IN THE SUPREME COURT OF FLORIDA

DWAYNE KIRKLAND,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NUMBER: 84, 353

APPEAL FROM SENTENCE OF DEATH, CIRCUIT COURT FOR THE 14TH JUDICIAL CIRCUIT CALHOUN COUNTY, FLORIDA

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

A. NATURE OF THE CASE AND JURISDICTION

This is a direct appeal from a sentence of death imposed by the trial court. This Court has jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution and Rule 9.030(1)(A)(I), Fl.R.App.P.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE LOWER TRIBUNAL

GUILT PHASE

On April 28, 1993, Mr. Kirkland was arrested on an open count of homicide. (R-28) On May 17, 1993, he was indicted for the first-degree murder of Coretta Martin. The murder was alleged to have occurred sometime on April 13 and 14, 1993. (R-5) About a month after the indictment was returned, Kirkland's lawyer filed a motion challenging Kirkland's competency to stand trial. (R-18-20).

Based on this motion, the trial court appointed two mental health experts to examine Mr. Kirkland; Ralph Walker, a psychiatrist, and Harry McClaren, a psychologist. (R-21-23). This evaluative process culminated in a finding by the trial court that Mr. Kirkland was incompetent to proceed with any pretrial hearing as well as the trial. (R-25). This decision resulted in his commitment to Florida State Hospital. (R-25)

Approximately two months later, the forensic administrator at Florida State Hospital notified the trial judge stating that the hospital's professional staff had concluded that Mr. Kirkland "has an adequate understanding of the nature and seriousness of the criminal charges; is able to communicate rationally with an attorney; and is otherwise capable of satisfactorily participating in the defense of the case." (R-29) On October 13, 1993, the trial court found Mr. Kirkland competent to proceed. (R-40).

Mr. Kirkland then filed a motion to suppress any statement he had given after his arrest in Ft. Myers on April 19, 1993. (R-49-51) In addition, Mr. Kirkland filed a notice that he intended to rely upon an insanity defense at trial. (R-58) He also filed two motions to discontinue the use of any psychotropic drug around the time of and including his trial. (R-59-61; 62-65). The trial court issued an order stating that "'Mellaril' or 'Prozac' shall be administered only upon the request of the Defendant." (R-71).

The case then proceeded to trial. The jury returned a verdict on July 1, 1994 of guilty as charged of first-degree murder. (R-108) Mr. Kirkland filed a motion for new trial. (R-113-114). It does not appear to have been ruled on.

PENALTY PHASE

At the sentencing phase, the State offered certified copies of two prior convictions. (TR-972) and then rested. Mr. Kirkland offered the testimony of an osteopathic physician who diagnosed him as HIV positive. (TR-977) Otherwise, both the State and Mr. Kirkland relied on the testimony offered at trial. The jury recommended a sentence of death by a vote of 12-0. (R-109)

The trial judge solicited sentencing memoranda from the parties in the form of a proposed judgment and sentence. (State - R-117-121; Defense - 129-132) With some stylistic changes, the trial judge adopted the State's proposed judgment and sentence as its own (R-123-128) and sentenced Mr. Kirkland to death.

Prior to the sentence being pronounced, Kirkland's lawyer stated that Kirkland was not competent to proceed. (TR-1022) The lawyer had recently learned that a psychiatrist had prescribed five medications; two antidepressants; one anti-anxiety drug; and 100 milligrams of thorazine as an antipsychotic (specifically auditory hallucinations that were telling Kirkland to hurt himself). (TR-1028-1030; 1032). The psychiatrist, when he saw Kirkland on August 4, 1994, thought Kirkland knew what was going on but did not specifically evaluate him for the purpose of determining competency. (TR-1032) As a result, the psychiatrist had no opinion on Kirkland's competency on the date sentence was imposed - August 29, 1994. (TR-1033)

APPEAL

From the judgment and sentence adjudicating him guilty of first-degree murder and imposing a death sentence Mr. Kirkland filed a timely notice of appeal. (R-143)

STATEMENT OF THE FACTS

Teresa Michelle Martin met Dwayne Kirkland in 1990 in Quincy (TR-275). Ms. Martin was separated from her husband, from whom she had three children - Antwan, Gregory, Jr. and Coretta. They started dating shortly after meeting and in 1991 moved to Atlanta. The children did not live with her at the time. (TR-277) In January 1992 she moved back to Blountstown without Kirkland. He returned to Blountstown in June 1992 and they resumed their relationship. (TR-278) About two months later they moved in together. Gregory and Coretta were living with her at that time. (TR-278, 279) Angel was born March 7, 1993. (TR-279)

On April 10, 1994, Angel became ill with a high fever. When Dwayne suggested taking her to the emergency room, Teresa Martin did not want her taken to the Blountstown hospital. Dwayne called his parents and arranged to have his dad come to take them to Tallahassee. Along with his father, Dwayne and Ms. Martin took Angel to Tallahassee Memorial. The hospital admitted Angel (TR-280) and they were taken to her room at approximately 6:00 a.m. the next morning (Sunday). Dwayne's father and Gregory, Jr. left the hospital to get some rest and something to eat since they had been there all night. They all came back to the hospital Sunday evening. (TR-281, 282) That night, Gregory and Kirkland returned to Blountstown with their mother. Gregory, Jr. and Coretta visited the hospital on Monday. Ms. Martin wanted both children to stay

with her. Gregory, Jr. did so; Coretta indicated she would not because she could take care of herself. Worried, Ms. Martin asked Coretta to stay with her sister until Ms. Martin came home from the hospital. When Coretta left the hospital on Monday, Ms. Martin believed she would be staying with her sister (TR-282) .

Kirkland came to the hospital for a while Monday evening (283) . No one visited on Tuesday and Ms. Martin and Gregory spent Tuesday night at the hospital. Ms. Martin found out Wednesday morning that Angel would be released from the hospital that day. (TR-284) Kirkland called Wednesday afternoon at 2:30 Blountstown time and said he was trying to get to the hospital. (TR-285) Ms. Martin told him that Angel had been released and when Kirkland's dad came to the hospital she would have him bring her home. Ms. Martin told Kirkland that she didn't have a key because she had given it to Coretta on Monday. (TR-285) Kirkland told her that he had left his key at home and that Coretta had a softball game in Vernon so she would not be there to let her mother in. (TR-286) He said he was in Havana with a friend and if he didn't come home that night he would have someone bring him home the following day (TR-286-7) Kirkland's father picked up Ms. Martin, Gregory Jr. and Angel from the hospital and dropped them off at her home between 5:30-6:00 p.m., Blountstown time .

The father did not stay while Ms. Martin tried to get inside. (TR-287) The family waited, hoping Coretta would come home. When Corretta did not, Ms. Martin started trying to find a way into the house. She was not successful. Gregory went to the

landlord's house to get him to come let them in but the landlord was not home. (TR-288) While waiting around for the landlord, the family again tried to get in. Gregory found a piece of metal on the ground and used it to successfully pick the lock. Once inside the house, Mr. Martin put the baby in her crib and told Gregory not to go anywhere because she wanted him to watch the baby while she fixed something to eat. (TR-289) It was getting dark so she walked through the trailer turning on lights. She turned on the lights in the bathroom.

She then went back to the master bedroom and turned on the light and looked around. Starting back up the hall, she turned on the light in Gregory's room. There was a bundle on the bed. She snatched the cover off to straighten it out. At this point she saw Coretta' s legs (TR-290) She threw the cover the rest of the way off. (TR-290,1) She knew something was wrong and started screaming. She told Gregory to get some help and went out of the trailer herself screaming for help. (TR-291) It was about 7:00 p.m. (TR-291) when the police arrived.

In April, 1993 Henry Fain, Jr. had been separated from his wife approximately one and a half years. (TR-308) He and Coretta were in a church gospel group together. They had met each other through his cousin, Sylvia Engram. (TR-308-9) He started dating Coretta in November of 1993. (TR-309) During this time he basically saw her every day. (TR-309-10) He saw her at rehearsal at his mom's house the day before she was found murdered (Mary and Rudolph Engram). (TR-310-11) After the rehearsal, Fain

took home several members of the rehearsal group, including Coretta. He took Coretta home last, at about 10:00 p.m. At her house, there was a truck in the yard he recognized as belonging to Cuyler Engram (TR-312) There were no lights on in the house. Coretta asked him to drive around the block. When they got back the truck was gone (TR-313). They sat in the car and talked for about five minutes. (TR-313) Before Coretta got out of the car, Fain gave her a gold chain and a cassette tape. He watched her go in the house; the house was completely dark. (TR-314) Fain remembers leaving at five or ten minutes after ten. He went and drank some beer with friends and then went home to his parent's house. (TR-315, 316) On the way to work the next day he went to Hardees to get something to eat at about 11:00 a.m. (TR-316) He saw Coretta's best girlfriend there and learned she had not been to school that day. (TR-317) He went on to work; Fain did not learn that Coretta had been killed until he got off work that night about 7:00 p.m. His aunt, Dorothy Battles, told him. (TR-318) They went around to the house and stayed there just about all night. (TR-318) Fain testified he was in the Martin's house on Sunday and Monday of that week and had sex with Coretta in Gregory's bedroom. (TR-320, 321) He testified there would probably be no evidence (fingerprints) of his presence except on the front door. (TR-321)

Coretta's best friend was Sylvia Engram. She knew Coretta for about 3 ½ years before her death. (TR-331) She was at Hardees in Blountstown after coming back from a softball game in Vernon when she learned of Coretta's death. (TR-333) She had not

seen Coretta at all that day. (TR-334) She had gone by that morning to meet Coretta at the bus stop and Kirkland told her Coretta had already left. (TR-335) He was wearing black shorts with netting at the bottom. (TR-337) She had been at gospel practice the night before at her Uncle Rudolph's and his wife Mary's trailer. Sophia, Demetri, Coretta, Latoya and Cynthia were present. Henry Fain took her home (TR-338) Cynthia and Latoya rode with them. Fain dropped her off shortly before midnight. Coretta was still in the car. She did not see Fain the next day. (TR-339) The bus comes at 7:00 a.m., so it was between 6:30 and 7:00 that Kirkland told her Coretta had left already. (TR-341).

Kendall Howell works at Folmar Gun and Pawn on North Adams in Tallahassee. (TR-348) According to their business records, Kirkland pawned a Figaro chain with a cross and rose on April 14, 1993. (TR-349-354)

Almost a month later the chain was retrieved (TR-355) from the pawn shop, along with the pawn ticket (TR-356-357), by a Tallahassee police officer.

In April 1993, Cuyler Engram owned a night club on River Street named Club Shadows. He also worked in the wholesale earthworm business. (TR-360) Kirkland had worked for Engram for about 2-3 months, doing janitorial work and occasionally working the door at the Club. (TR-362) Kirkland also went with him on pretty much a daily basis to gather earthworms. (TR-363) Monday through Saturday, Engram would pick Kirkland up about 4:30 a.m. and they would return around 9:30 or 10:00 a.m. (363-

364)

The day following Coretta's killing, Engram was running about 30 minutes behind. He saw Kirkland at approximately 4:45/5:00 walking up River Street. (TR-356) Kirkland was about 3/4 of a mile from his house. He was wearing blue jeans and a jacket and was carrying an ice chest. (TR-366) The ice chest was small, approximately two 6 pack size. Engram thought Kirkland was coming to meet him because he was late. (TR-367) Kirkland told Engram he wouldn't be able to work because his father was sick and asked for a ride to Bristol. Kirkland wanted to go to Quincy so Engram decided to take him so he wouldn't have to hitchhike from Bristol. He recalls Kirkland saying he had a change of clothes in the cooler. (TR-368) He dropped Kirkland off about 2 miles from Quincy on a dirt road that Kirkland said his uncle lived on. It was between 5:30 and 5:45 a.m. (TR-369) Kirkland told Engram he would meet him back at the club about 10:30 to help him work on his truck. He did not see Kirkland again. (TR-370)

The day before Coretta was found murdered, Kirkland went with Engram to Panama City to deliver earthworms. (TR-372) On the trip Kirkland told him he felt he could have Coretta sexually if he wanted. (TR-374) Engram told him to think of the consequences and that it would not be right. They returned to Blountstown about 5:30 or 6 that evening (TR-374) They went to the club and worked on Engram's truck camper until approximately 8:30. After they were through working they had a beer. (TR-375) When Engram took Kirkland home, there were no lights on in the home. Kirkland did

not get out, indicating he was looking for someone. While they were driving around, they saw Gregory Martin. (TR-376) Engram took Kirkland uptown and let him out on Pear Street about 8:45 p.m. (TR-377) He went by Kirkland's house about 10:15 p.m. but no one was home. (TR-378) The trailer was completely dark. (TR-379)

When Engram picked Kirkland up the following morning, his appeared normal and calm. (TR-380) Engram told the police he believed Kirkland had a split personality, meaning that if he "gets upset he really goes off the deep end as far as doing harm or trying to do harm". He also told the police Kirkland talked crazy on the way to Panama City, talking about Coretta "just over and over again." (TR-381) He stated that Kirkland told him if " some people cross me the wrong way I will do something drastic." (TR-386)

On April 14, 1993, William H. Schoob of FDLE crime lab (TR-388) went to crime scene in Blountstown, specifically the mobile home at 620 Mayhall Drive. (TR-390) When he arrived there at about 11:00 p.m. that night, (TR-389) the crime scene was taped off (TR-390). He met with local police, surveyed the scene, took photographs and drew a sketch trying to document where things were. A pocket knife was found in the sink that had soggy water in it. (TR-403) This knife was not examined for prints. (TR-500) Coretta Martin was found in the master bedroom in back of trailer, (TR-403) lying on the bed. (TR-407)

Blood was found at different places in the bedroom. (TR-410-411) After Coretta Martin was removed from the bed an empty can of mace was found. (TR-413) Blood

was also found in the bathroom, including the ledge of the bathtub, the wall and corner of the bathtub. (TR-405)

Josephine Roman, the FDLE crime lab serologist, (TR-434) determined that Coretta's blood type was A, PGM Enzyme 1 (TR-440); Kirkland's blood type was O - secretor (TR-439), PGM enzyme 2, 1 (TR-440).

No blood was found on the pocket knife. (TR-449) No semen was found in the victim's mouth (TR-450) or her vaginal area.(TR-451) (FDLE Exhibit "5"). Vaginal secretions from Coretta Martin were examined and no semen was found. (TR-452) Ms. Martin's rectal area was examined and no semen was found. (TR-452) The burgundy shirt and purple jumper taken from Coretta Martin's body had no presence of semen. (TR-452) Her own blood type was found from fingernail scrapings. (TR-453) No blood on Kirkland's clothing was detected (TR-453) except on some white socks. (TR-454) No finding could be made about what blood type it was. There was not any blood type O from any blood stain found at the crime scene. (TR-457) There was no information as to how long the semen had been present from places it was detected. (TR-457) Testing did not detect any enzyme consistent with Kirkland from any semen stain. (TR-457) No item from the crime scene submitted for fingerprint comparison matched Kirkland. (TR-494-495)

Randolph Engram saw Coretta Martin the day before her death at about 3:30 p.m. when she came to his house. (TR-471) In talking with her, Engram advised her to

put in a trap in front of her house to alert her if someone came when she was asleep. (TR-472) George Teck lived right behind the Martin's trailer. (TR-473) Teck knew Kirkland from Gadsden County (TR-474) and knew he was living with Teresa Martin at the Blountstown trailer. (TR-474) Teck saw Kirkland the morning he heard about Coretta's death, (TR-475) but did not see Coretta at the bus stop that morning. (TR-476) After returning from taking his daughter to her school bus, Teck saw Kirkland coming out of the back door of the trailer. Kirkland was carrying a wrapped-up shirt and was walking in the direction of the park. (TR-476) Teck next saw Kirkland the next evening walking toward the trailer wearing bright colored clothes and tennis shoes. (TR-477)

Teck heard Teresa Martin scream and ran to her house. He heard her say someone killed her baby; then saw Coretta dead in the trailer. (TR-478) The night before he did not hear any screams. (TR-479) He also did not see Coretta after Monday. (TR-481)

Tom Wood was the pathologist serving as acting medical examiner for Calhoun in April 1993. (TR-517) He did the autopsy of Coretta Martin. (TR-518) Wood believed Coretta died sometime between 10:00 p.m., Tuesday the 13th and 7:00 p.m. Wednesday the 14th when the body was discovered. (TR-521) The state of the body was consistent with this time frame. The cause of death was severe cuts to the throat and neck. There were very deep cuts in front; a number of slashes - deep enough to cut

blood vessels in front of the neck. The swallowing tube, wind pipe and voice box were cut; the spine in front of the cervical vertebra was partially cut. The spinal cord was not damaged. (TR-540) As a consequence of these cuts, Coretta bled a lot. This, along with her inability to breathe, caused her death. (TR-523) The rate of bleeding meant she bled to death in a matter of seconds. (TR-541)

Wood described wounds as a stellate laceration on top of forehead (TR-528) with two abrasions beneath it. (TR-528) There was also a superficial wound on right thigh and a tear of the skin on front of left knee.

He found an abrasion on the back of left arm. Little cuts were seen on the inside and outside of the hands. (TR-528) Wood characterized wounds on the hand and forearm and maybe one on the knee as defensive wounds Correta suffered while protecting herself from the knife blade. (TR-531) The stab and slash wounds in the neck area, were caused by a number of stabs and slashes. (TR-531-532) Wood believed there were at least 7 separate slashes. The front of her neck had deep, complex wounds - the ones that caused her death. (TR-532) Neck slashes were found on the right side. Wood thought the wounds would preclude Coretta from sitting up in bed or being able to speak. (TR-533) He believed the type of weapon used to be a fairly large knife without a very sharp cutting blade. (TR-535) The knife taken from the trailer could have caused the injuries but other types of knives would have caused the same injuries. (TR-536)

Kirkland was arrested on April 19, 1993 in Ft. Myers, Florida. (TR-620) On April

22, 1993 Officer Kimbrell talked with him at the Gadsden County Jail (TR-623) and noticed some scratches on his face and forehead. Kirkland called the police and asked to talk with them. (TR-626) The police read Kirkland his Miranda Rights and the waiver of these rights. (TR-627)

Kirkland told the police he went to Tallahassee on Monday night after being in and out of the trailer in Blountstown during the day. He paid someone to drive him from Tallahassee to Blountstown.

Kirkland stated that when he got back to the trailer, he searched it room by room. He saw Coretta lying in bed; she jumped up and asked him to help her. He got scared and she scratched him at this time. Kirkland packed his clothes and left for the last time from the trailer. (TR-628-629) He was adamant that he left Tuesday, not Wednesday morning. (TR-629) Walking away from the trailer, he met up with Cuyler Engram and got him to give him a ride to Quincy. (TR-629) Kirkland repeatedly denied harming Coretta. (TR-630) During the interrogation Kimbrell tells Kirkland that the police already know what happened and that Kirkland killed Coretta. (TR-632) Kimbrell says Coretta was still alive on Tuesday and the autopsy shows that she died after midnight on Tuesday. (TR-634) Kimbrell also tells him that he left Wednesday morning when Cuyler Engram picked him up about 5:30 - 6:00 p.m. while walking on River Street (TR-634) and that he went to Panama City on Tuesday afternoon with Cuyler Engram. (TR-634) Kimbrell says he understands that Coretta tempted him sexually (TR-635)

because Kimbrell told that to Cuyler Engram's wife (TR-635) on Tuesday afternoon. Kimbrell's theory is that Kirkland went to have sex with Coretta, she rejected him and he killed her. (TR-636) Kirkland denies this. (TR-636) Kirkland repeats that he went into her room when he got home, he did not have sex with her. (TR-667) At that point, she jumped up out of bed and told him to help her. He saw blood on her. She was on the bed when he ran out of the room; he threw the can of mace on the floor that he was carrying. (TR-637)

Kimbrell tells Kirkland that Coretta's injuries would not have allowed her to say anything. (TR-638) The police say Kirkland is lying. (TR-638)

Kirkland says he does not know what kind of injury she had (TR-639) and denied fighting with her. (TR-639) He says he was scratched in the face when Coretta was trying to pull herself up. (TR-640) Coretta was laying on top of the bed when he first saw her. He shook her leg, calling her name; she woke up (TR-640) and then she died. (TR-641)

Kirkland says he talked with Teresa the day he left Blountstown. He believed this was Tuesday, but the police say it was Wednesday. (TR-641) The police tell him he left Blountstown on Wednesday, while Kirkland says he thought it was Tuesday. Kirkland was driven to Quincy on Wednesday morning (TR-642) and he called Teresa that afternoon around 3:30 p.m.

Kirkland says he first went to Atlanta on Wednesday. He stayed there one day

and then went to Ft. Myers, getting there Thursday. (TR-643)

Kimbrell now says that Kirkland agrees that he left Blountstown on Wednesday. Kirkland says he might have his days mixed up. Kimbrell tells Kirkland that Kirkland was with Cuyler Engram Tuesday night at the club helping him put the camper shell on the truck 10:00 - 10:30 p.m. Engram drove him uptown and dropped him off. Kimbrell then says it was 9:30 when Kirkland was dropped off; Kirkland thinks it was before 9:00. (TR-644-645)

Kirkland then insists he went to Tallahassee that night and paid someone to take him. He did not know who he met at the Southern Express. (TR-646) Kirkland got dropped off in Tallahassee around Tallahassee Community College, hung around town until about 2:30 a.m. and then started trying to get a ride back to Blountstown. (TR-647) He went to Tallahassee because he had some money to spend. Kimbrell says that Kirkland wanted to be sexual with Coretta. Kirkland says this was not true, although everyone talked about it. (TR-650) Kirkland says he did not kill her but was with her when she died. (TR-649)

Kimbrell asks him where his pocket knife was and Kirkland says it should be at home. Kimbrell told him it is not. (TR-652) Kirkland denies taking most of his stuff when he left. (TR-653)

Kirkland took a shower before he left town that morning. (TR-653) It bothered him that Coretta was dead in the next room. (TR-654)

He took a shower because he had blood on him, specifically his hands and face, and used a blue towel to dry off. (TR-655) He did not try to clean up the shower stall to get rid of the blood. (TR-656) Kirkland did not think he had that much blood on him and there was none on his clothes. (TR-657)

Kimbrell says a young woman came to the trailer that morning 5:30 - 6:00 looking for Coretta (TR-658) and Sylvia Engram (TR-659). Kirkland says no one did. Sylvia asked him where Coretta was and Kirkland told her that Coretta had already left to catch the bus. Kimbrell also says Kirkland invited Sylvia in the trailer. (TR-660) Kirkland denies this. (TR-660)

Kimbrell tells him he cannot establish an alibi and asks him to confess to the killing after a physical struggle. (TR-662) Kirkland says there was no fight. (TR-662) When other police officers asked Kirkland if he cut Coretta's throat Kirkland again denied doing this. (TR-665)

Kirkland had a key to the trailer; his practice was to always lock the door. (TR-666) Kirkland says the only lights on in the trailer were in the bathroom and back bedroom. (TR-667) Kimbrell says that was not enough light to see Coretta in her bedroom. (TR-668) Kimbrell tells him that he has already said enough for the jury to find him guilty. Kimbrell tells him a jury is not going to believe him (TR-670) and that Kirkland knows right from wrong. (TR-674)

Kirkland explained that he did not call the police because he had been running

from the police. (TR-670) He was scared and thought people would think he did it. (TR-671) Kimbrell tells Kirkland that he has already said enough to get in trouble; the police already know what happened.

In July, 1985 Dr. Robert Head, a psychiatrist, worked with Apalachee Mental Health in Quincy. (TR-714) Based on the report he prepared, he says he saw Kirkland at the clinic. He had no present memory of Kirkland. (TR-715) He was brought there by law enforcement because he had threatened his mother with violence. Kirkland was found to be potentially violent at that time. (TR-718) There was a history of thinking of violence and using alcohol to help him sleep. There were indications of auditory hallucinations and for being on antipsychotic medication.

Head diagnosed Kirkland as suffering from acute psychosis and believed he was actively psychotic when he saw him. (TR-716) Head prescribed Mellaril, which assists in preventing hallucinations. (TR-719) By the next day, Kirkland had improved. He was calm and cooperative and was discharged with a Mellaril prescription. The discharge diagnosis was acute psychotic reaction, unclassified and in remission. (TR-719) Head did not recall any other contact with Kirkland.

Josephine Hilton is a nurse specializing in psychiatric nursing. She is employed by Counseling Alternative. (TR-729) She met with Kirkland in the summer of 1993 (TR-729) and was assigned to his case as case manager. (TR-730) She was required to see him at least once a month. (TR-730) Her first contact with him was at Florida State

Hospital and then later at the Calhoun County Jail. She knew that the doctor was prescribing prozac, mellaril, artane and xanax for Kirkland.

Harry McClaren, a forensic psychologist, (TR-734) examined Kirkland. McClaren talked with Kirkland at least four times at length and other times for shorter periods. (TR-737) He also reviewed records from Florida State Hospital and Apalachee Mental Health. Both sources revealed that Kirkland suffered from an unusual kind of psychotic condition. (TR-738) McClaren also determined that Kirkland was mentally retarded; (TR-739) his I.Q. was in the 60s range. (TR-848) Kirkland's mental age was about 10 years.

Kirkland had meningitis as an infant resulting in high fever and head injuries. (TR-740) Kirkland is presently HIV positive. All these factors could account for Kirkland's brain not functioning properly.

Mr. Kirkland has been prescribed a variety of drugs: Prozac - a antidepressant; Mellaril - for psychosis, anxiety depression symptoms; Artane - to minimize physical side effects of taking major tranquilizers that control mental illness (TR-743); Xanax a mild tranquilizer thought to have an antidepressant effect. (TR-744)

McClaren had no doubt Kirkland is mentally retarded and no doubt was psychotic at times in the past. It is also highly likely he has some degree of brain damage and brain disfunction. (TR-746)

Everyone who examined Kirkland (mental health professionals) agreed that

Kirkland has a mental illness. (TR-751) The diagnosis is of mild mental retardation, organic mental disorder - organic hallucinosis. (TR-751) Kirkland had reported hallucinations since 1985. (TR-747) In addition, McClaren's observation of Kirkland in the courtroom was consistent with mental illness. (TR-750)

There was no evidence that Kirkland was feigning his mental illness; in fact, Kirkland tried to portray himself as mentally healthier than he was. Kirkland did not want to take his psychotropic medication because he did not want people to think he was crazy. (TR-778)

Ralph Walker is a psychiatrist and lawyer. (TR-759) His initial contact with Kirkland was to determine if he was competent to stand trial (TR-762) and to consider his sanity at the time of the offense. (TR-763)

Walker's opined that Kirkland suffered from an atypical psychosis; psychotic with a variety of manifestations - disorientation, loss of contact with reality, hallucinations, bizarre feelings, mood swings. (TR-763-764) Walker believed Kirkland was psychotic in April 1993 and that his psychosis was chronic. (TR-765) Based on this, he determined Kirkland was legally insane on April 13 and 14, 1993. (TR-766) Walker acknowledged that people can be legally insane and still perform activities day to day. (TR-786) Like Dr. McClaren, Walker's courtroom observations was consistent with psychotic withdrawal. (TR-768) Walker agreed that a typical psychotic can sometimes know the difference between right and wrong and possibly could know the consequences

of conduct. (TR-776)

Teresa Martin never knew Kirkland to take any medication. (TR-800) Nor did she observe any unusual behavior of Kirkland during their time together. (TR-804, 806)

Larry Annis, a psychologist, found that Kirkland was at least mildly mentally retarded, performing below a sixth grade level. Annis found that Kirkland was sane at the time of the offense (TR-841) but that he suffered from mental illness and mild retardation, chronic differential schizophrenia and depression/anxiety. (TR-842)

Kirkland's account to Annis was generally consistent with the one he told police. (TR-840) Annis testified that Kirkland's recollection of events of April 13th - 14th was "real clear." He also stated that Kirkland told him that he was facing criminal charges and knew that unpleasant things could result if convicted. (TR-844)

Kirkland's psychological testing revealed major brain disfunctions and potential neurological impairment. (TR-849) Annis believed that Kirkland had not been mentally ill in a way that interfered with his ability to know right from wrong for some time.

SUMMARY OF THE ARGUMENT

Mr. Kirkland raises two issues affecting the guilt phase of his trial. The primary issue contends that the evidence offered by the State at trial was simply insufficient to sustain his conviction for premeditated first-degree murder. An examination of Mr. Kirkland's brain deficits combined with the evidence extrapolated from the crime scene describes a level of murder not of the first degree but one of the second degree.

The other guilt phase issue involves prosecutional misconduct. During the rebuttal portion of the prosecutor's closing argument, he commented on two tape recordings made by law enforcement of Kirkland statements. The trial court correctly sustained the defense objection but refused to grant a mistrial.

The other issues raised by Mr. Kirkland address his sentence of death. Primarily, he argues that the sentence of death is not a proportionate one given an accurate assessment of the aggravation and mitigation evidence. To this end, Mr. Kirkland challenges the sufficiency of the evidence used by the trial court to find the attempted sexual battery and heinous, atrocious or cruel aggravators. A review of the State's evidence in support of these aggravators must result in a finding that neither was proven beyond a reasonable doubt.

Mr. Kirkland also challenges two jury instructions from the penalty phase of the trial. Specifically, the heinous, atrocious or cruel instruction was unconstitutional both on its face and as applied to the facts of this case. In addition, the instruction telling the

jury about the weighing process of aggravators and mitigation creates the real danger that a jury will feel compelled to recommend death solely because the aggravation outweighs the mitigation.

Finally, the actual sentencing proceeding was flawed because of the probability that Mr. Kirkland was not competent at the time. Echoing earlier concerns that led to a finding of incompetency to stand trial, Mr. Kirkland's lawyer again believed his client failed to understand the nature of the proceedings against him. Although these red flags were raised, the trial court did not question Mr. Kirkland directly not ask for an exempt opinion. This was error.

THE TRIAL COURT ERRED IN NOT GRANTING MR. KIRKLAND'S MOTION FOR A JUDGMENT OF ACQUITTAL

At the conclusion of the State's case-in-chief, Mr. Kirkland moved for a judgment of acquittal because the State had not shown "the intent of what was in the mind of the perpetrator . . ." (TR-689) Essentially, this was a statement that there was no prima facia case on the necessary element of premeditation.

Mr. Kirkland was charged and this case was tried solely on a premeditated theory of the first degree murder of Coretta Martin. The jury was instructed only on this theory. (TR-947-948) Therefore, the State had the burden of proving premeditation beyond a reasonable doubt.

> To convict an individual of premeditated murder the state must prove, among other thing, a "fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection and in pursuance of which an act of killing ensues." *Sireci v. State,* 399 So.2d 964, 967 (Fla. 1981).

Gurganus v. State, 451 So.2d 817, 822 (Fla. 1984)

Premeditation "includes the requirement that the accused have the specific intent to kill at the time of the offense." *Gruganus v. State,* 451 So.2d at 822.

> A premeditated design to effect the

> death of a human being is a fully-formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon information of the intent.

McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957)

The facts of McCutchen are illustrative of classic premeditation. Mary Rose McCutchen killed her husband. The spouses were having an argument in the kitchen during which he slapped her. Ms. McCutchen told her husband that "you will be sorry." In fact, he was. About five minutes later, Ms. McCutchen returned to the kitchen and shot him twice. At the time she shot him she told him "I told you you would be sorry."

In this case, the State had no direct evidence that Mr. Kirkland engaged in any activity prior to the killing directed toward the killing. The prosecutor's argument in response to the judgment of acquittal motion focused on the fact that Kirkland admitted

being there when Coretta Martin died. (TR-689-690) There was certainly no evidence of any planning activity.

The mental health experts in this case all agreed that Kirkland was mentally retarded. (TR-739) His mental age was approximately 10 years old, with an IQ in the 60s. (TR-739, 742, 848) In addition, all the mental health experts concurred that Kirkland suffered from a mental illness. Although the specific diagnosis differed somewhat, the mental health expert agreed Kirkland suffered from some sort of psychosis and it was of long standing origin.

Dr. Annis believed Kirkland was schizophrenic. Dr. McClaren thought the psychosis was organic; that is, there was some degree of brain damage and brain disfunction. Dr. Walker testified that Kirkland was legally insane at the time of the crime. (TR-766)

This description of Kirkland is the backdrop for how Coretta Martin died. The cause of death was very deep cuts in the front of the neck. (TR-540) Dr. Wood thought there were at least seven separate slashes. (TR-532) These wounds were made by a fairly large knife without a sharp cutting blade. (TR-535) Dr. Wood opined that the knife found in the sink in the trailer could have made the wounds. (TR-536) Coretta's mother said that Kirkland kept a knife the entire time she knew him, including when they lived in Atlanta. (TR-812) Teresa Martin remembered that Kirkland bought a knife at a flea market when he came back to Blountstown. (TR-812)

The element of premeditation can be proven by circumstantial evidence.

> Evidence from which premeditation may be inferred includes the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.

Holton v. State, 573 So.2d 284, 289 (Fla. 1990), quoting *Larry v. State,* 104 So.2d 352, 354 (Fla. 1958).

Admittedly, this analysis is fact intensive and generally conducive to resolution by a jury. However, the State's theory of premeditation must be inconsistent with every other reasonable inference that can be drawn from the presentation of the evidence. In this case a knife was used. Although there was no evidence linking any particular knife to the killing, it was proven that Kirkland had a knife. Therefore, there is nothing that indicates prior planning with a knife as a murder weapon.

There is simply no evidence at all about provocation. There was testimony from Cuyler Engram that Kirkland thought that Coretta had been sexually enticing him but there was no history of any previous problems between them.

The medical examiner explained that there were a number of slashes made in Coretta's throat and neck area. As a consequence of these cuts, Coretta bled a great deal and her death was caused by her inability to breathe. Death happened very quickly - a matter of seconds. (TR-541)

There were a number of wounds in addition to those that caused her death. There were bruises on her forehead; a superficial wound on her right thigh and a tear of the skin on the front of her left knee. (TR-528) Dr. Wood believed that the little cuts on the inside and outside of her hands were defensive wounds as Coretta protected herself from the blade of the knife. (TR-529)

One interpretation of these facts is that the homicide was brutal but this is an emotional response, not an objective one. Dr. Wood explained that the "wound is so deep that it cut across the big blood vessels in the front of the neck and as soon as that occurred she didn't get any more circulation to her brain and as soon as she stopped getting circulation to her brain it is just like fainting and collapsing." (TR-541) Coretta died virtually instantaneously. There is nothing about the manner of killing that "was so particular and exacting that the defendant must have intentionally killed according to a preconceived design." *U.S. v. Downs,* 56 F.3d 973, 975 (8th Cir. 1995)

There was no evidence of any bad feelings between Kirkland and Coretta. In fact, Kirkland was concerned about Teresa Martin's health during her pregnancy with their child. (TR-806) Although most of the responsibility for raising Coretta posited with Teresa Martin, Kirkland generally participated in instilling moral values in the children. (TR-807) Again, there is nothing in the evidence presented by the State that remotely suggests a reason why Kirkland would kill Coretta.

In *Hoefert v. State,* 617 So.2d 1046 (Fla. 1993), the defendant was convicted of

the first-degree murder of June Hunt. Hunt's body was found in Hoefert's apartment, partially nude, in a contorted position and wrapped in several sheets and blankets. The autopsy finding was that death was caused "probably due to a type of asphyxiation." There was no evidence of sexual battery although the medical examiner stated the condition of the precluded detecting evidence of sexual activity.

The State also presented the testimony of people who related statements by Heofert of having sex with a woman on April 1st and digging a hole in his backyard the following day. Hunt's body was discovered on April 3rd.

Hoefert testified at trial that Hunt came to his apartment but he denied killing her. He stated that he found her dead when he came back from work and he was afraid to tell the police what happened because he had just been released form prison. Heofert initially planned to bury the body in his backyard but had second thoughts about this plan of action and instead fled to Texas.

Reviewing this evidence, this Court determined that there was not "sufficient evidence to prove premeditation." There is one distinction between Hoefert and Kirkland. The medical examiner in Hoefert said that the cause of death was "probably asphyxiation based upon the lack of finding something else." In Kirkland's case, the medical examiner denoted the cause of death. However, in every other major aspect, the cases are similar. The prosecution argued that Kirkland's post-killing behavior was goal directed. This is not the definition of premeditation. Second degree murder and

manslaughter are equally goal directed criminal acts.

Second degree murder involves an act that "indicates an indifference to human life" and requires certainty that the act would result in the death of another. Manslaughter also requires the performance of an act of goal-directed behavior. Even a person who is legally insane is still capable of goal-directed conduct; this point was explained by Dr. Walker during cross-examination.

> People can be psychotic, legally insane, not be able to distinguish right and wrong and still be able to perform the activities of daily living, feed themselves, dress themselves, take a shower. (TR-786)

There was no expert opinion on Kirkland's ability to premeditate. However, it is important to make this decision based on the totally of his mental health history. This is because premeditation is the defining element - the quality of thought involved in a premeditated killing must rise to the level where there is a conscious decision to kill. It must be a decision that is present in the mind at the time of the killing and it must be formed before the killing. There must also be a sufficient period of time that is long enough allow reflection. This is why Kirkland's mental capacity is crucial to the premeditation equation.

The undisputed testimony is that Kirkland is mental retarded and is mentally ill. The consensus seemed to be Kirkland suffers form some sort of psychosis of long

standing. The divergence of opinion was whether this illness was active in April of 1993. Thus the debate revolved around whether Kirkland knew right from wrong. Compare Dr. McClaren (TR-745) with Dr. Walker (TR-766). The combination of all these factors precludes a finding of premeditation. This is especially true given the incidence of organic brain damage and neurological deficits.

There is a distinction between a thought to kill and the necessary reflection to support a finding of premeditation. This more careful consideration of a decision to kill was not proven to reside in Kirkland's mind.

The evidence does support a finding of second-degree murder - that is the intent to kill "without any premeditation design." This Court should remand the case back to the trial court with instructions to enter a judgment for second-degree murder and resentence Mr. Kirkland. Section 924.34, Florida Statutes (1991); *Hoefert v. State,* 617 So.2d at 1050.

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED DURING THE COURSE OF AN ATTEMPTED SEXUAL BATTERY

Interestingly, this aggravator reared its ugly head for the first time when the State filed its proposed judgment and sentence on August 29, 1994. (R117-121)* This is the same day the death sentence was imposed. The Judgment of the trial court sentencing Mr. Kirkland to death is taken virtually verbatim from the State's proposal and adopts the aggravator.

Mr. Kirkland was never indicted for attempted sexually battery. The State did not argue this aggravator before the jury and there was no instruction given the jury to consider this information in determining its recommendation. This is not surprising, for the evidence was not sufficient to find its existence as a matter of law.

This Court permits the practice of allowing the finding of the aggravating factor of murder committed during the course of a specific felony without charging that felony. *Occhicone v. State,* 570 So.2d 902, 906 (Fla. 1990) Of course, the aggravator must be proven beyond a reasonable doubt. The trial court's finding in this case was:

> The murder was committed while the defendant attempting to commit sexual battery upon Coretta Martin. Dwane Kirkland was not charged with sexual battery and was not tried and convicted of that crime. Regardless, the motive, purpose, and

*The certificate of service for this pleading was August 26, 1994 but the Clerk's date stamp on the pleading is August 29, 1994.

> reason for the eventual death resulted or was associated with an attempt to sexual assault on Coretta. The evidence proves this beyond a reasonable doubt. Coretta was home alone (her mother and other family members were away for at least the evening until the next day); the defendant had discussed his sexual preoccupation over Coretta with friends on the same day of the murder; the murder was committed on the double bed in the bedroom; Coretta was dressed in bed clothes; her bra and night shirt was up around her neck and her bra was disconnected and also up around her neck; and she was naked from the neck down. The only link missing in this conclusive chain of circumstantial evidence is the defendant's matching sperm. The only reason for this missing link is his attempt failed.

(R124-125)

The first part of this supposed factual decision is purely speculative. There was no evidence as to "motive, purpose or reason" for Coretta's death. The evidence decidedly does not support that Kirkland had a "sexual preoccupation over Coretta". It is true he told Cuyler Engram that Kirkland could be sexually involved with Coretta if he wanted it. There is no evidence that he wanted to.

Coretta was found in the bedroom at the back of the trailer. (TR-463) She is partially clothed, wearing a bra. (TR-617) She is naked from the waist down. (TR-619) It is not clear where the predicate for "her bra and night shirt was up around her neck and her bra was disconnected and also up around her neck" comes from in the record.

This was inconsistent with the video tape record made by the Investigator with the Calhoun County Sheriff's Department.

Finally it is incredibly disingenuous for the trial court to say that "only link missing in this conclusive chain of circumstantial evidence is the defendant's matching sperm."

The sentencing order never talks about the elements the State had to prove beyond a reasonable doubt to convict Mr. Kirkland of attempted sexual battery. At a minimum, the State has to prove that Mr. Kirkland attempted to commit an act upon or with Coretta Martin in which the sexual organ of Mr. Kirkland penetrated or had union with the anus, vagina or mouth of Coretta Martin and that the act was committed without the consent of Coretta Martin. Section 794.011(5), Florida Statutes (1991); Florida Standard Jury Instructions in Criminal Cases, pg. 119b.

The testimony did show that on Sunday and Monday of the same week that Coretta was killed, Henry Fain admitted to having sex with her. (TR-321) Mr. Fain was dating her for months before this time, in spite of Coretta being under 16 years old. (TR-309) In fact, they hid this fact from Teresa Martin. (TR-310)

Fain appears to be the last person to see Coretta before her death. He says he dropped Coretta off at the trailer a little after 10:00 p.m. Tuesday night. (TR-312) Only he and Coretta know if this is true because they made a concerted effort to conceal their presence together. (TR-327-328)

This case is in contrast to *Bogle v. State,* 655 So.2d 1103, 1108 (Fla. 1995). Like Kirkland, Bogle was not charged or convicted of sexual battery. The evidence against Bogle consisted of the victim found completely naked with semen in her vagina and trauma to her anus consistent with sexual activity. The DNA extracted from the semen was consistent with the Bogle's (although not a perfect match). Pubic hair found on the defendant's pants in the crotch area was consistent with the pubic hair of the victim. Finally, the medical examiner testified that sexual activity occurred within three hours of the victim's death.

None of the characteristics are present in Kirkland's case. The trial court says that the only reason the physical manifestations of sexual activity are not present is because Kirkland's "attempt failed." The trial court does not support this conclusion by any logical factual sequence. This failure means that this aggravating factor was not proved beyond a reasonable doubt.

THE EVIDENCE PRESENTED BY THE STATE DID NOT SUPPORT A FINDING THAT THE MURDER WAS "HEINOUS, ATROCIOUS OR CRUEL"

Section 921.141(5)(h), Fla. Stat. (1991) ["s. (5)(h)"], provides that an aggravating circumstance may be established where the "capital felony was especially heinous, atrocious, or cruel." The trial court found this aggravating factor to be present in Mr. Kirkland's case, stating that she suffered and was tortured before her death. (TR-124)

While killing another human being is always reprehensible, this act in and of itself does not permit the finding that the murder was "heinous, atrocious, or cruel" pursuant to s. (5)(h). That aggravating factor has been reserved for only those homicides where "the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon,* 283 So.2d 1, 9 (Fla. 1973). The burden rests with the State to prove beyond a reasonable doubt that the crime rises to the requisite level of aggravation pursuant to s. (5)(h). "Not even logical inferences drawn by the court will suffice to support a finding" that the murder qualifies in this regard. *Clark v. State,* 443 So.2d 973, 976 (Fla. 1983)(quotations omitted).

Examination of this Court's previous decisions demonstrates that a finding under s. (5)(h) has to satisfy three requirements. First, the quality and duration of the

suffering caused by the additional torturous acts must be markedly different from the suffering normally associated with murders. Second, the victim must be considered during the torturous acts in question. Finally, the defendant must possess the intent to inflict the heightened suffering.

Application of the current law governing s. (5)(h) to the evidence presented by the State at Mr. Kirkland's trial clearly shows that the State failed to meet its burden of proof on the "heinous, atrocious, or cruel" aggravating factor.

A. The Quality And Duration Of The Victim's Suffering Did Not Rise To The Level Required For A Finding Under The "Heinous, Atrocious Or Cruel" Aggravating Circumstance

It is the State's burden under s. (5)(h) to establish beyond a reasonable doubt that the quality and duration of the suffering caused the victim by the additional torturous acts is markedly different from the suffering normally associated with murders.

This requirement has been met in those instances where the victim's physical pain or emotional anguish rises to a sufficient level to set his or her death apart from other homicides. See *Reed v. State,* 560 So.2d 203, 207 (Fla. 1990)(victim tied, severely beaten, choked, raped, then murdered by having throat slashed more than a dozen times with serrated-edge knife, requiring "more time and effort"). The requirement has not been met when "death results from a single gunshot and there are not additional acts of torture or harm." *Cochran v. State,* 547 So.2d 928, 931 (Fla. 1989). Nor has it been met when an unprolonged rape or battery occurs and the act of killing is done rapidly. See

Robinson v. State, 574 So.2d 108, 111-112 (Fla. 1991)(victim raped, soon after shot twice in the head; victim "rendered unconscious immediately after the first bullet struck her head"; "death occurred within several seconds").

The "quality and duration" requirement is also met where the particular method of killing causes the victim an extraordinary amount of pain, beyond that necessary to accomplish the killing. For example, the finding of s. (5)(h) has been sustained when the victim has been beaten or bludgeoned to death in a particularly vicious manner. See, e.g., *Penn v. State,* 574 So.2d 1079, 1080, 1083 n. 7 (Fla. 1991)(victim bludgeoned to death with a hammer); *Cherry v. State,* 544 So.2d 184, 187-88 (Fla. 1989)(victim beaten so severely skull was dislocated from spinal cord; beating was sole cause of death); *Chandler v. State,* 534 So.2d 701, 704 (Fla. 1988)(elderly couple beaten to death with baseball bat).

Finally, this requirement may be satisfied upon a showing of the victim's "helpless anticipation of impending death." *Clark v. State,* 443 So.2d at 977. The "helpless anticipation", however, must be prolonged by the defendant's continuing acts or must be extraordinarily severe in order to qualify. See *Douglas v. State,* 575 So.2d 165, 166 (Fla. 1991)(victim expressed to wife "that something bad was about to happen and asked that she promise to stay alive"; wife testified defendant "said he felt like blowing our . . . brains out"; forced victim and wife to engage in prolonged sexual acts "at gunpoint"; "fired the rifle into the air" when they complied; hit victim in head with rifle so hard

"stock shattered"; finally told victim's wife to "get back" and shot victim in head).

Where the "helpless anticipation" is not prolonged and severe, the "quality and duration" requirement has not been met. See *Amoros v. State,* 531 So.2d 1256, 1260-1261 (Fla. 1988)(victim realized about to be shot, ran to rear of apartment, shot three time); See also *Lewis v. State,* 377 So.2d 640, 646 (Fla. 1979)(evidence insufficient where defendant "shot the victim in the chest and, as the [victim] attempted to flee, shot him several more times").

The trial court found as follows:

> The crime scene, the small bedroom, reveals a violent struggle for life by Coretta Martin. Blood spatters abound on the walls and ceiling in the room, all the result of violent blows to the back and front of the hear -- blows from a metal walking stick covered with tape. Dents appear on the bedroom walls and ceiling from the same metal object. The body also reveals the same struggle for life. The incise wound to the palms of the hand and the back of the hands of Coretta Martin are classified by the medical examiner as "defensive wounds", meaning Coretta Martin was attempting to ward off the attack, an attack by club and eventually by knife.
>
> The dead body of Coretta Martin further reveals the suffering and torture she experienced before the death. There were four incise wounds (caused by a cutting instrument) to the upper back of the head along with a large irregular contused laceration (made by a blunt object). On her forehead was a massive stellate (star-like) contused laceration cause by considerable force along with lesser contusions above the eyes. Finally the fatal wounds: seven to ten

> forceful slash wounds, seven to ten slash wounds from a sharp knife which was eventually dulled by the continued cutting, seven to ten slash wounds which began from the back of each side of the neck, seven to ten slashes that went all the way to the spinal column severing the windpipe, voice box and large neck veins. Coretta then bled to death.

(R-125)

Very little of this recitation is factually accurate. Dr. Wood testified quite clearly that Coretta Martin died within seconds by her neck being cut. The trial court's description that she received "violent blows to the back and front of the head -- blows from a metal walking stick covered with tape" appears nowhere in this record. The doctor testified that the injury on the forehead was likely cause by "blunt trauma". (TR-531)

Dr. Wood did testify that Coretta had what appeared to defensive wounds on her hand and forearm. (TR-528-529) She had other bruises on her body.

The death wound itself was caused by at least seven slashes. (TR-532) Dr. Wood said these slashes were accomplished by a knife with a blade that was not "real sharp". Although the trial court's description was melodramatic, the actual testimony by the doctor was not that the wounds were from "a sharp knife which was eventually dulled by the continued cutting."

The State further failed to show that Coretta experienced any anguish over her impending death. There is no testimony over how long a period of time the crime

occurred; which wounds were inflicted in what order; what if anything happened between Kirkland and Coretta before her death.

The physical pain associated with the injury suffered by the victim in Lewis would have been at least the equivalent of the pain suffered by Coretta Martin from her stab wounds. The fear experienced by the Lewis victim was also no less than that experienced by Coretta Martin throughout the brief course of Kirkland's attack. And just moments later -- like the victim in Lewis -- Coretta was dead, killed within a matter of seconds by the neck wound inflicted by Kirkland. Lewis is an appropriate bench mark against which to measure the suffering inflicted upon Coretta Martin. The pattern of injury was similar, the physical pain and fear of death were similar, and the moment of death came quickly in relation to when the assault began. If the "quality and duration" requirement was not established in Lewis, it cannot be met in this case.

B. The State Failed To Prove Beyond A Reasonable Doubt That The VictimWas Conscious During The Acts In Question

The second requirement under s. (5)(h) is that the State prove beyond a reasonable doubt that the victim was conscious of the additional torturous acts.

In *Rhodes v. State,* 547 So.2d 1201 (Fla. 1989) the trial court found a murder by strangulation to qualify as heinous, atrocious, or cruel. *Id.* At 1208. The Court reversed this finding, noting that the defendant, in his many conflicting accounts of the murder, repeatedly referred to victim as "knocked out" or drunk, that the victim was known to frequent bars and to be a heavy drinker, and that on the night she disappeared the

victim was last seen drinking in a bar. *Id.* In the face of this evidence, the Court held that the State had failed to make a sufficient showing that the victim was anything more than "semiconscious" at the time of the murder, and, therefore, concluded that the State did not meet its burden of proving the "heinous, atrocious, or cruel" aggravating factor beyond a reasonable doubt. *Id.*

This Court ruled similarly in *Jackson v. State,* 451 So.2d 458 (Fla. 1984), where the trial court found the murder to qualify under s. (5)(h) based on evidence that the victim was "shot in the back, put in the trunk while still alive, wrapped in plastic bags, and subsequently shot again while still alive." *Id.* At 463. (quotations omitted). Reversing the trial court's finding on this point, the Court noted that there was "no evidence that [the victim] remained conscious more than a few moments after he was shot in the back the first time . . ." See also, *Herzog v. State,* 439 So.2d 1372, 1378-80 (Fla. 1983)(evidence that victim beaten, suffocated with pillow and strangled with a telephone cord held insufficient because victim was unconscious or only semi-conscious during incident due to intake of drugs). No evidence was presented at all about this factor in Mr. Kirkland's case.

C. Kirkland Did Not Possess The Requisite Intent

The final requirement under s. (5)(h) is that the defendant must have acted with a desire to inflict the enhanced suffering upon the victim, or at least have shown utter indifference to the heightened suffering which his actions caused.

In *Porter v. State,* 564 So.2d 1060 (Fla. 1990), the Court found significant, in reversing the trial court's findings under s. (5)(h), that the crime in question was "a crime of passion" and therefore was not a "crime that was meant to be deliberately and extraordinarily painful." *Id.* At 1063 (emphasis in original). Likewise, in *Shere v. State,* 579 So.2d 86 (Fla. 1991), a trial court's finding under s. (5)(h) was overturned since the evidence did not rise to the level of establishing that the defendant "desired to inflict a high degree of pain, or enjoyed or [was] utterly indifferent to the suffering [he] caused." *Id.* At 96.

Under the facts of this case, there is "no evidence that [this crime] was committed to 'cause the victim unnecessary and prolonged suffering,'" *Robinson v. State,* 574 So.2d at 112, or that this was "a crime that was meant to be deliberately and extraordinarily painful." *Porter,* 564 So.2d at 1063. In fact, the events support a finding quite to the contrary.

As was the defendant in Porter, Mr. Kirkland was in a fit of rage, caused by his mental illness. The stabbings of Coretta must be seen in their proper context as the impulsive reactions of someone in an out-of-control state of rage, brought on by mental impairments. When Kirkland's actions are viewed in this proper context, it is evident that he had no desire to inflict a high degree of pain upon, or enjoy in any way the suffering of his victim.

In *Green v. State,* 641 So.2d 391, 395-396 (Fla. 1994), this court refused to apply

this aggravator despite the following factual findings. First, the victim hands were tied behind his back and the victim knew Green had a gun. Green drove the victim into an orange grove where he was found lying face down. When the police first arrived at the crime scene, the victim was still alive. This Court found that this crime was not the "especially heinous" type of crime for which this aggravator can be properly applied.

"There is nothing about the commission of this capital felony 'to set the crime apart from the norm of capital felonies.'" *Rhodes v. State,* 547 So.2d 1201, 1208 (Fla. 1989), citing *State v. Dixon,* 283 So.2d 1, 9 (Fla. 1973).

THE TRIAL COURT'S INSTRUCTION ON "HEINOUS, ATROCIOUS OR CRUEL" WAS CONSTITUTIONALLY INADEQUATE

The trial court gave the following instruction to the jury on this aggravator:

> The crime for which the Defendant is to be sentence was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shocking evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference, to or even enjoyment of, the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(TR-1009)

Mr. Kirkland knows that this Court has specifically approved an identical instruction in *Hall v. State,* 614 So.2d 473, 478 (Fla. 1993). It is still constitutionally deficient under *Espinosa v. Florida,* 505 U.S. 112 (1992). The instruction by the trial court does not give a full or correct statement of the law as to heinous, atrocious, or cruel.

This instruction fails the basic test of channeling "the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Godfrey v. Georgia,* 446 U.S. 420, 428 (1980)(footnotes omitted).

Because Florida juries are a co-sentencer or "constituent part" of the capital

sentencing scheme, they must be properly instructed on the aggravating circumstances. *Sochor v. Florida,* 504 U.S. ____, 112, S.Ct. 2114 (1992). "It is not enough to instruct the jury in bare terms of an aggravating circumstance that is unconstitutionally vague on its face." *Walton v. Arizona,* 497 U.S. 639 (1990).

Important information relating to this instruction is not told to a jury. More precise instructions were necessary to address the consciousness and additional torturous acts language. Any determination that this case qualifies for the "heinous, atrocious or cruel" aggravating factor must be based on fine distinctions. By failing to offer instructions that note the relative nature of this determination, the trial court failed to give the jury the proper tools to make these subtle distinctions.

The trial court's finding as to this aggravator highlights the difficulty of making a thorough and fair analysis of Mr. Kirkland's case. Though the trial court described in some detail the crime scene and the body, it made no mention of how long it took for these events to occur nor the nature of pain or suffering endured by Coretta Martin.

The instruction as given did not properly guide the jury in deciding whether the "heinous, atrocious or cruel" aggravating circumstance existed. This was reversible error.

THE TRIAL COURT FAILED TO MAKE CLEAR TO THE JURY THAT IT COULD EXERCISE ITS REASONED JUDGMENT AND RECOMMEND LIFE IMPRISONMENT EVEN IF THE MITIGATING CIRCUMSTANCES DID NOT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES IN MR. KIRKLAND'S CASE

Mr. Kirkland submits that the trial court's charge on the weighing of mitigating and aggravating circumstances created a reasonable likelihood that the jury would have believed that a death sentence was mandatory if mitigating factors did not outweigh aggravating factors, in violation of longstanding principles of state law.

The Court has long held, since *Alvord v. State,* 322 So.2d 533 (Fla. 1975), that while the determination that mitigating circumstances do not outweigh aggravating circumstances is a prerequisite to imposing a death sentence, that determination does not mandate the imposition of a death sentence.

> The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that the discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.

322 So.2d at 540.

In keeping with this, the standard jury instructions concerning the jury's

deliberative process explain that process in the following terms:

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed . . .
> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and you advisory sentence must be based on these considerations.

Fla. Standard Jury Instructions -- Penalty 79-80. Clearly, under these instructions, a jury could appropriately determine that even though aggravating circumstances outweigh mitigating circumstances, the mitigating circumstances are still weighty enough to recommend a life sentence.

The trial court also instructed the jury that "should you find sufficient aggravating circumstances exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." (1009-1010)(emphasis added).

Reading these instructions on the jury's deliberative process as a whole, it is evident that a reasonable juror would have interpreted the instructions to mean that a death sentence was mandatory unless "sufficient mitigating circumstances exist to outweigh aggravating circumstances found to exist." The critical factor in this is that the

jury was instructed that it should first determine if there were "sufficient aggravating circumstances" that would "justify the imposition of the death penalty." Upon such a finding, the jury would be death prone since these aggravating circumstances in and of themselves "justified" the death penalty. The instruction then told the jury that it should determine if there were "sufficient mitigating circumstances" to "outweigh" the "aggravating circumstances found to exist." If the jury found mitigating circumstances but concluded that they did not outweigh the aggravating circumstances, the jury would logically think that it had to impose the death sentence since the charge instructed that "sufficient" aggravating circumstances "justified" its imposition.

Based on the reasonable likelihood that the jury interpreted the trial court's charge in the manner described above, the trial court committed reversible error. Its charge precluded the jury from making a "reasoned judgment" about whether the "factual situations [in Mr. Kirkland's case] c[ould] be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence." *Alvord,* 322 So.2d at 540 Accord, *McCaskill v. State,* 344 So.2d 1276, 1279 (Fla. 1977).

MR. KIRKLAND WAS NOT COMPETENT TO BE SENTENCED

Subsequent to Mr. Kirkland's conviction for first-degree murder and the jury recommendation, he was scheduled to be sentenced on August 29, 1994. At that time, the trial court asked the lawyer for Mr. Kirkland whether he knew" of any legal cause why I should not proceed to sentencing at this time?" (TR-1021-1022) The lawyer responded that there was.

> MR. ADAMS: Yes, Your Honor. If it please the court, it is our position by a written plea of insanity that this man is still incompetent to proceed and particularly incompetent to proceed to sentencing under Florida Rules of Criminal Procedure 3.213, 3.214, 3.215. I know that it is sort of late to mention this but I want to advise the court. I was told Friday, just last Friday, about the Defendant having been taken by a Jo Hilton from the Sheriff's Department and new medications prescribed for him, up to five medications, I believe, through a Dr. Darmarajah. This was all without my knowledge. I knew nothing about it. I called that Lady as a witness in the trial of the case but I don't know by what authority they were doing this. It Is our position he is still incompetent to proceed and particularly incompetent to proceed for sentencing. Thank you, Judge.

(TR-1022)

This was not the first time in this case that Mr. Kirkland's competency had been questioned. Over a year earlier, Kirkland's lawyer had questioned his competency to proceed for trial. (R-18-20) Based on these allegations, the trial court appointed two

experts to assess Kirkland's competency to proceed. (TR-21-23)

As a consequence of these evaluations, the trial court found Mr. Kirkland incompetent to go forward with any pretrial proceeding and the trial. (R-25) The trial court then committed Kirkland to the Department of Health and Rehabilitative Services for treatment. (R-25)

Approximately two months later, the forensic administration at Florida State Hospital notified the trial court that in their professional staff opinion, Mr. Kirkland was now competent to stand trial. (R-29)(R-30-35) Ultimately, the trial court found him competent to proceed to trial. (R-40)

Throughout the trial, the mental health experts described Kirkland. Dr. Robert Head, who treated Kirkland in 1985 for a psychotic episode (TR-705), noticed that Kirkland had his hands over his face and "he's rocking." (TR-705) Dr. Head thought Kirkland may have been psychotic then. Kirkland was "openly sobbing" during and after Dr. Head's testimony. (TR-710) Dr. McClaren also observed similar behavior. (TR-750)

Dr. Walker testified that he believed Kirkland was psychotic at the time of the offense and had been for a number of years and continued to be so. (TR-765) While Dr. Walker was testifying, he noticed that Kirkland "refuses to look at people. He's withdrawn. He's in a state of regression. He's covering his face. He's rocking back and forth. These are consistent with psychotic withdrawal. The technical term for it is

catatonic state but it is simply a state of regression and withdrawal." (768)

The trial court recessed the sentencing hearing to "give the State Attorney's office an opportunity to investigate to what might have taken place." (TR-1025) The medical doctor was called as a witness. Dr. Darmarajah, a psychiatrist, saw Kirkland at the jail on August 4, 1994. (1028) This was approximately one month after the jury's sentencing recommendation. At that time, Dr. Darmarajah prescribed five medications - Trazadone, an anti-depressant; (Kirkland was hearing voices and having problems sleeping); Prozac - for depression; and Trihexyphenidyl - to counter the effects of the Thorazine.

The doctor intervened because Kirkland has complained at the jail. (TR-1031) Dr. Darmarajah thought he was mild to moderate psychotic at the time - Kirkland was hearing voices telling him to hurt himself. (TR-1032) The doctor did not examine Kirkland, nor was he asked to, for Kirkland's present competency. (TR-1033)

The trial court made no finding as to Kirkland's competency at the time of sentencing but simply proceeded to sentence him. (TR-1034) This was error. Competency can and must be raised at any time to determine:

> "whether . . . [the defendant] . . . has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding --and whether he has a rational as well as factual understanding of the proceedings against him."

Dusky v. United States, 362 U.S. 402 (1960).

The right not to be tried when one is incompetent is so fundamental to the concept of fairness, see *Bishop v. United States,* 350 U.S. 961 (1956), that special procedures have been developed to protect that right. *Pate v. Robinson,* 383 U.S. 375, 385-386 (1966).

There is no question that the obligation to ensure a criminal defendant's competency to stand trial is a continuing one. *Nowitzke v. State,* 572 So.2d 1346, 1349 (Fla. 1990) "Thus, a prior determination of competency does not control when new evidence suggests the defendant is at the current time incompetent."

There are two factors that should be considered. The first is that there was a previous finding of incompetency in this case. Second, Kirkland's lawyer's observation of his client.

With respect to evidence of the defendant's irrational behavior, a particularly important form of this evidence is, quite obviously, counsel's own observation of the defendant concerning his case.

> "Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, . . . An expressed doubt in that regard by one with 'the closet contact with the defendant,' *Pate v. Robinson,* 383 U.S. 375, 391 (1966) (Harlan, J., dissenting), is unquestionably a factor which should be considered."

Drope v. Missouri, 420 U.S. at 177, n. 13. Counsel's view of the defendant's alleged incompetence is of paramount importance. *Reese v. Wainwright,* 600 F. 2d 1085, 1092 (5th Cir. 1979), cert. Denied, 444 U.S. 983 (1979).

Not surprisingly, by the time the trial had been conducted and Kirkland awaited sentencing, his mental health deteriorated. A new competency hearing should have ordered to determine Kirkland's ability at that time to understand what was going on.* Without one, there is no assurance that Mr. Kirkland could assist his lawyer at this critical stage of the proceeding or that he had a rational understanding of what was happening on August 29, 1994.

*The trial court never inquired of Mr. Kirkland personally as to whether there was anything he wanted to say. Rule 3.720, Fl.R.Cr.P.

DEATH IS A DISPROPORTIONATE SENTENCE FOR DWAYNE KIRKLAND

In *Tillman v. State,* 591 So.2d 167 (Fla. 1991), this Court stated its proportionality review:

> We have described the "proportionality review" conducted by this Court in every death case as follows:
>
> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. *Art. I,* s. 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. *Id.* Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. *Art. I,* s. 9, Fla. Const.

Sinclair v. State, 657 So.2d 1138, 1142 (Fla. 1995)

Viewed approximately, the case in aggravation was two prior felony convictions - aggravated assault and aggravated battery. The aggravated assault conviction occurred in 1981 when Kirkland was a child; the aggravated battery conviction was obtained six

years later. Still another six years preceded the arrest for Coretta Martin's murder.

Since there is truly only one aggravator in this case, *Thompson v. State,* 647 So.2d 824 (Fla. 1994) and *Sinclair v. State,* 657 So.2d 1138, 1142 (Fla. 1995) should control. The mitigators in Sinclair were

> (1) Sinclair cooperated with police; (2) Sinclair has a dull normal intelligence; and (3) Sinclair was arrested without a father or father figure or any positive male role model. We further find evidence in the record that the low intelligence level of and the emotional disturbances inflicting this defendant were mitigators which had substantial weight.

The mitigation for Mr. Kirkland was stronger.

Mr. Kirkland was mentally retarded with an I.Q. in the 60 percentile. Mental retardation is a debilitating cognitive deficiency which necessarily implies the presence of organic brain impairment. His ability to accurately assess stimuli and consider options is significantly diminished. He functions in the bottom one percent of the population.

Mental retardation, by definition, is a developmental disorder that manifests before a person reaches the age of 18. It is irreversible and pervades most aspects of a person's life. These aspects include the ability to learn; reflect on and appreciate the consequences of behavior; adequately care for oneself; achieve academically and professionally. It also affects memory.

Mr. Kirkland was diagnosed as HIV positive although it was never established

whether he had full blown AIDS. The AIDS virus can affect a person's brain function by creating an organic condition. This means that the integrity of the brain function is compromised. This can and often does cause problems with the limbic system which regulates emotions. This organic condition can cause a person to overreact to perceived stimuli with a corresponding inability to stop one's action. It can also cause violent, irrational uncontrollable outbursts.

During his first year of life, Mr. Kirkland suffered from spinal meningitis. This disease is an infection or inflammation of the fluid that bathes the spinal cord and brain. The symptoms include an extremely high fever which "cooks" the baby's developing brain. If the child lives, the disease usually causes irreversible brain damage which can result in mental retardation; an inability to modulate emotions and other mental illness.

In addition, it was documented that Mr. Kirkland was in car accidents. Although the effects are not precisely known, the car accidents caused head injuries which could exacerbate preexisting brain damage or any other organic personality disorder.

Mr. Kirkland's mental illnesses were established by each expert that examined him for trial or in Dr. Head's instance, in 1985. Kirkland was often found to be out of touch with reality while frequently hallucinating and possibly attending to command voices. He was treated inpatient and prescribed powerful antipsychotic and antidepressant medications. Kirkland was catatonic at times (complete withdrawal and regressing) - sitting and rocking, uncommunicative and unresponsive. Kirkland suffered from bizarre

feelings and mood swings.

Mr. Kirkland often resorted, as many mentally ill people do, to self-medication. He drank to allow himself to sleep (718). This was most likely to try to rid himself of hallucinations. Under these conditions, drinking itself can cause additional brain injury.

Even with all this, however, Kirkland has maintained a foothold in humanity. He has been noted for his exceptional kindness toward and nurturing of children, for his charitable spirit, for his generosity. Teresa Martin was Coretta's mother, Mr. Kirkland's girlfriend and the mother of Kirkland's child. (TR-806) They attended church together; she and Mr. Kirkland studied the Bible at home.

Mr. Kirkland was active in the child rearing of their daughter, Angel. (TR-807) In addition, he played the father's role toward her son Gregory. When Angel got sick the week of Coretta's death, it was Kirkland who made arrangements to get her the medical care she needed. (TR-809)

In addition, Mr. Kirkland always seemed to work to help provide for Ms. Martin and her family. He worked when they lived in Atlanta. (TR-814) In spite of his obvious intellectual and emotional limitations, he continued to work with Cuyler Engram when they returned to Blountstown. Kirkland was a daily worker for him, getting up at 4:30 a.m. to harvest earthworms and then working at the nightclub as a janitor.

On all these facts, death is just as disproportionate for Dwayne Kirkland as it was for Earnie Fitzpatrick. *Fitzpatrick v. State,* 527 So.2d at 811-12. And death is just as

disproportionate -- for these same reasons -- as it was for James Penn, *Penn v. State,* 574 So.2d 1079, 1083 (Fla. 1991); Billy Nivert, *Nivert v. State,* 574 So. 2d 1059, 1061-63 (Fla. 1990); and Leonard Smalley, *Smalley v. State,* 546 So.2d 720, 722-23 (Fla. 1989).

> This Court has repeatedly noted that the death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes.' *State v. Dixon,* 283 So.2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)

Deangelo v. State, 616 So.2d 440, 443 (Fla. 1993) Like Deangelo, "this is not such a case."

THE TRIAL COURT VIOLATED THE DICTATES OF CAMPBELL V. STATE

Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) requires a trial court sentencing a defendant to death to "expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature."

The sentencing order considered the two statutory mitigating factors of "extreme mental or emotional disturbance", Section 921.141(6)(b) and "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." Section 921.141(6)(f). These statutory factors were rejected by the trial court because neither qualifier - "extreme" or "substantial" was deemed proven. The trial court did believe these factors should be taken into account in the weighing process as nonstatutory mitigating factors. The trial court ignored its own decision.

The items identified by the trial court as nonstatutory, mitigation was far from complete. The trial court should have addressed each of the items identified in his proportionality argument.

The failure to do so requires this Court to "vacate the sentence of death and remand the case for the trial judge to enter a new sentencing order." *Foster v. State,* 614 So.2d 455, 465 (Fla. 1992)

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL BECAUSE OF THE PROSECUTORIAL CLOSING ARGUMENT

At the rebuttal portion of the State's closing argument in the guilt phase of the trial, the prosecutor argued

> Another thing I need to point out, Mr. Adams makes an issue out of, "Okay, there were three taped statements, one on the 21st, one on the 22nd, and one on the 13th." Yes, there were, we didn't try to hide that. And Mr. Adams tries to make an issue out of, "You didn't hear the other two tapes, that's a lack of evidence." Yeah, you didn't hear the other two tapes but what Mr. Adams didn't tell you is those tapes are equally accessible to him and could be played. Why is it . . .

(TR-904)

The defense lawyer objected because it was a comment on Mr. Kirkland not testifying. The trial court sustained the objection but denied the defense motion for a mistrial. (TR-941)

In this case, Kirkland gave three statements to law enforcement that were tape recorded. (TR-683-684) One of these, dated April 22, 1994, was admitted into evidence (TR-624) and then played to the jury. (TR-625-675) The other two tapes were never introduced into evidence by the prosecutor.

In addition to the taped statements, Glenn Kimbrell talked about information given by Kirkland when the taped recorder was turned off during the May 13, 1993

interview. (TR-822)

In his closing argument, the defense lawyer argued that because there was no tape made of the items that the police officer testified about, the jury should consider this factor in weighing the credibility and believability of the information. The prosecutor completely missed the point in his rebuttal argument; he argued the defense had equal access to play the other two tape recorded statements. (TR-941) Of course, the defense lawyer had not mentioned this at all.

As the other tapes were not in evidence, the prosecutor should not have not made any reference to them. The trial court correctly sustained the defense lawyer's objection but erred in not granting the mistrial motion. *Haliburton v. State,* 561 So.2d 248, 250 (Fla. 1990)

The other tapes were the equivalent of Kirkland testifying. The prosecutor directly commented on the misguided notion that the defense had an opportunity to play those tapes. *Dailey v. State,* 594 So.2d 254, 258 (Fla. 1991).

CONCLUSION

Based on the arguments made in Mr. Kirkland's initial brief, he requests this Court to take any of these alternative actions. First, reduce the conviction from first-degree murder to second-degree murder. This would eliminate the necessity of the Court addressing any other issue raised in this appeal.

If this Court affirms Mr. Kirkland's first degree murder conviction, then he asks to have his death sentence reversed with a life sentence imposed.

Failing to resolve the case in the first two ways suggested by Mr. Kirkland, he would request this Court to reverse his death sentence and remand for a new sentencing hearing, complete with a new jury.

Finally, Mr. Kirkland would ask for a new sentencing hearing before the trial court to address all of the mitigation offered in the case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this 2nd day of October, 1995 to **Mr. Richard Martell,** Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

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