former outweighed the latter, this court gives great weight to its recommendation of death. But because (a) Florida's statutory scheme doesn't require the jury to give it factual advices regarding AC's and MC's etc., and/or (b) because the judge wouldn't ask the jury to advise him as to findings concerning the AC's and the MC's because no decision told the judge he could do **so,** the very quality that this Court said that Furman v. Georaia found unconstitutional in death penalty sentencing, i.e., the limiting of the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible" (Provence v. State, supra) was very much present in the sentencing in this case.

V.

THE TRIAL COURT ERRED IN ITS FINDING THAT NO MITIGATING CIRCUMSTANCES EXISTED WITH REFERENCE TO DEFENDANT'S MENTAL STATE AND THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED ANY MITIGATING CIRCUMSTANCES.

Specifically the court found that neither statutory MC's 6(b) ["The capital felony was committed while the Def. was under the influence of extreme mental or emotional disturbances]" or 6(f) ["The capacity of the def. to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantialy impaired"], had been proven to have existed in this case. (R-3839).

It is Deft's contention that the court erred in **so** finding and that to the contrary the Deft's evidence in this regard met the sufficiency test as set forth in Florida Statute Jury Instructions in Criminal Cases, 2d.Ed, as updated (at pg. 8l) of being reasonably convincing (as contrasted to the State's burden of having to prove the existence of each claimed AC beyond and to the exclusion of every reasonable doubt) despite the herculean efforts of State to discredit the testimony of the of Defense witnesses Drs. Krop and Toomer, which efforts in one major respect were unfair beyond all reason. This additional instance of State unfairness involved the question of whether Def. suffered from a brain "organicity" at the time of the involved crime.

Def.'s sister, Dyane Swartz, who was 7 to 8 years older than Def., testified as to Deft's uproarious childhood and upbringing, including that when Def as born he was a black and blue baby and that the mother thought he was "a Negroid child" (T-4/27/89-l80-l86). This sister described in detail how the mother had abused Def. and that the mother was a prolific pill taker, including diet, sleeping and pain pills and that Def would ingest the pills, etc. She said that Robt. never behaved like a normal child and that he would freeze and stare and that he would sneak into "our room" and steal things, plus stealing from others, i.e., non-family members (T-4/27/89-l87-l92). She said that Robt. continued "to pilfer" the rooms (T-4/27/89-l92-l96).

Swartz testified that shortly before the commission of the involved crime, Robt. was staring at her like he was in a trance and that thereafter he smiled at her and returned to his chair and that she had never seen him move before when he was staring (T-4/27/89-214). Swartz testified as to Robt's having been incarcerated in a detention center in Gainesville and having escaped therefrom and having subsequently visited him in the Dade County Jail (T-5/l/89-62-67).

Psychologist Dr. Krop, a defense witness, testified that he met with Def. twice, once in Dec. 1988 and again in Jan. 1989; that "since there was some indication of brain damage in the past he rendered Robt. a full intellectual evaluation", that he found a 30% variation in IQ levels between Robt's non-verbal IQ score of ll8 and his verbal score of 89 and that this indicated that "there may be some organic reasons on brain damage that is causing this discrepancy" (T-5/l/89-l70,l7l). Dr. Krop further testified: that from the records he had reviewed, he determined that on 4 or 5 occasions, Robt. was diagnosed as having evidence of brain damage, which included Dr. Guerro's 1976 diagnosis of his having a psychotic organic brain syndrome, a 1977 recitation by Dr. Castillo that he had organic brain syndrome, and a 1978 recitation by Dr. Charles Mutter that he had "soft signs of organicity" (T-5/l/89-l72-l74).

Dr. Krop's diagnoses were: (l) substance abuse; (2) antisocial personality disorder (APD); and (3) possible organic syndrome (T-5/l/89-l74,l75). He further said that Robt's "kleptomania" was evidence of acute psychotic episodes which involved losing touch with reality, that the interaction of the various things that were going on when the involved crime took place, with the long standing personality disturbance that he showed, would have resulted in impaired judgment and poor impulse conduct; that the report of a Dr. Goldin recited that when Robt. was l2 to l4 he was, "...a budding sociopath with chronic behavioral difficulties with mother and schools..."; that the Florida Baptist Children's Home records recited that Robt. had been stealing and setting fires since the age of three and that the principal thereof could not attend either normal schools or those for the emotionally disturbed; that a Dr. Cantor in a Sept. 1982 report recited that Robt. was found in a psychotic state while working

out of the Lake City Road Camp; that he was eventually determined to be psychiatrically unable to know right from wrong and determined to be both incompetent to stand trial and he, i.e., Dr. Krop, believed he was also found insane. Further, Krop said that a Dr. Carter recited that he was not sure if Robt's condition in this regard was due to drugs or an ongoing psychotic state, but he, i.e, Dr. Carter, thought it was due to drugs. He also testified that a series of other evaluations were made for the South Florida State Hospital and that at least two of the psychiatrists diagnosed him as psychotic organic brain syndrome associated with drug abuse. He said that all these records formed part of the basis for his opinions and that a Dr. Foosner indicated Robt. had a mildly abnormal EEG in 1978 (T-5/1/89-182-196).

Defense next called Dr. Jethro Toomer, a psychologist, who said he rendered Robt. the Bender-Gestalt instrument exam and the Rivitz Debeta exam. He said the Bender Gestalt instrument test is designed to point out deficits in intellectual functioning, personality functioning and as a screening device for brain damage or organicity and that, "(I)t indicates that further testing would have to be done to determine the nature and extent of any subsequent or any existing brain damage" (T-5/2/89-25,37). He testified that Robt. was using drugs since he was 5 or 6 years old; that he used toxic substances for 3 to 4 weeks before the involved crime and was out of control in his apt.; and that drug paraphernalia was found in the car (T-5/2/89-38-58).

Dr. Toomer testified that medical records furnished him recited that Robt. was described as a schizophrenic and budding sociopath at age 12; that the mother insisted there was something wrong with Robt. and that he was a blue baby; that Robt. had been previously diagnosed as having "an organic brain syndrome" and as suffering from "organicity due to his drug utilization," and he described a "brain scan" as showing mild abnormalities (T-5/2/89-38-58). Dr. Toomer said that he felt that Robt's **ASP** constituted a mitigating circumstance and he said that "the nature of the antisocial personality disorder is such that behaviors tends to break down when the individual is faced with unanticipated or anticipated stressors" (T/5/2/89-96-97). He also indicated that he felt **MC's** 6(b) and 6(f) were also applicable (T-5/2/89-61,63). Regarding **ASP,** Dr. Toomer testified that 11 out of 12 factors of an entity known as DSM-3, which is designed to test for **ASP,** were present in Robt. and that he only needed 3 to qualify as having **ASP** (T/5/2/89-104). He said that having **ASP** would not necessarily mean that would be an MC in every situation and he repeated that he felt the two claimed MC's---6b and 6f---were applicable (T-5/2/89-114-119).

He said the basis of his opinion as to the applicability of the two statutory MC's is "that there is soft signs of organicity" (T-5/2/89-137). He said that he didn't feel Robt. was malingering in 1988, but that he was in 1981 and that "conning" is part of what those with **ASP** do (T-5/2/89-159,160).

The next witness was psychiatrist Dr. Herrera who was called in rebuttal by State. He said that he met with Robt. on one occasion, Sept. 29, 1981; and that he reviewed medical records produced to him; that in his opinion Robt. was not under the influence of extreme mental or emotional disturbance at the time of the involved crime and that he had the capacity to understand what he was doing; and that Robt. suffered from no mental illness including schizophrenia. He said that personality disorders are very hard to diagnose after one meeting. In response to a State leading question, he said that he did not consider **ASP** an MC and he said that if that were the case all prison inmates would qualify as having this MC (T-5/2/89-270-277).

Dr. Herrera said he didn't remember asking Robt. about drugs but that he always does so but he conceded that Robt's use of drugs was documented by the records furnished him. He thereafter said he did discuss Robt's use of drugs with Robt. and immediately thereafter he said he didn't remember doing this (T-5/2/89-276-278).

He said there was no evidence of organicity and that this was his "clinical impression" and that Robt. may have misled others but not him. He added that the slightly abnormal EEG was not of much importance and that it is not unusual to find abnormal EEG's. He said that to his knowledge, "(T)here is no study or any evidence to connect any particular type of upbringing and the consequence to **ASP**...no study...(T)hat is just pure conjecture and speculation" (T-5/2/89-279-283). He belittled the significance but not the truth of Dr. Caballos' report reciting that on Feb. 16, 1977, Robt. had a drug induced psychosis associated with **ASP,** saying that that condition could or would have been of short duration (T-5/2/89-292). When Defense interjected and called to Herrera's condition that it had been 5 months between Dr. Caballo's diagnosis until Dr. Canton's diagnosis, Dr. Herrera became very argumentative and defensive and here as much as anywhere else in his testimony his total bias and to any argument Defense might be contending was very evident (T-5/2/89-292,293).

Herrera thereafter said he didn't rule out that Robt. had had short term psychotic episodes in the past which would have been drug induced, but he said they would not be MC's in this case. He said that Robt. had used drugs since he was 13 and that "if I recall" he was not showing acute symptoms of drugs at the DCJ as evidenced by his having a sufficiently clear mind to make a statement. He said he was aware of Robt's having had fresh track marks after that happening of the involved crime but that he took that "with a grain of salt," but thereafter he conceded the presence of those marks "certainly might constitute grounds for suspecting this man may have been intoxicated." Herrera agreed that Robt. exercised poor judgment in committing the involved crime and, as well, the 1975 crime. He denied any relationship between Robt's pulling the trigger and his compulsive childhood behavior but contradictory of what he had said earlier, he said that he believed a person's emotional development can influence future behavior. He said that the length of a drug induced psychosis varies

depending on the drug and the person and that it can clear in 10 to 15 days and that (therefore) when he examined Robt. 27 days after the date of the involved crime, any such psychosis would probably have cleared. He conceded that poor judgment and poor impulse control are characteristics of ASP but he said he nevertheless didn't consider ASP as a MC (T-5/3/89-1-36).

The next State rebuttal witness, O. Brooks, said that based upon his having seen Robt. the day of involved crime, and on his past experience as an officer and his subsequent experience as a narcotics officer, he was not of the opinion that Robt. was under the influence of narcotics when they arrested him. He said that the involved crime was committed at 9:00 to 9:30 a.m., and that Robt. was arrested at 4:31 p.m. (T-5/3/89-64-66).

The record of State's rebuttal doctors, Dr. Charles Mutter, said that he first saw Robt. in 1978 for a different offense; that he believed he was court-appointed; and that he rendered him a complete psychiatric examination. Regarding this, Dr. Mutter said the following:

> "Well, in that particular charge I felt that he had a problem of chronic drug abuse and there were some soft sians of oraanicitv, which may have been caused by the drug abuse. But, I felt he was competent to aid counsel and he knew right from wrong." (Emphasis added)(T-5/3/89-98)

Mutter said he next examined Robt. on Sept. 26, 1981, "for the murder of O. Broom," and reviewed records and that people with ASP understand what the rules are but don't care (T-5/3/89-99).

He said he thought that the determining of AC's and MC's is a decision for the jury; that he had no "frank evidence" of Robt's malingering to him; that Robt. told him he was under this influence of drugs at the time of the involved crime; and that he didn't think Robt. was trying to convince him he was mentally ill (T-5/3/89-105,106). State then asked Dr. Mutter, "You have indicated earlier when you saw the Def. back in 1978, he (sic) noted that he miaht have soft signs of organicity? (emphasis added)(T-5/3/89-105-106). Thereafter Dr. Mutter testified: "I felt there miaht be soft signs..."

Dr. Mutter thereafter testified, in effect, that the two statutory MC's were not applicable, although at the time of the involved crime he was "certainly under emotional stress", and that he had anxiety because of the taking of drugs and the violation of his probation (T-5/3/89-108-110). He then said:

> "..One test alone does not make a diagnosis. It may be suggestive. *So* that there was to be a consistent pattern of organic defect..If vou are oraanic brain damaaed and vou have a defect, it is aene. It doesn't come and ao. If vou have brain damaae. it is damaaed. It doesn't come back. That wouldn't make sense." (emphasis added) (T-5/3/89-114,115)

Dr. Mutter said the child abuse did not influence Deft's shooting of O. Broom; that a lot of people are abused and don't kill anyone; and that "it is nonsense that his mother made him do it," although child abuse is

"absolutely" an MC to be considered; and that "every human is responsible for his own behavior, unless he is *so* mentally ill that he cannot control his behavior because of a major mental disorder..." (T-5/3/89-II5-I33).

Dr. Mutter said that it might influence his opinion that Robt. may have been under the influence of drugs but that he didn't know to what degree and that "that certainly is a possibility." However, he then added that, "I took it under consideration and I don't think it is mitigating," and that "whatever happened as a result of this is his choice..(T)hat is voluntary...(T)hat is his responsibility." (T-5/3/87-I42,I43).

It is interesting to note how the prosecutor appeared to have steered Dr. Mutter away from a position that in 1978 he definitely found Robt. to have soft signs of organicity to one that he might have had soft signs of organicity. It is also interesting to note that it was Dr. Mutter's opinion that once one has organic brain damage or organicity, that damage is permanent. It is further interesting to note that the prosecutor himself told the jurors:

> "...organicity. That means there is something wrong with the brain, a brain tumor, a brain lesion. Part of the brain is dead. That is what organicity is. Psychologists can diagnose it, but then it has to go to the medical doctors because there is something wrong with the brain." (T-5/4/89)

The credible evidence presented to the jury and to the court was that insofar as the matter was examined into and tested, Robt. had soft signs of organicity. All the doctors who testified at this trial save one---Dr. Herrera--- said that this was the case.

As in reviewing the sufficiency of the evidence, this Def. respectfully suggests that it is this Court's function, in considering whether the sentencing court in a death penalty case properly assessed the applicability or non-applicability of claimed AC's and MC's, to review the evidence thereof anew, and Def. submits that this retesting of the evidence shows that he sustained his burden of proving the applicability of one or all of the three claimed MC's because he proved by reasonably convincing evidence that he was grossly abused as a child and, in addition, that he previously demonstrated soft signs of organicity.

Further it is Deft's contention that the evidence was reasonably convincing that the involved mental MC's, health or illness MC's outweighed the claimed AC's. Further, the evidence of Robt's having been severely and grossly abused by his mother was more than reasonably convincing, and Dr. Mutter's non-medical philosophizing that each of us is responsible for our acts, etc., goes to sanity and incompetency issues which are guilt trial, but not sentencing trial issues despite the fact that State and its two medical witnesses, particularly Dr. Mutter, continually injected those issues into this trial, which could only serve to confuse the jury and the Court. The finding of sanity, "...does not eliminate consideration of the statutory mitigating factors concerning