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IN THE SUPREME COURT OF FLORIDA

VERNON AMOS,

Appellant,

v. CASE NO, 76,061

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts *Amos'* statement of the case and facts with the following exceptions:

1. On pages 2-3, Amos states "Howard was not certain if he heard one or two voices that evening. (R-4989-90)". This "fact" comes from a prior statement that was being used for impeachment (R 4987-90). Howard testified that he heard one voice coming from behind the counter and one from where he was (R 4988). Howard was subsequently rehabilitated with the fact that he had previously stated he heard two different voices telling him to open the cash register at the Mr. Grocer (R 4993-96).

2. On pages 11-12, *Amos* states:

> During jury selection, it became apparent that some jurors had knowledge of the facts of the case and had discussed those facts with other jurors and/or in the presence of other jurors. One juror, Ms. Stophel, stated that the jurors had been talking about the case in the jury room. (R4574). Another juror, upon being asked by the court if he remembered anything about the case, replied that he had, noting several facts of the case. This was juror Sequin. (R-4581-82). Upon learning the juror's discussion about the facts of the case, Appellant's counsel moved to strike the group of ten jurors, (R-4575).

Ms. Stophe stated that the jurors were talking about whether anybody *remembered* the case (R 4574). Counsel did not ask the trial court to make any further inquiries, and made limited inquiries himself. Mr. Sequin stated that he did not discuss the facts of the case with any of the prospective jurors (R 4581-82). Seven others stated they had no knowledge of the facts (R 4560,

4566, 4567, 4569, **4571,** 4574, 4576), and the other two were excused prior to being asked if they had any knowledge of the facts (R 4554, 4578). Counsel did not exercise any peremptory challenges to excuse the jurors.

3. On page 12, ***Amos*** states that counsel objected to an "instruction", apparently on felony murder. Appellee objects to the characterization of this statement **as** an instruction, and the record reflects that the only concern over this statement in terms of the felony murder rule was voiced by the prosecutor, and defense counsel pointed out that the judge had been referring to the penalty phase (R **4703-04).**

4. On page 13, *Amos* states:

> During the state's case, the prosecution never presented any evidence that Appellant ever participated in the crimes, or possess a weapon, or that Appellant **had** any intention of committing a robbery. The only evidence presented by the state was the Appellant's mere presence at the scene with the co-defendant, Leonard Spencer.

These are not facts, but rather *Amos'* characterization of the evidence.

5. Appellee objects to the characterization of the photographs as "gruesome" on page 13.

6. On pages 14-15, in regard to the luncheon recess that was called during ***Amos'*** testimony, ***Amos*** states:

> Appellant's counsel argued the point with the Court and expressed a **desire** to confer with his client. **(R-5557).** The Court then ruled that counsel could not speak with Appellant. **(R-5557).** The Court recess lasted for over an hour. **(R-5556, 5562).**

Defense counsel originally objected to taking a recess because it was "only 11:50" (R 5556). After the prosecutor requested the trial court to remind *Amos* not to speak to his attorney, defense counsel stated, "I believe during the break, I am, I am not talking about specifically the questions, but to talk to him about his cross examination" (R 5557). Court reconvened at 12:30 (R 5562).

7. The question referred to was asked on re-redirect, not redirect.

8. On page 19, *Amos* states that his request to discharge his counsel "was made due to the fact that a conflict had arisen between Appellant and his counsel". ***Amos*** originally moved to discharge his court appointed attorney prior to his second trial, and counsel had also moved to withdraw; a hearing was held after which the court determined there was no conflict; these findings were approved by the district court. ***Boudreau v. Carlisle,*** 549 So.2d **1073** (Fla. 4th DCA 1989).

9. On **page** 20, *Amos* states he indicated to the trial court "that. without an attorney he could not put on any evidence (R-5929-5930)." ***Amos*** actually told the trial court that since he did not have an attorney he *would not* put an any evidence (R 5929-**30).** On page 21 *Amos* states that he "could not" *go* forward with argument", but he told the court that he did not have anything to say (R 5956).

Any additional facts that refute ***Amos'*** arguments **are** included in the respective points on appeal.

SUMMARY OF ARGUMENTS

POINT 1: The Federal Constitution does not compel every trial judge to allow a defendant to consult with his lawyer while his testimony is in progress. In the instant case, the recess was short and counsel stated that he wanted to talk to *Amos* about his cross examination, so the trial court did not abuse its discretion in precluding consultation. *Amos* set forth nothing, at trial or on appeal, other than his ongoing testimony, that absolutely had to be discussed over the luncheon recess that could not have been discussed before or after the testimony.

POINT 2: Claims pertaining to questions that were asked on cross examination were waived by failure to object below or to object on the grounds now asserted on appeal. Error cannot be demonstrated regarding the prosecutor's statement during closing argument as no canstitutional protections were in effect since *Amos* was not in custody or under arrest. Even if error occurred it was harmless at worst as the verdict could not have been affected.

POINT 3: The trial court did not abuse its discretion in excusing three prospective jurors for cause. The record as a whole supports the trial court's findings, and demonstrates that no venireperson was eliminated who indicated in any way he or she could follow the law.

POINT 4: Failure to develop a record as to this claim or to put the trial court on notice of any further objections to any of the prospective jurors should constitute a waiver of this issue. In any event, it is clear from the limited questions that were asked

that the jurors did not discuss the specific facts of the case, so there was no abuse of discretion in the way the trial court handled the matter. Reversal is not warranted as *Amos* has failed to demonstrate that he had to accept an objectionable juror.

POINT 5: The argument on appeal was never presented to the trial court, and in fact it appears that defense counsel agreed with the trial court's statement, so the claim is not cognizable. The claim is also without merit as the trial court was not stating the law on felony murder, but was explaining to the jury that if the case reached a penalty phase, they would be able to consider the extent of the defendant's involvement in recommending a sentence.

POINT 6: The question at issue was beyond the scope of recross examination so the state's objection to it being asked on re-redirect was properly sustained and *Amos* has failed to demonstrate an abuse of discretion. Error, if any is harmless at worst.

POINT 7: The trial court did not abuse its discretion in refusing to conduct a competency hearing regarding witness Edward Cain. *Amos* is confusing competency with credibility. Every person is competent to be a witness unless otherwise provided by statute, and competency is fixed when the person is offered as a witness, not when the facts testified to occurred.

POINT 8: Joseph Batchelor was available to both parties so the trial court did not abuse its discretion in limiting comment on the state's failure to call him as a witness. Error, if any, is harmless.

POINT 9 The photographs were relevant as they were used by the medical examiner, who was qualified as an expert in gunshot wounds, to explain the nature of the injuries, the causes of the **deaths,** and formed the basis of his opinion as to who was the trigger man. Both victims died of a single gunshot wound, so the photos were not so shocking as to outweigh their relevance.

POINT 10: The trial court correctly declined to instruct the jury on presence. The standard instructions adequately informed the jury of the applicable law and would not permit a finding of guilt predicated on mere presence,

POINT 11: *Amos'* failure to request a specific instruction, either orally or in writing, constitutes a waiver of this issue. Even if the claim is preserved error has not been demonstrated as the instruction does not accurately state the law and was properly refused.

POINT 12: The trial court correctly denied the motions for judgment of acquittal. The direct evidence presented by the state was sufficient for the jury to determine that *Amos* intended t.o commit these crimes and was an active participant in the commission of them; the circumstantial evidence was sufficient for the jury to determine that *Amos* fired **the** shot that killed Robert Bragman.

POINT 13: The trial court correctly denied *Amos'* motion to disqualify him as the motion was untimely and insufficient. The motion was not based on anything that occurred during trial so there was no reason for it not to be filed ten days before the trial began. The motion and affidavits merely stated conclusions, with no factual support, so both were insufficient.

POINT 14: Florida's death penalty statute is constitutional. Most of these claims were not presented below so are not cognizable on appeal. All are without merit.

POINT 15: The trial court's findings as to aggravating factors are fully supported by the record. The facts clearly demonstrate Robert Bragman was murdered so *Amos* could avoid arrest. The trial court's findings demonstrate there was no improper doubling, but even if the court had weighed both factors it would have been proper. This murder was nothing less than an execution, committed without any pretense of moral or legal justification. Even if this court determines the trial court erred in the finding of any aggravating factor, any error is harmless.

POINT 16: The death sentence is proportional to *Amos'* culpability. Evidence of his participation in all of the events of this crime spree is relevant to that determination, and demonstrates that death is the appropriate penalty.

POINT 17: The jury recommended a life sentence for the McAninch murder, and pursuant to Florida law the trial court was required to give it great weight, Thus, the death sentence for the Bragman murder is not disproportionate because ***Amos*** received a life sentence for the McAninch murder.

POINT 18: There was no request for these instructions nor any objection to the instructions as given so the claim has been waived. In any event it is without merit as the jury was instructed on the underlying felonies during the guilt phase and convicted *Amos* of those crimes.

POINT 19: *Amos* was not denied the effective assistance of counsel at the penalty phase. The trial court had rendered extensive findings that counsel was not ineffective and there was no conflict, and these findings were approved by the district court. *Amos* never set forth any additional grounds to support the substitution of court appointed counsel.

ARGUMENT

POINT 1

AMOS WAS NOT DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF THE TRIAL COURT'S BANNING CONSULTATION BETWEEN HIM AND HIS ATTORNEY DURING A LUNCHEON RECESS CALLED AFTER HIS DIRECT TESTIMONY WAS COMPLETED AND BEFORE HIS CROSS EXAMINATION BEGAN.

Amos contends that he was denied the effective assistance of counsel when the trial court precluded him from consulting his attorney during a one hour[1] recess which occurred prior to the state's cross examination of him. After ***Amos*** finished his direct testimony, the prosecutor requested a luncheon recess, in anticipation of a lengthy cross examination (R 5555-56). Defense counsel objected because it was "only 11:50" (R 5556). The prosecutor requested the trial court to remind ***Amos*** not to speak to his attorney since he was on the stand (R 5556). Defense counsel stated:

> MR. BOUDREAU: I believe during the break I am, I am not talking about

[1] It is apparent from the record that the recess was only about forty minutes long. When the recess was requested, defense counsel noted it was 11:50, and the record demonstrates that court reconvened at 12:30 (R 5556, 5562).

specifically the questions, but to talk to him about his cross examination.

(R 5557). Defense counsel offered no other reasons for consulting with *Amos*, **Amos made** no request to consult with counsel, the cross examination proceeded after the recess with no further objections, **and** upon completion **of *Amos'*** testimony the defense rested. Appellee contends that under the current state of the law, no abuse of discretion has **been** demonstrated and reversal is not warranted.

In *Boua v. State*, 392 So.2d *950* (Fla. 4th **DCA** 1981) *(Boua I)*, the district court **held** that a trial court has discretion to order a defendant, who is in the midst of cross examination, to refrain from talking with his attorney about his testimony, and the **defendant's** Sixth amendment right to counsel was not violated by such action. This court rejected that holding and **found** that no matter how brief the recess, a defendant in a criminal proceeding must have access to his attorney, but **agreed** with the district court that any error was harmless beyond a reasonable doubt. *Boua v. State*, **410 So.2d 1343 (Fla.** 1982) *(Boua II)*. In *Thompson v. State*, 507 So.2d 1074 (Fla. 1987), this court reaffirmed its holdings in *Boua II* as to a defendant's right **to** consult with his attorney during a recess **and** the appropriate harmless error analysis to be applied when it is determined there has been a violation of that right.

Two Justices concurred only in the result of *Thompson*, and stated their beliefs that *Boua II* should be revisited. Justice Ehrlich **noted** that cross examination is critical to the truth

seeking process, that a defendant who makes the decision to take the stand should not be permitted to consult with his attorney at this critical juncture, and but for *Boua II* he would hold that the trial judge was correct in denying defense counsel's request to consult with his client during a brief recess while he was on the witness stand. *Thompson* at 1076 (Ehslich, J., concurring in result only). Justice Shaw stated that he would take the opportunity to clarify and correct *Boua II*, for in his view the *Boua I* court reached the right result and correctly grounded its decision on the absence of a right to consultation during cross examination and the short duration of the restriction. *Thompson* at 1076 (Shaw, J., specially concurring in result only). The facts of this case again present this court with the opportunity to clarify and correct *Boua II*, and this court should take that opportunity because since the last time this court addressed this issue, the United States Supreme Court has held that when a defendant becomes a witness, he has no constitutional right to advice during a short recess where it can be presumed that nothing but the testimony will be discussed. *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989).

The *Perry* Court began its analysis by noting, as Justice Shaw had, that the *Geders*[2] Court had specifically reserved ruling on the question of whether a defendant has a constitutional right to consult with his attorney during a short break during his testimony. The court noted that the line between the facts of

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[2] Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976).

Geders and the case before it was a thin one, but it was **a** line of constitutional dimension. The Court found, as the *Bova I* court, Justice Ehrlich, and Justice Shaw had, that the distinction rested an the fact that when a defendant becomes a witness in his own behalf, he has no constitutional right to consult with his lawyer while he is testifying. The Court also noted how crucial uncounseled cross examination is to the discovery of the truth, and determined that the trial judge must have the power to maintain the *status quo* during a brief recess where there is a virtual certainty that any conversation between the witness and the lawyer would relate to ongoing testimony. **The** Court concluded by holding that the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress where the judge has **decided** there is a good reason to interrupt the trial for a few minutes.

The ***Perry*** reasoning and holding are applicable to the facts of the instant case. ***Amos*** was in the process of testifying, and the luncheon recess was less than forty minutes long. Counsel specifically stated that he would talk to *Amos* about his cross examination, so what was a presumption in ***Perry***, i.e., during **a** short recess only testimony will be discussed, is an actual fact in this case. The trial court had extensive experience with *Amos* and counsel in this case, having presided over two of the previous trials, where *Amos* proceeded ***pro** se* in the first and half of the second. The fact that there had been three previous trials, and no significant developments over the four year period

since these crimes were committed, along with the fact that the defense rested immediately after *Amos* finished testifying, with no further requests for consultation, certainly indicates that there was nothing to discuss over the luncheon recess *but* **Amos'** ongoing testimony, It is also significant that defense counsel objected to taking a lunch recess at that point, as this further indicates that there was no need or desire for consultation on any other matters. Under these circumstances, the trial court did not abuse its discretion in determining that cross examination would be more likely to elicit truthful responses if it went forward without allowing *Amos* an opportunity to consult with his attorney. ***Perry,*** 109 S.Ct. at 601.

A virtually identical situation was presented in ***People v. Enrique,*** **566 N.Y.S.2d 201 (A.D.** 1 Dept. 1991). There, a luncheon recess was declared during the defendant's cross examination. After the jurors left, defense counsel asked if he could **speak** to the defendant. The trial court replied that it was within his discretion to prohibit consultation, but told counsel that if he wished to tell the court what he wanted to say, or how long he would like to say it, the court might entertain it. Defense counsel replied that he would rather not reveal that information, and the trial court prohibited consultation. After the recess, the court asked if there were any further comments on its ruling, and defense counsel stated he still did not want to get into what he wanted to discuss with his client, but one topic was a procedural item on how to conduct himself as a witness, and another was a substantive matter involving something the

defendant had not testified to earlier but nothing he anticipated would be raised in the future. The trial court stated he did not believe it was appropriate for counsel to discuss with his client anything with regard to the anticipated line of questioning, and cross examination continued.

On direct appeal, the defendant argued that he was deprived of effective assistance of counsel as a result of the court's injunction to counsel not to speak to him during the luncheon recess called during the midst of cross examination. The court observed that the ***Perry*** decision was based on a principle of basic fairness, i.e., once **a** defendant exercises his right to testify, he should generally be subject to the same truth seeking rules as are applied to other witnesses. The court found it significant that the trial court had imposed the ban only because he found it would be inappropriate for counsel to discuss the defendant's pending cross examination, and counsel's response amply demonstrated that those concerns were justified. The court thus determined that the ruling had a firmer basis than the mere presumption that counsel wauld discuss the testimony, which the ***Perry*** Court had found to be sufficient. The court held that the luncheon recess was the type of limited interruption during a defendant's testimony to which ***Perry,*** and not ***Geders*** applied. Likewise, in the instant case, where the recess was short and counsel stated that he wanted to talk to *Amos* about his cross examination, the trial court's directive was not an abuse of **discretion.** ***See*** *also, Narayan v. Scully,* 741 F. Supp. 377 (E.D.N.Y. **1990).**

Amos also baldly asserts that he was denied "his right guaranteed under the Florida Constitution" (IB 23), but argues nothing in support of this and appellee contends that any such claim is not cognizable. Appellee would also note that the line of Florida cases addressing this issue has **been** based on the Federal Constitution, and specifically the *Geders* interpretation of it. Since *Amos* fails to offer any convincing reason for establishing a state constitutional rule different from the federal one, and precedent demonstrates that the Florida courts have never drawn such a distinction, no independent state rule should be established. ***See, Enrique,*** *supra,* where the court found no reason to reject the federal constitutional standard set forth in ***Perry.***

Appellee would like to make clear that it is not seeking **a** ban on consultation in these situations, but simply a holding, as the ***Perry*** and ***Enrique*** courts found, that it is within the trial court's discretion to determine if such consultation is necessary **during** a defendant's ongoing testimony. While several courts have expressed concern as to drawing a line for a specific time limit, this should not be the primary concern where the recess is less than overnight, and should be but one factor that is taken into consideration in judging each case on its own facts. Indeed, in **a** rare case where there has been a sudden, unexpected development, it could be an abuse of discretion for a trial court to preclude consultation over a fifteen minute recess; in another case, where there is nathing to discuss but the ongoing testimony, it would not be an abuse of discretion to preclude

consultation over a two hour recess. As with virtually every other trial court ruling, it should be up to the parties to make an appropriate record and to have the burden of demonstrating error.

Further, a holding that such a ruling is within the trial court's discretion would not work any hardship on any of the parties or courts. A defendant's rights are adequately protected, since if consultation on some other matter is necessary, this can be explained to the trial court, and the trial court may permit consultation but forbid discussion of ongoing testimony. *See, Perry,* at 602 n. 8. The attorney-client privilege should not be implicated by such revelation, since counsel would not be required to reveal the substance of the communication, but simply the topic. *See, Enrique, supra.* The state's rights are protected since a defendant will not be permitted to discuss ongoing testimony with counsel. Most significantly, the truth seeking process will be enhanced, so justice will best be served by such a holding. Finally, this issue does not arise with any great regularity or frequency, so appellate courts will not be burdened by conducting a case by case analysis when such situations do arise.

Even if this court still adheres to its holdings in *Bova II* and *Thompson,* reversal would not be warranted since this court has held that a harmless error analysis can be applied. Counsel specifically stated that he wanted to discuss *Amos'* cross examination with him, and as has been demonstrated, *Amos* has no right to such. *Amos* was not precluded from consulting with

counsel at any other time, and he has set forth nothing, at trial or on appeal, other than his ongoing testimony, that absolutely had to be discussed over the luncheon recess that could not have been discussed before or after the testimony. As noted, counsel originally objected to a recess being taken at that point, which indicates there was no need for consultation. Indeed, if events had proceeded as counsel originally wanted, there would not even be a claim of error, and simply because the trial court called a luncheon recess *Amos* should not now be permitted to allege reversible error. Further, the defense rested as soon as *Amos* completed his testimony, so again it is apparent that there was no need to discuss strategy or witnesses. It is just as apparent that there were no sudden developments in this case, as it had proceeded pretty much the same over the course of four years and four trials. *Amos* had testified in at least one previous trial, had represented himself in the second one and half of the third, so he certainly demonstrated his capability of functioning without constant guidance and support of counsel. Reversible error has not been demonstrated.

POINT 2

THE PROSECUTOR DID NOT COMMENT UPON AMOS' RIGHT TO REMAIN SILENT.

Amos claims that the trial court violated his constitutional right to silence by allowing the prosecutor to comment upon his failure to offer exculpatory statements prior to trial. *Amos'* claim involves three comments; two questions that were asked during his cross examination and one comment made

during closing argument. The record demonstrates that there was no objection when the prosecutor 'asked **Amos** why he did not tell Detective Fitzgerald in a previous statement that the gun had misfired (R 5625), so the claim has been waived. *Clark v. State,* **363 So.2d** 331 (Fla. **1978).** While there was an objection when the prosecutor asked **Amos** about never previously mentioning the fact that he knew how to open the register, the basis of the objection was improper impeachment (R 5594), and not the grounds now asserted, so that claim is waived as well. *Bertolotti v. Dugger,* 514 So.2d 1095 (Fla. 1987).[3]

As to the prosecutor's statement in closing argument, error cannot be demonstrated as no constitutional protections were in effect at the time of Amos' silence. **Amos** was not under arrest, he was not in custody, and in fact was fleeing at the time. The use of prearrest silence to impeach a defendant's credibility does not violate the Constitution. *Jenkins v. Anderson,* 447 U.S. 231, 100 S.Ct. 65 **L.Ed.2d** 86 **(1980).** The Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence. *Id.*[4] *Amos* took the stand and

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Even if these claims have been preserved, relief would not **be** warranted. *Amos* took the stand and testified that he gave a complete statement the morning he was arrested (R 5549). Thus, the questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement. Anderson **v.** Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980); Ivey v. State, 16 F.L.W. 2479 (Fla. 1st **DCA** September 18, 1991). Further, *Amos* was given ample opportunity to explain that not all statements were recorded and that he could have told someone those things (R 5595, 5625, 5631).

While the Jenkins Court noted that jurisdictions are free to formulate evidentiary rules defining situations in which silence is is viewed as more probative than prejudicial, **Amos** has couched his claim solely in constitutional terms.

testified that he was fleeing from Spencer and not the police, and the prosecutor's comment rebutted this testimony and was relevant to Amos' credibility and thus not violative of the Fifth Amendment.

A very similar situation was presented to the federal court in United *States v. Butler,* 924 F.2d 1124 (D.C. Cir. 1991). There, the defendant was wanted on an outstanding warrant, and accompanied a police officer to a store where the officer made a phone call to confirm the outstanding warrant. After confirming the warrant, the officer arrested the defendant, searched him and discovered cocaine on his person. The defendant's defense was that he was taking the drugs to the police station to get even with a certain drug dealer. The prosecutor questioned him as to why he did not tell that to the original officer at the store, and also pointed this fact out in closing argument, The court did not even have to reach the issue because the defendant conceded on appeal, on the basis of *Jenkins,* that questions and comments regarding his silence before arrest were proper. ***See also,*** United *States v. Rivera,* 926 So.2d 1564 (11th Cir. 1991).

Even if this court determines that the comment was erroneous, any error was harmless at worst as the verdict could not have been affected. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986). In terms of admissible testimony, Amos testified that he was driving the car, Spencer was gone before he stopped the car, and he saw the police car come behind him (R 5545-46). Amos further testified that he ran in the opposite direction from Spencer, he did not run up to the police because Spencer had

guns, and that he was running from Spencer and not the police (R 5547-48). Amos was very tired from running because he has a history of asthma, so he passed out (R 5548). Thus, the prosecutor could properly have argued that even though Amos knew that Spencer had run in the other direction and knew a police officer was right there, he still ran from him. The fact that the prosecutor put this in inverse terms, i.e., Amos did not run to the police and ask how the victims were, did not change any of the evidence nor did it create any additional or improper inferences for the jury to rely upon in reaching its verdict. Further, it is apparent from the jury's recommendation of death only for the Bragman murder that it was convinced Amos was the trigger man, so there was never any question in the jury's mind that Amos was "merely present". Reversal is not warranted.

POINT 3

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCUSING THREE PROSPECTIVE JURORS FOR CAUSE.

Amos contends that the trial court erroneously excluded for cause three prospective jurors based solely upon their views on the death penalty. As this court has stated, "[t]here is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause." *Cook v. State,* 542 So.2d 964, 969 (Fla. 1989). The party seeking exclusion must demonstrate, through questioning, that a potential juror lacks impartiality; then the trial judge must determine whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with the

instructions and his oath. *Trotter u. State,* **576** So.2d **691,** 694 (Fla. 1990). This standard **does** not require that a juror's bias be proved with "unmistakable clarity". *Wainwright u. Witt,* **469 U.S.** 412, 105 S.Ct. 844, **83** L.Ed.2d 841 (1985); *Sanchez-Velasco v. State, 570* So.2d 908 (Fla. 1990). The question. on appeal is whether the trial court's findings are fairly supported by the record. *Trotter, supra.* **A** review of the record in the instant case demonstrates that the trial court's findings are supported.

Mr. Emmer

Amos notes that Mr. Emmer "indicated his uncertainty about the death penalty" (IB 32), and the record demonstrates that he indicated uncertainty on virtually every topic he was questioned about. Mr. Emmer first stated that he needed more time to think about his feelings on the death penalty, because "one day I might feel for it; the next day I might feel against it" (R 4740). Mr. Emmer indicated that maybe he would think about it if he was given until the next day, but he did not know (R 4740). He stated that he knew "a little bit" about the case from the media, but "just not too much", and that he could not decide the case based on the evidence presented in the courtroom (R 4741-42). Upon further questioning as to what he knew about the case, Mr. Emmer stated that he did not know (R 4742).

The entire Emmer colloquy demonstrates that he equivocated a number of times in responding to questions concerning the case and his views on the death penalty, and it is clear that the trial judge did not abuse his discretion in removing Emmer for cause. *Trotter, supra.* The trial court had the opportunity to

evaluate the demeanor of the prospective juror,[5] and along with Emmer's equivocal answers, it cannot be said that the record evinces a clear ability to set aside his own beliefs in deference to the law. *Randolph v. State*, 562 So.2d 331 (Fla. 1990). An abuse of discretion has not been demonstrated.

Mr. Vers

Mr. Vers stated three times that he did not think he could recommend the death penalty (R 4589-90). Upon further questioning, he stated he did not know if he could follow the law, and "if it really was an outrageous crime, I guess I could. Right now my feeling is that I can't" (R 4590). Mr. Vers' frank admission that he felt he could not follow the law if it resulted in the recommendation of a death sentence was sufficient for the trial court to determine that his ability to perform as a juror in conformance with the instructions would be substantially impaired. ***Trotter***, *supra; Witt, supra.* No abuse of discretion has been demonstrated.

Mr. Fitzsimmons

Mr. Fitzsimmons first stated that he was opposed to death penalty, but then stated that while he was generally opposed he could see himself choosing it under some circumstances (R 4597-98). After the trial court explained the process of weighing aggravating and mitigating circumstances and asked Mr. Fitzsimmons if he could follow the law under those circumstances and vote for death, he replied that he was not sure he could (R

As the trial court stated, "And besides the guy is as goofy as they come...I looked at that man and my impression is that he is a little goofy" (R 4745).

4598-99). As with Mr. Vers, these answers do not evince a "clear ability to set aside [the juror's']own beliefs 'in deference to the rule of law'". *Randolph, supra,* at *337* (citations omitted). While Mr. Fitzsimmons eventually stated that it was possible he could recommend the death penalty **under** certain circumstances listed by defense **counsel,**[6] this still does not indicate a clear ability to follow the law, nor does it eliminate the necessity to consider the record as a whole. ***Trotter,*** *supra.*

In sum, the record as **a** whole supports the trial court's findings, and no abuse of discretion has been demonstrated. No venireperson **was** eliminated who indicated in any way that he or she could follow the law. *Sanchez-Velasco, supra.* Reversal is not warranted.

POINT 4

THE INSTANT CLAIM IS NOT COGNIZABLE ON APPEAL AND EVEN IF IT IS NEITHER ERROR NOR PREJUDICE HAS BEEN DEMONSTRATED.

Amos contends that the trial court erred in denying his motion to strike a panel of ten prospective jurors where some jurors had knowledge of the facts of the case and discussed those facts with other jurors and/or in the presence of other jurors. Appellee first submits that the instant claim has not been properly preserved for appellate review. The basis of the motion was one prospective juror's statement that the jurors were talking about whether anybody *remembered* the case (R 4574). There was no indication that the jurors had discussed the *facts* of the

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[6] "...the most grevious (sic) capital crime that there are (sic) ever to be..." (R 4600).

case. **After** the initial motion was made, defense counsel did not ask the court to make any further inquiries **as** to what was said, and although he had the opportunity **made** very limited inquiry himself,[7] and even after making these inquiries did not challenge any of the jurors for cause nor were any peremptory challenges used as a result of this,

At best, there was potential for a problem, but counsel's failure to develop a record in this area or to put the trial court on notice of any further objections to any of the individual jurors should constitute a waiver. Further, just as when a trial court erroneously denies a challenge for cause, and the defendant must exhaust all of his peremptories and be denied additional ones to preserve the issue for appeal, ***see, Floyd v. State,*** 569 So.2d 1225 (Fla. 1990), *so* too should a defendant in a situation such as this, where there is a limited number of jurors involved, be required to make further inquiry and if cause cannot be established then his peremptories must be exhausted in an attempt to overcome alleged trial court error.

Even if the issue is preserved, it is clear from the limited questions that were asked that the jurors did not discuss the specific facts of this case, so there was no abuse of discretion in the way the trial court handled the matter. ***See, e.g., Occhicone v. State,*** 570 So.2d 902 (Fla. 1990). The record demonstrates that only one of the prospective jurors, Mr. Sequin, had any knowledge of the facts, and he specifically stated that

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[7] Appellee would also point out that this occurred during individual *voir **dire***, so there was not even the potential for "poisoning the venire".

he did not discuss them with any of the other jurors (R 4581-82). Seven other jurors stated that. they had no knowledge of the facts of the case, which further indicates that none of the facts were discussed (R 4560, 4566, 4567, 4569, 4571, 4574, 4576).[8] Since there was no discussion of the facts of the case, there was no basis to grant the motion.

Finally, even if the claim has been preserved and it could somehow be said that the trial court erred, reversal is not warranted as *Amos* has failed to allege or demonstrate prejudice, i.e., that he had to accept an objectionable juror. *See, e.g., Penn v. State,* 574 So.2d 1079 (Fla. 1991), and cases cited therein at 1081. *Amos* did not exercise any peremptory challenges to exclude any prospective jurors on this basis, nor did he voice any abjection to the seating of the one juror from this group who eventually served on the panel (Mr. Vicchiullo). *See, Hitchcock v. State,* 578 So.2d 685 (Fla. 1990) (defendant did not point to any remaining juror on the panel that he wished to challenge). Reversal is not warranted.

POINT 5

THERE WAS NO OBJECTION TO THE TRIAL COURT'S STATEMENT AND IT WAS NOT ERRONEOUS.

Amos contends that the trial court erred when it misstated the law on felony murder during jury selection. While *Amos* states that his attorney voiced his objections (IB 12), the record reflects that the only concern over this statement in

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[8] The other two were excused for cause prior to being asked if they had any knowledge of the facts of the case.

terms of the felony murder rule was voiced by the prosecutor, and defense counsel pointed out that the judge had been referring to the penalty phase (R **4703-04**). Since the argument on appeal was never presented to the trial court, and in fact it appears from the record that defense counsel agreed with the trial court's statement, the claim is not cognizable. *Bertolotti, supra.*

In any event, the claim is without merit. The trial court was not stating the law on felony murder. Rather, as defense counsel below recognized, and as is readily apparent from the statement, the trial court was explaining to the jury that if the case reached a penalty phase, they would be able to consider the extent of the defendant's involvement in recommending a sentence. After the prosecutor requested clarification, the trial court emphasized that he was only referring to the penalty phase, and his comments did not go to the issue of guilt. As the colloquy prior to the trial court's statement demonstrates, this is the area the jurors were concerned about (R **4687-94**). Error has not been demonstrated.

POINT 6

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTION TO A QUESTION THAT WAS BEYOND THE SCOPE OF RECROSS EXAMINATION.

Amos contends that the trial court erred by limiting his redirect examination, *Amos* states that the prosecutor was permitted to ask him on recross if he had a complete opportunity to make a statement on tape and if there was anything he wanted to add to the statement, and that this was asked in attempt to

demonstrate that he had made statements during direct examination that were not made during the statement. *Amos* thus contends that he should have been permitted to testify, on redirect, the number of hours he spoke with detectives that were not on tape. Appellee disagrees with *Amos'* characterization of the facts, and when put in proper context it is clear that the trial court did not abuse its discretion in limiting this testimony,

The prosecutor was indeed permitted to ask the question as *Amos* states; however, it was not in response to testimony elicited on direct examination. The question was posed on *recross*, and was to clarify the following exchange, which occurred on ***redirect:***

> **BY MR. BOUDREAU:**
>
> Q When you went to the police station, the Sheriff's Office, where did they put you at first?
>
> A First they put me in a holding cell.
>
> Q How long did they put you in the holding cell for?
>
> A It wasn't long.
>
> Q Then what did they do with you?
>
> A Then they came and got me and put me in a room.
>
> Q What happened in the room?
>
> A First there were two detectives. I don't remember this other detectives name. Robert Fishdale (Sic) and another detective was there, They were talking to me.
>
> Q Was that statement being taped?

A No.

Q How long did you talk to them for?

A For a while.

Q Then what happened?

A We talked from early that morning, whenever it was, when they brought me in, until 5:00 in the morning, Only a short part of it was taped.

Q When was it that the taped statement was taken?

A I think it was after Squirrel came in.

Q Sergeant Dowdell?

A Yes.

Q Was that later in the morning?

A Yes.

Q In other words, everything that you said that morning was not recorded, was it?

A No.

(R 5630-31). On recross, the prosecutor asked:

Q On the taped statement at the end, do you recall Detective Dowdell and Detective Fitzgerald giving you an opportunity to say, so you had a complete statement on the tape, if there was anything else you wanted to add to the statement?

They gave you a complete opportunity to do that; is that right? They even gave you time to think about it, a couple of minutes? Do you recall that?

A I suppose so.

(R 5639).

A party may re-examine a witness **about** any matter brought up on cross, and a trial court has broad discretion in determining the proper scope of examination of a witness. *Johnston v. State,* 497 So.2d *863* (Fla. 1986). Generally, testimony is admissible on **redirect** which tends to qualify, explain, or limit cross examination testimony. *Tompkins v. State, 502* So.2d 415 (Fla. 1986). The foregoing exchange demonstrates that the prosecutor's question on *recross* was not asked to prove that **there** were statements made on direct that were not **made** in the statement; the prosecutor had already done that on *cross* (and actually **such** questions would have been beyond the scope of redirect). Since the prosecutor had shown that on *cross,* defense counsel attempted, on *redirect,* to rehabilitate ***Amos*** by demonstrating that he had given a number of statements that were not on tape. To qualify *Amos' redirect* testimony that he made a lot of statements that were not taped, the prosecutor pointed out, on *recross,* that ***Amos*** had been given the opportunity, during the taped statement, to add anything he wanted to, i.e., anything he had said before that had not been taped. Thus, while the question at issue may have been properly asked on *redirect,* it was improper on *re-redirect* since it was beyond the scope of *recross* **as** it did not qualify, explain, or limit any testimony that was elicited. ***See,*** *Tompkins, supra.* The state's objection to it being **asked** on re-redirect was properly sustained, and *Amos* had failed to demonstrate an abuse *of* discretion. *Johnston, supra.*

Even if this court determines that the trial court erred in sustaining the objection, any error is harmless at worst as the

verdict could not have been affected. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986). When a court errs in disallowing certain evidence or questions but substantially the same matters sought to be elicited are brought before the jury through other testimony, the error is harmless. *Palmes v. State,* 397 So.2d 648 (Fla. 1981). In addition to the above quoted testimony, where Amos stated three times that he made statements that were not on tape, he also volunteered this information several times during cross examination (R 5595, 5625). Reversal is not warranted,

POINT 7

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT CONDUCTING AN INQUIRY INTO THE COMPETENCY OF A STATE WITNESS,

Amos contends that the trial court erred in failing to conduct an inquiry into the competence of state witness Edward Cain, on the basis of Cain's prior statements where he stated that he had experienced hallucinations.[9] Amos is confusing competency with credibility. Pursuant to section 90.601, Florida Statutes (1989), every person is competent to be a witness unless otherwise provided by statute. Section 90.603, Florida Statutes (1989), states that a person is disqualified from testifying when he is incapable of expressing himself or incapable of understanding his duty to tell the truth. *See, Zabrani v. Riveron,* 495 So.2d 1195 (Fla. 3d DCA 1986). A witness' competency is fixed when he or she is offered as a witness, not when the facts testified to occurred. *Rivet v. State,* 556 So.2d 521 (Fla. 5th DCA

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[9] While it is not entirely clear from counsel's argument, it appears that these statements were taken from Cain's 1986 depositions (R 244-73, 755-908).

1990); *United States v. Martino,* 648 F.2d 367 (5th Cir. 1981). There were no allegations that Cain did not understand the importance of his oath OK that he would not be able to express himself in an understandable manner.

A review of Cain's testimony demonstrates that he was responsive to questions and answered coherently. *See, Rivet, supra* (it is appropriate for an appellate court to review the witness' full testimony at trial to bolster the trial court's finding or to support the argument that it was wrong), In this respect, appellee would point out that there was no objection or further argument on **this** issue after Cain began to testify, which further indicates that he understood what he was there for and was able to express himself. The fact that Cain had at one time experienced hallucinations, and may even have done so at the time of the events he was testifying to is related solely to his credibility, and was thus **a** jury determination. Thus, the trial court did not abuse its discretion in refusing to conduct a competency hearing.

The cases cited by *Amos* are readily distinguishable. This is not a case where the witness had previously been declared incompetent to stand trial, *see, Sinclair v. Wuinwright,* 814 **F.2d** 1516 (11th Cir. 1987), or where the defendant's cross examination on the witness' drug use and ability to recall was restricted. *See, Cruz v. State,* 437 So.2d 692 (Fla. 1st **DCA** 1983); *Murrell v. State.* **335** So.2d 836 (**Fla.** 1st DCA 1976). In fact, the record demonstrates that counsel was given wide latitude and extensively cross examined Cain in this area (R 5684-97), and counsel argued Cain's

lack of credibility in closing (R 5802-05). *See, United States v. Khoury*, 901 F.2d 948 (11th Cir. 1990). Likewise, the jury was instructed, as defense counsel noted that it would be, that it could rely on its own conclusions as to whether to believe or disbelieve the witness (R 5870-71). *See, Martino, supra,*

The other case cited by Amos, *Hightower v. State,* 431 So.2d 289 (Fla. 1st DCA 1983, actually supports denial of relief, as the court found that the bare assertion of psychiatric treatment did not call the witness' capacity into question. The trial court had the opportunity to observe Cain's demeanor and his testimony in light of the other evidence, and Amos has failed to demonstrate that the court abused its discretion. *See,* United *States v. Killian,* 524 F.2d 1268 (5th Cir. 1975) (trial court did not abuse its discretion in allowing testimony of witness who was heavy user of drugs and suffered hallucinations from time to time where the witness testified that he had not been under the influence of drugs for several days).

POINT 8

THE TRIAL COURT WAS CORRECT IN NOT PERMITTING DEFENSE COUNSEL TO COMMENT ON THE STATE'S FAILURE TO CALL A WITNESS.

Amos contends that the trial court erred in not permitting defense counsel to comment, during his closing argument, upon the state's failure to call Joseph Batchelor as a witness. The general rule is that when witnesses are equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness. *State v. Michaels,* 454 So.2d 560 (Fla. 1984); *Haliburton v. State,* 561 So.2d 248 (Fla.

1990); *Martinez v. State,* 478 So.2d 871 (Fla. 3d DCA 1985). The witness was available to both parties so the trial court did not err in limiting such comment.

Amos attempts to distinguish his situation from those cases due to the fact that he called the witness, but does not explain why this distinction makes a difference. The reason such comments are made is to create the adverse inference that the witness was not called because it would not help or would hurt the noncalling party's case. At best, the only difference calling the witness makes is to remove that inference. It becomes a matter for the jury to determine each witnesses' ability to observe and recall, their credibility and the weight to be given their testimony. The facts are there, and counsel is free to argue any discrepancy in them. Since there is no inference to be drawn, the comment was irrelevant, and likewise objectionable. The purpose of closing argument is to help the jury understand the issues by applying the evidence to the law, and this purpose is disserved when comment upon irrelevant matters is permitted. *Haliburton, **supra*** at 250.

On the basis af this reasoning, even if the trial court erred it does not require reversal as *Amos* has neither alleged nor demonstrated how he was prejudiced by the trial court's action and the verdict certainly could not have been affected. The trial court simply explained to the jury that it could not draw any inference from the fact that the state had not called the witness; since the defense called the witness, there was no inference for the jury to not draw as they heard what he had to

say. Further, the witness added nothing startling to the case, as he did not even see the shooting.[10] Reversible error has not been demonstrated.

POINT 9

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PHOTOGRAPHS OF THE VICTIMS,

Amos contends that the trial court erred in permitting the state to offer into evidence several allegedly gruesome slides and photographs of the victims. There were fifteen photographs; seven of victim McAninch (Exhibits 71, 79, 82, 83, 85, 86, 87) and eight of victim Bragman (Exhibits 72, 73, 76, 77, 78, 80, 81, 84). Slides were published during the medical examiner's testimony and the photographs were admitted into evidence (R 5401-02).

The test of admissibility of photographs is relevancy rather than necessity. *Nixon v. State,* 572 So.2d 1336 (Fla. 1990); *Haliburton v. State,* 561 So.2d 248 (Fla. 1990). The photographs were relevant as they were used by the medical examiner, who was qualified as an expert in gunshot wounds, to explain the nature of the victims' injuries, the cause of their deaths, and also formed the basis of his opinion as to who shot each victim (R 5402-04, 5411-17, 5431). As to McAninch, one picture shows him at the scene; one shows the bruising on the side of his face and forehead; one is a picture of his back and shows the location of the exit wound; one shows the washed entrance wound and the

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[10] Any error was clearly harmless as to the McAninch murder as the testimony did not even relate to that.

bruising associated with an entrance wound; one shows the exit wound close up and the accompanying signs that it is an exit wound; and the other shows the unwashed entrance wound.[11] As to Bragman, one is a close up of the bullet hole which shows how prominent the stippling is; one shows the washed wound on the face with the soot gone so the stippling can be seen; one shows the soot deposit down along the neck area; one is of the left side of the neck and the soot pattern indicates that the weapon was very close; one shows blood splatters, mot, and abrasions on the left hand; one shows soot and smoke residue on the right hand; one shows blood drops on the pants which indicates the victim was upright when shot; and one shows the victim as the medical examiner observed him at the scene.

Appellee would also point out that while the photographs depict murder victims, both victims died of a single gunshot wound so the pictures are not nearly as gruesome as others that have been before this court. *See, e.g., Nixon, supra; Davis v. State,* 586 So.2d 1038 (Fla. 1991); *Burns v. State,* 16 F.L.W. 389 (Fla. May 16, 1991). In fact four of the pictures depict only bullet holes and three of the pictures depict uninjured extremities such as hands and legs. Since the photographs are not so shocking in nature as to outweigh their relevance, the trial court did not abuse its discretion in admitting them. *Id.*

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[11] Exhibit 82, which shows the victim's face, was not discussed by the medical examiner.

POINT 10

THE TRIAL COURT CORRECTLY DECLINED TO INSTRUCT THE JURY ON PRESENCE.

Amos claims that since the law is clear that mere presence at the scene of a crime is insufficient to establish participation or an intent to participate, the trial court erred in failing to give his requested instruction on mere presence. This court has long held that a challenged instruction should be considered in connection with all other instructions bearing on the same subject and if, when thus considered, the law appears to have been fairly presented to the jury, alleged error predicated on the challenged instruction standing alone, must fail. *Driver u. Stute,* 46 So.2d 718 (Fla. 1950). Bath the First and Fourth Districts have held that it is not error to fail to give an instruction on presence where the standard instruction on principals is given. *Williams u. State,* 492 So.2d 1388 (Fla. 1st DCA 1986) (requested instruction concerning presence at scene of crime and knowledge that offense is going to be or is being committed was properly denied in burglary prosecution where standard instruction on principals was given, since in light of conflicting testimony the requested instruction could have been construed as judicial comment on the credibility of witnesses); *Wolack u. State,* 464 So.2d 587 (Fla. 4th DCA 1985) (trial court did not err in not giving instruction that mere presence at scene of crime is insufficient to prove guilt as import of such instruction was well covered by instruction on principals which clearly would not permit a finding of guilt predicated on a mere

showing of presence at the scene). *See also, Richardson v. State,* 488 So.2d 661 (Fla. 4th DCA 1986) (no error in refusing to instruct that mere proximity to contraband without more is legally insufficient to prove possession where standard instructions adequately informed jury of the law).

As in those cases, the standard instructions in the instant case adequately informed the jury of the applicable law, would not permit a finding of guilt predicated on mere presence, and could have been construed as judicial comment on the credibility of witnesses. The jury was instructed that in order to find *Amos* guilty of premeditated murder, it had to find that the death was caused by the criminal act or agency of ***Amos*** (R 5851); and that in order to find *Amos* guilty of felony murder it had to find that *Amos* actually did the killing or ***Amos*** was present and did knowingly aid, abet, counsel, hire or otherwise procure the commission of a robbery (R 5852). The jury was likewise instructed as to the intent element for the remaining charges (R 5856-64). The jury was also instructed on coercion, compulsion and duress (R 5864-65). Finally, the jury was instructed on principals (R 5867). ***Amos*** has failed to demonstrate an abuse of discretion.

POINT 11

THE TRIAL COURT CORRECTLY DECLINED TO GIVE AN INSTRUCTION ON THE AZLEGEDLY LIMITED USE **OF REBUTTAL TESTIMONY.**

At the charge conference, defense counsel stated that there may be another instruction he would be asking for, after more research, which essentially stated that rebuttal witnesses cannot

be used to prove elements of the case (R 5728). The trial court stated that he did not believe that was the case, and requested defense counsel to find whatever law he could on the issue (R 5729-30). Neither case law nor a proposed instruction was ever submitted to the trial court, either orally (R 5740-41), or in writing. Amos' failure to request a specific instruction, either orally or in writing, constitutes waiver of this issue. Fla.R.Crim.P. 3.390(c); *Adams v. State,* 412 So.2d 850 (Fla. 1982); *Watkins v. State,,* 519 So.2d 760 (Fla. 1st DCA 1988).

Even if the claim has somehow been preserved, error has not been demonstrated. Instructions which do not accurately or correctly state the law are properly refused. *Barwicks v. State,* 82 So.2d 356 (Fla. 1955). Rebuttal evidence explains or contradicts material evidence offered by a defendant. *Britton v. State,* 414 So.2d 638 (Fla. 5th DCA 1982). This is not a case where the evidence was inadmissible in the state's case in chief but became admissible solely as impeachment evidence in rebuttal. Rather, this was evidence the state could have presented in its case in chief, but apparently did not feel was necessary until Amos took the stand and injected the issues of coercion and duress into the case, at which time it became necessary for the state to present additional evidence to meet and rebut his claims. *See, e. g., Weaver v. State,* 370 So.2d 1189 (Fla. 4th DCA 1979), where the court noted that the state should be given an opportunity to reopen the proof to meet an entrapment defense.

POINT 12

THE TRIAL COURT CORRECTLY DENIED AMOS' MOTION FOR JUDGMENT OF ACQUITTAL.

Amos contends that the trial court erred in failing to direct a judgment of acquittal at the close of the state's case and at the close of the defense case because the state had shown nothing more than his mere presence at the scene. Prior to addressing the merits of Amos' claim, a review of the state's evidence is necessary.

A. Counts I-IV (crimes at Mr. Grocer-McAninch murder, robbery; Howard attempted murder, robbery of Howard's keys and wallet).

Terry Howard was standing by the door when two black males entered the Mr. Grocer (R 4961). The shorter man *(Amos)* walked to the counter and the taller (Spencer) walked to the cooler (R 4961). *Amos*, who had a dollar bill in his hand, asked for a pack of cigarettes, and Spencer came down the aisle and set a can of soda on the counter, then acted like he was leaving (R 4962-63, 4977). Spencer grabbed Howard, put his arm around Howard's neck and a gun to his side and told him to get to the floor (R 4964-65). Howard heard a shot while Spencer was still standing next to him, then heard a command to "open the register'' approximately three times from behind the counter (R 4966-67). The man next to Howard kicked him and also told him to open the register, and he replied that he didn't know how to (R 4968). The two men never spoke to each other (R 4969).

Howard was ordered to move behind the counter, and could hear somebody fiddling with the cash register keys (R 4969-70). The men asked Howard for the keys to the car out front, and he

told them they were on his belt loop (R 4971). They pulled his keys off, took his wallet from hi's back pocket, and shot him in his arm, which he had over his head (R 4972-73). Howard got up after he heard the men leave and saw them drive away in his car (R 4973, 4975). Bobby Helvey saw the two men run out of the store and get into Howard's car (R 5059). Amos got in the driver's side; Helvey saw no weapons and did not see either man force the other into the car (R 5060).

The sale price reflected on the cash register was $1.38 and totalled out to $1.45, which was the price of a pack of cigarettes (R 5029-30). Amos had an unopened pack of Newport cigarettes when he was arrested, and the tax number on the bottom was 46236 R 5094-95). The tax number on the Newport cigarettes at the Mr. Grocer was the same (R 5041, 5096). The bullets that killed McAninch and injured Howard came from the same, unknown weapon (R 5340, 5354).

Robert Anderson, a deputy with the canine unit of the Palm Beach County Sheriff's Office, saw the car pull out of the Mr. Grocer parking lot without the tail lights on, and was going to stop it but got a call (R 5115, 5119). Curtis Bolen, who lived about 1/4 mile from the Mr. Grocer, saw Howard's car stop and watched two men exit from it, one from the driver's side and one from the passenger's side (R 5140, 5142). The two men were "just walking'' in a northerly direction (R 5145). Deputy Anderson was called to the place where the car had been abandoned, and saw footprints coming from both doors of the car (R 5121). He was then called to the scene at the English Pub (R 5121). Deputy

Columbrito started a track from the abandoned car (R 5209), which went through a dark wooded area and into a residential area (R 5301), then he too was called to the English Pub (R 5302).

B. Counts V and VI (crimes at English Pub-robbery and murder of Robert Bragman).

John Foster was the passenger in a car driven by Craig Batchelor, and they arrived at the English Pub around 12:10 a.m. (R 5145-47). Batchelor was pulling the car into a spot facing a Ford pickup truck, and Foster saw a black male and a white male at the back of the truck fighting over something with their hands (R 5150-51). The men were moving toward the driver's door of the truck, and it looked like the black male was trying to get something from the white male's hands (R 5152-53). The driver's side door was open, and the black male was positioned to turn around and get in the truck, facing the white male (R 5153, 5155-56). Foster heard a gunshot, and saw a shorter black male on the other side of the truck door, to the left of the white male (R 5157-58). Foster saw the hand of the shorter black male around the face of the white male (R 5159). The taller black male was still face to face with the white male when the gun went off (R 5159). The shot that killed Bragman entered the jaw area on the left side of his face, angulated downward through the neck tissues, into the throat, thraugh the chest cavity and into the lung (R 5392, 5395-96).

After pushing the white male straight back into the car in the next spot, the taller black man jumped in the driver's side of the truck, closed the door, unlocked the passenger door for

the shorter black male, and turned on the motor and lights (R 5160, 5162-63). Foster and Batchelor pulled out (R 5164-65), saw a Sheriff's car and made a U turn to chase it; Foster saw that the truck was somewhat pulled out of the spot, both doors were open and there were no occupants (R 5166-67). When Deputy Anderson arrived at the English Pub, he saw two black males running in a northwest direction (R 5122). The footprints at the English Pub scene appeared to be the same as those at the abandoned car (R 5122). Deputy Columbrito described the area as dark and wooded with dense vegetation (R 5304-05). The murder weapon, a derringer, or Saturday night special, was found on the seat of the truck (R 5251, 5256, 5352-53). The gun needs to be cocked before it can be fired; there was one bullet remaining in the gun (R 5347-48).

C. Counts VII and VIII (Sedenka assault and robbery).

Allen Sedenka was driving to Denny's, and heard about the shooting at the English Pub over the police scanner he had in his car (R 5176-78). Sedenka passed the pub and saw two black males coming out of the wooded area just past the pub (R 5179). They were half crouched and half running (R 5180). Sedenka, who had worked for the Palm Beach County Sheriff's Office for two years, figured it was the two men the police were looking for (R 5176, 5180), and went to a phone booth and called 911 (R 5180). Sedenka watched the progress of the two men down Military; they were hugging the buildings and half walking and half running (R 5184-85). Sedenka saw no pushing or shoving nor any weapon displayed (R 5186-87). As the two approached the area where

Sedenka was, Sedenka dropped the phone, leaving the line open to the 911 operator, and went to get in his car (R 5188).

As Sedenka pulled the door closed, he felt a gun pointed at the left side of his head, and saw the shorter man come up to the front of the car (R 5189). The person with the gun said "you're going to drive us", and the shorter man told Sedenka to do what he said or he (the man with the gun) will shoot you (R 5191). The latter was stated as a command (R 5193). Sedenka eased himself out of the driver's seat, and the man with the gun got in (R 5194). The shorter man quickly went to the passenger side and told the other to open the door (R 5195). The man driving the car stalled it so the two switched seats and quickly left (R 5196). Sedenka said the taller male gave no directives to the shorter, there was no arguing and no gun pointed at the shorter man (R 5197). Sedenka identified both men; the shorter man's directive to "open the door, open the door" can be heard on the tape of the 911 call (R 5201, 5204).

Sergeant Newcomb of the Palm Beach County Sheriff's Office heard the BOLO and positioned himself to intercept the car (R 5271-73). He saw headlights approaching and could tell that the car was moving at a high rate of speed (R 5274). He began to follow the car, which was travelling in excess of 85 m.p.h. (R 5276). Newcomb caught up with the car at an intersection and put on his lights and siren; the car turned on Dyer Road, veered off the road and both men bailed out (R 5277-78). Both doors flew open before the car came to a stop and the two men ran in different directions (R 5280, 5284). The passenger, *Amos*, ran into a fenced junk yard area (R 5280).

Deputy Columbrito and Deputy Anderson were called to the Dyer Road area with their dogs. (R 5123, 5205). Columbrito recognized prints he had seen at the other two areas (R 5307). There were five or six deputies and a helicopter with a searchlight flying overhead (R 5328). Columbrito made two announcements at the gate for the person to come out, and the same announcement was made twice over the helicopter's public address system (R 5312). Columbrito was there at least an hour when one of the dogs began to indicate at a pile of cars; Columbrito saw Amos in the back seat looking out the back window (R 5317-18). He hollered three times for Amos to come out (R 5319).

Medical examiner's testimony

Dr. James Benz, the Palm Beach County Medical Examiner, was qualified as an expert in gunshot wounds (R 5367-70). The shot that killed McAninch was fired from three to four feet away, and the shot that killed Bragman was fired from three to six inches away (R 5409-10). It was Dr. Benz's opinion that Bragman's shooter was the shorter man if Bragman was face to face with the taller man (R 5431).

In moving for a judgment of acquittal, a defendant admits all facts in evidence as well as every conclusion favorable to the state that a jury might fairly and reasonably infer from the evidence. *Taylor v. State,* 583 So.2d 323 (Fla. 1991). A court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. *Id.; Lynch,*

v. State, 293 So.2d 44, 45 (Fla. 1974). To prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. *Taylor* at **328.** The state must only introduce competent evidence which is inconsistent with the defendant's theory of events, and once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. *State v. Law,* 559 So.2d 187 (Fla. 1989). To be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime. *Staten v. State,* **519 So.2d** *622* (Fla. **1988);** 5777.011, Fla. Stat. **(1989).** The law **of** principles and the felony murder doctrine combine to make a **felon liable** for **the** acts of his co-felons. *Adams v. State,* **341** So.2d 765 (Fla. 1976). Applying these principles to the facts of the instant case, the trial court correctly denied the motions for judgment of acquittal.

The direct evidence presented by the state was sufficient for the jury to determine that *Amos* intended to commit these crimes and was an active participant in the commission of them; the circumstantial evidence was sufficient for the jury to determine that **Amos** fired the shot that killed Robert Bragman. *Amos* accompanied Spencer into the store, there was no **discussion** between the two, and taken in a light most favorable to the state, this indicates *Amos* was well aware that a robbery was going to occur, and his action in asking for cigarettes was clearly a ploy to get the register open while Spencer cased the

store. After McAninch was shot, Howard heard both men commanding him to open the cash register. 'While Howard was not sure who shot him and took his keys and wallet, both men were seen running from the store and Amos drove the stolen car away.

Amos' and Spencer's joint venture continued after they fled from the Mr. Grocer crime spree. After abandoning Howard's stolen car, in which they had been seen by a witness and a police officer, they began walking and ended up at the English Pub, where Spencer was seen fighting with Bragman. Again, in a light most favorable to the state, the jury could certainly infer that they were fighting over the keys. A shorter black male, which the jury certainly could infer was Amos since he was identified as being with Spencer both before and after the Bragman murder, was standing to Bragman's left and had his hand around Bragman's face when the gunshot was heard. Bragman was standing face to face with Spencer at that time. In addition, the weapon used to kill Bragman had to be cocked before it was fired, and was different than the gun used to kill McAninch. Amos then ran around to the passenger side of Bragman's truck and waited for Spencer ta open the door for him. After Bragman's truck was abandoned, two black males were seen running from the parking lot at the English Pub, and the footprints were the same as those where Amos and Spencer had abandoned Howard's car.

Amos and Spencer were seen emerging from the woods by the pub, and they proceeded to half run and half crouch as they stayed close to buildings, in an obvious attempt to avoid detection. The duo approached Sedenka, and after Spencer put a

gun to his head *Amos* told Sedenka to do what Spencer said or he would shoot him. Again, in a light most favorable to the state, the evidence supports the inference that *Amos* was attempting to increase Sedenka's fear and apprehension. Again, *Amos* ran around to the passenger door, but instead of just waiting for Spencer to open it, *Amos* twice commanded Spencer to open the door for him. After Spencer stalled the car, he and *Amos* switched seats and *Amos* drove the car in excess of 85 m.p.h. while being chased by the police. *Amos* pulled the car over, and with the police in plain view right behind him, he continued to flee. He then hid for well over an hour as deputies searched the junk yard and a helicopter flew overhead, from which announcements were made over the P.A. system. Appellee submits that this evidence was clearly sufficient to overcome a judgment of acquittal at the close of the state's case. This evidence was sufficient for the jury to conclude that *Amos* was not merely present, but was an active participant if not instigator of all of the events and was clearly responsible for the Bragman murder. At the close of all evidence, it was then for the jury to determine whether this evidence, along with the state's rebuttal evidence that *Amos* left Belle Glade with the intent to commit a robbery and was armed, was sufficient to exclude *Amos'* version of events. The trial court correctly denied the motions for judgment of acquittal.

POINT 13

THE TRIAL COURT JUDGE CORRECTLY DENIED AMOS' MOTION TO DISQUALIFY HIM.

On February 23, 1990, fifteen days after the guilt phase was completed and twelve days before the penalty phase was scheduled to commence, Amos filed a *pro se* motion to disqualify Judge Carlisle (R 6581-90). A hearing was held March 6, 1990, at which several pending motions were discussed (R 5913-19). Judge Carlisle orally denied the motion, stating that the motion did not allege anything that would require him to recuse himself; the prosecutor also noted that the supporting affidavits were legally insufficient (R 5918). Amos' claim that the trial court erred in denying the motion is without merit as the motion was untimely[12] and insufficient.

Pursuant to Florida Rule of Criminal Procedure 3.230, a motion to disqualify a judge shall be filed no less than ten days before the time the case is called for trial, unless good cause is shown for failure to do so within that time. Amos' motion was untimely since no good cause was shown far not having filed it ten days before the trial. Jones *v. State,* 411 So.2d 165 (Fla. 1982). As that court noted, since sentencing in capital felony cases is based on facts established at the guilt phase as well as those brought out at the sentencing phase, it is highly desirable

[12] While the trial court did not specifically state timeliness as a basis for denial, this court has held that a decision of the trial court will generally be affirmed, even if based on erroneous reasoning, if the evidence or an alternate theory supports it. Case v. State, 524 So.2d 422 (Fla. 1988); Stuart v. State, 360 So.2d 406 (Fla. 1978); Combs v. State, 436 So.2d 93 (Fla. 1983); Grant v. State, 474 So.2d 259 (Fla. 1st DCA 1985).

that the same judge preside over both. *Id.* at **167.** Since the motion in this case was not based on anything that happened during the trial, and in fact most of the allegations pertain to matters occurring well before the instant trial, as will be demonstrated shortly, there was no reason for it not to be filed ten days before the trial began. *Id.*

Moreover, *Amos'* motion merely stated conclusions and therefore lacked legal sufficiency. *Id.* To justify recusal, a motion must be well founded. ***Gilliam v. State, 582*** **So.2d** 610 (Fla. 1991); ***Fischer v. Knuck,*** 497 So.2d 241 (Fla. **1986).** The test for sufficiency of a motion for disqualification of a judge for prejudice is whether the motion demonstrates a well-grounded fear on the part of the defendant that **he** will not receive a fair trial at the hands of the judge. ***Tafero v. State,*** 403 So.2d ***355*** (Fla. 1981); ***Dragovich v. State,*** 492 So.2d ***350*** (Fla. 1986). Merely receiving adverse rulings is not a ground for recusal. *Gilliam, **supra*** at **611;** ***Tafero,** supra,* at 361. The rule "is not **intended** as a vehicle to oust a judge who has made adverse pretrial rulings." *Id.*

A review of the instant motion demonstrates that it is virtually devoid of factual allegations and contains mainly conclusory allegations that are insufficient to demonstrate a well-grounded fear. ***See,** Keenan **v.** Watson,* 525 So.2d 476 (Fla. 5th **DCA** 1988) (mere conclusion that judge may be biased is totally unsupported by any factual allegation). Further, as stated, any factual allegations contained in the motion were known well before trial in the instant case. Since no prior motion was

filed, it cannot be said that these facts would place a reasonably prudent person in feat of not receiving a fair and impartial penalty phase, where that alleged fear was not present during any of the prior trials,

Amos first states:

> 1. Judge Carlisle refused to withdraw counsel of record who violated defendant's civil rights,

(R 651). This pertains to events occurring well before the instant trial, is devoid of any factual basis relating to any violation of civil rights, and relates to a prior ruling, which is an insufficient basis. *Gilliam, supra.* This is particularly true where that prior legal ruling was reviewed by the district court and found to be correct. *Boudreau v. Carlisle,* 549 So.2d 1073 (Fla. 4th DCA 1989). *Amos* next "alleged":

> 2. Judqe Carlisle showed bias and prejudice toward defendant throughout proceedings in above caption (sic) case.

(R 6581). This mere conclusion unsupparted by any factual allegations is insufficient. *Keenan, supra.* Amos next states:

> 3. Defendant was forced to represent himself without the aid of co-counsel during numerious (sic) trials.
>
> 4. Defendant again was forced to trial with the same attorney who violated defendant's civil rights.

(R 6581). Like paragraph one, these "facts" were well known before trial and pertain to prior legal rulings and are insufficient. *Amos* next states:

> 5. Judge Carlisle refused to hear motions stated that he was denying all motions and would proceed to trial without hearings an them.

(R 6581). Again, this "fact" would have been known prior to trial, it is not specific, and 'appears to relate to a prior adverse ruling without any demonstration of why this makes the judge biased or prejudiced. *Amos* next states:

> 6. Judge Carlise (sic) denied defendant's civil rights throughout (3) three trials.

(R 6581-82). Again, this is simply a conclusory allegation, devoid of factual support, and is an insufficient basis for disqualification. See, *Dowda v. Salfi,* 455 So.2d 604 (Fla. 5th DCA 1984) (defendant cannot disqualify a trial judge by merely filing a civil law action against the judge). *Amos* next states:

> 7. Defendant states there were and are numerous conflicts with court appointed attorney.

(R 6582). This has nothing to do with the trial court judge and provides no basis for recusal. *Amos* next states:

> 8. Judge Carlisle exceeded his judicial capacity by holding in open court in regards to a civil suit pending within the county court against court appointed counsel, and this hearing also violated the defendant's civil rights.

(R 6582). Again, this was known well before trial, *Boudreau, supra,* is conclusory in nature, and the fact that the judge held a prior hearing which resulted in an adverse ruling to *Amos* is an insufficient basis for recusal. *Amos* next states:

> 9. Judge Carlisle only gave defendant (2) two days to prepare for trial in which defendant was forced to represent himself which resulted in a hung jury.
>
> 10. Judge Carlisle again refused defendant change of counsel at second trial and force (sic) defendant again to

> represent himself which also resulted in a hung jury.
>
> 11. Judge Carlisle again refused to change counsel of record at forth (sic) trial and forced defendant to trial with same counsel who violated defendant's civil rights.

(R 6582). Like paragraphs 1, 3, and 4, these allegations are conclusory, these matters were known before trial, and relate to prior rulings and provide an insufficient basis for recusal. *Amos* next states:

> 12. Defendant states that he filed a motion that defendant has not and did not waive any of his rights, what-so-ever at the begining (sic) of all trials.

(R 6582). It is not clear what this means, but it does not provide any factual support for recusal of a trial judge. *Amos* next states:

> 13. Judge Carlisle told defendant to shut-up and sit down while defendant was representing himself during trial.

(R 6582). Since *Amos* had not represented himself since halfway through the third trial, this fact would have been known prior to the instant trial. Further, this is not sufficient to demonstrate that the judge was prejudiced against *Amos*. *See, e.g.*, *Nasetta v. Kaplan*, 557 So.2d 919 (Fla. 4th DCA 1990) (a judge's remarks that he is not impressed with a lawyer's or his client's behavior are not, without more, grounds for recusal); *Dempsey v. State*, 415 So.2d 1351 (Fla. 1st DCA 1982). Finally, *Amos* states:

> 14. Defendant states that as the (3) three trials went on Judge Carlisle continued to show an increase of prejudice and bias toward the defendant.

(R 6583). Again, this conclusory allegation, devoid of factual support, is insufficient to demonstrate bias or prejudice on the part of the trial judge.

Likewise, the supporting affidavits are completely devoid of facts and must be found insufficient, Florida Rule of Criminal Procedure 3.230(b) states:

> Every motion to disqualify shall be in writing and be accompanied by two or more affidavits *setting forth **facts relied** upon to **show** grounds **for** disqualification,* and a certificate of counsel of record that the motion is made in goad faith. (emphasis supplied)

Without a showing of some actual bias or prejudice *so* as to create a seasonable **fear** that a fair trial cannot be had, affidavits supporting a motion to disqualify are legally insufficient. ***Drugouich,*** *supra* at 353.

The instant affidavits show nothing, as they contain no facts, and are limited to the following conclusosy allegations:

> ...throughout the three trials in the above caption (sic) case, Judge James T. Carlisle did in fact show prejudice and bias toward defendant Vernon ***Amos.*** This affiant was present during these (3) three trials and further states defendant's civil rights were also violated by the trial judge. This affiant states the alleged bias and prejudice does in fact exist. And can see no way that defendant can receive a fair sentence trial with judge Carlisle presiding.

(R 6589-90).[13] There is no factual basis in these affidavits to support the conclusions contained in them, so they must be found

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[13] The other affidavit contains the additional statement that "this affiant has taken numerous law courses" (R 6587).

legally insufficient. Fla.R.Crim.P. 3.230(b); *Id.; Tafero,* ***supra;*** *Keenan, supra.* ***See*** *also, Heiney v. State,.* **447** *So.* 2d 210 (Fla. **1984);** *Van* ***Fripp*** *v. State,* 412 **So.2d** 915 (Fla. 4th DCA 1982) (two affidavits which accompanied defendant's motion for disqualification failed to demonstrate conclusively that trial judge possessed information that went to a fact affecting the merits of the cause). The trial court did not err in denying the motion for disqualification.

POINT 14

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

Amos claims, for a variety of reasons, that Florida's death penalty is unconstitutional. Most of these claims were not presented below so are not cognizable on appeal. All are without merit, and have been consistently rejected by this court. *Bedford v. State,* 589 So.2d 245 (Fla. 1991); *Young v. State,* 579 So.2d 721 (Fla. 1991); *Van* ***Poyck*** *v. State,* 564 So.2d **1066** (Fla. 1990). The issue of whether Florida's death penalty statute is constitutional has been resolved by this court as well as the United States **Supreme** Court. *Thompson v. State, 553* So.2d 153, 156 n. 2. Each claim will be briefly addressed, and appellee requests this court apply its procedural bar rather than find the claims without merit.

Amos first attacks the jury instruction on heinous atrocious or cruel, but has no standing to raise this issue since this aggravator was not argued, instructed upon, or found. Further, there was no objection to the instructions below so the claim is waived,

Amos next claims that the jury was never told the definition of the felony aggravators. Again, there was no objection to the instructions and the record contains no written request for a special instruction so the claim is not cognizable. It is also without merit as the jury was instructed on the underlying felonies during the guilt phase and convicted *Amos* of those felonies so he certainly cannot demonstrate any prejudice. Finally, this claim has been rejected. *See, Hitchcock v. State,* **578** So.2d 685 (Fla. 1990); *Occhicons v. State,* 570 So.2d 902 (Fla. 1990).

Amos next claims that a verdict by a bare majority violates due process and prohibition against cruel and unusual punishment. Again, this claim was never presented to the trial court so it is not cognizable. In any event it is without merit as a jury recommendation is not a verdict, and in Florida it is the judge and not the jury who is the ultimate sentencer. *See, Hildwin v. Florida,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); *Spaziano v. Florida,* **468** U.S. 447, 104 S.Ct. 3154, **82** L.Ed.2d 340 (1984).

Amos next contends that ambiguities in the statute have precluded evenhanded application of appellate review and the independent reweighing process, and the statute is unconstitutional because it does not provide for meaningful appellate review. *Amos* notes that Mr. Elledge moved to declare the statute unconstitutional on these grounds, but there is nothing in the record to indicate that Amos ever did, so the claim is not cognizable. In any event, Florida's system of

appellate review has been approved. *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Spaziano, supra. See also, Clemons v. Mississippi,* U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

Amos next contends that Florida has institutionalized disparate application of aggravating and mitigating circumstances by erecting the contemporaneous abjection rule to bar valid claims. Amos does not explain how this occurs, so the claim is insufficient. Further, the legitimacy of the contemporaneous objection rule has been recognized by the United States Supreme Court. *Dugger v. Adams,* 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

Amos next contends that the jury instruction on the burden of proof far mitigating circumstances is unconstitutional. Again, in the absence of argument or objection below the claim is waived. Further, this claim has been rejected. *Brown v. State,* 565 So.2d 304 (Fla. 1990).

Amos next contends that the sentencer was selected by a system designed to exclude blacks from participation as circuit judges. Amos states that he filed a motion to declare the death penalty statute unconstitutional on these grounds, but includes no record citation, and appellee can find no such motion in the record so the claim is waived. Further, Amos has demonstrated no right of a defendant to be tried before a judge who is the same race as the defendant.

Amos next contends that since a circuit judge's career is often on the line in deciding whether to condemn a defendant,

this violates the requirement of heightened reliability. Again ***Amos*** notes that Mr. Elledge moved that the statute be declared unconstitutional on these grounds, but there is nothing in the record to indicate that *Amos* ever did, so the claim is not cognizable. Further, all death sentences are automatically reviewed by this court which ensures reliability in the sentencing process.

POINT 15

THE TRIAL COURT'S FINDINGS AS TO THE AGGRAVATING FACTORS ARE FULLY SUPPORTED BY THE RECORD.

The trial court found that five aggravating factors were applicable: prior violent felony conviction; during the commission of or flight after the commission of a robbery; avoid arrest; pecuniary gain; and cold, calculated and premeditated (R 6655-59). The trial court specifically stated that it was combining the pecuniary gain and during the commission of a robbery factors (R 6659). Nothing was offered in mitigation (R 6659). ***Amos*** now contends that the trial court erred in finding that the murder was committed to avoid arrest; that the trial court improperly doubled two aggravating factors (during a robbery and pecuniary gain); that the trial court erred in finding that the murder was committed for pecuniary gain; and, that the trial court erred in finding that the murder was committed in a cold, calculated and premeditated manner.

When there is a legal basis to support an aggravating factor, a reviewing court will not substitute its judgment for that of the trial court. ***Occhicone v. State,*** 570 So.2d 902 (Fla.

1990). The resolution of factual conflicts is solely the responsibility and duty of the trial judge and an appellate court has no authority to reweigh that evidence. *Gunsby v. State,* 574 So.2d 1085 (Fla. 1991). In arriving at a determination of whether an aggravating factor has been proved a trial judge may apply a "common-sense inference from the circumstances". *Swafford v. State,* 533 So.2d 270, 277 (Fla. 1988); *Gilliam v. State,* 582 So.2d 610, 612 (Fla. 1991). When a trial judge, mindful of the applicable standard of proof, finds that an aggravating factor has been established, this finding should not be overturned unless there is a lack of competent substantial evidence to support it, *Bryan v. State, 533* So.2d 744 (Fla. 1989). The facts of this crime spree and precedent demonstrate that there is a legal basis for each of the aggravating factors found by the trial court, and each is supported by competent, substantial evidence. Appellee will address *Amos'* challenges in the arder they were raised.

Amos first claims that the evidence does not support the trial court's finding that the Bragman murder was committed to avoid arrest. In support of his claim, *Amos* contends that this court has previously held that where the victim is not a law enforcement officer, there must be strong proof of the defendant's motive and it must clearly be shown that the dominant or only motive for the murder was the elimination of a witness. *See,* Jackson *v. State,* 575 So.2d 181 (Fla. 1991). However, this court has also found that this factor is applicable in other situations, *see, e.g., Zeigler v. State, 580* So.2d 127 (Fla. 1991);

Young v. State, 579 So.2d 721 (Fla. 1991), and the facts of this case clearly demonstrate that Robert Bragman was murdered so that Amos could avoid arrest.

The trial court's extensive findings as to this factor are **as follows:**

> These crimes began in Belle Glade, Florida. The defendant, Vernon Amos, was approached by Leonard Spencer, who asked him if he wanted to go get some money. Vernon Amos replied that he did not get any money unless he had a gun. They then drove to Leonard Spencer's home in Pahokee, Florida, where a gun was obtained far Vernon Amos. They then drove to Indiantown with the intent to commit a robbery. Vernon Amos objected to this location because of the limited roads leading from Indiantown, Florida, increasing the chances for apprehension.
>
> They then drove fifty (50) miles to West Palm Beach, Florida, where they went to several businesses looking for a likely place to rob. At each stop a small purchase was made with a dollar bill, in order to get the cash register open. A variation on the theme was attempted at another business, i.e. a carburator (sic) was taken to the business, but the shop was closed.
>
> Edward Cain was driving Leonard Spencer's car. He was reluctant to take part in a robbery but also unwilling to refuse to help. On several occasions he thwarted Vernon Amos' and Leonard Spencer's attempts to commit a robbery. When the Mr. Grocer was selected Leonard Spencer, like Cortez burning his ships, ordered Edward Cain to take the car back to Belle Glade.
>
> Vernon Amos adjusted his clothing to be sure his firearm was concealed. They then walked by the Mr. Grocer store and waited until customers and cars left. When they entered the stare Terry Howard was the sole customer. Vernon Amos

approached the clerk, Alan McAninch, with the dollar bill and asked for a pack of cigarettes. Leonard Spencer grabbed Terry Howard and forced him to the floor. He then shot Alan McAninch and attempted to open the cash register. He then commanded that Terry Howard open the register but Terry Haward pretended to be unable to do so. He took Terry Howard's keys and wallet and shot Terry Howard. At that moment Terry Howard was lying on the floor with his hands over his head. The bullet entered his wrist. This evidence indicates that the purpose of the two shootings at Mr. Grocer was to eliminate witnesses.

After leaving the Mr. Grocer Vernon Amos and Leonard Spencer took Terry Howard's car but almost immediately attracted the attention of a deputy sheriff. Unfortunately, the deputy sheriff broke off his surveillance when he received a radio call of a shooting at the Mr. Grocer. The car was abandoned a short distance from the English Pub. Vernon Amos and Leonard Spencer made their way through the woods to the parking lot of the English Pub, where they encountered Robert Bragman. Leonard Spencer attempted to take Robert Bragman's keys and a struggle ensued. The door to Robert Bragman's truck was open. The struggle was delaying their escape so Vernon Amos reached over the top of the door and shot Robert Bragman in the face. They then got into the truck with Leonard Spencer driving, and immediately stalled the truck as it had a standard shift.

They then made their way on foot north on Military Trail to the Kentucky Fried Chicken, While en route they were observed by Alan Sedanka, a former deputy sheriff who called in to report their position. Observing Alan Sedanka's automobile near the telephone booth Leonard Spencer pointed his gun at Alan Sedanka and got behind the wheel of the car. Vernon Amos ran to the passenger's side and, on the 911 tape, can be heard yelling to Leonard Spencer

to open the door. Vernon *Amos* got in the passenger seat and once again Leonard Spencer stalled the car. (It was also a standard shift.) They then switched seats and Vernan *Amos* drove the car away.

They were subsequently observed by another deputy sheriff, A high speed chase ensued and they abandoned Alan Sedanka's car near a junk yard. Vernon *Amos* was subsequently apprehended hiding in the hulk of a junked car.

All of these crimes were committed for the purpose of avoiding or preventing a lawful arrest. Belle Glade and Pahokee were not chosen because both Leonard Spencer and Vernon ***Amos*** were well known in those communities. Indiantown was rejected because of its isolation and the limited escape routes available. West Palm Beach was chosen because Vernon *Amos* and Leonard Spencer were unlikely to be recognized and because of the unlimited avenues of escape.

The testimony of Edward Cain indicates that many businesses were considered and rejected on grounds of too many people, too many television cameras, or other factors which would lead to apprehension.

Mr. Grocer was selected because at the time there was only one customer inside. The clerk was executed and Terry Howard was shot in a manner that indicates an intent to kill him as well, thus eliminating any witnesses.

Terry Howard's car was taken and abandoned to avoid detection. Robert Bragman was killed and his truck taken likewise to avoid apprehension. Alan Sedanka was robbed of his automobile and assaulted for the same reason. Vernon *Amos* lead the deputy sheriff on the high speed chase and secreted himself in the junked car to avoid capture.

(R 6656-58).

The situation in this case is very similar to the one in *Young, supra,* In that case, the victim apprehended the defendant as he was committing a burglary, and instructed his son to call the police. The defendant knew he would be arrested when the authorities arrived, admitted he wanted to flee the scene, and the victim died trying to keep him from doing so, Likewise, in the instant case, *Amos* knew he had been seen by a witness at the Mr. Grocer, and he also had a close encounter with a police officer as he was fleeing that scene. ***Amos*** knew that if he did not get out of the area soon he would be arrested, and needed a vehicle to hasten his escape, Bragman died trying to stop *Amos* from taking his truck.

This is not, as *Amos* claims, "mere speculation", but a pattern that runs throughout this crime spree. ***Amos*** chose to commit his crimes in West Palm Beach because it would be easier to escape. Terry Howard was shot and his car was stolen to facilitate *Amos'* escape; Robert Bragman was shot so that his truck could be used for escape; and Allen Sedenka was threatened with being shot if he did not surrender his car so that *Amos* could continue to elude the police, who were always just a step behind. The only "common-sense inference" that can be drawn from these facts is that ***Amos*** killed Bragman to avoid arrest, so this factor was properly found by the trial court.

Amos next contends that the trial court improperly doubled the aggravating factors of during the course of or flight after the commission of a robbery and pecuniary gain. The trial court specifically stated:

> I am being careful not to 'double-up' the aggravating circumstances of murder while engaged in a robbery and murder for pecuniary gain. Maggard v. State, 399 So. 2d 973 (Fla. 1981). I have combined this factor with murder in the commission of a robbery.

(R 6659). Since the trial court stated that these factors were not doubled, *Amos* cannot demonstrate that the weighing process was affected in any way.

Appellee would further point out that based on the facts of this case, both factors could properly be found as each is supported by independent facts. *Amos* first robbed the Mr. Grocer and Terry Howard, and was in flight after committing these robberies, which is sufficient to support the aggravating factor of during the course of or flight after committing a robbery. ***Amos*** then murdered Robert Bragman in the course of stealing his truck, which is sufficient to support the pecuniary gain aggravating factor. ***Jones u. State,*** 569 So.2d 1234 (Fla. 1990). ***See*** *also,* ***Suarez u. State,*** 481 So.2d 1201 (Fla. 1985) (sufficient distinct facts support and make relevant pecuniary gain and avoid arrest aggravating factors). Thus, the trial court's findings demonstrate that there was no improper doubling, but even if the court had weighed both factors, it would have been proper.

Amos next contends that the evidence does not prove beyond a reasonable doubt that the Bragman murder was committed for pecuniary gain. As stated, the trial court merged this factor with during the course of a robbery and did not give it consideration. As also stated, it could have been properly found. *Amos* was convicted of the robbery of Bragman, and the

only logical inference that can be drawn from the facts of this case is that Bragman was murdered to facilitate the taking of his truck, and that it was not simply an after thought. ***See, Jones,*** *supra.* This entire crime spree demonstrates a pattern of shooting or threatening to shoot people in order to obtain their vehicles.

Amos next contends that the evidence does not demonstrate beyond a reasonable doubt that the murder was committed in a cold, calculated and premeditated manner. In support of this factor, the trial court found:

> This aggravating factor applies to circumstances which *go* beyond the regular premeditation required for a first degree murder conviction. Much of what has already been said establishes this aggravating factor. During that long ride from Belle Glade to Pahokee to West Palm Beach there was ample opportunity to reflect an what was going to happen. During the many visits to various business establishments there were any number of occasions when it would have been appropriate to give up the idea of committing a robbery and return home. It was Edward Cain who continually pointed out why a robbery should not be committed at any given location. Edward Cain became more of a hinderance than a help in the criminal enterprise, For that reason he and Leonard Spencer's automobile were sent back to Belle Glade.
>
> This decision to "burn the ships" indicated a resolve to commit this robbery. The robbery at Mr. Grocer and the shootings that took place of Alan McAninch and Terry Howard and the efforts to escape at any price, even that of another human life, indicated cold, calculated and premeditated homicide.

(R 6659). This murder was, without a doubt, nothing less than an execution, committed without any pretense of moral or legal justification. *See, Valle v. Stale,* 581 So.2d 40 (Fla. 1991); *Brown v. State,* **565** So.2d 304 (Fla. 1990). Appellee contends that there was clearly sufficient evidence that *Amos* planned **or** prearranged to murder Bragman before **he** shot him in the face at close range. *See, Asay v. State,* 580 Sa.2d 610 (Fla. 1991). *See also, Squires v. State,* 450 So.2d 208 (Fla. 1984) (close range shot to head supports finding of cold, calculated and premeditated).

As the trial court had previously found, *Amos* selected West Palm Beach for his crime spree because chances of being detected there would be less than in Belle Glade or Indiantown, and *Amos* did not want. to commit any robberies unless he had a gun, so one was obtained for him (R 6656). *Amos* and his partner in crime sent the car they travelled to West Palm Beach in back *to* Belle Glade. A short time before Bragman **was** murdered, *Amos* and his partner shot twa other people, one of them fatally, and one in the arms that he held over his head, which certainly indicates an attempt at a fatal wound as well, and stole the first vehicle of the evening. That car was abandoned a short distance away, and the two proceeded on foot until they came to a parking lot, no doubt to obtain another vehicle. Spencer struggled with Bragman for the keys, while *Amos* remained hidden until his firepower was needed to hasten their escape. The two could not drive Bragman's truck, so they again proceeded on foot until they saw Allen Sedenka, who was told he would be shot if he did not turn over his car. Had Sedenka resisted in any manner, he no doubt, like Bragman, would be dead.

These facts indicate a highly planned, calculated, and prearranged effort to commit the 'crime, even though the victim was picked at random. Wickham *v. State,* 16 F.L.W. 777 (Fla. December 12, 1991). In that case, the defendant devised a plan to trick a motorist into stopping so that he could be robbed. After the victim examined an apparently disabled vehicle and determined there was nothing wrong with it, the defendant came out of a nearby hiding place and pointed a gun at the victim, The victim turned and attempted to walk back to his car, but the defendant shot him once in the back and once in the chest, and as the victim pled for his life the defendant shot him twice in the head. This court found that even though the murder may have begun as a caprice, it escalated into a highly planned, calculated and prearranged effort to commit the crime, and therefore met the standard for cold, calculated premeditation set forth in ***Rogers*** *v. State,* 511 So.2d 526 (Fla. 1987). *Wickham* at 777.

Likewise, in the instant case, the facts demonstrate that Bragman was murdered as a result of a planned, calculated, and prearranged effort to commit this crime, even though the selection of him as the victim was at random. According to Amos, Spencer approached Bragman and asked him for a light. A witness saw Bragman struggling with Bragman, then *Amos* appeared behind the door of the truck and put his hand around Bragman's face and a shot was heard. Similarly, this murder "was not the result of an 'impulsive' spur-of-the-moment decision to kill made without reflection," *Asay, supra,* at 613. As in that case, the murder

occurred shortly after two previous shootings (as well as two previous robberies, one of which was to obtain a car in which to escape). In addition, Amos and Spencer continued their plan to escape at any cost by threatening to shoot Sedenka if he did not give them his car, These facts demonstrate that the execution of Robert Bragman was committed in a cold, calculated and premeditated manner, *See also, Jones v. State,* 569 So.2d 1234 (Fla. 1990).

Amos also contends that the evidence does not establish that he was the shooter and this factor cannot be applied vicariously to him As demonstrated in point 12, *supra,* the evidence does indicate that Amos shot Bragman. Further, the facts demonstrate that Amos willingly assisted in the planning and execution of this crime spree, so this factor applies directly, and not vicariously, to him.

Even if this court determines for some reason that the trial court erred in the finding of any aggravating factor, the error is harmless, Amos presented nothing in mitigation, nor does any mitigating evidence appear in the record. Amos' codefendant received death sentences for these crimes, and Amos' claim that he was not a willing participant is clearly refuted by the evidence and verdicts. The trial court found that five aggravating circumstances were applicable and merged two of them. Amos has not, and certainly had no good faith basis for attacking two of those factors (prior violent felony and during the course of a robbery). The striking of any other aggravating factor would not affect the sentence imposed in this case, particularly

where there is nothing in mitigation. *See, Young v. State,* 579 So.2d 721 (Fla. 1991); *Robinson v. State,* 574 So.2d 108 (Fla. 1991); *Porter v. State,* 564 So.2d 1060 (Fla. 1989); *Rivera v. State,* 561 So.2d 536 (Fla. 1989); *Hamblen v. State,* 527 So.2d 800 (Fla. 1988); *Rogers, supra.* Death is the appropriate penalty. *State v. Dixon,* 283 So.2d 1 (Fla. 1973).

POINT 16

THE DEATH SENTENCE IS PROPORTIONAL TO AMOS' CULPABILITY.

Amos contends that there is no evidence to support a conclusion that he planned the murders or robberies with the codefendant, carried a firearm at any time, participated in the robberies, attempted to kill, or intended to kill. Amos claims that the robbery of the convenience store should not be considered in determining his culpability for the Bragman murder as it was a separate incident. This was one continuous crime spree. Evidence of Amos' participation in all of the events is relevant to a determination of his culpability, and that evidence demonstrates that death is the appropriate penalty for the murder of Robert Bragman.

The evidence shows that Amos left Belle Glade armed, to go to West Palm Beach to "go get money" (R 5656-57). Several potential robbery sights were rejected because either the chances for escape were diminished (R 5663), the chances of detection were increased (R 5667-78), witnesses appeared (R 5671), or the place was closed (R 5674-75). At the selected sight, the Mr. Grocer, Amos made a purchase to get the clerk to open the

register, then told Terry Howard to open the register after the clerk had been shot (R 4967). **Amos** also drove the "getaway car", which had **been** stolen from Howard (R 5059-60). The evidence also indicates that *Amos* shot Bragman while Spencer struggled with him over the **keys** (R **5159-60, 5431).** *Amos* waited for Spencer to open the door of Bragman's truck for him so they could continue their escape (R 5163). After approaching Sedenka, *Amos* told him he would be shot if he did not give them his car (R 5191). Again, *Amos* waited and specifically commanded Spencer to open the door to Sedenka's car for him (R 5195, 5201, 5204). *Amos* again drove the "getaway car", since apparently Spencer could not drive a standard transmission (R **5195-96).** With the police in close pursuit, Amos pulled the car over and continued his escape on foot, in a different direction than Spencer had fled (R 5278). The police searched the compound where they believed *Amos* was located for over an hour, utilizing a helicopter with a searchlight and public address system, as well as police dogs, but *Amos* never came out of hiding until he was found by the police (R 5217-18).

This evidence indicates that **Amos** planned the murders or robberies, **carried a** firearm **until** after the Bragman murder, participated in the robbery and murder, and intended to kill. Further, the jury was specifically instructed, pursuant to *Jackson v. State*, 575 So.2d 181 (Fla. 1991), that in order to recommend a death sentence it. had to find that *Amos* killed or attempted to kill or intended that a killing take place or that lethal force **be** employed (R **5961).** The jury recommended life, by an even

vote, for the McAninch murder, most likely because some of the jurors believed that *Amos* was not the trigger man in that murder. Its recommendation of death for the Bragman murder certainly indicates that it found *Amos* had the requisite culpability for that murder, and that finding is supported by the evidence.

POINT 17

AMOS' SENTENCE OF DEATH FOR THE BRAGMAN MURDER IS NOT DISPROPORTIONATE SIMPLY BECAUSE HE RECEIVED A LIFE SENTENCE FOR THE MCANINCH MURDER.

Amos contends that since the trial court found the same aggravating factors and **lack** of mitigating factors as to both murders, and he received a life sentence for the McAninch murder, the death sentence for the Bragman murder is disproportionate. However, there is a major distinction which *Amos* glosses over and which readily provides the basis for the trial court's imposition of a life sentence for the McAninch murder, and that is that the jury recommended a life sentence for that murder. Pursuant to Florida law, the trial court is required to give the jury recommendation great weight, ***Tedder v. State, 322*** So.2d 908 (Fla. 1975), which the trial court did in the instant case (R 6655). As stated in the previous point, the jury most likely recommended life for the McAninch murder based on its determination that *Amos* was not the trigger man, and the court determined, contrary to the state's argument, that it was a reasonable basis for that recommendation (R 5998-6000). The trial court is not required to justify a life sentence, as it is statutorily mandated where a trial court does not justify a death sentence, and the trial

court's findings as to the Bragman murder are fully supported by the record, so death is the appropriate penalty and not disproportionate.

POINT 18

THE JURY INSTRUCTIONS WERE SUFFICIENT.

Amos contends that the trial court erred in not instructing the jury on the definitions of the felonies used to support the aggravating factors. There was no request for these instructions nor any objection to the instructions as given so the claim has not been preserved for appellate review, and fundamental error cannot be demonstrated. *See, Occhicone v. State,* 570 So.2d 902 (Fla. 1990). In any event, the claim is without merit as the jury was instructed on the underlying felonies during the guilt phase and Amos was convicted of these felonies. *Sochor v. State,* 580 So.2d 595, 603 n. 10 (jury instructions not inadequate where court instructed jury on underlying felonies during the guilt phase) (Fla. 1991). *See also, Hitchcock v. State,* 578 So.2d 685 (Fla. 1990).

POINT 19

AMOS WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

Amos filed a motion to dismiss court appointed counsel, and the trial court granted it. *Amos* now contends this was error. *Amos* filed that motion two weeks before the penalty phase was scheduled to commence, but now complains that he did not have time to prepare. *Amos* also complains that the trial court denied his request to continue, although no request was ever made. In short, *Amos* is complaining that the trial court granted something he requested, and denied him something he never requested.

Prior to addressing the merits, or more appropriately, the lack thereof to *Amos'* claims, a review of all of the facts is necessary.[14] Craig Boudreau was appointed to represent *Amos* at his original trial in 1986, where *Amos* was convicted and received two death sentences. Boudreau also represented *Amos* on appeal, where this court reversed and remanded for a new trial. Mandate was issued July 14, 1989. On July 22, 1989, *Amos* filed a civil suit against Boudreau alleging malpractice and seeking monetary damages. *Amos* moved to dismiss Boudreau and Boudreau moved to withdraw, and a hearing was held August 31, 1989 (R 11-62). In a detailed order, the trial court denied Boudreau's motion to withdraw and *Amos'* motion to withdraw counsel. *See,* Boudreau at 1074-77.

Amos and Boudreau both sought review in the district court. The court first determined that the trial court had made a sufficient inquiry into Amos' claim of ineffective assistance of counsel and determined that it was frivolous, so the procedure set forth in *Nelson v. State,* 274 So.2d 256 (Fla. 4th DCA 1973), and adopted in *Hardwick v. State,* 521 So.2d 1071 (Fla. 1988), had been met. The court found that the trial court had not departed from the essential requirements of the law, and held that a trial court is not obligated to grant a motion to

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[14] Facts which do not contain a cite to the instant record on appeal can be found in Boudreau v. Carlisle, 549 So.2d 1073 (Fla. 4th DCA 1989).

[15] *Amos* filed a petition for writ of prohibition, which was treated as a petition for writ of certiorari to review the trial court's order denying his motian to withdraw counsel, and Boudreau filed a petition for writ of certiorari seeking review of the trial court's denial of his motion to withdraw.

substitute counsel based solely upon the filing of a malpractice complaint or grievance alleging incompetence of counsel where the court has held an evidentiary hearing and found such claims to be without foundation. *Boudreau* at **1078.** The court **then** stated:

> *Amos* has not requested the court to be permitted to represent himself. He has only asked for substitute counsel to be appointed. He made no request at the hearing to represent himself. If he again requests the discharge of his counsel, then the trial court, consistent with *Nelson* should advise the defendant that if he discharges Boudreau the state may not thereafter be required to appoint a substitute. Furthermore, the trial court also must inquire into *Amos'* desire to represent himself and his ability to **make** a knowing and intelligent waiver of his right to be represented by counsel. *See Hardwick; Nelson.*

549 So.2d at **1078.** The court also denied Boudreau's petition. This opinion was issued September 19, 1989.

On or about September 22, 1989, Boudreau filed a "motion to determine defendant's request to proceed *pro* **se** and discharge counsel" (R **6411).** On or about September 25, **1989,** *Amos* filed **a** "motion to proceed as my own counsel" (**R** 6412-16). **A** hearing was held September 25, at which *Amos* was advised that he could hire an attorney, be represented by Boudreau, or represent himself (R **86).** *Amos* stated that he did not want to represent himself, but he had no other choice (R 87). While *Amos* strategically avoided giving a straight answer as to whether he wanted to represent himself, insisting that he was being forced to do so, he made it abundantly clear that **he** did not want to be represented by Boudreau, and stated that he would rather be represented by the

assistant state attorney (R 87, 88, 96-97, 100-01, 101). *Amos* stated that he wanted to renew his motion for new counsel, and acknowledged that other than that he would be "forced to represent myself" (R 97). The trial court determined that *Amos* had finished twelfth grade, could read and write, and the prosecutor made further inquiries as to *Amos'* mental state (R 93-94, 102). *Amos* requested stand by counsel and a jury expert (R 104, 106). The trial court asked *Amos* to think about it further, inquired further, and again asked *Amos* if he wanted to represent himself, to which *Amos* again replied that he was being forced to represent himself (R 105-11). The trial court stated he was going to deny the motion then, told Boudreau he was representing *Amos,* and *Amos* stated "I will not go to trial with this man" (R 112-13). *Amos* again stated that he was being forced to represent himself and would proceed the best he could (R 115). *Amos* proceeded to trial with Boudreau as standby counsel (R 139), and the trial resulted in a hung jury.

The third trial commenced November 6, 1989. *Amos* again proceed *pro se,* until about half way through the trial when he asked far Boudreau to return (R 3407-11). At that trial, Spencer was found guilty but the jury could not reach a verdict as to *Amos* (R 4346-47). The record contains no other formal pretrial motions by Boudreau or *Amos* to withdraw or discharge counsel, and *Amos* was represented by Boudreau throughout the instant guilt phase, which commenced January 22, 1990. After the jury returned verdicts of guilty on all counts February 8, 1990, Boudreau requested an additional three weeks to prepare for the penalty

phase, which was then scheduled for March 7, 1990 (R 5893-94). Boudreau filed a list of defense witnesses on February 15, 1990, and a motion for funds to transport Amos' sister to testify on March 6, 1990 (R 6564-65, 6602-03).

On February 26, 1990, Amos filed a *pro se* "Motion to Withdraw Counsel" (R 6599-6600). Amos alleged that counsel failed to present timely motions and violated his civil rights; there was a constant conflict with Boudreau throughout three trials; the court continuously forced representation of ineffective counsel who violated Amos' civil rights; and, Amos had no faith in Boudreau for further representation. Amos concluded by stating:

> Wherefore defendant moves this honorable court to withdraw counsel Boudreau from proceeding in the above caption case. For the reasons herein given and previous reasons for removal as stated within the moving papers of this circuit court case.

(R 6599-6600). At a hearing on March 6, 1990, the trial court asked Amos if he wanted to fire Boudreau, and Amos said yes (R 5916). The trial court noted that he had been through that with Amos "a bunch of times", repeated his warnings that it was not a good idea and that Amos was making a grave mistake (R 5916). Amos stated that he was at a conflict with Boudreau, and had never wanted to be represented by him (R 5916-17). The trial court granted Amos' motion (R 5917). The prosecutor requested that Amos have his sister contact her for a deposition if he intended to have her testify (R 5917).

The penalty phase commenced the next day (R 5921-72). The state announced it had nothing additional to present, and the court told Amos he could call whoever he wanted to call (R 5926). Amos stated that he had not had time to read the depositions (R 5926-27). Amos stated that he was against representing himself at the hearing and wanted appointment of counsel that he did not have conflict with (R 5927). The court advised the jury that Amos had discharged counsel and would be representing himself, and called a ten minute recess (R 5928-29). After court reconvened, Amos stated that since the trial court would not give him an attorney, he would not put on any evidence (R 5929-30). After the state finished its closing argument, Amos stated that he had not had much time to prepare, and did not have anything to say (R 5956). The jury returned a life recommendation for the McAninch murder and a death recommendation for the Bragman murder (R 5967-68). The trial court stated it would order a PSI and reconvene on April 10, 1990 (R 5970-71).

The PSI had not been completed by the April 10 hearing, and another discussion was held regarding Amos' representation. The court noted Amos had several choices; hire an attarney, or accept court appointed counsel (R 5975). The court noted that if a dispute arose with appointed counsel, it was to conduct a hearing, which it had done several times, and was willing to do again (R 5975). The court stated that if there was no real dispute and if Amos did not want his court appointed attorney, he could represent himself (R 5975). Amos stated that he was against representing himself from the beginning; the trial court

asked him if the nature of the dispute was the same as had been ruled on by the district court (R 5975-76). *Amos* stated that there was more, and that he did not trust Boudreau, and it would **be** human nature for a person not to represent another to the fullest where he had to defend himself against that person's malpractice suit (R 5976). The court noted that they were back to the malpractice suit, so the only attorney *Amos* was going to get was Boudreau (R *5976). Amos* stated he would like to wait until the PSI was completed, and the state presented argument (R 5977). **The** trial court asked ***Amos*** for an outline of what he wanted to present in mitigation, and set the next hearing for April 23 (R 6010-11).

After the PSI was received, the trial court offered *Amos* the opportunity to present anything he wanted to (R 4357). *Amos* requested counsel; anyone but Boudreau (R 4357). *Amos* stated that if he **could** not have counsel other than Boudreau, he would not put on anything (R 4358). Sentencing was **held** May 14, 1990, and ***Amos*** stated he wanted counsel, but did not want Boudseau (R 6028). The trial court followed the jury recommendations as to both counts of first degree murder.

Amos now alleges that he was denied effective assistance of counsel when the trial court refused to appoint conflict free counsel for the penalty phase. *Amos* further alleges that there was a legitimate conflict between him and court appointed counsel, and the trial court had an obligation to appoint conflict free counsel. ***Amos*** complains that the trial court summarily denied his motion to discharge counsel and failed to

make any inquiry of court appointed counsel. To the contrary, the record demonstrates that the trial court *grunted* Amos' motion after exhaustive inquiry and a determination that Amos had presented nothing new since the district court had determined that there was no conflict. Likewise, contrary to Amos' allegation, he was not in a Catch-22 situation of being forced to represent himself or being forced to be represented by an attorney with whom there was a conflict, as there was no conflict. Rather, Amos was attempting to put the court in a Catch-22 situation of committing error no matter which way he ruled. The court clearly did not have to appoint substitute counsel, and Amos was well aware of that. Had the court forced Amos to the penalty phase with Boudseau, Amos would no doubt be claiming that he was denied his right to represent himself. In the face of these problems, the trial court ruled properly.

Neither the exercise af the right to self representation nor to appointed counsel may be used as a device to abuse the dignity of the court or to frustrate orderly proceedings. Jones *v. State,* 449 So.2d 253 (Fla. 1984).

> If incompetency of counsel is assigned as the reason, or a reason, the trial judge should make a sufficiency inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective

> representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Nelson v. State, **274 So.2d 256, 258-59** (Fla. 4th **DCA 1973);** *Hardwick v. State,* 521 So.2d 1071, **1074-75** (Fla. **1988).** The trial court held a hearing when this issue first arose, and on September **5, 1989,** rendered extensive findings. The court stated that it was unable to discern from any of the pleadings any deficiency by Boudreau, that it was unable to learn from ***Amos*** why he believed Boudreau failed him, and that Boudreau was in the dark on this issue as well. Nor could the court find any conflict. The district court approved these findings, and specifically stated that if ***Amos*** again requested discharge of counsel, the court should advise him that the state may not be required to appoint substitute counsel. ***Boudreau, supra*** at **1078.** *Amos* has never asserted any additional grounds to support the substitution of Boudreau, and to this date, while he still insists "[t]here was **a** legitimate conflict between appellant and his court-appointed trial counsel (IB 85), he has yet to provide any court with one fact to support this allegation. ***See*** *e.g., Ventura v.* ***State,*** 560 So.2d 217 (Fla. 1990).

Defendants who, without good cause, refuse appointed counsel but do not provide their own counsel are presumed to be exercising their right **Lo** self representation. *Jones, supra* at 258; *Hardwick, supra* at **1074.** Where a defendant continues to demand a dismissal of court appointed counsel, the trial judge

may, in his discretion, discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel. *Nelson, supra* at 259. This is what Judge Carlisle did in the instant case, and the record demonstrates that it was not an abuse of discretion. Numerous inquiries were conducted and numerous warnings about this decision were given. Judge **Carlisle** had presided over one trial where *Amos* had proceeded ***pro se,*** and certainly was in an excellent position to determine that ***Amos*** was competent, literate, and understanding. ***See, Jones, supra,*** at 257.

Amos also states that the trial court denied his request to continue the penalty **phase,** and that he had wanted to call his sister and a psychological expert. These is no record support for these allegations. Amos never requested a continuance, nor did he ever claim that he wanted to call certain witnesses. Rather, *Amos* insisted that since he did not have a lawyer he would not present any evidence. This "strategy" was repeated in later proceedings when the trial court **offered** further opportunities to present mitigation. Appellee would also point out that *Amos* knew when the penalty phase was to commence, filed his motion to discharge counsel two weeks before that time, and should not be heard to complain that he did not have sufficient time to prepare,

This caurt has recognized that "the right to appointed counsel, like the obverse right to self-representation, is not a **license** to abuse the dignity of the court or to frustrate orderly proceedings, and a defendant may not manipulate the proceedings

by willy-nilly leaping back and forth between the choices." *Jones, supra* at 259. Both the state and defendant are entitled to orderly and timely proceedings, and Florida's capital punishment law, which has been repeatedly upheld, contemplates that the sentencing phase will follow the guilt phase, using the same jury. *Id.* at 258. Whatever else may be open to a defendant on appeal, one who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel". Id. at 258-59, quoting *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). *Amos* should not be heard to complain that he **was** denied effective assistance of counsel.

CONCLUSION

Based on the foregoing arguments and authorities, appellee respectfully requests this court affirm the judgments and sentences of the trial court in all respects.

Respectfully submitted,

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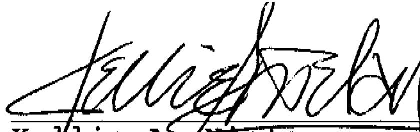
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to Bert Winkler, Esquire, 2001 Palm Beach Lakes Boulevard, Suite 503, West Palm Beach, FL 33409, this 27th day of February, 1992.



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