SUPREME COURT OF FLORIDA
CASE NO. 75,844

NORBERTO PIETRI,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

REPLY BRIEF OF APPELLANT

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution 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 although Appellee will also be referred to as the State or the prosecution.

The following symbols will be used:
"R" Record on Appeal
"AB" Appellee's Answer Brief

For Points Eight, Fourteen, Fifteen, Sixteen, and Seventeen, Appellant relies upon the arguments and authorities cited in his initial brief.

POINT ONE

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY THE JURY SELECTION PROCESS EMPLOYED BY THE COURT.

A. Motion To Strike The Venire

Appellee responds to Appellant's claim that the trial court erred in refusing to strike the venire with the argument that the court's inquiry was sufficient. In fact, the trial court did not conduct any inquiry and went so far as to refuse to call the Clerk to testify to what he had told the venire. The trial court's steadfast refusal to call the Clerk as a witness and its repeatedly telling Appellant he needed a record hardly constitutes an inquiry.

Appellee attempts to excuse the trial court's conduct by pointing out that it was aware of the nature of past communications by the Clerk. This is irrelevant. The question is what was the venire from which Appellant's jury was to be selected told by the Clerk. Appellee itself notes that it is incumbent upon the trial court to determine whether the contact raises the possibility of prejudice, whether it has actually reached the jury, and whether it interferes with the jurors' ability to render an impartial verdict (AB 32-33). The trial court refused to take the first step: to determine the nature of the contact. Appellant repeatedly asked the trial court to call the Clerk to testify. The trial court repeatedly refused. This cannot be excused as harmless because the trial court was aware of the nature of past communications by the Clerk.

Appellant presented testimony to show the prejudicial nature of the Clerk's communication with the venire (See, Appellant's Initial Brief, p. 16). Appellee dismisses this testimony as insufficient because the witness did not hear all of the Clerk's statements. Appellee apparently assumes the

remainder of the Clerk's statements were proper and corrected the remarks known to be improper. Such an assumption is completely unfounded. For example, it is unreasonable to assume that the Clerk, having told the venire that most trials are run of the mill (R 807), then told them this was not true for Appellant's trial. Or, having stated that plea negotiations were presently occurring (R 809), then said but Appellant maintains his innocence.

Appellee also attempts to minimize the harm caused by the Clerk's remarks because they were made to the venire "at the preliminary stages of trial" and the subsequent instructions by the trial court along with counsel's inquiry as to jurors' ability to be fair and impartial eliminated the prejudice (AB 32-33). Appellee also asserts that since Appellant's trial lasted two weeks the jurors probably forgot whatever the Clerk had said. It should first be noted that among the remarks known to have been made by the Clerk was the statement that challenges for cause are directed toward those jurors who have knowledge of the case (R 806). This statement alone could have a chilling effect upon any member of the venire hoping to become a juror in Appellant's trial. But none of Appellee's arguments can be properly assessed without first knowing the totality of the Clerk's statements to the venire. To leave this matter to speculation, when it is known that the Clerk did make several improper and prejudicial remarks, certainly deprives Appellant of due process.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to confront witnesses against him. It also guarantees the compulsory process of the court. This latter guarantee is what Appellant sought to invoke when it requested the trial court to require the Clerk of Court to testify to the statements he made to the venire. So Appellee's contention that John Dunkle, the Clerk, was not a witness against Appellant is simply irrelevant.

There is no question, and Appellee does not dispute, that the Clerk made several incorrect statements of law and improper remarks to the venire. The resulting prejudice to Appellant could not be ascertained by the trial court without, at a minimum, calling the Clerk to testify. This prejudice cannot be dismissed because it is not known everything the Clerk said to the venire. Nor can it be presumed that the two-week trial period or intervening remarks of the judge or counsel somehow dissipated the taint. Without conducting a proper inquiry into the remarks by the Clerk of Court, the only way Appellant could be assured of a fair trial was to strike the venire.

B. Individual Voir Dire

Appellant claims the vast majority of the media coverage of Appellant's case occurred at the time of the shooting, with the publicity at the time of trial consisting of only one news article (AB 38). Appellee bases its assertion upon what is contained in the record before this Court (See, Xerox Copy of Exhibits). But these news articles were placed before the trial court to illustrate the need for the prospective jurors to be individually asked their specific knowledge of Appellant's case. Appellant introduced the news articles to show prejudicial items contained therein which would warrant a person to be excused from the jury panel, either by peremptory challenge or challenge for cause. Appellant pointed out that these articles were inaccurate and inflammatory (R 829). At no time did counsel or the trial judge indicate that the articles presented constituted the total publicity Appellant's case received. It was recognized by the trial court that the publicity was extensive and included radio and television reports (R 1423-24). So for Appellee to represent otherwise is simply incorrect.

It is irrelevant whether the vast majority of news articles were "factual," as Appellee claims. Even a small percentage of prejudicial news

information, factual or "non-factual," would be sufficient to contaminate the jury panel. Indeed, even one juror who remembered reading that Appellant had a history of violence, which he did not, or the police believed the evidence sufficient to convict him of first degree murder would deprive Appellant of a fair trial. It is well to remember that despite these supposedly factual news reports, twenty-five of the fifty-two prospective jurors who had knowledge of the case readily admitted their knowledge would render them unable to be fair and impartial. But to say that most of the news articles were factual and therefore did not deprive Appellant of a fair trial is tantamount to saying that most of the jurors were probably fair and impartial. A mostly fair jury does not meet the requirement of the United States and Florida Constitutions.

Appellee states the newspaper articles did not contain information which a juror would not otherwise learn through voir dire (AB 38). This is again incorrect. Numerous "facts" not disclosed during voir dire were reported in the newspapers (See, Appellant's Initial Brief, pp. 24-25). Appellee also asserts that Appellant admitted he committed first degree murder as part of his defense! (AB 39). Nothing could be further from the truth. Appellant admitted to the shooting but hardly admitted it was first degree murder. So any juror who knew that others, particularly police officers, had a contrary opinion could not be expected to be fair and impartial. Also, there is a vast difference between conceding Appellant fired the shot that killed Officer Chappell and labelling him a violent criminal. Thus, news articles employing this label certainly prejudiced Appellant.

Appellee states that the juror who believed he had read Appellant had mental problems fails to demonstrate the need for individual questioning because that particular juror was in fact individually questioned and excused! It is unknown how many jurors had prejudicial or inaccurate

knowledge of Appellant's case because the trial court would not allow individual questioning of the prospective jurors. The possibility that the jury in Appellant's trial was untainted by their knowledge of the case is simply too speculative to conclude Appellant was accorded a fair trial.

C. Motion To Change Venue

Appellee states it is Appellant who has the burden of showing the need for a change of venue (AB 40). Yet, Appellant could not meet this burden without asking prospective jurors what knowledge they possessed of Appellant's case. Appellee again asserts the publicity surrounding Appellant's case was confined to the time of the incident except for a single news article (AB 41). As pointed out above, Appellee has made the erroneous assumption that the only publicity regarding Appellant's case was that provided in the news articles contained in the record on appeal. It is apparent, however, as the trial court was well aware, that news coverage of Appellant's case was not restricted to the newspaper but also included television and radio coverage (R 1423-1424).

Appellee has not accurately stated the composition of the jury. Seven jurors, excluding alternates, had knowledge of Appellant's case (R 960, 961, 1255, 1472-73, 1587, 1669, 1768). In addition to these seven, one other juror was not sure of her knowledge (R 959-961). So of twelve jurors, only four definitely had no knowledge of Appellant's case (R 991, 1255, 1344, 1472). Two of these four were challenged for cause for other reasons (R 1411, 1278). But in the final analysis it does not matter if four or more jurors had no knowledge of Appellant's case when determining whether a motion to change venue should be granted. The test is "whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident" that it cannot be expected to be fair and impartial. Holsworth v.

all twelve is not

State, 522 So.2d 348, 350 (Fla. 1988) (emphasis supplied). This test cannot even be conducted without asking jurors what knowledge they possess.

POINT TWO

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S CHALLENGES FOR CAUSE.

Appellee initially asserts that Appellant has failed to preserve this issue for appeal because he did not identify a specific objectionable juror who remained on the jury. Appellee acknowledges that Appellant objected to the entire jury, an objection based upon the entire jury selection process and the trial court's denial of Appellant's motion to change venue. Yet, Appellee claims this was not sufficient to preserve the issue under this Court's decision in Trotter v. State, 576 So.2d 691 (Fla. 1991). Applying Appellee's reasoning, an objection to one juror is sufficient, an objection to all twelve is not.

What Appellee fails to acknowledge is several of the jurors were previously challenged for cause. As this Court stated in Trotter:

> 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. Id. at 693 (footnotes omitted, emphasis supplied).

There were nine persons whom Appellant challenged for cause who sat on the jury (R 1278, 1411, 1538, 1646, 1772). Appellant also renewed his challenges for cause after exhausting his peremptory challenges and requesting additional challenges (R 1774). Even under Appellee's application of Trotter, Appellant has preserved this issue for appeal.

Appellee claims Appellant is contesting the trial court's denial of

his challenges of jurors Miller and Mosier on grounds he failed to raise in the trial court and is therefore barred from raising them now. Appellant would note, however, that the challenges for cause were renewed at the end of the voir dire. The trial court denied the challenges without requesting counsel to specify his reasons. The challenges for cause were sufficient to put the trial court on notice, and to preserve the issue for review by this Court.

Even if the challenges to jurors Miller and Mosier were properly denied, the same certainly cannot be said for juror Kizis. This juror clearly stated one could not determine what was in a person's mind and did not feel the prosecution should be required to prove state of mind. At no point in the questioning by either counsel or the court does Mr. Kizis unequivocally say he would be able to decide the state of mind of Appellant (R 1044-1046; R 1077-1080). But it was Appellant's state of mind at the time of the shooting that was the critical difference between whether he was guilty of first degree murder or second degree murder. The importance of a juror being able to recognize and accept the distinction between degrees of murder cannot be exaggerated. For Appellant, it was literally a difference between life and death. Any juror for whom there was a reasonable doubt as to his ability to determine whether Appellant acted with or without a premeditated intent to kill when he shot the police officer certainly should have been excused. See, Singer v. State, 109 So.2d 7 (Fla. 1959). For juror Kizis it wasn't even a close question. He not only said it would be impossible to determine Appellant's state of mind, and the State should not be required to prove it, but that he might relieve the prosecution of its burden to prove state of mind (R 1046). The trial court certainly should have granted the challenge for cause as to this juror.

As to juror Wolfe, he unequivocally stated he did not believe the use of drugs or alcohol should be a defense to first degree murder (R 1230). This clearly rendered Wolfe unqualified to serve as an impartial juror despite his subsequent answers that deviated from his original position. See, **Hamilton v. State, 547 So.2d 630 (Fla. 1989).**

Appellee suggests Appellant's voir dire questions were designed to elicit "wrong" answers from the prospective jurors. Yet, Appellee fails to cite a single question to support this claim. Indeed, many of the "wrong" answers were given during questioning by the trial court (See, e.g. R 1078-1080; R 1275-1279). It should also be noted that at no point during the questioning of the four jurors at issue did the prosecutor object to Appellant's questions. In the final analysis the answers given were indeed "wrong" to the extent that it rendered the juror unqualified. The trial court should have granted Appellant's challenges for cause. That it did not deprived him of a fair trial.

POINT THREE

APPELLANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE COURT COMMENTED ON THE EVIDENCE.

The trial court made the statement during a bench conference "he would appear to have a very strong case" which both the court and the prosecutor stipulated was heard and understood by Appellant's co-counsel, seated at counsel table, as a reference to the strength of the State's case (R 2128-2129). Despite this most damaging statement, Appellee maintains the trial court's general inquiry of the jury was adequate and Appellant incurred no prejudice since the jury indicated they had not heard the remark. The inquiry was far from adequate because it basically told the jury they would be admitting to wrongdoing if they acknowledge hearing the remark (R 2132).

Appellee notes that co-counsel for the State did not hear the remark and he was seated closer to the jury than Appellant's co-counsel (AB 52). What Appellee does not note is that this lawyer admitted he did not have the "greatest hearing" (R 2129-2130). Also, the trial court did not, as represented by Appellee, conduct the bench conference in a way as to avoid the jury overhearing any remarks. The trial court did state that most of his bench conferences are so conducted but could not say if that was done when making the damaging remark. In fact, Appellant, without any disagreement from the State, asserted it was not (R 2128).

Appellee incorrectly states the trial court's remark was made outside the jury's presence (AB 52). The whole issue arose because it was made in the presence of the jury. The question was whether any of the jurors heard the remark. Indeed, that was the only question. At no time did the trial court or the prosecutor deem the remark harmless or that "he" referred to anyone other than the State. To determine if any juror heard the remark by the judge, given its most damaging nature, required more than a perfunctory inquiry.

POINT FOUR

THE TRIAL COURT ERRED IN ADMITTING PREJUDICIAL SIMILAR FACT EVIDENCE THAT HAD NO PROBATIVE VALUE.

The State presented testimony by Officer Donovan of the Delray Beach Police Department that during the stopping of Appellant's vehicle Appellant had waved him to come forward. This incident occurred two days after the traffic stop that resulted in the shooting of Officer Chappell. Appellant objected to this testimony as constituting impermissible similar fact evidence. Appellant contended the State was trying to establish Appellant's propensity to lure police officers away from their vehicles. This

would improperly bolster the State's position that Appellant shot Officer Chappell with a premeditated design to kill him, the only issue at Appellant's trial.

Appellee attempts to justify the admission of the police officer's testimony by asserting there is nothing unlawful in waving a police officer forward. Appellee appears to take the position that as long as the conduct in question is not criminal or wrongful, it is never prohibited by Section 90.404(2)(a) Florida Statutes (1989). This is not correct. This statute also prohibits acts of the defendant which are introduced for the sole purpose of showing propensity. There is no limitation on whether the act is criminal, wrongful, or otherwise.

The argument that the testimony was permissible evidence of flight is nothing but a subterfuge. Assuming it otherwise admissible, evidence of Appellant's flight was not established by the act of waving the police officer forward. In fact, the "flight" was the driving away from the officer and the subsequent chase. In this context the act of first waving the officer forward is even more prejudicial since it implies an initial consideration by Appellant to do something other than flee.

In the final analysis, the evidence of Appellant waving the officer forward was not really to show the flight of Appellant but to create an ominous, but false, impression of what Appellant did at the time of the shooting, or to create an impression of what he may have done had he been in possession of a gun when he waved the officer forward. The State's case of premeditation was weak. Appellant's actions at the time of the shooting were at least as indicative of panic as they were of a premeditated design to kill. The scales could easily be tipped in favor of the State by the evidence of Appellant at some other time waving a police officer forward. And this was

the real purpose of that evidence at Appellant's trial. Even Appellee has argued that Appellant's actions at the time he was stopped by other officers show a premeditated intent to kill Officer Chappell (See, AB 64).

The testimony of Officer Donovan did not consume a large portion of Appellant's trial. But this does not lessen its prejudice. What Appellant did when stopped by Officer Donovan is in no way probative of what he did, or thought, when stopped by Officer Chappell. Yet, this testimony could very well have been the difference for Appellant being convicted of first degree murder instead of second degree murder. The resulting harm is obvious.

POINT FIVE

THE TRIAL COURT ERRED IN ADMITTING A PORTRAIT PHOTOGRAPH OF THE VICTIM.

State Exhibit Number 1 was an eight-by-ten inch glossy portrait photograph of the victim, Officer Brian Chappell. One glance at this photograph immediately causes feelings of sorrow and sadness. The argument that this photograph is relevant to establish identity or to depict the manner in which the officer was dressed at the time of the incident is totally without merit. This photograph had one purpose: to maximize the impact of the tragedy of the police officer's death upon the jury. Even the trial court recognized this in telling the prosecutor to not unduly emphasize the photograph (R 1844). The prosecutor did not need to emphasize the photograph, it spoke for itself.

Contrary to Appellee's argument, the evidence of Appellant's guilt of premeditated murder was far from overwhelming. The actions recited by Appellee are not susceptible of only one possible inference. The short distance Officer Chappell pursued Appellant can support an argument of premeditation but this is rebutted by the fact that Appellant stopped his

vehicle at an intersection and was told to move forward by the police officer (R 1894). Appellant did not shoot the officer at the window but while he was further away (R 1908). He shot at the officer's body and not his head and only fired one shot (R 1897). Only a hand was seen emerging from the truck (R 1910). The procedure in firing the gun used by Appellant, as described by Appellee, takes less than one second (R 2177).

That Appellant's conduct indicated a premeditated intent to kill is at best arguable. Equally arguable, if not more so, is that the shooting was the result of cocaine-induced fear or panic. But the argument for premeditation becomes far more persuasive when made in the presence of a portrait photograph of the victim. Combined with evidence of Appellant having waved another police officer forward during a separate incident (See, Point Four), the argument becomes virtually conclusive. As a result, Appellant was denied a fair trial.

POINT SIX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL TO FIRST DEGREE MURDER AND TO REDUCE THE CHARGE TO SECOND DEGREE MURDER.

The only evidence that Appellant killed the victim from a premeditated design is his failure to stop immediately when initially pursued by Officer Chappell. But as previously noted, this evidence is rebutted by Appellant's subsequent conduct. If Appellant were luring the officer to a remote area why did he stop at the intersection where traffic was heavy and remain there until instructed to move his vehicle forward (R 2072). The rest of Appellant's conduct is inconsistent with a conscious decision to kill the police officer.

Appellant did not wait until the officer was within close range

before firing the gun. Despite Appellee providing a contrary impression (AB 62), there was only one eyewitness to the shooting. This witness saw Appellant stick his hand out the driver's window and fire the gun once, while the officer was still toward the rear of Appellant's truck (R 1908, 2171-72). Clearly, a premeditated intent to kill would cause one to wait until the officer were next to the driver's window before firing. And more than one shot would be fired, and it would be fired at the officer's head, not his torso. Finally, the procedure employed to fire the gun may require two hands as noted by Appellee (AB 62-63), but it also takes less than one second (R 2177).

Since other inflammatory and unduly prejudicial evidence was improperly admitted against Appellant (See, Point Four and Point Five), it is not surprising the jury found Appellant guilty of first degree murder especially considering the jury selection process employed by the trial court (See, Point One and Point Two). Nonetheless, the trial court should have reduced the charge of first degree murder to second degree murder because the State failed to present prima facie evidence that the killing was premeditated.

POINT SEVEN

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

It is difficult to understand why a jury is responsible for determining whether circumstantial evidence excludes every reasonable hypothesis of innocence but it is not told the law it should apply when making that determination. When the critical issue is the defendant's intent, and the only evidence of that intent is circumstances susceptible of two or more constructions, Appellant does submit the jury should be instructed on the law regarding circumstantial evidence. There is simply no other way to ensure the

defendant a fair trial.

Even if a jury need not be instructed on circumstantial evidence in all cases where the defendant's intent or state of mind is an issue, it certainly should have been so instructed in Appellant's case. The only issue in Appellant's case was whether he shot the police officer with a premeditated intent to kill. The evidence presented by the State, when viewed most favorably for it, is equally susceptible to a finding of premeditation or no premeditation. For example, Appellee maintains Appellant driving his vehicle a mile and a quarter after Officer Chappell initially tried to stop him demonstrates a premeditated intent to kill (AB 62). Appellant maintains this shows nothing more than uncertainty as to what to do (R 2387-89). Appellee states premeditation is shown since the officer was killed by a single shot fired through the heart at close range (AB 62-63). Appellant claims this shows a lack of premeditation since an intent to kill would be manifested by several shots fired at the officer's head and at point-blank range. In short, the evidence can be reasonably construed in two different ways: one indicating guilt of first degree murder, the other indicating guilt of second degree murder.

Appellant did not request the trial court to instruct the jury it "had to accept [his] hypothesis of innocence" (AB 67). The request was for the trial court to instruct the jury on the applicable law regarding circumstantial evidence. The instructions given by the court on first degree murder and reasonable doubt were not sufficient. Under those instructions, the jury could easily believe it was free to reject the defense interpretation of Appellant's actions and decide to accept the State's argument that these actions evidenced a premeditated intent to kill. If one accepts the State's argument, there is no question of premeditation. In other words, guilt beyond

a reasonable doubt has been proved. There is nothing unreasonable in accepting the State's argument but doing so contravenes the law regarding circumstantial evidence. The jury, however, did not know this law.

The circumstantial evidence instruction is designed to prevent someone from being convicted of a crime where the evidence can be viewed in a manner that establishes guilt beyond all reasonable doubt but it is not the only reasonable view of the evidence. Indeed, the instruction itself expressly states the procedure to follow where two reasonable views of the evidence are possible. A juror could easily decide to accept one view of the evidence over another. Without the circumstantial evidence instruction, there is nothing directing a juror which view of the evidence to accept. Nothing in the Florida Standard Jury Instructions prevents a juror from choosing the State's construction of the evidence over the defendant's construction even though both are equally valid. Appellant should be convicted of first degree murder, if at all, because a jury decided the only reasonable view of the evidence supports a finding that he had a premeditated intent to kill. A conviction should never be the result of a jury adopting a particular view, to the exclusion of all others, however reasonable. Yet, since the trial court denied Appellant's request for an instruction on circumstantial evidence, his conviction could be the result of the jury accepting the State's interpretation of the evidence as the one preferred, but not necessarily the only reasonable interpretation.

POINT NINE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE THE STATE FROM SEEKING THE DEATH PENALTY.

To its credit Appellee does not dispute the State sought the death penalty in Appellant's case solely because it was what the victim's family

desired. Yet, Appellee sees nothing wrong in this action. First, Appellee argues, Appellant has no constitutional right to a plea bargain. Second, Appellant's death sentence was imposed after a full hearing before the judge and jury. So, concludes Appellee, Appellant has no cause to complain.

The enforcement of a plea bargain is not the issue. The issue is Appellant's death sentence. Under Appellee's reasoning, a death sentence is constitutional provided it is the result of a fair hearing, with total disregard for the reason the hearing was conducted in the first place. This reasoning is equivalent to upholding a punishment that is clearly cruel and unusual provided it is imposed in accordance with due process. The violation of one constitutional right is not remedied by the preservation of another.

Appellant's death sentence was sought because it was what the victim's family wanted. Even if the trial and jury that resulted from the family's wishes were constitutionally fair, that does not alter the arbitrary and capricious nature of the initial decision. As Appellee recognizes, the judiciary can interfere with a prosecutor's discretion in seeking the death penalty when premised on bad faith (AB 71). Bad faith is present when a prosecutor, having determined that justice does not demand imposition of the death penalty, seeks it nonetheless because a victim's family demands its imposition. The only reason Appellant is on death row is because it was the wish of the victim's family.

POINT TEN

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S CHALLENGE FOR CAUSE OF A JUROR WHO WOULD AUTOMATICALLY VOTE FOR THE DEATH PENALTY FOR ONE CONVICTED OF THE FIRST DEGREE MURDER OF A POLICE OFFICER.

In claiming that Appellant has failed to preserve this issue, Appellee has neglected to inform this Court that Appellant renewed his

challenge for cause of the juror at issue after the guilt phase of his trial but before the sentencing phase. The challenge was again denied (R 2801-02). As with Point Two, this issue is well preserved.

Juror Carroll unequivocally stated he would automatically vote to impose the death penalty were Appellant to be convicted of the premeditated killing of a police officer (R 1259). This was not an answer Appellant "wanted," this was the answer given. There was nothing in the question which suggested any particular answer. And having twice provided this answer, it is unreasonable to assume the juror had a sudden conversion in his belief when asked a third time. See, Hamilton v State, 547 So.2d 630 (Fla. 1989). The juror certainly should have been excused for cause.

Fitzpatrick v. State, 437 So.2d 1971 (Fla. 1983) cert. denied, 465 U.S. 1051, 104 S.Ct. 1328, 79 L.Ed.2d 723 (1984) relied upon by Appellee, is easily distinguished. In Fitzpatrick, this Court found a challenge for cause was not erroneously denied because the prospective juror only indicated "a tendency toward being in favor of the death penalty." Id. at 1075. In Appellant's case, the juror stated far more than a tendency. He said he would automatically vote for the death penalty if Appellant were convicted of the premeditated killing of a police officer. Thus, Appellant's challenge for cause should have been granted.

POINT ELEVEN

THE TRIAL COURT IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN FLIGHT AFTER COMMITTING A BURGLARY.

Appellant filed a motion to preclude the State from prosecuting him for first degree felony murder with burglary as the underlying felony (R 3517). The State stipulated to Appellant's motion (R 253). Appellee

contends this stipulation did not constitute "a legal finding on the merits that there was insufficient evidence to support a felony murder conviction" (AB 75-76). So, according to Appellee, the State was not barred from seeking the death penalty on the basis that the killing occurred while Appellant was engaged in flight after committing a burglary.

Appellee has overlooked that Appellant's motion stated "there can be no question that the killing did not occur by a person engaged in the perpetration of, or in the attempt to perpetrate, a burglary" and "the alleged commission of a burglary by Defendant in the above-styled cause can in no way support a prosecution on the theory of felony murder." The State's stipulation to Appellant's motion was unqualified. It therefore unequivocally agreed the evidence was insufficient to support a felony murder conviction against Appellant. This was tantamount to a nol pros.

Appellee is correct that a nol pros does not preclude further prosecution. But Appellant was further prosecuted. He was prosecuted for first degree premeditated murder subsequent to the State's stipulation that the evidence was insufficient to support a conviction of first degree felony murder. Yet, after obtaining a conviction of first degree premeditated murder, the State then sought to use the aggravating circumstance that Appellant was engaged in flight from a burglary when the killing occurred. This is clearly contrary to Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989). Subsequent to Delap the United States Supreme Court held in Grady v. Corbin, 495 U.S. ____, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990):

> ...the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. 495 US. at ____, 110 S.Ct. at 2093, 109 L.Ed.2d at 564.

Since the State prosecuted Appellant for premeditated murder at the guilt phase of his trial, it could not then prosecute Appellant for the same conduct at the sentencing phase of his trial under a theory it had previously conceded lacked sufficient evidence (felony murder). Occhicone v State, 570 So.2d 902 (Fla. 1990), cited by Appellee, does not compel a different result. In Occhicone the State did not stipulate prior to trial that the evidence was insufficient to support a conviction of felony murder. Having so stipulated in Appellant's case, use of the aforementioned aggravating circumstance violated the Double Jeopardy clause of the United States and Florida Constitutions.

POINT TWELVE

THE TRIAL COURT IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE THE KILLING WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Aggravating circumstances must be proved beyond all reasonable doubt. The aggravating circumstance that the killing was committed in a cold, calculated and premeditated manner was certainly not proved beyond all reasonable doubt. It is pure speculation by Appellee that Appellant "led the victim to his demise by instigating a pursuit of one and a quarter miles" (AB 79). It was the victim who instigated the pursuit and the distance travelled took only a few minutes. There is no evidence Appellant, during this brief period, was executing "a careful plan or prearranged design" Rogers v. State, 511 So.2d 526, 533 (Fla. 1987) cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Rather, the unrefuted testimony of Appellant established he was uncertain what to do: to stop or run. At no time did the thought of killing the officer enter his mind (R 2387-2392). Indeed, the act of shooting while the officer was still some distance from Appellant,

and firing only one shot, negates a heightened degree of premeditation.

The cases relied upon by Appellee are distinguishable from Appellant's case. In Valle v. State, 581 So.2d 40 (Fla. 1991) the defendant killed a police officer during a traffic stop. However, in Valle, the defendant killed the officer after leaving the latter's car and returning to his own to retrieve a gun. He told his companion he would have to kill the officer. Then, the defendant walked back to the officer's car and called out to him to get a better shot. This methodical killing differs significantly from Appellant's case. Appellant, who is blind in the right eye, stuck his arm out the window and shot the officer while he was still some distance from the driver's window.

In Jackson v. State, 498 So.2d 406 (Fla. 1986) the defendant distracted the officer by dropping her keys and then fired six shots into the victim, four of them into his head. This Court found the defendant was not someone who had panicked in a frightening situation. Appellant, on the other hand, did fire a single shot in a moment of panic. Similarly, in Johnson v. State, 438 So.2d 774 (Fla. 1983) the Defendant was sentenced to death for killing a police officer by shooting him three times. The defendant had stated he would not mind shooting people to get money and did kill two other people earlier that evening. The facts in Johnson are hardly analogous to Appellant's case.

This aggravating circumstance requires "heightened premeditation." The facts of Appellant's case simply do not meet this standard. To apply it in imposing the death sentence amounted to a denial of due process and cruel and unusual punishment under the United States and Florida Constitutions.

POINT THIRTEEN

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THREE AGGRAVATING CIRCUMSTANCES THAT COULD ONLY BE TREATED AS A SINGLE AGGRAVATING CIRCUMSTANCE.

Appellant did not state in his initial brief that the trial court 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), only instructed the jury on two aggravating circumstances. The jury was instructed in Suarez on four arguably relevant aggravating circumstances that the trial court merged into two. It is not clear in Suarez if the trial court knew beforehand that the four aggravating circumstances would be merged under the law. In Appellant's case, however, the trial court knew the three aggravating circumstances read to the jury in fact constituted only a single aggravating circumstance. It is Appellant's contention that it violates due process to read to the jury a greater number of aggravating circumstances than is known to be applicable under the law. The error was exacerbated by the fact that the prosecutor argued to the jury that these three aggravating circumstances only merged into two and not one aggravating circumstance. This allowed the prosecutor to present and bolster his argument for the death penalty in a manner that violated the law. The prosecutor knew the three aggravating circumstances merged into a single aggravating circumstance. Yet, he suggested to the jury that there were two separate aggravating circumstances. After the jury returned its death recommendation, but prior to sentencing, the prosecutor submitted a memorandum to the court acknowledging that the three aggravating circumstances at issue could only be treated as a single aggravating circumstance (R 3683-3688).

POINT EIGHTEEN

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE TO SENTENCES IMPOSED FOR SIMILAR OFFENSES.

Although the trial court found four aggravating circumstances, two of these are invalid: (1) that the capital felony was committed while the defendant was engaged in flight after committing a burglary (See, Point Eleven) and (2) that the capital felony was committed in a cold, calculated and premeditated manner (See, Point Twelve). This leaves two valid aggravating circumstances applicable to Appellant. At the time of **Songer v. State, 544 So.2d 101 (Fla. 1989)**, only one of these aggravating circumstances, that the capital felony was committed by a person under sentence of imprisonment, existed. This Court found the death sentence in **Songer** to be disproportionate when weighed against the mitigating circumstances. But for the legislature creating more aggravating circumstances, there is no difference between Appellant and **Songer**.

Appellee claims the trial court's finding of no mitigating circumstances is supported by the record (AB 95). In **Santos v. State, 16 FLW S634 (Fla 1991)**, this Court reaffirmed the test it enunciated in **Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988)**:

> [T]he trial court's first task ... is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crimes committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors. **Santos, supra** at S634 quoting **Rogers, supra** (emphasis original).

All of the mitigating evidence presented by Appellant was

unrefuted. Yet, the trial court did not conduct in any way the test adopted in Rogers and reaffirmed in Santos. Giving this mitigating evidence its due consideration compels the conclusion that Appellant's death sentence is disproportionate.

POINT NINETEEN

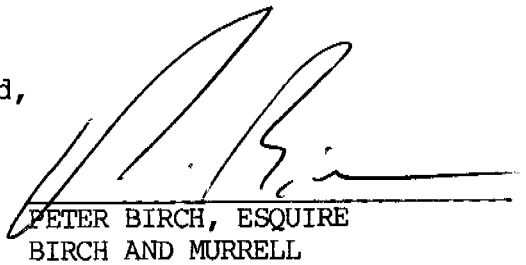
THE TRIAL COURT ERRED IN FAILING TO PREPARE A GUIDELINES SCORESHEET WHEN SENTENCING APPELLANT FOR THE NON-CAPITAL OFFENSES.

Contrary to Appellee's argument, Appellant did not stipulate to the sentences received for the non-capital offenses. In a letter written by the prosecutor to the trial judge, it was simply stated what sentences could be imposed (R 3710). There was no discussion of a waiver of the sentencing guidelines or that Appellant could be sentenced in excess of the guidelines recommended sentence. The trial court clearly erred in sentencing Appellant for non-capital offenses without preparation of a guidelines scoresheet.

C O N C L U S I O N

WHEREFORE, based upon the foregoing argument and authorities cited therein, Appellant respectfully requests this Court to reverse the judgments and sentences of the trial court and grant a new trial and to preclude the State from seeking the death penalty against Appellant. Alternatively, Appellant requests this Court to reduce his sentence of death to life imprisonment without the possibility of parole for twenty-five years or to grant a new sentencing hearing.

Respectfully submitted,



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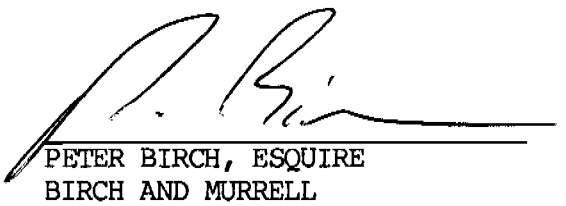
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to CELIA TERENZIO, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, 33401, on this 30th day of December, 1991.



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