IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

CASE NO. 84,371

WILLIAM LEE STRAUSSER, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT
WILLIAM LEE STRAUSSER, JR.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CASE NO. 92-16860 CF10A
HONORABLE PAUL J. BACKMAN

LAW OFFICES OF RICHARD L. ROSENBAUM
ATTORNEY FOR APPELLANT
ONE EAST BROWARD BOULEVARD
SUITE 1500, BARNETT BANK PLAZA
FORT LAUDERDALE, FLORIDA 33301
(305) 522-7000
FLORIDA BAR NO: 394688

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PRELIMINARY STATEMENT

The following symbols, abbreviations and references will be utilized throughout this Initial Brief of Appellant:

The term "Appellant" shall refer to the Defendant in the Circuit Court below, William Lee Strausser, Jr.

The term "Appellee" shall refer to the Plaintiff in the Circuit Court below, The State of Florida.

Citations to the transcript of the trial proceedings contained in Volumes I through XIV, contained in pages 1 through 1842, and Volumes XV through XVI, containing all of the pleadings and other documents filed in this cause, contained in pages 1843 through 2214 will be indicated by an "R" followed by the appropriate page number (R).

All emphasis indicated throughout this Brief has been supplied by undersigned counsel, unless otherwise stated.

STATEMENT OF THE CASE

On August 18, 1992, members of the Broward Sheriffs Office responded to the scene of a "possible home invasion robbery that possibly resulted in the death of a man." (R 1846) The man was later identified as Allan[1] Trubilla (R 1845). Allan Trubilla's 14 year old son, Elec Trubilla was found at the scene covered in blood. Elec's statements to the police were inconsistent with other witnesses' statements. Ultimately, law enforcement believed that the stabbing death of Allan Trubilla was committed by the decedent's son and the decedent's friend, William Strausser.

An arrest warrant was issued for William Strausser seeking his detention for murder in the first degree (R 1844). William Strausser was described as a white male whose date of birth was February 20, 1961 (R 1848). On September 3, 1992, a Grand Jury from the Seventeenth Judicial Circuit in and for Broward County returned an Indictment charging the decedent's son, Elec Trubilla and William Strausser with murder in the first degree (R 1843).

William Strausser was apprehended by members of the United States Marshal's Office in Chicago, Illinois in September 1992, and was extradited to Florida to stand charges on the outstanding Indictment (R 1849). On October 14, 1992, when William Strausser returned to Broward County, Florida, he was held on two charges, murder in the first degree in case number 92-1666-CF, and

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[1] The Indictment spells the decedent's name "Allan". The trial transcripts contain the spelling "Alan".

interference with child custody, 92-12870-CF10A (R 1849). No bond holds were placed on William Strausser as to each count (R 1849). Broward Sheriff's Officers believed William Strausser to be a suicide risk (R 1850).

On October 15, 1992, William Strausser was brought before a committing Magistrate, who found that probable cause existed to require William Strausser to answer the charges based upon the Affidavit of Officer Nieves (R 1851).[2] Counsel was appointed and an Order entered forbidding law enforcement from speaking to the Defendant without an attorney being present, based upon the Defendant's previously filed Notice of Defendant's Invocation of Rights to Remain Silent, and Right to Counsel (R 1852).

On October 20, 1992, the Defendant was arraigned. A plea of not guilty was entered as to the charge of murder in the first degree (R 1-41; 1862).

Pretrial, the defense moved for appointment of an expert pursuant to Rule 3.216, Fla. R. Crim. P. (R 1872) In so doing, the defense advised the court that William Strausser had a history of mental illness, having attempted suicide on two prior occasions.[3] While detained pending trial, William Strausser was

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[2] There is no Affidavit from Officer Nieves in the Clerk of Court's file nor in the Record on appeal. No such officer testified at trial. The Appellant at this juncture is unsure what affidavit, if any, the court actually reviewed.

[3] From the pleadings filed, in 1979 William Strausser attempted suicide by overdosing on pills while in the United States Air Force (R 1882). In 1981 William Strausser attempted suicide by shooting himself in the chest with a .22 caliber gun (R 1878).

ingesting prescription psychotropic medication (R 1872).

On December 21, 1992, pursuant to an Order entered by the trial court, Dr. Antoinette Appel was appointed to evaluate William Strausser regarding several issues surrounding his sanity at the time of the offenses and competency to stand trial (R 1886-88).

On March 25, 1993, the State Attorney advised William Strausser's counsel that Elec Trubilla would be testifying as a State witness in the prosecution of William Strausser (R 1904). Discovery continued.

On October 15, 1993, William Strausser filed a Notice of Intent to Rely On the Insanity Defense Pursuant to Rule 3.216, Fla. R. Crim. P. (R 1935). The Notice stated that William Strausser:

> Did not know the difference between right and wrong and/or the nature and consequences of his actions on August 18, 1992 due to his abrupt discontinuation of his medication to wit: Prozac and/or Elec Trubilla's report of being abused by his father, Allan Trubilla.
>
> (R 1935).

The same day, the trial court appointed Dr. Trudy Block-Garfield, and Dr. Michael F. Walczak as court appointed doctors to evaluate the Defendant (R 1938-39).

During a pretrial hearing conducted on November 19, 1993, defense counsel informed the court:

> In my conversations with Dr. Walczak, he indicated to me that one of the areas that he really is not familiar with is the situation where someone is immediately taken off the drug Prozac, what affect that may have.

(R 84).

Pretrial, the defense filed several "capital motions." (R 89) Likewise, the defense filed a Motion to Suppress a statement given by William Strausser at the time of his arrest in Chicago, Illinois (R 2041). An evidentiary hearing was conducted on the Motion to Suppress Statements (R 93-172; 443-461; 478-535; 2043).

On January 27, 1994, a jury panel was selected. Voir dire was conducted over the course of a full day, at which time the jury was selected and sworn (R 2044-50). The jury was recessed until February 7, 1994.

During the interim, hearing on the Defendant's suppression motion continued on February 4 and February 7, 1994. The Defendant as well as other witnesses testified on William Strausser's behalf. The Motion to Suppress was denied (R 2051). All of the capital motions were either denied or, deemed moot, or deemed to not yet be "ripe." (R 2052)

Opening statement was conducted by the State on February 7, 1994. Just prior thereto, the Rule of Sequestration was invoked (R 536). During the State's opening, reference was made to felony charges lodged against William Strausser for interference with child custody surrounding Elec Trubilla. Trial continued on February 8 and 9, with the State resting its case-in-chief. A defense Motion for Mistrial and for Judgment of Acquittal was denied (R 984-985). After defense opening on February 9, the defense case continued with the presentation of four witnesses, including William Strausser on February 10, 1994. Over defense

objection, the state expert witnesses were permitted to sit in the courtroom during William Strausser's testimony. On February 14, 1994, the defense rested. The renewed Motion for Judgment of Acquittal was denied (R 1305). Following the presentation of the two rebuttal witnesses, who had been permitted to violate the Rule of Sequestration, closing arguments were given (R 1411-1496). On February 15, 1994 the jury was instructed (R 1506-1523).

Following deliberations, a Guilty Verdict was returned (R 1535; 2092). The jury was polled (R 1535-1537). Following entry of the Verdict, William Strausser was adjudicated guilty of murder in the first degree (R 2093).

The defense timely filed a Motion for New Trial (R 2095). The Motion was orally denied (R 1772).

The penalty phase was conducted approximately six weeks later via the presentation of one witness on behalf of the State, and five witnesses, including William Strausser, on behalf of the defense. The jury was instructed concerning its advisory sentence (R 2105). After hearing all of the testimony and reviewing all of the evidence, the jury recommended that William Strausser be imprisoned for life with a mandatory 25 years (R 2112). Subsequently, the State of Florida filed a request for a judicial override (R 2118).

On September 1, 1994, the Honorable Paul Backman, Circuit Judge, entered a Sentencing Order (R 2029-71). The court overrode the jury's recommendation of life, and sentenced the

Defendant to death by electrocution (R 2172-78). The court cited two (2) aggravating factors: that the offense was especially heinous, atrocious, or cruel (§ 921.141(5)(h); and that the offense was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (§ 921.141(5)(i))(R 2130; 1234). The court likewise took into consideration statutory mitigating circumstances offered by the defense: 1) that the defendant had no significant history of prior criminal activity (§ 921.141(6)(a); 2) that the offense was committed while the defendant was under the influence of extreme mental and emotional disturbance (§ 921.141(6)(b); 3) that the victim was a participant in the defendant's conduct or consented to the act[4] (§ 921.141(6)(c); 4) that the defendant was an accomplice in the felony committed by another person, and the defendant's participation was relatively minor[5]; 5) the defendant was under extreme duress or under the substantial domination of another person (§ 921.141(6)(e))[6]; 6) the capacity of the defendant to appreciate the criminality of his conduct and to conform it to the requirements of the law was substantially impaired (§ 921.141(6)(f)[7]; 7) the age of the defendant at the

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[4] But the court found no Record testimony or evidence to support this mitigating circumstance.

[5] The court found that this mitigating circumstance did not exist (R 2159).

[6] However, the court found that this mitigating circumstance did not exist (R 2160).

[7] The court found that this mitigating factor did not exist (R 2161).

time of the offense (§ 921.161(6)(g)[8]. Similarly, the court reviewed several non-statutory mitigating factors, including William Strausser's family background, his mental problems and difficulties, the fact that William Strausser was severely abused as a child, his remorse, his employment history, his potential for rehabilitation, the sentence of the co-defendant, the Defendant's excellent behavior during trial, the Defendant's voluntary confession and cooperation with the police, the Defendant's contribution to the community or society, and found that William Strausser is a good parent, good husband, and family man. The court also reviewed other aspects of William Strausser's character, record and background, and "other circumstances" of the offense. Nonetheless, the court found the jury's advisory sentence "...was not the result of sound reasoned judgment as it must be." The trial court disregarded the jury's verdict and sentenced William Strausser to death (R 2169). A Notice of Appeal was timely filed (R 2180). William Strausser remains confined on death row at Union Correctional Institution in Raiford, Florida. This appeal ensues.

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[8] The court found no testimony or evidence to support this mitigating factor (R 2161).

STATEMENT OF THE FACTS

Deputy Fernando Gajate of the Broward Sheriffs Office responded to a "911" home invasion call at the apartment of Elec Trubilla and his father, Allan Trubilla, on August 18, 1992. The 911 call was dispatched at 1:25 o'clock a.m. (R 557). When Deputy Gajate arrived at the scene, he observed a white juvenile male, later identified as 14 year old Elec Trubilla covered in blood standing outside the apartment (R 558). Elec Trubilla's father, Allan Trubilla was found laying in the bathroom in a pool of blood with a knife lying next to his body (R 560). Elec Trubilla was asked what happened (R 561). He had blood all over him and a cut on his left hand (R 562). Elec Trubilla told Deputy Gajate and Deputy Orlando Alvarez that he awoke to his father being attacked and stabbed (R 563; 571-74). He stated that he was cut by the subject as he tried to assist his father. Elec Trubilla testified that Mark Chandler, the apartment manager, came to the door during the attack and that shortly thereafter the suspect ran off (R 563). At the time of the statement, Elec was unemotional and was not crying (R 565; 568-69).

The medical examiner, Dr. Michael Bell, testified that he found 45 stab or incise wounds on Allan Trubilla. The wounds were caused by a sharp object, such as a knife, and were clustered in several areas. There were 13 on the right side of the head and neck (R 740). There were 8 on the left side of the head and neck, and 7 in the back (R 740). The most serious

wounds involved the right neck, underneath the jaw. The medical examiner testified concerning one (1) stab wound which went upwards through the tongue and severed the carotid artery. The medical examiner also testified that wounds were caused by a blunt object, consistent with the iron skillet found at the scene of the crime. The medical examiner concluded that the cause of death was blunt and sharp forced injuries to the head and neck (R 743-48). The doctor admitted on cross-examination that he had no way of knowing whether the decedent was struck with a blunt object first, or stabbed (R 750). There was no way to tell which of the two (2) individuals inflicted which injury (R 751).

Officer Gail Neuman testified that she arrested William Strausser in Chicago, Illinois following his apprehension at the Chicago O'Hare Airport on September 19, 1992 (R 581). Officer Neuman was called in to witness the reading of the Miranda rights (R 582). The witness testified that she observed Sergeant Kurt Blanc read the Defendant his rights (R 483). This was at approximately 9:00 o'clock p.m. (R 582). Via Officer Neuman, the State introduced the Rights Waiver Form signed by the Defendant (R 583). The defense objected and renewed its pretrial Motion to Suppress (R 584). The objection was overruled (R 585). The officer admitted that William Strausser had a broken ankle and was on crutches (R 487; 588).

William Strausser testified during the defense case-in-chief. At the time of his testimony, William Strausser was being prescribed sinaquane and thorazine (R 1199). William Strausser

testified that he had been born in Baltimore, Maryland and has one brother, one step-brother and one step-sister (R 1199). William Strausser recounted being physically abused by his step-father while growing up, and simultaneously being molested by his step-father and another man (R 1203-04). When William Strausser was 11 years old, he was molested by his Aunt Janet (R 1205).

At age 19, William Strausser entered the Armed Forces (R 1207). He testified that he joined because he could not handle all the responsibilities placed on him at home (R 1207). While in the Air Force, the William Strausser attempted suicide by taking an overdose of pills and jumping through a plate glass window. The military psychiatrist found him to be unfit, and honorably discharged him (R 1208). One year after his attempted suicide while in the Air Force, William Strausser tried to kill himself again by shooting himself in the chest while living in Baltimore, Maryland (R 1210). He was 21 at the time.

William Strausser testified that he became involved with Lloyd Pryor through the Big Brother Program and eventually moved in with he and his mother (R 1212). William Strausser was engaged to marry a woman named Debbie Markeo, who died in a car accident six (6) months before his second suicide attempt (R 1213-14).

At the time of William Strausser's second attempt on his life, Strausser was under the care of a psychologist named Mary Brooks at Johns Hopkins Hospital (R 1211).

William Strausser testifeid that he moved to Florida with

Lloyd and his mother, Mary Pryor, in 1986 or 1987 (R 1216). He married his wife, Margaret Strausser in 1990 (R 1217).

Over defense objection, Detective George A. Bruder, from the Broward Sheriff's Office, testified concerning the facts and circumstances surrounding the charges filed against William Strausser for interference with child custody (R 966; 972). Detective Bruder advised that he encountered William Strausser and his wife while investigating a complaint concerning Elec Trubilla running away. Elec had been reported missing on May 20, 1992 (R 974). On May 28, 1992, the Detective went to William Strausser's home. William Strausser greeted the Detective at the door in a bathrobe and told him that Elec was not there (R 974). At about the same time, his wife, Margaret Strausser came out of the bedroom and closed the door (R 975). As Mrs. Strausser tried to go back into the bedroom, the Detective attempted to follow her. She stopped the Detective from going into the bedroom. After the Detective persisted, stating that he was concerned about his personal safety, the Detective entered the bedroom and found Elec dressed in his underwear (R 975). The Detective was permitted to testify that before Elec Trubilla left, he observed William Strausser hug Elec and that they kissed each other on the lips (R 976). The Detective testified that Elec Trubilla was examined by the Sexual Assault Treatment Division and the exam was negative for any type of abuse (R 980). After Elec was returned a Complaint was lodged against William Strausser by Allan Trubilla (R 981).

William Strausser met Allan Trubilla through working at Zaks and also a 7-Eleven (R 1218). He became sexually involved with Allan Trubilla four (4) months after their friendship started (R 1219). At the time, William Strausser was seeing a psychologist named Katrina Fritz (R 1219).

Ultimately, William Strausser's relationship with Allan Trubilla began to "sour" when Allan wanted more of a commitment from William Strausser (R 1221). William Strausser was not ready for that. He never intended to leave his wife (R 1221). During the break-up, Allan Trubilla told William Strausser to stop spending time with his son. Strausser believed that Allan was jealous of the relationship between he and Elec Trubilla (R 1224). Elec repeatedly told him of the abuse he was suffering because of Allan. William Strausser was trying to get help for Elec by contacting Elec Trubilla's school counselor, the Florida Abuse Center, HRS, and Elec's mother (R 1228). William Strausser, his wife, and Elec's mother at one point discussed trying to get Elec out of Allan's house, and into William Strausser's custody (R 1229). Elec had threatened to run away many times (R 1230). William Strausser and his wife allowed Elec to stay with them (R 1230).

William Strausser testified that when he was seeing Katrina Fritz he would miss appointments because he did not have the money to pay for the sessions (R 1232). Ultimately, William began to see Dr. Diaz, and was prescribed Prozac (R 1232). Being cautious about the drug he waited about thirty (30) days to begin

taking it (R 1233). Although Katrina Fritz and William both felt that he needed hospitalization, it was too expensive for him (R 1233). William Strausser was without funds. At that point, he was depressed and suicidal.

William Strausser testified that before taking Prozac, he was very violent and angry (R 1234). After taking Prozac, everything changed and he became calm.

After the interference with child custody charges, William Strausser, his wife, Lloyd and Lloyd's mother moved to the Cape Coral area (R 1235). William Strausser and his mental health advisors thought it best he move away. William Strausser no longer talked to Katrina Fritz, and could no longer afford to see Dr. Diaz or obtain medication. Prozac cost $60 per month, and William Strausser had no health insurance (R 1236).

William Strausser made appointments in July to seek treatment at the end of August and middle of September (R 1237). He testified that he was unable to get treatment at any other time. In the meantime, at the beginning of August, William Strausser ran out of Prozac (R 1237). During the two (2) or three (3) weeks thereafter, he became violent, depressed, and suicidal (R 1237). His behavior was worse after going off Prozac than it was on Prozac (R 1238). At one point he almost killed his wife. He was unable to control himself (R 1238). Elec Trubilla continued to call him during this time. Then, Lloyd abruptly left. William Strausser became enraged (R 1239).

A couple of months before the incident, Elec Trubilla had

contacted William Strausser and discussed killing his father (R 1239). On the Saturday night before the incident, at approximately 11:30, Elec called William and again told him that he wanted to kill his father (R 1240). William Strausser told him to forget about it, that he would call him the next day. The next morning William Strausser decided that he needed to intervene before something happened, because he did want to see Elec Trubilla or his father get hurt.

On that Monday, William Strausser had been working on his wife's car trying to fix the speaker wire with a kitchen knife. The knife remained in his car when he drove to Broward County later that day (R 1241). When William Strausser got in the car, he noticed the knife lying on the floor, so he picked it up and put it in his bag (R 1241-42). William Strausser testified that he stopped by Eckerds to pick up hair dye and rubber gloves to dye Mary's hair the next day, but because Eckerds was out of hair dye, he just bought the gloves (R 1242). He then drove around town looking for a gift for his wife's birthday (R 1242).

William Strausser testified he wanted to speak to Elec face to face before Allan got home at 10:15, so he called Elec from a pay phone at a 7-Eleven. Elec told him to come over.

William Strausser went to the Trubilla residence and went upstairs with Elec to change his clothes and talk to him about going into the Covenant House (R 1244). They heard Allan's keys in the door, and William Strausser hid in Elec's bedroom. Allan went to bed at approximately 1:00 a.m. After Allan went to bed,

Elec came and got William Strausser and they were talking (R 1244). The next thing William Strausser remembered was waking up on top of Allan Trubilla, who was laying face down on the bathroom floor (R 1245). William Strausser testified that he had no recollection of what happened. He did not remember hiding in Elec's room when he gave his statement to the police. He stated that medication has helped him in remembering what happened (R 1245). William Strausser does not remember the apartment manager, Mark Chandler coming to Allan's door that evening (R 1246). He only remembers taking off in his car and heading back to Cape Coral (R 1246). He eventually called his wife and had her meet him at State Road 41 and Pine Island Road (R 1247). Mrs. Strausser initially wanted to take William Strausser to the hospital, but decided not to (R 1249). They headed to Texas, and then to Jamaica. While in Jamaica, William Strausser broke his ankle. While there he was depressed and suicidal (R 1249).

William Strausser testified that prior to his arrest in Chicago, IL, he was taking pain medication for his ankle (R 1251). He was in pain and asked for his medication before speaking to the detectives. William Strausser testified that he was told by law enforcement officials that he could only get help for his ankle after he gave a statement (R 1253). He gave a statement (R 809-835). The statement was taken by Detective John Palmer of the Broward Sheriff's Office at the Chicago O'Hara Airport Police Facility in Chicago, IL.

The statement commenced at 11:25 PM (R 810). The detectives

had been speaking to William Strausser about the homicide of Allan Trubilla since approximately 9:10 (R. 811). In the taped statement William Strausser stated that the murder of Allan Trubilla started months ago (R. 811). He had known Allan a couple of years, and they were lovers (R. 812). He became friendly with his Allan's Elec. There were no sexual relations with Elec at all (R. 812). Elec would call William Strausser and say his father was being abusive to him. He was treating him like a pawn with his mother. He'd embarrass him in front of his friends. Elec couldn't have friends over (R. 813). William Strausser recounted to law enforcement his relationship with the Trubillas, as well as his recent move to Cape Coral approximately 3 weeks before the murder (R. 815). William Strausser stated that Elec had spoken of killing his father on many occasions.

During the taped statement, William Strausser went over as many of the intricate details of the incident that he could remember. William Strausser described the knife found at the scene and admitted that it was from his house. William Strausser denied remembering buying rubber gloves at Eckerds (R. 823).

William Strausser told the detectives that when Allan came out of the bedroom he heard Allan being hit on the head (R. 828). He stated that he couldn't see what Elec had used to hit him - it was dark (R. 829). After Elec hit him, William Strausser stuck him with the knife (R. 829). He denied remembering how many times he stabbed him. He denied remembering cutting himself (R. 829). William Strausser stated that at one point Allan got ahold

of the knife. William Strausser admitted that he ended up getting cut on the left index finger (R. 830).

Immediately after the murder, Elec flipped the light on. That was the first time that William Strausser could see anything. There was blood everywhere (R. 831). William Strausser did not remember seeing anyone coming or knocking on the door. He grabbed his clothes and ran out.

During the trial, William Strausser testified that while in custody in Chicago, he was placed in a psychiatric ward in the Cook County Jail (R 1253). Later, he was taken to MCC and placed on a suicide watch and placed back on Prozac (R 1254). After coming to Broward County, he was given further psychiatric treatment and placed on more medication (R 1255). William Strausser testified that when he went to Fort Lauderdale on the day of Allan's death, he had no intention of doing anything to hurt Allan. He did not take Elec to Covenant House because Elec did not want to do that (R 1256).

The defense psychological expert, Dr. Antoinette Appel, was court-appointed to conduct a privileged examination for the defense (R 1010). The doctor interviewed the Defendant, reviewed medical records, and talked to several people about William Strausser. She met with William Strausser 4 or 5 times (R 1010).

Dr. Appel testified that William Strausser sustained birth trauma (R 1011). His mother remarried a man named John Foster, who sexually and physically abused William Strausser from the time he was 5 until he was 9 1/2 years old (R 1012).

Additionally, from the time William Strausser was 5 until he was 11 1/2 years old, he was sexually abused by his Aunt Janet (R 1013). When the Strausser family moved to York, Pennsylvania, William Strausser first became involved in the mental health system (R 1013). He was treated while he was 17, 18, and 19 years of age. The doctor testified concerning William Strausser jumping out of a window while in the Air Force, and getting discharged. He received treatment in Baltimore, Maryland. He next received psychological treatment at Johns Hopkins University, first as an out-patient, and later had multiple admissions there. In the early 1980's, William Strausser was hospitalized on several occasions for suicidal tendencies. He tried to again cause his own death, by shooting himself in the chest and upper abdomen (R 1014).

Dr. Appel testified that in early 1990, William Strausser was treated by mental health counselor Katrina Fritz (R. 1016). After treating the Defendant over a 6 month period, Katrina Fitz referred him to a psychiatrist, Dr. Diaz. Dr. Diaz placed William Strausser on Prozac, an anti-depressant.

After reviewing the office notes of Katrina Fritz and Dr. Diaz, as well as the Baltimore City Hospital records which indicated William Strausser's suicide attempt and the records from Johns Hopkins University Hospital where William Strausser received psychotherapy, Dr. Appel noted that William Strausser had been abruptly taken off neuroleptic medication, a major anti-psychotic drug (R 1018). Previously William Strausser had been

diagnosed with a personality disorder and possibly as being a manic depressive (R 1019). He was admitted in March 1981 to the Francis Scott Key Baltimore City Hospital for a suicide attempt. He was diagnosed at the time with a personality disorder (R 1019-20). The records indicated that he attempted suicide because of the death of his fiancee.

William Strausser began seeing Katrina Fritz after his break-up with Allan Trubilla (R 1022). He told Ms. Fritz that he discontinued the relationship because his lover had become ill. Ms. Fritz did not take up on the possibility that his former lover, Allan Trubilla may have been HIV positive. Dr. Diaz made a note of it in his records (R 1023). Dr. Appel testified that had someone responded to William Strausser, allowing him to grieve and essentially, kill off his current lover, "we would not be here." The State's objection to this opinion was sustained (R. 1026).

Dr. Appel was appointed to evaluate the Defendant's competency to proceed as well as his sanity at the time of the offense (R 1028). The doctor testified that William Strausser was competent to proceed to trial, but not sane at the time of the murder (R 1028). To evaluate William Strausser's sanity at the time of the offense, she reviewed extensive records of his prior history as well as the records obtained after William Strausser's arrest. The doctor reviewed Federal transfer records and the records from Surmak Health Center, Cook County Jail (R 1023). William Strausser was first diagnosed with a mental

disorder while living in York, Pennsylvania. He was diagnosed as being schizophrenic (R 1032). The doctor testified it was not a "full blown schizophrenic disorder," but a "major mental illness." (R 1032) The records indicated that he had been diagnosed with a major depressive disorder with a dysthymic disorder (R 1030). Dr. Appel opined that William Strausser has a bipolar disorder (R 1031). A bipolar disorder is a recognized mental illness in the Diagnostic Statistical Manual, Third Edition Revised (R 1031).

Dr. Appel testified that after William Strausser's arrest in Chicago, William was medicated with Doxepin and Prozac. Based upon the medical examiners report, Dr. Appel provided an expert opinion that the explosive events that occurred here, including the multiple stabbings, were more in line with a manic, sudden explosive event, than with anything else. The doctor characterized it as a "frenzy" of mental illness (R 1033-34). Dr. Appel testified that the explosive event was consistent with her evaluation of the Defendant, and her opinion that he suffered from a bipolar manic depressive condition.

Dr. Appel considered the sexual abuses suffered by the Defendant, and the fact that he was seeing Dr. Fritz about it, in forming her ultimate conclusions and opinions regarding William Strausser's sanity (R 1035). The fact that Elec Trubilla was claiming to be abused played into William Strausser's mental illness, in the doctor's opinion (R 1036).

Dr. Appel testified that when a patient discontinues

medication, the patient goes back to the state that he was in at the time that he went on the medication (R 1038). As the level of medication dropped, the patient's behavior drops back to the level that it was before, and in the case of depression, down even further. It is called the "rebound effect." (R 1038) The doctor testified Prozac has a much shorter "wash out time", so the effects are seen more rapidly than with other drugs (R 1038).

Dr. Appel opined that between the time of William Strausser's discontinuance of the medication and the death of Allan Trubilla, William Strausser would have been in a "rebound" effect state, and would have been psychiatrically unstable. This was not only as an underlying disease, but as a consequence of the discontinuation of the medicine (R 1039-1040). Thus, Dr. Appel concluded that William Strausser was not legally sane at the time of the events (R 1040). In the doctor's professional, expert opinion, William Strausser did not appreciate the nature and consequences of his acts (R 1041). The doctor testified that additional records obtained after William Strausser's arrest confirmed the doctor's opinion (R 1041). Dr. Appel's opinion was that by the time the stabbing started, William Strausser did not know what he was doing (R 1053). He did not necessarily know that a stabbing was going to take place (R 1054-55). Dr. Appel believes that William Strausser did not know what he was doing at the time of the stabbing, and that he did not know the consequences (R 1074).

In rebuttal, the State called two (2) psychologists to rebut

evidence offered in support of William Strausser, that he was not sane at the time of the offense. Both witnesses had been permitted over defense objection to sit in the courtroom during William Strausser's testimony (R 1193; 1197). First, Dr. Trudy Block-Garfield[9] testified concerning her evaluation of William Strausser with respect to the issue of insanity at the time of the commission of the offense (R 1321). Dr. Garfield reviewed material with respect to William Strausser's background and medical history. She likewise reviewed a narrative report of the investigation by the Detective Palmer. The doctor reviewed a report by Dr. Appel, as well as the clinical notes from Katrina Fritz. The doctor also looked at notes which she believed may have belonged to Dr. Diaz.

Dr. Garfield met with William Strausser on two (2) separate occasions, one (1) week apart (R 1324-25). William Strausser told her that he did not recall the homicide itself (R 1325). Because of William Strausser's memory loss, Dr. Garfield administered tests to determine whether he suffered brain damage (R 1326). According to Dr. Garfield, the screening devices did not reflect any brain damage. Further, there was no previous report of brain damage by the neuropsychologist who had evaluated William Strausser (R 1327). However, there were indications of

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[9] Dr. Garfield is a clinical psychologist. Dr. Appel is a neuropsychologist. Initially, the State was concerned about a conflict of interest in Dr. Garfield being appointed to evaluate William Strausser in this case because of the doctor's involvement in treating Elec Trubilla (R 78). No Record evidence dispels the perceived conflict.

brain damage at the time of birth (R 1327).

Dr. Garfield testified that William Strausser may have a mental illness (R 1336). The doctor testified that at the time of the killing, William Strausser was probably depressed and was probably experiencing a great deal of stress. The doctor admitted that he likely suffers from a "mixed bag of personality disorders and personality difficulties," including schizophrenia (R 1337). However, the doctor could find no psychosis in the Defendant at or about the time of the killing (R 1340). Dr. Garfield testified that William Strausser knew what he was doing and its consequences (R 1340). One of the reasons for her opinion was the degree of planning involved, including a series of behaviors to protect himself from the consequences of his actions after the killing (R 1341).

Dr. Garfield noted that William Strausser did seek treatment and counselling long before the incident in this case (R 1347). Dr. Garfield acknowledged the Defendant's prior suicide attempts, agreeing that William Strausser does indeed have psychological difficulties (R 1348).

Dr. Garfield testified that in her opinion discontinuing Prozac would not cause much, if any effect on a patient (R 1357). However, the doctor admitted that Prozac can effect people differently. The doctor believed it to be possible that a person would be worse off after discontinuing the use of Prozac (R 1358).

Dr. Michael Walczak, an expert in the field of forensic

psychology, received a court order to evaluate the Defendant in jail on the issue of competency to stand trial as well as on the issue of sanity at the time of the offense (R 1370-71). At the time of trial, Dr. Walczak testified as a State witness that he originally thought his purpose was to evaluate the Defendant strictly for the purposes of sanity and competency to stand trial, and thus did a simple evaluation of William Strausser to ascertain whether he understood what was going to take place in the courtroom, and to find out information regarding the incident (R 1371-72). All in all, Dr. Walczak spent approximately one (1) hour with William Strausser (R 1371). However, after finding out his true role, the doctor reviewed more records and contacted Dr. Garfield telephonically regarding what testing had been done on the Defendant. After Dr. Garfield advised Dr. Walczak that there was nothing to indicate insanity on William Strausser's part, Dr. Walczak concurred (R 1372).

Dr. Walczak did not request copies of reports of William Strausser's history going back to 1981 that were in Dr. Appel's possession (R 1389). The doctor made no effort to look at any other records than Dr. Appel's report, Psychotherapy Institutes report, the Sheriff's Office investigative report, and Katrina Fritz' notes (R 1389-90). Dr. Walczak did not speak to the Defendant's family, or anyone other than the Defendant - and only then on one brief occasion (R 1390). Dr. Walczak did no testing of William Strausser (R 1391-92). His opinion was based in part on his brief interview with William Strausser, and an MMPI score

that he received over the phone from Dr. Garfield (R 1392). Dr. Walczak admitted that he based his report partially on work done by Dr. Garfield, and not work done by himself (R 1392).

Over defense objection, Dr. Walczak was permitted to testify during the State's rebuttal concerning William Strausser's eyes allegedly dilating, a fact which was very important to the doctor (R 1392-93).[10] Dr. Walczak stated that he witnessed the eyes allegedly dilating while the Defendant was testifying in court (R 1393). The doctor likened the eye dilation to a "lie meter" (R 1393).

Dr. Walczak was permitted to testify, over defense objection, concerning the direct examination and testimony of William Strausser before the jury (R 1375). The State elicited expert opinion that William Strausser testified to things that were different or inconsistent with what he had previously told Dr. Walczak (R 1366). The doctor discussed seeing William Strausser's eyes dilate, stating:

> Well, I am not one to look a gift horse in the mouth. I mean, I saw this guy as having a meter, a lie meter.
>
> (R 1379).

Dr. Walczak believed that William Strausser knew that the murder was wrong on October 22, 1993, which the doctor believes had an effect upon whether William Strausser knew the murder was

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[10] Interestingly, nothing about William Strausser's "eyes dilating" had ever been in Dr. Walczak's brief two (2) page report. Dr. Walczak had performed no testing on William Strausser (R 1391-92).

wrong back on August 18, 1992 (R 1397). Dr. Walczak felt that the reports of William Strausser's history of mental illness might not be correct (R 1401). Dr. Walczak admitted that he had no knowledge, experience, or training to base an opinion on the effects of the sudden cessation of the use of Prozac (R 1403).

The only other opinion evidence concerning William Strausser's sanity at the time of the offense came from 24 year old Lloyd Pryor (R. 942-943). Over defense objection, the State was permitted to question Lloyd Pryor whether it appeared to him that William Strausser knew what he had done was wrong.

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT REVERSIBLY ERRED IN EXCLUDING A CRUCIAL STATE EXPERT WITNESS FROM ABIDING BY THE RULE OF SEQUESTRATION, AND ALLOWING HIM TO COMMENT ON WILLIAM STRAUSSER'S CREDIBILITY AS A WITNESS DURING TRIAL?

II. WHETHER THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING OTHER CRIME EVIDENCE?

III. WHETHER THE TRIAL COURT REVERSIBLY ERRED IN PERMITTING A 23 YEAR OLD LAY WITNESS TO GIVE AN OPINION CONCERNING WILLIAM STRAUSSER'S SANITY AT THE TIME OF THE OFFENSE?

IV. WHETHER WILLIAM STRAUSSER'S CONFESSION WAS GIVEN VOLUNTARILY BASED UPON THE TOTALITY OF THE CIRCUMSTANCES?

V. WHETHER THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING THE STATE TO INTRODUCE IMPROPER EVIDENCE IN VIOLATION OF WILLIAM STRAUSSER'S RIGHTS UNDER THE FLORIDA AND FEDERAL CONSTITUTION?

A. Whether The Trial Court Erred In Denying William Strausser's Right To Confront Elec Trubilla's Out of Court Statements?

B. Whether The Trial Court Erred In Allowing A State Witness To Read Letters Sent To Him By William Strausser Which Were Not Admitted Into Evidence?

C. Whether The Trial Court Abused Its Discretion In Allowing The Jury To View An Inflammatory Videotape Which Was Cumulative And Prejudicial?

STATEMENT OF THE ISSUES (cont'd)

D. Whether The Trial Court Erred In Denying William Strausser's Attempt To Exclude For Cause?

E. Whether The Cumulative Effect Of The Errors Violated William Strausser's Rights To A Fair Trial And To Due Process Of Law?

VI. WHETHER THE JURY HAD A REASONABLE BASIS FOR RECOMMENDING A LIFE SENTENCE, THUS PRECLUDING THE JUDGE'S OVERRIDE OF THE JURY'S RECOMMENDATION?

SUMMARY OF ARGUMENT

The trial court reversibly erred in excluding a crucial State expert witness from abiding by the Rule of Sequestration, and by allowing him to comment on William Strausser's credibility as a witness during trial. Over defense objection, State expert Dr. Walczak was permitted to testify during the State's rebuttal concerning William Strausser's eyes allegedly dilating, a fact which the doctor deemed very important. The doctor stated that the dilation of the eyes was like a "lie meter." The doctor had been permitted to remain in the courtroom, over defense objection, despite invocation of the Rule of Sequestration. The State failed to present evidence justifying exemption from the court's sequestration order.

Dr. Walczak's testimony was far from harmless. On the contrary, this case involved a "battle of the experts" with Dr. Walczak's testimony apparently "tipping the scale" in favor of guilt. Interestingly, Dr. Walczak's testimony was based upon his interview with William Strausser which lasted approximately 1 hour.

Likewise, the trial court reversibly erred in allowing other crime evidence. The State provided the defense with no notice of its intent to rely upon other crime evidence pursuant to § 90.404, Fla. Stat. William Strausser contends that even had proper notice been given, the evidence of his felony arrest for interference with child custody surrounding Elec Trubilla, and insinuations that William Strausser sexually abused Elec were

neither supported by the evidence nor probative in light of their prejudicial effect. Accordingly, the court reversibly erred in allowing such evidence.

Sub judice, the central issue to be decided was William Strausser's sanity at the time of the offense. A court-appointed defense expert testified that William Strausser was not sane at the time of the murder. Dr. Appel based this opinion upon William Strausser's extensive history of mental illness, including his prior suicide attempts. In support of the State's contention that William Strausser was indeed sane at the time of the offense, two expert witnesses testified on behalf of the State during their rebuttal case. The only other witness permitted to testify concerning the issue of whether William Strausser knew right from wrong at the time of the murder was a 23 year old lay witness, Llyod Pryor. Clearly, Lloyd Pryor was not an expert witness. Clearly the opinion testimony was inadmissible. William Strausser contends a new trial is necessitated.

William Strausser's confession to law enforcement officials in Chicago, IL was not given voluntarily based upon the totality of the circumstances. Law enforcement officials knew or should have known of William Strausser's longstanding history of mental illness. Law enforcement officials were advised of William Strausser's fragile mental condition by the Defendant's wife at the time of the statement. William Strausser was limping and on crutches, having broken his ankle. Law enforcement was made

aware of the fact that William Strausser was on pain medication. After being questioned "off the record" for in excess of two hours, the police officers took a lengthy recorded statement from the Defendant. The recorded statement was inconsistent in material respects from William Strausser's trial testimony. Based upon the totality of the circumstances, William Strausser's statement was not given voluntarily, nor was his waiver of the right to counsel and the right not to incriminate himself made freely and voluntarily. Based upon the United States and Florida Constitutions, the statement should have been suppressed.

The trial court reversibly erred in allowing the State to introduce improper evidence in violation of William Strausser's rights under the Florida and Federal Constitutions. First, the trial court erred in denying William Strausser's right to confront Elec Trubilla's out of court statements. Elec Trubilla had placed a 911 telephone call to the police immediately after his father's death. This taped statement was played to the jury without providing William Strausser an opportunity to cross-examine Elec Trubilla. Similarly, during the sentencing phase of the proceedings, a lengthy sworn statement of Elec Trubilla was played to the jury. Although hearsay is admissible in sentencing proceedings, the State is not permitted to violate the Defendant's rights to confront his accusers. In this case, via allowance of the out of court statements, William Strausser's constitutional rights were violated.

Additionally, the trial court erred in allowing State

witness, Lloyd Pryor, to read portions of letters sent to him by William Strausser. The letters were never admitted into evidence. Accordingly, the prejudicial material should not have been permitted. The trial court likewise abused its discretion in allowing the jury to view an inflammatory videotape which was cumulative and prejudicial. Further, the trial court erred in denying William Strausser's attempt to exclude two jurors for cause. Based upon the cumulative effect of the errors in this trial, William Strausser's rights to a fair trial and to due process of law were violated.

Clearly, the jury had a reasonable basis for recommending a life sentence. Accordingly, the trial judge's override of the jury's recommendation, and the death sentence imposed must be vacated. Several mitigating factors were presented and proven by William Strausser. Neither of the aggravating factors relied upon by the trial court outweighed the mitigating factors, and William Strausser contends that the trial court's decision to override the jury's recommendation of life imprisonment was improper, since the jurors could have relied upon both statutory mitigating factors and non-statutory mitigating factors in their recommendation of a life sentence based upon the totality of the circumstances. William Strausser should not be put to death by electrocution. At a minimum, the sentence imposed should be reversed, and the Appellant sentenced to a term of life imprisonment.

ARGUMENTS

I. THE TRIAL COURT REVERSIBLY ERRED IN EXCLUDING A CRUCIAL STATE EXPERT WITNESS FROM ABIDING BY THE RULE OF SEQUESTRATION, AND ALLOWING HIM TO COMMENT ON WILLIAM STRAUSSER'S CREDIBILITY AS A WITNESS DURING TRIAL

William Strausser asserts that the trial court reversibly erred in allowing a crucial State witness, Dr. Michael Walczak, to violate the rule of sequestration by sitting in the courtroom during William Strausser's testimony and thereafter allowing him to comment on the Defendant's testimony when called as a State witness in rebuttal. An objection was timely lodged (R 1193-97). The rule of sequestration had been invoked (R 536). No hearing was conducted concerning the State's violation of Florida and Federal sequestration law. William Strausser contends the error prejudiced the crux of the defense which surrounded his sanity at the time of the offense, thereby violating his rights to due process of law and to a fair trial.

Prior to 1990, the Florida Evidence Code contained no provision relating to the exclusion of witnesses. The rule of exclusion was found only in case law. In 1990, § 90.616, Fla. Stat. was enacted concerning exclusion of witnesses. In 1992, an additional exemption from the Rule of Sequestration was added allowing

> ...the victim of a crime, the victim's next-of-kin, the parent or guardian of a minor child victim, or a lawful representative of such person [to be present], unless, upon motion, the court determined such persons presence to be prejudicial.

§ 90.616(2)(b).

The central issue raised below was William Strausser's competence at the time of Allan Trubilla's death. The case presented a classic "battle of the experts," pitting defense witness Dr. Appel against her former partner, State witness, Dr. Trudy Block-Garfield, and State witness, Dr. Michael Walczak. William Strausser contends that the court erred in allowing the State's doctors to violate the Rule of Sequestration by listening to William Strausser's testimony and then testify in rebuttal. While arguably such violation of the Sequestration Rule might not cause reversible prejudice in every case, at bar the State witness was permitted to comment upon William Strausser's trial testimony, thereby improperly commenting upon the evidence.

William Strausser asserts that the Florida Supreme Court's ruling in Burns v. State, 609 So. 2d 600 (Fla. 1992), does not bar reversal sub judice, because of the distinguishable factual characteristics of this case as opposed to Burns. In Burns, the defendant was convicted of first degree murder and trafficking in cocaine, and sentenced to death. Daniel Burns' convictions were affirmed, however, the sentence was vacated and the matter remanded for resentencing following the Supreme Court of Florida's finding that the murder committed was not "heinous, atrocious or cruel."

In Burns, the defense invoked the witness sequestration rule at the beginning of trial. Subsequently, after conducting a full hearing on the matter, the trial court allowed the State's expert

to remain in the courtroom during the testimony of the defendant or the defense psychologist. The court allowed the State's expert to hear the testimony to enable the State to rebut the defense's evidence of mental mitigation. In Burns, the trial court determined that exemption from the Rule of Sequestration

> ... was necessary in light of the fact that Burns would not be required to submit to an examination by the state's expert because there appeared to be no authority for such an examination.
>
> Burns at 606.

At bar, William Strausser was examined by both of the State's experts. Although Dr. Walczak chose to only meet with William Strausser on one occasion, he should not have been permitted to sit in the courtroom during the Defendant's testimony and thereafter comment upon his observations of the Defendant while testifying and his opinions relative to the alleged inconsistencies between William Strausser's sworn trial testimony his brief conversation with the doctor while in the jail, and police reports.

As stated by this Court:

> Generally, once the witness sequestration rule has been invoked, a trial court should not permit a witness to remain in the courtroom during proceedings when he or she is not on the witness stand.
>
> Burns at 606; Randolph v. State, 463 So. 2d 186, 191-92 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985).

In Burns, the court held that under the particular circumstances of the case "this was the only avenue available for

the state to offer meaningful expert testimony to rebut the defense's evidence of mental mitigation." Burns at 606. Such was not the case during William Strausser's trial. William Strausser remained available pre-trial for any examination or testing.

William Strausser acknowledges that it is within the discretion of the trial judge to invoke the Rule of Sequestration after opening statements. Lambert v. State, 560 So. 2d 346 (5th DCA 1990). Clearly, the rule was invoked below prior to opining. William Strausser suggests this Court must next determine whether prejudice resulted from violation of the Sequestration Rule.

Section 90.616, Fla. Stat., is fashioned after Federal Rule of Evidence 615 which provides, in relevant part, that "[a]t the request of party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." It has long been held that the process of sequestering witnesses serves both to reduce the danger that a witnesses testimony will be influenced by hearing the testimony of other witnesses, and to increase the likelihood that the witnesses testimony will be based on his or her own recollections.[11] See United States v. Hobbs, 31 F.3d 918, 921 (9th Cir. 1994); Perry v. Leeke, 488 U.S. 272, 281-82, 109 S.Ct. 594, 600-601, 102 L.Ed.2d 624 (1989); Jack B. Weinstein and Margaret A. Berger, 3 Weinstein's Evidence, p.

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[11] The Eleventh Circuit has held that the Rule of Sequestration is not violated by witnesses reading each other's grand jury testimony before trial. United States v. Chitty, 15 F.3d 159, 161 (11th Cir. 1994).

615 (01) at 615-1 (1994).

The United States Supreme Court has recognized three (3) sanctions for violation of a sequestration order: 1) holding the offending witness in contempt; 2) permitting cross-examination concerning the violation; and 3) precluding the witness from testifying. See Holder v. United States, 150 U.S. 91, 92, 14 S.Ct. 10, 11, 37 L.Ed 1010 (1893). William Strausser contends that the trial court erred in failing to conduct a hearing to determine the prejudicial effect of exempting the State's expert witnesses from the Rule of Sequestration. Randolph v. State, 463 So. 2d 186, 191-92 (Fla. 1984), cert. denied, 473 U.S. 907 (1985). Reversal and remand is required.

Below, the State failed to show that the presence of experts during William Strausser's testimony was essential to the presentation of its cause. William Strausser suggests that his demeanor while testifying was of no assistance to the experts who were to determine William Strausser's sanity months earlier at the time of the offense. The State failed to even proffer evidence showing the necessity of the witnesses presence.

In Steinhorst v. State, 412 So. 2d 332 (Fla. 1982), the Florida Supreme Court held that the test for excluding testimony of witnesses for violating the Rule of Sequestration is whether the testimony of the challenged witness was substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been. The Steinhorst standard was easily met here. Dr. Walczak would not have

testified about William Strausser's "dilating eyes" had it not been for his observations of William Strausser while testifying. Clearly, a violation of the Rule occurred. As the violation surrounded the central issue raised during the trial, William Strausser's capacity at the time of the offense, such error cannot be deemed harmless, requiring reversal and a remand for new trial.[12]

In First Union National Bank of Florida v. Goodwin Beach Partnership, 644 So. 2d 1361 (Fla. 5th DCA 1994), the court excluded First Union's expert witness from the courtroom during a non-jury trial. The Rule of Sequestration had been invoked, yet First Union requested that the expert witness be allowed to hear testimony of the other parties expert witnesses so that he could be called as a rebuttal witness. Id. at 1368. First Union cited § 90.704 of the Florida Evidence Code, which permits an expert witness to base an opinion on facts of data made known to him or her at trial. The District Court of Appeal ruled that the trial court was correct in determining that First Union could either sequester its expert witness, if it intended to call him as a witness, or have him sit with counsel at trial in an advisory capacity, but then not to be permitted to testify. Id. at 1368. First Union also cited § 90.616(2)(c) of the Florida Evidence Code, that a person whose presence is shown by party's attorney

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[12] During deliberations, the jury question whether all of the criteria must be met to determine that William Strausser was insane (R 1528). Even the prosecutor admitted that "they are obviously confused on what it takes to find a defendant - or to consider the defendant to be insane." (R 1528)

to be essential to the presentation of the party's cause should not be excluded from the courtroom by the witness sequestration rule. At bar, no cause was shown as to the necessity for violating the Rule of Sequestration.

The law is well settled that where in a criminal prosecution the defendant has testified as a witness, testimony of other witnesses as to the credibility of the defendant as a witness in the case to be tried is inadmissible. Maloy v. State, 41 So. 791 (1906). Sub judice, Dr. Walczak was permitted to testify as to William Strausser's credibility. The doctor compared William Strausser's eyes to a "lie meter." (R 1393) William Strausser had no opportunity to rebut the "expert."

It was improper, and constituted reversible error when the court permitted the State's expert witness to comment on the credibility and testimony of William Strausser. Credibility should have been the sole province of the jury. See State v. Camejo, 641 So. 2d 109 (Fla. 5th DCA 1994). In similar settings, an expert's direct comment on the credibility of an alleged victim of a sex offense is inadmissible. Audano v. State, 641 So. 2d 1356, 1360 (Fla. 2d DCA 1994); State v. Townsend, 635 So. 2d 949 (Fla. 1994).

Sub judice the central issue was sanity at the time of the offense. By testifying based upon his observations of William Strausser's eyes dilating, Dr. Walczak was able to comment on the accused's testimony and credibility, ignoring the very purpose of sequestration. Reversal is required.

II. THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING OTHER CRIME EVIDENCE.

Reversible error occurred via the admission of extrinsic crime evidence concerning William Strausser's arrest and prosecution for the felony offense of interference with child custody.[13] The improper evidence was timely objected to, and in light of the close factual issue concerning William Strausser's sanity at the time of the offense, cannot be considered harmless (R 547; 583; 674; 754; 793; 802; 805; 966; 972; 972; 984; 985).

The objectionable evidence started in opening statement when the prosecutor stated:

> And it was that development, the relationship between and Elec and William Strausser, that affection, that friendship that ultimately, you will see from the evidence, provoked Elec to even run away from his father, with whom he was living. He ran and went to Mr. Strausser's home. There he wanted to stay with Mr. Strausser and his wife, Peggy[14] Strausser.
>
> It was that relationship between Elec and Mr Strausser that ultimately led Allan Trubilla to file an interference with child custody, a criminal charge against William and Peggy

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[13] Pursuant to § 797.03, Fla. Stat.:

> Whoever, without lawful authority, knowingly or recklessly takes or entices, or aids, abets, hires, or otherwise procures another to take or entice, any child 17 years of age or under ... commits the offense of interference with custody and shall be guilty of a felony of the third degree...

William Strausser "plead", and the court withheld adjudication of guilt (R 547-48).

[14] The Appellant's wife, Margaret Strausser is known as "Peggy."

Strausser.

(R 546-47).

The prosecution contended that the "other crime" evidence went "hand in hand with the incident." (R 547) The State argued the evidence went to William Strausser's motive and state of mind at the time.

The court initially reserved ruling on William Strausser's Motion for Mistrial (R 547). After researching[15] the issue, the court stated:

> I believe the filing of those charges and the indication to the jury of those charges goes toward motive, not propensity. I think it is proper under the theory that is being put forward in terms of the prosecution of this defendant. And accordingly, that is the reason why the court at the present time is denying it.
>
> As to its disposition, I think that would be improper and the court will preclude a motion in limine to avoid any additional commentary as it relates to the disposition of that, unless the defense seeks to raise that.

(R 674).

After receiving a favorable ruling, the prosecution introduced extensive evidence concerning this uncharged crime. Detective Palmer was permitted to testify over defense objection that he knew William Strausser was the individual who Mark Chandler saw flee the apartment because he reviewed a "prior police report" concerning the interference with child custody

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[15] The court did not comment upon the State's failure to file written notice as required by the Florida Rules of Evidence.

case (R 771).[16] Detective Palmer testified that a Complaint was filed against William Strausser and his wife Peggy for child interference (R 793-94). The detective testified that William Strausser was arrested on the charge.[17] The State proffered the additional testimony sought to be elicited and was told by the trial court to "stay away" from the fact that William Strausser was arrested (R 754-60). The improper evidence was again placed in front of the jury when the State was permitted to publish William Strausser's taped statement (R 802-804; 814-15).

Thereafter, Detective Bruder was permitted to testify, over defense objection, concerning the child custody interference matter. Detective Bruder had "nothing to do with the homicide itself." (R 965; 971-75). The detective testified in great detail concerning William Strausser and his wife hiding Elec Trubilla, and the facts and circumstances surrounding Elec's apprehension (R 975-76).

William Strausser contends the improper evidence was further exacerbated by the State's introduction of evidence through Detective Bruder which incorrectly insinuated that Elec Trubilla was sexually abused by William Strausser. When Detective Bruder located Elec on the interference with custody matter, Elec Trubilla had just gotten out of William Strausser and his wife's

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[16] Detective Palmer also testified that a restraining order was filed by Allen Trubilla against William Strausser (R 793).

[17] The state attorney had previously represented to the court he did not intend to elicit evidence that William Strausser was arrested on the charge (R 759).

bed (R 975). He was wearing only his underwear (R 975-76). As the officer was taking Elec from the Strausser residence, William Strausser was alleged to have kissed Elec on the lips (R 976). Ultimately, the State elicited testimony that Elec was examined at the Sexual Abuse Treatment Division.[18] The examination was negative for any kind of physical abuse (R 980).

The Williams Rule[19], now codified in § 90.404(2)(a), sets forth the procedure which must be followed when the State intends to introduce evidence "other crimes, wrongs, or acts." Section 90.404(2)(a) makes such "similar fact evidence" admissible:

> When relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
>
> 90.404(2)(a).

Further, Florida law requires that no fewer than 10 days before trial, the State furnish the accused with a written statement of the acts or offenses it intends to offer. § 90.404(2)(b)(1). No such notice was filed in this case.

The law requires each and every case to be tried on its own merits, and to be determined by the circumstances connected with it, without reference to the character of the accused or to the fact that he may be suspected of having been guilty of committing

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[18] Prompting a defense Motion for Mistrial which was denied (R 983-84).

[19] Williams v. State, 110 So. 2d 654 (Fla. 1959)

crimes other than the crime for which he is charged. Jordan v. State, 171 So. 2d 418 (Fla. 1st DCA 1965). Evidence that an accused has committed a crime other than the one in question, even if of similar nature, should not be admitted unless it comes within one of the recognized exceptions. Boyett v. State, 95 Fla. 597, 116 So. 476 (1928). William Strausser acknowledges that the decision whether to admit other crime evidence is left to the discretion of the court. State v. Ayala, 604 So. 2d 1275 (Fla. 4th DCA 1992). In this case, an abuse of discretion occurred.

Sub judice, no Williams Rule notice was provided as required by § 90.404(2)(b)(1). No pretrial hearing on the admissibility of the evidence was conducted. The defense advised the court on several occasions of the prejudicial affect of the testimony. Thus, the situation at bar is easily distinguishable from cases wherein notice was given untimely, and the trial court conducted a full hearing and determining that the belated notice did not suggest prejudice in any manner. Miller v. State, 632 So. 2d 243 (Fla. 3d DCA), review denied, 639 So. 2d 979 (1984).

William Strausser contends that the State made William Strausser's relationship with Elec Trubilla, particularly the facts surrounding the interference with child custody offense, the feature of the trial, instead of merely being an incident. The effect was an attack on William Strausser's character. Ashley v. State, 265 So. 2d 685 (Fla. 1972). William Strausser asserts that the evidence at issue was viewed by the court and

the parties as being "bad act" evidence (R 1305).[20] William Strausser asserts that the evidence at bar lacked probative value, and was extremely prejudicial to the defense. Accordingly, the evidence was barred by §§ 90.403 and 90.404, Fla. Stat., as well as by the Fifth and Fourteenth Amendments to the United States Constitution and by applicable provisions of the Florida Constitution.

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[20] William Strausser anticipates the State contending that the other crime evidence was inseparable or inextricably intertwined with the charged crime. As this Court recently stated in Griffin v. State, 639 So. 2d 968 (Fla. 1994), such evidence is not Williams Rule evidence.

III. THE TRIAL COURT REVERSIBLY ERRED IN PERMITTING A 23 YEAR OLD LAY WITNESS TO GIVE AN OPINION CONCERNING WILLIAM STRAUSSER'S SANITY AT THE TIME OF THE OFFENSE.

The trial court reversibly erred in permitting Lloyd Pryor to give an expert opinion concerning William Strausser's sanity at the time of the offense (R 942-43). The issue was raised before the defense was permitted to introduce any evidence on the subject of insanity. The 23 year old witness was permitted to give his opinion as to whether it appeared that William Strausser knew what he had done was wrong (R 877; 942).

The law is well settled that a witness may only testify as an expert in those areas of his expertise. Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Kelly v. Kelly, 362 So. 2d 402 (Fla. 1st DCA 1978); Upchurch v. Barnes, 197 So. 2d 26 (Fla. 4th DCA 1967); see § 90.702, Fla. Stat. Lloyd Pryor was not qualified as an expert in any field, and was wholly unqualified to provide an opinion as to William Strausser's mental status. See Hall v. State, 568 So. 2d 882, 884 (Fla. 1990); Ramirez v. State, 542 So. 2d 352 (Fla. 1989).

In Florida, a person is presumed sane. Hall, 568 So. 2d at 885. In a criminal proceeding, the burden is on a defendant to present evidence of insanity. Preston v. State, 444 So. 2d 939 (Fla. 1984); Yohn v. State, 476 So. 2d 123 (Fla. 1985). If a defendant introduces evidence sufficient to present a reasonable doubt about sanity, the presumption of sanity vanishes, and the State must prove the accused's sanity beyond a reasonable doubt.

The legal test of insanity in Florida, for criminal

purposes, has long been the so-called "M'Naghten[21] Rule." Anderson v. State, 276 So. 2d 17 (Fla. 1973); Campbell v. State, 220 So. 2d 873 (Fla. 1969), cert. dismissed 400 U.S. 801, 91 S.Ct. 7, 27 L.Ed.2d 33 (1970); Davis v. State, 44 Fla. 32, 32 So. 822 (1902). Under the M'Naghten Rule, a defendant is not criminally responsible if at the time of the alleged crime, he was by reason of mental infirmity, disease, or defect, unable to understand the nature and quality of his act or its consequence, or was incapable of distinguishing right from wrong. Mines v. State, 390 So. 2d 332 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981). Despite Dr. Appel's professional expert opinion that William Strausser was insane at the time of the offense, Lloyd Pryor was improperly allowed to give expert opinion testimony to the contrary. In this close case, such error requires reversal and remand.

[21](Common Law Of England), 10 Clark & F. 200 (1845).

IV. WILLIAM STRAUSSER'S CONFESSION WAS NOT GIVEN VOLUNTARILY BASED UPON THE TOTALITY OF THE CIRCUMSTANCES; ITS ADMISSION VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § § 9, 16, 17, FLORIDA CONSTITUTION.

William Strausser sought suppression of an oral taped statement taken by law enforcement subsequent to his arrest on September 19, 1992, in Chicago, Illinois (R 2041-42). William Strausser contended a Miranda[22] violation occurred as a result of a custodial interrogation in violation of William Strausser's privilege against self-incrimination, his right to counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and applicable provisions of the Florida Constitution. The defense contended that William Strausser was suffering from longstanding emotional and/or mental illness exacerbated by the sudden discontinuation of his Prozac, as well as pain from an injured ankle and medication that William Strausser was taking making William Strausser's waiver of his right to counsel and waiver of his right to remain silent involuntary.

After hearing testimony at the suppression hearing, the court ruled:

> But I find, based upon the totality [sic] the circumstances and the testimony that been forthcoming, that Mr. Strausser was, in fact, read his rights; that he did, in fact, acknowledge those rights; that he understood them; that he knowingly, voluntarily and intelligently gave the statement. There were

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

> no threats, there was no coercion, there was no interference or influence with respect to the drugs. And at this time the court is going to deny the defendant's motion to suppress.
>
> (R 535)[23].

In William Strausser's attempt to show that he did not have the ability to voluntarily waive his rights, the defense presented evidence of a long history of William Strausser suffering from mental illnesses. Likewise, William Strausser had been ingesting prescription medication, Prozac, and discontinued it 5 to 6 weeks prior to his arrest. In the interim between the incident and his surrender, William Strausser suffered an injury to his ankle and was ingesting pain medication. William Strausser advised the officers interrogating him of his pain. After being taken off the airplane at O'Hare Airport, it is contended that law enforcement officials withheld William Strausser's pain medication until he provided a statement.

William Strausser asserts that the statement given by him was not voluntary based upon the totality of the circumstances See Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). The issue of voluntariness is ultimately a legal question to be determined under Federal constitutional standards. Arizona v. Fulminante, 111 S.Ct. 1286 (1991). Although the appellate tribunal must defer to the factual findings of the trial judge who observed the witnesses, in this case, the trial court erred in refusing to suppress a confession given while

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[23] No written order was entered by the court.

William Strausser was in pain, needing medication, especially in light of William Strausser's extensive history of mental illnesses. In this case, it is impossible to determine how much "weight" the jury gave William Strausser's statement with regards to his competency at the time of the murder. Clearly his statement differed in material respects from his trial testimony. The appellant asserts herein that in light of the close issue as to his competency at the time of the offense, and in light of the trial court's override of the jury's recommendation and subsequent sentence to death, this matter must be reversed and remanded for a new trial.

Detectives O'Neal and Palmer were present during William Strausser's taped statement (R 131). William Strausser stated that Elec Trubilla had spoken of murdering Allan Trubilla many months earlier. William Strausser had known Allan for a couple of years (R 133). William Strausser developed a friendship with Elec Trubilla during that time. The plan to murder Elec's father started when Elec was calling and telling William Strausser that he was being abused by his father (R 133). Allan was using his son Elec as a pawn against his mother, and embarrassing him in front of his friends (R 134).

William Strausser testified that he moved from Tamarac to Cape Coral about three (3) weeks before the murder. Before the killing, Elec spoke often about killing his father. Elec wanted to kill his father because of the abuse. Elec spoke about electrocuting his father in the bathtub or shower a week before

the murder (R 136). William Strausser continuously "talked Elec out of" killing his father and told him to wait until he was old enough to move out (R 137). When William Strausser was asked about a plan to commit the murder, he replied that they had talked about it, but it just happened on that day (R 137).

Everything started happening the Saturday night before the day of the incident, Monday. Elec called at approximately 11:30 p.m. on Saturday night and said that he wanted to kill his father. William Strausser told him to forget about that and to go to sleep. Elec then called William Strausser on Sunday night from a pay phone (R 139). They did not talk about killing Elec's father. Strausser talked to Elec on Monday and told him that he would be coming over later that day (R 140). Elec and William were throwing around ideas, but there was no set plan. Strausser stated that if he had planned it, he would never have gotten caught (R 141). Elec wanted to hit his dad in the head with a bat, but didn't have one. William Strausser believed that he was to be the one to "ditch the body." (R 142)

William Strausser left Cape Coral at 4:00 p.m. or 4:30 p.m. on the day of the incident. He had with him "a change of clothes and I guess I had a knife with me." (R 142) William Strausser testified that he did not remember bringing an extension cord or a bag. He brought a change of clothes with him because he had come over in long pants and a shirt and tie and wanted to get comfortable. The knife was a kitchen knife with a black handle (R 143). William Strausser testified that after he arrived in

Fort Lauderdale he drove by his old house, and then went to Eckerds. He denied remembering purchasing rubber gloves (R 144). When the detectives asked where William Strausser was between 6:30 p.m. and approximately 1:00 a.m., he replied "driving around in the car, just hanging around." (R 144) Strausser admitted knowing that Allan was working late (R 145). William Strausser called Elec from a pay phone at a 7-Eleven (R 145-46). He drove over to the Trubilla's and parked the car in the back lot of the apartment complex. Elec let him in the back door. William Strausser's statement reiterated that he tried to talk Elec out of killing his father (R 147). Initially, Strausser waited in Elec's room with a knife, and then waited in the bathroom (R 149). Elec called his father out of the bedroom. William Strausser heard something like a hit on the head (R 149). After Elec hit his father, William Strausser stuck him with a knife in the hallway (R 150). William Strausser did not remember cutting himself, but did recall that Allan got a hold of the knife at one point (R 150). Strausser later saw that he had a cut on his finger (R 151). He also remembered Elec being cut (R 151). Strausser stated that there was blood everywhere. Allan Trubilla was on the floor in the bathroom (R 152). William Strausser grabbed his clothes and ran. William Strausser admitted that he left his glasses - running out without them. They were later discovered in the parking lot (R 157).

William Strausser[24] drove back to Cape Coral (R 158). It was approximately 4:00 in the morning. He contacted his wife and told her what had happened. They met and eventually drove to a hotel (R 158). William Strausser was full of blood and needed to get cleaned up (R 159). At the hotel Mrs. Strausser called Lloyd Pryor, William Strausser's mother, and the psychologist, Katrina Fritz. There was talk about taking William Strausser to a hospital, but ultimately they decided not to go. They drove north, and then towards Texas. Then ended up going to Jamaica (R 161). William Strausser was flying back to Chicago to turn himself in when taken into custody (R 161). He had broken his ankle while in Jamaica (R 162).

Agent Robert Daniel had been assigned to the Chicago O'Hare International Airport (R 443). He assisted in apprehending William Strausser. Strausser was arrested before he got off his flight when it arrived in Chicago. He was arrested for unlawful

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[24] William Strausser contends he has multiple personalities (R 1767). Prior to ruling on William Strausser's Motion for New Trial, and prior to imposition of sentence, defense counsel advised the court that he had been contacted by the Defendant's wife, who had received several letters from her husband. One of the letters was written by William Strausser in German. Mrs. Strausser was concerned and surprised because William Strausser neither speaks nor writes German, nor understands it (R 1767). After defense counsel was informed of this psychological evidence, counsel advised the court he had recently learned that Mr. Lloyd Pryor knew that William Strausser had multiple personalities, and that he had experienced it in the past with William Strausser. There were even names attached to each personality (R 1786). William Strausser asserts that he could not drive from Fort Lauderdale to Cape Coral without his glasses - the car was driven by one of his other personalities. The Appellant asserts this is wholly consistent with his psychological history and Dr. Appel's opinion that he was not sane at the time of the offense.

flight concerning a murder warrant in Florida (R 449). Agent Daniel testified that he advised William Strausser of his rights (R 449). Two (2) other law enforcement officers were with him (R 451).

Agent Daniel admitted that William Strausser told him that he had broken his ankle in Jamaica and that while in custody in Chicago he needed medical treatment (R 453). The agent testified that William Strausser did not appear to be intoxicated in any way, and did not appear to be hallucinating or acting strangely (R 454). Agent Daniel admitted that William Strausser was not questioned whether he was under any medication (R 459).

Chicago Police Department Officer Gayle Neuman testified that she assisted in arresting William Strausser and in taking he and his wife into custody (R 478-81). The officer personally witnessed William Strausser being advised of his Miranda rights (R 483). William Strausser signed the rights waiver form in her presence (R 484). He complained about being in pain (R 487; 492).

Margaret Strausser, the Appellant's wife, testified at the pretrial Motion to Suppress. She had been taken into custody with her husband in Chicago after spending three (3) weeks in Jamaica (R 497). While in Jamaica, her husband had broken his ankle. He was on crutches, could hardly walk, and was in a lot of pain (R 498). She had given him medication before they boarded the plan in Jamaica. It was Darvon, a pain killer (R 498).

Mrs. Strausser testified that about one-half hour after being taken into custody, she advised law enforcement officers that William needed his pain medication (R 499). The detectives would not give it to him until the interview was over. They spent three (3) hours with him (R 500). The statement was taken after William Strausser has been in custody for over 2 hours.

Margaret Strausser testified that William Strausser had been on Prozac prior to the homicide (R 501). He stopped taking the Prozac approximately three (3) weeks before the incident. She saw a definite change in him in regards to his emotions and personality. While on the medication, he was calm and able to function on a daily basis. While off the medication there were major differences in his reactions, and he was extremely irritated (R 501). After Allan Trubilla's death, William Strausser was like "an injured child" very upset and crying (R 502). While in Jamaica he talked about committing suicide on several occasions (R 502). Margaret Strausser testified that her husband was unable to function on a day to day basis. While in custody in Chicago, at the Cook County Jail, he was held in a psychiatric ward and placed back on Prozac (R 505).

William Strausser testified on his own behalf at the suppression hearing. He confirmed that he had a broken ankle at the time he was taken into custody (R 510). He was taking a lot of pain medication, and was in a lot of pain.

In support of suppression, the defense pointed out William Strausser's long history of mental illness. The defense

contended that equally important in viewing the "totality of the circumstances," was the fact that he had been on Prozac, and suddenly stopped taking the medication[25]. At the time of his arrest and giving of his sworn statement, medication was available to him, but was withheld until after the statement was taken. He complained about the pain. Further, at the time that William Strausser gave the statement, he was not taking the medication that he needed - Prozac. He was placed back on Prozac immediately after his arrest. However, at the time he was questioned by detectives in Chicago, he did not have the benefit of either pain medication or the psychotropic medication required to keep him in balance (R 530).

William Strausser contends his waiver of rights and waiver of counsel were not voluntary. Law enforcement officials were well aware of William Strausser's history of mental illness at the time of his questioning. In a fragile mental state, William Strausser was "ripe for the plucking." The added pain and wearing off of the medication heightened the problem. Knowing all this, the officers in essence "tricked" William Strausser into giving a statement.

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[25] During a pretrial hearing conducted on November 19, 1993, defense counsel informed the court:

> In my conversations with Dr. Walczak, he indicated to me that one of the areas that he really is not familiar with is the situation where someone is immediately taken off the drug Prozac, what affect that may have.
>
> (R 84).

The voluntariness of a confession "is a mixed question of fact and law to be determined initially by the trial court in ruling on admissibility of the statement and ultimately by the jury." Donovan v. State, 417 So. 2d 674, 676 (Fla. 1982); Stephenson v. State, 645 So. 2d 161, 163 (Fla. 4th DCA 1994). The law is well settled that any waiver of a suspect's constitutional rights must be voluntary, knowing, intelligent, and, where reasonably practicable "prudence suggest it should be in writing." Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992).

William Strausser contends that his confession was a product of a mind confused by mental disturbance. State v. DeConingh, 400 So. 2d 998 (Fla. 3d DCA 1981). The officers knew of this. They "played" upon it.

In Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1987), the Supreme Court ruled that "the defective mental condition of the accused, even when clearly established in a timely manner in support of an effort to exclude statements, does not by itself render the statements involuntary within the meaning of the due process clause of the United States Constitution. (Citing Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Connelly holds that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the due process clause of the Fourteenth Amendment."

At bar, law enforcement officials knew of William Strausser's fragile mental condition and history of mental

illness. After seeing him limping and on crutches, an upon learning William Strausser was taking mind altering pain medication, the officers knew or should have known any waiver of his right to remain silent, right to counsel, and right to due process of law would be questioned. Nevertheless, the interrogation continued despite William Strausser's repeated proclamations of pain. Based upon a totality of the circumstances, the statement should have been suppressed. Reversal and remand is required.

V. THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING THE STATE TO INTRODUCE IMPROPER EVIDENCE IN VIOLATION OF WILLIAM STRAUSSER'S RIGHTS UNDER THE FLORIDA AND FEDERAL CONSTITUTION

The trial court committed reversible error in allowing improper evidence to be presented to the jury. The court denied William Strausser's right to confront Elec Trubilla's out of court statements, both during the guilt and penalty phases of these proceedings. Likewise, the court erred in allowing Lloyd Pryor to read portions of letters sent to him by William Strausser which were not admitted into evidence. Further, the trial court abused its discretion in allowing the jury to view an inflammatory videotape which was cumulative and prejudicial. Although not reversible in and of itself, William Strausser likewise contends that the trial court erred in denying his attempt to exclude two jurors for cause. Based upon the cumulative effect of these errors, reversal and remand for new trial is required.

A. THE TRIAL COURT ERRED IN DENYING WILLIAM STRAUSSER'S RIGHT TO CONFRONT ELEC TRUBILLA'S OUT OF COURT STATEMENTS.

The trial court erred in allowing Elec Trubilla's out of court statements, including a 911 tape following Elec Trubilla's father's death to be introduced into evidence during the guilt phase of the proceedings. The court further erred in allowing Elec Trubilla's sworn out of court statement to police, which was not subject to cross-examination during the penalty proceeding.

Elec Trubilla was not called as a witness at either stage of the proceedings, and thus William Strausser's constitutional rights pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and under Florida law were violated.

Shortly after the stabbing, Elec Trubilla contacted the police, placing a 911 telephone call to law enforcement. The call was recorded. During the brief conversation, Elec Trubilla fabricated a story about what had transpired (R 773-76; 1610; State Exh. 48).[26]

Similarly, during the sentencing phase of the proceedings, the State introduced over defense objection, a lengthy taped statement of Elec Trubilla.

William Strausser acknowledges that violations of the confrontation clause, including the denial of face to face confrontation are subject to a harmless error analysis. Heuss v. State, ___ So. 2d __ (Fla. 4th DCA 1995)[1995 WL 106305).

William Strausser contends that the court further erred by permitting Elec Trubilla's sworn statement to law enforcement to be introduced without subjecting him to cross-examination during the sentencing phase of these proceedings (R 1585-1608).

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[26] William Strausser contends that the error in admitting the tape is fundamental, despite the fact it was not preserved for review by a specific contemporaneous objection. Castor v. State, 365 So. 2d 701 (Fla. 1978). Despite defense counsel's failure to object, William Strausser contends that the trial was so unfair that fundamental error occurred, and that the contemporaneous objection rule has less force in a capital case. William Strausser acknowledges that this court has previously rejected similar arguments. Sochor v. State, 619 So. 2d 285, 289 (Fla. 1993); Rose v. State, 461 So. 2d 84 (Fla. 1984), cert. denied, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985).

At bar, the 911 call was not relevant and lacked probative value. Importantly, it contained a false statement by a 14 year old which William Strausser was never permitted to cross-examine. William Strausser asserts that the issue herein is distinguishable from that presented to the Third District Court of Appeal in Ware v. State, 598 So. 2d 1200 (Fla. 3d DCA 1992), wherein a tape recording of a 911 call made by the murder victim's mother was held to be admissible as an excited utterance and spontaneous statement. In Ware, the declarant testified at trial. Sub judice, Elec Trubilla did not.

Pursuant to § 921.141(1), Fla. Stat., hearsay evidence may be admitted at sentencing if the court deems the evidence to have probative value, regardless of its admissibility under the exclusionary rules of evidence. However, the defendant must be accorded a fair opportunity to rebut any hearsay statements.

Although § 921.141(1) has been determined by the Florida Supreme Court to be constitutional on its face, Chandler v. State, 534 So. 2d 701, 702 (Fla. 1988), at bar, allowance of the hearsay testimony denied William Strausser an adequate opportunity to cross-examine a crucial adverse witness. United States v. Owens, 108 S.Ct. 838 (1988); Delaware v. Van Arsdale, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

William Strausser acknowledges that Florida's death penalty statute allows the introduction of hearsay testimony during capital sentencing proceedings. Michael Lee Lockhart v. State, ___ So. 2d ___ (Fla. 1995)[1995 WL 109154]. However, "the line

must be drawn when the evidence ... gives rise to a violation of the defendant's confrontation rights." Rhodes v. State, 638 So. 2d 920, 925 (Fla. 1994); Duncan v. State, 619 So. 2d 279, 282 (Fla.), cert. denied, 114 S.Ct. 453 (1993). Based upon the constitutional violations specified herein, reversal is required.

B. THE TRIAL COURT ERRED IN ALLOWING A STATE WITNESS TO READ LETTERS TO HIM BY WILLIAM STRAUSSER WHICH WERE NOT ADMITTED INTO EVIDENCE

Over defense objection, Lloyd Pryor was permitted to read portions of letters sent from William Strausser to Lloyd Pryor after William Strausser's arrest. The State was permitted, over defense objection to read portions of the letters, and not introduce them into evidence (R 915). The first letter was dated November 27, 1992 and post-marked November 30, 1992.

The defense contended that the letters lacked relevancy. The court ruled that there was aspects of the letters which were relevant toward the state of mind in William Strausser at the time the act was committed (R 914). The court's concern was how to avoid the prejudicial impact and the unfairness of the balance of the statements contained in the letters.

C. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE JURY TO VIEW AN INFLAMMATORY VIDEOTAPE WHICH WAS CUMULATIVE AND PREJUDICIAL

The trial court abused its discretion in allowing the jury to be shown a video tape which was cumulative and prejudicial to the defense (R 631-33; 640). William Strausser acknowledges that the test of admissibility of photographic evidence is relevancy.

Burns v. State, 609 So. 2d 600 (Fla. 1992); Nixon v. State, 572 So. 2d 1336 (Fla. 1990), cert. denied, 112 S.Ct. 164 (1991); Haliburton v. State, 561 So. 2d 248 (Fla. 1990), cert. denied, 111 S.Ct. 2910 (1991); Gore v. State, 475 So. 2d 1205 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986). William Strausser contends that the videotape was unnecessary to assist any witness in explaining the facts and circumstances of this case. Bash v. State, 461 So. 2d 936, 939 (Fla. 1984), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986). William Strausser contends that the video tape at issue was so inflammatory in nature as to outweigh its relevancy. Further, in light of the other evidence admitted, the videotape was merely cumulative. Cf. Young v. State, 234 So. 2d 341 (Fla. 1970), receded from on other grounds, State v. Retherford, 270 So. 2d 363 (Fla. 1972). Accordingly, the trial court abused its discretion in allowing use of the video tape.

D. THE TRIAL COURT ERRED IN DENYING WILLIAM STRAUSSER'S ATTEMPT TO EXCLUDE FOR CAUSE

William Strausser asserts that the trial court erred in refusing to excuse potential jurors Ms. Jacobs and Ms. Renedo for cause upon defense request.[27] From the Record there was clearly a reasonable doubt whether the jurors could follow the court's instructions and weigh the appropriate penalty in the event a conviction for premeditated first degree murder was returned.

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[27] Although somewhat rehabilitated by the Prosector, William Strausser asserts reversible error occurred.

Ms. Renedo had knowledge of the case from reading the newspaper or watching TV (R 286-87). She believed homosexuality was involved (R 286). She felt "sorry there was 14 year old boy involved." (R 287) Most importantly, Ms. Renedo candidly admitted that if William Strausser committed premeditated first degree murder, she would have difficulty in recommending any penalty less than the death penalty (R 304).

The colloquy concerning Ms. Jacobs showed an equally closed minded juror:

> MR. BARON (defense counsel): So in this case, if you were convinced of premeditated first degree murder, when you went back there, you basically already made up your mind you would be rendering an advisory recommendation of death?
>
> MS. JACBOS: Yes, if he was found guilty of first degree.
>
> MR. BARON: If the Judge says to you that there are some factors you have to consider, weigh the mitigating and aggravating circumstances, you still have difficulty in your mind coming back with any other recommendation other than death, is that correct?
>
> MS. JACOBS: That's correct.
>
> (R 305).

William Strausser contends that the erroneous denial of the Defendant's challenge for cause is reversible error because the defense was forced to waste two (2) preemptory challenges in striking Ms. Renedo and Ms. Jacobs. United States v. Wood, 299 U.S. 123 (1936). It was crucial that they be off the panel. While William Strausser concedes that his trial counsel did not

exhaust all of his preemptories, and failed to request an additional amount, in this case, the error had already occurred. Had the court properly excused the jurors for cause, William Strausser would have enjoyed the use of two (2) additional preemptory challenges, which he contends would have changed the overall composition and complexion of the jury, resulting in a jury that would find that the State failed to present proof beyond a reasonable doubt of William Strausser's sanity at the time of the of the offense. William Strausser contends reversible error occurred. See Kemp v. State, 611 So. 2d 13 (Fla. 3d DCA 1992); Mann v. State, 571 So. 2d 551 (Fla. 3d DCA 1990); Hill v. State, 477 So. 2d 553 (Fla. 1985).

E. THE CUMULATIVE EFFECT OF THE ERRORS VIOLATED WILLIAM STRAUSSER'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW

Based upon the cumulative effect of all of the errors complained of, William Strausser is entitled to a new trial. Caruso v. State, 645 So. 2d 389 (Fla. 1994); Jackson v. State, 575 So. 2d 181 (Fla. 1991).

VI. THE JURY HAD A REASONABLE BASIS FOR RECOMMENDING A LIFE SENTENCE, THUS PRECLUDING THE JUDGE'S OVERRIDE OF THE JURY'S RECOMMENDATION AND BARRING IMPOSITION OF A DEATH SENTENCE.

At bar, the State of Florida presented its complete case in front of a jury. Ultimately, the jury was presented evidence during the sentencing phase wherein the State of Florida sought imposition of the death penalty. The jurors had been death qualified. Nevertheless, despite a full opportunity to present any and all evidence in support of a death sentence, as well as allowance of an opportunity to present evidence in contradiction of the statutory and non-statutory mitigating circumstances alleged by the defense, the jury recommended a life sentence for William Strausser. Nowhere in its Order overriding the jury's recommendation does the trial court provide any citation to any authority which would indicate that the jury failed to have any reasonable basis for recommending a life sentence for a homicide defendant. Accordingly, the trial judge's override of the judicial recommendation of a life sentence was precluded, requiring remand for resentencing.

Recently, Governor Lawton Chiles vetoed C.S/H.B. 1319 which sought to amend the judicial use of a non-binding advisory recommendation returned by the jury in a capital case by removing references to an advisory sentence. In so doing, the Government withheld his approval of House Bill 1319, and vetoed the same, stating:

> If this bill were to become law, the jury's recommendation would be relegated to a non-binding recommendation "to apprise the trial judge and appellate court of the jury's reaction to the evidence of aggravation and mitigation as a matter of information." In other words, the jury's verdict would become largely symbolic and would carry virtually no weight at all.
>
> Just as we entrust jury's to determine innocence or guilt, we also should entrust jury's to determine the appropriate sentence. I would support a law which held that a jury recommendation of imprisonment would not be subject to override by the judge.
>
> Correspondence from Governor Chiles to the Honorable Sandra B. Mortham, dated June 14, 1995.
>
> [Emphasis added]

In Dolinsky v. State, 576 So. 2d 271 (Fla. 1991), the defendant was convicted of a first degree premeditated murder as well as second degree murder. The circuit judge entered a death sentence, overriding the jury's recommendation of life. In reversing the death sentence, the Florida Supreme Court restated well established law that:

> To sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.
>
> Dolinsky at 274.

The well enunciated standard, as set forth in Tedder v. State, 322 So. 2d 908 (Fla. 1975), states that:

> "[I]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id. at 910. The Florida Supreme Court has consistently

> interpreted Tedder as meaning that an override is improper if there exists a reasonable basis for a jury's recommendation of life imprisonment. Washington v. State, ___ So. 2d ___ (Fla. 1994 WL 684008); Freeman v. State, 547 So. 2d 125 (Fla. 1989).

William Strausser's jury unanimously recommended that he be sentenced to life imprisonment[28]:

> [A] jury's advisory opinion is entitled to great weight reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion.
>
> Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983); Dolinsky at 274.

The Florida Supreme Court has reversed life overrides when the Record contains mitigating circumstances which may provide a reasonable basis for the jury's life recommendation. For example, in Esty v. State, 642 So. 2d 1074 (Fla. 1994), the court vacated a life override where a defendant was young, had no prior criminal history, evidenced a potential for rehabilitation, and may have been in an emotional rage during the commission of a murder. See also, Parker v. State, 643 So. 2d 1032 (Fla. 1194).

When faced with the facts of the instant case, most specifically William Strausser's longstanding history of mental illness, his abuse as a child, his attempt at "helping" an abused

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[28] The jury was not sequestered for the 6 weeks between the guilt and penalty phases. Sequestration of a jury during trial is within the discretion of the trial court absent a showing of harm or prejudice to the defense. Ford v. State, 374 So. 2d 496 (Fla. 1979), cert. denied 445 U.S. 972, 106 S.Ct. 1666, 64 L.Ed. 2d 249 (1980). However, a jury must be sequestered during deliberations in a capital case until a verdict is reached. Livingston v. State, 458 So. 2d 235 (Fla. 1984).

child, his lack of significant history of prior criminal activity, and the fact that he was under the influence of extreme mental and emotional disturbances, one can only conclude that the jury's recommendation of life imprisonment was proper. William Strausser contends that the testimony of Dr. Appel fully supported a finding that the offense was committed while William Strausser was under the influence of extreme mental and emotional disturbance. Section 921.141(b)(6). Even if the jury was correct in finding that the Defendant did not show that he was insane at the time of the offense, to establish the mitigating factor William Strausser was required to introduce evidence of less than insanity, but more than the emotions of an average man, however inflamed. Duncan v. State, 619 So. 2d 279 (Fla. 1993); State v. Dixon, 283 So. 2d 1, Fla. 1973). It is uncontroverted that William Strausser has a longstanding history of mental illness. He has attempted suicide on two or more occasions. He has been under the care of a mental health expert since he was young.

The evidence was uncontroverted that William Strausser was prescribed Prozac, and that he abruptly stopped taking the prescribed mediation. While the effects of a abrupt discontinuance of Prozac was not presented by an expert during the trial of this matter, Dr. Appel testified concerning the "rebound effect" which would have caused William Strausser's depression to drop down even further than when he was first prescribed Prozac because of his depression and suicidal

tendencies (R. 1038).

Both Lloyd Pryor and Margaret Strausser testified that they noticed a change in William Strausser prior to the murder. He became very depressed, suicidal, and angry after discontinuing the Prozac. This was entirely consistent with the effect of an abrupt discontinuance of Prozac. During the same time period William Strausser was recounting to a psychologist instances of abuse he had suffered as a child, not only at the hands of his stepfather, but also at the age of 11 by his aunt.

Contrary to the trial court's findings, Dr. Appel's credibility was not diminished on cross-examination (R. 2152). The doctor's opinion as to William Strausser's insanity at the time of the offense was unshakable. Neither Dr. Garfield nor Dr. Walczak, singularly or cumulatively, spent the time or care in reviewing William Strausser's records and in meeting with William Strausser as Dr. Appel had. William Strausser contends that Dr. Garfield's analysis was not wholly contrary to Dr. Appel's; the two experts simply reached different ultimate opinions.

Dr. Walczak disagreed with many of the findings and the ultimate opinion of Dr. Appel. Dr. Walczak was the least qualified of any of the experts. Dr. Walczak had spent the least time with William Strausser and in reviewing Strausser's records. Although Dr. Walczak testified that he believed William Strausser knew what he was doing and the consequences of his actions, as well as the difference between right and wrong on the night of the murder, the doctor admitted that he did not review many of

William Strausser's medical records from his treatment in the early 1980's, and did not have access to records generated after William Strausser's apprehension. Again, Dr. Walczak admitted that his testimony about the eyes dilating being a "lie meter" played an important factor in his overall opinion.

The trial court found that the expert opinions were in conflict. The trial court was correct in that regard (R. 2156). Clearly, the court erred in finding that the Defendant was not under an extreme mental or emotional disturbance at the time of the offense. The totality of the circumstances supported a finding of William Strausser's mental condition being a mitigating circumstance.

William Strausser contends that because of his mental illness and the abrupt discontinuance of Prozac, his capacity to appreciate the criminality of his conduct and to conform it to the requirements of the law was substantially impaired. Section 921.141(6)(f). This mitigating circumstances applies even when an accused is not legally insane, but has mental problems which limit his capacity to conform his conduct to that required by the law. Ferguson v. State, 417 So. 2d 631, 638 (Fla. 1982). The mental disturbance must be one which interferes with one's knowledge of right from wrong. Duncan v. State, supra. Contrary to the trial court's finding, this mitigating factor was not rebutted by competent evidence. Rather, the Defendant's longstanding history of mental illness, the testimony of defense witnesses, including William Strausser, and the Defendant's

medical records confirm that William Strausser's ability to appreciate the criminality of his conduct was indeed impaired.

Although the trial court failed to find record evidence to support the statutory mitigating factor of the Defendant's age at the time of the offense pursuant to Section 921.141(g)(6), William Strausser contends nonetheless that the young age at which he was first diagnosed with a mental illness is a factor which mitigates William Strausser's conduct herein.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this Court vacated a death sentence as a result of a death caused during the commission of a burglary and robbery. Although the Supreme Court found that the killing was particularly heinous, atrocious or cruel because of the 23 stab wounds inflicted over the course of several minutes, the Supreme Court disagreed with the trial court's finding that the stabbing was committed in a cold, calculated and pre-meditated manner. The State argued that because the defendant stabbed the first person, then stopped when attacking the second, and then returned to stabbing the first, arguing that the defendant had time to reflect upon the plan and resume his attack. The Court noted that this factor generally is reserved for cases in which it is shown that there was "a careful plan or pre-arranged design." Id., citing Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed. 2d 681 (1988).

More important to the case at bar, in Campbell the trial judge concluded that the defendant did not suffer from impaired

capacity under Section 921.141(6)(f) because there was no evidence that he was "insane" at the time of the killing. In ruling that the trial court erred in rejecting impaired capacity as a mitigator, the Court noted that

> The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition. Mines v. State, 390 So. 2d 332, 337 (Fla. 1980)
>
> Campbell at 419

As in Campbell, Judge Backman erred in failing to recognize the presence of mitigating circumstances.

At bar, William Strausser contends that the trial court improperly found that the killing in this instance was heinous, atrocious or cruel. The United States Supreme Court has stated that this factor is appropriate in a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Sochor v. Florida, 112 S.Ct. 2114, 2121 (1992). The crime must be both conscienceless or pitiless and unnecessarily torturous to the victim. At bar, the evidence did not exclude the possibility that Allan Trubilla lost consciousness from the time he was struck on the head by Elec Trubilla. Likewise, there is no evidence that the first stab wound was not fatal. Thus, the factor of heinous, atrocious or cruel is not permissible based on the present facts, because there was no pitiless or conscienceless infliction of torture.

William Strausser contends that neither of the aggravating factors found by the trial court were supported by the evidence. Under Florida law, death is thus an inappropriate penalty,

because one cannot be executed in the absence of aggravating factors. Banda v. State, 536 So. 2d 221, 225 (Fla. 1988), cert. denied 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed. 2d 852 (1989).

Reviewing the Record at bar, the jury indeed had a reasonable basis for its recommendation. While William Strausser participated and committed the stabbing, the jury reasonably relied upon several mitigating circumstances, both statutory and non-statutory, which justified the jury's determination that a life sentence was appropriate. Clearly, reasonable persons could differ as to the propriety of the death sentence here. Accordingly, the trial court improperly overrode the jury's recommendation.

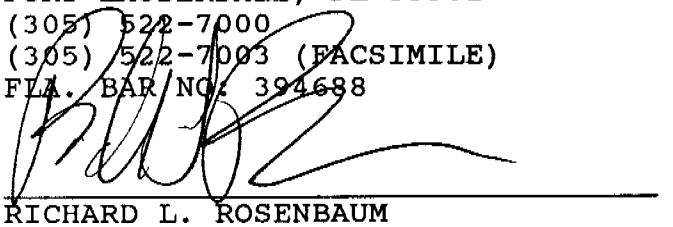
An override is improper where there is a reasonable basis for the jury's recommendation. See Bedford v. State, 589 So. 2d 245, 253 (Fla. 1991), cert. denied, 112 S.Ct. 1773 (1992); Turner v. State, 645 So. 2d 444 (Fla. 1994). At bar, the trial court's decision to override the jury's recommendation of life imprisonment was improper, since the jurors could have relied upon both statutory mitigating factors and non-statutory mitigating factors to recommend a life sentence under the totality of the circumstances. See Parker v. State, 643 So. 2d 1032 (Fla. 1994).

CONCLUSION

William Strausser should not be sentenced to death by electrocution. Based upon errors at trial of constitutional dimension, William Strausser is entitled to a new trial, free from the errors asserted herein. Alternatively, the sentence imposed must be vacated and the jury's recommendation of life imprisonment followed.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF RICHARD L. ROSENBAUM
ATTORNEY FOR APPELLANT
ONE EAST BROWARD BLVD.
SUITE 1500, BARNETT BANK PLAZA
FORT LAUDERDALE, FL 33301
(305) 522-7000
(305) 522-7003 (FACSIMILE)
FLA. BAR NO. 394688



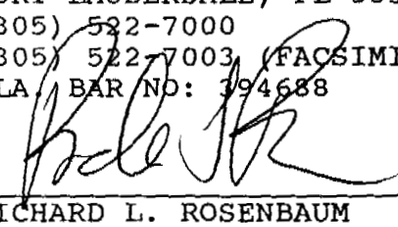
RICHARD L. ROSENBAUM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original plus seven (7) copies was furnished this **19th day of JULY, 1995** to the Clerk of Court, Florida Supreme Court, 500 S. Duval Street, Tallahassee, FL 32399-1925 and copies furnished to: AAG CELIA TERENZIO, Office of the Attorney General, 1655 Palm Beach Lakes Blvd., West Palm Bch., FL 33401 and WILLIAM LEE STRAUSSER, DC # 123740, UNION CORRECTIONAL INST., P.O. Box 221 Raiford, FL 32083, A-1NE4522-14.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF RICHARD L. ROSENBAUM
ATTORNEY FOR APPELLANT
ONE EAST BROWARD BLVD.
SUITE 1500, BARNETT BANK PLAZA
FORT LAUDERDALE, FL 33301
(305) 522-7000
(305) 522-7003 (FACSIMILE)
FLA. BAR NO: 394688



RICHARD L. ROSENBAUM

cc: Margaret Strausser