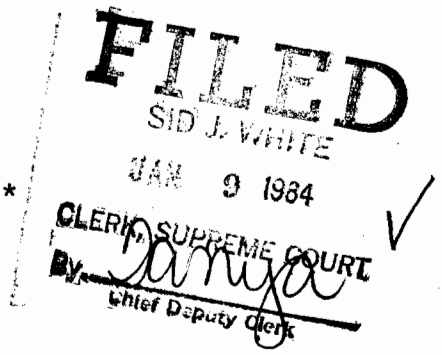
THE SUPREME COURT OF FLORIDA

CASE NO. 62,819



* * * * * *

FRANK GRIFFIN

Appellant

vs.

THE STATE OF FLORIDA

Appellee

* * * * * *

An Appeal From the 11th Judicial Circuit
of the State of Florida

INITIAL BRIEF OF APPELLANT

MELVIN S. BLACK
Suite 1002, Executive Plaza
3050 Biscayne Boulevard
Miami, Florida 33137
(305) 573-6622
Counsel for Appellant

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INTRODUCTION

This is an appeal from a judgment of guilt and imposition of a sentence of death for murder in the first degree and a consecutive life sentence for armed robbery. The appellant, Frank Griffin, was a defendant in the lower court, and the appellee, State of Florida, was the prosecution. In this brief, the parties will be referred to either by name or as they stood below. The Record will be designated by "R." for Record On Appeal and the letter "T." designates the transcript of lower court proceedings. Pagination is based upon the Clerk's Index rather than with the court reporter pagination. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

An Information was filed against the defendant in the Circuit Court of the 11th Judicial Circuit in and for Dade County, on February 25, 1982. (R.7-10a). A superceding Indictment was filed on March 5, 1982, (R.11-12a), charging the defendant with first degree murder and armed robbery, under Case No. 82-3268-B. The defendant filed a pretrial motion to discharge which was denied. (R.68-68a). Following jury trial on September 8 through September 10, 1982, the defendant was found guilty of first degree murder and armed robbery. (R.141,146). The trial court adjudicated the defendant guilty of armed robbery and first degree murder (R.142-143). After the sentencing hearing on September 16, 1983, the jury returned an advisory verdict of death (T.938). The trial court sentenced the defendant to death for the first degree murder conviction with a consecutive prison term of life imprisonment for the armed robbery conviction on September 17, 1983. (R.156-159). A motion for new trial was heard on October 15, 1982, and denied on October 18, 1982. (R.164-164a). This appeal was then instituted. (R.168).

STATEMENT OF THE FACTS

On April 2, 1981, the body of Raul Nievez was found at a U-Tote-M convenience store at 602 N.W. 57th Avenue, Miami, Florida. (T-515). He had been shot twice. (T.515).

SPEEDY TRIAL ISSUE

On May 19, 1981, the defendant, Frank Griffin, was in the Dade County Jail awaiting trial on unrelated robbery charges. (T.-76). Detectives Wasserman and Ilhardt came to the Dade County Jail and ordered the defendant to be brought down from his cell to the lobby. (T.78). According to the defendant, Detective Ilhardt told him at that time that he was under arrest for the first degree murder of Raul Nieves. (T.138). Detective Wasserman testified the officers did not tell the defendant he was under arrest. Wasserman testified further that he and Det. Ilhardt took the defendant away from the Dade County Jail but did not tell him of the pending investigation until they had taken him out of the jail to the police car. (T.78). Both Detective Ilhardt and Detective Wasserman confirmed the fact that the defendant did not want to leave the Dade County Jail. (T.80,170). Det. Wasserman acknowledged that Frank Griffin was not given an opportunity to refuse to go with the police officers. (T.100-101).

Detective Ilhardt testified that the defendant refused to leave the jail with the detectives. (T.170). A jailer in the lobby area came over to the defendant and quieted him down because the defendant was loud and belligerent in his protest. (T.92-97). Mr. Griffin was handcuffed and taken out of the jail by Ilhardt and

Wasserman. (T.171). The Detectives testified that the defendant waived his rights when given an oral advice of rights in the police car. (T.79). However the defendant refused to sign a form for the waiver of his constitutional rights when one was presented to him at the police station. (T.108,186-87). At the police station, the defendant was subjected to an interrogation that lasted two hours. (T.180). He was shown evidence from the police investigation including the fingerprint comparison and the taped statement of one Gerald Nichols and questioned about the murder. (T.180). The defendant denied involvement. (T.180).

The same police officers questioned Johny Stokes, who later testified against the defendant. Johny Stokes was also in jail in May of 1981 on unrelated robbery charges. The same police officers came to the Dade County Jail and advised Stokes that they were charging him with first degree murder on May 12 or 13, 1981. (T.119). Stokes made numerous requests for his attorney to be present during the interrogation which took place at the Miami Police Department, but these requests were refused. (T.120). Steven Haguel, who was Stokes' attorney, testified that he had advised the police officers that he wanted to be contacted and to be present at any time that they wished to question his client. The officers ignored this request and questioned Stokes without first advising his attorney that they were questioning him. (T.112,119).

Based upon these events, the defendant filed a Motion to Suppress Statements, Admissions and Confession (R.69-70a) and a Motion for Discharge (R.68-68a). The statement he sought to suppress was a declaration by the defendant that he had not been to the

U-Tote-M. (T.176-178). After hearing testimony, the Court made the following findings:

> I'm going to grant the Motion to Suppress on the ground the State has not proved to the Court the defendant knowingly and voluntarily waived his rights under the Miranda decision and voluntarily made the statement the State seeks to introduce.
>
> * * * *
>
> This is another factor I considered and in this case he did not initiate the contact. The police came to him and got him out of jail. I don't believe he had much ability to refuse to go.
>
> I think that there was conflicts between the two officers that the defendant really accompanied them voluntarily. I don't believe that was sufficient.

(T.215-216)

The Court granted the motion to suppress the statement by the defendant that he had never been to the scene of the crime. (T.217,178).

Based upon the testimony at the motion to suppress hearing, the defendant also moved for discharge under the Speedy Trial Rule on the ground that he had been in custody from May 19, 1981, when he was placed under arrest, without being brought to trial. (R.68-68a, T.164). When the motion for discharge was announced, the Court responded:

> Certainly the understanding all along that the speedy trial time has been extended for whatever reasons. So, I will deny that motion based on all the discussions that we had in regard to the speedy trial rule. Even if you had a valid reason on that basis, I think your subsequent agreement to extend the speedy trial period, and specifically to extend it for this period of time, I think would waive any objections.

MR. MAYS: This is my point. The speedy trial had already expired and my client is correct and also Mr. Stokes is correct, both of them were told on May 11 or 12 that they were arrested, speedy trials were expired long before the Defense took any objections with respect to an extension. After the speediesexpires, there is nothing anybody can do to extend it.

THE COURT: You may go ahead and file the motion, but I will be denying to this charge on that basis.

(T.164-165)

There is no other discussion in any of the transcripts or the Record on Appeal regarding the issue of speedy trial except for the hearing on July 20, 1982, one of the dates that the case was set for trial. The following is the entire transcript of testimony and proceedings in the record on July 20, 1982:

THE COURT: Why is Mr. Griffin here today?

MR. MAYS: Forgive my state of dress. The Court recalls that I would not have to be here because Mr. Kahn, the prosecutor, was tied up in another matter. I was called this morning by my client and advised that he was on the calendar for a trial status.

MR. KAHN: He may be on the robbery case.

MR. MAYS: No, this is the murder case.

THE COURT: Both cases are set for trial. It is possible we may reach the robbery case but not the murder case. The murder case will have to be reset within the speedy trial date which means before August 2nd, I believe. You will be advised of that. If anything goes to trial against Mr. Griffin, it will be the robbery case this week.

MR. MAYS: Thank you.

(Thereupon, the hearing was concluded.)

(T.64)

There is no order of extension of speedy trial period in the record nor any other transcript referring to an extension of speedy trial period prior to the hearing on September 8th set forth above. Nor is there any motion for extension of speedy trial period. Examination of the court file insert sheet reflects that on July 20, 1982, "counsel stipulated to 60-day extension of speedy trial expiration date, 10-1-82." (R-3).

Additionally, the trial court insert sheet reflects no hearings between July 20 and August 25, 1982. (R.3).

Prior to commencement of voir dire, the following conversation took place on the record:

> THE COURT: May I see the indictment or information?
>
> THE CLERK: Here is the indictment.
>
> THE COURT: Before we proceed, I want to have a jury panel reserved. There will be a twelve person jury; is that correct?
>
> MR. KAHN: Yes.,
>
> THE COURT: Has there been any discussions about waiving that?
>
> MR. KAHN: I offered a plea pursuant to discussions we had before we came as to the hearing yesterday afternoon and obviously it's been denied.
>
> MR. MAYS: He offered life sentence with the minimum mandatory of 25 years. My client, after careful deliberation, reputed it.
>
> THE COURT: Is the State asking for the death penalty in this case?
>
> MR. KAHN: Yes, Your Honor.

VOIR DIRE

Five jurors were excluded by the Court because of their views on the death penalty. During preliminary questioning of the panel, the Court asked:

> [The Court] Is there anyone in the first row who feels opposed to capital punishment? How about the second row? Would you pronounce your name for me?
>
> MS. TSIOMAKIDIS: Naomi Tsiomakidis.
> THE COURT: Mrs. Tsiomakidis, I assume you have some personal objections to capital punishment?
>
> MS. TSIOMAKIDIS: Yes.
>
> THE COURT: My question to you is this. Would your personal feelings about capital punishment in opposition to capital punishment, would that interfere with your ability to make a decision in the first phase of this trial as to whether the State has proved the defendant guilty?
>
> MS. TSIOMAKIDIS: In the first phase I don't believe so.
>
> * * * *
>
> THE COURT: In other words you would vote to find the defendant guilty if you believe the State proved its case?
>
> MS. TSIOMAKIDIS: Yes.
>
> THE COURT: Now, let's assume the defendant has been found guilty of first degree murder. Is your personal feeling opposed to capital punishment such that you would never under any circumstances be able to recommend the imposition of the death penalty or are there certain circumstances under which you would recomend?
>
> MS. TSIOMAKIDIS: I would not.
>
> THE COURT: You would not under any circumstances?

MS. TSIOMAKIDIS: No.

THE COURT: Now, in my questions that we have gone through, is there anyone in the first row who has anything further to say? Does this bring up any questions to any of you? Anyone else in the second row that has any questions about those matters? Yes, sir?

MR. GRIER: I'm just undecided. I just heard what you said to the young lady and I'm just undecided whether I would go for that second phase.

THE COURT: You understood all the questions that I asked?

MR. GRIER: Yes.

THE COURT: Do I understand, Mr. Grier, that you personally are opposed to the death penalty?

MR. GRIER: Yes.

THE COURT: And because of your own beliefs, you don't think that you could recommend the imposition of the death penalty?

MR. GRIER: No.

THE COURT: Under any circumstances?

MR. GRIER: No.

THE COURT: Is there anybody else on the panel who shares these views or have anything else to say about this subject? Yes, sir?

MR. ATKINS: I feel like the gentleman.

THE COURT: Like Mr. Grier?

MR. ATKINS: Yes.

THE COURT: Would you state in your own words what your belief is? I don't want to put words in your mouth.

MR. ATKINS: I don't think that I could vote for capital punishment or the death penalty.

THE COURT: You understand, Mr. Atkins, that the jury does not make the final decision as to what penalty should be imposed in the case, that it is up to the Judge to make that decision ? The jury does make a recommendation. Are you saying that you would not be able to recommend the death penalty under any circumstances?

MR. ATKINS: No.

THE COURT: You cannot?

MR. ATKINS: No.

MR KAHN: We can't hear.

THE COURT: He indicated that he cannot.

(T .237-241).

TRIAL PROCEEDINGS

In summary, the State's case consisted of a partial fingerprint of the defendant on the cash register counter, two bullet casings and one bullet but no gun, and the testimony of Johnny Stokes who testified pursuant to a plea agreement that he and the defendant robbed Nieves and the defendant shot Nieves.

Jorge Auer

Jorge Auer, a Holsum bread delivery man, came to the U-Tote-M convenience store on April 2, 1981, at 3:30 a.m. to make a delivery. (T.477-479). Mr. Auer testified that no customers were in the store and that Raul Nieves, the decedent, verified the delivery. After completion of the delivery, Auer went to the truck and then re-entered the store to use the restroom. (T.480,490). As Auer came out of the restroom, he noticed Nieves looking down the aisle toward two black men. Auer walked outside and looked back in through a plate glass window where he saw the heads and shoulders of the two black men standing in an aisle. (T.493-5). Mr. Auer was asked if the defendant Frank Griffin was one of the men he saw in the store and Auer responded that he did not know. (T.496-497). Auer testified he became suspicious when he didn't see a car in the parking lot. Auer went to a gas station and told the proprietor to call the police. He then heard two shots from the area of the U-Tote-M. (T.485).

Rene Alvarez

The next witness, Rene Alvarez, lived across the street from the store. He heard the shots and looked outside to see two persons run from the store to a car located under a tree in a vacant

lot next to the store. (T.511-13). Alvarez could not tell if the two persons were black or white or male or female. (T.513). Alvarez ran to the store where he found the cash drawer open and Nieves' body behind the cash register counter facing down with the right arm under his body and his head away from the front door. (T.514).

The State sought to introduce six photographs of the body. The defendant's objections that the photos served no purpose except to arouse passions were overruled, and the photos were admitted except for one photo which was deemed repetitious of the others. (T.530,533-535,546). The photographs which appear at R.71-74 are of Nieves' nude chest, back, and abdomen were taken after the medical examiner assisted in removing the clothing from the body at the scene. (T.548). One photograph shows the face of the decedent with eyelids open, eyes rolled back, and lower jaw dropped away. (R.71).

Gary Ludwig, M.D.

The assistant medical examiner testified that the decedent had two gunshot wounds. Both shots were at a 45 degree downward angle from front to back. (T.155). One of the shots entered at the upper part of the chest, passed downward and left to right through the left lung, heart, and liver before exiting from the right side. (T.544-545). The other gunshot wound was an entry at the abdomen on the left side with a downward pathway left to right and front to back exiting the lower back. This shot was a flesh wound and was not fatal. (T.56).

In describing the 45-degree angle of the bullets, Dr. Ludwig pointed out that the angle could be interpreted in various ways:

> The muzzle was pointed downwards at approximately a 45-degree angle in relationship to the body. That doesn't mean necessarily the gun was pointed downwards. It could be the body was leaning forwards while the gun was horizontal. There are various ways that would explain why it is going downwards. (T.551)

Dr. Ludwig testified that the order of the gunshots wasn't ascertained. (T.551). The prosecutor attempted to get the medical examiner to speculate that the fatal shot was fired after the first shot to the stomach caused the victim to double over. (T.551)(The inference being that the fatal wound was not from a spontaneous gunshot). Dr. Ludwig responded only, "That would be one possibility." (T.552).

Johnny Stokes, an alleged accomplice-turned-witness described the sequence of shots as follows:

> I told Frank let's go. As we were leaving I heard a shot and turned around and seen the guy falling back in to the cigarette rack and there was another shot. I said let's go and we ran. (T.630-631).
>
> * * * *
>
> Q. (By the State Attorney) Now, when the young man was shot the first time would you please show us exactly with the Court's permission, stand up here in front and show us exactly what he did after he was shot with the first shot, what did you see him do?
>
> A. He backed up to the cigarettes like this and was about to fall.

Q. Which way was he leaning when he was about to fall. Was he leaning backwards or forwards when he started to fall?

A. He was just falling.

Q. Do you remember which direction he was going before the second shot.?

A. Forwards.

Q. The body was going forward when the second shot w as fired?

A. Yes, sir.

Q. Did you see that shot fired the second time?

A. I heard it but I didn't see where it hit.

Q. Did you see what the young man did when he was hit the second time?

A. No. he fell to the floor.

(T.632)

Robert Sarnow

The crime scene technician, Robert Sarnow, testified that he found two spent shell casings in front of the cash register counter and a projectile in the rack behind the counter. (T.562-563). Five latent prints were taken from the counter and a total of 37 from the store. The technician couldn't specify exactly where the latents were lifted. He could only testify to general areas. (T.584-588).

Johnny Stokes

The alleged accomplice Johnny Stokes testified that he had maintained his and the defendant's innocence when questioned by the police in May, 1981, and again in February, 1982, for one and one-half hours of interrogation (T.661,645), during which time Stokes'

requests for his lawyer to be called were ignored. (T.652). Stokes explained that he finally admitted involvement because:

> Well, he kept interrogating me and kept saying do I want to go to prison and all. He told me I might become homosexual and all because it was my first time. I got shook up about it. It started coming to be about my family and kids, and I said I might as well cooperate. (T.646).

In exchange for his testimony, Stokes was sentenced to a 25-year sentence total for two unrelated robberies and the first degree murder of Nieves with a six year mandatory sentence without parole. (T.618).

Stokes testified he and the defendant Griffin entered the U-Tote-M, leaving George Nichols outside in the car. (T.622-626). After the Holsum delivery man (Jorge Auer) left, they both approached the counter and Griffin pulled a gun and asked for money. (T.-629). Stokes testified that the clerk handed about $60 to him. Stokes then tried to pull the gold chain off Nieves neck. (T.630). After getting the chain and money, Stokes started to leave. As noted previously in this statement of facts, Stokes did not see what transpired between Griffin and Nieves, but he heard a shot and turned around to see the defendant fire a second shot at Nieves. (T.-630-632).

When Stokes and Griffin reached the car, Nichols asked what happened. Stokes testified that the defendant said, "I shot the cracker. The cracker is bleeding like a hog." (T.636).

Ivan Almeida

The latent fingerprint comparison expert, Ivan Almeida,

was allowed to fingerprint the defendant--despite objection--immediately prior to his testimony because the State had lost the fingerprint standard card. (T.685). The newly made fingerprint standard card (R.91) was admitted over objection even though it contained a statement that the signature of the person printed had been "refused" and a notation "taken by court order, Judge Smith's Room". (R.91, T.697).

Almeida testified that the latent had 16 points of comparison to the left index of the defendant. (T.698).

The State rested and the defendant's motion for directed verdict was denied. (T.704). The Court compelled counsel for the defendant to announce that the defense was resting notwithstanding repeated requests by defense counsel for permission to rest outside of the presence of the jury. (T.707,731,732).

INSTRUCTIONS-GUILT OR INNOCENCE

The instructions given by the court are found at R.104-140. The instruction on premeditation deviates from the Standard Jury Instruction promulgated by this Court by excluding the required sentence: "The premeditated intent to kill must be formed before the killing." The instructions given also omitted the standard instruction required when there are instructions on both premeditated murder and felony murder:

> There are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder.

The State requested the Standard Instruction on principals and accessories (Std. Inst. 3.01) which the court agreed to give

over the defendant's objection. (R.124; T.716-717,811-812).

The defendant requested the federal instruction on accomplices rather than the Standard Instruction. The Court refused to give this instruction. (T.720).

During his final argument, the State Attorney urged the jury as follows:

> Now, by law I don't have an opportunity to address you again. The defense attorney comes up and can rebut anything I brought out in my closing argument.
>
> I will ask you to listen to his arguments closely and objectively as you have been throughout the trial. Weigh his testimony and the evidence and see if it makes sense. (T.791).

After two hours of deliberation, the jury returned verdicts of guilty on Count I murder in the first degree and Count II armed robbery. (T.827-828). The Court then adjudicated the defendant guilty of both offenses. (T.832).

PENALTY INSTRUCTIONS

The State and Defense both requested that the trial judge instruct the jury on all statutory aggravating and mitigating circumstance but the Court refused, saying:

> [M]y position, as is instructed in the standard jury instructions, is that only aggravating and mitigating circumstances for which evidence had been presented should be given to the jury. (T.829-831).

In reviewing the proposed instruction on the aggravating factor of prior conviction of violent felony, the defense objected to the introduction of evidence of his simoultaneous conviction for armed robbery under Count II of the Indictment. The Court announced

it would admit the evidence and give the instruction. (T.836).

The Court further anticipated the prospect that some facts might be duplicated as aggravating factors (stacking). The Court asked if it was required to limit the jury by instruction on stacking and then announced that it would merely instruct the jury on aggravating factors and "if it comes to that point, I would consider that in terms of whether penalty should be imposed." (T.836).

The defendant announced that since the court was overruling his objection to the failure to advise the jury of all possible statutory aggravating factors, he was also objecting to instructions on two specific factors which the court stated it would give:

> --The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (T.838).
>
> --The crime for which the defendant is to be sentenced was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification. (T.841).

The defendant requested that all statutory mitigating circumstances be read to the jury. (T.842).

The Defendant made a specific request for an instruction regarding the mitigating circumstance of no significant history of prior criminal activity. (T.844). In response to the request, the state attorney announced that he would introduce evidence of another murder charge which had been nolle prossed by the state (T.846) and a burglary charge to which the defendant pled but adjudication was withheld. (T.848). The Court then asked defense counsel, "Knowing that are you asking for that instruction?" and defense counsel advised he wanted to discuss the matter with his client. (T.849).

In the face of this evidence defense counsel later withdrew the request for the specific instruction after conferring with his client. (T.864).

The court refused the defendant's requested instruction on the mitigating circumstance that the victim was a participant in the defendant's conduct (T.850) and the age of the defendant at the time of the crime because the defendant was 27 years old (T.852).

The Court initially agreed to give instructions on the following mitigating factors when defense counsel advised he would present testimony regarding them:

> --crime commited under extreme mental and emotional duress
>
> --defendant was an accomplice but offense was committed by another
>
> --defendant acted under domination of another
>
> --defendant's capacity was impaired (T.850-852).

These instructions were later refused because the defendant chose not to testify. (T.872).

The defendant requested a special instruction on the non-statutory mitigating circumstance of comparison with the sentences of Stokes and Nichols, the accomplices. The Court agreed to instruct the jury: "In your deliberations you may properly consider as a mitigating circumstances the sentence the defendant's accomplice received." (T.853-860).

During the penalty phase, the State Attorney introduced a cerified copy of a Judgment against the defendant from 1977 for resisting an officer with violence to his person. (T.868). The

Judgment didn't have any factual recitation of what actions the defendant allegedly did to violate the law. (R.144-145). The fingerprint on the judgment was matched to the defendant's fingerprint standard. (T.870). No testimony was adduced regarding the facts of the resisting arrest charge.

The jury verdict regarding the simultaneous conviction for robbery under Count II of the Indictment was introduced. (T.871; R.146).

During the penalty phase argument, the State attorney addressed the mitigating factor of uneven sentences for the accomplice. The prosecutor argued the death penalty was justified for the defendant while Stokes received a negotiated 25 year sentence:

> But he [Stokes] agreed to do 25 years and come in here and tell the truth. That is the first step in any rehabilitation to admit your own wrongdoing and to come in here and tell the truth. (T.900).

The defendant's objection and motion for a mistrial were denied. (T.900,904-905).

The prosecutor further exhorted the jury in anticipation of defense counsel's argument:

> If he comes up here and asks sympathy for his client, show him the same sympathy he showed Raul Nieves back on April 2, 1981.

The defendant's objection was sustained (T.903) but his motion for mistrial was denied. (T.904-905).

The court gave the standard instructions on the following aggravating circumstances:

--prior conviction of violent felony
--murder committed during course of robbery
--crime was committed to avoid arrest or effect escape
--crime was committed for financial gain
--crime was cold, calculated, premeditated, without moral justification

The court instructed the jury regarding mitigation that it could consider the accomplices sentence and any aspect of the defendant's character and record and any circumstance of the offense. (T.921-923).

During penalty deliberation, the jury requested that the evidence be sent into the jury room. The defendant objected to the jury viewing the fingerprint standard card on which the technician had written "refused" regarding the defendant's signature. (T.927-932). The court overruled the objection and submitted the fingerprint card to the jury.

The jury returned a recommendation verdict of death. (T.938).

penalty verdict which appears in the record is the unsigned form for a recommendation of 25 year mandatory life sentence (T.153).

At the sentencing hearing on September 17, 1982, the court announced its death sentence and entered the written sentence which provided:

> Following the guilty verdict, the trial jury convened to consider evidence presented at a penalty proceeding, authorized by Florida Statutes 921.141. The jury, after hearing additional evidence, retired, deliberated, and returned its advisory sentence as to Count I, First Degree Murder. The jury recommended by a unanimous vote that the Court impose the death penalty upon the defendant, FRANK GRIFFIN for murder of Raul Nieves.

The Court, independent of, but in full agreement with the advisory sentence rendered by the jury, and after full consideration of each of the aggravating and mitigating circumstances in Florida Statute 921.141, does hereby impose the penalty of death upon the defendant, FRANK GRIFFIN, as to Count I, First Degree Murder.

In so doing, the Court has fully considered both the evidence and the testimony received at trial and at the penalty phase of the trial and pursuant to Florida Statute 921.141(3) does hereby make the following findings upon which it has based its sentence of death:[1]

AS TO AGGRAVATING FACTORS

1. The defendant has been previously convicted of a felony involving the use of violence.

In 1977, in case number 77-26262A defendant was convicted of resisting a police officer with violence and in this case, the defendant was convicted of armed robbery.

The conviction for these crimes was a fact at the time the jury made its sentencing recommendation and at the time the Court imposes the death penalty. See King v. State, 390 So.2d 315 (Fla. 1980).

2. The crime for which defendant is to be sentenced was committed while he was engaged in or was fleeing from the commission of a robbery.

The evidence at trial, specifically the testimony of accomplice, Johnny Stokes, and the testimony of the officers arriving on the scene, clearly show defendant robbed the victim, a clerk of a U-Totem convenience store, of cash and jewelry immediately before shooting him.

---

[1] Only those aggravating circumstances on which evidence was offered and which apply in this case will be set forth in the Court's order

3. The crime for which defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.

The evidence leads one to conclude defendant murdered the victim not because he resisted the robbery but because the victim was an eye witness, the only eye witness to the early morning robery other than defendant's accomplice, Johnny Stokes. Raul Nieves was murdered so that FRANK GRIFFIN would not be apprehended and brought to justice for the armed robbery.

4. The crime for which defendant is to be sentenced was committed for financial gain.

The evidence at trial was that defendant and his accomplice were looking for a place to rob on April 2, 1981 and did take from the victim or his custody gold chains and cash.

The Court finds this aggravating factor merges with the aggravating factor regarding felony murder, the second aggravating factor referred to above.

5. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

Killing a witness and killing for money always imply a degree of cold, calculated and premeditated behavior. To that degree this aggravating circumstance may overlap with the others mentioned. However, this aggravating circumstance includes a further requirement in order to be applicable; that the killer act without any pretense of moral or legal justification. Not only must the killing be calculated, the killer must act without a sense of conscience, or without some arguable excuse for his act.

After hearing all the evidence in this case, I am left with a profound sense that FRANK GRIFFIN killed Raul Nieves in a random, offhand and senseless manner

without a thought that Raul Nieves was a human being; thinking of him only as a "cracker, bleeding like a hog," as defendant exclaimed to Johnny Stokes as they fled from the scene.

MITIGATING FACTORS

Turning, as the law requires, to an examination of any mitigating factors that may apply, the Court finds none. The Court has considered the evidence that defendant's accomplices received less severe sentences: Johnny Stokes, 25 years in prison and Gerald Nickles 10 years (should he be charged with this crime).

However, the difference in sentences does not indicate to the Court an inequality or injustice. A disparity in sentences would be significant only if the disparity were not justified. The uncontradicted evidence in this case is that FRANK GRIFFIN was substantially more culpable than his accomplices. He pulled the trigger, shooting the victim twice, while Stokes was leaving the store and Nickles was waiting in the car. Even if the Court found the differing sentences to be a mitigating factor, it is clearly outweighed by the aggravating circumstances.

In conclusion, the Court finds that there are more than sufficient aggravating circumstances proven beyond a reasonable doubt to justify the imposition of the sentence of death. As stated above, this Court has found no statutory or non-statutory mitigating factors to exist or, alternatively, that no mitigating circumstance outweighs the serious aggravating circumstances. After fully evaluating all of the evidence in this case, the Court feels compelled to follow the unanimous recommendation of the trial jury.

It is therefore the judgment and the sentence of the Court that as to Count I of the Indictment in his case that FRANK GRIFFIN be adjudicated guilty of Murder in the First Degree for the death of Raul Nieves and that the defendant be sentenced to death in the electric chair.

> It is further the judgment and sentence of the Court that as to Count II, Armed Robbery, FRANK GRIFFIN be adjudicated guilty and sentenced to three years, to be consecutive to the sentence imposed in Count I.
>
> It is therefore ordered that FRANK GRIFFIN be taken by the proper authorities into the custody of the Department of Corrections and be kept under close confinement, to be executed at a time, date, and place to be set according to law.
>
> DONE AND ORDERED on this 17th day of September, 1982, in Miami, Dade County, Florida.

(R.156-159).

MOTION FOR NEW TRIAL

The defendant filed a motion for new trial based upon newly discovered evidence (R.164-164a). At the hearing on the motion, one Andreau Burns testified that he had been a cellmate of Johnny Stokes in September, 1982, when Stokes came back from Raiford to testify against Griffin (T.965-967). Stokes told Burns he was going to give false testimony against Griffin and that he had been coached regarding the false testimony. Stokes said that neither he nor Griffin were at the U-Tote-M on the night of Nieves' death. (T.967-968).

Burns could not be certain whether the jailcell conversation took place on the day Stokes testified. (T.969). After the trial and sentencing, Burns advised his own attorney, H.T. Smith, about the conversation with Stokes. (T.969).

H.T. Smith testified that he saw his client, Andreau Burns, on September 20, 1982, at a hearing on Burns' case in another courtroom. At that time, Burns handed him a handwritten note which

referred to Stokes admission to Burns that his testimony was false. H.T. Smith reviewed the note a few days later and forwarded it to Charles Mays, Esquire, who was representing the defendant in the instant case. (T.984-988). This was the only communication H.T. Smith had with Andreau Burns about Stokes' false testimony. (T.-1000-1001).

The motion for new trial was denied.

POINT I

THE TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT ON PREMEDITATION AND FELONY MURDER WAS FUNDAMENTAL ERROR

During the guilt/innocence phase, the instruction on premeditation wholly failed to inform the jury that "the premeditated intent to kill must be found before the killing" as required by Florida Standard Jury Instruction for Criminal Cases, page 63 (1981). Nowhere in the court's instructions on the issue of premeditation (T.790-92) is the jury informed that the formation of premeditated intent prior to the killing is the gravaman of premeditated murder. As noted in Sireci v. State, 399 So.2d 964, 967 (Fla. 1981):

> [Premeditation] . . . must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned.

By omitting the essential advance-thinking element from the instructions, which accompanied them into the jury room, the jurors were left with the impression that a person would still be guilty of first degree murder even if he didn't actually decide to effect death until the exact moment of death. Such a crime would be totally lacking the traditional "malice aforethought" which has been the leitmotif of first degree murder. The crime as defined by the Court more closely fits the mold of manslaughter or second degree murder.

This ambiguity was further compounded by the failure of the trial court to clearly distinguish between premeditated murder and felony murder by omitting the introduction to the same standard jury instruction which is required when there are instructions on

both premeditated murder and felony murder:

> There are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder. (R.789-791).

Fla. Std. Jury Instr. (Crim.) p. 61 (1981).

Although trial defense counsel failed to object to the failure to give the two instructions, this failure does not relieve the fundamental reversible error. In Smith v. State, 282 So.2d 179, 180 (Fla. 2d DCA 1973), the trial court gave an ambiguous definition of "depraved mind" during a second degree murder trial. The improper instruction caused reversal even though the defendant failed to object:

> The error of the trial court in failing to properly instruct the jury cannot be regarded as harmless or technical but is highly prejudicial and constitutes reversible error, the substantial rights of the appellant to a fair trial being affected adversely. We note that no objection was made to the said instruction by appellant's trial attorney. The error being fundamental, we do not deem it necessary for an objection to have been made.

Likewise, in State v. Jones, 377 So.2d 1163, 1165 (Fla. 1979), this Court reversed a trial court's failure to fully define the underlying felony in a felony-murder prosecution even though the defendant failed to object. See also Franklin v. State, 403 So.2d 975 (Fla. 1981).

One of the State's persistent goals throughout the instant trial and penalty phase was to demonstrate that the murder was premeditated viz, the thrust of questioning of the medical examiner and Johnny Stokes as well as the argument in both phases.

The distinction betweeen felony murder and premeditation had significant implications regarding the propriety of multiple convictions and sentences as well as the proofs for aggravating circumstances of cold, premeditated murder and aiding escape. The evidence was not clearly weighted in favor of premeditation. Thus, proper instruction on premeditated murder was crucial to a fair trial and the failure of the court to provide proper guidance on the essential elements of premeditation cannot be swept under the harmless error carpet and ignored. The conviction must be reversed just as the conviction was reversed in Anderson v. State, 276 So.2d 17, 18 (Fla. 1973). In Anderson the trial court gave an inadequate definition of premeditation and the defendant failed to object. Nonetheless, this Court reversed, citing Polk v. State, 179 So.2d 236, 237 (Fla. DCA 1965):

> Thus, premeditation is the **ever-present** distinguishing factor; and no doubt should be left in the minds of the jury as to its complete and full legal import. No door should be left open for confusion as to what it means. Without the full and complete definition of premeditation, the jury would have neither an understanding of what they were looking for to determine it, nor what to exclude to reject it.

POINT II

THE SEPARATE CONVICTION AND CONSECUTIVE LIFE SENTENCE FOR THE ROBBERY UNDERLYING THE FELONY MURDER VIOLATED THE DOUBLE JEOPARDY CLAUSE AND FLORIDA STATUTE 775.021(4)

The conviction for robbery was entered on September 10, 1982 (R.142-143), and the consecutive life sentence was imposed on September 17, 1982 (R.159). At the time of the adjudication and sentencing, F.S. § 775.021(4) provided:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.[1]

In Pinder v. State, 375 So.2d 836, 839 (Fla. 1979), this Court clearly held:

> Accordingly, where premeditated murder is charged, but the only evidence to sustain the murder conviction is furnished by proof that the killing occurred as the result of one of the felonies enumerated in section 782.04(1), we hold that the defendant may not be convicted and punished for both the felony murder and the underlying felony.

The viability of Pinder was questioned in State v. Hegstrom, 401 So.2d 1343, 1346 (Fla. 1981) when this court reviewed the significance of Whalen v. United States, 445 U.S.

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[1] F.S. § 775.021(4) was ammended effective June, 1983, to mandate separate sentences for lesser included offenses. This statute is inapplicable to the instant sentence which occurred before the statute was amended.

684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) and Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). This Court held:

> Our sole inquiry now is to determine what punishment our legislature authorized for a single criminal transaction involving two or more separate, statutory offenses. Section 775.021(4), Florida Statutes (1979), supplies the answer.
>
> * * * *
>
> Because the crime of first-degree murder committed during the course of a robbery requires, by definition, proof of the predicate robbery, the latter is necessarily an offense included within the former. Under Whalen's legislative intent test and our statute, it would follow that Hegstrom could not be sentenced both for felony murder and for the underlying felony. But we see nothing in Blockburger which bars multiple convictions for lesser included offenses.

However, since the decision in Hegstrom this Court has returned to Pinder, and invalidated both multiple convictions and sentences: Bell v. State, ____ So.2d ___, 8 FLW 199 (Fla. 1983); State v. Gibson, ___ So.2d ___, 8 FLW 76 (Fla. 1983).

Also, the Third District Court of Appeal has very recently interpreted Section 775.021(4), Florida Statutes (1981) to preclude the imposition of multiple convictions and sentences which are lesser included offenses. Boivin v. State, 436 So.2d 1074 (Fla. 3d DCA 1983).

It is beyond cavil that the case at bar involved a felony murder rather than premeditated murder. Count I of the Indictment charged the defendant with first degree murder by premeditated design or, alternatively, during the perpetration of robbery.

(R.11). Thus, there is no factual determination by the jury regarding the basis for the murder conviction.

The simultaneous verdict of guilt for armed robbery does show that the jury concluded that a robbery was committed. However, there is not sufficient evidence from which the jury could have concluded that the murder was premeditated and separate from the robbery. There is no testimony or evidence that the murder or elimination of witnesses was planned before the defendant and his accomplice Johnny Stokes entered the store. Nor is there any evidence which reveals what led Griffin to shoot. Stokes testified that he had turned away from Nieves after taking the jewelry and cash and was leading the way to the door when he heard a shot. He was surprised by the shot. Stokes did not know what had happened between Griffin and Nieves while he had his back turned. (T.632).

When Stokes and the other accomplice questioned the defendant in the car as to why he shot Nieves, the defendant didn't respond beyond saying he shot the man. (T.636). This failure to elaborate on the reason for the shooting cannot fairly or logically be transformed into a conclusion that there was a premeditated design to affect the death of Nieves. Griffin's statement in the car and Stokes' observations can just as readily be interpreted to mean that there was a struggle with Nieves which resulted in two rapid shots or that Griffin panicked.

Moreover, the description by Stokes of the second shot by the defendant does not support an inference of premeditation because it cannot be determined whether the first shot or second shot was the fatal shot. Stokes testified that he didn't see where the

second shot hit. He did testify that Nieves was starting to fall forward before the second shot. (T.632). The medical examiner testified that one shot was a flesh wound and one shot was the fatal shot. The medical examiner clearly stated that he couldn't determine the sequence of the shots.

In the final analysis, Stokes' description of Nieves falling after the first shot favors the conclusion that the first shot was the fatal shot. Since there is no evidence regarding what transpired between the time Stokes turned to leave and the time of the first shot, there is no evidence upon which to base a finding of premeditation rather than felony murder.

This question could have been clarified beyond any doubt or speculation if the trial court had employed a special verdict form which this Court proposed as a possible "improvement in the manner in which a case is presented to the jury on alternate theories of felony murder and premeditated murder." Matter of Use by Tr. Cts. of Stand. Jury Inst., 431 So.2d 594, 597 (Fla. 1981). In this case, the determination of whether the murder was premeditated or felony murder is of utmost importance. That determination impacts not only upon the validity of the separate conviction and sentence but also upon the validity of several aggravating circumstances: "aiding escape"; "cold, calculated, and premeditated"; and "previously convicted of felony involving use of violence". This Court is urged to mandate special verdicts in cases such as this so that the juries and courts will be guided by a process that is due and clear.

POINT III

THE CONVICTION FOR THE UNDERLYING FELONY OF ROBBERY WAS IMPROPERLY ADMITTED AND CONSIDERED IN THE PENALTY PHASE

In this state the death penalty can only be imposed pursuant to Section 921.141, Florida Statutes, upon the reasoned judgment of the trial jury, trial judge, and this Court that the state's inerest in retribution and deterrence, in light of the totality of the circumstances present in the evidence, cannot be satisfied by the lesser penalty of life imprisonment. Proffitt v. Florida, 428 U.S. 247, 251-9 (1976); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975); State v. Dixon, 283 So. 2d 1, 7-8 (Fla. 1973). Both the trial jury and judge "must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 542 (1981); accord: Adams v. State, 412 So. 2d 850, 855 (Fla. 1982). The exercise of this Court's reasoned judgment, unlike the trial jury and trial judge, is not to impose sentence, but to

> "review", a process qualitatively different from sentence "imposition". It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law.
>
> * * * *
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we

> compare the case under review with all past capital cases to determine whether or not the punishment is too great.

Brown v. Wainwright, 392 So.2d at 1331. Accord: Adams v State, 412 So.2d at 855.

Indeed, this Court has previously held that the review function cannot be administered without a jury recommendation, or in its absence, the appearance on the record of the accused's knowing, intelligent, and voluntary waiver of his right to a jury recommendation. Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974). The jury represents the "conscience of the community", McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977), and this Court must give "great weight" to its recommendation -- be it life or death. Odom v. State, 403 So.2d 936, 942 (Fla. 1981). Accord: Neary v. State, 384 So.2d 881, 885 (Fla. 1980). In exercising its review function, this Court has in the past expressly considered jury recommendations in other but similar cases so as to ensure relative proportionality among death sentences. McCaskill v. State, 344 So.2d at 1280.

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[1] Thus, the standard employed by this Court to review a death sentence where the jury recommendation was life requires that death be reversed unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ," Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), but where a jury recommends death, a sentence of death should not be disturbed "unless there appears strong reasons to believe that reasonable persons could not agree with the recommendation." LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978). Accord: Ross v. State, 386 So.2d 1191, 1197-8 (Fla. 1980).

The essence of these legal principles is that this Court cannot perform its review function without a valid jury recommendation. In fact, in cases where jury death recommendations have been tainted by the exclusion of mitigating evidence or the admission of non-statutory aggravating evidence, this Court has repeatedly vacated death sentences and remanded for resentencing before new specially impaneled juries. See: Maggard v. State, 399 So.2d 973, 978 (Fla. 1981); Perry v. State, 395 So.2d at 176; Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Miller v., State, 332 So.2d 65, 68 (Fla.1976); Messer v. State, 330 So.2d 137, 142 (Fla. 1976).

The admission and consideration of the conviction for the underlying felony constitutes just such an improper aggravating circumstance. As noted in the preceding point, the conviction for robbery as a lesser included offense of the felony murder was improper. Pinder v. State, 375 So.2d 836 (Fla. 1979); Bell v. State, ____ So.2d ___ (Fla. 1983); Boivin v. State, 436 So.2d 1074 (Fla. 3d DCA 1983). Accordingly its admission and consideration as a prior conviction of a felony involving violence F.S. 921.141(5)(b) was totally improper.

Assuming arguendo that the conviction (but not sentence) for robbery was proper under the holding in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), its admission into evidence during the penalty phase was still improper because the conviction did not truly precede the conviction for murder.

In Meeks v. State, 339 So.2d 186, 190 (Fla. 1976) the defendant robbed a convenience store and then marched the two victims into a storage room where he made them lie on the floor before

shooting both in the head. One person died and the defendant was convicted of murder, robbery, assault with intent to commit murder, and possession of a firearm in a felony. The defendant objected to the reference in the sentencing phase to the contemporaneous convictions for assault and robbery. In ruling that the error was not prejudicial, this Court held that "contemporaneous convictions do not qualify as aggravating circumstances vel non under section 921.141(5)(b) Florida Statutes (1975) . . . ."

The trial court's reliance upon King v. State, 390 So.2d 315 (Fla. 1980) was sorely misplaced. King involve the contemporaneous conviction for attempted murder of one person during a crime spree that finally led to the murder of another person. In ruling that the contemporaneous conviction was properly considered, this Court went to great lengths to distinguish the factual situation in Meeks:

> We find the legislature intended that the attempted murder be considered as an aggravating factor in an instance of this type. In reaching this decision, we have not overlooked our decision in Meeks v. State, 339 So.2d 186 (Fla. 1976). The convictions in Meeks are factually distinguishable from those in the instant case; however, to the extent there is conflict with Meeks, we hereby recede. (Emphasis in original).

The distinction between Meeks and King is that the former case involved a contemporaneous conviction for a felony committed at the same time and place as the murder albeit with two victims while the latter case involved a contemporaneous conviction for a felony committed prior to, and at a different place from the murder.

The facts in the case at bar militate even more strongly against aggravation by contemporaneous conviction than in Meeks because here the contemporaneous felony is the underlying felony of a felony murder that involved a single victim and a single incident.

The statutory aggravating factor for prior crimes has as its obvious basis the fundamental jurisprudential concept that one who has engaged in violent felonies in addition to the one for which he is being sentenced is more deserving of an enhanced sentence (death being the ultimate enhancement). Thus a contemporaneous conviction for a crime of violence that was committed independently of the murder should be applied for aggravation. However, to use the self-same felony which resulted in the conviction for murder to enhance the sentence departs from the fundamental reason for inclusion of the factor in the statutory scheme and boot-straps the defendant into the electric chair.

In its sentence, the trial court noted that the defendant had one other prior conviction, to-wit: resisting arrest with violence some five years before the sentencing hearing. (R.144-145). A prior conviction for resisting arrest is a far less meaningful indicia of violent character than robbery with a firearm. If the armed robbery had been properly excluded, the jury would have been left to consider whether the resisting arrest conviction, standing alone, proved beyond a reasonable doubt the aggravating circumstance. Indeed, in Swan v. State, 322 So.2d 489 (Fla. 1975) this Court reversed a death sentence where the only evidence of prior conviction of violent felony was a resisting arrest conviction.

POINT IV

THE APPLICATION OF SECTION 921.141, FLORIDA STATUTES, TO IMPOSE DEATH UPON THE DEFENDANT VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES[1]

A. The Improper Exclusion Of A Prospective Juror Who Merely Stated That She Would Have Difficulty Recommending A Sentence Of Death Requires That The Death Sentence Be Vacated

In Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), the Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty." That decision allows the exclusion of only two classes of jurors: 1) those who "would automatically vote against the imposition of capital punishment without regard to any evidence" or 2) those whose "attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. at n.21. If prospective jurors are "excluded on any broader basis than this, the death sentence cannot be carried out." 391 U.S. at n.21. Accord: Maxwell v. Bishop, 398 U.S. 262 (1970), Boulden v. Holman, 394 U.S. 478, 481-82 (1969). A prospective juror with a bias against the death penalty cannot be excluded "so long as his bias

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[1] In light of decisions of this Court and of the Supreme Court of the United States, the defendant will not present repetitive arguments concerning the constitutionality vel non of Section 921.141. However, the defendant does not waive any contentions that capital punishment is per se violative of the Eighth and Fourteenth Amendments and that Section 921.141 is unconstitutional on its face.

is not so strong as to preclude or prevent him from at least considering the issue of punishment." Williams v. State, 228 So.2d 377, 379 (Fla. 1969).

The importance of careful questioning of veniremen before exclusion was explained in Witherspoon:

> Any 'layman [might] say he has scruples if he is somewhat unhappy about death sentences . . . . [Thus] a general question as to the presence of . . . reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.' . . . Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position. 391 U.S. at 515, n.9.

Therefore, the only veniremen who can be excluded for cause are those who make:

> unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . . . 391 U.S. at 522, n.21. (Emphasis in original)

Three jurors were excluded because of their views on the death penalty in this cause. Ms. Tsiomakidis said only that she would never recommend death under any circumstances. Her exclusion was not improper. However, the dialogue with venireman Grier does not reveal that it was "unmistakably clear" that he would "automatically" vote against death. Grier's initial statement was that he was "undecided whether I would go for that second phase." The Court then "led" him to a somewhat firmer position:

THE COURT: Do I understand, Mr. Grier, that you personally are opposed to the death penalty?

MR. GRIER: Yes.

THE COURT: And because of your own beliefs, you don't think that you could recommend the imposition of the death penalty?

MR. GRIER: No.

THE COURT: Under any circumstances?

MR. GRIER: No.

The examination by the Court hardly resulted in an abiding and unmistakenly clear picture of Mr. Grier's view of death. The fixedness or strength of the opinion is always the essential test of a jurors competency. 33 Fla.Jur.2d Juries § 102 p.485.

B. The Failure Of The Trial Court To Instruct On All Statutory Aggravating And Mitigating Circumstances Constituted A Denial Of Due Process

Jury instructions in guilt-innocence trials are generally limited to matters raised by the evidence and facts in proof. Fla.R.Crim.P. 3.390(a); 16 Fla.Jur.2d Crim.Law § 1106. However, in a prosecution for homicide, instructions on necessarily included offenses are given in order to fairly apprise the jury of the statutory scheme. Such instructions allow jurors to have a point of reference for evaluating the evidence. The importance of providing a full framework for the jury's deliberations was articulated in Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976):

> [T]he sentencing authority's discretion [must be] guided and channeled by requiring examination of specific factors

> that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

C. The Inflamatory Remarks Of The Prosecutor Denied The Defendant Due Process of Sentencing

During his plea for the death penalty, the prosecutor admonished the jurors:

> If he comes up here and asks sympathy for his client, show him the same sympathy he showed Raul Nieves back on April 2, 1981.

The defendant's objection was sustained but his motion for mistrial was denied. (T.903-905)

The prosecutor's comment is very similar to the comments in the homicide prosecution of Breniser v. State, 267 So.2d 23, 25-26 (Fla. 4th DCA 1972) where the prosecutor argued:

> I know it is hard not to have sympathy for this man in this circumstance, but I think if sympathy is to be given to this man, you must think of sympathy along another line and that sympathy must go toward Mrs. Jeanie Cooper, and the little girl, James' little girl.

In reversing the conviction, the court wrote:

> [T]he real thrust of appellant's point here is the prosecutor's misconduct in appealing to the sympathy of the jury. Such is indeed improper, and while prosecutors should be commended for handling their duties with zeal, they would profit greatly by giving careful heed to the admonitions and restraints set forth in the numerous time-honored cases cited and discussed by Mr. Justice Drew in Grant v. State, Fla. 1967, 194 So.2d 612, some of which are also cited and discussed by Judge Mann in Chaves v. State, Fla. App. 1968, 215 So.2d 750.

See also Grant v. State, 171 So.2d 361 (Fla. 1965); Pait v. State, 112 So.2d 380 (Fla. 1959).

D. The Trial Court Improperly Instructed The Jurors And Made Improper Findings Regarding Aggravating Factors

1. The court instructed the jury, and later made a finding of aggravating circumstance, that the capital felony was committed for the purpose of avoiding and preventing arrest and prosecution. There is no evidence that the victim knew the defendant and therefore might direct the police to him. There is no evidence whether the victim or any other person was trying to stop the defendant. According to Stokes, the defendant's only statement was that he had shot the man and "the cracker was bleeding like a hog." This statement is discussed in more detail in another issue on appeal. There is nothing in the statement that would support an inference that it meant the shooting was done to aid escape.

In Clyde Foster v. State, ____ So.2d ____, case no. 60,549, 8 FLW 269, 270 (1983), this Court made it exceedingly clear that this aggravating factor will not be freely inferred:

> Foster argues that the trial court erred in finding that the capital felonies were committed to avoid lawful arrest and to hinder law enforcement. He contends that there was insufficient evidence to support either of these aggravating circumstances. We agree. Although we know from the medical examiner's testimony that both victims were shot from behind as they sat in the front seat of Weimorts' automobile, we do not know what events preceded the actual killing. In Menendez v. State, 368 So.2d 1278 (Fla. 1979), wherein we found that it was doubtful that the murder was committed to avoid lawful arrest within the contemplation of our statute,

> we held that the defendant's motive cannot be assumed and that the burden is on the state to prove it. As to the burden of proof necessary to prove this aggravating circumstance, we stated in Riley v. State, 366 So.2d 19, 22 (Fla. 1978), that "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." See also Armstrong v. State, 399 So.2d 953 (Fla. 1981). We find here that the state did not prove beyond a reasonable doubt that Foster committed the murders to avoid lawful arrest.

In the case at bar, the facts do not show the "clear intent" to prevent arrest or aid escape as required by Riley v. State, 366 So.2d 19 (Fla. 1978).

2. The instruction and finding that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification were improper. There was no evidence of a discussion of plan between Stokes and the defendant that the storekeeper would be shot. In fact, Stokes expressed surprise at the shots. The sequence of shots as described by Stokes does not reveal a cold and calculated killing. Stokes' testimony sheds no light on what Griffin or Nieves were doing immediately before the shot.

In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981) this Court noted that

> [t]he level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor--"cold, calculated . . . and without any pretense of moral or legal justification.

In McCray v. State, 416 So.2d 804, 807 (Fla. 1982), this aggravating circumstance was limited in its application:

> That aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not all inclusive.

These limitations on the application of this aggravating circumstance are necessary to avoid making every premeditated murder a death case. Such a result would violate Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976). Death must be reserved for the truly aggravated cases.

In its sentencing finding, the court could not and did not point to any fact which shows that the defendant actually planned and calculated the shooting as an execution. Instead, the court based its finding on the following:

> After hearing all the evidence in this case, I am left with a profound sense that FRANK GRIFFIN killed Raul Nieves in a random, offhand and senseless manner without a thought that Raul Nieves was a human being; thinking of him only as a "cracker, bleeding like a hog," as defendant exclaimed to Johnny Stokes as they fled from the scene.

(R.158). Instead of pointing to specific facts that showed planning, premeditation, or calculation, the court's own impression that the killing was "random" and "offhand" is tthe antithesis of premeditation. In the final analysis, the finding of premeditation is illogical and included solely because of the defendant's statement to Stokes. By aggravating the sentence because of the defendant's exclamation "cracker bleeding like a hog", the trial court applied unauthorized non-statutory factors.

The defendant's statement shocks the sensibilities because it refers to the decedent as a "cracker". However, this might not be a term of derision but a neutral idiom. At very worst the statement demonstrates a lack of remorse immediately after the event.

This Court has recognized that lack of remorse cannot be a valid aggravating factor because a rule allowing consideration of lack of remorse would in effect punish the defendant for pleading not guilty, remaining silent, and exercising his right to due process. McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Pope v. State, ____ So.2d ____, case no. 62,064, 8 FLW 425 (1983).

3. In summary, of the five aggravating factors found by the trial court, three were improper: 1) the crime was not committed to avoid arrest, 2) the crime was not committed in a cold, calculated, premeditated manner, and 3) the simultaneous robbery was improperly considered as a prior conviction for a crime of violence. The remaining two factors--1) that the murder was committed during the commission of a robbery and 2) that the murder was committed for pecuniary gain--clearly merge into a single factor. Vaught v. State, 410 So.2d 147 (Fla. 1982); Richardson v. State, 437 So.2d 1091 (Fla. 1983).

Since there was evidence to support the mitigating factor of uneven sentences, the court cannot fairly presume that the sentence of death was correct despite the reduction from five aggravating factors to a single one.

Defendant submits that the rule of appellate review articulated in Francois v. State, 407 So.2d 885, 891 (Fla. 1982) constitutes a denial of due process. The rule of appellate

review set forth in Francois establishes a presumption of correctness for death sentences notwithstanding reliance by the trial court upon improper aggravating factors:

> Although the trial court's sentencing errors resulted in the recitation of three statutory aggravating circumstances that were not properly established by the evidence, we find that the sentences of death should still be upheld. Where the consideration of erroneous aggravating circumstances does not interfere with the weighing process prescribed by statute because there are no mitigating circumstances to weigh, no resentencing is required. See Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); Elledge v. State, 346 So.2d 998 (Fla. 1977).

The sentencing procedure of F.S. § 921.141 calls for the advisory jury and then the judge to determine if the aggravating factors taken together call for a death sentence before any consideration of mitigating factors. Obviously the jury or judge that finds death appropriate in the face of five aggravating circumstances might not find death to be appropriate in the face of one or even two aggravating factors. The appellate presumption of correctness denies due process by denying meaningful apellate review especially in a case like the one at bar which involved a felony murder. Since murder during the course of a felony is a statutory aggravating factor, there is a presumption of death whenever the defendant is sentenced to death on the basis of the felony murder and one or more improper factors. The improper factors might be overturned on appeal. Even though the factor of murder during a felony might not be aggravated enough standing alone to evoke a death recommendation or sentence, the rule of appellate review still

condemns the defendant. Ironically, the defendant is condemned because of the trial court's errors in sentencing. The Francois rule of appellate review prevents rectification of the trial court error and is clearly erroneous.

4. Prior to commencing the trial, the trial court asked both counsel whether there had been plea negotiations. The court was informed that the State offered a plea to first degree murder without death penalty but that the defendant had refused the plea and chose to go to trial.

Obviously if the defendant had accepted the plea offer he would have been sentenced to life imprisonment. The death penalty, which is strikingly more harsh than life imprisonment, was imposed only after the defendant exercised his right to trial. The trial judge's inquiry was directed towards resolving the case without the need for a trial. At the time of the inquiry, the trial judge had already heard extensive testimony in motion hearings and had the benefit of the arrest affidavit which set forth the facts in great detail. (R.30-31). Since the death penalty would not have been imposed if the defendant had not exercised his right to trial and since there were no additional facts learned by the trial judge during trial which would justify a harsher sentence, the death sentence is invalid. In Fraley v. State, 426 So.2d 983, 985 (Fla. 3d DCA 1983), a harsher penalty imposed after a defendant chose to go to trial was invalidated:

> The law is clear that any judicially imposed penalty which needlessly discourages assertion of the fifth amendment right not to plead guilty and deters the exercise of the sixth amendment right to demand a jury trial is

patently unconstitutional. United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968)(a statute, violation of which is punishable by death on a jury's recommendation, but which assures no execution if the accused enters a guilty plea, is invalid because it encourages guilty pleas); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966)(imposition of harsher punishment as a result of defendant's refusal to waive his fifth amendment rights held improper); R.A.B. v State, 399 So.2d 16 (Fla. 3d DCA 1981)(decision to adjudicate juvenile delinquent based upon his assertion of fifth amendment right to remain silent and right to plead not guilty was improper); McEachern v. State, 388 So.2d 244 (Fla. 5th DCA 1980)(court could not impose a more severe sentence because of the costs and difficulty involved in proving the State's case); Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979)(defendant's choice of plea should not have played any part in the determination of his sentence); Hector v. State, 370 So.2d 447 (Fla. 1st DCA 19879)(defendant's failure to confess to crime is an improper consideration in imposing sentence). Compare United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978)-(sentencing court can properly give consideration to defendant's false testimony observed by the judge during trial).

POINT V

THE DEFENDANT SHOULD HAVE BEEN DISCHARGED FOR VIOLATION OF THE SPEEDY TRIAL RULE BY: 1) LACK OF TIMELY TRIAL AFTER HIS "JAILHOUSE ARREST" and 2) FAILURE TO PROPERLY EXTEND THE TIME FOR TRIAL

JAILHOUSE ARREST

The beginning date from which the 180 day speedy trial date is properly calculated is May 19, 1981, when Detectives Wasserman and Ilhardt arrested the defendant at the Dade County Jail for the Nieves murder. The defendant and Johnny Stokes, who was a State witness, both testified that Dets. Ilhardt and Wasserman told them they were under arrest for the Nieves murder at the time of the interrogations on May 12 and 19th, 1981. Although the two detectives denied that they told Griffin he was under arrest, their admitted actions in removing Griffin from the jail in handcuffs; not giving the defendant an opportunity to refuse to go with them; enlisting the aid of a jailer to quiet the defendant; advising him of his Miranda rights; and taking him to the police station for further interrogation clearly constituted an arrest on May 19, 1981, which triggered the running of the speedy trial period.

The trial court granted a motion to suppress the statement made on May 19, 1983, by Griffin that he wasn't at the scene of the murder. In ruling, the trial court noted that the defendant didn't initiate the contact: "The police came to him and got him out of jail. I don't believe he had much ability to refuse to go." (T.216). The involuntariness of the defendant's

removal from the jail is also seen in his refusal to sign a Miranda waiver form. Implicit in the trial court's finding that the defendant didn't voluntarily waive his Miranda rights was a finding that a waiver was necessary, i.e., that the interrogation was custodial.

If the defendant had not been incarcerated on an unrelated charge when Detectives Ilhardt and Wasserman came to take him away in handcuffs against his will for interrogation, then the action of the police would unquestionably constitute an arrest. In Dunaway v. New York, 442 U.S. 200, 212, 99 S.Ct. 2248, 60 L.Ed.2d 824, 836 (1979) involved the question of whether a defendant was illegally arrested when he was picked up on a street corner, taken in a police car to the police station, placed in an interrogation room, not informed he was free to return home, and interrogated. Finding that these activities involved an arrest, the Court said:

> The application of the Fourth Amendment's requirement of probable cause does not depend on whether on intrusion of this magnitude is termed an "arrest" under state law. The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless . . . obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in Terry and its progeny. Indeed, any "exception" that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause.

Dunaway v. New York, 442 U.S. at 212

Although Dunaway involved a Fourth Amendment issue, its definition of arrest is equally applicable to a determination of the triggering arrest for speedy-trial analysis.

The intent and purpose of the Speedy Trial Rule is that it protect both persons in custody and persons not in custody with equanimity. Fla.R.Crim.P. 3.191(a)(1). There is no basis for distinction between persons in custody or not in custody in determining whether there has been a de facto arrest by police action in taking them against their will to a police station for questioning. A detainee who is presumed innocent of his pending charges only loses his freedom of movement. His detention does not give local police carte blanche to remove him from jail without their action constituting an arrest.

The mere fact that officers did not use the formal words of arrest does not mean that their actions didn't constitute arrest. Giblin v. City of Coral Gables, 149 So. 2d 561 (Fla. 1963); Johnson v. State, 409 So. 2d 152 (Fla. 1st DCA 1982); Lynn v. State, ___ So. 2d ___, 8 FLW 2109 (Fla. 1st DCA 1983)("[N]o formal words of arrest are necessary to commence the running of the speedy trial clock.") In State v. N.B., 360 So. 2d 162 (Fla. 1st DCA 1978), an arrest for speedy trial purposes was found where two prisoners were advised of their Miranda rights, questioned about a prison incident and informed that charges would probably be filed although they were not formally arrested.

The facts of the case at bar are clearly distinguishable from State v. Clyde Miller, 437 So. 2d 734 (Fla. 1st DCA 1983) where

a defendant, detained on unrelated charges, was interrogated at the jail after signing a written Miranda waiver. This interrogation which did not involve removal of the defendant from jail in handcuffs against his will was correctly ruled to not constitute an arrest. Officers should certainly be as free in going to a jail to question a suspect in custody on unrelated charges as they are to go to the home of a suspect who has not been arrested or is free on bail. However, officers must be equally restrained from hauling suspects in handcuffs on trips to crime scenes and stationhouses whether they are dealing with detainees or persons at liberty.

The defendant Griffin was entitled to discharge because he was not brought to trial within 180 days from his arrest on May 19, 1983, despite being continuously available for trial.

When the motion for discharge was made on September 9, 1982, the trial court denied the motion on the ground that the defendant waived any right to discharge because there had been an extension of the speedy trial time. There is no evidence of any such extension in the record. Even if there were an extension, it would logically have come after July 19, 1982, when the trial court noted that the speedy trial period would expire August 2, 1982. The speedy trial period running from May 19, 1981, had run long before the July 20, 1982 hearing. In Muller v. State, 387 So. 2d 1037, 1039 (Fla. 3d DCA 1980), the established rule was stated:

> In the absence of an order of extension entered by the trial court during the speedy trial period, we will not find that time is extended no matter how compelling or exceptional the circumstances may appear. (emphasis original).

LACK OF EXTENSION

The trial court incorrectly assumed that the defendant was arrested on February 5, 1982, instead of May 19, 1981, and that the speedy trial period would expire on August 2, 1982, viz the trial court's statement on July 20, 1982, when the case was set for trial:

> The murder case will have to be reset within the speedy trial date which means before August 2, I believe. You will be advised of that . . . .(T.64).

Even if one accepts the trial court's reckoning of the speedy trial expiration date, the defendant was not tried timely since he was not brought to trial until September 9, 1983. The Record on Appeal includes all motions, orders, and transcripts of all hearings. It reveals that no stipulation, motion or order of extension or continuance was entered. Extensions of speedy trial period must be by "written or recorded order" or by stipulation, announced to the court or signed in proper person by counsel." Fla. R. Crim. P. 3.191(d)(2). A continuance alone does not toll the speedy trial time. Durrance v. Rudd, 398 So.2d 1012 (Fla. 1st DCA 1981); Stuart v. State, 360 So.2d 406 (Fla. 1978).

The Clerk's notation on the docket sheet regarding a stipulation for extension (R.3) does not constitute a stipulation as contemplated by the Rules. Florida Rule of Judicial Administration 2.060(g) provides:

> Parole agreements may be made before the Court if promptly made a part of the record or incorporated in stenographic notes of the proceedings . . .

The Clerk's action in making a notation on a Court file is clearly inadequate to constitute a record. The inaccuracy and inadequacy of the Clerk's notation is manifest when one examines the transcript of proceedings for July 20, 1982, the date of the supposed extension of speedy trial time. The clerk's docket erroneously lists H. T. Smith as the attorney appearing on July 20, 1982, "for Charles Mays".[1] This entry is clearly contradicted by the transcript of July 20, which shows that Mr. Mays, the defendant's trial counsel, appeared in person and was informed by the Court that the case would be reset before the expiration of the speedy trial deadline. (T.64). The case was not set until after the deadline and the defendant is entitled to discharge.

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[1] The authority of one attorney who is not counsel of record to stipulate to an extension of speedy trial is obviously suspect. Snead v. State, 415 So.2d 887 (Fla. 1st DCA 1982). Since the record shows Mr. Smith in fact did not appear, discussion of this issue is unnecessary.

POINT VI

COMMENTS BY THE PROSECUTOR ON DEFENDANT'S SILENCE DURING BOTH PHASES OF THE TRIAL VIOLATED THE FIFTH AMENDMENT AND DENIED THE DEFENDANT A FAIR TRIAL

Oblique comments on defendant's failure to testify, if sufficiently suggestive, can be as pernicious and unlawful as direct comments. United States v. Harbin, 601 F.2d 773 (5th Cir. 1979) cert. den. 444 U.S. 954, 100 S.Ct. 433, 62 L.Ed.2d 327; Fla. R. Crim. P. 3.250. Any comment which is fairly susceptible of being interpreted by the jury as referring to defendant's failure to testify constitutes reverible error, without resort to the harmless error doctrine. David v. State, 369 So.2d. 943 (Fla. 1979).

Several incidents throughout the proceedings repeatedly brought home to the jury the fact that the defendant had exercised his right to remain silent under the Fifth and Fourteenth Amendments to the United States Constitution:

A. The comment at the conclusion of the State Attorney's final argument in anticipation of defense counsel's argument:

> Now, by law I don't have an opportunity to address you again. The defense attorney comes up and can rebut anything I brought out in my closing argument.
>
> I will ask you to listen to his arguments closely and objectively as you have been throughout the trial. Weigh his testimony and the evidence and see if it makes sense. (T.791).

This comment is closely akin to Cunningham v. State, 404 So.2d 759 (Fla. 3d DCA 1981) where a constitutional violation was found in a prosecutor's closing comment to a jury: "That has not been explained in this case and I think that counsel owes you an explanation."

B. The prosecutor argued to the jury that defendant Griffin was deserving of the death penalty while Johnny Stokes shouldn't be executed because:

> But he [Stokes] agreed to do 25 years and come in here and tell the truth. That is the first step in any rehabilitation to admit your own wrongdoing and to come in here and tell the truth. (T.900).

This argument was made in the penalty phase. It is not an argument given to buttress or enhance the testimony of Stokes. If it were, the argument might be taken as favorable observation on the willingness of one of several co-defendants to testify rather than an adverse reference to the defendant's failure to testify. United States v. Diecidue, 603 F.2d 535, 553 (5th Cir. 1979). Since Stokes was not a co-defendant in a joint trial and since his credibility was not in issue in the sentencing phase, the line of cases following Deicidue fail to excuse the comment.

It must be remembered that the prosecutor's comment in this case was made during a proceeding to decide whether the defendant should live or die. It was in ths context that the prosecutor urged the jury that the defendant should not receive a prison sentence as had Stokes, but rather that he was deserving of electrocution, in part because he chose not to testify.

C. The trial court admitted a fingerprint standard card with the word "Refused" written into the line for signature of the person fingerprinted. The Court had ordered the defendant to submit to fingerprinting but there was no order by the court directing the defendant to sign the card. (T.685). The fingerprint technician, a

state witness, apparently wrote the damning word on the card without the Judge's authority. The clear impression created by this legend on the card was that the defendant had either disobeyed a court order or was refusing to cooperate.

The mere fact that the comment on the defendant's silence was made by a state police witness rather than the prosecutor does not lessen the constitutional dimension of the violation of the defendant's right to remain silent. Smith v. State, 342 So.2d 990 (Fla. 3d DCA 1977); Sublette v. State, 365 So.2d 775 (Fla. 3d DCA 1978).

POINT VII

TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING THE PHOTOGRAPH OF THE DECEDENT'S FACE

It is well established that gruesome photographs should be admitted if and only if they depict factual conditions relating to the crime and are relevant. Swan v. State, 322 So. 2d 485 (Fla. 1978); Bauldree v. State, 284 So. 2d 196 (Fla. 1973). Photographs serving only to create passion in the minds of the jurors must be rejected. Reddish v. State, 167 So. 2d 858 (Fla. 1964); Calloway v. State, 189 So. 2d 617 (Fla. 1966).

The photographs of the wounds on Nieves' body might arguably be relevant to show the angle of the shots. However, the wildest imagination could not concoct a valid, relevant purpose for the grotesque photograph of the decedent's face. The grim picture of the decedent with eyes rolled back and mough agape is a chilling visage which undoubtably moved the jury in both phases of the trial

POINT VIII

THE TRIAL COURT ERRED IN DENYING THE DEFENDAND A NEW TRIAL

The trial court erred in denying the defendant's motion for new trial based upon newly discovered evidence. The evidence was clearly material and unavailable despite due diligence. Fla. R. Crim. P. 3.600.

CONCLUSION

Based upon the foregoing, the defendant prays for the appropriate relief:

1. The sentence for armed robbery should be vacated;

2. The conviction for armed robbery should be vacated;

3. The defendant should be discharged for denial of speedy trial.

4. The defendant's sentence of death should be vacated and a sentence of life imposed or a new sentencing hearing mandated.

5. The defendant should be granted a new trial.

Respectfully submitted,

MELVIN S. BLACK
Special Assistant Public Defender
Suite 1003
3050 Biscayne Boulevard
Miami, Florida 33137
(305) 573-6622

CERTIFICATE OF SERVICE

I Hereby Certify that a copy of the Initial Brief of Appellant was mailed this 7 day of January, 1984, to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128.

MEL BLACK