IN THE SUPREME COURT OF FLORIDA

DUANE EUGENE OWEN, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 68,549

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant was the defendant in the court below. The Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this Court. The following symbols will be used:

"R"	Record on Appeal
"SR"	Supplemental Record on Appeal
"AB"	Appellant's Initial Brief
"APB	Appellant's Pro-Se Brief

All emphasis has been supplied by Appellee unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State is unable to accept Appellant's Statement of the Facts due to the incompleteness, partiality, and argumentative nature of such statement (AB 2-7). The State therefore respectfully provides its own Statement of the Facts as follows:

Stephanie Worden, the victim's daughter,[1] testified that because May 28, 1984 was Memorial Day, she and her sister Kara, stayed up until 11:30 or 12:00 that night (R 3460). When Stephanie was ready for bed she said good night to her mother, who was in her own bedroom, sitting up in bed reading a book (R 3460). Georgianna Worden's bedroom door was open when the little girls went to bed and it normally remained that way throughout the night (R 3461).

Stephanie testified her mother usually woke her and Kara up everyday to get ready for school; however, the morning of May 29, 1984, she was awakened by a phone call from her school mate, Jennifer Eddinger (R 3462). That morning it was raining, and as it was the norm on rainy days Stephanie's mother would drive the kids to school in the morning and Mrs. Eddinger would pick them up after school. Hence, Jennifer called Stephanie to see if Mrs. Worden would be driving them to school as usual; Stephanie told Jennifer she would check with her mother and call

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[1] Date of birth August 1, 1972, therefore, Stephanie was 11 years old at the time of her mother's murder May 29, 1984, and 13 years old when she testified at trial February 13, 1986 (R 3458).

her back (R 3463). Stephanie then went and knocked on her mother's bedroom door and called out to her mom, but Mrs. Worden did not answer. Stephanie went to the kitchen to make lunch for school when she noticed there was dirt on the kitchen floor, and noticed the kitchen window was broken (R 3463) - - that window was not broken when she went to bed the night before (R 3469). Stephanie decided to go back to try and talk to her mother, but the door was shut and locked (R 3463). Stephanie tried knocking again and when she received no response, she unlocked the door with a Q-tip as her mother had taught her (R 3464). She opened the door, looked inside and saw blood; then without touching anything or going in the room, Stephanie went back out and called Jennifer back (R 3465). Stephanie told Jennifer what she had seen that she was scared her mother was hurt and could she have her father come over to her house (R 3465).

Jennifer Eddinger testified that when Stephanie called her back, Stephanie was very upset and was crying (R 2801). Stephanie asked Jennifer to send her father over because when she opened the door to her mother's bedroom, she saw her mother with a pillow over her head, there was blood on the floor, the kitchen window was broken and there was dirt on the floor (R 2803).

John Eddinger, Jennifer's father, who happens to be a fire lieutenant for the City of Boca Raton, testified that when he was informed that Stephanie had asked him to go over because there was something wrong, he went right over (R 2807).

Stephanie was very upset, showed him the dirt all over the floor, and said she was afraid someone had broken into the house (R 2808). Stephanie then unlocked the bedroom door for him (R 2808). Mr. Eddinger opened the door and looked in but did not go in (R 2808). He noticed Mrs. Worden lying on the bed, spread-eagle, nude, with a pillow over her head (R 2809). Mr. Eddinger then closed the door and asked Stephanie and Kara to go out to his car (R 2809), and he called 911 (R 2810). Subsequently, Mrs. Eddinger took the little girls to a neighbor's house while Mr. Eddinger waited at the house for fire rescue to arrive (R 2810). When rescue arrived he asked only one medic to accompany him. Linda Milliken was shown the room by Mr. Eddinger, Ms. Milliken walked in alone, and only touched Georgianna Worden's right hand to check for a pulse. Finding no pulse, she left the room (R 2811-12). Mr. Eddinger and Ms. Milliken went out to the front door to await the police (R 2812). When Officer Jeff Albrecht arrived, Mr. Eddinger told Albrecht what he had been told by Stephanie, led the officer to the room, gave the officer the basic information and left the investigation up to the police (R 2813).

Officer Jeff Albrecht testified he did enter the room alone, and was cautious not to disturb anything (R 2818). In making initial observations, he carefully lifted the pillow and shorts that were over the victim's head and saw she had been traumatically beaten (R 2822). He noticed a book adjacent to her

right shoulder. There was also a sneaker shoe print made with blood or mixed mud and blood on the bed sheet. The prints were criss-crossed, as if someone had walked around on the end of the bed (R 2822). On the floor next to the bed, he noticed blood and tissue matter, and a pile of clothing with blood under it (R 2823). A kitchen knife was found in a low cabinet in the room (R 2824). Officer Albrecht noticed the victim had no clothes on, but a nightgown was on the side, and a pair of lady's underpants were on her right leg down around her knee (R 2832). He also noticed a hammer laying in the middle of the floor of the bedroom (R 2834). The hammer was old and had a bent nail with a head on it, and some blood, but it appeared to have been wiped off (R 2834). The officer also saw a purse on top of the dresser, with jewelry next to it (R 2834). He found the door leading out of the master bathroom to the porch area was partially open (R 2835). Officer Albrecht also commented that the master bathroom was exceptionally clean in comparison to the rest of the house (R 2835).

The evidence showed the police found a slit approximately 3-4 feet across the bottom and the same distance up to the top of the screen of the porch area (R 2826). The door to the screened-in patio was closed and locked (R 3173). The sliding clasp upper metal groove had been bent and could not be opened from the inside or the exterior (R 3174). The screen to a two-paned window that led over the kitchen sink was off the window

and resting against a TV Antenna next to the window. The top pane of the window was shattered out and the bottom pane pushed all the way up (R 2829, 2839, 3180-3184).

The investigating officers found shoe sole impressions on the exterior on a concrete slab immediately in front of the screen door; on the edge of the screen that was torn; on the surface of the patio up to the door, away from the door, along the patio; as well as in front of and beneath the kitchen window; inside the house on the carpeting, below the window sill which was the point of entry (R 3186-87). All the shoe impressions were similar in pattern with the ones found on the bed sheet (R 2922, 3187).

The evidence further shows the police found an extensive amount of blood splattered on the wall to the back of the bed and to the right side of the bed (R 2832, 2920-22). They found a large puddle of blood and brain matter on the floor at the end of the bed (R 2833, 2922). However, Mrs. Worden's body was relatively free of any blood on it, except for a small smear on her left ankle area (R 2923-2924), 3249). The investigators also found a terrycloth garment extremely wet on the floor at the foot of the bed (R 2922, 3237-38).

Officer Monica Canonica testified she assisted in the investigation of the homicide and on the evening of May 30, 1984, she searched the surrounding areas around the victim's home (R 2990-2991). In the vacant lot across the street from the home, in a wooded area, the officer found "a wad of material-type

things," which when inspected revealed to be a pair of grey nylon jogging shorts, a pair of white tube athletic-type socks with gold and green rim around the top, and a pink washcloth with red roses design on it (R 2942). This washcloth matched a washcloth found in the master bathroom and a towel taken from the drier in the garage (R 3144, 3246-47).

Officer John Barrett testified that on May 30, 1984, he went to Appellant's apartment which he shared with his brother, Mitchell Owen. And that with Mitchell Owen's consent, he searched the apartment (R 3020-3021). In a duffle bag belonging to Appellant the officer found tube socks matching those found by Officer Canonica in the vacant lot (R 3021-27). Officer Barrett testified he was looking for a pair of sneakers with little knobs on the bottom but found no sneakers in the apartment (R 3027).

Mitchell Owen, Appellant's brother, took the stand and testified that on May 28, 1984, Appellant owned a pair of athletic shoes with a "thick sole, [which] had knobby knobs with holes in the center of the knobs"(R 2974). He testified that during the month of May, Appellant had two different pairs of sneakers (R 2983), and the ones he was talking about were the second pair he had for just a couple of weeks (R 2984). Mitchell said after May 28, he did not see those shoes anymore (R 2976), and the next morning when he saw Appellant working on a car, Appellant was wearing his army boots (R 2987). Mitchell Owen also testified that on May 28, 1984, he saw his brother wearing "silky" grey

jogging shorts, and he also had on a pair of knee high tube socks with two or three rings on the top (R 2976).

Doctor James A. Benz, the medical examiner who performed the autopsy on Georgianna Worden testified that the cause of death was cranial cerebral injury, which consisted of fractures of the skull and injuries to the brain (R 3042). The autopsy revealed injuries to three areas of her body; first, injuries to the head area which exhibited the most extensive injury, second, injuries to her neck area; and third, injuries to her vagina (R 3043-3044). Dr. Benz described the injuries to the head as follows:

> The injuries to the head area were quite extensive. There were large tears in the skin, which has the technical term of laceration. This is an injury where the tissues are pulled apart, either by crush-ing or over stressing the tissues.
>
> There were large tears in the skin located in the forehead area. Underlying bones were extensively fractured, broken into many pieces, and in fact, one could look through the wounds in the central area of the forehead and observe the brain tissue which tended to just exude out of the head through these large wounds.
>
> The left eyeball was torn and collapsed, and the fluid within the eyeball was running out of the eyeball area. So we had these large laceration areas and the area of the forehead which extended over the eyebrows on both sides, and in the left eye area extended up into the eyelids.

There was black eyes, so to speak, that is hemorrhage within the eyelids on both eyes.

In addition to these wounds in the front of the head, there were wounds on the right side of the head. These consisted of a curved tear in the skin just in front of the upper attachment of the ear.

A second tear that was located just in front of the ear.

A third tear that was located over the back of the jaw area.

Under these lacerations, which extended through the full thickness of the skin, there were fractures of the skull involving the frontal bones, the temporal area, the cheek bone was fractured.

The injury pattern that was depicted by these wounded areas that I just described indicated to me that there were a series of blows to the head with a blunt object that had fairly significant weight. This was manifest by the curved nature of these lacerations, one being up over and extending into the eye area on the left side. The curved area of the laceration in the central area of the forehead, and the laceration in the side of the head was curved. The laceration here was fairly straight as was this laceration. However, the extensive fractures, the skull in the frontal area were depressed inward, so that the bone fragments were driven into the brain.

The injuries to the skull in the side there was some slight indentation, but they were not of the severity of those that were seen in the front of the head.

> Again, the fracture of the jaw was a linear fracture. However, there was a chip out of the external aspect of the bone, again, suggesting a blunt object striking this area of the body.
>
> The circular configuration certainly suggests that a hammer -- and indeed, at the time of the autopsy I suggested [a hammer] -- as being a possible weapon that was used to cause these particular injuries.

(R 3044-3046). Dr. Benz testified the hammer was probably used for the distinct blows (R 3047), and stated that the degree of force varied (R 3047-3048), but that he found five distinct blows causing separate and distinct lacerations and fractures to the head (R 3065-3069). Dr. Benz testified the victim eventually lost consciousness from the blows, but that none of them would cause unconsciousness instantaneously (R 3069).

Dr. Benz specifically testified Mrs. Worden did not die immediately (R 3069). That there was a lapse of time where she went into heart failure (R 3069). The autopsy revealed she had accumulated fluid in the lungs, which shows that she was alive for a while after these blows were inflicted (R 3069). Dr. Benz could not say precisely how long she survived, but that she did not die right away (R 3070).

The injury to the neck was described by Dr. Benz by stating that the hyoid bone, located in the neck, was completely broken on the right side, but the left side had an incomplete fracture (R 3073). Dr. Benz stated the injury was indicative of a compressive force in the neck area (R 3073). The fact that

there was little hemorrhage associated with these injuries, the Doctor said, could be explained in several ways, First, it could be that the compressive force was done by a human hand with some padding on -- such as a glove or socks on the hand (R 3073-3074). The second explanation could be that she was in the phase of dying (R 3074). Because there is still some blood pressure and some hemorrhaging, the victim was still alive, but in the agonal phase of dying (R 3074).

The third class of injuries found on Mrs. Worden were the vaginal injuries. The autopsy revealed penetration of the vagina by a penis proven by the semen found through the swab test (R 3077, 3402, 3405). In addition, the Doctor found two large lacerations which were not consistent with penetration by a penis, but penetration with a blunt object, such as the hammer handle (R 3086). The testing of the hammer handle did reveal the presence of "epithelial cells which are characteristic of vaginal secretions." This is consistent with the hammer having been inserted in the victim's vagina (R 3422-23). Again, there was a small amount of hemorrhaging in the surrounding tissue (R 3084-85), which means the victim had low blood pressure, which means the head injuries came first (R 3085). However, there was little blood pressure, and since a person <u>cannot</u> bleed postmortem, Mrs. Worden may have been near death, but still alive, when these injuries occurred (R 3092).

Detective Robert J. Lynn testified he picked up the

book from the crime scene to process it for fingerprints (R 3259-60, 3471-3473). Detective Lynn testified that when the book was found, the book was opened to pages 40 and 41. So these pages and other pages close by were tested (R 3500). On page 43 a latent fingerprint was found (R 3501), which when compared with Appellant's fingerprints matched (R 3503-3504).

The forensic serologist testified that after testing Appellant's blood and comparing it to the semen found on the bedspread, Appellant cannot be eliminated as a possible contributor of the semen (R 3410-3415, 3447).

Prior to trial, Appellant filed three motions to suppress evidence: The First Motion to Suppress (SR 2-5) sought to suppress the statements of Appellant alleging "lack of probable cause, reasonable grounds to believe, and founded suspicion" for the initial stop which lead to Appellant's arrest. The Second Motion to Suppress alleged Appellant did not make a voluntary, knowing and intelligent waiver of his rights, nor were the statments freely and voluntarily given due to the "psychological coercion" exercised on Appellant by the manner the officers obtained the statements from Appellant (SR 6-7). The Third Motion to Suppress alleged that selectively recording portions of Appellant's statements denied Appellant access to exculpatory material, and otherwise rendered the remaining recorded portions "untrustworthy" (SR 8-9).

A hearing on these three motions was held by the trial

court (R 614-1513). On the First Motion to Suppress (SR 2-5), the State presented the testimony of the officers involved in the arrest of Duane Owen on May 30, 1984.

Detective John W. Brady, Jr., testified that he was investigating the burglary of William Sasko's residence at 823 Dover Street, Boca Raton, on May 22, 1984 (R 635) and Mr. Sasko advised he saw the individual who tried to gain entrance (R 636). As a result Officer Brady showed Mr. Sasko a photo line-up on May 29, 1984, which included a photograph of Duane Owen (R 636). Mr. Sasko immediately picked Appellant's photograph from the line-up (R 637).

On the 28th of May, 1984, the Boca Raton Police were investigating a burglary at Dumille gorman's home, 640 Lakeview Terrace (R 637). Officer Brady spoke to Ms. Gorman, who related facts which pointed to Appellant as a possible suspect (R 638). Brady showed Ms. Gorman a photo line-up, which included a photograph of Appellant (R 638). Ms. Gorman immediately picked Appellant's photograph as that of her assailant (R 639). The murder of Georgianna Worden was reported May 29, 1984 (R 640). Officer Brady stated the police were looking for Duane Owen prior to May 30, 1984 (R 644, 645).

Investigator Kathleen Petracco testified the Boca Raton Police Department was involved in the investigtion of Georgiana Worden's murder (R 648). Officer Petracco stated she was aware the Department was looking for Duane Owen, and that on May 30,

1984, Sergeant McCoy gave her a photograph of Appellant with instructions to keep an eye out for him as there were active warrants on Duane Owen, and he was also a suspect in the burglaries (R 649). Along with Appellant's photograph, McCoy gave Officer Petracco the physical description of Duane Owen and advised that Appellant was known to "hang out" at the beach area (R 650).

Officer Petracco, on May 30, 1984, at 12:30 p.m., was driving on Country Club Boulevard and saw someone who matched the description given her of Duane Owen (R 650). The officer stopped the individual, identified herself, and asked the suspect for identification (R 651). Appellant identified himself as Dana L. Brown (R 652). The individual was identical to the photograph given to her as that of Duane Owen (R 652), and although the person produced army identification with the name of Dana Brown (R 652), Officer Petracco "was not convinced [the person] was not Duane Owen"(R 658-659).

Lieutenant Kevin J. McCoy testified that due to three outstanding and active warrants for Duane Owen, and the fact Duane Owen was suspected of committing the burglaries against the Sasko's property and Gorman's residence, a bulletin and BOLO were prepared and distributed to all road patrol units (R 677-688). Then on May 30, 1984, at about 12:30 p.m., Officer Petracco called to inform him she had someone who matched Duane Owen's description (R 692). When McCoy arrived at the scene, he saw the person looked just like the photograph, and was "sure

this was Duane Owen" (R 693-4), whereupon Appellant was placed under arrest (R 694).

After hearing the evidence and arguments by counsel (R 704-710), the trial court denied the first motion to suppress finding that there was probable cause and a basis for the stop and arrest (R 615-618).

On the second and third motions to suppress, after listening to the police officers' testimony (R 727-1029, 1128-1300), the arguments of counsel (R 717-727, 1050-1128, 1436-1487) and reviewing the tapes in their entirety (R 1348), the trial court found that the arrest was based on probable cause (R 1491), and Owen had been properly advised of his constitutional rights. (R 1491-1492). The court found no evidence of physical coercion, or threats of violence (R 1493); further, that the conversations between Owen and the police officers were had at the invitation of Appellant (R 1494). The court ruled that selective recording of statements is not illegal (R 1501), and then denied the motions to suppress (R 1508, 1512).

At trial, Sergeant Kevin McCoy testified that he first met Appellant the afternoon of May 30, 1984 (R 3263). That after booking and Appellant being advised of his rights (R 3298), the officer interrogated Appellant, and at one point Appellant asked, "What am I really here for?" To which McCoy replied, "I believe you killed a woman in Boca Raton last night." Appellant exclaimed, "Well, now I know what I am really here for," and "I didn't

kill anybody; I didn't kill her." (R 3298).

McCoy testified that during his conversation with Appellant on June 1, 1984, Appellant again denied any responsibiltiy for the Worden homicide (R 3336). But when McCoy asked Appellant about the sneakers, Appellant said the sneakers were at home, and when told the police could not find the sneakers anywhere, Appellant said he did not know where they were (R 3336-37). Appellant however described the sneakers for McCoy, and drew the sneakers on a piece of paper (R 3337). At trial the drawing was introduced into evidence as exhibit 68 (R 3337-3343). Immediately after making the drawing, Appellant related information about the homicide in the form of "What if John Doe did this," what would he be charged with? (R 3344-3358).

Sergeant McCoy with reference to the June 21, 1984 conversations with Appellant, stated Appellant was advised of his Miranda rights twice (R 3553). The jury was advised that by agreement of counsel the video tape of the confession had been edited before being shown to the jury (R 3565-3566). A transcript of the edited tape of June 21, 1984, as played for the jury appears at R 3582-3638.

The transcript shows Appellant was read the Miranda rights (R 3583-84). Sergeant Livingston read the probable cause affidavit to Appellant (R 3585-3587), and told Appellant he was being charged and arrested on the first degree murder (R 3587-3589). Whereupon, McCoy re-read the rights to Appellant

(R 3590-91), and asked if Appellant was willing to answer a few questions now that he had been arrested on the murder (R 3593-94). Appellant began the confession by telling McCoy where he threw away the sneakers (R 3596-98). He said he had to throw away the sneakers because he couldn't keep them after leaving an impression on the bedsheets (R 3598-3599). Appellant testified he drove his bike to the neighborhood, and left the bike hidden "over near the ditch in the field" south, across the street from the house (R 3600). Then he "walked around [the house], checked it out and started pulling on a few things. [Because the windows were] pretty locked up, he went around the back and slit the screen [in] the patio" (R 3604). Appellant told McCoy, he pushed up one of the jalousies on the door, but the door was all locked up (R 3605). Owen then went around the house to the garage but the door was locked inside too (R 3606), so he went back outside and "scoped out the scene again, and tried to get in through the bedroom window [right] by the front door, but they had a little stick holding up the window (R 3607, Tape Transcript p. 996), so he put the screen back on (R 3607). Owen said he used a screw driver to cut the screen, and tried to pry open the window by the kitchen (R 3608). Owen said he removed a plant from the window (R 3609), lifted the window, went in and walked through the house once or so (R 3610). He shut the door where the girls were sleeping in the same room (R 3611-12). Owen obtained the hammer from one of the drawers in the kitchen (R 3612-13). Owen told

McCoy how he could not see into the kid's room from the outside because they had one side all blocked up with "the shit" [wood] (R 3613).

Owen said he then "snuck in" to Mrs. Worden's room and took her purse and stuff from the dresser to a different room to check it out, but found no money in it (R 3614-15), so he put the purse back where he had found it. Owen said he also saw a jar with money, and a ring and a watch right by the purse (R 3616). He turned off the lamp that was on the dresser so if she woke up she could not see him (R 3618). Owen then told McCoy, "I just figured I'd just go up there and rape her, ... and I went over by her so I figured, hell, once she gets up ... I was going to say, just tap her on the shoulder, and say, there's other guys in the other room that got your daughters ... that way she wouldn't scream."

"Instead, I figured, well, hell, maybe I'll just hit her once,and then that way she'll get knocked out. So I did." But then ... I just heard her scream" (R 3618-19). Then she was starting to get up, out of bed, and dove at him (R 3620), so he pushed her off him, and then she fell down (R 3621). He hit her more than once to put her out (R 3621). Finally, "when she was just laying there," Owen laid down the hammer, and put her back up on the bed (R 3622). Owen then turned the light on (R 3623), and covered her head with the pillow, and shorts (R 3624-25). At that point Owen "got a towel or something like that and "was just

wiping it down" (Tr. p. 1018), and took the pair of socks off his hands (R 3626). Owen told McCoy his socks had blue, green and yellow bands and "that's the only kind of socks" he had (R 3627). "And that's probably how I touched that stupid book that was laying on the bed" (R 3627). He took the socks off because they were drenched with blood (R 3627-8), so Owen threw them in the shower and rinsed them, and "wiped off the scene a little bit," and laid the cloth down somewhere (R 3628). After he "raped" Mrs. Worden, Owen took a shower. Then Appellant wrapped up the socks and the pair of shorts with a washcloth and left through the side door (R 3632). Went to get his bike over by the woods, and put on the pants and shirt he had there, got on his bike and "threw the shit over" (R 3633-34). "Then [Owen] went up the road a little ways and pulled between the two buildings and put [the] tennis shoes in [the dumpster]" (R 3634).

The unedited version of the tape can be found at pages 993-1027 of the tape transcripts filed with the court as supplemental record on or about December 2, 1987.

At that point the Court, by stipulation of the parties, told the jury that the body found on May 29, 1984, at 215 Northwest 35th Street in Boca Raton was that of Georgianna Worden (R 3672). At that point the State rested its case in chief (R 3672-73).

The defense then moved for judgment of acquittal in each of the three counts (R 3673-3697). The trial court denied each of the motions (R 3677-78, 3681-82, 3684, and 3695). The

defense then rested (R 3703, 3715), with Appellant personally stating on the record he did not wish to testify (R 3703-3705).

The jury return verdicts of guilty on each of the three counts (R 3976-3977), and Appellant was thus adjudged guilty (R 3983-84).

During the Phase II hearing, the medical examiner, Dr. James Benz, took the witness stand and reasserted that in his professional opinion, Mrs. Worden was alive during each of the five (5) distinct blows to the head (R 4040). Further, Mrs. Worden was alive for a period of time after all five of the blows occurred because there was anatomic evidence that she survived long enough to develop terminal heart failure and she aspirated blood (R 4040). Dr. Benz stated Mrs. Worden would have lived at least three to four minutes, and could have survived up to one half hour or an hour after suffering the blows to the head (R 4041).

Dr. Benz also stated that as a result of the injuries, Mrs. Worden eventually would have lapsed into an unconscious state and gradually gone into shock, creating oxygen hunger, and experiencing the realization that she was going to die (R 4041-4042). The doctor explained that each of the blows was very painful, specially so the collapse of the eyeball and the crushing of same (R 4042), however, that loss of consciousness was not instantaneous upon all five blows being struck (R 4042). Additionally, the injury to the neck was very painful, but would not

have caused her to lose consciousness immediately (R 4043-44). The injury to the neck, impaired Mrs. Worden's ability to breath, causing her to feel air hunger, which is the apprehension that she could not breath, and feeling fearful she was going to die (R 4044). This injury further would have impaired her ability to cry out (R 4044).

Finally, the two lacerations to the vagina were very painful as well (R 4045). The doctor also opined that the lack of defensive wounds does not mean Mrs. Worden was unconscious (R 4045).

The certified copies of the indictment and conviction of Appellant for the murder of Karen Slattery, and the conviction for the attempted first degree murder of Marilee Manley were introduced in evidence (R 4060-62, 4071-4073). The State then relied on all the evidence presented at trial, and rested (R 4153).

In mitigation, the defense called Appellant's brother, Mitchell Owen, who testified about Appellant's childhood and general background (R 4153-4163).

The defense also presented the testimony of Doctor J. Patrick Peterson, a clinical psychologist, who was court appointed to evaluate Appellant and assist the defense in preparation for trial (R 4166). Dr. Peterson stated that in his opinion no evidence existed to sustain the opinion that Appellant was not fully capable and able to formulate intent (R 4168). Dr.

Peterson's diagnosis was that Appellant harbored a severe distortional distress: a fake personality disorder (R 4170); and episodic mental breakdowns (R 4171). In the Doctor's opinion Appellant lost his ability to form intent "after the initial blow" (R 4175), but that Appellant does not meet the criteria to be characterized as legally insane (R 4178-79).

On cross-examination Dr. Peterson stated he made his conclusions based on the facts of this case as he found them out from the probable cause affidavit and from what Appellant told him (R 4188-90). Dr. Peterson recognized Appellant had a good awareness and knowledge of the legal system (R 4192). Dr. Peterson further stated that the clinical evaluation showed Appellant was average to high average intellectually (R 4194), he suffered of no mental disorder (R 4194), and was legally sane during the murder (R 4195).

The jury returned an advisory sentence of death by a vote of 10 to 2 (R 4356-57). The trial court found four (4) aggravating factors, and no mitigating circumstances that would outweigh the aggravating factors (R 4559-4564), and sentenced Appellant to death. The written order appears at R 4951-4954.

SUMMARY OF THE ARGUMENT

POINT I - The evidence fully supports the conclusion that all the elements of a sexual battery were proven beyond a reasonable doubt. Whether Mrs. Worden was still alive at the time Duane

Owen sexually battered her was a question to be decided by the jury. Therefore, the trial court did not err in denying the motion for judgment of acquittal as to Count II.

Assuming arguendo, this Court finds the evidence proved Mrs. Worden was dead and sexual battery cannot be committed on a corpse, Appellant's conviction must only be reduced to attempted sexual battery which maintains the conviction as a valid ground to support the aggravating factor in support of the death sentence imposed.

POINT II - The ruling of a trial court on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. In the case sub judice, the trial court, after listening to all the testimony and viewing the taped confessions of Appellant ruled that the initial stop and arrest of Appellant was lawful, that no coercion had been exercised on Appellant to make him confess, and that all his constitutional rights had been scrupulously observed by the officers, and therefore, denied the three motions to suppress. The trial court's rulings being well supported by the record must be upheld on review.

POINT III- The trial court's sentencing order is clear, the sentence decision was based only on the aggravating and mitigating factors supported by the evidence. After considering

mitigating factors to determine if they outweighed the aggravating factors, the court arrived at the conclusion that death was the appropriate sentence. There was no reference to or consideration of the victim impact statements. Under these circumstances, there is no reversible error present here.

POINT IV - The four aggravating factors 1) defendant previously convicted of a violent felony, 2) the murder was committed during the commission of a burglary and sexual battery, 3) the murder was especially heinous, atrocious and cruel, and 5) the murder was committed in a cold, calculated and premeditated manner, were well supported by the evidence, and are therefore valid factors. It was within the court's discretion to reject the evidence as to Appellant's personality disorders to establish a mitigating factor. In view of the findings that four aggravating factors were valid, and that no mitigating factors existed, the sentence of death is appropriate.

POINT V - Florida's Capital Punishment statutes are con stitutional both facially and as applied to the Appellant. All of Appellant's arguments have consistently been rejected by this Honorable Court in previous cases before the court.

POINT VI - The United States Supreme Court and this Honorable Court have on numerous occasions held that "the Constitution does not prohibit the states from 'death qualifying' juries in capital cases." Lockard v. McCree 90 L.Ed.2d 137 (1986). Appellant's arguments are totally without merit.

ARGUMENT

I.

A. THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO SEXUAL BATTERY WAS PROPERLY DENIED.

Appellant alleges his motion for judgment of acquittal as to Count II of the indictment should have been granted on the basis that if Mrs Worden was dead at the time of the sexual battery, no sexual battery could have been "committed against 'a person', but rather a corpse." (AB 14). However, the State maintains the trial court was correct in denying Appellant's motion for judgment of acquittal and submitting the case for decision by the jury. Further the verdict arrived at by the jury is fully supported by the evidence.

In Lynch v. State, 293 So.2d 44, 45 (Fla. 1974) this Court stated:

> A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the Court should submit the case to the

> jury for their findings, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal.

In the case at bar, Mrs. Worden's body was found completely naked except for her panties which were rolled down to her knee on the right leg. Doctor Benz found evidence that the murderer had sexual contact with Mrs. Worden (R 3076-77), and testified that there was insemination of the vagina thereby showing penetration (R 3077). In his confession, Duane Owen told the police that his intention was to rape Mrs. Worden (R 3619), and that he in fact did so (3629, 3632). This evidence supports the conclusion that all the elements of a sexual battery under § 794.011(3) Florida Statutes were proven beyond a reasonable doubt. From the condition and position of Mrs. Worden's body, the jury properly inferred that Duane Owen committed sexual battery of Georgianna without her consent, by force pursuant to the use of the murder weapon. See, Rowan v. State, 431 N.E. 2d 805, 813 (Ind. 1982); Hindes v. State, 473 A.2d 1335, 1348-1349 (Md.App. 1984); Tuggle v. Commonwealth, 323 S.E.2d 539, 549-550 (Va. 1984); Bailey v. State, 493 A.2d 396, 402 (Md.App 1985).

Appellant does not deny that he committed sexual battery on Georgianna Worden. The argument is that the State did not prove that the victim was alive when the sexual battery occurred. However, Dr. Benz could not have been more forceful in

his testimony that Mrs. Worden did not die immediately (R 3069). Dr. Benz stated the autopsy revealed that between the blows to the head and death there was a time lapse where Mrs. Worden went into heart failure, because she had accumulated fluid in the lungs, which showed she did not die right away (R 3069-3070).

Dr. Benz testified there was some bleeding from the vaginal lacerations, therefore, since a person cannot bleed postmortem, the little amount of bleeding shows Mrs. Worden may have been near death (R 3092), but was still alive. Dr. Benz' opinion was that Mrs. Worden lived at least three (3) to four (4) munites after suffering the injuries, and could have survived for as long as half an hour to an hour in those conditions (R 4041).

Faced with this evidence, the trial court properly denied Appellant's motion for judgment of acquittal and allowed the jury to reach the issue.

From the testimony presented at trial, the jury could believe Mrs. Worden was still alive during the sexual battery. During his confession, Appellant stated he remembers Mrs. Worden trying to get up and grab him (R 3600-3620). That he pushed her back off of him (R 3622). That Mrs. Worden screamed at first, but not later (R 3619), but the doctor explained that the injury to her neck would have prevented her from screaming after sustaining that injury (R 4044). The doctor also testified there was one injury to the right leg, which could be considered as a

defensive wound (R 3087). In the absence of any evidence of necrophilic tendencies on the part of Appellant, it is considerably more reasonable and logical to infer that Mrs. Worden was still alive when the sexual battery took place. Hines v. State, supra, 473 A.2d at 1349; Rowan v. State, supra. Appellant's argument, therefore, is not based on any evidence presented to the jury. Hence, whether the sexual battery on Mrs. Worden preceded or followed her death was an issue of fact to be decided by the jury, People v. Stanworth, 522 P.2d 1058, 1071 (Cal. 1974), and which could not be decided on a motion for judgment of acquittal, Lynch v. State, supra.

The jury resolved the issue against Appellant by rendering a verdict of guilty of sexual battery as charged in Count II of the indictment (R 3676). The evidence presented at trial was totally inconsistent with any reasonable hypothesis of innocence and clearly established Appellant's guilt. The evidence, and all reasonable inferences therefrom favorable to the verdict, presented substantial competent evidence to support the verdict. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), Aff'd, 457 U.S. 31 (1982). Affirmance of the judgment based upon the wholly proper guilty verdict is required. Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981); Rose v. State, 425 So.2d 521, 523 (Fla. 1982), cert denied, 460 U.S. 1049 (1983).

B. IF THIS COURT AGREES WITH APPELLANT'S ARGUMENTS,THE CONVICTION NEED NOT BE REVERSED, BUT ONLY REDUCED TO ATTEMPTED SEXUAL BATTERY.

Appellant relies on McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983) and McCall v. State, 503 So.2d 1306 (Fla. 5th DCA 1987) for his argument that his conviction for sexual battery cannot be committed against a corpse. First, McCall is a sentencing guidelines case where the stated reasons for departure were held to be invalid because a departure cannot be based on a crime for which a conviction has not been obtained. McCall aside from being inapplicable to the facts sub judice, the dicta, "neither sexual battery nor robbery can be committed against a corpse" is wrong.[2] In Bates v. State, 465 So.2d 490, 492 (Fla. 1985) this Court held:

> Similarly unavailing is Bates' argument that the state failed to prove armed robbery because, since he claims that he took the ring after the victim's death, the state did not show that it had been taken "by force, violence, assault, or putting in fear." § 812.13(1), Fla. Stat. (1981). Bates had the victim's ring in his pocket when arrested, and evidence introduced at trial showed that the victim's finger had been injured when the ring was removed. As we stated in McCloud v. State, 335 So.2d 257, 258 (Fla.1976), "[a]ny degree of force

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[2] Recently this Court reviewed the Fifth District's decision in McCall. This Court's opinion at State v. McCall, 13 F.L.W. 311 (Fla. May 12, 1988) clearly shows the inapplicability of that case to the circumstances at bar.

> suffices to convert larceny into a robbery." We find Bates' argument to be without merit. But for the force and violence used against and done to the victim, Bates would not have obtained her ring. The evidence supports the conviction of armed robbery. See Ferguson v. State, 417 So.2d 631 (Fla. 1982); Hallman v. State, 305 So.2d 180 (Fla.1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed2d 1220 (1976).

Therefore, the statement that armed robbery cannot be committed against a corpse was found to be without merit in Bates.

Likewise, McCrae does not stand for the proposition cited by Appellant, nor does it support the allegation that the conviction for sexual battery must be reversed. The issue in McCrae was the propriety of the jury instructions on the felony-murder charge therein. In McCrae this Court held:

> From the fact that the attacker did in fact have sexual union with the body of the victim, either before or after her death, the jury could have inferred that rape was what he intended to do. The overt act of sexual violation, whether the victim was alive or dead, together with the intent inferable from the circumstances, were sufficient to prove the crime of attempted rape if in fact the jury believed that the victim was dead. Since it was later unclear from the expert testimony whether the victim was alive or dead at the time, the jury could have concluded that Appellant believed she was alive or at least that he originally set out to have forced sexual contact with her while she lived. The fact that a rape may not have occurred because the intended victim was dead at the time of the actual penetration would not have changed the attacker's intent, which

> was properly inferable from the evidence.

Id. at 871. The question whether Mrs. Worden was dead or alive during the sexual battery was for the jury to decide.

It is, thus, abundantly clear that under the authority of McCrae, should this Court agree that Mrs. Worden was dead, and that the jury was bound to so find, the conviction for sexual battery need not be reversed, but only reduced to attempted sexual battery. The evidence proves, and Appellant does not dispute, he had sexual union with the body of the victim, and that rape was what he intended to do. Therefore, the overt act, together with his intent were sufficient to prove the crime of attempted sexual battery. "The fact that a rape may not have occurred because the intended victim was dead at the time of the actual penetration would not have changed the attacker's intent, which was properly inferred from the evidence." McCrae, supra.

That Mrs. Worden may have been dead, and therefore, could not suffer emotional trauma is of no moment. As a matter of policy, there is no reason to exonerate Appellant because of facts unknown to him which made it impossible to cause emotional trauma to Mrs. Worden when Owen's mental state was the same as if she were alive. By the acts he performed, Appellant demonstrated his readiness to carry out his illegal venture. He is therefore deserving of the conviction and in need of restraint just as if his victim had been alive to prevent this dangerous activity to reoccur. "A person whose acts and accompanying mental state show

him to be dangerous is deserving of conviction of attempt without regard to whether he encroached upon some lesser interest of the victim than intended."2 W. La Fave and A. Scott, Substantive Criminal Law, § 6.3 at 44 (1986).[3] Thus, the conviction herein was well supported by the evidence.

C. NO NEW TRIAL IS NECESSARY SUB JUDICE

Appellant argues a new trial is necessary because the denial of the judgment of acquittal on the sexual battery charge poisoned the jury in its deliberation to the capital murder count because they were also confronted with the evidence of sexual battery which influenced the jury to reach a more severe verdict of guilt than it would otherwise. This argument is based totally on sheer speculation, and is otherwise without merit.

Appellant was charged in a three count indictment with first degree murder under Count I, and sexual battery under Count II. The record shows overwhelming evidence of guilt to support the conviction on each count separately. The State had to prove the charges separately, and explained to the jury the evidence that established each count separately. The trial court instructed the jury a separate verdict was to be returned on each count (R 3932).

The sexual battery conviction was supported by substan-

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[3] For a thorough discussion, see 2 W. La Fave, A. Scott, Substantive Criminal Law, Attempts - the limits of Liability § 6.3(1986).

tial and competent evidence, therefore the trial court did not err in allowing the jury to deliberate as to Count II of the indictment. No prejudice has been shown by Appellant.

D. THE DEATH SENTENCE NEED NOT BE VACATED.

Likewise, sexual battery was established through substantial and competent evidence, therefore, the conviction must be affirmed. The sexual battery conviction being a valid and legal conviction, it could be used as an aggravating factor during the Phase II of the trial.

That the jury returned a more severe recommendation than it would have otherwise is again speculation on the part of Appellant, and is refuted by the record. The brutal and senseless killing of Georgianna Worden by Appellant, Duane Owen, even without the sexual battery conviction is deserving of no lesser punishment than death.

II

Issue II of Appellant's (Counsel's) Initial Brief and Issue I and II of Appellant's Pro se Brief are both challenging the denial of the motion to suppress statements. See AB 24-32 and APB 5-22. In the instant answer brief, the State will answer the issues and sub-issues raised in AB's Issue II, and APB Issues I and II, under this section (Issue II) of the State's Answer

Brief, and will number the sub-issues consecutively, attempting to cross-reference the answer to the Appellant's allegations.

A. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS.

The ruling of a trial court on a motion to suppress comes to the Appellate Court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. McNamara v. State, 357 So.2d 719 (Fla. 1978). Contrary to Appellant's position, the above rule of law was not invalidated by the innocuous questions propounded by the court to the prosecutor. As a matter of fact, in response to the prosecutor's comments, the trial court responded that the answer by the prosecutor would not be "a consideration with regard to the resolution of these matters." (R 1314). The record fully supports the denial of the motion to suppress, thus an abuse of discretion has not been shown by Appellant sub judice.

1. The initial stop was valid.

William Sasko picked Appellant as the person who burglarized his home on May 22, 1984, from a photographic line-up shown to him on May 29, 1984 (R 636-637). Durmile Gorman assisted the police in preparing a composite of her assailant, and on May 29, 1984, also picked Appellant from the photographic

line-up as the person who burglarized her home on May 28, 1984 (R 637-639). Upon these identifications of Appellant, the Boca Raton Police Department began looking for Appellant on May 29, 1984 (R 644, 645), and prepared and circulated a bulletin with Appellant's photograph for the patrol units to keep a look out for Appellant (R 644). Additionally, several failure-to-appear-warrants were outstanding against Appellant (R 646).

On May 30, 1984, Sergeant McCoy gave Investigator Kathleen Petracco Appellant's photograph and physical description, and advised her that the Department was looking for Duane Owen with reference to active warrants and as a suspect in the burglaries (R 648-650). When Officer Petracco saw Appellant walking down the street, she recognized him as being identical to the photograph and stopped him to ask for identification (R 651).

Appellant's argument herein are totally without merit. The facts herein are not at all similar to the facts in Brown v. Texas, 443 U.S. 47 (1979), or State v. Levine, 452 So.2d 562 (Fla. 1982). In fact, sub judice the police had probable cause to stop Appellant and take him into custody. Roulty v. State, 440 So.2d 1257 (Fla. 1983); Shriner v. State, 386 So.2d 525, 528 (Fla. 1980). The officer who stopped Appellant testified Appellant looked the same as the picture (R 652). Officer McCoy testified he was aware that Appellant had been identified by the victims as the assailant in the Sasko and Gorman's burglaries (R 666); McCoy was also aware there were

three outstanding active warrants for Duane Owen (R 666-671); McCoy then prepared and distributed the bulletin (R 672), and a BOLO (R 681-2). Sergeant McCoy stated that when he went to where Officer Petracco had stopped Appellant, Owen identified himself as Dana Brown and said he used to live on Coventry Street (R 693). McCoy was aware Duane Owen had once lived at 208 Coventry Street; therefore, because the person looked just like the picture of Duane Owen, McCoy was sure this was Duane Owen and arrested him (R 693-694). The police encountered Appellant one day after being identified by two burglary victims. As the Eleventh Circuit said in Shriner v. Wainwright, 715 F.2d 1452, (11th Cir. 1983):

> With such a temporal and geographic proximity, a description by witnesses of a suspect may provide a sufficient basis for arresting an individual who closely resembles the description.

Id. at 1454. See also, Lee v. Wainwright, 488 F.2d 140 (5th Cir. 1973). Under the facts of this case, as they were known to Officer Petracco, the police officers were justified in relying on the bulletin and BOLO as a basis for their articulable reasonable suspicion that Appellant was Duane Owen who was a suspect in the Sasko and Gorman burglaries, and on whom outstanding arrest warrants existed and about whom Petracco had been alerted to be on the look out for earlier that day. Under the totality of the circumstances, the stop and arrest of Appellant was valid and the trial court correctly denied the

motion to suppress. State v. Webb, 398 So.2d 820 (Fla. 1981); Tennyson v. State, 469 So.2d 133, 135 (Fla. 5th DCA 1985).

2. The record does not support the allegations of psychological coercion.

Appellant alleges the manner in which the statements were obtained over many hours of interrogation resulted in psychological coercion. The allegations are lacking of merit, and the record fully supports the denial of the motion to suppress.

At the hearing on the second motion to suppress (SR 6-7), the police officers testimony revealed that after being arrested on May 30, 1984, Appellant was transported to the Boca Raton jail for booking by Officers Brady and O'Hara (R 728). At the jail, Officer Brady advised Appellant of his Miranda [4] rights, and Appellant signed the form at 1:10 p.m., after indicating he understood (R 728-733). Officer Brady testified Appellant understood his rights, that Appellant appeared very coherent (R 733-734), and did not request an attorney (R 734). Appellant was not threatened (R 736). The Officer also noted that Appellant was fingerprinted and booked in before any officers talked to him (R 736). Also noteworthy is the point that Appellant signed the rights card with the name "Dana Brown", but signed the fingerprinting card with the name "Duane Owen" (R 737). Officer Brady testified Appellant was very congenial, and

[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

appeared to enjoy talking to them (R 740). There was no yelling at Appellant or any physical abuse of Appellant (R 740). The interrogation in the afternoon of May 30, 1984 was an informal conversation dealing mainly with Appellant's background, and much of it was Appellant asking about police work and the military (R 739-740). The conversations were not continuous for two or three hours, but instead there were numerous breaks (R 739). With reference to attorneys, Appellant said he had dealings with attorneys in the past in Michigan, and he thought they (Attorneys) were all jerks (R 740). When asked if he had an attorney, Appellant said he did not have an attorney, nor did he want one (R 741).

This background conversation ended at 4:30 for a dinner break (R 742). Then about 5:45, Appellant was re-advised of his rights, and again Appellant did not request an attorney be provided to him (R 742-745). It was not until this second session on the 30th of May that specific crimes were addressed (R 757-758). Appellant denied the Sasko and Gorman burglaries (R 758), but Officer Brady believed Appellant was involved in the Worden homicide (R 760).

Lieutenant Kevin McCoy stated that on May 30, he spoke to Appellant at the Boca Raton Police Department at about 9:30 p.m. (R 762-763). McCoy was informed that Appellant had been Mirandized (R 763). This Officer also related that the interrogation proceeded in a "conversation-type format" (R 764) in

that sometimes Appellant would not answer questions asked of him by the officers, and other times Appellant would be the one asking questions of the officers (R 764). It was McCoy's perception that Appellant was in full possession of his faculties (R 764); Appellant did not request to speak to an attorney, he was not handcuffed, did not appear to be in any physical discomfort, and that no promises or threats were made to Appellant by the police (R 764-765).

Appellant explained he grew up with Dana Brown at the CVFW Home in Michigan (R 766). After being told he had been identified through a photographic line-up, Appellant confessed to the Sasko residence burglary (R 767, 772), then subsequently asked, "What am I really here for? Not petty burglaries." (R 769). When McCoy explained that he believed Appellant had murdered a girl in Boca Raton the night before, Appellant exclaimed, "Well, finally I know the real reason" (R 769). However, Appellant did not admit to the murder (R 769). After approximately an hour and a half, Officer McCoy terminated the conversation by telling Appellant that an officer from Delray wanted to talk to him. Appellant said that was fine (R 769, 770, 786).

Sergeant Marc Woods testified he too talked to Appellant on the 30th of May (R 788). Sergeant Woods read Appellant his rights again (R 790). Appellant signed the card acknowledging he understood his rights (R 792-93, and made no

request for an attorney (R 794). Woods testified that Appellant explained his use of Dana Brown by saying he mailed away for a birth certificate in Michigan and obtained a Florida Identification Card that way (R 795). Woods also testified Appellant was trying to see what kind of "deal" he could get on the charges he might be facing (R 796-97). Appellant began by asking about the Boca Raton homicide about which McCoy was questioning him (R 796). Woods stated Appellant brought up the subject of making a "deal," and the point that murder was punishable by death, and asked what kind of sentence he would get on the burglaries (R 796-798). Officer Woods responded he could not give Appellant legal advice on what the sentences were, and that he could not arrange any deals for him, give him any promises or make any inducements as to a deal (R 797-98). That Appellant would have to speak to Paul Moyle with reference to making "deals" for himself (R 798). Woods stated he was just asking Appellant general questions, when Appellant began asking about how many years he could get for the different crimes (R 797). Appellant also told Sergeant Woods that it was fun to run away from the police, because he never got caught (R 800). Appellant was returned to the jail at 12:30 a.m., May 31, 1984 (R 751).

Officer Woods testified that on June 1, 1984, Delray Police Department received a collect phone call from Appellant asking for Sergeant Woods (R 931). Appellant asked Woods if he would go to the jail to see him (R 932-33). Woods said he would

go, and Appellant consented to McCoy accompanying Woods to see him (R 983). Appellant was advised of his rights (R 934-935), no promises or threats were made (R 935), and Appellant indicated he understood his rights, and did not request a lawyer (R 936). During these conversations, there were a number of breaks for coffee and use of the bathroom facilities, as well as for dinner (R 936). Officer Woods stated that on June 1, after talking about this homicide, Appellant asked "Let's say John Doe pled guilty to [the Boca homicide] and there was a murder just like it in a nearby town, would they come hounding me for first-degree murder?"

Officer McCoy testified that on June 1, 1984, he received a phone call from Detective Woods telling him that Appellant called asking Woods to go see him at the Palm Beach County Jail, so McCoy accompanied Woods to see Appellant (R874-875). Appellant once again signed the rights card (R 877-879), acknowledging he understood his rights (R 881-882). Once again no threats were made against Appellant, and the tone was again conversational, "since Duane asked to talk, [police] waiting to see what he wanted." (R 883-884). The tone was more of story telling by Appellant (R 885), Appellant asked questions of Woods and McCoy (R 886), and appeared to enjoy talking with the officers (R 886-887). During this conversation, Appellant admitted he committed the Sasko and Lynn Wade burglaries (R 887), he also admitted involvement in the Gorman burglary (R 887), and

two indecent exposure incidents at Florida Atlantic University (R 888).

To show the informal tone of the conversation, McCoy explained that when Appellant was asked about his activities on the night of the 28th and early hours of the 29th of May, Appellant was asked about his sneakers, and said he threw them away. When asked if he knew which ones, he responded, "Yes, the ones with the round knobs, give me a pencil and paper and I will show you." (R888), whereupon Appellant drew his sneakers (R 869). Appellant explained he went out on "maneuvers" (R 890), which meant he went out "prowling and looking to steal" (R 890). Appellant said he enjoyed the chase with the police because he knew they would not catch him (R 890-892). Appellant told the officers he wanted to be a "cop", but got convicted of a felony, so he was no longer eligible, so he decided to be the opposite of a cop, and the more he stole and got away with, the more he enjoyed it (R 891-892). Throughout the conversation, Appellant dropped hints about several crimes he committed (R 892).

McCoy stated that throughout the conversations, Appellant asked questions describing crimes and asking what the penalty might be, suggesting negotiated pleas and deals (R 892,, 894). During these discussions, Appellant described different scenarios that correlated to actual crimes being investigated in the area (R 894-900). Owen wanted to know if he plead, whether

he could choose which hospital or jail he would be sent to (R 896-900). Appellant told McCoy he had no alibi for the night of this homicide (R 901). Owen also asked many questions to see what the police had on him (R 902). He asked about the electric chair four or five times that day (R 905-906).

At one point, Appellant asked if he could talk to his brother saying that since Mitch was family, he could not testify against him. McCoy informed Appellant that was incorrect, so Appellant decided not to talk to his brother (R 902-903). According to McCoy, this first conversation was not a formal question and answer session, but seemed like Appellant was simply trying to impress the officers (R 920; 923-24).

McCoy testified that the note in his report, "Duane didn't want to talk about these," did not mean Owen said he did not want to talk about the crimes, but rather that Duane denied being involved (R 910-913). Appellant did not refuse to talk (R 916); that the officers did not plan to go see Owen on June 1, 1984, but rather only went when called by Appellant requesting the officers to visit him (R 925). McCoy told the trial court, the police were at the "beck and call" of Appellant (R 928).

On the first day of June, 1984, the conversations with Appellant were said to have begun at 3:55 p.m., and end at 10:45 p.m., with numerous bathroom, and coffee breaks, and one dinner break (R 906-907). The officer estimated the conversation in total lasted about five hours, producing about 26 pages of hand-

written notes (R 908). Neither the conversations on the day Appellant was arrested, nor the conversation of June 1, 1984 were videotaped by the police.

On June 3, 1984, Mitchell Owen (Appellant's brother) requested Officers McCoy and Woods to give him a ride to the jail so he could see Appellant (R 959), and the officers complied. According to Officer McCoy, Mitchell and Appellant talked privately for about one hour and a half (R 962-3) Upon conclusion, McCoy went in and talked to Appellant (R 963). These conversations were videotaped (ST 1-262). Before beginning, Appellant was read his Miranda rights (R 963; ST 18-19), at which time Appellant acknowledged he understood his rights and signed the Rights Card (ST 20). Officer McCoy testified Appellant was in a good mood, he was comfortable, and making jokes (R 964); further McCoy said the officers made no threats or promises to Appellant (R 966), nor did Appellant request an attorney (R 966).

The record reveals that at one point Appellant, believing that by posing his hypothetical situations he had incriminated himself, stated:

> See, we are going to court anyway about this shit.
>
> My lawyer is going to look at me and say that I'm a fucking nut. Say I'm a fucking dumb ass, an idiot. You should never have talked to these dudes....

(ST 130, R 967). The record also shows Appellant tried to get a

deal from the officers (R 967-968, ST 164-166, 234-243). At one point Appellant states, "When I go to court on burglaries, I'll plead guilty. There is no need to go to trial." (ST 242-243).

McCoy testified he told Appellant, he could not promise Owen anything; to which Appellant replied, "I know you can't give any guarantees" (R 968, 971). Appellant once again expressed his concern with the electric chair (R 969, 971). McCoy said his impression was that Owen was willing to talk and was simply playing with the officer's head (R 970). McCoy also stated that bringing his brother to talk to Owen at jail was not being used as an inducement (R 973, 978-979). That when Appellant asked about certain cases being dropped, McCoy made it clear he was controlling the charges, and he was not making Owen any promises (R 980-983).

After the Third of June, the next conversation occurred on June 6, 1984 (R 1128). The police went to request a blood sample from Appellant (R 1129), then they asked him if he wanted to talk and Appellant said "ok." These conversations were video-taped (R 1129; see ST 265-422). Appellant was advised of his rights (ST 265-266). Officer McCoy inquired if Appellant had an attorney, and if he did that the attorney could be present while they talked, whereupon Appellant responded, "No. I can talk to you. That's fine, you know." (ST 270, R 1131-1133). On the sixth of June, Appellant once again was concerned with the electric chair, making a deal, and asking questions using "John

Doe" as the perpetrator (R 1134, ST 332, 341-352). During this conversation McCoy told Appellant, he should not go on false hopes, but plan on facing murder charges (R 1133).

On June 7, 1984, Appellant called McCoy and said he had been thinking and was wondering if McCoy could go to see him at the jail (R 1142). McCoy went to see Appellant, and the conversations were once again videotaped (R 1142; 425-647). The tape shows McCoy read Appellant the Miranda rights at 6:05 p.m. (ST 425-427). Appellant began that day's session by telling McCoy, "I want to kind of solve a few things here and there" (ST 429, R 1144). Appellant told McCoy he would start at the beginning and work up the "-ladder" (R 1144-45 ST 430). On the 7th of June Appellant tells McCoy, bring Mark Woods--the Delray Police Officer--"I'd prefer that he be here. And you can bring a tape recorder or whatever else you want, and I'll tell you anything you want to know" (ST 548). And insisted that if McCoy came back the next day with Mark Woods and his brother, he would talk; that he would talk the next day after he got his thoughts together (ST 549-551). McCoy was ready to leave, when Appellant said, "Bring that shit back in here and I'll tell you a couple other things" (R 1147-48; ST 552). Appellant subsequently confessed to the "Peter Pan Motel case" (R 1148; ST 558-592). Later that night the following took place:

McCoy: What I want to discuss is the one I'm here for....Do you want to

tell me about that one?

Appellant: Well, we already made a bargain on that one.

McCoy: No, we didn't make a bargain.

(ST 640-644). McCoy explained Appellant was not refusing to speak with him about the homicide, but simply suggested that if McCoy brought up his brother the next day, he would tell McCoy what he wanted to know (R 1151-1152).

On June 8, 1984, McCoy, Mark Woods, Tom Livingston, and Mitchell Owen went to see Appellant in jail (R 1154). First Appellant and his brother talked for about one hour (ST 854; R 1154-5) Thereafter McCoy and Woods talk to Appellant, but first they read him his rights (R 1157; ST 855-856). Appellant told McCoy he had lied to him the night before and that he committed the Smiley Assault (ST 865-874, R 1159). The videotape makes it clear, Appellant called the police early that day so they would go to see him and bring his brother with them (ST 892). That night Appellant selectively chose which questions he would answer (ST 896-898). To end the conversations McCoy asked, "Do you want to talk anymore?" and Appellant responded, "No, ...I really ain't got nothing to say anymore..." (ST 966), and the taping was concluded at 4:15 p.m. (ST 966). Appellant was allowed to speak to Mitch once again (R 1166).

At the suppression hearing, it was revealed that no conversations were held between Appellant and the officers

between the 8th and the 18th of June, 1984 (R 1170). On the 18th of June, Appellant called his brother about going to see him, and Mitchell called Officer Woods (R 1180-81). Officer Woods testified that on the 18th Appellant called Officer Woods at about 9:00 a.m. and said he wanted to talk about events in Delray (R 1182). Woods told Appellant he would have to make arrangements (R 1182-83), and Appellant called again around 1:30 p.m. (R 1183). Officer Woods finally went at 4:20 p.m. (R 1184, ST 650). These conversations were videotaped (R 1189) and appear in the record (ST 648-851). Officer Woods read Appellant his rights (ST 649-650, R 1185) on two occasions that night (R 1187). The officer stated he made no promises or inducements to Appellant (R 1189), and that he felt that Appellant was playing a "catch me if you can" game (R 1191). There was a break, and after dinner, Officer Woods read Appellant his rights one more time (ST 759). During this conversation Appellant said, "I've got a little pointer for you, man...Let me see. It goes, roses are red, pigs are blue, start counting victims, there will be quite a few" (ST 779-780). The record also shows that while Woods was asking questions of Appellant, the following occurred:

Woods: ....I just wanted to know.

Appellant: If I've killed anybody before?

Woods: Mm-hmm.

Appellant: Yes.

(ST 780, R 1191-92). Woods asked Appellant if he would consent

to giving them his footprints, but Appellant declined (R 1192; ST 815-817).

On June 21, 1984, the conversations were again videotaped (ST 968-1217). The Miranda rights were read to Appellant at 6:29 p.m. (ST 969-970, R 1206). At that point Officer Livingston formally read the charges and arrested Appellant for the Worden homicide (ST 971-974, R 1209-10). When Officer McCoy came back into the room, the Miranda rights were read to Appellant one more time (ST 977-978, R 1210), and then Appellant talked about the Worden homicide (ST 993-1027, R 1113).

A review of the tapes, transcript and McCoy's testimony clearly demonstrate that Appellant was very coherent and understood his rights (R 1213-1215). Further, Appellant did not exercise his right to remain silent or cut off further questioning at any point while talking about the Worden homicide. Nor did Appellant ask for an attorney to be present, even after being read his rights two times within a span of half an hour (R 1214; ST 969-978). The tape transcripts clearly reveal, Officer McCoy asked Appellant, "Could you answer a few questions for me?" (ST 980). Appellant, rather than exercising his right to remain silent or stop the conversation, continued talking to McCoy claiming he did not remember where the book might have been and when he may have touched it (ST 981-983). Appellant explained where he threw away the sneakers, (ST 983-986) and then freely and willingly told McCoy all the details as to how he committed

the murder (ST 993-1027).

At the suppression hearing, Appellant chose not to testify (R 1308-09). The trial court in ruling on the motion to suppress found that Appellant was given the Miranda rights repeatedly throughout the conversations. The court found that once the suspect is given his rights, and the suspect chooses to speak to the police, the officers are not precluded from using other "psychological" techniques to get the suspect to talk (R 1051-53; 1056). The court found that from viewing the tapes and listening to the officers'testimony, he concluded that this was nothing more than a game for Owen (R 1053-1054; 1056-57), and that as a finding of fact, Appellant understood his rights, he called the officers to go talk to him, and thus he freely and voluntarily talked to the officers (R 1058-60). At the conclusion of the suppression hearing, the trial court found there was probable cause for the initial arrest (R 1491), and that the rights were properly read (R 1491-92). The court further found no evidence of physical coercion, or threats of violence (R 1493). He ruled that the conversations between Appellant and the police were discussions had at the invitation of Appellant (R 1494). The court found that Appellant is very intelligent and was only playing a game with the police (R 1494). The court found the police did not suggest a better deal if Appellant talked (R 1499). The trial court ruled that selective recording

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[4] 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed 2d 313 (1975)

of conversations by the police is not illegal (R 1501), and denied the motion as to psychological coercion (R 1508, 1512).

The test for admissibility of a confession is whether it is freely and voluntarily made. Christopher v. State, 407 So.2d 198, 200 (Fla. 1981). The applicable standard for determining whether a confession is voluntary is whether, taking into consideration the totality of the circumstances, the statement is the product of the accused's free and rational choice. The determination must be done on a case-by-case basis. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Palmes v. State, 397 So.2d 648, 653 (Fla. 1981). As shown above, the trial court, after viewing the tapes, listening to the testimony, and argument of counsel, and otherwise reviewing the totality of the circumstances, ruled that Appellant's confession was freely and voluntarily made after proper waiver of the right to remain silent.

The trial court's very specific findings and rulings are found at pages 1051-1061 and 1487-1512 of the record, and are attached hereto as Appendix A to this Answer Brief. A reading of those findings reveal that the trial judge viewed and reviewed all the tapes on several occasions, heard the testimony presented to him during the several days of hearings on the motion to suppress, considered the arguments of counsel, and reviewed all the case law presented to him. After sifting and pouring through, considering and agonizing over all of the 20 hours of taped conversations, and several hours of testimony and legal arguments, the trial court

decided Appellant was very astute as to all of his actions, as well as to the legal ramifications (R 1494). His perception was that Appellant was playing games with the police officers, checking out how much evidence they had on him on the different cases, and trying to decide whether it was beneficial for him to confess on the lesser charges in order to have a better bargaining chip for the more serious charges coming down the line (R 1494-95). The trial judge found that there was no threats, or coercion exercised on Duane Owen (R 1498), that Appellant, due to his prior studies in criminology, believed he knew more than the officers, and that Owen very much controlled the situation during the conversations with the officers (R 1505).

The trial court's ruling comes to this Court clothed with a presumption of correctness. A reviewing court must defer to the fact-finding authority of the trial court and should not substitute its judgment for that of the trial court. Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987); De Conigh v. State, 433 So.2d 501, 504 (Fla. 1983). Under the particular circumstances of this case, it is crucial that the trial court's rulings be affirmed, and not ignored, as the trial judge was the person who viewed all the tapes, heard all the testimony, and was in the best position to exercise his fact-finding authority.

a. Protracted Interrogations

Appellant argues the record shows "psychological coercion employed by the police in the instant appeal [by] the format and the length of the interrogations." These allegations are totally without merit.

The record shows that Appellant was read his constitutional rights every time a conversation was begun. This is true, even after dinner breaks, when the conversations were resumed. For example, on June 21, 1984, the day Appellant confessed to the instant case, the Miranda rights were read to Appellant on four (4) different and separate occasions (ST 969-970, 977-978, 1039-1041, 1175-1176). Appellant always acknowledged he understood his rights, and asserted clearly he was willing to talk with the officers. The record also makes it very clear, the conversations held after the initial interrogation on the date of his arrest, were at the insistance of Appellant. Appellant invited the officers to talk to him, and the officers testified Appellant enjoyed "matching wits" with them.

The United States Supreme Court declined to find coercion in cases involving twelve hours of interrogation, see Stein v. New York, 346 U.S. 156, 185-86, 73 S.Ct. 1077, 97 L.Ed.2d 1522 (1953). Likewise, Appellant's allegations have been rejected by this Court. In Roberts v. State, 164 So.2d 817 (Fla. 1964), the defendant was arrested at 6:00 p.m. and was interrogated beginning at 6:30 and continued intermittently until 1:30

a.m. the next morning. This Court found that the fact of the long hours of interrogation would not destroy the validity of the confession if it was otherwise freely and voluntarily given. In Harris v. State, 162 So.2d 262 (Fla. 1964), the defendant was questioned intermittently from 10:00 a.m. to 10:00 p.m., yet this Court again found no evidence of coercion and held the confession was freely and voluntarily made. Then in Dawson v. State, 139 So.2d 408 (Fla. 1962), this Court again rejected the contention the confession was not voluntary because it was obtained only after a long and protracted interrogation. The court ruled that a confession is not vitiated by the fact that it was made while in custody after interrogation, provided the questions was orderly and properly conducted. Id. 411. See Also, Williams v. State, 22 So.2d 821, 823 (Fla. 1945).

The record herein clearly shows, Appellant was read his rights, and he waived his right to remain silent. The conversations took place between his arrest on May 30, 1984, and June 21, 1984. Thus, the 20 hours of conversations were spread over 23 days taking place on eight different dates. The transcript of the tapes clearly show Appellant was provided food, drinks, and allowed to use the bathroom as needed. The conversations did not last for longer than five hours at a time, and there were constant breaks. Appellant did not allege, and the videotapes do not show any evidence of either mental or physical abuse of Appellant. This allegation is without merit.

b. Feigned Empathy

Appellant alleges that by acting friendly towards Appellant and flattering him, the police distorted Appellant's perception of his right to remain silent. The record is clear whatever kindness was shown to Appellant by the police officers did not rise to the level of improper influence which would nullify the voluntariness of his confession. Oats v. State, 446 So.2d 90, 93 (Fla. 1984). Here there was no evidence of threats, promises, or other improper influences. Thomas v. State, 456 So.2d 454, 458 (Fla. 1984). As stated in Barnason v. State, 371 So.2d 680 (Fla. 3d DCA 1979):

> This contention is founded essentially upon the fact that the methods of interrogation used by the officer, although not involving any of the forbidden elements of force, promise or threat, were so psychologically effective as to break down Barnason's will and produce the confession.[3] The adoption of this argument would, in effect, render inadmissible every statement by a defendant while under police questioning, as the product of a degree of coercion which is inherent in every such situation. In common with every other court which has considered such a claim, we reject this view. See Paulk v. State, 211 So.2d 591 (Fla. 2d DCA 1968); Ebert v. State, 140 So.2d 63 (Fla.2d DCA 1962), and cases cited. In a case such as this one, in which a mentally competent and aware defendant has been given appropriate Miranda warnings and has not been placed in "fear of material or physical harm, or [given] hope of material reward . . ." Denmark v. State, 95 Fla. 757, 762, 116 So. 757, 759 (1928), his voluntary confession may properly be admitted

into evidence.

> 3. The officer, Fernandez, employed what he called the "agitation and stroking" technique of questioning Barnason in which the interrogator picks at the suspect's psychological weaknesses and insecurities and at the same time seeks to reassure him with protestations of personal friendship and confidence. We see no constitutional reason for the disapproval of this technique, or any other, merely because it proves to be successful in securing a confession.

Id. 681. See also, Chaney v. Wainwright, 561 F.2d 1129, 1132 (5th Cir. 1977), Puccio v. State, 440 So.2d 419, 421-422 (Fla. 1st DCA 1983); State v. Caballero, 396 So.2d 1210, 1213-1214 (Fla. 3d DCA 1981).

Faced with a similar claim in Moore v. State, 13 F.L.W. 347 (Fla. Case No. 69,496. May 26, 1988), this Court stated:

> Appellant claims that the investigating detective played upon his personality and tricked him into giving the confession. To the contrary, we find no abusive treatment or improper conduct by the investigating detective. The officer's statement to the appellant that, based on the evidence, the officer knew the defendant committed the murder is not such conduct that would render a confession involuntary. The appellant was promised nothing and expressly acknowledged in his statement that he had been well treated. We find the confession was freely and voluntarily made and properly admitted in this case.

at 349. The record sub judice supports the same finding under the facts of the case at bar.

c. Format of the Interrogation

Appellant asserts the transcript of the record on appeal goes on for pages without Appellant ever saying a word, and that this shows prejudicial and constitutionally impermissible tactics (AB 36). Again these allegations are without merit.

Under the totality of the circumstances, it is clear that Appellant summoned the police to talk to him. The videotapes clearly show proper investigative tactics used by the officer which at no point over stepped its bounds. This argument was not presented to the trial court, thus it is not preserved for appeal. However, and in any event, these allegations do not support a reversal of the trial court's finding of voluntariness of the confession. Moore, supra; Barnason, supra; Puccio, supra.

A review of the totality of the tapes makes it abundantly clear, and supports the trial court's conclusion, that Appellant did not feel coerced into talking. Appellant summoned the officers to talk to him. He was interested in obtaining information as to how the investigation into his cases was progressing. He wanted to see whether he could obtain a favorable "deal" from the officers or Paul Moyle. If one looks at the videotapes themselves, it is apparent Appellant is not silent in an effort to avoid the questions being propounded of

him. Rather Appellant, very calculatative, is sizing up the officers, considering their knowledge, making mental notes and checking up on the information he is being provided by the officers. This is obvious from the tapes: During the taped conversations of June 3, 1984, Appellant told the officers, "Being if I did do that, I probably wouldn't confess anyway." Then he explained, "Because you just don't confess to shit like that," (ST 134) because if the police have the evidence to prove he committed the murder, the police should prove it through evidence, and not have to rely on a confession by the suspect (ST 137-138). Appellant discussed the facts of the murder in "John Doe" terms, rather than giving a straight out confession (R 1216-17). Then on June 7, 1984 Appellant called McCoy to see him because he was tired of lying (ST 558), and wanted "to kind of solve a few things here and there." (ST 429). He told McCoy he would like to "start in the front and work our way up....like a ladder."(ST 430). In this sense Appellant decided what cases he would talk about, leaving the more serious cases for last or until the officers could prove to him they "had him." Appellant made his point clear on the June 8, 1984 conversation: when asked whether he committed the Worden homicide, he answered he "couldn't answer that," and explained the difference between "won't" and "can't" by stating "Well, if you won't, that would be like, uh, you just strictly refuse. If you can't, that means maybe you ain't so sure." (ST 896). During the same

conversation, when asked about his habit of attacking women while in their sleep, Appellant states, "I can't answer that one either." (ST 941).

Then on June 21, 1984, after he was charged and arrested on the Worden homicide, Appellant freely and voluntarily confessed without asserting his right to remain silent, right to the presence of his attorney, and at no point in time attempted to interrupt the conversations (ST 993-1027). Appellant advised the officers he knew the law, and that he had law books that told him the sentences he could be facing on the different crimes (ST 932-935). Appellant told the police he knew in addition to the Worden murder, he would probably be facing a second murder charge in the future (ST 901, 934). Under the totality of the circumstances, it is clear Appellant acknowledged he knew what he was doing, and that he was the one that brought up the idea on June 8, that "if you're up on a murder charge, man, what the hell's another one." (ST 935). The effect of any one statement by Appellant cannot be considered by itself, but in the totality of the 20 hours of conversation as the officers were confronted with, and the trial judge based his rulings on.

3. Appellant Waived his Right to Remain Silent

Appellant alleges his Fifth Amendment rights were violated when he indicated he wished to remain silent (AB 29-32). The brief, however, is totallly devoid of any reference to the record where Appellant allegedly asserted his right to remain

silent or cut off interrogation during the discussins of the Worden homicide on June 21, 1984 (ST 977-1032). The record is, rather, very clear that Appellant invited the officers to visit him and discuss the various cases with him. As previously discussed (infra pp.), throughout the tapes it is clear Appellant discussed what he wished to discuss and advised the police that he would not confess to the homicide until he was shown the police had sufficient evidence to convict him (ST 137-138).

The record is abundantly clear, each time the officers read the Miranda rights to Appellant, he was advised that he had the right to remain silent, that if he made a statement, it must be free and voluntarily given, that he had the right to the presence of an attorney during the interrogation, that if he could not afford a lawyer, one would be provided, that "if at any time during the interview you do not wish to answer any questions, you are privileged to remain silent," that the officers could not threaten him or promise him anything to induce him to make a statement, but if he did make a statement, the statement "will be used against you in a court of law" (ST 18-19). As discussed, infra, at no time did Appellant request an attorney, but unhesitently and clearly stated he was willing to talk without the presence of an attorney. He knew if he asked for an attorney, the attorney would advise him not to talk (ST 130), yet he talked with the officers freely and voluntarily.

If one looks at the entire conversation between ST 130 and ST 140, it becomes abundantly clear that Appellant was not invoking his right to remain silent at ST 137, but was simply saying he was not going to confess to the homicide because he is going to make the police prove he was the one who did it:

> **Defendant:** Because if he had it stuck in his heart that I did it so bad, then he should have to prove that I did it and he shouldn't be here asking for a confession because he should have enough proof against me to not even worry about it.

(ST 137).

During the conversations of June 6, 1984, Appellant again was informed of his right and specifically that he was privileged to stop the questioning at any point during the interview (ST 265-266). On the Sixth of June when specifically asked if he wanted an attorney present, he stated, "No. I can talk to you. That's fine..." (ST 270). It must be kept in mind that the video tapes demonstrate Appellant fully enjoyed talking with the officers, and checking out what kind of evidence they had against him. Appellant appears to be willing to confess to a particular crime once he becomes aware the police have enough evidence to charge him with the homicide.

Beginning at ST 355 Appellant and Officer McCoy talked about the Worden Homicide, whereupon the following colloguy took place:

> A. You know, see, I didn't B & E her house, you know, or wherever this house

was.

Q. Okay.

A. So, really, I can't say I, know know, I did it when I didn't.

Q. Okay. Well, that's why I said to you a minute ago, you know, I know -- I know the house was burglarized or whatever you want to call it. I know somebody got into the house, okay. Maybe that's a better term.

Okay. And what I was saying, it's--all along, okay, I know you were the one. Okay.

So, here we are again. So, it's up to you to bring me any further.

A. So, whatever this, uh -- when this person does get charged, whoever it is, what is he going to get charged with, he is going to get charged, from my viewpoint, okay, he's going to end up getting charged with burglary -- first is going to be first-degree murder.

And then, it's going to be burglary or -- no, no. Then, it's going to be rape charge or sexual assault or whatever you want to call it, and then it's going to be burglary.

So, then he's got -- so, they're going to end up giving him life for the first-degree murder, say, for instance.

Q. Or the electric chair or whatever.

A. Yeah.

Even if they give him life, say twenty years, and then they're going to give him for sexual assault ten years or something. And then, they're going to end up giving him for burglary ten years. So, he's never going to get out.

Q. Well, maybe not.

A. There ain't no maybe's. I know. He ain't never going to get out if he's charged with that kind of stuff.

Q. Well, whatever. Whatever. Okay? But as it stands right now, without anything, okay, without any thing for me to go on, I mean as far as, you know, that person's point of view or his -- or what happened or blackout or this or that, whatever.

The only alternative will be a premeditated murder. Maybe first-degree murder, yeah. That would be it.

And we get all the tests back and everything like that, I got nothing else to go with, yeah. That's going to be the charge. We'll have to deal with that later on.

Can you offer me anything?

A. Well, no, not on that case, no.

Q. What other case?

A. Well, the other ones that I'm already here for, you know.

Q. Uh-huh. I know about that.

A. I admitted to them because I knew I did them.

Q. Uh-huh.

Okay. And those were the only other ones you ever did in Boca Raton?

A. No. I did a couple more of them, but mums the word on them.

Q. Maybe for now.

A As a matter of fact, I don't think I ever did. I think that's about it.

Q. No, they weren't.

A. Huh?

Q I says they weren't, and I know that and you know that.

A. Oh, yeah. I know it, too. Now, I remember.

Q. The ones --

A. Huh?

Q. The ones I asked you about, you mean?

A. Yeah. Oh, I didn't do them, you know, about them other ones, but I know the ones I did do that didn't get caught on them.

Q. Okay. You don't want to talk about them?

A. About which one?

Q. The ones that you did that you didn't get caught for.

A. No reason to, no.

Q. Why?

A. Why should I?

Q. Because you want to, because you want to tell me about them. I don't know.

A. No. They -- ain't such importance anyway.

(ST 360-364). Thus, it is abundantly clear Appellant was not seeking to terminate the interrogation, but was very effectively exercising his right to answer only the questions he decided he wanted to respond . Appellant's rights were scrupulously honored

by the officer.

The passage ST 880 occurring during the June 8, 1984 session, was at the request of Appellant. He had been talking to McCoy on June 7, 1984, and Appellant decided to call McCoy the next day to come back and talk to him because he had lied the night before (on the 7th of June) and wanted to clear up and confess to the Lydia Smiley case (ST 857-876). Then again, exercising his right to choose which questions he will answer, the following colloquy took place:

> OFFICER WOODS: Where would you get a camera? Do you have to think of that?
>
> THE DEFENDANT: Yeah.
>
> OFFICER WOODS: Or you don't want to tell me?
>
> THE DEFENDANT: Well, I think I got it, uh -- I know I got it when I was working at the beach, you know.
>
> OFFICER WOODS: Mm-hmm.
>
> THE DEFENDANT: I think I stole it off a tourist or somebody like that when they came down on the beach or something.
>
> OFFICER WOODS: Yep. Because we can't find it, you know --
>
> OFFICER McCOY: Let me ask you something else.
>
> THE DEFENDANT: You can't find the camera?
>
> OFFICER WOODS: Can't find where anybody reported it stolen.

OFFICER McCOY: Let me back up. Uh, forget about the camera for now. Okay? We can think about that later.

Uh, okay. That was the one lie you told me. What was the other one?

THE DEFENDANT: Same lie that I told you I was going to talk to you about when you came up here. You're up here and I ain't talking about it.

OFFICER McCOY: Are you going to?

THE DEFENDANT: Nope.

OFFICER McCOY: why not? Why not?

THE DEFENDANT: Idon't know.

OFFICER McCOY: Is it because you're afraid or you don't want to remember or what? What's the reason? Give me a reason?

THE DEFENDANT: I've got to figure it out myself, you know.

OFFICER McCOY: Okay. Let me ask you something. We'll get off of that for a while. Then we'll come back to it, okay? But we'll get off of it for a while. But now your brother's got to go and he wants to just say good-bye to you before he goes. Okay?
Uh, remember we talked about the flashing when you flashed a little girl over at FAU? Back, uh, the night Mary Lee Manley was hurt? Do you remember that?

THE DEFENDANT: Yeah. I said I went out there. I didn't know if I was out there to do that or not.

(ST 879-881). It is inconceivable how Appellant can argue he was exercising his right to remain silent in this passage. However,

even if so viewed, it is abundantly clear his subsequent actions evidenced a second knowing waiver of his right. Lightbourne v. State, 438 So.2d 380, 389 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984).

With reference to the passage at ST 921, the record shows the conversation occurred as follows:

> McCoy: What -- what are we going to do with Georgiana Worden?....
>
> Defendant: There ain't much to do about it, chief.
>
> McCoy: Oaky. Mark's got a few questions for you about the camera shit you were talking about. You want to talk to him for a couple of minutes?
> Defendant: Yeah. Yeah. That'd be fine.

(ST 921-922). It is clear, therefore, that if Appellant was trying to exercise his right to remain silent, that right was scrupulously honored by Officer McCoy. It is interesting to note that Appellant did not discuss the events of the Worden Homicide until after he had been charged with the crime. Once again exhibiting Appellant's total comprehension of his rights and effective exercise of same.

The passage at ST 966 where Appellant says he has nothing more to say, occurred at the conclusion of the June 8, 1984 interrogation. The record is clear, the question and answer was Officer McCoy's way of concluding the session for that day. Therefore, if Appellant did not want to talk anymore, his wishes were observed by McCoy and the interrogation was concluded (ST

966). No further conversation was held until June 18 -- ten days later -- when Appellant asked Officer Woods to bring his brother to see him (R 1130, 1139, 1141-1143). At the June 18 interrogation Appellant was once again read his Miranda rights, and he voluntarily waived his rights (ST 649-650). Therefore, his subsequent actions evidenced a second knowing waiver of his rights. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed. 2d 313, 321 (1975).

Finally, during the afternoon of June 21, Captain Richard Lincoln, of the Delray Police Department served the court order on Appellant which ordered him to supply the police with his footprint impressions. At that time Captain Lincoln told Appellant not to say anything, all he wanted was the footprint impressions (R 1200). Then that same evening Officer McCoy read Appellant his Miranda rights, including "If at any time during the interview you do not wish to answer any questions, you are privileged to remain silent" (ST 970). Appellant acknowledged he understood his rights (ST 969-970).

At that point Sergeant Livingston of the Boca Raton Police Department read the probable cause affidavit and formally charged Appellant for the murder of Georgiana Worden (ST 971-975). Immediately thereafter, McCoy once again read the Miranda rights to the Appellant (ST 977-978), and he voluntarily talked about his actions in the Worden Homicide without claiming any desire to stop talking at any time therein. Upon reviewing the

entire record, it is clear that Appellant was very willing to speak to the officers. And that Appellant was also aware he could choose which questions to answer, and exercised that right on several occasions.

It is well settled that a fragmented statement, a phrase taken out of context, or the failure to answer a specific question while answering others is inadequate to sustain the claim that one exercised his right to remain silent. The totaltality of the circumstances surrounding an officer's interview with a suspect as well as the full context of the officer's testimony must be considered in determining whether the right was invoked. State v. Rowell, 476 So.2d 149 (Fla. 1985).

The record sub judice clearly shows the Appellant did not assert his right to remain silent at any point when talking about the Worden Homicide. Thus udner the totality of the circumstances in this case, the trial court considered the videotape and surrounding testimony of the officers and correctly determined that the statements were freely and voluntarily made in light of Miranda. Consequently, the trial court did not err in admitting into evidence, the statements made by Appellant during the custodial interrogation. Moore v. State, 13 F.L.W. 347, 349 (Fla. May 26, 1988).

4. Appellant did not request to Consult with an Attorney

Appellant alleges he was denied his Fifth and Sixth Amendment rights to the assistance of counsel during the inter-

rogations (APB 5-8). Appellant asserts he invoked his right to counsel when he requested to speak to Paul Moyle, -- the assistant state attorney who would be presenting the case to the grand jury for their consideration (APB 5). These allegations are totally without merit, and rather border on the ridiculous.

Appellant was arrested on May 30, 1984 (R 648) and signed the first rights form at 1:10 p.m. before Detective John W. Brady (R 730-732). According to Officer Brady, Appellant acknowledged he understood his rights (R 733), and did not request an attorney (R 734, 741). Officer Brady asserted they gave Appellant a dinner break at 4:30 p.m. (R 742), and then re-advised Appellant of his rights at 5:45 p.m. that night, again without request for an attorney being made (R 742-745). Officer Brady testified Appellant was taken to the jail at 12:30 a.m. May 31, 1984 (R 751). Therefore, Appellant was at the Boca Raton Police Department less than 12 hours, on May 30, 1984. Appellant was taken for first appearance on May 31, 1984 (R 943). Appellant's unfounded allegations were never raised at the trial court, thereby it must be assumed no error was committed, otherwise the argument has been waived.

The record is abundantly clear that before each and every session the officers scrupulously read Appellant his Miranda rights. Each time Appellant acknowledged he understood his rights and never declined to speak to the officers without an attorney present.

Officer Brady testified that on May 30, 1987, during the initial interrogation Appellant signed the rights form acknowledging he understood his rights (R 730), and did not request an attorney (R 734). Further, Brady specifically testified that Appellant had said he had dealings with Attorneys in Michigan and Appellant thought attorneys were all jerks (R 740). On the 30th Appellant said he did not have an attorney, and did not want one (R 741). Both Officers McCoy and Woods stated they too each advised Appellant of his rights on the 30th of May (R 763-790), and he did not request an attorney (R 764, 794).

It must be kept in mind that the conversation of June 1, 1984, was at the request of Appellant. Appellant called Woods to go see him, and Woods asked if it was allright for McCoy to go along (R 874, 925, 932-933). On that day, Appellant again was advised of his rights (R 877-882, 934-935), and did not request an attorney (R 936). On the first of June, Appellant was doing a lot of the questioning (R 884-886).

The videotapes of June 3, 1984, clearly show Appellant was read the Miranda rights at the beginning of the interview, he signed the card, and did not request an attorney to be present (ST 18-20). During these conversations on the 3rd of June, Appellant inquired of the Officers about the possibilities of plea bargaining, and McCoy informed him that no charges will be dropped unless the officers want it dropped (R 1021-22; ST 23-

26). While discussing the possibilities of a good deal in case he confessed, Appellant recognized that his own attorney would tell him not to talk (ST 130-131). Clearly, these comments by Appellant demonstrate he was aware of his right to have an attorney present, but freely and voluntarily waived that right. See, Connolly v. State, 350 So.2d 36, 37 (Fla. 3d DCA 1977).

While still trying to extract a "plea agreement" from the officers, the following colloquy takes place:

> **Defendant:** Who's this Paul Doyle character?
>
> **McCoy:** Paul Moyle?
>
> **Defendant:** Yeah.
>
> **McCoy:** He's the state attorney. Well, the Chief felony prosecutor in the state attorney's office.
>
> **Defendant:** What the hell is his job?
>
> **McCoy:** He basically tries all major cases ..for the state, you know.

(ST 169). Appellant then changed the subject and inquired what were all the papers McCoy carried with him.

On the 6th of June, McCoy went to request Appellant's consent for a blood sample, and asked Appellant if he was willing to talk, and Appellant said, "OK." (R 1091). McCoy read Appellant his rights, which he acknowledged he understood and signed the card (ST 265-266). At the very beginning of that session the following took place:

> **McCoy:** Have you seen a lawyer?

Defendant: I talked with a guy I know.

McCoy: Was he an attorney?

Defendant: Yeah, he was referred to me by Tracy over there, you know. Tracy said I should call the guy.

McCoy: Okay. Is he representing you?

Defendant: No.

McCoy: Is anybody representing you at this point?

Defendant: Not that I know of, no.

McCoy: Okay. Well, you would know if you retained somebody; right, whether it's a public --

Defendant: Yeah, I guess -- I guess the guy that came up today was just like an investigator or something, you know, all he wanted to know - -

McCoy: Do you want to - -

Defendant: -- was my history. So . . .

McCoy: Do you want to -- do you want -- do you want to talk? This is up to you, okay, or your lawyer, if you have a lawyer. You can have him here.

Defendant: No. I can talk to you. That's fine, you know.

McCoy: Okay. That's up to you, because if not, I just, you know - - I'll get you lunch and bring it rightback. Is it okay? I mean --

Defendant: No. I can -- I can talk to you. . . .

(ST 269-70).

After a lunch break, and the blood sample obtained from Appellant, the rights were read to him again, and the following takes place:

Defendant: Um, Mark was talking to me about last time he was here about this here guy named Paul Doyle or Moyle.

McCoy: Oh, State Attorney?

Defendant: Yeah.

McCoy: I'm supposed to go see him today.

Defendant: Oh, you are?

McCoy: Yeah.

They called on a break, and they said -- because I've been trying to get ahold of him because I just want to sit down with him for a while, and he was in Grand Jury all day. And he said -- he called and left a message that he would be available, you know, after three, you know, for us talk to him. so, you know - -

Defendant: Is it about my case?

McCoy: Oh, yeah, yeah, just sit down and get some legal opinions, you know, and junk like that and tell him what we have so far, you know, and what he suggest we do and, you know, like that. Why?

Defendant: Because he's the guy that can give guarantees and stuff, you know, or close to it, anyway.

McCoy: Well, he may be, if he gets the whole -- if he works the case. He's the guy that sits down and talks with you or whoever, if you have a lawyer down the ways or whatever.

You know, if he -- if he gets the case, you know. He may not. I don't know.

Defendant: Oh, yeah?

McCoy: yeah?

Defendant: So, I couldn't just go start talking to him and --

McCoy: Well, probably not, because he's -- what he's going to do is he's got to sit down with us, first, and he's got to find out what we got.

And, cause, if it's him or one of his assistants we file it with, but he's the guy we've been talking to right now, you know, other than all sorts of little odds and ends, just briefly.

But, if I go over there, I got to sit down and lay out a bunch of things and discuss the charge and so on and so forth of where we're going right now.

Defendant: Is he the guy that puts down the okay to say okay, you got enough evidence to arrest him for such and such?

McCoy: Well, we got enough evidence now. We just got to -- you know, when we're ready to file, we'll file.

Defendant: Who do you file it with?

McCoy: The State Attorney, maybe him.

(ST 386-388). Here McCoy and Appellant discuss the Grand Jury procedures, and Appellant inquires about the amount of his bond (ST 388-391). Then Appellant asks again:

Defendant: But anyway, I just wanted

to talk to you about that. Because I kept thinking about what Mark said.

He said like, you know, you don't have to say nothing to nobody. You can go to this Paul Moyle dude. You could use these here --

McCoy: Well --

A. --John Doe situations and stuff--

Q. Uh-huh.

A.--and then he would have to come back with you, like, say for instance--

Q. Well, if the attorney wants to sit down and talk with you, okay.

I mean I'll go over to the attorney and I'm going to go over and tell him, you know, what you've told me so far and this and that and the other thing, and he may not want to sit and talk with you.

He may just go full steam ahead and say well, I don't have to talk, because what's he telling us? He's not telling us anything. I mean all he's saying: What about this, what about that?

A. See, I'm saying then you could bring this up to him like when he says well he ain't telling us nothing, say maybe because he wants certain guarantees or something.
Q. Well --

A. Like Mark said, he said that like for instance, if I go in front of this Paul Moyle, I could almost call my own shots, just like you were saying.

Q. Well, no. No.

What he said was -- is if we get down to that point, okay, you know, he may sit down with you.

You want to control the ball game or your attorneys or both of ya's.

If he -- if he, you know, wants to do anything, okay, or maybe if your attorney approaches him, okay, and sits down and discusses options on what to do, you know, where to do, okay.

I -- I can't say that because I can't, you know, I can't offer you the promise that it's definitely going to happen. You're going to go over there and this is going to go over there and this is the way to do it. You know, I can't do that. Okay. That's -- that's later down the pike.
A. But see, I realize that.

But say for instance if, you know, if I go over to talk to him like, for instance, he could say well, if this certain situation does happen and stuff, we could pass background and stuff and all this.

Q. Yeah. Well, yeah. Yeah, that's what you're going to find out.

But I got to go over there first and I got to sit with him and, you know, we'll discuss our case, what we, you know, what we have up to this point pending results of the lab tests and all that stuff like that, and he may just go put it in front of the Grand Jury and go for an indictment.
Okay. And then, once you're charged and everything like that, you know, then you do what you want to do.

You know, you can ask to go see him or him, whether it's him or what ever other attorney or through your attorney, say, yeah, I want to sit down with this guy. That's up to you.
Okay. I'm sure, you know, he may sit down and listen to you. But you --

Q. Maybe he won't, you know. Maybe

he won't until he wants to.

I mean but you're going to snap your fingers and he's going to come running over here because maybe he won't feel as though he has to.

And he'll call the shots and he'll come to you and he'll say hey, here what I'm going to recommend or here's what I'm going for.

See, but I can't -- I can't -- that's -- that's down the line. Okay. That's not now.

Okay. Or like I said, you know, we can -- we can sit here all day long and theorize about different things and there is a hundred thousand and one different options. But, we are not --

(ST 391-399). Appellant diverts to the amount of evidence the police has against him (ST 395-399), and then proceeds:

A So when you go over there to present your case to this guy, I mean what actually is that going to do? I mean is he going to say all right. We can go --

Q. Well, we'll fill him in and he'll kick it around today. That's all. Be cause I got to wait on the lab results from the other side. Okay.

You know, bedding and all that other jazz. We got to wait on the lab results from that.

When I have all of that back, I'll just go ahead and, you know, file it or go in front of a Grand Jury, whatever, you know, drag all that stuff with me, show it to the Grand Jury and they make an indictment, or they don't make an indictment, okay.

And then, you'll be charged. Okay. You'll be charged while you're right up there.

A. So, when I actually am charged, I mean I'm going to be notified, right? They're going to call me up and say come down and say hey --

Q. Oh, yeah, yeah, yeah, yeah. Un-huh, yeah. Yeah, it's not going to be charged and you be sitting over here wondering. Oh, yeah. You'll know. You'll know.

A. Because, you know, I'd like to know before the news tells me or something, you know.

Q. Yeah. But, uh, that's what we'll do. Okay. That's where we're going. Anything else?

A. No. That was my main concern about this Paul dude.

Q. Okay.

A. I just wanted to know where he fell into this whole situation.

Q. Well, it's -- I guess he was called because he's head honcho over there, you know, and the head attorney, I think, right now. But, uh --

A. All right. I guess tha sums it up. You got to get over there anyway, right?

Q. Yeah. I got to go.

(ST 399-402). The totality of the transcript and circumstances make it abundantly clear Appellant was not requesting an attorney to protect his rights or ask legal advice from. Appellant was made well aware that Paul Moyle was the prosecutor who would be

presenting the case to the grand jury in order to indict Appellant for first degree murder. If Appellant wanted to talk to Paul Moyle, it was to try and obtain a "good deal" from him, and not for any legal advise. As a prosecuting attorney, Paul Moyle was not at liberty to engage in any kind of discussions with a soon-to-be defendant, Martin v. Wainwright, 770 F.2d 918, 927 (11th Cir. 1985). The record supports the finding that Appellant did not request the presence of an attorney at any time during the different sessions.

On June 7, 1984, Appellant once again called McCoy to go see him (ST 426, 511-512, 517). The Miranda rights were read and no request for an attorney was made (ST 425-427). The record shows that during the sessions of June 8, June 18, and June 21, 1984, Appellant was read his rights each and every time, including every time after a break was taken. This is clear in that Appellant can not point to any other places in the record from where he could suggest he had exercised his right to an attorney. Appellant not having exercised his right to his attorney being present during these conversations, the holding in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 681 Ed.2d 378 (1981), is inapplicable to the instant case.

Finally at pages 8-11 of Appellant's pro se brief, it is alleged that the officers erred by interrogating him after he had been appointed counsel at first appearance. It is well settled that simply because Appellant has been appointed counsel

on one matter that does not mean that he cannot be interrogated on that matter or any other case. See Parham v. State, 13 F.L.W. 809 (Fla. 3d DCA March 29, 1988); Delap v. State, 440 So.2d 1242, 1247-1248 (Fla. 1983).[5] It is a settled rule of law that the right to counsel during questioning can be waived, See North Carolina v. Butler, 441 U.S. 369, 372-376, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). As discussed above, Appellant was repeatedly advised of his right to consult with counsel and to have counsel present during questioning. Appellant voluntarily agreed to the questioning and did not invoke his right to counsel upon being informed of his rights. No error appears under the circumstances of this case. Delap v. State, supra; Palmes v. State, 397 So.2d 648, 652 (Fla. 1981).

In support of his allegations, Appellant cites to Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); and Espinoza v. Fairman, 813 F. 2d 117 (7th Cir. 1987). However, a review of Jackson demonstrates that case is not applicable sub judice. The question in Jackson was whether the Edwards "bright-line" rule applies "to a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment" Id. 89 L.Ed.2d at 636. Jackson

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5 Compare, Michigan v. Mosley, 923 U.S. 96 (1975), where the Supreme Court held no fifth amendment violation occurred where an accused asserts his right to remain silent in connection with one charge and is subsequently, while still in custody, questioned solely about an unrelated charge.

is clearly dealing with a situation where formal accusations have been filed against the defendant at arraignment. Id., 89 L.Ed.2d at 638-640. In the case at bar, Appellant was taken for first appearance pursuant to Fla.R.Crim. P. 3.130 on May 31, 1984. Not until the morning of June 22, 1984, the day after he confessed he was arraigned on the burglary charges (R 6), and came for the first appearance on the murder cases that afternoon (R 6-7). Clearly, no formal charges had been filed against Appellant on any of the cases prior to or on June 21, 1984, when he confessed to the police.

In United States v. Gouveia, 467 U.S. 180, 187 (1984) the Supreme Court of the United States held that "[t]he Sixth Amendment right to counsel attaches only when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing." See also Moran v. Burbine, 475 U.S. 412 (1987); Kirby v. Illinois, 406 U.S. 682, 688-689 (1972). This right simply does not attach when a Florida criminal defendant is brought before a judicial officer within 24 hours of his arrest for a nonadversarial determination of probable cause or "first appearance" pursuant to Rule 3.130, see Gerstein v. Pugh, 420 U.S. 103, 122 (1975); see also Kirby v. Illinois, 406 U.S. 682, 687; Baker v. State, 202 So.2d 563 (Fla. 1967); Waterhouse v. State, 429 So.2d 301 (Fla. 1938), cert. denied, 464 U.S. 977 (1983); Perkins v. State, 228 So.2d 382, 388-389 (Fla. 1969). For this Court to retroactively interpret our state constitution's version of the Sixth Amendment to

afford those arrestees who have been "first appearanced" a right to counsel more expansive than that afforded to them under the federal constitution would be totally unwarranted considering that the police here faithfully followed the letter of the law as it existed at the time of appellant's interrogations. Appellant's Fifth Amendment right to counsel attached no later than the time of his arrest, see Caso v. State, 13 F.L.W. 249 (Fla. April 7, 1988), and would have adequately protected him from all of the various subsequent solo interrogations had he chosen to avail himself of it. Of course, Appellant voluntarily waived this right for reasons of his own, which was certainly his prerogative. Colorado v. Connelly, 479 U.S. ___, 93 L.Ed.2d 473 (1986).

Further, under the facts of the instant case it is abundantly clear that Appellant initiated the interrogations when he called Officers Woods and McCoy to come see him in jail on June 1, June 3, June 7, June 8 and June 18, 1984. Additionally, as discussed supra in this issue and the statement of the facts, Appellant specifically waived his Fifth Amendment right to counsel when he explained that he knew he had been appointed the public defender at first appearance, and had talked to a private attorney, but he specifically asserted he did not need an attorney present, and he would go ahead and speak to McCoy (ST 269-270). Appellant throughout the conversations let the officers know he was well aware of his right to have an attorney present and knew what the advice would be, but declined to have

his attorney present because he thinks attorneys are all jerks. Thus, the rule in Jackson is not applicable sub judice. See, Arizona v. Roberson, ___U.S.___, 43Cr.L. 3085 (No. 87-354, June 15, 1988); Tucker v. Kemp, 660 F.Supp. 832, 835-836 (M.D.GA. 1987), approved, 818 F.2d 749, 751 (11th Cir. 1987).

Additionally, the state points out that Espinoza has been rejected by the Fourth Circuit Court of Appeals in Butler v. Aiken, ___F.2d ___, 43 Cr.L. 2117-2118 (4th Cir., No. 87-4004, May 6, 1988), where it was held that:

> Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers the accused an opportunity to weigh his rights intelligently in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements

Therefore, the record herein supports the conclusion that Appellant's confessions, preceded by appropriate warnings and a voluntary waiver of fifth amendment protections, were not obtained in violation of his constitutional rights or the prophylactic rule of Edwards v. Arizona. Thus, Appellant's contentions are without merit. See also, Knight v. State, 512 So.2d 922, 925-926 (Fla. 1987) rejecting similar Espinoza allegations.

5. Conclusion

The trial court viewed the videotapes, heard the testimony, observed the witnesses, adjudged their credibility and concluded that the statement was freely and voluntarily given. Even should the evidence be regarded as not so clear and unequivocal as it might have been, the testimony is reasonably susceptible of such a finding by the trial court. Any contrary inferences which might be drawn from the evidence have been resolved by the trial court in favor of the State, and this Court does not substitute its judgment for that of the trial court. Wasko v. State, 505 So.2d 1314, 1316 (fla. 1987); Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980); Kennedy v. State, 455 So.2d 351, 353 (Fla. 1984); Keeton v. State, 427 So.2d 231 (Fla. 3d DCA 1983); Harley v. State, 407 So.2d 382, 384 (Fla. 1st DCA 1981).

Mental weakness alone does not render any confession involuntary. Moore v. State, supra; Ross v. State, supra; Keeton v. State, supra. Denials of a crime by one well aware of his right to remain silent cannot, without more, be taken as an unspoken election to exercise the right to remain silent. Warren v. State, 384 So.2d 1313 (Fla. 3d DCA 1980). In the instant case no threats or promises were exerted upon Appellant to cause his statements to be invalidated, Appellant's statements were made voluntarily and were therefore admissible, thus the trial court's ruling should be affirmed. Webb v. State, 433 So.2d 496, 498 (Fla. 1983); U.S. v. Perkins, 608 F.2d 1064 (5th Cir. 1979); U.S.

v. Klein, 592 F.2d 909 (5th Cir. 1979).

B. NO DUE PROCESS VIOLATION OCURRED BY THE FAILURE TO VIDEO-TAPE APPELLANT'S STATEMENTS GIVEN MAY 30, AND JUNE 1, 1984.

Appellant alleges the police officers' failure to record the statements of May 30, and June 1, 1984, violated his rights and denied him of an opportunity to present a complete defense (APB 12-22). At the motion to suppress, the officers testified that although they had the equipment to record the conversations, same were not used in this case on those two days. This was not a conscious decision, nor an attempt to keep anything from Appellant, but simply because the officers do not automatically record all conversations (R 749-750, 755, 777-779, 835-837, 917-918, 948). The officers testified they took extensive notes during those two sessions, producing 20 handwritten pages on May 30, 1984 (R 830), and a very extensive report on June 1, 1984 (R 893, 953-954). These reports were provided to the defense as part of discovery and used by the defense at the suppression hearing (R 906-924).

Appellant's assertions of prejudice at this late hour are totally bogus and without merit. Appellant, although he could have testified at the suppression hearing without any reprecussions at trial, chose not to take the stand and contradict anything asserted by the officers as to substance or procedure during the interrogations. It is noteworth that even in his brief Appellant does not contradict the officers or state what

promises were made by the officers to induce him to talk. The allegations that the officers were keeping something from the court was not made at trial. The allegations were to the contrary (See R 852). Thus, Appellant is barred from raising these unsubstantiated allegations now.

The trial court found that "selective recording is not illegal" (R 1501), and denied the motion to suppress. This ruling is supported by case law, and as such must be afirmed. State v. Williams, 386 So.2d 27 (Fla. 2d DCA 1980). See also, Hawkins v. State, 399 So.2d 449 (Fla. 4th DCA 1981); Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979).

As it was held by this Court:

> The fact that the confession was an oral one does not vitiate its validity nor prohibit it being received into evidence. The true test is whether the statement was voluntarily and advisedly made by the appellant after full warning of his constitutional rights. There is no rule nore statute which requires a statement to be in writing nor that it be recorded by any recording device. The fact that the confession was not written or recorded but was oral would go only to the weight to be given to it, first by the trial judge in determining its voluntariness and second by the jury in determining its evidentiary weight. [Emphasis added.]

Ashley v. State, 265 So.2d 685, 690 (Fla. 1972). The trial court having found the statements of May 30 and June 1, 1984, to have been freely and voluntarily given, no reversible error appears under this ground.

III

THE TRIAL COURT CONSIDERED ONLY THE STATUTORY AGGRAVATING FACTORS IN SENTENCING THE APPELLANT.

The Appellant, citing the recent decision in Booth v. Maryland, 482 U.S. _____, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), claims he is entitled to a new sentencing proceeding based on the fact that Mrs. Worden's father made a statement at the sentencing hearing before the judge only. The State maintains there is no reversible error under the circumstances of this case.

Sub judice, the jury did not hear Mr. Sharitt's comments, as the statement was made in court (R 4364-4369) only after the jury had given its advisory sentence on a 10-2 vote for the imposition of death (R 4356-4357). At that point the jury was thanked and excused by the court (R 4360-4362). At which time, the trial court asserted that pursuant to §921.143 the court would hear any advice from the victim's family (R 4363). In response to the defense objection (R 4363), the trial court responded that under §921.143 F.S., he was obligated to hear from the family, specifically here where Appellant was found guilty, "not just of first degree murder but also of two other felonies..." (R 4363).

The State requests this Court take judicial notice of the record in the Slattery Homicide (Case No. 68,550) wherein on the date set for imposition of the sentence, defense counsel, Barry Krischer, made a motion for disqualification of the trial

judge for purpose of sentencing on the basis that the trial court by listening to Mr. Slattery's comments had heard what "amounted to non-statutory aggravating circumstances"(SR[6] 4649-4652). In denying the motion, the trial judge stated he had heard from Mr. Slattery because it was required by Statute [§921.143 Fla Stat.] to hear from family members. Further, that he did not believe "there was any intent by the legislature to adopt a statute that would effectively remove any trial judge from sentencing [a defendant in] a case by virtue of complying with the statute." The trial judge made it abundantly clear he was capable of separating "different legal decision-making processes," so that Mr. Slattery's comments would not be part of his consideration in the imposition of sentence (SR 4089-93, 4094-95).

In her arguments for the death penalty, the prosecutor based her comments solely on the aggravating and mitigating circumstances as supported by the evidence presented, which are the only proper considerations (R 4279-4313). The trial court's sentencing order is clear that the sentence decision was based only on the aggravating and mitigating factors supported by the evidence, in that the court found four (4) applicable aggravating factors (R 4559-4563); and after considering the evidence presented to establish mitigating factors, determined that none of the mitigating factors outweigh the aggravating fctors, and

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6 SR refers to record on appeal in the Slattery Homicide Case. Florida Supreme Court No. 68,550.

arrived at the conclusion that death was appropriate (R 4563-65), without making reference to or taking into consideration Mr. Sharrit's comments.

In Booth the Court held that introduction of a victim impact statement before the jury in a capital sentencing proceeding, which the applicable statute required that the jury consider, violated the Eighth Amendment. The Maryland statute declared invalid in Booth specifically required that the victim impact statement be considered in a capital case. Md. Ann, Code, Art. 41 §4-609(d) (1986). By contrast, the Florida Statutes; §921.143 -- as it existed at the time of this sentencing hearing, and prior to Grossman, -- required that the victim or victim's next of kin be permitted to make a statement at felony sentencing, but there was no concommittant directive that it be considered in imposing sentence in a capital case.

Appellee, thus maintains that any error in admission of this brief comment by Mr. Sharrit is harmless under this Court's analysis in Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988), reh. denied, 13 F.L.W. 349 (Fla. May 25, 1988). As noted in Grossman, the distinction between Booth and the instant case is that the sentencer that heard the victim impact evidence in Booth was the sentencing jury, whereas in the present case it was the trial judge who was required to give great weight to the recommendation of death. Appellant has misinterpreted Booth in a wholly overbroad manner. The Booth decision rested upon Maryland

law, mandating that the victim impact information be contained within presentence investigation "shall be considered", by the sentencing court, or jury." Booth, 96 L.Ed.2d at 445-446; State v. Post, 513 N.E. 2nd 754, 757-758, n. 1 (Ohio 1987); State v. Bell, 360 S.E. 2nd 706, 713 n. 4 (S.C. 1987). Furthermore, the Booth decision was based on considerably detailed evidence of the victims' children's difficulty in coping with their parents' murder, including economic losses and psychological problems. Booth, 96 L.Ed.2d at 445-456. The record herein, demonstrating a brief comment by Mrs. Worden's father (R 4364-4369), did not constitute evidence of the type of devastation to the victim's family evident in Booth. See, State v. Brown, 358 S.E. 2nd 1 (N.C. 1987) (prosecutor's argument referring to rights of victims' family, as well as those of the defendant, not reversible); Bell, 360 S.E. 2nd at 713 (victim's sister's testimony, as to her fear of defendant, not Booth error); Hill v. Thigpen, 667 F. Supp. 314, 338, n. 4 (N.D. Miss. 1987) (testimony of victim's widow, the victim had two children who were close to their father, not "prejudicial" to defendant uner Booth). It is clear beyond a reasonable doubt tha the judge would have imposed the death penalty in absense of this very insignificant victim impact evidence.

At bar, the trial judge's sentencing orders indicate his consideration of aggravating circumstances was limited to those enumerated in the statute. The written findings present no

indication of reliance on the victim impact testimony. The fact that he heard from the victim's family does not mean he considered their wishes in imposing the sentence. In Brown v. Wainwright, 392 So.2d 1327, 1333 (Fla. 1981), this court recognized that judges are often cognizant of information that they disregard in the performance of their judicial tasks. Just as factors outside the record play no part in this Court's death sentence review role, Brown, supra, the victim impact statements made before the trial judge did not enter into his decision. See, Alford v. State, 355 So.2d 108, 109 (Fla. 1977) [even if judge was "made aware" of certain facts, that does not mean he "considered" them].

It is a well recognized legal principle that judges are capable of disregarding that which should be disregarded; the trial judge's express statement that he would limit his consideration to the statutory aggravating factors should end the matter. Harris v. Rivera, 454 U.S. 339, 346-347 (1981); Ford v. Strickland, 696 F.2d 804, 811 (11th Cir. 1983) (en banc). In Lighthbourne v. Dugger, 829 F.2d 1012, 1027 n. 16 (11th Cir. 1987) the Eleventh Circuit held that resentencing was not required under Booth where victim impact statements contained in a presentence investigation were seen only by the judge and not the jury, when the judge's sentencing order relied solely on the statutorily authorized aggravating circumstances.

Moreover, the trial judge found four (4) aggravating

factors and no mitigating factors. Thus, Appellee maintains the balance in favor of imposing the death sentence is overwhelming. Finally, as in Grossman, supra, the record shows that the jury did not receive the improper victim impact evidence, but nevertheless recommended the sentences of death by a 10-2 vote. In view of the balance of aggravating factors and the fact that the jury's recommendation was entitled to great weight, any error in receipt of the evidence is harmless. Therefore, the Appellant is not entitled to a new sentencing hearing.

IV.

THE TRIAL COURT DID NOT ERR IN ACCEPTING THE JURY RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH. (Restated)

The primary standard for this Court's review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appears strong reason to believe that reasonable persons could not agree with the recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975). The standard is the same regardless of whether the jury recommends life or death. LeDuc v. State, 365 So. 2d 149 (Fla. 1978).

In the instant case, the jury recommended by a vote of ten (10) to two (2) that Appellant be sentenced to death (R 4356, 4941). The trial court, after finding four (4) aggravating circumstances to be fully supported by the evidence beyond a reasonable doubt, and no mitigating factors that outweigh the

aggravating ones, accepted the jury's recommendation and sentenced Appellant to death (R 4258-9565, 4951-4954).

Appellant challenges the imposition of the death sentence sub judice on several grounds, and argues that if any one of the aggravating factors is found invalid, the entirety of the trial court's order is void, and the cause must be remanded for resentencing. This contention is totally erroneous. As will be discussed infra, the four (4) aggravating factors relied upon by the trial court were valid and are fully supported by the evidence in the record. However, if one or two of the five factors were to be found to be invalid by this Court, the sentence of death may still be affirmed by this Court "on the basis that a jury recommendation of death is entitled to great weight and there were no mitigating circumstances to counterbalance the [remaining] valid aggravating circumstances." Mitchell v. State, 13 F.L.W. 330, 332 (Fla. May 19, 1988); Smith v.State, 515 So.2d 182, 185 (Fla. 1987), and cases cited therein. See also, Hill v. State, 515 So.2d 176, 179 (Fla. 1987); Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986); Johnston v. State, 497 So.2d 863, 872 (Fla. 1986); Griffin v. State, 474 So.2d 777, 782 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986); Duest v. State, 462 So.2d 446, 450 (Fla. 1985); Doyle v. State, 460 So.2d 353, 358 (Fla. 1984).

In the case at bar, the trial court found four (4) aggravating factors were proven beyond a reasonable doubt by the State: (1) The defendant was previously convicted of a felony involving the use or threat of violence to the person; (2) The murder of Georgianna Worden was committed while Duane Owen was engaged in the commission of or the attempt to commit any burglary or sexual battery; (3) The murder was especially wicked, evil, atrocious or cruel; and (4) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R 4951-4954). Appellant is seriously challenging only three (3) of the four (4) aggravating factors, and the State will address each of Appellant's contentions separately below.

A. Appellant was previously convicted of a felony involving the use or threat of violence to the person.

Appellant does not challenge the aggravating factor that he had been previously convicted of a felony involving the use or threat of violence to a person. This factor is valid under the circumstances of this case. Appellant's prior conviction for attempted murder of Marilee Manley warranted application of this aggravating factor, Mason v. State, 438 So.2d 378 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). Further, Appellant's conviction for the first degree murder of Karen Slattery (for which Appellant received a second sentence of death), additionally supports this aggravating factor, Correll v.

State, 13 F.L.W. 34, 37 (Fla. January 14, 1988); Modified and rehearing denied 13 F.L.W. 271 (Fla. April 13, 1988); Craig v. State, 510 So.2d 857, 868 (Fla. 1987).

Appellant's specific challenges to the four remaining aggravating factors are totally without merit.

B. The murder was committed while Duane Owen was engaged in the commission of or the attempt to commit any burglary or sexual battery.

Appellant argues that since the victim was deceased when the admitted rape occurred, no sexual battery could exist. Appellant's argument is flawed on several counts. First the medical examiner was very definite and positive that in his opinion, Mrs. Worden was alive at the time of the sexual battery. Dr. Benz testified there were five distinct blows to Mrs. Worden's head (R 3067), that the blow to the left eye could have been fatal in itself, and the same as to each of the blow to the central area of the forehead and to the right side, but that the blow to the jaw would not have been fatal by itself (R 3067). Dr. Benz could not tell which blow came first. Dr. Benz testified all blows would have been very painful (R 3068), and that although each of the blows, except maybe the one to the jaw, could have caused Mrs. Worden to lose consciousness (R 3068), how soon she lost consciousness is difficult to say, but none would cause instantaneous unconsciousness (R 3068, 3069). The doctor was very definite, however, that Mrs. Worden did not die

immediately (R 3069, 3070). Dr. Benz also testified that there was evidence of sexual penetration in that semen was found in Mrs. Worden's vagina (R 3076-77), and that there was a small amount of hemorrhaging from the lacerations to the vagina caused by the blunt instrument (R 3085); therefore, that since humans do not bleed postmortem, Mrs. Worden was still alive at the time of the sexual battery.

Thus, that the victim was dead by the time of the sexual battery was not supported by any evidence presented to the jury, save by unsupported conjecture by counsel that the victim could not have survived long enough after the blows to the head. However, Dr. Benz testified Mrs. Worden did not die immediately, that she could have lived at least three to four minutes and could have survived up to a half hour or an hour (R 4041). This is so because he has seen where individuals have shot themselves through the front of the head and have not lost consciousness (R 4050). The trial court's finding, therefore, is supported by the record.

Second, and as discussed under Count I of this brief, even if this Court should find that Mrs. Worden was dead by the time Appellant raped her, the conviction for sexual battery may be reduced to a conviction for attempted sexual battery under the factual impossibility theory, and still support this aggravating factor beyond a reasonable doubt. Tompkins v. State, 502 So.2d 415, 420 (Fla. 1986) (murder committed during an attempted

rape.); Roberts v. State, 510 So.2d 885, 894 (Fla. 1987). The jury found Appellant guilty of sexual battery, and its verdict is supported by competent substantial evidence. Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986).

Finally, the trial court's findings as to this aggravating factor was as follows:

> The facts of the case leave no doubt let alone a reasonable one that DUANE OWEN was engaged in the commission of a burglary at the time of the commission of the murder. Defense has argued that Sexual Battery cannot be committed on someone who has died. There was sufficient evidence that GEORGIANNA WORDEN was still alive when the Sexual Battery occurred. In any event there is no reasonable doubt that there was an "attempted" Sexual Battery which occurred when the Murder occurred.

There is no doubt, nor does Appellant dispute the fact that in addition the murder occurred during the commission of a burglary. This fact alone, therefore, supports this aggravating factor, Johnston v. State, 497 So.2d 863, 871 (Fla. 1986); Brown v. State, 473 So.2d 1260, 1267 (Fla. 1985), cert. denied, U.S.___, 106 S.Ct. 607 (1986); Bundy v. State, 455 So.2d 330, 350 (Fla. 1984), cert. denied ___U.S.___, 90 L.Ed.2d 366 (1986); Roulty v. State, 440 So.2d 1257, 1262 (Fla. 1983), cert. denied, 468 U.S. 1220 (1984). It is clear that this aggravating factor was proven beyond a reasonable doubt and remains valid. Jennings v. State, 512 So.2d 169, 176 (Fla. 1987); Roberts v. State, 510 So.2d 885, 894 (Fla. 1987); Jones v. State, 411 So. 2d 165, 168 (Fla.), cert denied, 459 U.S. 891 (1982); Straight v. State, 397

So.2d 903, 910 (Fla.), cert. denied, 454 U.S. 1022 (1981); Delap v. State, 440 So.2d 1242, 1257 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984).

C. The murder was committed in a cold calculated and premeditated manner.

The trial court's order on this factor provides:

> On this record there is no doubt let alone a reasonable one that the State has proved this aggravating factor. The defendant checked all around the house, covered his hands, and followed such a similar plan as in the KAREN SLATTERY case as to evidence a heightened premeditation including the hammer and knife.

(R 4953). The trial court's findings are amply supported by the record, and the facts clearly show a substantial period of reflection and thought by Appellant, which rises to a level beyond that which is required for a first degree murder conviction. Card v. State, 453 So.2d 17 (Fla.), cert denied, 469 U.S. 989 (1984); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert denied, 457 U.S. 1111 (1982).

Appellant's statements to the officers demonstrates that Appellant walked around the house two or three times "checking it out," and trying to find a way in, but it was all locked up (ST 993-1000). Appellant brought a screwdriver and cut the screen with it (ST 998), and broke the window to climb in the house (R 999), then armed himself with the hammer from a drawer

in the kitchen (R 1003-04) before going into Mrs. Worden's bedroom. Appellant stated he, "figured I'd go over there and rape her ... Instead, I figured well hell, man, maybe "I'll just hit her once, and that way, she'll get knocked out." (ST 1010), but then he couldn't remember how many times he hit her, but it was more than once (ST 1013).

Further, the facts in this case are so similar to the facts in the Karen Slattery homicide as to show his modus operandi and heightened premeditation in support of this aggravating factor. Thus, Appellee submits the trial court correctly found this aggravating factor applicable beyond a reasonable doubt.

This Court has held that this aggravating factor applies to murders which are characterized as execution murders, contract murders, or witness elimination murders though this description is not intended to be all inclusive. See, Herring v. State, 446 So.2d 1049, 1057 (Fla.), cert denied, 469 So.2d 989 (1984). However, this circumstances can also be found when the facts show a substantial period of reflection and thought by the killer. Preston v. State, 444 So.2d 939, 946 (Fla. 1984). Appellee submits that Appellant's stalking of the home and desperate attempts to break into the home, arming himself with the hammer and knife from the kitchen immediately after entering the home, placing the chair in front of the door of the bedroom where Mrs. Worden's two little girls were asleep as an alarm for himself in case the little girls began to come out of the room,

the quiet and careful removal of the purse from the victim's dresser so as not to awake her, prior to carrying out the carefully planned final attack of Mrs. Worden demonstrates the kind of heightened premeditation necessary for application of this circumstance. Id.

Appellant obviously had a cold and calculated purpose in arming himself with a hammer from the kitchen and carrying same into the bedroom to strike Mrs. Worden with it to effect her death. This was done as coldly and premeditatedly as was his stalking of the home, search of the purse, and subsequent cleaning up of the scene to make a clean get away. There is no evidence that this attack was provoked by the victim who was asleep at the time of the attack.

In Rose v. State, 472 So.2d 1155 (Fla. 1985), this Court held that the trial court properly found as an aggravating circumstance that the murder was cold, calculated, and premeditated where the defendant search for an object before finding a concrete block used to kill the victim, carried the block to the victim, and repeatedly hurled the block onto the head of the helpless and defenseless victim. Thus, where the instrument of death was not taken from the immediate area, the court correctly found that the murder was committed in a cold, calculated, and premeditated fashion. See, e.g., Huff v. State, 495 So.2d 145, (Fla. 1986) (defendant's heightened premeditated design evidenced by fact that he must have brought the murder weapon with him into

his parent's car that day).

In Jennings v. State, 453 So.2d 1109 (Fla. 1984), this Court in upholding the factor of CCP stated:

> We also find that the trial court properly applied the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner. The evidence shows that Appellant located his victim, left, and then returned a short time later to enter the victim's home through her bedroom window and take her from her bed. His subsequent conduct in brutally fracturing her skull and then drowning her in the manner previously described establishes the heightened premeditation required for finding the aggravating circumstances.

Id. at 1115.

The facts of this case support a finding of cold, calculated and premeditated design, and as such this factor is also valid. See, Mason v. State, supra at 379; Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984), cert. denied, 417 U.S. 1045 (1985).

D. The murder was especially heinous, atrocious, and cruel.

Appellee submits that beyond a shadow of a doubt this aggravating factor is well supported by the record. The mental anguish and physical pain suffered by the victim from the slow death due to profound bleeding and asphyxiation are sufficient to support the trial court's finding under § 921.141(5)(h). Smith, supra at 185; Tompkins, supra at 421; Scott, supra at 1137; Ross

v. State, 474 So.2d 1170, 1174 (Fla. 1985); Brown, supra at 1268; Doyle v. State, 460 So.2d 353, 357 (Fla. 1984) (prior to losing consciousness the victim was aware of the nature of the attack and had time to anticipate her death.); Bundy, supra at 350; Squires v. State, 450 So.2d 208, 212 (Fla.) cert. denied, 469 U.S. 892 (1984); Heiney v. State, 447 So.2d 210, 215 (Fla.), cert.denied, 469 U.S. 920 (1984); McCrae v. State, 395 So.2d 1145, 1153 (Fla. 1980), Cert. denied, 454 U.S. 1041 (1981).

Appellant's allegations that "The victim was unaware of her attacker as she was asleep and the attack was brief," (AB 37) is pure speculation and unsupported by the record. It is clear that the Appellant in his statement to the police stated that Mrs. Worden woke up after being hit in the head with the hammer and screamed at least once and tried to fight him. Whether the attack is brief is of no consequence; the important fact to consider is the victims awareness of her impending death and her long lasting suffering under sever pain. In that sense, Dr. Benz testified Mrs. Worden did not die immediately (R 3069), and that the injuries would definitely have been very painful (R 4042), 4043-44, 4045). The doctor explained that after all five blows were struck, loss of consciousness was not instantaneous (R 4042), rather she would slowly have lapsed into an unconscious state and gradually go into shock, creating oxygen hunger and experiencing the realization that she was about to die (R 4041-4042). The evidence revealed Mrs. Worden was alive during each

of the five blows, and alive for a period of time thereafter because she developed terminal heart failure and aspirated blood into her lungs (R 4040); therefore, Mrs. Worden lived for at least three to four minutes and as long as half to a full hour (R 4041), with realization that she was going to die (R 4042-43, 4044). Thus, the heinous, atrocious or cruel aggravating factor was properly applied in this instance.

This Court has consistently held that these circumstances are the type to which these aggravating factor applies: In Smith v. State, supra, 515 So.2d at 185, the victim suffered extensive pain from injuries to her vagina and anus and from being repeatedly struck on the head with a rock. "This is heinous, atrocious, and cruel by any standard." In Jennings v. State, 512 So.2d 169, 175 (Fla. 1987), the defendant went to the victim's window and saw her asleep. He forceably removed the screen, opened the window, and climbed into the bedroom. The defendant kidnapped the victim, brutally raped her, then lifted the victim by her legs, brought her back over his head, and swung her like a sledge hammer onto the ground fracturing her skull and causing extensive damage to her brain. While still alive, the defendant held her head under water until she drowned. This Court found the aggravating factor to be fully supported by the record. In Johnston v. State, supra, 497 So.2d at 871, this Court held the HAC aggravating factor was properly applied where the victim who had retired to bed for the evening, was strangled

to death and stabbed three times through the neck and twice in the upper chest. The victim therein lived for three to five minutes after the knife wound severed the jugular vein. In Lambrix v. State, 494 So.2d 1143 (Fla. 1986), the victim, Moore, died from multiple crushing blows to the head; the HAC factor was found to be applicable under the circumstances. In Ross v. State, 474 So.2d at 1174, this Court found HAC applied where Gladys Ross was the victim of a vicious, barbaric and savage murder, and the medical testimony demonstrated that the death was not instantaneous causing the victim to endure "torturous knowledge of her impending death with excruciating pain. In Doyle v. State, supra, 460 at 353, the Court held HAC applied where the victim of strangulation "prior to losing consciousness was aware of the nature of the attack and had time to anticipate her death."

In Thomas v. State, 456 So.2d 454 (Fla. 1984), the victim was beaten, kicked, or bludgeoned so severely that his skull was fractured in many places. HAC was found to be proper under the circumstances. In Bundy v. State, 455 So.2d 350, the victims were bludgeoned, sexually battered, and strangled while sleeping in their own beds, these circumstances were found to be more than sufficient to uphold the HAC aggravating factor. In Heiney v. State, 447 So.2d 210 (Fla. 1984), the victim's head was savagely beaten with a claw hammer. There were at least seven blows to the head, causing the victim to die as a result of brain

injury due to severe blows delivered to both sides of his skull. This Court found that the bludgeoning murder of the victim was heinous, atrocious, and cruel. In King v. State, supra, 436 So.2d 50, the victim was struck on the forehead with a blunt instrument and then shot in the head. HAC is applicable under the circumstances. In Lusk v. State, 446 So.2d 1038, 1042 (Fla.) cert. denied, 469 U.S. 873 (1984), the victim died from stabbing that caused her to bleed to death with a high degree of pain. In Breedlove v. State, 413 So.2d 1, 9 (Fla.) cert. denied, 459 U.S. 882 (1982) this Court said that although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. Therefore HAC was applicable therein. In Booker v. State, 397 So.2d 910, 917 (Fla. 1981). (The defendant severely beat, wounded, raped and stabbed the victim; this was found to be HAC); In Straight v. State, 397 So. 2d 903, 910 (Fla.), cert. denied, 454 U.S. 1022 (1981) it was held that the murder inflicted by multiple stab wounds and bludgeoning supports a finding of HAC); and in Washington, supra at 665, HAC was found to be supported by the facts that one of the victims received seven potentially fatal wounds, one of which caused instantaneous death; the second victims's death was caused by four of nine stab wounds, none of which was instantly fatal.

It is thus clear that not only does this aggravating circumstance apply in the instant case, but that under any

proportionality review, the death sentence is warranted.

E. The trial court did not fail to consider mitigating factors.

Appellant's contentions citing to Elledge v. State, 346 So.2d 998 (Fla. 1977), where the original death sentence was vacated because of improper consideration as an aggravating factor of a collateral felony for which Elledge at the time had not been convicted, is totally without merit.

Although the consideration of all mitigating circumstances is required, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the judge and jury. Kight v. State, 512 So.2d 922, 932-933 (Fla. 1987); Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985), and cases cited therein at 887.

A trial court has broad discretion in determining the applicability of mitigating circumstances urged. Kight, at 933, and the weight to be given it, Nibert v. State, 508 So.2d 1, 4 (Fla. 1987). It is clear from the trial court's sentencing order (R 4951-4754) that the judge considered all the evidence presented in both the guilt and penalty phases of the trial and all the mitigating circumstances urged by the defense. Rather than ignoring the evidence, the trial court considered it and rejected same. There being competent substantial evidence to support the trial court's rejection of these mitigating circumstances, the sentence cannot be disturbed simply because

Appellant disagrees with the conclusions reached, Mason, supra at 379-380, Rose v. State, 472 So.2d 1155, 1158-59 (Fla. 1985).

In the instant case, Appellant has failed to show any error in the imposition of the death sentence against him, therefore, the sentence must be affirmed, Harvey v. State, So.2d___, slip op. at p. 9 & n. 5 (Fla. No. 69,101, June 16, 1988); Rogers v. State, 511 So.2d 526, 534-535 (Fla. 1986). Tompkins, supra at 421; Deaton v. State, 480 So. 2d 1279, 1283 (Fla. 1985); Johnson, supra at 871-872; Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986); Brown supra at 1268; Lusk, supra at 1043; Porter v. State, 429 So.2d 293, 296 (Fla. 1983).

F. Any errors by the trial court in its sentencing order would be harmless error.

Appellee submits that if this Court should find that the trial court improperly found one of the aggravating circumstances or committed any other sentencing error, then this Court should still affirm the sentence of death. Reversal of a death sentence is permitted only if this Court can say that the error, in weighing the aggravating and mitigating factors, if corrected reasonably could have resulted in a lesser sentence. If there is no likelihood of a different sentence, the error must be deemed harmless, Rogers, supra 511 So.2d at 535.

The record reveals four (4) valid aggravating circumstances. Under these circumstances it cannot be said that there

is any reasonble likelihood that the trial court would have concluded that the aggravating circumstances were outweighed by any of the mitigating evidence presented. Id. The error, if any, was harmless beyond a reasonable doubt.

Even when the single mitigating circumstances of personality disorder is weighed against the four (4) well-founded aggravating circumstances, it is clear that the trial court's decision to impose the death sentence would have been unaffected by the elimination of any unauthorized aggravating circumstance. Harvey, supra; Hamblen v. State, ___ So.2d ___, 13 F.L.W. 361, 364 (Fla. June 2, 1988). There can be little question that a comparison of the facts in the instant case clearly shows that the death penalty is the appropriate sentence. See cases cited at pp. 103-105 supra.

V

FLORIDA'S CAPITAL PUNISHMENT STATUTES ARE CONSTITUTIONAL BOTH FACIALLY AND AS APPLIED TO THE APPELLANT.

In this issue V Appellant challenges the constitutionality of the Florida capital punishment statutes, §§ 921.141, 922.10, and 782.04, Fla. Stats. Binding precedent compels rejection of the four grounds enumerated by Appellant.

A. Death by Electrocution does not not constitute cruel and unusual punishment.

Appellant contends that § 922.10 Fla. Stat. is un-

constitutional in that death by electrocution constitutes cruel and unusual punishment. This argument was rejected by this Court in Booker v. State, 397 So.2d 910, 918 (Fla.), cert. denied, 454 U.S. 957 (1981), where it was held that death by electrocution does not constitute cruel and unusual punishment citing Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert denied 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

B. The mitigating factors listed in § 921.141 Fla. Stat. are not to vague nor restrictive.

Appellant's claim that the statutory mitigating factors are too vague and that insufficient emphasis is given to nonstatutory factors is without merit. In Proffitt v. Florida, 428 U.S. 242, 257-258 (1976), the United States Supreme Court held the mitigating factors are not too vague and they are adequate to channel sentencing discretion. In Peek v. State, 395 So.2d 492, 497 (Fla. 1980), this Court stated:

> While we do not contend that the statutory mitigating circumstances encompass every element of a defendant's character or culpability, we do maintain that the factors, when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her entitlement to a sentence less than death.

Therefore, the Appellant's contentions are foreclosed by the Proffitt and Peek decisions.

C. The use of the aggravating factor under §921.141(5)(D) passes constitutional muster.

Appellant argues that use of the felonies listed in the statutory aggravating factor under § 921.141(5)(d) fails to "genuinely narrow the class of persons eligible for the death penalty." This argument was recently rejected by the United States Supreme Court in Lowenfield v. Phelps, 484 U.S. ___ 108 S.Ct. ___, 98 L.Ed.2d 568 (1988). The Louisiana Statute challenged in Lowenfield is very similar to the Florida Statute. The Court in rejecting the argument stated:

> [T]he fact that the aggravating circumstances duplicated one of the elements of the crime does not make the sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Id., 98 L.Ed.2d at 583. Thus, this argument is without merit, Bertolotti v. State, 13 F.L.W. 253, n. 3 (Fla. April 7, 1988).

D. Section 921.141 Fla. Stat. is constitutional on its face and as applied in Florida.

The constitutionality of § 921.141 was confirmed by the United States Supreme Court in Proffit v. Florida, supra.

Further, Appellant's discrimination claim has been rejected numerous times by this Court. And this Court's view was recently confirmed by the United States Supreme Court's decision in McCleskey v. Kemp, ___U.S.___, 95 L.Ed.2d 262 (1987). This claim has no merit.

VI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTIONS REGARDING DEATH QUALIFIED JURORS AND BIFURCATED JURY.

The question left open by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 368 (1968), and raised as issue VI of Appellant's Initial Brief (AB 59-67) was answered, and Appellant's arguments rejected by the Supreme Court in Lockhart v. McCree, 476 U.S.___, 90 L.Ed.2d 137 (1986), where it was held that "the Constitution does not prohibit the state's from "death qualifying" juries in capital cases." Id., 90 L.Ed. 2d at 147. The court explained:

> [G]roups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group the group from performing one of their duties as jurors, such as the "Witherspoon-excludables" at issue here, are not "distinctive groups" for fair cross-section purposes.
>
> "Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law

> to the facts of the case at both the guilt and sentencing phases of a capital trial...
>
> Furthermore, unlike blacks, women, and Mexican-Americans, "Witherspoon-excludables" are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control. It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "Witherspoon-excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death qualification hardly can be said to create an appearance of unfairness.
>
> * * *
>
> In sum, "Witherspoon-excludables," or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair cross-section requirement...It is for this reason that we conclude that "Witherspoon--excludables" do not constitute a "distinctive group" for fair cross-section purposes, and hold that "death qualification" does not violate the fair cross-section requirement.
> [Footnotes omitted.]

Id. 90 L.Ed.2d at 147-150. With reference to the use of a unitary jury, the Court Stated:

> [T]he removal for cause of "Witherspoon-excludables" serves the State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in McCree's case.. We have upheld against constitutional attack the Georgia capital sentencing plan which provided that the same jury must sit in both phases of a befurcated capital murder trial, Gregg v. Georgia, 428 U.S. 153, 158, 160, 163, 49 L.Ed. 2d 859, 96 S.Ct 2909 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), and since then have observed that we are "unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." Spaziano v. Florida, 468 U.S. 447, 464, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984).
>
> [I]n most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase; if two different juries were to be required, such testimony would have to be presented twice, once to each jury...
>
> Unlike the Illinois system criticized by the court in Witherspoon, and the Texas system at issue in Adams, the Arkansas system excludes from the jury only those who may properly be excluded from the penalty phase of the deliberaions under Witherspoon, supra, Adams, supra, and Wainwright v. Witt, 469 U.S.___, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985). That State's reasons for adhearing to its preference for a single jury to decide both the guilt and penalty phases of a capital trial are sufficient to negate the inference which the Court drew in Witherspoon concerning the lack of any neutral justification for the Illinois rule on jury challenges.

Id. 90 L.Ed.2d at 152-553. The Lockhart opinion reversed the Eight circuit's decision in Grisby v. Mabry, 758 F.2d 226 (8th

Cir. 1985)

This Court has repeatedly rejected Appellant's argument on the authority of Lockhart. See, Dougan v. State, 470 So.2d 697 (Fla. 1985), cert. denied, ___U.S.___, 89 L.Ed.2d 900 (1986); Lambrix v. State, 494 So.2d 1143 (Fla. 1986); Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987); Diaz v. State, 513 So.2d 1045 (Fla. 1987); Masterson v. State, 12 F.L.W. 603 (Fla. Dec. 10, 1987). This claim is, thus, without merit.

CONCLUSION

WHEREFORE based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgments and sentences of death should clearly be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by United States Mail to: CRAIG A. BOUDREAU, ESQUIRE, Counsel for Appellant, 220 Sunrise Avenue, Suite 207, Palm Beach, Florida 33480 and to DUANE OWEN, Pro se #101660, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 24th day of June, 1988.

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