IN THE FLORIDA SUPREME COURT

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OSCAR TORRES-ARBOLEDO,

Appellant,

v,

THE STATE OF FLORIDA,

Appellee.

CASE NO. 66,354

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This is a direct appeal from a judgment and sentence of death entered by the Circuit Court, Hillsborough County, Florida. In this brief, the parties will be referred to by their proper names or as they stand before this Court. The letter "R" will be used to designate a reference to the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement of the Case and Facts as presented by the State Public Defender except where specifically pointed out in Argument. Appellee would point out that after a complete reading of the record proper, the factual presentation given to this Court by Appellant is most accurate and objective.

SUMMARY OF THE ARGUMENT

Issue I:

The "dying declaration" of a homicide victim is admissible into evidence; and, the "dying declaration" is properly established by circumstantial evidence. An individual need not be robbed of all hope of survival in order to make a dying declaration. All the victim stated to his physician was a

statement of fact focusing on the cause and circumstance of his homicide. There is nothing in this record to support an argument that the homicide victim entertained a hope that he would recover. The circumstances support a conclusion that the victim thought death was imminent; otherwise, why would he have directed the attending physician on what to do with his personal property [his gold chain and medallion]? Such testamentary directives support a "dying declaration".

Issue II:

The cross-examination of the prosecution witness [Raymond Jacobs] was not improperly restricted. Why? Because by statute, inquiry is to address as to whether a conviction has been obtained; and, how many times an individual has been convicted. To attempt to adduce more information, would be contrary to the statute.

Issue III:

Appellant received a dispassionate trial. The testimony of the victim's daughter did not prejudice Appellant. In fact, the jury in this case made a recommendation of life imprisonment; thus, Maria Ferrer's testimony had no effect in the penalty phase. Her testimony was relevant for the purpose of identifying the subject matter of the attempted robbery [gold chain and

medallion]; and, her testimony was relevant as corroboration of that given by George Williams. Her testimony established the anxiety and fear felt by George Williams and goes to explain why George Williams initially interacted passively with law enforcement.

Issue IV:

The "State of Florida" never made Oscar Torres-Arboledo stand trial in prison garments. That Appellant chose not to wear the civilian clothing provided for him is no fault of the government. This was a choice made by Appellant; and, the Court took steps to ensure that Appellant was not viewed with the words "county jail" on the back of his jump suit. More significantly, defense counsel did not object, ask for a continuance, or offer alternate clothing for his client. This claim is procedurally defaulted.

Issue V:

The state courts of Florida do not require that a defendant testify that he is waiving his right to testify. There is a valid waiver in this record; and, that waiver comes through the mouth of Appellant's attorney. Nothing more is constitutionally required.

Issue VI:

The argument by the prosecutor is not a "Golden Rule" one. The prosecutor does not ask the jury to place themselves in the shoes of the victim in arriving at their verdict; nor, does the prosecutor ask the jury to render such a verdict as they would want rendered if they were the homicide victim.

Issue VII:

Appellant's sufficiency of the evidence argument does not prevail. Why? The underlying felony of attempted robbery was established. The attempted robbery was contemporaneous with the homicide. The attempted robbery was not abandoned; and, a homicide begun. Rather, the attempted robbery continued through the homicide. For the attempted robbery and homicide to be contemporaneous, it is not required that the "exact" same time be established for the offenses.

Issue VIII:

At bar, the issue of Appellant's extradiction from California to Florida was fully litigated as an original action in habeas corpus. Appellant concedes that the Florida authorities were not noticed of his demand for disposition. Further, Appellant's initial trial date was calendared within the primary 120-day

period. Appellant waived this trial date; and, as a matter of state law, Appellant has waived his claim to a speedy trial violation springing from his extradiction.

Issue IX:

The trial court did not err in overriding the jury recommendation of life. This record does not contain any statutory mitigating factors. The trial court was correct in rejecting the one non-statutory mitigating factor embraced by the jury: ". . . Defendant is a very intelligent and rehabilitable person." The two statutory factors (1) that Defendant was shot during an attempted robbery, and (2) that Defendant was previously convicted of a California homicide supports the sentence of death. That the jury might have been seduced by the testimony of Gerald Mussenden does not carry over to the trial court. This Court must approve Judge Graybill's finding that the statutory mitigating circumstances so clearly outweigh the possible nonstatutory mitigating circumstances concerning Defendant's intelligence and rehabilitativeness that the jury recommendation is unreasonable.

Issue X:

It is appropriate to depart from the sentencing guidelines when the primary offense is a capital one. Why? A capital felony cannot be scored under the guideline parameters.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN PERMITTING THE STATE TO ELICIT HEARSAY TESTIMONY FROM ITS WITNESSES CONCERNING WHAT THE VICTIM, PATRICIO LORENZO, SAID TO THEM.

(As Stated by Appellant).

What Appellant overlooks is that alternate reasons for an exception to the hearsay requirement exist in this case other than the ones he argues. It is appropriate to advocate any ground which the law and record permit. See, Smith v. Phillips, 455 U.S. 209, 71 L.Ed.2d 78, 85 fn.6, 102 S.Ct. 940 (1982). As recognized by Judge Russell (dissenting) in Sharpe v. United States, 712 F.2d 65, 66 (4th Cir. 1983) rev'd 470 U.S.___, 84 L.Ed.2d 605, 106 S.Ct. ___ (1985):

> ". . . [I]t is a well-settled and oft-repeated rule of appellate procedure that, if the result of the decision which is challenged on appeal is correct for any reason, whether stated by the lower court or not, the decision of the lower court is affirmed. Riley Co. v. Commissioner, 311 U.S. 55, 59, 61 S.Ct. 95, 97, 85 L.Ed.36 (1940); Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 157, 82 L.Ed. 224 (1937)."

(Text of 712 F.2d at 66).

Pursuant to §90.804(2)(b), Florida Statutes (1985), the following is provided:

> *Statement under belief of impending death.* -- In a civil or criminal trial, a statement made by a declarant while reasonably believing that his death was imminent, concerning the physical cause or instrumentalities of what he believed to be his impending death or the circumstances surrounding his impending death.

This problem has been addressed in McCormick's treatise on evidence. See, C. McCormick, McCormick on Evidence Chapter 29 (West 1954). The traditional approach to this problem is admissibility as an exception to hearsay.

> *259. Requirements that Declarant Must Have Been Conscious of Impending Death and that Death Actually Ensue.*
>
> The central notions on which rests the popular reverence for deathbed statements are embodied in the first two limiting rules. Unlike the more recent limitations, which will be mentioned later, these two rules are rational enough, though possibly they have drawn too sharply the lines of restriction.
>
> The first is -- and this is the commonest battleground of admissibility -- that the declarant must at the time he made his statement have been conscious that death was near and certain. 1/ He must have lost all hope of recovery. 2/ It is quite arguable that a belief in the probability of impending death would make most men strongly disposed to tell the truth and hence guarantee the needed special reliability. But belief in certainty, not mere likelihood, is the formula insisted on and rigorously applied. Usually, this belief is proven by evidence of the declarant's own statements of such belief at the time, his expression of his "settled hopeless expectation." 3/

> That the deceased should have made such a statement is not required,[4] however, and his belief may be shown circumstantially by the apparent fatal quality of the wound,[5] by the statements made to the declarant by the doctor or by others that his condition is hopeless,[6] and by other circumstances.[7]
>
> (McCormick text at 555-556). (footnotes omitted).

Thus, there is a legal basis for the Florida Legislature promulgating the "dying declaration" exception to hearsay. There is an interesting twist to these cases. How is a licensed physician to inform his patient that death is near and certain and still have his patient maintain hope that his demise is not at hand? Thus, it is reasonable to assert that the victim's belief may be shown circumstantially. The prosecution pointed the circumstances out to the trial court prior to Dr. Mallea's testimony. (R. 359). The testimony of Dr. Mallea was proffered. (R. 353-357) There is no question but that the apparent fatal quality of the wound (R. 354) and his testamentary directive to the attending physician to give his gold medallion and chain to family (R. 354) establishes a classic dying declaration. To the extent that the lower court did find the victim's statement to fit this exception is a matter this Court can reach to affirm upon.

The trial court did find the statement to Dr. Mallea to be an exception to §90.803(4), Florida Statutes (1985). (R. 358). Under traditional practice, all such questions of fact are for the trial court. See, Tillman v. State, 44 So.2d 644, 648 (Fla. 1950), motion for stay of execution denied 339 U.S. 976 (1950). There, this Court determined such an issue to be a mixed question of fact and law. At this point, the "State" would assert a factual finding by the trial court that the conversation between physician-patient was to make competent diagnosis and render lifesaving treatment. What Appellant overlooks is that exceptions to the hearsay rule are not alternative syllogistic choices [either the exception is a dying declaration or statement for medical diagnosis or treatment]. These exceptions are intertwined; and, the acceptance of one is not, per se, the rejection of the other. In Morella v. Brown, (Fla. 4th DCA 1983) rev. denied 434 So.2d 886 (Fla. 1983), Judge Schwartz noted that now under the evidence code, there is no distinction between the testimony of a treating physician and an examining one. Here, it is obvious that in making a competent diagnosis and beginning a treatment plan, an emergency room physician must listen to each and every utterance made by his patient. To not heed the complaints and statements made by the patient might well lead to an erroneous treatment plan. Is it not in the patient's best interest

that the physician know at all times the levels of orientation as to time, place and date a patient grasps ? To ignore the utterances of an emergency room patient might well lead to an autopsy protocol.

As to the excited utterances, Judge Ott in Cox v. State, 473 So.2d 778 (Fla. 2nd DCA) sets out a comparable factual backdrop for statutory interpretation:

> [8] Finally, appellant argues that the trial court erred in admitting certain hearsay statements over his timely objections. Appellant's wife's statements to the officer at the Cox home and en route to the hospital fall within the excited utterances exception to the hearsay rule under section 90.803(2), Florida Statutes (1983). The statements were made immediately upon being notified of her husband's accident, "an occurrence startling enough to produce nervous excitement and render the utterances spontaneous and unreflecting." Lyles v. State, 412 So.2d 458, 460 (Fla. 2nd DCA 1982).
>
> [9] The hospital clerk's testimony regarding a telephone conversation with a Mrs. Cox should have been excluded as inadmissible hearsay. See §90.801(1)(c), Fla. Stat. (1983). Nevertheless, the admission of this hearsay testimony was harmless error given the overwhelming evidence of appellant's guilt. See §924.33, Fla. Stat. (1983); Pickrell v. State, 301 So.2d 473 (Fla. 2nd DCA 1974). The investigating officer and others testified that appellant smelled of alcohol; appellant's blood alcohol content was high; and appellant was the driver of a vehicle which caused a death. See §316.1931(2) Fla. Stat. (1983).
>
> (text of 473 So.2d at 782.

The "State" cannot project a scenario more adapt to "excited utterances" than that in which the deceased was cast. To suffer a mortal gunshot wound after a robbery attempt certainly leaves its victim startled enough to produce nervous excitement and render the utterances spontaneous and unreflecting. Thus, the victim's statements to George Williams falls within this exception. The prosecutor laid the proper predicate (R. 728-729) and the statement was correctly admitted. In any event, if there is error under this claim, it is harmless in light of the overwhelming evidence which includes the direct evidence of eyewitness identification of Appellant. (R. 734). This Court must affirm on this claim.

ISSUE II

THE COURT BELOW ERRED IN IMPROPERLY RESTRICTING OSCAR TORRES-ARBOLEDO'S CROSS-EXAMINATION OF AN IMPORTANT PROSECUTION WITNESS, RAYMOND JACOBS.

(As Stated by Appellant).

The "State" has no quarrel with Appellant's assertion that a criminal defendant is to be given the right of full and fair cross-examination of witnesses for the prosecution. See, Pointer v. Texas, 380 U.S. 400 (1965); and, Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of a witness. See, §90.612(2), Florida Statutes (1985). Character evidence of Raymond Jacobs was inadmissible to prove that he acted in conformity with it on a particular occasion, except evidence which is addressed in §§90.806; 90.810, Fla. Statutes (1985). See, §90.404(1)(c), Florida Statutes (1985).

On direct examination, the witness disclosed that he avoided police when he exited the car at a laundromat parking lot. (R. 593). He stated that he avoided police contact because he was then presently on probation for grand theft. (R. 593). Mr. Jacobs then stated that several days after he learned

that police were looking for him -- he surrendered to police custody. (R. 596 - 597). On cross-examination, the lower court ruled that the witness did not have to answer as to the factual basis for probation revocation. (R. 607-C). Defense counsel abandoned a line of questioning as to whether the witness has been charged with first-degree murder. (R. 608).

Defense counsel then asked:

Q. Did you subsequently get arrested for this?

A. Did I get arrested for it?

Q. Yes.

A. Yes.

Q. When you went to the police?

A. Yes.

Q. They told you they were arresting you for first-degree murder?

A. Yes.

Q. You were on probation at that time, weren't you?

A. Yes.

Q. Did they ever violate your probation?

A. No.

Q. Even after you were arrested for first-degree murder?

A. No.

After that, then the following transpired:

> Q. Raymond, have you ever been convicted of any crime?
>
> A. Yes.
>
> Q. What?
>
> MR. OBER: I object, improper
>
> MR. PALOMINO: Judge, may we approach the bench?
>
> THE COURT: Counsel approach the bench.

The trial court ruled that the proper basis for inquiry is §90.610, Florida Statutes (1985). (R. 625). Correctly, the trial court instructed defense counsel that he could not inquire whether Mr. Jacobs had been arrested for giving false information. (R. 625). The statute is specific in that inquiry can be made as to whether a conviction has been rendered, and, how many times one stands convicted. What next transpired was defense counsel's attempt to circumvent the statute. (R. 262). The prosecutor objected and was sustained. (R. 626-627).

Interrogation as to former arrests or accusations of crimes is improper. See, Jordan v. State, 144 So.669 (1932). The accepted procedure still used in Florida practice for using a prior conviction to impeach is set forth in McArthur v. Cook, 99 So.2d 565 (Fla. 1957). It remains improper to name the

specific crime involved. The credibility of this witness never came into play. The witness was forthright and honest in his answers. There was no improper restriction of the cross-examination of Raymond Jacobs. However, had Raymond Jacobs denied his prior convictions, then the door would have been opened to defense counsel to establish the past convictions. This door continues to remain closed. There is no error in the restriction of the cross-examination.

ISSUE III

THE COURT BELOW ERRED IN PERMITTING THE VICTIM'S DAUGHTER TO TESTIFY FOR THE STATE AT OSCAR TORRES-ARBOLEDO'S TRIAL.

(As Stated by Appellant).

In Mills v. State, 462 So.2d 1075, 1079 (Fla. 1985) cert. denied 87 L.Ed.2d 661 (1985), this Court declined to reverse either the judgment or sentence. One of the claims on appeal was whether the trial court had erred in allowing the decedent's father to establish that certain property had belonged to his slain son. It was not relevant that the defense stipulated to ownership and value. This Court held in a unanimous opinion:

> [9] Mills next argues that the trial court erred in allowing the victim's father to dentify certain property that belonged to the victim. His reliance upon Welty v. State, 402 So.2d 1159 (Fla. 1981), is misplaced. Welty addressed the propriety of allowing a relative to identify the victim. The concern expressed in Welty as to assuring the defendant a dispassionate trial has less force in this case because property identification by a relative has far less potential for creating sympathy or prejudice in the minds of the jurors. The fact that Mills stipulated to the ownership and value of the property does not render the testimony of the victim's father irrelevant. The victim's father was the only person who could identify specific items of property that belonged to the victim.

> His testimony corroborated the testimony of co-defendant Fredrick relating to that property. The record does not indicate that this testimony had the underlying purpose of gaining the sympathy of the jury or of prejudicing it against Mills. We find no error in allowing the victim's father to identify the stolen property.
>
> (text of 462 So.2d at 1079, 1080).

Here, as in Mills, Appellant's reliance on Welty v. State, 402 So.2d 1159 (Fla. 1981) is misplaced. In Welty, the purpose of the appearance of the victim's brother was to establish identification of the deceased. This Court recognized that there is a well-established rule in Florida that a member of the deceased victim's family may not testify for the purpose of identifying the victim where non-related, credible witnesses are available to make such identification. However, this Court went on to recognize that admission of such evidence is not fundamental error and may be harmless.

At bar, the decedent's daughter wept when asked if she knew her father. (R. 379). The jury was removed and the witness apologized. The prosecutor argued that relevancy of Maria Ferrer's testimony goes to that of George Williams. (R. 380). By photograph, the witness then identified the medallion which ahd been the subject of the robbery. (R. 383).

Then the witness related, without objection, the visit of George Williams to her home. (R. 384-385). She testified that George Williams asked to use the victim's gun because he understood that the decedent's murderers were looking for him. (R. 385). Defense counsel objected to the witness's testimony that George Williams was nervous. (R. 386). Ms. Ferrer then established that George Williams requested her father's gun because he needed it for self-protection. (R. 386). This testimony of Ms. Ferrer corroborated that the gold chain had been the subject of the robbery. (R. 729-730). That Appellant and George Williams simultaneously identified one another. (R. 730). Further, this goes to establish the basis as to why George Williams initially declined to make an identification of Appellant from a photographic display. (R. 733). That George Williams was apprehensive about Appellant is established by the testimony of Maria Ferrer. Her testimony was not for the purpose of identifying her father. Rather, her testimony establishes and corroborates the identification of the jewelry (gold chain and medallion) which was the subject of the robbery. Also, her testimony establishes the fear and anxiety of George Williams [the eye-witness to the slaying].

The sympathy of a father - daughter relationship was not paraded before the jury by the prosecution. Here, the

witness rapidly regained her composure and completed her testimony. The facts of this case are more readily apparent than in Justus v. State, 438 So.2d 358, 366 (Fla. 1983). Had the outburst of Maria Ferrer been of such emotional intensity, then the trial court would have granted a mistrial. In fact, defense counsel never moved to strike the testimony of Maria Ferrer nor moved for a mistrial. (R. 379-382). Under these circumstances, the "State" would assert that this issue has been procedurally defaulted as the claim has not been preserved for appellate review.

ISSUE IV

THE COURT BELOW ERRED IN REQUIRING OSCAR TORRES-ARBOLEDO TO STAND TRIAL IN IDENTIFIABLE JAIL CLOTHING.

The "State" would suggest that Appellant, pro se, has attempted to create an issue where non exists. On October 31, 1985, at 1:20 p.m., trial resumed from the previous day. (R. 316-317). At that time, defense counsel stated on the record the following:

> THE COURT: Mr. Palomino, the jury is in the jury room.
>
> Do you have anything to put on the record at this time, concerning the clothing that Mr. Arboledo is presently wearing?
>
> MR. PALOMINO: Yes, sir, your Honor.
>
> At this time I would like to make part of the record, that the Defendant is dressed in a semi-blue or dark blue county jail uniform, that was provided to him by the jail. He was previously, in the last days, wearing a yellow shirt that had also been provided to him. The Defendant indicated that that shirt last night, when he was returned to the jail was balled up and placed in the property basket, and he was unable to wear the shirt this morning, due to an insulted condition, and he refused to wear it.

> The jump suit that he is wearing has "County Jail", written on the back of it. I've indicated to him that he will have to wear it today. Tomorrow I will see about getting him some clothing.
>
> THE COURT: All right. Then each Bailiff is specifically instructed that they will do everything possible to prevent the jury from ever observing the back of Mr. Arboledo at any time that we take a recess.
>
> The State ready to proceed?
>
> MR. OBER: Yes, sir.
>
> MR. PALOMINO: The defense is ready, your Honor.
>
> THE COURT: All right. Mr. Bailiff, please ask the jury to return to the courtroom.

There is no question but that non-prison clothing was available to Appellant. It is Appellant who chose to wear the clothes he wore. Never did defense counsel ask for a continuance so that he might obtain shirting from a downtown Tampa store. Never did defense counsel object to his client appearing as he did before the jury. All defense counsel did was make the facts of the clothing known to the Court.

In resolution of this claim, the "State" would assert that Appellant is procedurally defaulted from litigating this claim. Why? Because he never objects to the clothing he wore; nor, did he ask for a continuance to obtain alternate clothing. Additionally, Appellant chose to wear the clothing he did wear. Better to wear a wrinkled yellow shirt than a shirt with "County Jail" imprinted on it. However, the State of Florida did not force Appellant to appear in the shirting he chose to appear in. This was a matter of Appellant's free will and self-determination. In no way does a constitutional deprivation exist under the facts and circumstances of how Appellant chose his garb.

As noted by Judge Easterbrook dissenting in United States ex rel Miller v. Greer, 789 F.2d 438 (7th Cir. 1986):

> The defendant starts with a presumption of innocence, and the Court has held that this implies a right not to be tried in prison garb. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). The defendant must assert this right to claim it; however, if he does not object, he may not later complain. The rationale for this, and for other cases insisting that the defendant take an active part in the vindication of his rights, is that every participant in the trial should help to reduce the incidence of error. Errors that affect the operation of the trial may and should be prevented or cured; there is joint responsibility.
>
> (text of 789 F.2d at 453).

Judge Easterbrook writes on a collateral review of a 28 U.S.C. §2254 attack on an Illinois capital [death warrant] case. The case grants the Great Writ on other grounds. In no way does trial counsel's failure to object affect the outcome of this trial. This claim is governed by Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982). Further, in no way did the trial of Appellant suggest in manner that he did not have a presumption of innocence. See, Estelle v. Williams, 425 U.S. 501 (1976) and Taylor v. Kentucky, 436 U.S. 478 (1978).

ISSUE V

THE COURT BELOW ERRED IN FAILING TO CONDUCT AN INQUIRY ON THE RECORD TO ASCERTAIN WHETHER OSCAR TORRES-ARBOLEDO WAS VOLUNTARILY, KNOWINGLY, AND INTENTIONALLY RELINQUISHING HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO TESTIFY.

(As Stated by Appellant).

The issue controlled by People v. Curtis, 681 P.2d 504 (Colo. 1984) has been rejected in Florida. Courts. The Second District in Cutter v. State, 460 So.2d 538 (Fla. 2nd DCA 1984) held that an accused is not deprived of a fair trial because the trial court does not establish on the record that the criminal defendant has validly waived his right to testify. There is no question but that on this record, defense counsel did inform his client that he had a right to testify. (R. 790-792). A reading of this portion of the trial transcript establishes that Appellant was advised by counsel of his right to testify and waived same. In fact, the trial court had the jury removed so that this right might be translated for him.

The Cutter opinion has been followed in Hyer v. State, 462 So.2d 488, 490 (Fla. 2nd DCA 1984) reh. den. January 23, 1985, and in Furr v. State, 464 So.2d 693 (Fla. 2nd DCA 1985). The Second District adopts the reasoning in State v. Albright, 291 N.W.2d 487 (Wis. 1980), cert. den 449 U.S. 957 (1980).

Why should this Court adopt the holding of the Second District? The Curtis decision did not seek certiorari review; however, certiorari was sought and denied in Albright. Clearly, Albright was reviewed by the highest state court in Wisconsin. The "State" would suggest that this issue does not present an important constitutional issue. Why? Because Florida, Colorado, and Wisconsin are free to formulate and apply general principles of law in the enforcement of an accused's rights. At bar, there is no question but that Appellant waived his right to testify. The waiver was tendered through counsel, in the client's presence, and, after consultation with the client. There is no constitutional deprivation; and, the "State" would urge this Court to adopt the well-reasoned opinion of the Second District in Cutter.

ISSUE VI

THE COURT BELOW ERRED IN REFUSING TO GRANT APPROPRIATE RELIEF TO OSCAR TORRES-ARBOLEDO WHEN THE PROSECUTOR MADE AN IMPROPER "GOLDEN RULE" ARGUMENT TO THE JURY DURING HIS FINAL ARGUMENT.

Appellant overlooks and fails to consider that in closing argument, defense counsel points out to the jury that the victim suffered two gunshot wounds . . . one where counsel "indicates" and the second to the chest. (R. 826-827). The wounds were addressed on defense counsel's closing argument; and, the trial court erred in sustaining the objection. (R. 853). In light of the fact that the prosecution made proper comment on matters brought to the jury's attention by defense counsel, there was no error in the trial court declining to give a curative instruction or grant a mistrial. (R. 853). In Smith v. Philips, 455 U.S. 209, 71 L.Ed.2d 78, 85 fn.6, 102 S.Ct. 940 (1982), Justice Rehnquist states:

> 6. [2b] Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted. United States v. New York Telephone Co., 434 U.S. 159, 166, n. 8, 54 L.Ed.2d 376, 98 S.Ct. 364 (1977); Dandridge v. Williams, 397 U.S. 471, 475, n. 6, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970); Ryerson v. United States, 312 U.S. 405, 408, 85 L.Ed. 917, 61 S.Ct. 656 (1941).

In the alternative, the "State" does not believe that Mr. Ober was presenting a Golden Rule argument. In Bullock v. Branch, 130 So.2d 74 (Fla. 1st DCA 1961), Judge Carroll sets forth the prejudicial and inflammatory consequences of a "Golden Rule" argument. However, at bar, the jurors were never asked to place themselves in the shoes of the victim to suffer gunshot wounds. The second person, singular case pronoun "you" refers to the decedent and not the jury. (R. 853).

If this prosecutorial argument were improper, and it is not, then the case is controlled by State v. Murray, 443 So.2d 955 (Fla. 1984). Error is harmless where the evidence is overwhelming. Here, there is an eye-witness to the homicide. See also, State v. Diguilio, 491 So.2d 1129 (Fla. 1986) explaining Murray.

ISSUE VII

THE EVIDENCE ADDUCED BELOW WAS INSUFFICIENT TO ESTABLISH OSCAR TORRES-ARBOLEDO'S GUILT OF PRE-MEDITATED OR FELONY MURDER AND ATTEMPTED ARMED ROBBERY.

(As Stated by Appellant).

Sufficiency of the evidence as argued below as the basis for a directed verdict of acquittal. (R. 796-801). The trial court correctly denied the Motions allowing the case to go to the jury. Clearly, a prima facie case of guilt had been established.

As noted in Justice Atkins in his dissent filed in State v. Jones, 377 So.2d 1163, 1166 (Fla. 1979), ". . .an indictment which charges only premeditated murder complies with due process. Evidence of either premeditation or felony murder may be used to support a conviction of murder in the first degree upon such indictment." See, Knight v. State, 338 So.2d 201 (Fla. 1976) and Everett v. State, 97 So.2d 241 (Fla. 1957) cert. denied 355 U.S. 941 (1958).

The "State" would urge most strongly that the acts of Appellant were reasonably contemporaneous with the attempted robbery (R. 721-724). In commercial law, the Fourth District was called on for review of a breach of contract in Popwell v. Abel, 226 So.2d 418, 421 (Fla. 4th DCA 1969). There, Judge Walden in resolving a dispute between a buyer who had

tendered a $50,000.00 downpayment check for a farm and subsequently stopped payment on the check turned to the "contemporaneous instrument rule":

> [3,4] The "contemporaneous instrument (or transaction) rule" is primarily a rule of construction or interpretation with regard to contracts.[6] Where one instrument is given contemporaneously with another, stated simply, as part of the same transaction and each refers to each other, then they should be considered together in determining their meaning and effect.[7] Contemporaneous in this sense has been interpreted as "so approximate in time as to grow out of, elucidate and explain the quality and character of the transaction, or an occurrence within such time as would reasonably make it part of the transaction." Elsberry Equipment Co. v. Short, 1965, 63 Ill.App.2d 336, 211 N.E.2d 463, 468. This rule of construction is also part of our Commercial Code,[8] F.S.1967, Section 673.3-119, F.S.A. It is noted the rule will in no way defeat the negotiability of an instrument.[9] Viewing the contemporaneous instrument in this light, it is difficult for us to see how the trial court could use this rule of interpretation as a basis for a motion to dismiss the plaintiff's cause of action.
>
> (footnotes omitted).

In State v. Snowden, 345 So.2d 856, 860 (Fla. 1st DCA 1977), Chief Judge Boyer defined "contemporaneous"

as used in reference to res gestae:

> . . . Res gestae is not confined to the act charged but includes acts, statements, occurrences and circumstances which are substantially contemporaneous with the main fact and so closely connected with it as to form a part or a continuation of the main transaction and to illustrate its character. In determinating what is admissible as part of the res gestae, no distinction is usually drawn between statements and acts. No precise measure of time or distance from the main occurrence can be arbitrarily applied.

At bar, the "State" would urge that the robbery and homicide are so intertwined as to overlap. Never can they be precisely concurrent in point of time as to set forth a structured scenario. In other words, the attempted robbery began when the victim resisted the taking of his gold chain and medallion. But that he was shot during this episode does not mean that the homicide was begun. Appellant makes much that the record does not establish that the firearm of Appellant was either displayed or used prior to or contemporaneous with any effort to obtain decedent's medallion; but, that Mr. Lorenzo was shot afterward. At bar, the shooting of Mr. Lorenzo did not need to transpire at the moment of the attempted taking of his medallion; rather, it was a

contemporaneous activity as it occurred within such a time span as would reasonably make it part of the transaction. See, Words and Phrases, "Contemporaneous: Exactly Same Time Not Required" pp. 83-86.

Under the teachings of State v. Jones, 377 So.2d 1163 (Fla. 1979), the "State" established Oscar Torres-Arboledo's guilt of murder in the first degree and attempted armed robbery. Why? Because the elements of the underlying felony were established. There is no reversible error.

ISSUE VIII

THE COURT BELOW ERRED IN DENYING OSCAR TORRES-ARBOLEDO'S MOTION FOR DISCHARGE, AS HE WAS NOT BROUGHT TO TRIAL WITHIN THE TIME LIMITS SET FORTH IN THE INTER-STATE AGREEMENT ON DETAINERS.

(As Stated by Appellant).

On July 31, 1984, this matter was brought to the trial court's attention. (R. 995). At that time, the trial court, defense counsel, and, the prosecutor agreed that trial was to begin September 10, 1984. (R. 998). Why? Because there was an obligation to bring Appellant to trial under the interstate extradiction compact focusing on speedy trial. (R. 996). At that point, Appellant now concedes that he does not attack that 120-day speedy trial period. Rather, Appellant now attacks the 180-day speedy trial period as he continued in his assertion that September 10, 1984 was to be his trial date. (R. 1002). Defense counsel pointed out to the trial court that his client had filed a "pro se" motion for discharge asserting extradiction speedy trial period had run. (R. 1003). Defense counsel pointed out that the motion was filed without his knowledge; and, that the matter could be heard prior to trial. (R. 1003).

On October 19, 1984, Appellant acknowledged that trial counsel had set his trial past September 10th until

October 29th. (R. 1028). At that time, Appellant had concerns about trial counsel's representation as matters in California had not been brought to Florida. (R. 1028). The crux of Appellant's claim was that he did not comprehend extradiction protocol in California and continued to have the impression that he was kidnapped and returned to Florida. (R. 1029). It would appear that between January and June of 1983, Appellant made approximately 25 court appearances. (R. 1029). Defense counsel represented that he was continuing in his efforts to obtain the records from the asylum state (California) to determine how the California procedures impacted §941.45(3)(a), Florida Statutes. (R. 1030). Appellant continued in the belief that the charges against him in California were dismissed and that, as a consequence, Florida did not have jurisdiction over him. (R. 1030). Defense counsel then asserted Appellant refused to cooperate with him. (R. 1031). Defense counsel then pointed out that perhaps a California attorney and persons incarcerated with Appellant were undermining Appellant's confidence in his performance. (R. 1032). Judge Graybill encouraged Appellant's defense counsel to obtain a copy of the transcript of the California extradiction hearing. (R. 1036-1039). The prosecutor agreed to obtain that transcript. (R. 1039). The trial court again pointed out to Appellant that these procedural matters had nothing to do with his guilt or innocence. (R. 1039).

On October 26, 1984, Appellant litigated his §941.45(3)(a) claim. Defense counsel concedes that his client could not establish the Tampa, Florida prosecuting office ever received his demand. (R. 1063). In fact, the face of the demand reflects that that when Appellant was using the Claifornia alias of "Tony Rivera" that a fugitive action had been dismissed. (R. 1331). On the day of trial, moments before trial, Appellant attempted to prosecute a habeas corpus focusing on extradiction protocol. (R. 7-8). Appellant testified that he did not wish to enter a plea; but, that he felt a legal issue was present with his extradiction which he wanted preserved for appellate purposes. (R. 11).

The prosecutor did obtain the transcript of the hearing requested. (R. 1332-1336). Therein, Appellant intends to waive extradiction. (R. 1336). The advisory hearing at which Appellant attempted to waive extradiction was January 21, 1983 . (R. 1332) and subsequently on June 6, 1983, the California authorities noticed Florida that Appellant stood convicted of a California murder and was ready for extradiction to Florida. (R. 1338). Defense counsel conceded before Judge Graybill that there was no evidence that the Tampa prosecutors had knowledge that Appellant was attempting to invoke §941.45(3) for final disposition. (R. 1064).

The trial court was aware of State v. Roberts, 427 So.2d 787 (Fla. 2nd DCA 1983). (R. 1066). In that case, Jeffery Roberts was successful in communicating his demands to the prosecutors of Pasco County, Florida, so that his speedy trial demands were perfected. There, Pasco County had the necessary information required to process the detainer charges. In denying the Motion for Discharge, the trial court here noted that Florida was not responsible for purported errors committed by California. (R. 1067). It should be noted that the prosecutor, as an officer of the court, represented that he had no knowledge of the detainer claims Appellant was then prosecuting. (R. 1068-1070). Appellant admits that he never furnished Tampa authorities with any demands or documents. (R. 1073).

Again, defense counsel conceded that speedy trial had been waived as to the 120-day period. (R. 1085). What defense counsel overlooks is that a waiver of speedy trial is a waiver of speedy trial.

As a matter of state law, an accused must provide notice to a state official requesting disposition and/or speedy trial. What Appellant overlooks is the policy consideration in Florida enacting the Interstate Agreement on Detainers. For California to begin the habilitation of Appellant, it was

necessary to resolve the outstanding charges against him. See, Johnson v. State, 442 So.2d 193 (Fla. 1983) cert. denied 466 U.S. 963 (1984). In fact, this Court has noted in Johnson that ". . . We cannot find any reason to hold the IAD's 120-day limit to be unwaivable and self-executing." At bar, the efforts of Appellant to communicate with Florida were inadequate to provide the information required by the IAD. See generally, State v. Culligan, 454 So.2d 700 (Fla. 4th DCA 1984). There can be no substantial compliance when Appellant admits that he did not furnish the prosecuting officials with notice. (R. 1073).

There is no merit to this claim. Why? Because after Judge Graybill conducted the penalty phase of this trial, he received evidence from the "State" on the habeas corpus attack. There was testimony from Appellant's California public defender as to how Appellant's rights were protected. (R. 967-970; 976-980). Also, the Clerk of the California court testified as to how Appellant was given an advisory hearing on the Florida homicide and that Appellant declined to attack the extradiction. (R. 980-985). Appellant has to this date failed to appreciate that the State of California did not and does not have jurisdiction to dismiss a Florida indictment charging homicide. (R. 977-978).

Appellant fails to present reversible error.

ISSUE IX

THE TRIAL COURT ERRED IN SENTENCING OSCAR TORRES-ARBOLEDO TO DEATH OVER THE JURY'S LIFE RECOMMENDATION AS THE RECOMMENDATION WAS FULLY JUSTIFIED UNDER THE FACTS OF THIS CASE, AND TORRES-ARBOLEDO DOES NOT DESERVE THE DEATH PENALTY.

(As Stated by Appellant).

This claim is always the most difficult for this Court in direct capital review. To defend the action of Judge Graybill in overriding the recommendation of the jury, the "State" will attempt to point out facts that he knew that perhaps did not have the same jury impact.

For one thing, Judge Graybill was able to view the manipulations of Oscar Torres-Arboledo when he attempted to have his trial counsel discharged. At this point, the "State" would point out that Appellant was manipulative to the extent that he (pro se) attempted to create an incompetency of trial counsel claim for collateral attack. Otherwise, why does Appellant decline to communicate with Mr. Palomino prior to trial? At a pre-trial hearing, Judge Graybill advised Appellant that anything he said might possibly be used against him. (R. 1025). Appellant consulted with counsel (R. 1025) and then proceeded to detail why his counsel's representation was not to his benefit. (R. 1027-1028). Appellant had deep

feelings that if the extradiction evidence were presented to the jury, that the jury would dismiss the charges against him. (R. 1034). Judge Graybill made a lengthy explanation to Appellant that his California extradiction claim had nothing to do with his guilt or innocence and further, that he should cooperate with defense counsel. (R. 1043-1047).

There is no question but that Judge Graybill became increasingly aware of Appellant's ability to seduce the judicial system. The psychological report rendered by Gerald Mussenden, Ph.D is a reflection of this seduction. (R. 1349-1353). Throughout the legal proceedings, Appellant, in an overabundance of caution and concern [both in California and Florida], benefited himself by the use of an interpretor. (R. 1333; 5). When Appellant appeared before Judge Graybill in an attempt to have Mr. Palomino discharged as counsel, his English abilities were competent. (R. 1022). Dr. Mussenden even comments on the abilities of Appellant to communicate in the English language, and Appellant's abilities are excellent. (R. 1351).

The psychological evaluation of Appellant addressed his "overall development and adjustment to date". (R. 1349). Clearly, Dr. Mussenden was given carte blanche by the trial court. (R. 925-926). Why? Because Dr. Mussenden was available to testify and share his impressions with the jury. There is no

question but that the written psychological evaluation was not subject to cross-examination; and, further, the background information section of the written report states: "In 1982, he was charged with murder and was placed in prison with a twenty-five year sentence." (R. 1350). That is a rather remarkable event in a human being's life; and, for whatever reason, Dr. Mussenden never factors this prior homicide into the written psychological evaluation or testimonial presentation. The "State" would suggest that to overlook and fail to incorporate a prior homicide as a personality dynamic casts some cloud on the written report and testimony.

One does not know if Dr. Mussenden was aware that there was an eye-witness to the homicide; but, one does know that Dr. Mussenden has ignored the dynamic of a prior homicide in his personality assessment. There is no question but that the jury was influenced by Dr. Mussenden's testimony. Judge Graybill is not so impressed. This is <u>why</u> the Florida Legislature provides for judicial overrides of jury recommendations.

The testimony of Dr. Mussenden was a mirror-image of his written report. Cross-examination of the California conviction for homicide was limited because it was not elicited on direct examination. (R. 936-938). It was certainly to Appellant's benefit that the written psychological report was

not received into evidence. Why? Because had it been received into evidence, then Dr. Mussenden would have been called on to explain why the dynamics of a prior California homicide was overlooked and failed to be factored into the personality assessment of Appellant.

The prosecutor in closing makes a most cogent argument:

> The easiest way to look at those factors in mitigation and aggravation is to place them to -- a chalk board again, to look at them, to scrutinize those under the balance sheet approach, if we could, and I have to anticipate -- I won't get, as I did the last time, the opportunity to come up and speak to you again. I must anticipate what Mr. Palomino will suggest to you. He will put on, and the only factor in mitigation that he has, came from Doctor Gerald Mussenden, and I've known Doctor Mussenden for a long time, a psychologist. He comes in here and has run a battery of tests on the Defendant sometime upon his arrival from Folsom Prison in California. He's never seen him before, doesn't know his background, doesn't know his history, but comes to the conclusion that he's an intelligent person. Is that a factor in mitigation that you can consider? I assume that the import of that, is that this person can be rehabilitated. He's intelligent and productive. Well, we've seen no productivity of Oscar Torres-Arboledo in the State of Florida We've seen no productivity of Oscar Torres-Arboledo in the State of Florida.

> What we've seen is a trail of blood, of dispair and destruction and families who have had a loved one shot to death. Is that a factor in mitigation that you should consider? I tell you to reject that factor in mitigation, because if he has the intellectual ability, if he had the intellectual ability to do something with his life, why didn't he do it?
>
> Mr. Palomino will suggest to you, because of this one factor, to allow the State of Florida, allow Judge Graybill, who's sentence is in his discretion, to sentence him to life imprisonment for twenty-five years before he's eligible for parole. Eligible. He can be released in twenty-five years.

Under this claim, Appellant contends that the trial court erred in overriding the jury's recommendation of life because its override did not meet the standard of Tedder v. State, 322 So.2d 908 (Fla. 1975). The argument is without merit. An analysis of this Court's override decisions shows that there are four circumstances when this Court approves overrides. This Court approves overrides when the defense has made an improper emotional appeal to the jury so that the jury's recommendation appears to be based on emotion and not reason. See, Porter v. State, 429 So.2d 293 (Fla. 1983)(overriding jury recommendation of life predicated on "extremely vivid and lurid" account of electrocution). Overrides are approved when the trial court had access to information which the jury

did not. White v. State, 403 So.2d 331 (Fla. 1981)(override proper on basis judge had access to information about the defendant not presented to the jury). This Court approves overrides when the trial court has found at least one proper aggravating factor and no mitigating factors. Heiney v. State, 447 So.2d 210 (Fla. 1984)(override proper where no mitigating circumstances found and totality of circumstances suggests death, jury's recommendation of life not based on any valid mitigating factor discernible from the record). In Johnson v. State, 393 So.2d 1069 (Fla. 1980)(override approved where four valid aggravating factors appeared with no mitigating circumstances). This Court approves overrides when necessary to avoid disparate sentences between similarly situated defendants. See, Barclay v. State, 343 So.2d 1266 (Fla. 1977) cert. denied 439 U.S. 892 (1979).

In Echols v. State, 484 So.2d 568, 576 (Fla. 1986), Justice Shaw in writing for the majority, points out this Court's ". . . responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision.

Fla.R.App.P. 9.140(f); §§59.04 and 924.33, Fla. Stat. (1981); Cohen v. Mohawk, Inc., 137 So.2d 222 (Fla. 1962); Congregation Temple De Hirsch v. Aronson, 128 So.2d 585 (Fla. 1961); In Re Wingo's Guardianship, 57 So.2d 883 (Fla. 1952); Wallace v. State, 41 Fla. 547, 26 So. 713 (1899).

What mitigating factor did Judge Graybill reject? There were no statutory mitigating circumstances. (R. 1397); and, Judge Graybill rejected the one nonstatutory mitigating circumstance:

NONSTATUTORY MITIGATING CIRCUMSTANCES

> NONE, notwithstanding expert testimony to the effect Defendant is a very intelligent and rehabilitable person.

This nonstatutory mitigating circumstance was appropriate for rejection. The prosecutor suggested that this circumstance might well describe Theodore Bundy. (R. 928, 929). Clearly, is a circumstance that an individual is an intelligent, rehabilitable murderer an appropriate consideration? No. On parallel facts, this Court in Garcia v. State, 492 So.2d 360, 367 (Fla. 1986) rejected error not to find the statutory mitigating factor that Appellant was twenty years of age. See, §921.141(6)(g) Fla. Stat. (1981). This Court pointed out in Echols v. State, 484 So.2d 568 (Fla. 1985), that every murderer has an age. This Court concluded the fact that

a murderer is twenty years old, without more, is not significant. See, Lemon v. State, 456 So.2d 885 (Fla. 1984) cert. denied __U.S.__, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985).

Is not every human being intelligent; and, is not every human being potentially habilitable? What did Appellant establish that he ever accomplished for himself, his family, and society with his intelligence? Nothing. Without more, intelligence and habilitable potentiality is not significant; and, the trial court did not err in not finding it as mitigating.

At bar, the override is based on facts so clear and convincing that virtually no reasonable person could differ.

ISSUE X

IN SENTENCING OSCAR TORRES-ARBOLEDO ON THE CHARGE OF ATTEMPTED ROBBERY WITH A FIREARM, THE COURT BELOW ERRED IN USING A GUIDELINES SCORE-SHEET THAT ASSESSED POINTS FOR VICTIM INJURY, AND IN DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE WITHOUT FILING PROPER REASONS FOR DOING SO.

(As Stated by Appellant).

The sentencing guidelines cases are legion; and, the claims appear even in direct capital review.

In McPhaul v. State, __So.2d __(Fla. 2nd DCA Case Nos. 85-1183 and 85-1182, November 7, 1986)[11 FLW 2339], Judge Frank, on a sentencing guidelines appeal, points out that a capital felony is not to be scored:

> One reason relied upon by the court, however, is a valid basis for departure -- that the defendant also stood convicted of first degree murder, a capital felony that could not be scored. Smith v. State, 454 So.2d 90 (Fla. 2nd DCA 1984); see also Wright v. State, 491 So.2d 283 (Fla. 2nd DCA 1986) (subsequent unscored conviction may form proper basis for departure).

(Text of 11 FLW at 2339).

This case, unlike McPhaul, is not subject to remand. Why? Because the facts and circumstances of this sentence

convinces beyond a reasonable doubt that departure from the guidelines would have occurred even had impermissible reasons been considered. See, Albritton v. State, 476 So.2d 158 (Fla. 1985).

In Casteel v. State, 481 So.2d 72 (Fla. 1st DCA 1986), the First District certified the following question to this Court:

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED ON BOTH VALID AND INVALID REASONS FOR DEPARTURE, WHAT FACTORS SHOULD THE COURT WEIGH IN DETERMINING WHETHER IT IS CONVINCED BEYOND A REASONABLE DOUBT THAT THE ABSENCE OF THE INVALID REASON OR REASONS WOULD NOT HAVE AFFECTED THE TRIAL COURT'S EXERCISE OF ITS DISCRETION IN DEPARTING FROM THE GUIDELINES.

That question is presently pending before this Court as Casteel v. State, Fla. Case No. 68,260. In the case at bar, the judgment of guilt was established against Appellant beyond and to the exclusion of a reasonable doubt. That an individual is convicted on a capital felony is a valid reason for departure. (R. 1141). See, Smith v. State, 454 So.2d 90 (Fla. 2nd DCA 1984) where the Second District holds: "Capital felonies are not sentenced according to the guidelines. §921.001, Fla. Stat. (1983). Rule 3.988 does not provide a means of scoring a capital felony as an additional offense at conviction. The fact

that a capital felony cannot be considered in calculating the applicable sentencing range does not mean it cannot be considered by the court as a reason for departing from the guidelines." There is no question but that in this case, Judge Graybill would ever render a subsequent sentence which would differ from the one on appeal.

Appellant also complains that it was the Clerk and not Judge Graybill who franked the written reasons for departure. (R. 1141). Judge Graybill signed the sentencing order and dictated the reasons to the Clerk for incorporation on the guidelines scoresheet. (R. 1141). In fact, the Court Reporter places the reasons in quotation marks. (R. 1141). The "scoresheet" reflects this mandate verbatim. (R. 1388).

In Hayes v. State, 488 So.2d 77, 83 (Fla. 2nd DCA 1986) certiorari denied Hayes v. Florida, 107 S.Ct. 119 (1986), the Second District points out that an appellate court is not required to do a useless act. The sentencing for the attempted robbery is consecutive to Appellant's sentence of death by electrocution and California homicide. (R. 1140). The "State" would urge that this claim is an academic abstraction in light of the fact that this case is a direct capital review.

CONCLUSION

WHEREFORE, based on the foregoing reasons, arguments and authorities, the Appellee would urge this Honorable Court to render an opinion affirming the judgement and sentence of death in the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to ROBERT F. MOELLER, Assistant Public Defender, Hall of Justice Building, 455 North Broadway, P.O. Box 1640, Bartow, Florida 33830 on this 12th day of December, 1986.

Of Counsel for the Appellee