IN THE SUPREME COURT OF FLORIDA

MELVIN NELSON, JR.

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 65,279

BRIEF OF APPELLEE

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STATEMENT OF CASE

Appellee accepts the appellant's Statement of the Case.

STATEMENT OF FACTS

Faye Baskovich testified that she returned home at about 7:00 p.m. on April 20, 1982. (R711-712) A short time later Wally Baskovich, Faye Baskovich's husband, arrived home from his restaurant. (R712) Upon Wally's arrival, the Baskovichs went into their living room. (R712) After being in the living room a short time, the Baskovichs were confronted with two black men carrying a gun and a club. (R712-713) Wally and Faye were then separated and Faye was placed in the powder room. (R713-714) While in the powder room, Faye Baskovich heard her husband informing the men that he had high boood pressure and an artifical limb. (R715) Faye Baskovich described her husband as being cooperative, as manifested by his informing the two black men of a thousand dollars in the bedroom. (R715) Faye Baskovich testified that she thought one man went to the bedroom and returned after not finding anything to ask if Wally had a gun in the bedroom. (R715) Thereafter, Faye heard two low soft shots. (R716) Faye was then removed from the restroom and taken to the bedroom. (R716-718) On her way to the bedroom, Faye saw her husband lying face down on the floor. (R718) Upon arriving in the bedroom, the men demanded to know where the money was

and Faye responded by removing an envelope from the bottom drawer which she believed contained money and giving it to them. (R-719) The men then took Mrs. Baskovich's jewelry which had come from her dresser drawer and placed it inside a blue tote bag. (R-719) Faye Baskovich then got down on the floor at the direction of the men and was struck on the head with what she believed to be the club they were carrying. (R-721) After being struck on the head, Faye pretended to be unconscious. (R-721) During this time, one of the men said to her "you are a lucky lady". After the men left, Faye called the operator from a phone in the bedroom. (R-721) Faye also testified that the intruders were wearing surgical gloves and that they had taken a bag and several jewelry boxes with them. (R-722)

When the police arrived at the Baskovich residence, the front door was locked and the house was equipped with a burglar alarm. (R-726,727)

Faye Baskovich testified that Mr. and Mrs. Dragovich had lived with the Baskovichs for a long enough period of time to have free access to come and go and to have keys to the house. (R727-728) Faye Baskovich didn't know whether Mr. Dragovich still had any keys to the house at the time of the murder but wasn't sure since Mrs. Dragovich and her daughter

possibly had one set of keys. Connie Dragovich, Alex Dragovich's daughter, had been living at both the Dragovichs and the Baskovichs residences. (R-746)

John Nicholson, a paramedic for the City of Clearwater Fire Department, was dispatched to the Baskovich residence at 7:55 and arrived at 8:00 p.m. (R-750) Upon arrival, Wally Baskovich was alive but unconscious as a result of two gun shot wounds to the Head. (R-751)

Dr. Jerry Chase was the emergency room physician that treated Wally Baskovich on his arrival at Clearwater Community Hospital. (R-755) Dr. Chase pronounced Wally Baskovich dead at 8:42 p.m. on April 20, 1982, as a result of gun shot wounds to the head. (R-757)

Irene Brobst, a neighbor of the Baskovichs, observed two black men arguing loudly in the vicinity of the Baskovich residence at approximately 7:30 p.m. on April 20, 1982. (R-759) This argument concerned Mrs. Brobst because the area is a retirement neighborhood and it was unusual to have a car parked in that location. (R-759) Mrs. Brobst identified the car as being a maroon two door American built vehicle (R-760) and identified State's exhibit no. 17 as being very similar to the car which she saw. (R-766)

Carol Pope testified that she had gone by the Baskovichs house on the way to get ice cream and had known that something

had happened in the neighborhood. (R782-783) On the way back, Mrs. Pope heard the police were looking for a blue bag. (R-783) Mrs. Pope had previously noticed a bag in the roadway at about 8:00 p.m. and again at approximately 8:45 p.m. (R-782) Thereafter, Mrs. Pope called the police and reported the bag she saw in the road. (R-782) Joy Foley also saw this bag in the road at approximately 8:30 that night. (R-788)

Officer Thomas Pudelski of the Clearwater Police Department found a jewelry box at the corner of Jefford Avenue and Woodcrest at approximately 1:30 a.m. the morning after the killing. (R793-797) This location is one block south and two blocks from the Baskovich's house. (R-797) At approximately 11:00 p.m. on April 20, 1982, Thomas Pettinato found an empty .38 caliber Smith and Wesson revolver ten feet off the road from a church on Hercules Road in Clearwater. (R804-5) The following morning, Mr. Pettinato heard about the murder of Wally Baskovich and contacted the police. (R-806)

At approximately 8:00 a.m. on the morning of April 21, 1982, Lieutenant Jeffrey St. Onge of the Lackport New York Police Department was jogging along the Courtney Campbell Causeway, running toward Tampa, when he discovered a wallet laying on the grassy area alongside a path. (R-814) St. Onge reviewed the contents of the wallet and discovered that it

belonged to a Mr. Baskovich and then truned it over to the Clearwater Police Department. (R-816)

Michael Baskovich, the son of Wally Baskovich, saw his father at the New Orleans restaurant at approximately 5:00 p.m. on April 20, 1982. (R-866) The New Orleans Restaurant is located approximately three to four blocks from the Baskovich residence. (R-866) Wally Baskovich left the New Orleans Restaurant between 7:00 and 7:30. (R-866) Michael Baskovich testified that his father kept cash in the house and that it was usually kept in an envelope in a dresser drawer. (R-867) Michael also stated that the Dragovich's had lived in the Baskovich residence from 1978 to the fall of 1981. (R-868) In the fall of 1981, the Dragovich's were forced to leave the Baskovich residence due to hostility between Wally Baskovich and Alex Dragovich. (R-868)

Edward Tooze, Wally Baskovich's accountant, testified that Wally Baskovich had expressed concern over Alex Dragovich's ability to control any assets that Wally Baskovich would leave to his wife in his will. (R-882) Tooze also stated that Alex Dragovich asked him to use his influence on the Baskovich sons to have Dragovich brought in to manage the Baskovich's businesses. (R-883)

Demetra Williams, the daughter of Wally Baskovich, testified that her father and Alex Dragovich had been co-owners

of a restaurant in Gary, Indiana many years earlier, and later on, in another restaurant called the Hungry Shopper in Clearwater. (R891-2) When the Dragovich's first moved to Florida they moved in with the Baskovichs. (R-892) The Dragovichs remained at the Baskovich house until August of 1981 and during this time Alex Dragovich had a key to the house and access to the two or three keys to the burglar alarm. (R-893) When the Dragovichs moved out of the Baskovich home, Wally and Alex were not on good terms and Wally declared that he would never go into business again with Alex. (R892-893)

Frank Harris, the owner of Harris Liquor Store in Gary, Indiana identified the suspected murder weapon as the gun that had been taken from his business when it had been burglarized in January of 1977. (R-916)

Larry Radin, a security agent with General Telephone Company, provided the records of long distance toll calls from Pinellas County. (R-920) In 1981 and 1982, the records revealed that the number 585-9700 was registered to Gari A. Dragovich in Largo, Florida. (R-920) During October of 1981, eight calls from this number were made to the number 219-883-2043 in Gary, Indiana. (R-923) Between February and August of 1982, 19 calls were made from that number to the 219-983-5449 listing in

Gary, Indiana. (R923-924) On September 20, 1982 another listing for Gari Dragovich was installed. (R-924) Three calls from that listing were made to the 211-983-5449 number in Indiana. (R-925)

Captain Barry Glover of the Clearwater Police Department began investigating airline and car rental records from the Tampa airport because it appeared to him that whoever was involved with the murder had left town by way of the causeway because Wally Baskovich's wallet had been found on the causeway. (R-933) Captain Glover's attention was particularly drawn to a car rental contract which was executed at approximately 2:00 p.m. on June 20, 1982 and in which the car was returned around 8:23 p.m. that night. (R934,938) Captain Glover discovered that there had been approximately 27 phone calls made to the person indicated on the contract from Alex Dragovich's home. (R-938) The name indicated on the rental contract was Robert Echols. (R938-939)

Erin Wilson, a rental agent with National Car Rental, rented a Cutlass to Robert Echols at 2:14 p.m. on April 20, 1982. (R950-953) The car was returned at 8:23 p.m. and had been driven 58 miles. (R-957)

James Jackson, a security representative for Indiana Bell telephone company provided the phone toll records for

Robert Echols. (R966-7) Robert Echols had a telephone number of 883-2043 which was disconnected on February 19, 1982. (R-969) Subsequently the number was changed to 219-983-5449. The toll records revealed that there were calls from the phones listed in Echols name to number 813-585-9700 in Clearwater, Florida at 7:42 a.m. on April 21, 1982.(R-970)

Detective Richard McManus of the Clearwater Police Department was assigned to the homicide of Wally Baskovich on April 20, 1982,and was in charge of the crime scene at that time. (R1056) Detective McManus observed no sign of forced entry to the Baskovich residence. (R-1057) McManus located a pink jewelry box at 1707 Jeffords at 2:30 a.m. on the morning of April 21, 1982. (R-1059) McManus was also present for the arrest of Robert Echols at 807 Dekalb Street in Gary, Indiana on October 25, 1982. (R-1061) At the Echols residence, McManus obtained an address book in which the name of Alex Dragovich appeared with a corresponding phone number of 446-8710. (R-1063) During McManus investigation he discovered that phone tolls from the Echols number were to the Dragovich number. (R-1063) Furthermore, the rental contract of a car in Clearwater was made by a person by the name of Robert Echols who used military identification on that rental contract. (R-1063) McManus found a corresponding military identification in Echols wallet when Echols was arrested in Gary, Indiana. (R1063-64) A check stub with Alex Dragovich's name on it

for the amount of $1,700.00 was also found in Robert Echols wallet. (R-1064) During McManus investigation of the phone tolls from the Dragovich residence he discovered that there was a toll call made on April 17, 1982 to the Bay Harbour Inn on the Courtney Campbell Causeway. (R-1066) McManus then proceeded to drive from the Tampa Airport to the Baskovich residence and then from the Baskovich residence back to the Bay Harbour Inn and then to the Baskovich residence and then to the rental company location at Tampa Airport. (R-1067) The mileage of the above trip amounted to a little over 57 miles and corresponded to the 58 miles on the rental car. (R-1067)

James Spiller of the Indiana police was present on October 25, 1982 when Robert Echols was arrested in Gary, Indiana at his residence on Dekalb Street. (R1070-1071) Officer Spiller obtained a car rental agreement from the Ugly Duckling Rent-a-Car service in Clearwater, Florida, a bumper sticker from that rental agency, and a newspaper article from the Post Tribune in Gary, Indiana about a police investigation about the murder of Wally Baskovich in Clearwater, Florida from a briefcase that was found in Echols bedroom. (R1073-74)

Robert Echols was called by the State but refused to answer any questions. (R-1082)

Detective William Ward of the Clearwater police department was assigned to locate the car that was rented to Robert Echols. (R-1089) Detective Ward located a car at the rental agency's storage lot a half mile from Tampa Airport

with the corresponding tag number. This car was described as a maroon 1981 Cutlass Olds. (R-1090)

Ronald Dick, a document analyst with the Florida Department of Law Enforcement, provided expert testimony in the area of document examination. (R-1102) Dick examined both the car rental contract with a signature of Robert Echols and the fingerprint card which was signed by Robert Echols and opined that the same person executed these signatures. (R1103-4)

Leonard Adams, the former son-in-law of Robert Echols, testified that Robert Echols had previously been employed by Alex Dragovich at Jackson's Restaurant in Gary, Indiana. (R-973) Adams had known Melvin Nelson for several years and stated that Nelson went by the name of Maddog. (R-976) Adams stated that when Robert Echols discussed Melvin Nelson that he referred to him as Maddog Melvin Nelson. (R-978) At the request of the Indiana State Police, Mr. Adams went to Robert Echols house in September and asked him if he had been involved with a murder in Florida. (R1230-1231) Robert Echols then told Adams that he had been involved in the murder in Florida and went to retrieve a news clipping about that murder. (R-1231) While Echols was obtaining the newsclipping, Adams went to his car and obtained a mini-tape recorder. (R-1231) Adams placed the tape recorder under his raincoat. (R-1232) Adams then returned to the house and taped his conversation with Echols.

(R-1234) During this initial conversation between Echols and Adams, Echols said that Dragovich wanted his brother-in-law killed because he was in the way. (R1235,2004,2015) Echols stated that Dragovich had given him the key to the Baskovich's house and that Echols and a friend of his had used this key to enter the house and commit the murder and robbery. (R-1236) Echols stated that he flew to Florida and rented a car in his own name to get to the Baskovich house. (R1236,2014) Echols had made two prior trips up to Florida for the purpose of killing Wally Baskovich. (R-1238) The first time Echols was precluded by a party given by Mrs. Baskovich and the second time Echols partner had gotten drunk. (R-1238,2011,2013) When Wally Baskovich was killed, Mrs. Baskovich was intentionally left alive so that Alex Dragovich could use her to gain control of Wally Baskovich's estate. (R1238-9)

In late September or early October, Leonard Adams met Robert Echols at the corner of Fifth Avenue and Massachusetts Street in Gary, Indiana. (R1241-2) During this conversation Echols informed Adams that his friend Sham had died. (R1242) Adams responded by telling Echols that he no longer had to worry about paying Sham for his participation in the Baskovich murder. (R-1242) Echols responded by saying that Sham wasn't the guy that committed the murder and that the person who had actually committed the murder had not been paid and it had

become a problem. (R1242-3) Echols and Adams then discussed Adams going to the person who had committed the murder and informing him that he would get paid as soon as the estate in Florida was settled. (R-1243) The person that Adams was told had committed the murder and whom he was to talk to was Maddog. (R-1243)

In addition to the conversation between Echols and Adams that was taped in Echols house and the meeting on Massachusetts Street, Adams made a second tape of a conversation with Echols by having a tape recorder placed in his car and using it to record another conversation that Adams had with Echols. (R1451-2) At this time Adams told Echols that the appellant told Carmouche that Echols owes the appellant $10,000.00. (R-2022) Echols then stated that things didn't go the way they were supposed to and that it was going to take time for Nelson to get his money. (R-1983,2022) Adams responded by saying that Maddog wasn't going to be satisfied with that and asked whether Dragovich would fund enough money to pay Nelson off. (R1983,2022) Adams then volunteered to go to Florida to pick up the money and bring it back. (R1984,2022) Echols said that he would contact Dragovich to find out, but that it would take three or four days to contact him because of the method they used to contact each other. (R1984,2023) Echols then stated that Nelson was the trigger man (R1985) and that Nelson didn't know Dragovich. (R1988).

SUMMARY OF ARGUMENT

The admission of tape #1 was proper as declaration against interest and since it was made under circumstances that substantiate its trustworthiness and the declarant is unavailable, the admission of tape does not violate the confrontation clause.

A statute should be interpreted so as to fulfill the legislature's intent. §90.804(2)(c) was meant to codify the Bruton decision. Since Bruton was solely a confrontation clause decision and the admission of tape #1 does not violate the confrontation clause, §90.804(2)(c) should not be interpreted so as to exclude evidence which does not violate the confrontation clause. Alternatively, §90.804(2)(c) does not preclude admission of tape #1 since tape #1 does not implicate the appellant.

Tape #2 is admissible as a declaration of a co-conspirator made in the furtherance of the conspiracy. Admission of declarations of conspirators, even though the declarant is not subject to face-to-face confrontation and cross-examination, against a criminal defendant does not offend confrontational clause rights. Alternatively, tape #2 was admissible to rebute defense allegations of fabrication and bias.

The prosecutor's comments were proper when viewed as a rebuttal to the defense counsel's arguments and the implications of the defense's cross-examination. The prosecutor's comment was not a comment on the appellant's failure to present evidence or a declaration to the jury that the appellant would kill again if acquitted of the crimes charged.

The trial court's imposition of the death penalty was proper in light of three statutory aggravating factors and no mitigating factors. The trial court did not consider any non-statutory aggravating factors as a basis for imposing the death penalty. The appellant's contention that the jury found that the appellant was not the triggerman is without record support and contrary to the overwhelming weight of the evidence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY ADMITTING TAPE #1 INTO EVIDENCE?

The appellant argues that the trial court's ruling admitting tape #1 into evidence was error because 1) it violated the appellant's confrontational rights as enunciated in Bruton v. United States, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968); and 2) it was contrary to §90.804(2)(c), Fla. Stat. (1983). Appellee submits that there was no violation of the confrontation clause of the Sixth Amendment and that tape #1 was admissible as a declaration against penal interest. Appellee will discuss it's positions categorically below:

A.

SIXTH AMENDMENT RIGHT TO CONFRONTATION

Appellant relies substantially on Bruton v. United States, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968) and this court's application of the Bruton doctrine in Hall v. State, 381 So.2d 683 (1980), for the position that the admission of Robert Echol's statement in tape #1 deprived the appellant of his confrontational rights because the appellant could not cross examine Robert Echols due to Echol's invocation

of his Fifth Amendment rights. However, since both Bruton and Hall, the United States Supreme Court reviewed "the relationship between the Confrontation Clause and the hearsay rule with it's many exceptions" in Ohio v. Roberts, 448 U.S. 56,65 L.Ed. 2d 597, 100 S.Ct. 2531 (1980). In Roberts, the court recognized that a literal application of the Confrontation Clause would require "the exclusion of any statement made by a declarant not present at trial", but rejected that application in light of the historical exceptions to the hearsay rule and the legitimate public policy interests of the jurisdictions in effective law enforcement. Roberts, 448 U.S. at 62-64, 65 L.Ed. 2d at 605-07. The United States Supreme Court went on to note that the Confrontation Clause "reflects a preference for face-to-face confrontation at trial", and that one of the "primary interest(s)" secure by the Confrontation Clause is the right to cross-examination. However, the failure to provide face-to-face confrontation at trial and cross-examination does not violate the Confrontation Clause if there are weightier public policy considerations. The court went on to provide the following as a two prong approach for reviewing exceptions to the hearsay rule for Confrontation Clause infirmities:

> The Confrontation Clause operates in two separate ways to restrict the range of

> admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant.
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule."
>
> Roberts, 448 U.S. at 65

Sub judice, Robert Echols was called to testify by the state. Echols refused to testify on the advise of his attorney and exercised his 5th Amendment rights. (R 1082). Accordingly, Robert Echols was unavailable to testify. Brinson v. State, 382 So.2d 322 (Fla. 2d DCA 1979). Therefore, the confrontation issue narrows to whether the hearsay statements admitted in tape #1 are "marked with such trustworthiness that there is no material departure from the reason of the general rule" and that face-to-face confrontation and cross examination are unnecessary to provide the "substance of the constitutional protection" provided by the Confrontation Clause of the Sixth Amendment. Roberts, 448 U.S. at 65-66. In Roberts,

the court states that reliability within meaning of the confrontation clause "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception". Sub judice, the hearsay exception is the declaration against interest[1] pursuant to §90.804 (2)(c), Fla. Stat. (1983). This declaration against interest exception to hearsay rule has been held to reliable and non-offensive of the Confrontation Clause where the declarant is not attempting to serve his own interests by implicating someone else. United States v. Katsougrakis, 715 F.2d 769 (2nd Cir. 1983); Maugeri v. State, 460 So.2d 975 (Fla. 3rd DCA 1984) Appellee concedes that if this were a case where the surrounding facts revealed the possibility that Robert Echols made the statements so as to benefit himself by opening the door to a lesser sentence or the granting of immunity for his cooperation with the state there would be shadow cast on the reliability of the declaration against interest admitted in tape #1. However, in the case sub judice, Robert Echols made the statements recorded on tape #1 to his son-in-law, Leonard Adams, without any knowledge that his statements were being recorded. This fact situation is substantially different from there the statements are knowingly made to the police or government officials whom a

declarant might believe could assist him in obtaining a lesser sentence or immunity. Furthermore, the evidence provided by tape #1 is entirely consistent with 1) the testimony of Faye Baskovich and Irene Brobst; 2) the discovery of a firearm that is traced to Gary, Indiana, along the route from the Baskovich residence to the Tampa airport; 3) the fingerprint of the appellant on a jewelry box taken from the Baskovich residence which was recovered along the route from the Baskovich residence to the Tampa airport; 4) Robert Echols and the appellant being from Gary, Indiana; 5) the car rental contract executed on the date of the Baskovich murder by Robert Echols in Tampa; 6) the mileage on the rental car; 7) the long distance toll calls between Robert Echols and Alex Dragovich; 8) the discovery of Wally Baskovich's wallet and identification along the causeway across Tampa Bay (which is part of the route between the Baskovich residence and the Tampa Airport); and 9) the time of the above mentioned events in relation to the murder.

In summation, the admission of tape #1 did not violate the Confrontation Clause because these tapes would qualify as a declaration against interest and were made under such circumstance that a reasonable person in the declarant's position would not have made the statement unless he believed them to be true. Roberts, supra; Katsougrakis, supra; and Maugeri, supra.

B.

DECLARATION AGAINST INTEREST[2]

The last sentence of the Florida Evidence Code section that provides an exception to the hearsay rule for statements against interest, §90.804(2)(c), Fla. Stat. (1983), provides that "a statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant on other person implicating both himself and the accused, is not within this exception." The appellant cites State v. William, 554 P.2d 646 (Ariz. 1976); Cook v. State ,353 So.2d 911 (Fla. 2d DCA 1977); and Mims v. State, 367 So.2d 706 (Fla. 1st DCA 1979) and argues that since the unnamed person that Robert Echols mentions as his co-perpetrator is "highly likely" the appellant that the last sentence in §90.804(2)(c) would preclude the admissibility of tape #1 under the declaration against interest exception to the hearsay rule. However, the above cited cases are Bruton type confrontation cases, and as previously discussed, the admission of a declaration against interest does not violate the Confrontation Clause. Roberts, supra; Katsougrakis, supra; and Maugeri, supra. As for the proper interpretation to be given to the last sentence of §90.804(2)(c), the Third District stated that the intent was "to codify the principles of Bruton v. United States", Maugeri at 980. Since Bruton

was based on the Confrontation Clause the last sentence should be interpreted within the confines of Confrontation Clause. When such an interpretation to the statute is given, the admission of tape #1 is proper since it does offend the Confrontation Clause of the Sixth Amendment for the reason previously discussed. Alternatively, if this court rejects interpreting §90.804(2) within the confines of the Sixth Amendment, appellee submits that the last sentence of 90.804(2)(c) was literally complied with since the appellant is not explicitly mentioned as Robert Echol's accomplice.

ARGUMENT

ISSUE II

THE TRIAL COURT PROPERLY ADMITTED THE STATEMENTS OF ROBERT ECHOLS SUBSEQUENT TO THE FIRST TAPE AS A DECLARATION OF A CO-CONSPIRATOR.

Appellant claims that the admission of both the taped (tape #2) and non taped evidence concerning the discussions between Leonard Adams and Robert Echols subsequent to their conversation which was covered on tape #1 was error because 1) it's admission as a declaration of a co-conspirator was improper because there was insufficient non-hearsay evidence of a conspiracy and 2) the statements were not made in the furtherance of the conspiracy.

Prior to discussing the points raised in the second issue on appeal, appellee submits that evidence complained of would be admissible as a declaration against interest by Robert Echols[3] for the same reasons discussed in Issue I. The sub-issues will be discussed categorically below.[4]

In Morales v. State, 460 So.2d 410 (Fla. 2d DCA 1984), the Second District Court of Appeal enunciated a two-fold

test by which a trial court is to determine whether sufficient independent evidence (exclusive of co-conspirator's declarations) existed to justify the admission of hearsays statement by alleged conspirators against a defendant. The Morales test is as follows: (1) Statements are not admitted until properly authenticated by substantial independent evidence, and (2) the statements do not remain in the proof to be submitted to the jury if the defense makes the proper motion at the conclusion of all evidence and the independent evidence failed to establish a conspiracy by a preponderance of the evidence. At the close of the evidence, the defense motions were as follows:

> THE COURT: Motions, Mr. McDermott.
>
> MR. McDERMOTT: Yes, sir, I move for a judgment of acquittal based on the insufficiency of the evidence, to wit: the fingerprint is insufficient to show Melvin Nelvin's participation in any criminal offense.
>
> Secondly, that the tapes or statements attributed to him as a co-conspirator is inadmissible and should not be considered.
>
> The manifest weight of the evidence, that does not establish guilt beyond a reasonable doubt.
>
> THE COURT: The State takes the opposite position, I see.
>
> MR. SANDEFER: Yes, sir, obviously we have more than a sole fingerprint in the case, which he referred to earlier, and I think that evidence is basically overwhelming as to guilt at this point on all counts.

THE COURT: Response.

MR. McDERMOTT: No.

THE COURT: Denied. Okay. Gentlemen, what is next?

MR. McDERMOTT: It's my turn; isn't it?

MR. CROW: Are you going to put on a case?

MR. McDERMOTT: No.

THE COURT: How do you want to handle it, just say that the defense has rested?

MR. McDERMOTT: The defense rests.

A review of defense counsel's motions reveal that his argument at the close of the evidence was that the co-conspirators statements were inadmissible. The appellant's counsel never stated why they were inadmissible or suggested that there was insufficient independent evidence of a conspiracy and the appellant's participation in it. In Castor v. State, 365 So.2d 701 (Fla. 1978), this Court stated that "an objection must be sufficiently specific to apprise the trial judge of the putative error" to preserve the issue for intelligent review on appeal. Sub judice, defense counsel's objection did not remotely suggest that the state failed to provide sufficient independent evidence to prove a conspiracy by a preponderance of the evidence. Therefore, the issue narrows to whether there was "substantial independent evidence" of the conspiracy and the appellant's participation in it.[5]

In Morales, supra, the Second District quoted United States v. James, 590 F.2d 575 (5th Cir. 1979), for the position that "substantial" evidence as being "at least enough to take the question to the jury." This standard is apparently the same as a prima facie showing and the reviewing standard should be the same as a denial of a Motion for a Judgment of Acquittal. In Lynch v. State, 293 So.2d 44 (Fla. 1974), this court stated that a motion for judgment of acquittal should not be granted unless no view of the evidence when viewed in light most favorable to the state, could sustain a guilty verdict. In Pressley v. State, 395 So.2d 1175 (Fla. 3d DCA 1981), the standard of review from the denial of a judgment of acquittal was whether there was "any evidence legally sufficient" upon which to base a guilty verdict. Viewing the sufficiency of the independent (non conspirator declarations) evidence under the "any evidence" standard of review, there was sufficient independent evidence to admit the declarations of the co-conspirators.

As a sub-issue, the appellant argues that the statements in tape #2 were not made in the furtherance of the conspiracy. Appellee concedes that declarations that occur in attempt to conceal the crime which was the purpose of the conspiracy are not statements within the furtherance of a conspiracy for the purpose of the Federal Rules of Evidence, Krulewitch v. United States, 336 U.S. 440, 93 L.Ed. 790, 69 S.Ct. 716 (1949).

However, in Dutton v. Evans, the United States Supreme Court held that the Georgia statute which permitted out of court statements made during the concealment phase to be permissible and not violative of the confrontation clause.[6] Dutton v. Evans, 400 U.S. 74, 27 L.Ed. 2d 213,91 S.Ct. 210 (1970) Accordingly, appellee invites this court to recognize the legitimate public policy reasons enunciated in Evans and interpret the Florida Evidence Code so as to bring declaration made during the concealment phase within the confines of §90.803(18)(e), Fla. Stat.

Alternatively, where the "criminal aim of the conspiracy is to make a profit by illegal means, the conspiracy continues until the fruits of the crime have been disposed of", United States v. Reynolds, 511 F.2d 603 at 607 (5th Cir. 1975). See also United States v. Rivera Diaz, 538 F.2d 461 (1st Cir. 1976) and United States v. Iacovetti, 466 F.2d 1147 (5th Cir. 1972). Since the conspirator's sole purpose was to make a financial windfall, their continued efforts to obtain this financial gain would be more concretely within the furtherance of the conspiracy than the disposition of obtained proceeds which have been found to be within the furtherance of a conspiracy. Rivera Diaz, supra.

Appellant argues that People v. Leuch, 124 Cal. Rptr. 752 (Cal.1975), is analogous and that it precludes co-conspirator's

statements made after Baskovich was killed. However, Leach acknowledged that their situations "where (a) conspiracy will be deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy." Leach at 760. Sub judice, the conspirators goal was to obtain financial renumeration for killing Wally Baskovich. Therefore, the declarations in tape #2 were within the teachings of Leach because they involved the mutual goals to be obtained and the methods of attaining these goals. Admittedly, in Leach the California Supreme Court determined that the co-conspirator's statements were not admissible since there was no evidence that the conspiracy was still operating to the point when efforts were being made to collect insurance proceeds. Sub judice, the statements that Faye Baskovich "was the key" evidences that the payoff was to be partially in the future when the estate was settled. Accordingly, there is independent evidence of the continuing nature of the conspiracy.

Assuming that it was error to admit the substance of the conversations between Leonard Adams and Robert Echols subsequent to the first tape, the only additional evidence brought out was that the appellant was Robert Echol's accomplice. This evidence was merely surplusage in light of

the fingerprint evidence and Echols and the appellant being acquainted. Therefore, the admission would be harmless error.

On cross-examination, the appellant's trial counsel sought to impeach Leonard Adams by suggesting that Mr. Adams had fabricated Mr. Nelson's involvement to increase the amount of the reward and for bias as a result or his pecuniary interest in the outcome of the trial. (R-1299) This theme was also carried into closing argument by the appellant's counsel suggesting that Leonard Adams had made up the appellant's involvment so as to obtain an increased reward and obtain favorable treatment on pending criminal charges in Indiana. (R1525) As such, the taped statements were admissible as rehabilitation to the claims of fabrication Oliver v. State, 442 So.2d 317 (Fla. 2d DCA 1983) and would not be hearsay since they were offered for reasons other than for the truth of the matter asserted.

ARGUMENT

ISSUE III

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE JURY TO USE TRANSCRIPTS AS AN AID DURING THE PLAYING OF THE TAPED CONVERSATIONS?

Prior to discussing the merits of the third issue on appeal, the appellee submits that instruction cited by the appellant at page 24 of the appellant's brief is an error attributed to the court reporter.[7] It would be illogical for the trial court to tell the jury to rely on the transcript after informing the jury that the transcript was not evidence and only an aid. (R-1247) Appellee's position is reinforced by the trial court's subsequent instruction at R-1251. However, assuming that trial judges instruction at R1247 was error, this court should accept the trial court's subsequent instruction as being sufficient to cure any error. Menendez v. State, 368 So.2d 1278 at 1280 n.9 (Fla. 1979). Further, the transcript accurately depicted the conversations recorded by tape, and as such, any error would be harmless.

Appellant argues that the use of the transcript resulted in the transcript supplanting the tape in the jury's mind and that the state's questioning about the tape prior to it's playing and the subsequent playing of the tape while the jury had in it's possession a transcript resulted in undue repetition and improper emphasis of the taped evidence.

Appellee recognizes that the Fourth District has stated in Stanley v. State, 451 So.2d 897 (Fla. 4th DCA 1984), that transcripts of tapes admitted into evidence should not be used. However, in Stanley the Fourth District recognized that use of transcripts would be harmless if the transcripts were accurate. Appellee invites this Court to review the copy of the transcript as given to the jury and to compare that transcript with the unedited transcripts of the tapes. Appellee submits that any possible error would be harmless due to the accuracy of the tapes. In Grimes v. State, 244 So.2d 130 (Fla. 1971), this court held that where the state published a transcript to the jury by having it read in open court, the defendant's claim would fail for lack of prejudice where the publishing witness had personally made and authenticated the tape. Sub judice, Leonard Adams, Jim Spiller, and Frederick Moore all attested to the accuracy of the tapes. (R-1509-10); 1228-9; 1245-6) The appellant's objection to the jury receiving the transcripts was on the grounds of 1) the best evidence rule, 2) the transcripts had not been properly authenticated, and 3) that giving the jury the transcripts would give evidentiary value to the transcripts. (R-1221-2) Nowhere is it suggested at trial or on appeal that

the transcripts were not accurate. The prosecutor responded to the "shotgun" objection by stating that he wasn't sure whether the appellant's counsel was challenging the audibility of the tapes and apprised the trial court of the veracity of the tapes and transcripts as follows: "We have listened to them several times before, and on this equipment, they are quite audible and in conjunction with the transcript". (R-1223) Later on, the trial court recognized that "the intelligible portions" were accurate. (R-1475)

The state argued that the transcript would be of "substantial assistance" to the jury by identifying who was speaking at different times throughout the tape. (R-1223) This use was explicitly approved by the Fifth Circuit Court of Appeals in Fountain v. United States, 384 F.2d 624 at 632 (5th Cir. 1967). In Fountain the Fifth Circuit required that the transcript be accurate and that voices in recording be identified by someone with personal knowledge. This is exactly the procedure that was followed sub judice.

The appellant never made an objection to the use of the tapes on the grounds that they supplant the evidence produced by the tapes themselves. As such, the appellant is precluded from raising this issue for the first time on

appeal. Castor v. State, 365 So.2d 701 (Fla. 1978). If this court does review the merits of the claim, the proper scope of review of a claim of unwarranted emphasis is whether the trial court abused it's discretion. United States v. Hall, 342 F.2d 849 (4th Cir. 1965) In Hasam Realty Corporation v. City of Hallandale, 393 So.2d 561 at 562 (Fla. 4th DCA 1981) the Fourth District defined an abuse of discretion as arising "when there is no conceivable bases for the decision. Reviewing, the appellants under the Hasam Realty standard, the appellant's claim must fail in light of the accuracy of the transcripts,[8] the assistance provided to the jury and the availability of Leonard Adams for cross-examination.[9]

ARGUMENT

ISSUE IV

THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR MISTRIAL.

Appellant claims that the trial court erred by failing to grant a mistrial as a result of the prosecutor's comment at R-1545 which appellant claims was intended to give the impression that the appellant would kill again if acquitted. (AB-29) This Court has stated that a prosecutor's arguments must be viewed "in the light of the circumstances" of which they were made. State v. Jones, 204 So.2d 515 at 517 (Fla. 1967). Accordingly, when the complained of comment is reviewed in the context of the appellant's previous arguments[10] it is clear that the prosecutor's comment was in fact a statement proposing that the evidence provide sufficient proof of the appellant's guilt and that if the law was as the appellant's counsel had argued a criminal defendant would have to be acquitted even though there was sufficient evidence of his guilt because there was no first hand knowledge of the appellant being at the Baskovich residence. Since the prosecutor's comment was not one which suggests that the appellant would kill again if acquitted when viewed in the context in which it was said, the trial court did not err in granting the appellant's motion for a mistrial.

Appellant argues that the prosecutor's comment that the fingerprint evidence was uncontradicted was a comment on the appellant's failure to testify and that it implied that the appellant had to make showing, contrary to law which imposes the burden upon the state and not on the criminal defendant. However, the appellant's argument is contrary to the long standing position of this court that permits the prosecutor to comment on "uncontradicted or uncontroverted nature of the evidence during argument to the jury." White v. State, 377 So.2d 1149 at 1150 (Fla. 1980). As for the last sentence of the comment which is cited by the appellant ("There is no other evidence." [R-1559 AB 30]), this was a product of defense counsel's objection which interrupted the prosecutor. As such, it was created by the appellant and should not merit relief under the invited error doctrine. Sullivan v. State, 303 So.2d 632 (Fla. 1974) Furthermore, a review of the completed statement by the prosecutor after the objection and the court's ruling (R-1560) discloses that the statement does render it susceptible to being interpreted as referring to the appellant's failure to testify or present evidence. As such, the prosecutor's comment was not improper and the trial court did not err by denying the appellant's motion for a mistrial.

ARGUMENT

ISSUE V

WHETHER THE TRIAL COURT ERRED BY IMPOSING A DEATH SENTENCE AFTER THE JURY RECOMMENDED LIFE.

Appellant cites Stromberg v. California, 283 U.S. 359 (1931) for the position that felony murder by the jury is "constitutionally mandated". (AB-32) From this point the appellant argues that since the jury returned a verdict of felony murder, the jury must have determined that the appellant was not the triggerman, and as such, the trial judge erred by overriding the jury recommendation of life since there was a reasonable basis for the rejection of the death penalty. The appellant's contention that jury finding of felony murder is mandated by the constitution is completely without merit. Stromberger was strictly concerned with facial validity of a California statute when attacked on first amendment and due process grounds. Secondly, the appellant's claim that the jury found felony murder is extravagently speculative and contrary to all the evidence. The appellant's use of small portions of Leonard Adams' testimony, taken out of context, is substantially misleading. Rather than give a syllogistic explanation of Leonard Adams testimony in this brief to refute the appellant's shallow evidentiary claims, appellee submits that the tape conversations dispositively refute the interpretation urged by the

appellant. (R1985) Appellee's position is bolstered by the jury's finding that the appellant carried a gun. (R206)

Appellant argues that there was no evidence that the appellant carried the gun which was thrown out and that Echols stated that he (Echols) threw the gun out near the scene. Again, the appellant distorts the record. During the guilt phase, Faye Baskovich testified that one of the criminals carried a club and the other carried a gun. The billy club gun was recovered from the Echol's residence. (R1072,1655) To find that the appellant was not the killer would require that all tape conversations be completely disregarded and that Echols carried and discarded the handgun while also obtaining the billy club shotgun from the appellant after the crime and transporting it back to his residence in Indiana. This is illogical and without record support. If the billy club shotgun was not the club testified to by Faye Baskovich, there was only one gun used in the commission of the crime and the jury found that the appellant carried that gun. (R206) Furthermore, Echols never stated that he threw the gun out, but rather, that the gun was thrown out.[12]

Appellant claims that trial court never considered the Enmund issue in sentencing the appellant. Enmund v. Florida, 458 U.S. 782 (1982). However, the trial court was apprised of this issue and rejected it's application. In Enmund the United States Supreme Court held that the imposition of a death sentence upon one "who aids and abets a felony but

who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed" violates the Eighth Amendment. Enmund at 788. The inapplicability of Enmund is obvious on numerous grounds. First, the trial court found that the appellant was the triggerman. Secondly, even if the appellant was not the triggerman, the fact that Nelson and Echols waited for Baskovich to leave his restaurant and followed him (Baskovich) home disputes the claim on appeal that the appellant's only desire was to burglarize the Baskovich residence and provides evidence that the murder of Baskovich was essential for both Nelson and Echols. As for the appellant's claim that the argument outside the Baskovich residence was a result of the appellant being disturbed by the killing of Baskovich, appellee submits that the evidence would suggest that the appellant was upset at the absence of the money at the Baskovich residence which was to be the appellant's compensation for the murder.

Appellant claims that the trial court relied on non-statutory aggravating factors. A review of the appellant's citations revealed that factors complained of were 1) statutory findings required to be made by the trial court prior to retaining jurisdiction over a defendant's sentence,

2) used to show the lack of evidentiary support for (negation of) the statutory mitigating factors, 3) elements of statutory aggravating factors, or 4) not considered by the trial court in determining the propriety of the death sentence.[13] Dr. Afield's report was used to rebute the mitigating factor of diminished capacity. (R345) As such, the appellant's complaint about the lack of Miranda warning and reliance on Estelle v. Smith, 451 U.S. 454 (1981) is without merit. Alternatively, the appellant's failure to raise the Miranda issue or Dr. Afield's use of the prosecutor's memorandum precludes the issue from being raised for the first time on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978); Wainwright v. Sykes, 433 U.S. 72 (1977).

Appellee concedes that the standard of review of a trial court's override of a jury recommendation of life is whether the facts suggesting the sentence of death are so clear that virtually no reasonable person could differ. Tedder v. State, 322 So.2d 908 (Fla. 1975). In Parker v. State, 458 So.2d 750 (Fla. 1984) this court held that where there were four legitimate aggravating factors and no mitigating factors the Tedder standard had been met and the trial court's jury override would be affirmed. Sub judice, there were three statutory aggravating factors and no mitigating factors. As such, the trial imposition of the death penalty over the jury

recommendation of life was proper. Parker, supra.

Appellant concedes that contract killings are properly found to be within the scope of the statutory aggravating factor of cold, calculated and premeditated. (AB-41) However, the appellant argues that the application of this aggravating factor is improper where the defendant is not the triggerman and not present in a felony murder setting. This argument is without merit in light of the trial court's finding of premeditated murder and the appellant as the triggerman.[14] (R-342) The appellant's complaint about the admission of the video tape is without merit since the trial judge did not use it as a basis for determining the appellant's sentence.[15]

FOOTNOTES

[1] The general rule is that face-to-face confrontation and the use of cross-examination provides accuracy in the fact finding process. Since face to face confrontations and cross-examination are aspects of the Confrontation Clause whose purpose is to insure truthfulness of testimony, the exclusion of evidence which is unquestionably truthful and accurate would not be mandated by purposes behind the face-to-face confrontation and cross-examination aspects of the Confrontation Clause of the Sixth Amendment. Therefore, "certain hearsay exceptions (that rests upon such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection. Robert, 448 at 66 citing Mattox v. U.S., 156 at 244, 39 L.Ed. 409, 15 S.Ct. 337 (1885)

[2] Appellee submits that tape # 1 would also be admissible under the co-conspirator exception to the hearsay rule. As for this point, Appellee will rely on its argument in Issue II of this brief.

[3] Robert Echols' statement obviously subject him to criminal liability. Further, the last sentence in 90.804 was meant to codify the Bruton v. U.S., 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). Since Bruton was a Confrontation Clause decision and the admission of a co-conspirator's declarations do not offend the Confrontations Clause, Dutton v. Evans, 400 U.S. 74, 27 L.Ed.2d 213, 91 S.Ct. 210 (1970), the last sentence would not

preclude the admission of the statements by Robert Echols because they are not offensive to the Confrontation Clause. ... Stated in another manner, the last sentence of 90.804 is a codification of confrontation clause requirements, and as such, should not preclude the declarations of Robert Echol since they are not vilative of the Confrontation Clause.

[4] Appellee disputes the Appellant representation that the state never argued that conspiracy involved "anything other than the murder." Rather, the state argues in the alternative throughout the evidentiay issues. Furthermore, as a matter of historical appellate law, the Appellee is not burdened with the same waiver and procedural default bars that an Appellant bears and a trial court rulings will be upheld on appeal if there are valid reasons for its ruling which weren't raised below.

[5] Appellee submits that the Appellant entirely failed to object to the co-conspirator's statement on the grounds of insufficient independent evidence and that the issue cannot be raised for the first time on appeal. The appellee recognizes that the Apollo Instruction, as codified in 90.803(18)(e), was given by the trial judge at the request of defense counsel. U.S. v. Apollo, 476 F.2d 156 (5th Cir. 1976). However, the request for this instruction is not sufficient to apprise the trial judge that the co-conspirator's declaration should be excluded for lack of independent evidence. As such the appellate should be excluded from obtaining relief on this issue for the first time

on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978); If this Court determines that the request for the Apollo instruction has preserved the sufficiency of non co-conspirator hearsay evidence for review, appellee provides the argument on the merits as an alternative to the procedural default issue.

6 The evidence at trial clearly reflects that the Robert Echols and the Appellant were acquaintances from Gary, Indiana. In the first tape (non co-conspirator evidence), Robert Echol declared that he had gone to Florida and killed Wally Baskovich and returned promptly by plane to Gary, Indiana. (R 2004-5). Echols had initially gone to Florida with another person to kill Baskovich, but had to abort the plan because there was a party going on at the Baskovich residence. (R 2011) Echols was made aware of an outside light being on when the burglar alarm was active. (R 2012) On a second attempt, Echols was forced to abandon his plans to murder Baskovich because his partner became intoxicated. (R 201) When the murder was finally accomplished, Mrs. Baskovich was intentionally left alive. (R 2015) This provides competent evidence that the purpose of the conspiracy was to kill Wally Baskovich and strip the estate for the benefit of conspirators. When the above evidence from tape # 1 is viewed with the evidence of the Appellant's fingerprint being found on the jewelry box, the testimony of Irene Brobst concerning the argument by two black men outside the Baskovich house at about the time of the murder and the description of their car, the car

in Robert Echols name, the locations (from and to) and the time frame of the toll calls, and that the probable murder weapon as being from Gary, Indiana. There is substantial independent evidence of a conspiracy and the Appellant's participation.

[7] Prior to instructing the jury, as to the use of the transcripts, the trial judge heard legal arguments which informed him that the jury should not substitute the "words of the transcript for the actual tapes themselves." (R 1224) Thereafter, the trial judge stated that he would give the corresponding cautionary instruction. (R 1224) Prior to the play of the second tape, the trial court again gave the appropriate cautionary instruction. (R 1454) Furthermore, the undersigned assistant attorney general has been informed by the prosecutor that this is a court reporter's error. As such, Appellee is submitting a motion to correct the record pursuant to Rules 9.200(f) and 9.300 Florida Rules of Appellate Procedure with this brief.

[8] Pena v. State, 432 So.2d 715 (Fla. 3d DCA 1983)

[9] In U.S. v. Avila, 443 F.2d 792 (5th Cir 1971), the Fifth Circuit found that the accuracy of the subject tapes and the corresponding transcripts was "bolstered by the fact that the person who carried the recording device appeared as a witness and was subject to cross-examination.

10 Defense counsel made the classical argument that since the Appellant was not caught at the scene with the smoking gun in his hand the state had not met its burden of proving the Appellant's guilt beyond a reasonable doubt. This point was made by defense counsel by stating that it was the State's burden to prove every element of the offense to the exclusion of every reasonable doubt and that a reasonable doubt could be brought about by a lack of evidence. (R 1524) Defense counsel then suggested that Leonard Adams had made up the Appellant's involvement so as to obtain benefit via increased reward money and favorable treatment by the Indiana authorities. (R 1525) Defense counsel went on to state that there was evidence that other persons had committed the murder (R 1532) and that Adams and Echols had fabricated the Appellant's participation to cast the blame away from Echols. (R 1533-1534) Defense implicitly suggested that Adams' involvement with Echols was criminal, i.e., a co-conspirator in the murder, because it was irrational for Echols to carry on the converstations with Adams otherwise. Defense counsel also argued that the fingerprint did not implicate the Appellant because it was located on a jewelry box, which the defense counsel suggested was not from the Baskovich house (R 1528), which was located three blocks away from the house on public street. (R 1527) It was also argued by the defense that fingerprint evidence was not reliable since it wasn't associated with the Appellant until after the Appellant's name was produced via Leonard Adams (R 1530) and that the fingerprint could have been on the jewelry box innocently since it could be determined when the fingerprint had

been placed on the box. (R 1527) In light of the above defense argument the prosecutor's comment was in substance declaring that the defense was arguing tht Appellant could not be found guilty of murder.

11 Speculation of this nature should not be the basis for reversible error. Sullivan v. State, 303 So.2d 632 (Fla. 1974)

12 Appellee submits that Leonard Adams used the terms "throw into the lake" to inquire whether the murder weapon had been disposed of. (R 1484) Robert Echols never stated that he personally disposed of the gun.

13 Where the complained of evidence is not considered in determining the propriety of the death penalty a claim of improperly admitted non statutory aggravating circumstance is meritless. Rose v. State, 10 F.L.W. 280 (Fla. May 16, 1985).

14 After the jury returned the verdict of Appellant's counsel made the argument to the trial court that the jury found that the Appellant was not the triggerman. (R 1667) Thereafter the trial court apprised defense counsel that he did not agree. (R 1667) With this background, defense counsel chose not to obtain clarification of the verdict and explically waived having the jury polled to support his position. (R 1785) Appellee submits that this issue has not been preserved for appellate review.

15 Rose v. State, supra.

CONCLUSION

WHEREAS the appellant has failed to show error that affected the substantial right of the appellant, the fairness of the preceding below or the propriety of the sentence imposed this Court should affirm the judgment and sentence of the Circuit Court of the Sixth Judicial Circuit, State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Regular Mail to Robert H. Dillinger, Dillinger & Swisher, P.A., 5511 Central Avenue, St. Petersburg, Florida 33710 this 9th day of July, 1985.

OF COUNSEL FOR APPELLEE