**IN THE SUPREME COURT OF FLORIDA**

**HAROLD A. BLAKE**

**Appellant,**

**v.** **Case No. SC05-1302**
**L.T. No. CF02-52030A1-XX**

**STATE OF FLORIDA,**

**Appellee.**
**_____/**

**ON APPEAL FROM THE CIRCUIT COURT**
**OF THE TENTH JUDICIAL CIRCUIT,**
**IN AND FOR POLK COUNTY, FLORIDA**

# ANSWER BRIEF OF APPELLEE

**BILL McCOLLUM**
**ATTORNEY GENERAL**

**KATHERINE V. BLANCO**
**Assistant Attorney General**
**Florida Bar No. 0327832**
**Concourse Center 4**
**3507 East Frontage Road, Suite 200**
**Tampa, Florida 33607-7013**
**Telephone: (813) 287-7910**
**Facsimile: (813) 281-5501**

**COUNSEL FOR APPELLEE**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

PAGE NO.

**Cases**

**Other Authorities**



## PRELIMINARY STATEMENT

References to the record:

References to the record on appeal will be designated as (R Vol. #/page #). References to the supplemental record will be designated as (SR/page #).

## STATEMENT OF THE FACTS

On August 12, 2002, Maheshkumar [Mike] Patel owned and operated a convenience store, Del's Go Mart, at 14 Coleman Road in Winter Haven, Polk County. (V5/T457). Around 6:00 a.m. that morning, Mike Patel was shot and killed as he stood inside the glass front door of his convenience store. Mr. Patel's murder was captured by the store's surveillance camera.[1] (V7/T839; V8/910-911).

Trish Alderman, a neighbor who lived across the street, heard the gunshot and looked out her window shortly before daylight. (V5/T435; 445). Ms. Alderman initially testified that she saw two black men, who appeared to be in their 20's, running to get into a car. (V5/T435-436). On cross-examination, Ms. Alderman clarified that she saw only one young man running to the car, which was only ten or twelve feet away

[1] The store's surveillance camera recorded the view from the back of the store toward the main entrance. During Blake's statements at the Sheriff's office, including those which were secretly videotaped, Blake admitted that he was the one who was armed with the loaded 9 mm gun, that Blake kept his finger on the trigger of the loaded 9 mm as he walked up to the glass front door of the store, that Blake was the one who shot Mr. Patel through the glass door, and that Blake burned the clothes that he was wearing at the time of the shooting. However, Blake claimed that the shooting was an accident. (V7/T763-765; 777; 783). At trial, Blake denied shooting Mr. Patel and Blake denied that he planned to rob the convenience store. (V8/T950; 987).

from the store. (V5/T444-445; 447). Ms. Alderman thought the young man had very short black hair. (V5/T445). He was waiving a gun and he climbed into the passenger side of the vehicle, an older-model, light-color Cadillac-type car. (V5/T441, 444). Ms. Alderman thought there were four people in the car. (V5/T435). Ms. Alderman also went across the street and saw that the front glass door of the store was shattered and she heard one loud moan from Mr. Patel, who was inside the store. (V5/T438; 440).

Denard Keaton, a detention center support specialist, was driving by Del's Go Mart around 6:00 a.m., when he saw a young black man, who looked like a teenager, walking toward the front of the store. (V5/452-453; 456). It was still dark outside that morning. (V5/T456). Shortly thereafter, Keaton heard a "pop," which sounded like a firecracker, and a loud yell, which came from the store. (V5/T451-452). Keaton put his car in reverse and he saw a Champagne or "goldish" light-colored Buick or Oldsmobile leave the parking lot and head north onto Coleman Road. (V5/T454; 457) Deputy Keaton saw three, or possibly four, people inside the car. (V5/T454-455). Deputy Keaton did not pursue the car, but he went directly to the store in order to help Mike. (V5/T457). Deputy Keaton called 911 from a telephone located outside the store. (V5/T457-458).

In the meantime, another neighbor, Donovan Steverson, also heard the sound of the gunshot and a scream from someone in the store. When Mr. Steverson looked over the privacy fence, he saw the same gold, older-model Oldsmobile or Buick that had been at his apartment complex earlier that morning. (V6/585). Mr. Steverson did not know if the man who ran and got into the gold car at the convenience store was the same man that got into the car at his apartment complex earlier that morning. (V6/580; 584). Mr. Steverson thought, but was not sure, that the man who was ran from the convenience store was wearing a bandana or something covering his hair. (V6/T585; 589). There were two other people in the gold car at the apartment complex and at the convenience store. (V6/T582; 585). It was still dark outside, and when Mr. Steverson went up to the shattered glass doorway, he saw Mr. Patel laying on the ground, bleeding and unable to speak. (V6/T583-586; 588).

Deputy Laura McManus was dispatched at 6:04 a.m. and arrived at Del's Go Mart at 6:08 a.m. (V5/T470). Although Mr. Patel was still breathing, his breathing was labored, he was gasping for air, and there was blood on his left chest. (V5/T473-474). Officer McManus went to get a CPR mask from her car, and when she returned, Mr. Patel was no longer breathing. (V5/T474-475).

The autopsy confirmed that Mr. Patel was shot in his left side. The bullet went through his left arm, into his left armpit, through his rib cage, through his left lung, and through his heart. Finally, the bullet ended up in his right chest cavity. (V6/T522; 554-555; V8/T898; 901-908). A spent 9 mm shell casing was found on the ground outside the glass door of the store. (V6/T520; 569).

Detective Glenda Eichholtz located the suspect's vehicle by traveling north on Coleman Road. Detective Eichholtz spotted an older-model, light colored Oldsmobile parked on the side of the road. (V5/T481). The car was still running, but there was no one around the vehicle. The steering column on the car had been broken and the rear window was broken out of the vehicle. (V5/T482).[2]

[2] The owner of the car, Wanda Petranick, parked her car in her driveway on August 11th, and she did not give anyone permission to take her car. There were small pieces of glass laying on the ground around where the car had been parked the night before. (V6/T488). Ms. Petranick did not know Harold Blake, Richard Green, Kevin Keaton, or Demetrius Jones, and none of them had permission to take her car. (V6/T491-492). The fingerprints lifted from Ms. Petranick's vehicle were sent to Patty Newton, a fingerprint examiner with the Polk County Sheriff's Office. Blake's fingerprint were located on the right front window. (V7/T815). Richard Green's fingerprint was located on the left rear window. (V7/T814). Fingerprint examiner Newton also submitted the other identifiable-quality prints for an FDLE computer search via AFIS [Automatic Fingerprint Identification System], which linked a print on the right exterior rear door to Demetrius Jones. (V7/T817; 821). In his statements to law

Officer Billo, a K-9 officer, responded with his dog, Fules, to the location of the abandoned vehicle. Fules was provided with a scent from the seat and driver's area of the car. Fules tracked the scent to the Lake Deer Apartments, stopping at the building with apartment 2633. (V6/T483-485; 499-502). Teresa Jones lived in 2631, one of three apartments in the same building where Fules stopped his track. (V6/504; 593).

On August 12th, Teresa Jones was interviewed by law enforcement and she stated only that Blake and another man came to her apartment that morning. (V6/T613). At that time, Teresa did not mention her boyfriend, Richard Green. Two days later, on August 14th, Teresa told law enforcement that Richard Green, Harold Blake, and a young man known as "Red Man" arrived at her apartment around 7:00 a.m. on August 12th. (V6/T595-596). That morning, Blake asked for and received a ride from Teresa to the Scottish Inn motel in Winter Haven. However, first, Teresa Jones drove the three men to the location of a car parked on the side of the road. The car was running. (V6/T598-601). Teresa saw Blake reach into the car and pull out two guns, a gray gun and a brown gun, and wrap them in a sweater. (V6/T604; 608). Teresa dropped off "Red Man" at a Cash Mart, dropped off Blake

---

enforcement and when he testified at trial, Blake admitted that he was the one who stole the Oldsmobile. (V8/T936).

at the Scottish Inn Motel. (V6/T598; 608). Teresa took Green back to her apartment, then drove her children to school. When Teresa returned, the deputies were already in her neighborhood. (V6/T610).

On August 14th, the deputies interviewed Richard Green. (V7/T748; 805). Green gave the officers a statement and also took members of the Sheriff's office to the apartment where Blake was hiding in Winter Haven. (V7/T748).

On August 14th, officers from the Polk County Sheriff's Office surrounded the apartment and made contact with Blake, who was inside the apartment. (V7/T749). The negotiations with Blake for his peaceful surrender lasted approximately 1½ hours. Blake surrendered to Detectives Giampavolo and Navarro and was arrested. (V7/749-753; 775).

A search warrant was executed on that apartment and a pair of tennis shoes were recovered from the bedroom closet. (V7/T688-689). The shoes were sent to the FDLE and examined by Ted Berman. Glass fragments were embedded in the treads of the shoes. (V7/T701). Eight glass fragments found in the treads of the shoes matched those found in the Oldsmobile. (V7/T703).

Demetrius Jones testified that he was at home in the early morning of August 12th, when Harold Blake, Richard Green (Plump), and Kevin Keaton (Red Man) came to his neighborhood. Between

3:00 and 4:00 a.m., Demetrius Jones was outside talking with a neighbor when the three men drove up in an older model, light-colored car with a broken rear window. (V6/T636). When they arrived, Blake was driving, Green was in the front passenger seat, and Key ("Red Man," who is Demetrius Jones' cousin) was in the back seat. (V6/T634; 646). Jones saw two guns – a .38 revolver and a 9 mm. The 9 mm was on the front seat, and Green had the revolver in the pocket of his hoodie sweater. (V6/T637-638).

Blake was the one who suggested that Jones go with them to rob some drug dealers in Lakeland. (V6/T638; 673; 685). Jones decided not to go with them, and when the three men left, Green was driving and Blake was in the front passenger seat. (V6/T640). Around 9:30 a.m., Jones went to the Lake Deer Apartments to see what was going on and he saw that the police had blocked off the apartments and Teresa Jones (no relation) was standing outside, talking to some detectives. (V6/T643-644).

Later that morning, around noon, Demetrius Jones saw Blake at Avenue Y in Winter Haven. (V6/T645). Blake appeared nervous and said that "somebody got shot" when they were doing a robbery. (V6/T646-647). Blake asked Jones to get rid of a gun, and Jones agreed to try and sell the gun to some Jamaicans. However, Blake did not show the gun to him or give the gun to

Jones. (V6/T647-648). Later that night, around 6:30 or 7:00 p.m., Demetrius Jones saw Richard Green on the same street, the same spot known as the "Boggy." (V6/T649). Green handed him a chrome 9 mm gun. (V6/T650). Demetrius and Green tried to sell the gun to some Jamaicans, but they had no takers. (V6/T651). Jones gave the gun back to Green, and sometime later that night or early the next morning, Demetrius Jones and Green went to the lake in order to get rid of the gun. (V6/T654). In Demetrius Jones' presence, Green tossed the gun into the lake. The gun was a semi-automatic, which had a magazine that fit into the handle of the gun. According to Demetrius Jones, when Green tossed the gun into the lake, the gun separated while in flight before landing in the lake. (V6/T654).

After Demetrius Jones was interviewed by law enforcement, Jones accompanied Detective Raczynski to the lake and showed him where the gun had been tossed into the lake. (V6/T655). A dive team from the Sheriff's office recovered the firearm, which was missing the magazine clip. (V7/T692-694).

The jacketing and bullet recovered from Mr. Patel's body were sent to the FDLE lab for analysis. Edward Lenihan examined the 9 mm firearm recovered from the lake, the shell casing found at the crime scene, the copper jacket recovered from Mr. Patel's arm, and the core of the bullet removed from Mr. Patel's body.

Mr. Lenihan determined that the firearm recovered from the lake was the same firearm that discharged the bullet that killed Mr. Patel. The shell casing found outside of the store was fired from the same gun that was recovered from the lake. (V7/T730-735).

After Blake was arrested at the apartment in Winter Haven, he was transported by Detective Raczynski and Detective Giampavolo. Blake was handcuffed and placed in the front seat of an unmarked car and Blake was advised of his Miranda warnings by Detective Giampavolo. (V7/T749-753). When they arrived at the sheriff's office at the Bartow Air Base, around 5:00 p.m., Blake was taken into an interview room, and he was questioned regarding his role in the death of Mr. Patel. (V7/T756-758). Detective Giampavolo testified that Blake initially denied any involvement and said he had eyewitnesses who could place him somewhere else. (V7/T755; 760). During the interview, Blake then said "all three of us will get charged," he mentioned the death penalty, began to cry and admitted that he was present at the shooting and that he was the one who shot Mr. Patel, but claimed it was an "accident." (V7/T761; 764-765). Detective Giampavolo asked Blake if he would agree to put his interview on tape. Mr. Blake told Detective Giampavolo that he didn't want to put it on tape, but that he would go over the events with the

detectives one more time. (V7/T767). Because the interview room had a hidden camera, with both audio and video equipment, they decided to tape the interview to "capture in his own words what was said." (V7/T767). Blake repeated his earlier statements, which were secretly videotaped. (V7/T767). Blake admitted that he was the one who shot Mr. Patel, and Blake also stood up and demonstrated his version of how the shooting occurred. (V7/T778). Detective Giampavolo did not promise Blake anything, did not threaten Blake in any way, and did not furnish any information about the crime for Blake to repeat on tape. (V7/T768-769; V9/T1073). Blake admitted that he had been well treated and read his Miranda rights. (V7/T781; 784). The detectives and Blake arrived at the homicide office at 5:00 p.m. and the interview lasted approximately one hour. (V7/T798; 800).

Additional facts related to the individual issues raised on appeal will be addressed in the Argument section of the instant brief.

## SUMMARY OF THE ARGUMENT

Issue I: The trial court correctly denied Blake's motion to suppress his second set of statements, which were secretly videotaped. Blake had no subjective expectation of privacy at the police interview room, his consent was not a necessary prerequisite, the videotape only depicted what was viewable by the officers, whose presence the defendant consented, and the videotape was merely cumulative to the officer's testimony.

Issue II: In response to Blake's motion to discharge counsel and appoint new counsel, the trial court conducted a Nelson hearing, asked the defendant to explain each of his complaints, addressed each of the defendant's complaints with defense counsel in Blake's presence, and entered a written order denying Blake's motion, without prejudice. Thereafter, the trial court was not required to also comply with Faretta.

Issue III: Blake's death sentence is proportional. The defendant's three aggravating factors include the "weighty" prior violent felony conviction aggravator (for another first-degree murder/robbery), Blake's felony probation status, and the merged robbery/pecuniary gain aggravator, and there is no compelling mitigation in this case. The defendant's involvement in two unrelated killings for financial gain, within less than two weeks of each other, undeniably supports the death sentence.

## ARGUMENT

### ISSUE I

**THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS BLAKE'S STATEMENTS TO LAW ENFORCEMENT, WHICH WERE SECRETLY VIDEOTAPED.**

The Appellant/Defendant, Harold Blake, gave two discrete sets of statements to the law enforcement officers.[3] The first set was not recorded by audio or videotape. When the officers asked Blake if he would go over his prior statements once again, Blake agreed to do so. However, when the officers asked Blake if he would consent to videotaping his second set of statements, Blake declined to consent to the videotaping.

In this case, it is readily apparent that (1) Blake was willing to talk to the law enforcement officers, (2) Blake did not invoke his right to remain silent, and (3) Blake affirmatively agreed to repeat his earlier statements to the officers. However, Blake simply did not consent to having his

[3] Issue I, as framed in the Appellant/Defendant's Initial Brief, refers solely to the defendant's *recorded* statements. (See, Initial Brief at 44). Blake asserts that the "issue presented in this case is whether or not the *recording* of Mr. Blake's statement was subject to suppression." (Initial Brief at 48). Blake also alleges that any error "in the admission of the *recorded* statement was not harmless." (Initial Brief at 53). Therefore, the State's Answer Brief will address only the *recorded second set* of statements.

second set of statements videotaped. Essentially, the officers ignored Blake's desire not to videotape the second set of statements. Blake now argues that his second set of statements –- which repeated his prior unrecorded statements and which were secretly videotaped -- should be suppressed because Blake did not consent to the videotaping. For the following reasons, the trial court's order denying Blake's motion to suppress should be affirmed.

Standard of Review

In Fitzpatrick v. State, 900 So. 2d 495, 510 (Fla. 2005), this Court emphasized the following standard of review applicable to reviewing trial court's orders on motions to suppress:

> [A]ppellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution.
>
> Id., at 510, citing Nelson v. State, 850 So. 2d 514, 521 (Fla. 2003) (quoting Connor v. State, 803 So. 2d 598, 608 (Fla. 2001)).

The Trial Court's Ruling

As the trial court pointed out, "[t]he Fifth Amendment due process right to remain silent can be invoked at anytime. The

defendant was fully informed of his rights. The defendant never invoked his right to remain silent. The Court can find no case which finds a due process violation where the defendant is tape recorded without his permission. The defendant has a right to remain silent, not a right not to be taped." (V2/314).

The trial court's cogent written order denying Blake's motion to suppress set forth the following findings of fact, which are not challenged, and resulting conclusions of law:

**ORDER DENYING MOTION TO SUPPRESS STATEMENT OF ACCUSED**

> This Cause came before the Court on Thursday, 10 February 2005, for a noticed hearing on the defendant's motion requesting this Court to exclude as admissible evidence in the trial of this cause the oral and tape recorded statement given by the accused to Detective Louis Giampovola of the Polk County Sheriffs Department. The defendant appeared with his counsel, Gil Colon, Esquire, and the State of Florida was represented by ASA Cass Castillo. The Court heard the sworn testimony of Louis Giampovola, Ivan Navarro, and Kenneth Racynski. The Court also received in evidence the video and audio electronic recording of the statement as Exhibit D-l. The Court took the matter under advisement to consider the relevant case law, and gave both parties the opportunity to submit any caselaw. The Court makes the following findings of fact:
>
> **FINDINGS OF FACT**
>
> 1. On 14 August 2002 the Polk County Sheriff's Department received information that the defendant was involved in the fatal shooting of a store clerk during an attempted robbery on 12 August 2002, and could be located at a specified residence. The defendant was arrested at the residence without incident. He was handcuffed in front and taken to an unmarked

detectives department passenger vehicle. He was placed in the front seat. Det. Giampovola drove the car to his department office at the Bartow Air Base. Det. Kenneth Racynski rode in back. The trip took about twenty minutes. As he drove, Det. Giampovola read to the defendant his full *Miranda* rights from a department issued card. He stopped after each sentence and confirmed that the defendant understood his right as recited. [fn1]

The defendant indicated he understood his rights and was willing to speak with the detectives about the shooting. He indicated that he was not present at the shooting. He asked the detectives to contact his girlfriend by telephone, and they indicated that they would.

2. Det. Giampovola put the defendant in an interview room equipment [sic] with a concealed video camera with microphone. He was not re-advised of his rights. The detectives continued the interview with the defendant, who continued to deny his involvement. The defendant was told the deputies had recovered a video surveillance tape of the shooting from the store.

3. The defendant was asked if he would give a taped statement, and he said he would not give a taped statement. He was not provided with a rights waiver form to sign. During a break, the defendant was being watched by Detective Navarro in the interview room. He told the defendant that he did not believe the defendant’s version of events. The defendant asked him what if the shooting was an accident.

4. The detectives decided to surreptitiously recorded [sic] the remainder of the interview. The defendant answered questions, and re-enacted his movements at the door of the store as he was confronted by the clerk. He indicated that he shot the clerk by accident.

**ANALYSIS**

The defense does not challenge the probable cause

for the arrest. There is no evidence of coercion or promise. There is no evidence that the defendant was threatened with the death penalty if he did not give a statement, or a promise that he would be released from custody if he gave a statement. The defendant's actions on the video tape do not suggest his comments were forced or less than cooperative. He seemed genuinely regretful of the shooting. The defendant was able to terminate the interview at any time. [fn2]

The defense counsel has argued the defendant partially invoked his rights when he declined to give a taped interview. Certainly the defendant had no expectation of privacy in the interview room which would implicate his Fourth Amendment rights. The Court notes that a deputy sheriff was held to have no reasonable expectation of privacy in the jail's property room in Deputy Sheriff's Ass'n v. Sacramento, 59 Cal. Rptr. 2nd 834 (3rd Dist. 1996). The facts in this case are distinguished from those in State v. Calhoun, 479 So.2d 241 (Fla. 4th DCA 1985) where the police videotaped a *private* conversation the defendant had with his brother in the police interview room after he had invoked his right to remain silent and for an attorney. As noted in State v. Clemmons, 81 Wash. App. 1003 (Div. 1 1996), a video surveillance as a method of investigation does not itself violate a reasonable expectation of privacy as the police could record what they could view with their naked eye. It appears that the interception of oral communications is governed by Fla. Stat. Chapter 934, and permits the recording of the interview for law enforcement purposes by a consenting party to the communication under law enforcement supervision.

The Fifth Amendment due process right to remain silent can be invoked at anytime. The defendant was fully informed of his rights. The defendant never invoked his right to remain silent. The Court can find no case which finds a due process violation where the defendant is tape recorded without his permission. The defendant has a right to remain silent, not a right not to be taped.

Upon consideration of the foregoing findings of

fact and conclusions of law, it is

ORDERED AND ADJUDGED that:

1. The motion to suppress is DENIED.

DONE AND ORDERED this 18 February 2005 in Bartow, Polk County, Florida. (R Vol. 2/314)

[fn1] The Court recognizes that there was a conflict in the testimony. The Court accepts as correct the testimony of the deputy who actually read the rights card, as opposed to the deputy who was not charged with that responsibility.

[fn2] It would be better if the rights were memorialized on the tape, however they were mentioned, and the defendant confirmed at the end of the interview he had been informed.

(R Vol. 2/313-314)

Analysis

Blake candidly admits that "[i]n the video recording Mr. Blake provided essentially the same factual recitation of the incident. Mr. Blake was also asked to demonstrate what happened and complied. Mr. Blake stated on the tape that he had not been threatened or hit and acknowledged receiving Miranda." (Initial Brief at 46). Accordingly, the videotape would be merely cumulative to the in-court testimony of the officers and, for the following reasons, the trial court's order denying Blake's motion to suppress should be affirmed.

First, the trial court was correct in ruling that "the defendant had no expectation of privacy in the interview room"

at the Sheriff's office located at the Bartow Air Base. In Boyer v. State, 736 So. 2d 64 (Fla. 4th DCA 1999), the police officer left the interview room at the police station, but secretly recorded a conversation between Boyer and Boyer's sister-in-law. The Fourth District Court found the Boyer had no subjective expectation of privacy at the police station, and noted that Boyer neither asked for privacy, nor was it offered, and police said and did nothing that would reasonably foster a sense of privacy in the conversation.[4] See also, Larzelere v. State, 676 So. 2d 394 (Fla. 1996) (holding that police recording of defendant's jailhouse conversation with her son was not improper because the police had not fostered a reasonable expectation of privacy); State v. Smith, 641 So. 2d 849, 852 (Fla. 1994) (holding that a person does not have a reasonable expectation of privacy in a police car and that any statements intercepted therein may be admissible as evidence); Allen v. State, 636 So. 2d 494 (Fla. 1994) (voluntary jailhouse conversations are not normally accorded the same privacy as other communications).

Second, the defendant's consent was not necessary or

[4] The State is not unmindful of the case of State v. Calhoun, 479 So. 2d 241 (Fla. 4th DCA 1985), which the trial court below readily distinguished. In Calhoun, the defendant had invoked his right to remain silent under Miranda and had asked for an

required in order for law enforcement to record, by audiotape or videotape, the statements made in the police interview room. See Boyer, *supra*. In Bedoya v. State, 779 So. 2d 574, 579-580 (Fla. 5th DCA 2001), the defendant asserted that his statements to law enforcement officers at the Sheriff's Department should have been suppressed because they were recorded and videotaped without his knowledge or consent. In rejecting Bedoya's argument, the Fifth District Court held that "the fact that the interview was audiotaped and videotaped without his consent or knowledge does not constitute a violation of his due process rights." As the Court in Bedoya explained:

> In order for the Fourth Amendment right to privacy to exist, the person must have a subjective expectation of privacy, and that expectation must be one that society recognizes as reasonable. State v. Smith, 641 So. 2d 849, 851 (Fla. 1994); Boyer v. State, 736 So. 2d 64 (Fla. 4th DCA 1999). Although the investigators did not tell Bedoya at the outset that he was the main suspect or that he would be arrested at the conclusion of the interview, they did not attempt to foster any particular sense of privacy in the conversation. Moreover, a defendant does not have a reasonable expectation of privacy in a police interview room. See State v. Calhoun, 479 So. 2d 241 (Fla. 4th DCA 1985); see also Boyer; Johnson v. State, 730 So. 2d 368 (Fla. 5th DCA 1999)."
>
> Bedoya, 779 So. 2d at 579.

Accord, Bell v. State, 802 So. 2d 485 (Fla. 3d DCA 2001). In this case, as in Bedoya, the law enforcement officers were not

---

attorney.

required to first obtain Blake's consent to any audio or videotaping of their interview at the police sub-station. Moreover, as the trial court found, "the interception of oral communications is governed by Fla. Stat. Chapter 934, and permits the recording of the interview for law enforcement purposes by a consenting party to the communication under law enforcement supervision." (V2/314) (e.s.); See e.g., §934.03 (2)(c), Florida Statutes. Therefore, the failure of the police to do something that was not required cannot be grounds to render the defendant's confession involuntary. See also, State v. Lewis, 129 N.H. 787, 533 A.2d 358 (N.H. 1987) (Validity of waiver of Miranda rights prior to making confession was not affected by fact that police videotaped interview with the defendant without mentioning that fact until the questioning was nearly over, since the operation of video camera had no bearing on defendant's comprehension and volition, which are the objects of Miranda's solicitude. "Events occurring outside the presence of the suspect and entirely unknown to him can have no bearing on the capability to comprehend and knowingly relinquish a constitutional right." Id., citing Moran v. Burbine, 106 S. Ct. at 1141 (1986)).

Third, the trial court was also correct in concluding that a "video surveillance as a method of investigation does not itself

violate a reasonable expectation of privacy as the police could record what they could view with their naked eye." (R Vol. 2/304). In sum, the videotape evidence here only depicted what was viewable by the officers, whose presence the defendant consented. See also, §934.04, Florida Statutes.

Fourth, there was no intrusion into any privileged or confidential communication, nor was there any misrepresentation or promise by law enforcement. Indeed, the trial court specifically found that "there is no evidence or coercion or promise" in this case. Rather, the officers simply ignored Blake's desire not to be videotaped. However, even if there had been some affirmative misrepresentation, which the State strongly disputes, Blake still would not be entitled to relief. As this Court stated in Fitzpatrick v. State, 900 So. 2d 495, 511 (Fla. 2005), "police misrepresentations alone do not necessarily render a confession involuntary… The determination of voluntariness is based upon the totality of the circumstances." In addressing the voluntariness of a defendant's statements, the Court must consider the "totality of the circumstances," including, *inter alia*, (1) any police coercion; (2) interrogation length; (3) interrogation location; (4) interrogation continuity; (5) the suspect's maturity; (6) the suspect's education; (7) the suspect's physical condition

and mental health; and (8) whether the suspect was advised of Miranda rights. Withrow v. Williams, 507 U.S. 680, 693-94 (1993). At trial, Blake admitted he had nine felony convictions, and Blake was no stranger to the criminal justice system. The "totality of the circumstances" here include Blake's confirmation, on videotape, that he was read his Miranda rights, that he had been treated well by Detective Giampavolo, and that he had not been threatened or mistreated. (R Vol 7/T784).

Fifth, for a confession to be involuntary, police coercion must have played a significant role in obtaining it. Colorado v. Connelly, 479 U.S. 157, 164, 167 (1986). Absent "police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." Id. at 164. In this case, there is no police misconduct or coercion causally connected to the defendant's post-Miranda statements to the law enforcement officers at the police interview room.

Sixth, Blake testified at trial and he then denied being the one who shot Mr. Patel. Miranda's "core ruling" was "that unwarned statements may not be used as evidence in the prosecution's case in chief." See, Dickerson v. United States, 530 U.S. 428, 443-44 (2000). Even if the videotape itself was arguably subject to suppression during the State's case-in-

chief, which the State strongly disputes, the same videotape still would have been admissible to contradict or impeach Blake's in-court testimony during the guilt phase at trial. See, Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975) (a substantive violation of Miranda does not preclude a defendant's voluntary statement from being used for impeachment purposes).

Lastly, error, if any, is harmless. Blake admits that "in the video recording Mr. Blake provided essentially the same factual recitation of the incident" [*i.e.,* as the statement previously given to the law enforcement officers -- that Blake was the one who shot Mr. Patel, but the shooting was an "accident"]. (Initial Brief at 46). Accordingly, the video recording would be merely cumulative to the detectives' in-court testimony, thus rendering the admission of the videotape itself harmless. Error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not affect the verdict. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). Such is the character of the alleged error in the instant case. See, Almeida v. State, 748 So. 2d 922, 931 (Fla. 1999) (applying harmless error test to the erroneous introduction of defendant's taped confession).

## ISSUE II

**THE TRIAL COURT CONDUCTED AN APPROPRIATE INQUIRY UNDER NELSON AND THE TRIAL COURT WAS NOT REQUIRED TO SUBSEQUENTLY INITIATE ANY ADDITIONAL INQUIRY UNDER FARETTA.**

On January 29, 2004, Blake filed a motion to dismiss his trial counsel, but Blake withdrew this motion in court the following day. (SR3). At that time, Blake also admitted that there were "no alibi witnesses" in this case. (SR5-6). Nine months later, on October 20, 2004, Blake filed a second motion to dismiss court-appointed counsel and to appoint new counsel. (V1/R175-177). Blake specifically sought only the appointment of a different attorney. (V1/R177). On November 23, 2004, the trial court held a hearing on Blake's [second] motion to discharge counsel and noted that this case was set for trial in February [2005]. (SR13). The trial court addressed each of Blake's four grounds with the defendant and with trial counsel, Gil Colon, who pointed out that he had been on this case for "almost two years," and had "not been made aware of any alibi witnesses" in this case. (SR16; 14-21). At the conclusion of the November 23rd hearing, the trial court announced that he would take the motion "under advisement" with "a written order to follow." (SR21). The trial court's written order was filed the following day, November 24, 2004. (V1/R184). Jury selection

in this case did not begin until nearly three months later, on February 21, 2005. (V3/T1; 13; 21). Blake did not renew his motion to discharge in the intervening months before trial, and/or at any time before trial had ended.

Significantly, Blake does not dispute either the trial court's written findings or the trial court's ruling that no basis existed to appoint another counsel in this case. In other words, Blake can show nothing to establish that trial counsel was incompetent. Accordingly, in this case, as in Lowe v. State, 650 So. 2d 969 (Fla. 1994), Capehart v. State, 583 So. 2d 1009 (Fla. 1991), and Bell v. State, 699 So. 2d 674, 676-677 (Fla. 1997), the trial court did not err in denying Blake's motion for a new court-appointed counsel. Moreover, as this Court held in Bell, the trial complied with Hardwick v. State, 521 So. 2d 1071 (Fla. 1988) by adequately inquiring into the defendant's "complaints about his defense counsel and stating its findings. The trial court was not required to comply with Faretta."[5] Bell, 699 So. 2d at 677.

Blake nevertheless argues that he is entitled to a new trial because, at the conclusion of the Nelson[6] hearing in November of 2004, the trial court (1) did not announce his findings on the

[5] Faretta v. California, 422 U.S. 806 (1975).
[6] Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

record, but entered a written order, without prejudice, instead and (2) did not thereafter inform Blake that if Blake still persisted in his request to discharge his court-appointed counsel, that the trial court was not obligated to appoint a new attorney, but that Blake could seek to represent himself under Faretta. (Initial Brief at 59-60). For the following reasons, Blake's Nelson/Faretta complaints must fail.

Standard of Review

The standard of review concerning whether the trial court conducted an appropriate Nelson inquiry is abuse of discretion. Moore v. State, 778 So. 2d 1054, 1056 (Fla. 4th DCA 2001). Kearse v. State, 605 So. 2d 534, 536 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 5 (Fla. 1993).

The Trial Court's Ruling

In denying Blake's motion to discharge his court-appointed counsel, the trial court entered the following fact-specific findings and denied Blake's motion, without prejudice. The trial court's order states, in pertinent part:

> ORDER DENYING PRO SE MOTION TO DISMISS APPOINTED COUNSEL AND FOR APPOINTMENT OF NEW COUNSEL
>
> This Cause came before the Court on Tuesday, 23 November 2004, for a noticed hearing on the defendant's pro se motion to discharge his appointed counsel and to appoint new counsel. The defendant appeared in custody with his appointed counsel, Atty Gil Colon, and the State of Florida was represented by ASA Cass Castillo. The Court made inquiry of the

defendant in regards to each ground set forth in the motion and also heard from appointed counsel. [fn1] The Court finds as follows:

FINDINGS OF FACT

1. The defendant asserts in ground one that his counsel has not interviewed witnesses which would show his innocence. The Court notes that the case is set for a jury trial to begin on 21 February 2005, which is approximately three months in the future. [fn2] While the defendant has been indicted for a capital offense for which he could receive the death penalty, the defendant has not identified any particular witness whose name has been furnished to appointed counsel who has not been interviewed. The Court finds no evidence that appointed counsel is ineffective on this ground.

2. The defendant asserts on ground two that appointed counsel has not discussed trial strategies and filed motions on the admissibility of evidence. The Court has heard a pre-trial motion in regards to the defendant's statement. The defendant filed a pro se motion to suppress on 03 May 2003, and on 09 February 2004 the appointed counsel filed a Motion to Suppress Statements. That motion was heard and denied on 10 February 2004, although it was in the context of the defendant's case number CF02-006050 and the order is filed in that case. The Court finds no evidence that appointed counsel is ineffective on this ground.

3. The defendant asserts on ground three and ground four that appointed counsel is "unwilling" to pursue an adversarial role and the defendant lacks confidence in counsel. When asked to identify a particular matter which gives rise to this feeling, the defendant was unable to point to a specific instance of deficiency. The Court finds no evidence to support a finding of ineffectiveness on these grounds.

[fn1] The defendant previously filed a similar motion to dismiss counsel on 29 January 2004, and that matter was heard on 30 January 2004 at which time the defendant withdrew the motion.

[fn2] The jury selection process actually began on this case on 09 August 2004 but was canceled due to Hurricane Charley. There was no indication at that jury selection that the defense was not ready to proceed to trial. (R Vol. 1/184)

ANALYSIS

The defendant is constitutionally entitled to the assistance of conflict-free and effective counsel, especially in a case of this magnitude and consequences. Although not specifically addressed in the motion or hearing, the defendant has two highly experienced, death penalty qualified, trial counsel. Atty Gil Colon is handling the guilt phase, and Atty Al Smith is handling the penalty phase. The motion is apparently directed to guilt-phase counsel. The Court notes that Atty Colon also represents the defendant in other pending cases, including another murder/robbery case which involved three jury trials. The first trial resulted in a mistrial after many hours of deliberation and a hung jury voting 11 to 1 for acquittal. Defense counsel has taken a very adversarial role in all the litigation.

The Court cannot discharge appointed counsel and appoint new counsel unless there is a factual basis for a finding that counsel is rendering ineffective assistance. The record does not support such a finding.

Upon consideration of the foregoing findings of fact and conclusions of law, it is

ORDERED AND ADJUDGED that

1. The motion to dismiss appointed counsel and appoint new counsel is DENIED, without prejudice to re-file the motion if new grounds become available.

DONE AND ORDERED this 23 November 2004 in Bartow, Polk County, Florida.

(R Vol. 1/185) (e.s.)

Analysis

For the following reasons, Blake is not entitled to a new trial on his current Nelson/Faretta claims. First, Blake's current complaints, raised for the first time on appeal, are procedurally barred. In order to preserve an issue for appeal, "[f]irst, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third … 'it must be the specific contention asserted as legal ground for the objection … below.'" Harrell v. State, 894 So. 2d 935, 940 (Fla. 2005) (quoting Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)).

Second, Blake's claim that he is entitled to a new trial because the trial court's findings were not announced from the bench, but were rendered in a detailed written order on the following day, is both speculative and disingenuous, at best. The defendant now offers only pure speculation as to what "might have been" if the trial court only had announced his ruling in open court at the end of the hearing. Relief on appeal cannot be based on such mere speculation and conjecture. See, Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002) (holding that the defendant's allegation that there would have been a basis for a for-cause challenge at trial if defense counsel had only "followed up" during voir dire with more specific questions was

mere conjecture). Furthermore, the trial court promptly denied the defendant's motion to discharge counsel in a written order, without prejudice. Accordingly, the defendant had another three months before his trial commenced in order to identify any specific objections. In this case, as in Moore v. State, 778 So. 2d 1054, 1056-1057 (Fla. 4th DCA 2001), the defendant did not renew his motion to discharge in the intervening months before trial, and/or at any time before trial had ended. Accordingly, his current objections are waived.

Third, this Court repeatedly has emphasized that it is not error for the trial court to fail to even conduct a Nelson hearing in cases where a defendant expresses only general "dissatisfaction with his counsel's trial preparation, his witness development, and his lack of contact with the defendant." Morrison v. State, 818 So. 2d 432, 440 (Fla. 2002); See also, Davis v. State, 703 So. 2d 1055, 1058-59 (Fla. 1997); Gudinas v. State, 693 So. 2d 953, 962 n.12 (Fla. 1997); Branch v. State, 685 So. 2d 1250, 1252 (Fla. 1996); Cummings-El v. State, 863 So. 2d 246, 254-255 (Fla. 2003). A lack of communication between the defendant and counsel is not a ground for a claim of incompetency. See, Bowhey v. State, 864 So. 2d 510, 511 (Fla. 5th DCA 2004). The State respectfully submits that although the trial court did conduct a Nelson inquiry in

this case, Blake's admission that he did not have any alibi witness, Blake's failure to identify any specific witness who had not been interviewed, and Blake's remaining "statements can best be characterized as generalized complaints" that were simply insufficient to warrant any inquiry at all. See, Smith v. State, 931 So. 2d 790, 804-805 (Fla. 2006), citing Logan v. State, 846 So. 2d 472, 477 (Fla. 2003) (holding Nelson hearing unnecessary "where the defendant merely expresses dissatisfaction with his attorney").

In Hardwick v. State, 521 So. 2d 1071 (Fla. 1988), this Court adopted the procedure announced in Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), to be followed when a defendant complains that his appointed counsel is incompetent. When this occurs, the trial judge is required to make a sufficient inquiry of the defendant to determine whether appointed counsel is rendering effective assistance to the defendant. See Howell v. State, 707 So. 2d 674, 680 (Fla. 1998). However, this Court has also recognized that, as a practical matter, the trial judge's inquiry can only be as specific as the defendant's complaint. See Lowe v. State, 650 So. 2d 969 (Fla. 1994).

Since a Faretta inquiry is only required where there has been a clear and unequivocal request for self-representation, no error has been demonstrated in this case. See, Capehart v.

State, 583 So.2d 1009, 1014 (Fla. 1991), cert. denied, 502 U.S. 1065 (1992); Hill v. State, 549 So. 2d 179, 181 (Fla. 1989). To the extent that Blake suggests that his statements expressing dissatisfaction with his attorney *required* the trial court to also conduct a Faretta inquiry, this Court has rejected this argument. In State v. Craft, 685 So. 2d 1292 (Fla. 1996), this Court specifically held that expressions of disagreement or dissatisfaction with trial counsel do not require a trial judge to inform a defendant about his right to represent himself or conduct a Faretta inquiry. Such comments only require an inquiry into the competence of counsel. The record reflects that the judge below discussed the concerns raised in the defendant's motion with the both the defendant and defense counsel. See also, Gamble v. State, 877 So. 2d 706, 718 (Fla. 2004) (holding that no Faretta inquiry was necessary because Gamble never asked to represent himself), citing Teffeteller v. Dugger, 734 So. 2d 1009, 1028 (Fla. 1999) (holding that a defendant who does not make a request to represent himself is not entitled to a Faretta inquiry).

In Brooks v. State, 762 So. 2d 879, 889 (Fla. 2000), the defendant also argued that the trial court failed to properly advise him of the right to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975). In rejecting Brooks' claim,

this Court explained:

> … the record clearly reflects that Brooks did not make an unequivocal assertion of the right to self-representation during the in-camera hearing. Therefore, the trial court was not required to conduct a Faretta inquiry. See, e.g., State v. Craft, 685 So. 2d 1292, 1295 (Fla. 1996) ("This Court has repeatedly held that only an unequivocal assertion of the right to self-representation will trigger the need for a Faretta inquiry."). For the above-stated reasons, we reject the claim now asserted by Brooks.

Blake cites, *inter alia*, this Court's decision in Weaver v. State, 894 So. 2d 178, 191 (Fla. 2004), in which Weaver raised the converse of Blake's current argument. Weaver argued that the trial court should *not* have undertaken a Faretta inquiry because he never made an unequivocal request to represent himself. This Court disagreed, noting that Weaver decided to discharge trial counsel even though the trial court found that he was providing effective and competent counsel. "A defendant who persists in discharging competent counsel after being informed that he is not entitled to substitute counsel is presumed to be unequivocally exercising his right of self-representation." Weaver, 894 So. 2d at 193.

In Davis v. State, 703 So. 2d 1055, 1059 (Fla. 1997), this Court, citing Watts v. State, 593 So. 2d 198, 203 (Fla. 1992), also painstakingly explained:

> Before the trial in that case, Watts informed the trial court that he was dissatisfied with his

attorneys because they allegedly had not been to see him in the jail, and he requested that another attorney be appointed. No inquiry was made, but his counsel explained that Watts' complaint was probably based on his misunderstanding of what the attorney was doing to prepare Watts' case for trial. We held:

> First, because there was no unequivocal request for self-representation, Watts was not entitled to an inquiry on the subject of self-representation under Faretta. Hardwick v. State, 521 So. 2d 1071, 1073 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). We also reject Watts' claim that the trial court erred by failing to conduct further inquiry in connection with his request for another attorney. Where a defendant seeks to discharge court-appointed counsel due to alleged incompetency, it is incumbent upon the trial court to make a sufficient inquiry of the defendant and counsel to determine whether there is reasonable cause to believe that counsel is not rendering effective assistance. Hardwick, 521 So. 2d at 1074; Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). However, under the circumstances present in this case, no further inquiry was warranted.

Watts, 593 So. 2d at 203. Davis made no request for self-representation, so there is no Faretta issue. As in Watts, Davis merely expressed general dissatisfaction with his attorney. Accordingly, we find that the court did not err.

Davis v. State, 703 So. 2d 1055, 1059 (Fla. 1997).

In this case, the trial court did comply with the requirements of Nelson, which this Court adopted in Hardwick v. State, 521 So. 2d 1071 (Fla.), cert. denied, 488 U.S. 871, 102 L. Ed. 2d 154, 109 S. Ct. 185 (1988), and no basis was

demonstrated for requiring the trial court to appoint other counsel. On two occasions, Blake complained of the performance of his court-appointed counsel. The trial court held hearings on the defendant's complaints. At the first hearing, in January of 2004, Blake withdrew his motion. The second motion to discharge counsel and appoint new counsel was filed in October of 2004. The hearing on Blake's [second] motion to discharge counsel was held in November of 2004, approximately three months before jury selection. The trial court inquired at the hearing in a repeated attempt to identify the specific basis of Blake's complaints. Blake was allowed to explain any reasons for his dissatisfaction with trial counsel. Blake's dissatisfaction focused upon seeking increased telephone contact with his lawyer, the status of witness development (although there were no alibi witnesses), trial strategies and pre-trial suppression motions, and a claim that trial counsel allegedly was "unwilling" to pursue a more adversarial role and, therefore, Blake had lost confidence in trial counsel. In response, the trial judge addressed Blake's each of complaints, including the purported lack of witness interviews, telephone contact with counsel, pre-trial motions, and the trial court specifically noted trial counsel's "very adversarial role in all the litigation." (R Vol. 1/185). In his complaints, Blake did not

actually assert that his counsel was incompetent. Rather, Blake objected to the manner in which counsel was conducting the defense. The trial judge allowed Blake to explain his complaints, asked counsel for his explanation, and Blake does not contest the trial court's finding that no basis existed for granting Blake's motion to appoint new counsel.

Faretta requires that a defendant be allowed self-representation when the defendant clearly and unequivocally declares to the trial judge a desire for self-representation and the judge determines that the defendant has knowingly and intelligently waived the right to be represented by a lawyer. Faretta at 835-36. No such declaration to the judge was made in this case. The trial court judge focused upon the defendant's specific request when he made inquiries of the defendant, and Blake has demonstrated no abuse of discretion by the trial court.

Here, as in Bell, the defendant never asserted clearly and unequivocally at any time that he wanted to represent himself. At no time during any proceedings did Blake request to act alone as his own counsel. In this case, the trial court complied with Hardwick by adequately inquiring into the defendant's complaints about his defense counsel and publishing its findings. As in Bell, the trial court was not required to thereafter comply with

Faretta. See, Bell v. State, 699 So. 2d 674, 676-677 (Fla. 1997)

Ultimately, the defendant's argument must fail under this Court's decision in State v. Craft, 685 So. 2d 1292, 1295 (Fla. 1996), which squarely considered the question of whether Nelson *requires* the trial court to inform a defendant of his right to self-representation after the trial court denies his motion to discharge counsel. In Craft, this Court found that the record supported the trial court's conclusion that there was no reasonable basis for a finding of incompetent representation and, thereafter, the trial judge had no *obligation* to also inform the defendant of his right to self-representation under Faretta. As this Court cogently explained in Craft:

> The question presented here is whether Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), which was cited with approval by this Court in Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 185, 102 L. Ed. 2d 154 (1988), requires the trial court to inform a defendant of his or her right to self-representation after the court denies the defendant's motion to discharge counsel based on incompetence. Nelson clearly requires an inquiry where the defendant requests new counsel based upon incompetence of counsel. Nelson, 274 So. 2d at 258-59; Hardwick, 521 So. 2d at 1074. That inquiry was conducted in the instant case and the record supports the trial court's conclusion that there was no reasonable basis for a finding of incompetent representation.
>
> However, Nelson also states that the court should "advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute." 274 So. 2d at 259;

Hardwick, 521 So. 2d at 1074-75. While it is unclear from Nelson or Hardwick whether the judge has an obligation to inform the defendant of his right to self-representation, a recent decision from this Court appears to resolve the question by finding no such obligation. In Watts v. State, 593 So. 2d 198 (Fla.), cert. denied, 505 U.S. 1210, 112 S. Ct. 3006, 120 L. Ed. 2d 881 (1992), the defendant claimed that the trial court erred in failing to advise him of his right to represent himself and in failing to conduct a Faretta [n3] inquiry when he expressed dissatisfaction with his attorneys and requested that another attorney be appointed. This Court concluded that "because there was no unequivocal request for self-representation, Watts was not entitled to an inquiry on the subject of self-representation under Faretta." Watts, 593 So. 2d at 203.

n3 Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Watts is consistent with other cases where defendants have sought to discharge allegedly incompetent counsel. In Capehart v. State, 583 So. 2d 1009, 1014 (Fla. 1991), cert. denied, 502 U.S. 1065, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992), where the defendant sought to replace his court-appointed counsel, this Court stated that while it would have been the "better course" for the trial court to inform the defendant of the option of representing himself, the court did not err in denying the request for new counsel where the defendant did not state a desire to represent himself. This Court has repeatedly held that only an unequivocal assertion of the right to self-representation will trigger the need for a Faretta inquiry. See, e.g., Smith v. State, 641 So. 2d 1319, 1321 (Fla. 1994), cert. denied, 115 S. Ct. 1129, 130 L. Ed. 2d 1091 (1995).

Accordingly, we conclude that the trial court committed no error on this point. While we do not agree with the district court's reasoning, we agree with the district court that Craft is not entitled to relief on this basis.

State v. Craft, 685 So. 2d at 1295 (e.s.)

See also, Maxwell v. State, 892 So. 2d 1100, 1102 (Fla. 2d DCA 2004) (Stating that "[t]he first step in the procedure is the preliminary Nelson inquiry in which the court ascertains whether the defendant unequivocally requests court-appointed counsel's discharge and the court asks the reason for the request. Tucker v. State, 754 So. 2d 89, 92 (Fla. 2d DCA 2000). The answer to the preliminary inquiry determines the next steps. If a reason for the request is court-appointed counsel's incompetence, then the court must further inquire of the defendant and his counsel to determine if there is reasonable cause to believe that court-appointed counsel is not rendering effective assistance and, if so, appoint substitute counsel. Nelson, 274 So. 2d at 258-59. If the reasons for the request do not indicate ineffective assistance of counsel, then no further inquiry is required. Tucker, 754 So. 2d at 92.") Lastly, if any arguable error exists, which the State strongly disputes, it is clearly harmless. See, Sweat v. State, 895 So. 2d 462 (Fla. 5th DCA 2005) (Concluding that because the defendant never discharged his attorney, the trial court's failure to advise him that a second attorney may not be appointed if he dismissed his current attorney was harmless.)

**ISSUE III**

**THE SENTENCE OF DEATH IS PROPORTIONATE.**

In his final claim, Blake asserts that his death sentence is not proportionate for the first degree murder of Maheshkumar [Mike] Patel. Less than two weeks before Blake shot and killed Mr. Patel, Blake was an active participant in another violent felony involving the use of the same firearm -– the attempted robbery and shooting of Kelvin Young. Both victims, Patel and Young, were shot and killed with the same handgun. And, as the trial court specifically noted, "[b]y his own admission on the video taped statement, Exhibit S-54, and the testimony of witnesses, the defendant went to the convenience store operated by Mr. Patel early that morning for the express purpose of gaining money from a robbery. He armed himself with a large caliber, 9MM semi-automatic Bryco Firearms handgun. In order for the firearm to discharge a projectile it is necessary to chamber a live round of ammunition from the clip by pulling the top slide back. The safety must be placed in the off position in order to pull the trigger which causes the gun to fire. All of these preliminary steps had been accomplished when the defendant confronted Mr. Patel at the front door." (Sentencing Order, V3/402-403).

On February 25, 2005, the jury returned a verdict of guilty as charged. The trial court then recessed the proceedings at the request of defense counsel in order to permit a mental

health evaluation and additional time to prepare for the penalty phase proceedings. On April 20, 2005, the jury returned a unanimous vote of 12 to 0, recommending that the trial court impose the sentence of death for the first degree murder of Mr. Patel. On April 29, 2005, the trial court held a Spencer hearing [Spencer v. State, 615 So. 2d 688 (Fla. 1993)] without the jury, in order to hear additional evidence and argument.

Blake's sentencing hearing was held on May 13, 2005. The trial court found the following aggravating factors: (1) Blake's prior violent felony conviction for the murder of Kelvin Young on August 1, 2002, (2) the capital felony was committed while Blake was on felony probation, and (3) the merged factors that the murder was committed during the course of a robbery and for pecuniary gain. (V3/389-390). Significantly, Blake does not, and credibly could not, challenge the trial court's findings of any of these established aggravating circumstances.[7]

In mitigation, the trial court found one statutory mitigating circumstance: Blake's age [nearly 23]. (V3/390). The trial court also found the following non-statutory mitigation: (1) the defendant's positive behavior in court,

[7] When the finding of an aggravating circumstance is challenged on appeal, the standard of review is whether competent, substantial evidence supports the trial court's finding. Huggins v. State, 889 So. 2d 743, 769 (Fla. 2004).

with his family, and with counsel, (2) the defendant never displayed violence in the presence of his family and was a good son, (3) the defendant is truly remorseful, (4) the defendant's cooperation with police, (5) the participation of the co-defendant, Richard Green, (6) no prior violent history until just prior to this murder, (7) the defendant is capable of adjusting to institutional living. (V3/390-394).

Blake now argues that Mr. Patel's murder is not among the most aggravated and least mitigated, and that the sentence is disproportionate compared to other capital cases. For the following reasons, Blake's proportionality claim must fail.

Preliminary Legal Standards

Proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." Schoenwetter v. State, 931 So. 2d 857, 875 (Fla. 2006). Rather, to determine whether death is a proportionate penalty, this Court must consider the totality of the circumstances of the case and compare the case with other similar capital cases where a death sentence was imposed. See, Boyd v. State, 910 So. 2d 167, 193 (Fla. 2005); Troy v. State, 2006 Fla. LEXIS 2419, 31 Fla. L. Weekly S 677 (Fla. 2006).

The Trial Court's Sentencing Order

The trial court's written sentencing order in this case

states, in pertinent part:

CAPITAL SENTENCING ORDER AS TO COUNT ONE

The defendant was indicted on 29 August 2002 for the offenses of First Degree Murder, Attempted Armed Robbery and Grand Theft of a Motor Vehicle all of which occurred on 12 August 2002. After a jury trial, the jury returned a verdict of guilty as charged on 25 February 2005. The Court recessed the proceedings at the request of defense counsel to permit a mental health evaluation and additional time to prepare for the penalty phase proceedings. On 20 April 2005 the jury recommended by a vote of 12 to 0 that the Court impose the sentence of death for the first degree murder of Maheshkumar Patel. On 29 April 2005, the Court held a further hearing in accordance with Spencer v. State, 615 So.2d 688 (Fla. 1993), without the jury to hear additional evidence and argument. The sentencing date was set for 13 May 2005 at 1:00 p.m.

The Court has heard the evidence presented in the guilt and penalty phase as well as the additional evidence and arguments heard on 29 April 2005. The Court finds as follows:

**AGGRAVATING FACTORS**

**1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. Fla. Stat. 921.141(5)(b).**

In case number CF02-06050A-XX, the defendant was indicted on 19 September 2002 by the grand jury in Polk County, Florida for the offenses of First Degree Murder and Attempted Robbery with a Firearm. The defendant was tried by jury and a verdict of guilty to both offenses was returned before this Court on 17 June 2004, according to Exhibit SP-11. Those offenses occurred on an evening in Lakeland, FL about two weeks prior to the offenses in this case. The death in that case and the death in this case were caused by the same firearm, Exhibit SP-12. The jury in the former case did find by their verdict that the defendant did

not personally discharge the firearm that caused the death; however, that finding does not negate the application of this factor. The verdict is consistent with a finding that the defendant was driving the vehicle as it approached the victim standing at the roadside, and demanding money as he pointed a gun at the victim. There was testimony in the record that a second person in the vehicle also possessed a firearm. The record evidence supports a finding that the defendant was an active participant in the Attempted Robbery and had personal contact with the victim who was fatally shot. (R Vol. 3/401) This aggravating factor has been proven beyond all reasonable doubt and is given great weight by this Court. [fn1]

**2. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment, or placed on community control, or on felony probation. Fla. Stat. 921.141(5)(a).**

As a result of the 1996 amendment which added the felony probation aspect, this factor applies to the defendant. The defendant was on active supervision in this county and circuit on case numbers CF01-04886A-XX, CF01-04213A-XX, CF01-04487A-XX, and CF01-05489A-XX. A witness from the Department of Corrections, Michael Hemando, testified that the defendant was on probation on the day of the death of Mr. Patel. All these cases are based on felonious conduct on different dates. The conduct was Driving While License Suspended or Revoked as an Habitual Traffic Offender, except CF01-04487A-XX, which included a Grand Theft of a Motor Vehicle. [fn2] The Legislature has not limited this factor to what is referred to as “forcible felonies” as enumerated in Fla. Stat. 776.08, or “dangerous crimes” as enumerated in Fla. Stat. 907.041(4). The Court concludes that any felony, violent or nonviolent, is intended by the Legislature to support this factor. This aggravating factor has been proven beyond all reasonable doubt and is given some weight by this Court. [fn3]

**3. The crime for which the defendant is to be sentenced was committed while the defendant was engaged in an attempt to commit the crime of Armed Robbery, and was committed for financial gain. Fla.**

**Stat. 921.141(5)(d) and (f).**

By his own admission on the video taped statement, Exhibit S-54, and the testimony of witnesses, the defendant went to the convenience store operated by Mr. Patel early that morning for the express purpose of gaining money from a robbery. He armed himself with a large caliber, 9MM semi-automatic Bryco Firearms handgun. In order for the firearm to discharge a projectile it is necessary to (R Vol. 3/402) chamber a live round of ammunition from the clip by pulling the top slide back. The safety must be placed in the off position in order to pull the trigger which causes the gun to fire. All of these preliminary steps had been accomplished when the defendant confronted Mr. Patel at the front door. The jury verdict supports the finding beyond a reasonable doubt that the defendant was actively engaged in the commission of an Armed Robbery for pecuniary gain when Mr. Patel was killed. The Court finds this aggravating factor has been proven beyond all reasonable doubt and is given moderate weight by this Court. [fn4]

**MITIGATING FACTORS**

The Court has considered the following Mitigating Factors:

**1. Age of the defendant at the time of the offense. Fla. Stat. 921.141(6)(g).**

The defendant's date of birth is 02 September 1979. The offense occurred on 12 August 2002. The defendant was almost 23 years of age at the time of the offense. This is his chronological age. There is no evidence that his mental age is inconsistent with that age. He was familiar with the procedures of the criminal justice system. He used a stolen car in the commission of the attempted robbery. He had earned a nickname of "Seven Seconds" for his skill in stealing cars. He was under active supervision by the Department of Corrections for prior non-violent felonies. There is no evidence that he was immature for his age. The Court does find that his lack of years of life's experiences added to his lack of

judgment and his lack of appreciation for the life of another. His youthfulness contributed to his decision to engage in life-threatening behavior. The Court finds that this factor has been reasonably established by the evidence and gives it moderate weight.

**2. Capacity of defendant to appreciate criminality. Fla. Stat. 921.141(6)(f).**

There is no evidence of substantial impairment of Mr. Blake's ability to conform his conduct to the requirements of the law or to appreciate the criminal nature of his conduct. The Court does not find that this factor has been reasonably established, and is given no weight.

**3. Defendant acted under duress or domination. Fla. Stat. 921.141(6)(e).**

There is no evidence of this factor. To the contrary, it appears from the testimony of Demetrius Jones that the defendant was a leader in the plan to rob the store, and attempted to enlist (R Vol. 3/403) others to participate. The Court does not find that this factor has been reasonably established, and is given no weight.

**4. Defendant was an accomplice with minor participation. Fla. Stat. 921.141(6)(d).**

There is no evidence of this factor. To the contrary, the evidence is that the defendant was the leader who stole the car, invited others to participate, and approached the store with a loaded handgun in battery. The Court does not find that this factor has been reasonably established, and is given no weight.

**5. Victim was participant or consented. Fla. Stat. 921.141(6)(c).**

There is no evidence of this factor. Mr. Patel was opening his business at the store in an effort to support his family in a lawful and admirable manner. There is not one scintilla of evidence that Mr. Patel participated or consented except as an unwilling victim of the defendant's senseless violence. The

Court does not find that this factor has been reasonably established, and is given no weight.

**6. Defendant was under extreme mental or emotional disturbance. Fla. Stat. 921.141(6)(b).**

There is no evidence of this factor. The Court recessed the trial between the guilt and penalty phase to give the defendant an opportunity for a psychological evaluation. [fn5] There is no testimony suggesting that he was displaying anything other than normal behavior in the days and hours leading up to the death of Mr. Patel. The Court has considered the possibility that Mr. Blake would have been emotionally disturbed after his participation in the criminal offense which resulted in the death of Mr. Young just two weeks earlier; however, there is no evidence that the death had any impact on him. The Court does not find that this factor has been reasonably established, and is given no weight.

**7. The Defendant has no significant prior criminal history. Fla. Stat. 921.141(6)(a).**

There is no evidence of this factor. To the contrary, he was on four active felony probations at the time of the offense, and had other prior felony convictions. The Court does not find that this factor has been reasonably established, and is given no weight.

**8. Any other factor in the defendant's background. Fla. Stat. 921.141(6)(h).**

a. The defendant had appropriate courtroom behavior throughout these proceedings. This Court presided over four jury trials with Mr. Blake as well as many pre-trial proceedings. He has always been respectful to the Court. He has acted appropriately with his counsel while in the Court's presence. I have had the opportunity to observe him interact with his mother and family members. The Court is reasonably convinced that this factor about his present behavior has been established, and it is given some weight.

b. The defendant has never displayed violence in the presence of his family members, and in the words of

his mother, was a good son. He has formed a loving relationship with his family. The witnesses at the penalty phase clearly established this factor, and it is given moderate weight.

c. The defendant is remorseful for his conduct. From his testimony and demeanor, it is clear to the Court that the defendant truly is sorry for the death of Mr. Patel. It is plausible to believe that when he left the store that morning of 12 August 2002 he did not realize that his shot was fatal. Of course, he did not remain at the scene to render aid. As reprehensible as that conduct is to all good citizens, his present remorse is a mitigating factor. The Court is reasonably convinced that this factor about his present state of mind is established by the evidence, and is given some weight.

d. The defendant cooperated with the deputies at the time of his arrest. The evidence is clear that the defendant was located in a private residence on 14 August 2002, two days after the death of Mr. Patel. The defendant was made aware of the presence of the deputies surrounding the house. He verbally communicated his decision to surrender peacefully. He was taken into custody without violence, and he agreed to waive his rights and submit to an interview. The Court is reasonably convinced that this factor is established, and is given some weight.

e. The co-participant, Richard Green, was sentenced to life imprisonment. This Court presided over the trial of Richard Reginald Green in case number CF04-004460 in which the jury returned a verdict of guilty of First Degree Murder of Mr. Patel, the same offense for which Mr. Blake has been convicted. He was sentenced to life imprisonment. He was convicted as a principal. The Court is reasonably convinced that this factor has been established by the evidence and judicial records of this Court, and gives this factor very little weight.

f. The defendant has no prior violent felony convictions, except the capital felony committed two weeks prior to the death of Mr. Patel. The defense has argued, and the Court finds as reasonably

established by the evidence, that the pre-August 2002 criminal conduct of Mr. Blake related to non-violent offenses. This factor is given little weight.

g. The defendant appears to have adjusted to confinement and institutional living, and would not pose a danger to the community at large if incarcerated for life. There is no evidence showing (R Vol. 3/405) that his pre-trial confinement has been troublesome and disruptive. He is already serving a life sentence for the death of Mr. Young. A consecutive life sentence would be the alternative disposition in this case. Assuming no escape, he would only be a danger to fellow inmates and guards. Prison guards can take precautionary steps for their own protection. The Court is reasonably convinced this factor has been established by the evidence, and is given some weight.

CONCLUSION

This Court has thoroughly reviewed the nature and quality of all the aggravating and mitigating factors, and has deliberatively weighed those factors knowing that it is not a simplistic numerical comparison as human life is involved. The Court has been cautious to avoid the temptation to quickly conclude that the death penalty is appropriate because the defendant has been convicted of the First Degree Murder of Mr. Young which occurred just two weeks before the death of Mr. Patel in this case. The Court has sought out every aspect of mitigating evidence. The State has proven beyond a reasonable doubt by evidence the existence of three statutory aggravating factors.

The only hesitance the Court has had regarding the mitigating factors is the defendant's age as a mitigating factor; however, as indicated, the Court has concluded that it was established as a mitigating circumstance. In the end, the Court has been unable to conclude that the evidence reasonably convinces the Court that any of the other enumerated statutory mitigating circumstances have been established. The Court has been able to conclude that seven (7) non-statutory mitigating circumstances have been established; however, those factors do not outweigh

the very weighty and substantial aggravating circumstances. [fn6] This Court agrees with the jury that death is the appropriate penalty in this case for the First Degree Murder of Mr. Patel. It is, therefore

ORDERED AND ADJUDGED that for the first degree murder of Maheskumar Patel as alleged in Count One of the Indictment in this case the Defendant is hereby sentenced to death. This sentence shall run concurrent with the life sentence previously imposed in CF02-006050A-XX, and all other existing sentences. The Defendant shall be transferred to the custody of the Department of Corrections and securely confined until this sentence can be executed as provided by law. [fn7]

DONE AND ORDERED this 13 May 2005 in Bartow, Polk County, Florida. (R Vol. 3/406)

[fnl] This aggravator has been referred to as a "strong" factor and the most weighty in Florida's sentencing calculus. See Ferrell v. State, 680 So.2d 390 (Fla. 1996) and Sireci v. Moore, 825 So.2d 882 (Fla. 2002).

[fn2] According to a witness, the defendant was known in the community as "Seven Seconds" because he took that long to steal a car. The homicide in this case involved the use of a stolen car, and is the conviction in Count Three.

[fn3] To make clear for the record, the Exhibit SP-l introduced by the State at the Spencer hearing on 29 April 2005 includes the judgments in case numbers CF99-01740, CF99-03584, and CF99-03575, all involving the Sale or Possession of Cocaine. These felony convictions were not introduced to the jury at the penalty phase as the defendant was not on supervision or imprisoned for these non-violent offenses, and the defendant was not relying upon the statutory mitigator of no significant history of prior criminal activity. See Maggard v. State, 399 So.2d 973 (Fla. 1981). They are not considered by this Court in regards to this aggravating factor. (R Vol. 3/402)

[fn4] These two statutory aggravating factors have been combined in this order to make clear that they have been considered as one factor because the facts are not different for each. See Francis v. State, 808 So.2d 110 (Fla. 2002). (R Vol. 3/403)

[fn5] The defendant had repeatedly indicated throughout the pre-trial proceedings that he was not seeking an evaluation or mitigation on that basis. It was not until the end of the guilt phase that he voiced a change of mind. (R Vol. 3/404)

[fn6] The Court has permitted the presentation of Victim Impact evidence pursuant to Fla. Stat. 921.141. The Court heard the testimony of the friends, customers, and neighbors of Mr. Patel, and the moving testimony of his widow. While greatly sympathetic to their loss, the Court has given no weight to that testimony in weighing the aggravating and mitigating circumstances, and determining an appropriate sentence. (R Vol. 3/406)

[fn7] The sentences for Count Two and Three have been orally pronounced in open court.
(R Vol. 3/406)

Analysis

In conducting proportionality review, this Court has stated that in the absence of demonstrated legal error, this Court will accept the trial court's findings on the aggravating and mitigating circumstances and consider the totality of the circumstances of the case in comparing it to other capital cases. Rodgers v. State, 2006 Fla. LEXIS 2542, 31 Fla. L. Weekly S 705 (Fla. 2006), citing Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000).

In this case, the trial court gave "great weight" to the

defendant's prior violent felony conviction aggravator. Along with HAC, the prior violent felony conviction aggravator is considered one of the "most weighty in Florida's sentencing calculus." Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002) (noting that the prior violent felony conviction and HAC aggravators are "two of the most weighty in Florida's sentencing calculus"); Anderson v. State, 863 So. 2d 169, 188 (Fla. 2003); Ocha v. State, 826 So. 2d 956, 966 (Fla. 2002) (finding the existence and nature of Ocha's prior violent felony to be "particularly weighty").

Particular importance should be given to this aggravating factor inasmuch as Blake's prior conviction, as in this case, involved similar crimes of violence – attempted robbery with a firearm and first-degree murder. Blake does not seriously dispute that there is likely no greater aggravator that a previous killing of another human being. Rather, Blake argues that his prior violent felony conviction for first-degree murder is "less significant" because the jury in the Kelvin Young murder case did not find Blake to be the actual "shooter." However, as the trial court found, this factor alone did not lessen the significance of Blake's involvement in the attempted robbery and first-degree murder. As the trial court explained:

> … The death in that case and the death in this case were caused by the same firearm, Exhibit SP-12. The

> jury in the former case did find by their verdict that the defendant did not personally discharge the firearm that caused the death; however, that finding does not negate the application of this factor. The verdict is consistent with a finding that the defendant was driving the vehicle as it approached the victim standing at the roadside, and demanding money as he pointed a gun at the victim. There was testimony in the record that a second person in the vehicle also possessed a firearm. The record evidence supports a finding that the defendant was an active participant in the Attempted Robbery and had personal contact with the victim who was fatally shot.
>
> (R Vol. 3/401)

Moreover, this Court also has affirmed death sentences where the defendant's death penalty case is the one in which the defendant is a principal in a felony or premeditated murder. See Stephens v. State, 787 So. 2d 747, 760 (Fla. 2001) (finding death sentence proportionate in case where defendant did not actually commit murder, but personally committed crimes of burglary and robbery and actions displayed reckless disregard for human life); Van Poyck v. State, 564 So. 2d 1066, 1070-71 (Fla. 1990) (finding the death sentence proportionate where the defendant was the instigator and primary participant in the underlying crimes, came to the scene "armed to the teeth," and knew lethal force could be used).

The second aggravator was based on Blake's undisputed felony probation in four other cases (habitual traffic offender and grand theft of a motor vehicle). In sum, Blake was given an

opportunity to change his criminal conduct, but refused to do so. Blake does not dispute the existence of the felony probation aggravator, but argues that his felony probation is distinguishable from those defendants who are on supervision from prior prison sentences or violent offenses against persons. The fact that Blake's felony probation did not involve violent offenses was a distinction already recognized by the trial court. The trial court concluded that this aggravator applied whether the defendant's probation was for any felony, violent or nonviolent, and accorded this aggravator only "some weight." And, in addressing mitigation, the trial court specifically found that Blake's pre-August 2002 criminal conduct related only to "non-violent" offenses. Moreover, an undeniable link still exists between Blake's felony probation and the instant crime. As the trial court noted, Blake "was familiar with the procedures of the criminal justice system. He used a stolen car in the commission of the attempted robbery. He had earned a nickname of "Seven Seconds" for his skill in stealing cars. He was under active supervision by the Department of Corrections for [these] prior non-violent felonies."

The third aggravator involves the merged armed robbery/pecuniary gain aggravator, which was afforded "moderate" weight by the trial court. Blake claims that this was not a

"violent" confrontation, but the shooting appears to have occurred only "when the gunman was startled." (Initial Brief at 66). The State strongly disputes Blake's self-serving characterization. In this case, Blake armed himself in advance with the loaded 9 MM semi-automatic handgun, Blake admitted that he kept his finger on the trigger of the loaded gun as he walked up to the store, and Blake fired directly through the glass at Mr. Patel. Blake was the one who both began and ended this unquestionably "violent" confrontation with Mr. Patel. The fact that an intended victim either attempts to flee or tries to thwart an armed robbery does not render a death sentence disproportionate. See e.g., Smith v. State, 931 So. 2d 790, 803 (Fla. 2006), citing Smith v. State, 641 So. 2d 1319 (Fla. 1994) (noting that Smith and his codefendant called a cab with the intent to rob the driver. After the driver took them to the provided address and stopped the cab, all three exited the vehicle. When the cab driver tried to flee, Smith shot him in the back. Smith's death sentence was upheld where there were two aggravating factors -- murder committed while attempting robbery and Smith's prior violent felony conviction – an armed robbery committed several hours after the cab driver's shooting); Bryant v. State, 785 So. 2d 422, 437 (Fla. 2001) (rejecting defendant's argument that the death penalty was

disproportionate because, although Bryant "intended to commit an armed robbery … he did not enter the store with the premeditated design to kill … and the shooting … was an impulsive action in response to [the victim's] resistance to the robbery"); Mendoza v. State, 700 So. 2d 670, 679 (Fla. 1997) (rejecting defendant's argument that the death penalty was disproportionate "because the murder was not planned but was committed on the spur of the moment during a robbery gone awry," and that "the shooting of [the victim] was a reflexive action in response to [the victim's] resistance to the robbery"); Carter v. State, 576 So. 2d 1291, 1293 (Fla. 1989) (rejecting proportionality argument based on a "robbery gone bad" theory where the trial court found three aggravating circumstances which far outweighed the nonstatutory mitigation). Moreover, within less than a two week time period, Blake was involved in two armed robbery offenses, which resulted in two murders. In other words, Blake had no hesitation to use armed violence to steal other people's property. Both robberies were ultimately "unsuccessful" for Blake and, nevertheless, both intended robbery victims paid with their lives. Blake's two unrelated killings for financial gain undeniably support the death sentence in this case.

Next, Blake argues that notably absent are the heinous, atrocious, or cruel [HAC], and the cold, calculated, and

premeditated [CCP] aggravators. Although this Court has acknowledged the relevance of these two factors, this Court also recognized that their presence or absence is "not controlling" when this Court conducts a proportionality analysis. See, Taylor v. State, 937 So. 2d 590, 601 (Fla. 2006), citing Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Indeed, this Court has upheld a number of death sentences as proportionate when neither HAC nor CCP were applied. See, Taylor v. State, 855 So. 2d 1, 32 (Fla. 2003); Bryant v. State, 785 So. 2d 422, 437 (Fla. 2001); Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997); Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996); Vining v. State, 637 So. 2d 921, 928 (Fla. 1994).

Blake does not dispute any of the trial court's findings in mitigation. Rather, Blake essentially summarizes the trial court's findings in mitigation and he summarily asserts that this case is not among the "least mitigated." However, the underlying evidentiary support for these non-statutory mitigators does not generate any significant reduction of the defendant's moral culpability. For example, Blake's mother believed her son was a "good boy." However, Blake's repeated criminal acts do not support his mother's belief. Blake's sister acknowledged that he was known as "Seven Seconds" for his ability to steal a car, his "skill" utilized in this case.

Unlike the victim who worked seven days a week in order to provide for his family, Blake decided to take what he wanted by violence. Blake proclaimed that he was remorseful. If Blake was truly remorseful, he certainly could have changed his behavior after the killing of Kelvin Young. However, the defense witnesses uniformly confirmed that Blake did not change his behavior after Mr. Young's murder, which was less than two weeks before Blake shot and killed Mr. Patel.

Next, Blake asserts that his case is similar to three other capital cases where the death penalty was set aside on direct appeal: Urbin v. State, 714 So. 2d 411 (Fla. 1998), Livingston v. State, 565 So. 2d 1288 (Fla. 1990), and Terry v. State, 668 So. 2d 954 (Fla. 1996). In Urbin, there were two aggravating circumstances (prior violent felony and pecuniary gain) and a number of mitigating circumstances (age of 17, substantial impairment, drug and alcohol abuse, dyslexia, employment history, and lack of a father). In Urbin, this Court found the defendant's age of 17 compelling when coupled with the defendant's history and the other mitigating circumstances. In Livingston, the defendant was 17 at the time of the offense, had been physically abused as a child, and possessed marginal intellectual functioning. In Terry, the murder took place during the course of a robbery; however, the circumstances

surrounding the actual shooting remained unclear. Although there was not a great deal of mitigation in Terry, this Court found that the aggravation was not extensive given the totality of the underlying circumstances.

This case, which involves three significant aggravating factors, including the prior violent felony aggravator of *another* murder conviction, and no compelling mitigation, is also comparable to the following cases in which the death penalty has been affirmed by this Court on proportionality review. In Shellito v. State, 701 So. 2d 837 (Fla. 1997), a twenty-year-old defendant was convicted in a shooting death. In Shellito, the trial court found two aggravators (prior violent felony conviction and pecuniary gain/commission during a robbery), and nonstatutory mitigation consisting of alcohol abuse, a mildly abusive childhood, difficulty reading, and a learning disability. In Melton v. State, 638 So. 2d 927 (Fla. 1994), the defendant committed murder during the course of a robbery. The trial court found two aggravators, no statutory mitigators, and two nonstatutory mitigators which were assigned little weight. See also, Finney v. State, 660 So. 2d 674 (Fla. 1995) (sentence of death affirmed where trial court found three aggravating factors and five nonstatutory mitigating factors); Duncan v. State, 619 So. 2d 279, 284 (Fla. 1993) (death sentence affirmed

where single aggravating factor of prior second-degree murder of fellow inmate was weighed against numerous mitigators); Ferrell v. State, 680 So. 2d 390 (Fla. 1996) (affirming death sentence in case involving a single aggravator, the defendant's prior felony conviction for second-degree murder, and several non-statutory mitigators).

In Bryant v. State, 901 So. 2d 810, 828-830 (Fla. 2005), this Court, in post-conviction, reiterated that in finding Bryant's death sentence proportionate on direct appeal, this Court cited cases which all found the death penalty proportionate where the two aggravators of prior violent felony and crime committed for pecuniary gain were involved. As this Court explained in Bryant:

> Moreover, this Court has upheld death sentences in other cases based upon only two of the three aggravating factors present in the instant case. See: Pope v. State, 679 So. 2d 710 (Fla. 1996) (holding death penalty proportionate where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed two statutory mitigating circumstances of commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct and several nonstatutory mitigating circumstances); Melton v. State, 638 So. 2d 927 (Fla. 1994) (holding death penalty proportionate where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed some nonstatutory mitigation); Heath v. State, 648 So. 2d 660 (Fla. 1994) (affirming defendant's death sentence based on the presence of two aggravating factors of prior violent felony and murder committed during course of robbery, despite the existence of the

> statutory mitigator of extreme mental or emotional disturbance). Accordingly, we find that death is a proportionate penalty in this case.
>
> Id.; [n9] see also: Diaz v. State, 860 So. 2d 960, 971 (Fla. 2003) (finding the death penalty proportionate, despite invalidating an aggravator and the existence of five statutory mitigating circumstances, where two aggravators remained: "(1) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (2) the defendant was previously convicted of another capital felony or of a felony involving use or threat of violence to the person"). The cases we cited all found the death penalty proportionate where the two aggravators of prior violent felony and crime committed for pecuniary gain were involved. Furthermore, two of the sentences were found proportional despite the existence of statutory mitigating circumstances. In Bryant's case, the court found no statutory mitigating circumstances and only a single nonstatutory mitigator remorse. 785 So. 2d at 437. In light of our prior holdings, Bryant's sentence was proportional even without the "avoid arrest" aggravator. Further, no reasonable possibility exists that the trial court would have found the evidence in mitigation sufficient to outweigh the two remaining aggravating circumstances. Therefore, no prejudice resulted from any error on the part of appellate counsel in not challenging the "avoid arrest" aggravator on direct appeal.

Bryant v. State, 901 So. 2d 810, 828-830 (Fla. 2005) (e.s.)

In Freeman v. State, 563 So. 2d 73 (Fla. 1990), the death penalty was proportional when two aggravating circumstances were weighed against mitigating evidence of low intelligence and abused childhood. See also, Johnston v. State, 841 So. 2d 349, 361 (Fla. 2002) (finding death sentence proportional where four aggravators were found, including prior violent felony

conviction and murder committed during commission of sexual battery and kidnapping; moderate weight was given one statutory mitigator; and slight weight or no weight was ascribed to 26 nonstatutory mitigators); Singleton v. State, 783 So. 2d 970, 979 (Fla. 2001) (finding sentence proportional where two aggravators were found, including prior violent felony conviction; three statutory mitigators were found, including defendant's age (69), impaired capacity, and extreme mental or emotional disturbance; and several nonstatutory mitigators were found, including that defendant suffered from mild dementia); Sliney v. State, 699 So. 2d 662 (Fla. 1997) (finding the death penalty proportional with the existence of two aggravating circumstances of commission during a robbery and avoid arrest, two statutory mitigators (age and lack of criminal history), and a number of nonstatutory mitigators); Hurst v. State, 819 So. 2d 689, 701-02 (Fla. 2002) (affirming death sentence where defendant robbed fast food store and two aggravators outweighed mitigation); Franqui v. State, 804 So. 2d 1185, 1198 (Fla. 2001) (affirming death sentence where defendant murdered a law enforcement officer during a bank robbery and trial court found three aggravators: pecuniary gain, prior violent felony, and avoid arrest and minor nonstatutory mitigation); Mendoza v. State, 700 So. 2d 670 (Fla. 1997) (affirming death sentence

based on the aggravators of prior violent felony conviction and a murder committed during a robbery); Hayes v. State, 581 So. 2d 121, 126-27 (Fla. 1991) (affirming the death penalty after the trial court found the "committed for pecuniary gain" and "committed while engaged in armed robbery" aggravators, the "age" statutory mitigator, and the "low intelligence," "developmental learning disability," and "product of a deprived environment" nonstatutory mitigators). In Anderson v. State, 863 So. 2d 169, 188 (Fla. 2003), this Court affirmed the death sentence where, as here, the jury unanimously voted in favor of a death sentence. In Anderson, the trial court found four aggravating factors, including two which were given great weight: CCP and prior violent felony for the contemporaneous conviction of attempted murder. In comparison, the trial court found a total of ten nonstatutory mitigating factors, and other than Anderson's lack of a violent history and his religious activities, most of the mitigation was given little weight.

Lastly, Blake asserts that his death sentence is disproportionate because Blake's co-defendant, Richard Green, was convicted as a principal and sentenced to life imprisonment. In rejecting the statutory mitigating circumstances based on Blake's participation in this attempted armed robbery/murder, the trial court's order states, in pertinent part:

**3. Defendant acted under duress or domination. Fla. Stat. 921.141(6)(e).**

There is no evidence of this factor. To the contrary, it appears from the testimony of Demetrius Jones that the defendant was a leader in the plan to rob the store, and attempted to enlist others to participate. The Court does not find that this factor has been reasonably established, and is given no weight.

**4. Defendant was an accomplice with minor participation. Fla. Stat. 921.141(6)(d).**

There is no evidence of this factor. To the contrary, the evidence is that the defendant was the leader who stole the car, invited others to participate, and approached the store with a loaded handgun in battery. The Court does not find that this factor has been reasonably established, and is given no weight.

(Sentencing Order, V3/403-404)

Addressing the non-statutory mitigation of co-perpetrator Green's conviction and life sentence, the trial court found:

> e. The co-participant, Richard Green, was sentenced to life imprisonment. This Court presided over the trial of Richard Reginald Green in case number CF04-004460 in which the jury returned a verdict of guilty of First Degree Murder of Mr. Patel, the same offense for which Mr. Blake has been convicted. He was sentenced to life imprisonment. He was convicted as a principal. The Court is reasonably convinced that this factor has been established by the evidence and judicial records of this Court, and gives this factor very little weight.
>
> (V3/405)

A trial court's determination regarding relative culpability constitutes a finding of fact and will be sustained on review if supported by competent, substantial evidence. Brooks v. State, 918 So. 2d 181, 208 (Fla. 2005). In evaluating Blake's

eligibility for the death penalty, Blake and Green were not "equally culpable" in the shooting death of Mr. Patel. Competent, substantial evidence introduced during the guilt phase established that Blake was the one who stole the car used in the crime, Blake was the one who sought others to participate, Blake was the one who armed himself with the loaded 9 MM beforehand, and Blake was the one who walked up to the glass door and shot and killed Mr. Patel on August 12th. At trial, the State introduced evidence that a shell casing was collected from the August 12th shooting of Mr. Patel, Blake initially tried to get rid of the gun, without success, Green eventually threw the gun into the lake, the gun was recovered from Lake Conine, and ballistics showed that the casing from the August 12th shooting of Mr. Patel and the bullet in Young shooting both came from the gun recovered from the lake. Contrary to Blake's suggestion, this case is comparable to Evans v. State, 808 So. 2d 92 (Fla. 2001) in which the death sentence was found to be proportional. See also, Downs v. State, 572 So. 2d 895 (Fla. 1990) (determining that evidence supported the trial court's conclusion that Downs was the triggerman and thus more culpable than his co-defendant); Gordon v. State, 704 So. 2d 107, 117-18 (Fla. 1997) (rejecting disproportionality argument where conspirator who had instigated and paid for the

contract killing received a life sentence after a jury trial and the conspirator actually responsible for the killing received a death sentence); Marquard v. State, 850 So. 2d 417, 423-24 (Fla. 2002) (affirming the defendant's death sentence even though his codefendant received a life sentence, because the defendant was more culpable); Ventura v. State, 794 So. 2d 553, 571 (Fla. 2001) (denying the defendant's claim because he was the triggerman in the scheme and his codefendant was not equally culpable). In this case, the death sentence imposed for Mr. Patel's murder is not disproportionate when compared to other factually similar cases. Blake's request for a life sentence on this basis must be denied.

## CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the appellant/defendant's conviction and death sentence must be affirmed.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished U.S. Regular mail to Robert A. Norgard, Esq., P.O. Box 811, Bartow, Florida 33831-0811, this 2nd day of January, 2007.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

**BILL McCOLLUM**
**ATTORNEY GENERAL**

_____

**KATHERINE V. BLANCO**
**Assistant Attorney General**
Florida Bar No. 0327832
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE