IN THE SUPREME COURT
STATE OF FLORIDA

BRYAN F. JENNINGS,

Appellant,

v.

CASE NO. 68,835

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

POINT ONE: Photographs of appellant's penis were properly admitted into evidence since the evidence would inevitably have been discovered by investigation independent of and without reference to the prior misconduct of law enforcement personnel.

POINT TWO: The motions for post-conviction relief, which appellant sought to introduce into evidence, were properly excluded pursuant to section 90.614(2), Florida Statutes (1985).

POINT THREE: Relevant evidence is admissible unless excluded by some exception. Appellant has failed to show that the trial court abused its discretion in admitting testimony regarding the victim. Regardless, the alleged error is harmless.

POINT FOUR: The trial court's determination of the preliminary fact of the existence of a warrant for appellant's arrest is supported by the evidence and should not be disturbed on appeal.

POINT FIVE: Photographs of the victim were properly admitted into evidence as they were relevant to the issues of identity and penetration, aided the pathologist in explaining the victim's injuries to the jury, and corroborated the testimony regarding appellant's admissions to the crimes charged.

POINT SIX: The prosecutor's comment was not fairly susceptible of being construed as a comment on appellant's right to remain silent. Regardless, the error was harmless.

POINT SEVEN: Letters written by appellant to a friend were properly admitted into evidence under the Best Evidence Rule.

POINT EIGHT: The instruction disputed by appellant was previously approved by this court. The trial court was entitled to rely on it. Appellant's special requested instruction was covered by another standard instruction.

POINT NINE: A juror was properly removed from the penalty phase of the trial where her opposition to the death penalty would substantially impair the performance of her duties as a juror.

POINT TEN: The issue of the prosecutor's allegedly improper remark was not properly preserved for review. Regardless, the remark was part of proper argument, restricted to the facts and the law.

POINT ELEVEN: The jury received no evidence concerning the case which it had not already received in open court in the manner prescribed by law. The trial court properly instructed the jury that matters outside of the evidence were not for their consideration.

POINT TWELVE: The alternate juror did not participate in nor was he present during the deliberations of the jury. This issue was not preserved for review by a contemporaneous objection.

POINT THIRTEEN: As was the case in the prior appeal by appellant to this court, the instructions given by the trial court were sufficient.

POINT FOURTEEN: Since appellant was convicted of first degree murder, not a sex offense, appellant fails to meet the definition for a mentally disordered sex offender. Refusal to

cetify him as such was proper.

POINT FIFTEEN: The sentence of death imposed upon appellant was proper in view of the overwhelming evidence supporting the aggravating factors and the lack of mitigating factors.

POINT SIXTEEN: Florida's capital sentencing statute has been repeatedly held to be constitutional by previous decisions of this court.

POINT ONE

PHOTOGRAPHS OF ABRASIONS ON APPELLANT'S PENIS WERE PROPERLY ADMITTED INTO EVIDENCE

ARGUMENT

At the hearing on appellant's motion to suppress, appellant sought to exclude from use in evidence against him, among other things, photographs of his penis, as having been obtained as a direct result of an illegally obtained confession (R 3238-3242; see, paragraph numbers 1 and 4 of appellant's motion). Appellant's penis had been injured during the rape of his six year old victim (R 554). At the hearing, the trial court was permitted to use live testimony, deposition transcripts, and prior trial testimony in ruling on the motion (R 1896). The trial court denied appellant's motion, finding that the photographs would have been taken, and the appellant's injury discovered even if appellant had made no statements to the police (R 3290). Appellant now claims that the photographs of his penis should have been excluded from evidence as the poisonous fruits flowing from his illegally obained confession under the holding of Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2 441 (1963).

At the outset, it should be noted that appellant assumes that the poisonous tree doctrine of Wong Sun applies to physical evidence obtained as a result of the violation of his rights as declared in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). As noted by the court in United States v. Scalf, 708 F.2d 1540 (10th Cir. 1983):

> This remains an open question. Compare, Michigan v. Tucker, 417 U.S. 433, 460-61 (White, J., concurring) (evidence which is a fruit of a violation of prophylactic rules of Miranda should not be excluded) and Wilson v. Zant, 249 Ga. 373, 290 S.E.2d 442, 447-448 (1982) (fruit of violation of Edwards is admissible if the confession was voluntary), cert. denied, ____ U.S. ____, 103 S.Ct. 580, 74 L.Ed.2d 940 (1982) with U.S. v. Downing, 665 F.2d 404, 407-09 (1st Cir. 1981) (fruit of Edwards tainted statement must be suppressed) and Massachusetts v. White, 374 Mass. 132, 371 NEd.2d77, 781 (1977) (fruit of a violation of Miranda rules must be suppressed) aff'd by an equally divided court, 439 U.S.280, 99 S.Ct., 712, 58 L.Ed.2d 519 (1978) (mem.).

Id. at 1545-1546. This issue need not be considered because, even considering the poisonous tree doctrine, the photographs were admissible.

Quoting from Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 64, L.Ed.2d 319 (1920) the Wong Sun court noted:

> "The essence of a provision forbidding the acquisition of evidence in a cerain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." (citation omitted).

83 S.Ct. at 416. Thus, the court made it clear that where the facts surrounding a crime would have become known through investigation independent of the illegal investigation, the evidence so obtained would be admissible in the trial of a

criminal defendant. This doctrine was further expanded by the holding of the court in Nix v. Williams, 104 S.Ct. 2501 (1984), that evidence which would ultimately or inevitably would have been discovered, notwithstanding a constitutional violation, is admissible.

In the instant appeal, the testimony available to the trial court revealed that on the morning that the victim was discovered to be missing, an extensive neighborhood investigation began in order to locate her. A woman had reported seeing a male, who was wearing a red shirt, sitting on a bridge on North Banana River Drive, at around midnight earlier in the morning (R 2432, 2476-2477). Prior to finding the victim's body and during the neighborhood investigation, two young men (appellant and a friend), one wearing a red shirt, were seen pushing a motorcycle in the area (R 1910, 1925, 2476-2477). A deputy was sent to talk to appellant and his friend (R 2434-2435, 2476-2477). Deputy Cain spoke with appellant at this time and obtained appellant's name, address and date of birth (R 1925, 1946,, 2575-2576).

After the victim's body was found, appellant was considered to be a possible suspect or lead, among eighteen or nineteen others (R 1911-1923, 1930-1931). This was because of an awareness, by the deputies, of appellant's past history which included going into another female's house and attacking her (R 1957, 2479). A records check revealed an outstanding Orange County, Florida, warrant for appellant's arrest. Appellant was arrested on this warrant (R 1916, 1928, 1958, 2442, 2578) and taken to the Rockledge substation (R 1930-1931, 2482).

Deputy Porter spoke with appellant's aunt and mother after an initial interview with appellant at the Rockledge Precinct (R 1931) having prior to this personally observed the footprints thought to belong to the killer at the victim's house (R 1932, 1936-1937). Porter testified that, even if he had not spoken with appellant at the Rockledge precinct, he would have gone to the appellant's home as part of his investigation, independent of the interview, because appellant's name was on the list of leads to check out in connection with the murder (R 1935). Porter further testified that he would also have inquired of appellant's aunt and mother regarding appellant's whereabouts the previous night regardless of the Rockledge interview; would have asked them if they had appellant's clothing; and, would have obtained the clothing (R 1936). Appellant's aunt told Porter that she had seen appellant all wet earlier that morning (R 1936). Porter knew that the victim's body had been found in water and that it was possible that the killer may also have become wet during the crime (R 1944). Appellant's shoes were turned over to the deputies by the ladies; both were very cooperative (R 1959-1960, 1933, 2515, 1452). Porter noticed a distinctive pattern on the sole of appellant's shoes (R 2453). The shoes were later compared to the plaster cast of a shoe print which was taken at the crime scene. The cast and one of the shoes appeared to match (R 2459). Along with this comparison, it was suggested that appellant's fingerprints be compared with those unknown prints discovered at the crime scene (R 2459, 2518).

Prior to the interview of appellant at the jail in

Titusville, the deputies had been told by the pathologist that the person who raped and killed Rebecca Kunash would likely have injured his penis (R 1928-1920), and that Deputy Plowden had identified the fingerprints discovered at Rebecca's bedroom windows as being identical to appellant's (R 1915, 1922, 1348, 2520). Deputy Porter testified that, based upon the shoe comparison and the fingerprint identification, he felt he had probable cause to arrest appellant (R 1941). As a result, appellant was going to be arrested and an examination and photographing of appellant's genitals undertaken whether appellant had confessed or not (R 1915-1916).

From the foregoing testimony, it was clear to the trial court that the evidence obtained by law enforcement officers, in the instant appeal, would inevitably have been discovered by investigation independent of and without reference to the prior misconduct. As such, denial of appellant's motion to suppress the photographs was proper under Wong Sun and Williams, supra. Even if erroneously admitted, the error was harmless in light of the overwhelming evidence of quilt. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

POINT TWO

THE TRIAL COURT PROPERLY EXCLUDED FROM INTRODUCTION INTO EVIDENCE COPIES OF TWO PREVIOUS MOTIONS FOR POST-CONVICTION RELIEF FILED BY A STATE WITNESS.

Appellant sought to introduce into evidence, as substantive evidence in his case-in-chief, two motions for post-conviction relief filed by state witness Muszynski for the purpose of impeaching Muszynski's credibility (R 1122, 1124). Appellant relied on section 90.614(1) and (2), Florida Statutes (1985) for admissibility of the motions as prior inconsistent statements (R 1125-1126).

The disputed testimony surrounded an allegation by witness Muszysnki in a motion for post-conviction relief concerning alleged treatment he received in a hospital in Houston, Texas (R 1124-1125). During cross-examination in the state's case-in-chief, appellant questioned witness Muszynski as follows concerning this allegation:

> Q. Thank you. Mr. Muszynski, did you likewise allege in your motion that less than a month prior to that trial you had been confined in a mental ward in Houston, Texas, and you had been hallucinating and you had been treated with Thorazine?

(R 661). Muszynski admitted making the statement in the motion, but said that it was untrue (R 661). Appellant's counsel thought Muszynski had denied making the statement (R 1125). Appellant admitted that his sole purpose in seeking to introduce the motions for post-conviction relief was to argue that Muszynski was a liar (R 1125). The trial court denied appellant's motion

to admit the post-conviction pleadings into evidence after appellant admitted that Muszynski had agreed that he made the prior statement (R 1127).

The motions were properly excluded from evidence pursuant to section 90.614(2), Florida Statutes (1985). Muszynski admitted made the statement so it was not a prior inconsistent statement. Even viewed as a prior inconsistent statement, the fact that Muszynski admitted making the statement and explained it, making exclusion of extrinsic evidence of the statement proper under section 90.614(2). Nevertheless, the disputed statements were read into evidence by appellant during his cross-examination of Muszynski.

As for appellant's contention in the hearing on his motion for new trial, that the statements should be admitted to show that Muszynski was insane, this argument was not preserved for review by a contemporaneous objection and is not cognizable on appeal. Castor v. State, 375 So.2d 701 (Fla. 1978). During the trial, appellant specifically advised the trial court that the only purpose for which he sought to introduce the post-conviction motions was to prove that Muszynski was lying (R 1125). Appellant was bound by this representation and, for this reason, also, the new ground for admissibility of the motions was not preserved for review. Finally, Muszynski's motions did not qualify as competent expert testimony regarding his sanity.

POINT THREE

THE TRIAL COURT PROPERLY ADMITTED RELEVANT TESTIMONY CONCERNING THE VICTIM.

During direct examination by the prosecutor, the victim's father described his actions in searching for her after he discovered she was missing (R 340-341). On the outside wall of the house, underneath the window to the victim's bedroom, the father described having seen a scuff mark which he had not seen there before. The father also related his effort to find the victim at her school (R 341).

Over objection, the father testified that he thought the victim might have gone to the school early because she was excited about being the narrator in her first grade school play (R 342). The principal of the school which the victim attended testified that the victim was to have participated in a May Day program at the school on the day she disappeared (R 491). The trial court ruled that the testimony was relevant to explain why the parents thought the victim might have gone to school (R 342), and looked around their home prior to calling the sheriff (R 491).

Relevant evidence is evidence tending to prove or disprove a material fact. § 90.402, Fla. Stat. (1985). Relevant evidence is admissible unless excluded by some exception. § 90.402, Fla. Stat. (1985). Absent a showing that the trial court abused its discretion, its ruling regarding the admissibility of testimony in a criminal proceeding will not be disturbed. Mikenas v. State, 367 So.2d 606 (Fla. 1979).

The trial court did not abuse its discretion in admitting

this testimony. The testimony was relevant as an explanation of the prior testimony of the father--that he searched for the victim after he discovered her missing and discovered a scuff mark below her window--which came into evidence without objection. Appellant was not only charged with the murder of the victim, but with kidnapping her (R 2089-2094). This testimony tended to disprove any inference that the jury might draw, or the defense might argue in closing, which suggested that the victim might have left her home willingly or with her parents consent, either with or without the appellant.

Even if erroneously admitted, the error was harmless. The evidence against appellant--including his admissions to cellmates, letters to friends and fingerprints at the victim's residence--was overwhelming.

POINT FOUR

DENIAL OF APPELLANT'S MOTION TO SUPPRESS WAS PROPER WHERE THE EXISTENCE OF A WARRANT FOR APPELLANT'S ARREST WAS ESTABLISHED AS A PRELIMINARY FACT BY THE TRIAL COURT.

Appellant filed a motion to suppress fingerprint cards, photographs of himself, shoes taken from his home, and evidence flowing therefrom as a result of his arrest pursuant to an arrest warrant from Orange County, Florida, on the ground that the evidence was obtained as a result of his "illegal warrantless arrest" (R 3242). As a fact preliminary to the grant or denial of appellant's motion, the trial court necessarily was required to pass upon the existence vel non of the Orange County warrant. The court heard testimony and considered the evidence presented by the state, ruling that the outstanding warrant did, in fact, exist (R 3289-3290).

It is well settled that an appellate court will not reverse a finding of fact by a lower court unless error is patent on the record. Mixon v. State, 54 So.2d 190, 192 (Fla. 1951); Demps v. State, 462 So.2d 1074 (Fla. 1985). In Mixon, the grant or denial of a motion to suppress, filed by a defendant charged with violating the lottery statute depended on the existence of a lease by the defendant of the premises from which the evidence against the defendant was seized. This court held that the trial court, by denying the motion to suppress, necessarily found that the lease did not exist. Since there was record evidence to support this factual determination, it was not disturbed.

In the instant appeal, the trial court explicitly found,

after considering testimony and evidence, that the arrest warrant existed and denied appellant's motion to suppress (R 3290). This function was within the province of the court and since there is evidence to support the finding of the court, the denial of appellant's motion should be affirmed. Mixon, supra.

Appellant's contention that his shoes were illegally seized, is also without merit. Appellant was at home, on leave from the military, and was staying in his sister's room temporarily. His mother cooperated with the police, consented to a search, and retrieved appellant's wet shoes from the house dryer, where she had put them herself. The house belonged to appellant's aunt.

Appellant's mother obviously had access to the dryer for the purpose of doing laundry, having put the shoes in the dryer herself (R 842). This was not a private closet or bureau drawer. Having exposed his shoes to equal access of third parties by allowing his mother to do his laundry in the jointly used clothes dryer, appellant exhibited no legitimate expectation of privacy regarding the shoes and his mother could validly consent to seizure. Preston v. State, 444 So.2d 939 (Fla. 1984). See also, the arguments and authorities cited in Point One, supra, relating to independent investigation and inevitable discovery.

POINT FIVE

PHOTOGRAPHS OF THE VICTIM WERE RELEVANT AND PROPERLY ADMITTED INTO EVIDENCE.

The test for admissibility of allegedly qruesome photographs is relevancy. Bush v. State, 461 So.2d 936 (Fla. 1985); Bauldree v. State, 284 So.2d 196 (Fla. 1973). In Foster v. State, 369 So.2d 928 (Fla. 1979) and Bush, supra, this court emphasized what continues to be its current position regarding allegedly gruesome and inflammatory photographs saying that the photographs--

> ". . . are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of 'whether cumulative,' or 'whether photographed away from the scene,' are routine issues basic to a determination of relevancy, and not issues arising from an 'exceptional nature' of the proffered evidence."

369 So.2d at 930.

The photograph of the victim's face was relevant to the state's burden of proving, beyond a reasonable doubt, the identity of the victim (R 464), and the cause of death (R 502-502A)--a burden which cannot be relieved by stipulation of the appellant. Foster, supra, at 930. The photograph aided the jury in understanding what the pathologist observed during his examination of the victim.

The two photographs of the victim's vagina (depicting the trauma to this area), were relevant to the issue of penetration (R 517,543,546) on the sexual battery charge, and assisted the pathologist in explaining the injuries he perceived (R 511), as

well as assisting the jury in understanding the basis for his observations and conclusions during his examination. It corroborated witness Muszynski's testimony that appellant admitted penetrating the victim's vagina (R 639).

Likewise, the photograph of the injury to the victim's back was relevant to the pathologist's testimony regarding the degree of force used in slamming the child victim to the ground (R 534), and the type of object which the body struck (R 543). The photograph also corroborated the testimony of witness Muszynski that appellant had admitted slamming the victim to the ground (R 637).

The photographs were relevant and admissible as assisting the pathologist in explaining the nature of the wounds and the manner in which they were inflicted. Bush, supra at 939. The fact that the photographs might be offensive to one's senses and might tend to inflame the jury is insufficient by itself to constitute reversible error. State v. Wright, 265 So.2d 361 (Fla. 1972). The photographs were relevant and under the test reemphasized in Bush, supra, admissible. Similar photographs were ruled admissible by this court in a prior appeal by appellant to this court. See, Jennings v. State, 453 So.2d 1109 (Fla. 1985), vacated on other grounds, 473 So.2d 204 (Fla. 1985).

POINT SIX

THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR MISTRIAL WHICH WAS BASED UPON AN ALLEGEDLY IMPROPER COMMENT BY THE PROSECUTOR DURING VOIR DIRE OF PROSPECTIVE JURORS, ON APPELLANT'S RIGHT TO REMAIN SILENT.

While speaking with prospective jurors during jury selection, the prosecutor engaged in the following dialogue:

> MR. WHITE: I'm sure your father does. Okay. Now, let me ask everybody else as a group. Would any of you feel that you do have some particularly strong feelings about law enforcement officers as a group or class of people as a result of anything that has happened to you or anyone else that you know of?
>
> PROSPECTIVE JURORS: (All answer in the negative).
>
> MR. WHITE: So nobody has had any particular negative or particularly positive encounters with law enforcement officers? Okay. In this case there are, as you have heard, six different charges. In some of those charges the state will have to prove a specific intent on the part of the defendant. Do any of you feel that a person's intent cannot be shown by evidence of a circumstantial nature, or in other words, do any of you feel that circumstances such as his own acts cannot express his intent as clearly as words do?
>
> That is kind of a long question. Did it confuse you? I will put it in different words for you then. Intent is a matter of a person's mind and thoughts, and there are ways to determine that. One might be by that person's explanation to you in person, what his thoughts were --
>
> MR. HOWARD: Objection, Your Honor. May we approach, please?

(R 63-64) (Emphasis supplied).

Prosecution and defense counsel approached the bench, and outside the hearing of the jury, defense counsel moved for mistrial asserting that the above emphasized language was a "clear indirect comment" on appellant's right to remain silent (R 64). The trial court denied the motion, finding that the prosecutor was not referring to appellant taking the witness stand and that, in any event, the alleged improper comment could be cured by instruction to the jury (Id.) The prosecutor resumed his dialogue with the jury:

> MR. WHITE: Do any of you disagree with the proposition that a person's intent at a particular time can be determined by reviewing what their actions were at that particular time and the circumstances surrounding their actions at that time? Do any of you disagree that you can determine a person's intent in that way? No? Okay.
>
> The Judge has already spoken to you about the penalty phase of this case, should we reach that stage. Is there anyone amongst you has any disagreement with the requirement that if we reach that stage, there must be more proof from the State than merely that the defendant is guilty of a capital offense for which the death penalty would be appropriate, that there must in addition be proof of the aggravating circumstances. Does anyone disagree with that? No? Okay.

(R 64).

This court recently adopted the harmless error rule of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and extended this rule to prosecutorial comments on a defendant's right to remain silent in State v. Marshall, 476 So.2d 150 (Fla. 1985), explicity receding from its prior rulings that such comments were per se reversible error without regard to

the harmlessness of the comment. The test for determining whether an improper comment has occurred is whether the comment is "fairly susceptible" of being interpreted by the jury as referring to a criminal defendant's failure to testify. State v. Kinchen, 490 So.2d 21 (Fla. 1985), David v. State, 369 So.2d 943 (Fla. 1979). "Fairly" is defined as "[i]n a fair manner; equitably; justly; legitimately; without unfair advantages; . . . [p]lainly; clearly, distinctly." Kinchen, supra at 22 (quoting Webster's New International Dictionary 911 (2d ed. 1956)). Whether a comment is fairly susceptible of an improper interpretation by the jury is to be determined by viewing the prosecutor's argument as a whole. Harris v. State, 438 So.2d 787, 794 (Fla. 1983). Where a comment is found to be impermissible, the burden is on the state to prove beyond a reasonable doubt that the error did not contribute to the verdict. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). Application of the harmless error test requires an examination of the entire record by the appellate court. DiGuilio, supra, at 1135.

The allegedly improper comment arose in the context of the jury selection process. Prior to the disputed comment, while addressing the purpose of the voir dire by the attorneys, the trial court advised the prospective jurors:

> The purpose of these questions is to determine whether or not you are the people to serve as a juror in this particular case, decide whether or not there is something in your background experience or opinions that might prevent you from being totally fair and impartial in this case.

(R 15). During the entire jury selection proceeding, the attorneys sought to determine the attitudes and biases of prospective jurors by inquiring about their feelings toward police officers, psychiatrists, finger print evidence, expert testimony, the death penalty, intoxication as a defense to a crime, convicted felons who might be called to testify, and proof of intent by circumstantial evidence. Defense counsel also addressed the question of proof of intent by circumstantial evidence and whether a "person's intent is susceptible to being shown by what happens or a person's actions", describing the previous inquiry by the prosecutor as "concerning the way in which a person or group of people would determine someone's intent." (R 117). Defense counsel inquired of the prospective jurors concerning the concept of requiring the state to prove appellant's guilt beyond a reasonable doubt and specifically asked if they disagreed with the concept of the appellant having the constitutional right not to testify, the right to remain silent, and that he need not prove anything (R 147-148). None of the jurors indicated any dislike for these concepts. The attorneys also asked the prospective jurors about their occupations, religions, hobbies, number of children, television programs watched, magazines read, and whether they had been prime victims.

Considering the disputed remark in the full context in which it was made at the voir dire, as is required in Harris, supra; State v. Jones, 204 So.2d 515 (Fla. 1976), and Gosney v. State, 382 So.2d 838 (Fla. 5th DCA 1980), it would not be fairly (i.e.--

clearly or distinctly) understood as referring to the appellant's right to remain silent. The challenged comment related to proof of intent by circumstantial evidence. This evidence could be testimony of the pathologist concerning the circumstances of the victim's death, appellant's letter to or discussions with Sylvain, the acts of appellant in leaving and returning to the victim's home and deliberately opening the victim's bedroom window, the testimony of Clarence Muszynski regarding appellant's own description of the crime. Defense counsel recognized this when he discussed intent with the jury (R 117). No testimony had been presented so that the remark could not possibly be construed as a comment on silence.

Even if fairly susceptible of being construed as a comment on appellant's right to remain silent, an examination of the entire record reveals that there is no reasonable possibility that the alleged error affected the verdict. Clarence Muszynski testified to the appellant's admissions that appellant had entered the victim's residence through her bedroom window, had seen a woman sleeping alone in another bedroom, had rendered the victim unconscious, dropped the victim on the grass outside the window, grabbed the victim by the legs and slammed her on a hard surface, raped the victim while only being able to insert two to two-and-one-half inches of his penis in her vagina as she regained consciousness, and finally drowned her in a canal (R 635-639). Muszynski's testimony was corroborated by the pathologist Dr. Adamson, who testified that the victim's head had hit a solid surface (R 534-535), her death was caused by drowning

(R 529-530), the injuries to the victim's vagina occurred "prior to death, or at the time of death" (R 541), and that the victim's vagina was two inches deep (R 535). The victim's father, Robert Kunash, corroborated the fact that on the night of the crimes, his wife slept alone; he had slept on the livingroom floor (R 923). Alan Brown "Pops" Kruger also heard appellant's admission (R 640, 909-915).

Beyond a reasonable doubt, the alleged error was harmless. Mistrial was properly denied.

POINT SEVEN

LETTERS WRITTEN BY THE APPELLANT TO A FRIEND WERE PROPERLY ADMITTED INTO EVIDENCE.

The state sought to introduce into evidence copies of letters written by appellant to a friend, Lorraine Sylvain, with whom he corresponded while in jail. Appellant had written about one dozen letters to Sylvain (R 747). Appellant objects to the admission of the letters into evidence on the grounds that the letters sought to be introduced were photostatic copies, not the originals, and that there was insufficient predicate that Sylvain was familiar with appellant's handwriting (R 751).

Sylvain testified that to the best of her knowledge she had destroyed the letters (R 749-750, 772), by burning them when she had gone through her whole house and "redone" it (R 773). She further testified that she visited the county jail about once every weekend (R 755) and that she discussed the letters and topics contained in them with appellant (R 754-755). The trial court believed this testimony (R 757).

In Florida, the best evidence rule (sections 90.952 to 90.954, Florida Statutes (1985) provides that in proving the terms of a writing, the original must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent). Williams v. State, 386 So.2d 538, 540 (Fla. 1980). Appellant argued that the destroyed letters were under the control of the state, who had noticed that they would be used at trial (R 752). The trial court rejected appellant's argument, in effect recognizing that the letters had been in

control of Sylvain and not the state (R 752). Since the originals of the letters have been destroyed, the photo copies were admissible. Fredericks v. Howell, 426 So.2d 1200 (Fla. 4th DCA 1983); In re McCollum's Estate, 88 So.2d 537 (Fla. 1956).

Sylvain's identification of appellant as the writer of the letters was proper. Non-expert witnesses may identify the writer of a document and his handwriting if they have previously become familiar with the author's handwriting. Pittman v. State, 51 Fla. 94, 41 So. 385, 393 (1906). The prosecutor established Sylvain's familiarity with appellant's handwriting, as described above, and the trial court permitted Sylvain to identify the handwriting as that of the appellant (R 757). Sylvain's weekly conversations in visits with the appellant and the resultant familiarity with his handwriting, made her competent to offer her opinion identifying appellant as the author of the letters in question. Clark v. Grimsley, 270 So.2d 53 (Fla. 1st DCA 1972). No abuse of discretion has been shown wanting reversal of the trial court's evidentiary ruling. Maggard v. State, 399 So.2d 973 (Fla. 1981).

The appellant's letters were admissible in evidence as admissions against interest. Hampton v. State, 308 So.2d 560 (Fla. 3d DCA 1975).

POINT EIGHT

THE DENIAL OF APPELLANT'S REQUEST TO MODIFY A STANDARD JURY INSTRUCTION WAS PROPER.

Florida Standard Jury Instruction (Criminal) 2.05 (8) provides:

> Feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence, and on the law contained in these instructions.

(Emhasis supplied). Appellant sought to modify this instruction to exclude the above emphasized language (R 1140-1143). The trial court apparently deemed the instruction appropriate, denied appellant's request and read the instruction in its entirety to the jury (R 1288).

In State v. Bryan, 290 So.2d 482 (Fla. 1974), this court noted that trial courts should use the standard jury instructions where appropriate. Incomplete instructions are properly denied. Kinchen v. State, 297 So.2d 341 (Fla. 3d DCA 1974).

The purpose of this instruction is to keep the jury focused on their function during deliberations--to base their verdict on the law and the evidence. This instruction was approved by this court to guide juries in their deliberations and the trial court was entitled to rely on it.

Appellant's proposed modification of the above restriction was adequately covered by Florida Standard Jury Instruction (Criminal) 2.05 (3) which provides:

> This case must not be decided for or against anyone because you feel sorry for

anyone, or are angry at anyone.

The jury was properly instructed in this regard by the trial court (R 1287).

POINT NINE

THE TRIAL COURT PROPERLY REMOVED A JUROR FROM THE TRIAL OF THE PENALTY PHASE WHERE THE JUROR'S OPPOSITION TO THE DEATH PENALTY WAS SO STRONG THAT IT WOULD PREVENT HER FROM PERFORMING HER DUTIES AS A JUROR AT THE SENTENCING PHASE OF THE TRIAL.

During the trial, it was learned that Juror Milligan believed that she had not accurately expressed her feelings regarding the death penalty during voir dire examination (R 416). During a conference with the trial judge and counsel, she advised the court that she could not be impartial during the trial of the penalty phase, and could not render an advisory verdict recommending the death penalty, regardless of the law or evidence presented (R 417-423.

By virtue of Juror Milligan's admissions, it became clear that she was unable to perform her sworn duty to render a true verdict according to the law and the evidence during the trial of the penalty phase. Pursuant to Florida Rule of Criminal Procedure 3.280(a), she was properly replaced by an alternate. Jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial, may be removed without violating the constitution . Lockhart v. McCree, 106 S.Ct. 1758 (1986); Wainwright v. Witt, 469 U.S. _____ 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Adams v. Texas, 448 U.S. 39, 100 S.Ct. 2521, 65 L.Ed.2d 56 (1980), Robinson v. State, 487 So.2d 1040 (Fla. 1986).

POINT TEN

THE APPELLANT FAILED TO PROPERLY PRESERVE FOR REVIEW HIS OBJECTION TO A SINGLE STATEMENT BY THE PROSECUTOR DURING CLOSING ARGUMENT.

Appellant contends that a small portion of the closing argument of the prosecutor, during the penalty phase of the trial, was so improper, inflammatory and calculated to prejudice the jury as to have the affect of depriving him of a fair trial at the penalty phase. The comment of the prosecutor actually protested by the appellant was:

> (MR. HOLMES): . . . What else? Sexual battery. Each of us, man and woman have the right not to be sexually abused or sexually violated without their consent.

(R 1658). To this alleged improper argument, defense counsel objected as follows:

> MR. HOWARD: Your Honor, I must raise an objection. I think Mr. Holmes is coming perilously close to the Golden Rule argument, in that statement.
>
> THE COURT: I think its proper argument. Overrule the objection.
>
> MR HOWARD: Very well, Your Honor.

(R 1658-1659) (emphasis suppled). No motion for mistrial followed the objection by defense counsel, nor did defense counsel move for mistrial, based upon his comment, at the conclusion of the prosecutor's closing argument. Appellant's "Statement of Judicial Acts to be Reviewed " contains no reference to error of the court regarding mistrial as it would pertain to this comment (R 3467-3472).

In Clark v. State, 363 So.2d 331 (Fla. 1978), this court

held:

> 4. When there is an improper comment, the defendant, if he is offended, has the obligation to object and to request a mistrial. If the defendant does not want a mistrial, he may waive his objection. The trial may proceed, but he may not again raise that objection as a point on appeal. If the defendant wants to object or if, after having objected, he does not ask for a mistrial, his silence will be considered an implied waiver. Cf. Spenkelink v. State, 350 So.2d 85 (Fla. 1977), cert. den. 434 U.S. 960, 98 S.Ct. 492, 54 L.Ed.2d 320 (1977). The important consideration is that the defendant retain primary control over the course to be followed in the event of such error. United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

363 So.2d at 365. (Emphasis supplied).

Clark makes it clear that in order to preserve a point for appeal, a motion for trial must accompany an objection to a disputed comment at the time the comment is made. This requirement may also be met if the defendant moves for mistrial at some point during the closing argument or, at the latest, at the conclusion of the prosecutor's closing argument. State v. Cumbie, 380 So.2d 1031, 1033 (Fla. 1980).

Appellant, having failed to accompany his objection with a motion for mistrial, has not properly preserved this point for review Clark, supra; Cumbie, supra; James v. State, 429 So.2d 1363 (Fla. 1st DCA 1983).

Appellant has not demonstrated any abuse of discretion in the handling of his objection by the trial court or grievous or egregious injustice resulting from this single excerpt from the prosecutor's closing argument, warranting remand for a new

penalty phase trial, in light of the evidence of aggravation presented. The jury verdict was advisory only. A "Golden Rule" argument is an argument by which jurors are urged to place themselves or members of their families or friends in place of the victim. State v. Wheeler, 468 So.2d 978, 981 (Fla. 1985); Black's Law Dictionary 623 (5th ed. 1979). The trial court correctly ruled that the prosecutor's comment did not constitute such an argument.

The prosecutor's comment arose in the context of explaining to the jury the first aggravating circumstance upon which the state was relying in support of a recommendation of a sentence of death--that "the crime of murder was committed in the course of other felonies, burglary, kidnapping, sexual battery"--and explaining why these felonies are aggravating circumstances (R 1657). Considering the prosecutor's comment in the context of the entire closing argument, it is clear that the prosecutor did not intend the design to improperly prejudice the jury. His argument was designed to explain to the jury the aggravating facts which set this case apart from a simple homicide. His argument was confined to the evidence and was directed to the jury understanding the facts and law, not passion and prejudice. This is proper exercise of the closing argument. Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985).

In Breedlove v. State, 413 So.2d 1 (Fla. 1982), the prosecutor made the following comments in his closing argument:

> "When we walk the streets we take our chances."

and,

> "One place in the world where we ought to be free from this kind of violence, this kind of crime, is in our own home."

Id. at 8, n.11. This court held that these comments were not out of place, appeared to reflect common knowledge, and were probably the sentiments of a large number of people. Id. Likewise, the comments by the prosecutor, in the instant appeal, were proper argument.

In the instant appeal, the prosecutor's statement merely restated the obvious, stated nothing more than that which is within the common knowledge of all reasonable people, and was properly based upon the law and the facts. Appellant's objection was properly overruled. No new penalty phase or trial is required.

POINT ELEVEN

APPELLANT HAS FAILED TO SHOW THAT THE PENALTY PHASE JURORS ACTED TO HIS PREJUDICE ON SPECIAL AND INDEPENDENT FACTS WHICH ARE NOT RECEIVED IN EVIDENCE.

Prior to the taking of testimony during the penalty phase of the trial, the trial court inquired of the jurors whether they had, during the lapse between the guilt and penalty phase, gained any knowledge about or concerning the case being tried, which they had not received during the trial, from any source outside of the trial (R 1310).

Juror Chamberlain testified that, though she had learned that appellant had been tried once before by virtue of the Lorraine Sylvain letter which was introduced into evidence during the guilt phase of the trial (R 1324), someone at work had mentioned that the case had been tried before (R 1325). Chamberlain indicated that, in accordance with the court's instructions, she told the person not to say anything more (R 1325). In response to a question by defense counsel and the trial court, she indicated that this knowledge would not affect her ability to weigh the evidence and follow the law (R 1324-1326). Appellant specifically indicated that there was no objection to Ms. Chamberlain being retained on the jury (R 1326).

Juror Daugherty, after initially stating that she had not received any outside information (R 1323), voluntarily returned to the courtroom and advised the court that she had learned that the case had been tried before through her daughter (R 1327). This was all that her daughter had said to her (R 1327). Though the daughter mentioned saving some newspaper clippings, Daugherty

told her daughter that Daugherty had "no comment", and that she did not want to hear or discuss the matter further (R 1328). Daugherty told the trial court (R 1327), and defense counsel (R 1328) that this knowledge would not affect her ability to follow the law and waive evidence. Appellant objected to Daugherty's presence on the jury, claiming that Daugherty had had more extensive communications with her daughter than Juror Chamberlain (R 1329-1330). This objection was overruled (R 1336). No curative instruction or mistrial ruling was requested.

Juror Borovich testified that a neighbor mentioned only that appellant's trial was the second or third trial, but that he had suspected this from the first day of trial (R 1332-1333). He also said that this information would not affect his objectivity (R 1334). Defense counsel specifically advised the trial court that he had no objection to the service of Borovich or Chamberlain on the jury (R 1336). After testimony had concluded and during deliberations, the jury inquired of the court, "Are we permitted to know the basis of the first retrial and this retrial, if so, what are they?" (R 1704). The trial court answered the question, "The answer to this question, should not be considered by you in your deliberations, and therefore, the question will not be answered." (R 1704). Defense counsel requested a mistrial on the grounds that "It is obvious that some of the people in there have been talking about despite the court's admonition not to." (R 1705). Believing that the jury would follow the instruction he sent back to them and that a mistrial would be inappropriate, the trial court denied the

mistrial (R 1705).

It is well settled that it is improper for jurors to receive information or evidence concerning the case before them, except in open court and in the manner prescribed by law. Russ v. State, 95 So.2d 594 (Fla. 1957). Though appellant relied on Russ, to suggest the need for a new penalty phase, a closer reading reveals that Russ is distinguishable, on its facts, from the instant appeal. In Russ, a juror had personal knowledge of previous threats, beatings, and acts of the defendant against the victim. That juror described these actions to other jurors, influencing the verdict in the case. It was shown that prior to this description, the jury had voted to recommend a life sentence, but after discussion about the matters outside the evidence, no recommendation of mercy was made. This court held that a new trial would be warranted if the allegations of juror misconduct were found to be true.

Nelson v. State, 362 So.2d 1017 (Fla. 3d DCA 1978), relied upon by appellant is also distinguishable. There, the new trial was granted upon a showing of prejudice by the defendant by virtue of adverse instances which were drawn by the jury resulting from the refusal of the trial court to allow cross-examination of a prosecution witness regarding some clothing not in evidence. No such adverse inferences or prejudice has been shown in the instant appeal.

There is no evidence that the jurors, in the instant case, received any information or evidence concerning the case before them which they had not alreaady received in open court in the

manner prescribed by law. All agreed that they would decide the case only upon evidence received at trial and would follow the law as instructed by the court. The question presented by the jurors to the trial court asked the trial court to provide them with information regarding the prior trials, which was not within their knowledge, if they were permitted to know what that information was. Since they did not know the answer to the question, they could not improperly consider that information. Consistent with the holding in Russ, supra, the trial court instructed the jury that the answer to the question would not be given and should not be considered in their deliberations (R 1704). No abuse of discretion has been shown in the denial of appellant's motion for mistrial.

POINT TWELVE

THE TRIAL COURT TIMELY DISCHARGED THE ALTERNATE JUROR PRIOR TO JURY DELIBERATIONS DURING THE PENALTY PHASE.

No error was committed by the trial court by virtue of its oversight in allowing alternate Juror Chandler to be escorted by the bailiff from the courtroom along with other jurors enroute to the jury room for deliberations during the penalty phase.

The record reflects that the court instructed a bailiff to escort the jury to the jury room (R 1703). Immediately after the jury left the courtroom, the prosecutor advised the trial court that the alternate juror was enroute to the jury room with the other jurors (R 1703). The trial court immediately directed a bailiff to bring the jury back and the jurors were contacted by this bailiff prior to arrival at the jury room and the commencement of deliberations (R 1703-1704). Defense counsel identified the alternate juror as Juror Chandler (R 1704). The court then asked that the alternate be brought into the courtroom and advised a bailiff to take the remaining jurors to the jury room (R 1704).

As a result of the action of the prosecutor and the trial court, alternate Juror Chandler was timely discharged from the jury and was not present during the penalty phase deliberations by the jury. Berry v. State, 298 So.2d 491 (Fla. 4th DCA 1974), Fischer v. State, 429 So.2d 1309 (Fla. 1st DCA 1983), and Lamadrid v. State, 437 So.2d 208 (Fla. 3d DCA 1983), relied upon by appellant for reversal are distinguishable since the alternate jurors were actually present during deliberations by the jury.

No objection or motion for mistrial was voiced to the trial court by defense counsel to the trial court suggesting any error or improper inclusion of the alternate juror in the jury room during deliberations. In Ray v. State, 403 So.2d 956 (Fla. 1981), this court noted:

> "The failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful or prejudicial."

Id. at 960. The lack of an objection by trial counsel to the events surrounding the discharge of alternate Juror Chandler, reflects his determination that the trial court properly discharged Chandler from deliberations during the penalty phase and that any potential harm or prejudice had been prevented by the quick actions of the court and the prosecutor.

POINT THIRTEEN

NO PREJUDICE RESULTED TO APPELLANT FROM THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT DURING THE PENALTY PHASE.

Appellant submitted four (4) written instructions at the penalty phase of his trial (R 3441-3444). The trial court denied all of the appellant's special requested instructions (R 1653, 3441-3444).

Special requested jury instruction number one (R 3443), was rejected by the trial judge, while noting that this court had previously considered the identical instruction in Jennings v. State, 453 So.2d 1109 (Fla. 1984), vacated on other grounds, 473 So.2d 204 (Fla. 1985), because he felt that the standard jury charges to be given were adequate to cover the terms that appellant sought to define (R 1651). Appellant, in his closing argument, described his definition of "cruel" to the jury (R 1682). A similar instruction was rejected in Lemon v. State, 456 So.2d 885 (Fla. 1984).

Special requested jury instruction number two (R 3442), was denied because it was considered to be covered by the standard jury instruction and the trial judge also noted that a similar instruction had been considered by this court in Jennings, supra, (R 1651). The judge agreed with the prosecutor's assessment that this instruction was covered by the mitigating circumstances relating to mental disturbance and that to give the special instruction would place undue emphasis on this factor (R 1653). The trial court instructed the jury on mental disturbance as a mitigating factor (R 1700).

Special requested jury instruction number three (R 3441) was denied as being covered by the standard jury instructions (R 1652). It was so covered (R 3424), and instructed to the jury (R 1700).

Special jury instruction number four (R 3444), was denied because the judge felt that the standard instruction was sufficient to cover the requested instruction (R 1653). Appellant argued the need for a lengthy period of reflection in regard to this aggravating factor in closing before the jury (R 1685).

Where a jury was similarly instructed based upon standard instructions in Jennings, supra, this court found no prejudice to appellant during the sentencing phase. In compliance with Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the trial judge provided the jury with all of the statutory mitigating circumstances, as well as any other they may wish to consider, that were supported by the evidence.

Appellant's reliance upon Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), is misplaced. Under Georgia law, the jury imposes the death sentence. Id. at 100 S.Ct. 1764. In Florida, the trial judge imposes the death sentence. Therefore, even if the jury instructions are later found to be inadequate, the death sentence should be affirmed, because the trial judge, utilizing the guidelines designed by the legislature, must still determine whether the ultimate penalty is warranted. This is a valid measure to assure that the Florida death penalty is applied in a manner that avoids arbitrary and

capricious infliction of the death penalty. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

POINT FOURTEEN

THE TRIAL COURT PROPERLY REFUSED TO CERTIFY APPELLANT AS A MENTALLY DISORDERED SEX OFFENDER.

Appellant asserts that he is a mentally disordered sex offender as defined in section 917.13 Florida Statutes (1977), and that his death sentence should be vacated and remanded for certification as a mentally disordered sex offender. In support of this proposition, appellant relies on LeDuc v. State, 365 So.2d 149 (Fla. 1978), and Huckaby v. State, 343 So. 2d 29 (Fla. 1977), for the application of the M.D.S.O. statute to capital offenses. Appellant also relies on numerous other cases which suggest that where a defendant makes a strong showing that he is a mentally disordered sex offender, the trial court is required to certify him for treatment before imposition of sentence. All of these cases are distinguishable from the instant appeal by virtue of the change in the definition of "mentally disordered sex offender" between the time of the offense addressed in the opinion and the first degree murder involved in the instant appeal, or by virtue of the fact that the convicted offenses in those decisions were sex offenses, not first degree murder.

Allthough, LeDuc, supra, involved a rape and first degree murder of a nine year old girl, the trial court, at that time, pursuant to section 917.14(1)(a), Florida Statutes (1975), was permitted, in its discretion to certify a person for a hearing to determine if that person was a mentally disordered sex offender, whether or not the crime for which he was convicted was a sex offense. In that case, this court held that the trial court did

not abuse its discretion in refusing to certify the defendant under the statute. Appellee notes that section 917.24 Florida Statutes (1973), making the M.D.S.O. statute applicable to persons convicted of capital felonies was repealed, effective October 1, 1974. See, Ch. 74-379, § 4,6 Laws of Fla..

Section 917.13(1), Florida Statutes (1977), defines a mentally disordered sex offender as follows:

> (1) A "mentally disordered sex offender" or "offender" is a person who:
> (a) has been convicted of or pleaded guilty or no contest to a sex offense or attempted sex offense in a current prosecution;
> (b) suffers from a non-psychotic mental or emotional disorder, yet is competent; and
> (c)is likely to commit further sex offenses if permitted to remain at liberty.

The appellant, in the instant appeal, fails to meet the criteria to be certified as a mentally disordered sex offender, under this statute, because he was convicted of the capital felony of first degree murder. First degree murder is not a sex offense. Appellant fails to qualify under 917.13(1)(a) of the definition. Refusal of the trial court to certify appellant as a mentally disordered sex offender was proper.

POINT FIFTEEN

THE SENTENCE OF DEATH IMPOSED UPON THE APPELLANT IS JUSTIFIED IN THAT IT IS BASED UPON APPROPRIATE AGGRAVATING CIRCUMSTANCES AND THERE ARE NO MITIGATING CIRCUMSTANCES THAT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

In the instant case, the trial court found that there were no mitigating circumstances existing, either statutory or otherwise, which outweigh any aggravating circumstance to justify a sentence of life imprisonment rather than a sentence of death (R 3459-3464). Specifically, the trial court found that there were three aggravating circumstances that justify the imposition of the death penalty.

INTRODUCTION:

Appellee strongly asserts that appellant's suggestion that the trial court totally abrogated its legal duty in this cause is without support in fact or by evidence.

AGGRAVATING CIRCUMSTANCE

1. As an aggravating circumstance, the court finds that the murder of Rebecca Kunash was committed by the defendant while he was engaged in the commission of, or flight after committing, the crimes of burglary, kidnapping, and rape (§ 921.141(5)(d), Fla. Stat. 1985).

2. As an aggravating circumstance, the court finds that the murder of Rebecca Kunash was especially heinous, atrocious, or cruel (§ 921.41(5)(h), Fla. Stat. 1985).

3. As an aggravating circumstance, the court finds that the murder of Rebecca Kunash was committed in a cold, calculated and pre-meditated manner without any pretense of moral or legal

justification (§ 921.41(5)(i), Fla. Stat. 1985) (R 3460-3461).

The death sentence imposed upon appellant must be affirmed. The review of the evidence and findings below will lead this court to the inescapable conclusion that the death sentence is warranted.

A. THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING CIRCUMSTANCE OF HEINOUS ATROCIOUS AND CRUEL TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY.

The appellant's contention that the trial court erred in finding the aggravating circumstance of heinous, atrocious, and cruel to support the imposition of the death penalty as wholly untenable. In his finding to support this aggravating circumstance, the trial judge found that the victim, Rebecca Kunash, while sleeping in her bed, was abducted by the appellant, who rendered her unconscious by placing his hand over her mouth and nose; that appellant gained entry to the Kunash home by forcibly removing the screen and opening the window; that appellant took Rebecca to his car and proceeded to an area near the Girard Street Canal on Merritt Island. There, he raped Rebecca, severely bruising and lacerating her vaginal area, using such force that he bruised his penis. In the course of events, the appellant lifted Rebecca by her legs, brought her back over his head, and swung her like a sledge hammer to the paved ground, fracturing her skull, causing extensive damage to her brain. The trial court further found that the appellant took Rebecca into the canal and held her under the water until she drowned. At the time of her death, Rebecca Kunash was six (6) (R 3460-3461).

Additionally, the appellee would point out that Clarence

Muszynski's testimony indicates that while appellant was sexually assaulting Rebecca, she regained consciousness, after which appellant took her down to the water and held her under water for ten minutes, leaving her body for the sharks, turtles, fish, and other animals of the sea to eat (R 638-639).

In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), this court stated the following:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to the victim. (Emphasis added).

Id. at 9.

Appellant highlights several cases in particular, all of which allegedly involved defendants equally or more deserving of the death penalty than he, but in all of which the Florida Supreme Court reversed sentences of death. The first case cited by appellant is Purdy v. State, 343 So.2d 4 (Fla. 1977). The appellant contends that Purdy supports his contention that the rape of a child under eleven (11), does not support the death penalty. The appellee would disagree. The facts in Purdy are not similar to the facts in the instant case. In Purdy, the rape of the seven (7) year old child did not lead to her death. The child was left alive, and other than evidence of sexual abuse,

the child showed no signs of extreme emotional or psychological distress. Purdy, supra, at 5. In Purdy, this court concluded:

> Although the trial judge found the act for which appellant was convicted to be "especially heinous, atrocious or cruel", nothing was shown to distinguish this crime from any other violation of the same statute. The findings in the evidence do not show how this involuntary sexual battery of a child not more than eleven (11) years of age was especially aggravated under the terms of the death sentence law.

Id. at p. 6.

This court's decision in Purdy, hinged on the fact that no further physical harm was done to the child outside of the sexual battery. In the instant case, the appellant murdered a six (6) year old child by holding her head under water until she drowned. Certainly, a rape/murder of a six year old is worse than that of a rape of a six year old child standing alone. The rape of Rebecca Kunash and her subsequent murder requires a finding that this crime was especially heinous, atrocious, and cruel.

The second case relied upon by the appellant is Halliwell v. State, 323 So.2d 557 (Fla. 1975), which appellant cites for the proposition that the rape/murder of Rebecca Kunash was not especially heinous, atrocious, or cruel. Again, the facts in Halliwell are not similar to the facts in the instant case. In Halliwell, the defendant beat his victim to death with a breaker bar and then dismembered the body. The jury convicted him of first degree murder and recommended the death penalty, which the trial court imposed. The Florida Supreme Court affirmed the

conviction but reduced the sentence to life imprisonment. The court found the defendant had no prior arrest and was a decorated Green Beret in the Viet Nam War. It found further, that the defendant had acted "under emotional strain over the mistreatment of (the woman he loved) by the victim", and that the dismemberment occurred after death. Thus, the death penalty was not warranted. Id. at 561.

In Halliwell, this court's decision emphasized that "if the mutilation had occurred prior to death or instantly thereafter, it would have been more relevant in fixing the death penalty. Id. at p. 561. In the instant case, the mutilation of a child by crushing her skull, causing a hemmorage between the cerebral membrane itself, occurred prior to death; and would have resulted in her death even if the appellant had not drowned her (R 562-563).

The third, fourth, and fifth cases cited by the appellant are Burch v. State, 343 So.2d 831 (Fla. 1977), Chambers v. State, 339 So.2d 204 (Fla. 1976), and Jones v. State, 332 So.2d 615 (Fla. 1976). In Burch, the defendant murdered his victim by stabbing her over thirty times after an unsuccessful rape attempt. Burch, supra, at 832. Following a jury conviction of first degree murder with a recommendation of life imprisonment, the trial court imposed capital punishment. The Florida Supreme Court affirmed the conviction but reduced the sentence to life. The court quoted Tedder v. State, 323 So. 2d 908, 910 (Fla. 1975), in recognizing that a jury recommendation of life is entitled to great weight. It then found, "that at the time of

the offenses the defendant was mentally disturbed." Burch, supra at p. 834. Burch also had no history of criminal conduct. Id. at 833-834. These mitigating circumstances, held the court, were sufficient to preclude imposition of the death penalty.

Chambers v. State, supra, involved the case in which the appellant severely beat his girlfriend to death. Her brain was battered by a continuing, massive, indiscriminate beating. Id. at p. 205. In Chambers, the jury recommended a life sentence as appropriate. The trial judge, however, sentenced the appellant to death. The trial judge found that the defendant, in Chambers, had a significant history of drug usuage and was under the influence of some mental or emotional disturbance, but that any such disturbance was self induced by illegal drugs and was not a mitigating circumstance. The jury had before it evidence that the appellant and the victim had voluntarily shared a long standing sado-masochistic relationship which included severe and disabling beatings. The jury also knew that the victim had herself obtained the appellant's release from jail on the day he had beaten and dragged her through the streets in an unholy rage. This court found that the totality of the circumstances existing in the Chambers case, and the weighing of the mitigating and aggravating circumstances did not warrant the imposition of the death penalty. Id. at p. 207. The court determined that the jury's recommendation of a life sentence was appropriate. Id. at p. 208.

In Jones v. State, the defendant raped his victim and then murdered her by stabbing her thirty-eight (38) times. Id. at

616. The jury convicted him of first degree murder and recommended life imprisonment. The trial court sentenced him to death. The Florida Supreme Court found that the defendant "suffered a paranoid psychosis to such an extent that the full degree of his mental capacities at the time of the murder is not fully known." This mitigating circumstance, according to the court, was "determinative" and sufficiently outweighed the aggravating circumstances. Defendant's sentence was therefore reduced to life imprisonment. Id. at 619.

In the above quoted cases of Purdy, Halliwell, Burch, Chambers, and Jones, the Florida Supreme Court, after balancing the aggravating and mitigating circumstances, found that sufficient mitigating circumstances existed to outweigh the aggravating circumstances and preclude the imposition of the death penalty. In Tedder, the only case in which the court did not appear to balance, at least not expressly aggravating and mitigating circumstances, this court announced a rule that when the jury recommends life imprisonment the trial court should impose capital punishment only when "the facts suggesting a death sentence (are) so clear and convincing that virtually no reasonable person could differ." Tedder, supra, at p. 910. That was not the situation in Tedder, so this court reversed the death sentence. That also was the situation in Jones, Burch, and Chambers. In each case, the jury recommended life and the trial court sentenced the appellants to death. That is not the situation in the instant appeal, because the jury recommended that appellant receive the death penalty.

The appellant further contends that even if this court finds sufficient factual basis for the aggravating fact of heinous, atrocious, and cruel, that the finding is improper because the judge failed to consider and weigh the alleged fact that these acts were committed while appellant was acting under the influence of extreme mental and emotional disturbance, which prevented him from exercising his ability to conform his actions to the requirements of law. The appellant cites in support of his position Huckaby v. State, 343 So.2d 29 (Fla. 1977) and Miller v. State, 373 So.2d 82 (Fla. 1979). The facts in Huckaby and Miller, are distinguishable from the facts in the instant case. In Huckaby, medical tests showed an abnormality of Huckaby's brain wave pattern, suggesting a possible organic cause for his anti-social behavior. In the instant case, there is no evidence suggesting that the appellant had a possible oraganic cause for his anti-social behavior. In Miller, the trial judge specifically found as a mitigating circumstance, that due to mental sickness, the defendant's capacity and ability to conform his conduct to the requirements of law were substantially impaired. In addition, the trial court in Miller, specifically found that the evidence presented at the sentencing hearing indicated that the defendant was suffering from mental illness at the time the murder was committed.

In Miller, this court reversed the appellant's sentence of death, based on the trial court's consideration of a non-statutory aggravating factor. The facts in Miller, are substantially different from the facts in the instant appeal.

After Miller was charged with first degree murder, he was found incompetent to stand trial and was committed to the state mental hospital at Chattahoochee. After two and one-half years of confinement and treatment, he was sufficiently competent to stand trial. Apparently, his mental illness was in remission through the use of tranquilizing drugs. Psychiatric testimony presented at the sentencing hearing, concluded that Miller was suffering from paranoid schizophrenia and hallucinations. He had been committed to mental hospitals on several previous occasions, and had a long history of drug abuse. Miller had a severe hatred for his mother, and had planned to kill her after his release from the Lake County Jail, just prior to the murder in that case. Miller had been raised primarily by his mother, who had been married four times. For many years prior to that time, Miller's mother had refused any contact with her son. On several previous occasions, Miller had suffered hallucinations in which he saw his mother and other persons in a "yellow haze." On at least one previous occasion, he had senselessly assaulted another woman during such hallucinations. He testified that at the time of the murder, he saw his mother's face on that fifty-six year old woman taxi driver, in a "yellow haze", and proceeded to stab her to death. Miller, supra, at 885 n.4.

In the instant case, the appellant did not suffer from delusions or hallucinations (R 1380). The appellant was not neurotic nor psychotic (1379). Doctor Gutman testified at the sentencing proceeding that appellant knew right from wrong, and agreed that appellant's behavior indicated that his acts were

deliberate (R 1380, 1389-1390). Doctor Gutman further testified that he felt that the appellant was capable of performing his actions to the law and norms of society (R 1383).

The appellee would maintain that the appellant's position that the trial court improperly applied the aggravating circumstance that this crime was heinous, atrocious, and cruel as highly untenable, in light of the facts detailed above. This factor has been proven beyond a reasonable doubt. On similar facts, this court has previously held that this aggravating circumstance to have been properly applied. See, Jennings v. State, 453 So.2d 1109, 1115 (Fla. 1984).

B. THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED MURDER.

The findings of the court were that the appellant had driven by the Kunash home earlier in the evening, gone to Rebecca's window where he saw her sleeping, and that he left only to return a short time later. The court found that at that time appellant had made a conscious decision to enter her room, did so, and that Rebecca Kunash offered no threat to the defendant. From the initial abduction to the final premeditated act of drowning her, appellant's acts represented cold and calculated indifference to the feelings or life of Rebecca Kunash (R 3461). This finding is supported by the testimony of Clarence Muszynski (R 623-640), and that of the experts at the penalty phase that appellant's behavior demonstrated the planned nature of his crimes (R 1389-1390, 1535, 1553-1554).

Appellant now maintains that the trial judge, following his

first trial, did not find this aggravating circumstance, and to permit this to occur would violate his right to being placed in double jeopardy.

Appellant mistakenly relies upon this court's statement in State v. Dixon, that the aggravating circumstances actually define those crimes punishable by death and must be proved beyond a reasonable doubt. Id. at 9. Appellant argues that aggravating circumstances are analogous to individual offenses, and by failing to make this finding after the first trial, that he was acquitted of that particular factor.

The appellee would invite appellant to read further to the next paragraph, wherein the appellee would maintain, this court explains that the aggravating factors represent "situations" wherein the death penalty was applicable absent overriding mitigating factors. Id. at p. 9.

The appellee would maintain that the homicide was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification, does not add an entirely new factor as an aggravating circumstance, but only relates, in part, what is already present in the elements of premeditated murder, with which appellant was charged, and which the evidence clearly supported. Therefore, the finding of this factor was proper and did not violate prohibition against ex post facto as set forth in Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 7 (1981) and State v. Williams, 397 So. 2d 663 (Fla. 1981). See also, Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 102 S.Ct. 2258 (1982).

C. THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED DURING THE COMMISSION OF A FELONY TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY, WHEN THE FELONY FORMED AN UNDERLYING BASIS FOR THE FELONY MURDER CONVICTION.

The appellant contends that a death sentence for a felony murder cannot be supported by an aggravating circumstance which takes into account the same underlying felony in which the murder was committed. The appellee would maintain that the appellant's position is unsupported by the law. In Alford v. State, 307 So.2d 433 (Fla. 1979), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976), this court stated:

> The aggravating circumstances of Fla Statute § 921.141(6) F.S.A., actually define those terms--when read in conjunction with Fla. Stat. 782.04(1) and 794.01(1), F.S.A.--to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury . . .
>
> Fla. Stat. § 921.141(6)(d), F.S.A., provides that the commission of a capital felony as part of another dangerous and violent felony, constitutes not only a capital felony under Fla. Stat. § 782.04(1), F.S.A., but also an aggravating capital felony. Such a determination is, in the opinion of this court, reasonable.

Id, at 444. The appellant improperly concludes that the use of an underlying felony as an aggravating circumstance violates principles enunciated in Furman v. Georgia, 408 U.S. 238 (1972). In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court found that the Florida statute has a provision designed to insure that the

death penalty cannot be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to insure that similar results are reached in similar cases. 96 S.Ct. at 2969; State v. Dixon, 83 So.2d at 10. Florida courts consistently compare the circumstances of the case under review, with those previous cases in which it has assessed the imposition of death sentences. Alford, supra at 445.

In Proffitt, the supreme court found that the requirements of Furman, are satisfied and the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of, or against imposition of the death penalty, thus, eliminating total arbitrariness and capriciousness in its imposition. On its face, the Florida death penalty system satisfies the constitutional deficiencies identified in Furman. Proffitt, supra, at 96 S.Ct. 2967

D. THE TRIAL COURT DID NOT ERR IN FINDING NON-MITIGATING FACTORS PRESENT.

The appellant contends that the trial court erred in rejecting three of the statutory mitigating circumstances and in rejecting or not considering the existence of non-statutory factors in mitigation. The appellee would contend that appellant's position is without merit. Appellant argues that his alcohol and his L.S.D. consumption, coupled with his emotional disorder, establish that he was unable to conform his conduct to the requirements of law. The appellee would point out that Doctor Gutman, Dr. Podnos, and Dr. Wilder testified that appellant was able to conform his conduct to the requirements of

law (R 1380, 1383, 1513), and that alcohol was not a serious mitigating factor (R 1385-1386). Additionally, there was expert testimony that it was highly unlikely that appellant's disorder could be successfully treated (R 1514, 1559). Appellant's perceptions, at the time of the offense, were not distorted by L.S.D. (R 1543-1544, 1584).

This court rejected a similar argument in Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 102 S.Ct. 1039 (1982), wherein the defendant, convicted of the rape/murder of a seven year old child, argue that he had a diminished capacity due to the excessive consumption of alcohol, drugs, and marijuana. The court rejected Buford's argument because he knew the difference between right and wrong, unlike in Jones v. State, 332 So.2d 615 (Fla. 1976). This court should accordingly, reject appellant's contention.

It has long been held that the question of a defendant's mental condition at the time of the offense, is a question of fact for the jury. Williams v. State, 45 Fla. 128, 34 So. 279 (1903). In Byrd v. State, 297 So.2d 22, (Fla. 1974), this court stated:

> We here must re-emphasize that a jury does not necessarily have to take expert testimony over non-expert testimony. They may believe the expert and believe the non-expert if this inclination, . . .

Id. at 24. In the instant case after a hearing to determine if the appellant was suffering under the influence of extreme mental or emotional disturbances, the court found that he was not and that this was not a mitigating circumstance. The court found

that the capacity of the appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, were not substantially impaired. Based upon the evidence heard at the sentencing proceeding, the appellee would maintain that the trial court was correct in concluding that this was not a mitigating factor here. The appellant was twenty years old at the time he committed the crime, and he was of above average intelligence. The court found that though he was of a young age, and was above average intelligence, that this was not a mitigating circumstance. This court has consistently affirmed death sentences wherein the appellant's were young in age. See, Meeks v. State, 336 So. 2d 1142 (Fla. 1976), Hoy v. State, 353 So.2d 826 (Fla. 1978); Jackson v. State, 366 So.2d 752 (Fla. 1978); Buford v. State, supra, Brown v. State, 381 So.2d 690 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980); Thompson v. State, 389 So. 2d 197 (Fla. 1980); and King v. State, 390 So.2d 315 (Fla. 1980).

With respect to the non-statutory mitigating factors that the appellant had unstable family life and that appellant appeared to show remorse for his actions, there is nothing in the record to indicate the trial judge did not consider these factors, but simply that he declined to find that the record justified the conclusion, that these were in fact such mitigating factors that would outweigh the three aggravating factors.

In conclusion, the appellee would maintain that the case of Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912, 96 S.Ct. 322, 49 L.Ed.2d 1221 (1976), is directly on

point with the instant case. In Alford, the body of a thirteen year old female victim was discovered lying on a trash pile. She had been raped, both vaginally and rectally, was blindfolded and shot over six times. The defendant was a twenty-seven year old male and had no significant record of prior criminal history. In Alford, this court held that the death sentence was appropriate.

The appellee would further point out this court's holding in Goode v. State, 365 So.2d 381 (Fla. 1978), wherein the defendant, age twenty-two, committed a crime in a manner in which this court found was unnecessarily tortuous to the victim. Both the jury and the judge considered the question of whether the mental capacity of the defendant was "substantially impaired", so that he could not appreciate the criminality of his conduct or conform his conduct to the requirements of law. In Goode, this court found that the imposition of the death penalty was proper. The appellee would maintain that, as in Goode and Alford, the jury and the trial judge considered the question of his, mental capacity, and the non-statutory mitigating factors included in the appellant's brief, and that the record will substantiate that those factors did not outweigh the three aggravating circumstances.

Accordingly, the judgment and sentence of the circuit court should be affirmed.

POINT SIXTEEN

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant's suggests that the Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied. A review of cases that he cites will serve to show that these contentions are without merit.

Appellant cites Mullaney v. Wilbur, 421 U.S. 685, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), for the proposition that the Florida statute fails to provide any standard proof for determining that aggravating circumstances "outweigh" the mitigating factors. The case held that a Maine law requiring the defendant to establish by a preponderance of evidence that he acted in the heat of passion on sudden provocation, in order to reduce murder to manslaughter, is violative of due process. Appellee fails to see any relevant connection between Maine law and the present case.

Appellant then cites Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), for the proposition that the aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. The United States Supreme Court in reversing a death sentence based on Georgia law cites Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), as a valid example of a capital sentencing scheme which provides "specific and detailed guidance."

Appellant's argument that the Florida capital sentencing

process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, and limitations on consideration of/and weight given to mitigating evidence and factors, is without merit. The constitutional infirmities of the Ohio death penalty in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), cited by appellant for the above proposition, were compared to the valid Florida capital sentencing statute in Proffit v. Florida, supra.

The Florida death penalty scheme, under which a trial judge weighs nine (9) aggravating factors against seven (7) mitigating factors to determine whether the death penalty shall be imposed, under which the trial judge focuses on the circumstances of the crime and the character of the individual, under which the court sets forth in writing its findings upon which the sentence of death is based, and under which there is automatic review by the Supreme Court of Florida is sufficient, on its face, to avoid constitutional deficiencies arising from arbitrary and capricious imposition of the death penalty. Proffit v. Florida, supra. The court also held that imposition of the death penalty is not cruel and unusual punishment.

The constitutionality of the Florida capital sentencing statute, both as to due process arguments and cruel and unusual punishment arguments has repeatedly been upheld. See, Spinkellink v. State, 313 So.2d 666 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973); Ford v. State, 374 So.2d 496 (Fla. 1979); Foster v. State, 369 So.2d 928 (Fla. 1979); Songer v.

State, 365 So.2d 696 (Fla. 1978); Jackson v. State, 366 So.2d 752 (Fla. 1978); Raulerson v. State, 358 So.2d 826 (Fla. 1978); Gibson v. State, 351 So.2d 948 (Fla. 1977); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Meeks v. State, 364 So.2d 461 (Fla. 1978); Cooper v. State, 339 So.2d 1133 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); McCrae v. State, 395 So.2d 1145 (Fla. 1980); Peek v. State, 395 So.2d 492 (Fla. 1981).

There is no merit in the appellant's contention that the state should have been required to provide defense counsel with advanced notice of the aggravating factors upon which it intended to rely. See, Spinkellink v. Wainwright, 578 F.2d 582, 609 (5th Cir. 1978), Menendez v. State, 368 So.2d 1278, 1282, n.21 (Fla. 1978).

Appellant's suggestion that the Florida capital sentencing system is unconstitutional because it allows exclusion of jurors for their views on capital punishment is also without merit. The United States Supreme Court has recently held that respective jurors may be excluded from the jury, without violating the constitution, where their views on capital punishment would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of a trial. Lockhart v. McCree, 106 S.Ct.1758, 1760 (1986); Wainwright v. Witt, 469 U.S.____, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This court has recognized this principle in Robinson v. State, 487 So.2d 1040 (Fla. 1986).

Additionally, appellant's contention that this court has rendered Florida's death penalty unconstitutional because of its

decisions in Quince v. State, 414 So.2d 185, 187 (Fla. 1982), cert. denied, 103 S.Ct. 192 (1982), and Brown v. Wainwright, 392 So.2d 1327 (1981), cert. denied, 102 S.Ct. 542 (1981), clearly, in light of the United States Supreme Court's denial of ceritorari jurisdiction, defeats appellant's assertion. Surely, if this court's announced function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision was deficient in any respect, the United States Supreme Court would have said so. Appellant's assertion is clearly untenable in fact and law.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the conviction and sentence of the trial court in all respects

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished by mail to Christopher S. Quarles, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the appellant this 1 day of December, 1986.

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