IN THE SUPREME COURT OF FLORIDA

JOSHUA D. NELSON,	:	
Appellant,	:	
vs.	:	Case No. 89,540
STATE OF FLORIDA,	:	
Appellee.	:	
______________________________	:	

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

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Lee County Grand Jury indicted the appellant, Joshua D. Nelson, and his codefendant, Keith M. Brennan, on April 4, 1995, for Count I, first-degree premeditated murder of Thomas Owens on March 10, 1995, Count II, first-degree felony murder of Thomas Owens, and Count III, robbery of Thomas Owens with a deadly weapon. (I, R 1-2)[1]

Nelson was separately tried by jury before Judge William J. Nelson on September 16-19, 1996. (XIV, T 1, 7) The jury found Nelson guilty as charged on each count of the indictment. (VII, R 527; XVIII, T 989-90) The court adjudicated Nelson guilty, merging Counts I and II. (XIII, R 1114; XVIII, T 992-993)

The penalty phase trial was conducted on November 7, 1996. (X, R 694) The jury unanimously recommended the death penalty. (XI, R 930, 935) The court heard additional evidence and argument at a sentencing hearing on November 26, 1996. (XII, R 1017-1047) On November 27, 1996, the court sentenced Nelson to death for the murder and to 189 months in prison for the robbery. (XII, R 1070-85, 1088-94; XIII, R 1114-1119; A 1-7)

[1] References to the record on appeal are designated by a Roman numeral for the volume number, R for the record proper, T for the trial transcript, and SR for the supplemental record. References to the appendix are designated by A.

Defense counsel filed a notice of appeal on December 6, 1996. (XIII, R 1122) The court appointed the public defender to represent Nelson on this appeal. (XIII, R 1134)

STATEMENT OF THE FACTS

A. Pretrial Motions

Defense counsel filed a motion in limine to exclude testimony by Misty Porth and Tina Porth regarding Keith Brennan's admissions or confessions. (II, R 32-33) Defense counsel filed a motion in limine to exclude DNA testimony by Darren Esposito because the prejudicial impact of his testimony outweighed its probative value and his opinion was not based on generally accepted scientific standards. (II, R 73) At a pretrial motion hearing defense counsel suggested deferring the DNA motion until a defense expert rendered an opinion. (IV, R 389-390) The court denied the DNA motion without prejudice. (IV, R 390, 400) The court deferred hearing on the Porth testimony motion so the court could review the Porths' statements and depositions. (IV, R 390-391, 400)

Defense counsel filed a second motion in limine to exclude the testimony of Misty and Tina Porth, asserting that it was constitutionally impermissible to admit a confession by Keith Brennan against Nelson because the defense could not cross-examine Brennan, and that the witnesses could not separate what Nelson said from what Brennan said. (IV, R 403-404) At a pretrial motion hearing the state argued that Brennan's statements were made in Nelson's presence and were admissible as admissions by silence. (VI, R 477-482) The court denied the motion without prejudice. (VI, R 483, 513)

B. Trial Proceedings and Testimony

Defense counsel renewed all pretrial motions at trial. (XIV, T 12; XV, T 309) During opening statements, defense counsel stated that Nelson admitted his involvement in the crime and the issue for the jury was whether it was second-degree murder or first-degree murder. (XV, T 332)

On March 22, 1995, two Cape Coral grounds keepers discovered a decomposed body lying in a field and asked their dispatcher to notify the police. (XV, T 354-360) Lt. William Rivers of the Cape Coral Police responded to the scene on 21st Avenue in Northwest Cape Coral. The workers pointed out the body. He secured the scene until the investigators arrived. (XV, T 362-364)

Karen Cooper, a crime laboratory analyst supervisor for FDLE, went to the scene at the corner of Northwest 21st Avenue and Northwest 1st Street in Cape Coral. (XV, T 365-366) She observed the body lying under some bushes at the edge of a cleared area. (XV, T 367-368) A piece of plywood was lying partly on and next to the body. The body's right shoe had been removed and was missing the lace. The body's wrists were tied behind his back with a black shoe lace similar to the lace on his left shoe. (XV, T 368) The body was clothed in jeans and a sweat shirt which was pulled up around the chest and neck. (XV, T 368-369) There was trauma to the skull and face. (XV, T 369) A few pieces of skull were scattered near the body, probably by animals. (XV, T 370) The

skull pieces were collected and sent with the body to the autopsy. (XV, T 376) Photographs showed the location of the body, the right shoe, the legs with the left shoe on, the plywood laying over the left shoulder, the left jeans pocket pulled out, the right foot, and the shoe lace tying the wrists. (XV, T 371-374) At the autopsy, Cooper received a sample of thigh tissue to be used to identify the victim's blood type. She sent it to the FDLE lab in Tampa. (XV, T 376-378)

Dr. Carol Huber, the acting medical examiner, testified that the autopsy on Thomas Owens was conducted on March 22, 1995, by Dr. Wallace Graves, who had since retired. (XV, T 380-384) Dr. Huber had reviewed the autopsy report, a supplemental report by Dr. William Maples, the medical examiner's initial report when the police reported the death, Dr. Graves' deposition, the death certificate, dental charts, various notes and statements in the file, and autopsy photographs. (XV, T 384-385) The body was in an advanced state of decomposition with partial skeletonization and the absence of internal organs. (XV, T 386) Thomas Owens died as the result of blunt injuries to his head. (XV, T 389) It could not be determined whether there were any neck injuries because all of the flesh from the neck was gone. (XV, T 390)

Lisa Baehne testified that she is a registered dental hygienist employed by Dr. Ralph Burke in New York City. (XVI, T 401) Her duties include exposing, developing, and reading x-rays.

Tommy Owens was her nephew. She was visiting in Florida when Owens became missing in March, 1995. (XVI, T 402) She identified a photograph of her, Owens, and Owens' car taken on Thursday, the day before Owens became missing. (XVI, T 403) Owens visited her in 1992. She took him to her office for dental work and took x-rays of his teeth on July 30, 1992. She identified the original x-rays. (XVI, T 403-405) She identified Owens' dental chart she prepared on July 30, 1992. The chart also showed the dental work performed by Dr. Burke in August, 1992. (XVI, T 406-408) Baehne identified copies of the original x-rays. (XVI, T 410-413) She identified a copy of the dental record. (XVI, T 413-414)

Cape Coral Police Detective Thomas Rall testified that he and Detective Garrett spoke to Owens' parents on the evening of March 22, 1995, after the autopsy. Rall then contacted the dental office in New York to request Owens' dental records. When he received the dental records, he took them to the medical examiner's office. (XVII, T 686-687, 689)

Dr. William Maples, a forensic anthropologist at the University of Florida, received the skull fragments and copies of the dental records and x-rays of Tommy Owens from the medical examiner's office on March 24, 1995. (XV, T 395-396; XVI, T 420-426) The remains of the skull were x-rayed, cleaned, and reconstructed. Maples identified the x-rays of the remains. (XVI, T 426-427) Maples compared the x-rays of the remains with the copies of Owens'

x-rays and dental chart and identified the remains as those of Tommy Owens. (XVI, T 428, 432, 438) Maples identified photos of the reconstructed skull. (XVI, T 432-434) A great deal of the frontal area and facial area was missing. The front teeth were broken off at the level of the bone, indicating a blow from a heavy or fast moving hard implement. Curved compression fracture lines in the frontal bone above the eyes indicated a second blow with a rounded object. (XVI, T 435) Injury to the left side of the skull indicated a third blow with a round weapon. (XVI, T 435-436) Fractures on the right side of the skull indicated a fourth, less forceful blow. (XVI, T 436) There were at least four blows, with the probability of additional blows. (XVI, T 437) Three of the injuries were consistent with a metal baseball bat, and none were inconsistent. (XVI, T 438)

Linda Owens testified that Tommy Owens was her son. He was nineteen when he died. His birth date was August 24, 1975. She lived on Pine Island with her husband Donald, who was Tommy's father, and her daughter Cheryl. She has another son. (XVI, T 440) Her husband had two children from a prior marriage. The family was originally from New York and had been living in Lee County for eleven years. Tommy lived with them until February, 1995, when he temporarily moved to Josh Nelson's home. On March 10, Tommy told her that he would move back home the following day and already had his clothes in the car. (XVI, T 441) While

staying at Nelson's house, Tommy was in daily contact with her. Tommy had gone to the 11th grade in school, received a GED, and was enrolled in college. (XVI, T 442) Tommy had worked for an exterminator, Luria's, Shooters, and a telemarketing firm. (XVI, T 443) Tommy had a 1994 Ford Probe, the car shown in the photo of Tommy with her sister. (XVI, T 444-445)

On Thursday, March 9, 1995, Tommy came home around 3:30. Mrs. Owens' mother and sister were visiting. Tommy went to the dog track with them that evening, and spent the night at the house. (XVI, T 445-446) Tommy left around 7:15 a.m. on Friday to take Keith Brennan to school. (XVI, T 446-447) Tommy came home around 6:00 p.m. on Friday, and was talking on the telephone when Mrs. Owens left the house at 6:30, the last time she saw him. (XVI, T 447) Mrs. Porth called on March 11, said that her girls were missing, and that Tommy took them somewhere. Mrs. Owens tried to contact Tommy through his friends and heard they had gone to Fort Lauderdale. (XVI, T 448) Mrs. Owens tried to call Tommy on the cellular phone he kept in his car, but the only response was from an operator. (XVI, T 448-449) Mrs. Owens reported Tommy missing on March 15. (XVI, T 448) She saw a news report about a body on March 22, 1995, and contacted Detective Garrett of the Cape Coral Police. (XVI, T 449)

Misty Porth from Greentown, Pennsylvania, testified that on March 10, 1995, she had lived on 2nd Avenue in Cape Coral with her

parents, sister, and brother for seven or eight months. She was seventeen, and her sister Tina was fifteen. (XVI, T 452-454) Misty worked at McDonald's on Pine Island Road with Josh Nelson, with whom she had an on and off relationship. (XVI, T 455) Nelson no longer worked at McDonald's on March 10. (XVI, T 457) Misty met Nelson's parents, who were nice to her and appeared to get along with Nelson. She met Keith Brennan and Tommy Owens through Nelson; they were his friends. (XVI, T 456-457) Tina developed an on and off relationship with Brennan. A couple of weeks before March 10, Misty and Tina discussed their problems with their parents with Nelson and Brennan. The girls did not want to move back to Pennsylvania with their parents. They decided to go to Fort Lauderdale with Nelson and Brennan. (XVI, T 458)

On the evening of March 10, Misty and Tina had their mother's car and met with Nelson, Brennan, and Owens in the parking lot of a shopping mall. (XVI, T 459-460) Owens was talking on the phone. Nelson and Brennan were outside Owens' car. Nelson and Brennan told Misty and Tina that if they still wanted to leave with them, to meet them on 2nd Avenue between 1:00 and 1:30. Nelson said he was kicked out of his house that day. (XVI, T 461-463) Misty and Tina went home to pack, then met Nelson and Brennan, who had Owens' car. (XVI, T 464-466) Nelson drove up the interstate. Misty asked where Owens was or what had happened. (XVI, T 466) Nelson and Brennan did not respond. Later they said they had $90. Misty

again asked what happened, and they said just imagine. Defense counsel objected, unless Misty could clarify who said what. The prosecutor responded they were both in the presence. The court overruled the objection. (XVI, T 467)

They stopped at a hotel around 10:00 or 11:00 a.m. Nelson got them a room, and they took showers and slept. Brennan watched TV. (XVI, T 467-468) When Misty woke up, she asked Nelson and Brennan what was going on. The court overruled defense counsel's renewed objection. (XVI, T 469) Misty testified that she kept asking what happened. Nelson asked Brennan if he was going to tell them. Brennan said Nelson beat Owens with a baseball bat, they tied his hands up and slit his throat. They said it happened behind Mariner High School, and they left Owens there. (XVI, T 469-470) Nelson and Brennan told Misty and Tina to clean the blood off their shoes in the sink. (XVI, T 471) They left the hotel between 7:00 and 9:00 p.m. and went to Daytona Beach, where they spent a couple of days riding around and sleeping in the car. (XVI, T 471-472) Then they went to New Jersey, with Nelson driving the car. While they were still in Florida, Owens' phone was ringing, so Brennan threw it out of the car. (XVI, T 472-473)

On Thursday, in Toms River, New Jersey, Misty and Tina called their grandmother who arranged for their uncle to come and get them. When they told Nelson and Brennan, they said this was between us, nobody else was to know. (XVI, T 474) Brennan said he

had brothers. The court overruled defense counsel's objection to what Brennan said. Misty testified that Brennan said he had brothers, if anything happened, somebody would know. (XVI, T 475) Misty and Tina left with their uncle at 9:00 p.m. Thursday and went to their uncle's home in Strasburg. (XVI, T 475-476) On March 24, two investigators came and took statements from Misty and Tina. (XVI, T 476) Nelson did not appear to be under the influence of alcohol or drugs on the evening of March 10, or at any time during the trip. He was quiet for the first couple of days, then he was fine. (XVI, T 477)

A couple of weeks prior to March 10, Tina told Misty that Owens had forced her to engage in oral sex. Misty told Nelson about this the same night. Later, she heard Nelson and Owens arguing about it. (XVI, T 479, 481) Nelson told her that Owens denied it, and Nelson and Owens continued to do things together like normal friends. (XVI, T 481-482) At the hotel, Misty asked if what happened had anything to do with her sister. Nelson and Brennan said probably or maybe. (XVI, T 480-481)

Tina Porth's testimony was generally consistent with Misty Porth's testimony. (XVI, T 487-514) Tina said neither Nelson or Brennan had a car. (XVI, T 490) When Tina and Misty talked to Nelson and Brennan at the shopping mall on the evening of March 10, Nelson and Brennan said they wanted to get a car and leave for Fort Lauderdale that night. (XVI, T 493) Owens said he was not going,

to just pack up and leave. (XVI, T 497) Owens, Brennan, and Nelson appeared to be normal. They did not appear to be under the influence of alcohol or drugs. (XVI, T 498) In the prior discussion about a month earlier, when Tina and Misty said they wanted to leave home, Brennan and Nelson said they were having trouble with their families and wanted to leave, too. Nelson said he had an aunt in Fort Lauderdale who would put them up. (XVI, T 494, 498) Tina and Misty got home around 11:00 p.m. on March 10, then Misty called Owens to talk to Nelson to make sure they were going to pick them up. (XVI, T 496-497)

After Nelson and Brennan picked up Misty and Tina in Owens' car and while they were driving to Daytona, (XVI, T 498-499) Misty asked what happened. The court overruled defense counsel's renewed objection. (XVI, T 500) Tina testified that Misty asked if they beat up Owens or killed him. Nelson told Brennan to answer. Brennan said, "well, we killed him." (XVI, T 500) At the hotel, Tina and Misty asked Nelson what happened while Brennan was taking a shower. (XVI, T 501) Nelson said they had to wait till Brennan got out of the shower. When Brennan got out, Nelson told Brennan that Tina and Misty wanted to know what was going on. They both explained that they asked Owens to drive them to a back road where they had to meet somebody to pick up money. When they got there, they got out of the car to have a cigarette. They asked Owens to get out a few times, but he kept getting back into his car. They

put a scratch in the bumper of the car because they knew that this would get him out. When he got out and leaned down to look at the scratch, they hit him with a baseball bat. Owens ran and said he would make up a story, to just take the car. Nelson said it would not be believed. (XVI, T 502) Nelson chased him and beat him with the bat until he was unconscious. (XVI, T 502-503) Nelson told Brennan to slit his throat, and Brennan did. They tied his hands and feet together and put him behind a bush. They said it took place on a back road near Mariner High School. They said they had to do it or they would be caught. (XVI, T 503) Nelson bragged that he had done more than Brennan, that Brennan had not helped as much as he expected. Tina told the investigators about this conversation in her statement on March 24. (XVI, T 504)

Tina testified that they left Daytona on Monday afternoon and arrived in New Jersey around 3:00 a.m. on Tuesday. (XVI, T 505-506) Nelson and Brennan joked about stealing cars in the past. The court overruled defense counsel's hearsay and relevancy objection. (XVI, T 508)

About two weeks before March 10, Tina and Misty went to Nelson's house. Brennan was not there. Owens offered to let Tina use the phone in his car. (XVI, T 511) Owens drove to a back road and parked on a field. Owens insisted that Tina engage in oral sex or he would leave her there. They argued, then Owens grabbed her and pulled her over until she did what he told her, then he took

her back to Nelson's house. Tina told Misty about this when they got home. Nelson knew about the incident. (XVI, T 512) Nelson did not discuss the incident with Tina, nor did Brennan. She did not report it. (XVI T 513) She had no further problem with Owens. (XVI, T 514)

Tina Fletcher testified that her daughter, Kitty Stevenson, dated Owens. (XVI, 515) On Friday night, March 10, 1995, Owens and Kitty were supposed to have a date, but they had an argument, and Kitty took off. Fletcher called Owens to ask him to help her find Kitty. (XVI, T 515-518) Owens met Fletcher at a Circle K store on Pine Island Road between 10:30 and 11:00 p.m. Nelson and Brennan came to the store. Owens asked them to wait until he finished talking to Fletcher. She left the store around 11:45. (XVI, T 517-520) When she got home she found a message from Owens on her answering machine telling her that Kitty was fine. That was the last time she saw Owens. (XVI, T 520)

Lucien Gaumond testified that he lived at 8918 Santa Barbara Place in Cape Coral. Lake Kennedy was behind his house. On March 11 or 12, he went for a walk and found a piece of clothing with blood on it. (XVI, T 522) When he moved the clothing, he saw an orange box knife. He called the police. Officer Johnson came and picked up the clothing and the knife. (XVI, T 523) A few weeks later, Johnson and another officer came to his house. He gave them a statement and showed them where he saw the clothing and knife.

(XVI, T 523-524) Gaumond identified and described photos of the location. (XVI, T 524-527)

Cape Coral Police Officer Scott Johnson testified that he was on patrol on March 13, 1995, when he responded to a call about suspicious items in the 900 block of Santa Barbara Place West. (XVI, T 528) Johnson found some underwear and a knife in a swale area, put them in a plastic bag, and entered them into evidence at the station. (XVI, T 529) A couple of weeks later, Detective Garrett asked him about this, and they went to the area where the items were found. They spoke to a man Johnson had seen in the driveway the first time. The man pointed to the area where he had seen the items. (XVI, T 530) That area was marked and photographed. Johnson identified the knife, underwear, and photos of them. (XVI, T 531-532)

Cape Coral Police Detective Charles Garrett testified that he was the lead investigator in Owens' death. (XVI, T 534) He worked with Investigator James Fitzpatrick of the State Attorney's Office. Garrett went to the crime scene and the autopsy. (XVI, T 535) He identified and described aerial photos and a diagram of the crime scene area, pointing out the locations of the body, Mike Greenwell's business, the Circle K, the Porth's house, the box cutter knife, the bat which was recovered with Nelson's assistance about 50 yards from where the knife was found, and a car wash. (XVI, T 535-543) He identified and described photos of the locations where

the box cutter, underwear, and bat were found. (XVI, T 543-544) Brennan's house was nearby, on the other side of a canal. (XVI, T 544-545) The underwear and knife were sent to FDLE, which subsequently returned them. (XVI, T 546-547) Garrett identified the bat which was recovered from Lake Kennedy on April 3. It was sent to and returned by FDLE. (XVI, T 548-551, 554) He identified photos of the bat, box cutter, and underwear. (XVI, T 553-555) Nelson said the box cutter and underwear were in the car, but he was not sure what happened to them. (XVI, T 556) Garrett identified the sneakers Nelson was wearing at the time of his arrest on March 25, 1995. Nelson said they were the sneakers he was wearing on March 10. The sneakers were sent to and returned by FDLE. (XVI, T 557-559, 767)

The state proffered testimony by Darren Esposito, an FDLE crime laboratory analyst in the serology and DNA section, to establish his qualifications as an expert. (XVI, T 560-564) Esposito had been with FDLE for four years, completed a one year three month training program by FDLE in serology and DNA analysis, and several workshops and classes in serology and DNA analysis. (XVI, T 562) With regard to PCR methods and DQA-1 testing, he attended a two week program put on by Applied Biosystems, the company that markets the tests. (XVI, T 562-563) He had performed the type of test performed in this case on about 1,000 samples. He had a Bachelor of Science degree in biology and continued course

work in biochemistry and molecular genetics. He attended workshops and programs in the forensic science community. (XVI, T 563) He was a member of the Southern Association of Forensic Scientists. He had been qualified as an expert in serology and DNA analysis by a court in Polk County, Florida. (XVI, T 564) On voir dire examination, defense counsel brought out that in this case, Esposito used the PCR method of DNA analysis and the FBI database for frequencies of occurrence in the population. The FBI database has been generally recognized and accepted in the scientific community. (XVI, T 565-566) However, one of the figures reported by the FBI database was .000, which would give a frequency of 0. He consulted his supervisor, who then consulted a population geneticist, who determined that a value of .03 would be sufficient for that particular frequency. (XVI, T 566) He concluded that the DNA he identified occurs in one out of 17,000 people. (XVI, T 565)

Defense counsel objected to Esposito's failure to use the FBI database which had achieved general acceptance in the scientific community. (XVI, T 566-567) The court ruled that Esposito's qualifications were sufficient, and the failure to use the FBI database went to his credibility. The court allowed the defense to preserve the objection for the record. (XVI, T 567-568)

Esposito repeated his training and experience in testimony before the jury. (XVI, T 569-571) He said the PCR method of DNA analysis is generally accepted in the scientific community, and he

followed the proper PCR test procedures in this case. (XVI, T 571-572) The court overruled defense counsel's renewed objection and ruled that Esposito was an expert. (XVI, T 572) He explained the testing procedure. (XVI, T 572-580) He tested a sample of Owens' thigh tissue to determine his DNA types. (XVI, T 580-583) He tested a stain on the end of the bat, but was not able to obtain any results. (XVI, T 583-585) He tested a blood stain found on Nelson's sneakers and found the DNA types matched Owens. (XVI, T 585-587) He tested blood stains from the underwear and box knife and found the DNA types matched Owens. (XVI, T 587-591) He identified and explained photos of the PCR strips used in the tests. (XVI, T 591-593) Esposito calculated that the probability of finding another Caucasian with the same DNA types as Owens was one in 17,800. (XVI, T 593)

Officer Bernard Snyder of the Lacey Township Police in New Jersey testified that he assisted the Cape Coral Police on the evening of March 23, 1995, by sending another officer to 734 Lake Barnegat Drive in Lanoka Harbor to confirm the location of a white Ford Probe with Florida tags. (XVII, T 599-600) After talking to Det. Garrett, Snyder contacted Investigator Hayes in the county prosecutor's office. Snyder, Hayes, and Investigator Frulio went to the house, which was the residence of James O'Donnell. (XVII, T 600-601) Nelson and Brennan were at the house. Hayes interviewed Nelson, while Frulio interviewed Brennan, to find out how

the car got there, who was with the car, and where the owner was. (XVII, T 602)

Investigator Thomas Hayes testified that he spoke to Snyder around 8:30 or 9:00 p.m. on Thursday, March 23, 1995. He then spoke to Garrett. Hayes, Snyder and Frulio went to the O'Donnell house, where O'Donnell introduced them to Nelson and Brennan. (XVII, T 610-612) Hayes did not advise Nelson of his rights because he was not under arrest and it was not a custodial situation. (XVII, T 613) Nelson said he met with Owens at the Nelson house on Friday, March 10. Owens had been living with him for about a month. Nelson's father had thrown Nelson out. (XVII, T 614-615) They met with Brennan and drove around in Owens' car. They went to a wooded area off Pine Island Road, partied, and waited for RayRay Johnson until one or two in the morning. Johnson never showed up, so they left and rode around in Owens' car with Owens driving. (XVII, T 615) They stayed at 427 Pine Island Road, then met with Owens at Greenwell's Park in the morning. (XVII, T 615-616) They drove to Fort Lauderdale on Saturday afternoon. They parked behind a restaurant and slept until Sunday morning. They drove back to Cape Coral, then went to Fort Myers Beach in the afternoon and stayed until nighttime. They went to a party in Bokeelia. (XVII, T 616) After about an hour, Owens threw the car keys to Nelson and said he was going to talk to a friend. Owens left with the friend and did not return. (XVII, T 617) After

waiting about three hours, Nelson and Brennan left in Owens' car. (XVII, T 617-618) They went to Greenwell's Park, but did not find Owens. They picked up Misty and Tina Porth, then drove north to New Jersey. (XVII, T 618) The Porths called their parents from a highway rest stop in New Jersey, and their parents came to pick them up. (XVII, T 618-619) They went to Lacey Township High School, met with Steve Maloney, and stayed at Maloney's house for two or three days. Nelson had some of Owens' clothes in the basement of the O'Donnell house. They sold Owens' pager. (XVII, T 619)

Hayes testified that O'Donnell and Nelson signed a form giving permission to search and impound Owens' car, which the officers then impounded. (XVII, T 620) Hayes identified photos of the car. They did not find anything unusual in the car. (XVII, T 621) The officers also recovered two shirts and two pairs of jeans that Nelson said belonged to Owens from the basement of the house. The clothes had been washed and folded. (XVII, T 620-622)

Snyder testified that the officers took the car into custody and left Nelson and Brennan at the house. (XVII, T 604-605) The next morning Snyder was informed that Nelson and Brennan left the O'Donnell house during the night. Snyder and another officer found them sleeping on the screened porch of a house at 405 Bayway in Lanoka Harbor, less than a quarter mile from the O'Donnell house. (XVII,T 605-606) Later that day, Garrett called and told Snyder

that the body found in Florida had been identified as Owens and the car was reported as stolen. Garrett also sent a teletype. (XVII, T 606) Snyder made out complaints against Nelson and Brennan for possession of stolen property. (XVII, T 607) On March 25, 1995, Snyder met with Garrett and Fitzpatrick around noon. They went to 405 Bayway and arrested Nelson and Brennan. Snyder advised them of their Miranda rights, and they were transported to the police station. (XVII, T 606-608)

Officer Michael Pannone of the Ocean County, New Jersey, Sheriff's Department processed Owens' car for fingerprints, vacuumed it for hairs and fibers, and collected clothing and other items from the car. (XVII, T 623-624) The car was very clean, inside and out. It was released to Ford Motor Credit. (XVII, T 625) Pannone identified photos of the car. One of the photos showed a scratch on the passenger side of the rear bumper. (XVII, T 624-627)

Investigator James Fitzpatrick of the State Attorney's Office and Detective Garrett testified that they went to Pennsylvania on March 24, 1995, to contact and take statements from the Porths. The next day, they went to New Jersey to arrest Brennan and Nelson. (XVII, T 632-634, 693-694, 767) They interviewed Brennan and Nelson at the police station. (XVII, T 634, 694) Fitzpatrick advised Nelson of his Miranda rights, and Nelson signed a consent form. (XVII, T 634-637, 695) Fitzpatrick said he played portions

of recorded statements by the Porth girls for Nelson and told him that Brennan had given a statement. (XVII, T 638-640, 678-679, 681) Garrett said he played portions of recorded statements by both the Porth girls and Brennan. (XVII, T 695, 757-758, 762-763) Fitzpatrick tape recorded the interview. (XVII, T 637-641) The recording was played for the jury. (XVII, T 642)

Nelson told Fitzpatrick that at first he and Brennan were just playing around when they planned to kill Owens. When they were in the SWFAS rehab program they made plans to run away and do stupid things, but they never happened. (XVII, T 643-644) On Friday, March 10, Nelson had a fight with his parents and got kicked out of his house. Brennan complained about his stepmother and also wanted to leave. (XVII, T 644-645, 647) Nelson got his clothes. They walked to Greenwell's to call Owens. Brennan told his brother the day before to throw out his bag of clothes and a shovel because they were going to bury Owens. Nelson did not think they would really do it. (XVII, T 645) The plan was to kill Owens, take his car, and go to New Jersey. Nelson first said he did not think there was a purpose for killing Owens, then agreed that it was to get his car. (XVII, T 646) They decided they could use the bat Owens kept in the back of his car. As they left Nelson's house, Brennan grabbed a box cutter. (XVII, T 647-648) They did not plan where to do it. (XVII, T 648) Brennan was supposed to get a shovel to bury the body, but he did not get it. (XVII, T 648-649)

The plan to take the girls with them did not come up until about two hours before it happened. (XVII, T 649) Nelson and Brennan agreed that it would happen that night. Brennan said they could tell Owens they had to meet RayRay. (XVII, T 650)

When they were in Owens' car, Brennan told Owens they were going to meet RayRay because he owed money to Brennan, and he would give some of it to Owens. (XVII, T 651) They drove to a remote area off of Pine Island Road. Brennan told Owens where to stop. (XVII, T 652-653) Nelson and Brennan got out to smoke cigarettes. Owens remained in the car. (XVII, T 653) Nelson was holding the baseball bat. Owens saw him take the bat from the car. (XVII, T 654) Brennan got Owens out of the car by cutting his bumper with the box cutter and telling Owens about the cut. (XVII, T 653-656) The plan was for Nelson to hit and knock out Owens, then Brennan was supposed to finish him, because Nelson said he could not kill anyone. (XVII, T 655)

Owens got out of the car and looked at the bumper. Nelson hit him in the back of the head. (XVII, T 656) Owens began screaming and running down the road. (XVII, T 656-657) Nelson ran after him. Owens was bleeding. He ran about 20 feet, then Nelson hit him with the bat again, and he fell down. (XVII, T 657-658) Owens said not to hit him anymore, they could take the car. (XVII, T 658) Nelson hit Owens in the arm. (XVII, T 658-659) Owens was lying there crying. Nelson gave Brennan the box knife and told him

to do his job. Brennan said Owens was not knocked out yet. Nelson told Brennan to tie him up. Brennan removed one of Owens' shoe laces and tied his arms. (XVII, T 659) Brennan removed the shoulder strap from Nelson's bag and tied it around Owens' feet. (XVII, T 659-660) Brennan told Nelson to knock him out. Nelson stepped on Owens' arm, and Owens rolled over. Nelson hit him in the face and knocked him out. (XVII, T 660)

Brennan tried to cut Owens' throat, but it did not start bleeding. Brennan started hacking at his throat with the box cutter, blood came out, and Owens started blowing bubbles. (XVII, T 660, 663-664) Nelson wanted to leave, but Brennan said they had to pull Owens behind the bushes. They used the bat to pull the strap tied to Owens' legs, and drug him behind the bushes. (XVII, T 660-661) They took turns hitting Owens, four or five times each, but he was still alive and gurgling. Brennan removed the strap because he said it would incriminate them. (XVII, T 661-662) Nelson decided to leave. He wrapped a shirt around the bat so they would not get blood in the car and put it in the trunk. Brennan wrapped the box cutter in a pair of underwear and put it in the trunk. (XVII, T 664)

They drove near Brennan's house. Brennan threw the bat in Lake Kennedy next to a new house on Santa Barbara. (XVII, T 664-666, 668) Nelson did not know what happened to the box cutter and underwear, but he thought they must have fallen out when Brennan

disposed of the bat. (XVII, T 666-667) Brennan threw Owens' wallet, driver's license, and credit cards in the garbage at the O'Donnell's house. (XVII, T 667-668) On the way to Daytona, the girls kept asking what was going on. At the motel, Nelson and Brennan told them that "we killed him, that's it." The girls cleaned Nelson's shoes at the motel because there was blood on them. He was wearing the shoes during the interview. (XVII, T 669) On the night of the offense, Nelson threw out the T-shirt and jeans he wearing at a car wash because there was blood on them. (XVII, T 670)

Fitzpatrick examined Owens' car and saw the cut on the rear bumper. (XVII, T 672-673) Fitzpatrick and Garrett left New Jersey, then returned several days later and brought Brennan back to Florida on a separate flight from Nelson. (XVII, T 673, 696) Detectives Rall and Barnes accompanied Nelson on the flight from New Jersey to Fort Myers. Nelson initiated a conversation on the flight and said he wanted to talk to Garrett when they got there. (XVII, T 687-688, 690-692) They arrived in Lee County on April 2. Rall and Barnes told Garrett that Nelson wanted to talk to him. (XVII, T 674, 688, 697) Garrett advised Nelson of his rights. (XVII, T 697, 699-700) Fitzpatrick and Garrett took Nelson to the crime scene and made both a videotape and an audiotape of another statement. (XVII, T 674, 682-684, 697-698, 766-767) Then they went to and videotaped the area where the bat was recovered.

(XVII, T 698) Afterwards, Garrett found that the audio was missing from the first three or four minutes of the videotape, so that portion of the audiotape was played for the jury as well as the videotape. (XVII, T 698-706)

In the recorded statement, Nelson said that they came to the crime scene because he and Brennan were planning to beat up and kill Owens, take his car and money, and leave the state. They decided to do this on Thursday morning. Nelson knew that Owens had $80. (XVII, 707-708, 743, 745) On Friday, March 10, Nelson argued with his parents and got kicked out. Brennan was at Nelson's house. They decided to walk to the Circle K store and call Owens. Owens picked them up. They rode around with Owens for three or four hours, then he dropped them off at Greenwell's while he helped a woman find her daughter. Owens picked them up again around 12:00 or 12:30 that night. (XVII, T 709-11) Brennan made up the plan that they were supposed to meet RayRay to get some money from him and to stay with him. (XVII, T 711-712) Owens drove them to the scene near the intersection of Northwest 21 st Avenue and Northwest 1st Street. Nelson showed the officers where the car stopped and parked around 12:30 to 1:30 a.m. Saturday. (XVII, T 712-715)

Owens was talking to a girl on the phone. Nelson and Brennan got out of the car. (XVII, T 715-716) Nelson took the bat when he got out because he was supposed to hit Owens with it. (XVII, T 717-718) Brennan had taken an orange razor from Nelson's house to

use to cut Owens. (XVII, T 719-720) Brennan cut the back of the car and told Owens the cut was there. Owens got out of the car to look at the cut. (XVII, T 722-723) Nelson hit Owens on the head with the bat. Owens grabbed his head and asked what was going on. Nelson hit him on the arm. Owens ran, and Nelson chased him. (XVII, T 723-724) Nelson hit him on the side of his head with the bat. Owens staggered, fell, and sat down. He was bleeding. (XVII, T 725-726)

Owens told them to take the car, to take anything they wanted. Nelson told him to shut up. (XVII, T 726, 731) Nelson went to get the car, then told Brennan to tie up Owens. Owens was lying on his side. He told them he would make up an excuse that someone beat him up and took his car. Nelson and Brennan said they did not think that would work. (XVII, T 727, 731, 744-745) Nelson removed the strap from his bag. Brennan used it to tie Owens' legs together. Brennan used a shoe lace to tie his hands behind his back. (XVII, T 728-731)

Brennan told Nelson to knock out Owens and he would finish him. Nelson stepped on Owens' arm, Owens rolled over, and Nelson hit him in the face with the bat. Owens was bleeding. Nelson told Brennan he was out and to do what he had to do. Brennan started to cut him, but Owens said he was not knocked out. Nelson hit him again. (XVII, T 732) Brennan tried to cut Owens with the razor, but it was not working, so he began hacking. Blood came from

Owens' throat, and Nelson heard blood bubbles when Owens was breathing. (XVII, T 733-734) They used the bat to pull the strap to drag Owens. (XVII, T 735-736) Nelson hit Owens on the head with the bat three or four more times. (XVII, T 736-738) Then Brennan hit Owens on the head with the bat three to five times, and once on the chest. Owens was still breathing. They drug him further. (XVII, T 738-740) Brennan went through Owens' pockets to make sure he did not have any identification. (XVII, T 746) Nelson said he wanted to leave, but Brennan said they had to cover up Owens. Nelson grabbed a plywood board and threw it over him to hide the body. (XVII, T 740-742)

The videotape resumed at the intersection of Santa Barbara Place and Southwest 10th Terrace. Nelson showed the officers where he stopped Owens' car because Brennan said he knew where he could get rid of the bat. Brennan took the bat, walked over, and put it in the lake. Brennan lived nearby. (XVII, T 748-752) Before going to the lake, they stopped at a car wash where they removed their jeans and put them in the trash can. (XVII, T 749, 751) They looked for the underwear and knife at the car wash, but did not find them. (XVII, T 752-753) After disposing of the bat, they went to pick up the girls. (XVII, T 752)

Joshua Nelson testified that he was born in Kokomo, Indiana, on January 16, 1977. (XVIII, T 795) In March, 1995, he was eighteen years old. (XVIII, T 837) His parents were alcoholics.

His father beat his mother. (XVIII, T 795) His mother sometimes kicked his father out, then let him return. His father left them when Nelson was 13. His mother had a number of boyfriends. Some of them beat Nelson, including his stepfather. (XVIII, T 796) Nelson stayed with his aunts on weekends, Christmas, and his birthday. (XVIII, 796-797) When his aunts gave him money, he gave it to his mother. Also, his mother gave him food stamps to buy candy which he sold to other children at school. His mother used the money to buy cigarettes. (XVIII, T 797-798) Nelson had attended several different schools and dropped out in the eleventh grade. (XVIII, T 798, 837-838) He saw a psychiatrist when he was nine or ten because of a sexual incident with a younger girl. (XVIII, T 798) While Nelson was in jail, he was given Thorazine because he was hearing voices and Zoloft, an antidepressant. (XVIII, T 798-799)

Nelson moved to Florida in 1990 with his mother and stepfather, Greg Percifield. He thought they moved because Percifield stole money from a motorcycle gang. (XVIII, T 799) Percifield began beating Nelson. When the beatings slowed down, Percifield began molesting Nelson by performing oral sex on him two or three times a week. If Nelson refused, Percifield used his mother against him, refused to buy things he needed, or hit him. This continued for two or three years. (XVIII, T 800-801) As a juvenile, Nelson was convicted of stealing cars seven times and

burglary two times. He stole cars twenty to forty times. Someone showed him how to steal Chrysler products when he was fifteen. (XVIII, T 801, 836) Nelson began using drugs when he moved to Florida. He used marijuana, ruffies, alcohol, ecstasy, acid, and mushrooms. He also huffed gas. (XVIII, T 802) He was sent to Southwest Florida Addiction Services (SWFAS) for help with his drug addiction. He was there for six months, then ran away when a staff member slapped him. He was sent back for nine more months. He met and became friends with Brennan while he was there. (XVIII, T 802-803, 831, 834-835)

After moving to Florida, Nelson stayed away from home on weekdays, weekends, and while in school. (XVIII, T 803-804) Sometimes he stayed with his friend Chuck Smith and his mother Donna Walker. He worked at Kash-n-Karry, McDonald's, and doing landscaping, but was not working on March 10. He met Misty Porth at McDonald's, and dated her off and on. (XVIII, T 804, 838-839) One night they were watching TV when Owens took Tina to use the phone. When they returned, Tina was crying. Tina talked to Misty, then they told Nelson that Owens forced Tina to perform oral sex. This made Nelson very mad. (XVII, T 805-806) In March, Owens was living with Nelson because he did not have a good home life. When he moved in he brought clothes, a television and VCR, and some pornographic videos. Percifield also watched videos. (XVIII, T 806)

Nelson, Brennan, Owens, and the Porths talked about leaving town because they were not happy at home. Owens said he had an aunt with a house in Fort Lauderdale. They hoped they could stay there. They were going to use Misty's car, but the engine blew up. (XVIII, T 807) Nelson thought about stealing a car. (XVIII, T 807-808) Nelson and Brennan talked to Owens about going in Owens' car. (XVIII, T 808) Nelson did not think the plan to kill Owens was a real plan. They talked about it the way they talked about doing illegal things while in SWFAS. Nelson thought it was a fantasy or a joke until it happened. (XVIII, T 808, 810-811, 830-832, 842-843) Nelson was not under the influence of alcohol or drugs on March 10. (XVIII, T 839) He did not bring any weapons, although his stepfather had several firearms, including three pistols, which he did not keep locked away. (XVIII, T 808-809, 831) Owens carried the bat once in awhile, but Nelson did not know it would be in the car that night. (XVIII, T 812, 833) Brennan did not tell Nelson about telling his brother the day before to throw out his bag with clothes and a shovel to bury Owens until after it was all over. (XVIII, T 833-834)

On the morning of March 10, Percifield approached Nelson about sex, but Nelson told him it was not going to happen anymore. Nelson had told his mother about the sexual abuse once before. She said she told Percifield to stop or she would kill him. They went to the Circle K to talk to Nelson's mother. She got mad, told

Nelson to give her his house key, and kicked him out. (XVIII, T 809-810) Nelson met with Brennan that morning when Brennan skipped school. They did not talk about killing Owens that day. (XVIII, T 811) Brennan brought up the part about getting money from RayRay and letting Owens have some of it when they were in the car. (XVIII, T 811, 828, 846) When Nelson hit Owens with the bat, he was thinking about how much he hated Percifield. All he could see was Percifield's face, and that was what he was swinging at. Nelson felt Percifield and Owens were so much alike because of the movies, the sexual acts, and the way they used weaker people. (XVIII, T 811, 827, 845) Nelson was sorry about what he did and wished it had never happened. (XVIII, T 811-812)

Afterwards, Nelson took the car and drove north to New Jersey. He was the only one who knew how to drive. (XVIII, T 812, 845-846) He had driven Owens' car once before. (XVIII, T 812-813, 828-829) Owens had given him a key to the car while they were living together. (XVIII, T 813) Nelson did not want to talk to the Porths about the crime, but they kept asking. He told Brennan he could tell them if he wanted to. (XVIII, T 813-814) The Porths' testimony was truthful. (XVIII, T 820) Brennan threw out Owens' phone on the way to New Jersey. (XVIII, T 846) Brennan sold Owens' pager to a friend in New Jersey. (XVIII, T 845) Nelson was staying at the O'Donnell house in New Jersey when he first talked to the police and they took the car away. Brennan's brother said

he had to get them away from the house because they were all over the news. He took them to the house with the porch where they were arrested. (XVIII, T 814-815, 829-830) Nelson gave his key to Owens' car to Brennan, who hid it in a ceiling panel on the porch. (XVIII, T 815)

Nelson admitted that he lied to Investigator Hayes on March 23. (XVIII, T 824) Nelson said he was trying to help Investigator Fitzpatrick and Detective Garrett. (XVIII, T 818, 820-821, 826, 843) The statement on March 25 was the truth, but he was confused about part of it. (XVIII, T 822, 824, 826) He said he cried during the first part of the statement, but the officers did not record that. (XVIII, T 840) He told them what they wanted to hear. (XVIII, T 826, 841-842) Nelson's mother told him that he would lose his family if he testified. (XVIII, T 820)

C. Penalty Phase Proceedings and Testimony

Defense counsel objected to the standard jury instruction on the heinous, atrocious, or cruel (HAC) aggravating circumstance as unconstitutionally vague and submitted a written requested instruction which changed the wording of the last paragraph of the instruction. (IX, R 684; X, R 697-698) The court denied the request. (X, R 699-700)

Susan Meier testified that she had known Tommy Owens since he was 11 or 12. He was a close friend of her son, came over to play,

and went places with them. He was always smiling, laughing, and happy. He did not fight or argue with anybody. She trusted him. He worked with her son washing dishes at a restaurant. He also worked at a grocery store, in pest control, and cleaning carpets. (X, R 764-766)

Tina Fletcher testified that Owens played basketball with her son and dated her daughter Kitty. He was very polite. He was friendly towards the senior citizens who lived in the same park as Fletcher and their grandchildren. Fletcher trusted him. He was very likable and wanted to get along with everybody. He helped her find her daughter when she went astray. He wanted to be an officer to work with kids. (X, R 767-769)

Kitty Stevenson, Fletcher's 17 year old daughter, testified that Owens was her best friend and her boyfriend. He comforted her when her grandfather died. She could rely on him to be there when she needed him. He was always polite. She never had any problems with him while they were dating. He would have been a great role model for children as a police officer. (X, R 770-772)

Linda Owens testified that her son was an exceptional young man who always had a smile and a kind word to say. People told her she should be proud of him. He was attending college and wanted to be a police officer. He never had a fist fight. He tried to talk out problems. He helped people. He loved animals. He was her

only chance to have grandchildren. He promised to take care of his autistic sister. (X, R 772-776)

Dr. Sidney Merin, a clinical psychologist and neuropsychologist, examined Joshua Nelson on October 23 and 27, 1996. He obtained Nelson's version of the offense, his background, family history, education, medical history, and use of drugs and alcohol. (X, R 776-780, 794-795, 800) He administered psychological tests concerning Nelson's personality, emotions, thought processes, and the condition of his brain. (X, R 781, 795-796) The tests indicated that Nelson's brain was in good order and not defective. (X, R 782, 801) Dr. Merin found four mitigating circumstances. (X, R 782) First, although Nelson was 19 years old, he had the emotional maturity of a 12 to 13 year old. (X, R 783) Second, he was a bright young man with average intelligence, with an IQ between 100 and 110. (X, R 783-784)

Third, Nelson came from a markedly dysfunctional family. (X, R 784, 806) He never had the opportunity to learn proper rules, how to process information, deal with discipline, and handle problems. He got into trouble at age 8 for molesting a 3 or 4 year old girl, and was arrested at age 11 for breaking into a theater. (X, R 785, 798-799, 806) His family behaved as gypsies. (X, R 785) His father had bizarre concepts of life, lived in box or a tent, withdrew from society, and had a family history of schizophrenia. (X, R 785-786, 802, 804) It was likely that Nelson had

latent genes of a mental disorder which emerged while he was under heightened stress and while he was incarcerated. He had auditory hallucinations which went away with medication. (X, R 784, 786, 802, 804, 806-807) He never learned order, organization, structure, or responsibility. (X, R 786) His father was an alcoholic who abused his mother. (X, R 787, 803) His mother hit his father with a frying pan. (X, R 803) His stepfather abused him sexually. (X, R 787-788) Because Nelson was neglected as a child, he gravitated towards law breakers, drug users, and alcohol users. He got in trouble with the law for burglaries and stealing cars and waived a gun at an officer in one incident. (X, R 789, 799) He used alcohol and drugs at an early age and spent 15 months in the SWFAS treatment center. (X, R 789-790, 799-800)

The fourth mitigator was that Nelson could be rehabilitated in a structured environment. (X, R 791) Also, he was under the domination of Brennan in the commission of the offense. (X, R 791-792) Finally, Nelson was very angry on the day of the offense because his mother told him to leave home after he resisted his stepfather's sexual advance. (X, R 792-793) However, at the time of the offense, Nelson did not suffer from any extreme mental or emotional disturbance. (X, R 807)

Nelson's father, James Allan Nelson, testified that he was unemployed, lived in a tent in Orlando, and received SSI. (X, R 808-809, 814) He was an alcoholic and used drugs. (X, R 809-810,

812) He was married to Joshua's mother Peggy and lived with his son from 1977 to 1981. (X, R 809-810) They put liquor in Joshua's water when he was a baby and had colic. (X, R 810) Once, Nelson came home drunk, and Peggy beat him with a frying pan. (X, R 811) He never took Joshua to a library or fishing, and never read to him at bedtime. (X, R 811-812) After Nelson left, he saw Joshua only once in awhile. (X, R 811, 813-814)

Heather Timm testified that Joshua Nelson was her half-brother. They had the same mother. Her father obtained custody of her when she was seven and Joshua was two. (X, R 814-815) When she lived with her mother, there was alcoholism and abuse. She visited Joshua after she left. (X, T 816) Her mother did not take care of him. He wore the same clothes for days at a time. There was no schedule for bedtime or meals. (X, R 817) She had not seen Joshua since he had been in Florida. (X, R 819)

Nelson's aunt, Patricia Bennett, testified that her brother Allan was his father and was an alcoholic and drug addict. (X, R 821-823) There was a history of mental illness in her family, involving her grandfather, her mother, her brother, and her uncle. (X, R 823) Allan and Peggy sometimes left Joshua at home alone while Peggy was working at night. They did not provide for his basic needs like school clothes and supplies. (X, R 823-824) Bennett was present when Allan came home drunk, and Peggy beat him with a skillet. (X, R 824-825, 827) Allan divorced Peggy in 1986

and did not have any contact with Joshua after they moved to Florida. (X, R 827) Bennett had no contact with Joshua since he came to Florida in 1991. (X, R 828) In Indiana, Joshua was intelligent, behaved, and knew how to follow rules. (X, R 829) Peggy called her during Joshua's trial and asked her not to come because nothing would help Joshua and there would be accusations of sexual abuse. (X, R 825-826)

Tammy Long testified that Joshua was her nephew, her brother was his father. (X, R 830-831) Peggy begged her not to come because Joshua did not have a chance, and Peggy and Greg would be lucky not to have charges brought against them. (X, R 830-832) There was a history of mental illness in Long's family involving her mother and grandfather. (X, R 833) Her brother was an alcoholic, used drugs, and is schizophrenic. (X, R 834, 840) Peggy quit a good job with no regard for Joshua's needs. He was not their priority. (X, R 834) Long's family provided most of Joshua's clothes. (X, R 835) When Long gave Joshua money, he was happy because his mother could use it for cigarettes or gas. (X, R 835-836) Joshua loved his mother and felt responsible for her. (X, R 837) Long had not seen Joshua since he left Indiana in 1991 when he was 14. At that time he was loving, sweet, intelligent, well-behaved, and appreciative. (X, R 841-843)

Reba Oular testified that Joshua was her nephew, his mother was married to her brother. (X, R 843-844) Peggy chose not to

care for Joshua. She did not appear to feed him and never bought him clothes. Oular's mother bought diapers and formula for Joshua even when Peggy had a good job. Joshua loved his mother and was protective of her. (X, R 845) Oular felt Joshua did not have a chance because of his parents. (X, R 845-848) Joshua could contribute to society because he is intelligent and his experiences could help someone else. (X, R 846) Oular did not have much contact with Joshua after 1991. She came to Florida and took him to Disney World a month before the crime. He "ditched" her, and she feared he might have stolen her car. (X, R 847) When he left Indiana, Joshua was intelligent and well-behaved. (X, R 848)

Donna Walker testified that Nelson was her son's friend while they were in high school. (X, R 849) Nelson and Owens were at her house all the time working on cars with her son. She met Brennan and did not like him. (X, R 850, 853) Once the boys had some problems while out on a boat at night, and the Coast Guard was looking for them. Peggy came to Walker's house, but appeared not to be concerned. (X, R 850-851) Walker had Nelson over for Christmas. She took him, Owens, Owens' girlfriend, and her son to dinner for Nelson's birthday. (X, R 851-852) Nelson was a good boy. He was polite and showed concern for her grandson when he cried. The boys got along well together until Brennan got involved. (X, R 852) Nelson complied with her rules and was courteous and well-behaved. He worked at McDonald's and sometimes

mowed Walker's lawn. She sometimes gave him money and bought some school clothes for him. (X, R 854)

In closing, the prosecutor argued that the jury should apply the robbery aggravating circumstance. (X, R 868, 879-881; XI, R 902) He argued the jury should apply the CCP aggravating circumstance and played four minutes of excerpts from Nelson's recorded statements to support his argument. (X, R 868-870, 881-888; XI, R 902) He argued the jury should apply the HAC aggravating circumstance and played six to seven minutes of excerpts from Nelson's recorded statements to support his argument. (X, R 870-871, 888-889; XI, R 893-902) Defense counsel argued that HAC did not apply because Nelson did not intend to inflict pain or to be cruel. (XI, 905-906) He argued that CCP did not apply because there was a pretense of moral or legal justification due to sexual abuse by Nelson's stepfather, abandonment by his mother, and the rape of the Porth girl. (XI, R 908, 915) He also raised alcohol and drug abuse as a mitigating factor. (XI, R 906, 911)

The court instructed the jury on three aggravating circumstances: crime committed while engaged in the commission of a robbery, HAC, and CCP. (XI, R 919-920) The court instructed the jury on six mitigating circumstances: extreme mental or emotional disturbance, minor participation in offense committed by another, extreme duress or substantial domination of another, impaired

capacity, age, and background. (XI, R 921-922) Defense counsel renewed his prior objections to the instructions. (XI, R 924)

At the sentencing hearing before the court, the state presented testimony by Sergeant Thomas Ellegood, a sheriff's deputy who worked in the Lee County Jail. On October 1, 1996, Ellegood observed that Nelson had a fresh tattoo on his arm which stated, "natural born killer." (XII, R 1019-1026) Defense counsel filed letters to the court from Tammy Long, Patricia Bennett, Heather Timm, Timm's father Jerry Stewart, and Reba Oular concerning Nelson's background and the sentence to be imposed. (XII, R 1027, 1051-1067) The court considered sentencing memoranda submitted by both parties. (XII, R 1028)

Defense counsel's memorandum argued that the HAC aggravating factor did not apply because Nelson intended to knock Owens unconscious to avoid the infliction of pain and conscious suffering. (XI, R 1002-1003) The memorandum also argued that the CCP aggravating factor did not apply because there was a pretense of moral or legal justification because of Nelson's emotional suffering, sexual abuse by his stepfather, and the incident involving the Porth girl. (XVI, R 1004) The memorandum urged the court to consider five statutory mitigating factors and fifteen nonstatutory mitigating factors. (XI, R 1005-1014)

At the sentencing hearing, the court stated that it had received a presentence investigation report. (XVII, R 1072; SR 1-

8) In sentencing Nelson to death, the court found three aggravating circumstances: crime committed during the commission of a robbery, HAC, and CCP. (XII, R 1074-1078, 1088-1090; A 1-3) The court rejected four of the statutory mitigating circumstances relied upon by the defense because they were not supported by the facts: extreme mental or emotional disturbance, defendant was an accomplice whose participation was relatively minor, extreme duress or substantial domination of another person, and impaired capacity. (XII, R 1078-1081, 1090-1092; A 3-5) The court found and weighed the statutory mitigating circumstance of Nelson's age of 18 at the time of the offense (great weight). (XII, R 1081, 1092; A 5) The court considered and weighed all fifteen nonstatutory mitigating circumstances proposed by the defense, including: (1) Nelson's voluntary confessions (substantial weight); (2-3) that death was caused by the codefendant (little weight); (4-10, 12) Nelson's dysfunctional family background with an alcoholic father, parental abuse and neglect, sexual abuse by stepfather, and family history of mental illness (moderate weight); (11) prior criminal offenses did not rise to level of violence in this case (some weight); (13) Nelson's offer to plead guilty for a life sentence (some weight); (14) potential for rehabilitation (some weight); and (15) proportionality (moderate weight). (XII, R 1081-1085, 1092-1094; A 5-7)

SUMMARY OF THE ARGUMENT

I. Before admitting the state's DNA evidence, the trial court was required to determine whether the evidence would assist the jury, whether the testing and calculation methods used by the state's expert were generally accepted in the scientific community, and whether the state's expert was qualified. The state's proffer of the expert's qualifications was inadequate because it failed to establish that he had sufficient knowledge of the database used in his calculations and it ignored the state's burden to establish that his testing and calculation methods were generally accepted. The trial court erred as a matter of law in admitting the expert's testimony because the court failed to determine whether the evidence would assist the jury and whether the testing and calculating methods were generally accepted. While the expert claimed that the PCR testing method he used was generally accepted, no factual basis was presented to establish this claim. The expert did not explain his calculation methods, so there was no factual basis to determine whether the methods were generally accepted. Also, the court erred by finding that the state's expert was qualified because he used a figure in his calculations for which he had no knowledge of the database. The court's error in admitting the DNA evidence was not harmless and requires reversal and remand for a new trial.

II. Defense counsel moved to exclude testimony by Misty and Tina Porth regarding out of court statements by Brennan because the defense could not cross-examine Brennan and because the Porth sisters could not separate what Nelson said from what Brennan said. The state asserted that the statements were admissible as admissions by silence because they were made in Nelson's presence. The court denied defense counsel's motion and overruled his objections to the testimony at trial. The court erred in admitting the statements because the state did not show, and the court did not determine, whether the statements satisfied the requirements of the Confrontation Clause for admission despite the absence of an opportunity for cross-examination. It was not established that the statements were made under circumstances that satisfied the criteria for admission under the statutory hearsay exception for adoptive admissions, that the adoptive admissions exception is a firmly rooted hearsay exception, nor that there were particularized guarantees of trustworthiness. The court's error in admitting the statements was not harmless because the statements corroborated Nelson's confessions, so the convictions must be reversed and the case remanded for a new trial.

III. Under the Eighth Amendment the sentencer in a capital case must consider and weigh mitigating evidence offered by the defense. Defense counsel presented evidence that Nelson had a history of alcohol and drug abuse, which has been recognized as a

nonstatutory mitigating circumstance. The trial court failed to consider this evidence except in relation to the statutory circumstance of duress or substantial domination by another person to which the evidence did not apply. The court's failure to find and weigh the nonstatutory mitigating circumstance violated the Eighth Amendment.

IV. The cold, calculated, and premeditated aggravating circumstance did not apply because the evidence showed a pretense of justification arising from Nelson's emotional suffering, sexual abuse by his stepfather, abandonment by his mother, and the sexual battery of Tina Porth by Owens. This evidence of a pretense of justification negated the otherwise cold and calculated nature of the offense. Also, while Nelson admitted that he and Brennan planned to kill Owens to take his car and money and leave the state, Nelson explained that he thought the plan was only a fantasy or joke until it actually happened. The trial court violated the Eighth Amendment by weighing the CCP factor when it was not proved beyond a reasonable doubt.

V. The heinous, atrocious, or cruel aggravating circumstance did not apply because the evidence showed that Nelson intended to knock Owens unconscious to avoid the infliction of unnecessary pain and suffering, and Nelson did not intend to be cruel. This court has ruled that the evidence must show the defendant intended to inflict unnecessary and prolonged suffering to support the HAC

factor. The trial court violated the Eighth Amendment by weighing the HAC factor when it was not proved beyond a reasonable doubt.

VI. The trial court violated the Eighth Amendment by giving a vague jury instruction on the heinous, atrocious, or cruel aggravating circumstance. Defense counsel objected to the vagueness of the instruction and offered a substitute instruction. The standard instruction is defective because it defines the HAC factor in terms that have been held unconstitutionally vague. It is also defective because it fails to inform the jury of the requirement that the defendant must have intended to cause unnecessary and prolonged suffering.

VII. The death sentence is disproportionate under the circumstances of this case because it is not among the most aggravated and least mitigated of murder cases. The only valid aggravating circumstance was murder committed during the course of a robbery. The aggravating factors are outweighed by substantial mitigation, including: Nelson's age of 18, with the emotional maturity of a 12 to 13 year old; his confessions; a dysfunctional family background marked by an alcoholic father, parental abuse and neglect, sexual abuse by his stepfather, and a family history of mental illness; his offer to plead guilty for a life sentence; the absence of violence in his prior record; and a history of alcohol and drug abuse.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY FAILING TO PROPERLY DETERMINE THE ADMISSIBILITY OF TESTIMONY BY THE STATE'S DNA EXPERT.

This Court addressed the admissibility of expert opinion testimony concerning a new or novel scientific principle in Ramirez v. State, 651 So. 2d 1164 (Fla. 1995), holding that it requires a four-step process:

> First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. § 90.702, Fla. Stat. (1993) . . . . Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). . . . The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. § 90.702, Fla. Stat. (1993). All three of these initial steps are to be made by the trial judge alone. . . . Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.

Id., at 1167. This Court further held,

> [T]he burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the

> testing procedures used to apply that principle to the facts of the case at hand. The trial judge has the sole responsibility to determine this question.

Id., at 1168.

This Court first addressed the admissibility of deoxyribonucleic acid (DNA) test results in Hayes v. State, 660 So. 2d 257 (Fla. 1995), ruling that it must be determined under the four-step inquiry provided by Ramirez. Id., at 262. This Court took judicial notice that

> DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the Frye test to protect against false readings and contamination.

Id., at 264-265.

In Brim v. State, 695 So. 2d 268 (Fla.1997), this Court determined that the DNA testing process consists of two steps. The first step relies on principles of molecular biology and chemistry to determine that two DNA samples match, while a second statistical step is needed to give significance to the match. Id., at 269. The second step relies on principles of statistics and population genetics, and the calculation techniques used in determining and reporting DNA population frequencies must also satisfy the Frye test. Id., at 270-271; Murray v. State, 692 So. 2d 157, 161 (Fla. 1997). Also, in Murray, at 164, this Court ruled that the expert must, at the very least, demonstrate sufficient knowledge of the

database upon which his calculations were based to be qualified to report population frequency statistics. The trial court's decision to admit DNA test results and DNA population frequency statistics is subject to de novo review on appeal. Brim, at 274; Murray, at 164.

In this case, defense counsel filed a motion in limine to exclude DNA testimony by Darren Esposito because the prejudicial impact of his testimony outweighed its probative value and his opinion was not based on generally accepted scientific standards, citing Frye. (II, R 73) At a pretrial motion hearing defense counsel suggested deferring this motion until a defense expert rendered an opinion. (IV, R 389-390) The court denied the motion without prejudice. (IV, R 390, 400) Defense counsel renewed all pretrial motions at trial. (XIV, T 12; XV, T 309)

The state proffered testimony by Darren Esposito, an FDLE crime laboratory analyst in the serology and DNA section, to establish his qualifications as an expert. (XVI, T 560-564) Esposito had been with FDLE for four years, completed a one year three month training program by FDLE in serology and DNA analysis, and several workshops and classes in serology and DNA analysis. (XVI, T 562) With regard to PCR methods and DQA-1 testing, he attended a two week program put on by Applied Biosystems, the company that markets the tests. (XVI, T 562-563) He had performed the type of test used in this case on about 1,000 samples. He had

a Bachelor of Science degree in biology and continued course work in biochemistry and molecular genetics. He attended workshops and programs in the forensic science community. (XVI, T 563) He was a member of the Southern Association of Forensic Scientists. He had been qualified as an expert in serology and DNA analysis by a court in Polk County, Florida. (XVI, T 564)

On voir dire examination, defense counsel brought out that Esposito used the PCR method of DNA analysis and the FBI database for frequencies of occurrence in the population. Esposito said the FBI database has been generally recognized and accepted in the scientific community. (XVI, T 565-566) However, one of the figures reported by the FBI database was .000, which would give a frequency of 0. He consulted his supervisor, who then consulted a population geneticist, who determined that a value of .03 would be sufficient for that particular frequency. (XVI, T 566) Esposito concluded that the DNA he identified occurs in one out of 17,000 people. (XVI, T 565)

Defense counsel objected to Esposito's failure to use the FBI database which had achieved general acceptance in the scientific community. (XVI, T 566-567) The court ruled that Esposito's qualifications were sufficient, and the failure to use the FBI database went to his credibility. The court allowed the defense to preserve the objection for the record. (XVI, T 567-568)

Esposito repeated his training and experience in testimony before the jury. (XVI, T 569-571) He said the PCR method of DNA analysis is generally accepted in the scientific community, and he followed the proper PCR test procedures in this case. (XVI, T 571-572) The court overruled defense counsel's renewed objection and ruled that Esposito was an expert. (XVI, T 572) He explained the testing procedure. (XVI, T 572-580) He tested a sample of Owens' thigh tissue to determine his DNA types. (XVI, T 580-583) He tested a stain on the end of the bat, but was not able to obtain any results. (XVI, T 583-585) He tested a blood stain found on Nelson's sneakers and found the DNA types matched Owens. (XVI, T 585-587) He tested blood stains from the underwear and box knife and found the DNA types matched Owens. (XVI, T 587-591) He identified and explained photos of the PCR strips used in the tests. (XVI, T 591-593) Esposito calculated that the probability of finding another Caucasian with the same DNA types as Owens was one in 17,800. (XVI, T 593)

The state's proffer addressed only the third step in the process mandated by <u>Hayes</u>, 660 So.2d at 262, and <u>Ramirez</u>, 651 So. 2d at 1167, Esposito's qualifications as an expert. The proffer was inadequate to establish Esposito's qualifications to report population frequency statistics because it did not demonstrate that he had sufficient knowledge of the database upon which his calculations were based. <u>Murray</u>, 692 So. 2d at 164. The state's

proffer ignored the state's burden to prove the general acceptance of both the DNA testing procedures used by Esposito and his calculation of population frequency statistics. Murray, at 163; Ramirez, at 1168.

The court erred as a matter of law in admitting Esposito's testimony based on the state's inadequate proffer because the court failed to determine first, that the testimony would assist the jury in determining a fact in issue, and second, that the testimony was based on scientific principles that were sufficiently established to have gained general acceptance in the field. Hayes, at 262; Ramirez, at 1167. The court failed to determine whether both the DNA test conducted by Esposito and his calculation of the statistical probability of a match satisfied the Frye test. Brim, 695 So. 2d at 270-271; Murray, at 162.

Esposito testified before the jury that the PCR method of DNA testing he used is generally accepted in the scientific community. In Murray, at 160 n. 5, this Court noted that the state's expert told the trial court that the report of the National Research Council, DNA Technology in Forensic Science (1992), endorsed both the RFLP and PCR methods of forensic DNA testing, while in fact the report withheld endorsement of PCR methodology. The expert's misleading testimony about the acceptance of the PCR methodology was one of the reasons this Court found the state failed to carry its burden as the proponent of the DNA evidence in that case.

Murray, at 163. In this case, no factual basis was presented to establish Esposito's claim that the PCR method of DNA testing is generally accepted.

Esposito did not explain the methods he used to calculate the one in 17,800 statistic. In Brim, at 274, this court found that it could not properly evaluate whether the methods used to calculate the state's population frequency statistics would satisfy the Frye test because the record failed to show complete details of the state's calculation methods.

While Esposito testified that his calculations used the generally accepted FBI database, he admitted that one of the figures he used came from a different source, a population geneticist consulted by his supervisor. The trial court erred in ruling that this was a matter of credibility for the jury because the court had the sole responsibility to determine the general acceptance of the techniques and methods used in the expert's calculations. Murray, at 162-163. There was no evidence that Esposito had any knowledge about the database or other source of the figure supplied by the geneticist, so Esposito was not shown to be qualified to report the population frequency statistics. Murray, at 164.

The trial court's error in admitting the DNA evidence in this case was very similar to the error committed in Murray. In Murray, at 164, this Court concluded that the trial court erred by

admitting DNA evidence when the state failed to offer a qualified expert witness or to demonstrate the reliability of the DNA processes and calculations. Because of the damaging nature of the DNA evidence, the error could not be considered harmless beyond a reasonable doubt. This Court reversed Murray's convictions and sentences and remanded for a new trial. This Court should grant Nelson the same relief.

Harmless error review 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. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The fact that the prosecutor chose to present the DNA evidence to the jury indicates that he thought that the evidence would enhance the probability of conviction and thereby affect the jury's verdict. Esposito's testimony established that Owens' blood was on Nelson's sneakers and the box cutter razor used to cut Owen's throat. The testimony was harmful to the defense because it provided a scientific basis to link Nelson to Owens' murder and served to corroborate Nelson's confessions. Under these circumstances, the error in admitting the DNA evidence cannot be found harmless beyond a reasonable doubt. This Court must reverse Nelson's convictions and sentences and remand for a new trial.

ISSUE II

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION BY ADMITTING EVIDENCE OF HIS NONTESTIFYING CO-DEFENDANT'S OUT OF COURT STATEMENTS.

Defense counsel filed a pretrial motion in limine to exclude testimony by Misty Porth and Tina Porth regarding Keith Brennan's admissions or confessions. (II, R 32-33) At a pretrial motion hearing the court deferred ruling on the motion so it could review the Porths' statements and depositions. (IV, R 390-391, 400) Defense counsel filed a second motion in limine to exclude the testimony of Misty and Tina Porth, asserting that it was constitutionally impermissible to admit a confession by Keith Brennan against Nelson because the defense could not cross-examine Brennan, and that the witnesses could not separate what Nelson said from what Brennan said. (IV, R 403-404) At a pretrial motion hearing the state argued that Brennan's statements were made in Nelson's presence and were admissible as admissions by silence. (VI, R 477-482) The court denied the motion without prejudice. (VI, R 483, 513) Defense counsel renewed all pretrial motions at trial. (XIV, T 12; XV, T 309)

Misty Porth testified that while Nelson drove up the interstate, she asked where Owens was or what had happened. (XVI, T 466) Nelson and Brennan did not respond. Later they said they had $90. Misty again asked what happened, and they said just imagine.

Defense counsel objected, unless Misty could clarify who said what. The prosecutor responded they were both in the presence. The court overruled the objection. (XVI, T 467)

Misty testified that when they were at the motel, she asked Nelson and Brennan what was going on. The court overruled defense counsel's renewed objection. (XVI, T 469) Misty testified that she kept asking what happened. Nelson asked Brennan if he was going to tell them. Brennan said Nelson beat Owens with a baseball bat, they tied his hands up and slit his throat. They said it happened behind Mariner High School, and they left Owens there. (XVI, T 469-470) Nelson and Brennan told Misty and Tina to clean the blood off their shoes in the sink. (XVI, T 471)

In New Jersey, Misty and Tina called their grandmother who arranged for their uncle to come and get them. When Misty and Tina told Nelson and Brennan, they said this was between us, nobody else was to know. (XVI, T 474) Brennan said he had brothers. The court overruled defense counsel's objection to what Brennan said. Misty testified that Brennan said he had brothers, if anything happened, somebody would know. (XVI, T 475)

Tina Porth testified that while they were driving to Daytona, (XVI, T 498-499) Misty asked what happened. The court overruled defense counsel's renewed objection. (XVI, T 500) Tina testified that Misty asked if they beat up Owens or killed him. Nelson told Brennan to answer. Brennan said, "well, we killed him." (XVI, T

500) At the hotel, Tina and Misty asked Nelson what happened. (XVI, T 501) Nelson said they had to wait till Brennan got out of the shower. When Brennan got out, Nelson told Brennan that Tina and Misty wanted to know what was going on. They both explained that they asked Owens to drive them to a back road where they had to meet somebody to pick up money. When they got there, they got out of the car to have a cigarette. They asked Owens to get out a few times, but he kept getting back into his car. They put a scratch in the bumper of the car because they knew that this would get him out. When he got out and leaned down to look at the scratch, they hit him with a baseball bat. Owens ran and said he would make up a story, to just take the car. Nelson said it would not be believed. (XVI, T 502) Nelson chased him and beat him with the bat until he was unconscious. (XVI, T 502-503) Nelson told Brennan to slit his throat, and Brennan did. They tied his hands and feet together and put him behind a bush. They said it took place on a back road near Mariner High School. They said they had to do it or they would be caught. (XVI, T 503) Tina testified that Nelson and Brennan joked about stealing cars in the past. The court overruled defense counsel's hearsay and relevancy objection. (XVI, T 508)

The court erred by admitting Misty and Tina Porth's testimony regarding Brennan's out of court statements against Nelson, including the statements which the Porths attributed to both

Brennan and Nelson because they could not separate what Brennan said from what Nelson said. Because Brennan did not testify, the admission of his out of court statements violated Nelson'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.

The prosecutor's assertion that Brennan's statements were admissible against Nelson as admissions by silence because Nelson was present when they were made was insufficient to establish their admissibility under the Confrontation Clause. First, the state did not show, and the trial court did not determine, whether the statements satisfied the criteria for this hearsay exception. "[N]o general hearsay exception exists for statements made in the presence of a defendant." J.J.H. v. State, 651 So. 2d 1239, 1241 (Fla. 5th DCA 1995); see § 90.803, Fla. Stat. (1995). In Privett v. State, 417 So. 2d 805, 807 (Fla. 5th DCA 1982), the district court explained that the admissions by silence rule has been

incorporated into the Evidence Code as section 90.803 (18)(b), Florida Statutes, which provides:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> * * *
>
> (18) ADMISSIONS. -- A statement that is offered against a party and is:
>
> * * *
>
> (b) A statement of which the party has manifested an adoption or belief in its truth;

In Privett, at 806, the court ruled that the circumstances and nature of the statement must be considered to determine whether the person's silence constitutes an admission. The court listed several factors to be considered in making this determination:

> 1. The statement must have been heard by the party claimed to have acquiesced.
> 2. The statement must have been understood by him.
> 3. The subject matter of the statement is within the knowledge of the person.
> 4. There were no physical or emotional impediments to the person responding.
> 5. The personal make-up of the speaker or his relationship to the party or event are not such as to make it unreasonable to expect a denial.
> 6. The statement itself must be such as would, if untrue, call for a denial under the circumstances.

These criteria were not addressed by the state or the trial court in this case.

Second, even if Brennan's statements were admissible under the adoptive admission exception to the hearsay rule, the state did not show, and the trial court did not determine, whether this was a

firmly rooted hearsay exception which would satisfy the requirements of the Confrontation Clause. Third, the state did not show, and the trial court did not determine, whether there were particularized guarantees of trustworthiness which would satisfy the requirements of the Confrontation Clause.

In Farina v. State, 679 So. 2d 1151 (Fla. 1996), Anthony Farina was convicted and sentenced to death for the murder of a Taco Bell employee shot by Anthony's brother Jeffery Farina during a robbery. The two brothers were jointly tried. The court admitted tape recorded conversations between the brothers which occurred on two occasions while they were in custody in the back seat of a police car and discussed the crimes. On appeal, Anthony argued that the admission of Jeffery's statements violated his right to confront and cross-examine witnesses under Bruton. This Court found that

> the circumstances surrounding Jeffery's taped conversations had sufficient "indicia of reliability" to rebut the presumption of unreliability that normally attaches to such hearsay evidence. . . . First, neither brother had an incentive to shift blame during these conversations as these were not statements or confessions to the police. These were discussions between two brothers sitting in the back seat of a police car; neither was aware that the conversations were being recorded. Second, Anthony was present and confronting Jeffrey face-to-face throughout the conversations. Anthony could have taken issue with Jeffrey's statements at any point, but instead either tacitly agreed with Jeffery's statements or actively discussed details of the crime.

Id., at 1157.

Nelson's case is significantly different from Farina. First, the conversations of the Farina brothers were recorded, so there was an accurate record of what was said and by whom, while in the present case Tina Porth could not clearly separate what Brennan said from what Nelson said, attributing most of the description of the crimes to what "they" said. (XVI, T 502-503) Second, the Farina brothers, unaware that their conversations were being recorded, thought that they were privately discussing the crimes they had committed and had no reason to fear that their statements could be used against them. In contrast, Nelson and Brennan discussed their crimes with the Porth sisters, who could and did report the conversations to the police and testify against them in court. Nelson was initially reluctant to answer the girls' questions, telling Brennan to answer Misty's questions when they were in the car (XVI T 500) and telling the girls to wait until Brennan got out of the shower when they were in the motel. (XVI, T 501-502) Brennan may very well have been motivated to shift the blame by emphasizing Nelson's role while minimizing his own. For example, Misty testified that Nelson asked Brennan if he was going to tell the girls what happened, then Brennan said Nelson beat Owens with a baseball bat, they tied his hands up, and they slit his throat. (XVI T 470) On the other hand, Tina testified that after they had described how the murder occurred, Nelson bragged

that he had done more than Keith because it made him feel big that he did it. (XVI, T 503-504) Thus, the present case does not provide the necessary particularized guarantees of trustworthiness required for admission of Brennan's statements under the Confrontation Clause.

The court's error in admitting Brennan's statements in violation of Nelson'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). In Cruz, at 193-194, the Supreme Court ruled that the defendant's confession may be considered in assessing whether a violation of the Confrontation Clause was harmless.

In Franqui, at S376, this Court found the error in admitting a codefendant's statement implicating the defendant to be harmless because the codefendant's statement mirrored the defendant's confession in many respects. However, Franqui was wrongly decided in light of Cruz. See Franqui, at S379-S380 (Anstead, J., concurring in part and dissenting in part). In Cruz, the Supreme Court explained,

> A codefendant's confession will be relatively harmless if the incriminating story it tells

> is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession. . . . In such circumstances a codefendant's confession that corroborates the defendant's confession significantly harms the defendant's case . . . .

Id., at 192. Moreover, the Court observed,

> It seems to us illogical, and therefore contrary to common sense and good judgment, to believe that codefendant confessions are less likely to be taken into account by the jury the more they are corroborated by the defendant's own admissions; or that they are less likely to be harmful when they confirm the validity of the defendant's alleged confession.

Id., at 193.

In this case, the Porth sisters' testimony regarding Brennan's statements corroborated Nelson's confessions to the investigators. (XVII, T 642-670, 707-746) Misty testified that Brennan said Nelson beat Owens with a baseball bat, they tied his hands up, and they slit his throat. (XVI, T 470) Tina testified that Brennan said, "we killed him." (XVI T 500) Tina further testified that both Brennan and Nelson gave a step by step account of how the murder occurred, without separating what Brennan said from what Nelson said. (XVI, T 502-503) This account substantially paralleled Nelson's confessions.

Because Brennan's statements corroborated Nelson's confessions, the admission of Brennan's statements was significantly harmful to Nelson's defense, and the jury was likely to have taken

them into account in reaching its verdict. See Cruz, at 192-193. Thus, the court's error in admitting Brennan's statements in violation of the Confrontation Clause requires reversal of Nelson's convictions and remand for a new trial.

ISSUE III

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FAILING TO WEIGH APPELLANT'S HISTORY OF ALCOHOL AND DRUG ABUSE AS A MITIGATING FACTOR.

The United States Supreme Court has repeatedly held that under the Eighth Amendment "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Skipper v. South Carolina, 476 U.S. 1, 2 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982). This constitutional requirement is not satisfied solely by allowing the presentation of mitigating evidence. The sentencer is required to "listen" to the evidence and to give it some weight in determining the appropriate sentence. Eddings, 455 U.S. at 113-14 & n. 10.

Thus, in Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), this Court ruled:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. [Footnote omitted.]

In Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990), this Court ruled that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved."

Accord Morgan v. State, 639 So. 2d 6, 13 (Fla. 1994); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993). The court must accord some weight to the mitigating circumstances found to be present. Dailey v. State, 594 So. 2d 254, 259 (Fla. 1992).

In this case, Nelson testified that he began using drugs when he moved to Florida. He used marijuana, ruffies, alcohol, ecstasy, acid, and mushrooms. He also huffed gas. (XVIII, T 802) He was sent to Southwest Florida Addiction Services (SWFAS) for a total of 15 months to receive help with his drug addiction. (XVIII, T 802-803, 831, 834-835) However, Nelson also testified that he was not under the influence of alcohol or drugs on March 10. (XVIII, T 839) Dr. Merin testified that Nelson used alcohol and a wide variety of drugs at an early age and spent 15 months in the SWFAS treatment center. (X, R 789-790, 799-800) The presentence investigation report (PSI) stated that Nelson said he used marijuana, ruffinal, ecstacy, beer, malt liquor, and vodka on a regular basis; he experimented with huffing gasoline, cocaine, LSD, and crack; and he received counseling through HRS, SWFAS, and the Eckerd Youth Development Center. (SR 6) At the sentencing hearing, the court stated that it had received the PSI. (XII, R 1072) None of this evidence of Nelson's history of alcohol and drug abuse was refuted by the state.

The trial court did not find Nelson's history of alcohol and drug abuse to be a mitigating circumstance in the sentencing order.

(XII, R 1090-1094; A 3-7) The court's only consideration of this history occurred in the paragraph finding that there was no evidence of the statutory mitigating circumstance of extreme duress or substantial domination of another person:[2]

> Dr. Merin testified as to the Defendant's dysfunctional family and its history of mental illness and alcohol and drug abuse. The Defendant himself related a personal history of alcohol, drug as well as sex abuse by his step-father. There was no evidence that the Defendant was under extreme duress or under the substantial domination of another person at the time of this offense. This statutory mitigating circumstance does not exist.

(XII, R 1092; A 5) But Nelson's history of alcohol and drug abuse did not pertain to the statutory mitigating circumstance of extreme duress or substantial domination of another person.

Nelson's history of alcohol and drug abuse was relevant and should have been considered as a nonstatutory mitigating circumstance. Lawrence v. State, 691 So. 2d 1068, 1076 (Fla. 1997) (history of drug and alcohol abuse); Robinson v. State, 684 So. 2d 175, 179 (Fla. 1996) (history of drug abuse); Besaraba v. State, 656 So. 2d 441, 447 (Fla. 1995) (history of alcohol and drug abuse). It would also be relevant for consideration under the new statutory mitigating circumstance provided by section 921.141(6)(h), Florida Statutes (1996 Supp.): "The existence of any other factors in the defendant's background that would mitigate

[2] § 921.141(6)(e), Fla. Stat. (1995).

against imposition of the death penalty." The court instructed the jury on this new statutory mitigator on request of the defense. (X, R 707-710, 732-733; XI, R 922)

In Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990), this Court stated,

> Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is trying to establish.

Accord Consalvo v. State, 22 Fla. L. Weekly S494, S498 (Fla. Oct. 3, 1996). While defense counsel failed to specifically identify Nelson's history of alcohol and drug abuse as a separate mitigating circumstance in his sentencing memorandum, he did raise substance abuse and alcohol abuse in paragraphs 6 and 8 concerning emotional handicaps and turmoil. (XI, R 1010-1011) He also raised alcohol and drug abuse as a mitigating factor in his closing argument to the jury. (XI, R 906, 911)

Even if defense counsel could be faulted for failing to clearly inform the court that Nelson's history of alcohol and drug abuse was a nonstatutory mitigating factor to be considered, the court had an independent obligation to consider the evidence which established this mitigating circumstance. In Farr v. State, 621 So. 2d 1368 (Fla. 1993), the defendant waived the presentation of mitigating evidence and urged the court to sentence him to death. The trial court failed to consider evidence of mitigating circum-

stances contained in a presentence report and a psychiatric report. This Court held,

> [M]itigating evidence must be considered and weighed when contained anywhere in the record, to the extent that it is believable and uncontroverted. . . . That requirement applies with no less force . . . even if the defendant asks the court not to consider mitigating evidence.

Id., at 1369. Accord Robinson v. State, 684 So. 2d at 177.

The trial court's failure to find and weigh the proven mitigating circumstance of Nelson's history of alcohol and drug abuse violated the Eighth Amendment as construed in Eddings v. Oklahoma. Because the error concerns the weighing of aggravating and mitigating circumstances in a capital case, this Court must determine whether the error contributed to the death sentence. Sochor v. Florida, 504 U.S. 527, 539-540 (1992). In the absence of a showing of harmless error by the state, the failure to consider evidence of nonstatutory mitigating circumstances renders the death sentence invalid. Hitchcock v. Dugger, 481 U.S. at 399.

In Lawrence v. State, this Court found that the failure to consider the mitigating factor of the defendant's history of drug and alcohol abuse was harmless because the mitigator would not have offset three aggravators that were properly found. Id., 691 So. 2d at 1076. In the present case, the trial court also found three aggravating factors, but appellant contends in Issues IV and V, infra, that the evidence did not support the findings of the CCP

and HAC aggravators. Also, this case involves substantially more mitigating factors than were found in Livingston. The trial court found and weighed the statutory mitigating circumstance of Nelson's age of 18, as well as fifteen nonstatutory factors specifically identified by the defense. (XI, R 1008-1013; XII, R 1092-0194; A 5-7) The inclusion of Nelson's history of alcohol and drug abuse among the mitigating factors should change the balance in the weighing of the aggravating and mitigating circumstances, especially if this Court strikes the CCP and/or HAC aggravating factors. In Farr v. State, 621 So. 2d at 1370, and in Robinson v. State, 684 So. 2d at 180, this Court found that the error in not considering all the available mitigating evidence required the death sentence to be vacated and the case remanded for a new penalty phase hearing, despite the presence of four valid aggravating factors in Farr and three aggravating factors in Robinson. Similarly, this Court should vacate the death sentence in this case and remand for a new penalty phase hearing.

ISSUE IV

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY WEIGHING THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE BECAUSE THERE WAS A PRETENSE OF JUSTIFICATION AND NO CAREFUL PLAN.

The weighing of an invalid aggravating circumstance in reaching the decision to impose a death sentence violates the Eighth Amendment to the United States Constitution. Sochor v. Florida, 504 U.S. 527, 532 (1992). An aggravating circumstance is invalid if it is not supported by the evidence. Id., at 539.

In closing argument to the jury and his sentencing memorandum, defense counsel argued that the cold, calculated, and premeditated (CCP) aggravating factor[3] did not apply because there was a pretense of moral or legal justification due to Nelson's emotional suffering, sexual abuse by his stepfather, abandonment by his mother, and the rape the Porth girl. (XI, R 908, 915, 1004)

The trial court found that the CCP factor was proved beyond a reasonable doubt because,

> The Defendant in this case made a plan in advance and lured the victim to the scene of his murder. The Defendant testified live and by video taped confession that he calmly discussed with his Co-Defendant methods by which they might entice the victim out of his car so they could kill him.

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[3] § 921.141(5)(i), Fla. Stat. (1995).

> The Defendant hit the victim, then chased him down and continued the beating. The Defendant then stopped and discussed with the Co-Defendant the victim's offer to give them what they wanted and make up a story in return for his life. Both decided the victim must die. The victim was cut at the throat with a box cutter, bound, and dragged into the brush where he was beaten some more and finally left to die.
>
> These actions were the product of calm and cool reflection and were not prompted by emotional frenzy, panic or a fit of rage.
>
> The death of Thomas Owens was the result of a careful plan made well in advance of the commission of the offense thus indicating a heightened state of premeditation.
>
> Since these facts were all admitted by the Defendant and the evidence fully supports his admission, the aggravating factor that the capital felony for which the Defendant is to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification has been proved beyond a reasonable doubt.

(XII, R 1090; A 3)

In Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994), this Court explained that there are four elements which must be proved for the CCP aggravating factor to apply:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson [v. State, 604 So. 2d 1107, 1109 (Fla. 1992)]; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers [v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484

> U.S. 1020 (1988)]; and that the defendant exhibited heightened premeditation (premeditated), Id.; and that the defendant had no pretense of moral or legal justification. Banda v. State, 536 So. 2d 221, 224-25 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S. Ct. 1548, 103 L. Ed. 2d 852 (1989).

See also Walls v. State, 641 So. 2d 381, 387-388 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995).

In Banda v. State, 536 So. 2d at 225, this Court defined a pretense of moral or legal justification as "any claim of justification or excuse that, although insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." In this case, Tina Porth testified that about two weeks before March 10, she and Misty went to Nelson's house, where Owens offered to let Tina use the phone in his car. (XVI, T 511) Owens drove to a back road, parked on a field, and forced Tina to engage in oral sex before he would take her back to Nelson's house. Tina told Misty about this when they got home. Nelson knew about the incident. (XVI, T 512)

Misty Porth testified that Tina told her Owens had forced her to engage in oral sex. Misty told Nelson about this the same night. Later, she heard Nelson and Owens arguing about it. (XVI, T 479, 481) Nelson told her that Owens denied it, and Nelson and Owens continued to do things together like normal friends. (XVI, T 481-482) At the hotel, Misty asked if what happened had anything

to do with her sister. Nelson and Brennan said probably or maybe. (XVI, T 480-481)

Nelson testified that one night they were watching TV when Owens took Tina to use the phone. When they returned, Tina was crying. Tina talked to Misty, then they told Nelson that Owens forced Tina to perform oral sex. This made Nelson very mad. (XVII, T 805-806) Nelson also testified that his stepfather molested him by performing oral sex on him two or three times a week. If Nelson refused, Percifield used his mother against him, refused to buy things he needed, or hit him. This continued for two or three years. (XVIII, T 800-801) On the morning of March 10, Percifield approached Nelson about sex, but Nelson told him it was not going to happen anymore. They went to the Circle K to talk to Nelson's mother. She got mad, told Nelson to give her his house key, and kicked him out. (XVIII, T 809-810) When Nelson hit Owens with the bat, he was thinking about how much he hated Percifield. All he could see was Percifield's face, and that was what he was swinging at. Nelson felt Percifield and Owens were much alike because they both watched pornographic videos and used weaker people to commit sexual acts. (XVIII, T 806, 811, 827)

Dr. Merin also testified that Nelson was very angry on the day of the offense because his mother told him to leave home after he resisted his stepfather's sexual advance. (X, R 792-793)

While this evidence of Owens' sexual misconduct with Tina Porth, Nelson's anger about that incident, Nelson's anger about the sexual abuse by his stepfather, and Nelson's anger because his mother threw him out of the house did not legally justify the murder of Owens, it did provide a pretense of justification which rebutted the otherwise cold and calculated nature of the offense as required by Banda, 536 So. 2d at 225. It also negated the "cold" element of the CCP factor required under Jackson, 648 So. 2d at 89, because the killing was not the product of cool and calm reflection, but an act prompted by emotional frenzy, panic, or a fit of rage. In Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993), this Court found that the CCP factor did not apply when the defendant murdered the man he believed had raped his wife two months earlier because the murder was not cold, although it may have been calculated.

Also, the calculation element of CCP required by Jackson, at 89, was not proved beyond a reasonable doubt because Nelson did not carefully plan to murder Owens. Nelson admitted to the investigators that he and Brennan planned to kill Owens, take his car and money, and go to New Jersey. (XVII, T 646, 707-708, 743, 745) However, Nelson explained that he did not think it was a real plan, nor that they would really do it, because he and Brennan made plans to run away or commit illegal acts, which they never carried out, while they were in the SWFAS drug rehabilitation program. Nelson

thought the plan to kill Owens was a fantasy or a joke until it happened. (XVII, T 643-645; XVIII, T 808, 810-811, 830-832, 842-843)

Because there was a pretense of justification and Nelson did not carefully plan to kill Owens, the trial court violated the Eighth Amendment by weighing the factually unsupported CCP aggravating factor. This error requires this Court to reweigh the valid aggravating and mitigating factors or to conduct harmless error review. Sochor v. Florida, 504 U.S. at 532, 539-40.

Constitutional harmless error review 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. Chapman v. California, 386 U.S. 18, 23-24 (1965); State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). In a case involving the weighing of an invalid aggravating circumstance, this Court must determine that the error did not contribute to the death sentence to find that the error was harmless beyond a reasonable doubt. Sochor, at 540.

In Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993), this Court held that it could not determine what effect the error in finding the factually unsupported HAC factor had in the sentencing process where the factor was extensively argued to the jury. This Court vacated the death sentence and directed that a new sentencing proceeding be held with a new jury empaneled. Similarly, the

prosecutor extensively argued the factually unsupported CCP factor to Nelson's jury and played four minutes of excerpts from Nelson's recorded statements to support his argument. (X, R 868-870, 881-888; XI, R 902) Therefore, this Court must vacate Nelson's death sentence with directions to hold a new sentencing proceeding with a newly empaneled jury.

ISSUE V

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY WEIGHING THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE BECAUSE THE EVIDENCE DID NOT ESTABLISH THAT APPELLANT INTENDED TO CAUSE THE VICTIM UNNECESSARY AND PROLONGED SUFFERING.

The weighing of an invalid aggravating circumstance in reaching the decision to impose a death sentence violates the Eighth Amendment to the United States Constitution. Sochor v. Florida, 504 U.S. 527, 532 (1992). An aggravating circumstance is invalid if it is not supported by the evidence. Id., at 539.

The trial court found that the heinous, atrocious, or cruel aggravating circumstance[4] was proved beyond a reasonable doubt in this case because,

> The victim in this case was lured under false pretenses to a remote section of Cape Coral, Lee County, Florida, ostensibly for the purpose of meeting a friend. The facts show that the Defendant and Co-Defendant knew that the victim kept a baseball bat in his car. They formulated a plan to get the victim out of the car by informing him that there was a cut in the rear bumper. When the victim got out to look, the Defendant hit the victim with the metal baseball bat. The facts show that the Defendant hit the victim twice before the victim tried to run away. The Defendant then chased the victim down and struck him again. While on the ground the victim asked the Defendant not to hit him any more and told him to take the car and anything else he wanted. The Defendant repeatedly told the victim to

[4] § 921.141(5)(h), Fla. Stat. (1995).

> "shut up." The victim then offered to make up a story and let the Defendant and the Co-Defendant take everything in return for his life. The Defendant then beat the victim again to knock him unconscious so that the Co-Defendant could slit the victim's throat, the victim cried out that he was not out yet whereupon the Defendant hit the victim again with the bat. After the victim's throat was cut, the evidence shows that he was still alive and the Defendant then hit the victim at least four more times. This ordeal lasted over an undetermined period of time where the victim suffered multiple blows to the head. The evidence shows he was conscious and was aware of his impending doom when he asked to be knocked out before his throat was to be cut. This murder was a conscienceless, pitiless crime which was unnecessarily torturous to the victim. Since these facts were admitted by the Defendant and the facts fully support his admission, the aggravating factor that this murder was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.

(XII, R 1089; A 2)

Defense counsel argued in his sentencing memorandum that the HAC aggravating factor did not apply because Nelson intended to knock Owens unconscious to avoid the infliction of pain and conscious suffering. (XI, R 1002-1003) He argued to the jury that HAC did not apply because Nelson did not intend to inflict pain or to be cruel. (XI, R 905-906) The state relied upon Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), vacated, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992), to support the finding of this factor. (XII, R 1029-1030) In Hitchcock, this Court upheld the trial court's finding of HAC where the defendant stated that he continued to

choke and hit the victim until she lost consciousness. Id., at 692-693. This Court explained,

> That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's.

Id., at 692.

Hitchcock appears to have been overruled by three cases in which this Court reversed HAC findings because of the absence of proof that the defendant "intended to cause the victim unnecessary and prolonged suffering." Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995); Stein v. State, 632 So. 2d 1361, 1367 (Fla.), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993).

Similarly, the evidence in the present case does not establish beyond a reasonable doubt that Nelson intended to cause Owens unnecessary and prolonged suffering. In his March 25, 1995, statement, Nelson said the plan was for him to hit and knock out Owens, then Brennan was supposed to finish him, because Nelson said he could not kill anyone. (XVII, T 655) In his April 2, 1995, statement, Nelson said Brennan told him to knock out Owens and he would finish him. Nelson stepped on Owens' arm, Owens rolled over, and Nelson hit him in the face with the bat. Nelson told Brennan he was out and to do what he had to do. Brennan started to cut

him, but Owens said he was not knocked out. Nelson hit him again. (XVII, T 732) These statements indicate that Nelson's intent was to knock out Owens with the bat before Brennan killed him, thus preventing the infliction of unnecessary and prolonged suffering.

In the absence of proof beyond a reasonable doubt that Nelson intended to inflict unnecessary and prolonged suffering, the trial court erred by finding the HAC factor. Kearse; Stein; Bonifay. Under the Eighth Amendment, the trial court's error in weighing a factually unsupported aggravating factor requires this Court to reweigh the valid aggravating and mitigating factors or to conduct harmless error review. Sochor, 504 U.S. at 532, 539-540.

Constitutional harmless error review 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. Chapman v. California, 386 U.S. 18, 23-24 (1965); State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). In a case involving the weighing of an invalid aggravating circumstance, this Court must determine that the error did not contribute to the death sentence to find that the error was harmless beyond a reasonable doubt. Sochor, at 540.

In Bonifay, this Court held that it could not determine what effect the error in finding the factually unsupported HAC factor had in the sentencing process where the factor was extensively argued to the jury. This Court vacated the death sentence and

directed that a new sentencing proceeding be held with a new jury empaneled. Id., 626 So. 2d at 1313. Similarly, the prosecutor extensively argued the factually unsupported HAC factor to Nelson's jury and played six to seven minutes of excerpts from Nelson's recorded statements to support his argument. (X, R 870-871, 888-889; XI, R 893-902) Therefore, this Court must vacate Nelson's death sentence with directions to hold a new sentencing proceeding with a newly empaneled jury.

ISSUE VI

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY GIVING A VAGUE JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING FACTOR.

In Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the Supreme Court ruled that the former standard jury instruction on the heinous, atrocious, or cruel (HAC) aggravating circumstance, which simply recited the language of the statute, § 921.141(5)(h), Fla. Stat. (1989), was unconstitutionally vague. The court explained that the weighing of an invalid aggravating circumstance violates the Eighth Amendment. Id., 120 L. Ed. 2d at 858. An aggravating circumstance is invalid if it is so vague that it leaves the sentencer without sufficient guidance for determining the presence or absence of the factor. Id. When the jury is instructed that it may consider such a vague aggravating circumstance, it must be presumed that the jury found and weighed an invalid circumstance. Id., at 858-59. Because the sentencing judge is required to give great weight to the jury's sentencing recommendation, the court then indirectly weighs an invalid circumstance. Id., at 859. The result of this process is error because it creates the potential for arbitrariness in imposing the death penalty. Id.

In the present case, defense counsel objected to the standard jury instruction on the HAC aggravating circumstance as unconstitu-

tionally vague and submitted a written requested instruction which changed the wording of the last sentence of the instruction to state:

> The aggravating circumstance that the felony was especially heinous, atrocious and cruel applies only where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the the norm of first degree murders -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

(IX, R 684; X, R 697-698) The court denied the request. (X, R 699-700)

The court instructed the jury:

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

(XI, R 919)

This was the instruction approved in Hall v. State, 614 So. 2d 473, 478 (Fla.), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993), on the ground that it adequately defines the terms of the factor. Appellant respectfully disagrees and requests this Court to reconsider the vagueness of the HAC instruction.

The first sentence of this instruction simply recites the statutory language, "especially heinous, atrocious or cruel," from section 921.141(5)(h), Florida Statutes (1989). In the absence of a sufficient limiting construction, the statutory language is unconstitutionally vague and overbroad and violates the Eighth Amendment. Espinosa; Maynard v. Cartwright, 486 U.S. 356 (1988); U.S. Const. amend. VIII. The sentences which define the statutory terms use the same definitions held unconstitutionally vague and overbroad in Shell v. Mississippi, 498 U.S. 1 (1990). Thus, the constitutionality of the instruction depends upon whether the final sentence provides sufficient guidance to the sentencer.

In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court found that the HAC aggravator provided adequate guidance to the sentencer because this Court's opinion in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), construed HAC to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Sochor v. Florida, 504 U.S. 527, 536 (1992).

Cases decided after Proffitt call into question the adequacy of the Dixon limiting construction of HAC. The Supreme Court has ruled that a State's capital sentencing scheme must genuinely narrow the class of defendants eligible for the death penalty, and a statutory aggravating circumstance must provide a principled basis for the sentencer to distinguish those who deserve capital

punishment from those who do not. Arave v. Creech, 113 S. Ct. 1534, 123 L. Ed. 2d 188, 200 (1993). "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Id.

Thus, the term "pitiless" is unconstitutionally vague because the jury might conclude that every first-degree murder is pitiless. Id., 123 L. Ed. 2d at 201. The term "conscienceless" suffers from the same defect; all first-degree murders can be seen as conscienceless. "Unnecessarily torturous" might also be construed by the jury as applying to all first-degree murders because any pain or suffering felt by the victim is plainly unnecessary. Moreover, the phrase "the kind of crime intended to be included" does not limit the jury's consideration of the HAC factor solely to unnecessarily torturous murders, but implies that such murders are merely an example of the type of crime to which HAC applies.

Furthermore, this Court has been applying a narrower construction of HAC than the Dixon construction, requiring proof that the defendant "intended to cause the victim unnecessary and prolonged suffering." Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995); Stein v. State, 632 So. 2d 1361, 1367 (Fla.), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994); Bonifay v. State, 626 So. 2d 1310 (Fla. 1993). This limiting construction has not been incorporated into the HAC jury instruction. The point of Espinosa is that the

jury must be informed of the limiting construction of an otherwise vague aggravating circumstance, and failure to do so renders the sentencing process arbitrary and unreliable. For example, in Jackson v. State, 648 So. 2d 85, 88-90 (Fla. 1994), this Court ruled that the standard cold, calculated, and premeditated (CCP) jury instruction, which simply repeated the language of the statute, was unconstitutionally vague because it did not inform the jury of the limiting construction this Court had given the CCP factor.

The court's error in giving a vague instruction on the HAC aggravating circumstance was harmful because of the likelihood that it affected the jury's sentencing recommendation. "[W]hile a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is 'unlikely to disregard a theory flawed in law.'" Jackson v. State, 648 So. 2d at 90, quoting, Sochor v. Florida, 504 U.S. at 538. "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." Stringer v. Black, 503 U.S. 222, 232 (1992). In Jackson, this Court found that the trial court's error in giving a vague jury instruction on the cold, calculated, and premeditated aggravating circumstance required reversal for a new sentencing proceeding before a newly empaneled jury. Id., at 90.

This court has held that the use of an unconstitutionally vague instruction on HAC is harmless error when the facts of the case establish the presence of the factor under any definition of the terms and beyond a reasonable doubt. Thompson v. State, 619 So. 2d 261, 267 (Fla.), cert. denied, 114 S. Ct. 445, 126 L. Ed. 2d 378 (1993). This is not such a case. As argued in Issue IV, supra, the evidence was insufficient to establish beyond a reasonable doubt that Nelson intended to cause Owens unnecessary and prolonged suffering and, therefore, did not support the HAC factor as construed in Kearse, Stein, and Bonifay.

Under these circumstances, the failure to adequately inform the jury of what they must find to apply HAC undermined the reliability of the jury's sentencing recommendation, created an unacceptable risk of arbitrariness in imposing the death penalty, and could not have been harmless beyond a reasonable doubt. See Jackson v. State, 648 So. 2d at 90. The death sentence must be vacated, and this case must be remanded to the trial court for a new sentencing proceeding before a new jury.

ISSUE VII

THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.

This Court conducts proportionality review of every death sentence to prevent the imposition of unusual punishment prohibited by Article I, section 17 of the Florida Constitution. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Because death is a uniquely irrevocable penalty, death sentences require more intensive judicial scrutiny than lesser penalties. Tillman, at 169. "While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional," this Court is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer, at 277. Application of the death penalty is reserved "only for the most aggravated and least mitigated murders." Id., at 278; Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Joshua Nelson's case is not among the most aggravated murders. Although the trial court found three aggravating circumstances, (XII, R 1088-1090; A 1-3) appellant's argument that the CCP and HAC factors were not supported by the evidence is presented in Issues IV and V, supra. Assuming this Court agrees with appellant's

arguments, the death sentence is supported by only one valid aggravating factor, the murder was committed during the commission of a robbery.[5]

In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court held that the death sentence was disproportionate because the only aggravating circumstance was outweighed by the mitigating circumstances. The Court explained,

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated murders. . . .
> . . . We have in the past affirmed death sentences that were supported by only one aggravating factor, . . . but those cases involved either nothing or very little in mitigation.

Id., at 1011 (citations omitted); accord Besaraba v. State, 656 So. 2d 441, 446-47 (Fla. 1995); Clark v. State, 609 So. 2d 513, 516 (Fla. 1992).

Under the Songer standard, the death sentence is disproportionate for Nelson because the only valid aggravating factor, murder committed during a robbery, was outweighed by substantial mitigating factors. Moreover, even if this Court rejects appellant's arguments that the CCP and HAC aggravating factors were not proved, death is disproportionate because this case is not among the least mitigated cases.

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[5] § 921.141(5)(d), Fla. Stat. (1995).

The trial court gave great weight to the statutory mitigating circumstance of Nelson's age of 18 at the time of the offense.[6] (XII, R 1092; A 5) This mitigator was further supported by Dr. Merin's testimony that Nelson had the emotional maturity of a 12 to 13 year old. (X, R 783) The court gave substantial weight to the nonstatutory mitigating factor that Nelson gave detailed statements confessing to the murder. (XII, R 1093; A 6)

The court gave moderate weight to the mitigating factor of Nelson's dysfunctional family background, which included an alcoholic father, parental abuse and neglect, sexual abuse by his stepfather, and a family history of mental illness. (XII, R 1093-1094; A 6-7) Dr. Merin testified that Nelson came from a markedly dysfunctional family and never had the opportunity to learn proper rules, how to process information, deal with discipline, and handle problems. (X, R 784-785, 806) His family behaved as gypsies. (X, R 785) His father had bizarre concepts of life, lived in box or a tent, withdrew from society, and had a family history of schizophrenia. (X, R 785-786, 802, 804) It was likely that Nelson had latent genes of a mental disorder which emerged while he was under heightened stress and while he was incarcerated. He had auditory hallucinations which went away with medication. (X, R 784, 786, 802, 804, 806-807) He never learned order, organization, structure, or responsibility. (X, R 786) His father was an alcoholic

[6] § 921.141(6)(g), Fla. Stat. (1995).

who abused his mother. (X, R 787, 803) His mother hit his father with a frying pan. (X, R 803) His stepfather abused him sexually. (X, R 787-788) Because Nelson was neglected as a child, he gravitated towards law breakers, drug users, and alcohol users. (X, R 789) Supporting evidence of Nelson's dysfunctional family background was provided by the testimony of his father, (X, R 808-814) his half-sister, (X, R 814-819), and three of his aunts, (X, R 821-828) as well as letters to the court from his aunts, his half-sister, and her father. (XII, R 1027, 1051-1067)

The court gave some weight to the mitigating factors that Nelson offered to plead guilty in exchange for a life sentence and Dr. Merin testified that Nelson could be rehabilitated. (XII, R 1094; A 7) The court considered, but gave little weight to the defense claim that the death was caused by the codefendant. (XII, R 1092-1093; A 5-6) The court also gave little weight to the absence of violence in Nelson's extensive prior criminal record as a juvenile. (XII, R 1094; A 7) The court gave moderate weight to its consideration of whether the death penalty was proportional. (XII, R 1094; A7) Also, as argued in Issue III, supra, the court erred by failing to consider and weigh Nelson's history of alcohol and drug abuse. (X, R 789-790, 799-800; XVIII, T 802-803, 831, 834-835; SR 6)

Nelson's case is comparable to several prior cases involving murders committed during the course of another violent felony in

which this Court found that the death sentence was disproportionate. In Robertson v. State, 22 Fla. L. Weekly S404 (Fla. July 3, 1997), this Court found two valid aggravating factors, murder committed during a burglary and HAC, but concluded that death was disproportionate because of the mitigating factors, defendant's age of 19, impaired capacity due to drug and alcohol abuse, an abused and deprived childhood, a history of mental illness, and borderline intelligence.

In Terry v. State, 668 So. 2d 954 (Fla. 1996), this Court found the death sentence was disproportionate where there were two aggravating circumstances, a contemporaneous conviction as a principal to an aggravated assault and murder committed during the course of an armed robbery for pecuniary gain. The trial court rejected the defendant's age of 21 and proposed nonstatutory mitigating circumstances. The mitigating circumstances proposed by the defendant were emotional and developmental deprivation in adolescence, poverty, the defendant was a good family man, and the circumstances of the crime did not set it apart from the norm of other murders.

In Sinclair v. State, 657 So. 2d 1138 (Fla. 1995), this Court found the death sentence disproportionate where the murder was committed during the course of a robbery. The mitigating factors were the defendant's cooperation with the police, dull normal

intelligence, being raised without a father or any positive role model, and emotional disturbance.

In Thompson v. State, 647 So. 2d 824 (Fla. 1994), this Court struck three invalid aggravating factors, CCP, witness elimination, and under sentence of imprisonment. This Court found the death sentence disproportionate where the only valid aggravating circumstance was murder committed during the course of a robbery and the mitigating circumstances were the absence of violent propensities before the murder, honorable discharge from the Navy, gainful employment, being raised in the church, rudimentary artistic skills, and good prison behavior.

In McKinney v. State, 579 So. 2d 80 (Fla. 1991), this Court found that the HAC and CCP aggravators were not supported by the record. This Court held that the death sentence was disproportionate where the only valid aggravating factor was murder committed in the course of a robbery and the mitigating factors were no significant history of prior criminal activity, mental deficiencies, and a history of alcohol and drug abuse.

In comparison with Robertson, Terry, Sinclair, Thompson, and McKinney, the death sentence imposed in this case is disproportionate. This Court should vacate the death sentence and remand this case for resentencing to life.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgments and sentences and remand this case for appropriate relief in the trial court.

TABLE OF CITATIONS (continued)

APPENDIX

	PAGE NO.
1. Sentencing Order	A1-A7

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of October, 1999.

Respectfully submitted,

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