IN THE SUPREME COURT OF FLORIDA

KENNETH KOENIG, :

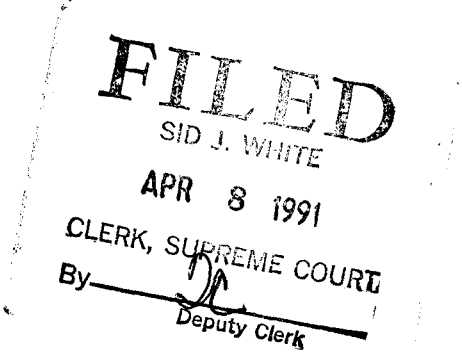
Appellant, :

vs. : Case No. 75,019

STATE OF FLORIDA, :

Appellee. :

_____ :



APPEAL FROM THE CIRCUIT COURT
IN AND FOR MANATEE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE

On January 12, 1988 a Manatee County grand jury returned a three-count indictment against Appellant, Kenneth Koenig. (R276-277) Count I charged the premeditated murder of Ida Souta by stabbing her with a knife. (R276) The second count alleged armed burglary of Souta's residence during which Appellant committed an assault or battery on her. (R276-277) Count III charged armed robbery of Souta. (R277) All three offenses allegedly occurred on or about December 23, 1987. (R276-277)

Through his counsel, an assistant public defender, Appellant filed various pretrial motions. These included motions to declare sections 921.141 and 922.10 of the Florida Statutes unconstitutional, and a motion to declare death not a possible sentence in Appellant's case. (R334-351,357-358) These motions were heard by the Honorable Gilbert Smith on July 7, 1989, and denied. (R365-367,371,513-514) At the same hearing, Judge Smith heard and granted motions Appellant filed to suppress statements and admissions Appellant allegedly made, as well as certain physical evidence (a plastic bag containing jewelry allegedly belonging to the victim). (R352-356,368-370,443-508)

Appellant also filed motions directed toward preventing the State from using in aggravation of sentence Appellant's alleged prior convictions for robbery in Canada and Pennsylvania. (R332-333,376-377) Judge Smith denied the motions. (R3-8,364,509-513) The State requested that the court take judicial notice of the

robbery convictions and certain documents related to them. (R378, 387)

On July 7, 1989 Appellant appeared before Judge Smith and entered no contest pleas to all three counts of the indictment, and waived a jury recommendation as to the sentence he would receive. (R261-266) Appellant also executed a written "Acknowledgment and Waiver of Rights" (R372) and a written "Waiver of Jury Recommendation as to Penalty Stage." (R363) The court accepted Appellant's plea, adjudicated him guilty, and set a sentencing hearing for July 24. (R265,422-423)

The court received evidence from both the State and the defense at the sentencing proceeding on July 24 (R2-199), and heard arguments of counsel the following day. (R200-244) The court ordered a presentence investigation and took the matter under advisement. (R244-245,399)

Appellant appeared before the court for sentencing on August 28, 1989. (R268-274) Appellant addressed the court briefly, saying that he was "deeply sorry" for what happened. (R270) The court sentenced Appellant to consecutive life terms in prison on the burglary and robbery counts, citing Appellant's conviction for first degree murder as his reason for departing from the sentence recommended under the guidelines. (R270-271,420-421,425-427) As to the murder itself, the court orally found four aggravating circumstances (R271-273): (1) Appellant was previously convicted of another capital felony or a felony involving the use or threat of violence to another person. (2) The capital felony was committed

while Appellant was engaged in the commission of a robbery and burglary. (3) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. (4) The capital felony was especially heinous, atrocious, or cruel. The court orally found that there were no statutory mitigating circumstances, but found that Appellant had proven the following, which the court initially referred to as "nonmitigating circumstances" (R273-274): (1) Prior psychiatric history. (2) Prior deprived environmental background. (3) Emotional instability. (4) Remorse and admission of guilt. The court concluded that sufficient aggravating circumstances existed which outweighed the mitigating circumstances, and sentenced Appellant to death. (R274,424)

The record contains a document entitled "Sentence of Kenneth Koenig," which mirrors Judge Smith's remarks at the sentencing hearing of August 28, but which is not signed. (R416-419)

Appellant's notice of appeal was timely filed on September 26, 1989, and was subsequently amended twice, on November 6, 1989 and November 16, 1989. (R428,430,431)

STATEMENT OF THE FACTS

State's Case

At the end of 1987, Charles Friedman was working at Woodcrest Apartments in Bradenton as manager of maintenance personnel. (R68) Appellant, Kenneth Koenig, did lawn work for him for roughly a little over a month, and did a good job, but was fired by the owner in December. (R68-69,77,79)

A week or two before Christmas, Appellant and Friedman had a conversation in Friedman's kitchen. (R69) Appellant was highly depressed because he had no job and no money. (R80-81) [On a prior occasion Appellant wanted Friedman to obtain some drugs from his father so that Appellant could kill himself. (R80)] Appellant felt put down; nobody gave him a chance. (R69) Appellant told Friedman he needed to pull a "scam," and might need to "off" somebody or take somebody out in order to get away with it. (R70-72) Appellant talked about three possible targets for a scam: a man named Alan from Sarasota, the Woodcrest Apartments, and a lady called "Mom." (R70,81) Friedman knew "Mom" as a lady who lived in San Remo Shores, Ida Souta. (R71) Friedman had not seen her, but had heard Appellant talk about her. (R70-73) Appellant told Friedman "Mom" had a lot of money. (R70,72) Appellant lived in a van near San Remo Shores, and had pointed out to Friedman where Ida Souta lived, but had not taken him directly to the house. (R71) Appellant told Friedman that Souta was a good lady who was like another mother to him. (R81) Appellant had danced with her and cooked dinner for her. (R72-73,81)

Appellant did not know what scam to pull. (R71) He said he would have to do his homework. (R76) It was "[j]ust all in the air." (R71) Friedman "really didn't believe he was gonna do anything with that." (R77)

Marie Kuusinen had known 70 year old Ida Souta since 1978. (R14) The two women were neighbors in San Remo Shores in Bradenton. (R13-14)

Souta was a widow. (R14) She lived with her son, Rudy. (R14) Rudy left for Chicago on December 21, 1987. (R14-15)

Kuusinen and some other friends of Ida Souta gathered at Souta's house late on the afternoon of December 22, 1987. (R15-16) Around 7:30 they left for a restaurant on Bradenton Beach called Uncle Dan's, where they sat around a big table and ordered beer and pizza. (R16-17)

When they entered Uncle Dan's, Appellant was there, sitting with a man named Jim Schlang, or "Animal." (R27) Kuusinen had seen Appellant in Ida Souta's home approximately three or four months before the instant homicide. (R25-26) He was cooking dinner for Souta. (R26) Most of the young people called Souta "Mom" or "Ma;" Appellant called her "Mom" when he was cooking at her house. (R26)

Appellant came over to the table where Souta's party was sitting at Uncle Dan's and sat with them for an hour or more, drinking beer and talking. (R17-18,27-28) Appellant wanted to buy some beer for them, and Kuusinen believed that Appellant stated that he had no problem with money now that he had gotten a job as a cook at Rich's Drugstore. (R28) While Appellant was there, the other

people at the table referred to the fact that Rudy Souta was not staying with his mother. (R18)

About 10:30 Souta's group left the restaurant and walked across the street to the Patio Lounge. (R19,28) Appellant was still at their table, but they did not invite him to come with them. (R19) At the Patio they sat, ordered beer, and listened to the band. (R19) Ida Souta may have danced with someone at a table close to them. (R19-20) Appellant came in and glanced over at them without saying anything, then came over and asked Souta to dance. (R20) After the dance, Appellant walked promptly back to the bar. (R20) Later, he brought a girl over and introduced her to them. (R20)

Ida Souta's party left the Patio Lounge before midnight. (R20) They drove back to Souta's house in her car, arriving about midnight. (R21) Kuusinen had been driving, and she put Souta's car in the garage and handed her the key. (R21) When Kuusinen went across the street to her house, Souta was standing there, talking to Phil Valley. (R16,21)

Appellant remained at the Patio Lounge when Souta and the others left. (R20-21,29) He could have been sitting at the bar with the lady he had introduced. (R29)

Ida Souta had an appointment to have her hair done by Marie Kuusinen at a beauty shop on Bradenton Beach shortly after 9:00 a.m. on December 23, 1987. (R21-22) She did not show up, which surprised Kuusinen, because Souta was seldom late, and was usually early. (R22) Kuusinen called Souta's house many times, but there

was no answer. (R22) She called a friend named Richard, who was one of those in Souta's party the previous night, and asked him to call, because Kuusinen was busy. (R22) Richard did call, and went to Souta's house and knocked on her door. (R22) He called Kuusinen and said that Souta did not answer, but her newspaper was on the driveway. (R22) They kept calling back and forth until 10:00, when Kuusinen told one of her customers she was going to lock up the beauty shop and see if she could rouse Souta. (R22)

Kuusinen and Richard went to Souta's house. (R23) Kuusinen knocked on the window in Souta's bedroom with her keys as she passed, then knocked on the door. (R23) The sliding glass door leading from the swimming pool into the den and kitchen area was closed, but unlocked. (R23) Unlike the night before, the handle of the screen door was broken off on the outside. (R23,32) There was blood on the inner part of the house, on a wall where the door slid against the wall. (R23-24,45)

Richard and Kuusinen went through the kitchen area, down a hall, and through the living room. (R24-25) When they got within about 10 feet of Souta's door, Kuusinen told Richard to go in and look to see what had happened. (R24-25) When Richard came back, he had a strange look on his face, and said, "'Don't go in there, it's a bad scene.'" (R25) Kuusinen asked what happened. (R25) Richard initially said he could not tell her, but Kuusinen prodded him until he said that Souta appeared to be dead and appeared to have been knifed. (R25) They called 911, and law enforcement people arrived at Souta's house shortly thereafter. (R25)

After arriving at Ida Souta's residence on the morning of December 23, 1987, Sergeant Patric Simonet observed that an awning window on the house had been pulled out, and the screen was pushed in. (R30-31,45) There was a small speck that was possibly blood on the window. (R45) There was no evidence that anyone entered the house through that window. (R48)

The interior of the house was very much in order, and did not appear to have been ransacked in any manner. (R48)

In the master bedroom Simonet observed an elderly woman lying on her back between the foot of a bed and a dresser. (R32-33,37) There was a tremendous amount of trauma to her neck. (R33) A very large boning knife was lying near her head. (R33) There was blood on various items in the room. (R37-38,41-42) Simonet believed the woman had not been moved, but died where the trauma occurred. (R36)

A latent thumb print was lifted from the dresser in the bedroom that was later identified as matching the right thumb of Appellant. (R39,56-58)

Dr. James C. Wilson, who performed an autopsy on Ida Souta on December 23, 1987, found that she had at least three confluent incisions across her neck which completely transsected the trachea and esophagus, cut across the jugular veins, and cut the right and left common carotid artery. (R92-93,96-97) The depth of the deepest wound to the neck was about three inches. (R97-98) The wounds to Souta were consistent with the knife found at the scene. (R93-94,99) The cause of her death was severe external hemorrhage as a result of the cutting injuries to her neck, complicated by ische-

mia, or lack of blood supply to the brain, which would have hastened her demise. (R93,104-105) Souta would have become unconscious within seconds after the carotid arteries were transsected,[1] and would have died within a very few minutes. (R105-106,110,113,118)

Dr. Wilson identified other injuries to Souta, including five broken ribs on the right side of her chest. (R100-101) It would have taken something such as a knee pressing against the chest cage in pinning the body to the floor to cause the broken ribs, which could have happened after Souta lost consciousness. (R101-102,109-110)

A small fracture on the right side of the upper larynx and a small fracture to the right side of the hyoid bone were consistent with Souta's neck having been squeezed with a hand at some point during the incident. (R100)

Also, there were five areas of bleeding into the scalp, indicating that the head struck, or was struck by, some hard object. (R102-104) These injuries would have occurred prior to the injuries to Souta's neck, and could have occurred when she struck the floor or bed frame. (R107-108)

Dr. Wilson did not note any wounds compatible with "defensive wounds." (R107)

Linda Giguere, a teller in the lobby at Barnett Bank in College Plaza, knew Appellant "vaguely" through the Carriage Club, where she used to live. (R49-51) He used to "pretty much hang out

---

[1] On deposition Wilson said that one would remain conscious for a maximum of about 10 seconds following the type of trauma Souta incurred. (R111-112)

there," and Giguere had seen him between five and ten times. (R51) Appellant knew Giguere as "Missy," and knew where she worked. (R51)

On December 23, 1987 Giguere saw Appellant at Barnett Bank right around noon, waiting in line for service. (R51) Another teller wanted to take him, but Appellant indicated that he was definitely waiting for Giguere. (R51) She cashed a check for him in the amount of $1,500. (R51-52) The check was made payable to "Cash," and was written by Ida E. Souta, and endorsed on the back by Kenneth M. Koenig. (R42-43,52,61-64,516) The check was filled in completely correctly, and looked fine to Giguere. (R52) When he presented the check for payment, Appellant pulled his Georgia driver's license out of his wallet without hesitation and handed it to Giguere. (R54) He made no attempt to use any false or fictitious names. (R54)

The Manatee County Sheriff's Department found a latent fingerprint on the back of the check next to the endorsement area that was identified as matching Appellant's left thumb. (R43-44,58)

James Outland, an expert in handwriting analysis who worked for the Florida Department of Law Enforcement, opined that there was no indication that Ida Souta was under stress when she wrote the check in question; there appeared no difference between the writing on it and on 14 other checks Souta had written. (R60-61,64-65) Outland had never before been asked to render an opinion as to whether someone's handwriting or signature was made under duress. (R65)

Over defense objections, the State introduced into evidence documents pertaining to Appellant's alleged robbery convictions in Canada and Pennsylvania. (R85-87,516)

Defense Case

Appellant was born in Virginia on April 9, 1947. (R121-122) His mother was Anna May Anderson Koenig. (R122) Appellant never knew who his father was. (R124,180,411)

Appellant had three siblings (or half-siblings). His older sister, Nancy Toy, was 43 at the time of Appellant's sentencing hearing. (R120) He had a brother, Robert, 45, and another sister, Cecilia, 33. (R121)

When Appellant was about a year old, the family moved to the poorer section of Harrisburg, Pennsylvania, called Shipolk, which was probably the worst area in town. (R122) They lived on the second floor of a row house. (R124) The boys had a bedroom upstairs on the third floor in the attic. (R124)

The children were raised by their mother, who was an alcoholic. (R125,126) The family was on welfare when the children were young. (R125-126) The first thing Mrs. Koenig did when she received her welfare check was buy a couple of cases of beer and a couple of cartons of cigarettes. (R126) Anything that was left over would go to buy food, which was usually something like homemade potpies or macaroni and cheese. (R128) There was not a lot of meat, but there was always a lot of beer in the house. (R128) However, Appellant and his brother had a third grade teacher who liked them and took them to her house now and then for spaghetti dinners. (R128)

The clothing the children got consisted of one or two outfits and new shoes when school started. (R126-127) Nancy was a loner in

school because she was embarrassed and ashamed of the way she looked. (R127-128) She sort of stayed to herself because she did not want to be made fun of. (R127-128) Her brothers were the same. (R128)

The children did not bring anyone home because they were embarrassed by their mother's drinking. (R129) She frequently drank until she passed out. (R129)

The family did not celebrate Christmas and birthdays until Appellant was about 11 years old. (R134-135)

Mrs. Koenig physically and verbally abused all the children. (R128-129) If they got into trouble, she would hit them across the bottom or back with a doubled-over leather strap. (R128-129) Sometimes this was after she had been drinking, sometimes not. (R129) Mrs. Koenig would quickly lose her temper when Appellant did little things that irritated her, and either strap him or call him all kinds of bad names and make him feel worthless. (R130,132-133)

Their mother never showed affection toward the children, nor would she praise them when they did something good. (R131-133) Nancy Toy never saw her mother hug Appellant throughout his entire life, and never heard her tell Appellant that she loved him. (R130-131) When Appellant tried to hug his mother and tell her he loved her, she would tell him to get away. (R130)

The only time the children got attention was when they were paddled or strapped, or yelled at and called such things as

s.o.b.'s, no good bastards, and worthless. (R132) Nancy Toy felt that this really tore their self-esteem down to nothing. (R132)

It seemed to Nancy Toy that Appellant was more in need of caring and wanted attention more than the other children. (R132-133)

When Appellant was about eight, the family left Shipolk, because a good part of it was being torn down for the building of a superhighway. (R123-124,135) They moved to the Allison Hills section of Harrisburg, about 10 blocks up the hill from where they had been living. (R136) This was another low-income neighborhood. (R136) They lived in a house that was huge, but not very well kept up. (R136)

In Allison Hills they had a stepfather, an older man who was Cecilia's father. (R136-137,180) He was a nice person, but he did not have the patience for children, and was only minimally involved with Appellant. (R136,180,181) When Appellant's mother was being too abusive, and his stepfather tried to intervene, Appellant's mother would dominate and tell him to mind his own business. (R180) Except perhaps for one fishing trip, the stepfather never did anything with the children as a family. (R136,180)

When Appellant was about 12, his mother began mixing prescription drugs with her alcohol, and would go into drunken stupors. (R144) She did not stop drinking until doctors diagnosed her cancer of the liver. (R143-144)

As a pre-adolescent and adolescent, Appellant was institutionalized off and on for various delinquent behaviors, such as setting off fire alarms, up to the age of 16. (R146-147,175-176,191-192)

Appellant began drinking at the age of seven, but did not start drinking heavily until he got out of the institutions. (R177, 411) He started using marijuana about that time, then began using heavier drugs, including LSD, Mescaline, and a lot of other hallucinogenic, mind-altering drugs. (R177,411) He eventually started using Valium constantly. (R177)

After Appellant left home at the age of 18, he lived in various parts of the country, never staying in one place or keeping the same job for very long. (R148,150,198) He was in California when his mother lapsed into a coma and died. (R131,140)

About 10 years before the instant homicide, Appellant's alcoholism became very bad. (R178) He began having blackouts and passing out. (R178) He sought help through Alcoholics Anonymous, went to many meetings, and made progress. (R153-156) But Appellant felt that he did not belong any place, even an AA meeting, and in the months preceding the homicide he deteriorated again. (R157-158,178) He stopped going for help and started using crack cocaine. (R158, 178) He was smoking six to ten cocaine rocks a day for two months prior to the instant homicide. (R182) In the hours before the homicide occurred, Appellant drank an unknown quantity of beer at two bars, then went home and smoked six rocks of crack cocaine. (R182)

Subsequent to his arrest, Appellant accepted full responsibility for the incident, and expressed his sorrow and remorse to several people. [R142-143,162,181-183,516 (Defendant's Exhibit #2)]

At the time of his penalty hearing on July 24, 1989, Appellant had had one Disciplinary Report (for fighting) since his arrest in December, 1987, and had had none since May 29, 1988. (R184,197)

Appellant attended Alcoholics Anonymous meetings at the Manatee County Jail while he was incarcerated there pending disposition of the instant charge, and attempted to assist some of the younger inmates with their alcohol problems. (R159-161,184)

Dr. Harry Krop, a psychologist, was appointed by the court to examine Appellant, and met with him four times in 1988 and 1989. (R168-169,299-301) Appellant cried many times during these sessions. (R181)

Dr. Krop noted that Appellant received extensive mental health counseling as a child, but it was more or less forced upon him by the court. (R178) An abnormal EEG was found in 1960, but an EEG conducted in June, 1989 was normal, and Dr. Krop could not find any other indicants of an organic process. (R189-190)[2]

Dr. Krop opined that Appellant was competent to participate in the legal proceeding in which he was involved, and did not meet the criteria for the statutory mental health mitigating factors. (R185-186) However, Appellant did suffer from alcohol and substance

---

[2] The presentence investigation revealed that Appellant was in a coma for approximately a month following a fall when he was a child, and that Appellant later suffered a hole in his head as the result of a motorcycle accident. (R411-412)

abuse, and a mixed personality disorder, which included antisocial personality defects, a dependent kind of personality, and an immature personality disorder, which was the aspect that would probably best characterize Appellant. (R179-180) He was more or less like a child who had never grown up inside, and he was often engaging in attention-seeking behavior. (R173-176,179-180) Appellant's judgment certainly was impaired at the time of the homicide, probably from the interaction of alcohol and drugs and the defects in his personality. (R195)

Dr. Krop believed Appellant to be the type of person who functions better in a structured kind of environment such as that found in an institution than he does in society. (R184) Appellant apparently was doing well on psychotropic medication he had been given at the jail. (R184) He had been on a number of different medications, and seemed to respond well to them. (R184)

Appellant had sent some artwork and poems to his sister, and Dr. Krop hoped that Appellant would continue to employ adaptive coping mechanisms such as that if he should be sentenced to life in prison. (R185-186) Finally, Dr. Krop thought the incident in question would motivate Appellant further to try and change himself within the institutional environment. (R186-187)

SUMMARY OF THE ARGUMENT

I. A plea of no contest cannot result in a sentence of death because of the ambiguities inherent in a plea of this nature. Furthermore, the record here fails to show that Appellant's plea and waiver of a jury were entered intelligently and voluntarily, with full knowledge of the consequences. The need for a thorough plea colloquy was manifest because of the penalty Appellant was facing and because of the possibility that Appellant is mentally ill, yet the court's questioning of Appellant was minimal, and no advice was given to Appellant on the record pertaining to the important right he was giving up by foregoing a jury recommendation on penalty.

II. Nothing in the record shows that Appellant's conviction from Canada that was admitted into evidence was obtained in compliance with legal principles that would apply in this country and state. As a matter of policy, foreign convictions should be excluded from use in aggravation at Florida capital sentencing proceedings because of their inherent unreliability. Furthermore, the documents from Canada failed to establish that Appellant's conviction was for a crime of violence.

Appellant's Pennsylvania conviction should not have been relied upon by the trial court to aggravate Appellant's sentence because it was not shown to have been based on a plea that was voluntarily and knowingly entered.

III. Appellant's death sentence must be vacated because of the lack of written findings prepared by Judge Smith. Although

there is a document in the record which discusses aggravating and mitigating circumstances, the record does not disclose how and by whom it came to be prepared, and it is unsigned. Appellant must be resentenced to life.

IV. A. Appellant's convictions from Canada and Pennsylvania should not have been considered by the trial court in aggravation of Appellant's murder sentence, for the reasons explained in Issue II. Furthermore, they were not entitled to much weight, as the incidents occurred many years ago, and apparently did not involve particularly aggravated circumstances.

B. The State failed to establish beyond a reasonable doubt that Appellant killed Ida Souta in order to avoid or prevent arrest. The fact that Appellant knew Souta was not enough to prove this element. Appellant's remarks to Charles Friedman about having to "off" somebody or take somebody out were not specific and definite to show that Appellant was intending to eliminate Ida Souta as a witness. Her death may have resulted from a robbery that went bad.

C. The court's reference to "nonmitigating" circumstances in his discussion of those factors Appellant proffered in support of a sentence less than death requires clarification. Also, the court did not fulfill his responsibility of giving consideration to each and every factor Appellant proposed as mitigating. He ignored Appellant's drug and alcohol abuse, good behavior in jail, artistic ability, and helping of others while incarcerated.

V. When sentencing Appellant for the burglary and robbery counts of the indictment, the lower court should have used one guidelines scoresheet, not two. For the reasons discussed in Issue II, the Canadian and Pennsylvanian robberies should not have been scored as "prior record" on the scoresheet. If the robbery in Canada was properly scored, points for a misdemeanor only should have been assessed.

ARGUMENT

ISSUE I

APPELLANT'S ADJUDICATION OF GUILT OF FIRST DEGREE MURDER AND HIS SENTENCE OF DEATH ARE UNRELIABLE AND IN VIOLATION OF CONSTITUTIONAL PRINCIPLES OF DUE PROCESS OF LAW AND THE RIGHT NOT TO BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT WHERE THEY ARE PREDICATED UPON A NO CONTEST PLEA, AND THE RECORD DOES NOT CLEARLY ESTABLISH THAT APPELLANT KNOWINGLY AND VOLUNTARILY RELINQUISHED HIS CONSTITUTIONAL RIGHTS.

The Supreme Court of the United States has emphasized the need for heightened reliability in capital cases because of the uniqueness and finality of the death penalty. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, 961 (1976). When the defendant's life is at stake, the courts must be "particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 353, 96 S.Ct. 2909, 49 L.Ed.2d 859, 882 (1976). These principles are violated where, as here, a death sentence is predicated upon a plea of no contest, and the record does not affirmatively show that Appellant knowingly and voluntarily relinquished his constitutional rights.

No Contest Plea

Although Appellant apparently signed a document entitled "Acknowledgement and Waiver of Rights" which indicated he was pleading guilty (R372), the plea he actually entered, and which the

court accepted, at the change-of-plea hearing held on July 7, 1989 was "no contest." (R261-265)

Appellant would note at the outset that "no contest" is not a plea which a defendant may enter. Florida Rule of Criminal Procedure 3.170(a) limits the types of pleas available to not guilty, guilty, or, with the consent of the court, nolo contendere.

Assuming, arguendo, that a plea of "no contest" is equivalent to a plea of nolo contendere, and so may be entered in most cases, the question remains whether this type of plea can be used to support a sentence of death.

Section 921.141(1) of the Florida Statutes provides, in part: "If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant [Emphasis supplied.]" The omission of any mention of a nolo contendere plea in the statute suggests that the Florida Legislature did not contemplate that such a plea could be entered in a case where the accused was facing the ultimate punishment.

In Smith v. State, 197 So.2d 497 (Fla. 1967) this Court specifically held that a plea of nolo contendere was not acceptable in a capital case. However, Smith relied in large part on a statute that was subsequently repealed, and in Seay v. State, 286 So.2d 532 (Fla. 1973) this Court held that a plea of nolo contendere was available in all cases, including capital, but did not address the issue of whether a death sentence imposed after a plea of nolo contendere could be upheld.

In Anderson v. State, 420 So.2d 574 (Fla. 1982) the defendant pled nolo contendere to first degree murder in an attempt to preserve his right to appeal the denial of certain pretrial motions, and was sentenced to death. This Court vacated Anderson's conviction and sentence because his confession should have been suppressed by the trial court. The matter of whether a death sentence predicated upon a plea of nolo contendere could stand was apparently not raised by Anderson, who was attempting to gain some benefit from this type of plea (i.e., the preservation of certain points for appeal), and was not decided by this Court.

In Vinson v. State, 345 So.2d 711 (Fla. 1977) the Court undertook a thorough analysis of the plea of nolo contendere. The Court concluded that a plea of nolo contendere "does not admit the allegations of the charge in a technical sense but only says that the defendant does not choose to defend." 345 So.2d at 715. The plea "is in the nature of a compromise between the State and the accused." 345 So.2d at 715.

In Wyche v. Florida Unemployment Appeals Commission, 469 So.2d 184 (Fla. 3d DCA 1985), the unemployment claimant had pled no contest to a charge of battery on her supervisor. The court held this plea to be insufficient evidence to establish "misconduct in employment" or "violation of a criminal law." 469 So.2d at 186. It hardly seems fair that a plea of nolo contendere could be good enough to send someone to the electric chair but not good enough to deny them unemployment benefits.

This Court addressed the nature of the nolo plea again in Garron v. State, 528 So.2d 353 (Fla. 1988), a death penalty case. The Court indicated that a plea of nolo contendere does not amount

> to either a confession of guilt or a "conviction" for purposes of capital sentencing proceedings. A nolo plea means "no contest," not "I confess." It simply means that the defendant, for whatever reason, chooses not to contest the charge. He does not plead either guilty or not guilty, and it does not function as such a plea.

528 So.2d at 360. This analysis led the Court to reject use of a nolo plea where adjudication of guilt was withheld to establish as an aggravating circumstance the Garron had previously been convicted of a felony involving the use or threat of violence. If a nolo plea cannot support an aggravating circumstance, then it certainly cannot form the foundation for a conviction which results in a death sentence.

A plea of nolo contendere is "equivalent to a guilty plea only insofar as it give the court the power to punish." Vinson, 345 So.2d at 715. In the capital sentencing context, the ambiguities inherent in a nolo plea render any death sentence resulting therefrom unreliable, and the court's "power to punish" must be limited to imposing a life sentence.

Waiver of Rights

In Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) the defendant entered a plea of guilty without addressing the court or being asked any questions by the court. The United States Supreme Court held that it was error to accept a

guilty plea absent an affirmative showing that the plea was intelligent and voluntary. The trial judge must conduct an inquiry into whether the plea is voluntary and it must be a part of the record.

The Boykin Court required this facial record because entry of a plea involves a defendant's waiver of the Fifth Amendment privilege against self-incrimination and the Sixth Amendment rights to trial by jury and to confront accusers. A waiver of constitutional rights must be intelligent and voluntary in order to comport with due process under the Fourteenth Amendment. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Waiver cannot be presumed "from a silent record." Boykin v. Alabama, 395 U.S. at 243.

To implement the holding of Boykin, Florida Rule of Criminal Procedure 3.170 mandated the procedural steps required when the court accepts a plea. Specifically, Florida Rule of Criminal Procedure 3.170(j) provides:

> (j) Responsibility of Court on Pleas: No plea of guilty or nolo contendere shall be accepted by a court without first determining, in open court, with means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.

This Court interpreted the requirements of this Rule in Williams v. State, 316 So.2d 267 (Fla. 1975). First the Williams court noted the importance of a thorough inquiry by the court when taking a plea to insulate the plea from appellate and post-conviction

attack. The opinion sets forth "three essential requirements for taking a...plea":

> (1) the plea must be voluntary; (2) the defendant must understand the nature of the charge and the consequences of his plea; and (3) there must be a factual basis for the plea.

316 So.2d at 271.

Florida Rule of Criminal Procedure 3.172(c) and (d) set forth in more detail what the trial court is required to do when taking a plea:

> (c) Except where a defendant is not present for a plea. pursuant to the provisions of Rule 3.180(c), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he understands the following:
>
> (i) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (ii) If the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (iii) That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to compel attendance of witnesses on his behalf, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself.
>
> (iv) That if he pleads guilty, or nolo contendere without express reservation of right to appeal, he gives up his right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but does not impair his right to review by appropriate collateral attack.
>
> (v) That if he pleads guilty or is adjudged guilty after a plea of nolo contendere there will not be a further trial of any kind,

> so that by pleading guilty or nolo contendere he waives the right to a trial and
>
> (vi) That if he pleads guilty or nolo contendere, the trial judge may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury; and
>
> (vii) The complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result.
>
> (viii) That if he or she pleads guilty or nolo contendere the trial judge must inform him or her that, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Naturalization and Immigration Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases.
>
> (d) Before the trial judge accepts a guilty or nolo contendere plea, he must determine that the defendant either 1) acknowledges his guilt, or 2) acknowledges that he feels the plea to be in his best interest, while maintaining his innocence.

Compliance with these safeguards obviously takes on even greater importance in a capital case, where the accused is facing the ultimate sanction.

The court below failed to properly ascertain whether Appellant was knowingly and voluntarily giving up his rights in accordance with Boykin, Williams, and the Florida Rules of Criminal Procedure. The transcript of the entire July 7, 1989 change-of-plea hearing is only six pages long. (R261-266) Appellant was not placed under oath, as required by Florida Rule of Criminal Procedure 3.172(c), and the court addressed only a few questions to him. (R262-265) The court asked Appellant if he understood that by entering the

plea, he was "waiving certain rights," but did not specify what any of those rights were. (R263) The only evidence of a factual basis for the plea was defense counsel's stipulation that the State could prove a factual basis. (R264) The court failed to determine whether Appellant acknowledged his guilt or felt the plea to be in his best interest, as required by Florida Rule of Criminal Procedure 3.172(d). (R261-266)

The need for a thorough plea colloquy was particularly evident in this case, in light of the indications that arose at the change-of-plea hearing that Appellant might be mentally ill. Appellant told the court he had been treated for mental illness when he was young, and that he had taken medication at the jail for "anxiety," which should have been red flags that induced the court to conduct a more probing inquiry.

The fact that Appellant may have executed a written acknowledgment and waiver of rights form prior to the plea hearing could not cure the inadequacy of the hearing itself. The cases and rules require a face-to-face discussion between the court and the accused concerning the rights he is relinquishing. Certainly, in a capital case, nothing less can suffice.

Perhaps the most glaring defect in the proceedings below is the absence of any on-the-record advice to Appellant concerning his waiver of an advisory verdict on penalty by a jury. Even after entering a plea, Appellant was entitled to the jury's opinion as to what sentence he should receive, pursuant to section 921.141(1) of the Florida Statutes. Any waiver of a jury recommendation requires

an affirmative showing on the record that the defendant voluntarily and intelligently bypassed his right to have the jury render its view on the appropriateness of the death penalty. LaMadline v. State, 303 So.2d 17 (Fla. 1974). At the very least, Appellant should have been told on the record that the court would be required to give a jury recommendation great weight, and that if the jury recommended life, the court could not override this recommendation unless the facts suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So.2d 908 (Fla. 1975).

The existence of a written waiver does not in and of itself establish a free, intelligent and voluntary waiver of Appellant's right to have a jury deliberate his fate. See Enrique v. State, 408 So.2d 635 (Fla. 3d DCA 1981). The better practice for waivers of jury trial, and hence the practice that should always be followed in capital cases, is

> for trial courts to use both a personal on-the-record waiver and a written waiver. An appropriate oral colloquy will focus a defendant's attention on the value of a jury trial and should make a defendant aware of the likely consequences of the waiver. If the defendant has been advised by counsel about the advantages and disadvantages of a jury trial, then the colloquy will serve to verify the defendant's understanding of the waiver. Executing a written waiver following the colloquy reinforces the finality of the waiver and provides evidence that a valid waiver occurred. Because the waiver of a fundamental right must be knowing and intelligent, the above-stated practice better promotes the policy of recognizing only voluntary and intelligent waivers.

Tucker v. State, 559 So.2d 218, 220 (Fla. 1990).

Although Appellant did not file a motion to withdraw his plea in the court below, this Court can and should consider the arguments Appellant makes herein as they pertain to both his conviction and his sentence, pursuant to the Court's review obligations under section 921.141(4) of the Florida Statutes. See Anderson v. State, 420 So.2d 574 (Fla. 1982) and LeDuc v. State, 365 So.2d 149 (Fla. 1978).

ISSUE II

THE COURT BELOW ERRED IN CONSIDERING IN AGGRAVATION FOREIGN CONVICTIONS WHICH WERE NOT SHOWN TO HAVE BEEN OBTAINED IN COMPLIANCE WITH APPELLANT'S CONSTITUTIONAL RIGHTS, AND ONE OF WHICH WAS NOT ON ITS FACE A CONVICTION FOR A CRIME OF VIOLENCE.

The trial court considered in aggravation of Appellant's sentence two convictions for alleged robberies, one from Canada and one from Pennsylvania, as previous convictions of felonies involving the use or threat of violence. (R271) Appellant filed pretrial motions seeking to prevent the use of these convictions as aggravating circumstances (R332-333,376-377), and objected when they were introduced at his sentencing hearing before the court. (R85-87)

With regard to the Canadian conviction, Appellant argued that there was nothing to show that it was obtained in compliance with the constitutional rights to which Appellant is entitled in this country. (R509-513) As a matter of policy, convictions from foreign countries should not be used to establish aggravating circumstances to support a death sentence in Florida, because those convictions may not have been, and probably were not, gotten in a manner consistent with the legal procedures and safeguards we in this country and state value so highly.

State's Exhibit Number 15 shows that Appellant was convicted in Canada pursuant to a guilty plea. (R516) Appellant has discussed in Issue I of this brief some of the requirements imposed under the laws of Florida and the United States before a plea can be

accepted. The record fails to reflect whether any of these requirements were met when Appellant entered his plea in the Province of Ontario. Nor does the exhibit even reflect whether Appellant had the benefit of the advice and assistance of counsel, or validly waived it, as required under the Sixth Amendment to the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Florida. In Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) the Supreme Court went so far as to say that a court lacks jurisdiction to convict and sentence a defendant without counsel or a valid waiver. Uncounseled convictions (unless counsel was waived) cannot even be used on a sentencing guidelines scoresheet in Florida. Annechino v. State, 557 So.2d 915 (Fla. 4th DCA 1990); Crigler v. State, 487 So.2d 420 (Fla. 2d DCA 1986). They certainly should not be used in so critical a matter as aggravation of sentence in a capital case.

In sum, then, the unknown circumstances under which foreign convictions are obtained make them too unreliable to justify their use in Florida capital sentencing proceedings. Although the conviction in this case emanated from a country with legal traditions similar to our own, it could have come from a country not know for its attention to due process of law (such as Cuba or Iraq).

It is unclear whether the court below took judicial notice of the Canadian conviction, as the State requested (R378-386), or admitted it on some other basis. (R86-87) As defense counsel noted in objecting to the admission into evidence of State's Exhibit Number 15, the Florida Statutes do not provide for the taking of judi-

cial notice of a conviction from outside the territorial United States. (R86-87) Laws of foreign nations may be judicially noticed, but there is no authority in the Florida Statutes for taking judicial notice of official judicial actions or court records from outside the United States. § 90.202(4),(5), and (6), Fla. Stat. (1989). Therefore, if the Canadian conviction was admitted on the basis of judicial notice, this was error.

As a final point regarding the documents from Canada, they do not show on their face that Appellant was convicted of a crime of violence. In Mann v. State, 420 So.2d 578, 581 (Fla. 1982) this Court held that a "prior conviction of a felony involving violence must be limited to one in which the judgment of conviction discloses that it involved violence. [Footnote omitted.]" [But see Brown v. State, 473 So.2d 1260 (Fla. 1985).] The information and certificate of conviction from Ontario indicated that Appellant stole money from a restaurant while armed with a shotgun. (R516) While this fact situation may constitute robbery under section 302(d) of the Canadian Criminal Code (R516), it would not constitute robbery (or any other crime of violence) in Florida. Robbery under Florida law requires a taking by "the use of force, violence, assault, or putting in fear." § 812.13(1), Fla. Stat. (1989). The Canadian documents did not show that the taking was accomplished in this manner, but only that Appellant stole money and happened to be carrying a shotgun at the time. Under Florida law, this would only constitute theft. § 812.014, Fla. Stat. (1989).

With regard to the Pennsylvania conviction, State's Exhibit Number 14 shows that, like the Canadian charge, Appellant entered a plea. (R516) As Appellant argued below (R3-8,376-377), the record fails to establish that this plea was entered knowingly and voluntarily, pursuant to the principles Appellant discussed in Issue I of this brief. For that reason, it lacks sufficient indicia of reliability to be used as an aggravating factor in Appellant's Florida murder case.[3]

---

[3] Defense counsel below mentioned that he had filed a petition for writ of habeas corpus in federal court in Pennsylvania attacking the conviction because the plea was involuntary and there was no colloquy, which petition remained pending at the time of the sentencing proceedings below. (R376-377,3,5-6) It is not reflected in the record, but on October 31, 1989 the United States District Court for the Middle District of Pennsylvania dismissed the petition because Appellant's sentence had expired and, as he was no longer incarcerated on the charge, the court lacked subject-matter jurisdiction. The court also noted that Appellant had not shown exhaustion of state remedies.

ISSUE III

APPELLANT'S DEATH SENTENCE CANNOT STAND, AS IT IS NOT SUPPORTED BY THE WRITTEN FINDINGS OF THE COURT REQUIRED UNDER FLORIDA'S CAPITAL SENTENCING SCHEME.

Under Florida's capital punishment law, the trial judge bears final responsibility for sentencing. Thompson v. State, 456 So.2d 444 (Fla. 1984). He must independently weigh the aggravating and mitigating circumstances to determine whether a life sentence or death is appropriate in the case before him. Patterson v. State, 513 So.2d 1257 (Fla. 1987). If he imposes a sentence of death, the judge is required to set forth in writing his findings upon which the sentence of death is based. § 921.141(3), Fla. Stat. (1987); State v. Dixon, 283 So.2d 1 (Fla. 1973). The court's written findings as to aggravation and mitigation constitute "an integral part of the court's decision; they do not merely serve to memorialize it." Van Royal v. State, 497 So.2d 625,628 (Fla. 1986).

In the instant case the record does not contain the requisite written findings prepared by the sentencing court. Although the record does contain a document entitled "Sentence of Kenneth Koenig" which mirrors the oral remarks of Judge Smith at the sentencing hearing of August 28, 1989 (R416-19), this document does not bear the signature of the judge. The circumstances surrounding its making, such as when it was prepared and by whom[4], are

---

[4] In Patterson this Court held it to be error for the trial judge to delegate to the state attorney the task of articulating in writing the appropriate aggravating and mitigating circumstances.

unknown. Thus it can hardly be said to qualify as the written findings of the sentencing court.

The fact that the "trial judge must justify the imposition of the death sentence with written findings," making meaningful appellate review of the sentence possible, was one of the factors emphasized by the Supreme Court of the United States when it held Florida's capital sentencing scheme to pass constitutional muster in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, 922 (1976). And in Grossman v. State, 525 So.2d 833 (Fla. 1988) this Court found the need for written sentencing orders in capital cases to be so compelling that it formulated a new procedural rule "that all written orders imposing a death sentence be prepared prior to oral pronouncement of sentencing for filing concurrent with the pronouncment." 525 So.2d at 841. The Court spelled out the consequences of failure to comply with this rule in Stewart v. State, 549 So.2d 171, 179 (Fla. 1989): "Should a trial court fail to provide timely written findings in a sentencing proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence."

Because the record does not contain an appropriate written sentencing order signed by Judge Smith, Appellant's death sentence does not comply with constitutional principles of due process of law, and would subject Appellant to cruel and unusual punishment if allowed to stand. Art. I, §§ 9 and 17, Fla. Const.; Amends. VIII and XIV, U.S. Const. Appellant's death sentence must be vacated

and this cause remanded for imposition of a life sentence in accordance with section 921.141(3) of the Florida Statutes.

ISSUE IV

THE TRIAL COURT ERRED IN SENTENCING APPELLANT, KENNETH KOENIG, TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The trial court improperly applied section 921.141 of the Florida Statutes in sentencing Kenneth Koenig to death. This misapplication of Florida's death penalty sentencing procedures renders Appellant's death sentence unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Specific misapplications are addressed in the remainder of this argument.

A. Prior Violent Felonies

The court below found in aggravation that Appellant was previously convicted of another capital felony or felony involving the use or threat of violence to another person, because of his robbery convictions in Canada and Pennsylvania. (R271) As discussed in Issue II in this brief, these convictions were too unreliable to justify using them as aggravating circumstances, and the court should not have considered them.

Furthermore, even if they could properly have been used in aggravation, the robberies were entitled to little weight. Both were remote in time from the instant offense, the incident in Pennsylvania having occurred in 1967 when Appellant was only 20 years old (R516--State's Exhibit Number 14), and the one in Canada having occurred in 1976, some 11 years before the instant homicide. (R516--State's Exhibit Number 15) Neither episode must have been particularly aggravated, in light of the punishments Appellant received. He was treated as a youthful offender in Pennsylvania. (R516--State's Exhibit Number 14) In Canada he was sentenced to two years in prison when the Criminal Code called for one who committed robbery to be "liable to imprisonment for life and to be whipped." (R516--State's Exhibit Number 15)

B. Committed for the Purpose of Avoiding or Preventing A Lawful Arrest

In finding that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, the court below relied upon the following facts (R272-273):

> A week or so before the crime the Defendant told a witness that he needed to pull a scam to get some money and that he may need to off someone in order to get away with it. Mrs. Ida Souta, the victim, is one of the persons he mentioned.
>
> The fact that the Defendant knew the deceased and her son, and they knew him, and the fact that he told to a witness a week or two prior to the murder of his plan is evidence that the Defendant killed Mrs. Souta for the purpose of avoiding or preventing a lawful arrest.

In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Caruthers v. State, 465 So.2d 496 (Fla. 1985); Bates v. State, 465 So.2d 490 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978); Menendez v. State, 368 So.2d 1278 (Fla. 1979). In fact, there must be proof beyond a reasonable doubt that the dominant or only motive for the killing was the elimination of a witness. Perry v. State, 522 So.2d 817 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Doyle v. State, 460 So.2d 353 (Fla. 1984); Oats v. State, 446 So.2d 90 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983).

The mere fact that Appellant and Ida Souta knew each other, and Souta could have identified him, will not support application of this aggravator. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Perry; Floyd; Caruthers. The court's statement that Appellant and the deceased's son knew each other does not enjoy record support and is irrelevant. Rudy Souta was out of town and not involved in the incident in any way.

With regard to the remarks Appellant made to Charles Friedman about having to "off" somebody or take somebody out, these comments were sufficiently ambiguous as to provide scant support for this aggravating circumstance. And Friedman acknowledged that Appellant never said he would have to "off" Mom or Ida Souta. (R81-82)

What little is known about the precise circumstances surrounding Ida Souta's death is susceptible to another interpretation than that arrived at by the trial court: This was a robbery that simply got out of hand. Perhaps Souta offered some resistance, or the killing was an angry reaction to not being able to obtain more money from her. [After all, Appellant told Friedman that Ida Souta was a millionaire. (R72)] This alternative explanation of events renders the aggravator in question inapplicable. See Hansbrough and Schafer v. State, 537 So.2d 988 (Fla. 1989).

C. Mitigating Circumstances

After discussing aggravating circumstances at the sentencing hearing of August 28, 1989, the court below initially referred to many "non-mitigating" circumstances that Appellant contended should be considered, and listed prior psychiatric history, prior deprived environmental background, emotional instability, and remorse and admission of guilt. (R273-274) The court then concluded that Appellant had "proven these mitigating circumstances." (R274)

The court's use of the work "nonmitigating" initially to describe the factors Appellant urged to support a sentence less than death creates an ambiguity in his findings which must be resolved. Was this merely a slip of the tongue, or did it have deeper significance? What this Court wrote in Mann v. State, 420 So.2d 578, 581 (Fla. 1982) is applicable to Appellant's cause: "The trial judge's findings in regard to the death sentence should be of

unmistakable clarity so that we can properly review them and not speculate as to what he found; this case does not meet that test."

Additionally, the court below failed expressly to consider all mitigating circumstances urged by Appellant, as he was obligated to do.

In Magill v. State, 386 So.2d 1188 (Fla. 1980) this Court noted that the sentencing judge in a capital case is charged with the responsibility of articulating the mitigating circumstances he considered "so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death." 386 So.2d at 1191. In Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990) this Court further described the duties of the trial judge when considering evidence in mitigation:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant [footnote omitted] to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla.1987), cert.denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature [footnote omitted] and has been reasonably established by the greater weight of the evidence [footnote omitted]: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla.Std.Jury Instr.(Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating fac-

> tor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.

See also Rogers v. State, 511 So.2d 526 (Fla. 1987). The judge may not refuse to consider any relevant mitigating evidence presented. Stevens v. State, 552 So.2d 1082 (Fla. 1989); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Although the trial court did address some of the factors Appellant urged as mitigating, he did not address them all, as required. For example, defense counsel referred to Appellant's alcohol and drug abuse and good behavior in jail in arguing for a life sentence. (R229-230) Factors of this type have been recognized as legitimate mitigation. See, for example, Parker v. Dugger, 498 U.S. __, 111 S.Ct. __, 112 L.Ed.2d 812 (1991); Nibert v. State, 16 F.L.W. S3 (Fla. Dec. 13, 1990); Campbell; Carter v. State, 560 So.2d 1166 (Fla. 1990); Stewart v. State, 558 So.2d 416 (Fla. 1990); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Copeland v. Dugger, 565 So.2d 1348 (Fla. 1990). Yet the court below omitted any reference to them. The court similarly ignored other factors specifically argued by the defense, such as Appellant's artistic ability and his helping of others while in jail. (R229-230) The court's consideration of

mitigating circumstances thus was incomplete, and not in compliance with his responsibilities under Campbell.

ISSUE V

THE COURT BELOW ERRED IN USING TWO GUIDELINES SCORESHEETS WHEN SENTENCING APPELLANT FOR THE NONCAPITAL OFFENSES OF BURGLARY AND ROBBERY, AND IMPROPERLY SCORED APPELLANT'S ALLEGED PRIOR ROBBERY CONVICTIONS.

The record contains two sentencing guidelines scoresheets, one listing robbery with a deadly weapon as the primary offense at conviction, and the other listing armed burglary as the primary offense. (R420-421) The court apparently used both scoresheets in imposing sentences for the robbery and burglary, as he wrote on both his reasons for imposing departure sentences. (R420-421) Although it was proper to prepare two scoresheets, only one, recommending the more severe sentence, should have been used. Clifton v. State, 16 F.L.W. D780 (Fla. 2d DCA Mar. 22, 1991); Earp v. State, 522 So.2d 992 (Fla. 3d DCA 1988); Benbow v. State, 520 So.2d 312 (Fla. 2d DCA 1988).

The "prior record" section of both scoresheets includes points for one first degree felony and one second degree felony. (R420-421) These points were apparently assessed for Appellant's robbery convictions from Pennsylvania and Canada. For the reasons discussed in Issue II in this brief, these convictions should not have been factored into the guidelines. Furthermore, too many points were scored for at least one of these offenses. Appellant's Canadian conviction was for stealing an unspecified sum of money from a restaurant while armed with a shotgun. (R516--State's Exhibit Number 15) Florida Rule of Criminal Procedure 3.701(d)(5)(a)-

(2) provides that foreign convictions shall be assigned the score for the analogous or parallel Florida Statutes. As discussed in Issue II herein, the Canadian offense would not constitute robbery under the Florida Statutes. Nor would it qualify as any other felony. At most it would constitute petit theft, as defined in section 812.014 of the Florida Statutes, and points only for this misdemeanor should have been assessed for the Canadian offense. Also, Florida Rule of Criminal Procedure 3.701(d)(5)(a)(3) provides that if it cannot be determined whether the offense is a felony or misdemeanor, it should be scored as a misdemeanor.

Appellant must be resentenced for the noncapital offenses charged in counts II and III of the indictment.

CONCLUSION

Appellant, Kenneth Koenig, prays this Honorable Court to grant him one of the following forms of relief:

(1) Vacate his sentences and remand for imposition of a life sentence on the capital count and for resentencing on the robbery and burglary counts, using a single correct scoresheet.

(2) Because the record fails to establish that Appellant's no contest plea to the instant charges was made intelligently and voluntarily, vacate his convictions and sentences and remand to allow Appellant either to plead anew or to proceed to trial.

(3) Vacate Appellant's sentences and remand for a penalty trial before a jury as to the capital count, and for resentencing on all counts.

(4) Vacate Appellant's sentences and remand for resentencing by the court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 4th day of April, 1991.

Respectfully submitted,

Robert F. Moeller

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

ROBERT F. MOELLER
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

RFM/ddv