IN THE SUPREME COURT OF FLORIDA

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

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

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

A. ANNE OWENS
Assistant Public Defender
FLORIDA BAR NUMBER O284920

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT/CROSS-APPELLEE

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

STATEMENT OF THE CASE AND FACTS

Appellee's Statement of Case and Facts is substantially correct except that Appellee omitted all of the facts indicating Hess' innocence, including the absence of physical evidence of Hess' guilt and the existence of evidence that someone else committed the crime. Detective Allen, the lead investigator at the time the crime was committed, admitted that they had insufficient physical evidence that Hess committed the crime and could not arrest him. No weapon, wallet or credit cards were ever found.

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.(10/61) Although Hess' car held only 10 gallons, Galloway's Shell card was used to purchase 13.396 gallons of gas and two quarts of oil. (11/988) Although the card was used approximately ten minutes after the homicide, the State presented no evidence that anyone at the Shell station, where Hess' wife worked, saw Mr. and Mrs. Hess purchase gasoline using someone else's credit card. They had no credit card of their own.

In the "dream sequence," which law enforcement purported to believe, 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. Crime scene investigators testified that they

submitted to FDLE the victim's uniform and fingernail clippings, but they had nothing to compare them with. (10/598-603,620,630) No one saw Hess in the area and no reasonable motive was found. The night clerk at the motel in the Everglades where Galloway's credit card was used several hours after the homicide, described a man and a red Mustang that in no way resembled Hess or his white Festiva. (11/934,945) The officers searched Hess' house and car and found nothing.

Detective Randy Crone, who took over the investigation two years later, also found no physical evidence that Hess committed the crime. He based his arrest solely on Hess' statements of April 11, 1995, and thereafter.(13/1202) According to Hess' "admissions," the two shots from his pants pocket left a hole and a burn on his thigh. The State found no evidence of blood or injury on Hess, or any holes in or blood on either uniform. If Hess stopped to pump gas and register at a motel, it would seem that someone would have noticed gunshot holes in his pants.

Agent Allen said he never told Hess about the ATM card. They did not release the fact that the wallet was trifold. Hess knew these facts. 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) He also said that Hess talked to various persons, including a local police precinct, about his dreams. (11/ 839) Hess said that Allen told him about the ATM card about three days after the crime, which would have been

about the day they had the three hour interview at the sheriff's department.[1] (13/1298) Hess did not know what bank issued the card (Barnett Bank), what it looked like, or where the perpetrator attempted to use it (Barnett Bank) (11/798,900-05); nor did he know what kind of gun or ammunition was used to kill the guard. (12/1138) He said the trifold wallet was black or dark when Mrs. Galloway described it as camel. (3/532-34)

Agent 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 and needed more evidence to tie things together. (11/932,934) Although Hess' hair and blood were sent to the FBI, they had nothing from the crime scene to compare it with. (11/947) Handwriting samples were "inconclusive." (11/932) A fingerprint on the motel receipt did not match.(11/935) They had nothing to support an arrest. (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)

Other inaccurate, incomplete or misleading "facts" in the Appellee's Statement of Case and Facts are as follows:

Pages 1-3: Many of Appellee's "facts" concerning the taped conversation between Warren, Partington and Hess are inaccurate or misleading. After the three hour surveillance, Partington said that Hess knew no more about the crime than two days before it happened. Refer to the section entitled "The Target Store Surveillance Tape," in Appellant's Statement of Facts, page 6.

Page 2: The only similar facts Hess told Warren two days

[1] The dream sequence shows how the officers led Hess into the information about the ATM card. See n.11, infra.

before the crime were that it was a security guard who was shot in the chest, and died almost immediately. One of the witnesses said Hess told him the shooting happened at the bus barn. Hess told Warren other stories, some of which were so far-fetched they just "went in one ear and out the other." (4/708)

Page 2: The media was present at the crime scene, photographed the body, and Hess saw it on the noon TV news. Although the police did not release that the victim's trifold wallet was stolen, a pocket was pulled out and the crime was immediately thought to be a robbery.

Page 4: Although Allen said that Hess had details that others did not have, almost none were specified. This is dealt with further in Issue I, infra.

Page 5: Although Allen testified that there was sufficient time to drive from the scene to the Shell station, one must also consider whether there was time to drive from the Shell station to Lake Fairways, shoot the guard, dispose of the weapon, and return to the Shell station, pump gas, and pay for it by 12:36, without being noticed. See Issue IV in Appellant's Initial Brief.

Page 5: Lloyd Sawyer did not fire Hess, but was present when Hess was fired. Hess admitted he had a grudge against Sawyer, but already had a new job with Omar Security by then. (11/822-28)

Page 6: Although Juli Hess first testified she left work at 11:30 or 12:00, records showed otherwise. She modified the time to "sometime after midnight." Her coworkers told detectives that the Hesses talked awhile and left about 12:15. (11/956-57, 12/1042-43)

Page 6: When Hess "admitted" he shot Galloway, he said it was an accident. Galloway grabbed his pocket and the gun went off.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY FAILING TO GRANT HESS' MOTION TO SUPPRESS BECAUSE THE TOTALITY OF THE CIRCUMSTANCES SHOW THAT HESS' STATEMENTS WERE INVOLUNTARY AND UNRELIABLE.

Appellee has omitted the fact that the invocation of rights form Hess signed on April 4 included not only the sexual activity

allegations, but any other charges pending against Hess or any other criminal matter in which he was a suspect or could reasonably be expected to become a suspect based on anything he might say.... It provided further that any waiver of rights must be in writing, signed by Hess and his attorney. A copy was forwarded to the sheriff's department on that date. (1/20; 2/28-29,97) Thus, the defense filed a motion to suppress, arguing that the statements Hess made to law enforcement after signing the invocation of his right to counsel must be suppressed. (2/27) At trial, defense counsel renewed his objections to the statements. (4/675)

Appellee mistakenly asserts that Agent Crone saw Hess sitting in the bench area on April 5, and Hess told him he needed to talk to Randy.[2] Actually, it was Deputy Stanforth who encountered Hess in the book-in area of the jail. Hess told him he needed to talk to "Randy," which was Agent Crone. Hess did not indicate what he wanted to talk to Crone about. Stanforth called Randy Crone (his half-brother) and told him Hess wanted to see him. (2/55,59)

Crone remembered that Stanforth called him, 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) Hess was a suspect in three different cases. He might have wanted to discuss any of them or none of them. It doesn't matter, however, because Randy Crone testified that he did not respond to this request or know what it was about. (2/38-40)

[2] Brief of Appellee, p. 19

Appellee asserts that Crone regarded Hess only as a witness until April 10th[3] when Hess "admitted" that he had accidentally shot Galloway. Crone said, at the suppression hearing (apparently to avoid application of the invocation of rights), that he did not think much about the invocation of rights form because he assumed Hess was a witness -- not a suspect, and they did not talk to him about the sexual activity case. (2/73) Crone insisted that, even though he read the 1993 records concerning the Galloway homicide on the plane while en route to Michigan to pick up Hess, he did not consider Hess a suspect. He said that 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 that he knew Hess was a suspect in this case when he went to Michigan to arrest him on unrelated charges. (12/1155) Crone identified a rights waiver that he had Hess sign on March 31, 1995, in Michigan, as to the sexual battery case. The form had the case number of the Galloway homicide on it and was signed by Randy Crone. (2/81-82) Crone said his paperwork must have become confused. (2/86)

Moreover, Allen admitted Hess was the primary suspect from two days after the crime until his arrest. (11/967) Whether Crone was personally aware that Hess had signed the invocation of rights form is irrelevant. "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

[3] Brief of Appellee, p. 21.

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. Id.

At the suppression hearing, defense counsel relied upon State v. Guthrie, 21 FLW 136 (Fla. 2d DCA Dec. 29, 1995), which held that, if a person is arrested and signs a written invocation of rights form, he cannot be questioned about that case or any other case that he's a suspect in. The invocation in Guthrie was almost identical to the one signed by Hess. The trial judge noted that the case conflicted with Sapp v. State, which was a First District case. (2/87-88) The prosecutor argued that, under Edwards v. Arizona, 451 U.S. 477 (1981), and Traylor v. State, 596 So. 2d 957, 964 (Fla. 1992), the police may not interrogate as to unrelated charges until counsel has been made available, **except** when the accused initiates the contact. (2/89) The judge responded that "it's just common sense that after they sign the form you can't talk to them again unless they ask you to and waive their rights pursuant to Miranda. (2/9) Thus, it would seem that the judge would rule in favor of the defense. Instead, however, he denied the motion.

At the time of the suppression hearing and trial, State v. Guthrie was the law in the Second District. The hearing was held in the Second District. Thus, the trial judge was required to follow the law in the Second District because this Court had not yet overruled it. See Mason v. State, 710 So. 82, 83 (Fla. 1st DCA

1998) (court constrained to follow precedent that sentencing errors may be raised at any time without preservation, despite 5th District's decision otherwise); Ellis v. State, 703 So. 2d 1186 (Fla. 3d DCA 1997) (when confronted with binding precedent, trial judges are obliged to follow that precedent even if the might with to decide case differently). The purpose of this rule was explained by the Fourth District in State v. Hayes:

> The District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts -- District Courts of Appeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. Alternatively, if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it. Contrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive.

333 So. 2d 51, 53 (Fla. 4th DCA 1976) (footnote and citations omitted). Appellant Hess should not be punished because the trial court failed to follow the law. Even under Sapp, which had not yet been decided, Hess' statements should be suppressed.

Appellee argues that interrogation was not imminent when Hess signed the invocation on April 4th. There is some discrepancy as to whether Hess talked to Crone between April 4 and April 10. Hess testified that Crone "pulled me out of the jail" about every day from April 2nd through April 10th, perhaps nine or ten times altogether. (2/45-46) On April 7, when he was questioned without having asked to talk to anyone, he took his "invocation of rights"

with him. Although the agent told him that his lawyer would be there, no lawyer was present. (2/32-33) Hess said he gave statements to law enforcement on April 7, 11, and 12, 1995. (2/31)

On the other hand, Crone testified that he did not take any statements from Hess between April 2 and 10, 1995.[4] He did not recall Hess being brought from the jail to CID to see him. (2/73) The answer may be that some of these statements concerned other crimes with which Hess was charged, and some of the interrogations were by different officers. Nevertheless, if any of Hess' recollections are true (and they were not specifically denied), his interrogation was imminent in all three cases, all of which were covered by the invocation the officers disregarded. Because Crone admitted that he was not aware of it until Hess showed it to him on April 10, 11, or 12, although a copy was filed at the sheriff's office on April 4, it is unlikely that any of the other officers checked to see whether Hess had invoked his rights. If so, perhaps, like Crone, they did not consider it important. (2/73)

Appellee again asserts that, while in the book-in room, Hess said he wanted to talk to "Randy." As we already explained, this entire point is irrelevant because "Randy" Crone testified that he did not know what Hess wanted to talk about and did not contact him

[4] Appellee points out, on page 28 of the Answer Brief, that Crone testified that, after the April 1 interview, "John would ask me to come get him, come talk to me, and I would take him back to the jail." (2/72) This contradicts Crone's trial testimony that he had no contact with Hess from April 2 until April 10, 1995.

pursuant to the request. (2/73-74) Crone said the only request Hess made in jail was for help with his dreams. (2/79) Considering Hess' history of making up stories, Crone probably ignored the request. Nowhere in the record does Crone ever even suggest that the April 10 interview resulted from Hess' request. Instead, he testified that he had Hess brought in to look at a photo line-up, although it is hard to imagine who else he suspected. (2/75)

Our interpretation of the facts of this case obviously differs from that of Appellee.[5] On the evening of April 10, 1995, Crone arranged to have Hess, his wife, Juli, and Lloyd Sawyer all brought into the criminal investigation division. Hess was left in an interrogation room waiting while Crone talked to Sawyer. Appellee asserts that Hess was there to look at a photo line-up while Crone questioned Sawyer. Although Crone did so testify, there was no evidence that Hess was ever shown a line- up or that Crone had any suspects to put in a line-up, nor was there any testimony as to why Sawyer was there as both Allen and Crone testified throughout the trial that Sawyer was not a suspect. As far as we know, Hess was not told why he was there. Thus, he was left in a room wondering what was going on. Hess believed that his wife was in the building, which was true at some point. He kept asking for her but was put off. (13/1266-74) 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.

Again, Appellee insinuates that Hess started the conversation

[5] See Brief of Appellee, pp. 29-30.

with Griner about telling the truth. It seems apparent from the quotation in Appellee's brief,[6] that Griner did so. We know for certain that Griner approached Hess who was sitting alone in a room waiting for Crone, and began a conversation. Thus, the case is not in any way comparable to Davis v. State, 598 So. 2d 1182 (Fla. 1997) (officer expressed disappointment in defendant who then confessed). Although Appellee asserts that Griner merely told Crone that Hess wanted to talk to him, he omits the fact that this was after Hess had "confessed" to Griner, without Miranda warnings, that he was the shooter. (2/79,84-85)

The entire situation at the sheriff's department that night is suspicious. Surprisingly, Captain Griner talked to both Hess and his wife prior to turning them over to Agent Crone to take their taped statements. (12/1186) While Crone interviewed Sawyer (who he claimed was not a suspect), he left Hess sitting alone in a room, which Griner then entered and started his speech about telling the truth. In the meantime, Hess said he knew his wife was also there, although the officers would not let him see her.[7] After Hess made the incriminating statements to Griner, Crone talked to him for three hours before taking a taped statement. (2/61-63; 12/1180; 12/1092-93) Crone admitted discussing Hess' blackouts and need for mental health treatment, and may have also discussed prosecuting Hess' wife. Hess was despondent from lack of medication, and made

[6] Brief of Appellee, p. 29.

[7] Other testimony indicated Juli was not brought in until 2:00 a.m. (12/1184)

admissions that were not accurate, based on the evidence. Hess' wife also changed her story that night, implicating Hess, allegedly because she was threatened with prosecution. (12/1184)

Although Hess made further admissions during the next 2 days, each story varied from the last.[8] All statements were made without counsel, although Hess showed Crone his invocation of rights on the 11th, if not sooner. Hess never turned over a gun or wallet or credit cards or gave the officers any physical evidence to substantiate his guilt. At trial, he said he made it all up and knew nothing about the homicide. Thus, his admissions are questionable at best.

Appellee again asserts that an objection to the "totality of the circumstances" is not preserved. The defense argued that Hess' right to counsel had been violated. The totality of the circumstances is not the objection, but the theory under which this Court determines whether a violation occurred. Again, we point out that defense counsel would have expanded his argument had Guthrie v. State not been the precedent in the Second District at that time, and squarely on point.

Appellee points out that Allen testified that Hess knew information that only the perpetrator would know. This evidence was that the wallet was trifold and the ATM card was taken. Of course, how Galloway was shot was on the news at noon the day of the crime. By the time Hess did the dream sequence walk-through, he had spent at least seven hours talking with law enforcement, and

[8] See "Statement of Facts" in Appellant's Initial Brief.

had seen photos of the crime scene on TV and in the papers. Hess said he knew the wallet was missing because the media called it a robbery. Hess testified that the officers spoke with him many times about the cases when the conversations were not taped. (2/38) Allen said that Hess talked to numerous people about his dreams, including a priest, psychic, and law enforcement officers at a local precinct. (11/839) Who knows how many other local precincts he visited?

During the dream sequence, law enforcement encouraged him to talk about an ATM card. He first said the guard (which was him in the dream) did not have one; then that the perpetrators kept it; then they tried to use it at an unknown bank and then the perpetrator got mad and cut it up. (11/899-919) Interestingly, Hess did not know what bank issued the card or at which bank the perpetrator tried to use the card. That the card was issued by Barnett Bank and the perpetrator tried to use it at Barnett Bank indicates that the perpetrator knew which bank issued the card. When Hess finally claimed he was responsible for the shooting, he said the gun went off accidentally, while in his pants pocket. He did not know what kind of gun or ammunition was used. (13/1201) 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)

Although defense counsel may not have argued all of the factors brought out in our Initial Brief, most of them were brought out during the testimony at the suppression hearing; thus, the

trial court was aware of them and should have considered them and ruled based on the totality of the circumstances. Davis, 698 So. 2d 1182. Additionally, defense counsel renewed the motion at trial, giving the trial judge (who was not the judge at the suppression hearing) an opportunity to make a new ruling based on the trial testimony in addition to the suppression testimony. He declined to do so.

Although Appellee compares this case with Walker v. State, 707 So. 2d 300 (Fla. 1997), in which relief was denied, the case at hand involves much more than merely six hours of questioning and coercion. This case is more similar to Sawyer v. State, 561 So. 2d 278 (Fla. 2d DCA 1990), discussed in our Initial Brief, especially because law enforcement had nothing more than suspicion that either Sawyer or Hess were the perpetrators, and law enforcement used both defendants' histories of blackouts to undermine their reliance on their own memories.

In this case, when Griner was lecturing Hess about telling the truth, Hess said maybe he was not telling the truth because of his blackouts. (2/63) Crone testified that he discussed blackouts with Hess on April 10, before Hess gave his statement. (12/1172-78) During the video walk-through he also complained of a headache. The penalty phase record also showed that Hess had a brain infection as an infant, could not keep a job, was chronically depressed, suffered headaches, blackouts, and hyperactivity, and tended to fabricate to make himself look important.

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.

Appellee has set out a list of evidence which the State believes to be "competent substantial evidence."[9]

(1) The evidence that Hess told someone (the other overheard from another room) that a security guard was shot that morning is not competent evidence that Hess committed this murder, because Galloway's murder did not happen for two more days, and the facts Hess provided were very general.

(2) Although Hess told Warren he usually carried a gun in his car, and had another at home, he did not happen to have it that day. He later admitted to Partington and Allen that he did not own any firearms. (11/974-79; 12/1001) The State had no evidence that he ever owned a firearm. Even if he did, this is not competent evidence that he killed Galloway. Many people own guns.

Hess told the men that there was information the police had not given out, to explain how he knew about the murder two days early 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. (10/740-41) This was just Hess' way of explaining away something he made up two days earlier.

Hess told lots of other stories. He said Galloway had worked

[9] Brief of Appellee, p. 39.

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. (10/734) Galloway had never worked for any security company except the private company at Lake Fairways. (11/970) No other witness confirmed that Hess ever met Galloway. (11/985) He could not remember Galloway's name. Moreover, this does not show premeditation.

(3) None of this shows premeditation. Although Allen may have so testified, other evidence showed that the media covered the shooting which was on television later the same day. As discussed under Statement of Facts, p.2, there was little that Hess knew and many ways he could have learned the information. Warren said, during the surveillance taping, that Hess did not tell them anything about the crime he did not say Monday before it occurred. (10/763) By the time of Hess' 3-hour discussion with Hess, there certainly had been much media coverage. Hess was interested in security and may have asked questions of various witnesses or officers.

(4) None of this shows premeditation.

(5) Hess told Allen that he had worked at a guard post similar to Lake Fairways, and had 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. (11/814-15) It is obvious that Hess was obsessed with security guards. The remainder of this section only shows that Hess changed his story over and over and over again. It has

nothing to do with premeditation.

As to Appellee's attempted rebuttal of our showing that the crime was not premeditated,

(A) Although Hess told Allen he had driven by Lake Fairways at about ten that night, he testified later that he worked that night. The State apparently never attempted to verify it. Even if he did drive by, he may have intended only to talk to the guard.

(B) If Appellee is suggesting that Hess killed Galloway so that he could blame it on Sawyer, this is a bit far-fetched and was not even suggested at trial. If this were the motive, why didn't he kill Sawyer? Besides his statement that Galloway was once rude, he also described him as a very nice man, a "very sweet old man." (10/734) At trial, Hess said he never met Galloway and the State produced no evidence that he had, other than Hess' statements. This one comment -- that Galloway once was rude -- hardly supports a premeditated killing. Because no one knows how the guard was really killed, we cannot speculate that it was premeditated.

Appellee cites Peterka v. State, 660 So. 2d 59 (Fla. 1994), in which the defendant's possession of the victim's property supported premeditation. In this case, none of Galloway's property was ever found, nor did anyone explain what happened to it, other than the ATM card "eaten" by the ATM.

In attempting to rebut Mungin v. State, 689 So. 2d 1026 (Fla. 1995), and Norton v. State, 709 So. 2d 87 (1997), Appellee notes nothing showing premeditation -- certainly not that he disliked Sawyer, nor that some of his stories, and that of his wife, were

indicative of premeditation. In Rogers v. State, 60 So. 2d 237 (1995), the evidence indicated a struggle, which was Hess' final version prior to trial. That Hess may have studied the layout of Lake Fairways does not mean he intended to kill the guard.

Similarly, in Brown v. State, 644 So. 2d 52 (Fla. 1994), the defendant was arrested with the victim's credit cards and wallet. Finney pawned the victim's VCR. Finney v. State, 660 So. 2d 674 (Fla. 1995). In Sager v. State, 699 So. 2d 619 (Fla. 1997), and Voorhees v. State, 699 So. 2d 602 (Fla. 1997), Sager and Voorhees had been with the victim drinking, and they confessed to various people. They had made long distance calls on the victim's card. As in Mahn v. State, 23 Fla. L. Weekly S219 (Fla. 1998), Hess' taking of the wallet may have been an afterthought as Hess had no reason to want to rob Galloway.

ISSUE III

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

Appellee first asserts that this argument was not preserved. While this may be true, it does not matter because this Court must review every death case to determine whether the State presented sufficient evidence to support the verdict, regardless of whether the issue was raised. 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); Fla. R. Crim. P. 9.140(h) (requires that capital cases be examined for sufficiency even if issue not raised on appeal). In this case, a review of the entire record shows that the State presented insufficient evidence of felony murder to support Hess' conviction.

The cases cited by Appellee are distinguishable because, in those cases, the State presented uncontroverted evidence that the defendant robbed the victim, and that it was not just an afterthought. In Atwater v. State, 626 So. 2d 1325 (Fla. 1993), for example, the prosecutor presented evidence that Atwater had obtained money from the victim before; that the victim was afraid of the defendant; that the defendant had told a friend that he was not going to give Atwater any more money. There was evidence that the victim had money in his trousers pocket and when he was found the pockets were both pulled out and only a few pennies were on the floor. 626 So. 2d at 1328. In the instant case, there was no conclusive evidence that Hess knew the victim and no evidence that the victim had money in his pockets. Although the wallet was missing, the perpetrator may have taken it as an afterthought, as he had no motive to rob the victim. Moreover, Hess described the wallet as dark or black when the victim's wife said it was camel colored. It was never found.

Similarly, in Brown v. State, 644 So. 2d 52 (Fla. 1994), the defendant was arrested with the victim's credit cards and wallet. Finney pawned the victim's VCR. Finney v. State, 660 So. 2d 674 (Fla. 1995). In Sager v. State, 699 So. 2d 619 (Fla. 1997), and

Voorhees v. State, 699 So. 2d 602, 613-14 (Fla. 1997), Sager and Voorhees had been with the victim drinking. Voorhees admitted that while the victim was tied up, Voorhees and Sager searched his house looking for things to steal and that they had taken the victim's remaining cash from his pockets. This was consistent with the evidence adduced at trial. Sager's statements did not contradict the evidence that Voorhees actively participated in the crime but rather tended to support it. Sager stated that Voorhees gave Sager the phone cords to tie up the victim and was looking around the apartment for things to steal. The evidence showed that Voorhees and Sager took the victim's car, ATM card, and telephone calling card; that they drove to several ATMs, where they attempted to withdraw money from the victim's bank account; and that they used the victim's calling card. Voorhees. As in Mahn v. State, 23 Fla. L. Weekly S219 (Fla. 1998), Hess' taking of the wallet may have been an afterthought as Hess had no reason to want to rob Galloway.

Hess and his wife both worked. There was no evidence of a drug of alcohol problem. No evidence indicated Hess needed money. If he did, there would certainly be better places to rob. One would not expect a security guard to carry much cash. The perpetrator got little -- a tank of gas and a motel room he did not need, and a bunch of credit cards he must have disposed of. We don't know if there was any cash.

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 FROM FURTHER PROSECUTION.

This is an exceptional case. As Appellee notes, our argument sounds like a jury argument. This is required, however, to explain why the State's evidence is insufficient. Besides a lack of evidence, other than hearsay and innuendo, the evidence the State presented to the jury all conflicted with the State's other evidence (or lack thereof) and, often, with the physical evidence. While it is true that the jury can decide to believe one witness over another, in this case, they apparently believed one witness whose testimony could not have been true based upon the State's physical evidence.[10] We are not asking this Court to usurp the role of the jury, but, instead, to evaluate the State's evidence to determine whether it was sufficient to convict a man of first-degree murder, and sentence him to death. This is not a "weight of the evidence" argument, but a sufficiency argument.

Appellee suggests that we are asking this Court to conclude that state witnesses Allen, Crone, Sawyer, Juli Hess, Lindsey and Walker should not be believed. This is not true. In a few instances we may have suggested that a state witness was mistaken as to his recollection, but the only witness that does not deserve

[10] Juli Hess is the only State witness who provided any testimony against the defendant other than law enforcement recountings of Hess' myriad of prior stories. Her testimony was beyond belief. She said they stayed at Lake Fairways 30 minutes before returning to the Shell station where she worked to get gas using the victim's credit card. Additionally, the police searched for the gun where Juli suggested that Hess threw it over the bridge, to no avail. (See our Initial Brief for other examples).

belief is Juli Hess. This is because other state evidence showed that what she told the jury could not have been true.

As Appellee asserts, it is true that, besides Hess' statements, the State had the testimony of Juli Hess.[11] What Appellant intended to assert was that, other than Hess' statements, the State had no **direct** evidence. Juli's testimony was entirely circumstantial. She did not say that she saw her husband shoot Galloway or that she saw the gun. If her testimony were believed or believable, Hess could have walked up to talk to the guard, found him dead, taken his wallet and a gun on the ground, and returned to his car, later deciding to dispose of the gun. He told Agent Allen at one time that he liked to see how close he could get to guards before they saw him. We are not suggesting that this happened, but Juli's testimony is as consistent with this theory as with the theory that her husband shot Galloway.

Furthermore, as Appellee points out, Juli testified that she signed for the gasoline, although the FDLE report said that neither Juli's nor John's signature matched the ones on the receipts. (11/995, 12/996-97) She said her husband unsuccessfully tried to use the victim's ATM card, but the State's witness said the fingerprint taken from it was not his. (11/932) Juli testified that her husband signed the victim's name on the hotel registry, although Agent Allen said that 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

[11] See Brief of Appellee, p. 60.

forties, 190 pounds, with brownish, slightly graying hair, driving a classic red Ford Mustang, around 1964 or 1965. (11/934,942-43) Allen admitted Hess did not match Gore's description, and his car was a white Fiesta. (11/945) Nor did the signature match that of John or Juli Hess.

Appellee attempts to explain why the sheriff's department was unable to substantiate Hess' admissions by noting that Juli testified that Hess allegedly stopped on a bridge and she did not see a gun afterwards. As a matter of fact, she did not see a gun before either. She only said that she saw what looked like the outline of a gun under Hess' shirt which was not tucked into his pants, and she did not see it until Hess returned from Lake Fairways. Moreover, law enforcement searched under the bridge and did not find a gun. Since Juli was going through the wallet and using Galloway's credit cards, surely she would have known if Hess threw the wallet over the bridge. She did not say he threw his pants (with a hole in them if his confession were true) over the bridge. Fingerprints and handwriting cannot be thrown over the bridge.

Juli's testimony was so unbelievable that it is hard to think of it as evidence. Further, it was very convenient that all of her testimony was inconclusive, i.e., she did not actually see Hess shoot Galloway; she did not actually see the gun; and she did not actually see Hess throw it over the bridge. Nor does any of this testimony alone prove that Hess committed the crime -- it is all circumstantial. She gave four prior statements in which she claimed

no knowledge of the crime. She changed her statement on the night Hess "confessed," when both she and Hess had been brought to CID at the same time. (2/1184-86) Although Juli testified to having committed numerous felonies for which she was not prosecuted, she testified that Agent Crone threatened to arrest her for murder unless she implicated Hess. (12/1067)

Although, as Appellee has pointed out, this Court is not the trier of fact, Agent Crone testified that they had not yet decided whether to prosecute her, which is consistent with her testimony of a threat, perhaps implied rather than direct, rather than a deal. Perhaps Juli felt threatened by what Crone explained to her that she could be charged with, which Crone believed was only the truth.

Appellee argues that Agent Allen denied having told Hess details about the crime. The trial was two years after the crime and memories may have faded some. Allen conducted a three-hour interview with Hess two or three days after the crime, which was apparently untaped. Most of the information Hess gave to Allen proved to be untrue. (11/806-08) We are not suggesting that Allen lied, but that Hess could easily have gleaned information from his questions or seen photos in the file. We know from the walk-through that Allen attempted to get Hess to talk about the ATM card after Hess said there were no credit cards, and denied that the guard had an ATM card.[12] Allen also testified that Hess talked to numerous

[12] Agent Allen asked, "What are they doing with your wallet?" Hess said they were looking 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. He said the men were looking for an ATM card but he

people about his dreams, including a priest, a psychic, and law enforcement officers at a local precinct. (11/839) Agent Crone said that, two years later, they showed Hess 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)

At the suppression hearing, Hess testified that when he made a second statement April 2, 1995, Agent Crones told him much about the case and showed him "so much" [evidence?] in the interrogation room. (2/44) Could this have also happened when Agent Allen first interviewed Hess for three hours a few days after the murder?

Appellee asks, "what is the reasonable hypothesis of another perpetrator that this Court should adopt?"[13] If Hess is not guilty, who did commit this crime? There are several possibilities. First, it may have been someone who merely wanted to rob Galloway, although one would not expect a security guard to carry a lot of money when on duty. Alternatively, it might have been someone who knew Galloway and had a grudge against him.

It might have been Lloyd Sawyer, despite his denial.[14]

---

didn't have one. Allen asked whether the guard had an ATM card and if they got it. Hess said 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. (11/899-02)

[13] See Brief of Appellee, p. 61.

[14] Although Appellee notes that both Sawyer and Juli Hess denied committing the crime, this does not mean they did not. Hess also denied committing the crime and was convicted. Neither

Although Hess eventually said he made up the story about Sawyer (12/ 1092), he told the officers on several occasions that Sawyer was the perpetrator. Lloyd Sawyer was 32 years of age, about 6 feet tall, 22 pounds with brown hair. Unlike Hess, he 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 hotel clerk. (12/1165-67)

Agent Crone testified that on April 10, 1995, he learned that Sawyer had been working on the night of the homicide. (2/79) Sawyer testified at trial, however, that he was not at work. Instead, he became ill and called in a replacement. Sawyer said 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 trial, he did not know Sweeney's whereabouts. (11/1022-24) Thus, no one was able to substantiate the time Sawyer left his post. It seems unusual that he would need to stay for an hour-and-a-half to explain what the guard needed to do, especially when he was ill.

A third possibility is Juli Hess. In fact, Hess testified in court that he was covering up for his wife. Although she probably did not commit the murder by herself, 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. Juli apparently had no alibi and appears to have had a boyfriend. (12/

Sawyer nor Juli Hess had an alibi.

1071-72) Juli seems most likely as it would also account for Hess knowing details of the crime. Moreover, his relatives testified that he had a history of taking the blame for others, having done so for his siblings and his first wife.

Appellee asks how the "unknown perpetrator" theory is possible based on Juli Hess' testimony. If Juli was the perpetrator then the answer is obvious. Otherwise, Juli may have fabricated her testimony based on what she knew about the crime. By then, her husband had been arrested and she had been brought into the sheriff's office for further questioning. Her husband was making "admissions" and Agent Crone was suggesting that she could be prosecuted. As discussed in our Initial Brief, her testimony did not coincide with her husband's "admissions," and was not verified by any physical evidence.

Although this Court is not the weigher of fact, to a large extent, Juli's story was counteracted by the State's physical evidence, or lack thereof, and was not possible, based on other irrefutable evidence. Juli was not even sure she heard gunshots. If they had stayed at Lake Fairways for 30 minutes, they could not have bought gasoline, as she also testified, at the Shell station where she worked at 12:36 a.m. as was indicated by the receipt. By itself, her testimony was insufficient to convict Hess.

The State presented evidence concerning the crime and testimony from several law enforcement officers. They played the tape of Hess' conversation with Warren and the undercover officer at Hess' job site, two nights after the homicide; the audiotape of

the walk-through during which Hess allegedly recited information from his dream; and his confession to having accidentally shot Galloway, made two years later. The only information they alleged that he had which law enforcement had not released was that the perpetrator had taken an wallet and ATM card,[15] and Hess' knowledge of the layout at Lake Fairways, which he may have known because he too was a security guard. All of his knowledge is easily explainable. If law enforcement did not release these details, perhaps the media did, or perhaps Hess talked to a deputy on patrol or listened to the police radio. The State presented no physical evidence connecting Mr. or Mrs. Hess with the homicide.

In Long v. State, 689 So. 2d 1055, 1057-58 (Fla. 1997), this Court dismissed because the State's only evidence that Long committed the crime were a hair and a fiber, neither of which were conclusive. The State bears the responsibility of proving a defendant's guilt beyond and to the exclusion of a reasonable doubt. Cox v. State, 555 So. 2d 352 (Fla. 1989). Although the question of whether the evidence is inconsistent with any other reasonable inference is a question of fact for the jury, Holton v. State, 573 So. 2d 284 (Fla. 1990), cert. denied, 500 U.S. 960, (1991), nevertheless, a jury's verdict on this issue must be reversed on appeal if the verdict is not supported by competent,

[15] Hess said the wallet was dark or black when Mrs. Galloway said it was camel. As previously mentioned, during the dream sequence, Allen sort of led Hess into the ATM story. Moreover, what would one do with an ATM card other than try to use it at a bank? Hess did not know which bank issued the card or which bank the perpetrator went to.

substantial evidence. Evidence that creates nothing more than a strong suspicion that a defendant committed the crime is not sufficient to support a conviction. Cox; Scott v. State, 581 So. 2d 887 (Fla. 1991); Williams v. State, 143 So. 2d 484 (Fla. 1962). As in this case, other evidence suggested Long could have committed the crime, but the evidence was insufficient to convict. The same is true in this case.

This Court must exercise its procedural responsibility to review all of the evidence in a death case to assure that it is competent and substantial evidence to support the verdict.

ISSUE V

THE TRIAL COURT ERRED BY FINDING TWO STATUTORY AGGRAVATORS, WHICH THE STATE FAILED TO PROVE, AND BY FAILING TO FIND ESTABLISHED STATUTORY AND NONSTATUTORY MITIGATION.

1. No Significant History of Prior Criminal Activity

Appellee asserts that the trial court did not err by relying on Hess' sexual misconduct convictions which occurred about two years after the murder and for which he was convicted about a month before the conviction in this case. The crux of Appellee's argument is that this Court made an aberration[16] in Santos v. State, 629 So. 2d 838, 840 (Fla. 1994), which should now be corrected.

Appellee failed to note various other cases which show this Court's opinion in Santos was not an aberration. For example, in Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995), this Court stated:

---

[16] The aberration was from (from Ruffin v. State, 397 So. 2d 277, 283 (Fla.), cert. denied, 454 U.S. 882 (1981), and Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989) (contemporaneous crimes are not prior history).

> Harvey argues . . . that the mitigating circumstance of lack of a significant history of prior criminal activity existed in Harvey's case because of Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989), which was decided after Harvey. In Scull, we found when considering the existence of this mitigator, the term "**prior**" **means before the commission of the murder**. In the instant case, the basis of the trial court's rejection of this mitigator was because Harvey had escaped from jail while awaiting trial on the murder charges. We reject Harvey's contention because at the time of Harvey's sentencing, the law provided that any significant criminal activity "prior" to sentencing precluded the finding of this mitigating circumstance. Ruffin v. State, 397 So. 2d 277 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). Scull was not a fundamental change in the law that requires retroactive application. See Lucas v. State, 568 So. 2d 18 (Fla. 1990) (prosecutor's jury argument that mitigation of no significant prior history of criminal conduct should be rejected because of contemporaneous criminal conduct in violation of Scull was not fundamental error).

656 So. 2d at 1257-58 (footnotes omitted).

In Pardo v. State, 563 So. 2d 77, 81 (Fla. 1990), this Court noted that

> Contemporaneous criminal conduct cannot be considered as prior criminal activity. Scull. However, it would be absurd to say that Pardo, who had already murdered two people, had no significant history of prior criminal activity when he committed the last seven murders. **Only the criminal activity, not the convictions for that activity, must occur prior to the murders for which the defendant is being sentenced**. Perry v. State, 522 So. 2d 817 (Fla. 1988).

Accordingly, Santos was not merely an aberration.

Appellee's assertion that punching a police chief at age 16, while standing up for his high school girlfriend, and later wife, supports this factor. The State failed to prove that this was true and it was not substantial.

ISSUE VI

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

That Hess realized his children were better off where they were, and that he was incapable of raising them properly does not mean he did not love them and did not feel terrible about losing them. Hess obviously realized he had emotional problems that prevented his caring for them. When he did have them, however, he tried hard to take care of them. The judge found in mitigation that he was a caring father.

Appellee suggests, at page 85, footnote 13, that Hess is a pychopath or sociopath, now known as an anti-social personality disorder because he and his sister testified that HRS told them he had a character disorder. Hess interpreted this as not being able to get along with others. Actually, his "character" disorder, if a real diagnosis, was probably a Personality Disorder. The DSM IV lists eleven types of personality disorders: Paranoid Personality Disorder; Schizoid Personality Disorder; Schizotypal Personality Disorder (detachment from social relationships); Anti-social Personality Disorder (disregard for and violation of rights of others); Borderline Personality Disorder (instability in interpersonal relationships, self-image, and affects and impulsivity); Histrionic Personality Disorder (excessive emotionality and attention seeking): Narcissistic Personality Disorder (grandiosity, need or attention, lack of empathy); Avoidant Personality Disorder: Dependent Personality Disorder, and Personality disorder Not Otherwise Specified. American Psychiatric

Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed., p. 629). Hess appears to fall into several of these categories but not the Anti-Social Personality Disorder category. His problems seem to be mainly those involving grandiosity, attention-seeking and lack of self-image. The medication he testified to taking, however, Lithium and Klonopin, are generally prescribed for Manic Depression and seizures, panic disorder or anxiety. Physicians Reference Guide, (Pocket Book, 1998).

It appears from Appellee's brief that the trial court did find all the non-statutory mitigation presented. Appellee lists nearly twenty nonstatutory mitigators. The only problem is that he accorded most of it little or slight weight even though it was supported by Hess' sister and other relatives, in letters, and was unrebutted by the State. As Appellee notes, the weight of the mitigators is generally left to the trial judge; however, in cases such as Santos v. State, 591 So. 2d 160 (Fla. 1991), this Court found that, despite trial court's findings, the two statutory mental mitigating factors existed and the aggravating factor of cold, calculated premeditation did not exist. See also, Crump v. State, 622 So. 2d 963 (Fla. 1993) (crime was not CCP); cf. Maulden v. State, 617 So. 2d 298 (Fla. 1993) (aggravating factors inapplicable); Crump v. State, 654 So. 2d 545 (Fla. 1995); (court failed to consider numerous nonstatutory mitigation presented.)

ISSUE VII

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

It is quite obvious that Hess had mental and emotional problems despite Appellee's argument that he presented no psychological evidence. The fact that he told law enforcement story after story after story, all differing, and many incriminating, does not indicate a man with all of his faculties intact.[17] Moreover, he, his sister and mother (in a letter) told of a serious brain ailment Hess suffered as an infant. They testified he was in classes for children with learning disabilities; that he was severely depressed, and that he had lost his children to HRS due what he called a "character" disorder.

Appellee observes that our reliance on Maxwell v. State, 603 So. 2d 490 (Fla. 1992), is odd.[18] We relied on that case only for the proposition that the court must consider and weigh any uncontroverted evidence presented by the defense in penalty phase. In this case, we refer to testimony of Hess and his sister concerning his prior mental and adjustment problems. The Maxwell court noted that "we . . . must construe [the evidence] 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). There was absolutely no evidence presented that Hess did not suffer from the

---

[17] Although no psychological testimony confirmed it, Hess appeared to be a pathological liar. Law enforcement also came to this conclusion, without the aid of a professional. (13/1243)

[18] Brief of Appellee, p. 92 n.16,

mental problems described in the penalty phase. Undersigned counsel is unaware of any case law or statute that mandates that mental or emotional distress be presented or corroborated by expert testimony, as suggested by the trial court and Appellee.

Appellee also attempted to distinguish Clark v. State, 609 So. 2d 513, 515-16 (Fla. 1992), because Clark was drunk when he killed a man to get the man's job. Clark presented uncontroverted evidence of alcohol abuse, emotional disturbance and an abusive childhood. This Court found only one remaining aggravator, and held that the strong nonstatutory mitigation made the death penalty disproportionate even though Clark's jury recommended death by a ten to two vote. In the instant case, if either aggravator is eliminated (see Issue V), Hess will also have one aggravator remaining. Rather than being drunk or on drugs, he was mentally ill at the time of the offense. He did not kill Galloway to get his job, because only persons living at Lake Fairways could work at the guard gate. That he killed Galloway to rob him seems unlikely because it was not shown that he was in need of money (he had a job and no drug or alcohol habit) and had no reason to believe that Mr. Galloway had money with him; in fact, Appellee argues throughout the brief that Hess had a grudge against Galloway, although there was no evidence, other than Hess' statements, recanted at trial, that he even knew Galloway.

Appellee unsuccessfully attempts to compare this case to Mendoza v. State, 700 So. 2d 670, 697 (Fla. 1997). The portion of

Mendoza quoted by Appellee,[19] distinguishes that case from Terry v. State, 668 So. 2d 954, 965 (Fla. 1996), and Jackson v. State, 575 So. 2d 181 (Fla. 1991), for exactly the same reason we argued in our Initial Brief, and Appellee scoffed at in this brief: that the robberies that were used as aggravators were contemporarious in Terry and Jackson, while Mendoza had a prior armed robbery conviction. This lessens the weight of the aggravator.

Moreover, the trial court in Mendoza found no history of drugs or mental problems. In the instant case, the trial judge did find, as a nonstatutory mitigator, that Hess was under the influence of extreme mental and emotional distress, based on his mental background, and gave it moderate weight. For the reasons discussed in our Initial Brief, Issue VI, however, this should have been treated as a statutory mitigator and given great weight. For these reasons, Mendoza is nothing like this case.

It is obvious that Hess is emotionally ill. The totality of the circumstances and the mitigation presented here, compared with only one aggravator (the other is invalid), require the conclusion that death is not a proportionate penalty in this case.

CROSS-APPEAL ISSUE I

WHETHER THE LOWER C0URT ERRED IN DENYING THE PROSECUTOR'S MOTION IN LIMINE AND PERMITTING DEFENSE COUNSEL TO ARGUE A COMPARISON TO OTHER CASES WHERE NO EVIDENCE HAD BEEN INTRODUCED REGARDING SUCH CASE.

Appellee complains, in cross-appeal, that, over the prosecutor's objection, defense counsel compared this case to those

[19] Brief of Appellee, p. 93.

of Ted Bundy, Jeffrey Dahmer and Charles Manson. This Court has repeatedly recognized that "wide latitude is permitted in arguing to a jury." Thomas v. State, 326 So. 2d 413 (Fla. 1975); Spencer v. State, 133 So. 2d 729 (Fla.), cert. denied, 369 U.S. 880 (1962). The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. Thomas.

In Garcia v. State, 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986), cited by Appellee, the defense attempted to have Garcia's sentence reduced to life because two accomplices had plea bargained for life sentences and the third accomplice, tried later, received concurrent life sentences. In Garcia, the Court explained that proportionality had not yet been extended to cases in which the trial court imposed life. 492 So. 2d at 368. Thus, Garcia is not relevant to this case which deals with a jury considering proportionality.

Appellee apparently could find no relevant case other than Herring v. State, 446 So. 2d 1049, 1056-57 (Fla. 1984), bearing on the subject. In Herring, defense counsel wanted to bring in other defense lawyers to tell the jury about their clients. This is far different from the brief mention of three famous serial killers.

Even if defense counsel's argument was not based on evidence in the case, it was relevant as to whether the jury should recommend life or death. Obviously, this argument did not dissuade the jury, which recommended death by an 8 to 4 vote, and therefore, was harmless, at most. If Appellee wants a new penalty phase

trial, however, Appellant is in agreement.

CERTIFICATE OF SERVICE

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

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

A. ANNE OWENS
Assistant Public Defender
Florida Bar Number 0284920
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/aao