IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,646

KRISHNA MAHARAJ,

Appellant

vs.

THE STATE OF FLORIDA,

Appellee.

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

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BRIEF OF APPELLEE

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INTRODUCTION

The Appellant, **Krishna Maharaj**, was the defendant below. The Appellee, **the State of Florida**, was the prosecution below. The parties will be referred to as they stood below. The symbol "R" will designate the record on appeal.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged by Indictment with the first degree murder of Derrick Moo Young; the first degree murder of Duane Moo Young; armed burglary; two counts of armed kidnapping; aggravated assault; and possession of a firearm while engaged in a criminal offense. (R.1-5a).[1] Defendant pled not guilty and requested a trial by jury.

Trial of this cause commenced on October 5, 1987. (R.1917). Prior to jury selection, the trial court granted the State's Motion in Limine to prevent evidence concerning a report made by the government of Trinidad concerning money laundering (R.1919); to prevent evidence concerning the Defendant's lack of prior felony record (R.1920); and to prevent admission of evidence that Neville Butler submitted to a polygraph examination. (R.187,

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[1] The Defendant was charged with an additional count of armed kidnapping, the victim of which was Neville Butler. However, just prior to trial the State nolle prossed said count. (R.1925).

1920). The trial court deferred ruling on the State's motion to permit the recalling of certain witnesses was requested in order to present an orderly chronological sequence of events to the jury. (R.1922-1924).

Jury selection then began. (R.1929). During the trial court's opening remarks to the venire, they were advised that this was a death penalty case and that if the case proceeded to the penalty phase it would be their duty to render an advisory opinion regarding the imposition of the sentence. The trial court further advised that the trial court was the ultimate sentencer. (R.1935-1937). The State, during its initial voir dire, advised the venire that although their sentencing recommendation was only advisory, their recommendation would be used in assisting the trial court in deciding whether the death sentence would be imposed. (R.2037). Voir dire proceeded in an orderly fashion and a jury was selected and impaneled to try this cause. (R.2037-2104; SR.1-160).

Prior to opening statements, the parties met to determine which physical evidence was going to be presented to the jury. (R.2105). The Defendant objected to State's exhibits II through V, (R.1567-1574), on the ground that they were prejudicial since the exhibits were newspaper articles concerning the Defendant's involvement in uncharged crimes. The State responded that these articles were relevant to establish motive, to wit: that the

Defendant murdered the victims on account of the derogatory contents of the articles. The trial court overruled the objection. (R.2110-2116). The remainder of the evidentiary matters were handled without objection. (R.2116-2142).

The parties then made their opening statements. (R.2151-2185). The State then presented its first witness. (R.2188).

Tino Geddes, a native of Jamaica, is a journalist. (R.2188-2189). In December 1985, Geddes met Eslee Carberry, the publisher of the weekly newspaper, The Caribbean Echo. In January 1986, Geddes began working for the Echo as entertainment and sports editor. (R.2191). He considered the paper to be geared to the sensational, as it reflected Carberry's character. (R.2192).

While working for the Echo, Geddes, through Carberry, met the Defendant. Carberry took Geddes to the Defendant's home, to discuss an article which the Defendant wanted The Echo to publish. (R.2192-2193).[2] Carberry agreed to publish the Defendant's article for four hundred dollars. The subject of the article was the victim, Derrick Moo Young and it was to encompass the centerfold spread. (R.2196). The article was published in

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[2] At the first meeting Defendant had a bushy mustache and until October 16, 1986, the day of the incident in question, the Defendant always had a mustache. (R.2194-2195).

the May 2, 1986 edition of The Echo. (R.2197). The article detailed the background of a civil suit filed against Derrick Moo Young, by the Defendant's wife. The article stated that the civil law suit charged Derrick Moo Young with fraud, statutory theft, racketeering and conspiracy, based on Moo Young's conversion of rental money from properties owned by the Defendant's wife, but managed by Moo Young. (R.1565-1566).

After The Echo published the foregoing articles, Geddes left its employ. Geddes became the editor of a brand new newspaper, The Caribbean Times. This paper was owned by the Defendant. It's initial edition was published on July 4, 1986. (R.2202-2203). During the early stages of Geddes' and the Defendant's relationship, The Echo started to publish articles favorable to Moo Young and unfavorable to the Defendant. The Defendant was not pleased with The Echo's coverage of the controversy. (R.2204-2205). Based on The Echo's coverage, the Defendant developed a hostility against Carberry. The Defendant believed that Carberry was being fed the information against the Defendant by Moo Young. (R.2209). The Defendant also became resentful of Moo Young and felt that Moo Young was dishonest. (R.2210-2211).

As a result of The Echo's coverage, the Defendant stated that he was going to get Carberry. (R.2214). The Defendant then purchased exotic weapons, which included cross bows, two hunting

knives and camouflage uniforms. The Defendant told Geddes that he wanted to physically harm Carberry. Geddes then went with the Defendant to West Palm Beach, where the Defendant knew Carberry would be, in order to hurt Carberry. In the car was a shotgun. The Defendant and Geddes drove to West Palm Beach, where The Echo was printed. They knew that Carberry would be there that night and the Defendant planned to kill him. Upon their arrival, they spotted Carberry's car, so they parked and waited for him to leave the print shop. After awhile, the Defendant and Geddes left their surveillance to purchase something to eat. Upon their return Carberry's car was missing. Their attempts to relocate Carberry were unsuccessful. (R.2215-2217).

Geddes then related a conversation he had with Moo Young, where Moo Young told Geddes that he was going to destroy the Defendant. Geddes related this conversation to the Defendant. At that time, the Defendant said that he was going to destroy Moo Young. (R.2220-2221).

Geddes then participated in a second incident with the Defendant. This time it was an attempt to kill Derrick Moo Young. Geddes and the Defendant went to Ryder Truck Company on West Broward Boulevard. Geddes used his license to rent a truck, while the Defendant paid the rental fee.[3] They drove to a rarely

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[3] Anthony Mulanko, the records custodian for the Ryder Truck Company corroborated Geddes' testimony. (R.2321-2322). The lease agreement was introduced into evidence. (R.1651).

used road which Moo Young traveled on to get home. The plan was to wait for Moo Young and then ram his car and force him off the road. The Defendant had a rifle, shotgun, crossbows, (R.2218-2219) and they both wore the camouflage gear. (R.2226). This plan also failed since Moo Young never drove by. (R.2224).

Geddes became involved in a third incident with the Defendant. Geddes was in the Times' offices when he received a telephone call from the Defendant, who told him to go to the Dupont Plaza Hotel and go to the bar and wait. Upon his arrival at the bar, the Defendant appeared and the both of them went to a room in the hotel. The Defendant was carrying an attache case and a light colored canvas overnight bag. The Defendant had a light colored automatic pistol and had a glove on one hand. The glove was on the right hand, which was holding the pistol. When in the hotel room, the Defendant asked him how would he feel if he saw two men lying dead on the floor. The Defendant then told Geddes to call Moo Young and Carberry and try to lure them to come to this hotel room. The Defendant told Geddes to tell them that a certain person from Trinidad would be there and that the Defendant rented the room in the Trinidadian's name so that Moo Young or Carberry, upon checking the story, would be fooled and would show up. Geddes, who did not see a silencer for the pistol, asked the Defendant about the noise the gun would make. The Defendant assured him that the hotel room was soundproofed. The Defendant told Geddes that he could take care of three people

but if more showed up he expected Geddes to help. This was necessary to eliminate all witnesses. Geddes then called Moo Young, but since he was out of town Moo Young did not respond. He next called Carberry who refused to come. (R.2227-2235).

Geddes was not present at the time the murders took place. (R.2236). On the day before the murders, the Defendant still had a bushy mustache. (R.2237).

The witness was then tendered for cross examination. The trial court then ruled that Geddes could be recalled at a later time. (R.2239).

Prince Ellis, a native of Nassau, Bahamas, owns and operates a catering business in Nassau. (R.2264). At the time of the incident in question, Eddie Dames was Ellis' business partner. (R.2265). On October 15, 1986, Ellis flew to Miami to meet Eddie Dames to purchase disco equipment from Ace Music. Before he left Nassau, Ellis called Dames in Miami and told him that he would meet him at Dames' hotel, the Dupont Plaza. Dames told Ellis his room was 1215. (R.2265-2268). Dames flew to Miami a couple of days earlier than Ellis, in order to purchase a steam table and ice machines. (R.2269). Ellis arrived in Miami at 8:00 P.M. on October 15, 1986. He went directly from the airport, by rental car, to the Dupont Plaza Hotel where, at about 9:00 P.M., he checked into room 538. Ellis inquired about Dames, and the

front desk advised that he was registered, but that upon ringing Dames room there was no answer. Ellis waited until 1:00 A.M. for Dames. After he failed to show, Ellis went partying. He returned to the hotel about 3:00 A.M. and Dames still was not around. Ellis never saw Dames that night. (R.2270-2273).

The first time Ellis saw Dames was around 9:30 A.M. on the morning of October 16, 1986. Dames was with Neville Butler. Ellis had not made any plans with Butler. At about 10:30 A.M., Ellis and Dames left the Dupont Plaza Hotel, while Butler remained. Upon leaving, Dames told Butler he would meet him at the hotel around 1:00 P.M. that day. Ellis and Dames went to Ace Music Studio and purchased, with cash, disco equipment. They stayed at Ace Music for approximately four hours.[4] Ellis felt that Dames was stalling for time. They then went back to the Dupont Plaza Hotel. (R.2274-2281, 2312).

Upon their return, at about 2:30 P.M., they went into the Hotel and Ellis, pursuant to Dames request, called Dames' room. Someone answered and shortly thereafter Ellis was contacted by homicide detectives and they were told that two people were murdered in Dames' room. (R.2282-2283). They stayed at the Hotel for an hour and then the officers transported Ellis and Dames to

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[4] Bernard Selditch, a salesman for Ace Music, confirmed that Ellis and Dames were at the store on the morning of October 16, 1986 and that they bought disco equipment. (R.2618-2626).

the police station for questioning. Prior to leaving, Ellis observed a brief conversation between Dames and Butler. (R.2284-2285). While at the police station both Ellis and Dames gave statements and had their fingerprints taken. (R.2286).

Upon leaving the police station, Butler and his girlfriend were waiting for them in Dames' rental car. They all drove to Sizzler's restaurant, on Biscayne Boulevard. During the drive Ellis observed that Butler was acting nervous, that his watch was broken and that his shirt was torn and a little blood stained. Butler kept repeating the statement that he did not know there was going to be any shooting and the man went crazy. Dames told Ellis he would explain later. (R.2287-2290).

When they arrived at the restaurant, Dames told Ellis that Butler was involved in the murders. Ellis tried to get Butler to call the police. Butler's girlfriend then told Butler that he was supposed to met someone at the Denny's on LeJuene Road near the airport and that this person called her house all day every fifteen minutes. (R.2290-2291).[5]

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[5] Daphne Canty lives with her sister, Porshe. Porshe's boyfriend is Neville Butler. On October 16, 1986, during the afternoon she received a series of phone calls, approximately thirty minutes apart, from a man who was looking for Butler. The man said it was important. These messages were transmitted by Daphne to her sister, who said she would give the messages to Butler. (R.2663-2668).

Dames then called the police, and Detective Buhrmaster and a female officer, responded within fifteen minutes, to the scene. Butler had left to change his clothes, but returned shortly. Butler then spoke with the Detective. Thereafter Butler and the Detectives drove off. (R.2292-2293). Shortly thereafter, Ellis went to the hotel and the next day he flew back to Nassau. (R.2293-2294). Ellis did not know the Defendant, nor did he know the victims. (R.2296).

Stephen Veltri was a Florida Highway Patrol Trooper on July 26, 1986, and about 2:30 A.M., he responded as a backup unit, regarding a traffic stop. (R.2325-2329). The Defendant had been stopped for a traffic infraction. During the stop, Veltri saw that the Defendant was in possession of numerous weapons, including a nine millimeter, semi-automatic pistol. (R.2330-2335). The Defendant told Veltri that he obtained the semi-automatic pistol from a police officer from either the City of Miramar or Pembroke Pines. (R.2235). A computer check revealed that the gun was not stolen, and the gun, along with all other weapons found, were returned to the Defendant. (R.2337-2343). Other weapons that Veltri observed in the Defendant's possession included a crossbow, hunting knives, survival saws and Chinese throwing stars.[6]

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[6] Gregory Jansen, a City of Plantation police officer, also was a backup in the traffic stop in question. He recognized the Defendant as the driver of the stopped vehicle. Jansen observed the same weaponry as Veltri, including a nine millimeter semi-

Eslee Carberry is the publisher of The Caribbean Echo, a weekly newspaper geared to the West Indian Community in South Florida. (R.2347). Geddes worked for him in April 1986. (R.2348). Carberry knew both the Defendant and Derrick Moo Young before his paper started publishing the articles in question. (R.2349).

Carberry was approached by the Defendant's accountant, one George Bell, who requested that Carberry publish a front page story about Moo Young. Carberry refused this request until he met with the Defendant. A meeting was arranged at Defendant's home, where Carberry was provided documentation for the article. Geddes was also at this meeting. (R.2349-2352). The Defendant told him that Moo Young stole money from him and the documents proved it. They agreed on a center spread and the Defendant paid $400 to have the article published. The article was published on May 2, 1986. (R.2352-2354). Before publishing, Carberry did not contact Moo Young for his side of the story. (R.2357).

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automatic pistol. The pistol was removed from the passenger compartment. It was a Smith and Wesson model 39, silverish-white in color. Jansen ran the serial number to determine if the gun was stolen; the serial number was A235464. (R.3383-3388). Detective Richard Bellrose, a police officer with the City of Miramar, received a present in 1974 of a Smith and Wesson model 39. (R.3264-3265). In 1979 he had the gun refinished and the color was changed to silverish-white. (R.3268-3269). In 1986 he sold the gun, through an intermediary, to the Defendant. The serial number of the gun was A235464. (R.3269-3271).

After the first article, the Defendant wanted Carberry to do a weekly article on Moo Young. Carberry refused this request. The Defendant then attempted to buy The Echo. (R.2358). Subsequently, he learned that Defendant was beginning his own paper. (R.3262).

Shortly thereafter, Carberry was contacted by Moo Young, so that he could present his side of the story. Moo Young met with Carberry and provided documentation to refute the Defendant's allegations. Carberry then began his own investigation and thereafter began publishing articles unfavorable to the Defendant. The first was published on June 20 (R.1567-1568); then on June 27 (R.1569-1571); then on July 18 (R.1572-1573) then on July 25 (R.1574). The last one was published on October 10, 1986. (R.1619-1623).

The June 25 article charged the Defendant with taking money illegally out of Trinidad. (R.2366). The July 18 article also dealt with illegally taking money out of Trinidad. (R.2368). The July 5 article was written to inform the readership that The Echo could not be bribed regarding the Defendant's articles. (R.2372-2374). The October 10 article accused the Defendant of forging a $243,000 check and a lawsuit Moo Young was filing against the Defendant based on the forged check. (R.2380).

During the period of time The Echo was publishing the articles about the Defendant, the Defendant severed his relationship with Carberry. (R.2375). One evening, Geddes called Carberry's home to try to get Carberry to a hotel to talk with a Trinidad government official about the articles. Carberry was not home and the meeting never occurred. (R.2376).

Loretta Molaskey, a maid for the Dupont Plaza Hotel, was the maid for the 12th floor on the day in question. (R.2411-2412). She cleaned Room 1215 in the early morning of October 16. Upon entering the room, there was no evidence that it had been used the previous night. (R.2413). She cleaned and emptied all ash trays and garbage cans; dusted all the furniture; and cleaned the bathrooms. When she left the room it was perfect, including the fact that the Do Not Disturb sign was on the inside of the door. When she was leaving room 1215, a black man entered the room. As she was entering another room Molaskey saw a white person enter 1215. (R.2414-2418). She continued her work without further incident. Shortly thereafter, she was requested, by her boss Mr. Sueiras, to check out 1215. At around 12:15 P.M. Molaskey and Sueiras, attempted to enter room 1215. But they were unable to because the room was locked from the inside and therefore her master key did not work. The room could not be locked from the inside unless someone was in the room. At that time, she noticed blood on the carpet outside 1215 and the Do Not Disturb sign was not evident. (R.2419-2420). Molaskey then left

and ten minutes later she was requested to return to 1215. This time her master key worked and she opened the door. The Do Not Disturb sign was now hanging on the outside of the front door. She observed that the furniture had been moved and two bodies were on the floor. She also saw a soda can and other garbage that was not there after she previously cleaned the room. (R.2421-2428).

Miguel Sueiras, the head housekeeper at the Dupont Plaza Hotel, was working on the 11th floor on the day of the incident. He had over thirty people working on the remodeling, which included remodeling the bathrooms and carrying furniture. (R.2430-2432). According to Sueiras, with all the noise going on on the 11th floor, it was hard to hear noises emanating from anywhere else. He did not hear anything that sounded like gunfire or loud arguments emanating from the 12th floor. (R.2434). Around noon, he was advised that blood was found in the 12th floor hallway. He went to the 12th floor, and had the maid use her key to let him into 1215. The maid's key would not work since the door was locked from the inside. This meant that someone had to be in the room. (R.2435-2436). He then left to notify the hotel management. As he was going into the elevator, Jorge Aparicio, a hotel security guard, came out of the elevator. (R.2441).

On the day of the incident, Jorge Aparicio was a security guard for the Dupont Plaza Hotel. At noon he was directed to room 1215 because bloodstains were found on the carpet outside the door. As he left the elevator he passed Suieras going into the elevator. When he arrived at 1215, Aparicio touched the carpet and it was soaked with blood. He then knocked loudly on the door and identified himself as security. He asked if there was a problem and a voice answered in the negative. Aparicio then left. He did not see a Do Not Disturb sign on the door. (R.2446-2450).

Ana Fernandez, a security guard for the Dupont Plaza Hotel, worked the 8:00 A.M. to 3:00 P.M. shift on October 16, 1986. Around noon, she responded to 1215 reference bloodstains on the floor. She found the door to 1215 open and located two bodies in the room. She secured the room until the police came. (R.2401-2404).

Sylvia Romans, a crime technician for the City of Miami Police Department, responded to the scene at 1:08 P.M. (R.2463, 2470). She located two projectiles in the door jam of room 1216, the room right across from 1215. (R.2481). The carpet outside of 1215 was ripped which was made by a bullet. (R.2486). The door to room 1214 had markings which were made by a bullet. (R.2487). Blood was found on the wall, west of room 1214. (R.2489). Blood was also found on the door to 1215. The Do Not Disturb sign was

hanging from the exterior front door knob. (R.2490). Blood was also on the door knob to 1215. (R.2491). In the downstairs bathroom blood was found, along with broken eyeglasses and a shirt button. (R.2500, 2502). Two opened packages for immersion heaters were found in a waste basket. (R.2504). A plastic glass and a soda can was located on the top of a bureau. (R.2505). An edition of USA Today was found with a telephone number written on it. Also, a spent casing was found lying on the newspaper. (R.2505-2509). Two immersion heaters were found on a green upholstered chair. (R.2511). A casing was also found near the green chair. (R.2512). The screen to the television was shattered by two bullets. (R.2513-1514). The downstairs table and chairs were also covered with blood. (R.2514). The carpet near the wall, across from the entrance door, was ripped. The tear was caused by a bullet, which bullet was found under the carpet. (R.2515-2516). On top of the downstairs table, there was an ashtray, with a crumbled up piece of paper in it. The paper was the sanitary wrapper from the plastic cup. (R.2518-2519). On the coffee table, several legal pads, pens and a brown briefcase were found. (R.2520). Eight casings were found on the scene. (R.2523). The coffee table had a bullet hole. (R.2525). There was blood on the sofa and blood on the carpet directly below the blood spot on the sofa. (R.2526). One end table contained two newspapers: a second edition of USA Today and the Miami News. (R.2527-2528). Two casings were found on the other table. (R.2530). A casing was found on the floor beneath the stairway

to the second floor of the suite. (R.2531-2531). Another casing was found on the fourth step of the staircase. (R.2535). On the sixth step, the outside wood was splintered and a projectile was found therein. (R.2541). In the wall, next to the body of Duane Moo Young, a projectile was found. (R.2544). A button was missing from Duane Moo Young's shirt, and the buttons on the shirt were consistent with the one found in the downstairs bathroom. (R.2546). A casing was found under the bed, by the head of the bed. (R.2546). Derrick Moo Young's shirt was also examined and gunpowder was located thereon. This indicated that Derrick was shot at close range. (R.2556). A casing was found in one of Derrick's shirt pockets. (R.2552). Blood samples were then gathered from the scene. (R.2555-2566).[7] Latent prints were then collected and standard prints were taken from the Defendant and Butler. (R.2569-2591).

Inez Vargas, is a front desk clerk for the Dupont Plaza Hotel, whose job it is to assign rooms. She worked the 7:00 A.M. to 3:00 P.M. shift on October 15, and 16, 1986. (R.2633-2634). On October 15, 1986, the Defendant asked Vargas for a suite at the corporate rate. Vargas was not authorized to give the Defendant the corporate rate since his company was not registered with the hotel. (R.2635-2636). Vargas sent the Defendant to the

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[7] David Rhodes, a serologist with the Metro Dade Police Department, received the blood samples. He determined that all the blood was consistent with Derrick Moo Young's blood. None was consistent with Duane Moo Young's blood. (R.3278-3289).

sales department to see Arlene Rivero about receiving a corporate rate. The Defendant returned to Vargas with an approval for the corporate rate. Vargas then assigned room 1215 to the Defendant. (R.2637-2638). On the morning of October 16, 1986, a black man asked her if Eddie Dames, room 1215, had left him any messages. He then waited about an hour. After the murders, Eddie Dames came by for his messages and thereafter the police arrived. (R.2639-2640).

Arlene Rivero, is a sales representative for the Dupont Plaza Hotel, whose job includes the corporate rate business. (R.2709-10). On October 15, 1986 Rivero worked the 9:00 A.M. to 5 P.M. shift. At around 9:00 A.M. that morning, the Defendant met with her concerning a corporate rate for a penthouse suite. She rented the Defendant a penthouse suite for two nights, October 15 and October 16, 1986. The Defendant identified himself as Derrick and asked that the room be reserved in Eddie Dames' name. (R.2711-2716, 2720).

Neville Butler, is a journalist, who worked for The Echo in June 1986. (R.2736). Prior to his employment he had read the May 2, 1986 article accusing Derrick Moo Young of theft. When he joined The Echo, Butler assisted Carberry in writing the articles against the Defendant. He assisted on the June 27, article, and the July 18, article. The source of information for these articles was Moo Young. (R.2738-2744).

In September 1986, Butler was unhappy working for The Echo. He then contacted The Caribbean Times looking for employment. Thereafter a meeting was set up between Butler and the wife of The Times publisher. After that meeting, Butler was given an appointment with the publisher, the Defendant. He met the Defendant at The Times' offices. The Defendant wore a bushy mustache. (R.2745-2749). Butler was not immediately hired, rather he submitted articles under a pen name in order to prove himself. The Defendant did not pay for these articles and kept stringing Butler along, always telling him that he would hire him next week. (R.2749-2751).

In October 1986, the Defendant asked Butler to arrange a meeting between the Defendant and Moo Young. Moo Young did not know of Butler's relationship with the Defendant. The Defendant accused Moo Young and Carberry of extorting the Defendant's relatives in Trinidad. The Defendant told Butler that Moo Young and Carberry were telling people in Trinidad that Butler was behind the extortion plot. (R.2752-2755). The Defendant convinced Butler to help him set up a meeting between Moo Young, Carberry, Butler and the Defendant. At that meeting, the Defendant assured Butler that they would secure statements from Moo Young and Carberry, exonerating him. The Defendant told Butler to lure Moo Young to the meeting, by telling him he would meet with Eddie Dames, an exporter. At no time was Butler to

tell Moo Young that he was really to meet the Defendant, because if he did Moo Young would not show up. (R.2756-2758). It was Butler's idea to use Dames and the Defendant agreed that Dames was the type of person which would lure Moo Young to a meeting. (R.2759-2760).

The Defendant told Butler that the purpose of this meeting was to get Moo Young to confess to extorting the Defendant's family and thereby clear Butler's name. The Defendant said he was going to show Moo Young some documents and if he still would not confess, the Defendant said he would have to rough Moo Young up to get him to confess. (R.2760-2761). The Defendant thought Carberry was also involved in the extortion and wanted to include him in the meeting with Moo Young. (R.2762).

Butler learned that Dames would be arriving in Miami on October 15, 1986. The meeting was originally set for Butler's home, but due to circumstances it had to be reset. The Defendant then suggested that the meeting take place at the Dupont Plaza Hotel. The Defendant suggested the hotel because he was familiar with it since he held previous business meetings there. The plan was to tell Moo Young that Dames was a big time restauranteur who was also into the import/export business. Moo Young was contacted and was very interested. On October 14, Butler learned that Dames would be arriving the next day. Butler then called Moo Young and told him that Dames would be in the next day. Moo

Young was still interested in the meeting because he wanted to secure Dames' business. The Defendant was then informed of the plan's success. (R.2763-2767).

On the morning of October 15, Butler met the Defendant at the Dupont Plaza Hotel. The purpose of the meeting was to register in the hotel as Eddie Dames. He met the Defendant in the hotel lobby and Butler then went to rent a room in Dames' name. Upon mentioning Dames' name, the registration clerk gave him a paper to fill out and then assigned him room 1215. Butler stayed with the Defendant for about twenty minutes.

Butler then left to pick up Dames from the Airport. Dames had been advised that his name was used to get a room and that after Butler's business was finished, Dames could use the room. Butler's girlfriend, Porsche Canty, drove him to the airport. After picking up Dames, Butler took him shopping and stopped at Ace Music. While with Dames, Butler called the Defendant and Moo Young to confirm that the meeting was on for the next day. The meeting was confirmed for 11:00 A.M. the next morning. (R.2771-2779).

That night Butler and Dames went bar hopping. Dames met a lady friend and decided to spend the night at her house. Dames did not occupy 1215 that night. (R.2777-2779).

On the morning of October 16, Butler awoke around 7:00 A.M. Shortly thereafter he received a phone call from the Defendant to reconfirm that the meeting was still on. Butler told the Defendant he would meet him at the hotel at 9:30 A.M. The Defendant said he would be there earlier. (R.2780). Butler then left to pick up Dames and drop him off at the Dupont Plaza Hotel. Upon arrival at the hotel, at approximately 9:00 A.M., Butler observed the Defendant just standing on the sidewalk. Butler and Dames then went into the hotel. Dames, after learning the hotel room number, went to the front desk to check for messages. There was a message that Prince Ellis was looking for Dames. Dames and Butler then went up to 1215 and stayed there for about ten minutes. While there, Butler called Moo Young to let him know that Dames arrived and the meeting was on. Butler wrote Moo Young's telephone number on the complimentary copy of USA Today. Thereafter, Butler and Dames went back to the lobby, where Dames met up with Ellis. Both Dames and Ellis then left and Dames had instructions to meet Butler in the lobby after 1:00 P.M.

Butler then met the Defendant in the lobby. They then left the hotel and went into one of the hotel's gift shops. Once there, the Defendant bought a pen, some note pads and two packages of immersion heaters. The Defendant told him that the pen and paper was for the confession and the cords from the immersion heater would be used, if necessary, to tie up Moo Young. (R.2791-2795).

Butler then went back to 1215 and when he arrived the maid was just leaving. The entire suite was cleaned and everything was in order. Shortly thereafter the Defendant arrived at 1215. (R.2786-2788). He was carrying a soda can, brown overnight bag and a couple of newspapers. (R.2796-2797). The Defendant offered Butler some soda, and the Defendant went upstairs and returned with a plastic cup. He then removed the sanitary covering and poured Butler a drink. (R.2798).

At around 11:30 A.M., Moo Young called from the lobby to announce his arrival and told Butler that he brought his son Duane along. The Defendant did not object to this and he immediately went to rearrange the chairs. The chairs were removed from the table and placed side by side and the table was moved out of the way. A couple of minutes later Moo Young knocked on the door. The Defendant secreted himself in the downstairs bathroom. Butler opened the door and the Moo Youngs entered 1215. Immediately Derrick Moo Young asked Butler where Dames was. Butler instructed them to sit. The Defendant then jumped out of the bathroom. In his gloved right hand he was holding a silverish-white automatic pistol and in his left hand was a small pillow. The Defendant told Derrick Moo Young that he now was going to have to deal with the Defendant. Moo Young was startled. The Defendant then asked Moo Young for the money he extorted from his family in Trinidad. Moo Young denied owing the

Defendant anything. Duane Moo Young was not involved in this argument. (R.2801-2807).

The Moo Youngs were then instructed to sit side by side on the couch. The argument between the Defendant and Derrick Moo Young continued. When Derrick Moo Young started to rise up from the couch, the Defendant shot him in the leg and Derrick Moo Young sat back down. The Defendant then said that he had nine more shots in his pistol. (R.2807-2808). Duane Moo Young was then ordered into one of the rearranged chairs. The Defendant handed Butler an immersion cord and instructed Butler to tie Duane up. The Defendant continued to interrogate Derrick Moo Young concerning the money. After receiving no response, he ordered Butler to tie Derreck up in the chair next to his son. After Derrick moved to the chair, the Defendant handed Butler the other immersion cord and Butler tied Derrick up. (R.2809-2811). Before Butler could securely tie up Derrick Moo Young, he lunged at the Defendant. The Defendant backed away and fired three or four shots into Derrick's chest and Derrick then fell forward. Butler, who was standing close by, received blood splatter on his shirt. (R.2812-2813).

After Derrick Moo Young collapsed, the Defendant turned his attentions to Duane Moo Young. The Defendant now began asking Duane what his father did with the money. During this interrogation, Derrick crawled to the front door, pulled himself

up and threw himself out the door into the hallway. The Defendant then rushed to Derrick, placed the gun next to Derrick and fired. He then pulled Derrick back into the room and dropped him next to the downstairs bathroom. The Defendant then went back to his interrogation of Duane. (R.2814-2816).

While Defendant continued his interrogation of Duane, some one knocked on the door. A security guard asked if everything was alright, and the Defendant answered that everything was alright. (R.2817-2818).

As the Defendant was coming back from the front door, Duane broke loose and rushed the Defendant in an attempt to disarm him. Butler then held Duane back. The Defendant then took Duane upstairs and told Butler he was going to kill him because Duane was the only witness to his killing of Derrick. Once upstairs, the Defendant told Duane to kneel down, face the wall and continued to question Duane about the money. Duane finally told the Defendant that his sister knew where the money was and the Defendant, after thanking Duane for the information, shot him one time. The Defendant then came downstairs and told Butler that it was time to leave. The only thing the Defendant took was his brown overnight bag. (R.2819-2825).

They then left 1215 and took the elevator to the lobby. They went to the Defendant's car and he drove around the block

and they then parked and waited for Dames to return. (R.2828-2829). While they were waiting, an ambulance and the police arrived at the hotel. (R.2831). During the wait, the Defendant told Butler that the gun he used previously belonged to a police officer from Broward County and that he was going to throw it in the river. (R.2832).

When Dames arrived, Butler got out of the car and asked Dames if he heard what happened, at which time Dames told him he was with the police. Dames then gave Butler his car keys. Butler then got into Dames' car and drove off. The Defendant followed, but they were separated by traffic. (R.2841-2842).

Later in the day, Butler received a call from the Defendant. He told Butler to meet him at the Denny's by the airport. The Defendant was calling from there. The reason for the meeting was so that they could get their stories straight. (R.2842). At this point, Butler called Detective Buhrmaster. After telling the Detective what had transpired in 1215, the Detective along with another officer drove Butler to the Denny's. After arriving at Denny's, he sat with the Defendant. At a prearranged signal, the Detectives came in and arrested the Defendant. (R.2843-2846). At the time of his arrest, the Defendant was clean shaven. (R.2847). The trial court then adjourned the proceedings.

Trial could not continue that next day, because presiding Judge Gross was arrested for bribery. The Defendant, who was present, through counsel informed the administrative judge, that he did not want a mistrial and wanted to continue the proceedings in front of a substitute judge. (R.2854-2855). Later in the hearing, the Defendant himself confirmed this. (R.2858). The jury was then advised that the case was not going forward and they were admonished before they were excused. (R.2860-2862).

On October 13, 1987, the trial reconvened in front of substitute Judge Solomon (R.2864). The trial court then questioned the Defendant regarding whether he wanted a mistrial and whether his counsel had advised him of all the ramifications of requesting or waiving his right to a mistrial. After the Defendant answered in the affirmative, he specifically requested that the trial resume. (R.2805-2866). The trial was then adjourned for the day. (R.2873).

The trial reconvened on October 14, 1987, and the trial court advised that as soon as the transcript was read the trial would recommence. The jury was so advised. (R.2877-2896). The jurors were then voir dired concerning whether they heard anything about Judge Gross. (R.2896-2986).

On October 15, 1987, the trial judge advised that he read all the transcripts and he was ready to proceed. (R.3004-3014).

Prior to proceedings, the trial court once again personally asked the Defendant if he wanted a mistrial, to which the Defendant stated that he wanted to proceed with this trial. (R.3014). Trial then reconvened with the continued direct examination of Neville Butler. (R.3016).

Ivan Almeida is the latent fingerprint examiner for the City of Miami Police Department who did the comparisons of the latent prints taken from the scene with the Defendant's standard prints and the elimination standards. (R.3146, 3165-3166). According to Almeida once a print is made, it remains until it is either wiped clean or dries out. (R.3159). Fourteen latent fingerprint cards belonged to the Defendant. (R.3167). The Defendant's fingerprints came from: the Do Not Disturb sign attached to the exterior door knob of the entrance door (R.3168); two prints came from the exterior surface of the entrance door (R.3172-3173); two prints from the outer surface of the downstairs bathroom (R.3173-3174); the top surface of the desk (R.3175); the soda can the Defendant brought into the room (R.3175); the telephone receiver (R.3176); the top of the television (R.3177); two prints came from the glass table top (R.3178-3179); the sanitary wrapper for the plastic cup found in table ashtray (R.3179); one print was found on the Miami News and one print was found on the USA Today (R.3180-3181); and the last prints came from the torn plastic packages that held the immersion heaters. (R.3181). Butler's prints were found on the

plastic glass, the telephone, the desk, the front door, and the television. (R.3186-3189).

Charles Welti, the deputy chief medical examiner for Dade County, was assigned to the investigation. (R.3196-3199). On the day of the incident, Welti responded to the scene at about 5:40 P.M. The reason for responding to the scene was to interpret the results of an autopsy in light of the decedents' deaths, the circumstances of the deaths and the environment of the deaths. (R.3199-3200).

Welti examined Derrick Moo Young's shirt and found black powder on the right shoulder, indicative of a contact wound of one inch or less. (R.3202). Welti then performed an autopsy on Derrick Moo Young. (R.3204). Derrick had facial cuts which were consistent with a fall. (R.3203). He had an abrasion on his right breast which was made by a fragment of glass. (R.3208). These abrasions were made at the time of death. (R.3209). Derrick had six gunshot wounds; one was a penetrating wound with no exit and five were perforatory wounds with exits. (R.3210). One wound entered the back of the right shoulder, which was the contact wound evidenced by Derrick's shirt, and it exited through the neck. This wound was not immediately fatal. If left untreated, it would take anywhere from several minutes to an hour for the subject to die. Derrick would still be able to move around. There would not have been very much external bleeding.

(R.3213-3219). The pathway of this bullet was consistent with Derrick lying on the floor face down and the gun being fired into his back. (R.3221). There was wounds to the right thigh and left thigh, which were caused by one bullet. Neither wound was fatal, nor did they have any effect on movement. (R.3221-3227). Another wound entered the kneecap and exited the lower part of the left leg. This wound was not fatal and did not immobilize Derrick. He would be able to lunge forward with such a wound. When the wound was received the knee was flexed. (R.3228-3233). The next wound entered the right side of the chest and exited the lower back. Its path caused severe damage to major organs. This wound was fatal with death occurring within minutes. The wound was consistent with someone standing over the subject and firing a shot into the chest. (R.3233-3237). The last wound entered the right shoulder and fractured it. (R.3237-3239). Derrick Moo Young died from multiple gunshot wounds to the chest and neck. (R.3240).

Welti also performed the autopsy on Duane Moo Young. Welti viewed the actual scene, the second floor of 1215, in order to place Duane's murder in context. (R.3243). The autopsy revealed a few small abrasions on the left side of the forehead which were caused by his chin rubbing against the carpet. (R.3245). There was only one gunshot wound and it entered the left side of the face and exited the right side of the neck. There was gunpowder stippling surrounding the wound, which is evidence of being shot

at close range with up to six inches between the wound and the barrel. This wound was fatal within minutes and a fair amount of external bleeding occurred. The bullet severed the carotid artery and death could have been instantaneous or it could have enabled Duane to have limited mobility for a matter of minutes before death. The cause of death was a gunshot wound to the head. The wound along the hole in the wall next to where the body was found, was consistent with Duane kneeling or sitting with his head close to and facing the wall. (R.3247-3251). The physical evidence of the room also made the wound consistent with the scenario that Duane was hiding under the bed and was shot as he was running away. (R.3260).

Thomas Quirk, a firearms examiner with the Metro Dade Police Department, examined the spent projectiles and casings. It was his opinion that eight bullets were fired and they all came from a pre-1976 Smith and Wesson model 39, a nine millimeter semi-automatic pistol with a serial number under 270,000. (R.3303, 3326-3348). Said weapon holds a clip with eight bullets. (R.3350). Quirk examined a green pillow that was taken from the scene and it was his opinion that the holes in the pillow were caused by a gunshot at close range to the pillow. (R.3363-3365). He also examined Derrick Moo Young's shirt and slacks and it was his opinion, based on the holes and the residue, that most of the shots were fired from six feet away. (R.3365-3371).

John Buhrmaster, a homicide detective for the City of Miami Police Department, was the lead detective in this case. (R.3390, 3399). Buhrmaster responded to the scene at about 1:00 P.M. on the day in question. (R.3400). He returned to the homicide office at about 4:00 P.M. and at that time he spoke with Dames and Ellis. Dames told Buhrmaster that Butler was involved and he gave him Butler's telephone number. Thereafter Dames and Ellis were permitted to leave. (R.3404-3409). With the aid of Butler's telephone number, the Detective was able to ascertain Butler's address and he and his partner Detective Amoto proceeded thereto. En route, they were advised that Dames and Ellis were with Butler at a Sizzlers Restaurant. The Detectives arrived there at 10:20 P.M. and only Dames and Ellis were present. A few minutes later Butler arrived. They spoke with Butler and he told them that he was present during the murders and he was on his way to met the Defendant at the Denny's by the airport so that they could make up stories about their involvement in the murders. (R.3410-3414).

The Detectives then drove Butler to the Denny's. On the way, Buhrmaster instructed Butler that once he saw the Defendant, he was to take his glasses off and clean them. This would be the signal for the Detectives to arrest the Defendant. Upon arrival, Butler went into Denny's and the Detectives followed. Butler was seated in a booth with the Defendant and the Detectives sat in

the adjacent booth. After the signal, they approached the Defendant and identified themselves and asked the Defendant to step outside in order for the Detectives to question him about a homicide. They then left the restaurant, and while in the parking lot observed the Defendant's wife, Geddes and Clifton Sagree. Thereafter, the Detectives, Butler and the Defendant returned to the homicide office. (R.3416-3424).

Upon arrival at the homicide office, the Defendant was placed in an interview room. (R.3427). Only Detective Buhrmaster interviewed Defendant. After advising the Defendant of his rights, the Defendant waived them. (R.3435-3448). The Defendant denied being involved and stated that from 10:00 A.M. on he was in Broward County with Geddes. (R.3450-3464). At the conclusion of the interview the Defendant was arrested. (R.3465).

Tino Geddes was then recalled to the stand. (R.3601). On the day of the incident, Clifton Sagree was staying with Geddes. On October 16, Geddes and Sagree went to Sunrise to watch The Times being printed. They arrived at 10:30 A.M. and Geddes did not see the Defendant there. About one half hour later, they left and went to a lounge. Thereafter, they went to The Times offices and they stayed there all afternoon. (R.3603-3606).

The first time Geddes saw the Defendant that day was at 7:00 P.M. at Miami International Airport. (R.3606-3607). He was

there at the Defendant's request. (R.3609). Geddes, Sagree and the Defendant's wife all traveled to the airport together. (R.3613). When they arrived at the airport Geddes did not recognize the Defendant because the Defendant had shaved his mustache off and had cut his hair very short. (R.3614). The Defendant told Geddes that, if asked, Geddes should say that he saw the Defendant at the printers in Sunrise that morning and that they went to the lounge for drinks. (R.3616). Geddes told the Defendant that he was with Sagree all day and therefore Sagree had to be included in the alibi. (R.3619). Sagree refused to go along with the lie or to remain silent. (R.3620-3621).

Clifton Sagree testified that he was visiting Geddes during October 1986. On October 16, he was with Geddes all day. First they went to see The Times being printed, then they went to a lounge and then to The Times' offices. He did not see the Defendant anytime during the day. (R.3676-3680). While at the newpaper's offices, he heard Geddes receive a call from Kris and as a result Sagree, Geddes and the Defendant's wife went to Miami International Airport. (R.3681-3682). At the airport, they met the Defendant. (R.3684). Thereafter, they all went to Denny's and at that time the Defendant told Geddes and Sagree that they were going to be his alibi. When Butler arrived they left the Defendant alone. (R.3690-3691). Sagree refused to go along with the alibi. (R.3693-3698).

The State then rested its case. (R.3724). The Defense then moved for a judgment of acquittal on all counts. (R.3724). After argument thereon, the motion was denied. (R.3725-3720). The Defendant then rested without presenting a case. (R.3745). The Defendant's renewed motion for judgment of acquittal was then denied. (R.3742). Thereafter the trial court held the charge conference. (R.3749-3809). The Defendant then presented his closing argument (R.3811-3962); the State then presented its closing argument (R.3907-4060); and the Defendant then presented his rebuttal. (R.4061-4134). The jury was then charged and they then retired to consider their verdict. (R.4140-4179). Thereafter, the jury reached its verdict. The Defendant was found guilty of two counts of first degree murder; of two counts of armed kidnapping and the count of unlawful possession of a firearm while engaged in a criminal offense. He was found not guilty of the armed burglary and aggravated assault counts. (R.1714-1720, 4183-4187). The Defendant was then adjudicated guilty. (R.4218).

The penalty phase was originally scheduled for Friday, October 23, 1987. (R.4129). However, based on the Defendant's request, it was continued until November 6, 1987, in order to allow the Defendant to secure his witnesses. (R.4211-4216).

On November 6, 1987, the penalty phase commenced. (R.4220). The trial court gave the jury its opening instructions. (R.4227-

4234). The jury was advised that the final decision as to the sentence was the trial court's, but that it was their duty to advise the trial court as to the penalty. (R.4227). The jury was also advised as to the gravity of their duty and that a human life was at stake. (R.4230). Neither the State nor the Defendant presented an opening statement to the jury.

The State called the medical examiner, Doctor Charles Wetli, back to the stand. (R.4235). He described Duane Moo Young's murder as an execution since he was on his knees when a single shot to the head killed him. The path of the bullet when lined up with the hole in the wall was further evidence that Duane was on his knees facing the wall when he was shot. (R.4243-4246). The scene also established that Duane was conscious for a couple of minutes before death since the blood on the wall did not come from the gunshot wound itself, rather it was a dripping pattern which indicated movement after the fatal shot. (R.4246-4249). The only other way to account for the blood dripping on the wall was for someone else to have moved Duane. (R.4253). That is why the scene is more consistent with the execution scenario rather than the one which had Duane hiding under the bed and being shot when he dashed out. (R.4257).

The State then rested. (R.4257). The Defendant then began its case. (R.4258).

Mervyn Dymally, a member of Congress from California knew Defendant socially. He stated that in his opinion the Defendant was truthful, honest, and a good family man. As far as he knew, the Defendant did not have a propensity for violence. (R.4259-4262).

Levi England, a member of the Florida Bar, was the Defendant's civil lawyer in his dispute with Derrick Moo Young. He felt the Defendant was honest and that he had valid legal claims against the victim. (R.4287-4290).

Frank Naiser, a lawyer and former judge in Trinidad and Tobago, was close with the Defendant until 1960. During that time, he knew the Defendant to be a good and honorable person, not prone to violence. (R.4323-4331).

Doctor Krisendath Maharaj, no relation to the Defendant, knew the Defendant since childhood. His opinion of the Defendant was that the Defendant was intelligent, honest, hardworking, charitable and a considerate man. (R.4336-4339).

The Defendant then took the stand. (R.4356). He told the jury about his upbringing and how he was successful in business. (R.4357-4362). He then recounted how he met and went into business with Derrick Moo Young. (R.4363-4364). He then told the jury of the problems he had with Derrick Moo Young. (R.4365-

4366). The Defendant then denied that he became incensed at the articles published by The Echo against him and he also denied that he decided to resolve the dispute by himself. (R.4367). The Defendant then told the jury that he did not kill Derrick or Duane Moo Young. (R.4368). He then reiterated that he was not involved in the murders in any way. (R.4372-4375).

On cross examination, the State asked the Defendant where the murder weapon was. The Defendant replied that the last time he saw the gun in question was when he was involved in the traffic stop in Plantation. (R.4376-4377). The trial court was then concerned about going into guilt or innocence matters. However, the State contended it was permitted to do so because the Defendant, during the penalty phase, proclaimed his innocence to the jury and thereby put his integrity in issue. (R.4378-4381). The trial court, on the basis that the Defendant's declaration of innocence was a denial of the evidence against him, permitted the State to continue this line of cross examination. (R.4387). The Defendant then stated that the reason he had camouflage gear and weapons in the car at the time of the traffic stop was because he was sending them to his farm in Costa Rica. He denied having Chinese throwing stars. (R.4389-4390). He denied he ever told Buhrmaster that he did not own a handgun, and that he was never in Room 1215. (R.4394, 4414). He then denied sponsoring the May 2, 1986 article in The Echo. (R.4400). According to the Defendant, all the witnesses lied and he was the ony one telling the truth. (R.4416).

The State then recalled Detective Buhrmaster. He denied the Defendant's allegation that he told Defendant that they found the murder weapon. (R.4442-4446).

The State then presented its closing argument. (R.4452-4472). During the argument, the State advised the jury that although it did not have ultimate responsibility for the penalty, its decision carried weight and they should not take the matter lightly. (R.4455-4457). The defense then presented its closing argument. (R.4473-4485). The Defendant argued lingering doubt. (R.4476). He also told the jury that their decision was only a recommendation. (R.4482). The trial court then instructed the jury. (R.4486-4492). Thereafter, the jury, by a seven to five vote, returned a recommendation of death for the murder of Duane Moo Young and by a six to six vote, a recommendation of life imprisonment for the murder of Derrick Moo Young. (R.1752-1753, 4497-4498).

On November 19, 1987, the matter came before the trial court for sentencing. (R.4510). Prior to imposing sentence, the trial court permitted the Defendant to present two more witnesses on his behalf.

Gerald Stewart, a prosecuting attorney from Trinidad, testified that he knew the Defendant for about 25 years. His

opinion was that the Defendant was a good man, not prone to violence. The Defendant was a peaceful, loving family man. He was also a honorable man.

On November 20, 1987, the sentencing hearing resumed (R.4529) and the Defendant called Dr. Arthur Stillman. (R.4530). Based on his evaluation of the Defendant, it was Dr. Stillman's opinion that he is not a violent person and he is also a very credible person. (R.4532).

On December 1, 1987 the trial court sentenced the Defendant to death for the murder of Duane Moo Young. (R.4563-4565). The trial court found the following aggravating circumstances: The Defendant was previously convicted of another capital felony or of a felony involving the use of violence to the person; the capital felony was committed while the Defendant was engaged in the commission of a kidnapping; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; the capital felony was especially heinous, atrocious or cruel; and the capital felony was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. The trial court found the statutory mitigating circumstance that the Defendant had no significant history of prior criminal activity and found that the record refuted the nonstatutory mitigating circumstance that Defendant is a truthful, nonviolent man. The trial court found that the

aggravating circumstances outweighed the mitigating circumstances and therefore imposed the death penalty. (R.1761-1781). The Defendant was sentenced to life imprisonment for the first degree murder of Derrick Moo Young; life imprisonment for the armed kidnapping of Derrick Moo Young; life imprisonment for the armed kidnapping of Duane Moo Young; and 15 years imprisonment for unlawful possession of a firearm during the criminal offenses. (R.1755-1781, 4566).

This appeal then followed.

SUMMARY OF THE ARGUMENT

The Defendant contends that the trial court erred three different times when it permitted introduction of improper evidence of collateral crimes. All three instances were not properly objected to and therefore have not been preserved for appeal.

On the merits, the Defendant first complains that it was error to admit into evidence the newspaper articles published by The Echo against the Defendant on the ground that they contained collateral crimes evidence. These articles were relevant to show motive, since without the articles the jury would not have understood the nature of the feud and therefore would not have understood the motive for the killing. Therefore, the articles were admissible.

Next, he complains about testimony concerning the Defendant's attack of Carberry. This testimony was relevant to put the entire episode in context, since Carberry's demise was part of the Defendant's plan to get even with all those individuals who published the defamatory articles. As to the evidence of other weapons, their relevancy was to establish that the Defendant had the ability to carry out his threats and, in fact, used some of the weapons in the failed attempt to kill Derrick Moo Young and Carberry.

The Defendant next contends the trial court erred by failing to secure an on-the-record knowing and intelligent waiver of his right to mistrial. Since such a right does not go to the heart of the adjudicatory process, an on the record waiver is not required.

The Defendant contends the trial court erred in failing to consider as a mitigating circumstance that Butler remained uncharged at the time of the Defendant's trial. No error occurred here since Butler, who did not plan or participate in the murders, was not equally culpable with the Defendant.

His next contention, that the State impermissibly cross examined the Defendant during the penalty phase is also without merit. The cross-examination concerned the Defendant's assertion that he was a truthful and honest man. This was presented as a mitigating circumstance and therefore the State has a right, on cross examination, to refute it.

The Defendant also raises an unobjected to Caldwell claim. This claim is procedurally barred and the merits have already been rejected by the Court.

He alleges that the aggravating circumstances of heinous, atrocious or cruel is unsupported. This is meritless since the

victim waited in hopeless anticipation for his certain doom. This type of emotional stress is sufficient to support the circumstance even when a death is almost instantaneous, from a gun shot to the head.

The cold, calculated and premeditated aggravating circumstance is also supported by the record. The evidence established a prearranged plan to lure one of the victims and a clear intention to kill all those who came along with the intended victim. This fact along with the execution style of killing supports this circumstance.

The only reason Duane Moo Young was murdered was to eliminate him as a witness. Therefore, the aggravating circumstance of killing for the purpose of avoiding or preventing a lawful arrest was proved beyond a reasonable doubt.

The death sentence was properly imposed when the five aggravating circumstances were weighed against the statutory mitigating circumstance of no prior criminal history and the nonstatutory one of being a honest man.

POINTS INVOLVED ON APPEAL

I.

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE THE NEWSPAPER ARTICLES WHICH WERE THE BASIS OF THE FEUD BETWEEN THE DEFENDANT AND DERRICK MOO YOUNG.

II.

WHETHER THE TRIAL COURT ERRED IN PERMITTING TESTIMONY REGARDING THE DEFENDANT'S ATTEMPT ON ESLEE CARBERRY'S LIFE.

III.

WHETHER THE TRIAL COURT ERRED BY NOT SECURING A KNOWING AND INTELLIGENT RECORD WAIVER OF THE DEFENDANT'S RIGHT TO A MISTRIAL WHEN THE TRIAL JUDGE WAS DISABLED DUE TO HIS ARREST FOR BRIBERY.

IV.

WHETHER THE TRIAL COURT ERRED IN PERMITTING TESTIMONY REGARDING THE FACT THAT THE DEFENDANT POSSESSED WEAPONS.

V.

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER BUTLER'S FREEDOM FROM PROSECUTION AS A NONSTATUTORY MITIGATING CIRCUMSTANCE.

VI.

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CROSS EXAMINE THE DEFENDANT DURING THE PENALTY PHASE WHERE THE CROSS EXAMINATION WAS LIMITED TO REFUTING THE MITIGATING CIRCUMSTANCE THAT DEFENDANT WAS AN HONEST MAN.

VII.

WHETHER THE JURY'S ROLE IN THE SENTENCING PROCEEDING WAS DENIGRATED BY THE STATEMENTS OF THE PROSECUTOR.

VIII.

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS OR CRUEL.

IX.

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED.

X.

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO INTRODUCE THE NEWSPAPER ARTICLES WHICH WERE THE BASIS OF THE FEUD BETWEEN THE DEFENDANT AND DERRICK MOO YOUNG.

Prior to trial, the Defendant objected to the introduction of newspapers articles, State's Exhibits II-V, on the ground that they dealt with collateral crimes. The State responded that the articles were relevant to motive and to put the entire episode in context. The trial court overruled the objection. (R.2110-2116). The Defendant, when this evidence was admitted during the trial did not object. The failure to object when collateral crimes testimony is admitted is failure to preserve the issue for appellate review. Phillips v. State, 476 So.2d 197 (Fla. 1985).

Even assuming proper objection had been made the newspaper articles were relevant to prove motive. The Defendant was charged with the first degree murders of Derrick and Duane Moo Young. The State's theory of prosecution was that the Defendant and Derrick Moo Young were feuding and were using The Caribbean Echo and The Caribbean Times, weekly tabloids, to further their feud. In essence Moo Young got the better of the Defendant, as evidenced by exhibits II-V, and it was the State's theory that the Defendant sought his revenge for said derogatory articles by killing the victim. Without these articles, the murders would

not have been placed in their proper context for the jury. Craig v. State, 510 So.2d 857 (Fla. 1987) cert. denied, 108 S.Ct. 732 (1988). (Evidence that the defendant had been stealing from one victim was admissible in murder prosecution, though the defendant was not charged with theft, as relevant in establishing motives for crimes.) Heiney v. State, 447 So.2d 210 (Fla. 1984). (In prosecution for first degree murder, testimony of the defendant's former cohabitants that the defendant shot one of them in abdomen in the course of an argument and, upon learning of victims critical condition and that authorities wanted to talk to the defendant, asked another cohabitant to drive him out of town was relevant to show motive for subsequent crimes and to establish entire context of crimes charged and therefore was admissible).

II.

THE TRIAL COURT DID NOT ERR IN PERMITTING TESTIMONY REGARDING THE DEFENDANT'S ATTEMPT ON ESLEE CARBERRY'S LIFE.

The Defendant contends that the trial court erred when it permitted the State to elicit evidence from Geddes concerning an attempt the Defendant made on Carberry's life. He contends that facts were neither similar crimes evidence nor relevant to any aspect of the murders in question.

The Defendant never objected to the introduction of this evidence on the ground now asserted. Therefore, although the State has the burden to show relevancy, this burden only arises after the Defendant has made a proper objection to its introduction. Since this record fails to indicate any objection by the Defendant on the now asserted grounds, he is precluded from arguing this point on appeal. Herzog v. State, 439 So.2d 1372 (Fla. 1983).

Assuming arguendo that a proper objection was made, the evidence was relevant to establish the entire context out of which the criminal action occurred by establishing that the Defendant was consumed by the articles published by The Echo and that he was going to take care of the problem himself. This included the killing of not only Derrick Moo Young, but also Carberry since he was publishing the derogatory articles.

Jackson v. State, 522 So.2d 802 (Fla. 1988) cert. denied, 109 S.Ct. 183 (1988).

Even if this was improper collateral crimes evidence, reversible error still did not occur. The evidence herein amply established the Defendant's guilt and discredited his alibi. There is not a reasonable probablity that the jury was unduly or improperly influenced by a short reference to this incident and therefore the error, if any, is harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1980).

III.

THE TRIAL COURT DID NOT ERR BY NOT SECURING A KNOWING AND INTELLIGENT RECORD WAIVER OF DEFENDANT'S RIGHT TO A MISTRIAL WHEN THE TRIAL JUDGE WAS DISABLED DUE TO HIS ARREST FOR BRIBERY.

In the middle of trial, the trial judge, due to his arrest for bribery, became disabled and could not proceed with the trial. (R.2854-2855). Pursuant to Rule 3.231, Fla.R.Crim.P., a successor judge was appointed who, prior to recommencing trial, certified that he familiarized himself with the case. (R.3004-3014). Prior thereto, the Defendant personally and through counsel, advised the court that the Defendant was aware of his right to and the ramifications of a mistrial, and specifically waived those rights and in order to proceed with the trial.[8] (R.2858-2862, 2865-2866, 3014).

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[8] Rule 3.231, Fla.R.Crim.P., provides for a substitute when the original judge is disabled and can no longer continue. The rule provides only that the successor judge certify that he familiarized himself with the case before he can proceed. Where such certification takes place, the rule does not provide the parties with the right to a mistrial on this ground. This rule is similar to 18 U.S.C. Fed.R.Crim.P., Rule 25. In interpreting the rule, disability has been held not to include a judge who could not continue due to the fact that he was indicted during the trial. Therefore, it was held that Rule 25 was inapplicable, and therefore the only remedy would be to offer the defendant a mistrial. United States v. Jaramilla, 745 F.2d 1245 (9 Cir. 1984) cert. denied, 105 S.Ct. 1292 (1985). Although this issue was not presented herein, clarification of the scope of the term "disability" would enhance the rule.

The Defendant contends that the waiver of the right to a mistrial requires an on-the-record knowing and intelligant record waiver by the Defendant. He contends that the failure to obtain one in the present case, mandates reversal. This position is meritless since an on-the-record, knowing and intelligent, waiver is required only for those rights that go to the very heart of the adjudicatory process, such as the right to a lawyer or the right to a jury trial. State v. Singletary, 549 So.2d 996 (Fla. 1989). (On-the-record waiver not required in waivering the right to have the trial judge present during voir dire). State v. Griffith, 561 So.2d 528 (Fla. 1990) (On-the-record waiver not required in waiving the right to a twelve person jury in a capital case).

Since a right to a mistrial does not go to the very heart of the adjudicatory process, the waiver of the same need not be on the record. The fact that it was done with counsel raises the presumption that the Defendant, as he stated, was advised by his counsel of his right to a mistrial, the consequences of relinquishing that right, and any advantages expected therefrom. Dumas v. State, 439 So.2d 246 (Fla. 3 DCA 1983), rev. denied, 462 So.2d 1105 (Fla. 1984) (Record evidence of the defendant's signature on document waiving jury trial was sufficient to support a knowing and intelligent waiver of jury trial). Therefore, the State submits that the record waiver herein, which was made by both counsel and defendant, was sufficient to establish that said waiver was knowingly intelligently made.

IV.

THE TRIAL COURT DID NOT ERR IN PERMITTING TESTIMONY REGARDING THE FACT THAT THE DEFENDANT POSSESSED WEAPONS.

The Defendant contends that the trial court erred when it permitted testimony that the Defendant had in his possession certain weaponry during the Plantation traffic stop. Once again, the record fails to reveal an objection thereto and therefore this issue is not preserved for appeal. Castor v. State, 365 So.2d 701 (Fla. 1978).

Assuming that a proper objection was made, the evidence was relevant establish that the Defendant had the ability to carry out his threat to settle the matters his own way and that he had attempted to use some of these weapons in his first attempt against Derrick Moo Young and against Carberry. Irizarry v. State, 496 So.2d 822 (Fla. 1986). (Two machetes, which were connected to the defendant but neither of which was murder weapon, were admissible in the defendant's prosecution for first degree murder where testimony established that the defendant used machetes for tools and weapons).

Even if this evidence was properly objected to and not relevant, error still did not occur since such error was harmless beyond a reasonable doubt. Jackson v. State, supra at 806. (Improper admission into evidence of references to murder

defendant's possession of weapons and bulletproof vests was harmless error in light of ample evidence establishing guilt and discrediting his alibi defense). Here the evidence of guilt was more than ample considering the testimony of Geddes, Butler and all of the physical evidence, particularly the Defendant's fingerprints and ballistic evidence, found in room 1215. Additionally, Defendant's alibi was totally discredited by those people he enlisted to provide him with one. Clearly then the error, if any, was harmless.

V.

THE TRIAL COURT DID NOT ERR WHEN IT FAILED TO CONSIDER BUTLER'S FREEDOM FROM PROSECUTION AS A NONSTATUTORY MITIGATING CIRCUMSTANCE.

The Defendant first contends that the trial court erred in not considering Butler's freedom from prosecution as a nonstatutory mitigating circumstance. This position is meritless since disparate treatment of accomplices is a ground for mitigation only when the Defendant and another party are of equal culpability. Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984) (Evidence given by immunized witness showed her to be an aider and abetter had she been charged; it also showed that she did not yield a murder weapon and was not present at the scene of the murder, thereby it was not error to fail to consider disparate treatment of accomplice as a mitigating circumstance). In the instant case, like Palmes, the evidence established that Butler was an aider and abetter in the kidnapping and it also showed that he had no knowledge that the Defendant planned to use a gun or that he planned to kill the victims or that he used a gun. Therefore, the failure to consider the disparate treatment of Butler as a mitigating circumstance was not error. Mendyk v. State, 545 So.2d 846 (Fla. 1989), cert. denied, 110 S.Ct. 510 (1989) (Trial court properly refused to instruct jury to consider the mitigating factor of the co-defendant's reduced sentence where the co-defendant was not equally culpable and did not actually participate in murder itself).

The cases relied upon by the Defendant are inapposite. In Craig v. State, 510 So.2d 857 (Fla. 1987) cert. denied, 108 S.Ct 732 (1988), this Court upheld the trial court's override of the jury's life recommendation, rejecting the disparate treatment argument after finding the defendant was the dominant force behind the homicide. In Spivey v. State, 529 So.2d 1088 (Fla. 1988), this Court overturned a jury override where it found the jury could have found that the defendant was not the principal actor and the principal actors received substantially less severe sentences. In Williamson v. State, 511 So.2d 289 (Fla. 1987), cert. denied, 108 S.Ct. 1098 (1988), this Court upheld a death recommendation and sentence where, although the co-defendant pled to a life sentence, the evidence established that defendant was the dominate force behind the homicide. In Brookings v. State, 495 So.2d 135 (Fla. 1986), this Court overturned a jury override where the two other equally culpable principles received less severe sentences. Finally in Herring v. State, 446 So.2d 1049 (Fla. 1984), cert. denied, 105 S.Ct. 396 (1984), this Court simply reiterated the law that evidence concerning the co-defendant's sentences must be admitted in the penalty phase so the jury will have all facts surrounding the offense and the participants before recommending a sentence.

None of the foregoing cases relied upon by the Defendant finds it error to fail to consider as a mitigating circumstance

the fact that a less culpable participant received a less severe sentence. The reason is clear, the more the dominating force a defendant is the more severe his sentence should be. Therefore, this point requires rejection.

VI.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO CROSS EXAMINE THE DEFENDANT DURING THE PENALTY PHASE WHERE THE CROSS EXAMINATION WAS LIMITED TO REFUTING THE MITIGATING CIRCUMSTANCE THAT DEFENDANT WAS AN HONEST MAN.

In State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), cert. denied, 94 S.Ct. 1950 (1974), this Court established the parameters for cross examining a Defendant at the penalty phase.

> Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The State can cross-examine the defendant on those matters which the defendant has raised to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States Fla.Const., art.I, §9, F.S.A., and U.S.Const., Amend. V. In no event is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

In the instant case, prior to Defendant's testimony, he presented witnesses in mitigation, which witnesses testified that the Defendant was a truthful and honest man. Mervyn Dymally stated that the Defendant was truthful and honest. (R.4259-4262). Levi England stated that the Defendant was an honest man. (R.4287-4290). Doctor Krisendath Maharaj also stated that the Defendant was an honest man. (R.4336-4339).

The Defendant then took the stand and then proclaimed his innocence. (R.4368, 4372, 4373, 4374, 4375). The State challenged the Defendant's nonstatutory mitigation evidence that he was an honest and truthful man, by cross examining him concerning the evidence adduced against him at the guilt/innocence phase of the trial. The State concerned itself with the whereabouts of the murder weapon since the Defendant stated that he had not seen it since the traffic stop in Plantation, where the evidence established that he had possession of it and used it to commit the murders. (R.4376-4377). Defendant was questioned as to whether he told Detective Buhrmaster that he never owned a handgun, (R.3437) and he denied that he ever said it. (R.4394). He denied he sponsored the May 2, 1986 article in The Echo. (R.4400). Finally, the Defendant stated that he was the only one telling the truth and that all the witnesses against him were lying. (R.4416).

The State's line of cross examination simply challenged the Defendant's evidence that he was an honest and truthful man. Since said evidence was attempted to be used by Defendant in mitigation, the State, under Dixon, had every right to question the Defendant on the guilt/innocence issues in order to rebut the Defendant's mitigating evidence. Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 101 S.Ct. 784 (1981). (In sentencing phase of first degree murder prosecution, the State was properly

allowed to cross-examine the defendant regarding his thoughts and actions during the murder, where the defendant had testified as to his mental state before the murder in order to establish mitigating circumstance that defendant was suffering from emotional turmoil and problems).

The Defendant next complains that during the State's closing argument in the penalty phase, the State impermissibly argued the nonstatutory aggravating circumstance of lack of remorse. There was no objection to this statement and therefore it has not been preserved for review by this Court. Darden v. State, 324 So.2d 287, 291 (Fla. 1976).

Assuming arguendo there was an objection, the Defendant would still not be entitled to relief since the complained of comment, in order for it to be viewed as arguing lack of remorse ,was taken completely out of context. Just prior to and right after the complained of comment, the State was describing how Derrick Moo Young, after being shot numerous times dragged himself to the front door and opened it.

> He opened the door. He lunged out in the hallway and it was then that the defendant walked over to him with his gun and administered what Doctor Wetli referred to as the coup de grace, the final blow, when the defendant put that gun to the back neck area of Derrick Moo Young and, as he lay helpless, possibly dying, he made sure that Derrick Moo Young was going to die. A helpless man lying on the floor.

> This defendant, no compassion, no compassion whatsoever. Yet he's going to ask for your compassion. A man who to this day walks in front of you and insults you and tells you, as the members of this jury, that you have convicted an innocent man.
>
> The audacity of that individual. The utter audacity of that individual. He's going to ask you for your compassion.
>
> He showed no compassion for Derrick Moo Young and Duane Moo Young and he deserves none from you.
>
> He put that gun to the back of Derrick Moo Young and he killed him and then what did he do? He turned his attention to the surviving witness. There were two witnesses, Mr. Butler and Duane Moo Young.

(T.4469-4470).

When viewed in its proper context, the State was referring to the Defendant's lack of compassion to the victim in the manner in which he killed him. It cannot even be inferred that the argument was that the Defendant has shown a present lack of remorse for the killings. Therefore, on the merits this claim lacks substance.

Even if the comment can be viewed as arguing lack of remorse, error still did not occur. This is so because the argument was not for the nonstatutory aggravating circumstance of lack of remorse, but rather was an argument used to rebut the

Defendant's mitigating evidence that, although he did not kill the victims, the Defendant was sorry they were dead. (R.4372-4376). Walton v. State, 547 So.2d 622 (Fla. 1989). (After thedefendant adduced evidence during sentencing phrase of capital case about the defendant's remorse for murders, the State could present evidence of lack of remorse to rebut the defendant's evidence).

Finally, even if this Court considers the comments as an inappropriate argument to consider the nonstatutory aggravating circumstance of lack of remorse, the error was harmless. It was harmless because the trial court, in imposing the sentence, never considered lack of remorse as an aggravating factor.

The Defendant next contends that the State improperly argued the pain and suffering of the victim. As with the other comment, it was unobjected to. Further, the case relied upon by theDefendant, Garron v. State, 528 So.2d 353 (Fla. 1988) was reversed not for arguing pain and suffering, but for violating the golden rule by arguing that the jury should imagine how much pain the victim suffered. This is clearly not the case herein. Likewise, his complaint about the State calling the Defendant a used car salesman was unobjected to and futhermore was supported by the evidence that the Defendant had, in fact, sold used cars at one point in his life. (R.4394).

VII.

THE JURY'S RULE IN THE SENTENCING PROCEEDING WAS NOT DENIGRATED BY THE STATEMENTS OF THE PROSECUTOR.

The Defendant contends that prosecutor's statements during the penalty phase concerning the fact that the jury's role was merely advisory and that the decision was not their responsibility violated the dictates of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1984). This contention requires rejection on two grounds.

Initially, no objection was made to the complained of comments. Since there was no objection the issue was not perserved for appellate review. Reed v. State, 560 So.2d 203 (Fla. 1990); Hill v. State, 549 So.2d 179 (Fla. 1989).

Next, since the trial court's instructions, (R.1935-1937, 4486), and the State's comments (R.2037, 4455-4457) correctly stated the law, that the jury's role was merely advisory, Defendant is not entitled to any relief. Grossman v. State, 525 So.2d 833 (Fla. 1988); cert. denied, 109 S.Ct. 1354 (1989), Combs v. State, 525 So.2d 853 (Fla. 1988); Reed v. State, supra.

VIII.

THE TRIAL COURT DID NOT ERR IN FINDING THAT AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS OR CRUEL.

Defendant contends that the aggravating circumstance of heinous, atrocious or cruel is unconstitutionally vague, under Maynard v. Cartwright, 486 U.S. 358, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). This Court has already rejected this argument in Smalley v. State, 546 So.2d 720 (Fla. 1989).

The Defendant next contends that the facts of the murder does not support the finding that it was heinous, atrocious or cruel. The State submits the facts surrounding the murder established the necessary fear and emotional torture to sustain the finding.

The validity of this aggravating circumstance rests not on the actual method of killing, but rather on the additional facts setting the crime apart from the norm of capital felonies. State v. Dixon, supra. The fear and emotional strain preceding a victim's almost instantaneous death can be considered as contributing to the heinous nature of a capital felony. Adams v. State, 412 So.2d 850 (Fla. 1982) cert. denied, 103 S.Ct. 182 (1982).

The trial court imposed this circumstance based on the following facts:

> . . .The evidence was overwhelming that Duane Moo Young, a twenty-three year-old young man, witnessed the abduction, imprisonment, and murder of his own father, Derrick Moo Young. The evidence further proved that Duane Moo Young struggled, albeit briefly, for his own existence, shortly after the murder of his father. The testimony of Neville Butler, as well as the physical evidence of the victim's shirt button being found on the ground, indicated that the victim, Duane Moo Young, charged at the defendant, KRISHNA MAHARAJ, engaged in a physical struggle over the gun, but was unable to wrestle the gun away from him.
>
> The Court has considered Duane Moo Young's state of mind in viewing this aggravating circumstance.
>
> This Court finds that having your father murdered in front of you, struggling unsuccessfully for your own life, and then being led upstairs to what you surely know to be your own death, is a murder especially heinous, atrocious, or cruel, within the meaning of Florida Statute 921.141(5)(h). The brutal terrorization of this young man prior to his own murder cannot be over emphasized. ...

(T.1767-1768).

The foregoing facts sufficiently established the necessary emotional fear and strain prior to death to support this finding in an almost instantaneous death situation. These facts created the same type of severe strain this Court approved of in Knight v. State, 338 So.2d 201, 202 (Fla. 1976):

> It might be considered a close question as to whether these murders were especially heinous, atrocious or cruel, because of the fact that when the defendant actually killed the victims, death was almost instantaneous. However, the Court is of the opinion that the hours preceding the actual killings constituted exceedingly cruel treatment of the victims. Mr. Gans was continually under severe strain, not only thinking of his own life but that of his wife. Mrs. Gans was also under continuous strain. Mr. and Mrs. Gans proceeded to follow the directions of the defendant hoping to escape death, although probably fearing for their lives at every instant. When it became apparent to them that the defendant was forcing them to a deserted area, it probably also became apparent to them they were going to be murdered. This feeling no doubt continued up to the actual moment of the deaths. Mr. Gans' actions were particularly noteworthy. After the initial danger, he could have escaped when directed by defendant to the bank. However, Mr. Gans, with commendable courage, attempting to save the life of his wife, again voluntarily submitted himself to the control of the defendant, only to lose his life together with his wife. All of these circumstances constitute particularly cruel, heinous and atrocious actions by the defendant when he finally shot the victims.

See also, Melendez v. State, 498 So.2d 1258 (Fla. 1986) (Aggravating factor of murder being heinous, atrocious and cruel, for purpose of imposition of the death penalty, was supported by the record even if death was instantaneous by single gunshot wound to the head, where the defendant ignored the victim's pleas for mercy and the victim had knowledge of his impending doom). Copeland v. State, 457 So.2d 1012 (Fla. 1984), cert. denied, 105

S.Ct. 2051 (1985) (Murder was especially heinous, atrocious, or cruel for purposes of determining death sentence, even though the aggravating factor did not rest on actual method of killing since victim was shot in the head with a pistol, but where the victim endured hours long ordeal of rape, robbery and kidnapping prior to her death).

IX.

THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED.

This Court in Rogers v. State, 511 So.2d 526 (Fla. 1987) cert. denied, 108 S.Ct. 733 (1988) set the standard for the circumstance. In order for it to apply the evidence must show that the defendant had a careful plan or prearranged design to kill anyone during the commission of the underlying acts or the murder itself. The instant case clearly falls under this standard.

The Defendant worked out all at the details to lure, under false pretenses, Derrick Moo Young to the Dupont Plaza Hotel. During the beginning stages he advised Geddes that he would kill anyone who showed up with Derrick Moo Young in order to eliminate all witnesses to the murder of Derrick. (R.2233). During the actual incident, when Derrick Moo Young called from the lobby to announce his arrival, and that he brought his son Duane Moo Young, the Defendant rearranged the seating arrangement in order for it to be easier to tie up both victims. (R.2801). After he killed, Derrick, the Defendant then told Butler they would have to kill Duane to eliminate the only witness. (R. 2821-2822). The Defendant then led Duane from the downstairs to the upstairs, had him kneel down and after a few more seconds of deliberation shot Duane Moo Young in the head. (R.2822-28824).

The foregoing facts clearly establish that the Defendant had a pre-arranged plan to kill any witness' to Derrick's murder. Therefore, this circumstance is supported by the evidence. See Remeta v. State, 522 So.2d 825 (Fla. 1988), cert. denied, 109 S.Ct. 182 (1988) (Evidence that the defendant planned the robbery in advance and planned to leave no witnesses supported finding that murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification). Jackson v. State, 522 So.2d 802 (Fla. 1988) cert. denied, 109 S.Ct. 103 (1988) (Sufficient evidence supported finding that killing was committed in a cold, calculated and premeditated manner by the defendant who had ample time during series of events leading up to murder to reflect on his actions and their consequences). Koon v. State, 513 So.2d 1253 (Fla. 1987), cert. denied, 108 S.Ct. 1124 (1988). (Finding that killing was cold, calculated and premeditated without any pretense of moral or legal justification was supported by the evidence which included the defendant's luring of victim from home, obtaining a shotgun before meeting with the victim, and executing the victim with a single shot to the head.)

X.

THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The trial court found that the sole purpose of killing Duane Moo Young was to eliminate him as a witness to the murder of his father, Derrick. The evidence clearly supported this finding inasmuch as the Defendant, both at the prior failed attempt and the successful attempt of murdering Derrick, advised that he would kill any others who accompanied Derrick. (R.1766, 2821-2822). Since Duane accompanied his father, the Defendant's murder of Duane was to eliminate all witnesses to the murder of Derrick and therefore, this circumstance was proved beyond a reasonable doubt. Hooper v. State, 476 So.2d 1253 (Fla. 1985), cert. denied, 106 S.Ct. 1051 (1986) (Evidence in prosecution for murder of nine-year-old girl, including fact that the defendant prior to killing girl, had killed her mother in her presence, was sufficient to prove beyond a reasonable doubt that murder was committed to avoid a lawful arrest). Clark v. State, 443 So.2d 977 (Fla. 1983) cert. denied, 104 S.Ct. 2400 (1984). (Murder was committed for purpose of avoiding arrest when evidence established that the defendant made a statement that the victim could identify him, the victim knew the defendant, the victim knew the defendant just committed a violent felony of her husband, and the victim was helpless due to her physical disability).

The Defendant contends however, that this circumstance does not apply because witness elimination was not proved beyond a reasonable doubt to be the dominant motive for Duane's murder. He bases this contention on the ground that the medical examiner gave two different scenarios as to how the murder occurred: (1) an execution style killing by one shot to the head; or (2) the victim was shot in the back as he attempted to escape. This contention totally misses the mark. It is not how Duane was killed, but why he was killed which establishes this factor. Since the only reasonable conclusion that can be drawn is that Duane was killed to prevent him from identifying the Defendant, this factor was established beyond a reasonable doubt. Jackson v. State, 502 So.2d 409 (Fla. 1986), cert. denied, 107 S.Ct. 3198 (1987). (Trial courts assumption that the murder was committed solely to eliminate a witness was only one of several possible explanations where evidence revealed that neither the defendant nor his brother knew the victim and there was nothing in the facts which suggested the murder was committed solely to eliminate a witness).

The Defendant next contends that even if this circumstance is sufficient, error still occurred because the same facts were used to find the murder was cold calculated, and premeditated. Therefore he contends that there was an improper doubling. This Court has held that the same facts can support both factors and

therefore there is no improper doubling. Cooper v. State, 492 So.2d 1059 (Fla. 1986); cert. denied, 101 S.Ct. 1330 (1987). Burr v. State, 466 So.2d 1051 (Fla. 1985) cert. denied, 106 S.Ct. 201 (1985).

The Defendant has not challenged the remaining two aggravating circumstances since both are supported by the record. The murder was committed during a kidnapping and therefore the aggravating circumstance that the murder was committed while the Defendant was engaged in the commission of a kidnapping was established. The prior violent felony was established by the contemporaneous conviction for first degree murder of Derrick Moo Young. LeCroy v. State, 533 So.2d 750 (Fla. 1988).

The trial court properly found that all five of the aggravating circumstances were established beyond a reasonable doubt. The Court then properly weighed them against the statutory mitigating circumstance of no significant prior criminal history and the nonstatutory mitigating circumstance that the Defendant was a peaceful and truthful man and then properly imposed the death penalty after finding that the aggravating circumstances far outweighed the mitigating circumstances. Therefore, the death penalty requires affirmance.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully prays that the judgments and sentences, including the death sentence, of the lower court should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **KENNETH E. COHEN**, Attorney for Appellant, Miami Center - Suite 1330, 201 South Biscayne Boulevard, Miami, Florida 33131 on this 30 day of August, 1990.

MICHAEL J. NEIMAND
Assistant Attorney General

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