IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,844

NORBERTO PIETRI,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, WEST PALM BEACH COUNTY, FLORIDA

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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal.
"A.B."	Appellant's Initial Brief.

All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE

The State rejects Appellant's statement of the case as incomplete. Appellee would instead rely on the following:

In a sixteen count indictment, appellant was charged with escape (Count I), two counts of burglary of an automobile (Counts II and X), three counts of grand theft auto (Counts III, XI and XIII), burglary of a dwelling (Count IV), grand theft (Count V), two counts of possession of a firearm during the commission of a felony (Counts VI and VIII), the first degree murder of Brian Chappell (Count VII), possession of a firearm by a convicted felon (Count IX), strong arm robbery (Count XII), attempted kidnapping (Count XIV), false imprisonment (Count XV), and possession of cocaine (Count XVI), (R. 3177-3182). Appellant proceeded to a trial by jury. He was found guilty of all counts as charged, except as to Count XV, false imprisonment, where appellant was found not guilty (R. 3603-3605).

Following the sentencing phase of appellant's trial, the jury recommended that appellant be sentenced to death by a vote of eight to four (R. 3680). In accordance with the jury's recommendation, the trial court sentenced appellant to death on the capital felony; the trial court found that four aggravating factors and no mitigating factors had been established (R. 3708-3709, 3712-3717).

On the non-capital offenses in which appellant was found guilty, appellant was sentenced pursuant to a stipulation between appellant and the State. Pursuant to said stipulation, appellant

was not adjudicated or sentenced on counts six, eight and thirteen; count nine was nolle prossed by the State (R. 3716, 3717). Appellant was adjudicated and sentenced on the remaining counts as follows: Count I/escape: 15 years to run consecutive to any active sentence being served and consecutive to counts 2 through 5, 7, 10 through 12, 14 and 16 (R. 3729); Count II/burglary: five years to be served concurrently with the sentence imposed in Count 3, and consecutive to the sentences imposed in counts 1, 4, 5, 7, 10 through 12, 14 and 16 (R. 3724); Count III/grand theft: five years concurrent with count II, and consecutive to counts 1, 4, 5, 7, 10 through 12, 14 and 16 (R. 3725); Count IV/armed burglary: life, concurrent with count 5 and consecutive to counts 1 through 3, 7, 10 through 12, 14 and 16 (R. 3726); Count V/grand theft: five years concurrent with count IV, and consecutive to counts 1 through 3, 7, 10 through 12, 14 and 16 (R. 3727); Count X/burglary: five years concurrent with count 11 and consecutive to counts 1 through 5, 7, 12, 14 and 16 (R. 3729); Count XI/grand theft: five years concurrent with count 10 and consecutive to counts 1 through 5, 7, 12, 14 and 16 (R. 3730); Count XII/robbery: 15 years concurrent with count 14 and consecutive to counts 1 through 5, 7, 10, 11 and 16 (R. 3731); Count XIV/attempted kidnapping: fifteen years concurrent with count 12 and consecutive to counts 1 through 5, 7, 10, 11, 16 (R. 3732); and Count XVI/possession of cocaine: five years consecutive to counts 1 through 5, 7, 10 through 12, and 14 (R. 3733). Appellant timely filed a notice of appeal on April 9, 1990 (R. 3739). This appeal follows.

STATEMENT OF FACTS

GUILT PHASE:

Appellee rejects appellant's statement of the facts as argumentative and incomplete, and would instead rely on the following rendition of the facts:

On August 18, 1988, appellant escaped from the Lantana Community Correctional Center (R. 1827). At that time, appellant was in the process of being transferred to a more secure facility because he had failed to return from a work release program on August 15, 1988 (R. 1827-1828).

At approximately 10:00 a.m. on Monday August 22, 1988, the appellant knocked on the door of Carmen Diaz' home. She lived in an area of West Palm Beach known as Lone Pine Estates (R. 1967). Appellant asked Ms. Diaz where the offices of Lone Pine were located (R. 1968). After Ms. Diaz directed appellant to the office, appellant got into his truck and left in a southerly direction (R. 1968-A). Ms. Diaz described appellant's vehicle as a silver or gray, Mazda or Toyota truck (R. 1969).[1] She described the appellant as having a tatoo on the left side of the face and on the left arm (R. 1968-A). Ms. Diaz subsequently picked out appellant from a live lineup and a photographic lineup (R. 1972-1973).

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[1] Catherine Jarvis testified that she owned a 1987 Mazda pick-up truck (R. 1833). When she attempted to leave from work on August 21, 1988, she could not find her vehicle in the parking lot (R. 1834). As a result, she reported the vehicle as stolen.

Located south of Carmen Diaz' house in Lone Pine Estates was the house of Patricia Kutlick and Daryl Tronnes (R. 1973-1974). When Patricia Kutlick, a court liaison sergeant with the Palm Beach County Sheriff's Office, returned home from work at 4:40 p.m. on August 22, 1988, she found that the home she shared with Daryl Tronnes had been broken into (R. 1846-1848). The perpetrator gained entry into the dwelling through a kitchen window which was located above the kitchen sink; the glass of the window was removed from the window frame, so as to avoid activation of any alarm systems (R. 1849, 2044). The kitchen counter appeared to have been wiped down with a rag in an apparent attempt to eliminate any fingerprints; the rag, which belonged to the perpetrator, was subsequently found in the living room (R. 1853-1854); the glass window and windowsill were also wiped of fingerprints (R. 2045). Also found on the kitchen counter was a carton of milk, which appeared to have been sitting on the counter for several hours (R. 1855).

The intruder purposely left open the doors to the house, including a sliding glass back door; he also disturbed various other areas of the house, including the living room and the master bedroom (R. 1852-1853, 1862-1864, 2043). Several items were taken from these areas, such as a VCR and cam corder with remote control, coins, a tennis bracelet, a watch, a pearl, a nine millimeter Browning semiautomatic firearm and a .38 caliber revolver (R. 1855-1859).

Daryl Tronnes explained that he kept the nine millimeter in a desk drawer, located in the master bedroom (R. 1867). The gun was housed in a holster (R. 1868). The grip of the weapon contained a clip which was loaded with bullets. However, given the manner in which the gun was left in the drawer, the gun would not fire if one were to pull the trigger; in order to fire, the slide had to be pulled back and released, so as to load the gun with a live round underneath the hammer; this procedure required use of both hands (R. 1868-1869). Once fired, the gun would release the casing of the bullet from its right side (R. 1870). Tronnes kept the spent casings of the gun for reloading. He gave a box of the casings to Officer John Johnston for analysis (R. 1870-1871, 2065).

Floyd Dyess, one of the Kutlick's/Tronnes' neighbors, heard loud music in the area of the Kutlick/Tronnes home at approximately 10:00 a.m. on a Monday in August, 1988 (R. 2140). When he looked to investigate, Mr. Dyess observed a silver colored pickup truck sitting in his neighbor's driveway; he saw a man going back and forth from the garage to the truck, placing something in the cab of the truck (R. 2142, 2143). Mr. Dyess dismissed his suspicions because he did not think that a burglar would make himself so conspicuous (R. 2142).

Sometime thereafter, Officer Brian Chappell of the West Palm Beach Police Department, was observed sitting on his motorcycle on a hill on Southern Boulevard (R. 1874). The officer appeared to be looking for speeding violators. A hispanic male driving a

japanese-style pickup truck sped past Officer Chappell at a high rate of speed, traveling east on Southern Boulevard, after which the officer began to follow appellant (R. 1875). Officer Chappell activated his sirens and lights in pursuit of appellant, but appellant refused to stop (R. 1839, 1877, 1879). With the officer directly behind appellant, the appellant finally made a right turn onto Dixie Highway followed by another right turn onto Malverne Road (R. 1839-1840, 1893).

Ralph Galan was walking on Dixie Highway when he heard the siren and saw a gray-colored Mazda pickup truck being pulled over by a police officer on a motorcycle (R. 1890-1893). Appellant finally stopped his vehicle on Malverne Road, approximately one and a quarter miles from where the pursuit initially began (R. 2074). However, because the area where appellant first stopped the truck would put the officer in the line of traffic, Officer Chappell motioned the appellant to move up further (R. 1894, 1905-1906, 2072-2073). As Officer Chappell approached the appellant in the truck, he moved his hands across the back of the truck;[2] the officer's gun was not drawn, but in its holster (R. 1894, 1907). When the officer was within two to four feet along the length of the truck, appellant turned around and shot the officer once; at this point, the officer was closer to the

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[2] Homicide detective John Johnston later testified that officers are trained to approach a vehicle during a traffic stop in a specific manner: to drag one hand along the side of the vehicle permitting the officer to gauge the distance away from the car (R. 2067-2069).

driver's window of the truck than he was to the back of the truck (R. 1894-1895, 1897). Ralph Galan saw Officer Chappell put his hand to his chest exclaiming, "Oh, my God," (R. 1897). The victim dispatched that he had been shot at 10:56 a.m. (R. 2064). Galan stated that appellant sped away in the truck following the shooting (R. 1897-1898).

Lazaro Suarez and Roy Nelson were in the area of the shooting when it occurred. Lazaro Suarez was approximately twenty five feet away from the shooting, and his attention was first drawn to the area by Officer Chappell's siren (R. 1913, 1915). He saw the light gray or blue Mazda pickup truck when it pulled over, and he saw that the truck's occupant was observing the officer through the side rear view mirror (R. 1916). Suarez testified that once appellant and the officer stopped, the officer dismounted the motorcycle and removed his helmet (R. 1918-1919, 1922). Suarez stopped paying attention to the men until he heard a shot (R. 1919).

Nelson's attention was drawn to the area upon hearing the gun shot. Nelson saw the victim stumbling away from the area where the shot was fired, until the victim fell (R. 1938-1939). Upon realizing that it was the officer who had been shot, Suarez ran to the victim to provide CPR (R. 1919-1921). Suarez saw the officer had been shot on the left hand side of the sternum, close to the heart (R. 1921).

Both Suarez and Nelson observed appellant speed away from the area of the shooting (R. 1922, 1939-1941). As the truck

passed Nelson, Nelson could see that the driver's window of the truck was partially open (R. 1941).

Wilma Wilke saw Officer Chappell when he was pursuing the appellant; however when appellant and the officer turned onto Malverne Road, she lost sight of the two. When she next saw Officer Chappell, he was lying in the street, and appellant was gone (R. 1841). By the time Ms. Wilke went to where Brian Chappell was laying, another officer had arrived at the scene, and he was telling the victim to "Hang in there" (R. 1841-1842).

As appellant was speeding away from the shooting, he almost ran into Desmond Elgar and William Rogg (R. 1979, 2012). Desmond heard the boom of the gunshot and saw appellant driving away immediately thereafter (R. 1986, 1993). Desmond and William described the truck as silver-colored; Desmond remembered that the truck had tinted windows (R. 1980, 2013). They saw one man inside the truck; Desmond testified that the man looked hispanic, that the man had a tatoo on the right side of the neck and that he was wearing a white tee shirt and a gold watch (R. 1985, 2015). Desmond and William both stated that the driver's window of the truck was down (R. 1993, 2017).

Fred Navarro was the first officer on the scene of the shooting (R. 2023). He observed the victim lying in the street on his back, with both arms at the sides; the victim had been shot through the left side of the chest (R. 2023). Navarro testified that the victim's gun was still in its holster, although the holster was unsnapped, indicating that Officer Chappell may have tried to retrieve his weapon (R. 2024).

Sergeant James Wilburn, a crime scene investigator, testified that two dark spots and some dotted lines, called chirp marks, were found just above the area where Officer Chappell's motorcycle was parked; these marks indicated that a vehicle had accelerated off from the area (R. 2029-2030). The distance from the chirp marks to the front of Officer Chappell's motorcycle was fifteen feet, ten inches; moreover, the chirp marks were consistent with having been made with the rear tires of the truck (R. 2046).

A spent casing, blood stains, and the victim's cracked sunglasses were also found in the area (R. 2030, 2032). The location of the casing was consistent with the location of the front driver's window of the truck (R. 2048).

The shirt the victim was wearing at the time of the shooting was also collected for analysis by a firearms examiner (R. 2034-2035). The shirt had a whole in the area consistent with the area of the bullet wound on the victim (R. 2038). When the bullet entered the victim, it broke the cross belt which was used to holster the victim's weapon (R. 2038-2039).

Based on an examination of the victim's shirt and cross belt, the forensic firearms examiner, Gerald Styers, estimated that appellant shot Officer Chappell within a range of three to eight feet (R. 2172, 2185). Styers confirmed that the casing of the bullet which shot the victim matched the casings of the bullets provided by Daryl Tronnes, and that therefore the two sets of casings were fired from the same gun (R. 2164-2167).

Finally, the firearms examiner explained how to load and shoot a Browning nine millimeter weapon (R. 2159-2161).

The medical examiner, Dr. James Benz, confirmed that the victim died as the result of a through and through gunshot wound to the chest (R. 2249). The bullet went through the heart and several other vital organs, exiting through the back (R. 2247).

After the shooting, appellant went to his nephew's house (R. 2148). Ralph Valdez, appellant's nephew, stated that he helped the appellant get rid of a silver colored Mazda truck (R. 2148). The two ended up in an area off the Florida Turnpike and Lantana Road (R. 2150). Appellant dropped off his nephew and proceeded in a westerly direction (R. 2150). Appellant was gone for approximately seven minutes, and when he returned to his nephew, he did not have the truck (R. 2150). The two were then picked up by a taxi, and returned to the nephew's house (R. 2137-2138, 2151). The appellant stayed at Ralph's house and ordered a pizza (R. 2058, 2152). Appellant also gave Ralph a .38 caliber handgun; in exchange therefore, Ralph gave appellant a .25 automatic handgun (R. 2152). Ralph subsequently got rid of the gun appellant had given him. Ralph testified that when he saw appellant on the morning of the shooting, appellant appeared normal (R. 2153-2154).

Scott Thompson was traveling south on the turnpike on August 22, 1988 when he observed a truck going into a canal; he thought that the incident was strange because he did not see anyone in or near the truck (R. 2055). Officer Gregory Parkinson, who

ultimately responded to the area on August 23, 1988, was present when the pickup truck was removed from the canal (R. 2048-2049). The nearest accessible road to the canal was Lantana Road. A barefoot set of prints was found in a north to south direction from the canal back to Lantana Road (R. 2050, 2094-2095). Also found were several tire tracks which were consistent with the tracks taken by the truck prior to its submerge (R. 2051). The tire tracks in the dirt were also consistent with the tires of the truck (R. 2096).

Denise King, an old friend of appellant, testified that she unexpectedly saw the appellant at a convenience store on Sunday evening, August 21, 1988 (R. 2189). At the time, appellant was driving a silver Mazda truck with tinted windows; appellant told her that the truck belonged to a friend (R. 2190). Denise King stated that appellant did not appear to be under the influence of alcohol or drugs (R. 2191).

Ms. King saw the appellant again the following evening, Monday (R. 2191). Ms. King drove the appellant to the Airport Motel on Belevedere Road where they stayed for approximately twenty five minutes; appellant was met there by Randy, appellant's brother Luis and Yori (R. 2193). Appellant and his friends had some discussion in spanish, wherein Ms. King heard some talk about coins (R. 2193). Thereafter she took appellant to the Aqua Hotel (R. 2194). Appellant asked Ms. King to rent the room for appellant, though appellant gave her the money to pay for same; appellant explained that this was necessary because

he had no identification (R. 2195). That evening, appellant gave Ms. King several items of jewelry, including a tennis bracelet and a pearl (R. 2194). Ms. King stated that appellant did not appear to be under the influence of drugs on Monday evening as well, nor did she see any cocaine in appellant's presence (R. 2196, 2199).

When appellant contacted Ms. King again, it was Wednesday, August 24. Appellant asked Ms. King to return to the Aqua Hotel to pick up some of the appellant's belongings (R. 2195). Appellant explained that his brother, Randy and Yori had gotten into trouble, and that he needed Ms. King to pick up his clothes at the hotel (R. 2196). Ms. King did not see appellant on that Wednesday (R. 2199).

Appellant was next seen by Sergeant Laurie Van Deusen at approximately 6:30 p.m. on Wednesday, August 24, 1988 (R. 2076). At the time, appellant was driving a small beige vehicle (R. 2076-2077).[3] She began to follow appellant, but temporarily lost sight of him (R. 2077-2078). When she spotted the vehicle again, it was parked in an apartment complex off of Vicliff Road, however appellant was not in the car (R. 2078-2079). It was later determined that one of appellant's sisters lived in the complex (R. 2080). Other officers and law enforcement personnel

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[3] Aaron Saylor testified that in August, 1988 he owned a 1982 tan-colored Toyota (R. 2200). His stepdaughter had possession of the vehicle until August 24, 1988 when it was reported stolen (R. 2201). When Officer Saylor next saw the vehicle on August 24, it was parked in the area of Vicliff Road in West Palm Beach (R. 2201).

responded to the apartment, but appellant managed to flee from the area (R. 2081). A subsequent search of the vehicle appellant was driving revealed a VCR, a cam case and a remote control (R. 2079).

That same evening, Officer Roger Palmer was off duty and at church when he became aware of a helicopter hovering in the area (R. 2084). Officer Palmer was aware of the murder investigation and assumed that the helicopter was connected to searching for the murder suspect (R. 2085). As such, the officer searched the area surrounding the church until he observed the appellant in a tree (R. 2085-2086). The officer stood under the tree and directed appellant to come down therefrom (R. 2086). Appellant reached into his pants and threatened to blow the officer's head off, although Officer Palmer did not see appellant in possession of a gun (R. 2086, 2089). Nonetheless, the officer looked for a place to escape, during which time appellant jumped out of the tree and onto Officer Palmer (R. 2087). After attempting to strike the officer, appellant took off running into the woods (R. 2087-2088, 2089). Appellant was wearing a pair of blue bathing shorts, and no shoes at the time (R. 2088). Officer Palmer was unable to apprehend appellant.

That same evening, Tami and Kieth Nelson, and their son Devon, were leaving from their home in their new blue Honda Accord; Tami was driving, her husband was seated in the front passenger seat, and their son was sitting in the back seat (R. 2209-2210). As they were exiting from the driveway, the Nelsons

realized that they had forgotten something, so Tami stopped the car in the driveway while her husband exited the car and approached the front door of the Nelson home (R. 2210-2211). While at the front door, Keith Nelson heard some footsteps; when he turned around he saw appellant running towards the open car door (R. 2218). As Mr. Nelson attempted to approach the car, appellant reached into his waistband and threatened Mr. Nelson by directing him to stop or appellant would shoot (R. 2218). Suddenly appellant jumped into the front passenger seat of the Honda, locked the doors and yelled, "We're leaving; drive, or I'll shoot you," (R. 2211). When Ms. Nelson hesitated, appellant unlocked and opened the driver's door, he kicked Ms. Nelson and pushed her out of the car; appellant then jumped into the driver's seat of the car and began to drive away from the Nelson home (R. 2213-2214, 2219). As appellant was exiting the driveway, he slowed down so as to allow the Nelsons to retrieve their son from the back seat of the car (R. 2216, 2219, 2223).

At approximately 9:30 p.m. on Wednesday, August 24, Officer John Donovan observed the appellant driving a blue Honda automobile, so he began to follow the appellant (R. 2226). At the time, Officer Donovan was driving a marked police vehicle (R. 2227). Appellant pulled over to the side of the road and the officer pulled over behind appellant. Appellant waved the officer out of his vehicle, but as Officer Donovan began to alight from his car, appellant sped off (R. 2228-2229).

Police Officers Mark Woods and Michael Swigert then picked up the chase of appellant (R. 2231-2235, 2237). Eventually, appellant lost control of the car; when the vehicle finally came to a stop, appellant exited the car and began to run on foot (R. 2235-2236, 2238). As Officer Swigert pursued appellant on foot, appellant reached into his pants, and put the object from his pants into his mouth; the object in question was a bag containing cocaine (R. 2238, 2239). Officer Swigert finally apprehended appellant.

Appellant testified in his own defense. Appellant stated that he is blind in the right eye and can only see a blur therefrom (R. 2267). Due to appellant's marijuana use, appellant began to report late to work and was subsequently laid off from his job in the summer of 1983 (R. 2272-2273). As a result, appellant began to support himself through the income he acquired from selling marijuana. Appellant graduated from using marijuana to cocaine by 1984; at first, appellant just snorted cocaine, but eventually he began to freebase cocaine (R. 2274, 2278). Appellant quickly became addicted to the drug, and began to commit burglaries on a daily basis to support his habit (R. 2280). Appellant was arrested for burglary in 1984; he pled guilty to approximately 10 to 15 burglaries and was sentenced to three years incarceration (R. 2282). Appellant did not participate in any drug rehabilitation programs while in prison (R. 2283).

Appellant completed his sentence in 1986, but four months after his release, he renewed his use of cocaine (R. 2284). Appellant again returned to committing burglaries to support his habit; appellant committed approximately three to four burglaries a day (R. 2285-2286). Appellant was again arrested in 1986, and he was charged with only ten to thirteen burglaries (R. 2289). Appellant was sentenced to seven years incarceration (R. 2290).

In July, 1988, appellant was eventually transferred to a work release center in Lantana (R. 2295). Appellant got a job as a mason in an area outside of the prison grounds, and he was eventually reintroduced to marijuana (R. 2298-2302). Appellant also qualified for furloughs of four to eight hours (R. 2303). However, after appellant's second furlough, appellant was disciplined and was denied any further furlough privileges (R. 2310-2312). As a result, appellant decided to take his "own" furloughs, however after the second one, appellant never returned to the facility.

According to appellant, appellant spent the next few days abusing cocaine and committing burglaries to support his habit (R. 2339-2364). On Sunday, appellant was given a truck which appellant knew had been stolen (R. 2357-2359). At approximately 2:00 a.m. Monday morning, August 22, 1988, appellant was driving around the area of West Palm Beach smoking crack (R. 2364). At one point appellant stopped his vehicle, at which time appellant was approached by a police officer (R. 2365). As the officer alighted from his vehicle, appellant sped away from the officer (R. 2366-2367).

Later on in the morning, appellant began knocking on doors of homes to find an unoccupied house to burglarize, until he came upon the Kutlick/Tronnes house (R. 2373-2376). Appellant opened the doors of the truck and put on loud music; he took a towel he had brought with him and pretended to clean the windows of the house (R. 2377-2378). Appellant broke into the house, wiping away all his fingerprints in the process; he opened all of the doors to the house to provide an easy means of escape if he were caught in the house (R. 2378-2381).

As appellant was searching through the master bedroom, he came upon a sheriff's badge; appellant thought, "Law, I'm in big trouble," so he grabbed the nine millimeter Browning weapon and put it in his pants; appellant made sure that the weapon was loaded (R. 2381-2382). Appellant took the gun and put it in his waist in the event that he needed to be armed (R. 2504). Appellant admitted to taking the VCR, the weapons and various items of jewelry from the Kutlick/Tronnes home (R. 2381-2383). Once back inside his vehicle, appellant removed the nine millimeter from his waist and placed it on the dashboard of the truck (R. 2384).

When appellant completed the burglary, he drove on I-95 to Southern Boulevard in order to exchange the stolen merchandise for money or cocaine (R. 2386-2387). Appellant realized he was exceeding the speed limit when Officer Chappell began to follow appellant (R. 2387). While the officer was following appellant, appellant was thinking about his alternatives, i.e. fleeing or

giving himself up to authorities (R. 2388-2390). Despite various opportunities to stop, appellant continued bating the officer until he arrived at Malverne Road (R. 2505-2506). Appellant finally stopped the truck, and observed as the officer dismounted his vehicle and approached appellant (R. 2508). The victim did not have his weapon drawn, nor did he talk to the appellant (R. 2511-2512). Nonetheless, appellant retrieved the gun from the dashboard of the truck, he cocked the gun, turned around and shot the officer (R. 2391, 2309-2310). Appellant testified that he had not thought about trying to kill the officer, and that when he shot the gun, he did not intend to kill the victim; appellant stated that he did not aim for the victim's heart (R. 2391-2392).

After appellant killed the officer appellant fled the scene. In the hours after the shooting, appellant saw his niece and told her that his friend had killed the officer (R. 2397). Appellant spent the days following the murder smoking cocaine and committing burglaries (R. 2408-2422). Appellant came into possession of the Toyota vehicle on Wednesday, August 24; appellant was advised that the car was stolen (R. 2425).

When appellant was finally apprehended, he was taken to the police department wherein appellant gave a statement. In the statement, appellant did not admit to having committed any of the crimes with which he was charged (R. 2480-2481, 2518-2522). At trial, however, appellant admitted to having committed almost all of the crimes with which he was charged (R. 2488-2497, 2522).

PENALTY PHASE:

The Deputy Clerk for the Fifteenth Judicial Circuit, testified that the certified copies of the judgments and sentences relating to several of appellant's criminal cases were true and correct copies of the original judgments and sentences (R. 2824-2826).

Appellant's brother, William Pietri, testified that he was the eldest of nine children had by his mother and his father (R. 2827-2728). All of the family lived in Puerto Rico, until 1966. William Pietri described his father as a violent alcoholic (R. 2828). The father would constantly beat his mother in front of the children on a daily basis, until he left the family home for New York in 1965 (R. 2829). Appellant was two years old at the time (R. 2836). William and his brother Marino stayed working in Puerto Rico to support the family (R. 2830); however shortly thereafter, William followed his father to New York (R. 2830). After approximately six months, the father abandoned William as well (R. 2832-2833).

William worked together with the appellant in 1983 in construction for approximately one year (R. 2833-2834). William described appellant as being a very nice kid during this time (R. 2834).

Yoris Santana testified that he spent the four days prior to the murder with appellant; during those four days, appellant ingested cocaine rocks intermittently with marijuana, day and night (R. 2839). Appellant and the witness also made plans to commit the various burglaries throughout those four days (R.

2844). Appellant was shown a newspaper article regarding Officer Chappell's murder, at which time appellant stated that, "It wasn't me," and he advised the witness to forget about ever having seen the Mazda truck (R. 2845-2846).

Marino Pietri was the second eldest child of the Pietri family, and that appellant was the second youngest of the nine children (R. 2849). He testified that his family did not have a lot of money, and that his family was raised in a small house (R. 2851). Marino also affirmed the fact that his father was a violent alcoholic, who would beat their mother and the children on a daily basis (R. 2852-2856). After his father left the family in 1967, Marino quit school in order to work cutting sugar cane to help maintain the family (R. 2857).

In May, 1969, Marino left Puerto Rico and came to live in Ft. Pierce (R. 2860). Approximately four months later, he brought the rest of the family to the United States (R. 2862). Along with the family came Freddy Torres (R. 2865). Marino remembered that Freddy Torres always paid special attention to appellant (R. 2867). Additionally, Freddy Torres sexually abused appellant's and Marino's mother, resulting in her becoming pregnant (R. 2867-2868).

Marino Pietri confirmed that appellant had a problem with his right eye since an early age; appellant had surgery to correct the defect at the age of six, but appellant became blind in the right eye instead (R. 2868-2871).

Marino had his own landscaping business, and appellant eventually began working for his brother (R. 2873, 2880). Marino stated that appellant was a good worker and a good man (R. 2873-2874). During this time, appellant began to live with a woman and they had a child together (R. 2875). Appellant was doing okay until 1983 when he became involved with drugs (R. 2876-2877). Marino testified that he himself had never done drugs, he had never had any legal problems, and that he always managed to maintain his family (R. 2881).

Ramona Rivera, appellant's youngest sister, reaffirmed appellant's blindness in the right eye (R. 2888). She stated that she and appellant were close (R. 2892). She picked the appellant up when appellant was given his first furlough and spent the day with appellant (R. 2895-2896).

Appellant's half sister, Ada Lidell, testified that appellant was a good brother before he began using cocaine; appellant would take the witness and her friends to the park or skating, and he would give her money (R. 2903-2905). Ada confirmed that appellant became heavily addicted to cocaine in 1983 or 1984 (R. 2905-2906). When appellant used cocaine he would become very paranoid (R. 2907). On one occasion, appellant took a shot gun and stated that he was going to kill himself (R. 2908-2909). However, appellant never did ask for help (R. 2911).

Roger Paul, a registered minister with the county jail, met the appellant while appellant was awaiting trial on the instant charges (R. 2913-2914). Appellant expressed that he had converted to Christianity (R. 2915-2918).

Judy Iodice, a social worker who works with recovering drug addicts and alcoholics, testified that a family history of substance abuse may predispose an individual to drug abuse (R. 2932-2933). Other factors, i.e. low self esteem, family abuse, may contribute to chemical dependency as well (R. 2933-2935). Ms. Iodice stated that freebase cocaine is the most potent form of cocaine, resulting in feelings of heightened exhilaration and excitement; however, these feelings are followed by a down, which depending on the individual, can result in extreme depression, paranoia, hostility and irritability (R. 2935-2937). The down phase can last anywhere from thirty minutes to two hours (R. 2942). Cocaine use will not distort the memory, intelligence, or the ability to make cognitive decisions; in other words, an individual high on cocaine still knows the difference between right and wrong (R. 2937, 2944-2945).

Given appellant's continued use of marijuana while incarcerated, Ms. Iodice opined that appellant was at a high risk of relapsing into abusing cocaine (R. 2939). Nonetheless, Ms. Iodice admitted that she had never met the appellant (R. 2941).

Dr. Glen Caddy met with the appellant for three and a half hours, during which time the appellant relayed his family background and childhood, reaffirming what appellant's siblings had testified to (R. 2955-2962, 2964-2967). Dr. Caddy testified that appellant's childhood and upbringing made appellant vulnerable to drug abuse (R. 2967-2968). Dr. Caddy testified that appellant was of average intelligence (R. 2976).

Regardless, given the circumstances under which appellant committed the murder, i.e. perhaps experiencing some of the residual effects of cocaine, Dr. Caddy opined that appellant's judgment was impaired at the time of the shooting (R. 2987-2995). Nonetheless, appellant was not psychotic at the time of the shooting; he knew the difference between right and wrong, and that it was wrong to kill (R. 3010).

Dr. Caddy admitted that his opinion was based exclusively on what appellant told him and on the probable cause affidavit (R. 3004). Thus, if any of the information provided was erroneous, so too would be Dr. Caddy's professional opinion (R. 3005-3006). Finally, Dr. Caddy admitted that appellant's family history was not the reason for appellant having committed the murder; rather, appellant's family history merely set the stage for appellant's substance abuse (R. 3011).

SUMMARY OF THE ARGUMENT

1. The trial court did not err in refusing to strike the jury venire due to the Clerk of the Court's communications with the jury. The prospective venire was continuously advised that the trial judge would be instructing the jury on the law; moreover, the communication at issue occurred at the most preliminary stages of trial, prior to voir dire and not during deliberations, a critical stage of trial. As such, appellant was not prejudiced by the Clerk's preliminary communications with the jury.

By the same token, the trial court did not abuse its discretion in denying appellant's motion for individualized voir dire and motion for change of venue. The trial court was not required to question the jurors individually about the specific contents of news reports to which they might have been exposed. Furthermore, given the eighteen month period of time between the extensive media coverage and trial, and the non-prejudicial and factual nature of the news reports published, a change of venue was not required. This was affirmed by the ability to select a fair and impartial jury who could swear to follow the law and base their decision solely on the facts adduced at trial.

2. The trial court's denial of appellant's challenges for cause was not preserved for appellate review on several grounds. Additionally, appellant's challenges for cause against the various jurors were properly denied where the jurors indicated that they would follow the law and base their decision on the facts adduced at trial.

3. In the absence of any evidence that the jury heard the statement, "he appears to have a very strong case, and understood the "he" to mean the prosecutor, the trial court did not err in denying appellant's motion for mistrial.

4. Since there was no evidence that appellant "waved up" the victim prior to the murder, and since it is not criminal to "wave up" an officer, the trial court did not err in admitting this so-called similar fact evidence. Furthermore, since the testimony tended to establish that appellant would lure officers out of their police vehicles in order to provide appellant an opportunity to flee, the testimony was relevant as evidence of flight.

5. The photograph of the victim in full uniform was relevant because it demonstrated the cross belt used to hold the officer's revolver which the victim was wearing at the time of the shooting. The bullet that killed the officer broke through the cross-belt and was relevant to determining the distance from which the officer was shot. In any event, the photograph did not add anything which the jury did not already know, i.e. that the victim was a police officer killed in the line of duty, and the trial court took efforts to diminish any inflammatory impact which could result from the photo. Finally, any error was harmless beyond a reasonable doubt.

6. The jury was entitled reject appellant's hypothesis of innocence, that he did not intend to shoot and kill the officer. Thus, based on the evidence adduced at trial, there was

sufficient evidence on which to find that the murder was premeditated.

7. In the absence of a mandate requiring instruction on circumstantial evidence, the trial court did not err in refusing to instruct the jury on circumstantial evidence where the jury was instructed on the burden of proof and the presumption of innocence. The trial court's instruction on flight did nothing to exacerbate the lack of a circumstantial evidence instruction especially where, as here, the trial court advised the jury that "there may be reasons for [flight] which are fully consistent with innocence," followed by a list of possible reasons inconsistent with guilt.

8. Appellant's constitutional attack on the standard jury instruction of premeditated murder was not preserved for appellate review. On the merits, the trial court's instruction on premeditated murder was in accordance with the instruction set forth in the Florida Standard Jury Instructions; the definition of deliberation is already subsumed within the definition of killing with premeditation as provided for in the standard instructions.

9. Appellant does not have a constitutional right to enter into a plea agreement with the State. By the same token, it is within the State's sole discretion whether to seek punishment in the electric chair. As such, the trial court did not err in denying appellant's motion to prevent the State from seeking the death penalty.

10. Having determined that the juror would be able to weigh the mitigating and aggravating circumstances before recommending a sentence of life or death, and that the juror could follow the trial court's instructions, the trial court did not abuse its discretion in denying appellant's challenge for cause.

11. Since jeopardy did not attach to the murder charge under a felony murder theory by virtue of the prosecutor's stipulation not to proceed to trial on felony murder, the trial court was not precluded from finding that the murder was committed while engaged in the commission of a felony or flight therefrom.

12. Given the amount of time which transpired between the initial pursuit of appellant by the officer and the shooting of the officer, and the execution-style manner in which the killing was committed, the trial court did not err in finding that the murder was cold, calculated and premeditated.

13. The trial court did not err in instructing the jury on the three aggravating factors which were ultimately merged into one. Further, the trial court granted appellant's specially requested instruction which advised the jury that if they found that one or more of the aggravating factors overlapped, they could consider them as only one aggravating circumstance.

14. Appellant's constitutional challenge to the aggravating circumstance that the victim of the killing was a law enforcement officer is moot in light of Payne v Tennessee, 5 F.L.W. Fed. S708 (April 24, 1991); in any event, even under Booth v Maryland, 482

U.S. 496 (1987) this aggravating factor is valid since the victim's status as a law enforcement officer is a relevant circumstance of the offense. This aggravator is analogous to the enhancement of the crime of battery when the victim of the battery is a law enforcement officer in the line of duty.

15. The trial court did not err in denying appellant's request to instruct the jury on specific nonstatutory mitigating factors, especially where appellant advised the jury of what specific nonstatutory mitigating factors they could find.

16. Since it is not cruel and unusual punishment for a judge to impose the death penalty when the majority of the jury recommends a life sentence, it therefore follows that it is not cruel and unusual punishment for a judge to impose the death penalty when the jury recommends, by an eight to four vote, that death be imposed.

17. During the penalty phase, the trial court instructed the jury in accordance with the standard jury instructions; as such, it was not error to refuse to advise the jury that they could recommend life in the absence of any mitigating factors and the existence of aggravating factors.

18. The trial court's imposition of the death penalty is not disproportionate for sentences imposed in similar offenses; appellant murdered a police officer in the line of duty, and four aggravating factors and no mitigating factors were found.

19. In light of appellant's stipulation with the State regarding appellant's sentences on the non-capital felony

offenses, the trial court did not err in failing to prepare a sentencing guidelines scoresheet.

POINT I

THE TRIAL COURT DID NOT COMMIT ANY ERRORS DURING THE JURY SELECTION BY FAILING TO STRIKE THE VENIRE DUE TO COMMENTS MADE BY THE CLERK OF THE COURT, BY DENYING APPELLANT'S MOTION FOR INDIVIDUAL VOIR DIRE, AND BY DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

A. Motion to Strike Venire:

Appellant claims that reversible error occurred when the trial court refused to dismiss the jury venire upon learning that the clerk of the court, John Dunkle, had communicated with the prospective jury venire. Upon learning of the communication, the trial court conducted an inquiry of what transpired during the clerk's communications with the venire, and allowed questioning of witness Gordon Richstone (R. 802-823). Despite appellant's request, the trial court did, however, refuse to call in John Dunkle to inquire into what the jury venire was told. The trial court felt that, absent an accurate transcription of what was stated, he could not make an appropriate ruling on the matter (R. 800-802). Indeed, it appeared that the trial court was aware of the Clerk's practice of welcoming prospective jurors with opening remarks about the court system; the court noted that the Clerk emphasizes to the prospective jurors that the lawyers and the judge will provide them with true and accurate statements of the law (R. 801).

In cases involving impermissible contact with the jury or juror misconduct, the trial court must determine whether the material or contact raises serious questions of possible

prejudice to the litigants; if so, the trial court must determine whether the material has actually reached the jury and whether the contact interferes with the jurors' ability to render an impartial verdict. Alfonso v State, 443 So.2d 176 (Fla. 3d DCA 1983). The extent of the inquiry to be undertaken is within the trial court's discretion. Id.; Jones v State, 411 So.2d 165 (Fla.) cert. denied, 459 U.S. 891, 103 S.Ct. 189, 74 L.Ed.2d 153 (1982).

Based on said inquiry, the defendant bears the initial burden of establishing that the conduct was presumptively prejudicial; once the defendant meets this burden, the onus shifts to the state to demonstrate that the contact with the jurors was harmless. Amazon v State, 487 So.2d 8 (Fla.) cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986); See State v Hamilton, 574 So.2d 124 (Fla. 1991).

Applying the foregoing to the instant case, the trial court did not abuse its discretion in refusing to call John Dunkle, the clerk of the court, to testify, or in declaring a mistrial. Assuming for the sake of argument that appellant established that the conduct sub judice was presumptively prejudicial, any error was harmless. First, the contact at issue occurred at the preliminary stages of trial, before the commencement of voir dire. At the opening of voir dire, the trial court instructed the jury on the general legal principles applicable in a criminal trial (R. 860-861, 880, 1317-1319, 1351-1352, 1427-1429, 1552-1553, 1653, 1679-1681). Furthermore, both the prosecutor and

defense counsel extensively questioned the prospective jurors about their ability to be fair and impartial jurors (R. 941-963, 978-1064, 1068-1075, 1123-1142, 1148-1158, 1165-1210, 1224-1237, 1253-1274, 1287-1291, 1292-1301, 1352-1401, 1458-1500, 1505-1537, 1586-1641, 1696-1770). The jury again received instructions regarding the burden of proof, the presumption of innocence, and the right to silence after the jury was sworn and in the jury charge (R. 1791-1792). Moreover, the jury was given a written copy of the instructions to take back with them during their deliberations.

Secondly, the testimony of Gordon Richstone did not necessarily establish that appellant was prejudiced by the Clerk's communications. Richstone admitted that he did not hear all that the Clerk said (R. 814), nor did the Clerk specifically mention appellant's case (R. 810). Furthermore, according to Richstone, the Clerk did advise the prospective jurors that the judge would instruct the jury on the law (R. 805).

Thirdly, in the cases relied on by appellant, namely Holzapfel v State, 120 So.2d 195 (Fla. 1960) and McQuay v State, 352 So.2d 1276 (Fla. 1st DCA 1977), the unauthorized communications occurred during the jury's deliberations. This Court has recognized that jury deliberations are an especially sensitive portion of trial, State v Hamilton, 574 So.2d at 126. Contrarily, the communication which appellant complains of at bar occurred at the most preliminary stages of a trial which transgressed over about a two week period. As such, the trial

court's repeated instructions to the jury cured any prejudice which may have resulted from the Clerk's statements. See Peri v State, 426 So.2d 1021, 1025 (Fla. 1983). Further, given the passage of time, it is highly questionable whether any of the jurors remembered any of the Clerk's comments.

By the same token, jurors are presumed to follow the law as they are instructed by the trial court, Raulerson v Wainwright, 753 F.2d 869, 876 (11th Cir. 1985), and the jury instructions must be viewed in the context of the overall charge, Cupp v Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368, 373 (1973). Thus, when considered together with the fact that the communication occurred at the preliminary stages of trial, any impact which may have resulted from the Clerk's communications is virtually nil. As such, any error was harmless.

Finally, appellant's right to confrontation was not violated by the trial court's refusal to inquire of John Dunkle as to what he told the jury. As pointed out above, it was within the trial court's discretion to determine whether questioning of the Clerk was required. Alfonso v State, 443 So.2d at 178. Having determined that a transcription of the complained of communication would have been the best evidence, the trial court was not obliged to call in the Clerk. Contrary to appellant's assertions, questioning of John Dunkle was not required pursuant to the confrontation clause since the Sixth Amendment guarantees the right of the accused to confront the witnesses against him. In the scenario at bar, Dunkle was not a witness against the

appellant, and the purpose of the trial court's inquiry did not necessitate an inquiry of the Clerk. The inquiry which the trial court did conduct was adequate to a determination of whether appellant was prejudiced by the communication. Having found that no prejudice resulted, the trial court did not err in refusing to declare a mistrial.

B. Individual Voir Dire:

Appellant argues that, based on the pretrial publicity which appellant's case received, the trial court erred in refusing to individually question the prospective jurors who had knowledge of the case, about the specific details of what they knew. Appellant acknowledges that Mu'Min v Virginia, 500 U.S. ___, 111 S.Ct. ___, 114 L.Ed.2d 493 (1991) does not require that jurors be questioned about the specific contents of news reports to which they have been exposed. Nonetheless, appellant urges this Court to hold that individual questioning about a juror's specific knowledge of a case be required where the case has received extensive pretrial publicity. The State maintains that Florida law has never required individual questioning of jurors about the specific contents of news reports where a case has received extensive pretrial publicity, and that the holding of Mu'Min is essentially in line with Florida law.

Under Florida law, the trial court is entrusted with broad discretion in determining whether to allow individual voir dire. Randolph v State, 562 So.2d 331 (Fla.) cert. denied, ___ U.S. ___, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990); Davis v State, 461

So.2d 67 (Fla. 1984) cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985); Stone v State, 378 So.2d 765 (Fla.) cert. denied, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980). Moreover, the fact that a prospective juror has knowledge of the case as a result of pretrial publicity does not necessarily indicate that the juror is not impartial. Murphy v Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Rather, the proper focus is whether the juror's knowledge of the case creates prejudice against the accused. Davis v State, 461 So.2d at 69.

> The test for determining a juror's competency is whether that juror can lay aside any prejudice or bias and decide the case solely on the evidence presented and the instructions given.

Stano v State, 473 So.2d 1282, 1285 (Fla. 1985) cert. denied, 474 U.S. 1093, 106 S.Ct. 879, 88 L.Ed.2d 907 (1986).

Thus, the existing law in Florida prior to Mu'Min recognized that individualized voir dire to determine a juror's specific knowledge of a case from pretrial publicity, is not per se mandated in every case which has received media exposure.[4] Indeed, while the trial court in Cummings v Dugger, 862 F.2d 1504 (11th Cir.) cert. denied, 490 U.S. 111, 109 S.Ct. 3169, 104 L.Ed.2d 1031 (1989), conducted individual voir dire, the trial

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[4] In Mu'Min, the United States Supreme Court specifically noted that the Eleventh Circuit Court of Appeals, which encompasses Florida, does not mandate individualized questioning into a jurors specific knowledge of news reports of a case to which the juror has been exposed. 114 L.Ed.2d at 506. While not binding in Florida, federal decisions are highly persuasive in deciding Florida law. See Moore v State, 452 So.2d 559 (Fla. 1984); Brown v Brown, 432 So.2d 704 (Fla. 3d DCA 1983).

court asked jurors only two questions: whether the juror had heard anything about this particular case or read about it in the newspaper, and whether the juror could base any verdict the juror rendered solely on the testimony presented in court without any outside influence from anything the juror might have read in the newspaper or seen on television. This questioning by the trial court was not found to have been constitutionally inadequate.

The questioning upheld in Cummings was similar to the questioning conducted by the trial court sub judice. At the hearing on appellant's pretrial motion for individual voir dire, the trial court indicated that, upon determining whether the jurors had been exposed to the case through the media, he would advise the jurors not to repeat what they had heard; the trial court then explained that he would inquire whether the jurors could put from their minds anything they heard about the case and base their decision on the evidence adduced at trial (R. 215). The trial judge concluded by noting that a juror might be called for individualized questioning if necessary (R. 215). This was the procedure which was subsequently employed by the trial court during voir dire (R. 851, 869, 887, 1316-1317, 1325-1326, 1328, 1423-1424, 1547=1548, 1658, 1662-1663). Hence, insofar as the questioning employed by the trial court at bar was similar to the questioning employed by the trial court in Cummings, the conduct of voir dire sub judice was not constitutionally infirm. See Mu'Min v Virginia, supra.

Furthermore, the vast majority of pretrial publicity received by appellant's case occurred around the time the murder was committed, spanning from August, 1988 through October, 1988 (See Xerox copies of exhibits, pages 35-68), approximately one and a half years before appellant's trial took place. Only one brief newspaper article regarding the case was printed around the time of trial, which article merely indicated that a mistrial had been granted based on the trial court's statement to prospective jurors regarding the appellate process (See Xerox copies of exhibits, page 33). By the same token, the vast majority of newspaper articles regarding appellant's case were of a factual nature.

Appellant's cursory synopsis of media coverage was not highly prejudicial, as appellant contends now on appeal (See A.B. page 24).[5] The newspaper articles in question did not add anything which the jurors would learn about the case through voir dire. For example, the jurors obviously had knowledge that appellant was a prison escapee since this was one of the charges to be tried before the jury at the instant trial (R. 854); in fact, defense counsel concededly advised the jurors during voir dire that appellant had a criminal record and was serving a term of imprisonment by virtue of the escape charge (R. 1015-1016,

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[5] At the hearing on appellant's motion for change of venue, appellant admitted that the media coverage had not been inflammatory, only that it had been extensive (R. 207).

1184, 1262-1263, 1506, 1630, 1725).[6] Further, in light of the fact that appellant was being tried for a first degree murder charge, which appellant admitted he committed as part of his defense, appellant can hardly claim prejudice from news accounts stating that appellant was the prime suspect in the shooting or that he was a violent criminal! Indeed, one article recognized that appellant did not have a history of violent crimes (Xerox copies of exhibits, page 35).

Appellant also argues that individual voir dire was necessary because not all the jurors had an accurate recollection of the case (A.B. 28). However, the example appellant relies on in support of his proposition, i.e. a juror who recalled reading that appellant had mental problems, is a poor one since the trial court individually questioned this juror at a side bar about the specific contents of what he had read (R. 1412-1414). Based upon the juror's inability to put aside what he might have heard about the case, the juror was excused (R. 1413-1414).

In sum, appellant has failed to demonstrate how the trial court's refusal to question jurors individually about their knowledge of the case denied appellant a fair trial. Neither Mu'Min nor its Florida predecessors require individual questioning of jurors to determine what they know of a case through pretrial publicity, as a matter of law. The question of

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[6] In appellant's trial testimony, appellant stated that he had been convicted of at least 28 burglaries, even though appellant admitted that he had committed many more burglaries than those for which he was convicted (R. 2282, 2289).

individual voir dire is within the trial court's discretion, and on this record, appellant has failed to establish an abuse of same. Appellant was not denied of a fair and impartial jury, thereby requiring affirmance of appellant's conviction.

C. Motion to Change Venue:

As with the case of individual voir dire, the granting of a motion for change of venue is within the trial court's discretion, which ruling denying same will not be reversed on appeal absent a palpable abuse of discretion. Davis v State, 461 So.2d at 69. A trial judge may first attempt to empanel a jury comprised of persons who can decide the case based solely upon the evidence presented in court, before denying or granting a motion for change of venue. Lozano v State, 16 F.L.W. D1673 (Fla. 3d DCA, June 25, 1991); Copeland v State, 457 So.2d 1012 (Fla. 1984) cert. denied, 471 U.S. 1030, 105 S.Ct. 2051, 85 L.Ed.2d 324 (1985). Thus, in considering whether to grant a motion to change venue, the trial court must determine:

> ...[W]hether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

Manning v State, 378 So.2d 274 at 276 (Fla. 1979). Further, it is the defendant who bears the burden of coming forward and showing that the setting of the trial is inherently prejudicial because of the general atmosphere and the state of mind of the inhabitants of the community. Id.

Applying the foregoing to the facts of the instant case, the trial court clearly did not abuse its discretion in denying appellant's motion to change venue. The trial court held two hearings on the motion for change of venue (R. 205-212, 791-792).[7] At the hearings, appellant submitted various news articles regarding appellant's case in support of the motion (R. 206, 791). However, the fact that jurors have knowledge of the case as a result of pretrial publicity does not, by itself, require a change of venue. Bundy v State, 471 So.2d 9 (Fla. 1985) cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986). Realizing this, the trial court chose to deny the motion pending the ability to find jurors who, despite their knowledge of the case, could be open minded and yield to the evidence and the law presented in court (R. 208-209). The trial court's actions were fully in accord with the law. Id.; Davis v State, 461 So.2d at 69; Copeland v State, 457 So.2d 1012.

Based on the outcome of jury selection, it is clear that a change of venue was not necessary. As pointed out in the discussion relating to individualized voir dire, the majority of the news coverage regarding the instant case occurred at the time of the offense, in August, 1988, while appellant's trial occurred approximately eighteen months later (See xerox copies of exhibits, pages 35-68). The only article appearing in the local

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[7] The first hearing occurred prior to the commencement of the first trial of the instant cause, which trial was declared a mistrial.

newspaper around the time of appellant's trial briefly explained that a motion for mistrial had been granted in the first trial based on the trial court's explanation of the appellate process (Xerox copies of exhibits, page 33).

Of the jurors who did ultimately serve on appellant's case, only six of the jurors, including one alternate, unequivocally had heard about the case through the media (R. 960, 961, 1255-1256, 1472, 1587, 1768); one of the jurors was not sure if she had heard about appellant's case (R. 959-961, 993-994).[8] Further, only three of the jurors, including the alternate, had read about the case recently, while the remaining three had heard about the case when it happened approximately eighteen months before (R. 960, 961, 993, 1255-1256, 1473, 1587, 1768). Regardless of what they had heard through pretrial publicity, all six of the jurors indicated that they could put aside any knowledge of the case and base their verdict solely on the evidence presented in court (R. 961, 1007-1008, 1254-1256, 1473, 1525, 1587, 1605, 1724, 1726).

An examination of the voir dire sub judice reveals that the trial court readily excused any juror who did not unequivocally assert that he or she could be open minded and base their verdict solely on the evidence presented in court. Moreover, the vast

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[8] Juror Lowe did not state whether she had heard of the case through the media, but she did state that she knew the victim's father from having worked for him over ten years before; regardless, Ms. Lowe indicated that she could nonetheless be fair and impartial (R. 892-895).

majority of jurors who were excused for cause were excused for reasons other than exposure to pretrial publicity, i.e. length of trial, views on the death penalty, family and business commitments, illness, or bias due to fact that victim was a police officer (See for example R. 874-875, 890-903, 964-969, 970, 1083-1088, 1328-1341).

Thus, based on what transpired during the course of jury selection, the manner in which it was conducted and the outcome of same, appellant has failed to demonstrate that the community was so pervasively exposed to the circumstances of the incident that prejudice, bias and preconceived notions were the natural result, such that a change of venue was mandated. Questioning jurors about the contents of news reports to which they may have been exposed would not have changed this result. As such, the trial court did not abuse its discretion in denying appellant's motion for change of venue. In sum, the whole jury selection process employed by the trial court at bar comported with the requirements imposed by the Florida and United States Constitution.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S CHALLENGES FOR CAUSE.

Appellant contests the trial court's denial of appellant's various challenges for cause. However, appellee maintains that this instant issue has not been preserved in whole or in part on two grounds.

First, at trial at the close of voir dire, appellant failed to indicate which specific juror on the panel he would have stricken absent the trial court's denial of the challenge for cause. Under this Court's opinion in Trotter v State, 16 F.L.W. S251 (Fla. April 4, 1991), this Court outlined the procedure to be followed in order to preserve for review the denial of a challenge for cause.

> Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." *Pentecost v State*, 545 So.2d 861, 863 n. 1 (Fla. 1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted.

(Emphasis added). In the instant case, appellant stated that he found the entire panel unacceptable, on the following grounds:

MR. BIRCH: At this time we would renew our motion to change venue.

We would renew our motion to strike the venire.

We would renew our motion for an individual voir dire on the issue of publicity and the knowledge of the prospective jurors.

We would renew all our challenges for cause and we would renew our request for additional peremptory challenges.

In this Court's consideration of those motions and the renewed request for additional peremptory challenges, I would like to advise the Court that one of the primary reasons we had proceeded as we had with our peremptory challenges is, since we initially sought to strike the entire venire, we knew when that was denied that we had to make the best of a bad situation.

Therefore, in exercising our challenges for cause, we could not immediately strike anyone who was challenged for cause knowing that someone else may come along that was frankly worse.

As a result, we proceeded in the manner we felt would get us a jury that we felt was less unacceptable, if you will.

THE COURT: Less unacceptable?

MR. BIRCH: Yes, Judge.

The jurors we now have are not acceptable. That is why we are renewing all of these motions and a request for additional peremptory challenges, for all the reasons previously stated and everything I have just stated

(R. 1773-1775). Thus pursuant to Trotter, given appellant's failure to specify which juror was unacceptable by virtue of the trial court's denial of appellant's challenge for cause, appellant has failed to preserve this issue. Indeed, under the argument advanced by appellant at trial, nothing short of having

stricken the entire jury venire would have rendered the jury panel acceptable to appellant, regardless of whether appellant had been granted additional peremptories or his challenges for cause.

Secondly, the grounds for the challenges for cause raised by appellant now on appeal as to jurors Miller and Mosier are different from the grounds on which they were challenged at trial, and are therefore procedurally barred from appellate review. At trial, appellant challenged these jurors solely on the basis of their exposure to pretrial publicity (R. 1411). In this proceeding however, appellant claims that juror Miller should have been stricken because she was equivocal in her ability to be fair and impartial; appellant similarly contends that juror Mosier was unacceptable because he would automatically find a premeditated intent to kill by the mere act of shooting another person (A.B. 35, 40). Since the grounds raised for exercising the challenges at trial are different from the grounds now asserted on appeal, appellant has not preserved this issue for appellate review. Hitchcock v State, 578 So.2d 685, 689 n. 4 (Fla. 1990); See Sapp v State, 411 So.2d 363, 364 (Fla. 4th DCA 1982).

On the merits, the trial court's granting of a challenge for cause is within the trial courts discretion, and the denial of same will not be reversed on appeal unless the error is manifest. Davis v State, 461 So.2d 67. The broad discretion accorded the trial court is based on the fact that the trial court is in the best position to determine juror bias:

> The trial court hears and sees the prospective juror and has the ability to make an assessment of the individual's candor and the probable certainty of his answers to critical questions presented to him.

State v Williams, 465 So.2d 1229, at 1231 (Fla. 1985).

As such, the trial court did not abuse its discretion in refusing to strike for cause those jurors who had knowledge of the case through pretrial publicity. These jurors stated that they could be fair and impartial and would base their verdict on the evidence presented at trial, despite their exposure to the case pretrial. Smith v State, 463 So.2d 542. (See Point I, infra).

By the same token, juror Miller's statement that she would "[d]o [her] best" to hold the State to its burden of proving premeditated murder, does not by necessity disqualify her as a juror. Noe v State, 16 F.L.W. D2040 (Fla. 1st DCA, August 7, 1991); Hawthorne v State, 399 So.2d 1088 (Fla. 1st DCA 1981). Based on Ms. Miller's remaining answers on voir dire, it is evident that she would hold the state to its burden of proof, that she would be fair and impartial, and would follow the trial court's instructions (R. 1030-1031, 1040-1042, 1069-1070).[9]

The same holds true for juror Mosier, as evidenced by subsequent questioning by appellant:

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[9] Appellee would note that juror Wieronski gave the same answer as Ms. Miller, i.e. "I'll do my best" (R. 1043), yet appellant has not challenged her either at trial or in this proceeding.

> MR. BIRCH: You would feel if I intentionally pushed him over the cliff it must have been with a premeditated intent?
>
> MS. LEE: If there's no other evidence presented otherwise, I would say, yes.
>
> MR. BIRCH: Fair enough.
> Mr. Mosier?
>
> MR. MOSIER: No, I think I would have to know why. I would have to know what is in his mind.

(R. 1038-1039). (See also R. 1043-1044, 1056-1057).

As to juror Kizis, it is clear from the questioning that this juror was not predisposed to relieving the State of its burden of proving appellant's mental state at the time of the shooting. Rather, the juror's preoccupation was with determining what the appellant's state of mind was at the time of the shooting, since "...you don't know what is going on in people's minds" (R. 1080). Thus, having been instructed by the trial court that it was the jurors' decision to determine what was in appellant's mind based on the surrounding circumstances, Mr. Kizis' response that he could decide what he thought was in a person's mind indicates that Mr. Kizis concern was determining the issue of premeditation. Having observed Mr. Kizis' demeanor and his responses to questions, the trial court did not abuse its discretion in denying the challenge for cause.

Finally, appellant has failed to demonstrate reversible error in the trial court's refusal to strike juror Wolfe. Juror Wolfe's response that he did not know that drug use could be a

defense, but that he would consider drugs as a defense now that he knew it was a legal defense (R. 1230), indicates that Mr. Wolfe could follow the law as instructed by the trial court. Indeed, Mr. Wolfe stated that he could conceive of a scenario wherein someone could consume so much alcohol and/or drugs to the extent that they would not be able to form the intent to kill, and that he would consider same (R. 1232). Subsequent to the colloquy outlined by appellant in his brief, appellant continued questioning Mr. Wolfe on the issue of premeditation and drug use (R. 1233-1236). These subsequent questions and responses by juror Wolfe further bolsters the trial court's decision to refuse to strike Mr. Wolfe for cause.

In Penn v State, 574 So.2d 1079 (Fla. 1991), the defendant claimed that he had murdered his mother while under the influence of drugs. A prospective juror stated that she did not have much sympathy for people who had voluntary chemical dependencies; she acknowledged, however, that a person could be so intoxicated so as to not know what he was doing and stated that she would follow the court's instructions. Thus, given this juror's assertion that she would base her decision on the evidence and instructions, this Court found that the trial court did not abuse its discretion in denying the defendant's challenge for cause.

Similarly sub judice, Mr. Wolfe's dislike of drugs per se did not render him an incompetent juror. His subsequent statements saying that he would follow the courts instructions upon learning that it was a legal defense supports the trial

court's denial of appellant's challenge for cause. Appellee would also note that given the manner in which appellant phrased some of his questions, he was practically guaranteed a "wrong" answer from the juror. See Birch, Legal Issues of Voir Dire, Criminal Law Section Newsletter, June/July, 1991, at 12-16. Realizing this, the trial court intervened and further questioned juror Wolfe (R. 1232-1233). Having determined that the juror could be fair and impartial, the trial court did not abuse its discretion in denying appellant's challenge for cause.

Appellant's conviction must therefore be affirmed.

POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL WHERE THE TRIAL COURT'S STATEMENT AT A SIDE BAR THAT "HE WOULD APPEAR TO HAVE A VERY STRONG CASE" WAS NOT HEARD BY THE JURY.

Appellant's contention that the trial court should have granted a mistrial based on his comment at a side bar that, "he would appear to have a very strong case" presupposes two assumptions, both of which are refuted by the record. One assumption is that the jury heard the comment, and the second assumption is that the jury understood that "he" referred to the State/prosecutor, (See A.B. page 45).

While a judge's comments regarding the judge's views of the weight of the evidence or the guilt of an accused may destroy the impartiality of a trial, this determination must be considered in light of the factual circumstances under which the comments were made. Wilson v State, 305 So.2d 50 (Fla. 3d DCA 1975).

Under the circumstances of the instant case, the trial court's statement that "he would appear to have a very strong case" did not destroy the trial court's appearance of impartiality. The statement in question was made during the course of a side bar conference regarding the admission of certain evidence (R. 2062). Upon being advised that co-counsel heard the comment, the trial court questioned the jurors to determine whether they had heard any statements made during the bench conferences with counsel (R. 2132). None of the jurors indicated that they had heard anything which had been said at

side bar (R. 2132). Moreover, the prosecutor assisting in the case, who was seated closer to the bench than co-counsel, stated that he had not heard anything either (R. 2129). In addition, the trial court conducted the side bar so as to discourage the jurors from overhearing any comments made at the bench (R. 2127).[10] Thus, given the fact that the comment at issue was made outside of the jury's presence, appellant has failed to demonstrate reversible error. Fasenmyer v State, 383 So.2d 706 (Fla. 1st DCA 1980); Villageliu v State, 347 So.2d 445 (Fla. 3d DCA 1977).

The axiom that "[r]eversible error cannot be predicated on conjecture," Sullivan v State, 303 So.2d 632 (Fla. 1974) citing Singer v State, 109 So.2d 7 (Fla. 1959) strongly applies to the instant case. In the absence of any evidence that the jury heard the comment and that the jury understood the "he" to mean the State and/or prosecutor, appellant's contentions that the comments amount to reversible error are premised on mere

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[10] In denying appellant's motion for mistrial, the trial court stated:

> My ruling is as follows: As to the bench conferences, I can't attest to having done this every time, but I usually keep my mouth or my lips or hold something up in an effort to sheild myself from what I say from the jury. I always point away from the jury because the Court Reporter is standing to my right on the same level of the bench and my voice projects perhaps fifteen degrees to the right away from the jury.

(R. 2127).

speculation and conjecture. Accordingly, appellant's conviction must be affirmed.

POINT IV

THE TRIAL COURT DID NOT ERR IN ADMITTING OFFICER DONOVAN'S TESTIMONY THAT APPELLANT "WAVED HIM UP" WHILE ATTEMPTING TO EFFECT A TRAFFIC STOP OF APPELLANT.

Appellant claims that Officer Donovan's testimony that appellant "waved him up" while attempting to effect a traffic stop of appellant was prejudicial similar fact evidence, and was therefore inadmissible. Appellant's argument is void of merit for various reasons.

Under 90.404(2)(a) Fla. Stat. (1989), similar fact evidence of other crimes, wrongs or acts is inadmissible where offered solely to prove bad character or propensity. Thus, the admission of so-called "bad character" evidence presumes that the evidence in question pertains to an unlawful act or somehow impugns the defendant's character. However the evidence in question sub judice was not inadmissible "bad character" evidence where the testimony did not pertain to an unlawful act in and of itself, nor did the evidence have the effect of impugning appellant's character.

Appellant concedes that there is nothing unlawful about appellant having waved forward Officer Donovan. By the same token, appellant concedes that there is no similarity between appellant's actions in waving down Officer Donovan and the events leading up to Brian Chappell's murder (A.B. 50, 51), Compare §90.404(2)(a) Fla. Stat. (1989). Indeed, there is no evidence that appellant had at any time motioned for Officer Chappell to

come forward when he stopped appellant for speeding, just prior to the Officer's demise; in closing, the prosecutor argued that it was the victim, not appellant, who may have "waved up" the appellant (R. 2569). Despite this lack of evidence, appellant asserts that the implication of Officer Donovan's testimony is that, if appellant waved down Officer Donovan, he probably did the same thing prior to shooting the victim (A.B. 50).

In light of the absence of any evidence that appellant did not wave forward Officer Chappell prior to shooting him, there was no error in admitting Officer Donovan's testimony into evidence. Cf. Sarvis v State, 465 So.2d 573 (Fla. 1st DCA 1985). The trial court's ruling admitting same into evidence is further bolstered by the fact that there is nothing inherently illegal in "waving up" an officer. Jackson v State, 498 So.2d 406, 410 (Fla. 1986); Sastre v State, 486 So.2d 1137 (Fla. 3d DCA 1986).

In any event, the appellant's actions when Officer Donovan attempted to effect a traffic stop was relevant as evidence of flight. Highsmith v State, 580 So.2d 234 (Fla. 1st DCA 1991); West v State, 579 So.2d 288 (Fla. 3d DCA 1991); Duest v State, 555 So.2d 849, 852 (Fla. 1990); Jackson v State, 498 So.2d at 410. At the time the incident with Officer Donovan occurred, appellant had just forcibly taken the Nelson's automobile while police were in active pursuit of appellant. As such, the implication of the testimony in question was that appellant waved Officer Donovan forward to prompt the officer into exiting his vehicle, so as to provide appellant the opportunity to further

escape from the police. In point of fact, appellant himself testified that after he had escaped from prison, but prior to the murder, he was in a vehicle and was approached by an officer in a marked police car; appellant waited for the officer to alight from his vehicle, at which time appellant fled (R. 2365-2366).

As a result, Officer Donovan's testimony was not inadmissible similar fact evidence, and was admissible as evidence of appellant's flight. Moreover, appellant can hardly claim prejudice from the admission of the evidence since there was nothing inherently unlawful in waving the officer forward, and there was no evidence that appellant had acted in a similar fashion prior to shooting the victim. Thus, assuming that error resulted from the admission of the statement in question, it was harmless.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING A PHOTOGRAPH OF THE VICTIM IN POLICE UNIFORM INTO EVIDENCE.

Appellant claims that pursuant to Booth v Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) and South Carolina v Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), the trial court reversibly erred in admitting a photograph depicting the victim in full police uniform, into evidence. Appellee disagrees.

The test for admissibility of photographs is relevance, and the trial court's ruling admitting them into evidence will not be disturbed on appeal absent an abuse of discretion. Wilson v State, 436 So.2d 908 (Fla. 1983). Appellant's willingness to stipulate to the victim's identity does not render the photograph inadmissible since the State still has the burden of establishing first degree murder beyond a reasonable doubt. Engle v State, 438 So.2d 803 (Fla. 1983) cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984).

In the discussion which ensued following appellant's objection to the photograph in question, the prosecutor advised the trial court that the other photographs depicting the victim in its possession did not show Officer Chappell's head (R. 1843). The photograph at issue was also relevant because it showed the manner in which the officer was uniformed at the time of the shooting, especially with regards to the holster, depicted by a

leather strap across the victim's shoulder (R. 2024, 2039). The style of the holster and the location of the officer's weapon, in turn, were relevant to the issue of premeditation.

The testimony at trial established that at the time of the shooting, Officer Chappell still had his gun in his holster, though the holster was unsnapped. This testimony revealed that the victim did not have an opportunity to defend himself from appellant, and that death was imminent. Secondly, because the bullet entered the victim through the holster, causing it to snap (R. 2039), the location of the holster on the victim was relevant to determining the distance from which the officer was shot (R. 2170-2171, 2177-2178).

Thus, the relevance of the objectionable photograph was substantially outweighed by any prejudicial impact it may have had on the jury, §90.403 Fla. Stat. (1989). Contrary to appellant's assertions, the photograph at issue did not unduly prejudice the jury. The fact that the victim was portrayed in the photograph in full uniform did not add anything about the victim that the jury did not already know and which was not in dispute, i.e. the fact that the victim was a police officer killed by appellant in the line of duty. Moreover, the trial court instructed the prosecutor not to place undue emphasis on the photograph (R. 1844). It will not be presumed that jurors will become so inflamed by a photograph that they will find the accused guilty in the absence of evidence of guilt. Henderson v State, 463 So.2d 196, 200 (Fla. 1986) cert. denied, 473 U.S. 916

(Fla. 1986). Thus, any victim impact evidence which may have resulted from the admission of the photograph into evidence was minimal. Duest v Dugger, 555 So.2d 849, 852 (Fla. 1990).

In any event, assuming that the admission of the photograph in question was erroneous, any error was harmless beyond a reasonable doubt. State v DiGuilio, 491 So.2d 1129 (Fla. 1986). The permissible evidence on which the jury could have relied on in finding appellant guilty was overwhelming, especially in light of appellant's concession that he had killed the victim. Hence, the only dispute was whether the murder was premeditated. On this issue, and excluding the evidence regarding appellant's evasive actions following the murder, the jury could have relied on the following permissible evidence in finding appellant guilty: the victim followed appellant down Southern Boulevard for approximately a mile and a quarter before he succeeded in stopping appellant (R. 1839, 1878-1879, 2074); prior to approaching appellant in his truck, the victim first dismounted from his vehicle and removed his helmet (R. 1919); appellant waited to shoot the victim until the officer had approached the truck and was in close range: the state's expert estimated that the officer was more than three feet away from appellant when shot, while other evidence established that the victim was within the length of the truck when shot, approximately 2-3 feet away from appellant (R. 1894-1895, 1907, 1919, 2048, 2067-2069, 2073, 2172); the victim was shot with a nine millimeter semiautomatic weapon which was kept in a holster (R. 1867); in order to shoot

the weapon, appellant first had to remove it from its holster, pull back the slide to load the chamber, cock the hammer and pull the trigger (R. 1868-1869, 2159-2161); the procedure undertaken to shoot the gun required use of both hands (R. 1868-1869); appellant killed the officer with a single gun shot through the heart (R. 1021, 2023, 2038-2039, 2245-2249).

As a result, based on the entire record, the alleged impermissible evidence could not have affected the jury's guilty verdict. As such, the alleged error in admitting the photograph was harmless.

POINT VI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL FOR FIRST DEGREE MURDER WHERE THERE WAS PRIMA FACIE EVIDENCE TO SUPPORT A FINDING OF PREMEDITATION.

Contrary to appellant's assertions, there was substantial competent evidence to prove premeditated murder. As such, the trial court did not err in failing to grant appellant's motions for judgment of acquittal at the close of the State's case and at the close of all the evidence.

Appellee agrees with appellant as to the standard to be applied in circumstantial evidence cases, as enunciated by this Court in Law v State, 559 So.2d 187 (Fla. 1990), (A.B. at 58). However, the State would emphasize that, whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial competent evidence to support the jury verdict, the verdict will not be reversed on appeal. Cochran v State, 547 So.2d 928 (Fla. 1989). Thus, a defendant's interpretation of circumstantial evidence does not have to be completely accepted unless it is specifically contradicted by the State, Id. at 930; rather, the jury may assess the defendant's credibility, and if a reasonable basis exists to reject the defendant's testimony, the motion for judgment of acquittal should be denied.

As a threshold matter, the evidence presented by the State in its case in chief was sufficient to support a finding of premeditation. At the time that the victim attempted to

effectuate the traffic stop of appellant, appellant was an escapee from prison and was in possession of stolen goods. Once Brian Chappell was alerted to the fact that appellant was driving in excess of the speed limit, he followed appellant for a distance of approximately one and a quarter miles before he succeeded in stopping appellant (R. 1839, 1878-1879, 2074); during this time, the sirens and lights of the officer's motorcycle were activated (R. 1877, 1890, 1915, 1962). Appellant was observing the officer from his rear view mirror (R. 1916). Prior to approaching appellant in his truck, the victim first dismounted from his vehicle and removed his helmet (R. 1919). Appellant waited to shoot the victim until the officer had approached the truck and was in close range; the State's expert estimated that the officer was more than three feet away from appellant when shot; however other witnesses on the scene stated that the victim was within the length of the truck when shot, approximately two to three feet away from appellant (R. 1894-1895, 1907, 1919, 2048, 2067-2069, 2073, 2172). The victim was taken completely by surprise when shot and was not given an opportunity to defend himself, as evidenced by the fact that the victim's weapon was still in its holster (R. 2024).

The victim was shot with a nine millimeter semiautomatic weapon which was kept in a holster (R. 1867). In order to shoot the weapon, appellant first had to remove the gun from its holster, pull back the slide to load the chamber, cock the hammer and pull the trigger (R. 1868-1869, 2159-2161); the procedure

employed to shoot the gun required use of both hands (R. 1868-1869). Moreover, appellant killed the officer with a single gun shot through the heart (R. 1021, 2023, 2038-2039, 2245-2249).

Appellant sped off in the truck after the shooting (R. 1841, 1897-1898, 1922, 1939-1941, 1986, 2029-2030). Upon making his getaway, appellant ridded himself of the .38 revolver which he had stolen from the Tronnes' home together with the nine millimeter semiautomatic, to avoid being traced to the murder weapon (R. 2152, 2154). Appellant additionally and immediately ridded himself of the truck used in the shooting, by driving it into a canal (R. 2055, 2048-2051, 2148-2150). Further, Ralph Valdez testified that appellant did not appear to be under the influence of narcotics at the time (R. 2153).

Based on the foregoing evidence, there was sufficient evidence in which to find appellant guilty of premeditated murder. Bello v State, 547 So.2d 914 (Fla. 1989); Hill v State, 477 So.2d 553 (Fla. 1985); Suarez v State, 481 So.2d 1201 (Fla. 1985) cert. denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1984); See Jones v State, 580 So.2d 143 (Fla. 1991).

Appellant's testimony did not change this result, since the jury had a reasonable basis to reject appellant's self-serving testimony that he shot the victim in a panic, without premeditation (R. 2391-2392, 2509-2512). Appellant admitted that he had previously been convicted of twenty eight offenses, although he had committed hundreds of burglaries (R. 2282, 2288-2289, 2484-2485). Appellant admitted that he lied to police

when, upon his arrest for the instant offense, he gave police a statement denying that he committed the murder (R. 2480-2481, 2518-2522). Appellant also admitted that he lied when he told his niece that Cholo had committed the murder (R. 2397, 2512-2513, 2515-1517).

During appellant's crime spree, two other police officers had attempted to effect traffic stops of appellant. Each time before driving off, appellant would wait for the officers to begin alighting from their vehicle (R. 2365-2366, 2472-2475). Yet, despite the relatively long amount of time appellant would have had to escape from Officer Chappell between the time the officer initially stopped appellant, dismounted his motorcycle, removed his helmet and began to approach appellant's vehicle, appellant chose to shoot the victim instead (R. 2508-2512).

Appellant also admitted that at the time he armed himself with the gun during the burglary, he did so with the intent to use it if the need arose (R. 2503-2504, 2530). Appellant also admitted that, although he was not armed when he threatened to shoot Tami Nelson and Officer Palmer, appellant could not say whether he would have shot them had he been armed (R. 2525-2526).

Thus, appellant's testimony negating any premeditated intent to kill the victim could have reasonably been discarded by the jury. Based on the circumstantial evidence standard, neither the judge nor jury was required to wholeheartedly accept as true appellant's version of events. As a result, there was substantial competent evidence to sustain the jury's verdict

finding appellant guilty of first degree murder, thereby justifying the trial court's denial of appellant's motion for judgment of acquittal. Holton v State, 573 So.2d 284 (Fla. 1990); Stone v State, 564 So.2d 225 (Fla. 4th DCA 1990).

POINT VII

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE IN ACCORDANCE WITH APPELLANT'S REQUESTED INSTRUCTION.

Appellant alleges that the trial court erred in refusing to instruct the jury on circumstantial evidence, in accordance with the special instruction requested by appellant. Appellant's argument is premised on the contention that, given appellant's testimony negating any premeditated intent in killing Officer Chappell, the jury was bound to accept appellant's hypothesis of innocence. However, as pointed out in Point VI, supra, the State presented a prima facie case of premeditated murder, and the jury was free to reject appellant's testimony to the contrary based on its assessment of appellant's credibility. Thus, the premise underlying appellant's argument is erroneous, and no error has been established.

This Court has long ago abolished the requirement that the jury be instructed on circumstantial evidence, finding that any such instruction is unnecessary where the jury is instructed on reasonable doubt and the burden of proof. In re Florida Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981); See Holland v United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954). This finding has consistently been upheld. White v State, 446 So.2d 1031, 1035 (Fla. 1984); Kelley v State, 543 So.2d 286 (Fla. 1st DCA 1989).

The trial court sub judice instructed the jury in accordance with the standard jury instructions on premeditated murder, the burden of proof, and reasonable doubt (R. 2625-2626, 2642-2644). The trial court also advised the jury that,

> "they [would] consider the circumstances surrounding the killing in deciding of the killing was first-degree murder or murder in the second degree or manslaughter, or whether the killing was excusable or resulted from the justifiable use of deadly force."

(R. 2623-2624). This instruction is in accordance with the law, and is merely a broad variation of the standard instruction defining "killing with premeditation." Fla. Standard Jury Instructions, (Crim.) §782.04(1)(a) Fla. Stat. Thus, it was not error to refuse to tell the jury that they had to accept appellant's hypothesis of innocence. Kaufman v State, 400 So.2d 1273 (Fla. 4th DCA 1981). This is further bolstered by appellant's contentions during the charge conference that his requested instruction was relevant to the definition of burglary (R. 2447).

If appellant's contentions were true, i.e. that the jury must be instructed on circumstantial evidence whenever that type of evidence is relied upon in establishing premeditation (See A.B. at 61), then the circumstantial evidence instruction would be a standard instruction in all offenses where the State must prove intent.

> Intent, being a state of mind, is often not subject to direct proof and can only be inferred from circumstances.

Jones v State, 192 So.2d 285, 286 (Fla. 3d DCA 1966). Hence, in the absence of any requirement mandating such an instruction, it was not reversible error to deny appellant's requested instruction.

Contrary to appellant's assertions, the trial court's instruction on flight did nothing further to exacerbate its refusal to instruct on circumstantial evidence (R. 2647-2648). This is especially true in light of the trial court's admonishment that, "there may be reasons for [flight] which are fully consistent with innocence," followed by a list of possible reasons inconsistent with guilt (R. 2648).

When read in their full context, see Cupp v Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368, 373 (1973), there was no error in the instructions as given to the jury. In sum, appellant has failed to demonstrate reversible error on this issue, requiring an affirmance of appellant's conviction.

POINT VIII

THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL REVERSIBLE ERROR IN INSTRUCTING THE JURY ON PREMEDITATION IN ACCORDANCE WITH THE FLORIDA STANDARD JURY INSTRUCTIONS, WHERE THE INSTRUCTIONS ARE NOT UNCONSTITUTIONAL.

Appellant's constitutional attack on the standard jury instructions pertaining to premeditated first degree murder were not raised at trial, and are consequently not preserved for appellate review. Sochor v State, 580 So.2d 595 (Fla. 1991); Walton v State, 547 So.2d 622, 625 (Fla. 1989) cert. denied, ___ U.S. ___, 110 S.Ct. 759, 107 L.Ed.2d 775 (1990).

On the merits, the trial court instructed the jury on premeditated murder in accordance with the Florida Standard Jury Instructions (R. 2624-2626), which are presumed correct. In re Florida Standard Jury Instructions in Criminal Cases, 431 So.2d 594. Furthermore, as noted by appellant, premeditation and deliberation are synonymous terms. Owen v State, 441 So.2d 1111 (Fla. 3d DCA 1983). Thus, the omission of the word deliberation from the standard instruction does not have the effect of lessening the prosecution's burden of establishing premeditation. Indeed, the definition of "killing with premeditation" includes the statement that "[t]he period of time must be long enough to allow reflection by the defendant," and that "[t]he premeditated intent to kill must be formed before the killing." As such, appellant's proposed definition of premeditation[11] is already

[11] "A fully formed and conscious purpose to take human life,

subsumed in the definition of premeditation as it exists in the standard instructions. See Williams v State, 492 So.2d 1388 (Fla. 1st DCA 1986). Given these definitions, as well as the trial court's instruction on the burden of proof and reasonable doubt, appellant's constitutional attack on the instructions is without merit. Dorminey v State, 314 So.2d 134 (Fla. 1975). Accordingly, appellant's conviction must be affirmed.

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formed upon reflection and deliberation," and "the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life a human being, and of the consequence of carrying such purpose into execution." (A.B. 68).

POINT IX

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO PRECLUDE THE STATE FROM SEEKING THE DEATH PENALTY.

Appellant claims that the trial court should have precluded the State from seeking the death penalty. Appellant's argument is premised on the fact that the State had negotiated a plea agreement with appellant, and subsequently retracted the agreement because the victim's family desired that the death penalty be sought. As such, appellant claims that the imposition of death as to appellant was arbitrary and capricious.

First and foremost, there is no constitutional right to a plea bargain. Weatherford v Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). By the same token, the state attorney is vested with the discretion to decide whether to seek the death penalty when the accused is charged with first degree murder. State v Bloom, 497 So.2d 2 (Fla. 1986). The judiciary lacks the jurisdiction to interfere with the prosecutor's discretion in seeking the death penalty so long as the State's motives for prosecuting are not premised on bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights. Id. As such, the trial court was without the authority to grant appellant's motion to preclude the State from seeking death. State v Ferguson, 556 So.2d 462 (Fla. 2d DCA) review denied, 564 So.2d 1085 (Fla. 1990).

The fact that at one point the State had been amenable to entering into a plea agreement with appellant, and withdrew the

agreement based on the victim's family's wishes, does not render the imposition of death sub judice arbitrary and capricious. Such an argument fails to recognize that death was imposed following a full hearing on the matter before a judge and a jury, and that death was imposed in accordance with the jury's recommendation, by a vote of eight to four (R. 3680).

Thus, appellant's assertion that, "but for the whim of the victim's family, appellant would not be on death row" (A.B. 73), is a misstatement; rather, but for appellant's "whim" in pulling the trigger on the officer, appellant would not be on death row! It was the judge who ultimately imposed sentence, based on the jury's recommendation that death was the appropriate sanction. Appellant's argument that the sentence is arbitrary and capricious must therefore fail.

POINT X

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO EXCUSE FOR CAUSE A JUROR WHO STATED THAT HE WOULD WEIGH THE MITIGATING AND AGGRAVATING FACTORS BEFORE DETERMINING WHETHER DEATH WAS THE APPROPRIATE SENTENCE.

As was argued in Point II, supra, appellant's challenges for cause were not preserved for appellate review based on appellant's failure to specify which juror he would have stricken absent the trial court's denial of appellant's challenge for cause. The lack of preservation argued in Point II equally applies to the challenge for cause as to juror Carroll, (See pages 44-46, above).

A prospective juror who indicates that he is in favor of the death penalty should not be excused for cause unless the juror is irrevocably committed to voting for death if the defendant is found guilty of murder and is therefore unable to follow the judge's instructions to weigh the aggravating circumstances against the mitigating circumstances. Fitzpatrick v State, 437 So.2d 1071 (Fla. 1983) cert. denied, 465 U.S. 1051, 104 S.Ct. 1328, 79 L.Ed.2d 723 (1984). Great deference will be accorded to the trial judge in making this determination since the trial judge is in the best position to evaluate the juror's demeanor and credibility. State v Williams, 465 So.2d 1229, at 1231 (Fla. 1985); See Wainwright v Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

Sub judice, when appellant made his challenge for cause, the trial court noted that appellant had not pursued any further questioning of the juror once appellant got the answer he wanted (R. 1274). As a result, the trial court was warranted in further questioning the juror to determine whether the juror was indeed irrevocably predisposed to recommending a sentence of death, or whether the juror could follow the trial court's instructions and weigh the aggravating and mitigating factors before making such a determination. Having informed juror Carroll that the recommendation of death requires a weighing of the mitigating and aggravating factors, and having determined, based on Mr. Carroll's answers, that the juror would be able to follow the trial court's instructions (R. 1274-1278), the trial court did not abuse its discretion in denying the challenge for cause. Penn v State, 574 So.2d 1079 (Fla. 1991); Brown v State, 565 So.2d 304, 307 (Fla.) cert. denied, ___ U.S. ___, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990); Cf. O'Connell v State, 480 So.2d 1284 (Fla. 1985); Thomas v State, 403 So.2d 371 (1981).

In point of fact, the questions and answers at bar were similar to the exchange which occurred in Fitzpatrick, 437 So.2d at 1075; as was the case in Fitzpatrick, the juror's response that he would be able to weigh the mitigating and aggravating circumstances in recommending sentence supported the trial court's denial of the challenge for cause. Hence, no reversible error has been demonstrated.

POINT XI

THE TRIAL COURT DID NOT IMPROPERLY RELY ON THE AGGRAVATING FACTOR THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN FLIGHT AFTER COMMITTING A BURGLARY.

Appellant contends that the trial court improperly relied on the aggravating factor enumerated in §921.141(5)(d) Fla. Stat. (1989), namely that the capital felony was committed while the defendant was engaged in flight after committing a burglary. Prior to trial, appellant filed a motion to preclude the State from proceeding on a felony murder theory; the prosecutor agreed to the motion (R. 253). Appellant argues that the prosecutor's agreement to this motion was in effect the equivalent of a nolle prosse, which therefore collaterally estopped the prosecution from relying on the aggravating factor of §921.141(5)(d), based on double jeopardy grounds. Appellant relies on Delap v Dugger, 890 F.2d 285 (11th Cir. 1989) and Wilson v Meyer, 665 F.2d 118 (7th Cir. 1981) in support of his proposition. Appellant's reliance on Delap and Wilson is misplaced, and his argument must therefore fail.

First, the prosecutor's concession that he would not proceed to trial on a felony murder theory is not the equivalent of a nolle prosse; even if, for the sake of argument, it is the equivalent of a nolle prosse, it does not follow that the State was estopped from relying on the aggravating factor enumerated in §921.141(5)(d). The State's agreement in not proceeding to trial on a felony murder theory was not a legal finding on the merits

that there was insufficient evidence to support a felony murder conviction.

It is well settled that jeopardy does not attach in a jury trial until the jury is sworn. Brown v State, 367 So.2d 616 (Fla. 1979); Rawlings v Kelley, 322 So.2d 10 (Fla. 1975). As a result, a nolle prosse entered before jeopardy attaches does not operate as an acquittal, nor does it preclude further prosecution for the offense. Bucolo v Adams, 424 U.S. 641, 96 S.Ct. 1086, 47 L.Ed.2d 301 (1976); State v Carter, 452 So.2d 1137 (Fla. 5th DCA 1984).

Wilson v Meyers, 665 F.2d 118 is in line with the foregoing principles. The defendant in Wilson was tried for first degree murder under a theory of felony murder and premeditated murder. The defendant was found guilty of both. However, the state subsequently entered a nolle prosequi on the felony murder count. After successfully appealing the first degree murder conviction, the defendant was retried for first degree murder and felony murder. Thus, since the nolle prosequi on felony murder was entered after the defendant had been tried and found guilty of felony murder, the prosecution was collaterally estopped from retrying the defendant under a felony murder theory. Jeopardy had attached in the first trial, thereby precluding reprosecution for murder on a felony murder theory in a second trial.

Similarly in Delap v Dugger, 890 F.2d 285, the trial court in the first trial had found that there was insufficient evidence of felony murder as a matter of law. This determination on the

merits was made mid-trial, after jeopardy had attached, pursuant to the defendant's motion for judgment of acquittal. Hence, collateral estoppel principles barred the imposition of a death sentence based on the aggravating factor enumerated in 921.141(5)(d).

The factual scenarios in Wilson, and Delap are dramatically different to the circumstances presented here, and therefore do not bar reliance on the aggravating factor that the capital murder was committed while the defendant was engaged in flight after committing a burglary. §921.141(5)(d) Fla. Stat. (1989). There was never a determination on the merits by a judge or a jury, that the evidence was legally insufficient to support a felony murder conviction. Indeed, jeopardy never attached to the felony murder charge because the prosecutor agreed to not proceed to trial on felony murder.

In any event, the State could have chosen to proceed to trial on a felony murder theory in addition to premeditated murder. Appellant committed the murder of Officer Chappell while fleeing from the commission of a burglary. This factual scenario would have supported a first degree murder conviction based on a felony murder theory. State v Hacker, 510 So.2d 304 (Fla. 4th DCA 1986); Campbell v State, 227 So.2d 873 (Fla. 1969); See Suarez v State, 481 So.2d 1201 (Fla. 1985) cert. denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986). Thus, the prosecutor's agreement not to proceed to trial on a felony murder theory did not preclude the trial court from relying on same when

it found that appellant committed the capital offense while appellant was engaged in flight after committing a burglary. Occhicone v State, 570 So.2d 902, 906 (Fla. 1990).

POINT XII

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

There was evidence supporting the trial court's determination that appellant committed the murder of Officer Chappell in a cold, calculated and premeditated manner. The evidence established that appellant led the victim to his demise by instigating a pursuit of one and a quarter miles (R. 1839, 1878-1879, 2074). During this time the victim had activated the siren and lights of his motorcycle (R. 1877, 1890, 1915, 1962). Appellant, by his own admission and by independent evidence, saw from his rear view mirror that the Officer was following appellant (R. 1916, 2387). When the victim finally succeeded in stopping appellant, appellant observed as Officer Chappell dismounted his vehicle, removed his helmet, and approached appellant's truck (R. 2508-2512). The evidence further established that appellant waited until the victim was between the rear of the truck and the driver's window of the truck before fatally shooting him with a single gun shot through the heart (R. 1894-1895, 1907, 2048, 2067-2069, 2073, 2172).

Given the amount of time which elapsed between the time the victim began pursuing appellant and the final stop, appellant had ample time in which to reflect upon his actions and their consequences. Valle v State, 581 So.2d 40 (Fla. 1991); Jackson v State, 498 So.2d 406 (Fla. 1986) cert. denied, 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987). The calculated nature of the

attack is further bolstered by the fact that appellant waited until the officer was within close range before shooting, and that the killing was execution-style, committed without provocation from the officer. Valle, supra; Jones v State, 440 So.2d 570 (Fla. 1983). Finally, by appellant's own admission, he armed himself with the gun which he found during the burglary, in case he needed to use it (R. 2503-2504, 2530). This factor bolsters the heightened premeditation necessary for establishing that the murder was committed in a cold, calculating and premeditated manner. Johnson v State, 438 So.2d 774, 779 (Fla. 1983) cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984).

Based on the foregoing, the trial court did not err in finding that the murder was committed in a cold, calculated and premeditated manner.

POINT XIII

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THREE AGGRAVATING CIRCUMSTANCES WHICH WERE ULTIMATELY MERGED INTO ONE BY THE TRIAL JUDGE WHEN HE IMPOSED SENTENCE.

Appellant alleges that the trial court erred in instructing the jury on three aggravating factors which were ultimately merged into one aggravating factor. The three aggravating factors involved are: that the capital felony was committed for the purpose of avoiding or preventing lawful arrest, §921.141(5)(e) Fla. Stat. (1989); that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws, §921.141(5)(g) Fla. Stat. (1989); that the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties, §921.141(5)(j) Fla. Stat. (1989). Appellant obliquely concedes that this Court has rejected the same argument in Suarez v State, 481 So.2d 1201 (Fla. 1985) cert. denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986), accord Bowden v State, 16 F.L.W. S614 (Fla. September 21, 1991), Hayes v States, 581 So.2d 121 (Fla. 1991), but argues that the instant case presents a different scenario because the trial court instructed the jury on three aggravating factors, rather than two, as was the case in Suarez.

However the facts of Suarez do not require a different result in the instant case. In Suarez, the trial court instructed the jury on four aggravating factors. However when

imposing sentence, the trial court merged the four aggravating factors into two pairs; thus, only two aggravating factors resulted. This Court rejected Suarez' claim that the trial court erred in instructing the jury on the four aggravating factors; this Court reasoned that:

> [t]he jury instructions simply give jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling.

481 So.2d at 1209.

This Court's basis for finding that it was not error to instruct the jury on the four aggravating factors refutes appellant's claim that the jury would be affected by being instructed on the sheer number of aggravating circumstances. Furthermore, the prosecutor conceded in his closing arguments to the jury that two of the aggravating factors overlapped (R. 3041). Moreover, despite the fact that the trial court ultimately merged §921.141(5)(j) Fla. Stat. (1989) with 921.141(5)(e) and (g) does not necessarily require a finding that those aggravating factors overlap.[12]

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[12] Appellee maintains that the aggravating factor enumerated in §921.141(5)(j) helps to foster the public safety and focuses on the defendant's disrespect for the law (See Point XIV, supra).

Most importantly, the trial court granted appellant's specially requested instruction on overlapping aggravating factors (R. 2726-2729, 3625). Accordingly, the trial court instructed the jury that:

> If two or more enumerated aggravating circumstances are supplied by or come from a single aspect or part of the case, then you should consider that as supporting a single aggravating circumstance.

(R. 3091). Thus, the jury was well aware that they could merge one or more of the aggravating factors where supported by the same factual circumstances. As a result, the trial judge did not err in instructing the jury on three aggravating circumstances which were ultimately merged into one.

POINT XIV

THE AGGRAVATING CIRCUMSTANCE ENUMERATED IN 921.141(5)(J) FLA. STAT., THAT THE VICTIM OF THE CAPITAL FELONY WAS A LAW ENFORCEMENT OFFICER ENGAGED IN THE PERFORMANCE OF HIS OFFICIAL DUTIES IS NOT UNCONSTITUTIONAL.

Appellant alleges that the aggravating factor enumerated under §921.141(5)(j) Fla. Stat. (1989) is unconstitutional pursuant to Booth v Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Appellant argues that because this aggravating factor focuses on the victim's professional character and status, which would otherwise be irrelevant, this aggravating circumstance constitutes cruel and unusual punishment and violates due process. The State disagrees.

First, appellant's argument is no longer viable insofar as Booth has been overruled by Payne v Tennessee, 5 F.L.W. Fed. S708 (April 24, 1991). Payne held that the threshold of admissibility of such "victim impact" evidence is relevance. Thus, the question sub judice becomes whether the aggravating factor in question, i.e. that the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties, is unconstitutional to the extent that the victim's status as a police officer is irrelevant to the nature of the crime. Appellee maintains that the fact that the victim of the instant offense was a police officer is highly relevant to the nature of the crime and that this factor may legitimately be considered in aggravation.

In this regard, even under Booth this aggravating circumstance would not be rendered improper. Booth held that "victim impact" evidence was per se inadmissible in a capital trial except to the extent that it "relate[s] directly to the circumstances of the crime." Booth v Maryland, 482 U.S. at 507, n. 10. Moreover, the holding of Booth was premised in part on the reasoning that it was unfair to hold a capital defendant accountable for a victim whose personal characteristics were unknown to the defendant. Id. at 504.

As a result, where the capital felony involves a police officer engaged in the performance of his official duties, not only is the victim's status as a police officer a relevant, inextricably intertwined circumstance of the capital crime, but it is a personal characteristic of the victim of which the defendant was aware. For example in the instant case, appellant killed the officer precisely because of the fact that appellant knew the victim was a police officer. Indeed, appellant's motivation for killing Officer Chappell was that appellant knew that the victim had the power to apprehend appellant because appellant was driving a stolen vehicle, because appellant was an escapee from prison and because appellant had in his possession the fruits of a burglary; these factors would ultimately result in appellant's incarceration.

That the victim's status as a police officer engaged in the performance of his official duties may be considered in aggravation of the capital offense is analogous to the

enhancement of the crime of battery where the victim is a law enforcement officer engaged in the performance of his official duties, §784.07 Fla. Stat. (1989). Section 784.07 reclassifies the offense of battery on a police officer from a misdemeanor of the first degree to a felony of the third degree. In upholding the constitutionality of section 784.07 against the attack that the statute offered more protection to law enforcement as opposed to other persons, this Court stated:

> Because the public welfare is protected by the performance of these duties, the legislature in its wisdom has chosen to accord greater protection to one who performs these indispensable public services. When an officer is not performing his official duties, he is no longer protecting the public welfare and, consequently, the statute yields him no greater protection than that accorded to the members of the general public. Thus, contrary to appellant's assertion that the legislature has created "an elite class of untouchables," in reality it merely has passed a law which fosters the public safety and welfare. (Citations omitted.)

Soverino v State, 356 So.2d 269, 271-272 (Fla. 1978).

The State maintains that this reasoning equally applies to the aggravating factor that the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties, 921.141(5)(j) Fla. Stat. (1989). It is a circumstance of the crime which may be considered by the jury in deciding whether to impose sentence. Furthermore, to the extent that this aggravating factor focuses on the appellant's

disrespect for the law this aggravating factor has a direct bearing on the appellant's "personal responsibility and moral guilt." Compare, Brown v State, 569 So.2d 1223 (Fla. 1990).

In any event, assuming arguendo that this aggravating factor is unconstitutional, the trial court's reliance on same in imposing the death sentence is harmless. The trial court merged this aggravating factor with two others: that the capital felony was committing for the purpose of avoiding lawful arrest, §921.141(5)(e) Fla. Stat. (1989); and that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, §921.141(5)(g) Fla. Stat. (1989) (R. 3709). As such, the fact that the victim was a law enforcement officer engaged in the performance of his official duties had no practical effect on appellant's sentence. Any impact which resulted from this aggravator was ameliorated by the merger which occurred with subsections (e) and (g) of §921.141(5). Hence, appellant suffered no prejudice from its consideration.

POINT XV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO SPECIFICALLY INSTRUCT THE JURY ON THE NONSTATUTORY MITIGATING FACTORS DELINEATED BY APPELLANT.

As conceded by appellant, this Court has already ruled that the trial court is not required to instruct the jury on specific nonstatutory mitigating factors. Robinson v State, 574 So.2d 108 (Fla. 1991). Lucas v State, 568 So.2d 18 (Fla. 1990), which held that the defense must identify for the court the specific nonstatutory mitigating circumstances, is not contrary to the holding in Robinson, supra, since it is the trial court that determines whether a mitigating circumstance has been established. Stano v State, 460 So.2d 890 (Fla. 1984) cert. denied, 471 U.S. 111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

The trial court instructed the jury that it could consider in mitigation "any aspect of the defendant's character or record and any circumstances of the offense," (R. 3090). Pursuant to appellant's request (R. 2755-2758), the trial court also instructed the jury that:

> Because the court has not read a list of mitigating circumstances does not prevent you from finding any mitigating circumstances in the case.

(R. 3090). Moreover, although the trial court refused to instruct the jury on the specific nonstatutory mitigating factors tendered by appellant, he did not limit appellant from arguing the nonstatutory mitigating circumstances to the jury. Thus,

appellant presented the jury with a list of eleven non-statutory mitigating circumstances (R. 3081-3086). As a result, in light of appellant's arguments to the jury, and the trial court's instructions that any aspect of the appellant's character, or his record or the offense, could be considered in mitigation, the trial court did not err in refusing to instruct the jury on the nonstatutory mitigating circumstances proposed by appellant. Mason v State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984).

POINT XVI

THE JURY'S EIGHT TO FOUR RECOMMENDATION THAT APPELLANT BE SENTENCED TO DEATH DOES NOT RENDER APPELLANT'S DEATH SENTENCE INFIRM BASED ON THE LACK OF UNANIMITY.

Appellant claims that appellant's death sentence violates the Eighth Amendment proscription against cruel and unusual punishment. Appellant's argument is premised on the contention that the jury's eight to four recommendation that death be imposed is a "bare majority." The State disagrees that an eight to four vote constitutes a "bare majority," and that nonetheless, there is no violation of the Eighth Amendment.

Since it is not cruel and unusual punishment for a judge to impose the death penalty when the majority of the jury recommends a life sentence, Spaziano v Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), it therefore follows that it is not cruel and unusual punishment for a judge to impose the death penalty when a "bare majority" of the jury recommends that the death penalty be imposed. This is based in part on the fact that capital sentencing is not is not like a trial in respects significant to the Sixth Amendment guarantee to a jury trial, Spaziano, 468 U.S. 459.

For the same reasons, this Court rejected a similar challenge as that raised sub judice in Alvord v State, 322 So.2d 533 (Fla. 1975) cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). Further, appellant's feeble attempts to distinguish Alvord from the instant case on the basis that the

verdict at bar was by a "bare majority," is unavailing (A.B. 94). The Alvord decision does not specify how many jurors voted for death and how many jurors voted for mercy. Consequently, the holding of Alvord is equally applicable to the facts of the instant case. There is nothing in Alvord which indicates that an eight to four vote for death versus life, respectively, is unconstitutional. As such, Alvord and Spaziano control the instant case, thereby requiring that the trial court's imposition of the death penalty be upheld.

POINT XVII

THE TRIAL COURT DID NOT ERR IN REFUSING TO ADVISE THE JURY THAT THEY COULD RETURN A RECOMMENDATION OF LIFE EVEN IF NO MITIGATING CIRCUMSTANCES WERE FOUND AND AGGRAVATING FACTORS WERE FOUND.

During the penalty phase of trial, the trial court instructed the jury in accordance with the standard jury instructions. As such, the trial court did not err in refusing appellant's specially requested instruction that they could grant mercy to appellant and recommend a life sentence despite the lack of mitigating circumstances and the existence of aggravating circumstances (R. 3633). Lemon v State, 456 So.2d 885, 887 (Fla. 1984) cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); Kennedy v State, 455 So.2d 351, 354 (Fla. 1984) cert. denied, 469 U.S. 1197, 105 S.Ct. 981, 83 L.Ed.2d 983 (1985); See Correll v Dugger, 558 So.2d 422 (Fla. 1990).

POINT XVIII

THE TRIAL COURT'S IMPOSITION OF THE DEATH PENALTY IS NOT DISPROPORTIONATE TO SENTENCES IMPOSED IN SIMILAR CASES.

In imposing the sentence of death, the trial court found that no statutory or nonstatutory mitigating circumstances had been established, and that the following aggravating circumstances had been established:

> 1. That the capital felony was committed by a person under sentence of imprisonment, §921.141(5)(a) Fla. Stat. (1989).
>
> 2. That the capital felony was committed while the defendant was engaged in flight after committing a burglary, §921.141(5)(d) Fla. Stat. (1989).
>
> 3. That the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, §921.141(5)(i) Fla. Stat. (1989).
>
> 4. That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; that the capital felony was committed to disrupt or hinder the enforcement of the laws; that the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties, §921.141(5)(e)(g)(j), Fla. Stat. (1989).

(R. 3708-3709). In light of the four aggravating factors and lack of mitigating factors found by the trial court, appellant's sentence is not disproportionate to sentences imposed for similar offenses. Jones v State, 580 So.2d 143 (Fla. 1991): four aggravating factors and no mitigating factors established; Valle

v State, 581 So.2d 40 (Fla. 1991): while three aggravating factors were established, mitigating factors were either not established or were not outweighed by aggravating factors; VanPoyck v State, 564 So.2d 1066 (Fla. 1990): four aggravating circumstances found and no mitigating circumstances to outweigh aggravating factors found; Hill v State, 515 So.2d 176 (Fla. 1987): four aggravating and one mitigating factor established; Jackson v State, 498 So.2d 406 (Fla. 1986) cert. denied, 483 U.S. 1010 (1987): no mitigation established, and two aggravating circumstances upheld; Jones v State, 440 So.2d 570 (Fla. 1983): no mitigating factors found, and three aggravating factors established.

Appellant's reliance on Songer v State, 544 So.2d 1010 (Fla. 1989) in support of his argument that the death penalty is a disproportionate sentence, is misplaced. In Songer, there was only one aggravating factor, i.e. that the defendant was under a sentence of imprisonment when the killing was committed, which was questionably established.[13] Moreover, several compelling mitigating factors were found. Contrarily sub judice, four aggravating and no mitigating factors were found to have been firmly established.

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[13] See Songer v State, 544 So.2d at 1012 (Ehrlich, J. and Barkett, J. concurring) which notes that the basis for the one aggravating factor no longer existed by the time the direct appeal at issue was resolved; though Songer was incarcerated at the time he committed the killing, the conviction for which he was incarcerated had been subsequently declared invalid.

Furthermore, despite appellant's various attempts to point out evidence which should have been considered in mitigation, the determination of whether a mitigating circumstance has been proven is a question of fact to be resolved by the trial judge. Stano v State, 460 So.2d 890 (Fla. 1984) cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). As such, the trial court's ruling that no mitigation was established will not be reversed on appeal merely because appellant disagrees with the trial court's conclusions. Sochor v State, 580 So.2d 595 (Fla. 1991). The trial court's findings are supported by the record.

The trial court was entitled to discount the evidence relating to appellant's impoverished childhood and his abusive, alcoholic father. The impact on appellant which may have resulted from the abuses inflicted by appellant's father is minimal in light of the fact that appellant was only two years old by the time appellant's father left the home (R. 2836). Indeed, appellant's older siblings who actually witnessed and suffered the abuse by appellant's father were able to rise above the circumstances of their youth to become law-abiding and productive members of society (R. 2827, 2835, 2849, 2880-2881, 2883). By appellant's own admission, appellant was gainfully employed, maintained a family and was never in trouble with the law until he began using and selling marijuana in 1983 (R. 2269-2273). Even the defense expert, Dr. Caddy, testified that the shooting of Officer Brian Chappell was not the result of appellant's family history (R. 3011). Thus, in light of this

evidence, the trial court did not abuse its discretion when it found that the killing of Officer Chappell was not mitigated by appellant's family history. Sochor v State, 580 So.2d at 604; Kight v State, 512 So.2d 922, 933 (Fla. 1987) cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1987); Lara v State, 464 So.2d 1173 (Fla. 1985); Deaton v State, 480 So.2d 1279 (Fla. 1985).

The trial court was also entitled to disregard as a mitigator appellant's alleged mental impairment at the time of the shooting which resulted from appellant's drug use. Appellee would point out that neither the State nor the trial court rejected the notion that appellant was addicted to cocaine. Rather, the question was whether appellant's cocaine use affected appellant's mental state at the time of the killing. The trial court found that appellant's addiction did not rise to the level of mitigation so as to offset the circumstances of the crime:

> I reject as contrived and fabricated his self serving claim of cocaine intoxication. In fact, his lucid, coherent and logical testimony and the evidence of his conduct revealed in the trial show that, like so many others who use this central nervous system stimulant, he was sharpened, elevated, more alert and cunning than one would expect.

(R. 3709). The trial court's findings were supported by the appellant's own testimony regarding the calculated manner in which he committed the burglary prior to the killing and his actions while eluding the police.

The trial court's findings as to appellant's demeanor highlights the little weight which the trial court afforded Dr. Caddy's testimony, since all of Dr. Caddy's findings were premised on whatever information was provided him by the appellant himself (R. 3000, 3003). Indeed, the other expert who testified on behalf of the defense, Judy Iodice, never even met the appellant (R. 2941). In any event, even the experts testified that appellant's cocaine use would have no affect on appellant's ability to know right from wrong at the time he killed the officer (R. 2944-2945, 3010). As such, the trial court did not err in finding that appellant's drug addiction did not serve to mitigate the crime. Koon v State, 513 So.2d 1257 (Fla. 1987) cert. denied, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988); Kokal v State, 492 So.2d 1317 (Fla. 1986); Johnston v State, 497 So.2d 863 (Fla. 1986).

Finally, appellant's remorse for the killing and his lack of a history of violence did not establish mitigation. As pointed out above, the trial court gave little credence to appellant's self-serving testimony. This is supported by the fact that, up until the time of trial, appellant denied any involvement in the killing. See, Agan v State, 445 So.2d 326 (Fla. 1983).

Moreover, in light of appellant's prior criminal history, which the trial court found shocking (R. 3709), the trial court properly failed to find appellant's lack of a history of violence as a mitigator. In point of fact, the circumstances surrounding the crime spree appellant engaged upon in the days surrounding

the murder belie a lack of violence. Appellant's alleged generosity during the kidnapping when he allowed the Nelsons to retrieve their son from the car appellant was robbing, was nothing more than a fortuitous happenstance, in light of appellant's admission that he could not say whether he would have harmed the Nelsons during the robbery had he been armed with a gun (R. 2525-2526). Thus, the trial court was entitled to rely on this evidence in finding a lack of prior violence. Echols v State, 484 So.2d 568 (Fla. 1985) cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986); Daugherty v State, 419 So.2d 1067 (Fla. 1982); Ruffin v State, 397 So.2d 277 (Fla. 1981).

In sum, the trial court's imposition of the death penalty was not disproportionate when compared to similar offenses. Furthermore, the trial court's finding that no mitigation was established is supported by the record. The death sentence in the instant case should therefore be upheld.

POINT XIX

THE TRIAL COURT DID NOT ERR IN FAILING TO PREPARE A SENTENCING GUIDELINES SCORESHEET WHERE THE SENTENCES IMPOSED FOR THE NON-CAPITAL OFFENSES WERE PURSUANT TO THE STIPULATION OF APPELLANT AND THE STATE.

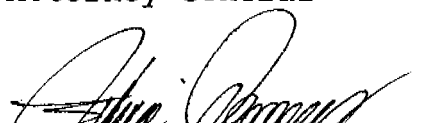
It appears from the record that no guidelines scoresheet was prepared for the non-capital offenses of which appellant was found guilty. In light of appellant's extensive criminal history i.e. twenty eight prior convictions, appellant was sentenced on the non-capital felony convictions pursuant to a stipulation entered into between appellant and the State (R. 3116-3117, 3710-3711). Given appellant's stipulation to the sentences, no guidelines scoresheet was required. See Houston v State, 502 So.2d 977 (Fla. 1st DCA 1987); Rowe v State, 496 So.2d 857 (Fla. 2d DCA 1986) review denied, 545 So.2d 1368 (Fla. 1989); Stokes v State, 476 So.2d 313 (Fla. 1st DCA 1985).

CONCLUSION

Based on the foregoing arguments and authorities cited herein, the State respectfully requests that appellant's convictions and sentences be AFFIRMED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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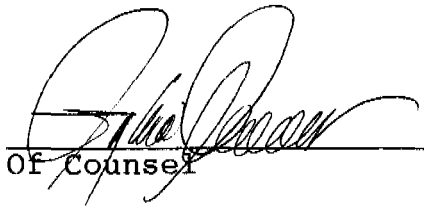
CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been forwarded by U.S. mail to Peter Birch, Esquire, Birch and Murrell, Suite 400, Comeau Building, 319 Clematis Street, West Palm Beach, FL 33410 this 31st day of October, 1991.



Of Counsel