IN THE SUPREME COURT OF FLORIDA

CRUZ Marta-Rodriguez,

Appellant,

v.

CASE NO. 85,326

STATE OF FLORIDA,

Appellee.

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

# BRIEF OF APPELLEE

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**MISCELLANEOUS**

## SUMMARY OF THE ARGUMENT

As his first claim on appeal, Appellant contends that the trial court violated his right to be present during the bench conference when jury strikes were made. It is the state's position that Coney does not apply to the instant case because appellant's trial was held before the opinion became final and, as Appellant concedes, Coney specifically states that the rule applies only prospectively. Furthermore, counsel's failure to object waives any claim of error and error, if any, was harmless beyond a reasonable doubt.

Appellant's next claim challenges the trial court's findings that the murder of Alfredo Garcia was committed to avoid arrest, and that both murders were committed in a cold, calculated, and premeditated manner. However, a review of the sentencing order and the evidence presented clearly demonstrates the applicability of these aggravating circumstances.

Appellant's next issue contends that the trial court's imposition of two death sentences was improper in light of the jury recommendations for life imprisonment. However, Appellant has failed to demonstrate any reasonable basis for the jury recommendations, and therefore he is not entitled to relief on this

issue.

Appellant's last issue challenges the sentences imposed by the trial court on Appellant's noncapital felonies. Specifically, Appellant contends that the minimum mandatory sentences imposed for his use of a firearm in the commission of these offenses should have been ordered to be served concurrently under the reasoning of Palmer V. State, **438 So. 2d** 1 (Fla. **1983).** It should be noted that this issue may be rejected as moot should this Court affirm Appellant's death sentences. State v. Suareg, **485** So. **2d 1283, n. 1** (Fla. 1986). However, even if considered, the issue does not compel resentencing since the facts of this case support the imposition of consecutive minimum mandatory sentences.

## ARGUMENT

### ISSUE I

**APPELLANT HAS FAILED TO DEMONSTRATE *ANY* ERROR PERTAINING TO APPELLANT'S PRESENCE AT THE BENCH CONFERENCE DURING WHICH JURY STRIKES WERE BEING EXERCISED. (Restated)**

As his first claim on appeal, Appellant contends that the trial court violated his right to be present during the bench conference when jury strikes were made. To support his claim of error, appellant relies on Coney V. State, 653 So. 2d 1009 (Fla. 1995), wherein this Court held:

> The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. See Francis. Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. See State v. Melendez, 244 So.2d 137 (Fla.1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry. Our ruling today clarifying this issue is prospective only.
>
> Id. at 1013

It is the state's position that no harmful error has been shown by appellant.

First, Coney does not apply to the instant case. Appellant's trial was held before the opinion became final and, as Appellant concedes, Coney specifically states that the rule applies only prospectively. Id. at 1013. Although Coney was decided on January 5, 1995, this Court did not deny rehearing until April 27, 1995. This is the date that controls the prospective application. *See* Allen v. State, 662 So. 2d 323 (Fla. 1995)("[O]ur ruling in Koon by its own terms is prospective only. [citation omitted] The opinion in Koon did not become final until rehearing was denied in June 1993, over three months after sentencing occurred in the instant case. Because the Koon procedure was not applicable, we find no error[.]")

Pursuant to Allen, the rule of Coney applies only to trials commencing after April 27, 1995. Appellant's trial commenced on January 9, 1995. Therefore, Coney does not control the instant case.

Assuming, *arguendo*, that Coney is applicable to the instant case, appellant is still not entitled to relief as appellant has clearly failed to show that reversible error was committed. The record shows that after defense counsel finished questioning the jury

panel during voir dire, the following exchange occurred:

> THE COURT: Counsel, your client may come up.
> (Court and counsel conferred at bench, as follows:)
> (T 202)

Despite the absence of any affirmative statement that appellant declined this invitation and was, therefore, absent from the bench conference, appellant now argues that the record's silence is sufficient to support a claim that he was not present, that he may not have heard the invitation and that he did not knowingly and intelligently waive his presence. "Reversible error cannot be predicated on conjecture." Pietri v. State, 644 So.2d 1347, 1355 (Fla. 1994), quoting, Sullivan v. State, 303 So.2d 632, 635 (Fla.1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). 'It repeatedly has been held that an appellant may not present an alleged error for appellate consideration on an incomplete record if the matter might affect the determination of the reviewing court." Montalvo v. State, 323 So.2d 674, 675 (Fla. 2DCA 1983), citing, Costantino v. State, Fla.App.1969, 224 So.2d 341, 343 and Royal Flair, Inc. v. Cape Coral Bank, Fla.App.1971, 251 So.2d 895. See, also, McKenzie v. State, 543 So.2d 454 (Fla.App. 2 Dist. 1989) (Can not necessarily equate the absence in the record of a determination with there having been no such

determination).[1] Absent an affirmative statement in the record that the defendant was not present at the bench conference, there is no basis for reversal.

As previously noted, this Court issued its original opinion in Coney on January 5, 1995. That opinion was published at 20 FLW(S) 16 (Fla. January 5, 1995) and contained the following passage:

> The defendant has the right to be physically present at the immediate site where pretrial juror challenges are exercised. (Cite omitted.) Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they were made. (Cite omitted.) Again, the court must certify the defendant's approval of the strikes through proper inquiry. *Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure.*

Coney, 20 FLW(S)16, 17 (Fla. January 5, 1995) (emphasis added)

On April 27, 1995, the Court denied rehearing but issued a

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[1] On June 6, 1996, this Court denied appellee's Motion to Relinquish Jurisdicition to Clarify and/or Reconstruct the Record on Appeal, wherein appellee had requested the opportunity to reconstruct the record with regard to this claim.

revised opinion in which the Court expressly deleted the statement that no contemporaneous objection by the defendant is required to preserve this issue for review. See Coney, 20 FLW(S) 255, 256 (Fla. January 5, 1995). Therefore, because the Court expressly excluded this statement contained in its initial opinion from its revised opinion, an objection is required to preserve this issue for review. Because there was no objection to the procedure employed in the instant case, this issue has not been preserved for review. Not only did Appellant fail to object to his not being present during juror strikes (an indication he was present) but this claim was also not raised in Appellant's motion for new trial. Counsel cannot stand silent as to a purported error until receipt of an adverse verdict and then claim the error requires a new trial. *See* Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993), addressing the related issue of jury panel composition, where the court held that a defendant fails to preserve the issue of an improper racially based striking where, after hearing the State's explanation for the striking, the defendant expresses disagreement with the explanation but nevertheless accepts the panel as ultimately constituted and does not again raise the objection "until after an adverse verdict" has been received. Accord, Brown v. State, 606 So.2d 742, 744 (Fla. 1st DCA 1992), approved 620

So.2d 1240 (Fla. 1993). This analysis should apply to the instant case where the record reflects the defense sat silent and did not raise the purported error until now.

Finally, the state maintains that if Appellant was not present during the strikes, the court's failure to get Appellant's waiver for his presence or for his acceptance of the strikes made is harmless beyond a reasonable doubt under Coney.

## ISSUE II

**THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING CIRCUMSTANCES OF AVOID ARREST *AND* COLD, CALCULATED, AND PREMEDITATED. (Restated)**

Appellant's next claim challenges the trial court's findings that the murder of Alfredo Garcia was committed to avoid arrest, and that both murders were committed in a cold, calculated, and premeditated manner. However, a review of the sentencing order and the evidence presented clearly demonstrates the applicability of these aggravating circumstances.

As to the finding of avoid arrest, the trial court noted that Alfredo Garcia was previously unknown to Appellant, and Garcia's arrival with Miguel was unexpected; and that valuables were not taken from Garcia's body after the murder (R. 490, T. 989). As in Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994), "there was little reason to kill [Garcia] other than to eliminate the sole [witness] to his actions." In Thompson, as in the instant case, two victims were robbed at one location and then kidnapped, taken to remote locale, and shot execution-style. Where a victim is transported from one area to another, and no other reasonable motive is suggested, a trial court may properly find that the murder was committed to avoid a lawful arrest. Hall v. State, 614

So. 2d 473 (Fla. 1993); Swafford v. State, 533 So. 2d 270 (Fla. 1988).

Proof of the avoid arrest aggravator may be presented by circumstantial evidence, from which the motive for the murder may be inferred. Preston v. State, 607 So. 2d 404, 409 (Fla. 1992), cert. denied, ___ U.S. ___, 123 L. Ed. 2d 178 (1993). A motive of witness elimination is the only reasonable inference to explain Garcia's murder on the facts of this case. Garcia's arrival was clearly unexpected. Earlier in the day, Rodrigo Miguel had come alone to negotiate the transaction for later that evening. None of the defendants knew Garcia. Garcia was not killed for his money, since jewelry and over one hundred dollars cash was found on his body. The only logical conclusion is that Appellant did not want to leave Garcia as a witness. Appellant had no mask to hide his identity; so he used two bullets to protect that identity. Alfredo Garcia truly died because he was in the wrong place at the wrong time.

The evidence also clearly supports the trial court's finding that both murders were committed in a cold, calculated, and premeditated manner, without any pretense of justification. Although Appellant questions whether the trial court intended this factor to apply to both murders, it clearly did since the court did not expressly

restrict the applicability to one victim, as was done with the avoid arrest factor. The sentencing order discusses both victims in reciting facts to support the applicability of this factor. There is no ambiguity in the order to suggest that this factor was only found as to one victim.

The lack of evidence showing murder to have been part of Appellant's initial plan does not preclude the finding of this factor, where it is clear that murder quickly became the primary objective. The length of time after the decision to kill was made, and particularly the transportation of the victims to another location, as well as the manner in which the victims were killed, all support the applicability of this factor. While others tried to convince Appellant not to kill the victims, Appellant chose to ignore them and prepare the victims for their death. Then Appellant armed himself and determined it was time for the victims to die.

Within moments of the victims' arrival at the trailer, Appellant helped throw them to the ground and disable them. Once the victims were hooded and taped, he quickly got a loaded gun and began to demand drugs and money. When it wasn't produced, he began to state that they would die. He then placed the gun to their heads and cocked it, and kicked Miguel in the face.

He next had the victims loaded like bound animals into a car, and driven approximately fifteen minutes to a secluded area. Once there, he unloaded and continued to threaten them. Despite the victims' pleas to live, he shot one, then the other, execution-style. Both were shot at close range to the head, and Garcia was also shot in the middle of his chest. Appellant wanted them dead, and made sure he accomplished his goal. Miguel and Garcia didn't stand a chance.

The factual similarity between this case and Thompson was noted above. In Thompson, this Court also upheld the finding of CCP. 648 So. 2d at 696. Noting the advance procurement of the weapon, the transportation to an isolated location, and the lack of resistance from the victims, this Court found "sufficient evidence from which the trial judge could find that the murders were cold, calculated, and premeditated." Id; see also, Swafford, 533 So. 2d at 277.

The facts of this case clearly refute Appellant's assertion that these murders were "essentially a spontaneous and angry reaction" to a robbery that did not go as planned. The reflective thought and calm deliberation preceding the murders demonstrates the heightened premeditation necessary, not the "fit of rage or panic" suggested in Appellant's brief. No error has been demonstrated in

the finding of this factor.

Appellant has also failed to establish error in the trial court's finding of both CCP and avoid arrest. Relying on Derrick v. State, 581 So. 2d 31 (Fla. 1991), Appellant contends that the decision to kill Garcia could not have been cold, calculated, and premeditated since Garcia's arrival was unexpected. This contention overlooks the fact that the heightened premeditation for CCP arose after Garcia and Miguel arrived at the trailer. The facts are clearly distinguishable from Derrick, where the victim was stabbed to death at his convenience store after recognizing Derrick during the robbery of the store. This Court was remanding for a new sentencing proceeding and did not expressly reject either factor, but simply noted they appeared inconsistent and noted that the State may present new evidence on remand to support both factors. 581 So. 2d at 36-37.

The trial court properly found both aggravating circumstances of avoid arrest (as to Garcia) and cold, calculated, and premeditated on the facts of this case. Appellant has not demonstrated any error in this issue, and this Court should therefore affirm the death sentences imposed.

## ISSUE III

**THE TRIAL COURT PROPERLY OVERRODE THE JURY RECOMMENDATIONS OF LIFE IMPRISONMENT. (Restated)**

Appellant's next contends that the trial court's imposition of two death sentences was improper in light of the jury recommendations for life imprisonment. However, Appellant has failed to demonstrate any reasonable basis for the jury's recommendations, and therefore he is not entitled to relief on this issue.

In his argument on this issue, Appellant actually presents three separate claims; 1) the trial court's alleged deficient consideration of the mitigating evidence, 2) the admissibility of Nicholson's testimony which was not presented to the jury, and 3) the trial court's findings as to the lack of other significant aggravation, to support his claim that the jury override was improper. As will be seen, none of these claims present any error in the imposition of the death sentences.

1) Consideration of Mitigation:

Appellant contends that the jury override was improper because the judge did not sufficiently consider the proposed evidence in mitigation. Specifically, Appellant contends that the court should

have found and weighed the following mitigating factors: Appellant's ineligibility for parole for 50 years; Appellant's intoxication on the night of the crime; Appellant's relationship with his mother, siblings, common law wife, and daughters, as well as his troubled childhood; Appellant's capacity for gainful employment and good work; Appellant's youthful age of 24; and the respective roles and participation of other co-defendants, particularly Alice Knestaut. This argument misconstrues the nature of review necessary to determine the propriety of an override.[2]

In general this Court has held "that a trial judge's override of a jury's recommendation of life will be upheld only where the record supports the trial judge's finding that there is no reasonable basis upon which the jury could have based its recommendation. Tedder v. State, 322 So.2d 908 (Fla.1975)." Williama v. State, 622 So.2d 456, 465 (Fla. 1993). In rejecting the jury's recommendation the trial judge, in the instant case, stated:

> The Court very carefully considered and weighed the aggravating circumstances and the non-statutory mitigating circumstances presented by the defense being ever mindful

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[2] Furthermore, the state maintains that the trial court's consideration of the **proposed** mitigating evidence comports with the requirements of Campbell v. State, 571 *So.* 2d 415 (Fla. 1990).

> that human life is at stake. The Court finds that the non-statutory mitigating circumstances presented by the defense are either refuted by the evidence or simply are of a nature that they are not mitigating circumstances. The Court, therefore, finds no mitigating circumstances to exist. The Court has given great weight to the jury's recommendation of Life. The Court finds, however, that the facts, particularly those facts not available to the jury, suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. The Court further finds that the contemporaneous conviction of the capital felonies is a valid, sufficient reason to depart upward on the sentencing guidelines for the non-capital crimes.
>
> (R 496)

A review of the evidence before the court in the instant case and a comparison of similar cases where this Court has upheld a jury override reveals that no reasonable basis for the jury's life recommendation exists and, therefore, the trial court did not err in imposing sentences of death for the double homicide. **Garcia v. State**, 644 So.2d 59, 60 (Fla. 1994); Williams v. State. 622 So.2d 456, 465 (Fla. 1993).

In Williams v. State, 622 So.2d 456, 465 (Fla. 1993), Williams, like Marta-Rodriguez, argued that his jury override was improper because his two co-defendants were given lesser sentences. Upon rejecting that argument this Court stated:

> Williams first argues that one reasonable basis for the jury's recommendation of life was in response to the lesser sentences received by the Frazier brothers. We disagree. Even with the elimination of two aggravating factors, "the evidence in this case provides no basis upon which the jury could have recommended life imprisonment in **order** to prevent disparity in sentencing." Thompson, 553 So.2d at 158. The record unequivocally establishes that Williams was in charge and that he ordered his "enforcers" to recover his drugs and money and to kill anyone involved with the theft. Furthermore, the record also reflects that the Fraziers were less culpable because they disobeyed Williams' orders by allowing Crenshaw to escape and because they did not kill any of the victims.
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> . . . We further note that the jury's recommendation could have been based on defense counsel's emotional closing argument, which we find is similar to arguments that we have held " 'overstep[] the bounds of proper argument.' " White v. State, 616 So.2d 21, 26 (Fla.1993) (quoting Taylor v. State, 583 So.2d 323, 330 (Fla.1991)). We conclude that the trial judge's override was warranted. Francis v. State, 473 So.2d 672 (Fla.1985), cert. denied, 474 U.S. 1094, 106 **S.Ct. 870, 88 L.Ed.2d 908 (1986).**
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> Wi11iams v. State, 622 So.2d 456, 465 (Fla. 1993); Accord, Torres-Arboledo V. State, 524 So.2d 403, (Fla. **1988)**

Circuit Judge, Diana Allen, thoroughly analyzed the disparate sentencing and found that it was appropriate based on the lesser culpability of Marta-Rodriguez' codefendants:

> 2. The evidence, though not

establishing a reasonable doubt as to guilt, leaves an uncertainty about whether the Defendant was the actual shooter. The jury did not have the benefit of testimony from anyone who was at the scene and may have had lingering doubt about whether the Defendant was the actual shooter. This Court has no such doubt based upon testimony and cross examination of a co-defendant to which the jury was not privy due to severance of the six defendants for trial and the only testifying co-defendant, Luis Pecina, not being present at the scene of the murder. The only direct evidence presented to the jury that Defendant RODRIGUEZ was the shooter was a statement made by Defendant RODRIGUEZ to the father of co-defendant Alice Knestaut. The credibility of this witness was in issue due to his relationship to an untried co-defendant and his immunity from prosecution for assisting in the destruction of evidence, i.e. the burning of a rug, pillow cases, clothes and shoes. This mitigating circumstance is not established.

3. Co-defendant Luis Pecina, a six-time convicted felon, was permitted to plead guilty to charges of Attempted Robbery only and will receive a sentence of five-and-a-half years imprisonment. This is not a mitigating circumstance where the degree of culpability is so disparate and co-defendant Pecina was not present at the scene of the murders.

4. Co-defendant Pecina testified after receiving a 'deal" from the State. This is not a mitigating circumstance.

6. Co-defendant Alice Knestaut exerted a significant and substantial influence on Defendant RODRIGUEZ at the time of these offenses. While there is evidence to suggest that co-defendant Knestaut came up with the plan and fully participated, Defendant RODRIGUEZ was the reason for the plan in the first place and participated fully up to and

> including pulling the trigger three times, going back to the crime scene to remove evidence and assisting in the destruction of evidence. This mitigating circumstance is not established.
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> 7. The plan which resulted in the victims' deaths was initiated and instigated by co-defendant Knestaut. Defendant RODRIGUEZ was the reason for the plan. This mitigating circumstance is not established.
>
> (R 492-94)

The trial court's finding is clearly supported by the record and the law. This Court has repeatedly held that a death sentence is not disproportionate where a less culpable codefendant receives a life sentence. Hannon v. State, 638 So. 2d 1283 (Fla. 1992); Coleman v. State, 610 So. 2d 1283 (Fla. 1992); Hayes v. State, 581 So. 2d 121 (Fla. 1991).

Marta-Rodriguez also argues that the trial court's rejection of his eligibility for parole in 50 years was error, in that his jury unmistakably found great significance in the potential sentences facing him if they recommended a life sentence. Clearly, this type of evidence is an appropriate consideration in the determination of mitigating evidence. Jones v. State, 569 So. 2d 1234 (Fla. 1990). However, the undersigned can find no cases where this Court has ever held that a defendant's potential length of sentence, *standing alone,* provides a reasonable basis for a jury to recommend life.

cf. Turner v. State, 645 So. 2d 444 (Fla. 1994). However, in Garcia v. State, 644 So.2d 59, 63-64 (Fla. 1994), Garcia also claimed that the trial court erred in failing to find any of the following mitigating circumstances: (1) the defendant was under the influence of extreme mental or emotional disturbance; (2) defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (3) defendant's consumption of beer; (4) defendant's exemplary prison record; (5) *the alternative to the death penalty was life in prison without chance of parole for fifty years;* (6) lack of premeditation; (7) defendant's employment; (8) defendant's peaceful nature; (9) codefendant sentenced to life in prison; and (10) defendant had no significant history of prior criminal behavior. In rejecting Garcia's challenge to the jury override, this Court held:

> The record establishes that the trial judge expressly addressed and rejected the extreme mental and emotional disturbance factor, as well as the defendant's capacity to appreciate the criminality of his conduct. Further, the trial judge could properly find from the evidence that there was insufficient evidence of intoxication to establish that as a mitigating factor. Finally, we find that the trial judge did not err in rejecting the remaining alleged mitigating factors because the record does not support any of these

> factors . . . .
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> . . . We also find that the trial judge did not err in sentencing Garcia to death for the murder of Mabel despite the jury recommendation of life in prison. We note that the trial judge found the same aggravating and mitigating circumstances applied to the murders of both Julia and Mabel. We find that under the circumstances of this case no reasonable person could differ as to the appropriateness of the death penalty for the murder of Mabel. See Torres-Arboledo v. State, 524 So.2d 403, 413 (Fla.) ("[A]n override sentence of death will not be upheld unless the facts justifying a death sentence are so clear and convincing that no reasonable person could differ as to its appropriateness."), cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988).
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> Accordingly, we affirm Garcia's convictions on two counts of first-degree murder, one count of sexual battery, and one count of armed burglary, and we affirm Garcia's sentences including his two sentences of death.
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> Garcia v. State, 644 So.2d 59, 63-64 (Fla. 1994)

To follow appellant's argument to its logical conclusion, a jury recommendation of life in the case of every double homicide where the defendant would be facing a minimum sentence of 50 years, would be more reasonable than a recommendation of life for a single murder where the defendant would have been eligible for parole in

*only* 25 years.[3] It defies logic that the larger the number of victims, the more reasonable a jury's recommendation of life.

This is not a case where the judge disallowed the presentation of evidence or where the judge thought she could not consider it at all. A review of the record shows that Marta-Rodriguez was allowed to argue his parole eligibility to the jury, that the judge considered whether it was mitigating in *this* case, and based on the facts before her, she did not find it mitigating. (R 496) No error was committed.

However, assuming, arguendo, that the judge should have given the parole eligibility some weight, it is harmless. Armstrong v. State, 642 So.2d 730 (Fla. 1994). As previously noted, the defendant's parole eligibility alone does not provide a reasonable basis for a life recommendation.

As to Marta-Rodriguez' claim that the judge failed to adequately consider his intoxication on the night of the crime; relationship with his mother, siblings, common law wife, and daughters; capacity for gainful employment and good work; and youthful age of 24, these claims were thoroughly discussed in the sentencing order and

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[3] Under Florida law a defendant whose crimes were committed after October 1, 1995, is no longer subject to release after serving 25 years. cf., Sec. 775. 082 (1) Fla. Stat. (1987) and Sec. 775. 082 ,(1) Fla. Stat (1995).

rejected, as follows:

NON-STATUTORY MITIGATING FACTORS

The defense has argued a number of non-statutory mitigating factors relating to the Defendant's character, record, background and any other circumstance of the offense which the defense argues provide a reasonable basis for the jury's recommendations of life imprisonment.

1. The offenses were committed so closely in time and place as to indicate a single period of aberrant behavior. This mitigating circumstance is rebutted by the history of criminal acts outlined in the pre-sentence investigation beginning as an adult on 4-20-87 including the conviction for aggravated assault with a firearm in 1988 and continuing after the Defendant's release from prison on 4-11-91, and culminating in these murders. There is further evidence that the Defendant was engaging in major drug deals for which he was never arrested. This mitigating circumstance is not established.

5. Defendant was intoxicated at the time of the incident. While there is evidence that the Defendant was perhaps under the influence of marijuana or alcohol there is no evidence that such marijuana or alcohol use mitigates this offense. To the contrary, the evidence suggests that Defendant RODRIGUEZ was a chronic user of marijuana and alcohol and nothing to show this in any way contributed to his actions on this occasion. This is not a mitigating circumstance in this case.

9. The Defendant has demonstrated caring and concern for his family. At the time leading up to this murder Defendant RODRIGUEZ was not living with his common-law 17-year-old wife, but was apparently cohabitating with co-defendant Knestaut. The only "care and concern" established by the evidence was that he on occasion associated

with family. This mitigating circumstance is not established.

10. The crimes committed **by** the Defendant were out of character and Defendant's prior record does not indicate a pattern of felonious criminal activity. This mitigating circumstance is refuted **by** the record of previous arrests, convictions, and criminal activity including drug dealing and firearms offenses.

11. A sentence of death would deprive the Defendant's daughters of a father, mother of a son, and brothers and sisters of a brother; Defendant's family do not want the Defendant to receive the death penalty and would maintain a relationship with him if sentenced to life imprisonment; Defendant has a large family; Defendant has the ability to engender feelings of love and respect and is able to develop and maintain meaningful social relationship with others. This family background is not a mitigating circumstance.

12. The Defendant is a family man who has been a productive member of society. This is rebutted **by** the evidence. The Defendant apparently has had a series of girlfriends whom he has battered and the only thing produced for society by the Defendant is children. The Defendant's economic activity was minimal except for his illegal drug trade.

13. Defendant did not flee, offered no resistance at the time of arrest and cooperated with the police. The Defendant was not indicted or apprehended until several months after this crime during which he was aware of the investigation, he assisted in destruction of evidence, and he lied in an effort to minimize his culpability at the time of his arrest and at the sentencing hearing. This is not a mitigating circumstance.

(R **488-496)**

In Washington v. State, this Court reviewed a similar claim and held:

> . . . We have affirmed life overrides in cases similar to the instant one. For example, in Coleman v. State, 610 So.2d 1283, **1287** (Fla.1992), cert. denied, --- U.S. ----, 114 S.Ct. **321**, 126 L.Ed.2d **267** (1993), the aggravating circumstances were: (1) a felony committed while engaging in a robbery, sexual battery, burglary, and kidnapping; (2) heinous, atrocious, or cruel; (3) cold, calculated, and premeditated; and **(4)** a previous conviction for a violent felony. *The* mi*tigating* ***circumstances were*** *the* ***defendant's close family*** *ties* ***and maternal support.*** See also Mills v. State, 476 So.2d 172 (Fla.1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986); Spaziano v. State, **433** So.2d **508** (Fla.1983), aff'd, **468** U.S. **447, 104** S.Ct. 3154, **82** L.Ed.2d **340** (1984). . . . When faced with the facts of the instant case, we can only conclude that the judge's imposition of a death sentence was proper. Washington is convicted of causing Ms. Berdat's death by homicidal violence, including manual choking and blunt trauma to the chest with multiple rib fractures. There are four valid statutory aggravating circumstances, no statutory mitigating circumstances, and inconsequential non-statutory mitigating circumstances. We disagree with Washington's assertion that the testimony of his mother and Dr. Merin, a clinical psychologist and neuropsychologist, provided a rational basis, i.e., rehabilitation potential, for the jury's recommendation of life. We agree with the trial court's finding that Washington's potential for rehabilitation is extinguished by the "totality of [his] past criminal history, and his behavior in jail to date."

> Since we are unable to find a reasonable basis for the jury's recommendation of life imprisonment, Washington's death sentence is affirmed, Washington v. State, 653 So.2d 362, 367 (Fla. 1994). (emphasis added)

As none of the foregoing claims were supported by the evidence, they could not have provided a reasonable basis for the jury's life recommendation.

**2) Nicholson's testimony**

As to the admissibility of Nicholson's testimony, Appellant insists that his right to due process was violated by the trial court's consideration of evidence which was never presented to the jury. This argument was expressly rejected in Engle v. State, 438 So. 2d 803, 813 (Fla. 1983). Appellant appears to concede that Engle permits the consideration of such evidence, but claims due process is implicated because the process is skewed when a judge relies on a jury recommendation that is based upon less than all of the evidence. In Taylor v. State, 638 So.2d 30, 33 (Fla. 1994), this Court rejected a similar claim:

> Taylor next argues that it was error for the trial judge to consider evidence which had not been provided to the jury and which had not been properly admitted under section 921.141, Florida Statutes (1987). At a hearing held subsequent to the penalty phase proceeding but prior to sentencing, the trial judge allowed a detention deputy to testify that Taylor had

> attacked him with a homemade razor at the jail. The incident had occurred after the jury had been discharged. The evidence was submitted in rebuttal of the argument in mitigation that Taylor had behaved well in custody. Taylor could not have been prejudiced by the jury's failure to hear this unfavorable testimony. There was no error in the admission and consideration of this evidence. See Engle v. State, **438** So.2d **803** (Fla.1983), cert. denied, **465** U.S. **1074, 104** S.Ct. 1430, **79** L.Ed.2d 753 **(1984).**

Taylor v. State, **638** So.2d 30, **33** (Fla. **1994)**

As in Taylor, appellant could not possibly have been prejudiced by the fact that the jury did not hear prejudicial information specifically identifying him as the shooter. Appellant speculates that the jury would have doubted Nicholson's credibility, and therefore may not have recommended a death sentence even if aware of his testimony. Consequently, he suggests that the trial court unreasonably discounted the jury recommendations herein due to this testimony, and the override should not be sustained. However, the sentencing order does not reflect that the trial court discounted the jury recommendations based on Nicholson's testimony; the order specifically notes that "great weight" was given to the recommendations (R. **496).** It is clear that the trial court's conclusion that no mitigating circumstances where established led to the jury override. On these facts, any possible procedural

error in the jury's failure to consider Nicholson's testimony could only have benefitted Appellant, and he is not entitled to relief on this basis.

**3) Aggravating factors**

The third prong of Appellant's attack on the jury override focuses on the applicability of the aggravating factors of avoid arrest and CCP, as discussed in Issue II, and suggests that the weight of the remaining factors of prior violent felony conviction and during the course of a robbery/kidnapping is too weak to support a jury override. Of course, it is not this Court's function to reweigh factors found by the trial judge. As already noted, the court below properly applied avoid arrest and CCP to the facts of this case, and therefore this was a case of strong aggravation. It is also worth noting that the prior violent felony conviction factor was not just based on the contemporaneous offenses, but also on an aggravated assault committed by Appellant in 1988.

Based on the foregoing, the state urges this Honorable Court to affirm the death sentence.

## ISSUE IV

**THE TRIAL COURT PROPERLY STACKED THE MINIMUM MANDATORY SENTENCES IMPOSED ON THE NONCAPITAL FELONIES. (Restated)**

Appellant's last issue challenges the sentences imposed by the trial court on Appellant's noncapital felonies. Specifically, Appellant contends that the minimum mandatory sentences imposed for his use of a firearm in the commission of these offenses should have been ordered to be served concurrently under the reasoning of Palmer v. State, 438 So. **2d** 1 (Fla. 1983). It should be noted that this issue may be rejected as moot should this Court affirm Appellant's death sentences. State v. Suarez, 485 So. **2d 1283**, n. **1** (Fla. 1986). However, even if considered, the issue does not compel resentencing since the facts of this case support the imposition of consecutive minimum mandatory sentences.

This Court has recognized that palmer's prohibition against stacking minimum mandatory sentences does not apply "when the same crime is committed in a nonsimultaneous manner or when different crimes are committed in the same episode." Downs v. State, 616 ***So.*** 2d 444, 445 (Fla. 1993). In the instant case, the victims were robbed separately and the kidnappings involved putting the victims in separate areas of **a** car and then transporting them to another

location in order to kill them. Appellant and his codefendants did not merely hold a gun on both victims and rob them with the same act, as in Palmer. Rather, the robberies were clearly distinct, separated in time and location from the kidnappings, and both victims were robbed and kidnapped individually. Therefore, all four offenses were different and nonsimultaneous, supporting the imposition of consecutive minimum mandatory sentences.

In LeCroy v. State, 533 So. 2d 750, 754 (Fla. 1988), this Court rejected this argument where two separate victims were robbed and killed. The uncontradicted evidence in LeCroy showed that one victim was killed and robbed and, after an indeterminate lapse of time, the other was killed and robbed when she arrived on the scene. Similarly, in State v. Thomas, 487 So.2d 1043 (Fla. 1986), this Court approved consecutive minimum mandatory sentences for first degree attempted murder and aggravated assault where the defendant shot a woman in her trailer, stopped to reload then chased her outside, shot at her son, and then shot at the woman again. The instant case clearly involves crimes as distinct as those committed in Thomas.

The facts of this case are comparable to those in Murray v. State, 491 So. 2d 1016 (Fla. 1986). Murray and a codefendant abducted a young woman by gunpoint from a carwash. Murray drove as

his cohort held a gun on the victim, threatened her life, and went through her purse for money. After Murray parked the car, both men sexually assaulted the victim. They took her necklace then drove her to a nearby wooded area. Murray walked with the woman away from her car, kissed her goodbye, then shot her through the back of the head as she walked away. This Court agreed that the minimum mandatory sentences for two counts of sexual battery by Murray must be served concurrently, but permitted the consecutive imposition of the minimum mandatory sentence on the robbery conviction. Approving the district court's conclusion that the sexual batteries were sufficiently separate from the robbery, this Court reiterated that Palmer did not prohibit the stacking of minimum mandatory sentences for separate instances, even where offenses were committed in a single criminal episode. 491 So. 2d at 1123. See also, Ross v. State, 493 So. 2d 1015, 1016 (Fla. 1986) (affirming stacked minimum mandatory sentences for robbery and kidnapping for Murray's codefendant based on same criminal episode).

This case did not involved the commission of a single act giving rise to different offenses, as in Palmer and McGouirk v. State, 493 So. **2d** 1016 (Fla. 1986). Therefore, the trial court's imposition of consecutive minimum mandatory offenses must be affirmed.

## CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 13 day of June, 1996.

COUNSEL FOR APPELLEE.