IN THE SUPREME COURT OF FLORIDA

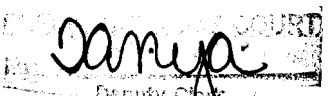
HECTOR FUENTE,

Appellant,

v.

THE STAE OF FLORIDA,

Appellee.



CASE NO. 69,196

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued):

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued):

TABLE OF CITATIONS (Continued:

TABLE OF CITATIONS (Continued):

PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE

Appellee accepts the Statement of the Case as presented by Appellant in his initial brief except where specifically pointed out in Argument

STATEMENT OF THE FACTS

This case is one of those few novel cases in which evidence to sustain the conviction is overwhelming.[1/] Why? Because there is an eye-witness to the murder of Enrique Alfonso.

Enrique Alfonso was murdered by Hector Fuente. (R. 272). The murder took place in 1979. (R. 272). It was not discovered by police until 1983. (R.415).

Hector Fuente's half-brother, Ralph Salerno (R. 356), entered into an agreement with Hector Fuente to kill Enrique Alfonso. (R. 269; 275). The basis Hector Fuente had for eliminating Enrique Alfonso was that he "talked too much and was flashy." (R. 272,707):

> Q. Mr. Salemo, with regard to the offer, $2,500 to $5,000, did Barbara Alfonso ever say that she wanted her husband out of the way by Christmas?
>
> A. Yes, sir, she did.
>
> Q. Did she ever say that she needed to do away with her husband because she was doing big drug deals with the people in Miami and they wouldn't deal with her because of her husband's big mouth?
>
> A. Yes, sir, she did.
>
> (R. 391, 392).

1/ The evidence in this case is sufficient to fulfill the mandate of §921.141(4), Florida Statutes. Additionally, the evidence is sufficient to survive a 28 USC §2254 attack. Why? Because a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. See, Jackson v. Virginia, 443 U.S. 307 (1979). Also, there is sufficient evidence for this Court to determine that Hector Fuente killed Enrique Alfonso, attempted to kill Enrique Alfonso, or intended that Enrique Alfonso's killing take place. See, Enmund v. Florida, 458 U.S. 782 (1982) and Cabana v. Bullock, __ U.S. __, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Also see, Hardwick v. Wainwright, 496 So.2d 796 (Fla. 1986), where this Court held that failure to argue sufficiency of the evidence does not establish incompetency of appellate counsel as ". . . this court independently reviews each conviction and sentence to ensure they are supported by sufficient evidence."

Enrique Alfonso and his wife, Barbara, were both involved in fraud, auto theft, boat theft, and, arson. (R. 268-269). Sally Fuente, Hector Fuente's wife (R. 286), was also involved in auto theft, boat theft, fraud, and, arson. (R. 268). Enrique's wife, Barbara, was Hector Fuente's cousin; and, Enrique and Barbara Alfonso managed the Peter Pan Motel for Hector Fuente. (R. 689-690).

As established, Ralph Salemo was engaged by Hector Fuente to kill Enrique Alfonso. Ralph Salemo, on the day of the murder, was summoned to Hector Fuente's residence. (R. 273). Hector Fuente was instructed to dig a hole [grave] three feet wide by approximately six feet long. (R. 273). The grave was to be as deep as he could get it. (R. 384). The location of the grave was on Howard Avenue [just south of Hillsborough Avenue]. (R. 273). After preparing the victim's grave, Ralph Salemo returned to Hector Fuente's residence. (R. 275). Hector Fuente then supplied Ralph Salemo with a .38 snub-nosed handgun and an ankle holster. (R. 275). Hector Fuente then directed Ralph Salemo to proceed to the Imperial Lounge. (R. 275). Ralph Salemo telephoned Hector Fuente on his arrival at the bar. (R. 275). Hector Fuente then instructed Ralph Salerno to wait at the bar and that he and Enrique Alfonso [the murder target] would pick him up. (R. 278). Hector Fuente informed Enrique Alfonso that the two of them were joining Ralph Salemo in a silver 1978 Toyota with black interior. (R. 277-278). Ralph Salemo got in the back seat on the passenger's side. (R. 278). The "three" *then* drove to Morris Bridge Road where Ralph Salemo attempted to murder

Enrique Alfonso. (R. 278-279). Ralph Salerno pulled out his .38 caliber special and aimed it at the back of Enrique Alfonso's seat pulling the trigger three times . . . the gun misfired. (R. 279). The victim turned and asked Ralph Salemo what was the problem; and, Ralph Salemo replied that he was checking out his *gun*. (R. 279). At that point, the victim [Enrique Alfonso] stated that he would go to the Peter Pan Motel to pick up his .38; but, Hector Fuente prevailed saying it was better to return to the Fuente residence to obtain his .357 Magnum. (R. 279). Hector Fuente went into his house [which was 2½ miles from the gravesitel and returned to the car with that firearm. (R. 279-280). The three then drove to the parking lot of an Albertson's grocery which was located at Hillsborough and Memorial. (R. 280). Hector Fuente excused himself to make a telephone call about the bogus ***drug*** deal. (R. 280). The telephone call was to his spouse -- Sally Fuente. (R. 281). He returned to the car and the three proceeded down Hillsborough Avenue, turning right on Howard. (R. 281). Then, from the lips of the eye-witness, the premeditated murder of Enrique Alfonso was performed:

> A. We proceeded down Hillsborough Avenue, tuned right on Howard, pulled into a drive which was a vacant lot. Mr. Fuente said that he needed to urinate, opened the door to his car, picking up the .357 which was between the seat and the door, went back around the rear of the car, did what he had to do, came back toward the door of the car which was left open, pointed the gun in the car like so, hit the hammer, pulled the trigger. Shortly thereafter, he hit the hammer again and pulled the trigger a second time.

Q. Who was it pointed at?

A. Enrique Alfonso.

Q. And what happened?

A. The first shot went off. I heard a clang as if it had hit metal somewhere. After the second shot, Mr. Fuente got back into the car, at which point Mr. Alfonso's left hand started to rise.

Q. Well, before that, did the victim say anything?

A. Yes, he did. He said, "Oh, *my* God."

(R. 281).

After Enrique Alfonso was shot, he exclaimed: "Oh, *my* God!" (R. 282), Enrique Alfonso's arm rose -- scaring Hector Fuente -- who directed Ralph Salerno to grab it so it would not touch him. (R. 282). Ralph Salerno then felt the victim's arm go completely limp, and, he reposed it. (R. 282). Later, Hector Fuente bragged to Enrique Alfonso's wife about her husband's last living moments:

Q. Did he say anything about the victim during the shooting?

A. Yes. He bragged on the fact that Enrique's last words were, "Dios Mio."

Q. What is that?

A. "Oh, *my* God."

(R. 696).

Hector Fuente and Ralph Salemo then drove to the gravesite. (R. *282-283).* Ralph Salerno dragged the corpse to the grave and, at Hector Fuente's direction, removed all of Enrique Alfonso's personal belongings. (R. *283).* Hector Fuente left the site directing Ralph Salemo to bury Enrique Alfonso. (R. *284).* Twenty minutes later, Hector Fuente returned to the gravesite to pick up Ralph Salemo. (R. *284).*

Hector Fuente returned to the gravesite in a black Cadillac. (R. *284).* The next time that Ralph Salerno saw the Toyota, it was parked in front of the Peter Pan Wtel. (R. *284).* Subsequently, Hector Fuente informed Ralph Salemo [after reviewing the personal property removed from the victim's body] that he had overlooked and failed to remove the Peter Pan Wtel key from the body. (R. *284).* The motel key was identified by Ralph Salemo and received into evidence. (R. *285, 778*; 874-875). Keys were found on the body during autopsy. (R. *847-875).* After burying Enrique Alfonso, Hector Fuente directed Ralph Salemo to return to the Imperial Lounge to solidify his alibi. (R. *286; 398-400).* Hector Fuente did have Ralph Salerno drive the Toyota to the Liberty Lounge where the car was incinerated. (R. *288).* The burned Toyota remained at the Liberty Lounge [a local "strip joint"] for approximately thirty days after being burned. (R. *289).*

Hector Fuente confessed that he had murdered Enrique Alfonso to his then-wife, Sally Fuente in the presence of Ralph Salerno. (R. *633-634).*

Ralph Salemo testified as to Hector Fuente's reaction to killing Enrique Alfonso:

> Q. Did he make any other, specific comments regarding his shooting of the victim?
>
> A. Yes, sir. He specifically said that he was glad that he had done it and not I because he wanted to know what it felt like.
>
> (R. 288).

Sally Fuente Resine [Hector Fuente's then spouse] testified as to Hector Fuente's reaction to killing Enrique Alfonso:

> Q. What did the defendant say in regards to the shooting in relation to the misfire, in relation to the shooting in this conversation?
>
> A. Hector said, "I'm glad that I killed him because I wanted to see what it felt like."
>
> (R. *646).*

Hector Fuente telephonically confessed the murder to Enrique Alfonso's widow, Barbara Alfonso. (R. *694).* Hector Fuente intimidated Barbara Alfonso into silence, telling her that he would kill his *own* mother if she got in the way. (R. *696).* Barbara Alfonso was subjected to Hector Fuente confessing her husband's murder on a daily basis. (R. 701-702). She was told to be strong in case she was questioned about Enrique Alfonso's disappearance. (R. 701-702).

SUMMARY OF THE ARGUMENT

Issue I:

Hector Fuente alleges that he was deprived of a codified right to speedy trial due to the tardiness of the extradiction. What Hector Fuente overlooks is that Florida could not initiate prosecution until the Federal Government surrendered his person. Because of health reasons, Hector Fuente had been transferred to a correctional center located in California. Then, when it was time to be turned over to Florida, Hector Fuente filed a lawsuit in federal court. This claim has no merit whatsoever.

Issue II:

There was no perjured testimony used in Hector Fuente's trial. If three individuals see a traffic accident, there will be three different accounts. All testimony presented by the prosecution were slight variations on the same theme; and, that theme was that Hector Fuente killed Enrique Alfonso in cold blood -- and that Hector Fuente wanted to know what it felt like to kill someone. Like Loeb & Leopold, his wish has come true.

Issue 111:

The jury recommendation for life imprisonment was split evenly; and, during closing argument, the jury was apprised by defense counsel of the consequences of a split vote. (R. 1172-1173). On the facts of *this* case, Judge Coe has made an appropriate application of the Tedder standard in his proportionality review. See, Statement of the Facts presented *on* behalf of the People of Florida.

Issue IV:

The jury instructions were supported by the evidence. When Hector Fuente began this enterprise, he was a principal/aider and abettor. After the homicide, he continued in this role by establishing an alibi for Ralph Salemo at the Imperial Lounge and disposition of the Toyota. There is no error.

Issue V:

This claim is rather an academic abstraction. Never did Barbara Jean Wright appear at trial so that she might be asked questions to invoke her Fifth Amendment rights. However, the record is clear that the prosecution might have charged her with a criminal offense depending on her testimony. There is no prejudice in not calling Ms. Wright as a witness as her testimony focuses on actions subsequent to Hector Fuente's murder of Enrique Alfonso.

Issue VI:

The predicate acts of kidnapping and extortion under 18 USC §1962(c) fulfill the aggravating circumstance of §921.141(5)(b), Florida Statutes (1985). *One* motive for kidnapping is to terrorize by blackmail; and, in extortion, there is a threat for a future harm. Judge Coe has not erred as a matter of law in making a determination of this aggravating circumstance.

Issue VII:

Carlos Cabrera, the 19-year-old boyfriend of Hector Fuente's daughter, testified as to riding past the burial site with Hector Fuente; he testified as to Hector Fuente's declarations when driving past the burial site and news broadcast. It was only after defense counsel attacked his testimony by a prior deposition in which the youth testified that he could not recall the events, that Judge Coe allowed the prosecution to rehabilitate. There is an exception to the rule prohibiting a witness' prior consistent statement being used to corroborate his trial testimony; and, that exception focuses on when the testimony is assailed as being a recent fabrication. The exceptionwas established in the court below; and, Judge Coe has not erred as a matter of law in allowing the rehabilitative testimony.

Issue VIII:

Vickie Lindauer, D.D.S. [dentist] is not an unqualified witness to testify as to how x-rays are used as both a case history and treatment record. For example, had Maria Prado, D.D.S. expired and Enrique Alfonso picked up his dental records, would not the new dentist, say for example, Dr. Lindauer, be able to rely on the "marked" x-ray to designate the molar for extraction. Such is the nature of the uniformity of practice. In the event there is error [and there is none], it is at most harmless in light

of the overwhelming identification testimony of Ralph Salemo.

Issue IX:

There is no prosecutorial misconduct which brought about the mistrial; and, as such, the "Double Jeopardy" attack collapses. The record at bar does not have a ruling from the lower court on prosecutorial misconduct. If this attack were meritorious, then it was necessary for Hector Fuente to have set an evidentiary hearing on his Motion for this Court to review. On the face of the Motion filed, Judge Coe has not erred as a matter of law in denying relief.

Issue X:

Most simply, this record has overwhelming evidence that Enrique Alfonso was murdered because he talked too much. The conclusion is inescapable that the direct consequence of talking too much was that Hector Fuente [and his colleagues] might avoid prosecution for their past and continuing criminal activities. In any event, Judge Coe has made of a finding of three (3) independent aggravating circumstances; and, most simply found "[a]ny one of the three aggravating circumstances standing alone is sufficient to justify the death penalty and the override of the jury recommendation for mercy."

ARGUMENT

ISSUE I

(A)

WHETHER APPELLANT WAS ENTITLED TO DISCHARGE FOR VIOLATION OF THE 'SPEEDY TRIAL" PROVISION OF CHAPTER 941.45 et seq. FLA. STAT.

(B)

WHETHER APPELLANT WAS DENIED A HEARING UPON HIS MOTION FOR DISCHARGE.

(As Stated by Appellant).

For purposes of brevity and clarity, the "State" will argue the two prongs of Issue I under one section in this brief.

Extradition is not a matter of Constitutional right; but, rather emerges as a result of agreement between governments. At bar, Florida sought to extradite Hector Fuente from the govemment of the United States of America.

It would appear that the Sheriff of Hillsborough County, Florida furnished Hector Fuente of the pending first degree murder charges. (R. 2014). Hector Fuente received such "notice" on June 17, 1985. (R. 2015). On July 2, 1986, Hector Fuente directed the warden of the Memphis, Tennessee Federal Correctional Institution to initiate disposition of pending detainers and informations. (R. 2016). Additionally, pursuant to the Freedom of Information Act [5 USC §552] and Privacy Act [5 USC §5A], Appellant sought to have the federal government furnish him with copies of all information

the agency had on him in reference to the Florida detainer. (R. 2385-2396).

The Pbtion to Dismiss alleged that more than 180 days had elapsed since the filing of the documents; and, that as a consequence, he was entitled to discharge. The Pbtion was filed on March 3, 1986 (R. 2013); and, the Motion was denied on its face March 10, 1986. (R. 2012).

Initially, Appellant urges that the trial court erred in denying Hector Fuente a hearing on the motion. Prior to filing that Motion, Hector Fuente appeared before Judge Coe [pro se without counsel] and waived reading of the indictment and entered a plea of not guilty to the charge. (R. 1536). The basis for appearing pro se was that a fee arrangement had not been negotiated with Mr. Unterberger. (R. 1522). The prosecutor asserted that if Hector Fuente continued in this manner, there would be awaiver of speedy trial by operation of law. (R. 1523). See, Blackstock v. Newman, 461 So.2d 1021 (Fla. 3rd DCA 1985).

On March 7, 1986, Mr. Unterberger brings the extradiction demand to the trial court's attention. (R. 1598-1600). The prosecutor responds that Florida could not obtain the person of Hector Fuente. Why? Because the United States Government replied that Hector Fuente's poor health made it impossible to release him. (R. 1601). The prosecutor informed the trial court:

> MR. ATKINSON: If it please the Court, Your Honor, Mr. Fuente did make the request as indicated by counsel and, in fact, the documents necessary to return him to the State of Florida were prepared and signed and transmitted to the governor's office as required

> by law, and they include documents signed by Your Honor so that he could properly be returned to the State of Florida.
>
> By August, 1985, well within the time period allowed, the State of Florida's representatives were prepared to take custody of Mr. Fuente and bring him back.
>
> Unfortunately, the federal government would not release him because his physical condition was such that in their opinion, and in the opinion of the doctors where he was housed in California, where they had moved him from the Federal Correctional Institute in Tennessee, he could not and would not be released from custody until he was physically capable of safely traveling.
>
> (R. 1605).

The prosecutor informed the Court that the Federal authorities had transferred Hector Fuente because of internal beleding. (R. 1606). In essence, because of Hector Fuente's medical condition, he was not subject to extradiction. The trial court found this reason to be of little impact. (R. 1771). The trial court did pose two issues for resolution of this claim:

> THE COURT: The reason I say that is because I don't think it comes down to that, and correct me if I am wrong. The issue is: The federal government doesn't deliver him. Is that an excuse? Second, he arrives within the hundred eighty and doesn't say anything, and you don't say anything. Is that an excuse? I don't think all these precise facts really tell us, add anything to that one way or the other.
>
> (R. 1772, 1773).

The trial court granted an evidentiary hearing on the matter. (R. 1773).

Hector Fuente even resisted his return to Florida by filing a Motion for Temporary Restraining Order in the United States District Court. (R. 2397-2399). The Certificate of Service states that the document was deposited in the United States mail on December 2, 1985. (R. 2399). In federal practice, Hector Fuente has filed upon deposit in the United States mail and received by the Clerk. See, Rule 5(e), Federal Rules of Civil Procedure. The United States District Court denied relief. (R. 2411-2413).

The record proper contains an 18 USC 04082 transfer order which removed Hector Fuente fran Memphis, Tennessee Federal Correctional Institute to the Lompoc, California United States Prison. (R. 2426). For what reason was Hector Fuente transferred? Medical treatment is the basis. (R. 2426). The medical history of Hector Fuente speaks for itself. (R. 2427). This was a man suffering fran chronic coronary dysfunction. (R. 2426-2427). Additionally, Hector Fuente suffered from epilepsy, memory loss, and unconsciousness as of August 1, 1985. (R. 2427-2428).

Interestingly, on November 5, 1985, Hector Fuente represents to the Tampa prosecutor that Simpson Unterberger'is his counsel (R. 2435-2436; 2437-2438). Never did Mr. Unterberger attack the extradiction as being tardy. On November 25, 1985, the federal government informed the Florida officials that Hector Fuente would be released to them after December 4, 1985. (R. 2480). Peggy Kirman (an administrative systems manager who was custodian of the federal records) was deposed and established the Odessey of Hector Fuente through the federal system. (R. 2441-2485).

There is no question but upon this record, it was established why the United States of America declined to release Hector Fuente until after December *4, 1985.* (R. *2480).*

There is no question but that Judge Coe at the evidentiary hearing noted that he was taking judicial notice of official documents. (R. *1786).* This is proper pursuant to *990.204,* Florida Statues *(1985).* Had Mr. Untenberger excepted to the documents noticed, he had a full and fair opportunity to challenge their authenticity pursuant to §90.204(3), Florida Statutes *(1985).* Moreover, it was Mr. Unterberger who, in California, urged that the copies of the documents be substituted for the originals. (R. *2446).* Thus, any argument attacking authenticity collapses.

The trial court did not err as amatter of law in denying the Motion for Discharge. (R. *1795).* At the hearing, Mr. Unterberger was not prohibited from calling Hector Fuente as a witness to testify as to his good health; nor, was Mr. Unterberger prohibited from calling Dr. Mueller to challenge his medical records. To not utilize a pre-trial opportunity to except such findings is either a failure of proof and/or by-pass. See generally, Murch v. Mottram, *409* U.S. *194 (1972).* However, Hector Fuente was not prejudiced by this by-pass. why? Because even had proof been offered and/or original documentation obtained, the result would have been the same. The discharge would have been denied as Hector Fuente was a medically disabled individual. Clearly, Florida could not commence prosecution until the federal authorities released Hector Fuente; and, his release was not until after December *4, 1985.* (R. *2480).* Had Hector Fuente felt his rights

as a third party beneficiary to the compact between the federal government and Florida had been breached, then he should have sought extraordinary relief against the United States by way of a Mandamus. Hector Fuente cannot have it both ways. Under the facts and circumstances of Hector Fuente's transfer, error as a matter of law has not been demonstrated.

ISSUE II

WHETHER APPELLANT WAS ENTITLED TO DISMISSAL FOR APPELLEE'S USE OF PERJURED TESTIMONY?

(As Stated by Appellant).

At bar, the State of Florida in no way whatsoever solicited false testimony from Ralph Salerno, Barbara Alfonso, and/or Barbara Fuente Resina. What Appellant overlooks and fails to consider is that prior to bringing criminal charges in state court, a racketeering enterprise had been the subject of federal investigation. It was small inconsistencies between those reports and depositions and trial testimony upon which Appellant's complaint is based. Clearly, Appellant utilized his right to cross-examination. See, §90.612(2), Florida Statutes *(1985).* &. Unterberger was relentless in his interrogation of these witnesses.

The question is whether alleged false evidence went uncorrected? To be frank, what Hector Fuente now asks this Court to do is reweigh credibility findings of Judge Coe (R. *751).*

In State v. Murray, *443* So.2d *955* (Fla. 1984), Justice Shaw in writing for the Court instructs: 'When there is overzealousness or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or in appropriate cases, referring the matter to the Florida Bar for disciplinary investigation." Judge Coe was not so struck with Mr. Unterberger's veiled suggestion of the prosecution establishing

its case in chief by means of perjured testimony. Thus, the "State" presumes that now Mr. Unterberger does not abaondon his allegations in prosecution of this claim. Does Mr. Unterberger request this Court to refer the matter to the Florida Bar for an investigation of the prosecution's conduct?

This was a rather simple case to prosecute and defend. A reading of the record establishes that defense counsel was most artful in his cross-examination of the witnesses as to details of their testimony. However, in light of the overwhelming amount of evidence in this case [if there is error -- and there is not] it is at most harmless. This was the resolution of Murray; and, this must be the conclusion reached at bar.

ISSUE III

WHETHER REASONABLE PEOPLE COULD HAVE DIFFERED OVER WHETHER LIFE IMPRISONMENT WAS AN APPROPRIATE SENTENCE.

(As Stated by Appellant)

The most difficult question to come before this Court is a judicial override of a jury recommendation of life imprisonment. The facts of this case as established by the testimony of Ralph Salerno points to premeditated murder. Never has such an intent to kill been established; and, never has such a ratification of that intent to kill been so widely published. (R. 288; 646).

Fuente's argument is that Judge Coe's overriding of the jury's life recommendation is contrary to the dictates of Tedder v. State, 322 So.2d 908 (Fla. 1975). In Tedder, this Court held that a jury's recommendation of life should be given great weight and that in order to sustain a sentence of death, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." This Court in Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978) sustained the trial court's override of a jury recommendation. The ultimate decision as to whether the death penalty should be imposed rests with the trial court.

Thus, in this Court's analysis of the claim, the "State" would argue that the totality of the circumstances contain facts suggesting the death sentence is appropriate. These facts are so clear and convincing that no reasonable person could differ. There has been no misapplication

of the Tedder standard by Judge Coe.

An analysis of this Court's override decisions shows that there are four circumstances when this Court approves overrides. This Court approves overrides when the defense has made an improper emotional appeal to the jury so that the jury's recommendation appears to be based on emotion and not reason. See, Porter v. State, 429 So.2d 293 (Fla. 1983)(overriding jury recommendation of life predicated on "extremely vivid and lurid" account of electrocution). Overrides are approved when the trial court had access to information which the jury did not. White v. State, 403 So.2d 331 (Fla. 1981)(override proper on basis judge had access to information about the defendant not presented to the jury). This Court approves overrides when the trial court has found at least one proper aggravating factor and no mitigating factors. Heiney v. State, 447 So.2d 210 (Fla. 1984)(override proper where no mitigating circumstances found and totality of circumstances suggests death, jury's recommendation of life not based on any valid mitigating factor discernible from the record). In Johnson v. State, 393 So.2d 1069 (Fla. 1980)(override approved where four valid aggravating factors appeared with no mitigating circumstances). This Court approves overrides when necessary to avoid disparate sentences between similarly situated defendants. See, Barclay v. State, 343 So.2d 1266 (Fla. 1977) cert. denied 439 U.S. 892 (1979).

In Echols v. State, 484 So.2d 568, 576 (Fla. 1986), Justice Shaw in writing for the majority, points out this Court's ". . . responsibility

to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision. Fla. R. App. P. 9.140(f); §§59.04 and 924.33, Fla. Stat. (1981); Cohenv. Mohawk, Inc., 137 So.2d 222 (Fla. 1962); Congregation Temple De Hirsch v. Aronson, 128 So.2d 585 (Fla. 1961); In Re Wingo's Guardianship, 57 So.2d 883 (Fla. 1952); Wallace v. State, 41 Fla. 547, 26 So.2d 713 (1899).

Attached to this brief as Appendix is a copy of Judge Coe's rendition of sentencing. Judge Coe found one mitigating factor; and, three aggravating factors. (R. 2175). Specifically, Judge Coe ruled:

> THEREFORE, the Court finds that three aggravating circumstances exist and that one mitigating circumstance exists. Any one of the three aggravating circumstances standing alone is sufficient to justify the death penalty and the override of the jury recommendation for mercy.
>
> (R. 2175).

Judge Coe found:

a). The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

b). The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

c). The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justiication;

d) . . . the defendant did, approximately six months after the commission of this murder, save the life of a woman unknown to him, who was drowning, risking his *own* life in the process, and finds this a mitigating circumstance.

These are the findings of Jue Coe. There is no Lockett v. Ohio, 483 U.S. 586 (1978) claim. Fuente was not restricted in the presentation of mitigating evidence and/or non-statutory mitigating evidence. As an **aside,** in federal review of denials of 28 USC §2254 actions, the federal habeas corpus court will not re-evaluate the weight accorded to particular aggravating and mitigating factors. This determination is left to state courts, provided the death penalty statute and sentencing hearing meet relevant constitutional requirements. See, Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Judge Coe in his fact-finding **has lawfully** and constitutionally detennined the existence of one mitigating circumstance. In his override of the jury recommendation of life imprisonment, Judge Coe has correctly applied the Tedder standard. What record support is there for this constitutional conclusion? The support is found in the factual basis Judge Coe sets forth for each individual finding. To be frank, after a complete review of the facts of this crime, the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.

Hector Fuentes, in essence, advocates three reasons as to why the trial court should not have overriden the jury recommendation.[1/] The first two are that Ralph Salerno and Barbara Alfonso received immunity from prosecution; and, the third is that it maybe unknown as to whether Salemo or Fuente was the triggerman. As to the first *two*, a grant of immunity does not support a non-statutory mitigating circumstance of a jury pardon of death. As to the third, the evidence is overwhelming from the testimony of Ralph Salerno that Hector Fuente murdered Enrique Alfonso. Although it was not proper to comment on Hector Fuente's failure to testify at trial, it is now. In Russell v. State, 269 So.2d 437, 439 (Fla. 2nd DCA 1972), the appellate court noted: ". . . and finally, he did not even take the stand to deny it. Such voluntary decision could not, of course, be commented upon at the trial, but it can be now -- and we do it."

1/ The "State" would pause to remind this Court that the jury recommendation for life imprisonment was not unanimous. Rather, the recommendation was split six (6) votes to six (6) votes. (R. 1179).

ISSUE IV

WHETHER THE JURY INSTRUCTION ON PRINCIPAL/ AIDERS AND ABETTORS WAS SUPPORTED BY THE EVIDENCE?

(As Stated by Appellant).

At the charge conference on jury instruction, Mr. Unterberger did not object to the standard jury instructions which includes aiders and abettors establishing the crime of premeditated murder in the first degree. (R. 896-906). Prior to Judge Coe giving the jury instructions, Mr. Unterberger did object to the instructions. (R. 922-923).

> MR. UNTERBERGER: Number 2, I want to renew my request that the Court not give the instruction on principals. I have further reviewed that instruction in light of certain case law, and that instruction is really, although they call it principals, it deals solely with the aider and abettor concept.
>
> The law is the instruction should only be given when there is something in the evidence to support the giving of the instruction. In this case, the State's position has been that Mr. Fuente was the actual perpetrator, to-wit: the shooter. It's never been alleged and the State has never taken the position, nor has it attempted to present any evidence in support of the position that Mr. Fuente was merely a helper, that is, someone who aided, abetted, or assisted.
>
> Accordingly, to give the State the opportunity to perhaps argue that Mr. Fuente is not the shooter but merely assisted, aided or helped in the shooting, I would take the position it's unsupported by the evidence. Therefore, I renew that request.

> THE COURT: I understand part of your theory is perhaps Salerno did it and so what. If he was driving and he was aiding and abetting, he is just as guilty. I will deny your request. I am going to give aiders and abettors.
>
> (R. 922, 923).

Judge Coe is correct. The facts of this case reflect that Hector Fuente began this murder as chief planner and driver. This is an aider and abettor. (R. 923). He continued to aid and abet Ralph Salerno [the undicted co-principal] through, to, and including the moment when Enrique Alfonso's corpse was exhumed.

The following jury instruction was given:

> Now, if two or more persons aid, abet, counsel, hire, or otherwise procure the commission of a crime, and the defendant is one of them, the defendant must be treated as if he had done all of the things the other person or persons did if the defendant:
>
> 1. Knew what was going to happen;
>
> 2. Intended to participate actively or by sharing in an expected benefit; and
>
> 3. Actually did something other than mere presence by which he intended to help commit the crime.
>
> "Help" means to aid, plan or assist. To be a principal, the defendant does not have to be present when the crime is committed.
>
> (R. 1024, 1025).

This instruction is the standard jury instruction on principals. See, Florida Standard Jury Instructions in Criminal Cases, p. 32a (1981 Edition) -- Instruction 3.01. Under 9777.01, Florida Statutes (19851, persons who aid, abet, counsel, hire, or otherwise procure a crime to be committed may be chasrged as principals in the first degree, regardless of whether they were actually or constructively present at the commission of the crime. See, State v. Lowery, 419 So.2d 621 (Fla. 1982) and Weeks v. State, 492 So.2d 719, 720 (Fla. 1st DCA 1986).

The evidence was more than sufficient to sustain this instruction; and, Judge Coe has followed the law in giving this instruction.

ISSUE V

WHETHER A WITNESS CAN ASSERT THE SELF-INCRIMINATION PRIVILEGE TO PROSECUTE POSSIBLE PERJURY?

(As Stated by Appellant).

At bar, Mr. Untenberger took stong exception to the fact that the prosecution declined to call Barbara Jean Wright as awitness. His exception was fully explored during closing argument before Judge Coe at several bench conferences. (R. 1970-983).

Before trial, Mr. Untenberger filed a Motion for a determination as to whether Barbara Jean Wright had standing to assert her Fifth Amendment Right at trial as a bar to testifying. (R. 2096-2097). Attached to the Motion was a transcript of her deposition testimony. (R. 2098-2157). A hearing was held before Judge Coe.

At the hearing, Barbara Jean Wrightwas represented by privately retained counsel, Robert Foster, Esquire. Present at the hearing was Joe Episcopo who informed the Court that there was a possibility that Ms. Wright might well be charged with a criminal offense subsequent to her testimony. (R. 1845-1846). The prosecution then reminded Mr. Unterberger that the "State" had not granted Ralph Salerno immunity. (R. 1849). What the hearing established is that any testimony that Barbara Jean Wright might give did not focus on the murder of Enrique Alfonso. All Ms. Wright would be testifying to was her actions, after the fact, of Enrique Alfonso's

murder, in washing and/or cleaning the Toyota with Barbara Alfonso. (R. *1870).* Judge Coe reasoned:

> THE COURT: I think she is entitled to assert her Fifth Amendment right. Short of you showing me a case that she has waived the right to assert it by going to the deposition, it seems to me like she *can* assert her Fifth Amendment right against being charged with being an accessory after the fact.
>
> I agree totally with you that she can't duck under the immunity on these other questions. It's the question of accessory after the fact that she is facing.
>
> (R. *1877, 1878).*

The prosecution was quite candid in disclosing that it was not going to call Barbara Jean Wright as awitness. (R. *1857).* However, could not Hector Fuente use the deposition of Ms. Wright? See, §90.804(2)(a), Florida Statues *(1985).* The Fifth Amendment right of Ms. Wright was a personal right she sought to protect; and, protect it she did by retaining Mr. Foster. However, did she waive her Fifth Amendment privilege in her deposition? The traditional standards for waiver are established in Johnson v. Zerbst, *304* U.S. *458, 464 (1938):*

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

The Fifth Amendment is a personal right; and, it is a right which may be asserted at any time. Otherwise, why would Miranda warnings carry the assurance that questioning will cease at anytime the accused directs that it cease. Hector Fuente chose to litigate this question prior to his trial by a Motion. (R. 2096-2097). However, this whole claim may well be an academic abstraction. Why? Because privilege cannot be claimed in advance of questions actually asked. From Ms. Wright's deposition, it is clear that many questions asked of her would be answered. In Apfel v. State, 429 So.2d 85, 86 (Fla. 5th DCA 1983), Judge Dauksch writes that the defense is precluded from calling awitness to the stand for the purpose of invoking the privilege in front of the jury. See, Faver v. State, 393 So.2d 49 (Fla. 4th DCA 1981).

Hector Fuente was never denied his right to compulsory process. Judge Coe never prohibited Hector Fuente from calling Barbara Jean Wright to testify in front of the jury as to questions not incriminating. It was, therefore, necessary for Ms. Wright to appear before Judge Coe with Mr. Foster so that questions might be propounded by Mr. Unterberger; and, objections made by Mr. Foster; and, ruling made by Judge Coe. (R. 1867). Then this case would be in a posture where this Court might review questions which Barbara Jean Wright asserts her privilege not to answer. Thus, the "State" would assert that the claim now raised is mot. All of this could have been accomplished at the hearing on Hector Fuente's motion. Even assuming the claim is not mot, the questions raised were not material ones. Thus, in no way was Hector Fuente prejudiced by the failure to call Barbara Jean Wright as a witness. A reading of her deposition gives no defense

or excuse to the homicide of Enrique Alfonso.

The prosecution disclosed Barbara Jean Wright on its witness list; however, it was Hector Fuente who deposed her. The "State" cannot be forced to call this woman as a witness because if her compelled testimony would lead to evidence that she committed another crime, she could not be prosecuted for that crime unless the prosecution could establish that evidence came frum an independent source. See, State ex rel. Hough v. Popper, 287 So.2d 282 (Fla. 1973) and State v. McSwain, 440 So.2d 502 (Fla. 2nd DCA 1983). To the extent that Hector Fuente argues prosecutorial misconduct in failing to call Barbara Jean Wright or granting her immunity, that argument collapses. Why? Because pursuant to the authority of State v. Montgomery, 467 So.2d 387 (Fla. 1985), Hector Fuente carried the burden of making a substantial evidentiary showing of prosecutorial misconduct. On that score, this record proper establishes a failure of proof on the part of Mr. Fuente. There is no error in Judge Coe declining to grant immunity from the bench. There has been no due process violation.

ISSUE VI

WHETHER APPELLANT'S CONVICTION UNDER 18 USC §1962(c) CONSTITUTED AN AGGRAVATING CIRCUMSTANCE UNDER §921.141(5)(b), Florida Statutes (1985)?

Prior to trial, the prosecution noticed Hector Fuente that it intended to offer evidence of other criminal activities. (R. 1981-1986). The notice contains sufficient allegations that Hector Fuente knew his past criminal history would be used as an aggravating circumstance. The record proper for Phase II of Hector Fuente's trial contains a federal indictment (R. 2271-2279); and, plea agreement. (R. 2281-2285). During the penalty phase, the plea agreement was not relied upon as it was agreed that Larry Hart (former Assistant United States Attorney) would establish the offense. (R. 1075-1076). Larry Hart did testify; and, he responded to the trial court's inquiry:

BY THE COURT:

Q. Did the defendant plead?

A. Yes, he did.

Q. To what?

A. He entered a plea to a count of racketeering.

Q. And did it have predicate acts?

A. Yes, it did.

Q. Two of the predicate acts were what?

A. Extortion and kidnapping were two of the predicate acts.

(R. 1108, 1109).

In United States v. Elliott, et al, 571 F.2d 880, 899 (5th Cir. 1978), reh. den. 575 F.2d 300, cert. denied 439 U.S. 953 (1978), *six* defendants were convicted of RICO before the United States District Court for the Middle District of Georgia. There, Judge Simpson noted that in order to fall within the provisions of 18 USC §1962(c), the two or more predicate crimes must be related to the affairs of the enterprise, but need not otherwise be related to *each* other. It is established in this record proper that the two predicate crimes of extortion and kidnapping. (R. 1109).

As to kidnapping, it was a crime at common law punished by life imprisonment. The Federal Government has promulgated 18 USC §1201 which makes kidnapping a crime punishable by life imprisonment; and, where there is no statutory provision to the contrary, the common law of England with respect to crimes is still in effect in Florida. See, 5775.01, Florida Statutes (1985). One motive for kidnapping is to terrorize by blackmail. In extortion, there is a threat to inflict a future harm. Hector Fuente threatened Manuel Capaze with injury if he appeared as a witness in a criminal trial in violation of §787.01(4), Florida Statutes which is an act of racketeering as defined in 18 USC §1961(1)(A). (R. 2276). Hector Fuente did also kidnap Manuel Capaz. (R. 2276).

It cannot be said that as amatter of law, Judge Coe has erred in this determination of aggravation:

B. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

FACT:

The evidence in the record demonstrates that the defendant plead guilty on January 19, 1984, for the federal offense of Racketeering, two predicate acts included in that plea were Kidnapping and Extortion, felonies involving the use or threat of violence to the person.

CONCLUSION:

The defendant has, beyond and to the exclusion of a reasonable doubt been previously convicted of a felony involving the use or threat of violence to the person.

A federal habeas corpus court will not re-evaluate the weight accorded to particular aggravating and mitigating factors. See, Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). On this direct review, Judge Coe has applied the correct standard in his proportionality review.

ISSUE VII

WHETHER, WITHOUT AN INFERENCE OF IMPROPER INFLUENCE, MOTIVE OR RECENT FABRICATION, A WITNESS CAN BE REHABILITATED BY PRIOR CONSISTENT STATEMENT.

Carlos Cabrera, a 19-year old youth, who had just been released from the Tampa Community Correctional Center for violation of his probation and strong armed robbery (R. 597). At the time Mr. Cabrera testified, he had been incarcerated two and one-half years. (R. 598). Carlos Cabrera was the boyfriend of Hector Fuente's daughter. (R. 598). The youth testified that in May, 1983, he was riding with Hector Fuente when they passed an area where the mobile "Crime Unit" was digging with a bulldozer. (R. 599-600). Carlos Cabrera said, "Look, there is a bulldozer digging." (R. 600). The "crime unit" was staticmed across the street from "the dig". (R. 630). To this declaration, Hector Fuente stated:

> A. He said Sally was running her mouth too much.
>
> (R. 602).

Later, Hector Fuente *again* drove by the "dig *area*" and remarked and/or commented:

> 'They are not going to find anything."
>
> (R. 603).

This latter comment was made by Hector Fuente while watching "the news" with Carlos Cabrera. (R. 603).

On cross-examination, Mr. Unterberger placed the youth's crimes before the Court and jury. (R. 606). Further, he established that Carlos Cabrera was benefitted by immunity. (R. 607). Mr. Unterberger then read prior deposition testimony to Carlos Cabrera focusing on his deposition testimony where he answered that he could not recall Hector Fuente speak of involvement in a homicide. (R. 608-610).

On re-direct, the prosecution then used the same deposition to establish that the witness had been under an emotional strain [at the time he was deposed] due to the death of his sister. (R. 617). Further, Carlos Cabrera testified to a prior FBI interrogation. (R. 617). In essence, Carlos Cabrera testified that he had made these statements to Robert Conrad [FBI agent] prior to his deposition. (R. 623-624). The witness then stated that he refreshed his memory with that deposition after the deposition he gave to Mr. Unterberger. (R. 626).

On re-cross examination, Carlos Cabrera testified that he was under psychiatric care from the death of his sister; and, that he was still traumatized. (R. 627). Mr. Unterberger then focused in on Carlos Cabrera's memory lapse. (R. 628-629).

Judge Coe ruled that it was proper procedure for the prosecutor to rehabilitate Carlos Cabrera. (R. 616). The trial court relied on §90.801(2)(b), Florida Statues (1985). This was correct. Why? There is a rule against a witness' prior consistent statement being used to corroborate his trial testimony. See, Van Gallon v. State, 50 So.2d 882 (Fla. 1951); Lamb v. State, 357 So.2d 437 (Fla. 2nd DCA 1978); Brawn v. State, 344 So.2d 641

(Fla. 2nd DCA 1977); and, Roti v. State, 334 So.2d 146 (Fla. 2nd DCA 1976). However, this is not the posture of this evidentiary claim. Rather, the exception comes into play. Justice Thomas points out in Van Gallon:

> [1] We recognize the rule that a witness's testimony may not be corroborated by his *own* prior consistent statement and the exception that such a statement may become relevant if an attempt is made to show a recent fabrication. The exception is based on the theory that once the witness's story is undertaken, by imputation, insinuation, or direct evidence, to be assailed as a recent fabrication, the admission of an earlier consistent statement rebuts the suggestion of improper motive and the challenge of his integrity.
>
> (text of 50 So.2d at 882).

The redirect examination of Carlos Cabrera establishes a sufficient showing to warrant the application of the exception. Judge Coe is correct as a matter of evidentiary law in finding the testimony admissible under §90.801(2)(b), Florida Statutes (1985). Clearly, defense counsel assailed Carlos Cabrera's testimony as a recent fabrication; and, it was not. The "State" was entitled to place the testimony in its full light. There is no error.

ISSUE VIII

WHETHER AN UNQUALIFIED WITNESS CAN TESTIFY TO AN ORGANIZATION'S ROUTINE PRACTICE.

At bar, direct recognition of Enrique Alfonso's corpse was impossible due to the lapse of time from burial to exhumation. Thus, it was a burden of the "State" to establish identity through size, height, and, teeth. Additionally, because of the decomposition, the "State" sought to introduce the personal effects [such as the Peter Pan Motel keys] found on the corpse. In an effort to further establish the identification of Enrique Alfonso as this homicide victim, the prosecution resorted to dental records.

In Bundy v. State, 455 So.2d 330, 348-349 (Fla. 1984), this Court reflected on forensic odonological identification techniques; and, noted that the uniqueness of individual dental characteristics serves as a basis for comparison testimony. These evidentiary matters certainly fall into the sphere of expert opinion. Why? Because a layperson is not qualified to address the science of odontology.

As background, there is a property right in x-ray negatives and office records. The x-ray's are part of the history of the case. They are of extraordinary value to a treating and/or evaluating practitioner; and, they are of little value to a layperson. Clearly, Enrique Alfonso's dentist had custodial rights to these treatment records; and, a treatment record is precisely what a dental x-ray establishes. See, 61 Am.Jur.2d, physicians, Surgeons and Other Healers, §165, p. 298.

Whether marking an "X" on a dental x-ray conforms to custom in the profession or conforms to usage in the profession is a matter upon which it was in the province of Judge Coe to determine.

For example, it is admissible that a prevailing custom is to have an operating room nurse account for sponges used in an operation. Any physician licensed to practice in the state of Florida is competent to testify to this protocol and practice. Why? Because its common practice.

Maria Prado [a dentist] treated Enrique Alfonso. (R. 541-542). Dr. Prado testified as to treatment and x-rays taken of the decedent. (R. 542-545). Judge Coe inquired as to the purpose of the testimony; and, Mr. Unterberger stated:

> MR. UNTERBERGER: It's only an issue insofar as I may want to preserve something. With their next witness, there is an issue. What they are doing is they are going to try and identify the dead person by matching up or comparing dental records with the teeth of the corpse.
>
> THE COURT: Well, in other words, you are saying there may be some question that Alfonso is the deceased, Enrique Alfonso is dead, and that he is the deceased? That is an issue?
>
> MR. UNTERBERGER: To be totally candid with the Court, it's not much of an issue. However, I don't know yet whether or not I am going to attack, just for the purposes of the record, the science of dental identification.
>
> (R. 546).

To be frank, it wasn't much of an issue below; and, its not much of an issue now. After Maria Prado's testimony, in which the x-rays were received into evidence, Vickie Lindauer [a dentist] employed as an Assistant Medical Examiner for forensic odontology, testified. The purpose of her testimony was to compare ante mortem x-rays of Enrique Alfonso with post

mortem x-rays of Enrique Alfonso . The purpose of this testimony was to "head off" any argument that the corpse discovered was not that of Enrique Alfonso. (R. 557). Judge Coe informed the prosecution that he would allow Dr. Lindauer to make her comparisons; but, that he would not allow her to render an opinion on the ultimate issue of identity. (R. 566). Dr. Lindauer then testified as to her camparison. (R. 569-577). Then Dr. Lindauer testified as to an "X" being drawn on the x-ray as she compared it with the skull. (R. 577). Dr. Lindauer was admonished not to speculate; but, to only testify as to the comparisons. (R. 577-578). Then Judge Coe inquired as to the practice of franking an "X" on an x-ray:

> THE COURT: Don't speculate. Say 10 shows this and 12 shows that.
>
> THE WITNESS: All right. 10 shows that there is a molar present on the upper right-hand side and that tooth is not present in the deceased. There is an X *drawn* through that tooth which, to me, --
>
> MR. UNTERBERGER: I'll object, Your Honor. That's the point. It's not her X.

BY THE COURT:

> Q. Well, from your background and training, does that X have any significance?
>
> A. To me that would.
>
> Q. Yes or no. Does your training and experience tell you that that X means anything?
>
> A. Yes.
>
> Q. Is that a common practice to see X's on an exhibit like LO?
>
> A. Yes.

(R. 578).

At trial, Mr. Unterberger relied on $90.406, Florida Statutes (1985) (R. 579) in support of error. The Court overruled the objection (R. 580) and the following transpired:

> BY THE COURT:
>
> Q. What does the X mean to you, ma'am?
>
> A. An X to me means that that tooth is indicated for extraction or removal. That wasn't a real --
>
> THE COURT: Excuse me. Excuse me. Okay. Next question.
>
> (R. 580).

Any dentist is competent to testify that to "chart an X on an x-ray" is to designate that tooth for extraction. There are few cases on this point in Florida jurisprudence. However, the Florida Evidence Code is patterned upon the Federal Evidence Code. Compare $90.406, Florida Statutes (1985) with Fed. Rules Evid. Rule 406, 28 U.S.C.A. In Brawn v. State, 426 So.2d 76, 88 fn. 19 (Fla. 1st DCA 1983), Judge Ervin points out: "It is well settled that if a state statute is patterned after the language of its federal counterpart, the statute will take the same construction in Florida courts as its prototype has been given insofar as such construction comports with the spirit and policy of the Florida law relating to the same subject".

What do the federal cases hold on this identical evidentiary point? It is admissible evidence of a trade or business custom to establish that

the routine practice of the organization was followed in a particular instance. See, Spartan Grain& Mill Co. v. Ayers, 517 F.2d 214 (5th Cir. 1975). Evidence of county health department's habit and routine practice of obtaining signed consent forms prior to innoculation was sufficient to establish that a patient received a consent form concerning potential adverse effects of the vaccine. See, In re Swine Flu Immunization Products Liability Litigation, 533 F.Supp. 567 (D.C. Colo. 1980). Also see, Whittemore v. Lockheed Aircraft Corp., 151 P.2d 670 (Cal. 1944) where evidence of general custom in aviation is for a pilot of a dual controlled plane to assume the seat on the left-hand side of the cockpit.

There is no question but that the forensic dent st was competent to testify as to the "X" on the x-ray. If there is error on this point, it is at most harmless in light of the overwhelming evidence on identity.

ISSUE IX

WHETHER THE INVITATION To MISTRIAL CREATED BY APPELLEE PRECLUDED RETRIAL OF APPELLANT ON DOUBLE JEOPARDY GROUNDS.

The "State" rejects Hector Fuente's suggestion that it issued an invitation for mistrial.

The issue before this Court is whether Judge Coe erred as a matter of law in denying Hector Fuente's Motion to Dismiss on double jeopardy grounds. (R. *2094-2095).* It is ludicrous to suggest that the prosecution had the improper motive of having a mistrial declared. Why? Because the trial testimony of Ralph Salerno had established beyond and to the exclusion of any reasonable doubt that Hector Fuente's craven heart had the premeditated intent to kill Enrique Alfonso. The testimony of Ralph Salemo is chilling as to this cold blooded murder. (R. 1340-1345):

> A. Mr. Fuente opened the door to the car, stating that he had to urinate.
>
> As he got out of the car, he picked up the .357 which was laying between the driver's seat and the door. He walked around to the back of the car, did what he had to do, walked back around to where the door had been left open, pointed the *gun* in, pulled the hammer back with his left hand like such, pulled the trigger approximately four or five second later, hit it again and pulled the trigger a second time.
>
> (R. *1343, 1344).*

> Q. And where were you when this shooting occurred?
>
> A. Still in the back seat directly behind Alfonso.

Q. What did you hear when the *gun* went off?

A. I heard it hit metal. I heard a clang.

Q. Did Mr. Alfonso say anything?

A. "Oh, *my* God!"

(R. 1344, 1345).

With this testimony in mind, why in the world would the prosecution manipulate testimony so that a mistrial ensued?

Mr. Unterberger drilled Ralph Salemo relentlessly on what support he had in preparation for his trial testimony. (R. 1354-1361). Further, Mr. Unterberger established that Ralph Salemo testified under the benefit of immunity. (R. 1362-1366). Mr. Unterberger established that Ralph Salemo was dependent on VA benefits and Social Security for his livelihood. (R. 1367-1368). Further, Mr. Unterberger established that Ralph Salemo was involved in credit card fraud, thefts, insurance fraud, and, *arson.* (R. 1368). Never was it urged that Ralph Salemo was a candidate for Eagle Scout. Mr. Unterberger then attempted to *impeach* Ralph Salemo's trial testimony by use of depositions. Testimony resumed the following day. (R. 1451)

Previously, on cross-examination, Mr. Unterberger established that Ralph Salemo was involved in credit car fraud, thefts, insurance fraud, and, arson. (R. 1368). The, on re-direct, Mr. Episcopo inquired into this criminal activity:

Q. It was also brought out on cross-examination that you were involved in extensive criminal activity.

A. That's correct.

Q. What led you to become involved in that criminal activity?

MR. UNTERBERGER: Well, if the Court please --

A Hector Fuente.

MR. UNTERBERGER: I object and move that the answer be stricken. I think I heard an answer.

MR. EPISCOPO: Yes, he said Hector Fuente.

MR. UNTERBERGER: Barely, I would like to approach the bench.

(R. 1483).

Mr. Unterberger moves for a mistrial. (R. 1485). After argument, Judge Coe [in an abundance of concern and regret] declared the mistrial. (R. 1508-1510). Now, in no way does this record support any allegation of prosecutorial misconduct in obtaining this mistrial. Clearly, this was no last ditch effort to save an ill-fated prosecution. The prosecution was well on its way to conviction when the mistrial occurred.

In light of what Mr. Unterberger elicited on cross-exanination focusing on Ralph Salerno's criminal activities (R. 1368), the prosecutor's question on what led Mr. Salerno to crime is appropriate. The standard against which double jeopardy applies is announced in Bell v. State, 413 So. 2d 1292 (Fla. 5th DCA 1982). There, Judge Orfinger did note that overreaching would bar a second prosecution; but, that when mere error transpires, reprosecution is not barred. Judge Coe has never made a finding that the prosecution's action was calculated in bad faith to provoke a mistrial. Without a

determination on this point by the trial court, it is difficult for an appellate court to review what Judge Coe has not determined.

This same claim has withstood federal constitutional scrutiny in the Eleventh Circuit. There, Judge Roney (which in dissent District Judge Thomas concurred) found no subversion by the prosecution to destroy the defendant's Double Jeopardy protection. In United States v. Posner, 764 F.2d 1535 (11th Cir. 1985) the Court points out:

> [6,7] Second, Posner contends that the appeal should be dismissed as mot because a retrial of Posner would be barred by the double jeopardy clause. Because Posner filed the motion that led to the district court granting severance with respect to him, Posner must demonstrate an "intent on the part of the prosecutor to subvert the protection afforded by the Double Jeopardy Clause," Oregon v. Kennedy, 456 U.S. 667, 676, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982), by establishing that "the governmental conduct in question [was] intended to 'goad' the defendant into moving for a mistrial." Id. at 676, 102 S.Ct. at 2089, an inquiry for which the trial court is best suited. Cf. United States v. Dante, 739 F.2d 547, 548 (11th Cir.), cert denied, ___U.S.___, 105 S.Ct. 811, 83 L.Ed.2d 402 (1984)(applying clearly erroneous standard to district court's finding of fact that Government did not intend to cause mistrial).
>
> (Text of 764 F.2d at 1539).

There must be a factual finding by Judge Coe on the question of whether the prosecution "goaded" Mr. Unterberger into a mistrial. As there is no

such finding for appellate review, the "State" has no choice but ta assert its procedural default argument as a bar to consideration of this constitutional claim. See, Wainwright v. Sykes, 433 U.S. 72 (1977).

ISSUE X

WHETHER THE AGGRAVATING CIRCUMSTANCE OF CHAPTER 921.141(5)(e) Fla. Stat. WAS SUPPORTED BY THE EVIDENCE?

There is record support for Judge Coe to find this aggravating circumstance in his determination to render a sentence of death by electrocution.

What Appellant overlooks and fails to consider in his argument is the motive for killing Enrique Alfonso. It had been determined by Hector Fuente that Enrique Alfonso talked too much. His verbosity was a cause of concern to an on-going criminal endeavor. Whether Ralph Salemo shared this view that Enrique Alfonso talked too much is irrelevant. Whether Barbara Alfonso shared this view that Enrique Alfonso talked too much is irrelevant. Whether Sally Fuente Resina shared this view that Enrique Alfonso talked too much is irrelevant. What is relevant is that Hector Fuente adopted and conformed this determination that Enrique Alfonso talked too much as his own. Why then was Enrique Alfonso killed? Because Enrique Alfonso was the embodiment of The Man Who Talked Too Much.

This whole issue was litigated before Judge Coe during Phase II. The prosecutor proffered the testimony she intended to ask Barbara Alfonso:

1). Did Hector Fuente tell you why he killed Enrique Alfonso?

2). What did Hector Fuente tell you the reason was he killed Kiki [Enrique Alfonso]

(R. 1127).

Mr. Unterberger did not object; but, rather advanced argument. The prosecutor then correctly pointed out where this case fits §921.141(5)(e), Fla. Stat. (1985):

> MS. **JENKINS:** Your Honor, I will concede that most of the cases do deal with a witness to a crime at that moment and the witness is then murdered immediately following the crime. I will not, however, concede that there is any requisite in any case that says it has to be within five minutes of the crime.
>
> I would further *argue* that if detection were coming in a racketeering enterprise, that is an ongoing enterprise, if the defendant foresaw detection of it at any time in the future, and that is the reason he killed the witness, then it fits under Subsection 5 if that is what it is.
>
> (R. 1130, 1131).

Judge Coe reviewed this Court's opinions focusing on this aggravating circumstance. (R. 1133-1134).

There was strong proof that Enrique Alfonso was killed because he posed a threat as a potential witness to the conviction of the criminal enterprise. Judge Coe restricted Barbara Alfonso's answer:

> THE COURT: Well, let's make sure we are clear about this, and I want the witness, over objection, to say the reason he was killed was because he was talking too much, and then you can *argue* as you see fit.
>
> MS. JENKINS: Can she say, "He was talking too much," or can she say, "Talking too much about the racketeering activity"?
>
> THE COURT: Talking too much. If the jury can't add two and two from that, we are in big trouble.
>
> (R. *1142).*

The evidence which went before the jury at Phase II is:

> Q. Mrs. Alfonso, I will ask you again. What was Hector Fuente's stated reason for killing Enrique Alfonso?
>
> A. That he talked too much and ran his mouth.
>
> Q. That is Enrique Alfonso, that he talked too much?
>
> A. Talked too much.
>
> (R. 1144).

On this point, Judge Coe has followed §921.141(5)(e), Florida Statutes (1985). An examination of Barbara Alfonso's testimony supports Judge Coe's finding in aggravation. It is a fact that Hector Fuente determined Enrique Alfonso talked too much; and, as a consequence, Enrique Alfonso was murdered so that Hector Fuente might avoid arrest and prosecution for his criminal endeavors. Appellant argues no case which holds that the statute is restricted to the elimination of awitness to a crime. Judge Coe has applied the statute correctly.

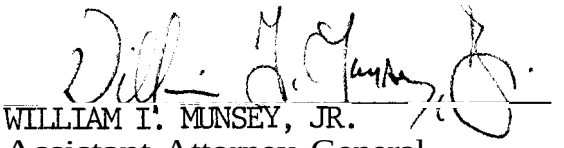
In the event this Court would find error [and there is none], Judge Coe's sentence of death must still remain intact. Why? Because he had determined that any one of the three aggravating circumstances standing alone outweighs any mitigation. Specifically, Judge Coe found "Any one of the three aggravating circumstances standing alone is sufficient to justify the death penalty and the override of the jury recommendation for mercy." (R. 2175)

CONCLUSION

WHEREFORE, based on the foregoing reasons, arguments and authorities, the People of the State of Florida pray that this Honorable Court make and render an opinion affirming the conviction and further affirming the sentence of death.

Respectfully submitted,

ROBERTA. BUTTERWORTH
ATTORNEY GENERAL



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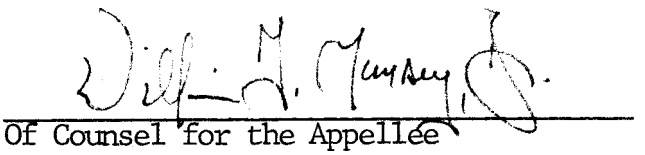
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to SIMSON UNTERBERGER, ESQUIRE, Suite 302, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602 on this 6th day of February, 1987.



Of Counsel for the Appellee