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IN THE SUPREME COURT OF FLORIDA



WALTER GRANT KYSER,

Appellant,

v.

Case Number 69,736

STATE OF FLORIDA,

Appellee.

/

**ANSWER BRIEF OF APPELLEE**

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PRELIMINARY STATEMENT

Walter Grant Kyser was the defendant below and will be referred to herein as "Appellant" or "Kyser". State of Florida was the prosecution below and will be referred to herein as the "Appellee" or "the State".

The record on appeal consists of eight volumes of trial transcript and two volumes of documenting instruments. All references to the record on appeal will be by the symbol "R" following by the appropriate page numbers in parenthesis.

## SUMMARY OF ARGUMENT

**I** An equivocal request for counsel does not render the voluntary statements of appellant inadmissible where those statements are exculpatory and are not an admission of guilt.

**II** Circumstantial evidence which demonstrates that the defendant fired the fatal shot at close range using his own recently purchased firearm, then fled the jurisdiction and is inconsistent with suicide or accidental discharge constitutes substantial competent evidence sufficient to survive a motion for judgment of acquittal.

**III** A jury instruction which apprises the jury of the essential elements of an underlying felony is sufficient.

**IV** The seating of an alternate juror after the conclusion of the guilt phase did not prejudice the penalty proceedings where a majority of eight jurors voted for death.

**V** The sentencing order finds two aggravating factors and no mitigation. The death sentence is proper.

**VI** The shooting of a law enforcement officer to avoid arrest justifies imposition of the death sentence under proportionality review of similar police shootings.

**VII** A homicide involving one triggerman does not require a special instruction on whether the defendant killed the victim.

Moreover, absent a timely objection to the instructions given and a written request for an alternative instruction, this claim is barred from appellate review.

**VIII** The jury should be allowed to hear any and all evidence which sheds light on the character of the defendant. Prior convictions for burglary apprise the jury of the defendant's bad character which is in issue during a capital penalty proceeding.

**IX** The Florida Standard Jury Instructions do not cause the jury to undervalue its recommendation. Moreover, this alleged error was not preserved for appellate review.

## ARGUMENT

### ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE DURING A CUSTODIAL INTERROGATION.

Appellant argues that his exculpatory statements made after advisement of his Miranda rights were improperly admitted because he indicated a desire to consult an attorney. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

The State would answer that this case is factual indistinguishable from Waterhouse v. State, 429 So.2d 301 (Fla. 1983) where this court upheld the admission of a similarly situated capital defendant who argued that his equivocal statements-"I think I'd like to talk to my attorney before I say anything else" and "I think I'd like to talk to my attorney. Would you all come back tomorrow?" Were the same kind of explicit invocation of the right to deal with the police through counsel that was not "scrupulously honored" by the police in Edwards. This Court correctly distinguish Edwards from Waterhouse and the instant case noting:

> Unlike in Edwards, appellant never explicitedly stated that he did not want to talk to the police nor was he ever told that he was required to. Therefore the police did not act improperly in visiting appellant in questioning him further after his two

> equivocal statements expressing possible interest in seeing an attorney.

Id. at 305. In Edwards, the defendant had explicitedly stated "I want an attorney before making a deal". 451 U.S. at 479. Likewise, in Smith v. Illinios, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) the Court held that a state court of appeals findings that the statement "uh yeah I'd like to do that" by the eighteen year-old defendant therein made to a police officer upon being advised he could have an attorney present during questioning constituted a invocation of the right to counsel which was sufficient to trigger the Edwards's bright-line rule that all questioning must cease at that point.

Here the statement by Kyser to Officer W.E. Miller was identical to that in Waterhouse, "can we talk about something else. I think I want to talk to a lawyer before I talk about that and I hope you understand that." (R 1168). There is no objective distinction between this equivocal statement and the statements in Waterhouse. Admittedly one police officer could have construed this as a request for an attorney while another officer would come to a different conclusion. The trial counsel for appellant did not ask W.E. Miller if at the motion to suppress hearing if he considered this a request for counsel. (R 1169-1170). Miller did deny Kyser requested to speak with a lawyer. (R 664). The record of the hearing on the motion to

suppress and the order denying the same motion does not indicate whether the trial court found this statement to be an unequivocal request for counsel. Absent such an expressed finding by the trial court, the standard of review must now be whether a reasonable law enforcement officer would have or should have considered this statement an unequivocal request for counsel triggering the bright-line rule of Edwards. This Court's opinion in Long v. State, Case No. 67,103 (Fla. November 12, 1987) reaffirmed this Court's position in Waterhouse but held the confession inadmissible because the officers did not attempt to clarify the equivocal request for counsel and instead vigorously continued the interrogation. "I was pursuing the interrogation." Long, slip opinion at (p.3). Long made a full, explanatory confesion of Virginia Johnson's murder.

Here the first officer who heard the equivocal request for counsel did cease questioning Kyser and Deputy McKeithen ceased questioning Kyser after he renewed his equivocal request for counsel. Unlike the suspect in Long, Kyser never gave the officer's a full explanatory confession of murder. Instead he explained how the shooting was attributable to some one else or an accident. The case does not involve a confession so there is not need to question its voluntariness or admissibity.

This Court has already determined that the similar statement in Waterhouse did not rise to the level of unequivocal invocation

of the right to counsel sufficient to trigger the requirement of Edwards that all questioning seize. Of course, Kyser did not request all questioning seized. The crux of the matter was Kyser's desire to make a exculpatory statement that either another person did the shooting as indicated by his telephone conversation with his wife or to establish an explanation of ex-accident. Kyser was a shrewd ex-con who by his own admission in the penalty phase was quite capable of munipulating situations to his benefit and avoid problems with law enforcement. (R 948). Kyser was not a scared and confused teenager as was the suspect interrogated in Smith v. Illinois.

The trial court below suggested that the phone call to Kyser's wife and the subsequent statements may have satisfied the Edwards rule that the questioning must cease unless the suspect initiates further conversation. Once again, absent an express finding by the trial court, this Court must objectively review the record and determine for itself whether or not Kyser explicitedly invoked his right to counsel and if yes, did he initiate further discussion by seeking to blame Ricky Wyrick for the killing. (R 1158).

Absent an express finding by this Court that the statement did adequately invoke the right to counsel, the statements were clearly admissible. However, even inspite of this finding, if the court finds the request unequivocal, the statements were

admissible because Kyser initiated contact to explain the presence of Ricky Wyrick at the shooting. The testimony at the motion to suppress hearing and at trial reveals that Officer McKeithen did readvise Kyser of his miranda rights from a written form and Kyser did not assert any right to counsel until McKeithen asked for a taped statement. The questioning then ceased. (R 1178) (R 730). See Connecticut v. Barret, 479 U.S. ___, 93 L.Ed.2d 920, 107 S.Ct. ___ (1987).

The trial court did not err in admitting the statements made after the "equivocal" request for counsel and there was no failure of law enforcement officers to "scrupulously honor" the Appellant's Miranda rights. Michigan v. Jackson, 475 U.S. 625, 89 L.Ed.2d 631, 106 S.Ct. 1406 (1986) has no application to a Fifth Amendment pre-arraignment custodial interrogation. Jackson clearly involves the Sixth Amendment right to counsel which attaches after official criminal proceedings have been initiated against the defendant. The record reveals that Kyser was advised of his Miranda rights and testified that he was aware of his rights. (R 1191-92).

Moreover, the statements were exculpatory in nature if believed, intended to establish Kyser's defense at trial and not rebutted. It was the testimony of the medical examiner, Dr. Sybers, which established at the circumstances of the killing were sufficient to prove first degree murder. Therefore, any error in the admission of the testimony was harmless.

## ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING KYSER'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE WAS SUFFICIENT TO REBUT ANY REASONABLE HYPOTHESIS OF INNOCENCE.

The evidence presented by Dr. Sybers, a forensic pathologist, showed there were no bruises to the victim's neck, head, or shoulders consistent with being hit by handgun. (R 605). The wound was not a contact wound where a suicidal person presses a weapon to his head and pulls the trigger. (R 611). The shot was fired one to six inches from the victim's left ear. (R 613). The shooting was inconsistent with being struck with the gun or accidential discharge causing the death. (R 614). This evidence contradicted the defendant's statement to Officer McKeithen that Kyser swung the gun, struck Moore only to have the gun accidently discharge. An admission by a defendant to facts which are sufficiently at odds with the circumstantial evidence surrounding the death are sufficient in to show of guilt. See Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985). Moreover, Deputy Moore, the victim, was wearing his Deputy Sheriff's cap and jacket and was known to be a deputy sheriff by Kyser as revealed in his statement to Officer Miller that was admissible even under the arguments of counsel presented in Issue I. Kyser's behavior after the shooting was also introduced as evidence of guilty knowledge. See Bundy v. State, 471 So.2d 9, 21 (Fla. 1985) where this Court approved admission of evidence of flight to prove

guilty knowledge. The evidence of flight in this case was telling as (1) Kyser was aware that he had shot and probably killed a law enforcement officer, (2) there was clear evidence of flight including shaving his beard, disposing of the firearm and leaving the State and (3) there was no delay from the commission of the crime to the time of flight. The only reasonable interpretation of Kyser's action immediately prior to and after the shooting was that he killed Officer Moore to avoid being arrested. The jury could have found premeditated murder based on the circumstances of the killing including the accuracy of the shot to the head, the type of bullets and weapon used, and Kyser's own statement that he did not want to return to prison. (R 666). See Griffin v. State, 474 So.2d 777 (Fla. 1985) where this Court unanimously held that premeditation may be found from the circumstances of a shooting may demonstrate sufficient evidence to support a finding of premeditation where the bullets were designed for high penetration ability, the victim had no reaction prior to the shooting and the location of the wound indicates the shot was fired at close range and thus unlikely to have struck the victim accidentially. Id. at 780. Kyser's reliance on Hall v. State, 403 So.2d 1318 (Fla. 1981) is misplaced because the State presented the testimony of Dr. Syber to refute his accidential discharge theory. This case is clearly governed by Buenoano as the State presented contrary evidence which the jury could and did chose to believe.

Kyser also argues that there is no evidence of felony murder even though the State proceeded under three possible enumerated underlined felonies, escape, burglarly and attempted burglarly.

The State's case as to escape established that Deputy Moore was wearing his sheriff's cap and radio and had obtained Kyser's driver's license and radioed for a marked patrol unit to be sent to the Turtle Lake Apartments clearly establishing that Deputy Moore had (1) a purpose or intention to affect an arrest under his apparent authority in the offices of the sheriff's department, (2) the actual or constructive detention of Kyser, (3) an inference that a communication between Moore and Kyser as to the officer's intent to arrest were continually detention; (4) Kyser's admissions established the fact that he understood himself to be the subject to an arrest by Moore and the soon to arrive patrol unit. See Melton v. State, 75 So.2d 291 (Fla. 1954).

It would be an absurdity to conclude that Kyser did not kill Moore to escape custody as Moore had a right to legal custody of Kyser and Kyser shot Moore as a conscious and intentional act to leave the established area of custody. State v. Ramsey, 475 So.2d 671 (Fla. 1985). See also Jackson v. State, 498 So.2d 401 (Fla. 1986).

The evidence of burglary or especially attempted burglary was sufficient to show the two essential elements of a specific

intent to commit the crime (Kyser was there to burglar) and he was caught by Deputy Moore which constitutes the interference or some other explanation for Kyser's failure to complete the act. Adam v. Murphy, 394 So.2d 411, 413 (Fla. 1981).

## ISSUE III

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON A FIRST DEGREE FELONY MURDER WHERE THERE WAS SUFFICIENT EVIDENCE OF THE UNDERLINED FELONIES IN THE INSTRUCTIONS GIVEN ADEQUATELY DEFIND THE ALLEGED FELONIES.

The trial court instructed the jury on the underlined felonies, burglary and escape:

> Burglary, as I have used it here means entering or remaining in a structure or conveyance with the intent to commit an offense therein, unless the premises are the time opened to the public where the defendant is licensed or invited to enter or remain. Escape means any prisoner confined in any prison, jail, road camp, or other penal institution, state, county, or municipal, working upon the public roads, or being transported to or from a place of confinement who escapes or attempts to escape from such confinement shall be guilty of escape.

(R 886-887).

This is no different than the instructions given in Vasil v. State, 374 U.S. 465 (Fla. 1979) and it cannot be said that the jury was not "apprised of the essential elements of the underline felony". McCrae v. Wainwright, 422 So.2d 826-827 (Fla. 1982).

## ISSUE IV

THE TRIAL COURT WAS NOT REQUIRED TO DECLARE A MISTRIAL AND IMPANEL A NEW JURY AFTER THE FOREMAN OF THE JURY WAS EXCUSED FROM SERVICE BECAUSE OF HIS DAUGHTER'S ATTEMPTED SUICIDE.

After the jury reached its guilty verdict the foreman of the jury, Mr. Schlief, was advised that his daughter had attempted suicide. (R 923). The jury was concerned and one jury, a nurse, actually called the hospital to check on the daughter's condition. (R 924-925). Apparently the juror, did not call Mr. Schlief. The trial court placed the alternate juror on the panel and the penalty phase proceeding took place and the jury voted 8 to 4 to recommended death. (R 1044).

Presence of an alternate juror who had not participated in the guilt phase of the trial should be deemed harmless if in fact error at all and definately not fundamental error as the vote for death was more than the simple majority required.

Kyser argues contradictory positions for a view that the trial court should have declared a mistrial and impaneled a new jury for the penalty proceeding. He first argues that the alternate juror, Ms. Thurman should not be allowed to participate because she was not involved in the guilt phase. He next argues that Kyser was entitled to an entire panel of twelve new jurors who had not participated in the guilt proceedings to cure the taint of the jurors knowledge of attempted suicide.

The alleged taint in no way involved matters which would affect the jury's collective ability to diliberate Mr. Kyser's fate in a fair and imparial manner such as contact with media reports or concern for the victim's family. Amazon v. State, 47 So.2d 8 (Fla. 1986); Booth v. Maryland, 107 S.Ct. 2529 (1987). In Florida, the jury's recommendation is advisory and need not be unanimous, which is required in the guilt phase. There is no resemblance between this situation and an impermissable golden rule argument.

## ISSUE V

THE TRIAL COURT DID NOT ERR IN SENTENCING KYSER TO DEATH.

### A.

THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED DURING A BURGLARY OR ATTEMPTED BURGLARY.

The issue presented during the guilt phase was sufficient to prove Kyser was engaged in a burglary or in an attempt to commit burglary. The testimony of Kyser during the penalty phase admitted he was on the grounds of the Turtle Lake partments complex to commit burglary and he in fact opened a door of a storage room which involved the necessary overt act in the commission of a burglary. It is not a defense to burglary that the victim left the doors unlocked. Appellee agrees with Kyser that this Court has rejected this argument in Brown v. State, 473 So.2d 1260, 1267 (Fla. 1985).

### B.

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST.

Circumstances of the shooting coupled with the fact that the deputy had radioed for a marked patrol unit constitute substantial competent evidence beyond a reasonable doubt that the homicide was committed to avoid arrest. Jackson v. State, 498

So.2d 406 (Fla. 1986); Songer v. State, 322 So.2d 481 (Fla. 1975). See also Bates v. State, 465 So.2d 490 (Fla. 1985) where this Court reiterated its view that the fact that the victim was nown to be a police officer by the defendant gives special weight to the trial court's finding that the murder was committed to avoid arrest; Riley v. State, 366 So.2d 19 (Fla. 1978).

C.

THE TRIAL COURT DID NOT ERR IN FAILING TO BELIEVE KYSER'S TESTIMONY THAT HIS WIFE WAS THE ACTUAL KILLER.

This point is not deserving of argument except to say that inconsistent exculpatory statements are admissible evidence of guilt. Johnson v. State, 465 So.2d 499, 506 (Fla. 1985); Buenuoano, supra.

D.

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THE NON-STATUTORY MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES PROVEN BEYOND A REASONABLE DOUBT.

Kyser argues that the trial court's sentencing order fails to consider non-statutory mitigating factors such as the degree of his participation and, residual doubt as to guilt, his relation with his employee, his parental status and his non-violent nature. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

This claim has been raised against the same judge in Card v. State, 453 So.2d 17 (Fla. 1984). This Court refused to reweigh the testimony and evidence offered in mitigation where the reasoned judgment of the trial court has taken these factors into consideration. See Smith v. State, 407 So.2d 894 (Fla. 1981) cert.denied, 456 U.S. 984 (1982). The trial court below specifically found that:

> After studying, considering, and weighing all the evidence in the case, the court finds, as to the mitigating circumstances, that there are not mitigating circumstances which exist in this case. The court has considered all possible mitigating circumstances listed under Florida Statutes 921.-141(6) and any others that might apply, and the court finds that the testimony and circumstances of the offense do not support any mitigating circumstances. Even if the court determines that any mitigating factor raised by the defendant had been established, that would not outweigh the overwhelming evidence of aggravating circumstances established by the testimony and evidence in this case.

(R 1468)

Moreover, the claim that Kyser was not the killer is ludricious thus there is no residual doubt. Aldridge v. State, 503 So.2d 1250 (Fla. 1987). Kyser's non-violent nature is belied by his purchase of the gun and carrying a weapon during this episode. Kyser admitted killing the victim to avoid having to return to prison. (R 717) Finally the fact that Kyser and his teenage bride produced a child sheds no light on the defendants

character or the circumstances of the crime. Jackson v. State, 498 So.2d 406 (Fla. 1986). (defendant's gender is not a mitigating factor).

E.

THE TRIAL COURT DID NOT GIVE UNDUE WEIGHT TO THE JURY'S RECOMMENDATION OF DEATH.

The trial court's order finds two aggravating factors as set forth in §921.141, Florida Statutes and no mitigating circumstances statutory or otherwise. Therefore the relative importance of the jury's recommendation was not over stressed and the trial court was aware of the applicable law. The trial court's sentencing order specifically found on this point that:

> This court's firmly of the opinion that the facts suggesting a sentence of death for the commission of this murder are so clear and convincing that no reasonable person could differ. The aggravating circumstances were proved beyond any reasonable doubt and there are no mitigating circumstances to outweigh the two aggravating circumstances which have been thus proved. Therefore this Court finds that the advisory sentence of the jury should be followed and the death sentence should imposed upon the defendant.

(R 1468).

This was not a situation where the trial court found mitigating circumstances existed and possibly ignored them by relying solely on the jury's recommendation. It is interesting

that Kyser accuses the trial court judge of placing undue emphasis on the jury's recommendation of death in this issue and then in issue nine he advances the notion that this trial judge conveyed or failed to convey to the jury an accurate sense of their solemn responsibility in a capital case.

## ISSUE VI

THE TRIAL COURT DID NOT ERR IN SENTENCING KYSER TO DEATH BASED ON A PROPORTIONALITY REVIEW OF THIS CRIME AND OTHER SIMILARLY SITUATED FIRST DEGREE MURDER CASES.

Appellant argues that comparing this case to Proffit v. State, 12 F.L.W. 373 (Fla. July 9, 1987); Rembert v. State, 445 So.2d 337 (Fla. 1984) and Caruthers v. State, 465 So.2d 496 (Fla. 1985) requires that this Court's proportionality review reduce his death sentence to life. None of the above cases involved the murder of a law enforcement officer where there exist a presumption that killing a law enforcement officer is done to avoid arrest. Riley, supra. Here we have the additional fact that Deputy Moore had already obtained Appellant's driver's license and had radioed for a marked patrol car to be sent to the Turtle Lake Apartment Complex before Kyser shot him. The above cases also involves situation where the Court found mitigating circumstances to exist. Here the court found the were no mitigating circumstances.

Additionally, this Court noted in Proffit, supra that there was no evidence that Proffit possessed a weapon when he entered the home and he made no effort to harm the victim's wife when he could have but instead fled and confessed to his own wife before turning himself into authorities. Walter Grant Kyser armed himself several weeks in advance, shot the victim who could and

did identify him posthumously, altered his appearance and fled the jurisdiction. There is also Kyser's penalty phase testimony where he attempted to blame the murder on his wife. Mr. Kyser has presented absolutely no evidence that the death penalty would be disproportionate, to the facts proven below. The death penalty is the proper sanction for this criminal conduct.

## ISSUE VII

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT IT COULD NOT RECOMMEND DEATH UNLESS IT FOUND KYSER KILLED, ATTEMPTED TO KILL OR INTENDED TO KILL OR USE LETHAL FORCE.

Kyser argues that the jury should have been instructed on his Enmund claim even though he was the only killer and made no request for such instruction. See Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), where the United States Supreme Court held that there must be a finding that a defendant killed, attempted to kill, or intended to kill or use lethal force before a death penalty may impose on someone who was not physically present at the murder. See Rogers v. State, 12 F.L.W. 330 (Fla. July 9, 1987). Kyser phrases this issue as a belated request for Enmund jury instructions. The failure to request this instruction would preclude appellate review whether or not the claim was valid. In Jackson v. State, 502 So.2d 409 (Fla. 1985), the death sentence was imposed on a non triggerman in a shooting homicide. This crime of course involves only one defendant who by his own admission was the triggerman. This is not an Edmund v. Florida, case.

## ISSUE VIII

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO INTRODUCE KYSER'S PRIOR JUDGMENT'S FOR BURGLARY AND LARCENY INTO EVIDENCE DURING THE PENALTY PHASE.

The United States Supreme Court has held that any and all evidence which sheds light upon the character of the defendant facing a possible death sentence should be admitted. Skipper v. South Carolina, 106 S.Ct. 1669 (1986). The evidence of Kyser's prior convictions for burglary sheds light on Kyser's fear of going back to prison which was one of his primary motivations in killing Deputy Moore. There was also evidence admitted in the guilt phase which involved Kyser's admission that he had previously served time in prison for burglary. Any err was therefore harmless. See also Muehleman v. State, 503 So.2d 310 (Fla. 1987) allowing admission of prior crimes where defense explores defendant's "past personal and social development history including a prior criminal history." Id. at 316. This Court has receded from its earlier decisions in Maggard v. State, 399 So.2d 938 (Fla. 1981) and Fitzpatrick v. Wainwright, 490 So.2d 939 (Fla. 1986). This claim is without merit.

## ISSUE IX

THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION AS TO THE JURY'S RECOMMENDATION OF PENATLY.

Kyser relies on Caldwell v. Mississippi, 105 S.Ct. 2633 (1985) for the now familar claim that the standard jury instructions in Florida death cases cause the jury to undervalue their important function. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). Kyser feels the role of the jury in Florida is important but apparently not that important. See subissue E of Issue V at page 51-52 of the Initial Brief.

In any event, the fact that the Eleventh Circuit Court of Appeals in Atlanta has concluded in Adams that a trial judge in Florida errs when he fails to inform the jury that the recommendation of life is to be afforded great weight is of no consequence to this Court.[1] The Adams or Caldwell claim relies on this Court's opinion in Tedder v. State, 322 So.2d 908 (Fla. 1975). The Eleventh Circuit Court of Appeal has decided to reargue this claim en banc in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987).

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[1] It goes without saying that this Court applies the stricter standard of appellate review to life than when it overrides reviews death recommendations. Given this fact Adams mades no sense as inaccurate statement of Florida law as it would only confuse jurors.

This argument has been rejected on the merits in Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987) and a host of other opinions emanating from this Court. This case involves a clear procedural default regardless of how the federal court's including the United States Supreme Court resolve the so-called Adams or Caldwell claim. Kyser was tried long after the high court issued its opinion in Caldwell and trial counsel's failure to object to the instruction and request a curative instruction or provide a written alternative instruction precludes appellate review. See Roman v. State, 475 So.2d 1228 (Fla. 1985) precluding appellate review of standard jury instructions on the state's burden of proof in the insanity context for failure to provide object or provide a written alternative instruction. Martin v. Wainwright, 497 So.2d 872 (Fla. 1986).

## CONCLUSION

The State of Florida respectfully submits that the judgment and sentence entered below should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Appellee has been furnished by U.S. Mail to W. C. McLain, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida on this 12th day of November, 1987.

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