IN THE SUPREME COURT OF FLORIDA

JAMES MICHAEL MACK,

Appellant,

vs.

CASE NO. 71,099

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts the appellant's factual statement and addresses the relevant facts where appropriate in the argument herein; however, the state does take issue with Mack's assertion that his co-defendant, North "stated that he had killed someone. (R 474)" (AB 7)[1] The record reveals that North's statement was to the effect that "they killed somebody". Only Mack stated that "he" had killed the victim (R 502-503).

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[1](R) refers to the record on appeal. (AB) refers to the appellant's initial brief.

SUMMARY OF ARGUMENT

POINT I: Defense counsel's waiver of lesser included offenses on behalf of his client does not justify reversal. The issue has not been preserved for appellate review and no fundamental error has been shown. There has been no demonstration that any substantive error even occurred given the clear record evidence that defense counsel, as represented to the state and trial court, discussed the waiver with Mack who then personally decided to forego lesser included offense instructions through his counsel in an "all or nothing" strategy.

Mere speculation as to actual prejudicial/harmful, as opposed to procedural, error should not justify reversal especially given the adequate and appropriate relief available through post-conviction motion. The appellant should not be allowed to profit from an alleged error of his creation and this court should revisit and reconsider its decision in Harris v. State, 438 So.2d 787 (Fla. 1983).

POINT II: The sentencing judge did not abuse his discretion in refusing to admit, as irrelevant, evidence of the jury recommendation of life imprisonment in the separate trial of co-defendant North. That advisory recommendation was not a sentence; was not relevant to Mack's character; and was obviously based on evidence and circumstances different from that presented at Mack's trial and sentencing hearing.

POINT III: The sentencing court did not abuse its discretion in rejecting as inapplicable the statutory mitigating factors argued and in determining that the statutory aggravating circumstances found far outweighed any nonstatutory mitigating circumstances. The sentencing order adequately outlines the rationale for the court's decision to follow the 10-2 jury recommendation of death.

There is no evidentiary basis for finding that Mack was under emotional distress, domination, or otherwise unable to conform his conduct to the law when the murder occurred; nor did the lower court abuse its discretion in finding five aggravating circumstances (two of which are not challenged on appeal). Mack was under "sentence of imprisonment" - as conceded by trial counsel - although on a supervised community release program. The late night burglary of the victim's home and brutal stabbing accompanied by almost certain terror and fear of impending death as the elderly woman defended herself supports a finding that the killing was heinous, atrocious or cruel. No improper doubling of the burglary and pecuniary gain aggravating circumstances has been demonstrated especially given the other surrounding circumstances, including the brutal beating inflicted, which demonstrate the "broader purpose" of the burglary perpetrated.

POINT IV: The trial court's orally stated rationale for departing from the recommended guidelines sentence for the non-capital offenses (i.e., that there was an unscored capital felony) has been specifically validated by this court and should be deemed sufficient under the circumstances of this case, notwithstanding State v. Jackson, 478 So.2d 1054 (Fla. 1985).

POINT V: As conceded by the appellant the various constitutional challenges to Florida's death penalty statute and procedure have already been rejected. Furthermore, these arguments have not been preserved for appellate review.

POINT I

THE APPELLANT HAS FAILED TO PRESERVE FOR APPELLATE REVIEW HIS CHALLENGE TO THE TRIAL COURT'S FAILURE TO INSTRUCT UPON NECESSARILY LESSER-INCLUDED OFFENSES BASED UPON THE SPECIFIC REQUEST OF TRIAL COUNSEL ON BEHALF OF THE APPELLANT; THE APPELLANT HAS FAILED TO DEMONSTRATE ACTUAL REVERSIBLE ERROR.

a. The issue was not properly preserved for appellate review.

Mack contends that because there were no lesser-included offense instructions to the offenses charged, including the first degree murder, his conviction must automatically be reversed for a new trial despite the fact that defense counsel, acting on Mack's behalf, on the record (after an unrecorded jury charge conference) specifically waived all lesser-included offenses; specifically indicated that he had no objections to the jury instructions contemplated by the trial court; and raised no objection to the jury instructions as read, despite being given the specific opportunity to do so (R 648, 693, 718). The state disagrees.

This court in a continuous and unswerving line of decisions, left undisturbed by the holding in Harris v. State, 438 So.2d 787, 795-797 (Fla. 1983) upon which the appellant relies, has held that a defendant must make a proper request for jury instructions or raise a specific and contemporaneous objection to the failure to give said instructions in order to preserve that issue for appellate review. Jones v. State, 484 So.2d 577, 579 (Fla. 1986); White v. State, 446 So.2d 1031 (Fla. 1984); Castor v. State, 365 So.2d 701, 703 (Fla. 1978); Brown v. State, 124 So.2d 481, 483-484 (Fla. 1960); Fla. R. Crim. P. 3.390(d).

In Brown v. State, supra, this court addressed the contemporaneous

objection requirement in the context of lesser-included offense instructions in a first degree murder case and found that:

> To summarize our position, we herewith hold that in any trial for first degree murder the accused is entitled to have the jury instructed on all degrees of unlawful homicide including manslaughter and error is committed if he requests such an instruction and is refused. On the other hand, if the accused fails to request such an instruction or fails by timely objection to bring to the attention of the trial judge an error in any such instruction given he cannot urge the error for the first time on appeal.

(emphasis added)

The court there rejected the assertion that "fundamental" error had occurred sufficient to justify reversal in the absence of timely objection noting that such a finding would require a determination that the error asserted reached down "into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. at 484. In Castor, this court reaffirmed the vitality of its contemporaneous objection rule in the context of a jury instruction issue and outlined the rationale for the rule, to-wit:

> . . . Where the alleged error is giving or failing to to give a particular jury instruction, we have invariably required the assertion of a timely objection. Febre v. State, 158 Fla. 853, 30 So.2d 367 (1947); see Williams v. State, 285 So.2d 13 (Fla. 1973). The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Id. at 703.

The reasoning behind the contemporaneous objection rule is no less applicable to this case.

In Harris v. State, supra, upon which the appellant's argument is based, this court did not reject the well established contemporaneous objection rule or repeal Florida Rule of Criminal Procedure 3.390(d) and its specific requirement that no party may allege as error on appeal the giving or the failure to give an instruction unless a specific objection is raised before the jury retires to consider its verdict. In fact, the Harris court in effect reaffirmed that rule stating that:

> . . . This Court has consistently held that, **upon a proper request**, a trial judge must give jury instructions on necessarily included lesser offenses, **that a refusal of such a request constitutes fundamental error when properly preserved for appeal by timely objection under Florida Rule of Criminal Procedure 3.390(d), and that the harmless error rule does not apply.** See, e.g., Reddick v. State, 394 So.2d 417 (Fla. 1981); State v. Abreau, 363 So.2d 1063 (Fla. 1978); State v. Thomas, 362 So.2d 1348 (Fla. 1978); Lomax v. State, 345 So.2d 719 (Fla. 1977).

Id.at 796. (emphasis supplied)

The Harris decision indicates no intent to gut Florida's contemporaneous objection rule or Rule 3.390(d); to the contrary, the opinion clearly concerns itself only with the issue of the propriety of the defendant's waiver of lesser-included offense instructions in that case and not with the separate and distinct issue of preservation of appellate review through timely request or objection. The court's determination, from an expansive reading of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), that a defendant has a procedural due process right to have the jury instructed on necessarily

included lesser offenses in a capital case did nothing to obviate Florida's separate and distinct procedural requirement for appellate review, i.e., the contemporaneous objection rule.

Certainly Beck cannot be read to reach that conclusion given the great pain taken by the majority, in response to Justice Rehnquist's dissent, to point out that Beck raised his challenge to the statutory prohibition of lesser included offense instructions in capital cases, in the state trial court and intermediate appellate court. The majority specifically rejected the assertion that the Alabama Supreme Court had found the issue waived holding that it had also been adequately presented to the Alabama Supreme Court despite the dissent's assertion that the constitutional question was not preserved for review.

Federal courts have also indicated that they will reject a Beck v. Alabama claim in a federal habeas corpus challenge where the state applies its procedural default rule to bar relief because of a lack of objection at the trial court level to the failure to give lesser-included offense instructions. Johnson v. Thigpen, 806 F.2d 1243, 1252 (5th Cir. 1986), cert. denied, 107 S.Ct. 1618 (1987); see also, Jones v. Thigpen, 741 F.2d 805, 815 n. 18 (5th Cir. 1984), cert. denied, 107 S.Ct. 1292 (1987) (federal court "inclined to agree with the State" that failure to request lesser-included offense instructions or to object to the failure to give those instructions constituted a state procedural bar to a Beck argument in federal habeas corpus proceeding); Reddix v. Thigpen, 805 F.2d 506, 510 (5th Cir. 1986) (federal habeas relief not procedurally barred on Beck claim because it was not shown that the state court consistently applied its own procedural default rule under the circumstances); Vicker v. Ricketts, 798 F.2d 369, 373 (9th Cir. 1986) (because the state did not argue the failure to include lesser-included

offense instructions and did not object to the failure to give those instructions and because state courts did not invoke their procedural bar, federal habeas court refused to consider a procedural default issue).

The proper request/contemporaneous objection requirement is also applied by federal trial and appellate courts which have likewise held that a defendant is entitled to an instruction on a lesser-included offense if the evidence supports it and if a proper request is made. United States v. Ashby, 771 F.2d 392 (8th Cir. 1985); United States v. Neiss, 684 F.2d 570 (8th Cir. 1982). However, if defense counsel does not request such a charge, the admission is not error. United States v. Seijo, 537 F.2d 694 (2d Cir. 1976), cert. denied, 429 U.S. 1043, 97 S.Ct. 745 (1977); United States v. Meyers, 443 F.2d 913 (9th Cir. 1971).

b. No "fundamental error" excusing the appellant's failure to object has been demonstrated.

No "fundamental error" rule removing the proper request/contemporaneous objection requirement for preservation of the jury instruction challenge was announced in Harris; to the contrary, the "fundamental error" discussion specifically noted the failure to give requested necessarily included lesser offense instructions and clearly referred only to the per se reversal rule, i.e., that the error was "fundamental" because it could not be harmless. The court noted that such "fundamental error" must still be "properly preserved for appeal by timely objection under Florida Rule of Criminal Procedure 3.390(d)..." 438 So.2d at 796. In fact, in each of the cases discussed in Harris in the context of previous efforts by defendants to waive lesser-included offense instructions, it was specifically noted that the refusal to waive such instructions was ". . . of no avail on appeal unless it is

requested and then properly refused at the trial level." Brown v. State, 206 So.2d 377, 384 (Fla. 1968); accord, Williams v. State, 285 So.2d 13 (Fla. 1973); State v. Washington, 268 So.2d 901 (Fla. 1972); Rayner v. State, 273 So.2d 759 (Fla. 1973), after remand, 286 So.2d 604 (Fla. 2d DCA 1973).

The doctrine of fundamental error should be applied in only the rare cases where a jurisdictional error appears or the interests of justice present a compelling demand for its application. Ray v. State, 403 So.2d 956, 960 (Fla. 1981). In Ray this court held that it was not fundamental error to convict a defendant upon an erroneous lesser-included offense instruction for an uncharged crime if the defendant failed to object to that instruction and, inter alia, defense counsel requested the improper jury charge or relied on that charge as evidenced by his argument to the jury or other affirmative action. In reaching that conclusion, Justices Alderman and Boyd concurred entirely on the basis that in order to preserve for appeal the issue of the giving or failure to give an instruction a defendant must make a timely objection under Florida Rule of Criminal Procedure 3.390(d).

The state respectfully submits that under the rationale of Ray no fundamental error can be deemed to have occurred in this cause, if any error in fact occurred, where the failure to give the lesser included offense instructions was the sole result of defense counsel's request and where it is obvious that the appellant raised no objection as an apparent tactical decision to present an "all or nothing" case. The same waiver/contemporaneous objection provision applied in Ray should be applied in this case for if it is not fundamental error to convict a defendant on a crime not charged because of the actions of his attorney it cannot be said that a deprivation of fundamental fairness occurred sub judice. Here, the accused was required, like the state, to comply with the established rules of procedure to assure

both fairness and reliability in the ascertainment of guilt or innocence, and his failure to object (indeed, his specific request that no lesser-included offense instructions be given) is a "strong indication" that at the time and under the circumstances the alleged fundamental error was considered neither harmful nor prejudicial. Id.

c. No actual, as opposed to speculative, substantive error has been demonstrated justifying reversal.

As previously noted the fundamentality of the due process right to lesser offense instructions noted in Harris did not change the state's contemporaneous objection requirement. Certainly, if a defendant is refused necessarily lesser-included offense instructions error of fundamental proportions is committed justifying per se reversal under state law without reference to the harmless error rule. However, in this case it has not been established that any error in fact occurred, i.e., the record does not show that lesser-included offense instructions were not withheld at the personal request of Mack, through counsel, after full and complete consideration of the ramifications of that decision. In fact, at the charge conference defense counsel made clear that he had discussed the waiver with his client and that it was Mack's decision to forego lesser offense instructions. The supplemental record prepared after relinquishment of jurisdiction to reconstruct the charge conference clearly indicates that Mack and his counsel had discussed the issue and that "Jimmy" wanted to go "all or nothing." (R 999-1000, 1007) Defense counsel's written statement indicated his belief that "he did represent to the court and to the state that he had discussed lesser included offenses with James Mack and, pursuant to that discussion, defense counsel did waive all lesser included offenses" (R 1009-1010). Trial counsel

further noted that he was certain he had discussed the waiver with Mack and that it was Mack's decision (R 1001).

The record transcript does give some indication that Mack was apparently present when his trial counsel, on his behalf, announced on the record the waiver of all lesser-included offenses, without objection of any kind from the appellant (R 693) (Volume V of the Transcript of Proceedings in the Record, p. 2). Here there was ratification and acquiescence in the waiver by defense counsel. The court was informed that Mack had discussed the matter with counsel and desired to go "all or nothing". Despite Mack's "involvement" in the trial he voiced no objection to the announced waiver as the trial continued and when the jury was instructed. See, Amazon v. State, 487 So.2d 8, 11 (Fla. 1986).

This court has many times indicated that it will not reverse a conviction solely upon speculation or conjecture as to reversible/prejudicial error. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Salvatore v. State, 366 So.2d 745 (Fla. 1978); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). If in fact, as specifically indicated by defense counsel's waiver, Mack did wish an "all or nothing" trial and personally made an informed decision to forego lesser-included offense instructions, then no error, fundamental or otherwise, in fact occurred. Section 924.33, Florida Statutes (1987) provides that an appellate court shall not presume that an error injuriously affected the substantial rights of a defendant requiring reversal. This harmless error doctrine is based on the proposition that a defendant is entitled to a fair trial not necessarily an errorless one such that the defendant must show that he was prejudiced by the error asserted. State v. Jones, 377 So.2d 1163, 1167 (Fla. 1979), (Atkins, J. dissenting).

Here, the record in fact reveals no actual error in that the waiver of lesser-included offenses by defense counsel, in the appellant's presence, provides a clear and proper explanation for the failure to give necessarily lesser-included offense instructions to which a capital defendant would be entitled, as noted in Beck and Harris, if requested. If Mack was in fact substantively prejudiced by the failure to give lesser-included offense instructions because he never agreed to any such waiver (despite counsel's assertion to the contrary and Mack's acquiescence) or because defense counsel did not adequately explain the ramifications of that waiver to Mack, such an allegation can and should be raised by motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 as an ineffective assistance of counsel allegation sworn to by the appellant. That post-conviction motion would allow the trial court to adequately determine the factual issues (including the extent of discussion between trial counsel and the defendant as to the ramifications of the waiver and the defendant's "knowing and voluntary" decision) and reach a proper informed conclusion as to whether any reversible error was actually demonstrated.

d. Harris should be revisited and its personal waiver dicta should be reconsidered.

At this point, no factual determination has ever been made and any reversal would necessarily be based upon improper speculation as to whether any error in fact occurred. This court has recently held, in evaluating a comparable waiver of constitutional due process rights, that a trial court has no obligation to secure a knowing, voluntary and intelligent waiver of a defendant's right to testify at trial. Remeta v. State, 522 So.2d 825 (Fla. 1988); Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988). In Torres-Arboledo, this court determined that while there is a constitutional right to

testify under the due process clause of the United States Constitution this right does not fall within the category of "fundamental rights" which must be waived on the record by the defendant himself apparently because that right does not go to the very heart of the adjudicatory process. This court noted, however, that it would be advisable for the trial court to make a record inquiry to determine whether the defendant understands his right to testify and that it is his personal decision not to take the stand, because such an inquiry "will, in many cases, avoid post-conviction claims of ineffective assistance of counsel based on allegations that counsel failed to adequately explain the right or actively refused to allow the defendant to take the stand." Id. at 411 n.2.

Under the rationale of Remeta and Torres-Arboledo this court's decision in Harris should be revisited for re-evaluation of the express personal waiver requirement created therein. The state is unaware of any other court which has created such an expansive waiver requirement in the Beck context and suggests that the issue should be re-evaluated to determine whether the due process right recognized in Beck should be "considered so fundamental as to require the same procedural safeguards employed to ensure that a waiver of the right to counsel is knowingly and intelligently made." Torres-Arboledo, supra, at 411. Since, as correctly determined by this court in Jones, no personal waiver is required in order to guarantee fundamental fairness, to forego lesser-included offenses in the non-capital context, the fact that a death penalty case is involved should not serve to overcome "the general principle that a client is bound by the acts of his attorney performed within the scope of the latter's authority." Jones v. State, 484 So.2d at 579; State ex rel Gutierrez v. Baker, 276 So.2d 470 (Fla. 1973). The "role of defense counsel" noted by the Jones court in the context of lesser-included offense

instructions is not substantively different such that in both situations "no useful purpose would . . . be served by requiring the court to ensure that . . . counsel's conduct truly represents the informed and voluntary decision of the client." Id. at 579-580. In both capital and non-capital situations the rights of the defendant are adequately protected by the availability of post-conviction relief upon a substantiated ineffective assistance of counsel claim.

Certainly, nothing in Beck elevates the due process right to lesser-included offense instruction to the lofty pinnacle of such personal fundamental rights as the right to counsel or the right to trial by jury so as to justify a personal, knowing and intelligent waiver requirement. As determined by the court in Look v. Amaral, 725 F.2d 4, 9 (1st Cir. 1984), the Beck decision stands merely for the proposition that Alabama could not by statute constitutionally prevent a judge from charging a jury concerning a lesser-included offense, however:

> . . . Beck does not prevent a defendant from foregoing that option for himself as Look did in this case. Defense counsel may well have felt that, on the evidence, the jury would be more likely to convict on manslaughter than to acquit, but if given a choice only between a murder conviction and acquittal that an acquittal was more likely. Nothing in Beck or elsewhere prevents a defendant from making a strategic choice. Having gambled and lost Look may not now complain.

(Emphasis supplied).

Inasmuch as a defendant's counsel acts as a spokesman in trial matters and stands free to exercise technical decisions on the part of his client which necessarily involve many of his constitutional rights, should it be necessary that this specific "right" require an express waiver by the

defendant? This court has previously noted, as partial justification for a contemporaneous objection rule, that the furnishing of all defendants with counsel in criminal cases has resulted in the safeguarding of their rights and provision for their adequate defense. See, State v. Jones, 204 So.2d 515 (Fla. 1967). Indeed, although this court has recognized a defendant's right to a speedy trial as "fundamental", Singletary v. State, 322 So.2d 551 (Fla. 1975), it is well established that defense counsel has full authority to act on his client's behalf in waiving this right guaranteed a defendant under Florida's Constitution and implemented by state procedural rule. Defense counsel may dispense with this "fundamental right" on behalf of his client without a defendant's expressed waiver and in fact may do so outside the defendant's presence. State ex rel Gutierrez v. Baker, supra.

Similarly, any number of strategic decisions and procedural determinations made by defense counsel at trial may profoundly affect his client's fundamental constitutional rights and may in fact result in a waiver of any of those rights without the defendant's expressed, knowing and intelligent agreement on the record. For example, an improper comment on a defendant's exercise of his fundamental right to remain silent made at trial may be waived by defense counsel's failure to object (for whatever reason) without any expressed, knowing and voluntary waiver by the defendant himself. See, Clark v. State, 363 So.2d 331, 335 (Fla. 1978). In addition the failure to challenge the sufficiency of the evidence to support a conviction at trial necessarily waives that right despite the fact that the question as to evidentiary sufficiency is a constitutional one involving a due process right. See, Fla. R. Crim. P. 3.380(a); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). No expressed, knowing involuntary waiver by the defendant is necessary. Similarly, when a defendant's counsel

does not call his client to the stand to testify, does not call a particular witness, or does not cross-examine a specific witness at trial, such determinations made by counsel exercising the authority granting him by his client are not questioned on the record with an accompanying requirement that the defendant then on the record demonstrate an expressed, knowing and voluntary waiver of his constitutional rights.

Further, the state submits that Mack should be precluded from challenging the failure to instruct on lesser-included offenses since he clearly "invited" the alleged error and should therefore be estopped from complaining on appeal. See, Pope v. State, 441 So.2d 1073 (Fla. 1973); Jackson v. State, 359 So.2d 1190 (Fla. 1978). To require reversal in this cause would undermine the obvious intent of the contemporaneous objection rule and its principles of "practical necessity and basic fairness in the operation of a judicial system" in that this court will have allowed the defendant to in effect "sandbag" the trial court by creating error without placing the trial judge on notice that it may have been committed so as to allow him to easily correct it at that stage of the proceedings. Castor v. State, supra at 703.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT, AS IRRELEVANT, EVIDENCE AT THE PENALTY PHASE AS TO THE RECOMMENDATION OF LIFE IMPRISONMENT RENDERED BY THE ADVISORY SENTENCING JURY IN AN ACCOMPLICE'S SEPARATE FIRST DEGREE MURDER TRIAL.

Mack contends that the trial court committed reversible error in refusing to admit the proffered certified copy of the life recommendation returned by the advisory sentencing jury in the first degree murder trial of Mack's accomplice, Robert North (R 753-755). The state objected to the admission of the life recommendation evidence asserting that it was irrelevant to Mack's character or the surrounding circumstances of the offense such that it did not constitute proper mitigation evidence:

> [Prosecutor]: Your Honor, the State objects to that. First of all, we've spent the entire week listening to the defense trying to keep out everything about Robert North and what he said and what he did now suddenly it looks like it's going to be to their advantage. Now they want to bring something in about Robert North.
>
> Secondly, the evidence presented to the Robert North jury was not the evidence presented to the James Michael Mack jury and for this jury to be confronted with some recommendation made by another jury based on other evidence would be improper and frankly I don't see how or what applies to Robert North, the recommendations made as to Robert North has anything to do with this Defendant's character and that's basically what this whole mitigating process is about, presenting to this jury anything in mitigation about this Defendant not what some jury thought about some other Defendant.
>
> The Court: Objection be sustained.

(R 754-755).

The wide discretion afforded trial courts in determining questions of relevancy/admissibility is well established and this court has made clear that absent obvious error a trial judge's ruling on the admissibility of evidence will not be disturbed on appeal. Blanco v. State, 452 So.2d 520, 523 (Fla. 1984); Jones v. State, 440 So.2d 570, 574 (Fla. 1983); Welty v. State, 402 So.2d 1159 (Fla. 1981). Florida's capital sentencing statute provides that at the penalty phase proceeding evidence may be presented as to any matter "that the court deems relevant to the nature of the crime and the character of the defendant" and that any such evidence which the court "deems to have probative value" may be admitted. § 921.141(1), Fla. Stat. (1987). Thus, the trial court's relevancy determinations are an integral part of the sentencing hearing and the capital sentencing context does not alter the appropriate standard of review, i.e., absent a demonstration of an abuse of discretion by the trial court this court will not disturb the rejection of irrelevant sentencing hearing evidence. King v. State, 514 So.2d 354, 358 (Fla. 1987).

The appellant has failed to demonstrate an abuse of discretion in the trial court's determination that the jury's advisory recommendation of life imprisonment at North's separate trial was not relevant for Mack's advisory jury to consider in reaching their own "individualized" recommendation. There is no legal or logical support for introduction of this extrinsic matter so as to bias or influence the jury in making what is intended to be an independent analysis of the facts and circumstances of the offense as demonstrated by the evidence presented to them and Mack's character or record.

Certainly, the underlying rationale for the admission of non-statutory mitigating evidence announced in Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) does not require the admission of such "evidence" in that an advisory recommendation in another case, necessarily

involving other evidence not only as to the circumstances of the crime but as to the individual character of another defendant, was not probative of "any aspect of [Mack's] character or record and any of the circumstances of the offense . . ." The Lockett Court specifically noted that its ruling was based upon the need for dealing with the "uniqueness of the individual" in each capital case through "an individualized decision"; however, the Lockett decision does not limit "the traditional authority of the court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id. at footnote 12. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) did not expand the relevance/admissibility of mitigation evidence beyond the defendant's personal characteristics and the particular circumstances of the offense to include a mere advisory recommendation reached by a jury in another case utilizing other factors.

This court has established and repeatedly applied the principle "that lesser sentences imposed on accomplices may be considered in mitigation . . ." Rogers v. State, 511 So.2d 526, 535 (Fla. 1987) (emphasis supplied); see also, Craig v. State, 510 So.2d 887, 870 (Fla. 1987) (claim of disparate treatment based on difference in sentences rejected); Herring v. State, 446 So.2d 1049, 1056 (Fla. 1984) ("evidence concerning sentences imposed upon co-defendants" admissible in penalty phase however Lockett does not require admission of evidence as to circumstances in sentences in other death penalty cases.) This court has never, however, extended the "disparate treatment" analysis to comparison of mere advisory sentencing recommendations by juries in companion cases, nor does any of the case law cited by the appellant require such a conclusion.

For example, despite the appellant's apparent reliance upon Malloy v. State, 382 So.2d 1190 (Fla. 1979), that case stands only for the proposition that the life sentence recommendation in that case should not have been overridden because the jury may well have determined that all participants were equally culpable such that the death sentence imposed upon Malloy would not have been consistent with the "other sentences imposed in similar circumstances". Id. at 1190. The Malloy Court went on to hold that:

> Our ruling does not mean that the imposition of the death sentence is always dependent upon the sentences of accomplices. It is a factor, however, that may be considered along with evidence of complicity. Each case will depend on its own facts and circumstances. See, Witt v. State, 342 So.2d 497 (Fla. 1977).

Id. While the ultimate "treatment" of an accomplice, i.e., the sentence finally imposed by a judge as the sentencing authority, has been determined relevant in the sentencing analysis, the non-binding advisory opinion rendered by the jury in a separate case has never been treated as the equivalent of the actual sentence and therefore been deemed relevant or probative to the independent advisory recommendation analysis of a different jury which heard different evidence in a different trial. The mere recommendation by an advisory jury is not itself relevant evidence of relative culpability, especially since under Florida law "the judge is the sentencing authority and the jury's role is merely advisory." Grossman v. State, 525 So.2d 833, 839 (Fla. 1988). The jury's recommendation is not the de facto sentence; it is the judge's responsibility to make an independent determination, notwithstanding the jury recommendation, i.e., he has final responsibility and is the sentencer. Id.

Would it be relevant to introduce testimony from one of North's jurors as

to his reasons for recommending life in that case? Should Mack's advisory jury have been told if North's jury had recommended death but by only a slim margin, e.g., seven to five?[2] The state thinks not. Why then should the mere recommendation by a different jury under different circumstances be relevant? The jury's utilization of a mere recommendation in another case would be at best a speculative and potentially erroneous basis for recommending life since the death penalty might in any event be imposed by the sentencing judge in the collateral case. No abuse of discretion has been demonstrated in the trial court's relevancy determination.

The state unsuccessfully sought consolidation of the two trials and from the record presented in this cause it is clear that at least one bit of evidence conceivably admitted at North's trial was omitted in this case, i.e., North's statement, referred to in the state's disclosure report, implicating himself "and defendant Mack in this burglary and murder" (R 793, 805-806, 809). This record does not reveal what specific evidence was presented to the North jury resulting in the advisory recommendation of life imprisonment in that case; however, one need not be clairvoyant to predict that North's statement placed greater culpability on Mack. Even if the life recommendation in North's case were probative and admissible at the penalty phase at Mack's trial its admission would necessarily open the door for the state's presentation of the evidence admitted in North's trial, at both the guilt and penalty phases, including any statements made by North which implicated Mack

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[2]See, Craig v. State, supra at 867 - vote margin in jury recommendation is of no relevance to the question of whether that recommendation should be followed; see also Teffeteller v. State, 495 So.2d 744 (Fla. 1986) - improper for new jury at resentencing to be informed as to prior sentence because it "offers the sentencing jury no probative information on any aggravating or mitigating factors weighed in such proceedings."

and which most certainly would have painted an even more clear picture of him as the more culpable of the two perpetrators. Of course, it is only this substantive evidence of circumstances surrounding the offense itself that is even arguably relevant, not the advisory opinion rendered by the jurors in that separate trial. North's refusal to testify in Mack's trial and the lack of consolidation in this case necessarily left Mack's sentencing jury to determine from the evidence presented to them in this case whether death was the appropriate penalty. To allow them to consider the advisory opinion of twelve other jurors at a separate trial, necessarily involving different evidence goes beyond the intent or requirement of Lockett, Skipper, Eddings, and section 921.141(1), Florida Statutes (1987).

In this case Mack's blameworthiness for the murder perpetrated is obvious given his admission that he killed the victim; the physical evidence including the apparent blood on his clothing; and his obvious domination and control of North in the post-murder events including substantial control of the possession and sale of the stolen jewelry. Despite the appellant's assertion to the contrary there was no evidence that North actually murdered (knifed) the victim and there was in fact physical evidence (including apparent bloodstains) which, along with Mack's admissions, implicated him in that murder. Obviously, the jury considered Mack culpable, returning a premeditated, as opposed to felony - murder conviction and recommending death by a 10 - 2 vote (R 915-916). The testimony of those witnesses who saw North and Mack together clearly indicated that Mack was the controlling and dominant individual both immediately after the murder and in the attempt to sell the stolen jewelry kept for the most part in Mack's possession. It was Mack who was observed with a screwdriver and pliers (obvious burglary tools) immediately after the offense (R 483); it was he who sported a "fresh" scratch

mark "a good four inches long" on his throat immediately after the killing (R 457-458); it was he who took control of the stolen jewelry and secreted it at his father's house and who held in his possession the expensive diamond ring that he twice attempted to sell (R 462, 481-482, 494-500, 568-569); it was Mack who admitted to Karen Campbell that "he was in a lot of trouble" and needed the money for the ring because he had killed "an old woman" to get it (R 502-504). Karen Campbell noted that it was Mack who was "in control of the situation" and that "he was definitely the one in charge" in that he exuded a "general attitude . . . of authority over [North]", telling him what to do on several occasions (R 510). Finally, it was Mack who threatened Allen Aslinger's life to keep him from going to the police and who told Aslinger to say that the "fresh" scratch on Mack's throat was the result of Mack's "wrestling" with North, if anyone asked, to conceal evidence of his offense (R 456-458, 473-474).

Upon the evidence presented at Mack's trial the jury and judge properly allocated culpability to the appellant based inter alia, upon his own specific admission that he had killed the victim, as evinced by the premeditated murder conviction and advisory recommendation of death and the sentencing judge's specific factual finding that Mack murdered the victim (R 915, 916, 918). Upon these facts, even if it could be said that the life recommendation in North's case was somehow relevant and probative in determining Mack's sentence the fact that the appellant was found to have actually committed the premeditated stabbing murder of the victim would render failure to introduce the extraneous life recommendation harmless given the clear difference in culpability indicated by the findings of the judge and jury.

As noted by the court in Garcia v. State, 492 So.2d 360, 368 (Fla. 1986), even given the relevance of an accomplice's lesser convictions and sentences

in a separate trial, there is no impropriety in imposing a death sentence upon the actual trigger-man. Indeed, even in those situations where one of the accomplices was also a triggerman, there is no error in sentencing a particular defendant to death where the evidence supports the sentencing judge's conclusion that the aggravating factors outweigh the mitigating, notwithstanding the lesser sentence already given the accomplice. Jacobs v. State, 396 So.2d 1113 (Fla. 1981). The exercise of mercy on behalf of one defendant in one case does not prevent the imposition of death by capital punishment in another trial, especially where Mack's culpability as the actual murderer has been well demonstrated.

POINT III

THE TRIAL COURT DID NOT ERR IN FOLLOWING THE JURY RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH GIVEN THE AGGRAVATING CIRCUMSTANCES ESTABLISHED WHICH, AS CORRECTLY DETERMINED, FAR OUTWEIGHED ANY MITIGATING CIRCUMSTANCES IN THIS CAUSE.

a. No deficiency in the sentencing court's findings of fact with reference to aggravating circumstances has been demonstrated.

Initially, Mack argues that the sentencing court's findings of fact in support of the death penalty are insufficient with reference to two of the five aggravating circumstances found applicable in that order such that meaningful review by this court is impossible. The state disagrees.

In Holmes v. State, 374 So.2d 944, 950 (Fla. 1979), this court noted that there is no prescribed form for the order containing findings of mitigating and aggravating circumstances. The primary purpose of requiring these findings to be in writing is to provide the appellate court with an opportunity for meaningful review and analysis of whether the trial judge viewed the issue of life or death within the framework of the rules provided by the statute and to determine that the sentence imposed was the result of that reasoned judgment. In Holmes the "findings" as to aggravating circumstances were not nearly as extensive or detailed as those in this case, yet this court had no difficulty in evaluating the factual basis and legal propriety of the aggravating circumstances found by the trial court in Holmes - including a finding that the capital felony was especially heinous and atrocious - after a review of the appellate record presented.

The appellant's claim that he is extremely handicapped in his argument concerning the finding of these two aggravating factors is baseless. Simple

analysis of the short trial transcript and relevant case law on the applicability of the aggravating factors at issue in light of that factual record would suffice. The analysis is no different from that normally conducted by any appellate court in evaluating evidentiary sufficiency to support a conviction through review of the appellate record and analysis as to whether there is any evidentiary support for each statutory element of the offense. In this case, a review of the trial testimony provides overwhelming evidence in support of both the pecuniary gain and heinous, atrocious and cruel aggravating circumstances. In addition, the state submits that despite Mack's assertion to the contrary, the trial court did not simply find the murder wicked, evil, atrocious, or cruel, for within the same section the court specifically noted that the murder was perpetrated during the commission of a burglary during which the appellant stabbed the victim in the neck (R 918).

The detailed three page sentencing order/findings of fact provides for meaningful review by this court and adequately evinces the fact that the sentencing judge properly applied the framework of Florida's capital sentencing statute by stating those particular aggravating circumstances he found to be established after careful study, consideration, and review of "all of the evidence in the case at the trial of this matter and . . . the separate sentencing proceeding . . ." (R 917). A like analysis of the mitigating circumstances complete with specific rejection of those he found unestablished based upon that evidence was performed, followed by the judge's reasoned judgment that "the aggravating circumstances far outweigh[ed] the mitigating" such that death, in accordance with the jury's advisory sentence, was the appropriate penalty (R 918-919). Nothing more is required under Holmes, nor does the decision in Hall v. State, 381 So.2d 683, 684 (Fla. 1978), cited by

the appellant, require any different conclusion.

In Hall the court in its order for clarification remanded for detailed findings of fact only because that additional information was "necessary to enable this Court to properly review the death sentence in accordance with our pronouncement in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) . . ." Id. The trial judge, although he listed the aggravating circumstances he found to be established, had failed to adequately address the issue of mitigating circumstances especially in light of the jury recommendation of life imprisonment. The trial court's finding in Hall that there were "insufficient mitigating circumstances as enumerated in section 921.141, Florida Statutes to outweigh the aforesaid aggravating circumstances . . ." made a proper Tedder/jury override analysis difficult without specific determinations as to the mitigating circumstances considered and/or rejected by the sentencing court. There is no Tedder/jury override issue in this case given the recommendation of death by a majority of ten members of the advisory jury. In addition, all mitigating circumstances raised were specifically addressed by the sentencing judge in this cause in reaching his determination, in compliance with the capital sentencing statute, that death was the appropriate penalty since the aggravating circumstances outweighed the mitigating.

> b. The trial court properly considered the mitigating factors presented and did not abuse its discretion in rejecting those various circumstances and determining that, because the aggravating circumstances far outweighed any mitigating factors, the jury recommendation of death should be followed.

Mack argues that it is "clear" that the trial court failed to properly consider evidence offered in mitigation and based his rejection of those factors "entirely on the jury recommendation." (AB 36) This assertion is

unsupported by the record.

The trial court in its sentencing order noted that the instructions on mitigating circumstances presented to the jury "at the request of the Defendant" included evaluation of whether Mack was under the influence of extreme mental or emotional disturbance; whether his ability to appreciate the criminality of his conduct and conform his conduct to the requirements of law was substantially impaired; and "any other aspect of the Defendant's character or record, and any other circumstance of the offense." (R 918) The jury was instructed as outlined in the sentencing order with the trial judge informing them that, inter alia, it would be his responsibility to make the final decision as to punishment but that their evaluation required analysis of the aggravating and mitigating circumstances contained within the instructions (including in mitigation "any other aspect of the Defendant's character or record and any other circumstance of the offense") in weighing the aggravating and mitigating circumstances and determining the appropriate punishment (R 769, 770-771, 774-775).

At the penalty phase hearing both the prosecutor and defense counsel focused on the potential mitigating factors for which the jury would be instructed. The prosecutor conceded that Mack probably had a "drinking problem" but noted that there was no evidence that Mack was drunk or drinking at the time of the victim's murder so as to demonstrate a substantial impairment on Mack's part of his ability to appreciate the criminality of his conduct and conform it to the law (R 762-763). The prosecutor further acknowledged sentencing phase testimony that Mack was a "good father" and loved his kids but challenged the weight or value of such evidence in light of the various aggravating factors presented (R 763). Defense counsel did not challenge the applicability of any of the five aggravating circumstances for

which the jury was instructed; in fact, he conceded that Mack was under a sentence of imprisonment (although he was out of jail on a work release program) when the offense was committed (R 765-766). Instead Mack's counsel focused upon the appellant's alcohol problem and noted that if Mack were executed he would not be around for his young children (R 766-767).

Given this factual scenario it is incredible that the trial court could have "completely ignored" Mack's mitigating circumstance arguments as urged on appeal (AB 37). In Johnson v. Dugger, 520 So.2d 565 (Fla. 1988), this court held that although the sentencing judge made no specific reference to certain mitigating factors in his sentencing order that did not mean that he did not consider them. See also, Brown v. State, 473 So.2d 1260, 1268 (Fla. 1985) (trial court's failure to address nonstatutory mitigating circumtances in order not error). The specific jury instructions given "constitute ample evidence that the judge knew what he was required to consider, and in fact did consider those circumstances" such that the reviewing court "must presume that the judge followed his own instructions to the jury on the consideration of non-statutory mitigating evidence." Id. at 566 (footnote omitted).

Here, the judge did specifically mention, consider, and reject all of the statutory mitigating factors as well as the "catch-all" non-statutory mitigating factor as to "any other aspect of the Defendant's character or record, and any other circumstance of the offense." (R 918) His order specifically indicates that he carefully considered, reviewed and weighed all of the evidence in the case including evidence presented at the separate sentencing proceeding as well as his independent bottom-line conclusion that the aggravating circumstances presented far outweighed the mitigating circumstances in this cause such that the jury's advisory sentence of death

was appropriate (R 917-919). The trial court's failure to more specifically discuss the specific component aspects of the defendant's "character", i.e., Mack's "alcohol problem" and the fact that the appellant was a "very good" father does not justify reversal.

It is clear that the judge was aware of these character factors when he rendered his independent decision to follow the 10-2 jury recommendation and impose the death penalty. The prosecutor had already acknowledged these factors in his argument to the jury in asserting they carried little weight under the factual circumstances of this case. Furthermore, the appellant fails to note that at sentencing defense counsel again reiterated "the mitigating factors that were given during the penalty phase of the trial" but found it unnecessary to go into the specifics of those factors (other than to again note that Mack had "an alcohol problem") in apparent acceptance of the fact that the judge was obviously well aware of them (R 946-947). At sentencing the judge stated that he had deferred the proceeding so that he could "spend some quiet time and compare for myself the mitigating factors against the aggravating factors and come to a decision . . ." (R 947).

The only reasonable conclusion to draw from this record is that the trial judge was well aware of Mack's "alcohol problem" as well as the testimony asserting that he was a "very good" father[3] but nevertheless determined that death was the appropriate penalty and that any mitigating circumstances were far outweighed by the aggravating. There was of course, as noted by the prosecutor, no evidence that Mack's "alcohol problem" had any impact on the circumstances of the brutal murder perpetrated. Under the circumstances of

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[3]Mack's status as a good father was, as noted by the prosecutor, of questionable weight in light of the fact that his kids had not lived with him for some time (R 763).

this case, especially given Mack's violent prior history and the brutality of the late night attack upon the elderly victim in the sanctity of her own home, the trial court could properly reject this "problem" and the fact that Mack played with, occasionally cared for, and loved his children, as insignificant. See, Brown v. State, 13 F.L.W. 317, 319 (Fla. May 12, 1988); Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Kokal v. State, 492 So.2d 1317 (Fla. 1986); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983).

The trial court did consider and reject as insufficient the non-statutory mitigating factors urged. It is within a trial court's discretion to determine whether sufficient evidence exists of a particular mitigating circumstance and, if so, the weight to be given it. Tompkins v. State, 502 So.2d 415 (Fla. 1986); Toole v. State, 479 So.2d 731, 734 (Fla. 1985); White v. State, 446 So.2d 1031 (Fla. 1984). A mere disagreement with the force to be given mitigating evidence is not a sufficient basis for challenging a sentence. Floyd v. State, 497 So.2d 1211, 1213 (Fla. 1986); Porter v. State, 429 So.2d 293, 296 (Fla. 1983).

Furthermore, the mere fact that the judge agrees with the jury recommendation is not error where the record, as in this case, reflects independent weighing by the trial court of the relevant factors and an independent judgment about the reasonableness of the jury's recommendation. Rogers v. State, 511 So.2d 526, 536 (Fla. 1987). No abuse of discretion has been demonstrated in this case.

Similarly, Mack's attack upon the trial court's rejection of the statutory mitigating circumstance relating to domination by an accomplice is not only unpreserved for appellate review but is unsupported by the record. By failing to object to the jury instructions presented at the penalty phase the appellant necessarily conceded the lack of any evidentiary basis for a

determination that Mack acted under the substantial domination of another person in accordance with section 921.141(6)(e), Florida Statutes (1987). The trial judge's decision to address and reject each of the statutory mitigating factors in his sentencing order hardly justifies the appellant's baseless assumption that the court believed that there was some support for that factor in the record. Certainly, the appellant has failed to present any evidence that Mack was dominated by anyone; to the contrary, as noted in Point II herein, there was competent substantial evidence of record that Mack, not North, murdered the victim, and was the more "dominant" of the two. Finding or not finding a specific circumstance applicable is within the broad discretion of the trial court and reversal is unwarranted simply because an appellant draws a different conclusion. Perry v. State, 13 F.L.W. 189, 190 (Fla. March 10, 1988); Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986); Johnston v. State, 497 So.2d 863 (Fla. 1986). No such abuse of discretion has been demonstrated.

The evidence as cogently outlined by the prosecutor in his closing argument demonstrated that Mack, not North was the killer. The discovery of North's fingerprint in the house only demonstrates that he was in there with Mack who could well have worn socks over his hands to leave no fingerprints (R 394, 401). In addition, Mack's throat bore a lengthy and fresh scratch/scar after the murder and it was he who was in obvious control/domination when the fruits of the obviously planned burglary were peddled. These circumstances, in conjunction with the overwhelming impact of Mack's own admission that he murdered the victim, clearly support the trial court's rejection of a mitigating circumstance not even argued by the defense at the sentencing proceeding.

In any event, reversal of the death sentence imposed after the 10-2 jury

recommendation is not justified. The court did not preclude consideration of any mitigating factor and in fact considered all of the evidence presented and the mitigating factors urged by the appellant. The determination that the evidence presented did not support the statutory mitigating factors argued to the sentencing jury and that the mitigating factors argued did not outweigh the aggravating circumstances presented did not constitute an abuse of discretion. There was no trial evidence to support the conclusion that Mack's alcohol problem affected him at the time of the murder so as to demonstrate either mental or emotional disturbance or substantial impairment under the statutory mitigating factors. See, Hardwick v. State, supra; Cooper v. State, 492 So.2d 1059, 1062 (Fla. 1986); Simmons v. State, 419 So.2d 316 (Fla. 1982). Certainly, Mack's purposeful actions both before and after the killing fail to support such a finding and the testimony as to his "alcohol problem" adduced at sentencing clearly indicated that Mack was not always drunk or suffering from that "problem" (R 746-747).

Furthermore, even if it is assumed, despite the contrary evidence of record, that the trial judge completely overlooked or refused to consider Mack's alcohol "problem" and his "very good" father status as non-statutory mitigating character factors any error was necessarily harmless in this case. Here, there are even more valid aggravating factors than in Rogers v. State, 511 So.2d 526, 535 (Fla. 1987) where this court deemed the alleged failure to properly consider certain non-statutory mitigating factors, i.e., that Rogers was a good father, husband and provider, harmless despite the fact that three out of five aggravating circumstances were invalidated. Here, the aggravating circumstances are more compelling and, as noted by the trial court far outweigh any mitigating circumstances such that any error should likewise be deemed harmless in this case.

c. The trial court did not err in finding that the appellant committed the murder while under a "sentence of imprisonment"; the appellant has failed to preserve this error for review and in fact acquiesced in the finding at the trial court level.

Initially, the state notes that the appellant raised no objection to instructing the jury as to the applicabilty of the "under sentence of imprisonment" statutory aggravating circumstance under section 921.141(5)(a), Florida Statutes (1987). Indeed, in his argument to the sentencing jury Mack's trial counsel conceded that the appellant "was under the sentence of imprisonment" although on a work release program when the murder was perpetrated (R 766). No legal argument comparable to that now raised by Mack on appeal, or otherwise, was ever presented at the trial court level challenging the applicability of this aggravating circumstance. Accordingly, inasmuch as appellate courts will generally review only those issues which have been specifically presented to and determined by the trial court, Mack has failed to preserve this issue for appellate consideration. Tillman v. State, 471 So.2d 32, 34-35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). The obvious purpose and intent of the contemporaneous objection rule has been thwarted by the appellant's failure to timely present and have determined the legal argument now raised for the first time. Clark v. State, 363 So.2d 331 (Fla. 1978).

Even if the issue had been preserved for review, no error has been demonstrated. As conceded by the appellant, the evidence presented to the trial judge clearly indicated that notwithstanding the fact that Mack was not in the physical custody of the Department of Corrections, i.e., incarcerated within any specific institution, he was nevertheless still considered an inmate within the department and continued to be under department supervision

while on the "Community Release Program" (R 727-729). The testifying corrections department official noted that the community release program took prisoners who were within ninety days of their "release date" and who were at that time assigned to work release centers and moved them out of the centers and let them go home where they could "complete their work with the Release Center" (R 727). The inmates nevertheless remain supervised by the Department of Corrections until their sentences expired on their "release date". The appellant raised no challenge to any of this testimony.

Now Mack argues that his release program was more akin to probation than parole such that under this court's previous decisions disapproving this aggravating factor where a defendant was on probation at the time of the offense the finding in this case should likewise be invalidated. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Peek v. State, 395 So.2d 492, 499 (Fla. 1981). This argument overlooks the specific language of the statutory aggravating circumstance which provides only that a defendant must be "under sentence of imprisonment" not that he be actually incarcerated or in the physical custody of the Department of Corrections or other comparable entity. Since, as conceded by the appellant, a murder committed while on parole does satisfy this aggravating factor, it is clear that confinement in prison is not the controlling factor. Delap v. State, 440 So.2d 1242, 1256 (Fla. 1983); Straight v. State, 397 So.2d 903 (Fla. 1981). Rather, the controlling factor is whether the defendant was under a "sentence of imprisonment" and it is this factor that distinguishes parole from probation, i.e., when one is placed on probation he is not sentenced to imprisonment and cannot in fact be imprisoned until his probation is violated. Probation is not a sentence. Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981); Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987).

Mack was placed under sentence of imprisonment by a judge and that fact could not be and was not altered by the fact that the Department of Corrections, in order to relieve prison overcrowding, released Mack from the physical custody of a prison to complete his sentence on a modified but nevertheless supervised form of work release. The ramifications of Mack's failure to abide by the conditions of that program were clearly comparable to those of individuals on parole in that if while in the community under the supervision of the department he failed to follow established departmental rules or otherwise demonstrate "satisfactory" progress in the program, he would be returned to the "institution or facility designated by the department." § 945.091(1)(d), Fla. Stat. (1987). It is also interesting to note that under the community work release provision an inmate remains eligible to "earn or lose gain-time as prescribed by law and rules of the department" such that his sentence of imprisonment may be decreased. Id.

Mack's reliance upon this court's decision in Ferguson is innovative but cannot justify relief. In Ferguson, the defendant was at the time of the murders on probation after having completed that portion of his sentence requiring incarceration; thus, Ferguson was not confined in prison at the time "nor was he supposed to be" pursuant to the sentence previously imposed. 417 So.2d at 646. Here, Mack was supposed to be incarcerated in prison under the sentence imposed and but for the well recognized shortage of prison space which motivated the statutory provision at issue as well as other remedial legislative action. See, e.g., § 921.001(9), Fla. Stat. (1987); Fla. R. Crim. P. 3.701(b)(7). The fact that inmates are placed on supervised relief status to make room for others and for that reason are no longer considered to be in the "care and custody of the department or in physical confinement extended or otherwise", does not alter the fact that they are nevertheless still under a

sentence of imprisonment; that sentence is simply completed at home under the supervision of the department. There is no legal or logical reason why this aggravating factor, applicable to parolees should not be applied to the appellant.

Mack has failed to demonstrate an abuse of discretion in the trial court's finding as to this aggravating factor especially given the uncontroverted evidence presented at the sentencing proceeding.

d. The trial court did not improperly double aggravating circumstances where it found that the crime was perpetrated during the commission of a burglary and for pecuniary gain.

The basis for the trial court's proper finding that Mack committed the murder while engaged in the crime of burglary and that the murder was committed for pecuniary gain are obvious of record. All of the circumstances (including Aslinger's testimony and Mack's admission of murder) support the conclusion that Mack did in fact burglarize the victim's home, i.e., illegally enter the dwelling with the intent to commit a criminal offense, and that the murder was committed for pecuniary gain as evinced by Mack's theft and peddling of various items stolen from the premises.

While this court has held that the burglary and pecuniary gain aggravating circumstances are improperly doubled where they are based on the same "aspect" of the case, Mills v. State, 476 So.2d 172, 178 (Fla. 1985); Maggard v. State, 399 So.2d 973 (Fla. 1981); the state respectfully submits that in this case, as in all burglary prosecutions, the offense was completed as soon as Mack made his late night entry into the residence with the intent to commit a criminal offense therein. The actual pecuniary gain that followed with the robbery/removal of the various items stolen was separate. In

Provence v. State, 337 So.2d 783 (Fla. 1976), upon which the Maggard decision is based, this court found an improper doubling where robbery (as the enumerated felony committed while engaged in the capital felony) and pecuniary gain were both found to be aggravating circumstances since robbery and pecuniary gain are necessarily intertwined and therefore referred to the "same aspect" of the defendant's crime. Id. at 786. Robbery and pecuniary gain are logically inseparable in terms of a time and place analysis; burglary and pecuniary gain, however, do not necessarily share these common factors since the burglary is completed well before any valuable is taken. The legislature has made it clear that it should be considered an aggravating circumstance in a capital case if the capital felony was committed while engaged in the commission of or flight after the commission of a burglary; it is equally clear that a separate aggravating circumstance exists if the capital felony was committed for pecuniary gain. §§ 921.141(5)(d), (f). The state respectfully submits that both should be applied in this case.

Alternatively, under the peculiar facts of this case no improper doubling of burglary and pecuniary gain occurred under this court's analysis in Brown v. State, 473 So.2d 1260, 1267 (Fla. 1985). In Brown, this court noted that the evidence presented showed:

> . . . that the offense of burglary had a much broader significance than simply being the vehicle for a theft. The victim was beaten, raped, and strangled. While she was tormented, her home was ransacked. Thus the burglary had a broader purpose in the minds of the perpetrators than a burglary seen merely as an opportunity for theft. On the basis of these facts, we find that the burglary factor and the pecuniary gain factor were separate characteristics of appellant's crime and were properly given separate consideration. Id.

Here too, the peculiar facts of this case demonstrate the "broader

purpose" of Mack's burglary. The testimonial and physical evidence amply demonstrated that although the elderly woman's cause of death was due to stabbing she was also beaten and there was obvious evidence allowing the inference of the commission of other extraordinary acts far in excess in that necessary to achieve a simple theft. The victim suffered numerous bruises about her head, around her neck and over her upper body and arms consistent with having been beaten with a fist or blunt object (R 352-369). There was also moderate bruising in the area of her vagina and anus and the anus had suffered trauma by some blunt object (R 356-357, 369). There were also bruises on the buttocks area which the medical examiner believed to have been caused by a beating with a hard object (R 357, 366). Much of the bruising on the forearm area indicated defensive wounds demonstrating the victim's attempt to ward off the beating inflicted upon her (R355-356). In conjunction with the expert testimony as to trauma/bruising of the anus open containers of baby oil and mineral oil were discovered on the bedroom dresser and bathroom vanity areas and staining consistent with those materials was observed on the victim's bed (R 383-384, 855, 857, 862). The victim was discovered lying face down across the bed with her bedclothes pulled up above her buttocks area (R 382, 834).

Given these facts it is clear that the burglary at issue had a much "broader significance than simply being the vehicle for a theft" as the beating covering virtually the entirety of the victim's body amply demonstrates. Brown v. State, supra, at 1267. Even if the evidence adduced at Mack's trial was insufficient to prove sexual battery beyond a reasonable doubt the evidence of an unspeakable and brutal attack upon the victim is nevertheless clear.

Certainly, no improper doubling of aggravating circumstances has been

demonstrated sufficient to justify Mack's inexplicable assertion that this court must "reverse the sentence and remand for the imposition of a life sentence" (AB 46). Even if, despite the state's argument to the contrary, this court were to find an improper doubling of burglary and pecuniary gain it would not justify imposition of a life sentence; indeed, the state submits that any doubling would be harmless error in this case given the proper conclusion by the trial judge that the aggravating circumstances presented far outweighed any mitigating circumstances (R 919). Considering the two challenged aggravating circumstances as one does not alter the fact that Mack is still a menace to society "as his past actions have indicated beyond doubt" such that death is still the appropriate penalty given the number and overwhelming weight of the other aggravating circumstances presented. Id.

It is unchallenged that Mack was previously convicted for aggravated assault with the intent to commit first degree murder; as noted infra, the brutal beating and stabbing of a ninety-four year old woman during the late night burglary of her home is clearly heinous, atrocious and cruel; Mack was still under sentence of imprisonment for a previous offense involving theft when he committed the calculated burglary and murder in this case. In Mills v. State, supra, this court let stand a death penalty imposed despite a jury recommendation of life notwithstanding a finding that burglary and pecuniary gain were improperly "doubled" and that the aggravating circumstance of a heinous, atrocious or cruel killing was likewise improperly applied. There is no jury override in this case and the aggravating circumstances presented are no less compelling especially in light of the sentencing judge's stated conclusion that they far outweigh any mitigating circumstances and that Mack's "past actions" justify death in accordance with the 10-2 jury recommendation (R 919).

In Rogers v. State, 511 So.2d 536 (Fla. 1987), this court affirmed a death sentence after invalidating three of five aggravating circumstances leaving intact only the findings that the murder occurred during the flight from an attempted robbery and that the defendant had previously been convicted of a felony involving the use or threat of violence. Despite the fact that there were non-statutory mitigating circumstances (including Rogers' status as a "good father") this court nevertheless determined that any error was harmless finding that there was "no likelihood of a different sentence". Id. at 535. Any error in this case was likewise harmless and Mack's assertion that the alleged doubling of aggravating circumstances mandates a life sentence is clearly erroneous.

e. The trial court did not err in finding the murder especially wicked, evil, atrocious, or cruel under section 921.141(5)(h), Florida Statutes.

A homicide is especially heinous, atrocious or cruel when the actual commission of the capital felony is accompanied by additional facts so as set the crime apart from the norm of capital felonies, i.e., a conscienceless or pitiless crime which is unnecesarily torturous to the victim. Buenoano v. State, 13 F.L.W. 401, 403 (Fla. June 23, 1988); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Under the particular factual circumstances of this case it cannot be said that the trial court abused its discretion in determining that this aggravating circumstance was applicable.

This case involved a brutal attack upon the ninety-four year old victim as a result of an illegal early morning intrusion into the victim's home as she apparently slept. This court has held that an attack on the victim in the supposed safety in her own home is a factor which adds to the atrocity of the crime. Perry v. State, 13 F.L.W. 189 (Fla. March 10, 1988); Johnston v.

State, 497 So.2d 863 (Fla. 1986); Troedel v. State, 462 So.2d 392, 398 (Fla. 1984); Breedlove v. State, 413 So.2d 1 (Fla. 1982).

It is not difficult to imagine the terror and pain this elderly victim felt as the sanctity of her home was violated and she, alone and defenseless, was subjected to a brutal assault. Johnston v. State, supra. From the evidence it is clear that the attack on the elderly woman in her bedroom included a vicious beating in which numerous blows were struck with fists and/or blunt objects. The victim's body was peppered with bruises, deep and shallow, over the head, scalp, face, around the neck, over both arms, over the upper body, as well as in the vicinity of the vagina, anus, and on the buttocks (R 352-357, 365-369). Multiple bruises over both forearms as well knife wounds on an arm and on the victim's fingers were described as "defense" wounds indicating that during the beating and the knife attack which eventually ended her life the victim attempted to defend herself (R 355-356). That defensive effort came to an end when Mack finally embedded a steak knife deep into the victim's throat with great force severing the victim's jugular vein and causing the victim's death through loss of blood within a ten to fifteen minute period (R 358-360). Although the victim may have lost consciousness not long after Mack forced the knife through her voice box the torturous nature of the brutal attack upon the victim culminating in the fatal stabbing are enough to set this case apart from the "norm" of capital felonies as previously determined in comparable cases.

Here, in conjunction with the shock of the late night intrusion into her home and the pain of the senseless beating inflicted, the victim also clearly must have felt terror after she undoubtedly became aware of the likelihood of her impending death. See, Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Scott v. State, 494 So.2d 1134 (Fla. 1986). That mental anguish alone is

enough to support this aggravating circumstance. The obvious presence of defensive wounds, especially in conjunction with the previously noted evidentiary factors, also demonstrate the correctness of the trial court determination in light of various comparable decisions by this court.

In Roberts v. State, 510 So.2d 885 (Fla. 1987), this court affirmed such a finding where the victim was killed by numerous blows to the head and where there was evidence of defensive wounds. See also, Wilson v. State, 493 So.2d 1019 (Fla. 1986) (brutal beating while victim attempted to fend off blows); Heiney v. State, 447 So.2d 210 (Fla. 1984) (victim exhibited defensive wounds in fending off hammer blows to the head).

In Booker v. State, 397 So.2d 910 (Fla. 1981), this court found the homicide to be heinous, atrocious or cruel wherein an elderly widow was stabbed to death and left with knives sticking out of her body; the autopsy revealed that she had been beaten as well. Similarly, in Harris v. State, 438 So.2d 787 (Fla. 1983), this court upheld this aggravating factor where the victim had died in her own home of multiple stab wounds and had been struck repeatedly with a blunt instrument; the autopsy again revealed the presence of defensive wounds. See also, Washington v. State, 362 So.2d 658 (Fla. 1978) (the victim stabbed repeatedly while held down, defenseless, on a bed); McCrae v. State, 395 So.2d 1195 (Fla. 1980) (elderly widow found nude from the waist down, brutally beaten about head and chest and agony and horror victim suffered prior to death "evident"); Breedlove v. State, supra (victim killed from single stab wound while asleep in own home); Quince v. State, 414 So.2d 185 (Fla. 1982), (elderly victim found bruised, beaten, stabbed and raped); Preston v. State, 444 So.2d 939 (Fla. 1984) (victim's throat slashed, subject to agony of prospect of imminent death).

The appellant's reliance on previous decisions is misplaced.

Specifically, appellant contends that Halliwell v. State, 323 So.2d 557 (Fla. 1975), Chambers v. State, 339 So.2d 204 (Fla. 1976), Burch v. State, 343 So.2d 831 (Fla. 1977) and Jones v. State, 332 So.2d 615 (Fla. 1976), all indicate that this death sentence should be vacated. None of these cases are of benefit to appellant. As this court observed in Arango v. State, 411 So.2d 172 (Fla. 1982), wherein the victim had been repeatedly beaten with a blunt instrument about the face and head and then strangled and shot, the death sentence was vacated in Halliwell because the mutilation to the body had taken place after death. In Williams v. State, 437 So.2d 133 (Fla. 1983), this court observed that the death sentence was vacated in Chambers, not due to any lack of "heinousness", but due to the fact that the trial court had impermissibly overridden the jury's recommendation of life. Similar motivation impelled this court's reduction of the death sentence in Jones and Burch, both of which involved jury overrides and the presence of significant mitigating factors. These cases are, thus, inapposite, as are those cases in which this finding has been vacated due to the fact that the victim had suffered an instantaneous death, without suffering or knowledge of her predicament. This aggravating factor should be approved and the instant sentence of death should be affirmed. Mack has failed to show that under the peculiar facts of this case the sentence is disproportionate to others, already noted, where it was imposed.

POINT IV

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN IMPOSING DEPARTURE SENTENCES ON THE NON-CAPITAL OFFENSES FOR THE REASON, STATED BOTH ORALLY AND IN "WRITTEN" FORM, THAT MACK HAD BEEN CONCURRENTLY FOUND GUILTY OF FIRST DEGREE MURDER, A CAPITAL OFFENSE NOT SCORED ON THE GUIDELINES SCORESHEET.

As correctly noted by the appellant, the trial judge did specifically announce at the sentencing hearing his basis for departing from the recommended guidelines sentences on the non-capital offenses (robbery and burglary) in counts I and II stating:

> THE COURT: Let the record reflect in sentencing Counts I and II the Court has exceeded the guidelines which were seven to nine years. The basis for exceeding the guidelines was the fact that the Defendant was concurrently found guilty of first-degree murder, premeditated murder, which crime was not scored as part of the score sheet.

(R 951). The appellant does not mention, however, that this court has specifically accepted that stated departure rationale as a valid basis for departure. Livingston v. State, 13 F.L.W. 187, 188 (Fla. March 10, 1988); Hansbrough v. State, 509 So.2d 1081, 1087 (Fla. 1987).

Florida Rule of Criminal Procedure 3.701(d)(11) provides that a departure sentence be accompanied by a "written statement delineating the reasons for departure." In State v. Jackson, 478 So.2d 1054 (Fla. 1985), this court rejected the assertion that a transcript of oral statements made by the judge during sentencing would be sufficient to justify the written statement requirement for departure under the guidelines relying upon the reasoning in Boynton v. State, 473 So.2d 703 (Fla. 4th DCA 1985). Under Boynton the alternative allowing oral prouncements to satisfy the written statement

requirement was rejected as "fraught with disadvantages" because the reasons for departure "plucked from the record by an appellate court" might not be the reasons chosen by the trial judge if placed in writing; the absence of written findings would force appellate courts to search the record for findings and underlying reasons for departure; and the development of the law would "best be served by requiring the precise and considered reasons which would be more likely to occur in a written statement than those tossed out orally in a dialogue at a hectic sentencing hearing." 473 So.2d 706-707.

The Jackson court did not, however, specifically address the question of harmless error in adopting its per se reversal rule in Jackson. The state respectfully submits that while the reasoning of Boynton and Jackson is persuasive and compelling in some cases, that is not the situation in a case such as this where the trial court has clearly and succinctly set forth its sole reason for departure in a two sentence statement at sentencing. Here, there are none of the concerns raised in Boynton and Jackson so as to justify per se reversal and vacation of otherwise valid sentences merely to require the trial judge to have his secretary retype those same two sentences for "the record".

Here, there is no danger that this court might "pluck" the wrong reason for departure from the record; indeed, it is interesting to note that the appellant was obviously able to focus in upon the rationale for departure and in fact incorporated it within his brief. Id. at 1055-1056. Finally, the "development of the law" rationale of Boynton and Jackson is totally inapplicable in this case since the single departure rationale clearly and succinctly announced at sentencing, i.e., contemporaneous conviction of an unscored capital felony, has already been clearly established by this court in the aforementioned decisions. To exhalt form over substance and reverse and

remand for a "resentencing" that would involve nothing more than having the judge affix his signature to page 951 of the appellate record (i.e., the sentencing hearing transcript) would do nothing to take the sentencing guidelines out of their "embryonic stages." Id. at 1056.

How can it be said that the purported error has "injuriously affected the substantial rights of the appellant" especially given the statutory presumption against such a finding of prejudicial as opposed to harmless error. See, § 924.33, Fla. Stat. (1987); Perri v. State, 441 So.2d 606 (Fla. 1983). Reversal is unjustified because of errors in matters of procedure unless actual injury resulting from that error, not the error alone, warrants reversal. Martin v. State, 100 Fla. 16, 129 So. 112 (1930); Whitten v. State, 86 Fla. 111, 97 So. 496 (1923).

Finally, the appellant fails to note that the departure sentence in this case was in fact "accompanied by a written statement delineating the reasons for the departure" as required by Rule 3.701(d)(11), in that the guidelines scoresheet - which also contains specific notations of the actual sentences imposed - also contained a typewritten notation in the vicinity of the "reasons for departure" section of the scoresheet specifically stating that: "the Capital offense of First Degree Murder is not scored." (R 928) The state submits that this "written statement," especially when taken in conjunction with the specific and corroborating oral pronouncement of the sentencing judge, adequately satisfies the requirements of Rule 3.701(d)(11) as well as the Jackson and Boynton decisions. Certainly, as contemplated by the rule and the committee note thereto the "written statement" was made part of the record and contains sufficient specificity to inform all parties as well as the public of the reason for departure. Any deviation from Jackson's requirements is necessarily harmless especially in light of the "written" departure rationale

clearly corroborated by the sentencer's oral pronouncement.

POINT V

NONE OF THE APPELLANT'S CHALLENGES TO THE CONSTITUTIONALITY OF FLORIDA'S CAPITAL SENTENCING STATUTE HAVE BEEN PRESERVED FOR APPELLATE REVIEW; ALTERNATIVELY, EACH OF THESE ALLEGATIONS HAS BEEN REJECTED, AS CONCEDED BY THE APPELLANT, EVEN WHEN PROPERLY PRESERVED FOR APPELLATE REVIEW.

None of the alleged constitutional infirmities raised in the appellant's pro forma argument were presented to or ruled upon by the trial court. This court has made clear that absent an allegation and showing of fundamental error an appellate court will not consider an issue unless it is first presented to and determined by the trial court. Grossman v. State, 525 So.2d 833 (Fla. 1988); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Brown v. State, 381 So.2d 690 (Fla. 1980). Even alleged constitutional violations can be waived if not timely presented. See, Trushin v. State, 425 So.2d 1126, 1129-1130 (Fla. 1982); Ray v. State, 403 So.2d 956 (Fla. 1981).

In Grossman, this court noted that the appellant's various constitutional challenges to the capital sentencing statute had been raised by various motions to dismiss; here, there were no such motions nor was there ever any ruling by the trial court. The appellant's failure to raise these claims resulting in the procedural default barring appellate review is easily explained inasmuch as he has candidly and correctly conceded "that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute . . ." (AB 52). Florida's procedural default rule is no less significant in capital cases and is routinely utilized by this court to bar consideration of issues not properly preserved by objection or motion for appellate consideration. This case presents an obvious situation for application of Florida's procedural default rule

especially inasmuch as the appellant has failed to allege or demonstrate any fundamental error justifying extraordinary relief from that procedural default; indeed the lack of any fundamental error in this case has already been conceded by the appellant who admits that this court has rejected each of the constitutional claims raised.

Alternatively, it is worthy of note that the same constitutional challenges were raised virtually verbatim and were recently again rejected in Robinson v. State, 520 So.2d 1 (Fla. 1988). See also, Stano v. State, 473 So.2d 1282, 1289 (Fla. 1985). Similar constitutional challenges, including claims that the death penalty statutes violate the Sixth, Eighth, and Fourteenth Amendments, even where preserved by timely objection or motion to dismiss, have been consistently rejected by this court. Remeta v. State, 522 So.2d 825 (Fla. 1988); Grossman v. State, supra; Rogers v. State, 511 So.2d 526, 536 (Fla. 1987); Lightbourne v. State, 438 So.2d 380, 385-386 (Fla. 1983).

A representative example of the baseless nature of Mack's constitutional claims is his assertion that the Florida capital sentencing system allows exclusion of jurors for their views on capital punishment thereby unfairly resulting in a prosecution-prone jury unrepresentative of the community. Mack fails to note the controlling precedent in both this court and the United States Supreme Court rejecting this claim. Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987), citing Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

The appellant has presented no compelling legal argument or support for his assertion that the capital sentencing statutes are invalid on their face nor has he presented any factual support for any claim that these statutes are unconstitutional as applied in his case. His mere regurgitation of arguments

already rejected, despite the failure to preserve any of these arguments for appellate reivew by timely objection or motion to dismiss, should be rejected through this court's finding of procedural default. Even if, however, this court were to somehow determine that the issues presented had been preserved for appellate consideration his allegations of constitutional violations are without merit especially in the factual context of this case. Certainly, this court stands ready to follow the capital sentencing scheme specifically validated by the United States Supreme Court against various constitutional challenges such that no basis for reversal in this cause has been demonstrated. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

CONCLUSION

Based on the arguments and authorities presented the appellee respectfully requests this honorable court to affirm the judgment and sentences in all respects.

Respectfully submitted,

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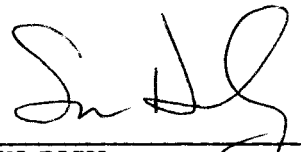
ATTORNEY GENERAL



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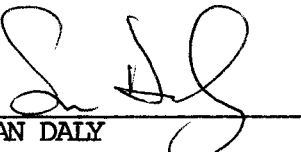
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished, by delivery, to Christopher S. Quarles, Assistant Public Defender, counsel for appellant, at 112-A Orange Avenue, Daytona Beach, FL 32014, this 15th day of August, 1988.



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