IN THE SUPREME COURT OF FLORIDA

EDDIE LEE SEXTON,	:	
Appellant,	:	
vs.	:	Case No. 94,487
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF TYPE USED

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STATEMENT OF THE CASE

The instant appeal arises from the retrial of Mr. Sexton as ordered by this Court on July 17, 1997 and pursuant to the Mandate issued on August 18, 1997. (Vol.I,R67-72) This appeal follows the re-imposition of a sentence of death by the trial court.

Mr. Sexton was indicted for the First-Degree Murder of Joel Good on February 16, 1994, in Hillsborough County. (Vol.I,R58-59) Counsel was appointed to represent Mr. Sexton. (Vol.I,R73-74)

Numerous motions attacking the constitutionality of the death penalty were filed, and subsequently denied, by the trial court. (Vol.I,R145-155;Vol.II,R156-196;Vol.XII,T1076-1078) Pretrial motions requesting to limit victim impact evidence and to video tape that evidence were also filed. (Vol.I,R125-132) At a hearing on November 19, 1998, the motion to video and to limit the victim impact evidence to prepared written statements to be read by the family members was granted. (Vol.XII,T1064-1069) Motions for special findings and for an interrogatory penalty phase verdict were filed. (Vol.I, R136-144) Each was denied at the November 19th hearing. (Vol.XII,T1070-1073)

On December 17, 1997, defense counsel requested funds to obtain a PET scan and interpretation of the scan. (Vol.II,R197-247) The motion was granted. The State's motion to compel a mental examination for use in penalty phase was likewise granted on July 29, 1998. (Vol.II,R250-251)

On July 14, 1998, the State filed a Suggestion of Conflict and attached a copy of a Motion for Post-conviction Relief filed on

behalf of Mr. Sexton. (Vol.II,R252-282) The Suggestion for Conflict alleged that Mr. Sexton's current attorney, Rick Terrana, was alleged to have engaged in conduct which resulted in an improper plea in another case. (Vol.II,R252-282) A hearing was held on the Motion For Suggestion of Conflict on July 15, 1998. (Vol.XII, T1082-1088) Attorney Brian Donnerly, who represented Mr. Sexton in the post-conviction matter, advised the court that trial counsel was not being alleged to have been ineffective. (Vol.XII,T1082) The allegations in the post-conviction claim were that both Mr. Sexton and counsel had been misled by the court. (Vol. XII,T1082) Mr. Terrana advised the court that he would like the court to question Mr. Sexton and obtain a waiver of any conflict. (Vol. XII, T1083) The court then questioned Mr. Sexton, asking if he was willing to waive any conflict that might arise in this case as a result of the post-conviction proceeding. (Vol.XII,T1087) Mr. Sexton stated he wanted Mr. Terrana to represent him. (Vol. XII, T1087) Mr. Donnerly also advised the court that he had discussed the situation the prior evening with Mr. Sexton. (Vol.XII,T1087)

On August 21, 1998, counsel for Mr. Sexton moved for a clarification from the trial court of this Court's earlier opinion concerning what evidence relating to dissimilar fact evidence under Section 90.402 would be admissible in the new trial. (Vol.II,R287-299) The court ruled testimony relating to Willie was admissible. (Vol.XII,T1120) On the remaining areas, the judge did not rule pretrial. A separate motion sought to preclude the State

from mentioning Mr. Sexton's appearance on the television show "America's Most Wanted" was filed and granted. (Vol.III,R301-302)

A hearing was held on August 24, 1998. (Vol.XII,T1093) At the beginning of the hearing, Mr. Sexton presented the court with a letter, which according to the court, contained a request for new counsel. (Vol.XII,T1096;Vol.SR3-4) Mr. Sexton said this was not the first request, he had made a previous request in February. (Vol.XII,T1097) Mr. Sexton said he had no confidence in his lawyers. (Vol.XII,T1098) Without further inquiry, the court denied the request. (Vol.XII,T1098)

At the same hearing the court denied a motion for individual and sequestered voir dire. (Vol.XII,T1112) The court granted a defense motion to prohibit the State from having Teresa Boron testify about a conversation with Mr. Sexton regarding whether Joel Good was left insurance money after the death of his parents. (Vol. XII,T1128) The court also reversed its earlier ruling on the videotaping of the victim impact evidence. (Vol.XII,T1139)

Mr. Sexton was tried by jury from August 31, 1998 through September 3, 1998, with the Honorable Roger Padgett, circuit judge, presiding. (Vol. III,R311) The jury returned a verdict of guilty as charged on September 3, 1998. (Vol.III,R342)

Penalty phase commenced on September 4, 1998. (Vol.III,R343) Following the presentation of evidence, the jury returned an advisory recommendation in favor of death by a vote of eight to four. (Vol.III,R354)

A motion for new trial and a motion for JNOV were filed on September 22, 1998 and denied on October 5, 1998. (Vol.III,R355-358; Vol.XI,T1037-1044) Brief argument regarding sentencing was made by the defense. (Vol.XI,T1038-1044)

In preparation for sentencing, a Memorandum in Support of a Life sentence was filed on November 17, 1998. (Vol.III,R359-370) The State Sentencing Memorandum was filed on November 18, 1998. (Vol.III,R370-383) Mr. Sexton appeared for sentencing on November 18, 1998. The court's written sentencing order reflects that the court found three aggravating factors as follows:

1. The defendant had previously been convicted of a felony involving the use or threat of violence. This was a 1965 conviction for Armed Robbery. The court assigned little weight to this factor. (Vol.III,R385;388)

2. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. The court assigned great weight to this factor. (Vol.III,R386;388)

3. The capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court assigned great weight to this factor. (Vol.III,R386;388)

In mitigation the court found the following factors:

1. The defendant was under the influence of extreme mental or emotional disturbance at the time the capital felony was committed. This factor was assigned great weight. (Vol.III,R386-388)

2. The defendant was capable of kindness to children and would even act as Santa Claus at Christmas.

3. The defendant was Pastor of a church attended by family and friends.

4. The defendant at times had a normal, loving relationship with his children.

5. The defendant often helped his mother and sisters with household chores and repairs.

6. The defendant's father died when the defendant was 10, depriving him of a male role model.

Each one of factors 2 through 6 was assigned some weight. (Vol.III,R388)

The court sentenced Mr. Sexton to death, writing that the sentence was proportional even with Willie Sexton receiving a lessor sentence because the murder was the sole idea of Appellant. (Vol. III,R388-389) The sentencing order was not read in open court. (Vol.XI,T1047-1048)

A timely Notice of Appeal was filed on November 25, 1998. (Vol.III,R390)

STATEMENT OF THE FACTS

GUILT PHASE

The trial testimony is summarized as follows:

Judy Genetin is employed at the Stark County, Ohio, Division of Human Services. (Vol.VI,T353) She is a licensed attorney. (Vol. VI,T353) In Ohio, the Division of Human Services (DHS) has the responsibility to investigate allegations of abuse and neglect of children. (Vol.VI,T353) Through the Division's involvement with Mr. Sexton, Ms. Genetin became very familiar with the Sexton family. (Vol.VI,T354)

Ms. Genetin identified a family tree outlining the Sexton family's genealogy. (Vol.VI,T355) According to Ms. Genetin, Mr. Sexton was the father of two children, Shasta and Dawn, whose mother was Estella Mae "Pixie" Good, Mr. Sexton's daughter. (Vol. VI,T356-357) Skipper Lee Good was the child of Estella Mae Good and Joel Good. (Vol.VI,T357)

On February 11, 1992, DHS opened an investigation into the Sexton family and on February 12, 1992, one of the children left the home and went into a temporary shelter. (Vol.VI,T357) On February 16, 1992, a dependency and pick-up order authorized the removal of the remaining children from the home. (Vol.VI,T357-58) The following day, after a hearing, DHS was granted temporary custody of the six youngest children. (Vol.VI,T358) The children were then placed in foster care. (Vol.VI,T358)

Five months later, in September, custody of three children, Kimberly, Christopher, and Charles, was returned to their mother,

Mae Sexton. (Vol.VI,T359) The whereabouts of Charles were unknown at that time. (Vol.VI,T359) A "no contact" order was in place which forbade Mr. Sexton from having contact with the children. (Vol.VI,T360)

On November 21, 1992, Ms. Genetin and the Jackson Ohio Police Department became involved in a negotiation process with Mr. Sexton. (Vol.VI,T360) Mr. Sexton had barricaded himself inside the family home on Caroline Street. (Vol.VI,T360) Mr. Sexton was demanding the immediate return of the remaining children in foster care. (Vol.VI,T361) Ms. Genetin agreed to change the social worker on the Sexton case because Mr. Sexton did not like her, and a court hearing was scheduled for three days later. (Vol.VI,T361-362) None of the Sextons appeared for that court hearing. (Vol.VI, T361) Arrest warrants were issued for Mr. Sexton and his wife in October 1993. (Vol.VI,T373)

Steve Zerby was a Captain with the Jackson Township Police force in 1992. (Vol.VI,T364) Mr. Zerby had known Mr. Sexton 25 or 30 years, stemming back to before he was a police officer and had been Mr. Sexton's barber. (Vol.VI,T364)

On November 21,1992, he was called to the Sexton home because Mr. Sexton had barricaded himself in the house with three juvenile children, one adult child, and his wife. (Vol.VI,T365) Mr. Sexton had first called the press to alert them to his dissatisfaction with DHS, and the press called the police. (Vol.VI,T369) Mr. Zerby engaged in telephone negotiations with Mr. Sexton for around 11 hours. (Vol.VI,T366) Mr. Sexton told Mr. Zerby that he had

barricaded himself in the house because he thought there were more pick-up orders on his children and he would not allow that. (Vol.VI, T366) Mr. Sexton told Mr. Zerby that he would kill anyone from Child Protection Services or any policeman that tried to take any of his children. (Vol.VI,T367)

When Mr. Sexton left the house and the police entered around 8:00 p.m., they found the house had been fortified. (Vol.VI,T365) The doors had been removed from their hinges and nailed across the windows. (Vol.VI,T368) Chicken wire and plastic bags also covered the windows. (Vol.VI,T368) A lighting system had been set up under tables and there were large amounts of canned food and water. (Vol. VI,T368) Police found a .357 revolver and one 20 gauge shotgun, along with 70 rounds of ammunition. (Vol.VI,T368) The guns were taken into custody and not returned to Mr. Sexton. (Vol.VI,T368)

On September 20, 1993, DHS took permanent custody of the five youngest children. (Vol.VI,T362) Charles had turned 18, so custody was not obtained on him. (Vol.VI,T362) State's Exhibit 16, a video tape, was published to the jury. (Vol.IX,T631) The tape was made by Mr. Sexton after leaving Ohio, while he and some of his family were on the road. (Vol.IX,T631) The tape is summarized as follows:

Mr. Sexton addressed the tape to the citizens of the United States, and requested that some government official step in and stop what was happening to his family. (Vol.IX,T631) According to Mr. Sexton, he and his family of twelve children were living a good life in Ohio until 1991 when one of the children, Machelle, ran away from home after dumping urine on the younger children's

heads. (Vol.IX,T633) Machelle returned in six days, claiming she had been sexually abused by her friend's father. (Vol.IX,T634) Machelle again began to cause trouble in February, which culminated in a fight with her brother and Machelle was scratched on the face. (Vol.IX,T635) The next day, Social Services came and took Machelle's clothing and told Mr. Sexton that Machelle was ten weeks pregnant. (Vol.IX,T636) Machelle left the home. (Vol.IX,T637)

In April, Mrs. Sexton went to school to pick the children up and found that Social Services had taken them and that the police were waiting for her at the elementary school. (Vol.IX,T637) Apparently, Machelle had had further difficulties, and Mr. Sexton was being accused of sexually molesting her. (Vol.IX,T638) The children were taken and given to Mr. Sexton's brother Otis, whom Mr. Sexton does not like. (Vol.IX,T638-39) After a court hearing the children were taken from Otis and placed in foster care. (Vol.IX,T639)

On the tape Mr. Sexton claimed that he and his wife were American Indians and that they had sought assistance from the "Indian Nation". (Vol.IX,T640) They had a lengthy struggle to be recognized as such. (Vol.IX,T641) After traveling across the country, he and his wife still needed some number to prove their status as Indians, so Mr. Sexton appealed for help in obtaining that . (Vol.IX,T660)

Eventually, Mr. Sexton moved out of the home and into a camper with his son Willie. (Vol.IX,T642) Despite great health issues,

Mr. Sexton lived in the camper from July until November. (Vol. IX, T643)

Mr. Sexton chronicled his perceptions of his children's experiences in the foster homes. (Vol.IX,T643-646;650-1;658;668-672)

Mrs. Sexton eventually took a trip with some of the children to Fort Knox. (Vol.IX,T646) While she was gone she learned that another pick-up order had been issued. (Vol.IX,T649) The car had broken down, she had no one to help her, and Mr. Sexton couldn't be around the children. (Vol.IX,T648-49)

At this point Mr. Sexton decided to barricade himself and family in the house to put a stop to what was going on. (Vol.IX, T652) Mr. Sexton instituted the barricade and called the press. (Vol.IX,T655) At the end of it he was taken to the crisis center and evaluated. (Vol.IX,T654) Mr. Sexton bonded out of jail and the next day found out that the police were coming after his wife. (Vol.IX,T654) Mr. Sexton and his wife decided to flee with the three children they had. (Vol.IX,T657)

Mr. Sexton concluded the tape by stating that he would give his life for his family because they were his country. (Vol.IX, T665) Without family, there would be no country. (Vol.IX,T665) A stand had to be taken against the people who would take children out of a family. (Vol.IX,T666)

The next contact the police had with the Sexton family was in 1994. (Vol.IX,T373) Detective Steve Ready of the Stark County, Ohio Sheriff's Office, learned that Mr. Sexton had been arrested in

Hillsborough County, Florida on January 14, 1994. (Vol.VI,T373) Detective Ready interviewed three of the Sexton children: Eddie, Jr., Sherri, and Charles (also known as Skipper). (Vol.VI,T373-374) After these conversations, Detective Ready notified Hillsborough County of the possibility of two homicides. (Vol.VI,T374)

On January 20, 1994, Detective Ready and Charles Sexton came to Hillsborough County to locate the grave of the infant, Skipper Good. (Vol.VI,T375) The child's grave was found in the Hillsborough River State Park on January 27th. (Vol.VI,T395-396) Later that day, they searched for the body of Joel Good in the Little Manatee River State Park. (Vol.VI,T375;396) The body was recovered on January 28th. (Vol.VI,T397) A video was made of the walk from the Sexton's camper to the gravesite. (Vol.VI,T398)

Dr. Marie Hermann was the assistant medical examiner at the time Joel's body was recovered. (Vol.IX,T620) She participated in the removal of the body from the grave. (Vol.IX,T622) The body had been buried about three feet deep. (Vol.IX,T622) When Joel Good's body was taken from the grave, there was a rope tied to two sticks around his neck. (Vol.VI,T400; Vol.IX,T623)

An autopsy was performed on the body. (Vol.IX,T624) Despite advanced decomposition, Dr. Hermann found bruising on the neck under the ligature. (Vol.IX,T625) Red discoloration indicated that pressure had been applied. (Vol.IX,T626) Dr. Hermann's opinion was that Joel died as a result of asphyxiation due to ligature strangulation. (Vol.IX,T626)

Dr. Hermann also observed a wound to the right hand of Joel Good. (Vol.IX,T628) This wound was consistent with being a chop wound. (Vol.IX,T629) It was caused by a sharp object applied with great force. (Vol.IX,T629) A machete could have caused it. (Vol.IX,T630)

Yale Hubbard is employed by the Little Manatee River State Park as a ranger. (Vol.VI,T378) His duties include the registration of campers, providing services to campers, and maintenance of the campground. (Vol.VI,T378) The park has electricity and water hookups, as well as phones available. (Vol.VI,T391) In November and December 1993 and January 1994 he rented a campsite to Mr. Sexton and his family. (Vol.VI,T380) Two weeks was generally the rental limit, but if the spaces were available, a stay could be extended. (Vol.VI,T381) The family stayed until Mr. Sexton's arrest by the FBI. (Vol.VI,T381)

The Sexton's occupied site 18. (Vol.VI,T383) They camped in a motor home. (Vol.VI,T383) The way the camper was parked was not the usual way and you could not see into the door from the road. (Vol.VI,T384) The license plate was not visible. (Vol.VI,T384) The license number would have been given when the Sexton's registered. (Vol.VI,T387)

There was no rule against babies in the park. (Vol.VI,T389) No complaints were received about babies crying or about the Sextons in general. (Vol.VI,T389) The rent was paid in cash at the ranger station. (Vol.VI,T389) It was paid almost every time by

Estella Mae, who was also known as "Pixie". (Vol.VI,T389) Willie, her brother, almost always accompanied her. (Vol.VI,T389)

Willie Sexton testified that he is the fourth child and son of Mr. Sexton. (Vol.VI,T405;409) He was 27 at the time of trial. (Vol.VI,T406) Willie stated that he finished "special school" and collects social security disability benefits because of the problems he had in school. (Vol.VI,T406) Willie is currently in prison, serving a 25 year sentence. (Vol.VI,T407) Willie has also stayed in Chattahoochee for a year and a half since his arrest. (Vol.VI,T407) Willie still takes medication that was first prescribed for him while he was in Chattahoochee. (Vol.VI,T408)

Willie testified that as a child his father, Mr. Sexton, began to have anal sex with him when he was nine years old. (Vol.VI, T451) Mr. Sexton told Willie that daddies are supposed to do that to their sons. (Vol.VI,T451) This continued in Florida. (Vol.VI, T452) Willie did not tell anyone what was happening because he was afraid that his dad would hurt him. (Vol.VI,T452) Willie has problems with his bowel functions to this day as a result of this. (Vol.VI,T452)

Willie was punished by Mr. Sexton growing up. (Vol.VI,T452) He was hit with a belt, a ball bat, and an electric belt. (Vol.VI, T452) Willie has scars on his forehead from this. (Vol.VI,T453) Mr. Sexton continued to beat Willie while they were in Florida. (Vol.VI,T454) Mr. Sexton would tell Willie "I brought you into the world, so you do what I say." (Vol.VI,T454)

Willie was punished as a child by having to stand naked against the wall with his arms out with books placed on the back of his hands. (Vol.VI,T453) Willie was also tied in his bed at night. (Vol.VI, T455) If he had to use the bathroom, he would have to soil the bed. (Vol.VI,T455) If he soiled the bed, he was beaten. (Vol.VI, T455)

Mr. Sexton teased Willie as a child. (Vol.VI,T455) He called him retarded and stutter bug. (Vol.VI,T455) Willie was not allowed to talk to anybody about what his father did to him. (Vol.VI,T456) Mr. Sexton told the children he would hurt them if they talked. (Vol.VI,T456) Willie was given quarters to take to school and you were supposed to call home if you saw any of the children talking about the family. (Vol.VI,T456) Willie didn't tell HRS what had happened to him in 1992 because he was too scared. (Vol.VI,T457)

Willie believed that Mr. Sexton had special powers. (Vol.VI, T458) Mr. Sexton would show Willie a line on his palm and tell him that he was a warlock. (Vol.VI,T458) Mr. Sexton would tell Willie to look in his eyes, that he could see the devil there. (Vol.VI, T459)

Willie tried to run away once, right after high school graduation. (Vol.VI,T455) Mr. Sexton ran him down with a car, causing him to flip over the hood. (Vol.VI,T455)

When Willie was arrested four years ago he was living with his parents in a campground. (Vol.VI,T410) Willie has never held a job or lived away from his parents. (Vol.VI,T410,451) Willie knew that HRS had taken kids away from his parents in 1992. (Vol.VI,T411)

Willie understood that HRS takes kids when the parents are mean. (Vol.VI,T410)

When HRS took Mr. Sexton's children, Mr. Sexton moved out of the house. (Vol.VI,T411) Willie went with his father. (Vol.VI, T411) Mr. Sexton was sad the children were gone. (Vol.VI,T412) In order to get the kids back, his dad had a stand-off and then they left and went to an uncle's house. (Vol.VI,T414) After that Willie didn't know where they went, but they did try to find Indian cards. (Vol.VI,T415) They traveled to stay away from the cops. (Vol.VI, T417) They went to Indiana and stayed with relatives. It was there that Pixie and Joel Good met up with them. (Vol.VI,T419) Mr. Sexton would tell Willie that if HRS came, he would take them out. (Vol.VI,T420)

While in Indiana, Mr. Sexton taught Willie and his two brothers how to use weapons. (Vol.VI,T420) Willie was taught to use a 12-gauge shotgun, a .357, and a rope. (Vol.VI,T420) The rope was attached to two sticks. (Vol.VI,T420) Mr. Sexton taught Willie to put the rope around someone's neck, turn it, and then the rope will pull tight. (Vol.VI,T421) According to Willie, Mr. Sexton told him when you make the rope tight, it puts the person to sleep. (Vol.VI,T421) Mr. Sexton was teaching the boys how to use these weapons in case the FBI surrounded the motor home while they were camping and they had to fight. (Vol.VI, T422) Joel did not want to learn to fight the FBI and during the standoff in Ohio he had wanted to go home. (Vol.VI,T423) Willie had previously seen the

rope and sticks that were found on the body of Joel Good. (Vol.VI, T422)

Before they left Ohio, Willie knew that Pixie had married Joel Good. (Vol.VI,T416) Pixie had two girls. Mr. Sexton told Willie they were his children. (Vol.VI,T419) Pixie and Joel had a baby named Skipper. (Vol.VI,T419) According to Willie, Pixie and Joel did not get along good. (Vol.VII,T470) They argued a lot. (Vol.VII,T471) Pixie burned Joel with cigarettes. (Vol.VII,T472) Pixie beat Joel with pots and pans. (Vol.VII,T472) Pixie forced live fish down Joel's throat and had others put a funnel in Joel's rear. (Vol.VII,T473)

Willie got along good with Joel. (Vol.VI,T441) They were like brothers. (Vol.VI,T442) Willie did beat Joel up once when Mr. Sexton told him to. (Vol.VII,T421)

After the stand-off in Ohio, the family traveled in a motor home to Oklahoma and then to Florida. (Vol.VI,T425) In Florida they first stayed at Uncle Dave's house in New Port Richey. Dave is Mr. Sexton's brother. (Vol.VI,T425) While they were in New Port Richey Willie heard Joel tell Mr. Sexton that he wanted to go back to his grandparent's home in Ohio. (Vol.VI,T426) Mr. Sexton told Joel no. (Vol.VI,T426) Mr. Sexton told Joel that he would hurt him if he mentioned leaving again. (Vol.VI,T427)

After leaving New Port Richey, the family went to a campground at the Hillsborough River. (Vol.VI,T427) Among those who went were Pixie's daughters, Pixie, Joel, their baby Skipper Lee, Sherri and

her child, Matthew, Charles, Christopher, Mr. and Mrs. Sexton and Willie. (Vol.VI,T427)

While they were camping at Hillsborough, Skipper Lee got sick. (Vol.VI,T428) He was sick a long time, but Mr. Sexton would not let Pixie take the baby to the doctor. (Vol.VI,T431) The baby kept crying. (Vol.VI,T428) Willie would see Pixie "Jap-slapping" the baby. (Vol.VII,T475) According to Willie, Mr. Sexton told Pixie to shut the baby up before the baby got them caught. (Vol.VI,T428)

One night the baby was crying and it woke Willie up. (Vol.VI, T429) Willie heard Mr. Sexton go back and tell Pixie to put her hand over it and smother it. (Vol.VI,T430) Pixie asked how, and Mr. Sexton told Pixie to put her hand over the mouth and nose and hold it. (Vol.VI,T430) Pixie did that and the baby stopped crying. (Vol.VI, T431) The next day the baby was dead and Pixie acted surprised. (Vol.VI,T431) Joel was very upset and crying. (Vol. VI, T432)

The baby was buried in the park. (Vol.VI,T433) Joel was very upset, wanting a real burial. According to Willie, Mr. Sexton said no, because Joel would be arrested, then Joel would tell where they were, and the rest would be arrested. (Vol.VI,T433) After the burial, Mr. Sexton had Willie check the grave daily to make sure the animals did not dig it up. (Vol.VI,T434) The family left this park about two weeks after the baby died, going to the Little Manatee State Park. (Vol.VI,T434,436)

According to Willie, Joel continued to want to go home to Ohio after the burial. (Vol.VI,T435) Mr. Sexton said that he didn't like snitches and that Joel was a snitch. (Vol.VI,T436)

Willie admitted that he killed Joel at the Little Manatee River State Park. (Vol.VI,T437) He used the rope and sticks that his father had taught him to use. (Vol.VI,T437) Willie stated it was Mr. Sexton's idea to kill Joel. (Vol.VI,T437)

After the baby died, but before the family left the Hillsborough River park, Mr. Sexton told Willie that he had a job for him to do. (Vol.VI,T438) According to Willie, Mr. Sexton told him that he wanted Willie to put Joel to sleep. (Vol.VI,T438) Willie thought that Mr. Sexton meant something that he had done to Willie in Ohio. (Vol.VI,T438)

Occasionally Willie, Pixie, and Mr. Sexton would drive up to Ohio to pick up checks. (Vol.VI,T439) On these drives Mr. Sexton mentioned wanting to put Joel to sleep. (Vol.VI,T439) Mr. Sexton said he wanted Willie to put Joel to sleep so Joel would not go to his grandparents. (Vol.VI,T440)

On the morning of Joel's murder Mr. and Mrs. Sexton left to get food for a picnic. (Vol.VI,T442) When they came back Mr. Sexton told Mrs. Sexton that today was the day "Willie was going to do it." (Vol.VI,T442) Mr. Sexton told Mrs. Sexton that Willie was going to put Joel to sleep. (Vol.VI,T443) Most of the family then left for a picnic, but Mr. Sexton returned. (Vol.VI,R443)

At some point in time Willie and Joel went into the woods. (Vol.VI,T443) Willie was standing on a log with Joel. (Vol.VI,

T444) Mr. Sexton was there and told Willie to take the rope out of his pocket, which Willie did. (Vol.VI,T444,491) Mr. Sexton then told Willie to put it around Joel's neck. (Vol.VI,T444) Joel said "What?". Willie told Joel he was just going to put him to sleep. (Vol.VI,T444,491)

Willie put the rope around Joel and Mr. Sexton told him to turn it fast and hard. (Vol.VI,T444) Willie did this while Skipper held Joel's arms. (Vol.VI,T444) Willie stated that while he was twisting the rope Joel called out "Eddie". (Vol.VI,T445) Willie saw blood come from Joel's ears and asked Mr. Sexton what had happened. (Vol.VI,T444) Mr. Sexton told Willie that he had killed Joel. (Vol.VI,T444)

Joel fell to the ground and Mr. Sexton kicked the body. (Vol. VI,T445) Joel moved and Mr. Sexton told Willie to "Finish it off". (Vol.VI,T445)

Mr. Sexton had Willie bury Joel's body in the woods. (Vol.VI, T445) Willie used a shovel that Pixie and Skipper bought at Wal-Mart. (Vol.VI,T445) Before Joel's body was put into the grave Mr. Sexton told Willie to chop the hands off with a machete so there would be no evidence as to whose body it was if it was found. (Vol.VI,T447) Willie hit the body with the machete, but couldn't cut the hand off. (Vol.VI,T448) Mr. Sexton said some words over the body. (Vol.VI,T449)

When they got back to camp Joel's clothes were thrown away. (Vol.VI,T449) Mr. Sexton told Willie that if anyone asked where

Joel was he should say that he took the baby and went back to Ohio. (Vol.VI,T449)

Willie stated that when he killed Joel, he was afraid of his father. (Vol.VI,T459) Willie felt that his dad tricked him about the killing. (Vol.VII,T464) Willie thought that "put to sleep" meant that Joel would wake up. (Vol.VII,T465) If he had known that Joel would die, he wouldn't have done it. (Vol.VII,T465) Willie knew that killing is wrong. (Vol.VII,T465) Willie has flashbacks about the killing that are scary. (Vol.VI,T460)

Willie acknowledged that he had given earlier statements. (Vol.VII,T469) Willie stated he knew that his dad killed animals by putting them to sleep, but he was all confused about it. (Vol. VII,T469) Mr. Sexton did tell Willie that he wanted him to kill Joel too. (Vol.VII,T470)

Willie admitted he had told other versions of the killing. (Vol.VII,T477) He once said that Mr. Sexton pointed a gun at him to make him do it. (Vol.VII,T477) Willie once said that the killing was Pixie's idea, he said this because he was afraid of Mr. Sexton. (Vol.VII,T477) Willie told the police once that Mr. Sexton actually killed Joel. (Vol.VII,T480) This was a lie to get back at his dad. (Vol.VII,T480)

Eldra Solomon is a clinical psychologist with extensive training in the treatment of child abuse and the treatment of people who have survived trauma, including post traumatic stress disorder. (Vol.VIII,T752) In August 1994 she assessed Willie Sexton. (Vol. VIII,T754) During this testing she also associated

with a nationally known expert, Dr. Joan Chase, in the area of mental retardation. (Vol.VIII,T755) Willie tends to say what others want to hear and to answer questions without fully understanding them. (Vol.VIII,T769)

According to Dr. Solomon, Willie was developmentally behind as early as kindergarten. (Vol.VIII,T755) Approximately 20% of mental retardation is environmentally linked and social isolation, such as being kept in a locked room, can contribute. (Vol.VIII,T756) At her evaluation Willie performed very poorly on the Weschler IQ test -- he performed at the 1% level, meaning 99% of the population in his age group would perform better. (Vol.VIII,T756-757) Willie performed very poorly on verbal sub tests and the comprehension test. (Vol.VIII,T757) This test measures common sense and judgment. (Vol.VIII,T758) The test also measures "conventional standards of behavior" and can give an idea as to a person's cultural opportunities. (Vol.VIII,T758)

Willie was not able to think abstractly. (Vol.VIII,T759) The concept of death is a very abstract concept, normally not understood in terms of its finality in normal children until age nine or so. (Vol.VIII,T760) Willie functions on the level of a seven or eight year old with a first grade reading level. (Vol.VIII,T760) Dr. Solomon did not think that Willie had a concept of death. (Vol. VIII,T761) Willie is very compliant and eager to please. (Vol.VIII,T764)

When Willie spoke about his father to Dr. Solomon he visibly changed. (Vol.VIII,T765) He shook and stammered and stuttered.

(Vol.VIII,T765) There were definite physiological correlates of fear when he talked of his father. (Vol.VIII,T765)

Dr. Solomon also concluded that Willie suffered from post traumatic stress disorder as a result of the homicide. (Vol.VIII, T763) Willie would bang his head against a wall to try to stop the flashbacks of the homicide. (Vol.VIII,T763) Dr. Solomon did not believe that Willie had the intellectual capacity to orchestrate and plan a murder. (Vol.VIII,T763) Dr. Solomon also believed that Willie would have been too terrified to do such a thing without his father's okay. (Vol.VIII,T764)

Matthew Sexton, age 19 or 20 at the time of trial, was 16 or 17 at the time of the murder. (Vol.VII,T499) He is the fifth child. (Vol.VII,T499) Matthew was in foster care for two years, then joined the family on their flight in Indiana. (Vol.VII,T500)

According to Matthew, Mr. Sexton made the decisions and was the disciplinarian in the family. (Vol.VII,T501) Matthew saw Mr. Sexton whip Willie with belts and beat him with his hands. (Vol. VII,T501) Willie was beaten every three or four days, including while they were in Florida. (Vol.VII,T502) Matthew also heard Mr. Sexton tell Willie that he was a warlock and more powerful than Satan. (Vol.VII,T503) The children were not allowed to talk to others about their family, Mr. Sexton would often say that a "good snitch is a dead snitch". (Vol.VII,T504)

Matthew was taught by his father to use weapons while the family was in flight. (Vol.VII,T506) They were to fight anyone who "came against them." (Vol.VII,T506)

Matthew believed that Pixie was very cruel to Joel. (Vol.VII, T511) She would beat him with pots and pans and a sweeper cord. (Vol.VII,T511) Pixie accused Joel of molesting her daughter, although Matthew believed that Charles had done it. (Vol.VII,T511) On the other hand, Mr. Sexton and Joel got along well. (Vol.VII, T512)

Matthew was present when the baby died. (Vol.VII,T507) Matthew stated that Mr. Sexton told Pixie to quiet the baby, but he did not think that Mr. Sexton told her to kill it. (Vol.VII,T507) Pixie then smothered it. (Vol.VII,T507) Pixie mistreated the baby, slapping it all the time. (Vol.VII,T513) The baby had bruises on its cheeks on the morning after it died, which were caused by Pixie. (Vol.VII, T513)

According to Matthew, discussions about killing Joel first occurred on Treaty Lane (New Port Richey) between Willie, Skipper, Pixie, and Mr. Sexton. (Vol.VII,T516) Willie said he was going to kill Joel. (Vol.VII,T517)

Matthew was on a picnic with his mother, Kimmie, Chris, and Mr. Sexton when Joel was killed. (Vol.VII,T507) All of them were coming back from the picnic when Pixie came out of the woods saying that Joel had taken off. (Vol.VII,T509,517) Mr. Sexton went into the woods with Pixie and the rest of them got into the camper. (Vol.VII,T509,517)

Matthew testified that he talked to Willie about Joel's death that night and Willie said he had cut Joel into little pieces. (Vol.VII,T518) Pixie overheard their conversation and told Matthew

not to tell anyone else. Pixie told Matthew that she was the one who egged Joel on to get him to go into the woods and Willie followed behind. (Vol.VII,T518) According to Matthew, Pixie or practically anybody could control Willie. (Vol.VII,T519)

Christopher Sexton, the youngest Sexton boy, also watched Mr. Sexton discipline Willie. (Vol.VII,T520) He saw Mr. Sexton fist fight Willie. (Vol.VII,T520) Christopher heard Mr. Sexton tell Willie that he had brought him into the world and he could take him out. (Vol.VII,T520)

Christopher heard Mr. Sexton tell Willie and the children that he was a warlock and had powers. (Vol.VII,T521) Mr. Sexton also told them to look into his eyes and see a demon. (Vol.VII,T521)

Mr. Sexton taught Christopher to use weapons to fight off the FBI. (Vol.VII,T522)

Christopher also knew that Pixie and Joel did not get along well. (Vol.VII,T527) Pixie burned Joel with cigarettes. (Vol.VII, T527) Pixie had Skipper (Charles) beat Joel up after she accused him of molesting her daughter. (Vol.VII,T527) On the other hand, Pixie and Willie were very close. (Vol.VII,T535)

Christopher knew that Joel wanted to return to Ohio after the baby was killed. (Vol.VII,T521) Mr. Sexton would not let him. (Vol.VII,T521) Mr. Sexton described Joel as a snitch and would say the only good snitch was a dead snitch. (Vol.VII,T522)

Christopher recalled going on a picnic with his father, mother, and some of the kids in the Little Manatee State Park. (Vol.VII,T523) When they returned, Pixie came running out of the

woods saying that Joel had taken off and Willie had gone after him. (Vol.VII,T524) Mr. Sexton said "Oh, shit", and ran into the woods. (Vol.VII,T524) A few hours later Christopher saw Willie and he looked pale. (Vol.VII,T524)

After that, Mr. Sexton told them to say that Joel and the baby left in a red car. (Vol.VII,T510;523) Mr. Sexton told them not to say anything else because he and Willie could get the electric chair. (Vol.VII,T510)

Estella "Pixie" Good testified that she is the third oldest child. (Vol.VII,T540) She married Joel Good in February 1992. (Vol.VII,T541) Pixie and Joel had a child together, Skipper Lee. (Vol.VII,T567) The wedding occurred so HRS wouldn't take Pixie's daughters from her, which were 1 and 3 years old at the time. (Vol.VII,T542) According to Pixie, Mr. Sexton was the father of her daughters. (Vol.VII,T542)

Pixie testified that she loved Joel and the marriage was good. (Vol.VII,T581) She couldn't remember writing Joel a letter asking for a divorce. (Vol.VII,T582) She denied mistreating Joel or of accusing him of molesting her daughter. (Vol.VII,T583-585) Pixie denied making statements after Joel's death that she was glad he was dead. (Vol.VII,T605)

Pixie had observed her father discipline Willie by beating him with his fists. (Vol.VII,T563) Willie was beaten in Florida. (Vol. VII,T563) The Sexton children were not allowed to talk about what happened in the household, they were given money to call and report if they saw anyone talking. (Vol.VII,T564) The children and

Willie were not allowed to have friends over to their house. (Vol. VII,T564)

From November 1993 through January 1994 Pixie, Joel, her daughters, and their son, Skipper, were traveling with her family through Florida. (Vol.VII,T543) They were living in a camper in various state parks. (Vol.VII,T544) Pixie knew her father planned to have another stand-off if the police came after him. (Vol.VII, T565) Pixie knew her father had shown the boys how to kill in case this happened. (Vol.VII,T565)

While they were camping, the baby, Skipper Lee, got sick. (Vol.VII,T568) Mr. Sexton would not allow Pixie to take the baby to the doctor because it would get Mr. Sexton busted. (Vol.VII, T568) One night Pixie couldn't get the baby to stop crying, so Mr. Sexton told her to give it Nyquil. (Vol.VII,T569) This didn't work and Mr. Sexton told her to get the baby quiet or he would come to the back of the camper and take care of it himself. (Vol.VII,T569) Pixie held her hand over his mouth until he was quiet. (Vol.VII, T570) In the morning she discovered the baby was dead. (Vol.VII, T570) Mr. Sexton told her the baby died from crib death. (Vol.VII, T571) Pixie denied ever slapping her son or mistreating him. (Vol.VII, T587-588)

Following the death of the baby, Joel wanted to go back to Ohio. (Vol.VII,T571) Mr. Sexton said no. (Vol.VII,T572) Mr. Sexton said that no one could go back and anyone that turned him in would be killed. (Vol.VII,T575)

Joel Good was murdered while they were staying at the Little Manatee State Park. (Vol.VII,T545) Pixie stated she didn't know who did the hands-on killing. (Vol.VII,T545) Pixie did see Willie holding something around Joel's neck. (Vol.VII,T545)

On the day of the murder Pixie saw Mr. Sexton and Willie together. (Vol.VII,T546) She did not know what they talked about. (Vol.VII,T546) Mr. Sexton and Willie were gone about a half hour. (Vol.VII,T546) When they returned, Mr. Sexton went off on a picnic. (Vol.VII,T546) Pixie, Sherri, Joel, and Willie were the only ones that remained behind. (Vol.VII,T546)

Pixie and Sherri went into the camper leaving Willie and Joel outside. (Vol.VII,T547) After a little while, Joel and Willie went into the woods. (Vol.VII,T547) Pixie followed the path they took and found them smoking next to a fallen tree. (Vol.VII,T548) Pixie took some cigarettes from them and went back to the camper. (Vol. VII,T549)

Back at the camper she and Sherri heard someone yelling. (Vol.VII,T549) Joel was yelling "Ed". (Vol.VII,T600) Pixie and Sherri followed the voices and came upon Joel and Willie. (Vol. VII,T549) They found Willie with a rope around Joel's neck and Joel was laying on Willie's lap. (Vol.VII,T550) Pixie and Sherri ran back to the camper and got Mr. Sexton. (Vol.VII,T550)

Pixie told Mr. Sexton that Willie was hurting Joel and she took him to where they were. (Vol.VII,T551) Mr. Sexton kicked Joel's leg and it moved. (Vol.VII,T553) Mr. Sexton then told

Willie to finish him off. (Vol.VII,T553) Pixie was told to go back to the camper. (Vol.VII,T553)

Mr. Sexton came back to the camper and gave Pixie money to get a shovel. (Vol.VII,T554) Pixie and Skipper went to a hardware store and bought it. (Vol.VII,T555) Pixie collected Joel's clothes into a bag. (Vol.VII,T555)

Later that night Pixie heard Mr. Sexton discussing the killing with Mrs. Sexton. (Vol.VII,T556) Mr. Sexton said he had Willie kill Joel. (Vol.VII,T557)

Pixie had heard her father talk of killing Joel three times before the murder. (Vol.VII,T557) He first mentioned it at the campground to her, Skipper (Charles), and Willie. (Vol.VII,T557) The next two times were when she, Willie, and Mr. Sexton were driving to Ohio. (Vol.VII,T558) Mr. Sexton said Joel had to be gotten rid of because he knew too much. (Vol.VII,T558-561)

Pixie was eventually arrested for the death of the baby. (Vol.VII,T572) She entered into a plea bargain with the state for a plea to manslaughter instead of first degree murder and was sentenced to 12 years prison. She was required to testify against Mr. Sexton. (Vol.VII,T573,611) Pixie was out of jail at the time of her testimony, having served about three years. (Vol.VII,T577; 611) Pixie was not charged in the death of Joel. (Vol.VII,T578) Pixie hates Mr. Sexton for what he did to the family and wants to see him punished. (Vol.VII,T607)

Charles "Skipper" Sexton is right in the middle of the children. (Vol.IX,T675) He was one of the children accompanying

the family to Florida. (Vol.IX,T675) Charles knew that Mr. Sexton disciplined Willie every time he got out of line. He saw Mr. Sexton take Willie into the bedroom and shut the door, then he would hear Willie scream. (Vol.IX,T676)

During the trip across the country and to Florida Mr. Sexton taught Charles how to use weapons. (Vol.IX,T678) Willie was also taught. (Vol.IX,T678) One of the weapons they were taught to use was a choker. (Vol.IX,T679)

At some point in time Pixie and Joel caught up with the family. (Vol.IX,T680) Mr. Sexton used to say that he wanted to erase Joel because the only good snitch was a dead snitch. (Vol. IX,T680) Mr. Sexton thought Joel was a snitch because he wanted to go back to his family in Ohio. (Vol.IX,T681) Mr. Sexton said this about Joel quite a bit. (Vol.IX,T682)

Charles went on the picnic the day of Joel's death, but he snuck back to the campsite on his sister's bike. (Vol.IX,T683) When he got there the campsite was empty. (Vol.IX,T685) Charles walked back into the woods and came upon Willie and Mr. Sexton killing Joel. (Vol.IX,T686) Willie had a choker around Joel's neck and Joel was making noises. (Vol.IX,T686) Joel was trying to grab at the choker. (Vol.IX,T688) Mr. Sexton stood about a foot away and watched. (Vol.IX,T688) At one point Joel and Willie fell to the ground and Mr. Sexton finished it off by pulling on the choker. (Vol.IX,T689-690)

Charles went with Pixie to buy the shovel. (Vol.IX,T691) He helped Willie to dig the grave. (Vol.IX,T691) Charles heard Mr.

Sexton say that he wanted Joel's hands chopped off and buried apart from the body. (Vol.IX,T692) Mr. Sexton also said that they were to say that Joel had left with the baby in a red car. (Vol.IX, T692)

Charles acknowledged that he had given many different statements in this case, including in his deposition, his statements to law enforcement, and prior testimony. (Vol.IX,T694;698) Some things weren't true, some were. (Vol.IX,T699) Today was the first time Charles said that Mr. Sexton actually killed Joel. (Vol.IX, T695)

Kimberly Sexton was fourteen at the time of trial. (Vol.VIII, T778) She is the third youngest child. (Vol.VIII,T778) She was with the family at the time of the murder. (Vol.VIII,T778) Kimberly remembered the last time she saw Joel Good was right before she went on a picnic with her mother and father. (Vol.VIII, T779) Either on the day of the picnic or before it she heard Mr. Sexton talking about Joel. (Vol.VIII,T780) Mr. Sexton was talking to Mrs. Sexton and Willie. (Vol.VIII,T780) Mr. Sexton said that Joel had to go. (Vol.VIII,T780) The following night Kimberly overheard Mr. Sexton tell Mrs. Sexton that Pixie had to go. (Vol. VIII,T783) Kimberly acknowledged that she doesn't love her father, that he deserves to get something, and that she was testifying because she wanted him to get something. (Vol.VIII,T789)

Gail Novak is a librarian at the New College campus in Sarasota. (Vol.VIII,T721) Around Thanksgiving, 1993, Mrs. Novak

recalled Mr. Sexton coming into the library. (Vol.VIII,T722) He wanted to find out about Indian names. (Vol.VIII,T723)

According to Mrs. Novak, three people were with Mr. Sexton, whose names she heard were Pixie, Joel, and Billy. (Vol.VIII, T726) Pixie asked Mrs. Novak for some information on crib death. (Vol. VIII,T726) Mrs. Novak thought Pixie was withdrawn, with dark circles under her eyes, and that she mumbled to herself. (Vol.VIII,T726) While Pixie was talking to Mrs. Novak, Mr. Sexton came up and grabbed Pixie. (Vol.VIII,T727)

Mrs. Novak heard Billy talk to Mr. Sexton about Joel. (Vol. VIII,T729) She heard Billy tell Mr. Sexton that Joel wanted to get on a plane and go back to Ohio. (Vol.VIII,T729) Mr. Sexton said that the only way Joel would go back was in a body bag. (Vol.VIII, T729)

Mrs. Novak tried to give Pixie a phone number to get help at the Women's Center, but Mr. Sexton prevented her from taking it. (Vol.VIII,T731) At one point Mr. Sexton slammed both boys up against the bathroom wall. (Vol.VIII,T741) Mrs. Novak tried unsuccessfully to call security. (Vol.VIII,T745)

Some months later Mrs. Novak made notes about the incident. (Vol.VIII,T734) She had seen a newspaper article about the murder before she made the notes. (Vol.VIII,T734)

PENALTY PHASE

The State presented the following evidence in support of a death sentence:

A 1963 certified conviction for robbery by Mr. Sexton was entered into evidence. (Vol. XI,T889)

Teresa Boron testified that Joel Good was her nephew. (Vol. XI,T890) She had prepared a written statement, which she read to the jury. (Vol.XI,T891) Joel had lost both his parents by age thirteen. (Vol.XI,T891) Joel and his brother were then taken care of by their grandparents and aunts. (Vol.XI,T891) Joel lived with Mrs. Boron from his junior year in high school until he was age 20 and got his first apartment. (Vol.XI,T891) He was treated like her son. (Vol.XI,T891)

Joel suffered from learning disabilities and was termed "slow". (Vol.XI,T891) Although Joel had difficulty in school and with social skills, he was kind and had goodness of heart. (Vol. XI,T891) Joel was kind and gentle. (Vol.XI,T893)

Joel was head over heels in love with Pixie. (Vol.XI,T892) He married her when she was pregnant to do the right thing. (Vol.XI, T892) Joel couldn't wait for the birth of the child. (Vol.XI, T892) Mrs. Boron saw the baby once, when he was only a couple of weeks old and Joel was on cloud nine. (Vol.XI,T893) Joel kissed Mrs. Boron goodbye and said that he would always love her when he left. (Vol.XI,T893) That was the last time Mrs. Boron saw Joel or the baby alive. (Vol.XI,T893)

According to Mrs. Boron, Joel loved his family very much and would have been a good father to his child. (Vol.XI,T893) Instead, a year after his disappearance, he returned to Ohio in a sealed vault with his baby son in his arms. (Vol.XI,T893)

The family grieves for Joel. (Vol.XI,T894) His disappearance made his grandfather's emphysema worse. (Vol.XI,T894) Since his death his brother has had trouble keeping jobs and with alcohol abuse. (Vol.XI,T894) Joel's death was like a wound that won't heal, just when it gets better, something like this new trial comes along and it's fresh all over. (Vol.XI,T895)

Following this testimony, the defense moved for a mistrial, noting that the witness was weeping during her testimony. (Vol.XI, T895) Two jurors were also weeping and several more looked about ready to cry. (Vol.XI,T895) The motion was denied. (Vol.XI,T896)

Asby Barrick testified that he was Joel's uncle. (Vol.XI,T896) Joel's death affected his brother Daniel deeply. (Vol.XI,T897)

Joel had a hard time growing up because he was slow. (Vol.XI, T897) Joel was determined to graduate from high school and did. (Vol.XI,T897)

Joel loved Pixie and his baby, Skipper. He finally had what he always wanted, a family of his own. (Vol.XI,T897)

The defense presented the following testimony in support of a life sentence:

Teresa Boron was called as a witness. (Vol.XI,T898) She testified that she met Mr. Sexton when he was planning to move out of state and wanted Joel to go with them. (Vol.XI,T898) Mr. Sexton was going to Montana to live on a ranch that he had purchased for 1.9 million dollars. (Vol.XI,T900) Mr. Sexton said the ranch had a mansion and a helicopter pad. (Vol.XI,T900) Mr. Sexton wanted

Joel to work at the guard station to make sure no one got to the mansion. (Vol.XI,T900)

Mr. Sexton told Mrs. Boron that he was an American Indian. (Vol.XI,T900) Mr. Sexton also showed her his palm, telling her that he and his daughter Lana were the only two people with a special mark. (Vol.XI,T901) She had to be quiet about this or cult members would come and kill them for their special powers. (Vol.XI, T901)

Mr. Sexton showed Mrs. Boron a picture of something he called "Futuretrons". (Vol.XI,T902) Mr. Sexton said that Burger King wanted to sell these little toys and have him go around the United States in a vehicle that looked like them. (Vol.XI,T902) This whole thing had something to do with the marks he and Lana had on their palms. (Vol.XI,T902)

Mr. Sexton told her that his daughter Kimberly had a mark on her leg shaped like a Christmas tree. (Vol.XI,T903) When Mrs. Sexton had been pregnant with Kimberly a Christmas tree had fallen over and the baby had jumped. (Vol.XI,T903)

Mr. Sexton was an odd person. (Vol.XI,T903)

Joel and Pixie lived together in Ohio for two years after their prom. (Vol.XI,T903) Mrs. Boron had heard that members of the family were violent to Joel during that period, but she never heard anything to the effect that Mr.Sexton was ever violent toward Joel. (Vol.XI,T904)

Over objection, on cross-examination, Mrs. Boron stated that at her initial meeting with Mr. Sexton he asked how Joel's parents

had taken care of things for him when they had died. (Vol.XI,T907) Mr. Sexton asked if they had had insurance. (Vol.XI,T908) Mrs. Boron also said that the boys got Social Security, but did not tell him how much. (Vol.XI,T908)

Dr. Irving Weiner is a clinical psychologist. (Vol.XI,T910-912) He met with Mr. Sexton, evaluated him, and administered a battery of tests to him. (Vol.XI,T913) Dr. Wiener also reviewed Mr. Sexton's medical records, depositions, and statements given by Mr. Sexton. (Vol.XI,T914)

Mr. Sexton's IQ was in the low 80's, which is low average level. (Vol.XI,T916) On other measures he tested into the 25th percentile rank. (Vol.XI,T916) On tests designed to measure the ability to concentrate, pay attention, and remember, Mr. Sexton fell into a range between 16% and 2%. (Vol.XI,T916) Dr. Weiner's conclusion was that Mr. Sexton suffered from some type of neurological impairment relating to attention, memory, and concentration. (Vol.XI,T917) There did not appear to be malingering. (Vol.XI,T918)

According to Dr. Weiner, memory dysfunction such as Mr. Sexton's is ordinarily related to brain damage. (Vol.XI,T919) Other testing showed no schizophrenia, paranoia, or other mental illness. (Vol.XI,T924) Mr. Sexton did show a tendency toward hypochondria. (Vol.XI,T923) Mr. Sexton appeared to be a guarded person who did not want to reveal much about himself. (Vol.XI,T926)

Dr. Weiner found that to a reasonable degree of forensic psychological certainty, Mr. Sexton suffered from brain

dysfunction. (Vol.XI,T927) People with this problem have limited tolerance for stress and diminished self-control. (Vol.XI,T927) Dr. Weiner referred Mr. Sexton for a PET scan. (Vol.XI,T927)

Dr. Weiner acknowledged that there was no history of mental illness in the Sexton family. (Vol.XI,T930) Mr. Sexton's problems would not prevent him from planning a murder. (Vol.XI,T930)

Dr. Frank Wood, a neuropsychologist, performed a PET scan on Mr. Sexton. (Vol.XI,T967) He also reviewed an MRI scan taken of Mr. Sexton's head in 1991 following a motor vehicle accident. (Vol.XI,T968) PET scans measure brain activity, MRI and CT scans measure brain structure. (Vol.XI,T972)

The PET scan showed that Mr. Sexton has lower activity in the right, lower section of his brain. (Vol.XI,T975) These low areas are in the limbic section of the brain. (Vol.XI,T975) The limbic area includes the temporal lobes, the basal ganglia, the cutaneum, and caudate nucleus and related structures. (Vol.XI,T976-977) These areas register emotional responses for memory. (Vol.XI,T977) Mr. Sexton's limbic system was dysfunctional and not normal. (Vol. XI, T977) The impact on a person with a dysfunctinal limbic portion of their brain is that they do not have normal emotional responses to events. (Vol.XI,T978)

The PET scan also confirmed an earlier abnormality that had appeared in an MRI done in 1991. (Vol.XI,T979) The MRI had shown a disease in the top half of Mr. Sexton's brain. (Vol.XI,T979) The PET scan showed that there is damage and disease in the brain --

structurally on the top half and functionally on the bottom half. (Vol.XI,T979)

Dr. Wood's opinion to a reasonable degree of certainty as recognized in the field of neuropsychology was that Mr. Sexton had a diseased brain. (Vol.XI,T983) Because of his dysfunction Mr. Sexton is not normally responsive to emotional situations, his emotional responsiveness is outside normal limits, and is what would be considered bizarre and strange. (Vol.XI,T983) On a day to day basis he would have trouble with memory. (Vol.XI,T983) Mr. Sexton functions in the present and doesn't have the continuity of information from the recent past that most people do. (Vol.XI, T984) Mr. Sexton's ability to plan would be impaired. (Vol.XI, T985) Persons with this dysfunction will also tend to get stuck on a theme and repeat it constantly, even if it is not advantageous to them. (Vol.XI,T986)

On cross Dr. Wood explained that there are two portions of the brain which control or affect homicidal ideation or thought processes. (Vol.XI,T988) These two portions are the frontal lobes and the limbus system. (Vol.XI,T988) According to Dr. Wood, Mr. Sexton's limbic dysfunction made him more at risk to committing a homicide and made his ability to resist doing it less strong. (Vol.XI,T990) Mr. Sexton's ability to appreciate the criminality of what he did was impaired. (Vol.XI,T990)

Nellie Hanft is Mr. Sexton's sister. (Vol.XI,T939) Mrs. Hanft testified that her and Mr. Sexton's father was a coal miner and

neither parent was an Indian. (Vol.XI,939) Mr. Sexton's father died when he was nine. (Vol.XI,T940)

Nellie would spend time with Mr. Sexton's family. (Vol.XI, T942) She never observed signs of sexual abuse. (Vol.XI,T942) She did not think the children were afraid. (Vol.XI,T942)

Mr. Sextons' mother was disabled. (Vol.XI,T943) Mr. Sexton helped her alot. (Vol.XI,T943) Mr. Sexton also helped Mrs. Hanft with her disabled husband and in helping her around her house. (Vol.XI,T944) Mr. Sexton was a minister, he often preached to poor people. (Vol.XI,T945) Mr. Sexton played Santa Claus. (Vol.XI, T946) Mr. Sexton was kind to his sister, who was slow. (Vol.XI, T946)

Caroline Rohrer is Mr. Sexton's niece. (Vol.XI,T952) Her child would visit the Sexton home and play with the Sexton children. (Vol.XI,T953) Mr. Sexton would do work for her. (Vol.XI, T953) Mr. Sexton was kind to her and helped her. (Vol.XI,T956)

ALLOCUTION HEARING

A hearing regarding allocution was held on October 5, 1998. The following summarizes the argument made at that hearing:

Defense counsel argued that a sentence of death would not be proportional in this case. (Vol.XI,T1038) Defense counsel submitted that although Willie Sexton was retarded, there was not a great deal of difference between Willie's functioning ability and that of Mr. Sexton. (Vol.XI,T1039) Counsel directed the court's attention to the memorandum of law that had been filed in support of a life sentence, and pointed out the psychological testimony

regarding Mr. Sexton's brain injury, the stress of losing his children, all rising to the level of the statutory mental mitigator. (Vol.XI,T1041)

Defense counsel argued that two of the aggravators could be blended together -- witness elimination and CCP. (Vol.XI,T1041) Counsel conceded that witness elimination applied, but argued CCP did not. (Vol.XI,T1042)

Mr. Sexton was sentenced to death on November 18, 1998. No additional argument or testimony was held at the sentencing hearing.

SUMMARY OF THE ARGUMENT

The trial court erred in permitting evidence which implied that Mr. Sexton had ordered the murder of the infant, Skipper Lee Good, to be presented to the jury. The evidence at trial insinuated that Mr. Sexton ordered the death of his grandchild. Such evidence was not relevant to the issue at trial, which was whether Mr. Sexton persuaded his son to kill Joel Good. This evidence was extremely prejudicial, and any probative value it may have had was far outweighed by the prejudicial impact on the jury. The jury was led to believe that Mr. Sexton was also a child killer.

The trial court failed to make sufficient inquiry into Mr. Sexton's request to discharge appointed counsel where his claims were reasonably construed to allege ineffective assistance of counsel. The trial court failed to address the question of ineffectiveness, and failed to conduct a Nelson inquiry .

The trial court erred in permitting impermissible victim impact testimony to be presented to the jury. Relatives of the victim focused their testimony on the death of Joel's child, Skipper Lee Good. The testimony was not relevant, was clearly excludable as a matter of law, and was so extremely prejudicial that it vitiated any semblance of a constitutionally balanced penalty phase.

The sentence of death is disproportionate in this case. This is not the most aggravated and least mitigated of murders and the

lesser sentence received by the co-defendant, who was the actual killer, warrants a sentence of life imprisonment.

Florida's death penalty statute which allows a death recommendation to be returned by a bare majority is unconstitutional.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY RELATING TO THE DEATH OF THE INFANT, SKIPPER LEE GOOD WHERE THE ADMISSION OF THIS EVIDENCE WAS NOT RELEVANT AND THE PREJUDICIAL IMPACT FAR OUTWEIGHED THE PROBATIVE VALUE.

The State presented evidence in this trial from Willie Sexton, Matthew Sexton, and Pixie Good about the death of Pixie and Joel Good's infant son, Skipper Lee Good. The testimony varied greatly between each witness as to Appellant's involvement, but is summarized as follows:

According to Willie, he heard Skipper Lee crying in the camper one evening. The baby had been sick, but Mr. Sexton had not let Pixie take him to the doctor. (Vol.VI,T431) Mr. Sexton told Pixie to stop the crying or they could get caught. (Vol.I,T428) Willie said he heard Mr. Sexton tell Pixie to smother the baby, and Pixie asked how. (Vol.VI,T430) Mr. Sexton told Pixie to put her hand over the mouth and nose and hold it. (Vol.VI,T430) Pixie did this, the baby stopped crying, and the next morning he was dead. (Vol.VI,T430) Willie did not believe Joel Good was not awake during the time that this occurred and when the baby was smothered. (Vol.VI,T432) Willie testified that Mr. Sexton then wanted Joel to be "put to sleep" so he couldn't go to his grandparents and tell them about the baby being dead. (Vol.VI,T441)

Matthew Sexton testified that he was awake in the camper at the time the baby died. (Vol.VII,T506) He actually saw Pixie smother the baby. (Vol. VII,T507) Matthew heard Mr. Sexton tell Pixie to quiet the baby, but Matthew did not think he told her to kill it. (Vol. VII,T507) Mr. Sexton was upset about the baby's death. (Vol.VII, T512) Matthew thought Mr. Sexton was afraid Joel would run off because the baby was dead because Joel was "broke down" or mad. (Vol.VII,T510)

Pixie Sexton testified that her infant son was ill while they were in the camp ground. (Vol.VII,T569) She couldn't get him to stop crying and Mr. Sexton expressed concern that the crying drew attention to the family. (Vol.VII,T569) Mr. Sexton told Pixie to give the child Nyquil. (Vol.VII,T569) One night the baby woke up and wouldn't quiet down. Mr. Sexton told Pixie to quiet the child or he would come back there and do it himself. (Vol.VII,T569) Pixie put her hand over the baby's mouth and he quieted down. The next morning he was dead. (Vol.VII,T570) Mr. Sexton said the child died from crib death. (Vol.VII,T570) Joel was upset and wanted to go back to Ohio. (Vol.VII,T571) Joel wanted to take the baby back to Ohio for burial. (Vol.VII,T571) Pixie believed Joel had wanted to return to Ohio before the baby's death as well. (Vol.VII, T575)

According to Pixie Sexton, Mr. Sexton wanted to kill Joel because he knew too much and wanted to go to Ohio concerning the baby. (Vol.VII,T560) Mr. Sexton did not want anyone to know where he was. (Vol.VII,T559) Pixie didn't know if Mr. Sexton was worried

about being arrested for the death of the baby, but he had told her that she would be arrested. (Vol.VII,T588)

Pixie denied being told by Mr. Sexton to smother the baby. (Vol.VII,T589) Mr. Sexton did not show her how to smother it. (Vol.VII,T589)

Permitting the introduction of testimony detailing the death of the infant, Skipper Good, which ranged from Mr. Sexton ordering and demonstrating how to kill his grandchild according to Willie to Pixie's inference that Mr. Sexton would kill the child if she did not was error. The details of the infant's death were not relevant to whether Mr. Sexton ordered Joel Good killed and the prejudicial impact far outweighed the probative value of this evidence.

Appellant acknowledges that this Court in Sexton v. State, 697 So. 2d 833 (Fla. 1997), held that evidence that Mr. Sexton was involved in the death of the baby was relevant. However, in the retrial, the relevancy of this incident was significantly diminished and the amount of testimony relating to the death of the baby not necessary. Due to the different testimony offered in this second trial, whether the testimony relating to the death of the baby was relevant and admissible should be revisited.

Section 90.402, Florida Statutes (1995), states that all relevant evidence is admissible, except as provided by law. Section 90.401, Florida Statutes (1995), defines relevant evidence as evidence which tends to prove a material fact in issue. However, under Section 90.403(1), Florida Statutes (1995), relevant evidence is excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. The trial court must engage in this balancing test in order to determine whether evidence is admissible. Steverson v. State, 695 So. 2d 687, 688 (Fla. 1997). The detailed evidence of the death of the baby was not relevant, and even if it had some relevance, it should have been excluded because of the reality of unfair prejudice in its admission.

This Court has continued to adhere to these principles -- indeed they served as the basis for the reversal of Mr. Sexton's conviction and are the reason for the retrial. Since this Court's prior opinion in this case, the Court has reviewed the same issue in Gore v. State, 23 Fla. L. Weekly S518 (Fla. October 1, 1998).

In Gore the defendant was charged with killing Robyn Novick. The State introduced as Williams Rule evidence that Gore had also killed Susan Roark and Tina Corolis. Gore took the stand and denied his involvement in all three homicides. In cross-examining Gore, the prosecutor violated a pretrial ruling and asked Gore if he had taken his and Tina Corolis's two year old child after her murder and had abandoned the naked child in freezing weather by leaving the child locked in the pantry of an abandoned and burned house in Georgia. Despite claims by the State that the door to this testimony had been opened by the defense, this Court ruled that the evidence concerning the child was not admissible because it was not relevant to establishing a similarity between the Corolis and Novick murders. The relevancy of the evidence was

marginal and clearly outweighed by the tremendous prejudice resulting from what this Court termed "despicable actions".

Without a doubt, if Gore's actions were termed despicable, the suggestion that Mr. Sexton ordered the death of his grandchild or threatened to kill his grandchild are equally despicable. There can be no doubt that the jury would be terribly influenced by this testimony. Whether Mr. Sexton was charged with the murder made little difference. It was clearly admitted by the State to leave the impression with the jury that Mr. Sexton was responsible for two murders -- Joel Good's and his own infant grandson.

In the first trial, the main issue was whether Mr. Sexton directed Willie to kill Joel Good, or as the defense strongly suggested, Pixie did. As this Court noted, all the information relating to the death of the baby and the incestuous relationship between Pixie and Mr. Sexton was necessary in order to show why Mr. Sexton perceived Joel as a threat and why he, rather than Pixie, had ordered the death. In the first trial Willie Sexton did not testify, thus there was no direct testimony that Mr. Sexton, as opposed to Pixie, had been the instigator.

However, in this retrial, Willie Sexton testified. Willie maintained that it was Mr. Sexton, not Pixie, who had directed him to put Joel to sleep. With direct testimony on this issue from Willie, the necessity was no longer as great to establish through evidence of collateral crimes why Mr. Sexton, as opposed to Pixie, had been involved in the murder.

Secondly, the testimony at this trial was also different from that in the first trial as to the reasons Joel wanted to go back to Ohio as they related to the baby's death. In the first trial, the State's prosecution theory hinged on the reason that Mr. Sexton wanted to prevent Joel from returning was fear over his own prosecution for the death of the baby. That theory was not supported by the evidence in the second trial. According to Pixie, Joel wanted to go back to Ohio prior to the death of the baby and Mr. Sexton knew this. Mr. Sexton's concern was that Joel knew too much about the other matters, especially the parentage of Pixie's two daughters, and that was what Mr. Sexton did not want Joel speaking about. According to Pixie, Mr. Sexton was not worried about being in trouble for the baby's death -- he indicated to Pixie that she was the one in trouble over that. Mr. Sexton was concerned that if Joel returned, the authorities in Ohio would be able to locate the family and act upon the outstanding warrants for Mr. Sexton's arrest.

There was no testimony at this trial that Joel wanted to return to Ohio in order to turn in Mr. Sexton for the death of the baby. In fact, the evidence was that Joel had been asleep at the time the baby was smothered. There was no evidence at trial that Joel knew of any actions on the part of Mr. Sexton that supposedly contributed to the death of the baby or of even any conversations between Pixie and Mr. Sexton about quieting the baby. It is one thing if Joel wished to return to Ohio because he believed that Mr. Sexton killed his child and wanted to turn him in for the murder,

it is quite another if Joel simply wanted to leave because his child was dead. If indeed the evidence had supported a theory that Joel wanted to return to Ohio and turn Mr. Sexton in for the murder of the child at the hands or instigation of Mr. Sexton, then whether Mr. Sexton played a role, direct or insinuated, in that death would be relevant. However, the evidence supported the theory that Joel simply wanted to return to Ohio to get away because he was distraught about the death of the child. The evidence did not suggest that Joel was aware that Mr. Sexton played a role in or caused the death of the child. Therefore, any testimony that Mr. Sexton played a role in the death had little to no relevance.

The evidence admitted about the circumstances of the baby's death served only to blatantly portray Mr. Sexton's bad character and to demonstrate to the jury that he was a reprehensible individual, a baby killer. The State should not have been permitted to introduce testimony which implicated Mr. Sexton as the killer of the baby. The prejudicial impact of this testimony far outweighed any probative value the evidence may have had. This highly inflammatory testimony unfairly prejudiced Mr. Sexton, denying him a fair trial.

Even if this Court disagrees with Mr. Sexton and determines that the death of the baby has some relevance to the case at hand, it was still error for the State to present the details of the death and burial of the infant. If this Court rules that the death of the infant was necessary in order to explain Mr. Sexton's

motivation to have Willie kill Joel, then the evidence should have been presented in a much more limited fashion. This Court has, in prior cases, permitted only minimal references to collateral crimes in order to establish the context of the instant offense and to describe the investigation that led to the arrest of the defendant. In both Henry v. State, 574 So. 2d 73, 75 (Fla. 1985) and Long v. State, 610 So. 2d 1276, 1280 (Fla. 1992), this Court reversed convictions and sentences of death and held that on retrial, only minimal reference to collateral crimes was permissible.

The introduction of the collateral bad act evidence relating to the death of the infant, Skipper Lee Good, was of incalculable prejudice to Mr. Sexton. It should have been excluded, and because it was not, Mr. Sexton was deprived of his Constitutional rights to due process and a fair trial under the 5th and 14th Amendments to the U.S. Constitution, and Article I, Sections 9 and 16 of the Florida Constitution.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY ADDRESS APPELLANT'S REQUEST FOR NEW COUNSEL WHERE APPELLANT RAISED QUESTIONS REGARDING THE EFFECTIVENESS OF COUNSEL'S REPRESENTATION.

On August 24, 1998, Mr. Sexton presented the court with a letter requesting that he be appointed different counsel. The letter requested that he be given different counsel because he no longer had confidence in their ability to represent him. (Vol.SR3-4) Mr. Sexton stated in the letter that his lawyers had not talked

to some witnesses and that they did not want to present some witnesses for strategic reasons. (Vol.SR3-4) Mr. Sexton also stated in the letter that he had talked to another lawyer who had said that what his lawyers were doing sounded very inexperienced. (Vol. SR3-4)

After reading the letter the court told Mr. Sexton he was not entitled to different counsel, but that he could represent himself. (Vol.XII,T1097) Mr. Sexton stated that he didn't have the ability to represent himself. (Vol.XII,T1097) Mr. Sexton told the court that this was not the first request he had made, but that he had requested different attorneys from a different judge. (Vol. XII,T1097) The trial judge then told Mr. Sexton that most defendants have good and bad days with their attorneys, but Mr. Sexton wasn't entitled to different counsel. (Vol.XII,T1098) The court then asked counsel if they had anything to say and they declined. (Vol.XII,T1099)

The trial court conducted an inadequate inquiry into Sexton's request to discharge counsel. When an indigent defendant requests that he be appointed different counsel a specific procedure must be followed which comports with the requirements of Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). These requirements were adopted by this Court in Hardwick v. State, 521 So. 2d 1071 (Fla. 1988), cert. denied, 488 U. S. 871 (1988). Under Nelson a trial court must first inquire as to the reason that the defendant seeks to have counsel removed. If incompetency is the alleged reason, the trial court should make sufficient inquiry of the defendant and

counsel to determine whether there is reasonable cause to believe that court-appointed counsel is not rendering effective assistance of counsel. The court's findings should appear in the record. Howell v. State, 707 So. 2d 674 (Fla. 1998) In a concurring opinion in Jones v. State, 658 So. 2d 122,127 (Fla. 2d DCA 1995), it was suggested that the proper procedure to utilize in these situations is to inquire of the defendant as to what he believes is ineffective and then to inquire similarly of defense counsel. The inquiry to defense counsel should include questions regarding the extent of counsel's investigation of the facts, counsel's knowledge of the law, the presence or absence of influence or prejudice, and any other factor material to the specific case.

In this case the trial court did not make sufficient inquiry into the reasons why Mr. Sexton had no confidence in the abilities of his attorneys. A feeling of "no confidence" when coupled with the statement in the letter that Mr. Sexton had consulted another attorney who felt that performance may be deficient was clearly a complaint about the ineffectiveness of counsel. The trial court should have, under Nelson, conducted a more thorough inquiry into the reasons why Mr. Sexton felt counsel was ineffective. Instead, the trial court treated the complaint as more of a personality conflict. The trial court should also have questioned defense counsel specifically about the allegations in the letter rather than allowing them to simply state they had no comment. Any subsequent findings from this inquiry should have appeared in the record.

Because of the inadequate inquiry by the trial court into Mr. Sexton's request, reversal is required.

ISSUE III

THE TRIAL COURT ERRED IN THE ADMISSION OF VICTIM IMPACT EVIDENCE WHEN THE CONTENT OF THAT EVIDENCE VIOLATED DUE PROCESS GUARANTEES OF BOTH THE FEDERAL AND FLORIDA CONSTITUTIONS.

Under Section 921.141(7), Florida Statutes (1996), victim impact evidence is admissible. According to the statute,

> the evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of the victim impact evidence.

This statute has been found to be constitutional in Windom v. State, 656 So. 2d 432 (Fla. 1995), cert. denied, 116 S.Ct. 571 (1995).

Despite there being no 8th Amendment bar to victim impact evidence under Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 120 (1991), neither the U.S. Supreme Court nor this Court have held that this evidence is not without limitations. Three members of the U.S. Supreme Court noted in Payne that the Fourteenth Amendment can impose limits on the nature and quality of victim impact evidence. In her concurring opinion, Justice O'Conner noted that "If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to

render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." Id. at 831,2612 It is also noteworthy that three members of the U. S. Supreme Court opined that all victim impact evidence is inadmissible. Id. at 2619-2631.

In Windom this Court likewise held that victim impact evidence has limitations. As two members of the Windom court wrote:

> The use of victim-impact evidence can pose a constitutional problem if misused.... I do not believe the courts can or should encourage the use of victim-impact evidence when it in effect may invite jurors to gauge the relative worth of particular victims' lives. All human life deserves dignity and respect, including in the penalty phase of a capital trial. This includes victims of high stature in the community as well as those in humbler circumstances. It would not be especially difficult for one or the other side in a criminal case to prey on the prejudices some jurors may harbor about particular classes or victims. Subtle appeals to racism, caste-based notions, or similar concerns clearly would undermine the fundamental objective of a criminal trial-achieving justice. If the effect is either to aggravate the case for one type of victim but mitigate or for another in similar circumstances, then the Constitution is violated. The victim's high stature in the community is not a legal aggravating factor just as a victim's minority status does not lawfully mitigate the crime. In this sense, all human life stands at equal stature before the law. Courts must be vigilant to see that this equality is not undermined. (Kogan, J., concurring and dissenting).

Defense counsel in this case made his concerns known to the trial court regarding the potential for harm in the admission of the victim impact in this case. Motions were filed to limit the number of witnesses, to seek pretrial determinations on

admissibility, and to video tape the presentation of the evidence to provide better appellate review of this highly emotional and particularized evidence. (Vol.I,R107-132) The court's denial of the request to videotape this testimony was error. Improper victim impact evidence was presented to the jury, resulting in further reversible error.

Prior to the trial, written statements from the family members of Joel Good were submitted to the trial court. Some items were stricken, then each family member read his or her statement to the jury. (Vol.XII, T881-882) Keeping in mind that Mr. Sexton was on trial for the death of Joel Good and not Skipper Lee Good, the following evidence was presented as victim impact evidence:

Teresa Boron, Joel Good's aunt, testified that the deceased baby, Skipper Good, was a beautiful baby. (Vol.XII,T892) She gave Skipper her children's baby clothes. (Vol.XII,T892) Joel was on cloud nine with the child. Joel always wanted to be a father and have a family. (Vol.XII,T893) Joel would have made up with Skipper for the time he missed out with his own father.(Vol.XII,T893) He (Joel) took his one and only airplane ride in a sealed vault with his baby son cradled in his arms. (Vol.XII,T893) If Joel was alive today he would be raising his son away from the sickness of his wife's family. (Vol.XII,T893) Joel's brother, Danny, will never get to play catch with the only nephew he will ever have because Skipper's life was also taken in a senseless act of violence. (Vol. XII,T894)

Following Mrs. Boron's testimony, defense counsel moved for a mistrial, stating this was not appropriate victim impact evidence and that two of the jurors cried during her testimony and couple of other appeared ready to cry. (Vol.XII,T895) The motion was denied. (Vol.XII,T896)

Asby Barrick, Joel's uncle, then testified that when Skipper was born, Joel finally had a family of his own, something he wanted all his life. (Vol.XII,T897-898)

Two errors occurred in relation to the admission of the victim impact evidence. The first was the trial court's denial of the motion to videotape the victim impact testimony and the second was the admission of improper evidence.

1. THE VICTIM IMPACT EVIDENCE IN THIS CASE WAS IMPROPER UNDER SECTION 921.141(7), FLORIDA STATUTES (1996), AND VIOLATED DUE PROCESS UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.

Section 921.141(7), Florida Statutes (1996) limits victim impact evidence to that which demonstrates the uniqueness of the victim as an individual and the community's loss. The victim in this case was Joel Good. Under the statute, victim impact evidence should have been limited to Joel Good's uniqueness and the community's loss of Joel Good. However, the majority of the victim impact evidence presented in this case was not about Joel Good, it was about Skipper Lee Good, the deceased infant who was murdered by Pixie Sexton. The admission of the emotionally harrowing evidence relating to the death of Skipper Good was not only in violation of the Florida Statute, it also infected the penalty phase proceedings to such a degree that Mr. Sexton's right to Due Process under the

Fourteenth Amendment to the U.S. Constitution and Article I, Section 9 of the Florida Constitution.

Under Payne v. Tennessee, 501 U.S. at 830, a family member is not allowed to offer characterizations and opinions about the crime, the defendant, and the appropriate sentence. Mrs. Boron offered her characterization of the killings of Joel and Skipper Good as being "senseless". (Vol.XII,T894). Mr. Sexton, presumably a part of "his wife's family" was referred to as "sick". (Vol.XII, T893) Joel's death was called "tragic and unnecessary". (Vol.XII, T891,893) Clearly, Ms. Boron's testimony contained statements that are in direct violation of Payne. On this alone, reversal is required.

However, the inappropriateness of the testimony in this case went further -- in fact so far that it violated the most basic and fundamental notions of due process. Under Payne, in some specific circumstances, evidence can be so unduly prejudicial that its introduction in either phase violates the due process clause of the Fourteenth Amendment. Mr. Sexton suggests that under Florida law, as well, such prejudicial evidence as this also violates Article I, Section 9 of the Florida Constitution.

The testimony which related to the death of the baby, Skipper Lee Good, was not authorized by statute and was so unduly prejudicial that it violated Mr. Sexton's due process rights. Mr. Sexton was on trial for the death of Joel Good, not Skipper Good. Yet, a significant amount of the testimony elicited as victim impact evidence in the penalty phase of the trial dealt with the

factors about the child, the effects of the child's death on the surviving family, and supposition as to the effects that the death had on Joel Good. Not a single bit of the testimony about the baby had anything to do with showing the uniqueness of Joel Good. The victim impact evidence which related to the death of the baby was simply not relevant under Section 921.141(7), Florida Statute (1997). Under this Court's decision in Windom, victim impact evidence must be relevant and this was clearly not. As such, it should not have been admitted at all.

Not only was the evidence inadmissible on relevancy grounds, it was also inadmissible because the prejudicial impact of the testimony far outweighed any probative value and the prejudicial impact infected the fundamental fairness of the entire sentencing proceeding. The testimony relating to the death of the baby was extremely prejudicial. The death of a child is especially poignant. The images of the baby painted by Ms. Boron would have moved a stone to tears. It would be impossible to remove the horrifying image of Joel Good cradling his infant son in his arms, both bodies decomposed, as they are carried in a body bag back to Ohio to be buried from the minds of the jury. The harm speaks for itself.

A comparison between the first trial in this case and the instant trial also illustrates the prejudicial impact of this evidence. In the first trial the penalty phase contained no victim impact evidence and no mental health testimony. The guilt phase contained the voluminous testimony which this Court found to be reversible error. The first jury's recommendation in penalty phase

was 7-5. In contrast this case contained less improper evidence in the guilt phase. In penalty phase extensive mental health testimony was presented. And, most strikingly, the second trial contained the victim impact evidence. The assumption would be that the instant jury recommendation would not have not been more severe than in the first trial, given a more extensive penalty phase. However, the recommendation for death was 8-4. The reasonable conclusion which must be reached is that the testimony of Mrs. Boron and Mr. Barrick had an overwhelming impact on the jury.

This conclusion is also supported by counsel's uncontested observation of the jury after the testimony of Mrs Boron. According to counsel, two jurors cried as Mrs. Boron wept on the stand and a couple of the other jurors appeared about to cry at the end of her testimony. There can be little dispute as to the effects of this testimony on the jury and the improper impact it had on their recommendation. In this case the victim impact evidence, coupled with the evidence about the baby's death that was elicited in guilt phase, served to infect the entire proceedings.

The conviction and sentence in this case, because of this inflammatory evidence, cannot be supported by either the state or federal constitutions. As a result of the introduction of this testimony before the jury, reversible error occurred. Mr. Sexton is entitled to a new trial or at minimum, a new penalty phase free from this type of testimony.

2. RECONSIDERATION OF THE ALLOWING OF VICTIM IMPACT EVIDENCE

Although this Court has ruled that the statute permitting victim impact testimony is constitutional, Mr. Sexton respectfully invites this Court to reconsider this issue.

As this case illustrates, victim impact evidence is devastating. Its admission is risky and potentially dangerous. Without the safeguards of videotaping there is no way to adequately judge the emotional toll this evidence takes on the jury. It appears to be a fairy tale second in magnitude to only the Brother's Grimm to believe that the jury can disregard this type of evidence. If it is to play no role in their sentencing recommendation, then its admittance serves no purpose other than to inflame.

It seems that while the statute appears constitutional on its face, in reality, the application of Section 921.141(7), Florida Statutes (1997) is violative of other constitutional provisions that were not fully addressed by either the U.S. Supreme Court or by this Court. Mr. Sexton respectfully requests that this Court reconsider this important issue.

3. VIDEOTAPING OF THE VICTIM IMPACT EVIDENCE

During pretrial hearings, the defense requested from the court permission to have the victim impact evidence videotaped. The court initially granted this motion. At a later date, the court reversed its ruling and refused to permit the evidence to be videotaped.

This Court has long recognized that capital cases present compelling circumstances for additional safeguards due to the unique nature of the punishment being imposed and the irrevocability of an execution. Constitutional requirements are heightened in capital cases. This Court has even charged itself with the duty of conducting specialized review of capital cases, proportionality review. See, Tillman v. State, 591 So. 2d 167 (Fla. 1991). And now, capital cases can contain a type of evidence unique to them alone -- victim impact evidence. The unique features of this type of evidence require special safeguards to ensure constitutionally sound appellate review of death sentences where this evidence is presented.

In no other cases do juries hear testimony from the family members of the victim. That this testimony is heart-rending, emotional, and almost unbearably poignant is an understatement. In permitting this testimony the trial court must walk a fine line between the admission of the testimony and the defendant's constitutional rights to a fair trial. Most often, it is the searing emotional aspects of this testimony which will give rise to legal challenges. The unique and terrifying aspects of capital cases warrant the requirement, that when requested by a defendant who faces execution, the presentation of this evidence be videotaped.

Counsel can locate no Florida cases which authorize this practice. More importantly, neither could counsel find any cases which would prohibit the use of video taping. The use of video

taping is not foreign to the criminal justice system and is used in order to provide better tools for trial courts in some instances. For example, Florida Rule of Criminal Procedure 3.220(h)(4) (1998), requires that the depositions of children under the age of sixteen be videotaped unless otherwise ordered by the court. Under the comments to the Rule, videotaping is intended to permit the trial court to control the intimidation of sensitive witnesses.

The introduction of video tapes into evidence at trial is an often used tool of the prosecution. The State is routinely permitted to introduce video tapes of crime scenes and video tapes of the statements of criminal defendants under the theory that the jury is better aided by such evidence than just from still photographs or recordings. Often the video-taped confessions of criminal defendants are admitted so the jury can see the demeanor of the defendant, the State then often arguing that the defendant's demeanor at the time he confessed is a critical feature of the case as well.

If the old adage that a picture is worth a thousand words (the modern corollary must be "and even more if the picture moves") at the trial level, then it must be even worth more at the appellate level. It simply stands to reason that the cold, typed page of a record cannot convey the emotional aspects of victim impact evidence nor can written pages demonstrate the devastating impact that the demeanor of these witnesses has on the jury as they speak of their deceased loved ones.

A complete appellate record is necessary for all concerned to fulfill their responsibilities in the criminal justice system. It is necessary for the appellant and the appellee in order to present their claims for relief. A complete appellate record is necessary for this Court to carry out its constitutionally proscribed duties of review in capital cases. Mr. Sexton believes that in order to adequately review a claim that the emotional impact on the jury by the victim impact evidence deprived a defendant of a fair trial, this Court must be able to review the demeanor of the witnesses and that of the jury as it heard the evidence. Videotaped testimony is vital if this Court is to be able to perform the type of scrutinized review a capital case requires. Unless this Court can see and hear just what the sentencing jury saw and heard it cannot adequately determine whether the penalty phase was constitutionally infirm.

In this case a request for videotaping was made and ultimately denied. This was error. Mr. Sexton asks this Court to require the videotaping of victim impact evidence when such a procedure is requested by either party.

ISSUE IV

THE SENTENCE OF DEATH IS DISPROPORTIONATE BECAUSE THIS IS NOT THE MOST AGGRAVATED AND LEAST MITIGATED OF CASES.

Under Florida law the death penalty is reserved for only the most aggravated and least mitigated homicides. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973); Songer v. State, 544 So. 2d 1010, 1011

(Fla. 1988); Kramer v. State 619 So. 2d 274, 278 (Fla. 1993). The Eighth and Fourteenth Amendments to the United States Constitution require that capital punishment be imposed fairly and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U. S. 104 (1982). The independent review that this Court conducts in capital cases is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger, 498 U. S. 308 (1991). This review requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

To meet these constitutional requirements, this Court conducts proportionality review of every death sentence to prevent the imposition of cruel and unusual punishment, which is also prohibited by Article I, Sections 9 and 17 of the Florida Constitution. Kramer, 619 So. 2d at 277; Tillman v, State, 591 So. 2d 167, 169 (Fla. 1991). "A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Because death is a uniquely irrevocable penalty, death sentences require more intensive judicial scrutiny than lesser penalties. Tillman, 591 So. 2d 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, 610 So. 2d at 277.

Proportionality review is not simply a tallying of the aggravating and mitigating circumstances. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). It is a two prong analysis -- the crime being analyzed must fall in to two categories -- (1) the most aggravated and (2) the least mitigated of murders. Almeida v. State, 24 Fla. L. Weekly S336 (Fla. July 8, 1999).

This case is certainly not among the most aggravated murder cases in Florida. While the trial court found three aggravating factors -- prior violent felony, cold-calculated-premeditated (CCP), and murder to avoid arrest or detection, there was also substantial mitigation.

Although three aggravators were found and these are ones which are at times given great weight, they were not of such a weight that no amount of mitigation could overcome them. One aggravator, the prior violent felony conviction, was appropriately given little weight by the trial judge. This aggravator stemmed from a conviction in 1965 for armed robbery. Given the age of the prior conviction and the little weight afforded to it by the trial court, this is essentially becomes a two aggravator case -- CCP and a homicide committed to avoid arrest or detection.

The CCP aggravator in this case is closely linked to the statutory mitigator regarding Mr. Sexton's mental health. According to the defense testimony, a significant feature of Appellant's mental illness was his inability to plan or

premeditate; instead, Mr. Sexton would obsess. As such, in this case this aggravator should not be considered as severe when compared to those cases where a murder is meticulously planned and carried out. See, Larzelere v. State, 676 So. 2d 394 (Fla. 1996) (defendant spent six years leading up to the homicide obtaining life insurance policies on her husband and doubled the value on the policies six months before the murder).

In mitigation, the court found that statutory mental health mitigator was established and assigned it great weight. A list of six other mitigating factors were found and some weight was assigned to each of those. Mental mitigation has been given significant weight by this Court when determining the appropriateness of a death sentence. For example, in DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), the trial court failed to find the statutory mental mitigators, but found that DeAngelo suffered from mental health disorders. This Court reversed, finding that the one aggravator of CCP was outweighed by the mitigation and that a death sentence was disproportionate.

When comparing this case to others with similar aggravators, it is clear that this was not one of the most aggravated homicides, thus a death sentence is not warranted. For example, in Cave v. State, 24 Fla. L.Weekly S18 (Fla. 1998), the evidence established the presence of four aggravating circumstances, one statutory mitigator, and several additional mitigating factors. In Cave, the victim was abducted from a convenience store during a robbery, was driven to a remote location, then stabbed and shot in the back of

the head execution-style. The court found the aggravating factors of CCP, HAC, witness elimination, and that the murder was committed while in flight from a robbery and kidnapping. The statutory mitigator was no significant prior criminal history, and eight other factors were assigned some weight. Mr. Sexton's crime in this case is not nearly as aggravated and far more mitigated than that of Cave. This Court has always weighed heavily the mental health mitigators. To sentence Mr. Sexton to death would be disproportionate when compared to the far worse crimes committed by Cave.

In Henyard v. State, 689 So. 2d 239 (Fla. 1996), the defendant shot and killed two children and raped and shot their mother. The jury recommended death by a vote of 12-0. The trial court found four aggravators: prior conviction of a violent felony, murder committed in the course of a felony, murder committed for pecuniary gain, and HAC. The mental mitigators were found, afforded little weight, and age was a statutory mitigator. Five nonstatutory mitigators were found. This Court upheld the death sentence. When compared to Henyard, a death sentence is disproportionate in this instance.

Again, in Hildwin v. State, 24 Fla. L. Weekly S243 (Fla. June 4, 1999), this Court found a death sentence to be proportionate in a case far more aggravated and less mitigated than this one. In Hildwin there were four aggravators -- murder for pecuniary gain, HAC, prior conviction of violent felonies, under sentence of imprisonment at time of murder: two statutory mitigators given some

weight -- mental disturbance and inability to appreciate the criminality of his action; and five non-statutory mitigators. The victim had been strangled to death for a small amount of money and the death was referred to as a senseless and needless murder by the trial court. Hildwin had no evidence of brain damage and no psychological testing was done. In this case psychological testing was done and revealed extensive brain dysfunction on the part of Mr. Sexton.

This case is more similar to that of Boyett v. State, 688 So. 2d 398 (Fla. 1996). Boyett involved two aggravators -- CCP and in commission of a burglary. The defendant's age, significant emotional problems, and various other non-statutory mitigators were considered. The trial court overrode a life recommendation from the jury and imposed a death sentence. This Court overturned that sentence in favor of life in prison. Although Mr. Sexton is not young, he had similar other mitigation. Neither was the recommendation for death in this case overwhelming, being 8-4 as opposed to an 11 or 12 vote for death.

The trial court also addressed the question of proportionality between the death sentence Mr. Sexton received and the 25 year sentence that Willie Sexton received. In the trial court's opinion, a death sentence was warranted because Mr. Sexton was the main instigator of the murder and Willie was mentally deficient.

In Puccio v. State, 701 So. 2d 858, 860 (Fla. 1997), this court set out the standard for reviewing a defendant's death sentence when co-perpetrators were sentenced to lesser punishments:

> A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by the evidence. See generally, Scott v. Dugger, 604 So. 2d 465 (Fla.1992)(relying on the factual statements of the trial judge concerning the relative culpability of the co-perpetrators). Our review of the present record, however, shows that the trial court's determination is not supported by competent substantial evidence.

By examining the facts the case, this Court concluded "that the trial court's determination that Puccio was more culpable than the others is not supported by competent substantial evidences in the record. . . ." Puccio, 701 So. 2d at 863.

Mr. Sexton recognizes this Court's opinions that have approved a harsher sentence for defendant than a co-defendant receives where the defendant has a larger role in the homicide. See, Henyard v. State, 689 So. 2d 239 (Fla. 1996) (co-defendant not eligible for the death penalty due to his age despite conviction for same offenses, a triple homicide); Larzelere v. State, 676 So. 2d at 394, (the defendant planned the murder in a cold and calculated manner, she instigated and masterminded and was the dominant force in the planning and execution of the murder and was present when it occurred); Craig v. State, 510 So. 2d 857 (Fla. 1987), cert denied, 383 U. S. 1020 (1988) (a double homicide where the defendant was the actual killer in one murder and the dominant force behind the second murder); Smith v. State, 365 So. 2d 704 (Fla. 1978) (defendant who received death had much greater participation in the murder by originating the idea and directing co-defendant to kill). However, the trial court's justification of a more severe penalty

for Mr. Sexton than Willie is incorrect under the facts of this case.

According to the testimony presented at penalty phase, Mr. Sexton was not a high functioning individual. He functioned at a low-normal intelligence level. Mr. Sexton had an inability to appreciate the emotional significance of reality. He exhibited many bizarre thought processes. Mr. Sexton suffered clinically demonstrable brain dysfunction. This was not a situation where a significantly more capable person was exercising control over another individual with limited abilities. Willie and Mr. Sexton were not markedly different in their ability to function appropriately.

Willie, admittedly the actual killer, received a sentence of 25 years in prison. Mr. Sexton received a death sentence. Although Mr. Sexton did exert influence over Willie, it was also testified that anyone could influence him, and Pixie was also urging Willie to kill Joel. It is entirely likely that Pixie was also an equally strong force behind this homicide. She, however, was not charged in this offense by virtue of a plea bargain she entered into with the State. In exchange for her testimony against her father, she was not charged in this case and was allowed to plead to manslaughter in the death of her child. At the time of this retrial, she had already been released from prison. A life sentence in this case would still punish Mr. Sexton far more severely than either Willie or Pixie, yet would not be disproportionate.

While no two cases are ever identical, this case is not one of the most aggravated and least mitigated murders, and it is not deserving of the death penalty. The totality of the circumstances in this case warrant a sentence of life imprisonment.

ISSUE V

THE PROVISION OF FLORIDA'S DEATH PENALTY STATUTE WHICH ALLOWS A DEATH RECOMMENDATION TO BE RETURNED BY A BARE MAJORITY VOTE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States Supreme court has repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U. S. 586, 604 (1978); see also, Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Zant v. Stephens, 462 U.S. 862, 884-85 (1983). The jury's recommendation of life or death is a crucial element in the sentencing process and must be given great weight. Grossman v. State, 525 So. 2d 833, 839 n.1, 845 (Fla. 1988). When a penalty jury reasonably chooses not to recommend a death sentence, it amounts to an acquittal of the death penalty within the meaning of the state's double jeopardy clause. Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991) In the overwhelming majority of capital cases in florida, the jury's recommendation determines the sentence ultimately imposed. See Sochor v. Florida, 504 U.S. 527 (1992) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part). To the extent that Florida's death penalty scheme allows a death recommendation to be returned by a bare majority vote of the jury, it violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Mr. Sexton recognizes that this court has previously rejected arguments challenging the imposition of death sentences based on

bare majority jury recommendations. See, Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990). Whether the Sixth, Eighth, or Fourteenth Amendments require jury unanimity (or at least a substantial majority) in this state's death penalty proceedings is ripe for re-evaluation now, however, because it has become clear that a Florida penalty jury's role is not merely advisory. Under Florida's capital sentencing scheme, the penalty phase jury is recognized as the co-sentencer. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So. 2d 656,657 (Fla. 1987)

In Williams v. Florida, 399 U. S. 78 (1970), the Court held that a statute providing for a jury of fewer than twelve in non-capital cases does not violate the Sixth and Fourteenth Amendments. The Court noted that no state provided for fewer than twelve jurors in capital cases, "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." 399 U.S. at 103. Two years later, in Johnson v. Louisiana, 406 U.S. 654 (1972), the Court concluded that a Louisiana statute which allowed a substantial majority (nine to three) verdict in non-capital cases did not violate the due process clause for failure to satisfy the reasonable doubt standard. Justice Blackmun noted, however, that

a seven to five standard, or less than 75% would cause him great difficulty. 406 U.S. at 366 (Blackmun, J., concurring).

Florida's sentencing scheme further violates constitutional guarantees because of its failure to require unanimity or even a substantial majority in order to find that a particular aggravating circumstance exists, or that any aggravating circumstance exists. Under the law of this state, aggravating circumstances substantively define those capital felonies for which the death penalty may be imposed. Vaught v. State, 410 So. 2d 147, 149 (Fla. 1982); State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) An aggravating factor "must be proven beyond a reasonable doubt before being considered by judge or jury." 283 So. 2d at 9. A death sentence is not legally permissible where the State has not proved beyond a reasonable doubt at least one aggravator. Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990) Accordingly, aggravating circumstances function as essential elements, in the absence of which a death recommendation cannot lawfully be made.

Because neither unanimity nor a substantial majority is required to find an aggravating circumstance or recommend the death penalty, the Florida procedure allows a death recommendation even if five of the twelve jurors find that no aggravating factors were proved beyond a reasonable doubt, as long as the other seven jurors find one or more aggravators and conclude that these were not outweighed by the mitigating factors. The seven jurors voting for death could each find a different aggravating factor, while five found no aggravators at all, as long as each of the seven

determined that his or her aggravator was not outweighed by mitigators. Thus, a death recommendation would be possible under Florida's procedure even if each aggravator was rejected by eleven out of the twelve jurors.

When the State convinces only a bare majority of jurors that death is the appropriate sentence, a sole juror could effectively make the difference between whether the defendant lives of dies. Such a result makes Florida's death penalty scheme arbitrary and capricious, in violation of Furman v. Georgia, 428 U. S. 238 (1972). Because Mr. Sexton's death sentence was based on an 8 to 4 death recommendation, this Court should find the requirement for only a bare majority verdict unconstitutional, vacate the death sentence, and remand for the imposition of a life sentence.

CONCLUSION

Based upon the foregoing arguments and authorities, Mr. Sexton is entitled to the reversal of his conviction and to have his case remanded to the trial court for retrial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Attorney General's Office, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of October, 2000.

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