IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON,

Appellant,

vs. **CASE NO. SC00-979**

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF FACTS

Appellee generally accepts Appellant's Statement of Case and Facts. However, for purposes of addressing Issues III and IV which concern the statutory mitigator relating to whether Appellant suffered from an extreme mental or emotional disturbance at the time of the murder, the following additional Statement of Facts, derived from the penalty phase, is provided.

Penalty Phase

The penalty phase of Appellant's trial began with an opening argument from the State outlining the five aggravators which would be proven by the evidence: that Appellant had committed prior violent felonies; that the murder of Leanne Coryell was committed during the course of burglary, kidnapping, sexual battery, and robbery; that the murder was committed for the purpose of avoiding arrest; that the murder was committed for pecuniary gain; and that the murder was especially heinous, atrocious and cruel. (16/1472-1473).

Appellant's counsel countered, in his opening statement, that two neuropsychologists would testify that Appellant suffers from an abnormal brain dysfunction and has seizure disorders. (16/1475-1476). According to defense counsel, this frontal lobe damage robbed Appellant of the ability to make judgments and impaired his ability to control his impulses. (16/1477). However, defense counsel specifically stated that his brain damage did not affect

Appellant's ability to tell right from wrong. (16/1477). Notably, defense counsel made no mention of any extreme mental or emotional disturbance suffered by Appellant at the time of the offense. (16/1475-1480).

The State's evidence against Appellant at penalty phase included the testimony of three victims of prior violent felonies committed by Appellant. Susan Reeder testified that, in 1974, Appellant abducted her at knife point, took her to a secluded location, and beat her with a belt and raped her. (17/1533-1537). Julia Maynard testified that, in 1988, Appellant broke into her home, put a knife to her throat, and forced her to pose in various stages of undress as he took pictures of her. (17/1539-1541). Appellant was later convicted of burglary with an assault upon Ms. Maynard. (17/1541-1542). Also, in 1988, Appellant abducted Carolyn Sue Peak at knife point as she was getting out of her car at home. (17/1543-1544). Appellant tied her up, placed her in the back seat of her car and began driving with her. Fortunately for Ms. Peak, a police officer pulled over her car and Appellant was apprehended. A camera, surgical gloves and a mask were later found in her car. (17/1544-1547).

Dr. Russell Scott Vega also testified to the results of the autopsy he performed on the victim in this case. Dr. Vega opined that the last injury received by Ms. Coryell was manual strangulation of her neck. (17/1549-1550). The injuries she

received to her buttocks, chin, upper body and vaginal area occurred prior to the strangulation and while she was still conscious. (17/1550).

The remaining State witnesses provided victim impact evidence. These witnesses included the victim's father, Thomas Edward Morris, (17/1567-1571), the victim's employer, Dr. Gregory Scott Dyer, (17/1572-1578), and the victim's pastor, Matthew Hartsfield, (17/1578-1580).

The defense then put on four experts to testify to Appellant's mental health and frontal lobe brain damage. Not one of these experts testified that Appellant acted under any extreme mental or emotional disturbance during the actual commission of the offense.

Dr. Frank Wood, a neuropsychologist, examined Appellant and reviewed the results of his PET scan. (16/1493-1495). Dr. Wood found abnormalities in Appellant's frontal lobe functioning. (16/1498-1500). The scan showed less metabolism on the right side of Appellant's brain than on the left. (16/1503). Dr. Wood further explained that the scan, taken March 17, 1998, showed Appellant was underutilizing the frontal lobe which correlates with poor judgment, impulsivity and disinhibited behavior at the time of the scan. In order to infer a chronic condition, the scan reading must be made in connection with other medical and behavioral records. (16/1508-1509). Based upon other medical records, Dr. Wood concluded that Appellant was not as able to exercise judgment

or impulse control as normal people would. (16/1509). However, the scan measurements show only frontal lobe activity, and are not direct measures of impulse control or judgment. The measurements are below normal, but the assessment of impulsivity and poor judgment is only an inference from those measurements. (16/1510).

According to Dr. Wood, Appellant's frontal lobe impairment may have been caused by problems with cerebral blood vessel supply which may be supported by his medical records. (16/1511-1512). Dr. Wood believed Appellant's condition went back to at least the age of fourteen. (16/1513). Finally, Dr. Wood did not believe that Appellant's bad judgment problems were so serious as to make him incompetent to stand trial. (16/1514).

Neurologist Dr. Diana Pollock also testified to her treatment of Appellant for blackouts prior to the commission of the instant offense. (17/1582). At that time, Appellant complained of headaches, tingling and weakness on the left side of his body, loss of consciousness and spells of confusion. (17/1583). Dr. Pollock conducted tests and found the results suggestive of Appellant's complaints. She prescribed medication. (17/1585-1586). However, the MRI and EEG did not reveal any abnormal structural deficiencies in Appellant's brain. (17/1589).

Dr. Michael Maher, a physician and psychiatrist, evaluated Appellant to determine if he was competent to stand trial, whether there was evidence of mental illness that might relate to sanity

issues at the time of the offense, and with regard to mitigation evidence. (17/1593). As to competency, Dr. Maher found Appellant had some significant mental illness, but not so as to impair the abilities necessary to stand trial. (17/1594-1595). Based upon his examination and the PET scan results, Dr. Maher concluded that Appellant's normal ability to inhibit an urge into behavior was significantly impaired and had been since childhood. (17/1599-1600). Appellant also suffered from a dissociative disorder and seizures related to his brain abnormality. (17/1601-1602).

Dr. Maher's only comments with respect to Appellant's behavior at the time of the murder came on cross-examination. Dr. Maher then admitted, "I think he was experiencing a mild dissociative episode. I don't think it was severe. I don't think it was to the point where he didn't know who he was or who she was or what the likely result of his actions would be. I think it was to the point where he didn't have the capacity to appreciate in a fully human way what he was doing and what was happening." (17/1608). Dr. Maher also believed that Appellant was sufficiently aware to understand that putting his hands around the victim's neck was "...a real dangerous thing to do." (17/1608-1609). However, Appellant was experiencing a dissociative episode during the course of the murder up until he returned to his apartment to shower and change his clothes. (17/1609).

Finally, Dr. Harry Krop, a neurosychologist, examined

Appellant for any brain damage. (17/1652). He administered a battery of tests designed to assess Appellant's cognitive functioning. (17/1653). Appellant had an average I.Q. of 104 with consistent verbal and nonverbal functioning. (17/1654-1655). All other tests were normal except for two involving frontal lobe performance which showed significant impairment. (17/1655-1659).

Individuals with frontal lobe impairment have trouble starting and stopping behavior. They also are very impulsive. (17/1661). As for Appellant in particular, Dr. Krop concluded that the psychological test results were consistent with some type of frontal lobe impairment. (17/1662-1663).

Of course, none of the lay witnesses who testified for Appellant during the penalty phase had anything to relate regarding Appellant's mental or emotional condition at the time of the offense where no eyewitnesses testified. In fact, none of them even mentioned Appellant acting under an extreme mental or emotional disturbance at any time in Appellant's life.

Appellant worked for Gloria Myer in the Cross City Correctional Institution while he was incarcerated there. (17/1615-1616). Appellant had been a fine teacher's aid and never gave her any trouble. (17/1617).

John Walkup supervised Appellant on probation in 1987 and 1988. Appellant was no problem during his supervision and was recommended for early termination. (17/1620-1622).

William Jordon was a case manager at Charlotte Correctional Institute while Appellant was incarcerated there. (17/1624-1625. Appellant was intelligent, got along well with others and was never a disciplinary problem. (17/1626).

Appellant's mother, Sara James, also testified. She testified regarding Appellant's childhood and his close relationship with his father. (17/1629-1632). He was an average student, but developed musical talents. (17/1632-1634). In fifth grade, Appellant became a disciplinary problem and went to a psychiatrist for seven or eight months. (17/1635-1637). As a teenager, Appellant had electroshock treatments and was put on medication. (17/1639-1640). At three or four years old, he fell out of a car and hit his head. (17/1641-1642). However, Appellant's mother concluded that Appellant has a good brain, good verbal skills and had always been personable. (17/1643).

John Field, a prison minister, employed Appellant as a chapel clerk while he was incarcerated in the early 1990's. (17/1664-1665). Appellant was an excellent clerk who fulfilled his responsibilities, had good administrative and musical skills. Field actually stated, "There really wasn't anything [Appellant] couldn't do." (17/1665-1666). Appellant was never any trouble. (17/1666).

Bruce Drennen, President of the Greater Brandon Chamber of Commerce, testified to his knowledge of Appellant in 1997. Drennen

testified as to Appellant's participation in the Chamber. (18/1690-1692).

Susan Bailey, Appellant's ex-wife, also testified to her four year relationship with Appellant. (18/1694). She claimed that no one treated her better than Appellant and that he loved her two children. (18/1695-1697). She also stated that he got along well with his other family members. (18/1697). They were divorced after Appellant was arrested and imprisoned in Alabama. (18/1699.

Ray Johnston's sister, Rebecca Vineyard, was the last family member to testify in his behalf. Appellant got along wonderfully with her children. (18/1704). He can act like a child, but with women he was a very good gentleman. (18/1705). She believed he committed the crime because he could not stand rejection. (18/1707).

Finally, Appellant took the stand. He admitted killing Ms. Coryell. (18/1710). Appellant then described how he approached the victim on the night of the murder, how he grabbed her by the neck and, after she was not breathing, put her in the back of her car, drove to a park, made it look like she had been assaulted, and left her by the pond. (18/1711-1717). He then returned to the apartment complex, cleaned himself off and went back to Ms. Coryell's car in the park. (18/1718-1719). He denied committing a sexual assault. (18/1718). But, he admitted taking her ATM card and getting money with it. (18/1719-1720).

Eventually, Appellant went to the police with a lie about seeing Ms. Coryell the night of the murder. He was then arrested. (18/1722).

On cross-examination, Appellant admitted that he killed Ms. Coryell because he wanted her attention and he did not get it. (18/1727). He further admitted that she never said anything aggressive or mean-spirited to him. (18/1727-1728).

Regarding the specifics of the murder, Appellant admitted that within moments of strangling Ms. Coryell to death, he realized what he had done and took steps to cover it up. (18/1737). Appellant also testified that, during the murder, "it's not like you don't know what you're doing because you're aware of what's going on and you – you just can't stop....All you think of is now how am I going to get away with this, how am I going to put this away so that nobody else will know that it was me." (18/1724). "It's like you know exactly what you're doing; you're aware of exactly what you're doing, you know what's going on around you; you just can't stop." (18/1716).

Finally, in closing during the penalty phase, defense counsel argued only one statutory mitigator: the capacity of Appellant to appreciate the criminality of his conduct was substantially impaired. (18/1800). Other than non-statutory mitigation, this was the only mitigator argued by defense counsel. Absolutely no mention was made of the mitigator involving an extreme mental or

emotional disturbance suffered by Appellant at any point during closing argument. (18/1779-1806). In fact, defense counsel actually reiterated that Appellant understood what he was doing when he murdered Ms. Coryell, he just could not stop himself. (18/1787).

After deliberations, the jury unanimously recommended the death penalty. (18/1187).

SUMMARY OF THE ARGUMENT

Issue I: No abuse of discretion resulted from the trial court's denial of Appellant's motion for new trial relating to Juror Robinson's service on the guilt phase jury. First, Robinson was not under prosecution by the Hillsborough State Attorney's Office during Appellant's trial based upon a capias issued for a failure to pay court costs. Where the failure to pay such financial obligations constitutes only civil contempt, Robinson was fully qualified to sit on the jury. Second, no error can be ascribed to Robinson's failure to disclose a prior conviction where defense counsel neglected to inquire of any juror concerning prior criminal accusations. Moreover, this particular sub-claim was not preserved where the motion to interview juror was untimely filed. And, finally, the trial court's decision to refuse to allow an interview of Juror Robinson concerning her possible drug use during the course of Appellant's trial was proper where Appellant offered no concrete evidence to support this baseless allegation.

Issue II: Appellant's challenge to voir dire is without merit where the trial judge specifically ruled that individual and sequestered voir dire could be conducted on a limited basis. Even if the trial judge had prohibited individual voir dire, no error would have occurred where the alleged pretrial publicity was too remote in time from the commencement of Appellant's trial to have impacted the jurors. Finally, Appellant's acceptance of the jury

panel without objection waived his ability to challenge any alleged bias on the part of the jurors on appeal.

Issues III and IV: Where Appellant failed to present any evidence in support of the statutory mitigator concerning whether Appellant acted under an extreme mental or emotional disturbance at the time of the offense, no error resulted from the trial court's failure to consider this mitigator in the sentencing order or in the failure to instruct the jury on said mitigator.

ARGUMENT

ISSUE I

APPELLANT IS NOT ENTITLED TO A NEW TRIAL BASED UPON ANY ALLEGED ERROR STEMMING FROM TRACY ROBINSON'S SERVICE ON APPELLANT'S JURY DURING THE GUILT PHASE OF THIS CAPITAL TRIAL. (AS RESTATED BY APPELLEE).

Appellant seeks a new trial based upon three separate challenges to Tracy Robinson's service on his jury during the guilt phase of the trial. First, Appellant claims that Robinson was under prosecution by the Hillsborough State Attorney's Office during Appellant's trial, and, as such, was not qualified to sit on the jury. Second, Appellant maintains that Robinson's failure to disclose her prior conviction, as well as her capias status, denied him a fair trial. And, finally, Appellant complains that the trial court reversibly erred in failing to allow an interview of Juror Robinson concerning her possible drug use during the course of Appellant's trial. As discussed below, none of these three challenges demonstrate an abuse of discretion resulting from the trial court's denial of Appellant's Motion for New Trial. See Stephens v. State, 26 Fla. L. Weekly S161 (Fla. March 15, 2001).

A. Whether Juror Robinson was "under prosecution" such that she was not qualified to serve on Appellant's jury.

Relying upon Lowery v. State, 705 So. 2d 1367 (Fla. 1998), Appellant argues that Juror Robinson's capias status at the time of his trial rendered her unqualified to serve on the jury. According to Lowery, 705 So. 2d 1367, 1368, "where it is not revealed to a

defendant that a juror is under prosecution by the same office that is prosecuting the defendant's case, inherent prejudice to the defendant is presumed and the defendant is entitled to a new trial."[1] However, Robinson was not actually "under prosecution" at any time during the guilt phase of Appellant's trial. Consequently, Robinson was perfectly qualified to serve on Appellant's jury.

After the jury found Appellant guilty, but before the penalty phase began, Juror Robinson was arrested for possession of marijuana and cocaine. The trial court then excused her from the jury over the *objection* of defense counsel. By the time the defense argued its motion to interview juror, all parties had learned that a capias had also been outstanding for Juror Robinson during the guilt phase of the trial. (21/2233-2237). The capias was based solely upon Juror Robinson's failure to pay court costs

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1 Here, the trial court found that no "inherent prejudice" existed because Juror Robinson could not have known about the outstanding capias. In view of the particular circumstances of the issuance of the warrant against Robinson, the facts of Lowery are readily distinguishable. In Lowery, the juror had been aware of an investigation being conducted regarding battery charges and actually initiated a discussion with the prosecutor regarding the charges . Juror Robinson, on the other hand, had no way of knowing that the capias had been issued and nothing on the record demonstrated otherwise. Thus, no appearance of impropriety can be attributed to Robinson's jury service.

However, to the extent that this Court may accept Appellant's argument that the juror's knowledge of the capias was irrelevant, the State would rely upon the "tipsy coachman" rule. See Lowery v. State, 766 So. 2d 417 (Fla. 4th DCA 2000)(court may affirm trial court decision deemed "right for a different reason"), citing Carraway v. Armour & Co., 156 So. 2d 495 (Fla. 1963).

in the amount of $150.00, stemming from her plea of nolo contendere to a charge of obstructing an officer without violence. (5/787). Appellant's suppositions to the contrary, Juror Robinson was never on probation or any other type of supervision based upon the obstruction charge. Instead, the court documents reveal that adjudication was withheld and the court costs mentioned above were imposed. (5/849-850). Again, the failure to pay costs was the only basis for the capias. Under these circumstances, Juror Robinson was never "under prosecution" during the course of Appellant's trial.

First, and foremost, the failure to pay court costs in a criminal case does not constitute a crime in and of itself. Instead, as set forth in Section 938.30(9), Florida Statutes, failure to pay court costs in criminal proceedings results simply in civil contempt. Section 938.30(2) further explains that a court may require a person obligated to pay court costs to appear regarding said obligation and that failure to comply can result in arrest or the issuance of a capias, as occurred in Juror Robinson's case. However, nowhere in Section 938.30, dealing with court-imposed financial obligations in criminal cases, does the legislature indicate that failure to pay court costs may result in a criminal charge. As such, Juror Robinson could not have been "under prosecution" based upon civil contempt for failure to pay court costs where she had not committed a crime for which she could

be prosecuted. See generally Parsons v. Wennet, 625 So. 2d 945, 947 (Fla. 4th DCA 1993)(criminal contempt is an actual crime punishable by law; civil contempt is not a crime). See also Ducksworth v. Boyer, 125 So. 2d 844, 845 (Fla. 1960) (civil contempt is neither a felony nor a misdemeanor, but a power of the courts).

Additionally, while a capias was issued for Juror Robinson's arrest, no information or indictment was ever filed for failing to pay costs (obviously, because the failure to pay did not constitute a crime). Since a prosecution does not commence until a charging document is filed, Juror Robinson was not "under prosecution" based upon the mere issuance of the capias. See Brown v. State, 674 So. 2d 738, 740 (Fla. 2d DCA 1995) ("A prosecution is commenced when 'either an indictment or information is filed, provided the capias, summons, or other process issued on such indictment or information is executed without unreasonable delay.' §775.15(5), Fla. Stat. (1993)."") Even if the failure to pay court costs was a crime, the issuance of the capias prior to the filing of a charging document would have precluded the State from proceeding against Juror Robinson. See Spicer v. State, 613 So. 2d 548 (Fla. 3d DCA 1993)(writ of prohibition precluding court from proceeding to trial against defendant granted where capias improperly issued before information filed).

Finally, Florida Rule of Criminal Procedure 3.730 provides the

trial court with the power to issue a capias "from time to time." However, this power to compel the attendance of an individual in court does not mean that the issuance of a capias equals the commencement of prosecution for a criminal offense. In fact, Section 939.04, Florida Statutes, also specifically provides that "[i]n all cases less than capital, wherein the defendant may be adjudged to pay costs, a capias may be issued, as is provided for the collection of fines and forfeitures," without any provision that the issuance of such a capias results in a criminal prosecution.

As such, Juror Robinson's service on the jury was appropriate despite the capias for failure to pay court costs. Where no crime occurred, no charging documents were filed and no prosecution commenced, Juror Robinson was simply not "under prosecution" to the extent that she should have been prohibited from jury service in this case.

B. Whether Juror Robinson's alleged concealment of her prior conviction during voir dire requires a new trial.

Next, Appellant complains that a new trial must be granted because Juror Robinson failed to reveal the fact of her prior conviction during voir dire. Appellant correctly sets out the three part test relevant to a juror's non-disclosure of information during voir dire as follows:

> 1) the information must be relevant and material to jury service in the case; 2) the information must be concealed by the juror during voir dire examination; and 3) the

> failure to discover the concealed information must not be due to the want of diligence of the complaining party.

See De La Rosa v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995). However, Appellant is not entitled to relief on this claim.

Initially, as Appellant candidly notes, this issue is not preserved for appeal. At no time did defense counsel ask the trial court to interview Juror Robinson because she may have concealed information during voir dire. Neither the defense Motion to Interview Juror[2], (5/781-783), the defense Motion for Judgment of Acquittal or Motion for New Trial[3], (5/778-780), nor defense counsel's oral argument on said motion, (21/ 2232-2242), contain any mention of concealment on the part of Juror Robinson during voir dire. As such, this particular sub-issue is procedurally barred. See Lucas v. Mast, 758 So. 2d 1194, 1196 (Fla. 3d DCA 2000)(citations omitted)(new trial denied where claim regarding failure of juror to disclose litigation history not preserved and not fundamental).

Alternatively, Appellant's argument also fails on the merits. While the State initially asked all prospective jurors about prior criminal accusations, no juror volunteered any information on the topic without further direct questioning. Moreover, when the

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2 In fact, the Motion to Interview Juror was actually untimely where it was filed more than 10 days following the verdict. See Fla.R.Crim.P. 3.590 and 3.600; also see generally Beyel Bros. Inc. v. Lemenze, 720 So. 2d 556, 557 (Fla. 4th DCA 1998).

3 The Motion for New Trial actually claims error resulted because the trial court dismissed Juror Robinson from service.

prosecutor asked Juror Robinson who it was that she knew who had been accused of a crime, she volunteered the information about her child's father and then the prosecutor moved on to other jurors without following up to ask her if she or anyone else she knew had been involved in a criminal prosecution. (7/126-127). Finally, neither of the two defense attorneys who participated in voir dire asked a single question of any juror regarding the topic of prior criminal accusations. (7/168-231). Under these circumstances, Appellant has failed to demonstrate error meriting a new trial.

Comparing the facts of this case to the three part test announced in De La Rosa, Appellant cannot prevail on this claim. First, Appellant cannot argue that Juror Robinson's prior conviction was material to the case. One factor in determining whether the withheld information was sufficiently material is whether Appellant would have exercised a peremptory challenge. See Tejada v. Roberts, 760 So. 2d 960, 965 (Fla. 3d DCA 2000), rev. granted, 786 So. 2d 1188 (2001). Based upon the fact that Appellant challenged the removal of Juror Robinson from the jury after she was arrested for drug possession during Appellant's trial, Appellant cannot now argue that a peremptory challenge would have been used against Juror Robinson during jury selection.

Second, a juror's answer cannot constitute concealment where counsel does not inquire further to clarify any ambiguity relating to the information sought. See Birch v. Albert, 761 So. 2d 355,

358 (Fla. 3d DCA 2000)(citations omitted). As such, where both the prosecutor and defense counsel failed to follow up with Juror Robinson to clarify any additional prior criminal accusations, no improper concealment can be attributed to Juror Robinson's answers. See Birch, 761 So. 2d 355, 358 (juror squarely answered the asked questions and there was no follow-up inquiry requesting information on her entire litigation history).

Finally, and most importantly, defense counsel failed to diligently discover this information. As noted above, defense counsel failed to ask a single question during voir dire regarding any juror's prior criminal litigation history. See Ford Motor Co. v. D'Amario, 732 So. 2d 1143, 1146 (Fla. 2d DCA 1999), rev. granted, 743 So. 2d 508 (1999)(no error regarding jurors' answers regarding prior litigation history where appellees did not ask a single question on this topic). Where defense counsel failed to follow up with any of the jurors on their prior criminal litigation history or even to follow up with Juror Robinson on the criminal history she did reveal, "...any failure to disclose additional prior legal proceedings was due to the defendant's lack of due diligence and thus cannot constitute active concealment on the part of the juror." See Birch, 761 So. 2d 355, 358 (citations omitted).

By way of comparison, in Birch, 761 So. 2d at 356, the juror revealed a prior workers' compensation suit, but failed to mention a suit regarding an unpaid medical bill. No follow-up inquiry

requesting information on the juror's entire litigation history was made. Thus, the appellate court determined that reversal was not required where the three part test of De La Rosa was not met. See id. Similarly, in this case, Appellant cannot demonstrate that the claimed error regarding Juror Robinson violates the De La Rosa test.

C. Whether the trial court reversibly erred in failing to allow an interview of Juror Robinson.

Appellant claims the trial court erred by denying him the opportunity to interview Juror Robinson concerning her possible use of illegal drugs during the course of the trial. As mentioned above, this particular sub-issue is procedurally barred where the Motion to Interview Juror was untimely.[4] Florida Rules of Criminal Procedure 3.590 and 3.600 provide for the procedure to be followed when a defendant seeks a new trial based upon a claim of juror misconduct. Specifically, Rule 3.590(a) requires that a motion for new trial be filed within 10 days of rendition of the verdict. Here, the Motion for New Trial, while timely, was silent as to the request to interview Juror Robinson. The actual Motion to Interview Juror was not filed until July 6, 1999, 19 days after the verdict was rendered on June 17, 1999. (5/777). As such, the

4 Notably, prior to the closing arguments in the penalty phase, defense counsel asked that the trial judge bring Juror Robinson over to the courtroom and inquire of her whether she was under the influence of cocaine at any time during the guilt phase or during deliberations. At that time, the trial judge denied the oral request and told defense counsel to file a motion. (18/1765). However, the written motion was still untimely.

trial court was without jurisdiction to entertain the motion to interview Juror Robinson. See e.g., State v. Bodden, 756 So. 2d 1111, 1112-1113 (Fla. 3d DCA 2000), citing to Florida Rule of Criminal Procedure 3.590(a).

Alternatively, Appellant's Motion to Interview Juror was also substantively without merit. Based upon nothing other than pure speculation, Appellant posits that Juror Robinson may have been under the influence of crack cocaine during the guilt phase of his trial. However, absolutely nothing in the record supports this assertion. Under such speculative circumstances, Appellant did not provide adequate justification to support the need for a juror interview. See Ehrhardt, Florida Evidence, Section 607.2 (ed. 2001)(counsel has to have knowledge of juror misconduct prior to interview).

Moreover, this allegation of possible use of intoxicating substances would not support the need for a juror interview. A jury verdict could only be attacked in this manner based upon allegations of an influence upon the jurors' deliberations arising from external sources. See Devoney v. State, 717 So. 2d 501, 503 (Fla. 1998)(citations omitted). No such allegation has been raised in this case.

Citing Tanner v. United States, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), with approval, the Devoney court explained, that even allegations of juror misconduct including consuming

alcohol and ingesting and selling narcotics during court recess did not constitute external influences on the jury which would violate a defendant's Sixth Amendment right to a fair trial. 717 So. 2d 501, 504. The Tanner Court reasoned that intoxication was similar to mental incompetency which had previously been found to be an internal influence. See Devoney, 717 So. 2d at 504 , citing Tanner, 483 U.S. 107, 118, 107 S.Ct. 2739. According to the Tanner decision, "drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep." Devoney, at 504, citing Tanner, 483 U.S. at 122, 107 S.Ct. 2739. As such, Appellant's baseless allegations of misconduct on the part of Juror Robinson fail to constitute external influences which would merit a new trial.

Despite the fact that the Tanner decision, cited with approval by this Court, is directly on point, Appellant distinguished Tanner's reliance upon the legislative history of Federal Rule of Evidence 606(b) from this Court's discussion in Devoney. While Tanner does rely on the legislative history of a federal rule of evidence, the Devoney decision, discussed, with approval, federal decisions which use the external/internal distinction to decide the admissibility of juror testimony to impeach the verdict. See Ehrhardt, Section 607.2. As such, regardless of any difference between the federal and Florida Rules of Evidence, this Court has specifically analyzed a request to interview jurors based upon the

distinction between external and internal influences. Toward that end, the Tanner decision explicitly categorizes juror intoxication as an internal influence which cannot establish a need to intervene in the juror deliberation process.

Appellant further attempts to argue that non-juror evidence could have established misconduct on Juror Robinson's part. However, other than pure speculation, Appellant cited to no evidence, either at trial or to this Court, concerning substance abuse by Juror Robinson *during* the trial. The fact of Juror Robinson's arrest at home after the guilt phase was concluded provides no evidence as to her behavior during trial or during guilt phase deliberations. And, even the information concerning her arrest provides no evidence of the use of crack cocaine at any time.

Additionally, in stark contrast to the cases cited by Appellant, no sign of impairment on the part of Juror Robinson was evident to the other jurors, the bailiffs, the trial judge, the attorneys, or any other court personnel or trial attendees. Compare Baez v. State, 699 So. 2d 305 (Fla. 3d DCA 1997)(during deliberations, the jury submitted a question to the trial judge indicating that a juror had admitted to having a couple of beers at lunch); and Goldring v. Escapa, 338 So. 2d 871 (Fla. 3d DCA 1976)(error resulted from denial of motion for mistrial when on the fourth day of trial one of the jurors appeared intoxicated by

having alcohol on his breath, making grimacing motions, waving his hands and attempting to engage in conversation with the other jurors about the case during the reception of evidence which disturbed the jurors). Where no indication of intoxication became evident during the course of Appellant's trial, the Motion to Interview Juror was properly denied.

Appellant has failed to demonstrate any improper external influence acted upon the jury's deliberations in this case. Consequently, where, as Justice O'Connor discussed in Tanner, the jury system could be undermined by such post-verdict scrutiny, Devoney, at 504, citing Tanner, 483 U.S. at 120-21, 107 S.Ct. 2739 (citation omitted), the trial court properly denied Appellant's request to interview Juror Robinson.

In conclusion, Appellant has demonstrated no error with respect to Juror Robinson's service on the guilt phase jury. None of these sub-claims, individually or collectively, merit a new trial.

ISSUE II

NO REVERSIBLE ERROR RESULTED FROM JURORS URSETTI AND JAMES SERVICE ON APPELLANT'S JURY WHERE THE CLAIMED ERROR RELATING TO INDIVIDUAL VOIR DIRE WAS NOT PRESERVED AND BOTH JURORS INDICATED THAT THEY COULD BE FAIR AND IMPARTIAL JURORS DESPITE ANY PRIOR KNOWLEDGE OF THE CASE. (AS RESTATED BY APPELLEE).

Appellant asserts that he is entitled to a new trial because the trial court denied his request for individual voir dire based upon allegations of pretrial publicity. (2/238-246). The record reveals that this assertion is factually inaccurate. In fact, the trial court explained that individual voir dire would be allowed on a limited and specific basis. As such, the trial court failed to abuse its discretion with regard to its rulings on the issue of individual voir dire. See Bolin v. State, 736 So. 2d 1160, 1164 (Fla. 1999).

Prior to trial, the trial court ruled as follows:

> Defendant's Motion for Individual Voir Dire and Sequestration of Potential Jurors During Voir Dire or in the Alternative Individual Voir Dire on Certain Subjects is granted to the extent that the Court will permit individual voir dire of those members of the venire who, during general questioning by the Court or attorneys on the issues of:
>
> (a) The death penalty;
>
> (b) The defense of intoxication;
>
> (c) Their knowledge of the case (through publicity or otherwise); and
>
> (d) On other particular sensitive areas;
>
> respond in such a way as to make it necessary or

> reasonable that they be questioned individually so that their responses can be fully understood, but without the danger of contaminating the remainder of the venire; however, in all other respects, the Motion be, and hereby is, denied. (4/629-630).

Just before jury selection began, the trial judge reiterated that individual voir dire would occur only if a juror indicated knowledge of the case. (6/8-9).

Specifically, when the defense renewed its request for individual voir dire, the trial judge stated,

> Well, that's denied. What we'll do is, we'll initially – everybody is going to be brought in, and I'll do what I normally do at the beginning of every trial: Read the indictment in this case, explain the penalty very briefly, that the penalty – what the possibilities are should he be convicted of first-degree murder, and I will ask them some questions concerning their feelings about the death penalty. They'll answer by a show of hands. You'll make notes of that, and then you can follow up on that.
>
> As far as the publicity, the only question I'm going to ask them is if anybody's heard the case, knows anything about the case. They'll answer by a show of hands. You'll make note of that. Then when it's your turn to inquire, you'll be able to ask them questions concerning their knowledge of the case. That can be done at the bench. (6/8-9).

Thus, Appellant's characterizations to the contrary, the trial judge never changed her position on how voir dire was to be conducted in this case. Neither did defense counsel raise any objection to the procedure outlined by the trial judge in the written order or verbally prior to voir dire.

Even if the trial court's ruling could be interpreted to have

prohibited individual voir dire, the ruling would still be appropriate. In making its discretionary decision on how to conduct voir dire in view of an allegation of pretrial publicity, the trial court must consider the timing, as well as the content, of the published information. See Bolin, 736 So. 2d 1160, 1166. Here, both the print and broadcast publicity occurred sufficiently prior to the trial so as to preclude a need for individual voir dire.

Appellant provided nine newspaper articles which appeared consecutively on August 21, 23, 24,and 26, 1997, and March 16 and 20, 1998. (1/87-98; Supplemental Record 42). The television reports cited by Appellant were aired between August and October, 1997. (1/100-101, 134-143,and 144-147). Where jury selection did not begin in this case until June 7, 1999, more than one year after the latest publicity mentioned by Appellant, the trial court acted properly within its discretion in ruling on the issue of individual voir dire. See Bolin, 736 So. 2d at 1166.

More importantly, no biased jurors sat on Appellant's jury. During the course of voir dire, eight jurors indicated prior knowledge of the case. Of those eight, only two eventually served on the jury: Mr. Ursetti (Juror Number 18) and Mr. James (Juror Number 20). Despite the revelation by these eight jurors of exposure to pretrial publicity, defense counsel never sought individual voir dire of any of them. Moreover, both Juror Ursetti

and Juror James stated that they were not unduly influenced by their prior knowledge of the case.

After indicating that he recalled something about the case, Juror Ursetti stated that his prior knowledge would not keep him from being fair and impartial. (7/179). Also, while Juror James' statement was not as direct as Juror Ursetti's, the context of the questioning demonstrates that defense counsel was satisfied that Juror James was not prejudiced by any previous knowledge of the case.

After questioning Juror Ursetti on his knowledge, defense attorney Littman continued with the other jurors as follows:

> **Mr. Littman**: You can put aside anything? As I said, it may have been reported accurately or inaccurately. Sir, I'm sorry. Your name?
>
> **Mr. Arnold**: David Arnold. I have seen him before in a different setting and heard information about the case, and I didn't recall until just now.
>
> **Mr. Littman**: All right. Now, as the case goes on, certain things may refresh your recollection or may not, but the question is, simply, can you put that aside and judge the case just on what's presented here?
>
> **Mr. Arnold**: Yes.
>
> **Mr. Littman**: Because as the judge has already told you, those who are chosen as jurors are not permitted to discuss the case while the case is pending. In the future sometime, you might. You might say no, that' not what happened at all because you have been a juror on the case?
>
> **Mr. Littman**: Next row?
>
> **Mr. James**: I just remember it from the news.

> **Mr. Littman:** One person feels they were influenced by it. Next row, which would be Row 4?
>
> **Ms. Guntert:** I believe I've seen something, but it wouldn't sway me. (7/179-180).

The defense attorney never asked any additional questions of Mr. James which indicates that he was satisfied with James' response. Moreover, the defense counsel's comments further demonstrate that only one person, not Mr. James, felt influenced by pretrial publicity.

Defense counsels' use of peremptory challenges also shows that both Juror Ursetti and Juror James were acceptable to the defense despite their prior exposure to the case. As the court proceeded numerically through the panel, the defense exercised peremptory challenges in the following order: Juror 2, Juror 6, Juror 8, Juror 11, Juror 12, Juror 15, Juror 26, Juror 27, Juror 29, and Juror 32. (7/235-242) Consequently, when the court came to Ursetti and James, Jurors 18 and 20 respectively, the defense had four remaining peremptory challenges and specifically chose not to exercise them on either Ursetti or James. Moreover, the defense never requested any additional peremptory challenges nor did the defense seek to challenge either Ursetti or James for cause. See Kalinosky v. State, 414 So. 2d 234, 235 (Fla. 4th DCA 1982), rev. den., 421 So. 2d 67 (Fla. 1982)(no abuse of discretion in limiting voir dire where defense counsel did not challenge jurors for cause nor did they exercise remaining peremptory challenge to remove

juror allegedly exposed to pretrial publicity).

Ultimately, the defense accepted the panel without objection. (7/240). Thus, any claim relating to jury selection has not been preserved for appellate review. See Frangui v. State, 699 So. 2d 1332, 1334 (Fla. 1997), citing Joiner v. State, 618 So. 2d 174 (Fla. 1993).

In an attempt to avoid the procedural bar to this claim, Appellant argues ineffective assistance of counsel with respect to counsel's failure to conduct individual voir dire. However, as Appellant notes, such a claim is not properly brought on direct appeal.

Nonetheless, Appellant points to a number of cases where ineffective assistance was addressed on direct appeal where counsel failed to object to jurors whose bias was evident on the face of the record. No such bias is evident on the record of this case. Both Jurors Ursetti and James indicated that their prior knowledge of the case would not impact their ability to be fair and impartial jurors. Thus, Appellant cannot demonstrate any abuse of discretion requiring reversal. See Pietri v. State, 644 So. 2d 1347, 1351-1352 (Fla. 1994), cert. den. 515 U.S. 1147 (1995). See also Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999).

ISSUE III

NO ERROR RESULTED FROM THE TRIAL COURT'S FAILURE TO DISCUSS THE STATUTORY MITIGATOR THAT THE HOMICIDE WAS COMMITTED WHILE APPELLANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE WHERE THE DEFENSE DID NOT REQUEST THAT THIS MITIGATOR BE CONSIDERED AND FAILED TO PUT ON ANY EVIDENCE REGARDING THIS PARTICULAR MITIGATOR. (AS RESTATED BY APPELLEE).

Appellant asserts that the trial court erred in failing to consider the statutory mitigator concerning whether the homicide was committed while the defendant was under the influence of extreme mental or emotional disturbance. See Section 921.141(6)(b), Florida Statutes. However, the record reveals that Appellant never proposed that this mitigator be considered and, more importantly, absolutely no evidence was presented during either the penalty phase or the Spencer hearing in support of this particular mitigator. As such, no error occurred.

Appellant never argued the statutory mitigator involving extreme emotional or mental disturbance at the time of the murder to the lower court. Defense counsel filed a Motion to Override Jury's Recommendation with Attachments, (5/795-832), and a Supplement to Defendant's Motion to Override Jury's Death Recommendation, (5/844-847), both outlining the statutory and non-statutory mitigators urged on Appellant's behalf. Neither of these motions mentioned the statutory mitigator related to extreme mental or emotional disturbance at the time of the crime. Moreover,

defense counsel never argued for consideration of this statutory mitigator in his opening or closing remarks in penalty phase (16/1475-1481; 18/1779-1806), or his closing argument to the trial court at the Spencer hearing. (21/2294-2319). Thus, where the trial court is only required to considered those statutory mitigators *proposed* by the defendant, Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), reversed after remand, 679 So. 2d 720 (Fla. 1996) (the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence), no error resulted from the sentencing order's failure to address a mitigator never asserted by the defense.

Moreover, absolutely no evidence supported the consideration of this mitigator. Of the four mental health experts who testified on Appellant's behalf, in either the penalty proceedings or the Spencer hearing, no one testified that Appellant was acting under an extreme mental or emotional disturbance when he killed the victim.

During the penalty phase, the only expert who even mentioned Appellant's behavior at the time of the crime was Dr. Maher. Dr. Maher testified simply that, at the time of the murder, Appellant was "experiencing a mild dissociative episode. I don't think it was severe. I don't think it was to the point where he didn't know who he was or she was or what the likely result of his actions

would be." (17/1608). This testimony actually negates any claim that Appellant was acting under an extreme mental or emotional disturbance.

Additionally, Appellant himself testified repeatedly during the penalty phase that he was fully aware of what he was doing at the time of the murder. (18/1716, 1724). Appellant further explained that he killed Ms. Coryell simply because she did not respond to his hello. She never did or said anything aggressive or mean-spirited to him. (18/1727-1728). Thus, no evidence was presented during the penalty phase supporting the statutory mitigator of extreme emotional disturbance at the time of the offense. In fact, the evidence was to the contrary.

At the Spencer hearing, Appellant asserts that Dr. Krop provided additional testimony in support of the mitigator in question. However, this testimony concerning a serious emotional disorder at the time of the offense, (21/2273), simply does not rise to the level of an extreme emotional or mental disturbance.[5]

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5 Even if Dr. Krop's testimony could be interpreted to support the extreme disturbance mitigator, it was well within the trial court's discretion to reject this evidence in view of the defense expert Dr. Maher's contrary conclusion that Appellant suffered from a mild, not severe, dissociative episode at the time of the crime. (17/1608). See Walker v. State, 707 So. 2d 300, 318 (Fla. 1997), citing Johnson v. State, 660 So. 2d 637, 646-47 (Fla. 1995)(contradictory evidence regarding mitigating factor supports trial court's conclusion that factor does not exist); Walls v. State, 641 So. 2d 381, 390-91 (Fla. 1994), cert. den., 513 U.S. 1130 (1995)(stating that "debatable link between fact and opinion relevant to a mitigating factor, usually means, at most, that a question exists for judge and jury to resolve").

See Provenzano v. State, 497 So. 2d 1177, 1184 (Fla. 1986), cert. den., 481 U.S. 1024 (1987) (testimony of various psychiatrists that Provenzano was suffering from some form of emotional disturbance does not require a finding of extreme mental or emotional disturbance). Compare e.g., Farinas v. State, 569 So. 2d 425 (Fla. 1990)(extreme mental or emotional disturbance mitigator established by evidence that during a two-month period after victim, defendant's former girlfriend, moved out of defendant's home, he continuously called her, came to her parents' home where she was living, and would become very upset when not allowed to speak with her, that he was obsessed with the idea of having her return to live with him and was intensely jealous, suspecting that she was becoming romantically involved with another man, and that murder was the result of a heated, domestic confrontation); Nibert v. State, 574 So. 2d 1059 (Fla. 1990)(evidence that defendant suffered from chronic and extreme alcohol abuse since preteen years, that he was a nice person when sober, but a completely different person when drunk, and that he had been drinking heavily on the day of the murder established extreme mental or emotional disturbance mitigator). And, again, defense counsel did not propose that this mitigator be considered in his closing argument during the Spencer hearing. (21/2294-2319).

Similarly, in Lucas v. State, 613 So. 2d 408 (Fla. 1992), cert. den., 510 U.S. 845 (1993), the defendant argued that the

judge disregarded three possible mitigators. However, the appellate court noted that the defendant did not list these items in his memorandum, and found that any failure to consider these items would be harmless error. See Lucas, 613 So. 2d 408, 410.

Where it is within the trial court's discretion to decide whether a mitigator has been established, the court's decision will not be reversed merely because an appellant reaches a different conclusion. See Lucas, 613 So. 2d at 410, citing Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, --- U.S. ----, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). Moreover, whether a mitigator has been established is a question of fact, and a court's findings are presumed correct and will be upheld if supported by the record. See Lucas, at 410, citing Campbell v. State, 571 So. 2d 415 (Fla.1990), reversed after remand, 679 So. 2d 720 (Fla. 1996). Here, the trial judge found four aggravating factors,[6] and, as in Lucas, conscientiously reviewed all of the statutory and non-statutory mitigators which were actually proposed by Appellant. (Supplemental Record/28-31).

It should further be noted that, while the trial court found no evidence to support an instruction on the statutory mitigator

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6 The aggravators found by the court and given great weight in this case include that Appellant was previously convicted of a felony involving the use or threat of violence to the person, Section 921.141(5)(b); that the capital felony was committed while Appellant was engaged in the commission of a sexual battery and a kidnapping, Section 921.141(5)(d); the capital felony was committed for pecuniary gain, Section 921.141(5)(f); and the capital felony was especially heinous, atrocious or cruel, Section 921.141(5)(h).

involving an extreme mental or emotional disturbance at the time of the offense, the trial court also specifically told defense counsel that they could argue any relevant facts concerning Appellant's state of mind at the time of the offense as non-statutory mitigation. (17/1671-1672).

Subsequently, the sentencing order did address non-statutory mitigation on this topic, giving no weight to the following mitigation:

> a. The time passing between the decision to cause the victim's death and the time of the killing itself was insufficient under the circumstances to allow Defendant's cool and thoughtful consideration of his conduct.
>
> ***
>
> d. The Defendant did not plan to commit the offense in advance, and it was the act of a man out of control, and in an irrational frenzy.
> e. The Defendant has a long history of mental illness.
> f. As testified to by Dr. Maher, the Defendant suffers from a disassociative disorder.
>
> ***
>
> h. The murder was the result of impulsivity and irritability. (Supplemental Record/29-30).

As such, the only evidence arguably offered in support of the denied statutory mitigator was considered by the court. Therefore, given the strength of the four aggravators in comparison to any mitigation proposed either at trial or on appeal, no error resulted from the sentencing order's consideration of mitigating evidence. See id.

ISSUE IV

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE PENALTY PHASE JURY ON THE EXTREME MENTAL OR EMOTIONAL DISTURBANCE MITIGATOR WHERE NO EVIDENCE WAS PRESENTED TO ESTABLISH THIS MITIGATOR. (AS RESTATED BY APPELLEE).

According to Appellant, the trial court committed reversible error by failing to instruct the jury at penalty phase on the mitigator involving extreme mental or emotional disturbance at the time of the offense. However, this issue was not properly preserved for appellate review. See Hall v. State, 773 So. 2d 99, 100 (Fla. 1st DCA 2000), rev. granted, 790 So. 2d 1104 (Fla. 2001)(failed to preserve jury instruction issue where challenge not raised below). See also Brooks v. State, 762 So. 2d 879, 898 (Fla. 2000). Moreover, as discussed above in Issue III, no evidence was presented which would support this mitigator.

When defense counsel initially requested that instructions be given on the statutory mitigator involving extreme mental or emotional disturbance, the trial court referred to Dr. Maher's testimony and concluded that no evidence had been presented to support this mitigator. (17/1671-1672). The trial court then specifically invited defense counsel to point to some other testimony which might support the requested mitigator; defense counsel failed to do so and moved on to discuss other mitigators. (17/1672). This was the only time that defense counsel ever mentioned this particular instruction. Under these circumstances,

where counsel failed to object to the instructions given, (18/1815), and failed to offer any evidence in support of the requested mitigator, including the evidence now urged for consideration in Issue IV by Appellant on appeal, this issue was not properly preserved for appellate review. See Brooks, 762 So. 2d 879, 898.

In fact, the only evidence urged by Appellant in support of this mitigator came from Dr. Krop in the Spencer hearing. (Initial Brief, p. 97). Yet, at the relevant time during the penalty phase, where the trial court specifically concluded that no evidence had been presented establishing the requested mitigator, (17/1671-1672), the trial court properly refused to instruct the jury on said mitigator. See Geralds v. State, 674 So. 2d 96 (Fla. 1996).

Only where a defendant has presented evidence regarding a statutory mitigator, such as extreme mental or emotional disturbance, should the trial judge read the applicable instructions to the jury. See Geralds, 674 So. 2d 96, 101, citing Bryant v. State, 601 So. 2d 529, 533 (Fla. 1992). In Geralds, the defendant presented no evidence that the "capital felony was committed while [he] was under the influence of extreme mental or emotional disturbance." James Beller, a psychotherapist, testified that he diagnosed Geralds as suffering from anti-social personality disorder and bipolar manic disorder which involves one episode of major depression followed by an episode or several episodes of

manic behavior. He also concluded that Geralds has an explosive temper and an aggressive acting out profile. However, Mr. Beller did not comment on Geralds' actual or probable mental condition at the time of the murder as contemplated by the statute. Therefore, no error resulted from the trial court's failure to give the jury an instruction on the statutory mitigator of extreme mental or emotional disturbance. See Geralds, 674 So. 2d at 101.

Similarly, in the instant case, Appellant provided no evidence during the penalty phase from either lay witnesses or the experts concerning his mental or emotional state *at the time of the murder*. In fact, as mentioned above in Issue III, Appellant testified that he was fully aware of what he was doing as he committed the crime. (18/1716, 1724). Consequently, no error resulted from the trial court's failure to instruct the jury on the statutory mitigator related to an extreme emotional or mental disturbance at the time of the offense. See James v. State, 695 So. 2d 1229, 1236 (Fla. 1997), cert. den., 522 U.S. 1000 (1997)(citation omitted)(trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal).

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence 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, Steven Bolotin, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33831 this _____ day of October, 2001.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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