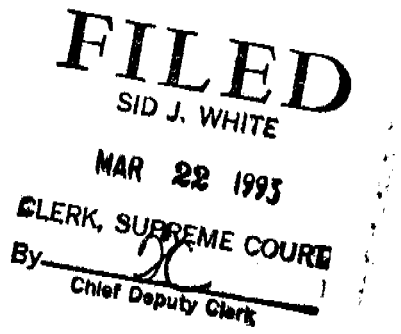
IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,676



JAMES A. MORGAN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY, FLORIDA CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

James Morgan was the Defendant and the State of Florida was the Prosecution in the Circuit Court of the Nineteenth Judicial Circuit of Florida. In the brief, the parties will be referred to as they stood in the trial courts.

The following symbols will be used:

R ..... Record on Appeal
1SR ..... First Supplemental Record
2SR ..... Second Supplemental Record
3SR ..... Third Supplemental Record
4SR ..... Fourth Supplemental Record

Additionally, note that page numbering 1034-1110 are repeated in the transcript. The repeated numbers are designated 1034A-1110A. (They are all in Volume VII.)

STATEMENT OF THE CASE

The State accepts the defendant's Statement of the Case as accurate.

STATEMENT OF THE FACTS

The information in the defendant's Statement of facts is accurate as far as it goes, however his recitation of expert testimony requires supplementation. Prior thereto, a brief overview is in order.

After the defendant's 1977 arrest, shortly after the murder, he was examined by three court appointed experts for competency and sanity, including Dr. Vaughn. In 1980 while his first trial was on appeal, the defendant gave a jailhouse statement to Detective Crowder. In 1981 the defendant was seen by Dr. Walter Dibbe, to whom he related the same version of events as he gave Detective Crowder. Also in 1981 the defendant was examined again by Dr. Vaughn, using hypnosis. Dr. Vaughn, now a defense expert, concluded that the defendant was insane. Unfortunately, the defendant was precluded from using an insanity defense at his 1981 retrial. In 1985, in preparation for the defendant's third trial, the defendant was seen by Dr. Caddy, who concluded that gaps in the defendant's memory prevented Dr. Caddy from determining sanity during the offense. Dr. Caddy, with the assistance of Dr. Kosen, believe they hypnotized the defendant, under which he gave a fuller version of events. They both concluded from this fuller version that the defendant was insane. This hypnotic session was not recorded, and according to the States' current expert, Dr. Orne, the session was devoid of the normal safeguards and was a completely unreliable source of information.

At the defendant's third trial, Drs. Caddy and Koson were not permitted to testify concerning the hypnotic session, its result or their findings based thereon, and this Court reversed on that basis. At the instant trial both testified, as did the

State's hypnosis expert, Dr. Orne. A main feature of the trial was the reliability and propriety of the 1985 hypnotic session, as the statements of the defendant given therein were necessary to Drs. Caddy and Kosen's finding of insanity. The second main feature of the trial was the substance of their insanity opinions, as contrasted with that of the State's expert, Dr. Dietz. In order to understand the rather incredible nature of the defendant's insanity defense, the testimony of these three doctors requires fuller treatment than is accorded in the defendant's brief.

Dr. Caddy was the first of the three to testify. Under supposed hypnosis, the defendant told him he was allowed in to use the victim's bathroom, although the victim gave him a dirty look. While in the bathroom the defendant became convinced the victim had smelled beer on his breath and would tell his parents. The defendant further became convinced, while in the bathroom, that he had to hurt or even kill the victim to stop her from telling his parents. He came out of the bathroom wrench in hand and bludgeoned the victim in the head several times. This portion of Dr. Caddy's testimony (R. 1112-1117) is revealing. Dr. Caddy believes the defendant was sane while in the bathroom, when he decided to attack the victim with the wrench, and was even sane while he attempted, with great success, to bash in her skull with the wrench. However, after the victim made it to the kitchen area, the look on her face, which reminded him of how his

mother looked when scolding his father for drinking, caused the defendant to lose all control and stab the victim repeatedly. It is during the stabbing that the defendant became momentarily insane because he could not control his rage:

> Q. If we could go to the issue of sanity and insanity. Do you believe that when the defendant picked up this crescent wrench, marked as State's No. 82, and he walked out to the bathroom saying I'm going to hurt her--or I'm going kill her, depending upon if you believe the version he told you or Dr. Vaughn, and then when he first struck the victim on the head that he was sane, correct?
>
> A. Yes.
>
> Q. And we know the victim was struck several times about the head, in fact, the defendant told you at least three times about the head, he was sane all those three times?
>
> A. Well, as I said to you before, if you want my full view of the matter he was functioning in an extremely limited way emotionally at that time. He was clearly extremely dysfunctional but he was in my view still likely sane.
>
> Q. And you had an opportunity to read the autopsy report in this case did you not?
>
> A. Yes.
>
> Q. And the autopsy report was the victim died not only from stabbing but from the beating with the wrench?
>
> A. I think that's true.
>
> Q. The victim's skull was crushed and broken in places as a result of the wrench. In fact, you've given testimony before that, [quote] I think that under

the circumstances of his loss of control after he picked up the knife he no longer knew the outcome and the consequences?

A. That's right.

Q. So sometime between the beating of the victim with the wrench numerous times about the head and picking up this knife he became insane?

A. Yes.

Q. What about when he picked up the vase knowing the vase came before the knife and jammed it into the victim's head as he told you he did? He was still sane then also?

A. No, I think that we're breaking--I think that--that during the process of the hitting with wrench we have this real decompensation taking place and by the time the vase comes into the scene he has lost it and then the knife just follows from that.

(R. 1112, 1113).

Dr. Caddy concluded the defendant was "probably insane" at the time of the vase and knife attack, but admits that in his 1985 deposition he said the defendant probably was not insane under the McNaughten test. (R. 1117). The defendant did not suffer a psychotic episode but rather an "implosive rage" (R. 1101). When asked if the defendant knew what he was doing was wrong, Dr. Caddy stated that during the second (vase/knife) phase of the attack "... he did not give consideration to whether it was right or wrong" (R. 1107).

The defendant's other expert on the insanity issue, Dr. Koson, testified in somewhat similar fashion. He began by relating the defendant's hypnotically induced account of events:

> A. He was able to elaborate on--on how he felt and the whys and wherefore, why was he getting so angry, what was going on, starting right from the door and that--that stepping back and looking at him, that--that look that he knew so well. He was able to discuss his feelings more about, you know, why he didn't want to work and--and his headaches and his wanting to get out of work and why he was angry at his father whom he expected to be there. The other area that he was able to elaborate on much further had to do with his reaction after he had struck her with the wrench. This was an impulsive act, he was getting, you know, angry, irritated, as I said but--and he'd done some drinking that day but it was a very, you know, sudden--he almost took himself by surprise I had thought, although these were my words, not his, it was a very sudden thing and I think he was reacting to what he had done to the consequences. And when she turned and looked at him, in the hypnotic interview he was able to talk about more of his feelings of panic, fear, able to discuss that this was the same look that his mother had had and that now I think he was reacting to what he done, he had just struck a woman with a wrench. And it wasn't staying out late or drinking and his mother's threats to take away his bicycle, it was now high ante and fear and panic were setting in. I think at that point he was able to discuss throwing a vase and trying to hit her in the face, chasing her, taking a knife and stabbing her many times. He was able to discuss under hypnosis some of the sexual behavior of the biting of her breasts, licking her genitals, doing the things he couldn't talk about before or wouldn't discuss with us. He was able at least to say what he did and to talk

about his feelings of anger, his need to--to degrade or defile, and just throughout this picture a constant sense of rage out of control. He could talk about most of this but not all of it at that second interview. And it was a story a rage that--coupled with fear and panic that just went absolutely out of control and he--he spends his anger, at least he appeared to, and could talk about not knowing what was going on with her, feeling for a pulse, looking for breathing, panicking and then his efforts to clean up, as he had before. That was what we got from the second interview.

(R. 1144, 1145).

Dr. Koson then explained that after commencing the attack, the defendant's emotions were so enraged he lost all control over his actions:

A. Having discussed what I just--what Mr. Morgan told me in my second interview, I will first discuss what I didn't think was going on with him, you know, medically or psychiatrically. I didn't think that he was having a seizure or--or that the couldn't remember because he'd been drinking so much. I concluded, as I indicated before, that there was an overwhelming of his behavioral controls, that the stress, the panic and especially the look on the face and the reaction to what he had just done, I think overwhelmed any controls that he had and there was a picture then of just an explosion of uncontrolled rage that could not be stopped by him. This I would--it's difficult to characterize diagnostically but to me this is an episode of dyscontrol and I would call this an isolated dyscontrol syndrome. I can also--I mean it is my belief that--that he was--during that time when--when I say that he--he blew up in a rage, he lost control, I think he lost at that time any capacity to--to think, to

> rationalize, to use logic to stop himself, to think about what he was doing and then I think he came to his senses. I think he recovered from that momentary and massive dyscontrol or loss of control. So I think that's-that's the best way to characterize his condition at that moment, not when he hit her with the wrench, not when he was coming to her door, not when he left the bathroom. I-- I think he was angry and acted impulsively but I don't think he was, you know, crazy, psychotic, I don't think he had totally lost control. It was at a particular point when she looked at him that I think he became absolutely out of control. So I would characterize that as--diagnostically as an episode-- isolated act of dyscontrol.
>
> (R. 1146, 1147).

Dr. Koson then stated that the defendant's "explosion of rage," his "explosive lack of control" (Id), prevented him from "understanding what he was doing, the nature of its act or its consequences." (R. 1148). At that point the defendant did not know right from wrong, although he did just prior to and immediately after the rage explosion. (Id).

The State's expert on insanity, Dr. Dietz, agreed that the defendant experienced an emotional rage, but explained that an isolated rage reaction is not a mental defect but rather a convenient label which describes a violent emotional outburst by a person with no prior history of such outbursts. The profession no longer uses this label because it was being misused in the forensic setting. An isolated rage reaction is just a violent

temper tantrum, an emotional outburst as opposed to a psychiatric or psychological condition. (R. 1438). Dr. Dietz stated the defendant suffered no hallucinations, delusions or other indications of psychotic or illogical thought processes. Rather the defendant lost his temper because his emotions, obviously long simmering, got completely out of control. (R. 1447-49). Dr. Dietz explained this concept further:

> A. It does mean a great outpouring of emotion and that brings me to the tenth area that I explore as a possible mental condition. Though not a mental disorder, let alone a mental illness, we still recognize emotions as a conditions of the mind and here there is ample evidence of Mr. Morgan having been exceedingly angry and enraged during the commission of the offense. I find evidence in those of his statements to doctors in which he's acknowledge what he did, of his being angry, he says so. He's said many times that he was angered at her, that he was mad at her, that he wanted to hurt her, and that his anger grew during the time he was with her. The scene itself as I'll describe in some detail shows evidence of great anger and rage in what he did at that scene and what he did to Mrs. Trbovich. So both the defendant's own statements and the crime scene evidence and the autopsy are quite consistent and being indicative of great anger and great rage. But great anger and great rage is on the same spectrum as a temper tantrum. We certainly wouldn't want to trivialize this crime by causing it a temper tantrum but it's the same kind of behavior in which one loses one's temper and is action out of emotion without much reflection. And that I think is very much the mental state of James Morgan on the day of this offense, that he was exceedingly angry and enraged. That is not a mental illness, it's not a mental defect, it's not a

> mental infirmity but it certainly is psychologically significant for someone to be that angry.
>
> (R. 1450-51).

Dr. Dietz then addressed the McNaughten standard. The defendant does not have a mental infirmity, disease or defect, because anger and rage do not qualify as such. (R. 1452). Dr. Dietz then undertook a detailed and extremely informative review of the crime scene evidence and the defendant's history of statements about the murder. (R. 1452-1472). In relation to the second part of the McNaughten test, he concluded:

> The evidence that I reviewed and that I've just described to you is entirely consistent with the evidence from the crime scene and from the autopsy, namely that Mr. Morgan committed this crime while very angry at Mrs. Trbovich, that he became enraged but that he knew what he was doing while he did it and that he knew the wrongfulness of his actions. We know that he knew it was wrong because his moral faculty that governs one's ability to know right from wrong was intact. When he says he was concerned about his mother finding out about his drinking or when he says he was concerned about his mother or father finding out about the murder, that's an indication that he knew that punishment could follow bad conduct, that he knew that conduct had consequences. When he attempted to remove his footprints from the floor, he was attempting to remove evidence that tied him to that crime. When he washed blood from himself, perhaps in the sink or wiping his hands in the bathroom, but certainly when he washed himself with the hose as he later says, or a tap outside, he is removing evidence of the crime he's just committed. And if one believes his

statement made earlier that he had had washed his clothes at home and dried them the very night of the murder, there too, he knows what he has done and the wrongfulness of it. While he was committing the offense there are several stages and those stages involve an escalation in his anger during the sequencing of the events. When he first struck her with an intent to either hurt her as he said many times, or to kill her as he said at least once, there was no--there is no question of his knowing what he was doing and of having a perfectly ordinary motive, that of hostility and anger, for striking her. But a question's been raised about whether later as he's stabbing here he is capable of reflecting on what he's done and knowing what he's doing, knowing that it's wrong. Well, I think to understand what his mental state was as he was stabbing Mrs. Trbovich one has to understand what it is like to be intensely angry. Because by the time he is stabbing her repeatedly I don't think he is pausing to reflect before each stab, he did not stop and ponder 50 or 60 times whether to stab her the next time, but he stabbed her and stabbed her and stabbed her some more being frightened that she wasn't dying, she was not going unconscious, she wasn't dying. This does not mean that his behavior at that time was due to mental illness and it does not mean that he was psychotic. It means that he was in that state of great anger or rage where one is not governing one's temper or one's passion, where one is behaving in a way one might very soon regret but not because or mental illness. This is an angry outburst of the first order without an indication that the defendant had a mental infirmity or mental disease or mental defect when he did it. Now according to the test of insanity in Florida an individual must have two different features as I interpret this psychiatrically before they can be found insane. One is that they must have a mental disease or

infirmity or defect. And as I've explained to you I do not believe that Mr. Morgan had such an infirmity, disease or defect on the day of the murder. The other is that that mental disease, infirmity or defect has to impair his function to be able to know what he's doing or its consequences or has to impair his function to be able to know that what he's doing is wrong. And I don't believe either of those functions was impaired either, not by mental illness, not by mental disease, not by mental infirmity, not by mental defect and even by rage or anger. His rage or anger, though on a big scale, were like the ordinary experience that people have of rage or anger when things upset them greatly.

(R. 1472-74).

ISSUES PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO ARGUE ATTORNEY-CLIENT CONVERSATIONS.

II.

WHETHER THE TRIAL COURT ERRED IN ADMITTING STATEMENTS OF THE DEFENDANT MADE TO OFFICER CROWDER.

III.

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FELONY MURDER.

IV.

WHETHER THE TRIAL COURT ERRED IN NOT APPOINTING ADDITIONAL DEFENSE EXPERTS.

V.

WHETHER THE TRIAL COURT ERRED IN GIVING A SPECIAL JURY INSTRUCTION ON IRRESISTIBLE IMPULSE.

VI.

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ELICIT STATEMENTS MADE BY THE DEFENDANT DURING PSYCHIATRIC EXAMINATION.

VII.

WHETHER UNOBJECTED TO TESTIMONY ABOUT THE VICTIM CONSTITUTED FUNDAMENTAL AND REVERSIBLE ERROR.

IX.

WHETHER THE TRIAL COURT ERRED IN "FORCING" THE DEFENDANT TO BE REHYPNOTIZED.

X.

WHETHER THE TRIAL COURT ERRED IN ALLOWING A STATE EXPERT TO EXAMINE THE DEFENDANT.

XI.

WHETHER THE RECORD IS SO INCOMPLETE AS TO PRECLUDE A FULL AND FAIR APPEAL.

XII.

WHETHER THE FLORIDA CONSTITUTION PROHIBITS EXECUTION OF A PERSON WHO IS SIXTEEN AT THE TIME OF THE OFFENSE.

XIII.

WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

XIV.

WHETHER THE TRIAL COURT ERRED IN ITS FINDINGS IN MITIGATION.

XV.

WHETHER THE HAC INSTRUCTION REQUIRES REVERSAL UNDER ESPINOSA.

XVI.

WHETHER THE FELONY MURDER AGGRAVATOR WAS IMPROPERLY FOUND.

XVII

WHETHER THE UNOBJECTED TO PROSECUTORIAL COMMENTS REQUIRE REVERSAL.

XVIII.

WHETHER THE TRIAL COURT ERRED IN ITS FINDINGS ON NONSTATUTORY MITIGATION.

XIX.

WHETHER THE TRIAL COURT ERRED IN FINDING HAC.

XX.

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

SUMMARY OF ARGUMENT

I.

The supposed attorney-client conversation consisted of defense expert Dr. Caddy confronting the defendant with his prior lies, and the defendant attempting to blame his lying on a prior (unnamed) attorney, who he claimed encouraged him to lie. The existence of an actual attorney-client conversation was never established, and even had it been, it was waived when the defendant disclosed the alleged conversation to his expert for purposes of assisting his diagnosis.

II.

The defendant's exculpatory statements to Detective Crowder in 1980 were in no way police initiated, however this Court need not decide the issue because the defendant told the exact same story to Dr. Dibbe in 1981, and his own experts stated the defendant's pre-1985 statements were all a pack of lies, which Dr. Caddy referred to as ". . . those other yarns."

III.

This issue is absolutely procedurally barred. Additionally, the trial court at the defendant's first trial did not "acquit" the defendant of first-degree felony murder, rather his sole ruling was that the motion for judgment of acquittal be denied because the evidence of premeditation was legally sufficient. More fundamentally, the defendant was charged with first-degree murder at the first trial, convicted thereof, and acquitted of nothing. The Eleventh Circuit in Delap simply

misinterpreted Florida's first-degree murder statute, when it essentially held that first-degree felony murder and first-degree premeditated murder are separate offenses for double jeopardy purposes. However, as stated above, the complete lack of preservation of this issue, either at the instant, third or second trials, should create a procedural bar to the instant claim.

IV.

The trial court did not err in failing to appoint more experts, as the defendant already had the assistance of extensive expert assistance in this cause.

V.

The special instruction on irresistible impulse was proper.

VI.

The statements the defendant made to various experts were all properly before the jury.

VII.

The references to the victim being a nice person were not objected to and the issue is thus waived.

VIII.

The State's experts did not attack the credibility of the defense experts, rather only their methodology. The incidents cited by the defendant contain attacks on the defendant's credibility, not that of his experts

IX.

The trial court did not "force" the defendant to attempt to be hypnotized, and any error in this regard was harmless beyond a reasonable doubt.

X.

The trial court properly allowed the State's expert to examine the defendant in order to assess his sanity at the time of the offense.

XI.

The remaining inaudibles in the record are insignificant and have in no way prevented a full and fair appellate review.

XII.

Florida's Constitution, as with the United States Constitution, does not bar execution of a person who is sixteen when the crime occurred.

XIII.

The death sentence is not disportionate.

XIV.

The trial court's use of an improper standard was harmless error, as he arrived at an independent conclusion.

XV.

Although the defendant objected to the HAC instruction on constitutional grounds, the relief he sought was no instruction at all on HAC, rather than an expanded definition. The defendant's Espinosa claim is thus improperly preserved.

XVI.

The felony murder aggravator was properly found, if not for sexual battery than most definitely for burglary.

XVII.

The complained of comments by the prosecutor were either proper, unobjected to or both.

XVIII.

The trial court's order predates Campbell and hence the failure to specifically address all nonstatutory mitigators is not ground for reversal.

XIX.

The trial court properly found the HAC aggravator applicable to this torture murder.

XX.

Florida's death penalty statute is constitutional.

ARGUMENT

I.

THERE WAS NO VIOLATION OF ATTORNEY CLIENT PRIVILEGE.

During opening statement the prosecutor referred to statements the defendant made in 1985 to his own expert, Dr. Caddy (R. 597); when Dr. Caddy confronted the defendant with his history of wildly conflicting stories, the defendant told Dr. Caddy that his parents and a prior (unnamed) defense attorney told him to lie to help his case. The defendant objected to this portion of the prosecutor's opening statement, which objection was sustained. He belately asked for a mistrial (R. 653), which was denied. During the prosecutor's cross-examination of Dr. Caddy he testified that the defendant did not want to accept responsibility for his lies, blaming them on a prior defense attorney (R. 1075A). There was no objection to this testimony. Dr. Caddy did not believe the defendant and in fact referred to these initial explanations as "stupid, incompetent" lies. (R. 1065).

The State's first point is that the existence of a confidential communication was never established, and indeed the crux of Dr. Caddy's testimony was that the defendant was giving him yet another fabrication. Secondly, even if some unknown prior defense attorney had told the defendant to lie to bolster his insanity defense, whatever privilege existed at the time of

the supposed communication was waived when the defendant disclosed it to his expert for purposes of assisting the expert in his diagnosis, an expert who became subject to cross-examination on the bases for his opinion at trial. See Fla. R. Evid. 90.704, 705. The State's third point is that the issue is in all events waived because Dr. Caddy testified to the matter without objection, and its fourth is that if an attorney tells his client to fabricate evidence and commit a fraud upon the court, such communication is underserving of any privilege whatever.

II.

ANY ERROR IN ADMITTING THE DEFENDANT'S STATEMENT TO DETECTIVE CROWDER WAS HARMLESS BEYOND A REASONABLE DOUBT.

There are very stimulating "police initiated" versus "defendant initiated" facets to this issue. The defendant's case was pending on appeal. His appeal was being handled by a different public defender's office than handled his trial (Nineteenth vs. Fifteenth). The defendant's parents had retained or wanted to retain private counsel, Raymond Ford, for the anticipated retrial (R. 975). The parents contacted Detective Crowder through a friend, and told Crowder that he must go see the defendant because he has something he needs to tell the police. Detective Crowder speaks with Ford, who tells Detective Crowder that "his" client, the defendant, wants to talk to Crowder. Ford agrees to attend the interview but cancels at the

last minute. Before the interview Crowder calls the prison and asks them to check with the defendant to see if he really wants to talk to Crowder. They tell Crowder the defendant wants to speak to him. When Crowder arrives the defendant tells him he wants to speak to him, and does so. As it turns out, Mr. Ford never entered an appearance nor actually met with the defendant. (R. 971-982).

The above scenario would create an interesting issue under Edwards v. Arizona, 451 U.S. 477 (1981), and its progeny, and obviously the State's well founded view is that this was a "defendant initiated" meeting, all things considered. However, this Court need not address this issue because in 1981, a year after the statement to Crowder, the defendant gave the exact same exculpatory version of the crime to Dr. Walter Dibbe, which the jury heard about through Dr. Caddy. (R. 1064A, 1065A). Not incidently, Dr. Caddy stated that this particular account (a fellow worker named Yawn committed the murder, then forced the defendant to bite the victim's breast) was a complete fabrication, and referred to all the defendant's pre-1985 stories as "these other yarns."

In short, the Det. Crowder statement added absolutely nothing to the evidence at trial, and its admission, even if erroneous, was harmless beyond any doubt.

III.

THE FELONY-MURDER INSTRUCTION WAS PROPERLY GIVEN.

The defendant was not "acquitted" of felony murder at his first trial. He was charged by an Indictment which stated he "... did unlawfully, from a premeditated design to effect the death of a human being, kill and murder Gertrude S. Trbovich, a human being, by stabbing and beating the said Gertrude S. Trbovich, in violation of Florida Statute 782.04." (3SR. 38). At the motion for judgment of acquittal (attached as exhibit A) the trial court heard from both sides as to both theories, then ruled as follows:

> THE COURT: Okay. The Court's of the opinion that a prima facie case shown. To establish the corpus delicti to identify the defendant as the assailant. And the only real question to argue is that of premeditation.
>
> I do not think that there is a prima facie case of felony murder, but I don't need to discuss that any further because cases that have been submitted to me premeditation may be inferred from evidence as to the nature of the weapon used, and the manner in which the murder was committed and the nature and manner of the wounds inflicted.
>
> That law is in Larry versus State 104 SSec 352 and Hernandez v. State 273 SoSec 130. And in Robinson v. State 3 SoSec 804.
>
> And in view of the evidence from the pictures as to the multiple wounds and the evidence that two separate weapons being used (indiscenable) prima facie case from which the jury could reach a

> conclusion of premeditation. So, the Court will deny those motions.
>
> (Morgan I, R. 413, 414).

The trial court proceeded to instruct the jury on both theories (attached as exhibit "B", Morgan I, R. 463). The State has reviewed the transcripts of the second and third trials and the issue of the alleged felony murder "acquittal" was not raised, nor was it raised on appeal therefrom. At the instant trial the only argument presented at the motion for judgment of acquittal was insufficient evidence as to both theories (R. 1002, renewed motion at 1543). Not only did defense counsel fail to object to the instruction on felony-murder, he was in complete agreement with it (R. 1554, 55, 58,59:" no problem, I agree with that," 1605).

The defendant claims that the unobjected to instruction on felony-murder somehow violated double jeopardy, and he relies on Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989). In Delap the Eleventh Circuit ruled that the Federal District Court's finding of an "acquittal" was not clearly erroneous. The State will shortly address why the Delap court misunderstood how Florida's first degree murder statute operates, however initially two points are clear. There was no State procedural bar in Delap, whereas here the issue is procedurally barred due to a failure to

object to the felony-murder instruction at trial.[1] Indeed, nothing has been heard of this "acquittal" since the discussion in Morgan I quoted above.

Secondly, the trial court in Morgan I deliberately refrained from issuing a ruling on the sufficiency of the evidence of felony murder. After stating he did not "think" the State had shown a prima facie case of felony murder, he immediately qualified this by stating he did not need to go beyond his "think" statement, since there was sufficient evidence of premeditation to deny the motion. This would be tantamount to a 3.850 ruling where the court stated "I think counsel was deficient, but I need not address this prong further because I conclude the defendant has not established prejudice." There are numerous other factual differences between Delap and the instant case, especially the fact that in Delap I the trial court did not give the felony murder instruction (or at least the Federal District Court so held after reconstructing the record, Id. at 310) whereas in Morgan I, the court gave the instruction. The Eleventh considered this a critical factor.

This Court could and should dispose of this claim on the above two grounds, procedural default and lack of initial ruling.

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[1] The Delap court specifically noted that the State was not arguing procedural bar, 890 F.2d at 307 n.24.

However, the State with all due respect to the Delap court, believes Delap misapplied the principle of double jeopardy.

The defendant in Delap, as here, was charged and convicted of first-degree murder. There are not two separate offenses of premeditated and first-degree felony murder, rather there is but a single offense of first degree murder. In Schad v. Arizona, 501 U.S. ___, 115 L.Ed.2d 555, 111 S.Ct. ___ (1991), the Supreme Court held that jurors need not agree on a particular theory, premeditated or felony-murder, because first degree murder was a single offense. The same is true in Florida. See Young v. State, 579 So. 2d 721 (Fla. 1991). The splitting of this offense into two, which is what the Court did in Delap, see especially 890 F.2d at 313, n.36, cannot be squared with Schad.

In sum, even had the trial court in Morgan I specifically granted the acquittal motion as to felony murder, such would not constitute a double jeopardy bar because the defendant was convicted of the only offense with which he was charged, first-degree murder.

IV.

THE TRIAL COURT DID NOT ERR IN REFUSING TO APPOINT ADDITIONAL EXPERTS.

Prior to trial the defendant sought the appointment of additional experts, Dr. Jonathan Pincus, M.D. a Professor of Neurology at Yale University (his report is at R. 1861-64), and

Dr. Dorothy Lewis, M.D., a Professor of Psychiatry at New York University (her report is at R. 1865-72). The discussion concerning the defendant's attempts to have Pincus and Lewis appointed is lengthy and at times confusing. It is clear the prosecutor, trial court and defense counsel were all confused (R. 43-58) about the basis for the defendant's request, which essentially was not to appoint but rather to obtain approval to retain at public expense.

The issue here is a simple one, i.e., did the trial court err in refusing to allow the defendant to retain two additional experts at State expense. Since the trial court's refusal violated no rule of procedure, the issue is whether his refusal violated either due process or equal protection, and clearly the answer is no.

What occurred below is that in order to attack the reliability of the crucial 1985 hypnotic session by Drs. Caddy and Dr. Kosen, the State spent considerable funds and effort to retain Dr. Orne, a hypnosis specialist of the first order. In order to attack the insanity findings of Drs. Caddy, Kosen, and Vaughn[2] the State retained Dr. Dietz, another "heavy hitter" of

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[2] Dr. Vaughn had been prepared to testify as to the defendant's insanity at the second trial and was listed as a witness at the instant trial. Although again prepared to testify the defendant was insane, and although actually present for that purpose, defense counsel decided not to call Dr. Vaughn apparently for reasons relating to statements the defendant made to him. (R. 1479-81, 1534.

national renown. The defense then decided it needed to parry the State's planned rebuttal thrust with still more experts of their own, experts who had examined the defendant as part of a campaign to outlaw the execution of juvenile offenders, which was the reason the prosecutor was ballistically opposed to their appointment, and understandably so.

In Ake v. Oklahoma, 470 U.S. 68 (1985), the Supreme Court required the States to provide access to a psychiatrist for defendants who make a preliminary showing of insanity. Not only did the defendant herein have access to Drs. Caddy, Kosen and Vaughn, he had the prior testimony of Dr. Benjamin Center read to the jury (R. 1172-1257), wherein Dr. Center testified as to the defendant's alleged brain damage and mental deficiencies. The defendant also had the opportunity to use Dr. McMillan, who the court appointed instead of Pincus or Lewis. (R. 299). The defendant had been examined by Drs. Cheshire, Goren, Dibbe and Mortimer at various times relative to insanity. (R. 278-280). In short, the dictates of Ake v. Oklahoma were definitely satisfied.

What the defendant argues is an indigent defendant's right to as many experts as he desires, as well as the specific experts he desires. The defendant argues further that the State must provide not only access, but sufficient funds to match the State's expenditures dollar for dollar. Such is not the law, and the instant claim should thus be denied.

V.

THE TRIAL COURT PROPERLY GAVE THE SPECIAL INSTRUCTION ON "IRRESISTIBLE IMPULSE."

As related in the Statement of Facts above, Drs. Kosen and Caddy based their insanity opinion entirely on the premise that after commencing his attack with the crescent wrench, the defendant became so enraged at the expression on the victim's face that he lost all control, and could not stop himself from continuing and indeed escalating his attack. Their testimony implicitly relied on the legal doctrine of irresistible impulse, although of course they did not use that term. Dr. Caddy never even attempted to square his opinion of insanity with the McNaughten test, though Dr. Kosen made some effort in this regard. (R. 1147, 48).

Because of this emphasis on the defendant's rage explosion overcoming his will, it was important for the jurors to understand that loss of control due to an emotional impulse or explosion is not a recognized defense in Florida. See Zamora v. State, 361 So. 2d 776 (Fla. 3d DCA 1978), cert. den., 372 So. 2d 472; Byrd v. State, 178 So. 2d 886 (Fla. 2d DCA 1965), cert. den., 188 So. 2d 318, and cases cited in the State's requested instruction. (R. 2108). The instruction reads "irresistible impulse is not recognized in Florida as an excuse for an unlawful act," which is indeed the law.

In his brief the defendant argues that this instruction somehow prevented or hindered the jury's consideration of the lesser included offense of second degree murder, the instruction for which stated in pertinent part:

> Three, that there was an unlawful killing of Gertrude Trbovich by an act imminently dangerous to another and evincing a depraved mind regardless of human life.
>
> An act is one imminently dangerous to another and evincing a depraved mind regardless of human life if it is an act or series of acts that, a person of ordinary judgment would know is reasonable certain to kill or to do serious bodily injury to another.
>
> And is done from ill will, hatred, spite or an evil intent.
>
> And is of such a nature that the act itself indicates an indifference to human life.
>
> In order to convict of second degree murder, it is not necessary for the State to prove that the defendant had a premeditated design to kill.
>
> (R. 1721).

The State fails to understand how the irresistible impulse instruction, which was given with the insanity instruction, (R. 1724), prevented the jurors from either considering the elements of second-degree murder or rejecting the element of premeditation as to first degree murder. Nothing prevented the defendant from arguing he had no predesigned intent to kill the victim, and therefore should only be convicted of second-degree murder.

In sum, the instruction was proper, and at the very worst it was duplicitous. In no way was the defendant prejudiced. Additionally, any error is harmless due both to the lack of a legally valid insanity defense, and especially the overwhelming evidence of the defendant's guilt of felony murder based on burglary. This is so because even if the defendant's experts are taken at face value, the defendant was sane when he decided to attack the victim in her home and sane during the initial blows. The jury was instructed on burglary as an underlying felony, with battery as the "offense therein." Since all the events necessary to establish the defendant's guilt of felony-murder (except the killing) occurred prior to the onset of the defendant's alleged insanity, it would be irrelevant that the defendant was insane when the killing actually occurred. In other words, the evidence of felony murder was overwhelming, and indeed the defendant had no defense whatever to this charge.

VI.

ALL THE DEFENDANT'S STATEMENTS TO MENTAL HEALTH EXPERTS WERE PROPERLY ADMITTED.

Both Drs. Caddy and Kosen, as well as Dr. Dietz, testified extensively as to statements the defendant made to a slew of experts between 1977 and 1985, including damaging statements made to defense expert Dr. Vaughn in 1981 ("I must kill her"). All three experts used the results of these prior examinations, including the defendant's statements made therein,

in forming their opinions. The existence and significance of these prior statements were hugely relevant because the defendant's credibility as a story teller to examining experts was critical, and the substance of the statements bore directly on the defendant's state of mind, a state of mind he put in issue when he filed a notice of insanity. He not merely agreed to but requested these examinations. At the time the "I must kill her" statement was made to Dr. Vaughn, supposedly under hypnosis, Vaughn was a defense expert preparing for the 1981 retrial. There is absolutely no Fifth Amendment issue here at all.

The cases relied on by the defendant, Parker v. State, 238 So. 2d 817 (Fla. 1970), Jones v. State, 289 So. 2d 725 (Fla. 1974), McMann v. State, 264 So. 2d 868 (Fla. 1st DCA 1972), and Curtis v. State, 589 So. 2d 956 (Fla. 3d DCA 1991), are all cases where the defendant had been compelled to submit to a court appointed examination, which is hardly the case with Dr. Vaughn's 1981 hypnotic session with the defendant. The cited cases are all in line with the reasoning of Estelle v. Smith, 101 S.Ct. 1866 (1981), holding that statements made during a compelled examination, one given without notice to counsel, were taken in violation of the defendant's miranda rights.

The State would further note that any hearsay problem (defendant to Vaughn = non hearsay, Drs. Caddy and Dietz relating what Vaughn said defendant said = hearsay) is resolved by Fla. R.

Evid. 90.704, 705, which permit experts to testify as to the source of their opinions without regard to the source's admissibility.

Finally, the defendant told Dr. Dietz directly that he wanted to hurt the victim when he exited the bathroom and beat her in the head with the wrench, hence the element of scienter necessary for at least felony murder was present independent of the "I must kill her" statement. The bottom line, however, is that the statement was properly admitted.

VII.

THE STATEMENTS AS TO THE VICTIM'S CHARACTER WERE NOT OBJECTED TO AND THE ISSUE IS THUS WAIVED.

There was no objection to this testimony and the issue is thus procedurally barred.

VIII.

THE STATE'S EXPERT DID NOT COMMENT ON THE CREDIBILITY OF A DEFENSE WITNESS AND THIS ISSUE IS PROCEDURALLY BARRED.

In the excerpt cited, State expert Dr. Orne was talking about the defendant's credibility, not that of the defendant's experts. There of was also no objection and thus the issue is procedurally barred.

IX.

THE TRIAL COURT DID NOT ERR IN ORDERING A SECOND HYPNOSIS SESSION AND ANY ERROR WAS HARMLESS.

This issue arose as follows (SR3. 12-31): Defense counsel thought a new hypnosis session was needed because the 1985 session did not contain the safeguards announced in Morgan v. State, 537 So. 2d 973 (Fla. 1989). He wrote a letter to the prosecutor to that effect, and the prosecutor's response was that he wanted to be present and have it videotaped. At the June 29, 1989 hearing the prosecutor spoke at length about the need for videotaping the new session planned by defense counsel. Id at 15-23. Defense counsel then stated he wasn't sure if a new session was needed, and asked the Court for a ruling on whether the old (1985) session was admissible. Defense counsel then stated that if the court required a new session, it should not be videotaped (Id. at 23, 24). The prosecutor then stated the defendant had raised a new issue, the need for a new session, and that the State's position would be that a new session was needed because the 1985 one had none of the safeguards announced in Morgan III. He then argued as to the need for videotaping. The trial court ultimately ruled that as a prerequisite for admissibility of the 1985 session, a new session with the safeguards must be undertaken.

The defendant sought rehearing, (R. 28-43) and the trial court again ruled that Morgan III's "in the future" referred to

the trial in Morgan IV, i.e. the instant case. As the defendant relates in his brief, Dr. Caddy was unable to hypnotize the defendant at the new session. Because the attempt was made, the court allowed in evidence of the 1985 sessions, and the opinions of Dr. Caddy and Kosen based thereon.

The State asserts initially that the trial court was making every effort to comply with Morgan III, and his interpretation (that a new session was needed, one complying with the Morgan III safeguards) was correct. This Court will of course make the final call as to its intent in Morgan III. Even if this Court holds that requiring a new session was error, the error is definitely harmless beyond a reasonable doubt. The only evidence generated by this failed session was Dr. Ornes' testimony that succeptibility to hynosis is usually consistent over time, so the failure of the defendant to become hypnotized in 1989 bolstered his opinion that the 1985 session was invalid. This was a tiny fraction of the basis for his opinion that the 1985 session was completely unreliable, an opinion based on a total failure to follow any of the procedures and safeguards required by the profession (R. 1308-1357). His detailed critique spans every facet of the 1985 session, as well as the assumptions Dr. Caddy and Kosen drew therefrom. He closed out by concluding that Dr. Caddy's failure to use the tape recorder he had with him was not only an unforgiveable professional sin, but an indication as well that he knew his procedures would not stand up to scrutinity by other professionals. (R. 1357).

In sum, the negative effect of the new session was insignificant and could not possibly have effected the verdict herein. Any good faith error by the trial court was thus harmless beyond a reasonable doubt.

X.

THE TRIAL COURT PROPERLY ORDERED THE DEFENDANT EXAMINED BY THE STATE'S EXPERT.

This issue is governed by Henry v. State, 574 So. 2d 66 (Fla. 1991), as the defendant acknowledges, and the State will rely on the analysis therein.

XI.

THE RECORD IS DEFINITELY ADEQUATE FOR MEANINGFUL APPELLATE REVIEW.

The record below underwent substantial reconstruction as to the inaudible segments, and is now virtually complete. The remaining inaudibles cited hardly prevent meaningful review. Specifically as to the shackling issue, it is clear that the trial court was extremely sensitive to the jurors not seeing the defendant restrained in any fashion. At one point in the trial (R. 845) the bailiff reported that as he led the defendant to the bathroom in handcuffs, a juror might have seen the defendant. The judge then questioned the juror, Mr. Shafer, who reported that he had not seen anything (R. 876, 47). It is clear from this incident that whatever restraints were used for security

purposes (handcuffs and the accompanying waist belt were all the bailiff testified to) were kept from the view of the jurors, as they should be unless the defendant's dangerousness compels otherwise. The other inaudibles cited in no way suggest any type of error occurred. This issue is thus without merit

XII.

EXECUTION OF A PERSON WHO WAS SIXTEEN (16) AT THE TIME OF THE OFFENSE IS NOT UNCONSTITUTIONAL.

The State will rely on the analysis of Justice O'Conner in Stanford v. Kentucky, 492 U.S. 361 (1989). There is no logical distinction between the provisions of the Federal and Florida prohibition against cruel and unusual punishment, and the State urges this Court to adopt the rationale of Stanford in rejecting this claim.

XIII.

THE DEATH PENALTY HEREIN IS NOT DISPORTIONATE.

The trial court found two aggravators, HAC and in the course of a felony. It found the statutory mitigator of extreme emotional disturbance and rejected all other proffered mitigating factors, both statutory and nonstatutory. As related below, several of the trial court's findings on mitigation are problematic, and these problems cloud the proportionality picture considerably. However, taking the aggravating - mitigating balance as a whole, the death sentence is not disportionate.

The instant murder is as heinous, atrocious and cruel as it could possibly be. The physical evidence and autopsy results show that the victim struggled valiantly while being at first pummeled and then stabbed some sixty (60) times, mostly about the head, neck and face. The defendant's statements suggest the defendant deliberately attacked the victim's face and head in order to wipe off the expression on her face. Indeed, the ferocity of the attack increased because the victim continued to remain conscious and defend herself. There is no question that as far as the circumstances of the killing are concerned, the defendant is extremely deserving of the death penalty.

The second aggravating factor is in the course of a felony. The trial court cited the sexual battery, however even if this Court finds the sexual battery was an afterthought, this factor was established because the murder occurred in the victim's house, her castle, where she was deserving of and legally entitled to special protection. It is irrelevant how the defendant entered the home, because when he left the bathroom with the intent to bash in the victim's skull with his wrench, he was definitely "remaining" in an occupied dwelling without consent, and with an intention to commit on offense therein, i.e., battery. The State submits that the fact that the murder occurred in the elderly victim's home, her sanctuary, is a compelling aggravating factor in this cause.

As to mitigation, the crime ended up as a violent rage, yet the key decision to attack with the wrench was not the product of rage but rather of self-interest, i.e., the defendant was going to silence the victim so she could not tell his parents bad things about him. Though a profound over-reaction, the decision to attack was a deliberate one. The defendant's emotions certainly took over as the attack progressed, and the trial court found that the defendant did suffer an extreme emotional disturbance. The fact he gave it little weight is a reflection of the fact that the reason the defendant went into a frenzy is that his initial, deliberate attack did not have the desired result.

With due respect to the trial court, there was nonstatutory evidence which he "rejected," when in fact it should have been placed on the mitigating scale because it had some mitigating value, whether directly linked to the crime or not. The defendant had a learning disability, was illerate at the time of the offense, was only sixteen and, in this regard, there was no evidence he was wise beyond his years so as to justify outright rejection of this mitigating factor. His parents fought over his father's drinking, and there were two or three instances of sexual abuse by an uncle.

As for brain damage, this factor was properly rejected because Dr. Dietz testified the defendant had no clinically significant brain damage (R. 1406), and his diagnosis was certainly entitled to be credited by the trial court.

Taking the balance as a whole, one could certainly envision a vote for life, i.e., a fact-finder giving greater weight to the mitigation. However as this Court has stated many times, proportionality is not to be used as a vehicle for reweighing, rather the issue is whether the sentence is disportionate when compared to other defendants' sentences for similar murders. Cook v. State, 581 So. 2d 141 (Fla. 1991). The instant case is similar to Brown v. State, 565 So. 2d 304 (Fla. 1990) (death sentence warranted where defendant shot victim after breaking into her room, despite existence of extreme emotional disturbance). This is not a case of a domestic dispute. See Farinas v. State, 569 So. 2d 425 (Fla. 1990) (HAC and "in the course of a burlgary" insufficient where murder was product of longstanding domestic dispute.

In sum, the death sentence herein is not disportionate. C.F., Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

XIV.

THE TRIAL COURT'S USE OF THE WRONG STANDARD IN REJECTING MITIGATION WAS CURED BY ITS INDEPENDENT FINDING AS TO EACH FACTOR.

The State agrees that the trial court should not have relied on the jury verdict to reject the diminished capacity statutory mitigator. (R. 2280). However the trial court then determined that the facts did not support this factor, and hence his statement that he was "bound" by the jury verdict is harmless error.

As for the trial court's rejection of age as a statutory factor (R. 2281), the State believes this factor should have been found and given some weight, as there was nothing to indicate the defendant was wise beyond his years. See Deaton v. State, 480 U.S. 1279 (Fla. 1985). However it is clear the trial court's weighing process would have been the same even had the defendant's age been factored into the equation.

The State agrees that the trial court should not have relied on the jury's rejection of the intoxication defense as a basis for rejecting this factor (R. 2282), at least as to the time of the offense. The trial court then properly rejected a history of drug or alcohol abuse based on the evidence at trial. As to intoxication at the time of the offense, other than a can of beer, the only claim was inhalation of gasoline fumes several

hours prior to the murder, and Dr. Dietz testified that the effects would have worn off long before the crime occurred. (R. 1409-1416).

As to the "sudden rage" mitigator (R. 2282, 83), the trial court again mistakenly relied on the jury's verdict, however he then rejected the factor based on his own analysis of the evidence, and the error is thus harmless.

XV.

THE DEFENDANT'S ESPINOSA CLAIM IS PROCEDURALLY BARRED.

Although the defendant objected to the HAC instruction on vagueness grounds, he did not request a fortified instruction but rather asked that no instruction on HAC be given at all (R. 1743, 44). The issue is thus not properly preserved. Gaskin v. Florida, Case No. 76,326 (Fla. March 18, 1993), slip op. at 2 (defendant must object on vagueness grounds and request special instruction as replacement).

XVI.

THE FELONY MURDER AGGRAVATOR WAS PROPERLY FOUND.

As set forth under claim III above, the defendant was not "acquitted" of felony murder in Morgan I, and this claim is thus meritless.

XVII.

THE COMMENTS OF THE PROSECUTOR WERE EITHER NOT OBJECTED TO OR DO NOT MERIT REVERSAL.

The only comment cited which was objected to was the first one, concerning the defendant not knowing what happened to the victim. Even if susceptible to a lack of remorse interpretation, it was not so egregious as to warrant a mistrial. This Court has found far worse comments not to warrant reversal. See Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986) (comments on lack of remorse and telling jury defendant stated he wanted to die) Bertollotti v. State, 476 So. 2d 130 (Fla. 1985) (comments on right to remain silent, asking jurors to put themselves in victim's shoes, and send message to community) and Jackson v. State, 522 So. 2d 802 (Fla. 1988) (comments about statement to community, community watching, victims will no longer read books, visit families, see sun rise, etc.). For the types of egregious comments warranting reversal, see Garron v. State, 528 So. 2d 353 (Fla. 1988).

The other comments cited were not objected to and these claims are thus procedurally barred.

XVIII

THE TRIAL COURT DID NOT ERR IN NOT ADDRESSING ALL THE MITIGATION PROFFERED BY THE DEFENDANT.

This case preceded Campbell v. State, 571 So. 2d 415 (Fla. 1991), and hence the trial court was not yet required to separately address each proferred nonstatutory mitigating factor. As for the trial court's express rejection of mitigating factors, these are all dealt with under Claim XIV above.

XIX.

THE TRIAL COURT PROPERLY FOUND THE HAC AGGRAVATING FACTOR.

The victim of this case was stabbed sixty (60) times, with over a dozen wounds being defensive. The victim was literally butchered alive, while hopelessly and painfully struggling to fend off the defendant's attack. If HAC cannot be found based on the instant facts than it can never be found.

XX.

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

The issues cited herein were not raised or properly raised at trial, and are procedurally barred. They have also been all rejected on numerous occasions and are meritless.

CONCLUSION

The judgment and sentence are proper and thus should be affirmed.

Respectfully submitted,

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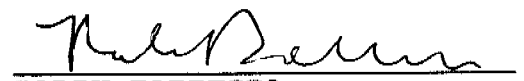
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by mail to **RICHARD GREENE**, Assistant Public Defender, Public Defenders Office, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 on this 19 day of March, 1993.



RALPH BARREIRA
Assistant Attorney General

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,676

JAMES A. MORGAN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY, FLORIDA CRIMINAL DIVISION

APPENDIX TO ANSWER BRIEF OF APPELLEE

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