IN THE SUPREME COURT OF FLORIDA

JOHN HESS,	:	
Appellant,	:	
vs.	:	Case No. 90,026
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On May 3, 1995, a Lee County grand jury indicted Appellant John Hess for both premeditated and felony murder, and robbery with a firearm. The indictment alleged that Hess killed John Galloway with a firearm on or about May 11, 1993, in Lee County Florida. (1/5-6)[1] Hess had been arrested in Michigan, two years after the homicide, on unrelated charges. He waived extradition and was returned to Florida, whereupon he was questioned about Galloway's homicide. Ten days later, he said he shot Galloway by accident.

First Appearance on the unrelated charges was held April 1, 1995, at which time the Public Defender was appointed to represent Mr. Hess. (2/26, 28, 41) On April 4, 1995, Hess executed a written invocation of rights form which applied to any criminal matters in which he was a suspect. (2/28-29, 97) The form stated, in part:

> I hereby announce my desire to have counsel present before anybody talks to me about any matters relating to this case or any other charges pending against me or any other criminal matter in which I am a suspect or can reasonably be expected to become a suspect based on anything I might say. . . .
>
> I further state hereby that at no time in the future do I or will I waive (that is, give up) my right to have my attorney present unless and until, after adequate consultation with my attorney, I specifically waive (give

[1] The record of appeal in this case will be referenced by the volume number followed by the page number, pursuant to Florida Rule of Appellate Procedure 9.210(b)(3). For example, the indictment, which appears on pages 5 and 6 of the first volume is referenced as (1/5-6). Items in the supplemental record are referenced by S and the page number; for example, the first page would be (S/1).

up) all or part of my rights in written form . . . . (1/22; 2/97) The investigating officers ignored the written invocation and continued to interrogate Hess concerning the crime.

The case was first assigned to Judge William J. Nelson. (1/7) On March 11, 1996, Hess filed a Motion to Suppress Confessions, Admissions and Statements. (1/19-20) After denial of Appellant's motion to suppress, the case was tried by jury, December 9-13, 1996, Circuit Judge Jay B. Rosman, presiding. (3/137-41) Hess was found guilty of all three counts, as charged. (14/1437-37, 1444) Penalty phase was held December 17, 1996. (4/282) The jury recommended death by a vote of 8 to 4. (4/474)

An allocution or "Spencer" hearing was held on January 17, 1997 (5/545), and Hess was sentenced to death on January 29, 1997. (6/688, 715) The judge merged the premeditation and felony murder convictions. He sentenced Hess to serve 5 1/2 years for armed robbery, with a three-year minimum mandatory, consecutive to the thirty year sentence imposed in a prior unrelated case,[2] and the sentence for first-degree murder. (6/692) Judge Rosman filed a written sentencing order on that date. (6/718-23)

Hess filed a Notice of Appeal on February 26, 1997 (6/724),

[2] Hess was arrested in Michigan March 14, 1995, on charges of sexual misconduct with his nieces, which allegedly occurred in Florida from March 11 to 13, 1995. He was tried and convicted of eight related counts on October 21, 1996. (5/498-99, 520-21) Although the alleged sexual activity occurred two years after the homicide, Hess was convicted a month or so before the trial in this case. He was sentenced to thirty years in prison in that case. (5/498-99, 520-21)

and the State filed a Notice of Cross-Appeal on March 6, 1997. (6/732-35) The Public Defender for the Tenth Judicial Circuit was appointed to represent Hess. This Court has jurisdiction of this appeal pursuant to Article V, Section 3(b)(1), Florida Constitution, and Florida Rule of Appellate Procedure 9.030 (a)(1)(A)(i).

STATEMENT OF THE FACTS

State's Case

On Monday afternoon, May 10, 1993, Appellant John Hess stopped by Omar Security to pick up a uniform for his new job as a security guard. While so doing, he chatted with his new boss, Mr. Warren. Among other things, Hess asked Warren if he had heard about a security guard who had been shot and killed that morning at the Lee County school system's bus garage, in East Ft. Myers, and that his body was found behind a bus.[3] The man was shot once in the chest.[4] Warren heard nothing about a homicide for two days. (10/693-95)

Two days later, on the night of May 11-12, 1993, John ("Jay") Galloway, a 69-year-old security guard at Lake Fairways, a

[3] Geraldine Lindsay, a former employee of Omar, testified that she overheard the conversation, and that Hess said a security guard was shot in the chest on Sunday night at a private security gate. She said Hess knew the guard, had worked with him at one time, and that the place where he worked (Weiser) called him into the office and told him about it. (4/678-685) When Hess began bragging about other stuff he had done, she tuned him out. (4/686)

[4] Hess told Warren other stories; some were so far-fetched they just "went in one ear and out the other." (4/708)

residential community in North Fort Myers, Lee County, Florida, was shot in the chest and killed.[5] David Luffman, the roving security guard, testified that Galloway was fine when he left him shortly after 11:00. About 1:15 a.m., he found Galloway on the ground outside the guard house. (9/08-13) His body was cool. (9/524)

A resident of Lake Fairways returned home about midnight that night. The usual guard opened the door and waived them through. (9/554-555) About 12:30, a resident of a park adjoining Lake Fairways, heard two gunshots. (9/539-41) A resident of Lake Fairways heard two sharp sounds at 12:25 or 12:30. (9/547-48, 553)

The perpetrator took Galloway's wallet. Mrs. Betty Galloway testified that her husband's wallet was camel in color and was a trifold wallet. Galloway's Shell credit card was used shortly after the homicide to purchase gasoline at a Shell station about fifteen miles south of Lake Fairways. None of Galloway's credit cards were ever returned. (3/532-34)

Christina Amspacker, crime scene specialist, said a copper-colored projectile was found northeast of the body. (9/571, 573) An impression in the north wall of the guard house suggested a metal object ricocheted off the wall. (9/576) Amspacker said that, when they first arrived at the scene, they observed tire tracks on the

[5] The security at Lake Fairways was run by the owners of Lake Fairways and an adjoining mobile home park. (3/509) Galloway and his wife, Betty, moved to Lee County from Michigan nine years prior to the homicide, and lived in the adjoining park which was called Pine Lakes. (3/530) Galloway had worked as a security guard there for about eight months. (3/535)

north side of the road, emerging west of the guard house. (9/586-89) Deputy Joslin testified that the tracks were in the dew and were destroyed by the sprinkler system. (10/624) Allen recalled that photos were taken of the tire tracks but did not measure the tires or wheelbase on Hess' car.[6] (11/988-89)

A copper projectile was recovered from the Galloway's body. (9/581, 629) Amspacker and Joslin submitted items of evidence to the FDLE, including projectiles, a hotel receipt, Shell credit card receipt, the victim's uniform and fingernail clippings, and hair and fibers from the victim's body and hair. (10/598-603, 620, 630)

Dr. Burgess, an associate medical examiner in Lee County, opined that Galloway died from a gunshot wound to the chest. (10/654) The victim would have bled to death quickly. Internal bleeding showed Galloway's heart continued pumping for thirty seconds to a couple minutes. He may have been conscious for "seconds." (10/656-57) The path of the bullet was from front to back and left to right. There was little vertical deviation. Burgess could not determine the distance between the shooter and victim, but it was not a contact wound. (10/655-56, 660-62)

Sergeant Gil Allen, lead investigator in the case (11/791), said that, although they were unable to locate a weapon, they found

[6] Two years after the crime, Amspacker and Joslin were involved in processing Hess's vehicle. No measurements were made to determine whether the car might have made the tracks. They found no evidence connecting Hess to the crime. (9/583-84, 10/621, 633)

a projectile which might have produced the mark on the wall. They found no wallet or personal identification belonging to Galloway. The officers interviewed Galloway's wife and learned that he carried a wallet containing numerous credit cards and some cash. (11/794-96) Allen learned that Galloway's Barnett Bank ATM card had been used at a Barnett Bank without success at about 1:00 a.m. on the night of the murder. (11/798) They withheld this information from the media. (11/801) Fingerprint and handwriting samples from Hess and his wife were sent to FDLE to compare with fingerprints and handwriting on credit card receipts. FDLE reported that they did not match. (10/631)

Mickey Warren of Omar Security heard of Galloway's murder on May 12, 1993, and thought it unusual that Hess had told him about a similar incident two days before Galloway was killed; thus, he called the authorities and spoke with Gil Allen. (10/696; 11/799) The following night, Allen sent Warren and undercover officer Les Partington, both of whom wore concealed "wires," to talk with Hess at his job site -- a Target store under construction. (10/697, 702, 788) They did not approach Hess honestly, however, but told him the officer was a prospective supervisor for the security agency. (10/702, 713-22) A tape was played for the jury. (10/718-82)

The Target Store Surveillance Tape

Hess told the men that he had worked for Weiser Security and had worked security at the schools in Lee County, including the

school bus garage. (10/726-28) Hess talked mainly about his training in guns and as a security guard in Michigan.[7] (10/731)

When Warren mentioned that Hess knew about the Galloway incident before it occurred, Hess said he knew who Galloway was and that he was a very nice man, a "very sweet old man." He said Galloway had worked for Weiser Security for awhile and he had told him not to go to Pinkerton, that "they" were going to get him killed, but Galloway said it was good money.[8] (10/734)

Hess said that Galloway "was sitting in this guard house" and "some kid" blew him away. When asked if the guard was killed with a shotgun, Hess did not know. He said nobody knew; that's "all they'll tell you." (10/734-35) Hess could not think of Galloway's name. (10/739) When asked why someone would shoot Galloway, Hess said he did not know; that they "[d]idn't take a fucking thing." He said no one knew what the guard had. (10/739-40)

When Warren asked why law enforcement took so long to release the news story, Hess said it was standard police practice to withhold information until they had done some investigation to keep people from getting panicky and putting weapons in their cars. Hess said it happened Monday **night** on the midnight shift, and "rumor has it" a lot of officers "are going to start carrying," (10/740-41)

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[7] Agent Allen was unable to verify Hess' training because the school Hess said he attended was no longer in existence. (11/806)

[8] Galloway had never worked for any security company except the private company at Lake Fairways. (11/970)

Hess told the men about a security guard killed in a car wreck and asked if they heard about the guy blown away over in Suncoast recently. Hess said a man who worked at Weiser was changing a tire when a black guy with a gun asked for his money. The man got his .38 and started shooting. (10/769-72) He described an incident that allegedly happened at the bus garage, during which four men were shot on New Year's Day. The captain handed Hess "his nine" and they started shooting. They hit four people before deputies arrived. (10/773-74) Partington was familiar with the bus barn in Ft. Myers and had never heard of such a shoot-out there. (4/787-88) Lloyd Sawyer, who worked at the bus barn with Hess, did not know of the incident. (12/1021) During the surveillance taping, Hess did not tell them anything he did not say Monday. (10/763)

On the day following the taped surveillance, May 14, 1993, Allen asked Hess to come into the sheriff's office. Hess complied. (11/806) Allen said he had talked to other security people, was getting nowhere, and needed help from a real professional like him. Hess' boss had told him about Hess' vast experience and training. Hess was not told he was a suspect. (11/807, 968)

Hess told Allen he knew Galloway because Galloway used to work at Weiser Security; he thought Galloway also worked for Pinkerton, which had or was trying to get the contract at Lake Fairways. He taught Galloway some security tricks, for which he got in trouble with the security agency. (11/811) This was not true as Galloway worked only for the security company at Lake Fairways. (11/970) No

other witness confirmed that Hess ever met Galloway. (11/985)

Hess told Allen he had been to the Lake Fairways guard gate to inquire about moving into Lake Fairways, and the guard told him it was a retirement community. Galloway was very polite, and let him pull in and turn around. Allen said Hess also described Galloway as rude, and as nice and friendly. Hess speculated in detail about how Galloway must have been killed, much of which Allen believed was fairly accurate. (11/816) Hess said Galloway did anything wrong, but was just doing his job. (11/979)

Hess told Allen he did not own any firearms. He had worked at a guard post similar to Lake Fairways, and driven by Lake Fairways every day on the way to his post. (11/811, 974-79; 12/1001) He knew there were two guards and the roving guard came back to the guard house periodically. Hess even told Allen about his own [Allen's] patrol duties and knew exactly when and where he would be at certain hours. (11/814-15)

Hess said his wife got off work about 12:15 a.m. on the night of the homicide. State witnesses confirmed that his wife got off work at 12:00 and that Mr. and Mrs. Hess sat around until about 12:15. (11/973) Hess said he heard about the Galloway murder over a CB radio. When confronted with the fact that he told Warren about the murder before it happened, Hess said Lloyd Sawyer at Weiser Security told him about the homicide. Hess said he was fired from Weiser for overhearing a conversation between Sawyer and Ms. Gordon, an administrator at Weiser, about a "hostile" takeover of

security positions (security guards beat up, hurt, or intimidate guards at other companies to take over positions). Allen found no credibility to Hess' story. He interviewed Sawyer and Gordon and found no reason to believe Sawyer was involved.[9] (11/822-28)

Hess drew a layout of Lake Fairways. Although Allen thought it was a good drawing, defense counsel pointed out various errors which Allen conceded. Hess omitted the golf course and woods, the sidewalk and retail office, and the pond south of the guard house. Although some trailers were not positioned correctly, the driveway and guardhouse were properly located. (11/981-84)

Shortly after midnight on May 15th, Hess returned to the sheriff's office, asking to speak with Allen. (11/829) Hess told Allen he had made up some of the stories he told them. (11/831) (11/831) Allen admitted that after he first interviewed Hess, Hess was and remained a suspect. (11/967)

They obtained a search warrant for Hess' trailer on May 15, 1993, and searched with no advance warning to Hess, but found no evidence. (11/948) The warrant included Hess' car which was also searched. No evidence was found in the car. (11/985) Although Allen was suspicious of Hess, he follow any other leads. (11/833)

[9] Lloyd Sawyer, age 32, was about six feet tall, two-twenty pounds, with brown hair. He had a concealed weapons permit and owned handguns. Sawyer testified that he was working at a guard post about ten minutes from the Charlotte County line on the night of the homicide. He did not feel well so called in a replacement (Sweeney) who arrived at midnight. Sawyer stayed until 1:30 to explain what needed done. At the time of the trial, he did not know Sweeney's whereabouts. (11/1022-24)

When the officers called Galloway's credit card holders, they learned only that someone had tried to use his ATM card. About thirty days later when the bills started coming in, they learned that two other cards were used. The first was a purchase made at the Shell station on U.S. 41, where Hess' wife worked, at 12:36 a.m. on the night of the murder. They talked to the managers at Shell and the employees on duty that night. (11/834-35) Allen did not check to see if there were any other Shell stations between Lake Fairways and the station where Juli Hess worked, but was unable to recall any. (11/990)

They also learned that a Mastercard belonging to Galloway was used on the Miccosukee Indian reservation at Everglades Towers, a motel on U.S. 41 near Miami. The card was used at 4:00 a.m. on the night of the murder. The guest registration receipt bore John Galloway's name and was dated May 12, 1993. (11/835-37)

Between May 15 and May 19, 1993, Allen had several telephone conversations with Hess. Hess said he dreamed about the case and agreed to show them how the perpetrator committed the crime. Hess talked to numerous people about his dreams, including a priest, a psychic, and law enforcement officers at a local precinct. (11/839)

Audiotaped Walk-Through; The Dream Sequence

An audiotape was played for the jury during which Hess, Agent Futch and Agent Allen did a re-enactment of Hess' dreams of the homicide on April 19, 1993. (11/843-928) On the way to Lake

Fairways, Hess pointed out where the perpetrator committed other crimes. He just had flashes of trailers in his dreams. He took the officers past a store where the man sometimes bought beer. (11/846-55) He said the man was "very, very mean." (11/872)

Hess told the officers they would go the way the perpetrator walked prior to the homicide. He was on foot that night. Hess did not know the perpetrator and did not feel as though he knew him because he was not very nice; was violent; and enjoyed harming defenseless people. He was not a security guard. (11/848-55)

During this conversation, the men were driving toward Lake Fairways. Hess told them to pull over, and pointed out where the perpetrator liked to park. He said the perpetrator always walked down the road and never went into the woods. (11/856-57) He said the man stayed in the car a long time before he got out. He was drinking. He got out when it became dark. (11/860-62) The man had been there before counting how many cars went in and out of the park. He'd been watching the goings and comings. He "hit" other places too and when he got too drunk he would leave. (11/863-64)

On the night of the murder, the perpetrator got drunk. Hess did not think he had killed before, but he liked to rob people. The dream started "when . . . I came on duty." (11/864-66) Somebody spotted the man and he ran back to his car and took off. He moved the car across the road. (11/867) He hid it in a culvert.

They entered the woods. Although one of the officers asked if the man was watching the guard, Hess said he was "just watching."

That was the killer's favorite drinking spot. Hess said that the killer's buddy "comes out over here." (11/872-84)

Hess said that the perpetrator was running "like mad," and two people were chasing him. He went through the woods to the guard gate because he'd been spotted on the sidewalk. Although Hess said he did not "see" the man go to the guard house and did not know how he got there, the officers insisted he show them. Hess said the killer came out "somewhere in here." (11/876-78)

Hess seemed to believe he was the guard who had been killed; he was doing his report in the guard house. The perpetrator saw him and backed off. He called the police and told them someone was sneaking around. (11/875) The guard house at Lake Fairways was not the one in his dream. There were gates in his dream, and no flag pole. (11/880) He said he picked up the rolodex and looked for the sheriff's number, but it wasn't there. Hess continued,But see, I'm on duty. . . Dead at night. There's a door now. The night was going perfect, no problems, but something made me -- I heard something. I picked up the radio. . . . I walked. . . . And I got out. I picked up the radio, okay, and asked where the, what the rover's 10-20 was. . . . He didn't answer. . . . I put it back down and sat back down. . . . Somebody came walking up. (11/881-82) A white male, skinny, black hair, very long. . . . I stood at the doorway. . . . The door was just like it is, propped open . . . [t]he guy I relieved said it gets too hot in here and leave the door open. . . In the dream, I stay in here. . . . He . . . says, hey man, what's up? . . . I says . . . excuse me, sir, but you are trespassing. And he says, no, I'm not. I says, do you live here? He says, no. Then I ask him for his ID. He reaches in his pocket to get his ID. Instead he pulls a gun.

(11/883-84) Continuing, Hess, as the guard, asked,

> [W]hat do you want? . . . you want my money? . . . He says yes. I don't have any. Do you want my checkbook? No, I want money. I threw him my wallet. I says, here,

> check. I don't have none. . . . He didn't believe me. . . . I was like this. . . . I had my arms up. I had nothing on me. He says, give me your money. I said, I don't have any. He was pointing the gun right at me.

(11/884-85) Hess did not know what kind of gun it was because he was looking at the man's face. The man wore no glasses, was clean shaved. He tried to get to a phone, but had his hands up and was looking at the perpetrator. As he touched the phone, he heard a gunshot. He showed the men where he landed. (11/885-56) It hit

> somewhere through here. . . I dropped. But see, before I dropped I grabbed him. . . . And then another shot rang out. . . . He landed on top of me. . . . This is where the dream gets real strange. . . . I felt one [shot]. Then I left. While I was going out --

(11/887) Hess said the second shot hit his chest. The first shot hit "[a]pproximately through here." Allen tried to get Hess to conform his "dream" to what he told them before, and what really happened -- that only one shot hit the guard. (11/888) Hess said,

> [H]e grabbed him like this. . . . And then the other shot went out, because he was -- for some reason he grabbed him. . . . It just plays right into motion. . . I'm looking over, I remember getting covered up. . . .

When Futch asked Hess if he could describe the guard, Hess said, "No, it was me. I can -- it was me. . . ." He said the guard house at Lake Fairways was not the one in the dream. (11/889-90)

The officers tried to persuade Hess to stop talking about the shooting and show them how the man got away and where he put the gun. (11/887-89) Hess said the man ran back the way he had come, with the gun in hand. He was laughing; he thought it was funny. He was happy. He stopped a minute to look back. The rover "popped

up" and the man started running again. He would run a way, look back and run again. Someone in the area said "hey." (11/891-92)

Hess said, "my body's chasing him. . . . he's in uniform, my body's chasing him." (11/892) The man was laughing. He met a black man there. They were on a road leading to U.S. 41. Hess was in hot pursuit of him. The gun was in the car. "[W]hen I left my body, I so distinctly remember it because it scared the hell out of me. . . [M]y ghost is chasing him." (11/896-97)

Hess' ghost returned to the scene. He watched himself being covered up. His wife came and was very upset and crying. The men were laughing. Allen told Hess again that they wanted him to take them to the gun, and turned off the tape until they reached the patrol car. Hess' body then went elsewhere. (11/899)

Agent Allen asked, "What are they doing with your wallet?" Hess said they were looking through it for money. They found only a driver's license and security license. Agent Allen said, "[w]hat about credit cards. . . ?" Hess said he did not have any credit cards. (11/899-900) He said the men were looking for an ATM card but he didn't have one. Allen asked whether the guard had an ATM card and if they got it, because he had thrown the man his wallet. Hess said he did not know; he only remembered that they got his (Hess') wallet. He led them to a grassy area where they "tossed" what they took. They kept only the gun and ATM card. They tried to figure out the code, but the card was "eaten" by an ATM machine. He did not remember where. When Hess said he was getting a

headache, the detectives told him to stick with them. (11/900-02)

The officers asked Hess to describe the ATM card, and when the men used it, but Hess ignored their questions, intent on showing where the men were going. (11/904) He said they had only the ATM card which did not say which bank. The perpetrator drove to his trailer park. He turned around and drove in a different direction, trying to find "where he can buy his beer." He put the gun in a black leather case. He was not married (11/905-07) and did not have a job. (11/920) He was smiling, but his teeth were decayed and rotten, and he had a weird smile. (11/907-08, 923)

The perpetrator stopped and put the gun in the trunk of the car. He had another gun in the trunk -- a small automatic in a holster. The man loaded it and the bullets were very large. Hess had never seen that kind of gun before. (11/909) He put the gun in the trunk "with the rest of his collection." (11/910)

Hess had the men take a U-turn because the man spotted a store that was open. The officers repeatedly asked Hess to take them to the ATM machine. (11/911) Hess said there was an ATM machine at Shell. That was where the man wanted to use the ATM card and to buy beer, but the card did not work. He put the ATM card in his pocket. He first said the man tried the card once but then said he tried it several times and the machine kept saying "wrong access." (11/914-15) He did not know what other cards were in the wallet. He took only the ATM card which was "bluish." He did not know which bank issued the card. (11/916-17) The gun remained in the

trunk, and the perpetrator did not try to use the ATM card again because he was mad about it not working. He cut it into five pieces with a knife, and left it in the middle of the seat. When he became angrier, he put the pieces on the floor. Hess said the wallet looked like his. It was black. The man gave the wallet to his friend who kept what was in it, "a license."[10] (11/918-19)

Hess said the perpetrator lived in a trailer park very close to where they were because he "always runs." (11/922) Hess knew what he looked like "because it scares the hell out of me when I see him on the street." Hess did not know why the man killed the guard. He heard laughing in the car and said that the man "knows every move every security guard makes." (11/927) He kept hearing "break four," the channel that security guards have. He said that was where the CB came in; he kept hearing it in the dream. He heard the police scanner in his dream. The officers would say their locations and what was going on. The perpetrator turned off the police scanner and talked to security guards on the CB. (11/928) Eventually, the officers tired of driving around, and returned to their office. (11/927) Thus, ended the tape.

* * * * *

Allen said he never told Hess about the ATM card. They did

[10] Galloway had many cards in his wallet, and Mrs. Galloway said her husband's wallet was camel in color. (3/532-34)

not release the fact that the wallet was trifold.[11] Allen admitted that reporters were at the crime scene and witnesses were free to talk to the press. The said that the media sometimes dug up information not in the sheriff's press release. (11/965-66)

Allen testified that, although he was "comfortable" with what they had, they did not arrest Hess because the evidence from the crime scene was insufficient. They had no gun and needed more evidence to tie things together.[12] (11/932, 934) Although Hess' hair and blood were sent to the FBI, they were never compared to anything from the crime scene. (11/947) Handwriting samples were "inconclusive." (11/932) A fingerprint on the motel receipt did not match. (11/935) After they received the FDLE report, they had no more evidence than before and nothing to support an arrest.[13]

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[11] Law enforcement learned that these cards were missing on the day of the homicide, from Mrs. Galloway, and began calling to see if the cards had been used. (3/532-34) Hess said the officers told him about the ATM card about the third day after the homicide, and "fed him" lots of information by asking leading questions. (13/1296) On the tape, the officers asked Hess if the security guard had an ATM card and Hess said no. Shortly thereafter, Hess said the perpetrator kept the ATM card, and tried to use it at an ATM at a Shell station unsuccessfully. (11/918).

[12] Although Allen testified that what Hess told them was "exactly a duplicate of the crime scene," the tape shows that this was not true. There were many inconsistencies. (11/932)

[13] Apparently, defense counsel could not ask Allen the contents of the report because it was hearsay, so established that the fingerprints and handwriting samples did not match by asking whether the report produced any evidence meriting an arrest. The defense questioned Allen and Crone in this manner regarding various reports and evidence. (See e.g., 12/1186, 1187) The record does not tell why the experts who wrote the reports, and witnesses interviewed by law enforcement, did not testify at

(12/996-97) Agent Crone testified that when the report on Juli Hess' fingerprint analysis came back, it also contained nothing upon which to base an arrest. (12/1187)

Ballistics showed that both projectiles were fired from the same gun. It could have been one of six weapons. This was of no help because they never found a gun. (11/933) Although they found a flattened-out projectile which they believed made a ricochet mark on the wall of the guard shack, they were unable to find any casings. The projectiles were .32 caliber. (11/949-50)

Arthur Gore, the night clerk at Everglades Towers where Galloway's credit card was used, described the man who registered as a white male, six foot to six-two, in his late thirties or early forties, 190 pounds, with brownish, slightly graying hair, driving a classic red Ford Mustang, around 1964 or 1965. Gore was certain that he saw the red Mustang. (11/934, 942-43) Allen admitted Hess did not match Gore's description, and his car was a white Fiesta. (11/945) A young woman who worked at the Shell station reported having seen a red Mustang but could not recall the date. (12/1008)

About July 1, 1993, after Gore helped their forensic artist to complete a composite of the man and the car, they sent out about 250 fliers to law enforcement agencies in Florida and Tennessee, put up a billboard, and showed a re-enactment on Crime Stoppers, to no avail. About three weeks after Allen took the last statement

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trial.

from Hess, they started sending out fliers. When Allen was promoted, Randy Crone took over the case. (11/936-43) When Allen turned the case over to Crone, he had no evidence linking Hess to the crime other than Hess' own words. (12/1000)

When first questioned on May 14, 1993, Hess' wife, Juli, told police that she and her husband were at home the night of the homicide.[14](12/1049) Employees of the Shell station informed the detectives that Hess picked up his wife that night and they left about 12:15 a.m. (11/956-57) Galloway's Shell card was used at 12:36 a.m., and his ATM card about 1:04 a.m. Although Hess' car held only ten gallons, Galloway's Shell card was used to purchase 13.396 gallons of gas and two quarts of oil. (11/988)

In her second statement, on May 18, 1993, Juli Hess told law enforcement that, upon leaving the Shell station, she and her husband went to dinner at Dennys Restaurant, as they often did, and went straight home. Juli described the waiter, the cook, the manager, and the dinners they ate in great detail. (12/1047-48) She paid the bill, and they left at about 1:00 a.m. (12/1049) Employees of Dennys could not remember whether Mr. and Mrs. Hess were there that night or the night before. Juli made another statement June 15, 1993. (12/1069)

Two Years Later

[14] Although the court reporter spelled Hess' wife's name in the traditional fashion, as Julie, Hess' wife actually spelled her name without the "e," as Juli.

Two years later, on March 14, 1995, Hess was arrested in Michigan on charges of sexual misconduct with his nieces in Florida from March 11 to 13, 1995. (5/520-21) He waived extradition and two detectives from the Lee County Sheriff's Department returned him to Florida. One was Randy Crone. Crone knew Hess was a suspect in this case. Hess told Crone he had been questioned by Allen about the homicide.[15] They arrived in Florida in the early morning hours of March 31, 1995. (12/1155-56)

Thus, Crone first questioned Hess on April 1, 1995, at about 1:00 a.m. He read Hess his Miranda rights.[16] (12/1083) Hess told Crone that he was in the back seat of a car when Galloway was shot. He said that Lloyd Sawyer of Weiser Security, who was in the front seat, shot Galloway. (12/1088) Hess said that before he was picked up by the two security guards, he picked up his wife at work; they ate at Dennys; and he took her home. (12/1163) Sawyer was driving a small red car. He pulled up at Lake Fairways and went toward the guard gate. Hess heard two shots. Sawyer returned to the car and they drove off. Hess told Crone earlier that Sawyer struggled with the guard who was shot inside the guard house. He said the gun was large. He thought it was an automatic. Hess said they tried to use the ATM card at a shopping center. (12/1158-67)

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[15] Hess testified that he never indicated to Agent Crone or Sergeant Stanforth that he knew anything about, or wanted to talk to them about this or any other homicide case. (2/41)

[16] Miranda v. Arizona, 384 U.S. 436 (1966).

Crone and another officer questioned Hess again on April 2, 1995. (12/1167) They showed him the motel receipt and a photo of the motel, which he did not recognize. Crone did not remember whether they showed him crime scene photos. (12/1168-69, 1183) They took a second statement from Hess on April 2nd. (12/1169)

On April 10, 1995, Crone had Hess brought over from the jail.[17] While Hess was waiting for Crone in an interrogation room, Captain Griner, who knew Hess from the bus garage, told him, without Miranda warnings, that "nothing could ever be resolved in someone's life until the truth was known." Hess said he was telling the truth but no one believed him. He later said perhaps he was not telling the truth; that he was having blackouts and could not remember everything. When Griner reiterated that nothing would be resolved until he told the truth, Hess said he wanted to tell the truth. (2/61-63) Griner told Crone Hess killed Galloway.

Crone then spoke with Hess who told him that he shot Galloway accidentally. (12/1092-93) Crone admitted that they had some conversation with Hess about what they were about to discuss before turning on the tape recorder. Hess told him he did not know why but that he went to Lake Fairways to relieve the guard. (12/1172) When the gun went off in his pocket, he woke up and realized he was somewhere he was not supposed to be. The next thing he remembered

[17] Hess testified at the suppression hearing that he took his invocation of rights form. The agent told him his lawyer was there, but when he arrived no lawyer was there. (2/32-33)

he was home in bed.[18] (12/1070-71)

During that interview, Hess told Crone that he picked up Juli from work, they went out to eat, he took Juli home, and after they had been home for awhile he went out, by himself, to Lake Fairways. (12/1175) He parked at the end of the driveway. He could not recall taking the guard's wallet. Crone asked if he took the wallet to make it look like a robbery because he was scared and Hess said he thought so. He later said he threw it away without taking anything out of it, and that he threw the gun in the river off the middle of the Edison Bridge, but, later, said he gave it back to the man he bought it from. (12/1070-78) He said the wallet was in Galloway's back pocket although the front pocket was pulled out. He did not know whether Galloway fell on his back or stomach. Hess said that he just wanted it all to go away and did not know why he had to go through with this. (12/1180)

Hess kept saying that he wanted his wife. He kept asking if she was there, but was ignored. (12/1180-83) He just wanted the blackouts to go away. He asked Crone to help him get mental health counseling and Crone agreed to do so. (12/1176) Hess did not want to be charged with murder and asked what would happen to him. He wanted his nightmares to go away. Crone told him not to worry; that he just needed counseling. He told Hess that answering their

[18] Defense counsel objected to anything Hess said on April 10, based on his previous motions. (12/1291) He objected again prior to the videotape played for the jury. (12/1096)

questions would help him. (12/1178) Crone told Hess they had to go through the story again before he could help him. The second time Hess was sleepwalking, and again ended up at home in bed with no explanation of how he used or got rid of any of evidence. (12/1183)

Both Mr. and Mrs. Hess were at the sheriff's office on the evening of April 10th and early morning hours of April 11, 1995. The officers brought Hess' wife, Juli, to the station at about 2:00 a.m. She changed her story, giving a new version in which she had participated with Hess in the crime. (12/1184) As with Hess, Griner first spoke to Juli Hess and then told Crone that she wanted to tell him "what was going on." Prior to her statements, they had no evidence that she was involved in the crime. (12/1186)

Videotaped Walk-Through: The Accidental Shooting

On April 11, 1995, Hess participated in a videotaped walk-through of the crime, which was shown to the jury. (12/1098-1111) Hess indicted as they walked through the woods that he had to relieve the guard at the guard house. He opened the door and told the guard he was there to relieve him. The guard did not know who he was because he was not in uniform, or was in a different one. The guard said he was crazy. (12/1100-03) He pushed Hess down and grabbed his pants pocket. Hess grabbed his arm. Hess' pant leg went up and the gun in his pants pocket went off twice. (12/1104-05) Hess did not know whether the guard fell on his face or back, because he just took off. (12-1105-06)

Crone then said to Hess, "when the guard was on the ground, you moved him around to get to his pockets, correct?" Hess said "yeah." Crone asked what Hess found when he went through the guard's pocket. Hess said he found a three-way fold wallet. He did not remember the color. Crone asked where the guard was bleeding and Hess said the stomach area. Crone held his hand in front of Hess' chest at the exact location where Galloway was shot and asked Hess to show him where. Hess pulled Crone's hand again his chest at the exact spot the officer suggested.[19] (12/1105-07)

Hess started asking the officers to "just get me out of here." Hess said he was running with the wallet in his hand. He recalled that, when he "snapped out of it," he threw something down. When he got back to the car he had "a heck of a headache." He couldn't snap out of it. He wanted to go home but was too scared. He awoke at home. (12/1108-10) Crone asked if he remembered stopping at the Shell station. Hess said the only Shell station was where his wife worked. He did not remember stopping to get gas. (12/1111)

After the video, Crone said he did not believe the murder happened the way Hess said, because it would have been hard to shoot someone from the pants pocket into the chest. He did not believe that Hess walked through the woods. (13/1193-94)

The next day, Crone took three more statements from Hess, all without counsel. (2/36) An audiotape of one of them was played for

[19] Undersigned counsel watched the videotape and observed the officer's suggestive hand motions.

the jury. (12/1111-17)

Audiotaped Interview on April 12, 1995

Hess said that, on the night of the homicide, he picked up his wife at the Shell station and they went out to dinner at Dennys. They drove north and stopped at Lake Fairways. He wanted to talk to someone about changing jobs. The guard got real mad. He told Hess that he was an idiot for wanting a job there, that he was too young and "nerdy." They got in an argument. (12/1118-19) Hess forgot to set the safety on the gun. He usually had a gun for his own protection. It was a small silver handgun -- a "K and L." Randy Crone had never heard of it and was unable to find any such gun. (13/1201) Hess thought it was a .22, but it could have been a .25. He had the gun in his left front pants pocket.[20] The guard noticed Hess reach in his pocket because the gun was bothering him. The man grabbed him in the pants pocket, and the gun went off. Hess said, "no," and it went off again. It left a burn on his thigh and a hole in his pants pocket. (12/1120, 1143)

The first time the gun went off it hit the guard but he did

[20] Hess said that he got the gun at a pawn shop across the street from where he lived. He bought it from a guy named Carl that he knew from Allstate, for $25. (12/1138-39) He said the gun was not a Smith and Wesson because they did not make an automatic. It was a small gun. The man put a pearl handle on it. He did not sign anything and the man would not give him a receipt. (12/1146-47) He said the gun held eight bullets in a clip, which describes a semi-automatic. Galloway was shot with a .32, fired from a revolver rather than a semi-automatic. (13/1199-1200) They were unable to find any pawn shop transactions by John Hess. (12/1198)

not fall down until the second time. He grabbed his chest. He still had his hand on Hess' pocket when the gun went off again. He fell on his back. He was hit in the chest by the heart. Hess looked through the guard's pockets and found his wallet. (12/1122)

His wife was in the car. She asked what happened; where the gun was; and he told her he accidentally shot the security guard. She tried to snap him out of it but he wouldn't snap out of it. He could not get the gun out of his pocket. He put the wallet on the dash and Juli went through it. He threw the gun in the river because Juli said no one would find it there. He told Juli he had to "go back and help him." (12/1126) Hess then said Juli threw the gun in the river to protect him.

They needed gas and Juli wanted to make it look like the car was larger. She stole some. (12/1125) Juli told him to lay down and snap out of it. She kept hitting him in the face. She pumped and paid for gas. Juli drove when they left the station. (12/1129) She wanted to see if the ATM machine would "eat" the card. He was still laying down when she stopped somewhere to try it. (12/1131)

At the motel, Juli told him he had to register. She went in with him. He filled out the registration card, making up the information. He used a Mustang with a Tennessee tag because they saw one in Tennessee a long time ago. (12/1132-33) He woke up in when Juli told him it was 3:00. He did not remember the motel. He was still in his uniform and his leg hurt. Juli said he had to go to work in the morning so had to get back. He awoke in his own

bed. He did not know what happened to the wallet. (12/1131-38)

Crone arrested Hess on April 14, 1995, based on his statements during the walk-though on April 11, and thereafter. (13/1202) They had decided not to arrest Juli for anything. (13/1211-1212)

At trial, Juli testified that she and Hess left the Shell station after midnight. (12/1042-43) Hess drove their white Ford Festiva, and parked on the road about 100 feet from Lake Fairways. (12/1029) He walked toward the guard gate. Juli stayed in the car and listened to the radio. John was gone about thirty minutes. (12/1030, 1052) When he returned, he looked nervous. He drove south on Highway 41, stopping on the Caloosahatchee Bridge where he got out and looked over the side of the bridge. She did not see him do anything. (12/1031) Juli saw what she thought was the outline of a gun in the front of her husband's uniform when they left Lake Fairways. She did not see it when he got out at Lake Fairways or after he stopped on the bridge. (12/1039-40, 1053)

They went to the Shell station where she worked. John pumped the gas and filled the tank. She paid for the gas with a credit card John gave her. The name on the card was Galloway. She nor her husband had a Shell card. (12/1032) She signed the credit card receipt. (12/1036) She thought she gave the credit card to Cindy Simeon, who did not ask why she had a credit card with someone else's name on it. Although the receipt said they purchased 13.396 gallons of gas, Juli said that sometimes the pumps are wrong. (12/1057-59) They bought one or two quarts of oil, although the

car did not need oil, and put them in the truck. (12/1063)

They drove south towards Everglades City. They stopped at a bank in San Carlos where John tried to get money from an ATM machine. (12/1037, 1061-62) They stopped at a motel at Everglades City; she did not remember the name. She signed the guest register as John Galloway. She did not ask John where he got the card. She made up the information on the registration form. (12/1038, 1063-64) They left at check-out time and returned home. (12/1039, 1065)

Juli said she told the police she knew nothing about the Galloway murder to protect her husband. (12/1040) When she gave them her fourth statement on April 11, 1995, between 2:00 and 3:00 a.m., she changed her story. (12/1067) She said that Crone threatened to arrest her for murder unless she implicated Hess.[21]

Juli had asked her husband for a divorce. She had been living with a man named David Decker for a year-and-a-half. (12/1071) Prior to meeting Decker, she left Florida with a man named John West, but they returned to Ft. Myers. (12/1071-72)

Defense Case

John Hess, age 32, testified in his own defense. (13/1227) He and his wife of five years, Juli, moved to Florida from Michigan in

[21] Although Juli Hess testified at trial that her testimony was true, defense counsel said she had sent him an affidavit six or eight weeks earlier, stating that she was coerced into making the statement and it was not true. When asked if she had made such a statement on cross-examination, Juli denied it, and defense counsel did not have the affidavit with him to impeach her. (12/1074-76)

1991. His goal was to start as a security officer and to become a law enforcement officer. After moving to Florida, Hess worked as a security guard for Adams Security from February to October, 1992. He worked for Weiser Security from October, 1992, to May, 1993. (13/1229) He worked for Omar Security for about two weeks.

He worked at a Target store on Monday, Tuesday, Wednesday and Thursday nights, May 10-13, 1993. He recalled talking to Warren but did not recall telling him about a security guard being shot, and did not remember anyone else being there. He told Warren about a shootout at the bus barn where he used to work. He admitted it never happened. He wanted to show Warren he had training, and was just "running his mouth." (13/1231-36)

On May 11, 1993, he worked at Target, and then went to Cypress [Court] for some training, which took about ten minutes. He went to the Shell station to pick up his wife. They left the Shell station about 12:15 a.m., and went to Dennys Restaurant for dinner. They were at Dennys for about an hour-and-a-half. They returned to the Shell station where Hess got a cup of coffee to reheat for breakfast. They arrived home after 2:00 a.m. (13/1237-42)

Hess admitted that, when talking to Warren at Target, on the night of the surveillance tape, he exaggerated a bit about his training. He wanted to make himself look important. Although he was trained in firearms, he had never owned any. (13/1243-44)

On Friday, May 14, 1993, Mickey Warren paged him to tell him he would be contacted by law enforcement. He gave a three hour

taped statement. He was told he was there to give his professional opinion as to how a security officer could be shot on his post. He had been referred after they had talked unsuccessfully to other security guards. (13/1245-46) Hess had applied to work at the sheriff's department in 1992; thus, he thought that, if he could help them, he might get a letter of recommendation. He told Allen he knew Galloway; had worked with him at various times; and had talked to him while he was on duty. None of this was true. He had never seen nor met Galloway. He fabricated the stories because Allen was looking for someone who knew Galloway and how he worked. He was afraid that, if he admitted he did not know Galloway, he would lose the opportunity to assist Allen. (13/1246-48)

Hess had worked guard posts similar to Galloway's at several residential communities. He had worked as a "rover" at residential communities. He based the information he gave Allen on his experience and training as a security guard. (13/1249-50) Allen thought another security guard committed the murder so Hess named Sawyer. (13/1251-52) They said he was a pathological liar. (13/1243)

About five hours later, after discussing the situation with Warren who told him to clear things up, Hess returned to CID and admitted to Allen that he lied. (13/1254) About a month later, he was asked to give handwriting and fingerprint samples. The "walk through" of Lake Fairways was one of his "little fairy tales." He thought that if he told the officers he had dreams or was psychic,

it would help him get a job at the sheriff's office. (13/1255-58)

Hess had often driven by Lake Fairways on the way to one of his posts. He stopped once, not realizing it was a retirement community, but turned around before he got to the guard house. He knew two shots were fired because Allen told him in the car before the taped statement. He knew the wallet was taken because the media said Galloway was robbed. Allen indicated what kind of wallet was taken with his hands during one of the statements. Hess learned about the ATM card from Allen during the dream sequence. (13/1259-61, 1305-06) He later said Allen told him about the ATM card about three days after the homicide. (13/1298)

They heard nothing further until his arrest in Michigan. (13/1362) Hess believed that Crone went to Michigan to bring him back to charge him with Galloway's murder. (13/1297-98) Although he was taking lithium and klonopin at the time of his arrest, Crone put the medication into property and would not allow him to take it or see a doctor. Once the medication was out of his system, he went into deep depression which made him sleepy.[22] (13/1266-67)

On April 10th, Crone told Hess that people like him go to mental hospitals instead of prison. Prior to the "walk-through," Crone let him hold his wife. He was told that if he did not

[22] At the time of trial, Hess was taking 900 mg of lithium and 50 mg of sinequan for depression and mood swings. (13/1266) He did not have his medication from April 1st to October, 1996. (13/1281, 1308) He was found incompetent in 1987 during custody proceedings, but not been since that time. (13/1285)

cooperate, his wife could spend 25 years in prison. (13/1268-74)

Hess testified that he did not kill Galloway. He never had Galloway's wallet nor used his Shell or ATM card, and was not present when anyone else used them. His car only held ten gallons of gas. Crone showed him receipts and photos of Galloway's body and other crime scene photos between April 1st and 12th. He confessed because the officers were going to arrest his wife. He thought he would go to a mental hospital. (13/1276-79, 1306-07)

Penalty Phase

Betty Galloway, age 71, testified that she and her husband were married for 38 years. They had two children together, and Mr. Galloway had two children by a former marriage. His death was devastating, like a nightmare. Everyone liked and respected Galloway. He served on various committees and was president of their homeowners' association. (4/325-28) The State presented evidence of Hess' conviction on October 21, 1996, for sexual misconduct with a child. (5/498-99, 520-21)

John Hess' sister, Julie Ann Teachworth, St. Louis, Michigan (4/349-50), brought letters from John's parents, other siblings, family members and friends. (4/351-56) She said they grew up in Illinois and Michigan with two loving, caring parents. Their father had three jobs so was rarely home. There were three girls and two boys, all born within five years. Julie was the oldest child, and John was in the middle. (4/351-357)

John had numerous problems as a child. He contracted a rare virus in the hospital, and his lungs started to collapse.[23] He developed fluid on the brain. Because of this, John had learning and behavioral problems and was hyperactive. He was borderline retarded and was placed in special education. John continuously took the blame for things his siblings had done. (4/357-59, 419)

John Hess only went to the tenth grade in school because of his first wife, Laurie Wilson, who was also in special education.[24] When she got in trouble, John would take the blame. Laurie quit school at sixteen and John moved in with her when he was seventeen. He was on probation because of an incident during which he hit the chief of police in the mouth while trying to protect Laurie. He was in jail for that incident on his 16th birthday. (4/362-63, 398)

After living together off and on for about three years, John and Laurie married, and soon had two boys -- Robert Lee and Billy Joe. Although Laurie already had a daughter, she was taken by

[23] John's mother wrote in a letter that John contracted this virus in the nursery shortly after his birth. He had gastritis and was dehydrated and was fed by an IV through the soft spot on his head. He almost died. (S/26) When he was a small child, he was slow and would pass out a lot. He was finally hospitalized for this problem. A spinal tap revealed he was "abnormal." The doctor said he would never be able to compete with other children mentally. In school, he was placed in special education because of a learning disorder. (S/27)

[24] John's mother wrote that Laurie was in a mental hospital from age three to age sixteen. (S/29)

HRS.[25] (4/362-63, 420) John loved the boys and was both a mother and father to them. (4/371-72) He did not work because he had to care for them. Laurie was schizophrenic and dangerous and it was not safe to leave the boys with her. (4/401)

John and Laurie were married about three years. John worked and Laurie received SSI and AFDC. John's sister saw numerous injuries John sustained as a result of physical attacks by his wife. Sometimes he went to the hospital. Laurie held him against the furnace until he was burned. Another time she broke his hand. She threw him off the house. (4/363-65, 371) She broke his knee. Nevertheless, John loved Laurie. (4/405) He took the blame for whatever she did. He once spent 90 days in jail because Laurie chased him out of the house with an ax while he was naked. He was arrested for indecent exposure. (4/364-65, 387)

When Robert was almost two and Billy Joe almost a year old, John's sons were taken by HRS and placed in foster care. Laurie had deteriorated and John could not care for them and support the family. (4/107, 366, 403) The social worker said he could have the boys back if he ended his marriage to Laurie but did not do so. (4/407) They said that he had a character disorder. (4/421) Hess relinquished his parental rights in 1988, in exchange for the right

[25] According to a letter from John's brother, Harold, John married Laurie because he wanted her baby to have a father. When the baby was born, Laurie was not permitted to take her home from the hospital and, when John and Laurie were married, the court severed parental rights and placed the baby for adoption. (S/12)

to have contact with the boys by letter and photos. (4/366-74)

Devastated by the loss of his children, John went into a deep depression. He became moody and no longer thought clearly. (4/366-67, 403) Three years later, he began to take prescription drugs for depression. Although the medication helped, nothing would cure his depression. (4/404) John's sister, Christine, wrote that, after John lost the boys, the stories got bigger, the lies got longer, and the bragging got worse. (S/23)

In Michigan, John worked mostly as a dishwasher. (4/371) Work was scarce and they sometimes had to rely on public assistance. About a year after his divorce from Laurie, John married Juli. (4/406-07) They had no children. John worried about Juli staying out too late. (4/367-68, 411) Both worked and had no financial problems. (4/378-79) Juli controlled John.[26] (4/367-68, 411)

Teachworth and her family moved to Florida in 1991, several months before John and Juli. John and Juli stayed with them about six months. After that, John stopped by to see his sister every day. He was arrested in Michigan in April of 1995, while visiting his parents, for sexual misconduct with her daughters. (4/374-75) His sister said that she and her daughters had forgiven John. The incident happened only one weekend. Teachworth said that John knew right from wrong, but loved to protect people by taking the blame.

[26] John's sister, Christine, wrote in a letter to the court that Juli was a "tall, heavy, and scary" woman who "wore the pants" in the family. (S/23) Other members of Hess' family made similar comments about Juli ruling the household. (S/1-36)

It was not unusual for him to make things up. (4/390-93)

John Hess testified that he loved his family and wrote to them every day. (4/395) He was receiving counseling for depression, and taking 900 milligrams of lithium and 100 milligrams of klonopin. He was working to get his GED in jail, and was taking several Bible courses. He and Juli were regular church-goers. (4/399, 412-13)

Hess said he was a good person, although not perfect. He was not mean-spirited; knew right from wrong; and admitted when he did wrong.[27] He asked the jury to consider that his family loved him dearly, and he "couldn't hurt a fly."[28] He thought whoever killed Galloway was cruel. He had trouble sleeping during the trial, and had to talk to his counselor, because Galloway's death was so upsetting to him. (4/417-18) At the "Spencer" hearing, Hess said he felt very sorry for the Galloways, their loss, and their pain:

> It's very hard, I understand with Mrs. Galloway on her loss of her husband, you know, it's hard for somebody to fill the shoes of a family, and I can understand her loss. I understand her sympathy and why she's upset, I am too, you know. It's -- it's a human being that was lost and, Your Honor, it's very hard for me, even very difficult to accept anything.

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[27] Hess said he knew the difference between right and wrong in 1993, and agreed with the prosecutor that his ability to appreciate criminality was not impaired. (4/423-24)

[28] John's aunt wrote that John never liked guns and was afraid of them since age 12. He would never hunt. (S/17) As with most of the family and friends, his aunt believed that Hess' wife, Juli, committed the murder. (See letters in supplement.) When defense counsel asked Hess if there was anything he would like to tell the jury, he said he was there for protecting his wife. (4/416-17)

(5/557) Hess said he planned to become a minister and help others. He was very, very sorry for what happened -- "it's upsetting and it's disturbing, and I can understand that." (4/558)

SUMMARY OF THE ARGUMENT

John Hess was convicted and sentenced to death based on nothing other than his own alleged "admissions," which were shown to be involuntary and lacking reliability. Moreover, the officers questioned Hess without counsel after Hess signed an invocation of rights while incarcerated and while interrogation was imminent. His admissions should have been suppressed. (Issue I)

The State failed to prove that Hess committed premeditated murder because the State produced no evidence as to what happened before or after the crime, or any plausible motive for the crime. The prosecutor also failed to prove that the crime was committed during a robbery or any other felony. Thus, the State completely failed to prove robbery and first-degree murder beyond a reasonable doubt. (Issues II and III)

This Court must review every death case to determine whether the State presented sufficient evidence to sustain the conviction. If Hess' admissions were suppressed, the State would clearly not have the evidence to prove Hess committed this crime. Even if they are not suppressed, they were unreliable and were not supported by any evidence. Moreover, the State presented vital evidence tending to show that someone else committed the crime. Hess should be

discharged because the State failed to prove its case, or the case remanded for retrial in the interest of justice. (Issue IV)

The judge relied on two invalid aggravators, and failed to give sufficient weight to clearly established mitigators. (Issues V and VI) For these reasons, if Hess' conviction is affirmed, this Court should reduce the sentence to life. (Issue VII)

ISSUE I

THE TRIAL COURT ERRED BY FAILING TO GRANT HESS' MOTION TO SUPPRESS HIS STATEMENTS BECAUSE THEY WERE INVOLUNTARY, AND LACKED TRUSTWORTHINESS AND RELIABILITY.

"[B]ecause of the tremendous weight accorded confessions by our courts and the significant potential for compulsion -- both psychological and physical -- in obtaining such statements, a main focus of Florida confession law has always been on guarding against one thing -- coercion." Traylor v. State, 596 So. 2d 957, 964 (Fla. 1992). In Traylor, this Court reiterated the following standard for determining the admissibility of a confession, first set out nearly a century and a half ago:

> To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, **uninfluenced by fear or hope**. To exclude it as testimony, **it is not necessary that any direct promises or threats be made** to the accused. It is sufficient, if the attending circumstances, or declarations of those present, be calculated to delude the prisoner as to his true position, and exert an improper and undue influence over his mind.

Simon v. State, 5 Fla. 285, 296 (1853). Accordingly, the test for the admission of a confession is **voluntariness**. In assessing

voluntariness, the court must consider the totality of the circumstances to determine whether coercive police activity produced the confession. The determination must be made by the judge -- not the jury. Traylor at 964. The State has the burden to prove by a preponderance of the evidence that the confession was freely and voluntarily given. Thompson v. State, 548 So. 2d 198, 204 (Fla. 1989); DeConingh v. State, 433 So. 2d 501, 503 (Fla. 1983).

Under the totality of the circumstances, Hess' inculpatory statements to law enforcement were involuntary, and were admitted in violation of the Fifth Amendment protection against self-incrimination and the self-incrimination clause in Article I, section 9 of the Florida Constitution. Over a two-year period, by playing on Hess' desire to help law enforcement solve the crime, and his need to protect his wife, the Lee County Sheriff's Department mentally coerced Hess into making a false confession. Hess made up story after story after story, finally confessing to an "accidental" shooting, the facts of which were negated by the physical evidence. Despite the total absence of evidence to support Hess' statements, and a myriad of conflicting evidence which strongly suggested that Hess did **not** commit the crime, his statements were admitted, and formed the sole basis for his conviction in this case.

Moreover, the officers ignored Hess' written invocation of rights, signed while in custody and while interrogation was

imminent. See Sapp v. State, 690 So. 2d 581 (Fla. 1997). The next time he was questioned concerning this case, six days later, the officer who initiated the discussion failed to apprise Hess of his Miranda rights.[29] Hess never signed a waiver, as required by the invocation of rights.[30] Thus, the State violated the "bright-line" rule, by failing to comply with Miranda's standards.

In Miranda v. Arizona, 384 U.S. 436, 444 (1966), and its progeny, the United States Supreme Court set out a "bright-line" standard for police interrogation; any statement obtained in contravention of these guidelines violates both the United States and Florida Constitutions and may not be used by the government. In Miranda, the Court held that statements made by a defendant during custodial interrogation may not be introduced as evidence unless he was informed of the right to have counsel during custodial interrogation. Suspects must be told that they have a right to remain silent, that anything they say will be used against them, that they have a right to a lawyer, and that if they cannot pay for a lawyer one will be appointed to help them. These guidelines apply only to statements obtained while in custody and through interrogation. Traylor at 966; Art. I, § 9, Fla. Const.; see also Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (once

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[29] See Miranda v. Arizona, 384 U.S. 436 (1966).

[30] The lead investigator considered the written invocation irrelevant, allegedly because Hess was "merely a witness," and because the form was filed in the sexual misconduct case. (2/73)

individual has invoked right to counsel, he can validly waive right only if he reinitiates contact with law enforcement).

The Court ruled in Arizona v. Roberson, 486 U.S. 675, 677 (1988), that Fifth Amendment protection against self-incrimination is not offense-specific.[31] Once a defendant invokes the right to counsel for interrogation, with respect to one offense, he may not be questioned about any offense unless an attorney is present. Traylor, 596 So. 2d at 982 (Kogan, J., dissenting). When Hess made the statements at issue in this case, he had not yet been charged with the crime in the instant case. Because the Fifth Amendment right to counsel during interrogation is not offense-specific, however, it applied to all charges that were or might have been brought against him during his incarceration.

Hess was arrested in Michigan March 14, 1995, on unrelated Florida charges. He waived extradition and was returned to Florida, arriving March 31, 1995. At Hess' first appearance as to the unrelated charges, the Public Defender was appointed to represent Hess in that case. (2/26, 28, 41) John Hess later executed a written invocation of rights, dated April 4, 1995, which was filed in the sexual misconduct case with a copy forwarded to

[31] The Sixth Amendment right to counsel is offense-specific; as is the Fifth Amendment right to counsel, as opposed to the Fifth Amendment protection against self-incrimination. McNeil v. Wisconsin, 501 U.S. 171 (1991); see also San Martin v. State, 23 Fla. L. Weekly S1 (Fla. Jan. 2, 1998).

the sheriff's department on that date.[32] (1/20; 2/28-29, 97) Among other things, Hess stated:

> I hereby announce my desire to have counsel present before anybody talks to me about any matters relating to this case or any other charges pending against me or any other criminal matter in which I am a suspect or can reasonably be expected to become a suspect based on anything I might say. . . .
>
> I further state hereby that at no time in the future do I or will I waive (that is, give up) my right to have my attorney present unless and until, after adequate consultation with my attorney, I specifically waive (give up) all or part of my rights in written form signed by myself and my attorney. . . .

(2/97) Thus, defense counsel filed a motion to suppress, arguing that any statements Hess made to law enforcement after signing the invocation of his right to counsel must be suppressed. (2/27)

On March 18, 1995, the judge held a hearing on Hess' Motion to Suppress. (2/24-26) At the hearing, Sergeant Stanforth testified that he and Sergeant Randy Crone transported Hess from Ithaca, Michigan, to Lee County on March 31, 1995, pursuant to a felony warrant. (2/52-53) Stanforth and Crone testified that, while en route to the Michigan airport, Hess told them he had witnessed a homicide in Ft. Myers, and had been questioned about it. Crone told Hess he would take a taped statement when they got to Fort Myers. When the plane landed, Hess was taken directly to an interrogation room where a statement was taken. (2/31, 2/69-71)

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[32] Hess testified that he signed an invocation of rights form at first appearance on April 1st, but that it was undated. He said he showed it to the officers on April 2nd. (2/45-46) No undated form was introduced into evidence.

Crone testified that he read Hess his Miranda rights and Hess waived them. (2/71) Stanforth could not remember whether Miranda warnings were given, nor could Hess remember whether he was read his Miranda rights. (2/42-43) Hess told Crone that he was in the back seat of a car when Lloyd Sawyer and another person he did not know went out drinking, drove to Lake Fairways, and argued with the guard. Sawyer shot the guard. (2/71)

Because it was about 3:00 a.m., the officers decided to continue the interrogation the next day. (2/55) On April 2, 1997, Crone and Sergeant Tamayo interviewed Hess. According to Crone, he again read Hess his rights, Hess waived them and told him more about being a witness to the murder. (2/72) Crone said that Hess was very calm and helpful. He did not seem angry. (2/74)

Hess testified that, on April 2, Agent Crone told him so much about the Galloway case and showed him so much evidence that he did not remember what he told them. (2/44) He said Crone "pulled me out of the jail" about every day from April 2 through April 10.[33] Moreover, the officers spoke with him about the cases many times when the conversations were not taped. (2/38) He never expressed a desire to speak to the officers about any case in which he was a suspect, nor did he execute a written waiver of the invocation of rights form he signed April 4, 1997. (2/38-40)

[33] Crone testified that he did not take any statements from Hess between April 2 and April 10, 1995. (2/73) Because Hess was also being interrogated about unrelated crimes, some of the questioning Hess referred to may not have involved this case.

Stanforth testified that, on April 5, 1995, he encountered Hess in the book-in area of the jail. Hess told him he needed to talk to "Randy." He did not indicate what he wanted to talk to Crone about. Stanforth called Randy Crone (his half-brother) that night and told him Hess wanted to see him. (2/55, 59) Crone remembered that Stanforth called him, but did not remember what night it was and did not know what Hess wanted to talk about. (2/73-74) Crone said the only request Hess made in jail was for help with his dreams. Crone arranged mental health assistance to help Hess deal with the dreams. (2/79) Thus, the State's evidence shows that Hess did not initiate any contact with the officers, subsequent to his written invocation of rights on April 4, 1995.

Captain Kerry Griner, Lee County Sheriff's Department, testified that, on April 10, 1995, he transported Lloyd Sawyer to the criminal investigation division ("CID"), to be interviewed. When he arrived with Sawyer, Hess was in one of the interrogation rooms. Griner knew Hess from when Hess had been a security guard at the bus barn. (2/61-63) Griner told Hess that "nothing could ever be resolved in someone's life until the truth was known." (2/63) Hess first said that he was telling the truth about Sawyer and another man being involved in the homicide, but no one believed him. He later said perhaps he was not telling the truth; that he was having blackouts and could not remember everything. When Griner again said that nothing would be resolved until he told the truth, Hess said he wanted to tell the truth, and to talk to Crone.

(2/63)

Crone was interviewing Sawyer at that time. Griner told Crone what had transpired, and had no further involvement. (2/63-65) He did not prepare a report until the week before the suppression hearing, when he was asked to do so by "major crimes." (2/65-66)

Crone testified that he brought Hess to CID on April 10, 1995, to see whether Hess could identify anyone in some photo lineups.[34] Before he spoke with Hess, Griner told him Hess had done the shooting. Crone said he read Hess his Miranda rights. He admitted, however, that, after he turned on the tape recorder, he did not verify with Hess that he wanted to speak with him about any case. (2/75, 84-85) Hess said that the guard reached out and grabbed him, and the gun went off accidentally in his pocket. (2/76-77)

Although Hess did not tell the officers he wanted to talk with them, he was "pulled out of" his cell on April 11th, and a taped statement taken by Agent Dekle, at 7:24 a.m. A second statement was taken at 11:29 a.m. that day.[35] Hess was not returned to the jail between statements. He took his "invocation of rights" with him. Although he was told that his lawyer would be there, no lawyer was present. (2/32-35)

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[34] This seems questionable because the record reflects no other suspects, except for Lloyd Sawyer, whom Hess knew and would not need to identify from a photo lineup. Moreover, the record does not indicate that Crone seriously suspected anyone but Hess.

[35] The transcript shows that the videotaped walk-through of the crime scene ended at 11:00 a.m. so apparently it was done between these two statements. (12/1111)

On April 11, 1995, Crone videotaped a walk-through at the crime scene. Hess waived his Miranda rights. Crone said that, prior to that time, Hess had never shown him the invocation of his rights form. (2/77) On April 12, 1995, Crone and other officers took three more statements concerning this case. (2/35-36) Hess was not returned to the jail until late at night. (2/37) He did not remember participating in the videotaped walk-through.[36] (2/48)

The judge denied the motion by order dated April 9, 1996, giving no reasons.[37] (2/99) At trial, defense counsel renewed his objections to the statements covered by the motion. (4/675)

Written Invocation of Right to Counsel for Interrogation

In Sapp v. State, 690 So. 2d 581, 586 (Fla. 1997), this Court required that, to be valid, an invocation of rights must occur either during custodial interrogation or when interrogation is imminent. A defendant may not invoke the right to counsel for custodial interrogation before it is imminent, whether through a claim of rights form or by any other means. Id.; see also Rhode Island v. Innis, 446 U.S. 291, 300 (1980) (procedural safeguards

[36] At the jail, Hess was given two tablets for a headache and a couple other tablets. Officers at the jail told him he was "out of it." He was in the suicide ward for about four months after that, where he saw a psychiatrist weekly. (2/49)

[37] At the suppression hearing, defense counsel relied upon State v. Guthrie, 666 So.2d 562 (Fla. 2d DCA 1995) (incarcerated defendant who signed written invocation of rights cannot be questioned about any case in which he is a suspect), because the case had not yet been overruled in Sapp. (2/87-88) Although Guthrie was controlling in the Second District at that time, the trial judge apparently declined to follow it.

outlined in Miranda required not where suspect simply taken into custody, but where suspect in custody subjected to interrogation).

This case is factually distinguishable from Sapp, however, because Hess was interrogated twice about this crime before he signed the invocation of rights form, and was continually questioned about this and other alleged crimes throughout the first two weeks of his incarceration. Thus, interrogation was indeed imminent when Hess signed the invocation of rights form. Also, Hess was never given Miranda warnings in writing, nor did he sign a written waiver as did Sapp -- twice, after signing the form.

Robert Sapp was originally arrested for an unrelated crime, as was Hess. He was advised of his Miranda rights, waived them, and agreed to speak to the police. After his arrest, he was taken to jail. Within twenty-four hours, he was brought to a holding room (along with others who had been arrested) for a "chute speech," in which an attorney from the Public Defender's Office gives advice and explains "First Appearance" procedures. The attorney passed out copies of a "claim of rights form." Sapp signed one, and it was filed with the clerk of court. Copies were sent to the Public Defender and State Attorney, and stapled to Sapp's jail papers.

A week later while Sapp remained in jail on the original robbery charge, he was taken to the "homicide office" and interrogated about the facts of the case at issue. Before being questioned, Sapp was again advised of his Miranda rights in writing, and he waived them in writing. Without requesting an attorney, Sapp

talked about the circumstances that gave rise to the case and signed a written statement. Twelve hours later he was approached again. He signed a waiver form, agreed to talk to the detective, and signed a second written statement.

The trial court denied Sapp's motion to suppress. The First District Court of Appeal determined that Sapp's attempt to invoke his Fifth Amendment right to counsel was not effective because custodial interrogation had not begun when he signed the form, and was not imminent. 690 So. 2d at 585. This Court affirmed, relying on dictum in McNeil v. Wisconsin, 501 U.S. 171 (1991).

This case is different from Sapp for several reasons. Although we do not know where Hess signed the invocation of rights form, it was not during a "chute" speech at a First Appearance hearing, because it is dated three days later. Hess may have been undergoing or about to undergo interrogation about this or another crime; the record does not reveal the circumstances under which the form was signed. Unlike Sapp, however, it was **not** signed prior to interrogation about this case. Hess had been interrogated many times concerning Galloway's murder, and three times since his arrest on unrelated charges just a few days before he signed the form. He was incarcerated, and knew further interrogation concerning this case was imminent.

On April 10, six days after Hess signed the written invocation of rights form, Crone arranged for Hess to be brought to CID, where he obtained the confession that Hess shot Galloway accidentally.

Griner, who initially convinced Hess to "tell the truth," did not read Hess his Miranda rights prior to eliciting the admissions. Although Crone said he read Hess his rights, they are not included in the taped statement, nor did Hess sign a written waiver. Crone testified that he did not know Hess had signed the invocation of rights until April 10th, 11th or 12th. (2/73) Hess said he brought the form with him on April 11th. (2/32-35) Crone said that, prior to the April 11th walk-through, Hess had not shown him the form. (2/77) Even then, he did not consider it important because, allegedly, he still considered Hess a witness, and because they did not talk about the sexual misconduct case for which he was under arrest. (2/73) This distinguishes this case from Sapp. Even if Hess signed the form between various interrogations, he showed it to Crone during one of the interrogations, thus reaffirming his request for counsel **during** interrogation.

That Crone may not have been personally aware of Hess' invocation of rights on April 10, 1995, if true, was no excuse. He was required to determine whether Hess had invoked his right to counsel prior to initiating interrogation. Nor does it matter whether the interrogation concerned the case for which Hess was under arrest, or another case. The United States Supreme Court stated:

> [W]e attach no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel. In addition to the fact that Edwards focuses on the state of mind of the suspect and not of the police, custodial interrogation must be conducted pursuant to established

> procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel. . . . Whether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists.

Arizona v. Roberson, 486 U.S. 675, 687 (1988). In other words, the burden falls on law enforcement to learn whether the right to counsel has been invoked. Failure to do so renders subsequent interrogation impermissible, even if Miranda rights are waived. Id.

Because Hess invoked his right to counsel in writing, police were prohibited under Edwards v. Arizona, 451 U.S. 477 (1981), from interrogating him unless Hess reinitiated contact. Crone said the only request Hess made while in jail was for help with his dreams. (2/73-74, 79) Accordingly, because Hess clearly invoked his right to counsel during interrogation **as to any case in which he was a suspect**, and never revoked the invocation in writing, as required by the written invocation, his statements on April 10th, 11th, and 12th should have been excluded at trial. Hess was in custody in Florida from March 31, 1995, until the trial in this case, and interrogation was ongoing and/or imminent from March 31 through April 12, 1995, during which time the admissions were made.

Interrogation without Miranda Warnings

> [O]nce a suspect asserts the right [to counsel], not only must the current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him," 451 U.S., at 484-485 . . . which means, we have most recently held, that counsel

> must be present, Minnick v. Mississippi, 498 U.S. ---, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.... The Edwards rule, moreover, is not offense-specific: once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present. Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).

McNeil v. Wisconsin, 501 U.S. 171 (1991). The only exception to this rule is when the suspect voluntarily discloses information to the authorities without prompting. Minnick.

Captain Kerry Griner testified that, on April 10, 1995, six days after Hess signed the written invocation, he found Hess alone in one of the interrogation rooms. He knew Hess from when Hess had been a security guard at the bus barn. (2/61-63) He entered the room and told Hess that "nothing could ever be resolved in someone's life until the truth was known." (2/63) Hess first said that he was telling the truth, but no one believed him. He later said perhaps he was not telling the truth; that he was having blackouts and could not remember everything. When Griner reiterated that nothing would be resolved until Hess told the truth, Hess said he wanted to tell the truth and to talk to Crone. (2/63)

When this confrontation occurred, Griner had just transported Lloyd Sawyer (whom Hess had identified as the perpetrator) to the criminal investigation division ("CID"), and Crone was interviewing Sawyer. (2/63) Accordingly, Griner knew Hess was there for

questioning about the Galloway murder. Because Griner lectured Hess on the importance of telling the truth, he obviously did not believe Sawyer committed the murder. In fact, although Sawyer was allegedly there for questioning, the officers never suggested they ever considered Sawyer a suspect.

Griner's lecture concerning the importance of telling the truth was the functional equivalent of express questioning, because it was reasonably likely to elicit an incriminating response from Hess based on his emotional and mental state. See Arizona v. Mauro, 481 U.S. 520, 526-27 (1987); Rhode Island v. Innis, 446 U.S. at 300-301; Brewer v. Williams, 430 U.S. 387 (1977) (Christian burial speech); Talley v. State, 596 So. 2d 957 (Fla. 1992); Glover v. State, 677 So. 2d 374 (Fla. 4th DCA 1996). Moreover, we do not know what Griner asked Hess because Griner did not make a written report until a week before the suppression hearing; thus, he would not have remembered exactly what was said.

In Glover, 677 So. 2d at 374, the defendant was arrested and placed in an interrogation room for over an hour-and-a-half without Miranda warnings. Although he became increasingly agitated, the officers refused to inform him of the allegations against him. When the deputies entered the interrogation room, Glover began speaking right away, incriminating himself. The court held that the deputies had engaged in conduct that "rose to the level of interrogation or its functional equivalent." 677 So. 2d at 376.

Compare Glover with the situation in this case. On the

evening of April 10, 1995, Crone arranged to have Hess, his wife, and Sawyer all brought into the criminal investigation division. Hess was left in an interrogation room waiting while Crone talked to Sawyer. Hess testified that he had been taking lithium and klonopin prior to his arrest but that the medication had been taken from him and he had gone into a deep depression. As far as we know, he was not told why he was there. He believed that his wife was in the building somewhere. That same night, she changed her story, implicating Hess. She testified that Crone threatened to charge her with murder if she did not implicate Hess. Hess said they paraded her back and forth in front of him in handcuffs. He kept asking for her but was put off. (13/1266-74)

Griner approached Hess who was alone in the interrogation room, depressed, anxious and wondering what was going on. He told Hess, in so many words, that they did not believe him and that it was time to tell the truth. Pursuant to Glover, no words need be exchanged for the police to engage in interrogation or its functional equivalent. Here, words were spoken in addition to the intimidating nature of the situation. Moreover, Griner did not Mirandize Hess. See Pope v. Zenon, 69 F.3d 1018 (9th Cir. 1995) (condemning the tactic of "softening up" suspects by getting them to make unwarned statements before administering Miranda rights).

Although Griner did not testify that Hess told him he actually committed the murder, he must have done so because Crone testified that Griner knocked on the door where he was interviewing Sawyer

and told him Hess had done the shooting. (2/75) Crone's report also reflected that Griner told him Hess shot Galloway. (2/84-85)

Crone said he read Hess his Miranda rights before taking a taped statement. He admitted, however, that, after he turned on the tape, he did not verify with Hess that he wanted to speak with him about the case. (2/75-77) Crone admitted that he more or less promised Hess he would be sent to a mental hospital rather than prison. (12/1176-78) Hess said Crone also threatened to arrest his wife. (13/1268-74) It would seem that, after all the effort Crone put into coercing Hess into confessing, he would have remembered to record Hess' waiver of rights, or obtained a written waiver.

At the suppression hearing, Crone tried to convince the judge that Hess was not a suspect, apparently to justify questioning him without a waiver of rights. Crone said he did not consider Hess a suspect until Hess told him personally that he shot Mr. Galloway, even though his office took fingerprints, handwriting, hair and blood samples in 1993. Crone said "you do not consider someone a suspect until you can prove that he committed the crime." (2/86)

At trial, Crone testified otherwise. He said he knew Hess was a suspect when he went to Michigan to arrest him on unrelated charges. (12/1155) Moreover, Allen admitted Hess was the primary suspect from two days after the crime until his arrest. (11/967) All officers of the Lee County Sheriff's Officer were charged with this knowledge. Cf. Roberson, 486 U.S. at 687 (law enforcement charged with knowledge of defendant's invocation of rights).

If Crone apprised Hess of his Miranda rights on April 10th, as he said, he did not tape all of the interrogation because no waiver was taped. At some point, Crone more or less promised Hess that he would go to a mental hospital if he confessed, and threatened to charge Hess' wife if he did not. (12/1176-78; 13/1268-74) Hess finally "admitted" he had argued with the security guard who grabbed him, and the gun went off accidentally. (2/76-77)

The remainder of Hess' statements were tainted by the disregard for Hess' written invocation of rights and Griner's subsequent failure to Mirandize Hess. Police coercion rendered Hess' statements involuntary and inadmissible. A valid waiver, while significant, does not always result in a voluntary confession. Sliney v. State, 699 So. 2d 662, 699 (Fla. 1997); Traylor, 596 So. 2d at 966. We must consider the totality of the circumstances.

Totality of the Circumstances

In Davis v. State, 698 So. 2d 1182, 1188 (Fla. 1997), this Court held that, "once Miranda has been complied with, the better test for admissibility of statements made in subsequent or successive custodial interrogations is whether the statements were given voluntarily." To find a confession involuntary within the meaning of the Fourteenth Amendment, there must be coercive police conduct. Colorado v. Connelly, 479 U.S. 157 (1986). Police coercion can be either physical or psychological. Rickard v. State, 508 So. 2d 736, 737 (Fla. 2d DCA 1987). Whether there was police

coercion is determined by reviewing the totality of the circumstances under which the confession was obtained. Davis, 698 So. 2d at 1189.

The actions of the Lee County officers provide a stark contrast to those of the officers in Davis. In Davis, the police were honest with Davis, and Davis initiated the contact with the officers that led to his second confession. Davis was reapprised of his right to counsel. He had received full Miranda warnings and validly waived them earlier.

Unlike Davis, Hess was intentionally misled from the very beginning. When his employer contacted authorities about Hess' statements two days before the homicide, the officers did not contact Hess and question him forthrightly. Instead, they sent Warren and an undercover officer to Hess' job site under false pretenses and taped the conversation without his knowledge, trying to induce him to incriminate himself. (10/697-775)

When that did not work, Agent Allen asked Hess to come into the office. There, Allen played on Hess' emotional fixation with law enforcement. He told Hess they needed his help to solve the homicide. They deceived Hess, trying to coerce him to incriminate himself by playing upon his desire to impress them with his knowledge. (11/807, 968) Their strategy encouraged Hess to fabricate.

Hess left this interview, but returned to CID some hours later to confess to Crone that he lied about Sawyer being responsible for

the murder. Over several days, he talked to Crone by phone about his dreams about the crime. Hess voluntarily participated in a walk-through of the crime scene, based on his dreams. The officers tried to get him to incriminate himself during the walk-through. Because Hess was not in custody, they were not required to advise him of his rights. Again, they "played along," acting as though they believed he was relaying a dream or psychic vision. They never asked Hess whether he was the perpetrator he was describing.

Although Hess never admitted to being involved in the crime in 1993, much of this version of the offense was used by the State to convict him. The State theorized that Hess knew Galloway's ATM card was taken and how Galloway was shot based on the walk-through. In the dream, the perpetrator shot Galloway in the chest and ran. The judge concluded in his sentencing order that this was the version of the crime most compatible with the evidence. When Hess finally claimed he was responsible for the shooting, he said the gun went off accidentally, while in his pants pocket. The jury must have concluded that Hess was the perpetrator he described in the dream sequence -- the same evidence Allen found insufficient to support an arrest in 1993. (11/932-34)

Two years later, when Crone flew to Michigan to bring Hess back to face unrelated charges, he took the 1993 file on the Galloway homicide. When Hess signed a waiver of rights as to the sexual misconduct case, Crone mistakenly put the case number of the Galloway case on the form. Upon their arrival in Florida, Crone

took a statement concerning Galloway's murder at 1:00 a.m., before Hess was booked into jail. These facts suggest Crone was more interested in solving Galloway's murder than the other case.

On April 4, 1995, Hess signed the written invocation of rights form, which covered "any case in which he was a suspect." On April 10, 1995, Griner approached Hess who was alone in an interrogation room waiting for Crone. Without Miranda rights, Griner proceeded to lecture Hess on the importance of telling the truth.[38] Griner's lecture might be compared to the Christian burial speech in Brewer v. Williams, 430 U.S. 387 (1977). Griner told Hess that he needed to tell the truth to get his life in order. He played on Hess' desire to help the officers solve the crime. Hess finally said told Griner that he accidentally shot Galloway. (2/76-77)

After Griner's inroad, Crone told Hess he would probably be sent to a mental hospital. (12/1177) He threatened to arrest Hess' wife. (13/1268) Griner testified that he questioned Hess around 6:30 p.m. (2/65) Crone began the taped statement at 9:26 p.m. (12/1091-92) Obviously, something was discussed for nearly three hours prior to Hess' taped admissions. (12/1170) Crone admitted that they discussed Hess' blackouts, and agreed that they also discussed his going to a mental hospital. (12/1172-78) It is

[38] Alleged Miranda violations may be relevant not only as independent grounds for suppression, but also as part of "the totality of the circumstances" which the Court must consider to determine voluntariness. See Sawyer v. State, 561 So. 2d 278, 285 (Fla. 2d DCA 1990).

questionable whether Crone advised him of his rights prior to taking what he knew would be a confession, because it was not reflected in the taped statement.

Moreover, Hess had not been advised of his Miranda rights for at least six days. On April 4, 1995, while in jail, he had signed an invocation of his right to counsel during interrogation. The officers ignored Hess' signed invocation of rights which prohibited questioning without a written waiver of rights.[39] Thus, the State cannot argue that, like Davis, Hess had very recently been apprised of his rights and had validly waived them.

Many factors have been considered by the courts in analyzing the totality of the circumstances. These factors include: whether the statements were given in the coercive atmosphere of a station-house setting, Drake v. State, 441 So. 2d 1079, 1081 (Fla. 1983); whether the police suggested the details of the crime to the

[39] Fla. R. Crim. P. 3.111(d) requires that a waiver of rights be in writing. Although Crone had Hess sign a written waiver in the sexual misconduct case, he never obtained a written waiver in the Galloway case, despite the fact that Hess' written invocation of rights required it. In Traylor, 586 So. 2d at 966 n.15, this Court noted that "a written waiver will dispel a major criticism of Miranda, i.e., that it did 'nothing whatsoever to mitigate the pitfalls of the swearing contest' between the defendant and police, as to whether such warnings were given, and the content thereof." See also Sliney v. State, 699 So.2d 662, 669 n.10 (Fla 1997) (Although failure to obtain a complete signed waiver did not make the waiver invalid, Court reiterated that, "where reasonably practical, prudence suggests that a waiver of constitutional rights should be in writing." 596 So.2d at 966 (citing Traylor). The Sliney court also noted that the officers' failure to obtain Sliney's signature on the bottom of the form was a factor to consider in evaluating the totality of the circumstances surrounding Sliney's confession.

suspect, Langton v. State, 448 So. 2d 534, 535 (Fla. 2d DCA 1984); whether psychological coercion was applied, DeConingh v. State, 433 So. 2d 501, 503 (Fla. 1983), whether the police made threats, promised leniency, or made statements calculated to delude the suspect as to his or her true position, Brewer v. State, 386 So. 2d 232, 237 (Fla. 1980); and whether the police exerted undue influence or made direct or implied promises of benefits, Rickard, 508 So. 2d at 737. The accused's emotional condition is an important factor in determining whether the statements were voluntary. Id. Although one particular action may not invalidate a confession, when two or more statements or actions are used to coerce a suspect, courts more readily find the confession involuntary. Sawyer v. State, 561 So. 2d 278, 282-83 (Fla. 2d DCA 1990).

All of the above factors apply to this case. Many of the statements were taken in the coercive atmosphere of the sheriff's department; the police suggested details of the crime to Hess on a number of occasions; psychological coercion was applied by the officers in deceiving Hess as to their interest in his help in solving the crime; promises of leniency were made -- that he would probably go to a mental hospital; threats were made that his wife would be charged with murder; and Hess was deluded as to his true position as a suspect until April 10, 1995.

Many of the facts in Sawyer, 561 So. 2d 278, closely resemble those in this case. The day after the homicide, the police invited Sawyer, who lived next door to the victim, to the police station

for an interview. Like Hess, Sawyer agreed because he thought the police needed his help. 561 So. 2d at 283. In Sawyer, officers were stationed around and in the victim's apartment to conduct surveillance of Sawyer. Id. Hess' employer and an undercover officer conducted a surveillance of Hess at his work site.

Sawyer was a thirty-three-year-old recovering alcoholic who suffered from acute anxiety and an obsessive compulsive disorder; was very vulnerable to suggestion; and was anxious to please others -- especially authority figures. The officers persuaded him to provide fingerprints and other body samples, without telling him that he was the prime suspect. 561 So. 2d at 283, 287. Hess had a personality (or character) disorder, was manic depressive (taking lithium), anxious (taking klonopin) and wanted to please the authorities. Additionally, the evidence shows that Hess had a habit of confessing to things that he did not do, to protect others -- especially his wife. (4/390-93) He readily gave the officers his fingerprints and handwriting samples.

In Sawyer, there was an off the record "hallway meeting" where a deal may have been made that Sawyer would admit "the truth" in return for favors from the state attorney's office. 561 So. 2d at 287. In the instant case, Captain Griner used a similar tactic to persuade Hess to confess "the truth" on April 10, 1995. (2/63) Crone then told him not to worry; he just needed some counseling. (12/1178) Crone promised to help get his medication back, but said they had to take care of "this business" first. He told Hess that

if he did not cooperate, his wife could spend up to 25 years in prison. Crone let him hold his wife. (13/1268-74) Hess said he finally made a false confession because they were going to arrest his wife and he thought he would go to a mental hospital. (13/1306)

The police arrested Sawyer at the end of the interrogation, and charged him with first-degree murder and sexual battery. They later nolle prossed the sexual battery because the acts to which he confessed were not substantiated by the evidence. The police had no evidence when they interviewed Sawyer and, as in this case, when the reports came back they still had no evidence linking him to the crime. Many of the "details" of the murder which the police suggested to Sawyer were discovered to be false. 561 So. 2d at 289.

In this case, although the officers did not supply false information, they provided Hess with real details of the homicide. Also, most what Hess told them was not true -- for example, the kind of gun and ammunition used; where the gun was discarded; the color of the victim's wallet; where Galloway had worked, and that Hess had worked with him previously. (See Statement of Facts)

Hess testified that the officers supplied information concerning the crime. (13/1259-61, 1305-06) Crone showed him photos of Galloway's body, at the scene and the autopsy, and the receipt from the motel. (12/1168-69, 1183) The taped statements show that many of Hess' "admissions" were suggested to him by the officers. Unlike Sawyer, in which the police taped the entire sixteen-hour interrogation, the officers interviewed Hess without

taping it sometimes. (13/1276-79, 1306-07; 12/1070)

As in this case, Sawyer made numerous contradictory statements. Sawyer's trial judge noted that the transcript was

> replete with such contradictory statements to such a degree that one must select which answer applies and reject those inconsistent with one's own theory of the killing. It is a hodgepodge of detail, a substantial amount, if not all, emanating from the "scenario." The scenario is filled with grossly leading questions put by the detectives, repeatedly suggesting the answer desired or believed correct, whether or not it is later proven by independent lab tests from the forensic evidence gathered at the crime scene. . . . Possible information breaks in the police security detail posted around the York Apartments led to gossip and stories circulated among apartment dwellers, onlookers, and the press. . . .

Sawyer, 561 So. 2d at 288. Hess also admitted to many things that were inconsistent with the evidence. Some of his "facts" changed within minutes, during the same interview or walk-through. For example, during the first walk-through, Hess testified that Galloway did not have an ATM card; he then said the perpetrator took the ATM card. (11/900) He said an ATM machine "ate" the card, and that the perpetrator cut it up because he was angry because he could not get it to work. (11/902, 918) He said the perpetrator was on foot that night; then that he parked various places, got the car stuck, and sat in the car a long time. (11/567, 848, 860)

The Supreme Court has recognized that the proverbial "third degree" has been replaced by more subtle psychological techniques, with more emphasis on the mental makeup of the individual. Thus, Courts have found the defendant's mental condition more significant in determining voluntariness. See Spano v. New York, 360 U.S. 315

(1959). The relationship of a mental condition to police coercion must be considered. See Colorado v. Connelly, 479 U.S. 157 (1986).

In this case, law enforcement structured its interrogation around Hess' mental and emotional make-up. Hess was chronically depressed; suffered headaches and blackouts; had a mental or learning disorder since childhood; was obsessed with law enforcement, desperately wanting to participate habitually took the blame for others, especially family members; fabricated stories to impress others with his knowledge and abilities, especially about guns and security matters; was gullible and insecure, craving attention; and appeared to be a pathological liar. These aspects of his mental make-up probably account for his story to Warren about the shooting of a security guard (which never happened) two days before this murder; he was trying to impress Warren to get attention.

The Lee County Sheriff's Department had no other significant suspects, and they probably wanted to believe that Hess was the perpetrator. Somewhere along the line, however, they lost track of the purpose of interrogation -- to find the real perpetrator, and played "mind games" calculated to trick Hess into confessing, whether guilty or not.

In Frazier v. State, 107 So. 2d 16, 21 (Fla. 1958), this Court stated that "[a] confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his

true position, or to exert improper and undue influence over his mind." Confessions based on promises and threats lack a guarantee of truthfulness. The concern in such cases is that the confessions are false. Black v. State, 630 So. 2d 609, 616 (Fla. 1st DCA 1993). An erroneously admitted confession is subject to harmless error analysis. Traylor, 596 So. 2d at 973; State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In this case, however, the error was clearly harmful. Hess was convicted of murder and sentenced to death based solely on his statements. None of the State's physical evidence supported them. What he "confessed to" could not have happened as he described it, and many of his statements were contradictory. It seems likely that his "confession" was false, and he did not commit the crime. This case must be reversed and remanded for a new trial, in which Hess' statements are excluded, or Hess must be discharged because the State will have insufficient evidence to prosecute without Hess' admissions.

ISSUE II

THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL OF PREMEDITATED MURDER BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT THE CRIME WAS PREMEDITATED.

When the State rested, defense counsel argued that the State failed to present a prima facie case of premeditated first-degree murder. The State presented nothing more than Hess' so-called confession, that the murder was an accident. (13/1216-17) The

motion was denied. (13/1221) At the end of the defense case, counsel renewed the motion, which was again denied. (13/1314-15)

The premeditation essential for proof of first-degree murder requires more than a mere intent to kill. Premeditation

> is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit reflection, and in pursuance of which an act of killing ensues. Premeditation . . . must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned.

Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981) (citations omitted); see also Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997); Hoefert v. State, 617 So. 2d 1046, 1049 (Fla. 1993) (evidence consistent with unlawful killing insufficient to prove premeditation); Holton v. State, 573 So. 2d 284, 289 (Fla. 1990).

There was no direct evidence of premeditation at Hess' trial; any evidence of premeditation was purely circumstantial. Where the State seeks to prove premeditation circumstantially, the evidence must be inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So. 2d 972, 976 (Fla. 1977); see Hoefert v. State, 617 So. 2d 1046 (Fla. 1993); Bedford v. State, 589 So. 2d 245, 250 (Fla. 1981). Evidence from which premeditation can be inferred includes the nature of the weapon used, the presence or absence of adequate provocation, previous problems between the parties, the manner in which the murder was committed, the nature and manner of the wounds, and the accused's actions before and after the homicide. Sirici, 399 So. 2d at 967.

In this case, the weapon used was a gun. No evidence even suggested that Hess bought a gun just prior to the homicide. His wife testified that she never saw a gun but that she saw a bulge at Hess' waist, only after he left Lake Fairways (12/1039-40) which, if true, would suggest he got the gun at the guard gate. There was no evidence that the guard had a gun. There was no evidence that the shooting did not happen during a struggle, as Hess related on several occasions, which shows a lack of premeditation.

The manner in which the murder was committed, and the nature and manner of the wounds inflicted do not suggest premeditation. Galloway was shot once in the chest and died almost immediately. Although a second shot was fired, the evidence did not indicate which shot was fired first. Because the shooting occurred so quickly, the perpetrator had little time to think about whether he wanted to kill the guard. If one believes Hess' admissions, he shot the guard accidentally, while wrestling. In Rogers v. State, 660 So. 2d 237 (Fla. 1995), this Court reduced a first-degree murder conviction to second-degree murder, because the testimony reflected that the victim grabbed Rogers' gun, the men struggled over the gun, and the gun fired. This was not sufficient proof that Rogers formed a conscious purpose to kill. Id. at 241.

Whether there were problems between the parties is anyone's guess. There was no evidence that Hess knew Galloway. He said he worked with Galloway at two security agencies (Weiser and perhaps Pinkerton), but we know that Galloway never worked at either of

those places. Hess told varying stories about seeing Galloway at the guard gate, and being turned away. He described Galloway as pleasant, a "kind old man," rude, and "only doing his job." At trial, Hess admitted he had never met Galloway and only said he did to impress law enforcement so he could help solve the crime.

Something Hess said two days before the homicide is the State's best argument as to premeditation, although nowhere near sufficient. Hess told his employer that a security guard had been shot that morning. There is no reason to believe that Hess intended to murder anyone based on his unfounded story. Although some of his facts could apply to Galloway's murder (that security guard who was shot in the chest and died immediately), Hess said it happened at the bus barn. He never mentioned Galloway or Lake Fairways. He said he worked with the security guard.

Why would he tell such a story if he planned to kill someone? At his job site, a day after the homicide, he knew no more about it and could not even remember Galloway's name. Moreover, the evidence showed that Hess was in the habit of fabricating stories about shootings involving security guards.

In the case of Mungin v. State, 689 So. 2d 1026 (Fla. 1996), the defendant shot and killed a convenience store clerk. The victim was shot once in the head at close range; the only injury was the gunshot wound; Mungin procured the murder weapon in advance and had used it before; and the gun required a six-pound pull to fire. This Court found that evidence insufficient to support

submission of the issue of premeditation to the jury, noting that there were "no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation." Id. at 1029. The same is true in this case.

In Norton v. State, 23 Fla. L. Weekly S12 (Fla. Dec. 24, 1997), this Court found a complete absence of evidence to support premeditation, noting that the total absence of evidence as to the circumstances surrounding the shooting "militates against a finding of premeditation." Id. at S13-14. No evidence of motive was shown. The Court recognized that motive was not an essential element of homicide, but noted that when proof of a crime rests on circumstantial evidence, motive may become important. There was no evidence of a continuing attack suggesting premeditation. The medical examiner testified that the victim had no wounds other than a single gunshot wound to the head. No evidence showed that Norton procured a murder weapon in advance of the homicide.

This case had all of the same factors. There was no apparent motive for Hess to kill Galloway. Hess was not in need of money, nor did he receive any measurable benefit -- he obtained only a tank of gas and part of a night's stay at a motel. Detective Allen testified that he was unable to come up with a motive as to why Hess would want to kill Galloway. (11/985) Any difficulties they might have had (if they even knew each other) were minor. The prosecutor argued that maybe Hess was upset with Galloway, or maybe

he was "just going to kill somebody and take their stuff. Or maybe it's some other motivation we don't know." (13/1382-83) See Jackson v. State, 511 So. 2d 1047, 1050 (Fla. 2d DCA 1987) (where evidence is entirely circumstantial, lack of motive becomes significant).

As in Norton, no one saw the murder and no one saw any events before or after it. No one saw Hess either before or after the homicide with the exception of the employees at the Shell station, fifteen miles from the homicide, who saw him pick up his wife that evening ten or fifteen minutes before the murder took place. The State failed to place him anywhere near Lake Fairways.

There was no evidence of a continuing attack suggesting premeditation. There were no signs of a struggle. The medical examiner testified that the victim had no wounds other than a single gunshot wound to the chest. The State elicited no evidence suggesting that Hess intended to kill the victim or anyone else. No evidence showed that Hess procured a murder weapon in advance of the homicide. There was no evidence that Hess tried to conceal evidence of a crime except for his varying statements as to what he might have done with the gun and the wallet.

It is obvious that this case contains even less evidence of premeditation than does Norton. In fact, there is **no** evidence of premeditation in this case. See also Kirkland v. State, 684 So. 2d 732 (Fla. 1996) (no suggestion Kirkland possessed intent to kill prior to homicide; no witnesses to events preceding it; and no evidence suggesting Kirkland obtained a murder weapon in advance);

Terry v. State, 668 So. 2d 954 (Fla. 1996) (premeditation not shown in absence of evidence as to how shooting occurred).

Hess "confessed" that he shot Galloway accidently. This is the opposite of premeditation. In Kormondy v. State, 703 So. 2d 454 (Fla. 1997), this Court held that the trial court should have granted an acquittal as to premeditated murder because the State's own evidence failed to discount the reasonable hypothesis that the shooting was accidental. As in Hess, Kormandy's victim was killed by a single gunshot. The State's primary witness said Kormondy mentioned something about the "gun going off accidentally." Even Kormondy, when implicating another (Buffkin) as the shooter, said Buffkin did not mean for the gun to go off.

In this case, the evidence showed that Galloway was shot once, directly into the chest. It would seem unlikely, therefore, that Hess shot him accidently from his pants pocket. Because we have no idea how this crime really happened, however, it is just as likely that, if Hess did shoot Galloway, he shot him accidently while they were wrestling over the gun; perhaps Galloway tried to grab the gun. We could come up with any number of possibilities as to how the crime occurred because of the absence of any reliable evidence other than the medical examiner's findings. This is precisely why the State failed to prove premeditation.

That error was compounded when the judge erroneously instructed the jury as to premeditated murder because it is error to instruct on a theory of prosecution for which a judgment of

acquittal should have been issued. Mungin, 689 So. 2d 1026; McKennon v. State, 403 So. 2d 389 (Fla. 1981). This Court should reduce the conviction to second-degree murder because felony murder was also not proved. (See Issue III, infra.)

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO GRANT A JUDGMENT OF ACQUITTAL AS TO FIRST-DEGREE FELONY MURDER AND ROBBERY BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT HESS INTENDED TO ROB GALLOWAY.

The state relied entirely on circumstantial evidence to prove felony murder, and the aggravating factor that the homicide was committed during a felony. (See Issue V) Again, the burden is on the state to introduce evidence which excludes every reasonable hypothesis except that of guilt. Atwater v. State, 626 So. 2d 1325 (Fla. 1993). Again, this burden has not been met. The evidence in this case was entirely consistent with the reasonable hypothesis that the taking of the wallet was an afterthought, and was merely incidental to the homicide. Conversely, there was no evidence that a pre-existing desire to obtain the money or credit cards was the motivating factor, or even a contributing factor, in the homicide.

Unlike Atwater, 626 So. 2d 1325, there was no evidence of any statements by Hess showing that he "possessed the requisite intent to commit the crime of robbery at the time he committed the

murder"[40] Nor did evidence of Hess' prior contacts with Galloway, if any, suggest an intent to rob. In Atwater, this Court rejected the argument that the taking was an afterthought. There, however, the State presented testimony that Atwater obtained money from the victim before; and that on the day of the killing the victim told a friend he was not going to give Atwater any more money.

In Finney v. State, 660 So. 2d 674, 680 (Fla. 1995), in which the Court upheld the felony-murder conviction, the victim's VCR was pawned by Finney within hours of the murder; her jewelry box was missing; her bedroom was ransacked and the contents of her purse dumped on the floor. Finney never argued that the victim was killed for some reason other than robbery. In the case at hand, the State argued to the jury that perhaps Hess was upset with Galloway or "just going to kill somebody and take their stuff. Or maybe it's some other motivation we don't know." (13/1382-83).

In Mahn v. State, 23 Fla. L. Weekly S219, 220 (Fla. April 16, 1998), this Court found that the trial court erred by finding the defendant guilty of robbery and felony murder because the State failed to prove the murder was committed in the course of a robbery. It was only after Mahn killed his father's live-in girlfriend and her son that he found the victim's money, while looking for his father's car keys to effect his escape.

During his April 12 statement, Hess told the officers that he

[40] For purposes of this argument, it will be assumed without conceding that Hess committed the homicide.

wanted to talk to someone about changing jobs. When he asked the guard, the guard got real mad. He told Hess that he was an idiot for wanting a job there, that he was too young and "nerdy." They got in an argument. (12/1118-19) The guard grabbed him in the pants pocket, and the gun went off. (12/1120-21, 1143-44)

Even if Hess shot Galloway directly into the chest, the most likely scenario is an altercation between the two men. Plainly, then, the State's circumstantial evidence was susceptible of the reasonable inferences that the killing was not done to obtain the victim's assets. See Mahn, 23 Fla. L. Weekly at 220; Fowler v. State, 492 So. 2d 1344, 1347 (Fla. 1st DCA 1986) (circumstantial evidence case should not be submitted to jury without competent, substantial evidence susceptible of only one inference clearly inconsistent with defendant's hypothesis of innocence).

It may be noted that, at the close of all the evidence, the defense admitted that the State had introduced evidence of felony murder because Hess finally said he took Galloway's wallet and used a credit card. (13/1217) Despite defense counsel's concession, Hess' admission that he took these items does not conclusively prove he committed the murder during a robbery. The taking of the wallet may have been merely an afterthought; perhaps, to make the murder look like a robbery. Ironically, defense counsel later argued that the "committed during a felony" aggravator was not proven for these very reasons. (See Issue V)

In any event, the State's failure to prove an element of the

crime (felony murder) is fundamental error, and requires no objection. Also, because this is a death case, the Court is required to review the evidence to independently ascertain that the State proved each and every element of the crime. Williams v. State, 386 So. 2d 538, 541 (Fla. 1980); Tibbs v. State, 397 So. 2d 1120 (Fla. 1981); Fla. R. App. P. 9.140(h).

Because the evidence in the instant case was insufficient to prove robbery or felony murder predicated on robbery, and the evidence was also insufficient to prove premeditation (See Issue II), Hess' murder conviction must be reduced to second-degree murder, pursuant to Fla. Stat. §924.34 or, pursuant to Issue IV, Hess must be acquitted and discharged because the State failed to prove that he committed the crime.

Hess should also be acquitted of robbery with a weapon, and his conviction and sentence vacated, because the State failed to prove that the taking of Galloway's wallet was other than an after-thought. See Mahn v. State, 23 Fla. L. Weekly S219 (Fla. April 16, 1998) (Court vacated conviction of robbery, felony murder and "committed during a robbery" aggravator, because taking of car keys and money was afterthought rather than motive murder).

ISSUE IV

BASED UPON THIS COURT'S STATUTORY OBLIGATION TO REVIEW THE FACTS OF EACH CASE IN WHICH THE DEATH PENALTY IS IMPOSED TO ASSURE THAT THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION, THIS COURT SHOULD VACATE HESS'

CONVICTION AND SENTENCE AND DISCHARGE HIM.

This Court must review every death case to determine whether the State presented sufficient evidence to support the verdict. Williams v. State, 386 So. 2d 538, 541 (Fla. 1980) ("As is our duty in death penalty cases, we have thoroughly examined the entire record in this case and find the evidence more than sufficient to support appellant's conviction."); Aldridge v. State, 351 So. 2d 942 (Fla. 1977). Florida Rule of Appellate Procedure 9.140(h) provides that, in the interest of justice, the court may grant any relief to which any party is entitled. Rule 9.140(h) also requires that capital cases be examined for sufficiency even if the issue is not raised on appeal. In this case, a review of the entire record shows that the State presented insufficient evidence to support Hess' conviction. Thus, the Court should discharge Hess based on insufficient evidence, or remand for a new trial in the interest of justice. Tibbs, 397 So. 2d 1120; Fla. R. App. P. 9.140(h).

When the evidence is legally insufficient, the prosecution has failed to proved the defendant's guilt beyond a reasonable doubt. Terry v. State, 668 So. 2d 954 (Fla. 1996); Tibbs, 397 So. 2d at 1123 (1982). In contrast, sufficient evidence is "such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded." Id. (quoting Black's Law Dictionary 1285 (5th ed. 1979)). In the instant case, the only direct evidence linking Hess to the murders was his "confession" that he shot Galloway by accident. Even if this were true, an accidental shooting is not murder unless it occurred during the

commission of a felony. Hess never said he intended to rob Galloway, and the State's evidence -- entirely circumstantial as to this element of the crime, was not inconsistent with a reasonable hypothesis of innocence. (See Issue III)

This was not a "circumstantial evidence only" case because of the "admissions" of John Hess. A confession to committing 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). Hess did not, however, confess to first-degree murder. Instead, he confessed to an accidental shooting. Perhaps then, his admission should be found to constitute only circumstantial evidence that he committed first-degree murder.

To convict on circumstantial evidence, the State has the burden of presenting evidence that not only is consistent with guilt, but that is inconsistent with any reasonable hypothesis of innocence. Finney, 660 So. 2d at 679); Scott v. State, 581 So. 2d 887, 893 (Fla. 1991); State v. Law, 559 So. 2d 187, 189 (Fla. 1989). Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain a conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Davis v. State, 90 So. 2d 629, 631-32 (Fla. 1956); see also McArthur, 351 So. 2d 972; Heiney v. State, 447 So. 2d 210 (Fla. 1984). The evidence in this case did not lead to a reasonable and moral certainty that only Hess and no one else

committed the charged offense, and created nothing more than a strong suspicion that the defendant committed the crime.

The trial transcript shows that law enforcement was suspicious of Hess from the very beginning, but were never able to find any evidence that he committed the crime. Finally, they were able to psychologically coerce him into making an admission that he shot Galloway by accident. The circumstances of the "admission" (see Issue I) and the other evidence in this case show, however, that his admission was not trustworthy. At trial, Hess testified that he did not shoot John Galloway, and that he made up the stories he told the deputies. He wanted to take the blame for his wife whom he apparently thought was involved in the shooting. (4/416-17)

Crone did not believe Hess shot Galloway accidentally from his pants pocket, and he did not believe Hess walked through the woods to shoot Galloway. (13/1193-94) In other words, he accepted Hess' confession, but believed that Galloway was shot as indicated by the physical evidence. Nevertheless, he based the arrest on Hess' admissions of April 11, 1995. (13/1202) Crone apparently believed that the homicide happened the way Hess described it in the "dream sequence," in which he said that someone else committed the crime. The irony is that, based on the "dream sequence" and other evidence the officers collected in 1993, they had insufficient evidence to arrest Hess. (11/932-34) The conclusion from these facts then, is that the officers arrested Hess based on admissions they did not believe and the State convicted him based on evidence which did not even support an arrest.

Apart from Hess' admissions, the evidence was entirely circumstantial, and proved nothing more than that Hess was aware of some of the details of the murder in a very general way. His wife's testimony, which will be discussed infra, was totally incredible and did not prove that Hess committed the crime. The remainder of the State's evidence, which will also be discussed infra, indicated that someone other than Hess committed the murder. Thus, the State presented no competent evidence to sustain a conviction. If Hess' statements were excluded, pursuant to our argument in Issue I, the State would have no evidence that Hess committed this crime. Hess' statements were so unreliable, they failed to support a conviction. The few "facts" that Hess told Warren before the homicide were circumstantial. They were not admissions as he was only reporting a crime he had allegedly heard about. He said only that a security guard was shot in the chest and died immediately. These facts are not distinguishing. If Hess were contemplating such a crime, why would he tell someone it had happened? Additionally, he also told Warren facts that were not accurate. He said it happened at the bus barn where he formerly worked and the guard was found behind a bus. He told Warren other stories that were not true. They all involved shootings and security guards.

* * * * *

Before a confession or incriminatory statement may be admitted, the State is required to prove the corpus delicti. It is not required to prove the corpus delicti beyond a reasonable doubt,

but must present evidence that "tends to show that the crime was committed." Farinas v. State, 569 So. 2d 425, 430 (Fla. 1990); see also Sochor v. State, 580 So. 2d 595 (Fla. 1991); Thomas v. State, 531 So. 2d 708 (Fla. 1988); State v. Allen, 335 So. 2d 823, 825 (Fla. 1976). The state's corroborating evidence must be substantial. Allen, 335 So. 2d at 825. Proof may be by circumstantial evidence. It need not be uncontradicted or overwhelming, but must show the existence of each element of the crime. The identity of the defendant as the guilty party is not necessary for the admission of a confession. Burks v. State, 613 So. 2d 441 (Fla. 1993).

In Burks, 613 So. 2d 441, Justice Shaw expressed dissatisfaction with the "antiquated" corpus delicti rule. In a concurring and dissenting opinion, he wrote that "the corpus delicti rule has outlived its usefulness and should be discarded." Burks, 513 So. 2d at 445. Justice Shaw observed that the supreme court of New Jersey had abandoned the rule for a "more flexible" rule

> that the State must introduce independent proof of facts and circumstances which strengthen or bolster the confession and tend to generate a belief in its trustworthiness plus independent proof of loss or injury, affords ample protection for the accused and is the rule best designed to serve the ends of justice in the administration of the criminal law.

State v. Lucas, 152 A.2d 50, 60 (N.J. 1959) citations omitted).

Justice Shaw agreed with the supreme court North Carolina, in State v. Parker, 337 S.E.2d 487, 493 (N.C. 1985), that the federal rule would be better applied. Rather than requiring proof of a corpus delicti independent of the defendant's statements, the

government would be required to introduce "substantial independent evidence which would tend to establish the trustworthiness of the defendant's statements. Burks, at 445-46; see also Opper v. United States, 348 U.S. 84, 93 (1954) (sufficient if the corroboration supports essential facts admitted sufficiently to justify a jury inference of their truth); State v. Yoshida, 354 P.2d 986 (Hawaii 1960) ("trustworthiness of confession" test adopted in place of corpus delicti); State v. George, 257 A.2d 19 (N.H. 1969).

In this case, although the State established a corpus delicti, and introduced an "admission" from Hess, it utterly failed to prove that Hess committed the crime. This is because Hess' admissions lacked reliability. They were not "trustworthy." Under the test discussed above, the State would be required to present evidence supporting Hess' admissions to show that they were trustworthy.

One of the purposes of the corpus delicti rule was to prevent false confessions, specifically as to crimes that were never committed. We know, of course, that a crime was committed in this case. What we lack is any corroboration of Hess' admissions. To convict and execute an innocent man is worse when the real perpetrator is never caught than when the crime was never commit-ted.

The detectives in charge of the investigation admitted that the arrest was based solely on Hess' statements. Many of his statements contained details known to the officers to be at least somewhat accurate. What is missing, however, is substantiation of any of Hess' statements with physical evidence, or discovery of any

evidence based on details provided solely by Hess.

It is interesting to note that Hess knew only the facts that the law enforcement officers knew fairly soon after the homicide. He knew that Galloway, a security guard at Lake Fairways, was shot in the chest and died almost immediately, although on the night after the murder he could not think of Galloway's name. He knew that two shots were fired. He knew the perpetrator took Galloway's wallet which contained his ATM card. He did not, however, know about any other of Galloway's many missing credit cards, although Galloway's wife provided a list of them to authorities. He said during the "dream sequence," that the perpetrator tried to use Galloway's ATM card at the Shell station, to get money -- not gasoline. Hess was never able to recall what bank issued the ATM card although the perpetrator tried to use it at a Barnett Bank. The card was issued by Barnett Bank.

Hess knew, at least some of the time, which way Galloway fell. He could easily have learned this from photographs of the crime scene. He never described Galloway. He did not know what kind of gun or ammunition killed Galloway. Although the officers later learned that .32 caliber ammunition was used, Hess did not know this. Neither Hess nor the officers ever found out what kind of gun was used. Hess was never able to explain what happened to the wallet (12/1138), the credit cards or the gun. Although he told a couple of stories as to what he did with the gun, it was never found. He once "recalled" throwing something down while running from the scene, but nothing was found. It seems as though, if Hess

committed the murder, he would have been able to lead the officers to at least one piece of evidence, or to tell them at least one thing they did not already know which could be substantiated.

Hess never said that Galloway's Shell card or Master Card were taken. Law enforcement did not learn about the use of these cards until the bills came in. He only vaguely remembered registering at the motel, and only after the officers showed him the credit card receipt with Galloway's name on it and photos of the motel. Even then he did not actually remember the motel, where it was, or why he and Juli would have driven all the way to the Everglades when they lived in North Fort Meyers and he had to work the next day.

Because Hess only knew information known by the officers from the outset, he may have learned this information from a CB radio, as he suggested; from the media; from talking to other law enforcement officers, or from witnesses to the crime. Crone admitted that the media sometimes learned facts that were not released by the sheriff's department. Agent Allen testified that, shortly after the homicide, Hess talked to numerous people about his dreams, including a priest and a psychic. He at least tried to talk to law enforcement officers at a local precinct. (11/839-40)

It is significant to note that, during the taped surveillance of Hess at Target, only a day after the homicide and before he knew he was a suspect, he told Warren and the undercover officer that he did not know why someone would shoot Galloway; that they "[d]idn't take a fucking thing." (10/739) He said no one knew what the guard had. (1040) At that time, he had not yet met with law enforcement

to learn what they knew. Once he was questioned by Allen, he would have paid more attention to the media coverage.

Where Hess said he bought the gun was never verified, although the officers tried to do so; the pawn shop went out of business. The mythical gun came with two cartridges with eight bullets each, so Hess never had to buy ammunition. Although a gun which used this ammunition would be a semi-automatic, Mr. Galloway was shot with a revolver. The State presented no evidence that Hess ever possessed a gun. It seems though, if Hess had a gun, one of the security officers with whom he had worked would have seen it, especially because Hess liked to brag about his knowledge and possession of guns. The State presented no such evidence.

The bottom line is that the State was unable to substantiate any of the facts Hess gave in his statements, other than those they already knew. The State based its whole case on statements made by Hess which were conflicting, inconsistent, not supported by the evidence, and many of which were unbelievable. All of the physical evidence either (1) excluded Hess; (2) proved nothing; or (3) was inconclusive. Moreover, the State's physical evidence all pointed toward an undisclosed perpetrator.

Detective Allen, the lead investigator when the crime was committed, admitted that, after each report was received from FDLE or the FBI, they had no more evidence than before, that Hess was guilty of this crime. They had no evidence before and no evidence afterwards. Although the sheriff's department sent fingerprint and handwriting samples from both John and Juli Hess to FDLE, they

failed to match the fingerprint on Gallaway's ATM card or the handwriting on either receipt from the use of the credit cards. They took blood and hair samples from Hess but allegedly found nothing with which to compare them. In the "dream sequence," Hess said that the perpetrator fell on top of Galloway. If this were true, there would have been hair and fiber on Galloway's body.[41]

Detective Randy Crones, who took over the investigation two years later, still had no evidence that Hess committed the crime. He testified that he based his arrest solely on Hess' statements of April 11, 1995, and thereafter, that he shot Galloway by accident. (13/1202) According to Hess, it left a hole in his pocket and a burn on his thigh. The State was unable to find any evidence of blood or injury on Hess, or that any of his uniforms bore holes, blood or other stains. The officers searched his house and car and found nothing. If Hess stopped to pump gas and register at a motel, as indicated by the State's evidence, it seems strange that no one noticed the gunshot holes in his pants.

Hess' wife testified to a rather unbelievable scenario which was inconsistent with Hess' statements to law enforcement in numerous ways. Juli did not see Hess shoot Galloway; thus, her statement was also circumstantial evidence. If it were believable, it would have been incriminating, but her story was incredible. Much of it was negated by other evidence. Moreover, Juli Hess had

[41] Crime scene investigators testified that they submitted to FDLE the victim's uniform and fingernail clippings, hair and fibers. (10/598-603, 620, 630) It seems odd then that the State had nothing with which to compare Hess' hair and blood samples.

made four prior statements to law enforcement in which she denied knowledge of the crime. Only after she was brought to CID and threatened with prosecution did she change her story to implicate Hess and herself. Juli was never charged with a crime, although she admitted to numerous felonies during her trial testimony.

Juli lied to the police on every occasion. Even her final story, which no way resembled her earlier statements, could not possibly have been true. When first questioned on May 14, 1993, Juli Hess told police that she and her husband were at home on the night of the homicide (12/1049) In her second statement, she and Hess ate dinner at Dennys Restaurant after he picked her up at work. She described in detail what they ate, the service and the bill. They left about 1:00 a.m. (12/1047-49)

Employees of the Shell station where she worked informed law enforcement officers that Mr. Hess picked up his wife at the Shell station on the night of the homicide, and that they left about 12:15 a.m.[42] Galloway was shot about 12:25 or 12:30 according to two residents who heard gunshots. The Shell station is fifteen miles from Lake Fairways, on Route 41 in North Fort Myers, with about ten traffic lights between. (11/956-57; 12/1050) The investigation showed that the Shell credit card was used at 12:36 a.m., and that someone tried to use the ATM card about 1:04 a.m. Although Hess' car held only ten gallons of gas, the person who

[42] The officers apparently never even bothered to find out whether he worked that night, or when he got off work. These details might have shown when he picked up wife.

used Galloway's Shell card purchased 13.396 gallons. (11/988)

At trial, Juli Hess testified that she and Hess left the Shell station sometime after midnight and drove to Lake Fairways. She waited in the car, listening to music, for about thirty minutes while Hess was gone. Hess gave her Galloway's card and she used it to buy gas at the Shell station where she signed Galloway's name on the receipt. (12/1036) This scenario is impossible. Juli and John Hess could not possibly have driven fifteen miles to Lake Fairways, stayed thirty minutes, and driven fifteen miles back to the Shell station, stopping briefly on a bridge, in 35 minutes. It would have been at least 1:10 a.m. by the time they got back to the Shell station and, by that time, the perpetrator had already tried to use Galloway's ATM card at a Barnett Bank in San Carlos.

It is also interesting to note that, in Juli's testimony and John's pretrial "admissions," John said Juli pumped and paid for the gas (12/1129), and he registered at the motel (12/1132), while Juli said that John pumped the gas, although she signed the credit card receipt with Galloway's name (12/1032), and she registered at the motel. (12/1038, 1063) In other words, their testimony as to who did what was exactly reversed. Both took credit for making up the information on the guest registration (12/1038, 1063-64) No evidence supported either story so who should we believe?

The FDLE report said that neither Juli's nor John's signature matched the ones on the receipts. (11/995, 12/996-97) Juli thought she gave the Shell credit card to co-worker Cindy Simeon, who did not ask why she had a credit card with someone else's name on it.

They normally paid for gas by cash or check, and did not have a Shell card. (12/1057-58, 12/1032) Although the receipt said they purchased 13.396 gallons of gas, and their car held only ten gallons, Juli said sometimes the pumps are wrong. (12/1059) The State presented no evidence that anyone at Shell remembered John or Juli purchasing gasoline there that night. The motel clerk saw and described a man who registered as John Galloway, and drove a red mustang. His description did not match John or Juli. (11/934, 942)

Juli said that she was trying to protect her husband but that, when the police threatened to arrest her for Galloway's murder, she decided to testify for the State. She was told that she would not be arrested for perjury or forgery if she testified. 12/1068-70) Crone testified that they had not promised Juli Hess anything and could still arrest her if they decided to do so. (13/1211-1212)

We could pick out hundreds of cases to cite, in which the evidence was stronger than in this case. Unfortunately, however, we would not know how to pick the cases, or where to stop. We know of no cases at all in which the State had physical evidence, but none of it connected the defendant to the crime. We have found no case in which the State's only evidence was a number of inconsistent statements by the defendant, and testimony by the defendant's wife which was inconsistent with the physical evidence and her husband's versions of the crime, and induced by threats of arrest.

The State presented no evidence that Hess ever met Galloway, other than Hess' own statements which he admitted at trial were not true. No one testified to having seen him at or near Lake Fairways

at any time. He had no motive to kill Galloway. He had not talked about him before the homicide, or express any intention of robbing or killing him or anyone else. Hess and his wife both worked, and there was no evidence that they drank or used drugs, or had any particular need for more money. Hess had no history of burglary, robbery or theft, or any arrests for alcohol, drugs or firearms. Why would he suddenly get a gun and rob another security guard?

Although two of Galloway's credit cards were used, Hess was never connected to their use. The Shell card was used at the Shell station where Hess' wife worked, but it was the first Shell station on 41 south of Lake Fairways. Moreover, why would John and Juli Hess use the victim's credit card at a station where they were both known? Why would the employees not have noticed them there, using someone else's credit card. The handwriting on the receipt did not match either John or Juli's handwriting. The State presented no testimony that any employee remembered anyone using Galloway's card at 12:36, although the employees remembered John and Juli leaving that night about 12:15, after Juli got off work. One of them remembered a red Mustang, but was not sure which night she saw it. The State's own evidence shows that Hess did not commit the crime.

The time table included at the end of this issue shows that it was impossible for Hess to have committed this crime. The State's evidence showed that Galloway was shot at 12:25 or 12:30. Someone used his credit card at the Shell station at 12:36 a.m. If we believe the State's evidence, **someone** was able to drive fifteen miles through ten traffic lights, and to pump and purchase gas, in

six to eleven minutes. It would seem that another motorist would have noticed someone driving that fast on U.S. 41 in Ft. Myers.

Agent Allen reported that the Shell station was approximately fifteen miles south of Lake Fairways. (11/956-57) He admitted that one could drive only ten miles in ten minutes at sixty mph. He maintained he drove it within the time frame. (11/958) He said it was possible to leave the Shell station at 12:15 and get to Lake Fairways at 12:30. (11/959) He admitted, however, that if all clocks were synchronized, it would difficult to leave Lake Fairways at 12:30 and get back to the Shell station at 12:36 a.m. (11/959)

We might assume then that Galloway was killed slightly earlier -- maybe 12:20 or 12:25, and that the clock at Shell was a few minutes off, or someone was sloppy when filling out the receipt -- perhaps it was really 12:46. It could not have been much later because the perpetrator attempted to use Galloway's ATM card at Barnett Bank at 1:04 a.m. It is unlikely that the bank's time clock was wrong too. The State presented no evidence as to how far it was from the Shell station to the bank. If the bank were twenty minutes away, we would know the 12:36 Shell receipt was correct. In any event, because the perpetrator was able to get to the Shell station and the bank so quickly, we must assume Galloway was shot a little earlier than the witnesses believed.

We know that it was after midnight because another State witness saw him alive at the guard gate at midnight. We might assume that he was shot as early as 12:20 for the perpetrator to get to the Shell station and the bank so quickly. The State's

evidence showed that John and Juli did not leave the Shell station until 12:15. How did they get to Lake Fairways in time for Hess to kill Galloway? If, by some miracle, they did not miss a single traffic light, they would have to have driven sixty miles per hour in town for fifteen miles straight without an accident, and without being stopped for speeding or reported by irate motorists. With all the publicity this case generated, one would think someone would have reported this speed demon.[43]

If Hess is not guilty, who committed this crime? There are several possibilities. First, it may have been someone who merely wanted to rob Galloway; perhaps the man described by the motel clerk. Alternatively, it might have been Lloyd Sawyer. Sawyer, 32, was about six feet tall, two-twenty pounds with brown hair, had a concealed weapons permit and owned handguns. (11/1022-23) Hess said that he looked like the drawing of the perpetrator based on the description given by the motel clerk. (12/1165-67) Despite Crone's belief, Sawyer had no alibi.[44] (11/1022-24)

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[43] One further question: If John and Juli were trying to evade detection (ie, she pumped more gas than the car would hold), why did they go to the Shell station where they would be recognized (although the employees apparently never saw them), when they must have known that the credit card would be traced to the station? Why did they travel for several hours and stay in a motel in the Everglades, using Galloway's credit card which they must have known would be traced, when they had a home in Ft. Myers and Hess had to work the next day? They would not have needed to use either card if they had gone home. Why then did they use Galloway's card to buy more gas than their car could hold, and to pay for a motel room they did not need?

[44] See note 9, supra.

A third possibility is Juli Hess. In fact, the Appellant testified that he was covering up for his wife. (4/416-17) Although she probably did not commit the murder alone, she may have had a boyfriend who helped her; perhaps, a man who drove a red Mustang. Although Juli would not seem to have a motive, neither did John.

Hess testified that he did not commit the crime. He said he made up the stories to impress the officers because he wanted to become a sheriff's deputy. He said he was deprived of his antidepressants for several months while in jail. He confessed to protect Juli and because the officers said they wanted to help him and promised to get him mental health treatment. They told him he would probably just get sent to a mental hospital for a couple years. As to his knowledge of the details of the homicide, Hess said that law enforcement officers provided it. He never owned a gun. He had never met Galloway. The State never disproved his theory of innocence with any reliable evidence.

The Florida Supreme Court, in Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), distinguished between the "weight" of the evidence, which is a jury question, and the "sufficiency" of the evidence, which must be decided as a matter of law. When there is insufficient evidence, both reversal and acquittal are mandated; a new trial is barred by principles of double jeopardy. Id. at 1125-26.

A finding that evidence is "legally sufficient" means that it is sufficient for the trier-of-fact to find beyond a reasonable doubt that the defendant is guilty. Tibbs, 397 So. 2d at 1123 (citing Burks, 437 U.S. 1). In this case, the State failed to

present substantial competent evidence to support the verdict. A first-degree murder conviction that rests on such equivocal evidence violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

The right not to be twice placed in jeopardy is fundamental. State v. Johnson, 483 So. 2d 420, 423 (Fla. 1986); Plowman v. State, 586 So. 2d 454, 455 (Fla. 2d DCA 1991). The double jeopardy clause forbids another trial to afford the prosecution another opportunity to supply evidence it failed to muster in the first proceeding. Burks, 437 U.S. at 11; Green v. United States, 355 U.S. 184 (1957). Accordingly, the conviction must be reversed and the Appellant discharged.

In the event that this Court does not discharge Hess for the above reasons, Tibbs left one avenue for appellate reversal based the weight of the evidence. The Court stated as follows:

> By eliminating evidentiary weight as a ground for appellate reversal, we do not mean to imply that an appellate court cannot reverse a judgment or conviction "**in the interest of justice.**" 397 So. 2d at 1126. The latter has long been, and still remains, a viable and independent ground for appellate reversal.

Id. Appellate Rule 9.140(h) provides that, in the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the rule provides that the court shall determine whether the interest of justice requires a new trial, even if sufficiency is not presented for review. The Tibbs court noted that the rule is often used to correct fundamental error.

Fundamental error is error which goes to the foundation of the case or to the merits of the cause of action, or which reaches into the very heart of the proceeding. Peterson v. State, 376 So. 2d 1230, 1234-35 (Fla. 4th DCA l979). In the case at hand, the evidence is so insubstantial and conflicting as to suggest that Hess may have fabricated his admissions, and may be completely innocent. He provided no substantiated details that he could not have learned from law enforcement and/or the media. Certainly, this goes to the merits of the cause of action.

Presumably, the purpose of Rule 9.140(h)'s provision that capital cases be examined for sufficiency even if not raised on appeal, is to prevent the conviction and execution of innocent persons. Based on the evidence in this case, there was no legal justification for tipping the scales in either direction. The choice amounted to rank speculation. There was no evidence supporting a verdict of guilt beyond a reasonable doubt. Thus, a judgment of acquittal should be granted as to all charges. If a judgment of acquittal is not granted, the case should be reversed for a new trial in the interest of justice.

ISSUE V

THE TRIAL COURT ERRED BY FINDING TWO STATUTORY AGGRAVATORS, WHICH THE STATE FAILED TO PROVE.

The State must prove each aggravating factor beyond a reasonable doubt. Mere speculation derived from equivocal evidence or testimony is not sufficient. Hardwick v. State, 521 So. 2d 1071,

1075 (Fla. 1988). In the case at hand, the trial judge instructed on an found two aggravating factors, neither of which were supported by the evidence. (5/668-70) The error was not harmless because, without these aggravators, the trial court could not have imposed the death penalty. Even if one aggravator were valid, the mitigation would clearly outweigh the aggravating factor.

Prior Violent Felony

In sole support of the prior violent felony aggravator, the prosecutor introduced three of Hess' prior convictions from the sexual misconduct case which occurred two years after the homicide, on March 11-13, 1995. Defense counsel objected. (3/224) This Court has found convictions valid as prior violent felonies, notwithstanding the fact that the incident occurred after the charged capital offense. Brown v. State, 473 So. 2d 1260, 1266 (Fla. 1985). Defense counsel also objected, however, because the crimes were not per se violent crimes, and in this case there was no evidence that violence was involved. Although sexual battery is a violent felony, these offenses were charged as "sexual activity with a child" and "lewd handling, fondling **or** assault." Had the State intended to prosecute the case as a sexual battery the prosecutor would have labeled the charges "sexual battery."

The trial judge found that only three of the eight convictions stemming from the incident qualified as violent felonies.[45] He

[45] Defense counsel noted that, because the jury heard on several occasions that Hess had eight prior felonies, and they only were shown three convictions from the sexual misconduct

noted that sexual activity with a child tracks the sex battery statute, although the use of violence was not set out in the charges and the State did not allege assault. (3/285-90) Although he was not convinced that lewd fondling was by definition a violent crime, he noted that assault was alleged in the information. He failed to note, however, that assault was alleged only in the alternative. Nevertheless, he allowed the State to introduce two counts of sexual activity with a child, and one count of lewd fondling of a child. (3/236-37) All three convictions were for sexual misconduct involving his niece, Crystal, who was about thirteen years of age at the time. The trial judge found this aggravator existed, based solely on these three sexual misconduct offenses.[46] (5/670)

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case, they must have wondered what the other five felonies were. Defense counsel objected to the introduction of the information with the other counts deleted because of this problem. (3/292-95) Defense counsel renewed his objection during penalty phase. (4/327)

[46] The information alleged as follows:

I. SEXUAL ACTIVITY WITH CHILD: [The defendant] 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 familiar or custodial authority to said child.

II. SEXUAL ACTIVITY WITH CHILD: [The defendant] 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 familiar or custodial authority to said child.

III. LEWD ASSAULT: [The defendant] did unlawfully handle,

Although the record does not set out the details of Hess' convictions, it appears from the indictment that Hess had union with or penetrated the vagina of his niece, Crystal, with his finger and his penis. The third conviction was that he "did unlawfully handle, fondle, **or** make an assault" upon Crystal, in a lewd, lascivious or an indecent manner, by making her masturbate his penis to ejaculation." (4/499) Because the information used the word "or" prior to assault, the offense may have involved only handling, with no assault. Thus, the State failed to prove the offense involved violence. Sweet v. State, 624 So. 2d 1138, 1143 (Fla. 1993) (must consider individual circumstances of crime to determine whether violent before weighing as prior violent felony).

Defense counsel indicated to the court that these sexual activities may have been consensual, but that Crystal was too young to legally consent. This suggests that Hess' sexual misconduct was not violent. Both Crystal and her sister wrote letters asking the judge not to sentence their "Uncle John" to death; and wrote that they had forgiven him. Their mother testified that the convictions were based on an incident that occurred only one weekend, although Hess had spent a lot of time with the girls, and that she and her daughters had forgiven him. They testified against Hess only because they were subpoenaed; not because they wanted to. (4/393)

Sexual activity with a child and lewd fondling of a child do

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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. (4/499)

not meet the legal definition of violent crimes. That the crime was nonconsensual as a matter of law does not mean that force was used. The information alleged no threat or use of violence, but only that Crystal was over twelve and under eighteen, and Hess was in a position of familial or custodial authority. Force is not required by the statute. Had the crime been violent, or had Crystal been injured, surely the State would have charged Hess with sexual battery. The sexual activity offenses were charged as first-degree felonies only because Hess was in a position of familial authority to his niece. Because of this relationship, Crystal may have agreed to the sexual misconduct without the use of threats or violence. Perhaps, had she refused, Hess would not have used violence to force himself on her.

The State carries the burden of proving that the crime was violent. For example, burglary and trespass are not necessarily violent crimes. When the crime is not violent per se, the court must look at the facts of the case. Lewis v. State, 398 So. 2d 432 (Fla. 1981). In Lewis, the trial court based its finding that the defendant had committed a prior violent felony on his two convictions for breaking and entering with intent to commit a felony, two escapes, one grand larceny and a conviction for possession of a firearm by a convicted felon. This Court held that none of those crimes supported the prior violent felony aggravator, stating that **section 921,141(5)(b) refers to "life-threatening crimes** in which the perpetrator comes in direct contact with a human victim." 398 So. 2d at 438 (citing Ford v. State, 374 So. 2d 496 (Fla. 1979)).

Although Hess came into contact with a human victim, sexual activity with a child and lewd fondling of a child were not life-threatening crimes under the circumstances of case); see also Mahn v. State, 23 Fla. L. Weekly S219, 222 (Fla. April 16, 1998)(violent prior felony aggravator only applies "to life-threatening crimes": Robinson v. State, 692 So. 2d 883 (Fla. 1997) (purse snatching not a crime of violence constituting robbery).

The Court also erred by instructing the jury that the sexual misconduct convictions constituted prior violent felonies. In Sweet v. State, 624 So. 2d 1138, 1143 (Fla. 1993), the Court found that the defendant's prior conviction of possession of a firearm by a convicted felon was shown by the circumstances of the case to have included violence. Nevertheless, the trial court erred by failing to instruct the jury that it must consider the individual circumstances of the crime to determine whether it was violent before weighing it as a prior violent felony. See also Barclay v. State, 470 So. 2d 691, 693 (Fla. 1985) (conviction of breaking and entering does not, on its face, prove prior conviction of a violent felony); Mann v. State, 420 So. 2d 578 (Fla. 1982) (error to instruct jury that burglary is crime of violence without making clear that this depends on circumstances of burglary).

In the case at hand, the trial judge instructed the jury as follows: "The crimes of sexual activity with a child and lewd and lascivious assault are felonies involving the use or threat of violence to another person." (5/525) This language by itself shows the fallacy of the judge's reasoning. The information does not say

that Hess **used or threatened to use violence**. He may have just persuaded Crystal to participate. This is precisely why the charging statute pertains to activities within a familial relationship. Moreover, the judge instructed that lewd and lascivious "assault" was a felony involving violence when the information charged only "fondling, handling, **or** assault," and the State never showed that an assault took place. Accordingly, the judge erred by instructing the jury that the offenses involved violence. Because the State did not show that the crimes involved violence, the judge erred by instructing and finding this aggravator established.

Committed During a Robbery

When an aggravating factor is shown only by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984). Although, in this case, Hess finally said that he took Galloway's wallet, he never said that he intended to take his wallet or to rob him at the time of the shooting.

In his sentencing order, the judge relied on Hess' "dream sequence," in which the perpetrator said, "I want your money," because he said that it was "compatible with what happened." (5/669) Because no one knew what happened, it is only compatible if one is looking for something to justify the verdict in this case. As discussed in Issue IV, many of the things Hess said in

the "dream sequence" were not accurate. The State is required to prove this aggravator beyond a reasonable doubt. Hess' alleged dream, in which he said someone else killed Galloway, does not prove this aggravator beyond a reasonable doubt. Even the State admitted it did not prove motive in this case.

One of the State's arguments was that Hess killed Galloway because of an altercation at the guard gate. In fact, this is what Hess said in his "admission" -- he went to "relieve the guard," or to talk to him about a position there; he argued with the guard who grabbed his pocket; and the gun went off twice, by accident. (12/1104-05) Hess never said in any of his statements that he went to Lake Fairways to rob the security guard. During the taped surveillance a day after the homicide, Hess said the killer took nothing, and no one knew what the guard had. (10/739) Because the taking of Galloway's wallet was an afterthought at most, this aggravator was not proven beyond a reasonable doubt. See Mahn v. State, 23 Fla. L. Weekly S219, 222 (Fla. April 16, 1998) (taking of keys and money an afterthought); Parker v. State, 458 So. 2d 750, 754 (Fla. 1984) (no evidence that murder motivated by desire for necklace and other items taken); Clark v. State, 609 So. 2d 513, 515 (Fla. 1992) (that Clark took money and boots incidental to murder).

In Issue III, Appellant argued that the State presented insufficient evidence to support the felony murder conviction. The argument in that issue should be considered together with this issue. Defense counsel objected to the doubling of the "convicted

during a felony aggravator" and the felony murder conviction, because it resulted in giving the State an automatic aggravating factor. (3/247) Where the underlying charge of robbery serves as the basis for both the conviction of felony murder and the finding of an aggravator, the aggravator fails to genuinely narrow the class of persons eligible for the death penalty. See Arave v. Creech, 123 L.Ed. 2d 188 (1993); Zant v. Stephens, 462 U.S. 862, 867 (1983); Mahn v. State, 23 Fla. L. Weekly S219, 220 (Fla. April 16, 1998) (State failed to prove that the taking of Galloway's wallet was other than an afterthought); Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (constitutional requirement that aggravator perform narrowing function). Under these circumstances, the repetitive aggravating factor cannot constitutionally be weighed by judge or jury in imposing a death sentence. See State v. Cherry, 257 S.E. 2d 551 (N.C. 1979); State v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992); cf. Stringer v. Black, 117 L.Ed. 2d 367, 378-83 (1992); Espinosa v. Florida, 505 U.S. 1097 (1992).

ISSUE VI

THE TRIAL COURT ERRED BY FAILING TO FIND AND GIVE SIGNIFICANT WEIGHT TO THE MITIGATORS SUBMITTED BY HESS.

In mitigation, the trial judge instructed the jury that it might consider whether Hess (1) had no significant history of prior criminal activity; (2) whether he was under extreme mental or emotional disturbance when he committed the offense; (3) whether his capacity to appreciate the criminality of his conduct and to conform it to the requirements of law was impaired; (4) any other factor in Hess' background that would mitigate against imposition of the death penalty; and (5) any aspect of his character or record or other circumstance or the offense. (4/68) Although all were reasonably established by the evidence, the trial judge rejected all but the nonstatutory mitigation, citing the lack of expert testimony or written documentation. (6/718-93) In other words, he did not believe the unrebutted testimony of the defense witnesses, except when they testified about undocumented minor juvenile offenses that he found to rebut the "no history of criminal activity" mitigator.[47]

This Court made it abundantly clear that "when a reasonable

[47] The trial court clearly used the wrong standard in making his findings. Mitigators only need to be shown within a reasonable certainty, while aggravators must be proven beyond a reasonable doubt. Thus, crimes which would rebut mitigators should also be proved beyond a reasonable doubt. Otherwise, the mitigator would be reasonably established. See Barclay v. State, 470 So. 2d 691 (Fla. 1985) (State failed to prove conviction beyond a reasonable doubt to rebut "no prior history of criminal activity" mitigator).

quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). The trial court's findings were in error for the following reasons:

No Significant History of Criminal Activity

The trial judge instructed the jury on this statutory mitigator but found that it **did not exist** based on two minor juvenile offenses the defendant and his sister alleged during their penalty phase testimony, and Hess' eight sexual misconduct convictions which occurred two years after the capital offense. (5/671-72, 6/698) This was clearly error, requiring resentencing.

Convictions that post-date the conviction, for crimes that pre-date the conviction, are not considered prior criminal history, even though they may be considered "prior" violent felonies. See, e.g., Besaraba v. State, 656 So. 2d 441, 446-47 (Fla. 1995) (although contemporaneous capital offense supported the "prior violent felony" aggravator, trial court found defendant had no significant history of criminal activity). The prosecutor agreed, during charge conference, that the sexual activities conviction did not qualify as rebuttal for this mitigator. (3/257)

During penalty phase, Hess' sister, Julie Teachworth, testified that her brother once spent ninety days in jail because his first wife, Laurie, who was psychotic, chased him out of the house with an ax while he was naked. He was arrested for indecent

exposure.[48] (4/364-65, 387) Hess said he went to "probate" court and was on probation one time because of an incident during which he hit the chief of police in the mouth while trying to protect Laurie. He was in jail for that incident on his 16th birthday. (4/362-63, 398) These alleged juvenile offenses took place in Michigan. Presumably, the prosecutor was not aware of these offenses prior to the defense penalty phase testimony, and presented no documentation that they occurred or that the legal consequences were as described. Although Hess' sister claimed to have seen him run out of the house naked, chased by his first wife with an ax, his conviction is nothing more than hearsay. If the State documented these alleged offenses, they would have been introduced into evidence and included in the record.

None of the alleged "criminal activities" rebutted the "no significant prior criminal history" mitigator. As the judge seemed to understand during charge conference, the eight felonies arising from the sexual misconduct case were **not** prior criminal activities because they took place two years after the homicide. Additionally, the State failed to prove alleged juvenile offenses took place.

The prosecutor cited two cases to the judge to support the use of juvenile convictions to rebut "no significant criminal history." In Booker v. State, 397 So. 2d 910 (Fla. 1981), the trial court included the defendant's "assaultive tendencies, truancy and theft, and drug use" as a juvenile, in a list of offenses rebutting the

[48] Laurie quit school at 16 and John moved in with her when he was 17 so, at that time, Hess was in his late teens.

mitigator. The defendant had an adult conviction for "strong arm" robbery; thus, the inclusion of the juvenile offenses was surplusage. The issue was not raised and was not addressed by this Court.

In Quince v. State, 414 So. 2d 185 (Fla. 1982), the defendant argued that his juvenile record was too remote and, thus, he should have been found to have no significant criminal history. Citing Booker, the Court noted that juvenile offenses have been allowed when the circumstances warrant. Thus, the court rejected the defendant's argument because, in Quince, the offenses were included armed robbery and burglary, which were not trivial. Id. at 414. The case at hand is clearly distinguishable because Hess' undocumented juvenile offenses, were trivial in comparison to armed robbery and burglary. The mitigator excludes Hess' offenses by it's wording -- no **significant** history of criminal activity.

In Barclay v. State, 470 So. 2d 691 (Fla. 1985), the trial court erroneously used Barclay's criminal record to support his finding of a prior conviction of a violent felony. The information regarding Barclay's prior conviction for breaking and entering came solely from a presentence investigation. This Court held that the State did not prove this aggravator beyond a reasonable doubt. The judge also used Barclay's unsubstantiated prior record to turn the mitigating circumstance of "no significant history of prior criminal activity" into a nonstatutory aggravating circumstance. This Court held that the trial court improperly used Barclay's record as a nonstatutory aggravating factor. Thus, the court

failed to follow the correct weighing process. Id. The same is true in this case. The State presented no documentation of Hess' alleged juvenile offenses. Accordingly, the court erred by considering them to reject the "no prior history" mitigator.

Hess allegedly "punched" the police chief in the mouth to prevent him from arresting Laurie when he was fifteen. Even if true (and, as we know, Hess fabricated a lot of stories), it was not serious (except perhaps to the police chief). Hess brought this out as mitigation, to show problems he encountered with his first wife, who was mentally ill, and which finally led to the loss of his sons, causing serious and lasting depression. Certainly, the legislature did not intend that "no significant history" be rebutted by a minor offense committed by a fifteen-year-old child.

The other juvenile offense, if true, was not intentional. Hess allegedly ran out of the house naked because his wife was chasing him with an ax. This story is suspicious because it would seem that "necessity" (or lack of criminal intent) would be a defense to this crime -- unless Hess confessed so that Laurie would not get in trouble. When Hess said he was in "jail," it may well have been a juvenile facility. The "offense" was not significant.

In Craig v. State, 685 So. 2d 1224, 1231 (Fla. 1996), this Court found that the trial court did not abuse its discretion by finding no significant history of criminal activity, despite evidence of Craig's drug use in connection with the crime. The court found that his drug use was closely connected to the murders, that it was not significant, and it did not rebut the mitigator.

During the prosecutor's closing, he told the jury, correctly, that the sexual misconduct convictions could be considered as prior violent felonies. He then said,

> But you can also consider whether in mitigation the fact that he never has or has not had significant history of prior criminal activity before . . . . Well, even if you find and even if you believe that despite his testimony today of a previous criminal involvement back when he was in the tenth grade . . .

(4/425) Defense counsel objected and the court sustained and instructed the jury to disregard the last comment. (4/426-27) It seems incongruent, therefore, that he considered these offenses in sentencing. Clearly, they are not offenses one should consider in deciding whether to impose the death penalty.

Extreme Mental and Emotional Disturbance

The trial judge also found that this mitigator did not exist.[49] (5/671-72) He said that no evidence reasonably convinced him that Hess suffered from mental or emotional disturbance. The defense produced no records or reports. It is interesting to note that the judge did not require any "records" to find that Hess' two alleged juvenile offenses occurred, but required "records or reports" to substantiate the testimony of Hess and his sister, and the letters written by Hess' family members and friends, showing Hess' serious

[49] Although the trial court found that the extreme mental and emotional distress statutory mitigator did not exist, he found it to be a nonstatutory mitigator, based on Hess' mental background, and gave it moderate weight. (See Nonstatutory Mitigation, infra.)

problematic childhood and his emotional problems.

The judge noted that Hess lost his sons "a long time ago." Although five years may seem like a long time to the judge, it may not have seemed so passe' to Hess, who testified that he still suffered serious depression because of it. The loss of two small children to HRS is not too different than losing children to death. The result is that he could never see them again. He was very close to the boys because he cared for them himself and protected them from their mother who was mentally ill.

The trial judge added that "[i]t 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." (5/672) He mentioned this in three different places in his sentencing order. (5/672, 675, 681) Where he came up with this idea is a mystery. Undersigned counsel could find nothing in the record, including letters from family members, suggesting that the relationship between Hess and his two boys was anything other than father and sons. Perhaps the judge was thinking of a different case. If he based his conclusion concerning the applicability of this mitigator on erroneous information, or information outside the record, the case should be remanded for resentencing.

In State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), this Court defined "extreme mental or emotional disturbance "less than insanity but more than the emotions of an average man, however inflamed. . . . " Hess' mental and emotional disturbance is

obvious from his numerous stories to law enforcement. A normal person does not take law enforcement officers through a crime scene based upon dreams or psychic feelings, except on television. An emotionally healthy adult does not lie chronically about something as serious as murder. The record also showed that Hess could not keep a job for long, was chronically depressed, suffered headaches, blackouts, and hyperactivity, had a "character" or personality disorder and tended to fabricate to make himself look important. The trial court considered none of these factors.

Impaired capacity

The judge also found that this mitigating circumstance did not exist. He said that Hess testified that he knew the difference between right and wrong and could appreciate the consequences of his conduct. (5/672-73) The ability to distinguish right from wrong (insanity test) is not the standard for finding the mental mitigators. The insanity standard is a much higher standard than the mental mitigators require. In State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), this Court stated:

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. . . Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

In fact, therefore, mental mitigation is intended to benefit those who are not legally insane, but still have mental impairments that affect their lives, and mitigate the crime. In Campbell v. State,

571 So. 2d 415 (Fla. 1990), this Court stated that "[t]he finding of sanity . . . does not eliminate consideration of the statutory mitigating factors concerning mental condition." 571 So. 2d at 418-19 (citing Mines v. State, 390 So. 2d 332, 337 (Fla. 1980). The Campbell court found both mental mitigators applicable despite the trial court's conclusion to the contrary. Id; see also Ferguson v. State, 417 So. 2d 631 (Fla. 1982) (finding that Ferguson "knew the difference between right and wrong and was able to recognize the criminality of his conduct and to make a voluntary and intelligent choice as to his conduct based upon knowledge of the consequences thereof" did not negate mental and emotional distress mitigator).

In this case, the judge noted that the defense presented no expert nor any report nor records to support the claim of impairment. Although the judge found their testimony uncorroborated, he failed to note that the evidence of Hess, his mother (by letter) and sister was also **unrebutted**. See Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) (when reasonable quantum of competent uncontroverted evidence is presented, court **must** find mitigator). Expert testimony is not required to support a mitigating factor. See, e.g., Crump v. State, 654 So. 2d 545, 547 (Fla. 1995).

Hess and his sister testified that, while in grade school, Hess had been found to be borderline retarded, and to have a learning disability. This resulted from a severe virus Hess contracted in the hospital as an infant. Because of the apparent

brain damage, John had learning and behavioral problems and was hyperactive. His mother wrote that, when he was a small child, he was slow and would pass out a lot. A spinal tap revealed that he would never be able to compete with other children mentally. In school, he was placed in special education because of a learning disorder. (4/357-59, 419; S/27) He only went to the tenth grade. (4/362) The State never attempted to rebut any of this evidence.

Many cases have established that learning disabilities and lack of education are valid mitigating circumstances upon which the judge and jury may rely. See Morgan v. State, 639 So. 2d 6 (Fla. 1994) (learning disorder and poor education weighed in favor of reversing death sentence); Herring v. State, 446 So. 2d 1049 (Fla. 1984) (mitigated by learning disabilities). The judge erred by failing to find and weigh Hess' learning disability.

Nonstatutory Mitigation

As nonstatutory mitigation, the judge found that Hess was a loving son to his parents, and gave it slight weight. He gave slight weight to the fact that Hess' father worked all the time, and Hess had no male role model. He gave minimal weight to the fact that Hess maintained employment, and slight weight to the fact that he provided financial support to his family. He gave slight weight to the fact that Hess accepted blame for others, and slight weight to his religious devotion. He gave some weight to the fact that Hess cared for his two sons because his first wife was mentally ill, but only slight weight to the fact that he was

traumatized by the loss of his sons who were taken by HRS. (5/673-78)

In discussing this factor, the judge noted that Hess testified that the loss of his children was due, in part, to his "character disorder" -- that he did not get along with people. A "character" or "personality" disorder is a recognized mental illness. Hess' character disorder should be a mitigating factor; instead, the judge used it to diminish the mitigation that Hess suffered severe depression due to the loss of his children. His implication was that Hess' mental illness was his fault; thus, he deserved to lose his children and should not be heard to complain. That Hess was remarried, with no children, does not negate the trauma he suffered. Moreover, unrebutted testimony indicated that he was never able to recover from the depression caused by this loss. (4/404)

Again, the judge stated that borderline retardation was not proven and did not exist. (5/674-75) To support this finding, he noted that Hess was studying in jail for his GED; aspired to go to college; had held jobs including that of a private security guard; and passed a security course. Because Hess said he was studying for his GED and aspired to go to college did not prove that he would ever be able to get his GED or get into college. Moreover, the State was never able to substantiate that Hess had any courses or passed tests to be a security guard. (11/806) In Michigan, Hess worked mostly as a dishwasher. (4/371) Because testimony that Hess was diagnosed as borderline retarded (5/563) was unrebutted, it was

error for the court to assume the role of a mental health expert and make a contrary determination.

He gave minimal weight to Hess' learning disorder, as a nonstatutory aggravator. (See "Impaired Capacity.") He found that Hess was intelligent, articulate, and studying for his GED. That Hess was in special education, went only to the tenth grade, and does not yet have his GED reflects otherwise. A reading of the transcript makes one wonder how the judge concluded that Hess was articulate; well-versed in the English language; and that his grammar, vocabulary and diction were at high level.

The judge gave little weight to the fact that Hess cooperated with law enforcement and that, without his statements, they could have made no arrest. He noted that Hess made varying statements; and that he lied five or six times. (5/678) As noted earlier, the lying may have been caused by Hess' mental disorder, and certainly showed emotional instability and an abnormal desire for attention. Moreover, Hess did not flee. Although his statements varied, he went to the sheriff's department whenever he was asked to come in, and provided information. He willingly provided fingerprints and handwriting samples, and invited the officers to search his home.

The court also gave minimal weight to the fact that Hess' wife was involved and was not charged, noting that she was not involved in the shooting, and only committed forgery. (5/678-79) Who knows what she did? As discussed in Issue IV, her testimony was totally unbelievable. It conflicted not only with Hess' statements, but with the physical evidence in the case. Although the judge noted

that Hess lied five or six times, he neglected to consider that Juli lied four times, or else she perjured herself at trial. She may well have been involved in the shooting, or she may have done nothing but perjure herself at trial.

The trial court gave some weight to the length of Hess' sentence in the sexual misconduct case -- 30 years, to which at least 25 years would be added if Hess were sentenced to life in this case. He gave minimal weight to Hess' good jail and trial conduct. This finding is not consistent with this Court's case law. Good conduct while incarcerated reflects potential for rehabilitation -- a recognized mitigating factor. See Skipper v. South Carolina, 476 U.S. 1 (1986); Kramer v. State, 619 So. 2d 274, 276 & n.1, 278 (Fla. 1993); Songer v. State, 544 So. 2d 1010 (Fla. 1989) (evidence of good prison record should be considered in mitigation); Craig v. State, 510 So. 2d 857 (Fla. 1987). In Menendez v. State, 419 So. 2d 312 (Fla. 1982), testimony that Menendez demonstrated a capacity for rehabilitation may have made the difference between life and death. Moreover, Hess testified that he was undergoing counseling in jail. His medication had been increased and modified. He was studying for his GED. He planned to continue programs in prison, including Bible study, and would like to be a minister. (5/557-59)

The trial court did find, as a nonstatutory mitigator, that Hess was under the influence of extreme mental and emotional distress, based on his mental background (some of which he had earlier rejected), and gave it moderate weight. For the reasons

discussed under "Extreme Mental and Emotional Distress," however, this should have been treated as a statutory mitigator and given great weight.

The trial court erred by rejecting unrebutted mitigation that was reasonably shown by the evidence, and failed to give sufficient weight to many of the nonstatutory mitigators. This skewed his weighing of the aggravators and mitigators in sentencing.

ISSUE VII

THE DEATH PENALTY IS NOT PROPORTIONATELY WARRANTED IN THIS CASE BECAUSE THE MITIGATION OUTWEIGHS ANY AGGRAVATING CIRCUMSTANCES.

Part of this court's function in capital appeals is to review the case in light of other decisions to determine whether the punishment is too great. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). This is not a death case. If Hess' conviction is affirmed, his sentence should be reduced to life for reasons set out in Issues V and VI, and additional reasons herein.

If this Court agrees with the arguments in Issue V, and finds both aggravating factors inapplicable, it will be required to remand this case for a life sentence. Banda v. State, 536 So. 2d 221, 225 (Fla. 1988); Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990) (death sentence not legally permissible unless state proves at least one aggravating circumstance beyond a reasonable doubt). If the Court finds only one aggravator valid, it must weigh the aggravator against the substantial mitigation in this case. Under Florida law, the death penalty is reserved for the

most aggravated and least mitigated first-degree murders. Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440, 434-44 (Fla. 1993); Songer, 544 So. 2d at 1011. As recognized in DeAngelo and Songer, this Court has rarely affirmed death sentences supported by only one valid aggravating factor, and then only when there was very little or nothing in mitigation. See also White v. State, 616 So. 2d 21 (Fla. 1993). This case is not in that category because the two aggravators reflect crimes for which Hess has already been sentenced, and thus deserved little weight, and because of the significant mitigation.

Hess was sentenced separately for robbery and it was considered by the jury in finding Hess guilty of felony murder. If this Court relies on the "committed during a robbery aggravator," Hess will be punished three times for the robbery. Thus, if this aggravator is found to exist, it should not be afforded much weight. Similarly, Hess received a thirty year sentence for the sexual molestation of his nieces, which occurred two years after this offense. These offenses constituted the only "prior violent felonies." Thus, Hess would be punished twice for this offense. Accordingly, this aggravator should not be weighed heavily in this case. There are no other aggravating circumstances.

In Terry v. State, 668 So. 2d 954 (Fla. 1996), this Court reduced Terry's sentence to life despite the same two aggravators as in this case (prior violent felony and committed during a robbery) and very little mitigation; in fact, the trial court found no statutory mitigation and rejected Terry's minimal nonstatutory

mitigation. Although the murder took place during the course of a robbery, the circumstances surrounding the actual shooting were unclear. This Court concluded that the homicide, "though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate." In the case at hand, the judge found significant nonstatutory mitigation, and should have found at least two of the statutory mitigators. See also, Sinclair v. State, 657 So. 2d 1138 (Fla. 1995) (Court vacated death sentence where defendant robbed and fatally shot a cab driver; Court found only one aggravator, no statutory mitigators, and minimal nonstatutory mitigation.); Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994) (where defendant walked into sandwich shop, fatally shot and robbed attendant, Court vacated death sentence, finding only :committed in course of a robbery" mitigator, and "significant" nonstatutory mitigation).

In Clark v. State, 609 So. 2d at 515-16, the Court vacated the death penalty in favor of life because only one aggravating factor remained and substantial mitigation existed. Clark killed a man to get the man's job. He presented uncontroverted evidence of alcohol abuse, emotional disturbance and abusive childhood. Although the defense expert opined that the statutory mitigating circumstances were inapplicable, this Court found that the strong nonstatutory mitigation made the death penalty disproportionate even though Clark's jury recommended death by a ten to two vote.

As in the case at hand, in Maxwell v. State, 603 So. 2d 490 (Fla. 1992), the State tried to discredit the mitigating evidence:

> While we acknowledge that this evidence leaves questions unanswered, we nevertheless must construe it in favor of any reasonable theory advanced by Maxwell to the extent the evidence was uncontroverted at trial. As we stated in Nibert, the court must find and weigh any mitigating circumstance established by "a reasonable quantum of competent, uncontroverted evidence."

Maxwell, 603 So. 2d at 492 (citation omitted). The evidence must be construed in favor of the reasonable theory advanced by Hess to the extent the evidence was uncontroverted at trial. There was absolutely no evidence presented that Hess did not suffer from the mental problems described in the penalty phase.

The Court is not bound to accept the trial court's findings concerning mitigation if the findings are disproved by the evidence. In Santos v. State, 591 So. 2d 160 (Fla. 1991), the trial court rejected The unrebutted testimony of Santos's psychological experts. This Court conducted its own review of the record and determined that substantial, uncontroverted mitigating evidence was ignored. The Court reversed and remanded Santos for the judge to adhere to the procedure required by Campbell. On remand, the judge again imposed death. This Court vacated the death sentence and remanded for imposition of a life sentence because the mitigation clearly outweighed the one aggravating factor -- a contemporaneous capital felony. Santos v. State, 629 So. 2d 838 (Fla. 1994).

Mental mitigation must be accorded a significant amount of weight based on this Court's previous decisions. See, e.g., Larkins v. State, 655 So. 2d 95 (Fla. 1995); Santos; DeAngelo, 616 So. 2d 440; Nibert, 574 So. 2d 1059. In this case, the circumstances of

the crime itself, with no apparent motive, and Hess' many conflicting stories to law enforcement, show serious mental disturbance. The mitigation clearly outweighs the aggravators. For these reasons, Hess' death sentence is disproportionate.

CONCLUSION

For the foregoing reasons, Hess should be acquitted and discharged. (Issue IV) Alternatively, he should be granted a new trial because the court erred in admitting his confession (Issue I); the State failed to prove his guilt beyond a reasonable doubt, and in the interest of justice. (Issue IV) Otherwise, his sentence should be reduced to second-degree murder (and the robbery conviction vacated) because the State failed to prove premeditation or felony murder. (Issues II and III) If Hess' conviction is affirmed, his death sentence should be vacated and his sentence reduced to life for reasons set out in Issues V, VI and VII, or remanded for resentencing pursuant to Issues V and VI.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this ____ day of May, 2001.

Respectfully submitted,

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/aao

TIME LINE

May 11, 1993

11:00 p.m.	--	Roving security guard saw Galloway alive
12:00 midnight	--	Lake Fairways resident saw Galloway alive

May 12, 1993

12:15 a.m.	--	John and Juli Hess left Shell station 15 miles from Lake Fairways
12:25 a.m. 12:30 a.m.	--	Lake Fairway neighbors heard shots (11/838)
12:36 a.m.	--	Shell card used 15 miles away (11/838)
1:04 a.m.	--	Barnett Bank ATM card used unsuccessfully
1:15 a.m.	--	Galloway found dead
4:00 a.m.	--	AT&T card used in Everglades Towers motel

DATE LINE

1993

May 10, 1993 -- Hess told employer about homicide of security guard which allegedly occurred that morning.

May 11-12, 1993 -- Homicide occurred.

May 13, 1993 -- Surveillance tape

May 14, 1993 -- Hess summoned to CID for interview with Allen (3 1/2 hrs.)

May 15, 1993 -- Search of Hess' home and car -- found nothing
Interview at CID with Allen (35 minutes)

May 15-19, 1993 -- Several phone conversations between Allen and Hess re dreams, etc.

May 19, 1993 -- Audiotaped walk-through of crime scene per dream (1 1/2 hours)

1995

March 14, 1995 -- Hess arrested in Michigan on unrelated Florida charges; waived extradition

March 31, 1995 -- Hess returned to Florida by Crone

April 1, 1995 -- Hess questioned by Crone at CID

April 1, 1995 -- First Appearance for unrelated charges

April 2, 1995 -- Hess interviewed by Crone (1 hr. 45 min)

April 4, 1995 -- Hess signed written invocation of rights

April 10, 1995 -- Hess brought to CID "to look at photo line-ups." Said he shot Galloway accidentally

April 11, 1995 -- Videotaped walk-through of crime scene
Statement taken by Dekle prior to walk-through

April 12, 1995 -- Crone took three more statements from Hess

April 14, 1995 -- Hess arrested for Galloway's murder

May 3, 1995 -- Indictment