IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,361

ALBERTO FARINAS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

JUN 1 1988
CLERK, SUPREME COURT
By Deputy Clerk

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

****

BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

I.

The Murder Of Elsidia Landin

The Defendant gave two statements to police when he was arrested for the execution style murder of Elsidia Landin. (R.1953-1970; 2405-2413; T.983-999, 1097-1150). The first statement was given to Tampa police, after he had been given his Miranda rights, both at the scene of his arrest in Tampa, and at the Tampa police station before giving his account of the murder. (T.954, 971, 977). The second statement was given to Hialeah police officers, Detectives Nabut and Ubeda, who had driven to Tampa to transport Defendant back to Miami, after Defendant had executed a Miranda Rights Waiver Form, which was in Spanish. (R.1953-1970, 2417; T.1097-1150) In those two statements Defendant admitted killing the victim (Hereinafter "Elsie.") and described the events surrounding her demise. (R.1953-1970, 2405-2413; T.983-99, 1097-1150).

The circumstances surrounding this heinous crime are as follows. On November 25, 1985, at approximately 6:10 a.m., Elsie, and her sister Magaly Diaz, drove their father, Fernando Diaz, to work at Duramil of America, Inc., 9150 Northwest 105 Way, Medley, Dade County, Florida. (R.1926; T.839) Defendant was waiting outside Mr. Diaz's house, and followed them. (R.1960, 2407; T.988, 1112-1113).

After Elsie and her sister dropped their father off at work, they drove southeast on Okeechobee Road. (R.1926, T.1839). Defendant continued to follow them; commenced to try and force them off the road four or five times; and was finally successful in cutting Elsie, the driver, off. (R.1961, 2407; T.988, 1115). Defendant approached the car Elsie was driving, and the following is an account in Defendant's own words of his initial conversation with Elsie:

> Look, you see, you see that when I want to catch people I catch them, I watch and I catch them. (R.2407; T.1115).

Defendant had his nine millimeter pistol in his waistband. (R.2407-2408; T.989, 1121).

Defendant then told Elsie that her former husband, Gustavo, told Defendant that he was going to kill her, and Defendant said to Gustavo that he would help him. (T.842). Defendant then said:

> Elsie, you know something, you are not going to live to be an old lady. (T.842).

He then reached in the car and took the key out of the ignition. (R.1961; T.843, 1116). Defendant ordered her out of the car, bent the car key, and gave it to Elsie, who gave it to her sister, Magaly. (T.844-846). He grabbed Elsie by

the arm and guided her to his car. (R.1961; T.844-846, 1116.)

Terrified, Elsie asked Defendant:

> Why are you doing this, Alberto? **Why, Why?**
>
> What are you going to do Alberto?
>
> (T.844-845).

As Defendant took Elsie to his car, Magaly had gotten out and moved to the back of the car she was in. (T.845). Elsie continued to plead with Defendant, and Magaly begged him not to take her. (T.845-846). Elsie hesitated at Defendant's car, Magaly began to cry as did Elsie, while Defendant ordered Elsie into his car. (T.846-847). The following is an account of these events in Defendant's own words:

> Then the sister, "No, let's go. Let's go.'' **And** that's when I said, 'if you are going to get like that, you are not going to leave.' Then I took the car keys away from her and I told her, "Get in my car."
>
> "Look, Alberto, this girl here alone, she don't know how to drive. Don't leave her there."
>
> Then she told her sister, "No, I'm going over to my father and I tell him, I tell him to--1 tell him the story, no?"
>
> Then I gave her the keys and I told

> Elsidia, "Elsidia get in with me, 'Alberto,'" and I told her--and she told me, "Alberto, don't kill me. Alberto, don't kill me."
>
> And I told her, "Girl, I don't want to kill you. I don't want to kill you. I love you. I got good intentions towards you."
>
> And then she was crying and she told me, "I am going to leave with you, I am going to remake my life over again with you."
>
> (R.1961; T.1116).

Defendant then related that Elsie got in his car because she was afraid, and the reason why she was afraid: (A.S.A. Ridge reads defendant's part.)

> DETECTIVE NABUT: Why do you think she got in your car? Do you think she was afraid of you?
>
> MR. RIDGE: Fox sure she got in the car because she was, for sure, I imagine she was afraid of contradicting me, no?
>
> DETECTIVE NABUT: Yes.
>
> Why do you think she was afraid? Why would she have a reason to be afraid?
>
> MR. RIDGE: She had reason. She had reason to be afraid, because when she went to my house--
>
> DETECTIVE NABUT: Mm-Hmm.
>
> MR. RIDGE: --she went there and--she went to pick up her son at school. I took her to my house there. We talked and shared, we shared everything. Then she saw the pistol I had.

DETECTIVE NABUT: That was at 450 Beacon Boulevard?

MR. RIDGE: Yes, she saw the pistol that I had and she told me that, That's some pistol. I said, "Yes. It's a good pistol. And she even took it and took the clip in her hands and counted the bullets. Well, she counted them like this (indicating). Listen, how many bullets does it have? It has nine bullets.

Then I said--and she said to me, "And this, what is it for? With what idea?"

And then there is an unintelligible portion of the tape.

"Nine for the one who threatens me to put a bullet in his head."

I said, "But it's not for you." I never had any intentions of doing anything to her.

DETECTIVE NABUT: Then do you think that since she had knowledge of the pistol--

MR. RIDGE: And the defendant says, She is and its followed by an unintelligible portion of the tape, and it continues.

DETECTIVE NABUT: Then she was in fear and got in the car?

Okay. Magaly, her sister, remained in the car?

MR. RIDGE: Mm-hmm.

(R.1962-63; T.1118-1119)

Defendant related the conversation between himself and Elsie just before she jumped out of his car at a stoplight

near the Palmetto expressyway: (A.S.A. Paul Ridge for Defendant)

DETECTIVE NABUT: Okay. Explain to me what happened when you got to the light.

MR. RIDGE: When we are almost arriving there at the Palmetto, she was crying and she was telling me, "Alberto, don't kill me" because I had the pistol under here, I had it on a jacket, I had it on a jacket, so the pistol couldn't be seen, and I had the pistol. But the pistol had the clip on, but the bullet was not on in direct--

DETECTIVE NABUT: The bullet was not in the chamber?

MR. RIDGE: The bullet was not in the chamber. And then--

DETECTIVE NABUT: You had the pistol put away inside you pants, that is to say, in your waistband.

Okay. When you told her to get in your car, at any moment did you threaten her with the pistol?

MR. RIDGE: No, no.

DETECTIVE NABUT: It was only by words, and she got in?

MR. RIDGE: Yes. Just words. Only words. She didn't see the pistol nor her sister see the pistol.

She had seen it before, but I didn't use the pistol for her to get in.

DETECTIVE NABUT: Once she got in the car with you, and you drove away, that's when she saw the pistol?

MR. RIDGE: Yes, she saw it, because I took it out and then I put it next to me.

DETECTIVE NABUT: Mm-hmm.

> I said to her, "I don't want to kill you."
>
> Then she was crying, "Don't leave your daughter, my daughter, don't leave your daughter without a mother."
>
> I don't want-- and then there is an untelligible portion of the tape audit resumes:
>
> But then it seems that she got really scared when I made the U, and I was going to go in the expressway understand?
>
> DETECTIVE NABUT: When you made the U to go to the expressway?
>
> MR. RIDGE: Mm-hmm.
>
> Then she got very scared and she jumped out of the car. When she jumped out of the car was when I fired the first shot.
>
> (R.1963-1964; T.1820-1821).

Elsie ran, screaming and waving her arms for help. (T.852-853, 1049). Defendant jumped out of the car, shot her in the lower middle back from about thirty feet; which severed her spine causing instant paralysis from the waist down; the consequence of which resulted in her falling face down on the pavement. (R.1125; T.1012-1015, 1715-1117). This wound would not have been immediately fatal. (T.1717). Elsie was, at this point, able to see, hear, speak, think. (T.1718-1719). Defendant went up to her as she lay immobilized; he was right next to her when he fired two shots into the back of her head. (T.1126). However, Defendant's gun jammed not once, not twice but three times before he fired those two shots. (T.905, 1147-1158).

Before Elsie had exited the car Defendant said:

> . . .[B]ut from loving you so much before seeing you in the arms of another man, I kill you, you see?
>
> **(R.2410; T.995).**

II.

The Competency Hearing

Three court appointed experts testified at Defendant's Competency Hearing held on March **14, 1986:** Dr. Miller, Dr. Mutter, and Dr. Marina. **(T.26-91). All** three doctors found Defendant to be malingering and competent to stand trial. **(R.1938-1939, 1946; T.30-33, 55-57, 71-72, 76-78, 80-81,88).** The following observations by Dr. Miller a forensic psychiatrist, illustrates why he found Defendant competent to stand trial:

> **A.** The evidence of malingering are the consistencies or inconsistencies of the statements and presentations of Mr. Farinas, meaning that his responses were somewhat vague and evasive.
>
> The sum total of his presentation might indicate that he was ignorant or retarded, or paranoid or hallucinating or suffering from brain damage or perhaps other symptoms as well, when, in fact, there are really--too many symptoms to come up with the formulation of a bona fide mental illness especially in an individual who is not taking any kind of medica-

> tion and in jail, in a general population cell.
>
> It would be inconsistent for someone to apparently, be mentally abhorrent in a population environment and still get along acceptably well, according to the correctional officers with whom I consulted.
>
> **(T.30-31).**

Dr. Miller then gave examples of Defendant's evasive and nonresponsive answers. **(T.31-33).**

When asked what the significance of Defendant's responses was, Dr. Miller testified:

> Q. Doctor, I ask you the significance of the responses to these questions and how you used that to arrive at your opinion?
>
> **A.** Yes.
>
> But, before I answer that I would like to say that he claimed he was living with Elsidia and said that the correctional officers would not allow her to come and visit him.
>
> Basically, he was claiming that the deceased individual was alive and that he was waiting to get out and live with her.
>
> The responses he gave were not credible responses. If I were mentally retarded, he might not know some of the things, but he could not know either as little as he claimed to know. Even if he were mentally ill and schizophrenic.

> There is really no reason why he would not know what a Ford is or what an Exxon station is. It is immaterial to being mentally ill.
>
> If he were having some other symptomology, if you will, it is just totally inconsistent with any one bottom line or even too many mental illnesses.
>
> He had the gammut, basically, of claiming ignorance to things that anybody even of low intelligence would know.
>
> And, of course, significantly, he had no idea as to what he was doing in jail, what he was in jail for, et cetera.
>
> Even though lawyers had come to visit him, he just simply claimed not to know what was going on.
>
> ***Q.*** On the other hand, he was able to give you some information concerning his biography, history and lifestyle in Cuba and in the United States since coming here?
>
> **A.** Yes, as well as the history of his employment status.

(T.33-34).

Dr. Miller further testified that medication Defendant received in jail - Vistaril and Trilifron - were administered in mild dosages. (T.28). Further, although Vistaril was known as antipsychotic medication, it was not used for treating mental illnesses, but for mild anxiety or alcohol withdrawal. (T.28). Dr. Miller had reviewed Defendant's two statements given to the Tampa Police and Hialeah Police respectively, and testified that they appeared to be ''relatively coherent and well organized." (T.37).

Dr. Mutter, a forensic psychologist, found that Defendant's responses were inconsistent. (T.55) "[T]hese types of responses are just not even seen in any kind of mental disturbances." (T.56). Dr. Miller observed Defendant's changes in psychomotor activity and eye contact evidenced malingering:

> A. Well, when people tend to speak here is a degree of anxiety, so sometimes they can look you right in the eye and their lips may begin to curl up. This is usually done unconsciously. But, when I would ask him a question and he claimed not to remember, his eyes would shift up or down or away.
>
> This happened fairly consistent with the questions dealing with issues leading to his present belief. Yet this did not occur when he talked about basic information in his past that was really not charged material.
>
> **(T.57).**

Dr. Mutter reviewed Defendant's two statements, and found them consistent with his opinion that Defendant was malingering:

> A, Well, yes because in these statements he was able to describe the circumstances leading to the present circumstances with no contradictions. He claimed that he never carried a weapon and denied ever having a weapon. He said that he was home when the police brought him to jail whereas in the statements to the police he admitted that he had this

> lady in the car and had initially said that he was not going to kill her but later on when she cried for help he stated that she had tried to leave the car and that is when he shot her.
>
> The thought that he gave or at least the speech as transcribed was certainly well organized. They were well directed. They were consistent with a person who is able to understand the questions and answers in a proper manner and in a reasonable way. There was nothing that was really disconnected or out of touch with reality that I could see. That really has more to do, though, with the issue of mental state at the time of the offense. But, in terms of his now claiming, this one, when I asked him, he did not seem to remember anything about it. That certainly shows inconsistency.
>
> **(T.59-60).**

Earlier, Dr. Mutter had testified that he felt Defendant "knew more than he was telling me." **(T.58).**

While under cross-examination Dr. Mutter testified:

> . . .I think this man has some awareness that he is in a very very serious situation and that he could be facing very serious consequences if he is found guilty of this.
>
> I think he is trying to impress on a number of people that he is sick and is incapable of responding to anyone under any circumstances and that may not be such bad judgement.
>
> **(T.62).**

> **A.** And then I asked him if he knew what killing meant. Because some people do not know, technically, murder based on their education and other factors.
>
> I am sure that he was anxious. But, when examined, I asked him the question, "If I kill somebody and the police caught me, what would happen?" And he said "You would go to jail."
>
> **(T.63-64).**

Dr. Marina also observed evasive behavior and avoidance of eye contact on the part of Defendant, which to her evidenced malingering. **(T.76,** 81, **88).** She reviewed Defendant's statements to police, and had this observation as to those statements and her interview with him:

> **A.** Well, obviously, after the alleged event he had a much better memory than he had when I interviewed him. He could remember and was able to report different things.
>
> For example, he was able to report a telephone number in one of the interviews and yet with me he had difficulty reporting just basic objective facts such as that.
>
> I do not understand how the memory of a person can disintergrate so rapidly in such a short period of time without there being a drug abuse or a brain damage or some type of mental retardation.
>
> **(T.77-78).**

Dr. Marina diagnosed Defendant as having a "borderline personality disorder." (T.75). (Her definition is at T.80-81.) She placed him at the middle level. (T.81). She also found that he had an "anti-social personality disorder." (T.82-Defined on same page.) However, the bottom line of Dr. Marina's opinion came out on cross:

> I do not find him mentally retarded to a degree that he can ignore the fact that an event took place. In fact I know he is not mentally retarded.
>
> Q. All right.
>
> A. He did not -- he just did not fit the picture of psychosis. He just did not.
>
> (T.90).

Dr. Marina stated the following in her evaluation:

> He wants to present himself as being psychotic but he is not.
>
> (R. 1945)

There was a stipulation as to the contents of Dr. Castiello's report. (T.91). He was also court appointed. (R.1948-1951). Dr. Castiello found him to be not competent, psychotic, and that he should be institutionalized in a maximum security facility. (R.1949-1950).

Shirley Farinas testified that she had known Defendant since the Mariel boatlift in **1980. (T.94).** She stopped seeing him late in **1982,** but resumed acquaintance with him in January, **1985. (T.95-97).** The last time she saw him was September **19, 1985** when he stabbed her husband. **(T.102).**

During the time she encountered Defendant, he was always well groomed and dressed. **(T.96).** She never found his behavior abnormal or bizarre. **(T.96).** Defendant never complained of any mental problems, nor did he tell her he had had any psychiatric treatment. **(T.99-100)** Defendant had said he would act crazy, so he could receive disability benefits. **(T.101).** He was of average intelligence, and able to read and write. **(T.100).**

Magaly Diaz, Elsie's sister, testified similarly as to Defendant's behavior and grooming. **(T.105-107).** She testified that he was very intelligent. **(T.107).**

Detective Nabut, Hialeah Police, who took Defendant's second statement testified:

> When he talked he was very calm, collected and responsive. **(T.110).**

Defendant was clean shaven and "very cool." When Defendant gave his statement he was precise, coherent and responsive.

(T.1130). When he and his partner transported Defendant from Tampa to Miami, he exhibited no bizarre behavior. (T.114).

The day before Defendant's live lineup, March 10, 1985, Defendant greeted him and asked him how he was doing. (T.116). When Detective Nabut responded that he couldn't talk to him but that maybe he would see Defendant the next day, Defendant "started acting silly," (T.116-117). The next day, on the way to the lineup, Defendant recognized Detective Nabut as he came off the elevator, and said "Hi" to him. (T.117). Detective Nabut nodded. (T.117). Whenever Nabut addressed him at the lineup, Defendant would look at him and acknowledge by nodding. (T.117-118). When the conversation stopped, Defendant would start "acting crazy," (T.117-118). Detective Nabut thought Defendant was "completely competent" to stand trial. (T.118).

Defense counsel was allowed to take the stand and testify as to Defendant's allegedly bizarre behavior. (T.131-134). The trial court ruled Defendant was malingering, and that he was competent to stand trial. (T.134-135).

III.

The Suppression Hearing

Defendant filed two suppression motions: A Motion to Suppress his Confessions, Admissions and Statements, and a Motion to Suppress Evidence Obtained Through an Unreasonable Search and Seizure. (R.2376-79). A hearing on said motions was held on February 3 and 4, 1987, (T.145-342).

Detective Durkin, Tampa Police Department, was the initial arresting officer and testified as follows: (T.159-198). He had been notified by teletype from Dade County that Defendant was wanted for First Degree Murder, and that he was considered dangerous. (R.2392; T.161-163). Detective Durkin located Defendant's early '70 model silver Pontiac Lemans, with front end damage, in front of a private residence, located in a neighborhood in the northwest sector of the City of Tampa called Drew Park. (T.165). The neighborhood is predominantly Latin, and is "very active and very high in crime rates." (T.165). He located Defendant's car around noon December 1, 1985. (T.165,188).

Detective Durkin then set up a surveillance. (T.168). He was alone. (T.168). Defendant came out of the private residence, looked around, and then went back in. (T.168). Defendant came out a second time and did the same as on the first occasion. (T.170). At this juncture Detective Durkin

moved his vehicle, because it was a very obvious unmarked police car." **(T.171).** He finally established a surveillance vantage point in a bathroom of a bar, because it had a window which provided a view of the private residence. **(T.171).**

Defendant exited the house a third time, and started to open his car door. **(T. 1-72).** Detective Durkin ran out of the bar, jumped in his car and drove to the house. **(T.172).** It was approximately **2:15** p.m. and he radioed for assistance. **(T.172,** 188). Detective Durkin jumped out of his car armed with a **.12** gauge shotgun, pointed it at Defendant, and yelled police several times. **(T.173).** Defendant did a half turn and ducked down behind his car. **(T.173).** Detective Durkin ran to the rear of Defendant's car, and Defendant stood up and submitted. **(T.173).** Detective Durkin instructed him to kneel, which he did. **(T.173).**

At this point Detective Durkin's back-up arrived, and he was assisted by Officer Ullem in handcuffing Defendant. **(T.174).** At the time he was handcuffing Defendant, Detective Durkin ordered the remaining officers to cover him and conduct a "protective sweep." (T.174). The reason behind this action is best viewed through Detective Durkin's testimony:

> Q. Did you give any instructions or any directions to any other police

officers who arrived as a back-up at that point?

A. Yes, I did.

Q. What, if anything, did you tell them to do, detective?

A. I told the arriving officers to cover me and check the house.

Q. Why was it that you told the police officers to check the interior of the residence?

A. At this point when I apprehended *Mr.* Farinas I was standing directly beneath two windows also to my left there is an open door, I had no idea if anybody was inside or if anybody was about to come outside.

I had no idea of the conditions inside the apartment [sic] since I was outside and totally without cover I instructed them to run inside and check to secure my safety and their safety.

Q. Detective, did you--would you consider this a routine felony arrest--

MS. GEORGI: Objection.

THE COURT: Overruled.

THE WITNESS: No, sir. It's not.

BY MR. RIDGE:

Q. Why not, detective?

A. It's my opinion that it's one of the most serious crimes a person could commit.

The fact that he is in Tampa leads me to believe that he is fleeing Dade County, also, the fact that he is armed and has allegedly killed one person led me to have a great concern for my own safety.

> ***Q.*** Was there anything about the type of residence that was involved here that led you to be additionally concerned about your safety?
>
> A. The fact that I didn't know who resided there and the fact that it was a private residence, gave me a greater concern that whoever resided there evidently had befriended Mr. Farinas.
>
> (T.174-175).

Detective Durkin had testified on direct and redirect, that during his surveillance he was not able to see through the windows into the house. (T.170, 198).

Detective Durkin was present when Defendant gave his taped statement in Spanish to the Tampa police. (T.183-188). He instructed Officer Lastra, who is bilingual, to give Defendant his Constitutional Rights. (T.184).

Officer Carey, was one of the police officers that responded to Detective Durkin's summons for assistance. (T.203). When he arrived, Defendant was already handcuffed. He, his partner Officer Lastra, and several other officers conducted the protective sweep of the private residence as Detective Durkin had instructed. (T.174, 204). The reason for the sweep was to check for other people in the house, that may have posed a threat to the safety of the officers. (T.204). He was not able to see into the house through the windows. (T.206).

Several Officers preceded Officers Carey and Lastra as they entered through the kitchen door. **(T.206).** Officer Carey entered the northwest bedroom and observed, in plain view, a black leather zippered pouch **7"** by **10."** **(T.207-208).** It had the appearance of a gun pouch, and Officer Carey saw the outline of the what "appeared to be a firearm." **(T.208).** His reaction was: "That contains a gun." **(T.209).** He then partially unzippered the pouch and saw Defendant's 9 mm semiautomic handgun. **(T.209).** Officer Carey took possession of it, and notified Detective Durkin. **(T.209).**

Since his partner, Officer Lastra, was bilingual, they were given the responsibility of transporting Defendant to the police station. **(T.209).** Officer Lastra Mirandized Defendant at the scene. **(T.212).** Lastra drove to the station; Officer Carey testified that during the transport Defendant acted normal, and exhibited no unusual bizarre behavior. **(T.210-211).**

Officer Lastra testified that he observed Officer Carey pick up the black leather case off the bed. **(T.22).** It "looked like a gun case and you could tell there was a gun in it." **(T.22).** Officer Lastra advised Defendant of his rights in Spanish from a card, while he was in the front seat of his squad car with Defendant in the back. **(T.225-226).** Defendant indicated he understood **(T.220).**

Prior to Defendant's taped confession, he acted normal and calm. **(T.232).** Officer Lastra was instructed to give Defendant his rights again, which he did off of the top of his head. **(T.233).** Defendant's tape, and the English transcript of it were admitted into evidence for purposes of the hearing only. **(R.2405-2413; T.235-236).**

Detective Nabut, Hialeah Police Department took Defendant's second statement, and was responsible for transporting him back to Miami. (R.**2419-46; T.248-249, 267-268).** He testified that he and his partner, Sergeant Ubeda, arrived in Tampa around midnight December 1 and **2, 1985. (T.249).** He first saw Defendant in the lobby area downstairs of the Hillsborough County Jail. **(T.249).** When he first met Defendant he appeared coherent and responsive. **(T.254).** Detective Nabut transported him from the jail to the Tampa Police Station, Detective Bureau. **(T.254-255).**

Detective Nabut read Defendant has rights from a Miranda Rights Waiver form, with Detective Ubeda, his partner, present. **(T.256, 258-263).** Defendant executed same with Detective Ubeda as a witness. **(R.2417: T.256, 258-263).** Detective Nabut then conducted a preinterview with Defendant. **(T.255-256).** The tape and translated transcript of Defendant's second statement were admitted into evidence for purposes of this hearing only. **(T.267-268).** Detective Nabut testified as to corrections made on the tape transcripts.

(T.277-292). Detective Nabut instructed Defendant that he might face a life sentence, but not that he might face a death sentence. (T.297).

The Defendant took the stand on his own behalf. (T.299-311). He testified that Officer Lastra and Detective Durkin threatened him with the electric chair if he didn't talk. (T.300-301). While on cross, Defendant admitted that he was arrested before the murder for a stabbing incident on Miami Beach. (T.303).

Oscar Saiz apparently let him use the house in Tampa. (T.304). **An** individual named Luis stayed at the house in Tampa with Defendant. (T.304). At this time there was an outstanding warrant on Luis for attempted First Degree Murder. (T.305). Defendant said he was not aware of this fact. (T.305).[1] At the hearing he read from the Waiver Form, and admitted they were his signature and initials. (T.310).

Detective Ubeda testified that Detective Nabut informed Defendant of his rights with the Miranda Waiver Form. (T.313). In response to Defendant's allegation that he slammed his fist on the table, Detective Ubeda testified that he and his partner did not play "good guy/bad guy" with

---

[1] However, Defendant in his statement to Detective Nabut stated that a guy next door **was** "in some kind of mess." He also stated he stayed with Luis. (T.1141, 1146).

Defendant. (T.308, 314-315). He served only as a witness to Defendant's interview; he did not participate. (T.316-317).

After hearing argument the trial court denied both Defendant's motions, reasoning as follows:

> THE COURT: I am going to deny both of the motions.
>
> I want to make it clear that the cases that were cited by the Defense Counsel, some of them involved circumstances where the police were watching the premises for a matter of days, of one of them, involved the searching of a crevice. In this particular case, we have an observation by a police officer, for an extremely short period of time, that of two hours.
>
> Of that individual who had been in the Tampa area for a period of four days and in a home there.
>
> Since he was a fleeing fellow with not that having been his own home and that of a home of someone else, it was not an apartment building, it was not a hotel, and therefore there was reason to believe, reasonably that the premises may, in fact, have been occupied even though it was under surveillance for two hours. I do not consider that to be a lengthy period of time, sufficiently observed.
>
> The protective sweep was not as testified to, was not one of crevices, but was rather of an area to determine if there were, in fact, individuals on the premises.
>
> While making that protective sweep, which was determined to be necessary, even though the defendant was in custody, this was to assure themselves of no one else being on the

> premises; and since they could not see inside the premises, they observed the gun in plain view; well be it in a rectangular case.
>
> Nevertheless, both police officers in a room testified that it was clearly the outline of a gun on that case and there was no doubt in their minds that there was a weapon inside that case.
>
> So I will deny the motion with respect to the statement by the defendant, I find them to be knowing, voluntary, and intelligently made as a waiver of his rights are such, and then they should be admitted.
>
> **(T.338-340).**

IV.

The Trial

Defense counsel, in her opening statement, stated that Defendant admitted the facts surrounding and including Elsie's murder, but that he was insane when he did it. **(T.832).** Magaly Diaz, the victim's sister, was the first witness to take the stand, and her testimony has already been presented in I. THE MURDER OF ELSIDIA LANDIN, supra.

Richard Nunez testified that on November **25,** 1985, he was on his way to work, when at approximately 6:45 a.m., while stopped at a light on Okeechobee Road, just before the Palmetto Expressway overpass, he saw a girl running very fast, on the shoulder, against traffic. **(T.852-853).** He

first saw her when she was almost adjacent to his car, to the right. **(T.854).** He watched her until she disappeared behind cars. **(T.854).** He then saw the Defendant running in the same direction, on the shoulder, pointing a gun. **(T.855)** He lost sight of Defendant at approximately the same point he lost Elsie. **(T.855).** He then heard two of three shots: in actuality he heard a shot, there was a pause, and then he heard other shots. **(T.856).** **He** then saw Defendant run back to his car, close the passenger door, get in, and take off on to the Palmetto southbound ramp. **(T.856).** He picked Defendant out of a live lineup. **(T.862).**

After Mr. Nunez testified a recess was taken, and outside the presence of the jury Defense counsel objected to the pictures the State wanted to introduce into evidence. **(T.865).** She agreed that since Defendant admitted the murder, introduction of the pictures would be prejudicial. **(T.865).** She attempted to stipulate, but the State was not willing to stipulate, arguing that failure to prove one of the elements that it had to prove, in which defense counsel stipulated, would lead to automatic reversal. **(T.865-866).** The trial court then ruled as follows:

> THE COURT: As far as the photographs are concerned, we don't need to introduce those two, H and I.
>
> As far as the medical examiner, I will reserve judgment.

> If I allow them to be introduced, I am not allowing the entire picture. There is one picture there that, while it in fact shows the scene, it has a lot of blood, and I am not sure that that's necessary to show.
>
> All right, let's bring the jury in.
>
> Now, this is incidentally my ruling here as to the guilt portion. There may be photographs that are appropriate in the penalty portion which I might exclude here which may be relevant to the penalty portion.
>
> All of them are here, which does not necessarily conclude and they can be used in the penalty phase, and you can bring it up at the time.
>
> (T.870-871)

Officer Jennings, Hialeah Police Department, testified that he was dispatched to the murder scene as an emergency mode. (T.872-873). Two officers were already present attempting to secure the scene. (T.874). He saw a white female lying face down in the road, right near the entrance ramp to the Palmetto Expressway. (T.875). He observed spent casings near the victim's body. (T.876). He saw one of the officers check Elsie for vital signs, and it became apparent she was dead. (T.877). He then began directing traffic. (T.875,877).

Officer Andrews, Hialeah, was a crime scene technician. (T.878-879). He was dispatched at 7:03 a.m. accompanied by Technician Waters, and would later be joined

by Technician Ura. (T.880). He observed Elsie lying in a supine position, and made a sketch of the scene. (T.881). He testified as to the items found and then numbered on his sketch. (T.885). December 3, 1985, Detective Nabut gave him a pouch, which contained Defendant's 9 mm handgun and a magazine clip with eight live rounds of ammunition. (T.888,890). He also received a box of live ammo. (T.890). No fingerprints were found on the weapon. (T.892).

Technician Waters took photographs of the scene. (T.896). Through him, State Exhibits #2 through #8 Composite were introdced. (T.896-906).

Detective Durkin, Tampa Police Department, took the stand next. (T.912-945). His testimony was as it was at the suppression hearing supra. (T.159-198, 912-945). He testified that the protective sweep lasted about one minute. (T.925) The pouch, gun, and clip with live rounds became State Exhibit #9. (T.927-929). Officer Carey testified essentially the same as at the suppression hearing. (T.199-216; 945-962). He was the one who saw Defendant's encased gun, in plain view on a bed, during the protective sweep. (T.952).

Officer Lastra, Officer Carey's partner, testified as he did at the suppression hearing. (T.216-245, 962-1000). Since he was bilingual, he took Defendant's first statement,

and it was therefore published to the jury through him. (T.983-999).

Dr. Wetli, Deputy Chief Medical Examiner of Dade County, was at the murder scene and later performed the autopsy on Elsie. (T.1001, **1005, 1010-1011).** He testified that the shot in Elsie's back, severed her spine, causing instant paralysis. (T.1014)-1015). The cause of death was the two gunshot wounds to the head. **(T.1023).**

Technican Hart, a firearm's expert, identified Defendant's gun as the weapon that was used to kill Elsie. (T.1035-1039).

Michael Orsini was an eyewitness to the murder. (T.1048). On that day, he too was headed to work. **(T.1047).** Stopped at the red light, he saw Elsie running toward him screaming "Help" several times. (T.1049). Defendant was running behind her carrying a pistol and pointing it at her. (T.1049-1051). He then saw Defendant shoot Elsie, and watched her fall face down to the ground. (T.1048, **1052).** Orsini panicked and tried to get out of the line of fire, because Defendant was right next to his car. **(T.1052).** His girlfriend dove to the floorboard, as he jumped the median into the opposite lane. (T.1053). As he was driving away, he looked back and saw Defendant bending over Elsie shooting her some more. (T.1053). He made a U-

turn at the second light he came to and saw Defendant get in his car and head up the entrance ramp. (T.1054). He identified the Defendant at a live lineup. (T.1061).

Detective Nabut's testimony coincided with that given at the suppression hearing. (T.247-297; 1063-1153). Through him the Miranda Rights Waiver form executed by Defendant, was introduced. (R.2417; T.1078-10840). At the time Defendant gave his second statement he was coherent and responsive. (T.1086). Defendant spoke normally, was very calm and collected. (T.1086). Defendant's second statement was published to the jury. (T.1097-1150).

In that statement Defendant told how he washed his white pullover, that was stained with Elsie's blood, twice. (T.1132). He also told of how he had no intention of turning himself into the police, but rather he would let them catch him: (A.S.A. Ridge in part of Defendant)

> Did you tell anybody here in Tampa what had happened over in Hialeah?
>
> MR. RIDGE: No. Was none of those people, I only made a comment, I made a comment to one that has a restaurant, that he was the one who sent for me to get caught.
>
> DETECTIVE NABUT: What restaurant is it?
>
> MR. RIDGE: **The** restaurant's name is, and an unintelligible portion of the tape, followed by the word, that's on Habana and Tampa Bay.

DETECTIVE NABUT: Habana and Tampa Bay is the name of the restaurant?

Someone that has a restaurant you mentioned what had happened?

MR. RIDGE: Yes, sir, I told him the story, and there is an unintelligible portion of the tape, to the detective and the police, and another unintelligible portion, look, they don't even have my photograph, when the police went to get me--it was sent to me, for a telephone call.

DETECTIVE NABUT: And then it's your conclusion that this man in the restaurant that's on Habana and Tampa Bay---

MR. RIDGE: "Yes," and then there is an unintelligible portion of the tape.

DETECTIVE NABUT: Called the police and turned you in?

MR. RIDGE: Sure.

DETECTIVE NABUT: What did you tell him for him to turn you in?

MR. RIDGE: Nothing, I told him that I had killed my wife, I told him, dammit I have a problem that this and that, what you did was crazy, that for this life and the other, turn yourself to the police, and there is an unintelligible portion of the tape, I'm going to keep on like this until the police catches me.

He wanted for me to turn myself to the police, and then there is an unintelligible portion of the tape, It's not, it's a position, well, that I know that it was sent to get caught see?

DETECTIVE NABUT: For what you are telling me, up to now, you are well aware of-- well, the problem of last Saturday, well, you're well aware of the problems that occurred when you

picked up the girl, when you went to take her that they didn't want to give her back to you, you're aware of what happened at the scene, the way that everything occurred, well--and then the way that you explained everything to me, you explained to me that you reached the conclusion that this was the man that turned you over to the police, by the way, that the police went and found you.

What else did you tell this man?

MR. RIDGE: No, just that I had killed her.

DETECTIVE NABUT: Okay.

Did he tell you to turn yourself to the police and what did you tell him?

MR. RIDGE: I'm not going to turn myself to the police now, if they catch me fine, if not---

(T.1141-1144).

He knew that Detective Durkin was watching him:

DETECTIVE NABUT: Okay.

Why did you let yourself get caught by the police?

Well, without any type of violence, you didn't try to end your life like you had said.

Was it because you changed your mind or because the police did not give you the opportunity?

MR. RIDGE: Well, ah, the police the silliest policeman gets a person, and then there is an unintelligible portion of the tape, even an American told me no, they are looking for a guy by the name of Alberto.

> The American came and told me, and the guy, and there is an unintelligible portion of the tape, the guy was, the policeman how could I tell you he didn't have, well, well, he caught me because I, I, I gave myself, he was around there checking, checking with the police car, the police car, the thing is that I there was one next door that they had said that were in some kind of mess, from there, from that area and I thought they were checking on them, see?
>
> And I---
>
> DETECTIVE NABUT: And there is an unintelligible portion of the tape.
>
> MR. RIDGE: Yes, I had the doubt, see, I had the doubt, but the guy caught me, caught me---

Jesus Hernandez was called as a witness to identify the deceased. (T.1154). The State thereupon rested. (T.1154). Defense moved for a judgment of acquittal on all counts, which was denied. (T.1154-1164).

The Defense commenced its case, calling David Rothenberg, a clinical psychologist, as its first witness. (T.1165). Dr. Rothenberg was not a court appointed expert, but was chosen to aid in the preparation of defense. (T.1622). He testified that Defendant was a paranoid schizophrenic. (T.1166). Defendant was "absolutely not malingering." (T.1181). Defendant was insane at the time of the murder. (T.1188).

Under cross-examination, Dr. Rothenberg admitted that he didn't examine alot of criminal defendants, "but I do a fair amount of consulting with lawyers who defending [sic] criminal defendants." (T.1199). In fact there are ". . .very few cases that I am consulting with criminal defendants, yes." (T.1203. And then: "I don't work alot with defendants themselves. I work a lot with lawyers." (T.1204).

> . . .at the time the Hialeah and Tampa police officers took his statements, he may very well have been lucid but at the time I saw him he was in a fantasy."
>
> (T.1233).

The State then asked him about his previous position with the City of Miami Beach:

> BY MR. RIDGE:
>
> Q. Doctor, did you ever work for the City of Miami Beach?
>
> A. Yes, sir.
>
> Q. In what capacity?
>
> A. In psychology.
>
> Q. When did you work for them?
>
> A. It was a seven year period from the early 50's to the late 60's.
>
> Q. And, did there come a time when you terminated or you ceased your employment relationship with the City of Miami Beach?

A. Yes, sir.

The City closed the office because they felt that there was other services that should be provided at a county level rather than a municipal level so they did not include it in the next budget.

Q. Do you know whether or not the City of Miami Beach terminated you because the City of Miami Beach felt that you were ethically and purposely referring private patients to your-self after you had made contact with those patients as an employee of the City of Miami Beach?

A. No.

That's absolutely not true and it couldn't have happened because the City of Miami Beach was servicing people who were not able to afford private fees and they had to be screened as being eligible for public service becuse they only provided service for those and there was no way for me to refer those indigent people to anyone.

Q. So as far as you are concerned, you did nothing unethical in that instance?

A. I have never been unethical, sir.

Q. So as far as you are concerned, you did nothing unethical in that instance?

A. I have never been unethical, sir.

Q. I am not asking you that did you act unethically in that situation?

A. No, sir.

MR. RIDGE: Thank you, Doctor.

(T.1240-1242)

There was no objection to this line of questioning at this point. (T.1840-1842).

Later on recross, the State queried of Dr. Rothenberg if he would be surprised if Defendant talked to other defendants in jail about possible defenses:

BY MR. RIDGE:

Q. Mr. Gonzalez has asked if he had read it and I would like to ask you also, Doctor, would you be surprised if he talked to individuals over in the jail already about possible defenses in this case?

A. **No.**

I wouldn't be surprised.

Q. You wouldn't be surprised that he had talked about possible defenses---

MS. GEORGI: Objection, Your Honor. There is no evidence of that whatsoever and I would request that the Court reprimand the prosecutor to stop making any further inquiry of that issue and I have a mistrial motion.

MR. RIDGE: Judge, he has inferred that Mr. Farinas would not have the intelligence to go into the Dade County Jail there and discover all the symptoms and present them to the doctor.

> What I am trying to elicit from this doctor is that it's also possible that he can talk to other people.
>
> You don't have to read the Diagnostic Statistical Manual---
>
> THE COURT: Excuse me, let's not argue in front of the jury.
>
> The objection is overruled and your next question.
>
> (T.1246-1247).

Dr. Rothenberg gave these inconsistent responses as to Defendant's condition at the time of the murder:

> I don't think it was passion and I don't think it was anger.
>
> I think it was incredible fear that his loved one was leaving him. He panicked.
>
> (T.1240).

That was on cross, upon redirect he stated:

> He was in an absolute position of rage and that he anticipated this his loved one was going to leave him and he was going to [sic] what he could so that she wouldn't leave.
>
> (T.1244).

Upon completion of Dr. Rothenberg's testimony a recess was called, and argument took place outside the presence of the jury, in which Mr. Georgi, defense counsel, requested a mistrial. (T.1249-1253).

Dr. Castiello was then called as a witness. **(T.1257-1295).** He diagnosed Defendant as a paranoid schizophrenic. **(T.1264).** However, he could not definitely say whether Defendant's schizophrenia affected him on the day of the murder. **(T.1275-1276).** Under cross-examination he testified that it was possible that Defendant may have been perpetrating a fraud upon him. **(T.1279).** In his evaluation to the trial court, he stated that Defendant was in full control of his mental faculties at the time he gave statements to the police. **(T.1291).** Upon the conclusion of his testimony the Defense rested. **(T.1296).**

In rebuttal, the State called Doctors Marina, Mutter and Miller. **(T.1297-1416, 1442-1480).** Dr. Marina didn't believe that Defendant was hearing voices, because a true psychotic hears voices inside his head, and Defendant heard voices outside the window. **(T.1329-1330).** Defendant told her that he was so bored he wished he was dead. **(T.1333).** The significance **of** Defendant's boredom according to Dr. Marina was that:

> . . .boredom is not a feeling that many psychotic people have. [A] psychotic lives in a fantasy. He is never bored.
>
> **(T.1333).**

She further testified as to the significance of Defendant's statements to police:

> A. The document which I was able to read indicates that on December 2nd, he was able to talk rationally about events related to his wife's death.
>
> At that time, he was able to accept the idea, the condition that his wife was dead.
>
> And here he is on December 2nd, I am seeing him, January 14, and it's as if he had never made those statements before.
>
> Q. What did you find unusual about the transformation and what significance did you attach to this transformation on one hand, on December 2nd of 1985, he is able to talk rationally and accept her death: and then on, I believe, January 14, when you see him, he is not able to accept her death?
>
> A. Oh, he is not able to admit that she is dead.
>
> Q. What, if anything did that indicate to you?
>
> A. I really felt he was lying to me and that he really did know that his wife was dead, and he was not in a psychotic state at the moment I was interviewing him.
>
> (T.1341).

She administered the "Rorschach" test, which exhibited Defendant was malingering. (T.1347-1348). This test also caused her to diagnose Defendant as having a "borderline personality disorder." (T.1348-1350). On the "House-Tree-Person" test Defendant exhibited "aggressive impulsivity" that is often found in an antisocial personality disorder. (T.1353-1354).

The bottom line however, was that Defendant was sane when he killed Elsie. (T.1355). Further, Defendant was malingering; he was trying to deceive her that he was sicker than he actually was. (T.1355-1356). Under cross-examination Dr. Marina expressed her opinion that Defendant did not premeditate Elsie's murder. (T.1357).

At the time Defendant murdered Elsie he merged with his victim. (T.1364-1365). However, at the point when he shot her in the back, paralyzing her, and then pumped two shots into her brain, he had a concious intent/desire to kill her. (T.1368).

Dr. Mutter is a forensic psychiatrist, who at the time of the trial had testified as an expert in psychiatry "close to a 1,000 times." (T.1379). About the Defendant he testified:

> I felt that he was trying to impress me that he was mentally ill for self-serving purposes. (T.1385).

Later, he testified:

> But in looking at the overall examination. . . . I felt that he was trying to impress me that he was mentally ill so as to delay criminal proceedings. (T.1398).

In his opinion, at the time of the murder, Defendant was sane: he knew right from wrong and the nature of the

consequences of his acts. (T.1399).

Under cross-examination Dr. Mutter stated: "Borderline is not a major mental disorder." (T.1400). He gave the following response to the Defense's hypothetical related to a "rage-reaction:"

> Well, I think that the jury will make that decision, but on a psychological and psychiatric basis, my understanding is what I did know about that, that he was trying to get her to come back with him and if he felt at that moment or at that second that she was trying to flee or leave him, that would be more consistent in my medical opinion as an act of impulse. Passion of rage, but he would still know that killing somebody is wrong and it's against the law.
>
> (T.1404).

The State then presented it's hypothetical, utilizing Defendant's confessions to develop the scenario. (T.1408-1414). Dr. Mutter responded as follows:

> A. I can answer with this qualification. Number one, I think that is truly an issue and decision for a jury to answer and not me and if you are asking me how I would analyze this in terms of behavior and what I know about it and his personality, there are two issues that occurred.
>
> Based on his statements to the police which appear to be very logical and organized, which meant that he knew what was going on and he was sane

when he made the statement because of the answers--he answers the questions in direct context, you are dealing with a very immature individual who

is trying to get back a loved one by threat.

"If you leave me--don't leave me, or I will kill you."

Using this for her to come back to him. Even though he knew that killing somebody is wrong, but that's a knowing statement. It is also indicating that he realized that when he tried to get her back by telling her that he really doesn't want to kill her, and the threat was to get her back with him and this is what immature people do and impulsive people.

It would also appear to me at the moment that she said that, "I love you and I will come back with you," I assume for the other hypothetical that after telling him that and then bolting from the car, she confided with him at one point and then defied him and he immediately went into a rage and he was going to stop her and by taking the gun and aiming to shoot her and then coming back in close range of killing her, that was probably when he was in a rage reaction.

I don't think this is a man that had initially had the intent to kill her, I think he initially had the attempt to get her to come back to him. I think what happened is that when she left--this is what I would say to try and explain this.

To me, is that when she left that she had defied him and he is going to punish her and I think that his behavior after that was knowingly and willfully.

Whether or not he intended to kill her or not by this punishment, I

> think is up to the jury to decide and
> I defer to that.
>
> (T.1414-1416).

Dr. Miller concluded that Defendant was malingering. (T.1450). He testified that the Defendant ". . .was constantly trying to lead me astray." (T.1451). To Dr. Miller, Defendant suffered from too many symptoms of mental illness. (T.1459). ". . . I concluded and believed directly that he was faking." (T.1457). The Defendant was sane when he murdered Elsie. (T.1462). At the time Defendant "stood over his wife he was capable of formulating the intent to kill her." (T.1469). The reason Dr. Miller came to this conclusion is as follows:

> My belief is based upon the fact that he formed the acts as you described and I believe in shooting at the head determined that that would be reasonably believed that that he did not want to kill her, did not want to have to do that, and my belief is that he was capable of designating, that is, capable of deciding that he did not want to do it and equivalently capable of deciding that he did want to do it.
>
> (T.1470).

Detective Blazo, Tampa Police Department, served as liaison officer for the Hillsborough County Crisis Center for nine years. (T.1431). In this capacity he had come into contact with individuals that were diagnosed paranoid schizo-

phrenic. **(T.1432-1433).** He was present and observed Defendant when he gave his statement to Detective Nabut. **(T.1437).** From Detective Blazo's experience, Defendant did not appear on December **2, 1985,** to be suffering from any mental illness. **(T.1438-1439).**

Detective Nabut testified that while transporting Defendant to Miami, Defendant initiated casual conversation with him and his partner, and that he was coherent and rational while talking. **(T.1481-1485).** Defendant did not exhibit unusual behavior. **(T.1486).** Detective Nabut then related his encounter with Defendant on the way to the live lineup. **(T.1487-1488).** Defendant saw Nabut as Nabut came off the elevator and he greeted him. **(T.1487).** Defendant acted coherent, responsive. **(T.1487).** Nabut told him he couldn't speak to him, because the prosecutors had instructed him not to. **(1487).** At this point Defendant began to act like a completely different person:

> "Silly. . .putting up some kind of an act." **(T.1488).**

The State then rested in rebuttal. **(T.1489).** Defense renewed all motions made before, and the trial court denied the motions. **(T.1495-1496).** The jury returned its verdict on February **13, 1987. (T.1695).** It found Defendant guilty on all three Counts charged in the indictment. **(R.2555-2557; T.1695).** The trial court adjudicated Defendant guilty on all three Counts. **(T.1703).**

The Penalty Phase

Dr. Wetli, who performed the autopsy, testified as he did at trial. (T.100-1030), 1714-1723). Elsie would have been aware that she was shot after her spinal cord was severed. (T.1716-1717). Less than a minute would have elapsed between the shot which severed her spine, and the two shots to her head, based upon the autopsy. (T.1718). Elsie could see, hear, speak, think. (T.1718-1719). Based upon the fact that Elsie was immobilized and then shot twice in the back of the head, from Dr. Wetli's experience, her demise was an "executional style murder." (T.1719-1720). When questioned about "rage reaction," Dr. Wetli testified that if Defendant had emptied his gun into Elsie, that would be consistent with such a reaction. (T.1722).

Dr. Rothenberg did not testify at the Penalty Phase as put forth in Defendant's brief. (p.11). The Defense called Dr. Castiello. (T.1724-1732). Based upon his diagnosis of Defendant as a paranoid schizophrenic, it was his opinion that Defendant did not premeditate Elsie's murder. (T.1726). Defendant was under the influence of extreme mental or emotional disturbance. (T.1727). However, under cross-examination he could not tell the jury whether Defendant **was** insane under the law. (T.1730). Further, in the doctor's initial report to the trial court as to Defendant's competency, he stated that the Defendant was in

full control of his mental faculties at the time he gave his statements to the police. (R.1948-1951; T.1731).

The Defense then called Dr. Marina. (T.1733-1741). In her opinion, Defendant didn't have the emotional ability to premeditate. (T.1734). This was because he was under extreme mental or emotional disturbance. (T.1735). Under cross-examination, she admitted that she had found that Defendant was malingering. (T.1738). Further, she testified that one of the symptoms of Defendant's antisocial personality disorder is aggression. (T.1739-1740).

Officer Louis Donate testified that Defendant had been a model prisoner. (T.1745). On cross, he testified that Defendant never told him Elsie came to visit Defendant. (T.1756). Nor did he tell Officer Donate that he heard voices calling to him from outside the jail. (T.1756).

Officer Lozada also testified that Defendant was a model prisoner. (T.1759). On cross, he testified that in the short conversations he had with the Defendant, Defendant seemed "rational, coherent, clear, understandable. . . ." (T.1767-1768). Officer Lozada never observed Defendant acting abnormal. (T.1768). He never saw Defendant talking to himself. (T.1769). Defendant never told him he heard voices. (T.1769). Defendant never told him Elsie came to visit and they wouldn't let her in. (T.1769). Defense then

rested. (T.1771). The jury's recommendation was 9 - 3 in favor of the death penalty. (T.1854).

On February 26, 1987, Juror Colson, who was absent from the penalty phase, was brought before the trial court. (T.1863-1868). Colson explained why he was absent. (T.1865). The trial court sentenced Colson to twenty-five hours of community service at the Mission House. (T.1867-1868).

The Sentencing Hearing

The trial court denied Defendant's motions for a new penalty phase and a new trial. (T.1871). The trial court addressed Defendant as follows:

> THE COURT: Mr. Farinas, the issue of your guilt or innocence was determined by a jury of your peers this month, February 1987. A separate sentencing proceeding is authorized by the Florida Statutes and was presented to the jury on February 24th, 1987, earlier this week.
>
> The jury recommended to the Court that it impose a sentence of death by a vote of nine to three.
>
> The Court is required to consider all of the aggravating circumstances and mitigating circumstances.
>
> The Court will, in fact, present a written finding and sentence with respect to the aggravating mitigating circumstances.

With respect to the aggravating circumstances: There were four aggravating circumstances which the Court found to be applicable.

The four mentioned were those of the contemporaneous convictions in this case of armed burglary and armed kidnapping, the fact that you committed a capital felony while engaged in burglary and kidnapping.

The Court will point out with respect to those aggravating circumstances that the Court considers this to be an improper duplication of circumstances, and therefore, the Court considers only one of them and not both of them with respect to aggravating circumstance. However, the Court find [sic] the aggravating circumstances existed, that a homicide was committed in a cold calculated and premeditated manner without any pretense of moral or legal justifications, and that the murder was committed in an especially heinous, atrocious and cruel manner. The murder was committed execution style by the firing of two bullets into the head of Elsidia Landin after you had fired a bullet into her back from about 30 feet, paralyzing her from the waist down.

While she was fully conscious and aware of her impending demise, you proceeded to traverse at approximately 30 feet, unjam your weapon three times and executed her.

The Court found mitigating circumstances to exist that you were under the influence of extreme mental or emotional disturbance.

The Court also found mitigating evidence that you did not appreciate the criminality of your conduct or to conform your conduct to the requirements of the law which was substantially impaired.

While there was presentation to the jury of a potential mitigating factor that you were acting under duress notwithstanding that they were advised of that as a mitigating factor, the Court found no such evidence to exist.

Your actions were done in a cold and calculated manner. A calculated killing of Elsidia Landin, you cruelly stalked her, kidnapping her. She sat at your side crying, pleading for her life. When she tried fleeing for her life, you shot her in the back, but she was still alive, paralyzed. She was still fully conscious and aware of all that was happening. While she laid there helpless, knowing you were going to kill her, you approached her, traversing the 30 feet that separated you from the time that you paralyzed her--it is hard to imagine the incredible anguish she must have suffered at the time, but your gun jammed. You had ordained that this wonderful woman, the mother of your baby, the woman you had loved so much, had to die. If she could not be your exclusive possession, then you would execute her, and you did so.

You unjammed your gun three times, and then placed the gun at her head, and fired it twice.

This was a totally senseless and utterly pathetic waste of a human life. I only wish for her daughter and her family and friends that we could bring her back and exchange her life for yours.

The only facts that this Court has considered in determining the sentence to be imposed are those facts presented as evidence during the course of the trial and the penalty phase therefrom.

Those facts which were represented in the presence of the defendant and his

counsel, the Court find that the proof of the aggravating circumstances was beyond a reasonable doubt.

The Court is aware that in determining whether to impose the death penalty or life imprisonment, it is not a mere accounting process, but it's actually a reasonable judgment as to what factual situation requires the imposition of the death penalty as contrasted with that of life imprisonment.

Based upon the foregoing findings, and the Court's concurrence with the recommendation of the jury that the death penalty be imposed on the defendant, the Court further holds that sufficient aggravating circumstances exist for the imposition of the sentence of death and insufficient mitigating circumstances to outweigh the aggravating circumstances.

The Court further especially finds that the factors of your cold, calculated effort in bringing about the demise of Elsidia Landin by itself is sufficient to outweigh the mitigating factors, and further, that your actions in a heinous, cruel and unusual fashion are sufficient in themselves to outweigh the mitigating factors.

It is therefore the judgment and sentence of the Court that as to Count Number I, first degree murder, that you, Alberto Farinas, be adjudicated guilty of murder in the first degree, and that you be sentenced to death for the murder of Elsidia Landin.

It is further ordered that you be taken by the proper authority to the Florida State Prison, and there be kept under close confinement until the day of your execution is set.

(T.1888-1892).

The trial court's findings were incorporated in a written order. (R.2602-2608).

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT ABUSED ITS WIDE DISCRETION IN ADMITTING EVIDENCE, WHERE THE DEFENDANT'S 9 MM LUGER WAS FOUND IN PLAIN VIEW ON TOP OF A BED, WHILE POLICE WERE CONDUCTING A PROTECTIVE SWEEP?

II.

WHETHER THE TRIAL COURT ABUSED ITS WIDE DISCRETION IN THAT:

A. IT ADMITTED INTO EVIDENCE STATE'S EXHIBIT 14, A PHOTOGRAPH OF THE BACK OF THE MURDER VICTIM'S HEAD, WHERE IT CAREFULLY SCRUTINIZED ALL PHOTOGRAPHS THE STATE SUBMITTED, AND DENIED ADMITTANCE OF AT LEAST TWO?

B. IT ANNOUNCED IN THE JURORS' PRESENCE, AT THE OUTSET OF THE PENALTY PHASE, THAT AN ARREST WARRANT WAS ISSUED FOR ONE OF ITS MEMBERS, WHO HAD FAILED TO NOTIFY THE COURT OF HIS ABSENCE AND THE SURROUNDING CIRCUMSTANCES?

111.

WHETHER THE TRIAL COURT ABUSED ITS SOUND DISCRETION IN DENYING DEFENDANT'S MOTION FOR MISTRIAL, WHERE THE ERRORS WERE HARMLESS?

IV.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING JUDGMENT ON THE VERDICTS ON COUNTS II AND III OF THE INDICTMENT AND TO SENTENCE DEFENDANT THEREON?

V.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE MOTIONS TO:

A. BAR EVIDENCE, ARGUMENT AND INSTRUCTION THAT A CIRCUMSTANCE OF AGGRAVATION IN THE INSTANT CASE WAS HEINOUS, ATROCIOUS AND CRUEL, AND:

B. THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, WITHOUT JUSTIFICATION?

VI.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING THE DEATH SENTENCE, WHERE THE JURY RECOMMENDED DEATH, AND THREE COURT APPOINTED MEDICAL EXPERTS TESTIFIED THAT IN THEIR OPINION DEFENDANT WAS MALINGERING?

VII.

WHETHER THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

SUMMARY OF THE ARGUMENT

MAY IT PLEASE THE COURT

I.

The trial court carefully scrutinized the circumstances surrounding the seizure of the murder weapon. It reasoned that the police officers initial entry into the private residence, that Defendant did not own, constituted a "protective sweep." Once inside, one of the officers saw the murder weapon's outline in a gun case in plain view and seized it. The trial court's conclusion of fact comes to this Court clothed with a presumption of correctness.

11.

A.

The trial judge enjoys wide discretion in areas concerning the admission of evidence. The photograph at issue, State Exhibit #14, was relevant not only as to the medical examiner's testimony as to cause of death, but also as to the execution-style murder which went to the cold, calculated and premeditated manner of the crime. In that this photograph was highly relevant, the trial court correctly exercised its wide discretion in admitting it. Further, there was no contemporaneous objection at trial.

B.

The conduct of jurors is the responsibility of the trial court, and it is allowed discretion in dealing with any problems that arise. In the instant case a juror failed to appear for the Penalty Phase of the trial. Its announcement, in the presence of the jury, was within its discretion. Error, if any, was harmless in that an alternate juror was immediately appointed in his place. Again, there was no contemporaneous objection. It was only after the trial, including the penalty phase and sentencing, that Defendant alleged prejudice.

III.

Allegations of overzealousness or misconduct on the part of counsel are subject to harmless error analysis. There was no contemporaneous objection to the improper impeachment of Dr. Rothenberg. There was an objection as to a question asked of him about Defendant's conversations with other inmates as to his defense. There was overwhelming evidence by three court appointed experts that Defendant was malingering. Error was harmless, and the trial court correctly exercised its sound discretion in denying Defendants motion for mistrial.

IV.

The trial court correctly exercised its discretion in entering judgment on Defendant's guilty verdicts for kidnapping with a firearm and burglary with a firearm. It is enough if the evidence tends to show that the crime was committed, and the only question is whether the evidence of corpus delecti is prima facie sufficient.

V.

A. and B.

The trial court correctly exercised its discretion in denying the defense motion to bar evidence, argument and instruction that circumstances of aggravation in the instant case were heinous, atrocious and cruel and that the murder was cold, calculated and premeditated, without justification. The facts warrant the trial court's exercise of discretion. Defendant harassed, waited, stalked, paralyzed, and then executed the victim.

VI.

Three court appointed experts testified that Defendant was malingering. The fourth testified that Defendant could have perpetrated a fraud upon him. All experts, including the defense's found that when Defendant gave his two statements to the police he was coherent and lucid. The jury recommended death. The trial court correctly exercised its discretion in sentencing Defendant to death.

VII.

Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) controls.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN ADMITTING EVIDENCE, WHERE THE DEFENDANT'S 9 MM LUGER WAS FOUND IN PLAIN VIEW ON TOP OF A BED, WHILE POLICE WERE CONDUCTING A PROTECTIVE SWEEP.

This Honorable Court has held:

> . . .[T]he trial court's conclusions of fact come to us clothed with a presumption of correctness, and, in testing the accuracy of these conclusions, we must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial judge's conclusions. (Citations omitted).
>
> Shapiro v. State, 390 So.2d 344, 346 (Fla. 1980), U.S. reh. den. 454 U.S. 1165.

Although warrantless searches by police officers are per se "unreasonable" under the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Section 12 of the Florida Constitution, this per se rule is subject to exceptions involving exigent circumstances. Williams v. State, 403 So.2d 430, 431 (Fla. 3d DCA 1981). A "protective sweep," to insure the safety of police officers, has been recognized as such an exigent circumstance. Id. at 432-433; United States v. Bowdach, 561 F.2d 1160, 1168 (U.S. 5th Cir.

1977). A "protective sweep" as delineated by the United States Fifth Circuit constitutes the following:

> . . . .The law in this circuit holds that police officers have a right to conduct a quick and cursory check, of a residence when they have reasonable grounds to believe that there are other persons present inside the residence who might present a security risk. This is true whether the initial arrest of the defendant was made inside or outside the residence. (Citations Omitted)
>
> United States v. Bowdach, supra.

The Fifth Circuit went on to say that the purpose of this cursory search is to check for "persons, not things." Id. However, if during the course of such a sweep an item is in "plain view" it may be seized. (A shotgun in the Bowdach case). This Court has held similarly in relation to the "plain view" doctrine. Ziegler v. State, 402 So.2d 365 (Fla. 1981).

The District Court of Appeal of Florida, Second District, has made the following observation pertaining to a "high crime" neighborhood:

> A "high crime" neighborhood is not in itself a sufficiently incriminating fact as to give rise to an inference of guilt on the part of those found therein. However, these circumstances do contribute to justifying a search where there is additional and

> more directly suspicious evidence such as we have here.
>
> State v. Brooks, 281 So.2d 55 (Fla. 2d DCA 1973).

The United States Fifth Circuit has also held that a warrantless search is justifiable under the following circumstances:

> . . .[W]hen an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, the officer need not obtain a search warrant to enter the premises for the purpose of arresting that suspect.
>
> United States v. Cravero, 545 F.2d 406, 420-421 (U.S. 5th Cir. 1977).

In the instant case the trial court's sound reasoning in denying Defendant's motion to suppress his gun found in "plain view" on a bed is as follows:

> THE COURT: I am going to deny both of the motions.
>
> I want to make it clear that the cases that were cited by the Defense Counsel, some of them involved circumstances where the police were watching the premises for a matter of days, of one of them, involved the searching of a crevice. In this particular case, we have a observation by a police officer, by an extremely short period of time, that of two hours.

> Of that individual who had been in the Tampa area for a period of four days and in a home there.
>
> Since he was a fleeing fellow with not that having been his own home and that of a home of someone else, it was not an apartment building, it was not a hotel, and therefore there was reason to believe reasonably that the premises may, in fact, have been occupied even though it was under surveillance for two hours. I do not consider that to be a lengthy period of time, sufficiently observed.
>
> The protective sweep was not as testified to, was not one of crevices, but was rather of an area to determine if there were in fact, individuals on the premises.
>
> While making that protective sweep, which was determined to be necessary even though the defendant was in custody, this was to assure themselves of no one else being on the premises; and since they could not see inside the premises, they observed the gun in plain view; well be it in a rectangular case.
>
> Nevertheless, both police officers in a room testified that it was clearly the outline of a gun on that case and there was a weapon inside that case.
>
> So I will deny the motion with respect to the question of the weapon.
>
> (T.338-340).

Detective Durkin, Tampa Police had testified that he knew Defendant was armed and dangerous. (R.2392; T.161-163). He was alone during the two hours surveillance, and had to keep moving because of the conspicuous nature of his car. (T.168-171). In fact, after Defendant had been

arrested he stated he knew he was being observed. (T.1145-1146). Defendant also stated he had no intention of giving himself up, (T.1141-1144).

The house that Defendant was staying in was located in a "high crime" neighborhood. (T.165). This house was owned by a third party, who was an acquaintance of Oscarito Sayez, a friend, (T.304, 1139-1141). An individual named Luis, was in fact staying with Defendant. (T.304). There was an out-standing warrant on Luis for attempted First Degree Murder. (T.305).

Detective Durkin didn't know who all resided at the house. (T.175). He could not see inside, "and the fact that it was a private residence, gave [him] a greater concern that whoever resided there evidently had befriended Mr. Farinas." (T.170, 175, 198). Given these concerns, Detective Durkin ordered his backup to check inside the house for their safety, even though Defendant was being hand-cuffed. (T.174-175).

The subsequent "protective sweep" lasted approximately one minute. (T.975). As the cursory search was conducted, Officer Carey found the murder weapon in its black case, in plain view, on a bed in the northwest bedroom. (T.207-209). His partner, Officer Lastra, saw him find the murder weapon. (T.222). Officer Carey testified they could not see in the house. (T.206).

The trial court carefully scrutinized the circumstances surrounding the seizure of the murder weapon, and proferred its well reasoned analysis of the facts on the record, for denying Defendant's motion. That conclusion comes to this Court clothed with a presumption of correctness. Shapiro v. State, supra. Given the authorities cited by the State, it correctly exercised its wide discretion in admitting the murder weapon.

11.

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN THAT:

A.

IT ADMITTED INTO EVIDENCE STATE'S EXHIBIT 14, A PHOTOGRAPH OF THE BACK OF THE MURDER VICTIM'S HEAD, WHERE IT CAREFULLY SCRUTINIZED ALL PHOTOGRAPHS THE STATE SUBMITTED, AND DENIED ADMITTANCE OF AT LEAST TWO.

The trial court's conclusions of fact come to this Court clothed with a presumption of correctness. Shapiro v. State, supra. A trial judge enjoys wide discretion in areas concerning admission of evidence, and his ruling on admissibility of evidence will not be disturbed unless a clear abuse of discretion is shown. Booker v. State, 397 So.2d 910 (Fla. 1981); Wilson v. State, 436 So.2d 908 (Fla. 1983). Photographs are admissible if they properly depict factual conditions relating to the crime, and if they are relevant in that they aid the court and jury in finding truth. Booker v. State, supra. Photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which wounds were inflicted. Busch v. State, 461 So.2d 936 (Fla. 1984). The basic test of admissibility of photographs is not necessity, but relevance: photographs can be relevant to a material issue either independently or by corroborating other evidence. Straight v. State, 397 So.2d 903 (Fla. 1981); U.S. reh. den., 454 U.S. 1165.

A review of the cases cited supra involve very gruesome photographs: Photograph revealing a knife protruding from the victim's throat was admissible. Booker v. State, supra. Close-up photograph of the gunshot wound to the victim's head was used to assist medical examiner in explaining external examination of victim: and was admissible in murder trial, notwithstanding potential for swaying jury during sentencing phase, where photograph was not so shocking to defeat value of its relevancy. Busch v. State, supra. Trial court in murder prosecution did not err in admitting into evidence photographs depicting victim's body which was recovered from a river after twenty days, which showed wounds inflicted on the deceased, and were quite gruesome because of decomposition: in that photographs were few in number and included only a very few gruesome ones, which were relevant to corroborate testimony as to how death was inflicted. Straight v. State, supra.

The facts in the instant case reveal that the trial court carefully scrutinized the photographs submitted by the State, and concluded that two of them did not need to be introduced:

> THE COURT: As far as the photographs are concerned, we don't need to introduce those two, H and I.
>
> As far as the medical examiner, I will reserve judgment.

> If I allow them to be introduced, I am not allowing the entire picture. There is one picture there that, while it in fact shows the scene, it has a lot of blood, and I am not sure that that's necessary to show.
>
> It's not prejudicial terribly, but I am not sure that it is necessary.
>
> All right, let's bring the jury in.
>
> Now, this is incidentally my ruling here as to the guilt portion. There may be photographs that are appropriate in penalty portion which I might exclude here which may be relevant to the penalty portion.
>
> All of them are here, which does not necessarily conclude and they can be used in the penalty phase, and you can bring it up at the time.
>
> (T.870-871).

A review of the record reveals that State's Exhibit #14 objected to in Defendant's brief, but not by contemporaneous objection at trial, as he concedes, was the only photograph clearly depicting the two entry wounds in the victim's skull. (R.2403; 2413). This photograph was relevant in that they aided the medical examiner, Dr. Wetli, in explaining to the jury the nature and manner in which the wounds were inflicted. (R.2413; T.1016-1023).

In Wilson v. State, supra, this Court found that the trial court did not abuse its discretion by admitting nine autopsy photographs into evidence, since they were relevant to depict not only the identity of victims; but the nature

and extent of the victim's injuries, manner of death, nature of force and violence used, and were relevant to the issue of premeditation. In the instant case Dr. Wetli testified during the Penalty Phase, that the first shot fired by Defendant severed her spinal cord, causing instant paralysis from the waist down. **(T.1715-1716).** This would have felt like a kick. **(T.1716).** Elsie would have been able to see, hear, speak, and think. **(T.718-1719).** Defendant then went up to her and shot her twice in the head, after his gun had jammed three times and been cleared. **(T.905, 1126, 147-**1158). Given these fcts and Dr. Wetli's formidable experience (Approximately 4,000 autopsies performed.), it was his opinion that Elsie's demise **ws** an "executional style murder." **(T.1719).**

It is readily apparent that State Exhibit #14 was relevant not only in that it aided Dr. Wetli in explaining Elsie's murder, but also in that it exhibited an executional style murder. This later point was important in showing that her murder was premeditated and cold and calculated; an aggravating circumstance of which the trial court found in sentencing Defendant to death, and of which is an issue on appeal in Defendant's brief. In that this photograph was highly relevant, the trial court did not abuse its wide discretion in admitting it. Further, as Defendant concedes in his brief, he did not voice a contemporaneous objection at trial. Therefore, this issue is waived for purposes of the

instant appeal. Davis v. State, 461 So.2d 67 (Fla. 1984); ~~cert.~~ ~~den.~~ 105 S.Ct. 3540, 87 L.Ed.2d 663; stay granted 107 S.Ct. 17; State v. Neil, 457 So.2d 481 (Fla. 1984).

B.

IT ANNOUNCED, IN THE JUROR'S PRESENCE, AT THE OUTSET OF THE PENALTY PHASE, THAT AN ARREST WARRANT WAS ISSUED FOR ONE OF ITS MEMBERS, WHO HAD FAILED TO NOTIFY THE COURT OF HIS ABSENCE AND THE SURROUNDING CIRCUMSTANCES.

This is another issue for which there was no contemporaneous objection at trial, and therefore is waived for purposes of this appeal. Davis v. State, supra; State v. Neil, supra. For the sake of argument the State will continue. The conduct of jurors is a responsibility of the court, and it is allowed discretion in dealing with any problems that arise. Doyle v. State, 460 So.2d 353 (Fla. 1984); Walker v. State, 330 So.2d 110, 111 (Fla. 3d DCA 1976); Orosz v. State, 389 So.2d 1199 (Fla 3d DCA 1980).

In Orosz v. State, supra, the trial court dismissed a juror, who it had observed sleeping extensively throughout the trial. The First District determined that the juror's dismissal without the express consent of the Defendant, was not an abuse of discretion. It further held that even if it

was error, the error was harmless, where the juror was replaced by a duly selected alternate, who had been present during the entire proceedings, and defendant did not show that he was prejudiced by the substitution.

In the instant case, the absent juror was named Colson. **(T.1712).** The trial court announced in the presence of the jurors that a warrant was issued for his arrest. **(T.1712).** It's next statement was that "Mr. Walden . . . will take his place as a member of the jury," **(T.1712).** Certainly, the instant case bears some similarity to Orosz in which a juror was yanked for sleeping, Defendant speaks of the chilling effect of the trial court's comment on the jury. Imagine the chilling effect of a fellow juror, who sat (rather slept) through a trial and was dismissed prior to deliberation in the jury's presence.

The instant case reveals a juror who sat through the guilt phase of the trial, and then failed to appear for the penalty phase.[1] In actuality, Colson's fellow jurors, could well have been distracted by his failure to appear if the trial court had not dealt with his absence with such finality, and then immediately designated an alternate to take his place. This action would have effectively dismissed

[1] The circumstances surrounding Colson's failure to appear are found in his appearance before the trial court on February **26, 1987,** and are basically irrelevant to this appeal. **(T.1863-1868).**

Colson from the jurors' minds, so that they could concentrate on the penalty phase of the trial. This of course is conjecture, but it as much conjecture as Defendant's allegation of a chilling effect.

The conduct of the jurors was the trial court's responsibility. It correctly exercised its discretion. However, even if it was error, the error was harmless, in that Colson was replaced by a duly selected alternate, who had been present during the entire proceedings. Further, Defendant did not provide the trial court with an opportunity to correct the error, if in fact it was one, which the State strongly argues it wasn't, by voicing a contemporaneous objection. It was only after the trial, including the penalty phase, that Defendant, in his Motion for a New Sentencing Hearing, alleged prejudice. Such a failure warrants consideration by this Court, if it deems error, under the "invited error" rule. Clark v. State, 363 So.2d 331 (Fla. 1978).

III.

THE TRIAL COURT CORRECTLY EXERCISED ITS SOUND DISCRETION IN DENYING DEFENDANT'S MOTION FOR MISTRIAL, WHERE THE ERRORS WERE HARMLESS.

This Court has delineated the standard of review when there is an allegation of misconduct on the part of either the prosecutor or defense counsel:

> 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. Arrango v. State, 437 So.2d 1099 (Fla. 1983); Spenkelink v. Wainwright, 372 So.2d 927 (Fla. 1979) Alderman, J., concurring specially); Jackson v. State, 421 So.2d 15 (Fla. 3d DCA 1982). Nevertheless, prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether 'the error committed was so prejudicial as to vitate the entire trial.' Cobb, 376 So.2d at 232. The appropriate test for whether the error is prejudicial is the 'harmless error rule set forth in Chapman v. California, 386 U.S. 18 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progency. We agree with the recent analysis of the Court in United States v. Hastings ____ U.S. ____, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a convic-

> tion is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject or bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.
>
> State v. Murray, **443 So.2d 955, 956** (Fla. **1984).**

The State's improper impeachment of Dr. Rothenberg as to his previous employment with the City of Miami Beach, exhibits overzealous behavior on the part of the prosecutor. **(T.1240-1242).** However, to argue that this was so prejudicial as to vitiate the entire trial, laughs in the face of Justice.

A review of the record reveals that prior to this unfortunate line of questioning, the State had effectively elicited from Dr. Roghenberg that he had very little experience in the psychological evaluation of criminal defendants. **(T.1198-1204).** His criminal experience centered on consulting attorneys in their preparation for trial, but even this was limited. **(T.1199).** He was hired by defense counsel to aid in Defendant's charade, **(T.1622).** As the State argued in closing, his was the least credible of the expert testimony. **(T.1569).** The evidence was overwhelming that Defendant was malingering, as three court appointed experts had so found: and the fourth testified that it was

possible Defendant may have been perpetrating a fraud upon him. (T.29-30, 52, 55-57, 76, 81, 88 1279, 1355-1356, 1385, 1398, 1450). This is what prompted the State to make the following argument outside the presence of the jury.

> . . .Secondly, there may very well be some evidence concerning the reputation of this particular doctor and I choke on the words when I say them, this psychologist who perpetrates a fraud on the jury and this Court. (T. 1251).

There was no contemporaneous objection at the time that the State utilized the aforementioned line of questioning. It was only after Dr. Rothenberg had left the stand that defense counsel voiced an objection and requested a mistrial. (T.1249-1250). Therefore, she did not provide the trial court with the opportunity to correct the problem at the time it happened. This is the whole purpose of the contemporaneous objection rule, and defense counsel's failure to object certainly initiates the "invited error" doctrine. Davis v. State, supra: State v. Neil, supra.

Further, the granting of a mistrial is entirely within the sound discretion of the trial court. Wilson v. State, supra. The trial court, after the fact, offered to correct this matter by striking the evidence. (T.1252-1253). Defense counsel opted for a mistrial. (T.1253). The trial court, obviously viewing this impeachment as harmless error,

in its sound discretion, denied the motion for mistrial. (T.1253).

Defendant's other objection relates to the prosecutor's following questioning of Dr. Rothenberg:

> Q. . . . Doctor, would you be suprised if he talked to individuals over in the jail already about possible defenses in this case:
>
> A. No, I wouldn't be suprised.
>
> Q. You wouldn't be surprised that he had talked about possible defenses?
>
> (T.1246).

This time defense counsel voiced an objection as to facts not in evidence. (T.1246-1247). The State argued at sidebar as to this objection, that the jury could use its own common sense. Recall the previous argument, wherein the State argued that there was overwhelming evidence that Defendant was malingering. It is obvious that the prosecutor's line of questioning here concerned the fact that Defendant was faking. Although it may have been improper, it was harmless, and the trial court in its sound discretion denied defense counsel's motion for mistrial, (T.1252).

IV.

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN ENTERING JUDGMENT ON THE VERDICTS ON COUNTS II AND III OF THE INDICTMENT AND TO SENTENCE DEFENDANT THEREON.

Neither Florida nor federal law require that every element of an offense must be established by evidence outside the confession, in order for the confession to be admissible. Canet v. Turner, 606 F.2d 90 (U.S. 5th Cir. 1979). Some elements of an offense may be proved entirely on the basis of a corroborated confession. Id. Proof beyond reasonable doubt is not mandatory to support a finding of corpus delecti. Basset v. Florida, 449 So.2d 803 (Fla. 1984); Stone v, State, 378 So.2d 765 (Fla. 1979). It is enough if the evidence tends to show that the crime was committed, and the only question is whether the evidence of corpus delecti is prima facie sufficient. Stone v. State, 378 So.2d 765 (Fla. 1979).

Defendant alleges in his brief that the trial court erred in entering judgement on Count 11: Kidnapping with a Firearm, and Count 111: Burglary with a Firearm. This allegation is based upon his assertion, that the only proof that Defendant was armed when he committed these crimes, prior to the murder, came fron his own confession. However, once again there was no objection at trial. Further,

Defendant admitted all facts, relying on insanity as a defense. As Defendant's counsel in her opening statement posited:

> The State doesn't have to call Magaly Diaz and they don't have to call Mr. Orsini or Mr. Nunez or any of the other police officers in this case. We admit to the facts that Ms. Jiminez (State) has just described to you.
>
> (T.832).

Magaly Diaz, sister of Elsie, was in the car when Defendant forced Elsie, who was driving, off the road. (R.1961, 2407; T.988, 1115). He reached in the car and took the key out of the ignition. (R.1961; T.843, 1116). He ordered Elsie out of the car, grabbed her by the arm, and guided her to his car. (R.1961; T.844-846, 1116). He bent the key and it was given back to Magaly. (T.844-846). Defendant confessed that his 9 mm pistol was in his waistband, when he initially approached Elsie and Magaly after forcing them off the road. (R.2407-2408; T.989, 1121).

Before Defendant's confession to Detective Nabut, in which he stated his gun was in his waistband, was published, Richard Nunez and Mike Orsini testified. Nunez testified that he saw Defendant chasing Elsie, pointing a gun at her. (T.854-855). He lost sight of them once they were behind his car, but he heard shots. (T.855-856). Orsini saw the same

chase, but actually witnessed Defendant shoot her in the back, her fall to the pavement, and Defendant bending over her to shoot her again. (T.1048-1053).

Magaly testified as to the burglary and the abduction. Defendant stated he had his weapon on him when these occurred. ***An*** eyewitness saw Defendant shoot Elsie. The sum total of this testimony of the ongoing crime was prima facie sufficient for the admission of his confession. Therefore, the trial court correctly entered judgement on the jury's guilty verdicts for Court 11: Kidnapping with a Firearm, and Count 111: Burglary with a Firearm.

V.

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING DEFENSE MOTIONS TO:

A.

BAR EVIDENCE, ARGUMENT AND INSTRUCTION THAT A CIRCUMSTANCE OF AGGRAVATION IN THE INSTANT CASE WAS HEINOUS, ATROCIOUS AND CRUEL.

Imposition of the death penalty on the basis of an aggravating factor that a felony was especialy heinous, atrocious, or cruel was not improper in a situation where a victim was murdered by a gunshot and may have died instantaneously; the victim knew that he was going to die and the terror that was felt by the victim during the ride in the trunk of the defendant's vehicle, and immediately precedent to death, was beyond description by the written word. Routly v. State, 440 So.2d 1257 (Fla. 1983). A victim's abduction, confinement, sexual abuse, and ultimate execution-style killing constituted "heinousness" for purposes of death sentencing proceeding. Smith v. State, 424 So.2d 726 (Fla. 1983); cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379.

Fear and emotional strain preceding victim's almost instantaneous death may be considered as contributing to the heinous nature of a capital felony. Adams v. State, 412 So.2d 850 (Fla. 1982). Helpless anticipation of impending

death may serve as a basis for an aggravating factor that capital felony was especially heinous, atrocious, or cruel. Clark v. State, 443 So.2d 973 (Fla. 1983): cert. denied, ____ U.S. ____, 104 S.Ct. 2400, 81 L.Ed.2d 356. It is the effect upon the victim herself that must be considered in determining the existence of an aggravating factor that capital felony was heinous, atrocious, or cruel. Id.

A trial court's finding, as an aggravating circumstance, that murder was heinous, atrocious, and cruel would not be disturbed, where trial testimony showed that defendant admitted to another that he had shot the victim first with a shotgun and then, as the victim lay screaming in pain, completed the task by firing the remaining shots into the victim's head with a revolver, thus causing the victim unnecessary and prolonged pain, Squires v. State, 450 So.2d 208 (Fla. 1984). It is not merely the specific and narrow method in which a victim is killed which makes a murder "heinous, atrocious and cruel," for purposes of death penalty statute, but, rather, it is the entire set of circumstances surrounding the killing. Magill v. State, 428 So.2d 649 (Fla. 1983): cert. denied ____ U.S. ____, 104 S.Ct. 198, 78 L.Ed.2d 173.

Evidence, including fact that victim was stalked by defendant, shot twice in the chest and fled a short distance before being killed by repeated shots in the head and back,

was sufficient to support finding that murder was especially heinous, atrocious or cruel. Phillips v. State, 476 So.2d 194 (Fla. 1985). Finally, in a case involving facts very similar to those in the instant case: Although former wife's death was almost instantaneous due to a gunshot wound, defendant's lying in wait for and stalking his former wife, compounded by his previous harassment of her constituted sufficient "additional facts" to justify application of the heinous, atrocious or cruel aggravating factor necessary for death sentence. Harvard v. State, 414 So.2d 1032 (Fla. 1982); U.S. reh. denied, 460 U.S. 1017, 103 S.Ct. 1264.

The surrounding circumstances of Elsie's murder, illustrate that the aggravating factor of heinous, atrocious or cruel, warranted consideration in the penalty phase. Elsie had left Defendant two months prior to her demise. (T.838). He had harassed her in the interim. (T.1104-112). He waited outside her parent's home, and stalked her as she drove her father to work, (R.1960, 2407; T.988, 1112-11130. After Elsie, her sister Magaly accompanied her dropped her father off, he continued to stalk her. (R.1926, 1961, 2407; T.839-840, T.988, 1115, T.1839). Ultimately, he cut her off and walked up to her, with his 9 mm pistol tucked in his waistband. (R.1926, 1961, 2407-2408; T.839-840, T.988-989, 1121).

In Magaly's presence he queried of Elsie repeatedly why she had called the police on him. (T.841). He told Elsie:

> Look, you see, you see that when I want to catch people I catch them, I watch and I catch them.
>
> (R.2407, T.840, 1115).

Defendant told Elsie that her former husband, Gustavo, told Defendant that he was going to kill her, and Defendant told Gustavo he would help him. (T.842).

> Defendant then said: Elsie, you know something, you are not going to live to be an old lady.
>
> (T.842)

He reached in the car and took the key out of the ignition. (R.1961); T.843, 1116). He ordered Elsie out of the car, grabbed her by her arm, and guided her to his car. (R.1961; T.844-846, 1116). He bent the key to the car Elsie had been driving, was going to throw it, but at Elsie's request handed it to her, and she in turn gave it to Magaly. (T.844-846). As Elsie was being escorted to Defendant's car she continuously pleaded with him:

> Why are you doing this, Alberto?. . .
> What are you going to do? Please,

> no, what are you going to do?. . .
> Why, Why?
>
> (T.844-845).

Magaly had exited the car and moved to its rear. (T.845). Elsie continued to plead with Defendant, and Magaly begged him not to take her. (T.845-846). Elsie hesitated at Defendant's car: Magaly began to cry as did Elsie, while Defendant ordered Elsie into his car. (T.846-847.

Elsie pleaded with Defendant not to kill her:

> Alberto, don't kill me.
> Alberto, don't kill me.
>
> (R.1961: T.1116).

She got in the car with him because she was afraid. (R.1962-1963: T.1118-1119). She was afraid because she knew he had a gun. (R.1962-1963: T.1118-1119). Elsie continued to cry and begged Defendant not to kill her, not to leave his daughter without a mother. (R.1963-1964: T.1820-1821).

Forced to stop at a light near the Palmetto Expressway, Elsie jumped out of his car and fled for her life. (R.1963-1964: T.852-853, 1049, 1820-1821). She ran, screaming for help and waving her arms. (T.852-853, 1049). Defendant exited his vehicle and shot Elsie in the middle of her lower back from about thirty feet. (R.1125: T.1012-1015, 1715-1717). This shot severed her spine, causing instant

paralysis from the waist down. (R.1125: T.1012-1015, 1715-1717). This wound was not immediately fatal; Elsie would have been able to see, hear, speak, think. (T.1718-1719).

Defendant approached her, when he was right near her he fired his gun, but it jammed not once, not twice, but three times, before the fatal two shots into the back of her skull. (T.905, 1126, 1147-1158). Imagine her horror as Defendant stood over with his gun pointed at the back of her skull: Click . . .eject bullet: Click . . . eject bullet: Click . . .eject bullet. "Bang! Bang!" He did not empty his 9 mm into her skull.

The medical examiner testified that Elsie's demise had all the signs of an execution-style murder. (T.1719). Notwithstanding Defendant's assertion that the murder "occurred in seconds," Dr. Wetli further testified that from the time Elsie was shot in the back, to the fatal two shots that were administered to her head, a minute could have elapsed. (T.1718). As the State argued in closing, sixty seconds can be a long time: sit in front of a clock and watch it elapse.

Given the authorities cited, and the circumstances surrounding Elsie's horrifying death, the trial court correctly allowed evidence that a circumstance of aggravation was that Defendant's act **was** heinous, atrocious and cruel. In fact, Elsie's murder was heinous, atrocious and cruel.

B.

THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, WITHOUT JUSTIFICATION.

Execution-style shootings have been found to sufficiently establish cold, calculated and premeditated murder with no pretense of moral or legal justification. Dufour v. State, 495 So.2d 154 (Fla. 1986); U.S. cert. denied, 107 S.Ct. 1332; Eutzy v. State, 458 So.2d 755 (Fla. 1984) Squires v. State; supra.

In the later case the trial court's finding, as an aggravating circumstance, that defendant murdered the victim in a cold, calculating, and premeditated fashion was proper, where evidence indicated that defendant shot the victim four times in the head with a revolver, after having initially wounded him with a shotgun, and fired the four pistol shots at an extremely close range, estimated by the medical examiner as not more than two inches. Id. Evidence, including fact that defendant waited for victim to leave work, confronted him in parking lot and shot him twice, was sufficient to support finding that murder was committed in a cold, calculated and premeditated manner; moreover, in order for all shots to be fired defendant had to reload his revolver, affording him time to contemplate his actions and choose to kill his victim. Phillips v. State, supra.

Nothwithstanding Defendant's argument in his brief to the contrary, Dr. Wetli testified that from his tremendous experience Elsie's death was an executional style murder. **(T.1719).** Defendant waited, then stalked Elsie as delineated in **A.** above. **(R.1960, 2407; T.988, 1112-1113).** He shot her in the back, which paralyzed her from he waist down. **(R.1125; T.1012-1015, 1715-1717).** His gun jammed three times, and he cleared it three times, before he fired the fatal two shots into the back of Elsie's head. **(T.905, 1126, 1147-1158).** The jamming of Defendant's gun, afforded him time to contemplate his actions and choose to kill his victim, so to did his traversing thirty feet to finish her off.

Given these facts, and the authorities previously cited, the trial court properly allowed evidence that Elsie's death was cold, calculated, and premeditated murder.

VI.

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN IMPOSING THE DEATH SENTENCE, WHERE THE JURY RECOMMENDED DEATH, AND THREE COURT APPOINTED MEDICAL EXPERTS TESTIFIED THAT IN THEIR OPINION DEFENDANT WAS MALINGERING.

The death sentence for first-degree murder was not disproportionate in a case in which defendant killed a woman with whom he had had a previous relationship, after previous conviction for similar violent offense, despite a mitigating factor that defendant was acutely emotionally disturbed at the time of the offense. Lemon v. State, 456 So.2d 885 (Fla. 1984).

A trial court's finding that three established aggravating circumstances, consisting of defendant's prior conviction of a violent felony, and of findings that defendant's murder offense was committed during the course of a kidnapping and that it was especially heinous, atrocious, and cruel, outweighed the single mitigating circumstance that defendant suffered from psychotic depression and feelings of rage, supported imposition of the death sentence. Mann v. State, 453 So.2d 784 (Fla. 1984).

An aggravating circumstance that a murder was committed in a cold, calculated and premeditated manner was proven

beyond a reasonable doubt notwithstanding testimony of a clinical psychologist during penalty phase that he felt defendant evidenced a sociopathic personality, reacted impulsively, and had little awareness of consequences. Card v. State, 453 So.2d 17 (Fla. 1984); cert, denied U.S. ______, 105 S.Ct. 396, 83 L.Ed.2d 330. Evidence was sufficient to support finding that defendant committed murder in a cold calculated, and premeditated manner was proven beyond a reasonable doubt, despite defendant's assertion that such aggravating factor should not apply, because his alleged mental and emotional problems caused the murder, Michael v. State, 437 So.2d (Fla. 1983).

Evidence that defendant stabbed victim with a knife inflicting ten wounds, that defendant, during or immediately following the stabbing, tied loose cloth gag in victim's mouth, that victim took 10 to 30 minutes to die and experienced considerable pain, and that defendant killed victim to obtain her car and later attempted to sell it to raise bond money for his girl friend, supported finding as to aggravating fctors of heinous, atrocious, or cruel and for pecuniary gain and, thus, supported imposition of death penalty upon defendant, who had behavioral problem, who testified he had been hospitalized for mental problems in Cuba, and whose actions appeared to be impulsive at times. Medina v. State, 466 So.2d 1046 (Fla. 1985). Finally, evidence sustained imposition of death penalty on defendant

who was convicted of murder in the first degree despite extensive conflicting expert testimony on defendant's mental condition. Martin v. State, 420 So.2d 583 (Fla. 1982): cert. denied, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937.

There were four court appointed experts in the instant case who were to determine Defendant's competency to stand trial. (T.23-128). Dr. Miller, a forensic psychiatrist, testified that Defendant was malingering, and that he was competent to stand trial. (T.29-30). Dr. Mutter, a forensic psychologist, testified that Defendant was malingering and competent to stand trial. (T.52, 55-57). Under cross, he made these observations as to Defendant's behavior:

> . . .I think this man has some awareness that he is in a very, very serious situation and that he could be facing very serious consequences if he is found guilty of this.
>
> I think he is trying to impress on people that he is sick and is incapable of responding to anyone under any circumstances and that may not be such bad judgement.
>
> (T.62).
>
> A. And then I asked him if he knew what killing meant. Because some people do not know, technically, murder based on their education and other factors.
>
> I am sure that he was anxious. But, when examined, I asked him the question, "If I kill somebody and the police caught me, what would happen?" And he said "you would go to jail."
>
> (T.63-64)

Dr. Marina found Defendant to be malingering and competent to stand trial. **(T.76, 81, 88).** **As** did Doctors Miller and Mutter, she reviewed Defendant's statements to police, and made the following observation as to those statements and her interview with him:

> **A.** Well, obviously, after the alleged event he had a much better memory than he had when I interviewed him. He could remember and was able to report different things.
>
> For example, he was able to report a telephone number in one of the interviews and yet with me he had difficulty reporting just basic objective facts such as that.
>
> I do not understand how the memory of a person can disintegrate so rapidly in such a short period of time without there being a drug abuse or a brain damage or some type of mental retardation.
>
> **(T.37, 59, 77-78).**

She diagnosed Defendant as having a "borderline personality disorder." **(T.75, 80-81).** She also found that he had an "anti-social personality disorder." **(T.82).** However, in her evaluation she said: "He wants to present himself as being psychotic but he is not." **(R.1945).**

Dr. Castiello found him to be not competent and psychotic. **(R.1948-1950).** His testimony was stipulated to at the competency hearing. **(T.91).** At trial he testified that Defendant was a paranoid schizophrenic. **(T.1264).**

However, Dr. Castiello could not definitively say whether Defendant's schizophrenia affected him on the day of the murder. (T.1275-1276). On cross, Dr. Castiello testified that it was possible Defendant may have been perpetrating a fraud upon him. (T.1279). In his evaluation to the trial court, he stated that Defendant was in full control of his mental faculties at the time he gave his statements to the police. (T.1291).

Dr. Rothenberg, who was hired by Defendant to aid in his defense, testified that Defendant was a paranoid schizophrenic. (T.1166, 1622). Defendant was not malingering, and was insane at the time of the murder. (T.1181, 1188). However, cross-examination revealed that Dr. Rothenberg had the least experience of any of the experts who testified relative to interviews of criminal defendants. (T.1203-1204). In fact there were ". . .very few cases that [he was] consulting with criminal defendants." (T.1203). He then testified: "I don't work alot with defendants themselves. I work alot with lawyers." (T.1204).

Further, Dr. Rothenberg made the following response relative to Defendant's statements to the police:

> . . . at the time the Hialeah and Tampa police officers took his statements, he may very well have been lucid but at the time I saw him he was in a fantasy,"
>
> (T.1233).

He gave the following inconsistent statements as to Defendant's condition at the time of the murder:

> (CROSS) I don't think it was passion and I don't think it was anger.
>
> I think it was incredible fear that his loved one was leaving him, He panicked.
>
> **(T.1240)**
>
> (REDIRECT) He was in an absolute position of rage. . . .
>
> **(T.1244).**

Finally, Defendant in his brief incorrectly states that Dr. Rothenberg testified at the Penalty Phase of the trial. (p.110). He did not.

The State called Doctors Marina, Mutter and Miller in rebuttal, and their testimony ws essentially the same as that which they gave at the competency hearing, **(T.1297-1416, 1442-1480).** All three testified that Defendant was malingering. **(T.1355-1356, 1385, 1398, 1450).** All three testified that Defendant was sane at the time he murdered Elsie: he knew right from wrong and the nature of the consequences of his acts. **(T.1355, 1399, 1462, 1469).** For a more detailed analysis of their testimony please refer back to Statement of Facts.

The State also called Detective Blazo, Tampa Police, who served as a liason officer with the Hillsborough County Crisis Center for nine years. **(T.1431).** His experience had placed him in contact with individuals who were diagnosed paranoid schizophrenic. **(T.1432-1433).** He was present when Defendant gave his statement to Detective Nabut, **(T.1437).** Based on his experience, Defendant on December 2, **1985,** did not appear to be suffering from any mental illness. **(T.1438-1439).**

Detective Nabut testified that during Defendant's transport to Miami, Defendant initiated casual conversation with him and his partner, and that Defendant was coherent and rational while talking. **(T.1481-1485).** Defendant did not exhibit unusual behavior. **(T.1486).** However, the next time Detective Nabut saw Defendant was at the time of the live lineup, and Defendant acted: "Silly. . . putting up some kind of an act." **(T.1488).**

A careful scrutiny of the record does indeed reveal that Defendant was "putting on an act." His statements to the police exhibit coherence and rationality. (R,**1953-1970; 2405-2413; T.983-999, 1097-1150).** **All** of the medical experts, including Dr. Rothenberg, testified that that was the case. **(T.37, 59, 77-78, 1233, 1291).**

The facts in the instant case reveal that Defendant waited and then stalked Elsie. He kidnapped her and then murdered her in cold blood, while she fled for her life. He then fled Miami for Tampa, where he had no intention of giving himself up, rather he would let the police catch him, because "even the silliest policeman" can catch someone. Once caught he gave a coherent and detailed account of the murder, after being given his rights. While being transported back to Miami, he engaged in coherent casual conversation and exhibited no unusual behavior.

Then, the moment of truth is at hand, he's going to trial for Elsie's abduction and murder. All of a sudden he's crazy. Competent experts find that he's faking, and competent to stand trial.

At the suppression hearing he takes the stand on his own behalf, and is suddenly lucid, as he testifies that his confession was coerced. (T.299-311). Then, it's time to start acting crazy again, as the trial date looms closer and closer on the horizon.

Dr. Castiello, the court appointed expert, diagnosed Defendant as a paranoid schizophrenic, but testified that it was possible that Defendant perpetrated a fraud upon him. (T.1279). That is exactly what he did. He had come up with so much bizarre behavior that three experts found him as

faking. Essentially, he faked Dr. Castiello out. It wasn't necessary to fake out Dx. Rothenberg because he was aiding in his defense.

Defendant's ploy failed however. The jury found him guilty of murdering Elsie, and then recommended the death sentence. The trial court, based on the jury's recommendation, and its own findings, also decided on the death sentence. **(R.2602-2608; T.1860, 188-1894).** Given he preceding facts, authorities and reasoning, it is clear that the trial court did not abuse its discretion in sentencing Defendant to death.

VII.

THE DEATH PENALTY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Defendant's final issue on appeal is controlled by Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2690, 49 L.Ed.2d 913 (1976).

CONCLUSION

MAY IT PLEASE THE COURT

I.

The trial court carefully scrutinized the circumstances surrounding the seizure of the murder weapon. It reasoned that the police officers initial entry into the private residence, that Defendant did not own, constituted a "protective sweep." Once inside, one of the officers saw the murder weapon's outline in a gun case in plain view and seized it. The trial court's conclusion of fact comes to this Court clothed with a presumption of correctness.

II.

A.

The trial judge enjoys wide discretion in areas concerning the admission of evidence. The photograph at issue, State Exhibit #14, was relevant not only as to the medical examiner's testimony as to cause of death, but also as to the execution-style murder which went to the cold, calculated and premeditated manner of the crime. In that this photograph was highly relevant, the trial court correctly exercised its wide discretion in admitting it. Further, there was no contemporaneous objection at trial.

B.

The conduct of jurors is the responsibility of the trial court, and it is allowed discretion in dealing with any problems that arise. In the instant case a juror failed to appear for the Penalty Phase of the trial. Its announcement, in the presence of the jury, was within its discretion. Error, if any, was harmless in that an alternate juror was immediately appointed in his place. Again, there was no contemporaneous objection. It was only after the trial, including the Penalty Phase and sentencing, that Defendant alleged prejudice.

111.

Allegations of overzealousness or misconduct on the part of counsel are subject to harmless error analysis. There was no contemporaneous objection to the improper impeachment of Dr. Rothenberg. There was an objection as to a question asked of him about Defendant's conversations with other inmates as to his defense. There was overwhelming evidence by three court appointed experts that Defendant was malingering. Error was harmless, and the trial court correctly exercised its sound discretion in denying Defendant's motion for mistrial.

IV.

The trial court correctly exercised its discretion in entering judgment on Defendant's guilty verdicts for kidnapping with a firearm and burglary with a firearm. It is enough if the evidence tends to show that the crime was committed, and the only question is whether the evidence of corpus delecti is prima facie sufficient.

V.

A. and B.

The trial court correctly exercised its discretion in denying the defense motion to bar evidence, argument and instruction that circumstances of aggravation in the instant case were heinous, atrocious and cruel and that the murder was cold, calculated and premeditated, without justification. The facts warrant the trial court's exercise of discretion. Defendant harassed, waited, stalked, paralyzed, and then executed the victim.

VI.

Three court appointed experts testified that Defendant was malingering. The fourth testified that Defendant could have perpetrated a fraud upon him. All experts, including the defense's, found that when Defendant gave his two state-

ments to the police he was coherent and lucid. The jury recommended death. The trial court correctly exercised its discretion in sentencing Defendant to death.

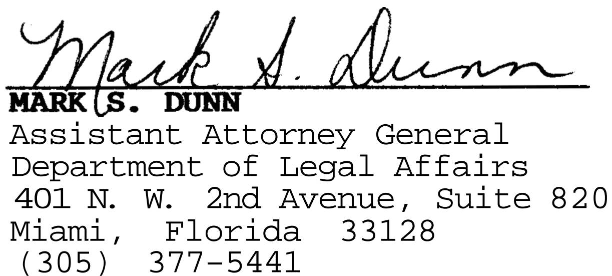
VII.

Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) controls.

The State respectfully submits to this Honorable Court that justice requires that Defendant's entire judgment and sentence be affirmed. Defendant's crime was heinous, atrocious, cruel, cold, calculated and premeditated without justification.

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 BRIEF OF APPELLEE was furnished by mail to WILLIAM A. CAIN, Esquire, Special Assistant Public Defender, Suite 401, 11755 Biscayne Blvd., North Miami, Florida 33181 on this _____ day of January, 1988.

MARK S. DUNN
Assistant Attorney General

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