IN THE SUPREME COURT OF FLORIDA

RICHARD HAROLD ANDERSON,

Appellant,

v. CASE NO. 72,127

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COUT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I: Settled Florida law precludes courts from inquiring into sufficiency, legality or character of the evidence presented to a grand jury which resulted in an indictment. That rule is broad enough to cover the situation presented here. The rule for which appellant contends is one that would require the dismissal of indictments when impeaching information comes to light even if the claim is first raised after jeopardy attaches.

Even under the case law most favorable to appellant's position, he is not entitled to relief. Although appellant knew of the factual basis for his claim prior to jeopardy attaching, he delayed moving to dismiss the indictment until after jeopardy had attached. And, even if his motion had been timely, the false evidence that went to the grand jury was not material because the witness whose testimony was challenged always maintained appellant's guilt. Materiality under appellant's cases is established when the witness either recants the accusation of guilt against the person accused by the grand jury or some substantial part of it.

As to Issue II: Cross-examination of Beasley had left the implication that her direct and positive testimony placing the full blame on appellant was a direct result of her negotiations with the state as it was tied closely to her meeting with the prosecution in time. It also left the implication that her testimony about the appellant's telling of disposing of the body in Orlando was an even more recent fabrication presented for the

first time at trial in hopes of improving her sentencing options as her ultimate sentence was still open at that time.

The kind of cross-examination conducted here has been found by this court to be a proper predicate for the introduction of prior consistent statements in Dufour, infra. Appellant's attempt to analogize his case to Jackson, infra is without merit. Cross-examination had failed to shows that Beasley believed she had anything to gain by blaming appellant at the time of her arrest. Trial counsel had correctly recognized that her testimony about lying to protect herself was not a motive for fabricating either the "He did it, and I knew about it" statement or the statement about appellant's moving the body and did not urge it on the trial court.

As to Issue III: Appellant has failed to demonstrate that the trial court abused its discretion in ruling on the admissability of the evidence about appellant's showing the state's witness the weapon in his car the day following the murder. It was relevant, as the circuit court found, to show consciousness of guilt. Appellant's attempt to distinguish Sireci, infra and analogize this fact pattern to cases in which evidence of uncharged crimes has caused a reversal is without merit. Clever and imaginative counsel can always suggest that the challenged evidence is consistent with some other explanation. But, that its not the test. The test is relevance and the trial court did not abuse its discretion in finding the evidence relevant in this case.

The specific cases appellant cites with regard to each of the evidentiary rulings are readily distinguishable. Appellant's threat cases did not involve post crime and post accusation threats against witnesses in the pending prosecution. And, the gun cases involved ownership or display of weapons that had no relation to the charged crime, not even the implication that they were available for protection in the event of the discovery of the possessor's culpability for the charged crime.

As to Issue IV: Appellant was not forced to stand trial in jail clothing. His own actions made the video of him in custody relevant evidence. Showing him instead of just the scenes about which he made comments was proper to connect the scenes to him and for the purpose of identification.

As to Issue V: Appellant has procedurally defaulted the claim urged on this court by his failure to urge it on the circuit court. On the merits, he is wrong as well. In adopting the district court decision in Delgado-Santos, this court specifically affirmed that a State Attorney investigation is an "other proceeding" for the purposes of Section 90.801(2)(a). The House statement given to the assistant state attorney at his office and introduced through the court reporter does not qualify as a statement given in a police investigation.

As to Issue VI: Staten, infra has not changed the well settled principle that it is not a defense to a crime for which a jury instruction is required that the accused has committed a crime other than the one charged. Appellant's claim that he was

only an accessory after the fact is just a reasonable doubt defense. That he claims to be guilty of another crime which accounts for some of the state's evidence does not change that fact that his basis claim is that there is a reasonable doubt as to his guilt of the charged crime.

As to Issue VII: The trial court had a full account of the background surrounding appellant's instructions to his counsel not to present the mitigating evidence his counsel had informed the court was available. The trial court conducted the only inquiry that was necessary in light of the facts that had been presented to him and appellants on the record endorsement of his counsel's representations to the court. The totality of the circumstances surrounding appellant's instructions to his counsel meet the knowing and voluntary relinquishment of a known right or privilege standard. The inquiry conducted by this careful trial judge went beyond that which the law commands.

Established precedent from this court teaches that the decision on whether to call witnesses is ultimately for the accused. There is not way that appellant's instructions to his counsel can be construed as a waiver of counsel. Counsel continued to function as counsel putting on a case in mitigation consistent with appellant's limitations. This case is not like those cases where an accused has gone wholly without counsel. Nor, can the situation be properly analogize to a waiver of the effective assistance of counsel because counsel continued to function as counsel in keeping with the role allotted to him by law.

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS TO DISMISS AND FOR ARREST OF JUDGMENT BECAUSE THE STATE VIOLATED DUE PROCESS BY FAILING TO CORRECT THE PRINCIPAL WITNESS'S PERJURED TESTIMONY BEFORE THE GRAND JURY.

(As stated by Appellant)

Appellant's argument takes the position that the state secured his indictment on the basis of perjured testimony and despite its knowledge of Beasley's perjury failed to notify either the grand jury, the court or opposing counsel. Appellant contends that this amounts to a violation of due process and requires reversal. The claim is without merit for a variety of reasons. Pursuant to established state law a grand jury indictment is not subject to attack on this ground as a court may not inquire into the sufficiency, legality or character of the evidence before a grand jury that resulted in an indictment. The due process cases to which appellant's argument points are of questionable validity in light of later developments in the law. But, the court need not address the viability of this line of cases as even under the standards established in them he is not entitled to relief. The Beasley testimony that was shown to be inconsistent with her deposition testimony was not material in the sense contemplated by this line of cases. And, the motion to dismiss was untimely coming on the third day of trial despite appellant's being aware of the inconsistencies prior to jeopardy attaching, the Friday before the trial commenced.

The discrepancy between Ms. Beasley's testimony before the grand jury and her subsequent statements first came to light on the Friday before trial was to commence (R. *2)[1] when the trial judge announced that he had reviewed the material in camera and compared it with her bond hearing testimony and other sworn statements she had given.(R. *3) After some discussion of the matter, the trial judge ordered the testimony disclosed to the prosecutor, Mr. Skye, and defense counsel, Mr. Fuente. Mr. Atkinson, another assistant in the office, was the Assistant State Attorney who had presented the case to the grand jury in this case. (R. 594) Mr. Skye was the Assistant State Attorney to whom Ms. Beasley first related the account of the crime to which she testified at trial. (R. 584) Skye represented to the court that he had not been aware of the inconsistencies until the time of the hearing. (R.*4) It was Skye's position that Atkinson had presented it to the grand jury but had not kept any notes on what the testimony had been. At the time of the disclosure, the grand jury which indicted appellant expired by law on the second Tuesday in October of 1987. See Section 26.34, Florida Statutes (1987).

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[1] References indicated in this manner are to the transcript of the Friday conference which will become a part of this record pursuant to this court's order allowing supplementation of the record but which has not yet arrived in view of the court's denying an extension of time to file the brief following the granting of the motion to amend.

Appellant delayed his attack on the indictment until after jeopardy had attached, filing his motion ot dismiss on February 11, 1989. (R. 939 [start of argument], 2962 [written motion]). The trial court denied the motion basing its ruling on two grounds. (R. 941) He ruled the motion untimely as it had not been filed until after jeopardy attached despite appellant's being aware of the grounds before jeopardy attached and because Beasley had never testified that Appellant had not committed the crime. (R. 941) The court overruled appellant's response to the delay ruling claiming that he could not know of the perjury until after Beasley testifed by pointing out that there were sworn statements that he was aware of, including her deposition which would have been a basis for him to make his claim of perjury. (R. 943-944) Following the arguments, the court again denied the motion on the same two grounds it had initially stated. (R. 952) This time it was without prejudice if appellant could show him case law on point that called for a dismissal at that point. (R. 952)

When appellant announced that he had case authority for the court the following morning, the court asked him to delay presenting it until the state rested. (R. 1234) The court heard the arguments just prior to hearing the motion for judgment of acquittal after the state had rested. (R. 1434-1445) The court took the matter under advisement so he could read all the authority which had been cited to him. (R. 1445)

Following the weekend recess, the court gathered case law from the prosecution and requested that the state furnish him

with a copy of United States v. Bowers. (R. 1474) Prior to the charge conference, the court announced that he would reserve ruling on the motion until after the jury returned its verdict. (R. 1880)

Following the verdict, the court again denied the motion ruling that the motion was untimely as it was not filed until after jeopardy attached. (R. 1882) But, as the court had not finished studying the case law, he continued to leave open the possibility of granting the motion if the case law warranted it. (R. 1882) The court eventually denied the motion just prior to the sentencing again noting that it had not been filed until after jeopardy attached. (R. 2274) He endorsed his written ruling on the renewed motion. (R. 3015)

The law of this state does not explicitly address the factual pattern presented by the facts of this case. Nevertheless, there is a well settled principle of law that covers the facts presented. Courts may not inquire into the sufficiency, legality or character of evidence presented to a grand jury. Johnson v. State, 27 So.2d 276, 281 (Fla. 1946) (affirming conviction over objection that defendant should have been allowed to attack the legality of the information on the ground that it was based on evidence seized in violation of Art. I Sec. 12, Fla. Const. stating that indictiment not subject to challenge on the basis of the sufficiency of the evidence to support it); State v. Schroeder, 112 So.2d 257 (Fla. 1959) (applying rule that court may not inquire into the sufficiency,

legality or character of the evidence before a grand jury that resulted in an indictment to reverse quashal of first degree murder indictment where there was a claim that it was predicated on evidence obtained in violation of attorney client privilege); State v. Mach, 187 So.2d 918 (Fla. 1966)(applying rule that court may not inquire into the sufficiency, legality or character of the evidence resulting in information to reverse quashal of information based on evidence seized pursuant to defective search warrant). The policy reason usually asserted is to keep from having mini trials. The law of this jurisdiction is in harmony with the majority of jurisdictions addressing attacks on evidence before a grand jury recognizing the limited nature of the role played by the grand jury, determining probable cause but not the truth of the charges. United States v. Bracy, 435 U.S. 1301, 98 S.Ct. 1171, 55 L.Ed.2d 489 (1978)(Opinion in Chambers 1978 denying stay of United States v. Bracy, 566 F.2d 649 (9th Cir. 1977), cert. denied, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 109 (1978).

Althought appellant takes the position that this is a perjured testimony case, these facts do not really fit that pattern. This is a case where appellant is asking for the dismissal of an indictment because it later developed that there was impeaching information available. A prosecutor is under no obligation to present impeaching information to a grand jury. See e.g. United States v. Mudarris, 695 F.2d 1182 (9th Cir. 1983) (recognizing that a prosecutor is under no duty to present to a

grand jury all matters bearing on the credibility of witnesses or exculpatory evidence). Appellant cites no decisions which call for the dismissal of an indictment because impeaching information was not presented to the grand jury either intially or when it became available. It is because that is not the law.

The lead case calling for dismissal of an indictment based on perjured testimony is United States v. Basturdo, 497 F.2d 781 (9th Cir. 1974). The majority of the Basturdo panel ruled that it was due process violation to require an accused to stand trial on an indictment based on perjured testimony if the testimony is material and is discovered by the government and jeopardy has not yet attached. The concurring opinion rested on an application of the court's supervisory power. There was no question in that case that the grand jury had been given false evidence of his participation in the crime. The state cases cited in appellant's argument are also all cases in which the prejury amounted to false accusation of the indictee. Escobar v. Superior Court, Maricopa Cty., 155 Ariz. 298, 746 P.2d 39 (Ariz. App. 1987)(false testimony as to degree of injury that was essential element of charge returned in indictment); People v. Pelchat, 62 N.Y.2d 97, 464 N.E.2d 447 (N.Y. 1984)(sole evidence of defendant's guilt presented to grand jury subsequently recanted by witness); State v. Reese, 91 N.M. 76, 614 P.2d 614 (N.M. 1977) (prosecutor knew officer's testimony was false at the time he presented it to the grand jury and false evidence was relevant and material because related directly to question of defendant's constructive

possession of the drugs he was charged with possessing). Beasley's false testimony was about her participation. Appellant never showed that she falsified appellant's guilt. And, because of that her fabrications to the grand jury are not material in the Basturdo sense.

It is unclear whether Basturdo is still good law in the Ninth Circuit. United States v. Bracy, 566 F.2d 649 (9th Cir. 1977), stay denied, 435 U.S. 1301, 98 S.Ct. 1171, 55 L.Ed.2d 489 (1978)(Opinion in Chambers 1978),cert. denied, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 109 (1978) (questioning continuing validity of Basturdo in light of United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). See also United States v. Kennedy, 564 F.2d 1329 (9th Cir. 1977)(giving very limited reading to Basturdo and refusing to apply it where the charge was that the prosecutor had not presented exculpatory evidence). But see United States v. Bowers, 534 F.2d 186 (9th Cir. 1976) (assuming applicability of Basturdo but finding error in not revealing perjury harmless beyond a reasonable doubt where both versions implicated the defendant and motion to dismiss too late). and United States v. Clairborne, 765 F.2d 784, 790-791 (9th Cir. 1985)(rejecting claim that indictment had been obtained by knowing use of perjured testimony and discussing issue with reference to Basturdo and discussing the materiality requirement citing Bracy, observing that if sufficient non perjurious evidence exists the indictment will not be dismissed and acknowledging that the presumption is that if ther was no

perjurious evidence supporting the indictment grand jury would have returened the indictment notwithstanding the perjurious evidence). All Ninth circuit cases have required timely assertion of the claim.

The First and Tenth Circuits have noted how it has been eroded by subsequent developments. United States v. Flaherty, 668 F.2d 566, 583-584 (1st Cir. 1981)(treating Basturdo as supervisory power case and noting its erosion by subsequent authority declining to either adopt or reject decision in view of the fact atht perjury before graqnd jury was not material as it related to a matter other than the charged conspiracy); Talamante v. Romero, 620 F.2d 784, 790 n.7 (10th. 1980)(noting erosion of Basturdo and finding false testimony about location of witness given to grand jury not material).

The Sixth Circuit has refused to adopt it. United States v. Adamo, 742 F.2d 927, 939-942 (6th Cir. 1984)(refusing to adopt Basturdo and affirming conviction despite presentation of evidence to grand jury subsequently shown to be false). And, the Eight Circuit has reserved dismissals for only the most extreme cases. United States v. Levine, 700 F.2d 1176 (8th Cir. 1983)(limiting dismissal of indictment to extreme situations involving knowing use of prejured testimony)(failure to provide jury with exculpatory evidence did not warrant dismissal).

The federal circuit serving our state has refused to decide whether it should adopt Basturdo. United States v. Rodriguez, 765 F.2d 1546, 1159 n. 17 (11th Cir. 1985)(refusing to decide whether

Basturdo should be adopted for the circuit). The only other Eleventh Circuit decision mentioning the decision treats it as a supervisory power case not a due process case. United States v. Pabian, 704 F.2d 1522, 1536 (11th Cir. 1983).

Regardless of the continuing validity of Basturdo, it is clear that it and its progeny do not warrant a reversal. Beasley's fabrications to the grand jury were not material in the sense contemplated by these cases. And, the motion to dismiss was certainly untimely.

ISSUE II

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF CONNIE BEASLEY'S PRIOR CONSISTENT STATEMENTS TO POLICE OFFICERS MADE AFTER SHE HAD TIME AND MOTIVE TO FALSIFY.

(As stated by Appellant)

Appellant contends that the trial court erred in allowing the state to introduce, over his hearsay based objection, two statements made by the witness Beasley following her cross-examination. Appellant's point is without merit because his cross-examination had raised the implication that her trial testimony implicating him was prompted by her plea agreement. Correctly recognizing this, trial counsel did not argue, as is urged on this court, to the trial court that the motive to fabricate had existed prior to the time of her arrest.

Following the state's laying of its foundation to introduce the statement Beasley made at the time of her arrest which implicated appellant, "He did it and I knew about it." (R. 1396), appellant interposed the hearsay objection that brings the matter before this court. (R. 1386) The circuit court initially sustained the objection. But, the prosecutor asked the court to hear him argue for its admissability under section 90.801(2)(b). (R. 1386-1387). After establishing that this was the basis for the state's seeking to introduce this evidence, the court inquired of appellant's counsel. He said:

> MR. FUENTE: Well, first of all, Judge, the Defense, in cross-examining her, did not cross-examine her and show that she was improperly influenced, that she recently

> fabricated her testimony or any motive on her part. As a matter of fact, what we showed and what she admitted is that she lied. (R. 1388)

The prosecutor argued in response that the implication of the cross-examination was, "She lied to save herself because she wanted a sweet deal." (R. 1388-1389) In further argument, he urged the court to conclude that the improper influence suggested was the plea agreement. (R. 1391) Trial counsel was given another opportunity to argue and admitted that, "there could not have possibly been any suggestions of improper influence at that point in time. She was just arrested." (R. 1393)

The trial court characterized the question he faced as whether the cross-examination of the witness had "created a possible expressed or implied charge of improper influence, motive, or recent fabrication . . . ." (R. 1393) He finally overruled the objection and Velbloom testified that almost immediately following her arrest, she stated, "He did it, and I knew about it." (R. 1396)

Later during the direct examination of Velboom, the prosecution established that Beasley had told him on August 20, 1987 and he had documented in one of his reports a statement by Beasley concerning appellant's moving of the body to Orlando. (R. 1411-1412) Appellant interposed a hearsay objection and the state replied that it thought the testimony was authorized under section 90.801(2)(b). The court overruled the objection and permitted the testimony without further argument. (R. 1412)

During the course of cross-examining her, counsel pursued some of her lies and then came to the point of her meeting with FDLE agents and her attorney following her grand jury appearance. (R. 569-584) He had her admit that the day following that meeting was the day she entered into her plea agreement, a plea agreement that contemplated that her testimony would be as it had been on direct. (R. 585) Counsel then impeached her with her grand jury testimony. (R. 589-596) Counsel then returned to establishing that she changed her testimony only a few days later following her meeting with the prosecution. (R. 596-606) And, he suggested that prior to her giving her testimony at trial this was the first time she had ever mentioned anything to anyone involved with the prosecution about Appellant's moving the body to Orlando. (R. 606-607)

Section 90.801(2), Florida Statutes (1987) provides:

> A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> * * *
>
> (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication;

This court's most recent cases pertinent to this issue are Jackson v. State, 498 So.2d 906 (Fla. 1986) and Dufour v.State, 495 So.2d 154 (Fla. 1986), cert. denied, 487 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987). One of those cases, Dufour, is essentially on all fours with the facts relating to the first prior consistent statement and sheds light on the second as well.

The first statement offered pursuant to this exclusion from the definition of hearsay was the statement immediately following her arrest in which she attributes the victim's death to appellant. Her early statements pursuant to interrogations were weak and contradictory. That fact had been fully developed on cross. Their content distanced her from knowledge of the details of the crime. And, cross-examination had made it abundantly clear that her trial testimony, testimony clearly and directly showing appellant to be the moving force behind this crime on the basis of her first hand observation and participation, was linked directly in time with her highly favorable negotiations with the prosecution. The implication left by the cross was that she was directly implicating him for an improper motive, to gain the benefit of highly favorable treatment in her case.

The implication of an improper motive for a witness' testimony inculpating an accused has long been recognized as a basis for the proper admission of prior consistent statements. VanGallon v. State, 50 So.2d 882 (Fla. 1951). Dufour offers a recent example of why this testimony was proper. One of the witnesses in Dufour was a person to whom he had confessed, sold jewelry belonging to his murder victim and from whom he had obtained help in disposing of the murder weapon.

Cross-examination of this witness had contained references to his negotiations with the state attorney's office. The state responded by presenting testimony from a detective to whom the witness had made statements consistent with his trial testimony

prior to his negotiations with the state. This court found that since the cross-examination of the witness had raised the matter of his negotiations with the prosecution there was a sufficient showing of improper motive or recent fabrication to permit the use of a prior a consistent statement.

This is the same situation as presented by the facts of this case. The use of prior consistent statement in such situation is unremarkable and is a proper use of this exclusion from hearsay. See e.g. Nussdorf v. State, 508 So.2d 1273 (Fla. 4th DCA 1987) (cross-examination about discussing testimony with prosecutor sufficient to raise inference of recent fabrication) and Wilson v. State, 434 So.2d 59 (Fla. 1st DCA 1983) (questioning witness about plea negotiations with state created inference of recent fabrication).

It is clear that the second statement was not hearsay because it was introduced to rebut the inference of recent fabrication. The question posed to Beasley suggested that the matter of appellant's disposing of the body in Orlando was a recent fabrication being presented for the first time at trial. As it came in the wake of cross-examination about her plea negotiations and the fact that her ultimate sentence was still an open question, the implication was clearly that it had been fabricated to help the state's case. It is a classic situation calling for the use of a prior consistent statement and fits the pattern of the above cases.

Contrary to the position he took in the trial court, appellant now takes the position that Beasley had a motive to fabricate prior to making either of these statements, to protect herself. Appellant seeks to analogize his case to the situation presented in Jackson. Jackson, is one of those cases in which this court has found that testimony offered pursuant to this exclusion from the definition of hearsay was inadmissable because the motive to fabricate arose prior to the making of the prior consistent statement. The cross-examination at issue in Jackson had raised the implication that the witness' motive to falsify, to help himself in his pending case, arose when he learned of the crime Jackson stood accused of and was already in existence at the time he made the statement offered as a prior consistent statement.

The cross at issue in this case links the direct blaming of appellant and the disposition of the body in Orlando to her negotiations with the state and had been unsuccessful in showing she believed that she had anything to gain by placing the blame on the appellant prior to that time. Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988), too, is readily distinguishable as the cross-examination in that case had not raised the implication that the damning testimony was the result of improper influence arising out of plea negotiations.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF COLLATERAL CRIMES RELEVANT SOLELY TO APPELLANT'S BAD CHARACTER OR PROPENSITY.

(As stated by Appellant)

Appellant's argument contends that the trial court erred in admitting evidence about appellant's showing Beasley a gun which she described as a machine gun and evidence that he had solicited another to kill Ms. Beasley. The evidence was manifestly relevant in both instances, showing a consciousness of guilt on appellant's part. Appellant's argument simply fails to show how the trial court abused its discretion in making either of these evidentiary rulings.

Following a proffer of Beasley's testimony about appellant's showing her the weapon, (R. 522-523), the state argued that it was relevant to show consciousness of guilt citing to Straight v. State, 397 So.2d 903 (Fla. 1981) and Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Following the argument, the court ruled:

> Objection is overruled. Under the totality of the circumstances, this testimony is admissable as being relevant to the consciousness of guilt which may be inferred from such circumstance.
> (R. 52)

Review of that ruling is subject to an abuse of discretion standard. Jent v. State, 408 So.2d 1024, 1029 (Fla.) cert. denied 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). As the court said in that case, "A trial court has wide discretion

concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not e disturbed."

The trial court did not abuse its discretion in so ruling because the evidence was relevant. Section 90.402, Florida Statutes (1987) authorizes that admission of all relevant evidence. Williams v. State, 110 So.2d 654 (Fla. 1959) specifically authorizes the admission of evidence of uncharged crimes when that evidence is relevant. The test for the admission or exclusion of such evidence is relevancy. Bryan v. State, 533 So.2d 744 (Fla. 1988). Here the evidence was plainly relevant to establish appellant's consciousness of guilt. It was not just the display of the weapon but appellant's comment to Beasley that went along with it. She testified that she had asked him why he had it when he showed it to her and that he replied, ". . . if it ever got hot or the heat was on, or hot, that he could take out a couple of people with him." (R. 529)

Appellant makes the same argument regarding the ruling on the evidence of appellant's solicitation of the murder of Beasley while he was awaiting trial. Appellant interposed an objection after the state presented this evidence, (R. 3468), and the court heard argument on the issue out of the presence of the jury. (R. 3468-3470) The prosecutor analogized the facts to those presented in Sireci. When the trial court asked if the appellant had any case authority to the contrary, appellant's counsel stated that he did not.

Appellant still has no authority to the contrary. Appellant's argument suggests that Sireci is distinguishable. But, the mode of analysis appellant's argument applies to the facts of this case could just as easily be applied to the Sireci facts. That appellant can suggest that the evidence is consistent with some hypothesis other than consciousness of guilt misses the point. Imaginative and creative advocates, especially ones engaged in the kind of post hoc analysis that is appellate practice, can usually come up with alternative explanations for evidence. Compare United States v. Sharpe, 470 U.S. 675, 686-687, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). Solicitations for the murder of an important witness by an accused can reasonably be understood as evidence of consciousness of guilt. See e.g. Dufour v. State, 495 So.2d 154, 159 (Fla. 1986), cert. denied, 487 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987) And, that makes such evidence relevant. That counsel can suggest or argue that it might be probative of something else is for consideration by the jury. It does not diminish the relevance and therefore the admissability of the evidence.

Neither Keene v. State, 504 So.2d 396 (Fla. 1987) nor Jackson v. State, 451 So.2d 458 (Fla. 1984), cases cited in appellant's argument as authority for reversal on this issue, require a contrary result. The evidence of attempted murder at issue in Keene did not involve a witness in the pending case. Rather, it was evidence of a prior crime with no link to the pending charges other than the prosecution's attempt to have it

treated as similar fact evidence. Likewise, the "thoroughbred killer" statement at issue in the Jackson case cited in connection with this claim did not involve a post crime and post accusation threat. It involved an event which preceded both the murders that were the subject of the prosecution in that case and the defendant's arrest for those murders.

The cases appellant's argument cites as specific authority on the gun evidence are just as readily distinguishable. The gun evidence in State v. Lee, 531 So.2d 133 (Fla. 1988) had come in in connection with the state's proof of a bank robbery that had followed the charged crimes and which had been offered by the state on the theory that it was relevant to show the entire context out of which the crime arose and to show a motive for not using his own car in the robbery. It most certainly was not a case like this one where the perpetrator shows a gun to the only witness to his crime the following day and talks about taking people out if there is "heat." Nor, does Jackson v. State, 522 So.2d 802 (Fla. 1988) require a different result. The evidence of bullet proof vests and Jackson's possessing weapons found to be inadmissable but harmless error in that case had not been connected to any facet of the case against him.

Both the gun evidence connected with appellant's remarks about taking people out in the event of "heat" and the attempt to have a witness in the pending prosecution killed are classic instances of consciousness of guilt evidence. The trial court did not abuse his discretion in admitting this evidence. The

arguments presented to him in support of the evidence were sound then and they are sound now. Even with the time for reflection affordable the nature of theses proceeding, appellant has not been able formulate any basis for reversal.

ISSUE IV

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS BY ADMITTING IRRELEVANT PORTIONS OF A VIDEOTAPED NEWS BROADCAST FEATURING APPELLANT IN JAIL CLOTHING WHILE IN THE CUSTODY OF JAIL AUTHORITIES.

(As stated by Appellant)

Appellant's argument under this point takes the position that showing the videotape of the newscast that included a shot of him in jail clothing and being led into a secure facility was tantamount to trying him in identifiable jail clothing. Plainly, he was not made to stand trial in jail clothing. The question presented is the relevance of the newscast.

It is certainly improper to compel an accused to appear in identifiable jail clothing at his trial. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Torres-Arboledo v. State, 524 So.2d 403 (Fla.), cert. denied, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988). But, that is not what happened in this case. The jury in this case saw a video tape of about one and one half minutes duration, (R. 1080), of a news broadcast, (R. 1080-1081, 1086) about which the witness Gallon testified. Appellant's counsel objected because it depicted, in part, appellant in jail clothing being led to a secure facility. (R. 1082, 1093, 3461-3462) There was an objection based on the fact that the tape was not the original, an objection not renewed on appeal. (R. 1082) Appellant never made any suggestion to the trial court that the tape should have been redacted. Gallon described watching the tape and what appellant's reactions had been to various portions

of the tape. (R. 3472-3473) Appellant's reactions included mimicking shooting Beasley and telling investigator depicted in the tape to stay away from a certain area. (R. 3473-3474)

It is the state's position that all of the tape was relevant. The depiction of him in the tape was relevant to the question of identity. He was indeed making comments about the case against him not someone else. The brief glimpse of him in identifiable jail clothing was certainly no more prejudicial than evidence of uncharged crimes offered under Section 90.404, Florida Statutes (1987) on the issue of identity and very probably much less. Compare Jackson v. State, 522 So.2d 802, 806 (Fla. 1988) (evidence of uncharged crimes on day of charged murders relevant to show context out of which the charged crimes arose).

Appellant asks the court for far more relief than the law he cites contemplates. The principle policy reason articulated by both the majority and dissenters for concluding that trial in identifiable jail clothing could result in a denial of due process by denying the accused the presumption of innocence was that it would be a ". . . constant reminder of the accused's condition . . ." as well as "a continuing influence throughout the trial . . . " 425 U.S. at 504-505 (majority) compare at 425 U.S. at 137 According to Powell's concurrence, the real differences in the case were only over the significance of the absence of an objection. 425 U.S. at 514 The single depiction of appellant him in the videotape in jail clothing is hardly the

constant reminder and continuing influence seen by the Williams court as impinging on the presumption of innocence. It was only cumulative to what they already knew on account of his creating this damning and relevant evidence.

But, the majority clearly recognized, and the dissent did not question, that there are limits to the rule. Among the limits recognized are situations where an accused has made his trial in shackles a necessity as was the case in Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). In addition to requiring a contemporaneous objection to preserve this issue, the court went on point out that no prejudice occurs from trial in jail clothing in situations where the jury would be learning of the accused jailed status in any event, e.g. trial of a case involving that the crime occurred while the accused was already incarcerated. The jury knew of appellant's jailed status from Gallon. The tape added nothing to what they already knew.

Appellant offers no direct authority for the proposition that relevant evidence which includes a depiction of an accused in identifiable jail clothing violates the presumption of innocence particularly when the depiction of him in jail clothing is cumulative. And, that is the reason United States v. Harris, 703 F.2d 508 (11th Cir. 1983) is distinguishable. Telling the jury that Harris had been arrested did not cure his appearance in jail clothing because it was a past event which would not explain his appearance at trial in jail clothing. Here the picture was cumulative because it corroborated testimony about what had

happened while appellant was incarcerated. And, the tape had independent relevance unlike Harris' appearance in court. This record shows no suggestion that the policy concerns that prompt relief in the jail clothing cases are present here. And, appellant's argument fails to suggest any.

ISSUE V

WHETHER APPELLANT HAS PRESERVED FOR REVIEW THE CLAIM HE URGES ON THIS COURT AND IF HE HAS WHETHER A STATE ATTORNEY INVESTIGATION IS AN "OTHER PROCEEDING" FOR THE PURPOSES OF SECTION 90.801(2)(a), FLORIDA STATUTES?

Appellant's argument takes the position the state erroneously introduced House' prior inconsistent statement as substantive evidence characterizing it as the result of a police investigation and urging that such statements and even discovery depositions in criminal cases do not qualify as other proceedings for the purposes of Section 90.801(2)(a) Florida Statutes. Appellant's position is without merit on both substantive and procedural grounds. Appellant has changed his grounds on appeal and the claim here is one that is procedurally barred. Even if it were not procedurally barred, the court would have to find it to be without merit because House's sworn statement, as recorded by the court reporter, was in what has already been determined to be an "other proceeding" for the purposes of the section.

As appellant's argument correctly documents, House did take the stand at his behest and give testimony directly at variance with the testimony he gave at the state attorney investigation. And, he did argue that the state's use of this statement was improper impeachment. But, he did not meet the state's argument on why the testimony was admissable as substantive evidence. And, he certainly did not mount the challenge to that testimony that he advances under this issue in his brief.

Because he did not advance those arguments to the trial court he has procedurally defaulted them. Florida law is and has been very clear for years. An appellant can not change the grounds of an objection urged on the trial court on appeal. The failure to preserve the issue works a procedural default of it. Glendening v. State, 536 So.2d 212 (Fla. 1988); Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Stewart v. State, 420 So.2d 862, 865 (Fla. 1982); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982)(collecting cases). The rule is necessary for service of the value finality in litigation. Clark v. State, 336 So.2d 331, 334-35 (Fla. 1978). It gives the trial court an opportunity to resolve the problem at the earliest possible time. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). The courts of the state recognize the applicability of procedural defaults in this area of the law. See e.g. Webb v. State, 426 So.2d 1033 (Fla. 5th DCA 1983) (conviction could rest solely on recanted grand jury testimony of child witness who had testified to the contrary at trial ruling that grand jury appearance was other proceeding for purposes of 90.801(2)(a) and objection on appeal to use of entire transcript waived by failure to assert same to the trial court).

The state urges the court to make a "plain statement" rejecting appellant's procedurally defaulted issue on the basis of the procedural default. The state is concerned that some courts may read Harris v. Reed, 489 U.S. ___, 109 S.Ct. 1083, 103 L.Ed.2d 308 (1989) as authorizing federal habeas courts to

conclude that the state courts have reached and decided on the merits every claim urges on them where the state court's decision is silent on the basis for its decision. The state does not read the decision this broadly but can readily see how this interpretation might be adopted until the United States Supreme Court makes clear the extremely limited nature of its holding.

Shortly after the adoption of Evidence Code the courts had occasion to construe and apply the section at issue here. The lead case is Moore v. State, 452 So.2d 559 (Fla. 1984). Moore arose out of a case wherein all the witnesses to the charged offense had recanted their grand jury testimony implicating defendant. Since that was the sum and substance of the state's case, Moore sought dismissal of the charges pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). Admitting that its only evidence against Moore was the grand jury testimony and that the case law was against it, the state suffered dismissal of the case in circuit court. The district court reversed on the basis of the newly enacted section (2)(a). State v. Moore, 424 So.2d 920 (Fla. 4th DCA 1982). Both the district court and this court looked to and essentially adopted federal precedent in the area as the state statute employs the same words as the federal rule.

Subsequent development in the area has sometimes involved the claim appellant urges on this court calling for development of what an "other proceeding" is for the purposes of the section. The first case to address the question was Diamond v. State, 436 So.2d 364 (Fla. 3d DCA 1983). The Diamond court reversed a

conviction in which the defendant had been precluded from using as substantive evidence a sworn statement of one of the state witnesses to an assistant state attorney which was contrary to the testimony he had given at trial. It found a state attorney investigation to be an "other proceeding" for the purposes of the section.

Other courts have followed the Diamond decision. Smith v. State, 539 So.2d 514, 515 (Fla. 2d DCA 1989) clearly ruled that a state attorney investigation is an "other proceeding" for purposes of section. Review of that decision is currently pending in this court in case number 73,822 pursuant to unrelated certified questions. Delgado-Santos v. State, 471 So.2d 74, 78 n. 6 (Fla. 3d DCA 1985) while ruling that police investigation does not qualify did survey the law in the area and conclude that a state attorney investigation is an "other proceeding" for purposes of (2)(a). This court has, apparently endorsed that view as it adopted the district court's decision and adopted its opinion as its own. State v. Delgado-Santos, 497 So.2d 1199 (Fla. 1986). And, it is in keeping with related case law. State v. Witte, 451 So.2d 450 (Fla. 3d DCA 1984) (state attorney investigation official proceeding for purposes of perjury statute). Appellee submits that appellant's failure to raise the issue in the trial court is predicated on his correct recognition that the House statement the state introduced had been taken in an "other proceeding" contemplated by the section.

Those cases on which appellant rests his case are either readily distinguishable or do not involve the formality of state attorney investigations. State v. James, 402 So.2d 1169 (Fla. 1981) does not stand for the broad proposition for which it is cited in appellant's argument, that deposition testimony does not qualify for the exception in section 90.801(2)(a). The witness had not testified at trial and been available for cross-examination about the statement which was to be introduced. The question urged on the court was whether such evidence could be used when the witness is unavailable. Kirkland v. State, 509 So.2d 1105 (Fla. 1987) is a police investigation case. It ruled only that a sworn statement given to police does not qualify under (2)(a) because a police investigation is not an "other proceeding" for purposes of the section. This court's ruling in Dudley v. State, 545 So.2d 857 (Fla. 1989) is properly understood as a "police investigation" case to the extent it addresses the issue. It is not clear from the text of the opinion that the inconsistent statement was even sworn. It plainly did not involve the level of formality involved in this case as the testimony was not introduced through a court reporter. It does not appear that a court reporter was involved much less examination under oath by an assistant state attorney in his office, the factual setting of this case. (R. 1837-1839 & 1868)

Appellant failed to make any demonstration to the trial court but that this was a state attorney investigation. He made no showing that the facts of this case bring it with in "police

investigation" cases. He correctly recognized that the introduction of the statement was not subject to attack on this ground. And, because he did not present the claim to the trial court the court should affirm on this ground.

ISSUE VI

THE TRIAL COURT VIOLATED DUE PROCESS BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON THE LAW APPLICABLE TO HIS THEORY OF DEFENSE.

(As stated by Appellant)

Appellant asks the court to reconsider its Palmes v. State 397 So.2d 648, 652 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981) ruling out an accessory after the fact instruction as a theory of defense instruction in a murder prosecution in light of its more recent decision in Staten v. State, 519 So.2d 622, 625 (Fla. 1988) ruling that guilt of accessory after the fact is inconsistent with guilt of first degree murder.

That the facts to which appellant testified regarding his relationship to the murder of the victim in this case made out a separate crime does not mean that his guilt of the another and even inconsistent crime is a defense is the sense contemplated by the case law on theory of defense instructions. Or, in the words of Palmes, "That a person committed a crime other than the one he is charged with is not a legal defense requiring a jury instruction." 397 So.2d at 652 See also Coxwell v. State, 397 So.2d 335, 337 n. 1 (Fla. 1st DCA 1981) (quoting Palmes for this proposition). The theory of defense is still reasonable doubt. As explained in the immediately preceding paragraph in Palmes, the defenses which require theory of defense instructions all concern the defendant's legal innocence or establish some legal

excuse of the crime. "None of them entail the commission of a crime other that the one charged in the indictment." Id.

The request for the instruction was a transparent attempt to gain rhetorical advantage in argument by being able to admit that an unsavory accused was guilty of something just not the offense with which he was charged. Such an argument can be an effective, even if somewhat dishonest, tactic as it throws a sop to the jury's perception of an accused's unappealing nature thus making a not guilty vote easier.

Staten changes nothing. It is just a more recent expression of the court's understanding of the relationship between a charged offense and accessory after the fact. The Palmes court recognized that accessory after the fact was a separate crime not included in the charged offense. All Staten did was to extend this and find that not only is it not included but is inconsistent with the charged offense.

ISSUE VII

THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S WAIVER OF HIS RIGHT TO HAVE DEFENSE COUNSEL PRESENT MITIGATING EVIDENCE WITHOUT CONDUCTING AN ADEQUATE INQUIRY TO DETERMINE WHETHER THE WAIVER WAS A VOLUNTARY AND INTELLIGENT RELINQUISHMENT OF A KNOWN RIGHT OR PRIVILEGE.

(As stated by Appellant)

Appellant urges a variety of reasons for reversing his death sentence arising out of his instructions to his counsel not to present certain evidence in mitigation. Appellant's arguments are all without merit. Given the full context of the hearing, it is clear that the court made a more than sufficient inquiry. The facts in front of the trial court clearly revealed that appellant was making an informed choice with his eyes open. This court has allocated the decision on whether to call particular witnesses to the accused. Counsel was not in error in following appellant's instructions. It is not proper to characterize the instructions as either a waiver of counsel as counsel continued to function a as counsel presenting other evidence and making appropriate arguments. Nor, is it proper to treat the matter as a waiver of the effective assistance of counsel because counsel diligently discharged his duties to the appellant.

Appellant's argument fails to give a full account of the information that was before the trial judge with respect to appellant's instructions to counsel not to call certain witnesses at the penalty phase of his trial. (R. 2166-2169) Counsel obtained permission to approach the bench with appellant. (R.

2166) Once at the bench, counsel announced that he had discovered a number of witnesses whom he believed would testify favorably for appellant. (R. 2167-2168) Counsel represented that he had gone over this with appellant in great detail in the presence of co-counsel Fuente and Mr. Ashwell and that appellant had never wavered in his desire not to have these people testify in the penalty phase of his trial. (R. 2168) Counsel also told the court that he had told appellant that he believed use of the witnesses was in his best interest. (R. 2168) Counsel then announced that he would not be calling any of these witnesses because of the appellant's command. (R. 2168) The court then invited counsel to inquire of appellant. (R. 2168) Counsel asked if appellant concurred in or disagreed with the statements that he had made to the court and asked him if there was anything he would like to add. (R. 2168) Appellant said, "I concur with the statements you made." (R. 2169) After a short interruption by counsel, appellant continued stating, "I would rather not have any witnesses testify on my behalf that you mentioned or that could, in fact, be called." (R. 2169) It was at that point that the court made inquiry about whether appellant was using any drugs or medication that would affect his ability to understand what was going on. (R. 2169)

Appellant takes the position that his instructing counsel not to call certain witnesses is tantamount to a waiver of the effective assistance of counsel and that Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) waiver hearing

be conducted on the record. This is certainly not a situation where appellant was making a waiver of counsel altogether like the situations presented in Hamblen v. State, 527 So.2d 800 (Fla. 1988) and Goode v. State, 365 So.2d 381 (Fla.), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). Counsel continued to function as counsel for him making arguments and presented other evidence. In fact, he introduced the information charging the witnesses Beasley with third degree murder. (R. 2200) And, he made use of the disparity it represented during his penalty phase argument. (R. 2246-2248, 2250-2252).

Nor, is it proper to characterize the acceptance of a client's desires as a waiver of the effective assistance of counsel. Counsel is not ineffective for accepting his client's advice not to put on mitigating evidence. Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986), cert. denied, 107 S.Ct. 3277 (1987). This court has specifically ruled that the decision on whether to call or not call certain witnesses lies with the accused. Blanco v. State, 452 So.2d 520, 524, (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985) (no error in allowing defendant to call witnesses contrary to his counsel's advice). And, this court has also rejected the notion that such disagreements amount to a conflict of interest. Blanco v. Wainwright, 507 So.2d 1377, 1388 (Fla. 1987). But see Blanco v. Dugger, 691 F.Supp. 308, 326-329 (S.D. Fla. 1988) (characterizing the court's actions as interference with presentation of the defense case and suggesting an alternative

analysis of the particular factual pattern presented but failing to include Tafero in its analysis).

Appellant asserts the fall back position that if the court can not construe it as a Faretta situation then it should be considered the kind of decision about a fundamental personal right which calls for an on the record determination of a knowing and voluntary waiver of the type contemplated in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). This is an even more extreme position than that already rejected by this court in Torres-Arboledo v. State, 524 So.2d 403, 409-411 (Fla.) cert. denied 109 S.Ct. 250, 102 L.Ed.2d 239 (1988). In Torres-Arboledo, this court rejected a claim that it was error for a trial court not to conduct an on the record determination as to whether an accused decision not to testify is the product of a knowing, voluntary and intelligent waiver.

In any event, it is the state's position that the record shows the kind of waiver of the right to have these witnesses called in appellant's behalf during the penalty phase of his trial contemplated by Johnson v. Zerbst. Johnson v. Zerbst defines a waiver as "an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464 This record certainly established that. Counsel had informed the court in appellant's presence about his right to have these witnesses called and appellant's adamant refusal to have them called. Appellant himself confirmed that this was the case and told the court that he did not want this evidence presented during the

penalty phase of his trial. In inquiring about whether appellant was using any medication or drugs that would affect his ability to understand what was happening, this careful trial judge went beyond what is required for a Johnson v. Zerbst waiver and made more of an inquiry that the law calls for. The trial judge made the kind of inquiry designed to forestall fabrication of a collateral attack where the appeal record is silent. See Torres-Arboledo v. State, 524 So.2d at 411 n. 2

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authorities the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Paul C. Helm, Assistant Public Defender, P.O. Box 9000 Drawer PD, Bartow, Florida 33830 on this 18th day of January, 1990.

OF COUNSEL FOR APPELLEE