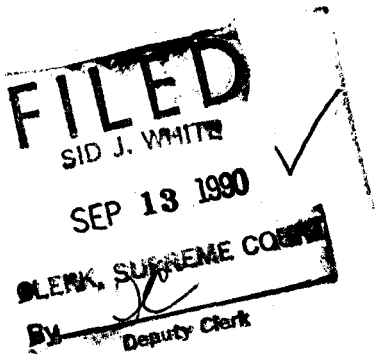
IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,867



BORIS McKINNEY,

Appellant

vs.

THE STATE OF FLORIDA,

Appellee.

****

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

****

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GISELLE D. LYLEN
Florida Bar No. 0508012
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohdes Building
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONT'D.

TABLE OF CITATIONS CONT'D.

TABLE OF CITATIONS CONT'D.

TABLE OF CITATIONS CONT'D.

OTHER AUTHORTIES

INTRODUCTION

This is an appeal by a defendant of judgments and sentences imposing the death penalty and three consecutive life sentences.

Throughout this brief, the defendant/appellant, **BORIS McKINNEY**, will be referred to in his posture before the lower court. The prosecution below and appellee herein, **THE STATE OF FLORIDA**, will be termed "the State." Reference to the Record on Appeal, Transcript of Proceedings, and Supplemental Transcript of Proceedings will be made by the use of the symbols "R", "T", and "S".

The State disputes the defendant's version of the Statement of the Case and Statement of the Facts and therefore includes its own. However, it reserves the right to argue additional facts in the argument portion of its brief where necessary.

STATEMENT OF THE CASE

On March 3, 1987, the defendant was indicted for the first degree murder of Franz Patella on February 12, 1987. (R.1-5). The indictment also charged the unlawful display of a firearm during the commission of a felony, armed robbery, armed kidnapping, armed burglary of a conveyance, and grand theft of an automobile. (R.1-5).

The defendant's trial by jury was conducted from May 31, 1989 through June 7, 1989 before the Honorable Allen Kornblum. (R.6-25; T.747-1968). The jury was charged, per the defendant's request, with all the primary offenses charged and the lesser included offense of second degree felony murder. (R.306-343, 1889-1918; T.1704-1705). The jury, on June 7, 1989, returned verdicts of guilt as to first degree murder with a weapon, use of a firearm during the commission of a felony, armed robbery, armed kidnapping, armed burglary of a conveyance, and grand theft of an automobile. (R.22, 347-352; T.1964-1966).

The defendant's sentencing hearing was conducted July 12, 1989. (R.23; S.1-318). The jury recommended the death penalty by a vote of eight (8) to four (4). (R.368-369; S.315). Thereafter, the trial court entered its written order in which it concurred in the jury's advisory sentence. (R.375-380; S.1977-1985).

The court found that three aggravating circumstances were proven: the murder was unnecessarily heinous, atrocious, and cruel, the murder was cold, calculated and premeditated, and the murder was committed while the defendant was engaged in the commission of a robbery, kidnapping, and burglary. (R.375-380; S.1978-1980). The trial court further found that one statutory mitigating circumstance had been proven, that the defendant had no significant history of prior criminal activity. (R.375-380; S.1980-1982). Although the court considered nonstatutory mitigating circumstances it did not give them any weight. (R.377; T.1980). The court imposed the death penalty for the murder of Franz Patella, and consecutive life sentences for the armed robbery, kidnapping, and burglary counts; no sentences were imposed for the remaining counts. (R.375-380; T.1984-1985).

STATEMENT OF THE FACTS

Between 8:30 and 9:00 a.m. on February 12, 1987, Jose Santos was working at an autoshop, located at N. W. 7th Avenue and 43rd Street, when he heard the warehouse dogs bark. (T.1157-1158). Mr. Santos looked out into the alley bordering the shop and saw a white four door sedan, which he believed was a Chevy Celebrity. (T.1158, 1162). When he looked again, Mr. Santos observed a black male walk around to the driver's side of the car, open the door, lean over, and pull a body from the car. (T.1158). The man dumped the body on the side of the alley[1] and got into the driver's seat kicking the victim's legs out of his way. (T.1158). The car stopped at the end of the alley as though the driver was checking for witnesses before driving away. (T.1159).

Mr. Santos ran to the nearest phone and called 911; fire rescue arrived about three to four minutes later and the police arrived within two or three minutes of rescue. (T.1159-1161). He provided the police with information about the car and the black male. (T.1162, 1171). Mr. Santos described the man he had seen as being between 5'9" and 5'10" tall, 160-165 pounds wearing blue jeans, a red pullover sweat shirt type top and possibly white sneakers. (T.1161, 1175). He did not see the man's face and thus

---

[1] Papers and other items also fell out of the car. (T.1158).

could not later identify the defendant as the man he had seen. (T.1165, 1174). No one else was in the vicinity. (T.1161).

Lt. James Pough and his fire rescue crew were dispatched to the scene as a result of the 911 call, at 9:22 a.m., arriving at 9:25 a.m.. (T.1180). Upon their arrival, the victim, was lying in the alley and was very grey in color and pale which indicated severe blood loss. (T.1180-1181; S.23). Several bullet wounds were apparent as was a head injury. (T.1181). They realized the man was hemorrhaging and took remedial steps to attempt to stabilize his condition. (T.1182). The victim was conscious and, when he was asked if he had seen the assailant, told the the crew that a black man had shot him. (T.1182-1183). The victim was semiconscious during the ride to Jackson Memorial Hospital (T.1183-1184).

Officer Diane Barnes of the City of Miami Police Department was the first officer to arrive at 9:35 a.m. (T.1189). She approached the fire rescue team which advised her that the male victim had been shot approximately four times. (T.1189). Officer Barnes approached the victim and asked his name; the man told her it was Franz Patella. (T.1190). She was able to verify it with a car rental agreement that rescue gave her.[2] (T.1190).

---

[2] The rental agreement apparently was one of the papers which had fallen out of the car.

Officer Barnes questioned Mr. Patella because she believed that if she did not they would not have another opportunity. (T.1190-1191). Mr. Patella told her that an unknown black male shot him after he stopped at N. W. 3rd Avenue and 36th Street to ask for directions to I-95. (T.1191-1192). Mr. Patella was also able to give her a description of the car and a partial tag number which was substantiated by the rental agreement. (R.152; T.1193-1194).

Technician Sylvia Romans was dispatched to the alley at 10:05 a.m. where she took ground level and aerial photographs of the scene and prepared a crime scene sketch. (T.1207-1260). Although the entire alley was searched, no gun was found. (T.1227). Technician Romans impounded the victim's upper clothing which fire rescue had cut off the victim and left on the scene. (T.1210, 1219). Bullet holes were present on the right side of the shirt and jacket; black gunpowder residue was also evident. (T.1225-1226; 1244). She later brought this clothing, and other items of clothing belonging to the victim which were obtained from the hospital, to Dr. Barnhart, the Medical Examiner, for his inspection. (T.1227-1228, 1230). No bullet holes were found in the remaining clothing. (T.1231). At the Medical Examiner's office Technician Romans took photographs of the deceased, as well as, fingerprint and blood standards. (T.1228-1231).

Detective Harold Bishop, lead homicide detective on the case, arrived at the scene with Sgt. Vincent at 11:50 a.m. (T.1263). While the scene was being processed, he spoke with other officers and canvassed the area for the gun and other evidence. (T.1263). Detective Bishop returned to the station in order to contact the victim's family in the Bahamas. (T.1266-1267).

During the subsequent investigation, it was learned that Mr. Patella was the owner of Bayview Village, a condominium resort, in Nassau and had been in Miami on business. (T.1481, 1487). Mr. Patella periodically made trips to Miami to obtain supplies and other items required at the resort; his staff would provide him with both checks and cash to pay for these items.[3] (T.1487-1488, 1522). On this occasion, he took approximately $11,000 in cash with him. (T.1487-1488, 1490, 1504). Only $1,500 of that sum was accounted for following Mr. Patella's murder. (T.1535). Charles Labosky, an employee also in Miami on business, last saw his boss on February 12, 1987 at approximately 8:00 a.m. when Mr. Patella dropped him off at a boatyard to oversee repairs to the resort's yacht; Mr. Patella told him he would return to the boatyard around noon. (T.1515).

---

[3] One of the places Mr. Patella was scheduled to, and did visit on the morning of his murder, was ACR, an air conditioning company located at 301 N. W. 36th Street. (T.1522, 1533).

At 10:15 on the evening of the murder, robbery Detective Hollis Andrews was travelling south-bound on I-95 at N. W. 95th Street in an unmarked police vehicle when he noticed that a car ahead of him bore license tag number YAK 73D. (T.607, 1277, 1290). The car had earlier been reported as stolen and involved in a murder. (T.607, 1277, 1290). Detective Andrews verified the tag with the dispatcher, further advising that he was in pursuit of the vehicle. He followed the car to a Circle K store at N. W. 7th Avenue and 69th Street where it pulled into the parking lot. (T.609, 1277-1279). The occupants of the car got out; the defendant exited from the passenger seat while Wilfred Gaitor,[4] the other occupant, exited from the driver's seat. (T.614, 1280 1281, 1291).

Officer Reginald Kinchen was on routine patrol when he heard Detective Andrews advise he was in pursuit of a stolen vehicle; he arrived at the Circle K as backup within seconds of Andrews' arrival. (T.611, 1277, 1279, 1311-1312). Officer Kinchen arrested Gaitor who attempted to dispose of the stolen vehicle's keys by throwing them to the ground. (T.1313, 1316). Detective Andrews took the defendant into custody. (T.611, 621, 1282, 1286, 1292, 1296). When Officer Jesus Perez arrived moments later, Detective Andrews had him cuff the defendant and place him in the back of his patrol car. (T.613, 627-628, 1281,

---

[4] Gaitor, a co-defendant, was charged with strong-arm robbery. (T.409).

1320). Both uniform officers were requested to transport their charges to the station. (T. 1313, 1321).

Although the defendant had not been told anything regarding the case, while in route to the station he asked Officer Perez "What is it that I was supposed to have done, killed someone?". (T. 631, 632,1322). Officer Perez told the defendant to relax, that a detective would talk to him at the station and the defendant replied, "He just picked me up." (T.631-632, 1322). The defendant repeatedly said "Oh, shit" during the rest of the trip. (T.631-632, 1322).

The stolen vehicle was immediately processed at the site of the arrest and the latents were later compared to fingerprint standards of the victim, the defendant, Gaitor, and another individual, Benny Copeland. (T.1463, 1475, 1600). Several of the prints were later identified as being those of the defendant. (T.1600-1601).[5]

Detective Jon Spear of the homicide unit, along with Detectives Bishop and Vincent, was also involved in the investigation. (T.133). On the evening of February 12, Detective Spear was asked to respond to the station because a stolen vehicle and two suspects had been apprehended in connection with

---

[5] These were located on the gear handle of the steering column and the victim's briefcase. (R.224-225; T.1601-1603).

a murder case. (T.1335). It was after midnight when he first saw the defendant in the interview room. (T.642, 1336). He was not aware that the defendant had already been arrested for grand theft. (T.677, 685, 1387, 1407).

Detective Spear identified himself and Detective Bishop as homicide officers; he also told the defendant that they knew the car had been stolen in the course of a homicide and asked him to explain his presence in it. (T.649-650, 1343, 1403). Although he first denied any knowledge whatsoever of the crime, the defendant then told them that he had been at his girlfriend's house where, shortly before his arrest, he was picked up by another person in the car. (T.656, 1343, 1399). The defendant identified Wilfred Gaitor as the other individual in the car, but did not tell the police the name of the girl he claimed to have been with. (T.1343). The defendant denied having seen the car prior to the time Gaitor picked him up. (T.1344).

Detective Spear told the defendant that he believed there was more to the story then the defendant was telling them and accused him of the murder. (T.1344). The defendant denied it, stating that Gaitor had killed the old man. (T.656, 1344, 1399). No one had previously provided the defendant with any of the facts of the case. (T.622, 629, 1281-1282, 1286, 1325, 1331). Detectives Spear and Bishop then exited the interview room. (T.1346). When Detective Spear returned, he told the defendant

he was only looking for the truth, that he believed there was more to the story than that, and that the defendant should tell them the truth. (T.658, 1346). The defendant changed his story again, stating that Benny Copeland had committed this murder in addition to another one. (T.1346-1347).

Detective Spear then left the room and related the new story to Detective Bishop and their supervisor, Sergeant Vincent. (T.660, 1347). Sergeant Vincent went into the interview room to speak with the defendant; he came out after several minutes and told them that the defendant had agreed to tell the truth. (T.660, 1347). Detectives Spear and Bishop went back into the interview room to talk to the defendant. (T.1347). The officers told the defendant that they did not believe him because he had told them too many stories with too many inconsistencies. (T.1061, 1348). The defendant once again changed his story claiming that Gaitor and Copeland committed the murder. (T.661, 1348, 1399). When the officers repeated that they didn't believe him and that they only wanted the truth, the defendant finally admitted killing Franz Patella stating, "I'm going to tell you. I'm going to tell you the truth, I killed him." (T.66, 1348, 1399).

The defendant then told them that he had first encountered the victim at N. W 3rd Avenue and N. W 36th Street when the man pulled up and leaned over to ask for directions. (T.662-663,

1349, 1356). The defendant told them that when he saw that the car door was unlocked, he jumped into the car striking the man on the head with a gun. (T.663, 1349). The defendant stated he ordered Mr. Patella to drive and directed him to a location near the I-95 overpass at N. W. 7th Avenue and 36th Street where he forced him to turn onto 43rd Street. (T.664, 1350). He further stated that he shot the man before forcing the car into the alley between 43rd and 44th Street. (T.664, 1350). He then dumped the body, taking the man's brown attache case, watch, and wallet. (T.664, 1350). At the Officers' request, the defendant agreed to direct them to the location where he had first encountered the victim and where he had disposed of the briefcase. (T.664, 705, 1350). The detectives had no knowledge of the existence of the attache case prior to the defendant's statements. (T.1351).

The three Detectives and the defendant left the station in an unmarked police vehicle with Vincent and Bishop in the front and Spear and the defendant in the back. (T.665, 1351, 1397). At N. W. 7th Avenue and 36th Street, Detective Spear asked the defendant if the area appeared to be familiar, if that was where he had first encountered the victim. (T.665, 1351). The defendant nodded to the east of 7th Avenue. (T.665, 1351). At the the I-95 overpass at N. W. 43rd Street, the defendant told them "This is where I shot him," then directed them to the alley where, after shooting the victim again, he dumped the body. (T.665, 1351-1352).

The detectives then asked the defendant where the attache case was and requested that he direct them to it. (T.666-667, 1352). The defendant agreed and directed them to a pair of green dumpsters at an apartment complex near N. W 58th Street and 8th Avenue where he indicated the case was in the second dumpster wrapped in plastic under a piece of carpet. (T.66-667, 1352-1353). Detectives Bishop and Vincent found the attache case exactly where the defendant described. (T.667, 1353). The case was impounded and turned over for processing, the defendants' fingerprints were later found both outside the case and on the papers inside. (T.668, 1356, 1469, 1603). Patrolman Willie Bell, who responded to the apartment complex location, said that the defendant was very calm. (T.1570). On the return trip to the station, the defendant agreed to and did take the officers to where he first encountered Mr. Patella on 3rd Avenue and 36th Street. (T.668, 1356).

After returning to the station, the defendant agreed to make a formal statement. (T.668, 1357). However, he again changed his story, this time denying any involvement. (T.672, 1364, 1419). Both in the statement and at trial, the defendant claimed the officers had beaten him to obtain a confession, although a close-up photograph of his face taken after he made his formal statement contradicted this claim. (R.142-143; T.1418). Officer Diane Barnes saw the defendant in the homicide

office the morning of February 13, before she began her shift at 6:30 a.m.; she could not understand why he was laughing and smiling when he had just been arrested for first degree murder. (T.1195).

Dr. Jay Barnhart, the Dade County Medical Examiner involved in this case, testified during both the guilt/innocence and penalty phases. (T.1610-1659; S.31-53). Dr. Barnhart's examination of the body of the 64 year old victim revealed the presence of a total of seven gunshot wounds all of which were on the right side of the body. (T.1618-1619; S.36). Wound "A" was a graze-type wound located on the back surface of the right forearm moving from the right to the left. (R.282-283; T.1621-1622). Wounds "B" and "C" were located seven inches below the right shoulder; Dr. Barnhart believed that the bullet causing wound "B" could have penetrated through the arm and continued into the body as wound "C." (R.280-287, 288-289, 290-291; T.1627, 1636; S.36-37,39). The bullet causing wound "C" penetrated the right side of the chest proceeding through the rib space, penetrating the right lung and periosteum, finally lodging in the twelfth vertebrae of the spine. (R.290-291; T.1627-1628, 1636; S.42). Wound "D" penetrated the skin on the right side of the back just below the shoulder blade, passing along the soft tissue and muscles of the back lodging in the first lumbar vetebrae of the spine. (R.292-293, 294-295; T.1629; S.42). It was consistent with having been fired while the victim was hunched over. (T.1629).

Wound "E" entered the body just below and to the outside of the right breast, penetrating the right lung, continuing through the diaphram into the abdomen where it penetrated the liver, stomach and spleen coming to rest just beneath the skin on the left side of the abdomen. (T.1632; S.44). Bullet wound "F" penetrated the skin, belt level, on the right side of the abdomen, also penetrating the liver and stomach, as well as, the large bowel. (R.294-295, 296-297, 298-299; T.1633-1635). Wound "G" followed the same path, also penetrating the small bowel. (R.302-303; T.1634; S.44).

Dr. Barnhart found black soot or gunpowder residue on all of the wounds with the exception of "A" and "C." (T.1636-1637. 1658). The presence of powder in the wounds indicated contact wounds with the barrel of the gun within inches of the body at the time it was fired. (T.1626, 1638, 1640, 1648, 1652-1653). The absence of soot in wound "C" was attributed to his assumption that "C" was a continuation of the bullet causing wound "B." (T.1658).

The only other injuries found on the body were two acute lacerations on the victim's head which were consistent with having been inflicted by the butt of a gun shortly before the time of death. (T.1623-1624; S.35).

Dr. Barnhart testified that of the seven gunshot wounds, four would have proved to be fatal if not treated immediately and two others would have proved fatal if not treated within several hours. (T.1628, 1633, 1638). Death resulted from the internal disruption of the body's organs from the bullets. (T.1639). At the penalty phase of the trial, Dr. Barnhart more fully described the results of the disruption of the body's internal organs. (S.31-53). Dr. Barnhart testified that all skin punctures or tears are painful because of the abundance of nerve endings and that in this case, eight separate wounds were present. (S.36-37). He further explained that other internal body membranes, such as the periosteum which surrounds the bones, are extremely sensitive to pain. (S.37-38). The spinal injuries resulting from wounds "C" and "D" would thus have caused Mr. Patella extreme pain. (S.38). These wounds also penetrated another sensitive body membrane, the pleura, which surrounds the lungs, also causing great pain. (S.42). Additionally, the tearing of the pleura resulted in immediate pleurisy and penetration of the right lung caused it to collapse and collect blood thereby rendering the lung useless. (S.42-43). As a result, Mr. Patella would have experienced great difficulty in breathing. (S.43).

Three other wounds, "E," "F," and "G," penetrated another sensitive membrane, the peritoneum, which lines the peritoneal or abdominal cavity, and also penetrated several internal organs causing their contents to spill into the abdominal cavity. (S.44-

45). This resulted in immediate intense pain due to the onset of peritonitis. (S.44-45).

Furthermore, Dr. Barnhard testified that peritonitis, combined with the collapsing lung, blood loss, and extreme pain would lead to shock. (S.45). As Mr. Patella was conscious following the shooting, he not only felt the pain of his extensive injuries, but also experienced the physical manifestations of shock thereby making him fully aware of his circumstances while preventing him from acting defensively. (S.46-47). Dr. Barnhart stated that it is medically recognized that individuals in shock experience a strong sense of impending doom, that they somehow know they are dying. (S.46-47). Mr. Patella's shock was so acute he was placed in military anti-shock trousers, by fire rescue. (S.26).

At trial, the theory of the defense was that while the defendant was admittedly guilty of being caught in possession of a stolen vehicle, he did not murder Franz Patella. (T.1852). Hugh McKinney, the defendant's older brother, testified that on the morning of February 12, 1987, he went to his family's home at 1059 N.W. 46th Street to pick up his beeper which he had forgotten the prior evening. (T.1708, 1710). He arrived between 8:30 and 8:35 a.m. (T.1710, 1714). Mr. McKinney stated that between 8:30 a.m. and 8:40 a.m. a friend of his brother's, Hubert Charles, came by to see him. (T.1710-1711). Hugh told Charles

that his brother was sleeping and they left the house together at 8:30 a.m. (T.1710-1711, 1716). Mr. McKinney admitted that he never told the prosecutor about the incident with Charles during his deposition and further stated that he had no idea of where his brother was after 8:30 that morning. (T.1717-1718, 1721).

Hubert Charles testified that on the morning in question, he went to the defendant's house at 9:15 a.m. and Hugh McKinney told him the defendant was asleep; he did not see the defendant at that time. (T.1723-1725, 1744). Charles stated he saw the defendant half an hour later, between 9:30 and 10:00 a.m., around 56th Street, in a white four door Chevy Cavalier. (T.1725, 1726, 1735). He lent the defendant five dollars so he could take some girls from Northwestern High School to lunch. (T.1725, 1735).

Charles testified he saw the defendant again at 11:30 a.m. when he came by with the girls; after about fifteen (15) to twenty (20) minutes, the defendant took the girls back to school. (T.1726). Charles saw the defendant for the last time later that day with the girls after they had gotten out of school. (T.1728). During cross-examination, Charles admitted that he and the defendant always "looked out for" each other. (T.1734).

Virgil Fisher, a neighbor whose home was across an alley from the defendant's, also testified on his behalf. (T.1747-1774). Fisher claimed to have seen the defendant at 9:00 a.m.

when he went to the defendant's home to get a loaf of bread. (T.1750-1751). However, Fisher also stated that he saw the defendant at 10:05 a.m. and they talked about an hour. (T.1751-1753). Fisher claimed to have seen him again at 12:30 p.m. when the defendant came back with the car. (T.1754).

On cross-examination, Fisher admitted that he went to the defendant's house on February 11th. (T.1760). He did not recall having previously stated under oath that the defendant had come to his house on the 12th and that the next time he saw him was at 4:00 p.m. with the car. (T.1759, 1962). Although he claimed to have been with the defendant at the time the murder was committed, he never informed the police of that claim, even though he knew the defendant had been arrested for murder. (T.1763, 1765, 1772). Finally, on direct examination, Fisher claimed that during his deposition, Mr. Haft and Ms. Dannelly had a big argument resulting in Mr. Haft's forcible ejectment from the room by an investigator for the State. (T.1770, 1772). This claim was clearly refuted by the testimony of David Milligan, a State investigator, who testified that the only deposition he attended was that of Hubert Charles. (T.1785-1787).

During the penalty phase of the trial, the defense presented the testimony of the defendant's mother, Alice McKinney. (S.54-61). Mrs. McKinney testified that she had single handedly raised her seven children after her husband left her ten

years before. (S.54-55). She stated that she had never had any trouble with the defendant other than the fact that his school often sent notes home indicating that Boris was not keeping up with his school work. (S.56, 58). The defendant did badly in school; he did not appear to be interested. (S.56). She was never informed by the school that the defendant had a mental problem; one of her children who had a mental problem was receiving treatment for his condition at Jackson Memorial Hospital. (S.58). When Mrs. McKinney asked her son if he committed the murder, he always told her no. (S.57-58).

The defense also put on several mental health experts. (S.69-171). Dr. Leonard Haber, a clinical psychologist, was appointed by the Court to assist Mr. Haft in the preparation of a defense. (S.72, 92-93). Mr. Haft requested that the defendant be evaluated to ascertain his mentality, outlook, intellectual functioning, background, and history. (S.72). Dr. Haber was provided by Mr. Haft with the defendant's school records which he believed showed difficulty in concentration, poor academic performance, and disruptive, assaultive behavior towards other students. (S.74-75, 86, 93, 98-99, 104).

While he was incarcerated at the Dade County Jail following his conviction, the Wrexler Intelligence Test and other tests were administered to the defendant. (S.72, 107). Based upon his analysis of these tests, Haber determined that the defendant's

I.Q. score was seventy-two (72) which was within a borderline category. (S.73-74, 79, 89). He found that the defendant functioned at the academic level of a third grader. (S.79, 83, 84, 89). Dr. Haber stated that the results of these tests were indicative of possible organic brain damage and therefore recommended that the defendant be evaluated by a neurologist. (S.72-73, 127-128). The defendant denied having committed the murder claiming he confessed to the crime because he was forced to do so by the police. (S.85). The defendant reported a substantial and varied history of drug and alcohol abuse beginning at age eight or nine. (S.82-88).

On cross-examination by the State, Dr. Haber admitted that the Wrexler Test was severely and repeatedly criticized as being culturally biased. (S.95, 115). He did not administer a culture-neutral test to the defendant. (S.95, 113, 117). The defendant's attention during testing was good. (S.101). Dr. Haber talked with another defense expert, Dr. Crown, about his findings and also spoke with Mr. Haft on numerous occasions in preparation for the penalty hearing. (S.119-120). Although he reviewed Drs. Jaslow and Castiello's evaluations of the defendent which were made in 1987 shortly after the murder, he never spoke to them regarding their findings. (S.93-94, 119). He disagreed with their assessments of the defendant's intelligence although he found their examinations appropriate. (S.123, 125-126).

In July of 1989, Dr. Barry Crown, a neuropsychologist, also examined the defendant. (S.144-146). Dr. Crown relied upon the results of the intellectual tests administered by Dr. Haber; he admitted that if Haber's analysis in those tests was, in fact, faulty, his evaluation would also be effected. (S.151, 162). Dr. Crown found that the defendant exhibited mild to moderate mental impairment. (S.154). On cross-examination Dr. Crown admitted that he did not have a degree in psychology, that his degree was in counselling. (S.157).

The final witness in mitigation was the defendant. (S.172-194). He testified that around 9:00 a.m. on the day of the murder the man who lived behind him came over asking for some bread. (S.174). The defendant claimed to have gone to the man's house where they talked until 10:00 a.m. or a little later. (S.174). He left and ran into someone who gave him the car he was later arrested in. (S.174). As he walked to the car, he ran into Gaitor with whom he rode around all day. (S.174). He claimed to have first seen the car around 10:40 a.m. (S.179). In the afternoon, the defendant stated they had lunch with two girls from Northwestern High School. (S.174). He also claimed to have been with two girls between 9:00 a.m. and 10:30 a.m. (S.178).

The defendant further testified that when he was arrested with Gaitor around 10:00 p.m. that evening he asked the officers what had happened and they did not tell him. (S.176). The

defendant knew he had been arrested for grand theft of the automobile and also knew it was wrong to be driving around in a stolen car. (S.176). He claimed that at the station the police told him they had been looking for him earlier in the day in connection with a murder; he denied having a gun or the victim's money. (S.176).

The defendant claimed to have told the police the only thing in the car was an empty briefcase. (S.176). He agreed to and did direct them to the garbage can he threw the case in. (S.176-177). On the way back to the station, the defendant claimed the officers stopped to show him locations relevant to the crime. (S.177). Upon their return to the station, the officers "jumped on" him inflicting cuts and bruises; they told him they knew he had committed the crime. (S.177, 187).[6] He denied killing the victim when the officers told him Gaitor had said he killed the man (S.178). The defendant also claimed that a gunpowder residue test was performed upon him and came back negative. (S.178).

The State presented three rebuttal witnesses; the first Dr. Anastasio Castiello, was a forensic psychiatrist. (S.196-197). Dr. Castiello examined the defendant, pursuant to court order, at

---

[6] The defendant claimed to have told corrections officers all about the injuries he received during the beatings as soon as he arrived at the jail. (S.188).

the jail on April 13, 1987. (S.198, 206). They discussed numerous areas relevant to the evaluation including, but not limited to personal background, family background, and schooling. (S.199). The defendant denied having committed the murder and said he went riding in the car with unnamed "others" because he was afraid of them. (S.210). He repeatedly claimed to have been threatened by Gaitor and Copeland following his arrest. (S.204, 211).

Dr. Castiello found that the defendant was able to concentrate on what was happening during the examination and had no difficulty in either expressing himself or answering questions. (S.199-200, 212). He found that the defendant functioned at an average level; nothing during the examination was indicative to the contrary. (S.200, 212). Significantly, Dr. Castiello did not find any evidence of mental deficiency, reasoning or attention deficit, or an intelligence deficiency which would indicate an inability to function from a mental standpoint. (S.199). Had he found any objective evidence of brain disfunction or use of drugs to the point of impairment of behavior, he would have recommended neurological or drug testing. (S.214-215).

Dr. Albert Jaslow, also a forensic psychiatrist, similarly found no evidence of organic brain disfunction after he examined the defendant. (S.260-261, 273-274). Had he done so, he too

would have recommended further evaluation. (S.264). Dr. Jaslow stated that he did find evidence of some mental disturbance, but testified that it did not rise to the level that would effect the defendant's thinking to the extent that he did not understand or know what he was doing. (S.262).

The last rebuttal witness was Arthur Brown, director of nursing at the Dade County Jail and custodian of inmate medical records. (S.216-217). Mr. Brown testified that although inmates are screened for injuries or medical problems by booking officers and the nursing staff upon their admission to the jail, the defendant's records indicated no injuries, illnesses, or other physical/mental complaints on February 13, 1987. (S.239-241, 252, 258). The first indication of any complaint by the defendant occurred on February 18, 1987, three days after his bond hearing was conducted and he was appointed counsel. (S.254-256).

POINTS INVOLVED ON APPEAL

I.

IS THE DEFENDANT ENTITLED TO RELIEF BASED UPON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL?

II.

DID THE TRIAL COURT ERR EITHER IN ADMITTING TESITMONY REGARDING THE DEFENDANT'S NUMEROUS STATEMENTS OR IN ENTERING CONVICTIONS ON ALL CHARGES?

III.

DOES THE BALIFF'S COMMUNICATION WITH THE JURY REQUIRE REVERSAL?

IV.

IS THE DEFENDANT ENTITLED TO A NEW TRIAL WHEN HE DECLINED TO HAVE THE COURT INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF CONTEMPANEOUS NONCAPITAL FELONIES OR BECAUSE COUNSEL WAS REBUKED BY THE COURT IN FRONT OF THE JURY?

V.

WAS THE DEATH PENALTY APPROPRIATELY IMPOSD IN THIS CASE?

SUMMARY OF THE ARGUMENT

I.

In this direct appeal, the defendant claims he received ineffective assistance of trial counsel. Claims of ineffectiveness are generally not recognized in this Court on direct appeal unless the underlying facts are clear upon the face of the Record. Here, the defendant has failed to move for relinquishment of this Court's jurisdiction while filing a motion for post-conviction relief in the trial court. Instead, he sets forth matters which he asserts constitute ineffectiveness. Not only are these matters examples of sound trial strategy of defense counsel, they are totally unsupported by the requisite showing of deficiency of performance and prejudice. Unsubstantiated claims of ineffective assistance of counsel are not cognizable by this Court.

II.

The trial court properly admitted the testimony of Detective Jon Spear regarding the defendant's statements since the State had established the corpus delicti of the crimes by ample independent evidence. The trial court also properly convicted the defendant of armed robbery and grand theft since totally distinct acts or takings were involved. Similarly, the defendant's conviction for first degree murder and use of a firearm during the commission of a felony is proper since F.S. 782.04 neither requires the use of a firearm nor may the sentence imposed therefor be enhanced as a result.

III.

The bailiffs communication with the jury, if error, is merely harmless. The jury in this case, at the time of the communication, was seeking clarification of an administrative matter, i.e. the correct numbers of verdict forms, and was not requested additional instruction on the law. This case is therefore outside the purview of Fla.R.Crim.P. 3.410 and if the communication was, in fact, error, harmless error analysis applies. Not only does the defendant fail to support his unsubstantiated claim of prejudice he ignores the fact he declined to have the court make an on the record inquiry and that the court, as a matter of caution, reinstructed the jury.

IV.

The trial court did not err in failing to instruct the jury on the lessor included offense to a contemporaneous noncapital offense when defense counsel waived such instruction. The trial court also acted within its discretion when it warned both counsel in open court, it would hold them in contempt if they failed to obey is orders. The defendant has failed to establish he was, in fact, prejudiced thereby.

V.

The record below substantiates the trial court's finding that the murder of Franz Patella was heinous, atrocious, and cruel and was committed in a cold, calculated, and premeditated

fashion. The death penalty was correctly imposed in this case and is not disproportionate to other cases in which this Court has upheld the penalty.

ARGUMENT

I.

THE DEFENDANT IS NOT ENTITLED TO RELIEF BASED UPON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

In his direct appeal, the defendant alleges that he was denied effective assistance of counsel thus entitling him to a new trial. As a general rule, claims of ineffective assistance of counsel are collateral matters which may only be addressed via motions for post-conviction relief and are thus not cognizable on direct appeal. Knight v. State, 394 So.2d 997 (Fla. 1981); Meeks v. State, 382 So.2d 673 (Fla. 1980); State v. Barber, 301 So.2d 7 (Fla. 1974). Only in those rare instances in which the facts underlying the claim are evident upon the face of the record before the Court are such claims cognizable upon direct appeal. Stewart v. State, 420 So.2d 862 (Fla. 1982). Indeed, those cases are rare because this Court recognizes that the review of a cold record on direct appeal provides an inadequate basis upon which to evaluate claims of ineffectiveness which, because of their nature, are best left to collateral proceedings.

In this case, the defendant has set forth the facts of approximately ten instances of what he claims are examples of ineffectiveness on the part of defense counsel Norman Haft. He has not filed a motion in this Court for relinquishment of jurisdiction and a motion for Post-Conviction relief in the trial

court as is required by the Rules of Criminal Procedure; his claims should not be addressed by this Court on direct appeal when alternate adequate procedures are available.

In the instant case, the defendant's attempts to establish that the trial record establishes ineffective assistance of counsel fail to meet the requirements established by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail upon such a claim, the defendant bears the high burden of showing that a specific, serious deficiency, measurably below the conduct of competent counsel, when considered under the individual circumstances of this case, was substantial enough to demonstrate prejudice to him to the extent there is a substantial liklihood that the deficient conduct affected the outcome of his trial. Strickland v. Washington, supra; It is abundantly clear that the defendant is unable to meet his burden since the matters raised merely allege ineffectiveness without either showing a serious deficiency in the conduct of defense counsel or showing sufficient prejudice to establish there was in fact a substantial likelihood that it effected the outcome. The State respectfully submits that mere conclusory statements of ineffectiveness are insufficient to present a claim cognizable on direct appeal.

Additionally, even if this Court were to consider the defendant's claims of ineffective assistance of counsel, it is

clear they are without merit. The defendant first challenges Mr. Haft's failure to object during the State's opening argument when prosecutor, Susan Dannelly, told the jury that it would have the opportunity to read the defendant's formal confession at a later time. (T.1125-1126). However, this claim ignores the fact that the decision to object or not object during argument by opposing counsel is a matter well within the scope of defense counsel's sound strategy. See: Mann v. State, 482 So.2d 1360 (Fla. 1986). Strategic decisions of counsel may not be second-guessed as the defendant asserts here. See Wilson v. Wainwright, 472 So.2d 1162 (Fla. 1985), approved 493 So.2d 1019. In fact, since great latitude is allowed counsel in opening statements and the prosecutor could properly outline and discuss the evidence she, in good faith, expected to prove at trial, defense counsel's failure to object was not error. Spaziano v. State, 429 So.2d 1344 (Fla. 2d DCA 1983). Furthermore, the defendant is unable to establish prejudice since the contents of the formal statement were testified to, in full, by Detective Spear.

The defendant also challenges Mr. Haft's opening statement in which he characterized the victim as a "Nazi." (T.1128-1129, 1136, 1142). These statements were obviously an attempt by defense counsel to make the victim less appealing in the eyes of the jury; this was an effective strategy in this case in view of the overwhelming evidence of the defendant's guilt. Mr. Haft did object to the prosecutor's attempt to point this out to the jury

during closing argument. (T.1184). The fact that this particular strategy may not have been successful does not in any way mean that defense counsel's performance was less than adequate. Bush v. Wainwright, 505 So.2d 409 (Fla. 1987); cert. den., 484 U.S. 873, 108 S.Ct. 209, 98 L.Ed.2d 160 (1987); Serici v. State, 469 So.2d 119 (Fla. 1985); cert. den., 448 U.S. 1010, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986).

The defendant also challenges defense counsel's efforts to attack the credibility of Officer Andrews, Technician Romans and the police department generally. (T.1255, 1303, 1337, 1847). These attacks were also clearly matters of defense strategy and were appropriate. As previously stated, the state presented overwhelming evidence of the defendant's guilt at trial. Given the weak defense available, it was necessary to attack the State's evidence by attacking the credibility of police personnel and police procedures. This tactic was not deficient; to the contrary, it was the sole sound choice available. The fact that a particular strategy is unsuccessful at trial does not render counsel ineffective for using it. Busch v. Wainwright, supra; Serici v. State, supra. Nor does the fact that the State's objections were sustained and the jury instructed to disregard the comments somehow change that fact. (T.1255, 1303, 1306).

The defendant apparently also claims ineffective assistance of counsel with regard to trial counsel's initial objection to

the admission of the defendant's formal statement which he then subsequently tried unsuccessfully to enter into evidence because of the exculpatory evidence contained in it. This ignores several key factors. Prior to trial, Mr. Haft properly sought to suppress the defendant's statements and confessions. (R.6, 130-136; T.597-744). The judge denied the motion stating "If that picture (i.e. of the defendant) had indicated any abuse, at all, I might very well have thought differently about this case. ..." (T.744). The defense consistently asserted that the defendant had not committed the murder and had confessed only because of what he alleged was police coercion. Haft's initial desire to keep the statement out of evidence is thus consistent with that defense. Nor was it improper for Haft to later seek admission of the unsigned confession after the State put on witnesses who fully testified about both it and the defendant's prior oral statements. (T.1262-1270, 1318-1331, 1332-1447). Furthermore, even though the formal statement with its exculpatory declarations was not physically introduced into evidence, no prejudice resulted. All the exculpatory statements made by the defendant, both in the formal statement and otherwise, were before the jury largely as a result of Haft's cross-examination. (T.656-660, 1343-1348, 1399-1400, 1418-1419, 1429).

The defendant challenges Mr. Haft's objection to the testimony of William Davis and corresponding physical evidence. However, the exact nature of this challenge is unclear. The

State was entitled to put on evidence relating to the victim's presence in Miami, as well as, testimony relating to the money he brought with him which was not recovered. If the basis of the defendant's claim on appeal is that Mr. Haft improperly objected to the introduction of this material, the underlying facts of these claims are not apparent on the record and thus may not be considered upon direct appeal. It is similarly unclear what the defendant's claim regarding Virgil Fisher is; mere conclusory allegations of ineffectiveness do not set forth a cognizable claim. See e.g., Combs v. State, 403 So.2d 418 (Fla. 1981).

The defendant also challenges Mr. Haft's performance during closing argument citing to Haft's mistaken use of a name (T.1848) and his violation of the Golden Rule (T.1853, 1863) as proof of his claims of ineffectiveness. However, the defendant again fails to show either deficiency of performance rising to the necessary level or prejudice. Mr. Haft clearly was mistaken in using the name Hasmer, however, such an honest mistake cannot be said to rise to the level of ineffective assistance of counsel since he simply is not entitled to a perfect trial with errorless counsel. Profitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), reh. denied, 706 F.2d 311 and 708 F.2d 734, cert. denied, 104 S.Ct. 508 and 104 S.Ct. 509 (1982). Additionally, Mr. Haft's violation of the Golden Rule was clearly a strategic attempt to gain sympathy for the defendant. This action was totally consistent with the defense asserted at trial, i.e., that the

defendant, while guilty of being caught in a stolen vehicle, had nothing to do with the murder of Franz Patella and was merely a victim of circumstance. The defendant's challenge also ignores the fact that not only is counsel always accorded wide latitude in argument, the jury was properly instructed that what was said by counsel during argument was in no way to be considered as evidence. (T.1102-1105).

The defendant points to several matters in the penalty phase of his trial as further examples of Mr. Haft's ineffectiveness; however, these too fail to support the claim on direct appeal. The defendant challenges Mr. Haft's reference to the McDuffy case and his comment "lie, lie" after the prosecutor stated she had nothing further. Mr. Haft's remarks regarding errors in the McDuffy case, as well as, his remarks in closing regarding the Richardson case were clearly tactical. Given the fact that his client had already been found guilty as charged, Mr. Haft sought to instill enough doubt in the minds of the jury to keep them from entering an advisory sentence of death. The fact that the stategy was unsuccessful does not make its use deficient. Harrich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), cert. denied, 109 S.Ct. 1355, 103 L.Ed.2d 822 (1989). Mr. Haft's comment to the prosecutor also cannot be deemed to be more than a mere error of judgment. Not only was it not harmful, the jury was, in this as in the other instances, properly instructed to disregard it. (S.259).

The defendant finds fault with Mr. Haft's attempt to discredit witness, Dr. Albert Jaslow. (S.265). Again, Mr. Haft's actions fall squarely within the realm of sound defense strategy. Given the number and weight of aggravating circumstances and the relative lack of mitigating ones, Mr. Haft followed the only available course - that of attacking the credibility of the State's case to avoid imposition of the death penalty. His actions were not deficient.

As his last example of deficient conduct, the defendant points to the prosecutor's argument to the jury that he was found guilty of felony murder. However, he fails to either explain or argue this point; as such, it may not be considered by this Court. His arguments as to the penalty phase must fail, since he is unable to prove that absent the alleged errors there was, in fact, a reasonable probability the balance of aggravating and mitigating circumstances did not warrant the death penalty. Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985), reh. denied, 776 F.2d 1057, cert. denied, 475 U.S. 10311, 106 S.Ct. 1242, 89 L.Ed.2d 349 (1986).

Having failed to meet his burden of establishing ineffective assistance of counsel by virtue of the foregoing exhaustive list of alleged errors, the defendant makes a last-ditch effort by asserting that his claim is proven by virtue of

the trial court's sentencing order. He bases this upon the trial court having stated that:

> My conscience compels me to state for the record that though defense counsel has a long and distinguished career, I fear his talents and abilities have been dimmed by his illness and treatment for it.
>
> (R.378).

Not only is this, and other statements by the court regarding its disapproval of the death penalty, personal opinions which cannot be given any weight or consideration, the trial court was simply not in a position to make a finding of ineffectiveness. Nor, did the trial court in fact make such a finding, since it added that neither the jury's verdict or its recommendation were affected by Mr. Haft's performance. (R.378).

II.

THE TRIAL COURT NEITHER ERRED IN ADMITTING TESTIMONY REGARDING THE DEFENDANT'S NUMEROUS STATEMENTS NOR IN ENTERING CONVICTIONS ON ALL CHARGES.

The defendant contends that the trial court improperly allowed the testimony of Detective Jon Spear regarding numerous statements made by him without first requiring the State to establish the corpus delecti of the crime. Not only does this argument confuse the formal transcribed statement with prior oral statements, it also urges this court adopt an entirely new definition of the corpus delecti of first degree murder. (Defendant's brief, page 68). His argument also overlooks the fact that ample evidence, independent of the confession, was adduced at trial.

To establish the corpus delecti of first degree murder, the State need only establish the fact of death, the identity of the victim, and the fact that that the death of the victim resulted from the criminal agency of another. Buenano v. State, 527 So.2d 194 (Fla. 1988). Here, more than adequate evidence was adduced at trial to establish Mr. Patella's death at the hands of another independent of the defendant's confession. The testimony of Officer Barnes as to statements made by Mr. Patella regarding his abduction and shooting and the testimony of Dr. Barnhart are

alone sufficient. (T.1190-1192, 1619-1659; S.31-53). The defendant's request that this Court redefine the corpus delecti of first degree murder is totally without support and does not deserve this Court's consideration.

Similarly, the State also presented sufficient evidence of the remaining crimes for which the defendant was indicted independent of the defendant's statments. For example, the defendant was charged with theft pursuant to F.S. 812.014. To establish the corpus delecti of this crime, the State must only prove that the property was lost by the owner and that it was taken without the owner's consent with the requisite felonious intent. Williams v. State, 117 So.2d 548, 549-550 (Fla. 2d DCA 1960). As in the case of all crimes charged, it is not necessary for the corpus delecti to be proven beyond a reasonable doubt by independent evidence pointing to the accused as the perpetrator before the defendants' confessions may be admitted into evidence. Hodges v. State, 176 So.2d 91 (Fla. 1965), conformed to 176 So.2d 604. Here, the evidence, independent of the defendant's statments, showed that Mr. Patella, and the Hertz Corporation were forcibly and without their consent, deprived of the rental car. (T.1158, 1190, 1191-1194). The defendant was later apprehended in that same car. (T.607, 614, 1272, 1280-1281, 1291). Interestingly enough, the theory the defense presented at trial was that the defendant was in knowing possession of a stolen car but that he had not committed the murder.

The corpus delecti of kidnapping was similarly proven by the testimony of Officer Barnes, who reported the victim's statements that he had been transported against his will from N.W. 3rd Avenue and 36th Street to the alleyway where he was shot, robbed, and had his car stolen. (T.1190-1194). Other, circumstantial evidence, such as the fact of the victim's death, the recovery of the stolen car in the defendant's possession, and the recovery of the victim's briefcase also substantiates the charge.

The record also supports the charge of burglary of a conveyance. The evidence showed that when Mr. Patella stopped to ask for directions, an unknown black male forced his way, uninvited, into his car, kidnapped him, robbed him, and shot him numerous times. (T.614, 1190-1194, 1280, 1291). Furthermore, not only was the defendant apprehended in the car, his fingerprints were found on its steering column. (T.1600-1601).

The corpus delecti of robbery was also established by evidence presented at trial independent of the defendant's statements to the police. In Knight v. State, 402 So.2d 435 (Fla. 3d DCA 1981), the court held that the corpus delecti of the crime of robbery was established where a victim was found dead and his wallet and its contents were removed from his person. Here, testimony was presented that Mr. Patella was in Miami to

purchase materials for his business on the day of his death and that he was carrying over $11,000 in cash. (T.1481, 1487-1488, 1490, 1504). Only $1,500 of that sum was accounted for after the murder. (T.1535). Additionally, no wallet was found on Mr. Patella; the gold Rolex watch he wore was also missing. (T.1407,1427, 1534-1535). The defendant's fingerprints were also found inside the victim's briefcase which was taken from him. (T.1600-1601).

Finally, the evidence also clearly established that he defendant was armed during these crimes. Not only did the victim sustain seven gunshot wounds, the lacerations which he sustained to his head were consistent with having been inflicted by the butt of a gun. (T.1618-1619, 1623-1624; S.35-36).

In his appeal, the defendant also challenges the appropriateness of his convictions claiming dual punishments for crimes arising from the same facts. He first complains that the trial court erred in convicting him of both armed robbery and grand theft. His reliance on State v. Bing, 514 So.2d 1101 (Fla. 1987) is, however, misplaced since this line of cases prohibits dual convictions only in those instances where a single theft occurred. Here, convictions for both crimes are appropriate because totally distinct acts or 'takings' are involved, i.e., the automobile theft and the taking of Mr. Patella's wallet, money, watch, and briefcase. See Waters v. State, 542 So.2d 1371

(Fla. 3d DCA 1989). The defendant's conviction for first degree murder and use of a firearm during the commission of a felony is also proper since F.S. 782.04 neither requires the use of a firearm as an element nor can the sentence be imposed therefore be enhanced. See F.S. 782.04 and F.S. 790.07; Harper v. State, 537 So.2d 1131 (Fla. 1st DCA 1989). Since the indictment alternatively charged the possession of a weapon during the commission of a murder, the conviction may stand.

III.

THE BALIFF'S COMMUNICATION WITH THE JURY DOES NOT REQUIRE REVERSAL.

In this case, the defendant alleges he is entitled to a new trial as a result of what he claims is an improper communication with the jury by the bailiff. However, once this incident is reviewed in the context in which it was made, the bailiff's comment is, if error, merely harmless.

During its deliberation, the jury propounded a written question to the trial court indicating its confusion over whether it had received the appropriate number of verdict forms. The bailiff returned to the courtroom and, in the presence of the court and both counsel, handed the question to the bench. While he did so the following conversation occurred:

> **THE BAILIFF:** They had a question. It was on premeditated murder. I told them it was part of the instructions. They were not to rule on premeditated murder.
>
> **THE COURT:** That's all very well and (R.1959) good. I don't know if you should be giving them instructions.
>
> **MS. DANNELY:** If they have a question tell them to write it down and the Court will consider it.
>
> **THE BAILIFF:** That's what I had them do. They said, no, they just wanted that clarification.
>
> **THE COURT:** You can't give them clarification.

> **THE BAILIFF:** I told them that.
>
> **THE COURT:** You tell them to bring out the question. You cannot give them that clarification. Questions is we have a verdict sheet for first-degree they want to know if they should have separate verdict.
>
> They have three forms of verdict and I think what they're confused about according to what the bailiff said is the difference between premeditated and felony first degree. (R.1960).

As the above section illustrates, it is obvious that the jury was asking for clarification of an administrative matter, i.e. the correct number of verdict forms, not for instruction on the law pursuant to Fla.Crim.P. 3.410.[7] As recognized by this court in Williams v. State, 488 So.2d 62, 64 (Fla. 1986), "communications outside the express notice requirements of rule 3.410 should be analyzed using harmless error principles." Although the better practice would have been for the bailiff to have said nothing at all and merely provided the trial court with the jury's written question, his response was, at most, harmless error. It is apparent that the bailiff did not improperly communicate with the jury on the law since he specifically told

---

[7] This case is thus distinguishable from those relied upon by the defendant. Holzapfel v. State, 120 So.2d 195 (Fla. DCA 1960), for example, is not applicable to this case because at the time the bailiff communicated with the jury, the trial court failed to take remedial action by reinstructing the jury on the question raised. In McQuay v. State, 352 So.2d 1276 (Fla. 1st DCA 1977) a communication to a deadlocked jury by a bailiff, comparable to an Allen charge was deemed reversible error since reinstruction did not occur prior to rendition of the verdict.

them he could not answer their question and they would have to submit written questions to the court. (R.1959-1960).

The circumstances of this case are comparable to those of Ennis v. State, 300 So.2d 325 (Fla. 1st DCA 1974) and Walker v. State, 546 So.2d 1165 (Fla. 3d DCA 1989). In Ennis a robbery trial, the jury asked the bailiff if the robbery victim kept his money in banks. The bailiff responded in the affirmative. The Ennis court held that the bailiff's response, while error, was harmless. Although that defendant asserted that the bailiff's communication was prejudicial to his rights, the court stated that Ennis, like the defendant in this case, had not attempted to establish how his rights had been violated. The court therefore held that it would not reverse the defendant's criminal conviction in view of ample evidence of the defendant's guilt and the absence of proof that substantial rights of the defendant's had been violated. Similarly, in Walker, the court held that a communication between a bailiff and members of a jury was not reversible error where the jury foreman asked to see a map of the area in which the crime occurred and the bailiff told them they would have to put their question in writing and also informed them that the court would probably not provide one since no map had been entered into evidence. The court found that the conversation, while error, was not harmful and did not constitute a violation of F.S. 918.07.

In this case, it is clear that, as the trial court recognized, the "question is we have a verdict sheet for first-degree -- they want to know if they should have a separate verdict. They have three forms of verdict and I think what they're confused about according to what the bailiff said is the difference between premeditated and felony first degree." (R.1960). This obviously referred to the jury's confusion as to separate verdict forms for premeditated first degree and felony first degree murder. The record clearly establishes that everyone present understood this to be the substance of the communication because no one either objected to it or requested an inquiry. In fact, defense counsel, when offered the opportunity to make such an inquiry by the trial court, declined to do so stating it simply was not necessary. Also significant is the fact that the trial court had the jury brought out and completely reinstructed the jury on premeditated first degree murder, felony first degree murder, and second degree felony murder. (R.1962-1963). It is thus clear that the defendant's substantial rights were not violated and a reversal as to this issue is unwarranted.

IV.

THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL WHEN HE DECLINED TO HAVE THE COURT INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF CONTEMPORANEOUS NONCAPITAL FELONIES NOR IS HE ENTITLED TO A NEW TRIAL BECAUSE COUNSEL WAS REBUKED BY THE COURT IN FRONT OF THE JURY.

The defendant first asserts that he is entitled to a new trial as a result of the trial court's failure to instruct on false imprisonment, a lessor included offense of kidnapping, despite his failure to request such instruction. He claims that Mr. Haft's decision not to have instructions upon the lesser included offense of false imprisonment is exemplative of ineffective assistance of trial counsel.

The defendant bases his claim as to this issue on this Court's holding in State v. Sanborn, 533 So.2d 1169 (Fla. 1988) which affirmed the decision of the Third District Court, appearing at 513 So.2d 1380 (Fla. 3d DCA 1987), to the effect that false imprisonment is a necessarily included lessor offense of kidnapping. However, Sanborn stands for the proposition that the trial court's failure to instruct on the lessor included offense of false imprisonment is error only where trial counsel objects to the instructions given thus preserving the matter for appellate review. See: Sanborn v. State, 513 So.2d at 1382; Simmons v. State, 541 So.2d 1212 (Fla. 5th DCA 1989), rev. denied, 548 So.2d 663 (Fla. 1989). Here, the defendant, despite

numerous opportunities afforded by the trial court to have other instructions read, waived the reading of instructions on the lessor included offense of kidnapping, i.e., false imprisonment. (T.1797-1798, 1800, 1810-1811, 1888, 1919). The defendant's failure to request such instruction and his failure to object to the trial court's failure to include it bars reversal. Parker v. Dugger, 537 So.2d 969 (Fla. 1988); Jones v. State, 484 So.2d 577 (Fla. 1986). Counsel may properly waive instruction on necessarily lesser included offenses to noncapital offenses. Reed v. State, 15 F.L.W. S115 (Fla. March 1, 1990).[8] Jones v. State, 484 So.2d 577 (Fla. 1986).

Additionally, the waiver of lessor included offenses by counsel is simply not support for the defendant's claim of ineffective assistance of counsel. It is a typical, perfectly acceptable, trial strategy. The fact the strategy was unsuccessful does not make its use ineffective assistance of counsel.

---

[8] Defense counsel also waived the lesser included offense of second degree murder. However, this does not violate the dictates of Harris v. State, 438 So.2d 787 (Fla. 1983) which requires the defendant to make an on the record waiver of all lesser included offenses to a capital felony. The reason is that here the defendant did receive instruction on the lesser included offense of second degree felony murder. This then provided the jury with the opportunity to convict on the lesser included offense, a choice which was consistent with his defense, to wit: that the defendant participated in the underlying crimes, but did not participate in the murder itself.

The defendant also cites as error the trial court's treatment of Mr. Haft before the jury. The defendant ignores the fact that, with one exception,[9] any admonishing remark to either counsel was made outside the presence of the jury either at sidebar or when the jury was out of the courtroom. (T.684, 797, 810, 898-919, 1128-1332, 1148-1150, 1303-1305, 1548-1550). He also exaggerates the remaining comments totally out of proportion. In this instance, as with the other issues heretofor discussed, the defendant has failed to meet his burden of proof by establishing the trial court abused its discretion in making the comments and that he was prejudiced thereby.

A trial judge is not a mere observer in the courtroom, but is instead responsible for maintaing the tone and tempo of the proceedings. United States v. Butera, 677 F.2d 1376 (11th Cir. 1982). As a result of the trial court's responsibility to ensure the orderly progress of a trial, admonition of counsel in hotly contested cases can become "requisite, even essential." Bursten v. United States, 395 F.2d 976, 983 (5th Cir. 1968), cert. denied, 409 U.S. 843, 93 S.Ct. 44, 34 L.Ed.2d 83 (1972). Although the better practice is to have the jury removed prior to rebuking counsel, there are occasions in which there is no error

---

[9] The sole exception is that one instance cited by the defendant in which the trial court admonished defense counsel for attempting to testify and informed both counsel that it would hold them in contempt for continuing to disobey its instructions. (T.1772-1773).

in doing so before the jury. Paramore v. State, 229 So.2d 855 (Fla. 1969), vac'd in part on other gr'ds, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972); see also: Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980); Baisden v. State, 203 So.2d 194 (Fla. 4th DCA 1967). It is not error for the court, when improper comments are made during trial, to make a "prompt and fitting rebuke so as to impress on the jury the gross impropriety of being influenced thereby," since the court is in the advantageous position of being best able to determine what is necessary. Paramore v. State, 229 So.2d at 860. Only in those instances in which the trial court clearly abuses its discretion may this Court find reversible error. To constitute such error, reprimands, when considered in light of the circumstances in which they were made, must result in actual prejudice to the defendant. Paramore v. State, 229 So.2d at 260.

Here, the defendant complains that the trial court's threat to hold both defense counsel and the prosecutor in contempt of court prejudiced him in his defense. (T.1772-1773) However, this is certainly not the case. It is necessary to first recall the fact that the jury was repeatedly instructed by the trial court that what was said by the lawyers was not to be considered as evidence by them in reaching their verdicts. (T.1102, 1105, 1136, 1909). The court stated during preliminary instructions that the lawyers would be making zealous objections, that the jury should not speculate on the court's rulings on those objections, and

that what was said sidebar, was also not a matter for their consideration. (T.1105). Significantly, the jury was told . . . the attorneys are not on trial and I don't want [you] to be influenced in any way by what they say." (T.1105). It may not be presumed that a jury is led astray by remarks of counsel. Paramore v. State, 229 So.2d at 860.

Throughout the course of the trial, the court repeatedly warned counsel, outside the jury's presence, that it would not tolerate personal remarks or attacks and all comments should be addressed to the bench. (T.684, 797, 917-918, 1132, 1148). It is clear that the remarks complained of, which were addressed to both counsel, were well within the court's discretion under the circumstances. Nor does the fact that both counsel were threatened with contempt change that fact. In Paramore v. State, this Court, held that trial court acted within its discretion when it held both counsel in contempt, in order to maintain the dignity of the courtroom, after they disobeyed the court's direct order. Here, the facts of this case are completely on a par with Paramore. This case is thus totally distinguishable from Wilkerson v. State, 510 So.2d 1253 (Fla. 1st DCA 1987), relied upon by the defendant, in which the trial judge repeatedly made derogatory remarks solely against defense counsel. Here, the remarks by the court were not partisan nor were they deragatory. Additionally, in this case, defense counsel at no time either moved for mistrial or sought recusal of the court; the matter is thus waived.

Finally, the defendant challenges the admission of testimony by the State's rebuttal witness, Investigator Milligan, regarding the Charles deposition.[10] Given the substance of Fisher's testimony which was elicited during direct examination by the defense, the State was entitled to put Mr. Milligan on the stand and the trial court properly allowed the rebuttal testimony. Additionally, it is significant to note that the testimony of Virgil Fisher about the deposition was elicited by the defense on direct examination. (R. 1770). Thus, if it was error it was invited. Finally, the jury was repeatedly instructed that counsel were not on trial and anything that they said was not to be considered as evidence. The defendant's allegations that his counsel was demeaned in front of the jury are clearly unsubstantiated by the record.

---

[10] Virgil Fisher testified that during his deposition the State had, in effect, attempted to impede the defense's case when Investigator Mulligan forcibly ejected Mr. Haft during an argument between counsel. (T.1770, 1772). Investigator Mulligan testified that the only deposition he attended during the case was that of Hubert Charles and that because of interruptions by Mr. Haft, he was forced to ask him to stop doing so or he would take action.

V.

THE DEATH PENALTY WAS APPROPRIATELY IMPOSED IN THIS CASE.

As his final issue on appeal, the defendant asserts that the imposition of the death penalty in this case was inappropriate since the penalty was disproportionate to other cases in which the death penalty has been upheld by this Court. He further disputes the correctness of the trial court's determination that the evidence established, beyond a reasonable doubt, that the murder of Franz Patella was especially heinous, atrocious, and cruel ("HAC"), and committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification ("CCP").

The record clearly supports the trial court's finding of these two aggravating factors, as well as, the third factor, that the murder was committed during the commission of a robbery, kidnapping and burglary. (R.375-377; T.1978-1980). The trial court also properly weighed the three aggravating factors against the sole mitigating factor, found to exist,[11] i.e. that the defendant had no significant prior criminal history, to reach the

---

[11] Contrary to the defendant's claim, the trial court did not find that the defendant's age was proven to be a mitigating factor. (R.377; T.1981). The trial court was correct in reaching this decision. Garcia v. State, 492 So.2d 360, 367 (Fla. 1986), cert. denied, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986); Mills v. State, 476 So.2d 175, 179 (Fla. 1985); cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986).

conclusion that death was an appropriate penalty. The penalty was not disproportionately applied in this case.

A. THE MURDER WAS ESPECIALLY HEINOUS ATROCIOUS AND CRUEL.

The facts of this case established that the murder of Franz Patella was especially heinous, atrocious, and cruel because, as defined by Dixon v. State, 283 So.2d 1, 9 (Fla. 1973) it was accompanied by additional facts that show it was a consciousless or pitiless crime which was unnecessarily tortuous to Mr. Patella. See: Tedder v. State, 322 So.2d 908 (Fla. 1975).

> The evidence at the guilt phase and penalty phase was that on the morning of February 12, 1987, the victim Franz Patella, 64 years of age, stopped at the intersection of the N. W. 36 Street and 3rd Avenue in Miami. The Defendant forced his way into the car and struck Patella in the head. The victim was then instructed to drive to an alley located in the rear of 658 N. W. 44 Street, approximately thirteen blocks away. While being directed along his route, the defendant shot Patella. Once in the alley, the Defendant shot the Victim again in the torso, at close range, and pulled or pushed him out of the car. (R.375-376). The record supports this finding.
>
> (T.662-664, 1192-1193, 1349-1350, 1356).

Additionally, that "fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony." Parker v. State, 476 So.2d 134, 139 (Fla. 1985), quoting from

Adams v. State, 412 So.2d 850, 857 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Moreover, as recognized in Swafford v. State, supra, at 277, the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." In this case, the trial court appropriately found that the record established the following facts beyond a reasonable doubt.

> A witness who could not identify the Defendant testified that he called 911 and within minutes the police and fire rescue arrived. Lt. James Paugh, one of the fire rescue team, testified that Patella was in pain and in shock but was fully conscious and was alive when he was brought to the hospital between 25 and 50 minutes later.
>
> Officer Diane Barnes, City of Miami Police Officer, testified that she talked to the victim who tried to tell her what had happened though he was apparently in shock.
>
> Dr. Jay S. Barnhart, the medical examiner, testified that he found 7 gunshot wounds on Mr. Patella's body and at least 4 of the wounds, if not treated immediately, were mortal wounds. One bullet pierced a lung collapsing it and causing pleurisy, a painful condition, making it difficult for Patella to breathe. One bullet tore into the stomach emptying the contents into the abdominal cavity causing peritonitis and extreme pain.
>
> Because of the injuries and injuries to the liver and other organs, the victim died.
>
> The victim must have been in terrible fear before and after he was shot. He

> survived and was conscious of the pain for at least 25 minutes after he was shot. During that time he must have suffered pain and fear of impending death.
>
> This factor was proven. Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 109 S.Ct. 1578. (R.376).

Again, a review of the record does, without doubt, support this finding. (T.662-664, 1182-1184, 1190-1194, 1349-1352, 1356, 1623-1624; S.46-47). It is abundantly clear that given the facts of this case, "the victim must have felt terror and fear as these events unfolded." Swafford v. State, supra at 277, quoting, Preston v. State, 444 So.2d 939, 946 (Fla. 1984). The manner of the killing itself may occur in such a way as to show a wanton atrocity to support a finding of HAC. Swafford v. State, supra, at 277; Troedel v. State, 462 So.2d 392, 397-398 (Fla. 1984). The Swafford Court found such a factor where the defendant fired nine times into the victim's body with the majority of the shots directed into the torso and extremities. Here, the defendant shot the victim, at close range, six times causing seven separate gunshot wounds. (T.1618-1619, 1626, 1638, 1640, 1648, 1652-1653). The evidence showed that the victim was in a defensive posture at the time some of the wounds were inflicted. (T.1629). This element of HAC was also established.

This Court has held that a finding of HAC may be supported by "evidence of actions of the offender preceding the actual

killing, including forcible abduction and transportation away from sources of assistance and detection." Swafford v. State, 533 So.2d 270, 277 (Fla. 1988), cert. denied, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989); Routley v. State, 440 So.2d 1257, 1264 (Fla. 1983); Griffin v. State, 414 So.2d 1025, 1029 (Fla. 1982); Knight v. State, 338 So.2d 201 (Fla. 1986). In this case, the trial court found that the victim had been forcibly abducted and transported away from sources of possible assistance and detection.

Finally, it is also clear, given the facts of this case, that Mr. Patella's murder was unnecessarily prolonged and torturous. Squires v. State, 450 So.2d 208, 212 (Fla. 1984), cert. denied, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984). Dade County Medical Examiner, Dr. Jay Barnhart, testified at length regarding the extreme pain and suffering experienced as a result of the numerous, serious wounds sustained by the victim. (T.1628, 1633, 1638; S.26, 36-38, 42-47). It is therefore clear that all of the elements, each of which alone could substantiate a finding of HAC, were present in this case and proven beyond a reasonable doubt. Dixon v. State, supra.

B. THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

The record also fully supports the trial court's determination that the crime was committed in a cold, calculated,

and premeditated manner without any pretense of moral or legal justification. Circumstances showing the advance procurement of a weapon and the lack of resistance or provocation by the victim may support a finding of cold, calculated, and premeditated. Swafford v. State, supra at 277; Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984), cert. denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). Here, the defendant procured, in advance, a gun; this situation therefore differs from these instances in which the murder weapon is procured from the scene. (T.633; 1349). It is also clear that the victim was elderly, unarmed, and unaccompanied in an unfamiliar area. (T.1191-1192, 1481, 1487, 1618-1619). No resistance was offered by the victim after being struck forcibly, several times, on the head with the butt of a gun; the evidence showed that all of the gunshot wounds were inflicted at extremely close range to the right side of the body. (T.1618-1619, 1623-1624, 1629; S.35-36).

The position of the body during the time some of the wounds were inflicted, indicated that the victim had assumed a completely defensive posture. See e.g. Squires v. State, supra. Other factors, such as the number of shots and manner in which they were inflicted, the lapse of time between the first and subsequent shots during which the defendant had the victim drive approximately thirteen blocks, and the defendant's obvious desire to avoid leaving the victim alive to identify him provide ample evidence of both a premeditated plan and the execution-style

nature of the killing. Swafford v. State, supra; Remeta v. State, 522 So.2d 825 (Fla. 1988); Jackson v. State, 522 So.2d 802 (Fla. 1988), cert. denied, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988). It is apparent on the face of the record that this crime demonstrates that degree of heightened premeditation necessary to support a finding of CCP. In making its finding, the trial court stated that:

> As the victim was driving from N. W. 36th Street and 3rd Avenue, the Defendant had ample time to contemplate his act. He could have taken the victim's property and fled. Instead, he coldly and calculatedly drove him to a deserted spot and then executed him. (R.376).

The evidence lies in direct contravention to the defendant's assertion that this was merely a robbery 'gone bad,' this factor was proven beyond a reasonable doubt. Squires v. State, supra; Stano v. State, 460 So.2d 890 (Fla. 1984).

Additionally, the defendant claims that the above aggravating factors were not proven because they were established only through the testimony of Detective Jon Spear regarding the formal confession which was never entered into evidence. This argument ignores numerous facts. First, it is apparent that both physical evidence and the testimony of numerous witnesses, as shown above, contributed to the Court's findings. Secondly, the defendant's claim that his oral statements should not be

considered because the exculpatory formal statement was not entered into evidence is flawed. It is the function of the trial court in determining the existence of these factors to determine the weight to be accorded the defendant's statements. Here, not only do the statements support the trial court's findings, other physical and circumstantial evidence also support and corroborate the statements. Remeta v. State, supra. Nor was the exculpatory nature of the formal statement improperly kept from either the jury's or the trial court's consideration as it was testified to at length both by Detective Spear in both phases of the trial and the defendant himself during the penalty phase.

C. THE DEATH PENALTY WAS APPROPRIATELY IMPOSED.

The defendant further asserts that the sentence imposed by the trial court was disproportionate when compared to other cases in which this Court has approved the death sentence. Garcia v. State, supra at 368. The defendant bases his claim upon the fact that the trial court, in sentencing the defendant, stated that it felt that the imposition of the death penalty in this case was disproportionate. (R.378; T.1382). This assessment was apparently based upon the fact that death resulted during the commission of other felonies. This Court has not found this fact to bar imposition at the death penalty. The court's statements might deserve the consideration of this Court had it stated that

it would override the jury's recommendation and impose a life sentence. Additionally, the trial court's assessment of proportionality is, of necessity, affected by its limited exposure to other cases in which it imposes the death penalty. A trial court may more easily determine proportionality in those cases in which it imposes sentence upon multiple co-defendants. A proportionality analysis is best conducted by this Court which, contrary to a trial court, is privy to the entire record of the cases before it. Also significant is the fact that the trial court's personal antipathy to the death penalty in any case was clearly established by the record in this case. (R.378; T.1982). Thus it is equally clearly that the court's assessment of proportionality was entirely biased by that sentiment. These comments are pure dicta and deserve no weight in the eyes of this Court, particularly when considered in light of the fact that despite its statement, the trial court nevertheless imposed the death penalty.

As the foregoing argument establishes the trial court appropriately found that the murder of Franz Patella was both heinous, atrocious, and cruel and committed in a cold, calculating and premeditated manner without pretense of moral or legal justification. It properly weighed these, and an additional aggravating factor against the sole mitigating factor found and imposed the death penalty. The sentence should not be reversed simply because the defendant disagrees with the court's

assessment. See e.g. Stano v. State, 460 So.2d 890 (Fla. 1985; cert. denied, 105 S.Ct. 2347 (1985).

CONCLUSION

Based upon the foregoing argument, the Appellee, **THE STATE OF FLORIDA**, respectfully requests that this Court affirm the convictions and sentences imposed below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

Giselle D. Lylen
GISELLE D. LYLEN
Florida Bar No. 0508012
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **WILLIAM A. CAIN**, Esquire, Special Assistant Public Defender, 1390 N. E. 162nd Street, North Miami Beach, Florida 33162 on this 11th day of September, 1990.

Giselle D. Lylen
GISELLE D. LYLEN
Assistant Attorney General