O/A 11-5-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,333

HORACE BROWN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON APPLICATION FOR DISCRETIONARY REVIEW

****

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONT'D

OTHER AUTHORITIES

INTRODUCTION

Petitioner was the defendant in the trial court and appellant/cross-appellee in the Third District Court of Appeal. In this brief he will be referred to as "Brown." The respondent was the prosecution in the trial court and appellee/cross-appellant in the Third District.

The symbol "R" will signify the record on appeal. "Tr" will refer to the transcripts of proceedings, while "S.Tr.I" and "S.Tr.II" will refer to the transcripts of September 6, 1985 and August 27, 1985 respectively.

STATEMENT OF THE CASE

Respondent agrees with Brown's version of this case's procedural history, but reserves the right to include additional details concerning said history in the "Argument" section of this brief.

STATEMENT OF THE FACTS

Brown's version of the facts is objected to as being self-serving. Respondent submits the following narrative:

Brown was living in Miami with his son Erik, daughter Dee Dee, a friend named Denny Haneline, and a woman named Gail Everett. Everett had been living in the Brown household as Brown's lover for a few months beginning in the fall of 1982. (Tr. 136-137).

On December 2, 1982, both Brown and his son Erik were arrested at Miami International Airport on a cocaine trafficking charge. (Tr. 137). Brown wanted to be released on bond. He called an old girlfried of his in Detroit named Alma Kelly and asked her to come to Miami to help bail him out of jail. She agreed, and flew into Miami.

Kelly was met at the airport by Everett and Dee Dee. They all went to the Brown house to get some sleep. Brown called Kelly the next day and told her to forge the name of his true wife (Sandra Nottage) on some papers that a bail bondsman was going to bring over for signing. This was done, and Brown was released from jail a short time later.

The next order of business was the release of Erik from jail. Brown told Gail Everett to appear at Erik's bond hearing and tell the court that she was his fiancee. Everett agreed, told the lie at the bond hearing, and Erik was released.

Everett was getting fed up with Brown. She used the arrival in Miami of Alma Kelly as her excuse to break off her relationship with him. She moved out of the Brown household and went to live with her mother. (Tr. 232, 247).

The Brown household then consisted of Brown, his children Erik and Dee Dee, Haneline, and Alma Kelly.

On December 8, 1982, Orlando Gomez arrived at the Brown residence. Gomez was a drug dealer who had done business with Brown in the past. (Tr. 142). The time was somewhere around 4:00 or 4:30 P.M. Brown heard him approach and hid so that Gomez would not notice his presence. He told Erik to tell Gomez to come back a few hours later (when it would be dark). (Tr. 144). After Gomez left, Brown mentioned to Haneline that he (Brown) was going to "rip-off" Gomez because he needed some money. Haneline related this statement to Erik. (Tr. 145, 183; 207, 208).

Gomez came back sometime between 7:00 and 8:00 P.M. (Tr. 147). Brown received him in his bedroom. Gomez was introduced to Kelly and they engaged in small talk for a few moments. Brown was observed snorting some white powder into his nose. Kelly left Gomez and Brown alone in the room at that time.

Gomez, Haneline, and Brown then departed. Gomez left in his vehicle and Brown and Haneline left in another.

Haneline and Brown came back a few minutes later. Haneline entered the house and retrieved a pistol while Brown waited in the car. They then drove off together. (Tr. 148).

Gomez soon arrived back at the house, looking for the others. Brown and Haneline then arrived again. At that time the parties all left, in the same vehicles as before.

Approximately forty-five minutes later, Haneline and Brown returned to the house. Haneline was the only one who entered. He came in very agitated, and he had blood on his shirt, which he changed. (Tr. 150). Erik stepped out to meet his father in the car. Brown told Erik that "Denny had shot Gomez". (Tr. 150).

Brown, Erik, and Haneline then drove to the Holiday Inn. (Tr. 151). Haneline registered under an assumed name. The time was 10:58 P.M.

Just after 11:00 P.M. Brown made the first of several phone calls to Kelly. He told her that he "had to kill Orlando" (Tr. 316, 373, 383, 395). He also told Kelly that he was afraid to return to the house that night for fear of retaliation from "Gomez' people." In subsequent phone calls

he told Kelly to gather up some of his clothes and deliver them to Gail Everett.

Kelly and Erik gathered up some clothes and went to a designated parking lot where Everett was waiting. Erik threw the clothes in Everett's car and told her to go to Cherry Bay to meet Brown. (Tr. 152-153).

She went to Cherry Bay and picked up Haneline and Brown. From there they all went to the Holiday Inn. Brown had alreay checked in so they went directly up to the room. While there Brown told Everett that if asked she was to say that Brown was with her from 8:00 P.M until 3:00 A.M. Everett then left.

The next morning a man came to the Brown house and told Kelly to go to a McDonald's and wait for a call from Brown. This was done. Brown called. He spoke to Kelly and told her to sell his car. The car was then sold at a used car lot for $1,500. Erik took $700 of it to a supermarket and left it with a Mr. Thomas, who turned it over to Brown. (Tr. 155-156).

Kelly never heard from Brown again. She returned to Detroit a couple of days later. About a month after arriving in Detroit, she told all she knew to Michigan police.

The medical examiner testified that Gomez died of four gunshot wounds fired from close range. His body was found lying next to the cab of the truck he had driven to the Brown house that evening.

Brown called an eyewitness to the killing as his only witness, who testified that four shots were fired in all. He (the witness) was awakened by the first shot and then looked out his window to see the killer fire three more shots as the victim "was laying on the ground and the other man was standing over him." (Tr. 403). After firing his weapon, the killer ran away. The only people the witness saw were the victim and his murderer.

The jury returned a "guilty" verdict for first degree murder. The trial court, on Brown's motion, discharged the jury and sentenced Brown to life in prison.

ISSUES PRESENTED

I.

WHETHER BROWN'S LIFE SENTENCE WAS EVER LEGALLY IMPOSED, AND WHETHER THE THIRD DISTRICT'S SUBSEQUENT ORDER VACATING SAID SENTENCE AND REMANDING THE CASE FOR CELEBRATION OF A PENALTY PHASE CONSTITUTED A VIOLATION OF DOUBLE JEOPARDY PRINCIPLES? (Restated)

II.

WHETHER THE FAILURE TO INSTRUCT ON BOTH OF THE THEORIES UNDERLYING THE MURDER CHARGE WAS ERROR, WHERE NO OBJECTION WAS EVER INTERPOSED, AND WHERE THE EVIDENCE AMPLY SUPPORTED A FINDING OF FIRST DEGREE PREMEDITATED MURDER? (Restated)

SUMMARY OF THE ARGUMENT

I.

The trial court's discharging of the jury before the penalty phase began was a violation of the strict sentencing procedures contained in Florida's capital sentencing scheme. Brown did not request a waiver of an advisory sentence. The State was never even given the chance to present evidence of aggravating factors to the court. In short, the trial court made a mockery of F.S. §921.141(1). The "sentence" which it handed down was illegally imposed. The Third District's order vacating that sentence was proper. Double jeopardy is not at issue here because only a void sentence has been vacated.

II.

The State proceeded on the theory of premeditated and not felony murder. The evidence supported that theory. It was unnecessary to either prove up felony murder or instruct on the underlying felony of cocaine trafficking. Brown's failure to object to the jury instructions serves to bar relief here.

ARGUMENT

I.

BROWN'S LIFE SENTENCE WAS NEVER LEGALLY IMPOSED, AND THE THIRD DISTRICT'S ORDER VACATING SAID SENTENCE AND REMANDING THE CASE FOR A CELEBRATION OF A PENALTY PHASE DID NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES.

Introduction

Brown's reasoning is flawed. He has not accurately described exactly what the trial court did in ruling on his Enmund [1] motion, and he has not presented dispositive case law to substantiate his position. The State will:

1.) describe the procedure followed below,

2.) cite the proper procedure in capital cases,

3.) point out the procedural errors committed by the trial court,

4.) provide case law regarding the Double Jeopardy issue raised by Brown, and

5.) distinguish the authority cited by Brown.

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[1] Enmund v. Florida, 458 U.S. 782 (1982).

1. Proceedings below

The guilt phase of Brown's trial for first degree murder ended with a verdict of "guilty as charged" (Tr. 554-555).[2]

The trial court then immediately told counsel:

> "[B]efore we proceed [on Friday], I'll hear any motions or law that you might wish to present and to comment on why the Court [should] not send this to the jury on the death penalty phase. I'm open." (Tr. 559-560).

The trial court held that hearing (Supp. Tr. 2-29). It listened to Brown's argument that Enmund precluded the imposition of the death penalty. The State objected and presented argument, but the court ruled:

> "I'm going to take it away from the jury. I'm not going to let it go to the jury on the death penalty." (Supp. Tr. 19).
>
> * * * *
>
> "I'm going to sentence him to the alternate sentence. Is there any reason why I can't sentence him right now? Mr. Brown, stand up." (Supp. Tr. 20).

[2] Brown was also convicted of aggravated assault. He was acquitted of robbery.

Brown was immediately sentenced to life in prison (Supp. Tr. 20-21), and the jury was discharged (Supp. Tr. 29-34).

Brown apealed his convictions. The State then cross appealed the trial court's imposition of a life sentence, its refusal to continue the case through the penalty and sentencing phases, and its refusal to properly "death-qualify" a jury (See: State's brief filed in the Third District Court of Appeal).

On appeal, the Third District affirmed Brown's murder conviction. It also reversed his life sentence and ordered the trial court to submit the case to a properly death-qualified jury. Brown v. State, 501 So.2d 1343 (Fla. 3 DCA 1987). It ruled that Enmund did not apply to Brown's case.

This appeal followed.[3]

2. Procedure in Capital Cases

Procedure in capital cases is strictly regulated by statute. There must be a guilt phase, as advisory penalty phase before a jury, a penalty phase before the court if jury is waived, and then a sentencing phase. F.S. 921.141 (1) through (3).

[3] Brown no longer asserts that Enmund precludes the death penalty in his case.

> F.S. §921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence:
>
> (1) Separate proceedings on issue of penalty. --Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. **** (Emphasis supplied).

This Court has held the penalty phase to be mandatory.

> The second step of the sentencing procedure is that the jury--the trial jury if there was one, or a specially called jury if jury trial was waived--must hear the new evidence presented at the post-conviction hearing and make a recommendation as to penalty, that is, life or death. (Emphasis supplied).
>
> State v. Dixon, 283 So.2d 1 (Fla. 1973).

The defendant may not waive the entire penalty phase. He may only waive a jury advisory sentence. Lamadline v. State, 303 So.2d 17 (Fla. 1974); Palmes v. State, 397 So.2d 648 (Fla. 1981).

Waiver of the jury advisory sentence must follow the usual procedure in place for any waiver of important rights.

> "We hold that the record must affirmatively show that the defendant voluntarily and intelligently waived the right to have a sentencing jury render its opinion on the appropriateness of the death penalty, granted him by the express provision of §921.141, F.S."
>
> Lamadline, at 20.

Regardless of waiver, the State has the absolute right to present its case in favor of death. It has the option of presenting evidence, and it has the right to make argument. "The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death." F.S. 921.141 (1).

It is only after the presentation of evidence and argument that the trial court is empowered to sentence a defendant.

> "The court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." (emphasis supplied) F.S. 921.141 (3).

The sentencing scheme of F.S. 921.141 is detailed and mandatory.

3. Procedural errors committed below

The trial court completely ignored proper procedure. The entire penalty phase, and not just the jury advisory phase, was eliminated over objection by the State.

Regarding a possible waiver of the jury advisory sentence, the record shows that Brown never asked to waive anything. (Supp. Tr. 2-34). Lamadline, supra.

The trial court's refusal to proceed according to law was without even a trace of justification. It applied Enmund, a felony-murder case, to Brown's, a contract killing type of case. The state never had the chance to argue in favor of death.[4]

The State's cross-appeal preserved these errors for appellate review. The Third District ultimately ordered the trial court to conduct a penalty phase according to law.

Although not discussed by the Third Circuit, the trial court's failure to allow the trial to continue through the penalty phase is analogous to what happened in State v.

[4] The record shows the presence of at least two and possibly three aggravating factors. Brown had previously been convicted of murder in another state, and this was a case of heightened premeditation. Since Brown and the victim were well acquainted with each other, it is possible that F.S. 921.141 (5) (e) also applied. There are no mitigating facts apparent from the record.

Bloom, 497 So.2d 2 (Fla. 1986) and State v. Donner, 500 So.2d 532 (Fla. 1987). In our case, the trial court took it upon itself to rule the death penalty inapplicable at a time when the prosecutor had the sole authority to decide whether the case should continue an a death penalty case.

> "In this petition the state argues that the circuit judge has no authority to prejudge the death penalty's appropriateness because such a ruling unconstitutionally infringes on an executive function exclusively within a prosecutor's discretion."
>
> * * * *
>
> "[w]e . . .hold that article II, section 3, of the Florida Constitution prohibits the judiciary from interfering with this kind of discretionary executive function of a prosecutor.
>
> We conclude that the circuit judge has no authority to interfere with the prosecutor's discretion in proceeding with this cause as a death penalty case. If we allowed the circuit judge to make pre-trial determination of the death penalty's applicability, we would be modifying the death penalty's statutory scheme. Section 921.141(1), Florida Statutes (1985), mandates that the decision to impose the death penalty must be made in a separate proceeding after an adjudication of guilt. A pre-trial penalty determination by the trial judge would effectively create a statutorily unauthorized trifurcated death sentence procedure." (emphasis supplied).
>
> Bloom at 3.

There is no difference in the reasoning which applied in Bloom and that which should apply in the case at bar. Since the sentencing (penalty) phase is an entirely separate proceeding, and since the decision to go forward as a death case still lies with the prosecutor at that juncture, the trial court has no authority to make a sentencing decision regarding the appropriateness of the death penalty at that time. He may only make that determination after the guilt and penalty phases are complete. The trial court's power to effectively halt the trial proceedings in simply non-existent.

4. Double Jeopardy and the case at bar.

Brown has cited case law[5] which supposedly precludes a remand for the proper conclusion of his trial. The State strongly disagrees.

Brown's life sentence was illegally imposed. It was imposed in contravention of the proper procedure in capital cases. Double Jeopardy does not bar the imposition of a more severe sentence after an illegally imposed sentence has been vacated.

> "The appellants contend that their right not to be placed twice in jeo-

[5] Arizona v. Rumsey, 467 U.S. 203 (1984); Fasenmeyer v. State, 457 So.2d 1361 (Fla. 1984), and Troupe v. Rowe, 283 So.2d 857 (Fla. 1973).

pardy was violated when their punishment was enhanced in the resentencing proceeding. They argue that they had a legitimate expectation that their sentences were final because (1) they were not at fault in the original sentencing proceeding, and (2) absent statutory authority, their sentences could not be enhanced once they had begun to serve them. The United States counters that no such expectation exists when, as here, the sentence is challenged in a manner provided by law."

* * * *

The appellant's final argument thus rests on their ability to point to a distinction, for double jeopardy purposes, between an illegal sentence and a sentence that is illegally imposed. Although "Rule 35 burdens us with the artificial task of drawing [such] lines" in cases involving the question whether review of a sentence is subject to the 120-day limit of Rule 3 (a) for sentences illegally imposed, see United States v. Cervallos, 538 F.2d 1122, 1128 (5th Cir. 1976), we see no reason, and the appellants give us none, to draw such lines for double jeopardy purposes. While DiFrancesco* did not involve correction of an illegal sentence within the meaning of Rule 35, its rationale, in the constitutional sense, is applicable here. Defendant is charged with knowledge that his sentence, if illegally imposed is subject to correction under Fed.R.Crim.P. 35(a). Under such circumstances, he has no expectation of finality in the sentence he receives. This case is resolved by the plain language of Rule 35," United States v. Henry, 709 F.2d 298, 317 (5th Cir. 1983) (Reavley, J., specially concurring), and DiFrancesco indicates that as thus applied

* this refers to United States v. DiFrancesco, 449 U.S. 117 (1980)

> the defendant is not exposed to double jeopardy. "Correction of a sentence imposed in an illegal manner does not violate double jeopardy even if the correction increases the punishment, and the fact that [the defendant] has commenced serving the sentence is irrelevant." United States v. Stevens, 548 F.2d 1360, 1362-63 (9th Cir.), cert. denied, 430 U.S. 975, 97 S.Ct. 1666, 52 L.Ed.2d 369 (1977)."
>
> United States v. Crawford, 769 F.2d 253 (5th Cir. 1985).

The Crawford rationale applies to this case. Brown's sentence was in no way final. He had no right to expect any treatment on appeal other than what he got from the Third District. By appealing his conviction, he gave the court the power to decide the sentence issue via cross appeal. The State also could have immediately sought relief via Writ of Prohibition before sentence was imposed. That life sentence was never final. No illegally imposed sentence is ever final if the state challenges it in a manner provided by law. See also: United States v. Colunga,786 F.2d 655 (5th Cir. 1986); United States v. Stevens, 548 F.2d 1360 (9th Cir. 1977).

5. Authority relied upon by Brown

Brown's legal argument has one major weeakness: he relies on caselaw applying the Double Jeopardy Clause to cases where proper sentencing procedures were followed in their entirety.

Rumsey, for example, involved a legal sentence imposed in a legal manner. After the jury reached a guilty verdict in a first degree murder trial the judge went on to conduct a complete penalty phase as required by law. The State argued in favor of death, pointing to the existence of three aggravating factors. The defendant followed with a witness and argument. After weighing all the aggravating and mitigating factors, a life sentence was imposed. The only error involved in that case had nothing to do with the procedure which produced the sentence. The error concerned the trial court's misinterpretation of one possible statutory aggravating factor.

The Supreme Court ruled that the sentence imposed after the completed Arizona capital sentencing hearing was an acquittal on the merits.

> "The trial court entered findings denying the existence of each of the seven statutory aggravating circumstances, and as required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and as such, bars any retrial of the appropriateness of the death penalty."
>
> Rumsey, at 211.

Our case is easily distinguishable. There was never a proceeding which produced a finding on the merits, and hence

Brown was never "acquitted." As the Supreme Court stated in Poland v. Arizona, 476 U.S. _____, 90 L.Ed.2d 123, 106 S.Ct. _____ (1986):

> Under Bullington and Rumsey, therefore, the relevant inquiry in the cases before us is whether the sentencing judge or the reviewing court has 'decid[ed] that the prosecution has not proved its case' for the death penalty and hence has 'acquitted' petitioners."
>
> Poland, 90 L.Ed.2d at 131.

It is hard to see how Brown can claim an "acquittal" when there was never even a sentencing hearing held in his case. An "acquittal" can only be the product of a duly conducted completed penalty phase. Rumsey did nothing more than hold that improper legal rulings relied upon during the penalty phase do not serve to vitiate a defendant's "acquittal" and subsequent sentence to life imprisonment. An erroneous ruling in an otherwise proper proceeding only "affects the accuracy of [the court's] determination, [and] it does not alter its essential character." Rumsey, at 211.

Brown reliance upon Rumsey is misplaced.

Fasenmyer, a Florida case, is not even close to being dispositive of the Double Jeopardy issue raised in this appeal. That case dealt with a sentence which had already been fully served and later changed so as to be served consecutive to other sentences. It should also be noted that

the sentences in that case were all legally imposed; one of them was simply changed from concurrent to consecutive upon resentencing.

Troupe, another Florida case relied upon by Brown does little to help his cause. In Troupe, the trial court accepted the defendant's plea and sentenced him. A second Assistant State Attorney (one who had not participated in the plea colloquy and sentencing) later objected to the terms of the plea. The trial court set aside the plea and sentence, withdrawing the plea on the defendant's behalf.

This Court held that jeopardy had attached upon the original sentencing, noting that there was no procedure which permitted the State to recall the defendant and reopen the case. Brown's case is quite different. The State's cross appeal was a legitimate vehicle for redress. In Troupe, the State had no such means available.

It should also be noted the sentence in Troupe was legally imposed. The only objection to it had to do with the precise terms of the plea agreement. Brown's sentence was not legally imposed.

6. SUMMARY

Brown has not been placed in jeopardy as far as his resentence is concerned. His life sentence, being illegally imposed, is subject to change when properly attacked. The State's cross appeal was a proper way to correct the trial court's sentencing error.

In addition to the Crawford case already cited, the State would point out that Brown is subject to greater punishment under the rule announced in North Carolina v. Pearce, 395 U.S. 711 (1969).

> "We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." Williams v. New York, 337 U.S. 241, 245, 93 L.Ed. 1337, 1341, 69 S.Ct. 1079. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is

> no more than consonant with the principle, fully approved in Williams v. New York, supra, that a State may adopt the prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."
>
> Pearce, at 723.

Brown's penalty phase should provide the trial court with aggravating factors (factors not presented previously for obvious reasons) which would provide the foundation for an increased sentence. Although Pearce is not identical to our case, the rationale is the same, viz., that increased punishment can be imposed if the sentencer is informed of aggravating factors previously unknown to it, and if the defendant is otherwise properly before the court for resentencing.

II.

THE FAILURE TO INSTRUCT ON BOTH OF THE THEORIES UNDERLYING THE MURDER CHARGE WAS NOT REVERSIBLE ERROR, WHERE NO OBJECTION WAS IMPOSED, AND WHERE THE EVIDENCE AMPLY SUPPORTED A FINDING OF FIRST DEGREE PREMEDITATED MURDER.

Brown was charged in the alternative. It was alleged that he either committed premeditated or felony murder. The underlying felonies were either drug trafficking or robbery. Only the robbery allegation was contained in a separate count in the indictment. (R. 1).[6]

The jury was instructed as to premeditated murder, felony murder, robbery, and principals. No instruction was given regarding drug trafficking, and no objection was raised regarding the failure to do so. (Tr. 553).

Brown takes the position that the trial court's failure to instruct on the trafficking charge constitutes fundamental error. He also candidly pointed out in his brief in the Third District, that Knight v. State, 394 So.2d 997 (Fla. 1981), has held such a failure not to be error, where no objection was raised below and where there is evidence to support a finding of premeditated murder.

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[6] Due to a clerical error, the title of the indictment read "attempted robbery." This error was explained to the jury. (Tr. 421).

Regarding premeditation, Brown argues that: a) the evidence showed that Haneline was the actual triggerman, and b) that there is no evidence to prove that Gomez' murder was premeditated.

It must first be pointed out that the State proceeded on the theory that Haneline was the triggerman, and that Brown simply had Haneline do his killing for him. (Tr. 455). Brown was tied to the Gomez murder as a principal, and an instruction to that effect was given to the jury. (Tr. 536, 537; R. 270). The trial judge even made the observation that Brown had in fact been convicted as a principal. (S.Tr.I 17). The question of who actually pulled the trigger is really not germane to this case. The question here becomes whether the murder was premeditated or not. Knight, Id.

The State contends that there is strong evidence of premeditation. Behold this analysis:

A. The Intent

Brown made known his intent to rip-off Gomez several hours before the rip-off was to take place. A cocaine rip-off is not just another robbery. Whenever a person sets out to rip-off cocaine, that person at the very least knows that deadly force will be an option he will have to consider. As noted in another local drug related crime:

"Derringer testified specifically that White had told him that he and the wheelman, Adolphus Archie, were asked by co-conspirator Ferguson if they would go with Ferguson 'to take off a dope house or something to that effect' or as he put it later 'to rob a dope house.' (TR. at 842). At the outset, then, Petitioner knew, at a bare minimum, that the specific object of the robbery was a narcotics house. He started with ample reason to anticipate that deadly force would be used. That lethal force would be contemplated in the context of such an enterprise seems to be an eminently reasonable conclusion to draw from the nature of any robbery directed specifically at an illicit drug house. The federal courts have for years recognized the inextricable link betweeen guns, use of the tools of violence, and the drug trade. Whether for their own protection, for the protection of their property or for their use in stealing from others, individuals engaged in buying or selling narcotics are reasonably assumed to be armed. See, e.g., United States v. Perez, 648 F.2d 219, 224 (5th Cir.), reh. denied, 655 F.2d 235 (5th Cir.), cert. denied, 454 U.S. 1055, 102 S.Ct. 602, 70L.Ed.2d 592 (1981); United States v. Pentado, 463 F.2d 355, 360 (5th Cir.), cert. denied, 409 U.S. 1079, 93 S.Ct. 698, 34 L.Ed. 688 (1972). As the United States Court of Appeals for the Second Circuit noted in United States v. Weiner, 534 F.2d 15, 18 (2d Cir.), cert. denied, 429 U.S. 820, 97 S.Ct. 66, 50 L.Ed.2d 80 (1976): "Experience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment.' In short, given the large sums of money and quantities of narcotics involved, and the high risk of loss at the point of exchange, it is often reasonable to infer that

> those present at such an exchange, especially an exchange which might involve the armed robbery of a narcotics dealer, will have occasion to use deadly force. Sadly in South Florida the use of lethal force in the context of a narcotics transactions has been repeatedly and amply demonstrated. See, e.g., United States v. Alvarez, 755 F.2d 830,848-49 (11th Cir. 1985), cert. denied, Hernandez v. United States, U.S. ____, 106 S.Ct. 274, 88 L.Ed.2d 235 (1985); Royer v. State, 389 So.2d 1007 at 1023-1024 (3rd DCA 1980) (en banc) (Hubbart J. concurring), ("unprecedented degree of violence and murder"); affirmed Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); State v. Sayers, 459 So.2d 352, 353 (3d DCA 1984), reh. denied, 471 So.2d 460; Martinez v. State, 413 So.2d 429, 430 (Fla. 3d DA 1982).

White v. Wainwright, 632 F.Supp. 1140, (USDC, S.D. Fla. 1986), affirmed, White v. Wainwright, 809 F.2d 1478 (11th Cir. 1987).

That is why Haneline and Brown brought along a pistol. The pistol is clear proof that Brown was at least considering at that point to kill his victim. In fact, Brown and Haneline made a special return trip to pick up the gun.

B. The Method of Killing

The victim was found to have been shot four times at close range, as if, according to the medical examiner, his killer were "standing over him" and firing. (Tr. 92). This observation was corroborated by Brown's own eyewitness to the killing, who described a man standing over the victim and firing. These cold facts clearly demonstrate nothing less than an execution-style killing, which by definition is premeditated. Antone v. State, 382 So.2d 1205 (Fla. 1980).

C. The Admissions

The most damaging pieces of evidence regarding the premeditated nature of this killing came from Brown's own mouth. He told his son Erik that Haneline had done the shooting. Then, a few minutes later, he called up Alma Kelly and twice told her that he (Brown) had killed Gomez. Kelly testified that Brown said "I had to kill Orlando." Look at Brown's two inculpatory statements that night-- "Denny shot Orlando" and "I had to kill Orlando." Take Brown at his word and assume both statements are true. The only possible conclusion one can derive from them is that Brown considered himself to be Gomez' killer. What he told Kelly clearly indicates that he (Brown) had Gomez killed.

His previous statement to Erik only showed that he used Haneline as the triggerman.

Equally damaging to Brown was the fact that the eyewitness testified that only one man was at the murder scene, and that he saw that man run away after firing into the victim. That being the case, Brown must have ordered the execution well in advance of its occurrence. He was not there when it took place yet he later said "I had to kill Orlando." How could Brown admit "I had to kill Orlando" if he was not even present, unless, of course, he had ordered him killed sometime earlier?

If one simply believes what Brown himself said about the killing and what the eyewitness testified to, the only possible conclusion is that Brown was some safe distance away from the murder scene when he sent Haneline off to do his dirty work. He told Haneline to kill Gomez. His words convict him.

D. The Evasion

If there was not enough on the record to connect Brown with the murder (he left with Haneline, returned with Haneline, and verbally inculpated himself by his admission to Kelly), he went one step further--he tried to set up an alibi

with Gail Everett. He tried frantically not to let his involvement be discovered, inducing Everett to lie about where he had been that night. This is just one more piece of evidence to tie him to the murder.

The conclusion that Brown was the true killer, that he ordered or was at least involved in this killing is borne out by his own fear that Gomez' people would be coming after him. (Tr. 316). His statement to Kelly to this effect and his elaborate attempts to avoid detection are clearly indicative that this was the case.

In summary, this was an execution. The method of killing and Brown's own words prove that he ordered Haneline to pull the trigger. There is no doubt about the presence of premeditation. Execution-style killings are by their nature premeditated.

It must also be pointed out that the State did not prove its case by mere circumstantial evidence, although that would have been sufficient to support a conviction of premeditated murder. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). There was an eyewitness who was able to testify as to the manner in which the killing took place and there were admissions made by Brown. Admissions and eyewitness testimony are direct evidence of guilt. Brown's argument

regarding a lack of proof of premeditation is woefully unfounded, and his conviction must stand. Under the authority of Knight v. State, supra, no reversible error took place.

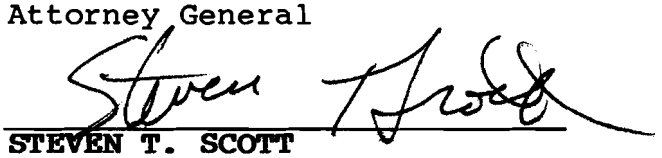
The State also hereby adopts the legal reasoning of the Third District, and incorporates it into this brief. See: 501 So.2d at 1344-1345.

CONCLUSION

Based on the foregoing, the Third District's decision should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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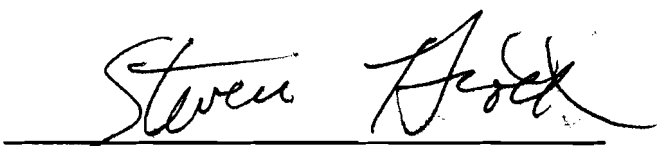
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON THE MERITS**, was furnished by mail to **JOSEPH DURANT**, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33128 on this 17th day of August, 1987.



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