IN THE SUPREME COURT OF THE STATE OF FLORIDA

DUANE OWEN,	*	
	*	
Appellant,	*	
	*	
vs.	*	CASE NO. SC95526
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STATE OF FLORIDA,	*	
	*	
Appellee.	*	
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APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the prosecution in the lower tribunal. In this Brief, the parties will be referred to as they appeared before the lower tribunal.

The record volume will be referred to by Roman numerals. The page number will be referred to by Arabic numerals. The supplemental record on appeal will be designated by the symbol "SR" followed by the page number.

In accord with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Appellant hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is spaced proportionately.

STATEMENT OF THE CASE

On July 11, 1984, the grand jury indicted the defendant for first degree murder in Count I, sexual battery with a deadly weapon or physical force likely to cause serious personal injury in Count II, and burglary of a dwelling while armed with a dangerous weapon in Count III. Trial commenced on January 4, 1999. (XXXII, 1343). The jury returned a verdict of guilty as charged as to first degree murder and burglary of a dwelling while armed with a dangerous weapon, and of guilty to the lesser charge of attempted sexual battery with a deadly weapon or by use of great force. (LX, 6113-6114).

On March 4, 1999, after a penalty phase hearing, the jury returned an advisory verdict recommending that the defendant be sentenced to death, by a vote of ten to two. (LXI, 6897). On March 23, 1999, the lower tribunal sentenced the defendant to death with regard to the first degree murder charge, to 15 years in the Department of Corrections with regard to the sexual battery charge, and to life imprisonment with regard to the burglary charge. (LXV, 6993-7025). The defendant's motion to correct sentence was heard by the court on April 26, 1999, and denied. (LXV, 728-730).

STATEMENT OF THE FACTS

GUILT PHASE

In the early morning hours of March 25, 1984, Major Richard Lincoln arrived at 1221 Harbor Drive, Delray Beach, Florida, to investigate a homicide. (LI, 4540-4546). Lincoln entered the residence through the front door and saw sizeable amount of blood and blood trail evidence that indicated a path to the master bedroom area at the back of the home. (LI, 4544). Lincoln observed a hammer found in the master bedroom and footprints on the floor. (LI, 4547-4549). At the end of the hallway, within the entrance of the master bedroom, the body of Karen Slattery was observed, partially clothed and with a towel over her head. (LI, 4552-4553). The underwear and the shorts of the decedent had been removed, and her bra and her shirt were pushed upward exposing her breasts. (LI, 4558). Lincoln testified that the blood trail that was observed within the scene was consistent with the body having been dragged by her feet. (LI, 4558-4559). A window was open in the master bedroom and a screen had been cut. The front windows of the house were open, without window coverings of any sort. (LI, 4573). Frank Pellegrinni was a crime scene officer with the Delray Beach Police Department in March, 1984. (LI, 4594). He was working in the early morning hours of March 25, 1984, and was assigned to the crime scene. (LI, 4595). He observed blood, a hammer, and a body at the scene. (LI, 4596). Pellegrinni

recovered items of the victim's clothing. (LI, 4603, 4605, 4606). He recovered a claw hammer from the residence in the master bedroom. (LI, 4609-4611). Pellegrinni knew of no items alleged to have been stolen from the home. (LI, 4615-4616).

William Helm was the owner of the house at 1221 Harbor Drive. (LI, 4637). On March 24, 1984, Helm and his wife went out for the evening and left their two children with Karen Slattery, who was babysitting for them. (LI, 4637). Slattery had babysat for the Helms before, was considered reliable, and had never invited unauthorized persons to the home while she was babysitting. (LI, 4638). Helm and his wife returned to the home just after midnight on March 25, 1984. (LI, 4639). He noticed only one light was on in the living room, which he termed to be unusual. (LI, 4639). There were no window coverings on the windows in the front of the home and anyone from the street could see in. (LI, 4640). As Helm and his wife walked into the door, they called for Karen Slattery. (LI, 4642). They saw her shoes near the kitchen area (LI, 4642), and saw a large pool of blood leading back to the master bedroom. (LI, 4643). The master bedroom door was closed, which was extremely unusual (LI, 4643), and there was a light on in the bedroom. (LI, 4644). The children's room door was closed, which Helm said was unusual when Karen was babysitting. (LI, 4644). Helm identified the hammer found in the master bedroom as his. (LI, 4645). When Helm left for the evening the hammer was in his tool box, which was kept closed in the

master bedroom closet. (LI, 4645-4646). In his bedroom ,Helms noticed that the telephone cord was twisted around one of the knobs of the chest of drawers (LI, 4647), dirt on the bedspread and pillow of the bed (LI, 4648), and the screen from the window in the bedroom having been cut. (LI, 4649). He identified red stains on the bedspread, which did not exist when he and his wife went out the evening. (LI, 4649-4650).

There were two rugs in the master bathroom, one of which had a red stain on it and the other of which was pushed together. (LI, 4651-4652). They did not appear like that when Helm left for the evening. (LI, 4652). A used towel was in the bathroom, which was not there when they went out for the evening. (LI, 4653). A sliding glass door in the master bedroom which was normally closed had been opened and was left open. (LI, 4653-4654). No person other than Karen Slattery had permission to be in the Helm house that night. (LI, 4656). Helm identified Karen Slattery from a photograph. (LI, 4657). As soon as Helm realized there was blood in the home, he instructed his wife to go next door and call the police. (LI, 4658-4659). As soon as the police arrived, he went into the bedrooms of his daughters and took them outside. (LI, 4659-4660). Both of the children had been sleeping. (LI, 4660).

Caroline Helm testified that when she and her husband were going out for the evening on March 24, 1984, they engaged the services of Karen Slattery as a babysitter. (LI, 4661-4662). The Helms left their home at about 6:30 p.m. and returned back slightly after midnight. (LI, 4663). She and her husband called for the babysitter when they arrived home and proceeded back into the kitchen and noticed there was a light on in the master bedroom. (LI, 4664). She noticed blood on the floor and her husband asked her to go next door to call the police. (LI, 4665). After the police came she noticed that a pair of deerskin gloves were missing from a pink satin lingerie case on the top shelf of her closet in the master bedroom. (LI, 4666). No person had permission to be in her home that night other than Karen Slattery. (LI, 4667).

David Little was a police officer with the Delray Beach Police Department in 1984. (LI, 4670). He participated in the investigation of the death of Karen Slattery. (LI, 4670). He arrived at the scene of the crime on the night it took place as a backup investigator. (LI, 4670-4671). On June 22, 1984, he was directed by Richard Lincoln to search an area of bushes directly east of Harbor Drive to look for clothing. (LI, 4672). He was assisted in that search by a number of other officers. (LI, 4672). In the bushes in the area in which he was searching, Little found two socks, a pair of gloves, and a pair of nylon gym shorts. (LI, 4708-4711). Before going to the scene,

on June 22, 1984, Little had been briefed about what to look for, and found that which he had been sent to retrieve.

Robert Tourville was a detective with the Delray Beach Police Department in March, 1984. (LI, 4683-4684). He searched with David Little in the bushes and hedge area. A pair of gloves, socks, and shorts were found in the bush area. (LI, 4695-4696).

Crime Scene Technician Kenneth Herndon testified that in 1984, he was a sworn officer with the Delray Beach Police Department. (LI, 4713-4715). As the supervisor of the crime scene and identification unit, he went to the Helm home to investigate the Slattery murder. (LI, 4716). He met Officer Pelligrinni outside the home and was taken to various areas, where he observed various items of evidence within the home. (LI, 4719-4723). He observed the body of Karen Slattery. (LI, 4723-4724). He noted the drag marks in the home (LI, 4726) and noted that he could look through the sliding glass door in the master bedroom all the way through to the living room, so long as the pocket door to the master bedroom was closed. (LII, 4727-4728). He noted that the lid of the toolbox in the master bedroom was open when he examined the scene. (LII, 4729-4730). As part of his investigation, Herndon collected the shirt and bra of Karen Slattery. (LII, 4731). He also testified that he collected other articles from around the house and preserved them for later testing. (LII, 4734-4740). Herndon noted bloody

footprints in the house. There was no ridge detail in the footprints, which was consistent with somebody wearing something on his feet. (LII, 4751). An attempt was made to gain fingerprint evidence for what was determined to be the point of entry, but the only usable print turned out to belong one of the captains at the Delray Beach Police Department who had been at the crime scene. (LII, 4756-4757). There were no prints of Duane Owen at the crime scene. (LII, 4757-4763). There was a footprint found outside the home in a sandy area, but because of the area in which it was found the print could not be compared. (LII, 4769-4770).

Carolyn Slattery testified that she was the mother of the victim, who had been dropped off at the Helm's home at 6:30 p.m. on March 24, 1984. (LII, 4775-4776). At approximately 10:00 p.m. on that night, she spoke with Karen from the Helm home. (LII, 4776).

Richard Tanton testified that he was the Director of the crime laboratory at the Sheriff's office in Palm Beach County and had been since 1985. (4783-4786). In 1984 he was serologist at the laboratory. (LII, 4788). He tested Duane Owen and determined that because he was not a secreter, his blood type would not be identifiable in his semen or his saliva. (LII, 4793). He analyzed the underwear of Karen Slattery and determined that there was a blood stain. (LII, 4794). Semen was not found and the blood type was A, which is the same type as Karen Slattery. (4797-4798). Duane

Owen was determined to be blood type O (LII, 4931), and there was no indication that his blood type was found in any items examined by Tanton. (LII, 4932). There was semen involved discovered in the autopsy smears taken from Slattery. (LII, 4932-4933, 4934). Tanton went to the scene at 1221 Harbor Drive and conducted luminol tests. (LII, 4936). Blood was found in the footprint (LII, 4941) and was further found on the bottom of the socks that were recovered in June from the bushes near the scene. (LII, 4943-4944). There was also an indication of blood on the shorts found at the same place and time. (LII, 4945).

Dr. Frederick Hobin was an Associate Medical Examiner for Palm Beach County in March, 1984. (LII, 4822-4824). He went to the scene at approximately 2:30 a.m. on March 25, 1984, and observed that a young adolescent female had died a violent death at that location. (LII, 4825). He conducted a physical assessment to determine time of death and estimated that time of death was some time very close to 10:00 p.m. (LII, 4827-4829). He observed multiple cutting injuries on the body. (LII, 4829). Hobin conducted an autopsy examination on Karen Slattery and collected various samples from her body. (LII, 4838). He had already determined that semen existed on the body at the scene, and began his collection of materials there. (LII, 4939). Hobin collected semen from the body of Karen Slattery, and concluded an insemination into the vagina had occurred. (LII, 4851-4852). There were a total of 18

stabbing and cutting injuries on the body, including eight stab wounds on the back, four incise wounds on the neck, and additional stabbing injuries about the neck area. (LII, 4854). He estimated the depth of the stab wounds to the lungs to be three inches. (LII, 4865). Potentially, all of the stab wounds were lethal, although not necessarily immediately causing death. (LII, 4865). He determined that the cause of death was the cutting and stabbing injuries she had suffered. (LII, 4866). He determined that Karen Slattery had lost almost all of her blood volume. (LII, 4874). Dr. Hobin opined that it was highly unlikely that Karen Slattery would have been alive at the time that she was raped, and determined that the rape would have had to have occurred after she was dead. (LII, 4876).

On cross examination Dr. Hobin pointed out that there was furniture directly next to the area of the large pooling of blood which had not been disturbed. (LII, 4881). He again stated his opinion that when the sexual intercourse took place, the victim was already dead or, it was very highly probable that she was dead. (LII, 4883).

Dr. Cecilia Crouse, the supervisor of the serology/DNA section of the Palm Beach County Sheriff's Office Crime Laboratory testified as an expert in DNA identification. (LIII, 4983). She conducted DNA analysis on items relating to Duane Owen and Karen Slattery. She identified semen from the autopsy and blood from the

Defendant. (LIII, 4994). She conducted DNA testing on the semen and the blood. Her testing indicated that the probability that a person other than Duane Owen had been the source of the semen recovered at the autopsy was one in every 690,000,000 Caucasian individuals, one in every 80,000,000 African American individuals, and one in every 300,000,000 Hispanic individuals. She admitted on cross examination that the purpose of DNA is to determine identity, and has no relevance to insanity. (LIII, 4999-5000).

Dr. Martin Tracy, Professor of Biological Sciences at Florida International University, testified as an expert in the area of population genetics. (LIII, 5009, 5014-5015). He testified that the comparison sample of the Palm Beach County Sheriff's Office was a scientifically valid database. (LIII, 5027-5028). He re-analyzed Dr. Crouse's work, and also determined that one person out of 690,000,000 in addition to Duane Owen would match the evidentiary or semen stain taken from Karen Slattery, as to Caucasians. He further testified that the odds for African American males was one in 80,000,000 and in Hispanics one person out of 300,000,000. (LIII, 5029).

John Brady was a police officer in the Palm Beach County area in 1984. (LIII, 5047-5048). On May 29, 1984, he explained a defendant's constitutional rights to the defendant. (LIII, 5049). Brady read the rights off of a standard issue rights sheet (LIII, 5047-5051), and the defendant indicated that he understood his rights both

verbally and in writing. (LIII, 5051). He signed the form in the name of Dana Brown. (LIII, 5051). Brady later learned that the defendant had entered the army under the name of Dana Brown. On cross examination, Brady admitted that at the time he spoke with the defendant he had admitted to a sexual problem. (LIII, 5054). Richard Lincoln was recalled to the stand and testified that on June 21, 1984, pursuant to court order, he went to the Palm Beach County Jail to get footprint standards from the defendant in order to compare those standards against the bloody footprints that were found at the scene. (LIII, 5058-5059). Lincoln also testified that he interviewed Duane Owen on that date. (LIII, 5065). There had not been any discussion of the Karen Slattery case at the time that the footprints were taken. (LIII, 5065). Lincoln later went back to see the defendant that night. (LIII, 5066).

Prior to trial, the defendant had filed a motion to suppress the statements given to Richard Lincoln. At the motion to suppress, Lincoln testified that he had coordinated the Slattery investigation. (XXVIII, 646-647). He had gone to the Palm Beach County Jail with Detective Mark Woods in order to interview the defendant with Woods. (XXVIII, 650-651). The defendant was read his rights by Detective Woods. (XXVIII, 651). He did not ask for a lawyer (XXVIII, 652), and did not object to Lincoln being in the room when Lincoln joined the interrogation. (XXVIII, 653). The defendant was asked by Lincoln whether he had selected the house where the attack

took place at random or for some reason in particular. (XXVIII, 654). His answer was that he would rather not talk about it. (XXVIII, 654). The defendant did not specifically say that he wanted to terminate the interview or ask for an attorney. (XXVIII, 655). Lincoln continued to talk with the defendant after the defendant indicated that he did not want to talk about it for an estimate of 10 minutes, during which time the defendant did not ask for an attorney and did not ask that the interview terminate. (XXVIII, 658-659). Lincoln claimed that the defendant responded to requests that were put to him by the officers (XXVIII, 659), until he was ultimately asked where he had left his bicycle before going into the house. (XXVIII, 659). The defendant then again advised Lincoln that he did not wish to talk about it (XXVIII, 659), but Lincoln continued to question him. The defendant never asked for a lawyer, for the detectives to leave the room or say specifically that he wanted to terminate the interview, in so many words. (XXVIII, 660).

On cross examination on the motion to suppress, Lincoln indicated that he was aware that on June 18, 1984, the defendant had told Detective Woods that there was nothing else to talk about in Delray Beach. (XXVIII, 667). Lincoln had told the defendant that the footprint that he had taken constituted conclusive evidence even though at that time he knew that the footprint did not. (XXVIII, 667). Lincoln was aware that at that time in order to make the Slattery case, he needed a confession from

the defendant, and felt that the interview with the defendant at that time was the last opportunity for the police. (XXVIII, 668). Although the defendant had on occasion requested that the police come to see him, he had not requested the police come on June 21. (XXVIII, 671). Lincoln claimed not to be aware that the defendant had told an officer from the Boca Raton Police Department that he didn't want to talk anymore. (XXVIII, 672). Lincoln spoke to the defendant after the Boca Raton Police had spoken to him. (XXVIII, 675). They were investigating a Boca homicide which took place after the homicide that Lincoln was investigating. (XXVIII, 673).

Lincoln told the defendant that he should give a statement both because Lincoln had already developed conclusive evidence with regard to the footprint and for the sake of the community and the people involved in the crime. (XXVIII, 678). The very first time that Lincoln asked the defendant anything about the Slattery homicide, the defendant's response was, "I'd rather not talk about." (SR 6, 1096). Lincoln continued to question him about the house (SR6, 1097), but the defendant did not respond to questions about the house. He was eventually asked if he knew the owners of the home, and indicated that he did not. (SR6, 1110). Lincoln questioned the defendant about his bicycle, asking him where he put it. (XXVIII, 716). The defendant eventually told Lincoln "I don't want to talk about it." Lincoln also told the defendant that it didn't really matter what happened in the Slattery case, since he

couldn't be punished twice for the same thing. He was referring to the electric chair when he said that it didn't really matter if the defendant had two murder convictions or one, since he could only go to the electric chair once. (XXVIII, 722).

Detective Mark Woods also testified on the motion to suppress. (XXVIII, 731). On direct examination, he indicated that he met the defendant with regard to some residential burglary arrests which took place in 1980. (XXVIII, 731-732). The residential burglaries involved forced entry with nothing being stolen but women's underwear and bathing suits. XXVIII,(731-732). All the charges brought against the defendant with regard to the crimes investigated by Woods in 1982 were eventually *nolle prossed*. (XXVIII, 742). Woods next saw the defendant in May, 1984, at the Boca Raton Police Department. (XXVIII, 743). The defendant was at that time was a suspect in the instant case. (XXVIII, 743). Woods spoke to the defendant about his psychiatric problems, which the defendant told him were getting worse and not better. (XXVIII, 746). Woods left his card and asked the defendant to call him if anything came up. (XXVIII, 748). Woods next saw the defendant on June 1, 1984, at the Sheriff's Office. (XXVIII, 748). That interview lasted seven and one-half hours. (XXVIII, 749). Woods knew that the defendant and his brother were close and agreed to bring the defendant's brother to the jail to see the defendant. (XXVIII, 749-751). Woods spoke to the defendant again on June 1, although he did not discuss

the Delray Beach crimes. (XXVIII, 751-752). The defendant had asked to see Woods, and indicated that he didn't like the Boca Raton Police Department. Woods went along to assist Boca in getting statements from the defendant. (XXVIII, 752). On June 1, there were discussions with the defendant as to how the defendant could get help for his psychiatric problems and stay in a mental hospital in South Florida near his brother. (XXVIII, 753). Woods claimed that he did not make any kind of deal with the defendant. (XXVIII, 753).

On cross examination, Woods admitted that on June 1, 1984, he reminded the defendant that he had helped him before. (XXVIII, 754). On June 3, 1984, there was another interview with the defendant which lasted 8.5 hours. (XXVIII, 775-776). On that date, Woods arranged for the defendant's brother to come to see the defendant with him. (XXVIII, 757). He discussed with the defendant whether he could help to get him to a hospital (XXVIII, 765), and assured him that he would definitely get help. (XXVIII, 765). Additionally, Woods discussed with the defendant the help (psychiatric) that he had arranged in 1982. (XXVIII, 766). When the defendant expressed an interest in getting help from the court system, Woods told him that he would have to ask for help in order to get sentenced to a program. (XXVIII, 769). He advised the defendant that if he confessed, he would have the ability to check his options, rather than doing what the jury decided. (XXVIII, 772).

On June 8, 1984, without being asked by the defendant, Woods brought the defendant's brother to see him at the jail. Woods claimed not to know that on the preceding day the defendant had asked to see his brother. (XXVIII, 776). Although he denied that there had been any deal to bring the defendant's brother to the jail, Woods acknowledged that when he went to the jail he said to the defendant, "Okay, you wanted to talk to your brother, first, right. Is that what you wanted, is that what your deal was?" (XXVIII, 777). He was also present when the Boca police officer said, "It's time for him to hold up his end of the bargain that he struck last night." (XXVIII, 778). The defendant refused to discuss a Boca Raton homicide with the officers on June 8, 1984. (XXVIII, 779). He was asked if he wanted to talk, but indicated that he did not because he had to get back over there and, "I'm not going to talk anymore." (XXVIII, 781). Questioning ceased.

On June 18, 1984, Woods was back at the jail, having received a telephone call from the defendant to come talk about matters that did not involve homicide cases. (XXVIII, 782). The defendant confessed to multiple non-homicide crimes. (XXVIII, 783). The crimes that the defendant confessed to were ones for which the police did not have evidence tying the defendant. (XXVIII, 784). Woods also saw the defendant on June 21, 1984, although he was not called by the defendant and asked to come up. (XXVIII, 784-785). Woods discussed the "second person" in the defendant with

regard to an explanation for why the defendant did certain things. (XXIX, 803). Although the defendant had confessed to a burglary and aggravated battery on June 8, Woods had not charged him. (XXIX, 806). The defendant was not charged with any crimes until after June 30, 1984, which was after he had confessed in the instant case. Woods was reminded that on June 3, 1984, he told the defendant that he and the Boca Raton Police officer were there to help him. (XXIX, 811-812). Woods told the defendant that he had proved to him that he had tried to help. (XXIX, 812). The defendant recalled that Woods had gotten him a doctor, referring to 1982. Woods did not correct him. (XXIX, 812). Indeed, Woods told him, "Don't you think that is why I am here now." (XXIX, 812). Woods recalled that on June 21, when this case was originally brought up to the defendant, he denied any knowledge of the case. (XXIX, 815).

On cross examination, Woods denied that he had agreed to get the defendant help in 1983 in exchange for information in this case. (XXIX, 843). He claimed he never agreed to bring the defendant's brother to the jail in exchange for a confession (XXIX, 849), and claimed to have never offered help in exchange for information in the homicide case on June 3. (XXIX, 850). The defendant was given breaks in the questioning (XXIX, 857) and never said he wouldn't talk or wanted a lawyer. (XXIX, 855).

Kevin McCoy, a police officer with Boca Raton Police Department, also testified on the motion to suppress. (XXIX, 870). He admitted he had discussions with the defendant about getting him help on June 1, 1984, but indicated that he was always talking about getting the defendant help while he was incarcerated. (XXIX, 875). The defendant indicated that he would rather have help in a hospital than in prison. (XXIX, 876). There was discussion with the defendant about intervening with the State Attorney to get him help in a hospital rather than a prison. (XXIX, 877). McCoy admitted that although the defendant had confessed to a burglary to him on June 3, he told the defendant he hadn't decided whether to charge the defendant with that crime, and indicated that the decision whether or not to charge him with the crime was his own. (XXIX, 881-884). He made clear to the defendant that he hadn't been charged with anything else, despite the fact that he had confessed to McCoy. (XXIX, 888). McCoy was trying to tell the defendant that he cared for him, because if he did not, he would have charged him with a number of crimes. (XXIX, 890). There was extensive discussion with the defendant about going to the hospital as an alternative to prison, although McCoy claimed that the defendant raised those issues. (XXXI, 1042-1044). He made clear that he would have input into the decision with the State Attorney. (XXXI, 1044-1045). McCoy advised the defendant that he had had input into the hold that existed for Michigan charges (XXXI, 1045), as well as charges

brought by the Army against him. (XXXI,1043). He even advised the defendant that although he had not yet been charged, the Army still could bring charges. (XXXI, 1047). He indicated that he controlled everything in the defendant's case, including whether he was charged, and whether he was charged as a habitual offender. (XXXI, 1048). He was present when Detective Woods told the defendant that if McCoy didn't want to file charges and do the paperwork, he didn't have to. (XXXI, 1050). McCoy told the defendant that if he wanted to get psychiatric help through prison, he would have to talk about his crimes. He advised the defendant that if he would give him a statement on the homicide, he would be able to get going more quickly. (XXXI, 1053-1054).

McCoy admitted that he advised the defendant that he could end to the fight at that point, or could fight all the way to the jury. (XXXI, 1058-1059). He told the defendant that he would be the winner if he confessed (XXXI, 1060), and also advised the defendant that some people even get released after they have killed. (XXXI, 1061). He disagreed when the defendant suggested that those who got released even though they had killed were those who had gone before a jury. (XXXI, 1061-1062). The defendant made it clear at all times that he wanted to go to a hospital. (XXXI, 1062). McCoy indicated that he would help the defendant get help, from the court system. (XXXI, 1064). He told the defendant that if he wanted to get help from McCoy, he

had to give McCoy something. (XXXI, 1067). On June 7, 1984, the defendant had admitted to an attempted murder and sexual battery case that Boca Raton Police Department had no evidence on prior to the confessions. (XXXI, 1077-1078). However, the defendant was not charged either then or the next day. (XXXI, 1078). When the defendant told McCoy that his brother had advised him to confess and that if he did he would get a manslaughter charge, McCoy advised the defendant to listen to his brother, take his advice, as that is his wish. (XXXI, 1081).

On cross examination, McCoy denied that he had promised mental health in exchange for a confession and claimed he never told the defendant's brother to promise him anything in exchange for a confession. (XXXI, 1089). He never told the defendant that he could control what charges the State would file (XXXI, 1092), and felt that the defendant was a smart and sophisticated suspect. (XXXI, 1094). He claimed the defendant never said he didn't want to talk, never asked for an attorney, and never indicated that he didn't understand his rights. (XXXI, 1095).

The last witness at the motion to suppress hearing was the defendant. He was 23 at the time of the interrogation in this case. (XXXI, 1107). He had been previously arrested in Delray Beach in 1982, where he met Detective Woods. (XXXI, 1108-1109). Woods arrested the defendant for burglary, and the defendant admitted to other crimes. (XXXI, 1110). At that time, the defendant and the detective discussed

the defendant's psychiatric problems. (XXXI, 1110). The defendant told Woods he was born with the wrong body and told him his psychiatric problems were the reason for his crimes of stealing female clothes. (XXXI, 1111). He and Woods discussed getting psychiatric help, and Woods told him that if he cooperated that Woods would get him a doctor. (XXXI, 1112). Eventually, the defendant was charged with only one case. (XXXI, 1113). A psychologist was ordered to examine the defendant, and the defendant assumed that the psychologist examination was arranged by Detective Woods. (XXXI, 1115-1116). The defendant was arrested in Michigan thereafter, and the case in Florida was dropped. (XXXI, 1117).

In 1984, the defendant again met Woods at the Boca Raton Police Department. (1118). He told Woods that he had been arrested for attempted burglary and other charges and that he had been advised that he was a suspect in a homicide. (XXXI, 1119). When Woods was brought in to see him, the defendant was advised by Boca officer McCoy that an "old friend" was there to see him. (XXXI, 1120). Woods immediately asked him how he had been and asked if he still had his psychiatric problems. (XXXI, 1120). At that time, the defendant considered Woods a friend. (XXXI, 1121). Woods never told the defendant he was investigating any cases concerning the defendant in Delray Beach. (XXXI, 1121).

The defendant had been booked on unrelated charges and appointed a lawyer at first appearances prior to June 1, 1984. (XXXI, 1121). On that dame date, he spoke to Woods on the telephone and asked Woods to talk to his brother and let him know what was going on. He also asked Woods to bring his brother to see him. (XXXI, 1123). The defendant's brother was his only relative, and he was close to him. (XXXI, 1124). On June 1, 1984, Woods did not bring his brother, but instead brought McCoy with him. (XXXI, 1124). They discussed the defendant's mental health problems and cases being worked on by Boca Raton Police Department. (XXXI, 1124). At that time, the defendant told the officers that he wanted psychiatric help and the officers agreed that he needed it. (XXXI, 1125). There was no discussion about any cases in Delray Beach and only general discussions regarding the homicide in Boca Raton. (XXXI, 1125). Both police officers indicated that they would assist him in getting help, and the defendant understood that by confessing he would receive psychiatric help. (XXXI, 1126). He was advised that Woods had gotten him a doctor before but that the defendant had left the state before getting help. (XXXI, 1126).

On June 3, 1984, without the defendant requesting them to do so, Officers McCoy and Woods brought his brother to see him. (XXXI, 1127). Afterwards, there was discussion with Woods and McCoy wherein the defendant was advised that

McCoy controlled everything in his case and that he would not be charged with anything. (XXXI, 1129). He was advised that he had to deal with an Assistant State Attorney, and Detective Woods said that he could talk to the Assistant State Attorney. (XXXI, 1129). The defendant believed that the officers were working as go-betweens between he and the State Attorney's office to resolve the outstanding cases. (XXXI, 1129). When the defendant asked to speak to the State Attorney by himself, he was advised that in order to have contact with the Assistant State Attorney, there would have to be a confession. (XXXI, 1130). It was the defendant's understanding that he would receive help in a hospital, and had his choices were to confess and get help or go to a jury. (XXXI, 1132). Neither officer specifically promised that the defendant would go to a hospital, but Woods had not given him guarantees in 1982, although he later sent a doctor and had the charges dropped against the defendant. (XXXI, 1133).

On June 6, 1984, the defendant was again visited by Sgt. McCoy, who this time was accompanied by another officer named Livingston. Livingston threatened the defendant with the electric chair, and advised the defendant that McCoy was the only true friend that he had. (XXXI, 1135). The next day, McCoy brought the defendant's brother to see him. Afterwards, he was questioned about the Boca Raton homicides. He told Sgt. McCoy that he had nothing more to say, and the interview then stopped.

(XXXI, 1137). On June 18, he called Det. Woods. The defendant explained that he felt bad that he had given a lot of information to Sgt. McCoy to resolve cases in Boca Raton, but had not been willing to assist Woods in Delray. He decided to confess to cases that had not even been reported as crimes. (XXXI, 1138). Until that time, he had never been questioned about the instant homicide, and had never indicated he wanted to confess to any homicide in Delray Beach. Through June 21, 1984, the defendant had not been arrested for any of the crimes that he had confessed to at that time.

On June 21, 1984, when the defendant met with Det. Lincoln, he was asked if he had ever been to the house where the Slattery crime took place before. (XXXI, 1143). The defendant told Lincoln he would rather not talk about, and when he said that he meant that he did not want to talk about the homicide. (XXXI, 1143). Lincoln continued to talk him and later, when pressing the defendant about his bicycle, the defendant again advised that he would rather not talk about it. (XXXI, 1143). The defendant meant that he did not want to talk about the Slattery homicide. (XXXI, 1143). When the defendant had told McCoy that he didn't want to talk, McCoy had ceased all interrogation. The defendant assumed the same thing would happen with Lincoln. (XXXI, 1143).

Despite what the defendant had told him, Lincoln continued to talk to him about the instant homicide. That was the first time anyone had talked to him about the Slattery homicide. (XXXI, 1143). The defendant kept talking even though he said he didn't want to, because he had already confessed to a homicide, and Lincoln told him he couldn't be punished twice for the same thing. (XXXI, 1144). When Lincoln told him that, the defendant assumed that since he couldn't be punished any further, he might just as well confess. (XXXI, 1144). That night, the defendant was arrested on the Boca Raton homicide. (XXXI, 1144). The next day, the defendant was arrested on the instant homicide. (1144). The following day, the defendant was taken to first appearances, where a lawyer was appointed for him.

On cross examination, the defendant claimed that when a doctor was appointed in 1982, he assumed that Det. Woods had spoken to the State Attorney, because Woods said that he would help him. (XXXI, 1148). The defendant never saw that doctor, because after he made bond, he left and fled the area. (1149). The defendant estimated that he had been read his rights 15 or 20 times. (XXXI, 1152). He agreed that he had never told Woods or McCoy that he wanted a lawyer and never asked for an attorney, at all. (XXXI, 1153). In fact, he had told Woods and McCoy that if he had a lawyer, the lawyer probably wouldn't let him talk to them. (XXXI, 1154).

The defendant spoke to Woods and McCoy by choice. (XXXI, 1154). Woods never advised him in 1984 that he would get him a doctor in exchange for a statement, although he had said that in 1982. (XXXI, 1155). The police had told him that he needed help, but did not specifically promise a mental hospital. (XXXI, 1157). The promise to go to a hospital was never specifically made, but was rather implied. (XXXI, 1161). He conceded that when he spoke with Lincoln, and told him he didn't want to talk about it, he didn't specifically say that he didn't want to talk about the homicide. (XXXI, 1165). Lincoln had advised him that he was there to talk about the Slattery case, and the defendant advised Lincoln that he didn't wan to talk about it. (XXXI, 1167). On redirect, the defendant clarified that Lincoln never asked him specifically about the homicide, he just began to bring up details about the case. (XXXI, 1169). Lincoln never asked him if he wanted to talk about Slattery, nor did Lincoln tell him what language he had to use to invoke his right to remain silent. (XXXI, 1169). He had been advised that confessing made his chances of ending up in a hospital better and his chances for a deal better, because the police officers would not intervene with the State Attorney without something from him. (XXXI, 1171).

The court denied the motion to suppress. (XXXII, 1329-1332).

At trial, during the testimony of Richard Lincoln, the jury received the video tape excerpt of the questioning of the defendant. The tapes revealed that the detectives

questioned the defendant with regard to the Slattery incident for some time, without the defendant giving any incriminating answers until the defendant was asked whether he was looking at the particular house or just going through the neighborhood. (LIII, 5093). At that point, the defendant indicated, "I'd rather not talk about it." (LIII, 5093). The defendant made no other incriminating statements until asked if he knew the owners of the house and whether he had ever been in the house before. (LIII, 5104). The defendant indicated that he did not know the owners and he had never been in the house before. (LIII, 5104-5105). When asked if he had a bicycle, and where he put it, the defendant advised the officers, "I don't want to talk about it." (LIII, 5108). The defendant later advised Lincoln that his bicycle was at the beach chained to a tree, one house over from the house where the homicide took place. (LIII, 5115). He indicated that he had driven by the house, and then went to a bar until about 10:30 at night. (LIII, 5115-5117). He later explained that he cut a screen and went into the bedroom, after parking his bike near some bushes and taking off his sneakers. (LIII, 5119-5122). He looked in through the sliding glass doors and saw two children and the babysitter on the floor. (LIII, 5122-5123). He then left the house through the window, closing it so it didn't appear as anyone had come in. (LIII, 5123). He went to the bar for a couple of hours and went back into the house through the window, with his hands covered with socks. (LIII, 5124). He took a pair of ladies

gloves from the closet (LIII, 5126), and took a hammer out of the tool box. (LIII, 5127). He went out, noticed the children sleeping, and closed their door. (LIII, 5127-5128). After looking through the bedroom, the defendant described the house and indicated that he saw Karen Slattery on the phone until she walked back through the kitchen. (LIII, 5130-5137). He saw her reach for the phone, and told her to hang up. (LIII, 5138-5141).

The defendant admitted that the had stabbed Slattery in the back more than one time, and that she fell to the floor almost immediately. He dragged her into the bedroom (LIII, 5146), closed the door, removed her clothes, and indicated that he raped her. (LIII, 5150). The defendant's clothes had been left outside by the window, and when he came in the house he was wearing only a pair of shorts. (LIII, 5151). The defendant's statement went on to state that after the encounter with the victim, the defendant took a shower and left. (LIII, 5152). He indicated that he threw his clothes in the area where his bike was (LIII, 5155-5156), and went to the beach. (LIII, 5160). The defendant went home, where a number of people saw him, at a time that the clock said 9:00 o'clock because the defendant had switched the time. (LIII, 5161-5163). He estimated the time in which he was in the Helm house to be approximately 12 minutes. (LIII, 5167). Lincoln later testified that articles of clothing were found where the defendant had told him they would be found. (LIII, 5174). He further testified that

the defendant had made a sketch to help him find the clothing, which did in fact lead the police to the clothing. (LIII, 5180). Lincoln further testified that nothing had been published in the press about numerous details which were brought out in the defendant's statement. (LIII, 5181-5184).

Lt. Mark Woods testified for the defense. (LIV, 5213). He testified about his 1982 contact with the defendant. (LIV, 5214). He testified that he had arrested the defendant for prior burglaries and was aware of his psychological problems. (LIV, 5214). He recommended that the defendant be treated as a mentally disturbed sex offender at that time. (LIV, 5215). The cases against the defendant were eventually dropped (LIV, 5216) and in the document filed by the State Attorney dropping those charges there was an indication that the defendant needed mental health treatment. (LIV, 5216). He originally spoke with the defendant in 1984 because he had a rapport with the defendant from 1982. (LIV, 5216-5217). During his conversations with the defendant they talked about his psychological problems and Woods' belief that the defendant had a second person inside him. (LIV, 5217).

On cross examination, Woods testified that he always believed that the defendant knew exactly what he was doing, and that what he was doing was wrong. (LIV, 5220). When speaking to the defendant in 1984, it appeared to Woods that

defendant understood where he was and what was going on. (LIV, 5222). He claimed that the defendant had full knowledge that what he was doing was wrong. (LIV, 5223).

Donna Sue Dunlap testified that she had known the defendant since he was 12 years old. (LIV, 5272-5273). She had lived next door to the defendant when he was young and after his mother passed away she became their babysitter. (LIV, 5273). She knew the family very well, and described the household as having a lot of fighting, police calls, verbal altercations, and profane screaming. (LIV, 5275). She indicated that both parents drank heavily. (LIV, 5275). She observed the mother with a black eye on one occasion and at times during the arguments the defendant and his brother would come to her home to get away from the drinking and fighting. (LIV, 5276-5277). The children were often walking around the street at night, while the parents were passed out drunk in the home. (LIV, 5277-5278).

The defendant's mother died from pserossis of the liver and after that Dunlap would babysit for them. (LIV, 5278-5279). The house was described as being filthy, with liquor bottles all over and no food in the refrigerator. (LIV, 5279). Dunlap was often there when the father would come home after work, drinking and abusing the children physically. (LIV, 5281). She noted that the defendant would flinch when she would try to touch him, as though he was afraid of being struck. (LIV, 5282). Eventually, the defendant's father committed suicide by running his automobile in a

closed garage. (LIV, 5282-5283). It took two days before the body was discovered, because the father was out of the house so often, it was not unusual for him to be gone that long. (LIV, 5282-5283).

On cross examination, Ms. Dunlap indicated that she had not seen the defendant for approximately 12 years prior to the murder. (LIV, 5291). She also indicated that she had sympathy for the defendant and hoped that everyone would understand how he suffered. (LIV, 5291-5292).

Roberta Duncan testified that she knew the defendant because she was raised with him in the VFW National Home in Eastern Rapids, Michigan. (LV, 5294-5295). She went to the home when she was 12 years old. (LV, 5295). The defendant was already there. (LV, 5295). Essentially, the home was an orphanage. (LV, 5296). The house parents were usually fresh out of college and with little or no training. (LV, 5297). It was not unusual for siblings to be separated within the home and with different house parents. (LV, 5296-5297). Ms. Duncan testified that she and others were beaten by their house mother. (LV, 5298). She knew that the defendant had been abused by his house mother. (LV, 5298-9). Ms. Duncan explained that the majority of the kids who were at the home are now dead. (LV, 5300). There were sexual relations between house parents and the children and sexual violence on a regular basis. (LV, 5300-5301). Children in the home were afraid to report these

things, because they were afraid of retribution from the house parents. (LV, 5301). She remembered the defendant as being quiet, insecure, and looking for someone to love him. (LV, 5303).

Ms. Duncan last saw the defendant in 1976 or '77, when he was thrown out of the home. (LV, 5304). Although there were promises that the children would receive college educations through the orphanage, it was usual for the children to be kicked out of the home in approximately eleventh grade, so that college would not have to be paid for. (LV, 5304).

On cross examination, it was established that the defendant was not only a victim, but victimized others at the home. (LV, 5309).

Dr. Frederick Berlin, the founder of the Johns Hopkins Sexual Disorder Clinic, testified as an expert in forensic psychiatry. (LV, 5322-5335). He explained the criteria to evaluate the issue of insanity in Florida. (LV, 5340-5341). He testified that the defendant had a gender identity disorder, and believed he was a female. (LV, 5347-5348). He further had a paraphiliac disorder, and was very disturbed in the sexual arena. (LV, 5350). Neither of those disorders would cause the defendant to be insane within the meaning of the laws of the State of Florida. (LV, 5350-5351).

Dr. Berlin also determined that the defendant suffered from schizophrenia, was not in touch with reality and was delusional. (LV, 5352). He believed that by having

intercourse with a woman he could access fluids from the woman which would make him more female. (LV, 5352). He further believed that if the woman was scared or unconscious, the process would be helped even further. (LV, 5352-5353). Dr. Berlin further found that in addition to schizophrenia and delusions, the defendant was impaired in his functions on important aspects of life, as well. (LV, 5356). He explained that the defendant's delusions would not prevent him from speaking clearly and rationally on certain subjects. (LV, 5359-5360). He testified that his professional opinion was that when the defendant assaulted Karen Slattery in 1984, his belief was that he was capturing her soul and that those beliefs were a consequence of his illness. (LV, 5365). It was Dr. Berlin's testimony that the defendant was insane at the time of the offense in this case within a reasonable degree of medical certainty. (LV, 5389).

Clinical Psychologist Fay Ellen Sultan testified as an expert in forensic psychology. (LV, 5482-5493). She evaluated the defendant in 1994 and 1995, at the request of his attorneys and did a general psychological evaluation. (LV, 5494). After examining the defendant, she brought up to the attorneys her opinion that the defendant had very severe mental illnesses and that he might have been insane at the time of the offense. (LV, 5495). She determined that the defendant was very, very mentally ill, probably among the most mentally ill of all the people she had seen during her career. (LV, 5513). Ranking his diagnosis in terms of severity, she determined

that the defendant's principal diagnosis that he had was a psychotic disorder, which caused him not to be in touch with reality. (LV, 5513). He met most of the criteria for a disorder called delusional disorder and also met the criteria for a diagnosis for schizophrenia. (LV, 5513). He had a very severe gender identity disorder, a paraphilia, and dysthymia. (LV, 5513-5514). Although by themselves the gender identity disorder, paraphilia, and dysthymia, did not rise to the level of causing the defendant to be insane, she felt that the gender disorder was so severe that it caused him to psychotic. (LV, 5514-5515). Dr. Sultan determined that the defendant was suffering from those illnesses in March, 1984 (LV, 5516), and testified to a continuous series of events, beginning from his birth, that was so traumatic and so horribly perverted that he was guaranteed to wind up with psychological problems. (LV, 5517-5518). She testified that she did not consult with Dr. Berlin about her diagnosis of the defendant, in order to be certain that she and Dr. Berlin arrived at independent conclusions. (LV, 5561). Dr. Sultan's opinion was that the defendant was insane at the time of the offense. She reiterated that opinion during cross examination. (LVI, 5646).

Thomas R. Waddell, a licensed psychologist, testified for the State in rebuttal. (LVII, 5694). He testified that he believed that the defendant was not schizophrenic (LVII, 5707), and that the defendant had an anti-social personality disorder. (LVII,

5715). It was his opinion that the defendant knew right from wrong when he was involved with Karen Slattery. (LVII, 5716-5718). He further testified that in his opinion the defendant was malingering and that even if mentally ill, was sane at the time of the offense. (LVII, 5721-5723).

On cross examination, Dr. Waddell admitted that he had no specialty in the area of sexual disorders (LVII, 5727), and that 80% of his practice was doing psychological evaluations. (LVII, 5728). He testified that he was aware of the defendant's traumatic experiences in his early life (LVII, 5735-5736), including deaths in his family, his time in the orphanage, and a basically horrible childhood, including sexual abuse and a household filled with conflict and violence. (LVII, 5736). He admitted that he never assigned the defendant the diagnosis of anti-social personality disorder in his written evaluation. (LVII, 5757). He further indicated that his opinion was that even if the defendant had a psychotic belief when he committed the acts in this case, he would not necessarily be insane. (LVII, 5781-5782).

Richard Lincoln again testified for the State, in rebuttal. (LVII, 5797). He indicated that he had come into contact with hundreds of people during his law enforcement career and during his contacts with the defendant he appeared to respond appropriately to topics that were being discussed, there did not seem to be any lapse of logic, and there were logical connections in the things that he was talking about.

(LVII, 5797-5799). It was Lincoln's testimony that in his opinion the defendant knew what he was doing, knew the consequences of his actions, and knew it was wrong to kill Karen Slattery. (LVII, 5812).

Dr. McKinley Cheshire also testified on rebuttal as an expert psychiatrist. (LVIII, 5819-5827). Cheshire testified that the defendant was sane at the time of the offense. (LVIII, 5833-5834). It was his diagnosis that the defendant had a sexual disorder and an anti-social personality. (LVIII, 5834). He did not believe the defendant's claim to be delusional at the time of the offense. (LVIII, 5840). He opined that the defendant had no components of schizophrenia and did not suffer from a delusional disorder. (LVIII, 5849-5850).

The jury returned verdicts of guilty of first degree murder, guilty of attempted sexual battery with weapon, and guilty of burglary of a dwelling while armed. (LX, 6113-6114).

PENALTY PHASE

Kevin McCoy was the State's first penalty phase witness. Through McCoy, the defendant's judgment and sentence for the crimes of attempted first degree murder and burglary, which were previous to the instant case convictions, were introduced. (LXI, 6350-6351). The defendant confessed to those crimes. (LXI, 6357). McCoy further testified to a burglary with an assault or battery that occurred previous to the

conviction in the instant case. The defendant confessed to that crime. (LXI, 6358). McCoy testified that the defendant has previously been convicted of burglary while armed with a dangerous weapon, sexual battery with a weapon, and first degree murder. (LXI, 6385-6386). The defendant confessed to those crimes. (LXII, 6393).

On cross examination, McCoy testified that in the prior conviction cases there was no real evidence of the identity of the attacker (LXII, 6428-6431) developed, in initial investigation. He recalled talking to the defendant about an incident where he was found naked in a college classroom with a knife to his stomach surrounded by blood spots on the floor. (LXII, 6432-6438). He recalled telling the defendant that he was going to help him and not simply throw him away and the courts would see to it that he got help. (LXII, 6442-6443). On the day that the defendant spoke with the officer about the non-homicide prior cases, the defendant called the officer and asked him to come to the jail. (LXII, 6444-6445).

The State's second witness in the penalty phase was the medical examiner, Frederick Hobin. Hobin testified that death in this case took a period of time. (LXII, 6462). He reviewed the nature of the wounds (LXII, 6464-6466), and indicated that the victim would have felt pain. (LXII, 6466-6467). From the loss of blood, the victim would have gone into shock and if conscious would have entered a fear-like state with high anxiety. (LXII, 6472). On cross examination Hobin indicated that there

were no defensive wounds present, and no evidence of a struggle. (LXII, 6476). Because of the lack of defensive wounds, Hobin testified that the victim was most likely unconscious at the time the neck wounds were received. (LXII, 6480). In his opinion, all of the events leading to the death of Karen Slattery would have occurred in less than a minute. (LXII, 6480). The State then rested. (LXII, 6483-6485).

Dr. Barry M. Crown testified for the defense in the penalty proceedings. (LXII, 6486). He testified as an expert neuropsychologist. (LXII, 6486-6490). He determined that the defendant had an age equivalent of 11 years, 5 months, and thus he was understanding things at about the middle level of someone in the sixth grade. (LXII, 6494). It was his opinion that the defendant's ability to process information and to reason or make judgments was significantly impaired and that he was under significant stress at the time of the offenses, as a result of organic brain damage that he determined to exist. (LXII, 6501). That organic brain damage would have impacted on his ability to conform his conduct to the requirements of the law. (LXII, 6502). He determined that the organic brain damage stemmed was exacerbated by an injury that took place in 1982, when a car fell on his head and he suffered from a frontal orbital syndrome. (LXII, 6503). He additionally believed that there was parinatal injury to the brain. (LXII, 6504). He also found signs of fetal alcohol syndrome. (LXII, 6505). On cross examination Dr. Crown indicated that he had

testified two to three times a year over the past 20 to 25 years, predominantly for the defense in criminal cases. (LXII, 6512-6513). He had never testified for the State. (LXII, 6514). He testified that the majority of the people with brain injuries do no commit crimes. (LXII, 6516).

Dr. Fred Berlin was also called as a witness for the penalty phase. (LXIII, 6546). He reiterated his trial testimony about the defendant being mentally ill at the time he killed Karen Slattery. (LXIII, 6547-6548). He testified that he further interviewed the defendant with regard to the other homicide case. (LXIII, 6548-6549). He found that the fact that in both this case and in the other murder case there were young children in the home who were not harmed was an indication that the defendant did not simply go on a random killing rampage, but rather was killing for the reasons he had described as capturing women's souls. (LXIII, 6546-6553). His opinion was that as to whether the crime was especially heinous, atrocious or cruel, the defendant was not one of sound mind misbehaving and being evil and bad, but rather the act of an irrational mentally ill person. (LXIII, 6558-6559). He was certain that the defendant committed the crime while he was under the influence of extreme mental or emotional disturbance (LXIII, 6562-6563), and that the defendant was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of law. (LXIII,

6563-6564). On cross examination, he pointed out that the defendant killed his victims very quickly and got it over with. (LXIII, 6571).

Hillary Sheehan conducted a social investigation with regard to the defendant. (LXIII, 6587-6589). She testified that the defendant's parents were alcoholic and the defendant's father would drink all day at work while his mother spent the day in a bar drinking. (LXIII, 6592-6593). The father would go on drunken rampages, strike the mother, rape her, and cause her to beg and cry for help while the defendant was in the home. (LXIII, 6592-6594). On some occasions, it was only a curtain separating the room where the parents were involved in this violence from that where the defendant slept. (LXIII, 6594). A brother eight years older than the defendant was born from an affair had by the mother and was required to live, sleep, and eat in the basement. (LXIII, 6597-6598). The defendant was further a victim of physical violence (LXIII, 6598) and was afraid of his father. (LXIII, 6599). The defendant was sexually exploited by other children beginning when he was approximately nine years old, and there was sexual violence between various children in the neighborhood. (LXIII, 6599-6600).

When the defendant's mother died, the defendant was devastated and had a very difficult time. (LXIII, 6601). He and his brother were left on their own when the father began drinking even more heavily. (LXIII, 6601). He stopped feeding them and

didn't care for them, hiring neighbors to be babysitters. (LXIII, 6601). The home was filthy and looked like a pig stye and was so bad off that it could not be cleaned by a neighbor attempting to help. (LXIII, 6601). On the day of the funeral, instead of accompanying his sons, the defendant's father went to a bar and did not appear. (LXIII, 6602). The defendant's father committed suicide in the garage of his home, and had been missing for two days before he was discovered. (LXIII, 6603). The children thought he was just missing from the household, probably drunk. (LXIII, 6603). About a month after the father's death, the defendant ended up at an orphanage. (LXIII, 6604). Within the orphanage there were ongoing episodes of sexual violence and physical violence by staff on the children and by children upon each other, as well as sexual relations between counselors and the children, both violent and non-violent. (LXIII, 6606). The defendant was treated for physical violence at the hands of the counselors and other staff members. (LXIII, 6607).

On cross examination it was suggested that the witness was hired for the purpose of discovery of mitigation evidence, but she indicated that she reported back all evidence that she found, both good and bad. (LXIII, 6613-6614).

Dr. Fay Sultan also testified in the penalty phase. She testified that she was aware of the other offenses in which the defendant was involved and the details of his confessions therein. (LXIII, 6628-6630). She indicated that the defendant's

upbringing would have affected him in his adult life. (LXIII, 6633-6634). She testified that based upon the defendant's background she could not imagine any possibility that he could have emerged even a relatively normal person. (LXIII, 6648). Her testimony was that as to the heinous, atrocious and cruel aggravator, the defendant was not motivated by a need to hurt another person, to torture another person, or to make another person suffer. (LXIII, 6652). He rendered his victim unconscious as quickly as possible. (LXIII, 6653). She further testified that the defendant did not act in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, as a result of his mental illness. (LXIII, 6653-6654). It was Dr. Sultan's opinion that the defendant was under the influence of extreme mental or emotional disturbance at the time of the crimes and that his ability to conform his conduct to the requirements of law was substantially impaired. (LXIII, 6655-6656).

Dr. Thomas R. Waddell was called in rebuttal by the State. (LXIV, 6729). He opined that the defendant was not under the influence of extreme mental or emotional disturbance at the time of the crimes. (LXIV, 6733). He further stated that the defendant's capacity to appreciate the criminality of his conduct was not substantially impaired and that the defendant's capacity to conform his conduct to the requirements of the law was not substantially impaired. (LXIV, 6733). He again testified that the defendant had some mental illness that was not of a psychotic nature or did not rise

to the level of psychosis. (LXIV, 6734). He found that the defendant was fully capable of committing the crime in a cold, calculated and premeditated manner (LXIV, 6735) and that the defendant's justification for his actions was not genuine. (LXIV, 6735-6736).

McKinley Cheshire next testified in rebuttal. (LXIV, 6788). He first testified that the defendant was not under the influence of extreme mental or emotional disturbance at the time of the crimes and that the defendant had the capacity to appreciate the criminality of his conduct and the ability to conform his conduct to the requirements of the law (LXIV, 6792-6793). He opined that the murder was premeditated. (LXIV, 6797) and that it was cold, calculated, and premeditated. (LXIV, 6797). His testimony was that the murder in this case was particularly heinous, atrocious or cruel. (LXIV, 6799-6800).

This appeal follows.

SUMMARY OF ARGUMENT

The defendant's statement were produced as a result of a calculated series of promises, threats, and attempts to influence the defendant. The defendant was promised that he would receive mental health treatment if he cooperated with the police and it was further promised that the police would withhold the filing of certain charges were he to confess to the murder. Additionally, promises were made to produce the defendant's brother for a visit at the jail in exchange for confessions. The police failed to stop questioning the defendant when he unequivocally stated that he did not wish to talk anymore. There was nothing equivocal about defendant's statement which he made twice, once each time he was pressed on a detail regarding the instant case. The defendant had previously effectively invoked his right to silence with police by utilization of the same language.

The death penalty is disproportionate in this case which is far from the most aggravated and least mitigated death penalty cases. The lower tribunal reasonably found mental health mitigators which go directly to the issue of the defendant's prior violent felonies and the aggravator of committing the instant murder while committing a violent felony. This case did not present evidence of intentional infliction of pain and torture so as to support a finding of HAC, and the crime was not carried out in a

manner which supports a finding of CCP when compared to other death penalty cases.

The conviction and sentence in this case violates the recent United States Supreme Court case of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), in that the jury made no finding of aggravating circumstances, made no findings that the aggravating circumstances are of sufficient weight to call for the death penalty, and did not recommend death by unanimous vote.

The felony murder aggravating circumstance (Florida Statutes 921.141(5)(d)) is unconstitutional on its face and as applied because it fails to narrow the class of persons eligible for the death penalty and justify the imposition of a more severe sentence compared to others found guilty of murder. All persons convicted of felony murder must start out with this aggravator even if they were not the actual killer or there was no intent to kill.

ARGUMENT

POINT I

THE LOWER TRIBUNAL ERRED IN ALLOWING THE STATEMENTS OF THE DEFENDANT INTO EVIDENCE.

It is a bedrock principle of the law that a confession can never be received in evidence where the prisoner has been influenced by any threat or promise. Bram v. United States, 168 U.S. 532, 543 (1897). Here, the entire questioning procedure utilized by the State reveals a calculated attempt to influence, threaten, and make promises to the defendant in order to coerce a statement from him. The testimony of Richard Lincoln and Kevin McCoy, as well as the tape excerpts of their questioning of the defendant makes clear that the defendant was promised mental health help in exchange for his confession. McCoy promised the defendant that he would definitely get help through the court system. (XXI, 1064). He had extensive discussion with the defendant about going to the hospital as an alternative to prison. (XXI, 1042-1044). There was discussion with the defendant about intervening with the State Attorney to get him help in a hospital, rather than a prison. (XIX, 877). On June 8, 1984, without being asked by the defendant, Det. Woods brought the defendant's brother to see him at jail. (XVIII, 776). Woods denied that there had been any deal to bring the defendant's brother to jail, although he acknowledged that when he went to the jail he

said, "Okay, you wanted to talk to your brother, first, right. Is that what you wanted? Is that what your deal was?" (XVIII, 777). He was also present when McCoy said, "It's time for him to hold up his end of the bargain that he struck last night." Woods advised the defendant on June 3, 1984, that he and McCoy were there to help him. (XVIII, 811-812). He told the defendant that he had proved to him that he had tried to help before. (XVIII, 812). When the defendant expressed that he believed Woods had gotten him a doctor in 1982, he told the defendant, "Don't you think that is why I'm here now?" (XVIII, 812).

Clearly, the police were attempting to influence the defendant with promises. There were promises of help, promises to bring his brother to see him in jail, and promises to intervene with the State Attorney on the defendant's behalf. The totality of the circumstances is replete with promises direct and implied of benefit to the defendant if he would give confessions. Accordingly, the confessions obtained as a result of those promises should be suppressed. Hanthorne v. State, 622 So.2d 1371 (Fla. 4th DCA 1993). In Hanthorne, the defendant received assurances that in return for cooperation concerning other crimes, he would not be charged with those crimes. For that reason, the statement that he subsequently gave to the crime with which he was charged was suppressed. Indeed, the policy favoring free and voluntary confessions was expressed in MDP v. State, 311 So.2d 399 (Fla. 4th DCA 1975).

There it was held that a confessing defendant should be free from the influence of either hope or fear, and the confession should be excluded if the attendant circumstances were calculated to delude the defendant or exert undue influence over him. In this case, that was exactly what took place.

In Brewer v. State, 386 So.2d 232 (Fla. 1980), this court held that the defendant's confession was involuntary where the officers raised the specter of the electric chair, suggested they had the power to effect leniency, and suggested to the appellant that he would not be given a fair trial. 386 So.2d 235. Here, the defendant was told the same thing. Officer Livingston threatened the defendant that he would get the electric chair and that McCoy was his only friend. (XXXI, 1135). McCoy made clear that he controlled everything about the case, including having input with the State Attorney as to charges and sentencing, and reminded the defendant that he had not charged him with crimes, despite the fact that he had confessed to them. Additionally, the defendant was advised that if he confessed, he would have the ability to check his options, rather than being bound by the decision of a jury. (XVIII, 772). Certainly, in this case, the officers raised the specter of the electric chair, suggested they had the power to effect leniency, and suggested to the appellant that he would not be given a fair trial.

The defendant clearly and unequivocally exercised his right to remain silent concerning the instant case. The defendant's language to Richard Lincoln was, "I'd rather not talk about it." (LIII, 5093). He later said, "I don't want to talk about it." (LIII, 5108). It is conceded that if the statement given by the defendant was ambiguous or equivocal, the police had no duty to clarify his intent and were privileged to proceed with the interrogation. However, the defendant's statement was unequivocal. The statement, "I don't want to talk to you anymore," was found to be unequivocal in State v. Belcher, 520 So.2d 303 (Fla. 3d DCA 1988). In other jurisdictions, the statement, "I ain't got nothing to say," People v. Cary, 183 Cal. App. 3d (2d DCA 1986), was found to be unequivocal and a suspect saying he had, "nothing to talk about," and that he knew nothing about the crimes was found to be unequivocal in United States v. Poole, 794 F.2d 462 (9th Cir. 1986). In Almeida v. State, 687 So.2d 37 (Fla. 4th DCA 1997), the court defined "equivocal" in the context of a request for counsel as, "an ambiguous statement, either in the form of an assertion or a question, communicating a possible desire to exercise the right."

The statement here has no equivocation to it. Unlike the statement in Davis v. United States, 512 U.S. 452 (1994), the defendant did not suggest that, "maybe I should [talk to a lawyer]." There was no maybe about the defendant's statement that he did not want to talk about the Slattery matters about which he was being

questioned. Indeed, the clarity of that statement is underscored by the fact that when the defendant was being questioned by Det. McCoy and told McCoy that he did not want to talk, McCoy had ceased all interrogation. (XXXI, 1143). The defendant had reason to believe that Lincoln would do the same. Additionally, the defendant had previously, on June 18, 1984, told Det. Woods that there was nothing else to talk about in Delray Beach. (XVIII, 667). He clearly indicated that he was not willing to talk about this case. Lincoln never asked the defendant if he wanted to talk about Slattery, nor did Lincoln ever tell the defendant what language he had to use to invoke his right to remain silent. (XXXI, 1169). Instead, he ignored the defendant's unequivocal invocation of his right to silence.

Under the totality of the circumstances test, the admission of the defendant's statements into evidence deprived him of a fair trial, and violated his rights pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as Sections of Article I of the Florida Constitution.

POINT II

THE DEATH SENTENCE IS DISPROPORTIONATE.

The hallmark of post-Furman death penalty law is that capital punishment is reserved for the most aggravated and least mitigated crimes. In State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), it was held that the death penalty statute provides "concrete

safeguards beyond those of the trial system to protect [the defendant] from death where a less harsh punishment might be sufficient." In that case, this court wrote at page 8:

> Review of a sentence of death by this Court, provided by Fla.Stat. § 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution.

Hence: "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). Accord Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997).

> Our proportionality review requires us to "consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). In reaching this decision, we are also mindful that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v. Dixon, [cit.]. Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, [cit.]. We conclude that this homicide, though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate.

Terry v. State, 668 So. 2d 954, 965 (Fla. 1996).

Proportionality review "involves consideration of the totality of the circumstances of a case and comparison of that case with other death penalty cases." Snipes v. State, 733 So. 2d 1000, 1007 (Fla. 1999).

> Proportionality review "requires a discrete analysis of the facts," Terry v. State, 668 So. 2d 954, 965 (Fla. 1996), entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. We underscored this imperative in Tillman v. State, 591 So. 2d 167 (Fla. 1991):
>
> > We have described the "proportionality review" conducted by this Court as follows:
> >
> > > Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.
> >
> > Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.
> >
> > ... Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.

> Id. at 169 (alterations in original) (citations and footnote omitted). As we recently reaffirmed, proportionality review involves consideration of "the totality of the circumstances in a case" in comparison with other death penalty cases. Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997) (citing Terry, 668 So. 2d at 965).

Urbin v. State, 714 So. 2d 411, 416-417 (Fla. 1998).

It is undisputed that the defendant was previously convicted of another capital offense or of a felony involving the use of violence to some person. However, the capital offense in fact occurred after the offense in the instant case, and all of the prior convictions took place within a relatively short period of time (three months) of the instant offense. In light of the court's finding of the mitigating circumstance that the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance, the weight given to this aggravator must be lessened. The same analysis holds true for the aggravating circumstance. There, the court found, and it is not contested, that the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of a burglary. The mental health mitigating factors found by the court to exist and given "considerable" weight goes directly to that aggravator. The third aggravator relied upon by the State was that the felony was especially heinous, atrocious, or cruel. The facts belie the finding of that aggravator. In Bonifay v. State, 626 So.2d 1310 (Fla. 1993), this court held that to establish that aggravator, the evidence must show beyond a reasonable doubt that the defendant intended to cause

unnecessary and prolonged suffering. Here, the evidence is to the contrary. Testimony of the medical examiner was that the entire incident likely took only a minute. (LXII, 480). The testimony of Dr. Fay Ellen Sultan was that the defendant felt that the victim would continue to live on through him. While it is clear that the nature of the crime was violent, the evidence was insufficient to prove that the crime was consciousless, pitiless, and unnecessarily torturous to the victim. Richardson v. State, 604 So.2d 1107 (Fla. 1992). This clearly was not a torture murder that was represented by a high degree of pain or utter indifference or enjoyment of suffering. Kearse v. State, 662 So.2d 677 (Fla. 1995). It is not necessary to establish that there was no suffering, and it is conceded that the testimony of the medical examiner was that if conscious, the victim would have felt pain. However, there were no defensive wounds, and there was no testimony that could support the conclusion that there was a struggle in this case. The most likely scenario testified to by the medical examiner was that the wounds to the throat occurred after the victim lost consciousness. (LXII, 480).

Any murder could be characterized as heinous, atrocious or cruel. However, to avoid such an overbroad and unconstitutional application of HAC, this court has placed restrictions on the HAC aggravator. In Scott v. State, 494 So.2d 1134 (Fla. 1986), HAC was found not to apply absent proof of victim consciousness, where a victim was run over, pinned under a car, and then died by suffocation. In this case, where death took less than a minute and could have taken as little as 30 seconds,

according to the medical examiner, and where the victim likely lost consciousness before the neck blows were struck (LXII, 480), the facts are much less egregious than in Scott, where the victim died by suffocation while pinned under a car.

Moreover, the lower tribunal participated in improper speculation with regard to its finding of HAC. The trial court speculated that the victim undoubtedly had a belief of her impending doom. The sentencing order went on to speculate that "[H]er fear and heightened level of anxiety occurred over a period of time." This type of speculation to support HAC has been rejected in Knight v. State, 746 So.2d 4231 (Fla. 1988) and in other cases. In Hartley v. State, 686 So.2d 1316 (Fla. 1996), the evidence reflected that the murder was carried out quickly. The speculation that the victim might have realized that the defendants intended more than a robbery when forcing the victim to drive to a field, was found insufficient to support HAC. When compared to the facts in Wyatt v. State, 641 So.2d 1336 (Fla. 1994), which involved 20 minutes of abuse, including undressing and raping a wife in front of her husband and then executing the pair as they begged for their lives while instructing the final victim to listen closely to hear the bullet coming before firing a non-fatal shot to that victim's head, Henyard v. State, 239 (Fla. 1996), where a mother was raped and shot in close proximity of her children who were then killed while they begged for their mother's life, and Preston v. State, 607 So.2d 404 (Fla. 1992), where an abducted convenience store clerk was forced to disrobe and walk at knife point through a dark field before death, it is clear that the kind of prolonged or torturous suffering contemplated by

Bonifay, supra, Kearse, supra, and Robertson v. State, 611, So.2d 1228 (Fla. 1993), does not exist in this case.

The final aggravator found by the court was that the crime for which the defendant was to be sentenced was committed in a cold, calculated and premeditated manner. In order for this aggravator to apply, the defendant must have had an "careful plan," Jackson v. State, 599 So.2d 103 (Fla. 1992), and the action must have been due to a lack of passion. Cannady v. State, 620 So.2d 165 (Fla. 1993). Thus, this aggravator is usually reserved for those murders characterized as "executions or contract murders." McCray v. State, 416 So.2d 804 (Fla. 1982). In Archer v. State, 673 So.2d 17 (Fla. 1996), the defendant who hired Bonifay was prosecuted. Archer provided Bonifay with a plan, including a description of the store security system and the location of the cash box and emergency exit. He advised Bonifay as to what to say and when to shoot. There, this court found that the murder resulted from a careful plan or prearranged design beyond a reasonable doubt. The contract murder proceeded over a period of several days and included an aborted attempt. Certainly, the facts contained therein draw a distinction between what has been found as cold and calculated and the instant case.

This court has rejected CCP in cases far stronger than this case. In Barwick v. State, 660 So.2d 6858 (1995), the defendant saw the victim sunbathing on her patio early in the day, went home and got a knife, and came back several hours later. He then raped and killed the victim. There, as here, the State argued CCP because of the

fact that the defendant left, came back with a weapon, and returned to commit the crime. This court rejected CCP, finding that under the facts of that case, the heightened premeditation required to establish that aggravating circumstance was not proven. In this case there was extensive expert testimony, accepted by the court in its sentencing order, establishing that the defendant committed this crime while under the influence of extreme mental or emotional disturbance and while unable to conform his conduct to the requirement of the law. The defendant having planned out a scheme based on a delusion resulting from mental illness cannot rise to the level of CCP.

In its sentencing order, the lower tribunal found extensive mitigating circumstances, and was reasonably convinced of the proof of numerous mitigating factors. Those mitigators, set out in detail in the sentencing order of the court, make clear that not only is this not a case where the most aggravating circumstances exist, it also cannot be considered to be a case where the least mitigating circumstances exist. Proportionality review requires that circumstances be both the most aggravated and least mitigated. Almeida v. State, 748 So.2d 922 (Fla. 1999); Terry v. State, 668 So.2d 954 (Fla. 1996). This court should undertake its historical task of reserving the death penalty for those crimes which are truly the most aggravated and least mitigated. The death sentence in this case is disproportionate.

POINT III

THE DEATH SENTENCE VIOLATES APPRENDI V. NEW JERSEY, 530 U.S. 466, 120 S.Ct. 2348 (2000).

This issue involves several related errors which combine to render the death sentence unconstitutional under the Florida and United States Constitutions. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984). These errors include: (1) The jury made no finding of aggravating circumstances. (2) The jury made no finding that the aggravating circumstances are of sufficient weight to call for the death penalty. (3) The failure to instruct the jury that this finding must be beyond a reasonable doubt. (4) The jury's recommendation of death was by a vote of ten to two. (5) The indictment contains no notice of aggravating circumstances.

Apprendi requires a rethinking of the role of the jury in Florida. The Court in Apprendi described its prior holding in Jones v. United States, 526 U.S. 227 (1999).

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.
>
> Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an

> indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n.6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

This case shows several violations of Apprendi. Under Apprendi the jury must find the aggravating circumstances. The aggravating circumstances actually define which crimes are potential death penalty cases.

> With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them – facts in addition to those necessary to prove the commission of the crime – whether the crime was accompanied by aggravating circumstances sufficient to require death or whether there were mitigating circumstances which require a lesser penalty.

State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

It is clear that under Florida law the conviction of first degree murder alone does not make a person eligible for the death penalty. It is only upon proving aggravating circumstances that the defendant becomes eligible for the death penalty.

The idea that the jury must find aggravating circumstances is further supported by the analysis in Apprendi. First, the proof of the aggravating circumstances is often "hotly disputed" as was the bias issue in Apprendi. 120 S.Ct. at 2354-5. Secondly, at least one of the aggravators at issue here; "The crime was committed in a cold, calculated, and premeditated manner" directly relates to the defendant's intent during the offense. The Court in Apprendi heavily relied on this aspect.

> The text of the statue requires the fact finder to determine whether the defendant possessed, at the time he committed the act, a "purpose to intimidate" on account of, inter alia, race. By its very terms, this statue mandates an examination of the defendant's state of mind – a concept known well to the criminal law as the defendant's mens rea.... It is precisely a particular mens rea that the hate crime enhancement statue seeks to target. The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."

120 S.Ct. at 2364 (footnote omitted).

Third, it must be noted that three out of four aggravators at issue here directly relate to the offense itself. (1) CCP; (2) HAC; (3) During an enumerated felony (burglary). The Court relied on this factor in Apprendi in explaining why the exception it had previously approved in Almendarez-Torres v. United States, 523 U.S. 224 (1998) should not be extended.

> New Jersey's reliance on Almendarez-Torres is also unavailing. The reasons supporting an exception from the general rule for the statute construed in that case do not apply to the New Jersey statute. Whereas recidivism "does not relate to the commission of the offense" itself, 523 U.S. at 230, 244, 118 S.Ct. 1219, New Jersey's biased purpose inquire goes precisely to what happened in the "commission of the offense." Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilty beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

120 S.Ct. 2366. Here, only the prior violent felony aggravator could conceivably fit in this exception. It should be noted that Apprendi specifically notes that Almendarez-Torres may have been incorrectly decided. Id. at 2362. In the concurring opinion of

Justice Thomas, he specifically states that Almendarez-Torres was incorrectly decided. Id. at 2378-80.

The difference between the two potential penalties, death and life imprisonment, is of the greatest magnitude.

> The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The Court in Apprendi relied on the potential difference in finding constitutional significance to the increase.

> The constitutional question, ... is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. The finding is legally significant because it increased – indeed, it doubled – the maximum range within which the judge could exercise his discretion, converting what otherwise was a maximum 10-year sentence on that count into a minimum sentence.

120 S.Ct. At 2354.

An additional constitutional error is that the jury made no finding that the aggravators were sufficiently weighty to call for the death penalty. Florida law requires not only the presence of aggravators, but that they are sufficiently weighty to warrant the death penalty. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). There was no jury

finding that the aggravating circumstances are sufficiently weighty to call for the death penalty.

Apprendi was also violated in that the jury was not instructed that it had to find, beyond a reasonable doubt, that the aggravating circumstances must be sufficiently weighty to call for the death penalty or that it must find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances. As to the first aspect the jury was told:

> It is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. (LXIV, 6883).

The jury was given no guidance as to by what standard it would have to find the aggravators sufficiently weighty to call for the death penalty.

The jury was also given no guidance as to by what standard it would determine whether aggravating circumstances outweigh mitigating circumstances.

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment with a minimum term of 25 years before possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist, you will – it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. (LXIV, 6886-7).

Not only does this instruction fail to tell the jury that it must find beyond a reasonable doubt that aggravating circumstances must outweigh mitigating circumstances, it

affirmatively tells them that mitigating circumstances must outweigh aggravating circumstances. This violates Apprendi's requirement that any fact which increases the punishment, with the possible exception of recidivism, must be proven beyond a reasonable doubt.

An additional violation of Apprendi is the fact that the jury's verdict in support of death was by a vote of ten to two. In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in serious felonies must be by at least nine votes out of twelve and verdicts in capital cases must be unanimous. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In Burch v. Louisiana, 441 U.S. 130 (1979), the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was a non-capital case. 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. However, in light of the above-cited cases, the ten to two verdict violates the Federal Constitution after Apprendi.

The Florida courts have held that unanimity is required in a capital case. Williams v. State, 438 So. 2d 781, 784 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956); Brown v. State, 661 So. 2d 309 (Fla. 1st DCA 1995); Flanning v. State, 597 So. 2d 864 (Fla. 3rd DCA 1992). The ten to two verdict is in violation of this rule.

The indictment in this case is also defective pursuant to Apprendi. The indictment contains no mention of any aggravating factors or of any allegation that the aggravating factors are sufficiently weighty to call for the death penalty. (II, 13).

The reasoning of Apprendi is consistent with decisions of the Florida courts. In State v. Overfelt, 457 So. 2d 1385 (Fla. 1984), this Court stated:

> The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981). But see Tindall v. State, 443 So.2d 362 (Fla. 5th DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

457 So. 2d at 1387. The District Courts of Appeal have consistently held that a three year mandatory minimum cannot be imposed unless the use of a firearm is alleged in the indictment. Peck v. State, 425 So. 2d 664 (Fla. 2nd DCA 1983); Gibbs v. State, 623 So. 2d 551 (Fla. 4th DCA 1993); Bryant v. State, 744 So. 2d 1225 (Fla. 4th DCA

1999). The requirements of Apprendi must apply to the penalty phase of a capital case under the Florida and Federal Constitutions. The defendant's sentence must be reduced to life imprisonment or the case must be remanded in light of Apprendi.

POINT IV

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE (FLORIDA STATUTES 921.141(5)(d)) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The felony-murder aggravating circumstance (Florida Statute 921.141(5)(d)) violates the Florida and United States Constitutions. Its use renders the defendant's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The defendant filed a motion to declare this aggravator unconstitutional (XX, 3849-3855). The jury was instructed on this aggravator and the trial judge found it to be established. (LXIV, 6883-5, 4654).

Aggravating circumstance (5)(d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree murder statute. Fla. Stat. 784.04(1)(2)2.

Under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 456 U.S. 410 (1982). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra.

The felony murder aggravator fulfills neither of these functions. It performs no narrowing function. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or the federal constitution. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992). This Court should declare this aggravator unconstitutional.

CONCLUSION

For the reasons stated herein, Defendant respectfully requests this Honorable Court vacate the judgment of conviction and sentence of death.

Respectfully submitted,

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MICHAEL DUBINER, ESQ.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Celia A. Terenzio, Bureau Chief, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 30th day of March, 2001.

_____

MICHAEL DUBINER, ESQ.

_____

MARK WILENSKY, ESQ.