IN THE
SUPREME COURT OF FLORIDA

DAVID DUANE PENTECOST,

Appellant,

v.

CASE NO. 71,851

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, David Duane Pentecost, defendant below, shall be referred to herein as "Appellant". Appellee, the State of Florida, will be referred to herein as "the State". References to the record on appeal shall be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellant's statement of the case and facts is acceptable to Appellee as an accurate portrayal of the facts and evidence adduced below. However, for purposes of a proper disposition of this case on appeal, the following additional facts and/or information are submitted as pertinent to the issues presented.

During the jury selection process, defense counsel challenged for cause jurors no. 3, 16, 20, 33, and 36 (R 199), Hammond, Filmore, Bowers, Lipti, and Siders, respectively (R 20-22). The cause was due to answers from said jurors which indicated to defense counsel that they could not follow the judge's instructions as to an alcohol intoxication defense (R 198). As it turned out, juror no. 20, Bowers, had already been peremptorily excused by the defense (R 196, 199). However, the State requested further inquiry as to the remaining four jurors (R 198). Said inquiry revealed that Ms. Hammond and Ms. Filmore would weigh the evidence presented and consider the law as instructed to determine whether intoxication was a valid defense under the circumstances of this case (R 201-203). The challenges thereto were denied (R 205). Lipti and Siders both stated that alcohol consumption was no excuse for a person's actions (R 203-204), and as such, were allowed to be excused for cause (R 205). At that point, Appellant still had nine peremptory challenges available (R 205-209).

Just prior to the foregoing, defense counsel attempted to question potential jurors hypothetically regarding the bitter loss of custody of a child to a different family member (R 158-160). Upon objection by the State, defense counsel argued:

> MR. KIMMEL: The entire defense case revolves around the notion that Kayle Smith and his sister, Kimber Pentecost, planned and executed this murder for that sole reason, that is the only known motive to anyone in law enforcement whatsoever, and that he did it at his sister's suggestion, and that she did it so she could get her son back. Mrs. Smith had taken her daughter to court and obtained custody of her very young son in 1979, and witnesses will testify that Kimber was violently bitter about this and threatened for years to kill her mother, and that she and her brother planned it and then killed the mother for that reason. That is the entire defense case. If we can't inquire into that, then there is no defense case. (R 160-161).

This defense was established at trial through the cross-examination of Kayle Smith (R 482-500) and through the testimony of Appellant who testified that it was Kayle and not he who killed Junevis Smith (R 673-736).

During the penalty phase of the trial, the State presented the testimony of Dr. Thomas Birdwell, a pathologist who performed the autopsy on the victim (R 924-925). He testified that although there were multiple stab wounds on the body, the cause of death was from a stab wound to the left side of the head (R 925). It would have taken "a considerable amount of pressure... because [the knife] would have had to go through the skin which,

while it appears very tender, is somewhat resilient, had to go through the muscle and had to go to the bone of the skull... . If the head were loose it would have taken a little less thrust. If the head were against something, the floor, a wall, a bed, it would have taken less than that, because the head would not have been moving" (R 926). Dr. Birdwell further testified that:

> Other than a stabbing wound made essentially by the hand alone in some thrusting method the instrument could have been placed against the skin and the skull, and force applied to it. It could have been done say by a heavy thrust of the hand, as simple as that, or some other object that had weight to it could have been used in a motion that would have driven it in with one or more blows (R 932).

The State then introduced certain exhibits, specifically: No. 3, a photograph of the front door of the victim's home which was forced in during the burglary; No. 4, a photograph of the parked car at the Scenic Heights Elementary School, which was used by Appellant and Kayle Smith; No. 9, a photograph of the victim; No. 5, a photograph of the victim's bed; No. 6, a photograph of the bloody ax found on the bed; No. 15, a photograph of the knife used to murder the victim; Nos. 23 and 24, statements made by Appellant; No. 26, emergency 911 dispatch tape of the victim talking to police; Nos. 10, 11, 12, 13, and 14, photographs of the injuries sustained by the victim (R 935-936). In addition, the State moved for the introduction of all other evidence presented during the guilt phase to be considered by the jury in aggravation (R 936).

In mitigation, defense counsel offered the testimony of Margaret Sloan, a probation and parole officer with the Florida Department of Corrections (R 939). She became professionally involved with Appellant in 1975 or 1976 when she was employed by HRS Children Youth Services in Milton, Florida (R 939). Ms. Sloan was Appellant's probation officer 11 years prior to the instant case. Prior to the penalty phase proceeding, she was provided with copies of reports relating to said probation period. Although her signature was on some of the reports, she did not have recollection of the contents therein and was, therefore, required to refresh her memory by studying them (R 940). She testified that she supervised Appellant based on some burglary charges; had his probation violated; and later recommended that he be certified to adult court (R 941). When inquired as to whether any of Appellant's charges involved violence to persons, Ms. Sloan testified that he had been arrested for assault in 1976, but the disposition was "nonjudicial action" (R 941). The only thing the witness could recall about Appellant was that "he was a very quiet person" (R 943).

The next witness was Anthony Pentecost, Appellant's brother (R 946). He testified that David and he weren't very close. That David was "laid-back" (R 947); he was calm, not aggressive, not violent; he wasn't greedy (R 948).

Dr. Benjamin Ogburn, an expert psychiatrist in the field of alcohol consumption and its effects on the human body (R 593, 949), testified that since his previous testimony at trial, he had an opportunity to review a summary of Appellant's hospitalization in an alcohol treatment program in Kentucky in 1986 (R 949-950). Appellant voluntarily admitted himself to this program after he jumped from a cliff and broke his leg when he was drinking one time in 1986 (R 951). David was "individualistic" as a child (R 951); he had low self-esteem (R 952); he began abusing alcohol in his early teen years, then almost daily (R 954). Dr. Ogburn testified that Appellant developed a tolerance to alcohol and he also had "alcoholic blackouts" (R 954). Appellant was unable to complete the program due to his leg injuries and thereafter sought no other alcohol abuse treatment (R 956).

The next witness was Shannon Bush, a friend of the victim's family. She testified that on occasion she would talk to Kimber Smith about Kimber's mother (R 958). Kimber would talk about how she hated her mother and how she was "going to find a way to kill her" (R 958).

Suzanne Jordan testified that she spoke with Kayle Smith shortly after the murder (R 959). Kayle told her that "David went in the house and then he turned around and came back out because he changed his mind and Kayle told him no, that they had to do it" (R 960).

Defense rested and no rebuttal was presented (R 962). However, after a recess, defense counsel requested to present additional testimony, which request was granted (R 976).

Appellant took the stand to verify the authenticity of a letter from him to his defense counsel, Robert Kimmel (R 977). The letter was then read in its entirety to the jury (R 977-980).

SUMMARY OF ARGUMENT

The trial court did not err in denying Appellant's challenges for cause as to Ms. Hammond and Ms. Filmore as further inquiry revealed that they would give full consideration to a voluntary intoxication defense as instructed by the trial judge. Moreover, Appellant elected not to use his remaining peremptory challenges to excuse said jurors and, therefore, should not now be heard to complain that he was prejudiced.

The trial judge also did not err in rejecting the jury's life recommendation and concluding that there was no reasonable basis for such a life recommendation. The trial court considered all the evidence before the jury and concluded that each of the aggravating factors outweighed the one non-statutory mitigating factor. The jury's recommendation of life was not based on any valid, reasonable mitigating factor. The sentencing judge not only may but must overrule the jury when its recommended sentence is not the appropriate sentence under the law. Appellant's sentence of death should be affirmed.

Finally, Appellant's claim that the trial judge erroneously considered victim impact evidence is procedurally barred from review by this Court as he failed to object thereto at trial.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S CHALLENGES FOR CAUSE AS TO PROSPECTIVE JURORS HAMMOND AND FILMORE AS BOTH STATED THAT THEY WOULD GIVE FULL CONSIDERATION TO A VOLUNTARY INTOXICATION DEFENSE.

Appellant asserts as error the trial court's denial of his challenges for cause of two prospective jurors who allegedly expressed doubt as to their ability to fairly judge the intoxication defense. However, a review of the jury selection transcript on appeal unequivocally demonstrates that the two jurors in question, Ms. Hammond (No. 3) and Ms. Filmore (No. 16), both stated that they could follow the instructions on the law as given by the trial judge.

As this Court is well aware, the competency of a challenged juror is a mixed question of law and fact, the determination of which is in the trial court's discretion. Davis v. State, 461 So.2d 67 (Fla. 1984); Christopher v. State, 407 So.2d 198 (Fla. 1981); cert. denied, 456 U.S. 910, 72 L.Ed.2d 169, 102 S.Ct. 176 (1982). Appellant must show manifest error before a trial court's ruling on a challenge for cause will be disturbed on appeal. Id. at 200. In Lusk v. State, 446 So.2d 1038 (Fla. 1984), this Court stated: "The test for determining juror competency is whether the juror can lay aside any bias or

prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Id. at 1041. In applying this test, the trial courts must utilize the following rule, set forth in Singer v. State, 109 So.2d 7 (Fla. 1959):

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or by the court on its own motion.

See also Moore v. State, 525 So.2d 870 (Fla. 1988) and Hill v. State, 477 So.2d 553 (Fla. 1985).

The undersigned submits that the prospective jurors in question met the foregoing test. During voir dire, defense inquired of the entire venire whether anyone felt that no level of intoxication could give rise to a defense to a criminal charge (R 142). Several of the members indicated that they would have a problem with excusing a defendant from their actions because they were intoxicated, including jurors Hammond, Filmore, Lipti, and Siders (R 143). Thereafter, during the challenge conference, defense counsel challenged those four jurors for cause based on their alleged inability to apply the intoxication defense (R199). Further inquiry by counsel revealed that Ms. Hammond "would listen carefully and weigh all of the evidence to that effect and then use that judgment" (R 201-202). Defense counsel then asked,

"Would you still have in your mind that that person, because they voluntarily took the alcohol, that makes them responsible for everything that happens after?" (R 202). Ms. Hammond responded in the negative (R 202).

Ms. Lipti stated that she "would have to listen to all of the facts and then base my decision on that." (R 202); she could "follow the judge's instructions" (R 204-205). Based on this inquiry and rehabilitation, the trial judge denied the challenges for cause thereto (R 205). However, as to Lipti and Siders, the challenges were granted as both jurors expressed the belief that a defendant is responsible for his actions no matter the level of intoxication involved, (R 203) and that they could not follow the law as instructed by the trial judge (R 204). Such action by the judge clearly demonstrates that he acted with reasonableness and did not abuse his discretion.

Moreover, the State would direct this Court's attention to the fact that no further challenge to jurors Hammond and Filmore appears in the record prior to the jury being sworn. Obviously, defense counsel was satisfied with their answers as he elected not to utilize any of the nine remaining peremptory challenges to excuse either of the jurors (R 205-227), although said challenges were exhausted and no additional peremptories were sought. In order to show reversible error, Appellant must demonstrate that "he was prejudiced by being required to accept an objectionable juror because of the denial of the challenge for cause... ."

Rollins v. State, 148 So.2d 274, 276 (Fla. 1963). Appellant has failed in this respect.

Appellee further submits that the harmlessness of the trial judge's denial of the challenges for cause is quite evident as the sole theory of Appellant's defense was not voluntary intoxication. During voir dire, defense counsel attempted to inquire of potential jurors whether they had lost custody of a child to another member of the family. The reason for such inquiry was expressed as follows:

> MR. KIMMEL: The entire defense case revolves around the notion that Kayle Smith and his sister, Kimber Pentecost, planned and executed this murder for that sole reason, that is the only known motive to anyone in law enforcement whatsoever, and that he did it at his sister's suggestion, and that she did it so she could get her son back. Mrs. Smith had taken her daughter to court and obtained custody of her very young son in 1979, and witnesses will testify that Kimber was violently bitter about this and threatened for years to kill her mother, and that she and her brother planned it and then killed the mother for that reason. That is the entire defense case. If we can't inquire into that, then there is no defense case (R 160-161).

At trial, this "finger-pointing" defense was established during the cross-examination of Kayle Smith (R 482-500) and also through the testimony of Appellant (R 673-736). In fact, Mr. Pentecost testified that he had been drinking prior to the incident but he was not drunk (R 691). The existence of these inconsistent defenses at trial reduces the possibility of any alleged

prejudice based on the denial of the challenges for cause, because it presented the jury with the task of determining the credibility of the two witnesses who were each placing the blame on the other, thereby diminishing the importance of the voluntary intoxication defense.

Nevertheless, the record demonstrates that the two jurors in question could follow the court's instruction on the intoxication defense and render a verdict on the evidence presented. The jurors' impartiality shines even brighter during the penalty phase as both recommended a sentence of life imprisonment without possibility of parole for twenty-five years (R 1026-1027). In light of the foregoing, Appellant's request for a new trial should be denied and the ruling of the lower court affirmed.

ISSUE II

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IN SENTENCING APPELLANT TO DEATH.

David Duane Pentecost challenges the trial court's override of the jury's recommendation that he be sentenced to life imprisonment. In his written order imposing the death penalty, the trial judge noted his "great respect for the jury's recommendation in this case and has given it great weight in making the ultimate decision as to whether the death penalty should be imposed" (R 1288). However, he concluded that the facts suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ (R 1288). Specifically, the court determined that the State had proven the existence of three aggravating circumstances and that Appellant had proven the existence of one nonstatutory mitigating circumstance (R 1272, 1288). The single mitigating circumstance does not outweigh the aggravating circumstances (R 1288).

Appellant now contends the trial court erred in overriding the jury's recommendation of life imprisonment because there were reasonable bases upon which the jury could have premised its advisory sentence. The general rule espoused in Tedder v. State, 322 So.2d 908 (Fla. 1975), is that in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing

that virtually no reasonable person could differ.[1] However, it is apparent from Appellant's brief that, because of the jury's life recommendation, the sentencing judge's statutory right of override should be done away with altogether and the judge should be relegated to a role of perfunctorily accepting the jury's life recommendation without giving any consideration to aggravating and mitigating circumstances. (See Initial Brief at 20).

Section 921.141(2), Fla. Stat., makes clear that the jury's role at sentencing in a capital case is merely advisory and is not binding on the trial court. Section 921.141(3) further provides that:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts... (emphasis added)

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[1] The State would reiterate its position made in past cases that abolition of this so-called Tedder rule by this Court would be totally appropriate inasmuch as the Fifth Circuit Court of Appeals has realistically stated in Spinkellink v. Wainwright, 578 F.2d 582, 605 (1978), that "...reasonable persons can differ over the fate of every criminal defendant in every death penalty case." However, as desirable as the abolition of Tedder may be, it is not required in the instant case. What is required is total rejection of any suggestion by Appellant sub judice that Tedder should be extended to ignoring the trial judge's sentencing order and focusing wholly on the unstated predicate of the jury recommendation.

Moreover, this Court has consistently and repeatedly held that it is the judge and not the jury that imposes sentence; the jury only recommends. Thomas v. State, 456 So.2d 454 (Fla. 1984); State v. Dixon, 238 So.2d 1 (Fla. 1973); Lamadline v. State, 303 So.2d 17 (Fla. 1974). The ultimate decision as to whether the death penalty should be imposed rests with the trial judge. Thomas, supra; Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978).

Clearly, then, pursuant to the statute governing capital sentencing proceedings as well as prevailing case law, the trial court may appropriately weigh aggravating and mitigating circumstances regardless of what the jury's recommended sentence has been. In the instant case, the trial court in its role as the ultimate sentencer considered all of the evidence that was before the jury, including the unrestricted evidence offered in mitigation, and concluded that each of the aggravating factors outweighed the sole nonstatutory mitigating circumstance and, thus, the death penalty was appropriate.

Nevertheless, Appellant asserts that the trial court did not give proper consideration to the jury's basis for recommending life imprisonment before the court imposed the death penalty. While there is some authority for the position that "where there are one or more aggravating circumstances and the trial judge has found no mitigating circumstances sufficient to outweigh the aggravating circumstances 'application of the Tedder rule calls

for inquiry into whether there was some reasonable ground for a life sentence that might have influenced the jury to make such a recommendation," Thomas, supra; Lusk v. State, 446 So.2d 1038 (Fla. 1984); Stevens v. State, 419 So.2d 1058 (Fla. 1982). That authority does not suggest, as Appellant implies in his brief, that this Court engage in speculative perusals of the record in search of any circumstance which could possibly have supported the jury's life recommendation. Tedder cannot reasonably be construed as creating a license by which the court may guess and speculate as to the basis for the jury's recommendation and, in the process, ignore the well-considered written findings of the sentencing judge. Indeed, to so construe Tedder would completely obfuscate the statutory function of the sentencing judge and, as noted above, would, contrary to clear legislative intent, reduce the trial judge's function to that of merely explaining why he concurs with a jury's recommendation of death. The Florida Legislature has not seen fit to abolish the jury override; nor has the Legislature required the jury to provide written findings in support of its sentence. Without written findings in support of the jury's sentence, such sentence is advisory and can never be given more deference than a judge's sentence supported by written findings. According such deference to a jury's advisory sentence unsupported by written findings constitutes the very arbitrariness and inconsistency condemned by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972).

The better approach was taken by this Court in Echols v. State, 484 So.2d 568 (Fla. 1985), in which it was stated that in determining, pursuant to Tedder, whether an override is based on facts so clear and convincing that virtually no reasonable person could differ, one must look at the trial court's sentencing order. Id. at 576. Appellant enumerates numerous factors in order for this Court to speculate as to why the jury recommended life, by looking at the evidence before the jury as opposed to the sentencer's order. However, this Court will never know whether the jury's recommendation was predicated on rational or arbitrary reasons since the jury did not delineate its findings. To satisfy the constitutional standards espoused in Furman v. Georgia, and Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976), the trial judge's sentencing order must be the order reviewed, not the unstated conclusions of the jury. Whereas here, the trial judge has determined the presence of three aggravating factors and one non-statutory mitigating factor, and his findings are not erroneous, this Court must agree that death is the appropriate sentence. Cf. Wainwright v. Goode, 464 U.S. 78, 78 L.Ed.2d 187, 104 S.Ct. 378 (1983); Torres Arboledo v. State, 504 So.2d 403 (Fla. 1988). Parker v. State, 450 So.2d 750 (Fla. 1984); Groover v. State, 458 So.2d 226 (Fla. 1984); Johnson v. State, 393 So.2d 1069 (Fla. 1980); Spaziano v. State, 433 So.2d 508 (Fla. 1983).

The trial court specifically stated that it had considered the aggravating and mitigating circumstances enumerated under §921.141, Florida Statutes, and concluded that three of the nine aggravating circumstances and no mitigating circumstances thereunder existed (R 1269-1274, 1285-1289). The validity of the court's findings of aggravating circumstances is not challenged by Appellant. However, Appellant does challenge the court's failure to find additional mitigating evidence to support the jury's recommendation.

Initially, Appellant asserts that "[t]he jury could have believed that Kayle Smith, not David Pentecost, actually stabbed the victim," and that this constitutes a basis for recommending a life sentence. Initial Brief at 30. Such an assertion is ridiculous in light of the jury's unanimous verdict which proved they believed otherwise.

Appellant next contends that the jury's recommendation of life imprisonment could have been based on the disparate treatment of Appellant and his "equally culpable accomplice," Kayle Smith. Initial Brief at 30. Again, such a contention is totally illogical given the jury's verdict. First, the jury obviously determined that Appellant was the person who actually committed the cold-blooded murder herein and, therfore, classifying Kayle as an "equally culpable accomplice" is devoid of merit. Secondly, to assert that "the jury knew that the State was not seeking a death sentence for [Kayle]," Initial Brief at

31, is a total misrepresentation of the facts. Direct examination of Kayle Smith expressly revealed that at the time, he had not yet been sentenced and that the State was in fact seeking the death penalty in his case (R 482). Therefore, there was no disparate treatment involved, even though Kayle was in no way "equally guilty."

Next, Appellant argues that the jury's recommendation could have been based on his alcohol consumption prior to the commission of the crime. Such a basis is clearly unreasonable in this case in light of Appellant's own admission that he wasn't drunk (R 691) and the fact that Appellant was able to give a detailed account of the events surrounding the murder (R 1288), thereby refuting his suggestion that he had a diminished or impaired mental capacity because of excessive alcohol consumption. Moreover, the jury obviously rejected the intoxication defense and, therefore, could not have reasonably formed such a basis for a life recommendation.

Finally, Appellant argues that non-statutory mitigating factors such as his alcoholism, troubled personal life, and his age of 25 years could have supported the reasonableness of the jury's recommendation. As the trial court stated, there is nothing in the record to associate Appellant's age with any other characteristic such as immaturity or senility and, as such, could not be accorded any significant weight (R 1288). Moreover, these factors, for which the sole support was the self-serving

testimony of Appellant, are not of such weight that reasonable people could conclude that they outweigh the aggravating factors proven. Since reasonable people could not differ as to whether death was appropriate in this case, the trial judge was not bound to follow the jury's recommendation of life. Therefore, the override is proper in this case.

ISSUE III

THE TRIAL JUDGE'S RECEIPT OF VICTIM IMPACT EVIDENCE WAS NOT ERROR.

As his final assertion of error, Appellant claims that the trial judge's consideration of certain victim impact evidence was in violation of the Eighth Amendment of the United States Constitution and the mandate of Booth v. Maryland, 482 U.S. _____, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987). This assertion is totally without merit.

First, the State would point out that the United States Supreme Court ruled in Booth v. Maryland that victim impact statements submitted to the jury were irrelevant to any legitimate sentencing consideration in capital cases and, therefore, were prohibited. The holding does not pertain to victim impact evidence considered by the sentencing judge.

Secondly, the two letters from Dorothy Littlepage and Teresa Ipock, which Appellant argues should not have been considered in sentencing, are clearly written in support of mitigation of Appellant's sentence (R 1413-1416). The undersigned fails to see the harm in the court's alleged consideration thereof!

Nevertheless, this claim is procedurally barred for failure to object at trial. Parker v. State, 13 FLW 695, 696 (Fla. Dec. 1, 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988). Moreover, the judge's sentencing order makes no reference

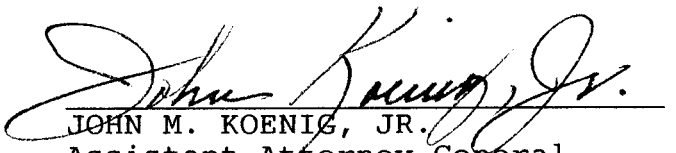
whatsoever to the victim inpact statement in the presentence investigation report and his decision was clearly limited to the statutory aggravating factors.

CONCLUSION

Based on the foregoing arguments, reasoning and citations of authority, the State respectfully requests this Court to affirm the decision of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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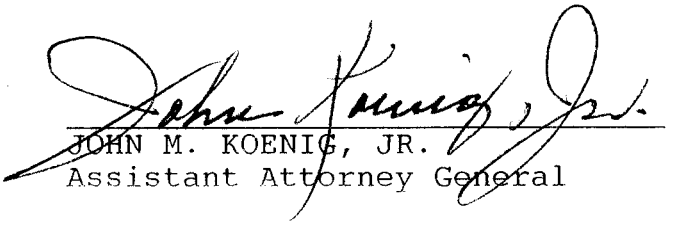
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via U. S. Mail to W. C. McLain, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 27th day of January, 1989.



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