IN THE SUPREME COURT OF FLORIDA

JOHNNIE C. BOUIE, JR.

Appellant,

vs.

CASE NO. 72,278

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 appellant's statement of the case and facts with the following additions and corrections:

Robert McKitrack encountered appellant and a woman at approximately 10:50 p.m., as he was driving to work at the water plant (R 306). Appellant was wearing dark slacks and a T-shirt, and the woman was wearing slacks and a blouse (R 307). Appellant told McKitrack that the car had a flat tire, not that the wheel was off the car (R 313). McKitrack saw no other people or cars at the scene (R 315). When McKitrack arrived at work, he felt that something was not quite right *so* he called the police to check it out (R 307).

Susan Sterthouse was driving down Eleventh Street between 11:15 and 11:30 (R 319). She heard a woman screaming for help, and was extremely bothered by the scream (R 317). She slowed down, and saw the screaming woman standing on the roof of a car flailing something white towards a man standing next to the car (R 318). The man was wearing a dark-colored T-shirt and jean-type pants, and height-wise the roof of the car was about parallel with his neck (R 317, 320-1). Sterthouse saw no other people or cars there and as she proceeded down Eleventh Street, and no other cars passed her headed in the direction from which she came (R 318).

At approximately 11:12 p.m., the Florida Highway Patrol received a communication regarding a disabled vehicle on Eleventh Street (R 339-364). Auxiliary Trooper D'Agostino responded, and

after finding appellant's car and a lot of blood but no people, he called the Volusia County Sheriff's Department (R **324**). A deputy was requested around **11:25 - 11:27** p.m., and Deputy Page arrived after **11:30** p.m. (R **334, 364**). Page observed great quantities of blood on the hood of the car as well as the pavement, where it had pooled in the gorges on the road (R **335, 341-2**).

A member of the Daytona Beach Police Department K-9 unit arrived with his dog, Ely, and a blood soaked bra found near the car was utilized as a starting point for a scent indicator (R **350**). The dog picked up that scent and headed back toward the car, following different splatters of blood that were on the opposite side of the road from the car (R **350**). Ely got parallel with the car, then went up to the front of it and jumped on the hood (R **350**). Ely came off the front, circled to the rear of the vehicle and did the same thing there (R **350**). Ely crossed back over the road the same way he came, and started back in the direction of the brassiere, but stopped abruptly, turned, and headed straight for the woods (R **351**). He dove under a fence, and went in about thirty feet and stopped, as that is where the victim's body was located (R **351**).

There were approximately a dozen vehicles from various police and fire departments at the scene, including the BATmobile (R **381-2**). The vehicles' headlights and emergency lights were on, as well as some spotlights in an attempt to light up the area (R **382, 616**). There was chatter from portable radio units carried by the officers and medical personnel and from the mobile

units, and at least two detective cars had on loudspeakers (R 383, 616). The location was a wooded area with no houses or businesses, and at night there is generally no traffic so it is very quiet and sound carries well (R 308).

Deputy Ellinor of the Volusia County Sheriff's Department K-9 Unit and his dog Jet responded to the scene to search for additional evidence (R 475). They went into the woods to a position parallel to where the body was found, approximately 50-60 feet away (R 477, 479). Jet struck on a track and headed east, away from the scene (R 477). The pair tracked east, through a swamp, where Ellinor could tell someone had been, and came up into a white patch of dirt, where Ellinor saw a fresh tennis shoe track (R 477). They continued east to a fire trail, came to a road where Jet turned south and started sniffing around (R 477). Ellinor could see the tennis shoe tracks had stopped and headed back north (R 477). He turned Jet around and backtracked, following footprints (R 478).

The two continued north to an intersecting road, where Jet turned east, went a short distance and stopped (R 478). Ellinor could tell that the person they were tracking had stopped, turned around and headed west back toward Eleventh Street (R 478). They followed the track to a gate, and found a large dried up mud puddle with clear footprints (R 478). Ellinor called a crime scene analyst to investigate the footprints (R 479). Ellinor and Jet returned to the starting point where the dog had originally turned east (R 480). He turned Jet west and ordered him to track, and Jet went directly nto where the body had been found (R

480). The murder weapon was not found, and Ellinor stated that it would be virtually impossible to find if it had been submerged in the swamp (R 479, 481).

Leroy Parker, a crime scene analyst with the Florida Department of Law Enforcement, arrived on the scene shortly after midnight (R 432, 434). He photographed a shoe impression in suspected blood next to the car, and made three plaster casts of shoe impressions at the scene (R 447, 452). Two of the impressions were near the body, going in a direction toward the body, and were similar to others that went up through to where the body was and those in the grassy area by the body (R 453). The other cast was made at the gate where Ellinor and Jet had tracked (R 455).

Parker collected appellant's shoes for comparison purposes (R 451). They could have made the prints that were cast, based on size, shape, manufacturer's tread design, manufacturer's size, and the wear pattern (R 528-30). The brand of shoes was Dunlop, which the examiner had never seen before in his work (R 530, 534).

Parker also photographed the body (R 441). The body was laying flat, and blood was running down the right side (R 443). Parker referred to this as "dropped blood," meaning that somebody had bled and before the blood could coagulate it ran down the side of the body (R 441). Parker also took several samples from blood that was on the car (R 444). The "dropped blood" recovered from the victim's body was consistent with appellant's, as was blood found on the inside pocket of the victim's jeans, blood on

the victim's blouse, blood on the victim's purse, and blood from several places on the car (R 498, 500, 503, 504, 507, 509).

Deputy Lockwood saw appellant the next morning walking north on Eleventh Street, north of the crime scene (R 423). Appellant had no identification, but said his name was Johnnie and that he had had car problems the night before and had spent the night in the woods (R 424). Appellant was wearing a cap, trousers, and shoes, but no shirt (R 425). Appellant never mentioned anything about a woman having been with him the previous evening when he had the car trouble (R 427).

In a statement to Corporal Hudson, appellant said he met the victim at his uncle's boarding house in Orlando, and she asked him to drive her to her mother's at Ormond-By-The-Sea, and she would pay him ten dollars when they got there (R 629). The tire on the car started to go flat, and the victim told appellant that the nearest service station was back the other way (R 630). He turned the car around, and the tire got flatter and came off (R 630). While appellant was working on the car, a person stopped and said he would go to the water plant to call help (R 630). As appellant was fixing the tire, two white males in a Buick or Oldsmobile stopped next to his car (R 630). At this time, the victim was standing by the driver's side door of appellant's car (R 631). The white males got out of their car and started beating the victim (R 630). Appellant got scared and ran into the woods, never looking back (R 630, 632).

Appellant said he had cut his finger on the barbed wire fence when he was running into the woods (R 633). He stated that

he had not bled anywhere around the car (R 633). Appellant was specifically asked if he had bled around the victim and he said no (R 633). Appellant was specifically asked if he had any physical contact with the victim, and he again replied that he had not (R 633). Appellant's description of the alleged attackers changed during the interview (R 632).

Appellant testified that he first met the victim in 1983 when he was selling a windshield, but never had any social engagements with her (R 746). He next saw her at his uncle's boarding house in September, 1984 (R 747). She had heard that he was going to Daytona, and asked him if he would take her to Ormond-By-The-Sea because there had been a death in her family, and she would pay him ten dollars when they got there (R 747). The rode over on I-4, turned on to Eleventh Street, and after travelling about a mile-and-a-half appellant felt the back end swerve and pulled over to check the tire (R 750). The tire was not totally flat, but appellant decided to fix it then (R 750). He loosened the lugs and jacked the car up, and when he went to take the tire off the jack broke and got stuck up under the car (R 750). It took about 15-20 minutes to get the jack loose (R 751).

Appellant turned the car around to go back to a gas station, but in his haste he had forgotten to tighten the lug nuts and the wheel came off (R 751). The victim flagged down a car, and the driver said he was running late for work but after he got to work he would either return or send help (R 752). Appellant went back to check the damage, and when he knelt down

the victim came on to him in a sexual way and he returned her affection, apparently by biting her (R 752-3). Appellant told the victim to let him go retrieve the tire and put it in the car, and they would leave walking because he did not feel comfortable out there (R 752).

Appellant started walking toward the tire, and got about 20-25 feet behind his car when another car came around the corner (R 753). It stopped in front of his car, off the road (R 753). Appellant figured help had arrived, so he started walking back that way (R 753). Two guys got out, and one started beating the victim, calling her a nigger-lover, while the other started toward appellant yelling what he was going to do to him (R 753). Appellant got scared and ran into the woods (R 753-4).

Appellant ran deep into the woods, where he became disoriented (R 754). He could hear cars on the road, but when he tried to walk the bushes got so thick that he could not walk (R 754). Appellant had to use the bathroom, so he used his shirt to clean himself and got tired and leaned up against a tree and when he woke up it was daybreak, and he walked out (R 754). Appellant never saw any lights from the emergency vehicles, nor did he hear any radios (R 767). Apparently appellant's shirt, like the murder weapon, was never found.

The totality of the victim's wounds indicated a struggle (R 411). She had a series of stab wounds on the back of her chest and neck (R 403). There were five stab wounds to the chest, four of which were deep in the chest wall, and penetrated both lungs (R 406). Three of them went through the bony portion of the rib, indicating that substantial force was used (R 406, 410).

The bite mark on the victim's arm was inflicted with substantial force that would have caused pain (R **658-9**). The wound was an exact match with appellant's bite (R **658-9**). Appellant and the victim would have been in a prone, face-to-face position, with him laying on top of her (R **664**). The wound was inflicted in an agitated condition or excited emotional state (R **677-8**). The pattern indicated that the victim tried to pull away (R **675**).

Jury selection in the instant case began on Monday, January **25, 1988**. On Wednesday, January **27, 1988**, around **12:15** p.m., the prosecutor's secretary contacted him at court and informed him that an individual had contacted the State Attorney's Office with information regarding this case (R **553-4**). The prosecutor sent his investigator, Bud Eaton, and Detective Hudson to interview the individual (R **284**). Eaton and Hudson returned to the courtroom around 3:00 p.m. and told the prosecutor that appellant had apparently confessed to a Bobby Edwards while in the holding cell the previous Monday, and they related to the prosecutor the details (R 284).

At the first opportunity, around a quarter after, the prosecutor informed defense counsel and the court about this development (R **284**). Mr. Edwards was brought over and deposed around **6:00** p.m. that evening (R **554**). Appellant, defense counsel and his investigator were present (R **555**). Defense counsel indicated that he would like to talk to all of the individuals who were in the holding cell at that time (R **555**). Defense counsel's investigator spoke with these individuals

during the day on Thursday, and they were all interviewed or deposed by defense counsel that evening (R 555).

Mr. Toole, who had been in the holding cell that day, told the state attorney's investigator and defense counsel that appellant had confessed, but he was too scared to say anything and did not want to be involved (R 555). The other individuals denied that there was a confession (R 555). Mr. Edwards had already been sentenced, and asked for nothing from the state in exchange for the testimony and was promised nothing except a safe place in prison (R 556, 587).

Defense counsel objected to the introduction of Edwards' testimony and moved for a continuance for the purpose of a thorough investigation of Edwards (R 572). After these motions were denied, defense counsel moved to withdraw based on the fact that Edwards was still represented by the Office of the Public Defender (R 574). Defense counsel contended that although Edwards had already been sentenced, the thirty day period for the filing of an appeal had not yet expired so his office still had a professional responsibility to Edwards (R 574). This motion was also denied (R 575).

Edwards testified that appellant said he had picked up a woman from Orlando, and was driving down 1-95 taking her to Daytona because a member of her family was ill (R 581). Appellant asked her to have a sexual relationship with him, and she started acting funny (R 582-3). He pulled over to the side, and she got out and started running (R 581). Appellant told Edwards that a man had seen him, and Edwards believed the man's

name was McDonald (R **582).** "McDonald" worked at the water plant at that time, but had since taken a job with the post office (R **582).**

After the victim started running, appellant struggled with her and stabbed her four or more times (R **583).** While they struggled she ran a "pretty good piece," about ninety feet or more (R **583).** Appellant dragged her into the woods (R **583).** After appellant killed the victim, he went back to his car to unloosen the bolts (R **584).** Appellant told Edwards that he had come up with a story about two white males that had seen him with the victim and chased him into the woods (R **584).** Mr. Toole was also sitting there when appellant made the statements (R **593).**

Edwards first tried to contact the State Attorney's Office late Monday, and tried about five or six times before contacting the prosecutor's secretary (R **585).** As Edwards was in jail at the time, he was afraid to discuss the matter over the phone, and requested that someone come out and talk to him (R **586).**

Edwards admitted that aside from pleading to the escape charge that Monday, he had been convicted of bank robbery, grand theft, writing worthless checks, and burglary (R **586).** He also admitted to having three aliases (R **588).** Edwards divulged the details of the worthless check charges, which actually consisted of forging about ten checks **R 609).**

SUMMARY OF ARGUMENT

POINT I: The trial court's failure to articulate factual findings in support of appellant's sentence does not mandate automatic reversal for imposition of a life sentence. The jury recommended death by a 9-3 majority, and as in all other cases where the trial court has followed a jury recommendation of death, but rendered an unclear or erroneous sentencing order, the appropriate remedy is to remand to the trial court for a new sentencing proceeding. Any other result would be inconsistent with prior decisions and policy of this court.

POINT 11: The trial court properly permitted the testimony of Bobby Edwards. Defense counsel deposed Edwards as well as other witnesses who were present when appellant confessed and appellant has not set forth anything else that additional time would have permitted him to do. Defense counsel thoroughly cross-examined Edwards, and also presented four rebuttal witnesses. No conflict of interest existed, as the public defender's representation of Edwards ended when he entered a straight plea. Appellant has failed to demonstrate that an actual conflict of interest existed or that his lawyer's performance was adversely affected.

POINT 111: The trial court properly denied appellant's motions for judgment of acquittal where the state presented substantial, competent evidence from which the jury could conclude that appellant murdered Barbara Smith in a premeditated manner. The evidence was not entirely circumstantial, as the

state also presented evidence of appellant's confession to Bobby Edwards, and most of the details of that confession were corroborated by the physical evidence. The question of whether the evidence failed to exclude all reasonable hypotheses of innocence is for the jury to determine, and this court will not reverse a judgment based upon a jury verdict where there is substantial competent evidence to support it.

POINT IV: The trial court properly permitted the state to present evidence of appellant's prior convictions during the penalty phase where appellant relied on the mitigating factor of no significant prior criminal activity. As the arguments presented on appeal were never presented to the trial court, they have been waived. In terms of the jury's consideration of this evidence, it relates to an issue of fact, not law, so the jurors should be provided with all of the relevant facts to decide this issue.

POINT V: The trial court properly admitted photographs of the victim's body that had been taken at the crime scene. They were relevant to show the location of the body, the manner in which it was (un)clothed, the nature of the surrounding area, other objects in relationship to the body, as well as the nature of the wounds. Given the nature of the subject, the photographs were not unnecessarily gruesome.

POINT VI: Appellant has waived appellate review of the issue of diminishing the role of the jury in the sentencing process by failure to object below.

POINT VII: Appellant's summary challenges to the constitutionality of Florida's capital sentencing statute were never raised in the trial court, thus are not preserved for appellate review. Appellant's boilerplate list of challenges has been repeatedly rejected by this court.

POINT I

THE TRIAL COURT'S FAILURE TO ARTICULATE FACTUAL FINDINGS IN SUPPORT OF THE DEATH SENTENCE DOES NOT REQUIRE THE REDUCTION OF THAT SENTENCE TO LIFE.

In the very early hours of September 4, 1984, the beaten and bloody body of Barbara Lynn Smith was found in a wooded area in Volusia County, Florida. The body was clothed only in underpants, which had been partially pulled down. A tracking dog had located the body, using a bloody brassiere found in the road as a scent indicator. A subsequent autopsy revealed Ms. Smith had died as a result of multiple stab wounds, which had been inflicted with substantial force. The totality of her wounds indicated a struggle.

Appellant was subsequently convicted of the first degree murder of Barbara Smith. The jury recommended the death penalty by a nine to three majority. Following the jury's recommendation, the trial court sentenced appellant to death. Appellant now contends that his death sentence must be reduced to life imprisonment, as the trial court failed to recite either oral or written findings of fact in support of the sentence. Appellee acknowledges that the trial court's sentencing order is erroneous, but contends that this does not mandate reversal for imposition of a life sentence. Rather, the appropriate remedy, as in all other cases where the jury recommends death and the trial court renders an erroneous order, is to remand to the trial court for further proceedings without a sentencing jury.

This court has previously addressed this issue in a variety of contexts. Ferguson v. State, 417 So.2d 639 (Fla. 1982) (supplemental record included judge's findings so issue moot); Cave v. State, 445 So.2d 341 (Fla. 1984) (judge had dictated findings at sentencing, cause remanded to trial court so written findings could be entered); Van Royal v. State, 497 So.2d 625 (Fla. 1986) (trial judge orally sentenced defendant to death, without setting forth reasons, oral or written); Meuhlmann v. State, 503 So.2d 310 (Fla. 1987) (findings filed 2 1/2 months after sentencing); Nibert v. State, 508 So.2d 1 (Fla. 1987) (trial court directed state attorney to prepare order); Patterson v. State, 513 So.2d 1257 (Fla. 1987) (trial court directed state attorney to prepare order, and judge signed it); Grossman v. State, 525 So.2d 833 (Fla. 1988) (written findings filed three months late). At first glance, this case appears to be most similar to Van Royal. However, there is one major distinction, and that is in Van Royal there was a jury recommendation of life, while in the instant case, the jury recommended death by a nine to three majority. Further analysis reveals that the instant case is virtually identical to Patterson.

In that case, the jury recommended death 7-5. At sentencing, the trial court imposed the death sentence, stating that the aggravating circumstances outweighed the mitigating factors, and commented that Patterson showed little or no remorse. The judge did not articulate or explain the specific aggravating or mitigating circumstances, but merely summarized the sentencing factors as they had been presented to the jury.

He then directed the state attorney to prepare a sentencing order, which he signed.

This court first determined that the record did not demonstrate that the judge articulated specific aggravating and mitigating circumstances, and delegation of this job to the state attorney raised a serious question concerning the weighing process. Id. at 1262. This court then found that it is insufficient for the trial judge to generally state that the aggravating factors outweigh the mitigating factors, and the judge must specifically identify and explain the applicable factors. Id. at 1263. This court concluded that Van Royal did not require the imposition of a life sentence, where it received an erroneous order as part of the record on appeal, and vacated that order and remanded for a new sentencing hearing in front of the judge. Id. at 1263.

Similarly, the record in the instant case does not demonstrate that the trial judge articulated specific aggravating and mitigating factors. Again, the trial court generally stated that the aggravating factors outweighed the mitigating factors, in both his oral statement at sentencing and his written order (R 1115, 1132). Consequently, the trial court's actions in the instant case are insufficient, and raise serious questions regarding the weighing process. However, as in Patterson, Van Royal does not require imposition of a life sentence, but a new sentencing hearing in front of the judge.

The only distinction between Patterson and the instant case is that the trial court in that case delegated to the state

attorney the responsibility of identifying the aggravating and mitigating factors. This is a factual distinction with no substantive effect. The error committed is the same. Both judges, in imposing a sentence of death, merely stated that the aggravating factors outweighed the mitigating factors, and both failed to specifically identify and explain these factors. Consequently, the remedy should be the same.

Appellee acknowledges that this court recently established a procedural rule that all written orders imposing the dea h sentence are to be prepared prior to oral pronouncement of sentence for filing concurrent with oral pronouncement. Grossman v. State, 525 So.2d 833 (Fla. 1988). According to appellee's calculations, this rule became effective in June, 1988, which was after appellant's sentencing. Further, this court did not state the effect of a violation of this rule, and appellee respectfully suggests that it should not be an automatic remand for imposition of a life sentence, particularly where the jury has recommended the death penalty. Such result would be inconsistent with prior decisions and policy of this court.

This court's role in reviewing death cases is that of sentence review, not sentence imposition. Randolph v. State, 463 So.2d 186 (Fla. 1984). The role of sentence imposition belongs to the trial court judge. § 921.141(3), Fla. Stat. (1987). Further, a jury recommendation of death, reflecting the conscience of the community, is entitled to great weight. Grossman, supra. As this court has recognized, the advisory opinion must be given serious consideration, or there would be no

reason for the legislature to have placed such a requirement in the statute. Thompson v. State, 328 So.2d 1 (Fla. 1976).

If violation of the procedural rule set forth in Grossman results in automatic remand for imposition of a life sentence, particularly where the jury has recommended death, all of these rules are thwarted. This court in effect becomes the sentencer, in derogation of its role of sentence review and contrary to statutory mandate. The voice of the community is choked, and the role of the advisory jury becomes meaningless. The only beneficiary of such a rule is the defendant, and there is something clearly wrong with that picture. Appellee, too, recognizes the press of trial judge duties, but suggests that this is not the way to ease that load.

Appellee also recognizes that where the court imposes the death penalty, that determination shall be supported by specific written findings of fact. § 921.141(3), Fla. Stat. (1987)'. That section goes on to state:

> If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

Appellee submits, despite appellant's suggestion to the contrary, that this only sets forth the procedure to be followed by the trial court, and not the standard of appellate review. In short, it does not mandate the imposition of a life sentence by this court where the trial court has failed to set forth written findings in support of the death sentence. Implicit in the trial

court's order imposing the sentence of death is the fact that it made the findings in support of it. Consequently, it should first be provided with the opportunity to cure its error by setting forth those findings in writing.

As in all other cases where this court determines that error has occurred, the remedy should first attempt to cure the error, not ignore it. When the trial court errs during trial to the prejudice of the defendant, this court remands for a new trial, and does not simply set the defendant free. When there is error during the penalty phase of a murder trial, this court remands for a new sentencing proceeding. Robinson v. State, 520 So.2d 1 (Fla. 1988). When the trial judge has failed to articulate mitigating circumstances, even though he may have considered some, this court remands to the trial judge for the purpose of making proper fact findings and imposition of an appropriate sentence. Magill v. State, 386 So.2d 1188 (Fla. 1980): When this court is unable to ascertain that the trial judge properly considered and weighed mitigating circumstances, this court remands to the trial judge for purposes of determining the appropriate sentence. Ferguson, supra. When the trial court erroneously finds aggravating circumstances and this court is unable to ascertain what it found in mitigation, this court remands to the trial court for a new sentencing proceeding. Mann v. State, 420 So.2d 578 (Fla. 1982). When this court determines that the trial court erroneously utilized aggravating factors and it is unable to approve the death sentence, this court remands for a new sentencing proceeding before the judge. Schafer v.

State, 14 F.L.W. 37 (Fla. January 19, 1989). When this court determines that the trial court improperly considered non-statutory aggravating factors, this court remands so the trial court can reweigh the appropriate factors. Lucas v. State, 417 So.2d 250 (Fla. 1982).

In sum, this court does not substitute its judgment for that of the jury and trial court, which is exactly what it would be doing in remanding for automatic imposition of a life sentence. As in all other cases where the trial court has followed a jury recommendation of death, but rendered an unclear or erroneous sentencing order, the appropriate remedy is to remand to the trial court for a new sentencing proceeding. Timing need not be a consideration, because facts are facts, and the fact that this was a brutal murder will not change.

POINT II

THE TRIAL COURT PROPERLY PERMITTED THE TESTIMONY OF BOBBY EDWARDS.

On Wednesday, January 27, 1988, after the jury had been sworn and the state had presented its opening statement, defense counsel took the opportunity to make a record of the events that had occurred between 12:15 p.m. and 3:30 p.m. that day (R 282-3). A man who had been in the holding cell with appellant the previous Monday had contacted the State Attorney's Office and said he had information relevant to the case. The state attorney sent an investigator to talk to the man, who learned that appellant had confessed to committing the murder. The state attorney brought this matter to the attention of the trial court and defense counsel.

In making the record of events, defense counsel stated that when the information became known to him, he discussed with the trial court the opportunity to conduct discovery, and it was his impression that nothing further would be done aside from swearing the jury and opening statements (R 289-90). Defense counsel later stated that with regard to the situation that might appear in the record that he had waited until after the jury was sworn to bring this matter up:

> When I did mention this my recollection was of the court advised me that it was not here to rule on anyone's competency and that we were proceeding to make opening arguments or statements at which juncture I construed that as

a direction to sit down and proceed (R 292-3).

At this stage, defense counsel: 1) requested that he be allowed to withhold his opening statement until the beginning of the defense's case-in-chief; 2) moved for "sufficient time" to make an adequate and thorough investigation of the matter; and 3) for the record, moved for a mistrial (R 290).

After further discussion of the matter, including the fact that the trial had already been continued numerous times, defense counsel recognized that there was no excuse for not proceeding with some momentum, and stated "then we'll see where we are when we've seen the worst" (R 299-300). Defense counsel further stated that he felt any ruling by the trial court would be premature until after a Richardson inquiry[1] was conducted, and that could not be done until the statements were obtained (R 301). Court was then adjourned for the day.

That evening, around 6:00 p.m., defense counsel deposed the witness, Bobby Edwards. At that time defense counsel obtained the names of others that had been present in the holding cell. Defense counsel's investigator spoke with these witnesses during the day on Thursday, and they were deposed Thursday evening (R 551). When court reconvened after lunch the following day, the state announced it would be calling Bobby Edwards as its next witness (R 546).

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[1] Richardson v. State, 246 So.2d 771 (Fla. 1971).

Defense counsel objected, initially on the basis of Richardson, supra (R 547). After argument by both sides, as well as a recess for both sides to research the issue, defense counsel conceded that this was not a Richardson situation, and contended that he should have been granted a continuance before the jury was sworn.[2] It was defense counsel's opinion that a responsible investigation would take at least a week (R 572). Defense counsel then objected to the testimony of Bobby Edwards and renewed the motion for continuance to further investigate the witness (R 572). Defense counsel also moved for a mistrial at such time as Edwards completed testifying (R 573). The trial court found no prejudice from the manner in which the state handled the matter and denied the motion for mistrial.

Defense counsel next moved to withdraw on the basis of conflict, as the Office of the Public Defender still represented Edwards (R 574). Edwards had pled and was sentenced the previous Monday, and defense counsel argued that until the thirty day period for the filing of an appeal expired, the office still had a professional responsibility to Edwards (R 574). The trial court denied that motion, and directed counsel to proceed (R 575).

Appellant has raised two issues in regard to this series of events. He first contends that the trial court erred in denying his motion for continuance, which resulted in a deprivation of his federal constitutional rights to effective assistance of

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[2] The record is not clear as to whether defense did move for a continuance at that time.

counsel, due process, and a fair trial. Appellant next contends that the trial court's denial of defense counsel's motion to withdraw based on ethical conflict resulted in a deprivation of his federal constitutional rights to effective assistance of counsel, due process, and a fair trial. Appellee will address these issues in the same order as they have been raised by appellant.

The granting or denial of a motion for continuance is within the discretion of the trial court. Williams v. State, 438 So.2d 781 (Fla. 1983). The trial court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. Jent v. State, 408 So.2d 1024 (Fla. 1982). The abuse of discretion must clearly and affirmatively appear in the record. Magill v. State, 386 So.2d 1188 (Fla. 1980). There is no evidence that the trial court abused its discretion in the instant case.

Appellee would first point out that the record does not demonstrate that defense counsel moved for a continuance prior to the jury being sworn. To the contrary, the record demonstrates that defense counsel acquiesced to the swearing of the jury (R 289-90). After the state had presented its opening statement, counsel moved for "sufficient time" to investigate the matter (R 290). Again defense counsel agreed to proceed, feeling any ruling by the trial court would be premature until after the witness' statement had been taken (R 301). The trial court immediately entered an order requiring Edwards to be brought over for deposition. After Edwards deposition revealed the names of

other people present in the holding cell, the trial court immediately ordered that they be brought over for deposition as well.

It was not until after the state announced it was calling Edwards as a witness that defense made what appellee submits is the only arguably sufficient and preserved motion for continuance. By this time, Edwards and the other witnesses had been deposed, and defense counsel had discussed the matter with appellant. Appellee submits that this case, despite appellant's contentions to the contrary, is analogous to Diaz v. State, **513** So.2d **1045** (Fla. **1987).**

In Diaz, the defense received notice one week prior to trial that the state intended to call a witness that Diaz had apparently discussed the murder with while the two occupied neighboring cells. Defense counsel immediately deposed the witness after receiving the state's notice, but on the first day of trial moved for a continuance, claiming insufficient time to discuss these statements with Diaz or investigate their truth. This court found that no abuse of discretion in the trial court's denial of the requested continuance. Id. at **1047.**

Appellant attempts to distinguish Diaz on the basis that Diaz's counsel had one week prior to trial to prepare, whereas his lawyer had only **48** hours after trial had begun to prepare. Such distinction only goes to the starting positions, but does not change the final results, which is the relevant factor to consider. The final result in the instant case is that the witness, as in Diaz, had been deposed, as had those witnesses in

a position to provide rebuttal testimony. Under these facts, defense counsel in the instant case was in an even better position than defense counsel in Diaz. In addition, counsel also had additional time before presenting his rebuttal witnesses, including the weekend, to investigate even further. Appellant has failed to demonstrate that the trial court abused its discretion, and has not demonstrated anything that additional time would have permitted him to do that was not done.

Nor has appellant demonstrated that the denial of the motion for continuance resulted in the denial of effective assistance of counsel. Generally, this court will not consider a claim of ineffective assistance of counsel on direct appeal, unless the facts upon which it is based are evident on the record. Stewart v. State, 420 So.2d 862 (Fla. 1982). The record demonstrates that counsel diligently pursued this matter, and his suffering an adverse ruling does not rise to the level of ineffective assistance of counsel. Jent, supra. Appellant notes that undoubtedly the bulk of counsel's energy was expended conducting trial during the day and preparing at night, and we should not forget that counsel undoubtedly required some rest to adequately perform. Let us also not forget that counsel had already been through dress rehearsal for this trial, and even had the benefit of reviewing the script from that previous trial (R 1192-4).

Likewise, counsel effectively cross-examined Edwards, and as noted, presented four additional witnesses to rebut that testimony. Appellant notes that an extremely difficult situation was presented as he was attempting to cross-examine Edwards about

his prior record with the rap sheet provided by the state, and the state disputed the accuracy of that sheet. Appellee submits that since Edwards had not denied having prior convictions, it was not even proper impeachment for defense counsel to inquire into the specifics. § 90.610, Fla. Stat. (1987); See, e.g., Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982). Further, a review of that cross-examination reveals that the only real problem was with the witness understanding what constituted a crime involving dishonesty or false statements (R 599). Once Edwards understood counsel's questions, he was very candid about his prior convictions, which included forgery of ten checks, armed bank robbery, burglary and escape.

Appellant asks this court to presume prejudice, on the basis that Edwards' testimony played a strong role in his conviction. Appellee submits that this is not the type of prejudice contemplated by reviewing courts. Appellant also points out that Edwards final statement on redirect, that appellant told him he would be "good to go" should he get the last person to have seen him "out of the way" (R 611), indicates prejudice. Appellee submits that a continuance would have had no effect on this, as Edwards had already been deposed. Defense counsel properly handled this statement by not drawing the jury's attention to it.

Appellant has also failed to demonstrate that a conflict of interest existed. Edwards had pled straight up to the escape charge (R 287). Consequently, his representation by trial counsel, which was the public defender, ended at that point. Appellant argues that the thirty day period for the filing of an

appeal had not yet run, but a person who pleads guilty has no right to a direct appeal. § 924.06(3), Fla. Stat. (1987); Fla. R. App. P. 9.140(b)(1). In addition, the defendant is responsible for initiating appeal proceedings, and Edwards had not done so. See, Baggett v. Wainwright, 229 So.2d 239 (Fla. 1977); Denard v. Wainwright, 418 So.2d 280 (Fla. 5th DCA 1982).

Appellee would also point out that even if an actual conflict had existed, it would have been for Edwards, not appellant, to complain. Appellant surely did not suffer from the public defender's prior representation of Edwards. Appellant points to the cross-examination of Edwards as substantiation of conflict, but as noted, Edwards was very cooperative in this respect. As such, the instant case is distinguishable from Jennings v. State, 413 So.2d 24 (Fla. 1982).

In that case, the state called a witness who had overheard statements Jennings made to a cellmate concerning the murder. That witness was awaiting sentencing. Jennings' public defender moved to withdraw because the public defender, through another assistant, had represented that witness. The trial judge denied the motion, and the Fourth District and this court denied writs of certiorari to review that decision. At trial, the witness, who had been sentenced by then, testified about the statements, and Jennings' public defender refused to cross-examine, contending conflict.

Based on that refusal, this court found that Jennings had been deprived of the benefit of cross-examination of a vital and material witness, and was thus deprived of a fair trial. Id. at

26. In the instant case, appellant was not deprived of the benefit of cross-examination of Edwards, so was not deprived of a fair trial. Consequently, appellant has failed to demonstrate that an actual conflict of interest existed or that his lawyer's performance was adversely affected. Cuyler v. Sullivan, 446 U.S. 335 (1980).

In sum, appellant has failed to demonstrate that the trial court erred in permitting Bobby Edwards to testify. Defense counsel deposed Edwards as well as other witnesses who were present when appellant confessed and appellant has not set forth anything else that additional time would have permitted him to do that was not done. Defense counsel thoroughly cross-examined Edwards, and the jury was well aware of his prior record. Defense counsel also presented four rebuttal witnesses. No conflict of interest existed, as the public defender's representation of Edwards ended when he entered a straight plea. The instant conviction should be affirmed.

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE STATE PRESENTED SUBSTANTIAL, COMPETENT EVIDENCE FROM WHICH THE JURY COULD CONCLUDE THAT APPELLANT MURDERED BARBARA SMITH.

Appellant contends that the trial court erred in failing to grant his motions for judgment of acquittal where the evidence was circumstantial and did not exclude his "very reasonable'' hypothesis of innocence. Appellant argues that the physical evidence is absolutely consistent with his version of events. Appellant further argues that at the very least, the state failed to prove premeditation, because the state's evidence was not inconsistent with the occurrence of an argument that resulted in a killing in the heat of passion. Appellee submits that the trial court properly denied appellant's motions for judgment of acquittal and appellant's conviction is supported by sufficient, competent evidence.

A trial court should not grant a motion for judgment of acquittal unless the evidence is such that no view the jury may lawfully take of it favorable to the opposing party can be sustained under law. Lynch v. State, 293 So.2d 44 (Fla. 1974). At the close of the state's case, defense counsel moved for a judgment of acquittal, stating that there had been no admissible evidence of contact between appellant and the victim to indicate he killed her, and the circumstances were not sufficient to exclude a reasonable hypothesis of innocence (R 680-81). As will

be demonstrated shortly, the state presented sufficient evidence from which the jury could conclude that appellant killed the victim.

At the close of all the evidence, defense counsel renewed the motion for judgment of acquittal on the same grounds (R 4846). By this time, the trial court and jury had heard appellant's version of events, and it was for the jury to weigh the evidence and resolve any conflicts. The question of whether the evidence failed to exclude all reasonable hypotheses of innocence is for the jury to determine, and this court will not reverse a judgment based upon a verdict by a jury where there is substantial, competent evidence to support it. Smith v. State, 515 So.2d 182 (Fla. 1987); Rose v. State, 425 So.2d 521 (Fla. 1983).

Appellee would first point out that the evidence was not entirely circumstantial, as the state presented evidence of appellant's confession to Bobby Edwards. A confession of committing a crime is direct, not circumstantial, evidence of that crime. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). It appears that appellant is asking this court to totally discount that evidence, simply because Edwards testified that appellant told him that the crime occurred on 1-95, while the other evidence demonstrated that it happened on Eleventh Street. Appellee submits that this is hardly grounds for ignoring all the testimony, particularly since most of the details were substantially corroborated by the physical evidence. Cf. Brown v. State, 526 So.2d 903 (Fla. 1988).

Edwards testified that appellant told him he had picked up a woman from Orlando, and was taking her to Daytona because a member of her family was ill. Appellant and the victim were seen by a man that Edwards believed was named McDonald, who worked at the water plant at that time but later took a job at the post office. Appellant struggled with the victim and stabbed her four or more times. While they struggled, she ran "a pretty good piece," about ninety feet or so, and appellant dragged her into the woods. Appellant had come up with a story about two white males that saw him with the victim and chased him into the woods.

Robert McKitrack testified that he saw appellant and the victim as he was on his way to work at the water plant. (He currently works at the post office.) The victim had five stab wounds, four of which were deep in the chest wall. The victim had other wounds produced by an instrument without a cutting edge, as well as defensive wounds, which indicated a struggle. There was a trial of blood as well as a trial of the victim's clothes and belongings, and the victim's body was found in the woods. Appellant testified that two white males saw him with the victim and chased him into the woods.

Other evidence presented by the state included shoe impressions, all similar, which were cast near the body and at a gate up the road from where appellant's car was found. The shoe impressions taken from near the body were going in a direction toward the body, and were similar to others that went up through to where the body was and those in the grassy area by the body. The shoe impression near the gate was similar to the tennis shoe

tracks that Deputy Ellinor and his tracking dog followed through the area. Appellant's shoes could have left all of the impressions, based on size, shape, manufacturer's tread design, manufacturer's size, and the wear pattern.

A tracking dog was started from a point upwind of the scene, so that he would be able to discriminate scents. The dog tracked due east, and ended up following tennis shoe tracks throughout the area. When returned to the original point and ordered to track west, the dog went straight to where the victim's body was found. Blood consistent with appellant's was found on the inside pocket of the victim's jeans, on the victim's blouse, "dropped" on the victim's body, on the victim's purse, on the hood of the car, on the rear window of the car, and on the driver's door of the car.

Just as important as what the evidence demonstrated is what the evidence did not show. When appellant first encountered the police, he said he had car problems the night before, but did not say that a woman had been with him and that he had also had problems with two white men. Appellant initially told the police he had no physical contact with the victim, though the bite mark on her arm was a perfect match with appellant's teeth. Appellant could hear cars on the road when he was in the woods, but never heard any noise from the emergency vehicles or the investigation, nor saw any lights from those vehicles. Appellant's description of the alleged attackers changed during the interrogation.

Contrary to appellant's assertion, the testimony of a passing motorist does not support his version of events. Ms.

Sterthouse saw a screaming woman on the roof of the car, flailing a white object at a man standing next to the car. The woman's screams really bothered her. Although Sterthouse could not specifically describe the individual, aside from a comparison of his height to the car and that he was wearing dark clothes (which matched appellant), she did specifically testify that she saw only one man, and no other people or vehicles in the area, and she passed no other vehicles as she proceeded down Eleventh Street. Nor does appellant's assertion that the state never proved he had any bloodstains on his clothing support his version of events. Appellant omits the fact that his shirt, like the murder weapon, was never found.

Appellant further argues that at the very least, the state failed to prove premeditation, as the evidence is consistent with the occurrence of an argument resulting in a killing in the heat of passion. This argument is somewhat inconsistent with appellant's previous version of events, and appellee respectfully suggests that since the evidence was consistent with a killing, it was clearly sufficient for the jury to infer premeditation. As this court has stated:

> If the evidence shows that the accused had ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design, it will be deemed sufficient in point of time in which to enable the killer to form a premeditated design to kill. Green v. State, **93** Fla. **1076, 113** So. **121, 122 (1927).** Where a person strikes another with a

> deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. See, Rhodes v. State, 104 Fla. 520, 140 So. 309, 310 (1932). Buford v. State, 403 So.2d 943, 949 (Fla. 1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982). Premeditation, often being impossible to prove by direct testimony, may be inferred from the circumstances surrounding the homicide. Campbell v. State, 227 So.2d 873 (Fla. 1969), petition dismissed, 400 U.S. 801, 91 S.Ct. 7, 27 L.Ed.2d 33 (1970); Dawson v. State, 139 So.2d 408 (Fla. 1962).

Ross v. State, 474 So.2d 1170, 1173-4 (Fla. 1985).

The evidence in the instant case reveals the victim was beaten about the face, neck and upper chest, was stabbed in the back with substantial force, and stabbed in the neck, as she attempted to defend herself. The victim ran from appellant, leaving a trial of blood and clothes. As the victim lay dying after being dragged into the woods, her pants were removed, and she suffered one last indignity, as appellant viciously bit her as she feebly attempted to pull away. This record contains sufficient evidence from which the jury could conclude that appellant murdered Barbara Smith in a premeditated manner. As such, the trial court properly denied appellant's motions for judgment of acquittal. That evidence was also sufficient for the jury to determine that it excluded appellant's hypothesis of innocence. Appellant's conviction must be affirmed.

POINT IV

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO PRESENT EVIDENCE OF APPELLANT'S PRIOR CONVICTIONS DURING THE PENALTY PHASE WHERE APPELLANT RELIED ON THE MITIGATING FACTOR OF NO SIGNIFICANT PRIOR CRIMINAL ACTIVITY.

At the commencement of the penalty phase, the state asked the trial court to take judicial notice of appellant's two prior misdemeanor convictions (R 876-77). One was for attempting to carry a concealed weapon, which occurred in October, 1970, and the other was for carrying a concealed weapon, which occurred in February, 1982. The trial court asked defense counsel if he had any objection and defense counsel replied, "They haven't got a basis for it, Your Honor" (R 877). The trial court admitted the evidence of the prior convictions.

Appellant now contends that the trial court erred in admitting this evidence, as it was evidence of a non-statutory aggravating factor; it fails as a matter of law to rebut the mitigating circumstance of no significant prior criminal history, as one was remote in time and is for a non-existent offense, and; that the state failed to produce a certified copy of the judgment and sentence on the carrying a concealed weapon conviction, instead producing just a disposition sheet. Appellee first contends that these arguments have been waived, as there was no such objection or argument below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Even if this court determines that these arguments have somehow been preserved, appellee submits they are without merit.

The general rule is that when the defendant waives reliance on the mitigating factor of no significant prior criminal activity, the state cannot introduce evidence of prior crimes. Maggard v. State, 399 So.2d 973 (Fla. 1981). The record demonstrates that appellant never waived reliance on this mitigating factor, and the jury was in fact instructed that it could consider this factor in mitigation (R 915). Consequently, appellant's reliance on Maggard and similar cases is misplaced.

Appellant also contends that the evidence failed as a matter of law because the attempt to carry a concealed firearm conviction occurred almost thirty years ago, and no such crime exists. Appellee notes that this conviction occurred in 1970, which is nowhere near thirty years ago, particularly since it must be considered in relation to the instant offense, which occurred in 1984. Further, appellant never previously attacked this conviction on the basis of it being a non-existent offense, and should not be permitted to bootstrap such attack on to the instant appeal. Finally, since appellant has never claimed he was not convicted of the other offense, the fact that the state produced a disposition sheet, signed by appellant, as opposed to a certified copy of the judgment and sentence, is irrelevant.

Appellee would also point out that in terms of the jury's consideration of this evidence, it relates to an issue of fact, not law. The jury was instructed that it could consider in mitigation that appellant had no significant history of prior criminal activity, and that it should consider all the evidence tending to establish such mitigating circumstance. As this court has noted in regard to this circumstance:

> As to what is significant criminal activity, an average man can easily look at a defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Consequently, the jurors should be provided with all of the relevant facts to assist them in making this determination. It naturally follows that in considering all the facts, the jurors were also free to find that this evidence actually established this mitigating factor. Had the trial court not admitted the evidence, it would have usurped the jury's fact-finding role in regard to this factor.

Even if this court determines that these arguments have been preserved and the trial court erred in admitting evidence of the prior convictions, appellant has failed to demonstrate prejudice. Cf. Rogers v. State, 511 So.2d 526 (Fla. 1987). Appellant's argument, that these convictions were particularly prejudicial because the victim was stabbed to death and one of the convictions involved carrying a knife, is simply not logical. Had the convictions been introduced during the guilt phase, this argument might have some merit. However, the jury had already convicted appellant of the stabbing death of Barbara Smith, thus already concluding that a knife was his weapon of choice.

Appellee also notes that along these lines, it is somewhat inconsistent for appellant to argue the significant impact these convictions may have had upon the jury, yet contend that they were not sufficient to rebut the mitigating circumstance of no significant prior criminal history. Appellee submits that just as a trial court may consider the facts giving rise to a prior conviction, or the severity as well as number of prior offenses, so too may the nature of those prior offenses be considered in determining the significance of a defendant's prior criminal history. See, Johnson v. State, 442 So.2d 185 (Fla. 1983); Perry v. State, 522 So.2d 817 (Fla. 1988). Appellant has failed to demonstrate that the trial court erred in admitting evidence of his prior convictions.

POINT V

THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHS OF THE VICTIM'S BODY THAT HAD BEEN TAKEN AT THE CRIME SCENE.

During the testimony of Sergeant Klepper, the state presented six photographs of the victim's body that Klepper had taken at the crime scene. Appellant objected to the similar nature of photographs D and G, E and B, and F and A (R **368-9**). He also objected to the total number of photographs, recognizing that the state was entitled to show some photographs, but arguing that the prejudice resulting from the total number offered by the state outweighed their probative value (R **369**). Appellant raises the same arguments on appeal, contending that he is entitled to a new trial not tainted by this prejudicial, inflammatory evidence.

Those whose work products are murdered human beings can generally expect to be ,confronted with photographs of their accomplishments. Henderson v. State, **463** So.2d **196** (Fla. **1985**). The admission of photographic evidence is within the' trial court's discretion and should not be disturbed unless a clear abuse is shown. Patterson v. State, 513 So.2d **1260** (Fla. **1987**). The test for admissibility is relevance. Id. The record supports the trial court's determination, as the photographs are not duplicative, and were relevant to show the location of the body, the manner in which it was (un)clothed, the nature of the surrounding area, other objects in relationship to the body, as well as the nature of the wounds.

Exhibits D and G show the body from essentially the same angle, with D being a much closer shot. D shows the wounds to the torso and neck area, while G the body in relation to the surrounding area and the nature of the area (R 1084). Exhibits A and F were both taken at the feet of the body, and A is the closer shot. A shows how the victim's underpants were pulled down, while F shows where the victim's jeans were in relation to the body (R 1083-4). Exhibit E was taken at the head of the body angling, straight down, and shows a bit of the surrounding area, while B was taken at the head of the body from the left side, and shows that the body was lying in a small clearing (R 1083-4).

Given the nature of the subject, the photographs were not unnecessarily gruesome or "shocking in nature." It should also be noted that the photographs were taken with an instamatic camera, at night, with the aid of a flashbulb, and had not even been enlarged (R 373, 379). All of the photographs were relevant, and appellant has failed to demonstrate that the trial court abused its discretion in admitting them into evidence.

POINT VI

APPELLANT HAS WAIVED APPELLATE REVIEW OF THE ISSUE OF DIMINISHING THE RULE OF THE JURY IN THE SENTENCING PROCESS BY FAILURE TO OBJECT BELOW.

Appellant contends that the state and the trial court diminished the responsibility of the jury's role in the sentencing process, contrary to Caldwell v. Mississippi, 472 U.S. 320 (1985). Appellant points to statements made by the prosecutor and the trial court during voir dire, closing argument at the penalty phase, and the standard penalty phase jury instructions. The record demonstrates that there was no objection to any of these statements or instructions, so the issue has been waived and is not properly before this court. Jackson v. State, 522 So.2d 802 (Fla. 1988) (failure to object to jury instructions concerning respective roles of judge and jury in sentencing waived issue for appellate review); Mitchell v. State, 527 So.2d 179 (Fla. 1988) (issue not properly before this court where defense counsel failed to object to prosecutor's comments during voir dire).

In light of the United States Supreme Court's recent decision in Harris v. Reed, U.S. ___, 109 S.Ct. 1038, L.Ed.2d (1989), appellee would ask this court to exclusively and expressly apply the procedural bar to this claim, particularly since Caldwell, which was decided in 1985, was clearly available to defense counsel at the time of trial. Alternatively, appellee would point out that this court has found

that the standard jury instruction does not provide the jury with erroneous information that denigrates its role. Banda v. State, 536 So.2d 221 (Fla. 1988). In addition, this court has found that Caldwell, which addressed the denigration of the jury as sentencer, is clearly distinguishable from the law in Florida, where the judge is the sentencing authority and the jury's role is merely advisory. Grossman, supra (emphasis supplied).

POINT VII

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL.

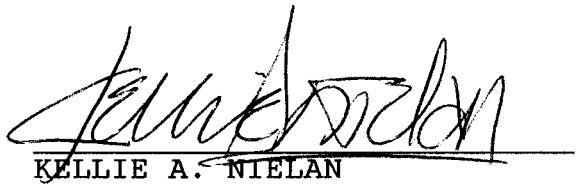
Appellee would first note that appellant's summary challenges to the constitutionality of Florida's capital sentencing statute were never raised in the trial court, thus are not preserved for appellate review. See, e.g., Eutzy v. State, 458 So.2d 755 (Fla. 1984). Further, appellant concedes that his boilerplate list of challenges has been repeatedly rejected. This point is repeated virtually word-for-word in every death penalty case in this appellate division, including, e.g., Stano v. State, 460 So.2d 890, 894-5 (Fla. 1984), where these "grab bag" claims were rejected. Appellee would also add that irrespective of any disparities or proportionality adjustments made over time, appellant's crime is one for which the death penalty is now and will always be appropriate.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant conviction of first degree murder should be affirmed, and the cause remanded to the trial court for a new sentencing proceeding without a sentencing jury.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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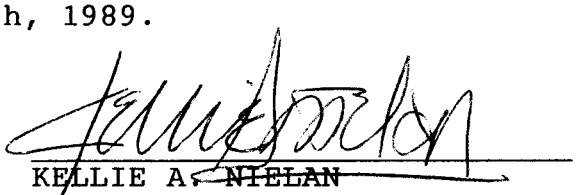
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished, by delivery in his basket at the District Court of Appeal, Fifth District, to Christopher S. Quarles, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, counsel for appellant, this 27th day of March, 1989.



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