IN THE SUPREME COURT OF FLORIDA

REINALDO AMOROS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 68,840

FILED
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AUG 10 1987
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ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

OF COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

REINALDO AMOROS will be referred to as the "Appellant" in this brief. The STATE OF FLORIDA will be referred to as the "Appellee". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the statement of the case and facts as set forth by the appellant.

SUMMARY OF THE ARGUMENT

Appellee respectfully submits the trial court properly admitted some evidence from the trial in which appellant was acquitted. The evidence admitted was relevant to the issue of appellant's possession of the murder weapon and the identity of the murder weapon as the weapon in appellant's possession a month earlier. These issues had not been decided in appellant's favor by the acquittal. Once the evidence was properly admitted, the prosecutor could use the evidence to refute the closing argument of the defense attorney.

This Court has eliminated the standard jury instruction on circumstantial evidence. The trial court can, however, in his discretion, give such an instruction. The failure to give an instruction is error only if an abuse of discretion can be demonstrated. Here, the jury was appropriately instructed on burden of proof and reasonable doubt. The facts are not so unique as to require a special circumstantial evidence instruction.

Appellant's argument that the jury improperly used the Williams Rule evidence is pure speculation. The jury was instructed on the limited use of the similar fact evidence, identity. There is no reasons to believe the jury did other than keep their oath and follow the instructions of the court.

One cannot raise for the first time on appeal an issue not presented to the trial court. There was no objection made to the two comments complained of here. Moreover, the comments were within the bounds of legitimate argument.

The victim in this case was shot three times. He was shot in one place, and he fled to others. It is clear Rivero did not die immediately, but was aware of the eminence of death. The murder was heinous, atrocious or cruel.

Appellant armed himself and proceeded to the murder scene intending to kill. When the original victim was not found, he vented his spleen on the person who was present. This situation is cold and calculated.

The jury recommended and the trial judge imposed a sentence of death. The court found the aggravating circumstances outweighed the mitigating circumstances. In such a situation, death is the appropriate sentence.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY ADMITTED SIMILAR FACT EVIDENCE CONCERNING THE APPELLANT'S PRIOR POSSESSION OF THE MURDER WEAPON (GUN).

It is undisputed that an issue at the trial of this case was appellant's possession of the murder weapon. There were two witnesses who put appellant at the murder scene a few minutes before the fatal shots were fired. (R 272, 278 - 280, 300 - 301) However, neither Mr. Fullwood nor Ms. Dixon saw a weapon in his possession. The gun from which the shots were fired was found abandoned on the street, not on appellant when he was arrested. Thus, it was necessary to demonstrate circumstantially that appellant had the gun on June 2nd when Omar Rivero was shot three times. This was properly done by admission of some of the same evidence used in a prior trial in which appellant was acquitted of a charge of second degree murder.

Section 90.404(2)(a), Florida Statutes provides for the admissibility of similar fact evidence of other crimes, wrongs or acts of a defendant so long as the sole purpose is not to prove bad character of the accused. See Williams v. State, 110 So.2d 654 (Fla. 1959) and, Randolph v. State, 463 So.2d 186 (Fla. 1984). Even though such evidence may tend to suggest the commission of another offense, it is still admissible if its probative value outweighs the prejudicial effect. Jones v. State, 440 So.2d 570, 575 - 576 (Fla. 1983). It is submitted that the evidence of appellant's possession of the murder weapon, approximately one month prior to the murder, and enough of the

surrounding circumstances of that possession as to put it in some logical context, was of sufficient probative value on the issue of appellant's possession on June 2nd as to outweigh on prejudice.

While this Court in State v. Perkins, 349 So.2d 161 (Fla. 1977) held evidence of crimes for which a defendant has been acquitted was not admissible in a subsequent trial, the court recognized the Fifth Amendment does not preclude admission of all evidence used in an acquitted crime. See, Ashe v. Swenson, 397 U.S. 436 (1970). This Court indicated Ashe prohibited use in a subsequent trial only those issues clearly decided by the acquittal at the prior trial. Accord, Lawson v. State, 304 So.2d 522 (Fla. 3d DCA 1974). The Ashe rule was later applied by this Court in Jackson v. State, 498 So.2d 406, 410 (Fla. 1986).

In Jackson a taxicab driver testified he picked up the defendant from a third party's house, and they struggled over the gun, the same gun that was used in the murder. Although the defendant had been tried and acquitted of attempted murder of the taxicab driver, those facts were not admitted. This Court held the evidence was admissible to show consciousness of guilt, flight and possession of the murder weapon. Evidence and facts from the prior trial which resulted in acquittal and which were necessary to show possession of the murder weapon by appellant and the identity of the weapon itself was admitted, properly, in this case.

Even if, as appellant argues, the evidence from the first trial went beyond the scope of the evidence used in Jackson, it

does not necessarily follow that the admission of the additional evidence was error. The test for such admissibility is relevancy and whether or not the Ashe rule has been violated. Appellee submits the evidence admitted from the earlier incident by the two state witnesses was relevant and necessary as the issues of possession of the firearm by appellant and identifying the murder weapon as the same weapon appellant had in his possesion a month earlier.

The evidence admitted from the prior trial was essentially:

> 1. Appellant error involved in a fight with a male friend of his common wife.
>
> 2. During the struggle a gunshot was heard.
>
> 3. The other man was the person shot, and appellant was seen with the gun in his hand thereafter
>
> 4. The person who had accompanied appellant to the scene of the shooting saw appellant with the gun when they left the scene.
>
> 5. Appellant made a statement which was substantially the same version of events; however, he added he threw the gun away the night of the shooting.
>
> 6. Both the state and the defense stipulated that the bullet removed from the body of Walter Coney, the shooting victim, came from the murder weapon.

This testimony as a whole put into context with appellant's prior possession of the murder weapon and established the murder weapon was in fact the same gun appellant had a month earlier.

All of the above facts were undisputed and acknowledged by the appellant. The verdict of acquittal in the death of Walter Coney in no way changed these facts. That verdict simply says these facts do not constitute a crime. Since there was no issue

which had been decided in the defendant's favor by the acquittal which was presented in this subsequent trial, the admission of the disputed evidence was not erroneous . Accord, Jackson v. State, supra. It is obvious from these facts that the shooting of Walter Coney was accidental or was self-defense.

It must be noted that the jury was instructed concerning the use of similar fact evidence. Prior to the testimony of the two witnesses concerning the facts of the Coney shooting the jury was told:

> THE COURT: Members of the jury, as I understand it, the evidence that you are about to receive from this witness may concern evidence of other crimes allegedly committed by the defendant.
>
> They will be considered by you. This testimony and evidence will be considered by you for the limited purpose of proving identity on the part of the defendant, and you shall consider it only as it relates to that issue. The defendant is not on trial for a crime that is not included in the indictment, and you should keep that in mind.

(R 393 - 394)

And during the final instruction at the guilt/innocence phase of the trial, the jury was again told:

> The evidence which has been admitted to show similar crimes, wrongs or acts allegedly committed by the defendant will be considered by you only as that evidence relates to the proof of identify on the part of the defendant.

(R 535)

The instructions by the court kept the proper use of the similar fact evidence in the jury's mind and cured any possible prejudice. Cf. Marshall v. State, 439 So.2d 973 (Fla. 2d DCA 1983).

Of further interest is the fact that defense counsel made it unmistakably clear that appellant had not committed a crime involving the shooting of Walter Coney. Defense counsel asked one of the witnesses what had been the outcome of the previous case and was told the defendant was found not guilty. (R 416)

During the closing arguments in this case, the defense attorney stressed the fact that while appellant had the gun on April 30th, no one could place the gun in the defendant's hands on June 2nd. (R 488 - 489) Counsel stressed appellant's statement that he threw the gun away. (R 489) He went on to suggest the gun could have been found by anyone and strangers or witnesses in the case could have killed Omar Rivero. (R 494) In response to such argument, the prosecutor attempted to show how ludicrous and far-fetched the defense counsel's sugestions were. Indeed, one would have to really strain their imagination to accept the weird chain of coincidents espoused by the defense to come up with the conclusion that someone other than appellant murdered Omar Rivero with the same gun from a previous accidental shooting, a gun which was known to have been in appellant's possession. And that gun was used only two minutes after the appellant was seen by two disinterested witnesses walking in the direction of the victim's apartment.

Appellee respectfully submits the trial court properly admitted some evidence from the trial in which appellant was acquitted. The evidence admitted was relevant to the issue of appellant's possession of the murder weapon and the identity of the murder weapon as the same weapon in appellant's possession a

month earlier. These issues had not been decided in appellant's favor by the acquittal. Once the evidence was properly admitted, the prosecutor could use the evidence to refute the closing argument of the defense attorney.

ISSUE II

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S REQUEST FOR A JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

In 1981, there was a major revision of the standard jury instructions for criminal cases. As a part of that overhaul , an instruction on circumstantial evidence was eliminated. In support of the elimination, this Court said:

> We find that the circumstantial evidence instruction is unnecessary. The special treatment afforded circumstantial evidence has previously been eliminated in our civil standard jury instructions and in the federal courts. **Holland v. United States,** 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed.2d 150 (1954). The Criminal Law Section's criticism of this deletion rests upon the assumption that an instruction on reasonable doubt is inadequate and that an accompanying instruction on circumstantial evidence is necessary. The United States Supreme Court has not only rejected this view but has gone even further, stating:
>
> > [T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect . . . .
>
> **Id.** at 139 - 40, 75 S.Ct. at 139 (1954). The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case. However, the giving of the proposed instructions on reasonable doubt and burden of proof, on our opinion, renders an instruction on circumstantial evidence unnecessary.

See, In the Matter of the Use by the Trial Courts of the Standard Jury Instructions, 431 So.2d 594, 595 (Fla. 1981).

Since the elmination of the instruction, both this Court and the district courts have addressed the failure to give a circumstantial evidence instruction. Williams v. State, 437 So.2d 133 (Fla. 1983). White v. State, 446 So.2d 1031 (Fla. 1984); Dunn v. State, 454 So.2d 641 (Fla. 5th DCA 1984) and Hawthorne v. State, 470 So.2d 770 (Fla. 1st DCA 1985). In Williams, the defendant argued an instruction on circumstantial evidence should have been given when the prosecution relied solely on circumstantial evidence to prove an essential element. This Court again stated such an instruction becomes duplicative when the jury is properly instructed on reasonable doubt and burden of proof. While the court added a trial court can give a circumstantial evidence instruction in his discretion, his action will not be disturbed absent a showing of abuse. Accord, White v. State. And in Hawthorne, the district court also held the giving of instructions on reasonable doubt and burden of proof are sufficient in circumstantial evidence cases.

Sub judice, the trial court did not give a specific instruction on circumstantial evidence; however, instructions were given on burden of proof and reasonable doubt. (R 527, 529, 530, 532 - 535) In defining first and second degree murder as well as manslaughter, the trial judge indicated the state had the burden of proving the elements of those crimes beyond a reasonable doubt. (R 527 - 532) Furthermore, the jury was told the defendant had pled not guilty, and he was presumed innocent. This presumption remains with the defendant until the state proves otherwise beyond a reasonable doubt. (R 532 - 533) Additionally, the term "reasonable doubt" was explained in detail. (R 533 - 535)

Appellee recognizes this Court has said an instruction on circumstantial evidence can be given if the trial judge, in his discretion, feels the peculiar facts of a case may warrant such an instruction. The judge in this case, when presented with the law now applicable to circumstantial evidence, did not feel the case was so unique as to require a special instruction. Although the defendant states the failure to give an instruction was an abuse of discretion, he has failed to demonstrate abuse. The mere fact that he had originally been inclined to instruct on circumstantial evidence does not prove abuse by failing to do so.

The instructions that were given in this case informed the jury of how they were to weigh the evidence or lack of evidence. As instructions on circumstantial evidence would not have changed the state's burden of proof or the way in which the jury determines reasonable doubt, such an instructive in this case would have been duplicative. Williams v. State, supra.

ISSUE III

THE DEFENDANT'S SENTENCING HEARING WAS RELIABLE AND DID NOT VIOLATE HIS CONSTITUTIONAL RIGHTS.

Appellant concedes that the shooting of Walter Coney was not mentioned during the penalty phase of this trial, yet invites this Court to speculate on how the jury used the similar fact evidence, a use directly opposed to the instructions given by the trial court. Prior to the taking of any testimony in this case, the jury was told by the Court that they must decide the case based on the evidence and the instructions on law given by the court. (R 201, 206) Before similar fact evidence was introduced, the jury was informed of its limited use in this trial. (R 393 - 394) During the final instructions, the limitation on the use of this evidence was again stated. (R 535)

Appellant is now asking this Court to hold that the jury ignored their oath and used the evidence in a manner inconsistent with the instructions. There is nothing in this record to suggest such a result. Appellant's reliance on the testimony by Ed Page that he did not have time to investigate the case does not help to make such a quantum leap. The fact that a prosecutor, upon reflection, invited by defense questioning thinks he should have investigated more, does not mean the jury believed appellant's acquittal was warranted. This is especially true in view of the fact that the prosecutor admitted there was no other evidence which had not been presented to the jury. It is obvious from the little similar fact evidence presented that the shooting of Walter Coney was either accidental or self defense; that was the inescapable conclusion from that evidence.

Reliance by the defendant on Robinson v. State, 487 So.2d 1040 (Fla. 1986) is not well-placed. In Robinson, the prosecutor in cross-examining the defense witnesses asked them about that defendant's commission of other crimes, crimes for which he had been neither charged, nor convicted. Here, as stated under Issue I, there was no question of another crime. The jury knew appellant had been cleared of any wrongdoing in Coney's death. Simply, some undisputed facts from that other case were relevant to issues in this one. This Court's holding in Keen v. State, 504 So.2d 396, 400 - 401 (Fla. 1987) does not help appellant.

The trial judge in Keen v. State, supra, had ruled the alleged other crime involving Keen and his brother was not admissible at his trial. The prosecutor again tried to get the judge to allow the evidence, but it was again ruled inadmissible. On cross-examination of the defendant, the prosecutor asked him about the incident in direct contravention of the judge's ruling. Sub judice, certain facts from the prior shooting was relevant to issues in the murder cases, and the trial judge had so held.

Appellant has not demonstrated the jury used the similar fact evidence in any way other than that allowed by the judge in his instructions.

ISSUE IV

THE PROSECUTOR'S PENALTY PHASE ARGUMENT WAS PROPER.

It is being alleged that two comments made by the prosecutor during the penalty phase argument were improper. Appellee submits the propriety of these comments are not properly before the court since there was no objection at the trial level. Our courts have continuously held issues which have not been presented to the trial court cannot be raised for the first time on appeal. See, i.e., State v. Jones, 204 So.2d 515 (Fla. 1967); Castor v. State, 365 So.2d 701 (Fla. 1978); Crespo v. State, 379 So.2d 191 (Fla. 4th DCA 1980) and Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

As has been pointed out, the contemporaneous objection rule is grounded in practical necessity. Timely objection by the party claiming error gives the trial judge notice of possible error and an opportunity to correct same. Additionally, when evidence or an argument is challenged, a record is thereby made which enables the appellate court to make a rationale ruling . These principles underlying the contemporaneous objection rule as equally applicable in death penalty cases and have been used in such cases. See, Lucas v. State, 376 So.2d 1149 (Fla. 1979) and Steinhorst v. State, supra. The rule has been applied to prosecutors' comments at sentencing. Jones v. State, 411 So.2d 165 (Fla. 1982).

In Lucas, the defendant claimed he was intoxicated at the time of the murder and could not form the premeditation necessary for first degree murder. The state called a police officer in

rebuttal who had not been named on the prospective witness list. The officer testified concerning the defendants' behavior and appearance some two hours prior to the murder. On appeal, the defendant claimed reversible error for failure to have an inquiry pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971). This Court rejected the argument saying:

> . . . it was incumbent upon the appellant to raise a timely objection and thereby allow the trial court to specifically rule on the issues. The record shows that while defense counsel brought the state's non-compliance to the attention of the court, he did not interpose an objection; but rather, he deferred to the trial court's statement of the applicable law. This court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law.

(376 So.2d at 1151 - 1152)

An objection should have been made to the prosecutor's comments in this case.

Furthermore, appellee alternatively submits there was nothing improper about the prosecutor's argument. While latitude is afforded the parties in arguing to the jury, Thomas v. State, 326 So.2d 413 (Fla. 1975) and Gosney v. State, 382 So.2d 838 (Fla. 5th DCA 1980), an attorney may argue any logical inferences which can be drawn from the evidence. Breedlove v. State, 413 So.2d 1 (Fla. 1982). There, the evidence presented at trial indicated after shots were fired, Mr. Fullwood and Ms. Dixon heard some type of thud on the door and a man yelling. Additionally, there was blood found on the door. These facts can fairly be interpreted in the manner espoused by the prosecutor.

Likewise, there was nothing erroneous in the prosecutor's comments concerning the alternate sentencing possibility of life in prison. **Section 921.141, Florida Statutes,** provides for a second phase in a capital trial if the defendant is indeed found guilty of first degree murder. This sentencing proceeding has as its object a determination as to whether death or life imprisonment is the appropriate sentence. Consideration of a sentence of life is therefore appropriate. There has been no showing that the prosecutor's comment undermines confidence in the outcome of the proceeding. Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985).

ISSUE V

THE TRIAL JUDGE PROPERLY FOUND THE MURDER WAS HEINOUS, ATROCIOUS OR CRUEL.

The evidence presented in the trial of this case supports the trial judge's finding that the capital murder was especially heinous, atrocious or cruel. It is clear and undisputed that the victim, Omar Rivero, was shot three times. Spent bullets and shell casings in the bedroom and kitchen are evidence of the fact that Rivero was shot in other parts of the house. He attempted to flee from his assailant and met with a padlocked door. The testimony of the victims' neighbors proves he was still alive after he was shot because he made a yelling noise.

Whether the victim was yelling and pounding on the door or whether, as appellant espouses, the victim yelled because he fell into the door is not of real significance. What is important is that Omar Rivero was conscious and aware of impending death. This Court has steadfastly held the fact that the victim lingered for several minutes, conscious of impending death are factors to be considered in determining heinous, atrocious or cruel. See, Funchess v. State, 341 So.2d 762 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976); Washington v. State, 362 So.2d 658 (Fla. 1978); Phillips v. State, 476 So.2d 194 (Fla. 1985) and Way v. State, 496 So.2d 126 (Fla. 1986).

ISSUE VI

THE CAPITAL MURDER WAS COLD, CALCULATED AND PREMEDIATED.

In support of this aggravating circumstance, the trial judge said:

> On the day prior to the murder of Oscar Fernandez Rivero, the Defendant had threatened the life of Ms. Veronica Simmons. Ms. Simmons was the Defendant's former girlfriend, who at that time was living with the victim, Oscar Fernandez Rivero. The Defendant had questioned Ms. Simmons regarding the ownership of the automobile she was then driving. Ms. Simmons did not respond to the Defendant's inquiries because she was fearful that the Defendant would cause trouble were he to learn she was driving another man's automobile.
>
> The day after he threatened to kill Ms. Simmons, the Defendant armed himself with a firearm and went looking for Ms. Simmons' apartment. Once he found the apartment he entered it, in the late night hours, with the sole purpose and intent of killing someone. He carried out his intended purpose by murdering Oscar Fernandez Rivero. (R 666)

The findings of the trial judge on aggravating and mitigating circumstances are factual findings which should not be disturbed unless there is a lack of competent evidence to support such finding. Sireci v. State, 399 So.2d 964 (Fla. 1981) and Lucas v. State, 376 So.2d 1149 (Fla. 1979). The aggravating factor of cold, calculated and premeditated, **§921.141(5)(i), Florida Statutes,** relates to the intent and state of mind of the killer at the time the murder is committed. Combs v. State, 403 So.2d 418 (Fla. 1981).

In Mason v. State, 438 So.2d 374 (Fla. 1983), the defendant broke and entered the home of the decedent and armed himself with a knife taken from the kitchen. He proceeded to Ms. Chapman's

bedroom where he stabbed her by lifting his arm up and coming down deliberately and with great force. The victim was not sexually assaulted, nor were the premises robbed. There was nothing to indicate the victim in any way provoked the attack. The defendant had no reason to commit the murder. On these facts cold, calculated and premeditated was sustained. Mason v. State, 438 So.2d at 379.

A cold, calculated and premeditated finding was also upheld in Squires v. State, 450 So.2d 208, 212 (Fla. 1984). The victim in Squires was shot once in the shoulder. While he lay on the floor screaming in pain, the defendant shot him four times in the head at close range, not more than two inches. See also, O'Callaghan v. State, 429 So.2d 691, 696 (Fla. 1983); Hill v. State, 422 So.2d 816 (Fla. 1982) and Jent v. State, 408 So.2d 1024 (Fla. 1981).

The evidence in this case clearly shows the defendant went to the murder scene with murder in mind. After not finding his intended victim home, he turns his wrath on the person he finds there and cold bloodedly shoots Rivero, not once, but three times. This is cold, calculated without any moral justification. Way v. State, supra.

ISSUE VII

DEATH IS THE APPROPRIATE SENTENCE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

It is the duty of this Court to review each capital murder resulting in a sentence of death to determine if there are clear and convincing reasons warranting imposition of this penalty. Harvard v. State, 375 So.2d 833 (Fla. 1977) and Antone v. State, 382 So.2d 1205 (Fla. 1980). This review is to find out whether the jury and the trial judge acted with procedural rectitude and to ensure relative proportionality among death sentences. Brown v. Wainwright, 392 So 2d 1327 (Fla. 1981). Appellee submits the jury and judge followed all procedural requirements, and the facts and circumstances of this case justify imposition of the death penalty.

The jury, by a vote of 11 - 1, recommended a sentence of death. The trial judge found both aggravating and mitigating circumstances, but found the aggravating circumstances outweighed the mitigating. Thus, the court imposed a sentence of death.

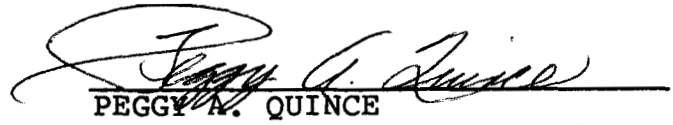
Appellant's reliance on Irizarry v. State, 496 So.2d 822 (Fla. 1986) to say death is not appropriate here is not well-founded. While both involves some type of domestic dispute, the similarity ends there. See, Way v. State, supra where death upheld in a domestic situation. The defendant in Irizarry received a life recommendation by the jury. This Court found there was a reasonable basis for that recommendation, one factor being the crime resulted from passionate obsession. Ibid. at 825. Sub judice, there was a recommendation of death.

CONCLUSION

Based on the above stated facts, arguments and authorities, appellee would ask that this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



PEGGY A. QUINCE
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Douglas S. Connor, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, P.O. Box 1640, Bartow, Florida 33830, this 6th day of August, 1987.

OF COUNSEL FOR APPELLEE.