IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-800

MICHAEL SIEBERT,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

AMENDED INITIAL BRIEF OF APPELLANT

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INTRODUCTION

In the trial court, the Appellant, Michael Seibert, was the defendant and the Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood in the lower court. The symbols "R" and "T" will be used to refer to portions of the record on appeal and trial transcript, respectively. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On April 1, 1998, an indictment was filed charging the defendant with first degree murder in the death of Karolay Adrianza. (R. 1-2). Prior to trial, the defendant filed a motion to bar the death penalty based upon the decision in *Ring v. Arizona*, 122 S. Ct. 2428 (2002). In that motion, and in several subsequent amended motions, the defendant alleged that Florida's capital sentencing procedure was unconstitutional because it permitted the imposition of the death penalty without requiring the State to allege the existence of specific aggravating circumstances and without requiring the jury to unanimously find those specific aggravating circumstances beyond a reasonable doubt. (R. 359-363,435-455, 465-469, 819-825). The trial court denied the defendant's motions and upheld the constitutionality of Florida's capital sentencing scheme. (T. 787).

On January 11, 2002, the defendant filed a motion to suppress evidence seized from his apartment by Miami Beach Police. (R. 121-126). In his motion, the defendant contended that the police illegally entered[1] his apartment without a warrant and that a search of his apartment after that illegal entry resulted in the discovery of Ms. Adrianza's body and numerous items of evidence that were later seized by the police. (R. 121-125). The defendant also filed a motion to suppress statements which were obtained from the defendant after the defendant was taken into custody following the discovery of the victim's body. (R. 127-133).

On October 29, 2002, a hearing on the defendant's suppression motion was convened before the Honorable Stanford Blake, Circuit Judge. Officer Douglas Bales stated that he responded to an attempted suicide call at an apartment at 1126 Collins Avenue on Miami Beach. It was about 11:00 AM. Bales met the defendant's roommate, Ace Green, outside the apartment house. (T. 1074-77). After a brief conversation with Green[2], Bales and Sergeant Howard Zeifman approached Apartment 11, the defendant's

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[1] The defendant alleged that the entry was not justified by the "emergency exception" to the warrant requirement. (R. 122-124).

[2] Bales said that Green told him that the defendant would not let him back in the

apartment. (T. 1079-80).

The officers knocked on the defendant's door. Two to three minutes later, the defendant responded. (T. 1080-81). The officers identified themselves and told the defendant that Green was concerned about him. (T. 1081). According to Bales, the defendant opened the door 4-5 inches and told the officers that he was OK, and that they could go because there was no problem. The defendant then shut the door. (T. 1082-83). Bales told the defendant that it would be necessary for the officers to see the defendant so that they could be sure that he was OK. (T. 1083). After telling the defendant that "one way or another, we will see you" and that they would get a key to gain access to the apartment, the defendant re-opened the door. (T. 1098-99).

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apartment. (T. 1096). Green did not have a key to the apartment and did not mention that anyone other than the defendant was in the apartment. (T. 1095, 1101).

When the defendant opened the door, Sergeant Zeifman placed his baton in the door jamb and the officers pushed their way into the defendant's apartment.[3] (T. 1084). After noting that the defendant had blocked the door with a couch, the defendant was ordered to sit on the bed. (T. 1084-85, 1100). Officer Bales saw no injuries or weapons on the defendant. (T. 1088). While asking the defendant whether there was anyone else in the apartment, Bales began to look around to assure himself that no one else was present[4]. (T. 1087-88). As Bales backed up and turned toward the bathroom, from a distance of about six feet, Bales saw a severed foot on the tub in the defendant's bathroom. (T. 1087-91, 1102-03). When Bales yelled to Zeifman that there had been a homicide, the defendant jumped to his feet and ran out of the apartment. (T. 1092). Zeifman pursued the defendant and tackled him in the hallway outside. (T. 1092-93). With Bales' assistance, Zeifman took the defendant into custody. (T. 1093). Sergeant Howard Zeifman's testimony was similar to that of Bales. Zeifman stated that after they knocked on the defendant's door, he and Bales announced, "police, we'd like to talk to you." (T. 1192). Zeifman said that the defendant replied that he did not want to talk.

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[3] Bales said that they forced their way into the defendant's apartment to assure themselves that the defendant was not hurt. They had only seen part of the defendant's body through the slightly ajar apartment door. (T. 1098).

[4] Officer Bales said that he asked the question for officer safety purposes. Officer Bales could not recall the defendant's answer to the question. (T. 1087-88, 1101, 1104, 1107-09).

(T. 1192). The officers then told the defendant that they wanted to be sure that he was OK. The defendant opened the door slightly and told them that he was OK and that they should go away. The defendant then shut the door. (T. 1192-93). Bales told the defendant that they needed to see him fully. The defendant was also told that if he didn't open the door, the officers would obtain a key and enter themselves. (T. 1193, 1207). When the defendant re-opened the door, at Bales' direction, Zeifman stuck his baton in the door jamb and the officers overcame the defendant's resistance by forcing their way into the defendant's apartment[5]. (T. 1195, 1208). After frisking the defendant and ordering him to sit, Zeifman did a cursory search of the kitchen for possible weapons, while Bales went to search the bathroom to see if anyone was there. (T. 1197-99, 1210). Zeifman then heard Bales yell, "Howard, it's a 31," which is the police code for a homicide. (T. 1200). The defendant then jumped up and ran out the door. Zeifman chased the defendant outside, apprehended him and handcuffed him. (T. 1200-03).

Officer Paul Acosta transported the defendant from the scene of the arrest to the police station. At the station, Acosta noted that the defendant seemed to stare in a manner that made Acosta believe that the defendant was under the influence of

[5] Zeifman said that they never asked the defendant to step outside of his apartment. (T. 1213).

something. (T. 1223-24). Acosta also noted that the defendant rambled when speaking and made statements that did not make sense. Acosta said that the defendant questioned him about where he was immediately after Acosta had told him of their location. The defendant also asked Acosta to be careful in his handling of the defendant's arms because he had needle marks from heroin use. (T. 1231). Based upon the defendant's statements and demeanor, Acosta believed that the defendant was out of it. (T. 1228-29, 1234-35).

Retired Miami Beach Detective Michael Jaccarino testified that he was the lead detective on the Adrianza case. (T. 968-70). Jaccarino said that at 12:15 PM on the day of the defendant's arrest, he introduced himself to the defendant at the police station. (T. 974). During the afternoon, Jaccarino ordered that the defendant's clothes be seized because of their possible evidentiary value. After providing the defendant with some food, Jaccarino and Detective Eliseo Zacarias met with the defendant at 8:20 PM. (T. 980). Although the defendant had reported to an officer that he was high on heroin and cocaine,[6] Jaccarino and Zacarias found no basis to believe that the defendant was under the influence at the time that they spoke with him. (T. 982-84, 1247). Zacarias read the defendant his rights from a waiver form, but the defendant refused to sign the form. (T.

[6] Jaccarino did confirm the presence of track marks on the defendant's arm. Jaccarino also said that the defendant told him that he had ingested cocaine that evening. (T. 1007-08).

984-85). After obtaining some background information, Zacarias left the room at 9:00 PM to speak with Danny Navarres. (T. 986-88). Jaccarino claimed that the defendant subsequently volunteered, "I don't know why this happened. I don't remember what happened, I was passed out. I had a second chance and fucked up. I guess this means I'm going back to prison." (T. 995).

Zacarias returned to question the defendant at 10:30 PM. (T. 1260). The defendant asked him if they would get him a lawyer. (T. 1263). Zacarias replied that the court provides lawyers. (T. 1278). Zacarias then showed the defendant a video tape of the crime scene in an effort to shock the defendant. (T. 1263-65). When the tape was over, Zacarias asked the defendant why he did it. The defendant then asked for a lawyer. Zacarias ended the conversation and returned the defendant to the holding cell. (T. 1265, 1281).

At 12:30 AM, the defendant asked for something to eat. (T. 1282). Taking the defendant's request for food as a sign that the defendant wanted to talk, Zacarias believed that the officers could question the defendant further. (T. 1283). After the officers gave the defendant cookies, the defendant told Detective Gus Sanchez that his parents would again be upset with him for becoming involved in a second incident.[7] (T. 1295). The defendant was asked by Sanchez about the first incident, which involved a British tourist.

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[7] Miranda rights were not re-read to the defendant before the conversation began. (T. 1301).

(T. 1296). When Sanchez asked the defendant why he had committed the Adrianza murder, the defendant again requested the assistance of a lawyer and stated that he did not wish to speak further. (T. 1299).

At the conclusion of Sanchez' testimony, the defense argued that Bales and Zeifman had unlawfully entered the defendant's apartment. The "emergency" that justified the officers' appearance at the defendant's apartment had abated when the defendant verified his presence in the apartment and that he was unhurt. (T. 1308-10). And, although the officers had no information that anyone else was present in the apartment and had been specifically told that there were no weapons in the apartment, the officers conducted an unlawful, exploratory search to satisfy themselves that there were no weapons or other people present. (T. 1308-10).

The court rejected the defendant's argument and found that the officers' initial entry into the apartment was justified by the emergency created by the attempted suicide call received by the officers. (T. 1311-12). Noting that the defendant's effort to barricade the apartment door aroused suspicion, the court then found that the officers' actions inside the apartment were proper. (T. 1311-12). As for the defendant's statements, the court held that the defendant's statements made prior to the 12:30AM conversation with Sanchez were admissible. (T. 1315-19). Specifically, the court found that the defendant's question concerning whether the police would provide him with an

attorney was merely an equivocal request for counsel. (T. 1318-19). The defendant's statement to Sanchez, that he was in trouble with his parents, was found to be spontaneously made and therefore admissible. (T. 1326-30). The remaining statements to Sanchez were found to be inadmissible. (T. 1324, 1328).

On November 12, 2002, following selection of a jury panel, testimony was received before the Honorable Stanford Blake, Circuit Judge. Chany Adrianza, Karolay Adrianza's sister, testified that Danny Navarres had been Karolay's boyfriend. (T. 2346-47). Navarres was related to good friends of her mother, the Korkours. (T. 2348). Chany said that it was not uncommon for Danny and Karolay to go out on school nights. On the night before her death, Danny called Karolay to go out to South Beach. AT 10:00 PM, they went out in Danny's black Lexus. (T. 2349-54).

At about midnight, Chany received a call from Danny's phone. Although no one spoke to her, Chany did hear music and Danny's and Karolay's voices. (T. 2358-59). Chany expected her sister to be home by 2:00 AM. At 6:30 AM, she awoke and noted that her sister did not come home. Chany also did not see her sister at school. When her mother picked her up from school, Chany told her mother that she did not know where Karolay was. (T. 2359-61). Chany tried to call Danny, but was not able to speak with him[8]. (T. 2361-62, 2390-91, 2397). Chany later identified Karolay's driver's license and

[8] Chany said that Danny never called her after her sister's death. When she tried to call Danny, she was given a variety of excuses as to why Danny was unable to speak

jewelry[9]. (T. 2367-71).

Officer Douglas Bales testified that at 11:00 AM on March 17, 1998, he received an attempted suicide call involving a man named "Michael." (T. 2399-2401). Bales responded to the defendant's apartment and met Ace Green. Green advised him that he had tried to get into his apartment, but that the defendant had refused to let him in. (T. 2401-04). Green told Bales that he thought the defendant might try to hurt himself. (T. 2425). Bales and Sergeant Zeifman approached the defendant's apartment and knocked on the door. (T. 2403-05). Bales told the defendant, through the closed apartment door, that they had been called by Green and that Green had advised them that the defendant was going to hurt himself. (T. 2410). After four or five minutes, the defendant opened the door a few inches and told Bales that he was OK and that the officers should go away. The defendant then closed the door. (T. 2410-11). Bales continued to ask the defendant to open the door. After two to three more minutes, the defendant re-opened the door and Bales and Zeifman forced their way into the defendant's apartment. (T.

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with her. (T. 2390-91, 2394-95).

[9] The defendant interposed a continuing objection to all items introduced in evidence that were seized as a result of the police searches of the defendant's apartment. (T. 2380, 2413).

2411-12). Noting that the defendant had placed a couch against the door, Bales ordered the defendant to sit down. (T. 2412-14).

After asking the defendant whether there was anyone else in the apartment, Bales backed up and began to look around for his safety. (T. 2415-16). Through a crack between the open bathroom door and the door jamb, Bales saw a severed foot. (T. 2416). Bales yelled that there was a homicide, looked back and saw the defendant and Zeifman run out of the apartment. Bales then ran out and assisted Zeifman in taking the defendant into custody. (T. 2416-17). Bales noted that after he lit a cigarette, the defendant asked him for one so that he might have his "last cigarette." (T. 2420).

The testimony of Sergeant Zeifman was similar to that of Bales'. Zeifman said that when they first knocked on the defendant's apartment door, the defendant told them that he was OK, that they should leave and that he did not want to talk to them. (T. 2669). Zeifman said that Bales told the defendant that his answer was not good enough. (T. 2670). According to Zeifman, Bales told the defendant that they had to make sure that he was OK; they needed to see the defendant's body. (T. 2671). When Zeifman later gained entry into the defendant's apartment, he was able to see that the defendant was not injured and that no weapons were in reach of the defendant. (T. 2672-73, 2697). Nevertheless, Zeifman began to look around the kitchen for weapons and for anyone that might be hiding, while Bales began to check in the hallway for others. (T.

2677, 2682). After the defendant assured Zeifman that there was no one else in the apartment, Zeifman heard Bales yell that there had been a homicide. Moments later, Zeifman chased the defendant out into the hallway where he was able to capture him. (T. 2683-85).

William "Ace" Green testified that he met the defendant in March, 1997. Green said that he periodically ran into the defendant on South Beach during the ensuing months and that in early 1998, the defendant invited Green to live with him. (T. 2462-66). Green moved in with the defendant, but did not pay rent. Green did not have a job. Instead, he made money from selling drugs. (T. 2467-68).

During the early morning hours of March 17, 1998, Green returned to the apartment and found the defendant, Karolay Adrianza and Danny Navarres. Green said that he had seen Adrianza and Navarres in the apartment before. On that night, all three of them were ingesting cocaine. (T. 2473-77). In fact, at one point, when they had exhausted the available cocaine, the defendant left the apartment and returned with more cocaine. (T. 2481-84). According to Green, the defendant, Adrianza and Navarres consumed more than an "8-ball" of cocaine that evening. (T. 2547-48).

Later, the defendant asked Green to go out and purchase some beer and cigarettes. (T. 2486-87). Green went with Navarres to make the purchase. When they returned to the apartment, only Green went back upstairs. Navarres told Green that he had to go buy

something and that he would return. Green said that he never saw Navarres again that night.[10] (T. 2488-90). When Green returned to the apartment without Navarres, Adrianza asked for Navarres and began making numerous phone calls. Some of the calls were made by Adrianza outside the apartment. (T. 2490-95). One of the phone calls was made to a radio station to request that a song be played.[11] (T. 2496).

Green noted that the defendant had been flirting with Adrianza.[12] (T. 2486). About thirty minutes after he had returned, Green was asked by the defendant to leave the apartment and to keep an eye out for Navarres. The defendant wanted to be alone with Adrianza. (T. 2496-99). Green went down to a nearby laundry, where a friend, Mike Smith, was working. (T. 2499).

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[10] Green admitted that he fell asleep several times while waiting outside the apartment. As a consequence, Green admitted that he had no idea whether Navarres had ever returned to the apartment. (T. 2553-55).

[11] Rob Roberts, a programmer with a local radio station, verified that two request calls were received from the defendant's home a little after 3:00 AM. (T. 2814-16).

[12] In fact, Green felt that the defendant and Navarres had been competing in a rivalry for Adrianza's affections. (T. 2567).

After a period of time, Green made numerous calls to the defendant in an effort to get back into the apartment. Green also tried to get in by knocking on the door. Green was told by the defendant to come back later. At one point, the defendant told Green, "give me ten minutes and I'll be in that pussy." (T. 2500-04). The defendant then asked Green to buy him cigarettes and passed money under the apartment door. When Green refused, Green noted that the defendant began to act erratically. First, the defendant claimed that Green was going to try to kill him because he looked high on drugs. When the defendant realized that Green was not "buying" it, the defendant told Green that he was going to kill himself. At that point, Green called 911. (T. 2506-08). When the officers arrived, Green told them that there were no guns in the apartment. However, there were kitchen knives and a knife was kept in a plant. (T. 2511-12).

After the defendant was taken into custody, Green signed a consent to search form for the apartment. (T. 2517). Green noted there were a number of changes to the apartment, as the police found it, from the way the apartment had been kept prior to that night. A rug and trash can that were normally kept in the bathroom were found by the police in a closet. The police observed three soap bars in the bathroom soap dish; there were usually not that many there. There were also no towels on the rod in the bathroom; Green said that towels were normally kept there. (T. 2520-26).

Green conceded that he was on probation on March 17, 1998, and that he never

successfully completed the probation term. (T. 2528). Since Green was living in Ecuador at the time of the trial, he admitted that he was facing a possible prison term for his violation of probation if he returned to the United States. (T. 2521).

At the conclusion of Green's testimony, the State played a tape of the 911 call Green made to the police on the morning of March 17. In the call, Green identified himself and told the police that his roommate, Michael Siebert, wouldn't open the door for him. Green said that his roommate was going crazy. Green described the defendant as erratic and paranoid. Green said that when he told the defendant that he would call the police, the defendant told him that he didn't care. Green stated that although the defendant told him that he would kill himself, Green didn't think that the defendant would do it. Green then added that the defendant did not have a firearm. (T. 2587-90).

Michael Smith testified that he saw Ace Green at 5:00 AM on March 17, 1998, while Smith worked at a laundry across from the defendant's apartment. (T. 2593-94). After a period of time, Smith saw Green page the defendant. The defendant then told Green that he needed more time. (T. 2595). After Green told Smith about what had happened at the apartment, Green became agitated and angry. Smith said that Green left the laundry shortly before 8:30 AM. (T. 2597-2601).

Marsha Hill lived in the apartment directly below the defendant's apartment. Hill testified that at around 6:30 AM on the morning of March 17, 1998, she heard a banging

noise that woke her up. It sounded to Hill like something was rolling on the floor in the apartment above hers. (T. 2734-35). The noise lasted for six to seven minutes. One minute after the noise stopped, Hill heard someone scream, "help, please." Thirty seconds later, she heard a female voice repeat, "help, please." (T. 2738-39). At the time, Hill thought that someone was just having an argument. (T. 2742). Afterward, Hill only heard the sounds of someone walking in the defendant's apartment. Several hours later, the police came to the apartment. (T. 2739-42).

Earl Holder, a Bell South investigator, testified that during the early morning hours of March 17, 1998, numerous phone calls were made from the defendant's phone to 613-6599. (T. 2621-28). Marcie Roman, an employee of AT&T Wireless, testified that 613-6599 was the number for a wireless account belonging to George Korkour. (T. 2639).

Arecelis Korkour testified that she had been a good friend of Louisa Lopez, Karolay's mother, for several years and that she knew Karolay since she was a little girl. Arecelis' nephew, Danny Navarres, came from Venezuela and lived with her in 1998. Navarres became friendly with Karolay Adrianza. (T. 2746-48).

On the night of March 16, 1998, Danny went out at about 10:30 PM. Korkour testified that she received three calls during the early morning hours that followed. (T. 2749-52). During the first two calls, no one on the other end of the line spoke. After the third call, Korkour dialed Star-69 to learn the caller's number. Korkour then re-dialed the

number and an American man answered. Korkour did not know the man. (T. 2752-53). Korkour then put her husband on the phone, who reported that Karolay was on the other end of the line. (T. 2754). The Korkours then checked Danny's room and found that his bedroom door was locked. Although Danny did not answer their knock, the Korkours assumed that Danny was home. (T. 2755, 2772).

The next day, Korkour received a call from Karolay's sister, who asked about Karolay and wanted to talk with Danny. Korkour did not put Danny on the phone because he was working on his car. (T. 2756-59). Later that day, the police called for Danny. (T. 2760). The Korkours went to the Miami Beach Police Station that night and saw Karolay's parents. They did not see Danny. (T. 2762-64). Danny arrived home after 4:00 AM in a distraught state. (T. 2764-65).

The Korkours then called Danny's parents. They immediately came from Venezuela. Danny's parents stayed for a week, sold the house to the Korkours[13] and returned to Venezuela with Danny and his belongings. (T. 2765-66). Danny's parents have not talked to the Korkours and the Korkours have not seen Danny since. (T. 2766-67).

Detective Michael Jaccarino responded to the defendant's apartment shortly after

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[13] Danny's parents owned the house in which the Korkours and Danny had been residing. (T. 2766-67).

receiving an officer-in-need-of-assistance call after 11:00 AM. (T. 2820). When Jaccarino arrived, he found the defendant already in custody. (T. 2821). Jaccarino briefly looked in the defendant's apartment and then returned to the police station to meet with the defendant. (T. 2824, 2834). After introducing himself to the defendant, Jaccarino noted that the defendant had blood on his jeans. Jaccarino then ordered that the defendant's clothes be seized. (T. 2836). Although Jaccarino observed that the defendant had needle tracks on his arms, Jaccarino determined that the defendant was not then high on narcotics. (T. 2837-38). Jaccarino left instructions for no one to talk to the defendant. (T. 2851).

Jaccarino interviewed Ace Green and learned that Danny Navarres had been in the defendant's apartment. Jaccarino then gave instructions for other officers to locate Navarres. (T. 2842, 2847).

Jaccarino returned to the defendant's apartment and found a paper with Navarres' phone number on it . (T. 2846). Jaccarino also listened to the defendant's answering machine tape. The tape contained recordings of five calls made by Green to the defendant. The tape revealed that at various times, from 6:13 AM to 9:30 AM, Green pleaded with the defendant to let him in the apartment. (T. 2870-72). Jaccarino also found a matchbook cover in Karolay Adrianza's pants. The matchbook cover contained the defendant's name, phone number, and beeper number. A beeper with a matching

phone number was found in the defendant's apartment. (T. 2874-75).

After hearing that the defendant wanted to speak to him, Jaccarino and Zacharias decided to interview the defendant after the defendant had eaten. (T. 2854-56). During their brief conversation, the defendant told Jaccarino that he was not under the influence and that Danny had nothing to do with it. (T. 2858, 2899). The defendant also told Jaccarino that he did not remember what had happened because he had passed out. (T. 2962-62). Jaccarino stated that at one point, the defendant asked if he was under arrest. The defendant then said, "I fucked up. I guess this means I'm going to prison." (T. 2882-83). The defendant then added, "maybe, I belong there." (T. 2802-04).

Jaccarino stated that he later obtained the defendant's saliva and blood and turned the specimens over to the FDLE. (T. 2878, 2881). A close examination revealed that the defendant's fingerprints were not found on Karolay Adrianza's body. (T. 2941).

Jaccarino stated that Ace Green and Danny Navarres were suspects at one point. However, they both had alibis. Jaccarino admitted that no one could account for Green's time between 7:15 AM and 9:15 AM. (T. 2939-43). The Korkours provided the alibi for Navarres. (T. 2943).

Jaccarino testified that the Korkours were generally cooperative with him. (T. 2949). Jaccarino stated that he was unaware that Navarres was intending to leave the country. Jaccarino said that he tried to contact Navarres in Venezuela, but was

unsuccessful. (T. 2951-53).

After establishing that Jaccarino did not know any of the witnesses or suspects in the case prior to March 17, 1998, the prosecutor asked Jaccarino:

> Q. So, is it fair to say you have to use your skills as an investigator and your skills as a person to decide whether you are going to accept what they say, or whether you have to go further and investigate further what they have to say?

(T. 2974). The court sustained the defense's objection to the prosecutor's question. The prosecutor then asked the question in another form:

> Q: When you did your investigation, and upon learning the information from the Korkours, and you talked to Ace Green, and you saw the crime scene, and all these other things, was there anything that leads you to believe that you should do more in terms of Danny Navarres Korkour?

(T. 2974). The defense again objected to the question, but this time moved for a mistrial. (T. 2974, 2080). The court sustained the defendant's objection, but denied the defendant's mistrial motion. (T. 2974, 2980).

Gary McCullough, a crime scene technician working with the FDLE in March, 1998, testified that he went to the scene on March 25 to collect blood and to develop fingerprints. (T. 2983-86). McCullough found a foot print on the tile area of the bath tub. The person leaving the print would have been lying on their back in the tub. (T. 2987-89). McCullough tested several cleaning bottles and sheets for blood. He also tested several articles of clothing and a towel for the presence of blood. (T. 2996-97).

McCullough collected suspected human tissue from the toilet, a knife from the victim's body, a shoe lace from around the victim's neck, a vial of powder, nail kits from the defendant and Adrianza and a rape kit from Adrianza.[14] (T. 2999-3002). McCullough found no semen at the scene. (T. 2993).

Later, McCullough examined Navarres' Lexus. McCullough found possible blood or tissue in the trunk of the Lexus, but did not find any blood inside the passenger compartment. (T. 3002-04).

Crime scene technicians Marsha Knowles and Linda Shows photographed the defendant's apartment and collected various items from the apartment. They included blood samples from the bathroom, a tissue with human hair from the kitchen garbage can, plastic gloves from the bathroom sink, five beer bottles and two beer cans from the kitchen garbage can and plastic baggies containing a white powder residue. (T. 3014-16, 3034-37, 3049-50, 3053, 3067-69, 3090-91, 3107). The knife found in Adrianza's body was collected, but was not processed for fingerprints. (T. 3258).

Donna Wallace, an analyst with the FDLE, prepared blood stain cards from the

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[14] From Karolay Adrianza's autopsy, Anita Douglas recovered scrapings from Adrianza's nails, possible semen from Adrianza's vagina, Adrianza's panties, a knife from Adrianza's body and a ligature from Adrianza's neck. (T. 3118, 3128-29, 3136-67, 3140-43).

defendant and Karolay Adrianza. (T. 3174-80). The cards were used for DNA testing. (T. 3181). Wallace never received any blood from Navarres. (T. 3184).

Paul Martinez, a fingerprint comparison technician with the Miami Beach Police, compared several latent prints with known standards of Ace Green, Danny Navarres, Karolay Adrianza and the defendant. (T. 3198-3201). Adrianza's prints were found on a beer can found in the garbage and on two glasses found in the kitchen sink. (T. 3210). Navarres' prints were found on a Marlboro cigarette box located on a cocktail table. (T. 3211). The defendant's fingerprints were not found on any of the latent cards submitted. (T. 3209). Two latent print cards of value went unidentified. (T. 3213, 3217-19).

DNA analyst Jennifer McCue testified that she utilized the RFLP test in analyzing specimens submitted to her in this case. (T. 3235). McCue stated that she found a large amount of semen on specimen swabs taken from Karolay Adrianza's vagina. (T. 3243-47). No semen was found on a blanket she had been given or on Adrianza's pants. (T. 3260-61). McCue found that the semen from Adrianza's vagina matched the defendant's DNA. (T. 3301). The possibility of matching the semen to someone other than the defendant in the Caucasian population was 1 in 7,040,000. (T. 3305-06). Although McCue could say that the defendant and Adrianza had engaged in sex, McCue could not say whether Adrianza was alive during the sexual act. (T. 3319-20). The defendant objected to the testimony and moved for a mistrial on the ground that it hinted at the

defendant having sex with a dead body. (T. 3321-23). The court denied the defendant's motion. (T. 3324-25).

McCue added that she examined clippings from the defendant's nails and found no sign of blood on the clippings. (T. 3286, 3292-93).

Chris Whitman, a lab analyst for FDLE, testified that he performed further DNA testing of a nail kit taken from Adrianza's nails, a portion of the defendant's jeans, and a pillow found in the defendant's apartment. (T. 3352-54, 3359-71). Whitman found that samples from Adrianza's nail clippings contained her own DNA. They did not contain DNA from the defendant. (T. 3372, 3379-80). Whitman could not eliminate Navarres' DNA from the nail samples because he did not receive samples from Navarres. (T. 3381). A cutting from the top of the defendant's jeans contained Adrianza's DNA. (T. 3375). The pillow contained DNA belonging to Ace Green. (T. 3373).

Brian Higgins, a serologist with FDLE, re-tested the sample taken from the defendant's pants using the short tandem repeats (STR) DNA testing method. (T. 3401, 3407, 3414). Higgins confirmed that Adrianza's DNA was found on the defendant's pants. (T. 3414). The possibility of matching the sample to someone other than Adrianza in the Caucasian population was 1 in 83 quadrillion. (T. 3411).

Ismael Mami, a toxicologist with FDLE, reported that a bottle which had been seized from the defendant's apartment was found to contain lidocaine. (T. 3388, 3393-

94). Mami testified that lidocaine is frequently used to weaken the strength of cocaine. (T. 3395-96).

Acting pursuant to instructions from Dr. Emma Lew, a medical examiner, morgue supervisor, Scott Hanks photographed and weighed the body of Karolay Adrianza. (T. 3462-64). Hanks reported that Adrianza's body was five feet tall and weighed 101 pounds. (T. 3471-72).

William Hearn, the director of the toxicology lab at the medical examiner's office, received blood, ocular fluid, stomach contents, liver, bile, brain tissue and nasal swabs from Karolay Adrianza. (T. 3480-85). Hearn stated that he tested for alcohol in the blood and ocular fluid. The blood and ocular fluid had readings of .05 and .09, respectively. The ocular fluid was higher because it contains a greater percentage of water by volume. (T. 3487-88). In Hearn's view, although Adrianza had consumed at least three drinks on the night of her death, Adrianza had likely stopped drinking before she died, because the alcohol level was in the elimination phase at the time of her death. (T. 3489).

Hearn also performed a drug screen. Hearn found benzoylecgonine (BE) in Adrianza's brain tissue and serum. BE is the result of the breakdown process performed by the body after cocaine is ingested. Hearn found that most of that breakdown process had been completed by the time of Adrianza's death. In Hearn's opinion, Adrianza had

not consumed much cocaine because he found little BE in Adrianza's brain. (T. 3394-98).

Hearn added that if a larger man had consumed the same amount of cocaine as Adrianza, the effect of the cocaine on the man would be negligible. (T. 3505-06). Cocaine in that quantity would have little impact on the judgment of the larger man and would not prevent the man from engaging in sex or from cutting a body into pieces. (T. 3507-08).

Dr. Emma Lew, a deputy medical examiner, testified that she went to the defendant's apartment to view the scene before performing the autopsy on Karolay Adrianza. (T. T. 3533-3536). Dr. Lew found that although the bathtub containing Adrianza was very bloody, everything else in the bathroom was clean. (T. 3544). Dr. Lew observed only one or two blood drops on the floor. (T. 3545).

Dr. Lew found Adrianza's body in the bathtub clothed in a shirt and underwear. (T. 3540). Most of the soft tissue below the waist was missing from Adrianza's body. Part of the abdominal wall, the large bowel and part of the small bowel were gone. (T. 3547). In addition, Adrianza's left hand, left foot and left ankle had been separated from the body. (T. 3547). In Dr. Lew's opinion, approximately 40-50 pounds of flesh had been cut from Adrianza's body. (T. 3549-50). A knife found at the scene was consistent

with the type of tool needed to cut flesh.[15] (T. 3550-51). Dr. Lew opined that it would take more than one hour to flush the flesh removed from Adrianza's body down the toilet. (T. 3551).

Dr. Lew stated that the autopsy revealed that Karolay Adrianza had died from manual strangulation, which took anywhere from seconds to minutes. (T. 3560, 3604). The time of death was between 4:30 and 9:00 AM. (T. 3615). Dr. Lew found bruising on Adrianza's collarbone and neck that was consistent with the use of hands in strangulation. (T. 3568-69). Dr. Lew also found hemorrhage in Adrianza's eyelids and voice box and petechiae in the eyes. All of those findings were consistent with strangulation. (T. 3564-70).

Dr. Lew found significant evidence of blunt trauma. Bruises under the scalp were consistent with a punch or contact with the tub. (T. 3571-73). Bruises under the lips were consistent with a punch or with physical pressure over the mouth to prevent screaming. (T. 3574-75). Bruises to the upper and lower back were consistent with

[15] Dr. Lew stated that she would expect the dripping of blood and blood spatter during the cutting process. The blood spatter on the defendant's pants was consistent with the type of spatter that Dr. Lew sees while she performs an autopsy. (T. 3551, 3555). Since only a small amount of blood was found on the defendant's pants, Dr. Lew suspected that the defendant was nude while he cut the body in pieces. (T. 3610).

contact with the tub. (T. 3577, 3579). Bruises on Adrianza's arms were consistent with grip marks and an effort to hold Adrianza down. (T. 3580). Adrianza was also found to have bruises and abrasions on the right ear. (T. 3576). In Dr. Lew's view, all of these injuries were incurred while Adrianza was alive. (T. 3581).

Dr. Lew noted that a ligature was placed around Adrianza's neck after the manual strangulation. (T. 3608). Dr. Lew also found scratches on Adrianza's neck which were consistent with Adrianza's effort to avoid strangulation. (T. 3602-03). In Dr. Lew's opinion, the ligature was likely placed around Adrianza's neck after her death. (T. 3608, 3617).

Dr. Lew found a number of incise wounds that were long, but not deep. (T. 3599). She was not able to conclude that those wounds were inflicted prior to death. (T. 3600, 3630). The iliac artery in Adrianza's right leg had a stab defect, which lined up with a stab defect in her underwear. (T. 3606, 3626-27). If Adrianza had been alive at the time that the artery was severed, the artery would have spurted blood. However, since the artery was deeply internal, most of the bleeding would have been internal. (T. 3627-28).

Dr. Lew also found evidence of semen in Adrianza's vagina. Dr. Lew stated that she could not say if Adrianza was alive when the defendant left his semen in Adrianza's vagina. (T. 3606).

At the conclusion of Dr. Lew's testimony, the State rested and the defense moved for a judgment of acquittal. The defendant argued that the State had failed to prove that the defendant had acted with premeditation. (T. 3638, 3653). The judge denied the defendant's motion as well as the defendant's renewed acquittal motion, which was made after the defendant had rested. (T. 3640, 3656-62).

The defendant also moved for a mistrial based upon Dr. Lew's testimony, which implied that the defendant had sex with a dead body. (T. 3656). The court denied the defendant's motion. (T. 3656).

Subsequently, the jury found the defendant guilty of first degree murder, as charged. (T. 3831-32). The court adjudicated the defendant guilty and continued the matter for a sentencing hearing. (T. 3838).

On January 15, 2003, the court ruled upon several motions filed by the defendant in which he challenged the constitutionality of Florida's capital sentencing procedure. Specifically, the court denied the defendant's motion requesting that the jury be required to reach a unanimous verdict on its sentencing recommendation. (T. 3945). The court also denied the defendant's other motions which relied upon the United States Supreme Court's decision in *Ring v. Arizona*, *supra*. (T. 3943).

On January 27, 2003, the court convened a sentencing hearing before the jury. First, the State presented victim impact evidence in the form of a statement read by the

victim's mother, Louisa Lopez. (T. 4109-14).

The State then introduced statements of two witnesses which related to the defendant's 1986 convictions in Broward County. In one statement, Leon Golden stated that on May 8, 1986, he and Michelle Kendricks drove in his Cutlass to a convenience store. After he got out of his car, he heard the sound of tires screeching and Michelle yelling. He turned and saw Michelle jump out of the car as a man drove off. Golden said that he recovered the car the following day. (T. 4119-21). Kendricks said that she was seated in Golden's car when a man jumped into the driver's seat and put the car in reverse. Kendricks jumped out of the car and managed to avoid being hit as the white man drove off. (T. 4122-24). As a consequence of those acts, the defendant was convicted of burglary, kidnapping and grand theft and was sentenced to fifteen years in prison. (T. 4116-17).

Officer Robert Vandevadt testified that while working with the Miami Beach Police, he received a call on May 12, 1986, regarding the kidnapping of a British tourist. (T. 4127-28). His investigation revealed that the victim was standing at a pay phone when the defendant, at knife point, forced the victim into a stolen car. (T. 4129). Fifteen minutes later, the defendant stopped to ask fifteen-year old Andrea Henderson for directions. (T. 4130). Henderson saw the defendant holding a crying, nude woman in a head lock. The woman's head was in the defendant's lap, while the defendant's pants

were undone and his penis was exposed. (T. 4130-31).

Vandevadt stated that the victim was subsequently found in a wooded area in Broward County. The victim was naked from the waist down and had suffered ankle injuries from being bound. A portion of a toilet seat had been used as a weapon to strike the victim. (T. 4132-38).

As a consequence of the foregoing, the defendant was convicted of attempted first degree murder, kidnapping and grand theft and received a sentence of thirty years imprisonment. (T. 4125-26).

Dr. Lew again testified that Karolay Adrianza died from mechanical asphyxiation. Dr. Lew opined that the bruising and scratches on Adrianza's neck and the large amount of petechiae were indicative of a lengthy struggle. (T. 4142-46). Dr. Lew stated that Adrianza would have been uncomfortable as she struggled for air. (T. 4146). The scratches on her neck came from her own hands as she tried to remove the hands of the strangler. (T. 4147). Adrianza was clearly conscious during that period. (T. 4148).

Dr. Lew testified that the bruises to Adrianza's head resulted from punches or being pushed into an object, like a bathtub. (T. 4148-51). The bruises to her lips were consistent with being punched in the mouth. (T. 4150). The bruises on her arms came from being forcefully gripped by another. (T. 4152). The bruises to Adrianza's back were likely caused from being slammed into the tub. (T. 4155-58). Adrianza was alive

during the foregoing blunt trauma, but Dr. Lew was unable to state whether she was conscious during that period. (T. 4151).

Due to the lack of tissue in the lower half of Adrianza's body, Dr. Lew was unable to say whether Adrianza was alive or conscious during the cutting of the tissue. (T. 4160-61, 4170). In all likelihood, the evisceration of Adrianza's body occurred after her death. (T. 4174).

In Dr. Lew's opinion, Karolay Adrianza was in a great deal of pain and physical distress prior to her death. (T. 4164, 4176). Dr. Lew felt that Adrianza suffered emotional horror and fear of death as she was strangled, released, and then strangled again. (T. 4165-66).

At the conclusion of Dr. Lew's testimony, the State rested. (T. 4178).

The defense called Officer Paul Acosta, the officer that transported the defendant from the crime scene to the police station. (T. 4179-80). Acosta prefaced his testimony by noting that he had been trained to recognize subjects who were under the influence of drugs or alcohol. (T. 4181). Acosta spent four hours with the defendant on the day of his arrest. During that time, Acosta noted that the defendant exhibited a glassy stare and that the defendant had needle marks on his arms. Acosta also said that the defendant occasionally rambled and was incoherent. (T. 4182-83). At one point, the defendant asked where he was even though the officer had advised the defendant that he was in the

police station. (T. 4184-84, 4188-89). The defendant also asked Acosta where were the two guys and a girl that had been with him. The defendant expressed concern that they had stolen something from him while he had been knocked out. (T. 4186). Acosta felt that the defendant was likely under the influence based upon his actions and statements. (T. 4187). Acosta did not exclude the possibility that the defendant was trying to "jerk him around" in an effort to set up a defense. (T. 4187, 4192).

Ace Green testified that he moved in with the defendant during February, 1998. (T. 4210). From that point until March 17, 1998, the defendant's condition greatly deteriorated. The defendant smoked marijuana, drank alcohol and used cocaine excessively. (T. 4211-12). By March 17, the defendant had become like "the living dead." (T. 4212). At that time, the defendant was only concerned with obtaining and using drugs. He cared little for personal hygiene, food or sleep. (T. 4212). While the defendant had previously been employed in construction, by March, he was unemployed. (T. 4213).

On the night of the homicide, Green arrived home at midnight. He found the defendant, Adrianza and Navarres doing cocaine in the apartment. (T. 4213-14). Green drank beer with them and did one line of cocaine. He found the cocaine to be strong. (T. 4214-15). Green later went out with Navarres to get beer. Navarres then dropped Green off. Although Navarres said that he would return, Green never saw him again

during that night. (T. 4215).

When Navarres did not return, Adrianza tried on numerous occasions to contact him. (T. 4216). Adrianza was free to leave the apartment and she did so to make some calls. (T. 4216). The defendant, however, would not let Green back into the apartment. (T. 4217). Green said that the defendant started to rant and rave. First, he accused Green of trying to kill him. Then, the defendant said he was going crazy and would kill himself. (T. 4217-18). As a consequence of the defendant's behavior, Green called 911. (T. 4218). Although Green did not think that the defendant would try to kill himself, he did not want to take that chance. (T. 4229).

On cross examination, Green said that the defendant was a "hustler" and a "schemer." (T. 4220). The prosecutor then asked Green:

> Q: And he [the defendant] would frequent or he would go to gay clubs to hustle money from gay guys...

(T. 4220). The defendant objected on relevance grounds and moved for a mistrial. (T. 4220-21). The court sustained the defendant's objection, but denied the defendant's mistrial motion. (T. 4223). The court then instructed the jury to disregard the prosecutor's question and any answer that may have been given. (T. 4225).

Dr. Ronald Wright, a forensic pathologist and former Chief Medical Examiner of Broward County, testified that he reviewed the records of Karolay Adrianza's autopsy and photographs taken of the crime scene . (T. 4236-41). Dr. Wright agreed that

Adrianza had died by strangulation. Since strangulation causes a loss of blood flow and oxygen to the brain, Dr. Wright estimated that a person would lose consciousness in no fewer than 13 seconds. (T. 4249). Dr. Wright would not agree that Adrianza was aware that she was going to die, because he did not consider that to be a scientific finding. (T. 4247).

Based upon his review, Dr. Wright also opined that all of the sharp injuries incurred by Adrianza's body had been inflicted after her death. (T. 4241-42, 4251, 4271). The bruises on Adrianza's back were not caused contemporaneously with her strangulation. Those bruises were caused at least one hour before death. (T. 4246-48).

Arthur Clemons, a sergeant with the Miami-Dade Department of Corrections, testified that he first met the defendant in 1998. (T. 4273). Clemons said that he never saw the defendant engage in violence during his incarceration. (T. 4273). In 1999, the defendant was stabbed by another inmate after the defendant refused to get the other inmate coffee. (T. 4274-75). Clemons did say that the defendant had been caught with illegal drugs during his incarceration period. (T. 4278).

Myra Torres stated that she met the defendant in 1998 and began a relationship with him, which occasionally included sex. (T. 4284-91). Torres said that she has periodically lent the defendant money. On one occasion, the day before Karolay Adrianza's murder, Torres noted that the defendant appeared to be ill. (T. 4285-86,

4291). At the time, Torres believed that the defendant had the flu. (T. 4286).

Susan Moles, a classification officer with the Department of Corrections, testified that since there is no parole in Florida, an inmate sentenced to life in prison would serve the remainder of his life in prison. (T. 4297-4301).

Dr. Bill Mossman, a forensic psychologist, testified that he was retained in 1998 to examine the defendant's sanity at the time of the offense and to evaluate the defendant's mental state for mitigation purposes. (T. 4319-25). To prepare, Dr. Mossman interviewed the defendant,[16] the defendant's adoptive father, Bill Seibert, the defendant's adoptive mother, Rosalie Seibert, and the defendant's adoptive sister, Paula Davidson. Dr. Mossman also examined the defendant's family, criminal and drug histories, and considered various public records, the defendant's psychological records and tests and other historical information. (T. 4326-30).

Dr. Mossman testified that the defendant was adopted under very secretive circumstances in February, 1968.[17] (T. 4329-31). The defendant's adopted family already had three children, all of whom were at least eight years older than the defendant.

[16] In fact, Dr. Mossman interviewed the defendant a total of seven times. (T. 4467). During those interviews, the defendant told Dr. Mossman that he did not commit the crime. (T. 4474).

[17] Dr. Mossman believed that the defendant's birth mother, June Lange, was a little over 15 years old at the time of the defendant's birth. (T. 4484). Dr. Mossman believed that records reflecting that Lange was 17 at the time of the defendant's birth were incorrect. (T. 4340).

(T. 4331).

Dr. Mossman noted that the Seiberts were a dysfunctional family at the time of the defendant's adoption.[18] (T. 4330). Bill Seibert was engaging in multiple affairs prior to the adoption. (T. 4332). Mrs. Seibert told Dr. Mossman that the defendant was adopted in hopes of keeping Bill Seibert at home. Instead, according to Paula Davidson, Bill Seibert grew to resent the defendant.[19] (T. 4351). The family engaged in fights and eventually chose sides. Paula and the defendant sided with the defendant's mother. The other children sided with Bill Seibert. The Seiberts then separated when the defendant was 5. (T. 4351-53).

Due to the turmoil during his early years, the defendant was primarily cared for by his adopted grandparents, George and Vestra. (T. 4332). The defendant developed a close relationship with his grandfather. (T. 4332). Unfortunately, both grandparents died by the time the defendant turned 8.[20] (T. 4355).

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[18] Dr. Mossman described the marriage of the defendant's adoptive parents as a "war zone." (T. 4804). The members of the family were so drastically affected by the problems in the marriage that when the parents ultimately divorced, the parents did not talk to the elder siblings for several years thereafter. (T. 4804, 4814).

[19] The defendant was used by his mother as a pawn against Bill. The other children then grew to resent the defendant because he was treated differently by his mother. (T. 4354-55). Bill then began to refer to the defendant as the "bad kid." (T. 4355).

[20] The defendant's grandfather, to whom the defendant had grown very attached, died when the defendant was 7. (T. 4803). The defendant's behavioral problems, which

Dr. Mossman testified that the defendant suffered through a traumatic event when he was 9. At that time, Bill Seibert told the defendant for the first time that he was adopted and that the defendant was not his real son. Bill then left the home. Dr. Mossman's investigation revealed that after that event, the defendant was never the same.[21] (T. 4357). Dr. Mossman stated that the defendant began to abuse drugs and became a problem at school and at home.[22] (T. 4358, 4367).

When the defendant was fourteen, the defendant was taken to a psychiatric institute in Maryland. (T. 4366). The defendant's parents sought hospitalization for the defendant because he had become increasingly despondent and had become abusive and prone to temper outbursts at school and at home. (T. 4367, 4492). The defendant told his treating physician, Dr. Rosen, that he wanted to go to the hospital because he felt suicidal.[23] (T. 4370-72). Dr. Rosen found that the defendant blamed himself for the

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compelled the defendant and his family to participate in counseling, began when the defendant was 7. (T. 4499). The defendant demonstrated an inability to relate to authority figures. At that time, the defendant's teacher reported a personality conflict between the defendant and the teacher. (T. 4495). The defendant's opposition to limits placed on him increased over time. (T. 4495).

[21] Dr. Mossman stated that his sources for information about the traumatic event were the defendant and his sister, Paula. (T. 4807). Dr. Mossman conceded that none of the records that he reviewed made reference to the event. (T. 4497, 4504). Bill Seibert maintained that he told the defendant that he was adopted when the defendant was 2 or 3 years old. (T. 4808).

[22] The defendant ingested PCP, LSD and cocaine. (T. 4391).

[23] Dr. Mossman noted that it is rare that a child would ask to be placed in a mental

problems at home. (T. 4373). The defendant felt alienated from his parents and reacted to difficult times by using drugs, isolating himself or running away. (T. 4374). Dr. Rosen noted that the defendant had a poor self-image,[24] and that he was angry, depressed and distrustful of others. (T. 4371).

Based upon his testing and evaluation, Dr. Rosen found that the defendant had significant symptoms - he was profoundly depressed, suffered from feelings of rejection and in times of high stress, he would lose control in his actions toward others. (T. 4376-77, 4392, 4567). Dr. Rosen recommended remedial placement, counseling and family therapy. (T. 4378).

While in the Maryland facility, the defendant tried to hurt himself and succeeded by breaking both of his arms. The defendant also attempted suicide. (T. 4356, 4378). Based upon the conclusion that the Maryland facility could no longer handle him, the defendant was transferred to a psychiatric institute in Washington, D.C., which featured a more structured environment. (T. 4380-81). At the new facility, the defendant was given anti-depressants and was evaluated by Dr. Schwartz. (T. 4382).

Dr. Schwartz initially found that the defendant had impaired insight and judgment.

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hospital for treatment. Only a truly desperate child would make such a request. (T. 4815-16).

[24] The defendant viewed himself as unworthy of being loved and as a "bad kid." (T. 4375). Results from a test administered by Dr. Rosen demonstrated that the defendant viewed himself as an emotionally or physically disturbed child. (T. 4376).

The defendant demonstrated inappropriate anger and could not handle hospital rules. Dr. Schwartz' initial diagnosis was that the defendant suffered from depression which was aggravated by substance abuse. Dr. Schwartz also found that the defendant had a conduct disorder. (T. 4382-83). Twelve days later, Dr. Schwartz modified his diagnosis. He found that the defendant suffered from major depressive episodes and had suicidal tendencies. The doctor eliminated the diagnosis of conduct disorder. (T. 4383-84).

After one month of treatment at the hospital, against the doctors' wishes, the defendant's mother removed him from the hospital setting. The mother removed the defendant so that the defendant could attend a family reunion. (T. 4384-4386). Although the doctors told the defendant's mother that the defendant should be returned to the hospital for further treatment, the defendant's mother never brought him back to the hospital. (T. 4386).

Three months after his departure from the hospital, the defendant began to commit crime.[25] (T. 4394). In conjunction with one of his juvenile cases, the defendant was evaluated by Dr. Greenberg, who found that the defendant was severely emotionally disturbed.[26] (T. 4395). Dr. Greenberg found that the defendant had low self esteem and

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[25] The defendant's criminal actions coincided with the time that his adoptive parents finally divorced. (T. 4390). The defendant's pattern of juvenile crime escalated over time. (T. 4552).

[26] Dr. Mossman conceded that many of the traits exhibited by the defendant at that age were consistent with someone with a conduct disorder. (T. 4567-70).

suffered from depression, anxiety and feelings of isolation. The defendant also had difficulty in relationships with others. (T. 4395). Unable to control his actions, the defendant frequently allowed his emotions to take over in stressful situations. (T. 4396). Dr. Greenberg recommended that the defendant be placed in a school for severely emotionally disturbed children. (T. 4396). That category is the most severe for a child in a school system. (T. 4417).

The juvenile system did not follow that recommendation. Instead, the defendant was placed in a juvenile facility, Montrose Boys Village. (T. 4418). The defendant ran away from the facility and was gone for a year, until he turned himself in at age 16. (T. 4418). The defendant was then sentenced to 18 months in an adult facility. He was released in September, 1985. The defendant jumped parole and came to Florida in December, 1985. (T. 4419-21). In May, 1986, the defendant was arrested on a case in Broward County and was sentenced for that case in January, 1987. (T. 4421-22). He remained in prison until March, 1997. (T. 4422). While in prison, the defendant took college courses and married his drug counselor. (T. 4422).

In 1998, and again in 2003, Dr. Mossman administered the MMPI - II test, which is a personality assessment instrument. Dr. Mossman also administered the MCMI - III test, which measures an inmate's mental status in comparison to other inmates. Dr. Mossman also administered a test that helps an evaluator determine whether the test

subject is attempting to manipulate. (T. 4424-25). In February, 2003, a neuro-psychological test on brain function was administered to the defendant. (T. 4426).

Based upon the test results, the doctor's review of the records and reference to the DSM-IV, Dr. Mossman determined that his diagnosis was the same as the one made when the defendant was 14. (T. 4426-28). The severe emotional disturbance that appeared at that early age had not gone away. (T. 4430, 4438). Dr. Mossman concluded that the defendant suffers from a depressive disorder and a drug dependency. The defendant also has a borderline personality and compulsive and cognitive disorders. (T. 4429-31). These disorders impact the defendant's ability to think and maintain control of his actions. (T. 4430-31). In Dr. Mossman's view, at the time of the homicide, the defendant was experiencing an extreme emotional disturbance. (T. 4437). Also, at the time of the homicide, the defendant's ability to control and conform his behavior to the requirements of the law was substantially impaired. (T. 4439).

On cross examination, Dr. Mossman stated that he had considered the defendant's suicide threats in forming his opinion. He acknowledged that the defendant had told Dr. Wellman that he had faked suicide in the past. (T. 4739-40). Dr. Mossman testified that he also considered whether the defendant was attempting to manipulate by claiming to be suicidal or high on drugs. (T. 4740-43).

With reference to the standardized tests administered to the defendant, Dr.

Mossman stated that there is no single test that allows you to conclude that a defendant has an anti-social personality. (T. 4744). The tests provide evidence of some of the personality characteristics found in the DSM - IV, but they do not fit any one disorder perfectly. Instead, the tests simply enable the examiner to better understand the test subject. (T. 4747, 4750). Dr. Mossman acknowledged that the defendant received high scores for anti-social behavior and drug and alcohol dependency. (T. 4749, 4751, 4756-63). However, Dr. Mossman testified that a diagnosis of anti-social personality disorder was not appropriate for the defendant. A diagnosis of anti-social personality disorder in an adult cannot be made unless the disorder was present when the defendant was a child. None of the reports prepared when the defendant was evaluated as a child concluded that the defendant had an anti-social personality disorder. (T. 4809).

Dr. Mossman noted that it is extremely rare for a 14-year old to be diagnosed as profoundly depressed. (T. 4806). Of the five reports prepared as a consequence of evaluations done on the defendant at that time, four of the reports mentioned that diagnosis. (T. 4806). Dr. Mossman considered it highly unlikely that the defendant had successfully manipulated the doctors then. (T. 4806).

Dr. Mossman concluded that the defendant's ability to know right from wrong was impaired at the time of the homicide. In the doctor's view, the homicide was not well planned. (T. 4810). However, Dr. Mossman acknowledged that the defendant's efforts

to cut up the body and to clean the bathroom were extensive. Those actions demonstrated that the defendant was not out of control and unable to think. (T. 4797-99).

Dr. Brad Fisher, a clinical forensic pathologist,[27] testified that he was asked to evaluate the defendant to assess and predict whether the defendant poses a risk of engaging in dangerous behavior in the future. (T. 4836-43). Dr. Fisher noted that the defendant had been incarcerated for 16 of the previous 19 years. (T. 4844). During that time, the defendant had not demonstrated a pattern of aggressiveness or violence in jail. (T. 4845-46). Dr. Fisher acknowledged that the defendant was stabbed during a prison dispute in 1990, but reports of that incident reflected that the defendant was not the aggressor. (T. 4845).

Dr. Fisher stated that while the defendant was incarcerated in prison, he had received disciplinary reports for masturbating in front of women and for possession of drugs. (T. 4849-52). Dr. Fisher noted that the defendant did not receive the sex offender treatment that was ordered by the judge as a condition of his previous, thirty-year sentence. (T. 4850-51).

Dr. Fisher testified that the best predictor of the defendant's future prison behavior

[27] Dr. Fisher stated that he had developed an assessment instrument for the classification of prisoners that has been utilized in the federal prison system. (T. 4837).

is the defendant's past prison behavior. (T. 4854). Given the defendant's non-violent incarceration record and the likelihood that the defendant would be confined in a maximum security setting, Dr. Fisher considered it unlikely that the defendant would behave violently in a prison setting in the future. (T. 4848-49, 4865, 4880).

In rebuttal, the State called Dr. Daniel Martel, a forensic psychologist. (T. 4961-64). Dr. Martel reviewed crime scene photos, witness statements, depositions, police reports, and the defendant's mental history and prison records. (T. 4969-72). Dr. Martel did not examine the defendant. (T. 4969-70). As a consequence of his inability to examine the defendant, Dr. Martel stated that he could not provide a diagnosis of the defendant's mental state on the date of the offense. (T. 4975-78).

Dr. Martel acknowledged that the defendant was diagnosed as depressed at age 14. (T. 5007). However, the doctor also noted that the defendant had been diagnosed with a violent disorder when he was first hospitalized. (T. 4991-92). When the defendant was discharged from the hospital, that diagnosis disappeared. (T. 4992). In Dr. Martel's view, the defendant had a violent conduct disorder at that time. (T. 4992). When the defendant did not get his way, as when he wanted out of the hospital, he responded by breaking his arm. (T. 4984). In Dr. Martel's view, the defendant's juvenile offenses also demonstrated the defendant's conduct disorder. (T. 4996). Dr. Martel noted that if the defendant was truly a danger to himself or others at the time of his discharge from the

hospital, the hospital would have retained the defendant notwithstanding the wishes of his mother.[28] (T. 4989).

Dr. Martel also acknowledged that the defendant had been diagnosed as severely emotionally disturbed by his school. (T. 4998). Yet, the defendant received no treatment from the school or the juvenile facility in which he was placed. (T. 4999-5000). In Dr. Martel's view, the defendant's escape from the juvenile facility was further evidence of his anti-social behavior. (T. 5001).

Although the defendant had been diagnosed as depressed at age 14, Dr. Martel was unable to say whether the condition continued into the defendant's adulthood. (T. 5007). The tests administered to the defendant showed signs of depression, but were not sufficient to support a diagnosis of clinical depression. (T. 5009). Dr. Martel's interpretation of the test scores was that the defendant exhibited strong anti-social personality traits with evidence of chronic alcohol and drug abuse.[29] (T. 5010-11). However, Dr. Martel found no correlation between drug abuse and the crime charged.[30]

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[28] The hospital did discharge the defendant with a prescription for Tofranil. (T. 5059).

[29] Dr. Martel found an inconsistency between the defendant's drug abuse and his purported depression. In Dr. Martel's view, depressed people lose interest in things that give them pleasure - sex and drugs. (T. 5013).

[30] Although Dr. Martel conceded that cocaine in combination with a pre-disposed mental disorder could cause temporary insanity, Dr. Martel concluded that the defendant was not so afflicted in this case. (T. 5073).

(T. 5011). Dr. Martel also was unable to say that the defendant was under an extreme emotional disturbance at the time of the crime, since that designation is a legal conclusion. (T. 5006).

Dr. Martel found that the defendant's statements before and after the crime did not demonstrate a mental or emotional disturbance. He also found that the defendant's conduct on the night of the murder was organized, which was inconsistent with a mental disorder and consistent with the defendant's appreciation of the criminality of his acts. As examples of that behavior, Dr. Martel cited the defendant's effort to clean the crime scene, his effort to dispose of the body, and his placement of a couch by the front door to keep the police out. (T. 5015-16, 5023, 5028-29, 5034, 5078). The defendant's statements to Green, which were designed to secure privacy with Adrianza, and his comments to the police, in which he first attempted to deflect responsibility, demonstrated goal-oriented behavior and an appreciation of the criminal nature of his acts, respectively. (T. 5017-23, 5031-32). Both were inconsistent with mental disturbance. (T. 5034-37).

Dr. Martel acknowledged that childhood trauma could lead to a variety of life-long psychological effects. (T. 5044). Dr. Martel stated that it is the defendant's perception of those traumatic events, such as when he was told that he was adopted, that is important. (T. 5046). Dr. Martel conceded that it would be particularly traumatic for a child to be told that he was adopted and to be told that he was the reason for his parents'

split. (T. 5046-47). That traumatic childhood experience, together with the trauma the defendant experienced from his grandfather's death, contributed to the progression of the defendant's illness and impacted the defendant on the night of the murder. (T. 5047).

Dr. Martel also conceded that Dr. Rosen's findings and diagnosis in 1982, which included a finding that the defendant was depressed and was not a conduct-disordered child, were directly contrary to his opinion. (T. 5049). When confronted with Dr. Rosen's findings, which included that stress caused the defendant's emotions to take over and control his actions, that the defendant had impaired insight and judgment, that the defendant was unable to express anger or accept discipline and that the defendant was extremely impaired, Dr. Martel stated that he had no trouble with those findings. (T. 5050-52). Dr. Martel also acknowledged that those with anti-social personalities are frequently not self-critical, as the defendant was at the time of his hospital admission. (T. 5053).

Following the conclusion of Dr. Martel's testimony, the jury recommended that the defendant be sentenced to death by a vote of 9-3. (T. 5179). Thereafter, the parties submitted memoranda concerning their position on sentencing. (R. 631-662, 663-683). The court then entered its sentencing order on March 24, 2003. (R. 792-818).

In his sentencing order, the court found two aggravating circumstances: the defendant had previously been convicted of a violent felony, and the murder was

committed in an especially heinous, atrocious or cruel manner. (R. 799, 801). The court assigned great weight to both aggravating circumstances. (R. 801, 803).

With regard to statutory mitigating circumstances, the court found that the defendant suffers from an emotional disturbance, a personality disorder with anti-social features and a history of substance abuse. (R. 810). However, the court found that the defendant's condition did not rise to the level of an "extreme" mental or emotional disturbance at the time of the crime. (R. 810). For his conclusion, the court relied upon the defendant's goal-oriented behavior on the night of the murder and the fact that the defendant had concocted a story to diminish his criminal responsibility. (R. 810). In support of its ruling, the court also cited the defendant's insubstantial use of cocaine on the night of the offense. (R. 810). In the court's view, although the statutory mitigating circumstance under Section 921.141(6)(b), Florida Statutes, had not been established, the defendant's emotional disturbance did establish a non-statutory mitigating circumstance that was entitled to "some weight." (R. 811).

Based upon the same analysis described above, the court found that the defendant did have the capacity to appreciate the criminality of his conduct and did have the ability to conform his conduct to the law. As a consequence, the court found that the statutory mitigating circumstance defined in Section 921.141(6)(f) had not been proven. (R. 811-12).

The court specifically rejected the defendant's age and the victim's alleged participation in the defendant's conduct as possible mitigating circumstances. (R. 812-13).

With regard to non-statutory mitigation, the court specifically accepted Dr. Fisher's opinion that the defendant would probably serve his prison sentence in a non-violent fashion. (R. 814). The court assigned moderate weight to that mitigator. (R. 814).

The court assigned "little weight" to the defendant's adoption or dysfunctional family background. Although the divorce of the defendant's parents and the deaths of several family members contributed to the family's instability, the court noted that the family sought assistance from counselors and mental health workers. In that regard, the court found little evidence that anyone had abused the defendant, physically or emotionally. (R. 815). In addition, since there was a conflict in the evidence regarding the time and circumstances in which the defendant was informed that he was adopted, the court found no basis to conclude that the defendant's status as an adopted child was evidence of mitigation. (R. 814).

The court noted that the defendant's psychological history from adolescence through adulthood was a mitigator worthy of moderate weight. (R. 815).

The court found that although the defendant was not intoxicated at the time of the murder, the evidence did establish that the defendant had a history of substance abuse.

The court assigned little weight to that mitigating factor. (R. 815-16).

The court found that no evidence had been introduced to establish that the defendant had been a good son. The court did find that the defendant had been a good friend to Myra Torres. The court assigned minimal weight to that factor. (R. 816-17).

Finally, the court found that the defendant had demonstrated appropriate courtroom behavior throughout the trial. The court assigned minimal weight to that factor. (R. 817).

Based upon the foregoing, the court found that the aggravating circumstances substantially outweighed the mitigating circumstances established by the evidence. (R. 817). As a consequence, the court sentenced the defendant to death. (R. 818, 931-32).

A timely notice of appeal was filed on April 21, 2003. (R. 982). This appeal follows.

SUMMARY OF ARGUMENT

Guilt Phase

Prior to trial, the defendant filed motions to suppress evidence and statements that were obtained by the police following a non-consensual, warrantless entry into the defendant's apartment. The State claimed that the officers' entry into the apartment was justified by information they had received from the defendant's roommate, Ace Green, which indicated that the defendant might try to hurt himself. However, prior to their

entry, the defendant was able to dispel any possible notion of a then existent emergency by demonstrating to the officers, by word and by appearance, that he was fine and uninjured. Notwithstanding the defendant's expressed wish that the officers leave, they forced their way into the defendant's apartment. Once inside, although the officers had received no information that anyone was with the defendant in the apartment, the officers engaged in an unlawful cursory, protective search to look for others. While doing so, they discovered the body of Karolay Adrianza. The evidence seized in subsequent searches of the defendant's apartment and the statements received from the defendant after he was taken into custody, were the direct product of the officers' initial, unlawful entry and search. It was therefore error for the court to have denied the defendant's suppression motions.

A physical examination of the victim's body revealed the presence of the defendant's semen. The State failed to produce evidence that established the circumstances in which the semen was left in the victim. Notwithstanding the fact that the defendant was not charged with any offense relating to sexual activity, the State twice elicited references to the possibility that the defendant had engaged in sex with a dead body. Under the circumstances, the State's effort to elicit evidence of the defendant's bad character by calling forth proof of uncharged criminal offenses deprived the defendant of a fair trial.

At trial, the defense sought to establish reasonable doubt by proving that Danny Navarres might have been the perpetrator of the crime. On the night of the offense, Navarres had been in the defendant's apartment ingesting cocaine and alcohol with both the defendant and Adrianza. The evidence also established that Navarres and the defendant were rivals for Adrianza's affections. Although there was evidence that Navarres left the apartment for a period of time, the defense sought to demonstrate that Navarres had the opportunity to return to the apartment and commit the offense.

A relative of Navarres, Arecelis Korkour, testified that Navarres lived with her. At the approximate time of the offense, Korkour's husband checked Navarres' bedroom door and found it to be locked. Although Navarres did not answer a knock on the door at that time, Korkour stated that the fact that the door was locked generally meant that Navarres was home. Subsequently, the prosecutor improperly asked lead Detective Jaccarino whether, in his opinion, it was necessary to further investigate Navarres as a suspect after receiving the information from the Korkours. The State's question was an improper effort to bolster the credibility of a key State witness and prejudiced the defendant on a key issue in the case.

Penalty Phase

The death sentence imposed in this case is disproportionate when compared to the facts of other, similar capital cases. Two aggravating circumstances, prior violent felony

and HAC, were found by the trial judge. The defense elicited substantial evidence of mental mitigation, including the fact that the defendant was emotionally disturbed at the time of the offense, which was found by the judge as non-statutory mitigation. In addition, the defense established that the defendant has a long history of drug abuse and the ability to peaceably serve time in prison. The facts therefore reveal that this offense is not among the most aggravated *and* least mitigated murders. As a consequence, the defendant's death sentence must be reversed.

During the penalty phase, the prosecutor sought to elicit evidence of a non-statutory aggravating offense - that the defendant frequented gay bars and "hustled" gay men for money. That evidence was not relevant to any aggravating factor and was highly inflammatory. As a result, the defendant lost the opportunity to have the jury focus on the statutory aggravating and mitigating factors that are essential to the jury's proper exercise of its discretion.

Finally, the defendant maintains that Florida's capital sentencing scheme is unconstitutional under the authority of *Ring v. Arizona*, *supra*. The failure to require that the jury unanimously make findings of specific aggravating circumstances that are the necessary prerequisites to imposition of the death penalty renders Florida's capital sentencing scheme constitutionally infirm.

ARGUMENT

GUILT PHASE

I

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE AND STATEMENTS, WHERE THE NON-CONSENSUAL, WARRANTLESS POLICE ENTRY INTO THE DEFENDANT'S HOME WAS NOT JUSTIFIED BY SUFFICIENT EXIGENT CIRCUMSTANCES KNOWN TO THE POLICE AND WHERE THE OFFICERS' SUBSEQUENT SEARCH OF THE DEFENDANT'S HOME WAS UNREASONABLY EXPANSIVE, IN VIOLATION OF ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION AND THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

"A private home is an area where a person enjoys the highest reasonable expectation of privacy under the Fourth Amendment." *Vasquez v. State*, 870 So. 2d 26, 29 (Fla. 2nd DCA 2003). It is therefore well settled that "absent valid consent or exigent circumstances, law enforcement may not cross the threshold of a residence without a warrant." *State v. Sakezales*, 77 8 So. 2d 432, 434 (Fla. 3rd DCA 2001), relying upon *Payton v. New York*, 100 S. Ct. 1371 (1980). One type of exigency that has been found to justify a warrantless entry into a residence has come to be known as the "emergency exception" to the warrant requirement.

Under the "emergency exception," the police may enter the home of another, without a warrant, in order to preserve life or to render first aid or assistance to someone

in peril. *Brinkley v. County of Flagler*, 769 So. 2d 468 (5th DCA 2000); *State v. Boyd*, 615 So. 2d 786 (2nd DCA 1993); and *Webster v. State*, 201 So. 2d 789 (Fla. 4th DCA 1967). In assessing the legality of a police entry under the "emergency exception," courts must look to the reasonableness of an officer's belief as to the existence of emergency circumstances, and not the existence of the emergency or exigent circumstances in fact. *State v. Boyd*, *supra* at 789. The officer's belief that an emergency exists may only be deemed reasonable if the exigencies of the situation make the needs of law enforcement so compelling as to make a warrantless entry and search objectively reasonable. *Mincey v. Arizona*, 98 S. Ct. 2408, 2414 (1978) and *State v. Boyd*, *supra* at 789. Finally, any warrantless search done pursuant to an emergency situation must be "strictly circumscribed by the exigencies which justify its initiation." *Mincey v. Arizona*, 98 S. Ct. at 2413, citing *Terry v. Ohio*, 88 S. Ct. 1868, 1882 (1968). A search that is more expansive than justified by the exigent circumstances is constitutionally unreasonable. *Mincey v. Arizona*, *supra*.

In the present case, the police entered the defendant's residence without his consent, without a search warrant and without supporting and compelling circumstances that would justify an objectively reasonable belief that a warrantless entry was necessary to tend to an emergency. Further, once the officers gained entry, they engaged in a cursory protective search of the defendant's apartment that was not justified by the

"emergency" or the information in the officers' possession. The trial court's failure to grant the defendant's suppression motions, which were directed at the evidence and statements obtained as a direct result of the above-described entry and search, was clearly error.[31]

A fair assessment of the legality of the police conduct in this case, demands that it be broken down into two component parts: 1) the officers' entry into the apartment, and 2) the cursory protective search conducted by the officers once they had gained entry inside the defendant's apartment.

The officers' entry into the defendant's apartment

The record reflects that the defendant first came to the attention of the police after Ace Green placed a 911 call on the morning of March 17, 1998. In that call, Green informed the police that his roommate, the defendant, would not let him back into the apartment. Green told the police that the defendant was going crazy and was acting in an erratic fashion. He added that although the defendant had threatened to kill himself, Green told the police dispatcher that he did not believe that the defendant would do it. Finally, Green told the police that the defendant was not armed with a firearm. (T. 2587-

[31] The trial court's ruling on the defendant's motions to suppress involved mixed questions of law and fact. As a consequence, this Court must defer to the trial court on questions of historical fact, but review the constitutional issue raised here de novo. *Connor v. State*, 803 So. 2d 598 (Fla. 2001) and *State v. Barmeier*, 878 So. 2d 411 (Fla. 3rd DCA 2004).

90).

Two officers, Bales and Zeifman, responded to the call placed by Green. At the scene, Green again informed the officers that the defendant had refused to permit him back into the apartment. (T. 1096). Of note, Green said nothing to the officers that would have led them to believe that the defendant was armed or that anyone else was in the apartment with the defendant. (T. 1095-1101).

The officers then knocked on the defendant's apartment door, announced their presence and informed the defendant that Green was concerned about him. (T. 1080-81). The defendant opened the door, informed the officers that he was OK and that they could go because there was no problem. The defendant then shut the door. (T. 1082-83). The officers did not indicate that there was anything about the defendant's appearance or manner that would have given them cause for alarm. Notwithstanding the defendant's clear expression that he was fine and that he preferred that the officers leave, Officer Bales told the defendant that it was necessary for the officers to see the defendant - "one way or another, we will see you." (T. 1083, 1098-99). In fact, Sergeant Zeifman informed the defendant that if he did not open the door, the officers would obtain a key and enter the apartment without the defendant's permission. (T. 1193, 1207). When the defendant re-opened the door, the officers utilized a police baton and overcame the defendant's will by physically forcing their way into the defendant's apartment. (T.

1084).

Based upon the foregoing, it is clear that the officers initial, forcible entry into the defendant's apartment was not justified by a reasonable belief that an emergency existed. There is no question that the officers were initially told by Ace Green that the defendant had been acting erratically and that Green believed that the defendant could hurt himself. At the time of these revelations, however, the officers knew nothing about Green and had no basis by which to test the reliability of his information. Significantly, Green never told the officers that the defendant had any weapons in his apartment.

Any concern for the defendant's well-being that had been raised by Green's revelations was quickly allayed by the officers' conversation with the defendant at the door of his apartment. After the police told the defendant of Green's concern, the defendant attempted to alleviate that concern, yet maintain his privacy, by partially opening the door to allow the officers to see him through a 4-5 inch wide opening. As a consequence, the officers were clearly able to see that the defendant was uninjured. The defendant confirmed this by telling the officers that he was fine. He also told the officers that he wanted the officers to leave. The defendant then closed the door. In doing so, the defendant again asserted his interest in privacy in his home. Despite the fact that the defendant had clearly demonstrated that he was not in need of emergency aid, the officers refused to take less intrusive steps. Rather than ask the defendant to step outside, the

officers insisted that the only thing that would alleviate their concern was entry into the defendant's apartment. A few minutes later, overcoming the defendant's efforts to resist, the officers' forcibly entered the defendant's home. Under the circumstances and prevailing case law, their entry was plainly unlawful.

This point is clearly illustrated by a comparison of the foregoing facts to the facts in cases where the courts upheld a warrantless entry to render aid in an emergency situation. In *Brinkley v. County of Flagler*, *supra*, the police found dead dogs on the defendant's property, while other dogs were living in squalor and filth - the court held that entry onto the premises was justified for the well-being of the animals; *Webster v. State*, *supra*, after the police found the unconscious defendant in his car following a suicide attempt, the police saw a body on a bed with a pillow placed over the person's head - held that warrantless entry into the defendant's house to check on the body was justified by the circumstances; *United States v. Brand*, 556 F. 2d 1312 (5th Cir. 1977), police responded to a call regarding a drug overdose victim - held warrantless entry justified by police observation of the unconscious victim in the living room.

Unlike the aforementioned cases, in this case, the defendant, in an unremarkable manner, informed the police that he was not in peril and that their services were not needed. Although the persistence of the police was commendable, the defendant did all that he could, by word and act, to assert his right to privacy and to inform the police that

emergency aid was not required. Yet, despite the apparent non-existence or clear diminishment of any emergency, the police refused to consider anything short of a full violation of the defendant's privacy interest in his home. Under the circumstances, their subsequent entry was unlawful.

In *United States v. Johnson*, 22 F. 3rd 674 (6th Cir. 1994), the police received information that a young girl was being held against her will in the defendant's apartment. The officers responded to the apartment and were surprised to be met at the door by the missing girl. The girl informed the police that she was being held against her will and that she was then alone in the apartment. The girl also told the police that there were firearms in the apartment. The police freed the girl, then entered the apartment and seized the firearms. The Sixth Circuit subsequently ordered that the firearms be suppressed. The court found that once the girl was freed, the exigency had abated and could no longer serve as a justification for a search of the defendant's home. The officers' non-consensual entry into the home and consequent search were deemed unlawful.

Similarly, in *Mincey v. Arizona*, *supra*, homicide detectives responded to the scene of a murder. Prior to their arrival, paramedics had ascertained that the victim had died and all of the occupants of the house had been accounted for by the police. The detectives then conducted an extensive search that led to the seizure of numerous objects of evidentiary significance. The Supreme Court found that the detectives' search was

constitutionally unreasonable. Given the abatement of the exigent circumstances prior to the arrival of the detectives, the Court concluded that their search was not justified by any emergency.

As in *Johnson* and *Mincey*, the "emergency" which compelled the officers to appear at the subject premises was diminished by the circumstances that developed. Given the absence of other compelling circumstances, the record before the court did not support the officers' warrantless entry into the defendant's home.

The officers' cursory protective search

Even if this Court were to find that the officers' entry was justified, their protective sweep search of the defendant's apartment for others, which resulted in the discovery of Karolay Adrianza, was unreasonably expansive given the nature of the emergency.

As noted earlier, the *Mincey* court specifically held that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Mincey v. Arizona*, *supra* at 2413. Bales' avowed purpose for entering the defendant's apartment was to satisfy himself that the defendant was not hurt. After their forcible entry into the defendant's apartment, that purpose was accomplished. Both Bales and Zeifman admitted that they were clearly able to see that the defendant was uninjured and unarmed as they viewed him inside the apartment. (T. 1100, 2672-73, 2697).

Still, neither officer was satisfied. Despite the complete absence of any

information indicating that there was someone else in the apartment, both Bales and Zeifman embarked upon a cursory protective search of the defendant's apartment for others. While Zeifman searched the defendant's kitchen, Bales backed up and began to look around. (T. 1098, 2415-16). As Bales peered into the bathroom, he was able to see the severed foot of Karolay Adrianza. (T. 1089, 2416). That discovery led to the arrest of the defendant, the statements made by the defendant while in custody, and the seizure of nearly every evidentiary exhibit that was subsequently introduced at trial. Under the circumstances, the officers' cursory, protective search was unlawful.

In *Maryland v. Buie*, 110 S. Ct. 1093, (1990), the United States Supreme Court addressed the legality of a police protective sweep under circumstances where the police arrested the defendant in his home.[32] In balancing the defendant's privacy interest with the interest of police safety, the Court concluded that a protective sweep of areas of the home apart from the area where the defendant was arrested is only justified where the police have specific and articulable facts that give rise to a reasonable suspicion that the area to be swept harbors others that might endanger the police.

Following *Buie*, in two cases, the Second District suppressed evidence seized during a protective sweep of a defendant's home after the defendant was arrested in his

[32] In *Buie*, the police had a warrant for the defendant's arrest. Therefore, their entry into the defendant's home was lawful. Application of the *Buie* rule is dependent upon an initial finding that police entry into the defendant's home was legal. As noted above, the defendant maintains that the police entry into his home was unlawful.

residence. In both *Vasquez v. State*, 870 So. 2d 26 (Fla. 2nd DCA 2003) and *Runge v. State*, 701 So. 2d 1182 (Fla. 2nd DCA 1997), the court found that in the absence of sufficient facts supporting a suspicion that others were in the house at the time of the arrest, evidence seized as a result of a protective sweep was suppressed. See also *Newton v. State*, 378 So. 2d 297 (Fla. 4th DCA 1979), for the same analysis and result.

In *Gonzalez v. State*, 578 So. 2d 729 (Fla. 3rd DCA 1991), the court rejected the State's attempt to justify a police protective sweep under *Buie*. Finding *Buie* inapplicable due to the absence of an arrest warrant or probable cause to arrest for an offense of any kind, the court concluded that the officers' protective sweep constituted an unreasonable warrantless search.

Based upon the foregoing, Officer Bales' protective sweep search of the defendant's apartment was clearly illegal. Not only did the officer lack an arrest warrant or any basis to arrest the defendant, but the officer had absolutely no knowledge of any facts that would justify a suspicion that anyone else was present in the defendant's apartment.

The protective search was also not justified by the "emergency." As stated before, after the officers were able to speak with the defendant and see that he was unharmed, the stated "emergency" no longer existed. Any search in the name of resolving the emergency was therefore illegal.

In *Campbell v. State*, 477 So. 2d 1068 (Fla. 2nd DCA 1985), the police received a 911 call from the defendant in which she indicated that she had overdosed on drugs. Paramedics and the police found the defendant on the front porch. After they took the defendant inside her home for treatment, the police observed drug paraphernalia in plain view. A search of a cabinet in the living room uncovered narcotics. The Second District found that while the entry into the defendant's home was justified by the emergency, the search of the defendant's furniture was not. The arrival of the paramedics and the defendant's disclosure of the drug that she had taken had alleviated the emergency. A further search of the defendant's apartment was not justified by the facts known to the officer.

Similarly, in *United States v. Brand*, *supra*, the police and emergency rescue responded to the defendant's home in response to a call regarding a drug overdose victim. The defendant was found unconscious on the floor of the living room. Drug paraphernalia was found in plain view in the living room. One officer entered the defendant's bedroom and found narcotics in the bedroom. On those facts, the Fifth Circuit found that the officer's entry into the defendant's home and living room was justified by the emergency at hand. The officer's plain view sighting and seizure of the paraphernalia in the living room were therefore lawful. However, the search and seizure of evidence from the defendant's bedroom were deemed illegal. The court found that the

medical emergency justified the officer's presence in the living room, but that the defendant retained an expectation of privacy in the remainder of his house. As a consequence, the officer's search of the bedroom was determined to be unjustified by the emergency and therefore illegal. See also *Anderson v. State*, 665 So. 2d 281 (Fla. 5th DCA 1995), (court finds that initial police entry into residence that was possibly burglarized was justified - however, once the officer determined that no one was present in the home, further search of the home was not justified by initial exigency).

Clearly, based upon the record and prevailing case law, the entry by the officers into the defendant's apartment was unlawful and their subsequent search of the apartment was likewise unlawful. The evidence seized from the defendant's apartment as a direct result of that search and subsequent police searches should have been suppressed. In addition, the defendant's statement obtained after the defendant was taken into custody as a result of the illegal search was presumptively invalid and should have been suppressed.[33] The court's failure to do so was error that requires reversal of the defendant's conviction.

II

[33] *Brown v. Illinois*, 95 S. Ct. 2254 (1975).

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL THAT WERE PREMISED UPON THE STATE'S EFFORT TO ELICIT IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF THE DEFENDANT'S INVOLVEMENT IN COLLATERAL CRIMINAL ACTIVITY, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Michaelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 218 (1948), the United States Supreme Court discussed the basis for the general proscription against introduction of evidence of the character of the accused by the prosecution:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character [citation omitted], but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The over-riding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

By its enactment of Section 90.404(1)(a) & (2)(a), Florida Statutes, the Florida

Legislature adopted the general proscription discussed by the United States Supreme Court. Evidence of a person's character or character trait, that is offered to prove action in conformity with it on a particular occasion, is inadmissible under that provision. In fact, the State may only introduce evidence of a character trait of the accused to rebut a character trait first placed in issue by the accused. *Jordan v. State*, 107 Fla. 333, 144 So. 669 (1932); *Carter v. State*, 687 So. 2d 327 (Fla. 1st DCA 1997) and *Albright v. State*, 378 So. 2d 1234 (Fla. 2nd DCA 1979). Moreover, evidence of any crime committed by a defendant, other than the crime or crimes for which the defendant is on trial, is inadmissible in a criminal case, where its sole relevance is to attack the character of the defendant or to show the defendant's propensity to commit crime. *Holland v. State*, 636 So. 2d 1289 (Fla. 1994); *Craig v. State*, 510 So. 2d 857 (Fla. 1987) and *Williams v. State*, 110 So. 2d 654 (Fla.) *cert. denied*, 361 U.S. 847 (1959). See also Section 90.401, Florida Statues.

In this case, these fundamental principles were violated when the State twice elicited evidence that severely impugned the defendant's character and portrayed the defendant as a morally reprehensible man, at a time when the defendant had not placed his character in issue. The prejudice resulting from the highly inflammatory reference served to deprive the defendant of a fair trial.

During the State's case, the prosecutor questioned DNA analyst Jennifer Mc Cue

about a semen sample that had been taken from Karolay Adrianza's vagina and had been submitted to McCue for testing. (T. 3243-47). After McCue testified that the semen belonged to the defendant, defense counsel asked:

> Q.: As to the sexual contact, is it fair to state, ma'am, that it is your testimony, as an expert, that Karolay Adrianza and Michael Seibert, scientifically, had sexual relations?
>
> A.: That's correct.
>
> Q.: You don't know if it was anything more than that?
>
> A.: No, I do not.

(T. 3319). On re-direct examination, the prosecutor immediately added:

> Q.: Miss McCue, for all we know, she could have been dead at the time the defendant had sex with her; isn't that correct?
>
> A.: Yes, it is.

(T. 3320). The defendant objected to the testimony and moved for a mistrial on the ground that it hinted at the defendant having sex with a dead body. (T. 3321-23). The court denied the defendant's motion. (T. 3324-25).

Later, Dr. Emma Lew, the coroner handling the autopsy of the victim made several findings concerning the condition of Karolay Adrianza's body. Included among her findings was the discovery of the defendant's semen in Ms. Adrianza's vagina. The following exchange then occurred:

> Q: Now, in terms of the tests that you performed and the evidence which you recovered from her vagina and cervix that came back as the defendant's

semen, *do you know whether she was dead when she had sexual activity?*

A: *I cannot tell you that.*

Q: *So, you don't know whether she was dead or alive for that ?*

A: *That is correct.*

(T. 3606). The defendant moved for a mistrial based upon Dr. Lew's testimony, which implied that the defendant may have had sex with a dead body. (T. 3656). The court denied the defendant's motion.[34] (T. 3656).

In taking the measure of these gratuitous, highly inflammatory and prejudicial references, it is important to remember that the defendant was charged only with murder through premeditation. (R. 1-2). The defendant was not charged with felony murder or with a separate count of sexual battery. As a consequence, the defendant was entitled to rely upon the notion that the jury would be permitted to focus on evidence that was solely relevant to the murder charged in reaching their verdict, and that the jury would not be tainted by evidence of uncharged crimes. That did not occur in the trial below. While the evidence of the defendant's semen in the victim's vagina was possibly relevant to establishing the identity of the perpetrator of the murder, whether the victim was alive or dead at the time that the sexual activity occurred, given the charge in the indictment, was

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[34] A trial court's ruling on the admissibility of collateral crimes evidence is reviewed for an abuse of discretion. *Mims v. State*, 872 So. 2d 453 (Fla. 2nd DCA 2004); *Cox v. State*, 869 So. 2d 1258 (Fla. 3rd DCA 2004).

not.[35] Moreover, the implication from the testimony of both McCue and Dr. Lew was that the defendant may have committed an uncharged offense, abuse of a dead human body, a second degree felony proscribed by Section 872.06, Florida Statutes. As a result of this highly prejudicial attack on the defendant's character, the defendant was required to not only defend against the relevant evidence admitted on the charged offense, he was also unfairly required to overcome the State's prejudicial assassination of his character, a depiction that clearly featured the defendant's commission of a morally reprehensible act. The defendant's right to a fair trial was sacrificed as a consequence.

There are numerous cases that illustrate the prejudice suffered by the defendant in the court below.

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[35] The State was unable to produce any evidence to indicate that the sexual activity was non-consensual.

In *Gore v. State*, 719 So. 2d 1197 (Fla. 1998), the defendant testified during his trial on charges of first degree murder and armed robbery. On cross examination, the State questioned the defendant about his having allegedly left his two-year old son in an abandoned home, naked, in thirty-degree weather. The State also questioned the defendant about allegations that he had sex with a thirteen-year old girl. On review of his convictions, this Court found that the prosecutor's questions relating to Gore's treatment of his child had marginal probative value[36] that was "clearly outweighed by the tremendous prejudice resulting from the jury hearing of these despicable actions." *Gore*, *supra* at 1200. The questions concerning the defendant's alleged sexual activity with a minor were found to have no relevance other than to demonstrate that the defendant was a morally reprehensible individual. This Court found that these attacks on Gore's character should not have been admitted and, as a consequence, reversed Gore's convictions.

In *Carter v. State*, 687 So. 2d 327 (Fla. 1st DCA 1997), the defendant was convicted of lewd assault on a child under sixteen after a thirteen-year old child accused him of touching her genitals. During trial, the victim's aunt was permitted to relate that in a conversation she had with the defendant concerning young girls and sex, the defendant

[36] The State contended that the evidence concerning the treatment of the two-year old was impeachment evidence.

said, “If you’re old enough to bleed, you’re old enough to breed.” The First District reversed the defendant’s conviction upon finding that the aunt’s testimony constituted an impermissible attack upon the defendant’s character made when the defendant had not placed his character in issue.

In *Wilkins v. State*, 607 So. 2d 500 (Fla. 3rd DCA 1992), during the prosecution of the defendant for attempted first degree murder and aggravated child abuse, the State elicited evidence that the defendant and his wife had considered having an abortion of the baby-victim, that the defendant had a violent temper and had committed prior acts of violence, that the defendant had neglected one of his children and that the defendant felt no remorse for the injuries inflicted on the victim. The Third District reversed the defendant’s convictions because the Court found that the above-described evidence was an impermissible assault upon the defendant’s character that was highly inflammatory and irrelevant.

See also the following, in which the courts unanimously condemned the State’s use of evidence designed to impugn the defendant’s character by establishing a propensity to commit violent or bad acts: *Ellis v. State*, 622 So. 2d 991 (Fla. 1993)(murder prosecution - evidence that the defendant was popular at school because of his hatred of blacks); *Hudson v. State*, 745 So. 2d 1014 (Fla. 5th DCA 1999)(manslaughter of an infant prosecution - evidence of the defendant’s two prior abortions); *McClain v. State*, 516 So.

2d 53 (Fla. 2nd DCA 1987)(sexual battery prosecution - victim's accusation that the defendant probably raped his stepdaughter too); *Donaldson v. State*, 369 So. 2d 691 (Fla. 1st DCA 1979)(aggravated battery prosecution - the defendant's wife (not the victim) testified that the defendant threatened and beat her); *Mudd v. State*, 638 So. 2d 124 (Fla. 1st DCA 1994)(manslaughter of a child prosecution - evidence that the defendant had abused his other child); *Thomas v. State*, 701 So. 2d 891 (Fla. 1st DCA 1997)(prosecution for attempted second degree murder of a fellow inmate - evidence that the defendant had been housed in space reserved for "more violent inmates"); *Gonzalez v. State*, 559 So. 2d 748 (Fla. 3rd DCA 1990)(manslaughter prosecution - evidence that the defendant had been expelled from high school, that the defendant had been placed in a "last chance" school and that the defendant had been suspended from the "last chance" school for carrying a concealed weapon).

Rather than simply attempting to prove the defendant's guilt of the offense charged with evidence related to that crime, the State chose instead to buttress its case with an attack on the defendant's character that featured irrelevant evidence detailing the defendant's involvement in an uncharged, violent and reprehensible offense. The extreme prejudice suffered by the defendant as a consequence of that character attack is apparent. The defendant was denied his constitutional right to be prosecuted only for the crime charged in a fair trial before an impartial jury. See also *Holland v. State, supra,* and

Craig v. State, supra. Reversal of the defendant's conviction for a new trial before an untainted jury is required.

III

> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL, WHICH WAS PREMISED UPON THE PREJUDICE SUFFERED BY THE DEFENDANT AS A CONSEQUENCE OF QUESTIONS ASKED BY THE PROSECUTOR OF DETECTIVE JACCARINO, WHICH IMPLIED THAT THE DETECTIVE WAS OF THE OPINION THAT THE KORKOURS HAD BEEN TRUTHFUL IN PROVIDING AN ALIBI FOR DANNY NAVARRES, THEREBY IMPROPERLY BOLSTERING THE CREDIBILITY OF THE KORKOURS ON THAT IMPORTANT ISSUE.

In *Boatwright v. State*, 452 So. 2d 666, 668, (Fla. 4th DCA 1984), the Court aptly noted:

> "It is elemental in our system of jurisprudence that the jury is the sole arbiter of the credibility of witnesses. (Citing *Barnes v. State*, 93 So. 2d 863 (Fla. 1957). Thus, it is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness."

In this case, the State violated that fundamental principal when Detective Jaccarino was permitted to offer his opinion regarding the credibility of the main alibi witnesses for Danny Navarres, the Korkours. The prejudice to the defendant resulting from that harmful testimony denied the defendant a fair trial.

At trial, the defendant claimed that Danny Navarres was responsible for the death

of Karolay Adrianza. The record established that Danny Navarres had been with the defendant and Adrianza on the night of her death and was ingesting cocaine and alcohol along with the defendant and Adrianza in the defendant's apartment. (T. 2473-77, 2481-84, 2486-87). During their time together, Green noted that the defendant was flirting with Adrianza and that the defendant and Navarres were competing for Adrianza's affections. (T. 2486, 2567). Later, Ace Green and Navarres left to purchase alcohol. Green said that Navarres dropped him off at the apartment and that he never saw Navarres again that evening. (T. 2488-90). However, Green noted that he had fallen asleep several times during the hours that ensued. As a consequence, Green admitted that he did not know whether Navarres had ever returned to the apartment that evening. (T. 2553-55).

As for Navarres' whereabouts during the time that Adrianza was murdered, Arecelis Korkour, Navarres' aunt, testified that during the early morning hours of March 17, 1998, she had her husband check Navarres' room after they received several phone calls. Korkour's husband reported that Navarres' door was locked. Although Navarres did not answer their knock on the door, the Korkours assumed that Navarres was at home. (T. 2754-55, 2752). After Adrianza's murder was discovered, Navarres returned to Venezuela with his parents and had not been seen since. (T. 2765-67). Following the reception of this evidence, the prosecutor engaged in the following colloquy with Detective Jaccarino, the lead detective in this case:

Q. So, is it fair to say you have to use your skills as an investigator and your

skills as a person to decide whether you are going to accept what they say, or whether you have to go further and investigate further what they have to say?

(T. 2974). The court sustained the defense's objection to the prosecutor's question. The prosecutor then asked the question in another form:

> Q: When you did your investigation, and upon learning the information from the Korkours, and you talked to Ace Green, and you saw the crime scene, and all these other things, was there anything that leads you to believe that you should do more in terms of Danny Navarres Korkour?

(T. 2974). The defense again objected to the question, but this time moved for a mistrial. (T. 2974, 2980). The court sustained the defendant's objection, but denied the defendant's mistrial motion. (T. 2974, 2980).

Based upon the record, it is clear that the prosecutors' questions were purposefully designed to have Detective Jaccarino provide his opinion that the Korkours' alibi for Navarres was truthful and that, as a consequence, Navarres was not a suspect. In doing so, the prosecutor improperly sought to have Jaccarino invade the exclusive fact-finding province of the jury by bolstering the testimony of another State witness. Several cases illustrate the point.

In *Lee v. State*, 873 So. 2d 582 (Fla. 3rd DCA 2004), the Third District reversed the defendant's conviction for robbery after the lead detective opined that he thought the victim was a credible witness. The court found that the detective's testimony improperly bolstered the credibility of the victim and denied the defendant a fair trial.

In *Page v. State*, 733 So. 2d 1079 (Fla. 4th DCA 1999), after the defense attacked the credibility of the informant, who had allegedly engaged in a drug transaction with the defendant, the supervising detective was improperly permitted to testify that the informant had always been trustworthy and reliable. The court reversed the defendant's conviction due to the officer's testimony and noted that such improper bolstering from a police officer is particularly harmful due to the great weight given an officer's testimony by the jury.

In *Olsen v. State*, 778 So. 2d 422 (Fla. 5th DCA 2001), after the defense attacked the credibility of the store manager/victim's version of the facts, the State improperly elicited the investigating officer's testimony that she believed the manager's version of the facts. The court found that the officer's testimony constituted improper bolstering of the manager's testimony and reversed the defendant's armed robbery conviction. See also, *Johnson v. State*, 682 So. 2d 215 (Fla. 5th DCA 1996); *Williams v. State*, 619 So. 2d 1044 (Fla. 4th DCA 1993); and *Hernandez v. State*, 575 So. 2d 1321 (Fla. 4th DCA 1991), where the courts reversed convictions due to testimony from a state witness which improperly bolstered the testimony of another state witness.

In the instant case, the defendant's defense, in part, was centered upon implicating Danny Navarres as the perpetrator of the murder. Given that Navarres did not testify and Ace Green was unable to exclude the possibility of Navarres re-entering the defendant's

apartment after Green had left, it fell to the Korkours to provide an alibi for Navarres for the time that Adrianza was murdered. In two related questions asked by the prosecutor, the jury was informed that Detective Jaccarino did not feel it necessary to further investigate Navarres, in part, due to the information he had received from the Korkours. Those questions left the unmistakable impression on the jury that Detective Jaccarino felt that the Korkours had been truthful in providing an alibi for Navarres. In doing so, the State improperly used the lead detective to bolster the credibility of the Korkours on an issue central to the defendant's defense. As in the cases cited above, the prejudice to the defendant resulting from such improper bolstering should compel this Court to order a new trial.

PENALTY PHASE

IV

UNDER THE CIRCUMSTANCES OF THIS CASE, THE DEATH SENTENCE IMPOSED UPON THE DEFENDANT IS DISPROPORTIONATE AND CONSTITUTES "UNUSUAL" PUNISHMENT IN VIOLATION OF ART. I, SECTION 17, OF THE FLORIDA CONSTITUTION.

This Court is well aware that as part of the appellate review of the defendant's conviction and sentence of death, this Court engages in a proportionality review that is designed to prevent the imposition of "unusual" punishment in violation of Article I,

Section 17 of the Florida Constitution. *Tillman v. State*, 591 So. 2d 167 (Fla. 1991). The death penalty is considered "unusual" in a constitutional sense if it is imposed for a murder which is similar to those in which the death sentence was deemed improper. *Tillman*, *supra*, at 169.

As a consequence, proportionality review requires this Court to consider the totality of circumstances in a case and compare them with other capital cases. That review is not, however, a mere comparison of the number of aggravating and mitigating circumstances. *Porter v. State*, 564 So. 2d 1060 (Fla. 1990). Instead, mindful that a death sentence constitutes a unique and final punishment and a total rejection of the possibility of rehabilitation, this Court, through its proportionality review, must be sure that application of the death sentence is reserved for those cases where the most aggravating *and* the least mitigating circumstances exist. *Kramer v. State*, 619 So. 2d 274, 278 (Fla. 1993).

A review of this record and comparison of this case to similar capital cases reveal that the defendant's death sentence is disproportionate and must be vacated.

The record reveals that Karolay Adrianza was strangled after a night in which she ingested cocaine and alcohol with the defendant. (T. 3560, 4213-15). Although the events that led to Karolay's death were unwitnessed, Dr. Lew was able to verify that Karolay had also suffered blunt trauma injuries that were consistent with blows from a

fist or contact with a hard surface like a bathtub. (T. 3571-79). That evidence, together with evidence of the defendant's prior conviction for a violent felony, formed the basis for the two aggravating circumstances found by the trial court - HAC and conviction for a prior violent felony.

The defendant offered substantial mental mitigation during the sentencing proceeding. Dr. Bill Mossman testified that the defendant was adopted into a dysfunctional family at a very young age. (T. 4330). The defendant's adopted mother hoped that his arrival would solidify a crumbling relationship with her husband. Instead, the defendant was frequently used as a pawn by his mother, which resulted in the defendant being resented by his siblings and his adopted father. (T. 4351-55). The family ultimately developed a schism that resulted in divorce of the parents and a rupture of the relationship between parent and child. (T. 4804, 4814).

The impact of the turmoil at home on the defendant's psyche was profound. Although the defendant often sought solace in the care of his grandparents, that outlet was eliminated with the untimely death of both grandparents before the defendant reached age 8. (T. 4332, 4355). After his father separated from his mother, the defendant began to abuse drugs and cause problems at school and at home. (T. 4357-58, 4367).

At age 14, the defendant was hospitalized in a psychiatric institute in Maryland. A full battery of tests and evaluations were done by Dr. Rosen that revealed significant

psychological symptoms - the defendant was profoundly depressed, he suffered from deep feelings of rejection, and he would lose control of his actions in times of high stress. (T. 4376-77, 4392, 4567). During his hospitalization, the defendant harmed himself by breaking both his arms and also attempted suicide. (T. 4356, 4378). The defendant was then administered anti-depressants and was transferred to a more restrictive facility. (T. 4380-82).

At the defendant's new placement, Dr. Schwartz made findings that were similar to Dr. Rosen's. Dr. Schwartz found that the defendant suffered from depression which was aggravated by substance abuse. The defendant also exhibited suicidal tendencies. (T. 4382-83). Against the doctors' wishes, the defendant was removed from the facility by his parents and was never returned. (T. 4384-86).

A short time later, the defendant became involved in crime. In conjunction with one of his cases, the defendant was evaluated by Dr. Greenberg and was found to be severely emotionally disturbed. (T. 4395). Dr. Greenberg found that the defendant suffered from depression, anxiety and an inability to control his emotions in stressful situations. (T. 4395-96).

In Dr. Mossman's view, the severe emotional and depressive disorder that had been found by three different doctors had not gone away at the time of the defendant's

offense. (T. 4426-28). In addition to the defendant's drug dependency,[37] Dr. Mossman also believed that the defendant suffered from compulsive and cognitive disorders that made it difficult for the defendant to think properly and control his actions. (T. 4429-31). In Dr. Mossman's view, at the time of the homicide, the defendant was suffering under the influence of an extreme emotional disturbance and was unable to conform his conduct to the requirements of the law. (T. 4437-39).

The State's expert, Dr. Martel, was not able to provide a diagnosis of the defendant's condition because he did not have the opportunity to examine the defendant. (T. 4975-78). However, in Dr. Martel's view, the defendant's conduct stemmed from an anti-social personality disorder.[38] (T. 5010-11). Dr. Martel acknowledged that childhood trauma of the type experienced by the defendant could have long-term

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[37] Ace Green testified that at the time of the offense, the defendant was severely abusing drugs such as cocaine. In Green's view, the defendant had become like the "living dead." (T. 4211-12).

[38] Significantly, Dr. Mossman testified that a diagnosis of anti-social personality in an adult cannot be made unless the disorder was present when the defendant was a child. None of the reports prepared when the defendant was evaluated as a child concluded that the defendant had an anti-social personality disorder. (T. 4809).

psychological effects. (T. 5044-47). Dr. Martel was forced to concede that the findings made by Dr. Rosen were diametrically opposed to his and that he had no basis to contest Dr. Rosen's findings. Dr. Martel stated that he was unable to state that the defendant was under an extreme emotional disturbance at the time of the offense, because that designation required a legal conclusion. (T. 5006).

In addition, to the mental mitigation evidence, the defense elicited testimony from Dr. Brad Fisher, who opined that based upon his review of the defendant's records, the defendant would likely serve a prison sentence imposed in this case in a non-violent way. (T. 4848-49, 4865, 4880).

Based upon the foregoing, the court found as mitigating circumstances: the defendant was emotionally disturbed at the time of the offense - "some weight;" the defendant's psychological history from adolescence through adulthood - "moderate weight;" the defendant would serve his prison sentence in a non-violent fashion - "moderate weight;" the defendant's history of substance abuse - "little weight;" and the defendant was a good friend and had exhibited appropriate courtroom behavior - "minimal weight." (R. 810-17).

The following comparable cases in which death sentences were found to be inappropriate demonstrate that the death sentence in this case is disproportionate.

In *Kramer v. State*, 619 So. 2d 274 (Fla. 1993), the defendant bludgeoned the

victim to death with a rock at the conclusion of a drunken fight. After the jury recommended the death sentence by a vote of 9-3, the trial court found two aggravating circumstances - prior violent felony and HAC. In mitigation, the record demonstrated that the defendant suffered from alcoholism and a stress disorder that resulted in loss of emotional control. The defendant also had the potential for productive functioning in a controlled setting like prison.

In *Sager v. State*, 699 So. 2d 619 (Fla. 1997), after a night of drinking, the defendant beat the victim and stabbed the victim to death. Following a jury recommendation of death by a vote of 8-4, the trial court found two aggravators - HAC and the murder was committed during the course of a robbery. In mitigation, the court found that the defendant had been drinking heavily and had recently suffered from a mental illness which had required hospitalization.

In *Voorhees v. State*, 699 So. 2d 602 (Fla. 1997), Sager's co-defendant received a jury recommendation of death by a vote of 9-3. The trial court found the same two aggravating circumstances. In mitigation, the court found that the defendant was an alcoholic who was intoxicated at the time of the murder and that the defendant had been abused as a child.

In *DeAngelo v. State*, 616 So. 2d 440 (Fla. 1993), the defendant strangled a friend of his wife. After a jury recommendation of death by a vote of 7-5, the trial court found

one aggravator - CCP.[39] In mitigation, the court found that the defendant suffered from bilateral brain damage and a bipolar disorder.

In *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990), the defendant stabbed the victim to death. After a jury recommendation of death by a vote of 7-5, the trial court found one aggravating circumstance - HAC. In mitigation, the record demonstrated that the defendant had a history of alcohol abuse, that the defendant had been abused as a child and that the defendant may have suffered from an emotional disturbance as a consequence of the his heavy drinking.

In *Hawk v. State*, 718 So. 2d 159 (Fla. 1998), the defendant entered the home of an elderly couple and bludgeoned the husband to death. After a jury recommendation of death by a vote of 8-4, the trial court found two aggravating circumstances - prior violent felony and pecuniary gain. In mitigation, the record demonstrated that the defendant was brain damaged with poor impulse control. The defendant was 19 years of age at the time of the offense and was deaf since he was very young.

See also *Robertson v. State*, 699 So. 2d 1343 (Fla. 1997), *Cooper v. State*, 739 So. 2d 87 (Fla. 1999), *Larkins v. State*, 739 So. 2d 90 (Fla. 1999) and *Terry v. State*,

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[39] Although this Court found sufficient evidence in the record to sustain a finding of HAC, this Court did not disturb the trial court's finding of only one aggravating circumstance.

668 So. 2d 954 (Fla. 1996), for additional cases with similar aggravating and mitigating circumstances to the case at bar, where this Court found the death penalty to be disproportionate.

If the death penalty is truly reserved for those cases where the most aggravating *and* the least mitigating circumstances exist, the facts of this case clearly demonstrate that the sentence of death is a disproportionate penalty. This Court must reverse the defendant's death sentence and remand this case with directions to impose a sentence of life imprisonment.

V

THE PROSECUTOR'S IMPROPER AND PREJUDICIAL REFERENCE TO IRRELEVANT CRIMINAL ACTIVITY CONSTITUTED AN EFFORT TO ELICIT EVIDENCE OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE AND SERVED TO DENY THE DEFENDANT AN OPPORTUNITY TO HAVE THE JURY FAIRLY CONSIDER ITS SENTENCING RECOMMENDATION.

This Court has long held that aggravating circumstances must be limited to those provided for by statute. *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992); *Hitchcock v. State*, 673 So. 2d 859 (Fla. 1996). The introduction of evidence of bad character or of prior criminal activity that is unrelated to statutory aggravating circumstances clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury and exposes the

defendant to the risk that the jury will give undue weight to such information in their sentencing recommendation. *Geralds*, *supra* at 1163.

In the case at bar, Ace Green, the defendant's roommate was called by the defense to testify about the defendant's quality of life immediately prior to the date of the homicide. Green testified that the defendant was seriously abusing drugs around the time of the homicide and had lost his job by then. (T. 4211-13). On cross examination, the State elicited from Green that the defendant was a "hustler" and a "schemer." (T. 4220). The prosecutor then went further and asked Green:

> Q. *And he [the defendant] would frequent or he would go to gay clubs and hustle money from gay guys....*

(T. 4220). The defendant objected on relevance grounds and moved for a mistrial. (T. 4220-21). The court sustained the defendant's objection, denied the defendant's mistrial motion and instructed the jury to disregard the prosecutor's question and any answer that may have been given. (T. 4223-25).

A review of the record clearly reveals that the prosecutor's remark was strictly gratuitous and was completely irrelevant to any aggravating circumstance before the court. The remark was also highly prejudicial because it suggested that the defendant bore some animus toward the homosexual community and had committed acts designed to unlawfully obtain money belonging to homosexual men. This baseless and irrelevant charge destroyed the defendant's opportunity to have an untainted jury render a fair

sentencing recommendation.

In *Bowles v. State*, 716 So.2d 769 (Fla. 1998), in a case markedly similar to the instant case, this Court reversed the defendant's death sentence because the State had injected irrelevant evidence of the defendant's hatred toward homosexuals into the defendant's sentencing hearing. At the sentencing hearing, a State witness testified that the defendant had admitted to being a "hustler" of gay men and that he had done it to generate income. Another State witness testified that the defendant had admitted "rolling faggots." The State argued that the foregoing evidence was relevant because it established the defendant's motive - his hatred for homosexuals - and was probative of CCP. This Court rejected the State's contention and found that the State's evidence was irrelevant to any material issue. As a consequence, the Court found that the defendant's sentencing proceeding was unreliable.

In several other decisions, this Court overturned death sentences in cases where the State elicited evidence of bad conduct that was not relevant to any aggravating circumstance. In *Hitchcock v. State*, *supra*, the State improperly elicited evidence of the defendant's sexual abuse of his sister and of the defendant's molestation of children. This Court found that the evidence constituted impermissible non-statutory aggravation. In *Kormondy v. State*, 703 So. 2d 454 (Fla. 1997), the State improperly elicited evidence of the defendant's alleged statement which voiced his intent to kill two state witnesses if

he were released. This Court found that the evidence was highly inflammatory and constituted non-statutory aggravation which tainted the defendant's sentencing proceeding. In *Perry v. State*, 801 So. 2d 78 (Fla. 2001), the State improperly elicited evidence from the defendant's wife of prior, unrelated acts of violence and spousal abuse. This Court found that the evidence was irrelevant and unrelated to any aggravating or mitigating circumstance. As a consequence, the defendant's death sentence was reversed. Finally, in *Geralds v. State*, *supra*, this Court found that the State's introduction of the defendant's eight prior convictions for non-violent felonies constituted evidence of non-statutory aggravating circumstances which necessitated a remand for re-sentencing of the defendant.

Similarly, in this case, the State's question which referred to the defendant's penchant for frequenting gay bars and "hustling" gay men constituted irrelevant and highly prejudicial evidence of non-statutory aggravating circumstances. The constitutionality of Florida's sentencing scheme demands that the jury's discretion be channeled to the aggravating circumstances enumerated in Section 921.141. The State's reference exposed the defendant to the risk that the jury would consider damning evidence of bad character that was not relevant to those statutory circumstances. As a consequence, this Court should reverse the defendant's death sentence and remand this cause for a new sentencing proceeding.

VI

FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL BECAUSE IT PERMITS IMPOSITION OF A DEATH SENTENCE WITHOUT FIRST REQUIRING THAT THE JURY UNANIMOUSLY FIND THE EXISTENCE OF SUFFICIENT AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), in a non-capital case context, the United States Supreme Court held that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Essentially, the *Apprendi* court held that the Sixth Amendment did not permit a judge to impose a sentence that exceeded the permissible maximum sentence justified by the jury's specific findings in its verdict. See also, *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

The *Apprendi* decision was extended to capital cases in *Ring v. Arizona*, *supra.* In *Ring*, the Supreme Court found that the Arizona capital sentencing scheme was unconstitutional because it permitted a judge to find an aggravating circumstance necessary for imposition of the death penalty without any input from a jury.

In a series of decisions rendered since the *Ring* decision, this Court has endeavored to reconcile the *Ring* decision with Florida's capital sentencing scheme. See *Bottoson v.*

Moore, 833 So. 2d 693 (Fla. 2002), *King v. Moore*, 831 So. 2d 143 (Fla. 2002), and *Duest v. State*, 855 So. 2d 33 (Fla. 2003). In doing so, justices on this Court have noted that the Florida system runs afoul of *Ring* in a few significant respects.

In *Bottoson*, *supra*, Chief Justice Pariente noted that based upon her reading of *Ring*, the maximum penalty for the crime of first degree murder in Florida is life imprisonment. *Bottoson,* 833 So. 2d at 721. The death penalty may thereafter only be imposed after additional findings are made concerning the existence of aggravating circumstances and that the aggravators outweigh the mitigators. Section 921.141, Florida Statutes. Florida's system runs afoul of *Ring* and the Sixth Amendment because the statute requires the judge to make those additional findings, not the jury. Further, the Florida system does not require that the jury reach a unanimous verdict in rendering its sentence recommendation. Section 921.141. However, since the Court in *Ring* placed an aggravating circumstance on the same plane as an element of an offense, it stands to reason, under Florida law,[40] that the jury must unanimously find that an aggravating circumstance exists before it may be used to support a death sentence.

In the case at bar, the defendant filed a series of dismissal motions that challenged the constitutionality of Florida's capital sentencing scheme. (R. 359-363,435-455, 465-469, 819-825). These motions noted that in the instant case, the *Ring* decision and the

[40] Fla. R. Crim. P. 3.440.

Sixth Amendment were violated in two material ways. First, the death sentence was imposed upon the defendant without the jury making any specific findings regarding the existence of aggravating circumstances in this case. Instead, the judge found that two aggravating circumstances existed that justified the sentence of death: HAC and the prior violent felony aggravator. (R .799, 801). In addition, the jury did not reach a unanimous verdict in recommending the sentence of death for the defendant. Instead, the jury voted by a 9-3 margin to recommend the death sentence. (T. 5179). The death sentence that was imposed by the judge as a consequence of this process was constitutionally infirm.

The defendant is cognizant of a number of cases that hold that the existence of the prior violent felony aggravator in this cause either satisfies the mandate of *Ring* or renders any *Ring* violation harmless error. See *Lugo v. State*, 845 So. 2d 74 (2003) and *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003). However, the defendant maintains that Justice Anstead's well-reasoned opinion in *Duest v. State*, *supra*, is more consistent with the constitutional principles set forth in *Ring*. In *Duest*, Justice Anstead noted that under Sixth Amendment principles, a judicial finding concerning the existence of a prior conviction in a particular case does not compel the conclusion that findings concerning other aggravators may also be made by the judge alone. Instead, Justice Anstead concluded that the jury must still make specific findings concerning the other aggravators. *Duest*, 855 So. 2d at 54.

Therefore, in this case, it was error for the judge to enter a death sentence based, in part, on the HAC aggravator,[41] without a specific jury finding on HAC. Since there have been few, if any, cases in which the death penalty has been upheld solely upon the basis of the prior violent felony aggravator, the trial court's reliance upon the HAC aggravator in entering its death sentence, without a jury finding on that aggravator, constitutes a violation of the Sixth Amendment that cannot be harmless error. Consequently, a reversal of the defendant's sentence is required.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence for first degree murder must be reversed and the case remanded for a new trial. Alternatively, the defendant's sentence of death must be vacated and the case remanded for a new sentencing proceeding before a jury.

Respectfully Submitted,

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[41] The court assigned great weight to the HAC aggravator. (R. 803).

BY:________________________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to: the Office of the Attorney General, Rivergate Plaza, 444 Brickell Plaza, Suite 950, Miami, Florida 33131, this 15th day of November, 2004; and to the Clerk of the Court by Electronic Mail (e-mail) to: e-file@flcourts.org.

BY: ________________________
SCOTT W. SAKIN

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is composed in 14-point Times New Roman type.

BY: ________________________
SCOTT W. SAKIN