THE SUPREME COURT OF FLORIDA

CASE NO. 71,419

MICHAEL G. BRUNO, SR.

Appellant,

vs.

STATE OF FLORIDA

Appellee.

****

APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY
CRIMINAL DIVISION

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant was the defendant and Appellee was the prosecution in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"SR"	Supplemental Record
"2SR"	Second Supplemental Record
"3SR"	Third Supplemental Record

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellant's statement of the case is acceptable to Appellee to the extent stated for purposes of disposition of this case on direct appeal. A separate statement of the case and additional facts as interpreted by the State is submitted below.

On August 13, 1986, Appellant was arrested for suspicion of first degree murder and armed robbery (R.1,17). The next day, on first appearance hearing was held at which County Court Judge Bart Budette found probable cause for the offense of murder and ordered Appellant held without bond (2SR.1-3). An indictment was issued September 11, 1986 charging Appellant with one count each of first degree murder (charged in the alternative, felony or premeditated) and robbery with a firearm (R.960; 2SR.110). He was ordered held without bond on the same date. On September 18, 1986, Appellant entered a plea of not guilty by his attorney in writing (R.960 (back of page); 2SR.7).

Prior to and after arraignment, numerous and sundry pretrial motions were filed on behalf of Appellant (R.957-959, 961-1003, 1005-1008, 1010-1043; 2SR.43-80, 92-104, 113-114, 119-124, 128-136, 138-140). At a hearing held on October 30, 1986, Appellant was declared indigent for costs; a psychiatrist was appointed to examine Appellant under Fla.R.Cr.P. 3.216; a private investigator was appointed to assist in the defense; and the state's motion for a handwriting exemplar from Appellant was granted (3SR.1-8).

At a hearing held on April 9, 1987, the trial court granted the State's unopposed motion to obtain hair samples from Appellant (2SR.10-11).

At a later hearing on June 16, 1987, the trial date was continued until August 3, 1987 (2SR.17-19) at which time Appellant's Motion to Suppress Statements and Physical Evidence was heard.

MOTION TO SUPPRESS

On August 11 or 12, 1986, Appellant was asked to accompany Detective Robert Edgerton to the police station for questioning. At that time, he was not a suspect and denied any knowledge of the murder (R.50-51, 61-62). He and his son, Mike, Jr., were later arrested on August 13, 1986 for the murder and armed robbery of Lionel Merlano. Appellant was advised of his Miranda rights when he was handcuffed and placed in the patrol car for transport to the station (R.62). Upon arrival, he was placed in a room with Detectives Edgerton and Hanstein and again advised of his Miranda rights (R.33,48-49). Appellant was apprised of the evidence against him and was advised that the police "thought his son was involved" in the murder (R.51-52). Appellant was then asked if he would like to make a statement. He responded that he had already told everything he knew (R.34, 52, 57-58). He then signed a rights waiver form at 8:04 p.m. specifically waiving his right to an attorney (R.62-63,65-68, 73). Thereafter, Appellant was taken to a holding cell (R35,53).

Twenty-five to thirty minutes later, Lt. Robert Manfre was performing a routine check on the prisoners when Appellant requested to make a phone call to his parents. He was granted this request and made the call outside the presence of Lt. Manfre (R.37). Appellant then appeared nervous, became "extremely upset," and "started crying" (R.37-38). He asked for a cigarette and started questioning Lt. Manfre about certain facts of the case. Manfre told Appellant not to ask any questions and not to give any statements. Appellant had to be stopped "four or five times" (R.38). He then began asking for advice. Manfre told him "to tell the truth" (R.39). Appellant also indicated concern as to what was going to happen to his son while in jail (R.39). Lt. Manfre emphatically denied ever advising Appellant that if he gave a statement clearing his son that his son would not go to jail (R.40-41). He also denied telling Appellant that there was evidence indicating that his son was involved in the crimes (R.42-43).

Appellant then told Manfre he wanted to make a statement. Manfre went to Detective Edgerton with this request and Edgerton said, "I don't want it, there is no reason to take it." He reasoned that "he had sufficient evidence at this time" (R.43,58). Lt. Manfre came back later and indicated that Appellant still wanted to make a statement absolving his son from any involvement (R.59). Appellant was then brought into the room and told by Edgerton that no promises were being made for him or his son and that if he wanted to give a statement "it was of his

own accord" (R.45). Appellant was again mirandized prior to giving the taped statement (R.62) and again at the beginning of the taped statement[1] (R.62;SR.3-7). Appellant then gave a recorded statement to Detective Edgerton in the presence of Lt. Manfre and Detective Hanstein commencing at 8:59 p.m. on August 13, 1986 (SR.2, 6). During the statement, Appellant swore under oath that on the evening of August 8, 1986, he and his son went to an apartment complex at 8200 S.W. 2nd Street., in North Lauderdale to visit a friend (SR.7). The friend was not at home so they went down the hall and drank some beers with a man named "Duke"[2] in "Duke's" apartment (SR.8). At the time, Appellant was carrying a crowbar approximately two feet long (SR.8). "Duke" began "playing his stereo and showing us his stereo, and he started getting loud with my son" (SR.8). Ultimately, a fist fight erupted between Appellant and "Duke" (SR.9). Appellant then hit "Duke" with the crowbar several times. "Duke" kicked Appellant between the legs, ran to the bedroom, and returned with a pistol (SR.9). Mike, Jr. then left and Appellant hit "Duke" with the crowbar again knocking him unconscious (SR.10). As Appellant was walking away, the victim "grabbed for the gun again" (SR.10). Appellant "grabbed the gun from him and I shot

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[1] Each time Appellant was mirandized, he indicated he understood his rights and never appeared to be under the influence of any alcohol or narcotics. He was never promised anything nor threatened in any way before giving the statement. (R62-63, 67-68).

[2] Apparently, the victim, Lionel Merlano was also known as "Duke" (SR14).

him" in the head "once or twice" (SR.10). The gun and crowbar were later thrown in a canal (SR.10-11).

Appellant then took his son home and went back to the apartment a half hour later to get "some stereo stuff" (SR.12). Appellant thought the victim was dead because he did not move or say anything (SR.13). He attempted to sell the stolen goods to Sharon Spalding (SR.12). Appellant also stated that he did not take the victim's money or wallet (SR.14-15).

At the conclusion of this statement, Appellant stated that he had not been given any promises and that no threats had been made in giving this statement. He further indicated that he was giving the statement of his own free will and that he was not under the influence of any drugs or alcohol (SR.15). The transcript of the recorded statement reflects that the tape concluded at 10:10 p.m. (SR.16). However, at the suppression hearing, Detective Edgerton testified that it was a misquote or mistype. The statement "certainly didn't take that long" (SR.72). The witness averred that the time must have been 9:10 p.m. instead of 10:10 p.m. (SR.73).

Sometime during or after the recorded statement was given, Detective Edgerton received a call from someone who said he was an attorney retained to represent Mr. Bruno (R.54-55). The time of the call was 9:00 p.m. or 9:15 p.m. (R.53,69). The alleged attorney asked Edgerton not to take any statement from Appellant. Unsure of whether the caller was in fact an attorney, Edgerton told him that Appellant had already signed a rights

waiver form and had not requested an attorney and, therefore, could not grant such a request (R.55). Edgerton did not inform Appellant that someone alleging to be an attorney had called for him (R.60).

Later that evening, at approximately 10:30 p.m., after Appellant's statement had already been taken, a woman named Kay Doderer came to the station alleging that she was an attorney and requesting to speak to Appellant (R.59). Edgerton denied the request and told her what he had told the first attorney who called, to-wit: "that Mr. Bruno's statement had already been taken, and he signed his waiver of his rights; he hasn't requested an attorney; he hasn't requested one of me or anyone else in this department; he hasn't made a telephone to my knowledge[3] requesting an attorney" (R.60). Edgerton then informed Appellant that Ms. Doderer was outside, wished to speak with him, and gave him her card (R.60,71). Appellant said he didn't need it and was going to throw it away (R.71).

At the commencement of the suppression hearing, defense counsel presented the testimony of the two attorneys referred to above. Michael Castoro testified that he was an attorney practicing in Hollywood, Florida, (R.7). Shortly after 9:00 p.m. on the night Appellant was arrested, Castoro was contacted by Mr. Judd, a friend of the Bruno family, indicating that there was a problem with Appellant. Castoro called the

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[3]Dectective Edgerton was apparently not made aware that Appellant had made a phone call (R37).

family and was retained by them to represent Appellant (R.7). Immediately thereafter, Castoro called the Margate precinct where Appellant was being held and asked to speak to him. That request was denied (R.9). Castoro then called his associate, Kay Doderer, and asked her to go down to the precinct on his behalf (R.9). He called the precinct back at 9:50 p.m. and told Detective Edgerton not to take a statement from Appellant (R.9,18). Mr. Castoro then went to bed as "it was getting about 10:30 or so" (R.10).

Ms. Kay Doderer then testified that she is an attorney and associate of Mr. Castoro. He called her at home at 9:40 p.m. on August 13, 1986, the night Appellant was arrested (R.17), and told her "to get to the Margate police station as soon as possible" (R.18). She told Mr. Castoro to "call them back and tell them that [Appellant] is not to make a statement one more time and that an attorney is on the way" (R.18). Ms. Doderer immediately proceeded to the police station in Margate (R.18). She testified that she arrived at the station "somewhere around 10:00, 10:15, 10:30. I can't tell you the exact time" (R.19). (However, her original notes indicate that her travel time to Margate was 10:00 to 11:30 (2SR.37)). She asked to speak to Mr. Bruno and his son (R.19). Mr. Edgerton denied the request and she testified that he told her that Appellant was giving a statement at that time (R.19-20).

Later, Detective Edgerton received Ms. Doderer's business card, took it in to show Mr. Bruno (R.20). He then told

her he could speak with Mr. Bruno "[a]fter they were finished with him" (R.21). At approximately 1:00 a.m. the next morning, Edgerton called Ms. Doderer and told her that Appellant was going to booking at the Broward County Sheriff's Office (R.22;2SR.37). He also told her that he had shown Appellant the business card and had the following conversation with him:

Edgerton: "Do you know this lady?"

Appellant: "No, I don't."

"Did you hire her?"

"No, I didn't."

"Did you call her?"

"No."

"Call her."

"No."

"Take it, call her." (R.22-23;2SR40).

At 3:00 a.m., Appellant called Ms. Doderer (2SR.37). She asked him, "Why didn't you want to speak with me?" Appellant did not want to talk to a lawyer "because he didn't want his son to continue in custody" (R.24). Appellant testified that he did not want to speak to Ms. Doderer because he had already given his statement (R.84).

After argument by counsel for both parties, the trial judge recognized that there was a lot of conflict among the witnesses' testimony but found that the statement was knowingly, freely, and voluntarily given and, therefore, denied the motion to suppress (R.98).

TRIAL

I. JURY SELECTION

On August 5, 1987, the case proceeded to jury selection (R.125). Prior to voir dire, the trial judge gave a brief introduction and procedural summary to the jury venire (R.125-128). After some preliminary questions and instructions by the judge (R.128-158), voir dire examination commenced by the parties (R.151). Apparently, all the juror challenges were made at unreported bench conferences (R.141,215,269,273,274,278). At the first challenge conference, defense requested to approach the bench "about making our final selection" (R.215). The court directed the parties to approach the bench and indicated that he would determine if a court reporter was necessary after the parties conferred (R.215). He further instructed the venire that in the event something arises throughout the trial which would require such to be made part of the record, the court reporter would be requested at the bench (R.215-216). Thereafter, a jury was empaneled and sworn (R.278,285) and released until the following day (R.291).

II. GUILT PHASE

On August 6, 1987, the evidence portion of the trial commenced with opening statements by both parties (R.297-319).

The State's first witness was Bob Bryant. He testified that in August of 1986, he resided at Candlewood

Apartments in North Lauderdale in apartment 303, which was right next door to the apartment of the victim, Lionel Merlano (R.322). Mr. Bryant "barely" knew the victim (R.322). In the early morning hours of Saturday, August 9, 1986, at approximately 2:30 a.m. he heard noises coming from the victim's apartment, to-wit: "[s]cuffling, a guy scuffling around and him saying hey, hey, hey" (R.327). The noise lasted for "about five or ten minutes" (R.327). "I started to go over to his apartment to ask him to keep it down" (R.327). However, the noise ceased so the witness went back to bed (R.328).

The victim's sister, Mary Jane Merlano, testified that she and her mother went to Lionel's apartment on August 11, 1986 and found him on the floor covered in blood. "His whole head was black, like blood, and there was a pillow" (R.332-334). She further testified that Lionel had a special interest in electronic equipment (R.332). He owned a television, V.C.R., computer, and stereo receiver which were all missing from the apartment (R.335-339).

The State's next witness was Christopher Tague, an acquaintance of Appellant and Jody Spalding.[4] "At the end of July, possibly early August" of 1986, Appellant asked if he could borrow Mr. Tague's .22 caliber revolver (R.346-347). Mr. Tague loaned him the gun, (State's exhibit number 7), however, he could not remember if it was Jody or Steve Mazzella who was present at

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[4]Appellant and his son and daughter lived with the Spalding family for two weeks prior to the instant crimes (R388).

the time (R.347,360-361). The witness then testified that on Friday, August 8, 1986, at approximately 6:30 p.m. or 7:00 p.m., he went to the Spalding residence to visit as he frequently did (R.348-349). The Brunos were also there as was Steve Mazzella (R.349). Appellant borrowed Mazzella's car so that he and his son could go to Candlewood Apartments (R.349-350). Appellant was wearing jeans and a T-shirt and white sneakers (R.350). The sneakers belonged to Jody (R.351). Appellant returned alone 1 1/2 to 2 hours later, got some beers, and left (R.353,370). He returned again about 11:00 pm. and left (R.353-354,371). Mr. Tague went home about "11:30, midnight" (R.354,371).

The following Monday, August 11, 1986, Tague, Jody, and Appellant took Jody's brother to the airport in Jody's car (R.354-355). On the way back, on Appellant's request, they stopped at Candlewood Apartments (R.355). Appellant said he wanted to remove "prints" from the apartment (R.355-356). They went upstairs to the third floor of C building, where Appellant tried to get into an apartment (R.356). Tague and Jody stood at each end of the hallway and acted as lookouts (R.356-357). "I knew there was somebody dead in there" (R.357). Appellant had told Tague that he had gotten into a fight and that he could not return the gun (R.358). Appellant could not get into the apartment so they left (R.359). Appellant was staying at his mother's house but had plans to go to New York (R.359).

Diana Liu testified that she lived at Candlewood Apartments and knew both Appellant and the victim (R.375). On

the night of the murder, she was at the Candlewood pool attending a party. She saw the victim at about 8:00 p.m. and they had idle conversation (R.376). Prior to that time, she saw Appellant walking into the pool area. He asked her if she wanted to go to another party. "It's a murder party. It's going to be a great killing" (R.378). He left about 9:00 p.m. and she didn't see him the remainder of the evening (R.378).

Ms. Liu saw Appellant the following Saturday morning about 11:00 a.m. at Candlewood "making his rounds" (R.379). She saw him later that afternoon working on a yellow Camaro in the parking lot (R.379). He was doing the same thing on Sunday (R.380). On Monday, at about 8:00 a.m. Appellant was seen sitting on top of the car at Candlewood (R.380). The police were on the premises. Appellant asked Ms. Liu "what was going on" (R.381). Appellant's son was also there and "seemed to be upset and he said that he didn't want to talk (R.381).

On cross-examination, it was revealed that Ms. Liu was questioned by the police on that Monday. She told them about Appellant's invitation to a murder party (R.382-383). She testified that she told them because she was "worried and scared" (R.385).

Jody Spalding next testified that he knew Appellant from Candlewood Apartments where they both used to live (R.387). Appellant and his son lived with Jody's family for about 2 weeks prior to the murder (R.388). Jody was working late on August 8, 1986 and returned home approximately 1:00 a.m. with some friends,

Kelvin Tillman and Ed Paul (R.390). Steve Mazzella and his girlfriend were still there (R.390). Later, "around 2:00 or 3:00", Mike, Jr. came home. He told Jody, "You don't ever want to see what I saw tonight" (R.391). Mike, Jr. looked "pale and weak and scared, really scared" (R.391). Ten minutes later, Jody saw Appellant in the kitchen. He said "that he had just gotten into a big fight with this guy and he was dead" (R.391). He then said "that he was going to get some equipment and stuff from the guy's house" (R.391). Appellant then left in Sharon Spalding's car (R.392).

At 10:00 a.m., Appellant awoke Jody and asked Jody to take him to his parent's house (R.392-393). Jody noticed a V.C.R. and other electronic equipment in the living room and stereo equipment in his mother's room (R.392-393). Appellant said that "he got it from the guy's house who he killed" (R.393). They both then left to go to Appellant's parents' house. On the way, they stopped at a canal into which Appellant threw a "steel bar" (R.394). They went to another canal where Appellant threw a gun (R.395). At yet another canal, Appellant threw the cylinder from the gun (R.395-396). The next day, Appellant came home with a commodore computer (R.396).

Jody then gave testimony similar to that of Chris Tague regarding their trip to the airport and subsequent stop at Candlewood so that Appellant could remove his fingerprints from the apartment (R.397-402). Later that week, Appellant called Jody. "He told me that my pair of shoes he had used when he was

murdering this guy, and they had gotten blood on them; and he told me to get rid of them" (R.403). Jody put them in a paper bag and threw them away (R.403). They were later retrieved and turned over to the police (R.403). Jody did not go to the police immediately because he "was worried about what [Appellant] might do to me and my family (R.404). Moreover, Jody did not tell the truth when he originally talked to the police because Mike, Jr. was with him, and Jody was scared Mike, Jr. might tell Appellant (R.404).

Mike Bruno, Jr. testified that, on the night in question, Appellant and he borrowed Steve Mazzella's car and went to Candlewood Apartments "for some beers" (R.426). They went to an apartment in C building. Lionel Merlano let them in and they listened to music, and talked, and drank beer (R.427-428). At some point, Appellant got up and went to the bathroom. Lionel then went over to the stereo system and began "playing with some knobs" (R.429). Appellant told Lionel he liked the stereo. He then pulled a crowbar out of his pants and began hitting Lionel over the head "like with a baseball bat" (R.430). The victim was bleeding and crying for help but Mike, Jr. couldn't do anything because he was in shock (R.430). Appellant then told Mike, Jr. to get the gun from the bathroom under the sink in the cabinet (R.431). Appellant then "grabbed a pillow and shot the man" twice in the head (R.431-432). They left and went back to the Spaldings' house. After talking to Jody, Mike, Jr. went to sleep (R.432).

Over the next "few hours or days," Appellant brought home some electronic equipment by using Jody's car and making several trips (R.432-433). Later, Appellant told Mike, Jr. that he had thrown the crowbar and gun in the canal (R.432).

After Appellant was arrested, he talked to Mike, Jr. on the phone. He told Mike, Jr. to blame the murder on Jody (R.434) or Marcello, the maintenance manager at Candlewood (R.376, 434). He then told Mike, Jr. to tell the police he was bowling that night or at the movies with a girl (R.434). He finally told him to say that he (Mike, Jr.) and Jody did it (R.434).

On cross-examination, Mike, Jr. testified that he had lied to the police on the night he was arrested (R.436-438).

The State's next witness was Sharon Spalding Maheu. She testified that she came to know Appellant when they lived at Candlewood Apartments (R.448). Appellant and his children stayed with Sharon at her present address for two weeks prior to the homicide (R.449). At some time during the last week of July, 1986, Appellant told Sharon "that he was in Vietnam with this man, and because of this man's stupidity eight or nine of his friends got killed, and that he was going to get even with him" (R.450). On the morning of August 8, 1986, she saw Appellant sitting on her couch with a small brown suitcase and a gun with a long barrel and white handle (R.450,459). The following morning, Sharon noticed a computer, V.C.R., and stereo equipment in her utility room (R.451). When she asked Appellant about it, he told

her not to worry, nobody would be coming for it "[b]ecause they were dead" (R.452). She did not immediately go to the police with this information because she was scared of what Appellant might do to her family (R.452). Sharon later put the electronic equipment in the trunk of her car and turned it over to the police (R.453). She further testified that when she talked to Appellant after his arrest, he told her that she should leave the state because her testimony would put him in the chair (R.453,465).

Steve Mazzella then testified that, one month prior to the homicide, Appellant had asked to borrow his car to borrow some stereo equipment (R.469). On August 8, he borrowed Steve's car at approximately 9:00 p.m. "to get stereo equipment" (R.469-470). When Appellant returned hours later, Steve got his keys and went home (R.471-472). When Steve visited Appellant in jail Appellant said "he wanted for me to stick up for him; and instead of using my father's car, we used my father's van to pick up stereo equipment" (R.472). "He wanted me to lie for him" (R.472). Steve told him he wouldn't lie and he wouldn't help him (R.472-473). Appellant then said, "Of course, you did know that I did do it" (R.473).

Kelvin Tillman testified that he was a friend and co-worker of Jody Spalding (R.481). On the night in question, he, Jody, and Ed Paul left work after closing, about 1:30 a.m. of August 9, and went to Jody's house (R.483). He saw Mike, Jr. come home about 2:00 a.m.. Mike, Jr. looked shocked, and

paranoid (R.484). He whispered something to Jody (R.485). Kelvin spent the night at Jody's house and saw Appellant in the early morning hours in the hallway (R.486). Kelvin noticed little specks of blood on Appellant's sneakers and the lower part of his leg (R.486,488).

Patrick Hanstein, a detective with the North Lauderdale Public Safety Department, testified that he was the first detective to arrive at the scene of the Merlano murder (R.493). His testimony was essentially the same as that given during the hearing on the motion to suppress (R.500-502). Additional testimony revealed that he participated in the search of the murder weapons in three different canals (R.502). The search was conducted pursuant to information supplied by Jody Spalding (R.503). Jody Spalding, according to Mr. Bruno, had driven him to these areas where he disposed of the items (R.503). Detective Hanstein also came into possession of the pair of sneakers worn by Appellant during the murder.[5] The shoes were turned over to the Broward County Sheriff's Crime lab for processing (R.504-505).

On cross-examination, testimony was elicited to the effect that Appellant had never served in Vietnam (R.511). Moreover, the results of the crime lab analysis revealed that Appellant's fingerprints were not comparable to any of the latent prints found at the scene of the crimes and that the hair found

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[5]Jody Spalding had loaned the sneakers to Appellant.

under the decedent's fingernails was not consistent with that of Appellant's (R.514-515).

On redirect examination, Detective Hanstein further testified that there was not much difference at all between the directions given by Jody Spalding and Appellant as to where the gun could be found (R.522).

Dr. James Ongley testified as an expert in forensic pathology (R.527-528). His performance of the autopsy on Mr. Merlano revealed that the death was caused by blunt trauma to the head as well as the two gunshots (R.530-531,534). The gunshot wounds were inflicted while the victim was still alive (R.537). The victim's blood alcohol level was .16 grams percent (R.541,547).

Arthur Maheu, the husband of Sharon Spalding, presented testimony similar to that of Sharon Spalding. He also noticed electronic equipment in his utility room the morning of August 9, 1986 (R.566). Appellant was sleeping on the couch at the time (R.566). When he awoke, Arthur observed a .22 caliber pistol under the pillow on which Appellant was laying (R.567). Appellant told Arthur that the equipment "came from this house where he had killed this guy, and he ransacked it" (R.567). Appellant further revealed that "he sent his son in first to give him an alibi to come looking for his son; stepped in, had a few beers with him. Then this guy got up to empty the ashtray, he pulled the bar out from his pants, he said, and started hitting him in the back of the head" (R.567). He said "the guy fell to

the ground, and he was still alive, and he shot him with the pillow muffling" (R.568). Appellant offered to sell the electronic equipment to Arthur, but Arthur could not afford it and told Appellant to leave because he was "jeopardizing my family" (R.568).

Prior to the murder and robbery, Appellant also told Arthur that he was going to "get even" with this man in Candlewood Apartments for what he did to his buddies in Vietnam (R.568-569).

The State's next witness was Patrick Garland, an expert firearms examiner (R.576-578). He testified that one of the projectiles recovered from the victim was fired from the gun retrieved from the canal (State's exhibit number 7) (R.582). Mr. Garland also examined the pillow found on the victim. It had two holes in both the top and bottom (R.582). On one side, there was a pattern which would be associated with the contact discharge of a firearm (R.583).

Forensic serologist, Howard Seiden testified that he found blood on the sneakers (State's exhibit 8) submitted for analysis (R.590). The sample of blood was not sufficient to determine further testing (R.592). Mr. Seiden, being an expert in hair identification and fiber analysis (R.589), also testified that he examined hair samples which revealed that they could be associated with hairs from the victim (R.592-593).

Detective Robert Edgerton gave essentially the same testimony as he did at the suppression hearing and played the tape of Appellant's confession to the jury (R.610-653).

The state then rested its case (R.653). Appellant moved for a judgment of acquittal as to the armed robbery count arguing that the taking of the electronic equipment took place after the homicide and, therefore, the charge was not properly joined in the indictment (R.653-654). He also made a general motion as to the murder count merely submitting that the State failed to make a prime facie case (R.654). The motions were denied as to each count (R.655).

Thereafter, defense counsel put on the record the fact that he had consulted with Appellant regarding his right and decision to present testimony on his behalf. Counsel stated that he had advised Appellant that to present the testimony of the particular witnesses Appellant wished to present would be detrimental to his case. He also advised Appellant not to take the stand in this case (R.655-656). The trial court also advised Appellant of his right to testify and present testimony on his own behalf, and of the State's burden of proving guilt (R.657-658). After a short recess, defense counsel made further record the fact that he had "strenuously" advised Appellant to take a plea in this case (R.661). The jury was then brought back and the defense rested (R.661). Appellant stated on the record that it was his decision not to take the stand or to call any witnesses (R.665).

The jury was then released for the weekend and the court ordered the State to prepare the jury instructions (R.666,668). The proposed instructions were reviewed by both

counsel (R.667). Defense counsel then stated, "I think we are basically in accord. I just want the standard and any degrees with it on justifiable use of deadly force, self defense" (R.667). The State agreed (R.667).

When the trial resumed, the parties presented closing arguments with no objections from either counsel (R.669-731). The jury was then instructed on the law (R.733-757) and, at the conclusion thereof, the court asked if there were any objections to the instructions given, not given, or the manner in which they were given. Both parties responded in the negative (R.757-758). The jury then retired to deliberate (R.758).

After releasing the two alternate jurors, the trial judge inquired of counsel that should the jury request any of the evidence, do they wish the court to reconvene or would they agree to allow the court deputy sheriff to give it to the jury. Defense counsel agreed to the latter (R.760).

During deliberations, the jury presented a note requesting to listen to the tape and see the photographs in evidence. Pursuant to the aforementioned agreement, the tape and photos were apparently submitted by the court deputy (R.762-763). The jury's request for a copy of the trial transcript was obviously denied (R.763).

Approximately four hours later, the jury informed the court that they were thirsty. In response, the court asked the jurors if they wished to continue deliberations or retire for the evening. The jury decided to retire and were sequestered until

the following morning (R.764-766). Neither party had any complaints regarding the court's action (R7.65-766).

Deliberations resumed the following morning at 9:00 a.m. (R.769). At 2:30 p.m., the court inquired of the jurors if there was any assistance needed. The foreman answered in the negative (R.769). An hour later, the jury sent a note requesting the court to "clarify please in light of count two of the Indictment" (R.770). The Court read count two of the indictment and reinstructed the jury on the robbery offense and the lesser includeds (R.770-776).

At 4:15 p.m., the jury returned a verdict of guilty as charged on both counts (R.777-780).

III. PENALTY PHASE

On August 12, 1987, prior to commencement of the penalty phase hearing, the prosecutor informed the court that Appellant was going to argue "lack of prior record" to the jury (R.783). The parties stipulated to Appellant's prior convictions for possession of cocaine and possession of marijuana (R.783).

The trial judge then gave the jury preliminary instructions (R.783-785) before allowing the State to proceed. The State offered no additional witnesses but read the above-mentioned stipulation to the jury.

The defense called Appellant's mother and father as witnesses to testify as to Appellant's childhood and recent

behavior (R.786-798). Their testimony is adequately set forth in Appellant's brief at pages 13-14.

The next witness was Dr. Arthur Stillman, a physician specializing in the practice of psychiatry (R.799). He testified as an expert in that field (R.802). His psychiatric opinion regarding Appellant's state of mind is adequately set forth in Appellant's brief at page 14. As indicated in the brief, Dr. Stillman did testify that he thought Appellant was insane at the time of the murder (R.821). He testified that he had told defense counsel that he had suspicion of Appellant's insanity but he needed corroboration (R.821). That corroboration was obtained apparently in the 48 hours prior to his testimony (R.822).

After a lunch recess, defense counsel told the court that he was "surprised" and "dismayed" with the foregoing testimony (R.863). For record and clarification purposes, counsel stated that during the break, he reviewed his files and read two letters he had received from Dr. Stillman (R.863-864). In a letter dated December 8, 1986, Stillman indicated that, although he still had "doubts", Appellant was "completely competent, finding no indication of insanity or competency (sic) at the time of the offense nor incompetency to stand trial" (R.864). On June 19, 1987, Dr. Stillman wrote defense counsel a letter "verifying and resubstantiating that position" (R.864,918).

Appellant himself testified in mitigation essentially refuting the testimony of every witness presented by the State in

the guilt phase. A summary of his testimony as set forth in the initial brief is accepted for purposes of disposition of this case on appeal.

After argument by both counsel and instructions by the trial judge (R.883-912), the jury, by an 8-4 vote, returned an advisory sentence of death (R.913).

On September 23, 1987 a motion hearing was held at which defense counsel argued a "motion for psychiatric evaluation prior to sentencing" based on the surprise testimony of Dr. Stillman (R.920-925). He also moved for a continuance of the sentencing to allow for such an evaluation (R.925). The motion was denied the following day (R.932, 935, 1096).

After argument from counsel, the trial court found six aggravating circumstances (three of which it considered as one because they are based on one criminal episode) and no mitigating circumstances (R.952-953,1104-1107). Finding that the aggravating outweigh the mitigating circumstances, the court sentenced Appellant to death for the murder conviction (R.952-954, 1107).

SUMMARY OF THE ARGUMENT

A. Guilt Phase Claims

Issue I

The trial court properly denied Appellant's motion to suppress his confession. The transcript of the hearing demonstrates that the confession was freely and voluntarily entered. There was no evidence to establish that the police conduct was such as to overbear Appellant's will or threaten him.

Appellant's right to due process was not violated when Detective Edgerton denied an attorney's request to speak to Appellant on the telephone as the call was received after the taped confession was completed.

Issue II

There was substantial evidence adduced at trial to prove that Appellant possessed the requisite intent to rob the victim of his electronic equipment. Once this evidence was established, it became the province of the jury to determine the credibility of the witnesses and the weight of the evidence.

Issue III

As the underlying felony of robbery with a firearm was based on sufficient evidence, the first-degree murder conviction is lawful. Appellant's argument that jury unanimity was required

as to the theory of conviction is totally unsupported by case law and, nevertheless, was not raised below.

Issue IV

Appellant's argument that the trial court erred in failing to have a court reporter present at the bench conferences during voir dire is not preserved for appellate review.

Issue V

Appellant's requests for grand jury testimony was not presented with a sufficient predicate. The trial court did not abuse its discretion in denying the request.

Issue VI

Appellant's motion to require the State to elect between felony and premeditated murder was properly denied as case law establishes that no such election is required.

Issue VII

Appellant's motion for psychiatric examination of State's complaining witness was never ruled on by the trial court and, therefore, he is estopped from seeking appellate review thereof.

Issue VIII

Appellant argues that testimony regarding witnesses' fear of him was a denial of due process. The testimony was never objected to and, therefore, is not reviewable on appeal.

Issue IX

Appellant's argument that witnesses' testimony regarding his arrest and jail status denied him of a fair trial is not preserved for appellate review.

Issue X

Appellant rested his case before presenting any evidence. He waived this right clearly and unequivocally on the record.

Issue XI

Any challenge to the prosecutor's closing argument is procedurally defaulted as no objection thereto was ever made.

Issue XII

Appellant's claim that the trial court erred in failing to instruct the jury on the long form instructions of justifiable and excusable homicide is without merit as the first-degree murder conviction is two steps removed from the crime of manslaughter.

Issue XIII

Appellant next claims that his absence from three separate stages of the trial constituted reversible error. His presence was not required at arraignment as he entered a written plea of not guilty. He has failed to demonstrate that he was absent at trial call and motion to continue hearing held on October 17, 1986. Lastly, his presence is not legally required when the judge responds to a jury question in the presence of both defense counsel and the prosecutor.

Issue XIV

The trial court's procedure of allowing the bailiff or court deputy to submit requested evidence to the jury in the absence of both parties was stipulated to by defense counsel and is, nevertheless authorized by the rules of criminal procedure.

Issue XV

Appellant did not preserve for review the challenge to trial court's offer of assistance to the jury during its deliberations.

B. Penalty Phase Claims

Issue I

The trial court's separate findings in aggravation and no mitigation must stand. His use of a prior violent felony as

an aggravator is impermissible as such was supported by the contemporaneous conviction of robbery with a firearm. The court's finding that the murder was committed for pecuniary gain must merge with the finding that the murder was committed during the commission of a robbery.

Appellant's argument that the trial court erroneously gave greater weight to the jury's recommendation of death is meritless as this Court clearly applied the proper standard at sentencing.

Issue II

Appellant alleges that the trial court erred in failing to conduct an evidentiary hearing when it was disclosed that he was insane at the time of the murder. This claim is raised in the guise of an ineffective assistance of counsel and, therefore, is more properly alleged in a Rule 3.850 motion for post-conviction relief.

Issue III

Appellant's challenge to the trial court's finding of no mitigation in this case is unpersuasive. The court, as required, considered all evidence in mitigation and in its discretion, properly found that no mitigating factors were applicable.

Issue IV

Appellant's proportionality argument must also fail as his case is in no way similar to those cited by Appellant which have been reduced to life imprisonment on appeal.

Issue V

Appellant's typical challenge to the constitutionality of Florida's death statute has been rejected repeatedly by this Court.

ARGUMENT

A. GUILT PHASE CLAIMS

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION AND THE FRUITS THEREOF AS IT WAS KNOWINGLY, FREELY, AND VOLUNTARILY GIVEN.

Appellant initially contends that his confession was involuntary as it was obtained by coercion or improper inducement. Specifically, he argues that the police detectives used a deceitful ploy playing on his fear his son would be sexually molested in jail by promising to release him if Appellant gave a statement absolving his son from any involvement in the crimes. The State disagrees and submits that the trial court was proper in concluding that Appellant's inculpatory statement was knowingly, freely and voluntarily given.

A trial court's findings on whether a confession is freely and voluntarily given are clothed with a presumption of correctness. Acensio v. State, 497 So.2d 640 (Fla. 1986). As this Court recently acknowledged, Art. I, Sec. 9 of the Florida Constitution protects a defendant from conviction based upon a coerced confession. Balthazar v. State, 14 FLW 465 (Fla. September 28, 1989). Before the State may introduce a

defendant's statement at trial, the State must show by a preponderance of the evidence that the defendant made the statement voluntarily. DeConingh v. State, 433 So.2d 501,503 (Fla. 1983), cert. denied, 465 U.S. 1005 (1984). However, when there is evidence of antecedent police illegality, overreaching, or misconduct, the State must show voluntariness by a clear and convincing standard. Norman v. State, 379 So.2d 643,647 (Fla. 1980); Bailey v. State, 319 So.2d 22,27 (Fla. 1975). Sub judice, there is no such evidence present in the record. It is merely an unsupported allegation on the part of Appellant that the reason he gave a statement was because he was told by Detective Edgerton that if he exculpated his son, his son would not go to jail. The State does not dispute the facts. At the suppression hearing, Detective Edgerton testified that he told Appellant they did not have any evidence linking his son to the crimes but that they thought his son was involved (R.51). Appellant was also told, prior to giving his statement, that his son was in custody for the same crime and that, if in fact he was involved, he was going to jail (R.57). As indicated by Appellant in his brief, at trial, Detective Edgerton testified that if Appellant gave a sworn statement exculpating his son from any involvement, his son would not be charged (R.646). These statements by Detective Edgerton intimated no leniency whatsoever and were clearly not an inducement for Appellant to inculpate himself. Statements suggesting leniency are only objectionable if they establish an express quid pro quo bargain for confession. State v. Moore, 530

So.2d 349, 350 (Fla. 2d DCA 1988), citing to State v. Beck, 390 So.2d 748, 750 (Fla. 3d DCA 1980). Appellant specifically stated under oath that he was giving the statement of his own free will without any inducements having been made (SR.6,15). The detective's action in this case is in no way comparable to the egregiousness of the acts of police officers in several cases which passed the test of voluntariness. Sec. Bush v. State, 461 So.2d 936, cert. denied, 106 S. Ct. 1237, 89 L.Ed.2d 345 (1984) (suggestion by investigating officers that defendant would benefit if he confessed); Gilvin v. State, 418 So.2d 996 (Fla. 1982) (promises by police detectives to talk with prosecutor about speeding up his case); Cannady v. State, 427 So.2d 723 (Fla. 1983) (promise by law enforcement officer to help defendant with his drug problem); Milton v. Cochran, 147 So.2d 137 (Fla. 1962), cert. denied, 375 U.S. 869, 11 L.Ed.2d 95, 84 S.Ct. 85 (1963) (officers' statements that only by confessing could defendant escape death penalty); Bova v. State, 392 So.2d 950 (Fla. 4th DCA 1980), approved, disapproved in part, 410 So.2d 1343 (Fla. 1982)(representation that defendant's authorization and court); State v. Beck, 390 So.2d 748 (Fla. 3rd DCA 1980) (promise that defendant would receive psychiatric assistance).

The standard for evaluating the voluntariness of a confession is whether the accused made an independent and informed choice of his own free will, possessing the capability to do so, and his will not being overborne by pressures and circumstances swirling around him, United States v. Rouco, 765

F.2d 983 (11th Cir. 1985), cert. denied, 106 S.Ct. 1646, 90 L.Ed.2d 190 (1986)[6] The record clearly establishes that Appellant was properly informed of his Miranda rights on at least four separate occasions (R.33,48-49,62,SR3-7), and that questioning ceased when Appellant told the officers that he had already told them everything he knew (R.34,52,57-58). Mr. Bruno re-initiated the conversation when he started questioning Lt. Manfre about certain facts of the case. Appellant had to be told to cease all discussion "four or five times" (R.38). Moreover, it was Appellant who initiated the concern for his son (R.39), and kept insisting on giving a statement (R.43). He persisted even after Detective Edgerton refused to take his statement, reasoning that there was sufficient evidence without a statement (R.43,58-59).

Then, when Detective Edgerton finally acquiesced to Appellant's demand, he told him that no promises were being made for him or his son and that if he wanted to give a statement "it was of his own accord" (R.45). There is no evidence to demonstrate that the police conduct was such as to overbear Appellant's will or threaten him.

Appellant further argues that his constitutional right to remain silent was violated by Lt. Manfre's "urging" him to give a statement coupled with the comments about what would

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[6] In state prosecutions, the standard by which a voluntariness of confession is to be determined is same as that which applies to federal prosecutions under Fifth Amendment privilege against self-incrimination. Brewer v. State, 386 So. 2d 232 (Fla. 1980).

happen to his son in jail. Such an argument is totally without merit and is hardly worthy of discussion. As noted above, Appellant initiated the conversations with Lt. Manfre and, more significantly, was told to cease discussions concerning the case on numerous occasions. Regarding the comments about what would happen to Appellant's son in jail, Lt. Manfre merely responded to Appellant's incessant interrogation. Manfre told Appellant that he "would better know what would happen to his son than I would since I have not been in jail" (R.39-40). Such a comment falls woefully short of rendering invalid Appellant's waiver of his Miranda rights.

Appellant also debates that his confession should have been suppressed as his right to due process was violated when Detective Edgerton denied an alleged attorney's request to speak to Appellant on the telephone. In support thereof, he relies on this Court's decision in Haliburton v. State, 514 So.2d 1088 (Fla. 1987). The State would urge this Court to reject the instant argument on two grounds. First, as acknowledged by Appellant in his brief, the trial court made a factual finding that Appellant had given his confession prior to the phone call from attorney Michael Castoro (R.98). A trial court's findings must be accepted by the appellate court if there is evidence to support the findings. Demps v. State, 462 So.2d 1074 (Fla. 1984). In such instances, the Florida Supreme Court will not substitute its judgment for that of the trial court. Appellant attempts to establish that the trial court's determination in

this case is without basis in evidence. Contrary thereto, a cursory review of the suppression transcript demonstrates that Appellant's taped statement commenced at 8:59 p.m. (R.70-73 SR2), and concluded eleven minutes later at 9:10 p.m. (R.71-73). Although, the transcript of the recorded statement reflects a completion time of 10:10 p.m. (SR.6), Detective Edgertan corrected this at the suppression hearing by testifying that it was a misquote or mistype (R.72). Moreover, this testimony was pursuant to defense counsel's concern as to the questionable time, which became obvious when he asked Detective Edgerton if the tape machine had been "turned off from time to time to discuss certain facts with the defendant" (R.72). The record further demonstrates that Mr. Castoro did not call the police station until well after 9:00 p.m. He was contacted by Mr. Judd "slightly" after 9:00 p.m. and informed that there was a problem with Mr. Bruno, Sr. (R.7). After that conversation, Mr. Castoro called the Bruno family and had a discussion with them regarding their retention of his services for Appellant (R.7). He was retained by the family and then given information as to Appellant's whereabouts (R.8). Detective Edgerton testified that he received Mr. Castoro's phone call at 9:15 p.m. (R.69), which is subsequent to the conclusion of Appellant's taped statement. Accordingly, no due process violation in respect thereto occurred as alleged.

Secondly, the State would submit that, notwithstanding the foregoing argument, Haliburton was decided over one year

after the alleged improper police conduct in this case, and its holding is not retroactive State v. Hanna, 536 So.2d 386 (Fla. 3d DCA 1989). The fact that the original decision in Haliburton was handed down on August 30,1985, makes no difference as it was vacated and remanded by the United States Supreme Court and this court finalized its decision by denying rehearing on November 24, 1987. See Haliburton, supra.

As his final argument regarding the trial court's denial of his motion to suppress his confession, Appellant asserts that the trial court committed reversible error by deferring to the jury its function of making an independent factual determination of admissibility of the confession. This argument is totally meritless.

In support of his contention, Appellant refers this Court to its decisions in Greene v. State, 351 So.2d 941 (Fla. 1977), Land v. State, 293 So.2d 704 (Fla. 1974), McDole v. State, 283 So.2d 553 (Fla. 1973). He also relies heavily on the United States Supreme Court's decision in Jackson v. Denno, 378 U.S. 468, 12 L.Ed.2d 908, 84 S.Ct. 1774 (1964). These cases all stand for the proposition that due process entitles a defendant to an independent determination of admissibility of a confession, which determination is to be made before admission of the confession and jury deliberation thereon. However, unlike here, in all of these cases, there is no actual ruling or finding in the record showing that the trial judge determined the voluntariness of the confession. In the case at bar, although the trial judge

prefaced his ruling by noting that there was obvious conflict in the testimony by Appellant and Detective Manfre, he did conclude "that the statement as related starting at 8:59 was knowingly, freely and voluntarily given" (R.97-98). This appears from the record with "unmistakable clarity" as required by Sims v. Georgia, 385 U.S. 538, 87 U.S. 639, 17 L.Ed.2d 593 (1967), as cited in McDole, supra, at 554. As such, Appellant's argument must fail.

ISSUE II

THE STATE PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO DETERMINE THAT THERE WAS REQUISITE INTENT TO COMMIT ROBBERY WITH A FIREARM.

Appellant avers that there is insufficient record evidence of his intent to rob as the property was not taken until well after the vicitm was dead. The jury obviously concluded otherwise.

In support of his argument, Appellant relies heavily on this Court's holding in Royal v. State, 490 So.2d 44,45 (Fla. 1986), that "force, violence, assault, or putting in fear must occur prior to or contemporaneous with the taking of property." He attempts to analogize the reasoning in Royal to the taking of property after force is used. Id. at 29. However, the legislature has since amended the robbery statute (Section 812.13, Florida Statutes) with the clear intent to repeal the rule in Royal. See Fonseca v. State, 547 So.2d 1032 (Fla. 3d DCA 1989); Rumph v. State, 544 So.2d 1150 (Fla. 5th DCA 1989); State v. Baker, 540 So.2d 847 (Fla. 3d DCA 1989). The statute now provides:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence or assault or putting in fear.

> (2)(b): An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events. (Italization denotes new language).

Consequently, Appellant's analogy is unpersuasive. Regardless, the element of force is not the issue here. Rather, Appellant challenges the sufficiency of the evidence to prove the element of intent. This Court is well aware that specific intent to permanently deprive an owner of his property is a requisite element of the crime of robbery. Bell v. State, 394 So.2d 979 (Fla. 1981).

In the case at bar, the State presented the testimony of Steve Mazzella which established that one month prior to the murder and robbery, Appellant had asked to use Steve's car to go "borrow a bunch of stereo equipment from a friend" (R.469). Later, on the night in question, Appellant borrowed Steve's car and said he was going "[t]o get stereo equipment" (R.470). While at the victim's apartment, Appellant was admiring the victim's stereo just prior to hitting him over the head with a crowbar (R.430). Then, after Appellant mercilessly shot the dying victim twice in the head, he left to take his son home as he (Mike, Jr.) was scared and in shock (R.391,430). While at home, Appellant told Jody Spalding he was going back to get some stereo equipment from a "guy's house who he killed" (R.391,393). Immediately therafter, he left in Jody's mother's car to remove the

electronic equipment (R.392). From this sequence of events, the jury could reasonably conclude that Appellant possessed the requisite element of intent to commit the crime of robbery. After the State presents evidence to establish the elements of the crime of robbery and of the defendant's connection with the crime, it becomes the province of the jury to determine the credibility of the witnesses and the weight of the evidence. Weeks v. State, 241 So.2d 203 (Fla. 2d DCA 1970). See also Davis v. State, 425 So.2d 654 (Fla. DCA 1983). That determination should not be disturbed in this case.

ISSUE III

THE FIRST-DEGREE MURDER CONVICTION URGED ON ALTERNATIVE THEORIES MUST BE AFFIRMED.

Appellant begs reversal of his first-degree murder conviction on three grounds: a) because the underlying felony of robbery was insufficient, the first-degree murder conviction is unlawful; b) the absence of a unanimous jury finding of guilt on any one theory requires the verdict to be set aside; c) the conviction violates due process and Florida law where the underlying felony used to transfer intent, if it occurred at all, happened well after the killing. Id. at 31-33.

The first ground is argued with the assumption that the robbery conviction will be vacated based on Appellant's argument in Issue II. However, as demonstrated in the previous discussion herein, there was sufficient evidence presented by the State for the jury to find Appellant guilty of the crime of robbery with a firearm. Accordingly, this ground must fail.

Appellant's second ground, is likewise unpersuasive. He argues that the jury was required to be instructed that their verdict on the first-degree murder count must be unanimous as to theory: premeditated murder or felony murder based on armed robbery. However, the record is clear that defense counsel below never argued that juror unanimity as to theory was required to convict Appellant. Had Appellant's jurors believed that they

were required to reach a unanimous verdict as to theory in order to convict Appellant of first degree murder, they certainly would have done so as to both premeditated and felony murder, given the State's very strong undisputed evidence that Appellant went to the victim's apartment with the requisite intent to rob him, and, in the course thereof, bludgeoned and shot the victim to death, all from a precontrived design (R.347,356-357,378,391-393,430-433,449-452,469-470). At the very worst, the jury would have at least convicted Appellant of felony murder given their unanimous verdict of his guilt for the underlying offense of robbery with a firearm (R.779-780). In sum, since Appellant did not properly preserve this ground below, this Court cannot pass upon its merits, not even under a circuitous rationale that trial counsel was ineffective for failing to present the claim. See, Bertolotti v. Dugger, 3 F.L.W. Fed. C128,1289 (11th Cir. August 31, 1989). The State urges this Court to dispose of this ground solely by rendering a plain statement that Appellant is in irrevocable procedural default thereupon, in order to prevent its subsequent unjustified litigation on the merits in a federal habeas corpus proceeding in the event of an affirmance here, see Harris v. Reed, 489 U.S. ___, 103 L.Ed.2d 308 (1989).

Turning alternatively to the verily unpreserved merits, the Florida Supreme Court had held upon many occasions that the State may generically charge a defendant with committing first degree murder via premeditation, as it did here (SR.1), and yet prove the defendant guilty of the charge at trial via his

commission of an underlying felony which resulted in death. See, e.g., Knight v. State, 338 So.2d 201 (Fla. 1976), O'Callaghan v. State, 429 So.2d 691 (Fla. 1983), and Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1985). That court has further concomitantly held that:

> ...a special verdict form is not required to determine whether a defendant's first-degree murder conviction is based upon premeditated murder, felony murder or accomplice liability.

Buford v. State, 492 So.2d 355, 358 (Fla. 1986). In Brown v. State, 473 So.2d 1260, 1265 (Fla. 1985), cert. denied, 474 U.S. 1036 (1985), the court explained the rationale for this ruling:

> Neither constitutional principles nor rules of law or procedure require such special verdicts in capital cases. The sentencing and reviewing courts can determine [when] a defendant may not constitutionally receive a death penalty... [A] special jury verdict ... would not ... resolve this question.

See also, Castro v. State, 547 So.2d 111 (Fla. 1989). Moreover, in Wool v. State, 537 So.2d 630 (Fla. 2nd DCA 1988), review denied, 547 So.2d 1212 (Fla. 1989), the Second district relied upon Buford and Brown to hold that...

> ...there was [no] error in the trial court's refusal to instruct that the jury must unanimously agree upon the particular theory upon which a verdict of first degree murder is based.

This is so because Sections 782.04(1)(a)(1-2), Fla. Stat. provide that one may commit the crime of first degree murder and receive a capital sentence therefor when he caused death either with a

"premeditated design .. <u>or</u>" while perpetrating an enumerated underlying felony, such as the armed robbery which occurred here. See also, <u>North v. State</u>, 538 So.2d 897 (Fla. 5th DCA 1989). Stare decisis requires that this Court, should it inadvisably reach the merits of the current issue, adhere to the precedents of <u>Buford</u> and <u>Brown</u>, as interpreted in <u>Wool</u> and <u>North</u>, and explicitly hold that where a jury is gratuitously given a special verdict form, unanimity as to theory is not required, only unanimity as to the defendant's guilt for the offense charged. Such a holding would, incidently, conform with the out-of-state majority rule, <u>see</u> e.g., <u>People v. Sullivan</u>, 65 N.E. 989 (N.Y. 1903), <u>People v. Milan</u>, 507 P.2d 956 (Cal. 1973), <u>State v. Williams</u>, 285 N.W.2d 248 (Iowa 1979), and <u>State v. James</u>, 698 P.2d 1161 (Alaska 1985), and reject the foreign jurisdiction minority rule announced in <u>United States v. Gipson</u>, 553 F.2d 453 (5th Cir. 1977), relied upon by Appellant.

In sum, Appellant's claim that his jury was required to unanimously find him guilty of first degree murder under at least one particular theory is unpreserved and unmeritorious.

Appellant's third basis for relief under this issue is likewise unpreserved for review by this Court as it was never presented to the lower court via a request for special jury instructions. Nevertheless, as argued in Issue II herein, the evidence demonstrated a causal connection between the homicide and the felony as one continuous series of acts. <u>See</u>, <u>Bryant v. State</u>, 412 So.2d 347,350 (Fla. 1982).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN FAILING TO HAVE A COURT REPORTER PRESENT AT ALL BENCH CONFERENCES DURING VOIR DIRE.

Appellant next asserts as error the trial court's failure to have a court reporter present during bench conferences at voir dire, thereby depriving him of his right to raise a partial jury claim on appeal. Again, Appellant has alleged an error which is raised for the first time on appeal and therefore, is precluded from review by this Court.

Alternatively, the State would submit that Appellant is merely speculating that error occurred during these unreported bench conferences. Conjecture does not lie as a basis for reversible error. Sullivan v. State, 303 So.2d 632 (Fla. 1974). Nevertheless, the issue is more properly raised in a Fla.R.Cr.P. 3.850 motion for post-conviction relief based on an ineffective assistance of counsel claim. This is so because Rule 2.070[7], Rules of Judicial Administration, is directory in the sense that it does not place an affirmative duty upon a trial judge to undertake responsibility which properly belongs to defense counsel. Loucks v. State, 471 So.2d 131,132 (Fla. 4th DCA 1985). Here, defense counsel was obviously in agreement with the trial court's policy of not having challenge conferences reported

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[7]This rule provides that all judicial proceedings required to be reported at public expense shall be reported.

unless necessary as no objection thereto was ever made (R.215-216). Moreover, at each unreported conference, defense counsel would no doubt have requested a court reporter had the need for one arisen. See Strickland v. Washington, 466 U.S. 668,689, 80 L.Ed.2d 674,694, 104 S. Ct. 2052 (1984) (a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance).

The State would further submit that the failure to record the charge conference does not amount to a constitutional deprivation. Songer v. Wainwright, 733 F.2d 788, rehearing denied, 738 F.2d 451 (11th Cir. 1984), cert. denied, 469 U.S. 1133, 83 L.Ed.2d 809 (1985).

Appellant's reliance on Loucks, supra, in support of his argument, is totally misplaced since in that case, unlike here, defense counsel made a specific request for the presence of a court reporter during jury selection. Id. at 131.

In light of the foregoing, the State respectfully urges this Court to affirm the procedure utilized by the trial court.

ISSUE V

THE TRIAL COURT DID NOT ERR IN REFUSING TO RELEASE OR HAVE IN CAMERA INSPECTION OF GRAND JURY TESTIMONY.

Appellant requests reversal and remand for a new trial on the basis that he was denied a fair trial when the court denied his requests for the release of grand jury testimony or for in camera inspection thereof. He alleges in his brief that his requests for grand jury testimony were predicated on the possibility that the transcripts contained (or could lead to) material consisting of prior inconsistent statements or other exculpatory material. Id. at 36. Based on the pretrial motions filed, the trial court properly denied all requests.

As recognized by Appellant, to obtain access to grand jury testimony, a proper predicate must be laid. Jent v. State, 408 So.2d 1024, 1027 (Fla. 1981); Minton v. State, 113 So.2d 361 (Fla. 1959). There is no pretrial right to inspect grand jury testimony as an aid in preparing one's defense and holding an in camera inspection of such testimony is a matter within the discretion of the trial court. Brookings v. State, 495 So.2d 135,137 (Fla. 1986). With the foregoing in mind, it is the State's position that Appellant failed to present a sufficient predicate in this case. While Appellant did in fact file three separate pretrial motions requesting certain grand jury proceedings, nowhere did he allege that the testimony therefrom

might result in or lead to prior inconsistent statements from key witnesses. The two motions filed September 16, 1986 (R964-965) and February 24, 1987 (R.1007-1008) are identical. They merely request the disclosure of the procedures used by the grand jury, records of grand jury vote, the "evidence" concerning Appellant, and whether any recordings were made known to the grand jury. It was defense counsel's belief, inter alia, that the grand jury "was only made aware of an agent's summary of evidence" which would be legally insufficient to support the indictment (R.965,1008). The remaining motion filed October 2, 1986 (R.978-988) was a request for inspection of the grand jury attendance records, production of the record of the number of grand jurors concurring or, in the alternative, an in camera inspection thereof (R.978). The basis for these requests was to ascertain the existence of any constitutional defaults in the manner of grand jury due process failures (R.979). Again, Appellant never stated that he sought the grand jury testimony in order to attack the credibility of certain witnesses. Even if he had, the cross-examination of these witnesses directed the jury's attention to any purported inconsistencies between their trial testimony and their prior depositions, thus obviating any need for resort to the grand jury testimony (R.360-371,408-422,435-445,454-464,571-575). See Brookings, supra; Jent, supra.

In sum, this Court should agree that the defense failed to present a sufficient predicate and find that the trial judge did not abuse his discretion in denying the requests for access to grand jury testimony.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO REQUIRE THE STATE TO ELECT BETWEEN FELONY MURDER AND PREMEDITATED MURDER.

The sixth issue raised by Appellant relates to the sufficiency of the indictment. Appellant asserts that he was tried for both premeditated and felony murder, but was not charged with nor put on notice of the felony murder theory. This issue is totally lacking in merit.

First, as acknowledged by Appellant, this Court has repeatedly held that felony murder and premeditated murder are not mutually exclusive. "The state does not have to charge felony murder in the indictment but may prosecute the charge of first-degree murder under a theory of felony murder when the indictment charges premeditated murder." State v. Pinder, 375 So.2d 836,839 (Fla. 1979). See also Garcia v. State, 492 So.2d 360,366 (Fla. 1986); Green v. State, 475 So.2d 235 (Fla. 1985); Bush v. State, 461 So.2d 936,940 (Fla. 1984); O'Callaghan v. State, 429 So.2d 691,695 (Fla. 1983); Adams v. State, 412 So.2d 850 (Fla. 1982); Knight v. State, 338 So.2d 201,204 (Fla. 1976). As in these cases, Appellant makes the allegation that the indictment fails to state the elements of the offense charged with sufficient clarity to apprise him of what he had to prepare to defend against. However, the record demonstrates that defense

counsel was fully aware that the State was proceeding under both theories as the indictment charged murder under both theories (R.107-108). In fact, Appellant's defense counsel admitted on the record that "the indictment in this case reads that the defendant has been charged with the premeditated and/or felony murder of one Lionel Merlano" (R.107). He merely wanted the State to elect one or the other. As established above, such an election is not necessary. The trial court's ruling should be affirmed.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR PSYCHIATRIC EXAMINATION OF STATE'S COMPLAINING WITNESS.

In this issue, Appellant challenges the trial court's order denying his Motion for Psychiatric Examination of State's Complaining Witness (R.128-130). However, it appears that said motion was never ruled on by the trial court, and therefore, Appellant is estopped from seeking appellate review since there was no trial court ruling. Coffman v. Kelly, 256 So.2d 79 (Fla. 1st DCA 1972). Moreover, this Court has further held that the losing party must assign the ruling as ground of error and include the same in the transcript of the record brought to the Supreme Court on appeal. Howland v. Cates, 43 So.2d 848 (Fla. 1950).

Sub judice, Appellant requested leave of this Court to supplement the record on appeal with the trial court's written order and a transcript of any hearing on that motion. See Motion served April 26, 1989. By order dated April 28, 1989, this Court denied the request "without prejudice to appellant's right to seek supplementation by affirmatively stating that any document filed of record has not been included in the record on appeal or that any specifically identified hearing recorded by a court reporter has not been included in the record on appeal or

transcribed for inclusion in the record." Appellant has failed to pursue either remedy. As such, he has forfeited any right to an appellate review of this issue and this Court is not required to go on a fishing expedition to accomodate Appellant.

ISSUE VIII

THE ELICITATION OF TESTIMONY CONCERNING WITNESSES' FEAR OF APPELLANT DID NOT DEPRIVE HIM OF A FAIR TRIAL.

Appellant complains that remarks from two of the State's witnesses that they were in fear of him, were irrelevant and inflammatory, thus denying him of his right to due process of law. It is axiomatic that any alleged error in the introduction of evidence must be objected to at trial in order to obtain appellate review thereof. Cooper v. State, 492 So.2d 1059 (Fla. 1986), cert. denied, 107 S.Ct. 1330, 94 L.Ed.2d 181 (1986); Phillips v. State, 476 So.2d 194 (Fla 1985). The record in this case is devoid of any objection whatsoever to the testimony complained of in this appeal. Accordingly, the issue has not been properly preserved for review by this Court. Again, this State urges the Court to dispose of this ground solely by rendering a plain statement that Appellant is in irrevocable procedural default thereupon, in order to prevent its subsequent unjustified litigation on the merits in a federal habeas corpus proceeding in the event of an affirmance here. See Harris v. Reed, supra.

The State would also note that on at least one occasion, Appellant likewise elicited testimony concerning the witness' fear of him. This occurred on cross-examination of Sharon Spalding Maheu (R.463). Consequently, Appellant is in

violation of the so-called "invited-error rule," which stands for the proposition that a defendant may not take advantage of an error which he has induced. Ellison v. State, 349 So.2d 731,732 (Fla. 3d DCA 1977), cert. denied, 357 So.2d 185 (Fla. 1978).

ISSUE IX

TESTIMONY REGARDING APPELLANT'S ARREST AND JAIL STATUS DID NOT DEPRIVE HIM OF A FAIR TRIAL.

Similar to the previous issue, Appellant laments that certain testimony from the State's witnesses denied him of his right to due process. Specifically, he avers that the prosecutor elicited testimony on six occasions through four different witnesses that Appellant had been arrested and had been in jail and that such testimony impermissibly denied him of his presumption of innocence. This argument is totally without merit.

First, the State reiterates that in order to preserve an alleged error for review, it must be objected to in the lower tribunal. Cooper, supra; Phillips, supra. Appellant has again failed to object to the testimony now challenged on appeal, and therefore, has forfeited his right to review. Appellant's inevitable protestation to the contrary notwithstanding, any "error" would not be "fundamental" such that it could be reached upon appeal absent its proper preservation, insofar as it would not "reach...down into the very legality of the trial itself to the extent that a verdict could not have been obtained without [its] assistance." State v. Smith, 240 So.2d 807,810 (Fla. 1970), quoting Gibson v. State, 194 So.2d 19,20 (Fla. 2d DCA 1967); see also, William v. State, 400 So.2d 542 (Fla. 3d DCA 1981), cert. denied, 459 U.S. 1149 (1981).

The State also finds it necessary to note that any discussion concerning Appellant's arrest and jail status for the instant crimes was only logical and necessary in light of the common knowledge that anyone suspected of committing first-degree murder is going to be arrested and jailed. Such testimony does not in any way suggest that the prosecution "feels that Appellant was guilty," Id. at 42, and thus has no prejudicial effect on his case.

ISSUE X

THE TRIAL COURT DID NOT ERR BY SUBMITTING THE CASE TO THE JURY AFTER APPELLANT WAIVED HIS RIGHT TO PRESENT EVIDENCE.

In this issue, Appellant initially alleges that the trial court deprived him of his constitutional right to present defense evidence. The record demonstrates otherwise.

It is well-established that the rights of an accused in a criminal trial to confront and cross-examine witnesses and to call witnesses in his own behalf are essential to due process and a fair trial. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 308, 93 S. Ct. 1038 (1973); Hitchcock v. State, 413 So.2d 741,744 (Fla. 1982), cert. denied, 459 U.S. 960, 74 L.Ed.2d 213,103 S. Ct.274 (1982). However, in the case at bar, Appellant unequivocally waived his right to present evidence, and thus, should not now be heard to complain.

The record demonstrates that after the State rested its case, the court was made aware of Appellant's desire to present evidence through witnesses in his own behalf (R.655). Defense counsel stated on the record that he had consulted with Appellant regarding his right and decision to present testimony in his own behalf. Counsel informed the court that he had questioned all the witnesses on the defense witness list and, based on his professional conclusion, their testimony would not contribute to Appellant's case (R.660). "It is a strategic decision on my

part, as I have indicated to Mr. Bruno" (R.660). Defense counsel also advised Appellant not to take the stand, but that it was a decision for Appellant to make (R.656). The trial judge also advised Appellant of his constitutional right to testify and present evidence in his own behalf, and of the State's burden of proving guilt (R.657-658). After a short recess, defense counsel made further record the fact that he had "strenuously" advised Appellant to take a plea in this case (R.661). Appellant then stated affirmatively on the record that it was his decision not to take the stand nor to call any witnesses (R.665). As Appellant clearly and unequivocally waived his right to present a defense, he should be estopped from asserting that the trial judge deprived him of that constitutional right. See McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971). Having fortified his decision not to present a defense, thereby entitling him to open and close argument, Appellant may not assert an inconsistent position challenging the trial court's subsequent submission of the case to the jury. This action is nothing more than classic sandbagging.

Appellant further argues in this issue that Fla.R.Cr.P. 3.250, providing that a defendant offering no testimony in his own behalf, except his own, is entitled to concluding argument before the jury, is unconstitutional as it penalizes him for exercising his right to present evidence. As recognized by Appellant, the constitutionality of this Rule has been challenged and upheld by this Court in Preston v. State, 260 So.2d 501 (Fla.

1972). He has offered no reason to disturb that decision at this time. See also Herring v. New York, 422 U.S. 853,863, n. 13, 45 L.Ed.2d 593, 95 S.Ct. 2550, 2556, n. 13 (1975); Leeks v. State, 529 So. 2d 787 (Fla. 2d DCA 1988).

ISSUE XI

THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT OBJECTED TO NOR DID IT AMOUNT TO FUNDAMENTAL ERROR.

As with numerous of the foregoing issues, Appellant is raising yet another claim of reversible error for the first time on appeal. He now argues that the prosecutor's alleged repeated interjections of personal opinion, references to evidence dehors the record, and suggestions of Appellant's guilt amounted to fundamental error depriving Appellant of a fair trial.

Prosecutorial misconduct only constitutes a ground for reversal if, viewed in context of the entire trial, it may have prejudiced the substantial rights of the defendant; if no objection is timely made, the prosecutorial conduct must constitute plain error or a defect affecting the substantial rights of the accused. United States v. Johns, 734 F.2d 657 (11th Cir. 1984). It shall not be presumed that error injuriously affected the substantial rights of the appellant. §924.33, Florida Statutes (1987).

Sub judice, there was no objection made nor was there a motion for mistrial or curative instruction based on the prosecutor's alleged improper argument and, therefore, Appellant has again failed to preserve this issue for appellate review (R.699-723). Appellant acknowledges his counsel's failure to object but argues that all of these instances constitute

fundamental error thereby requiring review. The State's review of the record shows that the comments did not constitute fundamental error and therefore urge this Court to bar review. Groover v. State, 489 So.2d 15, 16 (Fla. 1986).

The alleged improper arguments as set forth in the initial brief are apparently only improper in the eyes of appellate counsel through his interpretations, as Appellant's trial counsel further elected not to make such claims in his motion for new trial (R.1109-1111). The State also finds it quite reasonable to conclude that the prosecutor's closing argument was nothing but a fair reply to remarks of defense counsel in his arguments, thereby obviating the need for a second trial. As the Honorable Justice Barkett recognized while a member of the Fourth District Court of Appeal:

> [P]rosecutorial misconduct or indifference to judicial admonitions is the proper subject of 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. Morgan v. State, 464 So.2d 1306, 1307 (Fla. 4th DCA 1985), citing to State v. Murray, 443 So.2d 955, 956 (Fla. 1984).

Accordingly, Appellee urges this Court to find any alleged misconduct procedurally barred, and if not, meritless.

ISSUE XII

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY.

The twelfth issue in this cause concerns the trial court's instructions to the jury on excusable homicide, justifiable homicide, and manslaughter. The State submits, as it has repeatedly throughout this brief, that an objection is required to preserve an alleged error for review in criminal trials, and specifically, errors pertaining to jury instructions. Darden v. State, 475 So.2d 214 (Fla. 1985); Castor v. State, 365 So.2d 701 (Fla. 1978). There was *no* such objection sub judice. In fact, defense counsel specifically stated he had no objections to the instructions as given (R.757).

As to the alleged improper instruction given on excusable homicide, Appellant argues that the short form instruction recited by the trial judge is inaccurate as the phrase "without any dangerous weapon" has been held to be misleading. However, the short form instruction given in those cases cited by Appellant in support of his argument was objected to in every instance and, therefore, properly reviewed by the appellate court. Here, the instruction was not objected to, and understandably so, since it is required to be read as an introduction to all murder and manslaughter cases. Florida Standard Jury Instruction's in Criminal Cases: Introduction to

Homicide at page 61. A more detailed explanation of the use of a dangerous weapon is set forth in the long form instruction on excusable homicide. Florida Standard Jury Instructions in criminal Cases: Excusable Homicide at page 76. However, Appellant's counsel did not request the long form and is, therefore, precluded from arguing that the trial court erred in failing to instruct the jury thereon. Nevertheless, the dangerous weapon exception to the excusable homicide defense applies only to sudden combat criterion which is absent in this case. Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1986).

Appellant also contends that the instruction on justifiable homicide was inaccurate in that the defense of another as self defense was not clearly explained. This contention is meritless as the record clearly demonstrates that the instruction complained of was fully explained and recited in the instruction on self-defense (R.745-748).

As to the manslaughter instruction, Appellant asserts that the trial court committed fundamental error by reciting to the jury the short form, rather than the long form, standard jury instructions on justifiable and excusable homicide which is required to be included when defining manslaughter. See Stockton v. State, 544 So.2d 1006, 1008 (Fla. 1989). However, as stated above, Appellant's counsel neither requested the long form nor objected to the short form, thus resulting in a situation in which the incompleteness of the instruction requires reversal

only if it constitutes "fundamental error." As this court has recently held, such an error is deemed fundamental when it occurs during the original instructions, as it did here. Rojas v. State, 14 FLW 577, 578 (Fla. November 22, 1989). Nonetheless, the conviction of first-degree murder in this case is two steps removed from the crime of manslaughter, and thus, the error is harmless. Rojas, 14 FLW at 579, n.1; Lomax v. State, 345 So.2d 719 (Fla. 1977).

ISSUE XIII

APPELLANT'S ALLEGED ABSENCE AT SEVERAL STAGES OF THE PROCEEDINGS WAS NOT ERROR.

Counsel alleges that Appellant was absent during three stages of the proceedings below: 1) arraignment; 2) Trial Call and Motion to Continue hearing held on October 17, 1986; and 3) discussion of jury questions. Due to his absence, he claims that he was denied his right to due process and effective assistance of counsel. The State disagrees.

Rule 3.180(a)(2) of the Florida Rules of Criminal Procedure specifically allows for a defendant's absence at arraignment if a written plea of not guilty is entered. That is precisely what occurred in this case! (R.960, back of page; 2SR.7). Appellant is merely in disagreement with the rule.

Regarding the trial call held on October 17, 1986, the record does not conclusively support counsel's allegation that Appellant was absent at this brief hearing (2SR.8-9). Regardless, he has failed to set forth any reason why fundamental fairness might be thwarted by his absence during such a routine procedure.

Appellant's final assertion of error concerning his absence, involves the discussion of a jury question. It is likewise without merit. An hour and a half after the jury began deliberations, they sent out a note requesting, inter alia, "a

copy of the transcript" (SR.56). The following brief proceedings transpired:

> THE COURT: Jack, Craig and I both interpret that second request a little differently. He thought they meant transcript of the statement. I thought they meant transcript of the trial.
>
> Either one we cannot provide. What do you suggest that I do? Tell them that?
>
> MR. STELLA: Just to rely on their own recollection.
>
> THE COURT: Fine.
>
> MR. COYLE: Fine with me.
>
> THE COURT: I would like to get that responded. Have those people move down at the end, down there.
>
> MR. COYLE: The tape's in evidence, not the transcript,
>
> THE COURT: Hold it. We don't have Mr. Bruno. We have to have Mr. Bruno before I bring out that jury.
>
> We have to wait until you get Mr. Bruno (R761-762).

From the foregoing, it is apparent that Appellant was absent during this discussion. However, it can hardly be said that he suffered any prejudice thereby. In Meek v. State, 487 So.2d 1058 (Fla. 1986), this Court held that a defendant's presence, in addition to counsel, is not required when the trial judge, during jury deliberations, responds to a legal question in the presence of both defense counsel and the prosecutor. Id. at 1059. Any error in the instant case is substantially less severe as the

court did not even respond to the jury until Appellant was in fact present. As such, his argument must fail.

Appellant concedes the holding in Meek, but asserts that it is in conflict with this Court's earlier decision in Curtis v. State, 480 So.2d 1277 (Fla. 1985). To the contrary, a first-year law student would recognize the important distinction between the cases. In Curtis, the trial judge did not notify either the prosecutor or defense counsel of the jury request, unlike in Meek, thereby depriving both counsel and defendant of the right to discuss the action to be taken including the right to object and the right to make full argument. Curtis at 1278-1279. Here, the prosecutor and defense counsel were notified and heard. The trial court's actions should be affirmed.

ISSUE XIV

THE TRIAL COURT DID NOT ERR IN ALLOWING THE COURT DEPUTY TO SUBMIT REQUESTED EVIDENCE TO THE JURY WITHOUT THE PRESENCE OF THE PARTIES OR THE JUDGE.

Similar to the foregoing issue, Appellant next claims that he was denied due process and effective assistance of counsel when the court deputy was allowed to submit requested evidence to the jury in his absence and without the judge and defense counsel being present, or without any waiver thereof by Appellant.

After the jury retired to deliberate (R.758), the following discussion occurred in the presence of Appellant:

> THE COURT: Gentlemen, in the event that the jury should request the evidence, do you wish me to reconvene the court or can Frank just give it to them?
>
> MR. STELLA: Frank can give it to them.
>
> THE COURT: If they request any part, they get it all.
>
> MR. STELLA: That's fine.
>
> THE COURT: One additional question is if they request the evidence obviously there will have to be a machine. Do we have a machine they can play the tape on?
>
> MR. COYLE: Yes, sir.

> THE COURT: Do you gentlemen agree in the event that they should require technical assistance that Frank can demonstrate the tape machine?
>
> MR. STELLA: That's fine.[8] (R.760-761).

This type of procedure is authorized by Rule 3.400(d), Fla.R.Cr.P., and has specifically been upheld in both state and federal courts. Dixon v. State, 506 So.2d 55 (Fla. 3d DCA 1987) (submitting bill of particulars to jurors in absence of defendant and counsel is not reversible error); Bradley v. State, 497 So.2d 281 (Fla. 5th DCA 1986) (jury's request for original police report was not within scope of rule requiring that State and defense be notified of communication between judge and jury); Crews v. State, 442 So.2d 432 (Fla. 5th DCA 1983) (supplying videotape and viewing equipment to jurors by bailiff and deputy, outside presence of defendant and counsel, was not error); Turner v. State, 431 So.2d 328 (Fla. 3d DCA 1983) (no error occurred when exhibits were sent to jury room in absence of defendant or her attorney); United States v. Harrell, 788 F.2d 1524 (11th Cir. 1988) (expert witness' entering jury room to instruct members of jury as to use of equipment so that jurors could use a mini cassette if they saw fit to do so was not improper).

Based on the foregoing, and given the fact that defense counsel stipulated to the procedure in question, thereby prohibiting him from taking advantage of any error which he has

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[8] Frank Gentilella is one of the court deputy sheriffs assigned to the particular division of the trial court in this case.

induced, Ellison v. State, supra, such renders the alleged error meritless or, in the alternative, harmless. See McGriff v. State, 14 FLW 2651, 2652 (Fla. 1st DCA November 15, 1989).

ISSUE XV

THE TRIAL COURT DID NOT ERR IN ITS COMMUNICATION OFFERING ASSISTANCE TO THE JURY.

Appellant's final issue concerning his guilt involves the propriety of the trial court's following inquiry of the jury:

> THE COURT: Ladies and gentlemen of the jury, according to my calculations, it's been some 26 hours ago that I sent you all back to the juryroom.
>
> Since that time we have heard practically nothing from you. I would like to inquire is there some problem that the Court might be of some assistance to you as you deliberate?
>
> MR. GILLIS: Your Honor, not at this time. We're coming pretty close.
>
> THE COURT: Okay. I will speak to you again shortly. You may retire (R769-770).

For the first time throughout this case, Appellant laments that the foregoing deprived him of due process and effective assistance of counsel as it was done without any prior consultation with the parties and because it was coercive in nature. Neither assertion is persuasive.

The allegation that there was no prior consultation with the parties is strictly self-serving and totally unsupported by the record. Appellant points to no evidence whatsoever to demonstrate that he, his counsel, nor the prosecutor were conferred with prior to the judge calling the jury back in to

make the inquiry of which he now complains. Regardless, even had neither party been consulted, there was sufficient time to render an objection. Such did not occur prior to the communication nor subsequent thereto. Thus, any alleged error has not been preserved for review and is not fundamental.

Appellant argues that the communication was fundamentally prejudicial as it coerced the jury to reach a verdict. He implies that the jury was given an instruction which led them to believe that they were required to reach a verdict. See Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983) and Kozakoff v. State, 323 So.2d 28 (Fla. 4th DCA 1975). Unlike the juries in those cases, the jury here was merely offered assistance from the trial judge and he was in no way influential in the jury's role as decision maker. In fact, the jury foreman indicated that they needed no more assistance or reinstructions as they were close to reaching a verdict.

Appellant's allegations that the judge was "pushing the jury towards a verdict," Id. at 55, n.66, is more closely akin to a claim of an improper "Allen" charge. However, the trial court's brief inquiry was clearly not in response to any kind of deadlock indicated by the jury and, therefore, any claim of improper admonitions or motive is clearly misplaced. The trial court's discretionary communications with the jury should be affirmed as nothing more than "housekeeping" or tending to "administrative matters." See McGriff v. State, supra at 2652.

ARGUMENT

B. PENALTY PHASE CLAIMS

ISSUE I

THE TRIAL COURT'S IMPOSITION OF THE DEATH SENTENCE IN THIS CASE DID NOT CONTRAVENE THE CONSTITUTIONS OF THE UNITED STATES OR FLORIDA.

In this portion of his brief, Appellant contests the trial court's findings in aggravation and lack of findings in mitigation. He alleges that such findings are legally incorrect or not factually supported by the record.

Initially, Appellant challenges the validity of each and every one of the six aggravating circumstances found by the trial judge to exist in this case. As to the use of a prior violent felony in aggravation, the trial court used Appellant's contemporaneous conviction of robbery with a firearm in support thereof (R.1104). The State agrees with Appellant that such use does not qualify as a previous conviction of a violent felony for purposes of finding an aggravating circumstance in determining whether to impose a sentence of death. Patterson v. State, 513 So.2d 1257 (1987); Wasko v. State, 505 So.2d 1314 (Fla. 1987).

The court also found that the murder was committed during the commission of a robbery §921.141(5)(d), Fla. Stat.

(1987). Appellant argues that this circumstance is improper as the robbery conviction must be reversed for insufficient evidence. However, as demonstrated in Issue II above, the jury listened to the witnesses and weighed the evidence presented. In so doing, it determined that the State presented sufficient evidence of all elements of the crime of robbery and acted accordingly. As such, the robbery conviction must stand as well as the court's use thereof in aggravation.

That Appellant committed the murder for the purpose of avoiding a lawful arrest is strongly supported by the fact that Appellant bludgeoned the victim with a crowbar and then, after the victim begged for help, shot him twice in the head in order to eliminate him. Accord, Cave v. State, 476 So.2d 180 (Fla. 1985), cert. denied, 476 U.S. 1178, 90 L.Ed.2d 993, 106 S.Ct. 2907 (1985). Witness elimination was clearly a dominant motive of this killing as Appellant and the victim were acquaintances. See Harmon v. State, 527 So.2d 182 (Fla. 1988).

Appellant next argues that evidence of the finding that the killing was committed for pecuniary gain is "thin". Id. at 57. To avoid being repetitious, the undersigned directs this Court's attention to the State's argument in Issue II herein as support of the robbery conviction. The occurrence of a robbery, in and of itself, is sufficient for finding pecuniary gain as an aggravating factor. Bates v. State, 465 So.2d 490 (Fla. 1985); Smith v. State, 424 So.2d 726 (Fla. 1982). To assert that the taking of the electronic equipment was an afterthought of the

murder is clearly misplaced in light of the overwhelming evidence of a precontrived intention to take the equipment from the victim (R.391, 430, 469-470). However, the State is also in agreement with Appellant that the court's finding of this factor as a separate aggravator constitutes impermissible doubling as the court also used the robbery circumstance "F", as a separate aggravator. See Bates, supra; Provence v. State, 337 So.2d 783 (Fla. 1975). As such, the two factors, "D" and "F", must be considered singly.

The trial court next found that the killing was especially heinous, atrocious, or cruel (HAC). Appellant's attempt to establish that the court's finding is not supported by the record is woefully unsuccessful. As demonstrated previously, the victim in this case was murdered by means of a severe beating by blows to the sides and back of the head (R.430, 530-534); he had defensive injuries to his hands (R.537); while still conscious and begging for help, the victim was executed by two gunshots to the head (R.537). This is a method of killing to which this Court has held the factor of heinousness applicable. Cherry v. State, 544 So.2d 184, 187-188 (Fla. 1989); Lamb v. State, 532 So.2d 1051, 1053 (Fla. 1988); Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988); Roberts v. State, 510 So.2d 885, 894 (Fla. 1987); Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So.2d 1170,1174 (Fla. 1985). Like strangulation, the beating suffered by the conscious victim in this case involved foreknowledge of death, extreme anxiety and pain. See Johnson v. State, 455 So.2d 499, 507 (Fla. 1985).

As to the trial court's finding that the killing was committed in a cold, calculated and premeditated manner, Appellant again argues insufficiency of evidence in support thereof. The State disagrees. This aggravating factor is reserved primarily for "those murders which are characterized as execution or contract murders or witness-elimination murders." Bates, supra at 493. That is precisely what the murder in this case was found to be by the trial judge (R.1105-1106). Evidence in support thereof includes the fact that after savagely beating the victim with a crowbar, Appellant shot him twice in the head at point blank range through a pillow (R.431-432, 540-541). In Rogers v. State, 511 So.2d 520, 533 (Fla. 1987), this Court held that "calculated" consists of a careful plan or prearranged design. As outlined earlier in this brief, the evidence established that Appellant had a precontrived design to kill the victim during the robbery. He entered the apartment with a crowbar and a gun. Once inside, he went to the bathroom and put the gun in the cabinet under the sink. He waited until the victim was not looking and then severely beat him in the head using the crowbar like a baseball bat rendering the victim helpless. He then ordered his son to retrieve the gun, grabbed a pillow, and shot the victim twice in the head execution style (R.427-432). This evidence, coupled with the fact that Appellant had borrowed the gun two weeks prior to the murder and had discussed killing the victim with numerous people, supports the heightened premeditation observed in Rogers, supra; See also Perry v. State, 522 So.2d 817 (Fla. 1988).

Moreover, this Court has held the factor of CCP applicable in similar cases. Remeta v. State, 522 So.2d 825, 829 (Fla. 1988) (the defendant planned the robbery in advance and planned to leave no witnesses); Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987) (luring the victim from his home, obtaining a shotgun prior to meeting him, beating the victim, and executing him with one shot to the head); Dufour v. State, 495 So.2d 154, 164 (Fla. 1986) (execution style shooting); Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986) (beating the victim unconscious; then doing an execution style shooting); Parker v. State, 456 So.2d 436, 444 (Fla. 1984) (victim was lying naked and face down on a bed, defendant borrowed pillow from his partner to muffle the shot, and shot victim in the back with a shotgun). The finding of CCP in this case should likewise be upheld.

Appellant next contends the trial court erred in giving the jury's recommendation of death greater weight than that to which it was entitled. In LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978), this Court considered the standard of review of a death sentence where the jury recommends death and stated:

> "The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation." f.n.5: Tedder v. State, 322 So.2d 908 (Fla. 1975).

That is precisely the standard recited by the trial judge at sentencing: "It's my understanding of the law that the only time

a Court should override a recommendation of the jury is in those instances wherein the Court finds that no reasonable person could have done as they did, and I don't find that to be so in this case." (R.952). Thus, contrary to Appellant's assertion in his brief, the trial court accurately applied the Tedder standard of review in denying Appellant's motion to override the jury's recommendation (R.1097-1101).

Moreover, in its sentencing order the judge noted he was imposing this sentence "it being the opinion of this Court that there are sufficient aggravating circumstances to justify the sentence of death... ." (R.1107). The court made a reasoned independent judgment of whether the death penalty should be imposed here. This is the law. As this Court stated in Garcia v. State, 492 So.2d 360 (Fla. 1986), "[i]t is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985), and Tedder v. State, 322 So.2d 908 (Fla. 1975)." Id at 367. See also, Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 107 S. Ct. 3277, 97 L.Ed.2d 781 (1986).

Appellant's reliance on Ross v. State, 386 So.2d 1191 (Fla. 1980) is clearly misplaced since, unlike here, "the trial court felt compelled to impose the death penalty in this case because the jury had recommended death to be the appropriate penalty." Id. at 1197.

Appellant's claim of a Gardner [9] error is totally without merit. In Gardner, the trial judge overrode the jury's recommendation of life imprisonment and sentenced Gardner to death. In doing so, the judge based his findings in part on the presentence investigation report which contained a confidential portion which was not disclosed to defense counsel. 430 U.S. at 353. After the conviction and sentence were affirmed by this Court on direct appeal, the United States Supreme Court vacated and remanded the cause to the trial court holding that the defendant was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain. 430 U.S. at 362. In the case bar, unlike Gardner, the information in question consists of letters from Jean Grunger to Appellant while he was in jail. These were presented to defense counsel and Dr. Stillman for purposes of presenting mitigating evidence and were also considered by the trial judge in considering the imposition of sentence (R.923, 932). There was nothing kept confidential or undisclosed to Appellant or his counsel. Thus, there was no denial of due process. Appellant is merely disgruntled with the unsuccessful efforts at supplementing the record with such letters, so that he can make yet another claim challenging the trial court's lack of adequate consideration thereof. The State would further note that simply because the

[9] Gardner v. Florida, 430 U.S. 349, 51 L.Ed. 2d 393, 97 S.Ct. 1197 (1977).

trial judge has been unable to locate the letters is irrelevant. These letters were written to Appellant and, therefore, they were, and still could be, in his possession.

Appellant's challenge to the trial court's reliance on the presentence investigation report does not merit discussion.

Appellant next complains that the trial judge gave "short shrift to mitigation in its sentencing order" Id. at 66. He bases this argument on the fact that the trial judge discusses only three of the eight mitigating circumstances. However, such is not a basis to conclude that evidence in mitigation was not considered. Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984). A full hearing was conducted in this case in which defense counsel was given an opportunity to present all of the mitigation evidence. As in Palmes, there is no indication whatsoever that the trial judge did not conscientiously consider everything presented.

Appellant's claim that the trial court improperly rejected the mental health testimony of Dr. Stillman is actually raised in the guise of an ineffective assistance of counsel claim. Such a claim is only cognizable under a motion for post-conviction relief. Sireci v. State, 469 So.2d 119 (Fla. 1985), cert. denied, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986); Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984), cert. denied, 469 U.S. 1062, 83 L.Ed.2d 433, 105 S.Ct. 545 (1985); Howard v. State, 462 So.2d 31 (Fla. 1st DCA 1984), pet. for rev. denied, 475 So.2d 694 (Fla. 1984).

ISSUE II

WHETHER ALLEGED ERRORS IN THE CONDUCT OF THE PENALTY PHASE RENDER THE DEATH SENTENCE UNLAWFUL UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Appellant's initial assertion of error under this issue is the trial court's failure to conduct an evidentiary hearing or declare a mistrial or continuance at the penalty phase when it was disclosed through the mental health expert that Appellant was insane at the time of the murder. Again, Appellant has raised this claim in the guise of an ineffective assistance of counsel claim, which, as shown above, is not cognizable in this proceeding.

The remaining allegations of reversible error were not objected to or raised below by way of motion and therefore are not preserved for review by this Court and Appellant has failed to demonstrate that they rise to the level of fundamental error.

ISSUE III

THE TRIAL COURT DID NOT ERR IN FINDING THAT NO MITIGATING CIRCUMSTANCES EXISTED IN THIS CASE.

In this issue, Appellant contends that because the evidence presented in mitigation was substantial and unrebutted, the trial court committed error when it failed to find a mitigating factor applicable at sentencing, Appellant misinterprets the standard of review in Florida.

Section 921.141, Fla. Stat. (1987), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant. Patterson v. State, 513 So.2d 1257 (Fla. 1987). See also Nibert v. State, 508 So.2d 1 (Fla. 1987); Muehleman v. State, 503 So.2d 310 (Fla. 1987). Although consideration of all mitigating circumstances is required by the United States Constitution, Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rests with the judge and jury. Smith v. State, 407 So.2d 894 (Fla. 1982); Lucas v. State, 376 So.2d 1149 (Fla. 1979). The reasoned judgment of a trial judge will not be overturned on appeal. Card v. State, 453 So.2d 17 (Fla.), cert. denied, 469 U.S. 989 (1984). As stated by this Court in Pope v. State, 441

So.2d 1073, 1076 (Fla. 1983), when the record reflects that the trial court considered all evidence in mitigation, the trial court's failure to find a specific mitigating factor (or any factor in mitigation) is not error unless there has been a palpable abuse of discretion. See also, Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228, 75 L.Ed.2d 469, 103 S.Ct. 1236 (1983).

In determining whether mitigating circumstances are applicable in a given case, the trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other witness. Roberts, supra at 894. See Bates, supra (expert testimony is not conclusive even where uncontradicted).

Appellant finds it necessary to summarize the evidence regarding his "good boy" childhood to drug-ridden adolescent and adult years, alcohol impairment, and mental incompetence as evidence in mitigation. However, there is nothing in the record to suggest that these factors were not considered by the trial judge. It is readily apparent from the sentencing order that he considered the expert testimony as well as the lay testimony but considered the testimony unpersuasive (R.1106-1107). The thinking of a trial judge is not reviewable, for such would be pure conjecture. Palmes v. Wainwright, supra at 1523.

In sum, the State would note that the sole expert witness testifying as to Appellant's mental condition and/or capacity at the time of the offense based his opinion on two

psychological interviews with Appellant, a review of letters written by Appellant to a prison nurse, and discussions with Appellant's sister and parents (R.802). As in Roberts, supra, there was no evidence presented that C.A.T. scans, X-rays etc. or testing by qualified neurologists ever took place. There simply was no testimony from any witness that Appellant was exhibiting any of the behavioral charcteristics at the time of the murder, which would support or corroborate the bald assertions of the existence of extreme emotional or mental disturbance.

As to Appellant's contention that his conviction calls for a sentence less than death based on the disparity of treatment of persons who were involved in the offense, the undersigned submits that discretionary decisions of state prosecutors to grant immunity to some participants of a crime and not others is not arbitrary or cruel and unusual under the constitution. See Gregg v. Georgia, 428 U.S. 153, 199, 49 L.Ed.2d 859, 96 S.Ct. 2909, 2937 (1976); Proffitt v. Florida, 428 U.S. 242, 254, 49 L.Ed. 2d 913, 96 S.Ct. 2960, 2967 (1976). Accordingly, Appellant's claim is not a cognizable basis for relief.

ISSUE IV

THE SENTENCE OF DEATH IS NOT DISPROPORTIONATE.

This Court should reject Appellant's argument that death is not proportionately warranted in this case where it contains most of the features which have led this court to reduce the sentences of others to life. I.B. at 84. He supports the foregoing with the presumption that this Court is going to agree with his assertion that there are numerous invalid aggravating circumstances and substantial evidence in mitigation. As in other cases, such a scenario would counterbalance the aggravating and mitigating circumstances, warranting the imposition of a life sentence. See e.g. Livingston v. State, 13 FLW 187 (Fla. March 10, 1988) (still pending on Motion for Rehearing). However, as argued previously, the four aggravating circumstances("D", "E", "H", and "I") in this case far outweigh the nonexistence of any mitigation which was based on an independent reasoned decision of the trial judge as reflected in his sentencing order. Accordingly, Appellant's proportionality argument must fail.

ISSUE V

THE TRIAL JUDGE PROPERLY DECLINED TO HOLD THAT THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON IT FACE AND AS APPLIED.

Appellant next claims for the record that the trial judge erred in denying his numerous motions to hold the Florida capital sentencing statute unconstitutional on its face and as applied (R.991-1001). The State briefly responds that the Florida capital sentencing scheme is indeed constitutional in every way. McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041, 70 L.Ed.2d 468, 102 S.Ct. 583 (1981); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 40 L.Ed. 2d 295, 94 S.Ct. 1950 (1974); Proffitt v. Florida, supra.

Regarding Appellant's allegation that no sentencing guideline scoresheet was prepared as to Count II of the indictment, he has failed to establish such in the record. His unsuccessful attempts to supplement the record with the scoresheet is not per se evidence of its nonexistence. Appellant has simply not met his burden of providing this court with a sufficient record to support his allegations of error in the lower tribunal.

CONCLUSION

WHEREFORE, in light of the foregoing argument and cogent citations of authority, Appellee respectfully urges this Honorable Court to AFFIRM the judgments and sentences in this case.

Respecfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to STEVEN H. MALONE, ESQ., Assistant Public Defender, 9th Floor, Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401, on this 27th day of December, 1989.

John M. Koenig, Jr.
Of Counsel

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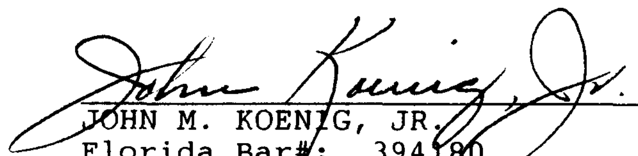

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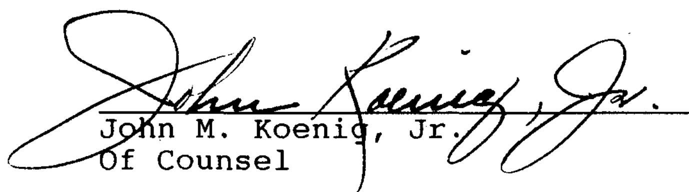

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