IN THE SUPREME COURT OF FLORIDA

ANGEL DIAZ,

Appellant

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 68,493

BRIEF OF APPELLANT

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INTRODUCTION

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

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

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SUMMARY OF ARGUMENT

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

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

STATEMENT OF THE FACTS

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. All death penalties are unconstitutional.

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The death sentence is disproportionate to the crime.

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

CERTIFICATE OF SERVICE

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

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