IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,493

ANGEL DIAZ,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

* *

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

* *

BRIEF OF APPELLEE

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INTRODUCTION

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

This appeal followed.

STATEMENT OF THE FACTS

I. Security Measures During Trial

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

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

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

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

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

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

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

II. Waiver of Counsel

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

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

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

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

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

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

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

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

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

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

III. Guilt Phase of Trial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Sentencing Phase of Trial

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

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

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

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

Agent Jose Pizzaro Andres of the Puerto Rican Police was the first state witness to testify. The defendant was arrested in November, 1977 for the first degree murder of Monsarrati Torres DiVega in Puerto Rico. (T. 1376-1377). At the time of the murder, the defendant resided in a drug treatment house which was part of the prison system in Puerto Rico, serving a sentence for armed robbery. (R. 1379-1380). DiVega was one of the directors at the treatment house. (R. 1381). Since DiVega filed a report which would have caused the defendant to be transferred back to a penal institution, the defendant stabbed a sleeping DiVega nineteen times with a knife. (R. 1381-1382). A certified copy of a second degree murder conviction was entered into evidence. (R. 280). The defendant received a sentence of ten to fifteen years for the murder. (R. 1383). He never completed his sentence, however,since he escaped on September 19, 1979. (R. 1383-1384). A certified copy of the defendant's robbery conviction was also entered into the record. (R. 1385). An escape warrant was also entered into evidence. (R. 282).

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

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

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

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

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

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

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

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

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

(R. 320-322).

Mitigating factors were not found.

POINTS INVOLVED ON APPEAL

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

I

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

II

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

III

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

IV

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

POINTS INVOLVED ON APPEAL CONTINUED

V

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

VI

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

VII

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

The defendant has therefore not demonstrated error on this point.

II

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

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

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

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

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

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

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

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

MR. YOUNG: Yeah, I think I would do that.

(R. 526-527).

With regard to Connell, the questioning was as follows:

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

MR. SIPPIO: Yes.

MR. SCOLA: Thank you, Ms. Connell.

MS. CONNELL: I feel the same way.

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

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

MR. SCOLA: Well, under our system.

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

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

MS. CONNELL: I guess it probably would.

(R. 528).

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

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

III

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

THE TRIAL COURT PROPERLY ALLOWED THE DEFENDANT TO REPRESENT HIMSELF.

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

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

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

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

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

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

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

Because the Supreme Court has held that the denial of the right to proceed pro se is not amenable to a harmless error analysis, McKaskle, supra, 456 U.S. 168, 177 n.8, the Eleventh Circuit Court of Appeals has held that the denial of a right to proceed pro se is inherently prejudicial regardless of the fairness of the trial at which a defendant is convicted. Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986). (The right was asserted before trial).

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

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

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

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

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

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

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

State is requesting the death penalty in this particular case.

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

THE DEFENDANT: Yes, ma'am.

(R. 810-811).

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

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

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

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

B. The defendant was competent to represent himself.

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

During trial, the defendant conferred with standby counsel many times. (R. 823, 824, 833, 841, 898, 931, 963, 1038, 1072, 1076, 1091, 1093, 1107, 1118, 1131, 1151). The record indicates that the defendant wrote out his cross-examination questions. (R. 1093). The defendant listened closely to the proceedings as is evidenced by his asking the prosecutor to speak slower, (R. 827, 957), and by his asking to have a diagram moved within his sight. (R. 833). He also made numerous, timely, proper objections. (R. 841, 851, 880, 882, 883, 934, 935, 937, 966, 1151, 1152). His cross-examination was clear and relevant seeking bias, motive, and testing memories. (R. 856, 885, 870, 1005). The defendant exhibited, a sound defense tactic of not commenting on the evidence during the initial part of closing argument, but rather waiting to get the last word in before the jury (R. 1245). Most importantly, during his closing argument, the defendant commented clearly on the evidence, the passage of time with regard to his identification by the witness Pardinas, Braun's bias and memory, courtroom identification by playing up the fact that he was the prisoner in chains, and asking the jury to note Braun's reactions when being questioned, etc. (R. 1280-1297).

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

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

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

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

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

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

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

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

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

V

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

A. All Death Penalties are Not Unconstitutional.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI

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

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

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

VII

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

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

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

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

CONCLUSION

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

Respectfully submitted

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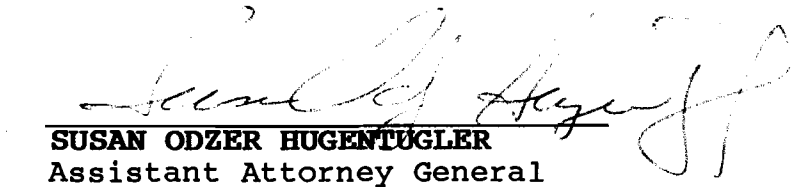

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CERTIFICATE OF SERVICE

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

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