IN THE SUPREME COURT OF FLORIDA

DUANE OWEN,

Appellant,

vs. Case No. 95526

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, DUANE OWEN, was the defendant in the trial court below and will be referred to herein as "Appellant," or “Owen”. Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "ROA," reference to the transcripts will be by the symbol "T," and reference to the original record on appeal with be by the symbol”ROA#1" .

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the facts to the extent they present an accurate rendition of what transpired below. The following additional facts are relevant to litigation of the specific issues raised in this appeal.

Trial court determined that voluntariness of confession was law of the case however appellant was provided opportunity to rebut that finding. (Vol. XXVIII T 604-643). In denying the motion to suppress, the trial court noted that Owen had been Mirandized at least 15 times. The trial court found the confession voluntary, the court read from the direct appeal opinion. (Vol. XXXII, T 1329-1330). The trial court found that Owen's statements to police were equivocal comments only. The trial court read from the Florida Supreme Court's opinion addressing the issue previously. (Vol. XXXII, T 1327).

Dr. Berlin testified that appellant knew that rape and stabbing was wrong and he knew the consequences of those actions. (Vol. LV, T 5364). Although he understood the consequences of stabbing he did not believe that stabbing Karen Slattery would kill her. (Vol. LV, T 5365). Rorsarch ink blot test suggests that Owen is not in touch with reality however the test results were ambivalent. (Vol. LV, T 5370). The MMPI is compatible with schizophrenia. (Vol. LV, T 5371). Owen contacted Berlin and wanted information on gender identity

disorder. (Vol. LV, T 5395). Gender identity disorder is not a form of psychosis. (Vol. LV, T 5399). Test result demonstrate that appellant has difficulty with expressing anger in a modulated fashion. (Vol. LV, T 5409). He has a tendency for rebellion. (Vol. LV, T 5408). He has trouble with authority figures, and he is impulsive. (Vol. LV, T 5409). Berlin is personally opposed to death penalty. (Vol. LV, T 5412). Appellant knew he was stabbing the victim at the time of crime but he did not know he was killing her. He thought he was capturing her soul. (Vol. LV, T 5423). He knew consequences of stabbing someone could result in death, he knew stabbing was wrong. (Vol., LV T 5423-5425). Appellant planned the attack, he did not want to get caught, he knew what he did was wrong and he tried to cover it up. (Vol. LV T 5429-5430). Berlin's evaluation of appellant was based in part on what Owen told Berlin about the delusion in 1996, twelve years after the murder. (Vol. LV, T 5414). Owen is deceptive, he has a history of being manipulative. (Vol. LV, T 5416). The corroboration Berlin relied upon for appellant's mental state are the facts of the crime. (Vol. LV, T 5418). Owen knew the victim's body would be dead or near death if he stabbed her. (Vol. LV, T 5435).

Dr. Faye Sultan testified that appellant worshiped and admired women. (Vol. LVI, T 5565). He did not tell police

about delusion because he was embarrassed. (Vol. LVI, T 5566). Appellant knows it is wrong to kill but he did not do this to kill. (Vol. LVI, T 5568). If asked if what he did was wrong at the time of the crime he would have said, “I’m doing what I need to do.” (Vol. LVI, T 5568). However, Sultan never asked him that question. (Vol. LVI, T 5568).

Sultan is opposed to the death penalty. (Vol. LVI, T 5572). During deposition, Sultan stated that appellant was psychotic but hat he was not schizophrenic. (Vol. LVI, T 5592). At trial she changed her opinion and now opines that appellant is schizophrenic. (Vol. LVI, T 5592). Her new opinion is now consistent with that of Dr. Berlin. She was made aware of Berlin’s diagnosis before trial. (Vol. LVI, T 5594). Owen has chronic depression, gender identity disorder, and he is paraphillic. None of these disorders render him insane. (Vol. LVI, T 5604). Sultan believes appellant is telling the truth because he has been consistent in telling his story for five years. (Vol. LVI, T 5632). Appellant was obsessed with his delusion to the exclusion of anyone’s else’s needs. (Vol. LVI, T 5650). He didn’t consider that his actions would mean that someone else would die. (Vol. LVI, T 5651). Appellant knew he was stabbing victim but Sultan not sure if he knew it was wrong. (Vol. LVI, T 5652). Appellant didn’t know he was hurting victim but he did know he was injuring her. (Vol. LVI, T 5653). He

didn’t know it was against her will, he thought she was consenting to merge with him.. (Vol. LVI, T 5653). The victim did not say anything to him to make him think that way. (Vol. LVI, T 5653). In the abstract appellant knew it was wrong to injure or kill someone. Sultan will not say if appellant knew that he killed victim. (Vol. LVI, T 5654).

The state presented two rebuttal witness at both the guilt and penalty phases. Dr. Waddell, a board certified psychologist in Florida was first to testify. (Vol. LVIII, T 5678, 5683-5685). He reviewed family history, VFW orphanage files, police reports, confession, autopsy report, and interviewed appellant for five hours in the presence of his attorney. Waddell spent an additional ten hours reviewing all the materials. (Vol. LVIII, T 5697-5700). Owen does not have a delusional disorder, he is not schizophrenic. Schizophrenia is so devastating and serious appellant should be exhibiting additional symptoms other than just bizarre delusions. (Vol. LVIII, T 5710). Appellant is a paraphilliac, voyeur, transvestite, peeping tom. He is uncomfortable as a male, depressed and also suffers from gender identity disorder. He has an anti-social personality disorder, and he is a sociopath. (LVIII, T, 5711-5716). Waddell said that his diagnosis of appellant is not even a close call. (Vol. LVII, T 5725).

At the penalty phase, Waddell testified that he spent 5 ½ hours with appellant. He administered an MMPI, and Rorsarch. (Vol. LXIV, T 6732). Appellant is not psychotic, and the statutory mitigators do not apply. He has no disorder which would impair reality contact or impair his ability to think coherently. (Vol. LXIV, T 6733). His delusion is not believable. (Vol. LXIV, T 6736).

Dr. McKinnely Cheshire, a psychiatrist and fellow of the American Psychiatric Association, interviewed appellant, reviewed depositions of the defendant's doctors, reviewed police reports, video-tapped confession, medical examiners report, family history of appellant. He spent twenty-four hours reviewing all the material in addition to the clinical interview. (Vol. LVIII, T 5831-5832). Appellant has an average IQ, he is clever, and functions at a level above his IQ. (Vol. LVIII, T 5833). He is calculating, fairly bright, and has ability to study psychiatric materials. He is sane, and not psychotic. (Vol., LVIII, T 5833-5834). Cheshire opined that appellant has a sexual disorder, an anti-social personality disorder, and he is a sociopath. (Vol. LVIII, T 5834-5839, 5888). Appellant's delusion is manufactured. It does not fit the picture of appellant since he needs to dominant, control, demean, and have power over women. (Vol. LVIII, T 5839-5841). In the confession, Owen should no compassion, he is callous, and

has no empathy. (Vol. LVIII, T 5842). Owen does not have schizophrenia. (Vol. LVIII, T 5849). He was not psychotic during confession. The only symptom of schizophrenia is the delusion. (Vol. LVIII, T 5849-5852). Appellant was clear, oriented to time and place. His crime was motivated by anger towards women. (Vol. LVIII, T 5853-5854). There was no evidence of delusion, psychosis, or schizophrenia. (Vol LVIII, T 5854). He knew rape was wrong, he knew stabbing was wrong, he knew it would kill her. (Vol. LVIII, T 5856). The attack was well planned. (Vol. LVIII, T 5856-5858). Even if he believed that he needed hormones to survive, he knew rape and killing were wrong. His disorders would not prevent him from knowing what he did was wrong. (Vol. LVIII, T 5839-5840).

At the penalty phase Cheshire opined that appellant does not meet the criteria for either statutory mental health mitigators. (Vol. LXIV, T 6790-6793). He is malingerer, the delusion is fabricated. (Vol. LXIV, T 6794). Appellant studied up on sexual disorders and believed that the more crazy the story the more apt people would believe that he is crazy. (Vol. LXIV, T 6795-6796). He has a sexual disorder and anti-social personality disorder but he is not psychotic. (Vol. LXIV 6795). He is only concerned about his pleasure, he lacks a conscience, he break the law for his own purpose. (Vol. LXVI, T 6796). The murder was premeditated, and calculated. (Vol. LXVI, T 6798).

Appellant explained how and why he chose the neighborhood and house. (Vol. LXVI, T 6799). He told the doctor that the more afraid the victim is the more fluids she will develop and transfer to him. (Vol. LXVI, T 6799-6800).

Dr. Hobin, the medical examiner testified at the penalty phase. Ms. Slattery received eighteen separate stab wounds, seven were fatal. (Vol. LXII, T 6462-6466). Ms. Slattery's lung collapsed, her larynx was cut, her body was devoid of blood. (Vol. LXI, T 6462-6466). The cuts were very painful, she was unable to cry out, and there was an extraordinary loss of blood. (Vol. LXII, T 6466-6471). She went into shock, which was a physiological response to the fear and high anxiety. (Vol. LXII, T 6471-6472). Hobin testified that there was no defensive wounds probably because she was disabled and stabbed while on the ground. She was moving while on the ground, the situation was dynamic. (Vol. LXII, T 6481-6482).

Captain McCoy from the Boca Police Department also testified at the penalty phase. McCoy presented evidence of three prior violent convictions, including his confession to all the crimes. Owen had previously been convicted of first degree murder of Ms. Worden, attempted murder and burglary of Marilee Manley, and burglary and assault of Monica Simpson. (Vol. LXI, T 6329-6426).

In February of 1984 Owen broke into the Manley home around midnight. He made entry through sliding glass door in the bedroom. He struck her in the head with a wrench as she was getting up out of bed. Ms. Manley's skull was fractured. In (Vol.LXI, T 6331-6354). He looked for items to steal and ultimately took a ring.

On May 24, 1984 appellant broke in to the home of Monica Simpson while she asleep. He entered through the kitchen looking for money. He entered the bedroom looking for her purse. He told police, "I hit the bitch." She received deep lacerations to her head. (Vol. LXI, T 6359-6370).

In the early morning hours of On May 29, 1984, appellant broke into the home of Georgian Worden. Ms. Worden received extensive injuries to her head. Her head was caved in as Owen attacked her with a hammer. (Vol. LXI, T 6381-6385). She was found with her head covered with a pair of shorts and legs spread apart. (Vol. LXI, T 6384). He looked in her purse for something to steal. He then figured he would go ahead a rape her. (Vol. LXI, T 6392-6404).

The state argued for the existence of four aggravating factors, "prior violent felony", the "murder was committed during the course of a burglary", the murder was "heinous, atrocious, and cruel," and the murder was "cold, calculated, and premeditated." (Vol. LXI, T 6304-6307. Appellant conceded the

existence of “prior violent felonies, and the felony murder aggravator. (Vol. LXI, T 6317-6321). Appellant argued for the existence of the two statutory mental health mitigators, and the age mitigator as well as numerous non-statutory mitigators, including the fact that he will never be released from prison.. (Vol. LXI, T 6322-6328, Vol. LXIV, T 6855-6866).

The jury received an expanded instruction on “HAC.” They were told that Owen must have intended to cause unnecessary and prolonged suffering. (Vol. LXIV, T 6884-6885).

The trial court sentenced appellant to death, finding all four aggravators argued by the state. The trial court found in mitigation both statutory mental mitigators and discussed twenty separate categories of non-statutory mitigators. (Vol. XXII 4055-4600).

SUMMARY OF ARGUMENT

Issue I - The trial court denied properly appellant's claim that his confession was involuntary as Owen failed to bring forth any new evidence which warrant an exception to law of the case. Furthermore, the trial court correctly determined that appellant made an equivocal request to remain silent and therefore the police were not required to cease further questioning.

Issue II - Owen's sentence of death is proportional in light of the extensive evidence in aggravation compared to the mitigation which was rebutted by the state's evidence.

Issue III - Florida's death penalty scheme is not constitutionally suspect in light of Apprendi v. New Jersey.

Issue IV - The "felony murder' aggaravator is constitutional

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS SINCE APPELLANT FAILED TO UNCOVER ANY NEW FACTS WHICH WOULD OVERCOME THE LAW OF THE CASE THAT THE CONFESSION WAS VOLUNTARY AND APPELLANT'S EQUIVOCAL STATEMENTS DID NOT AMOUNT TO AN INVOCATION OF SILENCE

In his initial brief, Appellant argues that his motion to suppress his confession should have been granted based on the following three reasons: (1) the video tapped confession reveals that the police, aware of Owen's past mental health issues, promised to provide medical intervention for his problems in exchange for a confession in the murder of Karen Slattery homicide; (2) Owen was allowed to visit with his brother provided he would later confess; and (3) Owen's two statements, "I don't want to talk about it" and "I'd rather not talk about it" demonstrate a clear and unequivocal invocation of his right to remain silent. (Vol. XVI, ROA Vol. 3019-3026). **Initial brief at 49-52.** In denying relief, the trial court found that appellant failed to overcome the law of the case doctrine on any of these claims After reviewing the video tapped confession, the records on appeal, the court determined that the confession was voluntary. Owen was given Miranda warnings on at least fifteen occasions and in light of all the testimony it is clear that the confession was voluntary. (Vol. XXXII T 1329-1330).

The trial court also found that Owen's statements to police were not unequivocal requests to remain silent. Rather reading extensively from this Court's most recent opinion in the instant case, the court determined that Owen's statements were equivocal. (Vol. XXXII T 1329-1335). A review of the record below establishes that the trial court's rulings were correct.

The following standards of review apply to appellant's relitigation of this issue. First, "[i]t is the general rule in Florida that all questions of law which have been decided by the highest appellate court become the law of the case which, except in extraordinary circumstances, must be followed in subsequent proceedings, both in the lower and the appellate courts." Brunner Enterprize., Inc. v. Department of Revenue, 452 So. 2d 550, 552 (Fla. 1984). Second, even if appellant is able to overcome the law of the case doctrine, the trial court's denial of the motion comes to this court clothed with a presumption of correctness. This Court, as a reviewing Court must interpret the evidence and all reasonable inferences and deductions in a manner most favorable to the trial court's ruling. San Martin v. State, 717 So. 2d 462 (Fla. 1998); Rolling v. State, 695 So. 2d 278 (Fla. 1997)(same). Applying these standards to the evidence adduced at the suppression hearing, appellant is not entitled to relief.

Prior to commencement of the suppression hearing the trial court determined that the law of the case doctrine precluded litigation of any issue regarding voluntariness. The only issue before the court would be the equivocal/unequivocal nature of Owen's statements pursuant to Davis v. United State, 512 U.S. 452 (1994).[1] In response, appellant counsel stated, If we were going to do it the same way it was done before when it was denied, I don't think we would be here. So, obviously, I intend to do things differently that [what] was done before." (Vol. XXVIII T 642). However, appellant's attempts "to do things differently" was not sufficient to overcome the law of the case doctrine in the instant case.

Relitigation of the voluntariness of Owen's confession was held on the motion on October 16, 1998. (Vol. XXVIII T 622-1325). Richard Lincoln, who headed the investigation into Ms. Slattery's murder was the first to testify at the motion to suppress. (Vol. XXVIII T 646). Lincoln spoke to Owen on June 18th, June 20th and June 21st. (Vol. XXVIII T 648, 653). Lincoln never promised Owen anything nor did he threaten him. (Vol. XXVIII T 660-661, 665). Owen received his Miranda warnings prior to confessing on the 21st. (Vol. XXVIII T 675). Lincoln listed for Owen the evidence that the police had. (Vol. XXVIII

[1] However, the court afforded appellant the opportunity to over come law of the case on any issue and invited appellant to proffer any arguments for review. (Vol. XXVIII T 640-643).

T 676, 67-678, 690-701). Lincoln purposely flattered Owen in an effort to get him to confess. (Vol. XXVIIIT 679).

Lincoln explained that when Owen made the first statement that “I don’t want to talk about it” it was made in response to Lincoln’s question regarding why Owen picked the house that he did. (Vol. XXVIII T 654). Lincoln testified that he just asked questions about other topics. (Vol. XXVIII T 658). Owen never asked to terminate the interview. (Vol. XXVIII T 655, 727). Approximately ten minutes later, Lincoln asked Owen were he had placed his bike during the murder. Owen said “I don’t want to talk about it.” (Vol. XXVIII T 659-660, 716, 719). Again Owen did not ask to terminate the interview. (Vol. XXVIII T 660, 662).

The next witness to testify was Detective Marc Woods. Woods, a detective for the Delray Beach police, met Owen for the first time in 1982. (Vol. XXVIII T 731). Woods had charged Owen with indecent exposure. Based on the nature of the charge, Wood recommended that appellant participate in a treatment program offered for sex offenders. (Vol. XXVIII T 735-738). Woods viewed his relation ship with Owen as strictly police officer to suspect. (Vol. XXVIII T 732). Ultimately the charge was dropped because Owen left the area. (Vol. XXVIII T742-743). The next time Woods saw appellant was in May of 1984 at the Boca Raton police department. (Vol. XXVIII T 745). During their

conversations, the Slattery case was never mentioned. (Vol. XXVIII T 743, 746, 748). Appellant asked Woods if he could see his brother. (Vol. XXVIII T 750). There was never any promise or deal made regarding appellant's subsequent confession in exchange for a visit with his brother. (Vol. XXVIII T 777-778). Appellant initiated and controlled the conversations. (Vol. XXIX T 851-860, 871). Appellant talked to the police in the third person, attempting to ascertain what evidence the state had against him. (Vol. XXXI T 1094). Appellant would ask hypothetical questions regarding the availability of psychological help/mental hospital. At no time did Woods ever expressly or impliedly offer a deal for appellant's confession in exchange for mental health treatment. (Vol. XXVIII T 753, 845-852, Vol. XXXII 1100-1101).

The last witness to testify for the state was Captain Kevin McCoy of the Boca Raton police department. McCoy initially saw appellant for the first time in May of 1984. McCoy was investigating the murder of Georgianna Worden. (Vol. XXIX T 870). McCoy and appellant had discussions about Owen receiving psychological help while in prison for the crimes involving indecent exposure. (Vol. XXIX T 875). There were never any discussions or promises made that appellant could obtain mental health intervention in a hospital in lieu of being charged for to the murder of Karen Slattery, provided he confessed. McCoy

always told Owen that any deal regarding these charges had to be made between Owen's lawyer and Assistant State Attorney Paul Moyle. (T Vol. XXIX 877, 893,899-900, Vol. XXXI 1043-1044, 1066, 1092, 1101).

Duane Owen also testified at the motion to suppress hearing.[2] Appellant stated the told Woods about his psychological problems, including his desire to become a woman. He recounted their encounter in 1982 when his indecent exposure case was ultimately dropped and Woods in fact referred appellant to a doctor. Owen admitted that the police never guaranteed that he would receive the same outcome regarding these new charges. He just thought that he would. (Vol. XXXI T 1136, 1155, 1157, 1160-1161). He also conceded that he understood that if any deal were to be made it had to be made by the prosecutor. (Vol. XXXI T 1158-1159).

Appellant explained that when he made the two statements that he "did not want to talk about it" he was specifically referring to the murder charges. (Vol. XXXI T 1143). Appellant admitted that he had previously been Mirandized on fifteen occasions. (Vol. XXXI T 1166). He acknowledged that the rights card stated that appellant could cut off questioning at any time. (Vol. XXXI T 1166). He also acknowledged that on a prior

[2] Although did not testify at the original motion to suppress in 1985, he did testify at the subsequent suppression hearing below.

occasion when he wanted to terminate the interview he stated that he did not want to talk anymore and the interview was terminated. (Vol. XXXI T 1166-1167). Appellant also conceded that prior to his actual confession he never invoked his right to an attorney because any attorney may advise him not to speak the police and he wanted to speak to the police. (Vol. XXXI T 1153-1154).

In addition to the presentation of witnesses at the suppression hearing, the trial court also reviewed the twenty-two hours of taped confessions. Referencing this Court's original finding of voluntariness, the trial court determined that Owen's confession remains voluntary.[3] (Vol. XXXII T 1329-1330). Therein this Court explicitly stated:

> Owen's more serious argument is that he was psychologically coerced into confessing by extended interrogation sessions, feigned empathy, flattery, and lengthy discourse by

[3] In the original motion to suppress, Owen argued the almost issues he presented below. The state employed improper psychological coercion in a variety of ways. For instance the police, feigning friendship with Owen, discussed his psychological problems and the possibility of seeking professional help. The police also allowed Owen to visit with his brother upon request. (ROA#1 1375-1387). Additionally the state incorrectly stated the law when Sergeant McCoy told Owen that he could not be punished twice. (ROA#1 1383-1385, 1387-1389, 1417). Owen also stated that his remarks, I'd rather not talk about it" and I don't want to talk about it" were invocations of his right to remain silent. (ROA#1 1398-1401, 1406, 1419-1421). The trial court denied the motion to suppress in part finding that appellant was very knowledgeable regarding his Miranda warnings, there were no threats, coercion, or deals for hospital treatment or anything else. The confession was voluntary. (ROA#1 1425-1439).

> the police. These interrogation sessions were videotaped and we have, as did the trial judge, the benefit of actually viewing and hearing them. It is clear from these tapes that the sessions were initiated by Owen, who was repeatedly advised of his rights to counsel and to remain silent. Moreover, he acknowledged on the tapes that he was completely familiar with his Miranda rights and knew them as well as the police officers. It is also clear that the sessions, which encompassed six days, were not individually lengthy and that Owen was given refreshments, food, and breaks during the sessions. The tapes show that the confession was entirely voluntary under the fifth amendment and that no improper coercion was employed. Martin v. Wainwright, 770 F.2d 918, 924-28 (11th Cir.1985), modified, 781 F.2d 185 (11th Cir.), cert. denied, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986).

Owen v. State,560 So. 2d 207, 210 (Fla. 1990). Appellant failed to overcome the law of case or demonstrate that this Court's original ruling was incorrect. His attempt to relitigate the identical factual and legal argument presented in 1985 is precluded. Brunner; Hodges v. Marion Cty., 774 So. 2d 950, 952 (5th DCA 2001)(rejecting contention that law of the case is overcome simply by arguing that issue was wrongly decided in first appeal); Barry Hinnant v. Spottswood, 481 So. 2d 80, 82 (1st DCA 1986)(ruling that law of the case applies regardless of correctness of the legal ruling provided facts are unchanged); Mitezenmacher v. Mitezenmacher, 656 So. 2d 178, 179 (3rd DCA 1995)(same); Cf. Davis v. State, 648 So. 2d 107, 110 (Fla. 1995)(refusing to revisit issue of prosecutorial misconduct

since it was addresses in original appeal); Rose v. State, 26 Fla. L. Weekkly S209, 215 (Fla. April 5, 2001)(refusing to revisit challenge to the trial court's weighing process of aggravating factors as issue was adversely decide to appellant in original appeal).

Irrespective of appellant's "new testimony" it is clear that appellant's confession was voluntary and knowing. The trial court properly denied relief as the initial ruling of the trial court as well as this Court's determination that the confession was voluntary remains correct. Owen 560 So. 2d at 210. Relief must be denied.. Johnson v. State, 696 So. 2d 326, 330 (Fla. 1997)(upholding denial of motion to suppress based on fact that defendant admitted at time of confession that he was not promised anything or threatened in anyway and such was testimony was consistent with that of the remaining witnesses who testified at the hearing); Martin v. Washington, 770 F.2d 918, 924-928 (11th Cir. 1986)(upholding voluntariness of confession as police investigative techniques were not unduly improper, there was no showing of psychological coercion and defendant was not unfamiliar with the legal system).

Regarding the separate issue of whether Owen ever made an unequivocal invocation of his right to remain silent relief was also denied. The trial court relied on this Court earlier ruling which specifically held the following:

> Because Owen's responses were equivocal, (FN8) the State would have this Court reinstate Owen's convictions on the ground that a retrial is unnecessary in light of our decision. We are unwilling to go that far. Our prior decision which reversed Owen's convictions and remanded for a new trial is a final decision that is no longer subject to rehearing. With respect to this issue, Owen stands in the same position as any other defendant who has been charged with murder but who has not yet been tried. Just as it would be in the case of any other defendant, the admissibility of Owen's confession in his new trial will be subject to the Davis rationale that we adopt in this opinion. However, Owen's prior convictions cannot be retroactively reinstated.
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> [8] We reject Owen's argument that because we termed his comments to be "at least equivocal" in our earlier opinion we should now construe his comments as unequivocal.

State v. Owen, 696 So. 2d 715 ,720 (Fla. 1997). The trial court could find no legal reason to overcome this Court's determination. (Vol. XXXII T 1330-1332). The state asserts that the trial court's determination that his statements were not an unequivocal invocation of this right to remain silent were correct. Although given the opportunity to present new evidence or new law to overcome the law of the case doctrine, appellant was unable to do so. Indeed when determining the equivocal nature vel non of other remarks in other cases, this Court has repeated it's determination that Owen's remarks were equivocal. State v.Glaztamyer, 789 So. 2d 297, 302 n.8 (Fla.

2001); Walker v. State, 707 So. 2d 300, 310 (Fla. 1997); Almeida v. State, 737 So. 2d 520, 523 (Fla. 1999). Appellant has failed to overcome the doctrine of law of the case. This Court must affirm the trial court's rulings.

ISSUE II

APPELLANT'S SENTENCE OF DEATH IS PROPORTIONAL

Owen alleges that his sentence of death is disproportionate for several reasons. Specifically he alleges the following: (1) the trial court erred in finding the aggravating factor of "heinous, atrocious, and cruel"[4]; (2) the trial court erred in finding the aggravating factor of "cold, calculated and premeditated."[5] (3) Owen's prior violent convictions were all committed within a short period of time, i.e., three months; (4) since the trial court found that the capital crime was committed while under the influence of extreme mental or emotional disturbance,[6] the weight assessed the aggravators must be lessened. A review of the trial court's sentencing order and the overall facts of this case clearly establish that Owen's sentence of death is proportional.

This Court has stated repeatedly that the purpose of proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. Urbin v. State, 714 So.2d 411 at 416-417 (Fla. 1998); Terry v. State, 668 So.2d 954 (Fla. 1996). Additionally, the task has been explained as follows:

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[4] 921.141(5)(h).

[5] 921.141(5)(i).

[6] 921.141(60(e).

> "We later explained: 'Our law reserves the death penalty only for the most aggravated and least mitigated murders.' Kramer v. State, 619 So.2d 274, 278 (Fla.1993).(FN21) Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders."

Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999). Furthermore when reviewing the relative weight attached to either aggravating or mitigating factors, this Court will not disturb the conclusions of the trial court absent an abuse of discretion. See, Alston v. State, 723 So.2d 148, 162 (Fla. 1998)(finding where detailed sentencing order identified mitigators, weight assigned each is within court's discretion); Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996)(same); Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995)(same); Cole v. State, 701 So.2d 845, 852 (Fla. 1997)(deciding mitigator's weight is within judge's discretion, subject to abuse of discretion standard). Gordon v. State, 704 So. 2d 107, 118 (Fla. 1997)(same); Larzelere v. State, 676 So. 2d 394 (Fla. 1996)(same). And finally, when reviewing the evidence in support of the aggravating and mitigating factors, this Court will not disturb the findings of the trial court as long as there is substantial and competent evidence in the record to support their existence. Stephens v. State, 26 Fla. L. Weekly S161, 165 (Fla. March 15, 2001). Applying the facts of the

instant case to these legal principles and standards of review, it becomes clear that jury's ten to two recommendation for death coupled with the trial court's sentence of death was proper and must be affirmed on appeal.

Owen claims that the trial court erred in finding that the stabbing death of Karen Slattery was "heinous, atrocious and cruel." He alleges the following; (1) there was no evidence that Owen intended to cause unnecessary suffering; (2) there was no evidence to demonstrate that Ms. Slattery was aware of her impending death and (3) there was insufficient evidence to establish that she suffered unduly or that there was ever a struggle. Rather he claims that the evidence establishes that unconsciousness/death came relatively quickly. The record and case law belie Owen's contentions.

This Court has consistently explained that,

> "[t]he HAC aggravator applies only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Kearse v. State, 662 So.2d 677 (Fla.1995); Cheshire v. State, 568 So.2d 908 (Fla.1990). The crime must be conscienceless or pitiless and unnecessarily torturous to the victim. Richardson v. State, 604 So.2d 1107 (Fla.1992); Hartley v. State, 686 So.2d 1316 (Fla.1996)."

Guzman v. State, 712 So. 1155, 1159 (Fla. 1998). The "HAC" factor focuses on the manner and means by which the murder is

accomplished and the circumstances surrounding the killing. Stano, 460 So.2d 890, 893 (Fla. 1984). In determining HAC, this Court has found that "fear and emotional strain" preceding the victim's death could contribute "to the heinous nature of a capital felony." Adams v. State, 412 So.2d 850, 857 (Fla. 1982). Moreover the intent of the defendant is not a necessary element for a finding of "HAC." Guzmann, 712 So. 2d at 1160(finding that appellant's lack of intent to cause undue suffering does not preclude a finding of "HAC" since "the HAC aggravator may be applied to torturous murders where the killer was utterly indifferent to the suffering of another.").

The trial court made the following factual findings with regards to the "HAC" factor:

> As previously noted, Karen Slattery was stabbed or cut eighteen times. She was alive when all the wounds were inflicted. She was in terror. She undoubtedly had a belief of her impending doom. Her fear and heightened level of anxiety occurred over a period of time. Most important the Defendant told Dr. McKinley Cheshire that fear in his victim was necessary. The Defendant stated that causing deliberate pain and fear would increase the flow of female bodily fluids which he needed himself. The puncturing of Karen Slattery's lung caused her to literally drown in her own blood. She experienced air deprivation. Each of the eighteen cuts, slashes and/or stab wounds caused pain by penetrating nerve endings in Miss Slattery's body. The crime of murdering Miss Slattery evidenced extreme and outrageous depravity. The Defendant desired to inflict pain and fear on Miss Slattery "to increase the flow of her female

> bodily fluids which eh needed for himself." The Defendant showed an utter indifference to Karen Slattery's suffering. He was conscienceless and pitiless and unnecessarily torturous to Miss Slattery. She had an absolute full knowledge of her impending death with unimaginable fear and anxiety.

(Vol. XXII ROA 4054-4055). The trial court's factual and legal conclusions are supported by the record. In addition to the fact recounted above the trial court also noted in its order the following relevant facts; Owen appeared in the house wearing only nylon shorts and caring a knife and hammer when he approached Ms. Slattery. Ms. Slattery attempted to pick up the phone but was prevented from doing so by appellant. He grabbed the phone from her and began to stab her in the back. She fell to the floor landing on her back while Owen continued to stab her. The evidence demonstrates that there was a struggle.[7] Her throat was cut which would have prevented her from crying out for help. Ms. Slattery lost almost all of her blood, which triggered physiological terror.[8] Ms. Slattery remained conscious for somewhere between twenty seconds to two minutes. Of the eighteen stab wounds suffered, eight were in the back, six were

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[7] The medical examiner testified that the situation was dynamic meaning that Ms. Slattery was moving around struggling on the ground while she was being stabbed. She was aware of what was happening. (Vol. LII T 4867-4869, 4876-4878, 4888, Vol. LXIV 6481-6482).

[8] The medical examiner testified that the loss of blood caused her to go into shock. (Vol. LII T 4874).

in the neck, and four were slashing wounds to the throat. Seven of the eighteen were each fatal in and of themselves. (Vol. XXII ROA 4052). The stab wounds were very painful given the nerve endings located in the skin.

The following additional facts adduced at trial are also relevant to supports a finding of "HAC." One of the stabs wounds that entered the throat dented the victim's spine. (Vol. LII T 4861). Ms. Slattery went into shock due to extraordinary loss of blood, she was in a fear like state, experiencing high anxiety. (Vol. LXII T 6472).Irrespective of appellant's claim that he did not intend for Ms. Slattery to be in fear or experience any unnecessary pain and suffering, the facts loudly state otherwise.

The majority of cases relied upon by Appellant in support of his claim involve gunshot murders. For instance in Richardson v. State, 604 So. 2d 1107 (Fla. 1992) this Court rejected the finding of "HAC" as the victim was shot once in the heart, lost consciousness and died. Likewise Owen's reliance on Bonifay v. State, 626 So. 2d 1310 (Fla 1993) is also of no moment. Therein this Court rejected a finding of "HAC" based on the fact that the medical examiner testified that the victim was shot twice in the head which would have rendered her immediately unconscious. Bonifay, 626 So. 2d at 1313. In Kearse v. State, 662 So. 2d 677 (Fla. 1995) again this Court rejected the claim

that multiple gunshots alone evinces either an intent to torture or an indifference to or enjoyment of the suffering of another. Id. at 686. And finally in Hartley v. State, 686 So. 2d 1316, 1323-1324 (Fla. 1996) this Court again rejected a finding of "HAC" where gunshot murder was carried out quickly.

Clearly the repeated stabbing, struggle, obvious pain, and tremendous amount of blood loss and eventual shock distinguishes this case from those of appellant. The multiple stab wounds to the victim's throat, neck, and back which included the collapse of a lung, and slashed throat. Ms. Slattery was brought to the floor quickly and struggled with her attacker. She ultimately went into shock caused by the tremendous loss of blood, anxiety and fear. These facts support a finding that the murder of Karen Slattery was "heinous, atrocious and cruel." The trial court's finding is supported by the record and must be affirmed on appeal. See Finney v. State, 660 So. 2d 674, 685 (Fla. 1984)(upholding finding that murder was "heinous, atrocious, and cruel" where thirteen stab wounds resulted in victim drowning in her own blood and although length of time that victim was conscious is uncertain it was clear that she felt at least first few stab wounds); Pittman v. State, 646 So. 2d 167, 172-173 (Fla. 1994)(upholding finding of "HAC" where victim's stab wounds resulted in her bleeding to death and her throat was cut); Davis v. State, 648 So. 2d 107, 109 (Fla.

1994)(reiterating Court's consistent application of the "HAC" factor to murders involving multiple stab wounds); See also Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995)(recognizing multiple stab wounds to a struggling victim warrant the finding of "HAC"); Atwater v. State, 626 So. 2d 1325,1329 (Fla. 1993)(same); Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990)(same).

Owen also challenges the trial court's finding that the murder of Karen Slattery was "cold, calculated and premeditated."[9] Specifically Owen claims that since the trial court accepted the expert testimony that Owen was under the influence of extreme mental or emotional disturbance[10] and he was unable to conform his conduct to the requirements of the law[11] his mental state negates a finding of "CCP." Through his own mental health experts appellant concedes that his crimes were carefully planned and carried out.[12] However the bizarre delusion from which he suffers precludes him from being able to

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[9] 921.141 (5)(i).

[10] 921.141 (6)(e)

[11] 921.141 (6)(f)

[12] Appellant's mental health expert, Dr. Berlin, conceded that Owen planned the attack, he intended to burglarize the home, he intended to have with sex with Karen Slattery with or without her consent, and he knew stabbing her would result in her physical death. (ROA 5427-5434). Owen formulated and carried out his plan to have sex with an unconscious or dying woman. Owen's actions became very deliberate over time. (T 5384, 6553, 6576-6577).

reflect on his actions and therefore represents a pretense of moral justification.(Vol. LXI T 6320, 6560-6562). Appellant misstates the trial court's findings. Although the trial court found the existence of the two mental heath mitigators, the court explicitly rejected appellant's claim that he in fact suffers from this delusion, *a fortiori,* the court rejected appellant's claim of a pretense of moral justification. The record and case law supports the trial court's findings.

In order to support a finding of "CCP" this Court has stated:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson, 604 So.2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers, 511 So.2d at 533; and that the defendant exhibited heightened premeditation (premeditated), Id.; and that the defendant had no pretense of moral or legal justification. Banda v. State, 536 So.2d 221, 224-25 (Fla.1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994)

Furthermore, in order to properly reject a claim that their existed a "pretense of moral justification" the following principles are relevant:

> Our decisions in the past have established general contours for the meaning of the word

> "pretense" as it applies to capital sentencings. For instance, we have held that a "pretense" of moral or legal justification existed where the defendant consistently had made statements that he had killed the victim only after the victim jumped at him and where no other evidence existed to disprove this claim. Cannady v. State, 427 So.2d 723, 730-31 (Fla.1983). We reached this conclusion even though the accused himself, an obviously interested party, was the only source of this testimony.
>
> On the other hand, we have upheld the trial court's finding that no pretense existed where the defendant's statements were wholly irreconcilable with the facts of the murder. Thus, we have upheld a finding that no pretense existed where the accused said the victim intended to kill him over a $15.00 debt, but where the evidence showed that the victim had never been violent or threatening and had been attacked by surprise and stabbed repeatedly. (FN2) Williamson v. State, 511 So.2d 289, 293 (Fla.1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988).
>
> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

In finding the existence of the "CCP" aggravator, trial court made the following factual findings:[13]

> The facts cited above that go to prove this aggravating circumstance beyond a reasonable

[13] The majority of the facts in support of this aggravator were provided by Owen. (Vol. LIII T 5070-5109).

> doubt are the Defendant's overall plan and design in committing this crime in such a cunning way. The crime was committed at night. The Defendant stalked the victim. He came to the home where she was babysitting. He entered the home, observed her and left. He came back approximately two hours alter removing his clothing and leaving them outside. He entered with socks on his hands in only a pair of nylon shorts. He did not take any property from the home stating that he did not want to get caught with the property. He showered to wash the blood away. He concocted an alibi by turning back the clocks. He dragged Karen Slattery by her feet from one part of the house to another. He carefully closed the door to the children's room. He covered Karen Slattery's face. He positioned her naked body spreadeagle on the floor of the master bedroom. He stabbed and cut Karen Slattery eighteen times. Finally, there was no pretense of moral justification. His pretense of moral justification cane ten years alter in 1994 after he contacted the Defendant's psychiatric expert. The Defendant acted cleverly in a cool and calm manner. He carefully planned or pre-arranged this murder and had all the indicators of a heightened level of premeditation as set forth in the facts above since for all he knew at the time, Karen Slattery was still alive when these events took place. This aggravating circumstance has been proven beyond a reasonable doubt and the Court gives it great weight.

(Vol. XXII ROA 4055)(emphasis added). As noted above, the trial court expressly rejected the existence of the delusion based on the amount of time Owen remained silent regarding the existence of this allegedly debilitating mental illness. During his silence, Owen had been prosecuted for Ms. Slattery's murder as well as prosecuted for the Worden murder. In addition to this

telling factor, the state presented the testimony of two mental health experts who both explicitly and clearly rejected appellant's claim that he suffers from a delusion. Dr. Waddell discounts Owen's claim that he suffered schizophrenia in 1984 for seven specific reasons; (1), the two and ½ hour video taped confession did not reveal any signs of any serious emotional maladjustment; (2), during the fourteen years subsequent to appellant's arrest he has been continually under care supervision, and observation of the Department of Corrections personnel and professionals. During this time there has never been any statement expressing a suspicion let alone a conclusion that appellant has schizophrenia or any other serious psychosis; (3) a large amount of time elapsed between the murders and the first time Owen described this behavior;[14] (4), appellant has not exhibited any collateral psychiatric symptoms associated with schizophrenic delusions; (5), the nature of appellant's delusion does not conform to any recognized type of delusion; (6), there is no corroboration for schizophrenia in the psychological testing performed by Waddell ;and (7) appellant has a very great incentive to invent such a delusion. (Vol. LVII T 5708-5711, 5721-5722).

[14] Waddell discounts any suggestion that he did not tell police about this delusion because he was embarrassed since he readily admitted to police that he was a flasher, a peeping tom, and he enjoyed women's clothing. (Vol. LVII T 5709).

Dr. McKinnely Cheshire also flatly rejected Owen's claim of schizophrenia. Cheshire testified that Owen is a malingerer and his delusion is entirely fabricated. (Vol. LVII T 5838, Vol. LXIV 6794). Cheshire offered several reasons which lead him to conclude that Owen is fabricating this illness. First, appellant's alleged delusion that he believes that he is a woman and he must "transfer a woman's essence to himself" to complete his desire to actually become a woman is inconsistent with his actions during his crimes. All of his behavior demonstrates a total disregard for women. Owen's life has been about dominating, demeaning, and totaling controlling women. (Vol. LVII T 5841, 5849). Secondly, appellant did not exhibit any signs of psychosis during his confession. His focus was on his ability to outsmart police as he often criticized their investigative techniques during the confession. (Vol. LVIII T 5851, 5842, 5883). Third, appellant has never exhibited any other symptoms of schizophrenia. For instance there has been no evidence of a destruction of the ego or loss of contact with reality. The alleged bizarre delusion is the only symptom of schizophrenia. (Vol. LVIII T 5850, 5854, 5889). And finally, the delusion is entirely self reported, i.e., appellant is the only witness to it. (Vol. LVIII T 5837-5839).

Furthermore, appellant's expert Dr. Berlin's explanation regarding why he felt appellant was telling the truth about the

alleged delusion was less than compelling. For instance, Berlin's only corroborating evidence in support of this delusion, is simply the fact that appellant has committed other similar burglaries and violent felonies against women. (Vol. LIV T 5379-5385, 5418, Vol. LXIII T 6583). Berlin did concede that the presence of anti-social personality could be confused with schizophrenia. However he discounts the notion that Owen's criminal record is simply evidence that he has an anti-social personality because Owen did not steal any money during any of the burglaries. (Vol. LIV T 5409-5412). Berlin's premise is incorrect since Owen did steal jewelry from victim Marilee Manly and Worden. It was not until after the theft was completed that appellant decided to take advantage of Ms. Manly her sexually since she was unconscious. Also during his confession to the murder of Ms. Slattery, Owen explains to the police that he did not steal anything from the Helms' home because he did not want to get caught "with any shit." Berlin simply disregards these statements. (Vol. LXIII T 6567-6571).

Berlin also concedes that Owen has never, during any of his confessions, told the police about this delusion. It did not come to light until twelve years after the murder. (Vol. LIV T 5414, Vol. LXIII T 6575). Berlin concedes that Owen is deceptive, he has a history being manipulative and he has a huge incentive to malinger. (Vol. LVI T 5417-5418).

Based on the state's evidence which is in complete contradiction of appellant's self serving claim that he suffers from a bizarre delusion, the state asserts that the trial court's rejection of same as a pretense of moral justification was proper. Cruse v. State, 588 So. 2d 983, 992 (Fla. 1991)(upholding trial court's finding of "a lack of any pretense of moral or legal justification" irrespective of defendant's alleged delusion that people were out to harm him); compare Banda v. State, 536 So. 2d 221, 225 (Fla. 1988)(finding trial court erred in rejecting defendant's claim that a pretense of moral justification existed since the uncontroverted evidence, which included state's own theory of the case, established appellant's allegation that the victim has a propensity towards violence); Wournos v. State, 676 So. 2d 972, 974 (Fla. 1996)(affirming trial court's rejection of "pretense of a moral or legal justification" that murder was in self defense irrespective of fact that defendant was only witness to the crime in light of contradictory evidence); cf. Walker v. State, 707 So. 2d 300, 317 (Fla. 1994)(upholding trial court's finding of "CCP" based on defendant's time for reflection and advancement procurement of weapon irrespective of court's finding of mental mitigator). The trial court's ruling must be upheld.

Irrespective of the fact that appellant has conceded the first three elements of "CCP" as required under Jackson, the state would also point to the following additional uncontroverted facts in support of the trial court's finding. After Owen entered the Helms' home the second time he took a pair of gloves out of the closet and retrieved a hammer form a tool box located in the same closet. (Vol. LIV T 5126-5127). As he walked out of the bedroom into the house he could see Ms. Slattery going to the phone. He assumed that she heard the noise and was attempting to call the police. He told her to put the phone down, when she did not follow his order he grabbed the phone from her. After he returned the phone to its cradle he immediately began stabbing MS. Slattery. She fell to the floor on her back. Ms. Slattery bleed to death at that location. (Vol. VIV T 5141-5145). Appellant then dragged her body into the bedroom, removed her clothes and in Owen's words, "I raped her." (Vol. LIV 5146-5150).

The uncontroverted facts clearly establish that the murder was the result of a careful and deliberate plan which was carried out in a calm and cool manner after much reflection. Appellant's intended goal was to attack young women at night while they were in vulnerable positions, i.e., sleeping in their beds or otherwise alone. After rendering them helpless he would either sexually assault them, and/or burglarize their home and

leave them for dead. The murder of Karen Slattery was "cold, calculating and premeditated." Indeed this Court has already uphold the "CCP" factor in the death of Owen's other murder victim, Georgian Worden. Specifically this Court found:

> The court's finding that the murder was committed in a cold, calculated, and premeditated manner was also adequately established. Owen selected the victim, removed his own outer garments to prevent them from being soiled by blood, placed socks on his hands, broke into the home, closed and blocked the door to the children's room, selected a hammer and knife from the kitchen, and bludgeoned the sleeping victim before strangling and sexually assaulting her.

Owen v. State 596 So. 2d 985, 990 (Fla. 1992). Given the striking similarity between the murders of Ms. Slattery and Ms. Worden, this Court must uphold the trial court's finding in this case. See also Gore v. State, 26 Fla. L. Weekly S257, 260 (Fla. April 19 2001)(upholding "CCP" based on appellant's history of targeting certain type of woman, luring them to remote location removing them for vehicle and killing victim without a trace of evidence to suggest a struggle).

In support of his contention that "CCP" does not exist appellant relies Barwick supra. However, the facts are clearly distinguishable. Therein this Court rejected the "CCP" factor because the murder was the result of a struggle between Barwick and the victim after she removed Barwick's mask and revealed his identity. Barwick, 660 So. 2d at 696. As detailed above, Owen

never hid his identity, and the stabbing of Ms. Slattery's occurred almost immediately as there was minimal interaction between the two prior to the attack. The trial court's findings must be affirmed.

Next Owen claims that since the trial court found the existence of the two mental health mitigators, the strength of the "CCP" and "HAC" aggravators is lessened and therefore death sentence is not proportionate. Owen is incorrect.

The trial court gave "considerable weight" to the mitigator that the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.[15] (Vol. XXII ROA 4055-4056). The trial court also found that although Owen clearly appreciated the criminality of his actions, he was unable to conform his conduct to the requirements of the law.[16] This factor received some weight. (Vol. XXII ROA 4056-4057). The court than listed and assigned varying degrees of weight, i.e., "some weight" to "minimal weight" to the twenty categories of non statutory mitigators. (Vol. XXII ROA 4057-4060). In finding that the aggravating factors outweighed the mitigating factors the court stated the following:

> The Court having considered all aggravating circumstances that have been proven beyond all doubt and/or beyond a reasonable doubt, and having weighed these aggravating

[15] 921.141(6)(e).

[16] 921.141(6)(f).

> circumstances against all aforementioned mitigating circumstances that the Court is reasonably convinced exists in this case, and the Court having given weight as indicated above to these factors, and the jury's recommendation, the Court's finds the aggravating circumstances in this case outweigh the mitigating circumstances. In essence, the Defendant, Duane Owen, suffered extreme and inhuman indignities and abuse as a child and teenager. He was without any reasonable support system and was molded into a sick and conscienceless individual. Nevertheless, he was not so sick that he was unable to become mean, calculating, cruel and evil-a wicked person who now deserves to die. (Emphasis added)

(Vol. XXII ROA 4060). The trial court explained that the aggravation in this case was extensive and all four aggravators were given great weight. For instance, the prior violent felonies committed by Owen were a "series of frighteningly violent crimes," which "where a frightening escalation of criminal events," overtime. (Vol. XXII ROA 4050-4051). They involved the brutal attacks of completely innocent young and vulnerable women asleep in their homes who were either killed or brutally assaulted. The court also noted that even Owen's own mental health expert Berlin admitted that Owen is a serial criminal who would do it again. (Vol. XXII ROA 4055).

The court also gave great weight to the "CCP" aggravator. The facts of this murder exhibit anything but a murder resulting from an emotional outburst. Rather the facts demonstrate a murder committed in a cunning and chilling manner by a clever

killer. After the murder Owen maintained his calm demeanor, took a shower to wash away Karen's blood as she lay in the next room. He disposed of the evidence and had the wherewithal to try and establish an alibi. (Vol. XXII ROA 4055).

In giving great weight to the "HAC" factor the court noted Owen's intention to inflict fear in his victims. (Vol. XXII ROA 4054). Ms. Slattery, was so brutally stabbed that she drowned in her own blood and ultimately lost almost her entire blood volume. (Vol. XXII ROA 4054).

With respect to the mitigating circumstances of "extreme mental or emotional disturbance" the court noted that all the experts agreed that Owen suffers from a sexual disorder, he has an antisocial personality and is not mentally healthy. (Vol. XXII ROA 4055). His troubling childhood and lack of support or mental health intervention is evident. The court gave considerable weight to this factor. (Vol. XXII ROA 4055-4056).

Regarding "the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law", the court found, "I have no question that the Defendant knew of the criminality of his conduct." (Vol. XXII ROA 4056). Owen knew he had a serious problem but received no intervention. Instead, he became a serial killer. The court gave this circumstance some weight. (Vol. XXII ROA 4056-4057).

Based on the relative weight given the aggravatotrs and mitigators, the state asserts that the facts of this murder along with the facts of his criminal history make this case one of the most aggravated and least mitigated. The death sentence is proportional. See Singleton v. State, 783 So. 2d 970, 979(Fla. 2001(finding death proportional irrespective of the presence of the mental health mitigators as facts demonstrate that defendant, "brutally stabbed a supine Hayes as she was calling for help); Spencer v. State 691 So. 2d 1062, 1065 (Fla. 1996)(finding death proportional irrespective of mental health mitigators based on ability to function and carry out calculated murder); Booker v. State, 773 So. 2d 1079, 1091-1092(Fla. 2000)(finding death proportionate for stabbing of ninety-four year old victim in her home irrespective of mental health mitigators); Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989)(finding death sentence appropriate where mental health statutory mitigators were not compelling given absence of evidence that murderers were not committed by an "emotionally disturbed man-child" but rather a "cold blooded heartless killer"); Lott v. State, 695 So. 2d 1239 (Fla. 1997(same); Robinson v. State, 761 So. 2d 269, 273 (Fla. 19990(same); Rivera v. State, 561 So. 2d 536, 540-541 (Fla. 1990)(finding death proportional irrespective of lack of "CCP" and presence of

sexual disorders which support finding of statutory mental health mitigator). Death is proportional.`

Appellant's reliance on Almeida v. State, 748 So. 2d 922 (Fla.1997) and Terry v. State, 658 SO. 2d 954 (Fla. 1996) are of no consequence given that they are clearly distinguishable. For instance in Almeida this Court struck the "CCP" aggravator which left only one aggravator, prior violent felony. Almeida, 748 So.2 d at 933. The prior violent felony was committed within six weeks of this murder, and was the result of appellant's marital crisis. In other words Almeida's criminal history was strictly episodic and related solely to this stressful period of time. Additionally his mental health history was extensive and the vote for death was of the barest of margins, seven to five. Id. As detailed above, Owen's criminal history and this murder were not episodic nor a result of heated passion. Owen is the most calculating and cunning of criminals. Additionally the jury's recommendation for death was ten to two.

Equally unavailing is Owen's reliance on Terry supra. Therein this Court focused on the fact that the circumstances of the murder were not clear, the murder occurred during a botched robbery and the case for aggravation was very weak. Terry, 668 So. 2d at 965.

Duane Owen carefully orchestrated a plan to burglarize and brutally attack vulnerable young women for sexual gratification. His sentence of death is proportional.

ISSUE III

APPRENDI V. NEW JERSEY HAS NO CONSTITUTIONAL EFFECT ON FLORIDA'S DEATH PENALTY SCHEME

Appellant argues that the United States decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) has rendered Florida's death penalty scheme unconstitutional in the following manner: (1) the jury makes no specific findings relating to existence of aggravators; (2) the jury makes no specific findings relating to the weight given to aggravators; (3) the jury is not instructed that a finding of death must be found beyond a reasonable doubt; (4) recommendation is not unanimous; (5)the indictment does not list aggravators sought to be proven by the state.[17] All of these claims have been repeatedly rejected by the United State Supreme Court and this Court on numerous occasions. Hildwin v. State, 531 So. 2d 124 (Fla. 1988); Hunter v. State, 660 So. 2d 244 (Fla. 1995); Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992); Gamble v. State, 659 So. 2d 242 (Fla. 1995); Robinson v. State, 574 So. 2d 108 (Fla. 1991); Thompson v. State, 619 So. 2d 261 (1993); Brown v. State, 721 So. 2d 274, n. 6 283(Fla. 1998); Stephen v. State, 26 Fla. L. Weekly S161, 165 (Fla. March 15, 2001) Spaziano v. Florida; 468 U.S. 447 (19840; Hildwin v.

[17] This specific issue is not preserved for appellate review as it was not specifically raised below. Hunter v. State, 660 So. 2d 244 (Fla. 1995). In any event, appellant was on notice regarding what aggravation factors the state was seeking as a "Statement of Aggravating Circumstances" was filed prior to penalty phase proceedings. (Vol. XIX ROA 3548-3549, 3553).

Florida, 490 U.S. 638 (1989); Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). Apprendi has not altered let alone overrule long standing precedent as it is inapplicable to Florida's death penalty sentencing scheme. Mills v. State, 786 So. 2d 547, 549 (Fla. 2001); Brown v. State, 26 Fla. L. Weekly S742, 743 (Fla. November 1, 2001); Mann v. Moore, 26 Fla. L. Weekly S490 (Fla. July 12, 2001); Looney v. State, 26 Fla. L. weekly S733 (Fla. November 1, 2001); Card v. State, 26 Fla. L. Weekly S670, 674 & n. 13 (Fla. October 11, 2001).

ISSUE IV

THE "FELONY MURDER AGGRAVATING CIRCUMSTANCE" IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED

Appellant alleges that the felony murder aggravating factor is unconstitutional because it is does not narrow the class of persons eligible for the death penalty. This issue has been repeatedly rejected by the United States Supreme Court and this Court.

> Blanco next argues that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony. We disagree. Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder (FN17) is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. (FN18) A person can commit felony murder via trafficking, car jacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). See generally White v. State, 403 So.2d 331 (Fla.1981). We find no error.

Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997). See also Hunter v. State, 660 So. 2d 244,n.11 253(Fla. 1995); Parker v. Dugger, 537 So. 2d 969, 973 (Fla. 1988); Sims v. State, 681 So. 2d 1112, 1118 (Fla. 1996); Kearse v. State, 662 So. 2d 677, 685 (Fla.

1995); Parker v. State, 6451 So. 2d 369, 377 n. 12 (Fla. 1994); Card v. State, 26 Fla. L. Weekly S670, n. 16 674 (Fla. October 11, 2001).

He opined that appellant has a sexual disorder, an anti-social personality disorder, and he is a sociopath. (Vol. LVIII T 5834-5839, 5888, Vol. LXIV 6795-6796). Owen does not present any new argument which would call those rulings into question.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Michael Dubiner, Esq. Mark Wilensky, Esq., 515 North Flager Drive, Suite 325 West Palm Beach, Florida 33401-4349, this 7th day of January, 2002.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____
CELIA A. TERENZIO
Assistant Attorney General