IN THE FLORIDA SUPREME COURT

ROBERT ECHOLS,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 64,246

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

ROBERT ECHOLS will be referred to as the "Appellant" in this brief. THE STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's Statement of the Case and Facts as a substantially accurate account of the proceedings below with such exceptions or additions as set forth in the Argument portion of this Brief.

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING TAPE 1 INTO EVIDENCE SINCE THE TAPE WAS MADE BY MEANS WHICH WERE ILLEGAL UNDER FLORIDA LAW.

The Appellant's argument under this point invites this court to apply the Sarmiento decisions, Sarmiento v. State, 371 So.2d 1047 (Fla. 3DCA 1979) and State v. Sarmiento, 397 So.2d 643 (Fla. 1981) to exclude Tape One from evidence despite the fact that the taping took place in Indiana and involved a conversation between two Indiana residents. The circuit court decided this issue correctly. It is undisputed that the taping of the conversation was lawful under both applicable federal and Indiana law. 18 USC § 2511(2)(d); McCarty v. State, 383 N.E.2d 738 (Ct. App. 1st Dist. 1975). Even if the court accepts the interest analysis argument advanced, the analysis of the interests involved results in a ruling in favor of the result below. The argument is also flawed in its characterization of Adams as a government agent for the purposes of making this tape.

The Appellant invites this court's attention to the decision in People v. Rogers, 141 Cal. Rptr. 412 (Ct. App. 1977) vacated on other grounds; People v. Rogers, 146 Cal. Rptr. 733 (Calif . 1978) and asks this court to apply the law of Florida to exclude Tape One from evidence. The claim is that since this is a Florida prosecution

Florida's interest is greater than any interest that Indiana might have in the case. In short, the argument invites this court to bring interest analysis in choice of law to the field of criminal law, to exclude relevant reliable evidence of guilt.

It is not surprising that counsel would pursue this line of argument as this court has already adopted interest analysis in deciding on the substantive law that should apply in torts where there is some question about which jurisdictions substantive law should be applied. Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980); Note, Torts - Conflict of Laws - Florida Abandones Lex Loci Delicti, Again, 9 F.S.U.L. Rev. 193 (1981).

Florida has no interest in applying its constitutional law to exclude relevant reliable evidence of guilt obtained lawfully in another jurisdiction. Under the Sarmiento cases, Florida elected to interpret its constitution to limit the police power of the state because of the value Art. I § 12, Fla. Const. attaches to the sanctity of conversations in one's own home. That protection is for the benefit of Florida citizens in their Florida homes. The parties involved in this taping were Indiana residents. The taping took place in Indiana. And, as shown earlier, the taping was lawful under both federal and local law. The center of gravity of the transaction was in Indiana. Florida gains nothing by applying its law. It has no interest in what citizens of a foreign jurisdiction lawfully do in that jurisdiction.

The one Florida court that has considered the decision rejected it. McClellan v. State, 359 So.2d 869 873 (Fla. 1st DCA 1978). The court said:

> [4,5] Further, we hold that evidence procured in a sister state pursuant to a search valid under the laws of that state is admissible in the trial of a criminal case in Florida notwithstanding that the warrant validly issued and executed in the sister state would not have been or was not valid under the laws of Florida; provided the warrant and its execution in the sister state does not offend U.S. Constitutional standards. In so holding, we have not overlooked the decision cited by defendant of People v. Rogers (Cal. App. 1977), 141 Cal. Rptr. 412, but we do not find the principle of that case applicable here. The warrant, sub judice, issued on the basis of the affidavit supplemented by the oral testimony, does meet U.S. Constitutional standards. Accordingly, we affirm on this point.

The McClellan decision is in accord with other decisions addressing the issue. See e.g. Stowe v. Devoy, 588 F.2d 336 (2d. Cir. 1975)(applying law of situs to admit wiretap evidence that would have been excluded by law of forum and collecting cases); United States v. Bennett, 538 F. Supp. 1045 (D.C.P.R. 1982) (applying Cotroni to admit evidence legally intercepted at situs but excludable under law of forum); State v. Matera, 401 So.2d 1361, 1365 n. 4 (Fla. 3DCA 1981).

The assertion that Adams was a government informant for the purposes of making the tape is not supported by the record.

All the Indiana police had asked of Adams was that he get them a photograph of the Appellant. (R. 649)(McManus' request photo from Indiana police); (R. 679)(Indiana officer asks Adams only for photograph). Thus, the purported distinction advanced in the Appellant's argument are distinctions without a difference. The point is without merit and this court should affirm over the objection presented here.

ISSUE II

THE TRIAL COURT ERRED IN ADMITTING TAPE 2 INTO EVIDENCE SINCE IT WAS DERIVED THROUGH EXPLOITATION OF PRIOR ILLEGAL POLICE ACTION.

Under this point, the Appellant urges this court to conclude that since he demonstrated that the first tape was illegally seized, a point already rejected in issue one of their brief, this court should apply the fruit of the poisonous tree doctrine of cases like Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 and Norman v. State, 379 So.2d 643 (Fla. 1980) and Fla. Stat. § 934.06 (1981). The point is without merit. Not only was the first tape legally made as previously demonstrated, but there is also another reason that the circuit court was correct in its analysis of this question. As the Appellant readily concedes, he swore under oath that the voice on Tape Two did not belong to him. As such, he had no standing to contest the legality of the way in which the officers obtained the tape. See e. g. State v. Loeffler, 410 So.2d 589 (Fla. 2DCA 1982) (knock and announce case). The point is simply without merit.

ISSUE III

THE TRIAL COURT ERRED IN DENYING ECHOLS' MOTION TO CONTINUE AND RELATED MOTION FOR COSTS TO OBTAIN AN EXPERT IN VOICEPRINT ANALYSIS SINCE AN EXPERT WAS NECESSARY TO THE PREPARATION OF AN ADEQUATE DEFENSE.

Under this point, the Appellant claims the circuit court abused its discretion in not granting him a continuance. The argument advances two other issues. It contends that the testimony of an expert on voice print analysis would have been admissable. Then, it argues they erred in not granting the motion for costs for the employment of such an expert. For the purposes of this argument, the state assumes that voiceprint evidence is admissible in this state where it is relevant.

The point is without merit for several reasons. The circuit court correctly denied the motion for a continuance. The Appellant failed to demonstrate that he was entitled to a continuance. The entitlement to costs argument presents a false issue. The court's denial of the motion was without prejudice if it granted a continuance. (R. 160). There was an undisputed representation to the court that the tape in question was of such poor quality that there was only a small chance that analysis of it would be useful to the court. (R. 561, 562). There was also an undisputed representation that the analysis could not be done before trial unless the defense would stipulate to the authenticity

of Echols' voice on Tape One so the expert would have something for comparison. (R. 563, 564).

Echols sought the continuance to have an expert evaluate the authenticity of his voice on Tape Two. The state disclosed the existence of this tape had been to him on January 26, 1983. (R. 25). The defense knew of these taped confessions during February, March and April. The confessional nature of both tapes came out during the depositions of Adams and McManus in that period of time. (R. 562). The Appellant filed his motion to continue on July 2, 1983, the Friday before trial the following Tuesday. (R. 152). Counsel claimed that Echols had told him that the voice on Tape Two was not his the previous Sunday, July 17, 1983. (R. 154).

The granting or denial of a motion for continuance is within a court's discretion and will not be overturned absent a palpable abuse of discretion. Lusk v. State, 446 So.2d 1038 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla.) cert. denied 457 U.S. 1111 (1981); Ziegler v. State, 402 So.2d 365 (Fla. 1981). cert. denied 455 U.S. 1055 (1982); Magill v. State, 386 So.2d 1188 (Fla. 1980) cert. denied 450 U.S. 927 (1981). There was no abuse of discretion in this case.

This is not a novel ploy. For example, in Pittman v. State, 360 So.2d 1138 (Fla. 1st DCA 1978), the court ruled that the circuit court had not abused its discretion in denying a continuance to a defendant who waited until the day of trial to inform his counsel of a witness he thought would be helpful to his case.

See also United States v. Gibbs, 594 F.2d 125 (5th Cir. 1979) (no abuse of discretion in denying continuance for study of documents that had been in possession of defendant); United States v. Smith, 548 F.2d 545 (5th Cir. 1977)(no abuse of discretion in denying continuance for psychiatric examination on eve of trial where no showing would have provided helpful testimony).

The fault lies directly with the Appellant himself. He waited until the eleventh hour to deny the authenticity of his second taped confession to Adams. The claim that he needed to hear the tape itself is at best a lame excuse. He had plenty of time to tell his counsel that he had not confessed to Adams for a second time. Apparently it was a ploy to delay having to be responsible for his crime.

The Appellant's argument seeks to analogize the facts of this case to the facts in Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983). It is not apposite. In Brown, the state's decision to hypnotically refresh the recollection of one of its witnesses shortly before trial forced the defense to seek a continuance to deal with this new development in the case that was directly attributable to the state's action. In this case, the state did not do anything to cause the defense to make additional preparation for trial. As demonstrated earlier, the only reasonable inference is that Echols waited until the eleventh hour to make this claim in an attempt to postpone having to accept responsibility for his crime. Brown is not controlling here. The Appellant had more

than adequate time to investigate and prepare. And, again unlike Brown he could not even make a colorable argument that the evidence would have been helpful.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING ECHOLS' MOTION TO DELETE PORTIONS OF TAPE 2 DEALING WITH OTHER CRIMES COMMITTED BY MELVIN "MAD DOG" NELSON SINCE SUCH EVIDENCE WAS IRRELEVANT AND PREJUDICIAL.

The Appellant claims that the trial court erred in not redacting the confessions Appellant made to his son-in-law, Leonard Adams, to exclude parts showing Melvin "Mad Dog" Nelson was guilty of other crimes. The argument is without merit. The court below correctly allowed the portions to which objection had been made into evidence because they were relevant evidence. And, the argument advanced on the Appellant's behalf fails to demonstrate any error below. The authority on which Appellant's argument rests addresses situations that differ materially and substantially from the factual pattern here.

Florida law provides that all relevant evidence is admissable unless it is made inadmissable by law for some reason. Fla. Stat. § 90.402(1983). As the prosecutor and the court below stated, there are many reasons that this evidence was relevant. It showed the entire context of the crime. Heiney v. State, Case No. 56,778 (Fla. opinion filed February 2, 1984); Ruffin v. State, 397 So.2d 277 (Fla.) cert. denied 454 U.S. 882 (1981). It helped to explain why the Appellant selected Nelson to act as the triggerman. It shows how dangerous and erratic

the Appellant believed Nelson to be. Thus, it explains why the Appellant felt that it was necessary to kill him to protect himself. Or, as the prosecutor said, "The whole conversation, this guy knows what happened and he could turn against you." (R. 1760). The court below also understood the relevance of the testimony. When addressing the question, it said, "Well, it shows what a bad fellow Mad Dog is, and it would tend to corroborate the idea that it's a good idea to get rid of Mad Dog." (R. 1764). Or, as the court below said at another point in the argument over this issue:

> "I understand that, but it shows the understanding of the character of Mad Dog, and I think it's some evidence that it goes to the idea that they agree it is a good idea to get rid of Mad Dog."
>
> (R. 1765).

In short, the evidence explained another piece of relevant evidence, the plan to kill Nelson. This evidence was, of course, admissable under the decision of Sireci v. State, 399 So.2d 964, 968 (Fla. 1981) cert. denied 102 S.Ct. 2257, rehearing denied 102 S.Ct. 3500 (statements to cellmate about attempts to have brother-in-law with knowledge of crime killed relevant and admissable). The evidence of Nelson's crimes was nothing more or less than another circumstance in a web of circumstantial and direct evidence demonstrating the Appellant's guilt.

Florida courts have long recognized that trial courts are to be allowed great latitude in the admission of indirect

or circumstantial evidence. Alvord v. State, 322 So.2d 533 (Fla. 1975)(testimony showing that Alvord owned a gun at the time of crime relevant to corroborated the testimony witness who said that Alvord had told her that he had to strangle the victims because a gun would make too much noise); Astrachan v. State, 28 So.2d 874 (Fla. 1947)(discovery of large sum of money relevant in prosecution for jewel theft); Baso v. State, 433 So.2d 660 (Fla. 3DCA 1983)(evidence showing the possession of a firearm by one accused of extortion and grand theft relevant). See also United States v. Pentado, 463 F.2d 355 (5th Cir. 1972); United States v. Marino, 658 F.2d 1120 (6th Cir. 1981).

This general principle is fully applicable even if the circumstances show the commission of another crime which is not similar in its facts and involves another party. 1 Wharton's Criminal Evidence § 241 at 536-538 (13th Ed. 1972); Anthony v. State, 44 Fla. 1, 32 So. 818 (1902) shows the principle in operation. In Anthony, the court approved the introduction of evidence establishing that a third party was guilty of stealing the property that Anthony was accused of receiving. The court ruled on a res gestae theory. Cf. Sutton v. State, 64 Fla. 150, 59 So. 893 (1912).

Neither of the cases the Appellant's argument rests on address the factual pattern of this case. Hirsch v. State, 279 So.2d 866 (Fla. 1973) involved proof of a crime by a third party totally unconnected with the charged party. Likewise, in

Armstrong v. State, 377 So.2d 205 (Fla. 2DCA 1979), the third party crime was not connected with the defendant or his motivation. Nor, did it shed any light on his actions. Thus, the cases are clearly distinguishable from the instant facts and do not control here. This court should affirm over the objection articulated under this point.

ISSUE V

THE TRIAL COURT ERRED IN LIMITING THE DEFENSE'S CROSS-EXAMINATION OF THE LEAD INVESTIGATOR SINCE THE DEFENSE IS ENTITLED TO WIDE LATITUDE ON CROSS-EXAMINATION

Under this point, the Appellant complains that the trial court erred in restricting his cross-examination of Detective McManus. There was no error in this regard. The circuit court correctly ruled that the questions Echols wanted to ask on cross went beyond the scope of the direct examination of the witness. Echols was attempting to develop defensive matters on cross that should have been in his case in chief. The argument advanced here is without merit for several reasons. It fails to demonstrate that questions sought to be asked on cross were not beyond the scope of direct. Echols did not preserve the confrontation issue advanced here by presenting it below.

Fla. Stat. § 90.612(2)(1983) controls the scope of cross-examination of the witnesses. It provides in relevant part:

> Cross-examination of a witness is limited to the subject matter of the direct examination and matter affecting the credibility of the witness.

Cross-examination is not properly used as a vehicle for the presentation of defensive evidence. The decisions in Steinhorst v. State, 412 So.2d 332 (Fla. 1982) and Coco v. State, 62 So.2d 892 (Fla. 1953) define and illustrate the proper scope for cross-examination. Comparison of this case with those decisions shows why the circuit court was correct.

Coco defined the proper scope for the cross-examination of witnesses. It teaches that cross is not confined to the identical details of what the witness testified to on direct examination but extends to the entire subject matter and all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief. This court then reversed the judgment and sentence under consideration. It ruled that Coco's counsel should have been allowed to elicit that fingerprints found on a gun the state's case claimed to be the murder weapon did not belong to the defendant on cross-examination. On direct examination of the witness, the state had been allowed to explore fingerprint comparisons made between Coco's fingerprints and fingerprints found on the gun.

Steinhorst ruled, inter alia, an attempt to go beyond the scope of direct on cross improper and an improper attempt to use cross to put on defensive evidence. On direct examination, a witness testified about a conversation he had with Steinhorst. The witness claimed that Steinhorst told him about the murders that were the subject of the prosecution. During cross-examination of the witness, the court ruled that cross of that witness would be limited to his knowledge of the murders and refused to allow cross-examination on the subject of the witness participation in the smuggling venture generally. It had been the state's position that the victims of the murder had discovered the smuggling and were murdered for their misfortune.

In this case, counsel for the Appellant sought to cross-examine McManus with regard to what Mrs. Baskovich told him after the crime, about one Danny Lombard and his knowledge about whether tape two had been subjected to a voice print analysis. He proffered the questions that he wanted to ask the witness outside of the presence of the jury. (R. 2258-2301). The court ruled that these areas of inquiry were outside of the scope of the direct examination of the witness. (R. 2281, 2282, 2284). (Baskovich interview); 2286 (Danny Lombard), 2299 (voice print). The court also ruled the proffer improper on other grounds. Appellant's trial counsel made no attempt to pursuade the court below that his questions were within the scope of direct or were for the purpose of impeachment. See e. g. R. 2259 where counsel claimed that he should be entitled to explore the witness conversation with Mrs. Baskovich because it was an excited utterance. Apparently, he was unwilling to accept that he should have presented this evidence in his own case.

The facts of the case show that Steinhorst is instructive in another regard. It ruled in part that it is improper to change theory from the trial to the appellate court. To be cognizable on appeal, the contention presented to the reviewing court ". . . must be the specific contention asserted as legal ground for the objection, exception, or motion below." 412 So.2d at 338. The Appellant did not present either his confrontation claim or his claim that his questions were within the scope of the direct examination to the circuit court. Thus, the claims presented in the Appellant's brief are not properly before this court and it should so rule.

ISSUE VI

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE OVER OBJECTION STATE'S EXHIBIT #7 AND TESTIMONY RELATING TO IT SINCE THE STATE FAILED TO ESTABLISH RELEVANCE, A REQUIRED PREDICATE FOR ADMISSION.

Under this point, the Appellant complains that the circuit court erred in not excluding a jewelry box or box top found near the crime scene that had Nelson's fingerprint on it. The complaint on appeal is that the evidence was irrelevant because Mrs. Baskovich did not identify it as having come from her home. The Appellant also claims prejudice because he says that this is the only piece of physical evidence tending to tie him to the crime scene. The point is without merit. The circuit court correctly recognized that it was relevant. It tended to prove a material fact, the Appellant's presence at the crime scene and its tendency to corroborate other evidence in the case like the content of the taped confessions that the Appellant made to his son-in-law Adams and the documentary evidence showing that he rented and returned a car at times that bracketed the crime and drove it far enough to have gone to and from the crime scene. The argument advanced for the Appellant is flawed because it proves too much with its claim of prejudice. If it had not been relevant it would not have been prejudicial.

Florida law provides, "All relevant evidence is admissible except as provided by law." Fla. Stat. § 90.402 (1983).

"Relevant evidence is evidence tending to prove or disprove a material fact." Fla. Stat. § 90.401 (1983). These provisions of the evidence code are declaratory of previously existing common law on the subject. See C. Ehrhardt, Florida Evidence at 394 (Sponsor's notes)(1977).

In Williams v. State, 143 Fla. 826, 197 So. 562 (1940), this court had occasion to observe the following about what constitutes relevant evidence:

> Any evidence tending to identify defendant as the guilty person, and show his presence at the scene of the crime, is relevant and competent.
>
> 197 So. at 565.

The evidence about which the Appellant complains certainly fit this definition of relevancy. Officer McManus found the exhibit found at 1707 Jeffords Street, south of the victim's residence while driving around the area to see whether they had missed anything. (R. 1467, 2291). It was one of several jewelry boxes found in the area of the victim's residence. (R. 2232). As noted above, it was relevant to prove material facts in the case.

The circuit court's ruling was in accord with long standing precedence in this area of the law. For example, in Gantling v. State, 40 Fla. 237, 23 So. 857 (1898) this court ruled that an oil cloth connected to the defendant that had been found near the body of the decedent was relevant and admissible. The court reasoned that it ". . . tended in some degree to connect the

defendant with the crime charged, and was therefore admissible in evidence." 23 So. at 860. In Williams v. State, 73 Fla. 1193, 75 So. 785 (1917), this court held that evidence that the Appellant owned a firearm of the same caliber as that used to kill the victim in the case and that it had been recently discharged and that the defendant fired the shots that killed the victim was relevant admissible evidence.

It does not matter whether the state proved that it came from the Baskovich residence. It conntected the Appellant to the crime scene just like the oilcloth in Gantling. It corroborated other evidence in the state's case against the Appellant and helped establish his identity as the killer. The decisions in Zeigler v. State, 402 So.2d 365, 373 (Fla. 1981) and Bryant v. State, 235 So.2d 721 (Fla. 1970) illustrate the admissibility of this type of evidence.

In Zeigler, this court ruled that a bullet and fingerprint evidence from an orange grove where the Appellant had been alleged to have taken one of his victims and a witness to some of the events surrounding the murders. There the objection had been that fingerprint evidence is inadmissible unless the surrounding circumstances are such that the print could only have been made at the time of the crime. While acknowledging this rule, this court pointed out that it did not apply when the evidence corroborated the testimony of one of the state's witnesses. The court then found no error in the admission of the evidence about which Zeigler complained.

In Bryant, this court rejected an argument that Bryant's finger and palm prints lifted from a telephone extension at the scene of the crime should have been excluded from evidence. Appellant had contended that they should have been excluded because the state's evidence did not establish the Appellant's identity because the evidence did not show that they could only have been left at the time of the crime. This court rejected that argument. Just as this court rejected the arguments raised in the cited cases, it should reject the argument in favor of excluding the jewelry box or jewelry box top with Nelson's fingerprint on it for the same reasons.

ISSUE VII

THE TRIAL COURT ERRED IN ADMITTING THE VIDEOTAPE OF DRAGOVICH'S MEETING WITH ADAMS AND WHITE INTO EVIDENCE UNDER THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE SINCE THE VIDEOTAPE WAS NOT MADE DURING THE PENDENCY OF OR IN FURTHERANCE OF THE CONSPIRACY.

Under this point, the Appellant contends the circuit court erred in admitting the Dragovich videotape. The claim is that since the conversation was not made during or in furtherance of the conspiracy, the co-conspirator hearsay exception to the hearsay rule did not apply. The argument is without merit. It rests on an erroneous assumption that the murder of Baskovich was the object of the conspiracy. It was not. The murder of Baskovich was only a part of the larger scheme. The object of the conspiracy, as the circuit court found in its sentencing order, was to gain control of Baskovich's money through his wife to build a condominium project in Indiana to be managed by the Appellant. (R. 299). See also R. 512 - 516, 520 (Tape One transcript showing scope of conspiracy). R. 1972 - 1975 (Adams testimony regarding Echols' account of purpose and scope of conspiracy).

This court has long recognized that acts and statements of co-conspirators occuring after the charged crime may be admitted in the prosecution of the charged crime if done pursuant to the general scheme or conspiracy of which the charged crime was a part.

Baldwin v. State, 46 Fla. 115, 35 So. 220 (1903). The court's syllabus in Baldwin teaches that in the prosecution of A, B and C for larceny, the testimony of A about a plan whereby B was to take grain from the victim and transferred it to a shed where A was about to pick it up and transfer to C's barn was direct evidence of guilt and not objectionable as an extrajudicial admission of a conspirator after the conspiracy ended. It also teaches that the acts of the co-conspirators done in pursuit of the general scheme or conspiracy three weeks after the charged larceny were admissible. This court's opinion allowed testimony about both the scheme and the acts done pursuant to that scheme three weeks after the charged larceny. It ruled on relevance. Then it summarily rejected the Appellant's characterization of the proof as the admission of a co-conspirator without proof of the conspiracy. Your undersigned has not located any Florida precedent addressing the weight to be given to a court syllabus. In some jurisdictions it is the law in others it is to be disregarded except for any pursuasive value it might have. Even if only pursuasive, the reasoning in the syllabus illustrates the admissability of the Dragovich videotape. And, Whitfield v. State, 433 So.2d 1285 (Fla. 1st DCA 1983) recently reaffirmed this principle when it said:

> There was no error in admitting evidence of acts of the co-defendant Nelson which occurred after the murder. This evidence was material to prove the conspiracy which extended beyond the time of the murder.
>
> 433 So.2d at 1288.

This approach is in keeping with that of other courts that have addressed the question. See e.g. United States v. Kahan, 572 F.2d 923 (2d Cir. 1978)(testimony of informer about payment for crime admissible as co-conspirator statements where payment and necessity to identify individuals to make payment contemplated by conspiracy); United States v. Ferro, 709 F.2d 294 (5th Cir. 1983) (conspiracy continued after thefts where object of conspiracy to make money with stolen goods/co-conspirator statements made after theft admissible); United States v. Testa, 548 F.2d 847 (9th Cir. 1977)(request for tribute money one month after delivery of cocaine during and in furtherence of conspiracy where payment of tribute money part of conspiracy); People v. Easley, 187 Cal. Rptr. 745 (Calif. 1982)(testimony about payment for contract killing arising out of conflict over corporate control where payment of money crucial object of conspiracy properly admitted under co-conspirator exception to hearsay rule); People v. Sailing, 103 Cal. Rptr. 698 (Calif. 1972)(finding conspiracy still in effect because payment had not been made); People v. Dominguez, 121 Cal. App. 3d 481 (Calif. Ct. App. 5th Dist. 1981)(distinguishing Leach and ruling account of slaying given to superior in gang to gain recognition and avoid punishment was during and in furtherance of conspiracy to kill gangland rivals); State v. Farinella, 150 N.J. Super. 61, 374 A.2d 1229 (1977)(statement to third official made after two officials bribed made in course and furtherance of

conspiracy and admissible in trial of previously bribed official); Commonwealth v. Tumminello, 437 A.2d 435 (Pa. Super. 1981)(statements made during attempt to conceal evidence of crime during and in furtherance of conspiracy). The evidence at issue here was certainly during and in furtherance of the conspiracy to gain control of the decedent's money through his wife and construct condominiums in Indiana using the Appellant's services as a contractor and have him manage them.

The Appellant places his argument on an analogy with People v. Leach, 15 Cal.3d 419, 124 Cal. Rptr. 752, 541 P.2d 296 (1975) cert. denied 424 U.S. 926, 96 S.Ct. 1137, 47 L.Ed.2d 335. Leach is clearly distinguishable. The Leach court rested its holding on the fact that there was no proof independent of the co-conspirator statement as to the scope of the conspiracy. Here there was proof independent of the co-conspirator hearsay statements made by Dragovich. It came from the Appellant himself in his confessions to Adams. (R. 512 - 516, 520).

ISSUE VIII

THE TRIAL COURT ERRED IN DENYING ECHOLS' REQUEST TO INSTRUCT THE JURY ON JUSTIFIABLE HOMICIDE AND EXCUSABLE HOMICIDE AS PART OF THE MANSLAUGHTER INSTRUCTION SINCE SUCH INSTRUCTIONS ARE ESSENTIAL TO AN UNDERSTANDING OF MANSLAUGHTER.

Under this point, the Appellant claims that the trial court erred in not giving the requested instructions on justifiable and excusable homicide. The point is without merit. The court did instruct the jury on justifiable and excusable homicide. (R. 2670, 2671). The Appellant's argument is without merit because he is complaining that the court did not give the instructions found at pages 71-76 of the Fla. Std. Jury Instr. (Crim.). (R. 2524). It would have been error to give these instructions. Further, the Appellant failed to preserve this issue for review because he did not renew his request for these instructions before the jury retired. Fla. R. Crim. P. 3.390(d). And, even if the requested instructions had been appropriate, the failure to give them was harmless error at best.

Instructions on justifiable and excusable homicide are important because they form a part of the law of manslaughter and the instructions are incomplete without them. There is no error, however, when as here, the court gives the standard instructions. In Phippen v. State, 389 So.2d 991 (Fla. 1980), this court found no error in instructions to the jury where the judges ". . . gave

the jury standard instructions which accurately and comprehensively reflected the law of manslaughter." 389 So.2d at 994. Phippen controls here.

The instructions requested treat the justifiable use of non-deadly force, the justifiable use of deadly force and detail the conditions for an excusable homicide. None of these matters were in issue at the trial. The giving of the instructions would have served no purpose than to confuse the jury. This court's note on the use of these instructions requires only that they be given when the evidence requires them. Fla. Std. Jury Instr. (Crim.) at 71.

The Appellant did not renew this alleged error for review in this court. Fla. R. Crim. P. 3.390(d) provides:

> (d) No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the presence of the jury.

After the close of the court's instructions to the jury, the court invited counsel to the bench. (R. 2699). While at the bench, all Appellant's counsel said was:

> For the purposes of the record, we renew all our objections and also all our motions for judgment of acquittal on the same grounds, all previous motions.
>
> (R. 2699).

Thus, this case is similar to Jones v. State, 411 So.2d 165 (Fla. 1982). Jones had complained on appeal that the courts instructions to the jury were confusing. But, he had not called this to the attention of the trial court. This court refused to consider Jones' claim because it was barred by the operation of Fla. R. Crim. P. 3.390(d). There is no meaningful distinction between Jones and this case in this regard.

The case law on which the Appellant rests his argument for reversal here does not address the factual pattern presented in this case. In Hedges v. State, 172 So.2d 824 (Fla. 1965), this court held it error not to reinstruct on justifiable and excusable homicide when jury requested reinstruction on all degrees of homicide. The court also instructed the lower court to include an instruction on no duty to retreat in one's home on the retrial of the matter. This case does not present a question of re-instruction and as pointed out above, the instructions to the jury were a complete and accurate reflection of the law applicable to the facts. In Nelson v. State, 371 So.2d 706 (Fla. 4DCA 1979), the court reversed a second-degree murder conviction where the court had failed to instruct on excusable homicide. It reasoned that the instruction on manslaughter was incomplete without this instruction citing to Robinson v. State, 338 So.2d 1309 (Fla. 4DCA 1976) and Pouk v. State, 359 So.2d 929 (Fla. 2DCA 1978). As shown earlier in this argument, the court did instruct the jury on justifiable and excusable homicide unlike Nelson where there was a complete

failure in this regard. In Jackson v. State, 317 So.2d 454 (Fla. 4DCA 1975), the court held that a failure to reinstruct on justifiable and excusable homicide when the jury had asked for reinstruction on the degrees of homicide constituted reversible error in a second-degree murder prosecution. As demonstrated above, this is not a reinstruction case and there were appropriate instructions on justifiable and excusable homicide for the jury. In Pouk v. State, supra, the court reversed a conviction in a second-degree murder prosecution where the trial court had failed to give a requested instruction on justifiable homicide when it had given an instruction on manslaughter. Pouk is not controlling here because the jury had instructions on justifiable and excusable homicide.

The argument's purported distinction of State v. Abreau, 363 So.2d 887 (Fla. 1978) is without merit. In Abreau, this court clearly asserted that any failure of a trial court to instruct on a lesser offense more than one step removed from the charged crime is harmless error clearly overruling Lomax v. State, 345 So.2d 719 (Fla. 1977) to the extent that it is inconsistent. It is irrelevant whether manslaughter is a true lesser included offense. It is more than one step removed from the crime charged and there was an instruction on the lesser included offense that was one step removed and the jury did not decide to pardon the Appellant to that extent. So, even assuming that Appellant's argument had some merit and there was error, the error would be harmless.

ISSUE IX

THE TRIAL COURT ERRED IN RETAINING JURISDICTION OVER THE SENTENCE IMPOSED ON THE BURGLARY CONVICTION SINCE WHERE CONCURRENT SENTENCES ARE IMPOSED, THE TRIAL COURT MAY ONLY RETAIN JURISDICTION OVER THE SENTENCE IMPOSED FOR THE HIGHEST FELONY.

The Appellant's argument under this point contends that the trial court erred in retaining jurisdiction over the first third of the Appellant's sixty-year sentence for burglary. This point must fail. The issue is not properly before this court. The Appellant failed to present this claim to the circuit court. Appropriate construction of the statute requires court to approve the retention of jurisdiction over the highest specified offense for which a term of years is the appropriate sanction. The construction of Fla. Stat. § 947.16(3)(1983) urged in the Appellant's argument under this point is erroneous because it seeks to frustrate legislative intent.

The Appellant did not call this alleged sentencing error to the attention of the court below. He made no contemporaneous objection. (R. 2989). Nor does the record reveal that the Appellant filed any motion calling the circuit court's attention to this alleged error. He failed to preserve the alleged error for review of this court. Alexander v. State, 425 So.2d 1197 (Fla. 2DCA 1983); Cf. Williams v. State, 414 So.2d 509 (Fla. 1982).

This court should construe the statute so that it permits the circuit court to retain jurisdiction over the highest specified offense for which a term of years is the appropriate sanction. It is clear that the legislature sought to give circuit court judges the power to keep certain violent offenders off the streets of the state without regard for the workings of the parole system. Given the passion with which and the time over which capital cases are litigated, it would not be surprising to find an occasional case where subsequent events would conspire to reverse a capital conviction of a factually guilty individual for which successful reprosecution would be impossible. By adopting the construction urged here, the court would be carrying out the intent of the legislature in allowing retention jurisdiction over such an individual's sentence. This court must give effect to legislative intent even if to do so means to contradict the strict letter of the statute. See e.g. State v. Webb, 398 So.2d 820 (Fla. 1981).

The Appellant's argument relies on the decision in Cordero-Pena v. State, 421 So.2d 661 (Fla. 3DCA 1982) for the proposition that the statute is inoperative when there is a twenty-five year mandatory minimum sentence involved. He argues by analogy that the statute should be inoperative when the death penalty has been invoked. The decision is wrong because it fails to give effect to the legislative intent behind the statute.

ISSUE X

THE TRIAL COURT ERRED IN SENTENCING ECHOLS TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Under this point, the Appellant makes four sub-arguments. The first argument contends that the trial court improperly doubled the murder for pecuniary gain aggravating factor with the cold, calculated and cruel factor. The trial court had evidence before it that justified these findings. Even if this court finds an improper doubling, the error would be harmless as there were other valid aggravating factors and no mitigating factors. The case law on which the Appellant relies does not address the factual patter of this case. The second argument contends that the trial court used an impermissable aggravating factor. The record shows nothing of the kind. The Appellant raised his character in mitigation. Looking to all the evidence that reflected on the Appellant's character, the court found that it was bad. It simply did not use this as an aggravating character. The final two arguments try to fault the trial court for not finding mitigating factors that the Appellant thought it should find. There was no error here because the court considered all the evidence it had before it. That is the only requirement. A court need not find a mitigating factor just because someone thinks that there was evidence

that would justify such a finding. The circuit court did not commit any error in its findings of aggravating and mitigating circumstances.

A.

It is only when two aggravating factors are based on the same essential feature of the crime or the offender's character that they cannot both be considered as aggravating factors. Agan v. State, 445 So.2d 326, 328 (Fla. 1983); Waterhouse v. State, 429 So.2d 301 (Fla. 1983). One aspect of a crime may reflect more than one "essential feature" of the crime. For example, in Squires v. State, Case No. 61, 931 (Fla., opinion filed March 15,1984) (9 FLW 98), this court found no improper doubling where manner of crime established both heinous, atrocious and cruel and cold, calculated and premeditated aggravating factors. Likewise, in Agan, supra this court rejected the argument that findings in support of a death sentence predicted on the Appellant's having been under a sentence of imprisonment and had previously been convicted of a crime involving violence amounted to impermissable doubling as the sentence of imprisonment Agan was under was for murder and robbery, the crimes involving violence. The court said that these factors were not based on the same essential feature of the crime or the offender's character. Thus, there was no error in the trial court's finding of both the murder for pecuniary gain aggravating factor with the cold, calculated and cruel factor. While evidence of killing for pecuniary gain might suggest cold, calculated and

premeditated, the best evidence in this case of the cold, calculated and premeditated aspect of the crime appear in the cancelled trips when circumstances were not right for the assassination and the obvious glee and satisfaction with which the Appellant recounted his planning and execution of the crime.

Even if there was improper stacking, the error is harmless. The trial court was aware of the doubling problem. (R. 2959). And, there were other properly found aggravating factors and no mitigating factors. Thus, the case is not analytically distinguishable from this court's decision in Sireci v. State, 399 So.2d 964, 968 (Fla. 1981)(cert. denied 102 S.Ct. 2257,rehearing denied 102 S.Ct. 3500 for the purposes of a harmless error analysis on this claim). See also Clark v. State, 379 So.2d 97 (Fla. 1980). This court should affirm the sentence over this objection.

B.

Under this point, the Appellant contends that the trial court improperly found a non-statutory aggravating circumstance when it pointed out the Appellant's laughter as he recounted his crime for Adams. The point is totally without merit. The trial court pointed to this evidence in its analysis of the mitigating factors in the case. As such, the case does not differ from Agan v. State, 445 So.2d 326 (Fla. 1983). There the court found mention of lack of remorse in the trial court's analysis of the mitigating factors argued to be present in the case not to be an improper non-statutory aggravating factor. This case is no different. This court should affirm the sentence over this objection.

C.

Under this point, the Appellant claims that the trial court failed to find that his age was a mitigating factor. The Appellant did not claim this in the trial court. Even if he had, it would be without merit. The trial court did consider his age when it found that he was no green twig bent in the direction of crime once, but rather a mature man. The reliance that the Appellant places on Agan v. State, supra is misplaced. Agan contemplates the infirmities age as a mitigating circumstance. 445 So.2d at 328. Agan found 54 not to be a mitigating factor.

D.

The Appellant's argument under this sub-point seeks to characterize various individual pieces of testimony tending to show the Appellant as a responsible citizen doing his best for his family, church and community as separate aspects of his character each deserving of individual consideration. He contends that the trial court failed to find mitigating circumstances that the evidence might arguably support. The contentions are without merit. In Porter v. State, 429 So.2d 293 (Fla. 1983), this court had occasion to address a very similar argument. This court's analysis is just as appropriate here. In addressing the contention, this court said:

> There is no requirement that a court must find anything in mitigation. The only requirement is that the consideration of mitigating circumstances must not be limited to those

> listed in section 921.141(6), Florida Statutes (1981). What Porter really complains about here is the weight the trial court accorded the evidence Porter presented in mitigation. However, "mere disagreement with the force to be given (mitigating evidence) is an insufficient basis for challenging a sentence." Quince v. State, 414 So.2d 185, 187 (Fla. 1982).
>
> 429 So.2d at 296.

This court recently affirmed this principle in its decisions in Lusk v. State, 446 So.2d 1038 (Fla. 1984); White v. State, 446 So.2d 103 (Fla. 1984); Daugherty v. State, 419 So.2d 1067 (Fla. 1982) cert. denied 103 S.Ct. 1236 (1983); Riley v. State, 413 So.2d 1173 (Fla.) cert. denied, 103 S.Ct. 317 (1982). The Appellant's arguments grouped under this sub-point are without merit.

ISSUE XI

THE TRIAL COURT ERRED IN SENTENCING ECHOLS TO DEATH AFTER A JURY RECOMMENDATION OF LIFE IMPRISONMENT SINCE ANY FACTS SUGGESTING DEATH ARE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

Under this point, the Appellant contends that the trial court erred in overriding the jury's recommendation of life because its override did not meet the standard of Tedder v. State, 322 So.2d 908 (Fla. 1975). The argument is without merit. An analysis of this court's override decisions shows that there are four circumstances when this court approves overrides. And three of these conditions are present in this case. This court approves jury overrides when the defense has made an improper emotional appeal to the jury so that the jury's recommendation appears based on emotion not reason. See Porter v. State, 429 So.2d 293 (Fla. 1983)(overriding jury recommendation of life predicate on "extremely vivid and lurid" account of electrocution). This court also approves overrides when the trial court had access to information which the jury did not. White v. State, 403 So.2d 331 (Fla. 1981)(override proper on the basis judge had access to information about the defendant not presented to the jury). It also approves overrides when the trial court has found at least one proper aggravating factor and no mitigating factors. Heiney v. State, Case No. 56, 778 (Fla., opinion filed February 2, 1984)

(override proper where no mitigating circumstances found and totality of circumstances suggest death, jury's recommendation of life not based on any valid mitigating factor discernible from the record); Johnson v. State, 393 So.2d 1069 (Fla. 1980)(override proper with four valid aggravating factors and no mitigating circumstances). And finally, this court approves overrides when necessary to avoid disparate sentences between similarly situated defendants. Barclay v. State, 393 So.2d 1266 (Fla. 1977) cert. denied 439 U.S. 892, 99 S.Ct. 239, 62 L.Ed.2d 176 (1979).

The first three of these factors are present in this case. Taking them in reverse order, first it is clear that there were valid aggravating factors and the court found no mitigating factors. The trial court had access to information the jury did not. The lower court made specific mention of the Appellant's talk about bombs on the first tape. (R. 302). And finally, the defense made an improper emotional appeal to the jury.

In this case, the Appellant's trial counsel made a successful emotional appeal to the jury to induce it to return a life recommendation. During the penalty phase of the trial, counsel for the Appellant called four witnesses in an attempt to establish the existence of mitigating circumstances; Mamie Anderson, the Appellant's sister; Maeva Echols, one of his children; J.T. Harris, a business associate and editor emeritus of local paper who knew the Appellant and Clemmon J. Allen, a policeman and political associate of the Appellant. (R. 2826-2287.)

Inter alia, Appellant's counsel established that Mrs. Anderson loved her brother despite his conviction for the crime charged in this case. (R. 2839). Likewise, he established that the Appellant's daughter still loved him despite his conviction. (R. 2850).

When the time for the Appellant to present his closing argument to the jurors regarding the penalty to be imposed, counsel opened by trying to curry favor with the jurors by thanking them for thei participation in the trial. (R. 2906). This was an attempt to bias the jurors in favor of the defense.

Later in the argument, counsel sought to re-direct the emotions aroused by the nature of the crime away from his client, the Appellant and toward one who was not on trial, Melvin "Mad Dog" Nelson. Counsel told the jurors that Nelson was "morally bankrupt" and that he had "no humanity and deserve(d) no humanity." (R.2912).

Counsel then sought to build on the rapport he had developed over the course of the trial by expressing his personal belief about the Appellant's moral culpability. He said, "I believe from as deep inside of myself as I can possibly go that Robert Echols is not in that same moral plane as those two people (the co-conspirators in the murder)." (R. 2912).

Later, counsel returned to his theme that killing the Appellant would hurt others by referring to the love that his sister had for him. (R. 2924).

Counsel finally closed his argument by trying to intimidate the jury with the power that they exercised. He said, "The legislature of our state has empowered you with the power of God."

(R. 2931). When counsel for the state objected to this line of argument, the court refused to sustain the objection. (R. 2931). After Appellant's counsel took this as an invitation to run with his improper argument and expanded on how the legislature had given jurors the "power to terminate life", counsel for the state objected again and this time the court sustained the objection, telling the jury that sentencing was the court's job. (R. 2932).

Since appeals to emotion are not a rational basis for discriminating between those who should die for their crimes and those who should merely be imprisoned for a minimum of twenty-five calendar years, this court has had no trouble in affirming circuit court decisions to override life recommendations and impose a death sentence. This court should affirm the override in this case.

ISSUE XII

A TRIAL JUDGE'S OVERRIDE OF A JURY'S LIFE RECOMMENDATION IS UNCONSTITUTIONAL SINCE IT PUTS A DEFENDANT IN DOUBLE JEOPARDY, VIOLATES THE DUE PROCESS CLAUSE AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The courts that have considered this issue have consistently held that as simple override does not subject a defendant to double jeopardy. Lusk v. State, Case No. 59,146 (Fla. opinion filed January 26, 1984); Spaziano v. State, 433 So.2d 508 (Fla. 1983) cert. granted __U.S.__, 104 S.Ct. 697 (1984); Porter v. State, __So.2d __ (Fla. 1983)(Porter II) Cannady v. State, 427 So.2d 723 (Fla. 1983); Dobbert v. State, 409 So.2d 1053 (Fla. 1982)(distinguishing Bullington v. Missouri, 451 U.S. 430 (1981); Johnson v. State, 393 So.2d 1069 (Fla. 1980); Phippen v. State, 389 So.2d 991 (Fla. 1980); Douglas v. State, 373 So.2d 895 (Fla. 1979). It is worthy of note that the court did not extend it grant of certiorari to the straight override situation presented by the facts of this case. 1/

1/ Questions presented:(1) Does death sentence imposed on petitioner violate Eighth and Fourteenth Amendment principles of Beck v. Alabama, 447 U.S. 625, 27 Cr.L. 3195(1980), where jury in this capital prosecution was not instructed as to any lesser included offenses because statute of limitations had run as to those lesser included offenses? (2) Alternatively, did Florida Supreme

Court, in affirming death sentences, adopt such broad and vague application of standards governing decision to override jury's life verdict as to violate Fifth, Sixth, Eighth, and Fourteenth Amendments? (#) Does trial judge's override of jury's factually based decision against imposition of death penalty violate, in all cases, Fifth, Sixth, and Fourteenth Amendments?

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ISSUE XIII

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS SINCE IT IS IMPOSED PURSUANT TO A PATTERN AND PRACTICE OF DISCRIMINATION, WITH A RESULTING DISPROPORTIONATE IMPACT ON BLACKS, TAKING INTO ACCOUNT THE RACE OF THE DEFENDANT, THE RACE OF THE VICTIM, AND THE LOCALITY OF THE CRIME.

Under this point on appeal, the argument contends the state's death penalty is administered in such a way that it evidences ". . . a pattern and practice of discrimination, with a resulting disproportionate impact on blacks, taking into account the race of the defendant, the race of the victim, and the locality of the crime." (Brief of Appellant at 52). This argument is predicated on the Appellant's motion to dismiss number three. (R. 79). There was a hearing on this motion on June 30, 1983. (R. 111). The transcript of this hearing is not a part of this record. When counsel made up his Directions to the Court Reporter, he did not call for the transcription of this hearing for inclusion in the Record on Appeal. Apparently, there was no proof of this claim offered to the trial court. Cf. Murch v. Mottram, 409 U.S. 41, 93 S.Ct. 71, 34 L.Ed.2d 194 (1972). The alleged error has not been preserved for review. Fla. R. Crim. P. 3.190(c); Williams v. State, 414 So.2d 509 (Fla. 1982); Steinhorst v. State, 412 So.2d 382 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978); Mariani v. Schleman, 94 So.2d 829 (1957); Moore v. State, 418

So.2d 435 (Fla. 3DCA 1982).

Even assuming that it had been preserved and there had been evidence before the lower court, it is unlikely that the Appellant could have made a prima facia case. Apparently, Justices and Brennan were willing to take the studies that they allude to in their dissent in Pully v. Harris, ___U.S.___, 34 Crim. L. Rpt'r (BNA) 3027 at face value. They should not have done so and neither should this court. There is simply no proof that victim race is a controlling variable in the decision as to whether a given first-degree murderer should die. McCleskey v. Zant, Case No. C81-2434A (U.S.D.C.N.D. Ga., opinion filed February 1, 1984). This decision reports the results of an evidentiary hearing held to determine whether Professor Baldus' conclusions in his studies that the race of the victim was a significant predictor in who would be condemned to death made out a prima facia case that McCleskey had been discriminated against. The decision is lengthy. But, it offers a detailed and cogent analysis of the evidence that there were significant flaws in the data base with which he worked. There were significant problems with the way in which the data had been coded for analysis. The models used had not been validated. The significance of race of victim declined as additional variables were controlled. In summary, Judge Forrester said that the three most important reasons he could not accept Baldus work were that the data base was substantially flawed, that even the largest models were not sufficiently predictive and that the analyses did not compare like cases.

Thus it is clearly demonstrated that not only did the Appellant deliberately bypass the opportunity to make this claim when it would have done the most good, but that it is highly unlikely he would have been able to make even a prima facia case. The court should set out the deliberate bypass and refuse to reach the issue.

CONCLUSION

Based on the above stated facts, arguments and authorities, the Appellee would pray that this Honorable Court affirm the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Regular Mail to W. C. McClain, Assistant Public Defender, 455 North Broadway Avenue, Bartow, Florida 33830-3798 on this 15th day of May, 1984.

Of Counsel for the Appellee