IN THE SUPREME COURT OF FLORIDA

DANA WILLIAMSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 84,198



ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

**AMENDED**

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

Appellant, Dana Williamson, was the defendant in the trial court and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "Appellee" or "the State." References to the record will be by the symbol "R"

and references to the supplemental record will by the symbol "SR" followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

Appellee rejects appellant's statement of the case and facts and submits the following complete rendition of the facts presented at trial.

Police responded to a "911" call which was received at 10:13 P.M. on November 4, 1988. The call was made by the decedent, Mrs. Donna Decker. (R 962-963). She stated that she had been stabbed to death. Mrs. Decker also expressed concern for the safety of both her husband and her son. (R 693-694).

The first officers on the scene entered the Decker home and heard a baby crying. The crying led them to the master bedroom where they found three of the four victims. (R 780, 784, 826, 836). Clyde Decker, the decedent's father-in-law, was found on the bed shot in the face. He was hog-tied and handcuffed. (R 966, 784, 836). Robert Decker, husband of the decedent, and their two-year-old son, Carl, were both on the floor. (R 784). Robert Decker was hog-tied, gagged and handcuffed. (R 786, 841, 978). Mrs. Decker was found stabbed to death in the closet/office. The door to the closet was locked. Next to Mrs. Decker's body was the telephone receiver. Also found near the body was a cowboy hat. (R 786-786, 840, 841, 807).

The three Decker males were all shot in the head. Robert Decker received two bullet wounds to the back of the head. Both were from close range. (R 1519, 1609-1613). His father, Clyde Decker, was shot in the right cheek. The bullet ripped through the nasal and sinus cavities and fractured the upper jaw. The treating physician opined that the bullet would have entered the brain if not for the fact that Mr. Decker was wearing dentures. Clyde Decker would have bled to death if he had not been treated right away. (R 1513, 1517-1520). Carl Decker was shot at close range, in

the back of the head behind the ear. The injury left the child with facial palsy. (R 1596-1604). The treating physician opined that it was a miracle that he lived. (R 1604).

The medical examiner, Dr. Ongly, testified regarding the wounds to Mrs. Decker. She died of multiple stab wounds. (R 918). The murder weapon was found under the body. (R 905). From the location of the blood it appears that Mrs. Decker was stabbed in the hallway and died in the office/closet area. (R 900, 894-896). She received six stab wounds and a series of other cuts. (R 908-910). Two of the stab wounds went through the left arm and into the chest. (R 908, 912). Mrs. Decker also received a very deep stab wound in the right side of her lower back. The force of that injury caused the knife to pierce through the lung, liver and kidney. The knife was found embedded into the sternum. (R 908, 914, 916). A second deep stab wound went through the left side of the chest and through the lung. (R 916-917). A series of smaller wounds were found in the upper left chest and three cuts were also found in the breast area. (R 902, 911). The medical examiner also opined that Mrs. Decker received a defensive wound to her hand. (R 911, 917).

Three eyewitnesses testified to the events of November 4, 1988. They were Charles Panoyan, who was originally charged with first degree murder in this crime; Robert Decker; and Clyde Decker. Robert Decker testified as follows: Decker met Panoyan through work may years earlier. At the time of the murder, Panoyan was working for Decker. (R 1032). They became good friends but did not do things socially outside of work. (R 1018, 1022). Panoyan had been to the Decker home approximately three times during the entire time that they knew one another. (R 1158-1159). Decker described Panoyan as someone who would never lie and someone who talked a lot. (R 1029). Panoyan helped Decker build his house. (R 1022).

That evening, Decker, his father Clyde ,and son Carl arrived home around 8:50 P.M. (R 1044). They had just come from dinner. (R 1044). When Robert pulled into his driveway, he saw Panoyan sitting in his car waiting in the driveway.(R 1044). The Deckers exited the car and went inside. Panoyan followed. Panoyan was allowed to stay as long as he kept quite while Decker was watching his favorite show "Dallas". (R 1061). Shortly thereafter Panoyan went outside and came back in with a package of venison. (R 1061). Panoyan was outside for only 30 seconds. ( 1165). Soon after Panoyan reentered the house, a masked gunman came in and pointed a gun at Clyde Decker's head. (R 1061). Decker thought it was a practical joke as he could tell that Panoyan knew the gunman. (R 1062). Everyone was ordered to the floor and handcuffed. (R 1062). The gunman immediately asked Decker were he kept the safe. The gunman then took Decker to the safe and it was opened. (R 1062, 1167). The gunman then asked Decker for his wallet. (R 1064). Decker, his father and son were then taken to the master bedroom and tied. Panoyan was not taken to the bedroom; he remained in the living room. (R 1065, 1170). Although Decker had been tied he was able to move from the bedroom to the living room. There he saw Panoyan and the gunman whispering. (R 1067). The gunman became very angry upon seeing Decker. He put Decker back in the bedroom and tied him up again. (R 1070-1071). The gunman then began to rummage through the house. Again Decker was able to wiggle his feet free but was caught and then hog-tied. The gunman asked Decker for money and drugs. (R 1072). While the gunman was rummaging through the bedroom, Mrs. Donna Decker, the decedent, arrived home from work. She walked into the bedroom and was immediately grabbed by the gunman. (R 1077). He dragged her to the hallway and tied her hands. Mrs. Decker lost her shoe during the struggle with the gunman. (R 1077). Decker estimated that the time was about 9:15 P.M. (R 1076). Mrs. Decker started to cry, and pled with

the gunman not to hurt anyone. (R 1078, 1079, 1180). Decker's son was lying right next to him throughout the ordeal. (R 1071). As soon as the gunman grabbed his wife, Decker heard a door close and never saw or heard Panoyan again. He assumed that Panoyan had left. (R 1079, 1182-1183, 1247). He could hear the gunman and Mrs. Decker talking as the gunman continued to rummage through drawers.(R 10781079). At one point, the gunman came back into the bedroom with an Uzi that belonged to Decker. He also was carrying a 22.caliber pistol. (R 1079-1080). The gunman then left again. (R 1083). Mrs. Decker came back in the bedroom asking if the gunman had left, she no sooner said that when he came back in and took her out again. (R 1083). Decker never saw his wife alive again. (R 1083). The gunman came back in the bedroom and told Decker to sign a white legal size paper. (R 1084). Decker signed one piece of paper which already contained his wife's signature. He was then made to sign a second piece of paper because the gunman did not like the way his signature looked on the first one. (R 1084-1088). This happened about 9:50 P.M. (R 101084). The gunman again left the bedroom. Decker could hear noises from the office or kitchen area. The time was now 10:00 P.M. Decker knew the time because he could hear the theme song to the program "Falcon Crest" on TV. The gunman reappeared. He took a pillow, placed it over Decker's head and shot him twice in the back of the head. He then took the pillow, placed it over Carl Decker's head and shot him. The gunman then took the pillow and placed it over Clyde Decker's face and shot him. The gun was fired twice because the first attempt resulted in a misfire. (R 1120-1132). The next thing Decker remembers is hearing the police. (R 1133-1134). Robert Decker testified that the gunman stole his wallet, his van, a briefcase, an Uzi, $2,000 in cash, his wife's engagement ring worth about $1,000 and various credit cards. (R 844, 874,1048, 1064, 1071-1073, 1075, 1081, 1102, 1104-1106). The entire episode lasted for approximately an hour. (R 1176).

Clyde Decker, the eighty-two-year-old father-in-law of the decedent, gave a deposition to perpetuate testimony. (SR 36). Charles Panoyan worked for Decker's son Robert on the day of the murder, November 4, 1988. (SR 44). Panoyan told Clyde that he was going to bring venison to the Decker home later that evening. (SR 45).

Clyde, his son Robert, and grandson Carl, arrived home from dinner to find Panoyan's truck in the driveway. (SR 57). Panoyan followed the Deckers into the house. (SR 57). Robert told Panoyan to be quiet while the program "Dallas" was on. Panoyan went out to the car to get the venison. He remained outside for approximately five to ten minutes. (SR 59). He then came back into the house and gave the venison to Clyde. Clyde put the venison out it in the refrigerator. At that time a masked gunman entered the house. (SR 59). The gunman was 5'10" 160 pounds. He was in a cowboy outfit and big rimmed hat. (SR 60). The gunman ordered the elder Decker to the floor. He was immediately handcuffed. The gunman then handcuffed Robert. (SR 63). The gunman began talking to Panoyan. (SR 63). The Deckers were placed in the bedroom, Panoyan was not. Mrs. Decker arrived home and asked Panoyan what he was doing there. (SR 66). She entered the bedroom and was immediately grabbed by the gunman. Mrs. Decker was then taken from the bedroom. (SR 67). She later reentered the bedroom, with her arms tied behind her. (SR 69). Mrs. Decker was led out of the bedroom and began screaming. Clyde Decker never saw the victim again. (SR 69).

Shortly after hearing Mrs. Decker scream, the gunman came into the bedroom and forced his son to sign some papers. (SR 75). The gunman then began shooting the victims. (SR 77). The gunman was not wearing a hat when he came back into the bedroom. (SR 78). The police arrived

shortly after the shooting. (SR 85). Clyde Decker had given his son $2,000. That money has been missing since the shooting. (SR 85).

Charles Panoyan was not a regular visitor of the Decker house. Robert Decker was always trying to get rid of him. (SR 93). The gunman came into the house around five to ten minutes after Panoyan returned with the venison. (SR 108). Clyde was handcuffed first and then his son. Panoyan was handcuffed but was never brought into the bedroom. (SR 123). Clyde Decker could hear Panoyan and the gunman talking. (SR 123).

Charles Panoyan testified to the following. Panoyan has known Robert Decker since 1972. They worked together and became friends. (R 2064-2065). Panoyan helped Decker build his house. (R 2074). Around the same time that Panoyan meet Decker, Panoyan had also become close friends with Charles Williamson, appellant's father. (R 2076, 2079).

Panoyan was working for Decker on November 4, 1988. (R 2083). On that evening, Panoyan went to the Decker home to bring his family some venison.(R 1039, 1061, 2101, 2088). No one was home so Panoyan waited in his truck. Shortly thereafter, Decker, his father Clyde, and his two year old son Carl came from dinner. (R 2103-2104). Prior to arriving at the Decker's home, Panoyan delivered venison to other friends. (R 2100). Panoyan followed Decker inside the home but soon exited the house to get the venison. While getting the meat from his truck, Panoyan was approached by appellant and his brother Rodney. (R 2107). They said they were there to rob Decker. Panoyan protested but appellant threatened to kill Panoyan's family. (R 2109). Panoyan reentered Decker's home with the venison. Panoyan stated that he was outside with the Williamson brothers for five to ten minutes. Appellant entered the house shortly after Panoyan and put a gun to Clyde Decker's head. (R 2109). Panoyan stated that the gun looked like his. (R 2111). He owned a rusty .22 caliber that

he kept in his truck. Appellant was wearing a cowboy hat, jeans, a jean jacket, gloves and a mask. (R 2112). Decker asked Panoyan if he knew the gunman. Panoyan told Decker that he did not. Panoyan admitted at trial that he lied to Decker because he was afraid for his family's safety. (R 2113).

Appellant then handcuffed everyone and ordered them to get on the floor. He then asked Decker were he kept the safe. (R 2115). Appellant made everyone go with him and Robert Decker to the bedroom to open the safe. (R 2115). Panoyan was placed back in the living room, while the Deckers were tied up and remained in the bedroom. (R 2115). Appellant started hitting Panoyan, asking him for the drugs and money, and threatening to blow his brains out. (R 2115). Decker was able to free himself enough to get back to the living room, where he saw appellant talking to Panoyan. (R 2116). (R 2113). Appellant then placed Panoyan in a chair and tied his feet. (R 2117). Mrs. Decker arrived home. She said hello to Panoyan and asked for her husband. She was immediately grabbed by appellant. (R 2117). Panoyan put his head down and did not see what happened. He saw the light on in Decker's office. (R 2118-2119). Appellant came out within a few minutes and ordered Panoyan onto the floor. (R 2119). He then hog-tied him and took his wallet. (R 2120). Appellant placed his foot on the rope that was tied around Panoyan's neck and made numerous threats regarding Panoyan's family. Panoyan recounted the following threats made by Williamson: "He was going to pull her [Panoyan's wife] teeth out and fuck her in the mouth and ass. Him and the boys were. Then he was going to tie her up and fuck her from both sides. They were going to whip her, burn her and take her nipples off. Take her tits off. Skin her. Tie her. Take her guts out. Tie her over an ant pile. Break her fingers, her arms, her legs. He said they were going to do the same to my whole family". (R 2124). Panoyan further told the jury the following: "he was going to cut my son's balls off and

feed it to him and do the same thing that he was going to do my girls." (R 2125). In response to Williamson's threats, Panoyan begged for his life. Appellant's brother, Rodney Williamson, who had previously remained outside, was now in the house. (R 2126). Appellant untied Panoyan and he and Rodney walked out of the house. (R 2126). Rodney put a gun to Panoyan's head and ordered him into his truck. R 2126). Panoyan drove the truck to the end of the street and waited. (R 2128). While in the car, Rodney repeated the threats made to Panoyan by appellant. (R 2128). Appellant came running up to the car. He did not have on his mask or gloves. (R 2129). He told Rodney that something had gone wrong. (R 2129). Appellant was carrying Panoyan's .22 caliber pistol, an Uzi and another gun was protruding from his waistband. (R 2131). Panoyan never saw his gun again. (R 2131). Appellant threatened Panoyan again and told him to go home and to not call the police. (R 2129).

Panoyan drove towards his home all the while checking to see if he was being followed. (R 2141). He pulled into a nearby shopping center and told a security guard what had happened. He called his wife from the shopping center. The police arrived at the shopping center and escorted Panoyan back to the Decker house. (R 2142-2143). He recounted the events of the evening to the police but did not tell the police that he knew the identity of the gunman. He also gave an inaccurate description of the gunman. (R 2146). Panoyan voluntarily went to the police station that evening and gave a statement. He did not get home until 5:00 A.M. the next morning. He did not tell police the identity of the killer because he was afraid of appellant. Panoyan took appellant's threats seriously because of appellant's past. Panoyan was aware that appellant had previously beaten to death four-year-old Peter Wagner and left the child's six-year-old sister brain dead. (R 2147). Appellant called Panoyan four days after the murder and told him that Rodney would be watching him. (R 2148).

The morning following the murder, Panoyan saw a car parked outside his house. He was afraid that it was one of appellant's men, so he called the police. (R 2150-2151). The police responded to Panoyan's call and the unknown car left when the police arrived. The strange car reappeared and again Panoyan called the police. (R 2152-2153). The police responded to Panoyan's second call and again the car left. Appellant was eventually told by the officer that responded that the person in the unknown car was a police officer. (R 2154).

Detective Marcus was next to testify. He spoke with Panoyan the night of the crime outside of the Decker house. Panoyan was sweaty, nervous and frightened. (R 2429-2430). Panoyan told the officer that he had been in the Decker home when the gunman came in. He said the gunman had a .22 caliber gun in his hand. The gunman tied everyone up but eventually let Panoyan go. The gunman threatened Panoyan and his family. (R 2430). Panoyan was very concerned about the people left in the Decker home. (R 2429). Detective Marcus was assigned to the surveillance operation of Panoyan's house the following day. (R 2432). Panoyan twice attempted to make contact with the officer. Eventually Marcus was forced to identify himself as a police officer because Panoyan pointed a gun at him. (R 2432-2434).

A security guard, Jay Greenfield, testified that Panoyan drove into the parking lot of the shopping center that night very upset. Greenfield described Panoyan as distraught and disoriented. Panoyan told Greenfield that he had been robbed. (R 1768-1770). Panoyan called his wife from the shopping center and told her to get the kids out of the house. (R 1774). Greenfield then called the police. (R 1774).

Joan Carter, a Davie police officer responded to the shopping center. She testified that Panoyan was nervous, sweating and frightened. (R 1811). He was very fearful and expressed concern for the safety of his kids. (R 1811). Panoyan was transported back to the Decker house at that time.

Officer Robert Spencer also testified that Panoyan repeatedly expressed fear concerning his family. (R 1292, 1332).

Panoyan's wife, Darla Panoyan, was next to testify. Her husband and Charles Williamson, appellant's father became very close friends. (R 2441-2442). Her husband also became friends with Robert Decker since they were both in the construction business. (R 2442). Charles Panoyan would visit Charles Williamson very frequently especially after the elder Williamson suffered a stroke. (R 2443-2447).

On the night of the murder Darla described her husband as very upset. He called her around 10:30 P.M. He told her to grab the kids, get out of the house and a police officer would be out to the house before too long. (R 2450-2451). He told her that he was delivering venison to the Deckers that night and robbery occurred. (R 2450). Mrs. Panoyan put the kids in the car and drove down the street waiting for the police. She meet the police and they went back to the house. (R 2451). The officer told Mrs. Panoyan what had happened at the Decker's home. He also told her that her husband was a suspect. (R 2452). After the police left, Mrs. Panoyan remained in her house and waited for her husband. Panoyan called again and insisted that she remove the kids from the house. Instead she went to the police station to see her husband. They did not get home until 5:00 A.M. the next morning. (R 2454). Panoyan was so fearful of appellant's threats, he made arrangements for his children to live with family friends for the following two weeks. (R 2457). Although fearful, Panoyan and his wife remained in their home. However, whenever they were home,

Panoyan made he and his wife crawl on the floor. He felt that someone would shoot at them from outside if they could see people in the house. (R 2457, 2462). Panoyan would not sleep and he would always cry. He carried a gun around constantly (R 2462). He continued to refuse to tell his wife what happened. (R 2470). His behavior and silence caused a lot of arguments between Mr. and Mrs. Panoyan. (R 2459-2463). Panoyan was eventually arrested for this crime and placed in jail. (R 2463-2464). It was not until two months following his release from jail that Panoyan finally told his wife what happened the night of the crime and who was involved.(R 2471-2476).

Detective Woodruff, the lead investigator, testified that the police knew that Panoyan was somehow involved or that at the very least he knew the identity of the actual killer. (R 2604-2605). Initially the only concrete evidence obtained from the crime scene was a cowboy hat worn by the killer, and a utility belt which contained keys to the handcuff's used on the Deckers and Panoyan. A year passed before any new leads materialized. (R 2161). In November of 1989, someone called TIPPS implicating appellant. (R 2161). The tipster was a friend of Panoyan, Winston Marsden. (R 2617). Based on the information, the police went to appellant's neighborhood to find him. Without mentioning the purpose of their visit or the identity of the victim, a neighbor was asked if she knew appellant. The neighbor responded by asking if their visit had anything to do with the Decker case. (R 2617). It was at this time that the police became aware of the connection between appellant and Panoyan. (R 2622). When Panoyan became aware that someone had implicated Dana Williamson, he became fearful and wanted to explain to appellant that he was not responsible for the call to TIPPS. Panoyan flew to Washington D.C., rented a car and drove to Norwood, Ohio. Panoyan's wife did not know that he had traveled up to Ohio to see appellant. (R 2162-2170).

Appellant's father-in-law confirmed Panoyan's visit to Ohio. He also stated that appellant had been in Ohio since November 17, 1988. (R).

Three of appellant's siblings and his ex-wife testified at trial. All of them stated that the cowboy hat found at the murder scene looked like the hat appellant used to wear. (R 1699, 1797, 1703), 2627-2628). Vernon Williamson, appellant's brother, stated that Panoyan would frequently visit Charles Williamson. (R 1699). Appellant provided much of the care for their invalid father. (R 1696) Vernon also stated that he never took appellant's hat. (R 1699) Renee Mayno, another sister of appellant, testified that Panoyan had been a friend of the family's for years. (R 1703). Two other family friends, Virginia Kosting and Eddie Roberts, also testified that the cowboy hat found at the scene looked like appellant's. Both witness also stated that the utility belt found in Panoyan's truck looked like the two belts that appellant and his brother Rodney owned. (R 1992, 2018). Appellant's ex-wife Cassandra Williamson also stated that the utility belt belonged to her former husband. (R 2627-2628).

Woodruff testified that the utility belt had a label on it indicating that it had been purchased from the Asian World of Martial Arts. The police confirmed from that company that appellant's brother, Rodney, purchased utility belts in August of 1988. (R 2585-2596). A catalog from that company was found in appellant's house in Ohio. (R 2589).

The state introduced the testimony of Dr. Richard Ofshe a social psychologist from California. (R 2225). Dr. Ofshe has testified numerous times as an expert in the field of extreme and extraordinary techniques of influence. (R 2229). Dr. Ofshe interviewed Panoyan, read his deposition and read police reports. (R 2232-2233). He explained how Panoyan took the threats from appellant seriously. He identified the significant facts which illustrated the sincerity of Panoyan's fear. Shortly

after the murder, Panoyan called his family to ease his fear and confirm their safety. (R 2246). He reported to the police the following day on two separate occasions that he was being watched. (R 2252). His fear turned into paranoia. (R 2251). Panoyan's fear was further exacerbated by the fact that the police could not be trusted since they suspected him in the crime. This resulted in further isolation. (R 2251). The threat was further intensified by the fact that appellant was in jail with Panoyan where the threat could be perpetuated. (R 2255). As long as Panoyan concealed the identity of the killer from the police he was protecting the safety of his family. (R 2247).

Three inmates testified regarding inculpatory statements made to them by appellant. The first such inmate was Patrick O'Brien. He meet appellant in jail in 1991. (R 1532). Appellant spoke to O'Brien about details of the robbery/murder. Appellant referred to himself as the gunman. (R 1540-1541). He told O'Brien that the victims were stabbed and shot. (R 1539). He also admitted that the cops had his hat and his utility belt. (R 1540). Appellant had left the belt in Panoyan's truck. (R 1572). He told O'Brien that he used a kitchen knife to kill Mrs. Decker because the gun misfired. (R 1560, 1540). He stabbed her because he "lost it". Appellant also stated that Mrs. Decker's put up a fight. (R 1543). Appellant wanted to find the Deckers to prevent them from testifying. (R 1544). He explained that he shot the little boy because he was afraid he could identify him. (R 1544). He thought the Deckers had a lot of money. (R 1545) He admitted that he had threatened Panoyan's family. Panoyan knew that appellant was capable of carrying out his threat because appellant had already been convicted of killing a four-year old child. (R 1546). Panoyan was unaware of appellant's plan to rob the Deckers until it actually happened. (R 1545). O'Brien did not have any deals with the state in exchange for his testimony. (R 1553, 1572).

The next inmate to testify was Stephen Luchak. He and appellant were cell mates for approximately six months. (R 1899). Appellant gave details of the crime to Luchak. (R 1901). Appellant never admitted that he was the gunman, however, he did express fear that Panoyan would talk and implicate him. He told Luchak that he wished that Panoyan could be killed. (R 1900-1901, 1917). During the robbery, Mrs. Decker surprised the gunman. Her shoe fell off. He had to tie her up with a cord from a make-up mirror because he ran out of rope. (R 1917-1918). He admitted that the cowboy hat left at the scene was his. (R 1925). He said that the gunman wore a mask and a denim jacket. (R 1927). The gunman made the victims sign some papers and he checked the signatures. (R 1927). The gunman was angry that he only got $2,000. (R 1930-1935).

The third inmate to testify was Edward Aragones. He meet appellant in jail in March of 1993. Appellant admitted to him that he tied up the family and shot them all in the head. The mother died. (R 2491). He showed remorse for his crime and was seeking God's forgiveness. (R 2490-2495). He then stated that the state was seeking the death penalty but the case would eventually deteriorate because they has no evidence on him. (R 2492).

Appellant gave a tapped statement to police in Ohio on May 2,1990. (SR 1). Appellant denied having any knowledge of the homicide of Donna Decker. (SR 2,12). He acknowledged knowing Charles Panoyan. He stated that the last time he spoke to Panoyan was around December of 1989 or January of 1990. (SR 3). Panoyan called him from somewhere in Ohio. Appellant denies that he saw Panoyan in person. Panoyan told appellant that his family called TIPPS and implicated him in a murder. (SR 6). Although he was implicated in a murder, appellant claims that he never asked Panoyan the name of the murder victim. (SR 18).

Appellant was shown a picture of the cowboy hat left at the scene of the murder scene. When asked if the hat belonged to him, appellant stated: "That is a hat I used to have that came up missing from the house in Florida." (SR 13). Officer asked: "Are you positive that's your hat?" Appellant responded: "Looks just like the hat I had." (SR 13). In an attempt to explain how his hat was found at the murder scene, Appellant theorized that his brother Vernon, must have taken it from him and planted at the scene. (SR 14, 22).

Appellant was shown a picture of the utility belt found in Panoyan's truck, he denied ever owning such a belt. (SR 15). He did state that his brother, Rodney, owned a belt that looked just like that one. (SR 15). The belt was ordered from the Asian World of Martial Arts company. (SR 20). He also acknowledged that Rodney owned handcuffs as well. (SR 15). He admits to being in Panoyan's truck on several occasions; however, he denied leaving that belt in the truck. (SR 20). Appellant denied any knowledge of who actually who killed Donna Decker. (SR 21). Appellant arrived in Ohio in November of 1988. He was asked by his in-laws to help with some construction in their house. (SR 27). Appellant divorced his wife in January of 1987. He divorced her because she deserted him. (SR 30).

The last witness to testify was Thomas Cavanaugh, a retired police officer from New York and father of the prosecutor, Brian Cavanaugh. He meet Charles Panoyan in March of 1992 and convinvced him to speak to the gran jury. Panoyan was very hesitant to testify because he was afraid. (R 2844, 2866).

Appellant was convicted of first degree murder, armed burglary, three counts of armed kidnaping and four counts of armed robbery, three counts of attempted murder, and one count of armed extortion. (R 3204, 5378). The penalty phase commenced on June 1, 1994 and concluded on

June 3, 1994. (R 3317, 3943). The state presented the following witnesses. The medical examiner, Dr. Angle described the fatal injuries to Mrs. Decker in much the same fashion as he had at the guilt phase. Mrs. Decker received three stab/cut wounds to the left upper arm. Two of the wounds went through her arm into her chest. (R 3416). The alignment of the wounds indicate/suggest that Mrs. Decker's arms were by her side when she was stabbed. He further postulated that perhaps her arms were bound when she was stabbed. (R 3418 -3419). There was also evidence of defensive wounds on her wrist and hands. (R 3419). Mrs. Decker suffered two deep stab wounds to her back. One went through her back, pierced her lung, and continued through her ribs and lodged in her sternum. (R 3419). The second stab wound went through her back, through her lung, kidney and liver. (R 3420). There was a tremendous amount of internal bleeding. (R 3420). Her lungs filled up with blood making breathing increasingly more difficult. (R 3437). As this happened, the immense pain increased as she struggled to breathe. (R 3437). A person would remain conscious for anywhere from four to ten minutes. (R 3421). Mrs. Decker was aware of the fact that she was dying, as she called "911" for help and stated the "I've been stabbed to death." (R 3437).

Also introduced at the penalty phase was evidence of appellant's manslaughter conviction from 1971. Appellant pled guilty to kicking and punching to death four year old Peter Wagner. Appellant told police that he beat the child for "something to do." This crime occurred during appellant's placement at the Nova Living and Learning Center for troubled children. (R 3470). The state rested.

Appellant presented the testimony of four doctors and seven family members. The first to testify was Dr. Dickens, a neurologist. Dr. Dickens testified regarding the results of a MCI and CAT scan done on appellant in April of 1994. The results were normal. (R 3533). An EEG was done in

May of 1994 also indicating no abnormality. (R 3546). Dickens did review the results of an EEG done in 1971 which indicated some disturbance to the brain. (R 3532). Dickens could not document or discuss that any correlation existed between the 1971 EEG and appellant's behavior. (R 3555-3557). Given the normal results in 1994, the doctor opined that the abnormal EEG in 1971 could have simply been developmental. (R 3546-3547). Dr. Dickens also testified that the diagnostic procedure of brain mapping was not an established test in the opinion of the American Academy of Neurology. (R 3541).

The next witness for appellant was Dr. Carlos Smulvotsky, an expert in radiology and nuclear medicine. (R 3579). Smulvotskyy reviewed the results of a brain mapping test that was conducted on appellant's brain. Based on those results, Smulvotskyy opined that appellant suffers from slight asymmetry decreased profusion. (R 3580). In other words, there is less blood flow in the right side of appellants' brain than there is in the left side of the brain. (R 3581-3582). This is an abnormal condition however, he could not conclude that any disease of the brain existed. (R 3595-3599). Smulvotsky cautioned that the brain mapping test should not be used as a diagnostic tool by itself as the findings are inconclusive. (R 3592-3593).

The next witness to testify was Dr. Wand, a neurologist. (R 3634). Dr. Wand stated that an EEG was performed in April which indicated mild brain damage. (R 3634-3635). Dr. Wand also reviewed the results of a brain mapping test. (R 3634-3635). He opined that the test indicated sever brain damage. (R 3635). Wand concluded that appellant's brain damage was the result of a car accident. (R 3651). Wand acknowledged the controversy over brain mapping. (R 3645). He also admitted that he was unable to correlate the findings of the brain mapping to any of appellant's

behavior. (R 3652). He also conceded that he knows nothing about appellant's life, including the events of the murder. Dr. Wand has never meet or talked to appellant. (R 3638-3639, 3652-3654).

The final expert to testify was Dr. Antoinette Appel a forensic neuropsychologist. (R 3754). Dr. Appel reviewed records from Florida State Hospital, HRS, and the Nova Living and Learning Center. She also reviewed the results from the various EEG's, MCI's, CAT scans and brain mapping test. Appel did not review any information relating to the facts of the crime.

Dr. Appel opines that appellant is brain damaged as a result of a car accident in 1969. (R 3788). Sometime in March of 1971, while appellant was a resident of the Nova Learning Center,, he would make threats about running away and murder. (R 3816-3817). His condition was made worse over the years because he was never properly treated for the malady. (R 3790-3791). Appel also feels that appellant suffers from convulsions. Her opinion is based in part on the statements of various people. The only such person identified by name was James O'Brien, an inmate who testified against appellant at the guilt phase. (R 3779-3780). O'Brien stated that appellant had a strange look on his face when he was describing the events surrounding the murder of Donna Decker. (R 3780). Appel also relied on statements from unidentified people from the Nova Learning Center who state that appellant would roll his eyes back in his head and refuse to answer questions. (R 3777-3778). Based on this information Appel concluded that appellant suffers from convulsions. (R 3777-3780). Appellant would have no control if he were in a rage or in a convulsion. (R 3778). Appel could not say if appellant had a seizure during the night of the murder and attempted murders of the Decker family. (R 3829).

Appel was then asked to explain the correlation between appellant's injured brain and his behavior. She opined that studies indicate a high correlation between people with brain damage and

criminal behavior. (R 3794- 795). Appellant's injured brain precludes the proper processing of information during very stressful times. (R 3835). The stressful events of appellant's life included the tragic loss of his mother in a car accident, the fact that his wife had a child with appellant's brother, Rodney, and his father suffered two debilitating strokes. (R 3803-3804).

When asked to explain the fact that all of appellant's relatives describe his behavior over the years as normal, she rejected their assessment. (R 3814-3815). Her opinion did not change even though another psychiatrist Dr. Haber found appellant to be sane and competent. He also found appellant to be alert, cooperative and responsive. (R 3827). He was controlled and coherent. (R 3827-3828). Appellant also demonstrated adequate memory for recent and remote events. (R 3828). He also demonstrated thought processes that were productive and goal oriented. Appellant tends to do thing as he wishes rather than as he is directed. (R 3829).

Appellant then presented the testimony of several family members. The first was his sister Rene Williamson. (R 3652). She confirmed that her mother was killed in a car accident in 1969. Appellant was injured and hospitalized as a result of in the accident. (R 3660). Their father Charles, an authoritarian, abused all of the children. The beatings became worse after the mother died. (R 3660-3661). Ms. Williamson had not seen her brother Dana since he was twenty-one. That is because Ms. Williamson's daughter accused appellant of sexually molesting her. (R 3672-3673). Ms. Williamson conceded that she experienced the same abuse and loss as appellant had, yet she was able to live her life without violence and crime. (R 3675-3678). Ms. Williamson described her brother as compassionate and dedicated to his family. (R 36750. Appellant is patient and very capable of taking control and dominating a situation. (R 3675-3679).

The next witness to testify was appellant's aunt, through marriage, Vena Williamson. (R 3698). She described appellant's family was a happy one while his mother was alive. (R 3700). After the death of appellant's mother, Verna became aware of the beatings that appellant would suffer from his father. (R 3702-3704). One time appellant and his brother Vernon, went to his aunt and uncle's house to hide from his father. Both boys had been terribly beaten by their father. (R3702-3704). Mrs. Williamson claims that she would have taken custody of the boys but that appellant kept running away. At the time of trial, Mrs. Williamson has not seen appellant in twenty years. She could not say that appellant would be a help t his family if he were kept alive. (R 3705). Appellant'suncle Bobby Williamson testified next. (R 3723). Appellant took care of his father after his stroke. Appellant was a hard worker, responsible and a perfectionist. (R 3729). Appellant was very much in control. (R 3729).

Next to testify was appellant's father-in-law, Rick Schultz. (R 3708). He described his son-in-law as caring and compassionate. After his father had the stroke, appellant would maintain a job and care for his father. ( 3720). He is a good worker and a good provider. (R 3710-3711). Appellant had no difficulty making decisions. (R 3720). Appellant obtained his GED while he lived in Ohio and furthered his education by attending computer school. (R 3711-3712). Appellant was very hurt by the affair between his wife, Cassandra and his brother, Rodney. (R 3713).

Appellant's mother-in-law, Fran Schultz testified. (R 3745). Appellant is a good father, never hit his children and cared for his sick father. (R 3748). He is a hard worker and obtained his GED. (R 3745-3748).

Appellant's mother-in-law's sister, Betty Moore, also testified. Appellant was always proper around her. He was capable of making decisions and always seemed in control. (R 3737-3743).

Another aunt, Billie Melon testified. (R 3729). She stated that appellant is a good provider and loved his family and father. (R 3729-3732).

Thomas Cavanagh, who testified for the state at the guilt phase, testified on behalf of appellant. (R 3850). He stated that appellant should not be executed because serial killers like him should be studied. (R 3860-3861).

The jury rendered an advisory recommendation for death by a vote of eleven to one. (R 3927). The judge sentenced appellant to death on July 15, 1994. (R 5402). The court found the following aggravating factors to exist; 1). appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence; § 921.141 (5)(b) 2). The court also found the existence of the aggravating factor that the capital felony was committed while appellant was engaged in or was an accomplice, in the commission of, or an attempt to commit a burglary, kidnaping and robbery. (R 5378). 921.141 (5)(d); and 3). The capital felony was especially heinous, atrocious and cruel. 921.141 (5)(h). (R 5379). The court rejected the state's argument that the capital murder was cold, calculated and cruel under 921.141 (5)(I). (R 5380).

The court did not find the existence of any statutory mitigating factors. (R 5381-5385). The court did consider and weigh eighteen separate nonstatutory mitigators. (R 5385-5389). After weighing both the aggravating and mitigating factors, appellant was sentenced to death. (R 5389-5390).

## SUMMARY OF ARGUMENT

The trial court properly allowed the admission of appellant's conviction for manslaughter during the guilt phase of the trial.

Appellant's claim that the trial court erred in failing to sever the extortion count is not preserved for appeal as the request for severance was grossly untimely. In any event, a motion for severance would not have been granted.

The trial court properly allowed the state to introduce evidence that appellant possessed the knowledge to execute a Quit claim deed as well as divorce documents.

The trial court properly denied appellant's motion for judgement of acquittal.

The trial court properly considered all the evidence presented in mitigation. The judge's findings regarding the mitigation are supported by the record.

Florida's death penalty statute is constitutional on its face and as applied.

## ARGUMENT

### ISSUE I

### THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S PRIOR CONVICTION FOR MANSLAUGHTER

Appellant claims that the trial court erred in allowing the state to use his prior conviction for manslaughter at the guilt phase of his trial. Appellant asserts that admission of the conviction was erroneous because it's probative value is outweighed by it's prejudicial effect and it's admission violates the spirit of "William Rule".

The trial court has great latitude in determining relevance of evidence, and such a determination will not be disturbed absent an abuse of discretion. Gaskin v. State, 591 So. 2d 917, cert. granted, 112 S.Ct. 3022, 120 L. Ed. 2d 894, rehearing denied, 113 S.Ct. 22, 120 L. Ed. 2d 948, on remand 615 So. 2d 679, cert. denied, 114 S.Ct. 328, 126 L. Ed. 2d 274 (1991). To be relevant, evidence must prove or tend to prove a fact in issue. Stano v. State, 473 So. 2d 1282, cert. denied, 474 U.S. 1093, 106 S.Ct. 869, 88 L. Ed.2d 12, denial of habeas corpus, affirmed in part, reversed in part, 901 F. 2d 898 (1985). With those principles in mind, appellant has failed to demonstrate the trial court abused its discretion.

A review of argument presented in support of admission of the collateral crime evidence along with the rationale behind the judge's ruling demonstrates that the manslaughter conviction was properly admitted because it was relevant to a material issue. (R 2093-2095). The reasoning behind admission of such evidence is best illustrated in Castro v. State, 547 So. 2d 111, 115 (Fla. 1989). For such admission to be proper, this Court requires that the collateral evidence be relevant to a material issue. In Castro, state witness McKnight, testified that the defendant threatened to stab him four days

before the alleged crime. McKinght admitted to helping the defendant cover-up the murder but he did not participate in the crime itself. Id. The state argued evidence regarding the prior threat was admissible to show McKinght's state of mind. This Court rejected that argument because McKnight's state of mind had not been made an issue at trial. Therefore, admission of prior threat was erroneous because it was irrelevant. Id, at 115. Contrary to the lack of relevancy of the collateral crime evidence in Castro, the credibility of key state witness, Charles Panoyan, was a central point in the case sub judice. Appellant's involvement did not become apparent for three years because Panoyan, initially charged with first degree murder, would not reveal appellant's identity as the gunman. In order to logically and accurately present the state's case, the state was required to explain to the jury why Panoyan initially a suspect, concealed appellant's identity for so long. Panoyan refused to speak with police because of his fear of appellant. Several witnesses testified about the explicit threats appellant made against Panoyan and his family. (R 149-151, 1505-1506, 2062-2094). Relevant to the reasonableness/credibility of Panoyan's fear was his knowledge/belief that appellant was capable of carrying out that threat. The state requested that it be allowed to introduce appellant's prior manslaughter conviction for the sole purpose of illustrating the believability of that threat. (R 149-156). The court's ruling was not predicated upon the rationale of "William's Rule" evidence. (R 1505-1506, 2092-2095). The trial court based it's ruling on the fact that Panoyan's state of mind was a central issue in this case. The trial court observed that the defense made Panoyan's credibility an issue in cross-examination. Panoyan's refusal to identify the killer was very relevant and central to both the state and the defense. (R 2092-2094). (R 2093). The state was correctly permitted to allow Panoyan to explain that appellant had previously beaten to death a four-year child. Given the fact that appellant is capable of such violence and that Panoyan is aware of that capability, Panoyan's

reluctance to reveal appellant's identity was motivated by fear and not guilt. Tumult v. State, 489 So. 2d 150, 153 (4th DCA 1986)(collateral crime evidence that is so "inextricably intertwined" in a case is relevant and admissible in order to present an orderly intelligible case); United States v. Larson, 526 F. 2d 262, 265 (5th Cir. 1976)(in prosecution for conspiracy to commit perjury, bad acts of co-defendant known by a witness who suborned perjury is relevant and admissible).

The central theme of appellant's defense was that Panoyan was involved in the crime and therefore should not be believed. Commencing with opening argument, the defense attorney emphasized the fact that Panoyan was initially a suspect. He concealed the identity of the alleged killer for three years. (R 646-650, 659, 669-671). This theme was developed throughout cross-examination of most of the state's witnesses. The defense repeatedly pointed out to the jury that Panoyan was the only victim that was not hurt, he knew the gunman, the police considered him a suspect from the beginning, he waited a long time to call for help after he was released by the gunman, and he concealed the identity of the killer for three years. (R 1166-1167, 1172, 1226, 1262, 1449, 1688, 1817, 1938, 2299-2301, 2477, 2708-2710, 2758, 2866). After the state rested, appellant moved for a judgement of acquittal based on the lack of credibility of Panoyan. (R 2899-2901, 2932). Finally during closing argument, defense counsel pointed out alleged inconsistencies in Panoyan's testimony, and reemphasized many of the points raised during cross-examination. (R 3007, 3011, 3012, 3016, 3019, 3020-3029). Given the state's theory of the case along with appellant's attempt to attack the credibility of Panoyan, appellant's manslaughter conviction was relevant and admissible. Castro; Tumult; Bryan v. State, 533 So. 2d 744, 747 (Fla. 1988)(evidence of collateral crime which demonstrates ownership and possession of murder weapon used in the instant case is admissible).

To the extent that this Court finds that the manslaughter conviction was inadmissible, any error must be considered harmless. State v. DiGuillio, 491 So. 2d 1182 (Fla. 1989). The evidence against appellant was overwhelming. Panoyan, an eyewitness to the crime, identified appellant as the gunman. It is clear from the testimony of Robert Decker and Clyde Decker that Panoyan could not possibly have been the killer. Appellant's cowboy hat and utility belt were left at the crime scene. The utility belt contained the keys to the handcuffs used on the victims. Appellant discussed details of the murder with three other people. He told two of those people that he had committed the murder. Castro.

## ISSUE II

APPELLANT'S CLAIM THAT THE TRIAL COURT SHOULD HAVE SEVERED THE COUNT OF EXTORTION IS NOT PRESERVED FOR APPEAL

On appeal appellant complains that the trial court should have severed a count of extortion. In count seventeen of the indictment, appellant was charged with threatening to injure or kill Charles Panoyan and his family if he testified against appellant. (R 4459). On April 27, 1993 prior to trial, appellant was on notice that the state intended to introduce appellant's prior manslaughter conviction. (R. 4573-4574)(R 149-154, 546-549).. On January 24, 1994 appellant filed two motions to preclude the state from introducing his prior conviction. The court heard argument regarding appellant's motion at that time. (R 149-154). Appellant never filed a motion to sever the extortion count, consequently this issue is not preserved for appeal.. (R 4719-4720, 4685). Barbon-Zureta v. State, 415 So.2d 824 (3rd DCA 1982)(untimely motion to sever will be heard only if the facts upon which it is based was not known before trial); Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1992)(failure to seek severance before the trial court waives issue for appeal).

In any event even if the issue was properly raised before the trial court, appellant cannot demonstrate that a severance should have been granted. The granting of a motion to sever is largely a matter within the trial court's discretion. Absent an abuse of that discretion, a trial court's ruling will not be overturned. Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992).

In an attempt to precluded the jury from knowing of appellant's manslaughter conviction, he claims that the trial court should have severed the extortion count from the remainder of the charges. However, given the fact that the offenses are connected in an episodic sense, severance was not

warranted. Fotopoulos. In Fotopoulos, the defendant and his co-defendant, Diedre Hunt, were charged with the murders of Kevin Ramsey and John Chase as well as the attempted murder of the defendant's wife Lisa Fotopoulos. Hunt was convicted of all charges in a separate trial. Id at 787. Fotopoulos sought to sever one of the murder charges, the murder of Kevin Ramsey, from the remainder of the charges. In a factual situation similar to the instant case, the state argued that Hunt's participation with the defendant in the murder of Kevin Ramsey was relevant to demonstrate how the defendant blackmailed Hunt into participating in the murder attempt of his wife. Id, at 789. This Court found severance to be improper. Id, at 790. In the instant case, the extortion count was necessary to explain Panoyan's connection to appellant as well as his role in the subsequent coverup. It was because of Panoyan's continued silence that this case remained unsolved for such a long period of time. Panoyan's relationship with appellant was a central issue in this case.

In any event, even if the extortion count should have been severed, appellant's prior manslaughter conviction was properly before the jury based on its relevance t Panoyan's state of mind. See issue I. Consequently, severance of the extortion count would not have made a difference. Id at 790; Robinson v. State, 610 So. 2d 1288, 1289 (Fla. 1992)(explain). This claim is without merit.

## ISSUE III

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE RELATING TO APPELLANT'S EXECUTION OF DIVORCE PAPERS AND A QUIT CLAIM DEED.

Appellant claims that the trial court erred in allowing into the evidence, certain documents prepared by appellant. The documents are a quit claim deed[1] and appellant's own divorce papers which were prepared without his wife's knowledge. (R 1459). Appellant claims that the documents are both irrelevant and prejudicial. The state requested that the documents be admitted solely for the purpose of establishing appellant's knowledge with regard to preparation of legal documents. (R 154 159). The trial court reasoned that appellant and the killer shared the common characteristic of knowledge of legal documents therefore the evidence was relevant. (R 157). The trial court further ruled that the documents were in no way prejudicial as half the population gets divorced. (R 159). Miller v. State, 605 So. 2d 492, 494 (Fla. 3rd DCA 1992)(testimony regarding defendant's dealing and ownership of guns does not imply bad acts since such acts are not illegal). Given the relevance and lack of prejudice the court admitted the evidence. (R 157-159). The trial court's ruling was proper. See generally Sections 90.401 and 90.402 Fla. Stats. Given that relevancy determinations are within the court's discretion, appellant cannot establish an abuse of that discretion. Howard v. State, 616 So. 2d 484 Fla. 1st DCA 1993).

Mrs. Decker's killer forced her and her husband Robert to sign a legal document. (R 156-157) This evidence was presented through the testimony of Robert Decker and one of the informant's

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[1] Charles Williamson signed a quit claim deed, giving ownership of his house to his son, the appellant. (R 1472).

Stephen Luchak. (R 1927). The killer was so concerned with authenticity of the document that he made Robert Decker sign two such forms. He did this because he was not satisfied with Robert Decker's first signature. The documents themselves were never recovered.

Even if the trial court erred in allowing evidence regarding those documents, any error must be considered harmless. Testimony regarding both documents was very brief. (R 1459, 1472, 2629). Furthermore as noted above, the evidence did not imply any bad acts. Miller. Appellant's claim is without merit.

## ISSUE IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL

Appellant claims that the trial court erred in denying his motion for judgement of acquittal. Appellant argued that the court should grant his motion for judgement of acquittal based solely on the fact that Charles Panoyan was not a credible witness. (R 2900-2902). The trial court properly denied the motion. (R 2902).

On appeal appellant argues that the state provided only circumstantial evidence of his guilt. He further attacks the sufficiency if the state's evidence by pointing out the lack of evidence presented. For example, appellant relies on the fact that there was no murder weapon found, nor was there any fingerprint, blood or DNA evidence presented. Appellant's argument is both leally and factually faulty.

When reviewing the correctness of a trial court's denial of motion for judgement of acquittal, this Court has repeatedly established the following standard of review:

> As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgement.

Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1983). See also Melendez v. State, 498 So. 2d 1258, 1261 (Fla. 1986)(it is within the province of the jury to determine the credibility of the witnesses and to resolve factual conflicts); Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1985)(court will not

substitute its judgement for that of the trial court on questions of fact); Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991)(defendant admits the facts in evidence and every favorable conclusion to the state that the jury may infer from the evidence).

In resolving these factual conflicts, the jury is not required to believe the defendant's version of the facts. This principle has been repeatedly reaffirmed:

> The jury determines whether the evidence fails to exclude all reasonable hypothesis of innocence. Although Pietri testified that he shot Chappel but did not intend to kill him, the jury is not required to believe a defendant's testimony.

Pietri v. State, 644 So. 2d 1347, 1352 (Fla. 1994). See also Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989)(jury not required to believe the defendant's version of facts to which the state has produced conflicting evidence); Grossman v. State, 525 So. 2d 833, 837 (Fla. 1988)(defendant's argument that he panicked and killed the officer out of fear was made to the jury and it was within their province to reject it). With these principles in mind, appellant's argument must fail.

Appellant's argument is simply attacking the credibility of the state's witnesses. As noted above, that task is for the jury. Simply because appellant does not accept the testimony of an eyewitness Charles Panoyan, does not warrant the granting of a motion for judgement of acquittal. Through cross-examination, opening and closing argument, appellant presented his case to the fact finder. He pointed out the inconsistencies in Panoyan's testimony. The jury is responsible for assessing the credibility of the testimony, not this court. The trial court properly denied appellant's motion for judgement of acquittal. Also incorrect is appellant's characterization of the evidence as circumstantial. Two of the shooting victims, Clyde and Robert Decker, testified as to the crimes committed upon them. Robert Decker testified that the assailant wore a cowboy hat. (R). Robert

Decker also testified that he felt that Panoyan knew the identity of the gunman. Appellant admitted that he owned the hat found at the scene. Numerous other witnesses testified that the hat found at the scene belonged to appellant. (R). Three witnesses testified regarding details of the crime as told to them by appellant. Two of them testified that appellant admitted to them that he killed Mrs. Decker. Charles Panoyan an eyewitness to the crime identified appellant as the killer. The credibility of witnesses is determined by the trier of fact. The trial court properly denied appellant's motion for judgement of acquittal.

## ISSUE V

THE TRIAL COURT'S FINDINGS WITH RESPECT TO APPELLANT'S MITIGATING EVIDENCE IS SUPPORTED BY THE RECORD.

Relying on Campbell v. State, 571 So. 2d 415 (Fla. 1990) and Larkin v. State, 20 Fla. L. Weekly S228 (Fla. May 11, 1995) appellant complains that the trial court committed two reversible errors regarding the sentencing determination. The trial court failed to properly find the existence of the statutory mental mitigators that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance[2]; and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.[3] The trial court also failed to give sufficient weight to his alleged brain dysfunction and dysfunctional upbringing. A review of the detailed sentencing order, the penalty phase testimony and the applicable case law, belies appellant's contentions.

The trial court rejected a finding of statutory mitigation because; 1). the techniques relied upon by appellant's experts, brain mapping and brain spectrography, were not generally accepted in the scientific community, (R 5383); 2). there was no correlation or nexus between appellant's brain damage and his behavior on the night of the murder, (R 5384); and 3) there was insufficient evidence to establish the existence of the statutory mitigators proposed by appellant. (R 5383-5384).

Appellant appears to further argue that the trial court applied the incorrect standard when assessing the sufficiency of the evidence to establish statutory mental mitigators. In his brief appellant

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[2] Section 921.141(6)(b), Fla. Stat.

[3] Section 921.141(6)(e), Fla. Stat.

criticizes the trial court's inquires of the mental health experts: "The trial judge repeatedly requested that the experts provide some proof that Appellant's brain disorder directly caused him to commit the crimes. The law provides that aggravating circumstances must be proven beyond a reasonable doubt, but mitigating circumstances do not share such a high burden." Appellant's Brief at 23. There is nothing in the record that even remotely suggests that the trial court applied an incorrect standard/ burden regarding the mitigating factors. The trial court did inquire about the correlation between an abnormal EEG and a person's ability to reason or control emotions and impulses. (R 3559). Three of the four experts presented by appellant would not even attempt to establish a connection between appellant's alleged brain damage and his criminal behavior. Dr.Dickens, a neurologist, concluded that even if there was an abnormality in appellant's brain, such a condition does not correlate with appellant's behavior. (R 3555-3559, 3542, 3516, 3519-3520). Dr. Smulvotsky, an expert in radiology and nuclear medicine, concluded that appellant's brain is abnormal. However it is beyond the area of his expertise to interpret that finding into a clinical diagnosis. (R 3583). Dr. Wand, a neurologist, also could not offer a clinical diagnosis based on the alleged brain damage. (R 3640). None of the doctors were able to articulate what if any effect a damaged brain would have on a person's character. Of appellant's four experts, only Dr. Appel's conclusions and opinions contained any mention of a clinical diagnosis. [Although Appel boldly offered an opinion regarding the nexus between the alleged brain damage and appellant's behavior on the night of the crime, her opinion is severely undermined. The basis for Appel's conclusions will be discussed in detail below]. Based on the responses given by appellant's own experts, the trial court correctly found no evidence to indicate that a nexus exits between appellant's mental health and his criminal conduct on the night of the murder (R 5384). In other words appellant's experts could not attach any relevancy to his brain

damage that would assist the judge or jury in determining his culpability and ultimately his punishment. The trial court's inquiry into the relevance of appellant's proposed mitigation was proper. This Court has recognized:

> Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion.

Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990). Furthermore, in order to be considered mitigation, the evidence "must, in some way, ameliorate the enormity of the defendant's guilt." Eutzy v. State, 458 So. 2d 755 (Fla. 1984) *cert. denied*, 471 U.S. 1045, 105 S. Ct. 2062, 85 L. Ed. 2d 336 (1985). Even if appellant is able to establish the existence of such mitigation he must also establish its relevance to the case. This Court has explained:

> The effects produced by childhood traumas, on the other hand, indeed would have mitigating weight if relevant to the defendant's character, record, or the circumstances of the offense. *citations omitted.* However in the present case Rogers' alleged childhood trauma does not meet this standard of relevance. No testimony on this question was ever presented during the penalty phase, and Rogers raised this issue for the first time on appeal....
>
> We thus find that the record factually does not support a conclusion that Rogers' childhood traumas produced any effect upon him relevant to his character, record or the circumstances of the offense as to afford some basis for reducing a sentence of death. *citations omitted.*

Rogers v. State, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). Johnson v. State, 20 Fla. L. Weekly S343 (Fla. July 13, 1995)(trial court's decision to give little weight to evidence regarding emotional disturbance is proper given that evidence was poorly correlated to the actual offense). The trial court's inquiry into the relevance of

appellant's brain damage was proper. The lack of relevance warranted the trial court's rejection\skepticism of appellant's proposed mitigation.

Dr. Appel has concluded that appellant has a distorted brain. The damage was probably the result of a car accident appellant was involved in as a child in 1969. (R 3789). Due to the lack of treatment for that injury the problem became worse. (R 3790). Appellant's brain damage prohibits his capacity to process both rapid information or information during stressful events. (R 3835). Appel cites to several to stressful events in appellant's life that have exacerbated the problem. Those stressful events include the fact that appellant's mother was killed in a car accident in 1969. Appellant's father became more abusive towards the children after the death of Mrs. Williamson. Although appellant left this dysfunctional family, he came back to care for his invalid father after his father suffered two debilitating strokes. The fact that appellant was now back in this dysfunctional family added to his stress. (R 3803-3804). Appellant's problems were compounded by the fact that his wife conceived a child by his brother Rodney. (R 3803). Based on the forgoing, Appel asserts that appellant's damaged brain along with the effect of several stressful events, indicates that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. 921.141(7)(b) She further opined that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. 921.141(6)(e).

For the following numerous reasons, the trial court properly rejected Appel's conclusions. Appel's opinion is greatly dependent on her conclusion that appellant does in fact have brain damage. Appel's opinion regarding the existence of brain damage is based in part on the results of the controversial brain mapping technique. Dr. Dickens testified that the diagnostic procedure of brain

mapping had not yet been established as a valid testing procedure by the American Academy of Neurology. (R 3541). He warned against its use in trying to assess a clinical diagnosis. Dr. Smulvotsky also cautioned against the use of brain mapping as a diagnostic tool because the findings generated by the testing are inconclusive. (R 3592-3593). Dr. Wand relied upon brain mapping testing to conclude that appellant has brain damage yet he too conceded that there is much controversy in the scientific community regarding the technique. (R 3645). He further conceded that there is confusion over whether or not brain mapping is a generally accepted methodology. (R 3644). The trial court properly rejected the opinion and conclusions of appellant's experts to the extent that they were based on the controversial brain mapping technique. Hayes v. State, 20 Fla. L. Weekly S296 (June 22, 1995).

Apart from the controversy over brain mapping, Appel's conclusion that appellant even has significant brain damage is not uncontroverted. Dr. Dickens found no evidence of brain abnormality. Appellant's EEG test conducted in April of 1994 produced normal results. (R 5382, 3514, 3533, 3537). Dickens opined that the abnormality found in an EEG conducted in 1971 did not necessarily indicate the presence of brain disease. The abnormal EEG could have been developmental. (R 3543). Dr. Smulvotsky found an abnormality in appellant's brain because there was less blood flow on the right side of the brain than there was on the left side. (R 3581-3582). Smulvotsky could not say how this occurred or when it occurred, but only that it existed on the day of testing which was May of 1994. (R 3582-3583). He could not conclude that the decreased blood flow indicated the presence of any disease. (R 3595). Based on the results of an EEG and brain mapping, Dr. Wand opined that appellant suffers from moderate to severe brain damage. (R 3633-3635). In Wand's opinion appellant has had brain damage since 1971. (R 3636). Although Wand concludes that

appellant suffers from brain damage, he concedes that he has no knowledge of how appellant has conducted his life from 1971 through 1994. (R 3638). He does not know if appellant is capable of reading a newspaper or driving a car. He does not know anything about where appellant has lived or worked. Furthermore Wand has no knowledge regarding the facts of the murder. (R 3639, 3653, 3632-3635, 3640, 3642). Consequently, to the extent that Appel's ultimate conclusions are based on appellant's brain damage, the trial court was well within its discretion in rejecting those opinions. Wickham, 593 So. 2d 191 (Fla. 1991)..

Relying on the results of EEG testing, brain mapping and the statements of various lay people[4], Appel concluded that appellant suffers from a complex seizure disorder which causes him to loose control during a fit of rage or during convulsions. (R 3778, 3809). Appel believes that the seizure disorder is further proof that appellant has a dysfunctional brain. Appellant's seizure disorder is a contributing factor to appellant's behavior yet Appel could not say that appellant had such a seizure on the night of the murder. (R 3825, 3838-3839). Again Appel's conclusions regarding a seizure disorder are not uncontroverted. Appel conceded on cross-examination that appellant is not and never has been prescribed any seizure medication. (R 3824). Furthermore, Dr. Smulvotsky did not see any history of seizures. (R 3594). Given the lack of any uncontroverted medical testimony, along with reliance on a statements from lay people, Appel's conclusions are not entitled to much weight. Carter v. State, 576 So. 2d 1291, 1292-1293 (Fla. 1989)(experts evaluations were less than unequivocal, consequently trial court's rejection of same is supported by the record). Thompson v. State, 553 So. 2d 153, 157 (Fla. 1989); Preston v. State, 607 So. 2d 404, 412 (Fla. 1992).

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[4] Appel stated that O'Brien, a cellmate of appellant, told her that Appellant would voluntarily roll his eyes and refuse to answer questions or he would have a strange look on his face when he started talking about the murder. (R 3778-3780, 3834, 3839).

Johnson (on the question of weight, the trial court's ruling will be affirmed if it is supported by substantial competent evidence).

Most damaging to Appel's credibility was her inability to explain to the judge and jury appellant's behavior immediately after the murder. The trial court asked Appel to explain that if appellant could not appreciate the criminality of his actions, then why did he flee the area and repeatedly threaten a witness[5]. (R 3844-3845). Appel's first response was that she was not asked to address the facts of the incident. (R 3845). The court pressed further asking Appel to explain appellant's seemingly contradictory behavior shortly after the murder. (R 3839-3848). Appel was unable to directly answer the court's questions. (R 3845-3848). The trial court's findings that Appel's testimony was faulty and illogical is supported by the record. (R 5384).Preston v. State, 607 So. 2d 404 (Fla. 1992)(Appellant's steps to avoid detention indicate that he could appreciate the criminality of his actions). The unpersuasiveness of Appel's opinions are further highlighted by the fact she offers an opinion regarding appellant's state of mind on the night of the murder yet Appel does not possess any knowledge regarding the facts of the crime, nor is Appel familiar with any of appellant's behavior subsequent to the crime.

The unreasonableness of Appel's conclusions regarding appellant's mental status is also evident from the testimony of other witnesses'accounts of his behavior. Dr. Haber was appointed to conduct a competency examination. He found appellant to be competent and sane. He also found appellant to be alert, cooperative, responsive, controlled ad coherent. (R 3827-3828). Appellant demonstrated adequate memory for recent and remote events and he demonstrated thought processes

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[5] Appellant was convicted of extortion based on the repeated threats to Charles Panoyan. (R 2124-2131, 5378).

that were productive and goal oriented. (R 3829). Lastly, accounts of appellant's behavior and characteristics from numerous family members seriously undermine the conclusions of Dr. Appel regarding the extent to which appellant is debilitated because of his brain damage. Appellant's sister Rene Williamson described her brother as compassionate and dedicated to his family. Appellant is patient and controlled and is capable of dominating a situation. (R 3675-3679). Appellant's uncle Bobby Williamson testified that Dana was a hard worker, responsible and very much in control. (R 3729). Appellant's in-laws described him as caring and compassionate and had no difficulty in making decisions. (R 3729). While living in Ohio, appellant obtained his GED while holding done a job and continued his education be attending computer school. (R 3720, 3711-3712). Appellant was a good father and never hit his children. (R 3745-3748). Given the overwhelming evidence rebutting Appel's opinion, the trial court's rejection of same was proper. Thompson, supra;

Appellant also challenges the weight given to his brain dysfunction and his dysfunctional upbringing. As noted above, the weight to be given mitigating evidence is within the trial court's discretion.Johnson. Appellant cannot demonstrate that the trial court abused that discretion.

The trial court's assessment of appellant's nonstatutory mitigation is also supported by the record. The trial court's order listed eighteen separate categories of nonstatutory mitigation offered by appellant. (R 5385-5389). The court gave no weight to five of those categories indicating that there was a total lack of evidence to establish their existence; appellant was beaten at school; appellant was easily led by others; appellant was emotionally handicapped; appellant's anger and hostility developed from his childhood circumstances; and appellant would be a model prisoner. (R 5387-5388). A review of the record supports the trial court's conclusions. Jones v. State, 652 So. 2d 346, 351 (Fla. 1995)(given the fact that fetal alcohol was never even mentioned during sentencing

phase as a mitigator the trial court properly refused to find its existence). The trial court gave varying degrees of weight to the remainder of the categories. For instance the court gave some weight to the following; appellant's exceptionally unhappy and unstable childhood, (R 5385-5386); appellant's life and psychological makeup was one of emotional instability, (R 5386), appellant was beaten as a child, (R 5387), appellant had a deprived childhood, (R 5385). The court gave little weight to the remaining categories of nonstatutory mitigation; appellant was denied parental love, (R 5386), appellant was born the product of an accident, (R 5386), appellant was aware of the physical and emotional abuse suffered by his mother at the hands of his father, (R 5386), appellant was incarcerated at a very early age, (R 5386-5387), appellant spent many years in prison, (R 5387), appellant has little education, (R 5388), appellant's appearance and demeanor at trial was clam and under control. (R 5389). Most of the nonstatutory evidence centers around appellant's somewhat abusive childhood. The trial court properly gave this evidence some/little weight. This abuse occurred sometime after the death of appellant's mother in 1969. Appellant was not exposed to the abuse for an extended period of time given the fact that he was a resident of the Nova Learning Center in 1971 where he beat to death four year old Peter Wagner. (R 3470). Furthermore the abuse suffered by appellant occurred well over fifteen years before the murder of Donna Decker. Appellant's other siblings also suffered the same abuse yet Rene Williamson, appellant's has lead a very productive crime free life. Jones v. State, 648 So. 2d 669, 680 (Fla. 1994)(remoteness in time of traumatic childhood and fact that sister also experienced abuse and became productive member of society warrants trial court's decision to give little weight to mitigation). Contrary to the opinion of Appel, appellant is very much in control of his environment and takes charge of stressful situations. Appellant cannot demonstrate that the trial court abused its discretion in giving little weight to the

nonstatutory mitigation. Jones v. State, 580 So. 2d 143 (Fla. 1991)(trial court did not abuse its discretion in refusing to find cultural deprivation and poor home environment as mitigating circumstance as sentencing is an individualized process); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991)(forcefulness of mitigation regarding alcoholism, abusive childhood and extensive mental problems is lessened by evidence to the contrary). The trial court properly considered all that was presented. The court's findings regarding both the statutory and nonstatutory mitigation is supported by the record. (R 5381-5389). Carter v. State, 576 So. 2d 1291, 1292 (Fla. 1989); Jones.

## ISSUE VI

FLORIDA'S DEATH PENALTY STATUTE IS CONSITUTIONAL ON ITS FACE AND AS APPLIED IN THE INSTANT CASE.

Appellant makes a cursory argument attacking the constitutionality of Florida's death penalty statute on its face and as applied. Appellee asserts that the argument as presented is procedurally barred. Appellant does not specify what portions of the statute are unconstitutional as applied to this case or how the statute is unconstitutional as applied to this case.. Given the inadequacy of the argument, this issue should be waived. Johnson v. State, 20 Fla. L. Weekly S343 (Fla.); Duest v. State, 555 So. 2d 849 (Fla. 1990). In any event, this Court has repeatedly rejected this argument. Appellanty does not present any argument let alone any compelling argument to reverse this Court's prior rulings. Hall v. State, 641 So. 2d 381, 389 (Fla. 1994); Gamble v. State, 20 Fla. L. Weekly S242 (Fla. May 25, 1995).

The trial court properly found the existence of the three aggravating factors. Appellant was previously convicted of a felony involving the use or htreat of violence to a person. Sec. 921.141 (5)(b). Appellant was convicted of Manslaughter in 1975 for the beating death of four-year old Peter Wagner. Appellant was also convicted of the three counts of attemtped first degree murder involving the shootings of Robert Decker, Carl Decker and Clyde Decker. (R 5377-5378). LeCroy v. State , 533 So. 2d 250 (Fla. 1989); Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987).

The court was also correct in finding sufficinet evidence that the murder was committed while the defendant was engaged in or was an accomplice in the commission of or an attempt to commit robbery and kidnapping under 921.141 (5)(d). Robert Decker testifed that the gunman put a gun to his head and demanded that he open the house safe. The gunman asked Decker for drugs and cash.

Ultimatley he took Decker's wallet, briefcase, $2,000 in cash, an engagement ring worth $1, 000, numerous credit cards, an uzi and Decker's van. (R 844, 874, 1048, 1064, 1071-1073, 1075, 1081, 1102, 1104-1106). Appellant otld Panoyan imeedicately before the home invasion that he was there to rob the Deckers. (R 2109). He also told inmate O'Brien that he thoght the Deckers had a lot of money. (R 1545). He also expressed anger over the fact that he only got $2,000 from them. (R 1930-1935). There was sufficinent evidence beyond a reasonable doubt that the murder was committed during the course of a robbery. Preston v. State, 607 So. 2d 404, 409-410 (Fla 1992).

There was also sufficient evidence to establish that the crime was committed during the course of a kidnapping. Charles Panoyan, Robert Decker and Clyde Decker all testifed that the gunman at gunpoint, handcuffed and hogtied the Decker family in the master bedroom for over an hour. (R1065, 1170, 1176, 2115). Sochor v. State, 619 So. 2d 285 (Fla. 1993)

The trial court properly found the existence of the aggravating factor , the capital felony was especially heinous, atrocious and cruel. 921.141 (5)(h). The medical examiner testifed that Mrs. Decker received three stab wounds to the left uper arm. Two of the wounds went through her arm into her shest. (R 3416). The alignment of the wounds indicate that her arms were by her side when she was stabbed. (R 3418-3419). She did have defensive wounds on her writs and her ahnds. (R 3419). Appellant told a cell mate that she had put up a good fight. (R 1543). Mrs. Decker also suffered two deep stab wounds to her back. One went through her back, pierced her lung, and continued through her ribs and lodged in her sturnem. (R 3419). The second stab wound went through her back, through her lung, kidney and liver. (R 3420). There was a tremendous amount of internal bleeding. (R 3420). Her lungs filled up with bolld making breathing increasingly more difficult. (R 3437). As this happened, the intense pain increased as she struggled to breathe. (R

3437). A preson would remin conscious for anywhere from four to ten minutes. (R 3421). Mrs. Decker was aware of the fact that she wa dying as she called "911" for help and stated that she had been stabbed to death.962-963). The state proved beyond a reasonable doubt that ths murder was "heinous, atrocious and cruel". Preston v. State, 607 So. 2d 404 (Fla. 1992); Merck v. State, 20 Fla. L. Weekly S537, 538 (October 12, 1995); Derrick v. State, 641 So. 2d 378 (Fla. 1994).

The death sentence is proportionally warranted in the instant case. Appellant's prior violent felonies include the senless beating death of four-year old Peter Wagner. Thriteen years later appellant motivated by greed, engages in this brutal home invasion robbery resulting in the vicious stabbing of Donna Decker along with the attemtpted murder of two-year old Carl Decker, Carl's father, Robert and and grandfather, Clyde. The trial court properly sentenced Dana Williamson to death. Wright v. State 473 So. 2d 1271, 1277 (Fla. 1995); Johnston v. State,497 So. 2d 863 (Fla. 1986); Rodriguez v. State, 609 So. 2d 493 (Fla. 1992); Derrick v. State, 641 So. 2d 378 (Fla. 1994).

## CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "AMENDED ANSWER BRIEF OF APPELLEE" has been furnished by U.S. Mail to Scott A. Mager, Esquire, and Robert E. Hodapp, Esquire, Barnett Bank Tower, Suite 1701, One East Broward Boulevard, Fort Lauderdale, Florida 33301, this **15th day** of **March, 1996.**

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