IN THE SUPREME COURT OF FLORIDA

KIRK ALLEN HANSBROUGH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 67,463

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant/Defendant in this Reply Brief will only cover those matters necessary to comment on in light of the Appellee/State's Answer Brief. The Defendant rejects in part as inaccurate many of the factual assertions of the State in its Brief. The Defendant will point out those factual disagreements in responding to the various points of the State's Answer Brief.

References to the Appellee's Answer Brief will be made by reference to "AB" followed by the applicable page number.

STATEMENT OF THE CASE AND FACTS

The Defendant adheres to the Statement of the Case and Facts set forth in his Initial Brief and rejects any disagreement by the State in its Brief of factual statements.

The State in its Brief incorrectly attempts to editorially characterize the Defendant as having a "small drug habit". However, the State in its Brief correctly points out that even some of its own experts, including Dr. Ernest Miller, stated that the Defendant was drug and alcohol dependent at the time of the robbery and homicide (AB-12). Dr. Miller testified that the Defendant was in a highly charged emotional state at the time of the homicide (AB-12). The three psychiatrists and two psychologists who testified that the Defendant was legally insane all agree the Defendant had a serious drug addiction and was in drug withdrawal at the time of the homicide.

The State at page 51 of its Brief correctly points out that this was not a premeditated murder but only a felony murder. The State in its Brief concedes:

> "There is no doubt that Hansbrough went to the Ramsey Insurance Agency, not to murder, but to rob." (AB-51).

Despite a comment by the State in its Brief that Shad Martin's testimony was not emphasized, the State itself puts tremendous emphasis on his testimony throughout its Answer Brief.

POINT I

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS ALL PHYSICAL EVIDENCE, ALL STATEMENTS OF THE DEFENDANT, ALL STATEMENTS PAST OR IN THE FUTURE OF WITNESSES SHARON ALDEN, ROBERT ALDEN, SR., ROBERT ALDEN, JR., AND ALL OTHER DERIVATIVE EVIDENCE OBTAINED AFTER THE DEFENDANT'S TRAFFIC STOP AND ARREST

The State argues that the Defendant did not preserve the issues as to suppression of statements and physical evidence during trial. During the Trial, the Defendant specifically objected to the admission into evidence of the Defendant's shoes, the consent form signed by the Defendant, the Defendant's shirt and trousers, based on his pre-trial objections (895) and also objected to the admission of shoes during John Chisari's testimony (989), based on the grounds in his pre-trial motions denied by the Court. These pre-trial objections were clearly preserved.

Furthermore, two long evidentiary hearings were held on the Defendant's Motion to Suppress Statements and Evidence (including derivative evidence) prior to Trial with the Court entering written orders on those motions. The Court was presented with memorandum of law from the Defendant as well as long argument from the Defendant. The Court and the State were fully aware of the Defendant's objections to this evidence and testimony. The Trial Court entered a long order denying the Defendant's pre-trial motions to suppress statements and evidence (5091-5094). Contrary to the State's assertion, the Defendant specifically objected to the testimony concerning the Defendant's shoes, consent form, shirt and trousers based on the pre-trial motions (895; 989). Any further objection by the Defendant on any pre-trial motion issue

would have been completely useless because the Trial Court had indicated in advance that any further objection would be fruitless. Thomas v. State, 419 So.2d 634 (Fla. 1982); Brown v. State, 206 So.2d 377 (Fla. 1968).

The State in its Answer Brief does not cite, distinguish, or discuss the main cases cited in support of the Defendant's argument that a minor traffic violation may not be used as a pretext to stop a vehicle to search for evidence that may indicate a violation of law, which occurred in the instant case. Byrd v. State, 80 So.2d 694 (Fla. 1955); Diggs v. State, 345 So.2d 815 (Fla. 3d DCA 1977); Riddlehoover v. State, 198 So.2d 651 (Fla. 3d DCA 1967).

The cases cited by the State in its Brief on this issue do not deal with a pretextual stop situation which is involved in the instant case. See, e.g., State v. Perera, 412 So.2d 867 (Fla. 2d DCA), rev. den., 419 So.2d 1199 (Fla. 1982); Thomas v. State, 395 So.2d 280 (Fla. 3d DCA 1981). The State in its Answer Brief ignores the pretextual stop issue which is present in the instant case.

It is absolutely clear that the instant case involved a pretextual stop as is reflected by the candid testimony by the police officers, especially Officer Bethea. Therefore, all evidence subsequently derived from the Defendant, physical evidence and statements, should have been suppressed.

Finally, the State in its Answer Brief does not seriously argue that the "inevitable discovery doctrine" applies. See Oregon v. Elstadt, 105 S.Ct. 1285 (1985). The State is precluded from

making such an argument since it waived such an argument by not presenting same in the Trial Court. Furthermore, no evidence to support such an argument was presented by the State in the Trial Court.

Moreover, the Defendant's statements after his arrest on July 23, 1984, should have been suppressed as not freely and voluntarily made, but made as the result of the police utilizing the Defendant's girlfriend to persuade the Defendant to make an incriminating statement. Taylor v. Alabama, 457 U.S. 687 (1982).

The State does not cite any cases in its argument that the Defendant somehow waived his Miranda rights notwithstanding that he refused to give either a written statement or to allow a statement to be recorded after his arrest. A person can exercise his Miranda rights "in any manner". Miranda v. Arizona, 384 U.S. 436 (1966). Without this prophylactic protection, the police would be allowed to use the interrogation device of requesting alternative means of a defendant giving a statement once they have been turned down the first time.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW THE DEFENDANT TO CROSS EXAMINE STATE WITNESS SHADRICK MARTIN AND TO PRESENT THROUGH OTHER WITNESSES EVIDENCE OF SHADRICK MARTIN'S BIAS, MOTIVE AND INTEREST TO LIE IN HIS TESTIMONY BECAUSE OF HIS PRIOR RELATIONSHIP WITH AND FEAR OF BELVIN PERRY AS IT RELATED TO MARTIN'S PENDING SENTENCING ON A SEPARATE CHARGE

The Trial Court prevented the Defendant from cross-examining Shadrick Martin and presenting through other witnesses the fact that Martin had bragged that he had beat a murder charge with Belvin Perry as a prosecutor and that he feared Perry was after him on the pending charge he was facing to retaliate for Martin having beaten Perry previously. The Trial Court did not allow the Defendant to bring out the fact that Martin felt he needed to help prosecutor Perry out as much as he could on this charge to prevent Mr. Perry from coming after him on the pending charge at the time of sentencing, a fear Martin had expressed to others. This was clearly error by the Trial Court and nothing that the State has presented in its Answer Brief shakes the certainty of this error.

The State in its Answer Brief cites to Shadrick Martin's testimony at pages 53, 54, 57, 58, and in other parts of its Brief in support of the legal sufficiency of the Trial Court's finding of two statutory aggravating circumstances, to-wit: that the Defendant killed the victim to prevent his arrest and that it was a cold, calculated, premeditated killing. Additionally, the Trial Court itself specifically referred to Shadrick Martin's testimony in support of its finding of aggravating circumstances in it order imposing the death penalty. Clearly, Shadrick Martin was a star

witness for the State in its case and the Defendant should have been allowed to cross-examine him concerning his strong bias in support of prosecutor Perry, and his very strong motive and interest to lie as shown by his own admissions to other persons that he felt he needed to help prosecutor Perry out in this case to prevent the prosecutor from going after him at sentencing on his pending charge. Nothing in the State's Brief dispels this error. See Harmon v. State, 394 So.2d 121 (Fla. 1st DCA 1980). Again, it is ironic that during argument on this issue, the prosecutor argued that "whether or not Martin felt I was out to get him, really has no bearing in this case" (1498). This fear of prosecutor Perry by Shadrick Martin was the strongest bias, motive and interest for him to lie and the Defendant should have been allowed to present it to the jury. This is especially so since Martin admitted he was facing up to life imprisonment on his pending case. This is not a situation as the State argues in its Brief of the defense merely trying to bring out evidence of a prior arrest. It is the strong significance of the prior relationship that Martin had with prosecutor Perry and Martin's admitted stated fear of Perry that the Defendant was improperly precluded from bringing to the jury's attention.

Additionally, the Court denied the Defendant's motion for disclosure of existence of promises from the prosecutor in the case, Belvin Perry, saying that the defense attorney could talk to the other Assistant State Attorney handling Shad Martin's pending case, and could look at a transcript of the plea of Shad Martin in that case (2820-2822). The State in its Brief erroneously assumes

that all promises made to a person pending sentencing are made on the record. This is simply not so. Many of the most significant promises made by the State to a defendant are intentionally made off the record to protect an inmate from the reputation in jail of being an informant. The prosecutor in the instant case, Belvin Perry, was in charge of the Charge Division at the State Attorney's office (969-972). Just like police officers are responsible for the knowledge of other officers, so must Assistant State Attorneys. It is not a matter as the State characterizes it in its Brief of the defense disbelieving any representations by the prosecutor as to promises made to Shadrick Martin. The prosecutor in this case refused to make any representations as to what promises had been made to Shadrick Martin and the Trial Court refused to Order the prosecutor to do so. The prosecutor shirked its duty under Brady v. Maryland, 373 U.S. 83 (1963), by attempting to avoid telling the defense what promises, if any, had been made to Shadrick Martin in return for his testimony. This is significant especially in view of the fact that Martin admitted that he was facing a potential life imprisonment term on the pending charge.

POINT III

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRAIL AFTER A STATE PSYCHIATRIST, ON DIRECT EXAMINATION BY THE STATE, MENTIONED THAT HE HAD REVIEWED A POLYGRAPH OF THE DEFENDANT AS PART OF THE MATERIALS HE RELIED UPON IN RENDERING HIS OPINION THAT THE DEFENDANT WAS LEGALLY SANE AT THE TIME OF THE HOMICIDE

The State's argument that the Defendant did not adequately or contemporaneously object to reference to testimony by Dr. Miller concerning the polygraph is totally without merit. The Defendant was so concerned that testimony concerning the polygraph examination would come up during the Trial that he exercised tremendous pains in attempting to prevent this problem from arising. The matter came up at a pre-trial hearing where the Defendant expressed his fears to the Court and the State represented that the matter of the polygraph would not come forth from any witness (2907-2908). The Defendant again brought up this matter during Trial and the prosecutor again assured the Court the fact that the polygraph would not be mentioned (847-848). It would have been entirely futile for the Defendant to object immediately after Dr. Miller mentioned the polygraph since it would have been impossible for him to have anticipated mention of the polygraph coming out in light of his prior efforts to prevent the problem from arising. The bell had been rung. The Defendant would have drew further attention to the problem by objecting at that point. The Defendant made his motion for mistrial in a timely manner at the next reasonably available opportunity. Furthermore, the State in the Trial Court properly did not even argue that the Defendant failed

to adequately or contemporaneously object to the comment recognizing the Defendant's proper preservation of this issue. The State in the Trial Court argued the issue solely on the merits.

Dr. Miller, a State psychiatrist, mentioned the polygraph test during direct examination by the prosecutor. Dr. Miller testified that the Defendant was sane at the time of the homicide. Certainly, any reasonable juror would conclude that because Dr. Miller mentioned the fact that he considered a polygraph result as part of the materials he relied upon in reaching his decision that the Defendant was sane, the jury would have to reasonably conclude that the polygraph result related to the Defendant not telling the truth and that this must have been a basis for the psychiatrist's opinion that the Defendant was sane. Reference to the polygraph examination was prejudicial and constituted reversible error. Since the issue of legal insanity is viewed with initial suspicion by a jury, any evidence to shake the credibility of the materials relied upon by experts on the issue would be prejudicial.

Additionally, the State's assertion at page 32 of its Brief that the evidence of the Defendant's guilt was overwhelming is totally inaccurate. This case involved the close issue of sanity of the Defendant. Three highly qualified psychiatrists, including Dr. Lloyd Wilder, former president of the Florida Psychiatric Association, and two clinical psychologists, testified that the Defendant was legally insane at the time of the homicide.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO GIVE THE DEFENDANT'S SPECIAL REQUESTED JURY INSTRUCTIONS

The State in its Brief cites no cases in support of its assertion that the Trial Court did not commit error in failing to give the special requested jury instructions on how to deal with the felony murder issue, where the Defendant was conceding sanity at the time of the robbery, but not at the time of the homicide.

Again, the State in its Brief at page 51 concedes that there was no doubt that Hansbrough entered the insurance agency to rob and not to kill.

The Defendant's alternative special jury instructions on how the jury should deal with the unique situation involving sanity at the time of the robbery, but insanity at the time of the homicide, are fully supported by the cases cited in the Appellant's Brief and cited to the Trial Court. See, Mills v. State, 407 So.2d 218 (Fla. 1981); Campbell v. State, 227 So.2d 873 (Fla. 1967). The State in its Answer Brief does not cite, distinguish or mention in any way those cases. The jury in the instant case would understandably be confused as to how to handle this unique situation. This is most noteworthy in light of the jury's finding of a felony murder rather than premeditated murder in the instant case. The standard instruction is not adequate in the instant case to apprise the jury of the law as it related to the theory of his defense. The Defendant was entitled to an instruction on the theory of his defense.

POINT V

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO INTRODUCE EVIDENCE CONCERNING A PRIOR ASSAULT AND SEXUAL BATTERY ON THE VICTIM NOTWITHSTANDING THAT EVIDENCE WAS RELEVANT TO SUPPORT THE TESTIMONY OF DEFENDANT'S MEDICAL WITNESSES THAT THE VICTIM ACTED IN THE MANNER DESCRIBED BY THE DEFENDANT PRIOR TO THE HOMICIDE

The testimony concerning the prior incident involving the dead victim being previously assaulted and sexually battered in 1977 was relevant to Dr. Miller's testimony and should have been allowed as part of the materials he was relying upon in rendering his opinion.

POINT VI

THE TRIAL COURT ERRED IN EXCLUDING FOR CAUSE JURORS ROGER HILL AND VIRGINIA JAX SINCE THOSE JURORS, ALTHOUGH BEING OPPOSED PHILOSOPHICALLY TO THE DEATH PENALTY, STATED THAT THEY COULD FOLLOW THE LAW AS THE COURT INSTRUCTED THEM

The State in its Brief fails to point out that jurors Roger Hill and Virginia Jax, although indicating opposition philosophically to the death penalty, stated that they would follow the law as the Court instructed them. Those two jurors should not have been excused for cause.

POINT VII

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION TO EXCLUDE FOR CAUSE JUROR WILLIAM LUCAS

The State in its Brief attempts to argue that Juror Lucas's real feelings in the case tended towards pro-life. A review of his testimony indicated that he was strongly in favor of

the death penalty and that his feelings substantially impaired his ability to follow the Court's instructions. The Trial Court clearly erred in failing to exclude Juror Lucas for cause.

POINT VIII

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO EXCLUSION FOR CAUSE OF VENIRE PERSON WHO INDICATED OPPOSITION TO THE DEATH PENALTY, INCLUDING JUROR ROBERT HILL AND JUROR VIRGINIA JAX

The Defendant adequately covered this issue in his Brief and will present no further argument herein.

POINT IX

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH OVER THE JURY RECOMMENDATION OF LIFE IMPRISONMENT

The instant case is virtually indistinguishable from the recent jury override case before this Court in Amazon v. State, 11 F.L.W. 105 (Fla. S.Ct. March 13, 1986). In that case, this Court reversed a jury override sentence of death in a case involving the murder by Amazon of a mother and her 11 year old daughter. Unlike the instant case, Amazon was convicted of killing two persons, a woman and her young daughter. Like the instant case, death to the victims resulted from multiple stab wounds. The Trial Court overruled the jury recommendation of life and imposed death finding four aggravating circumstances and no mitigating circumstances. In the instant case, the Trial Court also found four aggravating circumstances but also found one mitigating circumstance.

In Amazon, the defense was that the murders were committed by the defendant when he had a "depraved mind". In the instant case, the defense was insanity. This Court in reversing the Trial Court's jury override and imposition of the death penalty stated:

> "The Trial Judge found no mitigating factors. However, we are persuaded that the jury could have properly found and weighed mitigating factors and reached a valid recommendation of life imprisonment. We believe there was sufficient evidence for the jury to have found that Amazon acted under extreme mental or emotional disturbance. The defense theory in the guilt phase was that Amazon had acted from a "depraved mind", i.e., committed second degree murder. There was some inconclusive evidence that Amazon had taken drugs the night of the murders, stronger evidence that Amazon had a history of drug abuse, and testimony from a psychologist indicated Amazon was an "emotional cripple" who had been

> brought up in a negative family setting and had the emotional maturity of a 13 year old with some emotional development at the level of a one year old. Age could also be found as a mitigating factor. Although Amazon was 19, an age which we have held is not per se a mitigating factor..., the expert testimony about Amazon's emotional maturity suggests the jury could have properly found age a mitigating factor in this case." 11 F.L.W. 106-107.

Additionally, this Court held in Amazon that the Trial Court properly found that the murders by Amazon were heinous, atrocious, and cruel. This Court also noted that the stabbings were committed in an irrational frenzy. There is absolutely no question but that the stabbing of the victim in the instant case was done during an irrational frenzy. Dr. Kirkland, one of the State's own psychiatrists, testified to this.

In the instant case, the Trial Court erred in finding three of the four aggravating circumstances. Only one aggravating circumstance was proven beyond a reasonable doubt, to-wit: that the homicide was committed during the commission of a robbery. The State in its Answer Brief agrees that the Defendant went into the Ramsey Insurance Agency to rob and not to kill and yet it still attempts to argue the existence of the aggravating factors of "cold, calculated and premeditated" which clearly is not supported in the record - certainly not beyond a reasonable doubt. This is especially so in light of the substantial impeachment of Shad Martin. The Trial Court also clearly erred in failing to find five statutory mitigating circumstances which were proven by substantial evidence and which the jury obviously found to exist. In fact, there was expert testimony that the Defendant herein, like the

defendant in Amazon, acted under extreme mental or emotional disturbance.

The Defendant takes very strong issue with whatever implication the State is attempting to make by its assertion that the jury was somehow "mislead" by improper psychiatric testimony or psychological testimony.

The State in its Brief presents the inaccurate assertion that somehow incomplete psychological data was presented to some witnesses in the instant case. This is simply not true. Even the State's own expert witnesses in this case conceded that the Defendant was mentally disturbed and had a drug problem. In fact, it was the State's witnesses that relied upon incomplete data and evaluations and some of those State witnesses themselves did not have an adequate background to be able to present a proper psychiatric and psychological profile on the Defendant in light of the Defendant's theory that his psychotic break was caused by drug addiction and withdrawal.

For example, Dr. Upson, a psychologist for the State, admitted that he was not an expert on drugs, drug addiction, or drug withdrawal, which formed the basis for the Defendant's insanity defense (1863; 1869). He also admitted that he was not a neurologist or an expert in neopsychology. On the other hand, the five expert witnesses (three psychiatrists and two psychologists) called by the defense did have varying degrees of expertise in these areas.

Dr. Ernest Miller, one of the State's psychiatrists, although stating his opinion that the Defendant was sane at the

time of the incident, agreed that the Defendant had a drug dependency and drug addiction and agreed that the Defendant's father introduced him to drugs at an early age (1804; 1909). Furthermore, he could not exclude the possibility that the Defendant suffered a psychotic break as argued by the defense (1922). Dr. Miller himself agreed that the Defendant was impaired at the time of the homicide and that he had a very messed up background in terms of family background and drug addiction (1924). He further agreed that the Defendant suffered from a dull, normal range IQ (1927). The State's own psychiatrist, Dr. Miller, therefore supported many of the Defendant's assertions.

A neurologist who testified for the State, Dr. Victor Roberts, never even examined the Defendant but merely viewed records (1951-1953).

Dr. George Bernard, a State psychiatrist, stated that he did not in his practice work very much with substance abusers or addicts, the crux of the Defendant's insanity defense (2000). Dr. Bernard agreed that the fact of the Defendant's father giving his 16 year old boy, the Defendant, injectable narcotics would have destructive and horrible psychiatric complication on that person's development (2007). He further acknowledged that a drug addict in a high level of toxic state could have a disassociative episode or psychotic break and to withdraw (2009).

Dr. Kirkland, the other State psychiatrist, while feeling that the Defendant was legally sane at the time of the incident, felt that the Defendant "went into a frenzy or crazy" (2046-2048).

The State in its Brief ignores the testimony of its own experts at Trial as to the Defendant's drug addiction, a turbulent upbringing, and low IQ. The State concedes that the Defendant was a drug addict but attempts to characterize his addiction as a "small one". This is not supported in the record. Furthermore, there really can be no such thing as a small addiction. Contrary to the State's assertion in its Brief, all the evidence at the Trial was that the Defendant was undergoing withdrawal at the time of this incident. Furthermore, contrary to the assertions of the State in its Brief, the Defendant did undergo withdrawal at the time of his arrest while in jail. As a matter of fact, while the Defendant was in jail and away from drugs, his EEG went from a previous positive (suggesting brain damage) to a negative result. Finally, the Defendant's experts testified to support the jury's finding of several statutory mitigating circumstances improperly not found by the Trial Court.

Kirk Hansbrough was a young man with an IQ in a dull/normal range who was turned on by narcotic drugs by his own father at a non-volitional age. Unlike the defendant in Amazon v. State, supra, the Defendant had no significant criminal history having only one DWI conviction, a statutory mitigating circumstance the jury obviously found. The jury properly found age to be a mitigating factor since he was only 21 years old and since his intellectual maturity was obviously juvenile having an IQ in the dull/normal range (with subscales showing a retarded level in areas of judgment (1050)). The State concedes in its Brief that Hansbrough was abused as a child (AB-64). The Defendant had a

previous positive EEG suggesting brain damage. The offense was committed during a frenzy. Furthermore, three psychiatrists (Drs. Wilder, Scott and Gilbert) and two psychologists (Drs. Krop and Fisher) testified that the Defendant was actually legally insane suffering from a psychotic break at the time of the homicide. There was substantial testimony, both expert and non-expert, supporting the jury's finding of the two additional statutory mitigating circumstances that the capacity of the Defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was substantially impaired and that the Defendant acted under duress. Furthermore, despite the significant impeachment of Shad Martin's credibility at Trial, the Trial Court opted to believe him beyond a reasonable doubt. Obviously, the jury properly rejected his testimony since he was proven to be a sociopathic liar by the forced admission of his own psychiatrist, Dr. Golwyn (1586-1601).

The factual scenario in Amazon v. State, supra, is far more aggravated than the factual situation in the instant case. That case involved two homicides, as well as a finding of four aggravating circumstances and no mitigating circumstances. The instant case involved one homicide involving an incorrect finding by the Trial Court of four aggravating circumstances and the failure of the Trial Court to properly find a total of six rather than one mitigating circumstances.

The State in its Brief failed to cite, distinguish or mention other cases cited by the Defendant in his Initial Brief which are factually indistinguishable from the instant case in

requiring the Defendant's death sentence to be reversed upon proportionality review. See Burch v. State, 343 So.2d 831 (Fla. 1977), Norriss v. State, 429 So.2d 688 (Fla. 1983); Jones v. State, 332 So.2d 615 (Fla. 1976). All these cases as well as others cited in the Defendant's Brief are proportionally similar or even more aggravated than the Defendant's case herein. In those cases, this Court properly reversed the Trial Court's imposition of the death penalty. Furthermore, all of the State's expert witnesses supported in some respect all of the statutory mitigating circumstances argued by the defense. The Trial Court clearly erred in imposing the death penalty in the instant case.

POINT X

THE TRIAL COURT ERRED IN IMPOSING AN ILLEGAL SENTENCE ON ON THE ARMED ROBBERY CHARGE BY SENTENCING THE DEFENDANT TO 75 YEARS IN THE DEPARTMENT OF CORRECTIONS IN VIOLATION OF FLORIDA STATUTE §775.082(3)

The Defendant adheres to all of his previous arguments that the Trial Court relied upon numerous improper grounds to depart from the sentencing guidelines.

One of the grounds relied upon by the Trial Court to depart from the recommended guidelines range was that the Department of Corrections recommendation was "dispose of this case in the most severe manner possible". This improper delegation is similar to the issue in Rozier v. State, 11 F.L.W 543 (2d DCA March 7, 1986). In that case, the Court held that the Trial Court's assignment to the State Attorney the responsibility to formulate the reasons to be relied upon by it in departing from a presumptive sentence was improper. The Court found that this was an improper delegation of the Trial Court's function of sentencing committed exclusively to the judiciary. See also Carnegie v. State, 473 So.2d 782 (Fla. 2d DCA 1985); Gaynor v. State, 10 F.L.W. 2710 (Fla. 2d DCA Dec. 4, 1985). Furthermore, it is established law that failure to interpose a contemporaneous objection is not fatal in the circumstances where a trial judge deputizes another to fulfill a function mandated by statute to be executed by the judiciary. See Parker v. State, 10 F.L.W. 2646 (Fla. 2d DCA Nov. 20, 1985); Fla.R.Crim.Pro. 3.701(b)(11).

For the other reasons set forth in the Initial Brief of Appellant, the Trial Court erred in sentencing the Defendant to 75

years in the Department of Corrections when even on a departure basis, the Trial Court would have been limited to sentencing the Defendant to a term of years not exceeding 30 years or to life imprisonment. Since the Court chose a term of years, the Defendant should have been sentenced to no more than 30 years even assuming arguendo that the Trial Court would have been authorized to depart which the Appellant argues he was not.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to Margene A. Roper, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 19th day of June, 1986.

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