IN THE SUPREME COURT OF FLORIDA

NATHAN JOE RAMIREZ, :

Appellant, :

vs. : Case No. 89,377

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On May 15, 1995, a Pasco County Grand Jury returned an indictment charging Johnathan P. Grimshaw[1] and Appellant, Nathan J. Ramirez, with premeditated murder in the shooting death of Mildred Boroski, which allegedly occurred between March 10 and 11, 1995. (Vol. I, pp. 9-10) Appellant had just turned 17 years old at the time of the offense. (Vol. I, p. 1; Vol. VII, p. 1047)

The pretrial motions Appellant filed, through counsel, included a motion to suppress statements he made to sheriff's deputies during an interview that was videotaped without Appellant's knowledge.[2] This motion was heard by the Honorable Burton Easton on April 1, 1996, and denied. (Vol. I, pp. 153-155; Vol. X, pp. 1416-1551)

This cause proceeded to a jury trial on April 22-26, 1996, with the Honorable Craig C. Villanti presiding. (Vol. XI, p. 1-Vol. XV, p. 862) The jury found Appellant guilty as charged in the indictment. (Vol. II, p. 291; Vol. XV, p. 857)

Penalty phase was conducted on April 29-30, 1996. (Vol. VII, p. 935-Vol. VIII, p. 1335) After receiving additional evidence from the State and the defense, Appellant's jury recommended by a vote of eleven to one that he be sentenced to die in Florida's electric chair. (Vol. II, p. 325; Vol. VIII, p. 1328)

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[1] Grimshaw's first name is spelled at least two different ways in the record on appeal. Appellant will employ the spelling used in the indictment.

[2] For unknown reasons, the motion to suppress does not appear in the record, but Appellant has attached a copy of the motion as an appenidx to this brief.

A sentencing hearing was held before Judge Villanti on November 4, 1996, at which the court heard additional testimony from a defense witness, as well as arguments from counsel for the State and for the defense. (Vol. IX, pp. 1347-1415)

Sentence was actually imposed on November 8, 1996. (Vol. VI, pp. 921-934) In sentencing Appellant to death, the court found the following aggravating circumstances to exist: (1) the capital felony was committed while Appellant was engaged in the commission of the crimes of kidnapping and/or sexual battery; (2) the capital felony was committed while Appellant was engaged in, or in an attempt to commit, a robbery and/or burglary for the purpose of financial gain; (3) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; (4) the homicide was committed in an especially heinous, atrocious and cruel manner; (5) the homicide was committed for the dominant purpose of avoiding or preventing a lawful arrest. (Vol. VI, pp. 733-735, 923-926) With regard to statutory mitigating circumstances, the court found Appellant's age of 17 at the time of the offense to be mitigating, but gave it "little weight." (Vol. VI, pp. 735, 926-927) The court also found that Appellant had no significant history of prior criminal activity, but refused to give it "significant weight" because Appellant was prosecuted for an auto burglary as a juvenile. (Vol. VI, pp. 735, 927) Also found by the court, but given "little weight," were the factors that Appellant was under the influence of extreme mental or emotional distress, Appellant was under extreme duress and

substantial domination of another person (Johnathan Grimshaw), and that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (Vol. VI, pp. 736-737, 927-930) As for nonstatutory mitigation, the court found that Appellant's cooperation with law enforcement, conduct while incarcerated and during trial, demeanor and comments as they pertained to the crime, and conduct prior to the crime, were mitigating circumstances, but gave them little weight. (Vol. VI, pp. 738, 930-931) The court also discussed, in the context of nonstatutory mitigation, Appellant's age, personality, character and talents, family background and family problems, and prior record, but ascertained that these factors had all been considered as they applied to statutory mitigating factors. (Vol. VI, pp. 738, 931-932)

Appellant timely filed his notice of appeal to this Court on November 14, 1996. (Vol. VI, p. 915)

STATEMENT OF THE FACTS

Suppression hearing

Two witnesses testified at the suppression hearing held before Judge Burton Easton on April 1, 1996: Detectives Clifford Blum and Jeffery Bousquet of the Pasco County Sheriff's Office. (Vol. X, pp. 1416-1542) Blum testified that he was sent by the Crimes Against Persons Unit Supervisor, Mike Schreck, on May 3, 1995 to pick up a ring, a set of handcuffs, and a firearm from the Boroski residence that Johnathan Grimshaw had given to Appellant. (Vol. X, pp 1419-1420) Blum went to Appellant's residence at 3:00 in the afternoon and knocked on the door. (Vol X, p. 1420) Appellant came to the door, and Blum told him who he was and what he wanted. (Vol. X, p. 1420) Appellant at first denied having the articles, but after Blum informed him that Blum knew that Appellant and Grimshaw had talked about these articles on the telephone, Appellant said that he had lost one ring, the second ring was in his bedroom, he had given the handcuffs to his girlfriend, and given the gun to a friend. (Vol. X, p. 1421) Blum asked Appellant for the ring, and he retrieved it from his room. (Vol. X, p. 1421) Appellant agreed to take Blum to where the other articles were. (Vol. X, p. 1421) They went to Checkers, where Appellant's girlfriend worked, and she accompanied them to her home, and got the handcuffs. (Vol. X, p. 1421) From there, they went to "Rodney's" house, and Rodney gave Blum a gun. (Vol. X, p. 1421) Appellant thereafter agreed to go with Blum to the sheriff's office and speak with Detective Bousquet. (Vol. X, pp. 1421-1422) Blum drove him there in his

police car. (Vol. X, p. 1541) Blum had no intentions of making an arrest. (Vol. X, p. 1422) Appellant was not a suspect when Blum went to see him; the detective was merely seeking information. (Vol. X, pp. 1425-1426)

Detective Bousquet had three or four contacts with Johnathan Grimshaw prior to May 3, 1995. (Vol. X, p. 1427) Grimshaw told Bousquet that he had no involvement in this case. (Vol. X, p. 1427) On May 3, Grimshaw gave Bousquet four stories. (Vol. X, pp. 1426-1427) He said that Appellant was the one who killed Boroski, but Bousquet did not believe him at the time. (Vol. X, p. 1427) Detective Blum was directed to go to Appellant's house to see if he had any property [from Boroski's residence]. (Vol. X, p. 1428) It was between 3:00 and 4:00 when Bousquet came into contact with Appellant at the sheriff's office. (Vol. X, p. 1428) His intention was not to arrest Appellant, but to "[s]peak to him and see what knowledge he had." (Vol. X, p. 1429) Grimshaw had already been arrested, and it was Bousquet's intent to build a stronger case against him. (Vol. X, p. 1429) When Bousquet first came into contact with Appellant, he was not a suspect, but became one "[w]hen he started going into the fact he was involved with the homicide." (Vol. X, p. 1433) At that point, he was read his Miranda warnings. (Vol. X, pp. 1433-1434) According to Bousquet, Appellant was not in custody when his rights were initially read to him; he was free to leave at any time. (Vol. X, pp. 1526-1527)

A portion of the videotape of the interview between Appellant and Detective Bousquet was played at the suppression hearing. (Vol.

X, pp. 1435-1513) It showed that Appellant's Miranda rights were given for the first time after he began talking about how he and Grimshaw entered the residence. (Vol. X, pp. 1439-1440) After Detective Robert Jones suggested that they should let Appellant know about his rights, and said he did not think that was going to change Appellant's desire to cooperate with them, Appellant asked if he was "like being placed under arrest?" (Vol. X, pp. 1439-1440, 1442) Bousquet responded, "No, no. I'm just reading your rights at this time. Okay?" (Vol. X, pp. 1439-1440) After Bousquet read Appellant his rights, and Appellant indicated that he understood them, Bousquet asked, "Having these rights in mind, do you wish to speak to me now about the case?" (Vol. X, p. 1444) Appellant responded, "I guess that's what I'm here for." (Vol. X, p. 1444) He then went on to respond to Bousquet's questions and to detail various aspects of the offenses involved herein. (Vol. X, pp. 1444-1513) At one point, well into the interview, Bousquet had Appellant execute a written waiver of rights form. (Vol. X, pp. 1505-1506)

Bousquet acknowledged sitting in close proximity to Appellant during the interview, with Appellant's right thigh between the detective's knees. (Vol. X, p. 1526) He also acknowledged (and the videotape reflects) that he "patted" the inside of Appellant's thigh several times and placed his hand on Appellant's thigh several times during the interview. (Vol. X, pp. 1536-1540)

At the conclusion of the interview, Appellant was arrested for first degree murder. (Vol. X, p. 1521) His father came to the police station. (Vol. X, p. 1521)

Trial

Guilt Phase--State's Case

Mildred Boroski lived alone in Veterans Village with her cat and her little gray poodle named Chippy, who slept at the end of her bed. (Vol. XII, pp. 300-301, 308, 311-312; Vol. XV, p. 703) She had a .38 caliber service revolver, which had belonged to her late husband, who had been a police chief in Dillonvale, Ohio, as well as his handcuffs. (Vol. XII, pp. 297, 307-308; Vol. XV, pp. 703-704)

On Friday, March 10, 1995, Boroski and a group of her friends went to Leverock's to celebrate her seventy-first birthday. (Vol. XII, pp. 306, 309) They had dinner, and left a few minutes after six. (Vol XII, p. 309) Boroski then returned home, and most of the ladies joined her there. (Vol XII, pp. 298, 309) Fern Jungemann, one of Boroski's friends who was at Leverock's, tried to call her the next morning between 7:30 and 8:00, but there was no answer. (Vol. XII, pp. 309-310)

On Saturday, March 11, 1995, some children found Boroski's car, a new red Ford Tempo, in a wooded area about 10 blocks from her house, and three or four hundred yards from Appellant's residence. (Vol. XII, pp. 263-264, 269, 296, 307; Vol. XIII, pp. 409, 424) There was no observable damage to the exterior of the

car. (Vol. XII, p. 382) Inside, jammed between the passenger's seat and the door, there was a shark oven mitt. (Vol. XII, pp. 382-384, 404) On the rear deck of the car were two separate wires. (Vol. XII, pp. 384-385)

Approximately 100 to 150 feet southeast of where the car was located, there was a surgical glove. (Vol. XII, pp. 334-336) In some palmetto trees south of where the car was located, there was a knife with a black plastic handle, and a pair of pliers with red plastic handles. (Vol. XII, pp. 336-337, 341, 345) There was a can of pepper spray or Mace approximately eight feet from where the car was located, and an aerosol air freshener can was also found somewhere in the vicinity of where the car was found. (Vol. XII, pp. 339-341, 348, 355-356)

Deputy Dale Hutchinson of the Pasco County Sheriff's Office went to Mildred Boroski's home on March 12 and knocked on the front door, but received no response. (Vol. XII, pp. 269-271) After speaking with a neighbor, Candace Kelley, Hutchinson went around the back of the house, where he noticed that the screen for the door of the screened porch had been cut. (Vol. XII, pp. 271, 298) When he entered the porch, there was a "window that was busted out and in," through which he entered the residence. (Vol. XII, pp. 273-274) Hutchinson found nobody in the house. (Vol. XII, p. 276) Every telephone was either missing or disconnected. (Vol. XII, p. 283) The bedroom had been ransacked. (Vol. XII, pp. 277-278) The sheets were tucked up underneath the bed, and pulling them out revealed fecal matter and what appeared to be blood. (Vol. XII, pp.

277-278) There was also "a little drip of blood" on the wall facing the end of the bed. (Vol. XII, p. 281)[3] Hutchinson called for detectives and the crime scene technician because he "had something of a serious nature in the house." (Vol. XII, p. 279)

When Deputy Jeffrey Gray arrived at the residence, he found a strong box under the bed with an empty holster inside. (Vol. XII, pp. 288-289) There was also an empty box of shells under the bed. (Vol. XII, p. 362)

Crime scene technician William Joseph arrived at approximately 8:40 p.m. (Vol. XII, p. 314) Outside the house, on the east side, he observed that the telephone wires had either been cut or ripped from the box. (Vol. XII, p. 314) In the screened room at the rear, there was a table directly under the broken window; it had several panes of broken glass lying on top of it, as well as two thumb screw window locks. (Vol. XII, p. 315) Inside the house, there was a broken strong box or file box that contained assorted papers on a chair in the living room. (Vol. XII, pp. 316, 320-321) In the kitchen there was a purse with no money in it wedged between the refrigerator and one of the cabinets. (Vol. XII, pp. 316-320) There was a carving knife in a drawer in the kitchen that, like the knife found in the area where Boroski's car was located, had a black plastic handle. (Vol. XII, pp. 338-339, 345) In the bedroom there was a small brown serrated knife on top of a file cabinet. (Vol. XII, pp. 324-326) There was a jar of petroleum jelly on a

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[3] The blood on the bedclothes and wall was later determined to be of nonhuman origin, and was consistent with dog blood. (Vol. XIV, pp. 651-652)

dresser opposite the bed. (Vol. XII, pp. 327-328) There were indentations on both posts of the headboard, which a telephone wire found on the floor appeared to fit. (Vol. XII, pp. 329-331)[4] On the vanity in the bathroom were a green towel and a latex rubber surgical glove similar to the glove found in the woods where Boroski's car was located. (Vol. XII, pp. 330-333, 335)

Johnathan Grimshaw, who lived across the street from Mildred Boroski, offered to help Crime Scene Technician Jeffrey Boekeloo and Detective Bousquet find her. (Vol. XII, pp. 293-294; Vol. XIII, p. 400) He led them on a search that lasted a couple of hours during the early morning of March 12, 1995, but the body could not be found. (Vol. XIII, p. 405)

On the night of March 14, 1995, Mildred Boroski's body was found in a field in Veterans Village, about two or three minutes away from her residence, by a teenager named Steven Douglass and his cousin, approximately two miles south of where her car had been found, and in the opposite direction from where law enforcement personnel had been led by Johnathan Grimshaw. (Vol. XII, pp. 370-371; Vol. XIII, pp. 404, 568, 593) Douglass told another cousin about the discovery, and he called the sheriff's office. (Vol. XII, p. 372)

Sergeant Charles Calhoun and Crime Scene Technician Boekeloo were among those who responded to the scene. (Vol. XII, pp. 376, 381, 385-386) The field was overgrown with high grass and heavy

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[4] This observation was made by Joseph not on March 12, but on March 15, when he returned to the residence. (Vol. XII, p. 331)

brush. (Vol. XII, p. 378) Boroski was lying on her back, with a pillow under her head and another on top of her head. (Vol. XII, pp. 377, 386, 392-393) A pillowcase was covering her head. (Vol. XII, p. 392) She was barefoot and was wearing a white nightgown, which was hiked up above her genital area, and panties, which appeared to have been cut in the crotch area. (Vol. XII, pp. 377, 386-387, 392) Her wrists were bound with wiring that appeared similar to the wire that was found in the back of her car. (Vol. XII, pp. 377, 391, 396-397)

Associate Medical Examiner Marie Hansen examined the body at the scene, where she arrived at approximately 3:00 in the morning. (Vol. XV, pp. 679-682) She subsequently conducted an autopsy, on March 15. (Vol. XV, p. 685)

The panties appeared to have been cut with a knife or scissors. (Vol. XV, pp. 684, 698) The bindings around Boroski's hands were two different types of telephone cord. (Vol. XV, p. 684) She had two bullet holes in her head. (Vol. XV, p. 683) Each would have been lethal. (Vol. XV, p. 689) The shots were fired within minutes of one another, perhaps directly following each other. (Vol. XV, p. 689) Unconsciousness would have been instantaneous, with death occurring within a minute or two. (Vol. XV, p. 689) Boroski had small linear abrasions underneath the thumb and first finger of her left hand which could have been consistent with defensive wounds. (Vol. XV, pp. 690-691) There was some hemorrhage and bruising of the vaginal area, and a contusion to the anal area. (Vol. XV, pp. 692-693) Hansen also found a substance that was gray

metallic in color in the anal area, but she did not know if it was metal. (Vol. XV, pp. 692-693, 696, 699-700) The bruising to the anal and vaginal areas was consistent with a sexual assault, either with a penis or some other hard object, however, Hansen did not find any sperm. (Vol. XV, pp. 696-698)[5] The injuries to Boroski's anal area would have been painful. (Vol. XV, p. 698)

Crime Scene Technician David Tepedino of the Pasco County Sheriff's Office attended the autopsy, and received the bullets taken from Boroski's head. (Vol. XII, pp. 364-366)

Sometime shortly after Boroski's body was found, Candace Kelley saw Appellant and Grimshaw together at Grimshaw's house. (Vol. XII, p. 299) Kelley remarked that it was a shame someone could do that to a lady. (Vol. XII, p. 300) Appellant responded, "People are sick." (Vol. XII, pp. 302-303)

Christy Gibson, who had been Appellant's girlfriend for about a year when he was in tenth grade, testified that after Mildred Boroski's death, she saw Appellant at school with a dark-handled handgun tucked in his waistband, but she had no idea whether it was real. (Vol. XIV, pp. 656-657, 669-670) Also, some time after Boroski's death, Gibson received a pair of handcuffs when she, Appellant, and Grimshaw were in Grimshaw's living room; she kept

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[5] Testing done by the serology section of the Florida Department of Law Enforcement's Tampa Regional Crime Laboratory on certain items similarly failed to reveal the presence of semen. (Vol. XIV, pp. 649-650, 652)

them under her bed. (Vol. XIV, pp. 658-661)[6] And Appellant gave her a silver eagle ring to hold while he lifted weights at school; he said he got it from Grimshaw. (Vol. XIV, pp. 662-663) Gibson later gave the ring to a detective. (Vol. XIV, p. 663) Several times, Gibson observed Grimshaw approach Appellant at school and ask to talk with him privately. (Vol. XIV, pp. 666-667) Appellant usually did what Grimshaw wanted to do. (Vol. XIV, pp. 668-669)

In April of 1995, Appellant's stepmother found two handguns in his waterbed, between the frame and the mattress. (Vol. XIV, pp. 638-639) When asked where they came from, Appellant said he was keeping them for a friend, Rodney Bradley. (Vol. XIV, pp. 638-640) Appellant's father and stepmother said they would like his friend to come pick them up, and that is what Rodney Bradley did. (Vol. XIV, pp. 638-639) He received a Colt revolver and a semi-automatic with a clip, both of which were unloaded, and put them in the top of his closet. (Vol. XIV, pp. 617-622) Appellant told Bradley he would be back in about three days to a week to pick them up. (Vol. XIV, p. 624)

On May 3, 1995, Detective Bousquet of the Pasco County Sheriff's Office arrested Johnathan Grimshaw for Mildred Boroski's murder. (Vol. XIII, pp. 420-421) He interviewed Grimshaw for a little over five hours. (Vol. XIII, p. 569) Grimshaw gave him evidence about possible physical evidence that led Bousquet to Appellant. (Vol. XIII, pp. 425-426) While Grimshaw was at the

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[6] At trial, Gibson testified that she was not sure which of the two boys handed her the handcuffs, but on deposition she said it was Appellant. (Vol. XIV, pp. 658-660)

sheriff's office, he placed a telephone call to Appellant which was recorded. (Vol. XIII, pp. 426-434) During the telephone conversation, there were references to a gun, two rings, and handcuffs. (Vol. XIII, pp. 431-433) Detective Clifford Blum of the sheriff's office went to Appellant's home that same day and obtained from him a lady's ring with three clear stones. (Vol. XIII, pp. 625-626) Appellant accompanied Blum to the home of one of Appellant's friends, Rodney Bradley, where Blum recovered a .22 caliber semi-automatic pistol. (Vol. XIII, pp. 627, 631) Blum also recovered a chrome-colored set of standard handcuffs from Appellant's girlfriend, Christy Gibson. (Vol. XIV, pp. 628-629, 661-662)

Later that same day (May 3), Deputy Cheryl Piedmonte of the Pasco County Sheriff's Office obtained the .38 revolver from Rodney Bradley, which he had been unable to locate when Detective Blum was at his residence. (Vol. XIV, pp. 620-621, 633-634) Subsequent testing by the Florida Department of Law Enforcement showed that the bullets taken from the body of Mildred Boroski were fired by the Colt revolver. (Vol. XIV, pp. 641-645)

Detective Bousquet conducted an interview with Appellant at the Crimes Against Persons unit of the Pasco County Sheriff's Office on the afternoon of May 3 that lasted a little over two hours. (Vol. XIII, pp. 435-437, 569) It was surreptitiously videotaped. (Vol. XIII, pp. 436-437) The tape was played for Appellant's jury at his trial. (Vol XIII, pp. 439-529)[7] Appellant

[7] From the record on appeal, it appears that the court reporter did not report the playing of the videotape, but rather inserted a previously-prepared transcript of the tape into the

said on the tape that at around 12:00 midnight, he and Grimshaw entered the fenced backyard and cut the phone wires on the side of the house; Appellant cut one (Grimshaw told him to), and Grimshaw cut the rest. (Vol. XIII, pp. 464-465, 503, 515, 556) They cut the screen door with some scissors Grimshaw brought from his house[8] to gain access to a screened room, then entered the house by breaking a back window with a crowbar, opening it, and crawling through, with Grimshaw going in first. (Vol. XIII, pp. 443-445, 465-468, 483-484, 503, 517) They both were wearing gloves, but Grimshaw later took his off, and put oven mitts on his hands. (Vol. XIII, pp. 501, 522) Appellant took a knife from one of the drawers in the kitchen. (Vol. XIII, p. 469) When they went into the room where Boroski was, "everything just like started going crazy..." (Vol. XIII, p. 446) There was a dog in Boroski's bedroom, and it "was kind of like flipping out" and yelping (Vol. XIII, pp. 446-447, 470) When it snapped, Appellant hit it with the crowbar and killed it. (Vol. XIII, pp. 446-448, 470, 484-485) The dog "pooped all over." (Vol. XIII, pp. 470, 485)

Boroski was sleeping when the two entered her room, but woke up because the dog made a lot of noise. (Vol. XIII, pp. 448-449) She "like yelled or something," and Grimshaw "told her to shut up or something." (Vol. XIII, p. 470) Grimshaw tied her to the bed with phone cords; Appellant assisted by holding the cord. (Vol.

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record "due to the inaudible videotape played to the jury." (Vol. XIII, p. 439)

[8] Grimshaw did not have the scissors with him, but went across the street to his house and got them. (Vol. XIII, pp. 517, 525)

XIII, pp. 449-450, 454, 500) She was on her stomach. (Vol. XIII, pp. 451, 504) Grimshaw took two rings Boroski was wearing, and Appellant took a gun and handcuffs that were in the bedroom. (Vol. XIII, pp. 451-452, 508, 511-512, 518-520) Grimshaw told Appellant to bring him some petroleum jelly that he had seen in another room, and Appellant did so. (Vol. XIII, pp. 504-505) Grimshaw then told Appellant to take out the dog, which had been placed in a bag. (Vol. XIII, pp. 448, 505) Appellant took the dog out to the garage and put it in the trunk of the car. (Vol. XIII, pp. 473, 505, 560) [He and Grimshaw later disposed of it in a trash can. (Vol XIII, pp. 447, 509)] When Appellant returned from the garage and looked around the corner, he saw Grimshaw sexually assaulting Boroski. (Vol. XIII, pp. 471-472, 480, 485, 505, 511) Grimshaw thereafter put Boroski into her car, and Appellant drove to a field (Grimshaw told him to drive), where Grimshaw took Boroski out of the car, he and Appellant walked her out into the field, and Grimshaw told her to lie down. (Vol. XIII, pp. 452, 454-455, 474, 486, 507) She had a pillow over her head. (Vol. XIII, p. 457) Initially, Appellant stated that Grimshaw shot her in the head, and Appellant heard two shots. (Vol. XIII, pp. 455, 457, 475) He then stated that Grimshaw fired the first shot, and Appellant fired one shot. (Vol. XIII, pp. 476-477) He subsequently admitted that he fired both shots; Grimshaw handed him the gun and told him to shoot her so that she couldn't "do anything." (Vol. XIII, pp. 479-480, 482, 491, 507,

516, 564)[9] They parked Boroski's car in the woods and walked home. (Vol. XIII, pp. 460, 480) Before leaving the car, Appellant took a can of pepper spray or Mace out of the glove compartment, which went off into the trees; some of the mist came back and burned his eyes, and he threw the can. (Vol. XIII, pp. 518-519, 523) Appellant threw his gloves into the garbage. (Vol. XIII, p. 501) He threw the car keys into some water,[10] and the bullets that remained in the revolver, as well as the bullets from the shell box that was found under the bed, into some other water. (Vol. XIII, pp. 460-463, 502, 512-514) He gave the two guns that came out of the house to Rodney. (Vol. XIII, pp. 482, 507-508)[11] He gave the handcuffs to his girlfriend. (Vol. XIII, p. 441)

Appellant did not know Boroski, and did not know if she recognized them; her head was covered up the whole time. (Vol. XIII, pp. 486, 509) Boroski did not see Appellant, and he did not know if she saw Grimshaw or not. (Vol. XIII, p. 516) There was a

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[9] Initially, Appellant said the gun was a .32 caliber (Vol. XIII, p. 482), but then said it was a .38. (Vol. XIII, p. 507)

[10] The keys were found on March 25, 1995 by Thomas Lockwood, who was fishing in a lake in Veterans Village; he turned them over to Detective Blum. (Vol. XIII, p. 410; Vol. XIV, pp. 613-615, 629-630)

[11] Boroski's daughter, Susan Carter, testified at Appellant's trial that, to her knowledge, the .38 was the only handgun her mother possessed. (Vol. XV, pp. 703-704) And in his statement to law enforcement, Johnathan Grimshaw only mentioned one gun being taken from the house. (Vol. VII, p. 989) In Appellant's discussions with Dr. Maher, he told the doctor that, after they entered Boroski's house, he learned that Grimshaw had a gun with him. (Vol. IX, p. 1393)

pillowcase over her head when she was led into the field. (Vol. XIII, pp. 492, 515)

Appellant estimated that he and Grimshaw were in Boroski's house for perhaps an hour and a half. (Vol. XIII, p. 515) While there, they went through her purse, which contained only "like a couple dollars and some change," which they spent on video games the following day. (Vol. XIII, pp. 487, 506)

Appellant had never been in Boroski's house before, and he and Grimshaw had not planned ahead of time to go into her house; they only talked about it that night. (Vol. XIII, pp. 463, 503, 509-510)

During the interview with Bousquet, Appellant signed a form consenting to the search of his bedroom. (Vol. XIII, pp. 492-493)

Appellant said he "didn't want to do it [kill Boroski]," and he did not think they had to, but Grimshaw just told him to. (Vol. XIII, pp. 481, 499) He had had nightmares about it. (Vol. XIII, p. 480)

On redirect examination of Detective Bousquet, the prosecutor below was permitted to question him, over defense objections, regarding what Johnathan Grimshaw said in his statements to law enforcement. (Vol. XIII, pp. 578-579) Grimshaw claimed that he was in the car when Boroski was shot, and that it was Appellant who wanted to kill her. (Vol. XIII, p. 579) He also said that it was Appellant's idea that the deputies be led on a wild goose chase away from the body so that it would decompose, and they would have no evidence. (Vol. XIII, p. 579)

On recross, defense counsel elicited from Bousquet that Grimshaw had given three different versions of events. (Vol. XIII, p. 599) The first was that "he heard some glass and peeked in..." (Vol. XIII, p. 599) The second was that "he answered an ad over the computer to commit a burglary for $250..." (Vol. XIII, p. 599) The third was that "he went up to the residence, Nathan Ramirez jumped out of the bushes and forced him to commit this crime..." (Vol. XIII, p. 600) Grimshaw told Bousquet that he had been in that house before, that Boroski had made him dinner, and that he had helped unload groceries from her car. (Vol. XIII, p. 600) Grimshaw said in his statement that the surgical gloves that were used came from his house, and sheriff's deputies did find a box of such gloves in Grimshaw's residence. (Vol. XIV, p. 608)

On additional redirect, the prosecutor elicited that Grimshaw's final version of events was that he and Appellant did the actual break-in, but that Appellant was the one who shot and killed Mildred Boroski. (Vol. XIV, p. 610) With regard to the sexual assault, Grimshaw, in Bousquet's words, "stated that Nathan Ramirez only assisted in it, but that he was the one involved in sexual intercourse as well." (Vol. XIV, p. 610)

When the State rested, defense counsel moved for a judgment of acquittal, to no avail. (Vol. XV, p. 706-707)

Appellant rested without presenting any evidence. (Vol. XV, p. 736)

Penalty Phase--State's Case

The State called Detective Jeffrey Bousquet as its first penalty phase witness. (Vol. VII, pp. 954-991) The prosecutor stated that he wanted to talk in more detail about what John Grimshaw told Bousquet, and asked him whether Grimshaw told Bousquet why Mildred Boroski had to be killed. (Vol. VII, p. 955) Defense counsel objected on hearsay grounds, whereupon there was a discussion regarding the admissibility of Grimshaw's statements to Bousquet, with the court ultimately ruling that they could come in. (Vol. VII, pp. 955-961)

Bousquet testified that Grimshaw told him it was Appellant's decision to kill Boroski, "that she had seen his face." (Vol. VII, pp. 961-962) Appellant said, "We have to kill her, she's seen my face, if she lives she'll report it and she'll get an ID on me." (Vol. VII, p. 965) When Grimshaw said that he was in enough trouble as it was, Appellant told him to stop being a f---ing pussy and get on with it. (Vol. VII, pp. 965-966) According to Grimshaw's statement to Bousquet, it was Appellant who tied Boroski up and sexually abused her by having anal intercourse with her. (Vol. VII, pp. 964, 975) Grimshaw also told Bousquet that Appellant took $35 from the house, which was split evenly between them, and took the handcuffs, the gun, two rings off Boroski's fingers, and a man's silver eagle ring, which came from the box underneath the bed. (Vol. VII, pp. 965-966, 987) At Boroski's house, Appellant pointed the gun at Grimshaw's head and said, "You're in or you're out." (Vol. VII, p. 962) It was Appellant who brought Boroski to

the car and placed her in the back seat. (Vol. VII, p. 962) It was Appellant who had the firearm when Boroski was led out into the field, and he was the one who shot her while Grimshaw sat in the car. (Vol. VII, pp. 963, 977) Grimshaw said that after the first shot, Appellant looked back at him and smiled and said something. (Vol. VII, p. 966) Later, however, Appellant told Grimshaw that he had "had a couple of nightmares and stuff like that." (Vol. VII, p. 966) According to Grimshaw, Appellant was the one who disposed of the car; Grimshaw was not with him then. (Vol. VII, pp. 966-967) However, Grimshaw knew where the car was parked. (Vol. VII, pp. 973-974, 984-985)

According to Grimshaw, Appellant wanted to return to Boroski's house to set it on fire so there would be no evidence, but Grimshaw "was afraid if the house caught fire that something would explode and it would shoot across and ultimately might catch his house on fire." (Vol. VII, pp. 963-964)

Grimshaw told Bousquet that he had been in Boroski's house before, she had cooked dinner for him, and he had gone for a ride with her to the store to buy groceries, and she had paid by check. (Vol. VII, pp. 971, 977) However, Bousquet knew the story about going to the store was incorrect, as he had looked for such a check and not found one. (Vol. VII, p. 971)

Grimshaw gave Bousquet several versions of what happened before he came to the final version. (Vol. VII, p. 972-973) One version involved a stranger who held a gun to his head. (Vol. VII, p. 973) Another was that Grimshaw had answered an ad on the school

computer, words to the effect of, wanted, burglary for $250. (Vol. VII, p. 973)

Grimshaw did acknowledge leaving behind a surgical glove that he obtained from his mother's bathroom. (Vol. VII, pp. 978-979) He took it off because he picked up the dog, and there was fecal matter on it. (Vol. VII, p. 982) He replaced it with the oven mitt that was found in Boroski's car. (Vol. VII, p. 982)

John Neder of the Florida Department of Juvenile Justice was the State's second penalty phase witness. (Vol. VII, pp. 995-1003) He testified that on September 3, 1993, when Appellant was 15 years old, he was arrested for auto burglary for taking $10 from the interior of a pickup truck through an open window. (Vol. VII, pp. 997, 1001-1002) The money was recovered by the arresting officer. (Vol. VII, p. 1002) At the intake interview on September 27, Appellant said that he did it on a dare. (Vol. VII, pp. 997-998) Appellant admitted the offense at his arraignment on October 14, 1993. (Vol. VII, p. 998) He was placed in secure detention for four days, then on home detention pending disposition. (Vol. VII, pp. 998-999) At the dispositional hearing on October 28, adjudication was withheld, and Appellant was placed in the Juvenile Alternative Services Program, which he successfully completed. (Vol. VII, pp. 999-1000, 1002)

The final penalty phase witness for the State, whose testimony came in over defense objections, was Tim Spitzer, a Pasco County Sheriff's Deputy who was assigned to Gulf High School as the school resource officer. (Vol. VII, pp. 1005-1014) He testified regarding

a fight in which Appellant was involved at Gulf High in February of 1995. (Vol. VII, pp. 1008-1013) Appellant and another student, Tony Capitanis, were fighting on campus at dismissal time. (Vol. VII, p. 1009) Appellant got the worst of the fight, and was treated at the school clinic. (Vol. VII, p. 1009, 1011-1012) When Spitzer went to talk to Appellant five minutes after the incident, he was still excited. (Vol. VII, p. 1009) Spitzer asked him to calm down and let it drop, but "he said that he wasn't going to let it drop, this isn't over and I'll get even with him." (Vol. VII, pp. 1009-1010) No criminal charges were filed as a result of the fight, but Appellant was suspended from school for 10 days. (Vol. VII, pp. 1012-1013)

Spitzer also had contact with Johnathan Grimshaw on 10 or 12 occasions when Grimshaw came to him seeking advice about different things. (Vol. VII, p. 1011) Grimshaw talked about some of the problems he was having at home, and the fact that he could not get close to anybody because they always ended up dying. (Vol. VII, p. 1012) Grimshaw never left Spitzer with the impression that he was a dominating type of person; he was a follower rather than a leader. (Vol. VII, p. 1011)

Penalty Phase--Defense Case

Steven Henson was a corrections deputy at the Land O' Lakes Facility. (Vol. VII, p. 1014) He testified that Appellant's conduct in the county jail had been "fine." Henson had not had to

discipline him at all, and Appellant had been able to follow instructions that Henson gave him. (Vol. VII, p. 1015)

Another corrections deputy with the Pasco County Sheriff's Department, James Toner, similarly testified that Appellant's conduct while in jail had been "pretty good." Appellant had been able to follow Toner's instructions most of the time. (Vol. VII, p. 1017) Toner had not seen any problems between Appellant and other inmates in his presence, but had hearsay knowledge of Appellant having problems with others in the population on occasion. (Vol. VII, pp. 1020-1021)

A third corrections deputy, Lawrence Caniglio, testified that Appellant seemed to be very calm and quiet, never gave him any problems, and was able to follow his instructions. (Vol. VII, pp. 1022-1023) Caniglio had not heard that Appellant had any problems with other inmates or corrections officers, nor had he received any documentation to this effect, or reviewed any logs. (Vol. VII, pp. 1026-1027)

George Savarese lived across the street from Appellant in the Veterans Village area of New Port Richey. (Vol. VII, p. 1029) He had known Appellant for about two and one half years, and had talked with him both at the Ramirez residence and the Savarese residence. (Vol. VII, p. 1029) Savarese liked Appellant from the first time he saw him. He thought he was a nice individual. He was always the perfect gentleman. (Vol. VII, p. 1030) Appellant was interested in cars. He wanted to finish school and was looking for a job. (Vol. VII, p. 1031) Appellant was also nice around

Savarese's 17 year old daughter, who thought he was good-looking and very nice. (Vol. VII, p. 1030) Appellant came over one day and helped Savarese put brakes on his truck. (Vol. XII, p. 1033) It came as quite a shock to Savarese when Appellant was arrested for the death of Mildred Boroski; this was definitely out of character for him. (Vol. VII, p. 1034)

Appellant's father and stepmother were hard-working people who were very caring for Appellant. (Vol. VII, p. 1031)

David Moore had known Appellant for about three to five years. (Vol. VII, p. 1036) He found him to be a good young man, well-mannered, who was always respectful to his parents and to Moore. (Vol. VII, pp. 1038, 1043) The two would talk about weight-lifting and Appellant's part-time job as a bag boy at a grocery store. (Vol. VII, p. 1038) Appellant was excited about getting a car he had sitting in the driveway. (Vol. VII, p. 1038) The actions of the person who killed Mildred Boroski were not the actions of the Nathan Ramirez that Moore knew. (Vol. VII, p. 1039)

Linda Burgess, Appellant's mother, told his jury that Appellant was born on February 3, 1978. (Vol. VII, p. 1047) He was the child of Burgess' second marriage, to Ernie Ramirez. (Vol. VII, p. 1047) Burgess and Ernie Ramirez separated when Appellant was approximately two, and later divorced. (Vol. VII, pp. 1048, 1052) Burgess essentially raised Appellant and his half-brother, George, alone. (Vol. VII, p. 1052) Burgess married a man called Roger Stewart, but he did not treat the children well, and so the marriage only lasted a month. (Vol. VII, pp. 1052-1053) When

Appellant was about six, Linda Burgess married Kelly Burgess, but he was not a good father to the children either; he was immature, and "was more interested in playing drums with the guys and going partying than he was raising a family." (Vol. VII, p. 1054)

Appellant became aware at a later time that his mother had attempted suicide prior to Ernie Ramirez leaving. (Vol. VII, p. 1050) When he was 12 or 13, Appellant became aware of a physical illness his mother had, progressive terminal lung disease, and he worried about her continually. (Vol. VII, pp. 1050-1051, 1055)

When Appellant was growing up, he was always willing to help someone. (Vol. VII, p. 1055) He had "a heart as big as the whole outdoors." (Vol. VII, pp. 1055-1056)

Appellant had some problems in school when he was seven years old, showing aggressive behavior towards other children. (Vol. VII, p. 1065) Some of the problems that Appellant had in school resulted from his race; his father was "Scottish, Spanish Aztec, Spanish Mexican." (Vol. VII, p. 1078-1079) Appellant would become very upset when his feelings were hurt, and cry or be mad. (Vol. VII, p. 1079)

Appellant had always done very well with animals; when he lived in Colorado he had cats, dogs, hamsters, a salamander, tarantulas, even a piranha. (Vol. VII, pp. 1059-1060) At the time of his penalty trial he had an iguana. (Vol. VII, p. 1060)

Just prior to Appellant's 10th birthday, he moved away from his mother to live with his father, Ernie Ramirez. (Vol. VII, p.

1056) They moved from Colorado to Florida in 1991 or 1992. (Vol. VII, p. 1070)

In the summer of 1994, Appellant visited his mother in Colorado for a month to six weeks. (Vol. VII, p. 1052, 1056) He was head over heels in love with Christy Gibson at that time. (Vol. VII, pp. 1056-1057) Burgess later learned there was a problem between Appellant and his girlfriend. (Vol. VII, p. 1057) She was pregnant, and they were trying to decide whether the baby should be aborted. (Vol. VII, p. 1057) Appellant wanted to take the baby and raise it himself, but Gibson told him that she had scoliosis, and could not carry the baby to term without endangering her life. (Vol. VII, pp. 1057-1058) Gibson had an abortion in the fall of 1994. (Vol. VII, p. 1058) Appellant learned that Gibson had no physical ailment, and was devastated. (Vol. VII, p. 1058)

In approximately February of 1995, Appellant's stepmother called Linda Burgess and told her that Appellant was "huffing aerosol;" she had found quite a few cans in his room. (Vol. VII, pp. 1058-1059) There was a discussion about sending Appellant to Colorado to be placed into a drug rehabilitation program there. (Vol. VII, p. 1059)

Appellant had a talent as an artist that his mother had not realized before he sent her several drawings from jail. (Vol. VII, pp. 1060-1062)

George Ramirez, Appellant's older brother, described Appellant as "optimistic" when he visited Colorado in the summer of 1994. (Vol. VII, p. 1084) He had a lot of plans for himself, including

continuing his education. (Vol. VII, p. 1084) He talked about being on the wrestling team, and liked to lift weights, and he wanted a scholarship in wrestling, basketball or football. (Vol. VII, p. 1106) He cared deeply about his girlfriend, Christy, and was optimistic about his relationship with her. (Vol. VII, pp. 1084-1085) After she became pregnant and had the abortion, it "crushed" Appellant, "hurt him emotionally," and "broke his heart." (Vol. VII, p. 1086) Appellant was willing to raise the child, and had watched George raise his own daughter as a single parent. (Vol. VII, pp. 1087-1088) Before the abortion, Appellant was strong and confident, with a positive outlook. (Vol. VII, p. 1090) Afterward, he was somewhat depressed and down on life. (Vol. VII, pp. 1090-1091)

George learned that Appellant had been huffing aerosols. (Vol. VII, pp. 1087-1090) There was some discussion about Appellant going back to Colorado to live with his mother, but those plans were cut short by the incident for which Appellant was on trial. (Vol. VII, pp. 1089-1090)

When Appellant was in Colorado, George did not see any signs of aggression, or Appellant physically abusing anyone. (Vol. VII, p. 1109)

Kimberly Nicholas had known Appellant for about three years, and was his ex-girlfriend. (Vol. VII, pp. 1112-1113) They were in the same grade together at Gulf High School, and both liked to lift weights. (Vol. VII, pp. 1113-1114) She found Appellant to be a "sweet, caring guy" who never mistreated her in any way. (Vol. VII,

p. 1114) Nicholas' mother also loved Appellant; he was part of their family. (Vol. VII, p. 1115) Even after they broke up, after going together for nine months, Appellant and Nicholas remained friends, and he continued to care about her. (Vol. VII, pp. 1113, 1115)

Linda Nicholas, Kimberly's mother, found Appellant to be very kind, loving, generous, thoughtful, and respectful, everything she would want in a boyfriend for her daughter. (Vol. VII, p. 1121) When Appellant visited Kimberly, they would listen to music, swim in the pool, ride their bicycles. (Vol. VII, p. 1122)

Harlan Hauter knew Appellant and Johnathan Grimshaw from school. (Vol. VII, pp. 1123-1124) Grimshaw was older than Appellant, and in a higher grade. (Vol. VII, p. 1125) Appellant loved karate, and Grimshaw fancied himself a martial arts expert. (Vol. VII, p. 1129) Grimshaw, whom Hauter described as "a sick kid" and "a very sick individual," was a bad influence on Appellant. (Vol. VII, pp. 1125-1126) Grimshaw was the leader and the more aggressive of the two. (Vol. VII, p. 1127) Appellant was a different person when he was around Johnathan Grimshaw. (Vol. VII, p. 1130) Hauter knew Appellant was huffing because he introduced him to it. (Vol. VII, p. 1128) They huffed paint hundreds of times, and Glade Air Freshener four or five times. (Vol VII, p. 1128) Hauter explained that huffing "makes you feel real good for a long time, but sooner or later you're going to start feeling that your mind is going. It messes up your memory, you don't know what you've done five minutes ago. It messes you up." (Vol. VII, p.

1151) Hauter had been through treatment for huffing and learned that huffing "could kill you." (Vol. VII, p. 1151)

Hauter and Appellant stole a bike together, but Appellant was not arrested, because the police made him give it back. (Vol. VII, pp. 1134-1135) It was Hauter's idea to steal the bike, and Appellant went along with him. (Vol. VII, p. 1148)

Hauter stopped being friends with Appellant and Grimshaw when he saw Grimshaw kick a duck. (Vol. VII, pp. 1126-1127)

Augustine Ramirez testified that before Christy Gibson had the abortion, his son was happy-go-lucky, always in good humor, but there was a change afterwards. (Vol. VIII, p. 1155) Another reason for the change may have been that Appellant was huffing from aerosol cans; in early 1995 his father and stepmother found some cans in the care, and 55 of them in Appellant's bedroom. (Vol. VIII, p. 1155)

Johnathan Grimshaw was a bad influence on Appellant, who was more of a follower than a leader. (Vol. VIII, p. 1156) Grimshaw talked Appellant into quitting his paying job at Kash 'N' Karry to go work for free at a horse farm. (Vol. VIII, pp. 1157-1158)

Appellant was helpful around the house; he did all the landscaping at the Ramirez residence without even being asked. (Vol. VIII, pp. 1158-1159)

Appellant was great with animals. He took care of his iguana, German shepherd, and chihuahua, and Ramirez had never seen him abuse those animals. (Vol. VIII, p. 1158)

Appellant was also a good artist, "one of the best." (Vol. VIII, p. 1159)

Appellant's stepmother, Joel Ramirez, testified that he was "doing pretty good" in school before his trip to Colorado; he "liked the socialization and lots of friends," and liked wrestling, art, computers, and history. (Vol VIII, pp. 1180, 1185)

When Christy Gibson became pregnant, Appellant went to her parents' house to discuss the situation, but her mother slapped both Appellant and Christy and cursed them and chased them. (Vol. VIII, pp. 1181-1182) After the pregnancy was terminated, Appellant was very depressed, and his grades dropped severely. (Vol. VIII, p. 1182)

With regard to the fight at school, Appellant told his stepmother that it was started by an old boyfriend of Christy's. (Vol. VIII, pp. 1182-1183) He had been harassing Appellant, calling him names, trying to aggravate a fight. (Vol. VIII, p. 1183)

Joel Ramirez believed Johnathan Grimshaw to be a bad influence on her stepson. He lied for Appellant, and talked him into doing things he might not otherwise have done, such as skipping school and quitting the job at Kash 'N' Karry to go to work at the horse farm. (Vol. VIII, pp. 1184-1185) Grimshaw was the leader of the two. (Vol VIII, p. 1186)

Joel Ramirez described how she discovered some plastic bags in Appellant's car that were full of spray paint and rags, and found

55 cans of Glade aerosol in his room. (Vol. VIII, pp. 1186-1187)

Hearing of November 4, 1996

The court held a "sentencing hearing" on November 4, 1996 prior to actually sentencing Appellant on November 8. (Vol. IX, pp. 1347-1415) Dr. Michael Maher testified for the defense at the November 4 hearing. (Vol. IX, pp. 1350-) He reviewed various materials pertaining to this case and to Appellant's background, and conducted a mental status evaluation of Appellant. (Vol. IX, pp. 1351-1352) Dr. Maher found "a good deal of immaturity" in Appellant; his developmental or emotional age was consistent with a person two or three years younger than his chronological age of 17. (Vol. IX, p. 1355) His academic and intellectual development likewise was two or three years behind his chronological age. (Vol. 1355-1356) Appellant was "more like a 13 or 14-year-old who was really quite dependent on the people around him." (Vol. IX, p. 1357) When his girlfriend terminated her pregnancy, he "was very distressed about losing the fantasy of having family of own..." (Vol. IX, p. 1357)

Dr. Maher concluded that the capital felony was committed while Appellant was under the influence of significant, perhaps extreme, mental or emotional disturbance. (Vol. IX, p. 1358)

Dr. Maher also found "[p]retty good indication" that Appellant was "exposed to some pretty significant verbal, emotional and psychological abuse and aggression and violence in his home situation," as well as "[p]ossibly a small amount of physical

abuse." (Vol. IX, p. 1359) There were also tensions and hostility that existed between his parents after their divorce. (Vol. IX, pp. 1368-1369)

Appellant had problems in school with impulse-control and specific learning disabilities, which placed him in a special program. (Vol. IX, p. 1370) These problems "were related to the exact same kinds of issues that are relevant to his later drug abuse, his frustration and disappointment with his family life and situation and ultimately with making decisions to do things or not do things in an appropriate manner. Things that are related to the offense itself." (Vol. IX, p. 1370)

When Appellant visited his mother in Colorado, with her in "a condition of chronic respiratory deterioration, this "further weakened his ability to act and function independently and remain independent of other bad influences in his life." (Vol. IX, p. 1359)

Dr. Maher opined that Appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (Vol. IX, pp. 1360-1361) He found no evidence that the instant homicide was premeditated an planned ahead of time, but could not rule this out. (Vol. IX, pp. 1360-1361) Appellant had "a very diminished capacity to put up his resistance to the effects and demands of John Grimshaw on that night." (Vol. IX, p. 1361) His condition changed for the better a few months later when he was in a "highly structured environment [jail] where the rules were clear and he was able to

follow those rules and do as he was told." (Vol. IX, pp. 1361-1362)

With regard to the huffing of inhalants, Dr. Maher testified that this practice causes "quite consistently and significantly brain-cell death." (Vol. IX, p. 1362) Although Appellant may not have been huffing in the hours immediately preceding the Boroski homicide, the effects of this practice can linger for a long time. (Vol. 1363-1364) Dr. Maher testified (Vol. IX, p. 1364):

> What is typical in individuals who do this [huffing] is that for a period of months, sometimes years, sometimes permanently; I don't think that's the case in Mr. Ramirez here. Certainly for months afterwards, their moods tend to be a good deal more extreme. Their moods are labelized [sic]. Their depressed moods are more severe. Their angry moods are more intense. They're more irrationable [sic] less patient, more easily frustrated. They find it difficult to stop and think before acting. That's the general condition that inhalant inhalation causes almost universally.

Appellant was the follower in his relationship with Johnathan Grimshaw. (Vol. IX, p. 1364) He depended on Grimshaw for excitement and direction, and "looked to him as a stronger, more powerful, more significant person. He associated with him so that he could borrow, as it were, some of what he felt were Jonathan Grimshaw's strengths. He did, in effect, what Jonathan Grimshaw told him to do." (Vol. IX, pp. 1364-1365) Appellant was "certainly under the substantial influence of Jonathan throughout their relationship and specifically at periods of time where there would have been intense stress,like the time of the offense." (Vol. IX, p. 1365)

Dr. Maher believed that Appellant would adapt quite well to prison. (Vol. IX, pp. 1366-1367)

SUMMARY OF THE ARGUMENT

Appellant's statements to law enforcement should not have been admitted into evidence. The sheriff's deputies failed to read his Miranda warnings when he was first brought in for questioning. When they were read, after Appellant had already incriminated himself, it was done in a perfunctory manner which suggested a lack of importance. Furthermore, Appellant was only 17, immature for his age, and the police failed to contact his parents as required by statute until after he confessed. In addition, Detective Bousquet made inappropriate physical contact with Appellant during the interview. The totality of the circumstances failed to show that Appellant's confession was voluntary.

At both the guilt phase and the penalty phase of Appellant's trial, the State was permitted to introduce portions of codefendant Johnathan Grimshaw's confession in which he blamed Appellant for virtually everything that occurred on the night in question. Grimshaw did not testify, and the admission of his statements through the testimony of Detective Bousquet violated Appellant's rights to confront and cross-examine the witnesses against him, and to due process of law.

The evidence did not support the court's finding of CCP or its submission to the penalty phase jury. Although there may have been some minor planning that preceded the instant burglary, there was no proof that Appellant and Grimshaw intended that a killing would take place. Furthermore, the court's finding of CCP is inconsis-

tent with his finding that Boroski was killed after she saw Appellant's face because she could identify him.

A sentence of death is not warranted for this Appellant, primarily because of his youth, his lack of a criminal background, his history of substance abuse, the life sentence received by his codefendant, and his potential for rehabilitation.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN REFUSING TO SUPPRESS THE STATEMENTS APPELLANT MADE TO LAW ENFORCEMENT, AS THE STATE FAILED TO SUSTAIN ITS BURDEN OF SHOWING FROM THE TOTALITY OF THE CIRCUMSTANCES THAT THE STATEMENTS WERE MADE FREELY AND VOLUNTARILY, AND WERE OBTAINED IN COMPLIANCE WITH MIRANDA V. ARIZONA.

Appellant moved before trial to suppress his statements to law enforcement, but his motion was denied by Judge Burton Easton. Appellant renewed his motion to suppress in front of Judge Craig Villanti before his trial began, to no avail. (Vol. XI, p. 3) Appellant once again brought up the motion to suppress when the State was preparing to introduce his videotaped confession into evidence, without success. (Vol. XIII, pp. 415-419) Appellant was however, given a standing objection as to this evidence. (Vol. XIII, pp. 415-419) The prosecution thereafter introduced the tape of Appellant's interview with Pasco County Sheriff's deputies through the testimony of Detective Jeffery Bousquet, which formed a major portion of the State's case against Appellant.

It was the State's burden to establish that Appellant's statements were made freely and voluntarily, and that he knowingly and intelligently waived his rights. Lego v. Twomey, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); Roman v. State, 475 So. 2d 1228 (Fla. 1985); Brewer v. State, 386 So. 2d 232 (Fla. 1980); Drake v. State, 441 So. 2d 1079 (Fla. 1983); Reddish v. State, 167 So. 2d 858 (Fla. 1964); Snipes v. State, 651 So. 2d 108 (Fla.

1995); Williams v. State, 441 So. 2d 653 (Fla. 3d DCA 1983); Fillinger v. State, 349 So. 2d 714 (Fla. 2d DCA 1977). The determination as to the voluntariness of a confession must be arrived at by examining the totality of the circumstances that surrounded its making. Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960); Traylor v. State, 596 So. 2d 957 (Fla. 1992); State v. Dixon, 348 So. 2d 333 (Fla. 2d DCA 1977); Roman; Snipes.

In their questioning of Appellant, the sheriff's deputies failed to comply with the dictates of Miranda v. Arizona, 384 U.S. 436 (1966), and the State did not carry its burden of showing that Appellant's confession was given freely, knowingly, and voluntarily.

"Miranda warnings are required whenever the State seeks to introduce against a defendant statements made by the defendant while in custody and under interrogation." Davis v. State, 698 So. 2d 1182, 1188 (Fla. 1997) (emphasis in original). "Although custody encompasses more than simply formal arrest,...there must exist a 'restraint on freedom of movement of the degree associated with a formal arrest.' Roman v. State, 475 So.2d 1228, 1231 (Fla.1985)." Davis, 698 So. 2d at 1188.

It is not altogether clear exactly what the intentions of the deputies were when they brought Appellant to the sheriff's office for questioning. Detective Bousquet indicated that he initially did not intend to arrest Appellant, and did not even consider him

a suspect, but was seeking additional information to use against Johnathan Grimshaw, who was already under arrest for the Boroski homicide. However, at the very least, Bousquet must have suspected that Appellant was guilty of receiving stolen property; he knew that property from Boroski's residence had been recovered from Appellant, as well as from Appellant's girlfriend and from Rodney Bradley with Appellant's assistance. Furthermore, Grimshaw had already told Bousquet that Appellant was the one who killed Boroski, and near the beginning of the taped interview, Bousquet says that he had an indication that both Grimshaw and Appellant were involved, and that "everyone" knew that Appellant was there (although Bousquet characterized this type of questioning as a bluff). (Vol. X, pp. 1427, 1438, 1524-1525) At any rate, "[t]he proper inquiry is not the unarticulated plan of the police, but rather how a reasonable person in the suspect's position would have perceived the situation. [Citation omitted.]" Davis, 698 So. 2d at 1188. Appellant had no experience as an adult with the criminal justice system. It appears that he perceived that he had no choice but to sit there and be interrogated by the deputies. At one point, he asked if he was being arrested, thus indicating that he did not feel he was free to leave. It is also significant that at no time did Detective Bousquet tell Appellant that he could leave if he so desired (although he did give a negative answer to Appellant's inquiry as to whether he was being arrested). See Drake. In Drake, this Court wrote:

> The station-house setting of an interrogation does not automatically transform an

> otherwise noncustodial interrogation into a custodial interrogation. [Citation omitted.] Yet, an interrogation at a station house at the request of the police is inherently more coercive than an interrogation in another less suggestive setting, and it is a factor that should be considered in evaluating the totality of the circumstances of a given case.

441 So. 2d 1081. Certainly, if the station-house setting was coercive to Raymond Drake, who had prior experience with the criminal justice system, how much more coercive it must have been to the 17 year old Appellant, who had never experienced anything like an interrogation into a first degree murder by an experienced homicide detective. Under all the facts and circumstances of this case, it is virtually impossible to believe that this young man would not have felt that he was being detained and was not free to leave. Therefore, Miranda warnings were required from the outset, from the very beginning of the interview with Appellant, but they were not given until Appellant had already incriminated himself by describing his entry into Boroski's residence. When the warnings were finally and belatedly given, Detective Bousquet read them in a very offhand, casual manner, as if they were a mere formality to be gotten through, and did not mean much. Detective Jones further diluted the warnings by indicating that he did not believe reading the warnings would change Appellant's desire to cooperate with them, thus suggesting that the warnings had little importance. It is also significant that the detectives did not, at that time, secure a written waiver of Appellant's rights (they obtained a waiver later, after Appellant had provided many details of the offenses), perhaps because that would have put Appellant more

firmly on notice that he was in serious difficulty, and might need outside assistance before continuing to talk to the police. See Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992) ("where reasonably practical, prudence suggests [waiver of suspect's constitutional rights] should be in writing [footnote omitted]"). After Bousquet read Appellant his rights, and asked if Appellant wished to talk to them, Appellant responded, "I guess that's what I'm here for," which suggests that Appellant felt he had no choice but to talk to the police, despite what he had just heard read to him. Miranda imposed a "heavy burden" upon the State. Breedlove v. State, 364 So. 2d 495, 497 (Fla. 4th DCA 1978).

> Miranda further recognized that after the required warnings are given the accused, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." [Citation omitted.]

Fare v. Michael C., 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197, 212 (1979). That burden was not met here, where the police failed to read Appellant his rights before they began talking to him, failed to communicate those rights in a meaningful way, and then diluted them, and failed to obtain an adequate waiver from the young suspect.

In assessing whether Appellant's statements to the authorities were voluntary, one must be cognizant of his age; he had turned 17 only recently. Because he was a juvenile, the sheriff's deputies were required to notify his parents upon taking him into custody

pursuant to section 39.037(2) of the Florida Statutes. Although Appellant's father was eventually contacted, this did not occur until after Appellant had already incriminated himself. In Doerr v. State, 383 So. 2d 905, 908 (Fla. 1980), this Court held that, while parental notification is not a prerequisite to interrogation, "[l]ack of notification of a child's parents is a factor which the court may consider in determining the voluntariness of any child's confession[.]" "[I]solation from others who might lend moral support or advice" was one of the factors cited in Snipes, 651 So. 2d at 111, which may render a juvenile's confession inadmissible. Not only was Appellant not afforded the opportunity to speak with his parents before he was interrogated, his requests to contact his girlfriend were also rebuffed. Appellant was not "given access to family, friends, or counsel at any point" during the questioning. Sims v. Georgia, 389 U.S. 404, 407, 88 S. Ct. 523, 19 L. Ed. 2d 634 (1967). The Supreme Court emphasized the significance of this isolation at police headquarters in Miranda.

> The "principal psychological factor contributing to a successful interrogation is privacy -- being alone with the person under interrogation." [Footnote omitted.]... "If at all practicable the interrogation should take place in the interrogator's office.... The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior.... Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law. [Footnote omitted.]"

Miranda v. Arizona, 384 U.S. 436, 449-50 (1966) (quoting police manuals). Miranda concluded

> that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. [Footnote omitted.] The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself.

Id. at 384 U.S. 457-58. Appellant here was alone with one, and sometimes two, detectives who were both older than him and larger than him physically, in what appears from the videotape to have been a very small, windowless interrogation room, factors which could only intensify his sense of isolation and helplessness.

Other factors identified by the Snipes court which may bear on the issue of voluntariness include: (1) police conduct and interrogation techniques, (2) the duration and nature of the questioning, (3) whether the interview occurred at a police station in police-controlled areas, (4) that the defendant was not told that he was free to leave during the proceedings regardless of the officer's subjective intent, (5) the vulnerability of a juvenile to the wishes of adult authority figures and the emotional maturity or mental weakness of a child, (6) whether the defendant contacted the police or vice versa. 651 So. 2d at 111. Appellant will address each of these factors as they apply to his case. (1) With regard to the police conduct and interrogation techniques used against Appellant, it is obvious from the videotape that Detective Bousquet not only sat very close to Appellant, perhaps to intimidate him with his bulk, but made excessive physical contact with Appellant. Not only did he place his hand on Appellant's thigh on several

occasions, he also "patted" (Bousquet's term) or slapped the inside of Appellant's leg several times. These "pats" were hard enough that they are audible on the videotape. Any type of physical contact with a suspect by an interrogating officer which might tend to intimidate must not be condoned. It should also be noted that Bousquet "bluffed" Appellant by implying that he had more knowledge of Appellant's involvement than he actually possessed. (2) The duration and nature of the questioning here are not particularly significant, although the interrogation session did last for over two hours. (3) The interview was conducted at a police station (sheriff's office) in police-controlled areas. (4) Bousquet's testimony that Appellant was free to leave notwithstanding, Appellant was not told that he was free to go. (5) As the trial court found in his order sentencing Appellant to death, Appellant is "more immature emotionally, intellectually and behavior-wise than his chronological age..." (Vol. VI, p. 735) He was thus more vulnerable and susceptible to police intimidation and manipulation than the average 17 year old. (6) Appellant did not contact the police himself, but was approached by Detective Blum at this residence, and driven to the station in Blum's police car. The totality of these circumstances leads to only one conclusion: Appellant's confession was not shown to have been voluntary, and should have been suppressed. Because it was not, Appellant must be granted a new trial.

ISSUE II

APPELLANT'S CONSTITUTIONAL RIGHTS TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM AND TO DUE PROCESS OF LAW WERE VIOLATED WHEN THE PROSECUTOR BELOW WAS PERMITTED TO QUESTION DETECTIVE BOUSQUET EXTENSIVELY REGARDING STATEMENTS JOHNATHAN GRIMSHAW MADE TO HIM WHICH INCULPATED APPELLANT.

Both during the guilt phase of Appellant's trial, and more extensively during the penalty phase, the prosecutor below was permitted to elicit extremely damaging testimony from Detective Bousquet regarding what codefendant Johnathan Grimshaw (who did not testify at Appellant's trial) said about Appellant's participation in the instant offenses. For example, during Bousquet's guilt phase testimony, the State was permitted to elicit that Grimshaw claimed it was Appellant's idea to kill Mildred Boroski, and that it was Appellant's idea that law enforcement be led on a wild goose chase away from Boroski's body so that it would decompose, and they would have no evidence. Bousquet's testimony at penalty phase regarding what Grimshaw told him was even more devastating; Grimshaw essentially portrayed Appellant as the leader, and as having done everything to Boroski, while he just stood around. It was Appellant who tied Boroski up and committed the sexual battery, according to Grimshaw via Bousquet. It was Appellant who took the rings off her fingers and other property from Boroski's residence. It was Appellant who put her into the car. It was Appellant's decision to kill Boroski, because she had seen his face and could identify him. It was Appellant who looked back at Grimshaw and

smiled after he fired the first shot into Boroski's head. It was Appellant who disposed of the car. And it was Appellant who wanted to return to Boroski's house to set it on fire so there would be no evidence, but dissuaded by Grimshaw.

Because Grimshaw did not testify, the admission of his out of court statements violated Appellant's constitutional right to confront and cross-examine the witnesses against him, which is guaranteed under the Confrontation Clause of the Sixth Amendment, and applies to the states through the Fourteenth Amendment. See Cruz v. New York, 481 U.S. 186, 189 (1987); Pointer v. Texas, 380 U.S. 400 (1965); U.S. Const. amends. VI and XIV.

In general, the admission of a nontestifying codefendant's confession implicating the defendant in their joint trial violates the Confrontation Clause, even if the jury is instructed not to consider it against the defendant, Bruton v. United States, 391 U.S. 123, 126, 137 (1968), and even if the defendant's own confession is admitted against him. Cruz, at 193. This Court has held that the Bruton rule applies when the defendant and codefendant are tried separately, as in this case. Nelson v. State, 490 So. 2d 32, 34 (1986); Hall v. State, 381 So. 2d 683, 687 (1979).

Confessions by accomplices which incriminate defendants are presumptively unreliable. Lee v. Illinois, 476 U.S. 530, 541 1986). However, a nontestifying codefendant's confession incriminating the defendant may be directly admissible against the defendant, see Cruz, at 193, if it falls within a firmly rooted hearsay exception or if its reliability is supported by a showing

of particularized guarantees of trustworthiness. See Lee, at 543; Ohio v. Roberts, 448 U.S. 56, 66 (1980); Franqui v. State, 22 Fla. L. Weekly S373, S375 (Fla. June 26, 1997). Particularized guarantees of trustworthiness must be drawn from the totality of the circumstances surrounding the making of the statement which render the declarant particularly worthy of belief, and not from the presence of corroborating evidence. Idaho v. Wright, 497 U.S. 805, 819-820 (1990); Franqui, at S375. Therefore, the defendant's confession cannot be considered in determining whether there were sufficient indicia of reliability to admit the codefendant's statement as substantive evidence of the defendant's guilt. Id.

Below, the State did not argue that Grimshaw's out of court statements bore any particular indicia of reliability, or fell within some recognized exception to the Bruton rule, but essentially argued that defense counsel had somehow opened the door to this testimony during his cross-examination of Detective Bousquet. (Vol. XIII, p. 578; Vol. VII, pp. 955-961) However, close scrutiny of the cross-examination of Bousquet fails to reveal any questions asked of him about the substance of Grimshaw's statements, or any other questioning that might have opened the door to the testimony that violated Bruton. At penalty phase, the State also invoked the "rule of completeness," codified in section 90.108 of the Florida Statutes to justify admission of this evidence. (Vol. VII, pp. 955-957) However, this section applies by its terms only to writings or recorded statements that are introduced into evidence. Furthermore, it could not be applicable, as the defense did not introduce

any of Grimshaw's statements into evidence. The trial court appears (correctly) to have rejected the "rule of completeness" argument, but allowed the penalty phase testimony of Bousquet because he was a "live body" subject to cross-examination. (Vol. VII, p. 900) Said the court (Vol. VII, p. 900):

> Then it's relevant, and it's admissible, because you do have an opportunity to cross-examine the defendant [sic],you have a live body. The fact thaat [sic] it was a recorded statement of a co-defendant previously convicted is immaterial. I don't think the rule of completeness says it comes in, it's relevant if you can examine, if there is a live body, which is more than we have, then it's hearsay and it comes in.

The court also commented that they were "way past Bruton." (Vol. VII, p. 961) Obviously, the court did not understand the Bruton rule if he thought that merely having a live body, any live body, to cross-examine was sufficient to vindicate Appellant's rights. The declarant (Johnathan Grimshaw) was not subject to cross-examination; he was the important "live body" in this context. This Court has very specifically held that it is error to admit at penalty phase out of court statements of a nontestifying codefendant which incriminate the defendant; this "violates the due process rights of a defendant who had no opportunity to cross-examine and confront the co-defendant." Gardner v. State, 480 So. 2d 91, 94 (Fla. 1985). See also Engle v. State, 438 So. 2d 803 (Fla. 1983); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). As in Walton v. State, 481 So. 2d 1197 (Fla. 1985), Appellant did not open the door to Grimshaw's confession at the penalty phase of his trial.

The court's error in admitting Grimshaw's statements in violation of Appellant's right to confront and cross-examine the witnesses against him is subject to constitutional harmless error review, which places the burden on the state, as the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the jury's verdict. Chapman v. California, 386 U.S. 18, 23-24 (1965); State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Grimshaw's statements served to rebut Appellant's version of what happened at the Boroski residence and afterward, and to portray Appellant as by far the more blameworthy of the two. This evidence most likely had a considerable impact upon the jury's decision to convict Appellant and to recommend that he die in the electric chair. Furthermore, the trial court relied upon Grimshaw's account in his order sentencing Appellant to death, as for example, in his finding that the killing was committed to avoid or prevent arrest, quoting Grimshaw's statement that Appellant said they had to kill Boroski because she saw Appellant's face. Under these circumstances, the error in admitting Grimshaw's statements through Detective Bousquet cannot be considered harmless.

ISSUE III

THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS NOT PROVEN, AND THE COURT BELOW ERRED IN SUBMITTING THIS FACTOR TO THE JURY FOR ITS CONSIDERATION, AND IN USING IT IN SUPPORT OF APPELLANT'S SENTENCE OF DEATH. FURTHERMORE, THERE IS AN INCONSISTENCY IN THE COURT'S FINDING BOTH CCP AND COMMITTED TO AVOID ARREST.

One of the aggravating circumstances submitted to Appellant's penalty phase jury for its consideration was that the homicide of Mildred Boroski "was committed in a cold and calculated and premeditated manner and without any pretense of moral or legal justification." (Vol. VIII, p. 1304) And the trial court found CCP to exist in his sentencing order, as follows (Vol. Vi, pp. 733-734):

> The murder for which the Defendant was convicted was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The Defendant had a heightened level of premeditation as indicated by numerous factors including, but not limited to, the phone wires being cut prior to the Defendant entering the victim's home, the Defendant wearing gloves, but no masks, prior to entering the home; and, having made careful plans as evidenced by the thought process demonstrated in choosing an elderly victim who lived alone, in a quiet neighborhood with which the defendant was familiar; i.e. the victim was not chosen by accident or coincidence but through a careful prearranged plan to effectuate her death.

In order for CCP to be found, the defendant must have had "a careful plan or prearranged design" to kill. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); Clark v. State, 609 So. 2d 513 (Fla. 1992); Capehart

v. State, 583 So. 2d 1009 (Fla. 1991); Rogers v. State, 511 So. 2d 526 (Fla. 1987). He must have "planned or arranged to commit murder before the crime began. [Citations omitted.]" Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) (emphasis supplied). This aggravator involves a heightened "premeditation beyond that normally sufficient to prove premeditated murder." Perry v. State, 522 So. 2d 817, 820 (Fla. 1988). This Court has "consistently held that application of this aggravating factor requires a finding of ... a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987). See also Dolinsky v. State, 576 So. 2d 271 (Fla. 1991). The circumstance in question ordinarily applies to executions or contract murders. McCray v. State, 416 So. 2d 804 (Fla. 1982); Perry. The evidence presented by the State at Appellant's trial failed to establish that Appellant acted with the requisite state of mind with regard to the killing of Mildred Boroski.

With regard to the lower court's finding that Appellant "had a heightened level of premeditation," because of preparation that preceded the entry into Boroski's home, although there may have been some rudimentary planning for the burglary, this cannot be transferred to the murder itself where there is no evidence that a murder was planned in advance. In cases such as Barwick v. State, 660 So. 2d 685 (Fla. 1995), Perry v. State, 522 So. 2d 817 (Fla. 1988), Hardwick v. State, 461 So. 2d 79 (Fla. 1984) and Gorham v.

State, 454 So. 2d 556 (Fla. 1984), this Court has made it clear that even extensive planning of an offense other than the homicide for which the defendant is being sentenced cannot supply the heightened calculation needed to establish CCP; the prearranged design must have been to kill, not to commit some other crime. Appellant's statement to Detective Bousquet did not indicate that any killing was contemplated ahead of time; indeed, he said that he did not want to kill Boroski. Rather, it seems that the burglary was almost spontaneous. The two young men decided to go into the house and see what they could find, with little thought given as to what they would do once inside or who they might encounter. It is significant that Grimshaw had to run across the street to his house to get scissors with which to cut the screen door, and, even more importantly, the murder weapon was not procured in advance, but was obtained after the two boys entered the residence. Whatever degree of forethought may have gone into the burglary (and there seems to have been little) this does not establish that a murder was planned in advance. Compare the trial court's findings here with Barwick v. State, 660 So. 2d 685 (Fla. 1995). The trial court found that Barwick "'in a calculated manner selected his victim and watched for an opportune time. He planned his crimes, selected a knife, gloves for his hands, and a mask for his face so that he could not be identified.'" 660 So. 2d at 696. This Court rejected the trial court's finding of CCP because, while Barwick may have planned to rape, rob, and burglarize the victim, the evidence did not establish that he had a careful plan or prearranged design to kill

the victim. This Court should make a similar finding here. As for the trial court's notation that Appellant did not wear a mask when he entered the residence (thus suggesting that he did not fear being identified because he planned to kill Boroski), it should be noted that Appellant told Detective Bousquet that Boroski's head was covered the whole time and that she did not see him, and, of course, Boroski was found with a pillowcase over her head. If one does not want to be identified, covering the eyes of the victim is an alternative to wearing a mask. Failure to wear a mask does not necessarily establish an intent to kill. Where, as here, the State relies upon circumstantial evidence to establish CCP, the defense is entitled to any reasonable inference from the evidence which tends to negate it. E.g., Geralds v. State, 601 So. 2d 1157 (Fla. 1992). See also Peavy v. State, 442 So. 2d 2002, 202 (Fla. 1983) (where homicides were occurred during commission of another offense, they were "susceptible to other conclusions than finding [that they were] committed in a cold, calculated, and premeditated manner.")

Because the evidence did not support CCP, this circumstance should not have been submitted to Appellant's jury for its consideration, nor found by the court. Its improper consideration by the jury must result in a new penalty trial pursuant to Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) and Omelus v. State, 584 So. 2d 563 (Fla. 1991).

In addition, the court's finding of CCP seems inconsistent with his finding that Appellant killed Boroski because she saw his face and could identify him, and that the avoid arrest aggravating circumstance was therefor applicable. As in Derrick v. State, 581 So. 2d 31, 37 (Fla. 1991), if the decision to kill was made after Boroski saw Appellant's face, "then it seems unlikely that the facts would support the finding of the heightened premeditation necessary to find the murder was cold, calculated, and premeditated." Because of the inherent tension between the two factors, the court below should have found at most one, but not both.

ISSUE IV

THE TRIAL COURT ERRED IN SENTENCING NATHAN RAMIREZ TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1, 9 (1982). This Court's independent appellate review of death sentences is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger, 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812, 826 (1991). This requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring), that application of the death penalty must be reserved for only the most aggravated and least mitigated of most serious crimes. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). Nathan Ramirez's cause does not qualify for the death penalty under these principles.

One must first consider that an inapplicable aggravating circumstance (CCP) was both submitted to Appellant's jury, thus tainting its penalty recommendation, and found by the trial court, as discussed in Issue III above, and that inadmissible evidence was considered by both the jury and judge at penalty phase, as discussed in Issue II above. These defects in the proceedings below render Appellant's sentence of death so unreliable that it cannot be permitted to stand.

It is also of importance that the aggravating circumstances that do apply all relate to the instant offenses against Mildred Boroski; they say nothing about Appellant's propensity for committing such crimes. The record shows no history of committing violent acts, nor any indications that Appellant would be a danger to anyone in the future. Indeed, the only previous offense on his

record was a non-violent auto burglary for which he was prosecuted as a juvenile.

Obviously, Appellant's age is of great significance when one considers whether or not he deserves to die for the instant offenses. He had just turned 17 about one month before the homicide. In Eddings v. Oklahoma, 455 U.S. 104, 116 S.Ct. 869, 71 L.Ed.2d 1 (1982), the United States Supreme Court held that the chronological age of a minor is itself a relevant mitigating factor of great weight. Subsequently, in Thompson v. Oklahoma, 487 U.S. at 815, 835, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) the Court expressly endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. Because adolescents are more vulnerable, more impulsive, and less self-disciplined than adults, Thompson, 487 U.S. at 834 (citations omitted), they cannot be held to the same level of culpability:

> Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.

Id. (citations omitted).

Juveniles also are less culpable than adults because they have not yet had the opportunity to outgrow the effects of a bad childhood over which they had little control:

> [Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

Id.

Although the United States Supreme Court and this Court have declined to hold the execution of a seventeen-year-old "unusual" in a constitutional sense, see Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989); LeCroy v. State, 533 So. 2d 757 (Fla. 1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3262, 106 L.Ed.2d 607 (1989), imposition of the death penalty on adolescents has been rare, both in absolute and relative terms.

In three and a half centuries, only about 350 (1.8%) of the 19,000 persons executed nationally were juveniles.[12] Only nine of these juvenile executions were imposed during the current era. (1973-1997). These nine recent executions of juvenile offenders are only 3% of the total of about 350 executions nationally through May 1997. V. Streib, The Juvenile Death Penalty in the United States and Worldwide at 8 (1997) (article in Loyola University's Poverty Law Journal).

Juvenile offenders make up only a small proportion of the current death row population. A total of 155 juvenile death sentences were imposed from 1973 through early 1997, only 2.6% of the total of the over 6,000 death sentences imposed for offenders of all ages during this time period. Of these 155 juvenile death sentences, only 58 remain currently in force. As noted above, nine have resulted in execution (all seventeen-year-olds), and 88 have been reversed. Thus, for the ninety-seven juvenile death sentences finally resolved, the reversal rate is 91%. Id. at 6.

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[12]The term "juvenile" or "juvenile offender" in this brief means someone who was under age eighteen at the time of the offense.

The imposition of the death penalty on juveniles in Florida has been even rarer. The State of Florida has executed only twelve juvenile offenders, the last two being in 1954. V. Streib, Death Penalty for Juveniles at 63, 193.

The trial court found Appellant's age to be a mitigating factor, but gave it little weight, even though he recognized that Appellant is "more immature emotionally, intellectually and behavior-wise than his chronological age." (Vol. VI, p. 735) Appellant's youth certainly deserved more consideration than this.

Another significant mitigating factor which the court below gave short shrift was Appellant's history of substance abuse, which came to light only a month or two before the instant homicide. The court lumped Appellant's history of huffing in with other factors relating to mental or emotional distress, then brushed it off because Appellant "was not under the influence of 'huffing' type products or otherwise incompetent on the date of the crime..." (Vol. VI, p. 736) However, it should be noted that an aerosol can was found in the area where Mildred Boroski's car was recovered, thus suggesting that there may have been some huffing going on that night. Furthermore, the court's finding ignores the testimony of Dr. Maher relating to the long-term effects of huffing, specifically, brain damage and changes in personality that can persist for months. Thus, Appellant was indeed under the lingering effects of huffing, even if he had not indulged in the hours immediately preceding the homicide. Moreover, this Court has recognized that a history of substance abuse can itself constitute a mitigating

circumstance, apart from the question of intoxication at the time of the offense. See, for example, Scott v. State, 603 So. 2d 1275 (Fla. 1992) and Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987). The fact that Appellant's mother found 55 aerosol cans in his bedroom closet, and well as additional material for huffing in his car, and Harlan Hauter's testimony that he and Appellant had huffed paint hundreds of times, show very clearly that Appellant had a serious problem with substance abuse that deserved much more consideration than the trial court gave it.

A major factor which the trial court failed to address at all in his sentencing order is the fact that the codefendant, Johnathan Grimshaw, was sentenced to life in prison for his part in the Boroski homicide. (Vol. III, p. 395) In Craig v. State, 510 So. 2d 857, 870 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S. Ct. 732, 98 L. Ed. 2d 680 (1988), this Court wrote:

> the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision.

The trial court failed to take Grimshaw's life sentence into consideration in his sentencing decision, thus skewing the sentencing weighing process. It was particularly vital that Grimshaw's sentence be considered in light of the trial court's finding that the relation between Appellant and Grimshaw "was based more on a parity than any theory of domination; i.e. these individuals fit the classic mold of being 'partners in crime.'"

(Vol. VI, p. 737) In Heath v. State, 648 So. 2d 660, 666 (Fla. 1994), this Court noted that it

> has approved the imposition of the death sentence "when the circumstances indicate that the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime." [Citations omitted.]

Under all the facts and circumstances of this case, it cannot be said that Appellant was "the dominating force behind the homicide" of Mildred Boroski.

Finally, when one considers the entire record, one must conclude that Appellant has great potential for rehabilitation, which is "[u]nquestionably...a significant factor in mitigation. [Citations omitted.]" Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). See also McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Carter v. State, 560 So. 2d 1166 (Fla. 1990); McCray v. State, 582 So. 2d 613 (Fla. 1991). Appellant was a young man pursuing his education in high school, with no significant criminal history, and a supportive family who, for some unknown reason, perhaps under the influence of the wrong companion (Johnathan Grimshaw), became involved in a single very unfortunate episode. He has displayed good behavior while incarcerated and, as Dr. Maher indicated in his testimony, functions better in the structured setting of an institution. The ultimate penalty is not meant for one such as Nathan Ramirez.

Proportionality analysis is not based on the number of aggravating and mitigating factors, but on the quality of the circum-

stances presented. See Fitzpatrick and Livingston v. State, 565 So. 2d 1288 (Fla. 1988). This Court's analysis of Nathan Ramirez's cause must lead it to conclude that the quality of his evidence in mitigation outweighs the case the State presented in aggravation. The death penalty is not warranted for this Appellant and this crime, and it cannot stand without violating the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida. Nathan Ramirez's death sentence must be replaced by one of life imprisonment.

CONCLUSION

Based upon the foregoing facts, arguments and citations of authority, your Appellant, Nathan Ramirez, prays this Honorable Court to reverse his convictions and sentences and remand for a new trial. In the alternative, Appellant asks for vacation of his death sentence and remand for imposition of a life sentence, or, if that is not forthcoming, for a new penalty trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 8th day of January, 1998.

Respectfully submitted,

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