IN THE SUPREME COURT OF FLORIDA

NO. 74,927

ANGEL NIEVES-DIAZ,

Petitioner,

v.

HARRY K. SINGLETARY, JR.,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT IN REPLY

INTRODUCTION

As an introductory matter, Mr. Diaz replies to various arguments advanced by the Respondent which pervade the Respondent's pleading [hereinafter Response]. Although these arguments are bankrupt of any legal or factual basis, Mr. Diaz must address them in this reply in order to correct the misrepresentations of controlling legal precedent set forth by Respondent.

Repeated throughout Respondent's pleading is the argument that Mr. Diaz cannot raise claims "under the guise of ineffective assistance of appellate counsel." See Response at 5, 9, 11, 17, 20, 21, 23, 25, 26, 28, 30-31, 31, 34. A claim alleging ineffective assistance of appellate counsel is not a "guise" but rather a valid claim based on the Sixth Amendment to the United States Constitution, as well as the Due Process Clause of the Fourteenth Amendment. "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). This Court has recognized that "[i]t is the unique role of that [appellate] advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process." Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985).

Mr. Diaz was not entitled to the "guise" of appellate counsel, but rather to a "zealous advocate." Id. As the United States Supreme Court observed:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that -- like a trial -- is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right -- like nominal representation at trial -- does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.

Evitts v. Lucey, 469 U.S. at 396.

Just as a claim of ineffective assistance of appellate counsel is not a "guise," neither should a mechanistic (and legally groundless) incantation of "procedural bar" serve as a "guise" to prevent full review of the claims presented in Mr. Diaz's petition. Respondent blindly repeats that because Mr. Diaz raised some of the same issues in his Rule 3.850 motion and in his habeas petition, he is procedurally barred from raising these issues in a habeas petition.[1] As a putative legal justification for this argument, Respondent cites liberally to this Court's opinion in Blanco v. Wainwright, 507 So. 2d 1377 (1987). First of all, nowhere in the Blanco opinion does the Court state that a claim is procedurally barred if it is

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[1]See Response at 5 (regarding Claim I), 9 (regarding Claim II), 11 (regarding Claim III), 17 (regarding Claim VII), 19 (regarding Claim IX), 21 (regarding Claim X), 22 (regarding Claim XI), 23 (regarding Claim XII), 24-25 (regarding Claim XIII), 26 (regarding Claim XIV), 28 (regarding Claim XV), 29 (regarding Claim XVI), 31 (regarding Claim XVII), and 33 (regarding Claim XVIII).

raised in both a Rule 3.850 motion and a habeas corpus petition. Further, Respondent relies on Blanco for a legal proposition which simply is not at issue in Mr. Diaz's case. In Blanco, the Court observed that the "gravamen of the petition . . . is appellate counsel's failure to recognize egregious errors appearing on the face of the trial record, to wit: ineffective assistance of trial counsel." Blanco, 507 So. 2d at 1384. The Court then rejected the argument that appellate counsel on direct appeal should present issues relating to ineffective assistance of trial counsel because "[a] proper and more effective remedy is already available for ineffective assistance of trial counsel under rule 3.850." Id.

Mr. Diaz's habeas petition does not allege that appellate counsel failed to raise claims that trial counsel rendered ineffective assistance of counsel. A point apparently lost on Respondent is that Mr. Diaz represented himself at the guilt phase of trial. Therefore, particularly as to those claims addressing the guilt phase of his capital trial, Mr. Diaz clearly is not raising claims that the Court condemned in Blanco. Rather, Mr. Diaz's habeas petition alleges serious violations of his Sixth Amendment right to the effective assistance of appellate counsel for failing to raise clearly meritorious issues which are apparent on the face of the record and which were either preserved for appeal and/or constituted fundamental error either singularly or cumulatively. See generally Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986); Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984).[2]

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[2]Mr. Diaz will address with more specificity the misrepresentations made by the Respondent as to procedural bars in his discussion of the individual claims.

CLAIM I

A. Reply to Procedural Bar Argument.

Respondent first argues that this claim is procedurally barred from review because the claim was already raised on direct appeal (Response at 4). Respondent goes so far as to aver that "Diaz's allegation that appellate counsel failed to challenge the procedural propriety of his competency evaluation and waiver of counsel is patently false" (Response at 4). Respondent's counsel should not level such serious accusations without first consulting the briefs, *accurately* representing the arguments raised therein, and *accurately* describing the Court's direct appeal opinion. Because Respondent failed to do this, Respondent asserts a procedural bar which is factually and legally erroneous.

The Initial Brief filed by Mr. Diaz's appellate counsel shows that, as Claim IV, counsel alleged a Faretta[3] violation in that the trial court erred by granting Mr. Diaz's untimely request to represent himself where, in view of his background and circumstances of the trial, he lacked the capacity to do so (Initial Brief of Appellant at 22).[4] Respondent's Response cites a paragraph from page 26 of the Initial Brief to support its argument that appellate counsel did "challenge the procedural propriety of [Mr. Diaz's] competency evaluation" on direct appeal (Response at 3-4). However, an actual review of that brief reveals that the discussion quoted in

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[3]See Faretta v. California, 422 U.S. 806 (1976).

[4]For the Court's review, Mr. Diaz has included the Initial Brief as Appendix A to the instant Reply.

the Respondent's Response ***did not*** "challenge the procedural propriety" of the competency evaluation as a constitutional ground for relief. Rather, the quoted passage appears in the section of the Initial Brief entitled:

> B. The defendant was not competent to represent himself when he could not read or speak English well, and his mental competence was in doubt.

(Initial Brief at 25). The Brief goes on to discuss how the trial judge violated Faretta because Mr. Diaz failed to meet the minimum criteria to represent himself as set forth in Faretta (Initial Brief at 26-27). One of the criteria for an adequate Faretta inquiry is whether the defendant is "literate, competent, and understanding." Faretta v. California, 422 U.S. 806, 835 (1976). *In the context of the Faretta argument*, the Initial Brief pointed to the trial judge's failure to halt the proceedings after ordering a competency evaluation as well as the judge's decision to permit Mr. Diaz to appear *pro se* before the issue of competency was resolved (Initial Brief at 27).

Respondent underlined the passage from the Initial Brief that reads "The decision to allow self-representation was entered well before the issue of mental competence had been settled [TR-382] and was error on that basis" (Response at 3-4). Respondent apparently takes this passage to mean that the error that counsel was complaining about was the failure to halt the proceedings while disputed competency issues were resolved. This is not the case. It is obvious from the way the sentence was written that appellate counsel was raising as error the fact that the trial court allowed Mr. Diaz to represent himself before the

competency evaluation was conducted; this construction makes perfect sense given that appellate counsel was only alleging an inadequate Faretta inquiry.

Moreover, the initial brief contains no discussion of the violations of state and federal law governing competency proceedings which occurred in Mr. Diaz's case -- i.e., failure to suspend the trial while the competency determination was pending, Mr. Diaz's absence from the competency hearing, the mental health experts' failure to address the competency criteria. Rather, the Initial Brief only mentions that the trial court conducted the Faretta inquiry before making the competency determination. This is clearly because appellate counsel was only challenging the Faretta inquiry and was not challenging the legality of the competency proceeding.

A review of the State's Answer Brief on direct appeal further demonstrates that, contrary to Respondent's assertion that Mr. Diaz made a "patently false" representation of the claim raised on direct appeal, the only claim raised on direct appeal related to the adequacy of the Faretta inquiry at trial. First, counsel for the State on direct appeal fashioned Mr. Diaz's claim in the following manner:

IV

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE DEFENDANT TO REPRESENT HIMSELF?

(Brief of Appellee at 26).[5] The State's brief then argued that "the record conclusively establishes that the defendant was literate, competent, understanding,

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[5]Mr. Diaz has included the State's brief on direct appeal as Appendix B to the instant petition.

and 'voluntarily exercising his informed free will'" (Brief of Appellee at 46) (quoting Faretta, 422 U.S. at 835). The State on direct appeal recognized that Mr. Diaz was arguing that the Faretta inquiry was inadequate because the self-representation was entered before the competency evaluation had been done (Brief of Appellee at 49), but argued that "[e]rror, if any, was harmless in view of the conclusion by both Drs. Castiello and Haber that the defendant was competent" (Id.). This argument makes sense in relation to the actual claim raised by appellate counsel.

Finally, this Court's direct appeal opinion establishes that the claim raised by appellate counsel only addressed the adequacy of the lower court's Faretta inquiry. The Court characterized Mr. Diaz's claims as follows:

> Diaz next argues that the court erred in allowing him to proceed pro se because (1) his request was not timely, (2) he needed an interpreter, and (3) his movement before the jury during such representation drew attention to his shackles.

Diaz v. State, 513 So. 2d 1045, 1047 (Fla. 1987). The Court noted that the lower court conducted a Faretta inquiry, and held that "[t]he record shows that Diaz competently, knowingly, and voluntarily waived his right to counsel and exercised his right to conduct his own defense." Id.

The constitutional issues presented in Claim I of Mr. Diaz's habeas petition were not raised on direct appeal. In Claim I, Mr. Diaz alleged that appellate counsel rendered ineffective assistance of counsel for failing to raise as error the trial court's failure to halt Mr. Diaz's trial pending the resolution of disputed

competency issues. See Habeas Petition at 13.[6] Further, Mr. Diaz's habeas petition alleged that the trial court failed to explain to Mr. Diaz that the trial could not proceed until the competency issues had been assessed, and to inform Mr. Diaz what a competency evaluation consisted of, including the rules governing such competency determinations (Habeas Petition at 15). Mr. Diaz further alleged that the "procedure employed by the court wholly failed to comport with any notion of due process" (Habeas Petition at 17), including the facts that Mr. Diaz, who was representing himself, was not even present when Dr. Haber appeared in court and discussed the competency findings with Judge Donner and that Dr. Castiello's oral report was not even given in court (Habeas Petition at 17-19). In short, Mr. Diaz's habeas petition alleged numerous instances of fundamental constitutional error that were never presented on direct appeal.[7]

The Respondent also imagines that a procedural bar exists because Mr. Diaz raised this issue in his Rule 3.850 motion and in the appeal therefrom. However, Respondent then announces the legal fallacy of its own argument by writing that the claims raised in the Rule 3.850 motion were "framed as fundamental error or ineffective assistance of trial counsel" (Response at 4). Issues of fundamental

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[6]Standby counsel even informed Judge Donner that "the proceedings should stop at this point and determine his competency," and that "I do not see where we can go forward and then evaluate his competency" (R. 799-800) (quoted in habeas petition at 13-14). Therefore, the issue was certainly in the record and preserved for appellate review by standby counsel.

[7]Ultimately, Respondent recognizes that the issue presented in Mr. Diaz's habeas petition was not raised on direct appeal: "Diaz raised part of this issue on direct appeal" (Response at 5).

error and ineffectiveness of trial counsel are properly alleged via a Rule 3.850 motion, as the case cited by the Respondent, Blanco v. Wainwright, makes clear. There is no precedent, and Respondent cites none, for the proposition that Mr. Diaz is barred from raising a claim of ineffective assistance of appellate counsel in a habeas petition while at the same time raising claims of ineffective assistance of trial counsel in an appeal from the denial of a Rule 3.850 motion.

B. The Merits.

Regarding Mr. Diaz's claim that appellate counsel failed to raise on appeal the issue of Mr. Diaz's involuntary absence from the courtroom when the trial court conducted the competency proceedings, the Respondent argues that "neither [Mr. Diaz] nor Mr. Lamons objected to [Mr. Diaz's] absence once they discovered that the doctors had given their oral reports," and that "nothing mandates a defendant's presence at such an event" (Response at 5).[8] Respondent's argument is fundamentally flawed on numerous levels.

First, a competency hearing is not an "event," but rather an adversarial part of the legal process at which the defendant has an absolute right to be present, absent a knowing, intelligent, and voluntary waiver. Pate v. Robinson, 383 U.S.

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[8]The Respondent misrepresents that both Dr. Haber and Dr. Castiello gave oral reports in open court (Response at 5). Only Dr. Haber showed up in court and rendered the opinion that Mr. Diaz was competent, although "he did express to me that he would like some technical legal help in defending himself" (R. 981-82). The record is silent as to how Judge Donner even knew what Dr. Castiello's findings were, as his written evaluation was not even submitted until the next day. What the record does reflect is that Dr. Castiello did not appear in court.

375 (1966); Lane v. State, 388 U.S. 1022 (Fla. 1980).[9] See also Delguidice v. Singletary, 84 F. 3d 1359 (11th Cir. 1996). Respondent's simplistic assertion that a competency hearing is just an "event" is contradicted by longstanding precedent recognizing the fundamental right of a defendant not to be tried while incompetent. Pate; Medina v. California, 505 U.S. 437 (1992). A defendant's competency hearing implicates the most integral of constitutional rights:

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Cooper v. Oklahoma, 116 S. Ct. 1373, 1376 (1996) (citations omitted).

Respondent's bald assertion that Mr. Diaz had no right to be present during the competency hearing cannot overcome Mr. Diaz's constitutional right to be present during his trial. It must be remembered that the issue of Mr. Diaz's competency arose during the trial itself, and Mr. Diaz was representing himself. The competency proceeding took place during trial, not in a pretrial setting.[10] "It is settled law that trial begins when the selection of a jury to try the case

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[9]See also discussion in Habeas Petition at 27-28 and cases cited therein.

[10]Mr. Diaz would have had the constitutional right to be present even if the competency proceeding took place pretrial. See Fla. R. Crim. P. 3.180(a)(3)("In all prosecutions for crime the defendant shall be present: . . . . (3) At any pre-trial conference; unless waived by Defendant in writing"). However, the fact that the competency proceeding was conducted during the trial proceedings itself only strengthens Mr. Diaz's argument that he had the right to be present absent a constitutionally-mandated waiver.

commences." State v. Melendez, 244 So. 2d 137, 139 (Fla. 1971). Competency hearings are not conducted in the absence of the parties and the defendant, particularly when the defendant is representing himself, and due process applies to competency determinations. If a hearing is mandated, as it was in Mr. Diaz's case, see Fla. R. Crim. P. 3.210 (b) (1988), that hearing must comport with due process. See generally Pate v. Robinson, 383 U.S. 375 (1966).

Respondent complains that Mr. Diaz did not object to his absence *after* he was informed about the experts' findings (Response at 5-6). Respondent neglects to mention that the court never informed Mr. Diaz that the court had conducted a hearing in his absence. Further, it is Respondent's burden to show that Mr. Diaz waived his presence. Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982)("The State has failed to show that Francis made a knowing and intelligent waiver of his right to be present"). The trial court did not inform Mr. Diaz that a competency hearing had occurred and did not make any inquiry of Mr. Diaz regarding a waiver of his presence at that hearing. Finally, Respondent cites to no authority for the proposition that such an objection is required under these circumstances. Mr. Diaz's involuntary absence from this critical stage of his trial is fundamental error which can be raised for the first time on appeal. Wilson v. State, 680 So. 2d 592, 593 (Fla. 3d DCA 1996); Butler v. State, 676 So. 2d 1034 (Fla. 1st DCA 1996). See also Pate, 383 U.S. at 384 (the right not to stand trial while incompetent is sufficiently important to merit protection even if defendant fails to make a timely request for a competency determination).

Respondent's assertion that Mr. Diaz "did not ask to call other witnesses or introduce other evidence to contest the court's competency finding" just misses the point (Response at 6). Mr. Diaz did not know that the court had conducted a hearing in his absence, that he had a right to be present, that the doctors, after evaluating him, were to report their findings to the Court, that he had the right to confront the doctors' opinions through cross-examination, that he had the right to testify in his own behalf at the competency hearing, or that he had to object in order to preserve his rights. Certainly the trial court did nothing to inform Mr. Diaz of these rights.[11]

An analogous situation occurred in Francis v. State, 413 So. 2d 1175 (Fla. 1982). In Francis, during voir dire, defense counsel asked if the defendant could go to the restroom. Mr. Francis then left the courtroom to go to the bathroom. Without consulting Mr. Francis, defense counsel then waived Mr. Francis' presence. By the time Mr. Francis was returned to the courtroom, voir dire had been relocated to the jury room and was concluded in his absence. Id. at 1176-77. After the jury was selected, no inquiry was made of Mr. Francis as to whether he ratified the jury which was selected in his absence. Id. at 1177. On appeal, the Court first noted that "Francis was absent during a critical stage of his trial and his absence was not voluntary." Id. at 1178. The Court went on to hold that "Francis was not questioned as to his understanding of his right to be present

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[11]The trial court was on notice that Mr. Diaz lacked knowledge of the legal process, had "no idea" how a trial was conducted, and had never read a law book (R. 371).

during his counsel's exercise of his peremptory challenges," and that "[h]is silence, when his counsel and others retired to the jury room or when they returned after the selection process, did not constitute a waiver of his right." Id. This Court remanded for a new trial. Francis clearly controls Mr. Diaz's case.[12]

Respondent's argument that "[i]n any event, after obtaining the reports, the trial court communicated the doctors' findings to counsel" also fails to provide any legal justification for Mr. Diaz's involuntary absence (Response at 6). Although not expressly stating such, Respondent is apparently arguing that Mr. Diaz's involuntary absence is harmless error. However, Respondent's legal analysis is faulty. Mr. Diaz was *involuntarily absent* from the proceedings at issue, and was acting as his own counsel at trial. Respondent fails to explain how a *pro se* defendant's absence from trial can be harmless error. Further, even if there were some legal significance to the fact that standby counsel was notified about the experts' findings after the fact, even standby counsel was not present when Dr. Haber appeared in court (nor, for that matter, was the prosecutor).[13]

Respondent also argues that the error was somehow harmless because Mr. Diaz "personally stipulated to the doctors' findings" (Response at 6). Again, this does nothing to explain Mr. Diaz's involuntary absence from the proceedings.

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[12]Respondent never even cites Francis, much less attempts to distinguish it from Mr. Diaz's case. In fact, Respondent never addresses any of the caselaw discussed in Mr. Diaz's habeas petition on this claim.

[13]Certainly, had Dr. Haber reported to Judge Donner that Mr. Diaz was incompetent, the State would vociferously complain that it had no opportunity to test Dr. Haber's opinion through an adversary proceeding.

Moreover, an involuntary "stipulation" cannot satisfy the stringent harmless-beyond-a-reasonable-doubt standard that the State must meet in this case. Francis. It is clear that Mr. Diaz's stipulation was far from a knowing ratification of anything. When Mr. Diaz was brought into the courtroom, Judge Donner asked Mr. Diaz if he would "stipulate that the reports of the doctors are true" and that he was "competent in a mental sense" (R. 985-86). Mr. Diaz said yes (Id.). This is the extent of what occurred. The court pressured Mr. Diaz into "stipulating"[14]to the "truth" of the doctors reports, yet the court never afforded Mr. Diaz the opportunity to be in court when those reports were orally rendered, nor afforded Mr. Diaz the opportunity to read the written reports, which were not filed until the following day (R. 985). Mr. Diaz's "stipulation" provides a totally insufficient basis for finding Mr. Diaz's involuntary absence harmless beyond a reasonable doubt. Mr. Diaz is entitled to habeas relief.

Respondent never addresses Mr. Diaz's argument that appellate counsel failed to raise on appeal the trial court's failure to suspend the proceedings pending the competency determination. Respondent does not contest the fact that Fla. R. Crim. P. 3.210 (1988) required the trial court to halt the trial while Mr. Diaz's competency evaluations were being conducted, and that this was well-settled law at the time of Mr. Diaz's direct appeal. See, e.g. Jones v. State, 362 So. 2d 1334, 1336 (Fla. 1978) ("a defendant's due process right to a fair trial was

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[14]Given Mr. Diaz's difficulties with the English language, and his lack of legal knowledge, it is doubtful that he even knew what "stipulate" meant, much less the legal implications of entering into a "stipulation."

violated when the trial court failed to suspend a trial pending the determination of defendant's competence to stand trial").[15] Mr. Diaz is entitled to habeas relief.

Respondent only briefly addresses Mr. Diaz's argument regarding the inadequacy of the competency evaluations themselves. Respondent relies upon Fla. R. Crim. P. 3.211(d) to argue that the experts' written reports were adequate (Response at 7). However, Respondent overlooks the fact that the provision upon which Respondent relies was not in the rules at the time of Mr. Diaz's trial. See Rule 3.211, Fla. R. Crim. P. (1985). The rule in existence at the time of Mr. Diaz's trial (quoted in Mr. Diaz's petition at 24-25) required experts to consider eleven criteria and provided: "In considering the issue of competence to stand trial, the examining experts should consider and include in their report [the eleven criteria]." Fla. R. Crim. P. 3.211(1) (1985)(emphasis added). Since the issue here is whether appellate counsel was ineffective in failing to raise this claim, the applicable law is that in existence at the time of trial.

Regardless, reference to what the written reports actually contain misses the point, since the focus of Mr. Diaz's argument is the adequacy of the information that was before the court when the competency determination was made.[16] This

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[15]While Mr. Diaz contends that the trial court's error constitutes fundamental error, he would note that standby counsel did object when Judge Donner failed to halt the proceedings after ordering Mr. Diaz to be evaluated for competency to proceed. See R. 799-800.

[16]The written reports were not filed until the day after the oral pronouncements.

is the extent of the information contained in this record as to the experts' findings about Mr. Diaz's competency to proceed upon which the lower court relied:

> (Thereupon, other matters were handled, after which the following proceedings were had outside the presence of the attorneys, the Defendant, and the jury:)
>
> THE COURT: Dr. Haber, would you give me an oral on Angel Diaz, please.
>
> DR. HABER: Angel Diaz is competent. But he did express to me that he would like some technical legal help in defending himself.
>
> THE COURT: Did Mr. Diaz tell you that Mr. Lamons sits next to him and gives him help during the entire trial?
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> DR. HABER: (Thereupon, Dr. Haber shook his head.)
>
> THE COURT: No, he did not tell you that.
>
> The report, as I said, from Dr. Castiello is that Mr. Diaz is very competent.
>
> DR. HABER: Yes, he is.

(R. 981-82)(emphasis added). As to what Dr. Castiello orally reported to Judge Donner, that information is not contained in this record. Mr. Diaz is entitled to habeas relief.

In conclusion, Mr. Diaz has established that he is entitled to habeas relief. The errors that were not raised by appellate counsel implicated integral and fundamental constitutional rights, namely, the right to be present, the right not to

be tried while incompetent, and the right to a competency proceeding which comported with Florida law and due process. These are not "nonmeritorious" issues, as argued by Respondent. Appellate counsel's failure to raise this issue "must undermine confidence in the fairness and correctness of the outcome" of Mr. Diaz's direct appeal. Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Mr. Diaz is entitled to a new direct appeal.

CLAIM II

A. Reply to Procedural Bar Argument.

As with Claim I, Respondent erects imaginary procedural bars to this claim (Response at 9). Mr. Diaz relies on his arguments in Claim I, infra, to refute the procedural bar argument advanced by Respondent.

B. The Merits.

1. Absence from the Competency Hearing.

Mr. Diaz will rely on his discussion of this issue as set forth in Claim I, infra.

2. Absence from Discussions About Witnesses.

a. Hector Torres.

Respondent's main argument regarding Mr. Diaz's involuntary absence from the discussions about witness Torres is that "Appellant cannot show prejudice from his absence" (Response at 10). Respondent cites no authority for the proposition that a defendant must show how he was prejudiced by an involuntary absence. Indeed, authority is to the contrary: Respondent has the burden to show that the absence was harmless beyond a reasonable doubt. Francis v. State, 413

So. 2d 1175, 1178-79 (Fla. 1982). Respondent has not shown any voluntary and intelligent waiver of Mr. Diaz's presence and has not shown that his absence was harmless beyond a reasonable doubt.

Respondent further argues that "neither Appellant nor counsel had any standing to object to the prosecutor's talking to Mr. Torres" (Response at 10). Again, Respondent overlooks one salient -- and dispositive -- factor: Mr. Diaz was his own counsel during this trial. Because he was counsel, Mr. Diaz had the absolute right to be present during all stages of his trial. Even if Mr. Diaz had been represented by counsel, he had the absolute right to be present.

Respondent's standing argument is a simplistic response to what occurred. The trial court, the state, and standby counsel engaged in a lengthy discussion about Mr. Diaz's case in Mr. Diaz's absence when Mr. Diaz was supposed to be representing himself. The court never informed Mr. Diaz that this discussion occurred. As with the numerous other involuntary absences, Mr. Diaz did not waive his presence during the discussions about Hector Torres. For the Respondent to argue that "according to Mr. Galanter, there was no indication that Mr. Torres had exculpatory information" (Response at 10) fails to acknowledge that Mr. Diaz had the right to be present during these discussions and to decide for himself whether to pursue Mr. Torres' information. Further, Mr. Galanter was not involved in Mr. Diaz's case by his own admission, and his and the prosecutor's opinion that Torres had no exculpatory evidence does not vitiate Mr. Diaz's right to be present. Had Mr. Diaz been allowed to be present (he was representing

himself), he could have chosen to interview or depose Torres to see what information he had so that Mr. Diaz could have made an informed decision about subpoenaing Torres. The court never informed Mr. Diaz about the discussions regarding Torres. The court's actions made Angel Diaz, who was representing himself, irrelevant to his own capital trial.

3. Discussions About the Defense Case.

The record reflects that Mr. Diaz was involuntarily absent from various other proceedings at which time issues regarding the defense case were discussed. For example, the court had permitted Mr. Diaz and his standby counsel to interview various inmate witnesses to determine whether Mr. Diaz wished to call these individuals in his defense (R. 1216-17). After acknowledging in open court that Mr. Diaz was not present (R. 1218), standby counsel divulged that he (standby counsel) would not call the witnesses, but "I guess it is up to Angel" (R. 1218). Then, still outside the presence of Mr. Diaz, the court, the state, and standby counsel engaged in a discussion about the outcome of these interviews (R. 1218-19). During this discussion, the prosecutor stated that if Mr. Diaz were to present these witnesses, the door would be open to permit the introduction of evidence the court had previously ruled to be inadmissible (R. 1218). After these discussions, Mr. Diaz was brought back into the courtroom and Judge Donner announced her ruling. At no time did the court inform Mr. Diaz that discussions had taken place outside his presence, that the prosecutor had made legal

arguments about the witnesses' testimony, or that standby counsel had divulged his opinions about the witnesses.

Respondent does not address Mr. Diaz's absence from this discussion. Mr. Diaz's various absences were clearly set forth in the record on appeal. Whenever the court reporter begins the transcript, the defendant's presence of lack thereof is clearly marked, Moreover, during the specific discussion about the defense witnesses, Judge Donner on the record asked the corrections officer, "Could I have him brought out as soon as you have the proper personnel?" (R. 1218). Rather than stopping and waiting for Mr. Diaz, the proceedings continued in his absence. There is simply no justification for not raising Mr. Diaz's absence from this discussion on direct appeal.

4. Other Absences.

As to the numerous other proceedings at which Mr. Diaz was involuntarily absent, Respondent solely relies on the argument that these were not critical stages "under Florida Rule of Criminal Procedure 3.180" (Response at 10). The contrary is true, however. Rule 3.180(a)(3), Fla. R. Crim. P., specifically provides (and provided at the time of Mr. Diaz's trial): "In all prosecutions for crime the defendant shall be present . . . . (3) At any pre-trial conference; unless waived by Defendant in writing" (emphasis added). The rule thus is directly contrary to Respondent's position that a defendant need not be present for pretrial hearings.

There is no authority for Respondent's position that the pretrial hearings and other hearings during trial were not critical stages.[17] Because Mr. Diat was representing himself at trial, there can be no proceeding that is not "critical" and at which Mr. Diaz's presence would not be required. The record establishes *numerous* proceedings at which Mr. Diaz was not present, including pretrial and trial proceedings. See, e.g. R.374-75 (involving discussions about key witnesses recanting or "disappearing" and no waiver on the record); R. 350 (discussion about appointment of expert psychologist as well as production of favorable evidence in the form of inculpatory evidence concerning co-defendant Toro); R. 396-413 (hearing concerning potential witness against co-defendant Toro and conflict of interest resulting from Mr. Diaz's counsel Ferrero's representation of that witness); R. 696-702 (testimony regarding security measures; testimony adduced that Mr. Diaz had reputation for violence and had tried to bribe a security guard). Mr. Diaz

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"Respondent cites three (3) cases solely for the proposition that when proceedings deal only with legal issues to which the defendant "could not have added anything," an involuntary absence is not fundamental error (Response at 10). None of these cases are relevant to Mr. Diaz's case. Most significantly, none of the cases involves a situation where the defendant is representing himself. If a defendant is representing himself, he or she must obviously be present, as it will be the defendant addressing the legal issues. In Bianco v. State 452 so. 2d 520 (Fla. 1984), this Court held that a represented defendant's absence when the trial court explained its ruling on the legality of the defendant's arrest was not fundamental error, notably because the defendant had been present during the hearing itself, when testimony was taken and legal argument made. Randall v. State, 346 So. 2d 1233 (Fla. 3d DCA 1987), involved a situation where a represented defendant was not present during a jury instruction charge conference. In re Shriner 735 F. 2d 1236 (11 th Cir. 1984), involved a situation where a represented defendant was not present during some bench conferences. None of these cases is factually relevant to Mr. Diaz's case, where Mr. Diaz was representing himself.

was also absent during a pretrial hearing when defense counsel argued that co-defendant Toro was the triggerman, and that the State was not complying with Brady. In this rare occurrence, the trial court inquired about Mr. Diaz's absence from the hearing. Defense counsel stated that he advised Mr. Diaz that there was a hearing but "I don't know if he knew what the motion was for" (R. 359). The court then asked if counsel was waiving Mr. Diaz's presence, and counsel said yes (R. 359). Thus, on the rare occasion when Mr. Diaz's absence was noticed, standby counsel waived Mr. Diaz's presence although admitting that Mr. Diaz did not even know what the hearing was about. When Mr. Diaz returned, there was never any further inquiry into his absence, and the court obtained no waiver from Mr. Diaz.

Finally, Mr. Diaz was also involuntarily absent from his trial proceedings when the trial court, the prosecutor, and standby counsel had a discussion about the contents of Mr. Diaz's closing argument before the jury (R. 1179). After this discussion, further conversations occurred regarding security measures, at which time Judge Donner, on the record, announced that "We cannot talk about his in front of him, so close the door" (R. 1179-81). The judge also had a conversation with the prosecutors outside the presence of Mr. Diaz during which she asked how much time the State wanted for its closing argument, and addressed other matters such as the verdict forms (R. 1181-82). Finally, the prosecutor acknowledged to the court that "[w]e should have the defendant here for all these discussions" (R.

1182). To that, the court responded "[t]here is life after this courtroom, you know" (Id.). Finally, Mr. Diaz was brought into the courtroom (R. 1182).

These discussions occurred during trial, when Mr. Diaz was representing himself. There can be no portion of these proceedings that is not critical when a defendant is representing himself. The intermittent presence of standby counsel during these proceedings does not change the fact that Mr. Diaz himself was not present. Either Mr. Diaz was representing himself at his trial, or he was not. If he was, and the court ruled that he was, then he had the absolute right to be present. Further, the Court had the obligation to ensure that Mr. Diaz was present. However, Judge Donner actively proceeded in Mr. Diaz's case knowing he was not present, and even once announced on the record that "[w]e cannot talk about his in front of [Mr. Diaz]" (R. 1179-81).

These involuntary absences appear on the face of the trial transcript, and leap out to even a casual reader of this trial. No tactical or strategic reason can be discerned from this record which would justify the failure to raise this meritorious issue on direct appeal. Had appellate counsel raised the issue, Mr. Diaz would have been entitled to a reversal. Mr. Diaz is now entitled to habeas relief.

CLAIM III

Respondent accurately states that Mr. Diaz "claims that appellate counsel was ineffective for failing to challenge as fundamental error the trial court's denial of his right to call witnesses on his own behalf at the guilt phase of his trial" (Response at 1 1), but in the same paragraph regurgitates the argument repeated

throughout its pleading -- that Mr. Diaz is somehow "barred" from raising this issue under the "guise" of ineffective assistance of counsel (Response at 11) (citing Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987)). Blanco does not stand for the proposition that Mr. Diaz is "barred" from raising appellate ineffectiveness in a habeas petition. See Introduction, supra. A claim that appellate counsel was ineffective for failing to raise on appeal a claim of fundamental error is not a "guise" but a valid claim for relief.

As to the merits, Respondent's sole argument is that Mr. Diaz waited too long to subpoena the witnesses he wished to call (Response at 1 l-l 2). However, Respondent ignores the fact that Mr. Diaz was told he had to make his request for witnesses after the State's case was completed (R. 1161). Judge Doriner never informed Mr. Diaz that if he wished to present witnesses in his own defense, he needed to make those arrangements in advance of the trial.

Respondent also argues that Mr. Diaz failed to inform standby counsel of his desire to call various witnesses (Response at 12), as if this fact, if true, had any relevance to the case. Mr. Diaz was representing himself. However, Respondent's argument is factually inaccurate. On the record, standby counsel acknowledged that he "knew they could be potential witnesses. I had heard of them, obviously" (R. 1189-90).

As to the remainder of the Respondent's arguments, Mr. Diaz would rely on his habeas petition, which details the precise nature of the circumstances surrounding Mr. Diaz's desire to call witnesses on his own behalf, who those

witnesses were, and why those **witnesses were critical to** Mr. Diaz's defense. Based on the arguments advanced in the habeas petition, Mr. Diaz is entitled to ha **beas** relief.

CLAIM IV

The arguments advanced by the Respondent in this claim highlight the farcical nature of this case and demonstrate the length to which the State of Florida will go to defend this record. On the one hand, Respondent argues that Mr. Diaz failed to detail the dates or subject of various hearings which do not appear in the record, ignoring the fact that Mr. Diaz was not present during a large portion of the proceedings in this case. If Mr. Diaz has "failed" to allege with specificity the dates, subject, and "any specific error that occurred during" these proceedings (Response at 13), it is because he was not present during these proceedings. See Claims I, II, supra. Then, on the other hand, as to the one hearing at which Mr. Diaz was present yet which is not included in the record, Respondent argues that this claim should be denied because Mr. Diaz only "allegedly" had this conversation and he "fails to allege the source of the conversation" (Response at 64). Respondent's position can be summarized as follows: as to the hearings at which Mr. Diaz was involuntarily absent, he cannot prevail because he cannot allege what occurred during those hearings, and as to the hearing at which Mr. Diaz was present and alleged what occurred during those hearings, he cannot prevail because the claim involves only "allegations." Respondent is grasping at straws to defend the state of this record.

Specifically, as to Mr. Diaz's argument that there is a missing hearing transcript from a proceeding that commenced on the morning of Mr. Diaz's trial, Respondent argues that Mr. Diaz failed to allege the substance of the hearing and any error that occurred during it. However, Mr. Diaz's habeas petition demonstrates otherwise. In his petition, Mr. Diaz alleged the following:

> Finally, since appellate counsel never consulted with Mr. Diaz, she did not know that the record contains no transcript of matters which occurred the morning of the day Mr. Diaz's trial began. The trial began on December 17, 1985 (R. 430). The only thing indicated in the record for that morning is the court announcing that Mr. Diaz's case is set for trial (R. 433). Then the proceedings were adjourned until 1:30 p.m. (Id.), when various motions were heard and jury selection began. However, on the morning of December 17, Mr. Diaz spoke to the court, explained that he had just recently met Mr. Lamons, and asked for two or three weeks to get ready for trial.[18] The court informed Mr. Diaz that Mr. Lamons was a good attorney, that everything would be okay, and that there would be no continuance. Mr. Lamons also spoke to the judge that morning, but the court said the trial was going ahead. When Mr. Diaz protested, the court said he would have to represent himself. Mr. Diaz did not ask to represent himself, but just asked for two or three weeks to prepare for trial. The self-representation idea was proposed by the judge, not Mr. Diaz. The judge then asked Mr. Diaz if he knew how to pick a jury, and when Mr. Diaz said no, the judge said Mr. Lamons would pick the jury. The first time the record indicates anything regarding Mr. Diaz representing himself is after the jury was selected, just before the State's opening. None of the discussion which occurred that morning is in the record.

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[18] Mr. Lamons appears to have begun representing Mr. Diaz around September, 1985 (R. 439), and trial was set for February, 1986 (Id.). The trial date was then moved up to December, 1985 (Id.).

(Habeas Petition at 64-65) (footnote in original).

When transcripts of proceedings are missing from the record, a complete and accurate record is lacking. An appellant is entitled to a complete and accurate record on appeal. Entsminger v. Iowa, 386 U.S. 748 (1967). "[A] transcript may by rule or custom be a prerequisite to appellate review. Evitts v. Lucey, 469 U.S. 387, 393 (1985). This in and of itself is a constitutional violation. In Mr. Diaz's case, this Court on direct appeal upheld the adequacy of the Faretta inquiry based on the facts that appeared in the record. However, as detailed in the habeas petition, Mr. Diaz was pressured into representing himself because he had only just met his trial counsel, Robert Lamons, and wanted a few weeks to discuss the case with him in order to prepare for trial. The Court refused, telling Mr. Diaz that the trial was starting that day, and that he would represent himself if he did not want Mr. Lamons to represent him that day. This information was not brought to this Court's attention on direct appeal because appellate counsel failed to ensure that these facts were in the record. Mr. Diaz is entitled to habeas relief.

CLAIM VI

Mr. Diaz is not claiming that appellate counsel was ineffective because she was "unpersuasive" when she argued on direct appeal that Mr. Diaz's death sentence was disproportionate to that of co-defendant Toro, who received a life sentence for a reduced charge of second-degree murder (Response at 16). Mr. Diaz did not dispute that a proportionality argument was raised on appeal; however, appellate counsel failed to detail the evidence in her direct appeal brief

that established the injustice of Mr. Diat's death sentence in comparison to Toro's life sentence. Raising a claim and then never addressing the evidence that substantiates that claim is no better than not raising the claim at all.

On appeal, appellate counsel merely argued that it "appears" that the death penalty was disproportionate, simply stating that "[t]he evidence indicated that the codefendant, Toro, was the 'trigger man"' (Brief of Appellant at 37). See Appendix A. Appellate counsel, however, never discussed what that evidence was, which is the whole point of raising a proportionality claim in the first place. The facts showing that Mr. Diaz was not the shooter were in the record (facts which the Respondent does not challenge), yet never presented in the briefs to this Court. Appellate counsel did not inform this Court that the prosection conceded at trial that it could not establish that Mr. Diaz was the shooter. See R. 788 ("there will be no evidence as to who the actual shooter of [the victim] was"). Appellate counsel failed to inform this Court of a similar concession during the prosecution's closing argument. See R. 1257-58 ("I do not believe the evidence has shown that this defendant went in there with the intention of killing anyone"). Appellate counsel failed to inform this Court that no evidence pointed to Mr. Diaz as being the shooter. Candace Braun, who testified for the prosecution, repeatedly stated under oath that Angel Diaz was not the shooter. See R. 889-90; 896; 912. Appellate counsel failed to inform this Court that Ralph Gajus, who also testified for the prosecution, was never told by Mr. Diaz that he (Mr. Diaz) shot the victim: rather, it was something that he "inferred" from his alleged conversations with Mr.

Diaz. See R. 1123. This is the extent of the "evidence" that the State adduced to establish Mr. Diaz's guilt. None of it establishes that Mr. Diaz was the triggerperson.

On direct appeal, the issue of the identity of the triggerperson was significant. In fact, the very first sentence of the Court's opinion reads: "One of three Spanish-speaking men shot and killed the bar manager during the December, 29, 1979, holdup of a Miami bar." Diaz v. State, 513 So. 2d 1045, 1046 (Fla. 1987). In a special concurrence, Justice Barkett noted that "if one believed that this defendant was not the actual triggerman, the proportionality argument would have merit." Id. at 1049 (Barkett, J., specially concurring). Had the "evidence" in this case been presented on direct appeal, rather than simply alluded to in summary fashion in the direct appeal brief, the result would have been different. Habeas relief is warranted.

CLAIM VII

As with many of the previous claims, Respondent argues that the claim is barred because it is being raised under the "guise" of ineffective assistance of counsel, again citing Blanco v. Wainwright (Response at 17). This argument has no basis in fact or law, as described supra.

As to the merits, the Respondent concedes that fundamental error occurred, agreeing with Mr. Diaz that "this Court has condemned the practice of requesting the state to prepare a written sentencing order" (Response at 17). Respondent's only defense to this error is that "the trial court made the requisite findings at the

sentencing hearing" (Response at 18). However, it is clear from the record that the lower court did not make the "requisite findings" but rather delegated that responsibility to the prosecution.

The trial court's oral pronouncement of sentence consisted of some 330 words in approximately two (2) pages of typed transcript. The sentencing order drafted by the State and signed by the Court consisted of twelve (12) legal-size pages. During her oral sentence, Judge Donner made no findings about aggravating and mitigating circumstances. Rather, Judge Donner stated that the jury had the opportunity to consider the aggravating and mitigating factors before making its recommendation, and that the jury and the Court considered the fact that Mr. Diaz was previously convicted of a prior crime of violence, and considered that the crimes were committed for pecuniary gain (R. 1467-69). Judge Donner did not find that these aggravating circumstances existed in this case, but only detailed the information that the jury had been given to consider. The only "findings" made by Judge Donner were stated by Judge Donner herself:

> This court must find that you have a total disregard for human life and the welfare of others; and that this total disregard is apparent to this Court.

(Id.). Judge Donner thereafter sentenced Mr. Diaz to death.

At no time during oral pronouncement did Judge Donner make actual findings regarding aggravating circumstances. At no time during oral pronouncement did Judge Donner mention, much less discuss, the mitigating evidence presented by Mr. Diaz. This cannot be squared with Respondent's

position that Judge Donner made the "requisite findings" at the oral pronouncement of sentence, Respondent never addresses how, from Judge Donner's silence as to the mitigating evidence presented by Mr. Diaz, the sentencing order contains eight (8) legal-size pages of detailed discussion about mitigating factors. See R. 323-330. The discussion about mitigating factors contains lengthy legal discussion and factual determinations, none of which were mentioned during the oral pronouncement of sentence. Most incredibly, the State inserted a passage into the sentencing order concerning the disparate treatment received by co-defendant Toro to the effect that "[t]he Court is satisfied that the disparate treatment of the co-defendant has been sufficiently explained by the written proffer submitted by [Assistant State Attorney] John M. Hogan" (R. 327). The order further included that the State's proffer "is specifically adopted by the Court and made a part of this Order" (R. 327). This was not mentioned by Judge Donner in her oral pronouncement of sentence.

As demonstrated herein and in the habeas petition, this is not a case where the trial court made the necessary findings, weighed the appropriate aggravators and mitigators, made such pronouncements orally, and then asked the State to memorialize those findings in writing. Here, the Court's oral pronouncement made no findings at all. That task was left to the State. This is fundamental error, appellate counsel was ineffective in failing to raise it, and Mr. Diaz is entitled to habeas relief.

CLAIM VIII

Respondent argues that because this Court in other cases determined that the harmless error analysis conducted in those cases was constitutionally adequate, that somehow means that the harmless error analysis in Mr. Diaz's case was adequate as well (Response at 18-19). This argument is akin to saying the because trial counsel in numerous cases was found to be constitutionally effective, trial counsel in this case was constitutionally effective as well., This Court should to address the harmless error analysis it performed in Mr. Diaz's case notwithstanding the Respondent's argument.

Further, Respondent's argument establishes the point of Mr. Diaz's claim. Mr. Diaz alleges that the Court mechanistically presumed death to be the appropriate penalty even after striking an aggravating circumstance, and that this was a constitutionally inadequate harmless error analysis (Habeas Petition at 80-81). Mr. Diaz further alleged that the automatic affirmance rule was rejected by the United States Supreme Court in Sochor v. Florida, 112 S. Ct. 2114 (1992), Stringer v. Black, 112 S. Ct. 1130 (1992), and Richmond v. Lewis, 113 S. Ct. 528 (1992). "[M]erely affirming a death sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.'" Sochor, 112 S. Ct. at 2119 (citations omitted). Based on the argument detailed in his habeas petition, Mr. Diaz is entitled to a resentencing.

CLAIM IX

Respondent concedes that many of the improper comments made by the State were preserved for review: "trial counsel objected to some of the state's argument based on a violation of Caldwell v. Mississippi, 472 U.S. 320 (1985)" (Response at 20). However, Respondent simply points to one case which simply held that Florida's standard jury instruction did not violate Caldwell (Response at 20) (citing Sochor v. State, 619 So. 2d 285 (Fla. 1993). However, Mr. Diaz has not challenged the constitutionality of the standard jury instruction in this claim; rather, as his habeas petition makes clear, Mr. Diaz is challenging repeated comments by both the court and the prosecutor which constituted material misrepresentations about the law (Habeas Petition at 89).[19] As the Respondent has conceded, many of these improper comments were objected to by penalty phase counsel and were therefore properly preserved. No tactical or strategic reason exists for appellate counsel's failure to raise this meritorious issue, Caldwell was the clearly the law at the time of Mr. Diaz's direct appeal. Mr. Diaz is entitled to relief.

REMAINING CLAIMS

Mr. Diat relies on the arguments set forth in his habeas petition in reply to the Respondent's arguments as to the remaining claims. To the extent that the Respondent discusses imaginary procedural bars as to the remaining claims, Mr.

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[19]Mr. Diaz's habeas petition referred to the instruction read by the trial court because the instruction emphasized the error of the misleading comments made repeatedly throughout the trial (Habeas Petition at 93).

Diaz adopts the arguments contained in this pleading to specifically rebut any procedural bar argument. Mr. Diaz in no way waives and/or abandons any specific issue raised in his Habeas Petition yet not addressed in this Reply.

CONCLUSION

For all of the reasons discussed herein and in his petition, Mr. Diaz respectfully urges the Court to grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Reply to State's Response to Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on December 11, 1996.

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ATTACHMENT A

IN THE SUPREME COURT OF FLORIDA

ANGEL DIAZ,

Appellant

CASE NO. 68,493

vs.

THE STATE OF FLORIDA,

Appellee.
_____/

BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from a final judgment of conviction and sentence of death following jury trial in the Eleventh Circuit of Florida, case no. 83-18931-B, Hon. Amy Steele Donner presiding. Trial was held on December 17-21, 1985, with the sentencing proceeding on January 3, 1986, followed by sentences dated January 24 and February 14, 1986. The trial court having inadvertently failed to provide counsel for the statutorily-required appeal to this Court, the accused filed a pro se notice of appeal. Undersigned counsel was then appointed for appellate purposes.

In this brief, the parties will be referred to as "defendant" and "State," and the witnesses or alleged accomplices by name. Citations to the record will be in the form [R-] and to the transcript of the trial in the form [TR-]. Citations to transcripts of other proceedings will give the date of the proceeding and the page number.

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SUMMARY OF ARGUMENT

Before trial commenced, defense counsel moved for a continuance because he was not prepared to confront a crucial just-discovered state witness. The defendant, who throughout the trial was visibly shackled and surrounded by guards, lost confidence in his counsel after the continuance was erroneously denied and, after the jury had been sworn and empaneled, asked to represent himself. The court granted the untimely request even though the defendant could not read or speak the English language and his shackles would become even more impermissibly obvious as he moved before the jury. Exacerbating its aforedescribed errors, the court failed to replace defendant with standby counsel when he proved unable to conduct himself properly.

Like the trial, the sentencing was seriously flawed although, recognizing its previous mistake, the court required the defendant to appear through counsel. The jury instructions did not require the finding of intent necessary for imposition of a death sentence. The death sentence is disproportionate to the crime, as this defendant was not the "triggerman," and his codefendant received life. The court also improperly found the existence of an aggravating factor, and failed to declare a mistrial during the sentencing proceeding after the judge remarked that counsel had been forced upon the defendant over his objection. Even if the trial had not been plagued with errors, the death sentence would have to be vacated.

STATEMENT OF THE FACTS

Almost exactly six years before this trial, on December 22, 1979, a Miami bar experienced a holdup. The bar was sparsely patronized on that night, with perhaps eight customers [TR-513]. Three Latin men had been sitting together near the back of the bar. Two of them went out and returned shortly [TR-515,516]. Then one of them approached two patrons in the front of the bar, brandishing a silenced gun. When the customers did not lie down as he wanted, he fired once, hitting a light fixture over the stage [TR-519]. A second robber waved a gun on the bar's stage, ordering everyone into the back [TR-566]. The third robber, in back, muscled a barmaid into the lounge's office. The remaining customers and staff were herded into the back and confined in the bathrooms, with a cigarette machine blocking the men's room door, but they could hear shots and arguing [TR-585]. When they finally broke out, they discovered the lounge's manager shot dead in his office. A dancer who had been hiding under the bar said that before leaving, the robbers had made her try to open a cash register, but it jammed [TR-603]. Some valuables from customers, cash from the top of the bar, and money from another register were taken.

The investigating officers obtained fingerprints from the entire scene. A single print on one matchbook from the back of the bar [TR-715] matched the defendant's prints. . Casings from

three different-caliber weapons were found at the scene [TR-405], as well as a fragment of steel wool possibly from a silencer, and another gun in the office which had not been fired. The two customers closest to the robber up front agreed that he had been slight of build and had Latin features. The light in the bar was very dim when the crime occurred, and no witness identified the robbers from photos or lineups, except one victim from the front of the bar who stated that the defendant's photo and person "could fit the description of the person who robbed me" [TR-535].

The former girlfriend of the defendant testified that she had been living with him and some friends at the time of the offense. The defendant and three friends left the apartment at about 7 p.m., and he came home with two of the three at 1 or 2 a.m., arguing heatedly. From what she overheard, she concluded that Sammy Toro (codefendant who had previously accepted a plea bargain) had shot a man, but the defendant was extremely upset about Toro's actions. Later that night the defendant gave her cash in a wallet [TR-450] similar to one taken in the robbery [TR-524]. She admitted, on cross examination, that she had been a drug user [TR-455]. The final piece of evidence against the defendant was the statement of a fellow prisoner that in private conversations defendant had admitted shooting the victim [TR-689]. The defendant presented no evidence.

STATEMENT OF THE CASE

The defendant and a codefendant, Toro, were originally indicted for first-degree murder of the bar manager, armed robbery of the bar and customers, and kidnapping of the persons confined in the bathrooms, as well as the use of firearms in committing those felonies. The case suffered numerous delays, some due to the absence of the judge regularly assigned to that division. A new trial judge took over, and assigned a trial date of February 1986. She then reset the case earlier (January 6th, 1986) and finally pushed the date up to December 17, 1985 [TR-7], over defendant's objections. The defendant's attorney protested that he was prejudiced by having inadequate time to prepare for a late-produced state witness [TR-9]. By this time, the codefendant Toro had accepted a plea bargain for a life sentence and was no longer in the case. The state nol prossed several counts, leaving one count of first-degree murder, four of kidnapping, three of armed robbery, one of attempted armed robbery, and one of use of a firearm [TR-261-62].

During jury selection, the defense objected to having two jurors excused for cause after they indicated they opposed the death penalty [TR-133]. Throughout the pretrial proceedings and jury selection, the defense repeatedly objected to unusual and very obvious security measures in the courtroom: the defendant wore shackles and, at first, -even handcuffs [TR-4, TR-22,

TR-253-54]; everyone who entered the courtroom, including jurors, was searched upon entry [TR-18, TR-320]; large numbers of security personnel were conspicuously present in the courtroom [TR-13]. The trial judge made findings of fact that in the opinion of court security personnel, all these measures were necessary [TR-20-23, TR-270]. She suggested that the defendant hide his leg shackles behind a briefcase [TR-270]. The defendant was not permitted to be alone with his attorney [TR-4], to visit the cells of fellow prisoners who might become witnesses [TR-781], or to use a telephone [TR-916] during the entire trial.

After the jury had been sworn [TR-331] but before the opening statements, defense counsel announced that the defendant desired to assume his own defense [TR-336]. Rather than delay the trial, the judge allowed the state to open, then heard the newly-raised motion to act pro se while the jury was at lunch. The defendant appeared to be acting irrationally, his counsel felt, and the defense moved for a psychological examination and a mistrial [TR-365]. The Court granted an examination to determine the defendant's competence to stand trial, but ordered it to take place in the evening, after court was recessed for the night [TR-376]. In the meantime, the judge proceeded to question the defendant about his request, During this colloquy, it appeared that the defendant (a) was unable to speak and understand English very well [TR-370) and would have to rely on an interpreter as he had from the outset of the trial [TR-5]; (b) had "no idea" how a

trial. was conducted **and had** never read a law book (he could not read English well) [TR-371]; (c) had never finished high school but had obtained an equivalency degree; (d) had read only "part" of the U.S. Constitution (he is a Puerto Rican citizen); and (e) felt that his appointed counsel, though not incompetent, was unfamiliar with his case. The court entered a finding that defendant had made a free, voluntary and intelligent choice to represent himself [TR-382], and placed his counsel, with his consent, as standby even though, the Court noted, any objections standby counsel might suggest to witness' testimony would generally come too late (counsel did not speak Spanish either; and the testimony and objection would both have to be translated) [TR-380].

The defendant gave an opening statement, and the prosecution commenced its case. During the defendant's cross examination of his former girlfriend, he became agitated, and the judge suggested that he was perhaps unable to handle his defense: he agreed [TR-467]. Motion for mistrial was made by standby counsel, and denied [TR-469-70]. After a brief recess, the case continued with the defendant acting pro se. During the evening recess, two court-appointed psychiatrists examined the defendant. Based on their reports, the judge entered a finding that the defendant was competent to stand trial [TR-552].

During the testimony of a firearms expert, the unfired gun found in the bar and some live ammunition were brought in as

evidence and the judge quickly ordered both returned to the bench [TR-623-24], away from the defendant.

During cross examination of the lead detective, the defendant was reprimanded for arguing with the witness [TR-657], and became so agitated that the trial was again recessed [TR-662]. Upon conclusion of the state's evidence, the defendant moved for judgment of acquittal [TR-727]. That denied, he indicated his desire to call a number of witnesses whom his counsel had not subpoenaed. He did not seem to understand how to procure witnesses [TR-728-29]. The Court stated that no continuances would be given for obtaining witnesses [TR-730-31]. The defendant attempted to explain what witnesses he needed and what testimony he hoped to elicit from them [TR-756-76]. The court ruled that no effort would be made to locate witnesses [TR-776-78] but the defendant's standby counsel could interview two potential witnesses who were in jail near the defendant (both were, like defendant himself, considered "high risk"). That offer was refused by defendant, who insisted on seeing the potential witnesses himself [TR-781-82]. He insisted that the court had never warned him he would be unable even to speak to his witnesses [TR-782]. Finally, he was allowed to speak to them from an adjoining secure cell but not to view them, because security personnel feared having defendant together with any of his witnesses [TR-784-85]. After the inmate witnesses had been interviewed, the court informed the defendant that most of what

they would testify about was inadmissible; he eventually determined not to call them. He again asked the court for help in obtaining the other seven people he needed, and was again refused [TR-792-93]. Eventually, the defense rested without presenting any evidence [TR-808].

Defendant then moved unsuccessfully for mistrial, partly on the grounds that it was error to permit him to defend himself "without the necessary intellect to do so" [TR-810]. The jury was instructed on first-degree murder and felony murder, and was specifically told that felony murder did not require "a premeditated design or intent to kill" [TR-860-61]. During deliberations, the jury requested a copy of the instructions, which was furnished [TR-896); it also requested the "entire testimony" of witnesses Candy Braun and Ralph Gajus, which was not furnished. The court replied, with the parties' consent, that the jury must rely on its recollection [TR-897]. The jury found defendant guilty of first-degree murder, four counts of kidnapping, two counts of armed robbery, one count of attempted robbery, and one of possessing a firearm during the commission of a felony [TR-900-02].

A recess of two weeks intervened before the penalty phase of the trial. Before the recess, the court again offered counsel to the defendant. He stated that he would accept his standby counsel as his attorney for the sentencing proceeding [TR-909]. To help his preparations, defendant was to be allowed the use of

a telephone but only if his conversations were monitored by court personnel to block any escape plans [TR-916-17].

'At the commencement of the sentencing proceeding, the defendant demanded the right to again represent himself, although under repeated questioning from the court he maintained that he was not capable of representing himself adequately [1/3/86, pp. 5-10]. Finally, the court appointed his standby counsel to represent him in the sentencing. At the defendant's insistence, defense counsel refrained from cross examining the first few prosecution witnesses; finally, the court commented that although he had been appointed over the defendant's objection, counsel mus-. nevertheless act as he thought best (1/3/86, p. 43). Motion for mistrial based on this remark before the jury was made and denied (1/3/86, pp. 51-52). The defendant did not wish his counsel to make argument or ask for mercy, and interrupted him until the Court called a recess to admonish the defendant (1/3/86, pp. 95-99). The state argued the statutory aggravating factors of prior violent felony, being under prior sentence of imprisonment, causing great risk to many persons, committing the capital felony to aid another crime, and acting for pecuniary gain: the defense argued the mitigating factor of being a mere accomplice to the crime of another, but presented no new evidence of this, or of any nonstatutory mitigating factors. The jury recommended a death sentence, and the judge entered an order specifically finding-all the aggravating factors presented by the

state, specifically rejecting the mitigating factor argued by the defense, and sentencing defendant to death [R-319-330]. This appeal followed.

ARGUMENT

I. THE COURT ERRED IN DENYING A DEFENSE CONTINUANCE WHEN A CRUCIAL WITNESS HAD BEEN LISTED BY THE STATE ONLY ONE WEEK BEFORE TRIAL.

"This is going to be a nightmare," predicted Mr. Kastrenakis, one of the prosecutors, after the defendant's request to proceed pro se was granted by the Court [TR-386]. He was entirely correct, except that he used the wrong verb tense: the first of a series of judicial errors that would turn this case into a nightmare for all participants had already taken place when, at the very outset of the trial, defense counsel restated for the record his previously made, unrecorded objections to the trial date. This homicide trial had originally been set for February 24th, then reset to January 6, 1986. Then the parties were noticed to appear on December 17, 1985 [TR-7]. Defense counsel complained that he had been notified only one week before trial that a new witness, Gajus, would testify for the state. Although the defense had immediately deposed this witness, the transcript of that deposition was not ready, nor had counsel been able to investigate the truth of Gajus' allegations or consult with the defendant about them [TR-9-10]. The same defendant was also facing escape charges, and Gajus was known to the defendant as a witness for the escape case; however, the new

evidence which Gajus now claimed to have was a confession of the homicide in this case, given while Gajus and the defendant were incarcerated in neighboring cells. The judge denied the defense request for continuance, and insisted that the trial proceed.

The testimony of Gajus was the only evidence tending to indicate that this defendant had himself shot the bar manager for whose murder the defendant was being tried. It contradicted the testimony of the defendant's former girlfriend, Candy Braun, that the defendant had been very upset with his friend Toro because Toro had shot someone unnecessarily. It also tended to contradict the prosecution's theory that this defendant had been the man in the front of the bar who robbed two customers and herded them, with the bartender, into the rear. Another robber was entering the office at the rear, and would most likely have been the one to confront, and kill, the manager. Keeping in mind that only a single fingerprint connected this defendant to the crime scene, and that the only identification of him was a vague statement by one of the customers from the front that the defendant might fit the description of the robber who went up front, Gajus' testimony was crucial. Defense counsel had not had time to formulate a strategy for dealing with Gajus nor, even more important-, had he discussed Gajus with his client, the defendant.

Thus, when the defendant assumed his pro se defense he was unable to capitalize on the inconsistencies between-Gajus'

evidence and the rest of the state's case. In an attempt to impeach Gajus, the defendant very nearly "opened the door" to testimony about his own escape plot [TR-697] which had already been excluded by defense counsel's motion in limine. In addition to its palpable effect on the defense case, the court's refusal to allow a continuance had the effect of destroying the defendant's confidence in his counsel, so that he perceived the necessity for taking over his own defense. This initial error, in denying a continuance when defense counsel flatly stated he was not ready, set off a chain of bizarre events that rendered this trial a travesty of justice.

Granting or denying a continuance is, of course, within the scope of judicial discretion, and ordinarily such rulings will be disturbed on appeal only if the appellant demonstrates an abuse of discretion. Such is the rule even in capital cases, e.g., Jackson v. State, 464 So.2d 1181 (Fla. 1985): Williams v. State, 438 So.2d 781 (Fla.), cert. den. 465 U.S. 1109, 104 S. Ct. 1617, 80 L. Ed.2d 164 (1983). In this case, however, the trial court of its own motion twice advanced the trial date (from February 24th to January 6th to December 17th), taking the defense by surprise, and then refused to abandon the accelerated date even though the defense declared itself unready to cope with a new witness uncovered only a week previously. This witness was the only person who testified that defendant had confessed a murder, and this alleged confession was inconsistent with the other

evidence previously known to state and defense, for which they had prepared. &at the jury recognized the inconsistency is shown by their request during deliberations for the "entire testimony" of Gajus and of the defendant's former girlfriend Candy Braun. In the context of the entire trial, the magnitude of this error appears so clearly that it must be seen as a patent abuse of discretion.

II. TWO JURORS WHO OPPOSED THE DEATH PENALTY IN GENERAL WERE IMPROPERLY EXCUSED FOR CAUSE.

During voir dire, two jurors named Connell and Young indicated that they opposed the death penalty in general. Each, however, felt able to fairly adjudicate the guilt or innocence of the accused [TR-128, TR-132]. Each felt unable to vote for a death sentence in the penalty phase [TR-130, TR-132]. Under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), these jurors should have been allowed to serve at least in the "guilt or innocence" phase. Excluding such persons unfairly excludes an identifiable segment of the community and also tends to create a conviction-prone jury, Grigsby v. Mabry, 768 F.2d 226 (8th Cir. 1985) rev'd sub nom Lockhart v. McCree, ___ U.S. ___, 106 S.Ct. 1758, ___ L.Ed.2d ___ (1986). Defense counsel stated these grounds in his objection to the Court's excusing those prospective jurors for cause [TR-133].

The appellant is, of course, aware that this Court has rejected Grigsby, supra, in its recent cases Dougan v. State, 470 So.2d 697 (Fla. 1985) and Witt v. State, 465 So.2d 510 (Fla. 1985), but urges reconsideration, as Florida is free to provide more protection for the accused then the federal constitution minimally requires. This defendant was tried before a conviction-prone jury.

III. THE DEFENDANT'S APPEARANCE IN SHACKLES, HEAVILY GUARDED AND SURROUNDED BY CONSPICUOUS SECURITY MEASURES THROUGHOUT THE TRIAL, INEVITABLY BIASED THE JURY AGAINST HIM.

Because the defendant had a history of escape attempts and a prior murder conviction, the security personnel of the trial court considered him highly dangerous, and took unusual precautions. During voir dire, everyone who entered the courtroom including prospective jurors was searched individually by "running the device" (presumably a metal detector: over each one [TR-201. There were also "a number of obvious security personnel in the courtroom" [TR-18], only "sixty or seventy percent" of them in plain clothes [TR-20]. Many were armed [TR-20]. Defense counsel objected to these measures and moved, unsuccessfully, to strike the panel [TR-18, TR-20). He also objected to the defendant's being shackled at the ankles [TR-22] as inimical to a fair trial. At the pretrial proceedings, before the panel arrived, the defendant had been handcuffed as well [TR-4]. Defense counsel again objected to the defendant's shackles during voir dire, stating "It is clear that he is chained. It is quite a large chain. I am sure that [the jury] saw it today, and I am objecting and moving to strike this panel as being tainted because of the extreme security presence in the courtroom and on my client's person" [TR-254). The court rejected all these motions and objections on the basis that court

security personnel, who were questioned at length on the record, had recommended the security measures. The judge suggested that the defendant could keep a box or briefcase in front of his legs to hide his chains [TR-256]. The defense noted its standing objection [TR-268-9], alleging that the defendant's presumption of innocence had been destroyed.

Shortly thereafter, defendant took over his own defense, and in his movements as he questioned witnesses the chains were patently'obvious, distorting his gait and driving home the message that he was a dangerous prisoner. This spectacle was in front of the jury during the entire trial. In addition, all the security personnel followed his movements closely, a concentration which must have been quite apparent to the jury. The defendant himself mentioned, "I am prisoner. I have chains," in closing argument [TR-850], as the fact was certainly no secret by then. The court's fear of the prisoner was so strong that at one point the judge considered arming even the corrections officers who stood near the defendant [TR-748]. Although that discussion was not heard by the jury, the jurors witnessed an incident showing that the court apprehended danger, when a gun and ammunition placed into evidence were snatched back to the bench [TR-623-4].

The net effect of all these security measures was to impress upon the jury that the defendant was a very dangerous individual, indeed. His fundamental right to a fair trial was

thereby violated. In Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed. 2d 126 (1976), the United States Supreme -Court held that compelling a prisoner to be tried in identifiable prison garb would violate his fundamental right to a fair trial. When a defendant is obstreperous in court, it may be necessary to gag and shackle him, but that remedy is only used as a last resort, since "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself . . . an affront to the very dignity and decorum of the judicial proceedings that the judge is seeking to uphold." Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970). Forcing the accused to appear in shackles or prison garb violates his individual dignity, McCaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed. 2d 122 (1984), and is almost per se prejudicial in that it is a circumstance "so likely to prejudice the accused that the cost of litigating [its] effect in a particular case is unjustified." United States v. Cronic, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984).

There are, of course, certain situations wherein security measures must be used. But in order to require an accused to be tried in shackles, there must be a showing of "extreme need." Harrell v. Israel, 672 F.2d 632 (7th Cir. 1982); United States v. Garcia, 625 F.2d 162 (7th Cir.), cert. den., 449 U.S. 923, 101 S.Ct. 325, 66 L.Ed.2d 152 (1980). Furthermore, the court should

take precautions such as placing a table before the accused, and having him enter or exit when the jury is not present, to minimize the chance of prejudice, and to insure that the jury is not allowed to "focus on" the shackles, Harrell v. Israel, supra. When the claimed error is the presence of numerous security personnel rather than shackles, the same analysis is used. The question is not whether jurors articulate any consciousness of a prejudicial effect, but whether an unacceptable risk is presented that impermissible factors will affect the trial. Holbrook v. Flynn, 475 U.S. ____, 106 S.Ct. 1340, 89 L.Ed. 2d 525 (1986), citing Estelle v. Williams, supra.

The Supreme Court of Florida has briefly addressed the issue of shackles in the courtroom in some recent cases. While agreeing that the rule of Estelle v. Williams applies, this Court has held that a possible brief sighting by jurors of the accused in restraints outside the courtroom does not require reversal, Johnson v. State, 465 So.2d 499 (Fla. 1985); Heiney v. State, 447 So.2d 210 (Fla. 1984), and that an obstreperous defendant may be briefly shackled until he consents to behave properly, Jones v. State, 449 So.2d 253 (Fla. 1984). More recently, this Court found no error in a trial where the accused, an escape risk, was shackled throughout the trial but the restraints were hidden by a table, Dufour v. State, ____ So.2d ____ (Fla. 1986) (case no. 65, 694, opinion filed September 4, 1986) [11 FLW 466]. Had the accused in the case at bar remained seated, a similar result

might be appropriate. But in defending himself, this defendant was obliged to "parade . . . back and forth across the room in manacles," a spectacle which "is not to be tolerated." Harrell v. Israel, supra, at 634. Far from being hidden, this defendant's shackles were on center stage, the cynosure of all eyes. As he limped about the courtroom, all his movements closely watched by a small army of security personnel, in front of jurors who had themselves been searched for weapons upon entering the room, he was irrevocably branded in the jury's eyes as a dangerous criminal, who could never be clothed in the mantle of presumed innocence which our Constitution guarantees to every defendant. This error, while perhaps the most appalling, was not the last.

IV. THE COURT ERRED IN GRANTING THE DEFENDANT'S UNTIMELY REQUEST TO REPRESENT HIMSELF WHERE, IN VIEW OF HIS BACKGROUND AND THE CIRCUMSTANCES OF HIS TRIAL, HE LACKED THE CAPACITY TO DO SO.

A. The defendant's request to represent himself was not timely made.

The defendant first announced his desire to represent himself after the jury had been sworn, but prior to opening statements. The court did not consider the question until after the state had finished its opening. Because the defendant's request came as a surprise to everyone, the court was not given the benefit of any legal research on the issue,' and had only a quickly-located copy of the leading Supreme Court case Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1976) for guidance. In the Faretta case, the right to represent oneself at trial was declared to be "fundamental" where the request is made by a "literate, competent, and understanding" individual who has been fully informed of the dangers and disadvantages of proceeding pro se [422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 578]. Later cases, however, have established that there are a number of limitations on the right enunciated in Faretta, and that it is in some ways considered less important than other "fundamental" rights such as the right to counsel. See The Right of Self-Representation in the Capital Case, 85 COLUMBIA LAW REVIEW 130 (1985). For example, there has never been a necessity to inform the accused o-f his right to dispense

with a lawyer's services, although the right to avail oneself of such services must be explained to each accused.

The most widely accepted limitation on the right to proceed pro se is that of timeliness. Faretta did not address that issue, as the accused therein made his request several weeks before trial. But "if the defendant does not move to represent himself until trial proceedings begin, he no longer can claim the pro se defense as his right." Self-Representation in the Capital Cases, supra, at 140; see Sapienza v. Vincent, 534 F.2d 1007 (2d Cir. 1976). A request was clearly untimely when made after trial had proceeded through numerous prosecution witnesses, on the second day of a three-day trial, United States v. Smith, 780 F.2d 810 (9th Cir. 1985). It was, however, timely when made one day before trial, Armant v. Marquez, 772 F.2d 552 (9th Cir. 1984), and even when made just before jury selection, Maxwell v. Sumner, 673 F.2d 1031 (9th Cir.), cert. den., 459 U.S. 976, 103 S.Ct. 313, 74 L.Ed.2d 291 (1982). When made after the jury had been empaneled but before it had been sworn, the request was considered timely only because there was no showing it had been made for purposes of delay or would cause delay, United States v. Price, 474 F.2d 1223 (9th Cir. 1973). Had there been such a showing, the case implies, the court would have had discretion to deny the request even without engaging in questioning the defendant. As the trial date approaches, the court's right to control the trial proceedings augments, while the defendant's

right to proceed pro se declines. Although the right to proceed pro se is called "unqualified" if timely invoked, once a trial has begun with the defendant represented by counsel, "his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress." United States ex rel Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), cert. den., 384 U.S. 1007, 86 S.Ct. 1950, 16 L.Ed.2d 1020 (1966). Research has disclosed no case wherein a request to proceed pro se, made after the jury has been sworn (the traditional point at which jeopardy attaches) or after significant trial proceedings, such as opening argument, have begun, was considered a timely invocation of the fundamental right to represent oneself. But the trial court, in our case, having only Faretta for guidance, apparently did not realize that it had the power to deny the request for lack of timeliness.

Particularly where the request is made at or near the commencement of proceedings, courts consider whether the request will cause delay or is intended to cause delay. If its intent is merely to cause delay, it is likely to be declared untimely even if no meaningful trial proceedings have begun, Fritz v. Spalding, 682 F.2d 782 (9th Cir. 1982); Chapman v. United States, 553 F.2d 886 (5th Cir. 1977). In this case, the trial court had repeatedly stated that no delay would be permitted, and had

already denied continuances for preparing to combat the last-minute witness the state had produced, and for evaluating the defendant's competence to stand trial [TR-376]. Clearly the court had no intention of granting a continuance so defendant could study law books or obtain witnesses his counsel had not subpoenaed: but if such preparation was not to be allowed, the defendant's right to self-representation would be "meaningless," because he could not prepare an effective defense on such short notice. Armant v. Marquez, supra, 772 F.2d at 558.

Even without a formal request for continuance (none was made herein), a midtrial request to proceed pro se carries a substantial likelihood of delay because of the need to examine the defendant for competence, acquaint him with the court's procedures, and so on. See The Right of Self-Representation, at 143 n.84. The court must have recognized this problem. Thus, the decision to permit the defendant to appear pro se was probably made under a misapprehension of the post-Faretta law just summarized, wherein the court mistakenly believed that even after proceedings had commenced the defendant had a fundamental right to discharge his counsel. The trial judge should have denied the motion in the interest of the speedy administration of justice, and would very likely have done so if fully informed.

B. The defendant was not competent to represent himself when he could not read or speak English well, and his mental competence was in doubt.

Just as Faretta has little to say about timeliness, it also

gives little guidance on what constitutes competence to represent oneself; the accused in Faretta was held to be "literate, competent, and understanding," so the issue did not arise. Clearly, the lack of formal legal training does not render one incompetent to represent himself, as Faretta plainly states. Nevertheless, there are situations in which an individual who is otherwise competent to stand trial will not be competent to waive the assistance of counsel and proceed pro se. The extreme case is that presented in State v. Shank, 410 So.2d 232 (La. 1962), wherein the defendant wished to dispense with counsel so that he could be convicted and sentenced to death. Although there was no indication that the defendant in that case was insincere, it would clearly be inappropriate for the state to assist him in committing suicide. Thus, the appellate court held that his choice was not an "intelligent" one and could not be sanctioned. While this reasoning is somewhat circular, the result suits common sense. Clearly, where a pro se defense would be a mere farce, it must not be allowed: the courts draw the line at that point.

On the other side of the line, though just barely, is the recent Florida case Muhammed v. State, ___ So.2d ___ (Fla. 1986)(case no. 63,343, opinion filed July 17, 1986)[11 FLW 359], wherein the accused had a reasonable chance at an acquittal for insanity, but refused to cooperate with experts, and demanded to represent himself so as to abandon the insanity defense. The

trial court had made a valid finding that he was competent to stand trial. The only indications that he might be incompetent were his refusal to permit the insanity defense, his insistence on the use of his Moslem name, and some rambling diatribes, all consistent with his professioned Moslem religion. Refusing to find error in the trial court's **allowing pro se representation,** this Court **reasoned that the desire to abandon a good defense,** even when facing the death penalty, does not prove a defendant mentally incompetent. The opinion cited Faretta's "literate, competent, and understanding" language as establishing the minimum standard for competency to waive counsel.

The same minimum standard applies to the case at bar, though the question of the defendant's competence takes some unique twists. First, it should be noted that defense counsel raised the question of his client's mental competence in view of some bizarre behavior, asking for an examination and a mistrial [TR-365] before the court began its colloquy with the defendant himself. The court found merit in the issue and actually ordered an examination, but refused to stop the proceedings; the examination was to occur during the evening recess [TR-376]. (A formal finding that defendant was competent for trial was made the next morning [TR-550, TR-552], halfway through the, prosecution's case.) The decision to allow self-representation was entered well before the issue of mental competence had been settled [TR-382] and was error on that basis..

While the defendant's mental competence was yet in doubt, the trial judge proceeded to question the defendant about his background. He had "no idea" how a trial was conducted, and had read no law books because his English was inadequate [TR-371]. He would have to rely on his interpreter and would never know if the interpreter erred [TR-370-71]. Any objections his standby counsel might suggest, or that the defendant might think of, would generally come too late because everything would need to be translated each way, as the Court itself noted [TR-380]. The defendant had not completed high school but had passed an equivalency test [TR-371]. In view of his background and his language problem, the Court itself suggested that it would be "impossible" for him to act as his own attorney [TR-373]. Later in the trial the defendant himself admitted that he was "incapable of continuing" [TR-467] and that he was not competent to represent himself at sentencing [Jan. 3, 1986, p. 8], although he wanted to do so. The court did in fact deny his request to proceed pro se for sentencing; by implication, the court thereby admitted that he should not have been allowed to conduct his own defense at trial. This was equivalent to a finding that the defendant was not "literate" as Faretta requires.

Although there is no explanation for the requirement of literacy enunciated in Faretta, it seems obvious. that one who cannot read pleadings or law books, review transcribed testimony, or draft pleadings, would be impermissibly handicapped in .

presenting his defense. It is equally apparent that "literacy" in an American courtroom means the ability to understand, read and write English. Thus the defendant could not meet the Faretta minimum standard of literacy, just as he had not met the standard of mental competence at the time the court ruled on his pro se request.

c. **The prejudicial effect of the defendant's shackles and the court's security precautions became overwhelming when he was allowed to represent himself.**

As discussed in a previous section of this brief, shackles have been permitted on "high-risk" defendants only where precautions are taken to render them, and all other necessary security measures, as inconspicuous as possible. Once the defendant assumed the responsibility for presenting his own case, the shackles took "center stage." Similarly, his guards were obliged to follow his every movement, rendering the guards themselves far more conspicuous than they would have been if the defendant had remained seated at his counsel table. If the presence of the courtroom's elaborate precautions was not in itself **error as** the defendant herein maintains, these **measures** were clearly inconsistent with a pro se role. The prejudice to the defendant from exhibiting these marks of his imprisoned status was so great that it outweighed any possible benefit of his representing himself. It is interesting that both Faretta and Estelle v. Williams, supra (decrying prison garb or shackles) . . . are based upon the need to preserve the individual dignity of the

accused. Where the prisoner's desire to represent himself (which at this point in the trial was no longer a fundamental right) conflicted with his right to appear clothed in his natural human dignity, free of the brand of captivity before his jury, common sense and the interests of justice dictate that his pro se request should have been denied if the court was unable to dispense with the strict security placed all around him.

D. **The defendant's inability to conduct** himself **properly should have required the court** to **withdraw his permission** to proceed pro se, **even if the substitution** of counsel **necessitated a mistrial.**

Although the defendant did not misbehave in a rude or obstreperous fashion which could justify shackles or restraints, he persisted (perhaps out of ignorance) in conducting improper questioning, so that the trial had to be stopped twice. The first interruption occurred during the defendant's cross examination of his former girlfriend, when he became quite upset and began "arguing with the witness" [TR-465]. The trial judge sent the jury out and considered whether to appoint the defendant's standby counsel as attorney. The attorney pointed out that since his client had already said to the jury that he did not consider the attorney capable of presenting the case [TR-470, referring to defendant's opening argument at TR-388-90] there would be serious prejudice if the attorney re-entered the case. He therefore moved for a defense-caused mistrial [TR-469, TR-470] which the judge promptly denied. In support of his motion for mistrial, the attorney also pointed out that it was

already late in the trial, that several key witnesses had already been cross-examined in a fashion quite different from that which he would have used, and that they were presently in the middle of a very crucial cross-examination of a witness whom the attorney "would have cross-examined in a totally different manner" [TR-470]. The trial judge stated that this motion was merely "trial tactics" by the defendant who desired to stop the trial [TR-473]. After the denial of the motion, the defendant conferred with his attorney and decided his best hope was to continue pro se, which the judge permitted.

Another interruption occurred when the defendant was again admonished for arguing with a prosecution witness, over irrelevant matters. "I have evidence . . . that this man, this witness, is a liar," he told the judge [TR-655]. He could not seem to understand that he would not be allowed to present that evidence or testify during cross examination. The jury was again sent out and the defendant admonished. (The court once more demonstrated its fear of the defendant during this colloquy, when he apparently approached the bench. "Keep him out. Tell him to sit down out there" [TR-660].) The defendant became so agitated that the proceedings had to be recessed for a considerable time [TR-662].

The exact role of standby counsel in a pro se defense is ill-defined; it is clear that no "hybrid" defense is allowable Goode v. State, 365 So.2d 381 (Fla. 1978): that if an accused

represents himself, the role of counsel before the jury is to be minimal, McCaskle v. Wiggins, supra; and that "the right of self-representation is not a license to abuse the dignity of the courtroom," Faretta, 422 U.S. at 835 n.46, 95 S.Ct. at 2541 n.46. The ABA Standards of Criminal Justice suggest that "the preferable course for the defendant who is unable or unwilling to conduct an orderly, adequate defense is to revoke permission for pro se appearance and require the defendant to appear through counsel," ABA Std. Crim. J § 6-3.9 and Commentary thereto (2d ed. 1980). Indeed, one of the reasons for having "standby" counsel is that the attorney will be on the spot, ready to step in. Such a substitution, once it occurs, is final; the accused may not thereafter conduct his own defense. Id., § 6-3.7.

In light of these authorities, it appears that the trial court twice erred in failing to revoke the defendant's permission to act pro se, when it was apparent each time that he was unable to conduct an orderly, adequate defense. Even though he indicated a desire to continue pro se, his desire was irrelevant; it was the court's job to protect the integrity of the judicial proceedings. Forcing counsel upon unwilling defendants, while awkward, is often the better course. E.g., United States v. Bennett, 539 F.2d 45 (10th Cir. 1976). Even if the substitution of counsel at this late stage would have required a mistrial, an issue which this Court need not decide, the trial court was obliged to furnish counsel to the defendant once it became

apparent that he could not conduct himself properly, because he had in effect no representation whatsoever, in violation of the noble principles of Gideon v. Wainwright, 373 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

V. THE DEATH SENTENCE IN THIS CASE VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. All death penalties are unconstitutional.

While recognizing that the United States Supreme Court has refused to hold that every death sentence is per se violative of the Eighth Amendment, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), this defendant nevertheless contends that under the evolving standards of our society, all capital punishment is cruel and unusual, and therefore unconstitutional.

B. The jury instructions in this case did not require the necessary finding of intent.

The death penalty has, furthermore, been expressly found unconstitutional where the accused did not himself kill or intend to kill, but has been convicted under a "felony murder' statute, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). There remains the question of whether the requisite "intent to kill" may ever be properly found where the defendant merely helps to plan and takes a minor role in crimes which may be dangerous to the victims, but does not himself kill or intend to kill. That issue is pending before the United States Supreme Court currently, Tison v. Arizona, case no. 84-6075: lower court' decision State v. Tison, 142 Ariz. 446, 690 F.2d 747 (Ariz. 1984). When Florida considered a similar case, a split 5-2 decision ensued, State v. White, 470 So.2d 1377 (Fla. 1985), with

the majority holding that Enmund does not entirely prohibit the death penalty for an active participant who is not the "triggerman."

The finding of "intent to kill" for a non-triggerman must be clear and specific, however. The jury instructions must therefore require a clear finding which will meet the Enmund standard. In Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984), cert. granted, Cabana v. Bullock, ___ U.S. , 106 S.Ct. 689, 85 L.Ed.2d 476 (1985), the federal rule established in Reddix v. Thigpen, 728 F.2d 705, reh. den., 732 F.2d 494 (5th Cir. 1984) was recently reaffirmed. In Bullock, the jury in the "guilt" phase of a bifurcated capital trial was told that it should find the defendant guilty of felony murder if it found beyond a reasonable doubt that he

> alone, or while acting in concert with another, while present at said time and place by consenting to the killing of the said [victim] . . . did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, whether done with or without any design to effect the death of the said [victim]. 743 F.2d at 247 (italics added).

In the penalty phase, the jury was simply instructed to balance the relevant aggravating and mitigating factors, then recommend execution or life imprisonment as appropriate, 743 F.2d at 247. While the conviction of felony murder was not improper, the federal court held, the death penalty could not stand in light of the instruction that would permit imposition of the death penalty

"with or without any design to effect the death of the said [victim]" 743 F.2d at 248. In a slightly less recent case, this Court approved a sentencing instruction to be given in the penalty phase of a capital trial, to the effect that the jury should specifically decide "whether [defendant] killed [victim] or attempted to kill [victim] or intended that a killing take place, or intended that lethal force would be employed." James v. State, 453 So.2d 786, 791 (Fla. 1984). This case is not inconsistent with the later one Bush v. State, 461 So.2d 936 (Fla. 1984), wherein the defendant likewise complained that the jury in the sentencing phase was not instructed that proof of his intent to kill or contemplation of lethal force was necessary. Because the defendant had, in Bush, actually stabbed the victim (although a later gunshot may have been the exact cause of death), there was no question that he intended to use lethal force. Thus, "under the facts" of Bush, this Court rejected the contention of error in the jury instructions.

The case at bar had jury instructions almost exactly like those in Bullock v. Lucas, supra. In the "guilt" phase of this bifurcated trial, the jury was told that it should convict this defendant, Angel Diaz, of first degree felony murder if it found, along with other elements, that:

> Angel Diaz was the person who actually killed Joseph Nagy, or Joseph Nagy was killed by a person other than the defendant who was involved in the commission or attempt to commit robbery but the defendant was present and did knowingly aid, abet, counsel, hire or otherwise procure the commission of robbery.

> In order to convict of First Degree Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill.
> [TR-860-61] (italics added)

At the penalty phase, as in Bullock, the jury was simply told to weigh the statutory aggravating and mitigating factors, which were listed, and to make a majority recommendation. [Jan. 3, 1986, pp. 103-07). According to Bullock and to James v. State, supra, the death penalty cannot be constitutional because the jury was never instructed that it had to make findings consistent with Enmund v. Florida, supra. Unlike Bush v. State, supra, where the necessary findings could be presumed from the evidence, this is a case in which there is very little evidence even placing the defendant at the crime scene, and no good evidence as to who shot the murder victim. Even if, on the basis of an extremely tenuous identification by a single victim six years after the robbery, plus a single fingerprint on a matchbook, the jury believed the defendant to have been one of the three robbers rather than an "outside man" or "getaway driver," there is still nothing to show that he ever intended lethal force should be used. The robber in front of the bar and the one on the stage apparently fired only warning shots, directed upward away from the patrons. The defendant's girlfriend described him as being extremely upset over the shooting. Thus, in the absence of a clear instruction to the jury satisfying the Enmund standard, a reviewing court cannot say that a finding of sufficient intent to

permit imposition of a death sentence was made in this case. The sentence is, therefore, unconstitutional.

C. **The death sentence is disproportionate to the crime.**

One of the factors which permits a state's system of capital punishment to pass the scrutiny of the United States Supreme Court is a review by the state's highest court of the appropriateness of the sentence. Florida has long followed the practice of "proportionality review," Proffitt v. Florida, 428 U. S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The practice is intended to insure that the death penalty is consistently imposed for similar crimes, so that it is not an arbitrary or capricious penalty.

In the case at bar, the codefendant who had accepted a plea bargain before this trial received a life sentence. The evidence indicated that the codefendant, Toro, was the "trigger man." At the sentencing, the Court was asked to take judicial notice of the sentence received by Toro (Jan. 24, 1986, p. 3). The prosecution, with the consent of defendant's attorney, was allowed to submit a written memorandum explaining the disparity in the treatment of these two individuals [R-310-313]. This memorandum claims that the state initially planned to seek the death penalty in both cases, but was unable to produce crucial witnesses in time for Toro's trial; so Toro was offered a second-degree murder plea instead. The memo also claims that the defendant Diaz was a "suspect" in a newer Miami-murder and had

recently been arrested for planning a new jail break. It is axiomatic that crimes charged but not proven may not be used as factors in deciding an appropriate sentence. Furthermore, one of the key witnesses missing in Toro's case, one Georgina Deus, was still missing when Diaz came to trial. This memorandum is simply not adequate justification for the disparity between the treatment of the two defendants.

The focus of proportionality review should not be primarily upon the past history of the accused, which the state's memorandum emphasizes: it should be upon his role in the crime for which he is being sentenced. In Marek v. State, ___ So.2d ___ (Fla. 1986) (case no. 65,821, op. filed June 26, 1986) [11 FLW 285] this Court upheld a death sentence for a defendant who was the dominant actor in a rape and murder, while the "follower" codefendant got a life sentence. In another case where the degree of culpability seemed more equal, however, a death sentence was reversed in light of the codefendant's plea-bargained life sentence and other sentencing errors, Jacobs v. State, 396 So.2d 713 (Fla. 1981). In Wilson v. State, ___ So.2d ___ (Fla. 1986) (case no. 67,721, op. filed Sept. 4, 1986)[11 FLW 471], which was not a codefendant situation, the death penalty was found invalid for a man who had killed his father, mother, and cousin, who had the aggravating factors of prior violent felonies and an especially heinous method of killing, and had no mitigating factors; on the basis that

whatever premeditation there was had been of "short duration." In view of these three cases, particularly, it appears that the death penalty is grossly disproportionate to the crime for which this defendant was convicted, especially in view of the minor role he allegedly played and the absence of hard evidence placing him at the crime scene.

VI. THE COURT IMPROPERLY CONSIDERED ONE OF THE AGGRAVATING FACTORS IN SENTENCING THE DEFENDANT

The prosecution argued that the defendant's participation in this robbery, if he was indeed the man in the front of the bar who held the silenced gun, created a great risk of death to many persons [Jan. 3, 1986, pp. 16, 72]. The Court specifically found that this factor had been proven [R-321-22]. The evidence showed, however, that the man in the front of the bar fired only one shot, upward, which struck a light fixture. There is no proof that he fired any other shots. The prosecution argued, and the Court accepted, the existence of danger from a ricochet. That, however, is a highly speculative danger. No one in fact was struck, and a man firing a single shot toward the ceiling of a large but sparsely populated room surely would not expect to hit anyone. The defendant's girlfriend indicated that he ♦ was very angry with Toro, screaming that Toro's shooting the victim was not necessary. Under the circumstances, therefore, it cannot be said that this defendant knowingly created a great risk of death to many persons. The case Jacobs v. State, 396 So.2d 713 (Fla. 1981), cited in the previous section, found error in the court's considering this same aggravating factor when the defendant had fired only a single shot at the victim at close range. A single shot fired away from all the people present is, likewise, insufficient.

VII. THE COURT ERRED IN FAILING TO GRANT A MISTRIAL BASED ON THE COURT'S OWN PREJUDICIAL REMARK DURING THE SENTENCING PROCEEDING.

In a tacit admission of its error in allowing the defendant to conduct his own defense at trial, the court denied his request to continue pro se for the sentencing, and appointed counsel. But at this late stage, the disagreements between the defendant and his standby counsel over the best way to present the case were so marked that these two were unable to work harmoniously together. The defendant repeatedly indicated that he did not wish his counsel to cross examine the prosecution witnesses or present evidence and argument on his behalf. These disagreements became so apparent to the judge that she finally admonished counsel, in the presence of the jury, that even though he had been appointed against the wishes of his client, he must conduct the case as he thought best (1/3/86, p. 43). At the earliest possible opportunity, counsel moved for mistrial based on that remark which, although simply intended as guidance for defense counsel, must have prejudiced the jury. This motion was denied (1/3/86, pp. 51-52). For reasons similar to those advocated as likely requiring a mistrial had a change of counsel occurred during trial (section IV-D of this Brief) it is likely that this remark raised many negative inferences in the jurors' minds. Particularly as the defendant had previously represented himself,

his now-publicized disagreement with counsel presented the defendant as uncooperative, irrational, imprudent, and generally undesirable. Misconduct either of the defendant, Walker v. Lee, 320 So.2d 450 (Fla. 4th DCA 1975), or of the judge, United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1975), may necessitate a mistrial. In such a situation, where mistrial is granted at the defendant's request, there is of course no bar to retrial, McLendon v. State, 74 So.2d 656 (Fla. 1954). The defendant can and should be given a new sentencing hearing on the basis of this improper remark, the inadequate jury instructions, and the improperly considered aggravating factor discussed in the preceding sections of this Brief, even if he does not receive an a entirely new trial.

CONCLUSION

Although the points of law argued in the foregoing brief have occasionally been subtle, the bold outline of this case is a very clear portrait of injustice. The entire trial was, as the prosecutor predicted, a nightmare. It defies common sense to say that a man who cannot fluently speak, read, or understand the language of his accusers is competent to conduct his own defense, or that he can be fairly judged when he must appear before his jury shackled like an animal. By the agency of these and the other serious constitutional errors cited in this brief, a man was sentenced to be deprived of his life even though his more culpable codefendant escaped. The State of Florida cannot, in obedience to its own laws, the laws of the United States, and the laws of a higher moral nature, permit such an execution to take place. The defendant is entitled to a new trial **or,** at the very least, to a vacation of his sentence of death.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief of Appellant was mailed this 1st day of November, 1986, to Susan Hugentugler, Esq., Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 801, Miami, Florida 33128.

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ATTACHMENT B

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,493

ANGEL DIAZ,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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INTRODUCTION

Appellant, Angel Nieves Diaz, was the defendant in the trial court. Appellee, the State of Florida was the prosecution. The parties will be referred to in this brief as they stood in the lower court. The symbol "R", followed by the appropriate page number, will be used to refer to the record on appeal. The symbol "SR" will be used to refer to the proposed supplemental record which is being filed in conjunction with this brief. "AB" followed by an appropriate page number will be used to refer to the appellant's brief.

STATEMENT OF THE CASE

On January 25, 1984, the defendant, Angel Diaz and co-defendant Angel Toro, were indicted for crimes committed on December 22, 1979: first degree murder of Joseph Nagy (Count I); five counts of armed robbery (Counts II, III, Iv, V and VI): six counts of armed kidnapping (Counts VIII, Ix, X, XI, XII and XIII): one count of attempted armed robbery (Count VII); and one count of unlawful display and possession of a firearm during the commission of a felony (Count XIV). (R. 1-8a). The first degree murder charge was charged alternatively as premeditated murder or felony murder.

Before the jury was sworn, the State nol prossed Counts II, VI, XII and XIII (two counts of armed robbery and two counts of armed kidnapping). (R. 689-692).

A jury trial commenced on December 19, 1985, in the Circuit Court of Eleventh Judicial Circuit, In and For Dade County, Florida. (R. 430, et seq.). On December 21, 1985, the following verdicts were returned:

> Count I - first degree murder of Joseph Nagy - guilty.
>
> Count III - armed robbery of Carroll Robbins - guilty.
>
> Count IV - armed robbery of Vincent Pardinas - guilty.
>
> Count V - armed robbery of Liela Petterson - not guilty.
>
> Count VI - attempted armed robbery of Norman Bulenda - guilty.
>
> Count VIII - armed kidnapping of Gina Fredericks - guilty.
>
> Count IX - armed kidnapping of Carroll Robbins - guilty.
>
> Count X - armed kidnapping of Vincent Pardinas - guilty.
>
> Count XI - armed kidnapping of Norman Bulenda - guilty.
> Count XIV - possession of firearm during felony - guilty.
>
> (R. 252-261).

All verdicts of guilt reflected commission of the crimes with a firearm. Judgments of guilt were entered on the same date. (R. 263-265). The sentencing phase of the trial began on January 3, 1986. (R. 1351 et seq.). The jury recommended the death penalty for the murder of Joseph Nagy by a vote of 8 to 4. (R. 1459).

On January 24, 1986, the trial judge sentenced Diaz to death for the murder of Joseph Nagy and imposed the following sentences on the remaining charges: as to Count III, armed robbery, 134 years imprisonment: as to Count IV, armed robbery, 134 years consecutive to Count III: as to Count VII, attempted armed robbery, 15 years consecutive to Count IV: as to Count VIII, armed kidnapping, 134 years imprisonment consecutive to Count VII: as to Count IX, armed kidnapping, 134 years imprisonment consecutive to Count VIII; as to Count X, armed kidnapping, 134 years imprisonment consecutive to Count IX; as to Count XI, armed kidnapping, 134 years imprisonment consecutive to Count X; as to Count XIV, unlawful possession of a firearm during the commission of a felony, 15 years imprisonment to be served consecutive to the sentence imposed in Count XI. (R. 300-309, 1468-1470). A three year minimum mandatory term was imposed on counts III, IV, VII, VIII, IX, X, and XI, to be served concurrently. The trial court entered a written order detailing all aggravating and mitigating factors as set forth in Florida Statutes $921.141 (3). (R. 319-330). These factors will be discussed

at length in the Statement of the Facts and Argument portion of this brief. The trial court also entered an order retaining jurisdiction in accordance with Section 947.16, Florida Statutes. (R. 315-318).

This appeal followed.

STATEMENT OF THE FACTS

I. Security Measures During Trial

Because of her concern for the safety of all persons within the courtroom, the trial judge, assured by Commander Bencomo of Court Security that the precautions implemented were necessary and appropriate, overruled objections made by defense counsel to searches of all persons entering the courtroom and to the defendant's shackles. (R. 450-452, 454-455). The defendant was not handcuffed. (R. 701). Sergeant Rogers of Court Security also testified that the defendant had a reputation for violence. (R. 697).

The assistant state attorney informed the court of the fact that the defendant had previously been convicted of murdering a prison official in Puerto Rico and had subsequently escaped. (R. 450). The court also knew of the defendant's pending escape charge involving a plot to smuggle submachine guns into the Dade County Jail. (R. 439, 450, 452). The defendant was alleged to have bribed several

correctional officers. (R. 450). Most importantly, the plot allegedly included plans to kill at least one correctional officer. (R. 450). It was also known that the defendant claimed that he had an army of people on the streets to do things for him. (R. 450).

It should also be noted that the defendant, during a prior escape attempt, held a corrections officer hostage at knifepoint in a Connecticut prison and threatened to kill him. (R. 1391). During the same incident, another corrections officer was also beaten up and locked in a cell while the defendant and three other inmates escaped. (R. 1396-1398). The defendant ultimately was'convicted of the escape from the Connecticut prison. (R. 1398).

From pre-trial motions, the trial court was also aware of pending homicide investigations in Miami, Puerto Rico and New England in which the defendant and his co-defendant were suspects. (R. 361, 365). It was also alleged during hearings on pretrial motions that a female witness, presumably either Georgina Deus or Candace Braun, had received threats in the mail regarding testifying at trial and had thereafter disappeared. (R. 375). *There* were also allegations that Georgina Deus's apartment had been firebombed. (R. 389) The assistant state attorney stated that he and the lead detective in the case met with Georgina Deus in Boston in her attorney's office. (R. 390). They

were then informed of fire-bomb threatr received by Ms. Deus and inquiries were made by her attorney about the federal witness protection program. (R. 390). At the end of the discussion, Ms. Deus stated something to the effect that she would take care of herself and then said, "You'll never get me to Florida." (R. 390).[1]

The trial judge entered a finding that the chains were not visible when the defendant's pant legs were down. (R. 455). In addition, the trial judge made the following observations regarding the presence of security personnel in the courtroom: (1) sixty to seventy percent of the security personnel in the courtroom were in plainclothes and weapons, if any, were not visible, (2) every courtroom had at least two to four correction officers regardless of any possible risk and, (3) the measures taken were necessary for the safety of the courtroom personnel given the defendant's past. (R. 452-452).

II. Waiver of Counsel

After the jury had been sworn, but before opening statements, defense counsel announced that the defendant desired to assume his own defense. (R. 767). In order to allow the defendant time to rethink his request, the trial court

1 The State recognizes that these allegations are hearsay statements: however, they can and should be considered in security matters.

suggested that the state present its opening statement to the jury to be followed by a lunch recess. (R. 767-768). This procedure was accepted by defense counsel. (R. 768).

Upon reporting back to the trial judge, defense counsel requested psychiatric evaluations of the defendant, and for and further moved for a defense caused mistrial. (R. 797). The motion for mistrial was denied. (R. 798). The court granted the motion for psychiatric evaluations and appointed two Spanish speaking doctors to evaluate the defendant that evening after the court recessed. (R. 57, 808). Lamons stated that the defense that he and the defendant had developed over the prior months had suddenly been rejected. (R. 797-798). He further stated that the defendant absolutely insisted on addressing the jury and had prepared an eloquent opening statement. (R. 800). The defendant wanted Lamons to act in an advisory capacity while he addressed the jury and while he conducted cross-examination. (R. 800, 815).

In inquiring about the defendant's desires to represent himself, the trial court stressed the difficult challenges that lay before him. (R. 802-803). The defendant stated that he understood the difficulties involved in addressing the jury through an interpreter. (R. 802-803). The defendant revealed to the court that he had limited experience in a court of law (R. 802); had read the United

States Constitution, in part (R. 802): had no idea how a trial was conducted in Florida (R. 803); had not read law books since he stated that he could not speak English (R. 803); had obtained a high school equivalency degree (R. 803): and felt that his counsel, though not incompetent, was unfamiliar with his defense. (R. 804).

The court again stressed the defendant's deficiencies to him and even offered him an opportunity to address the jury at the close of the trial. (R. 809). The defendant responded by stating that he understood, but still wanted to represent himself. (R. 809). In a further effort to caution the defendant, the court yet again pointed out the disadvantage of self representation and the defendant again insisted on representing himself. (R. 810-811). Lamons was appointed as standby counsel. (R. 812). The court entered a finding that the defendant had made his choice freely, voluntarily, and intelligently after being advised, by both the court and Lamons, of the advantages and disadvantages of self representation. (R. 814). The court also noted that all responses by the defendant were highly appropriate, coherent and logical. (R. 814-815). In his eloquent opening statement, the defendant clearly explained his decision to represent himself to the jury. (R. 821-822).

At one point during the cross examination of Candace Braun, the defendant asked for a sidebar and stated that he

was incapable of continuing and wished Lamons to resume his representation. (R. 899-900). Lamons then unsuccessfully moved for a mistrial. (R. 901-902). After discussions with Lamons, however, the defendant again insisted on representing himself. (R. 907).

On the morning of December 20, 1985, Dr. Haber, who had evaluated the defendant for competency pursuant to the trial court's order, orally stated that the defendant was indeed competent. (R. 981) (SR. 1-3). The written report of Dr. Castiello indicated that the defendant was very competent. (R. 981) (SR. 4-6). Both reports were stipulated to by the state and the defendant. (R. 984-986). Observations made and announced by the trial court in finding the defendant competent included the fact that the defendant competently cross examined several witnesses, one for over an hour and a half. (R. 984).

III. Guilt Phase of Trial

On December 22, 1979, almost six years before the instant trial, Joseph Nagy was murdered during a robbery at the Velvet Swing Lounge.

Vincent Pardinas, a patron of the bar in 1979, said that he arrived at the bar between 9:15 p.m. and 9:30 p.m. (R. 945). At that time, the bar had only eight to twelve people

in it. (R. 945). Pardinas was Bitting at the bar next to Carroll Robbins. (R. 948). Both Pardinas and Robbins noticed three people sitting together at the rear of the bar. (R, 946, 1011). Leila Petterson, a dancer at the lounge, also remembered seeing the three robbers enter the establishment together and saw them sit towards the rear of the bar. (R. 1029). Petterson had a couple of drinks with them and spoke with two of them in English as the third did not speak English well. (R. 1029). The men spoke to each other in Spanish. (R. 1031).

Pardinas noticed two of the three men who were sitting together exit, then re-enter the bar and sit down. (R. 948). Then one of them approached Pardinas and Robbins, said "Hello", pulled out a gun equipped with a silencer and started waving it. (R. 951, 998, 1013). Robbins recalled hearing someone say in heavily accented English, "Hold them up". (R. 1012). When Pardinas, Robbins and Norman Bulenda, the bartender, failed to put their hands up, the robber fired once, hitting the mirrored glass ball over the stage. (R. 951). A woman was on the stage at that time. (R. 952).

Bulenda and Pardinas noticed three robbers at that time, one near them with the silencer, one on the stage and the third between the bathroom and office. (R. 953, 954, 998). The third robber had his arm around the barmaid's neck while pressing a gun against her head and leading her towards the office. (R. 954, 998).

After the globe was shot at, Pardinae and the others were told in broken, Latin accented English, to put their hands up and to get on the floor. (R. 952). Pardinas was able to look at the robber's face for a period of ten to fifteen seconds before he laid down. (R. 951). Because of the dim lighting however, he was unable to get a "good look". (R. 952). Pardinas saw the robber with the silencer take his wallet. (R. 956). His wallet was a dark blue or black nylon diver's wallet with a velcro flap containing $40 to $50. (R. 956). After their valuables and wallets were taken, Robbins and Pardinas were led into the men's room. (R. 953). The remaining customers were also herded into the men's room, with a cigarette machine blocking the door. (R. 958). While confined in the bathroom, Pardinas heard two to three additional gunshots and thought that they were going to be shot next. (R. 958). Robbins heard two shots, a woman's scream, and men arguing. (R. 1017). Robbins then heard excited Spanish coming from the parking lot area followed by a louder than normal muffler on a car which then faded away. (R. 1018). When they finally broke out of the bathroom, they found Joseph Nagy, the lounge's manager, shot dead in his office.

Meanwhile, Petterson had crawled under a bar during the shooting. (R. 1032). After Joseph Nagy was murdered, the robbers found Petterson, and at gunpoint demanded she open the cash register. (R. 1034). The robbers took money from

one register and tips from the stage and bar. When Petterson became hysterical as the second register jammed, the robbers left. (R. 1034).

Officer William Christian, Metro-Dade Police, arrived at the Velvet Swing Lounge at approximately 9:57 p.m. (R. 940). In speaking to Robbins, Pardinas, and Bulenda, he noticed that they were coherent and not under the influence of alcohol. (R. 941-942). Pardinas was able to give a description of the robber nearest to him. (R. 942). The description was 5'6" to 5'8" Latin male, 135 to 150 pounds, dark complexion and dark wavy hair. (R. 960). Pardinas did not hear anything about the case for three to four years. (R. 961).

As a patrolman with the crime lab section of the Metro-Dade Police Department in 1979, Joseph Thorne found two lamps with projectile holes in them, a mark in the ceiling where a projectile had hit and gone into a wall, and another area where a bullet or projectile had hit the wall in two different places, ricocheting. (R. 835, 58-59). He found four casings of three different caliber bullets. (R. 837, 62, 63, 65, 66). He also found two projectiles: one .25 caliber and one .45 caliber. (R. 839, 67, 68, 69). Additionally, steel wool fragments were found on the floor indicating the use of a silencer. (R. 848). An unused gun was found in a locked cabinet in the bar's office. (R .843). Thorne dusted for

fingerprints and concentrated in the area where he was told the robbers had been sitting. (R. 848). A total of one hundred latents were lifted. (R. 853). A matchbook and cash receipt found in the same general area was taken into evidence. (R. 850).

Norman Bulenda, the bartender, said that it was his standard operating procedure to make sure that the bar was wiped clean and dried, dirty glasses removed and cleaned, ashtrays cleaned and matchbooks replaced. (R. 988-989). He stated that this procedure was good advertising and a prerequisite to keeping his job.

Melvin Zahn, firearms and tool mark examiner with Metro-Dade Police, testified that the steel wool found at the lounge would be consistent with the witnesses' observations regarding the use of a silencer by one of the robbers. (R. 1051). Zahn's findings also indicated that the weapon found in the locked cabinet at the lounge had not been fired. (R. 1054). Zahn further concluded that each of the three men fired at least once during the course of the robbery. (R. 1055).

Dr. Roger Mittleman, Dade County Medicial Examiner, testified that the victim, Joseph Nagy, had a gunshot wound of the chest with its entrance in the front of the body and exit in the back. (R. 865-866). There was also an injury to

the victim's left hand where there was a tearing of the tip of the ring finger. (R. 866). The bullet entered Mr. Nagy's body and went through his major organs, the aorta of the heart and the lungs, causing death. (R. 867, 872). Gunpowder residue was not found on Mr. Nagy's body and would therefore be consistent with the theory that the shooter was five to ten feet away from the victim. (R. 870). The evidence was also consistent with the theory that the victim emerged from his office, saw an individual with a gun, brought his hand up to defend himself and was shot. (R. 873).

Gregory Smith, homicide detective with the Metro-Dade Police Department's "Cold Case Squad," received information from Candice Braun, the defendant's former girlfriend, which caused him to reopen the case of Joseph Nagy's murder in 1983. Braun provided the names of Angel Toro, Angel Diaz and "Willie" as those who were responsible for the murder/robbery. (R. 1059)

Candice Braun, had lived with the defendant him for two years. (R. 878). In 1979, a few days before Christmas, Braun testified that she saw the defendant leave their apartment at approximately 7:00 or 8:00 in the company of his friends, Willie, Luisito, and Angel Toro. (R. 879). When asked what he was going to do, the defendant responded that he was going for "business" though he was, at that time,

unemployed. (R. 879). They left in Luisito'e louder than normal car. She next saw the defendant at 1:00 a.m. or 2:00 a.m. along with Willie, Luisito and Angel Toro arguing. (R. 880). The defendant told Braun that Sammy (Angel Toro) shot a man during a robbery because he thought the man was reaching for a gun. (R. 881).

Braun was also given some money to buy a Christmas tree with and was shown a blue nylon wallet. (R. 881). The defendant told her not to mention it because he had taken it without anyone's knowledge and therefore had not divided its contents. (R. 881). Braun described the wallet as being a blue nylon ski wallet with velcro. (R. 882). She stated that she was not promised anything in return for her testimony. (R. 883 , 885, 930, 932, 933).

During cross-examination, Braun stated that she overheard the conversation because they were in an efficiency apartment and she couldn't help but overhear it. (R. 889, 916). She recognized Toro say Spanish words for "shoot", "man" and "panic". (R. 912). Everyone was yelling at Sammy (Angel Toro). (R. 913). Braun remembered going into the living room area from the kitchen and seeing Papo (the defendant) very, very angry telling Toro "that it wasn't necessary." (R. 912, 917). She further stated that she never wanted to testify against Angel Diaz at all but was under the impression that Toro was blaming the actual murder

on Diaz and from what she had over-heard, Diaz had not shot anyone. (R. 889-890, 896). Braun admitted using drugs and being on a methadone maintenance program. (R. 892-893). She further admitted being arrested for various crimes, mostly misdemeanors. (R. 893).

Normally, Braun would have been asked to leave the apartment when the men talked. (R. 914, 919, 921, 922). On that particular night, because it was late and she was sleeping when the men arrived, she was not asked to leave. Because she loved Diaz, she didn't go to the police: the police, Detective Smith, found her. (R. 932-933). She wanted to avoid testifying against Diaz "at all costs". (R. 933). She then discovered that the defendant was blaming her , for being in jail and received a picture of herself with her face burned out accompanied by a threatening letter. (R. 934). It was then that Braun decided to testify, to "do what was right." (R. 934-935).

On November 20, 1984, Pardinas was shown two sets of six photographs by Detective Smith. (R. 104-107). When Pardinas stated he couldn't be one hundred percent certain, he was asked to identify the three most likely, then two, then the most likely by a process of elimination. (R. 964). The final picture he selected was that of the defendant. (R. 974). While not one hundred precent certain, Pardinas tentatively identified the defendant in court as being a person who could fit the description of the man who robbed

him. (R. 966). Bulenda, Robbine and Pettereon were unable to identify anyone. (R. 1005, 1022, 1035).

Upon questioning by the defendant on cross-examination as to why Georgina Deus was unavailable for trial, Detective Smith stated that her apartment in Boston had been firebombed and she had been threatened regarding her testifying against the defendant and Angel Toro. (R. 1074). Smith further stated that Deus recanted her testimony because of the threats. (R. 1075). Georgina Deus' name was never mentioned by state witnesses during direct examination.

Detective Smith provided fingerprint copies to the Identification Section of his department to be compared with those prints lifted at the scene. (R. 1059). William Miller, fingerprint technician, stated that out of the 100 latents lifted by Lieutenant Thorne, 29 were of comparison value. (R. 1140). Twenty of the twenty nine lifted were identified as being employees' prints. (R. 1141). Miller had to develop prints through a chemical procedure on two cash receipts and two matchbooks. (R. 1142-1143). He was able to develop a print on one receipt and on one of the matchbooks. (R. 1143). Of the nine original latents, lifted from the cigarette machine, four were identified as being Angel Toro's finger and palmprints. Additionally, the print developed on the cash receipt was Angel Toro's. (R. 1146).

The print developed from the matchbook was identified as being the defendant's. (R. 1147).

Ralph Gajus, an inmate at the Dade County Jail and the state's last witness, stated that his solitary cell was directly across from the defendant's cell. (R. 1112). The defendant and Gajus spoke to each other in English since Gajus did not speak Spanish. (R., 1113). Gajue said that except for an accent, the defendant spoke English very well. (R. 1113). Over a seven month period of time, the defendant and Gajus discussed their respective cases three to five times in bits and pieces. (R. 1117-1118). The defendant told Gajus that he had taken care of a witness named Candy by firebombing her house. (R. 1120). Diaz told Gajus that he and two others committed a robbery of a bar in the Southwest section. (R. 1121). From the conversations they had had, Gajus stated that Diaz inferred he had shot a man in the chest but never clearly stated that he had in fact shot a man. (R. 1121). Diaz indicated that he had to shoot or be shot. (R. 1122).

The state then rested. (R. 1158) and motions for judgment of acquittal were denied. (R. 1159).

Diaz then advised that he had a list of witnesses whom he wanted 'the trial judge to locate. (R. 1185). This included a Detective O'Neil, from some city in Massachusetts

unknown to both the defendant and state, and Georgina Deus who the state could not locate. (R. 1186-1187). He also requested the presence of a Detective Murphy from Boston, Attorney Gutierrez, Emilio Bravo, an inmate at the Dade County Jail, Roberto Martinez, also an inmate, and Virginia Cummings from Connecticut. (R. 1189-1190). The defendant then handed the clerk copies of Georgina Deus's statement. (R. 1190-1193). Neither the defendant nor the state knew of Georgina Deus's whereabouts. (R. 1192). As to the production of Georgina Deus, the court ruled that while the defendant knew of her since 1984 he never expressed his desire to call her as a witness, (R. 1199), furthermore, her statements were not mentioned by the state but rather were made a feature of the defense. (R. 1198). The court told the defendant that he may make arguments concerning Deus in closing argument but that the trial would not be delayed. (R. 1199). The defendant explained that Murphy, O'Neil and Gutierrez's testimony was related to the Deus issue of whether or not Deus's statements were the result of coersion. (R. 1200-1201). The trial court found that to be irrelevant since Deus never testified and her statements were never offered against the defendant.

Regarding Virginia Cummings, the defendant knew her name, address and phone number but had never provided the state or Mr. Lamons with same. (R. 1206). The court therefore denied a continuance at the twelveth hour to obtain

witnesses whose locations were either unknown or not disclosed prior to that time. (R. 1209). Recognizing however that Bravo and Sanborne were prisoners at the jail, the court offered to let standby counsel Lamons interview them to see if they wanted to testify. (R. 1213). That offer was rejected by the defendant who insisted on seeing the potential witness himself. (R. 1213-1214). As a matter of fact, the defendant felt that he could go to Connecticut to look for witnesses. (R. 1214). Because the two men the defendant wanted to see were also considered to be high risks detainees, Diaz was allowed to talk to them from an adjoining cell. (R. 1216-1217).

After the inmate witnesses had been interviewed, the court informed the defendant that most of what they would testify about would be inadmissible inasmuchas the defendant would be opening the door to testimony regarding his own escape charge which the court had previously ruled inadmissible. (R. 1221-1222). The court also explained the procedure regarding closing arguments, Fla.R.Crim.P. 3.250. (R. 1223). The defendant thereafter decided to rest without presenting any evidence; (R. 1244).

The defendant, from a prepared statement contrary to his standby counsel's advice, made a motion to dismiss and for mistrial. (R. 1242). His grounds were: 1.) the trial judge secretely exchanged notes with the jury without

allowing him to see it, and 2) the trial judge failed to remain impartial by permitting him to incriminate himself by allowing him to represent himself "without the necessary intellect to do so." (R. 1241-1242). The motions were denied and the court found that the defendant was very intelligent and possesed a great deal of intellect. (R. . 1243).

The jury deliberated almost three hours before reaching a verdict. After the guilty verdicts were rendered and the jury excused, the defendant was asked if he had any witnesses to call for the penalty phase. (R. 1339). The trial court thereafter described the penalty phase and the jury's function at same. (R. 1339-1340). The defendant stated that . he understood but would not present any witnesses. (R. 1340). The court then offered to appoint counsel for the penalty phase, but was cut off by the defendant who stressed his desire to continue representing himself. (R. 1340). The trial judge even offered to appoint an attorney other than Lamons if the defendant so desired. (R. 1341). After conferring with Lamons, the defendant asked for Lamons to represent him. (R. 1341). Lamons was appointed pursuant to the defendant's wishes. (R. 1341). Sentencing was set for January 3, 1986. (R. 1343).

IV. Sentencing Phase of Trial

Immediately at the start of the penalty phase, defense counsel stated that the defendant wanted him only to act as his legal advisor, not his attorney. (R. 1354). Lamons advised that the defendant had been told of his preparations and of the motions he intended to raise. (R. 1354). Lamons also advised the court that the defendant had forbidden him from raising those arguments and motions. (R. 1355).

The defendant was reminded by the court of his decision on December 21, 1985, to allow Lamons to represent him. (R. 1356). He responded by saying that there was a "misinterpretation" of what he had said and that he didn't know about the second phase of the trial. (R. 1356). He said, "When you talked to me on the matter of assigning me a lawyer, as a fact, I did not wish to accept that, that's correct. When I needed it was during the trial." (R. 1356).

As Diaz insisted on representing himself, the court again warned him and proceeded to question him concerning his ability to represent himself. (R. 1357). This time, however, the defendant stated that he was not capable of representing himself. (R. 1359). He insisted that since Lamons was not interested in his case or his defense, he was forced to represent himself. (R. 1359). The defendant then proceeded to deny what he had said at the end of the guilt

phase of the trial. (R, 1360). The court asked the defendant five (5) times if he was capable of representing himself. (R. 1361-1362). The defendant instead responded by saying, "I will represent myself" each time. (R. 1361-1362). Therefore, Lamons was ordered to represent the defendant. (R. 1363).

Agent Jose Pizzaro Andres of the Puerto Rican Police was the first state witness to testify. The defendant was arrested in November, 1977 for the first degree murder of Monsarrati Torres DiVega in Puerto Rico. (T. 1376-1377). At the time of the murder, the defendant resided in a drug treatment house which was part of the prison system in Puerto Rico, serving a sentence for armed robbery. (R. 1379-1380). DiVega was one of the directors at the treatment house. (R. 1381). Since DiVega filed a report which would have caused the defendant to be transferred back to a penal institution, the defendant stabbed a sleeping DiVega nineteen times with a knife. (R. 1381-1382). A certified copy of a second degree murder conviction was entered into evidence. (R. 280). The defendant received a sentence of ten to fifteen years for the murder. (R. 1383). He never completed his sentence, however, since he escaped on September 19, 1979. (R. 1383-1384). A certified copy of the defendant's robbery conviction was also entered into the record. (R. 1385). An escape warrant was also entered into evidence. (R. 262).

Bruce Morrash, a correctional counselor at Hartford Correctional Center, was ambushed in an escape attempt and found himself held by the defendant with a sharpened homemade knife at his throat. (R. 1391). He was told in English not to move or say anything or he would be killed. (R. 1391). The sharpness and pressure of the knife against his neck drew blood. (R. 1392). He was then tied while the defendant and two others escaped. (R. 1393).

Lascelles Edwards, correctional officer at Hartford Correctional, was jumped on and punched in the groin and head by the defendant and three others. (R. 1396). He was locked in a cell while the defendant escaped. A certified copy of the defendant's escape conviction was entered into evidence. (R. 1399).

Contrary to Lamons' advice, the defendant refused to testify about his family and children in Puerto Rico. (R. 1407). The defense presented no witnesses for mitigation. During the defense counsel's closing argument, the defendant twice interrupted the proceedings causing the court to excuse the jury. (R. 1446, 1450). He did not want Lamons to present an argument to the jury on his behalf. (R. 1446-1447). The jury returned a recommendation of death by a vote of 8 to 4. (R. 1459).

On January 24, 1986, the trial court sentenced Angel Diaz to death for the murder of Joseph Nagy finding the following aggravating factors:

1. The Capital Felony was committed by the defendant while under a sentence of imprisonment. F.S. 921.141(5)(a)

2. The defendant was previously convicted of another capital felony involving the use or threat of violence to the person. F.S. 921.141(5)(b).

3. The defendant knowingly created a great risk of death to many persons. F.S. 921.141(5)(C).

4. The Capital Felony was committed while the defendant was engaged or was an accomplice in the commission of or the attempt to commit kidnapping. F.S. 921.141(5)(d).

5. The Capital Felony was committed for pecuniary gain. F.S. 921.141(5)(f).

(R. 320-322).

Mitigating factor8 were not found.

POINTS INVOLVED ON APPEAL

The State respectfully rephrases the defendant's issues on appeal as follows:

I

WHETHER THE TRIAL COURT ERRED IN DENYING A DEFENSE CONTINUANCE WHERE THE WITNESS LISTED BY THE STATE ONE WEEK BEFORE TRIAL HAD BEEN DEPOSED BY THE DEFENDANT?

II

WHETHER THE TRIAL COURT ERRED IN EXCUSING TWO JURORS FOR CAUSE WHO OPPOSED THE DEATH PENALTY?

III

WHETHER THE DEFENDANT'S APPEARANCE BEFORE THE JURY IN SHACKLES AND OTHER SECURITY MEASURES TAKEN WAS PROPER WHERE HE WAS AN ESCAPE RISK AND WHERE THERE WERE NO LESS RESTRICTIVE REASONABLE ALTERNATIVES AVAILABLE?

IV

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE DEFENDANT TO REPRESENT HIMSELF?

POINTS INVOLVED ON APPEAL CONTINUED

V

WHETHER THE DEATH SENTENCE IMPOSED VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

VI

WHETHER THE TRIAL COURT PROPERLY CONSIDERED ONE OF THE AGGRAVATING FACTORS IN SENTENCING THE DEFENDANT7

VII

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL DURING THE SENTENCING PROCEEDING?

SUMMARY OF THE ARGUMENT

I. The trial court did not abuse its discretion in denying an ore tenus motion for continuance on the morning of trial where counsel for the defendant indicated his readiness for trial, and where the recently disclosed witness complained of had been deposed for five to six hours.

II. The trial court did not err in excusing two prospective jurors for cause when they told the court that they could not vote for the death penalty under any circumstances,

III. The trial court, having broad discretion in maintaining the security of her courtromm, properly allowed security measures to be employed, including the shackling of the defendant, where she had a legitimate well-founded concern for the safety and wellbeing of all courtroom personnel. The defendant had prior convictions for murder, armed robbery and escape and was generally known as a violent person. He was awaiting trial for an escape attempt from the Dade County Jail. The defendant was not prejudiced by the trial court's actions where there were no less restrictive alternatives available and where the state's legitimate concerns outweighed the defendant's right to be tried free of restraints.

IV. The trial court properly allowed the defendant to represent himself where his waiver of counsel was made intelligently, knowingly, voluntarily, competently and in conformity with the dictates of Faretta v. California, infra. The defendant at all times exercised his informed free will.

V. The death penalty imposed does not violate the Eighth Amendment to the United States Constitution where the defendant's actions showed his intent to kill.

VI. The trial court properly considered as an aggravating factor the fact that the defendant fired his gun in a public place, in the presence of eight to twelve people, and specifically over a woman's head. Even if this factor is inappllicable, the presumed sentence would still be death.

VII. The trial court did not err in failing to grant a mistrial during the sentencing proceeding where the trial court's comments were not prejudicial and where an offered curative instruction was rejected and waived.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED A DEFENSE CONTINUANCE WHERE THE WITNESS LISTED BY THE STATE ONE WEEK BEFORE TRIAL HAD BEEN DEPOSED BY THE DEFENDANT.

The decision to grant or deny a motion for continuance is within the trial court's discretion and may be reversed on appeal only when it can be shown that the court abused its discretion. Jackson v. State, 464 So.2d 1181 (Fla. 1985): Lusk v. State, 446 So.2d 1038 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.23d 1322 (1981). Such is the rule even in capital cases. Jackson, supra; Williams v. State, 438 So.2d 781 (Fla.), cert denied 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 164 (1983).

The trial court acted soundly within its discretion in denying the defendant's ore tenus motion for continuance. According to the trial court, the original trial date was April 6, 1984. (R. 438). There were at least four defense continuances and several prosecution. (R. 438). The trial date of December 17, 1985, had been set by the court approximately two to three weeks earlier. As the trial judge stated and as counsel for the defendant, Robert Lamons, admitted, Mr. Huttoe, counsel of record, expressly told the trial judge that he or someone from his office would be prepared to try

the case on that date. (R. 438-440). Therefore, the December trial date could not have taken the defense by surprise as asserted. (AB. 13).

Defense counsel based his motion for continuance on the fact that he had been notified one week before trial that Gajus would testify for the prosecution in the murder case. (R. 440). Although the defendant admits that he immediately deposed the witness for six hours, he claims that a written transcript was necessary. A transcript is not a prerequisite to discussing testimony with a client nor is it necessary to a impeach witness.

Defense counsel also complained of insufficient time to investigate Gajus or the statement. (R. 440). Gajus was already known to be a witness against the defendant in his escape case. As for the contents of the statements made to Gajus, no one would be in a better position than the defendant to know whether or not he had made inculpatory statements. See, e.g. Echols v. State, 484 So.2d 568 (Fla. 1985). Certainly if counsel felt that he was absolutely unable to proceed to trial, he could have filed a written motion immediately detailing his reasons for requesting a continuance. Instead, he chose to wait until the eleventh hour to ask for a continuance with nothing more than general, blanket statements to the effect that he was not ready and had to discuss the matter with his client.

Moreover, Gajus', testimony was basically cumulative: the exception being that Diaz inferred he had shot a man in the chest. According to Gajus, Diaz never clearly stated that he had in fact shot a man. (R. 1121). The balance of his testimony is completely consistent with that of the other witnesses.

In Andrews v. State, 372 So.2d 413 (Fla. 3d DCA 1979), writ discharged, 390 So.2d 61 (Fla.), the Third District Court of Appeal found no abuse of discretion where a defense motion for continuance to take a deposition, based on surprise arising from a witness/co-defendant's sudden availability as a state witness, was denied where there was no concealment or failure to discover by the state. That the court's refusal to grant the motion for continuance caused the defendant to lose confidence in his attorney necessitating his self-representation is nothing more than unsupported speculation. (AB. 13).

The defendant has therefore not demonstrated error on this point.

II

THE TRIAL COURT DID NOT ERR IN MCUSING TWO JURORS FOR CAUSE WHO OPPOSED THE DEATH PENALTY.

The defendant claims that two prospective jurors, Connell and Young, were improperly excluded for cause resulting in the defendant's being tried before a conviction prone jury. This assertion has been rejected by this Court. Lambrix v. State, 494 So.2d 1143, (Fla. 1986): Dougan v. State, 470 So.2d 697 (Fla. 1985).

In Lockhart v. McCree, 476 U.S. ,___ 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), the United States Supreme Court recently held that the United States Constitution does not prohibit the removal for cause of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performances of their duties as jurors. In so holding, the Supreme Court expanded the law regarding the death qualifications of jurors which had previously been addressed in Witherspoon v. Illinois, 391 U.S. 510 (1968), and its progeny. In Lockhart, 476 U.S.___, 90 L.Ed.2d at 147, the Supreme Court specifically determined that the death qualification of a jury does not violate the fair cross-section requirement of the Sixth Amendment nor the constitutional right to an impartial jury.

The United States Supreme Court, in Wainwright v. Witt, 469 U.S. ,____ 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), has held that the test enunciated in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), is the proper standard for ex-eluding jurors in a death case. In Adams, the Supreme Court held:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.
>
> 488 U.S. at 45.

Therefore, under the standard established in Witt for excluding a prospective juror for cause, the juror's bias need not be proved with unmistakable clarity. Witt, 105 S.Ct. at 852.

When questioned about the death penalty, Young stated that he would be unable to recommend death. (R. 526). In questioning Young further, the prosecutor asked him:

> MR. SCOLA: In other words, would you find him guilty of perhaps second degree murder or find him not guilty just so you would not have to reach the decision on the death penalty?

HR. **YOUNG:** Yeah, I think I would do that.

(R. 526-527).

With regard to Connell, the questioning was as follows:

HR. **SCOLA:** If during the first phase of the trial you were *con-* vinced that the State met its burden that the defendant was guilty of first degree murder, would you hesitate to convict him just to avoid reaching that second part of the trial?

MR. **SIPPIO:** Yes.

MR. SCOLA: Thank you, Ms. Connell.

MS. CONNELL: I **feel** the same way.

MR. SCOLA: *When* you say, "the same way," are you telling us that you would be unable - - why don't you tell me how you feel.

MS. CONNELL: I feel that if a person is on trial for taking another person's life, what makes me any better to be able to judge him or to convict him or give him the death penalty.

MR. SCOLA: Well, under our system.

MS. CONNELL: That may be so, but that's the way I feel.

MR. SCOLA: You do not feel you would be capable of - - would it interfere with your decision as to whether he was guilty or not guilty?

MS. CONNELL: I guess it probably would.

(R. 528).

a

Although both Young and Connell later said that they could decide the defendant's guilt or innocence, when questioned by the court, both stated that they could not consider death as a possible penalty. (R. 560-561, 562-563).

The fact that both Young and Connell told the court that they could not vote for the death penalty under any circumstances is controlling. Lambrix, supra, at 1146. This is particularly true where the trial court, unlike the reviewing court, is in a position to observe the demeanor and credibility of a juror. Valle v. State, 474 So.2d 7896 (Fla. 1985), vacated on other grounds, Valle v. State, 106 So.2d 1943 (1986), Valle v. State, No. 61,176 ___ F.L.W. ___, (Fla. January 5, 1987). Thus, the defendant's argument on this issue is meritless. The prospective jurors were properly excluded for cause.

III

THE DEFENDANT'S APPEARANCE BEFORE THE JURY IN SHACKLES AND OTHER SECURITY MEASURES TAKEN WAS PROPER WHERE HE WAS AN ESCAPE RISK AND WHERE THERE WERE NO LESS RESTRICTIVE REASONABLE ALTERNATIVES AVAILABLE.

The defendant claims that the security measures taken during his trial, including his shackling, deprived him of a fair trial and inevitably biased the jury against him. The state submits that the record established in this case belies such a claim.

It is beyond question that a trial judge has wide discretion in maintaining the security of his or her courtroom. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970): United States v. Garcia, 625 F.2d 162 (7th Cir. 1980). Though the Supreme Court in Allen noted that the "sight of shackles and gags might have a significant effect on the jury's feelings about the defendant. . . ," 397 U.S. at 344, the Court also recognized that such precautions cannot always be avoided. The Supreme Court in Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), further recognized that while forcing a defendant to stand trial in prison clothing impermissiblty risks impairment of his presumption of innocence, physical restraints may further an essential state policy. 425 U.S. at 505, 48 L.Ed.2d at 131.

As stated previously in the Statement of the Facts portion of this brief, the trial judge was aware of the defendant's prior murder conviction, prior escapes, pending escape charge which allegedly involved smuggling submachine guns into the Dade County Jail and killing at least one correctional officer, prior armed robbery convictions, and alleged threats, via firebombing and letters, to prospective witnesses. It was also alleged that the defendant claimed an army of persons on the streets was available to do his bidding.

Under the circumstances, the trial judge had a legitimate, founded concern for the safety and wellbeing of all courtroom personnel including prospective jurors. As stated by the trial court, ". . . it is this Court's obligation, and this Court takes seriously this objection, to protect the courtroom, including its clerks, bailiffs and the other people that are here . . . . The Court believes the protection it is taking is the minimal for the protection of the parties involved . . . ." (R. 452). (See also pages 700-702).

The Eleventh Circuit Court of Appeals has also recognized and upheld this concern. Allen v. Montgomery, 728 F.2d 1409 (11th Cir. 1984): Zygadlo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983). This concern may outweigh the defendant's right to be tried free of restraints even when a

defendant has conducted himself properly at trial. See Harrell v. Israel, 672 F.2d 632 (7th Cir. 1982): Loux v. United States, 389 F.2d 911 (9th Cir.), cert. denied, 393 U.S. 867 (1968).

The Supreme Court of the United States recently found that the presence of identifiable security guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Holbrook v. Flynn, 475 U.S. , 106 S.Ct. 1340, 89 L.Ed.2d 525, 535 (1986). The Court in Holbrook cautioned against presuming that the use of identifiable security guards is inherently prejudicial, and stated that in view of the variety of ways in which guards can be deployed, a case by case approach is appropriate. In Holbrook, the Court found sufficient cause for having uniformed troopers in the courtroom when balanced with the state's need to maintain custody over defendants who had been denied bail. [1]

Recently, this Court rejected a claim similar to this one. In Dufour v. State, 495 So.2d 154 (Fla. 1986), this

[1] The fact that the defendant was standing trial for first degree murder required the jury to know that he was denied bail and was in jail. See, e.g. Harrell v. Israel, 672 F.2d 632 (7th Cir. 1982). Given the nature of the charge, it is not unreasonable to assume that the jury knows that security measures will be taken. The public is unfortunately all to familiar with instances of courtroom violence. Pxovenzano v. State, 11 F.L.W. 541 (Fla. October 16, 1986). The trial court in-the case sub judice also recognized this fact. (R. 701).

Court found no error in a trial where the accused, an escape risk, was shackled throughout the trial. The trial court in Dufour attempted to minimize any resultant prejudice by "granting defense counsel's request to place a table in front of the defense table in order to hide the leg shackles." 495 So.2d at 162. (emphasis added). The defense in the case sub judice never requested or suggested an alternative to the shackling. Instead, as acknowledged by the defendant, it was the trial judge who suggested that a briefcase or box be placed near the defendant's feet or that he remain seated with his pant legs down. (R. 700-701). Instead, as pointed out by the trial judge, the defendant wore jeans and crossed his legs. (R. 701). There is no evidence suggesting that the defendant was handcuffed in the presence of the jury. The fact that the defendant did not avail himself of the court's suggestions was his own choice.

The factual basis for the security procedures in the case sub judice was not in dispute as the defendant did not request an evidentiary hearing on the consideration used by the trial judge to support her implementation of the security measures. See, Zygadlo, supra. Moreover, the defendant never suggested an alternative or less obtrusive means of restraints. See, e.g. Harrell v. Israel, 672 F.2d 632, 634 (7th Cir. 1982). The defendant did suggest the use of a "walk-through" metal detector instead of the hand held device used to scan everyone entering the courtroom. (R. 451).

This was correctly rejected by the court as it is a difference in form but not substance.

It is a well settled rule of law that on appeal, any and all presumptions are to be made in favor of sustaining a trial court's ruling and/or judgment which comes to this , Court cloaked with a presumption of correctness.

Contrary to what is asserted by the defendant, the only evidence of the "number" of security people in the courtroom is defense counsel's statement wherein he objected to "a number of obvious security personnel in the courtroom." (R. 449) (AB. 16). In no way does this "evidence" support the defendant's speculation that, "In addition, all the security personnel followed his movements closely, a concentration which must have been quite apparent to the jury." (AB. 17) Nor does it support statements such as, "As he limped about the courtroom all his movements closely watched by a small army of security personnel . . . ." (AR. 20). Indeed, the trial court made specific findings of fact that most of the security personnel were in plainclothes and blended in with the spectators. (R. 451-452).

Additionally, the defendant's statement, "Many (security personnel) were armed" is unfounded. (AB. 16). The statement made by the trial judge, cited by the defendant, says, "Any weapons they have are not visibly seen by

anyone." (R. 451). This statement does not mean that many security personnel were armed. Accordingly, the contention of the defendant that the clearly needed security measures biased the jury against him should be rejected.

IV

THE TRIAL COURT PROPERLY ALLOWED THE DEFENDANT TO REPRESENT HIMSELF.

A. The defendant's request to represent himself was timely.

The defendant contends that the trial court should not have granted his motion to proceed pro se where his motion was not timely and where the trial court, upon a "mistake[en] belie[f]", did not "realize" that it had the power to deny the request for lack of timeliness. At no-time does the defendant challenge his waiver as being unknowing or involuntary nor does he challange the trial court's inquiry into same. Rather, he claims that his motion was untimely and that he was incompetent to represent himself since he did not speak English. (infra) The state submits that the record and case law supports the trial judge's actions.

A defendant has a constitutional right to waive counsel and conduct his own defense if that decision is knowingly, voluntarily, and intelligently made. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); McKaskel v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). As Faretta did not address the issue of timeliness, most federal courts of appeal, in the interest of maintaining continuity at trial and minimizing disruptions, have established the rule that the fundamental right to proceed

pro se must be claimed before the trial begins. United States v. Brown, 744 F.2d 905 (2nd Cir. 1985); United States v. Lawrence, 605 F.2d 1321 (4th Cir. 1979); United States v. Price, 474 F.2d 1223 (9th Cir. 1973). After trial "begins," these courts defer to the trial court's discretion.

This particular issue has never definatively been ruled upon in this jurisdiction. This Court has, in Smith v. State, 407 So.2d 894 (Fla.), cert. denied, 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982), upheld a defendant's waiver of counsel during the sentencing phase of his capital trial: the issue or definition of "timeliness" however, was not addressed. The defendant in Smith, was found to have been literate, competent, understanding and was apprised of the seriousness of his actions and the possible imposition of the death penalty in conformity with the dictates of Faretta. Smith, supra at 900.

The Fifth Circuit Court of Appeals appears to have vacillated on this issue. In Taylor v. Hopper, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083 (1980), it was held that the defendant was not deprived of his constitutional right to counsel when the state trial court honored his request to represent himself, after an appropriate Faretta inquiry, after the jury had been sworn. The Court in Taylor did not, however, decide whether a trial court is compelled to honor a request to proceed pro se after a jury

had been selected. Subsequently in 1982, the Fifth Circuit in Fulford v. Maggio, 692 F.2d 354 (5th Cir. 1982), stated that once trial begins, the right to defend pro se ceases to be absolute, but rather lies within the trial court's discretion. More recently, the Fifth Circuit, without mentioning "timeliness" or "discretion" concluded that a defendant's insistence on his counsel's removal on the third day of trial, after being warned that no replacement counsel would be appointed, was the functional equivalent of a knowing and intelligent waiver of counsel. McQueen v. Blackburn, 755 F.2d 1174 (5th Cir. 1985). The McQueen court did however state that the stage of the proceedings and setting in which the waiver is advanced must be considered., Id. at 1177.

Because the Supreme Court has held that the denial of the right to proceed pro se is not amenable to a harmless error analysis, McKaskle, supra, 456 U.S. 168, 177 n.8, the Eleventh Circuit Court of Appeals has held that the denial of a right to proceed pro se is inherently prejudicial regardless of the fairness of the trial at which a defendant is convicted. Dorman v. Wainwright, 798 F.2d 1358 (ilth Cir. 1986). (The right was asserted before trial).

Therefore, since the issue of "timeliness" is not settled in this jurisdiction, and given that a defendant either has an absolute right to proceed pro se, regardless of

the fairness of his trial, or that right is subject to the discretion of the trial court once trial begins, the court should err on the side of respecting a defendant's request if it is in conformity with Faretta.

The State of Florida finds nothing in Faretta or McKaskle suggesting that the harsher per se prejudicial standard applies once trial begins. As stated by the Fifth Circuit in Fulford, supra, nothing in Faretta suggests the Supreme Court was overturning established precedent and custom on this question. Indeed, to so hold would open our criminal courts to delay, inconvenience and confusion of the jury. Fulford at p. 362.

The State is not, however, conceeding that the defendant's request was untimely, nor that the trial judge improperly allowed the defendant to proceed pro se. Under either standard, the record conclusively establishes that the defendant was literate, competent, understanding and "voluntarily exercising his informed free will." Faretta, supra, 422 U.S. at 835. This is currently the appropriate standard in Florida. See, e.g. Muhammed v. State, 494 So.2d 969 (Fla. 1986); Jones v. State, 449 So.2d 253 (Fla.), cert. denied, 105 S.Ct. 269 (1984). Assuming arguendo the standard is abuse of discretion once a trial has commenced, the trial court in the instant case did not abuse her discretion in permitting the defendant to proceed pro se. The state

submits that the inquiry was thorough and in conformity with Paretta, with the trial judge specifically stressing the difficulty of proceeding pro se through an interpreter. (R. 802).

In its inquiry, the court ascertained that the defendant had completed the eleventh grade and had obtained a high school equivalency degree from a prison in Connecticut, (R. 803), was not knowledgeable in legal matters, (R. 803), and understood everything the court said but still wanted to represent himself because his lawyer did not know his case. (R. 805). The Court once again stated its hesitancy in allowing the defendant to proceed and told the defendant that it would not be in his best interest. (R. 809). The Court even offered the defendant an opportunity to address the jury at the close of the trial. (R 809). The defendant rejected this, said he understood but wanted to represent himself. (R. 809-810). Thereafter the court again stated:

> THE COURT: I will try yes or no. Mr. Diaz, you heard all the statements that the Court made and my inquiry into your educational background, your ability to practice law, to represent yourself in this courtroom, understanding what you believe to be the facts of the case as you know them, Mr. Lamons' ability as a defense attorney, the case that the State has against you your ability to speak the English language, the necessity of an interpreter at every stage of this proceending, and the fact that the

State is requesting the death penalty in this particular case.

Do you, yes or no, desire to represent yourself?

THE DEFENDANT: Yes, ma'am.

(R. 810-811).

In an abundance of caution, the court appointed Lamons as standby counsel. (R. 812). McQueen, supra. The defendant, understanding that he would be unable to cite law, wanted Lamons to remain as standby counsel thereby demonstrating his awareness of the disadvantage of self representation. The Court then specifically explained trial procedure to the defendant. (R. 817).

As his last argument, the defendant claims that the trial court's obvious denial of a motion for continuance, which he concedes was never made, rendered his right to self-representation meaningless. (AB. 24). This issue was not preserved for appeal and is mere conjecture and speculation at best.

The trial court's inquiry conclusively established that the defendant was literate, competent, understanding, and therefore capable of waiving counsel. Faretta, supra; Smith v. State, 407 So.2d 894 (Fla. 1981): Goode v. State, 365 So.2d 381 (Fla. 1978). Muhammed, supra.

Accordingly, this record reflects no error as the trial court was correct because the right is subject to trial court overview and discretion once trial begins or the right is absolute under Faretta - a position the state finds inconsistent under Federal case authority and of no help to this defendant.

B. The defendant was competent to represent himself.

The defendant asserts that since the decision to allow self representation was entered before the issue of competency had been settled, the trial court erred. (AB. 26). Error, if any, was harmless in view of the conclusion by both Drs. Castiello and Haber that the defendant was competent. (SR. 4-6). Dr. Castiello specifically stated that the defendant was extremely cautious, carefully considered answers to questions, spoke clearly, coherently, relevantly and precisely. He further stated that the defendant functioned at an average intellectual capacity. Dr. Haber's evaluations were similar to Castiello's with Haber concluding that the defendant's IQ was above average. (SR. 1-3). Haber further noted, "He has a full understanding of the adversary system and also realizes the difficulties he will face by representing himself in the current proceedings." (SR. 2).

During trial, the defendant conferred with standby counsel many times. (R. 823, 824, 833, 841, 890, 931, 963, 1038, 1072, 1076, 1091, 1093, 1107, 1118, 1131, 1151). The record indicates that the defendant wrote out his cross-examination questions. (R. 1093). The defendant listened closely to the proceedings as is evidenced by his asking the prosecutor to speak slower, (R. 827, 957), and by his asking to have a diagram moved within his sight. (R. 833). He also made numerous, timely, proper objections. (R. 841, 851, 880, 882, 083, 934, 935, 937, 966, 1151, 1152). His cross-examination was clear and relevant seeking bias, motive, and testing memories. (R. 856, 885, 870, 1005). The defendant exhibited, a sound defense tactic of not commenting on the evidence during the initial part of closing argument, but rather waiting to get the last word in before the jury (R. 1245). Most importantly, during his closing argument, the defendant commented clearly on the evidence, the passage of time with regard to his identification by the witness Pardinas, Braun's bias and memory, courtroom identification by playing up the fact that he was the prisoner in chains, and asking the jury to note Braun's reactions when being questioned, etc. (R. 1280-1297).

In view of the entire record, the defendant conducted his defense as well as any layman could be expected to do. See, Whammed, supra. His inability to speak English did not prevent him from making himself understood and does not

make him "illiterate," He did not have any problems filing pre-trial motions in English. (R. 47-49) (SR. 7-9).

The trial court's appointment of counsel during the sentencing phase was not an admission by the court that it should have disallowed the defendant's self-representation. The defendant was playing games with the court, attempting to invite error. At the close of the guilt phase, the defendant claimed that he was incompetent and that the trial court should not have allowed him to represent himself. (R. 124-1242). When he asserted his desire to continue self-representation during the sentencing phase, the court naturally asked him if he was "*capable." (R. 1357, 1361). He refused to answer the questions. (R. 1361-1362). The trial court at that point had no choice but to appoint counsel1

C. The defendant's pro se representation was not prejudiced by the security measures employed.

As discussed previously, the shackles and security measures were necessary to further a legitimate state interest. The defendant claims that once he took over his own defense, the shackles took "center stage" and the guards were obliged to follow his every movement. First, the actions of the guards or their conspicuousness are not reflected in the record. Moreover, a person cannot complain of alleged errors resulting from his own intentional

relinquishing or waiver of his rights. See, State v. Cappetta, 216 So.2d 749 (Fla. 1969), cert. denied, 394 U.S. 1008, 89 S.Ct. 1610, 22 L.Ed.2d 787. The defendant was not forced to represent himself.

D. The defendant's conduct did not require a withdrawal of permission to proceed pro se nor did it necessitate a mistrial.

The defendant contends that his "arguing" with a witness, his ex-girlfriend, necessitated the granting of a mistrial or substitution of counsel. An attorney arguing with a witness is not unheard of. The conduct complained of does not rise to a level of manifest necessity for the granting of a mistrial. After consulting with Lamons, the defendant decided to continue. (R. 907). The defendant then complains about one other outburst and contends that counsel should have been forced upon him. The trial court did not abuse her discretion in not forcing counsel upon the defendant.

From the above, it is apparent that the trial court properly allowed the defendant to proceed pro se as he desired and that she should not have "forced" counsel upon the defendant as he now contends.

V

THE DEATH SENTENCE IMPOSED DOES NOT VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. All Death Penalties are Not Unconstitutional.

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Spinkellink v. Wainwright, 578 F.2d 582, cert. denied, 440 U.S. 978, reh denied, 441 U.S. 937 (1978).

B. The Jury Instructions Given in This Case Were Proper.

Because the defendant was convicted on a theory of felony murder, he contends that the jury should have been instructed to consider whether or not he intended to kill at the penalty phase of the trial instead of being told to merely weigh the aggravating and mitigating factors. He cites Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); and Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984) as authority.

This exact issue has recently been decided adversely to the defendant by this Court in Jackson v. State, So.2d ___, No. 66,671 (Fla. December 24, 1986). As this

reversed Enmund's death sentence because affirmance was "in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken." Enmund, 458 U.S. at 801.

Recently, however, it was held that the constitution does not require a specific jury finding on the Enmund issue. Cabana v. Bullock, 106 S.Ct. 689 (1986). The Constitution merely requires that the "requisite findings are made in an adequate proceeding before some appropriate tribunal - be it an appellate court, a trial judge, or a jury." Cabana, supra at 700. (emphasis added).

In Jackson, this Court concluded that a review of the evidence showed that the appellant, by being a major participant in an armed robbery, at the very least contemplated that a life would be taken, Therefore, the concerns expressed in Enmund were not violated by the imposition of the death penalty on the non-triggerman in Jackson.

This Court adopted a procedure for ensuring compliance with Enmund's and Cabana's dictates, but specifically stated that the procedure will only be prospectively applied. (Jackson, Case No. 66,671, slip opinion at page 7)

In the instant case, the evidence showed that all three robbers fired their weapons. Additionally, the evidence

pointed to the defendant as being the robber with the silencer. He was, therefore, an integral part of the trio and showed that he meant business. He did nothing to dissociate himself from the robbery or the murder. Clearly, the evidence showed that the defendant intended or contemplated that life would be taken. The jury instructions were, therefore, sufficient. See, State v. White, 470 So.2d 1377 (Fla. 1985); Jackson, supra.

The state would point out, however, that Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984), is inapplicable to the instant case in that in Bullock, Mississippi's death statute is construed. Under Mississippi law, the jury makes the ultimate decision as to the appropriateness of the death penalty, whereas in Florida the jury's recommendation is merely advisory. See Miss. Code Ann. §99-19-101 (Supp. 1985); Florida Statute §921.141(2). The defendant has, therefore, not shown error as to this issue.

C. The Death Penalty is Not Disproportionate to The Crime.

The defendant argues that his sentence of death is disproportionate to that of his co-defendant, Angel Toro's, who was allowed to plead guilty to second degree murder. The defendant should not be allowed to benefit from the prosecution's problems in their case against Toro. Prosecutorial discretion in plea bargaining with accomplices

is not unconstitutional and does not violate the principle of proportionality. Garcia v. State, 492 So.2d 360 (Fla. 1986).

The state submitted a written proffer of testimony from the prosecutor involved in Toro's case. (R. 310-314). This proffer did not just state that one key witness, Georgina Deus, was unavailable for Toro's trial. It was made clear that the state could not locate any witnesses from within the bar in time for trial who could have testified that the robbers were seated in the area of the bar where the fingerprints *were found*, nor was there anyone who could have testified that Toro pushed the cigarette machine, nor was there anyone to identify Toro. (R. 310-311). Additionally, the state could not risk having Toro discharged on speedy trial grounds. (R. 311). Therefore, as to Toro, a conviction for second degree murder and a life sentence with a three year minimum mandatory was better than nothing. Additionally, the state would note that defense counsel did not argue Toro's disparate treatment as a mitigating factor.As pointed out earlier, the defendant was not a minor participant in this crime.

Marek v. State, 492 So.2sd 1058 (Fla. 1986), is inapplicable to the instant case where the evidence is consistent with the defendant's being an integral, major participant of the robbery and resultant murder.

VI

THE TRIAL COURT PROPERLY CONSIDERED AS AN AGGRAVATING FACTOR THE FACT THAT THE DEFENDANT'S ACTIONS CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

The defendant claims that his actions in the robbery/murder did not create a great risk of death to many persons. He cites Jacobs v. State, 396 So.2d 713 (Fla. 1981) as authority for his contention that since he fired away from the people present in the bar, the above-mentioned aggravating factor is inapplicable. In Jacobs, the defendant fired a single shot at point blank range. In the instant case, the testimony specifically showed the presence of a dancer on the stage directly below the mirrored light fixture shot. (R. 952). The testimony also showed the existence of at least one ricochet on a wall. (R. 835). Because it was not known what caliber each robbers' gun was, it could not be shown where each robber fired. since the evidence indicated that the defendant was in possession of a gun with a silencer, it would be safe to conclude, as Carroll Robbins concluded, that the defendant meant business. (R. 1014). By his very action of discharging his firearm in a public, occupied building, the defendant maliciously and wantonly, engaged in activity that could produce death or great bodily harm with a total disregard for life. See, Florida Statute $790.19.

The trial court properly considered but did not find any mitigating factors. (R. 323-328). Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 105 S.Ct. 1233 (1985); White v. State, 446 So.2d 1031 (Fla. 1984). Even if this Court finds that this aggravating factor was improperly applied, the defendant is still left with four valid aggravating factors. The error, if any, would be harmless. Thus, death is presumed to be the proper sentence and was so recommended by the jury. White v. State, supra; Alford v. State, 307 So.2d 433 (Fla. 1975), cert., denied, 428 U.S. 912 (1976).

VII

THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT A MISTRIAL DURING THE SENTENCING PROCEEDINGS.

First and foremost, the state submits that the trial court did not admit, either tacitly or otherwise, that it erred in allowing the defendant to conduct his *own defense.* As pointed out earlier in the Statement of the Facts and Issue IV of this brief, the defendant was playing games with the trial court.

This Court has recognized an accused's right to represent himself during the penalty phase of a capital trial. Smith, supra. The predicate to this representation is the Faretta inquiry. The record clearly reflects that the defendant **catagorically** refused to answer the court's questioning at the sentencing phase. (R. 1361-1362). Therefore, based on the defendant's attitude, the trial court could not permit his self-representation. The defendant's conduct, both before the trial judge and jury, was calculated to delay, frustrate and invite the Court to err. Any criticism exhibited by the defendant towards his attorney in open court was caused entirely by his conduct and as such was invited.

The State further submits that the objected to comment by the trial court was not so prejudicial as to rise to the level of manifest necessity requiring a mistrial. Reversible error cannot be predicated on conjecture. Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 96 S.Ct. 3226. The trial court offered to give a curative instruction. (R. 1403). This offer was rejected by defense counsel. (R. 1403). This issue is therefore waived. Sullivan, supra. The trial court did not err.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State submits that the judgment and sentence of the trial court should clearly be affirmed.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to HELEN ANN HAUSER, ESQ. Law Offices of Pines and Hauser, 145 Almeria Avenue, Coral Gables, Florida, 33134 on this 12th day of January, 1987.

SUSAN ODZER HUGENTUGLER
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