IN THE SUPREME COURT OF FLORIDA

DUANE EUGENE OWEN,

Appellant,

v. CASE NO. 68,550

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for 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
"ASB"	Appellant's Supplemental 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 respectfully provides its own Statement of the Facts as follows:

On March 24, 1984, Carolyn Slattery dropped off her daughter Karen Slattery at the Helm's residence around 6:30 p.m., as Karen was to babysit the Helms' two daughters that night (R 3213). Mrs. Slattery testified that on that evening Karen was wearing a pair of striped shorts that went just above her knees (R 3215, 3217). Karen was described as having an athletic-type build, and that being a diver in the school team, she did some special body conditioning by lifting weights (R 3217). Karen was also said to have had a "special talent" and liked to do people's hair (R 3217). Mrs. Slattery also explained that the braces Karen had been wearing had been recently removed, therefore, "she was eager to chew gum after the braces went off, so she would chew gum." (R 3214-3215). Ms. Slattery also testified that after the braces were removed Karen was required to wear a retainer (R 3215). Ms. Slattery testified on March 24, 1984, while at the Helms, Karen called her mother four times; the last phone call being at approximately 10:00 o'clock (R 3214).

William Helm, the owner of the home where Karen's body was found, testified that on March 24, 1984, he and his wife went

out and left their two daughters with Karen Slattery to babysit the five and nine year old girls (R 3182).

Mr. Helm stated that when he came home shortly after midnight, he noticed the lights in the living room, except for one, were turned off, which was unusual. The television set was off, when it normally would be on. And that other lights in the kitchen which would usually be off, were on (R 3184).

Mr. and Mrs. Helm walked up to the house; Mr. Helm called for Karen, but there was no response, he then saw the pool of blood, and the hammer laying next to it (R 3187-3188). Mr. Helm also noticed the trail of blood into the master bedroom, where he noticed the doors closed, and could tell the light was on in the room as it was shining through the bottom of the bedroom door (R 3188). He noticed the children's room was closed, where it normally would be left open (R 3188). He also noticed the phone was askew (R 3189). Mr. Helm asked his wife to go call the police from the neighbor's home (R 3189), while he stood in the entry foyer area in case the intruder was still in the house (R 3190). When the police arrived, he noticed Karen's shoes and retainer laying on the floor of the living room (R 3190). Mr. Helm then took his daughters out of the house one at a time (R 3192).

Mr. Helm testified the window in the bedroom had been left partially opened by them when they went out for the night (R 3194). Upon his observance of the house upon his return that

night he noticed the screen on the bedroom window was cut and black with debris (R **3194).** The hammer was normally kept in a toolbox in the master bedroom closet, and was there when he left for the evening on March **24, 1984 (R 3195).** Mr. Helm stated Peter Dolce's house is right next door to the Helm's home, and that the Dolces have a dog house in their backyard **(R 3196).**

Carolyn Helm corroborrated Mr. Helm's testimony, but added that when Mr. Helm brought the girls out of the house, she noticed Karen had braided their hair as that is not the way she had left them earlier that evening **(R 3226).** Mrs. Helm stated she used to have a pair of deerskin gloves which she kept in a pink satin lingerie box up on the upper shelf of the master bedroom closet. She was unable to find the gloves after that night **(R 3226-3227).** Mrs. Helm testified State's Exhibit 7-C looked just like her gloves (R **3226).** Nothing else of value was missing from their home (R **3227).**

Officer Ernest Soto of the Delray Beach Police arrived at **12:15** a.m. on March **25, 1984** at the Helm's residence at **1221** Harbor Drive, Delray Beach, Florida (R **2354).** The officer saw a pool of blood and a hammer next to it; and a trail of blood leading to the master bedroom (R **2357-2358).** When he opened the doors to the bedroom he found the naked body of Karen Slattery, with her blouse and bra pulled up to her shoulders, and a towel covering her head; her legs were spread open **(R 2358).** Officer Soto also observed mud on top of the bed near the headboard where

the pillows would be (R **2360).** The headboard of the bed was by the window which was open, and had the screen cut across the bottom (R **2360).**

Officer Frank Joseph Pelligrini testified he went to the scene that night and noticed the sliding glass door in the bedroom [which Mr. Helm had left closed and locked **(R 3193-4)]** was open approximately **17** inches, and the drapes were closed **(R 2467).**

Officer Kenneth F. Herndon testified that when he went to the scene of the murder he found a hairbrush on the foot stool (R **2508).** Officer Herndon also observed "bloody-type marks" which appeared to be impressions of a foot on the kitchen floor (R **2511).** When he found Karen's corpse she was still wearing pearl earrings and a gold chain around her neck (R **2525-26).** Officer Herndon's investigations also showed the bathroom rug in front of the sink in the master bathroom had blood stains on it. (R **2542).** Herndon determined the point of entry was through the bedroom window **(R 2547-48).**

Doctor Frederick Hobin, the Medical Examiner who performed the autopsy on Karen Slattery stated his examination revealed evidence of sexual contact with Karen at the scene **(R 2663).** The doctor determined the cause of death to have been the multiple stab and cut injuries, a collapse of lung tissue, as well as internal and external bleeding (R **2665).** The autopsy revealed Karen had been stabbed and cut 18 times -- 14 stabbings

and 4 incissions (R 2666). Appellant stabbed Karen eight (8) times in the back (R 2669). The evidence showed additional stab wounds on Karen's face and neck area (R 2669-70). There was one very deep cut to the throat which exposed the muscle on the neck, and cut all the way through the esophagus (R 2670). The doctor stated seven of the wounds by themselves could have caused death (R 2674). The doctor testified that because of the irregularities in the injuries, Karen was probably moving while being stabbed (R 2677). Doctor Hobin described the knife as probably having a blade about three inches long . . . one side of the blade was sharp . . . the other side of the blade was at least dull, at least through part of its length, and the blade was about an inch wide." These features are consistent with some sort of a medium-size pocket knife (R 2679).

It was Dr. Hobin's testimony that Karen's heart was still beating when all the injuries were inflicted (R 2679), but that Karen was not conscious at the time of the sexual assault (R 2683).

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 state-

ments 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 **599-1445).** On the First Motion to Suppress (SR **2-51,** 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 at **823** Dover Street, Boca Raton, on May **22, 1984** (R **618)** and Mr. Sasko advised he saw the individual who tried to gain entrance (R **619).** As a result Officer Brady showed Mr. Sasko a photo line-up on May **29, 1984,** which included a photograph of Duane Owen (R **619).** Mr. Sasko immediately picked Appellant's photograph from the line-up (R **620).**

On the **28th** of May, **1984,** Boca Raton was investigating a burglary at Dumille Gorman's home, **640** Lakeview Terrace (R **620).** Officer Brady spoke to Ms. Gorman, who related facts which pointed to Appellant as a possible suspect (R **621).** Brady showed Ms. Gorman a photo line-up, which included a photograph of Appellant (R **621).** Ms. Gorman immediately picked Appellant's

photograph as that of her assailant (R **622).** The murder of Georgianna Worden was reported May **29, 1984** (R **623).** Officer Brady stated the police were looking for Duane Owen prior to May **30, 1984** (R **627, 628).**

Investigator Kathleen Petracco testified the Boca Raton Police Department was involved in the investigation of Georgiana Worden's murder (R **631).** 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 632).** 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 **633).**

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 **633).** The officer stopped the individual, identified herself, and asked the suspect for identification (R **634).** Appellant identified himself as Dana L. Brown (R **635).** The individual was identical to the photograph given to her as that of Duane Owen (R **635),** and although the person produced army identification with the name of Dana Brown (R **635),** Officer Petracco "was not convinced [the person] was not Duane Owen." **(R 642).**

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 Sasko's property and Gorman's residence, a bulletin and BOLO were prepared and distributed to all road patrol units (R 660, 671). Then on May 30, 1984, at about 12:30 p.m. Officer Petracco called him to inform she had someone who matched Duane Owen's description (R 675). When McCoy arrived at the scene, he saw the person looked just like the photograph, and was "sure this was Duane Owen" (R 676-7), whereupon Appellant was placed under arrest (R 677).

After hearing the evidence and arguments by counsel (R 687-6941, the trial court denied the first motion to suppress finding that there was probable cause and a basis for the stop and arrest (R 698-699).

On the second and third motions to suppress, after listening to the police officers' testimony (R 710-997, 1090-1252), the arguments of counsel (R 702-710, 1018-1090, 1375-1421) and reviewing the tapes in their entirety (R 1295-6), the trial court found that the arrest was based on probable cause (R 1425), and Owen had been properly advised of his constitutional rights. (R 1425-1426). The court found no evidence of physical coercion, or threats of violence (R 1427); further, that the conversations between Owen and the police officers were had at the invitation of Appellant (R 1427). The court ruled that selective recording

of statements is not illegal (R **1434),** and then denied the motions to suppress (R **1441, 1445).**

After Appellant was arrested, a search warrant was obtained and Detective John Barrett searched Appellant's apartment at 501 N.E. 45th Street, Boca Raton, Florida (R **2903).** Detective Brady retrieved a name tag with the name of "Brown" on it; a second military name tag with the name **"Owen"** on it, and a rolled pair of socks (R **2909).** The socks were found in a blue zippered bag which also contained a military uniform with the name "Brown" on it (R **2914).**

During the conversation of June **18, 1984,** Appellant refused the request to take his footprints (R 1151), therefore Captain Lincoln obtained a court order for the footprints (R **1199),** which was served on Appellant June **21, 1984** (R **1200).** Later on that night, during the taped conversation of June **21, 1984,** Duane Owen confessed to the Slattery homicide (R **1204-5).** A transcript of the tape of June **21, 1984,** as played for the jury appears at R **2975-3088.**

Appellant stated he cut the screen with a knife (R **3030)** and went into the bedroom (R **3028),** by jumping through the window and **"** tumbling down on the bed." (R **3029).** Appellant was wearing socks on his hands (R **3029),** and did not have shoes on his feet, as he had taken his sneakers off and left them with his bike on the beach (R **3031).** Owen opened the door, heard some noises so he shut the door, and walked over to the sliding glass

doors and "peeked" into the living area where he saw Karen and two kids laying around the floor; Karen was doing their hair (R **3032).** Owen then left the house through the window again, closing up to make it look like no one had come in (R 3032), and went back to the Gipper Lounge',[1] had some drinks, and after two hours went back to the Helms' residence (R **3033).** Once he arrived at the house he went back in the same way, through the window (R 3033), and tumbling onto the bed (R **3034).** Owen said at some point he went to the closet and "got a pair gloves" for his hands, and put his socks back on his feet (R **3035).** The gloves were "small like ladies gloves." (R **3036).** Owen also admitted to getting the hammer out of the tool box in the closet (R **3036-3037).** He remembered the bedroom doors "slid" [they were pocket doors], he opened the doors, went over to the kids' room and closed that door (R **3037-38).** Owen went back to the master bedroom and "kind of scoped through the screen, the patio area, and just scoped it out." (R **3040).** He could see Karen's legs as she was watching TV (R **3040).** Owen looked through drawers in the bedroom, but could not find any jewelry (R 3040), so he went out in the hallway (R **3042).**

Owen noticed Karen was still watching television on the floor (R 3049), then she got up to check on the kids (R **3049).** Owen stated Karen was "pretty big", and did not appear to be only

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[1] The Gipper was described as a bar in Delray Beach (R **3025-3026).**

five feet tall (R **3050**). Owen stated, "I think she kind of looked, ... and there's that door, so you can really kind of see with the reflection, ... she figured maybe somebody was in the house so she went and got on the phone, ... I just looked towards the door and seen the reflection of her...getting on the phone. So I figured I'd better...just snatch the phone away before she calls the police...because...the door was bolt locked and I didn't feel like making all that noise...By the time I got out and ran around and got my shit that was stashed over here, ran up there and got my bike, they would have already been here hot on the trail." (R **3052**). Owen continues, "when I came up she turned around...she turned around and seen me before I was ever right here...she seen me coming...but she still had the phone and I really can't remember what she said. ...I said 'hang up the phone', and she didn't. [then] I grabbed hold of her trying to get it away and I think that's when I dropped the hammer..." (R **3053-54**). "I remember grabbing the phone and replacing it on the receiver'' (R **3055**). "I snatched up, replaced it, and I think that's when I ended up sticking her one...we was face on like this...and she, when I snatched ahold of her, ... she kind of went to grab ahold of me or something trying to punch me away. And I think that's when I came up from behind or something." (R **3056**). The confession continues, "I thought I only stabbed her in the back" probably more than once (R **3057**). When Karen fell to the floor she fell on her back, "she didn't fight...

anymore,. .didn't talk. [N]ot once [did she scream]" (R 3058). Appellant stated he at that point got up and went to check on the kids, he shut their door completely. "I went and shut off all the lights almost, shut a couple of them." (R 3058). Turned off the TV. He had the leather gloves on at all times, including while he took a shower (R 3059).

Owen continued, "then I took her in the bedroom...just grabbed her feet and drug her...with her head behind...[And] just closed the door." (R 3059). "And took off her clothes.. .she was barefooted. She had on these shorts, kind of like, you know, the new, new style...Like long...not a like, like a mini skirt, but where they have like, ah, pants...kind of long shorts...they go almost down to her knees." (R 3060). The blouse "I just pulled it up" (R 3060-61). Karen was wearing "kind of high wasted (sic) style [underwear]. (R 3061). After Owen took her clothes off "I just raped her." (R 3063). Owen claimed not to have his clothes on when he came into the house, having left his clothes "right outside" (R 3063). He was only wearing shorts (R 3064). Owen took off his shorts, raped her and then took a shower in the master bathroom, then left through the sliding glass door (R 3064).

Owen stated when he came outside, he picked up his shirt and noticed he still had the gloves in his hand and stained his shirt with blood (R 3073-74). So he took off his gloves, and threw "his stuff away." (R 3074). Appellant told the police

where he hid the gloves, shorts and socks that night, and exactly where the items could be found (R **3074-3079).**

Officers Herndon and Richard Tourville testified that the day after Appellant confessed, Junes **22, 1984,** the police went to **602** North Ocean which is an area in back of the Helm's home, and upon searching the area, the police found the pair of gloves, the pair of socks, and the pair of shorts, exactly where Appellant said the items would be (R **2582, 2702-2703).**

On May **30, 1985,** Jenny Klein, the head nurse at the county jail, pursuant to court order, drew a blood sample from Appellant for comparison purposes (R **2752).**

Richard Tanton, the forensic serologist, testified Appellant has type **O,** non-secretor blood (R **2779).** And that Karen had type **A,** secretor, blood (R **2780).** From the swabs he examined, Tanton found evidence of type A blood having a weak "O" material (R **2782).** This information lead Tanton to the conclusion that the "only possible contributor was either an "A" secretor or a non-secretor; therefore since Appellant was a non-secretor, he could have contributed to the semen found" in the bedroom by Karen's body (R **2783).**

Tanton also tested the gloves, shorts, and socks found in the bushes. Tanton testified he could not say whether there was or was not blood on the gloves (R **2879)** because the gloves when found were inside out. To have turned them outside out may have caused the gloves to fall apart *so* he did not attempt, thus

the exterior of the gloves was not tested (R **2832-2833).** The gloves as found and tested gave negative results (R **2829).**

The two socks did give luminol reaction consistent with blood **(R 2829-30).** The sock marked as Exhibit 75A gave reaction predominantly on the sole area, with some reaction along the top of the stocking (R **2830).** The reaction on Exhibit 75B, (the other sock) was substantially weaker, and only in a small area of the sole (R **2830).**

The shorts, only gave small reaction in about three spots on the front of the shorts, and a relative large reaction around the rear of the shorts (R **2830).**

Tanton also testified that on April 10, **1984,** he went to the Helm's residence to make luminol tests (R **2833).** The result was that he found what appeared to be a human footprint at the threshhold of the bathroom/master bedroom **(R 2835),** as well as additional footprints in the kitchen (R **2836).**

Dr. Gersen **M.** Perry, a Podiatrist, was accepted as an expert in biomechanics (R **3149-3152).** Dr. Perry testified he compared the footprints found at the Helm's residence with Appellant's prints and he found the same similar pattern (R **3158),** that there is definitely a similarity between the two prints (R 3159), but that these comparisons are not an absolute means of identification, and is not like a fingerprint (R **3155).**

Once the State rested (R **3265),** the defense moved for judgment of acquittal in each of the three counts (R **3286-**

3291). The court denied the motions on counts one and three, but reserved ruling on Count II (R 3319-3320). The defense then rested (R 3320), with Appellant personally stating in the record he did not wish to testify (R 3266-72, 3320-21).

The State advised the trial court it was inappropriate for the court to reserve ruling on the motion for judgment of acquittal on Count II (R 3322-24), to which the court replied:

> If you all perceive a problem, or the State perceives a problem, I will deny the motion without prejudice to their right to renew it. [Emphasis added.]

(R 3324).

The trial court granted the defense specially requested jury instructions on the issue whether Karen was dead at the time she was raped (R 3432-3434).

The jury returned verdicts of guilty on each of the three counts (R 3655-3657). During the Phase II proceedings, the parties stipulated that Appellant's prior record are crimes involving violence or the threat of violence (R 3696-3700, 3701).

Dr. Frederick Hobin, the medical examiner, again took the witness stand and stated that the autopsy revealed Karen had suffered 18 stabbing and cutting injuries, and that 7 of the stabbing injuries were fatal (R 3709). Dr. Hobin stated that death was not instantaneous, was very painfull, and that Karen was alive when each of the 18 wounds were inflicted on her (R 3710).

Dr. Hobin found Karen's lungs had been punctured so that her respiratory functions would have been impaired, causing her to gasp for air through violent respiratory efforts (R 3714-3716). Further, the massive blood loss suffered by Karen would have sent her into shock which causes feelings of impending doom (R 3717-19). The testimony revealed that loss of blood first causes unconsciousness, and later death (R 3720). Unconsciousness would occur in no less than 20 seconds, but the victim can be conscious for as much as two minutes with an average time being one minute (R 3722).

The State introduced Exhibit No.89 into evidence which is Appellant's prior convictions (R 3733), or felonies involving use or threat of violence to another person (R 3734). The State then relied on all the evidence presented at trial (R 3735).

In mitigation, the defense presented the testimony of J. Patrick Peterson, Ph.D., who was court appointed to evaluate Appellant (R 3798). Dr. Peterson's diagnosis was that Appellant has both an antisocial personality disorder, and a schizophreno-form disorder (R 3801). In his opinion, Appellant "snapped" on that day (R 3804-05).

On cross-examination, Dr. Peterson conceded Owen is legally sane and legally competent to stand trial (R 3819). Further, Appellant understood the nature of his acts when he entered the home, and he had the mental capacity to formulate the intent to kill (R 3823). But that he suffered a mental process

breakdown and lost his capacities "for a brief span of time during the commission of the act" (R 3824).

Mitchell Ray Owen, Appellant's brother, also took the stand on Appellant's behalf and testified about Appellant's childhood and general background (R 3875-3919).

The jury returned an advisory sentence of death by a vote of 11 to 1 (R 4052). After the jury was excused, in compliance with s 921.143 Fla. Stat. (R 4079, 4089-93), the trial court permitted any members of Karen Slattery to make a statement on behalf of the family (R 4058-4065). The trial court found five aggravating factors, and no mitigating circumstances that would outweigh the aggravating ones, and sentenced Appellant to death [(R 4271-4280), Written Order (R 4659-4662)].

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 Karen was dead or alive by 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 11.

Assuming arguendo, this Court finds the evidence proved Karen 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 evidence attempted to be adduced by the defense through cross-examination of Officer Pelligrini was found to be irrelevant and extremely especulative to be admissible by the trial court. To be admissible, evidence must be both logically and legally relevant. The trial court's ruling herein may not be disturbed as no abuse of discretion on the part of the judge has been shown by the Appellant.

POINT IV - At page 3324 of the record appears the trial court's ruling on Appellant's motion for judgment of acquittal as to Count 11. Assuming arguendo, the court erred, the error was

harmless and did not prejudice Appellant. Defense counsel considered the motion to have been denied.

POINT V - 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 the 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 VI - The five 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 committed to avoid or prevent arrest for the burglary, 4) 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 five aggravating factors were valid, and that no mitigating factors existed, the sentence of death is appropriate.

POINT VII - The test of admissibility of evidence is relevancy. In this case the trial court allowed the State to impeach Dr. Peterson's credibility by showing Appellant fully

cooperated with the Doctor upon finding he would testify that Appellant was not mentally responsible for the murder. The evidence that Appellant told Ontra Jones that it was perfectly fine to speak and cooperate with Dr. Peterson was demonstrative of Dr. Peterson's bias toward the defense. No reversible error appears in the record.

POINT VIII - The record is abundantly clear that both the jury and trial judge heard Dr. Peterson's testimony regarding Appellant's personality disorders. 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. The court was not mandated to find any factors in mitigation. Even if Appellant's personality disorder is accepted as a mitigating circumstance, it alone would not outweigh the five valid aggravating factors.

POINT IX - The testimony of the victim's mother was relevant to corroborate the evidence that showed Appellant committed the murder. Mrs. Slattery's testimony was relevant to the procedings and did not prejudice Appellant in any way whatsoever. The trial court did not err in admitting the evidence at trial.

POINT X - Florida's Capital Punishment statutes are constitutional 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 XI - 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.

POINT XII -- The standard jury instructions should be used where appropriate. Further, where the instructions taken as a whole correctly and fairly charge the jury, the trial court is under no obligation to give purely argumentative instructions. The trial court sub judice did not abuse its discretion, or commit reversible error, in denying Appellant's requested instructions.

POINT XIII - A claim of ineffective assistance of counsel cannot be raised for the first time on direct appeal, and as such, the issue as raised by Appellant's pro se supplemental brief should not be considered by this Court.

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 Karen was dead at the time of the sexual battery, no sexual battery could have been "committed against 'a person',

but rather a corpse." (AB 15). 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, Karen's body was found naked from the waist down, with her blouse and bra pushed up to her neck. Doctor Hobin found evidence that the murderer had sexual contact with Karen (R 2663), and testified that there was insemination of

the vagina thereby showing penetration (R 2680). In his confession, Duane Owen told the police that after he stabbed Karen, he dragged her to the bedroom, removed her clothes, and "just raped her." (R 3063). 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 Karen's body, the jury properly inferred that Duane Owen committed sexual battery of Karen 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 Karen Slattery. His argument is that the State did not prove that the victim was alive when the sexual battery occurred. Dr. Hobin testified Karen was stabbed and cut 18 times; that she was alive when all the injuries were inflicted (R 2679); and that because of the directions, and size of the different injuries, Karen could have been moving while being stabbed (R 2677). During direct examination, Dr. Hobin stated in his opinion Karen Slattery was not conscious at the time of the sexual assault (R 2683). However, on cross-examination Dr. Hobin said, "in all probability Karen Slattery was dead by the time she was relocated to the back room." (R 2693). Appellant contends

that because of the medical examiner's last statement, the matter was resolved and Karen was dead. It is well settled, however, that expert opinion testimony is not conclusive even where uncontradicted, and the trier of fact and court have discretion to accept or reject the opinion of the expert. U.S. v. Mota, 598 F.2d 995 (5th Cir. 1979); Nettles v. State, 409 So.2d 85 (Fla. 1st DCA 1982). Dr. Hobin did not testified that Karen was dead by the time Appellant "raped her". The doctor's testimony was only his expert opinion.

The trial court thus properly denied Appellant's motion for judgment of acquittal and allowed the jury to reach the issue. In instructing the jury on the issue, the court granted Appellant's request (R 3432-3434) and instructed the jury:

> If you find from the evidence that the defendant did with his penis penetrate or had union with the vagina of Karen Slattery, and at the time Karen Slattery was not a living breathing human being, and that the defendant, Duane Owen, also known as Dana Brown, had knowledge of that fact, then you must find the defendant not guilty of sexual battery as contained in Count Two of the indictment.
>
> If, however, you find that the defendant did , with his penis, penetrate or had union with the vagina of Karen Slattery and that at the time Karen Slattery was not a living, breathing, human being, and that the defendant Duane Owen, also known as Dana Brown, had no knowledge of that fact, then you may find the defendant guilty of attempted sexual battery as a lesser included offense of Count Two of

> the indictment, or guilty of attempted sexual battery using slight force.

(R 3612).

From the testimony presented at trial, the jury could believe Karen was still alive during the sexual battery. The doctor testified Karen was alive during all the stabbings, and that she was probably moving. Appellant during his confession stated that Karen did not scream, but the doctor explained that one of the stab wounds cut Karen's voice box (R 2670, 2674-76). In the absence of any evidence of necrophilic tendencies on the part of Appellant, it is considerably more reasonable and logical to infer that Karen Slattery was still alive when the sexual battery took place. Hines v. State, supra, 473 A.2d at 1349; Rowan v. State, supra. The jury was not bound to accept Dr. Hobin's testimony totally. The jury may disbelieve expert testimony if that is their inclination, Byrd v. State, 297 So.2d 22 (Fla. 1974), and the jury may accord expert medical testimony the weight and credibility it deems appropriate. Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979), cert. denied 444 U.S. 983 (1979); Brate v. State, 469 So.2d 790 (Fla. 2d DCA 1985), rev. denied 479 So.2d 117 (Fla. 1985). Appellant's argument, therefore, is based on conflicting evidence which the jury did not have to accept. Whether the sexual battery on Karen Slattery preceded or followed her death is a disputed issue of fact, People v. Stanworth, 522 P.2d 1058, 1071 (Cal. 1974), which

should 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 3656; 4601). 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 APPELLANTS 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. 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 tha 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 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 tha 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 Karen was dead or alive during the sexual battery was for the jury to decide. In the instant case, the jury rejected the contention and declined to find Appellant guilty of attempted sexual battery on the basis that Karen was dead as they were instructed they could do (R 3612).

It is, thus, abundantly clear that under the authority of McCrae, should this Court agree that Karen 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 Karen may have been dead, and therefore, could not suffer emotional trauma (AB 25-26) 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 Karen 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).[2] 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

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

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 (AB 27). 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 11. 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 3632).

The sexual battery conviction was supported by substantial 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 Karen Slattery by 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 of Appellant's Pro se Brief are both challenging the denial of the motion to suppress statements. See AB 30-41 and APB 7-29. One of the sub-issues is identical in both briefs (Compare AB 30-31 to APB 7-11). Likewise Appellant's (Counsel's) Supplemental Brief raises four grounds challenging the admission of Appellant's statements into evidence (See ASB 2013). In an attempt at clarity, undersigned counsel for the State will answer the issues and sub-issues raised in AB's Issue 11, APB Issue I and 11, and the issue raised by Appellant's counsel in their supplemental brief 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.

Appellant's Issue IIA in counsel's Initial Brief (AB

30-33), and Issue IA in the Pro se Brief (APB 7-11) are very similar. The only difference being that Appellant in his Pro se Brief also cites to Mullins v. State, 366 So.2d 1162 (Fla. 1978), and Franklin v. State, 374 So.2d 1151 (Fla. 3d DCA 1979) for the proposition that the police officers had no founded suspicion to stop Appellant initially. The following response is the State's answer to the arguments in both briefs.

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 1266). 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 619-620). 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 620-622). Upon these identifications of Appellant, the Boca Raton Police Department began looking for Appellant on May 29, 1984 (R 627, 628), and prepared and circulated a bulletin with Appellant's photograph for the patrol units to keep a look out for Appellant (R 627). Additionally, several failure-to-appear-warrants were outstanding against Appellant (R 629).

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 631-633). 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 634).

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 So.2d (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

635). Officer McCoy testified he was aware that Appellant had been identified by the victims as the assailant in the Sasko and German's burglaries (R 649); McCoy was also aware there were three outstanding active warrants for Duane Owen (R 649-654); McCoy then prepared and distributed the bulletin (R 655), and a BOLO (R 664-5). 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 676). 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 676-677). 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, at 1454: (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.

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 (AB **33-36);** that the police obtained the statements from Appellant through the use of promises (ASB **6-8);** and that the police obtained a coerced statement by appealing to Appellant's sense of morality (ASB **8-11).** All these 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 710). At the jail, Officer Brady advised Appellant of his Miranda [3] rights, and Appellant signed the form at 1:10 p.m., after indicating he understood (R 710-715). Officer Brady testified Appellant understood his rights, that Appellant appeared very

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

coherent (R 716-717), and did not request an attorney. Appellant was not threatened (R 719). The Officer also noted that Appellant was fingerprinted and booked in before any officers talked to him (R 719). 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 720). Officer Brady testified Appellant was very congenial, and appeared to enjoy talking to them (R 723). There was no yelling at Appellant or any physical abuse of Appellant (R 723). 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 722-3). The conversations were not continuous for two or three hours, but instead there were numerous breaks (R 722). 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 723). When asked if he had an attorney, Appellant said he did not have an attorney, nor did he want one (R 724).

This background conversation ended at 4:30 for a dinner break (R 725). Then about 5:45, Appellant was re-advised of his rights, and again Appellant did not request an attorney be provided to him (R 725-728). It was not until this second session on the 30th of May that specific crimes were addressed (R 740). Appellant denied the Sasko and Gorman burglaries (R 740), but

Officer Brady believed Appellant was involved in the Worden homicide (R **742).**

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 **744-45).** McCoy was informed that Appellant had been Mirandized (R **745).** This Officer also related that the interrogation proceeded in a "conversation-type format" (R **746)** 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 **746).** It was McCoy's perception that Appellant was in full possession of his faculties (R **746);** 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 **746-747).**

Appellant explained he grew up with Dana Brown at the CVFW Home in Michigan (R **747).** After being told he had been identified through a photographic line-up, Appellant confessed to the Sasko residence burglary (R **748, 753),** then subsequently asked, 'What am I really here for? Not petty burglaries." (R **750).** 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 **750).** However, Appellant did not admit to the murder (R **750).** 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 **751, 766).**

Sergeant Marc Woods testified he too talked to Appellant on the 30th of May (R **768).** Sergeant Woods read Appellant his rights again (R **770).** Appellant signed the card acknowledging he understood his rights **(R 772).** 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 **774-775).** Woods also testified Appellant was trying to see what kind of "deal" he could get on the charges he might be facing (R **776).** Appellant began by asking about the Boca Raton homicide about which McCoy was questioning him (R **775).** Woods stated Appellant brought up the point that murder was punishable by death, and asked what kind of sentence he would get on the burglaries (R **775-776).** 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 **777-78).** 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 **777).** Appellant also told Sergeant Woods that it was fun to run away from the police, because he never got caught (R **779).** Appellant was returned to the jail at **12:30** a.m., May **31, 1984** (R **734).**

Officer Woods testified that on June 1, 1984, Delray Police Department received a collect phone call from Appellant asking for Sergeant Woods (R 907). Appellant asked Woods if he would go to the jail to see him (R 907). Woods said he would go, and Appellant consented to McCoy accompanying Woods to see him (R 908). Appellant was advised of his rights (R 908-9091, no promises or threats were made (R 909-910), and Appellant indicated he understood his rights, and did not request a lawyer (R 911). During these conversations, there were a number of breaks for coffee and use of the bathroom facilities, as well as for dinner (R 911). Officer Woods stated that on June 1, the Slattery Homicide was not specifically mentioned (R 912), but that when Woods was alone with Appellant, Appellant made references to a second homicide in a nearby town (R 912-913).

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 (R853-854). Appellant once again signed the rights card (R 856-858), acknowledging he understood his rights (R 859-861). 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 862-863). The tone was more of story telling by Appellant (R 863), Appellant asked questions of Woods and McCoy (R 864), and appeared to enjoy talking with the

officers (R 865). During this conversation, Appellant admitted he committed the Sasko and Lynn Wade burglaries (R 865), he also admitted involvement in the Gorman burglary (R 865), and two indecent exposure incidents at Florida Atlantic University (R 866).

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." (R866), whereupon Appellant drew his sneakers (R 867). Appellant explained he went out on "maneuvers" (R 867), which meant he went out "prowling and looking to steal" (R 868). Appellant said he enjoyed the chase with the police because he knew they would not catch him (R 867-870). 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 869-870). Throughout the conversation, Appellant dropped hints about several crimes he committed (R 870).

McCoy stated that throughout the conversations, Appellant asked questions describing crimes and asking what the penalty might be, suggesting negotiated pleas and deals (R 872-

876). Owen wanted to know if he plead, whether he could choose which hospital or jail he would be sent to (R 876-878). Owen also asked many questions to see what the police had on him (R 878-9). He asked about the electric chair four or five times that day (R 882).

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 879). 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 896-899).

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 887-890). Appellant did not refuse to talk (R 892); the 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 900).

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 883-884). The officer estimated the conversation in total lasted about five hours, producing about 26 pages of handwritten notes (R 885). 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 932-933), and the officers complied. According to Officer McCoy, Mitchell and Appellant talked privately for about one hour and a half (R 935). Upon conclusion, McCoy went in and talked to Appellant (R 936). These conversations were videotaped (ST 1-262). Before beginning, Appellant was read his Miranda rights (R 936; ST 18-19), at which time Appellant acknowledged he understood his rights and signed the Rights Card (ST 20). Officer McCoy testified no threats or promises were made to Appellant (R 938), nor did Appellant request an attorney (R 938).

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....
>
> My lawyer is going to look at me and say that I'm a ...dumb...an idiot. You should never have talked to these dudes.. ..

(ST 130, R 939). The record also shows Appellant tried to get a deal with the police (R 939-940, 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).

After the Third of June, the next conversation occurred on June 6, 1984 (R 1091). The police went to request a blood sample from Appellant (R 1091), then they asked him if he wanted to talk and Appellant said "ok." These conversations were videotaped (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 1094-1095). 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 1096, ST 332, 341-352).

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 1103). McCoy went to see Appellant, and the conversations were once again videotaped (ST 425-647). The tape shows McCoy read Appellant the Miranda rights at 6:05 p.m. (ST 425-427). Appellant said, "I want to kind of solve a few things here and there" (ST 429, R1105-1107). 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" (ST 552). Appellant subsequently confessed to the "Peter Pan Motel case" (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).

On June 8, 1984, McCoy, Mark Woods, Tom Livingston, and Mitchell Owen went to see Appellant in jail (R 1115). First Appellant and his brother talked for about one hour (ST 854; R 1116). Thereafter McCoy and Woods talk to Appellant, but first they read him his rights (R 1117-1118; 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 1119). 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 allow-

ed to speak to Mitch once again (R 1126).

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 1130). On the 18th of June, Appellant called his brother about going to see him, and Mitchell called Officer Woods (R 1139). 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 1141). Woods told Appellant he would have to make arrangements (R 1142), and Appellant called again around 1:30 p.m. (R 1143). Officer Woods finally went at 4:20 p.m. (R 1143, ST 650). These conversations were videotaped and appear in the record (ST 648-851). Officer Woods read Appellant his rights (ST 649-650, R 1144). The officer stated he made no promises or inducements to Appellant (R 1148), and that he felt that Appellant was playing a "catch me if you can" game (R 1150). 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 1150-51). Woods asked Appellant if he would consent to giving them his footprints, but Appellant declined (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 1164). At that point Officer Livingston formally read the charges and arrested Appellant for the Worden homicide (ST 971-974, R 1167). When Officer McCoy came back into the room, the Miranda rights were read to Appellant one more time (ST 977-978, R 1168), and then Appellant talked about the Worden homicide (ST 993-1027, R 1171).

After a break, Miranda rights were read to Appellant for the third time that day at 7:30 p.m. (ST 1039-1041, R 1181-1182). Officer Lincoln testified that on the 21st of June was the first time anyone specifically talked to Appellant about the Slattery homicide (R 1205), but that Appellant had dropped hints that he knew if he were charged with the Worden homicide, there may be a second one (R 1206). Appellant said that he knew he was implicated in the Worden homicide, and that he had been found out through the fingerprint, (R 1207-1208), then asked what evidence they had on him on the Slattery homicide (ST 1208).

Officer Lincoln testified that when he said to Appellant "You can't be punished twice for the same thing" (R 1210), he was just telling Appellant that a person "cannot be

electrocuted twice" (R 1211). Officer Lincoln also explained that when Appellant stated "I would rather not talk about it" Officer Lincoln was not sure if Appellant did not want to answer that particular question or whether he wanted to stop talking, so to be sure he asked a different question and Appellant responded (R 1213-1215). The follow up questions were designed to find out if Appellant wanted to continue the conversations (R 1231).

At the suppression hearing, Appellant chose not to testify (R 1260-61). The trial court stated that relying on Michigan v. Mosely,[4] the court did not believe Appellant invoked his desire to terminate speaking to the police (R 1295). The court reviewed the tape of the 21st (R 1295-6, 1317, 1319-1370) before ruling. The trial court found there was probable cause for the initial arrest (R 1425), and that the rights were properly read (R 1425-26). The court further found no evidence of physical coercion, or threats of violence (R 1427). He ruled that the conversations between Appellant and the police were discussions had at the invitation of Appellant (R 1427). The court found that Appellant is very intelligent and was playing a game with the police (R 1428). The court found the police did not suggest a better deal if Appellant talked (R 1432). The court further restated that by saying "I don't want to talk about it" Appellant was not attempting to exercise his right to remain silent (R 1444). The trial court ruled that selective recording

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

of conversations by the police is not illegal (R 1434), and denied the motion as to psychological coercion (R 1441, 1445).

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 1421-1445 of the record and are attached hereto as Appendix A. 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 **1428).** 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 **1428-29).** The trial judge found that Appellant was testing the officers, and if the officers proved to him that they had sufficient evidence to charge him with the crime, he would be willing to discuss the matters with them (R **1423-33).** The court emphasized that it was this continuous "game" throughout the conversations on the eight **(8)** different days that made him determine Appellant was not exercising his right to remain silent on June **21, 1984** (R **1433).** Appellant's statements on that day were nothing more than his request to let him think about the situation he suddenly found himself facing. When Appellant was talking to Officer Woods, Woods said Appellant's blood type was "B"; but Woods was not very familiar with the case. Suddenly, when Officer Lincoln walks in and informs Appellant that they know his blood type is "O" and that they have footprints to tie him to the murder, Appellant is trying to remember where the footprints could have come from, and in his mind whether he knew the Helm's before that night, or where he left his bicycle, is of no importance (R **1441-**

1444). The trial judge found that there was no threats, or coercion exercised on Duane Owen (R 1432-34), that Appellant, due to his prior studies in criminology, believed he knew more than the officers, and very much controlled the situation during the conversations with the officers (R 1437-38).

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.'' (AB 35). 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).

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. 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 calculative, is sizing up the officers, considering his 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 conversation of June 7, **1984,** Appellant called McCoy because he 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).**

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.

d. Use of Promises

Appellant alleges the police used his brother as a bargaining position, and equate the "promises" sub judice to the promises made in Lynumm v. Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963), and threats used in Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961), U.S. v. Tingle, 658 F.2d 1332 (9th Cir. 1981), and Nebraska v. Smith, 277 N.W. 2d 441 (Neb. 1979). (See ASB 6-8). The record is abundantly clear that the officers did not make any promises to Appellant, nor did they use his brother as a bargaining chip. Once again, this argument was not raised before the trial court, therefore, it is not preserved for appellate review.

From a review of the entire transcript of the video-taped conversations and the motion to suppress, it is clear, the

officers were willing to drive Mitchell Owen up to see Appellant whenever he requested. However, it is also clear they did not say he could only talk to Mitchell after he confessed. It is noteworthy, that near the end of the conversations of June 7, 1984 when Appellant suggested McCoy and he made a bargain that if McCoy brought up Marc Woods and his brother, then Appellant would talk, McCoy in no uncertain terms corrected Appellant by saying "No, we didn't make a bargain." (ST 640). The next day, June 8, 1984, McCoy did go visit Appellant, but only after Appellant called to make sure they were coming to see him (ST 892). The quotations reproduced by Appellant occurred during the conversations of June 8, 1984, where Appellant still did not confess to any homicide. Additionally, there were no conversations between the 8th and the 18th. The conversation of the 18th took place yet no confession of the murder was forthcoming. Appellant did not confess to the Slattery Homicide until June 21, 1984, after he had been arrested on the Worden homicide. His decision to confess was not dependent on any promises by the officers to bring his brother to see him. Even if the remarks may be considered as containing "promises" to Appellant, it was not made as a means of inducing or in return for the confession. See, State v. Beck, 390 So.2d 748, 749 (Fla. 3d DCA 1980).

The record herein supports the finding that no promises were made to Appellant, as such the confession was properly admitted and the trial court's determination should be upheld.

U.S. v. Vera, 701 F.2d 1349, 1364 (11th Cir. 1983); Roulty v. State, 440 So.2d 1257, 1261 (Fla. 1983); Stevens v. State, 419 So.2d 1058, 1062 (Fla. 1982); Bova v. State, 392 So.2d 950, 952-3 (Fla. 4th DCA 1980); Mitchell v. State, 289 So.2d 54 (Fla. 2d DCA 1974).

e. Appeal to Sense of Morality

Appellant alleges his confession was obtained by appealing to his sense of morality (ASB-11).

Since Appellant equates this "technique" to the "Christian Burial" technique in Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 430 L.Ed.2d 387 (1977), the State submits this argument is refuted by the record and the resolution of the issue is controlled by the holding in Roman v. State, 475 So.2d 1228 (Fla. 1985) where this Court said:

> The use of the "Christian burial technique" by law enforcement personnel is unquestionably a blatantly coercive and deceptive ploy. The record shows however, that the use of this tactic did not directly result in appellant's statement, although we consider it as a factor among the totality of circumstances surrounding the giving of this statement. The record reflects that Appellant was a forty-five year old man of intelligence within the normal range, albeit at the lower end. He did not appear intoxicated or mentally ill at the time. He was read Miranda warnings, was capable of understanding them, and indicated that he did in fact understand them. He was offered sustenance and not promised or threatened. He was not handcuffed, and despite

> vomiting and trembling seemed alert and perceptive. Under these circumstances we find that the deception was insufficient to make an otherwise voluntary statement inadmissible. See Harris v. State, 438 So.2d 787 (Fla. 1983), cert denied, ___U.S.___, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984).

Id. 1232-1233. Therefore, under the circumstances of this case, even assuming a deception -- which Appellee is unwilling to accept -- just as in Roman, such "deception" was insufficient to make an otherwise voluntary statement inadmissible. Appellant herein is a college graduate, who fully understood his rights. He requested the conversations with the officers, and enjoyed the "catch me if you can" game he was playing with the officers. The videotapes show Appellant was read his Miranda rights, was capable of undertanding them, and indicated he did in fact understand them. He was offered sustenance and not threatened. In other words there was no atmosphere of coercion surrounding the confession and no reward or implied promise was made. See also, Barnason v. State, supra. There was sufficient evidence in the record to support the trial judge's findings, and this finding should not be disturbed on appeal. Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987); Albright v. State, 378 So.2d 1234, 1236 (Fla. 2d DCA 1979).

f. Videotaping of the Confession

Appellant alleges the officers violated his rights by videotaping the conversations of June 3, 6, 7, 8, 18 and 21,

1984, without first obtaining a search warrant (APB 23-25)

Section 934.03(2)(a)2.(c), Florida Statutes, provides in pertinent part:

> It is lawful under this chapter for law enforcement officer. . . to intercept a . . . oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.. . .

The constitutional protection under the Fourth Amendment to the United States Constitution, and Art. I, 512 of the Florida Constitution does not extend to oral communications where, as in this case, Appellant did not have any expectation of privacy in that he knew that whatever he said to the officers would be used against him in a court of law. No constitutional rights were violated under the facts of the instant case, because under the circumstances even if Appellant had any expectation of privacy, that expectation is not one which society is willing to recognize as reasonable or which society is willing to protect. See Madsen v. State, 13 F.L.W. 58 (Fla. January 28, 1988); State v. Inciarrano, 473 So.2d 1272 (Fla. 1985); Morningstar v. State, 428 So.2d 220 (Fla. 1982), cert denied 464 U.S. 821 (1983).

3. Appellant did not request to consult with an attorney.

Appellant alleges 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. (See APB 11-

22 and ASB 11-13). These allegations are totally without merit, and rather border on the ridiculous.

Contrary to Appellant's pro se brief at page 11, Appellant was arrested on May 30, 1984 (R 631) and signed the first rights form at 1:10 p.m. before Detective John W. Brady (R 713-715).[5] According to Officer Brady, Appellant acknowledged he understood his rights (R 716), and did not request an attorney (R 717, 724). Officer Brady asserted they gave Appellant a dinner break at 4:30 p.m. (R 725), and then re-advised Appellant of his rights at 5:45 p.m. that night, again without request for an attorney being made (R 725-728). Officer Brady testified Appellant was taken to the jail at 12:30 a.m. May 31, 1984 (R 734). Therefore, Appellant was at the Boca Raton Police Department less than 12 hours, and not 36 hours as alleged. Appellant was taken for first appearance on May 31, 1984 (R 917). 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.

Citing to U.S. v. Obregon, 748 F.2d 1371 (10th Cir. 1984), Appellant assigns error to the police officers' failure to have him sign a "waiver of rights" form in addition to the

[5] Although exhibit 6 suggests the rights form was signed May 29, 1984, Officer Brady testified he had no conversations with Duane Owen a/k/a Dana Brown on the 29th, and that the date on the document is nothing but human error, attributed to the fact Officer Brady worked straight through from May 29 to May 31, 1984 (R 738-740).

"advisement of rights" form he did sign (APB 12). Although obtaining written waivers might be the better practice, it is not required, State v. Williams, 386 So.2d 27, 29 (Fla. 2d DCA 1980). Even a request to sign a "waivers" form, without more, does not establish the absense of an effective waiver of Miranda rights, Eleuterio v. Wainwright, 587 F.2d 194 (5th Cir. 1979), cert. denied, 443 U.S. 915 (1979).

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 713), and did not request an attorney (R 717). Further, Brady specifically testified that Appellant had said he had dealings with Attorneys in Michigan and Appellant thought attorneys were all jerks (R 723). On the 30th Appellant said he did not have an attorney, and did not want one (R 724). Both Officers McCoy and Woods stated they too each advised Appellant of his rights on the 30th of May (R 745-7701, and he did not request an attorney (R 746, 772).

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 alright for McCoy to go along (R 853, 900, 907-908). On that day, Appellant again was advised of his rights (R 856-861, 908-9), and did not request an attorney (R 910). On the first of June, Appellant was doing a lot of the questioning (R 862-864).

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 989; ST 23-26). While discussing the possibilities of a good deal in case he confessed, Appellant recognizes that his own attorney would tell him not to talk (ST 130-131). Contrary to Appellant's contentions (ASB 11-12), these comments by Appellant clearly show 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 was 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. Because 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 could not point to any other places in the record from where he could suggest he had exercised his right to an attorney.

Finally under Issue IC of Appellant's pro se brief (APB 19-22), 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 Delap v. State, 440 So.2d 1242, 1247-1248 (Fla. 1983). The right to counsel during questioning can be waived. 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).**

4. Appellant Waived his Right to Remain Silent

Appellant alleges his Fifth Amendment rights were violated when he indicated he wished to remain silent, and the police officers persisted in an attempt to obtain a confession from him (AB **36-41;** ASB **2-6;** and APB **25-29).** Under the facts of this case it cannot be said that Appellant's statements were clear he wished to conclude the interview at that time, thus the officers were permitted to continue the communication to clarify whether Appellant wished to simply not answer the particular question or discontinue the conversation all together.

With reference to the particular passages cited by Appellant in his Supplemental Brief (ASB **2-3)** specifically at **ST 137, ST 364, ST 880, ST 921** and **ST 966,** if read in the context in which they were made, it is clear Appellant was not invoking his right to remain silent or cut off questioning at that point.

The record is abundantly clear, each time the officers read 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, supra, 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 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 not to answer any questions 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 like to you. That's fine.. **."** (ST **270).** As to the passage at ST **364,** again one must look at the entire context of that day's session. It must be kept in mind that Appellant appears to fully enjoy talking with the officers and checking out what kind of evidence they have 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 what ever you want to call it. I know some body 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 cited by Appellant at ST 880 is again not an attempt by Appellant to invoke his right to end the interrogation. This passage occurred during the June 8, 1984 session. This 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 of 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 some thing else.

THE DEFENDANT: You can't find the camera?

OFFICER WOODS: Can't find where any body 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: I don'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:** Okay. 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 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 ex-

hibiting Appellant's total comprehension of his rights and effective exercise of same.

Appellant also points to the passage at ST 966 where Appellant says he has nothing more to say (ASB 3). This 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 were held until June 18 -- ten days later -- when Appellant ask 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. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed. 2d 313, 321 (1975).

Finally, Appellant points to two passages during the June 21, 1984 session. 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 (ST **993-1031).** After Officer McCoy left and Officer Woods replaced him, Officer Woods read Appellant his Miranda rights for the third time that night **(ST 1039-1040).** Appellant acknowledged he understood his rights and signed the card at **7:30** p.m. (ST **1040-1041).** Officer Woods made it very clear he was there to speak to Appellant about the Slattery homicide **(ST 1042),** but Appellant denied any knowledge or involvement on that homicide (ST **1043).** Officer Lincoln then comes in and joins in the interrogation (ST **1051-53).** Appellant, although denouncing any involvement, after listening to the evidence collected on the case **(ST 1067-1073)** asks Officer Lincoln questions about the evidence (ST **1073),** and if that's all they have (ST **1074).**

The officers ask Appellant straight out to tell them about what happened that night (ST **1076).** The following colloquy then took placed:

> **OFFICER LINCOLN:** Satisfy yourself right now.
>
> There's a few things --

OFFICER WOODS: Yeah.

OFFICER LINCOLN: that I have to know, Duane.

A couple pieces of the puzzle don't fit. How did it come down? Were you looking at that particular house or just going through the neighborhood?

THE DEFENDANT: I'd rather not talk about it.

OFFICER LINCOLN: Why?

You don't have to tell me about the details if you don't want to if you don't feel comfortable about that.

Was it just a random thing?

Or did you have this house picked out?

That's what I'm most curious about?

Things happen, Duane.

We can't change them once they're done.

THE DEFENDANT: No.

OFFICER LINCOLN: But you can sure make it easier on two parents that need to know.

OFFICER WOODS: And a whole town full of babysitters that are afraid to go outside.

That's how the kids make all their money in the summer.

OFFICER LINCOLN: Had you ever been to that house before?

THE DEFENDANT: That was a big scene over there.

OFFICER LINCOLN: You're not kidding.

..**OFFICER WOODS:** Of Course.

THE DEFENDANT: Made the papers and everything.

OFFICER LINCOLN: Nationwide.

THE DEFENDANT: A lot of people's mad about it too.

OFFICER LINCOLN: I don't think it's mad so much, Duane, as --

OFFICER WOODS: Scared.

OFFICER LINCOLN: Scared of something they can't control.

You know how you are in a situation you can't control, sometimes you are frightened.

I know I am.

That's what those people feel.

See, and they are going to have to know that they have no reason to be scared anymore.

Had you been to that house before, Duane?

THE DEFENDANT: That tells you right there.

(ST 1077-1079). Appellant continued the conversation, making inquiries of the officers (ST **1080, 1081, 1083-84);** and discussing the case (ST **1084, 1086, 1087, 1089, 1091-92)** apparently trying to ascertain how much evidence the officers actually had on him.

Thereafter, the officers and Appellant argued as to whether the bicycle was Appellant's (ST **1091-1094).** At this point the following occurred:

THE DEFENDANT: How do you know I even had a bike?

You don't even know that.

OFFICER LINCOLN: You tell me you didn't have a bicycle.

See, you won't lie, Duane.

I know you won't lie when you are confronted with the truth.

Now, are you going to tell me you didn't have a bicycle?

I know that much about you now.

You play by the rules. Those rules are important.

We all need rules.

Now, did you have a bicycle?

Of course, you did.

Now, where did you put it?

THE DEFENDANT: I don't want to talk about it.

OFFICER LINCOLN: Don't you think it's necessary to talk about it, Duane?

Two months have gone by already, Duane. That's a long time. It's a long time for people to work. It's a long time for you to hold it within yourself. It's a long time for people to wonder.

* * *

THE DEFENDANT: **No,** it's just circumstances surrounding it, you know.

* * *

OFFICER LINCOLN: I won't make you tell me something you're not comfortable in talking about, Duane.

But I do want to know some of the things that shouldn't hurt you that much to talk about.

What you did with the bicycle. How long you were outside the house. Those kinds of things.

I know what you're reluctant to talk about and I won't press *you* on that.

THE DEFENDANT: I don't see what them kind of things got to do with it anyway.

OFFICER LINCOLN: It's all part of the crime, Duane.

And I know you're uncomfortable about talking about certain aspects of it, and I respect that.

Do you know what time it was when you first got to the house?

Do you remember?

OFFICER WOODS: What time was it, Duane?

THE DEFENDANT: Let me take -- use the bathroom, first.

OFFICER WOODS: Sure. I have to also.

THE DEFENDANT: I've been trying to hold it in for *a* **few minutes.**

OFFICER LINCOLN: Okay.

(Whereupon, **a** recess was taken.)

(ST 1094-1097). After the break, Appellant inquired about the possibility of the officers bringing his brother to see him after that day, both officers answer they would try, but could not promise anything (ST 1097-1099). Appellant then proceeded to express his concerns about confessing because of the public opinion generated by the newspapers (ST 1099-1100). Appellant then acknowledging the officers had enough evidence to charge him with the Slattery Homicide also (ST 1101), decided to confess and proceeded to do *so* (ST 1102-1170).

In Michigan v. Mosley, supra, the Supreme Court made a distinction between a defendant's invocation of his right to counsel during interrogation, and the defendant's invocation to remain silent after waiving his right to an attorney. The Court found that under Miranda, "If the individual states he wants an attorney, the interrogation must cease until an attorney is present." Mosley, supra, 46 L.Ed.2d at 320, n.7. and no further inquiries are allowed. However, when the individual only indicates "he wishes to remain silent," Miranda did not create a per se proscription which would totally preclude all further custodial interrogation. Mosley, supra, 46 L.Ed.2d at 321. Based on Mosley, the rule has been interpreted to mean that when a defendant makes at most an equivocal invocation of his right to remain silent, the interrogating officers are permitted to initiate further communications for the purpose of clarifying the suspect's wishes. Shriner v. Wainwright, 715 F.2d 1451 (11th

Cir. 1983) cert. denied 465 U.S. 1051 (1984): Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); Nash v. Estelle, 597 F.2d 513 (5th Cir.), cert. denied, 444 U.S. 981 (1979); United States v. Vasquez, 476 F.2d 730 (5th Cir.), cert. denied, 414 U.S. 836 (1973). But see, Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987)[6], U.S. Appeal pending ___ U.S. ___, 42 Cr.L. 4117 (U.S. No. 87-718, pet. for cert. filed 10/29/87).

Upon reading the entire record, with particularity ST 1077 -1097, it is clear that Appellant was very willing to speak to the officers. Appellant was also aware he could choose which questions to answer, and exercised that right on several occasions. Therefore, when on the last of eight (8) different days of interrogation, Appellant says "I don't want to talk about it", the officer could not guess whether Appellant wanted to conclude the conversation all together, or whether he simply did not want to speak about whether he knew the Helms before that night or whether he had a bicycle with him that night. As Appellant explained, "It's just circumstances surrounding it, . . . I don't see what them kind of things got to do with it anyway." It

[6] The State submits that Christopher is not controlling here. The Eleventh circuit acknowledges "whether a suspect's right to cut off questioning was scrupulously honored requires a case-by-case analysis." Id. at 840. Therefore, the trial judge sub judice analyzing the case under the particular facts herein, determined that because of the unusual circumstances herein, the officers had to assure themselves of what signal Appellant was giving them at that time. The trial court's findings cannot be ignored and this Court's judgment substituted thereby. Wasko, supra.

is clear the questions by the officers were nothing more than an attempt to try to determine whether or not Appellant wished to continue the conversation. Officer Lincoln testified that was his intention (R 1214, 1231). Therefore, 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 totality 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).

In Lightbourne v. State, supra, 438 So.2d at 389, this Court found that after the defendant therein questioned his need to go on with the interrogation, he voluntarily resumed his response to the interviewers, and held that "defendant's conduct evidenced a voluntary waiver of his known constitutional rights throughout the interrogation process", and affirmed the denial of the motion to suppress. See also, Shriner v. State, 386 So.2d 525 (Fla. 1980), cert. denied 449 U.S. 1103 (1981).

Under the totality of the circumstances the trial court considered the videotape and surrounding testimony in this case and clearly 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,

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 doesnst render any confession involuntary. 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, F.2d 909 (5th Cir. 1979).

B. NO DUE PROCESS VIOLATION OCCURRED BY THE FAILURE TO VIDEOTAPE 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 30-41). 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 732, 737, 758, 814, 893-4, 922). The officers testified they took extensive notes during those two sessions, producing 20 handwritten pages on May 30, 1984 (R 809), and a very extensive report on June 1, 1984 (R 871, 926-927). These reports were provided to the defense as part of discovery and used by the defense at the suppression hearing (R 882-899).

The trial court found that "selective recording is not illegal" (R 1434), and denied the motion to suppress. This ruling is supported by case law, and as such must be affirmed. 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 nor 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 DID NOT ERR IN LIMITING CROSS-EXAMINATION OF OFFICER PELLIGRINI

To be admissible, evidence must be both logically and legally relevant. The test of admissibility of any evidence is relevancy. Further, a trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. Booker v. State, 397 So.2d 910 (Fla.), cert. denied, 454 U.S. 957 (1981). In the instant case, the Appellant proffered

the testimony of Officer Pelligrini that two days after the Slattery homicide, while investigating a burglary of a motor home located approximately one quarter of a mile away from the Helm residence, he observed a bicycle with some pink color bubble gum on the spokes of the bicycle, the handlebars also had on them a subtance that appeared to be blood. Because the police had no leads on the Slattery homicide, all the officers were picking up any kind of leads, *so* Officer Pelligrini decided to call the lead detective in the Slattery homicide case (R **2437).** Upon further examination it was determined that although gum was also found in the pockets of Slattery's shorts, when the two pieces of gum were analyzed and compared, they were each found to be different in color and aroma (R **2491-92).** The substance that appeared to be blood on the handlebars of the bicycle at the motor home burglary was tested and found not to be blood (R **2490).** At the Slattery homicide no bicycle was found at scene, much less a bicycle with gum on the spokes (R **2489).** The Helm residence was a single family home, and the scene of the March **26** burglary was a motor home (R **2489-90).** The burglary case involved no injury to any individual within the motor home, and many items of value were stolen therefrom (R **2490).** Contrasted with the Slattery homicide, where Karen Slattery was brutally murdered, and nothing of value was taken from the house (R **2490).** After listening **to** the proffer and the argument of counsel, the trial court found there was insufficient similarities to justify admitting the

evidence and granted the State's objection on grounds of relevancy (R 2495). The trial court qualified its ruling by advising that should the defense present testimony from other witnesses that "would tie down these matters as having any similarity between these two incidents", he would reconsider his ruling (R 2495-97).

The State agrees with the proposition of law espoused by Appellant, to wit: one accused of a crime may show his innocense by proof of the guilt of another. Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982). However, in the case at bar, Appellant's position was far-fetched and unsupported. The proffered testimony clearly showed that there were absolutely no points of similarity between the two cases. The Delray Police grasping for any leads in the Slattery homicide investigated any possible leads. Once no similarities were found, that lead was discarted. The alleged points of similarities were both meager and commonplace. The defense not having demonstrated sufficient relevancy to the judge's satisfaction, the trial court did not abuse his discretion in refusing to allow cross-examination of Officer Pelligrini on that point. Dougan v. State, 470 so.2d 697, 701 (Fla. 1985), cert. denied, U.S. ___, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986); Barclay v. State, 470 So.2d 691, 694 (Fla. 1985), Blanco v. State, 452 So.2d 520, 523 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985); Diaz v. State, 409 So.2d 68 (Fla. 3d DCA 1982).

"Simply because a defendant thinks that tendered evidence might be beneficial does not make its rejection reversible error." Chandler v. State, 366 So.2d 64, 70 (Fla. 3d DCA 1978), Aff., 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981). The trial court allowed the defense to present evidence to "tie up" the similarities of the two cases in order that Appellant could show relevancy of the March 26 burglary. This he was unable to do. Appellant herein merely offered speculation, rather than relevant evidence, based on his belief that the tendered testimony might be beneficial. The rejection of the proferred testimony does not rise to reversible error, and the trial court's ruling must not be disturbed. Blanco v. State, supra.

IV.

THE TRIAL COURT DID NOT RESERVE RULING ON APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL ON COUNT II OF THE INDICTMENT.

Appellant claims the trial court's reserving ruling on his motion for judgment of acquittal as to Count II prejudiced him by forcing him not to take the stand in his defense since he did not know whether the question of sexual battery would go to the jury. For several reasons, Appellant's allegations are without merit.

At the conclusion of its case, the State rested (R 3265). At that point, defense counsel advised the court that

the defense had subpoenaed **27** witnesses and had prepared to present a defense, but that after consulting with Appellant, the defense was electing to rest at that point (R **3266).** The trial court asked Appellant directly if he concurred with his attorneys' decision, and after further conference with his attorneys, Appellant personally, told the court he felt he should not testify (R **3266-3276).** The jury was dismissed for the day R **3278-80).** Once the jury had left the room, the defense made its motion for judgment of acquittal as to each of the three counts of the indictment (R **3286-3291).** With particularity the motion for judgment of acquittal on Count II - sexual battery - alleged that since the evidence showed Karen was dead at the time of the insemination, no sexual battery could have occurred under the statute **(R 3289-3290).** The State responded the evidence was not clear cut whether Karen was dead at the time of the sexual battery, and therefore this was a question for the jury **(R 3296-98).** After much argument on the topic (R **3299-3319),** the court denied the motion as to counts one and three of the indictment (R 3319), but reserved ruling on the motion on Count II **(R 3320).** The defense did not object to the court's reserved ruling, but accepting the ruling as a denial proceeded to advise the court they would be resting and renewing the same motion upon conclusion of their case (R **3320).** At that point the State advised the court that "it is inappropriate for the Court to take under advisement a motion for JOA" (R **3322).** The court responded

that since the defense would not be resting until the next day, he was reserving ruling on the motion to allow further research on the matter (R 3322-23). The defense commented they had no problem with the ruling although it did "cause some difficulty in terms of jury instructions and closing argument" (R 3324). Whereupon the following colloquy took place:

> THE COURT: I don't believe there is a problem. If you-all perceive a problem or the State perceives a problem with regard to it, I will deny the motion without prejudice to their right to renew it.
>
> The burden changes with regard to the testimony, the burden now changes, the quantity of proof changes. They decided to put on nothing, the quantum of proof has changed with regard to it.
>
> You have any other motion upon resting?
>
> MR. KRISCHER [Defense Counsel]: Yes, sir.
>
> THE COURT: Does the State have any objection to that being noted, for purposes of the record?
>
> MS. KABBOUSH: [The Prosecutor]: The problem I have is I did not understand until what point in time the Court is reserving ruling?
>
> THE COURT: It was my intention to reserve ruling until this matter came back with a jury determination with regard to it.
>
> MS. KABBOUSH: I don't believe you can do that legally.

THE COURT: And what happens if I cannot legally do it? What is the practical effect of it?

MS. KABBOUSH: Reversible error.

THE COURT: Then, what we need to do is research with regard to that. If that is reversible error to do that, then I will deny the motion for directed verdict of acquittal without prejudice to your right to renew those matters on a motion for new trial, or what have you, at the conclusion of these matters.

* * *

THE COURT: The fact that it can be renewed is my only concern, as the State is indicating is reversible error. I told you my intention is with regard to it. That seems to be practically addressed by the rule, I don't know.

MS. KABBOUSH: You see, **I** take issue with the suggestion that Subsection C, Subsection C suggests that you can reserve ruling. All that it says is that the motion may be renewed, which means that having been made, and denied, that it may be renewed.

You don't renew something that has not been completed.

THE COURT: You are, in any event, renewing your motion after having rested, and the same rulings that I made previously with regard to those, unless the State has no objection, the arguments you made previously are accepted with regard to the motion that you made previously.

MS. KABBOSS: **I** am sorry to interrupt. The case that I was referring to

you, Hitchcock, 413 So.2d 741, if you want to pull it and see if my interpretation of that is correct or not --

* * *

THE COURT: That was Hitchcock?

MS. KABBOUSH: Yes, sir.

THE COURT: The FSA says, "Trial Court should not -- shall not reserve ruling presented at the close, but ever (sic) in reserving ruling on felony murder aspect of the case until Defense concludes its presentation was harmless, where factual basis supports felony murder theory, where Defense treated partial reservation as denial, as it would have, and where did not appear where Defense could have or would have proceeded in a different manner regarding felony murder, there by even if the Court had not reserved ru1ing."

THE COURT: I gather that that is the import of the decision putting the Defense into a position by doing something with regard to that and that is what I hope that I had addressed by indicating that I would deny the motion so that you have no misunderstanding from that standpoint, with the understanding that it can be renewed later on.

And I did not glean, when you said-- I questioned you whether I put you in that position, and I query you that you are not finding yourselves, by virtue of what I have done, in a position of resting.

MR. KRISCHER: But I was attempting to communicate that that was the next step, was for me to rest.

MS. KABBOUSH: Here is the full text of the opinion, if you want it.

> **THE COURT:** All right. For the purposes of being abundantly clear on this record, apparently the Hitchcock case was not going to come about in this case because of the understanding of Defense counsel as to my position.
>
> **MR. KRISCHER:** Yes, Sir

(R 3324-26, 3328-29).

From the above discussions, it is abundantly clear that the trial court did not impermissibly reserve ruling on the JOA motion. The trial court denied the motion, but allowed the defense to renew the issue on a motion for a new trial should they find case law (other than McCray, supra) to support the allegation that sexual battery can not be committed on a corpse.

Under the authority of Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960 (1982), and United States v. Conway, 632 F.2d 641 (5th Cir. 1980), (both cited by Appellant), the trial court's ruling, if error -- which the state does not concede as such -- the error was harmless. Since the trial court's denial was qualified to allow renewal of the issue on a motion for new trial, it could have, should have and was in fact considered denied by the defense. Because the factual basis supported a verdict of sexual battery or in the alternative attempted sexual battery (the completed act upon a corpse, see argument under Issue I of this brief), any reservation was harmless and did not prejudice Appellant. Appellant, in the videotape, confessed to "raping" Karen Slattery after removing her to the bedroom. The medical examiner's testimony proved sexual

battery of the victim. The defense presented the testimony of the medical examiner that it was possible Karen was dead at the time of the sexual battery. This testimony constituted the defense's only evidence to rebut sexual battery, but not attempted sexual battery, as such the defense properly treated the court's ruling as a denial. Since the victim was dead, the medical examiner had testified to the defense's theory on the State's side of the case, it does not appear that the defense could or would have proceeded in a different manner regarding the defense's theory even if the court did reserve ruling on the motion for acquittal. Hitchcock, supra, at **746.**

As discussed under issue I, supra, the evidence was sufficient to sustain a guilty verdict of sexual battery at the time the prosecution rested, or in the alternative verdict of guilt of attempted sexual battery if the jury believed the medical examiner's opinion that Karen was "probably" dead by the time the sexual battery was committed. As such, if there was a reserved ruling herein, the error was harmless. United States v. Conway, supra, at **643.**

V

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. _____, **96** L.Ed.2d **440 (1987),** claims he is

entitled to a new sentencing proceeding based on the fact that Karen'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.

The jury did not hear Mr. Slattery's comments, as the statement was made in court (R 4058-65) only after the jury had given its advisory sentence on a 11-1 vote for the imposition of death (R 4052). At that point the jury was thanked and excused by the court (R 4054-4056). At that point, the trial court re-asserted that pursuant to § 921.943, the court would hear any advice from the victim's family (R 3769, 4057), then he would hear arguments from the defense, the State, and again from the defense (R 4057). Because of the time of day, the court stated he would hear from the family at that point, but would not impose sentence at that time, rather a "specific sentencing date" would be set for in the future (R 4057).

On the date set for imposition of the sentence, the defense 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" (R 4649-4652). In denying the motion, the trial judge stated he had heard from Mr. Slattery because he is 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 (R 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 4213-4239). The trial court's sentencing order is clear, the sentence decision was based only on the aggravating and mitigating factors supported by the evidence, in that the court began by discarding the aggravating factors it found not applicable (R 4272), and found five (5) applicable aggravating factors (R 4272-77). After considering the evidence presented to establish mitigating factors (R 4277-4280) to determine if they outweighed the aggravating factors, but finding the mitigating factors did not outweigh the aggravating factors, the court arrived at the conclusion that death was appropriate (R 4280). There was no reference to or consideration of the victim impact statement. In any event, the error was harmless, see Grossman V. State, ____ So. 2d___ (Fla. Case No. 68,096, February 18, 1988).

The decision in Booth v. Maryland, 482 U.S. ____, 96 L.Ed.2d 440 (1987), does not require reversal in the present case, for 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 requires that the victim or victim's next of kin be permitted to make a statement in any felony sentencing, but there is no concommittant directive that it be considered in imposing sentence in a capital case.

The trial court below correctly recognized that the limited aggravating circumstances enumerated in § 921.141(5), controlled his decision. 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 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 consider-

ation 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 Lightbourne 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 pre-sentence 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. Therefore, the Appellant is not entitled to a new sentencing hearing.

VI

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 eleven (11) to one (1) that Appellant be sentenced to death (R 4052, 4637). The trial court, after finding five (5)

aggravating circumstances to be fully supported by the evidence beyond a reasonable doubt, accepted the jury's recommendation and sentenced Appellant to death (R 4271-4280, 4659-4662).

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 five (5) 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." 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 five (5) 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 Karen Slattery 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 committed for the purpose of avoiding or preventing a lawful arrest; (4) The murder was especially wicked, evil, atrocious or cruel; and (5) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R 4659-4662). Appellant is seriously challenging three (3) of the five (5) aggravating factors, and the State will address each of Appellant's contentions separately below.

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, although the trial court declined to consider Appellant's conviction for the first degree murder of Georgianna Worden (for which Appellant received a second sentence of death), to support this factor, it is clear that the conviction additionally supports the aggravating factor, Correll v. State, 13 F.L.W. 34, 37 (Fla. January 14, 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.

A. 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 as discussed under Count I of this brief, even if this Court should find that Karen 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).

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 KAREN SLATTERY 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 the murder occurred during the commission of 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). Therefore 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).

B. THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The State acknowledges that in order to support this aggravating factor where the victim is not a law enforcement officer, the State must prove beyond a reasonable doubt that the dominant motive for the murder was the elimination of a wit-

ness. Correll v. State, 13 F.L.W. 34, 37 (Fla. January 14, 1988). In the instant case the fact that Duane Owen stabbed Karen Slattery to death to eliminate her as a witness against him for the crime of burglary was proven beyond a reasonable doubt. See Jones v. State, supra at 168.

In his taped confession Appellant stated that when he saw Karen go for the phone after she saw him (ST 102-103), he decided to "just snatch the phone away before she calls the police or whatever.... Because the door was bolt locked and I didn't feel like making all that noise. [Because] by the time I got out and ran around and got my shit that was stashed out over here and ran and got my bike, they would have already been there and hot on the trail and a fresh track.. .." (ST 103). Appellant explained he walked toward Karen, who was still on the phone, and told her to "Hang up the phone," but "she didn't," so he dropped the hammer and grabbed the phone away from Karen (ST 104), Karen grabbed ahold of Owen trying to push him away, and he "ended up sticking her one." (ST 105). Through this statement, the aggravating factor was proven beyond a reasonable doubt. See, e.g. Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987) (The co-defendant attributed to the defendant the chilling statement, "Dead men can't tell no (sic) lies."); Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986) (Kokal's own statement to his friend to the effect that dead men can't talk confirms that the murder was committed to avoid or prevent arrest.); Wright v. State, 473 So.2d 1277,

1282 (Fla. 1985), cert. denied 474 U.S. 1094, (1986) (The record reflects that defendant admitted he killed the victim because she recognized him and he did not want to return to prison.); Herring v. State, 446 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989 (1984) (A detective testified Appellant said he "shot a second time to prevent [the victim] from being a witness against him"); Oats v. State, 446 So.2d 90, 95 (Fla. 1984) (This factor proven by Oats' statements in his confession.); Johnson v. State, 442 So.2d 185, 188 (Fla. 1983), cert. denied, 466 U.S. 963 (1984) (Appellant's statement that he killed the proprietor because "dead witnesses don't talk" is sufficient proof that he committed the murder to eliminate a witness to the robbery.); Hitchcock v. State, 413 So.2d 741, 747 (Fla.), cert denied, 459 U.S. 960 (1982) (in his post-arrest statement Hitchcock said that he chocked and beat the child to make her be quiet and to keep her from telling her mother.); Elledge v. State, 408 So.2d 1021 (Fla. 1981), cert denied, 459 U.S. 981 (1982) (During the confession Elledge detailed the victim's threats to call the police when he initiated the rape. Such evidence is sufficient to support this factor.); Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978) cert. denied, 444 U.S. 919 (1979) (Appellant's statement that "I was afraid I was going to get caught" proved he killed the victim to avoid later identification.) There was no other reason for this senseless killing.

C. THE MURDER WAS COMMITTED IN A COLD CALCULATED AND PREMEDITATED MANNER.

The trial court's order on this factor provides:

> E. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> On this record there is no doubt let alone a reasonable one that the State has proved this aggravating factor. The defendant stalked the house. He entered the house, checked it out, left the house and went to a bar. Returned to the house and armed himself with a hammer and a knife. Covered his hands to leave no prints. Left a change of clothing outside. All these matters evidencing a heightened premeditation.

(R **4661).** 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).**

The Appellant's statements to the police reveal he broke into the Helm's residence through the bedroom window after stalking the surroundings of the house at about **8:30** p.m. He searched for jewelry and other valuables in the master bedroom, but found none. When he began to go out of the bedroom, he heard

Karen playing with the two little girls she was babysitting, so he closed the door and left the house and replaced the window screen to make it appear no one had come in. Appellant went to a bar for a couple of hours. Then at about 10:30 or 11:00 he came back, made his way into the home through the same window which he left open for this purpose, proceeded to locate Mrs. Helm's gloves from the closet and took the hammer with him to burglarize the rest of the house. He knew Karen was still watching television, and Appellant made sure the two little girls were asleep in their bedroom, then he closed their door. During his confession, Appellant stated he brought the knife with him that night, that he used it to cut the screen on the bedroom window, and then used it to stab Karen. (See ST 1102-1170).

This Court recently in Rogers v. State, 511 So.2d 526, 533 (Fla. 1986) held that to support this aggravating factor, the State must prove a careful plan or prearranged design that supports the heightened premeditation described in the statute. The State submits that the facts show Appellant broke into the house to steal the Helm's valuables, however, being unsuccessful he decided to go after Karen. Upon realizing the two little girls were still up, and not wishing to harm them, Appellant left for a bar to have some drinks. After a couple of hours at the bar, he came back to the house to finish his plan. These facts fully support the finding of a cold, calculated and premeditated design. Jennings v. State, 512 So.2d 169, 175-176 (Fla. 1987).

Similar facts have been accepted by this Court to support this factor. In Jackson v. State, 498 So.2d 406 (Fla. 1986), the defendant vandalized her own car, when the officer responded to a call from neighbors, the defendant went to her house to obtain the papers relating to the car in response to the officers request. When she came back, she produced a pistol on the unsuspecting officer and shot him six (6) times. The court upheld the finding of cold, calculated and premeditated design under those facts. Id. at 498. In Rose v. State, 472 So.2d 1155 (Fla. 1985), the defendant was seen walking with the victim down the street. After a sound of breaking glass, the witnesses saw one of the men on the ground. The defendant walked to a nearby vacant lot, picked up a concrete block, and returned to hurl the 35 pound block six or eight times onto the head of the helpless and defenseless man. These facts were found to support the aggravating factor (CCP) Id. at 1159. In Duest v. State, supra, the defendant met his victim at a bar and agreed to go back to the victim's residence for a homosexual encounter. First they stopped by the defendant's home where he retrieved a dagger. The victim was found stabbed to death. This factor was upheld by this Court. Id. at 449-450. 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 from punctured lungs 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), 454 U.S. 1041 (1981).

The evidence in the case at bar reveals that when Karen turned and saw Appellant she tried to fight him off (ST 1140). The medical examiner testified Karen Slattery was stabbed and cut eighteen (18) times (R 2'666); seven (7) of the wounds, or any one of them could have caused death (R 2674). One of the cuts to the neck went through the esophagus (R 2670). The doctor explained that the type of cuts prove Karen was alive and moving while being stabbed (R 2677; 3710). Dr. Tobin testified Karen's death was not instantaneous and was very painful (R 3710). Further, one of the wounds punctured her lungs causing them to collapse (R 3714). He explained that when the lungs collapse, the respiratory function is impaired. When the individual realizes something is wrong he suffers an involuntary reaction of violent respiratory efforts due to a sensation of "air hunger" for lack of oxygen (R 3715). The collapsing of the lungs causes the victim to lose the ability to vocalize (R 3716).

Further, the doctor stated Karen suffered massive blood loss causing her to go into shock which is a feeling of impending doom (R 3717-3719). The medical examiner stated Karen was conscious throughout the brutal attack (R 3721), and in fact Karen

probably remained conscious for two minutes after her lungs collapsed (R 3722).

This court has consistently held that killing by numerous stab wounds is the type to which the factor of heinousness is applicable, Kight v. State, 512 So.2d 922, (Fla. 1987) (Multiple [51] stab wounds to the upper region of the victim's body), as in the instant case. In Hansbrough v. State, 509 So.2d 1081 (Fla. 1981), the medical examiner testified the victim was conscious while being submitted to thirty-some stab wounds, and this Court upheld the HAC finding. Id. at 1086. In Nibert v. State, 508 So.2d 1 (Fla. 1987), the victim was stabbed seventeen times, the HAC finding was affirmed. Id. at 4. Melendez v. State, supra at 1261, HAC proven by the "slitting of the victim's throat and knowledge of his impending doom." Floyd v. State, 497 So.2d 1211, 1214 (Fla. 1986), the victim dies from the deep stab wound to the chest, perhaps two to four minutes, after sustaining that wound. However, the victim was alive for a total of twelve stab wounds to her torso; this murder was heinous, atrocious and cruel. The victim in Johnston, supra at 871, was stabbed three times completely through the neck and twice in the upper chest. It took the victim three to five minutes to die after the knife severed the jugular vein; the victim experienced considerable pain during the attack supporting hac finding. In Bertolotti v. State, 476 So.2d 130 (Fla. 1985) the victim was repeatedly stabbed, and was found naked from the waist down, and medical

tests showed intercouse had taken place. Hac was proven beyond a reasonable doubt.

In Medina v. State, 466 So.2d 1046, 1050 (Fla. 1985), the victim was stabbed ten times, did not die instantaneously and experienced considerable pain. HAC was found to be valid under those facts. Duest v. State, supra at 449 (eleven stab wounds); Lemon v. State, 456 So.2d 885, 887-888 (Fla. 1984) cert. denied, 469 U.S. 1230 (1985), (victim repeatedly stabbed, fully aware of impending doom); Card, supra at 22 (The wound was vicious, it completely severed the windpipe and the right side jugular vein); Lusk v. State, 446 So.2d 1038, 1042 (Fla.) cert denied, 469 U.S. 873 (1984). (the premeditated stabbing caused the victim to bleed to death with a high degree of pain); Preston v. State, 444 So.2d 939, 945 (Fla. 1984) (where defendant committed murder by using knife to the jugular veins, trachea and main arteries of the neck, was found to be heinous, atrocious and cruel); Peavy v. State, 442 So.2d 200 (Fla. 1983); Mason supra at 379 (victim lived from one to ten minutes after being stabbed and aware of her impending death); Morgan, supra at 12 (cause of death was one or more of ten stab wounds, was found to be HAC); Breedlove v. State, 413 So.2d 1, 9 (Fla.), cert. denied, 459 U.S. 882 (1982) (Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately); Booker v. State, 397 So.2d 910, 917 (Fla. 1981). (defendant severely beat, wounded, raped and stabbed victim in the throat; this was found to be HAC); Straight v.

State, 397 So. 2d 903, 910 (Fla.), cert. denied, 454 U.S. 1022 (1981) (that the murder inflicted by multiple stab wounds and bludgeoning supports a finding of HAC); Washington supra at 665 (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.

A trial court has broad discretion in determining the applicability of mitigating circumstances urged. Kight, supra at 933, and the weight to be given it. Nibert, supra at 4. It is clear from the trial court's sentencing order (R 4659-4662) 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, Rogers supra at 534-535; Tompkins supra at 421; Deaton v. State, 480 So. 2d 1279, 1283 (Fla. 1985); Johnson, supra at 871-872; Kokal, supra at 1319; 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 five (5) valid aggravating circumstances: the murder was committed by one previously convicted of two separate and distinct violent felonies; for the purpose of avoiding arrest; during the commission of a burglary, and a sexual battery; the murder was especially heinous, atrocious and cruel, and committed in a cold, calculated and premeditated manner, by a person who although had personality disorders, was well aware of the consequences of his acts (R 3819-3823). 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 the single mitigating factor. Id. The error, if any, was harmless beyond a reasonable doubt.

Even when the single mitigating circumstances of personality disorder is weighed against the five (5) 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. 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.111-113 supra.

VII

NO REVERSIBLE ERROR OCCURRED BY THE STATE'S CROSS-EXAMINATION OF DR. PETERSON.

Appellant alleges the questions propounded by the prosecutor on cross-examination had a "grossly prejudicial impact on the jury which poisoned the Phase II proceedings" (AB **62**). This argument is totally lacking in substance both factually and legally.

The trial court granted Appellant's motion to appoint Dr. Peterson, in particular, to assist the defense in the preparation of its case (R **4448-4449, 4453**). The defense called Dr. Peterson during Phase II of the trial, and he testified that Appellant suffers of both antisocial personaltiy disorder, and schizophrenoform disorder (R **3801**). As a predicate for his diagnosis, Dr. Peterson stated that over a series of interviews on different dates he spent eight and a half hours with Appellant, and another eight and a half hours reviewing records, interpreting data and other follow-up work on the case (R **3799**). Dr. Peterson specifically stated that by the time he concluded all his contact and work, he felt he established a clear rapport with Appellant, and "had [Appellant's] full cooperation" (R **3799**).

On cross-examination, in order to impeach the doctor's testimony, the prosecutor was successful in having Dr. Peterson inform the jury, that two-thirds of the criminal work he does as part of his practice involves specific requests by defense attorneys to assist them in preparation of their defense; and that he could not recall a capital case in which he has testified for the

State (R **3808**). Dr. Peterson also conceded that although he might be court-appointed he reports only to the Defense (R **3809**). Along those lines, the following colloquy took place:

> Q. [By the Prosecutor]: More specifically, as it relates to Duane Owen, you got involved in this case because an Assistant Public Defender by the name of Bert Winkler made contact with you to assist him at the time that the Public Defender's office represented Duane Owen; isn't that correct?
>
> A. [Dr. Peterson]: That is correct.
>
> * * *
>
> Q. As a matter of fact, you worked with Mr. Winkler on a more recent murder case, that being Defendant Ontre Jones, an individual accused of a pawnbroker's murder, isn't that correct?
>
> A. Yes, sir -- yes, ma'am, that is correct?
>
> Q. And isn't it a fact, sir, that when you, as an individual, went to interview Ontre Jones on behalf of Mr. Krischer--
>
> MR. SALNICK: Judge, I am going to object, and approach the bench.
>
> THE COURT: All right.
>
> (Whereupon, there was a side-bar conference)
>
> * * *
>
> Q. Dr. Peterson, when you have occasion to visit a peson accused of -- well, let me, more specifically ask -- to visit a person accused of a capital crime and you have occasion to intro-

duce yourself, sometimes that individual is somewhat suspect of who you are; is that a fair statement?

A. Yes, quite often that is true.

Q. You make efforts at that point, do you not, to assure that individual that you are there to assist him at that point, if that is your role, if you are there to assist the defense?

A. Correct. There is a standard introduction procedure, which advises the Defendant as to what my role in the case is, whether it is having been retained for the Defense or for the State, or more often than not, court-appointed to report to all parties and to advise the Defendant as to what the limits of the confidentiality of the interview is.

Q. Dr, Peterson, I would like to direct your attention to sometime ago. If you will recall when you had occasion to make contact with Ontre Jones, you made an effort at that time to secure his confidence by particular means; isn't that correct?

A. The standard means, yes.

Q. In addition to that standard means you instructed or gave a suggestion to Ontre Jones to go and talk to Duane Owen to tell him, Ontre Jones, that you are an okay guy?

A. No. I am afraid that is incorrect.

Q. What is correct?

A. Mr. Jones asked me if he could be excused to go -- and go check me out to somebody. He didn't mention who he was going to check me out with, and I said, "I suppose that is all right, Who are you going to speak to?"

> And he named Duane Owen at that time.
>
> Subsequently, he left the interview room and returned a few minutes later, apparently reassured that I would be all right to talk to. It wasn't my suggestin, that is what I am trying to get at.
>
> Q. All right, sir, and then after he made that inquiry of the Defendant, Duane Owen, Ontre Jones proceeded to talk to you, is that correct?
>
> A. Yes, he continued then.

(R 3809-10, 3812-14).

Whenever a witness takes the stand, he ipso facto places his credibility in issue. Cross-examination of such a witness in matters relevant to credibility are given a wide scope in order to delve into the witness' story, to test the witness' perceptions and memory, and to impeach the witness. Mendez v. State, 412 So.2d 965 (Fla. 2d dCA 1982); D.C. v. State, 400 So.2d 825 (Fla.3d DCA 1981). In the instant case, the doctor testified as to how cooperative Appellant was during the interviews, and what good rapport there existed between the two of them. The challenged questions on cross-examination were used to provide the jury with all the facts surrounding the circumstances, in order to allow them to assign the proper weight and credibility deserved by the doctor's evaluation of Appellant's capacity. See, Jones v. State, 289 So.2d 725 (Fla. 1974); Knight v. State, 97 So.2d 115 (Fla. 1957); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935). The questions specifically showed the relationship

between Doctor Peterson and Appellant, and whether Doctor Peterson was biased toward the defense. See, Henderson v. State, 94 Fla. 318, 113 So. 689 (Fla. 1927).

Appellant alleges an "unconstitutional inference" was made that Appellant and Ontre Jones were both inmates at the county jail. (AB 62). First, a review of the pertinent portion of the cross-examination (R 3809-3814) clearly shows, no one mentioned the "county jail," or more specifically where the interviews were conducted. Therefore, it cannot be said that the prosecutor impermissibly hinted that Appellant was still incarcerated in the county jail. Secondly, even if the jury "assumed" both Ontra Jones and Appellant were being held in the county jail, it is difficult to see how this fact was held against Appellant by the jurors. This jury had convicted Appellant of first degree murder; it can only be taken for granted that the jury would be relieved to know that Ontre Jones and Appellant, both respectively charged and convicted of murder, were in jail prevented from committing any further violent crimes.

In an analogous situation, it has been held that an inadvertent sighting of the defendant in handcuffs by the jury is not *so* prejudicial as to require a mistrial or new trial. Heiney v. State, 447 So.2d 210, 214 (Fla. 1984); Neary v. State, 384 So.2d 881, 885 (Fla. 1980).

The questions and answers herein were relevant to assist the jury in testing the credibility of Dr. Peterson's

testimony, to show motive, plan, intent or knowledge. See, Smith v. State, 424 So.2d 726 (Fla. 1982), cert denied, 462 U.S. 1145 (1983); McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 104 (1981). As such the trial court did not abuse its discretion in overruling the defense' objection. Welch v. State, 342 So.2d 1070 (Fla. 3d DCA 1977).

If in impeaching the credibility of a defense witness, the prosecutor incidentally elicits testimony that would be otherwise inadmissible, the testimony is not ipso facto rendered inadmissible. The questioning of Dr. Peterson concerning his conversation with Ontra Jones was proper to impeach his credibility. Appellant requested no instruction to the jury that this evidence should be considered by them only as it bore on Dr. Peterson's credibility, and any error in the trial court's failure to give such an instruction was waived. Sias v. State, 416 So.2d 1213, 1218 (Fla. 3d DCA), pet.rev.den. 424 So.2d 763 (Fla. 1982).

In any event, in view of the sufficient amount of aggravating factors to support the jury's recommendation of death, the admission of the testimony, if error, it was harmless beyond a reasonable doubt.

VIII

THE TRIAL COURT PROPERLY IMPOSED THE DEATH SENTENCE AFTER FINDING THE EVIDENCE ON APPELLANT'S MENTAL ILLNESS DID NOT RISE TO THE LEVEL OF MITIGATING CIRCUMSTANCES.

Appellant argues that the trial court's failure to consider Appellant's mental illness as a mitigating factor entitles him to have the sentence vacated (AB **64-65).** A simple reading of the trial court's order (R **4659-4662)** refutes Appellant's contentions.

The Order in pertinent part provides:

> A respected Psychologist testified in DUANE'S behalf that even though DUANE knew what he was doing and knew right from wrong with regard to the crime he had a "snap" of the mind after the first stab occurred and thereafter DUANE was acting in a frenzy much like a shark attack when there is blood in the water. The Psychologist states that these matters were all a game or test from which DUANE got excitement. That DUANE was trying to fill an Ego need and that DUANE has little self esteem. In addition to all this DUANE wanted to be a policeman and enlisted twice in the army. (With some exceptions the evidence was identical on mitigation in both cases)

The record is abundantly clear, that both the jury and the trial judge heard Dr. Peterson's testimony regarding Appellant's alleged "mental illness." (R **3794-3853).** The court in its order made reference to all the evidence he heard either at the penalty phase or during the trial, and stated that he had not disregarded any of the mitigating circumstances offered in

evidence. 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.

Dr. Peterson did not testify that Appellant has a mental illness, but merely that he suffers from antisocial personality disorders (R 3801). The trial court did consider all the evidence on Appellant's mental and emotional problems as factors to be weighed but concluded that they did not outweigh the proven aggravating circumstances calling for a sentence of death. It is not this Court's function to engage in a general de nova re-weighing of the circumstances. Rather, the Court is to examine the record to ensure that the findings relied upon are supported by the evidence, Atkins v. State, 497 So.2d 1200, 1202 (Fla. 1986); ~~see also~~, Johnson v. State, 442 So.2d at 189, it was within the trial judge's province to grant the psychologist's testimony little or no weight; Sireci v. State, 399 So.2d 964, 971 (Fla. 1981), cert denied, 456 U.S. 984 72 L.Ed.2d 862 (1982) (personality disorders are described as the least serious of all disorders; nothing presented requiring the trial court's findings be disturbed); Hargrave v. State, 366 So.2d 1, 6 (Fla. 1978) (although some evidence of a personality defect in the defendant

existed, obviously the court and the jury were not persuaded it established the mitigating factor, and their findings will not be disturbed).

The record clearly reveals that the trial court considered the evidence on Appellant's "mental illness" as a mitigating factor and concluded it failed to rise to a sufficient level to be weighed as mitigating circumstnace. This same argument has consistently been rejected by this Honorable Court in Kight v. State, supra, and Roberts v. State, 510 So.2d 885, 894 (Fla. 1987); Provenzano, supra at 1184; Doyle, supra at 357; Card, supra at 23; Medina, supra at 1050. The trial court's findings must be affirmed. Roberts, supra.

IX

THE TRIAL COURT DID NOT ERR BY ALLOWING THE VICTIM'S MOTHER TO TESTIFY.

Appellant alleges Karen's mother, Carolyn Slattery, was called to testify at trial for the sole purpose of creating "improper sympathy for the victim's family through a display of emotion" (AB 66). The record is clear that when Mrs. Slattery was called to the stand, the defense objected alleging Mrs. Slattery was unable to control her emotions at deposition, and that if the same outburst occurred in the presence of the jury this would be highly prejudicial. (R 3206-3209). The defense specifically stated they were not taken issue with the State's right to call that witness (R 3207). The court overruled the

objection, finding the witness' testimony to be relevant (R 3211).

Mrs. Carolyn Slattery took the witness stand and testified concerning the apparel Karen was wearing on the night of the murder (R 3215), and that the shorts were long and came down to Karen's knees (R 3217). Mrs. Slattery also testified to Karen's physical appearance (R 3217), and to the fact that after two years of wearing braces on her teeth, the braces had recently been removed, and so Karen was eager to chew gum and did so. Additionally, Mrs. Slattery corroborated the fact that Karen wore a retainer (R 3214-15). Mrs. Slattery also testified as to Karen's special talent and enjoyment of working with people's hair (R 3217). All these facts were necessary to corroborate the facts as related by Appellant during his taped confession, and to show these facts would only be known by the murderer.

The test for admissibility is relevance. Appellant argues that the items Mrs. Slattery testified about had already been stipulated into evidence, therefore her testimony was irrelevant. However, "a defendant cannot by stipulating as to the identity of the victim and the cause of death, relieve the State of its burden of proof beyond a reasonable doubt." Foster v. State, 369 So.2d 928, 930 (Fla.) cert denied 447 U.S. 885 (1979). See also, Engle v. State, 438 So.2d 803 (Fla. 1983); Nettles v. Wainwright, 677 F.2d 410 (5th Cir. 1982). Mrs. Slattery's testimony was relevant to corroborate the fact that

Duane Owen committed the murder, this relevant testimony was peculiarly within her knowledge, and as such was admissible. The testimony of Mrs. Slattery was properly admitted at the trial. Randolph v. State, 463 So.2d 186 (Fla. 1984), cert. denied, 473 U.S. 907 (1985).

The record is clear that Mrs. Slattery did not become emotional during her testimony, rather, she was calm and articulate. This is supported by the fact that no interruptions were necessary during her testimony in order for Mrs. Slattery to compose herself, and the fact that no objections or observations into the record were made by the defense (R 3213-3217).

Mrs. Slattery's testimony was relevant to the proceedings and did not prejudice the Appellant in any way whatsoever. Since Mrs. Slattery maintained her composure at all times in front of the jury, her testimony did not prejudice the Appellant by injecting any element of sympathy into the proceedings. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Justus v. State, 438 So.2d 358 (Fla. 1983).

Even if the admission of the testimony could be considered error it would only be harmless error under the circumstances of this case. Malloy v. State, 382 So.2d 1190 (Fla. 1979); Scott v. State, 256 So.2d 19 (Fla. 4th DCA 1971). Since Mrs. Slattery did not testify as to her feelings or the impact Karen's death had on her, her testimony was not inadmissible under the authority of Booth v. Maryland, supra, and Appellant's

arguments are totally lacking in merit. No new trial is necessary on these basis.

X

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

In this issue X 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 constitute cruel and unusual punishment.

Appellant contends that § 922.10 ~~Fla. Stat.~~ is unconstitutional 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 5 921.141 Fla. Stat. are not

too 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, ___U.S. ___, 42 Cr.L. 3029, 3032-3033 (Decided January 13, 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., 42 Cr.L. at 3033. Thus, this argument is without merit.

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.

XI

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 XI of Appellant's Initial Brief (AB 89-96) 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]groups defined solely in terms of shared attitudes that would prevent or substantially impair members of 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 individuals 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 bifurcated capital murder trial, Gregg v. Georgia, **428** US **153, 158, 160, 163, 49L** 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** US **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 deliberations under Witherspoon, supra, Adams, supra, and Wainwright v. Witt, 469 US ___, 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 152-153. 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.

XII

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTIONS FOR THE PENALTY PHASE.

Appellant argues the trial court's denial of the requested instruction requires the sentence of death be vacated. It is settled law, however, that a trial judge should use the Standard Jury Instructions where they are appropriate, for a trial judge walks a fine line indeed upon deciding to depart. Kelly v. State, 486 So.2d 578 (Fla. 1986); State v. Bryan, 290 So.2d 482 (Fla. 1974). This is specially so at the penalty phase of a capital case where the risk is too great that an imprudent instruction may lay to waste the conscientious conduct of an otherwise entirely fair trial. In the instant case, the risk of deviation was greater because the judge realized he was dealing with a possible Caldwell[5] problem (R 3684-3690).

Further, where the instructions taken as a whole correctly and fairly charge the jury in relation to the issue and correctly states the law, no reversible error occurs, and the trial court is under no obligation to give purely argumentative instructions. U.S. v. Phelps, 733 F.2d 1464 (11th Cir. 1984). A defendant has no right to have the jury charged in any particular language. U.S. v. Jimenez, 484 F.2d 91 (5th Cir. 1973). The trial court, sub judice, denied the requested instructions on the

5 Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct 2633, 86 L.Ed.2d 231 (1985).

basis the language used in the request would do nothing more than confuse the jurors (R 3685-86), and that the Standard Jury Instruction that would be read to the jury covered the defense' concerns (R 3702).

There is no reversible error in refusing a requested charge if covered by the general charge. See e.g. Kelly v. State, supra; Bailey v. State, 411 So.2d 1377 (Fla. 4th DCA 1982); Mackiewicz v. State, 114 So.2d 684 (Fla. 1959); Fleming v. State, 34 So.2d 742, 160 Fla. 319 (Fla. 1948); U.S. v. Solomon, 686 F.2d 863 (11th Cir. 1982); U.S. v. Strauss, 886 (11th Cir.), cert. denied 459 US 911, 103 S.Ct. 218, 74 L.Ed.2d 173 (1982). Therefore, there appearing to be no error committed by the trial court, the sentence of death herein should be affirmed.[6] See, Combs v. State, ____So.2d____ (Fla. No. 68,477 February 18, 1988) Slip opinion pp. 4-9.

XIII

AN ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL MAY NOT BE RAISED FOR THE FIRST TIME ON DIRECT APPEAL.

Contrary to Appellant's contentions under issue III of his Supplemental Pro Se Brief (APB 42-43), a claim of ineffective assistance of counsel cannot be raised for the first time on

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6 Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) modified on denial of rehearing, 816 F.2d 1493 (11th Cir. 1987), U.S. Cert. Pet. Pending, 41 Cr.L. 4171 (Pet. filed 7/20/87), is not applicable sub judice in that the language used by the trial judge therein was a complete deviation from the Standard Jury Instructions, and in contradiction of the mandates of Caldwell, See, Adams, at 1531.

direct appeal. Williams v. State, 438 So.2d 781 (Fla. 1983), cert. denied, 465 U.S. 1109 (1984); Gibson v. State, 351 So.2d 948 (Fla. 1977), cert. denied, 435 U.S. 1004 (1978); State v. Barber, 301 So.2d 7 (Fla. 1974). This rule is applicable to capital cases. Perri v. State, 441 So.2d 606 (Fla. 1983); Gibson v. State, supra. Further, the rule was not receded from by this Court in Adams v. State, 456 So.2d 888 (Fla. 1984), as it is alleged by Appellant. Adams dealt with an appeal from a denial of a 3.850 motion to vacate his conviction, where this Court found that the matters raised to support the ineffectiveness claim were "all matters which could have been raised on direct appeal,'' but that the failure to interpose objections to these matters during trial was not such serious omission or such a deficient performance as to deprive defendant of a fair trial Id. at 890.

In the present case, Appellee does not concede and strongly disagrees that defense counsel in any way was ineffective in his representation of Appellant at trial. As to Appellant's claim concerning trial counsel's failure to have the videotapes examined by an expert (APB 44-48), it is conceivable that this was a judgment call by defense counsel which cannot be second guessed and accepted as ineffectiveness. This claim must be presented to the trial court before being raised before this Court.

As to the second claim (APB **48-52)** regarding the trial court's ruling preventing the defense from cross-examining Officer Pelligrini as to other suspects in the case, the record is clear, defense counsel attempted to bring out this information to the jury, objected to the trial court's ruling, moved for mistrial, and otherwise effectively preserved the issue for review on appeal, and has, in fact, been raised on appeal, see AB 111, pp. **42-45**. A claim of ineffectiveness of trial counsel on this basis is totally without merit as unsupported by the facts.

Therefore, since the record does not bear out Appellant's allegations, and since the specific allegations have not been presented to the trial court for determination, this issue should not be addressed by this court. Perri v. State, supra; State v. Barber, supra; Williams v. State, supra.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone : (305) 837-5062

Counsel for Appellee

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: THEODORE S. BOORAS, ESQUIRE, Counsel for Appellant, SALNICK & KRISCHER, 100 Australian Avenue, Suite 102, West Palm Beach, Florida 33406 and to DUANE OWEN, Pro se #101660, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 19th day of February, 1988.

Of Counsel