IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,687

JESUS SCULL,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant,

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

****

ANSWER BRIEF OF APPELLEE/CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

INTRODUCTION

Appellee/Cross-Appellant, **the State of Florida,** was the prosecution in the trial court and Appellant/Cross-Appellee, **Jesus Scull,** was the defendant. The parties will be referred to as they stood in the lower court. The letter "R" will designate the record on appeal and "T" the trial transcript.

STATEMENT OF THE CASE

The State accepts the defendant's Statement of the case.

STATEMENT OF THE FACTS

This Court affirmed the defendant's two first-degree murder convictions in Scull v. State, **533** So.2d **1137** (Fla. **1988),** but reversed the two death sentences because the trial court had relied on four improper aggravating factors (five in relation to the death sentence for the murder of Miriam Mejides), and because the trial court may have relied on victim impact evidence contained in the pre-sentence report. This Court ordered the trial court to resentence the defendant without a jury.

The facts concerning the resentencing are set out by the defendant. The State will be addressing additional relevant facts in the argument portion of this brief.

ISSUES PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR CONTINUANCE PRIOR TO RESENTENCING.

II.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR RECUSAL PRIOR TO RESENTENCING.

III.

WHETHER THE TRIAL COURT ERRED IN RESENTENCING THE DEFENDANT TO DEATH.

ISSUE ON CROSS-APPEAL

WHETHER THE TRIAL COURT ERRED IN NOT FINDING THE AGGRAVATING FACTOR OF "PRIOR VIOLENT FELONY" AS TO EACH MURDER VICTIM BASED ON THE CONTEMPORANEOUS MURDER OF THE OTHER VICTIM.

SUMMARY OF THE ARGUMENT

There is no question that defendant's counsel was rushed into the resentencing upon her return from vacation. The reason for this was the trial court's imminent departure from the bench, and his legitimate desire, as the judge who heard the evidence at trial, to conduct the resentencing prior to his departure. The real issue is whether the defendant was prejudiced by the expedited nature of the resentencing, and the State submits that neither the record nor the defendant's brief suggests any prejudice. The defendant's counsel stated she did not intend to present any additional evidence, but that she needed time to file a recusal motion and to obtain the medical examiner's testimony (so that counsel could reargue the HAC factor as applied to victim Lourdes Villegas). She also stated she was not sure she should represent the defendant at resentencing, because she may have been ineffective on direct appeal (by not contesting HAC as to Lourdes Villegas).

As to the recusal motion, she was able to prepare and file (and receive a ruling thereon) the motion prior to entry of the resentencing order. As for the need for the medical examiner's testimony, this Court on direct appeal had agreed with the State that HAC was properly found as to Lourdes Villegas, and the trial court thus correctly declined to readdress the issue at resentencing. Finally, as for counsel's statement that she did

not know if she should continue to represent the defendant because she may have been ineffective on direct appeal, the bottom line is that she never sought to withdraw, nor, after consulting with the defendant, did she proffer any objections or reservations on his part as to her continued representation. In sum, the defendant has not demonstrated how he was prejudiced by the denial of his motion for continuance.

The denial of the motion for recusal was proper because it was legally insufficient. The trial court's statements at the first trial, that the defendant was a psychopath who showed no remorse, were based solely on the vile nature of the crimes and his continued denial of culpability at the initial sentencing. On direct appeal defendant's counsel had rightly pointed out that being a psychopath and showing no remorse are not proper aggravating factors, and this Court noted that the trial court may have relied on improper aggravating factors (though not specifically mentioning the "psychopath" and "lack of remorse" factors) in determining sentence. It is presumed that the trial court will correct its errors on remand, and the defendant had no legitimate reason to fear that the trial court would rely on any improper motive in resentencing him in this cause.

As to the death sentence itself, the defendant attacks the finding of HAC as to the murder of Lourdes Villegas, on the basis that the trial court did not include in his order the

specific facts which supported that aggravating factor. Firstly, this factor was upheld on direct appeal. Secondly, there is no requirement, although it certainly is better practice, that the sentencing order include the facts upon which the finding of an aggravating factor is based. All that is required is that the finding of that factor be expressly stated in writing. Finally, the defendant argues that the court applied HAC to the murder of Miriam Mejides, where the State had already agreed on direct appeal that it did not apply to her murder. The trial court did no such thing, as it specifically stated in its order that HAC applied only to Lourdes Villegas' murder.

The defendant did not raise a proportionality argument in its brief. However, the State submits that the two death sentences for the double murder were in no way disportionate. As to Lourdes Villegas, the evidence showed that the murder occurred during an armed home invasion burglary (in the course of a felony), that she was choked and battered four times with a bat as she struggled to save herself (heinous, atrocious or cruel), and that the defendant was also convicted of murdering her companion, Miriam Mejides (prior violent felony). At resentencing the trial court refused to find this latter factor, because it felt bound by its initial order, in which this factor was inexplicably omitted. The State has assigned this refusal as error, and it will be discussed below. As to Miriam Mejides,

the factor of HAC does not apply. The mitigating evidence was age (24 years old) and no significant prior criminal history. The State submits that there is nothing disportionate as to either death sentence.

As for the State's cross-appeal mentioned above, the double nature of the murder, and specifically the contemporaneous murder convictions, established this factor as a matter of law. This Court has previously held that where this factor exists as a matter of law because of contemporaneous convictions of crimes upon a second victim, and the trial court inexplicably fails to list it as an aggravating factor, this Court will nevertheless consider this factor as supporting the death sentence. Indeed, it would be perfect insanity not to weigh in the double nature of the murder in determining whether the sentences are proportional.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO CONTINUE THE RESENTENCING PROCEEDING.

There is no dispute that defendant's counsel was rushed into the resentencing upon her return from vacation. The trial court, the same court which had conducted the trial and initial sentencing, rightly believed that he was the proper judge to conduct the resentencing, and his imminent departure from the bench the following week was the reason for the expedited nature of the proceeding. Obviously the trial court's desire to conduct the resentencing prior to his departure cannot be permitted to prejudice the substantive rights of the defendant at his resentencing. Thus the issue here is whether the defendant was in fact prejudiced by the trial court's denial of his motion for continuance.

Trial counsel stated at the outset of the December **28, 1988**, preceding that she wasn't prepared because she did not know if she or the public defender's office (which had originally conflicted out of the defendant's case prior to trial, to be replaced by Michael Von Zamft) was going to represent the defendant at the resentencing **(R.48,** 49**),** and that she wished to prepare a motion for recusal based on comments the

court had made at the original sentencing **(R.49-51)**. Counsel needed time to review the record of the initial sentencing and to research caselaw on reclusal **(R.54)**. Counsel specifically stated that she was not seeking to present any additional evidence, but rather she needed more time to research the recusal issue, and research case law on other points concerning reimposition of the death penalty **(R.56, 57)**. Counsel subsequently stated she needed time to respond to the State's argument that the court should consider the aggravating factor of prior violent felony (inexplicably not found by the trial court in its original order), **(R.67)**. Finally, counsel stated she needed the medical examiner's testimony (packed away in boxes in transit to counsel's new office) to reargue the HAC factor as to victim Lourdes Villegas **(R.68-69)**.

Taking each in turn, the first point for discussion is counsel's statement that she wasn't sure if she should be representing the defendant at resentencing. Counsel never sought to withdraw nor did she make any proffer, after conferring with her client, that the defendant did not wish her to represent him at the resentencing. The State respectfully submits that counsel's mere assertion that she "wasn't sure" if she should represent the defendant at resentencing, without more, is insufficient to demonstrate prejudice.

As for the reclusal motion, this issue was mooted when counsel filed the defendant's lengthy, well drafted recusal motion (R.41-45), which the trial court denied (R.80, 81) prior to entering its sentencing order on December 30, 1988.

As to the need for time to research caselaw, to rebut the State's assertion that the court should consider the "prior violent felony" aggravating factor, this issue was mooted when the trial court ruled that it would not consider any aggravating factors not included in its initial order. (R.67).

Finally, as to counsel's desire for more time to obtain the medical examiner's testimony, to facilitate argument of the HAC factor as to victim Lourdes Villegas, the finding of this factor was upheld by this Court on direct appeal, 533 So.2d 1137, 1142 (Fla. 1988), and thus was not subject to reconsideration, as per the trial court's ruling (R.50, 56, 67).

In sum, although counsel was rushed to an extent that normally would mandate a continuance, given the extremely limited scope of the proceedings, which defendant's counsel acknowledged entailed only legal argument, and given the lack of any discernible prejudice, the State asserts that reversal for a second resentencing is not required.

II.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR RECUSAL.

The defendant's first basis for recusal in his motion (R.41-45) is comments made by the court at the initial sentencing, to the effect that the defendant was a psychopath who showed no remorse for his terrible crimes. These comments were based solely on the evidence adduced at trial and on the defendant's continued refusal to admit his culpability at the initial sentencing. In Suarez v. State, 527 So.2d 190 (Fla. 1988), this Court summarily rejected the defendant's claim that three comments made by the trial court at his initial trial required the trial court's recusal from the defendant's Rule 3.850 proceeding[1]. The trial court's comments herein were challenged on direct appeal as indicating reliance on improper aggravating factors, and in this Court's opinion it noted that the trial court may have relied on improper aggravating factors (though it did not specifically address the "psychopath" and "no remorse" comments in the opinion).

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[1] This Court further held that recusal was mandated by comments the trial court made to the press, to the effect that capital defendant's have too many appeals, and he intended to deny the defendant's 3.850 motion in order to expedite his execution.

Trial court's are presumed to be capable of correcting their errors on remand, and in this case the trial court repeatedly stated he was relying only on the aggravating factors specifically upheld by this Court in its opinion (R.50, 56, 67). In addition, judicial comments, even ones severely critical of the defendant, do not require recusal in a subsequent proceeding involving the same defendant, where the comments were based solely on the evidence adduced in open court, unless such comments constitute "such pervasive bias or prejudice that it constitutes bias against a party". Wiley v. Wainwright, 793 F.2d 1190 at 1193 (11th Cir. 1986). ~~See also~~ Jaffee v. Grant, 793 F.2d 1182 (11th Cir. 1986), United States v. Archbold-Newbill, 554 F.2d 665 (5th Cir. 1977), and United States v. Guglielmi, 615 F.Supp. 1506 (W.D. N.C. 1985).

The second claimed basis for recusal was that, when contacted by the prosecutor[2], the court said it was "adamant" about not "dumping" the case on another judge. These exceedingly inarticulate comments were nothing more than a recognition by the court that, as the judge who conducted the trial and heard the evidence, it was his duty to conduct the resentencing.

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[2] It is true that the contact was ex parte, but it is also true that the defendant's counsel was on vacation in Colorado at the time. The prosecutor disclosed this contact to defendant's counsel promptly upon her return, which is how she learned of the judge's comments.

The next group of arguments in the defendant's motion concern the trial court's denial of the motion for continuance, matters dealt with above. The trial court perceived his role to be only a re-weighing of the aggravating factors upheld by this Court against the mitigating factors likewise upheld by this Court (on State's cross-appeal). Based on this perception the trial court reasonably believed that no delay was necessary, and the denial of the defendant's motion for continuance thus was not a legitimate basis for recusal.

Finally, the defendant cites a comment by the court at resentencing. The events leading to the comment are as follows. Counsel told the court she needed time to prepare a recusal motion based on comments by the court at the original sentencing (R.50). Counsel stated that she was moving orally for recusal (R.53). The court then stated "Well, Robin, I don't believe I said anything that would keep me from resentencing this defendant'' (R.53). The court then asked counsel what exactly had he said, and in response counsel said "you called him a psychopath", to which the court stated "Well, what's wrong with that, Robin" (R.54). Taken in context, this statement was merely a query by the court as to how such a comment could possibly constitute grounds for recusal. The defendant's assertion in its brief, that this comment showed that the trial court was again intending to rely on nonstatutory aggravating

evidence, is thoroughly disingenuous. The trial court repeatedly stressed it was relying solely on the aggravating factors upheld by this Court, and there is no reasonable implication in the record that he did otherwise.

In sum, the defendant has failed to demonstrate a legitimate fear of prejudice.

III.

THE TRIAL COURT CORRECTLY RESENTENCED THE DEFENDANT TO DEATH

The defendant's first complaint about his new death sentences is that, in relation to the finding of HAC as to victim Lourdes Villegas, the trial court's sentencing order does not give the factual circumstances upon which the finding of the factor is based. Fla.Stat. 921.141(3) states:

> **(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. -** Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravatingand the 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:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there were insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections **(5)** and **(6)** and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(emphasis added)

The findings of fact referred to are factual findings, based upon the trial and sentencing evidence, that a given factor has or has not been established by the evidence. This Court has never suggested that a sentencing order must contain all the factual circumstances which the trial court considered in arriving at its determination that a given factor exists. It is certainly a salutary practice to do so, as it would aid this Court in its review, but it is not and should not be required.

The record evidence either does or does not support the finding of a particular factor, and it is for appellate counsel, and ultimately this Court, to analyze the evidence and determine whether it is legally sufficient. To require the trial court to list all the facts it considered would raise issues such as: Must he list all the facts, i.e., can this Court consider other facts not listed, but which nevertheless support the ruling? What if facts are listed which are a proper basis for establishing the factor, but other facts are relied upon which are an improper basis? The point is that there never has, and never should be, the requirement for a laundry list of factual findings as to each aggravating and mitigating factor.

The defendant next claims that the trial court erroneously applied the aggravating factor HAC to the murder of the other victim, Miriam Mejides. The trial court definitely did not apply this factor to her murder, as clearly indicated by both his oral pronouncements and his sentencing order. The trial court's closing paragrph in its order (R.40), states ". . . that the two aggravating factors, whether taken individually or together, so far outweigh the two mitigating circumstances..." . It is abundantly clear, given the court's express finding in paragraph II (R.39), that HAC applied only to Lourdes Villegas, that the court was simply stating ". . .whether taken individually, in the case of Miriam Mejides, or together, in the case of Lourdes Villegas,. . ." . This issue is totally devoid of merit.

Finally, the defendant claims that the court again relied on nonstatutory aggravating factors. The defendant bases this on the court's "So, what's wrong with that" comment during counsel's oral argument for recusal. As stated above, this comment, when taken in context, was simply a query as to why his "psychopath" comment at the initial sentencing rendered him unfit to conduct the resentencing. The trial court repeatedly made it abundantly clear that he was relying solely on the aggravating factors left intact by this Court. This issue is thus likewise without merit.

PROPORTIONALITY

The defendant did not raise a proportionality argument in its brief, however such an analysis is of course mandated. The State submits that the two death sentences for the double murder were in no way disportionate.

As for Lourdes Villegas, the evidence showed that the murder occurred during a late night armed home invasion burglary (in the course of a felony), that she was choked and repeatedly bludgeoned *as* she struggled to save herself (T.1064-1069), (HAC), and that the defendant had been convicted of murdering her companion (prior violent felony). At resentencing the trial court refused to find this latter factor because it felt bound by its initial order, which had inexplicably omitted this factor. The State has assigned this refusal as error, as is discussed below. As to Miriam Mejides the factor of HAC does not apply. The mitigating evidence was age (24 years old) and no significant prior criminal history. Given this balance of factors, both death sentences are clearly proportionate to other cases in which this Court has upheld the death penalty.

CROSS-APPEAL

THE TRIAL COURT ERRED IN REFUSING TO FIND THE AGGRAVATING FACTOR OF PRIOR VIOLENT FELONY BASED ON THE DOUBLE NATURE OF THE MURDERS.

At the initial sentencing the prosecutor argued to the jury that the aggravating factor of "prior violent felony'' was established by the contemporaneous first degree murder convictions (T.1356), and the jury was instructed on this aggravating factor (T.1376). After the jury returned with its two recommendations of death, the court proceeded to sentence the defendant with no further argument from counsel (R.1386). Although the court made reference to the "victims" and the murder of "these two young girls" (T.1388, 1389), the court inexplicably did not find the aggravating factor of prior violent feony, based on the double nature of the murders, even though this factor was established as a matter of law[3].

At resentencing the State argued to the trial court that it had inadvertently left this factor out of its initial order, that the factor was established as a matter of law, and that the factor should be found by the court at resentencing (R.60-61).

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[3] See LeCroy v. State, 533 So.2d 750, 755 (fla. 1988), Correll v. State, 523 So.2d 562, 568 (Fla. 1988), Craig v. State, 510 So.2d 857, 868 (Fla. 1987), and a host of others, all holding that the contemporaneous murder of a second victim establishes this factor as a matter of law.

The court ruled that it could not consider a new factor not contained in its original order (R.61).

The State asserts that the trial court's conclusion was erroneous. This Court considered this exact situation in Echols v. State, 484 So.2d 568 (Fla. 1985), wherein this Court stated:

> In determining whether the override was based on facts so clear and convincing that virtually no reasonable person could differ, we look to the trial court's sentencing order. The trial court found three aggravating factors. First, the murder was committed while appellant was engaged in both a robbery and a burglary in the home of the victim and his wife. The proceeds of the robbery and burglary were given to accomplice Nelson for his participation in the crimes. Second, the murder was committed for pecuniary gain. Appellant's pecuniary gain, however, was to come from controlling the assets of the victim's estate, not from the robbery or burglary. Third, the murder was committed in a aold, calculated and premeditated manner without any pretense of moral or legal justification. We find that all three aggravatiing factors are established by the evidence beyond every reasonable doubt. We add that the record shows also as a fourth aggravatinq factor that the appellant had ,been previously convicted of robbery with a firearm and armed burglary with an assault. §921.141(5)(b), Fla.Stat. (1981); *Johnson v. State*, 438 So.2d 774, 778 (Fla. 1983), *cert. denied*, 465 *U.S.* 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); *Daughtery v. State*, 419 So.2d 1067, 1069 (Fla. 1982), *cert. denied*, 459 *U.S.* 1228, 103 S.Ct. 1236, 75

> L.Ed.2d 469 (1983); ***King v. State,*** 390 So.2d 315, 320-21 (Fla.1980), ***cert. denied,*** 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981); ***Lucas v. State,*** 376 So.2d 1149, 1152-53 (Fla. 1979). These prior convictions also negate the potential mitigating circumstance of no significant history of prior criminal activity. ***Teffeteller v. State,*** 439 So.2d 840, 846-47 (Fla. 1983) ***cert. denied,*** 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); ***Ruffin v. State,*** 397 So.2d 277, 283 (Fla.), ***cert. denied,*** 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). We cannot determine whether the trial judge overlooked this fourth aggravating factor or was uncertain as to whether convictions for crimes committed concurrently with the capital crime could be used in aggravation. However, we note its presence in accordance with our responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision. Fla.R.App.P. 9.140(f); 8859.04 and 924.33, Fla.Stat. (1981); ***Cohen v. Mohawk, Inc.,*** 137 So.2d 222 (Fla. 1962); ***Congregation Temple De Hirsh v. Aronson,*** 128 So.2d 585 (Fla. 1961); ***In Re Wingo's Guardianship,*** 57 So.2d 883 (Fla. 1952); ***Perkins v. City of Coral Gables,*** 57 So.2d 663 (Fla. 1952); ***Wallace v. State,*** 41 Fla. 547, 26 So. 713 (1899).
>
> (Emphasis added), Id at 576, 577.

See also Robinson v. State, 393 So.2d 33 (Fla. 3d DCA 1981), Owens v. State, 354 So.2d 118 (Fla. 1st DCA 1978), and Zirkle v. State, 410 So.2d 948 (Fla. 3d DCA 1982), (reasons not

stated by trial court, but which support ruling, will be considered on appeal).

It would be absolute insanity to imagine that this Court, in conducting its proportionality review, would close its eyes to the fact that this is a double murder (perhaps the most aggravating feature of the crimes) simply because the trial court inadvertently omitted this factor in its initial order, then intentionally omitted it in its order on resentencing. Obviously, as per Echols, this Court is well above such nonsense.

The State's real concern is that, should this Court order a resentencing, the new judge might deem itself restricted to the aggravating factors found at the initial sentencing, as did the instant trial court at resentencing. At the resentencing the defendant's counsel's had used Shull v. Dugger, **515** So.2d 748 (Fla. 1987), to convince the trial court not to go beyond the aggravating factors contained in its initial order **(R.61)**. Shull has absolutely no application to the instant setting. At a capital sentencing the trial court has a specific set of aggravating factors it must consider. If, as here, there is an aggravating factor that exists as a matter of law, the trial court has a duty to find that factor. If not, he commits a legal error. At an initial guidelines sentencing, the court; 1) does not even have to consider a departure sentence at all, 2)

if it does, it can consider any reason it considers clear and convincing, from a potentially unlimited number, and 3) most important of all, the trial court never has a duty to find any particular reason for departure, thus his decision to not find a particular reason can never constitute legal error. Additionally, Scull was adopted for a specific purpose, to stop the "ping-pong game." In a capital sentencing there can be no such game, because if all the aggravating factors are struck on appeal, or enough to make a subsequent death sentence disportionate, then this Court will decline to remand and instead impose a life sentence.

In order to avert any confusion at a subsequent resentencing, should this Court so order, the State respectfully implores this Court, in its instant opinion, to issue guidance to the successor trial court on this issue.

CLARIFICATION AS TO HAC

On direct appeal this Court stated:

> ***The Capital Felony was Heinous, Atrocious, and Cruel:***
>
> [7] The state concedes that the evidence does not support this aggravating factor as to Mejides since she died from a single blow to the head. Similarly, Scull does not challenge this circumstance regarding the murder of Villegas. Therefore, we agree that the murder

> of Lourdes Villegas was especially heinous, atrocious, and cruel, but the murder of Miriam Mejides was not.
>
> (Emphasis added) 553 So.2d at 1142

At resentencing defendant's counsel sought to reargue the HAC factor as to Lourdes Villegas, but the trial court declined to consider reargument because the issue was decided on direct appeal. If this Court does remand for a new resentencing, the State requests that this Court clarify whether its previous ruling as to HAC for Lourdes Villegas was on the merits, as assumedly the "we agree" language would indicate. Such clarification would certainly aid the successor trial court should resentencing be ordered.

CONCLUSION

The two death sentences are proper and should thus be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE/CROSS APPELLANT** was furnished by mail to **CALIANNE LANTZ,** Esquire, **9100** South Dadeland Blvd., Suite **512,** Miami, Florida **33156** on this 22 day of September, **1989.**

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