IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 65,631

DONALD ROBERT LLOYD

Appellant,

vs.

STATE OF FLORIDA

Appellee.

_____/

INITIAL BRIEF OF APPELLANT DONALD R. LLOYD
(CAPITAL CASE)

DIRECT APPEAL FROM THE THIRTEENTH
JUDICIAL CIRCUIT COURT, IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida. Honorable Harry Lee Coe, III, presiding.

In this brief, the parties will be referred to as they appear before this honorable court with the addition that for purposes of clarity, appellee will also be referred to as the State.

References to the record on appeal will be by volume and page number:

(Vol. ___p. ____)

All exhibits included within the record are located in Volume XVII.

The citation to the page on which the exhibit can be found will be located within brackets:

(Vol. ___ p. ____; Exhibit ___ [Vol. XVII, p. ___])

Volume XIX pages 2743 thru 2821 contains the sentencing proceedings.

Volume XVIII pages 2526 thru 2584 is a repeat of Volume IV pages 506 thru 599 and Volume V pages thru .

STATEMENT OF THE CASE

Appellant, DONALD ROBERT LLOYD, was arrested at approximately 2:30 a.m. on June 3, 1983 on the basis of a Warrant dated June 2, 1983. The Warrant was based upon information not known until the mid-morning hours of June 3, 1983, after appellant had been arrested (Vol. 1, p. 14-15).

On June 22, 1983, the appellant, DONALD ROBERT LLOYD, was charged by Indictment with the first degree murder of Cheryl Lynn Osborne in violation of Fla.Stat. Section 782.04. Count II of the Indictment charged appellant with armed burglary in violation of Fla. Stat. Section 810.02(2)(b and 775.087 (2) (Vol. I, p. 17-18).

Thereafter, multiple motions, witness lists and related documents were filed (Vol. I, p. 12-88).

Numerous motions challenging the Indictment, the constitutionality of Fla. Stat. Section 921.141, and the constitutionality and appropriateness of the death penalty were filed and denied. (Vol I, p. 50-75, 87).

A Notice of Aggravating Circumstances was filed in response to appellant's Motion for same (Vol. I, p. 80-82; Vol. II, p. 172).

A Motion for Individual Voir Dire and Sequestration of the Jurors (Vol. I, p. 83-83) was denied and a Motion to Preclude Challenges for Cause against persons who would not impose a death penalty (Vol. I, p. 85-86) were denied.

Motions were filed and Argument heard (Vol. VI, p. 800-

06, 812-16) on appellant's Motion to Limit dismissal in Death Qualification of Jury. The motions were based on appellant's contention that the State could not excuse for cause a juror who was unalterably opposed to the death penalty but who could otherwise rule fairly on a defendant's guilt or innocence. The Motion was denied with qualification when the Court ordered the State to use their peremptory challenges to challenge those jurors unalterably opposed to the death penalty (Vol. VIII, p. 1099).

Appellant's Motion to Limit Jury Dispersal (Vol. VI, p. 807), to the extent that they be kept in the bailiff's custody when at the courthouse during the trial, was granted (Vol. VI, p. 807).

The Court denied appellant's Motion for a pre-trial evidentiary hearing as to whether the State had sufficient potential aggravating facts to seek a death penalty (Vol.VI, p. 808-10).

The Court did grant appellant's Motion that the State limit the number and type of photographs it would seek to introduce so as not to produce cumulative and highly prejudicial evidence (Vol. VI, p. 810-11).

Appellant's Motion to Suppress Statements (Vol. I. p. 142-44), Motion to suppress Physical Evidence (Vol. I, p. 136-139), Motion to Suppress Pre-Trial Photographic and Courtroom Identification of the appellant by James Thornton (Vol. I p. 145-147) and a Motion to Suppress Pre-Trial Photographic and courtroom Identification of the appellant by

Kenneth Ryan Osborne (Vol. I, p. 148-150) were denied.

Appellant's Motion for an Independent Evaluation of Alleged eyewitness Kenneth Ryan Osborne (Vol. I, p. 117-126) was granted to a very limited extent when the Court permitted appellant's suggested expert Dr. Theodore Blau to meet with the child for sixty minutes whereas the State's experts had met with the child for a number of hours.

The State filed a Motion in Limini to exclude the testimony of the defense's recommended expert, Dr. Theodore Blau. The Motion was granted to the extent that the Doctor would not be permitted to state whether the child was credible (Vol. VI, p. 817-24).[1/]

A Motion to Exclude the Witness, Kenneth Ryan Osborne, from testifying at trial because he did not meet the threshold level of competency was denied (Vol. I, p. 140).

Motions for Judgment of Acquittal were denied (Vol. III, p. 389).

At the conclusion of the State's case, the Court directed a verdict of Not Guilty as to Count II, armed burglary, of the indictment (Vol. XIV, p. 2090).

On May 30, 1984, the Jury returned a verdict of guilty of first degree murder as charged in the Indictment (Vol. III, p. 346).

At the conclusion of the sentencing hearing, the jury, by a split vote of seven to five, recommended the death

[1/] Please see Argument Section infra.

penalty (Vol. III, p. 317; Vol. XIX, p. 2814).

Immediately thereafter, appellant was sentenced to death by electrocution (Vol. XIX, p. 2819).

Appellant's detailed Motion for New Trial was denied (Vol.XVI, p. 2327). Appellant's Motion for a new Trial and Renewed Motion for Judgment of acquittal argued inter alia that:

1. The verdict is contrary to the weight of the evidence.

2. That the evidence is insufficient as a matter of law to support a verdict of guilty on the charge of Murder I...(Vol. III, p. 355).

3. That the State Attorney's Office was guilty of misconduct in failing to permit the Defendant appropriate and necessary access to a State's witness, Ryan Osborne

4. The Court erred in refusing to allow new counsel, Marc S. Nurik, to redepose the witness, Ryan Osborne (Vol. III, p. 356).

6. The Court erred in denying the Defendant's Motion for Independent Psychological Evaluation of Ryan Osborne.

8. The Court erred in denying defendant's Motion to suppress the Pre-Trial Photographic Identification of the defendant by Ryan Osborne. Moreover, the Court erred in refusing defendant's request to have Ryan Osborne testify at the pre-trial hearing on said motion.

9. The Court erred in permitting Detective Reynolds to testify as to Ryan Osborne's pre-trial identification of

the defendant (Vol. III, p. 357).

Notice of Appeal was timely filed (Vol. III, p. 385) and the instant appeal ensued.

STATEMENT OF FACTS

At approximately noon on June 2, 1983, Cheryl Lynn Osborne was murdered in her home on Dixon Street in Tampa, Florida. The crime was allegedly witnessed by the victim's five (5) year old son, Kenneth Ryan Osborne (hereinafter Ryan Osborne).

The medical examiner found that Mrs. Osborne suffered two (2) gunshot wounds from a .38 caliber weapon, one superficial gunshot wound to the neck and a "compact [sic: should be contact] gunshot wound" to the top of the head, which caused the victim's death (Vol. XII, p. 1754-55). A blowback of gun powder and blood onto the hands and body of the assailant would have occurred (Vol. XII, p. 1769-70). The doctor was unable to form an opinion as to which of the two (2) shots was fired first (Vol. XII, p. 1761).

Shortly before noon on June 2, 1983, James Thornton bicycled from his home on Azalea Street to the intersection with Dixon Street, he crossed Dixon Street, then traveled across a field and a church parking lot on his way to purchase a newspaper (Vol. X, p. 1385-86, 1391; St. Ex. 9, [Vol. XVII. p. 2129]). On retracing his path to return home, Thornton noticed a red Volkswagen van with a white top in the parking lot of the church and as he rode out of the field he heard a scream (Vol. X p. 1394). As he neared his home, Thornton heard a shot and then a second shot as he turned

into his driveway (Vol. X, p. 1395-1396). Standing in his driveway, more than 100 yards away from the field (Vol. X, p. 1456-1457), Thornton who was not wearing his eyeglasses or contact lenses (Vol. X, p. 1432-33, 1452) saw the rear view of a man slowly jogging in the field (Vol XI, p. 1556). The man was described as approximately five feet eight inches to five feet ten inches tall, weighing about one hundred eighty (180) to two hundred (200) pounds with black bushy or curly hair wearing a red and blue plaid short sleeve shirt with dark blue pants and carrying a suitcase in his right hand. (Vol. X, p. 1397-98, 1400.)

Thornton bicycled back to the field during which time he temporarily lost sight of the man (Vol. X. p. 1450). Thornton did not recall whether he was watching the field as he rode his bike (Vol. X, p. 1455) and admitted that his field of vision was very limited (Vol X, p. 1452-1454). Thornton then saw a man, who was not carrying a suitcase (Vol. X, p. 1459) twenty or thirty feet from the van which was pointed west towards the church (Vol. X, p. 1403, 1405, 1454). Thornton was unable to give any specific details as to physical description or clothing but claimed to recognize the man near the van as the man he saw in the field because he had "the same build and he looked the same" (Vol. X, p. 1456).

Thornton did not see anyone get in the van. As he passed the van, Thornton saw the driver, later identified as the appellant, drive the van out of the parking lot (Vol. X, p.

1416).

Thornton proceeded to the Osborne house (Vol. X, p. 1421) and knocked on the door. At his second knock the door opened slightly. Ryan Osborne was standing inside and in response to Thornton's question said that somebody shot his mother (Vol. X, p. 1424). Thornton entered the home, saw the victim's body and telephoned the police (Vol. X, p. 1422-24) to whom he gave a description of the driver and the van, including the tag number (Vol. X, p. 1428).

The first officers on the scene noticed that half a key was broken and still inside the deadbolt lock on the outside of the front door. The top portion of the key had snapped off and was on the floor just inside the residence (Vol. XIV, p. 2110-11; Vol. XIV, p. 1795-99).

Attached to the broken key was an identifiable key chain. Ryan Osborne and several of the neighbors identified the key as the one always kept in the deadbolt lock on the inside of the front door (Vol. XIII, p. 1943). Leon Osborne, the victim's husband, denied recognizing the key chain. He told the officer that he had installed the lock, using a kit which came with two (2) keys and that there was no other key. Upon being confronted with the fact that the officers had three keys (Leon Osborne's, Cheryl Osborne's and the one in the door), Mr. Osborne suddenly recalled "Oh, my wife had made that key separately from the other keys" but he did not know where she had the key made (Vol. XIII, p. 2022).

Analysis by the Federal Bureau of Investigation determined that all three keys were made from the same cutting tool (Vol. XII, p. 1799). Ultimately it was determined that all of the keys were made by the manufacturer who supplied three keys with each lock (Vol. XIII, p. 2022-23).

Detective Michael McAllister and R.J. Reynolds of the Tampa Police Department arrived at the crime scene at approximately 12:40 p.m. on the day of the incident (Vol. XIII, p. 1971; Vol XIV, p.2052). Detective Polly Goethe arrived shortly thereafter and, due to her expertise with children was assigned the task of interviewing Ryan Osborne. Ryan described the man he had seen as clean-shaven and, by pointing to colors, indicated the assailant was wearing dark green pants and a white shirt (Vol. XIV, p. 2100-01). Ryan stated that the assailant was carrying only a gun when he left the house.

Although Detective McAllister recalled that a .38 caliber weapon was found in the Osborne home, he did not know what happened to it or what was done with it. "...It wasn't important at the time so we didn't follow through on it." The detective did not remember why it wasn't important (Vol. XIII , p. 2029).

Leon Osborne, husband of the deceased, reported having left his home about fifteen minutes before his wife was murdered. He claims he went to the American Fitness Health Spa where he says that he was observed by numerous witnesses.

This alibi was not checked soon enough to allow the police to verify this claim (Vol. XIII, p. 2024-25).

Osborne then went to a prearranged meeting with his girlfriend, Joyce Worrell. Mrs. Worrell testified that Osborne had insisted on meeting her at 12:45 p.m. at Wendy's Restaurant on Henderson Street (Vol. XIV, p. 2124). Mrs. Worrell thought Osborne's decision to meet at Wendy's was extremely odd because Osborne had previously told her that a neighbor had seen them there on a prior occasion and he was fearful that if his wife found out about the relationship she would call Mrs. Worrell's husband (Vol XIV, p. 2119, 2124).

Osborne and Mrs. Worrell had several discussions about Cheryl Osborne's jealousy of several women she thought were involved with Leon. Leon Osborne had threatened his wife that he would get his walking papers if she "threw a jealous fit again" (Vol. XIV, p. 2119). Two weeks before Cheryl Osborne's death, Leon Osborne and Joyce Worrell had a conversation about their friend Chuck Silliman's wife ruling the roost, her dislike of Leon and her control over the money. Osborne stated "Well, that is Chuck's problem. I've taken care of mine" (Vol. XIV, p. 2121).

Due to a traffic tie up, Mrs. Worrell arrived beyond the appointed time. Osborne was not at the restaurant, so Mrs. worrell went to call a mutual friend and when she returned a few minutes later at 1:40 p.m., Osborne was there. Thus she did not know what time Osborne arrived. Mrs. Worrell

reported that Leon was looking very pale and his hair was wet around the neck. She had never seen him look like that before (Vol. XIV, p. 2125-26). Mrs. Worrell added that Leon, who normally wore a watch, behaved in a very strange manner in requesting Mrs. Worrell to ask the woman behind her what time it was. Mrs. Worrell refused to ask the woman, and went to the counter instead. It was 1:47 p.m. Although Osborne was supposed to leave at 1:55 p.m. to pick up his older son, Danny, he decided to leave immediately claiming he had to pick up his son because the transmission of his wife's car was not working and he didn't want her to go to school to pick Danny up (Vol. XIV, p. 2127).

At 3:30 p.m. on June 2, 1983, Lieutenant Dubose of the Indian River Sheriff's Department went to appellant's home where he told appellant's wife that her husband was wanted for questioning concerning a hit and run accident which occurred in Tampa earlier that day. (Vol. XII, p. 1814-15).

When appellant called home his wife told him of the contact from the police (Vol. XIV, p. 2058). Appellant told his wife to meet him at the Sheriff's office. At approximately 7:00 p.m. that evening, appellant and his wife, driving separate vehicles, met in the parking lot of the Indian River Sheriff's Department (Vol. XII, p. 1815-16, 1832).

Appellant was immediately approached by several police officers and asked whether he had a gun. Appellant had no weapon. Captain Tippins asked appellant to go over to the

police station to wait for the Tampa detectives to arrive but, at the same time advised appellant that if he decided not to wait he would be detained (Vol. XII, p. 1823-24). Although appellant had not been booked and formally arrested he was for all practical purposes, under arrest (Vol. XII, p. 1824). The Court took judicial notice that appellant was not free to leave (Vol. VI, p. 696).

Tampa Detectives Michael McAllister and R. J. Reynolds, who had been at the crime scene (Vol. XIII, p. 1971, 2009, Vol XIV, p. 2052, 2056) arrived in Vero Beach about 9:30 p.m. Shortly thereafter, the detectives interrogated the appellant who was not advised of his Miranda rights by Detective Reynolds until after the questioning had begun (Vol. XIII, p. 1972-73; Vol. XIV, p. 2059-60).

Appellant told the officer he had arrived in the Tampa area on June 1st, spending the night in a rest area approximately thirty miles east of Tampa. On the morning of June 2, 1983, appellant drove into Tampa in order to search for a job with a trucking company. Vol. XIII, p. 1974; Vol. XIV, p. 2058). As the interrogation proceeded, appellant asked why he was being questioned. He was told that his van, including the tag number, had been positively identified as being seen in the vicinity of a home where a young lady had been killed and additionally, that the description of a man similar to himself had been seen in the area (Vol. XIII, p. 1979-80, 2027-28). At that point appellant said that he didn't want to talk anymore thereby affirmatively invoking

his right to remain silent (Vol. VI, p. 700-701).[2/] The detectives claim that shortly thereafter appellant spontaneously added "you got me, why don't you go ahead and shoot me now and get it over with?" (Vol. XIII, p. 2012-2014; Vol. XIV, p. 2079-80). Despite the fact that Detective Reynolds had a tape recorder with him, the conversation was not taped (Vol. VI, p. 701) nor was there any reference to appellant's alleged statement in the contemporaneous notes taken to preserve appellant's responses Vol. VI, p. 702). Detective Reynolds denied that he repeatedly told appellant "well, you already got the death penalty, you already got the death penalty (Vol. XIV, p. 2079-80). Both Detectives McAllister and Reynolds admitted that in testifying to appellant's statements they had omitted appellant's statement that "he didn't kill anybody" (Vol. XIV, p. 2080).

The interview ostensibly terminated upon appellant's assertion of his right to silence. Nevertheless when Detective Reynolds left the room to ask the local authorities to take photographs and fingerprints of appellant (Vol. XII, p. 1187; Vol. XIII, p. 1980). Detective McAllister told the appellant about a case involving a husband and a wife and a murder for hire (Vol. XIII, p. 2014). It was indicated that this probably had happened in this case, and that the people in the other case had been sentenced to die in the electric

[2/] No reference to appellant's invocation of this right was made at trial.

in the other case had been sentenced to die in the electric chair (Vol. XIII, p. 2014-15).

A few minutes later, after Detectives McAllister and Reynolds left to return to Tampa, the Defendant, who was in the custody of the Indian river sheriff's Office, allegedly said:

> If I had known this was about a contract killing I would have been on my way to Mexico by now. (Vol. II, p. 135; Vol. XII, p. 1848).
>
> Somebody got my tag number. There was a witness. Hey, they got me. I don't have anything against you guys. I know you got a job to do. (Vol. II, p. 135, 137).

When the Officers returned to Tampa at approximately 1:30 in the morning they gave the photograph taken of appellant (St. Ex. 55-B [Vol. XVII p. 2487]) to Detective Barney Fletcher for use in a photographic line-up (State Exhibits 55 A-E [Vol. XVII, p. 2485,2487,2489,2491,2493]).

On June 3, 1983 at approximately 2:00 a.m. James Thornton was shown a photographic array of five (5) bearded mustached men from which he selected the photograph of appellant as the person he saw driving the van from the church parking lot (Vol. XIII, p. 1991,1993).

One half hour later, the Indian River Sheriff's Office acting at the direction of the Tampa police, arrested appellant on a charge of first degree murder (Vol. XII, p. 1849). At that time, the clothes appellant was wearing were seized and forwarded to the F.B.I. A number of hairs were

found on appellant's trousers, only one (1) strand of which was similar to and matched the characteristics of th victim's hair (Vol. XI, p. 1570-74).

Eight hours later at about 10:30 a.m. on the morning following the offense, Ryan Osborne, in the presence of his grandmother, Detective Reynolds and Captain Martinez, was shown the same photographic array, albeit differently arranged, seen by James Thornton. This was done despite Ryan's description of an assailant which differed substantially the man described by James Thornton and which did not in any manner resemble the photographs. The child's description of the intruder as clean-shaven, wearing a white shirt and dark pants was blatantly at odds with the description of the bearded, mustached man dressed in a blue and red plaid shirt seen by Thornton (Vol. XIV, p. 2096). Every one of the men pictured in the photographs had a beard and mustache. The photographs shown to Ryan were arranged in two columns of two each, with the picture of the appellant set off to the right in a single space (Vol. XIV, p. 2091-2097). Ryan purportedly picked out appellant's photograph (Vol. VI, p. 760,765; Vol. XIV p. 2062,20630. On June 9, 1983, Detective McAllister and I.D. Technician Brozzetti returned to Vero Beach to conduct a search of appellant's van (Vol. XIII, p. 1996, 2017). The van was seized on the evening of appellant's arrest and had been kept locked and sealed until the Tampa Police Officers could return to Vero Beach to conduct a search. (Vol. XIII, p. 1996, 2014-15).

The purpose of the search was to look for fingerprints, photographs, soil samples, hair samples, blood and any other evidence that might be inside the van, because there was likely to be some transfer of fibers and blood among other materials (Vol. XIII, p. 2016). The floor of the vehicle was vacuumed and the debris forwarded to the FBI for analysis, along with an address book, papers with writings and a number of articles, as reflected in State Exhibit Nos. 56,57,58 [(Vol. XIII, p. 1996, 1998-99, 2004, 2017-19), (Vol. XVII, p. 2495-96, 2497-98)]. These materials failed to disclose any evidence to connect the appellant to the crime or to any other person who may have been involved with the crime (Vol. XIII, p.2020). The F.B.I. was unable to match soil samples taken from the van with samples from the field (Vol. XIII, p. 1961, 1963-64). No fibers from the victim's home were found in the debris taken from the van nor were any such fibers or blood of the victim found on the rough seats of the van or on appellant's clothes. Neither the address book nor the notebook revealed anything incriminating. In short, nothing was found to link appellant to the crime (Vol. XIII, p 2019-20). Moreover, an examination of telephone records from the Osborne house and the Lloyd home do not indicate any connection whatsoever between the two homes (Vol. XIII, p. 2024-2025). No evidence was found that appellant knew the deceased or that he knew the deceased's husband, Leon Osborne (Vol. XII, p. 2020).

As Ryan was about to testify at trial, the Judge,

becoming increasingly aware of the child's competency as a witness, ordered that the child be shown the same photographic line-up in chambers. this time the pictures were arranged in a straight line. The child again selected the picture to the far right; however, this time the picture was of someone other than the appellant (Vol. XIII, p. 1897). The Court then prohibited the State from attempting to have Ryan identify appellant in the courtroom (Vol. XIII, p. 1897). However, the State was permitted to adduce testimony from Ryan indicating that at an earlier time he had picked out the man who shot his mother. Detective Reynolds testified that on the day following Cheryl Osborne's murder, Ryan identified a picture of the appellant as the assailant (Vol XIV, p. 2062,2063).

A Stipulation indicating that on the previous trial day Ryan had reviewed the photographic line-up and had picked out someone other than the appellant as his mother's assailant was read to the jury (Vol. XIV, p. 2081).

During these proceedings, appellant's counsel attempted to get a definitive ruling on appellant's Motion to Suppress the Pre-trial Photographic Identification by Ryan. The Court declined to make a specific ruling. However, by virtue of its decision to allow testimony as to the pre-trial identification, the Court, denied the motion.

It was intended that the appellant testify in his own defense however, when the Court overruled appellant's contention that his conviction of twenty-two (22) years

earlier was not so remote as to be irrelevant and was therefore admissible, it was decided that appellant would not testify (Vol. XIV, p. 2155-2156, 2168-2169).

STATEMENT OF FACTS

COMPETENCY

This case presents unusual circumstances where the only witness to the murder of Cheryl Lynn Osborne was her five (5) year old son Ryan, who was, between the time of the offense and the time of trial, in the sole custody of his father, who was and remains, a suspect in this case (Vol. XIII p. 660-61). The importance of the child's testimony is reflected in the Prosecutor's statement when seeking a continuance allegedly to allow Ryan more time to adjust to testifying:

> I believe, sir, that we would have a difficult time proving this case (without the testimony of the child). I have other evidence but I don't believe that it is strong enough possibly to have a jury convict this man of first degree murder. And I would tell the Court right up front that the State is seeking the death penalty in this case should we get a conviction. And I believe the boy is crucial, crucial to the State's proof in this case (Vol. XVI, p. 2333-34).

Two (2) months after the incident, at the behest of the State, Ryan began play therapy with Dr. Ann Lockey a state recommended psychiatrist of minimal qualifications whose primary efforts were directed towards preparing the child to testify rather than towards helping the child toward resolution of his grief as had been contended by the State in prohibiting the defense access to the child (Vol. XVI p. 2332).

Dr. Lockey, a psychiatrist in the Tampa area, possessed limited experience as a psychiatrist in general and had

virtually no experience in dealing with children who had been subject to similar trauma. She had treated only one patient whom she placed in the same general category as Ryan but did not draw upon even that one limited experience in dealing with Ryan. Dr. Lockey had been in private practice for less than eighteen (18) months and, by her own admission, had limited practical field experience relative to this type of case. Dr. Lockey had no training or experience in the use of testing procedures to aid in the evaluation of intelligence, emotional status, personality and the like as such testing is performed by psychologists not psychiatrists (Vol. XVI, p. 2372-74). She did not rely upon any objective data in drawing her conclusions about Ryan. Dr. Lockey states she did not even become familiar with the facts of the case, because she wanted Ryan to be able to recall those things by himself. Nonetheless, she did know that Ryan allegedly was present when the offense was committed, that there was a firearm involved and that Ryan allegedly witnessed the murder. (Vol. XVI, p. 2345). Although Dr. Lockey had been conversing with the child's father she claimed they did not discuss Ryan's degree of distress immediately after the incident. Dr. Lockey's evaluation of Ryan's intelligence was based upon her own observations of Ryan in play therapy and, primarily, the statements of Ryan's father and grandmother that they considered Ryan to be intelligent (Vol. XVI, p. 2343). Reportedly the child refused to discuss the incident with Dr. Lockey (Vol. XVI, p. 2375) although Dr. Lockey

reported that Ryan took great pride in being able to tell lawyers the story of his mother's death (Vol. XVI, p. 2375-2376) (what was euphemistically referred to as "the scary story").

The State's frequent access to the child, the State's referral of the child to a psychiatrist two (2) months after the incident, the doctor's own admission that she was working primarily towards preparing the child to testify at trial, rather than assisting him to resolve his grief (Vol. XVI, p. 2376-77), the child's having continued to be under the domination of his father who was and remains a prime suspect in the case, and the multiple and grossly conflicting versions as to what Ryan saw and heard, together with the child's relation of things which he could neither have seen nor heard combined to prompt appellant to file an (Amended) Motion for Independent Psychological Evaluation of Alleged Eye Witness Kenneth Ryan Osborne (Vol. I, p. 117-125). It was requested that a thorough evaluation of the child's competency be made for presentation to the Court and all parties. It was suggested that the unusual circumstances of the case and the proceedings to date warranted a full psychological evaluation in order to assist the Court in evaluating the child's competency and to provide information which would allow the appellant to effectively exercise his Sixth Amendment right to cross examine the alleged sole eye witness to the offense here charged. It was pointed out in the motion and hearing thereon that a number of bona fide

questions as to Ryan's competency had emerged: Ryan was just barely five (5) years of age when the offense occurred. Neither his ability to differentiate between the truth from a lie nor his ability to differentiate fantasy from reality had been projectively, objectively or subjectively evaluated (Vol. XVI. p. 2376-77). Dr. Lockey did not explore with Ryan his fears and fantasies nor his likes and dislikes relative to television programs, movies, books or stories and thus obtained no information as to the possible overlay of these factors upon Ryan's stated recollection. There had been no assessment as to the degree to which Ryan was ordinarily able to separate fact from fantasy nor as to whether the alleged offense and resultant trauma from either the event itself or his mother's death may have additionally impeded Ryan's ability to separate fact from fantasy and/or affected his ability to accurately perceive, recall and relate the events of the instant offense (Vol. XVI, p. 2375-76).

It was submitted that Dr. Lockey was not competent to provide the Court with information appropriate to base its determination of Ryan's competency as a witness (Vol. XVI, p. 2369-70). In response to the Court's questions as to how another doctor could help, it was explained that a psychologist would be able to aid in the determination of whether or not Ryan had the minimal level of intelligence to be considered competent to testify as well as whether or not the child possessed sufficient reality concepts and indices of reliability so as to reach the threshold level of

competency to testify. It was noted that Dr. Lockey, who had seen Ryan approximately sixteen (16) times (Vol. XVI, p. 2370) had conducted neither objective nor projective testing in order to determine the child's competency nor did she conduct any tests or utilize any interviewing techniques to determine whether Ryan was very suggestible, whether or not the child was able to appropriately distinguish fantasy from reality or to determine whether or not the child's recitations of events were reliable.

In gathering information to assess Ryan's competency as a witness the Court permitted the defense only limited questioning of Ryan in order to determine whether he was competent to testify. As in Ryan's deposition, no questioning as to the actual factual events surrounding the offense was permitted. Over appellant's objection that he should not be in a position of challenging the child's competency at trial, the Court reiterated that the qualifications or lack thereof of the witness would not be based on his ability to recall (directly or indirectly) the events surrounding the offense (Vol. IV, p. 456).

Ryan, who had spoken to the Assistant State Attorney a whole bunch of times (Vol. IV, p. 460) testified to the usual information concerning his name, address, age and immediate family. Ryan said he knew what it meant to tell the truth but was unable to define the term in any manner. He did not respond when asked what it meant to tell the truth. In response to leading questions, Ryan finally did say that you

should tell the truth and that it is bad not to tell the truth. Ryan indicated that if a person does not tell the truth in Court they go to jail (Vol. IV, p. 456-59).

Ryan had given demonstrably untrue statements as to his own whereabouts at the time the intruder arrived, as to how the intruder gained entrance, as to what the intruder had said and as to how the intruder left. Moreover, his description of the intruder was grossly at variance with appellant's appearance.[3/] Ryan gave conflicting answers to every question of importance.

Because it was agreed that the child had given so much contradictory information, had reported observations which he clearly did not observe and had made statements which were demonstrably false, it was important that such unbiased and objective information be obtained. Other more technical considerations aside, reliance on Dr. Lockey's report which had been so heavily based upon observations made by the father and grandmother of the child was clearly inappropriate.

It was suggested that the discrepancies in the child's testimony raised the inference that the child may not have had the ability to perceive and recollect the events accurately (Vol. XVI, p. 2372-74).

The State felt compelled to obtain a protective order because (they said) the child was not emotionally or mentally fit to testify in deposition or at trial. The State

[3/] As detailed in Argument Two below.

contended that such an order was necessary in order to allow the child to work through the grief process in order to be able to testify. However, it is notable that Dr. Lockey testified the orientation of her "therapy" and the point of her therapy with Ryan was to enable him to testify rather than to help him to work through the grief process (Vol. XVI, p. 2332).

Dr. Lockey did not provide any information upon which the Court could rely in determining whether Ryan met the initial threshold of competency of a witness, whether the witness's intelligence, ability to perceive, recollect and relate events is sufficient to enable the child to testify or whether the child is so susceptible to persuasion and suggestibility that he is not competent to testify as to the events of this case.

Appellant argued that the child's fantasies should be considered. That in fact such consideration was overwhelmingly important in light of the child's demonstrably false statements, for example, that the door was shot off (Vol. XIII p. 1923-24; Vol. XIV p. 1905). It is impossible to tell whether the statement or other statements made by Ryan were a figment of the child's imagination, whether they were induced it by the suggestions made by other persons, whether the child simply misperceived the events or whether the child lied. Whatever the answer, it was pointed out that statements such as this one raise the inference that the child's perception and recollection may be based more on

fantasy than reality.

Appellant recommended a local psychologist, with an international reputation, Dr. Theodore Blau, to conduct the examination of Ryan (Vol. XVI, p. 2374).

Dr. Blau is a child psychologist with extensive experience in dealing with children. He has examined more than thirty (30) children who were witnesses to a tragic event comparable to the instant case. He has done extensive academic and practical research to develop criteria to determine the credibility of child witnesses and has served as a consultant in numerous major studies dealing with the credibility of witnesses (Vol. IV, p. 467-470).

Dr. Blau provided the Court and all parties with an evaluation study of Ryan, based upon his review of records, including depositions and police reports in the instant case.

Finally, Dr. Blau was present when Ryan testified at the hearing to determine his (Ryan's) competency to testify. Dr. Blau provided information as to appropriate criteria, research results of children as witnesses and appropriate levels of information and behavior was provided as well as conclusions and recommendations specifically concerning Ryan (Vol. IV, p. 471; Vol IV, p. 491).

Dr. Blau opined that Ryan appeared to be an average youngster between five and one half and six years of age but that he showed signs of suffering from "mild depression, certainly flatness and a certain lack of range and emotional response (Vol IV, p. 468). Dr. Blau noted that Ryan

responded to questions as a five (5) year old generally does but did not respond at the level of a seven (7) year old child thereby providing one of the indications that Ryan was not an above average child. Children generally learn it is more acceptable to an adult to answer yes or no and it was observed that Ryan fit the mode by making a very stringent effort to choose a yes or no answer. However, there were many times at which Ryan responded that "he did not know" or "that he could not remember or in which he did not respond at all. Youngsters are generally more comfortable with "I don't know answers". Research does indicate that all things being equal children of Ryan's age can give reliable answers to straightforward simplistic questions if they are carefully phrased and relative to their experience and if the answers and questions are not lengthy (Vol. IV, p. 474).

Interestingly, research has indicated that when asked leading questions five (5) year old children have twice as many errors as would an adult. If the child is given an answer for which he must say yes or no, the chances of such error increase to fifty percent (50%) (Vol. IV, p. 475). In game playing situations, a child can remember twice as much as in real life circumstances (Vol. IV, p. 482).

Based on his observations of Ryan's responses, Ryan's difficulty with recent memory as well as with his memory dating back several months, Dr. Blau opined that Ryan was not capable of recalling events and testifying accurately about events which occurred six (6) to nine (9) months earlier

(Vol. IV, p. 480-481). Based upon his review of Dr. Lockey's deposition plus several letters she wrote, the deposition of Ryan Osborne and Officer Goethe, several Tampa police reports, the Motion for Protective Order and Continuance filed by the State, and the Motion for Independent Psychological Evaluation, Dr. Blau's opinion which had been tentatively tendered in the earlier report, was that the average six (6) year old child, a class of which Ryan is a member[4/] is not able to understand the impact of telling the truth in courtroom proceedings nor to appropriately understand their role in such a proceeding. This opinion is supported by scientific studies that a mental age (as opposed to a chronological age) of at least seven (7) years old[5/] is required to understand and participate knowingly and understandingly in a judicial oath (Vol. III, p. 479).

These studies are supported by empirical evidence that the part of the brain which has to do with the ability to recall memory and events in a cognitive sequence does not develop until the chronological age of seven.

Dr. Blau advised the Court that two (2) instruments, the Weekster (sic should be Wechsler) Preschool Evaluation and the Stanford Binet Evaluation are considered to be standard for assessing the intellectual level of the child and that

4/ Ryan was five years old at the time of the offense.
5/ The average child has the same chronological age as mental age.

for assessing the intellectual level of the child and that either of these instruments would produce a pretty clear picture of the child's mental functions. One could extrapolate as to the mental age at any particular point in time within two (2) years pretty reliably (Vol. IV, p. 488). A thorough psychological evaluation of the child's actual intellectual level would take about three (3) hours. To measure the emotional effects on the intelligence and whether the child would be able to continue to function at "his exact level" under emotional stress would take an additional two (2) to two and one-half (2 1/2) hours (Vol. IV, p. 488-489).

From his review of Dr. Lockey's deposition and records as well as his own observation of Ryan, Dr. Blau stated that Ryan was "extremely vulnerable to severe feature (sic) future emotional reactions and ought to be in treatment at this time (Vol. IV , p. 490).

There is likely to be some intermixing of fantasy because the child is under six (6) years of age and "there is no such thing as a child under six years of age who clearly and unequivacably separates fantasy from reality". It is simply not within their brain structures as the Terwary zone has not yet developed. As an example of the intermixing of fantasy and reality the doctor noted that a six (6) year old child can eat part of his mother's blueberry pie, have it all over his face and say he didn't eat it. The child is not lying he just created fantasy to make things smooth (Vol.IV,

p. 489-91)

Based on the data he had available, Dr. Blau could say only that Ryan's testimony is somewhat tinged or affected by fantasy but could not say to what degree. Dr. Blau stated that if he were to examine the child he would be in a position to give a precise opinion as to this subject.

The Court indicated that it understood that the doctor was saying that a child naturally fantasizes at this age without intentionally doing so and it, "sort of concurs with it".

The doctor noted that the child could not recall correctly the days of the week when responding to Mr. Nurik's question and also in response to a question as to what the child was learning in school the child responded with the average answer expected of a five and a half (5 1/2) or six (6) year old child. That is to say, that the child was silent, he shrugged his shoulders as to say, "I don't know". The Court's questions to the child were not appropriate to the task of determining the competency of a six year old child. The judge asked the child to count to ten (10). However this question would be appropriate to tell the level of a four and a half (4 1/2) year old child. And although a child of five and a half (5 1/2) to six (6) years of age can usually say the days of the week only half of them will be able to tell you the answer as to what the precise day is, i.e., to what is today.

Dr. Blau interviewed Ryan for a very short period of

time because the Court had sharply limited the amount of time Dr. Blau was able to spend with the child (Vol. IV, p. 471)

STATEMENT OF FACTS
RYAN OSBORNE'S PHOTOGRAPHIC IDENTIFICATION OF APPELLANT

On the day of his mother's murder, Ryan Osborne described the assailant to Detective Polly Goethe, a police expert in interviewing children, as a man with no hair on his face, wearing a white shirt and dark green pants (Vol. XIII, p. 1906-1907). At a later time, Ryan added that the assailant wore sunglasses throughout the event (Vol. XIII, p. 1926; Vol. XIV, p. 2100).

The following day, in the presence of his grandmother, Detective Reynolds and Captain Martinez, Ryan was shown a photographic array of five (5) bearded, mustached men and asked to select the picture of the man who hurt his mother. Ryan allegedly selected a photograph of appellant (Vol. VI, p. 760,765); (Vol. XIV, p. 2062,2063).

Thereafter, appellant filed a Motion to suppress Pre-Trial Photographic and Courtroom Identification of the Defendant by Kenneth Ryan Osborne alleging that the line-up was impermissibly suggestive both in terms of the pictures shown and specifically in terms of the lay-out of the photographs. It was argued that the identification was unreliable and would necessarily taint any later identification the witness might make (Vol. II, p. 148-149).

Detective Reynold's testimony at the hearing on the aforesaid motion was contradicted by that of his superior, Captain Martinez, Detective Reynolds' testimony at the trial of the case was inconsistent with his own prior hearing

testimony. At the hearing, Detective Reynolds claimed that he did not recall which photograph was that of the appellant but that it wasn't first or last (Vol. VI, p. 765) nor did he recall whether he shuffled the order of the photographs he received (Vol. VI, p. 766). Detective Reynolds testified that "the photographs which he set out were then displayed on the desk in front of him (Ryan) and I don't remember if they were straight across or three and two. I believe they were straight across. I'm not positive" (Vol. VI, p. 760). Detective Reynolds claimed he asked Ryan to see if he recognized anyone. It is claimed Ryan immediately pointed to the picture of appellant and said this one. When Detective Reynolds asked Ryan to be sure, Ryan allegedly picked up the photograph of appellant and said "Sir, I'm sure this is the man that hurt my mom" (Vol. VI, p. 760,765).

At trial Detective Reynolds testified that the pictures shown to Ryan "were displayed in a straight line from left to right, total of five (5) photographs. "I believe Mr. Lloyd was the fourth photograph" (Vol. XIV, p. 2062-63). On cross-examination Reynolds finally admitted he testified at the deposition that he did not recall if the photographs were arranged straight across or in columns of three (3) and two (2) but "that he (no longer) remembered it that way nor did he recall that the fifth photograph which was separated from the other four pictures was that of the appellant 9ol. XIV, p. 2078).

Captain Martinez testified that the pictures were <u>not</u>

laid out in a straight line but were set up in two (2) columns of two each with an additional picture set off to the side (Vol. VI, p. 784).

Captain Martinez testified that when Detective Reynolds asked Ryan if he saw the man who hurt his mommy the child nodded affirmatively "He didn't say yes. He nodded affirmatively." (VOL. VI, p. 785) Ryan looked at each photograph for a second or two. According to Martinez Detective Reynolds asked Ryan whether he was sure and when Ryan said yes, Reynolds asked the child to hand the photograph to him (Vol. VI, p. 788).

At the trial Captain Martinez made an obvious attempt to minimize both the pattern of the photographic display and the impact of Reynold's testimony by altering his own testimony to the point of stating that he said one photograph was more to the side than the other although on being directly asked whether "the photograph that was over here to the side, that photograph was the photograph of (appellant)". The witness responded in the affirmative (Vol. XIV p. 2097).

Detective Reynolds said he did not have any conversation with Detective Goethe prior to showing the photographic array to Ryan but that he recalled Captain Martinez talking with Detective Goethe about interviewing the young boy. Reynolds claimed however, that he had no knowledge of their conversation and, at the time of the line-up, he did not know that Ryan had described the assailant as clean-shaven or that Ryan's description of the assailant did not otherwise match

that Ryan had described the assailant as clean-shaven or that Ryan's description of the assailant did not otherwise match the description of the man seen by James Thornton.

Captain Martinez was shown the photographic array prior to its presentation to Ryan but states that he too not been told of the description provided to Detective Goethe (Vol. VI, p. 782-83). No effort was made to determine how the child had described the assailant because the photopack already had been shown to one witness (Thornton) who had identified the appellant (Vol. VI, p. 761)

Over appellant's objection that the State was seeking to protect Ryan at the cost of appellant's Sixth amendment rights, the Court did not allow appellant to call Ryan as a witness (Vol. VI, p. 790).

After additional argument, the court ruled that it would defer ruling on the Motion until the time of trial at which time questioning of Ryan as to this issue would be permitted.

Ultimately, Ryan never did testify as to the photographic line-up. The Court short-circuited this testimony by its sudden decision during trial to show Ryan the photographic array (Vol. XIII p. 1897). On this occasion Ryan selected the picture to the far right but this time the identification was of someone other than the defendant.

STATEMENT OF FACTS
SENTENCING

At the Charge Conference for the sentencing proceedings, the court agreed with Appellant that there was no evidence to support aggravating circumstance number five (5)(F)[6/], that the offense was committed for pecuniary gain, and therefore determined not to instruct the Jury as to that aggravating factor (Vol. XIX, p. 2753). Over appellant's argument that there was no proof of a robbery therefore negating aggravating circumstance number four (4)(D) (Vol. XIX, p. 2751) and that the record did not support the kind of enhancement required to instruct the jury as to the crime having been committed in an especially heinous, atrocious and cruel manner (aggravating circumstance number eight (8)(H), the Court determined to instruct the jury as to both of those factors as well as to aggravating circumstance number nine (9)(I), that the crime was committed in a cold,calculated and premeditated manner without any pretense of moral justification (Vol. XIX, p. 2753-55). Thus, instruction as to aggravating circumstances number four (4), eight (8) and nine (9) were given. Agreeing that mitigating circumstance number eight (8), defining the jury's consideration of

[6/] Aggravating and mitigating factors are distinguished in the Statute and Sentencing document by letter. The appropriate letter shall be referenced in parenthesis following the number.

mitigating factors was unnecessarily limited, the Court agreed to instruct the jury that it must consider "any other aspect of the Defendant's character or record or circumstance, in other words, we must consider all evidence in mitigation" Vol. XIX, p. 2750). It was stipulated that Appellant had one (1) prior conviction, for a burglary committed in 1962. Therefore mitigating circumstance number one (1)(A), that appellant had no significant history of prior criminal history was applicable. Additional possible mitigating factors were that the appellant may have been an accomplice in the offense for which he was to be sentenced but that the offense was committed by another (mitigating factor E) and that the child had not been harmed. Thus, the jury was instructed as to mitigating circumstances numbers one (1) and four (4) and eight (8) (Vol. XIX, p. 2758).

At the sentencing phase, the state relied upon the evidence presented at trial. Appellant's uncle, his wife, brother-in-law and his nine (9) year old daughter as well as a former employer testified in appellant's behalf. Appellant's father was unable to attend the proceedings due to severe asthma and emphysema. Appellant had had a stable history of employment and had worked hard to provide for his family (Vol. XIX, p. 2775). No one had known appellant to exhibit any violent behavior (Vol. XIX, p. 2771, 2774) and he was known to be kind and considerate to those around him. He had a stable marriage (Vol. XIX, P. 2769). Appellant

provided a home as well as economic and emotional support to his brother-in-law when the latter was going through a divorce (Vol. XIX, p. 2770-2772). He was a good father to his daughter, Kimberly, whom he took on outings and who was the center of his existence (Vol. XIX, p. 2769-2775, 2777-2779). Appellant was himself the center of the neighborhood when he managed a game room in the area. The neighbors brought their problems to appellant who also babysat for children in the neighborhood (Vol. XIX, p. 2781). One of Appellant's former employers, James Edward Burke, a contractor and developer from Pompano Beach changed travel plans at the last moment to go to Tampa to testify for the Appellant. Appellant had worked for Mr. Burke as a construction laborer on a condominium project and advanced several positions to become a foreman laborer and then to a position as a security guard (Vol. XIX, p. 2785-2788). this latter position required someone who was trustworthy, dependable and reliable. There were a lot of financial operatives and someone untrustworthy could have cost the company a lot of money. As a lead laborer, Appellant was in charge of other men. Appellant had no problems in getting along with the other men and there was no evidence of a violent nature from a man who was "basically a pretty nice guy" (Vol. XIX, p. 2788). Appellant and Mr. Burke parted on very good terms when Burke recommended appellant to a close personal friend who had a company which would allow Appellant the ability to advance further (Vol. XIX, p. 2788).

Other friends and employers couldn't get to Tampa due to the short notice of only a few hours before the sentencing hearing (Vol. XIX, p. 2788). The jury returned its verdict shortly after 5 p.m. on May 30, 1984 and the sentencing proceedings were scheduled for 8:00 am. the following day.

Appellant was sentence to death by electrocution (Vol. XIX, p. 2819).

SUMMARY OF THE ARGUMENT

The chief witness for the State, Ryan Osborne did not meet the threshold level of competency required of a witness.

It was evident from the numerous inconsistencies and falsehoods in Ryan's statements and testimony that he did not accurately perceive, recall and recite the events connected with his mother's death. Appellant's Sixth Amendment Rights to confront the witnesses against him were abridged when the Court refused to allow appellant's expert witness, Dr. Theodore Blau, the opportunity to fully assess Ryan was compounded by its refusal to allow Dr. Blau more than an hour to examine Ryan when it became clear that the State's expert psychologist spent at least five (5) hours with Ryan.

The trial court also erred in refusing to suppress Ryan's photographic identification of appellant where the photographic line up was unduly suggestive and unreliable by virtue of the placement of appellant's photograph, the only picture with a paneled back ground and blue-eyed suspect, in a single column to the right of the other photographs. The Court committed additional error in denying appellant the opportunity to cross examine the identifying witness as to the identification procedure.

Detective Reynold's testimony concerning the out of court identification of appellant by Ryan Osborne must be stricken as the tainted fruit of the illegal identification

procedure and/or the Court's failure to allow cross examination of the witness as to this issue.

Appellant's statements were obtained in violation of Miranda and Edwards v.Arizona where appellant was held in custody, without notification as to the reasons, for several hours and the officers continued to speak with him after he invoked his right to silence.

The testimony of Jack Williams, a former supervisor of appellant should have been disallowed as more prejudicial than probative.

The trial Court erred in imposing a sentence of death. The aggravating circumstances listed by the Court are not supported by the record or by fact. The statutory aggravating factors not outweighing the mitigating factors, the sentence must be set aside and reduced to a life sentence.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S EXPERT PSYCHOLOGIST SUFFICIENT TIME TO EVALUATE RYAN OSBORNE

Following requests, discussions and hearings and after the State had Ryan meet with psychiatrist Ann Lockey no less than sixteen times and been evaluated by psychologist Sidney Merin, Ph.D.; the Court ruled that the defense recommended expert, Dr. Theodore Blau, could interview Ryan for what it termed a reason-able time. Such reasonable time being one hour (Vol. IX, p. 1343).

As is more than adequately shown by the number of hours Dr. Merin spent with Ryan, the time limit imposed was clearly not reasonable for two reasons: The arbitrary and unrealistic time limitation deprived Dr. Blau of the opportunity to conduct an appropriate professional evaluation of Ryan and Dr. Blau was denied the time to fully examine Ryan despite the fact that the State's Expert conducted a full scale evaluation of Ryan that lasted approximately five (5) hours.

On May 7, 1984, Dr. Merin administered the following tests to Ryan: A Stanford-Binet - LM, a Peabody Picture Vocabulary Test-Revised Form L, a performance Scale of the WISC-R, a Draw-A-Person Test, a Child's Sentence completion Test and a Three-Wishes Test (Court Exhibit I, Vol. XVII, p. 2508, App I).

The State's disingenuous claim that Dr. Merin gave Ryan only one test which was strictly an intelligence test, taking "only one hour" is belied by the results of the aforementioned materials which Dr. Merin supplied to Dr. Blau. The prosecutorial misconduct evidenced in the state's misrepresentations cannot be sanctioned. The six (6) tests, measuring intelligence, aptitudes, mental and emotional status cannot be administered within the one to one and one-half hour time period the State alleges. This full scale evaluation took approximately the same amount of time as Dr. Blau estimated would be required for him to conduct a thorough evaluation of Ryan (Vol. XVI, p. _____), that is, approximately five hours.

It is extraordinary that throughout the course of the proceedings in this case, the State has argued that to interview Ryan would be traumatic and potentially dangerous to him . Yet the State, through the police, the prosecution and two doctors had repeated contacts with the child from the inception of the case through the trial. Nonetheless, at every turn the State argued that any contact from appellant's counsel or Dr. Blau would further traumatize Ryan, thereby requiring restraint on defense access to the boy. There was never any showing, nor could there be, that interviews or evaluation by the defense would be more potentially harmful to Ryan that the repeated interviews by the various representatives of the State. Nonetheless, the

State ducked in and had the child fully evaluated by Dr. Merin.

Even assuming that Dr. Merin had seen Ryan for only one hour the State's argument for such limited evaluation was not viable. In Court Exhibit 1, (Vol. XVII, p. 2508) Dr. Blau notes the ethical considerations of his profession as well as noting that "The purpose of a psychological examination is to identify sources of a youngster's intellectual capacity, their neuro-psychological functioning, their emotional strengths and weaknesses". In response to the court's insistence that any examination be conducted without reference to the traumatic incidence in Ryan's past life, Dr. Blau citing ethical constraints, stated that "a psychological examination cannot be properly or ethically conducted in a fettered manner. Dr. Blau noted that "restraints and restrictions on areas which can be evaluated destroy the validity of the psychological evaluation". There could be no guarantee that areas of intense emotional response would not be touched on and responded to by Ryan. (Vol. XVII, p. 2508) (App.1). Dr. Blau emphasized that the repression of strong emotions can be extremely destructive for a child. Thereby indicating that the State's alleged efforts to protect the child from the incident were at best misguided and at worst dishonest.

The Court's refusal to allow Dr. Blau the right to examine the child created a fundamental denial of appellant's

rights resulting in a deprivation of appellant's due process rights under the Sixth and Fourteenth Amendments to the United States Constitution (see Argument II infra) and of his right to confront the witnesses against him. The conviction must therefore be reversed.

ARGUMENT II

THE TRIAL COURT ABUSED ITS DISCRETION IN RULING RYAN OSBORNE A COMPETENT WITNESS

In determining a child's fitness to testify, the child's age, intelligence and ability to understand must be considered in order to determine whether he possesses the requisite abilities to accurately perceive, recall and relate the events about which he is to testify Bell v. State, 93 So.2d 575 (Fla. 1957) (en banc); McKinnies v. State, 315 So.2d 211 (Fla. 1st DCA 1975); Harold v. Schluep, 264 So.2d 431 (Fla. 4th DCA 1972). The totality of the evidence concerning Ryan Osborne's competency as a witness including his own statements to the police, depositions, testimony in court and ultimately at trial reflects that the Court abused its discretion in determining that Ryan was competent to testify.

A youngster's age is relevant to his competency as a witness only insofar as it can assist in pinpointing the general age at which children may be considered suitable to testify. Prior to the development and introduction into common use of psychometric testing, the common law usually assumed that age seven (7) was the youngest age at which a child would be capable of testifying 81 Am.Jur ____. The wisdom of the common law is now borne out by the scientific evidence that human beings develop skills in a certain sequential order. The necessary mental abilities permitting

a child to independently testify with an acceptable degree of accurate recall are not developed, in average children, until seven (7) years of age. Thus, a normal child with a mental age of seven (7) would have the necessary brain development to be presumed competent to testify and in fact is more likely to be actually competent to testify than a child of a younger mental age who would not be presumed to be competent (Vol. _____, p. _____).

The evidence suggests that Ryan Osborne is a perfectly average child. Based upon his review of pertinent police reports, depositions and records in the instant case, together with his observations of Ryan at the hearing to determine Ryan's competency as a witness, Dr. Theordore Blau opined that at the time of the hearing Ryan was an average youngster between five and one-half and six years of age, Ryan's chronological age at the time. The doctor specifically noted that Ryan was not responding as would be expected of a child of seven (7) years of age thereby indicating he was not an above average child. Thus, Ryan would not be presumed to be a competent witness. The questions the Court asked to qualify Ryan were not suited to the task as they measured only the very minimal abilities a younger and incompetent child would be expected to meet. The questions are virtually wholly inapplicable to determining the competency of a witness. Ryan was not properly qualified as competent to testify.

The usual concerns about a five (5) year old witness testifying were enhanced because this particular witness had given demonstrably untrue statements as to his own whereabouts at the time the intruder arrived, as to how the intruder gained entrance, as to what the intruder had said and as to how the intruder left. Moreover, Ryan's description of the intruder was grossly at variance with appellant's appearance. Ryan gave conflicting conflicting or false answers to every question of importance.

(1) Ryan testified he heard a person knock on the door and his mother responded come in ((Vol. XIII, p. 1905).

Earlier, Ryan told James Thornton that the man shot the door off (Vol. XIII, p. 1923-24; Vol XIV, p. 2112).

(2) Ryan testified at trial that he heard the man and his mom talking (Vol. XIII, p. 1907). Ryan said there was no fighting at the front door (Vol. XIII, p. 1924).

Later in his testimony, Ryan said there was fighting at the front door (Vol. XIII, P. 1938-39).

(3) Ryan testified that he was in the garage with his dog [the garage is attached to the north side of the home, away from the field when the assailant arrived.

Ryan previously told Detective McAllister that he was in the backyard when the man arrived at the door (Vol. XIII, p. 1922, 2030).

(4) Ryan says he saw the person at the front door (Vol. XIII, p. 1906).

Such a view would have been impossible from either the garage or the backyard (Vol. XIII, p. 2030).

(5) Ryan testified on direct examination that the assailant asked the victim for money (Vol. XIII, p. 1909).

On cross examination testified that he could not remember what the man had said in the house (Vol. XIII, p. 1938).

(6) For the first time at trial, Ryan stated that the assailant claimed to be a guitar player (Vol. XIII, p. 1907).

(7) Ryan testified that he did not recall what happened to the ring (Vol. XIII, p. 1910, 1924-25).

Ryan denied that he previously told Detective Goethe that the ring was laying by his mom's hand after the man left. (Vol. XIII, p. 1924-5).

Ryan previously told defense counsel James Bush that the man took the ring and put it in his pocket (Vol. XIII, p. 1924-25; Def. Ex. 5; [Vol. XVII, p. 2503-04).

(8) At trial, Ryan said he remembered what the assailant looked like, that he had a beard and mustache (Vol. XIII, p. 1906).

Ryan recalled Detective Goethe asking whether the "bad man" had hair on his face, contrary to Detective Goethe, Ryan affirmatively stated that he did not say the man had no hair on his face (Vol. XIII, p. 1926).

(9) Ryan's father had a beard and mustache at the time of the offense (Vol. _____p._____).

Ryan denied that his father had a beard at that time (Vol. XIII, p. 1936).

(10) Ryan testified he did not recall the clothes the assailant was wearing (Vol. XIII, p. 1912, 1938).

Ryan said he recalled Detective Goethe asking what the man wore. But again he contradicted to Detective Goethe and specifically denied pointing to his white shirt and green shorts to describe the colors of the assailant's clothes (Vol. XIII, p. 1926) (See Vol. XIV, p. 2100).

(11) At trial Ryan claimed that after the shots were fired the assailant went out the front door and into the front yard (Vol. XIII, p. 1910).

Ryan denied that he previously told Detective McAllister that the man ran out the side garage door and over the fence (Vol. XIII, p.1928).

(12) At trial Ryan testified that the assailant had a suit case with him which he carried when he left the house ((Vol. XIII, p. 1907, 1927).

However, Ryan clearly told Detective Goethe that the man was carrying only a gun when he left the home (Vol. XIII, p. 1928; Vol XIV, p. 2113).

(13) Ryan said that he could not see the van from the front door of the house.

In deposition Ryan stated that he could see the van from his front door (Vol. XIII, p. 1937).

(14) When asked whether he had seen Dr. Lockey, Ryan said yes. When asked who Dr. Lockey was, Ryan responded "I don't know." (Vol. XIII, p. 1934-35).

Ryan stated he initially saw Dr. Lockey on the day following his mother's death.

Dr. Lockey's records revealed she did not meet Ryan until August 11, 1983, approximately six weeks after his mother's death. (Vol. XIII, p. 1935).

(15) Ryan denied speaking to anyone about the case (Vol. XIII, p. 1915).

In response to the prosecutors direct question, Ryan did admit to having spoken to the prosecutor about the case but continued to deny that he had spoken to anyone else (Vol. XIII, p. 1915).

On cross examination Ryan admitted he told James Thornton what happened (Vol. XIII, 1923). He also admitted he told Dr. Lockey what had happened (Vol. XIII, p. 1935).

(16) Ryan claims to have followed the assailant to his van, which Ryan described as having a red top

and white bottom and facing east, into the field (Vol. XIII, p.1928-9). Ryan said he saw the headlights of the van and that the man got into the van "where the steering wheel is..." (Vol. XIII, p. 1929). The driver's side of the van was described as being closer to the house.

James Thornton described the van as white over red and facing west, into the parking lot, with its back to the field. The driver's side of the van was therefore away from the house. It was the passenger side which was closer to the house.

(17) Ryan did not respond to where he was at the time he allegedly observed the man enter the van.

On a leading question he said he was not at the front door when he observed the man get into the van but was on the side of the house (Vol. XIII, p. 1932).

Ryan alledgedly saw the man run to the tree stump but did not see him run past the tree stump (Vol. XIII, p. 1932).

A glance ..... State Exhibit 3 (Vol. XVII, p.____) reflects that Ryan could not see the assailant enter the van if he did not see him pass the tree stump.

Ryan's contradictory versions made his statement inherently untrustworthy, unreliable and incompetent.

Part of the difficulty in assessing a child's ability to truthfully and accurately testify is that the child's testimony is given a certain credibility by virtue of the youth stating that he knows what it means to tell the truth and that he will be punished for failure to do so.

Determining whether a child is a competent witness by his ability to say the magic words relating to truth is superficial at best and unreliable at worst. Children are natural imitators. Moreover the use of imagination is an

important part of being a child. For a child imagination is easily interpreted as reality. It is not unusual for a child to integrate his fantasies or misperceptions into actual events or to integrate information gained from other sources with actual events so that the story told by the child is true in only very limited respects if true at all. The mutilated versions are not intentional lies and in the true sense of the word, may not be lies at all. The stories are compilations of known facts, suggestions, implications, confused facts, fantasy and attempts to cope. The child is no more lying than is an adult with severe mental disturbance who believes that he heard a voice which was not present, seen a man not there or imagined an event which did not occur. Ryan's ability to accurately perceive, recall and relate the events of his mother's death was clearly suspect in view of his contradictory and demonstrably untrue statements. In fact, appellant posits that were Ryan's statements created by an adult that at least some of the statements would have been considered perjury.

The extent of Ryan's inconsistencies, Ryan's demeanor and the state's continuing claim that any questioning by the defense would be detrimental led appellant to request an Independent Psychological Evaluation to determine Ryan's intelligence and the extent, if any, to which Ryan's fantasies might impinge upon his reality conceptions, the extent to which the trauma he may have undergone affected

his abilities to perceive, recall and relate the events in question (as well as to determine his native abilities in that regard). It was felt such information was important both to assist the Court in making an appropriate determination as to Ryan's competency as a witness and to provide appellant with necessary and relevant information in order to effectively cross-examine Ryan. An additional benefit of such an evaluation would have been the knowledge gained by all parties as to how to avoid creating undue anxiety for Ryan.

Psychiatric examination of a witness, whether adult or child, has been allowed where there is some predicate laid for the examination. In the case of an adult witness the predicate is usually that the witness has a prior history of mental disturbance of such a nature that it may interfere with the witness' competency to testify United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950) United States v. Partin, 493 F2d 750, 762 (5th Cir. 1974), United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983).

In the case of a child, the same considerations are relevant, but it has been sufficient to show that the child may not have the necessary capacity, either emotionally or mentally to testify or that the information is desirable to provide information with which to protect the child State v. Keitz 410 So.2d 625 (Fla 4th DCA 1982).

Just as certain forms of mental disorder have probative

value on the issues of competency and credibility so does a child's ability to be able to differentiate not only fact from fantasy, but fact from suggestion. It has been acknowledged that "many types of emotional or mental defect may materially affect the accuracy of testimony" United States v. Lindstrom, 698 Fed. 2d 1154, 1160 (11th Cir. 1983) quoting Juviler, Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach, Cal. L. Rev. 648, (1960).

The type of emotional or mental disturbance which may affect testimony is not limited to labeled disturbances of certain mental disorders. For testimonial purposes mental disturbance would include any emotional or mental disturbance, whether temporary or permanent, which would tend to produce bias in a witness' testimony, would mentally impair the capacity to observe, relate or recollect actual events or which would cause the witness to skew reality to match his flawed perceptions.

In evaluating whether a witness is legally competent to testify, consideration should be given as to whether the witness can relate the pertinent facts about which he is to testify without reliance on leading questions, Bell v. State, supra, Hall v. State, supra, McKinnie v. State, supra, or the promptings of others, lest the witness be able to piece together his testimony on the basis of outside information. The child must be able to relate the events on the basis of his own capability id. In the case of a child,

especially, there must be an evaluation as to whether the child is under the influence of people who consciously or unconsciously, overtly or implicitly, subject the child to their own perceptions or self-serving conclusions as to the events in question or as to the guilt or innocence of any particular party, thus contaminating the child's memory and motives. See generally, Bell v. State, supra.

Ryan Osborne has been consistent only in that he has been inconsistent. His version of the events in question and his descriptions of those involved have been so inconsistent as to raise very serious questions as to what RYAN actually observed and to what extent, if any, he can accurately relate that which he did observe. Overall, Ryan's responses are so confusing and contradictory as to raise the possibility that his answers would have no value in a judicial proceeding. See McKinnies v. State, supra.

The most pre-eminent case, relied on both by the Florida State Courts and Federal Courts, is United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950) in which the Court held that evidence of insanity or mental derangement of a witness is admissible for credibility purposes and that such evidence not only went to the preliminary question of competency but also to the jury question of credibility. United States v. Hiss, supra cited in United States v. Partin, 493 F. 2d 750, 762 (5th Cir. 1974).

After his mother's death, at the State's behest, Ryan

was involved in therapy with Dr. Lockey. It is reasonable to assume that the trauma of losing his mother or the startling event itself may have affected Ryan's ability to perceive, recall and relate the events surrounding his mother's death. If the child was not so grossly affected by his mother's death, that in itself would raise a question as to whether the child responds to situations in such a way as to render him a competent witness. In any event, the State has, by its recommendation that Ryan undergo therapy with Dr. Lockey and the Protective Order which prohibited defense examination of the witness for Six (6) months, effectively conceded that Ryan Osborne was suffering such mental and/or emotional difficulties as to impede his ability as a witness. Ryan's need of psychiatric intervention raises questions as to whether he was a competent observer at the time of the offense.

Unfortunately, Dr. Lockey who maintained close contact with State Attorney's office throughout this case, had no meaningful experience in dealing with children who had undergone a trauma such as in the instant case and very slight experience in general. It would, therefore, appear to be appropriate to evaluate the extent to which Dr. Lockey's therapy in preparing Ryan as a witness has impacted first, on his competency to testify and secondly, on his credibility. The thrust of Dr. Lockey's therapy with Ryan was to enable Ryan to testify without traumatic effect, not

to enable Ryan to deal with his grief. However, learning to testify without traumatic effect is not synonymous with competency to testify. No meaningful efforts at evaluating Ryan's intelligence, overall emotional status or ability to adequately testify were made. Dr. Lockey reports that she and Ryan did not discuss his mother's death but notes that Ryan took great pride in being able to tell lawyers the story of his mother's death. There was no evaluation as to how much of this is Ryan's need for love and approval nor was there evaluation as to the extent to which such needs may have been influenced by his need to meet with the approval of those he considers close to him such as famfily members, Dr. Lockey and members of the State Attorney's Office.

Ryan's pride in talking with lawyers was necessarily in telling the story to the various prosecutors and their representatives since Ryan had only met defense counsel James Bush, one time, six months after the incident and, the Court refused permission for new counsel to re-depose Ryan.

In a case where the witness had undergone psychiatric examination, the Second District Court of Appeals stated that psychiatric testimony concerning a witness' propensity and abiity to tell the truth is "relevant and admissible for the purpose of impeaching (his) credibility". Hawkins v. State, 326 So. 2d 229, 231 (Fla. 2nd DCA 1976). In making its ruling, the court, as do other courts in Florida which have addressed the issue, relied heavily on Federal cases

which have discussed the issues as to psychiatric examination of a witness and the use to be made of the results of such examinations in greater detail. See, for example, Fields v. State, 379 So. 2d 408 (Fla. 3rd DCA 1980).

In United States v. Partin, supra at 763, a case frequently relied upon by the Florida Courts, the Court held that the Defendant had the right to challenge a witness' credibility with "evidence of any mental defect or treatment at a time probatively related to the time period about which (the witness) was attempting to testify". The Court noted that "It is just as reasonable that a jury be informed of a witness' mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth". id at 762.

The Eleventh Circuit Court of Appeals traced the recent history of cases addressing the relevance of psychiatric testimony concerning the mental state of important witnesses and the right of the Defendant in criminal case to make use of such evidence in confronting adverse witnesses. Relying, inter alia, on Greene v. Wainwright, 634 F. 2d 272 (5th Cir. 1981), 3/ the Court overturned the Defendants' convictions because they had been denied access to psychiatric materials of a key prosecution witness who was alleged to be suffering from an ongoing mental illness. Consequently, the Defendant's Sixth

3/ This case reversed the convictions obtained in a Circuit Court within the State of Florida.

Amendment rights were held to be violated. In its discussion, the Court noted that some mental disorders "have high probative value on the issue of credibility". id at 1160. Similarly, it was felt RYAN'S emotional difficulties may provide a clue as to his wildly inconsistent statements as well as explanation for what appears to be a high level of suggestibility, and thus may prove to be highly probative on the issue of RYAN'S credibility. U.S. v. Lindstrom, 698 F 2d 1154 (11th Cir. 198 .

In order to be competent to testify, a witness must have e intellectual and emotonal capability of being able to

accurately perceive, remember and relate the events in question on the basis of their own capability as well as the intelligence to comprehend the nature and obligations of an oath. Bell v. State, supra; Hall v. State, 260 So. 2d 881 (Fla. 2d DCA 1972); McKinnies v. State, 315 So. 2d 211 (F 2d DCA 1975).

RYAN OSBORNE is, by the State's own admission, a key witness in the instant case. He is alleged to be the sole eye-witness to his mother's murder and the only witness who can testify as to the identity of the intruder who was within his home. Ryan has however, been so inconsistent, so suggestible and apparently, at times, so imaginative, as to raise numerous questions not only as to his ability to tell

the truth as he perceived it but also as to whether he, in fact, observed that about which he is to testify.

Ryan does not meet the standards required of a witness who is competent to testify. His answers are based either on leading questions or on information which was previously praided to him. It is obvious that Ryan recalls and testifies to those events which he believes he is expected to recall in a manner which he believes is acceptable to those people whom he wishes to please. The inconsistency of his answers indicates a lack of basic information which he dutifully supplies in order to receive the appreciation of those around him. Either because he has not yet developed to the level where he can be a competent witness or because the events he witnessed or the aftermath of those events have impinged on his capabilities, Ryan was not competent to testify.

The only expert testimony concerning Ryan's ability as a witness was that of Dr. Theodore Blau who indicated that Ryan was not a competent witness (Vol. IV, p. 479-80, 497). Courts should not ignore uncontested expert testimony as to the competence of a witness. Trucci v. State, 438 So.2d 219 (Fla. 4th DCA 1983); Paynter v. State, 443 So.2d 219 (Fla. 4th DCA 1983).

Finally, the Defendant has a Sixth Amendment right to obtain psychiatric/psychological information about the witness, Ryan Osborne. "In the contest of a criminal trial

(the interests of a witness) must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case." United States v. Society of Independent Gasoline Marketers of America, 624 F 2d at 469." United States v. Lindstrom, supra at 1167.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS PRE-TRIAL PHOTOGRAPHIC IDENTIFICATION OF APPELLANT BY RYAN OSBORNE

Twenty-two (22) hours after describing his mother's assailant as a skinny clean shaven man, wearing a white shirt and dark green pants 2/, Ryan Osborne was shown a photographic line-up lof five men, all with beards and mustaches. None of the men pictured bore any resemblance to the man described by Ryan. Appellant has found no authority authorizing the showing of a photographic line-up of people whose appearance is entirely dissimilar to that supplied by the witness.

The photographs shown to Ryan were, of course, based upon the entirely different description of the man seen by James Thornton in a van which was parked in a lot near the scene of the crime.

Such a line-up is at least one step further removed from that displayed in Rolle v. State 416 So.2d. 51 (Fla. 4th DCA 1982) where a picture of the defendant was included in a line-up based on unsubstantiated hearsay from unknown sources. Here the picture was included based on information from a known source but the description given did not match that provided by the eyewitness and the person providing the description had described a person seen in a van not someone at the scene. As in Rolle, supra, the identification made in this case must be suppressed.

2/ Although Ryan apparently did not tell detective Goethe, he also stated the assailant was wearing sunglasses throughout

Testimony at the hearing on appellant's Motion to Suppress the photographic display included the conflicting testimony of the detective and his captain who were present at the line-up but the Court refused to allow examination of the identifying witness, Ryan Osborne. Upon appellant's insistence that the court was abridging his sixth amendment right to confront the witness, the court ruled that appellant would have to wait until the time of trial to question Ryan concerning the identification process. However a full confrontation as to the identification process never occurred. In the midst of trial, as appellant was reminding the Judge of his prior ruling to complete the Motion to Suppress, the court suddenly determined to resolve the issue as to whether the witness would be permitted an attempt to identify the appellant in the courtroom by holding a second photographic line-up (same pictures) in chambers. When the pictures were set out in a straight line, Ryan unhesitatingly again chose the picture to the far right. However, on this occasion the photograph selected (State Exhibit 55-E [Vol. XVII, p.2493]) was <u>not</u> that of appellant. The ease and quickness with which Ryan selected the "wrong" photograph is reflected in the Court's comment: '...I saw what happened in there" (Vol. p.). Minutes after failing to identify appellant as his mother's assailant, Ryan testified at trial that he remembered what his mother's assailant looked like.

To make its determination as to the admissibility of Ryan's pre-trial identification of the appellant, the Court had the following information at its disposal:

1. That none of the photographs in the line-up resembled the man described by the witness.

2. That the photograph of appellant was the sole photograph with a paneled background.

3. That only appellant had blue eyes.

4. That the photographs initially shown to Ryan were set up in a legally impermissible manner, with appellant's photograph set off to the right in a single column by itself.

5. That Detective Reynolds testimony as to the display pattern of the pictures as well as his recitation as to Ryan's statement at choosing the picture had been contradicted by his superior, Captain Martinez.

6. That at the second viewing, at trial, of the pictures in the line-up, Ryan unhesitatingly selected another person as his mother's assailant.

7. That moments after pointing to someone else as his mother's assailant, Ryan testified he recalled what the man who shot his mommy looked like.

Due process rights guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution are violated where a photographic line-up for identification of a suspect in a crime does not portray the suspect in an unbiased way or, where the line-up is conducted in such a way as to give indication as to which photograph is the suspect. This is because suggestive confrontations increase the likelihood of misidentification. Stovall vs. Denno, 388 U.S. 293, 87 S.Ct. 1967, (1967); Neil vs. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Grant v. State, 390 So.2d 341

(Fla.1980) cert. denied. 451 U.S. 913 (1981).

The picture of Appellant included in the photographic line-up was unduly suggestive in a number of ways.

First was the over-all suggestion that the assailant had a beard and mustache thereby completely ignoring Ryan's description of the man as clean shaven.

Second, of the men pictured, only appellant had blue eyes.

Third, only appellant's photograph was distinguished by its paneled background.

Finally, as attested to by Captain Martinez, the photographs were arranged in such a manner that the photograph of appellant was set off in a single column to the right of the other photographs which were in columns of two.

Other suggestive implications take on even greater significance when a witness is shown photographs bearing no resemblance to the person he has actually seen. It is impermissibly suggestive to enhance the chance of selection of a suspect's photograph by virtue of a different background than all other photographs or by virtue of distinctive eye color or by placement of the photograph. Yet all of these variances occurred in the instant case.

The accuracy of the identifying witness's prior description of the suspect is an important factor in determining whether a likelihood of misidentification exists. Neil v. Biggers, supra; Grant v. State, supra.

In M.J.S. v. State, 386 So.2d 323 (Fla. 2nd DCA 1980) the Court held that a photopack of three persons, only one of whom had shoulder length hair as did the suspect was unnecessarily suggestive. A second photopack of five persons, including a picture of the suspect which gave the impression of a "corona effect" around the likeness of the suspect, was also held to be impermissibly suggestive. Each procedure used was held to have created a substantial risk of misidentification and was therefore unreliable.

In Sepulvado v. State, 362 so.2d 324 (Fla.2nd DCA 1978) the identifying witness/victim and the police officer gave conflicting versions as to how the photographic display was conducted. The witness testified that the defendant had a full beard but the officer testified the witness told him the defendant did not have a beard. Thus, there was a question as to whether the bearded man in the photographic line-up was the assailant. The witness was then shown a more recent photograph of the defendant wherein the defendant did not have a beard and immediately identified the defendant as the assailant. The photographic identification was suppressed. Similarly, in the instant case different versions as to the identification procedure were given, albeit the conflict was between a police detective and his captain and the identifying witness initially stated the assailant had no facial hair and later identified a man with both beard and mustache.

The totality of the circumstances surrounding the display of the photographic line-up that is, the display of a photographic line-up without reference to the description supplied by the identifying witness and the placement of the sole photograph containing a noticeably different background, with the only blue-eyed suspect in a single column set apart from the other photographs mandates a conclusion that the appellant's photograph was shown in an impermissibly suggestive manner thereby unacceptably creating a substantial risk of misidentification. Neil V. Biggers, supra; State v. Sepulvado, supra; Lavamore v. State, 922 So.2d 896 (Fla.1st DCA 1982); Grant v. State, supra.

Ultimately, it is the reliability of a witness's identification which determines whether a pretrial identification is admissible. There was no reliability whatsoever attached to Ryan's identification of appellant as his mother's assailant. Grant v. State. supra; Neil v. Biggers, supra.

Five criteria determine the reliability of a witness's identification:

(1) The opportunity of the witness to view the criminal at the time of the crime;

(2) The witnesses' degree of attention;

(3) The witnesses' prior description of the criminal;

(4) The level of certainty demonstrated by the witness at the identification procedures; and,

(5) The length of time between the crime and the identification procedure.

Despite the limited time frame, it appears that Ryan had sufficient opportunity to view the assailant as he claims to have seen him both at the front door and in the bathroom. There is no testimony from Ryan concerning his degree of attention. However, Ryan's attention was evidence by his ability to provide a description of the assailant's clothes as well as facial description.

Ryan's prior description of the assailant was, as detailed above, completely at odds with the photograph he identified as the assailant.

Ryan's certainty at selecting appellant's photograph is highly suspect. First, Ryan chose someone whom he did not previously describe. Second, according to Ryan the assailant was wearing sunglasses, thus, precluding his having seen the assailant's face. Third, not only was his pre-identification description at variance with his selection but his selection of someone other than the appellant, made while maintaining that he recalled what the assailant looked, like reflects a distinctive lack of certainty.

Appellant would suggest Detective Reynolds' testimony that Ryan voluntarily picked up the picture and said "this is the man who shot my mommy", is inherently unworthy of belief in view of the Detective's testimony as to the display of the photographs, as well as the testimony of

Captain Martinez who testified that Ryan said nothing. The Captain recalled that Ryan pointed to the picture which was set-off as the man who shot his mother.

As previously noted approximately twenty-two hours elapsed between the time of the crime and Ryan's viewing of the photographic identification, during which time Ryan's description of the assailant was provided to Detective Goethe, pursuant to her orders from Captain Martinez to question the child. It is inconceivable that neither the lead Detectives or Captain Martinez were privy number to the information by Detective Goethe.

Based upon the above-referenced critieria it is evident that Ryan's identification of the appellant cannot be relied upon and the identification must therefore be suppressed.

Appellant would respectfully submit that the photographic line-up was nothing more than a self-fulfilling prophecy of the Tampa Police Department. Curiously the arrest warrant issued eight hours before Ryan saw the photographic display contained the sworn statement that Ryan had identified appellant as the assailant.

ARGUMENT IV

THE TRIAL COURT ERRED IN ALLOWING DETECTIVE REYNOLDS TO TESTIFY AS TO RYAN OSBORNE'S OUT OF COURT IDENTIFICATION OF APPELLANT

Should this Court suppress the photographic identification of appellant by Ryan Osborne, then the testimony of Detective Reynolds regarding Ryan's out of court identification must obviously also be stricken as having no proper predicate.

However, even if the aforesaid identification is not suppressed the testimony of Detective Reynolds must be disallowed because there did not exist a proper predicate for the admission of Detective Reynold's statement. Although Ryan testified that he had seen a photographic line-up from which he identified the "man who hurt his mom", there was never an opportunity to properly cross-examine Ryan as to the pre-trial identification. The Court repeatedly, both before trial and during trial, refused to allow appellant the right to examine Ryan as to the conduction of the photographic line-up (Vol. p.).

Ryan's competency as a witness again becomes an issue. Not only did Ryan initially identify someone other than the man he had described as the assailant but, on the very day of his in-court testimony Ryan identified an entirely different man as the assailant. Minutes later Ryan stated that he recalled the man who shot his mother.

Unlike, State v. Freber, 366 So.2d 426 (Fla.1978), the identifying witness in this case was, for all purposes, unavailable for cross-examination as to this issue. Additionally, in Freber, supra, the witness was not certain the defendant was the man she had earlier identified due to the defendant's different hair length. The witness did not at the next opportunity, as did Ryan, identify an entirely different individual as the culprit, despite the fact that he was shown the same photographic array previously displayed and when he had already had an opportunity to view the appellant in the court room.

Because Ryan was not subject to cross-examination on the issue, the suggestiveness and reliability of Ryan's out of court identification of appellant was not adequately tested. Detective Reynold's testimony as to Ryan's identification of appellant was improperly admitted at trial.

ARGUMENT V

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS APPELLANT'S STATEMENTS

Appellant was taken into custody the moment he voluntarily arrived at the Indian River Sheriff's Office. He was not advised of his Miranda rights by the officers at Indian River nor was he initially advised of his Miranda rights by the Tampa police. Appellant was told only that a hit and run accident in Tampa was under investigation

Fla. Stat. §901.16 requires that an officer arresting a suspect pursuant to a warrant advise him of that fact and the reasons for arrest. Nothing less should be required where a warrant has not issued, but the suspect has been taken into custody on specific charges.

In State v. Madruga-Jiminez, 485 So.2d 465 (Fla. 3rd DCA 1986), the defendant's statements were suppressed because the police failed to notify him a warrant for his arrest had issued and that the charge was murder.

In the instant case, no warrant had been issued for appellant at the time he was taken into custody but the charge was already known. It, therefore, appears that the officers were required to immediately advise appellant as to the correct reason he was held for interrogation rather than to mislead him by stating a far less serious incident was under investigation. Appellant invoked his right to silence immediately upon being advised that the investigation con-

cerned a murder. It is logical that appellant would have invoked his right to counsel at an earlier time had he been advised of the severity of the offense.

In the instant case Detectives Reynolds and McAllister began interrogating appellant without advising him of his rights pursuant to Miranda v. Arizona, 384 U.S. 436; 86 §5-Ct. 1602; 16 L.ED 2d 2694 (1966). After completing some background questioning appellant was advised of rights pursuant to Miranda, supra. Approximately one-half hour later appellant asked the officers why he was being questioned. At that point appellant was advised that the case involved a murder and that a man fitting his description was seen in the vicinity of the crime. Appellant immediately indicated he did not wish to proceed further.

Detective McAllister acknowledged that the Defendant terminated the interrogation by stating that he did not want to talk any further. Indeed the formal interrogation ceased at that point and Detective Reynolds left the room to make certain arrangements. Nevertheless, Detective McAllister in an admitted effort to obtain an incriminating statement from the appellant, advised the appellant of a case which was described as similar to the one which appellant was under investigation.

Appellant was informed that the other case involved a man who hired two people to kill his wife. The husband attempted to set up an alibi by asking a number of people

for the crime. The death penalty was imposed for that offense. Appellant was told the same thing had probably happened in the instant case, and it would be better to speak now. (Vol. _____p. _____).

Appellant was then taken to be fingerprinted and photographed, immediately after which Detective McAllister and Reynolds left for Tampa. Appellant was required to remain at the Sheriff's office where a few minutes later he allegedly made the following comments.

> If I had known this was about a contract killing, I would have been on my way to Mexico by now. (Ud. II p. 135, Vol. XII, p. 1848).
>
> Somebody got my tag number. There was a witness. Hey, they got me. I don't have anything against you guys. I know you got a job to do. (Vol. II, p. 135, 137; Vol. XII, p. 1848).

In Edwards v. Arizona, 451 U.S. 477; 101 S.Ct. 1880; 68 L.Ed. 2d 378 (1981) the United States Supreme Court unequivocably prohibited police from continuing with any form of interrogation once a suspect requests counsel or indicates he does not wish to speak further.

In Rhode Island v. Innis, 446 U.S. 291; 64 L.Ed. 2d 297; 100 S.Ct. 1682 (1980) the Court explained that interrogation within the dictates of Miranda v. Arizona, 384 U.S. 436; 86 S.Ct. 1602; 16 L. Ed. 2694 (1966) includes not only express questioning but also its functional equivalent which was defined to be any "word or actions on the part of the police...that the police should know are reasonably likely

to elicit an incriminating response from the suspect" U.S. at 301, L.Ed. 2d. at 308.

Florida court held it be constitutional error when the officer continued questioning the suspect after acknowledging that the defendant appeared uncertain about continuing the interrogation. Bain vs. State, 440 So. 2d 454 (Fla. 4th DCA 1983).

Appellant who had been held in custody for four hours, prior to being advised as to the crime for which he was under investigation, was frightened by threats of death into making statements which the trial court should have suppressed as unconstitutionally obtained. Edwards v. Arizona, supra; Anderson v. State 11 F.L.W. 914 (Fla. 2nd DCA April 18, 1986); Neal v. State 9 F.L.LW. 1412 (Fla. 5th DCA June 28, 1984).

It was absolutely impermissible for Detective McAllister to threaten appellant with the specter of death. Appellant's statements were illegally obtained, thus, requiring the suppression of all statements made by the appellant.

ARGUMENT VI

THE TRIAL COURT ERRED IN ALLOWING THE WITNESS JACK WILLIAMSON TO TESTIFY

Jack Williamson, appellant's supervisor at Armellini Freight Co., was called to the stand by the State. Just after the introductory questions were concluded and before any substantial answers were provided, the Court abruptly requested Mr. Williamson to step down (Vol. XIII p. 1968). The Court felt the State was improperly and repeatedly asking a leading question (Vol.XIII, p. 1969). Several witnesses later, the state was permitted to recall Mr. Williamson to the stand. (Vol. XIII, p. 2038).

Mr. Williamson testified that in March of 1983, appellant claimed his lost shaving kit from Williamson's office where it had been placed for safekeeping. Inside the kit was a small dark colored revolver, facing down into the kit. Williamson did not take the weapon out but testified anyway that the gun appeared to be a .32 or a .38 Smith and Wesson revolver (Vol. XIII, p. 2039-2040). On cross-examination Mr. Williamson reluctantly stated the kit was found during the time of the trucker's strike when truckers were having trouble if they did not protect themselves (Vol. XIII, p. 2045).

Fla. Stat. Section 90.403 provides for the exclusion of evidence if its probative value is outweighed by its prejudicial effect. Where the evidence sought to be introduced

is unfairly prejudicial the evidence may not be admitted. See generally, Straight v. State, 397 So.2d 903 (Fla.1981); Parker v.State,389 So.2d 336 (Fla.4th DCA 1980), approved 408 So.2d 1037 (Fla.1982).

Two related objections are made to the testimony of Williamson: (1) that the Court's action in excusing the witness and its later reversal of its position in allowing the witness to testify had the effect of enhancing the witness' testimony thereby attaching greater credibility and importance to the witness and his testimony than was warranted or would otherwise have existed and (2) that the testimony was itself inappropriate, speculative and unfairly prejudicial.

As shown above, the witness testified that several months before the offense, he saw in appellant's shaving kit what may have been a Smith and Wesson .32 caliber or .38 caliber weapon. Although the witness owned several guns, there was no indication he was an expert in the field of firearms. The witness did not take the weapon out of the shaving case for close examination. Therefore he merely guessed at its being a commonly owned weapon, a Smith and Wesson .32 or .38 caliber gun. The testimony as to the type of gun was not based on personal knowledge but the mere speculation which may not be the basis for testimony.

Moreover, there was no showing the weapon seen by Williamson was connected or could have been connected to the

crime.

There was no evidence of any connection between the gun seen by Williamson and the weapon used in the crime and indeed there could be none. The bullet which killed Cheryl Osborne was not fired from a Smith and Wesson revolver (Vol. p.) and in fact may not have been fired from a .38 caliber weapon. Thus Williamson's testimony was irrelevant to the case and, even if considered to be relevant, had no probative value. The only value was to unduly prejudice the jury by showing that several months before the crime, appellant had access to a weapon which may have been of the same caliber as the murder weapon. The prejudicial impact of this testimony requires that it be stricken from the record.

ARGUMENT VII

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH

In the sentencing document the trial court stated there was proof of four (4) aggravating circumstances but merged the aggravating factors of robbery and pecuniary gain, Provence vs. State. 337 So.2nd 783 (Fla.1976)cert den. 431 U.S. 969, thus ultimately finding three (3) aggravating circumstances: that the offense was committed while appellant was engaged or was an accomplice, in the commission of, or an attempt to commit any robbery, rape, arson, burglary or kidnapping; that the felony was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification; and that the crime was especially heinous, atrocious or cruel. These aggravating circumstances were weighed against one mitigating circumstance: that the appellant had no significant history of prior criminal activity (Vol. III p. 367) Finding "that insufficient mitigating circumstances exist to outweigh the aggravating circumstances" the Honorable Harry Lee Coe III, imposed a sentence of death by electrocution (Vol. III, p. 369).

Appellant asserts that the lower court erred in finding any aggravating circumstance because none of the aggravating circumstances were proven beyond and to the exclusion of any reasonable doubt. State v. Dixon. 283 So.2d 1,9 (Fla.1973); Williams v. State. 386 So.2d 538,542 (Fla.1980).

In the instant case, the Court relied upon identical facts that the Defendant gained entrance to the home of the victim, and that the defendant asked for money...(Vol. III, p. 363-64) to support the aggravating circumstances of the offense having been committed during a robbery and for pecuniary gain. The Court correctly ruled, that these two (2) aggravating circumstances merge. Provence v. State 337 So.2d 783, 786 (Fla. 1976). The analysis, however does not conclude at this point.

During the sentencing charge conference, the court explicitly agreed with appellant's counsel that there was no proof whatsoever that the offense was committed for pecuniary gain (Vol. XIX, p. 2753), thereby indicating that the sentencing order prepared by the State is nothing more than a rote order routinely signed by the Court without regard to its own prior ruling.

There having been no proof that the crime was committed for pecuniary gain there likewise could have been no proof that the offense was committed during the commission of or attempted commission of a robbery, and, therefore this aggravating circumstance must fail. Only the uncorroborated inherently incredible testimony of five (5) year old Ryan Osborne served to imply that the assailant requested any money. The victim's open change purse is no indication money was sought. There exist multiple innocent reasons for the location of the wallet, and there has been no showing

that any money or other articles of value were taken from Cheryl Osborne. Refutation of Ryan's testimony is found in the facts that the victim's wallet was left in the bathroom, there was no evidence any money was taken from it and her diamond ring was not taken, despite Ryan's testimony that the assailant had taken the ring and put it in his pocket. (Ryan's deposition in evidence Vol. XVII, p. 2503). The Court's conclusion that no financial gain was shown was correct. As a matter of law, the proof was insufficient to prove that a robbery had occurred. Kimbler v. State, 360 So.2d 1270 (Fla. DCA 1978); Simmons v. State, 419 So.2d 316,318 (Fla.1982). Thus this aggravating factor was improperly applied.

The Court's reliance, as reflected in the sentencing document, on the defendant's entry into the home, as a factor to enhance the sentence implies that such entry was nonconsentual. This interpretation of the facts was expressly refuted by the courts directed verdict of acquittal on the burglary charge.

State v. Dixon, 283 So.2d 1 (Fla. 1973) sets the standard for defining offenses which are especially heinous atrocious and cruel. Such an act must be a "consciousless, a pitiless crime which is unnecessarily tortuous to the victim". There is nothing about the act committed in the instant offense to set it apart from the norm of capital felonies. It was not "unnecessarily torturous to the vic-

tim" State vs. Dixon, supra. Two shots were fired in rapid succession. James Thornton heard the first shot at his next door neighbor's driveway and immediately thereafter he heard the second shot. Therefore, there was no essential time lag between the two shots. Moreover, evidence by Thornton's testimony as to the timing of his trip across the field to purchase the newspaper and his testimony as to hearing the shots virtually immediately after the scream reflect a very short time frame within which the entire event occurred. There was no extended period of suffering and such suffering as did occur was not beyond the level caused by an instantaneous death. The movement from the front door into the bathroom of this very small house took a very slight amount of time and is otherwise irrelevant to assessment of the aggravating factors. Facts two and five concerning Ryan's having witnessed his mother's murder are essentially the same factor and is, in any event, not an item to consider. This court expressly held that it is the suffering of the victim, not the victim's child or witnesses which is the weighted factor. Clark v. State, 443 So.2d 973,977 (Fla.1983). There was no conclusion made as to whether the first shot was the non-fatal flesh wound to the neck. Dr. Lardzibal, the State's expert and the county medical examiner, testified that he was unable to form an opinion as to which shot came first (Vol. XII p.1761). Even assuming arguendo that the superficial wound was the first to be

inflicted, the other shot was immediate and caused instantaneous death (Vol.XII p.1761) The factors listed to substantiate the findings supporting aggravating circumstances "H" (heinous, atrocious and cruel) and "J" (cold, cruel and premeditated) were identical but for the one, irrelevant, additional factor listed for the finding that the felony was committed in a cold, calculated premedicated manner. That is "the defendant gained entrance to the home of Cheryl Osborne, victim" (Vol. III, p. 366). In the first instance this factor is essentially included in several of the other factors listed. Secondly, that the Defendant gained entrance to the home is in and of itself not a fact to support an aggravating circumstance. Simmons vs. State, 419 So.2d 316 (Fla. 1982). Moreover, and most importantly, the court specifically found that there was no forced entry to the home when it directed a verdict of acquittal as to the burglary charge because entry was evidenced to be consentual. Additionally, in deposition, Ryan Osborne himself reported that his mother said "come in" (Deposition p. 7, l. 24). The mere fact that the crime occurred in the home is not a fact to support an aggravating circumstance.

The level of premeditation needed to support the aggravating circumstance of cold, calculated and premeditated is higher than that required to convict a defendant of premeditated murder. The murder must also be shown beyond any reasonable doubt to be cold, calculated... and without any

pretense of moral justification. Jent vs. State. 408 So.2d 1024 (Fla.1981).

In Cannady v. State, 427 So.2d 2723 (Fla. 1983), where the victim was shot five (5) times the murder was held not to be committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In Mann v. State. 420 So.2d 578 (Fla. 1982) where a 10 year old girl died from a skull fracture, after having been stabbed numerous times, the murder was held not to have been committed in a cold, calculated and premeditated manner.

Even if true, the presence of Ryan Osborne, is not an aggravating factor. In Mason v. State, 438 So.2d 374 (Fla. 1983), the presence of the victim's three children, one of whom was present throughout the crime, was insufficient to warrant a finding of an aggravating circumstance.

As in Peede v.State, 474 So.2d 802 (Fla. 1985), the Court held there was sufficient evidence of premeditation but there was no showing of the heightened, premeditation, calculation or planning that must be proven to support a finding that the murder was cold, calculated and premeditated.

As to the remaining facts used to support the aggravating circumstances, the State makes repeated referral to the child's presence at the murder of his mother and thereby appears to place hearsay reliance upon this fact in seeking to substantiate the aggravating factors. However

unfortunate and tragic the event, the child's presence is not a consideration. It is only "the effect upon the victim herself that must be considered". Clark v. State, 443 So.2d 973 (Fla. 1983).

Moreover, other points within the facts listed to substantiate the aggravating factors are not relevant, Although it is worth noting, as an additional mitigating circumstance, that the child was left unharmed despite his status as an eyewitness.

The defendant's lack of a substantial criminal history was found to be a statutory mitigating factor and appellant would suggest that an additional mitigating factor is that the child was left unharmed despite his status as an eyewitness.

The aggravating circumstances were not proven beyond a reasonable doubt. Assuming arguendo that one of the aggravating circumstances may stand, said aggravating circumstance does not outweigh the mitigating circumstances.

The sentence of death by electrocution must be vacated.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, appellant would respectfully request that this Honorable Court reverse the conviction and vacate the sentence of death imposed by the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on behalf of Donald Robert Lloyd was mailed to Assistant Attorney General Frank Migliore, Department of Legal Affairs, Park Tramell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, this 5th day of August, 1986, and to appellant Donald Robert Lloyd, prison # 007214, Florida State Prison, P.O. Box 747, Starke, Florida 32071.

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