

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,697

SEBURT NELSON CONNOR,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

REPLY BRIEF OF APPELLANT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

Counsel for Appellant

TABLE OF CONTENTS

PAGE(S)

CERTIFICATE OF FONT 1

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING THE MOTIONS TO SUPPRESS, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 12, OF THE FLORIDA CONSTITUTION, AND AMENDMENTS IV, V, AND XIV TO THE UNITED STATES CONSTITUTION 1

II

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO ELIMINATE A WITNESS, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION 11

III

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION 19

IV

THE TRIAL COURT ERRED IN REJECTING THE STATUTORY MENTAL MITIGATING

CIRCUMSTANCES AND FAILING TO GIVE EFFECT TO UNCONTROVERTED MITIGATING EVIDENCE, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES
 CONSTITUTION 21

V

THE TRIAL COURT ERRED IN FAILING TO FIND THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE DEFENDANT DID NOT HAVE A SIGNIFICANT PRIOR HISTORY OF CRIMINAL ACTIVITY, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES.
 CONSTITUTION 28

VI

THE DEATH SENTENCE IS DISPROPORTIONATE, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES
 CONSTITUTION 29

CONCLUSION 31

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

CASES	PAGE(s)
<i>Alston v. State</i> 723 So. 2d 148 (Fla. 1998)	12, 19, 21
<i>Arbelaez v. State</i> 626 So. 2d 169 (Fla. 1993)	19, 20, 29
<i>B.S. v. State</i> 548 So. 2d 838 (Fla. 3d DCA 1989)	3, 5
<i>Cave v. State</i> 727 So. 2d 227 (Fla. 1998)	12
<i>Cook v. State</i> 542 So. 2d 964 (Fla. 1989)	18
<i>Correll v. State</i> 523 So. 2d 562 (Fla. 1988)	12
<i>Craig v. State</i> 685 So. 2d 1224 (Fla. 1996)	28
<i>Cruse v. State</i> 588 So. 2d 983 (Fla. 1991)	19, 21
<i>Davis v. State</i> 604 So. 2d 794 (Fla. 1992)	11
<i>Dixon v. State</i> 283 So. 2d 1 (Fla. 1973)	24
<i>Dunaway v. New York</i> 442 U.S. 200 (1979)	3, 4, 5, 6
<i>Florida v. Royer</i> 460 U.S. 491 (1983)	3, 4, 5

<i>Garron v. State</i> 528 So. 2d 353 (Fla. 1988)	11
<i>Geralds v. State</i> 601 So. 2d 1157 (Fla. 1992)	11, 18
<i>Gonzalez v. State</i> 578 So. 2d 729	6
<i>Knowles v. State</i> 632 So. 2d 62 (Fla. 1993)	27
<i>Nibert v. State</i> 574 So.2 d 1059 (Fla. 1990)	27
<i>Oregon v. Mathiason</i> 429 U.S. 492 (1977)	6
<i>Pardo v. State</i> 563 So. 2d 77 (Fla. 1990)	28
<i>Phuagnong v. State</i> 714 So. 2d 527 (Fla. 1st DCA 1998)	7
<i>Raleigh v. State</i> 705 So. 2d 1324 (Fla. 1997)	12
<i>Smalley v. State</i> 546 So. 2d 720 (Fla. 1989)	18
<i>U.S. v. Echegoyen</i> 799 F.2d 1271 (9th Cir. 1986)	9
<i>U.S. v. Johnson</i> 22 F.3d 674 (6th Cir. 1994)	9
<i>U.S. v. Mejia</i> 69 F. 3d 309 (9th Cir. 1995)	9

U.S. v. Satterfield
743 F.2d 827 (11th Cir. 1984) 10

U.S. v. Sharpe
470 U.S. 675 (1985) 6

Walls v. State
641 So. 2d 381 (Fla. 1994) 19, 21

Zakrzewski v. State
717 So. 2d 488 (Fla. 1998) 19, 20, 29

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING THE MOTIONS TO SUPPRESS, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 12, OF THE FLORIDA CONSTITUTION, AND AMENDMENTS IV, V, AND XIV TO THE UNITED STATES CONSTITUTION.

The state asserts that it is an inaccurate reading of the evidence to say that the officers told Mr. Connor it was “necessary” for him to go the station. (Answer Brief at 61-62). That interpretation, however, was also that of the trial court (R. 436), and the prosecutor (R. 192), and is supported by the testimony of the officers and Mrs. Connor (T. 214, 257, 394, 439-40, 465-66, 500-1, 4081). According to the court:

Defendant’s initial response was to question whether it was necessary to go to the station at 2:00 a.m. When Detective Tymes replied that it was, in fact necessary, Defendant complied with her request. (R. 436).

According to the prosecutor:

Once inside [the detectives] asked the defendant whether or not he was willing to come to the police station to be interviewed. His initial response was to ask if it was necessary to do it at that hour (2:00 A.M.). When the police answered that it was, his response according to the

detective and Mrs. Connor was to turn around and go into his bedroom to get dressed.

(R. 192).

Mrs. Connor testified that Detective Tymes told her husband that “she needed him to come to the station to answer some questions” about the missing child. (T. 214). Mr. Connor asked, “This late?” (T. 214) or “Why go to the station?” (T. 257). Detective Tymes again said she needed him to come to the station. Mr. Connor then got dressed. (T. 214-15, 257).

At the hearing on the motion to suppress, Detective Tymes and Detective Murias gave various accounts of this conversation, according to which, either the defendant was asked to come to the office to continue his earlier interview with Detective Murias (T. 394, 500-1), and/or was told that Detective Tymes needed to talk to him, to which he said “yes” and asked if he could get dressed (T. 439-41). During cross-examination, Detective Tymes testified that when she told Mr. Connor she needed him to go down to the station, he asked “what do you need me to go down there for?” (T. 466). Her response was “to further interview you.” (T. 465).

Detective Tymes’ testimony at trial that she “advised Mr. Connor that I needed to further talk to him at my office” (T. 4081) confirms the accuracy of the trial court’s interpretation: The officers conveyed to Mr. Connor that it was necessary for him to come with them to the station to be interrogated (R. 436). This was an order or demand, not a nonmandatory request or invitation, *see B.S. v. State*, 548 So. 2d 838,

840 (Fla. 3d DCA 1989), and under the circumstances effected not only a seizure, but an arrest, *see Dunaway v. New York*, 442 U.S. 200, 216 (1979); *Florida v. Royer*, 460 U.S. 491, 502-3 (1983).

In *Dunaway*, the Court held that “regardless of its label,” taking a man from his neighbor’s house to the police station for interrogation, where although he was not told that he was under arrest he was also not told that he was free to leave, was an arrest for purposes of the Fourth Amendment. Because *Dunaway* was “seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance,” his confession had to be suppressed. *Id.* at 218-19. The violation occurred “when, without probable cause, they seized petitioner and transported him to the police station for interrogation.” *Id.* at 216.

In *Royer*, two detectives in plain clothes approached an airline passenger (*Royer*) in the boarding area of an airport, and asked if he had a moment to speak with them. *Royer* said yes. Upon request, *Royer* produced his airline ticket and driver’s license. When questioned about the discrepancy between the name on his license and the name on his luggage, he became nervous and said that a friend had made the reservation. Dissatisfied with his answers, the detectives told him they were narcotics agents and had reason to suspect him of transporting narcotics. They asked him to accompany them to a room 40 feet away. *Royer* said nothing in response but went with the officers as he had been asked to do. He was asked if he would consent to a

search of his suitcases. Without orally responding to this request, Royer produced a key and unlocked one of the suitcases. Asked if he objected to opening a second suitcase, he said “[n]o, go ahead,” and did not object when the detective explained that the suitcase might have to be broken open. 460 U.S. at 494-95. The detective who searched the suitcases, testified that he did not have probable cause to arrest Royer until he opened the suitcases and found marihuana. *Id.* at 496-97.

The Court held that “when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver’s license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.” *Id.* at 501. Moreover, “[a]s a practical matter, Royer was under arrest” at the time of the search, *id.* at 503, and because he was being illegally detained without probable cause at the time he gave his consent to the search, the consent was ineffective to justify the search. *Id.* at 508.

Here, the defendant was awakened at 2:00 a.m. by two detectives and told it was necessary for him to come to the police station to be further interviewed about the missing child. This was clearly more intrusive than the seizure in *Royer*, and since, as in *Royer* and *Dunaway*, the seizure was for the purpose of custodial interrogation, it constituted an arrest.

The state points out that Mr. Connor was initially confronted by only two

detectives, who were in plain clothes and did not display their guns, and Mr. Connor was not handcuffed. (Answer Brief at 63). However, all of these factors were also present in *Royer*; and similar circumstances existed in *Dunaway* (defendant picked up by three detectives, who did not tell the defendant he was under arrest, did not draw their guns, and did not handcuff him), 442 U.S. 203, 215 & n. 17, and they do not vitiate the coercive nature of the detectives' demand.

Moreover, contrary to the state's suggestion that the situation was rendered less coercive by the fact that one of the officers, Detective Murias, had spoken to Mr. Connor the day before (Answer Brief at 63), this circumstance actually reinforced the reasonable conclusion that the officers were not giving Mr. Connor a choice, since it made clear that they were not satisfied with his previous answers. *See Royer*, 460 U.S. at 503 (where defendant asked to accompany officers to police room "where the police, unsatisfied with previous explanations, sought to confirm their suspicions," defendant was under arrest). That they said it was necessary to take him to the police station at two o'clock in the morning for the purpose of further interrogation would lead any reasonable person to believe that he was not free to refuse. *See Royer*; *Dunaway*; *B.S.*, 548 So. 2d at 840.

The state argues that a detention for custodial interrogation does not become an arrest even after the defendant actually arrives at the station, so long as the questioning is not unduly prolonged, citing *Oregon v. Mathiason*, 429 U.S. 492

(1977) and *U.S. v. Sharpe*, 470 U.S. 675 (1985). (Answer Brief at 64-66). However, neither *Mathiason* nor *Sharpe* stand for that proposition. Neither of those cases involved a detention for custodial interrogation at the police station: In *Mathiason*, the defendant went to the police station voluntarily and was allowed to leave after being interviewed, and *Sharpe* involved a twenty-minute roadside detention. Here, from its inception -- i.e., from the time the officers told him it was necessary for him to come to the station -- the seizure was an arrest without probable cause. See *Dunaway*, 442 U.S. at 216.

Regarding the search of the car, the state argues that even if any initial illegality existed, it was not exploited by the officers because the officers obtained Mr. Connor's consent and advised him of his right to refuse before searching the car. (Answer Brief at 67). However, unlike in the cases cited by the state, here it was only *after* obtaining Mr. Connor's *uninformed* consent that Detective Tymes advised him of his right to refuse by reading the consent form. (R. 193; T. 400-1, 4088-89). This subsequent reading of his rights could not save the prior unadvised verbal consent to search, and the written consent, in turn, was tainted by the illegally obtained verbal consent. See *Gonzalez v. State*, 578 So. 2d 729, 733-34 & n. 14 (Fla. 3d DCA 1991) (verbal and written consent to further search premises were tainted and rendered involuntary by previous illegal search and, although the written consent forms advised defendant of her rights, "these subsequent, written advices could not possibly

save the prior coerced, verbal consent to search; moreover, the written consent forms were tainted by the coerced, verbal consent and could not, under any circumstances, dissipate the taint of the prior search”); *see also Phuagnong v. State*, 714 So. 2d 527, 533 (Fla. 1st DCA 1998) (signature on consent form only minutes after illegal arrest was plainly the fruit of the poisonous tree).

Contrary to the state’s assertion (Answer Brief at 65), the appellant does not agree that there would be no reason to suppress the fruits of the search of the car if this was merely a *Terry* stop. Whether or not the analysis of the voluntariness of consent would be different under those circumstances is irrelevant, since the officers in this case did not limit their confrontation of the defendant to a consensual encounter or a brief investigative detention, but, rather, began with an illegal arrest.

The state also argues that there was no flagrant official misconduct because the purpose of searching the car (and of the other searches as well) was to find the missing girl, and the officers’ could reasonably believe that their conduct was not illegal. (Answer Brief at 68). However, the officers’ actions are not consistent with that theory. Contrary to the state’s argument that the officers’ concern was to search for the missing girl, in the hope that she might still be alive, the officers in fact neglected to search the one obvious place where she might be located, namely, the main residence, until after 5:00 a.m., several hours after taking Mr. Connor to the police station. (T. 3902, 3912-13). Nor did the officers immediately proceed to

search the cottage. The testimony of the officers who conducted the first search of the cottage is inconsistent, but it is clear that it was not searched until after the search of the car, and until after Detective Tymes took Mr. Connor away to the police station. Indeed, according to Detective Butchko, the cottage was not searched until some time after 3:00 a.m., or at least half-an-hour after Mr. Connor had been taken to the station. (T. 4444-45).¹

What the officers did immediately proceed to do was to arrest Mr. Connor without probable cause and to search the Cadillac. Detective Tymes, who conducted the search, did not testify that she thought she might find the child alive inside the Cadillac (T. 376-472), and, indeed that would have been highly unlikely given the fact that 34 hours had passed since the abduction. Detective Tymes merely thought that the Cadillac might have been involved in the crime. (T. 398-99).

The state argues that Jessica's body and the blood in the Cadillac would inevitably have been discovered, because the police would inevitably have obtained a search warrant for the car and the cottage. (Answer Brief at 72-73). It does not

¹It should also be noted that Sergeant Jimenez, who, although he had assigned the lead to Detective Tymes, was the senior homicide detective at the scene, and stayed there to protect the scene's integrity, claimed to have been unaware that the cottage was searched before 11:00 a.m. (which was six hours after he and the other officers obtained consent from Mr. and Mrs. Connor and their daughter to search it). (T. 3901, 3909). Even as late as the suppression hearing Jimenez did not know that an earlier search had taken place. (T. 371-72). Clearly, Sergeant Jimenez felt no urgency to search the cottage, and he was the supervisor of the homicide team.

appear that this argument was made to the trial court (R. 190-97), and it is accordingly waived. Moreover, not only was it not “inevitable” that a warrant would have been granted to search the car based only on Ms. Goodine’s suspicions and the fact it was a black Cadillac, the officers made no attempt to obtain such a warrant until hours after their initial search. (T. 320-23, 357-59).

The inevitable-discovery exception cannot be used to excuse a warrantless search whenever there is probable cause. Such a holding would effectively eliminate the warrant requirement. *U.S. v. Mejia*, 69 F. 3d 309, 320 (9th Cir. 1995) (“If evidence were admitted notwithstanding the officers’ unexcused failure to obtain a warrant, simply because probable cause existed, then there would never be *any* reason for officers to seek a warrant. To apply the inevitable discovery doctrine whenever the police could have obtained a warrant but chose not to would in effect eliminate the warrant requirement.”); *U.S. v. Echevoyen*, 799 F.2d 1271, 1280 n. 7 (9th Cir. 1986) (to “excuse failure to obtain a warrant merely because the officers had probable cause and could have obtained a warrant would completely obviate the warrant requirement”); *U.S. v. Johnson*, 22 F.3d 674, 683 (6th Cir. 1994) (“to hold that simply because the police could have obtained a warrant, it was therefore inevitable that they would have done so would mean that there is inevitable discovery and no warrant requirement whenever there is probable cause”).

“[T]he prosecution must demonstrate that the lawful means which made

discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the illegal conduct.” *U.S. v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984). Here, the police were not seeking a warrant at the time of the search of the Cadillac (or of the cottage); indeed, they did not even decide to do so until some two hours later. (T. 320-23, 357-59).² Since at the time the search of the Cadillac was conducted, the police had not yet initiated lawful means to discover the evidence, their warrantless search did not fall within the inevitable discovery exception. *See Satterfield* at 846.

Finally, the state asserts that the suppression issue was waived because the defendant’s testimony at trial was inconsistent with the suppression testimony and arguments presented on his behalf. (Answer Brief at 73-74). However, Mr. Connor’s testimony was not inconsistent with the contention that his trip to the station had been involuntary, nor with the contention that the officers’ subsequent conduct did not break the chain of illegality. (T. 4816-28). His assertion that he was innocent was not a waiver of the motions to suppress.

With regard to the state’s other contentions, appellant relies on the arguments in his initial brief.

²By the time the matter was discussed with an assistant state attorney, at around 4:30 a.m. (T. 357), not only had the Cadillac and cottage been searched, Detective Tymes had observed the blood on Mr. Connor’s socks and shoes and was in the process of seizing them (T. 413-16, 4102, 4141, 4261-62, 4465).

II

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO ELIMINATE A WITNESS, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION.

The state argues that it is irrelevant that Jessica Goodine may not have witnessed her father's killing, since she could place Mr. Connor at the Goodine home at the time of the murder, in violation of a restraining order, and this, together with the fact that Mr. Connor's relationship with the child was cordial, was enough to show that the dominant motive for the murder was to eliminate her as a witness. (Answer Brief at 74-75, 78).

However, it is well established that evidence that the victim knew the defendant and witnessed him commit a crime is not enough to prove this aggravator. *See Gerald v. State*, 601 So. 2d 1157, 1164 (Fla. 1992) (evidence insufficient to show avoid arrest aggravator where defendant knew victim and killed her while burglarizing her home twenty minutes after binding her wrists with plastic ties he brought to the house); *Davis v. State*, 604 So. 2d 794 (Fla. 1992) (defendant knew elderly victim, whom he stabbed to death during burglary of her home); *Garron v. State*, 528 So. 2d 353, 360 (Fla. 1988) (shooting stepdaughter after she witnessed killing of her mother and was in the act of calling the police insufficient).

Here, there was evidence affirmatively showing that at the time Mr. Connor left with Jessica Goodine he was not concerned that Jessica might report his presence. As the state acknowledges in its Statement of the Case and Facts, but overlooks in its argument, after Jessica Goodine went to her house, she returned to the house of Ms. Merrit to ask a question and to say she was leaving. (Answer Brief at 29). The fact that Jessica was allowed to go to Ms. Merrit's house and that she told Ms. Merrit she was leaving, shows that she was leaving voluntarily and that the defendant was not concerned about what the child might say. It is completely incompatible with an intent to eliminate the child as a witness. The essence of such an intent is surely to prevent communication with others.

Unlike in *Correll v. State*, 523 So. 2d 562 (Fla. 1988) and *Raleigh v. State*, 705 So. 2d 1324 (Fla. 1997), upon which the state relies, the evidence did not show that the defendant came to the house with the intent to kill everyone who happened to be present so there would be no witnesses. Nor is the present like those cases, also cited by the state, where the victim of a crime is abducted, taken to a remote location, and there executed, for no apparent purpose than to eliminate her as a witness. *See Cave v. State*, 727 So. 2d 227 (Fla. 1998) (clerk who was sole witness to robbery of convenience store was taken to a remote location where she was killed execution style); *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998) (after abducting and robbing victim, Alston and a codefendant took him to a remote location, where, after telling

his codefendant that he would have to kill the boy because he could identify him, Alston walked him into the woods and shot him). Here, the record affirmatively shows that at the time he left with the child, the defendant was *not* concerned that she would report his presence at the Goodine house, or even that the neighbors would see him leaving with her.

The state's arguments in support of the theory that the defendant came to the house intending to kill Mr. Goodine, and then abducted the child to eliminate her as a witness, are not supported by the record:

- The state argues that since Mr. Goodine parked his car in front of the home, Mr. Connor must have known he was there, and therefore entered the house with the intent to murder Mr. Goodine. (Answer Brief at 77). This assumes that Mr. Connor came to the house after Mr. Goodine. But there is nothing to show this. He was probably already inside, removing personal items from Ms. Goodine's bedroom as he had in the past. It is also probable that there was nothing which would alert Mr. Goodine to the fact that Mr. Connor was in the house. Mr. Connor must have known, since he had lived at the house, that the neighbor across the street, Ann Merrit, was almost always at home and kept a close watch on the house. Accordingly, it is unlikely that he would have parked his car in front. Indeed, it appears that the Cadillac was driven

to the house after the murder, since Jessica and her friend did not notice it until some time after they had returned from school. (T. 3927-29, 3935).

- The state also suggests that Mr. Connor must have known that Lawrence Goodine would be home at that hour, because he was familiar with the household routine. (Answer Brief at 77). However, although he knew the routine of Ms. Goodine and her daughters, because he had lived with them at the house, there is nothing to show that he knew of Mr. Goodine's routine. Based on what he knew, there should have been no one at the house until late in the afternoon. Moreover, the fact that Mr. Goodine was bludgeoned with whatever weapon was at hand, also indicates that Mr. Connor did not come to the house with a plan to commit murder. The evidence is consistent with his having been surprised by Mr. Goodine and confronted in the area just inside the front door (which is also the area just in front of Ms. Goodine's bedroom).

- The state argues that the defendant did not kill Jessica at the house because he did not have the opportunity to do so. Apparently, the argument is that there was insufficient time because, according to the state, the defendant spent "a good amount of time" cleaning up the house to avoid detection of the murder of Mr. Goodine, and because,

according to the state, Mr. Connor knew that Jessica's sister Karen was due to come home and Ms. Webb would check on the children after they returned from school. (Answer Brief at 77). However, the only evidence of a cleanup is that an attempt was made to wipe up the main area of blood immediately inside the front door, and that the carpet runner was placed over it by returning it to its normal position. This, and wrapping Mr. Goodine's body in a quilt, would not have taken more than a few minutes. Moreover, Karen was not due to come home until much later: Jessica came home around 3:30 p.m. and went to her house about 4:00 p.m. (T. 3935, 3946); she returned to the Merrit house, to say she was leaving, then went back to her own house and left in the Cadillac; Karen did not come home until about 6:00 p.m. (T. 3955). There was ample opportunity to kill the child at the house. Instead, he allowed Jessica to go to the Merrit's house, to say she was leaving, and then left with her in full view of the neighbors.

- The state asserts that the child was present when the defendant transported Mr. Goodine's body in the back seat of his car. (Answer Brief at 78). However, the only evidence that the body might have been on the back seat at one time is that blood stains were found on the pouch behind the driver's seat and on the rear seat. (T. 4173-74). That does not

mean that the body was on the back seat. Something must have been used to soak up the large pool of blood near the front door, and it is just as likely or even more likely that this was the source of the blood on the seat. The body was wrapped in a quilt and the head was also wrapped in a blue bathrobe (T. 3648; Exhibit 6), so it should not have left any blood whether it was placed on the back seat or in the trunk. Moreover, although as the state notes (Answer Brief at 78), there is no evidence that the defendant disposed of the body and then returned to the house, there is also no evidence to the contrary. There was time to do so. Mr. Goodine arrived at the house at 2:30 p.m. Although Jessica came back from school at 3:30, she did not go to her house until about 4:00 p.m. when she saw the Cadillac. (T. 3935, 3946).

- The state argues that the fact that Jessica did not go with Mr. Connor voluntarily is shown by the fact that she did not wave to her seven-year-old friend. (Answer Brief at 77-78). However, Jessica had already told her friend that she was leaving (T. 3829), and it appears that Faisha observed the departure of the Cadillac from the back, since she could only see the back of the driver's head (T. 3830, 3837, 3839-40), which indicates that Jessica may not have seen her friend as she left. Moreover, Faisha did not observe any fighting or any "words." (T. 3834-

36).

The fact that Jessica was allowed to return to the Merrit's house to say she was leaving, the fact that she was not observed to be quarreling with the defendant as they left, and the fact that he had always been good to her and treated her as his own child, all indicate that she left voluntarily and, initially, was willing enough to be with him. And the fact that Jessica was allowed to return to Merrit's house and then left with the defendant in open view of the neighbors, shows that the defendant was not concerned that she would report his presence at the Goodine house, or even that the neighbors would see him leaving with her.

The record does not disclose under what circumstances she was being held over the next twenty-four hours. She was not sexually molested, or beaten, and does not appear to have been bound, since there were no ligature marks on the body. The state's assertion that she was trussed up in a comforter in order to prevent any movements (Answer Brief at 79, 83) is speculation. There is no evidence that this happened while she was still alive.

At some point, Jessica began to cry. (T. 5321-23). According to the state, the medical testimony shows this was "a prolonged period of crying, not a sudden burst of tears." (Answer Brief at 79). If this is meant to suggest that the child had been crying for hours, there is no support in the record for that assertion. What the medical examiner said was that the puffiness of the eyes indicated that the child had been

“crying quite an extent.” (T. 5321). The defendant evidently tried to keep her quiet, forcefully pressing his hand on her mouth, and, perhaps at that time, placing duct tape over the mouth. He then strangled her. It is a perfectly reasonable hypothesis that these actions were committed in a fit of rage, prompted by frustration at not being able to keep the child from crying, and that his mentally and emotionally disturbed state was the major contributing factor in the killing. *See Geraldts v. State*, 601 So. 2d 1157, 1164 (Fla. 1992); *Cook v. State*, 542 So. 2d 964, 970 (Fla. 1989); *see also Smalley v. State*, 546 So. 2d 720 (Fla. 1989).

Mr. Connor’s failure to take any steps, either before or later, to get rid of the evidence in the car and on his clothing linking him to the murder of Mr. Goodine, also suggests that witness elimination was not the dominant motive for the crime. The state argues that Mr. Connor had the presence of mind to attempt to explain away the blood on the yellow socks when confronted by Detective Tymes during interrogation. (Answer Brief at 80). Yet, the fact remains that he chose to put those socks on, even though he had ample time to decide what to wear and got dressed in the privacy of his bedroom. The blood on the socks was very noticeable and, if he was involved in Mr. Goodine’s murder, he must have known where it came from. The same is true of the blood on the pants, which he left on top of a pile of clothes in the bedroom he shared with his wife. These are not the actions of a rational person bent on seeking detection. Despite his apparent calm, hours after the murder of the

child, he was manifestly not thinking rationally.

The state's contentions regarding the expert testimony are discussed under Argument IV, below. However, appellant notes that contrary to the state's contention that the testimony of Dr. Mosman and Dr. Eisenstein "was not based on the circumstances of the crime, as the Defendant had never discussed these with the experts" (Answer Brief at 79), the record is clear that both Dr. Mosman and Dr. Eisenstein reviewed police reports and were aware of the manner in which the homicides occurred. (T. 5418-19, 5488-90, 5671-72).

III

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION.

The state argues that the evidence was sufficient under this Court's precedents to show CCP, citing *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998); *Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993); *Walls v. State*, 641 So. 2d 381 (Fla. 1994); *Alston v. State*, 723 So. 2d 148 (Fla. 1998); and *Cruse v. State*, 588 So. 2d 983 (Fla. 1991). (Answer Brief at 83-85). However, unlike the present case -- where the evidence of Mr. Connor's state of mind at the time of the crimes was purely circumstantial and consistent with a reasonable hypothesis negating the aggravator -- in all of the cases

cited by the state there was direct evidence, in the form of statements and testimony of the defendants or of testimony of witnesses to the crime itself, that the crimes were highly premeditated and cold.

Thus, in both *Zakrzewski* and *Arbelaez* there was direct evidence that the defendant had carefully set up the occasion for the crime, well in advance, and then proceeded to carry it out in a cold and ruthlessly deliberate manner. *Zakrzewski* decided to kill his wife and two children (age seven and age five) rather than have them go through a divorce. He bought a machete during his lunch hour, came home before the rest of the family and placed the machete in the bathroom. After disposing of his wife by bludgeoning her with a crowbar and strangling her with a rope, he called his children one by one into the bathroom, telling them it was time to brush their teeth, and then hacked them to death with the machete. He then boarded a plane to Hawaii, where he changed his name and lived in a religious commune. In *Arbelaez*, the defendant confessed that he killed his girlfriend's five-year-old son as revenge for her breaking up with him. He took the child to a cafeteria, where over coffee he calmly explained to a friend that he was going to do something to assure "that bitch is going to remember me for the rest of her life." Hours later, he drove to a bridge, stopped the car, and lifted the hood to make it appear the car had broken down. He called the child to him. After beating and strangling the child, he threw him off the bridge into the water seventy feet below.

Likewise, in *Alston* and *Walls* there was direct evidence of the highly premeditated and cold nature of the murder: Alston admitted that he told his codefendant that the victim had to be killed because he could identify him, 723 So. 2d at 153; Walls admitted that he shot the second victim because he did not want any witnesses. 641 So. 2d 390. And in *Cruse* there was testimony of several witnesses to the defendant's calm and controlled behavior during the commission of the crime, "as if he were merely accomplishing a task." 588 So. 2d at 992.

Here, as set forth at length in the initial brief, the evidence does not show a cold and calculated plan to commit murder, but rather a series of impulsive acts by a mentally ill person whose judgment and ability to think rationally were substantially impaired.

IV

THE TRIAL COURT ERRED IN REJECTING THE STATUTORY MENTAL MITIGATING CIRCUMSTANCES AND FAILING TO GIVE EFFECT TO UNCONTROVERTED MITIGATING EVIDENCE, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION.

The state asserts that Dr. Garcia, who was the only expert called by the state during the penalty phase, "expressly testified that neither of the statutory mental mitigators were applicable to the Defendant." (Answer Brief at 89). However, as

noted in the defendant's initial brief, when questioned during cross-examination, Dr. Garcia admitted that he equated the phrases "substantial impairment" and "emotional problem or emotional distress" with the criteria for incompetence. (T. 5787-88). The cross-examination on this began with a discussion of Dr. Garcia's report and its focus, and then turned to the meaning of his testimony on direct examination:

[DEFENSE COUNSEL:] Doctor, you said that most of the data indicated that there was no profound illness in your report, but you did find some illness. You also stated that you did find, as we have discussed, some organic symptoms.

[DR. GARCIA:] That is correct.

[DEFENSE COUNSEL:] Extent of which we have just discussed. At that time, you were called upon to decide whether Mr. Connor was competent to stand trial, isn't that correct?

[DR. GARCIA:] That is correct.

[DEFENSE COUNSEL:] Also at that time you were not asked about substantial impairment, is that correct?

[PROSECUTOR:] Objection, it was not appropriate at that time.

THE COURT: Overruled.

[DEFENSE COUNSEL:] Isn't that correct?

[DR. GARCIA:] The question, as I understood, was he competent or not. I gave an opinion to that question.

[DEFENSE COUNSEL:] You were never asked about whether there was a substantial impairment, is that correct?

[DR. GARCIA:] It is implicit in the question that if there is a severe impairment, for whatever reason, and that impairment is severe enough, that will make the person not competent.

[DEFENSE COUNSEL:] So you are equating the words substantial impairment with incompetent to stand trial, is that what you are saying?

[DR. GARCIA:] I think so, yes.

[DEFENSE COUNSEL:] You are equating the words, emotional problem or emotional distress as Mr. Gilbert asked you with the standard for competency to stand trial, is that correct?

[DR. GARCIA:] In other words, basically, I am just looking at two criteria. Does he suffer from a mental illness? Two, is that severe enough, serious enough to the point where that hinders the person's ability to tell right from wrong to meet the criteria for competency? That is the question that I understood was asked of me. When I say I find the Defendant competent, I was addressing that particular question.

[DEFENSE COUNSEL:] So when you were responding to [the prosecutor's] theory or questions, you were responding as to whether Mr. Connor was competent to stand trial, which you said, I guess, he was. That was one part.

The other part of [the prosecutor's] questioning that you were responding to was whether he knew right from wrong, which is the definition of insanity, is that correct?

[DR. GARCIA:] At that point, yes, I think so. The answer is yes.

[DEFENSE COUNSEL:] So when you were responding to [the prosecutor's] questions, it was to those

two matters that were the criteria for all your assessments, is that correct?

[DR. GARCIA:] That is correct.

[DEFENSE COUNSEL:] No further questions.

THE COURT: Any redirect?

[PROSECUTOR:] Nothing further.

(T. 5786-88).

It is clear from this testimony that Dr. Garcia had only evaluated the defendant for competency and sanity and that is all his testimony went to. He had never been asked to address the question of whether the defendant was under the influence of a mental or emotional disturbance which could be considered “extreme” in the sense required by the statutory mitigator, or whether that disturbance interfered with but did not obviate the defendant’s knowledge of right and wrong. *See Dixon v. State*, 283 So.2d 1, 10 (Fla. 1973) (explaining the meaning of these statutory mental mitigators). Dr. Mosman and Dr. Eisenstein, the only experts to address that issue, testified that in their opinion Mr. Connor was under the influence of extreme mental or emotional disturbance and that his ability to conform his conduct to the requirements of law was substantially impaired (T. 5469-70, 5669-71).³

³The state notes that several of the experts would not testify on behalf of the state because of moral and ethical objections to the death penalty. (Answer Brief at 86 n. 6). However, that clearly does not show that their testimony would actually have been favorable to the state. As the prosecutor acknowledged, he could have issued subpoenas to compel their testimony. (T. 5481).

Dr. Mosman and Dr. Eisenstein repeatedly interviewed and tested Mr. Connor over a period of five years, beginning with Dr. Eisenstein's first interview in 1993, which was three years before the earliest interview by a state expert. Not only was their contact and evaluation far more extensive than that of the other experts, they appear to have been the only ones to have gone through the exercise of attempting a diagnosis, and more importantly, of testing the effect of stress upon his level of impairment. The question of whether, and at what point, Mr. Connor's mental illness fit within the diagnostic criteria of paranoid schizophrenia set forth in the DSM-IV, was, as Dr. Eisenstein testified, "secondary" (T. 5494), to the main issue of whether his mental and emotional disturbance at the time of the crimes rose to the level required for the statutory mitigators. While Dr. Garcia disagreed with a diagnosis of schizophrenia, he did not offer a diagnosis of his own, and never addressed the matter of the effect stress would have on Mr. Connor's mental condition. He did not have to, because his evaluation was solely directed to determining whether Mr. Connor was suffering from a mental illness so severe that it would render him incompetent or insane. When asked by the prosecutor whether he gave Mr. Connor a clean bill of health, he replied, "Well, I find him competent," and explained that while he did find "some paranoid features," "[y]ou can have paranoid features and be able to tell right from wrong." (T. 5750-51). Neither this testimony, nor the testimony of the other state experts, could be said to controvert the opinions of Dr. Mosman and Dr.

Eisenstein regarding Mr. Connor's mental process or his mental state at the time of the crimes.

As the trial court found, based on the testimony of all the experts and the other evidence it is a fact that Mr. Connor is both mentally ill and emotionally disturbed. (R. 2207, 2214). There was also consensus as to the main features of his illness, including paranoid thinking and some organic brain damage. (R. 2207). The testimony of Dr. Eisenstein and Dr. Mosman that his condition can and does sometimes reach psychotic proportions was not controverted. Indeed, the trial judge herself stated that she may have noticed lesser instances of this, noting that he seemed to recoup fairly quickly. (T. 823).

The state asserts that the testimony of Dr. Mosman and Dr. Eisenstein "was not based on the circumstances of the crime, as the Defendant had never discussed these with the experts." (Answer Brief at 79). However, both Dr. Mosman and Dr. Eisenstein reviewed police reports and were aware of the manner in which the homicides occurred. (T. 5418-19, 5488-90, 5671-72). They were far better informed in this regard than Dr. Garcia, who appears to have had very little, if any, knowledge of the circumstances of the crimes. His level of understanding may be gauged from the fact that at the time he interviewed Mr. Connor he thought Margaret Goodine was one of the murder victims. (T. 851-57).

The opinion of Dr. Mosman and Dr. Eisenstein regarding Mr. Connor's thought

process and his state of mind at the time of the crimes was not controverted by other expert testimony, and it was supported by the facts. What is inconsistent with the facts is the trial court's conclusion, reiterated by the state (Answer Brief at 92-93), that Mr. Connor's mental illness affected only areas of his life other than the crimes.

It is true that despite mental problems, and other handicaps, which had been present throughout his life he was able to lead a "full and rich life" and provide for his children. But all of that began to change in the mid-1980s, as not only Dr. Mosman and Dr. Eisenstein, but also Dr. Jacobson testified. The evidence of increasing deterioration -- from the conduct which got him fired from his job in 1986, to the bizarre, and for him unprecedented, conduct during the six months preceding the crime -- is overwhelming and cannot be ignored. The testimony of the defense experts on the issue at hand was not controverted by other expert testimony and was supported by the facts. Because the two statutory mental mitigators were established by a reasonable quantum of competent, uncontroverted evidence, their rejection by the court was error. *Knowles v. State*, 632 So. 2d 62, 67 (Fla. 1993); *Nibert v. State*, 574 So.2 d 1059, 1062 (Fla. 1990).

V

THE TRIAL COURT ERRED IN FAILING TO FIND THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE DEFENDANT DID NOT HAVE A SIGNIFICANT PRIOR HISTORY OF CRIMINAL ACTIVITY, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION.

The state asserts that during his county employment the defendant committed what it characterizes as “violent criminal acts” against his co-employees (Answer Brief at 94 n. 8). However, the trial court quite properly did not rely on these incidents in its order. (R. 2206). These four incidents occurred nine to twenty-one years before the crimes for which Mr. Connor was being sentenced, and the record does not show whether or not his behavior had been “criminal” or not. Indeed, since they were all reported, at least to the employer, and no convictions or trials resulted, it would appear that the proper authorities concluded that they should not be prosecuted as criminal offenses.

The misconduct upon which the court did rely was all substantially related to the crimes, and therefore could not be used to reject this statutory mitigator. *Craig v. State*, 685 So. 2d 1224, 1231 (Fla. 1996). The state’s apparent suggestion that the defendant’s acts in the months preceding the crimes were “singular, discrete, and only tenuously related to other episodes” (Answer Brief at 95 & n. 9, quoting *Pardo v.*

State, 563 So. 2d 77, 80 (Fla. 1990)) is directly contrary to the position it took below, when it introduced, over defense objection, the testimony concerning these acts of collateral misconduct (T. 102-3).

VI

THE DEATH SENTENCE IS DISPROPORTIONATE, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION.

The state suggests that this case is very similar to *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998) and *Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993) because those cases involved the murders of children and some level of emotional distress. (Answer Brief at 96-97). In fact, however, those cases are very different from the present case, because (1) in both *Zakrzewski* and *Arbelaez* there was direct evidence that the crimes were highly premeditated and carefully planned, and that the defendant set up the occasion for the crime and coldly executed it, and (2) in both those cases there was also little or no evidence of mental illness, although in *Zakrzewski*'s case there was evidence of emotional disturbance. Here, as the trial court found, Mr. Connor was both mentally ill and emotionally disturbed, and as argued in Argument II and III, the evidence was not only insufficient to show that the homicide was cold, calculated and highly premeditated, it actually showed the contrary.

The other cases cited by the state are inapposite because they all involve

torturous murders of young children who were abducted for the purpose of sexual gratification. This was not that kind of case.

The murders were the direct result of mental illness and emotional disturbance; they were not planned. The death penalty is disproportionate.

CONCLUSION

For the foregoing reasons, appellant's convictions and sentence of death must be reversed.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

By: _____
LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail, to the office of Assistant Attorney General FARIBA N. KOMEILY, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 this 6th day of June 2000.

LOUIS CAMPBELL
Assistant Public Defender