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.

REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN REFUSING TO SUBMIT TO THE JURY A SPECIAL VERDICT FORM WHEREUPON 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.

The Attorney General's argument under this point is short and sweet and totally unresponsive to the substantive reasons advanced by the Defendant as to why it would be a far better practice to have sentencing advisory juries in Death Penalty cases return special verdict form interrogatories as to their findings with respect to aggravating and mitigating circumstances.

How a representative of the chief legal officer of this State could even consider arguing that the alleged difficult logistics of having the jury answer such interrogatories as a reason for not making a procedural change that would lessen the opportunity for arbitrariness in the decision making process to determine life or death is simply beyond comprehension.

POINT 11.

DEFENDANT ROBERT 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 NOTE YET IN EXISTENCE AT THE TIME OF THE INVOLVED CRIME.

POINT 111.

DEATH PENALTY DEFENDANT ROBERT PATTEN WAS

DENIED A FAIR SENTENCING TRIAL BY THE PROSECUTORIAL MISCONDUCT OF THE STATE'S PROSECUTORS.

In responding to the arguments raised in behalf of Defendant in this appeal (in Points II and 111) that he was denied a fair trial by the prosecutor's repeatedly pointing out to the jury that the victim was a police officer killed in the line of duty, the Attorney General recited as follows in its brief herein (at page 64 thereof), to-wit:

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

In making the above assertion, the Attorney General has fallen right in line in championing the modus operandi utilized by the State in the trial court to secure its death sentence, i.e., hit as hard and as often as possible the theme that the victim was a police officer, etc., to try to arouse the jury's passions against a cop killer.

The victim's status as a police officer was NOT-----or at least should have NOT been----- major facet of the sentencing trial below: rather, the major "facets" should have been whether the Defendant committed either of the charged aggravating circumstances, to-wit: that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, etc., and/or

that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws; and/or that the Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person and whether such aggravating circumstances, if found, outweighed the mitigating circumstances.

It is Defendant's contention herein that since "the policeman killed in the line of duty" aggravating circumstance was not yet part of the statutory law when the killing involved in this case occurred, State shouldn't have claimed it was relying on that aggravating circumstance in the first place, in keeping with State's responsibility to accord the very Defendant it is prosecuting justice and fair treatment-----but, more importantly, once the trial court finally made its ruling that it would not allow State to go to the jury on "the police killed in the line of duty" aggravating circumstance (T-5/2/89-247-259; 5/3/89-301), it was unfair in the extreme for State to have told the jury in its final argument:

> "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 cow---County. Florida Highway Patrol. It 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).

The fact that "he police killed in the line of duty" aggravating circumstance wasn't enacted until two years after the involved killing be damned. The fact that the judge had ruled that State wouldn't be allowed to claim that aggravating circumstance be damned, too. This prosecutor was not to be deterred and through making this argument to the jury, he totally defeated the very constitutional purpose of the aggravating-mitigating circumstances scheme in death penalty sentencing, which is to circumscribe the class of persons eligible for the death penalty, in pertinent part, by categorical narrowins at the definition stage. Zantv. Stephens, 462 US 862 (1983).

Instead of categorical narrowing, this prosecutor's conduct amounted to categorical broadening and this Court simply should not countenance same, the fact that the trial court did so to the contrary notwithstanding.

In State v. Dixon, 283 So.2d 1 (Fla.1973), this Court stated:

> "Cases involving life imprisonment would not be directly reviewable by this Court, and the District Courts of Appeal would not be empowered to overturn the trial judge on the issue of sentence. However, requiring these findings by the judge provides an additional safeguard for the defendant sentenced to death in that it provides a standard for life imprisonment against which to measure the standard for death established in the defendant's case, and again avoids the possibility of discriminatory sentences of death.
>
> The most important safesuard presented in

> Fla.Stat. Section 921.141, F.S.A., is the propounding of aaaravatins and mitisating circumstances which must be determinative of the sentence imposed. It is argued that the circumstances are vaguely worded in some cases, and that they do not provide meaningful restraints and guidelines for the discretion of judge and jury. We disagree.
>
> The aggravating circumstances of Fla. Stat. Section 921.141(6), F.S.A., actually define those crimes----when read in conjunction with Fla. Stat. Sections 782.04(1) and 794.01(1), F.S.A.---to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury." (Emphasis added)

Regarding the Attorney General's main line of attack on Defendant's contention herein that State was guilty of multiple acts of prosecutorial misconduct from the beginning to the end of the trial below, to-wit: "NO OBJECTION," Defendant would respond that there are situations where the comments of the prosecutor so deeply implant seeds of prejudice and confusion that even in the absence of a timely objection at the trial level, it becomes the responsibility of the appellate court to point out the error and if necessary reverse the conviction. Akin V. State, 86 Fla. 564, 98 So. 609, 612 (1923); Pait V. State, 112 So.2d 380 (1959); and Garron v. State, 528 So.2d 353 (Fla. 1988). See also 15 Fla. Jur. 2d 409,410 (Section 778, Crim. Law).

In Garron, supra, which was also a death penalty case, this Court stated, in pertinent part:

> "We have held that prosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding. Bertolotti v. State, 476 So.2d 130,133 (Fla.1985) But see

> Teffeteller v. State, 439 So.2d 840 (Fla.1983), cert denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.#d.2d 754 (1984). We believe, however, that the actions of the prosecutor in this case represent an example of what constitutes egregious conduct. When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument. These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct. In his determination to assure that appellant was sentenced to death, this prosecutor acted in such a way as to render the whole proceeding meaningless. While it is true that instructions to disresard the comments were siven, it cannot be said that they had any impact in curbing the unfairly prejudicial effect of the prosecutorial misconduct...we believe a mistrial is the appropriate remedy here..."

Further, there is authority that prosecutorial misconduct may so pollute a criminal prosecution as to require a new trial, even without regard to prejudice. 23-A C.J.S. 119 (Crim.Law Sect. 1234, Prosecutorial Misconduct; Prejudice).

Defendant respectfully submits to the Court that the instances of prosecutorial misconduct-----as set forth in his initial brief----were as fully as egregious as were those involved in Garron and that although not all of them were objected to, he is nevertheless under the totality of the circumstances, entitled to relief therefrom by this Court.

POINT 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.

The Attorney General's argument under this point is like a cat chasing its tail. He argues: (1) "the evidence showed the Defendant murdered Officer Broom for two separate reasons; to avoid arrest for new charges, and to prevent his probation violated (with an attendant 5 year sentence) in a prior case"; and (2) "...the State suggested that, although these two aggravating factors were supported by different facts, 'in an abundance of caution,' the Court should merge them into a single factor". ..."That is precisely what the court did, and its order is entirely proper in this regard." (AGB-76)

If the two involved aggravating circumstances are based on the same aspect of the case, only one of the circumstances can be considered. Provence v. State, 337 So.2d 783 (Fla.1976). See also Clark v. State, 379 So.2d 97 (Fla.1980) and Bello v. State, 547 So.2d 914 (Fla.1989), both of which cases hold that consideration of the above-described two aggravating circumstances, i.e., avoiding lawful arrest and hindering a government function, constitutes improper doubling.

On the other hand, if, as the State Attorney argued below and the Attorney General argues here, the said two involved aggravating circumstances were supported by different facts, how can they be merged into a single factor, both from the perspective of logic and from the perspective that this in effect creates a new aggravating circumstance and thereby violates the rule prohibiting the prosecution from contending for non-statutory aggravating

circumstances. See Elledge v. State, 346 So.2d 998 (Fla.1977).

POINT 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.

In his argument of this issue, the Attorney General attempts to gloss over the fact that the language intoned by the trial court-----with respect to Defendant's claimed non-statutory mitigating circumstance of having been abused as a child -----makes it unclear whether it did in fact make a finding that Defendant had established the existence of such nonstatutory mitigating circumstance and, if it did, whether it gave any weight to such mitigating circumstance.

In this regard, the trial court recited:

> "...(the) circumstance of being the victim of child abuse does not mitigate this offense and does not outweigh the aggravating circumstances found in this case."(R-3839)...the Court...finds that the possible sole mitigating circumstance, being the victim of child abuse by his mother, if valued at all, is outweighed by the two aggravating circumstances listed" (R-3840).

The holding of this Court in Campbell v. State, 15 FLW S. 342 (June 15, 1990), makes it clear that once a mitigating factor is found to exist by the sentencing court, that factor cannot be dismissed as having no weight.

As in Campbell, the evidence adduced at the trial in this case establishes that without any doubt Robert was the victim of simply terrible child abuse by his mother and, as a matter of fact, the

victim's own mother, Lucille Broom, who attended at least parts of the trial, became so convinced of the extreme child abuse that was visited upon Robert by his mother that-----according to the lead article, to-wit: "The Heart of Lucille Broom," in the February 4, 1990, edition of The Tropic Magazine, the magazine section of the Sunday edition of that newspaper, she is quoted therein as being opposed to Robert being executed. For the Court's edification in this regard, a photocopy of this article is being attached as an appendix to this Reply Brief.

Defendant likewise contends-----the Attorney General's argument and the trial court's adverse ruling to the contrary notwithstanding-----that the evidence in this case was at least reasonably convincing that Defendant did establish the existence of the two statutory mental health mitigating circumstances, to-wit: that the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance (F.S. 921.141[6][b]), and that the Defendant acted under extreme duress or under the substantial domination of another person.

Certainly the proofs of the existence of these two statutory mitigating circumstances was as least as convincing as the proofs of two merged aggravating circumstances found to exist by the trial court and, in this regard, Defendant would call to the Court's attention that while aggravating circumstances must be proven beyond a reasonable doubt, mitigating circumstances are either not required to be proven by any certain standard (See State v. Dixon, 283 So.2d 1, 9 [Fla. 1973]), or they need to be established by

reasonably convincing evidence.

With reference to the possibility that Defendant has organic brain damage, the Attorney General has simply not addressed himself to such issue in his argument under this point but, in this regard, it is interesting to note that in the Statement of the Case and the Facts portion of the Attorney General's brief, he tries to water down the impact of this finding by the fact that Dr. Mutter had said that Defendant's "soft signs of organicity.. ..." may have been drug induced" (AGB-50). Likewise the Attorney General had no comment to make in his argument, or, for that matter in his Statement of the Case and the Facts, concerning the fact that Dr. Mutter also testified that **"organicity"** means that "there is something wrong with the brain, a brain tumor, a brain lesion.... " and that...."part of the brain is dead." (T-5/9/89)

In State v. Sireci, 502 So.2d 1221 (Fla.1987), this Court stated (at p. 1224):

> **"We** must warn that a subsequent finding of organic brain damage does not necessarily warrant a new sentencing hearing. James v. State, 489 So.2d 737 (Fla.1986). However, a new sentencins hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or brain damase. Mason v. State, 489 So.2d 734 (Fla.1986)."

The Attorney General's attempted response to the soft signs of organicity finding of Dr. Mutter was that this finding:

> "....was also based on a 1978 EEG report,indicating slight abnormality. There are much more sophisticated physiological tests for organicity, including CAT scans, and magnetic resonance imaging. These are also

neuropsychological tests."

It would appear that the Attorney General has made the case that more testing is necessary in that the experts involved in this case ignored clear indications of either mental retardation or brain damage.

The Attorney General contends that, "the trial court found his upbringing a mitigating factor, but of insufficient weight to counteract the aggravating **factors,"** and he added (T)here is no way this sentence is **"disportionate"** (sic) (AGB-91)**.**

The Defendant cites and relies upon the holdings in the following cases as support for its contention that the death sentence is disproportionate and that it therefore should be reduced to life, to-wit: Ross v. State, 474 So.2d 1170 (Fla.1985); Amazon v. State, 487 So.2d 8 (Fla.1986); Holsworth v. State, 522 So.2d 348 (Fla.1988); and Norris v. State, 429 So.2d 688 (Fla.1983).

POINT VI

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.

The Attorney General argues that "bad luck is not grounds for setting aside the instant sentence" (the "bad luck" being that the Defendant had his trial before the Court's decision in Rose v. State, 425 So.2d 521 [Fla.1983]). The Defendant made no such argument in his initial brief and he makes no such argument in this Reply Brief.

What he does argue is fairness! And he suggests to the Court that fairness is what the language, "...(I)n the interest of justice," as contained in Rule 9.140(f), Florida Appellate Rules, means. If the original trial court had not given the **"Allen"** or **"shotgun"** charge to the jury after it had reached a tentative 6 to 6 vote, that jury may well have remained at 6 to 6, or increased the numbers of its members who favored life, and then instead of a death recommendation, it would have made a life recommendation, and that then under the decisions of this Court, the judge would then have had to give great weight to that jury recommendation.

Furthermore, the jury at a 6 to 6 vote was not deadlocked. It was at a level where that vote, if it stood, was a vote for life. The original judge shattered the gain the Defendant had made in climbing the mountain at the first trial to achieve an initial vote for life by the jury and the damage was devastating in the extreme.

It is unthinkable that that mistake might cost Robert Patten his life. This is why it is in the interest of justice that the death sentence imposed upon him be reduced to life.

POINT VII

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.

One of the many movies based upon the Vietnam War was named "The Killing Fields." That war is long over but, unfortunately, the

"killing fields" psychology is still very much a part of our national psyche. Our's is a killing society. Undersigned counsel will most probably step on some emotional toes in saying this and then saying the rest of what he wants to convey to the Court, but trusting in the members of the Court to not penalize the Defendant to any extent whatsoever because of his counsel's views and believing in and espousing the Biblical enjoinder to know the truth and to thereby be set free, he is going to here give his reasons why the Death Penalty is cruel and unusual punishment and how the existence of that penalty itself contributes to the violence of America.

In Islamic countries, a thief can suffer the penalty of having his hand cut off so that he has to live with the indignity of having to use the same hand to eat and wipe his hind end. There is not a court in all of America that would not immediately strike down such a law or practice as constituting cruel and unusual punishment. Therefore, how can it be said that maiming is per se cruel and unusual punishment but killing is not. That simply is not logical and to be fair the law ought to make sense.

If this country really strives to be the best, it simply must have more regard for life. We should reverse the law at the national level which permits and authorizes the United States Government and American private entities to sell or give away weaponry all over the World. A moral country should not peddle armaments----even to its friends. If we had been such a country in the past, it is possible that Saddem Hussein's name would have

remained relatively unknown.

If we are to be a moral society, we must do something to prevent the killing of unborn children as a form of birth control.

If we are to be a moral society, we must do something about the easy availability of guns throughout the land and, in this regard, it is probably true that there are more guns loose in America than in all the rest of the World put together.

If we are to be a moral society, we must have more regard for the well being of those with less intelligence than us-----the animals. God created them, too, and we should treat them as his creatures.

And, finally, if we are to be a moral society, we must cease the barbaric practice of killing killers because when we do that, the stain is on us all. We are all made to be vicarious executioners. Thou shalt not kill!

Undersigned counsel respectfully disagrees with this Court that it is obliged to apply the death penalty so long as the citizens of this State deem it an appropriate punishment for select acts of criminality "and so long as the United States Supreme Court tolerates its use." Brown v. Wainwright, 392 So.2d 1327 (Fla.1981). No, you don't have to wait for the United States Supreme Court to finally muster the courage to declare executions as being violative of the federal constitution. You, the justices of the Supreme Court of Florida, have the power to do what that Court hasn't yet done. You can strike down the Death Penalty in this State as being violative of Articles 9 (Due Process) and 17 (Excessive

Punishments), and of Article I---the Declaration of Rights---of the Constitution of the State. Florida has a well earned reputation-----along with Texas-----of being one of the top executing states in the country. In this regard, to paraphrase candidate Bush, we truly need to become a kinder and gentler society. Justices, declare the Death Penalty to be no longer acceptable under our State constitution. Do it because it's the right thing to do!

CONCLUSION

For the foregoing reasons, the Defendant, Robert L. Patten, again prays the Court to reverse the trial court's sentence of death and to substitute in its place a sentence of life subject to the provisions of the involved statute.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was mailed this 21st day of February, 1991, to the Office of the Attorney General, State of Florida, 401 N.W. 2nd Avenue, Miami, Florida.

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