served 1 day late

IN THE SUPREME COURT OF THE

STATE OF FLORIDA

ROBERT PATTEN,	:	
	:	
Appellant,	:	
	:	
v.	:	CASE NO. 61,945
	:	
STATE OF FLORIDA,	:	Appeal from the Eleventh Judicial Circuit
	:	
Appellee.	:	
	:	Capital Case

REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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INTRODUCTION

Defendant's reply brief is limited to those issues where fuller development is warranted. This reply brief also addresses the state's cross-appeal argument that defendant lacked a reasonable expectation of privacy and, therefore, has suffered no Fourth Amendment violation.

Defendant also notes several errors in the state's position, without argument, as follows:

1. In response to defendant's claim that the trial court erred in refusing to excuse for cause those venirepersons who expressed the opinion that the death penalty should be automatic (Point IV-B of Appellant's Initial Brief), the state responds that: "The jurors answered affirmatively to questions as to whether they would follow the law in the instant cause." (State's brief, p. 45). In fact, the transcript references provided by the state show no such statements and no such statements exist.

2. The jury selection errors (Point IV-A of Appellant's Initial Brief) are not moot because the jury returned with a life recommendation. The mootness argument overlooks the guilt issue tendered to the jury -- whether the homicide was actually second degree murder. That death-prone jurors are also guilt-prone is highly prejudicial to defendant's defense.

3. The jury's life recommendation does not moot appellant's claim that the court should have conducted a hearing on the death-prone, guilt-prone issue (Point V of Appellant's Initial Brief), for the reasons stated above. Further, significantly

new information on the issue is available. The more recent studies are cited in Winick, Peremptory Challenges in Capital Cases, 81 Mich. L. Rev. 1, 50 (fn. 165) (1982).

I.

THE PRESUMPTION OF CONTINUING INSANITY REQUIRED THE STATE TO PROVE DEFENDANT SANE AS AN ESSENTIAL ELEMENT OF ITS CASE

The issue between the parties is who bears the initial burden of producing evidence. Defendant asserts that his prior acquittal by reason of insanity, without restoration of competency, required the state, as part of its proof, to establish his sanity at the time of the alleged offenses. The state's argument proceeds on the premise that "[t]he burden of proving insanity is on the defendant because he is presumed sane under the law." (State's brief, p. 17). Therefore, argues the state, the defendant has the initial burden of producing evidence of insanity.[1]

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1. The state's brief claims that no formal notice of intent to rely on an insanity defense was filed (State's brief, p. 19). Assuming, arguendo, that such a notice is of some significance in this case, the record belies the state's claim. It shows that the state received a copy of defendant's Notice of Intent to Rely on the Defense of Insanity in open court (Tr. 35-36). In response (certainly for no other reason) the state filed a motion demanding an Insanity Bill of Particulars (R. 101). The motion was denied on the ground that the information had been previously furnished (R. 129). Furthermore, the state was fully aware of defendant's prior acquittal by reason of insanity (Tr. 47).

It is true that the record fails to contain the Notice of Intent. Nevertheless, its existence is clearly shown by the circumstances. If the Court is seriously concerned that defendant did not provide such a notice, even though the state had actual notice, defendant suggests this Court temporarily relinquish jurisdiction to permit the record to be supplemented. (continued)

The state reverses the long established Florida rule that a prior adjudication of insanity results in a presumption of continuing insanity. Armstrong v. State, 30 Fla. 170, 11 So. 618 (Fla. 1892). Having reversed the applicable rule of law, the state is able to argue that insanity is an affirmative defense, and that the defendant bears the burden of presenting evidence of insanity sufficient to raise a reasonable doubt before the burden shifts to the state to prove sanity beyond a reasonable doubt. However, not one of the cases cited by the state in support of its affirmative defense, burden of producing evidence argument, was a situation where a defendant had previously been adjudicated insane.

The state's position is supportable only if Robert Patten's prior adjudication of insanity is deemed of no legal consequence. And that prior adjudication can only be deemed of no legal consequence if at least five prior decisions of this Court are reversed. Perkins v. Mayo, 92 So.2d 641 (Fla. 1957); Horace v. Culver, 111 So.2d 670 (Fla. 1959); Dixon v. Cochran, 142 So.2d 5 (Fla. 1962), cert. denied, 371 U.S. 866 (1962); Clark v. Wainwright, 148 So.2d 273 (Fla. 1963); Yates v. Wainwright, 151 So.2d 832 (Fla. 1963). See also, Livingston v. State, 383 So.2d 947 (Fla. 2d DCA 1980).

The state attempts to distinguish the cited authority on the ground that they deal with competency to stand trial and not sanity at the time of the offense (State's brief, p. 20). That claim is directly contradicted by the very words of this Court. In Dixon v. Cochran, supra, the court noted that "the record

contains no evidence to overcome the presumption that petitioner's insanity continued at the time of the commission of the alleged crime. . ." (142 So.2d at 5). The identical phraseology was used in Clark v. Wainwright, supra, (148 So.2d at 274) and in Yates v. Wainwright, supra (151 So.2d at 833). This language makes it clear that the issue before the Court was more than competency to stand trial.

Much of the state's argument is irrelevant. The issue is not what the Constitution permits with respect to insanity. Rather the issue is what Florida law requires. The state cites Stacy v. Love, 679 F.2d 1209 (6th Cir. 1982), cert. denied, 103 S.Ct. 364 (1983), for the proposition that "the burden of proving insanity could constitutionally remain at all times on the defendant." (State's brief, p. 15). Left out, however, is the actual holding that "[h]aving embraced this rule [shifting the burden to the state to prove sanity], however, the State of Tennessee is obligated to follow it." 679 F.2d at 1213. The existence of the prior insanity acquittal shifted the presumption of sanity to one of insanity, and, without more, required the state to prove, as an essential element of its case, the sanity of the defendant at the time he committed the offenses.

II.

THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED

A. Reasonable Expectation of Privacy:

The trial court found that the defendant had a reasonable expectation of privacy for items he kept at his grandmother's house. The record amply supports the trial court's finding and should not be distributed on appeal.

It is clear that Robert Patten considered his grandmother's house his home, his refuge from the outside world. From time to time he lived at the house. He kept his personal belongings in a room at the house. He left his dog there (Tr. 305-306). He told his girlfriend he was living there, and she observed him about the premises (Tr. 306, 308). He was required to live there pursuant to the terms of his release from the Gateway Residence (R. Exh. 312-313).

The state's position, apparently, is that an individual can only have a reasonable expectation of privacy in the premises in which he actually resides. Such a rule is easy for the state to argue, but has little to do with the actual legal standard for determining when an individual has a reasonable expectation of privacy. Indeed, if actual residence were the requirement, there would have been no need for the remand in United States v. Salvucci, 448 U.S. 83, 65 L.Ed.2d 619, 100 S.Ct. 2547 (1980), to determine if the defendants had a reasonable expectation of privacy for property kept at the apartment of the wife of one of the

defendants, an apartment where neither defendant had a possessory or proprietary interest. See, United States v. Salvucci, 599 F.2d 1094 (1st Cir. 1979). Indeed, the issue of reasonable expectation of privacy can only arise in situations where the premises searched are not the actual residence of the defendant. State v. Barrowclough, 416 So.2d 47 (Fla. 3d DCA 1982).

A reasonable expectation of privacy is measured by whether the person asserting the Fourth Amendment right has exhibited an actual (subjective) expectation of privacy and whether that expectation is one that society is prepared to recognize as reasonable. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Mr. Justice Harlan, concurring).

The privacy element encompasses the expectation of freedom from governmental intrusion, even if other individuals have the right or ability to gain access. The facts of Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) are quite similar to Robert Patten's situation. Although the automatic standing rule of Jones no longer applies, the Supreme Court in Rakas v. Illinois, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978), approved he ultimate result reached in Jones, noting:

> We think that Jones on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place.
>
> * * * *
>
> Viewed in this manner, the holding in Jones can best be explained by the fact that

> Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law.
>
> 439 U.S. at 143.[2]

The expectation of privacy, besides extending to a friend's apartment, Jones v. United States, supra, and a telephone booth, Katz v. United States, supra, also extends to a shared office, Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968), overnight visitors, United States v. Perez, 700 F.2d 1232 (8th Cir. 1983), a shared right to exclude others, State v. Barrowclough, supra and the home of one's parents, United States v. Haydel, 649 F.2d 1152 (5th Cir. 1981), mod. on other grounds, reh. & reh. en banc denied, 664 F.2d 84 (5th Cir. 1981) cert. denied, 455 U.S. 1022 (1982). That Robert Patten would have an expectation of privacy at his grandmother's house is hardly surprising. Indeed, its use as a place of concealment is but another indicator of his expectation of privacy. State v. Parker, 399 So.2d 24 (Fla. 3d DCA 1981), pet. for rev. denied, 408 So.2d 1095 (Fla. 1981); United States v. Haydel, supra.

Robert Patten enjoyed a long term, ongoing relationship with the property searched. It was, in fact, his only real home, whether or not he was actually residing there. Perhaps in recog-

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2. The decision in State v. Mallory, 409 So.2d 1222 (Fla. 2d DCA 1982), pet. for rev. denied, 418 So.2d 1280 (Fla. 1982), is directly contrary to the Jones proposition approved in Rakas.

nition of this, the state confines itself to arguing property concepts, and not expectations.

Finally, although not argued to the contrary by the state, there is nothing unreasonable in recognizing that a grandson has an expectation of privacy at his grandmother's house. That is certainly a relationship that society is more than willing to recognize.

B. Nexus:

Defendant agrees that the affidavit established probable cause to believe a crime had been committed and that defendant had committed the crime. Lacking is the foundation for a reasonable belief that the gun used to commit the crime would be at any particular location, let alone defendant's grandmother's house.

The cases cited by the state reinforce defendant's argument that some nexus must be shown. United States v. Williams, 605 F.2d 495 (10th Cir. 1979), cert. denied, 444 U.S. 932 (1979), is typical. In Williams the Court noted:

> One, or possibly two, informants provided information linking the defendant to the items sought. An informant was personally acquainted with the defendant, knew where he lived, and allegedly saw an identical hat and handgun at the defendant's house.

605 F.2d 497. Machado v. State, 363 So.2d 1132 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 459 (Fla. 1979), is similar -- involving direct police observation.

With one exception, the other cases cited by the state contain similarly detailed affidavits. In United States v. Maestas, 546 F.2d 1177 (5th Cir. 1977) the affidavit indicated that the

defendant had actually received the items to be searched for at the premises to be searched. United States v. Rahn, 511 F.2d 290 (10th Cir. 1975), cert. denied, 423 U.S. 825 (1975), assessed an affidavit which presented a detailed explanation why it was likely the stolen items would be at defendant's home. Bates v. State, 355 So.2d 128 (Fla. 3d DCA 1978), is a controlled buy case, not a nexus case, where the issue was the reliability of the informer. So too, is State v. Heape, 369 So.2d 386 (Fla. 2d DCA 1979). Churney v. State, 348 So.2d 395 (Fla. 3d DCA 1977) is a plain view case.

Only Iverson v. State of North Dakota, 480 F.2d 414 (8th Cir. 1973), cert. denied, 414 U.S. 1044 (1973), arguably supports the state's position. Iverson is like State v. Malone, 288 So.2d 549 (Fla. 1st DCA 1974) and Swartz v. State, 316 So.2d 618 (Fla. 1st DCA 1975), cert. denied, 333 So.2d 465 (Fla. 1976), both cited in Appellant's main brief, which held that arrest, without more, justified a search of the defendant's residence. But the law is clear that arrest, without more, will not justify a search of the arrested person's home. United States v. Lucarz, 430 F.2d 1051 (9th Cir. 1970).

And, even if correctly decided, Iverson, Malone and Swartz are distinguishable because they involved a search of the defendant's known actual residence, not simply one of several potential addresses possessed by the police. The affidavit here issued was for a private dwelling which the state contends was not defendant's residence. The law is clear that probable cause must appear within the four corners of the affidavit. The justi-

fication expressed in Iverson, Malone and Swartz, that the logical place for a defendant to conceal the instrumentalities and fruits of his crime - his home - is, accordingly, absent. It is just as likely that the gun was in the girlfriend's home, in the stolen car, or in a canal. Without the "home" justification, nothing is left.

III.

THE DOUBLE JEOPARDY CLAUSE PRECLUDES THE STATE FROM SEEKING A NEW JURY RECOMMENDATION

The state concedes, as it must, that the jury's six to six verdict constituted a recommendation for life. Rose v. State, 425 So.2d 521 (Fla. 1982). The state argues for a new sentencing before a new jury, the relief ordered in Rose. In remanding Rose for a new sentencing before a new jury, this Court overlooked the fact that the state failed to establish its entitlement to a death recommendation the first time, and is not entitled to try again. Bullington v. Missouri, 451 U.S. 430, 68 L.Ed.2d 278, 101 S.Ct. 1852, (1981).

The state's reliance on Dobbert v. State, 409 So.2d 1053 (Fla. 1982) and Dobbert v. Strickland, 532 F.Supp. 545 (M.D. Fla. 1982) is misplaced. The issue in both Dobbert cases was whether double jeopardy barred the trial court's override of the jury's life recommendation. Defendant agrees that in the Dobbert context, Bullington is clearly distinguishable (indeed not applicable) because the jury is not the ultimate sentencer.

But Bullington cannot be distinguished on the ground that in Florida the jury only advises whereas in Missouri the jury is the final sentencer. The Bullington analysis begins with the proposition that a defendant may not be retried if his conviction is reversed for insufficient evidence. Normally, a sentence less than the statutory maximum does not mean a lack of proof, for "there are virtually no rules or tests or standards -- and thus no issues to resolve. . ." 101 S.Ct. at 1860-1861. But, unfettered sentencing discretion is the antithesis of reasoned decision making, based on the evaluation of aggravating and mitigating circumstamces, called for by Florida's death penalty law.

In Florida, like Missouri, the burden is on the state to establish that capital punishment is called for. In Bullington, the Supreme Court focused on that fact finding procedure, noting:

> By enacting a capital sentencing procedure that resembles and is like a trial on the issue of guilt or innocence, however, Missouri explicitly require the jury to determine whether the prosecution has "proved its case". (Emphasis in original)

101 S.Ct. at 1852. Mr. Justice Blackmun then quoted with approval the observation of the dissenting Judge of the Missouri Supreme Court "that the sentence of life imprisonment which petitioner received at his first trial meant that the jury has already acquitted the defendant of whatever was necessary to impose the death sentence." Id.

Florida, too, provides a trial-like procedure for determining life or death. The state bears the burden of proof, beyond a reasonable doubt, of establishing the existence of one or

more statutory aggravating factors, and of convincing the jury that the aggravating factors outweigh the mitigating factors. The jury's recommendation, although not binding, is entitled to great weight. A trial judge can only override the recommendation if everyone would agree that the jury's recommendation is not reasonable. Tedder v. State, 322 So.2d 908 (Fla. 1975). In all respects, except for finality, the trial-like Florida procedure is identical to the trial-like Missouri procedure. The state's burden, and the jury's fact finding, are identical. It is this fact finding process, not the final or advisory nature of the jury decision, that Bullington focuses upon.

The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. Tibbs v. Florida, 102 S.Ct. 2211 (1982). Bullington applies that rule to sentencing trials. See also, Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), vacated on other grounds, 103 S.Ct. 776 (1983).[3] French v. Estelle, 692 F.2d 1021 (5th Cir. 1982), reh. & reh. en banc denied, 696 F.2d 318 (5th Cir. 1983). The state bore the burden at sentencing. It failed. The jury process is not an empty shell. No sound reason exists to give the state another chance.

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3. Bullard was vacated because the Texas Court adopted its rationale pursuant to the Texas Constitution. Ex parte Augusta, 639 S.W.2d 481 (Tex. Ct. App. 1982) (en banc).

IV.

THE RECORD DOES NOT SUPPORT IMPOSITION OF THE DEATH PENALTY

The state's argument in support of the death penalty gives no consideration to the jury's recommendation of life. Thus, three of the cases the state cites for comparative purposes upheld the death penalty where the jury had recommended death. Ford v. State, 374 So.2d 496 (Fla. 1979), cert. denied, 445 U.S. 972 (1980); Raulerson v. State, 358 So.2d 826 (Fla. 1978), cert. denied, 439 U.S. 959 (1978); Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977). The fourth and final case cited by the state, Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. denied, 428 U.S. 911 (1976), would not be decided the same way today. Witt v. State, 387 So.2d 922, 931 (Fla. 1980) (Justice England, concurring), cert. denied, 449 U.S. 1067 (1980).

The state argues that Robert Patten's crime can be equated with the crimes in Ford, Raulerson, Cooper and Sawyer. That argument is premised, at least in part, on the state's concession that "[t]he fact that the victim was a police officer was only one fact taken into account. . ." (State's brief, p. 63). Of course, as a nonstatutory factor, it should have played no part in the decision.

In a variety of cases, this Court has vacated death sentences imposed after a jury recommendation for life, under circumstances at least as serious as the conduct sub judice. Jacobs

v. State, 396 So.2d 713 (Fla. 1981); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Walsh v. State, 418 So.2d 1000 (Fla. 1982); Phippen v. State, 389 So.2d 991 (Fla. 1980).

Most recently, in Washington v. State, ____ So.2d ____ (Fla. 1983, 8 FLW 174), this Court vacated a jury override in circumstances remarkably similar to Robert Patten's situation. In Washington, Sheriff's Deputy Edwards began to investigate why the driver of a car was seeking to sell firearms. This court described Washington's activities thusly:

> Washington then got out of the car, brushed past the security guard, walked around the rear of the car, drew a .32 caliber chrome-plated pistol, and ordered Edwards to freeze. As he reached for Edwards' gun, Edwards spun around facing him. Simultaneously the security guard, who had followed Washington around the car, reached for Washington's shoulder. Washington shrugged the guard off and fired four bullets into Edwards. Washington and his companions then fled, leaving the car and stolen guns behind. Washington was apprehended a week later in North Carolina while driving a car he stole in Daytona Beach.

8 FLW 174. The trial judge found that the murder was committed to disrupt or hinder a governmental function, that the murder was committed to avoid or prevent a lawful arrest, and that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial court also found two mitigating factors, Washington's age (19) and lack of significant previous criminal activity.

The trial court's finding of cold and calculated was rejected, this court noting:

> Although there was sufficient proof of premeditation, we find there is a lack of any additional proof that the murder was committed in a cold or calculated manner, such as a prior plan to kill Edwards.

8 FLW 175. Robert Patten, rather than ordering a law enforcement officer to "freeze" and then shooting four times at point blank range, was seeking to run away. Shooting Officer Broom as part of the chase simply does not rise to the additional premeditation called for by the statute.

In Washington, this Court then went on to hold that the trial judge failed to give sufficient weight to the jury's recommendation. Relying on the Tedder standard of review, the Court found:

> In this case the jury's recommendation could have been based not only on the two statutory mitigating factors found by the trial judge, but also on the nonstatutory mitigating factor of appellant's character as testified to by members of his family. We do not find that the remaining aggravating circumstances are of such a grave nature that virtually no reasonable person could differ as to their outweighing these mitigating circumstances.

Id. Application of the Tedder standard to Robert Patten's case produces a similar finding. The facts are not so clear and convincing that no reasonable person could differ. Indeed, they are anything but.[4]

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4. The state's argument that death is presumed proper where one or more aggravating factors are found and no mitigating factors are found, said to derive from State v. Dixon, 283 So.2d 1 (Fla. 1973), has no application in a jury override situation. Tedder v. State, provides the standard. If the jury recommendation is entitled to great weight, and if that recommendation can only be overridden in a situation where no reasonable person could differ, then the trial judge's finding cannot be deemed to create a presumption for purposes of appellate review.

No purpose would be served in repeating the extensive evidence offered in mitigation. At least six members of the jury found that evidence persuasive. That position is certainly not unreasonable. The jury was justified in placing more weight on Robert Patten's long, and documented, history of mental problems than on the opinion of the two state doctors who each saw the defendant once, for a very short period of time. That the trial judge choose to see it the other way does not suffice to meet the Tedder test. That was made clear in Cannady v. State, 427 So.2d 723 (Fla. 1983), where the trial court, in overriding the jury life recommendation, rejected medical testimony supporting the defendant's claim of extreme emotional or mental distress and impaired capacity to appreciate the criminality of his conduct. Using the Tedder standard, this Court reversed the death penalty, holding:

> However, the jury may have given more credence to Dr. Hord's testimony than the trial judge in reaching its recommendation. The jury could have found that appellant was under mental or emotional disturbance and that he was unable to conform his actions to the requirements of law even though the trial court was not necessarily compelled to reach the same conclusions. Thus the jury's recommendation of life sentence could have been based upon these statutory mitigating circumstances.

427 So.2d at 731. Likewise, Robert Patten's jury.

In the final analysis, two aggravating factors exist. Robert Patten was previously convicted of robbery in 1975 at age

18. He committed the instant crime to avoid or prevent lawful arrest. The trial judge found no mitigating circumstances. But the jury could have reasonably concluded that two statutory mitigating factors existed. Furthermore, the jury could have reasonably concluded that a variety of nonstatutory mitigating factors existed. The record more than amply supports the jury's recommendation. That recommendation is not unreasonable.

The second function of this Court is proportionality review. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied 454 U.S. 1000 (1981). Defendant submits that in comparison with other cases where the issue is life or death, this case comes down for life. Defendant's initial brief described the characteristics of cases upholding the death penalty (Appellant's brief, pp. 63-68). The pattern has continued to date. Of the nine additional death cases decided through May 19, 1983, only one, Middleton v. State, 426 So.2d 548 (Fla. 1983), a case in which the jury recommended death, upheld the death penalty in the absence of a finding that the murder was "especially heinous, atrocious or cruel." In five of the cases the jury had recommended life. The only override to be upheld, Porter v. State, ____ So.2d ____(Fla. 1983, 8 FLW 53), found the murder to have been especially heinous, atrocious and cruel.

Robert Patten's crime is not deserving of the death penalty. Assuming, arguendo, that the Tedder reasonable man standard does not compel a reduction to life, then proportionality review compels the reduction.

CONCLUSION

Each section of Appellant's Initial Brief noted the precise relief requested. In summary, because the state failed to establish defendant's sanity, an acquittal is in order. The other guilt phase errors require a remand for a new trial. Finally, the penalty phase errors merit reduction of sentence to life imprisonment without possibility of parole for twenty-five years. Otherwise, defendant must be resentenced, based on the jury's recommendation for life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was delivered by mail this 2 day of June, 1983, to Assistant State Attorney Arthur Berger, State Attorney's Office, 1351 N.W. 12th Avenue, Miami, Florida, and Assistant Attorney General Callianne Lantz, Attorney General's Office, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.