IN THE SUPREME COURT OF FLORIDA

GEORGE MORRIS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 70,234

ANSWER BRIEF OF APPELLEE

[On direct appeal from sentence of death imposed by the Circuit Court of the 17th Judicial Circuit, Patti Englander Henning, Judge]

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOHN TIEDEMANN
Florida Bar No. 319422
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Appellee

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	i-vi
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENTS	3
ISSUE I	4
THE TRIAL JUDGE DID NOT REVERSIBLY ERR BY DENYING APPELLANT'S MOTIONS TO SUPPRESS EITHER THE ENTIRETY OF HIS INCRIMINATING STATEMENTS OR PORTIONS THEREOF	
ISSUE II	10
APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL	
ISSUE III	11
THE TRIAL JUDGE PROPERLY DENIED APPELLANT'S MOTIONS FOR A JUDGMENT OF ACQUITTAL	
ISSUE IV	14
THE TRIAL JUDGE DID NOT FUNDAMENTALLY ERR IN REFUSING TO DISMISS APPELLANT'S INDICTMENT SUA SPONTE	

TABLE OF CONTENTS

	PAGES
ISSUE V	15
THE TRIAL JUDGE NEITHER REVERSIBLY NOR FUNDAMENTALLY ERRED IN INSTRUCTING APPELLANT'S JURY	
ISSUE VI	19
THE TRIAL JUDGE PROPERLY SENTENCED APPELLANT TO DEATH	
CONCLUSION	27
CERTIFICATE OF SERVICE	27

TABLE OF CITATIONS

CASE	PAGE
Beckwith v. United States, 425 U.S. 341 (1975)	6
Booth v. Maryland, 482 U.S. ___, 96 L. Ed 2d 440 (1987)	19
Brown v. State, 501 So.2d 1343 (Fla. 3rd DCA 1987), affirmed in part & reversed in part on other grounds, 521 So.2d 110 (Fla. 1988)	18
Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1985)	14
Caso v. State, 524 So.2d 422 (Fla. 1988)	6
Correll v. State, 523 So.2d 562 (Fla. 1988)	7
Cupp v. Naughten, 414 U.S. 141 (1973)	17
Dempsey v. State, 415 So.2d 1351 (Fla. 1st DCA 1982), review denied, 424 So.2d 761 (Fla. 1982)	19-20
Dobbert v. State, 328 So.2d 433 (Fla. 1976), affirmed, 432 U.S. 282 (1977)	24
Donovan v. State, 417 So.2d 674 (Fla. 1982)	7
Dorminey v. State, 314 So.2d 134 (Fla. 1975)	17
Foster v. State, 400 So.2d 1 (Fla. 1981)	**10**
Francis v. State, 473 So.2d 672 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986)	25

CASE	PAGE
Grossman v. State, 525 So.2d 833 (Fla. 1988)	20
Hardwick v. State, 521 So.2d 1071 (Fla. 1988)	12
Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980)	8
Harris v. Rivera, 454 U.S. 339 (1981)	20
Henderson v. Kibbe, 431 U.S. 145 (1977)	17
Hernandez v. State, 14 F.L.W. 12 (Fla. 3rd DCA Dec. 29, 1988)	8
Hudson v. State, 14 F.L.W. 41 (Fla. Jan 19, 1989)	20
Huff v. State, 495 So.2d 145 (Fla. 1986)	12
Jones v. State, 415 So.2d 852 (Fla. 5th DCA 1982), review denied, 424 So.2d 761 (Fla. 1982)	14
Knight v. State, 338 So.2d 201 (Fla. 1976)	14
Lynch v. State, 293 So.2d 44 (Fla. 1974)	11
Mapps v. State, 520 So.2d 92 (Fla. 4th DCA 1988), review denied, 528 So.2d 1182 (Fla. 1988)	6
Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), cert. denied, U.S.___, 107 S.Ct. 307 (1987)	6
Miranda v. Arizona, 384 U.S. 436 (1966)	4
Morris v. Slappy, 461 U.S. 1 (1983)	10
Nickles v. State, 106 So. 479, 489 (Fla. 1925)	8

CASE	PAGE
O'Callaghan v. State, 429 So.2d 691 (Fla. 1983)	14
Olsen v. State, 338 So.2d 225 (Fla. 3rd DCA 1975)	19
Oregon v. Elstad, 470 U.S. 298 (1985)	6
Reyes v. State, 155 So.2d 663 (Fla. 3rd DCA 1963)	16
Ricketts v. Adamson, 483 U.S. , 97 L. Ed 2nd 1 (1987)	19
Roman v. State, 475 So.2d 1228 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986)	6
Schafer v. State, 14 F.L.W. 37 (Fla. Jan. 19, 1989)	6
Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982)	12
Smith v. State, 424 So.2d 726. (Fla. 1982), cert. denied, 462 U.S. 1145 (1983)	12
State v. Amaro, 436 So.2d 1056 (Fla. 2nd DCA 1983)	12
State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)	9
State v. Jones, 377 So.2d 1163 (Fla. 1979)	18
State v. Pennington, 534 So.2d 393 (Fla. 1988)	12
State v. Pinder, 375 So.2d 836 (Fla. 1979)	14
State v. Waters, 436 So.2d 66 (Fla. 1983)	16

CASE	PAGE
Stone v. State, 378 So.2d 765 (Fla. 1979), cert.denied, 449 U.S. 986 (1980)	4
Strickland v. Washington, 466 U.S. 668 (1984)	10
Swafford v. State, 533 So.2d 270 (Fla. 1988)	24
Tedder v. State, 322 So.2d 908 (Fla. 1975)	19
Teffeteller v. State, 495 So.2d 744 (Fla. 1986)	7
Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 45 U.S. 31 (1982)	11

OTHER AUTHORITY

Florida Statutes:	
784.03(1)(a-b)	17
784.045(1)(a)	17
792.04(1)(a)(2)(h)	16
827.03(1)(a-d)	17
Florida Standard Jury Instructions in Criminal Cases (1981 Ed.), p. 160	17

PRELIMINARY STATEIWNT

Appellant, George Morris, the capital criminal defendant below, will be referred to as "appellant." Appellee, the State of Florida, the prosecuting authority below, will be referred to as "the State."

References to the four-volume record on appeal will be designated "(R:);" to the five-volume supplemental record, "(SR:)."

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State accepts appellant's "statement of the case" and "statement of the facts" as reasonably accurate narrative synopses of the legal occurrences and the evidence adduced below for purposes of resolving the issues presented upon appeal, subject to the considerable additions and clarifications contained in the argument portion of this brief.

SUMMARY OF ARGUMENTS

The trial judge did not reversibly err in denying appellant's motions to suppress his incriminating statements, as such were not commenced in violation of Miranda v. Arizona, infra, because appellant was not in custody at this point. Moreover, the judge properly admitted the entirety of these statements so that the jury could understand their context.

Appellant's trial counsel cannot be faulted for the fact that appellant confessed to the crime charged from the stand, as counsel had advised appellant not to testify.

The judge properly denied appellant's motions for a judgment of acquittal because competent, substantial evidence of appellant's guilt for the instant murder on three theories had been introduced.

The judge properly refused to dismiss appellant's general murder indictment sua sponte, and properly instructed appellant's jury of the two underlying felonies for which evidence had been received.

Lastly, the judge properly overrode the jury's emotionally-induced recommendation for a life sentence.

ISSUE I

THE TRIAL JUDGE DID NOT REVERSIBLY ERR BY DENYING APPELLANT'S MOTIONS TO SUPPRESS EITHER THE ENTIRETY OF HIS INCRIMINATING STATEMENTS OR PORTIONS THEREOF

ARGUMENT

Appellant first alleges that Broward County Circuit Judge Patti E. Henning reversibly erred by denying his motions to suppress (SR 139) either the entirety or a portion of his incriminating statements to the police which were purportedly tendered in violation of Miranda v. Arizona, 384 U.S. 436 (1966), or other portions of these statements which purportedly constituted inadmissible hearsay. The State will refute these contentions sequentially.

A. Miranda v. Arizona Claim

The record, properly viewed in the light most favorable to the judge's rulings, Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986 (1980), reveals that 18 month old Matthew Roberts arrived comatose at North Broward Hospital at 6:46 P.M. May 28, 1986, and died at 10:07 P.M. (R 50-56). Detectives Douglas Beimly and Ernest Braggs of the Pompano Beach Police Department were informed at the hospital that the baby had fallen from a bed while under appellant's care earlier that day, and appeared at appellant's residence at 11:45 P.M. to investigate (SR 18-21). Appellant, who was not yet suspected of causing Matthew's death, told the detectives that the victim had

struck his head on a nightstand as he fell (SR 22-23). Because the nightstand appeared undisturbed, appellant's explanation aroused in Detective Beimly a suspicion that appellant may have been involved in the baby's death (R 23; 39). The detectives thus asked appellant if he would accompany them to the police station for questioning and appellant, who was not under arrest, agreed (SR 24). Upon arriving at the station, Detective Braggs administered appellant his Miranda rights, and appellant waived same (SR 24-27). In response to interrogation, appellant at first repeated his story about the nightstand and then, in a tape recorded statement beginning at 3:07 A.M. on May 29, inconsistently related that the victim had actually hit his head on a door (SR 45-46; 12-18; 50-51). During a second custodial interrogation beginning at 4:50 P.M. on May 31, appellant again told Detective Braggs that Matthew had hit his head on the door (SR 83-92), but during a third such interrogation beginning at 4:22 P.M. on June 16, which appellant initiated, appellant inconsistently told the detective that this injury had actually occurred when he engaged the baby in horseplay (SR 125-127; 131). Both these statements followed Miranda warnings and waivers (SR 84; 129), although Detective Braggs did elicit appellant's concession that his first two taped statements had been perjurious prior to the administration of appellant's Miranda rights on his third taped statement (SR 127-129), a concession appellant confirmed following his remirandization (R 138).

Appellant's primary Miranda claim, that all of his incriminating statements should have been suppressed merely because the officers had not yet mirandized him when he told them the story at his residence that the baby had fallen and struck the nightstand, is uncompelling for two dispositive reasons. First, the detectives were not required to mirandize appellant at this point since he was not under formal arrest or otherwise in custody, so his indisputably voluntary initial statement of explanation was admissible, as were all of his subsequent like statements, see e.g., Beckwith v. United States, 425 U.S. 341 (1975); Roman v. State, 475 So.2d 1228 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986); Caso v. State, 524 So.2d 422 (Fla. 1988); Schafer v. State, 14 F.L.W. 37 (Fla. Jan. 19, 1989); Mapps v. State, 520 So.2d 92 (Fla. 4th DCA 1988), review denied, 528 So.2d 1182 (Fla. 1988). This would be true even if appellant had been a suspect in the baby's death, id., which at that point he was not. Second, even if appellant's initial brief statement had been taken in technical violation of Miranda, his ensuing uncoerced and more detailed statements would still have been admissible under Oregon v. Elstad, 470 U.S. 298 (1985), rendering the admission of this first statement harmless error, see Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), cert. denied, U.S.___, 107 S.Ct. 307 (1987).

Appellant's secondary Miranda claim, that his admission to perjury in his third statement prior to his remirandization should have been suppressed, is similarly unavailing given his subsequent duplicative admission, id.

B. Hearsay Claim

The record discloses that appellant's three taped statements were interspersed with hearsay information that appellant had previously served time in jail for theft (R 89-91; 141); that the victim had previously suffered minor accidental injuries while under the case of appellant's brother Jay (R 125-126); that the victim had suffered rectal injury and been heard crying on the day of his death (R 87-89; 127-129; 136); and that appellant's brother Tony had corroborated appellant's later-repudiated story that the victim had hit his head on a door (R 152-153). Although appellant's jury received these snippets over defense objection (R 44-46; 66-68; 110-111; 144), it also received evidence that appellant had "never been in prison" (R 156) and that the victim had not sustained any rectal trauma until after he was hospitalized (R 204). The trial judge theorized that the jury needed the entirety of appellant's statements to assess their voluntariness (R 67-68).

The judge ruled correctly. It **is** the jury's job to independently assess the voluntariness of a criminal defendant's out-of-court statements once the judge has found them admissible, and such assessment must be made by viewing the "totality of the circumstances." Donovan v. State, 417 So.2d 674, 676 (Fla. 1982). Presumably for this reason, "absent totally extraneous matters...a defendant's statement[s] should...ordinarily...be introduced in [their] entirety." Correll v. State, 523 So.2d 562, 566 (Fla. 1988). Just as "we cannot expect jurors impaneled

for capital sentencing proceedings to make wise and reasonable decisions in a vacuum," Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986), we can similarly not expect jurors to intelligently assess heavily scissored statements for voluntariness. Cf. Nickles v. State, 106 So. 479, 489 (Fla. 1925), holding that "where it is impossible to give a complete or intelligent account of the crime charged without referring to [an]other crime," evidence of the related crime is admissible. Judge Henning's ruling afforded appellant's jury the necessary opportunity to fully assess his statements for voluntariness by considering all of their underlying dynamics.

The State would alternatively contend that any technical error in admitting the entirety of appellant's statements was either cured or rendered harmless under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) given the aforenoted contraventions of its most damaging snippets - i.e. appellant's supposed incarceration and the timing of the child's rectal injury - and the minimal magnitude of the other snippets. Cf. Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980) and Hernandez v. State, 14 F.L.W. 12 (Fla. 3rd DCA Dec. 29, 1988). As will be seen, appellant was obviously convicted of murdering Matthew Roberts through compelling evidence of his guilt for this crime, rather than through tangential innuendoes on the tapes as he insinuates.

* * *

In summary, appellant is not entitled to a new trial on the foregoing claims.

ISSUE II

APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

ARGUMENT

Appellant secondly alleges that Assistant Public Defender Thomas Gallagher provided him with ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984) by permitting him to take the stand in his own defense and confess his guilt to the crime charged under a felony murder by cocaine trafficking theory (R 228-233). Inasmuch as the record clearly discloses that appellant voluntarily exercised his constitutional right to testify against his trial counsel's expressed advice (R 216; 396), this ripe claim is completely baseless. Compare Foster v. State, 400 So.2d 1 (Fla. 1981). "A lawyer can give advice but he cannot oblige his client to follow it." Martin v. Wainwright, 770 F.2d 918, 932. Our system of criminal justice simply could not function if defendants could profit from freely disobeying the advice of their attorneys. See Morris v. Slappy, 461 U.S. 1, 14 note 6 (1983).

In sum, appellant is not entitled to a new trial on this point.

ISSUE III

THE TRIAL JUDGE PROPERLY DENIED APPELLANT'S MOTIONS FOR A JUDGMENT OF ACQUITTAL

ARGUMENT

Appellant thirdly alleges that the trial judge reversibly erred by denying his motions for a judgment of acquittal both at the conclusion of the State's case (R 204-209) and at the close of his own case (R 285-287) because the evidence was insufficient at either juncture to sustain his conviction for the murder charged under either premeditated or felony murder theories of liability. The State emphatically disagrees.

The record, correctly viewed in the light most favorable to the judge's rulings, Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31 (1982) and Lynch v. State, 293 So.2d 44 (Fla. 1974), reveals that the State established during its case-in-chief that Adrienne Coley entrusted appellant to care for her still-healthy young son on the morning of the boy's death (R 5-9; 137). When appellant and the baby were alone that afternoon, the baby was badly hurt, suffering a painful profusion of intentionally and violently inflicted mortal head, neck and abdomen injuries (R 153-154; 164; 177-178; 183-185; 189). Appellant gave the police three inconsistent statements of how the victim's "accidental" injuries occurred (R 63-64; 73-74; 149). After the State had rested, appellant presented his pseudo-exculpatory "defense" that the baby had died while he perpetrated the underlying felony of trafficking in cocaine (R

228-233). Yet appellant now claims that some vague reasonable hypothesis of innocence precluded his conviction for murder as a matter of law.

"The reasonableness of a hypothesis of innocence is a question for the jury." Huff v. State, 495 So.2d 145, 150 (Fla. 1986). When a defendant through his statements to the police and/or on the stand propounds multiple hypotheses of innocence which are inconsistent, the jury is not required to credit any of them, but may instead consider the defendant's "lying...[as] an indication of guilt." Smith v. State, 424 So.2d 726, 730 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983). See also Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988). Appellant's blatant deceit, when coupled with the deliberate manner in which the victim's grotesque fatal injuries were inflicted, abundantly established his guilt for committing the baby's murder via premeditation, compare Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982) and the cases cited therein, as the State argued below (SR 397; R 308). Appellant's actions concurrently proved his guilt for committing the baby's murder while perpetrating the underlying felonies of aggravated child abuse, compare Mapps v. State, 520 So.2d 92, 93, and trafficking in cocaine, compare generally State v. Amaro, 436 So.2d 1056 (Fla. 2nd DCA 1983), as the State also argued below (SR 397; 407-408; R 308-309).

It follows that Judge Henning properly denied both of appellant's motions for a judgment of acquittal. Should the

Court disagree with the State that appellant's first motion was properly denied, it should limit State v. Pennington, 534 So.2d 393 (Fla. 1988) and hold that any error was cured by appellant's in-court confession and the consequent propriety of the final denial. Pennington did not involve a defendant who confessed on the stand, and in the name of justice should not be interpreted to cover this situation.

* * *

In summary, appellant is not entitled to an outright discharge on the foregoing claims.

ISSUE IV

THE TRIAL JUDGE DID NOT FUNDAMENTALLY ERR IN REFUSING TO DISMISS APPELLANT'S INDICTMENT SUA SPONTE

ARGUMENT

Appellant fourthly alleges that the trial judge fundamentally erred by refusing to dismiss his indictment for murdering Matthew Roberts (R 431) sua sponte because it generally charged only premeditated murder and failed to specify which, if any, underlying felonies upon which the State might alternatively rely to establish felony murder. Appellant's position is contrary to numerous holdings of this Court, see e.g. Knight v. State, 338 So.2d 201 (Fla. 1976), State v. Pinder, 375 So.2d 836 (Fla. 1979), O'Callaghan v. State, 429 So.2d 691 (Fla. 1983), and Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1985), as appellant commendably concedes. Moreover, appellant's claim is not even preserved for appellate review inasmuch as he never so postulated below and the indictment, even if imperfect, definitely charges an offense. See Jones v. State, 415 So.2d 852, 853 (Fla. 5th DCA 1982), review denied, 424 So.2d 761 (Fla. 1982) and the cases cited therein.

In sum, appellant is not entitled to a new trial on this point.

ISSUE V

THE TRIAL JUDGE NEITHER REVERSIBLY NOR FUNDAMENTALLY ERRED IN INSTRUCTING APPELLANT'S JURY

ARGUMENT

Appellant fifthly alleges that the trial judge reversibly erred by instructing his jury over defense objection on trafficking in cocaine as an underlying felony which could support his conviction for felony murder (R **288-291; 334-337; 490-491)** because such was purportedly not one of the State's theories of its case at the start of trial, and also because the only evidence of this felony was purportedly appellant's uncorroborated in-court confession. Appellant further alleges that the judge fundamentally erred by supposedly instructing his jury without defense objection that simple rather than aggravated battery upon a child is one method of committing the underlying felony of aggravated child abuse (R **337-338; 492-493).** The State will refute these contentions in turn.

A. Trafficking Instruction

As noted, when the State generally charges a defendant with committing premeditated murder, such charge lawfully encompasses the defendant's possible commission of the murder through various and unspecified underlying felonies. Knight; Pinder; O'Callaghan; Bush. Appellant does not recite and research did not reveal any substantial authority whatsoever for his implicit and unusual proposition that a defendant *so* charged may seek to derail the

State's initial theory that one particular felony underlay the murder by confessing to another underlying felony from the stand and then successfully oppose a jury instruction for this second felony. Pennington is not even close. The State submits that appellant's proposition is contrary to both the aforecited case law and to logic. A generally-charged burglary defendant whom the State posits has entered a dwelling with the intent to commit theft therein cannot testify that he actually intended to commit rape and thereby escape criminal liability for committing burglary in this fashion, see State v. Waters, 436 So.2d 66 (Fla. 1983). Why should a generically charged murder defendant whom the State posits has caused a death either via premeditation or aggravated child abuse who testifies that he actually caused the death via cocaine trafficking be thereby permitted to escape criminal liability for committing murder in this fashion?

Appellant's attendant claim, that his in-court confession to cocaine trafficking could not be considered as dispositive evidence that he committed murder through this underlying felony because it was supposedly uncorroborated, is inaccurate both factually (R 14-15) and legally, see Reyes v. State, 155 So.2d 663 (Fla. 3rd DCA 1963). Only the homicide itself, and not an underlying felony, need be established by independent proof before a murder defendant's confession becomes admissible and probative. Id.

B. Aggravated Child Abuse Instruction

One may commit first degree murder in violation of 792.04(1)(a)(2)(h), Fla. Stat., when a person is killed as he commits or attempts to commit aggravated child abuse. One may commit aggravated child abuse in violation of § 827.03(1)(a-d), Fla. Stat., by, inter alia, committing an aggravated battery on a child. One may commit a simple battery in violation of § 784.03(1)(a-b), Fla. Stat., either by intentionally touching or striking another person against his will or intentionally causing bodily harm to the person; one commits aggravated battery in violation of §784.045(1)(a), Fla. Stat., if such touching or striking causes the person great bodily harm. Properly viewed in their entirety, Cupp v. Naughten, 414 U.S. 141, 146-147 (1973), the trial judge's charges to the jury, which mirrored this Court's presumptively correct standard instructions, Florida Standard Jury Instructions in Criminal Cases (1981) Ed.), p. 160, see Dorminey v. State, 314 So.2d 134 (Fla. 1975), adequately apprised appellant's jury of these prerequisites (R 337-338). Evidently appellant's trial counsel did not share appellant's current confusion over the judge's instructions on this score as he failed to object to same (R 355), and of course "it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

Even assuming arguendo both that the instruction was erroneous and that appellant's counsel had objected thereto, the fact remains that the State alternatively proved appellant's

commission of the instant murder through the underlying felony of aggravated child abuse via both willful torture and malicious punishment; through the underlying felony of trafficking in cocaine; and through premeditation. Appellant's jury was charged on all of these theories (R 333-338), thus rendering any error in their charges on aggravated child abuse via aggravated battery harmless under State v. Jones, 377 So.2d 1163 (Fla. 1979), see Brown v. State, 501 So.2d 1343 (Fla. 3rd DCA 1987), affirmed in part & reversed in part on other grounds, 521 So.2d 110 (Fla. 1988).

* * *

In summary, appellant is not entitled to a new trial on the foregoing claims.

ISSUE VI

THE TRIAL JUDGE PROPERLY SENTENCED APPELLANT TO DEATH

ARGUMENT

Appellant lastly alleges that the trial judge reversibly erred in overriding the jury's untabulated recommendation of mercy (R 406-407; 522) and imposing a sentence of death (R 419-424; 559-563) because the State had offered him a plea bargain for a life recommendation which he rejected which the State then withdrew prior to trial (SR 140-144); because the judge was purportedly biased (R 416); because the judge supposedly considered the prodeath wishes of the victim's family (R 529; 535) in imposing sentence in violation of Booth v. Maryland, 482 U.S. ___, 96 L. Ed 2d 440 (1987); because the judge reputedly improperly found one circumstance in aggravation while failing to find four circumstances in mitigation (R 518-519); and finally because the override itself was improper under Tedder v. State, 322 So.2d 908 (Fla. 1975). The State disagrees.

Appellant's first three points are easily disposed of. Appellant's rejection of the State's plea offer entitled the State to return to square one. Ricketts v. Adamson, 483 U.S. ___, 97 L. Ed 2nd 1 (1987). Judge Henning was not required to recuse herself sua sponte merely because defense counsel, without filing a motion for disqualification, baselessly suggested that she was predisposed as to penalty, see Olsen v. State, 338 So.2d 225 (Fla. 3rd DCA 1975) and Dempsey v. State, 415 So.2d 1351

(Fla. 1st DCA 1982), review denied, 424 So.2d 761 (Fla. 1982). The judge orally attested that her "sole...reasons" for imposing sentence were included in her written order (R 419) which contains no reference to the wishes of the victim's family (R 559-563); she must be believed, see Harris v. Rivera, 454 U.S. 339 (1981). Moreover, appellant never registered a Booth-type objection below; hence this claim is not preserved for appellate review. Grossman v. State, 525 So.2d 833 (Fla. 1988).

Also easily disposed of is appellant's fourth claim, that the judge improperly found that the murder was heinous, atrocious or cruel in aggravation, and improperly declined to find in mitigation that the murder was committed by one with no significant prior criminal history, who acted under extreme emotional disturbance, who was unintelligent, and who was young (R 559-563). Tackling the alleged mitigating circumstances first, the State notes axiomatically that "it is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to be given it." Hudson v. State, 14 F.L.W. 41 (Fla. Jan 19, 1989). Given that appellant had a prior conviction for grand theft (R 209-214; 426), related that he had no mental problems (R 155), and was not a teenager (R 523), the judge clearly did not abuse her considerable discretion in finding that appellant had proved nothing in mitigation. As for the aggravating factor, the State yields the floor to the much more eloquent Judge Henning:

The Court finds that the crime for which the Defendant, GEORGE MORRIS, is to be sentenced was especially heinous, atrocious or cruel.

On May 28, 1986, the Defendant, GEORGE MORRIS, picked up and took custody of his girlfriend's 18 month old infant son, Matthew Roberts, II. The purpose of this visit was never fully explained. According to the Defendant's own stories he either took him so they could see a movie or took him so the defendant could have an excuse to leave the scene of a $5,000 cocaine sale he had planned for later in the day or took him so his girlfriend would never suspect he was having a sexual encounter with another woman at a motel that afternoon. In any event, GEORGE MORRIS, was permitted to take and care for the child on that day.

At approximately 6 p.m., Matthew had been picked up by the Pompano Beach Fire Rescue Unit and transported to North Broward Hospital. He was pronounced dead later that evening.

The chronology leading up to 18 month-old Matthew's murder that day is vague. Indeed the sequence of events is perhaps forever unachievable because of the various and contradictory statements made by the defendant.

What is clear and undisputed from the evidence

however is the especially cruel, heinous and atrocious manner in which Matthew was murdered. Dr. Wright, the medical examiner, testified that the cause of death was multiple injuries by blunt trauma. The child had a lacerated liver, a skull fracture, a half cup of blood in his abdomen, intentional neck injuries, and bruises. More importantly, what these meant to tiny Matthew were a torn liver that couldn't have torn without the child being pressed against some kind of support (like a wall or floor) and punched in the abdomen severely; bruises on the buttocks that had to be caused by more than a spanking; a blow or blows to the head so sharp it fractured the child's skull (one that is more resilient and can take more force than an adult's); and strangling and choking around his neck. In fact, the medical examiner testified that the multiplicity of injuries made it impossible to determine which was the fatal blow, though almost any given one could be considered fatal.

This Court firmly believes and makes a specific finding that the defendant personally caused the victim's fatal injuries. Jackson v. State, [502 So.2d 409 (Fla. 1986), cert. denied, ___ U.S.,107 So. Ct. 3198 (1987)]. But even were that not the case, and had any of the defendant's improbable explanations been true, the defendant still permitted the death in a heinous and cruel manner by

waiting hours before seeking medical attention for the injured child who he had control over and who he knew was severely hurt. In fact the defendant's own testimony was that he was not concerned about Matthew, but about getting back at his "friend" who set him up at the alleged drug deal.

In this case the victim was an 18 month old child who could not verbally communicate, who had no input into his case and yet who was 100% dependent on whoever he was with for all of life's necessities; and who had no ability to defend himself against the atrocities being inflicted - or even comprehend the reasons for them.

The helpless, defenseless victim became the target of GEORGE MORRIS' beatings on May 28, 1986.

Florida law has held that a victim held helpless and unable to defend himself, who had tried to cry out and struggle against his killer had died a cruel and heinous death. Washington v. State, 362 So.2d 657 (Fla. 1978), [cert. denied, 439 U.S. 892 (1979)].

It has further held that a victim who pleads for mercy and knows of his impending doom has died a cruel and heinous death. Melendez v. State, [498 So. 2d 1258 (Fla. 1986)].

> It has further determined that strangulation involves extreme anxiety, pain and foreknowledge of death, Johnson v. State, 465 So.2d 499 (Fla. 1985), cert. denied, 474 U.S. (1985). And more particularly has held that the death of a frightened 8 year old girl being strangled by an adult man should certainly be described as heinous, atrocious and cruel. Adams v. State, [412 So.2d 850 (Fla. 1982), cert. denied, 459 U.S. 882 (1982)].
>
> How much more cruel heinous and atrocious is the strangulation and severe beating of an 18 month old boy who cannot yet even speak to cry out for mercy, who cannot struggle or defend himself, and who has not yet been born long enough to know life let alone have a foreknowledge of death.

(R 559-561). Compare Swafford v. State, 533 So.2d 270 (Fla. 1988).

This brings us, finally, to the only true issue in this case: should the override be sustained? The State acknowledges that under Tedder v. State, 322 So.2d 908, 910, "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." This Court has upheld an override for the brutal murder of a child, Dobbert v. State, 328 So.2d 433 (Fla. 1976), affirmed, 432 U.S. 282 (1977), and in the name of consistency should do so

here, particularly since Judge Henning explicitly found that the jury's life recommendation was induced by defense counsel's "emotional" penalty phase closing argument (R **562)** which included counsel's personal and religious opposition to capital punishment and inaccurate representation that appellant would necessarily leave prison "in a casket" even if the jurors recommended life (R **389-399),** compare Francis v. State, **473** So.2d **672, 676-677** (Fla. **1985),** cert. denied, **474** U.S. **1094 (1986).** The State again yields to Judge Henning:

> In evaluating aggravating and mitigating circumstances this Court will not engage in a mere counting procedure of "X" number of aggravating circumstances and "X" number of mitigating circumstances, but, rather will make a reasoned judgment in the opinion of this Court.
>
> The law states that death is presumed to be the proper penalty when one or more aggravating circumstances are found unless outweighed by one or more mitigating circumstances. White v. State, **403** So.2d **331** (Fla. **1981),** [cert.denied, **463 U.S. 1229 (1983)].**
>
> In this case, the trial jury recommended to this Court that the Defendant be sentenced to life imprisonment. However, it is obvious to this Court that the aggravating circumstance overwhelmingly outweighs any mitigating circumstance. This Court believes that it is very probable that defense

> counsel's emotional appeal to the jury caused the jury's recommendation. The law is clear that such is not a valid ground to bring back a life sentence. See Doualas v. State, 328 So.2d 18 (Fla. 1976), [cert. denied, 429 U.S. 871 (1976)], Thomas v. State, 456 So. 2d 454 (Fla. 1984).
>
> Accordingly, this Court cannot accept the jury's recommendation as being reasonable in this case. After trial, receiving the advisory sentence, reviewing the presentence investigation report and further deliberations, this Court be1ieves the appropriate sentence in this case is the imposition of the death penalty.

(R 561-562).

Should the Court be unconvinced that this override is sustainable under Tedder, the State would suggest that it recede from Tedder for the reasons cogently detailed by Justice Shaw in his Grossman v. State, 525 So.2d 833, 846-851 special concurrence, and affirm.

CONCLUSION

WHEREFORE appellee, the State of Florida, respectfully submits that this Honorable Court must AFFIRM the judgment and sentence under appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOHN TIEDEMANN
Florida Bar No. 319422
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(407) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been forwarded by United States Mail to: FRED HADDAD, ESQUIRE, Counsel for Appellant, 429 South Andrews Avenue, Fort Lauderdale, Florida 33301, this 23rd day of February, 1989.

Of Counsel