IN THE SUPREME COURT OF FLORIDA, STATE OF FLORIDA

KEITH BRENNAN,	:	SUPREME COURT NO.: 90,279
Appellant,	:	LOWER COURT
vs.	:	CASE NO.: 95-911CFB
STATE OF FLORIDA,	:	
Appellee.	:	

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

INITIAL BRIEF OF APPELLANT

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ISSUES ON APPEAL

ISSUE I: THE IMPOSITION OF THE DEATH SENTENCE ON THIS APPELLANT WHO WAS SIXTEEN YEARS OF AGE AT THE TIME OF THE OFFENSE CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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ISSUE XIV THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE

STATEMENT OF THE CASE

THE INDICTMENT

On April 4, 1995 a Lee County grand jury returned an indictment charging the Appellant, Keith M. Brennan, and a co-defendant, eighteen year old Joshua D. Nelson[1], with a March 10, 1995 first degree premeditated murder (Florida Statute 782.04, 777.011), first degree felony murder (Florida Statute 782.04, 777.011) and robbery with a deadly weapon (Florida Statute 812.13, 777.011). At the time of the alleged offense, the Appellant was sixteen years of age [I-R-2] and a sophomore in highschool. [V-R-607][2]

PUBLIC DEFENDER APPOINTED

On April 5, 1995 the deputy public defender was appointed to represent Appellant. [I-R-11]

MOTIONS CHALLENGING STATUTE'S CONSTITUTIONALITY

On November 15, 1995 Appellant filed a motion challenging the constitutionality of Florida Statute 921.141(5)(d). [II-R-41 ff.] The court denied the motion. [VII-R-930]

On November 22, 1996 [VII-R-844] Appellant filed a motion challenging the constitutionality of Florida Statute 921.141(5)(h).

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[1]Hereafter referred to as "Nelson" or "Co-Defendant". Nelson was sentenced to death and has an appeal pending before this Court in case number 89,540.

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

On December 2, 1996 the motion was denied. [VII-R-890][3]

MOTION TO DECLARE DEATH NOT A POSSIBLE PENALTY

On May 1, 1996 the Appellant filed a "Motion To Declare Death Not A Possible Penalty". [II-R-66 ff.] On September 25, 1996 the Appellant and the State stipulated before the court that Appellant was sixteen years of age at the time the incident occurred. He was born on March 18, 1978. The decedent died on March 10, 1995. [V-R-543] Appellant argued because of his age being subjected to the death penalty constituted cruel and unusual punishment. [V-R-544 ff.] The court denied the motion. [V-R-551 and VI-R-796][4]

MOTION TO PROHIBIT SUBSTITUTION OF MEDICAL EXAMINER

On October 28, 1996 Appellant filed a "Motion To Prohibit Substitution of Medical Examiner". [VI-R-814] The motion was denied. [VII-R-914] [5]

MOTION IN LIMINE

On December 2, 1996 Appellant filed a motion in limine to prohibit portions of the testimony of expert witness Darren Esposito. [VII-R-879] The court reserved its ruling. [VII-R-900][6]

OTHER PRETRIAL MOTIONS

Numerous other pretrial motions were filed. Since they do not relate to the specific issues contained in this brief, their

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[3]This is the focus of Issue VII.

[4]This is the focus of Issue I.

[5]This is the focus of Issue VI.

[6]This is the focus of Issue V.

content is not detailed here.[7]

TRIAL--JURY SELECTION

On December 3, 1996 [VIII-T-949] the trial commenced. On December 4, 1996 the jury with two alternate jurors was sworn. [VIII-T-950] [8]

TRIAL--GUILT PHASE

The guilt phase was tried on December 4, 5, and 6, 1997.

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[7]Other pretrial motions included "Motion To Exclude Sympathetic Evidence" [II-R-48 ff. and VII-R-929]; "Motion To Suppress Confessions, Admissions, and Statements" [II-R-94 and IV-R-459]; "Motion for Change of Venue" [VI-R-651 ff.]; "Amended Motion For Change of Venue" [VI-R-799]; "Second Amended Motion For Change of Venue" [VI-R-830]; "Third Amended Motion For Change of Venue" [VI-R-869 and VII-R-891]; "Motion To Videotape Victim Impact Evidence" [V-R-649 and VII-R-918]; "Motion For Individual Voir Dire" [VI-R-790 ff. and VII-R-906]; five "Motion[s] in Limine" reference proposed state witnesses [VI-R-817 and VII-R-918; VII-R-863 and VII-R-912; and VII-R-867 and VII-R-905]; and "Motion For Sequestration". [VII-R-877 and VII-R-897].

[8]Prior to the voir dire, Appellant renewed his motion for change of venue and individual sequestered voir dire. The motion was denied. [XIII-T-5 and XIII-T-14] Of the forty prospective jurors summoned only three did not recognize the facts of the case. [XIII-T-13] In response to the question "...is there anyone...who feels they've made up their mind or [XIII-T-6]...could not be fair and impartial jurors", six prospective jurors identified themselves. [XIII-T-13] The court excused them. [XIII-T-14 and XIV-T-241] Of the first sixteen prospective jurors only one had not read or heard about the case. [XIII-T-132] Of the next seven prospective jurors six had been exposed to publicity. [XIV-T-210 ff.] Of the next five four were exposed. [XIV-T-268 ff.] On the second day of trial additional prospective jurors were summoned. The court noted "most of them" had "read, heard, seen, listened" to media coverage of the case. [XIV-T-338] Counsel noted all but four of the new panel acknowledged exposures. [XIV-T-348] When the judge requested those who had "already made up their mind" to come forward, ten panel members responded. The court excused seven. [XIV-T-338] Appellant again moved for individual sequestered voir dire and was denied. [XIV-T-349] Appellant exhausted his preemptory challenges and moved for additional ones. The court granted an additional challenge. [XV-T-405]

After the State rested its case, [XVII-T-832] Appellant moved for a judgment of acquittal [XVII-T-833] which was denied. [XVII-T-836] Appellant rested without calling any witnesses. [XVII-T-838] After closing arguments the jury was instructed and began deliberations at 12:30 p.m. [XVII-T-945] The jurors' lunches were brought to the jury room. [XIII-T-944] At 1:50 p.m. the tape of Appellant's statement was replayed to the jury. [XVII-T-947] The jury resumed deliberations at 2:30 p.m. and returned with a verdict at 3:00 p.m. [XVII-T-994] The actual deliberation, including lunch, was one hour, fifty minutes. The jury found Appellant guilty as charged on all counts. [XVII-T-995]

POST-GUILT PHASE MOTIONS AND HEARING

Between December 16, 1996 and January 16, 1997 four matters were addressed.[9]

PENALTY PHASE

After presentation of penalty phase evidence on January 21, 1997, the jury began deliberations at 3:55 p.m. [XI-R-1505] It returned with its advisory verdict at 5:00 p.m., recommending by a vote of 8-4 that the death penalty be imposed. [XI-R-1507]

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[9]On December 16, 1996 Appellant filed a motion for new trial. [VIII-R-1078] The motion was denied. [IX-R-1228] On January 7, 1997 Appellant filed a motion requesting the impaneling of a new jury to make the sentencing recommendation alleging the jury was tainted during the six week hiatus between the guilt and penalty phases. [VII-R-947] The motion was denied. [IX-R-1231] On January 13, 1997 Appellant filed a motion for a change of venue for the purpose of the penalty phase. [IX-R-1096 ff.] The motion was denied. [IX-R-1232] On January 16, 1997 the court heard arguments and ruled concerning what aggravators and mitigators would be permitted. [IX-R-1225 ff.]

AMENDED MOTION FOR NEW TRIAL

On February 21, 1997 the Appellant filed an "Amended Motion For New Trial". [XI-R-1618 ff.] On March 14, 1997 it was heard and denied. [XI-R-1655]

SPENCER HEARING

On March 14, 1997 the court conducted a Spencer Hearing.[10] [XII-R-1660 ff.] Over Appellant's objection, a witness not listed in discover or otherwise disclosed was permitted to testify. [11] [XII-R-1685]

SENTENCING

On March 20, 1997 the court sentenced the Appellant as an adult to 160 months (13.3 years) for robbery with a deadly weapon to run consecutively with any other sentence. [XII-R-1691] The court sentenced Appellant to death for premeditated murder. [XII-R-1709] A copy of the sentencing order [XII-R-1716 ff.] is contained as Appendix A.

NOTICE OF APPEAL

On March 31, 1997 a timely "Notice of Appeal" was filed. [XII-R-1738]

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[10]Spencer v. State, 615 So.2d 688 (Fla. 1993).

[11]This is the subject of Issue VIII.

STATEMENT OF THE FACTS

GUILT PHASE

DISCOVERY AND IDENTIFICATION OF THE DECEDENT AND CAUSE OF DEATH

On March 22, 1995 DONALD JAMES LAUMEYER, a Cape Coral maintenance worker [XV-T-454], and his co-worker, JOSEPH GONZALES observed vultures in an open field. [XV-T-455] They investigated and discovered a body. They called the police. [XV-T-455]

CAPE CORAL POLICE LIEUTENANT WILLIAM RIVERS [XV-T-463] responded to the call and secured the scene. [XV-T-464]

FDLE CRIME LABORATORY ANALYST KAREN COOPER [XV-T-475] processed the scene. The deceased was underneath bushes. [XV-T-477] He was fully clothed except for one shoe. His hands were tied behind his back with a shoe lace. A shoe sans its lace was found nearby. A small piece of plywood covered his left shoulder. [XV-T-478] The body had been subject to animal predation. [XV-T-480 and 501] Cooper obtained tissue samples from the body during its autopsy [XV-T-485] for DNA testing. [XV-T-486]

MEDICAL EXAMINER CAROL JEAN HUSER[12] indicated Dr. Wallace Graves performed an autopsy on the deceased. [XV-T-496] She had reviewed Graves' report, a report by Dr. William Maples, an investigator's report, depositions, dental records, photographs and

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[12]Appellant objected to Dr. Huser's testimony because she was not present at the autopsy which was performed by another pathologist. [XV-T-492] This objection was the subject of a previous motion in limine, [VI-R-814 and VII-R-914] and is the focus of Issue VI.

miscellaneous papers.[13] Based upon this review Huser testified that death was caused by blunt trauma to the head. [XV-T-500] Opining that the death was a homicide, Dr. Huser noted that because of decomposition it was impossible to determine if there were injuries to the throat. [XV-T-501] Dr. Huser was not present at the autopsy. [XV-T-504] Her opinions relied solely upon the reports of others. [XV-T-505]

INVESTIGATOR SALVADORE MEDINA [XV-T-507] delivered the deceased's skull, dental charts and x-rays to Dr. Maples. [XV-T-508 ff.]

The deceased's aunt LISA KATHLEEN BAEHNE, a registered dental hygienist [XV-T-514], identified a photo of herself, the deceased and his vehicle taken in March, 1995. [XV-T-515] She and her employer, Dr. Burke, had performed dental work on the deceased in 1992. She sent the deceased's x-rays and charts to Cape Coral Detective Thomas Rall. [XV-T-516]

CAPE CORAL DETECTIVE THOMAS RALL obtained dental records by Federal Express from Dr. Burke in New York. He turned them to the medical examiner. [XV-T-510 ff.]

PROFESSOR WILLIAM ROSS MAPLES, a forensic anthropologist, [XV-T-523] received a skull from the medical examiner. [XV-T-524] The professor identified the deceased's dental records as being those of the Appellant. At a sidebar the prosecutor indicated: "Judge, I don't want to put him through this".

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[13]There was no testimony as to how Dr. Huser knew the documents she was relying upon were authentic.

The court recessed and a lengthy sidebar occurred in chambers concerning the professor, who the court characterized as "a world-renowned genius...falling apart in front of our very eyes". [XV-T-522] Excerpts from that side bar are reproduced in the argument section of this brief.[14]

Resuming the stand Professor Maples, over Appellant's objection, reidentified the dental records as being those of the decedent. [XV-T-536] He concluded, rather ambiguously, that "...the dental records of Tommy Owens were the same as the dental records of--of--of this case".[15] [XV-T-537] Maples reconstructed and photographed the skull. [XV-T-537]

THE DECEDENT'S LAST CONTACTS

The decedent's mother, LINDA OWENS [XV-T-542] last saw him on March 10, 1995. He owned a 1994 Ford Probe. [XV-T-544] She reported him "missing" the next day. [XV-T-545]

The decedent dated TINA FLETCHER'S fifteen year old [XVI-T-643] daughter, Kitty. [XVI-T-634] On March 10, 1995 Fletcher called decedent's car phone unsuccessfully attempting to locate her daughter. A second call from Fletcher resulted in the decedent meeting with her at approximately 11:00 p.m. [XVI-T-635, 636] While with Fletcher, decedent was joined by Appellant and Nelson.

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[14]The admissibility of this witness testimony is the focus of Issue II.

[15]Despite the leading nature of the prosecutor's questions, beginning at XV-T-525 the professor's testimony becomes stilted and disoriented.

[XVI-T-637][16]

THE INITIAL INVESTIGATION AND PHYSICAL EVIDENCE

CAPE CORAL POLICE DETECTIVE CHARLES GARRETT was the lead investigator in this case. He went to the crime scene, attended the autopsy, [XVI-T-665] interviewed witnesses, collected evidence and interrogated Appellant and Nelson. [XVI-T-666][17]

CAPE CORAL RESIDENT LUCIEN GAUMOND identified a blood-stained garment and a knife he found near his home. [XVI-T-646, 647] Appellant "lived around the corner" from Gaumond. [XVI-T-652]

CAPE CORAL POLICE OFFICER SCOTT ALAN JOHNSON responded to Gaumond's call and recovered the items. [XVI-T-654, 655]

FDLE CRIME LABORATORY ANALYST DARREN ESPOSITO [XVI-T-691][18] conducted a DNA analysis of tissue represented as being from the decedent. [XVI-T-704] The results were compared with DNA analyses on blood stains on the knife and clothing found by Gaumond. [XVI-T-709] A DNA match was obtained. [XVI-T-710] No DNA test results were obtained from the baseball bat. [XVI-T-713] The DNA types contained in the profile occur once in seventeen thousand eight

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[16]Decedent did not know the daughter's location, but indicated to Fletcher that he would try to find her. [XVI-T-638] Fletcher did not find her daughter that night. [XVI-T-645]

[17]He retrieved a baseball bat from Lake Kennedy near Appellant's home. [XVI-T-675] He interviewed the Porth sisters in Pennsylvania. He went to New Jersey where Appellant and Nelson were arrested. [XVI-T-686]

[18]Esposito's testimony was the subject of a motion in limine and was received over Appellant's objections. It is the focus of Issue V.

hundred (17,800) caucasians.[19] [XVI-T-720]

THE PORTH SISTERS

On March 10, 1995, 17 year old MISTY PORTH [XV-T-550] and her sister, 15 year old TINA PORTH, resided in Cape Coral with their parents. [XV-T-551] Misty was Nelson's "on-and-off girlfriend". [XV-T-552] Misty met Appellant and the decedent through Nelson. [XV-T-554] Tina was Appellant's "girlfriend on and off". [XV-T-554] Misty indicated her parents were moving out of state. She and her sister did not want to move. She discussed this with Appellant and Nelson a few weeks prior to March 10, 1995 and "We all decided just to go to Fort Lauderdale". [XV-T-555]

On March 10, 1995 the Porth sisters met Appellant, Nelson and decedent at a mall. [XV-T-556] While decedent was on a cell phone, the two boys told the sisters that if they "still wanted to go, that they would pick us up at...1:00, 1:30 (a.m.)". The sisters agreed. [XV-T-557]

Subsequently Nelson and Appellant met the sisters. Nelson was driving decedent's vehicle. [XV-T-560] They drove north until the following morning, [XV-T-562] when they stopped at a hotel outside Daytona. [XV-T-563]

Later, Misty indicated "they...told us that they had beat...(decedent) with a bat and they had tied his hands and his [XV-T-563] feet and left him there". The Porth sisters "washed the blood off" the boys' shoes. [XV-T-564]

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[19]At least 21 individuals in Lee County, Florida would have the same genotypes, with some 337,078 matches worldwide. [XVI-T-722]

The foursome spent two days at Daytona Beach and then proceeded to Tom's River, New Jersey. [XV-T-565] Shortly after arriving in New Jersey, the sisters contacted relatives who came to get them. [XV-T-567]

Fifteen year old [XVI-T-599] TINA LYNN PORTH [XVI-T-597] testified she dated Appellant and considered Nelson a friend. [XVI-T-599] She knew the decedent. [XVI-T-600] The two sisters planned to "run away" with Appellant and Nelson. [XVI-T-602] On March 10, 1995 plans were made to leave early the following morning. [XVI-T-605] The sisters packed clothing and were picked up by the two boys at approximately 1:45 a.m. [XVI-T-606] The boys had possession of decedent's car. [XVI-T-607] The four arrived in Daytona and stopped at a motel at about 5:00 a.m. [XVI-T-610] Later that day Nelson told Appellant the girls:

> ...wanted to know what was going on...they (Appellant and Nelson) said...(Appellant) told (decedent)...that they had to go down a back road to meet one of his friends...and when they got down there they parked...(Appellant and Nelson) got out of the car... [XVI-T-611] they kept trying to get...(decedent) out of the car...(appellant) put a slice in the bumper of...(Decedent's) car...knowing this would get him out of the car...(Decedent) kneeled down to look at it and when he did... (Nelson) hit him with a baseball bat...(Nelson) chased him...(Decedent) said "I know what you want, take the car..." [XVI-T-612]

Nelson indicated to the sisters "that they had to kill him or else [XVI-T-612] they'd definitely be caught". Porth continued:

> They took turns beating Tommy with the baseball bat and with their hands until he was knocked out and then...(Appellant) slit Tommy's throat with a razor, tied his hands

> behind his back and they drug him behind a bush and left him... [XVI-T-613][20]

The four stayed at the motel on Saturday, Sunday and Monday. [XVI-T-615, 616] On Monday they drove to New Jersey. [XVI-T-618] The sisters called relatives who came for them. [XVI-T-621]

THE NEW JERSEY INVESTIGATION

On March 23, 1995 POLICE OFFICER BERNARD SNYDER, of Lacy Township, Ocean County, New Jersey, [XVI-T-735] assisted Cape Coral Detective Garrett in locating the decedent's vehicle in Lanoka Harbor, New Jersey [XVI-T-736] at the residence of James O'Donnell. Snyder, went to the residence with two county prosecutor investigators.

> ...We knocked on the door and we were met by Mr. O'Donnell and he invited us in... [XVI-T-737]

> ...We were asked by Cape Coral Police...to locate the car and...to find out who was with the car, that there were missing people from (Lee County)...and (the Cape Coral Police) wanted to find out...who was with the car...

At the residence the officers encountered Appellant and Nelson. [XVI-T-738] Investigator Tom Hayes interviewed Nelson. Investigator Vincent Frulio interviewed Appellant.[21]

INVESTIGATOR VINCENT FRULIO [XVI-T-750] contacted Appellant at O'Donnell's home [XVI-T-752] where he interviewed Appellant in a bedroom. [XVI-T-753] Without providing Miranda warnings, [XVI-T-

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[20]Admissibility of the Co-Defendant's confession is the focus of Issue IV.

[21]Snyder indicated: "...One was in the livingroom, one was in the bedroom". [XVI-T-739]

762] Frulio indicated:

> I asked...(Appellant) who the vehicle belonged to and he advised that it belonged to... (decedent) [XVI-T-754]
>
> ...he stated he had last saw...(decedent) on or about March 12th of 1995...
>
> ...He saw...(decedent) at a party down in Florida...
>
> ...He said at the party...(decedent) had left the party with a female and that he (Appellant) and Mr. Nelson left the party with...(decedent's) vehicle... [XVI-T-755]
>
> ...He stated that he and Mr. Nelson did not know anyone at this party and decided to take...(decedent's) car and leave the party...
>
> ...Nelson had a spare key to the vehicle. [XVI-T-756]

The vehicle was impounded. [XVI-T-739] The boys remained at the residence.

The following day Snyder received a call that Appellant and Nelson had left the O'Donnell residence. Snyder found them six or seven blocks away, sleeping on a neighbor's porch. [XVI-T-740]

On March 24, 1995 Garrett informed Snyder that the decedent's body had been found. On March 25, 1995 Garrett and a Lee County state attorney investigator, James Fitzpatrick met with Snyder in New Jersey. With the Lee County Officers, Snyder located Appellant and Nelson and arrested them [XVI-T-741] for "receiving stolen property". The suspects were transported to the police station and interrogated. [XVI-T-742]

STATE ATTORNEY INVESTIGATOR JAMES FITZPATRICK [XVI-T-764] was present during Appellant's arrest. [XVI-T-765] After the arrest

Fitzpatrick interrogated Appellant [XVI-T-766] and obtained a taped statement which was played to the jury. [XVI-T-777 through XVI-T-822]

APPELLANT'S TAPED STATEMENT OF MARCH 25, 1995

Following is a summary of Appellant's taped statement of March 25, 1995 found in the record at V-R-577 ff. and XVI-T-777 ff.

On March 10, 1995 Appellant met Nelson at a McDonalds. They telephoned Owens. Owens met them. [V-R-577] Appellant and Nelson had been planning "to leave town" with Tina and Misty Porth that evening. [V-R-578] Owens vacillated about going with them, and decided not to go. Appellant and Nelson decided "to find a car either by friends or by stealing [V-R-579] one". The three boys met the two girls at a mall and Appellant and Nelson "were to go and get a car and then...pick them up". [V-R-580]

They "rode around" with Owens, went to the beach, Dillards, and Mariner Highschool. [V-R-581] Not finding a friend's home near Mariner Highschool [V-R-583] they "pulled off on a road", around midnight. [V-R-585] Owens was talking on his cellular phone. [V-R-584] Appellant and Nelson exited the vehicle to smoke cigarettes. [V-R-585]

Thinking they saw someone on foot nearby [V-R-586] Nelson "got the bat out". The metal baseball bat belonged to Owens. [V-R-587] Owens continued his phone conversation. Appellant subsequently noticed a "scratch" on the vehicle's back bumper [V-R-588] and advised Owens. Owens got out of the car to examine the bumper. [V-R-590] Nelson had been:

> ...playing with the bat...like swinging it around, not really hard, not really quick... [V-R-588]
>
> ***
>
> (Nelson)...was playing with the bat and he didn't mean to hit him, but Tommy walked into the path where he was swinging.
>
> ...Tommy walked into the path of it.

The bat struck Owens in the head. [V-R-590]

> ...then he thought that we were trying to steal his car, which we had no intention of doing.
>
> ...He said...take the car...and he fell down... He got up, and we tried to tell him we didn't want his car and that it [V-R-591] was an accident. He got up screaming like we were trying to kill him.
>
> ...he started running...we started to go after him and (Nelson)...hit him with the bat (after)...about 40 feet. [V-R-592]

Appellant indicated he "guessed" Nelson hit Owens. It was dark. He did not see the bat swing. But, "I think (Nelson)...hit him". [V-R-593]

> ...He was yelling. And we were like, Tommy, we're not stealing your car...and he wouldn't keep quiet...I took his shoe lace [V-R-595]...
>
> ***
>
> ...I tied his hands behind his back. [V-R-596]
>
> ...(Decedent said) you can take the car. I won't tell anybody. And we were like...we don't want the car...we just wanted to get away without him thinking we were trying to kill him...
>
> ...We were just...sitting there, and he started screaming again...(Nelson) hit him...with the bat...in the face (more than once)... [V-R-597]

> ...he was unconscious...we tried to carry him behind a bush. [V-R-598]

Appellant and Nelson each took one of Owens' legs and drug him "behind a tree". [V-R-598] then:

> ...We started hitting him again...we didn't plan on it...I took the bat [V-R-599]...I hit him in the chest once and then in the face. [V-R-599]

They went through Owens' pockets. [V-R-600] Owens' wallet was in the car. The keys were in the ignition. They left the area and went "to the girls' house." [V-R-601] They met Tina and Misty Porth. Later at a motel the girls were advised of the incident. [V-R-605]

The boys' bloody clothing was "lost...somewhere on the trip". [V-R-606] Owens' wallet was destroyed, [V-R-603] his beeper sold, [V-R-601] and a bankcard used on at least one occasion. [V-R-603]

At the conclusion of the first segment of the statement Appellant indicated:

> ...we didn't plan to do it...I'm real sorry it ever happened...I feel sorry for his family...it just started out as an accident and we couldn't---through fear---that's how it happened. [V-R-607]

Garrett then interviewed Nelson. After Nelson's interview Garrett took a "second segment" statement from Appellant. [V-R-608] Appellant acknowledged:

> ...I had a box cutter...I thought I'd try to put him out of his misery by cutting his throat...It wouldn't even cut, so I went back over it a couple of times. [V-R-609]...I think I just broke a couple of layers of skin, it wasn't bleeding real bad. It was just bleeding...It sounded like he was gurgling through his mouth and his throat...[V-R-610]

Appellant made three to five "cuts". He wrapped the box cutter in underwear "and we lost it". The bat was thrown into a canal. [V-R-614]

PENALTY PHASE

VICTIM IMPACT EVIDENCE

SUSAN MEIER, who knew the decedent through her children and school activities, [X-R-1304] testified that he was:

- a good boy
- real honest and caring
- a big teddy bear
- real nice and loving
- a large lovable kid

Meier indicated that the decedent "...always wanted to be a policeman". [X-R-1305]

TINA FLETCHER, whose daughter dated the decedent, [X-R-1310] indicated that he:

- was a very polite young man with eyes that...sparkle
- would...talk to all the older people and just smile and talk to the grand kids...always smiling. [X-R-1311]
- (was) very caring.
- always tried to better himself. [X-R-1312]

Fletcher indicated:

> ...I don't have the future that we all had thought of because we won't have a good cop out on the island that's going to be there for our protection, for our children's protection, somebody that would drive down the road if you were walking and you had groceries and everything and he might have had his car full, he would have stopped and picked you up, took all your food, took you where you needed to go

and not asked anything in return. We don't have the security anymore... [X-R-1313]

Seventeen year old KITTY STEPHENSON, Fletcher's daughter, [X-R-1316] dated the decedent. She related:

- When my grandpa died, I called him and he came over and I cried in his arms...he's like the only person I could talk to and I could [X-R-1317] rely on him...I just trust him.
- He was always polite.
- He wanted to be a police officer. [X-R-1318]

LINDA OWENS, the decedent's mother, [X-R-1321] testified that the decedent "wanted to be a police officer". [X-R-1322]

MITIGATION

ROBERT BRENNAN, SR., Appellant's father, indicated that Appellant was two years of age when Appellant's mother died. [X-R-1326] Prior to her death she was confined to a mental institution. [X-R-1328] She suffered severe mental depression. She committed suicide by inhalation of carbon monoxide from automobile exhaust. [X-R-1327] It had an effect on Appellant. [X-R-1328] When Appellant was eight years of age he was sexually abused by an older brother over a period of six months. [X-R-1329] Appellant engaged in several athletic activities which included little league football, wrestling, and weight lifting. [X-R-1331] Appellant was a follower rather than a leader. [X-R-1332] Nelson exerted influence over him. [X-R-1330 ff.]

RUSSELL WILLIAM MASTERSON, a licensed clinical psychologist, [X-R-1338] examined Appellant in May 1995, and found him in the high range of mild depression. Appellant had superior

intelligence. [X-R-1339] He suffered from a personality disorder with paranoid and antisocial features. The MMPI and Meyers Briggs indicated Appellant "would act somewhat intuitively without thinking...he would act on emotions rather than thought and that he probably wouldn't use good judgment...he did feel intimidated and threatened by (Nelson)..." [X-R-1340] He had a socialpathic personality. [X-R-1363] Appellant's juvenile record reflected no previous incidents of violence. [X-R-1367]

ROBERT WALD, a psychiatrist, [X-R-1370] examined the Appellant [X-R-1371] and interviewed his stepmother. [X-R-1372] Wald determined:

- O Appellant's natural mother committed suicide. [X-R-1372]
- O Appellant had been raped by his brother. [X-R-1371]
- O Because of his small stature, Appellant was "picked on and made fun of by older children". [X-R-1372]
- O Appellant's older brother led him into criminally chargeable offenses. [X-R-1372]
- O Appellant had "two hits of LSD" the day before the incident. [X-R-1372]
- O Appellant indicated Nelson threatened him to participate in the incident. [X-R-1372]

In his early years to puberty Appellant led "a very chaotic, unstructured, unsupervised and dysfunctional life". [X-R-1371]

Wald found and indication of retarded growth. He found Appellant was under emotion distress at the time of the incident. [X-R-1373]

Wald indicated the Appellant possessed a "sociopathic personality or personality disorder". [X-R-1378]

SONIA REEVES, a licensed practical nurse and therapist, treated Appellant in 1993 [X-R-1386] for drugs and alcohol at Southwest Florida Addiction Services. (SWFAS) [X-R-1387] Appellant successfully completed this inpatient program, returned to school, and was named to the National Honor Society. He was a member of the wrestling team. [X-R-1388] Reeves characterized Appellant's family as dysfunctional and Appellant's propensities to be a follower. [X-R-1389]

SWFAS DIRECTOR BETH NEHAMKIN indicated Appellant successful completed the long-term SWFAS program [X-R-1409] at age fourteen. [X-R-1410] He came from a dysfunctional family and was a follower. [X-R-1411]

LILLIAN BURGERON, a nurse [X-R-1414] and Appellant's aunt [X-R-1415] indicated Appellant had been born by a caesarean procedure. She indicated that when Appellant:

> ...was first born we questioned the size of his head...it was way out of proportion to the size of his body, almost..hydrocephalic ...I don't think anything was ever done with it...we also questioned whether there was dwarfism... [X-R-1415]

Most of Appellant's life he suffered from a speech impediment. [X-R-1415] Appellant was "definitely a follower, definitely. He's not a leader, never has been a leader." [X-R-1410]

ETHEL BRENNAN, Appellant's grandmother [X-R-1418] testified to Appellant's birth complication, his mother's suicide, his mother's mental problems, [X-R-1419] and the Appellant's small stature and fear of dwarfism. Appellant always acted intimidated and "he was a follower, definitely". [X-R-1420]

LYNN BRENNAN, Appellant's stepmother, [X-R-1424] first saw Appellant when he was 2 1/2 years old when "his hands were scalded and he had cigarette burns on his body". Appellant told her "his (natural) mother put them under scalding hot water...and put cigarettes on him". [X-R-1425] Brennan related how an older brother sexually battered Appellant for a period of six months. [X-R-1427]

SPENCER HEARING

PROBATION AND PAROLE OFFICER DON HUTTA conducted a presentencing investigation interview of Appellant. He observed a tattoo of a "circle with an A" on Appellant's right forearm. Appellant told him that it meant "anarchy". The Appellant's booking report reflected that he did not possess this tattoo when he was arrested. [XII-R-1664, ff.][22]

[22]The admissibility of Hutta's testimony is the focus of Issue VIII.

SUMMARY OF ARGUMENT

I. The rationale used by this Court in Allen to establish an "irreducible minimum age" for executions applies equally to the Appellant's case. The imposition of the death penalty on this sixteen year old is cruel and/or unusual punishment.

II. After determining that a critical expert witness was "definitely incapacitated" the court over Appellant's objections permitted the incapacitated witness' testimony.

III. The trial court gave the prosecutor advice on trial strategy and "tips" on how to overcome a problem with a critical witness. The judge became a participant rather than a neutral arbiter.

IV. The trial court permitted the admission of the statements of a nontestifying co-defendant in violation of Bruton and its progeny.

V. The trial court admitted DNA evidence without properly subjecting it to the Ramirez and Frye tests.

VI. The trial court permitted the testimony of a "substitute" medical examiner. The examiner testified from records only. The records were not properly authenticated.

VII. Appellant challenges the constitutionality of Florida Statute 921.141(5)(h) as being vague and defective.

VIII. The trial judge, not considering the Spencer hearing to be a part of the "sentencing procedure", permitted the prosecutor to introduce evidence in violation of discovery rules.

IX. The heinous, atrocious, or cruel aggravating

circumstance did not apply because the evidence showed that Nelson intended to knock Owens unconscious to avoid the infliction of unnecessary pain and suffering, and Appellant did not intend to be cruel. This court has ruled that the evidence must show the Appellant intended to inflict unnecessary and prolonged suffering to support the HAC factor. The trial court violated the Eighth Amendment by weighing the HAC factor when it was not proved beyond a reasonable doubt.

X. Improper doubling existed between the HAC and the avoiding arrest aggravators.

XI. The cold, calculated, and premeditated aggravating circumstance did not apply because the evidence showed a pretense of justification arising from Appellant's emotional suffering, sexual abuse by his brother, the suicide of his mother, and the numerous other personal factors detailed in the argument. This evidence negated the otherwise cold and calculated nature of the offense.

XII. For appeal purposes, Appellant adopts his trial counsel's argument that the avoidance of arrest aggravator should not apply.

XIII. For appeal purposes, Appellant adopts his trial counsel's argument that weighing the circumstances that the capital crime occurred during a robbery was constitutionally violative.

XIV. The death penalty is disproportionate.

ARGUMENT

ISSUE I

THE IMPOSITION OF THE DEATH SENTENCE ON THIS APPELLANT WHO WAS SIXTEEN YEARS OF AGE AT THE TIME OF THE OFFENSE CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant was a sixteen year old child at the time of the offense.[23] [I-R-2]

The youth had completed middle school and begun his sophomore year in highschool. [V-R-607]

As stipulated by the parties he was born on March 18, 1978. The decedent died on March 10, 1995. [V-R-543]

On June 29, 1988, the United States Supreme Court in Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) responded to the argument that irrespective of the heinousness of the crime or presence of statutory aggravating factors it is cruel and unusual punishment to execute a child below a certain age. The Thompson Court vacated the fifteen year old child's death sentencing holding at 487 U.S. 815, 837:

> Petitioner's counsel and various amici curiae have asked us to "draw a line" that would prohibit the execution of any person who was under the age of 18 at the time of the offense. Our task today, however, is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of

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[23]Florida Statutes 39.01(10) provides, in part, that "Child" or "juvenile" or "youth" means any unmarried person under the age of 18.

his or her offense.

Thus, the Thompson Court left open the issue of executing older children. This question was partially addressed in LeCroy v. State, 533 So.2d 750 (Fla. 1988), wherein this Court approved and authorized the death penalty of a seventeen year, ten month old defendant and concluded at page 758:

> ...We do not consider this to be a definitive resolution of whether there is some irreducible minimum age below which the death penalty may never be imposed...we limit our decision to the case at hand and hold that there is no constitutional bar to the imposition of the death penalty on defendants who are seventeen years of age at the time of the commission of the offense.

Some six years later in Allen v. State, 636 So.2d 494 (Fla. 1994) this Court declared an "irreducible minimum age" as under the age of sixteen. The Court's per curiam opinion indicated at page 497:

> ...more than half a century has elapsed since Florida last executed one who was less than sixteen years of age at the time of committing an offense. In the intervening years, only two death penalties have been imposed on such persons, and both of these later were overturned.
>
> ...death almost never is imposed on defendants of Allen's age.
>
> In sum, the death penalty is either cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime; and death thus is prohibited by article I, section 17 of the Florida Constitution...Tillman v. State, 591 So.2d 167, 169 n. 2 (Fla. 1991). We cannot countenance a rule that would result in some young juveniles being executed while the vast majority of others are not, even where the crimes are similar...Art. I, Sec. 17, Fla. Const.

> ...the death penalty is vacated and reduced to life imprisonment...

The citation of Tillman by the Allen Court is significant. In that footnote 2 to the Tillman opinion the Court indicated:

> The Florida Constitution prohibits "cruel or unusual punishment" Art. 1, Sec. 17, Fla. Const. (emphasis added). The use of the word "or" indicates alternatives were intended. Cherry Lake Farms, Inc. v. Love, 129 Fla. 469, 176 So.2d 486 (1937).

In his brief to this Court in Farina v. State, 679 So.2d 1151 (Fla. 1996), Farina argued Tillman's significance as follows:

> The significance is that, under Article I, Section 17, separate determinations must be made as to whether electrocution of sixteen-year-old offenders as a class is "cruel," and also whether the execution of this sixteen-year-old offender is "unusual." The standard of whether a punishment is "cruel or unusual" is malleable---it changes as the standards of civilized society evolve. Examples are abundant. Dungeons are a thing of the past. Racks are obsolete. No longer are children in England hanged in public squares for being pickpockets. No longer are sailors keel-hauled. No longer are women doused or burned at the stake for being a gossip or suspected witch. See, *"The Wonders of the Invisible World"*, Cotton Mather (1693). No longer are rapists executed when a human life has not been taken. Coker v. Georgia, 433 U.S. 584 (1977); Buford v. Florida, 403 So.2d 943 (Fla. 1981). See, Enmund v. Florida, 458 U.S. 782, 800 (1982).

The Appellant adopts and embraces Farina's argument. Cf. Hall v. State, 614 So.2d 473 (Fla. 1993) at 482, footnote 8.

Last year this Court had an opportunity to address the issue of execution of sixteen year olds in Farina, supra. This Court declined indicating at page 399: "We do not address Farina's first issue of whether it is unconstitutional to execute someone who is

sixteen years of age at the time of the crime."

Thus, after Thompson, LeCroy and Farina, the issue of imposition of the death penalty on sixteen year old children remained an unanswered constitutional question in Florida.

Appellant contends that the same rationale and authorities employed by this Court in Allen are applicable to his case. In Allen the court noted the extensive passage of time since the last execution of one from his age group.

In this regard, Florida's existing death penalty statute was enacted in 1973, post-Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Appellant presented the trial court with data establishing that at least since 1972----a quarter of a century---no individual under the age of 17 had been executed in Florida.[24]

The data reflects that during the last quarter century that in addition to the Appellant only three other children who were sixteen at the time of the offense were sentenced to death now and none were executed. Their histories follow:

HENRY BROWN was sentenced to death on August 1, 1975. On February 1, 1979 this Court vacated the sentence and ordered a life sentence. Brown v. State, 367 So.2d 616 (Fla. 1979).

JAMES MORGAN was sentenced to death on December 30, 1977. The case was remanded for a new trial. Morgan v. State, 392 So.2d 1315 (Fla. 1981). After retrial he was sentenced to death on December

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[24]This material is contained in the record at XI-R-1636 ff. and is reproduced herein as Appendix B.

7, 1991. The case was remanded for a new trial. Morgan v. State, 453 So.2d 394 (Fla. 1984). After the second retrial he was sentenced to death on June 7, 1985. The case was remanded for a new trial. Morgan v. State, 537 So.2d 973 (Fla. 1989). On December 16, 1992, after his fourth trial on this case, he was again sentenced to death. This court on June 2, 1994 vacated the sentence and remanded for imposition of a life sentence. Morgan v. State, 639 So.2d 6 (Fla. 1994).

JEFFREY FARINA was sentenced to death on December 16, 1992 and remanded for resentencing. Farina v. State, 680 So.2d 392 (Fla. 1996). He was resentenced to life.

The Appellant now finds himself in the onerous position of being the only sixteen year old child that the State of Florida has decided to execute in over 25 years. Clearly, these circumstances make the sentence of death cruel, unusual and disproportional.[25]

Appellant contends, as the Court in Allen concluded, that under these circumstances the imposition of the death penalty constitutes cruel or unusual punishment prohibited by the Florida Constitution, Article 1, Section 17 and the Eighth and Fourteenth Amendments to the United States Constitution, since to hold otherwise would countenance a rule that results in only one sixteen year old receiving the ultimate penalty.

If this case is resolved on this issue alone, Appellant requests the Court to vacate his sentence and remand the case with instructions to sentence him to life imprisonment. If this case is

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[25]Disproportionality is argued further in Issue XIV.

resolved on this issue and issues wherein Appellant requests a new trial, Appellant requests both remedies.

ISSUE II

THE TRIAL COURT PERMITTED THE TESTIMONY OF A CRITICAL WITNESS WHO WAS "DEFINITELY INCAPACITATED"

OR ALTERNATIVELY

THE TRIAL COURT PERMITTED THE TESTIMONY OF A CRITICAL WITNESS WHO WAS "DEFINITELY INCAPACITATED" WITHOUT MAKING FINDINGS REQUIRED BY CASE LAW.

The State called University of Florida Distinguished Service Professor William Ross Maples, a forensic anthropologist, for the purpose of establishing that skeletal remains were those of Owens. [XV-T-523 ff.]

At the very beginning of his testimony, the State asked Dr. Maples to identify dental records, which the State was alleging were those of Owens. Dr. Maples identified those records as belonging to the Appellant. [XV-T-523]

The State immediately requested of the court: "Could we take a break?" [XV-T-526] The Court recessed the trial and the following discussion was held:

> THE COURT: ...we're in a conference room behind the courtroom. Counsel for the state and his co-counsel, counsel for the defense and his co-counsel are here. We're here to discuss problems we're having with Dr. Maples. It's the Court's understanding, and the Court [XV-T-526] knew in September when it tried the companion case...that Dr. Maples was ill and has terminal cancer. It's obvious to this Court from just listening to his testimony in September where he had all of his faculties and testified normally, and now, December the 4th, <u>there's a marked difference in his ability to recall and to speak</u>, and I know it's due to his illness, and we're here to discuss that matter at this point. (e.s.)

MR. JACOBS (Defense): ...I know and I feel sorry for him. He apparently has brain cancer. But he did, at the state's questioning, identify the dental records as those of Keith Brennan.

And during the recess Mr. Russell (prosecutor) ...talked to him the entire recess, and we would object to that procedure...I think it's improper and I would ask the Court to strike his testimony.

THE COURT: Tell me what you all were talking [XV-T-527] about.

MR. RUSSELL: ...I asked him...if there was a manner in which I asked him questions that would be helpful. Candidly, his wife indicated to try to focus on a specific area. She indicated that he hadn't had that problem. He had been all right with forensics.

...while this is an unusual circumstance, ...there are certain reliability factors built into this case through his deposition, through his reports, through his prior in-court testimony such that the state should be given some leeway to attempt to proceed.

I don't know obviously how far we'll get...inherently I got to...ask...is he having a physical problem. The alternative, ultimately if there's a major problem, and I have some reason to believe we can get through this, I would streamline the questions obviously, would be to ask the Court for a recess and a substitute expert. And I would ask the Court to allow us to proceed with some leeway--

THE COURT: Under these circumstances the Court would feel...since he's already given [XV-T-528] depositions and since <u>he's definitely incapacitated at this point</u>, I'm wondering whether or not you can use his testimony from a deposition or testimony that was given at the prior trial. (e.s.)

MR. JACOBS: ...it puts us at a distinct disadvantage because we weren't part of the prior trial and we didn't have an opportunity to cross-examine him.

THE COURT: Did you take his deposition?

MR. JACOBS: Yes, sir, I did.

THE COURT: And did you have an opportunity to cross-examine him at the deposition?

MR. JACOBS: That I did.

THE COURT: Why can't we read that entire deposition into the record...in front of the jury?

MR. JACOBS: ...there's things in there that I don't think the state would want to go to this jury, and I think there would possibly be reversible error if someone read his testimony.

THE COURT: I'm talking about redacting anything that would be inadmissible. [XV-T-529]

MR. RUSSELL: ...my intention would be to go right to the dental records.

THE COURT: ...The immediate problem I have is <u>there is no doubt about that...he misidentified the dental records as Keith Brennan</u>. Is Keith Brennan's name on those things? (e.s.)

MR. RUSSELL: It's on the label.

THE COURT: See, that's what he did, he just read that.

MR. RUSSELL: It's on the label.

MR. JACOBS: I feel for the situation, but I don't want to come across as the bully in cross-examination.

THE COURT: I understand. If you want to proceed with him now--

MR. RUSSELL: I'm gonna attempt to do it.

THE COURT: --I think you're gonna have to ask him about that, you know, you identified this x-ray as Keith Brennan, you know, without letting him know. You know, is that correct,

I mean, is this x-ray of Keith Brennan, and see what he says.[26]

MR. JACOBS: The only thing, I'm sure during the recess Steve (prosecutor) told him he made a mistake. [XV-T-530]

THE COURT: Did you?

MR. RUSSELL: He in fact on his own said, oh, I didn't say Brennan. He was talking about Nelson. I think he was getting confused with Brennan. He brought that up on his own before I ever said anything. I think he realized he made a mistake and he was struggling.

...my hope obviously is this is a temporary thing, and I say that based on the understanding I'm led to believe that he has not had this problem up until today.

MR. JACOBS: ...your office flew him down today, and he was going to fly right back and he didn't even drive him.

MR. RUSSELL: And he was coherent with me when I talked to him earlier today.

THE COURT: Well, it's different when you're under pressure.

MR. JACOBS: ...I understand his plight and I feel for the man, I do, but my guy's looking at the electric chair here, and I can't backpedal, soft pedal this witness.

THE COURT: Here's what we're gonna do. We're gonna go ahead and proceed in there and we're gonna let the chips fall where they may, and you can ask [XV-T-531] him about the misidentification. I can't stop you from doing that. (e.s.) [XV-T-532]

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THE COURT: Well, I'm gonna allow you to proceed and see about that, because it's been indicated that this is the first time he's had

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[26]Appellant contends the judge is providing strategy and advise to the prosecutor. This is subject the subject of Issue III.

> this memory lapse, that he seemed coherent to you at the time, and what kills me is here's this world-renowned genius who has...just completely deteriorated to where it's so obvious. (e.s.)
>
> ***
>
> THE COURT: ...I would love to be telling this jury that this is a world-renowned genius...who's falling apart in front of our very eyes, but I know I can't do that because I don't want to generate any sympathy. (e.s.)
>
> On the other hand, if you (the prosecutor) can say something,[27] you have some physical difficulties now, end it, so they understand that this man isn't a boob (e.s.) and that we don't bring folks that don't know what they're [XV-T-533] talking about to testify, because he obviously does.

The court clearly made the following comments and acknowledgements concerning the witness:

- ...Dr. Maples was ill and has terminal cancer... [XV-T-527]
- ...there's a marked difference in his ability to recall and to speak... [XV-T-527]
- ...he's definitely incapacitated at this point... [XV-T-529]
- ...here's this world-renowned genius who has...just completely deteriorated to where it's so obvious.
- ...I would love to be talking this jury that this is a world-renowned genius...who's falling apart in front of our very eyes... [XV-T-533]
- ...if you (prosecutor) can say something... so they understand this man isn't a boob... [XV-T-533]

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[27]Appellant contends the judge is providing strategy and advise to the prosecutor. This is the subject of Issue III.

- ...We're gonna go ahead and proceed...and let the chips fall where they may... [XV-T-531]

Appellant contends that the "chips fell" erroneously and prejudicially against him when the trial judge, while clearly acknowledging that a witness was "definitely incapacitated" nonetheless permitted him to testify relating to a critical piece of evidence and identification, and simultaneously encouraging the prosecutor to "say something" to communicate to the jury that the witness was not "a boob".[28]

Dr. Maples testimony before the jury proceeded with the declaration of his "health problems" (as suggested by the judge). [XV-T-535] Maples corrected the misidentification [XV-T-536] after an ex parte discussion with the prosecutor. [XV-T-535] He then testified that Owens' anti-mortem dental records and dental records from the corpse were the same. [XV-T-536 ff.][29]

Florida Statute 90.601 provides: "Every person is competent

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[28]Appellant is not unmindful that Dr. Maples was a "legend of forensics"---a renown forensic anthropologist whose exploits included unraveling the slaying of Russian royalty, studying the Elephant Man and thwarting Michael Jackson from collecting the remains, contributing to solution of the Medgan Evers clues, examining the ValueJet crash---and many, many others. [See XI-R-1639] Appellant does not quarrel with the Court's classification of the witness as having been a "world-renowned genius". [XV-T-533] With this glorious past behind him, and being "definitely incapacitated", it is egregious that the State did not chose alternate means of establishing the critical identification and the court did not demand the prosecution to do so. (See suggestions XV-T-528 ff.) The failure of the State to exercise one of the options resulted in embarrassing and tarnishing a world figure and committing prejudicial error against Appellant.

[29]The record reflects the prosecutor virtually led the witness through the testimony and even then the witness had extreme difficulty in numerous responses.

to be a witness, except as provided by statute." Florida Statute 90.604 further provides that a person may be disqualified if the court determines that a person is incapable of expressing himself or herself so as to be understood, or is incapable of understanding the duty of a witness to tell the truth.

Appellant acknowledges it is within the sound discretion of the trial judge to determine the competence of a witness to testify. Rutledge v. State, 374 So.2d 975 (Fla. 1979), cert. denied 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Kaelin v. State, 410 So.2d 1355 (Fla. 4th DCA 1982).

Appellant contends that the trial court's on the record declaration that Dr. Maples was "definitely incapacity" coupled with the court's other comments adequately constitutes a declaration of the witness' incompetency and that it was then error for the court to permit the witness to testify.

Alternatively, if this Court rejects this contention, Appellant would advocate that the trial court's comment clearly place the witness in a category of "mentally challenged"---i.e., one suffering from advanced stages of a brain tumor is reasonable subject to mental dysfunctionality. If this be the case, Appellant would offer for consideration Hammond v. State, 660 So.2d 1152 (Fla. 2d DCA 1995) wherein the subject of a mentally challenged individual's competency to testify at trial was at issue. The Second District reversed for a new trial, finding that the trial court erred by failing to make the three specific determinations necessary to determine that the mentally challenged victims were

competent to testify. Citing cases dealing with the competency of child witnesses, the Hammond court stated that the trial court had failed to determine whether the witnesses (1) were capable of observing and recollecting facts, (2) were capable of narrating facts to the court or jury, and (3) had the moral sense of the obligation to tell the truth. The Hammond court citing McKinnies v. State, 315 So.2d 211 (Fla. 1st DCA 1975) went on to note that the "competency determination is of heightened importance when the witness is mentally retarded, because there might exist a tendency on the part of the jurors to believe that the retarded are not capable of conniving or fabrication."

A review of the record shows that the Court failed to make sufficient findings of fact to support receiving the testimony of Dr. Maples.

Further in Z.P. v. State, 651 So.2d 213 (Fla. 2d DCA 1995) the court citing Lloyd v. State 524 So.2d 396 (Fla. 1988) placed an affirmative duty on the court to determine whether the witness has "sufficient mental capacity" to be competent to testify. Cf. S.M. v. State, 651 So.2d 209 (Fla. 2d DCA 1995).

Appellant contends that the court's error in admitting Dr. Maples' testimony requires reversal of his conviction and remand for new trial.

ISSUE III

THE TRIAL COURT ERRED BY GIVING THE PROSECUTOR ADVICE ON TRIAL STRATEGY.

In the sidebar conference relating to the incapacity of Dr. Maples as a witness (detailed in the previous issue) the trial court made the following statements and offered the prosecutor advice and strategy as to how he might resolve the problem the State was having with its witness:

> THE COURT: --I think you're gonna have to ask him about that, you know, you identified this x-ray as Keith Brennan, you know, without letting him know. You know, is that correct, I mean, is this x-ray of Keith Brennan, and see what he says. [XV-T-530]
>
> ***
>
> ...what kills me is here's this world-renowned genius who has...just completely deteriorated to where it's so obvious.
>
> ***
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> ...I would love to be telling this jury that this is a world-renowned genius...who's falling apart in front of our very eyes, but I know I can't do that because I don't want to generate any sympathy.
>
> On the other hand, if you (the prosecutor) can say something, you have some physical difficulties now, end it, so they understand that this man isn't a boob and that we don't bring folks that don't know what they're [XV-T-533] talking about to testify...

These remarks clearly reflect the judge's bias that the witness appear professional to the jury or at least not be regarded as a "boob". The remark that "<u>we</u> don't bring" unqualified witnesses into court displays an interesting judicial association with the State's case.

In Chastine v. Broone, 629 So.2d 293 (Fla. 4th DCA 1993) the trial judge advised the prosecutor that "sometimes it is better not to cross-examine witnesses". The appellate court in disqualifying the judge from further proceedings in the matter observed at page 295:

> When the judge enters into the proceedings and becomes a participant a shadow is cast upon his judicial neutrality...Wayland v. Wayland, 595 So.2d 234, 235 (Fla. 3d DCA 1992)... Obviously, the trial judge serves as the neutral arbiter in the proceedings and must not enter the fray by giving "tips" to either side...

This is particularly critical when as pointed our in Duest v. Goldstein, 654 So.2d 1004 (Fla. 4th DCA 1995).

> In a death penalty case, the question of judicial bias is of particular importance, since the judge will be called upon to make what is literally a life-or-death decision.

The trial judge throughout the sidebar status openly exhibited his concern to make the witness appear credible. The judge may legitimately harbor such thoughts personally. But, when the court provides strategies for the prosecutor and devises mechanisms to implement the judge's personal opinions and passions, it has shed neutrality and impartiality. The judge then becomes not only a participant in the presentation of the case, but has entered the fray as an ally of the State---significantly prejudging the defense.

Appellant contends the court's participation constituted prejudicial error and requests this Court to reverse the conviction and remand for new trial.

ISSUE IV

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

During the testimony of Tina Lynn Porth the prosecutor elicited testimony of the hearsay statements made by the co-defendant. The defense attorney objected:

> MR. JACOBS: Your Honor, Objection, hearsay.
>
> MR. RUSSELL: Your Honor, this is in the presence of the defendant, and I think we've already been through this in other proceedings.[30]
>
> ***
>
> THE COURT: Overruled. You may proceed.

BY MR. RUSSELL:

> Q. Did you have a conversation in the presence of the defendant, Keith Brennan, in that vehicle that early morning?

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[30]The "other proceedings" the prosecutor references occurred in the co-defendant's case [not the Appellant's case]. In the co-defendant's initial brief at page 51 filed in case number 89,540 before this Court the following is stated:

> Defense counsel filed a pretrial motion in limine to exclude testimony of Misty Porth and Tina Porth regarding Keith Brennan's admissions or confessions...At a pretrial motion hearing the court deferred ruling on the motion so it could review the Porths' statements and depositions ...Defense counsel filed a second motion in limine to exclude the testimony of Misty and Tina Porth, asserting that it was constitutionally impermissible to admit a confession by Keith Brennan against Nelson because the defense could not cross-examine Brennan, and that the witnesses could not separate what Nelson said from what Brennan said...At a pretrial motion hearing the state argued that Brennan's statements were made in Nelson's presence and were admissible as admissions by silence... The court denied the motion without prejudice...Defense counsel renewed all pretrial motions at trial... [At trial]...The court overruled the objection.

A. Yes, we did.

Q. Would you indicate to the jury what the nature [XVI-T-609] of that conversation was?

The witness then related a series of discussion and comments by the co-defendant relating to the homicide, dotted with recitation of comments without attribution to either Appellant or co-defendant, and frequent usage of the phrase "they said". [XVI-T-610 ff.] This hearsay testimony constituted critical testimony against the Appellant.[31]

The court erred by admitting the co-defendant's out of court statements against Appellant, including the statements attributed to both Appellant and co-defendant. Neither the prosecutor, through his question, nor the witness, in response, separated what one said from what the other said. Because co-defendant did not testify, the admission of his out of court statements violated Appellant's constitutional right to confront and cross-examine the witnesses against him. See Cruz v. New York, 481 U.S. 186, 189, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

The admission of a nontestifying co-defendant's confession implicating the defendant in their joint trial violates the confrontation clause, even if the jury is instructed not to consider it against the defendant, Bruton v. United States, 391 U.S. 123, 126, 137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and even if the defendant's own confession is admitted against him. Cruz,

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[31]The details of the testimony are contained in the "Statement Of The Facts" portion of this brief.

at 193. This Court has held that Bruton applies when a defendant is tried separately. Nelson v. State, 490 So.2d 32, 34 (Fla. 1986); Hall v. State, 381 So.2d 683, 687 (Fla. 1979).

Confessions incriminating co-defendants are presumptively unreliable. Lee v. Illinois, 476 U.S. 530, 541, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986). To be admissible, a nontestifying co-defendant's confession must fall within a firmly rooted hearsay exception or its reliability must be supported by a showing of particularized guarantees of trustworthiness. See Lee, at 543; Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); Franqui v. State, 22 Fla. L. Weekly S373, S375, 1997 WL 348838 (Fla. June 26, 1997). Trustworthiness must be established by the totality of the circumstances and not through corroborating evidence. Idaho v. Wright, 497 U.S. 805, 819-820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); Franqui, at S375. A defendant's confession cannot be considered in determining if there are sufficient indicia of reliability to admit the co-defendant's statement.

The prosecutor's position that co-defendant's statements were admissible against Appellant as admissions by silence because Appellant was present when they were made [XVI-T-609] was insufficient to establish their admissibility. First, the state did not show the statements met criteria for a hearsay exception. "[N]o general hearsay exception exists for statements made in the presence of a defendant." J.J.H. v. State, 651 So.2d 1239, 124 (Fla. 5th DCA 1995); see § 90.803, Fla. Stat. (1995). In Privett v. State, 417 So.2d 805, 807 (Fla. 5th DCA 1982), the district

court explained that the admissions by silence rule has been incorporated into the Evidence Code as section 90.803 (18)(b), Florida Statutes, which provides:

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

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

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

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

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

firmly rooted hearsay exception which would satisfy the requirements of the confrontation clause.

Third, the state did not show, and the trial court did not determine, whether there were particularized guarantees of trustworthiness which would satisfy the requirements of the confrontation clause.

In Farina v. State, 679 So.2d 1151 (Fla. 1996), Anthony Farina was convicted and sentenced to death for the murder committed by his brother Jeffery Farina during a robbery. At a joint trial the court admitted recorded conversations between them. The tapes were made while they were in custody in the back seat of a police car. On appeal, Anthony argued that the admission of Jeffery's statements violated his rights under Bruton. This Court found that

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

Id., at 1157.

Appellant's case is significantly different from Farina. The conversations of the Farina brothers were recorded, providing an accurate record of what was said and by whom, while in the present

case the Porth sisters could not clearly separate what one co-defendant said from what the other said, attributing most of the description of the crimes to what "they said". [XVI-T-610 ff.]

The present case does not provide the necessary particularized guarantees of trustworthiness required for admission of the statements under the confrontation clause.

Appellant contends the court's error in admitting the statements requires reversal of Appellant's convictions and remand for a new trial.

ISSUE V

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

Appellant filed a "Motion in Limine" relating to the prospective testimony of Darren Esposito, [VII-R-879] an FDLE crime laboratory analyst. Esposito had been employed with FDLE for four years, completed a one year three month training program by FDLE in serology and DNA analysis, and attended several related workshops. [XVI-T-691]

The motion in limine asserts, inter alia that:

> The Defense would also ask the Court to strike the testimony of Mr. Esposito since he substituted his own database in place of the FBI database properly used in the PCR protocol used in his testing in this case. When the FBI database did not get the results he hoped for, he substituted his own of .03% to skew the test result to achieve a test result favorable to the State's case. [VII-R-879]

At the hearing on this motion the following exchange occurred:

> MR. JACOBS (Defense): ...we were asking the Court to strike the testimony of Mr. Esposito since he substituted his own data for that of the FBI data base that's contained in their protocol which FDLE uses. And our conclusion was that when the FBI data base did not get the result that he hoped for, he substituted his own, a .03 percent. Basically we feel it skewed the results and his whole testimony should be stricken.
>
> THE COURT: What say the state?
>
> MR. RUSSELL (Prosecutor): ...if asked, Mr. Esposito would indicate that he did not substitute his own data base, he substituted the data base of a geneticist, Dr. Martin Tracy from Florida Atlantic University, and that...the data base substituted was in fact

> more conservative, therefore would make it more likely that there's another individual in the general population to have the same genetic outline so to speak. [VII-R-902]
>
> ***
>
> MR. JACOBS: ...we basically quarreled with his numbers. He indicated in our deposition and at the Nelson trial that he was not a population geneticist. The state didn't call this other person that he referred to. And that because of that, that was our main argument, that his figures...are just not consistent with scientific probability. (e.s.)
>
> THE COURT: Well, you can make your argument at the time when it comes out. It will be more relevant and understandable to me. [VII-R-903]

At the trial defense counsel renewed his objections. [XVI-T-693] The court permitted Esposito's testimony. [XVI-T-694]

Esposito used the PCR method of DNA analysis [VI-T-701] and the FBI database for frequencies of occurrence in the population. [XVI-T-727] FBI database used in the test had a frequency of zero. [XVI-T-728] Esposito consulted his supervisor. The supervisor then consulted a population geneticist. The geneticist determined that a value of .03 would be sufficient for that particular frequency. [XVI-T-732] Over defense objection Esposito identified the geneticist as Dr. Martin Tracy of Florida Atlanta University. [XVI-T-732] Esposito acknowledged he was not a population geneticist. [XVI-T-727] No geneticist testified in the case.

The remaining substance of Esposito's testimony was that he conducted a DNA analysis of tissue represented as being from the decedent. [XVI-T-704] The results were compared with DNA analyses on blood stains found on the Gaumond-found knife and underwear.

determine this question.

The issue of admissibility of DNA test results was addressed in Hayes v. State, 660 So.2d 257 (Fla. 1995). Hayes held that admissibility must be determined under the four-step inquiry provided by Ramirez. Hayes at page 264:

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

In Brim v. State, 695 So.2d 268 (Fla. 1997), this Court determined that the DNA testing process consists of two steps. The first step relies on molecular biology and chemistry to determine that two DNA samples match. A second statistical step is needed to give significance to the match. Id., at 269. The second step relies on statistics and population genetics. The calculation techniques used in determining and reporting DNA population frequencies must also satisfy the Frye test. Id., at 270-271.

In Murray v. State, 692 So.2d 157 (Fla. 1997) at 164, this Court ruled that the expert must demonstrate sufficient knowledge of the database upon which his calculations were based to be qualified to report population frequency statistics. The trial court's decision to admit DNA test results and DNA population frequency statistics is subject to de novo review on appeal. Brim, at 274; Murray, at 164.

The state addressed only the third step in the process mandated by Hayes, 660 So.2d at 262, and Ramirez, 651 So.2d at 1167, Esposito's qualifications as an expert. The State did not

establish Esposito's qualifications to report population frequency statistics because it did not demonstrate that he had sufficient knowledge of the database upon which his calculations were based. Murray, 692 So.2d at 164. The state ignored it's burden to prove the general acceptance of both the DNA testing procedures used by Esposito and his calculation of population frequency statistics. Murray, at 163; Ramirez, at 1168.

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

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

Esposito testified that one of his figures came from a population geneticist consulted by his supervisor. The trial court erred in over-ruling Appellant's objections and failing to exercise its sole responsibility to determine the general acceptance of the techniques and methods used in the expert's calculations. Murray,

at 162-163. There was no evidence that Esposito had any knowledge about the database or other source of the figure supplied by the geneticist, so Esposito was not shown to be qualified to report the population frequency statistics. Murray, at 164.

Based upon this Appellant's request that this Court reverse the convictions and sentences and remanded for a new trial.

ISSUE VI

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO UTILIZE A SURROGATE OR SUBSTITUTE MEDICAL EXAMINER TO INTRODUCE EVIDENCE.

Over a month before the trial was to begin, the Appellant filed a "Motion To Prohibit Substitution of Medical Examiner". [V-R-814] The motion alleged Dr. Wallace Graves, a retired medical examiner performed an autopsy on the deceased. Appellant alleged substitution would constitute denial of due process and Appellant's right to confrontation. [V-R-815] The court denied the motion. [VI-R-914] Dr. Carol Huser, a medical examiner, was called as Graves' surrogate to testify. The Appellant objected. [XV-T-492]

Dr. Huser did not attend the autopsy. [XV-T-504] Her opinions were based solely upon the other reports. [XV-T-505] HUSER indicated Graves performed the autopsy on the deceased. She had reviewed his file, [XV-T-496] his report, a report by Dr. William Maples, an investigator's report, depositions, dental records, photographs and miscellaneous papers.

None of the items utilized to form Dr. Huser's opinion were produced by her at trial. There was no authentication of the documents upon which she based her opinion. There was no testimony as to how Dr. Huser knew the documents and reports she was reviewed were authentic.

Appellant acknowledges that this Court in Geralds v. State, 674 So.2d 96 (Fla. 1996) cert. denied __ U.S.__, 117 Ct. 230, 136 L.Ed.2d 161 (1996) held:

Geralds...argues the trial court abused its discretion by allowing Dr. James Lauridson, a pathologist who had not performed the victim's autopsy, to offer expert testimony as to the manner and cause of death of the victim...The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error. Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989). An expert is permitted to express an opinion on matters in which the witness has expertise when the opinion is in response to facts disclosed to the expert at or before the trial. § 90.704, Fla.Stat. (1993); see Capehart v. State, 583 So.2d 1009 (Fla.1991) (holding chief medical examiner, who based her opinion on autopsy report, toxicology report, evidence receipts, photographs of body, and all other paperwork filed in case, could testify regarding cause of death and condition of victim's body, although she did not perform autopsy), cert. denied, 502 U.S. 1065, 112 S.Ct. 955, 117 L.Ed.2d 122 (1992).

...The trial judge's ruling in this case does not represent a "clear showing of error." Although there may be a difference of opinion regarding the weight to be given to Dr. Lauridson's testimony concerning the manner and cause of the victim's death, its admissibility was within the properly exercised discretion of the trial judge. See Dragon v. Grant, 429 So.2d 1329, 1330 (Fla. 5th DCA 1983).

Moreover, there was no potential taint from Dr. Lauridson basing his opinion on the materials Dr. Sybers prepared and compiled because Dr. Lauridson based his independent conclusions largely on the objective evidence. Dr. Lauridson arrived at his conclusions by reviewing: (1) two to three hundred Kodachrome slides taken at the murder scene and during the autopsy; (2) written records prepared by Dr. Sybers; and (3) Dr. Sybers' previous testimony he offered in this case. Given the wealth of objective evidence (i.e., the slides) upon which Dr. Lauridson based his opinions, the trial court did not abuse its discretion in permitting Dr. Lauridson to

testify.

Geralds clearly attempts to establish safeguards for the receipt of one expert's testimony based upon the work product of another. The Appellant has no major quarrel with this general concept, so long as mechanisms to assure authenticity are in place and the basic rules of evidence are honored. However, in this case the testimony and evidence was received under circumstances that are distinguishing from Geralds. Namely, there was no testimony as to the authenticity of the items reviewed by the expert. Appellant had no assurance that the items reviewed by Dr. Huser were in fact authentic. Nonetheless, based upon this unauthenticated review, Dr. Huser was permitted to testify that death was caused by blunt trauma to the head [XV-T-500] and was a homicide. [XV-T-501]

Based upon this error, Appellant requests the Court to reverse the judgment and sentence and remand this matter for a new trial.

ISSUE VII

THE TRIAL COURT ERRED BY GIVING A VAGUE JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL FACTOR (HAC).

In Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992), the Supreme Court ruled that the former standard jury instruction on the heinous, atrocious, or cruel (HAC) aggravating circumstance, which simply recited the language of the statute, § 921.141(5)(h), Fla. Stat. (1989), was unconstitutionally vague. The court explained that the weighing of an invalid aggravating circumstance violates the Eighth Amendment. Id., 120 L.Ed.2d at 858. An aggravating circumstance is invalid if it is so vague that it leaves the sentencer without sufficient guidance for determining the presence or absence of the factor.

When the jury is instructed that it may consider such a vague aggravating circumstance, it must be presumed that the jury found and weighed an invalid circumstance. Id., at 858-59. Because the sentencing judge is required to give great weight to the jury's sentencing recommendation, the court then indirectly weighs an invalid circumstance. Id., at 859. The result of this process is error because it creates the potential for arbitrariness in imposing the death penalty.

In the present case, defense counsel objected to the standard jury instruction on the HAC aggravating circumstance as unconstitutionally vague and submitted the following written requested instruction:

The crime for which the defendant is to be

> sentenced was especially heinous, atrocious or cruel. To commit a crime that is heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental anguish or physical pain to the victim, and the victim must have consciously suffered such mental anguish or physical pain for a substantial period of time before death.[33] [XI-R-1594]

The court refused to give the requested instruction [XI-R-1594] and instructed the jury as follows:

> Three, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim. [XI-R-1500]

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

The first sentence of this instruction simply recites the statutory language, "especially heinous, atrocious or cruel," from section Florida Statute 921.141 (5)(h). In the absence of a

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[33]The source of this instruction was the Supreme Court Committee on Standard Jury Instructions in Criminal Cases Proposed Amendment to Paragraph 8 on Page 77 of the Standard Jury Instructions in Criminal Cases.

sufficient limiting construction, the statutory language is unconstitutionally vague and overbroad and violates the Eighth Amendment. Espinosa; Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); U.S. Const. Amend. VIII. The sentences which define the statutory terms use the same definitions held unconstitutionally vague and overbroad in Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Thus, the constitutionality of the instruction depends upon whether the final sentence provides sufficient guidance to the sentencer.

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Supreme Court found that the HAC aggravator provided adequate guidance to the sentencer because this Court's opinion in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), construed HAC to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Sochor v. Florida, 504 U.S. 527, 536, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992).

Cases decided after Proffitt call into question the adequacy of the Dixon limiting construction of HAC. The Supreme Court has ruled that a State's capital sentencing scheme must genuinely narrow the class of defendants eligible for the death penalty, and a statutory aggravating circumstance must provide a principled basis to distinguish those who deserve capital punishment from those who do not. Arave v. Creech, 113 S.Ct. 1534 123 L.Ed.2d 188, 200 (1993). "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for

the death penalty, the circumstance is constitutionally infirm." Id.

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

This Court has applied a narrower construction of HAC than that of Dixon by requiring proof that the defendant "intended to cause the victim unnecessary and prolonged suffering." Kearse v. State, 662 So.2d 677, 686 (Fla. 1995); Stein v. State, 632 So.2d 1361, 1367 (Fla.), cert. denied, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994); Bonifay v. State, 626 So.2d 1310 (Fla. 1993). This construction has not been incorporated into the HAC standard jury instruction. The point of Espinosa is that the jury must be informed of the limiting construction. Failure to do so renders the sentencing process arbitrary and unreliable. As in Jackson v. State, 648 So.2d 85, 88-90 (Fla. 1994), this Court ruled that the standard cold, calculated, and premeditated (CCP) jury instruction, which simply repeats the language of the statute, was unconstitutionally vague because it did not inform the jury of the

limiting construction this Court had given CCP.

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

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

Under these circumstances, the failure to adequately inform

ISSUE VIII

THE TRIAL COURT PERMITTED THE STATE TO INTRODUCE EVIDENCE AT THE SPENCER HEARING IN VIOLATION OF DISCOVERY PRINCIPLES.

The transcript of the Spencer Hearing reflects the following:

> MR. RUSSELL (Prosecutor): I have one bit of short evidence to present merely to rebut one nonstatutory mitigating point brought out in the defense's memo, and I would like to call Don Hutta, who prepared the presentence investigation in this case, briefly.
>
> THE COURT: Very well.
>
> MR. RUSSELL: For that purpose.
>
> MR. JACOBS (Defense): ...I would ask if Mr. Russell has listed this witness; if not, we would ask to strike him. We never got notice of this person's name.
>
> THE COURT: You knew this hearing was going to be held. There is no requirement, as I understand it, in Spencer vs. State[34] that anybody disclose to anybody what additional evidence they're gonna present.
>
> MR. JACOBS: Judge, I think in light of Dillbeck[35] and the cases that follow it, that there is a penalty [XII-R-1662] phase discovery violation, and I think this is one of them.
>
> THE COURT: Well, this is not penalty phase. As far as I'm concerned, this is a Spencer hearing, and either side's allowed to present further evidence and argument.
>
> MR. JACOBS: Please note our motion to strike him.
>
> THE COURT: Let the record reflect. I'm gonna listen. I would have listened to any of your

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[34]Cited, infra.

[35]Dillbeck v. State, 643 So.2d 1027 (Fla. 1994).

witnesses also. [XII-R-1662]

Whereupon, PROBATION AND PAROLE OFFICER DON HUTTA testified that he interviewed Appellant during the presentencing investigation. His testimony continued:

> Q. [Prosecutor] ...I noticed that the presentence investigation given to the Court indicates...under ID marks, it says tattoo, right forearm circle with an A, in which it stands for [XII-R-1664] anarchy. Did you observe a tattoo on this defendant, Mr. Brennan's right forearm, when you interviewed him on December 30th, 1996?
>
> A. Yes, I did.
>
> Q. How do you know that it stands for anarchy?
>
> A. I asked the defendant what the significance of the tattoo was, and he stated to me it meant anarchy. [XII-R-1665]

At the prosecutor's request the court took judicial notice of booking report in the case file which reflected that at the time of his arrest the Appellant did not possess the tattoo. [XII-R-1665, 1666]

Florida Rules of Criminal Procedure 3.220(j) provides:

> (j) Continuing Duty to Disclose. If, subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose or produce the witnesses or material in the same manner as required under these rules for initial discovery.

In Booker v. State, 634 So.2d 301, (Fla. 5th DCA 1994) the court held that discovery rules require disclosure of:

> ...a written list of the names and addresses of all witnesses whom the defendant expects to

> call "at the trial or hearing." The phrase "or hearing" should be interpreted to include sentencing. (e.s.) In a capital case, the penalty phase is similar to the guilt phase in that evidence is presented before the jury, sometimes even expert testimony. Defense expert witnesses in the penalty phase are often deposed by the state prior to sentencing in capital cases. See, e.g., Gore v. State, 614 So.2d 1111 (Fla. 4th DCA 1992). Discovery helps the state in preparing for cross-examination and in deciding whether to obtain its own expert witnesses. Discovery also helps the defense in preparing a response to the state's evidence of aggravating factors. To minimize surprise, Florida's criminal procedure permits extensive discovery...

In Sexton v. State, 643 So.2d 53 (Fla. 2d DCA 1994) the Second District Court of Appeal adopted Booker. Then, the Second District in Clark v. State, 644 So.2d 556 (Fla. 2d DCA 1994); rev. denied 651 So.2d 1193 (Fla. 1995) specifically indicated at page 557:

> We rejected the contention that rule 3.220 does not apply to capital sentencing procedures... (e.s.)

Within this context, Appellant contend that the hearing procedures established by Spencer v. State, 615 So.2d 688 (Fla. 1993) are an intrical part of the sentencing procedure. Spencer indicates at page 691 that the judge is to conduct the hearing and "then recess to consider the appropriate sentence". (e.s.) This language mandates that the judges decision should not be made until the conclusion of the required hearing. Thus, this hearing becomes a critical stage of the sentencing process and subject to the same discovery rights and duties.

Anticipating the State will argue that such an error is harmless. Appellant contends that the Hutta's testimony could have

inflamed the judge. The essence of Hutta's testimony was that while in jail awaiting trial or during his trial, the Appellant acquired a tattoo advocating anarchy, flaunting not only authority generally, but the court itself. Coming this late in the procedure, it could have had major impact on the judge's weighing of the mitigating circumstances.

A close reading of the court's "Sentencing Order" [XII-R-1716] does not establish how much impact the "anarchy tattoo" had on the judge's decision making process, but it is well within the realm of reason that it could have been the pivotal "straw" that resulted in the death penalty.

Had the Appellant and his counsel received appropriate discovery and notice of this witness, they would have been better equipped to respond. If such "ambushes" are permitted during Spencer hearings, both the future of due process and Booker's concept of "extensive discovery" are greatly impaired.

Based upon the foregoing, Appellant requests the sentence be vacated and the case remanded for a new sentencing proceeding before a new jury.

ISSUE IX

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

Weighing of an invalid aggravating circumstance in reaching a decision to impose a death sentence violates the Eighth Amendment to the United States Constitution. Sochor v. Florida, 504 U.S. 527, 532, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). An aggravating circumstance is invalid if it is not supported by the evidence. Id., at 539.

The trial court found that the heinous, atrocious, or cruel aggravating circumstance[36] was proved beyond a reasonable doubt in this case because:

> The victim in this case was lured under false pretenses to a remote section of Cape Coral, Lee County, Florida. The victim was told by defendant KEITH BRENNAN and co-defendant Nelson they were to meet a friend who owed them money. Defendant KEITH BRENNAN was armed with a box cutter and both defendant, KEITH BRENNAN and co-defendant Josh Nelson, knew from prior experience that the victim, Thomas Owens, carried a metal baseball bat in the back seat of his car. The evidence adduced at trial revealed that defendant KEITH BRENNAN and co-defendant, Josh Nelson had difficulty getting the victim, Thomas Owens, out of his car. As a subterfuge, defendant, KEITH BRENNAN, left the car and cut the rear bumper with is box cutter and then told Owens about the damage to his car. When victim Owens got out to look at the damage he was then struck by co-defendant Joshua Nelson with the bat. The victim ran and was chased down by co-defendant Joshua Nelson with Defendant KEITH BRENNAN not far behind. Victim Owens finding

[36] § 921.141 (5) (h), Fla. Stat. (1995).

> himself injured and in pain offered his car and money to KEITH BRENNAN and Joshua Nelson and to make up a story about its disappearance if he should not be hit again. Defendant KEITH BRENNAN and co-defendant Joshua Nelson then decided if they allowed victim Owens to live, they would be discovered.[37] (e.s.) The victim Owens was struck again by co-defendant Joshua Nelson, in order that defendant KEITH BRENNAN could cut the victim's throat. In his confession, Defendant KEITH BRENNAN described in detail how he had trouble cutting the victim's throat and repeatedly slashed and cut Owen's throat with the box cutter several times. Even after this gruesome procedure, defendant KEITH BRENNAN described how the victim was still breathing, and at that time he was struck again by the co-defendant Joshua Nelson with a baseball bat. This ordeal lasted over an undetermined period of time where the victim suffered multiple blows to the head. The evidence shows he was at times conscious and aware of his ultimate demise before his throat was cut. This was a malevolent, unmerciful and ruthless murder involving prolonged torture and unmitigated cruelty. Since these facts were admitted by the Defendant and the facts fully support his admission, the aggravating factor that this murder was especially heinous, atrocious, or cruel had been proved beyond a reasonable doubt. [XII-R-1720]

Appellant argues that the HAC aggravating factor did not apply because the co-defendant intended to knock Owens unconscious to avoid the infliction of pain and conscious suffering. HAC did not apply because there was no intent to inflict pain or to be cruel.

The evidence does not establish beyond a reasonable doubt that Appellant intended to cause Owens unnecessary and prolonged suffering. In the absence of proof beyond a reasonable doubt that

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[37]The consideration of this data here constitutes "improper doubling" with the aggravator of avoiding or preventing arrest. It is the focus of Issue X.

Appellant intended to inflict unnecessary and prolonged suffering, the trial court erred by finding the HAC factor. Kearse v. State, 662 So.2d 677, 686 (Fla. 1995); Stein v. State, 632 So.2d 1361, 1367 (Fla.), cert. denied, 115 S. Ct. 111, 130 L.Ed.2d 58 (1994); Bonifay v. State, 626 So.2d 1310, 1313 (Fla. 1993).

In Bonifay:

> Both Bland and Tatum testified that Bonifay told them the victim begged for his life. Bonifay, himself, said this in his tape recorded statement as did Barth in his live testimony. Even so, we find that this murder, though vile and senseless, did not rise to one that is especially cruel, atrocious, and heinous as contemplated in our discussion of this factor in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravated factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering. Santos v. State, 591 So.2d 160 (Fla. 1991). [e.s.]

Under the Eighth Amendment, the trial court's error in weighing a factually unsupported aggravating factor requires this Court to reweigh the valid aggravating and mitigating factors or to conduct harmless error review. Sochor, 504 U.S. at 532, 539-540.

The Appellant contends this Court should vacate Appellant's death sentence with directions to hold a new sentencing proceeding with a newly impaneled jury.

ISSUE X

THE TRIAL COURT DETERMINED THAT HEINOUS, ATROCIOUS OR CRUEL (HAC) EXISTED THROUGH A PROCESS INVOLVING IMPROPER DOUBLING.

The trial court in its "Sentencing Order" found that the aggravator of the crime being committed "for the purpose of avoiding or preventing a lawful arrest of effecting an escape from custody" existed beyond a reasonable doubt. [XII-R-1718]

The court also determined that HAC existed. [XII-R-1718, 1719]

In its findings that HAC existed, the court considered and determined that the killing was done to avoid discovery, arrest and prosecution:

> Defendant, KEITH BRENNAN and co-defendant Joshua Nelson then decided if they allowed the victim Owens to live they would be discovered. [XII-R-1719]

Appellant contends that the use of this rationale to establish HAC constituted "improper doubling" with the aggravator of avoiding arrest. This is duplicative because both factors are based upon a single aspect of the offense. Kearse v. State, 662 So.2d 677 (Fla. 1995); Castro v. State, 597 So.2d 259 (Fla. 1992).

The sentencer cannot consider the same aspect of the offense to establish more than one aggravating factor. Here that was clearly done and constituted reversible error.

Based upon this, Appellant requests this Court vacate the sentence with directions to hold a new sentencing proceeding with a newly impaneled jury.

ISSUE XI

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

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

In his sentencing memorandum, defense counsel argued that the cold, calculated, and premeditated (CCP) aggravating factor[38] did not apply because the record does not show the careful design and the heightened premeditation necessary. [XI-R-1628]

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

> The Defendant in this case, along with the co-defendant, planned in advance to lure the victim to a remote place in Cape Coral, Lee County, Florida, for the purpose of killing him and then stealing his car. The defendant, KEITH BRENNAN, in his statement discussed how he and his co-defendant, Joshua Nelson, discussed methods which the victim might be enticed to leave his vehicle. The defendant, KEITH BRENNAN, described how he went to the back of the car and made a cut or scratch, knowing the victim would come out to look because of how well he cared for the car. When the victim got out to look at the damage, he was hit by co-defendant Joshua Nelson. The victim then tried to flee. He was chased down by both defendant KEITH BRENNAN and co-defendant Joshua Nelson. The victim pleaded for them to take his car and

[38] § 921.141(5)(i), Fla. Stat. (1995),

> leave him alone. The defendant KEITH BRENNAN and co-defendant Joshua Nelson decided the victim should die. (e.s.)[39] The victim was then beaten by both defendant KEITH BRENNAN and co-defendant Joshua Nelson. The victim's throat was cut by defendant KEITH BRENNAN. The victim's hands were bound by defendant KEITH BRENNAN and together they dragged Owens along the ground into the bush where he was again beaten by both defendant KEITH BRENNAN and co-defendant Joshua Nelson and left to die after being covered by a piece of plywood. These actions were the product of calm and cool reflection and were not prompted by emotional frenzy, panic, or a fit of rage. The death of victim Thomas Owens was the result of a careful plan made well in advance of the commission of the offense thus indicating a premeditation. Since these facts were all admitted by the Defendant, and the evidence fully supports his admission, the aggravating factor that the capital felony for which the Defendant is to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification has been proved beyond a reasonable doubt. [XII-R-1716]

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

> ...in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richards v. State, 604 So.2d 1107, 1109 (Fla. 1992); and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); and that the defendant exhibited heightened premeditation (premeditated), Id.; and that the defendant had no pretense of moral or

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[39]The chronological placing of this statement implies that the decision to kill Owens did not occur until after he tried to flee.

> legal justification. Banda v. State, 536 So.2d 221, 224-25 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).

See also Walls v. State, 641 So.2d 381, 387-388 (Fla. 1994), cert denied, 513 U.S. 1130, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995).

In Banda v. State, 536 So.2d at 225, this Court defined a pretense of moral or legal justification as "any claim of justification or excuse that, although insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide".

The mitigation testimony reflects:

- The suicide of Appellant's mother when he was two years of age had an impact on him. [X-R-1328]
- The Appellant underwent long-term sexual abuse when he was eight years of age. [X-R-1329]
- The Appellant suffered a personality disorder with paranoid and anti-social features. He would act somewhat intuitively without thinking he would act on emotions rather than thought...He probably wouldn't use good judgment". [X-R-1340]
- Appellant had a sociopathic personality. [X-R-1363]
- Appellant led a very chaotic, unstructured, unsupervised and dysfunctional life. [X-R-1371]
- Appellant suffered from retarded growth. [X-R-1373]
- Appellant was under emotional distress at the time of the incident. [X-R-1373]
- Appellant had suffered from substance abuse problems. [X-R-1386 ff.]

While these factors do not legally justify the murder of Owens, it did provide a pretense of justification which rebutted the otherwise cold and calculated nature of the offense as required by Banda, 536 So.2d at 225. It also negated the "cold" element of the CCP factor required under Jackson, 648 So.2d at 89, because the killing was not the product of cool and calm reflection, but an act prompted by emotional stress and the other factors listed.

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

Appellant requests this Court to vacate the sentence with directions to hold a new sentencing proceeding with a newly impaneled jury.

ISSUE XII

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY WEIGHING THE AVOIDANCE OF ARREST CIRCUMSTANCE.

In his sentencing memorandum, Appellant's trial counsel argued that the aggravator of the capital felony being committed to avoid arrest should not be considered. Trial counsel indicated:

> The Court gave an instruction to the jury on this aggravator over the objection of the Defense. The State did not request from the Court nor did they use this aggravator in the State v. Nelson, the Co-Defendant in this case who received death from this trial judge on November 27, 1996.
>
> "The mere fact that the victim might have been able to identify this assailant is not sufficient to support finding this factor. Rather it must be clearly shown that the dominant or only motive for the murder was the elimination of the victim/witness." Hansbrough v. State, 509 So.2d 1081 (Fla. 1987)
>
> "In applying this factor where the victim is not a law enforcement officer, we have required that there be strong proof of the Defendant's motive and that it be clearly shown that the dominant or only motive for the murder was the elimination of the witness." Perry v. State, 522 So.2d 817 (Fla. 1988). "We have repeatedly held that the avoidance of arrest aggravating factor is not applicable unless the evidence proves that the only or dominant motive for the killing was to eliminate a witness. The mere fact that the victim knew and could identify the Defendant is insufficient to prove this aggravating factor beyond a reasonable doubt." Geralds v. State, 601 So.2d 1157 (Fla. 1992).

Appellant adopts this argument for purposes of appeal and contends the record does not reflect the required proof.

The Appellant requests this Court to vacate Appellant's sentence with direction to hold a new sentencing proceeding with a newly impaneled jury.

ISSUE XIII

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY WEIGHING THE CIRCUMSTANCE THAT THE CRIME OCCURRED DURING THE COMMISSION OF A ROBBERY.

In his sentencing memorandum, Appellant's trial counsel argued that the aggravator of the capital crime occurring during the commission of a robbery should not be considered. His position was:

> a) The felony murder aggravating factor of section 921.141(5)(d), Florida Statutes and its corresponding instruction is unconstitutional because it does not serve the limiting function required by the Constitution and creates an unlawful presumption of death, and an unlawful death presumption for the least aggravated form of first degree murder
>
> b) Because this unconstitutional circumstance has been and continues to be used as a basis for imposing a number of death sentences in this state, because its unlawful use makes proportionality review arbitrary, and because its bare terms are all that is required to be read to sentencing juries, Section 921.141, Florida Statutes as a whole is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting in part).
>
> c) Section 921.141(5)(d), Fla. Stat. (1990), the (5)(d) standard instruction and the death penalty as applied in Florida thus violate Article 1, Section 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), 21 (access to courts), and 22 (trial by jury) of the Florida Constitution, and the Fifth (due process), Sixth (notice; right to present defense), Eighth (cruel and unusual punishment), and Fourteenth (due process and incorporation) Amendments to the United States Constitution.
>
> d) Instead of narrowing the class of persons eligible for the death penalty, the felony murder circumstance automatically expands the class of those eligible for the death penalty.

> This Court will sentence Keith Brennan separate and apart from the murder charge for the robbery. We ask the Court not to double up the significance of this aggravator and give it a little weight.

Appellant adopts trial counsel's argument for the purpose of appeal.

The Appellant requests this Court to vacate his sentence with directions to hold a new sentencing proceeding with a newly impaneled jury.

ISSUE XIV

THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.[40]

Every death sentence is reviewed by this Court to prevent the imposition of unusual punishment prohibited by the Florida Constitution. Kramer v. State, 619 So.2d 275, 277 (Fla. 1993); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Because death is a uniquely irrevocable penalty, death sentences require more intensive judicial scrutiny than lesser penalties. Tillman, at 169. "While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional," this court is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer, at 277. Application of the death penalty is reserved "only for the most aggravated and least mitigated murders." Id., at 278; Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988); State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), cert denied, 416 U.S. 943 (1974).

Appellant's case is not among the most aggravated murders. The trial court found four aggravating circumstances. Appellant has presented an argument against each of them. If this Court agrees with one or more of Appellant's arguments, the death sentence would be supported by limited valid aggravating factor(s).

In Songer v. State, 544 So.2d 1010 (Fla. 1989), this Court held that the death sentence was disproportionate because an

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[40]This disproportionality argument supplements the one raised in Issue I.

aggravating circumstance was outweighed by the mitigating circumstances. The Court explained,

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

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

Under the Songer standard, the death sentence is disproportionate for Appellant if the Court accepts his aggravator arguments because aggravated factors would then be outweighed by substantial mitigating factors. Even if this Court rejects Appellant's arguments that aggravating factors were not proven, death is disproportionate because this case is not among the least mitigated cases.

The trial court gave great weight to the statutory mitigating circumstance of Appellant's age of 16 at the time of the offense [XII-R-1716] and moderate weight to his insignificant criminal record. [XII-R-1723]

Additionally, the court weighed the 29 non-statutory mitigators as follows:

Moderate weight	3	
Some weight	10	
Little weight	12	
No weight	4	[XII-R-1726 ff.]

In Robertson v. State, 22 Fla. L. Weekly S404 (Fla. July 3, 1997), 1997 WL 365537, this Court found two valid aggravating factors, murder committed during a burglary and HAC, but concluded that death was disproportionate because of the mitigating factors, defendant's age of 19, impaired capacity due to drug and alcohol abuse, and abused and deprived childhood, a history of mental illness, and borderline intelligence.

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

In Sinclair v. State, 657 So.2d 1138 (Fla. 1995), this Court found the death sentence disproportionate where the murder was committed during the course of a robbery. The mitigating factors were the defendant's cooperation with the police, dull normal intelligence, being raised without a father or any positive role model, and emotional disturbance.

In Thompson v. State, 647 So.2d 824 (Fla. 1994), this Court struck three invalid aggravating factors, CCP, witness elimination,

and under sentence of imprisonment. This Court found the death sentence disproportionate where the only valid aggravating circumstance was murder committed during the course of a robbery and the mitigating circumstances were the absence of violent propensities before the murder, honorable discharge from the Navy, gainful employment, being raised in the church, rudimentary artistic skills, and good prison behavior.

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

In comparison with Robertson, Terry, Sinclair, Thompson, and McKinney, the death sentence imposed in this case is disproportionate.

If this case is resolved on this issue alone, Appellant requests this Court to vacate his sentence and remand the case with instruction to sentence him to life imprisonment. If this case is resolved on this issue and issues wherein Appellant requests a new trial, Appellant requests both remedies.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.

CERTIFICATE OF SERVICE

I hereby certify that a copy has been mailed to Attorney General Robert Butterworth, Suite 700, 2002 N. Lois Avenue, Tampa, Florida 33607, on this 29th day of October, 1997.

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By: J. L. Ray LeGrande
J. L. "Ray" LeGrande
Florida Bar No. 193147

APPENDIX "A"

SENTENCING ORDER

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.
KEITH BRENNAN,
Defendant.

CASE NO: 95-911CF-B-WJN

SENTENCING ORDER

The Defendant was tried in this Court on December 3, 1996, through December 6, 1996. The jury found the Defendant guilty of all three counts of the Indictment (Count I - First Degree Premeditated Murder; Count II - First Degree Felony Murder; Count III - Robbery with a Deadly Weapon).

The same jury reconvened for the penalty phase on January 21, 1997. All were present except Juror Number 9. Whereupon the Court took a recess and sent the Bailiff to the last known address and work address of juror number 9 in order to obtain his presence. After a reasonable period of time and diligent search by the Bailiff, it was reported that Juror Number 9 had moved and left no address and was not at his work address. The Court summoned alternate juror number 15, who had attended the trial but had not participated in deliberations. The Court replaced the missing juror with juror number 15. Whereupon evidence in support of aggravating factors and mitigating factors was heard. On that same day, the jury returned an 8 to 4 recommendation that the Defendant be sentenced to death in the electric chair.

On January 21, 1997, the Court requested memoranda from both counsel for the state and counsel for the defense. The Court

received the memoranda from the defense on March 10, 1997, and from the State on March 12, 1997. On March 14, 1997, the Court held a sentencing hearing where both sides made further legal argument. The Court set the final sentencing for this date, March 20, 1997.

This Court, having heard the evidence presented in both the guilt phase and the penalty phase, having had the benefit of legal memoranda and further argument both in favor and in opposition of the death penalty, finds as follows:

A. AGGRAVATING FACTORS

1. The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.

The Defendant was charged with and convicted of the crime of robbery. The facts of this case show that the Defendant KEITH BRENNAN discussed with the co-defendant Joshua Nelson the killing of Thomas Owens on March 9 and 10, 1995. The purpose was to steal Thomas Owens' car and the cash he had on his person. In order to accomplish the crime of robbery, Mr. Owens was lured under false pretenses to a remote portion of Cape Coral on March 10, 1995. The Defendant admitted that the purpose was to kill Mr. Owens and steal his car and whatever cash was found on his person. This aggravating circumstance was proved beyond a reasonable doubt.

2. The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The facts in this case show that the Defendant, KEITH BRENNAN, had a discussion with co-defendant, Joshua Nelson, as to what should be done with victim Thomas Owens after Owens offered to make up a story about losing his car. Defendant KEITH BRENNAN agreed with co-defendant Joshua Nelson that the victim Thomas Owens would not be believed and that Thomas Owens should be killed or they would definitely be caught.
On March 25, 1995, the Defendant, KEITH BRENNAN, admitted tying the victim's hands behind his back, cutting his throat, then dragging the body into some foliage where the victim's body would not be easily found. He also described how they then covered the body with a piece of plywood and disposed of the baseball bat and the box cutter. This aggravating circumstance was proved beyond a reasonable doubt.

3. The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel.

The victim in this case was lured under false pretenses to a remote section of Cape Coral, Lee County, Florida.

The victim was told by defendant KEITH BRENNAN and co-defendant Nelson they were to meet a friend who owed them money. Defendant KEITH BRENNAN was armed with a box cutter and both defendant, KEITH BRENNAN and co-defendant Josh Nelson, knew from prior experience that the victim, Thomas Owens, carried a metal baseball bat in the back seat of his car. The evidence adduced at trial revealed that defendant KEITH BRENNAN and co-defendant, Josh Nelson had difficulty getting the victim, Thomas Owens, out of his car. As a subterfuge, defendant, KEITH BRENNAN, left the car and cut the rear bumper with his box cutter and then told Owens about the damage to his car. When victim Owens got out to look at the damage he was then struck by co-defendant Joshua Nelson with the bat. The victim ran and was chased down by co-defendant Joshua Nelson with Defendant KEITH BRENNAN not far behind. Victim Owens finding himself injured and in pain offered his car and money to KEITH BRENNAN and Joshua Nelson and to make up a story about its disappearance if he should not be hit again. Defendant KEITH BRENNAN and co-defendant Joshua Nelson then decided if they allowed victim Owens to live, they would be discovered. The victim Owens was struck again by co-defendant Joshua Nelson, in order that defendant KEITH BRENNAN could cut the victim's throat. In his confession, Defendant KEITH BRENNAN described in detail how he had trouble cutting

the victim's throat and repeatedly slashed and cut Owen's throat with the box cutter several times. Even after this gruesome procedure, defendant KEITH BRENNAN described how the victim was still breathing, and at that time he was struck again by the co-defendant Joshua Nelson with the baseball bat. This ordeal lasted over an undetermined period of time where the victim suffered multiple blows to the head. The evidence shows he was at times conscious and aware of his ultimate demise before his throat was cut. This was a malevolent, unmerciful and ruthless murder involving prolonged torture and unmitigated cruelty. Since these facts were admitted by the Defendant and the facts fully support his admission, the aggravating factor that this murder was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.

4. The crime for which the Defendant is to be sentenced was committed in a cold and calculated and premeditated manner and without any pretense of any moral or legal justification.

The Defendant in this case, along with the co-defendant, planned in advance to lure the victim to a remote place in Cape Coral, Lee County, Florida, for the purpose of killing him and then stealing his car. The defendant,

KEITH BRENNAN, in his statement discussed how he and his co-defendant, Joshua Nelson, discussed methods which the victim might be enticed to leave his vehicle. The defendant, KEITH BRENNAN, described how he went to the back of the car and made a cut or scratch, knowing the victim would come out to look because of how well he cared for the car.

When the victim got out to look at the damage, he was hit by co-defendant Joshua Nelson. The victim then tried to flee. He was chased down by both defendant KEITH BRENNAN and co-defendant Joshua Nelson. The victim pleaded for them to take his car and leave him alone. The defendant KEITH BRENNAN and co-defendant Joshua Nelson decided the victim should die. The victim was then beaten by both defendant KEITH BRENNAN and co-defendant Joshua Nelson. The victim's throat was cut by defendant KEITH BRENNAN. The victim's hands were bound by defendant KEITH BRENNAN and together they dragged Owens along the ground into the brush where he was again beaten by both defendant KEITH BRENNAN and co-defendant Joshua Nelson and left to die after being covered by a piece of plywood.

These actions were the product of calm and cool reflection and were not prompted by emotional frenzy, panic, or a fit of rage.

The death of victim Thomas Owens was the result of a careful plan made well in advance of the commission of

the offense thus indicating a premeditation.

Since these facts were all admitted by the Defendant, and the evidence fully supports his admission, the aggravating factor that the capital felony for which the Defendant is to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification has been proved beyond a reasonable doubt.

No other aggravating factors enumerated by Statute are applicable to this case and none were considered by this Court.

B. MITIGATING FACTORS

Statutory Mitigating Factors

In his sentencing memorandum, the Defendant requested the Court to consider the following statutory mitigating circumstances:

1. KEITH BRENNAN has no significant history of prior criminal activity.

The Defendant's juvenile records indicate his involvement with the juvenile justice system as early as April of 1992. He has been adjudicated a delinquent several times and has been committed to the Department of Health and Rehabilitative Services for placement in addition to being referred to the Juvenile Alternative Services Program. By his own admission in his statements, he considers himself an expert in stealing automobiles and

stated that Chryslers are the easiest to steal. However, until this offense, KEITH BRENNAN'S record was limited to crimes against property. Therefore, this statutory mitigating factor exists and the Court has given it moderate weight.

2. The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

Dr. Robert Wald testified that the Defendant had a traumatic early childhood. Dr. Wald was told by the Defendant, KEITH BRENNAN, that co-defendant, Joshua Nelson threatened him with bodily harm in order to procure his participation in this crime. However, Dr. Wald also testified that there was no strong evidence of mental retardation and no evidence of domination by co-defendant, Joshua Nelson. The Court rejects this testimony for the reasons set forth herein.

Dr. Masterson testified that the Defendant suffered from mild depression which was not unusual for an individual who was in the Defendant's position. He testified that the Defendant had superior intelligence and while he suffered from mild paranoia, he was not mentally ill but suffered from a personality disorder. This statutory mitigating circumstance does not exist.

3. The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

The evidence in this case was that it was the defendant, KEITH BRENNAN, and co-defendant, Joshua Nelson, who discussed the plan to murder the victim and take his car and money the day before it occurred. It was defendant KEITH BRENNAN who lured the victim out of his car by cutting or scratching the car with the box cutter he carried. It was the defendant KEITH BRENNAN who used the box cutter he carried to repeatedly cut the throat of the victim. It was the defendant KEITH BRENNAN who tied the victim's hands behind his back. It was the defendant KEITH BRENNAN who helped the co-defendant Joshua Nelson drag the victim into the brush where they both struck the victim again with the baseball bat. It was the defendant KEITH BRENNAN and co-defendant Joshua Nelson who covered the body with a piece of plywood and left the victim gasping and gurgling to die. Both defendant KEITH BRENNAN and co-defendant Joshua Nelson are equally culpable in the death of the victim Thomas Owens. This statutory mitigating factor does not exist.

4. The Defendant acted under extreme duress or under the substantial domination of another person.

Dr. Masterson was told by the defendant, KEITH BRENNAN, that he was intimidated by the co-defendant Joshua Nelson. In considering the evidence as a whole, there is no evidence to support this assertion. Nowhere in the statements given to the authorities does the defendant KEITH BRENNAN make that statement. Dr. Wald stated there was no strong evidence of domination by the co-defendant Joshua Nelson. This statutory mitigating factor does not exist.

5. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired.

The testimony of Dr. Masterson indicates that the defendant KEITH BRENNAN was of superior intelligence. The defendant KEITH BRENNAN was not mentally ill. Dr. Wald testified there was no evidence of retardation. This statutory mitigating circumstance does not exist.

6. The age of the Defendant at the time of the crime.

The age of the Defendant at the time of the murder was sixteen years. The defendant KEITH BRENNAN was clearly a young man, who nonetheless wielded a baseball bat and a box cutter to effect the murder of another young man.

This statutory mitigating factor exists and the Court has given it great weight.

Non Statutory Mitigating Factors

The Defendant has asked the Court to consider the following non-statutory mitigating factors:

1. The Defendant KEITH BRENNAN offered to plead to the charges in this case in return for a life sentence.
2. Proportionality
3. The Defendant's mother committed suicide when he was two years old.
4. Positive personality traits, rehabilitation potential.
5. Relative involvement
6. Character as testified to by members of his family.
7. Drug abuse problems
8. Sexually abused as a child by his older brother
9. Difficult childhood
10. The Defendant's behavior at trial was acceptable.
11. Dysfunctional family
12. Gave a voluntary statement following arrest
13. Using LSD the night before the homicide was committed.
14. Apprehension, perceived his own demise at the hands of the co-defendant Joshua Nelson, if he didn't follow his instructions.
15. Completed Southwest Florida Addiction Services program.
16. Influence of older co-defendant in the offense.
17. Alcohol abuse.

18. Not Known, prior to this case, to be a violent person.

19. Personality disorder.

20. Childhood trauma.

21. Psychological stress.

22. Questions regarding roles of the Defendant and Co-Defendant.

23. Above average intelligence.

24. Step mother testified he was good son.

25. Victim had committed sexual battery on the girlfriend of the Defendant, Tina Porth.

26. Lack of childhood development. Small in stature. Taken advantage of by others.

27. Emotional reasons for crime rather than cold calculation.

28. Very young, 16 years of age at time of killing.

29. Was a follower rather than leader.

(3, 8, 9, 11, 20, 24, 26)

There is evidence to establish that the Defendant's family was dysfunctional. The evidence establishes sex abuse by an older brother and the death of the Defendant's mother at an early age. The evidence also establishes that the Defendant was well cared for, received counseling, and participated in sports with his father. It was established that the Defendant was well behaved and did well in school if it suited his purpose. The Court has considered these factors and found that they exist and has given them little weight in the

weighing process.

(4, 6, 15, 23)

The Court finds these factors not mitigating under the facts and circumstances of this case and therefore not established.

(5, 14, 16, 22, 29)

On March 23, 1995, the Defendant, KEITH BRENNAN, in a statement made to authorities, disclaimed any knowledge of the victim, Thomas Owens. Later, on March 25, 1995, the Defendant, KEITH BRENNAN, told authorities that Thomas Owens' death was accidental. Later the Defendant, KEITH BRENNAN, made an admission of guilt by describing acts performed by him and his Co-Defendant. The Defendant never mentioned the use of drugs in his statements. Only when he was interviewed by Dr. Wald and Dr. Masterson did he mention anything about the co-defendant Joshua Nelson using force on him. The testimony of the Porth sisters and statements made by the Defendant, KEITH BRENNAN, show that substantial acts were committed by both the defendant, KEITH BRENNAN, and the co-Defendant, Joshua Nelson, leading up to the death of the victim, Thomas Owens. The Court finds these non-statutory mitigating factors to exist and has accorded them little weight in the weighing process.

(7, 13, 17)

The Court has treated these factors in other portions of

this Order. The Court finds these non-statutory mitigating factors to exist and the Court has given them moderate weight in the weighing process.

(1, 2, 10, 12, 18, 19, 21, 25, 27, 28)

The non-statutory mitigating factors listed in these paragraphs are mostly redundant and have been treated elsewhere in this Order. The Court has considered them all and has given them some weight in the weighing process.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds, as did the jury, that the aggravating circumstances present in this case clearly outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendant, KEITH BRENNAN, is hereby sentenced to death for the murder of the victim, Thomas Owens. The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul.

DONE AND ORDERED in Fort Myers, Lee County, Florida, this 20th day of March, 1997.

William J. Nelson
Circuit Judge

Copies furnished to:

Honorable Joseph P. D'Alessandro, State Attorney
Robert Jacobs, Counsel for the Defendant
Keith Brennan, Defendant

APPENDIX "B"

AFFIDAVIT OF MICHAEL L. RADELET

UNIVERSITY OF FLORIDA

College of Liberal Arts & Sciences
Department of Sociology

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Fax: (352) 392-6568
ufsoc@nervm.nerdc.ufl.edu
TTD:FRS-1-800-955-8771

Affidavit of Michael L. Radelet

State of Florida, County of Alachua

The undersigned, Michael L. Radelet, hereby states under oath as follows:

1. I received a Ph.D. in sociology from Purdue University in 1977. After two years of postdoctoral training in Psychiatry at the University of Wisconsin Medical School, I came to the University of Florida in 1979, where I am now a Full Professor in the Department of Sociology. In August 1996 I became Chair, Department of Sociology, University of Florida.

2. Since 1981 I have published four books and three dozen scholarly papers, in the nation's top sociology, criminology, and law journals, relating to various aspects of capital punishment. See, for example, Capital Punishment in America: An Annotated Bibliography (Garland Publishing Co., 1988); Facing the Death Penalty (Temple University Press, 1989); In Spite of Innocence: Erroneous Convictions in Capital Cases (Northeastern University Press, 1992); Executing the Mentally Ill (Sage Publications, 1993); "Choosing Those Who Will Die: Race and the Death Penalty in Florida," 43 Florida Law Review 1-34 (1991). I have also

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testified on issues relating to the death penalty before committees of the U.S. Senate and the U.S. House of Representatives, and been retained by the Racial and Ethnic Bias Study Commission of the Florida Supreme Court to research patterns of death sentencing in Florida.

2. As part of my ongoing research on capital punishment, I collect data on all post-Furman death sentences handed out in Florida. Information about the trial and crime is supplied by the defendant and his/her attorney, and the information on each case is regularly updated to include all appellate decisions in the case.

3. Since 1972 there have been no death sentences imposed in Florida for defendants aged 14 or younger.

4. Since 1972 there have been nine death sentences imposed on six defendants in Florida aged 15 or 16 at the time on the crime. None of these men remain on death row today. These cases include:

NAME	AGE	SENTENCING DATE	APPELLATE CITE	OUTCOME (see below)
George Vasil	15	12/1/74	374 So.2d 465	2
Frank Ross	15	10/24/77 (resentenced to life)	386 So.2d 1191	4
Jerome Allen	15	10/25/91	636 So.2d 494	2
Henry Brown	16	8/1/75	367 So.2d 616	2
James Morgan	16	12/30/77	392 So.2d 1315	3
James Morgan	16	12/7/81	453 So.2d 394	3
James Morgan	16	6/7/85	537 So.2d 973	3
James Morgan	16	2/2/90	639 So.2d 6	2
Jeffrey Farina	16	12/16/92 (resentenced to life)	680 S.2d 392	4

OUTCOME CODES:
1: Affirmed
2: Reduced to life
3: Remanded for new trial
4: Remanded for resentencing

0690 0945

5: Reduced to life by trial court on a motion for a new trial.

FURTHER AFFIANT SAYETH NAUGHT.

Michael L. Radelet

Michael L. Radelet, Ph.D.

Sworn to and subscribed before me, this 25th day of FEBRUARY, 1997:

Sheran Flowers

NOTARY PUBLIC

SHERAN FLOWERS

SHERAN FLOWERS
MY COMMISSION # CC375913 EXPIRES
June 28, 1998
BONDED THRU TROY FAIN INSURANCE, INC.

9460 0990

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11/3/97 filed 10/31/97

KEITH BRENNAN
v.
STATE OF FLORIDA

CASE NO. 90,279

I have this date received the below-listed pleadings or documents:

Initial Brief of Appellant (original & 7 copies with diskette)

Appellee's answer brief shall be served on or before February 2, 1998.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Clerk, Supreme Court

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

SJW/tsc
cc: Ms. Candance Sabella