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IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS CONLEY,

Petitioner

v. CASE NO.: 79,278

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, WILLIAM THOMAS CONLEY, defendant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred herein as either "Respondent" or "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number. References to the transcripts of proceedings will be by the symbol "T" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts petitioner's statement of the case and facts with the following additions.

Issue I

Petitioner did not object to the prosecutor's closing argument that refered to the officer's testimony of why he went to the scene. (T 306)

Issue II

The doctor testified that the history statement he took from the victim was necessary to enable him to perform his examination. (T 205) Although counsel objected to this testimony, he only objected on the ground that it was hearsay. (T 205-206)

Issue IV

Petitioner objected to the prosecutor's comment regarding "liking the defendant" but did not ask for a curative instruction or a mistrial. (T 331)

Issue VII

The trial judge did not prepare his order until all sides had the opportunity to present evidence relating to sentence. (T 386-389)

SUMMARY OF ARGUMENT

ISSUE I:

The lower tribunal did not err when it affirmed the admission of the police officer's testimony. The officer's initial statement of how he came into contact with the victim was not hearsay, as, it was not introduced to prove the truth of the matter asserted.

ISSUE II:

The lower tribunal did not err when it affirmed the admission of the medical doctor's testimony. The objection to the doctor's testimony was that it was hearsay. Appellee acknowledges that it was hearsay, however, it is admissible hearsay pursuant to the evidence code. Counsel below did not preserve the issue of whether the medical diagnosis exception fit these facts. Therefore, this court should affirm. In the event the court reaches the merits of the issue, the statement fit within the exception and was properly admitted.

ISSUE III:

The general rule is that use of a false name is admissible in a criminal trial unless it is unduly prejudicial. Petitioner who actually used the name, and a much worse name (mad dog) cannot establish that the lower tribunal erred in affirming the admission of this testimony. Alternate names were used repeatedly by the petitioner during trial and in the course of making admissions to the officer. The petitioner's statements

were relevant to the issues at trial. The statement was properly admitted and this court should affirm the ruling of the lower tribunal.

ISSUE IV

In this issue, petitioner alleges that the prosecutor's closing argument was improper. Respondent asserts that the argument properly referred to evidence introduced by petitioner that was not relevant. If the comment was error, it was invited or was harmless.

Petitioner's second allegation of error was not preserved by objection, thus, it was waived. Therefore, this court should deny relief.

ISSUE V

Petitioner's previous arguments have not established that error occurred, and, lumping them together does not raise any error he might have established to the level of a denial of due process, therefore, this court should reject petitioner's argument and affirm his conviction.

ISSUE VI

Florida's habitual offender statute, which has been repeatedly found to be valid; does not violate due process, equal protection, or double jeopardy. Also, it is not vague and is not an ex post facto law. Therefore, petitioner's arguments, which have been rejected by every Court in this state, do not establish a basis for reversal.

ISSUE VII

First of all, written orders do not have to be prepared in habitual offender cases. Therefore, if there is a problem with the order no reversible error exists. Further, there is no evidence that the lower court prepared its order prior to taking testimony at the sentencing hearing. Moreover, the cases and rules petitioner suggests should apply to habitual offender sentencings, do not apply. Therefore, petitioner has not identified any reversible error.

ISSUE VIII

The trial court did not err in imposing consecutive sentences on the petitioner. Section 775.021(4) as interpreted by the Florida Supreme Court is a strong statement rejecting the one act, one episode theories of double jeopardy. The statute specifically authorizes separate and consecutive sentences for all separate offenses. Since, petitioner was convicted of separate offenses, consecutive sentences are proper.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN ADMITTING, OVER OBJECTIONS, TESTIMONY OF A POLICE DISPATCH.

The first witness called by the state was the victim. She testified that petitioner sexually assaulted her, robbed her, and confined her against her will. (T 51-73). She also testified that at one point in the ordeal she broke away and ran. She stated that during the time that petitioner chased her down the street with his rifle she was shouting call the police. (T 73).

Officer Brown was the state's second witness. He testified he received a report that someone was being chased down a street by a person with a gun and so he went to investigate. (T 94). Petitioner's assertions that this was hearsay is erroneous. Hearsay is an out of court statement offered to prove the truth of the matter asserted. The officer's statement was not offered to prove the truth of anything. It was offered to establish why it was that the officer went to the scene to investigate. Johnson v. State, 456 So.2d 529 (Fla. 4th DCA 1984). In any event, it was merely cumulative and not reversible error.

Petitioner tries to bring this statement within the rule of State v. Baird, 572 So.2d 904 (Fla. 1991) and Harris v. State, 544 So.2d 322 (Fla. 4th DCA 1989). The facts of this case are

distinguishable, thus, the holdings of those cases do not control. In Baird, the statement of the officer was that Baird's activities were investigated because the officer had been told about Baird's gambling. This was an out of court statement which directly implicated the defendant. In the instant case, the information was generic. It did not implicate anyone. Therefore, the Harris/Baird rule applied by the district court in the cases cited by petitioner is inapplicable.

In any event, the statement was harmless. The victim had already testified in great detail regarding the torture she had endured. Further, petitioner was found under a bed in possession of a firearm. He acknowledge going hunting earlier and even one of his own witness said he had a firearm that day. If error occurred it was harmless. Petitioner has failed to identify any error made by the lower tribunal, thus, this court should affirm.

Petitioner now asserts this information was improperly argued to the jury. He fails to note that no objection was entered by counsel to this argument. Therefore, the effect of the evidence in closing argument is not preserved for review. Jones v. State, 473 So.2d 1244 (Fla. 1985), State v. Cumbie, 380 So.2d 1031 (Fla. 1980). Finally, this issue was not identified and argued to the lower tribunal as reversible error. Since it was not argued in the lower tribunal, it is waived. State v. Wells, 539 So.2d 464 (Fla. 1989). Therefore, this court should not address it.

ISSUE II

THE TRIAL COURT DID NOT ERR IN ADMITTING HEARSAY STATEMENTS MADE BY THE VICTIM TO A DOCTOR WHO EXAMINED HER.

Standard of Review

There are several provisions of law relevant to the determination of this issue. First of all, trial court rulings come to the appellate court cloaked with a presumption of correctness. McNamara v. State, 357 So.2d 410 (Fla. 1978). Moreover, in ruling on the admission or exclusion of evidence a trial court has a great deal of discretion, and, absent abuse, the ruling will not be reversed on appeal. Jent v. State, 408 So.2d 1024 (Fla. 1982). Petitioner arguments do not establish that the lower tribunal erred when it found no abuse of discretion by the trial court.

In this case, Dr. Johnson testified that he took a preliminary history of the event from the victim. In this preliminary statement, she described the nature of the sexual assault. He testified that the victim's statement was necessary to perform his medical examination. (T. 205). At this point defense counsel objected that it was hearsay and that he did not know how the state was going to use it. The state responded that pursuant to section 90.803(4) it was admissible. The court overruled the objection and counsel made no further objection.

Preservation

A Petitioner who brings an issue to an appellate court is asserting trial court error. If, he doesn't provide the trial court with the opportunity to rule on the issue, he cannot identify trial court error. State v. Barber, 301 So.2d 7 (Fla. 1974). Since, his burden when presenting evidentiary issues is to show abuse of discretion, Jent v. State, 408 So.2d 1024 (Fla. 1982), he has to make a specific objection in order to give the court the opportunity to exercise its discretion. Tillman v. State, 471 So.2d 32 (Fla. 1985), Steinhorst v. State, 412 So.2d 332 (Fla. 1986).

Petitioner objected on the ground that the testimony was hearsay. He was correct. The state responded that statements to physicians are within the medical exception to the hearsay rule. The state too was correct. Petitioner said nothing further. Therefore, petitioner never alerted the trial judge to his appellate contention that the testimony was not within the scope of the exception. Therefore, this issue is not preserved and this court should reject petitioner's claim.

In Bowden v. State, 588 So.2d 225 (Fla. 1991), a similar situation arose. The defense objected to the state's use of peremptory challenges. The trial court made the state respond and the state gave its reasons for the challenges. The defense did not challenge the asserted reasons and this Court held that

the failure to object resulted in a waiver of the objection. The rational of Bowden should be applied in this case. Petitioner never objected on the ground that this situation did not fit within the medical exception to the hearsay rule. Therefore, this issue is not properly preserved for appeal and this court should affirm the ruling of the lower tribunal.

Alternatively, the doctor testified that he asked the questions because he needed to know what happened in order to determine how to diagnose and treat the victim. He based his decisions relating to the examination and treatment of this patient on the statements he obtained. Because the description included an allegation of anal sex, the doctor performed an aquatic test. He did this to determine if the victim had suffered any injury to the anal cavity. Based on her statement of vaginal rape, he conducted an examination of her vagina using a speculum.

In this case, the doctor examined and treated the patient for her injuries caused by petitioner's sexual assault. The statements were statements obtained by the doctor during his examination, diagnosis and treatment. They were used by the doctor in the course of providing medical care for the injuries described in her statement. Under this Court's holding in Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), the testimony was admissable.

Petitioner did not object to there admission under the medical exception, nor, did he assert that the admission was barred by other provisions of the evidence code. Therefore, he cannot be heard on this issue now. Finally, introduction of the general description was neither an abuse of discretion nor harmful error as a far more detailed statement of the acts had already been introduced.

ISSUE III

THE TRIAL COURT DID NOT ERR IN PERMITTING TESTIMONY THAT PETITIONER GAVE POLICE FALSE NAME AFTER HIS ARREST.

Petitioner is wrong when he asserts that his out of court statements in which he used an alternate name were improperly admitted. These statements to the police detective were found to be voluntary and were properly admitted.

As an initial matter, introduction of a defendant's alias is not error. Lamb v. State, 354 So.2d 124 (Fla. 3rd DCA 1978) Moreover, even if it is error it is not reversible error unless the defendant can establish prejudice. Rodriguez v. State, 413 So.2d 1303 (Fla. 3rd DCA 1982).

Petitioner could never establish prejudice stemming from this initial giving of a wrong name, for petitioner repeatedly used alternate names for himself. During the course of the detective's interview petitioner used this alternate name, and, used a far more prejudicial name (mad dog). Petitioner who used the name mad dog during the trial cannot establish prejudice emanating from the use of the name Ronald Jones.

More importantly the use of the name, Ronald Jones, was admissible because it was part and parcel of the defendant's statement which contained admissions relevant to the issues being tried. Thus, it was properly admitted. Jackson v. State, 530 So.2d 269 (Fla. 1988), Swafford v. State, 533 So.2d 270 (Fla. 1988).

Petitioner failed to establish that the trial court abused its discretion in admitting the testimony, therefore, this court should affirm the lower tribunal's denial of relief.

ISSUE IV

ACTIONS OF THE PROSECUTOR DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL. (RESTATED).

In the defense case, friends of the defendant employed a scheme, which is statutorily prohibited. Without following the rules relating to introduction of character evidence, they portrayed the victim as a person of low moral character. They testified regarding specific acts of the victim. They testified that even though she was married, they had seen her naked with the petitioner. (T.241) They also claimed that she had exposed herself in public. (T 244,245). They even announced outside the courtroom that "the bitch wasn't worth screwing" and that "she would pay". (T 245-248) The petitioner testified and accused her of sleeping with two black men. (T 259). Some of this evidence was improper propensity evidence. This evidence some of which was admitted over objection (T 238) was allowed to be introduced because the defense stated that they would present a defense of consent.

However, the defense did not establish the affirmative defense of consent for the petitioner did not acknowledge he had sex with the victim. (T 261-264, 268) Because consent was not established, this testimony was improper and statutorily prohibited. §794.022(2), Fla. Stat.

The lower tribunal found that the testimony was admissable as impeachment. Certainly testimony relating to the number of times the victim had been seen in petitioner's company was admissible as impeachment, however, the details of sexual encounters were not admissable absent a legitimate consent defense. In light of the improper character assassination tactics directed toward the victim which were not relevant to any issue in the case, the prosecutor had every right to comment upon the evidence petitioner introduced. This was a comment on the defense or absence of a defense. It was a comment on what was being done to obscure the issues in the case. Therefore, it was permissible.

In any event, petitioner has identified no reversible error. For if any error occurred it was invited by the defendant and as found by the district court harmless. The prosecutor is allowed to comment on the evidence introduced. Petitioner chose to call witnesses and elicit this testimony although he could not tie it to a legitimate defense. He cannot be heard to complain when the prosecutor identifies it and then points out that after parading these consent witness the defendant denies having sex with the victim. (T 328) Petitioner created the situation, he chose the strategy, he invited the comment. White v. State, 446 So.2d 1031 (Fla. 1984), Clark, McCrae v. State, 395 So.2d 1145 (Fla. 1980).

Finally, petitioner now objects to the prosecutor during rebuttal stating that he did not like him. It was petitioner who raised the issue of the jury liking the defendant and the victim. (T 318, 324) Thus, if any error occurred it was invited. Darden v. State, 329 So.2d 287 (Fla. 1976), Clark.

After the trial court admonished the prosecutor, petitioner did not request a curative instruction or request a mistrial. (T 331) It is an established principle of law that when a court sustains an objection and counsel desires to preserve error he must request the court to take some action. Clark v. State, 363 So.2d 331 (Fla. 1978), Simpson v. State, 418 So.2d 984 (Fla. 1982). Petitioner asked for no relief. Therefore, he has waived review of this issue.

Petitioner has identified no preserved error which was not invited by defense tactics. Therefore, he has not established a basis for reversal of his conviction and this court should affirm.

ISSUE V

PETITIONER WAS NOT DENIED DUE PROCESS.

Petitioner argues that the cumulative effect of his alleged errors resulted in the denial of a fair trial. He is wrong. The matters that he asserts as error in issues one through four are not error, were not preserved, or are harmless.. He has not established he was denied a fair trial. Therefore, this court should deny relief. Clark.

ISSUE VI

THE HABITUAL OFFENDER STATUTE IS CONSTITUTIONAL.

Once again this Court is asked to review the constitutionality of the habitual offender statute. Petitioner notes and Respondent acknowledges that several cases with this or similar issues are still pending review in this court. By this reference, petitioner infers his issues have not been decided. He is wrong and this Court should reject his argument.

Petitioner's argument is predicated upon his assumption that the habitual offender statute punishes him for his past conduct. (Brief of Petitioner p. 27). This assumption has been rejected by every court which has considered it. This Court has previously rejected these arguments in Cross v. State, 96 Fla. 768, 119 So. 380 (Fla. 1928), Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962), Eutsey v. State, 383 So.2d 219 (Fla. 1980). In Ross v. State, 17 FLW S367 (Fla. June 17, 1992), this Court again held that the habitual violent offender statute enhances the present penalty. Since, the statute enhances the current offense the law is not ex post facto and defendant is not multiply sentenced in violation of the double jeopardy clause. Therefore, this court should deny relief.

ISSUE VII

THE LOWER COURT DID NOT ERR IN PREPARING AN ORDER IMPOSING HABITUAL OFFENDER SENTENCES.

Petitioner's arguments miss the mark for several reasons. Petitioner's case was filed in the special division of circuit court designed to handle career criminals. (R 6) The prosecutor early on obtained the documentation to establish petitioner's qualifications for habitual offender status. (R 71-89) The appropriateness of this placement not challenged. After the jury verdict, the trial court ordered a presentence investigation be conducted. The report established that petitioner had a prior robbery, a pending probation violation, and another pending burglary. (R 55,56).

The matter came before the court on May 11, 1990. At the hearing (T 382), petitioner presented nothing to the court to refute the factual allegations which established that he was a habitual violent offender. Petitioner also presented no evidence in mitigation. Because of allegation of conflict with his lawyer, the trial judge continued the hearing for a week to allow co-counsel to prepare mitigation. (T 388). The court stated it had not decided on the sentence. At the continued hearing counsel presented no mitigating evidence. The court found he met the criteria, and, he imposed a habitual violent felony offender sentence.

Petitioner concludes that the trial court decided his sentence before the sentencing hearing. The state asserts that he has identified no error. The only time a due process issue arises is when the court decides an issue without given the defendant the opportunity to be heard. Petitioner's conclusion that this happened is not supported by the record. The trial court held a hearing on May 11, 1990 at which the state presented evidence sufficient for habitualization. Petitioner did not contest the fact that he qualified for habitualization. The court passed the case until the May 18th to take aggravating and mitigating testimony. He stated sentence would not be imposed on that date. (T 386). The next portion of the transcript is dated May 23, 1990. The court states that it has heard from the state regarding aggravation and mitigation and he from the defense by way of argument. (T 389) The record reflects that the court had previously heard all the parties desired to say regarding the appropriate sentence and was prepared at that point to sentence the petitioner. Therefore, it was appropriate for the court to come to a sentencing hearing where no testimony was to be presented with his sentencing order. Petitioner has demonstrated no error.

Even though the argument is not relevant to the facts of this case, Respondent will address petitioner's argument. Petitioner asserts that the guideline sentencing case law regarding written reasons for departure should be applied to

habitual offender sentences. In making this argument, he ignores the facts that make Ree v. State, 565 So.2d 1329 (Fla. 1990) inapplicable. Ree is a case which interprets a different sentencing statute. Its holding is mandated by the language of the sentencing guidelines statute. Petitioner was sentenced under a statute which does not require specific written contemporaneous findings.

Moreover, his claims regarding Ree ignores the statutory language contained in section 775.084 Fla. Stat. (1989) and the cases of Parker v. State, 546 So.2d 727 (Fla. 1989) and Long v. State, 558 So.2d 1091 (Fla. 5th DCA 1990). His argument also ignores the distinction between departing from the guidelines and making habitual offender findings. A sentencing guideline departure is a discretionary action on the part of the judge and is the sentencing act itself. The habitual offender findings are not optional. They are findings the court must make independent of the sentencing decision. The choice of sentence is discretionary. Therefore, if the trial court's order setting out these mandatory considerations was prepared in advance no error occurred.

Most of the order consists of two items. The defendant's prior record which qualifies him for the special offender division, and, the facts of the instant case derived from the trial. These items were not subject to significantly change at the sentencing hearing. Moreover, these factual and historical

findings would be necessary regardless of the judges ultimate sentencing decision. Further, other items in the order, such as the recitation of the effects of habitualization are of a form order nature. Finally, petitioner was given multiple opportunities to present mitigation. The order was not prepared until petitioner had an opportunity to present mitigation. Petitioner has identified no error, therefore, this court should affirm.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN IMPOSING CONSECUTIVE SENTENCES UPON PETITIONER. (RESTATED).

Petitioner's argument merges two separate concepts and should be rejected by this court. Petitioner argues that the trial court erred in imposing consecutive sentences.

As to the consecutive sentences, the courts of this state have always recognized the authority of the sentence to impose consecutive sentences. In Palmer v. State, 438 So.2d 1 (Fla. 1983) separate consecutive sentences were upheld for the simultaneous robbery of thirteen separate individuals because thirteen offenses were committed.

Moreover, in the amending section 775.021(4) Fla. Stat. the legislature has made its intent very clear. As this Court in Boatwright v. State, 559 So.2d 210 (Fla. 1990) noted, the legislature intends that each separate offense within a criminal episode be punished separately and the trial court is given express authority to run the sentences consecutively. Thus, petitioner has identified no error committed by the trial court when it imposed consecutive sentences.

Petitioner's assertion that the Daniels v. State, 595 So.2d 952 (Fla. 1992), rationale should be applied to consecutive sentences must be rejected by this Court. Respondent notes that

the continued vitality of Daniels is at issue in the case of Downs v. State, 574 So.2d 1095 (Fla. 1991) after remand Downs v. State, 592 So.2d 762 (Fla. 1st DCA 1992), review granted Downs v. State, no. 79,322. In Daniels, the Court indicated that the issue of whether the mandatory minimums could be stacked was a close call. The state in Daniels failed to notice and argue that other statutory sections refute the major premise unpinning the decision.

Specifically, this Court held that section 775.021(4) was passed to overrule the decision in Carawan v. State, 515 So.2d 161 (Fla. 1987) and did not affect prior rulings regarding mandatory sentences. This holding overlooked section 775.021(2) Fla. Stat. (1989) which states:

> The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides. (e.s.)

When these provisions are examined its is clear that the rules of construction contained in 775.021(4) apply to the habitual offender statute because there is no express provision which excludes their application. This undermines the foundation of Daniels and suggests that it should be modified. It also establishes that the ruling in Daniels should not be extended in the fashion asserted by the petitioner.

Respondent asserts that the trial court has discretion to sentence a defendant as a habitual offender and as to the length

of a habitual violent offender sentence. State v. Brown, 530 So.2d (Fla. 1988). However, the trial court has no discretion whether or not to impose the appropriate minimum mandatory, for the minimum mandatory applies whenever a defendant is sentenced as habitual violent offender. Green v. State, 561 So.2d 1288 (Fla. 5th DCA 1990).

If the court applies the Boatwright analysis, the issue is whether the mandatory penalty attaches to the offense being sentenced for or to the status of being a habitual violent offender. In Boatwright, the court held that the mandatory attached to the offense and approved the stacking. In Palmer, the court attached the mandatory to the status of possessing a single firearm at one location and at a single moment in time, and prohibited the stacking. Instrumental in Palmer was the fact that the legislature chose to enhance the penalty for possession of a firearm in the same way no matter which offense was committed. In Daniels, this court applied Palmer to habitual offender sentencing.

In the habitual offender statute, the length of the sentence and the length of the mandatory minimum depends on the offense committed. The special procedures are placed in a statute which sets forth the findings which must be made to sentence the defendant for the offense he has committed. This statutory structure is offense and individual specific. It does not provide one general mandatory penalty applicable to all

offenses and all individuals. Thus, respondent asserts the statute authorizes consecutive sentences and stacking of mandatory sentences.

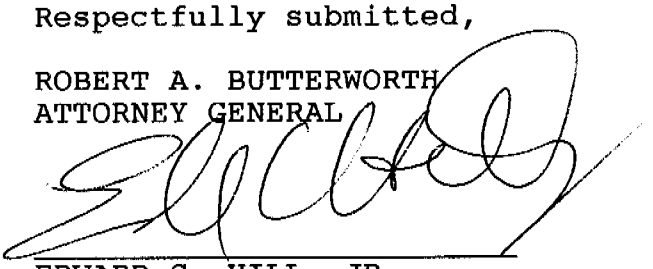
Further, there exists several separate but specific statements of legislative intent which reinforce this conclusion. The first is contained in section 775.084 where the legislature stated that it intended that habitual offender's be incarcerated for an extended period of time. The second is contained in the amended section 775.021(4), Fla. Stat. which the legislature passed to clarify erroneous judicial interpretations, and where it stated that it intended that trial courts have the authority to punish each offense separately, and, multiple offenses consecutively. Finally this interpretation is consistent with the legislature's action unfettering the trial court's discretion by removing habitual offender sentencing from the guidelines. Robinson v. State, 551 So.2d 1240 (Fla. 1st DCA 1989). Therefore this court should reject petitioner's assertions and recede from applying Daniels to consecutive sentence.

CONCLUSION

Based on the above legal citation authorities, Appellee prays this Honorable Court deny petitioner the relief he seeks.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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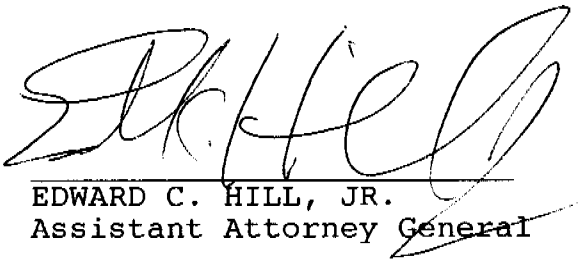
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to GLEN P. GIFFORD, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida 32301, this 27th day of August, 1992.



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