IN THE SUPREME COURT OF FLORIDA

MICAH LOUIS NELSON,	:	
Appellant,	:	
vs.	:	Case No. SC00-867
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

A. ANNE OWENS
Assistant Public Defender
FLORIDA BAR NUMBER O284920

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE

On December 10, 1997, a Polk County grand jury indicted the Appellant, MICAH LOUIS NELSON, for first-degree murder, kidnapping, sexual battery, burglary, and grand theft (auto). (1/3-6) On December 19, 1997, he was charged by information filed in Highlands County with burglary and sexual battery. (1/9-12) Nelson filed a motion to suppress his statements and admissions, which was denied after a hearing. (3/450-95; 4/496-563, 611-65; 5/666-717)

Nelson was tried by jury, in Polk County, the Honorable J. Michael Hunter, Circuit Judge, presiding. The jury found Nelson guilty as charged on December 14, 1999. (6/859-64) On December 22, 1999, following the penalty phase of the trial, the jury recommended death by a nine to three vote. (6/881; 26/3349) A Spencer (or allocution) hearing was held February 8, 2000. (6/930-1031) The judge sentenced Appellant to death on March 17, 2000. His sentencing order was filed the same date. (7/1073-82) He sentenced Appellant to four consecutive life sentences for burglary of a structure, sexual battery, kidnapping and burglary of a conveyance, as well as a consecutive 15-year prison term for grand theft, and four concurrent 60-month terms for violation of probation, to run consecutive to the 15-year term. (7/1056-67)

The Appellant filed a timely Notice of Appeal on April 13, 2000. (7/1091) The trial court appointed the Public Defender for the Tenth Judicial Circuit to represent Appellant on direct appeal. (7/1090, 1097) This Court has jurisdiction pursuant to

Article V, Section 3(b)(1), Florida Constitution, and Florida Rule of Appellate Procedure 9.030 (a)(1)(A)(i).

STATEMENT OF THE FACTS

Officer Jamie Davidson, Avon Park Police Department, was dispatched to the residence of Ms. Virginia Brace at about 10:00 p.m. on November 17, 1997. (17/1808) He and Sergeant Hofstra arrived at about the same time and spoke with Genevieve Olson, Ethel Olson and Arlene Dorman, neighbors and relatives of Ms. Brace, who reported that Virginia Brace and her car were missing.

Genevieve Olson, age 78, was Virginia Brace's sister-in-law. She had known Ms. Brace ("Ginny") since elementary school. Ms. Brace lived in Avon Park only half of each year. She lived in Mayville, New York, the other half. Genevieve Olson saw or spoke with Ginny every day. That Sunday night, she did not call Ginny until 8:00 p.m. When no one answered, she called every few minutes until 8:45 p.m. (17/1739-42) (18/1811)

By then, she was worried so she drove to Ginny's home. The house was dark and Ginny's car was gone. She let herself in with her key and saw Ginny's purse on the kitchen table. Her wallet, driver's license and credit cards were in the purse, but no money. The bed was unmade and Ms. Brace's hearing aids and glasses were on the dresser. She knew something was wrong because Ginny would never drive without her glasses. (17/1742-43)

Ms. Olson called her sister-in-law, Ethel, who met her at Ginny's. Ethel's sister, Arlene, who lived in building, joined them. When they were unable to find Ginny, they went to Arlene's

to call the police. (17/1743-46) When the police arrived, they asked Genevieve and Ethel to wait in Genevieve's car. Detective Burke got in the back seat and asked them questions. (17/1746-47)

While inspecting the residence, Officer Davidson noted that the telephone cord had been pulled out of the handset because the plastic was broken and the cord would not stay in the handset. After looking around, the officers took Ms. Brace's ID from her purse, which was open on the kitchen table, and called to report her, and her vehicle, missing. The report went out to all law enforcement officers in Avon Park, Sebring, and Lake Placid, and to the Highlands County Sheriff's Office. (18/1813-16)

FDLE crime lab analyst Lynn Ernst, and two forensic technologists, met with Commander Frank Mercurio in Avon Park on Tuesday morning, November 18, 1997. (16/1546-47) After their briefing, they went to Ms. Brace's residence at 24 West Palmetto Street in Avon Park. It was an apartment building with six units. They saw a shoe print impression outside the unit but were unable to find any fingerprints around the bathroom window, which appeared to be the point of entry. Ernst took aerial photographs. (16/1547-53)

Steve Stark, FDLE crime scene and fingerprint analyst, and his assistant, Angela Leavens, responded to the Avon Park crime scene that morning. (16/1567-73) Although Stark noted no forced entry outside of the building, he went inside and found two windows that were closed but not locked -- one in the bathroom and the other in one of the bedrooms. The screen on one unlocked window was upside down. He observed very faint shoe prints outside the unlocked bathroom window. A woman's handbag and wallet were on the kitchen

table. (16/1580-90) On a bedroom dresser were a pair of eye-glasses, hearing aids and a watch. The bed was unmade. They found a pair of women's underwear in the blanket. (16/1596-97) Stark took photos and collected latent fingerprints. (16/1585-1630)

Immediately after Officer Davidson contacted all law enforcement officers in the area, Highlands County Deputy Vance Pope contacted them on the radio with information about Ms. Brace's car. (18/1815-16) Deputy Pope had responded to a call about a suspicious vehicle at 6:30 in the evening.[1] When he arrived at the car, he found a black male sleeping in the back seat. He knocked on the window to awaken him. The man got out of the car and said he was returning from his girlfriend's house in Lake Wales, got tired, and stopped there to sleep. He said the car belonged to a friend of the family's. He did not have a driver's license but had a card identifying him as Micah Nelson. Pope could not run the car's New York tag number because the DMV computer was down. He searched the car, with Micah Nelson's permission, because he did not know who owned the car. He found an insurance card on the floorboard with the name Virginia O. Brace. (18/1871, 1897)

Nelson asked him for a ride because he did not have a driver's license. He did not appear intoxicated. Deputy Pope asked Nelson to lock the car, then drove him to his sister's house at 17B East

[1] Joann Lambert, Avon Park, testified that she called the police to check out the abandoned vehicle which was parked at an angle on Valencia Road, behind her house. She saw no one in or around the car. An officer soon arrived. (18/1855-61) Ms. Lambert was surprised when the officer knocked on car and a black man got out of the back seat. (18/1862-64)

Adams Street, Avon Park, which was about four miles away. Nelson told him he would have someone get the car later. (18/1872-87)

Shortly thereafter, while on routine patrol, Pope scanned the Avon Park police radio station and heard the officers mention Virginia Brace. He contacted Sergeant Hofstra and told him he had found a black man in the car earlier. Pope went to Ms. Brace's residence to talk with Officers Hofstra and Davidson; then returned to stay with the vehicle until Davidson arrived. (18/1887-89)

When he left Ms. Brace's condo, Davidson went to the location where Deputy Pope was with the missing vehicle. By then, it was about 1:00 or 2:00 in the morning. He stayed with the vehicle until 5:00 a.m. when detectives from the Highlands County Sheriff's Office arrived to photograph and seal the vehicle for processing. The Polk County Sheriff's Department sent a helicopter with a night vision camera to search the area for evidence, and Highlands County deputies brought a bloodhound and a pillow from Ms. Brace's home to try to find her. They eventually called Avon Towing to tow the vehicle to the Avon Park Police Department garage. (18/1819-30)

Back at the Avon Park Police Station, Steve Stark, FDLE crime scene investigator ("CSI"), photographed Ms. Brace's blue 1989 Ford Marquis which had been towed there. In the car trunk he found a greenish-blue hospital "plastic paper" sheet and a spare tire, and a tire iron under the spare tire. On the car's carpeting and in the trunk, he observed a yellow powdery substance, and on the back floorboard of the driver's seat, a fire extinguisher. Stark lifted latent fingerprints from the car, the interior of the trunk and the interior windows. (16/1630-17/1644)

Stark displayed to the jury various other items he found in the car including cassette tapes, a soda bottle, a garbage bag, an empty pack of Newport cigarettes, a lighter, a cigarette butt and silver chain found in the ashtray, and beer bottle caps. (17/1645-53) Stark also collected samples of sand soil from the tire iron which tested presumptively positive for blood; red clay soil that had splashed onto the wheels and outside of the car; and sand, dirt and debris from the driver's floorboard mat. (17/1655-57)

About 11:00 p.m., Deputies Pope and Starling went to the house where Micah Nelson was staying, at 17 Adams Street in Avon Park (17/1714), to pick him up. His sister, Judy Bolton,[2] answered the door and told them Micah was asleep. They went inside with her while she awakened Micah. He put some clothes on and came out of the bedroom to talk with them. Micah did not show any emotion and did not appear disoriented. He walked out to the car with them, at which time the Avon Park police investigator, Detective Robinson, arrived. Thus, they turned Micah over to him. (18/1891-95)

Sergeant John Robinson, Avon Park Police Department, testified that he drove Nelson to the police department about 12:30 a.m. on November 18, 1997, for questioning. About 1:30, he and Detective Daniel Burke began interviewing Nelson. Sergeant Robinson read Nelson a waiver of rights form and filled in Nelson's responses. Nelson signed the form. Nelson was not under arrest and was not restrained or shackled. (21/2341, 2347-59)

---

[2] When Judy Bolton testified, it was determined that her name was actually "Juldy." (25/3092) She was referred to as "Judy" during the trial.

A tape of the interview was played for the jury. (21/2362-2424) Micah Nelson told the officers that he was 21 years old. He borrowed the victim's car from her about 7:00 that morning (Monday) to go to work. He knew Ms. Brace through his Mom and people he formerly worked with at "The Palms," in Sebring. (21-2363-74)

After he got off work, Nelson drove the car to Lake Wales to see a friend named Tracy, who was not a home. He rode around Lake Wales awhile and returned to Avon Park. He went to Ed Johnson's house (a school friend), and then went to sleep in the victim's car. He was not drinking or taking drugs. (21/2374-83) Many of Micah Nelson's answers were inaudible and this seemed to get worse as the interview progressed. Nelson's responses were very vague as to times and places. (21/2362-2424) Robinson testified that Nelson was calm but spoke softly and was hard to understand. He asked him to keep his hands from in front of his mouth several times. When they asked him where Ms. Brace was, he became upset. (21/2427-28)

Commander Frank Mercurio, Avon Park Police Department, acted as a coordinator of the overall investigation. After the taped interview, Commander Mercurio questioned Nelson. (21/2429) Nelson was calm and acted like "a perfect gentleman." (20/2303-06)

Detectives Burke and Robinson had informed Mercurio of everything that had taken place, with specific information as to what Nelson told them. Mercurio then asked Nelson to go over what took place on Sunday and Monday, November 16-17, 1997. He did not tape the conversation or take notes but later completed a police report of what he recalled. Nelson recounted his activities, including having borrowed Ms. Brace's car (she was an old friend),

and told Mercurio that he had no idea where Ms. Brace was. (20/2306-10)

At 6:00 in the morning, Sergeant Robinson returned to speak with Nelson. Nelson told him he lied about the victim's car and that it was stolen. (21/2433-35) Detectives Burke and Robinson advised Mercurio that Nelson had changed his story somewhat. Commander Mercurio joined them. Nelson told them that he was on a corner in a high crime area of Avon Park when he saw some other black men with Ms. Brace's car. Because he needed a ride to Sebring, these men agreed to let him take the car. (21/2436-38)

At 7:10 Tuesday morning, the officers placed Nelson under arrest for burglary and grand theft of the motor vehicle. Nelson was taken from Avon Park to the Highlands County jail in Sebring. Prior to his departure, Mercurio again talked with Nelson about the whereabouts of Ms. Brace, without success.[3] Although Nelson seemed to nod his head "yes," indicating he knew where she was, he did not verbally respond. He was crying. (20/2011-17; 21/2340, 2438)

Sergeant Robinson went to the Highlands County Sheriff's Office that evening. Nelson said he had been given food and had been able to rest during the day. Robinson read the waiver of rights form used by the sheriff's department, and Nelson acknowledged that he understood his rights, signed it and agreed to talk with them. They confronted him with a report from two men who

[3] Mercurio returned to Ms. Brace's apartment at noon Tuesday, and found $139.00 in her top dresser drawer. There was no money in her wallet. (20/2319-21)

helped him get Ms. Brace's car out of the sand in Polk County. Nelson was slouched over with his face in his hands.[4] (21/2441-47)

At some point during the interrogation, the officers confronted Nelson with evidence that he was involved in the disappearance of Ms. Brace. They listed the evidence on a blackboard for Nelson to read. The evidence included fingerprints from the bathroom, that Nelson was found in the victim's car, and that it was stolen. Nelson looked at the blackboard for a minute and said, several times, "it's over, isn't it, it's over, isn't it." (21/2450-52)

Robinson told Nelson that he needed to tell the truth about what happened. He said that, if it were Nelson's family member who was missing, he would want to know what happened, and Ms. Brace's family would appreciate his helping them. Nelson had tears in his eyes and appeared to be emotionally upset. He put his head in his hands. Robinson put his hand on Nelson's back and told him that it would be ok -- just to tell them where the victim was. (21/2452-53)

Robinson did not want to push so left the room for a minute, leaving Detective Burke with Nelson. Detective Burke opened the door and told him that Nelson was going to tell them where to find the victim. Robinson talked with Nelson who agreed to ride with them to show them where she was. Nelson was crying. (21/2453-54)

Detective Burke testified that, as soon as Sergeant Robinson left the room, Nelson asked him whether he knew the road that ran

---

[4] The officers later had contact with Mr. Morgan and Mr. Weir who identified Nelson from a photo lineup as the man whose car was stuck in the sand. (21/2447-48) They testified at trial.

from Frostproof to Fort Meade. Burke asked him if that was where the victim was. Nelson nodded his head, "yes." Burke stepped out of the office to get Sergeant Robinson.[5] (22/2621, 2631-32)

Mercurio called Officer Davidson that night and asked him to follow them to a location where Micah Nelson was going to direct them, to find the deceased's body. They traveled north on U.S. 27; left onto U.S. 98; north; and then left onto South Lake Buffum Road. They stopped a short distance down that road near Ft, Meade, in Polk County, about 12:30 in the morning. (18/1831-38)

As they were walking along the grove area, Nelson started shaking. He pointed and said, "she's down there." Robinson noted that Nelson was extremely emotionally upset and crying. (21/2454-56) Detective Burke was able to see Nelson's face from the car lights and noted that he seemed somewhat emotional. Burke could see tears on his face and he seemed frightened. He asked, "you are not going to make me go down there, are you?" (22/2634) Robinson told Nelson they would not make him go with them. Nelson, who was physically shaking and crying, pointed out the line of trees in the grove where they would find the body. (21/2454-56; 22/2620-21)

Robinson and another officer walked down the row of trees and found the victim's body. It was obvious that Ms. Brace was dead. She was lying face up, wearing only a blue nightgown. They backed

---

[5] Prior to Burke's description of the defendant's admissions, defense counsel renewed his motion to suppress and objected to testimony about the tapes, and Nelson taking them where they found the body. The judge granted a continuing objection. (22/2628-29) When Mercurio testified, defense counsel was granted a continuing objection to testimony concerning their finding the victim's body, which was the subject of his motion to suppress. (18/1832-33, 1926)

out to secure the crime scene and covered her with a yellow police raincoat to preserve the evidence. They arranged a "night watch" until daylight when the FDLE crime scene technicians would be able to begin their work. (18/1924-33, 2456) Robinson returned to where Nelson and Detective Burke were waiting to return to Highlands County. Other officers took over the crime scene. (21/2456-58)

When Micah Nelson and Detectives Robinson and Burke returned to the detective's bureau, Nelson agreed to give a taped statement describing what happened. When Sergeant Robinson asked Nelson why this had happened, Nelson said, "I'm just mad, mad at the world, mad about [my] life." (21/2458-60)

The taped interview, which was played for the jury (21/2461-97), commenced at 2:10 a.m. Nelson agreed that he had earlier been given and understood his Miranda rights and was willing to talk with them. Nelson told them that, on Sunday night, he left his mother's house because his brother was "playing around" with him. He went to the home of his girlfriend, Reagis Ishmael, for a short time and then walked around some more. He walked by the home of Ms. Brace and entered through her bathroom window which was open. He did not know her. She was asleep. He was not looking for anything in particular. When he walked into the bedroom, Ms. Brace awoke and screamed. She got up, they got into a tussle, and he held her down on the bed. She started to scream again and Nelson "just lost it." He did not want to leave because he was afraid she would call the police. She did not say anything but just continued screaming, which made him angry. The telephone receiver came off

the unit and the cord pulled out while he was trying to stand her up during the struggle. (21/2464-74)

Ms. Brace stopped screaming when he got her keys and took her to her car. He took nothing from her purse other than the keys. He put her in the trunk so no one would see her, and got in the car. He took her from the house because he was not thinking. Ms. Brace was not injured and did not struggle. He did not know why he picked Ms. Brace's house. He was just walking by. (21/2470-75; 22/2614) He denied having had sexual contact with her. (21/2483)

He drove around Avon Park for an hour or two. He did not know what to do. It was about daylight when he drove to Polk County. (21/2475-77) Before arriving at the grove where he killed Ms. Brace, Nelson got the car stuck in the sand near Frostproof. When the man who pulled him out heard a noise in the trunk and asked what it was, Nelson told him it was a dog.[6] (21/2485-87)

---

[6] Kenneth Morgan, citrus foreman, testified that, on Monday morning, about 9:30 a.m., a young black man asked for help because his car was stuck in the sand. Morgan told the man he would get Steve, the loader operator, to pull out his car. (19/2074-85)

Steve Weir, 41, a heavy equipment operator, was pulling out trees with a front-end loader when Morgan asked him to pull a car out of the soft "sugar sand." The driver had pulled into the grove and was buried down to the gas tank about 3 feet off the road. The car had a New York license. When Weir looked under the car for a place to hook the chain, he had his hand on the trunk of the car and felt a bump and jumped back. The man told him it was a dog; then turned on some "rapping-type music" and turned up the volume. Weir thought the car did not "fit" this man who paced, seemed very nervous, and would not look Weir in the eye. The man took off without even thanking Weir for helping him. (19/2086-96)

Although Weir suggested calling the police, they did not do so at that time. At home that night, however, he called the Sheriff's Department in Bartow and reported what had happened. He was told to call a detective at the Avon Park Police Department. He later identified the man and car from police photo-

After he was out of the sand, he drove to the place where they found Ms. Brace's body. He did not pull into the grove but stayed on the dirt road. Ms. Brace walked with him from the road to where her body was found. Nelson said that both he and the victim were scared when walking into the grove. Ms. Brace did not ask what he planned to do to her, and he did not tell her. (21/2487-89)

He tried to choke her but she would not pass out.[7] He sprayed the fire extinguisher into her mouth two or three times, but did not hit her with it. She coughed for awhile but did not try to scream. He killed her with a tire iron by pushing it through her mouth into her neck and out the other side. He did this only once, and did not hit her with the tire iron. She gasped for air and did not move. He looked at her only a couple seconds because he was scared. He tried to clean the blood off the tire iron by rubbing it in the dirt. He took the fire extinguisher and tire iron back to the car and left. He stopped at a nearby corner store and bought a bottle of beer.[8] (21/2478-82, 2490-93)

Nelson returned to Avon Park where he parked the car down the road and went to his sister's house. He watched TV and washed some clothes -- not the ones he was wearing. He then drove to where the

---

graphs. (19/2097-2101)

[7] Sergeant Robinson testified that Nelson told them he first tried to choke the victim until was passed out in the grove so he could leave. When he took her from the house, he was not thinking clearly and was scared. (22/2614)

[8] Although Nelson's responses were mostly inaudible, the officer repeated what he said, or what he surmised Nelson meant to say. According to the officer, Nelson said he killed the victim because she could identify him. (21/2482-83)

deputy found him sleeping in the car and stopped because he was tired of driving around. (21/2493-97; 22/2608)

Steve Stark, FDLE CSI, was notified that the Avon Police officers had found a body they believed to be that of Ms. Brace. He and his supervisor, Karen Cooper, responded to an orange grove in a very rural area of Polk County. They parked on a dirt road and walked between the orange trees to where the body was located. They saw boot tracks going back and forth between the row of trees, and drag marks in the sand. Stark photographed the body and the area near the body. (17/1659-70) He observed two holes in the ground, one beneath the victim's head, and a yellow powdery substance on the face and mouth. (17/1688-91)

That same morning, November 19, 1997, Dr. Alexander Melamud, the medical examiner, was called to the scene to examine the body of Ms. Brace. He testified that lividity, a purple discoloration, had set in on the back of the body. Lividity is the settling of the blood after death and is an absolute sign of death. He saw fly eggs on the face and ants on the body but no decomposition. He observed a yellow substance on her face and chest. Based on the condition of the body and information he learned from the investigators, he thought she had been dead about two days. (19/2006-14)

The body was transported to the morgue at Lakeland Regional Medical Center where he performed the autopsy at 12:30 that afternoon. The 78-year-old victim weighed 121 pounds and wore a dirty nightgown which was torn in back. She wore a wedding ring and two other rings. (19/2014-22)

The victim had a bruise and a laceration in the back of her mouth where an object was inserted into her mouth and went through to the back of her neck. She had burn-type abrasions on her back which indicated that she had been dragged. She had abrasions on her the back of her shoulder, and on her thighs, legs, ankles, knees and feet. She had a bruise on her right buttock, her left hand and elbow, and right wrist. Ants were crawling on her body when Dr. Melamud first saw it. Her face was stained with blood and a yellow substance. Dr. Melamud showed the jury these injuries in photographs taken by the crime scene investigators. (19/2025-30)

Dr. Melamud showed the jury a photograph of the inside of the victim's mouth during the autopsy. It showed hemorrhaging in the deep neck muscles because of a fracture of the fifth cervical vertebra. This injury was caused by compression of the neck (or strangulation), causing asphyxiation, which was one cause of the victim's death. Another cause of her death was choking from the yellow fire extinguisher substance pumped into her mouth. He found the yellow substance in her air pipe and lungs, indicating that she inhaled the substance. (19/2030-34) She would have been alive for only a short time after the fire extinguisher was discharged into her mouth. There was no way he could tell whether she was conscious while choking on the fire extinguisher fluid or during the manual asphyxiation. At some point, she lost consciousness but he could not pinpoint when that happened. (19/2051-2055)

The victim also had three fractured ribs, which would have resulted from blunt force trauma. All of the injuries (other than the outer body bruising) contributed toward her death. Thus, there

was not just one cause of death. (19/2034-37) Dr. Melamud found no injuries indicating a sexual battery. He took oral, vaginal and rectal swabs, from which he made smears on glass. His examination of the vaginal smear showed no sperm. He sent the smears and swabs to FDLE for further examination. (19/2051)

Steve Stark, FDLE CSI, observed and photographed the autopsy. He collected as evidence the victim's nightgown, her inked fingerprints, fingernail scrapings, blood and hair samples, pubic hair combings, oral swabs, vaginal and rectal swabs and stains, and a yellow powder removed from the victim's face. (17/1696-1706)

Karen Cooper, FDLE crime lab analysis supervisor, assisted Steve Stark. Her specialty was footwear analysis. She was later asked to compare a pair of work boots with footprints in the crime scene photographs. She enlarged the photographs of the footprints, and made ink prints of the bottom of the boots. She concluded that the boots could have made the tracks. Although they were the same size, shape and tread, there were no specific wear marks or patterns to prove for sure that they did make the tracks. (19/2142-50)

Steve Stark, FDLE, found twelve latent prints at the victim's residence. He identified two fingerprints on the bathroom towel rack and one print on the tub as those of Micah Nelson. Three prints lifted from the tile under the bathroom window and a print on the interior bathroom door jam were Nelson's. Those lifted from the telephone were not those of Nelson or the victim. Nelson's prints were found only in the bathroom. (20/2157, 2162-67)

Stark also found Nelson's fingerprint on the Nehi bottle in the victim's car, and the interior rearview mirror. He found three of the victim's fingerprints on the inside lid of the car trunk. He found two of Nelson's fingerprints on the car's front door trim around the window exterior on the driver's side. (20/2170-71)

FDLE DNA analyst Jennifer Garrison examined samples from the white blanket and the bedspread from the victim's bed, both of which had semen stains. Using the "RFLP" test she found that the DNA profile from the bedspread matched Nelson's DNA profile. The blanket and a vaginal swab she received did not contain enough DNA for comparison using this test.[9] (20/2174-80) Garrison testified that, in the Caucasian population, one in 22.6 billion would have this DNA profile. In the African-American population, one in 5.9 billion would have the profile, and, in the Southeastern Hispanic population, one in 25.8 million would have the profile. (20/2181)

Darrin Esposito, FDLE serology and DNA analyst, performed "PCR"[10] testing on the same samples. Using this test, he could compare the samples which did not contain enough DNA for Garrison to compare using the RFLP test. (20/2190-94) In the vaginal swab, he identified a mixture of DNA consistent with a mixture of the DNA of Virginia Brace and Micah Nelson. He determined that the minor

---

[9] "RFLP" stands for "restriction fragment length polymorphism." In this test, the analyst looks at differences in lengths of DNA among individuals. (20/2179)

[10] "PCR" stands for "short tandem repeats." This test looks at smaller DNA fragments than the RFLP test used by Ms. Garrison. In the PCR process, the analyst makes copies of small fragments of DNA and, thus, can analyze a smaller amount of DNA. (20/2192-93)

contributor was Micah Nelson. The frequency of the profile of the minor contributor, in this case, Nelson, would be one in 19.3 million in the African-American population. (20/2190-98)

Forensic serologist Jeannie Eberhardt, formerly with FDLE, examined blood and semen samples. (22/2233-35) By swabbing, she found a very small amount of blood on the tire iron. She did not test the small amount of blood to see whether it was human blood, but saved it for other testing. She examined fingernail clippings from the autopsy and found evidence of blood under the left-hand clippings. She found blood on the victim's nightgown. (20/2241-44)

Eberhardt also tested for the presence of semen. She found semen and sperm on the white blanket and the bedspread from the victim's bed. She found no sperm on the oral or rectal swabs but found semen and sperm on the vaginal swabs and smears from the autopsy.[11] She found no semen on the nightgown. (20/2248-53)

Martin Tracy, professor of biological sciences at Florida International University, Miami, testified as an expert in population genetics. (20/2261-64) Dr. Tracy manually checked the statistics which Jennifer Garrison and Darren Esposito had arrived at by use of a computer, and found them accurate. (20/2271)

* * * * *

Reagis Ishmael, 31, was Micah Nelson's neighbor and girlfriend at the time of the homicide. He often spent the night with her. On the Sunday morning prior to the homicide, she and Nelson ate

[11] The medical examiner, who did not find sperm on the vaginal swab and smear, said it was unusual for FDLE to find something he did not find. (19/2049-51)

breakfast and walked to his cousin's house where Micah was to help with some painting. She and her two children went to church. (19/2109-14) Micah returned to her apartment when it was nearly dark, and left again less than an hour later. (19/2114-17)

Nelson's cousin, Andy Eiland, considered Micah his brother.[12] He recalled that his brothers, James and Micah, helped him paint the shed that Sunday. They at 4:00 or 5:00 p.m. because they ran out of paint. Andy took Micah to Judy's house to take a shower. Then he and Micah went to Mulberry to pick up Andy's truck. When they returned to Avon Park, they went to a bar and had one beer each. Andy dropped Micah off at their mother's house about 10:30 that night. His mother was still awake. (19/2133-40)

That Sunday night, Calvin Fogle, Micah's youngest cousin, got off work at Winn Dixie just before 11:00 p.m. When he got home, his mother and Micah ("Mike") were there. His mother was asleep. Mike wanted to watch TV and Calvin wanted to go to sleep, so Micah said he would leave and go down the street. Calvin thought Mike would go to his girlfriend's house. (19/2060-65)

The jury found the Appellant guilty as charged. (6/859-64)

PENALTY PHASE

State's Case

The medical examiner testified that he was not able to tell in what sequence the various injuries to the victim were inflicted.

---

[12] Micah and his sister, Judy, were raised by their aunt, Lelia Eiland, who was Andy's mother. (19/2058-59) Ms. Eiland had seven children of her own, who considered Micah their brother. (See Penalty Phase testimony)

He confirmed that each of the three methods the defendant used to injure and/or kill the victim would have caused significant pain as long as the victim was conscious. He could not tell at what point she lost consciousness and could no longer feel pain. (24/2968-72)

Jim Gibbons, probation and parole officer for the Highlands County Department of Corrections, testified that Micah Nelson had been in prison for a felony offense. Gibbons was assigned to supervise Nelson's felony probation when Nelson was released from prison. He first made contact with Nelson and began supervision on October 27, 1997. (24/2976-78)

Ms. Arlene Dorman, a neighbor of the victim, testified as a victim impact witness. She had known Ms. Brace since 1929 when they went to school together in New York. They were as close as sisters. She described Ms. Brace as a very caring, generous and giving woman who enjoyed helping others. She was very proud and fond of her three grandsons. Ms. Dorman described how "Ginny" took over her husband's insurance business when he died, raised her two daughters, was devoted to her family, church and community, and went out of her way to help others. (24/2980-83)

Barbara Murdock, the victim's niece, was retired and lived in Winter Haven. Her father was the oldest of six children, and Ms. Brace (her Aunt Ginny) was the fifth child. Ms. Brace grew up on a farm and worked hard. She taught Barbara to play the piano and spent a lot of time with Barbara when she was growing up. Barbara spent a week with her aunt every summer after she married. Ms. Brace was the leader in their family. She organized gatherings, and circulated long typewritten letters. She was very proud of her

daughters and grandchildren, and was known for special food dishes she made for others, including shut-ins. She served in her church and was involved with a hospice organization. (24/2983-86)

The third victim impact witness was Betty Redmond, one of the victim's two daughters, who taught school in Fremont, Ohio. She described her mother as a wonderful, faithful and devoted wife and mother. She made friends easily and reared her family in the church. She loved her three grandsons and enjoyed sewing and cooking for them, and reading to them.

Her mother was strong and determined. After losing her husband of almost 25 years, in 1971, she went to school to get her insurance license, competing mostly with men, and graduated second in her class. She put her family first, loved life, and helped others in sickness and grief. Betty was thankful to have had such a wonderful mother, and missed her greatly. (24/2986-88)

Defense Case

The first defense witness was Lelia Eiland, Micah Nelson's aunt and surrogate mother. She related that Micah Nelson was born in November, 1975, to her sister, Bobbie Nell Nelson, who was an alcoholic, and drank during her pregnancy. Micah's father, Micah Johnson, returned to Jamaica or "the Islands" when Micah was a few weeks old. He never had any contact with his son. (24/2990-92) Micah and his sister, Judy, who was two years older than Micah, were taken from their mother by the State (HRS) and placed with their maternal grandparents when Micah was a baby. Micah's mother lived with her parents until she went to South Carolina, but it was

her parents who were responsible for Judy and Micah's care. When Micah was four or five years old, his mother died. Micah was very upset about her death. Micah's mother died in 1980, and in August of that same year, his grandmother died. Micah took her death "very hard" and cried a lot. Mrs. Eiland's youngest brother Larry, Micah's uncle, also died that year. (24/2990-97)

After his mother and grandmother died, Ms. Eiland took Micah and his sister to live with her. She had seven children and her husband had left her. Her oldest child was born in 1962, and she had approximately one child each year through 1968, except for 1964. Her seventh child, Calvin, was born twelve years later, in June of 1980. Micah and Judy came to live with her in August of 1980. She was then a single mother supporting nine children, on of which was a new baby. All of the children lived at home in a four bedroom house. Ms. Eiland said she treated Micah and Judy the same as her other children. (24/2997-3004)

When Micah was 14 or 15, he went into the Job Corps. He continued to keep in close contact with her. When he returned to Avon Park, he lived with his sister but visited her every day. They had been in daily contact since he returned from prison. (24/3004-15)

John Eiland was Micah's cousin but, because they were raised together, considered Micah to be his brother. John was the last of Lelia Eiland's first six children and the last one who left home. After he left, only Judy, Micah and Calvin remained. Calvin was born twelve years after the first six children and had a different father than Ms. Eiland's first six children. Micah was seven years

younger than John, and five years older than Calvin. (25/3017-33)

John knew Micah's mother quite well. He said that she drank a lot, and that his grandmother was actually raising Micah. When Micah was about four years old, however, their grandmother died. Micah's mother had died out-of-state somewhere. He was told she died from alcohol. John remembered that Micah cried a lot when he learned that his mother had died. When their grandmother died, everyone was upset. John was 11 when Judy and Micah moved in. His father had moved out when John was too young to remember him. Judy and Micah were treated the same as the other children. (25/3021-28)

John recalled that, while he was still at home, they all moved to Frostproof, in Polk County, for about four years. He did not leave home until age 23, after they had returned to Avon Park.[13] (25/3024-27) After John moved out, Micah went to the Job Corps. Micah was about 16 at the time. When Micah returned from the Job Corps, John saw him a couple times a week. When Micah got out of prison, John was living with his mother again, so tried to help Micah by giving him rides, and such things. (25/3028-32)

Barbara Grinslaide, Polk County Sheriff's Office, was a detective with the child-victim unit in 1987. She investigated alleged sexual and physical child abuse. She investigated a referral from H.R.S. involving Calvin Eiland, age 7, who had contracted gonorrhea. The family lived in Frostproof. Also in the home were John Eiland (19), and Judy (13) and Micah (11) Nelson. (25/3034-35)

---

[13] At the time of trial, John was a supervisor at Georgia-Pacific, having worked there for thirteen years. (25/3027)

Detective Grinslaide recalled that she interviewed Calvin who told her he had been having sex with Judy. He referred to it as "poking Judy's kidney," which was a slang term for sexual intercourse. He had seen Micah "poking Judy's kidney" too. Micah also told her that he had been having sex with Judy. She tried to talk to Judy, but Judy would not talk to her at all. The children had watched a pornographic video that their brother, John, had left in the VCR, and decided to experiment. They were all tested and Judy also had gonorrhea, but Micah did not. The detective was never able to determine from whom the gonorrhea originated.[14]

The detective's report indicated that, in addition to Lelia Eiland, John, and the younger children, Calvin's father, Calvin Eiland, was living in the home. Detective Grinslaide talked with Lelia Eiland, who was not aware of the sexual experimentation, but did not talk with Calvin's father.[15] Ms. Eiland was not at home when the children watched the pornographic movie. The two young boys said they had sex with Judy when their mother was not at home on three or four occasions. Micah had not had sex with anyone other than Judy. Detective Grinslaide filed an incest complaint

---

[14] Calvin was taken to a doctor for a severe sore throat and was found to have gonorrhea of the throat and penis. Judy had gonorrhea in the vaginal area. (30/3038) Dr. Henry Dee reviewed the records and noted that the children were not likely to have contracted gonorrhea without sexual contact with an adult. In his opinion, the incident was incompletely investigated. (25/3136)

[15] Calvin Fogle, age 19, testified during guilt phase that his father, Collis Fogle, never lived in the home. His mother worked most of the time. (19/60-70) It seems likely that the detective who investigated the case had the facts mixed up in her report and that Calvin's father may not have lived there.

against Micah and Judy Nelson (the victims were each other) and had no further contact with the family. (25/3035-46)

Angela Lovett, 27, testified that she was Micah Nelson's first cousin. Her father was Lelia Eiland's brother. Angela, who was three years older than Micah, was raised by her parents but spent most of her time at her grandmother's where Micah lived as a young child. Micah's sister and mother and her Uncle Larry also lived there. They were all "doing wonderful" there. (25/3049-52)

Angela did not see Micah as often after he moved in with Lelia Eiland and her family. Although Micah seemed healthy and was doing fine, she observed that he did not receive the unconditional love that the natural children received. There was love and caring in the family but she did not see Micah getting the hugs and kisses and "good job" reinforcement that most children get. (25/3053-56)

Witness Claudia Daily lived in Miami with her three children, Kheirrha, age 6; Tomyshia, 18 months; and Dezstiny, 6 months. She was the same age as Micah Nelson. They first met in 1992 when both were in the Job Corps in Kentucky. Claudia had been there about six months when she became involved with Micah. Several months later, she was pregnant. She had to leave the Job Corps when she was five months pregnant. She did not tell Micah that he was the father of her baby. Because she had been seeing another boy before Micah, he did not know he was Kheirrha's father. (25/3061-66, 3072)

When her daughter was six or eight months old, Claudia's best friend sent her a ticket to go to Avon Park to stay with her. She saw Micah Nelson and told him he was the father of her baby. She stayed in Avon Park for a month or more. She and Micah were both

interested in having a family relationship. He gave her money to help support the baby while she was there. She suddenly returned to Miami, however, because of things that were happening with her family. Micah did not know she was leaving, and she did not know how to contact him after she returned to Miami because she did not get his address or phone number before she left. A couple months later, she received a letter from Micah, asking why she had left so suddenly and what she wanted to do. Because of the chaos with her family, she could not get together with Micah and eventually just quit thinking about it. (25/3067-75)

Micah's cousin, Private Calvin Fogle, United States Army, was stationed in Fort Eustis, Virginia. He was Micah's younger brother Micah taught him everything he knew. Micah was his role model. He taught Calvin how to dress, to be open and to be himself, and he helped him with his school work. Calvin did not think his mother treated Micah differently from the other children. (25/3076-82)

Reagis Ishmael, who was dating Micah at the time of the homicide, testified that she had two children, ages 9 and 7, and was studying at South Florida Community College to learn to read and write. Micah sometimes spent the night at her house. She recalled that, on the Saturday night before he was arrested, Micah had a nightmare and was "real scared." He would not tell her what was bothering him. She thought that something happened to him in prison because he did not like it when she touched him on the backside or buttocks area. He would not tell her why. (25/3083-90)

Micah's sister, Juldy Bolton (referred to as "Judy" throughout the transcript), age 26, lived with her husband in Avon Park. She

did not have the same father as Micah, and had no contact with her father. She did not really remember her mother and believed she died in New York. She lived with her grandmother until she was about 6, and then lived with their aunt. Juldy went to school to the tenth grade; then H.R.S. arranged for her to go into the Job Corps in Georgia. Micah went into the Job Corps soon afterwards but was in Kentucky. Juldy studied plumbing but never worked in that field. Instead, she worked with the handicapped. (25/3092-99)

Micah was staying at her house at the time of the homicide. He had his own room. Twice, when she awoke during the night, Micah was having nightmares. He was "hollering and screaming," but would not talk to her about the nightmares. He said it had to do with what people do to you in prison. (25/3097-98) Micah did not drink much and did not take drugs. (25/3107)

Dr. Henry Dee, a clinical psychologist with a specialty in clinical neuropsychology, evaluated Micah Nelson. Additionally, he reviewed a myriad of background information and materials concerning the crime, including discovery from the State Attorney. He reviewed records from the child protection team, of which he was supervising psychologist, and psychological evaluations done by the school system and Dr. Kremper, a psychologist. (25/3123-26)

Dr. Dee met with Micah a minimum of seven times from two to six or seven hours each time, and administered psychological tests. When he first met Micah on June 15, 1998, however, the interview lasted only 30 minutes because Micah would not talk with him. He was very puzzled and finally gave up and ended the interview. He had not encountered anyone who was mute before. (25/3127-30, 3158)

The next time he met with Micah, Dr. Dee found out why Micah had been mute. The night of the first interview, Micah attempted suicide. He was acutely depressed. Dr. Dee determined from jail records that the suicide attempt was genuine. He believed Nelson's suicide attempt resulted from acute depression, resulting from a combination of guilt for what he had done, and depression about the situation he was in and what might happen to him. (25/3031-32)

Dr. Dee related that Micah remembered little about his mother. She was an unavailable alcoholic who moved to New York shortly after his birth. His one memory of her was when he was about five. She took him to a nightclub or bar. He thought she was strikingly pretty and wondered why she was never around. (25/3133)

Those who knew Micah's mother during her pregnancy characterized her as a drinking alcoholic. Dr. Dee explained that, when a woman uses alcohol during pregnancy, the baby may be critically and permanently affected. During the first trimester, "fetal alcohol syndrome," may damage the nervous system, affecting the child in a variety of ways. Alcohol can affect the child's IQ and cause behavioral problems. Alcoholics often suffer from malnutrition which may cause the unborn child to be mentally retarded. (25/3134-35)

School records showed that Micah was retained in kindergarten and third grade, and repeated those grades. He received administrative or social promotions in first and second grade. (25/3163)

Micah was tested by the school psychologist at age 8 because he was not making normal progress in school.[16] He was functioning at the same level, or slightly higher, than the level on which he performed on Dr. Dee's test. Although the school never found an adequate reason for Micah's academic problems, Dr. Dee suspected it was Micah's brain damage and memory problems, which would have been hard to diagnose at age 8. (25/3135-38)

Dr. Dee reviewed the records from the child protection team concerning the incident involving sexual experimentation when Micah was 11 years old. Ms. Eiland terminated Micah's counseling after the second session, asserting that the children did not need counseling. Dr. Dee noted that Micah was diagnosed at that time as suffering from depression, characterized as adjustment disorder with depressed mood. Micah was later evaluated by Dr. Kremper, a psychologist, when he was about 16, and was again diagnosed with depression.[17] (25/3136-38) Thus, each time Micah was seen by a mental health professional, he was seen as depressed.

Dr. Dee explained that the depression Micah suffered was not the kind of depression the average person thinks of as having a bad day or being intensely sad. Depression is a psychological term describing a condition which includes "sleep disturbance, appetite

---

[16] Micah's records indicated that, in the ninth grade, which was the last year he attended school, he had A's, B's and C's. He was absent 26 days during that grading period. (25/3164) This is inexplicable based on his earlier academic performance.

[17] Dr. Kremper saw Micah in February of 1992 (25/3177), and went into the Job Corps in 1992. Thus, the evaluation may have resulted in Micah's stint in the Job Corps, or may have been done because he was going into the Job Corps. Micah would have been 16 in February of 1992.

disturbance and frequently anger about one's situation." The anger is usually directed toward the situation in which the person is living and the people upon which he is dependent. Anger is often missed in depression but is almost always a component. (25/3139)

Extreme depression in children and teens may be indicate a variety of psychological problems. Dr. Dee believed this was true with Micah because he was having hallucinations. Dr. Kremper's report indicated that Micah was already hallucinating when he was an adolescent. Hallucinations are not part of typical depression and indicate another kind of psychotic disorder -- most likely, schizophrenia. (25/3140-41)

Dr. Dee did a complete psychological and neuropsychological evaluation which included testing Nelson's mental abilities and mental functioning. This included a number of neuropsychological tests which relate to brain function and abnormalities, and personality assessment techniques and testing. The tests provide a baseline to compare with the person's history and the doctor's observations, and may also detect problems that are not otherwise apparent, or are forgotten or denied. (25/3141-43)

Based on the neuropsychological tests, Dr. Dee believed that Micah was brain-damaged. Although he tested in the borderline to low average intelligence range, his memory quotient was inconsistent with his IQ. Although his IQ was 79, his memory quotient was only 48.[18] The two scores should have been comparable. This discrepancy indicated a cerebral injury or disease which caused

[18] Dr. Dee said that an IQ of 79 was in the 12th percentile -- 86 percent of the population had a higher IQ. (25/3135)

memory impairment and increased irritability and impulsivity. Micah's test showed that his general concept formational mental ability, or higher mental ability, was grossly affected. Some of his right and left hemisphere dysfunction tests were quite normal while others showed serious impairment. Dr. Dee found a consistent and long-standing discrepancy between verbal and nonverbal abilities which indicated that the problem was long-standing. (25/3144-45)

A person with Micah's mental impairment would probably have difficulty adapting and getting along in the world. Cerebral disfunction causes impulsivity. A person with impulsivity does things without sufficient thought or deliberation. Thus, he might have a history of difficulties caused by impulsivity. (25/3146)

Nelson related to Dr. Dee that, which he was incarcerated at Lancaster Correctional Facility, in a youthful offender program, he was twice physically overcome and sodomized with a broom, by a group of fellow inmates. Groups of bullies ran the place, at least socially. Micah was young and very small at that time and his treatment by both the guards and the other inmates was tyrannical. He was constantly picked on. He was powerless to do anything because he was afraid of revenge by the bullies. (25/3148-50)

Micah described humiliating pranks perpetrated in prison which were referred to as playing or "horseplay." The offenders would do things such as pulling down his pants or undershorts, or forcing him to wrestle. There was nothing he could do because the bullies were so much bigger than he was, and would hold him down. He did not have any friends there. (25/3151)

Dr. Dee opined, to a medical certainty, that Micah had an extreme mental or emotional disturbance at the time he committed the homicide in this case. The cerebral damage had a dramatic effect on his education and ability to cope with life. The mental disorder was unmistakable when Dr. Dee saw Micah.

His symptoms fell into two broad categories. One was depression and the other psychosis. The auditory and visual hallucinations were among the psychotic symptoms. The hallucinations were very puzzling to Micah.[19] Sometimes he thought they were real and sometimes he did not. Command hallucinations, during which Micah was told to do things (like commit suicide), and felt that he had to do them, were documented by jail records. Micah's symptoms were long-standing, having begun when he was a child. He told Dr. Dee he never talked about the hallucinations because he believed it would make him look stupid. (25/3153-56) Micah said he was having visual hallucinations the day he killed Ms. Brace. (25/3182)

At first, Micah could not remember the crime at all because of his depression. Later, he remembered being in the apartment and driving around in the car afterwards, wondering why he had done it. He remembered sitting in the car and being arrested. Dr. Dee tried to ascertain why Micah had killed Ms. Brace but Micah just did not know. He could not come up with a reason. (25/3182-84)

---

[19] Micah had a friend who died when he was 7 to 10 years old while trying to do a back flip off the second floor of a building. Micah said it was after that traumatic event, which he witnessed, that he began hallucinating. (25/3151-53)

Dr. Dee believed to a medical certainty that Micah Nelson's ability to appreciate the criminality of what he was doing when he killed Ms. Brace was greatly diminished. His ability to think and reason about it, or plan alternatives, was substantially impaired because of his impulsivity, short-circuiting of thought processes, and psychotic symptoms. At the time of the homicide, Micah's cerebral damage caused substantial impairment of his ability to conform his behavior to the requirements of law. (25/3156-57)

The jury recommended, by a vote of 9 to 3, that Nelson be sentenced to death.

SUMMARY OF THE ARGUMENT

Appellant's statements to law enforcement should not have been admitted into evidence because the detectives used unwarranted coercive tactics. When Nelson was tired, they used a "Christian Burial" technique to produce a confession. The totality of the circumstances failed to show that his confession was voluntary.

The evidence did not support the court's findings that Nelson committed the homicide to avoid arrest. Nelson told Detective Robinson that he committed the homicide because he was mad at his situation and mad at the world. Only after the officers pressed him for a further reason did he suggest that his motive was to prevent the victim from identifying him. He told Dr. Dee he did not know why he committed the crime. The evidence showed that he was depressed and hallucinating at the time.

Similarly, the evidence was insufficient to prove that the crime was CCP. No evidence showed that Nelson intended to kill the

victim prior to taking her to the orange grove. He was scared and confused and did not know what to do. Because of his mental condition, he was unable to think things through to develop alternative solutions. Furthermore, the court's finding of CCP is inconsistent with the finding that the victim was killed after she saw Nelson's face because she could identify him.

The trial court also erred by failing to find either of the statutory mental mitigators, and many of the proposed nonstatutory mitigators that were clearly established by unrebutted evidence. A sentence of death is not warranted, primarily because of Nelson's mental problems, traumatic childhood, and lack of prior violence.

ISSUE I

THE TRIAL COURT ERRED BY FAILING TO GRANT NELSON'S MOTION TO SUPPRESS HIS STATEMENTS AND ADMISSIONS, AND THE RESULTING EVIDENCE, BECAUSE HIS STATEMENTS WERE INVOLUNTARY AND THUS WERE NOT TRUSTWORTHY OR RELIABLE.

"[B]ecause of the tremendous weight accorded confessions by our courts and the significant potential for compulsion -- both psychological and physical -- in obtaining such statements, a main focus of Florida confession law has been on guarding against one thing -- coercion." Traylor v. State, 596 So. 2d 957, 964 (Fla. 1992). In Traylor, this Court reiterated the following standard for determining the admissibility of a confession, first set out nearly a century and a half ago:

> To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, **uninfluenced by fear or hope**. To exclude it as testimony, **it is not necessary that any direct promises or threats be made** to the accused. It is sufficient, if the attending circumstances, or declarations of those present, be calculated to delude the prisoner as to his true position, and exert an improper and undue influence over his mind.

Simon v. State, 5 Fla. 285, 296 (1853). Accordingly, the test for the admission of a confession is **voluntariness**. In assessing voluntariness, the court must consider the totality of the circumstances to determine whether coercive police activity produced the confession. The determination must be made by the judge -- not the jury. Traylor at 964. The State has the burden to prove by a preponderance of the evidence that the confession was freely and voluntarily given. Thompson v. State, 548 So. 2d 198,

204 (Fla. 1989); DeConingh v. State, 433 So. 2d 501, 503 (Fla. 1983).

A trial judge's ruling on a motion to suppress a confession presents mixed questions of fact and law for the reviewing court. Ramirez v. State, 739 So. 2d 568 (Fla. 1999), cert. denied, 145 L. Ed. 2d 841 (2000); Rosenquist v. State, 769 So. 2d 1051 (Fla. 2d DCA 2000). While the trial court's factual findings are entitled to deference, the appellate court reviews application of the law to the facts using a de novo standard. Rosenquist, 769 So. 2d at 1052; Hines v. State, 737 So. 2d 1182 (Fla. 1st DCA 1999).

Micah Nelson filed a Motion to Suppress Statements and Admissions and the evidence derived therefrom, alleging coercive police tactics. An evidentiary hearing was held on September 30, 1999 (3/454-95; 4/496-563), and November 4, 1999. (4/611-65; 5/666)

At the hearing, Sergeant John Robinson, Avon Park Police, testified that, on Monday, November 17, 1997, at 10:30 p.m., he was called to 24 W. Palmetto Street where an elderly female, Virginia Brace, 78, and her car, were missing. The victim lived alone and was hard of hearing. Her purse was on the table and nothing else was missing from her residence. The car was found on Valencia Drive in the Avon Lakes area where there were not a lot of houses. The defendant, Micah Nelson, was found asleep in the vehicle about 6:30 that afternoon by Deputy Pope, Highlands County Sheriff's Office. He had been driven to his sister's house. (3/454-60)

After midnight, Sergeant Robinson went to see the defendant at his sister's house at 17B E Adams Street in Avon Park. Deputy Pope was already there. Robinson talked with Nelson who was sitting in

the back seat of Pope's patrol car when he arrived. Nelson agreed to talk with him at the Avon Park Police station so Robinson drove him there. (3/461-65) When they arrived, Nelson was advised of his Miranda rights from a form, and told that he was not under arrest; did not have to give a statement; and was free to leave. Nelson read and signed a Miranda rights form. (3/467-68)

Detectives Burke and Robinson interviewed Nelson, starting at 1:30 a.m. and ending at 3 a.m. The interview was taped. (3/468-471) Nelson told them he knew Ms. Brace; that his mother had known her for years; and that she loaned him the car. He borrowed it between 4:00 and 5:00 on Sunday evening, Nov. 16, 1997. He drove to Polk County to find a girlfriend, got tired on the return trip, and, because he was familiar with the area where the car was found, he stopped and slept in the car there. (3/473-75)

Nelson was soft spoken; kept his hands up around his face; and was hard to understand him at times. He seemed withdrawn and kept his head down a lot. He was cooperative and did not refuse to answer any questions, but Robinson did not believe him. The officers told him his story didn't make sense. For example, he went to sleep only two miles from his home; and there were discrepancies in the time frame. (3/476-78)

Robinson briefed his superior, Commander Mercurio, and Nelson took another break. Mercurio and Robinson went back to talk with Nelson again. This time they did not tape the interrogation. Although they went over same things, Nelson became a little upset. He said he didn't know why they asked him the same questions over and over. He said he was telling the truth. (3/478-82)

Robinson was going to take Nelson back to his sister's house, but Commander Mercurio called on the radio and asked them to return to the police department. Nelson agreed and they returned to the station at 5:00 a.m. Nelson waited with Detective Burke while Sgt. Robinson spoke with Mercurio. An assistant state attorney, the sheriff, and Nelson's probation officer were there, and had decided they had enough information to charge Nelson with theft of the car. Nelson was on probation and had left the county with the car. At 5:45, Robinson returned to the interview room and explained to Nelson that his probation officer was there and that he had left the county [in violation of his probation]. (3/487-90)

Robinson left the room briefly and, when he returned at 6:00 a.m., Nelson said he wanted to tell him something. He said he had lied about the job he had, and that the car was stolen. He said he wanted to tell the truth. Robinson got Commander Mercurio, and took an oral statement from 6:00 to 7:00 a.m. (3/490-91) Nelson told them he saw several black males sitting on Ms. Brace's car. They let him drive the car to Sebring. (3/491-93) Nelson had his head down, started to slouch and seemed less confident. When Mercurio said, "You know where she is, don't you," Nelson nodded his head "yes" but did not respond verbally. Mercurio didn't press it because Nelson seemed upset and was crying. (3/492-95)

The officers charged Nelson with grand theft and burglary of the car and arrested him about 7:00 a.m. Nelson was handcuffed at that time and was no longer free to leave. About 8:20 a.m., he was transported to the Highlands County Sheriff's office. Prior to his departure, the officers asked him to help find Ms. Brace. He hung

his head and started to cry again but maintained that he didn't know. He agreed to take a polygraph. When they asked if he knew what happened to Brace, he nodded his head but said nothing. They told him they would talk after he rested. (4/496-99)

Robinson had no further contact with Nelson until twelve hours later, at about 9:00 p.m. In the meantime, they were notified that Nelson's fingerprints were found in Ms. Brace's bathroom. (4/500) Also, the victim's panties were rolled up in the bedding on her bed, her fire extinguisher had been used; and a tire iron with sand on it was found in her car. In addition, a witness had encountered a black male with her car in the Frostproof area of Polk County, stuck in an orange grove, and had felt a thud on the trunk. Grove workers helped him get the car out of the sand. (4/501-03)

Robinson met with Wayne Porter of FDLE about doing a polygraph test. Nelson was brought to the detective's bureau when Robinson arrived that night. He wore hand and leg restraints but they removed the handcuffs. The officers told Nelson they had some new information, but not what it was. Nelson still agreed to take the polygraph. 4/503-06) Robinson gave Nelson a new Miranda form which he read and signed. Nelson asked what would happen if he did not pass the polygraph and Robinson told him they would have to deal with that at the time. (4/506-08)

During the polygraph test, Robinson and Burke discussed their strategies.[20] They expected that Nelson would flunk the polygraph.

[20] Robinson said that the strategy they discussed was to put the evidence on the chalk board to try to get Nelson to tell them the truth. (3/554-56) Robinson decided to ask Nelson whom he loved and to talk about the victim's family on the spur of

At 10:55 p.m., Porter told them that the polygraph indicated that Nelson was deceptive about the location of Ms. Brace. When Detectives Robinson and Burke asked Nelson how the polygraph went, he said, "not so good" or "the guy said I didn't pass." (4/508-16) He said he did not pass the question about where the victim was. When Robinson asked if he knew, he did not respond; he said he was mad at Porter because Porter said he didn't pass the polygraph. He said he had not been in Polk County. (4/517-19)

Micah Nelson told Robinson he was tired.[21] They took a very short break -- just a few minutes. The detectives then confronted Nelson with a chalk or marker board ("pro and con board") where they had listed evidence against him, and what he had lied about, including the polygraph.[22] On the other side of the chalk board, they listed positive things like honesty, cooperation, compassion, and his help finding the victim. (4/513, 515, 521) Nelson looked at the board for about a minute and said, "It's over isn't it? It's over isn't it?" Robinson said, "Yes, Mike, it's over." (4/521)

Detective Robinson told Nelson it would help if he would be honest about the body. Nelson said, "I'm in a lot of trouble, ain't I?" Robinson agreed that it did not look good and told him

---

moment but he had used that technique before. (4/559-60)

[21] Detective Burke testified that Robinson said something to the effect that they were all tired; that they understood. Sometime after that, Nelson was shown the chalk board. (4/662) During their breaks, Nelson rested in the interview room with his head on the desk, but did not sleep. (4/544-45)

[22] On the chalk board, Robinson wrote, "Other DNA evidence located in victim's home," but nothing specific as to what DNA. Robinson was thinking about the linens. (4/562)

that he needed to tell the truth. Robinson asked Nelson who he loved and Nelson said that he loved his sister, Judy. Robinson told him that the victim's family was worried and wanted to find Ms. Brace and asked him if his sister, Judy, were missing, wouldn't he want the police to find her and wouldn't he be mad if the perpetrator would not tell where she was. If she was dead, he should help find her so they could give her a proper burial just like he would expect if Judy were killed. Nelson "teared up" when he spoke of Ms. Brace. Robinson put his hand on Nelson's back and told him it would be ok, to just tell them where she was so they could "end this," and that he would feel better if he told them. Robinson told Nelson to relax and he left to go to the bathroom. Detective Burke was with Nelson.[23] (4/522-26)

A few minutes later, at 11:30 pm, Burke opened the door and told Robinson that Nelson was going to show them where the victim was. He said Nelson had spontaneously told them she was at the road between Frostproof and Ft. Meade. Nelson was crying and had agreed to ride with them to the location where she was. (4/526-28)

They got in the car and Nelson directed them where to go. It took about half an hour. Part way there, Nelson said he wanted to speak with Burke and Robinson alone so Officer Leftbridge got out of the cruiser and rode with Porter who was following them. Nelson

---

[23] Burke also testified that Robinson asked Nelson if he had a relative or someone he loved. He asked, if something happened to her, how would you feel? Nelson said he would be mad and would want to find her. (4/639) Burke thought this was before they confronted Nelson with the blackboard but was not sure. He did not recall discussing the "relative tactic" before-hand, but was not surprised when Robinson used the tactic. (4/660-62)

said, "this isn't going to look good for me, is it?" Detective Robinson told him it would look better than his not telling them where to find Ms. Brace. (4/528-29)

Nelson pointed out a grove where the body was located. He started shaking and crying and he pointed and said, "She's down there. I'm not going down there. You're not going to make me go down there are you?" He appeared scared. Robinson told him he did not have to go, so just Robinson and Porter went down the row and found the body. They left after about 20 minutes time, leaving other officers to secure the crime scene. (4/530-31)

Detectives Robinson and Burke returned Nelson to the jail, let him smoke another cigarette, and went into an interview room. When Robinson asked what happened, Nelson said he was just "mad at the world, mad about life." He agreed to make a taped statement and to tell the truth about everything. (4/532-33)

Robinson and Burke took the statement beginning at 2:10 a.m. and ending at 2:40 a.m. on the 19th of November, 1997. Nelson spoke softly, mumbling sometimes, but showed little emotion. He slouched and had little eye contact. He told them that his actions were not the result of alcohol or drugs, and they did not observe any such influence. Robinson felt that Nelson was being truthful during the final taped statement except that he denied the sexual assault. This was his last contact with Nelson. (4/534-42)

Detective Daniel Burke, also a detective with Avon Park, testified at the suppression hearing. His testimony was almost identical to that of Detective Robinson. Commander Mercurio directed him to go to police station and participate in an

interview with Detective Robinson and defendant Micah Nelson. (4/614-18) Although Robinson did most of the talking, they both witnessed Nelson's written waiver of rights. Detective Burke had no conversation with Nelson that was not taped. (4/619-21)

Detective Burke again witnessed Nelson's written waiver of rights at 9:00 p.m. on November 18th. He and Robinson concluded that Nelson had not been honest with them and would not pass the polygraph. They had also concluded that the victim was probably deceased. They discussed what was best approach to use to get Nelson to tell them where Ms. Brace was. They made a blackboard and covered it so that Nelson would not see it when he returned. On the list, they put "DNA found in house," even though they had not had any DNA work done yet. When Porter told them the polygraph indicated deception, Nelson seemed angry. When asked whether he had told the truth, he did not answer. (4/628-35, 655-58)

Robinson left the room briefly. Nelson leaned forward and said, "Do you know the road that runs from Frostproof to Ft. Meade?" By nodding, Nelson admitted that the victim was there and agreed to take them there. Several times Nelson appeared to be crying but kept his head down so that it was hard to tell. He seemed a sadder and more emotional. (4/638-41)

They took Nelson by car to find the body, with several units following. Nelson seemed uncomfortable and asked them to tell the other units to back off. They asked the other officers not to follow so closely. When they arrived, Robinson and Mercurio went down the row of orange trees and found the body where Nelson indicated. Nelson seemed a little distraught and was crying.

Burke put his hand on Nelson's shoulder and said, "It's all right, Mike." He did not touch Nelson any other time. (4/642-44, 650-51)

When they returned to Highlands County, Nelson agreed to make another statement. Although they had no discussion of the crime while in the car, he thought they probably did preliminary some questioning before taped statement (maybe 15-20 minutes) but did not discuss anything off tape that was not also on tape.[24] They made no threats or promises. Nelson seemed somewhat relieved during his final statement. (4/645-50)

To be admissible, a confession must be free and voluntary. It "must not be extracted by any sort of threat or violence . . . for the law cannot measure the force of the influence used, or decide its effect upon the mind of the prisoner. Bram v. United States, 168 U.S. 532, 542-43 (1897); see also Colorado v. Connelly, 479 U.S. 157 (1986) (due process forbids not only physical coercion but psychological persuasion); Moran v. Burbine, 475 U.S. 412 (1986); Brewer v. State, 386 So. 2d 232 (Fla. 1980) (quoting from Bram). This means that the police may not obtain a confession by coercion and may not utilize techniques calculated to exert improper influence. Brewer, 386 So. 2d 232 (defendant threatened with electric chair). The burden of proof is on the State to show that the confession was voluntary. Lego v. Twomey, 404 U.S. 477 (1972). If Nelson's confession was based, in any way, on the officers' inducements, it was not voluntary.

[24] Detective Robinson said they did no preliminary questioning before they started taping the interview. (4/534)

In Brewer v. Williams, 430 U.S. 387 (1977), the officers persuaded the defendant to tell them where the victim's body was located so that he could have a "Christian burial," thus taking advantage of the defendant's religious beliefs. Here, Robinson used similar coercion by asking Nelson whether, if it were his sister who was missing, he would want to find her and give her a proper burial. This Court has characterized the "Christian burial technique" as a "blatantly coercive and deceptive ploy" when used in police interrogation. Roman v. State, 475 So. 2d 1228 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986). Accord Hudson v. State, 538 So. 2d 829 (Fla. 1989).

When presented with a police interrogation which used religion to induce a confession, the court in Carley v. State, 739 So. 2d 1046 (Miss. App. 1999) wrote:

> Exhortations to tell the truth and adhere to religious teachings are the equivalent of inducements which render a statement inadmissible.

739 So. 2d at 1050. Noting that the defendant (like Nelson) had previously maintained his innocence, the Carley court held that the police overreaching procured an involuntary confession.

This Court should further observe that Detective Robinson considered his psychological tactic to be simply a trick of the trade. (4/559-60) Burke did not recall discussing the "relative tactic" beforehand, but was not surprised when Robinson used the tactic. (4/660-62)

* * * * *

In Davis v. State, 698 So. 2d 1182, 1188 (Fla. 1997), this Court held that, "once Miranda has been complied with, the better

test for admissibility of statements made in subsequent custodial interrogations is whether the statements were given voluntarily." To find a confession involuntary within the meaning of the Fourteenth Amendment, there must be coercive police conduct. Colorado v. Connelly, 479 U.S. 157 (1986). Police coercion can be physical or psychological. Rickard v. State, 508 So. 2d 736, 737 (Fla. 2d DCA 1987). Whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained. Davis, 698 So. 2d at 1189; Ramirez v. State, 739 So. 2d 568 (Fla. 1999), cert. denied, 145 L. Ed. 2d 841 (2000).

Many factors have been considered by the courts in analyzing the totality of the circumstances. These factors include: whether the statements were given in the coercive atmosphere of a station-house setting, Drake v. State, 441 So. 2d 1079, 1081 (Fla. 1983); whether the police suggested the details of the crime to the suspect, Langston v. State, 448 So. 2d 534, 535 (Fla. 2d DCA 1984); whether psychological coercion was applied, DeConingh v. State, 433 So. 2d 501, 503 (Fla. 1983), whether the police made threats, promised leniency, or made statements calculated to delude the suspect as to his or her true position, Brewer v. State, 386 So. 2d 232, 237 (Fla. 1980); and whether the police exerted undue influence or made direct or implied promises of benefits, Rickard, 508 So. 2d at 737. The accused's emotional condition is an important factor in determining whether the statements were voluntary. Id. Although one particular action may not invalidate a confession, when two or more actions are used to coerce a

suspect, courts more readily find the confession involuntary. Sawyer v. State, 561 So. 2d 278, 282-83 (Fla. 2d DCA 1990).

All of the above factors apply to this case. All of the statements were taken in the coercive atmosphere of the police department; psychological coercion was applied by the officers during their questioning. Nelson was awakened and taken to the police station about midnight. He was questioned off and on all night. Although he was given breaks, he could not sleep but could only put his head on the desk. At times he was distraught and tearful. He held his head down and did not look at the officers.

In the morning, he was taken to the jail in Sebring, and allowed to eat and rest during the day. Whether he got much sleep is unknown although, certainly, much of the morning was consumed with book-in, fingerprinting, and photographing. About 9:00 that night, Officers Robinson and Burke went to the jail with the FDLE polygraph examiner and Nelson took a polygraph test, which he did not pass. At all times, he was cooperative and answered the officers' questions, although not always truthfully.

At this point, the "tactics" began. The officers made a marker or chalk board with two columns -- a "pro and con" board. They covered it until they began interrogating Nelson again. The officers told Nelson that the polygraph showed that he was not telling the truth about whether he knew where Ms. Brace was. Nelson was angry at Porter, who administered the polygraph test.

Micah Nelson told Robinson he was tired. According to Burke, Robinson said something to effect that they were all tired, and that they understood. They took a very short break -- just a few

minutes. Robinson then unveiled the chalk board and explained to Nelson that one side showed all the evidence they had against him, and the other side showed the things in his favor. Detective Burke admitted that they included DNA evidence on their list of "cons," although they had not yet done any DNA testing. They also included evidence that his fingerprints had been found. In the "pro" column, they listed positive things like his being honest, cooperating, helping find the victim, and his compassion. Nelson looked at the board for about a minute and said, "It's over isn't it? It's over isn't it?" Robinson said, "Yes, Mike, it's over." (4/513-15, 521)

It is unclear whether the second tactic was used before or after the chalk board. Detective Robinson's testimony indicated it was afterwards. Robinson asked Nelson who he loved and Nelson said that he loved his sister, Judy. Robinson told him that the victim's family was worried and wanted to find Ms. Brace and asked him if his Judy were missing, wouldn't he want the police to find her and wouldn't he be mad if the perpetrator would not tell where she was. Nelson said he would be mad and want to find her. Robinson told him that, if Ms. Brace was dead, he should help them find her so they could give her a proper burial just like he would expect if Judy were killed. Burke thought this was before they confronted Nelson with the blackboard but was not sure. He did not recall discussing the "relative tactic" beforehand, but was not surprised when Robinson used the tactic. When Nelson began to cry, Robinson put his hand on Nelson's back and told him it would be ok if he just told them where she was, and that he would feel better.

Robinson told Nelson to relax and left Detective Burke was with Nelson briefly. A few minutes later, Burke told Robinson that Nelson was going to show them where the victim was. Nelson had spontaneously told him she was at the road between Frostproof and Ft. Meade. Nelson was crying and had agreed to ride with them to the location where she was. (4/526-28)

Robinson's questioning as to whether Micah loved someone, and whether he would want her to be found if she were murdered was a tactic used because it was reasonably likely to elicit an incriminating response from Hess based on his emotional and mental state. See Arizona v. Mauro, 481 U.S. 520, 526-27 (1987); Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980); Brewer v. Williams, 430 U.S. 387 (1977) (Christian burial speech); Talley v. State, 596 So. 2d 957 (Fla. 1992); Glover v. State, 677 So. 2d 374 (Fla. 4th DCA 1996). The tactic might well be compared to the Christian burial speech in Brewer v. Williams, 430 U.S. 387 (1977).

Robinson told Nelson that he needed to tell the truth because he want was the perpetrator to do so if Judy was killed so that they could give her a proper burial. He played on Nelson's exhaustion, his obvious distress, and his insecurity to get Nelson to admit to the murder and help them find the body. Both officers at some point put their hand on Nelson's shoulder and told him it would be all right -- Robinson in the interview room and Burke at the orange grove. Because Nelson was tired, alone and emotional, these gestures were intended to and did give him unfounded expectation that they were trying to help him -- and that all he needed to do was to tell them the truth and everything would be all

right. The Supreme Court has recognized that the proverbial "third degree" has been replaced by more subtle psychological techniques, with more emphasis on the mental makeup of the individual. Thus, Courts have found the defendant's mental condition more significant in determining voluntariness. See Spano v. New York, 360 U.S. 315 (1959). The relationship of a mental condition to police coercion must be considered. See Colorado v. Connelly, 479 U.S. 157 (1986).

In this case, law enforcement could tell Nelson was emotionally exhausted because he was crying and would not look at them. He held his head in his hands. Nelson was chronically depressed; suffered headaches and blackouts; had a mental or learning disorder since childhood. Although the officers were not aware of all of these facts, they could tell by Nelson's emotional state that he would be susceptible to their tactics.

An erroneously admitted confession is subject to harmless error analysis. Traylor, 596 So. 2d at 973; State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In this case, however, the error was clearly harmful. All of the details of this crime, including what the prosecutor used to argue several of the aggravating factors, were based on what Nelson told the officers. Thus, the court erred by not granting Nelson's suppression motion. Under the totality of the circumstances, Nelson's inculpatory statements to law enforcement were involuntary, and were admitted in violation of the Fifth Amendment protection against self-incrimination, and Article I, section 9 of the Florida Constitution.

ISSUE II

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THAT NELSON KILLED THE VICTIM TO AVOID A LAWFUL ARREST, BECAUSE THE EVIDENCE FAILED TO PROVE THIS AGGRAVATOR BEYOND A REASONABLE DOUBT.

The State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). When relying on circumstantial evidence to find an aggravating circumstance, the evidence must be inconsistent with any reasonable hypothesis which might negate the aggravator. Id. In this case, the trial court ignored the most likely motive for this homicide in finding that the crime was committed for the purpose of avoiding or preventing a lawful arrest, pursuant to section 921.141(5)(e), Florida Statutes.

A trial court's finding of an aggravator is reviewed under the substantial competent evidence standard. Mansfield v. State, 758 So. 2d 636 (Fla. 2000). The "avoid arrest" aggravator is typically found in cases in which the defendant killed a law enforcement officer. See e.g. Burns v. State,609 So. 2d 600 (Fla. 1992). When, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must clearly show that the **sole or dominant motive** for the killing was the elimination of a witness. Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Davis v. State, 604 So. 2d 794 (Fla. 1992); Geralds, 601 So. 2d 1157; Jackson v. State, 599 So. 2d 103 (Fla. 1992); Perry v. State, 522 So. 2d 817 (Fla. 1988); Rogers v. State, 511

So. 2d 526 (Fla. 1987); Floyd v. State, 497 So. 2d 1211 (Fla. 1986). Even where the victim and the perpetrator knew each other, which was not the case here, this fact alone is not enough to establish the aggravator in question. Robertson, 611 So. 2d 1228; Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Floyd, 497 So. 2d 1211. If this aggravator was applied in every case in which the defendant was afraid the victim might identify him, thus leading to his arrest, this factor would apply to many if not most murders, and would not serve the narrowing purpose of an aggravating factor.

The trial judge instructed the jury on this aggravator and found it proved beyond a reasonable doubt. He also gave it great weight. He wrote the following in his sentencing order:

> It has been long held "that in order to establish this aggravator, where the victim is not in law enforcement, the state must show that the sole, or dominant, motive for the murder was the elimination of the witness." Perry v. State, 522 So. 2d 817, 820 (Fla. 1988). However,this aggravator may be proven by circumstantial evidence.
>
> The Supreme Court has upheld this aggravating factor in cases similar to this one where the victim is abducted from the scene of the initial crime and transported to a different location where she is killed. Gore v. State, 706 So. 2d 1328 (Fla. 1997), Preston v. State, 607 So. 2d 404 (Fla. 1992), Swafford v. State, 533 So. 2d 270 (Fla. 1988) Cave v. State, 467 So. 2d 180 (Fla. 1985), Martin v. State, 420 So. 2d 583 (Fla. 1982).
>
> There are a number of factors that indicate this was the Defendant's sole motive:
>
> (1) The Defendant in his confession to the police said he killed the victim because he was afraid that Virginia Brace could identify him, "because she saw his face."
>
> (2) Once he removed her from her home and placed her in the trunk of her car, she was no longer a threat to his escape.
>
> (3) The defendant placed the victim in the trunk of her car and drove her around over six hours. Thus he had ample

opportunity to release the victim or simply leave her in the trunk. See Alton v. State, 723 So. 2d 148, 160 (Fla. 1998).

(4) The victim was abducted from her home and transported to an isolated area where she was killed.

Therefore, the only reasonable inference to be drawn from the facts of this case is the Defendant kidnapped Virginia Brace and took her to a remove area in order to eliminate the sole witness to this crime.

This aggravating factor has been proven beyond a reasonable doubt and is given great weight.

The evidence adduced at Nelson's trial was not sufficient to satisfy the standards for finding the avoid arrest aggravator. The evidence is at least as consistent with an alternative reason for the killing -- that the situation simply got out of hand, Nelson was scared, and, because of his mental instability, was not able to evaluate the situation and did not know what to do. When Officer Robinson first asked him why this happened, Nelson told him that he was just "mad at the world; mad about his life." (21/2458-60)

The trial judge's first circumstance on which he based his finding of this aggravator was that Nelson confessed to police that he killed the victim because she had seen his face. It may be noted, however, that many of Nelson's statements were only his acquiescence to suggestions made by the police, rather than his own ideas. Nelson hung his head and often did not respond, in which case, law enforcement officers made suggestions as to which he could just nod his head. The responses Nelson did make were mostly inaudible, after which an officer repeated what he said or what he thought or surmised Nelson said. Whether Nelson said he killed the victim so that she could not identify him, or whether this was an

officer's suggestion, is unclear. Nelson may have adopted this reason because he could think of no other reason for what he did. Although Nelson did say that Ms. Brace could see him from the bathroom light, he was just answering the officer's query as to how she could have seen his face in the dark house. (21/2482-83)

Nelson gave other reasons inconsistent with witness elimination. During his taped interview when he and the officers returned from the orange grove where Ms. Brace's body was found, which was the first time Nelson told the truth, Sergeant Robinson asked him why this had happened. Nelson said, "I'm just mad, mad at the world, mad about [my] life." (21/2458-60) This first response was most likely true because it was spontaneous, and not induced by suggestions from police officers.

Nelson told the police that, at the victim's apartment, he was trying to stop Ms. Brace from screaming so that he could think of what to do. She started to scream again and Nelson "just lost it." When he took her from the house, he was not thinking clearly and was scared. (22/2614) Her screaming made him angry. Thus, anger may well have been the dominant motive for the murder in this case.

Nelson told Sergeant Robinson that he first tried to choke the victim until she passed out in the grove, so that he could leave. (22/2614) This suggests that he was not going to kill her, but that the situation got out-of-hand, or perhaps he became angry when she would not pass out and impulsively killed her. He may also have vacillated about what to do with her, even after driving to Polk County. Nelson told the officers that both he and Ms. Brace were scared when they walked into the grove. Nelson's reaction

when confronted by the evidence of what he had done, when he went with the officers to find the body, shows clearly that he was horrified by what he had done. At one point, he told the officer that he killed the victim because he got scared. (21/2488)

The judge's second, third and fourth reasons for finding this aggravator are similar. He noted that, once Nelson removed the victim from her home and put her in his car, she was no longer a threat to his escape. This only suggests that Nelson did not kill the victim so that he could escape, and does not eliminate other motives or even no motive at all.[25]

The third reason was that the defendant drove the victim around in the trunk of her car, over six hours and, thus, had ample opportunity to release her or simply leave her in the trunk. This really has nothing to do with **why** he killed the victim. In most murder cases, the defendant had an opportunity to let the victim live rather than to kill him or her. Although the trial court cited Alton, 723 So. 2d 148, 160, in which the robbery victim was placed in the trunk of a defendant's car, the situation in Alton was different. There, two men robbed the victim, abducted him from his car, drove him directly to the woods and shot him. Their statements to law enforcement made it apparent that they shot him to eliminate the sole witness. No other motive was suggested.

[25] In finding the CCP aggravating factor, the judge opined that Nelson intended to kill the victim when he took her from her house. (7/1076) This speculation is not supported by the evidence. If he had intended to kill her, he would not have driven around for hours before driving to Polk County.

The court's final reason, that the victim was abducted from her home and transported to an isolated area where she was killed, is more or less the same as the last reason, and does not show that Nelson killed the victim to avoid arrest. Although it suggests that the defendant did not want the victim to be found right away, it does not mean that the **primary or dominant motive** for the murder was witness elimination. Moreover, it may have been a secondary motive, as in a case where the defendant kills someone because of hatred or revenge, or because he is mentally ill and on drugs, but also does not want to be caught. See, e.g., Douglas v. State, 575 So. 2d 165 (Fla. 1991) (defendant took victim to remote location to torture and kill him as revenge for taking old girlfriend, and not to avoid arrest); Doyle v. State, 460 So. 2d 353, 358 (Fla. 1984) (murder of rape victim too often results from same hostile-aggressive impulses that caused rape, rather than reasoned act motivated primarily by desire to avoid arrest).

Nelson had mental problems. He told Dr. Dee he was visually hallucinating on the day he killed the victim. (25/3182) On other occasions, he had suffered "command" auditory hallucinations, which were verified by jail records. Command hallucinations ordered him to kill himself when he tried to commit suicide in jail. (25/3153-56) Perhaps he had command hallucinations telling him to kill the victim. He would not have wanted to tell the officers he killed the victim because of a voice in his head.[26] If Nelson killed the

[26] Nelson told Dr. Dee that he had not told anyone about his hallucinations because it would make him look stupid. (25/3153-56)

victim because he was hearing voices, it would not be a witness-elimination murder. See Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987). As this Court noted in Jackson v. State, 502 So. 2d 409 (Fla. 1986), where there is more than one possible explanation for the homicide, the witness elimination aggravator has not been proven beyond a reasonable doubt.

In Jennings v. State, 718 So. 2d 144 (Fla. 1998), the trial court upheld the "avoid arrest" aggravator primarily because the defendant knew and had worked with the three victims, at a Cracker Barrell Restaurant. He and the codefendant did not wear masks and knew the three victims would identify them. The Court noted, however, that this, by itself, was insufficient to support the avoid arrest aggravator. See Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1997), cert. denied, 523 U.S. 1109 (1998). In Jennings, however, the defendant had expressed his desire to not leave witnesses, and had bound the victims and confined them to a freezer. More telling was the fact that the Appellant specifically disliked one of the victims so may have killed her for that reason; then killed the other two victims because they witnessed the first killing.

Our case is very different. Ms. Brace did not know Micah Nelson. Because she was elderly, was not wearing her glasses, and was surprised by his sudden appearance, it was unlikely that she could have identified him. Moreover, had he killed her in her home rather than taking her car, his risk of being caught would not have been as great. Rather than disposing of the car, Nelson went to sleep in it, thus negating any reasonable intent to avoid arrest.

Nelson's actions suggest that, because he did not know what to do with the car, he just went to sleep in it.

In Jennings, the defendant and co-defendant were already armed with the knives used to kill the three victims. Conversely, Nelson did not have a weapon. He did not intend to commit a burglary, rape or any other crime until he observed the victim's open window while he was out walking, disturbed and angry about his life. If he decided to kill the victim while driving around, he could have stopped somewhere to get a weapon -- at least a knife. Instead, when he could not get the victim to pass out, he used the only items available -- items he found in the victim's car.

In Doyle, 460 So. 2d 353, the victim was sexually battered and strangled. Even though Doyle was facing a five-year suspended sentence in another case if the rape had been reported, this Court held that the avoid arrest aggravator had not been proven beyond a reasonable doubt. "It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection." 460 So. 2d at 358.

This was the case here where Nelson was mad at the world and his life. (21/2458-60) His hostile-aggressive state of mind, and resulting inability to think clearly, coupled with his evident confusion as to what course of action to take after assaulting the victim, caused him to eventually kill her.

Dr. Dee tried to establish why Micah had killed Ms. Brace but Micah just did not know. He could not come up with a reason for

what he had done. (25/3182-84) It just happened. That he was mad about his situation in life is supported by Dr. Dee's description of the depression Nelson suffered since he was a child. (25/3139) Anger is almost always a component of depression even if not diagnosed. Nelson told the officers he was angry when the victim would not stop screaming and he "lost it." (21/2464-74)

Additionally, Nelson had been raped by inmates in prison, from which he was just released several weeks before this crime. He left home the night he entered Ms. Brace's home after becoming tired of his brother Calvin "playing around." Nelson told Dr. Dee that the inmates at Lancaster Correctional harassed him because he was younger and smaller than they were, by playing around, or "horseplay," which included pulling down his pants, or making him wrestle, and otherwise humiliating him. (25/3151) Perhaps Nelson became silently enraged when Calvin engaged in similar activities, could not get this out of his mind, and began hallucinating about getting even with those who inflicted this humiliation on him. Instead, however, he released his anger on an innocent woman who encountered and who became an inappropriate target.

The barebones jury instruction the court gave, which merely tracked the statutory language found in section 921.141(5)(e), was woefully inadequate to apprise the jury of what is required for the aggravator to be proven. (6/3341) The jurors were not told that, when the victim was not a police officer, the defendant's primary or dominant motive must be to eliminate a witness; or that the State's proof must be very strong. The instruction utterly failed to guide and channel the jurors' consideration of this circumstance

pursuant to the narrowing construction this Court has placed upon it. Therefore, the instruction failed to pass muster under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21, and 22 of the Constitution of the State of Florida.

In Espinosa v. Florida, 505 U.S. 1079 (1992), the Supreme Court condemned Florida's former standard jury instruction on the especially heinous, atrocious, or cruel aggravating circumstance and held that neither the jury nor the judge can weigh invalid aggravating circumstances. The Court explicitly rejected this Court's reasoning in Smalley v. State, 546 So. 720, 22 (Fla. 1989), that because the jury does not actually sentence the defendant, they need not receive specific penalty phase instructions. In Jackson v. State, 648 So. 2d 85, 92 (Fla. 1994), this Court found Florida's Standard Jury Instruction on the "cold, calculated and premeditated" (CCP) aggravator unconstitutional because it did not define the terminology. The logic of Espinosa compels the conclusion that the jury must be almost as informed on the law governing the penalty phase considerations as the trial judge. If the jury is ignorant of complete definitions of aggravators, then this Court cannot find the jury recommendation reliable.

Accordingly, remand for a new penalty phase before a new jury is mandated. Bonifay v. State, 626 So. 2d 1310 (Fla. 1993). Because the judge erred by finding the "avoid arrest" aggravator, the sentence must be vacated and the case remanded for resentencing.

ISSUE III

THE TRIAL COURT ERRED BY FINDING THAT THE HOMICIDES WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

This Court reviews the record "to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding". Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). A trial court's finding of an aggravator is reviewed under the substantial competent evidence standard. Mansfield v. State, 758 So. 2d 636 (Fla. 2000). The State must prove this aggravator beyond a reasonable doubt. Such proof cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1982), after remand 674 So.2d 96 (Fla. 1996); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982).

The "cold, calculated and premeditated" aggravating factor (CCP) was intended to separate the ordinary defendant convicted of premeditated murder from the cold, vicious person who has not the least bit of excuse, not the least bit of moral explanation, not the least bit of emotional reason for the killing. It is reserved primarily for execution or contract murders or witness elimination killings. Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987). Nelson was not an unemotional person or a cold-blooded killer; he had no violent criminal history and no evidence showed that he was ever a violent person. He was depressed and hallucinating.

"Cold" is connected to "calculated" and "premeditated" by the connector "**and**" rather than "or" as in "heinous, atrocious, or cruel." § 921.141(5)(h),(i) Fla. Stat. (1997). This means that, to establish this aggravator, the homicide **must meet each element of the definition**. The judge and jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotion, frenzy, panic, or rage (cold), **and** that the defendant had a careful plan or prearranged design to commit murder before the fatal incident began (calculated) **and** that he exhibited heightened premeditation **and** had no pretense of moral or legal justification. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). When circumstantial evidence is considered, the defense is entitled to any reasonable inference that negates the CCP aggravator. E.g., Geralds, 601 So. 2d 1157.

The State failed to prove that Nelson's premeditation was heightened because the evidence showed that he had not decided to kill the victim while he was driving around Avon Park, or even in Polk County. The State failed even further to prove that the killing was cold and calculated. It was not cold because Nelson was emotionally upset, scared and hallucinating. It was not calculated because he obviously did not know what he was doing. He drove around for hours in confusion, got stuck in the sand, did not procure a weapon, and did not even know how to kill the victim. If the homicide were calculated, he would have been prepared with a means of killing her, and would not have had to run back and forth to her car looking for a weapon. For these reasons, the crime cannot be found to be cold, calculated and premeditated.

Heightened Premeditation

"Heightened premeditation" requires more than the premeditation needed for a first-degree murder conviction. Douglas v. State, 575 So. 2d 165, 166 (Fla. 1991); Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). Heightened premeditation is premeditation that is cold, calculated, and without pretense of legal or moral justification. Id. Obviously, it is "above" or "more than" the premeditation needed for a first-degree murder conviction. Does heightened mean for a longer period of time, of greater intensity or, as suggested by Jent, 408 So. 2d at 1032; Combs v. State, 403 So. 2d 418 (Fla. 1981), cert denied, 456 U.S. 984 (1982); and Douglas v. State, 575 So. 2d 165, 166 (Fla. 1991), premeditation that is cold, calculated, and without pretense of legal or moral justification?

When CCP was first added to the list of statutory aggravating factors, this Court stated specifically that, to establish this aggravating factor, the state must prove beyond a reasonable doubt "the elements of the premeditation aggravating factor -- 'cold, calculated . . . and without pretense of legal or moral justification.'" Jent, 408 So. 2d at 1032. In Douglas, 575 So. 2d 165, this Court stated that section 921.141(5)(i) "limits the use of premeditation to those cases where the state proves beyond a reasonable doubt that the premeditation was "cold, calculated . . . and without any pretense of moral or legal justification." Id. at 166 (citing Jent and Combs). Accordingly, a finding of "heightened premeditation" is not based on the amount of time that passed prior to the actual murder. Instead, "heightened

premeditation" is premeditation that was cold, calculated, and without pretense of legal or moral justification.

Even if time were significant in establishing this aggravator, the evidence does not show that Nelson premeditated the homicide for a long time. No evidence shows when he decided to commit the murder. Although he drove around for several hours with the victim in the trunk of her car, this does not prove that he was reflecting on what he was doing. No evidence showed that Nelson intended to kill Ms. Brace before he drove to Polk County and, even then, the evidence is conflicting as to whether he had a fully formed intent to kill at that time.

Cold

The killer's state of mind is the essence of CCP. Mason v. State, 438 So. 2d 374 (Fla.), cert. denied, 465 U.S. 1051 (1983); Hill v. State, 422 So. 2d 816 (Fla. 1982), cert. denied, 460 U.S. 1017 (1983), especially as to the "cold" factor. The State introduced no evidence of Nelson's state of mind at the time of the homicide, or even during events leading up to her death. The only evidence of his state of mind was Dr. Dee's testimony that Nelson was afraid, and was having hallucinations. (25/3182) The evidence showed clearly that Nelson was unarmed, scared, emotionally upset, and did not know what to do.

Dr. Dee testified that Nelson clearly suffered brain damage. He suspected that it resulted from his mother's alcoholism during pregnancy. (25/3188) Persons with cerebral damage are very impulsive and are unable to think things through. They do things that don't make sense because they are ill-considered. (For

example, Micah Nelson went to sleep in the victim's car where he was found the police.) Nelson told Dr. Dee he was having hallucinations when he went into victim's house. He was afraid. He knew it was impulsive and silly once inside. (25/3199) Nevertheless, he was unable to reflect on what to do next.

Brain damaged people generally don't deliberate, or do so very little. Instead, they act on impulse. (25/3201) Nelson raped the victim on impulse and, when she would not stop screaming, he impulsively took her with him in her car. He said that he took her because he did not know what to do. After he took her, he still did not know what to do. He had no plan. He was distressed and upset was is the opposite of "cold" and "calculated."

Nelson was on antidepressant and antipsychotic medications while in jail. Antidepressants elevate the mood and energize the person. Antipsychotic medications limit hallucinations. (25/3205) Nelson was not on these medications when he committed the crime. Although he had been diagnosed with depression as a child and adolescent, he had never received treated. At the time of the homicide, he was experiencing extreme, intense feelings associated with his mental disorders. According, he was not thinking clearly and, perhaps, at times, not at all.

"A rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988). Dr. Dee testified that anger is always a part of depression, even if it is not diagnosed. (25/3139) Nelson was mad about his situation in life. He told the officers he was angry when the victim would not stop screaming and he "lost it." (21/2464-74) Accordingly, if

Nelson killed the victim because he was scared and was so angry that he lost control -- either angry at the world in general, or because Ms. Brace would not pass out and be quiet, CCP is not supported by the evidence. See also Nibert v. State, 508 So. 2d 1 (Fla. 1987) ("stabbing frenzy" does not establish the CCP aggravator); Thompson v. State, 565 So.2d 1311 (Fla. 1990); Porter v. State, 564 So. 2d 1060 (Fla. 1990).

Calculated

CCP requires a coldblooded intent to kill which is more contemplative, methodical, and controlled than that necessary to sustain a first-degree murder conviction. Nibert, 508 So. 2d at 4; see also Preston v. State, 444 So. 2d 939, 946-47 (Fla. 1984) (CCP requires "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator.") The defendant must have had "a careful plan or prearranged design" to kill. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994).

In the case at hand, it is apparent that Nelson did not have a careful plan or prearranged design. The opposite is true. He climbed into the victim's house through the bathroom window for no reason other than that it was open. When he unexpectedly encountered the victim, he raped her. Terrified by what he had done and afraid the victim would call the police if he left, he took the victim with him. He then drove around aimlessly for hours because he did not know what to do. He had no plan. Thus, the evidence did not show that Nelson planned to commit the murder

before the crime began. See Thompson v. State, 565 So. 2d 1311 (Fla. 1990).

While driving around with the victim in the trunk of her car, Nelson was not reflecting on how to kill the victim, but on what to do, considering the situation in which he suddenly found himself. Dr. Dee testified that Nelson said that, while driving around with the victim in the trunk of her car, he stopped to get coffee and did not know what to do. (25/3202) This negates the "calculated" requirement of the CCP aggravating factor.

* * * * *

In his written sentencing order, the judge found that the murders were cold, calculated, and premeditated, and stated that,

> The Defendant removed the victim from her home in Highlands County and placed her in the trunk of her car. He had every intention of killing her when they left her house. He then drove her to a remote orange grove in Polk County. Sochor v. State, 619 So. 2d 285 (Fla. 1993). The Defendant got stuck in the soft sand in this orange grove and had to be pulled out by a grove worker. He told the police in his confession that had he not gotten stuck in the grove, he would have killed her at that location. The Defendant further demonstrated his heightened premeditation when he drove to another orange grove and parked on the clay road. He then drug or walked the victim 175 feet into the grove and killed her. Stano v. State, 619 So. 2d 285 (Fla. 1993).
>
> Finally, the Defendant made two trips back to the car to obtain weapons to kill Virginia Brace. Willacy v. State, 696 So. 2d 693, 694 (Fla. 1997).
>
> This aggravator was proven beyond a reasonable doubt and given great weight.

(7/1076) The judge focused upon the length of time involved and the fact that the victim was driven to a remote area.[27] Douglas v. State, 575 So. 2d 165 (Fla. 1991), is directly on point here.

In Douglas, the defendant's girlfriend had married another man while Douglas was in prison. When Douglas was released, the former girlfriend returned to him for awhile; then rejoined her husband. Eleven days later, the defendant, armed with a rifle, stopped the couple while they were driving and forced his way into their car. 575 So. 2d at 166. Having commandeered the vehicle, Douglas guided the driver along a lengthy route of dirt roads. At one point, the car became stuck and Douglas solicited assistance from workers at a nearby phosphate mine. Finally, they arrived at a remote location where Douglas ordered the couple to undress, and forced the couple to have sex at gunpoint. Afterwards, Douglas shattered the man's skull with the stock of his rifle, and fired several shots into his head. The woman remained with Douglas until her husband's body was found and the police questioned her.

The sentencing judge in Douglas found that the CCP aggravating circumstance was applicable. On appeal, a majority of this Court disagreed, holding that the passion, relationship, and circumstances leading up to the murder negated the finding that the murder was committed in a cold, calculated, and premeditated manner. 575 So. 2d at 167. The entire series of events took about

[27] The "remote location" is the same factor the judge focused on in finding the "avoid arrest" aggravator. Aggravating factors should be merged if based on the same facts.

four hours. 575 So. 2d at 169. See also, Farinas v. State, 569 So. 2d 425 (Fla. 1990) (kidnapping insufficient to prove CCP).

Speculation regarding a defendant's motives and plans cannot support the "cold, calculated and premeditated" aggravating factor. Thompson v. State, 456 So. 2d 444 (Fla. 1984). The burden is upon the state to prove, **beyond a reasonable doubt**, affirmative facts establishing the heightened degree of premeditation necessary to sustain this factor. Thompson, 456 So. 2d 444; Peavy v. State, 442 So. 2d 200, 202 (Fla. 1983). The burden is not on the defendant to prove that he lost control, acted in panic or for any other reason.

In this case, the trial judge speculated in his sentencing order that the defendant "had every intention of killing her when they left her house." (7/1076) This is absolutely not true, based on the evidence in the case. Nelson took the victim from her home because he was scared, panicky, and could not think. He was hallucinating at the time he entered her house and had not planned to commit a burglary and sexual battery. When he realized what he had done, the victim was screaming and he did not know what to do.

Moreover, if he planned to kill her, why did he not kill her at the house, or drive directly to the orange grove to kill her. During the hours that she was in the car trunk, he did nothing to obtain a weapon or prepare to kill the victim or to escape. This Court has previously pointed to use of a weapon already at the scene as evidence that the murder was not cold, calculated and premeditated. See, Mahn v. State, 714 So. 2d 391, 398 (Fla. 1998) (attacks carried out in haphazard manner with "hastily obtained weapons of opportunity"); Geralds v. State, 674 So. 2d 96, 104

(Fla. 1996) (murder weapon was knife from the kitchen "rather than one brought to the scene"). The judge's statement that Nelson intended to kill the victim when he took her from the house is pure speculation, and is contrary to the evidence. In Hamilton v. State, 547 So. 2d 630 (Fla. 1989), this Court found that the trial court's speculation precluded affirmance of his CCP finding.

In addition, the judge's finding of CCP seems inconsistent with his finding that Nelson killed Ms. Brace because she saw his face and could identify him. As in Derrick v. State, 581 So. 2d 31, 37 (Fla. 1991), if the decision to kill was made after the victim saw Appellant's face, "then it seems unlikely that the facts would support the finding of the heightened premeditation necessary to find the murder was cold, calculated, and premeditated." Because of the inherent tension between the two factors, the court should have found at most one, but not both.

Furthermore, to use this same evidence to support both CCP and avoid arrest smacks of prohibited doubling. See, e.g., Peterka v. State, 640 So. 2d 59 (Fla. 1994); Provence v. State, 337 So. 2d 783 (Fla. 1976) (improper to use same aspect of case to prove more than one aggravating circumstance). Here, the judge even questioned whether this was doubling during charge conference. After counsel told him that this Court had not found these two factors duplicitous, he allowed both aggravators to go to the jury. (24/2879-93)

Because the evidence suggests that Nelson committed the crime because he became frightened and possibly enraged, the trial court

erred in instructing the jury on and in finding the CCP aggravating factor. This error requires reversal for a new penalty trial.

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO CONSIDER AND WEIGH SEVERAL UNREBUTTED MITIGATING CIRCUMSTANCES THAT WERE CLEARLY ESTABLISHED.

This Court has made it abundantly clear that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). As acknowledged by the trial judge in this case, the Court has recognized that the trial judge may reject expert opinion testimony even if unrefuted. See Jackson v. State, 767 So. 2d 1156, 1158 (Fla. 2000). In Jackson, however, the Court also found that the trial court was required to render a more thorough explanation when rejecting the mental mitigators because three experts found them to exist. Id. The trial judge may not reject unrebutted expert testimony without citing other contradictory evidence from the record to support his rejection.

Trial court judges must provide a thoughtful and comprehensive analysis of the mitigating evidence in the record. Jackson, 767 So. 2d at 1158. In the case at hand, the judge's written opinion provided little more analysis than in Jackson. The judge propounded his personal beliefs concerning mental health issues but failed to provide evidence to justify his rejection of all of Dr. Dee's testimony. Moreover, the State had an expert witness, Dr. Kremper, ready and available to testify, and after Dr. Dee's testimony, decided not to call him to the stand. (24/2848; 26/3211)

This indicates that the State's expert had no significant rebuttal. The State cross-examined the defense expert, Dr. Dee, but failed to call into question any of his findings.

The sentencing judge cited the case of Sochor v. State, 619 So. 2d 285 (Fla. 1993), for the proposition that he could reject the defense expert's unrebutted findings. Sochor is clearly distinguishable and demonstrates why the judge's findingsin this case cannot be upheld. In Sochor, the defense argued that the court should have found the two mental mitigating factors, based on evidence that the defendant used alcohol on the night of the homicide, and was a dangerous and violent person when drinking. His ex-wife and the victim of a prior rape testified that, when they refused Sochor's requests for sex, he became violent. Sochor explained that, when sexually aroused, he was overcome by an indescribable irresistible impulse. Id. at 292.

This Court noted that it was hard to determine whether Sochor's described conduct was mitigating; nevertheless, it was up to the judge and jury to decide whether a particular mitigating circumstance was established. Although several experts testified that Sochor was mentally unstable, one doctor testified that Sochor had not been truthful during testing and another testified that he had "selective amnesia." 619 So. 2d at 619.

This is clearly different from the case at hand. The judge did not decide, based on conflicting testimony, that the mental mitigators were not established. Instead, he rejected the only expert testimony presented, for an untenable reason. Dr. Dee found that Nelson met the criteria for both mental mitigators. He found

that Nelson was, and had been for years, clinically depressed; that he suffered from auditory and visual hallucinations, suggesting that he was also psychotic -- possibly schizophrenic, and that he had brain damage which most likely resulting from his mother's active alcoholism during pregnancy.

Although the State decided not to call Dr. Kremper (24/2848-49; 26/3211), Dr. Dee had his report from when he had evaluated Micah Nelson at age 16. The report revealed that Dr. Kremper diagnosed Nelson as depressed, and noted that he was hallucinating. (25/3136-42) Prior to trial, Dr. Ashby, the jail psychiatrist, testified that he had prescribed antidepressant and an antipsychotic medication for Nelson, and that these medications contribute to his competency. No testimony contradicted or rebutted Dr. Dee's testimony. The court's reliance on the fact that Nelson's family members did not notice that he acted differently in no way rebuts Dr. Dee's diagnosis. Nelson's family members had no mental health training and thus did not know what to look for. They could not diagnosis brain damage. That Nelson's mood was calm and unemotional may well have been a symptom of his depression and brain damage.

In Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), this Court acknowledged the mandate of Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978), defining the trial judge's duty to find and consider mitigating evidence. In Campbell v. State, 571 So. 2d 415 (Fla. 1990), the Court clarified the judge's responsibility to find mitigating circumstances when supported by the evidence:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. See, Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature. . . . [T]o facilitate appellate review, [the court] must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.[28]

Campbell, at 419-420 (footnotes omitted). Accord Ferrell v. State, 653 So. 2d 367 (Fla. 1995). In Nibert, 574 So. 2d at 1061-62, this Court reiterated that a trial court must find mitigating circumstances that are supported by unrefuted evidence

In Santos v. State, 591 So. 2d 160, 164 (Fla. 1991), this Court cited the mandate of the United States Supreme Court in Parker v. Dugger, 498 U.S. 308 (1991), indicated its willingness to examine the record to find mitigation the trial court ignored:

> The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, 111 S. Ct. 731 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the available

---

[28] While Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) allows the sentencing judge to find that a mitigating factor exists but accord it no weight, this is proper only when the sentencer determines "in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case." 768 So. 2d at 1055. Where the judge provides no reason for giving the mitigator no weight, this still violates the principles of Campbell and Walker, and the Eighth Amendment. See Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

> mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.

The mitigation presented in this case was substantial and compelling. The mental health expert testified that Nelson's mental condition at the time of the homicide qualified him for both statutory mental mitigating circumstances. The judge misstated many of Dr. Dee's findings in his order, and rejected his unrebutted testimony, with insufficient evidence to support the rejection. This Court has stated that the sentencing judge's findings should be rejected when "they are based on misconstruction of undisputed facts and a misapprehension of law". Pardo v. State, 563 So. 2d 77 at 80 (Fla. 1990); see also, Larkins v. State, 655 So. 2d 95,101 (Fla. 1995). As stated in Walker v. State, 707 So. 2d 300, 318-19 (Fla. 1997), the "result of this weighing process" can only satisfy Campbell and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty."

The findings were in error for the following reasons:

Extreme Mental and Emotional Disturbance

The trial judge found that this mitigator did not exist:

> The defense argues that this was established by the uncontroverted testimony of Henry L. Dee, Ph.D., a clinical psychologist. He testified the Defendant suffered from depression, a component of which is anger. Dr. Dee further testified that Defendant's natural mother was an alcoholic and he had a sexual relationship with his sister. However, his testimony conflicts with family members and the Defendant's girlfriend who testified that he was acting normal on the evening of the murder. Additionally, there was no indication in Defendant's school records to suggest any mental health problems.

> Prior to seeing Dr. Dee in the jail, the Defendant had no history of mental illness. He saw a mental health counselor two times after the incident with his sister. The history of this Defendant suggest[s] that his depression (which was diagnosed after incarceration) may have begun after his arrest and incarceration.
>
> The Court is not reasonably convinced that this mitigating circumstance exists; therefore, it is not proven.

(7/1076)

The majority of what the trial judge set out in his order is not factually correct. Either he did not hear all of the evidence introduced at penalty phase, or just chose to ignore Dr. Dee's uncontroverted testimony. First and foremost, the judge stated that Dr. Dee's testimony that Nelson suffered from depression, which invariably includes anger, conflicted with testimony of Nelson's family members and girlfriend who testified that "he was acting normal on the evening of the murder." This is not a conflict. What was "normal" for Nelson was depressed and angry. That he did not act differently means nothing. Moreover, Nelson's family members would not know the symptoms of clinical depression.

Dr. Dee explained during his testimony that the kind of depression suffered by Nelson was not what the average person thought of as extremely sad or having a bad day. Depression is a psychological term describing a condition which frequently includes anger about one's situation. Although anger is often missed in depression, it is almost always a component. (25/3139) Nelson may well have been holding his anger inside, perhaps because he could not rationally explain it. He may have been trying very hard to act "normal." Testimony of his sister and girlfriend showed that

he was having nightmares about what had happened to him in prison, and would not talk about it. Because he did not tell anyone what had happened, he would not likely act in such as way as to alert his family to his situation.

Second, the judge erroneously stated in his order that "there was no indication in Defendant's school records to suggest any mental health problems." Apparently, the judge did not recall Dr. Dee's testimony that Micah was tested by the school system at age 8, because he was not making normal progress in school. He was found to be functioning at about the same level shown on Dr. Dee's tests. Micah's school records showed that he was retained in kindergarten and third grade, and received administrative or social promotions in first and second grade. (25/3163) Although the school system never found an adequate reason for Micah's academic problems, Dr. Dee suspected it was because of brain damage and memory problems, which would have been hard to diagnose at age 8. (25/3135-8) Thus, the trial court was incorrect in finding that Micah's school records did not suggest any mental health problems.

Third, the sentencing judge erroneous write that, "[p]rior to seeing Dr. Dee in the jail, the Defendant had no history of mental illness. He saw a mental health counselor two times after the incident with his sister. The history of this Defendant suggest[s] that his depression (which was diagnosed after incarceration) may have begun after his arrest and incarceration." As noted above, the school system suspected a problem when Micah was 8 years old. Micah was seen and tested by the school psychologist. At that age, they were unable to make a diagnosis. The judge also failed to

note that Dr. Kremper, the expert the State did not call, evaluated Nelson at age 16. Dr. Kremper's report indicated that Micah was depressed and had hallucinations as an adolescent. (25/3136-41)

Micah was again seen by a mental health professional when t was discovered that he and his 7-year-old cousin, Calvin, were having sexual intercourse with Micah's 13-year-old sister, and that she and Calvin had gonorrhea. As noted by the trial court, Micah received counseling two times. The judge failed to note, however, that Micah's aunt terminated his counseling after the second session, and that Micah was diagnosed at that time as suffering from depression, characterized as an adjustment disorder with depressed mood. Thus, contrary to the judge's findings, each time Micah was seen by a mental health expert, he was diagnosed as depressed. Finally, the judge "concludes" that Nelson's history suggests that his depression started after his arrest. Clearly, Nelson's history suggests the opposite. His depression was diagnosed at age 11 and age 16, the only two times he saw a mental health expert. It was even suggested at age 8, when he was tested by the school system because he was not progressing normally. Dr. Dee testified that Nelson attempted suicide in jail because of depression based on his situation, and guilt based upon the crime he committed. Obviously, the basis of Nelson's guilt while in jail cannot be objectively determined; thus, the judge is free to draw his own conclusions. He cannot truthfully say, however, that Nelson's depression started after his arrest.

The trial court's failure to find and weigh the "extreme mental or emotional disturbance" mitigator constitutes reversible error, because the judge based his decision on erroneous evidence. Because the judge did not seem to be aware of some of the evidence supporting this aggravator, or misinterpreted the evidence, this Court cannot be assured that the trial court properly considered all mitigating evidence. Walker, 707 So. 2d at 318-19. This omission is especially critical in light of the fact that the extreme mental or emotional disturbance mitigator (along with the impaired capacity mitigator, which the trial court also rejected) are "two of the weightiest mitigating factors -- those establishing mental imbalance and loss of psychological control." Santos v. State, 629 So. 2d 838, 840 (Fla. 1994). Therefore, this Court should reverse Nelson's death sentence and remand for resentencing.

Impaired capacity

The judge also found that this mitigating circumstance did not exist. In his sentencing order, he reasoned as follows:

> Again, the defense contends that this mitigator was proven by the uncontroverted testimony of Dr. Dee. Dr. Dee testified that the Defendant has organic brain damage that resulted in an impulsive disorder. Therefore, he cannot appreciate the criminality of his acts. Yet, the Defendant's actions on the night and morning of the murder indicate otherwise. He removed his victim from her house and drove her to an orange grove where he intended to kill her. However, he became stuck in the grove, which temporarily prevented the offense. Steve Weir, the heavy equipment operator who pulled him out of the grove, testified that when he hooked a chain to the rear of the car, he heard a thumping sound coming from inside the trunk. He asked the Defendant what was in the trunk of the car and was told a dog. Weir said the Defendant then turned the radio up real loud. Finally, Weir said that as soon as he unhooked the chain, the Defendant drove off in a hurry, without even saying

> thanks. He drove to a different orange grove and this time parked on a clay road. He then drug or walked the victim 175 feet into the grove and killed her. This indicates that his capacity to appreciate the criminality of his act was not substantially impaired. He knew that his conduct was criminal and he took logical steps to conceal his actions from others. Preston v. State, 607 So.2d 404, 411 (Fla. 1992). Additionally, the Court questions the theory of Dr. Dee that the Defendant has organic brain damage. The doctor bases his theory on one subjective test. He testified that the Defendant's IQ was seventy=nine, which was borderline low to average. He also said his memory quotient was forty-eight and it should be closer to the IQ number. Therefore, Dr. Dee concluded brain damage which resulted in an impulse disorder.
>
> The Florida Supreme Court recently stated that, "we have recognized that a trial judge may reject expert opinion testimony even if that testimony is unrefuted." Jackson v. State, [767 So. 2d 1156, 1158 (Fla. 2000)]. The decision as to whether a particular mitigating circumstance is proven lies with the judge . . . " Sochor v. State, 619 So. 2d 285, 291 (Fla. 1993).[29]
>
> It appears to the Court that organic brain damage is becoming a popular argument in capital cases. Additionally, Dr. Dee admits that he had no objective evidence or medical test such as CAT scan, a brain wave test, etc., that would show brain damage. Finally, there was no testimony concerning the history of the Defendant, other than Dr. Dee's speculation concerning his mother's alcoholism, to indicate brain damage. Further, I question whether this testimony meets the Freye standard.
>
> The Court is not reasonably convinced that this mitigating circumstance exist[s], therefore it is not proven.

(7/1077)

Here, the sentencing judge, citing Nelson's activities at the time of the homicide, seems to believe that this mitigator requires that the defendant not understand that he is committing a crime. This is not true. If Nelson really did not understand that sexual

[29] These cases and findings were discussed at the beginning of this issue because they apply to both mental mitigators.

battery, kidnapping and murder were criminal, he would be insane. This would mean that he did not know the difference between right and wrong. The ability to distinguish right from wrong (insanity test) is not the standard for finding the mental mitigators. The insanity standard is a much higher standard than the test that the mental mitigators require. In State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), this Court stated that,

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. . . Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions may be deserving of some mitigation of sentence because of his mental state.

Thus, mental mitigation is intended to benefit those who are not legally insane, but still have mental impairments that affect their lives, and mitigate the crime.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this Court stated that "[t]he finding of sanity . . . does not eliminate consideration of the statutory mitigating factors concerning mental condition." 571 So. 2d at 418-19 (citing Mines v. State, 390 So. 2d 332, 337 (Fla. 1980). The Campbell court found both mental mitigators applicable despite the trial court's conclusion to the contrary. Id; see also Ferguson v. State, 417 So. 2d 631 (Fla. 1982) (finding that Ferguson "knew the difference between right and wrong and was able to recognize the criminality of his conduct and to make a voluntary and intelligent choice as to his conduct based upon knowledge of the consequences thereof" did not negate mental and emotional distress mitigator).

The judge then rejected Dr. Dee's theory that Nelson suffered from organic brain damage, noting that Dr. Dee based his theory on one subjective test showing that Nelson's memory was much lower than his IQ. Dr. Dee concluded from this test that Nelson had brain damage which resulted in an impulse disorder. The judge noted that Dr. Dee "admitted" he had "no objective evidence or medical test such as CAT scan, a brain wave test, etc., that would show brain damage." (7/1077)

Dr. Dee did not testify that he based his conclusion on one test. He said that various neuropsychological tests showed that Nelson's concept formation, a higher mental ability, was grossly affected. His memory was grossly affected on various tests. The doctor also found a long-standing discrepancy between Nelson's verbal and nonverbal abilities. The test results were consistent with everything Dr. Dee knew about Nelson. (25/3143-44; 26/3189)

Dr. Dee testified that he made his diagnosis based on written testing because that was "all I would give." (25/3162) Although Dr. Dee did not thoroughly explain this answer, it seems that Dr. Dee meant that this was the proper test to diagnose brain damage. As to the judge's questions concerning the lack of a CT scan or MRI to substantiate Dr. Dee's findings, the judge was apparently not aware that such tests show only structural brain damage, and not functional brain damage. Thus, it is often impossible to tell whether a person has brain damage by viewing an MRI. Neurological tests may be the best method to make this diagnosis. (See Appendix)

In this case, as noted by the judge, Dr. Dee suspected that Nelson's brain damage resulted from his mother's alcoholism during

pregnancy. (25/3188) The sentencing judge wrote that "there was no testimony concerning the history of the Defendant, other than Dr. Dee's speculation concerning his mother's alcoholism, to indicate brain damage." If the judge meant to say that no evidence showed Nelson's mother was an alcoholic, and that Dr. Dee only speculated about this, he is wrong. Nelson's family testified that his mother was an alcoholic. A cousins believed that she drank during pregnancy, which is consistent with her being an alcoholic, and died from drinking five years later. After Micah's birth, she lost custody of her two children. No one testified that she was not an alcoholic or that this was even in question.

The judge may have meant to say that Dr. Dee was speculating that Nelson's mother's alcoholism caused his brain damage. If so, this is more or less accurate. Nevertheless, the relationship between drinking alcoholic beverages during pregnancy and brain damage and mental retardation is clearly established in the medical community. Women are constantly warned not to drink alcohol during pregnancy. Thus, the jump from the established fact that Nelson's mother was an alcoholic during her pregnancy and at the time of Nelson's birth, to the opinion that this probably caused his brain damage, is not much of a jump. Doctors rarely if ever conclusively establish that brain damage was caused by a certain event. Neither a CT Scan, a PET Scan nor an MRI will establish the cause of brain damage, even if these tests are able to diagnose it.

The judge also questions whether Dr. Dee's testimony meets the "Freye standard." See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). This was never brought up at trial and, thus, is not

relevant. The party introducing the evidence need not prove that scientific evidence is generally accepted unless the opposing party objects on the basis that the evidence does not pass the Frye test. See Hadden v. State, 690 So. 2d 573, 574 (Fla. 1997) (specific objection required to preserve allegation of Frye error).

Moreover, it is the newer medical and scientific tests that may not meet the Frye test; it applies only to novel scientific evidence -- not the traditional written tests and evaluation such as that done by Dr. Dee. Dr. Dee's method of diagnosing mental problems, if not the specific tests, has been around since the days of Sigmond Freud, and longer. Such evidence is offered in most death cases with no mention of the Frye standard.

Dr. Dee said the results of his tests were not in question. The neuropsychological tests he performed, showing that Micah's IQ was 30 points higher than his memory quotient, substantiated that Nelson suffered brain damage. People with cerebral damage are very impulsive and don't think things through. They do things that do not make sense.[30] Dr. Dee testified that this was not controversial. Much research verified these findings. (25/3198-99, 3201)

Dr. Dee testified that his other findings were consistent with this diagnosis. Nelson told him he was having hallucinations when he went into the victim's house; and that he knew it was impulsive and silly once he was inside. (25/3199) He obviously was not able

[30] For example, Micah Nelson went to sleep in the victim's car, parked along a road not too far from where he lived. Someone soon called the police. This was clearly an ill-thought-out action.

to think through his alternatives once he had sexually abused the victim. Thus, he took her with him. He was still unable to think things through because he drove around for four to six hours. His indication to one of the officers that he just wanted to render the victim unconscious so he could leave suggests that, even when at the orange grove, he did not know for sure what he would do.

Finally, the trial judge noted that, "[i]t appears to the Court that organic brain damage is becoming a popular argument in capital cases." This is clearly no reason to reject this finding in the case at hand. Even if brain damage were argued in capital cases when it did not exist, as the trial judge implied, he cannot arbitrarily decide that it does not exist in this case. Moreover, there are several reasons why evidence of brain damage may be offered frequently in capital cases.

First of all, it may be that most capital defendants do have brain damage. Although the judge seemed to believe that brain damage was but a convenient excuse or mitigator, it may instead be that most people who are not brain damaged do not commit murder.

Second, brain damage is probably now more readily diagnosed because of newer medical and psychological techniques. In the past, mental health experts were not always able to determine whether the defendant had brain damage. Now they are.

Third, many more defendants are seeking mental health experts to testify at trial. As death penalty law is narrowed and refined, more defense lawyers realize the importance of having their clients see a psychiatrist or psychologist. In fact, in some cases, each party has as many as three experts. See, e.g. Jackson v. State, 767

So. 2d 1156, 1158 (Fla. 2000). If trial judges are allowed to arbitrarily dismiss the testimony of a psychologist who gives unrebutted testimony, as happened in this case, then defendants will be required to hire three or more experts to convince the judge.

In summation, the judge may not be permitted to arbitrarily or capriciously disregard expert testimony because he believes it to be a popular defense argument. The "heinousness" aggravator is a popular prosecutorial argument; yet the judge does not arbitrarily disregard it because it a factor in many cases. Brain damage may be a common mitigator because most death penalty defendants are brain damaged. It is still mitigating, especially because it not the fault of the defendant.[31]

Dr. Dee did not suggest that all of Nelson's mental problems and impairment were caused by brain damage. In fact, he did not know, nor does anyone, exactly what caused his mental problems. Nelson lost two mothers at age four or five, and was unsupervised, which resulted in sexual experimentation with his sister and cousin, both of whom had gonorrhea, at age 11. He went to prison at a young age, where he was sexually abused by men who were older and stronger than him. Thus, his mental problems may have been environmental, congenital, or both.

---

[31] It may be noted that, in this case, the defense did not argue that Nelson was impaired because of alcohol and drugs. The evidence showed that he did not have an alcohol or a drug problem. Alcohol and drug dependency are considered to be mitigation, even though these problems are not involuntary, as is brain damage.

Lastly, we wish to note that Nelson was on medication while in jail and during trial. Dr. Ashby, the jail psychiatrist,[32] testified prior to trial that Micah Nelson had been on two kinds of medication. Dr. Ashby testified that he was treating Nelson for a schizo-effective disorder -- both a mood disorder and a psychotic disorder. He said Nelson had intermittent episodes of depression, and auditory hallucinations. He first treated Nelson with Mellaril (100 mg twice daily) which is an antipsychotic medication used to stop auditory hallucinations. At the time of trial, Nelson was a drug called Imipramine (250 mg twice daily) for depression, which also is used to treat auditory hallucinations which result from depression. The drug helped Nelson and contributed to his competency to stand trial. Dr. Ashby said that Nelson had a neurochemical imbalance which is indeed a mental condition. (15/1438-47) Based on Dr. Ashby's testimony, the trial court gave the jury the following instruction:

> Micah Nelson is currently being administered **psychotropic medication** under medical supervision for a mental or emotional condition. Psychotropic medication is any drug or compound affecting the mind or behavior, intellectual functions, perceptions, mood, or emotions and includes anti-psychotic, anti-depressant, anti-manic, and anti-anxiety drugs.

(23/2787) If, as the trial judge found, Dr. Dee's conclusions were unbelievable and, thus, erroneous, then Nelson was medicated for no reason. Thus, not only Dr. Dee believed that Nelson was mentally

[32] Dr. Ashby testified that he was a psychiatrist in private practice, and also treated inmates at the jail. (15/1438)

ill, but also Dr. Ashby. The trial judge apparently disbelieved both doctors.

A third source of support for Dr. Dee's diagnoses was another psychologist -- Dr. Kremper, the expert the State did not call to testify. Dr. Dee read Dr. Kremper's report from when he had evaluated Nelson at age 16. Dr. Kremper diagnosed depression, and noted that Nelson reported hallucinations. (25/3136-41)

Other Mitigation

Defense counsel provided the trial court with a list of 21 mental mitigators in addition to the statutory mental mitigators and the age of the defendant. The sentencing judge did not find the defendant's age (21) to be a mitigator because Nelson was one week from his 22nd birthday, had dropped out of high school after completing 9th grade, spent a year in the Job Corps in Kentucky, served time in prison, and was living on his own. (7/1076)

Actually, the evidence was to the contrary. Nelson lived with his aunt until he was sent to the Job Corps at age 16. He was not own his own but lived in a supervised setting. When he returned from Kentucky, he stayed with relatives. He was then in prison which, again, is an extremely supervised living situation. He had recently been released from prison and was staying with his sister and mother. He had never been on his own and had never had his own apartment or other residence. He did not have a car. He had no driver's license and could not keep a job. Dr Dee said it would be hard for him to function based on his mental condition and

borderline intelligence. Although the judge was not required to find this statutory mitigator, he should have factored Nelson's young age in with his mental problems and immaturity. See Kokal v. State, 492 So. 2d 1317, 1319 (Fla. 1986) (twenty-one year old defendant was immature); Geralds, 674 So. 2d 96 (Fla. 1996).

The mitigators suggested by the defense and discussed in the court's written order are as follows:

1. **At the time of the offense, Nelson was impulsive and his ability to exercise good judgment was impaired.** The trial court did not find this mitigator for the same reasons he did not find the mental mitigators. He did not believe that Nelson had brain damage or that he was impulsive, based on Nelson's activities at the time of the homicide. (71078) This finding was erroneous based on our argument concerning the mental mitigation.

2. **Nelson was remorseful for his conduct.** The trial judge was not convinced that this mitigator existed. He stated was unemotional during questioning and that his depression while in jail may have been caused by his arrest and incarceration, rather than remorse. (7/078) This finding is erroneous because (1) Nelson hung his head and cried when questioned about the victim's whereabouts; (2) when confronted with the fact that the victim's family needed to find her so that she could have a proper burial, Nelson told the officers where to find the body; (3) twice, the officers patted him on the back or shoulder to comfort him; (4) Nelson shook and cried and was too upset to go into the orange grove where he left her body; and (5) tried to commit suicide in

jail, in part because of his guilt concerning the homicide. That Nelson showed little emotion during his earlier questioning may well have been a symptom of his depression and hallucinations. The State presented no testimony that Nelson lacked remorse. Remorse is a mitigating factor. Songer v. State, 544 So. 2d 1010 (Fla. 1989); Wright v. State, 586 So. 2d 1024 (Fla. 1991); Morris v. State, 557 So. 2d 27 (Fla. 1990); Pope v. State, 447 So. 2d 1073 (Fla. 1983).

3. **Nelson did not plan to commit the offenses in advance.** The trial judge also found that this mitigator did not exist. He distinguished Amazon v. State, 487 So. 2d 8 (Fla. 1986), because, in Amazon, the defendant had taken drugs and committed the murders in an "irrational frenzy." In this case, Nelson took the victim from her home, drove 16 miles to an isolated area, and "brutally murdered her. (7/1078) The judge ignored the fact that Nelson did not plan the burglary and kidnapping in advance, and the murder evolved from these acts. Moreover, no evidence showed that Nelson planned the murder before arriving at the orange grove. To the contrary, he had no weapon and no plan as to how to kill the victim.

4. **Nelson demonstrated appropriate conduct in court.** The judge found this mitigator to exist but gave it very little weight. (7/1078) Good conduct while incarcerated reflects potential for rehabilitation -- a recognized mitigating factor. See Skipper v. South Carolina, 476 U.S. 1 (1986); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1325 (Fla. 1994); Songer v. State, 544 So. 2d 1010 (Fla. 1989). In Menendez v. State, 419 So. 2d 312 (Fla. 1982),

testimony that Menendez demonstrated a capacity for rehabilitation may have made the difference between life and death. The little weight the judge gave this mitigator is inconsistent with case law.

5. **Nelson was capable of forming loving relationships with family members and friends.** The judge found this mitigator to exist but gave it very little weight. (7/1078) This is an established mitigator which deserves more than "very little" weight.

See, e.g., Crump v. State, 654 So. 2d 545, 547 (Fla. 1995).

6. **Nelson's mental illness could be controlled with medication.** The judge found that this mitigator existed but gave it little weight. He did not explain why except that Dr. Dee did not suggest that medication would cure Nelson's brain damage. (7/1079) Actually, although Dr. Dee said that medication would not cure brain damage, he testified that medication would ameliorate his mental condition and help him adjust. (26/3206) Additionally. Dr. Ashby, the jail psychiatrist, testified that Nelson's medication contributed toward his competency. (15/1438-47)

7. **It is unlikely that Nelson would be a danger to others in prison.** The judge considered that Nelson could be given consecutive sentences and gave it very little weight. (7/1079)

8. **Nelson did not resist arrest; cooperated with police; and showed authorities where the body was located.** The judge found this mitigator and gave it moderate weight. (7/1079) In addition to leading the officers to the victim's body, which they might not have discovered for days, Nelson agreed to go into the sheriff's

department whenever he was asked to come in for questioning. He willingly took a polygraph test.

9. **Nelson never knew his father and lost his mother at a young age.** The trial judge found this mitigator established and gave it moderate weight. (10/1079)

10. **Nelson had a troubled and neglected childhood.** The trial court did not find this mitigator to be established because Nelson was taken in by his aunt and raised as one of her children. He stated that the only evidence of neglect was one incident when he had sex with his sister. (7/1079-80) Here, the trial judge ignored much of the penalty phase testimony. Nelson's cousin, Angela Lovett (described by the judge to have testified that there was lots of love in the family) testified that Micah and his sister did not get the hugs and kisses the other children received. Moreover, the incident in which Nelson experimented with sex at age 11, with his sister and 7-year-old cousin who both had gonorrhea, is very significant in demonstrating the neglect, Nelson suffered. Nelson was diagnosed as depressed at that time. A single working mother with nine children could not have provided the love and supervision needed by each child. She was rarely home. (26/3191)

Additionally, the judge apparently did not realize that the loss of Nelson's mother and grandmother who was raising him, had to have been traumatic to a 4-year-old. Micah's psychological tests, given because he was not making proper progress in school at age 8, also indicated that he had problems. Even though his aunt may have treated him as one of her own, Nelson told Dr. Dee that he felt as though he did not belong. (26/3193) The Court has consistently

found a traumatic childhood mitigating. See, e.g, Nibert v. State, 574 So. 2d 1059, 1061-62 (Fla. 1990); Rogers, 511 So. 2d 526 (Fla. 1987); see also Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). This is probably the most recognized nonstatutory mitigator.

11. **Nelson was the victim of inappropriate sexual conduct and abuse as a child.** The trial judge found that there was inappropriate sexual conduct but not that Nelson was sexually abused as a child. (7/1080) Dr. Dee, who supervised the Child Protection Team, considered the incident when Nelson experimented with sex with his sister and cousin, at age 11, to be sexual abuse because of the lack of supervision. More importantly, because two of the children had gonorrhea, at least one of the children must also have had sex or have been molested by an adult with gonorrhea. Sexual abuse is a compelling factor.

12. **Nelson had organic brain damage.** For reasons discussed under mental mitigation, the judge did not find this mitigator to be established. (7/1080) Based on the testimony of Dr. Dee, the mitigator should have been found. Bryant v. State, 601 So. 2d 529, 533 (Fla. 1992); Toole v. State, 479 So. 2d 731, 733-34 (Fla. 1985). In view of the importance of mental mitigation, Santos, 629 So. 2d at 840, and the fact that Nelson's mental and emotional condition was the focus of his penalty phase defense, the judge's finding was clearly harmful.

13. **Nelson suffered from depression as a result of his conduct, and attempted suicide in jail.** The trial judge found that this factor was proven but gave it little weight, stating that although Nelson was depressed and tried to commit suicide in jail,

"there was no expert testimony suggesting that his depression and suicide attempt were related to his conduct as opposed to the fact that he is charged with murder and is incarcerated." (7/1080) The judge's statement was not true. Dr. Dee, an expert, testified that Nelson tried to commit suicide because of acute depression, caused by a combination of: (1) **guilt over what he had done**, and (2) depression about what might happen to him. (25/3031-32)

14. **Nelson had limited educational experience.** The judge decided that this mitigator was established because Nelson attended school only into the ninth grade before entering the Job Corps, but gave it little weight. (7/1080) Many cases have established that lack of education is a valid mitigating circumstances. See Morgan v. State, 639 So. 2d 6 (Fla. 1994) (poor education weighed in favor of reversing death sentence). The judge gave no reason for affording little weight to this normally significant mitigating factor.

15. **Nelson was sexually assaulted while in prison.** Based on Dr. Dee's limited testimony that Nelson was sexually molested in prison by fellow inmates, using a broom, the judge found this mitigator to be established and gave it some weight. (7/1081) This happened not too long before the homicide in this case and bothered Nelson greatly. Two witnesses testified that he was having nightmares about what happened to him in prison but did not want to talk about it. Because he raped the victim in this case, these incidents may well have been an important factor in his behavior.

16. **Nelson had limited intelligence.** The court found this mitigator and gave it some weight. (7/1081)

17. **Nelson had no prior violent felonies.** The judge found this mitigator established but gave it little weight. (7/1981) He did not explain why he afforded this factor little weight. Because prior violent felonies are statutory aggravating factors, it would seem that the absence of prior violent felonies should be very significant mitigation.

18. **The circumstances resulting in the homicide are unlikely to recur because Nelson would spend the rest of his life in prison.** The judge interpreted this mitigator to be the same as number 7, in which he stated that he could give Nelson consecutive sentences, and gave it some weight. (7/1081)

19. **Nelson accepted responsibility for his actions.** The judge stated that nothing in the record proved that Nelson accepted responsibility other than that he cooperated with police, so found this mitigator was not proven. (7/1081) The judge failed to note that Nelson confessed to police and did not testify or deny having committed the crime at trial.

20. **Nelson never received treatment for his mental or emotional problems.** Noting that Nelson was on antidepressants since being incarcerated for this crime, the judge found the mitigator proven but gave it little weight. (7/1081) The mitigation is that, although Nelson was depressed since childhood, he never received medication; if he had, he might not have committed the crime.

21. **Nelson was willing to plead to all charges for consecutive life sentences without parole.** The judge found this mitigator to be established but gave it very little weight.

* * * * *

The court's findings must be supported by sufficient competent evidence in the record. The judge cannot reject unrebutted mitigation without supporting his rejection with evidence that sufficiently refutes the mitigation. Santos, 629 So. 2d 840; Larkins, 655 So. 2d at 101. Nor can he ignore mitigating evidence. Parker v. Dugger, 498 U.S. 308 (1991); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). The court must consider mental disorders, even if they do not meet the criteria for statutory mitigating factors. Foster v. State, 614 So. 2d 455, 465 (Fla. 1992). Here, the judge erred by rejecting unrebutted mitigation reasonably shown by the evidence, and failed to give sufficient weight to many mitigators. This skewed his weighing of the aggravators and mitigators in sentencing, thus violating Nelson's constitutional rights. See Parker v. Dugger; Eddings; Lockett; Santos; and Nibert.

ISSUE V

A SENTENCE OF DEATH IN THIS CASE IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES IN WHICH THE DEFENDANT WAS MENTALLY DISTURBED.

In State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), this Court stated that the death penalty was reserved by the legislature for only the most aggravated and least mitigated first-degree murder cases. 283 So.2d at 7. The difference between life imprisonment and the death penalty is of the greatest magnitude. "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. 289, 305 (1976).

Part of this court's function in capital appeals is to review the case in light of other decisions to determine whether the punishment is too great. Dixon, 283 So. 2d at 10. The instant homicide is not one of the most aggravated first-degree murder cases. Nelson's sentence should be reduced to life, based on his mental illness and other mitigation.

The trial judge found fourteen nonstatutory mitigating factors established although he gave most of them little weight. He found six statutory aggravators factors.[33] He gave great weight to all

[33] The aggravators were that (1) the defendant was previously convicted of a felony, under sentence of imprisonment or on felony probation; (2) the crime was committed during or while in flight after a sexual battery, burglary or kidnapping;

but the sixth -- that the victim was particularly vulnerable because of advanced age or disability. He gave this aggravator little weight because there was little case law concerning this new aggravating factor. Although six sounds like a lot of aggravators, until recently, this aggravator did not exist, and until Riley v. State, 366 So. 2d 19 (Fla. 1978), the "avoid arrest" aggravator only applied when the victim was a law enforcement officer.[34]

Two of the aggravators, CCP and the avoid arrest aggravator, were not proven beyond a reasonable doubt. (See Issues II and III, supra.) Although the judge gave great weight to both CCP and the "avoid arrest" aggravator in his order, he earlier questioned whether these two aggravators were duplicative, because they were based on the same evidence. If this Court does not strike both of these aggravators, they should be merged.[35]

Moreover, all but one of the six aggravators arose from this incident. The only one that existed prior to the homicide was

---

(3) the crime was committed to avoid arrest; (4) HAC; (5) CCP; and (6) the victim was particularly vulnerable due to advanced age or disability.

[34] Although nonstatutory mitigators are unlimited, they do not seem to hold as much weight as do statutory mitigators and aggravators. Although new statutory aggravators are sometimes added, no new statutory mitigators are added. § 921.141, Fla. Stat. (1999).

[35] Even if this Court were to find the "avoid arrest" aggravator established, there are worse reasons to commit a homicide. In Clark v. State, 609 So. 2d 513 (1992), the defendant killed a man to get his job. Nevertheless, because Clark presented uncontroverted evidence of alcohol abuse, emotional disturbance and an abusive childhood, even though the defense expert opined that the statutory mitigators were inapplicable, this Court found that the strong mitigation made the death penalty disproportionate.

Nelson's felony probation status which became effective in October, 1997, less than a month before the homicide. Nelson had already been punished for the burglaries that gave rise to this aggravator. He served a prison sentence. Although this is an aggravator, the circumstances in this case are somewhat mitigating because Nelson never had time to adjust to life outside of prison, or get help from his probation officer, before committing a crime. Accordingly, this aggravator should not be weighed heavily in this case.

The trial court found that Nelson committed the murder during the commission of a sexual battery, kidnapping or burglary. Nelson was sentenced separately for these three felonies and they were also considered by the jury in finding Nelson guilty of felony murder. The felony murder aggravator exists automatically in all felony murders. Thus, the weight afforded this factor should be minimal because not all felony murders require the death penalty.

This was an especially offensive murder. Otherwise, there was little aggravation. Nelson had no prior violent felonies. He had been imprisoned for four burglaries, none of which were violent. His interviews with the detectives, and the penalty phase testimony, suggest that he was a quiet, non-intrusive person. He had never done anything like this before. In fact, the crime seems out-of-character for him, and he was unable to articulate any coherent reason for having committed the crime. Despite the court's finding, he showed sincere remorse.

Despite the fact that the trial court did not find the mental mitigators, both were reasonably established. Mental mitigation is

the most important mitigation. Mental mitigation must be accorded a significant amount of weight. See, e.g, Larkins v. State, 739 So. 2d 990 (1999): Snipes v. State, 733 So. 2d 1000 (1999); Santos, 629 So. 2d 838. In Larkins v. State, 655 So. 2d 95, 100 (Fla. 1995), this Court reversed, in part because the trial judge misconstrued Dr. Dee's testimony that the defendant qualified for the "impaired capacity" mental mitigator. In this case, the judge made various erroneous statements in his order, as to what Dr. Dee said, and what the evidence showed. (See Issue IV, supra.)

The Court is not bound to accept the trial court's findings concerning mitigation if the findings are disproved by the evidence. In Santos v. State, 591 So. 2d 160 (Fla. 1991), the trial court rejected the unrebutted testimony of Santos's psychological experts. This Court conducted its own review of the record and determined that substantial, uncontroverted mitigating evidence was ignored. The Court reversed and remanded Santos for the judge to adhere to the procedure required by Campbell. On remand, the judge again imposed death. This Court vacated the death sentence and remanded for life because the mitigation outweighed the contemporaneous capital felony. Santos v. State, 629 So. 2d 838 (Fla. 1994).

Although the trial court refused to believe Dr. Dee, the unrebutted evidence showed that Micah Nelson had mental problems for most if not all of his life. It is well-known that drinking during pregnancy may cause central nervous system damage to the unborn child and is a major cause of mental retardation. Micah's mother was an alcoholic who drank during her pregnancy and was

either unwilling or unfit to care for her children. She died when Micah was four, due to alcohol. It would be a wonder if Micah was not mentally disabled and brain-damaged when at birth.

It is also well-known that children who do not have sufficient love and parenting often have mental health problems. Having a loving family is more critical to a child's character than wealth and privilege. Other than his sister, everyone Micah loved died when he was four years old.[36] He started again with a new mother (his third) who already had seven children, and no father. He repeated two grades and received psychological testing at age 8 because he was not performing satisfactorily at school. At age 16, he was shipped off to the Job Corps. After he returned, he was sent to prison where he was mistreated and raped by other inmates.

Although the jury recommended death, three jurors voted for life. Moreover, it seems likely that the death recommendation resulted at in part from the fact that Nelson was a young black man who raped and killed an elderly white woman. Even though the all white jurors probably knew that the race of the victim and the defendant should not enter into their decision, human nature makes it impossible to totally erase such considerations. See generally, State v. Dixon, 283 So. 2d 1 (Fla. 1973) (inflamed juror emotions can no longer sentence a man to die; sentence viewed in light of judicial experience).

[36] The evidence does not tell when Micah's grandfather died other than it was not long after his grandmother died, or whether Micah ever saw him after being moved to his aunt's home.

To exacerbate the understandable empathy for the elderly white victim, the State introduced three victim impact witnesses who told the jury that Ms. Brace was a wonderful caring, generous and giving woman who enjoyed helping others. "Ginny" took over her husband's business when he died, raised two daughters, was devoted to her family, church and community, and loved her three grandsons. She took food to shut-ins and was involved with a hospice organization. Her daughter said that her mother loved life and was always there to help and support her family in sickness and grief. (24/2980-88)

Although victim impact evidence is statutorily authorized in capital cases,[37] it is not relevant to any aggravator. Nevertheless, this testimony must have encouraged the jury to draw an even greater distinction between the value of the defendant and the value of the victim. Upon hearing the victim impact evidence they may have believed that, because Ms. Brace was a "better person" than, say, a drug dealer or a prostitute, this should have some bearing on whether the defendant should be sentenced to death.

While the jurors heard the good qualities of the victim, they heard only about the defendant's problems. This was necessary to support the mitigation. That Nelson was not very bright,[38] did poorly in school, had sex with his sister at age 11, and was raped

---

[37] § 921.141(7), Fla. Stat. (1999). Even though the jurors were told that victim impact evidence was not an aggravating circumstance, they must have assumed that they heard it for some reason, the most likely being to compare the character of the victim to the character of other victims or of the defendant.

[38] The Florida legislature recently passed a law that will prohibit execution of the mentally retarded. Although Nelson may have been only borderline retarded, his mental limitations should be considered mitigating, in combination with his relative youth.

with a broom while in prison, are unpleasant facts from Nelson's life. These facts do not make Micah Nelson more deserving of the death penalty, however. Instead, they show that Micah Nelson suffered mentally from his past experiences. Whether the jury was able to make this distinction is uncertain.

Nelson's moral culpability is simply not great enough to deserve a sentence of death. This was not a killing for revenge, or pecuniary gain. It was not a contract killing nor a gang slaying. It was not a case where there were multiple victims like Oklahoma City or Columbine. Nelson is not a serial killer like Ted Bundy.

Imposition of the death penalty requires a "highly culpable mental state," Tison v. Arizona, 481 U.S. 137, 152, 158 (1987), and must be directly related to the defendant's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982). Mentally ill offenders have disturbed thought patterns, emotions, and a reduced ability to think rationally. They do not have the highly culpable mental state that the Eighth Amendment requires to justify the retributive punishment of death. Thus, the Court should reduce Nelson's sentence to life.

CONCLUSION

For the above reasons, this case should be reversed and remanded for a new trial. (Issue I) If the Court does not reverse, it should vacate the sentence and remand for a life sentence. (Issue V). If not, he sentence should be vacated, the "avoid arrest" and CCP aggravators struck, and the case remanded for the

trial court to reweigh the aggravators and mitigators, considering, the unrebutted mental mitigation and various nonstatutory mitigation, as discussed above, and giving sufficient weight to the mitigation. (Issues II, III and IV) Alternatively, the Court should remand for a new penalty phase with a new jury because the trial court found, two invalid aggravators. (Issues II and III)

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of October, 2002.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by the undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of the rule.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

A. ANNE OWENS
Assistant Public Defender
Florida Bar Number 0284920
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/aao