IN THE SUPREME COURT OF FLORIDA

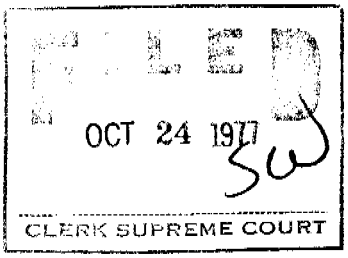
ARTHUR F. GOODE, III,

Appellant,

vs. Case No. 51,480

STATE OF FLORIDA,

Appellee.



APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
FOR LEE COUNTY, FLORIDA

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The appellant, ARTHUR FREDERICK GOODE, III, was the defendant below and will hereafter be referred to as "Appellant." The appellee, the State of Florida, was the plaintiff below and will hereafter be referred to as "State." References to the Record on Appeal will be designated by "R" followed by the appropriate page number.

STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case for purposes of this appellate argument.

STATEMENT OF THE FACTS

Appellee accepts appellant's statement of the facts for the purposes of this appellate argument.

POINTS ON APPEAL

POINT I

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ARGUMENT

POINT I

WHETHER THE TRIAL COURT'S APPOINTING COUNSEL TO PARTIALLY REPRESENT APPELLANT, WHILE ALLOWING APPELLANT TO PARTIALLY REPRESENT HIMSELF, DENIED APPELLANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO REPRESENT HIMSELF, WHEN APPELLANT REQUESTED TO REPRESENT HIMSELF WITHOUT THE ASSISTANCE OF COUNSEL?

The Florida Constitution guarantees every criminal defendant the right to "be heard in person, by counsel or both." Art. I, §16, Florida Constitution. This Florida constitutional right was noted by the United States Supreme Court in its decision in Faretta v. California, 422 U.S. 806, 813 n.10 (1975), which held that the Sixth Amendment of the U.S. Constitution required states to afford criminally accused the right of self-representation. The Court in Faretta interpreted the Sixth Amendment to include the right of self-representation, calling it an extension by necessary implication.

Florida has historically recognized the right of a criminal defendant to represent himself. See Deeb v. State, 179 So. 894 (Fla. 1938); State v. Capetta, 216 So.2d 749 (Fla. 1968).

> "It is not the function of trial courts to force counsel upon any defendant; be he indigent or not; in fact, such course of action would in itself constitute an infringement upon an accused's constitutional rights."
> Cook v. State, 167 So.2d 793,794 (Fla. 1 DCA. 1964).

Florida has also traditionally recognized, as was just recently mandated in Faretta, that to effectively waive counsel, a defendant must do so "knowingly and intelligently." See Jones v. Cochran, 121 So.2d 657 (Fla. 1960); King v. State, 157 So.2d 440 (Fla. 2 DCA. 1963); State v. Capetta, supra; Fulmore v. State, 198 So.2d 101 (Fla. 2 DCA. 1967). (In Jones v. Cochran, supra, the Court found that further inquiry into the waiver of counsel was required where the record showing that the defendant was seventeen and had a third-grade education thereby raised a serious question as to whether the waiver was knowingly and intelligently made).

While Faretta did not expressly set forth guidelines for determining whether a waiver of counsel is a knowing and intelligent waiver, the Court did state that:

> "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' Adams v. United States ex rel. McCann, 317 US, at 279, 87 L.Ed 268, 63 S.Ct. 236, 143 ALR 435." Faretta at 835.

From this we may gather that an accused's lack of legal knowledge is not a factor to be considered in determining the

voluntariness of his waiver. Faretta more explicitly so concludes.

> "We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code privisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."
> Faretta at 836.

The Faretta Court reversed the findings to the contrary of the California trial and appellate courts in finding that Faretta knowingly and intelligently waived counsel, saying only that

> "Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure."
> Faretta at 835-836.

The reversed finding of the state courts may be gleaned from footnote 7, page 812 of the majority opinion, to be that Faretta had not made a knowing and intelligent waiver of his right to counsel since "'Faretta did not appear aware of the possible consequences of waiving the opportunity for skilled

and experienced representation at trial.'" Since the Faretta Court itself required for a voluntary waiver that the accused "be made aware of the dangers and disadvantages of self-representation," the apparent conflict can only be resolved if the United States Supreme Court rejected the findings of the state courts and made its own findings on the record of the state court proceedings.

In summary, we may conclude from the above discussion of Faretta that a knowing and intelligent waiver requires that a defendant

1) need not have legal expertise;

2) should, on the record, be made aware of dangers and disadvantages of self-representation;

3) make a timely request for self-representation;

4) make a clear and unequivocal declaration of his desire to represent himself;

5) should, on the record, be shown to be literate, competent and understanding;

6) should, on the record, be shown to be "voluntarily exercising his informed free will."

These directives are not sufficient for guidelines, however, since the Court did not say what would be sufficient to make a defendant aware of the dangers and disadvantages of self-representation or how the trial court is to determine voluntariness.

> "The Supreme Court's decision in Faretta has clarified the source of the right to defend pro se while leaving open the procedural requirements for asserting that right." Chapman v. U.S., 553 F.2d 886, 895 (5th Cir. 1977).

However, Faretta did append the body of case law governing waiver of counsel in federal courts by citing Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938), and Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1947), for authority that an accused waiver must be "knowingly and intelligently" made. In the latter case we find the following directive for determining voluntariness.

> "To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." Von Moltke at 724.

Applying the foregoing law to the instant case, we find that appellant made a timely, emphatic request to represent himself (R.855,926-927,954-960). Appellant was found presently competent and of normal intelligence by three of four testifying psychiatrists (R.876, 891-892, 895, 897, 911, 917-918, 920, 1361-1369). The judge satisfied himself that appellant understood the role of his retained counsel but disagreed with his counsel's theory of defense (R.916, 957-958). The judge also requested psychiatric opinion as to appellant's ability to conduct his own defense

and to understand legal concepts explained to him (R.917-918). On the basis of these findings, the trial judge determined to allow appellant the right to conduct his own trial, with the legal advice of court-appointed counsel.

> "THE COURT: That's the lawyers' problem. His obligation is to advise Mr. Goode of what they [substantive and procedural rules of law] are and what he should do. It's Mr. Goode's option to accept that advice or reject it." (R.956)
>
> . . . .
>
> "THE COURT: It's the lawyer's obligation to advise you what the law is." (R.957)
>
> . . . .
>
> "THE COURT: I want to know if he has explained to you the legal reasons why you should not do that, and if you have, I want to make sure that it was an intelligent decision and that you still want to do that.
>
> THE DEFENDANT: Okay.
>
> THE COURT: This is your trial, son." (R.24)
>
> . . . .
>
> "THE COURT: Then you make the decision as to whether it is or it isn't, but there are certain legal ways to ask a question and that's one of their purposes is to legally assist you." (R.29)

These comments are representative of the court's ruling and explanation to appellant on the request for self-representation. At the request of the state, the trial judge instructed the jury as follows on the appellant's role

in the trial.

> "Ladies and gentlemen, in this case the court has allowed Mr. Goode, the Defendant, Arthur Frederick Goode, to participate in the trial in certain portions, and this is one of them. In other words, he is representing himself partially with the aid and assistance of counsel, who will also represent him.
>
> It is like three lawyers instead of two." (R.89).

Appellant did not object to this form of self-representation with the assistance of appointed counsel. See also pages R.960, 14, 112-114, 257-260, 286, 292, 303-305, 337, 340-347, 349-351, 421-422 for some examples of the continued assurances to all concerned that appellant was allowed self-representation.

The record does not reflect that counsel was forced on an unwilling appellant. To the contrary, during the course of the trial, appellant asked that his counsel not be discharged (R.258). The recent Fifth Circuit case of Chapman v. U.S., supra, directed courts in applying Faretta to weigh the "fundamental nature of the right" of self-representation against "the legitimate concern for the integrity of the trial process." The Court warned that particular, procedural requirements for invoking the right of self-representation "can be justified only insofar as they are functionally related to reconciling those interests." Chapman at 895. The trial court's reliance on the Florida Constitution in the instant case to allow appellant to be

represented both by himself and appointed counsel was an admirable solution to reconcile these two legitimate rights and insure the deliverance of the dignity of the judicial process from the threat of a circus atmosphere. Cf. Hammond v. State, 264 So.2d 463 (Fla. 4 DCA. 1972); 23 U.Mi.L.Rev. 551 (1968-69). Appellant, in the instant case, had the best of two worlds, "combining the benefits which would be derived by an exercise of the right with the expertise of an attorney." Id. at 563. See also Faretta at 846, n.7, dissenting opinion of Chief Justice Burger, joined by Justices Blackman and Rehnquist.

POINT II

WHETHER THE TRIAL COURT ERRED IN PERMITTING APPELLANT TO HOLD A PRESS CONFERENCE DURING HIS TRIAL AND IN REFUSING TO GRANT A MISTRIAL ON THE ALLEGATION THAT THE PRESS CONFERENCE AND ITS PUBLICITY DENIED APPELLANT DUE PROCESS.

A long-standing maxim of appellate review prohibits an appellant from taking advantage of his own-induced error. McPhee v. State, 254 So.2d 406 (Fla. 1 DCA. 1971). In the landmark Florida case on self-representation, the Court curtailed a defendant's right to take advantage of his self-representation to raise appellate arguments dependent upon his own actions.

> "Nevertheless, it is well settled that a person cannot complain of alleged errors resulting from his

> own intentional relinquishing, or waiver, of his rights, if done intelligently and with competence." Capetta at 750.

Faretta also reiterated that a defendant electing to represent himself would thereby be precluded from raising any appellate issue of effective assistance of counsel. Faretta at 834 or 835, n.46.

The court did not err in this case by not ordering appellant not to hold the press conference . By choosing to represent himself, appellant was free to speak with the press if he so chose, and cannot now complain that he prejudiced his own case. Appellee will rely on argument and citation to the record in point I for authority that appellant's waiver of his constitutional right to counsel was done intelligently and with competence.

Appellant argues only that the publicity from the press conference "could have easily reached the unsequestered jury." Even if it had, the fact does not require automatic reversal. See Singer v. State, 109 So.2d 7 (Fla. 1959); Murphy v. Fla., 421 U.S. 794 (1975). Appellant has not made a showing of bias on the part of the jury. In fact, the newspaper article resulting from appellant's press conference told little if any more than the jurors had already seen and heard at the trial, since appellant's taped confession had already been played. The trial court was given no reason to grant a mistrial even if one had been requested. The judge satisfied himself that the jury had not read

or seen news of the trial before denying the renewed motion for sequestration of the jury (R.56-58). Error did not result from these rulings.

POINT III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEQUESTER THE JURY.

Appellant alleges that the "pretrial and trial publicity prevaded the entire community creating a high probability of the jury being exposed to inadmissible and prejudicial information." As in the previous point, appellant has not shown any actual bias on the part of the jurors.

Since sequestration remains the discretion of the trial judge, appellant must show an abuse of that discretion in the judicial decision against sequestration. Rule 3.370, Fla.R.Crim.P., establishes judicial discretion for the decision. Appellant claims that the trial judge abused his discretion, supporting that statement only by claiming "probable prejudicial impact on the jury of the comprehensive news coverage." Case law does not turn on probabilities. ..."[W]e cannot determine error on doubt." Singer at 18. To the contrary, the Third District in Moore v. State, 299 So.2d 119 (Fla. 3 DCA. 1974), expressed the presumption of regularity.

> "Absent a showing of bias it is presumed that the jurors will base their verdict upon the evidence given at trial."
> Moore at 120.

The record does not support reversal on this point.

POINT IV

WHETHER THE TRIAL COURT ERRED IN REFUSING TO CHANGE THE VENUE OF APPELLANT'S CASE, THEREBY DENYING HIM DUE PROCESS AND A FAIR AND IMPARTIAL TRIAL?

A.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A CHANGE OF VENUE, SINCE APPELLANT'S ADMISSIONS OF GUILT FEATURED IN THE NEWS MEDIA PEREMPTORILY PREJUDICED HIS CASE.

B.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A CHANGE OF VENUE, SINCE NEWS MEDIA PUBLICITY PREJUDICED THE JURY THAT HEARD APPELLANT'S CASE, THEREBY DENYING APPELLANT A FAIR TRIAL.

Where the defendant himself has been responsible for the pretrial and trial publicity and where that defendant has requested and been found competent and informed to represent himself, the judge surely will not be required to change venue of the trial over the defendant's objection.

The appellant emphatically replied to judicial inquiry that he did not want the change of venue (R.14-16). The judge fairly denied, without prejudice, the defense counsel's motion for change of venue made at the beginning of trial.

> ". . . I am going to do that, deny it without prejudice to renew it orally if it appears that I have exhausted the venire, and I cannot find a fair and impartial jury.

> I am satisfied that he is aware of this, that it is an intelligent decision that he has made to try it here. There has been some extensive -- and probably as much as any case that I am aware of -- pre-trial publicity, but Arthur freely admits, and factually the court determines, that he has instigated that publicity, for whatever reason that's not for me to judge, but Arthur has done it and so we will try it here subject to orally renewing it if we have a problem getting a fair and impartial jury." (R.20-21)

Appellant himself had admitted to the court that he was responsible for most of the publicity and that he did not, therefore, think it was necessary for the court to grant the change of venue (R.13-14).

After the jury of twelve and an alternate was selected from the venire with no challenges for cause, the court again ruled on the change of venue question, saying,

> "I am satisfied that a fair and impartial jury was selected, thus the motion is ultimately denied." (R.39).

Defense counsel acknowledged that the jury had responded to questions in a manner indicating only that they could be fair and impartial (R.43). Appellant, himself, voiced his approval of the selected jury (R.50).

Mere knowledge of pretrial publicity does not require that a juror be excused. Singer v. State, 109 So. 2d 7 (Fla. 1959). Appellant's own admissions to the news-

paper did not "peremptorily prejudice his case" since they did not go beyond what the jury had already heard in the appellant's own words by virtue of his taped confession. Therefore, the trial court did not err in denying the requests for change of venue made by defense counsel. There is no citation to the record indicating that the jury disregarded the judge's order and read or heard any news during the course of the trial.

Nothing cited by the appellant from the voir dire reflects actual prejudice on the part of the selected jurors. To the contrary, the record reflects no basis for challenge for cause of any questioned prospective juror and counsel made no request to excuse any prospective juror for cause. Although pretrial publicity alone will not necessitate a change of venue, Singer, supra, at 14 and 17, the effect of such publicity on the impartiality of the veniremen is relevant to a determination of whether an accused has received a fair and impartial trial. The Singer Court noted its duty to examine the whole record in determining whether error occurred in the denial of the motion for change of venue.

While it may not be necessary to examine the whole record for error in judging impartiality of veniremen when the self-represented defendant has approved the jury, the record in this case does support the selection of the

jury. Although the Singer case reversed the conviction for error in the selection of a particular juror, the case is authority for upholding the instant conviction. As in Singer, the defense counsel exhausted all peremptory challenges. Unlike Singer, however, the instant record includes no instance supporting a challenge for cause to any sworn juror. Appellant's brief cites extensively from the voir dire without an instance of impermissable fixed opinion on the part of a venireman. The Singer reversal was based on proper challenge to the impartiality of a prospective juror. No such challenge appears in this record.

Out of an abundance of caution, the trial judge did excuse one prospective juror for cause. Mrs. Anderson was called as a prospective juror at R. 769. Although she was afraid she had formed an opinion from the newspaper articles of the crime a year before, she felt she could "look at the evidence and be fair about it" (R. 773). However she did not think she would change her opinion, although she thought she could if she heard evidence to change her opinion (R. 775). The court, sua sponte, excused her for cause (R. 775).

The Singer case established the following test for impartiality:

> "We think the true test to be applied should be not whether the juror will yield his opinion, bias or prejudice to the evidence, but should be that whether he is free of such opinion, prejudice, or bias or, whether he is infected

> by opinion, bias or prejudice, he will, nevertheless, be able to put such completely out of his mind and base his verdict only upon evidence given at the trial." Singer at 24.

The propriety of each juror selected is obvious on the record, even though no selected juror was challenged for cause.

The judge had specifically inquired of the jury venire if they could decide the case solely on the basis of the evidence presented (R.543-544).

Looking briefly at each selected juror, we find the following. Mr. Owen did not at the time of trial have an opinion as to appellant's guilt (R.624). He understood that appellant was presumed to be innocent (R.626). He responded to the Court's inquiry that after listening to all of the evidence, if he concluded in his own mind that there was a reasonable doubt that appellant committed the offense charged, he would vote for his innocence (R.647-648).

Mr. Edwards answered defense counsel that appellant was at the beginning of trial innocent until proven guilty (R.627-628).

Mrs. Woods, called at R.525, assured defense counsel that she had not formed an opinion of the case based on what she had heard or read (R.628). Nor would she require appellant to introduce any proof of his innocence (R.601-602).

Mr. Lee answered defense counsel tht he would not require appellant to introduce proof of his innocence before voting not guilty (R.604).

Mrs. Hart and Mr. Doyle told the prosecutor that they had formed no opinions about the case, each having read only one article about it (R.655).

Mr. Hubbs was called as prospective juror at R.689. He responded to questioning by the prosecution that he would base his determination of guilt on the evidence heard from the courtroom stand (R.692). He had read a few newspaper articles about the case but did not feel that he had formed an opinion based on the reports and would not let them cloud his judgment (R.696-697). He had not read nor seen anything about the appellant (R.700-701). The record reflects that the defense had sought to excuse him peremptorily, but that they had already used nine challenges at the time and were forced to select between excusing Mr. Hubbs and Mrs. Prego (R.41,810).

Mr. Cope was called as a prospective juror at R.703. Mr. Cope had not formed any opinions about the case and felt he could reach a decision based on what he heard in the courtroom (R.707-708,723). He would follow whatever the judge instructs is the law (R.718).

Ms. Kridle and Mr. Landbo were called as prospective jurors at R.729. She had not formed an opinion from the one newspaper article she had read or the radio

reports she had heard (R.734). He had not formed an opinion from the radio reports he had heard at the time of the incident, about a year before (R.734,761). They would follow the law as the judge gives it even were it to differ from what they thought the law was or should be (R.738-739). They understood that they were to make their decision on the testimony, evidence and facts (R.740-741).

Mr. Garrett was called as a prospective juror at R.777. He had not formed an opinion from what he had read about the case and thought he could reach a decision based solely on the evidence and testimony heard in the courtroom (R.778-779). He would follow the judge's instructions on the law (R.783).

Mrs. Swain was called as a prospective juror at R.812. She had not formed any definite opinions from the original accounts she had read in the paper (R.813-814, 823). She understood the presumption of innocence and the State's burden of proof (R.815).

Both the State and defense counsel accepted the jury panel of 12 persons at R.826.

The trial court properly denied the defense motion for change of venue since there was no proper showing of an inability to procure an impartial jury. See Hysler v. State, 181 So. 354 (Fla. 1938); Singer, supra; and Rhoden v. State, 179 So.2d 606 (Fla. 1 DCA. 1965). There was no showing that any juror was exposed to publicity during the

trial.

POINT V

WHETHER APPELLANT, WHO PARTIALLY REPRESENTED HIMSELF WITH ASSISTANCE FROM APPOINTED COUNSEL, WAIVED A CHANGE OF VENUE AND A FAIR AND IMPARTIAL TRIAL BY MERELY REQUESTING HIS TRIAL TO REMAIN IN LEE COUNTY.

Appellant argues that although appellant requested to be tried in Lee County and objected to his defense counsel's motion for change of venue, appellant's action cannot be considered a valid waiver. Appellant argues that the waiver was not valid because it created a contradiction with the request for a jury trial. To reach this conclusion, however, appellant must assume a logical predicate which may not be presumed on the record of this case. Appellant states his own fallacious predicate as follows. "In our system of justice, a demand for a jury trial necessarily requires a trial by an impartial jury." It does not. The right to a jury trial and to an impartial jury are two, distinct, severable constitutional rights, either or both of which may be waived.

Faretta clearly recognized that their ruling that a defendant has the right to self-representation could be contrary to the right to a fair trial.

> "There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted

> and imprisoned unless he has been accorded the right to the assistance of counsel ... . For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial.
>
> . . . .
>
> And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'"
> Faretta at 832-834; citations omitted.

The dissenting opinion of Chief Justice Burger in Faretta focuses on this dilemma. An accused who elects to represent himself will also waive a "fair and impartial" trial, as defined by the judicial system and circumscribed by its legal substance and procedures. Justice Burger expresses the social viewpoint here urged by appellant, that the integrity of the judicial system, as well as confidence in the system, requires that an accused be afforded the fullest defense possible under the system. It is more in keeping with the traditional and historical roots of this country to hold, as did the Faretta majority, that an accused has the freedom to decide that he will not accept any portion of the "rules of the game" called criminal justice. Appellant here urges an all or nothing approach to waiving the rules of the game. Having elected to have a jury trial, an accused should then be forced to accept all rights deriving therefrom, claims the

appellant. This approach has never been followed in criminal law. Piecemeal, an accused may waive his rights, such as the assistance of counsel at any critical stage of the proceedings, or his right to a jury trial, or the right to take the stand in his own defense.

Appellant's objections to a change of venue only seemed to counsel to be inconsistent with his demand for a jury trial. One of the four psychiatrists would agree with counsel to the point that he felt appellant was incompetent because of appellant's "irrational" choices (R. 874-876). The other three, however, noted that a man may have his own reasons for making what seem to others to be irrational decisions (R. 888-893, 907-908, 914, 919-920). The trial judge in this case comported with the philosophy expressed in the Faretta majority opinion in allowing appellant to make his own informed decisions at each stage of the trial proceedings (see especially 257-259).

The case of Ward v. State, 328 So.2d 260 (Fla. 1 DCA 1976), relied on by appellant will support denial of the motion for change of venue in this case. Ward reversed the order granting the prosecution's request for change of venue over defense objection, saying that despite strong evidence of the difficulty of selecting an impartial jury, the impossibility of obtaining an impartial jury was not demonstrated by an exhaustive effort to question the eligible citizenry. Ward reviewed the prior case law

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to this effect, including Ashely v. State, 72 So. 647, 648 (Fla. 1916), also relied on by appellant. Ashley will also support judicial action in the instant case since the jury was easily selected with only one person excused for cause and no challenges for cause being expressed to the court.

POINT VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING APPELLANT SANE AND COMPETENT TO ASSIST COUNSEL IN THE PREPARATION OF HIS DEFENSE.

Again, appellant relies on the defendant's apparently irrational behavior in wanting to be found guilty by a jury and the confirmation of the irrationality of such behavior by Dr. George Barnard to assert the defendant's incompetency to stand trial.

Appellee will rely on the reports of the other three psychiatrists, the judicial findings of competency and the obvious conclusion that one is not automatically incompetent for thinking differently from others. See Faretta, supra.

The record reflects appellant's ability to conduct his own defense after considering the legal advise of his court-appointed counsel. See particularly R.891, 897, 917-918.

POINT VII

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO MISSTATE THE LAW TO THE JURY DURING THE SENTENCING PORTION OF THE TRIAL.

At the inception of the sentencing trial, the judge instructed the jury as to the statutory purpose of the sentencing portion of the trial, including the lack of burden of proof and admissibility of evidence (R.1099-1100), as well as the jury's role in weighing mitigating circumstances to determine their sufficiency to outweigh any aggravating circumstances (R.1097). The Supreme Court's instructions defining aggravating and mitigating circumstances were given to the jury to take with them into the jury room (R.1098).

Irregardless of the unobjected-to comments by the prosecutor, the jury was properly instructed by the court. The attorneys' comments during opening or closing argument are not evidence and will not constitute fundamental error. See Robinson v. State, 70 So. 595 (Fla. 1916); Overstreet v. State, 197 So. 516 (Fla. 1940).

The totality of the prosecutor's closing argument did not leave the jury with an incorrect impression of the law. On the page before the argument cited by appellant as objectionable, the prosecutor explained that one mitigating factor could outweigh any number of aggravating factors to

permit the jury to recommend mercy (R.1226). Appellee does not believe that the prosecutor's comments went beyond the statutory definition or the Court's own language in Alvord v. State, 332 So.2d 533, 540 (Fla. 1975), relied on by appellant.

The judicial instructions on the law included the Standard Jury Instruction as to the burden of proof of aggravating circumstances (R.1254-1255). The Standard Instructions do not include any mention of the burden of proof for mitigating circumstances, and none was given. If the Florida Supreme Court wishes to establish such a burden of proof and wishes trial courts to give such an instruction, one should be adopted.

POINT VIII

WHETHER THE COURT ERRED IN FINDING AND WEIGHING THE AGGRAVATING CIRCUMSTANCE OF A PRIOR CONVICTION FOR A CAPITAL FELONY, ON THE GROUND THAT THE STATE PRODUCED ONLY HEARSAY EVIDENCE TO ITS PROOF AND COULD NOT PRODUCE A CERTIFIED COPY OF THE VIRGINIA JUDGMENT.

The case of Elledge v. State, 346 So.2d 998 (Fla. 1977), will support the trial court's finding of the aggravating circumstance of a prior conviction on the testimony of Officer Yeager. In Elledge, the Court allowed the testimony of the widow of the victim of a previous murder to be introduced during the sentencing portion of the trial. The Elledge court reasoned that

the statute itself contemplated such evidence, citing from Section 921.141(1), Florida Statutes, that the trial court could allow any evidence deemed relevant to matters concerning mitigating or aggravating circumstances and that such evidence would be admissible regardless of the usual exclusionary rules of evidence.

No case law has held that the aggravating circumstance of a prior conviction requires a certified copy of the conviction, and the result is not required since the judge rather than the jury makes the ultimate determination. The defense is free to rebut in whatever manner they choose, and no denial of the conviction was made in this case.

POINT IX

WHETHER THE TRIAL COURT ERRED IN NOT FINDING AND WEIGHING THE MITIGATING CIRCUMSTANCES, (1) THAT APPELLANT COMMITTED THE CAPITAL FELONY WHILE UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, AND (2) THAT APPELLANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR CONFORM HIS CONDUCT TO THE LAW WAS SUBSTANTIALLY IMPAIRED: IN VIEW OF THE PSYCHIATRIC TESTIMONY THAT SUCH CIRCUMSTANCES EXISTED?

Appellant has answered his own argument as to this point. Two of the three psychiatric witnesses denied the presence of any mitigating factor concerning appellant's mental or emotional state at the time of the offense.

The trial court has a wide discretion in homocide

sentencing, which is circumscribed by the statutory factors to be considered. Provence v. State, 337 So.2d 783, 786 (Fla. 1976). The trial court ruled on the mitigating factors present in the instant case and they did not include the mental state of the accused. The record does not require a finding of abuse of judicial discretion in that ruling. That the judge did consider whether appellant's mental state rose to the level of a mitigating circumstance is apparent from his questioning of the three court-called psychiatric witnesses at the sentencing portion of the trial.

There is no basis in the record for appellant's contention that the trial judge may have improperly felt that the mitigating circumstances must be proven by a preponderance of the evidence. He did not so instruct the jury on the law of sentencing (R. 1248-1258).

The jury recommended the death sentence despite their being instructed to consider the appellant's mental state as a mitigating circumstance. The judge's sentence of death, in agreement with the jury recommendation, does not require reversal. Cf. Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976).

CONCLUSION

WHEREFORE, the judgment and sentence of the lower court should be affirmed, there being no basis in the record for reversal of either the conviction or sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Appellee has been furnished, by U.S. Mail, to W.C. McLain, Esquire, Assistant Public Defender, Hall of Justice Annex, 495 North Carpenter Street, Bartow, Florida 33830, on this 21st day of October, 1977.

C. Marie King

Of Counsel for Appellee