IN THE SUPREME COURT
OF FLORIDA

CHARLES M. KIGHT,

APPELLANT

vs. APPEAL DOCKET NO. 65,749

STATE OF FLORIDA,

APPELLEE.

APPEAL FOR THE CIRCUIT COURT
DUVAL COUNTY, FLORIDA

AMENDED
ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On December 6, 1982, Charles Kight stabbed Lawrence Butler fifty one (51) times, causing a slow and torturous death. (Tr 2734) Kight has appealed his conviction and sentence of death, raising seventeen claims of error. The facts relevant to each claim shall be set forth in order:

Facts: Point I (Stop and Arrest)

On December 7, 1982, Mr. Kight was stopped and arrested for an (unrelated) armed robbery perpetrated against Herman McGoogin. (Tr 2142-43, 2153-54).

Ten days later Detective Ross Weeks contacted Mr. Kight in the course of an investigation into the murder of Mr. Butler. (Tr 524) Weeks wanted Kight's clothing for the purpose of delivering it to the crime lab for testing. (Tr 525) As Kight followed Weeks' to the property room, Kight asked if he was going to be placed in a "line-up." (Tr 525) When told he was not, Kight stated that he was not afraid of the electric chair. (Tr 525) He then blamed his accomplice, Hutto, for cutting the victim's throat. (Tr 525)

Weeks immediately stopped Kight from speaking and gave him his "Miranda" rights. (Tr 525) Kight readily agreed to give a statement. (Tr 526) Detective Kesinger arrived soon after and,

after again giving Kight his rights, took an exculpatory statement blaming Hutto for the murder. (Tr 527) Kesinger read the statement back to Kight, who signed it. (Tr 528) Kight and Hutto were subsequently arrested. (R-1)

Kight challenged the legality of his arrest in the McGoogin case as a basis for the suppression of evidence in this unrelated case. The details of the McGoogin arrest clearly supported the State's position, causing all motions (to suppress) to be denied. Those details are correctly set forth as follows:

Herman McGoogin, a taxi driver, picked up Hutto and Kight at the Silver Dollar Bar. (Tr 411-12) McGoogin got a good enough look at the men to later describe them to the police. During the ensuing drive, Kight put a knife to McGoogin's throat. (Tr 2123) The victim was able to get free of his attackers and run from the cab to a nearby house. (Tr 2125)

Several officers responded to the call for help. Officer Simmons, after meeting the victim, set out in search of the attackers - including a white male with light hair wearing blue jeans and a denim jacket. (Tr 253)

The neighborhood in question was known by Officer Simmons to be one which white males did not frequent at night, especially on foot. (Tr 285) Thus, when he saw Kight, alone, on foot, and dressed like a suspect (and in the area) Simmons called out to

Kight and merely asked to talk to him - nothing more. (Tr 254) As Kight approached Simmons' unmarked car, however, he said "I can explain everything." (Tr 254)

Kight sounded intoxicated to Simmons. (Tr 255) Kight had a knife and sheath on his belt. (Tr 255) Simmons asked Kight if he had seen two other white men in the area and Kight said yes. Then he (Kight) proceeded to describe two suspects in the same manner as the cabbie. (Tr 256) Simmons was told that the pair was seen near the expressway.

At that moment Officer Butler arrived, announcing Hutto's arrest by Officer Pate. (Tr 256) Officer Barge arrived with McGoogin. (Tr 297) McGoogin, without any prompting, quickly identified Kight and Hutto as the robbers. (Tr 301, 302)

At the police station Detective Weeks gave Kight his rights. (Tr 377) Kight stated that he knew his rights and that he did not want to speak. (Tr 377) His demand was honored. (Tr 401)

Thus, Kight was "Mirandized" at least three times prior to his voluntary statement to the police (as well as receiving his "first appearance" and a consultation with both the Public Defender and his investigator).

Facts: Point II
(McGoogin's Identification)

This "identification" claim is based upon the facts as set forth above. This trial, however, was for the murder of Lawrence Butler, not the robbery of McGoogin.

Facts: Point III
(Kight's Statement)

The facts surrounding Kight's free and voluntary statement are set forth above. It is to be noted that on December 14, 1982, Officer Riley attempted to interview Kight after reading him his rights yet again. (Tr 948) Kight did not ask for his attorney, simply stating he knew nothing about any missing taxi. (Tr 950) The interview ended at that point.

Psychiatric experts all agreed that Kight was fully competent to exercise his rights (and even advise counsel), his low intelligence did not cause him to unwittingly incriminate himself. (Tr 2230, 2238, 2244, 2246) Defense witness Harry Krop testified that Kight was aware of the insanity defense and how to "act accordingly." (Tr 2253) Krop also stated that Kight was capable of concocting an exculpatory story. (Tr 2613) Indeed, Kight's story was exculpatory.

Facts: Point IV

Mr. Kight was a prisoner in jail at the time he was taken from his cell for the purpose of surrendering his clothes for testing. (Tr 1857) No warrant was required.

Facts: Point IV (Refusal To Exclude Testimony of Statement Witnesses)

Despite receiving the advice of his appointed counsel (at first appearance) and the office investigator (Tr 743), as well as police and judicial "Miranda" warnings, Kight decided to save himself by talking to the police (blaming Hutto).

In the process, Kight boasted about his crime to other prisoners. Without "official" pressure, Kight boasted to Fred Moody that he murdered Butler and would "get off" on an insanity plea. (Tr 2014-15) Kight also made damaging admissions to inmates Elwood, Hugo and Sims. (Tr 2026-27, 2036-37).

The Public Defender's office became aware of these statements at some time (never precisely determined). The office had already ceased to represent Kight when it plea bargained Hutto's case. (Tr 927) A condition of the bargin was the identification of any (witnesses) to whom Kight confessed. Attorney Robert Link (who replaced the Public Defender as Hutto's lawyer) gave the state the desired names. (Tr 955) Not all of these witnesses were uncovered by the Public Defender. Moody,

one of the most damaging witnesses, was discovered by Mr. Link on his own. (Tr 962)

The appellant filed a motion to suppress which would punish the state for the alleged misconduct of defense counsel, operating under the theory that by calculated misconduct the defense can eliminate incriminating evidence. (Tr 977) The motion was properly denied.

Facts: Point VI
(Discrimination in Grand Jury
Foremen Selection)

Charles Kight is a white male who preyed upon black taxi drivers. As part of his defense, Kight falsely accused the judges of Duval County with "racism" in their selection of grand jury foremen. This included the presiding judge in his own case (Judge Adams) who was black and who had appointed at least one black foreman. (The State maintains that the court is not "racist" and in the absence of proof will refer to any charge as "false").

Kight produced a poorly prepared "statistical survey" to support his "racial theory" (that a black or female foreman would not approve an indictment no matter what the evidence). The "study," prepared by a "Dr." Powell, was carefully weighted to produce the desired results. For example, although grand jurors are selected from voter registrations, and persons under the age

of 21 could not vote in either 1960 or 1970, Powell based his analysis on the demographic differences between "the general population over age 18" (Tr 1004) (from 1960, 70 and 80) and grand jurors who actually served. (Tr 788) The 1960 data, of course, antedated both the civil rights act and the voting rights act. Both the 1960 and 1970 figures antedated what is now perceived as the "women's movement."

Upon cross examination and Court questioning, Powell conceded that his so-called "study" failed to address such variables as excusals for cause (Tr 1006), qualifications of particular (retained or excused) jurors (Tr 1006), persons who asked to be excused (especially pregnant women or mothers (or fathers) of children under 5, nurses or emergency personnel, (etc.). (Tr 1000-1002)

Incredibly, Powell said that legitimate "variables" which might tend to justify disproportionate service by women or minorities were "extraneous" factors which he, as a "pure statistician", never factors in. (Tr 1002, 1008)

In response to this "evidence," the State called every Circuit Judge availabe to testify to the procedure by which they had personally selected grand jury foremen. Judges Santora (Tr 1015), Martin (Tr 1028), Harding (Tr 1042) and Adams (Tr 1060-66) all testified to utilizing proper, recognized selection factors. None were effectively cross examined. Judges Martin

and Adams noted that women made extensive use of their statutory right to avoid service. (Tr 1032, 1066)

Judge Harding selected a female foreman, while Judge Adams had selected a black foreman. (Tr 1043, 1065)

A deposition from the late Judge Richardson and testimony from Judge Shephard were also considered. (Tr 1068, 1098)

The defense failed to allege or show impropriety in the Grand Jury selection in this actual case.

Facts: Point VII
(Court Disposition of
Witherspoon Challenges)

The Appellant contends that the court erred in failing to exclude for cause veniremen White, Andrews, Dinkins and Bird.

The Court bifurcated voir dire to permit individual, sequestered, Witherspoon voir dire prior to general voir dire. These four veniremen survived Witherspoon voir dire. Curiously, when (after general voir dire) defense counsel exercised only 7 of his peremptory challenges, defense counsel removed only White and Dinkins. The State challenged Andrews, while Ms. Bird was not selected for the final jury and did not serve. (Supp. Trans. 146-149)

The Court specifically noted that no challenged veniremen made the final jury. (Supp. Trans. 149)

Although Appellant contends (brief pg 53) that the Court committed "reversible error" in "failing to exclude" Andrews, the record shows (Tr 1558) that Sheppard objected to the State's challenge for cause to Andrews!

Seven other jurors were either totally unable to follow the law or were so easily led that either the state or the defense could elicit a desired response-making ascertainment of their views impossible.

Venireman Antolec stated that her opposition to capital punishment would affect her guilt phase deliberations. (Tr 1334) Venireman Mote would not convict Kight if it would expose him to a death sentence (Tr 1369) Venireman Reed said "God forgives" and would not convict Kight, period. (Tr 1400) Venireman Bowes, also religious, said it was "not his place" to convict someone. (Tr 1531), Atwater (Tr 1641) Thompson (Tr 1674-79), and Jones (Tr 1711) all agreed they would not convict Kight.

Judge Harrison took special pains to allow veniremen to remain if they opposed capital punishment but would nonetheless "convict." These veniremen included Andrews (see above), Williams (state challenge overruled Tr 1422), Szuch (state challenges overruled Tr 1475) Chambers, M. Andrews, Merrell, Reed, McAfee, Kent, Heyman, Small, Graham and Anderson. (Tr 1525, 1558, 1589, 1625, 1631, 1662, 1666, 1703, 1733, 1748). In fact, two veniremen who knew Mr. Sheppard were allowed to remain as well! (Tr 1306, 1748)

The State, like the defense, raised challenges for cause and peremptory challenges without regard to race. When defense counsel began pointing out the race of excused veniremen, the Court reacted by noting the race and sex of either retained veniremen or those challenged by the defense, thus pointedly exposing the lack of merit of any claim of racial bias.

Facts: Point VIII
(Kight's Statement)

The details of Kight's decision to give an exculpatory statement have already been addressed.

The statement was introduced at trial as proof of Kight's presence at the scene of the murder, not as "impeachment" evidence.

Facts: Point IX
(Williams Rule Evidence)

Kight's robbery of McGoogin was admitted under the William's rule as proof of common plan or scheme, modus operandi; knowledge, intent and lack of mistake. (Tr 2062)

Facts: Point X
(Limitation of Cross Examination)

The defense sought to "cross examine" Detective Weeks, who was not qualified as a mental health expert, concerning any hearsay he might have become familiar with re: the mental health

of Kight. (Tr 1890-91) The witness was incompetent to diagnose Kight, the inquiry was outside the scope of direct, and Kight never filed any notice of any intent to pursue an insanity defense. (Tr 1891)

Facts: Point XI
(Limitation of Evidence)

Defense counsel never filed any notice of intent to rely upon an "insanity" on "diminished capacity" defense. Defense counsel tried to sandbag the state by announcing, mid-trial, his decision to offer proof that Kight was "retarded" and incapable of planning or carrying out this murder. (Tr 2250-51)

Kight was allowed to proffer his "evidence." His first witness, Dr. Krop, said that Kight was the sane at the time of the murder and, in contradiction of Mr. Sheppard's theory, Kight was fully capable of formulating a lie to protect himself. (Tr 2238) Krop also stated that Kight was "aware of the insanity defense" and knew how to "act crazy." (Tr 2233)

The second expert, Dr. Miller, went even further; testifying that Kight was capable of "taking the initiative" while "role playing" in the course of an event. (Tr 2243) Kight was declared capable of independent action (Tr 2243) and was not so passive that he could not initiate a crime. (Tr 2246)

Mr. Kight called Dr. Krop during the penalty phase.

Facts: Point XII
(Jury Instruction Re:
Discussion of Case)

After the jury returned its verdict of guilty it was instructed as indicated at (Tr 2468). The instruction, quoted with distorted emphasis by Kight, told the jury it could talk about its deliberations if it wanted to.

When the jury reassembled for the sentencing phase the Court, at the request of the defense, polled the jurors to see which of them had actually spoken to anyone about the trial. (Tr 2489) Two jurors replied in the affirmative.

One juror (not named) stated she met Detective Kesinger and mentioned she was a (Kight) juror, with nothing more being said. (Tr 2504) Juror Perry spoke to someone in more detail, but Perry was subsequently removed from the jury over Sheppard's objection. (Tr 2511)

Kight can hardly be heard to complain when he objected to the removal of the "tainted" juror.

Facts: Point XIII
(Improper Argument)

During the sentencing phase the State argued the evidence in an attempt to induce a jury recommendation of death, as is its job.

The State argued that Kight's victim died a lingering death with time to reflect on his fate before passing. (Tr 2640-41) This was directly in line with the testimony of Dr. Floro (Tr 2524-26) and refuted a defense misrepresentation (apparently re-exclaimed in the jury's presence) that jugular wounds produce "instant death." (Tr 2525)

In fair rebuttal to Kight's relatives taking the stand, the State mentioned briefly the victim's family (drawing a prompt objection) in an attempt to do nothing more than remind the jury that it could not disregard its duty in a rush of mercy for either the victim or the defendant. (Tr 2659)

When the prosecutor argued that death would be appropriate, as she is allowed (just as the defense can argue for life) a frivolous defense objection was overruled. (Tr 2660)

The prosecutor's argument on the nature of felony murder was also objected to, but, again, the objection was overruled. (Tr 2645) The argument merely offset defense allegations that "felony murder" should not be punishable by death in any case.

Mr. Sheppard's closing argument was much more improper. Sheppard repeatedly injected his personal opinions on the weight of the evidence and the proper sentence. (Tr 2665, 2669, 2670, 2684). In a blatant sympathy ploy, Sheppard spoke of how he liked to fish, and how (on his last trip,) he thought about poor

Mr. Kight being locked up and never getting to enjoy the sun and the water again. (Tr 2675) Sheppard the speculated that a 25 year minimum sentence could mean Kight would die in jail "anyway." (Tr 2676)

Sheppard then insulted the jury, representing that society, and thus the jury, is to blame for Kight's crime rather than Kight himself. (Tr 2669) He claimed that the jury should not "exterminate our failure." (Tr 2670) This was followed by a personal attack on the integrity of the prosecuting attorney, which alleged that she "played lawyer games" (Tr 2680) and picked Kight to die (even though someone else was guilty) because he was retarded and an easier scapegoat than Hutto. (Tr 2680)

Facts: Point XIV
(Court's Abuse of Discretion
In Sentencing Kight)

The Court did not consider Kight's alleged retardation a mitigating factor due to the testimony (of defense witnesses) that Kight was sane, competent, capable of planning and carrying out the crime and aware of the consequences. (Tr 2734-36) The Court did find two non-statutory mitigating factors, those being Hutto's plea bargain and Kight's receipt of an award for once catching a robber. (Tr 2734-36)

Facts: Point XV

Kight stabbed Mr. Butler 51 times prior to slitting his throat. Although the court erred in not finding that victim-elimination was committed to avoid detection and arrest, it properly found the crime to have been committed in the course of a felony and "heinous, atrocious and cruel." (Tr 2734-36)

Facts: Point XVI

No plea bargain existed with any witness (Hugo, Sims, Elwood or Moody) prior to trial.

Mr. Hugo was scheduled to go on parole within a year of the trial's end. He testified to this in court. (Tr 2006) The State often puts prisoners into a work release program before putting them back on the street. While the State provided a motion to reduce Hugo's sentence, it must be stressed that the motion, on its face, says that Hugo did not request this "assistance" (exhibit 3-1) until after the trial.

Fred Moody was already scheduled for release within six days of trial. (Tr 2023)

The record clearly shows that Charlie Sims testified to an "understanding" that the State would assist him in exchange for testimony. (Tr 2040)

No evidence of actual "payment" to Elwood has been raised in this appeal or in the coram nobis petition. This Court denied coram nobis relief, thus resolving all four claims on their "merits." (Kight v. State, case 66,864)

Facts: Point XVII
(Cumulative Error)

No facts require restatement.

SUMMARY OF ARGUMENT

The Appellant's seventeen claims of error are predicated upon misstatements of fact and/or misapprehensions of law.

Mr. Kight was properly stopped for information on the night of his arrest. This led eventually to a valid arrest. Kight's clothing and other evidence was properly seized for testing, at which time Kight tried to save himself by volunteering an admissible "exculpatory" statement.

Kight received a full and fair trial following indictment by a legally selected grand jury. No errors were committed which warranted reversal, and Kight was properly convicted and sentenced to death.

ARGUMENT POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM HIS INITIAL ARREST

The Appellant propounds the theory that if he was "illegally arrested" in the (unrelated) McGoogin robbery then any evidence linking him to this crime should be suppressed as (for want of a better expression) "fruit of the poisonous tree." The State rejects the concept of perpetual immunity and the notion that Kight's initial detention was illegal.

In Johnson v. State, 438 So.2d 774 (Fla. 1983) this Honorable Court stated that a lower court ruling on a motion to suppress carries a presumption of correctness upon its arrival. All facts and all rational inferences therefrom are taken in favor of the lower court's ruling. Quickly reviewing the facts, we note:

> (1) McGoogin described the clothes and hair color of his assailants.
>
> (2) The robbers fled on foot, as white men in an area not frequented by whites late at night, especially alone and on foot.
>
> (3) Simmons' initial contact with Kight was not a seizure. Simmons was in plain clothes and an unmarked car.
>
> (4) Simmons hailed Kight, and Kight responded by exclaiming "I can explain everything."
>
> (5) Kight appeared intoxicated, alone and on foot. A pat down revealed a knife

(6) Kight described the two robbers just as McGoogin had, and was about to be released (thus he was not restrained) when the other officers and the victim arrived.

(7) The victim's identification was immediate and positive.

Mr. Kight alleges that police officers have no right to hail a pedestrian and ask if he has seen a given pair of suspects run by. This is utter nonsense. Mr. Kight alleges that if two thieves flee on foot, police cannot look in any direction other than the one indicated by the victim. This, again, is untenable. Fleeing criminals are not crows - they do not run in a straight line "every time" nor do they avoid "splitting up" to confuse any pursuers.

In Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889 (1968) a policeman saw two idlers hanging around a business district at 2:30 p.m. (normal business hours). Their odd manners caused the officer to continue watching. Gradually, the two men appeared to "case" a particular business, so the officer approached and frisked them, finding a concealed firearm.

In upholding this search, the Supreme Court reiterated that the Constitution does not ban all searches and seizures, just "unreasonable" ones. Thus, the standard for an on-the-street encounter is not as stringent as that for an arrest. The detaining officer merely requ res a "founded suspicion."

Two recent Florida cases have reinforced this standard. Ewing v. State, 11 F.L.W. 1 (Fla. 5th DCA 1985); Payne v. State, 11 F.L.W. 26 (1st DCA 1985).

Ewing states:

> "A founded suspicion is a suspicion which has some factual foundation in the circumstances observed by the officer, when these circumstances are interpreted in the light of the officer's knowledge."

In Payne v. State, supra, the same standard applied to analogous facts.

On October 22, 1983, a convenience store was robbed. On October 26, 1983, an officer noticed a car, with its parking or brake lights on, parked at the end (and away from the buildings) of a strip shopping center (laundry-convenience store). Two black men were walking from the car to the store. It was 10:55 p.m. in an all white area. The officer did not know of the prior robbery nor did he have a "B.O.L.O." Consumed with suspicion, the officer pulled up to the store, at which time the defendants broke and ran. (Incidentally, they split up, just like Kight and Hutto did).

The pair was apprehended and the "stop" was upheld, citing Terry.

Kight, however, seeks to narrow the Terry decision to absurd, if not wholly unattainable, dimensions citing easily distinguishable cases.

In Freeman v. State, 433 So.2d 9 (Fla. 2nd DCA 1983) the police stopped the defendant merely for having a flashlight on while walking through a parking lot at 2:30 a.m. There was no indication of wrongdoing at all, nor had a vehicle burlgary or theft been reported.

In McClain v. State, 408 So.2d 721 (Fla. 1st DCA 1982) an officer saw McClain exit and then reenter a store at 2:30 in the afternoon. He stopped McClain without more.

In R.B. v. State, 429 So.2d 815 (Fla. 2nd DCA 1983) the defendant, apparently upon seeing the squad car, shoved his hand deeper into his pocket.

So the list goes on. In our case the police responded to a robbery call. They received a description and spread out. When Kight (who matched the description) was approached, he was not seized or restrained. Indeed, Kight initiated the discussion by walking up and saying "I can explain everything." Kight was free to go when the serendipitous advent of the other officers, the capture of Hutto and the victim's arrival caused his detention and arrest.

Here we must note that Kight's reliance upon Dunaway v. New York[1] is equally misplaced. In that case an officer investi-

[1] 442 U.S. 200 (1979).

gating a homicide received Dunaway's name as a "possible lead" from an officer who heard it from an unnamed informant. Without more, Dunaway was seized from his apartment by three detectives. He was told that he was not "under arrest," but if he tried to leave the police station he would be physically stopped. The Court specifically held that following any kind of Terry stop, continued detention could only be justified by either consent or the advent of probable cause.

In our case Simmons merely hailed Kight as he rode by in his car. Kight made his cryptic comment and came to officer Simmons. Kight appeared to be alone, afoot, intoxicated and in an area not frequented by whites at night. This alone could cause the officer to check on Kight's well being. Then a concealed knife was found. (The robber used a knife). Then Kight began telling Simmons how he (Kight) had seen two white males by the expressway. Kight described the robbers when he described the two men. Simmons, fooled by Kight, was ready to go on the fool's chase when backup arrived and announced Hutto's capture. Now the police had two white males, each dressed like a fleeing robber. Simmons detained Kight, the victim arrived, and Kight was identified.

Was Simmons to ignore Kight's offered story and drive away? Was Simmons prohibited from asking a pedestrian if he had seen a fleeing pair of suspects? Of course not. Terry places no

cap on the length of the detention nor does it unduly limit citizen-police dialogue. Common sense dictates the circumstances as much as anything.

For example, in United States v. Montoya De Hernandez, 473 U.S. ____, 87 L.Ed.2d 381 (1985) a Dunaway argument was rejected where customs agents detained a cocaine smuggler. She was detained (on suspicion of smuggling balloons of cocaine in her alimentary canal) until she passed the narcotic. The defendant was stopped because her visa showed eight recent trips from Bogota to either Miami or Los Angeles. Questioning her, her story that she was "shopping" and her production of $5,000 in $50 bills (but no wallet) fed the agents' suspicions. She also had no hotel reservations. She did have four sets of clothes and a fabric-sample case. The Supreme Court upheld the "reasonable suspicion" of the federal officers based upon their experience, and the court, citing United States v. Sharpe, 470 U.S. _____, 84 L.Ed.2d 605 (1985) refused to indulge in "second guessing" the officers.

In Sharpe, of course, the decision of a DEA agent to follow, and then pull over, a suspiciously "over loaded" pickup truck was affirmed by the Supreme Court, though predicated solely upon "suspicion" which, as events transpired, gradually escalated. As noted by the Court:

> "Admittedly, Terry, Dunaway, Royer and place, considered together, may in some

> instances create difficult line-drawing problems in distinguishing an investigative stop from a defacto arrest. Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on Terry stops. While it is clear that "the brevity of the invasions of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion [citation], we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. United States v. Hensley," [469 U.S. ____, 83 L.Ed.2d 604 (1985)]

Id. at 615.

In United States v. Hensley, supra, the Court upheld an investigatory stop of a robbery suspect by Kentucky police based merely on a BOLO "flyer" (not a warrant) from Ohio.

Obviously, the stopping of Kight was perfectly proper, and the fact that circumstances caused the encounter to grow to a suspicion, probable cause and then an arrest does not taint the initial contact. This renders moot Kight's second claim, that "but for" the McGoogin arrest he would not have "been available" for arrest in this case.

An analogy can be drawn to United States v. Crews, 445 U.S. 463, 63 L.Ed.2d 537 (1980). Crews, a robbery suspect, was taken into custody as a "truant" so the police could get (and

circulate) his photo. Crews was able to suppress pretrial photo identification, but not the in-court identifications.

Crews argued that "but for" his illegal arrest the victims would never have seen his photo, never identified him, and there never would have been a trial. Ergo, Crews said, there never would have been an in-court identification. The contention was summarily rejected by the Court, which held:

> "Improper as respondent challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. Frisbie v. Collins, 342 U.S. 519 (1952); Gerstein v. Pugh, 420 U.S. 103 (1975)."

An illegal arrest in the McGoogin case, even if it occurred, does not bar any prosecution for this unrelated murder.

ARGUMENT: POINT II

THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS THE INITIAL SHOW-UP IDENTIFICATION OF THE DEFENDANT.

At the outset two points bear attention. First, Kight did not stand trial for, nor was he convicted of, the robbery of Herman McGoogin. Although that arrest has been extensively briefed, that case is not before this Court. Furthermore, McGoogin did not identify Kight as the perpetrator of this murder. Second, we again note that the trial court's decision regarding the facts and the law come to this Court clothed with a presumption of correctness. Indeed, the "facts" are no longer open to debate (despite Appellant's persistence) and all inferences from those facts must be construed in the State's (Court's) favor. State v. Sepuvaldo, 362 So.2d 324 (Fla. 2nd DCA 1978).

McGoogin provided the police with a sufficient description of the robbers to enable them to capture the perpetrators while they were still in the neighborhood. While defense lawyers can skillfully dissect any description and attack its adequacy, the bottom line cannot be ignored.

McGoogin gave the police Kight's hair color[2] and attire.

[2] The discrepancy over whether Simmons was told Kight was blonde is not debateable on appeal. Simmons was told.

Kight was apprehended within minutes, and McGoogin identified him on the spot.

Kight claims that a "show up" identification can never be valid because by being alone in the squad car the defendant is in an unduly suggestive situation. This is an incorrect statement of law.

Neil v. Biggers, 409 U.S. 188 (1972) recognized that all line-ups are "suggestive" to some degree. The Constitution does not prohibit "suggestive" procedures, just "unduly suggestive" ones. A show-up, with a solitary suspect in custody, is not unduly suggestive. Indeed, it is curious that Kight's massive brief fails to account for the myriad of cases upholding show up identifications. Obviously, none were cited because Kight cannot confront them.

In State v. Cromartie, 419 So.2d 757 (Fla. 1st DCA 1982) Rev. Dism. 422 So.2d 842 the First District upheld the validity of show-up identifications where (1) the police employed no unnecessarily suggestive procedure and (2) even if so, there was no substantial likelihood of irreparable misidentification.

Citing State v. Freber, 366 So.2d 426 (Fla. 1978) the District Court noted the inherently greater reliability of show up identifications made shortly after a crime.

In sum, show up identifications, even if inescapably suggestive, are not "automatically, unduly, suggestive." See Cross v. State, 432 So.2d 780 (Fla. 3rd DCA 1980); Lauramore v. State, 422 So.2d 896 (Fla. 1st DCA 1982); Bliniski v. State, 10 F.L.W. 353 (Fla. 3rd DCA 1985); Baxter v. State, 355 So.2d 1234 (Fla. 2nd DCA 1978).[3]

Kight would have the State haul possibly innocent people to the jail and subject them to a formal line-up prior to allowing the victim to see them. The police would lose so much time transporting suspects across town and then locating fresh faces for the new line-ups that arrests would become impossible. On the other hand, the police cannot leave Kight, or any (guilty) detainee, just wandering the sidewalk, hoping he does not run away when the victim arrives to identify him.

The Appellant's claim is simply unreasonable as well as meritless. Absent even a suspicion, much less a claim, of misidentification this argument should be rejected.

[3] Finally, we note that McGoogin's positive courtroom identification cured any "error" at the showup and rendered it harmless. Rahme v. State, 10 F.L.W. 2053 (Fla. 5th DCA 1985).

ARGUMENT: POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS KIGHT'S VOLUNTARY STATEMENT

Mr. Kight alleges that his voluntary, exculpatory, statement to the police should have been suppressed on two theories:

> (1) It was illegally obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966)
>
> (2) He is of low mentality and is entitled to automatic relief.

Neither claim has factual or legal merit.

Again we begin by noting that the factual determinations by the lower court are presumptively correct. All facts and inferences must be taken in favor of the state, and evidence or conflicts therein cannot be "reweighed." Tibbs v. State, 397 So.2d 1120 (Fla. 1980) affd. 457 U.S. 31 (1982).

(A) The "Miranda" Problem

Miranda v. Arizona, 384 U.S. 436, 477-78 (1966) forbade the interrogation of a criminal suspect without advising him of his constitutional rights and honoring those rights if invoked. The Court took great pains to exclude from this opinion voluntary statements, specifically holding.

> "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility in not affected by our holding today."

Mr. Kight was escorted from his cell to the property room

for the purpose of surrending his clothes for testing. Kight was perceptive, realizing that the test would incriminate him in the Butler murder. Kight preempted the investigation by offering a statement on his own - not as a result of any interrogation. The statement was exculpatory. Kight was advised of his rights and waived counsel.

Both federal and Florida case law upholds the admissibility of such a statement. Michigan v. Mosley, 423 U.S. 96, 46 L.Ed.2d 313 (1975); Jackson v. State, 359 So.2d 1190 (Fla. 1978) cert.den. 439 U.S. 1102 (1979).

The fact that Kight had counsel in a different case did not mean that (a) he could not waive counsel or that (b) he could not be approached. Brewer v. Williams, 430 U.S. 387, 51 L.Ed. 424 (1977); Miller v. State, 403 So.2d 1017 (Fla. 5th DCA 1981).

Even an invocation of the right to counsel under Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 386 (1981) can be relinquished by a suspect. Oregon v. Bradshaw, 103 S.Ct. 2830 (1983).

Again we note that Kight was never subjected to "interrogation." As such, he was under no "duress" as defined in Toole v. State, 10 F.L.W. 617 (Fla. 1985). Furthermore, the police had a right to seize his clothing, pursuant to, United States v. Edwards, 415 U.S. 800, 39 L.Ed.2d 771 (1974).

Finally, note must be taken of Suarez v. State, 11 F.L.W. 1

(Fla. 1985). There, in a case involving actual misconduct by the prosecutor (in taking a confession from a lawyer's client, ex parte) the confession, as a volunteered statement, was nonetheless admissible.

Here there was no misconduct, and no basis for suppression.

This brings up to the second claim: low intelligence.

(B) Knowing And Intelligent Waiver

Kight is not the mindless automaton the defense would have use believe. Indeed, Kight's own experts testified that despite his "IQ" of 72, Kight (though mildly retarded) was:

(1) Fully aware of his situation.

(2) Aware of the consequences of his actions.

(3) Capable of independent action.

(4) Capable of protecting himself and advising him lawyer.

(5) Capable of feigning insanity.

The facts bear this out. Kight's murder of Butler not considered, look at his post-murder conduct.

(1) Kight claimed illiteracy, yet kept a newspaper story about his case.

(2) Kight invoked his right to counsel.

(3) Kight concocted an exculpatory story to save himself when he figured the case was about to be solved.

Kight would have us look at his low IQ score as the single controlling factor, and supports his claim with cases which, in fact, are distinguishable.

Mr. Kight contends that his illiteracy and low intelligence rendered his statement involuntary.

Sims v. Georgia, 389 U.S. 104 (1967) is cited in support of this proposition. The facts in Sims indicate it has nothing to do with our case. While Sims was of "low" intelligence, his intelligence was not the reason for reversal. Rather, the Sims court noted that:

> (1) Sims' case was remanded for an evidentiary hearing on the issue of voluntariness.
>
> (2) No hearing was held. The trial court ruled on the basis of existing transcripts and the State offered no new evidence.
>
> (3) This procedure left unrebutted testimony that Sims was beaten (and suffered a laceration over his eye) and confessed after physical abuse.

Kight cannot possibly rely on Sims. Also of no assistance is Culombe v. Connecticut, 367 U.S. 568 (1961). Culombe, judged under now invalid intelligence tests, graded out as a "moron with an "IQ" of 64 and mental age of 9. (If we equate the IQ tests Culombe compares to Kight's 69-72 IQ). Culombe, however, was denied counsel and was subjected to twelve and a half hours of intense interrogation, until he confessed. Kight was never

interrogated and he never confessed (he blamed Hutto). Culombe was assessed as fearful, easily intimidated and easily led. Kight, according to his own witnesses, was capable of independent action, self preservation and even the ability to "feign" insanity.

Fikes[4] is also dissimilar. While Fike was of low intelligence, that factor did not control his case. Rather, the Court noted that Fike was arrested on May 16, 1953. Interrogation began on May 17 (4 hours) and continued on May 18, with Fikes being denied a first appearance. More interrogations (with Fikes in solitary) were conducted on the 19th, 20th, and 21st - at which time Fikes confessed. Another week of uncounseled interrogation followed. Also, Fikes was incarcerated at the State prison (far from home) and was mentally ill as well as unintelligent. He was also a black man in the hands of white Alabama police. Reversal was based upon totality of these circumstances.

Kight would have us concentrate on his low intelligence and alleged illiteracy (Kight claimed he could not read yet he clipped and kept a newspaper story about his crime, and he finished 9th grade). On the other hand, Kight would have us ignore the testimony of defense experts that:

[4] Fikes v. Alabama, 325 U.S. 191 (1975).

(1) Kight was competent to stand trial.

(2) Kight was competent to advise counsel.

(3) Kight appreciated the nature of his crime and possible consequences.

(4) Kight was capable of independent action.

(5) Kight was capable of self preservation, including making up lies to defend himself.

(6) Kight, remember, did not confess - he concocted an exculpatory story.

(7) Kight knew his rights and exercised them. His statement was unsolicited, volunteered by Kight when Kight perceived that the case was about to be solved.

In Schnecklock v. Bustamoute, 412 U.S. 218, 36 L.Ed.2d 854 (1973) the Supreme Court declared that no "per se" rule exists. Rather, reviewing Courts must examine the "totality of the circumstances." The totality here, courtesy of Dr. Krop and Dr. Miller, clearly weighs in favor of the state.

The standard in Florida similarly rejects any per se rule. In Ross v. State, 386 So.2d 1191 (Fla. 1980) this Honorable Court, noting its own prior decision in Brown v. State, 245 So.2d 68 (Fla. 1971), held that a confession is not inadmissible just because the suspect is mentally weak, unstable or of low intelligence. What is crucial is an appreciation of what he is

doing. See also, Keeton v. State, 427 So.2d 231 (Fla. 3rd DCA 1983).

Kight's own experts testified that he knew what he was doing. Indeed, Kight perceived what the police were doing (taking clothes for a lab test) and what they would find (Butler's blood). Kight intuitively gave a preemptive, exculpatory statement. (Not a confession.)

ARGUMENT: POINT IV

THE TRIAL COURT DID NOT ERR IN ADMITTING THE RESULTS OF LAB TESTS ON KIGHT'S CLOTHING

Mr. Kight claims that the state had no right to seize his clothing while he was a prisoner, due if nothing else to the passage of time between his arrest and the seizure.

Once again, Kight was arrested for a different crime on December 7, so there was no reason to take his clothes then. Kights clothing was seized contemporaneously with his December 17 arrest on this charge.

As a prisoner in lawful custody, Kight's property was subject to a warrantless seizure. See Lightbourne v. State, 438 So.2d 380 (Fla. 1983). The best case on point, however, seems to be United States v. Edwards, 415 U.S. 800, 39 L.Ed.2d 771 (1974). There, as here, the defendant was a prisoner whose clothing was seized (a day after his arrest) without a warrant. In approving the seizure, the Court held:

> "The police were entitled to take from Edwards any evidence of the crime in his immediate possession, including his clothing." Id. at 805.

and

> "This was and is a normal incident of a custodial arrest, and reasonably delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or

> immediately upon arrival at the place of detention. Id.

and

> "This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the property room of the jail and, at a later time searched and taken for use at the subsequent criminal trial." Id.

There clearly was no error in this seizure.

ARGUMENT: POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS THE TESTIMONY OF THE STATE'S WITNESSES

Charles Kight and Gary Hutto were, as represented, arrested for the robbery of Herman McGoogin on December 7, 1982. No "booking report" of Mr. Kight appears at (Tr 696) nor does that reference reflect testimony, from a public defender, that he or she had any notice at all of any statement from Hutto incriminating Kight. Kight's arrest report appears at (R-9), and contains no statement from Hutto. The testimony elicited regarding this report from Sergeant Elrod at (Tr 692-93) describes the form correctly; to wit: a form bearing the suspects name, address, phone number, social security number and other personal data on the front, and a medical report on the back. Thus, the representation that Kight's arrest report put the public defender "on notice" is simply not correct.

The truth is that Kight and Hutto were before the court on first appearance. The "right to counsel" had not yet attached since charges had not yet been filed. Kirby v. Illinois, 406 U.S. 682 (1972). First appearances are not "adversary proceedings" so neither Kight nor Hutto were entitled to the assistance of counsel, effective or not, at that time. Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54 (1975); Walker v. Wainwright, 409 F.2d 1311 (5th Cir. 1969) cert.den. 396 U.S. 894.

The defendants were deemed indigent and the office of the Public Defender was "appointed," but given the absence of a case or controversy no rights had attached.

The Public Defender's office sent its representative to see Kight and explain his rights to him yet "again." Here it must be noted that the Public Defender is accused of incompetence for not filing something called an "Edwards" notice. There is no such thing as an "Edwards notice" and the term should not be legitimized. Edwards involves a defendant's invocation of the right to counsel. In Roman v. State, 10 F.L.W. 495 (Fla. 1985) this Court noted that counsel had no reciprocal right to order police not to communicate with his client!

Despite many warnings from the police, the court, and defense counsel's office Kight boasted about his crime to several inmates.

When Kight and Hutto were arrested for first degree murder on December 17, 1982, the arrest stemmed from Kight's statement against Hutto. The Public Defender promptly moved to withdraw from Kight's case due to the conflict.

The appointment of a single lawyer to represent two or more co-defendants does not, of course, automatically create a "conflict of interest." State v. Youngblood, 217 So.2d 98 (1969); Babb v. Edwards, 412 So.2d 859 (Fla. 1982). The Public

Defender, upon verifying the existence of conflict, may move to withdraw. Babb, id. So, again, the record shows absolutely no error or misconduct by the public defender.

Eventually, however, the Public Defender had to represent Mr. Hutto. Mr. Kight was no longer represented. Owing sole allegiance to Hutto, the Public Defender accomplished what Kight's laywer could not; a successful plea. The terms of the plea included providing the state with the names of inmate witnesses (not police, so again Edwards is irrelevant). Those names were eventually provided by Mr. Link, and included some witnesses discovered by the public defender and some discovered by Mr. Link, on his own. No witnesses were revealed to either the public defender or Link by Mr. Kight!

Kight suggests that Mr. Hutto's lawyers had some duty to sabotage Hutto's defense out of some sense of loyalty to either an ex-client or simply a co-defendant. No such duty exists. (If it did, any time a public defender certified conflict under Babb he would have to withdraw from both clients' cases.) Hutto cannot be expected to pass up a life saving plea bargain to save Kight. Especially when Kight's statement blamed the murder on Hutto.

This case is analogous to Olds v. State, 302 So.2d 787 (Fla. 4th DCA 1974). There, Warner Olds (the Broward Public Defender) represented one of two co-defendants in a homicide case. The

other co-defendant had been represented by Olds' office in the past. The co-defendant was a state witness (against Odds' client) pursuant to a plea bargain for a reduced charge. The Circuit Court, operating under an erroneous perception of the attorney client privilege, restricted Olds' cross examination of the ex-client and finally held Olds in contempt.

The holding was reversed, and this Court denied review.

Among the erroneous restrictions were the following:

> (1) The witness' statements to the Public Defender and Prosecuting attorney were disallowed.
>
> (2) The witness' terms of his plea bargain were disallowed.
>
> (3) Public records of the witness' conviction were disallowed.
>
> (4) The witness' prior statements to third parties were disallowed.

Kight's statements, made despite the numerous Miranda warnings, to third parties were not subject to any attorney-client "privilege." Indeed, no matter what the Public Defender learned, attorney Link (who had no conflict) was able to develop at least one other witness on his own! That witness knew the others, so in all probability these inmates would have been discovered anyway. That, however, is academic. The fact is that there was no "ineffectiveness" by the public defender, and no ground for suppression.

Indeed, the State questions why the evidence would even be suppressed at all. Suppression is a sanction for improper police conduct, not defense-conduct. Otherwise, every defendant could orchestrate the suppression of all incriminating evidence.

ARGUMENT: POINT VI

THE TRIAL COURT DID NOT ERR IN REFUSING TO DISMISS THE INDICTMENT

The Appellant attempted to dismiss the Indictment by alleging discrimination in the selection of grand jury foremen in Duval County. As is usual in claims of this kind, Appellant did not allege discrimination in the selection of the foreman of his grand jury, nor did he allege any particular, personal prejudice as the result of his suspicions. Instead, he made the chronic, meritless claim typical of these cases and alleged some nebulous entitlement to relief in 1986 based upon "discriminatory practices" in 1960.

This claim came up for evidentiary hearing at which time the Appellant put on his "expert," Dr. Powell. Dr. Powell did not have any idea how Florida judges selected foremen; nor did Powell factor into his equation any of the recognized legal exemptions from service; nor did Power check to see why anyone in particular was not selected; nor did Powell compare the respective qualifications of foremen as opposed to other grand jurors. All Powell did was compare general population percentages to "foremen percentages," which was as simplistic and inaccurate an analysis as possible. He further shaded his results in favor of his employer by taking his data base from census figures going back to 1960. Thus, when one recalls that the civil rights movements

for blacks and women were almost unheard of then, one can see how statistics were conveniently skewed.

The State countered this alleged "evidence" by calling in every single available judge to testify to his procedure for selecting a grand jury foreman. These current, sitting, judges had selected black and female foremen as well as white, and had based their selections on legal criteria.

The trial court had to weigh the truth against Kight's loaded statistics, and refused to dismiss the Indictment. [Note: There was no stipulation by the State to any "under representation" at Tr 376-84 as represented. In fact, the opposite is true, as Ms. Watson argued on behalf of the State, there was no statisically unacceptable variation between the compared percentages, and when statutory factors are considered the variation that does exist is explained Tr 1076-1084]. Now that the evidence has been weighed, the court's finding of fact is not subject to review. Tibbs v. State, supra.

The Appellant opens his argument with a citation to Rose v. Mitchell, 443 U.S. 545 (1979).

This Honorable Court has already disposed of this claim. Andrews v. State, 443 So.2d 78 (Fla. 1983). In that case, an appellant alleged racial discrimination in the selection of Leon County foremen, also citing Rose. The State called every

available Circuit Court judge, adducing testimony identical to that given by the judges here. This Court quoted United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982) as follows:

> "Each judge testified that he acted independently of the other judges in making a selection. These guidelines generally consisted of four separate factors: (1) Occupation and work history; (2) leadership and management experiences; (3) length of time in the community; and (4) attentiveness during the jury impanelment. These factors directly relate to the ability to perform the administrative functions and duties of a grand jury foreman. This is not a case in which arbitrary and unrelated criteria operated to exclude distinct groups from a position . . . We can think of no better criteria for determining which grand jury member is best able to serve as foreman."

Id. at 81.

Perez-Hernandez looked at Southern (Federal) District foremen. Those federal practices tracked the ones used in Leon County, and Duval County as well. See also United States v. Holman, 680 F.2d 1340 (11th Cir. 1982).

This Court went on to note that there is no appreciable difference between the duties of a federal and a Florida grand jury foreman. Andrews, at 83. For that reason Florida and federal grand jury practices do not compare to those of Tennessee. (Rose).

Finally, this Court noted in Andrews that one cannot compare grand jury foreman percentages to population percentages. When there is no racial discrimination involved in the selection of grand jurors (and Dr. Powell confessed there was none) any percentage disparity between foremen and the general population of the county becomes statistically irrelevant.

The State does question the concept that social science surveys are capable of establishing "discrimination" in grand jury selection. As confessed by Dr. Powell, his survey failed to take into account any of a myriad of variables, including:

> (1) Statutory rights of some people to be released from service at their request - including mothers of young children and pregnant women. (These are heavily exploited by unwilling potential jurors to escape service).
>
> (2) Removals for cause.
>
> (3) The effect of social trends such as the civil rights or women's movements. (Especially upon factors such as management experience).

The fact is, sociological surveys provide, at best, circumstantial hearsay evidence which does not accurately reflect what Dr. Powell brushed off as "mere variables." These once-chic surveys have now fallen into general disrepute following McClesky v. Zant, 580 F.Supp. 338, rev. en banc 729 F.2d 1293 (11th Cir. 1984). (Rejecting the Baldus "study"). Bare statistics do not have as a rational nexus proof of "discrimination." Without that rational nexus, no prima facie case can exist. Tot v. United

States, 319 U.S. 463 (1953). (It is to be noted that Dr. Powell used no variables. Dr. Baldus incorporated over 230 variables and still found his data inconclusive). McClesky v. Zant.

In sum, therefore, Kight's "statistics" have the accuracy and scientific merit of the Piltdown Man, and should receive similar acclaim.

ARGUMENT: POINT VII

THE TRIAL COURT DID NOT ERR DURING JURY SELECTION

The Appellant next visits a rather chronic claim under Witherspoon v. Illinois, 391 U.S. 510 (1968). It is submitted that if the court erred at all it was in favor of the defense, since the judge let defense-biased jurors (Witherspoon excludables) sit on the trial jury, to be removed only for the sentencing phase.

The correct standard of review, of course is the one set forth in Wainwright v. Witt, 496 U.S. ____, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), a point conceded by Kight. Let us, therefore, recall certain facts conspicious by their absence from Kight's brief:

> (1) At page 53 Kight alleges venireman Andrews was "wrongfully retained." The truth is, Andrews did not serve on the jury because the State challenged Andrews over defense objection! How can he be heard to appeal? (Tr 1558)
>
> (2) Veniremen White and Dinkins were removed on defense challenges. (peremptory). The defense did not exhaust even half of its peremptory challenges.
>
> (3) Given the unused defense challenges, any "biased juror" who sat did so at Kight's pleasure.
>
> (4) "Especially" objectionable venireman Bird was excused from service for health reasons during voir dire.

Without naming the jurors or stating when they were stricken, Kight inserts another phantom claim that seven jurors who could abide by their oaths were "stricken." This is simply not so. Every single juror who opposed capital punishment but said she or he could still convict was allowed to remain in the pool, over state objections. For the record, those venire were Ms. Williams, Mr. Szuch, Ms. Chambers, Ms. Andrews, Ms. Merrell, Mr. Reed, Mr. McAfee, Mr. Kent, Mr. Heyman, Ms. Small, Ms. Graham and Ms. Anderson.

Nine jurors admittedly did not qualify under Witt, with several not even qualified under Witherspoon. Ms. Antolec was opposed to capital punishment and, on the question of following the law, gave contradictory answers that blindly followed the insinuations of the questioner. The Court had no idea what she would do. (Tr 1345) Ms. Mote flatly refused to convict anyone. (Tr 1369) Ms. Reed leaves these things to God, and would release Kight at once. (Tr 1402) Mr. Bowes felt it is not his place to convict anyone. (Tr 1435) Mr. Heying refused to convict anyone if capital justice could result, (Tr 1509-12) nor would Mr. Ross or Mr. Thompson. Ms. Jones answered questions the way Antolec did, (Tr 1713) while Atwater's religious beliefs would compel him to acquit even Hitler. (Tr 1649) None of these venire deserved to serve on this jury.

Lastly, the Appellant falsely accused the court of racism. The Court took pains to offset this charge by periodically noting the race and sex of retained veniremen. Retained veniremen who were black and/or female and who opposed capital justice included Chambers, Reed, McAfee, Small and Graham. Other retained blacks included veniremen Brown and Nelson. This claim is unworthy of further discussion.

The final jury did not include a single "Witherspoon" juror (Supp. Trans. 149) thus mooting this inquiry.

ARGUMENT: POINT VIII

THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS KIGHT'S STATEMENT

Mr. Kight argues that the court erred in allowing the state to "impeach" him with his own statement while his credibility was not at issue. Kight's basic premise is incorrect.

Kight's statement was relevant because, as one charged with felony murder, his admission to being present at the murder and participating in the robbery was direct, incriminating, proof of guilt without regard to the "credibility" issue.

False alibis, lies to the police and similar "exculpatory" statements are recognized by this Court as having independent evidentiary value beyond mere "impeachment." Douglas v. State, 89 So.2d 729 (Fla. 3rd DCA 1980).

Kight attempts to distinguish Douglas but neglects to mention that the reversal in question was not due to the use of an "exculpatory statement," but rather:

> "The State's case was based upon circumstantial evidence. The fact that the accused's own father apparently believed him guilty and accused him of the crime was a circumstance of such a highly prejudicial nature that under the circumstances the harmless error rule cannot be applied."

supra at 662.

Our case involves no such problem. The evidence was clearly admissible.

ARGUMENT: POINT IX

THE TRIAL COURT DID NOT ERR IN ADMITTING WILLIAMS RULE EVIDENCE

Despite the record, Kight blithely asserts that the Williams rule evidence sub judice was introduced "solely to show bad character."

Williams v. State, 110 So.2d 654 (Fla. 1959) creates a rule for the admission, not exclusion, of evidence tending to show intent, plan, motive, modus operandi, lack of mistake, identity or common scheme. Kight "alleges" that the following evidence does not fit any of those categories but merely reflects "bad character".

Kight and Hutto, on consecutive nights, hailed two cabs, driven by black operators, from the same neighborhood, had themselves driven to the same neighborhood, robbed the cabbie at knifepoint and fled on foot.

Even the Appellant must admit that the McGoogin robbery was evidence of plan, identity, intent, modus operandi and a common plan or scheme. It was clearly admissible under Section 90.404, Florida Statutues.

Contradicting his "bad character only" claim, Kight also alleges that the court erred in letting the jury consider this evidence for any purpose beyond "identity," (for which defense counsel told the trial court it was relevant). If anything, the

trial court was too generous to the defense in not drawing greater parallels between these two carbon-copy crimes.

The Appellant has failed to allege or show how these virtually identical crimes (differing only in that McGoogin escaped) were so dissimilar that the full breadth of the Williams Rule would not apply.

ARGUMENT: POINT X

THE TRIAL COURT DID NOT LIMIT CROSS EXAMINATION IMPROPERLY

(A) Scope of Cross

The trial court announced at the outset that it would apply the rule that the scope of direct examination would serve as the scope of cross. Both the state and the defense agreed, and both sides raised objections to the others' cross examinations on these grounds.

Going far beyond the scope of the direct examination of Detective Weeks (the officer who fetched Kight's clothes), defense counsel tried, (without even bothering to lay a predicate) to elicit testimony from Weeks about Kight's alleged "mental problems," including his level of intelligence! Aside from hearsay, Weeks had no knowledge of Kight's IQ; and Weeks was not qualified by training, experience or even familiarity with Kight to render an opinion about his mentality.

While the State agrees that a full and fair cross examination is vital to a fair trial, Davis v. Alaska, 415 U.S. 308 (1974), no one would suggest that the scope of cross is unlimited. Indeed, even the Appellant's cited authority of Alford v. United States, 282 U.S. 687, 692 (1931), as quoted, refers only to a "reasonable" cross examination. In fact, Kight's federal citations, especially the older cases, must be

viewed with an eye to the fact that the federal system - being without discovery in criminal cases - depends much more heavily upon cross examination than Florida does. That is why Alford says "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination." Id. In Florida, counsel can (and had better) know.

The Appellant goes on to cite some Florida decisions regarding the scope of cross examination, implying that any question which can be described by a fertile, legal, mind as somehow "modifying, supplementing, contradicting or rebutting" direct testimony must be permitted.

In Francis v. State, 10 F.L.W. 329 (Fla. 1985), a death case, the state called a witness who herself was facing a murder charge. The defense wanted to cross examine her on the pending charge and imply that she had a "motive" for testifying even though there was no deal between the witness and the state. This cross examination was disallowed, and this Honorable Court upheld the limitation; citing the evidence code's prohibition against irrelevant evidence of collateral, unrelated charges.

In Echols v. State, 10 F.L.W. 526 (Fla. 1985), another death case, the defense wanted to cross examine an investigator by examining him on "things he could have done but did not." The inquiry was outside the scope of direct examination so, pursuant

to Steinhorst v. State, 412 So.2d 332 (Fla. 1982) the restriction was upheld.

In our case, the record shows that Weeks merely testified to escorting Kight to the property room, at which time Kight offered to speak. Defense counsel wanted to question Weeks, who is no doctor and did not know Kight, about Kight's alleged low IQ and mental problem! (Facts about which this witness was wholly unqualified to testify to.)

The State objected because the inquiry was outside the scope of direct and because no notice of any intent to rely upon an insanity defense had been filed. Defense counsel acquiesced on both points but insisted that he should have the right "anyway."

Whatever rebuttal evidence Kight may have wished to present on his side of the case, the fact remains that per Echols, Steinhorst and Francis he could not do it on cross.

(B) Hearsay and Interpretation Thereof

Mr. Kight believes that his right to "cross examine" Mr. McGoogin on a collateral, unrelated, crime includes the right to (a) elicit hearsay testimony and (b) offer the witness' inexpert interpretation of that hearsay testimony. This position is untenable at best.

Despite his reliance upon cases from the 1800's, Kight must be aware that over the course of this century Florida has developed an evidence code.

There can be no doubt that hearsay evidence is inadmissible. Kight claims that an "exception" should be carved out for him because the hearsay, plus a favorable interpretation thereof, could show his "lack of intent" in a different crime, which in turn could imply a lack of intent in this crime. Thus, intentional first degree murder could be attacked, leaving the state with only felony murder.

This highly attenuated piece of "logic" can be analogized to an attempt by the prosecution to use hearsay evidence in Wells v. State, 10 F.L.W. 2352 (Fla. 3rd DCA 1985). There, a hearsay statement by a witness to an officer was offered despite the rule (See sec. 90.802, Florida Statutes 1983) because "hearsay" could demonstrate the officer's "probable cause" to arrest. The use of hearsay to prove a mental state was resoundingly rejected. See Postell v. State, 398 So.2d 851 (Fla. 3rd DCA 1981); Lane v. State, 430 So.2d 989 (Fla. 3rd DCA 1980).

Clearly, there is no reason to find error in the court's rejection of cross examination regarding hearsay statements plus speculation as to what the statements meant - all relevant to "intent" in an unrelated crime, offered solely to imply "lack of intent" (by inference) in this crime.

ARGUMENT: POINT XI

THE TRIAL COURT DID NOT ERR IN LIMITING THE APPELLANT'S CASE

The Appellant never filed any notice of any intent to file an insanity defense. Fla.R.Cr.P. 3.216(b). The Appellant was examined by numerous experts before trial, who found him sane at the time of the offense.

During trial, Kight attempted to ambush the state by producing evidence of "mental incapacity" due to "retardation" which was so severe that he could not form the "requisite intent" to commit a crime. In other words - a verbose statement of insanity.

Kight was allowed to proffer his testimony. At the outset, we should examine this proffer because upon doing so, we shall see that this entire point on appeal centers on evidence which, if admitted, would not have helped Kight anyway. (Indeed, this evidence was later admitted in the sentencing phase and the jury overwhelmingly recommended death.)

Dr. Krop, a psychologist, testified that Kight was generally passive and a "follower." (Tr 2230) He also testified that Kight was sane on the night of the murder. (Tr 2230) He knew just what he was doing (even if told to do it) and he knew right from wrong at the time. (Tr 2230) Interestingly, Kight was aware of the "insanity defense" and how to exploit it. (Tr 2233) Kight was

also capable of forseeing the consequences of his acts and of blaming someone else for them. (Tr 2238)

When this evidence is compared with that of the state's witnesses (regarding Kights' boast that he "killed a nigger" and would "get off on insanity") it is easy to see how incriminating Krop's testimony could have been.

As damaging as Krop's testimony was, Dr. Miller's was worse. Miller testified that there was nothing in Kight's "passive" nature that would preclude his taking the initiative or generating independent action! (Tr 2243, 2246) Miller agreed Kight was sane at the time of the murder.

This evidence indeed went to the "heart" of Kight's defense. It went like a dagger! It is suggested that Kight would challenge the effectiveness of any lawyer who succeeded in putting this evidence on during the guilt phase of his trial. (After conviction, the evidence was mitigating and was admitted.)

Retardation is not proof of insanity in Florida, as conceded in the Appellant's brief. Kight's "diminished capacity" defense was nonetheless an attempt to sneak an "insanity defense" in the back door, without notice. Its exclusion is directly attributable to the Appellant's non compliance with Fla.R.Cr.P. 3.216(b):

> "When in any criminal case it shall be the intention of the defendant to rely

> upon defense of insanity, no evidence offered by the defendant for the purpose of establishing such defense shall be admitted in such case unless advance notice in writing of the defense shall have been given by the defendant as hereinafter provided."

In Pope v. State, 441 So.2d 1073 (Fla. 1983) this Court stated that no party to a cause may invite error and then be heard to complain about it on appeal. By not filing a notice, despite procuring psychiatric evaluations, the Appellant sent a clear signal that he was not going to rely upon an insanity defense. It must be considered "invited error," therefore, that Appellant was prohibited from adducing his "proof" of insanity at trial.

It is further noted that Section (f) of the rule provides a remedy in the event that a pretrial insanity-defense notice is not filed. A defendant may request a mistrial and leave to file such a notice. Again, this was not done. Thus, Appellant elected to let any "error" stand.

This case stands in stark contrast to Morgan v. State, 453 So.2d 394 (Fla. 1984). There, Morgan went to trial utilizing an insanity defense and lost, but won an appellate reversal. On retrial, Morgan orally represented that he would rely upon the same defense and filed written, pretrial proffers - but he neglected to actually file the notice. He was not allowed to call his witnesses and this Court again reversed. In doing to,

this Court found that the State had de facto notice of his intentions, and that a mid-trial recess of over 30 days would have given the state time to defend had the evidence showed incompetence at the time of the offense (meaning that the jury need only accept or reject the evidence - an issue not relevant).

In our case no notice was filed or asserted orally. Kight's evidence, unlike Morgan's, established competence, not incompetence. No recess was requested. It is submitted that the mandatory language of the rule was not abolished by Morgan; and that the rule should be applied in this case.

Finally, in lieu of the fact that under Zeigler v. State, 402 So.2d 365 (Fla. 1981) and Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976) the evidence could be inadmissible anyway; and in lieu of the fact that the proffered evidence in no way supported the stated purpose of presenting it, it is submitted that the Court committed no error (even if right for the wrong reason) or, if it erred, the error was harmless (especially when we recall that this evidence did come in during the sentencing phase and had no effect at all on the jury).

ARGUMENT: POINT XII

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY

The trial court advised the jury that it could talk or could refuse to talk to others regarding its guilt phase deliberations.

One unidentified juror said she saw Detective Kesinger after the trial, but after identifying herself as a juror said nothing to him. A second juror, Mr. Perry - did discuss the case with others. Perry was excused from the jury, over defense objections.

We must question the good faith of any appeal which cites as "error" an instruction that jurors can speak, but then shows a record objection to the removal of the only juror who did speak.

It is suggested that the defense may have objected to Perry's removal (note: on other grounds) just so a "tainted" juror would remain on the panel, thus enhancing the chances of success on appeal. (After all, Kight was already convicted). Nevertheless, the fact remains that no matter the Court's instruction that jurors "could" talk, the only "tainted" juror left the jury and the sentencing phase was conducted before a jury which was no different than the one which did not receive permission to speak.

Kight contends that he was entitled to a jury "free from distraction and improper influence" pursuant to Livingston v.

State, 458 So.2d 235 (Fla. 1984). If he was so concerned, why did he object of Perry's removal? Only two possible answers exist: (1) Kight was telling the truth when he protested to the Court that he wanted to continue with "the same jury" he started with - meaning either that this de novo claim is a lie, or (2) He, being already convicted, wanted to sandbag some error for use on appeal. See Pope v. State, supra; Snook v. State, 10 F.L.W. 2481 (Fla. 3rd DCA 1985); United States v. Curry, 471 F.2d 419 (5th Cir. 1973).

Livingston notes that when a jury is discharged during deliberations they need not be sequestered as long as they are examined on their return to be sure no outside influences prejudiced them. See Diaz v. State, 435 So.2d 911 (Fla. 4th DCA 1983). Although Livingston holds that jurors ought to be sequestered, in high publicity capital cases, during guilt phase deliberations, the suggestion does not abolish Fla.R.Cr.P. 3.370, nor is it of universal application.

Livingston is applied on a case by case basis, having no impact where the facts do not warrant relief. See Frankling v. State, 472 So.2d 1303 (Fla. 1st DCA 1985).

Livingston, we would note, was decided just seven months after Oats v. State, 446 So.2d 90 (Fla. 1984). There, Oats (a capital defendant) argued that the court failed to sequester his jury in the face of much adverse publicity. This Court, noting

that sequestration is not required in capital cases, Ford v. State, 374 So.2d 496 (Fla. 1979) cert.den. 445 U.S. 972 (1980), looked to the facts of the case and the nature of the publicity before making any determination of prejudice. Neither prejudice nor juror misconduct was presumed. Absent proof of prejudice, Oats conviction was affirmed.

Here we must emphasize one stark difference between Livingston, Ford, Oats, Diaz and our case: those decisions addressed guilt phase deliberations. Our case only involves non-binding sentencing phase deliberations-thus further minimizing any "error."

Using the requisite case by case approach; and finding no actual juror misconduct, no defense demand to remove any juror, plus the fact that "trial was over" for the jury as far as any binding decision was concerned; if any error occurred, it was harmless.

ARGUMENT: POINT XIII

THE STATE DID NOT UTILIZE IMPROPER CLOSING ARGUMENT DURING THE SENTENCING PHASE

The prosecutor did not engage in improper argument during the sentencing phase. On the other hand, defense counsel did engage in improper argument which, arguably, was probably as much to blame for the jury's recommendation as anything the State said or did.

The State argued on behalf of the aggravating circumstances it felt were proved by the evidence. When, at (Tr 2640), it mentioned Butler's slow death and his realization that he lay dying, that was a direct common on the testimony of Dr. Floro that Butler died a slow death, fully realizing what was happening to him. Thus it was a proper comment on the evidence of Butler's heinous atrocious or cruel death. White v. State, 403 So.2d 331 (Fla. 1981); Henderson v. State, 463 So.2d 196 (Fla. 1985). In any event, Sheppard's objection was to "facts not in evidence," which clearly was not true, and not to "improper argument." Therefore, the want of a specific objection precludes appellate review in any event. Lusk v. State, 446 So.2d 1038 (Fla. 1984); Walker v. State, 10 F.L.W. 753 (Fla. 1st DCA 1985); Clark v. State, 363 So.2d 331 (Fla. 1978).

The next so called "objectionable" argument was a brief discussion of the concept of felony murder. It was intended to

address jurors who might not wish to recognize that felony murder, just like premeditated, can be punished by death. Here, again, Mr. Sheppard's objection was not on point. Sheppard objected that the State "need not explain legislative intent" (if there even is such an objection). No claim of impropriety or of "inflammatory tactics" was raised. Indeed, Sheppard's objection was merely conceding the fact that, in Sheppard's words: "they passed this as an aggravating circumstance." (Tr 2645) By conceding that the State was arguing a statutory aggravating circumstance, Sheppard revealed the frivolity of the objection. No one can seriously allege that this comment was of such a nature to require reversal. Indeed it was not. State v. Murray, 443 So.2d 995 (Fla. 1984); Meeks v. State, 10 F.L.W. 1853 (Fla. 4th DCA 1985).

The next objectionable argument was a "half argument" that, if improper, became so because defense counsel interrupted the State in the middle, causing a distorted message to reach the jury.

Remember that Sheppard tried to "humanize" his client by having his mother and sister come in to weep to the jury about Kight's hard life. While a hard life is not a permit for murder, the sympathy value of a mother's plea for her son's life cannot be overlooked. The evidence was calculated to prompt the jury to disregard its oath and recommend life without regard to the

"aggravating and mitigating" circumstances. This testimony was admissible, of course, despite the fact that the State could not let the victim's wife identify his hacked-up body because "sympathy for the victims" might be generated (the victims being the deceased and his widow).

In any event, the State attempted to argue that the jury could not arbitrarily and capriciously recommend a sentence of life or death based upon "feelings of sympathy or mercy", for either sides. This is a correct statement of post-Furman law. In fact, in Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983) the Court noted that "mercy" in Florida death cases is not an independent "boon" to be granted but rather is a factor already built in to our statute, which has "asymmetry on the side of mercy."

By interrupting when he did, defense counsel clipped the argument off so as to make it appear the state was only going to discuss the victims. His second objection, after the state got to give the full argument, incorrectly stated the law, while accusing the state wrongly of misconduct (in the presence of the jury).

In Bertolotti v. State, 10 F.L.W. 407, 408 (Fla. 1985) the court held that:

> ". . . prosecutorial error alone does not warrant automatic reversal of a conviction. In the penalty phase of a

> murder trial, resulting in a recommendation that is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence."

The prosecutor's perfectly correct comment on mercy - which also rebutted Kight's sympathy ploy - was hardly "egregious indeed." See Valle v. State, 10 F.L.W. 381 (Fla. 1985).

Finally, the prosecutor was accused of "expressing a personal opinion" when, in argument, she said "If the death penalty is appropriate in any case, it is appropriate in this case." That is not a statement of personal opinion forbidden by any rule. That comment is merely a conclusory statement following a summary of the evidence.

What are prosecutors expected to do? Flaccidly outline testimony and then sit down without asking for any verdict?

In reviewing "prejudice," we cannot overlook the Appellant's argument. Mr. Sheppard began with a personal comment about how wrong he felt the guilty verdict was, but how he had come to live with it, (objection sustained). (Tr 2665) He then told the jury "I say" death is inappropriate (Tr 2669) and that he felt a life sentence was appropriate in the interests of justice. (Tr 2684) Sheppard also told the jury that Kight is "society's failure" (Tr 2669) and that we should not "exterminate our failures." (Tr 2670) This assuredly did not impress the jury.

Absent any error, egregious or other, and in lieu of the totality of the circumstances, this claim is meritless.

ARGUMENT: POINT XIV

THE TRIAL COURT DID NOT ERR IN "REJECTING" PROFFERED MITIGATING EVIDENCE

The defense failed to produce any meaningful evidence that Kight's low IQ diminished his culpability for his crime. Any evidence of mental problems was further weakened when (1) Kight's experts testified that he was capable of "faking" insanity, and (2) they stated he was capable of acting independently and of his own initiative, and (3) that Kight boasted he would escape via an "insanity defense," and (4) Kight had the presence of mind to lie, blaming Hutto, and (5) the allegedly "illiterate Kight, who completed 9th Grade, saved newspaper clippings about the murder.

Clearly the "expert" testimony was of dubious weight. In Card v. State, 453 So.2d 17 (Fla. 1984) this Court held that it is the province of the trial court to assess expert testimony and either accept or reject it. See also Smith v. State, 407 So.2d 894 (Fla. 1981). The same holds true in this case. Only in the face of a culpable abuse of discretion (not alleged or shown) would relief be warranted Pope v. State, 441 So.2d 1073 (Fla. 1983).

ARGUMENT: POINT XV

THE DEATH PENALTY WAS PROPERLY IMPOSED

In Randolph v. State, 463 So.2d 186 (Fla. 1984) this Court held that its function in death cases "is that of sentence review, not sentence imposition." See Brown v. Wainwright, 392 So.2d 1327 (Fla.) cert.den. 454 U.S. 1000 (1981); Mickenas v. State, 367 So.2d 606 (Fla. 1978).

The Appellant, however, requests resentencing here on the following grounds:

(A) His history and background.

(B) Hutto's sentence.

The court was aware of Kight's history and considered it. In fact, one facet of it impressed the court sufficiently to find it a mitigating circumstance. The Court was not bound to accept Kight's hard life and low IQ as a mitigating factor. The court was not bound by "expert" testimony State v. Ward, 374 So.2d 1128 (Fla. 1st DCA 1979); Nettles v. State, 409 So.2d 85 (Fla. 1st DCA 1982) regarding low intelligence, especially when it had no bearing on the crime. Indeed "low intelligence" was properly rejected as a factor in Mills v. State, 462 So.2d 1075 (Fla. 1985).

Likewise, a tough childhood is not an obligatory mitigating factor. In Lard v. State, 464 So.2d 1173 (Fla. 1985) this Court noted that a difficult childhood is a nebulous "mitigating"

factor which may be either accepted or rejected depending upon the existence of a causal connection between the crime and the defendant's experiences. Again, the weight to be assigned this evidence is the province of the trial judge.

(B) Hutto is sentence

This case is the opposite of Enmund v. State, 399 So.2d 1362 (Fla. 1981) rev. Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140 (1982). Whereas in Enmund the co-defendant actually killed the victim but got life (while Enmund got death) in our case Kight was the killer (and got death) while Hutto, the mere accomplice, got life.

Here the sentences were particularized and personal as Enmund v. Florida, required, and were in proportion to the respective liability of each party.

ARGUMENT: POINT XVI

THE STATE DID NOT FAIL TO DISCLOSE ANY DEAL WITH ANY WITNESS

Mr. Kight had the name of every state witness, including the prisoners named in his petition for coram nobis, and had the opportunity to depose each one of them. None of the witnesses made any "deal" with the State which was not fully revealed prior to trial.

As noted in our statement of the facts, one witness was due for parole within months and was due for pre-parole work release anyway. Another witness received help after trial that was not planned before trial.

The record is devoid of any proof of misconduct other than the imaginings of Mr. Kight. This court does not reverse on speculation. Sullivan v. State, 303 So.2d 632 (Fla. 1974). Furthermore, a coram nobis petition on this very point was denied on the merits (not dismissed) making that the law of this case.

One final note. Kight refers us to his petition for coram nobis in lieu of briefing the issue for no justifiable reason. Kight was allowed to file an enlarged brief, and it is not the obligation of the State or this Honorable Court to hunt down his claims or draft his arguments. Lynn v. Fort Lauderdale, 81 So.2d 511 (Fla. 1955).

ARGUMENT: POINT XVII

THERE IS NO "CUMULATIVE ERROR"

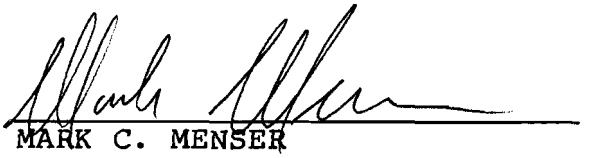
The whole being the sum of its parts, and the sixteen parts herein being devoid of legal or factual merit, no "cumulative error" exists.

CONCLUSION

The Appellant has failed to allege or show any basis for relief supported by the record or the law.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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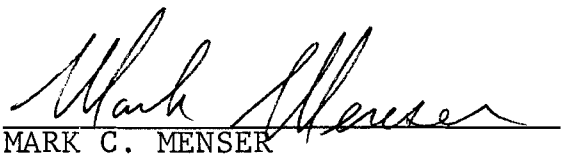
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Amended Answer Brief of Appellee was forwarded by U.S. Mail to William J. Sheppard, Esquire, Sheppard & White, P.A., 215 Washington Street, Jacksonville, Florida, 32202, on this 17th day of April, 1986.



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