IN THE SUPREME COURT OF FLORIDA

JOHN HESS,

Appellant,

vs. **CASE NO. 90,026**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No. 0134101
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
(813)873-4739

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO.:

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Guilt Phase:

Associate medical examiner Dr. Manfred Burgess opined that the cause of death to victim John Galloway was a gunshot wound to the chest. The path of the bullet was from front to back with very little vertical deviation (Vol. X, TR. 654-656). Two witnesses employed by Omar Security, Geraldine Lindsey and Michael Warren, testified that prior to the murder -- on May 10, 1993 -- appellant mentioned that a security guard had been shot and killed Sunday night and found Monday morning; neither witness had heard or seen any such report in the papers (Vol. X, TR. 678-688, 691-696). Warren subsequently contacted the sheriff's office and agreed to wear a wire and deputy sheriff Les Partington acted undercover and had a recorded conversation with Hess. In that conversation Hess mentioned that the police didn't give all the information about the case, that he had known the victim who died instantly when shot and that Hess owned some guns (Vol. X, 712-715). The taped conversation of May 13, 1993, Exhibit 19, was played to the jury (Vol. X, TR. 719-781).

Lead investigator Gil Allen of the Lee County Sheriff's Office arrived shortly after 2:00 A.M. on May 12, 1993 at the Lake Fairways retirement center and observed the deceased John Galloway with a small caliber gunshot wound to the chest. His pocket was

inverted, indicating something had been removed (Vol. XI, TR. 791-793). The murder weapon was not located at the scene but a projectile was discovered in the driveway of the entryway. There appeared to be a ricochet mark on the wall directly behind the victim. While there was no wallet at the scene, Mrs. Galloway informed them her husband had a trifold wallet with numerous credit cards and possibly some cash (Vol. XI, TR. 794-796). On May 12 he learned an ATM card belonging to the victim had been used at Barnett Bank in south Lee County at approximately 1:00 A.M. the night of the murder; someone attempted to use the ATM card a number of times without success (Vol. XI, TR. 798-799). On May 13 Allen got a call from a security company providing information that might be of assistance. Allen interviewed Mickey Warren who reported that a new employee had mentioned a security guard murder the day before this homicide and information Warren was reporting was very close to the exact nature of the crime. The sheriff's department had not published any particulars about the nature of the crime and news reporting was limited. Information withheld from the media included the number of shots fired, the nature of the death, position of the body, and evidence recovered. Information about the wallet was withheld (Vol. XI, TR. 800-801). They decided to do surveillance on the source of the information, appellant Hess (Vol. XI, TR. 802). The wired conversation with Warren and Agent

Partington confirmed the information Warren provided: Hess talked about weapons he owned and explained that the police withheld information from the press. Hess stated the murder actually occurred on Monday. Allen testified the murder occurred Tuesday night, on the 12th (Vol. XI, TR. 804). On May 14 at 4:00 P.M. Allen met with Hess for an interview in the sheriff's office. Appellant was not in custody, was not under arrest, was free to leave and voluntarily agreed to speak with Allen and after the interview Hess was allowed to leave and there was no attempt to arrest him (Vol. XI, TR. 806-807). Allen asked for his assistance. Hess first explained that he was at home with his wife and heard two gunshots and ambulances going to the murder scene. Hess lived seven or eight miles from there and from his experience Allen didn't believe he would have heard gunshots from that distance and since the number of shots was not provided to the media Allen found his statement important. Eventually Hess was challenged on the information he provided. Hess admitted knowing the victim (Vol. XI, TR. 810), said that he was a security guard and checked on Galloway at numerous times at night and once approached the victim checking on the possibility of moving a trailer in there and Galloway was rude, asking him to leave. Hess was familiar with the Lake Fairways area, described it in detail and drew a map. Appellant knew of the security details, when and how often a roving

second guard would check in, as well as the patrol deputies (Vol. XI, TR. 811-815). Allen stated that Hess had too many details that others didn't have (Vol. XI, TR. 817). Hess claimed he drove to Lake Fairways the night of the murder, he liked to see how close he could get to see what kind of job they were doing (Vol. XI, TR. 819). Appellant's series of explanations as to how he found out about the murder were: he heard about it on a CB radio, then a security guard whose whereabouts were unknown told him, then he abandoned the CB story and provided the name of Lloyd Sawyer and spoke of "hostile takeovers" among security companies and indicated Sawyer was involved in the murder. Allen investigated and found no merit to the allegations (Vol. XI, TR. 822-827).

Hess returned to the sheriff's office on May 15 on his own initiative and seemed to be in a panic state. He admitted having lied before about the CB radio, claimed he had embellished his conversation with Warren and stated that he had gotten the information from Sawyer (Vol. XI, TR. 830-831).

The first documentation of credit card activity after the murder was of a purchase at a Shell gas station -- where appellant's wife was employed -- at around 12:36 A.M. (Vol. XI, TR. 834-835). A MasterCard was used at a motel near Miami at 4:00 A.M. and Galloway's name was on the receipt. Witnesses in the neighborhood of the shooting reported hearing gunshots

approximately 12:30 A.M. and Allen confirmed there was sufficient time to drive from the scene to the Shell station (Vol. XI, TR. 837-838).

On May 19, 1993 Hess did an audiotaped walk-through of how the murder may have taken place -- his latest explanation was his claim that he had a dream (Vol. XI, TR. 839) and Exhibits 20A and 20B were admitted and played to the jury (Vol. XI, TR. 843-928). At one point during the re-enactment Hess placed himself in the role of victim, describing taking of the wallet, the use of a credit card at the Shell station and the ATM card. Allen did not furnish the information to Hess, and believed he accurately described the crime (Vol. XI, TR. 928-931). Agent Crone took over the investigation in 1995 after Allen was promoted (Vol. XI, TR. 936).

Lloyd Sawyer, a security guard for Weiser Security, had fired appellant who became violent when he was asked to return materials belonging to the company. Hess said he'd get even with Sawyer (Vol. XII, TR. 1014-1017). Hess denied participation in the Galloway killing (Vol. XII, TR. 1019-1020). Appellant's wife Julie Ann Hess testified that she left work between 11:30 P.M. and midnight May 11 and appellant drove to Lake Fairways. He stopped about a hundred feet from the entrance, got out and walked toward the guard shack and was gone for about a half hour. She heard a couple of gunshots in the distance and he returned, walking quickly

in a nervous condition. They drove south on 41, stopped at a bridge where Hess got out and looked over the side (Vol. XII, TR. 1029-1031). They got a full tank of gas at the Shell station where she worked and she paid for it with a credit card containing the name Galloway furnished by appellant (Exhibit 14 is the credit card receipt she signed in the early morning hours of May 12)(Vol. XII, TR. 1032, 1037). Appellant attempted to get money from an ATM and they stopped at a motel in the Everglades where she signed the guest register using the name John Galloway, Exhibit 15 (Vol. XII, TR. 1037-1038). She saw the outline of a gun in the front of his uniform that night after Lake Fairways but it was no longer visible after the stop on the bridge (Vol. XII, TR. 1039-1040). She initially tried to protect her husband when talking to police and she denied shooting the victim (Vol. XII, TR. 1040).

Sergeant Randy Lee Crone testified that on April 1, 1995 Hess indicated a willingness to talk without the presence of a lawyer. He stated that he was present in a car when Sawyer shot Galloway and took his wallet (Vol. XII, TR. 1026-1028). Crone investigated and determined that Sawyer was not involved (Vol. XII, TR. 1089). Crone spoke again on April 10 to a willing Hess who admitted that Sawyer, with whom he had a grudge, was not involved. On April 11, Hess indicated he wanted to tell the truth about what happened -- he admitted shooting Galloway in an audiotaped statement (Vol. XII,

TR. 1091-1092). Hess agreed to do a videotaped walk-through the next day. Exhibit 22 was introduced into evidence and the video and transcript were played to the jury (Vol. XII, TR. 1098-1111). On April 12, Crone interviewed Hess again at the sheriff's interview room, a day after the video walk-through, and the audiotape (Exhibit 21) was introduced and played to the jury (Vol. XII, TR. 1117-1148).[1]

Hess testified in his own behalf, repudiating his prior statements and explained that he lied to police initially in the hope of getting a job with law enforcement (Vol. XIII, TR. 1246), that he did not really shoot Galloway (Vol. XIII, TR. 1272-1273) and that he only wanted to protect his wife. On cross-examination he acknowledged that sometimes he fancies himself as a good talker (Vol. XIII, TR. 1280) and when asked if he were a pathological liar answered he "can come to be one" (Vol. XIII, TR. 1286), that the dream depicted in the walk-through was a "fairy tale" (Vol. XIII, TR. 1295). He claimed that Agent Allen gave him information about the wallet and failed ATM attempts [which Allen had denied] and only told Crone what he wanted to hear (Vol. XIII, TR. 1296-1297).

---

[1]In the April 11, Exhibit 22 taped statement Hess claimed that in a struggle the victim grabbed his arm and the weapon in his pants pocket discharged twice ((Vol. XII, TR. 1104-1105) and that he took the victim's wallet from his back pocket (Vol. XII, TR. 1106). In the subsequent April 12 statement (exhibit 21) he claimed his wife Julie wanted to use the credit card to buy gas and she threw the gun away and tried to use the ATM card (Vol. XII, TR. 1125-1129).

While insisting he would protect his wife he didn't remember telling authorities she paid with the credit card (Vol. XIII, TR. 1302).

The jury returned guilty verdicts on both premeditated and first degree felony murder (Vol. III, R. 168-169).

Penalty Phase:

On December 16, 1996, the trial court conducted a post-verdict charge conference to discuss penalty phase issues (Vol. III, R. 205-276). The state indicated that at penalty phase it would call a fingerprint examiner (Linda Crosby) to compare appellant's prints on the judgment and conviction in case 95-914CR, eight crimes involving the use or threat of violence to some person -- two counts of sexual activity with a child under F.S. 794.011(8)(b), four counts of lewd or lascivious assault or fondling under F.S. 800.04(1), and two counts of lewd act in the presence of a child under F.S. 800.04(4). The prosecutor indicated that it would choose to rely solely on the description of the crimes and ask the court to take judicial notice of the statutes involved, rather than bring forward the testimony of victims or other investigators (Vol. III, R. 222-224). The defense objected that they were not prior violent crimes (Vol. III, R. 225-226). The prosecutor argued that sexual activity with a child proscribed in the sexual battery statute, F.S. 794.011 was a violent crime; additionally, one of the

counts alleged lewd assault which he urged was violent and the other counts relating to a fondling or touching by an adult engaged in sexual contact with a child should be admissible (Vol. III, R. 230). The state argued that crimes against children of a sexual nature are violent or involve the implicit threat of violence because of the abusive, exploitative nature of the conduct (Vol. III, R. 232).

The court ruled the convictions qualified as prior conviction, that the sexual activity with a child charge and conviction which tracked the sexual battery statute qualified as a crime of violence (counts I and II of case no. 95-914), that count III also qualified because of the assault language, that lewd acts in the presence of a child did not so qualify (count VI), that the information did not charge and the verdict form did not reflect an assault, only a handling or fondling in counts IV, V and VII, and the court was reluctant to allow it unless supported by case law (Vol. III, R. 234-236).

When the state inquired whether the defense would be using experts in mitigation so that the state could have experts in rebuttal, the defense answered it would not call anyone not on their witness list; no expert was on the witness list (Vol. III, R. 244). Although the defense acknowledged they had reports they were not going to use the reports or the experts (Vol. III, R. 245).

The state also urged an instruction on the CCP aggravator (Vol. III, R. 249) and the court indicated that it was not convinced there was a heightened level of premeditation (Vol. III, R. 255).

The state also objected to any defense argument to the jury regarding making any reference to other local or national cases for comparison purposes. The prosecutor objected that such argument constituted providing facts not in evidence and the jury had no basis of knowing what aggravators or mitigators were present in the other cases. The defense indicated that it would argue reference to other cases unless instructed not to by the court (Vol. III, R. 264-265). The prosecutor argued that the jury should not be deciding a capital case based on newsworthiness of other cases (Vol. III, R. 266). The court denied the state's motion in limine (Vol. III, R. 268).

Prior to the penalty phase testimony on December 17, 1996, the prosecutor cited the case of Gramegna v. Parole Commission, 666 So.2d 135 (Fla. 1996) and argued that lewd fondling of a child victim is a nonconsensual matter as a matter of law and thus any argument that consent defeats the violent nature of the crime should be deemed without legal foundation. Counts IV, V and VII should be regarded as crimes involving the use or threat of violence (Vol. IV, R. 285-286). The court indicated it would stand

by its earlier ruling (Vol. IV, R. 290).

The state renewed its motion in limine citing Herring v. State, 446 So.2d 1049 (Fla. 1984) and argued that if the jury could not be given evidence of an unrelated capital case the jury should not be exposed to closing argument by the defense about other capital cases totally unsupported by any evidence (Vol. IV, R. 300-301). The court indicated it would allow some latitude (Vol. IV, R. 302).

The state presented to the jury the testimony of Betty Galloway, wife of the victim, who testified that the death was devastating to the family (Vol. IV, R. 325-326) and Linda Crosby, latent fingerprint examiner, who identified Hess' prints on Exhibits 28 and 29, as well as those exhibits (Vol. IV, R. 329-336) and Exhibit 27 (Vol. IV, R. 327).

The defense presented testimony from appellant's sister Julie Ann Teachworth (Vol. IV, R 349-394). The judge permitted her to testify, over the state's objection, that her children desired that Hess not be put to death (Vol. IV, R. 354-355). The witness admitted that her children April and Crystal had been victims in a case involving appellant (Vol. IV, R. 355). Growing up their family life had been fantastic with two loving, caring parents, although they didn't know who their father was growing up since he held down three jobs (Vol. IV, R. 356). Hess had behavioral

problems growing up (hyperactivity)(Vol. IV, R. 358). Appellant married first wife Laurie Wilson at age sixteen (Vol. IV, R. 361) and they had two children (Robert Lee and Billy Joe); Laurie had a daughter that Hess did not father (Vol. IV, R. 362). Laurie used to get physical with appellant (Vol. IV, R. 364). Social Services put the children in foster care and appellant developed a chip on his shoulder (Vol. IV, R. 366). John and Laurie divorced and he remarried to Julie; there were no children (Vol. IV, R. 368). It bothered Julie (the wife) more than appellant not having children (Vol. IV, R. 379). Julie Ann Teachworth's two children, April and Crystal were aged 15 and 13, respectively, at the present time (Vol. IV, R. 385). Hess knows the difference between right and wrong and when he loves somebody he does so unconditionally (Vol. IV, R. 386). When social services took appellant's two sons from their mother they wouldn't give them to appellant either (Vol. IV, R. 388). A foster care home was where they could get the care they needed (Vol. IV, R. 388). He loved the nieces he was convicted of molesting (Vol. IV, R. 389).

Appellant testified that life was great growing up in Illinois (Vol. IV, R. 396). He punched the Chief of Police in the mouth when he was sixteen (Vol. IV, R. 398). Hess claimed that he was nineteen years old when he married, not sixteen (Vol. IV, R. 400, R. 420). His first wife Laurie was schizophrenic (Vol. IV, R. 401)

and the County decided the children would be better off living elsewhere and “looking back . . . I feel they’re better off where they’re at right now” (Vol. IV, R. 402). Hess asserted that he “couldn’t hurt a fly” (Vol. IV, R. 418). Hess stated that he was diagnosed as having a character disorder, basically he “cannot get along with others” (Vol. IV, R. 421). Hess admitted that in 1993 his ability to appreciate what was and what was not criminal was not impaired (Vol. IV, R. 423) and he was able to obey the law in 1993 (Vol. IV, R. 424). He was not claiming anything regarding a mental disturbance and Hess admitted convictions on two counts of sexual activity with a child against Crystal Griffith and a lewd and lascivious assault against her (Vol. IV, R. 425).

In closing argument the defense compared Mr. Hess to Ted Bundy and Jeffrey Dahmer and Charles Manson in terms of aggravators; the state objected to the Manson reference since he was originally sentenced to death but had his sentence reduced to life when the Supreme Court eradicated the death penalty in the early 1970's. The state argued that the defense argument was improper, misleading and based on facts not in evidence (Vol. IV, R. 452-453). The court allowed the references to Bundy and Dahmer but sustained the objection to the Manson reference, but did not instruct the jury to disregard (Vol. IV, R. 454).

The jury recommended death by an eight to four vote (Vol. IV,

R. 474).

On January 17, 1997, the trial court conducted a hearing pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993) (Vol. V, R. 545-663). Subsequently, the court imposed a sentence of death and Hess now appeals.

SUMMARY OF THE ARGUMENT

Issue I: The lower court did not err in denying appellant's motion to suppress statements since the only basis asserted – reliance on State v. Guthrie, 666 So.2d 562 (Fla. 2DCA 1995) – was subsequently disapproved in Sapp v. State, 690 So.2d 581 (Fla. 1997). Additionally, appellant's statements were not involuntary, he did not inform authorities of any invocation of any right to counsel and provided voluntary statements after Miranda warnings.

Issue II: The lower court did not err in denying a motion for judgment of acquittal for the alleged failure to prove premeditation. Appellant made comments regarding the killing of a security guard to witnesses prior to the homicide, ultimately admitting killing the victim and utilized his wife in making purchases with the victim's credit card. His varying statements of an accidental shooting or that he did not commit the crime were properly rejected by the jury.

Issue III: The lower court did not err in failing to grant a judgment of acquittal on first degree felony murder. First, the issue has not been preserved since defense conceded below that the elements were established. Second, the claim is meritless as evidenced by appellant's use of the victim's property after the killing, purchases with the credit cards and efforts to withdraw money at an ATM machine. *See* G. W. Brown v. State, 644 So.2d 52 (Fla. 1994); Voorhees v. State, 699 So.2d 602 (Fla. 1997).

Issue IV: The Court should not vacate the conviction and discharge appellant on a discredited theory that this Court acts as a supervisory jury to trump the jury below who -- unlike this Court -- saw and heard the witnesses and could determine who was credible. *See* Tibbs v. State, 397 So.2d 1120 (Fla. 1981). This Court should not "acquit" when there is competent, substantial evidence to support the conviction.

Issue V: The lower court did not err in finding the two aggravating factors of prior violent felony and homicide committed during a robbery. Appellant admitted his prior convictions of sexual activity with Crystal Griffith (a child less than eighteen years of age) by penetration of her vagina with his penis and finger and by making her masturbate him and the judge and jury both properly found this homicide to have occurred during a robbery.

Issue VI: The lower court did not err reversibly in failing

to find and give significant weight to proposed mitigators. The court adequately explained why it failed to find some of the factors asserted and assigned the appropriate weight within its discretion to the mitigators it did find.

Issue VII: The sentence of death is proportionately warranted since the two valid aggravators outweigh the minor non-statutory mitigation found. *See* Mendoza v. State, 700 So.2d 670 (Fla. 1997).

Cross Appeal Issue I: The lower court erred in allowing the defense to argue at penalty phase over the prosecutor's objection that the instant murder was unlike other high profile murder cases about which no evidence had been presented in the effort for the jury to engage in a proportionality analysis about which they are uninformed and which is reserved for this Court. *See* Herring v. State, 446 So.2d 1049 (Fla. 1984).

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN FAILING TO GRANT A MOTION TO SUPPRESS APPELLANT'S STATEMENTS BECAUSE ALLEGEDLY THEY WERE INVOLUNTARY, AND LACKED TRUSTWORTHINESS AND RELIABILITY.

A. The Motion to Suppress Hearing:

Appellant, through counsel, filed a motion to suppress confessions, admissions and statements on March 11, 1996, alleging that law enforcement authorities had instigated all contacts with Mr. Hess after his April 4, 1995 invocation of rights in the unrelated case (Case No. 95-914-CFWJN)(Vol. I, R. 19-21). At the evidentiary hearing on March 19, 1996, counsel indicated that he had filed the motion on the two pending murder charges (Case No. 95-1039 and 95-1483), that appellant had been arrested in Michigan on Florida charges involving sexual misconduct with his nieces -- completely unrelated to any of the charges in the two cases before the Court, that Mr. Hess had executed a written invocation of rights form on the sexual misconduct charges on April 4, 1995 and that any questioning on any charges should be suppressed as a violation of the right to have counsel present (Vol. II, R. 26-27).

Hess testified that he was placed under arrest in Michigan on March 14, was returned to Florida on March 31, had a first appearance hearing on April 1, and signed an invocation of

constitutional rights form on April 4, 1995 (Vol. II, R. 28-29). Hess stated that he subsequently gave a taped statement in April to Agents Crone, Buissereth and Sergeant Tamayo, and claimed that he had not contacted any of these three agents prior to the recording. No one from the Public Defender's Office was there and he was in custody (Vol. II, R. 32-33). He gave another transcribed statement on April 11 to Agent Dekle (Vol. II, R. 33-4), and other statements on April 12 (Vol. II, R. 35-37).

On cross-examination appellant denied telling Agent Crone and Sergeant Stanforth on the March 31-April 1 flight to Florida that he knew something about the Galloway homicide and wanted to talk to them about it (Vol. II, R. 41). He didn't know if they read him his rights in the April 1 statement where he said he was just a witness and named others he claimed committed the killing (Vol. II, R. 42). Hess claimed that he was only asked if he knew two named security officers and he said he had worked with them (Vol. II, R. 43). He agreed that he spoke with Agent Crone between April 2 and April 20 (Vol. II, R. 45) and he didn't recall if he was read Miranda rights (Vol. II, R. 46). Hess declared that he was not challenging the technicalities of Miranda warnings (Vol. II, R. 47). He stated that he did not remember the April 10 videotaped walk-through (Vol. II, R. 48).

The state called Deputy Andrew Stanforth who testified that on

the drive from the jail to the airport in Michigan Hess mentioned that he had been a witness to a murder in North Fort Myers and Agent Crone told him he could take a statement later because they couldn't do anything on a plane or in an airport (Vol. II, R. 53-54). Later that evening, April 1, appellant provided a name that supposedly had done the crime (Vol. II, R. 54-55). On April 5, he saw Hess sitting in the bench area and appellant told him he needed to talk to Randy and the witness called Randy that night (Vol. II, R. 55). Hess hadn't been charged with murder at that time (Vol. II, R. 59).

Lieutenant Kerry Griner came into contact with Hess on April 10 who was in an interview room when Griner transported Sawyer to the office (Vol. II, R. 62). Griner knew Hess as a security guard in his district (Vol. II, R. 62). Hess said he was telling the truth and no one would believe him on the accusation that Sawyer and another man was involved in the homicide, mentioned that maybe he wasn't telling the truth and Griner responded that you can't resolve the issue until you tell the truth and Hess responded that he wanted to tell the truth and wanted to talk to Randy Crone (Vol. II, R. 63). Crone was interviewing Sawyer at the time; Hess had not yet made any admissions to being the murderer (Vol. II, R. 64).

Randy Lee Crone of the Lee County Sheriff's Office testified that he had no discussion with appellant on the homicide cases at

the Michigan jail; on the way to the airport Hess mentioned that he had witnessed a Fort Myers murder (Vol. II, R. 69). This was two years after the Galloway murder. Crone was not questioning him and told appellant he'd take a sworn, taped statement when they got back to Fort Myers. Hess was read and waived his Miranda rights on April 1 (Vol. II, R. 70-71). Hess claimed he was in the back seat when Sawyer and another passenger drove to the security guard gate, got into an argument with the man and Sawyer shot him (Vol. II, R. 71). He interviewed Hess again on April 2, appellant was again read his rights and indicated he wanted to talk without an attorney present (Vol. II, R. 72). Crone stated that he first became aware of the written rights invocation form dated April 4, 1995 on the sexual battery case after the interviews of April 11 and 12 and he didn't think much of it because he was under the assumption Hess was a witness and they weren't talking to him about the sexual battery case at all (Vol. II, R. 73). Crone interviewed Hess on April 2 and April 10 with no intervening contact (Vol. II, R. 73-74).

Crone was told by Stanforth -- between the 2nd and 10th -- that Hess wanted to speak to him again and Crone thought he might have more information on the case. Hess had been very calm, very helpful (Vol. II, R. 74). Crone had Hess brought from the jail on April 10 to do photo lineups on who did the shooting (Vol. II, R.

75). While Crone was interviewing Sawyer, Griner knocked on the door and advised that Hess wanted to speak to him, that he did the shooting and wanted to talk about it (Vol. II, R. 75). Crone read appellant his rights, indicated that he understood and wished to talk to him without a lawyer. His statement on April 10 was that he drove to the location, got into an argument with the security guard a night or two before that, that the guard reached out and grabbed him, and the gun went off and shot him (Vol. II, R. 76). At the end of the tape appellant agreed to do a video walk-through of the Galloway and Paulene Boyle homicides and Hess was aware of the fact he was being videotaped -- he again waived counsel (Vol. II, R. 77). Hess was conscious and alert and coherent. Prior to the April 10 interview Hess did not show him the written invocation of rights form (Vol. II, R. 77). Hess continued to tell him he had never been arraigned on the 1st and 2nd of April (Vol. II, R. 78). Appellant never told him he didn't want to talk to him, and he did not ask for a lawyer (Vol. II, R. 79). Crone regarded Hess as a witness prior to April 10 (Vol. II, R. 79). He had not previously been arrested in 1993 (Vol. II, R. 80).

In the lower court Hess argued that his motion was "based entirely upon the case of State of Florida vs. Guthrie which is a Second District Court of Appeals case which is -- which was decided on December the 29th of 1995 and is found at 21 Florida Law Weekly,

page 136" (Vol. II, R. 87). The defense acknowledged that Guthrie might conflict with Sapp v. State (Vol. II, R. 87).

The court denied the motion to suppress (Vol. II, R. 99).

Almost one year after the suppression hearing this Court decided Sapp v. State, 690 So.2d 581 (Fla. 1997), approving the decision of the First District Court of Appeal and disapproving the decision in State v. Guthrie, 666 So.2d 562 (Fla. 2DCA 1995). This Court held:

> [5] [6] We agree with the reasoning in *Alston* and find it entirely consistent with the underlying premise of *Miranda*. *Miranda*'s safeguards were intended to protect the Fifth Amendment right against self-incrimination by countering the compulsion that inheres in *custodial interrogation*. "[T]he presence of *both* a custodial setting and official interrogation is required to trigger the *Miranda* right-to-counsel prophylactic.... [A]bsent one or the other, *Miranda* is not implicated." *Alston*, 34 F.3d at 1243 (citing *Miranda*, 384 U.S. at 477-78, 86 S.Ct. at 1629-30). *See also Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980) ("[T]he special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."). Accordingly, we conclude that the claim of rights form was not effective under federal law to invoke Sapp's *Miranda* right to counsel under these circumstances.
>
> [7] [8] Sapp also argues that regardless of whether federal law permits an individual to anticipatorily invoke the right to have counsel present during custodial interrogation, article I, section 9 of the Florida Constitution provides an independent basis for this right. (FN8) He relies on our

statement in *Traylor v. State,* 596 So.2d 957, 966 (Fla.1992):

> Under [Article I,] Section 9, ... [i]f the suspect indicates in any manner that he or she wants the help of a lawyer, interrogation must not begin until a lawyer has been appointed and is present or, if it has already begun, must immediately stop until a lawyer is present.

Although states may afford greater protection to the individual than the federal Constitution does, *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), we do not interpret article I, section 9 of the Florida Constitution as doing so here.

[9] [10] While *Traylor* contemplates that an individual may invoke the right to counsel before questioning begins, it cannot fairly be read to mean that a suspect may invoke the right at *any time* after being taken into custody. *Cf. Arbelaez v. State,* 626 So.2d 169 (Fla.1993) (holding that police were not required to give defendant his *Miranda* warnings during a telephone conversation with him where conversation occurred outside the context of custodial interrogation), *cert. denied,* 511 U.S. 1115, 114 S.Ct. 2123, 128 L.Ed.2d 678 (1994). We must keep in mind that the reason for informing individuals of their rights before questioning is to ensure that statements made during custodial interrogation are given voluntarily, not to prevent individuals from ever making these statements without first consulting counsel. *Traylor,* 596 So.2d at 964. As we recognized in *Traylor,* freely given, voluntary confessions are an unqualified good. *Id.* at 965. A rule allowing one to invoke the right to counsel for custodial interrogation before it is even imminent (whether it be through a claim of rights form or by any other means) would provide little additional protection against involuntary confessions but would unnecessarily hinder lawful efforts by police to obtain voluntary confessions. We believe

> that requiring the invocation to occur either during custodial interrogation or when it is imminent strikes a healthier balance between the protection of the individual from police coercion on the one hand and the State's need to conduct criminal investigations on the other.
>
> (Id. at 585-586).

Appellant contends that his case is distinguishable from Sapp because the invocation of rights form was not signed prior to interrogation about this case. He argues that he was incarcerated and knew further interrogation concerning this case was imminent. Hess ignores the contrary testimony of police. According to Crone, Hess mentioned on the way to the airport in Michigan he had witnessed a murder and talked with officers on April 1 and 2, and Crone had no intervening contact until April 10 (Vol. II, R 69-74). Deputy Stanforth testified that on April 5 Hess requested to talk to Crone and that Stanforth phone Crone (Vol. II, R 55, 59). As to the claim that Hess showed the invocation form to Crone during an interrogation, Crone claimed he was informed of it after the interviews on April 11 and 12 (not before as Hess contended) (Vol. II, R 73, 77) and never indicated that he didn't want to talk to him or want a lawyer (Vol. II, R 79).

B. Appellant's Claim That the Statements Were Involuntary:

The first thing that must be asserted is that this claim should be deemed procedurally barred as it was not asserted in the

court below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Mordenti v. State, 630 So.2d 1080 (Fla. 1980). The only argument presented below was that the officers had questioned him in violation of State v. Guthrie, 666 So.2d 562 (Fla. 2DCA 1995) (Vol. I, R. 87) - a decision disapproved by this Court in Sapp v. State, 690 So.2d 581 (Fla. 1997) and quashed in State v. Guthrie, 692 So.2d 888 (Fla. 1997). *See also* Cullen v. State, 699 So.2d 1009 (Fla. 1997). (Appellee submits that the lower court did not err reversibly, if that is what Hess is suggesting at page 43, footnote 37 of his brief, in ruling consistently with this Court's precedents of Sapp, Guthrie, and Cullen, *supra*, rather than the discredited Second District Court opinion of State v. Guthrie, 666 So.2d 562.)

Although he made no similar challenge below Hess now initiates a challenge to his confession asserting that under the totality of circumstances his statements were involuntary.[2]

C. Written Invocation of Right to Counsel for Interrogation:

Appellant seeks to distinguish his case from Sapp, *supra*.

---

[2]Prior to jury selection when the parties announced ready for trial, the prosecutor represented that he was relying on Judge Nelson's ruling denying the suppression motion and that the defense had not interposed any other objections -- aside from the asserted violation of the invocation of right to counsel on April 4, 1995 -- and that if there were additional objections they should be made and resolved prior to starting the trial. The defense responded that they had raised all issues they deemed appropriate unless something comes up that's unexpected (Vol. VII, R 6-20).

Hess argues that we do not know the circumstances of his signing the invocation of rights form. The form was dated April 4, 1995 (Vol. II, R 29). While appellant claimed that he carried the invocation form when he was taken to the interrogation room of the sheriff's office from the jail on April 10th and 11th and that he did not request agents to speak with him (Vol. II, R. 32-33) and that he never waived his rights (Vol. II, R. 38-40) and couldn't remember if Agent Crone read Miranda rights on April 10th (Vol. II, R. 46) and didn't know or remember Agent Stanforth -- "I have just seen Agent Crone" (Vol. II, R. 47), and asserted that he did not remember the videotaped walk-through escorted by deputies at Lake Fairways (Vol. II, R. 48), the testimony of the officers was quite to the contrary.

According to Deputy Stanforth on April 5th while he was putting a person in jail on a warrant, Hess told him he needed to talk to Randy and he subsequently communicated this fact to Crone (Vol. II, R. 55-56). Officer Griner testified that on April 10th in an interview room Hess complained that no one was believing his accusation that Sawyer and another man was involved in the homicide, that he wanted to tell the truth and wanted to talk to Crone (Vol. II, R. 63).

Agent Crone insisted that appellant was read and waived Miranda rights when he first gave a statement at the sheriff's

office following the flight from Michigan, describing Sawyer's alleged involvement (Vol. II, R. 71), and that after the interview Hess invited him to come talk with him again and when Crone spoke to him again Hess agreed to talk with him without an attorney (Vol. II, R. 72). Crone stated that he became aware of the signed invocation of rights form after the April 10-12 interviews -- he never personally knew or saw it prior to Hess' statements -- but he didn't think much of it since he was talking to Hess as a witness and they didn't talk to him about the sexual battery case (Vol. II, R. 73). Crone had Hess removed from jail and brought to the sheriff's office on April 10th for a photo lineup on the shooter while Crone was interviewing Sawyer (Vol. II, R. 75). When Griner informed him that Hess wanted to talk to him about the shooting he had just admitted, Crone read appellant his rights and he understood and wished to talk without a lawyer. Appellant admitted shooting Galloway (Vol. II, R. 76). Hess also agreed to a video walk-through and waived counsel (Vol. II, R. 77). Appellant did not show any invocation of rights form prior to the April 10th interview (Vol. II, R. 77-78). Hess never indicated he didn't want to talk to him, and never asked for a lawyer. Crone regarded Hess as a witness prior to April 10th (Vol. II, R. 79).

Hess did not inform Crone of his allegedly having invoked his right to counsel prior to making his admissions and Hess had been

given Miranda warnings without expressing either the right not to speak or to counsel.

Contrary to appellant's implication at page 47 of the brief, Crone testified that after Hess gave his initial statement on April 1st after the flight from Michigan Hess invited him to talk more about the case:

> Q. Was there any discussions or agreements between the two of you regarding any further contacts after the termination of that statement?
> A. After our interview John would ask me come get him, come talk to me, and I would take him back to the jail.

(Vol. II, R. 72).

D. Interrogation Without Miranda Warnings:

Hess attempts to convert Griner's conversation with Hess into the "functional equivalent of express questioning." The allegation was not presented below -- Hess testified that he didn't recall Griner (Vol. II, R. 48) and did not urge that he was capitulating to interrogation by Griner. Griner stated that he knew Hess from a prior incident he had with him when Hess was a security guard and Hess said he'd remembered Griner (Vol. II, R. 62-63). Moreover, it was Hess who initially mentioned not telling the truth:

> Q. Would you please tell us the nature of that discussion.
> A. It was fairly general in nature about telling the truth and that nothing could ever be resolved in someone's life until the truth was known, and not really specifics about any individual case, just telling the

> truth.
>
> Q. Who was saying that, you or him?
>
> A. I was.
>
> Q. What if anything did Mr. Hess say to you?
>
> A. He at first said that he was telling the truth and that no one would believe him about -- I think he was accusing this Mr. Sawyer and another man of being involved in a homicide. And then he went into the fact that, well, maybe he wasn't telling the truth but he was having some blackout problems and he couldn't remember everything.
>
> And I said, well, you can't, you can't resolve this issue until you tell the truth. I mean, if you are not willing to tell the truth nothing is ever going to be resolved. And he said that he wanted to tell the truth and he wanted to talk to Randy Crone.

(Vol. II, R. 63).

Appellant asserts that his situation is comparable to Glover v. State, 677 So.2d 374 (Fla. 4DCA 1996). It is not. There, appellant had been arrested and placed in an interrogation room for over an hour and a half and his questions requesting an explanation for his arrest went unanswered by those present, even as he became more agitated. The appellate court found that the officers' conduct toward defendant was unduly protracted and evocative such that the atmosphere was tantamount to custodial interrogation. In the instant case, Hess had been arrested on unrelated sexual offense charges and was present at the sheriff's office on April 10 in the interview room because Crone wanted him available for photo lineups on the shooter while Crone interviewed Sawyer (Vol. II, R.

75). When Griner spoke to Hess, the latter complained that people didn't believe him, but that "maybe he wasn't telling the truth" and couldn't remember everything. Griner simply responded that things couldn't be resolved if he wasn't willing to tell the truth and Hess answered that he wanted to tell the truth and to talk to Crone (Vol. II, R. 63). The case is similar to Davis v. State, 698 So.2d 1182 (Fla. 1997) where Officer Judd's expression of disappointment was held not to constitute interrogation. Unlike Judd's subsequent failure to give Miranda warnings, Griner merely informed Agent Crone that Hess wanted to talk to him and Crone gave Miranda warnings (Vol. II, R. 65, R. 76).[3]

E. Totality of Circumstances:

Appellant next appears to argue that under the totality of circumstances, Hess' admissions were the product of police coercion. At the risk of repetition, appellee must insist that appellant's failure to urge this below precludes consideration now. San Martin, *supra*; Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

In any event, alternatively, the claim is meritless. There is

[3]With respect to Hess' claim that the police were parading his wife back and forth in front of him in handcuffs and they wouldn't let him see her, that was not an assertion at the suppression hearing where Hess sought only relief on the pre-Sapp ruling of State v. Guthrie (Vol. II, R. 87) and appears to be an afterthought by Hess. *See* San Martin v. State, 705 So.2d 1337 (Fla. 1997)("we note that San Martin's intelligence level was never argued to the trial court as a basis for suppressing the statements. Thus, that issue is not available for appellate review").

hardly any impropriety in using Agent Partington to record a conversation with Hess and provide the latter an opportunity to confirm the information provided by Michael Warren that he had information about a slain guard before it had happened. Appellant is unhappy that on occasion the officers used deception -- and did not believe his multiple changing stories that Hess provided voluntarily in 1993 (that he knew about the murder beforehand from a CB radio, a security guard told him, then Lieutenant Sawyer -- Vol. XI, R. 824). None of this involved coercion. *See* Escobar v. State, 699 So.2d 988 (Fla. 1997) (police misrepresentations alone do not necessarily render a confession involuntary); Johnson v. State, 660 So.2d 637 (Fla. 1995) (suspect's confession after police told him he failed consensual polygraph examination was not a result of coercion); State v. Manning, 506 So.2d 1094 (Fla. 3DCA 1989). That appellant continued to assist police by replacing one lie with another hardly constitutes impermissible police behavior.

Appellant argues that there were multiple factors demonstrating coercion -- none of them urged at the suppression hearing, of course. He mentions the atmosphere of a station house setting, but Hess had mentioned to Crone on the trip from Michigan his desire to give a statement on the crime he had witnessed and indeed after his first statement on April 1 he agreed to talk again (Vol. II, R. 72). He cites the factor of police suggesting the

details of the crime but Officer Allen testified that Hess had information which was not released that only someone involved in the murder would know (Vol. XI, R. 817). Crone denied in his testimony that he took appellant to Arcadia (Vol. XIII, R. 1208-1209) contradicting the suggestion made by Hess' counsel on cross-examination that he had done so (Vol. XIII, R. 1195-1196).

Appellant is not aided by reliance on Sawyer v. State, 561 So.2d 278 (Fla. 2DCA 1990) where detectives violated Miranda requirements by failing to clarify the defendant's equivocal request for an attorney, violated Miranda by ignoring defendant's unequivocal requests for an attorney, failed to scrupulously honor the defendant's request to cut off questioning which violated Miranda. *See* Walker v. State, 707 So.2d 300, 311, n. 5 (Fla. 1997) (also distinguishing Sawyer and describing it as a case involving an involuntary confession where it was the product of enforced sleeplessness, 16 hour serial interrogation with no meaningful breaks, a scenario of misleading questions, denial of requests to rest, refusal to honor Miranda rights and use of defendant's history of blackouts to undermine his reliance on his own memory). The Court in Walker denied relief on the challenged admitted statement, explaining:

> [4, 5] Walker next contends that the coercive interrogation techniques employed by Detectives Everett and Watterson rendered his confession involuntary. Where a defendant

alleges that his statement was the product of coercion, the voluntariness of the confession must be "determined by an examination of the totality of the circumstances." *Traylor v. State*, 596 So.2d 957, 964 (Fla. 1992).

In this case, Walker cites as improper the combination of the following techniques: (1) Walker was not advised prior to interrogation that he was the "focus" of the investigation; (2) police falsely told Walker that they had found "a" fingerprint or "his" fingerprint on the duct tape from one of the victims before they had learned such results, and repeatedly insisted that they knew he was guilty; (3) police showed Walker a picture of the deceased infant's decomposing body and told him that whoever had done this had done a terrible thing; (4) knowing that Walker was a deacon in his church, police exploited his religious beliefs when they told him that God would not believe his "abduction" story; (5) police engaged in "racially-charged role playing" with Detective Watterson, a white officer, being the "bad-cop" while Detective Everett, a black officer, attempted to relate to Walker "brother to brother." (6) police threatened Walker with the "electric chair" and Detective Everett then promised he could help Walker out.

[6] In orally denying Walker's motion on these grounds, the trial court noted:

> And these techniques that were used by the police, everyone knows about them. They have not been disapproved by the law in any way. They are used constantly. They practically are used in every murder case I've ever heard about. And I think there's no question that given the totality of circumstances, that this statement that the Defendant gave was freely and voluntarily given and the motion to suppress is denied.

As noted previously, a trial court's ruling on a motion to suppress is accorded great deference. *McNamara v. State*, 357 So.2d 410 (Fla.1978). The testimony from the motion to suppress hearing reflects that the trial

> court's denial of Walker's motion on this ground also is supported by the record.
>
> Contrary to Walker's assertions, the police interrogation here simply cannot be characterized as so coercive as to render his confession involuntary. Although Walker was questioned for six hours, the interrogation occurred during the morning and early part of day. Walker was provided with drinks upon request and allowed to use the bathroom when he wished. Although Detective Everett reminded Walker that he could face the death penalty for the murders of the victims in this case, Walker was never threatened with the "electric chair," or promised anything other than that Detective Everett would inform the prosecutor that Walker had cooperated in the investigation. Although Detective Watterson did not know that Walker's fingerprint was found on a piece of duct tape when he conveyed that information to Walker during questioning, Watterson honored appellant's wishes and refrained from taking fingerprints or photographs at that time because of Walker's shaken reaction to that news.[5] Consequently, we affirm the trial court's denial of Walker's motion on this ground also.

(text at 311).

Similarly, in the instant case, appellant presented no evidence at the motion to suppress evidentiary hearing regarding an involuntary or coercive extraction of a confession. He agreed to talk to the police, gave a videotaped walk-through at the crime scene which he conveniently chose not to remember at trial and opted for the last straw that his prior admissions constituted an effort to protect his wife.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A MOTION FOR JUDGMENT OF ACQUITTAL FOR THE ALLEGED FAILURE TO PROVE PREMEDITATION.

A court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. DeAngelo v. State, 616 So.2d 440, 441-442 (Fla. 1993); Taylor v. State, 583 So.2d 323, 328 (Fla.), cert. denied, ___ U.S. ___, 115 S.Ct. 518, 130 L.Ed.2d 424 (1994); Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). In moving for judgment of acquittal, a defendant admits the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. Lynch, Taylor.

While this Court has recognized that circumstantial evidence may be deemed insufficient where it is not inconsistent with a reasonable theory of defense, this Court has also recognized repeatedly that the question of whether any such inconsistency exists is for the jury, and this Court will not disturb a verdict which is supported by substantial, competent evidence. Spencer v. State, 645 So.2d 377, 380-381 (Fla. 1994); Cochran v. State, 547

So.2d 928, 930 (Fla. 1989); Heiney v. State, 447 So.2d 210, 212 (Fla.), cert. denied, 469 U.S. 920 (1984); Williams v. State, 437 So.2d 133, 134 (Fla.), cert. denied, 466 U.S. 909 (1984); Rose v. State, 425 So.2d 521 (Fla.), cert. denied, 461 U.S. 909 (1983). It is not this Court's function to retry a case or reweigh conflicting evidence; the concern on appeal is limited to whether the jury verdict is supported by substantial, competent evidence. Tibbs v. State, 397 So.2d 1120 (Fla.), aff'd., 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). *See also* Barwick v. State, 660 So.2d 685, 694-695 (Fla. 1995) wherein this Court explained:

> In a circumstantial evidence case such as this, a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. *Atwater v. State*, 626 So.2d 1325, 1328 (Fla.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994); *State v. Law*, 559 So.2d 187, 188 (Fla.1989). If a case is to proceed to trial where the jury can determine whether the evidence presented is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt, the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences. *Law*, 559 So.2d at 189. If there is an absence of such evidence, a judgment of acquittal is appropriate.
>
> * *
>
> [22][23] However, the State need not conclusively rebut every possible variation of events which could be inferred from Barwick's hypothesis of innocence. *Id.; State v. Allen*, 335 So.2d 823, 826 (Fla.1976). Whether the evidence fails to exclude *all* reasonable hypotheses of innocence is for the jury to

> decide. *Lincoln v. State*, 459 So.2d 1030, 1032 (Fla.1984). We have held that "[i]f there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury." *Taylor v. State*, 583 So.2d 323, 328 (Fla.1991).

Accord, Crump v. State, 622 So.2d 963, 971 (Fla. 1993).

In Orme v. State, 677 So.2d 258 (Fla. 1996), this Court also added:

> [1] In this appeal, Orme raises a number of issues challenging his conviction and sentence. First, Orme argues that the trial court should have directed a judgment of acquittal on grounds the case against him was circumstantial and the State had failed to disprove all reasonable hypotheses of innocence. *See Davis v. State,* 90 So.2d 629, 631 (Fla.1956). As his hypothesis, Orme contends that during his absence from the motel room an unknown assailant entered and killed Redd, with Orme discovering the body later in the morning. This hypothesis, he says, is entirely consistent with the direct evidence presented at trial, thus requiring a directed verdict under *Davis.*
>
> [2] In *Davis,* we made the following observations:
>
> > Direct evidence is that to which the witness testifies of his own knowledge as to the facts at issue. Circumstantial evidence is proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist. The conclusion as to the ultimate facts must be one which in the common experiences of men may reasonably be made on the basis of the known facts and circumstances.

> *Id.* at 631. Proof based entirely on circumstantial evidence can be sufficient to sustain a conviction in Florida provided the other conditions established by the *Davis* line of cases are satisfied. (FN1) *Id.* Thus, our analysis of this case must begin by determining the threshold question of whether the case against Orme was wholly circumstantial.
>
> The direct evidence presented by the State placed Orme at the scene of the crime around the time of Redd's death. This was established both by eyewitness testimony and Orme's own statement to police. His statement further acknowledged both a dispute between Redd and himself over his use of cocaine, and his theft of her purse and automobile. The DNA and blood-stain evidence taken from Orme and Redd's clothing obviously suggested that Orme had engaged in sexual relations with the victim. Likewise, the medical examination of the victim clearly showed she had been sexually assaulted around the time of death. Nevertheless, semen taken from the victim could not be matched to Orme; and at trial Orme argued that the DNA and blood-stain evidence could be explained by the fact he had engaged in sexual relations with Redd a week or two earlier.
>
> [3] [4] Evidence such as this cannot be deemed entirely circumstantial.

Id. at 261-262. The Court in Orme then assumed *arguendo* that the case was entirely circumstantial and concluded:

> We note that Orme's account was the sole factual source for the defense's theory, and his credibility clearly had been called into question by inconsistencies in his stories to the officials. Moreover, nothing anywhere in the record suggests that another person was present in the motel room. Based on this record, the State's theory of the evidence is the most plausible: that Orme was the one who had attacked and killed Redd. Put another way, competent substantial evidence supports

> the conclusion that the State had presented adequate evidence refuting Orme's theory, creating inconsistency between the State and defense theories. Accordingly, we may not reverse the trial court's determination in this regard.

Id. at 262.

The evidence adduced by the state below included:

(1) Two witnesses, Geraldine Lindsey and Michael Warren, testified that on Monday, May 10, 1993, prior to the Galloway homicide, Hess mentioned that a security guard had been shot and killed with a gunshot to the chest (Vol. X, TR 680-681, TR 694). The two witnesses did not hear of the incident by news or television until two days later, Wednesday, May 12 (Vol. X, TR 683, TR 695).

(2) In a wired conversation on May 13, 1993, with Warren and Agent Partington, Hess admitted owning guns [Hess had also told Lindsey he owned guns -- VOL X, TR 682], that the police had not given out all the information about the case, that the victim had died instantly when shot (Vol. X, TR 714-715). Hess stated in the wired conversation that he had a .380 at home (Exhibit 19, Vol X, TR 731-732).

(3) Sheriff’s Officer Gil Allen testified that the murder actually occurred Tuesday night-Wednesday morning on May 12 (Vol. XI, TR 804). Information withheld from the murder included the number of shots fired, the nature of the death, position of the body, evidence recovered and information about the wallet (Vol. XI,

TR 801). Two projectiles were found at the murder scene, one from the victim's body and another at the area of the drive (Vol. XI, TR 810). While the gun was never recovered, ballistics showed that both projectiles were fired from the same gun (Vol. XI, TR 933). The caliber was .32 (Vol. XI, TR 950).

(4) Dr. Manfred Burgess, associate medical examiner, testified that the victim died of a gunshot wound to the chest which perforated the pericardium, esophagus and right lung and grazed the backbone. The path of the bullet was from front to back, and right to left with very little vertical deviation -- almost straight in (Vol. X, TR 656). The bullet went from the victim's left side to his right side, with no significant vertical deviation (Vol. X, TR 661). Appellant's wife testified that when Hess returned to the automobile after visiting the guard shack she saw the outline of a gun in his uniform but it was no longer visible after he stopped and got out at a bridge (Vol. XII, TR 1039-40, 1053).

(5) Appellant's admissions to authorities included relating on May 13, 1993, that he knew the victim Galloway, that he checked on Galloway at numerous times at night and that Galloway was rude to him once when Hess checked on the possibility of moving a trailer into Lake Fairways (Vol. XI, TR 811), his vivid description of the security procedures at Lake Fairways (where and when patrol deputies would be by), the number of gunshots sustained by the victim and that he died instantly -- information not released to

the public and that he had been in the area on the evening of the murder (Vol. XI, TR 813-819). Hess initially claimed that he first heard about the murder on a CB radio (Vol. XI, TR 822) and when questioned about discrepancies, he became evasive in trying to explain how he knew about a murder that hadn't taken place the night before. Hess altered his account to that a security guard whose last name and whereabouts he could not provide told him of the event and then abandoned the CB radio story by asserting that Mr. Sawyer had given him the information (Vol. XI, TR 823-824). Hess claimed Sawyer committed the murder. Hess, on May 19, provided a taped walk-through about an asserted dream he had regarding how the murder could have taken place (which included information about the ATM card, trifold wallet and credit card used at a Shell station) and part of his dream or vision was consistent with Allen's belief as to what actually happened (Vol. XI, TR 928-931). Hess mentioned an incident wherein Galloway had accused him of trespassing and kicked him off the Lake Fairways property (Vol. XII, TR 1000-1001). Hess told homicide detective Randy Lee Crone on April 1, 1995, that he was present at the crime when Sawyer shot Galloway twice (Vol. XII, TR 1088).[4]

Appellant concedes that this is not a circumstantial evidence

[4]Crone investigated the allegation and determined that Sawyer was not involved (Vol. XII, TR 1089) and Sawyer testified both that he had no involvement in the slaying and that Hess -- who was fired a week before the killing -- told Sawyer he'd get even with him (Vol. XII, TR 1017-25).

case only because of Hess' admissions and a confession to a crime is direct, not circumstantial, evidence of that crime. Meyers v. State, 704 So.2d 1368 (Fla. 1997); Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988)(Brief, p. 71). As stated in Hardwick:

> We disagree that the case was circumstantial, since Hyzer and others testified that Hardwick had confessed to the murder or told others of his plans in advance of the killing. A confession of committing a crime is direct, not circumstantial, evidence of that crime.
>
> (Id. at 1075)

And in Meyers the Court explained:

> We disagree that the case was entirely circumstantial. Meyers' former cellmates testified that Meyers confessed to the murder. Because confessions are direct evidence, the circumstantial evidence standard does not apply in the instant case.
>
> (704 So.2d at 1370)

See also Walls v. State, 641 So.2d 381, 390 (Fla. 1994)(a confession is direct evidence in Florida).

On April 10, 1995, Hess admitted to Crone that Sawyer was not involved and that he had a grudge against Sawyer and another. On April 11, Hess admitted that he shot Galloway but in this version (Exhibit 22, Vol. XII, TR 1104-1105) the gun in appellant's pants pocket discharged twice when he struggled with the victim.

At trial appellant disavowed all prior explanations and contended that he made up his stories to law enforcement in the hope of getting a letter of recommendation for his job application with the sheriff's office (Vol. XIII, TR 1245-1246), that he made

up the story of Sawyer's involvement because they were people he had problems with at his last job (Vol. XIII, TR 1251-1252), that the videotaped dream walk-through was one of his "fairy tales" (Vol. XIII, TR 1257), insisted that he did not shoot Galloway or use his ATM or credit card but confessed because he wasn't going to stand for his wife being thrown into jail (Vol. XIII, TR 1272-1279). Hess maintained that details of the offense he provided had been related to him by Agent Allen and was what Crone wanted to hear (Vol. XIII, TR 1258-1261, 1295-1301). Allen had denied furnishing detailed information of the crime to Hess (Vol. XI, TR 928-929).

(A) The nature of the weapon and manner of crime -- Appellant reasons that there was no evidence Hess bought a gun prior to the homicide and that since Mrs. Hess only testified she saw the outline of a gun in appellant's pants when they drove away from Lake Fairways that night it "would suggest he got the gun at the guard gate" and "there was no evidence that the shooting did not happen during a struggle as Hess related . . ." (Brief, p. 62). To the contrary, among appellant's admissions were comments to Agent Partington on May 13, 1993 before Hess would consider himself a suspect that he had guns at home (Vol. X, TR 730-732).[5] The

[5]If appellant suggests Mrs. Hess never saw a weapon, appellee submits that her testimony was that she didn't see anything that night other than what she testified about (Vol. XII, TR 1039-1040). And in another admission Hess stated that he had purchased the gun from "Carl" (Vol. XII, Exhibit 21, TR 1138-1139).

physical evidence rebuts the contention that the shooting occurred in the struggle described by Hess. Appellant's final version was that the victim grabbed him in the pants where appellant's hand and gun was and the gun went off twice, leaving a burn mark on his thigh and putting a hole in his pocket (Vol. XII, Exhibit 21, TR 1121).

Mrs. Hess testified that she noticed nothing unusual about appellant's uniform when she washed it the next day (Vol. XII, TR 1074) but more significantly associate medical examiner Dr. Manfred Burgess' testimony refutes the claim -- the victim was shot in the chest directly even with no verticality (Vol. X, TR 656, 661) a scenario which does not comport with an exculpatory version of accidental discharge from the pants pocket.

Appellant argues that the shooting occurred so quickly the perpetrator had little time to think about whether he wanted to kill the guard. But in terms of time duration, discharging a firearm twice is not inconsistent with a premeditated design to kill. Additionally, Hess provided detailed information to Agent Allen on May 14, 1993 regarding a familiarity with the security and patrol activities at Lake Fairways (Vol. XI, TR 810-814) and even had told Allen that he had driven by Lake Fairways on the evening of the murder at around ten and he liked to see how close he could get to the security guards to see what kind of job they were doing (Vol. XI, TR 819).

(B) As to previous problems between the parties and the

presence or absence of provocation, Hess mentioned to Allen on May 14 a prior incident where the victim Galloway had accused Hess of trespassing and kicked him off the Lake Fairways property (Vol. XII, TR 1000-1001) and claimed that the victim had been rude (Vol. XII, TR 1001). Appellant additionally did not get along well with Lloyd Sawyer, a security guard for Weiser Security who requested he no longer work with Hess and Hess was fired from Weiser Security and said he'd get even with Sawyer (Vol. XII, TR 1017, 1025). At one point Hess told law enforcement authorities that Sawyer was involved in the murder (Vol. XI, TR 824-827; Vol. XII, TR 1088) and even on the stand acknowledged that he had had problems with Sawyer at his last job (Vol. XIII, TR 1252).

In Peterka v. State, 640 So.2d 59 (Fla. 1994) the defendant similarly urged that the state had not excluded his reasonable hypothesis that the killing was accidental. This Court explained that the jury determines whether the circumstantial evidence fails to exclude all reasonable hypotheses of innocence and where substantial, competent evidence supports their verdict, it will not be reversed on appeal. Also, the circumstantial evidence standard does not require the jury to believe the defense version of the facts on which the state has produced conflicting evidence and the state is entitled to a view of any conflicting evidence in the light most favorable to the verdict. Id. at 68. There, as here, the circumstances of the crime refuted a defense contention of an accidental shooting. Additionally, Peterka's possession of the

victim's property "support the finding of premeditation". Id. at 68.

Appellant cites Mungin v. State, 689 So.2d 1026 (Fla. 1995), a case in which this Court affirmed the conviction on felony-murder grounds ($59.00 missing from cashbox where convenience store clerk by single gunshot to the head) but also determined the evidence to be insufficient to sustain a premeditation theory because although the evidence supported premeditation (shot in head at close range, murder weapon procured in advance and required a six pound pull to fire) it was also consistent with a spur of the moment killing because there were no statements indicating an intent to kill and no continuing attack to suggest premeditation). In the instant case, appellee submits that there is also a felony-murder (Issue III) but additionally here Hess mentioned the shooting of a guard two days prior to its occurrence and attempted to put the blame on security guard Sawyer whom he had threatened to get even with on prior difficulties; and after he had developed a knowledge of the patrols and layout of the premises.

Appellant cites Norton v. State, ___ So.2d ___, 23 FLW S12 (Fla. 1997), wherein this Court concluded that the state had demonstrated an unlawful killing and that the circumstantial evidence rule does not require the jury to believe the defendant's version of events where the state produces conflicting evidence (thus, the jury could reject the alibi evidence in Norton, and the accidental shooting version *sub judice*). The Norton court

recognized that motive is not an essential element of a homicide but can become important when the proof of a crime rests on circumstantial evidence. Unlike Norton, however, the instant case contains an admission by Hess that he shot the victim and took his wallet and credit cards, corroborative testimony from Mrs. Hess who was in the area and heard two gunshots followed by appellant's return to the car with a gun and the victim's property, Hess' admissions that the victim had previously been rude to him and Hess threatened to get even with guard Lloyd Sawyer prior to his being fired from another security agency, Hess had told Partington and Warren he had guns at home. No serious claim can be made that the instant homicide only constitutes manslaughter as in the Norton case since the discharge of a weapon twice -- unlike the possible accidental discharge hypothesized in Norton -- with the fatal bullet striking Galloway in a straight line trajectory to the heart contradicts Hess' unbelievable accidental shot from the pocket version. Orme, *supra*.

Appellant cites Rogers v. State, 660 So.2d 237 (Fla. 1995), another case distinguishable by the absence of a felony-murder component. Additionally, premeditation was lacking there since the evidence actually showed a discharge of a firearm during a struggle between perpetrator and victim. The only support for the accidental discharge in the instant case comes from Hess, a story which does not square with the physical evidence attested by the medical examiner and as Orme teaches "his credibility clearly had

been called into question by inconsistencies in his stories to the officials." 677 So.2d at 262.[6]

[6]Similarly, in Kirkland v. State, 684 So.2d 732 (Fla. 1996) a killing apparently following sexual temptation by the victim, contained no indicia of a preconceived plan whereas Hess studied the guard's location and knew the patrol practices and went to the site at a time in which he would not likely be seen by others. Appellant also cites Terry v. State, 668 So.2d 954 (Fla. 1996) where, as in the instant case, the Court found sufficient evidence to support a felony-murder conviction (during a robbery). The victim there had not previously been rude to the defendant.

ISSUE III

WHETHER THE LOWER COURT ERRED BY FAILING TO GRANT A JUDGMENT OF ACQUITTAL AS TO FIRST-DEGREE FELONY-MURDER AND ROBBERY BECAUSE OF ALLEGED INSUFFICIENT EVIDENCE HE INTENDED TO ROB THE VICTIM.

Appellant first may not prevail on this contention because it has not been preserved for appellate review. In the lower court at the motion for judgment of acquittal Hess challenged only the state's premeditated evidence and acknowledged that the state had satisfactorily adduced evidence to support the robbery and felony-murder:

> There is the argument as to the felony murder that no matter whether it was an accident or not an accident or whether it was thought out or planned or not, if it happened during the commission of a robbery, then it doesn't make any difference.
>
> I reluctantly would argue as far as the robbery and the felony murder charge is concerned, that the state has at least established a prima facie case touching on each of the necessary elements for that offense. Although it took some time, I believe that the state was finally able to introduce statements indicating that Mr. Hess in fact took the wallet and used the credit card from the wallet.

(Vol. XIII, TR 121-122)(emphasis supplied)

See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); and Mordenti v. State, 630 So.2d 1080 (Fla. 1994).

Appellant's claim is also meritless. Gil Allen of the sheriff's office investigated the scene of the homicide at 2:00

A.M. on May 12, 1993. The victim's pocket was inverted, indicating something had been removed, there was no wallet at the scene and Mrs. Galloway informed Allen that her husband had a trifold wallet with numerous credit cards and possibly some cash (Vol. XI, TR 791-796). An ATM card belonging to Mr. Galloway had been used at Barnett Bank at approximately 1:00 A.M. the night of the murder and someone attempted to use the ATM card a number of times without success (Vol. XI, TR 799). Additionally, Allen received documentation of credit card activity after the murder of a purchase at the Shell gas station on US 41 near the Ft. Myers golf and country club -- where appellant's wife, Julie Hess, was employed; the transaction occurred around 12:36 A.M. Exhibit 14 is a receipt of this transaction (Vol. XI, TR 834-835). A MasterCard was used at the Indian reservation on US 41 near Miami at approximately 4:00 A.M. and Exhibit 15 was the guest registration receipt at the Everglades Tower. The name of John Galloway was on the receipt issued at 4:00 A.M. the night of the murder May 12 (Vol. XI, TR 837). Witnesses in the neighborhood of the shooting reported hearing gunshots at approximately 12:30 A.M. and Agents Allen and Futch determined there was sufficient time to drive from the scene to the Shell station (Vol. XI, TR 838).

Julie Hess, appellant's wife, testified that after appellant picked her up at work he drove to Lake Fairways and walked to the guard shack. She heard gunshots and he returned to the car. They returned to the Shell station where she worked and paid for a tank

full of gas with a credit card (bearing John Galloway's name) furnished by appellant and she signed the credit card receipt (Vol. XII, TR 1029-1032). Appellant attempted to get money from an ATM machine while they were driving south and they stopped at a motel in the Everglades where she signed the guest register using the name John Galloway (Vol. XII, TR 1037-1038). In Hess' taped statement of May 19, 1993 (Exhibits 20A & B) he acknowledged the murderer took the victim's ATM card from his wallet and the ATM card was eaten by a machine after unsuccessful efforts to use it (Vol. XI, TR 901-902) and that the victim had a tri-fold wallet (Vol. XI, TR 919).[7]

In G. W. Brown v. State, 644 So.2d 52 (Fla. 1994), this Court approved the defendant's judgment and sentence finding there was "ample evidence" supporting first-degree murder under a felony-murder theory -- he was convicted of robbery, he stole the victim's car and credit cards and cashed one of his checks. The Court necessarily rejected Brown's assertion that he merely found the body and took his property. *See also* Voorhees v. State, 699 So.2d 602, 614 (Fla. 1997) (after victim's throat was slit, two defendants took the victim's car, ATM card and telephone calling card; they drove to several ATMs where they attempted to withdraw money from the victim's bank account and they used victim's calling

[7]Hess additionally stated in his taped conversation with Agent Partington on May 13, 1993 (Exhibit 19) that "there is such a thing as securities officers do get robbed" (Vol. X, TR 768).

card); Sager v. State, 699 So.2d 619, 622 (Fla. 1997) (same); Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993); Finney v. State, 660 So.2d 674, 680 (Fla. 1995) (rejecting defense argument that taking of property was an afterthought and noting that state is not required to rebut every possible hypothesis that can be inferred from the evidence -- only to present evidence that is inconsistent with the defense version of events); Jones v. State, 652 So.2d 346, 349 (Fla. 1995).

Appellant is not aided by his reliance on Mahn v. State, ___ So.2d ___, 23 FLW S219 (Fla. 1998) wherein the court found the evidence insufficient to support a robbery and felony-murder. In Mahn, the jury indicated upon polling that the murder conviction was based on a premeditation theory, not a felony murder theory; in the instant case the jury returned guilty verdicts on both premeditation and felony-murder (Vol. III, R 168-169). In Mahn, the trial judge after penalty phase specifically found the taking of the car and money to be an "afterthought" and concluded that the evidence did not support the aggravator of homicide committed during a robbery. In the case *sub judice*, the trial court found this aggravator proven beyond a reasonable doubt (Vol. V, R 668-669):

> 1 The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of Robbery.
>
> Evidence was presented during the guilt phase that the Defendant became a suspect

in this case after having told an individual, two days prior to this homicide, that a private security guard in North Fort Myers had been killed. When the killing occurred and was reported, the individual who heard this conversation reported this incident to the Sheriff's Department. After speaking with the Sheriff's Department, the Defendant claimed to have had a dream. In this dream, the person who killed John Galloway, a private security guard, the victim in this case, threatened the victim with a gun, stating, "I want your money". When the victim gave the wallet to the perpetrator and tried to use a phone at the security booth the perpetrator, who was laughing, fired hitting the victim in the chest. In this so-called dream sequence the perpetrator took the victim's wallet and an ATM card and attempted to use the ATM card. In a later admission, the Defendant claimed to have traveled to the scene of the incident at Lake Fairways, a retirement community, with another security guard and claimed that the other security guard shot the victim in this case. In his final admission, the Defendant admitted to shooting the victim but claimed it was an accident. Two shots were fired. The dream sequence in which the Defendant described in detail what occurred was compatible with what happened. The jury returned a verdict of guilt on the Robbery with a Firearm charge and also the First Degree Premeditated Murder charge. The jury clearly chose to believe the admission in which the Defendant described in detail a robbery followed by a shooting when the victim attempted to use the phone at the security station. It is this court's finding, based upon the evidence presented at trial, and the verdict of the jury on the Robbery with a Firearm charge that this aggravating circumstance was proven beyond a reasonable doubt.

In Mahn, the court found that the defendant took money and an automobile in a desperate and frenzied effort to flee. The defendant did not even know of the presence of money in the house until he found it while searching for a key to the car. Mahn could have easily taken the car originally since he lived in the same household. The homicides there were the product of a mental and emotional disturbance prompted by jealousy for his father's attention. Finally, Mahn's statements afterwards constituted a reasonable hypothesis not refuted by the evidence. In the instant case, appellant's assertions at trial -- that he did not kill the victim, that he made up everything to police to ingratiate himself to obtain a letter of recommendation for employment with law enforcement and to protect his wife do not constitute a reasonable hypothesis, as the jury properly concluded. Hess' use of the credit cards to make purchases and to withdraw money from the ATM demonstrate his larcenous intent as in Brown, Voorhees, and Sager, *supra*.

ISSUE IV

WHETHER UNDER THIS COURT'S STATUTORY OBLIGATION TO REVIEW THE FACTS IN A CAPITAL CASE, THIS COURT SHOULD VACATE THE CONVICTION AND DISCHARGE MR. HESS.

Under this point appellant appears to revisit the assertions in Issues II and III claiming that there is insufficient evidence for a first degree murder conviction. Obviously the state is in agreement with the observation that the death penalty cannot stand if the evidence does not support first degree murder, but that is hornbook law and if the Court is in agreement with appellant's Issues II and III then it need read no further.

What appellant apparently seeks under this point is for the Court to alter its previously well-established role and assume the role of a jury and to that end regurgitates a jury argument inviting this Court to make credibility choices upon witnesses that it has not seen or heard. Appellee will not waste this Court's valuable time by presenting a jury argument here but if this Court wants to consider one we refer to the prosecutor's closing argument at Vol. XIII, TR 1362-1385. Suffice it to say that the jury below heard and chose to believe appellant's incriminating admissions and the supporting testimony of Julie Hess and to disbelieve appellant's final version that he made it all up.

Appellee will continue to urge that it is more appropriate for the fact finder below -- the jury -- to decide which witnesses told the truth on the stand and which ones lied. Just as the trial

courts are better able to make judgments of credibility and veracity on motions to suppress, rendering their decisions presumptively correct, Medina v. State, 466 So.2d 1046 (Fla. 1985); Dennis Javier Escobar v. State, 699 So.2d 984, 987 (Fla. 1997); Douglas Martin Escobar v. State, 699 So.2d 988, 993-994 (Fla. 1997); Johnson v. State, 660 So.2d 637, 642 (Fla. 1995); *see also* Wuornos v. State, 644 So.2d 1012, 1019 (Fla. 1994) (Court's duty is to review the record in the light most favorable to the prevailing party), so too the jury in the instant case was the appropriate body to discern which witnesses were believable and which were not.

In Tibbs v. State, 397 So.2d 1120 (Fla. 1981) this Court explained that as a general proposition an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact and that:

> Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.
>
> (Id. at 1123)

The Court further opined that "Henceforth, no appellate court should reverse a conviction or judgment on the ground that the weight of the evidence is tenuous or insubstantial." Id. at 1125. The Tibbs court also explained the "interest of justice" basis for reversal cited in then-Rule 9.140(f), Florida Rules of Appellate Procedure, currently Rule 9.140(h):

> Rule 9.140(f) of the Florida Rules of Appellate Procedure (1977) provides the relevant standards:

> In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.
>
> This rule, or one of its predecessors, has often been used by appellate courts to correct *fundamental* injustices, unrelated to evidentiary shortcomings, which occurred at trial.[14] Retrial in these circumstances is neither foreclosed, nor compelled, by double jeopardy principles. Each situation is unique.
>
> [9] With respect to the special mention of capital cases in the second sentence of the rule, we take that sentence to mean no more than that an additional review requirement is imposed when insufficiency of the evidence is not specifically raised on appeal--namely, that the reviewing court shall consider sufficiency anyhow and, if warranted, reverse the conviction. The consequence of that action would be to bar retrial under the double jeopardy clause.

(emphasis supplied)(Id. at 1126)

The post-Tibbs decisions have continued to maintain the principle that appellate courts will not reverse a judgment based on asserted tenuous or insubstantial weight, only where the evidence is legally insufficient to convict. *See* Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981); Williams v. State, 437 So.2d 133 (Fla. 1983); Burr v. State, 466 So.2d 1051, 1053 (Fla. 1985); Smith v. State, 515 So.2d 182, 184 (Fla. 1987); Holton v. State, 573 So.2d 284, 290 (Fla. 1990); Terry v. State, 668 So.2d 954, 964 (Fla. 1996).

Appellant citing the prohibition against double jeopardy also

argues (Brief, p. 86) that what the Court should do is order the discharge of Mr. Hess -- and this despite Hess admitting that he fatally shot Mr. Galloway and Mrs. Hess testifying that appellant provided her with the Galloway credit cards and directed her to use them immediately thereafter at the Shell station and motel in the Everglades. Kind of scary, isn't it. Certainly it was well within the jury's prerogative to conclude that appellant's trial testimony -- that he did not rob and did not kill and that he only lied to police during the investigation to ingratiate himself with authorities to obtain a letter of recommendation on his pending job application with the sheriff's office (Vol. XIII, TR. 124) and to protect his wife whom he otherwise was implicating in a major effort to minimize his own culpability (Vol. XIII, TR. 1301-1304) -- was not worthy of belief. Similarly, the jury could also disbelieve semi-exculpatory versions he gave to authorities where contradicted by the physical evidence or common sense (e.g., the accidental gun discharge from the pants pocket scenario with no vertical trajectory into the victim, or that he saw Lloyd Sawyer commit the crime).

There is perhaps some truth in the notion that a jury has unfettered power to acquit when the evidence demonstrates guilt -- the exercise of an illegitimate power that in a given case may not be correctable. *See e.g.*, United States v. Funches, 135 F.3d 1405, 1408-1409 (11th Cir. 1998). But it is quite another thing to ask this Court similarly to engage in such behavior, to conclude that

state witnesses Allen and Crone, Sawyer and Julie Hess, Lindsey and Walker should not be believed and that what must be believed is the final, desperate, pathetic urging of Mr. Hess at trial that the police lied, that he lied to seem important and to protect his wife and that in reality he has no knowledge of the crime. If the Court has this power, it should not exercise it in this case; Mr. Hess is not entitled to a mere appellate expression of Good Luck on his next job application.

Appellant also announces his disagreement with the corpus delicti rule announced in cases such as Burks v. State, 613 So.2d 441 (Fla. 1993) and states his preference for the dissenting view expressed by Justice Shaw. Appellee notes that recently in J.B. v. State, 705 So.2d 1376 (Fla. 1998) this Court determined that a contemporaneous objection at trial was required to preserve for appellate review the contention that the confession was introduced without independent proof of the corpus delicti; in other words, such an omission did not constitute fundamental error. The Court also took the opportunity to decline the state's invitation to overrule Burks and eliminate altogether the requirement that an independent corpus delicti be established when offering a confession or admission against interest. In the instant case appellant concedes that the state established a corpus delicti and introduced an admission from Hess (Brief, p. 75). Since appellant did not interpose a contemporaneous objection based on corpus delicti grounds, as J.B., *supra*, requires he may not now assert

that there should be any change in law on that subject.

Appellant's assertion at page 73 of the brief that if Hess' statements were excluded "the state would have no evidence that Hess committed this crime" is simply not true. Julie Hess' testimony placed appellant at the scene of the crime, she heard two gunshots, and appellant returned to the car (the outline of a gun visible in his uniform) and Hess gave her the victim's Shell credit card to buy gasoline, testified that appellant unsuccessfully attempted to obtain money from the ATM machine and that she signed the victim's name on the motel registry because that was the name on the credit card appellant gave her (Vol. XII, TR. 1030-1038, TR. 1053-1064).

Hess complains that there is no substantiation of his admissions with physical evidence -- a circumstance perhaps explainable by Julie Hess' testimony that appellant stopped at the bridge afterwards and that she did not see the gun afterwards. Hess suggests that law enforcement officers may have provided information about the crime to him but investigator Allen denied it (Vol. XI, TR. 928-929).

Hess complains that Julie Hess should not be believed because she first supported appellant's claim of innocence -- she admitted initially trying to protect him (Vol. XII, TR. 1040) and in fact tried to protect him as long as possible (Vol. XII, TR. 1079). She testified that her present testimony was truthful (Vol. XII, TR. 1079). While appellant challenges the timing, investigator Allen

testified that he and Agent Futch drove the distance at that time of night and there was sufficient time to drive from the crime scene to the Shell station (Vol. XI, TR. 838).

Finally, what is the reasonable hypothesis of another perpetrator that appellant would have the Court adopt? At one point he put the blame on Lloyd Sawyer with whom he'd had a falling out. Not only did investigating officers rule out Sawyer after pursuing the contention, but Sawyer testified and denied the crime (Vol. XII, TR 1019-1020). *See* Finney v. State, 660 So.2d 674, 679 (Fla. 1995) (Finney's theory that Kunkle who was seen leaving the victim's apartment on the morning of the murder was rebutted by Kunkle's testimony that he was not in the apartment and did not kill the victim).

Hess posits his wife, Julie, as a potential killer but she too testified and denied the murder (Vol. XII, TR 1040). Finney, *supra*. Hess on appeal suggests a third alternative, an unknown perpetrator who may have had a greater motive; but if some unknown, unrelated perpetrator is culpable, how does that explain the Julie Hess testimony that she heard gunshots at the scene, appellant returned with a gun and provided her the credit cards used at his direction to make a purchase at the Shell station and to register at the motel along with the unsuccessful attempts at an ATM withdrawal -- not to mention appellant's knowledge of the facts of the crime which were unrevealed and unreported?

Appellant's claim must be rejected.

ISSUE V

WHETHER THE LOWER COURT ERRED IN FINDING THE TWO AGGRAVATORS OF PRIOR VIOLENT FELONY AND COMMITTED DURING A ROBBERY, F.S. 921.141(5)(b), (d).

The lower court's sentencing order recites:

> 1. The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of Robbery.
>
> Evidence was presented during the guilt phase that the Defendant became a suspect in this case after having told an individual, two days prior to this homicide, that a private security guard in North Fort Myers had been killed. When the killing occurred and was reported, the individual who heard this conversation reported this incident to the Sheriff's Department. After speaking with the Sheriff's Department, the Defendant claimed to have had a dream. In this dream, the person who killed John Galloway, a private security guard, the victim in this case, threatened the victim with a gun, stating, "I want your money". When the victim gave the wallet to the perpetrator and tried to use a phone at the security booth the perpetrator, who was laughing, fired hitting the victim in the chest. In this so-called dream sequence the perpetrator took the victim's wallet and an ATM card and attempted to use the ATM card. In a later admission, the Defendant claimed to have traveled to the scene of the incident at Lake Fairways, a retirement community, with another security guard and claimed that the other security guard shot the victim in this case. In his final admission, the Defendant admitted to shooting the victim but claimed it was an accident. Two shots were fired. The

dream sequence in which the Defendant described in detail what occurred was compatible with what happened. The jury returned a verdict of guilt on the Robbery with a Firearm charge and also the First Degree Premeditated Murder charge. The jury clearly chose to believe the admission in which the Defendant described in detail a robbery followed by a shooting when the victim attempted to use the phone at the security station. It is this court's finding, based upon the evidence presented at trial, and the verdict of the jury on the Robbery with a Firearm charge that this aggravating circumstance was proven beyond a reasonable doubt.

2. The Defendant has been previously convicted of a felony involving the use or threat of violence to some person.

The State of Florida presented certified copies of the Defendant's prior convictions for two counts of sexual activity with a child and one count of lewd assault in case number 95-914. The sexual activity with a child convictions involve the charges of sexual battery on a child. The count of lewd assault also involved a crime against a child. The fingerprint evidence introduced at the penalty phase established that the Defendant was the same person as the one convicted in case number 95-914, the case involving the charges of sexual activity with a child and lewd assault. The sister of the Defendant spoke at the penalty phase and corroborated the convictions and these charges. These convictions are for crimes which took place after the killing of John Galloway. However, they are crimes of violence against a child that were considered by the jury and are being considered by this court. It is this court's finding that this aggravating circumstance has been proven beyond a reasonable doubt. The state requested that several other counts

> of lewd fondling should be considered by the jury and the court. However, the state did not charge those offenses as assaultive in nature, and the state did not present any authority which would have allowed the jury or this court to consider those offenses as crimes of violence. Therefore the jury and the court have not considered any other counts involving lewd fondling as aggravating factors.
>
> (Vol. V, R. 668-670)[8]

A. <u>Prior Violent Felony Conviction</u>:

Exhibit 27, the multi-count information charging improper sexual activity with a child by Mr. Hess, recited in pertinent part:

> Count 1
> did unlawfully engage in sexual activity with Crystal Griffith, a child twelve years of age or older, but less than eighteen years of age, and at the time of such sexual activity; to wit: penetration of or union with Crystal Griffith's vagina by his penis, said defendant was in a position of familial or custodial authority to said child,
>
> Count 2
> did unlawfully engage in sexual activity with Crystal Griffith a child twelve years of age or older, but less than eighteen years of age, and at the time of such sexual activity; to wit: penetration of her vagina with his finger(s), said defendant was in a position of familial or custodial authority to said child,

[8]The court declined the state's request to find the additional aggravating factor of CCP and did not permit it to be presented to the jury (Vol. V, R. 670-671). Even though Hess spoke of the crime two days prior to its occurrence and there was evidence the appellant had a grudge against the victim, the court concluded it fell short of the strict heightened premeditation requirement.

> Count 3
> did unlawfully handle, fondle, or make an assault upon Crystal Griffith, a child under the age of 16 years, in a lewd, lascivious or an indecent manner, by making child masturbate his penis to ejaculation,
>
> (Vol. V, R. 495-496)[9]

The offenses occurred between March 11 and March 13, 1995 (Vol. V, R. 495) and Crystal Griffith was eleven or twelve years old at the time (Vol. IV, R. 385). Appellant was adjudicated guilty on those counts, Exhibit 28A (Vol. V, R. 520-522).

Appellant argues that the state failed to prove that the offenses involved "the use or threat of violence to the person" and that the sexual activities may have been consensual with the child.[10] Appellee submits that the claim is meritless. Count III, for example, alleged Hess violated "by making child masturbate his penis to ejaculation" (emphasis supplied) so an assertion of consensual activity seems inapplicable. *See* King v. State, 390 So.2d 315, 320 (Fla. 1980)(legislative intent is clear that any violent crime for which there was a conviction at the time of the sentencing should be considered as an aggravating circumstance). A prior conviction for sexual battery or rape constitutes a violent

---

[9]The court declined to consider the remaining eight counts (Vol. V, R. 496-497).

[10]Appellant cites Sweet v. State, 624 So.2d 1138 (Fla. 1993) (prior conviction for possession of a firearm by a convicted felon could qualify though not a per se crime of violence where circumstances of crime are shown to have been violent and such circumstances shown here since Sweet used firearm to hit someone in the face and ribs).

felony conviction for purposes of F.S. 921.141(5)(b). Thompson v. State, 553 So.2d 153 (Fla. 1989). Appellant acknowledges that sexual battery is a violent felony (Brief, p. 88) but argues that the state, in its information, did not utilize the label "sexual battery" but rather "sexual activity with a child." What the state charged in counts 1 and 2 of case 95-914 irrespective of the label was a violation of F.S. 794.011 -- which is sexual battery. Any sexual battery is a crime of violence, as matter of law. The legislature stated its findings and intent as to basic charge of sexual battery in F.S. 794.005:

> The Legislature finds that the least serious sexual battery offense, which is provided in s. 794.011(5), was intended, and remains intended, to serve as the basic charge of sexual battery and to be necessarily included in the offenses charged under subsections (3) and (4), within the meaning of s. 924.34; and that it was never intended that the sexual battery offense described in s. 794.011(5) require any force or violence beyond the force and violence that is inherent in the accomplishment of "penetration" or "union."

F.S. 794.011(8)(b) for which appellant was convicted in two counts provides:

> (8) Without regard to the willingness or consent of the victim, which is not a defense to prosecution under this subsection, a person who is in a position of familial or custodial authority to a person less than 18 years of age and who:
>
> (b) Engages in any act with that person while the person is 12 years of age or older but less than 18 years of age which constitutes sexual battery under paragraph (1)(h) commits a felony of the first degree,

> punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

What that provision proscribes is "any act" with a person between the age of 12 and 18 "which constitutes sexual battery under paragraph (1)(h)". Paragraph (1)(h) defines sexual battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." Since there is some force and violence inherent in the accomplishment of penetration, appellant's convictions under this statute qualify for consideration under F.S. 921.141(5)(b). In Gore v. State, 706 So.2d 1328 (Fla. 1997), this Court approved the use of the (5)(b) aggravator for a conviction of armed trespass. Noting that like burglary which is not per se a crime involving violence or threat of violence but the facts may establish it to be so by documentation "including the charging or conviction documents or by testimony, or by a combination of both" citing Johnson v. State, 465 So.2d 499, 505 (Fla. 1985), the Court concluded that the woman's discovery of Gore upon returning to her car leading to his apprehension qualified for this factor since she was "under a threat of violence" and:

> We have held that the lack of any actual violence or harm to the intended victim is irrelevant for purposes of this aggravator. Johnston v. State, 497 So.2d 863 (Fla. 1986).

(text at 1334)

In Johnston, *supra*, this Court approved the finding of this aggravator for the convictions of battery on a law enforcement

officer in Florida and terroristic threat in Kansas, rejecting the defense argument that neither of the two convictions resulted in harm to the intended victim. Id. at 871. If a battery and terroristic threat which does not result in harm can qualify for F.S. 921.141(5)(b) certainly making a child submit to sexual activities including penetration of vagina by penis and finger should similarly be sufficient. *See also* Jordan v. State, 694 So.2d 708, 710, fn 2 (Fla. 1997)(citing the trial court's findings under F.S. 921.141(5)(b) of the prior felonies of lewd assault upon a child, robbery and first degree murder)(emphasis supplied). And in State of Arizona v. Arnett, 579 P.2d 542 (Ariz. 1978), the court approved a finding of a prior conviction of a crime of violence in the Arizona statutory aggravating scheme where the evidence disclosed that the defendant's prior crime of violence was a "lewd and lascivious" act upon "a child under the age of 14 years"; appellant admitted that he had inserted his finger into the vagina of a five year old girl which ruptured her hymen and caused vaginal bleeding. Id. at 51. Rejecting the defense argument that the legislature did not intend to include with the purview of the phrase violence the type of crime appellant committed, the court looked to the dictionary definition of violence (exertion of any physical force so as to injure or abuse) and found the conduct clearly fit within the common and approved use of the term violence. *See also* Rivera v. State, 561 So.2d 536, 538, n. 3 (Fla. 1990) (other felonies involving the use or threat of violence

included the October 1980 crimes of burglary with intent to commit robbery and of indecent assault on a female child under the age of fourteen) (emphasis supplied).

Appellant's final complaint on this point is that the lower court failed to instruct the jury pursuant to Sweet v. State, 624 So.2d 1138 (Fla. 1993) that it should consider the individual circumstances of the crime to determine whether it was violent. The claim should be deemed barred for appellant's failure to urge Sweet below. Following the judge's instructions to the jury, the defense offered no additional objections to those previously raised (Vol. IV, R 466-471). Earlier, on December 16, 1996, at the charge conference, the defense had objected, noting that an instruction that it was a felony involving the use or threat of violence would involve the province of the jury and at the court's inquiry regarding supporting case law, defense counsel responded that he hadn't found any (Vol. III, R 239-240). The prosecutor responded that the character and nature of the crime itself was a legal matter but the jury still had the fact-finding duty to determine whether the defendant was in fact convicted of such prior crime (Vol. III, R 241). Subsequently, when the court indicated it would instruct the jury that sexual activity with a child and lews assault were felonies involving the use of violence, the defense objected only to a reference to "another capital offense" which the prosecutor agreed should be stricken (Vol. III, R 275-276). On the following day, December 17 -- prior to the instructions to the jury

-- the court again rejected the state's argument that the remaining counts of lewd and lascivous acts should be given (Vol. IV, R 290). The defense objected to Exhibit 27A as unnecessary and prejudicial:

> . . . once they hear that Mr. Hess was in fact convicted and the court instructs them that those three charges meet the definition of being crimes involving the use or threat of violence"

(Vol. IV, R 293)

The court ruled that Exhibit 27A as presented and redacted was not prejudicial to the point of having jurors speculate on other counts but sustained the defense objection to Exhibit 27 (Vol. IV, R 294-295). The defense stated it had no objections other than previously made (Vol. IV, R 317). Hess' complaint now that the lower court erred in failing to give the Sweet instruction is barred since he failed to provide supporting case law when he had the opportunity to do so in the lower court and as this Court ruled in Lucas v. State, 376 So.2d 1149 (Fla. 1979), the appellate court will not presume the court would commit error if given supporting authority.

The claim should also be deemed meritless since Sweet applies to felonies which may or may not be violent whereas any sexual battery proscribed by F.S. 794.011 is violent. *Cf*. Preston v. State, 531 So.2d 154 (Fla. 1988)(permissible for trial judge to tell jury that throwing deadly missile into vehicle is a violent felony as a matter of law).

B. Homicide Committed During a Robbery:

As appellant does, appellee will also rely on the argument in Issue III to support the finding of the instant aggravator. Hess' use of the Galloway credit cards with his wife at the Shell gasoline station and motel and his unsuccessful efforts to withdraw money from the ATM machine shortly after the killing more than suffices to show his intent to take the victim's property with force. *See* Brown v. State, 644 So.2d 52 (Fla. 1994); Voorhees v. State, 699 So.2d 602 (Fla. 1997); Sager v. State, 699 So.2d 619 (Fla. 1997); Finney v. State, 660 So.2d 674 (Fla. 1995). Moreover, as the trial court's sentencing findings note, appellant's version during the dream sequence describing the perpetrator's taking the property of the victim was compatible with what happened.

Appellant's claim that the presence of the felony-murder aggravator violates the principle of narrowing the class eligible for the death penalty has been consistently rejected. Clark v. State, 443 So.2d 973 (Fla. 1983); White v. State, 403 So.2d 331 (Fla. 1981); Blanco v. State, 706 So.2d 7, 11 (Fla. 1997); Hunter v. State, 660 So.2d 253 (Fla. 1995); Johnson v. State, 660 So.2d 637 (Fla. 1995).

ISSUE VI

WHETHER THE TRIAL COURT ERRED REVERSIBLY BY FAILING TO FIND AND GIVE SIGNIFICANT WEIGHT TO PROPOSED MITIGATORS.

Appellant next contends that the lower court erred in failing to find and give significant weight to mitigators proposed by the defense. The trial court's findings recited:

> 1. The Defendant has no significant history of prior criminal activity.
>
> In the penalty phase evidence was introduced that the Defendant prior to the killing of John Galloway was involved with two criminal incidents. One involved a case where, as a juvenile, he punched a chief of police in Michigan. After being placed on probation he violated that probation. There is also testimony that the Defendant was convicted of indecent exposure and served a period of incarceration of sixty days for that charge. The Defendant's sister claimed he was chased out of his house and he was naked at the time and that was the basis for the charge. However, the Defendant in the guilt phase admitted to eight prior felony convictions. These convictions arise out of case number 95-914 which include multiple counts of sexual activity with a child and lewd fondling convictions. There were two victims involved in this case and they were children. Based upon the above, this court finds that this mitigating factor does not exist.

(Vol. V, R. 671-672).

Hess complains that the trial court erred in relying on appellant's eight sexual misconduct convictions on his two minor nieces because they occurred subsequent to the homicide. The only

case cited in support is Besaraba v. State, 656 So.2d 441 (Fla. 1995) where the trial court found both a contemporaneous felony conviction as an aggravator and the no significant history mitigator; this Court did not address the circumstance presented and apparently not present in Besaraba of a significant non-contemporaneous history of criminal activity. Supportive of the trial court's order is Ruffin v. State, 397 So.2d 277, 283 (Fla. 1981):

> [7] We hold that in determining the existence or absence of the mitigating circumstance of no significant prior criminal activity, "prior" means prior to the sentencing of the defendant and does not mean prior to the commission of the murder for which he is being sentenced. The interpretation of "prior" advanced by Ruffin is unreasonable particularly in view of the fact that a defendant may have committed a murder for which he is not apprehended until many years later and during the course of these years he may have a long history of significant criminal activity. Ruffin's position would prevent the court from negating this mitigating circumstance by considering the defendant's criminal activity occurring after the commission of the murder. This interpretation would thwart the legislature's intent when it established this mitigating circumstance.

Accord Daugherty v. State, 419 So.2d 1067, 1070 (Fla. 1982); Teffeteller v. State, 439 So.2d 840, 847 (Fla. 1983); Francis v. State, 473 So.2d 672, 677 (Fla. 1985). The Court appears to have deviated from Ruffin and progeny in Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988) where the Court receded from some language in Ruffin and concluded that contemporaneous crimes should not be

included in the prior criminal history mitigator:

> The state argues that, when considering the existence of this mitigating factor, it is proper to construe the term "prior" to mean prior to the sentencing, not the commission of the murder. Ruffin v. State, 397 So.2d 277, 283 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). However, we do not believe that a "history" of prior criminal conduct can be established by contemporaneous crimes, and we recede from language in Ruffin to the contrary.

The trial court's ruling in the instant case comports with Scull because the criminal activity regarding the asserted mitigator was not contemporaneous to the homicide. The Court's aberration occurred in the language used in Santos v. State, 629 So.2d 838, 840 (Fla. 1994):

> [4][5] In counterbalance, the State has conceded that Santos' case exhibits two of the weightiest mitigating factors--those establishing substantial mental imbalance and loss of psychological control. We also find (as the State concedes) that under Scull v. State, 533 So.2d 1137, 1143 (Fla.1988), cert. denied, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989), the trial court should have found in mitigation that Santos had no prior history of criminal conduct. As noted in Scull, this mitigating factor must be found if a defendant had no significant history of criminal activity prior to the transaction in which the instant murder occurred. Id. Our prior opinion in this case directly ordered the trial court to find and weigh any mitigating factor established anywhere in the record that is supported by sufficient evidence. Santos, 591 So.2d at 164 (quoting Rogers, 511 So.2d at 534). The State here concedes that Santos had no history of criminal activity prior to the instant murders. Accordingly, the factor cannot be discounted.

Santos was correctly decided, consistent with Scull and with the remainder of Ruffin not receded from because Santos had no history of prior criminal activity exclusive of that committed contemporaneously with the homicide. The unfortunate language in Santos suggesting that subsequent criminal activity prior to the imposition of sentence was unnecessary dicta, was not pertinent to the facts of the case and was perhaps aided by the concession of the state alluded to in the opinion. In any event, the Court should take this opportunity to clarify the Santos language and to repeat the Scull rule that only contemporaneous criminal activity may not be used to negate the no significant history mitigator and that non-contemporaneous criminal activity after the homicide but prior to sentencing may be considered as Ruffin still permits.

The lower court correctly ruled that appellant's conviction for multiple counts of sexual activity with children in 1995 sufficed to negate the no significant history mitigator. Even if the court erred on that point the conclusion is supported by Hess having punched a chief of police in Michigan while he was a juvenile (Vol. V, R. 671; *see also* Vol IV, R. 398, 423 wherein Hess admitted punching the chief of police and subsequently violating probation). *See* Booker v. State, 397 So.2d 910 (Fla. 1981); Quince v. State, 414 So.2d 185, 188 (Fla. 1988)(court has allowed past juvenile offenses to dispel mitigating circumstance of no significant history). Appellant's complaint here that the state failed to document the incident is unavailing since it was not

challenged below, indeed, appellant admitted the fact.

The instant situation is not comparable to Barclay v. State, 470 So.2d 691 (Fla. 1985) where the state had failed to prove the aggravating factor of conviction of a prior violent felony beyond a reasonable doubt as the law requires; here the state simply demonstrated on cross-examination of the appellant that any assertion as mitigation of no significant prior criminal activity was rebutted. The lower court did not abuse its discretion in making its findings. Finally, that the trial court did not abuse its discretion in finding the statutory mitigator present in Craig v. State, 685 So.2d 1224 (Fla. 1996) does not mean the lower court abused its discretion in not finding it here, especially since Craig involved a jury override with the attendant safeguards of Tedder v. State, 322 So.2d 908 (Fla. 1975) and in that case the cattle thefts relied on by the state were substantially related to the murders -- not separate incidents years apart as in this case.

(2) The lower court stated:

> 2. The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> At the trial and penalty phase no evidence was presented that reasonably convinced this court that this factor was established by a preponderance of the evidence. No expert testimony was presented nor were any reports or records produced which would support the finding of this factor. While the defense has claimed that the Defendant was distraught over the loss of his sons, this event

> took place a number of years prior to this incident. There is no evidence to support that because of the loss of his two sons from the State of Michigan that this is the reason that he killed the victim in this case. Nor did the evidence show that the Defendant was suffering from an impaired mental state at the time because of this loss. It should be noted that there is some conflict as to the relationship of these two sons; apparently one son was not fathered by the Defendant and the second son's biological relationship is in conflict. While there was some testimony at trial to show that the Defendant was nervous and walking quickly after the shooting there is no indication whatsoever that the Defendant was anything but calm and collected prior to and at the time of the killing. The court therefore finds that this mitigating circumstance does not exist.

(Vol. V, R. 672).

Apparently, appellant is annoyed that the trial court seemed unimpressed by Hess' self-serving testimony unsupported by that of mental health experts that he was depressed over the custodial loss of his sons five years earlier or that it had any connection with the robbery-murder of Mr. Galloway for which he disclaims responsibility at trial. The trial court adequately explained the reasons for rejecting this factor.

Additionally, appellant's sister Julie Teachworth testified that the inability of Hess' second wife to have children bothered her (the second wife) more than appellant (Vol. IV, R 368). Protective Services took his children away in the 1980's (Vol. IV, R. 373). The children were taken from appellant because "John was

a kind of person that could not manage" (Vol. IV, R. 388). Even appellant admitted that his children "were better off where they're at right now" (Vol. IV, R. 402). And that he doesn't want any more children (Vol. IV, R. 406). The reason the children were taken away was because appellant had a character disorder, he "cannot get along with others" (Vol. IV, R. 421). Appellant disavowed a claim that he was under the influence of a mental disturbance when he committed the murder -- "I'm not claiming anything" (Vol. IV, R. 425).

Appellee notes that the trial court did find that Hess was a caring father as a non-statutory mitigator (Vol. IV, R. 675).[11]

> 3. The capacity of the Defendant to appreciate the criminality of his conduct to the requirements of the law was substantially impaired.

---

[11]

> 4) Defendant was a loving and caring father.
>
> There was testimony that indicated that during his first marriage, the children were cared for by the Defendant. While this court has noted that their biological relationship to the Defendant is in question, the evidence presented was that the Defendant took care of those two children and handled many different functions in the raising of those children before they were taken away by Michigan authorities. This mitigating circumstance exists. The court has given this factor some weight in consideration of the Defendant's sentence.

> The defense has argued that the Defendant was in special education classes while at school and because of his capacity lacked an ability to appreciate the criminality of his conduct. The Defendant himself testified at trial that he knew the difference between right and wrong and could appreciate the consequences of his conduct. As noted previously, no expert nor report nor records were produced that support the claim that the capacity of the Defendant was in any way impaired at the time of the killing. This mitigating circumstance does not exist.

(Vol. V, R. 672-673).

Appellant criticizes the lower court for commenting that Hess knew the difference between right and wrong and could appreciate the consequences of his conduct but it does not constitute error for a trial court to allude to the M'Naughten standard. In Ponticelli v. State, 593 So.2d 483, 490 (Fla. 1991), vacated on other grounds, 506 U.S. 802, 121 L.Ed.2d 5, 113 S.Ct. 32 (1992), affirmed on remand, 618 So.2d 154, cert. denied, 510 U.S. 935, 126 L.Ed.2d 316, 114 S.Ct. 352 (1993) this Court explained:

> Next, we reject Ponticelli's contention that it was error to allow the state to elicit Dr. Mill's opinion that Ponticelli had the ability to differentiate between right and wrong and to understand the consequences of his actions. While this testimony is clearly relevant to a determination of a defendant's sanity, it is also relevant in determining whether mitigating circumstances exist under section 921.141(6)(b) (the defendant was under the influence of extreme mental or emotional disturbance), or section 921.141(6)(f) (defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired). Further, while the

> trial court below referred to the "M'Naghten criteria" in rejecting these mitigating factors, it specifically considered these mental mitigating factors in its sentencing order and used M'Naghten criteria as but one consideration leading to their rejection, unlike the courts in Ferguson v. State, 417 So.2d 631 (Fla.1982), and Mines v. State, 390 So.2d 332 (Fla.1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981).

Moreover, the argument advanced in the defense sentencing memorandum on the statutory mitigator of impaired capacity merely focused on appellant's special education classes in school and his menial jobs (Vol. V, R. 542):

> C.) The capacity of the Defendant to appreciate the criminality of his conduct to the requirements of the law was substantially impaired.
>
> Mr. Hess was in special education classes throughout school. Some attempts were made to mainstream him into regular classes, but those attempts were not successful and he remained in special education classes until he dropped out of school. After leaving school, Mr. Hess was able to obtain primarily menial jobs, such as dish washer; bus boy; fast food worker; day laborer, which required little intelligence. He was not able to keep any of those jobs for any significant period of time.

Furthermore, the trial court again specifically dealt with this asserted mitigation in the non-statutory mitigation section of the judge's sentencing findings (Vol. V, R. 674-675; R. 681-682):

> (a) Two witnesses testified at the penalty phase as to the Defendant being borderline retarded, the Defendant and his sister. No expert was presented who could support this claim. While the

court acknowledges the Defendant was in special education while in school, it should be noted that the Defendant is studying for his GED, reads books, has held a number of jobs, including being a private security guard, and presented evidence that he passed a course dealing with security. It should be noted that the Defendant aspires to attend college and has been studying the bible. Moreover, this court observed the Defendant in the course of the trial. He himself testified that he was active in the trial. This court specifically observed the Defendant actively participating in all phases of his defense. It was not unusual for counsel to discuss matters with the Defendant after examination of each witness and after further discussion with the Defendant present additional questions to the witness. The Defendant was as active as any Defendant this court has observed. The court also heard and the record should reflect, the testimony of the Defendant during the course of the trial at the guilt phase, the penalty phase, and at the sentencing hearing referred to as the Spencer hearing. The Defendant was extremely articulate, well versed in the English language. His diction, vocabulary, and grammar were at a high level. At no time did he request that any of the attorneys rephrase or repeat a question because he did not understand it. This court finds that the mitigating factor of the Defendant being handicapped with a retardation problem was not proven by a preponderance of the evidence and this court is not reasonably convinced that this mitigating factor exists.

* * *

3) The Defendant asked the court to find the statutory mitigating factor that he was under the influence of extreme mental or emotional disturbance when he committed the murder. For the reasons previously

> noted, the court found that the statutory mitigating factor did not exist. However, there was testimony that the Defendant was in special education. There has also been testimony from the Defendant that he has been depressed because his two children from a previous marriage were taken from him. This court has previously noted the question of the relationship of these children and has also noted that this taking took place a number of years prior to the killing of John Galloway. The Defendant also testified that since 1991 he has been taking medication for depression. Also he has admitted to being in counseling since October of 1995, a number of months after this killing took place. The court also notes that the Defendant, without any supporting evidence, has claimed borderline mental retardation. While the court does not find that the Defendant was under the influence of extreme mental or emotional disturbance when he committed the murder, there is some testimony, while in conflict, that the Defendant was suffering from some mental or emotional disturbance when this murder was committed. The Defendant has also claimed that he is ten years behind his chronological age which the court has previously addressed. Given the evidence concerning the Defendant's mental or emotional condition this court finds that this non-statutory mitigating factor has been proven. Based upon all of the evidence presented on the Defendant's mental background the court gives this factor moderate weight.

Again, contrary to appellant's suggestion the lower court did consider Hess' learning disability and found it as a non-statutory mitigator (Vol. V, R. 677):

> 8) The Defendant became very ill at a young age which left him with a learning disability.

> The Defendant and family members presented evidence that he suffered an illness as a baby. As a result the Defendant was in special education in his youth. As he matured the Defendant married twice. He has maintained employment. The Defendant testified he is preparing for his GED and aspires to attend college. He reads books and studies the bible. The Defendant testified to passing a security guard course in Michigan. The court has observed the Defendant to be an articulate, intelligent person. The court finds this mitigating factor exists but gives it minimal weight.
>
> 9) The Defendant was treated cruelly by his contemporaries as a result of his learning disabilities.
>
> As previously noted, the Defendant was in special education during his school years. Based upon the evidence children did tease the Defendant. However, after two marriages and a number of different positions of employment, the last of which was of a private security guard aspiring to work for the sheriff's department, there is no indication that this issue impacted him at the time he killed John Galloway. This circumstance has been proven, however, the court gives this factor little weight in its consideration.

As in Barwick v. State, 660 So.2d 685 (Fla. 1995) the trial judge's order properly considered all mitigating evidence offered; any error was harmless.[12]

---

[12]The instant case is unlike Morgan v. State, 639 So.2d 6 (Fla. 1994) where the trial court felt compelled to reject mental mitigation because of the jury's rejection of the insanity defense and had rejected all non-statutory mitigation. *Sub judice* the trial judge's thorough, complete and well-reasoned order satisfies the precedents of this Court. Herring v. State, 446 So.2d 1049

(4) Non-statutory Mitigating Factors - The trial court considered all that was presented by Hess and his counsel:

(a) Loving son to his parents - given slight weight.

(b) Loving brother to his siblings - very little weight.

(c) (1) Handicapped with a retardation problem - not proven by a preponderance of the evidence;

(2) Maintaining employment through most of his adult life - this mitigator exists and given minimal weight.

(d) Loving and caring father - given some weight.

(e) Provided financial support to his family and siblings' families - given slight weight.

(f) Lacked male role model when growing up - given very little weight.

(g) Traumatized by having two sons taken from him - proven mitigator given slight weight.[13]

(h) Very ill at young age which left defendant with a

(Fla. 1984) is supportive of the judge's conclusion as the lower court considered that mitigator and it is within the province of the trial court as to the weight to be given such mitigation.

[13]The trial court noted Hess' testimony that he had a character disorder, difficulty getting along with people. *See* Carter v. State, 576 So.2d 1291, 1292-1293 (Fla. 1989)(finding defendant to be a sociopath is not a mitigating factor); *see also* Graham v. Collins, 506 U.S. 461, 122 L.Ed.2d 260, 291 (1993)(J. Thomas concurring, criticizing defendants' asserting their victimization by complaining that credit has not been given "evidence that defendant suffers from chronic 'antisocial personality disorder' - that is, that he is a sociopath"); Harris v. Pulley, 885 F.2d 1354, 1381-1384 (9th Cir. 1988), cert. denied, 493 U.S. 1051, 110 S.Ct. 854, 107 L.Ed.2d 848 (1990)(distinguishing a personality disorder from a psychosis).

learning disability - this mitigator found and given minimal weight.

(i) Treated cruelly by his contemporaries as a result of his learning disabilities - given little weight.

(j) Defendant as child and adult would accept blame for things he did not do to keep loved ones out of trouble - factor given slight weight.

(k) Cooperation with law enforcement which led to his arrest and conviction - mitigator found and given little weight since he also tried to blame an innocent man, lied several times on the stand and recanted any involvement in the crime.

(l) Treatment of others involved with the case - mitigator given minimal weight since Julie Hess' involvement was only after the killing.

(m) Proportionality - rejected.

(n) Remorse of defendant - does not exist since Hess did not accept responsibility for guilt phase, penalty phase or at Spencer hearing.

(o) Peaceful nature of the defendant - factor does not exist in light of the verdict and other felony convictions.

(p) Non-statutory emotional disturbance - factor shown and given moderate weight.

(q) Religious devotion - given slight weight.

(r) Length of potential sentence - given some weight.

(s) Good jail and trial conduct - given minimal weight.

(Vol. V, R. 673-682).

While not entirely clear, it appears that appellant is voicing his disagreement with the weight to be accorded the non-statutory mitigating factors that were found to exist. Appellant does not cite any case law mandating that the weight assigned by the trial court must be identical to that desired by the appellant or that it must outweigh the totality of aggravators found. The law is to the contrary. *See, generally* Atkins v. Singletary, 965 F.2d 952, 962 (11th Cir. 1992)(Constitution requires only that judge consider not accept mitigators proffered); Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991)(resolution of factual conflicts is solely the responsibility and duty of the trial judge and as an appellate court we have no authority to reweigh that evidence); Pettit v. State, 591 So.2d 618, 621 (Fla. 1992)(decision as to whether mitigation has been established lies with the trial court); Ponticelli v. State, 593 So.2d 483 (Fla. 1991), vacated on other grounds, 113 S.Ct. 32 (1992), affirmed on remand, 618 So.2d 154 (Fla. 1993)(rejecting defense argument that court failed to consider unrebutted mitigating evidence; trial court found doctor's testimony speculation and there was competent, substantial evidence to support rejection of the mitigating evidence); Sireci v. State, 587 So.2d 450 (Fla. 1991)(decision as to whether a particular mitigating circumstance is established lies with the trial judge; reversal is not warranted simply because an appellant draws a different conclusion; since it is the trial court's duty to resolve

conflicts in the evidence, that determination should be final if supported by competent, substantial evidence); Hall v. State, 614 So.2d 473 (Fla. 1993)(record supports trial judge's conclusion that mitigators either were not established or entitled to little weight); Gudinas v. State, 693 So.2d 953, 966 and fn 16 (Fla. 1997); Sims v. State, 681 So.2d 1112, 1119 (Fla. 1996)(finding that Campbell had been satisfied by the trial court's according "little or no weight" to the proffered mitigators); Lawrence v. State, 698 So.2d 1219, 1222 (Fla. 1997)(Trial court's sentencing order is sound. It shows that the trial court considered all the proposed mitigating circumstances, found some as established and other not); San Martin v. State, 705 So.2d 1337 (Fla. 1997)(a trial court has broad discretion in determining the applicability of mitigating circumstances urged, the trial judge considered all the evidence presented); Jiminez v. State, 703 So.2d 437 (Fla. 1997)(weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of standard); Blanco v. State, 706 So.2d 7 (Fla. 1997); Raleigh v. State, 705 So.2d 1324 (Fla. 1997). The lower court did not abuse its discretion in failing to give greater weight to Mr. Hess' pursuit of bible studies and desire to be a minister in light of his refusal at trial to accept responsibility in the Galloway murder and in light of his molesting his nieces.

ISSUE VII

WHETHER THE IMPOSITION OF A SENTENCE OF DEATH IS PROPORTIONATELY WARRANTED.

The trial court in its sentencing found two aggravators (homicide in the commission of a robbery and prior conviction of a felony involving the use or threat of violence), declined to find four statutory mitigating factors (no significant history of prior criminal activity, under the influence of extreme mental or emotional disturbance, impaired capacity to appreciate the criminality of his conduct, and age of 28), considered some thirteen non-statutory mitigation presented by the defense and attributed only slight, minimal or little weight to those found; and as to a half dozen other non-statutory mitigators not specifically requested in the defense sentencing memorandum but brought out by appellant in his statement to the court, Judge Rosman gave some weight to those demonstrated (Vol.. V, R 668-683).

Appellant argues that if this Court finds both aggravators inapplicable, then the death sentence must be reduced to life imprisonment; appellee agrees that Florida law does not permit a death sentence to stand if there are no aggravators present. But that is not a proportionality analysis, only a failure to meet the minimal statutory threshold to qualify for a capital sentence.

Appellant argues that the Court should give minimal significance to the two found aggravators because they are “crimes for which Hess has already been sentenced” (Brief, p. 107). By

that logic when a defendant has been previously convicted and sentenced for murder and then commits another for which the death penalty is imposed the prior murders shouldn't count so much, a seemingly advantageous principle for repeat killers such as Gerald Stano[14] or Judy Buenoano.[15]

Hess cites Terry v. State, 668 So.2d 954 (Fla. 1996), but in Terry the prior violent felony "does not represent an actual violent felony previously committed by Terry, but rather a contemporaneous conviction as principal to the aggravated assault simultaneously committed by the co-defendant Floyd who pointed an inoperable gun at Mr. Franco." Id. at 965. Mr. Hess, unlike Terry, was not merely an accomplice-surrogate in the prior violent felony conviction -- he and he alone committed the sexual battery charges on a child, Exhibits 27-29 (Vol. IV, R 335-338; *see also* testimony of defense witness Julie Ann Teachworth that appellant was convicted of molesting Crystal and April Griffith -- Vol IV, R. 389).

Hess also compares his case to Clark v. State, 609 So.2d 513 (Fla. 1992), but the dissimilarities are greater. In Clark, this Court rejected three of the four aggravators found by the trial court, leaving only the single weak aggravator of pecuniary gain (killing to obtain the victim's job) and there was substantial

---

[14]Stano v. State, 460 So.2d 890 (Fla. 1984).

[15]Buenoano v. State, 527 So.2d 194 (Fla. 1988).

mitigation including alcohol abuse, emotional disturbance and abused childhood -- his judgment was impaired as he drank an excessive amount of alcohol on the day of the murder. The mitigation proffered was supported by both lay and expert testimony and all experts found him to be chemically dependent. 609 So.2d at 516. In contrast, appellant presented no mental health expert testimony (although Hess did have the benefit of pretrial appointment of such expert assistance -- Vol. I, R. 2-3) and the trial court's sentencing findings recites:

> No expert testimony was presented nor were any reports or records produced which would support the findings of this factor. [under the influence of extreme mental or emotional disturbance]
>
> (Vol. V, R. 672) (emphasis supplied)

* * *

> As noted previously, no expert nor report nor records were produced that support the claim that the capacity of the Defendant was in any way impaired at the time of the killing. This mitigating circumstance does not exist.
>
> (Vol. V, R. 673) (emphasis supplied)

* * *

> The defendant has argued that his mental age is ten years behind his actual age. He was 28 years old at the time that he killed John Galloway. The Defendant presented no expert, no records, no reports that would substantiate the claim that he is 10 years behind himself.
>
> (Vol. V, R. 673) (emphasis supplied)

* * *

> Two witnesses testified at the penalty phase as to the Defendant being borderline retarded, the Defendant and his sister. No expert was presented who could support this claim.
>
> (Vol. V, R. 673) (emphasis supplied)

There simply is no comparable, similar evidence in the instant case as that described in Clark. Hess was not under the influence of drugs or alcohol and presented no expert testimony to support his mitigation.[16]

The instant case is more comparable to the situation described in Mendoza v. State, 700 So.2d 670, 679 (Fla. 1997):

> [18] Finally, we consider whether the death sentence is proportionate in this case. Appellant argues that the death penalty is disproportionate here because the murder took place during a robbery and the shooting of Calderon was a reflexive action in response to Calderon's resistance to the robbery. Appellant cites three robbery-murder cases to support his contention that this crime does not warrant the death penalty because the murder was not planned but was committed on the spur of the moment during a robbery gone awry. *See Terry v. State,* 668 So.2d 954 (Fla.1996); *Jackson v. State,* 575 So.2d 181 (Fla.1991); *Livingston v. State,* 565 So.2d 1288 (Fla.1988). We find no merit in this

---

[16]Appellant's reliance on Maxwell v. State, 603 So.2d 490 (Fla. 1992) is odd. That case is inapposite. The reversal there was predicated on Hitchcock error raised on postconviction application committed by the judge both in instructions to the jury and in his written order. Contrary to appellant's suggestion in the instant case the trial court found as a nonstatutory mitigating factor that Mr. Hess was suffering from some mental or emotional disturbance when this murder was committed. The court thus gave some credence to appellant's testimony (Vol. V, R. 681). The lower court correctly concluded that the presence of the two strong aggravators made the imposition of the death penalty a proportionate one (Vol. V, R. 679-680).

> argument. In *Terry* and *Jackson*, as in this case, the trial court found two aggravating circumstances and no mitigating circumstances in imposing the death penalty. In both of those cases, we vacated the death sentences on proportionality grounds. However, in *Terry* and *Jackson*, the trial courts based prior-violent-felony aggravating circumstances upon armed robberies which were contemporaneous with the murders. By contrast, the trial court in this case based the prior-violent-felony circumstance upon appellant's previous armed robbery conviction in the Robert Street case. Thus, appellant's prior conviction of an entirely separate violent crime differs from the aggravation found in *Terry* and *Jackson*. In *Livingston*, the trial court found two mitigating circumstances: Livingston's age (seventeen years) and Livingston's unfortunate home life and upbringing. By contrast, appellant was twenty-five years old at the time of this murder, and the trial court considered but found no mitigation in the form of appellant's history of drug use and mental problems. Therefore, under the circumstances of this case, the death penalty is not disproportionate.

The death penalty in the case *sub judice* is not disproportionate.

CROSS-APPEAL ISSUE I

WHETHER THE LOWER COURT ERRED IN DENYING THE PROSECUTOR'S MOTION IN LIMINE AND IN PERMITTING DEFENSE COUNSEL TO ARGUE A COMPARISON TO OTHER CASES WHERE NO EVIDENCE HAD BEEN INTRODUCED REGARDING SUCH CASES.

The lower court erred in denying the state's motion in limine and permitting the defense to argue during penalty phase closing argument that the instant case was unlike other cases involving convicted murders -- in this and other states -- that were unrelated to the present case (Vol. III, R. 265-268; Vol. IV, R. 300-302, Vol. IV, R. 452-454; *see* Vol. VI, R. 734).

In Herring v. State, 446 So.2d 1049, 1056-1057 (Fla. 1984) this Court addressed the defense contention that the defendant should be allowed to present testimony by attorneys who represented other murder defendants in similar cases who were able to obtain life sentences:

> [4][5][6][7] As to his first contention, appellant argues that under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the trial judge should have allowed defense counsel for other first-degree murder defendants to testify that their clients received life sentences for similar crimes. The testimony sought to be presented reflects that these defendants were able to plead guilty and receive a life or lesser sentence. We have previously held that evidence concerning sentences imposed upon codefendants must be admitted in the penalty phase in order to allow the jury to know all the facts and circumstances surrounding an offense and its participants. See Downs v. State, 386 So.2d 788 (Fla.), cert. denied, 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 238 (1980); Salvatore v. State, 366 So.2d 745 (Fla.1978), cert. denied,

> 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); Smith v. State, 365 So.2d 704 (Fla.1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); Messer v. State, 330 So.2d 137 (Fla.1976), cert. denied, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982). These cases do not hold, however, that the circumstances and sentences in other death penalty cases must be admitted in the sentencing phase of the trial. Evaluating the sentences of other defendants in unrelated crimes involves a number of variables. There is no requirement in Lockett for the admission of such evidence in the sentencing phase. What Lockett does require is the admission of evidence that establishes facts relevant to the defendant's character, his prior record, and the circumstances of the offense in issue. 438 U.S. at 604-605 n. 12. The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant. The trial court, in determining the sentence to impose, must use its judicial experience in evaluating and weighing the aggravating and mitigating circumstances with the recommendation of the jury. The use of sentences imposed on other defendants relates to the proportionality of the sentence and is an appropriate element to be considered by the trial judge in imposing sentence upon the defendant, but is not a matter for the jury. This Court also has the responsibility to determine whether the sentence is proportionate with other death penalty cases. In the instant case the trial judge correctly excluded from the jury the proffered testimony concerning sentences imposed in unrelated capital cases.

(emphasis supplied)

Appellee submits that Herring was correctly decided and that this Court should continue to discourage the notion as it did in Herring that a jury should somehow become engaged in proportionality review, a function more appropriate for the trial

court and this Court. And if Herring would not even permit the testimony of lawyers for the jury to hear a version of why other defendants did not receive a death sentence, a fortiori, it should not permit defense counsel's argument without supporting testimony comparing the instant case to Ted Bundy, Jeffrey Dahmer or Charles Manson (Vol. IV, R. 452-454). If the jury is permitted or encouraged to make comparisons with other cases about which there has been no evidence presented, to what extent may the prosecutor respond in kind without evidence? Will the prosecutor be allowed to explain that older high profile case (like Manson) received the benefit of Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972) when all pending death sentences nationwide were struck down? May the prosecutor speculate and argue that Dahmer received a life sentence because of extensive mental health mitigating testimony not present in the instant case and is there error if that argument turns out to be factually erroneous? To avoid error must the prosecutor be prepared to offer the Dahmer trial record or the record of other high profile cases in order to argue that it is inapplicable?

In short, by permitting such irrelevant arguments before the jury,[17] this Court would allow the introduction of additional

[17]The arguments are irrelevant because it does not matter whether Manson and Dahmer deserved the death penalty and only received a life sentence or whether the sentencing schemes in other states are more just or less workable. Appellee's concern is not merely with out-of-state cases; the jury should not be comparing and contrasting with Bundy or any other case when it knows not the

arbitrary factors that would make Florida's death penalty scheme more vulnerable to constitutional challenge.

This Court should take this opportunity to remind the lower court that proportionality review is a function of the courts, not the jury and that it is improper for counsel to argue the applicability *vel non* of other high profile cases which are irrelevant and for which no evidence has been introduced. *See* Scott v. Dugger, 604 So.2d 465, 471 (Fla. 1992) ("Appellant's argument misapprehends the nature of proportionality review . . . Such review compares the sentence of death to the cases in which we have approved or disapproved a sentence of death. It has not thus far been extended to cases where the death penalty was not imposed at the trial level"); Garcia v. State, 492 So.2d 360, 368 (Fla. 1986) (same).

This Court has gone to great efforts in explaining in decisions such as Urbin v. State, ___ So.2d ___, 23 Florida Law Weekly S257 (Fla. 1998) that a prosecutor engages in improper closing argument and "we would be remiss in our supervisory responsibility if we did not acknowledge and disapprove of" such practices. 23 FLW S at 259. Such improprieties included an invitation to disregard the law as it is written by the legislature, an assertion that a vote for life imprisonment would be irresponsible and a violation of the juror's lawful duty,

---

evidence and arguments presented there or appellate analyses for the result that obtained.

argument which exceeded the evidence by emotionally creating an imaginary script demonstrating the victim was shot while pleading for his life, argument which attempted to create an animosity toward defendant's mother, and making an unnecessary appeal to the sympathies of the jurors. Appellee/cross-appellant would respectfully submit that this Court should similarly disavow the defense effort to evade Herring by arguing a comparison to other cases unsupported by evidence in an effort to have the jury engage in proportionality analysis beyond their ken. If the Court, on the other hand, chooses to permit such defense argument, it should articulate parameters of the prosecutor's response -- because sadly prosecutors will respond by extra-record reasoning and hypotheses and it is best to know before rather than after trial what are the permissible ground rules.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No.: 0134101
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, Post Office Box 9000, Drawer PD, Bartow, FL 33831, this _____ day of July, 1998.

COUNSEL FOR APPELLEE