IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-53

RANDY SCHOENWETTER

Appellant,

v.

STATE OF FLORIDA,

Appellee,

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
FAX - (386) 226-0457

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 10

SUMMARY OF THE ARGUMENT 34

ARGUMENTS 37

POINT I.
THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE MOTION TO SUPPRESS 37

POINT II.
THE TRIAL COURT DID NOT ERR IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW AFTER APPELLANT DISAGREED WITH THE ATTORNEY'S ABOUT VICTIM IMPACT EVIDENCE . . 52

POINT III.
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DR. QAISER TO TESTIFY REGARDING THE AUTOPSY CONDUCTED BY DR. VASALLO 58

POINT IV.
THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL AND GIVING A CURATIVE INSTRUCTION AFTER THE PROSECUTOR ADMITTEDLY MISSTATED THE LAW REGARDING "NO PRIOR CRIMINAL HISTORY" 61

POINT V.
THE TRIAL JUDGE DID NOT ERR IN DENYING THE MOTION TO DISQUALIFY HIMSELF BECAUSE HE PREVIOUSLY WORKED AS A HOMICIDE PROSECUTOR 64

POINT VI.
THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING PHOTOGRAPHS 67

POINT VII.
THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN FINDING AND WEIGHING THE AGGRAVATING AND MITIGATION CIRCUMSTANCES; THIS CASE IS PROPORTIONAL TO OTHER

DEATH-SENTENCED DEFENDANTS 70

POINT VIII.
THE STANDARD JURY INSTRUCTIONS DO NOT SHIFT THE BURDEN TO THE DEFENDANT 81

POINT IX.
FLORIDA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL UNDER *RING V. ARIZONA* 83

CONCLUSION 88

CERTIFICATE OF SERVICE 88

CERTIFICATE OF COMPLIANCE 88

TABLE OF AUTHORITIES

CASES

Almendarez-Torrez v. United States,
523 U.S. 224 (1998) 84, 87

Anderson v. State,
841 So. 2d 390 (Fla. 2003) 84

Apprendi v. New Jersey,
530 U.S. 466 (2000) 83, 84, 85, 86, 87

Arango v. State,
411 So. 2d 172 (Fla.), *cert. denied,*
457 U.S. 1140 (1982) 81, 82

Banks v. State,
842 So. 2d 788 (Fla. 2003) 84

Barclay v. Florida,
463 U.S. 939 (1983) 85

Barnes v. State,
794 So. 2d 590 (Fla. 2001) 86

Barnhill v. State,
834 So. 2d 836 (Fla. 2002) 78

Bates v. State,
465 So. 2d 490 (Fla. 1985) 73

Bates v. State,
750 So. 2d 6 (Fla. 1999) 78

Berkemer v. McCarty,
468 U.S. 420 (1984) 45

Bonifay v. State,
626 So. 2d 1310 (Fla. 1993) 46

Bonifay v. State,
680 So. 2d 413 (Fla. 1996) 56

Bottoson v. Moore,

833 So. 2d 693 (Fla. 2002) 84

Boyd v. State,
30 Fla. L. Weekly S87 (Fla. Feb. 10, 2005) 70

Brennan v. State,
754 So. 2d 1 (Fla. 1999) 59

Brown v. State,
721 So. 2d 274 (Fla. 1998) 75, 78

Burnette v. State,
157 So. 2d 65 (Fla. 1963) 63

Burns v. State,
699 So. 2d 646 (Fla. 1997) 56

Butler v. State,
842 So. 2d 817 (Fla. 2003) 84

California v. Beheler,
462 U.S. 1121 (1983) 45

Capehart v. State,
583 So. 2d 1009 (Fla. 1991) 59, 60

Carratelli v. State,
832 So. 2d 850 (Fla. 4th DCA 2002) 60

Chavez v. State,
832 So. 2d 730 (Fla. 2002) 48, 77

Clark v. State,
443 So. 2d 973 (Fla. 1984) 74

Cole v. State,
701 So. 2d 845 (Fla. 1997) 63

Cole v. State,
841 So. 2d 409 (Fla. 2003) 84

Conahan v. State,
844 So. 2d 629 (Fla. 2003) 84

Connor v. State,

803 So. 2d 598 (Fla. 2001) 46

Correll v. State,
523 So. 2d 562 (Fla.), *cert. denied,*
488 U.S. 871 (1988) 45

Correll v. State,
698 So. 2d 522 (Fla. 1997) 67

Cox v. State,
819 So. 2d 705 (Fla. 2002) 81

Craig v. State,
766 So. 2d 257 (Fla. 4th DCA 2000) 63

Crain v. State,
29 Fla. L. Weekly S635 (Fla. Oct. 28, 2004) 63

Crawford v. Washington,
541 U.S. 36 (2004) 61

Czubak v. State,
570 So. 2d 925 (Fla. 1990) 69

Davis v. State,
698 So. 2d 1182 (Fla. 1997) 45

Davis v. State,
859 So. 2d 465 (Fla. 2003) 47, 51, 52, 69

Doorbal v. State,
837 So. 2d 940, *cert. denied,*
539 U.S. 962 (2003) 63

Dragovich v. State,
492 So. 2d 350 (Fla. 1986) 67

Duest v. State,
855 So. 2d 33 (Fla. 2003) 75, 77, 79

Farina v. State,
801 So. 2d 44 (Fla. 2001) 74, 77

Finney v. State,
660 So. 2d 674 (Fla. 1995) 79

Florida v. Bostick,
501 U.S. 429 (1991) 47, 48

Floyd v. State,
808 So. 2d 175 (Fla. 2002) 69, 70
Francis v. State,
808 So. 2d 110 (Fla. 2001) 75, 77

Geralds v. State,
674 So. 2d 96 (Fla. 1996) 58

Gilliam v. State,
582 So. 2d 610 (Fla. 1991) 66

Goodwin v. State,
751 So. 2d 537 (Fla. 1999) 62

Gorby v. State,
630 So. 2d 544 (Fla. 1993) 78

Grim v. State,
841 So. 2d 455 (Fla. 2003) 84

Guzman v. State,
721 So. 2d 1155 (Fla. 1998) 78, 79

Harris v. State,
843 So. 2d 856 (Fla. 2003) 70

Henyard v. State,
689 So. 2d 239 (Fla. 1996) 79

Hildwin v. Florida,
490 U.S. 638 (1989) 87

Hitchcock v. State,
578 So. 2d 685 (Fla. 1990) 77

Hoskins v. State,
702 So. 2d 202 (Fla. 1997) 64

Huggins v. State,
889 So. 2d 743 (Fla. 2004) 56

J.Y. v. State,

623 So. 2d 1232 (Fla. 1993) 49

Jackson v. State,
599 So. 2d 103 (Fla. 1992) 66, 67

Johnston v. State,
497 So. 2d 863 (Fla. 1986) 57

Jones v. United States,
526 U.S. 227 (1999) 85

Kearse v. State,
770 So. 2d 1119 (Fla. 2000) 80

Kight v. State,
512 So. 2d 922 (Fla. 1987) 81

King v. Moore,
831 So. 2d 143 (Fla. 2002) 84

Kokal v. State,
30 Fla. L. Weekly S21 (Fla. Jan. 13, 2005) 67

Kormondy v. State,
845 So. 2d 41 (Fla. 2003) 57, 84

Lewis v. State,
572 So. 2d 908 (Fla. 1990) 81

Livingston v. State,
441 So. 2d 1083 (Fla. 1983) 66

Lucas v. State/Moore,
841 So. 2d 380 (Fla. 2003) 84

Lugo v. State,
845 So. 2d 74 (Fla. 2003) 84

Lynch v. State,
841 So. 2d 362 (Fla. 2003) 77

MacKenzie v. Super Kids Bargain Store, Inc.,
565 So. 2d 1332 (Fla. 1990) 66

Mahn v. State,

714 So. 2d 391 (Fla. 1998) 75, 77, 78

Mansfield v. State,
758 So. 2d 636 (Fla. 2000) 69

Miranda v. Arizona,
384 U.S. 436 (1966) . . . . . *passim*

McMillan v. Pennsylvania,
477 U.S. 79 (1986) 87

McNamara v. State,
357 So. 2d 410 (Fla. 1978) 42

Mills v. State,
786 So. 2d 532 (Fla. 2001) 87

Missouri v. Seibert,
124 S. Ct. 2601 (2004) 50

Mullaney v. Wilbur,
421 U.S. 684 (1975) 82

Nibert v. State,
508 So. 2d 1 (Fla. 1987) 75, 77, 79

Oregon v. Elstad,
470 U.S. 298 (1985) 51

Oregon v. Mathiason,
429 U.S. 492 (1977) 47

Payne v. Tennessee,
501 U.S. 808 (1991) 56

Perry v. State,
522 So. 2d 817 (Fla. 1988) 73

Philmore v. State,
820 So. 2d 919 (Fla. 2002) 74

Pittman v. State,
646 So. 2d 167 (Fla. 1994) 79

Pope v. State,

679 So. 2d 710 (Fla. 1996) 69

Porter v. Crosby,
840 So. 2d 981 (Fla. 2003) 84

Porter v. State,
429 So. 2d 293 (Fla. 1983) 80

Porter v. State,
564 So. 2d 1060 (Fla. 1990) 78

Preston v. State,
531 So. 2d 154 (Fla. 1988) 81
Preston v. State,
607 So. 2d 404 (Fla. 1992) 73, 78

Quince v. State,
414 So. 2d 185 (Fla. 1982) 80

Ramirez v. State,
542 So. 2d 352 (Fla. 1989) 60

Ramirez v. State,
739 So. 2d 568 (Fla. 1999) 40, 42, 45, 51

Ramsey v. State,
731 So. 2d 79 (Fla. 3d DCA 1999) 39, 40

Ring v. Arizona,
536 U.S. 584 (2002) 1, 36, 83, 84, 85, 86

Ring v. State,
25 P.3d 1139 (Ariz. 2001) 87

Roman v. State,
475 So. 2d 1228 (Fla. 1985), *cert. denied*,
475 U.S. 1090 (1986) 45

Rolling v. State,
695 So. 2d 278 (Fla. 1997) 42, 43

Rose v. State,
787 So. 2d 786 (Fla. 2001) 69

Routly v. State,

440 So. 2d 1257 (Fla. 1983) 78

San Martin v. State,
705 So. 2d 1337 (Fla. 1997) 81

Sliney v. State,
699 So. 2d 662 (Fla. 1997) 74

Spencer v. State,
842 So. 2d 52 (Fla. 2003) 9, 84

State v. Benitez,
395 So. 2d 514 (Fla. 1981) 85

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) . . . 52, 57, 61, 64, 70, 81

State v. Dixon,
283 So. 2d 1 (Fla.1973), *cert. denied*,
416 U.S. 943 (1974) 82

Stewart v. State,
549 So. 2d 171 (Fla. 1989), *cert. denied,*
497 U.S. 1032 (1990) 81

Sutton v. State,
718 So. 2d 215 (Fla. 1st DCA 1998) 64

Swafford v. State,
533 So. 2d 270 (Fla. 1988), *cert. denied,*
489 U.S. 1100 (1989) 73, 77

Taylor v. State,
855 So. 2d 1 (Fla. 2003) 46

Teffeteller v. Dugger,
734 So. 2d 1009 (Fla. 1999) 81

Terry v. State,
668 So. 2d 954 (Fla. 1996) 59

Thompson v. Keohane,
516 U.S. 99 (1995) 44

Thompson v. State,

648 So. 2d 692 (Fla. 1994), *cert. denied*,
515 U.S. 1125 (1995) 73

Traylor v. State,
596 So. 2d 957 (Fla. 1992) 48

Trease v. State,
768 So. 2d 1050 (Fla. 2000) 57, 80

Voorhees v. State,
699 So. 2d 602 (Fla. 1997) 44, 47

Walker v. State,
707 So. 2d 300 (Fla. 1997) 48, 49

Walls v. State,
641 So. 2d 381 (Fla. 1994) 74

Willacy v. State,
696 So. 2d 693 (Fla. 1997) 73

Windom v. State,
656 So. 2d 432 (Fla. 1995) 55, 56

Yarborough v. Alvarado,
541 U.S. 652 (2004) 45

Young v. State,
579 So. 2d 721 (Fla. 1991) 74

MISCELLANEOUS

Fla. Stat. § 38.10 65

Fla. Stat. § 90.704 . . . . . 59, 60

Fla. Stat. § 921.141(7) 56

Fla. Stat. § 921.141 (6) 82

Florida Rule of Appellate Procedure 9.210 87

Florida Rules of Judicial Administration Rule 2.160 . 65

STATEMENT OF THE CASE

Appellant was indicted on the following charges which occurred on August 12, 2000:

(1) First-degree murder of Virginia Friskey;
(2) First-degree murder of Ronald Friskey;
(3) Attempted felony murder of Haesun Friskey; and
(4) Burglary of a dwelling while armed.

(R 394-95).

Appellant moved to disqualify the trial judge because he had been a prosecutor and at one time opposed PET Scan testing in an unrelated case (R 490-494). The motion was denied (R 496, 497). A PET Scan was, in fact, allowed on Appellant without State objection (R 535-536). Appellant also requested an MRI be done at Dr. Weiss' office. The State objected (R 541-542). The procedure was allowed to be done at Dr. Weiss' office (R 548-549).

Appellant filed motions pursuant to *Ring v. Arizona,* 536 U.S. 584 (2002) (R 558-563); a motion to dismiss the indictment and for specific jury findings (R569-572); several motions to declare the death penalty statute unconstitutional (R608-618, 619-623, 624-625, 633-638, 639-643, 644-648, 649-654, 658-666, 674-677), a motion for special verdicts as to the theory of guilt (R655-657), and a motion that victim impact evidence be

presented only to the trial judge (R667-673). The motions were heard December 13, 2002 (R125-214).

Appellant moved to suppress statements, admissions and evidence (R684-689). The motions were denied (R706-726).

On February 17, 2003, Appellant wrote a letter to the trial judge admitting guilt (R705-706). The letter was stamped as received on February 25, 2003 (R705). The judge scheduled a status hearing for February 26, 2003, at which time he filed the letter (R 216-223). Appellant stated that he wanted to reject the advice of counsel and plead guilty (R222). At the plea hearing on March 5, 2003, defense counsel advised the court that Appellant had seen Dr. Riebsame and was competent (R 228). Defense counsel next advised the court Appellant was entering the plea against his advice (R229). The trial judge conducted a complete plea colloquy (R232-249). The State established a factual basis (R257-260). The penalty phase was set for September 15, 2003 (R264).

Immediately after opening statement and before the presentation of witnesses at the penalty phase, Appellant stated that he was having "a bit of a conflict of interest" with his attorneys (PP[1]81). Appellant did not want counsel to use

[1] There are three sets of documents which begin with the number "1." Cites to the pleadings and hearings will be "R."

psychological testimony (PP82). After defense counsel conferred with Appellant, he announced to the court that "We're okay." (PP83). After the first witness testified, Appellant asked to address the earlier conflict (PP119). Appellant did not want the attorneys to call certain witnesses (PP120). The trial judge asked Appellant to wait until the State had presented its case to address the issue (PP121).

Defense counsel objected to victim impact testimony (PP273). The testimony of Janice Keith, Kenneth Lathrop, and Terry Blythe was proffered (PP277-290, 290-304, 304-307). During the proffers, Appellant stated he did not want the attorneys to object to the victim impact testimony (PP286, 288) The attorneys argued that whether to make objections was not Appellants' choice and the court should not consider his comments (PP289). The trial judge stated that:

> Your objection, that's why I let it go on the record, but notwithstanding that, I believe the testimony does conform to the statute.
>
> I have to disagree with you, Mr. McCarthy. I believe it does conform with the statute. I don't believe there's anything inherent here which goes beyond the statute.

(PP289-290).

Cites to the penalty phase will be "PP." Cites to the sentencing phase will be "S."

The State proffered the next witness, defense counsel again objected, and Appellant asked him to stop (PP299). In the meantime, the trial court excluded some of the objected-to testimony (PP 301). Appellant objected to the exclusion; however, the trial judge limited the testimony of both Lathrop and Blythe (PP 303, 312). The judge's ruling was based on case law and statutes (PP290, 303, 312). When defense counsel asked the judge whether "any of your rulings on these three individuals were based in any way on Mr. Schoenwetter's statements" the judge said: "Yes, it's all part and parcel." (PP 312). The judge clarified that the basis of his ruling on victim impact was based on the fact the evidence fell within the victim impact statute (PP319). Although the judge did not ignore what Appellant said, the basis for the ruling was because it "fell within the gamut of the statute." (PP320). The Public Defender moved to withdraw due to conflict with Appellant (PP312-313). Defense counsel stated that he wanted to withdraw because "we will not have the defense controlled by Mr. Schoenwetter." (PP314). The motion to withdraw was denied (R314, 316). The parties discussed the possibility of Appellant waiving mitigation. (PP319-322).

Because of Appellant's interference on the victim impact issue,[2] defense counsel moved for a competency evaluation on Appellant (PP319). The trial judge noted that Appellant had been evaluated by Dr. Riebsame when Appellant wanted to plea (PP320). The judge had observed no behavior that would lead him to believe Appellant had become incompetent (PP320-321). Defense counsel believed Appellant showed signs of "decompensation" (PP322). Dr. Riebsame evaluated Appellant as a defense confidential expert (PP343-344). After Appellant

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[2] The victim impact testimony included Janice Keith, one of Virginia Friskey's schoolteachers. Virginia was always smiling. She had a positive outlook on life (PP428). Janice also knew Ronald Friskey. He was very supportive of Virgina at school, would walk her to class and be there after school. Ronald participated in school activities (PP429). Janice had a difficult school year and at the end of the year, Virginia wrote her an encouraging letter (PP430-431, State Exhibit 58).

Kenneth Lathrop knew the Friskeys socially. His wife was Korean, as was Haesun Friskey (PP433). Ronald was a great father and tremendous husband. He made sure Haesun adjusted to the different culture. He counseled his children, and they all turned out to be tremendous (PP434). Ronald was laid off and tried very hard to find another job quickly. He found two part-time jobs, one of which was at night. He did not like being away from his family at night. Just before the incident, he found a different job and was very happy (PP435). Virginia idolized her father (PP437).

Terry Blythe was the Friskeys' next door neighbor. Because Terry had a stroke and heart attack, he could no longer work (PP439). He also had a personal tragedy in his life. He discussed his personal affairs with Ronald. Terry did not usually get close to people, but Ronald was a person he could trust (PP440). The Friskeys did a lot together and went to church on Sunday (PP441).

spoke with Dr. Riebsame and the latter with defense counsel, the motion for competency evaluation was renewed (PP344). The trial judge appointed Dr. Podnos and Dr. Greenblum to examine Appellant (PP344-345). Appellant told the judge Dr. Riebsame said he was competent, and he did not know why the attorneys insisted on testing him (PP345).

After a weekend recess, the court held a competency hearing. In Dr. Greenblum's opinion, Appellant was competent (PP361). In fact, he was extremely competent (PP362). Dr. Podnos also believed Appellant was competent to proceed (PP386). The trial judge held Appellant was competent and made findings of fact (PP413-414).

The trial judge also addressed Appellant's desire not to present mitigation (PP415). Appellant said his difficulty with defense counsel was that they wanted to say he "was not acting under my own free will, which, like I said, was untrue." (PP417). Defense counsel summarized the mitigation evidence he intended to present (PP420-423). At that point, Appellant was "keeping an open mind" about whether the evidence should be presented (PP423). Appellant did not want the evidence presented as an excuse (PP423).

Appellant objected to post-autopsy photographs of Haesun Friskey which showed wounds from medical intervention (PP626).

The trial judge ruled the photos admissible and made findings of fact (PP630-631):

> THE COURT: I reviewed the photographs and each of the photographs indicated injuries which were sustained by Ms. Friskey as a result of the actions of Mr. Schownwetter.
>
> The two photographs in question regarding the medical intervention, the Court's going to find that as part and parcel necessary or play a role in saving the life of Ms. Friskey.
>
> Additionally, the issue regarding breasts being shown, from viewing that, I don't see that as being anything which is going to be prejudicial to the jury, other than showing the medical state that these physicians were attempting to treat her.
>
> That is part and parcel, again, with the efforts made by medical personnel to save her life as a result of the injuries which were inflicted on her. I do not find that prejudicial for the purposes of the jury.

(PP630-631).

Defense counsel objected to admission of the transcript of the status hearing February 26, 2003, at which time the judge provided the parties with the letter Appellant wrote to the judge (PP677). Appellant objected that the letter was not authenticated (PP681). The objection was overruled (PP685). The prosecutor reviewed the parameters of the judge's ruling before the letter was admitted (PP700). Ms. Donnelly, the court reporter at the status hearing, authenticated the transcript of the hearing (PP703). Ms. Donnelly quoted from the transcript. She relayed what the trial judge stated insofar as receiving a

letter from Appellant (PP705). During the February 26 hearing, Appellant stated on the record that he wrote the letter "with my own hand." He also stated he was disregarding the advice of counsel and pleading guilty. He stated that the facts he wrote in the letter were true (PP706). When the State offered State Exhibit 77, defense counsel again objected that it was not authenticated (PP707). The trial judge overruled the objection and took judicial notice of the exhibit which was contained in the court file (PP707). Defense counsel did not object to Ms. Donnelly saying she was present at the hearing on March 5, 2003, when Appellant pled (PP708). Defense counsel did not object to the court minutes order of the plea hearing being admitted as Exhibit 78. The trial judge took judicial notice of the minutes (PP709).

The State asked for a stipulation that Appellant pled to each charge. The defense would not stipulate. The State asked to admit the transcript of the plea colloquy (PP686, 687). After discussion, defense counsel indicated they would stipulate that Appellant pled guilty to all four counts (PP690). The trial judge held that he would not introduce the plea colloquy and that he had already advised the jury that Appellant pled guilty to the charges in the indictment (PP695).

Appellant elected not to testify at the penalty phase (PP1041, 1098-1099).

During closing argument, the prosecutor stated:

> Randy Lamar Schoenwetter has no significant history of prior criminal act. Well, if you believe Dr. Riebsame about the child pornography, he said that's significant. It may be or it may not be. If you believe Dr. Riebsame about the retail theft, I don't know that it matters that much in weight, but you also need to take into consideration that he's been previously convicted or contemporaneously convicted for all these crimes that are going on in this case when you're weighing that.

(PP1228). Defense counsel objected, stating: “that is not the law.” (PP1229). After a bench conference, the prosecutor admitted his misstatement (PP1231). Defense counsel moved for a mistrial (PP1231). The parties agreed on a curative instruction, defense counsel re-affirming he was not waiving the motion for mistrial (PP1233-1234).

The motion for mistrial was denied (PP1234). The jury was instructed:

> THE COURT: The record should reflect that the jury has returned to the courtroom. Ladies and gentlemen, I'm instructing you at this time to disregard the State's last statement regarding contemporaneous criminal activity as it relates to a prior criminal activity. In this regard, the law is that contemporaneous criminal conduct, at the same time as the criminal activity, cannot be considered by you.
>
> Did you all understand that?
>
> THE JURY: Yes, Your Honor.

(PP1235).

The jury recommended a sentence of death for the murder of Ronald Friskey by a vote of nine to three (R 769). The jury recommended a sentence of death for the murder of Virginia Friskey by a vote of ten to two (R768). The *Spencer* hearing was held November 7, 2003. Jean Dees, Appellant's grandmother, Pastor Dodzweit, and Debbie Rogers, Appellant's mother, addressed the court (R270-272, 273-275, 275-282). Two victim impact statements were read into the record (R284-288).

The trial judge imposed two sentences of death for the murders of Ronald and Virginia Friskey and two life sentences for the attempted murder of Haesun Friskey and the armed burglary (R 778, 781, 782). The life sentences ran consecutively (R 782, 783). The trial judge made detailed findings on the death sentences (R788-821). The trial judge found four aggravating circumstances as to the murder of Ronald Friskey: (1) prior violent felony; (2) during a burglary; (3) avoid arrest; and (4) heinous, atrocious and cruel (R800-804). The trial judge found four aggravating circumstances as to the murder of Virginia Friskey: (1) prior violent felony; (2) during a burglary; (3) avoid arrest; and (4) victim less than 12 years old (R796-797). The trial judge found four statutory mitigating circumstances: (1) no significant prior criminal history; (2)

extreme emotional disturbance; (3) inability to appreciate the criminality of his conduct; and (4) age (R807-811).

STATEMENT OF THE FACTS

State Presentation on Aggravating Factors

Brandi Lester and Appellant both worked at Krystal's in Titusville (PP123). They became friends (PP124). Neither one of them had many friends and were kind of "freaks" (PP136). They dressed in black, "Gothic" style (PP137). Brandi had a boyfriend who started working at Krystal's a few months after she and Appellant started (PP125-126). The boyfriend did not know Brandi and Appellant were friends. When he saw Brandi talking with Appellant, he wanted to beat him up (PP126). Brandi was kind of leading Appellant on and playing him against her boyfriend. At one time, Appellant kissed her (PP135). When Brandi's boyfriend threatened to beat him up, it upset Appellant (PP126). The incident was approximately one week before the murders (PP127).

On the night of the murders, Appellant came to Krystal's after 4:00 a.m. He seemed "really disoriented or sad" as if "he needed to talk to someone" (PP127). Brandi made eye contact with Appellant, but was too busy to go talk to him (PP129). A co-worker made a smart remark about Appellant being her boyfriend, and Appellant walked out. He left on his bike (PP128).

Theresa Friskey Lathrop, the daughter of Ronald and Haesun Friskey and sister of Virginia Friskey, lived with her family in

Titusville at the time of the murders (PP85). Her brother, Chad, lived with the family until he went into the Air Force (PP85, 656). Appellant and Chad Friskey were friends and their mothers also became friends (PP92, 103, 657). Appellant's mother instructed Appellant and the Friskey children in Tae Kwon Do (PP93). When he was younger, Appellant would spend the night at the Friskey house (PP94). At the time of the murders, Theresa was 16 years old and Virginia was 10 years old (PP92).

On August 11, 2000, Theresa came home around 11:00 p.m. (PP103). Her parents and Virginia were in the house (PP104). Virginia slept with her door open and a lamp on because she was afraid of the dark (PP104). The house was secured every night and the doors locked (PP105).

Haesun Friskey would get up to go to work at 5:30 to 6:00 a.m. The morning of August 12, she heard Virginia crying and whining (PP660). Haesun got up and stood by the door. She could see someone standing by Virginia's bed (PP661). He was moving his hand on top of Virginia's body. Haesun asked "Who are you?" in Korean (PP662). The man turned back to Virginia and made a motion. Virginia made a sound like an intake of air. Haesun recognized the man as Appellant (PP663). Haesun did not remember anything after that. She did not remember how she was stabbed, but she had a "sense" that her husband was fighting

with Appellant (PP664). She did not recall being stabbed, but knew she could not breathe (PP666).

Around 5:23 a.m. on August 12, Theresa awoke to the sounds of yelling and fighting. She thought her parents may have been arguing and throwing things. There was a lot of commotion, and she could hear things banging against walls. Theresa could hear her dad making angry noises and her mother grunting and fighting (PP107). Virginia was crying (PP108).

The door to Theresa's room was locked (PP108). She went into the hall and saw her parents' room in disarray. She looked into Virginia's room and saw "a pile of people on the floor" with a man who may have been her father on the top (PP109). It seemed as if there was a "triangle of people" on the floor and her father was on the top, facing up (PP110-111). Theresa couldn't be sure it was her father, but she thought it was (PP111). As she walked into the room, Theresa heard her father tell her to call "911" (PP109). She went back to her room, locked the door, and called "911" (PP111). As she was on the line with "911," Theresa looked out the window to see a man covered with blood stumbling out of the house and going down the driveway (PP113). The man was wearing only underwear (PP114). She later learned that was her father (PP115). Theresa could

hear her mother trying to breathe. She asked her mother who did this, but her mother could not answer (PP113).

Before the police arrived, Theresa opened her door to see her mother and sister. Virginia was laying on her back next to her bed. Haesun was in the middle of the doorway with her head in the hall (PP115). As the police walked Theresa out to a police car, she could see her father laying on the sidewalk being treated (PP116).

Julie Blythe lived next door to the Friskeys (PP141). During the early hours of August 12, 2000, she heard a loud bang outside the living room window (PP143). She turned on the light and saw a man covered in blood begging for help. He was saying “Terry, help me” (PP144). Julie could not recognize the man because he was covered in blood (PP146). She knew she must know the man because he knew her husband (PP145). Julie asked the man who he was and he said “I’m Ron, your next door neighbor (PP146). Julie called “911," then put the phone down and went to help Ron (PP146). Ron said a young white male stabbed him with a knife and killed his whole family (PP147). Ron said he used a knife. Julie could see three stab wounds: two in the stomach and one in the back (PP147). The paramedics arrived while Ron was still conscious; however, the paramedic kept

saying “I’m losing him, I’m losing him.” (PP148). Ron died in Julie’s arms (PP149).

Detective House, the primary case agent, responded to the scene at 6:33 a.m. (PP444-445). He then went to the hospital and examined the wounds on Ronald Friskey (PP447). He returned to the Friskey residence and learned there were two sets of blood evidence that lead away from the scene (PP448). One set lead to the Blythe residence next door. The second led out the rear of the residence, down the driveway, and out into the street. An officer and a canine team were following the blood drops (PP449). Sgt. Morgan said the blood drops ended in the parking lot of 215 Knox McRae Drive, an apartment complex (PP450, 490). Det. House and Det. Butler parked their unmarked car at the apartment complex (PP450). As they were sitting in the car discussing options, Deborah Roberts and a young girl walked toward the detectives(PP452, 491). The detectives asked Roberts about the complex, and she said a realty company owned and controlled the complex. When the detectives told Roberts about the Friskey murders, she said her son and daughter were friends of the Friskey children (PP452). Roberts gave them the phone number of the realty company and they talked some more. About that time, Appellant walked toward them. He “looked as if he had been in a bad car accident, had arthritis, or had been in

one heck of a fight." Roberts introduced Appellant as her son (PP453).

Appellant had a Band-Aid on his thumb. Appellant came up to the car and Roberts told him the detectives were investigating a homicide. Det. House stated that "it looked like his heart jumped out of his chest. It beat that hard." The detectives asked whether Appellant had any cuts and he said he cut his thumb while cutting Velveeta cheese. Appellant kept his hands behind himself (PP 454). The detectives got out of the car and started talking to him. Appellant said he had a bicycle. He took the detectives to see the bicycle (PP455). Right then Det. Esposito called from the crime scene and said they found a size 11 or 12 shoe print made by boat or deck shoes (PP456). Det. House asked Roberts whether Appellant owned boat shoes. She said he did. Appellant said he did not have the shoes anymore, but Roberts said he did (PP457). Appellant told his mother he had been fishing and threw the shoes away at a friend's house in Sharpes. The detectives said they would like to see the shoes.

The detectives then asked Appellant to go to the police station for an interview. Appellant said he needed a ride (PP458). The car in which they rode was an unmarked car with no cage for transporting prisoners. It did not have blue lights

(PP460). Appellant rode in the back seat (PP460). Appellant had been concerned that he be back in time for work at 4:00 p.m. The detectives told him the interview shouldn't take very long and he should be back in time (PP464).

The detectives were dressed casually in jeans and polo shirts. They had a police badge on their belts and were wearing guns (PP459). Before they left, Appellant wanted to change his clothes. The detectives asked him whether he had any knives and whether they could see them. Appellant went to get changed, and the detectives eventually went into the apartment with Roberts (PP460).

On the way to the police station, they stopped to get drinks and snacks. Appellant did not want anything. When the detectives were in the store, Appellant got out of the car and was walking around as if waiting for them. They got back in the car and went to the police department (PP461). The interview began around 1:35 p.m. Defense counsel objected to admitting Appellant's statement and renewed the motion to suppress (PP465). The trial judge stated that the guilty plea waived the motion to suppress (PP465).

The videotape of Appellant's statement was published to the jury (PP500, State Exhibit 68). During the interview, Appellant agreed to give a blood sample (PP509, 619). He denied

going to the Friskey house (PP510). He said he may have biked past the house while his hand was cut, but denied being in the house (PP 514). Appellant said he had had blackouts before (PP515). The written waiver of *Miranda* right was admitted over objection (PP497-500, State Exhibit 67)

Appellant later indicated he was responsible for the stabbings (PP523). He went in the house because he was bored and was just looking around (PP528, 530, 614). He cut the screen on the back porch and went in through a sliding glass door that was unlocked (PP529). It opened enough for Appellant to squeeze through (PP532). Appellant walked around the kitchen and got a steak knife from the drawer (PP533). The father and mother woke up and attacked Appellant, who stabbed at them (PP523). The father came at Appellant from behind (PP530). At first Appellant said he was in the hallway when the father grabbed him and they fell into Virginia's bedroom (PP531). The wife was screaming and trying to subdue Appellant (PP536-537). Appellant had the knife in his left hand and was stabbing wildly when his grip slipped and he cut himself (PP526, 537). They were fighting and everything was a blur (PP537). Appellant was tying to get them off him because he didn't want to get caught (PP538). When the parents let go, he exited the house the same way he came in and left on his bicycle (PP539).

Appellant denied going into the house to have sex with one of the Friskey girls (PP544). Appellant told the detectives his clothing and the knife were in a dumpster (PP467, 524). Appellant said he placed the items inside one bag, then placed that bag in a blue Wal-Mart bag (PP481).

The interview was interrupted after Appellant's implicating statements and Appellant was advised of his *Miranda* rights (PP466, 499, 547-548). Appellant indicated he understood his rights and signed the waiver form (PP548). They then reviewed Appellant's statements. Appellant added certain details, such as that he left home at 3:02 a.m. and biked around. He arrived at Krystal's around 3:30 or 3:40 a.m.(PP 549). He went to the Friskey house and split open the screen to the left of the porch door (PP553-554). Appellant retrieved a steak knife with a black handle from the drawer to the right of the sink (PP556). He knew where the children's and parents' bedrooms were located (PP558). Appellant again stated the father came at him in the hallway and they fell into Virginia's bedroom (PP560). The father and mother were on him and Virginia was trying to pull the mother off (PP561). That is when Appellant "hit her a few times" (PP562). The parents kept asking who he was (PP563). Appellant repeatedly denied going into Virginia's room to have sex with her (PP566, 567, 568, 573, 574).

Appellant then admitted he stabbed Virginia while she was in the bed because she recognized him (PP578). She had woken up, and Appellant put his hand over her mouth to keep her quiet (PP576, 584). Virginia said "[w]ho are you? Why are you doing this? And then she like looked at me and said Randy, like that." (PP595). Appellant had to stab her because the parents did not know who he was and he "was trying to make sure that nobody would know it was me" (PP580). Appellant stated that he panicked because "the little girl was the only one that knew who I was. Then I stabbed her, too, I guess, to make sure that no one would know that it was me" (PP585). He intended to kill the girl because she knew who he was (PP593, 594). He did not intend to kill the parents because they did not know who he was (PP594). After she was stabbed, Virginia got out of the bed and was on the floor with the mother (PP591).

Det. King was directed to go to the dumpster (PP467). Det King retrieved clothing, a knife and a box cutter which Appellant described would be found in the dumpster (PP480). Appellant had been wearing a hat, shirt, Converse shoes, and shorts (PP533, 550).

Dr. Sajid Qaiser, Medical Examiner for Brevard County, reviewed the charts of the autopsies on Ronald and Virginia Friskey and discussed the case with Dr. Vasallo medical examiner

who conducted the autopsies but, was unavailable(PP241). Ronald had multiple stab and incise wounds (PP243). There was a very deep stab wound to the right side of the neck (PP244). He had defensive wounds on the hands (PP246). One wound to the spine was 3½ inches deep (PP251). There were superficial wounds to the chest (PP252-253). The fatal wound was to the upper back which penetrated the lung (PP253). Of the wounds, the one to the neck and to the middle back were the worst because they caused so much blood loss (PP 254). Ronald would have been in pain because the nerve endings were cut; the loss of blood would make it difficult to breathe (PP 257). The knife that made the wounds most likely had a single blade with a serrated edge (PP249). The knife introduced as State Exhibit #25[3] was consistent with the type of weapon that would have caused the injuries (PP 256).

Virginia had stab wounds on the lips and chest (PP259-60). The wound to the left middle chest perforated the skeletal muscle and underlying rib, then penetrated the heart and the two lobes of the left lung (PP260). That wound was four inches

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[3] When the question was asked, the prosecutor referred to this Exhibit as number 31. One question before, he had made the proper reference to Exhibit 25 which is the knife and was introduced through the crime scene technician (PP199, 256). A photo of the knife was referred to as Exhibit 51 (PP258).

deep. A severe degree of force had to have been applied for the knife to go through all the layers of skin, tissue, muscle, bone of the rib, the heart and the lung (PP261). A wound on the right side of the middle chest perforated the rib and the three lobes on the right lung (PP261). Virginia was stabbed on the lower jaw, right wrist and hand (PP262-263). The knife used on both Virginia and Ronald appeared to be the same (PP266). The wounds were consistent with a right-handed person standing next to the bed and stabbing a person lying in the bed (PP270). Virginia would have died more rapidly than Ronald; however, it is possible she would have been conscious for a period of time and aware of her surroundings (PP270). The cause of death for both Ronald and Virginia was multiple stab wounds (PP271). Virginia was 10 years old at the time of death (PP272).

Dr. Emran Imami was the trauma surgeon who treated Haesun Friskey at Holmes Regional Medical Center on August 14, 2000, a couple of days after she arrived at the hospital by helicopter (PP634-635). When Haesun arrived at the hospital she was in a life-threatening situation. She was bleeding profusely from a number of stab wounds and was operated on for several hours. She had bled so much her entire blood volume had to be replaced “at least twenty or thirty or forty times over” (PP636). Blood transfusions were required throughout the hospital stay until

Haesun could make her own blood. Haesun was in the ICU for several months (PP636). Her recovery was “miraculous” (PP645).

Theresa Friskey identified a knife she had last seen in the kitchen drawer (PP117, State Exhibit “G” for identification).

A crime scene technician took a knife to the autopsy and observed the medical examiner compare the knife to the wounds observed on Virginia Firskey (PP234).

A Wal-Mart plastic bag containing a white plastic bag which contained bloody clothing was found in the dumpster at the apartment complex in which Appellant lives (PP189-190, 196). The bag also contained trash and correspondence from the Friskey household (PP194). Blood on the shoes was tested for DNA. The sample was consistent with a mixture of Ronald Friskey and Haesun Friskey on both the right and left shoe (PP192). The bag also contained a box cutter and Super Chef knife with bloodstains (PP197). DNA testing showed the blood on the knife was consistent with Appellant (PP199). DNA tests on droplets of blood found in the Friskeys’ driveway and on the road were consistent with Appellant (PP239).

Defense Presentation on Mitigating Circumstances

Dr. William Riebsame was qualified as an expert in forensic psychology (PP727). He met with Appellant twelve different times over the past three years and spent approximately twenty

five hours conducting psychological testing and interviews (PP728). The psychological testing indicated some type of brain injury or abnormal brain pathology. The evaluation by Dr. Wu confirmed the abnormal brain pathology with "decreased frontal and temporal cortex metabolism" (PP732). Those areas of the brain are directly related to decision making (PP733). According to Dr. Wu's report, the abnormal brain scan is familiar to individuals with autism. Asperger syndrome is a form of autism (PP734). Appellant's school records confirmed the diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD") (PP734). Appellant was administered medication beginning with the third grade. Appellant said he stopped taking the medication in the seventh grade. Academic records showed academic deterioration at that time (PP735).

The MMPI showed Appellant tended to minimize his mental health problems (PP736). He was reluctant to provide details of the crime. He could not provide a motive that was believable. Dr. Riebsame diagnosed Appellant with ADHD at the time of the crime (PP737). Additionally, signs of Asperger's syndrome, a neurological disorder, were apparent (PP738). Persons with the syndrome become so preoccupied with a subject it become all-encompassing. Appellant's preoccupation was with satanic and sexual matters (PP739). Appellant began accessing 900 phone

lines at age ten or eleven, and cable TV channels at age twelve or thirteen (PP739). Appellant began viewing pornographic and satanic websites in his early teens, as well as downloading child pornographic images (PP739-740). Appellant was also preoccupied with witchcraft, cults, evil and death (PP 741). He had an extreme sex drive driven by the pornographic materials as well as his commitment to satanic-like rituals and beliefs. Appellant would not be aware of the urges because it was his identity (PP741). He would not experience the feelings as an urge or hobby or inclination because "it is what he has become." (PP741-742). There is no capacity to control the fantasies, but there is some control on acting on the fantasies (PP 742). The reason Appellant went into the Friskey residence was to sexually assault one or both of the Friskey children (PP 744). The urge was extreme (PP 745). Appellant did not have a pre-schizophrenic condition; however he did have some "schizo-type" personality characteristics (PP747).

Dr. Riebsame reviewed the letters Appellant wrote to the trial judge and to Pastor Linkous. The letters confirmed the suspicion Appellant was not telling the truth during the evaluation and that the crime was sexually motivated (PP748). When Dr. Riebsame met with Appellant after the date of the letters, Appellant confirmed the details of the offense were

consistent with the letters (PP748). The interest in the Friskey daughter was in a "satanic, sexual, evil way," and when the child identified Appellant, he impulsively stabbed her (PP751). The act was not well thought-out and reflected the ADHD (PP752). Appellant had been sexually involved with other adolescents (ages 16, 17, and 18) in this time period (PP811).

In Dr. Riebsame's opinion, Appellant would not be a danger to any prison population (PP759). Appellant's only prior criminal history involved a retail theft (PP760). He was 18 years old at the time of the murders (PP761). His level of maturity was "comparable to a prepubescent individual of eleven or twelve years." (PP762).

In Dr. Riebsame's opinion, Appellant committed the murders when he was under the influence of extreme mental or emotional disturbance (PP761). Appellant knew what he was doing was wrong even though there was some impairment in his understanding to appreciate the criminality of his conduct (PP761). His actions seemed to be "frenzied." When Virginia recognized him, Appellant immediately made the decision to stab her (PP764). If Appellant did not have Asperger's disorder and abnormal brain pathology, there would be no extreme emotional disturbance (PP790).

Dr. Riebsame was questioned on cross-examination whether he viewed the videotape of the police interrogation of Appellant on August 12, 2000. At the time he had reviewed the transcript but not the videotape (PP994). Dr. Riebsame was re-called after he viewed the videotape (PP995). He did not see any obvious signs of Asperger's syndrome on the videotape (PP998).

Dr. Nona Currie Prichard, neuropsychologist and clinical psychologist, considered herself an expert in Asperger's syndrome (PP837). She was accepted as an expert in forensic psychology with a subspeciality in Asperger's syndrome (PP839). Dr. Prichard met with Appellant for six hours and relied on testing done by Dr. Crupp and Dr. Wu (PP840). She conducted several tests herself, including the MMPI (PP841). According to Appellant's mother, there was perinatal trauma (PP843-844). Appellant showed almost every symptom of Asperger's syndrome (PP844). Appellant was very bright with an IQ of 130, but had ADHD (PP845). He was given Ritalin from the third grade to high school (PP845). Appellant went into the Friskey house to "force himself on one of the women." (PP851). The door to the first bedroom was locked, so he wound up in Virginia's bedroom. He pulled the covers back and Virginia woke up, said his name, and started screaming. The parents came in. Appellant started to

leave but thought “Oh, she knows who I am,” and killed her. (PP852).

Appellant’s social comprehension is of someone eight to ten years old (PP855). His actions were not cold or calculated, they just were without feeling (PP855). Dr. Prichard admitted that planning to force himself on one of the women, obtaining the knife from the kitchen, deciding to kill Virginia because she recognized him, and stabbing Ronald and Haesun were conscious decisions (PP867, 869, 870-871). However, because of the Asperger’s syndrome, Appellant was unable to conform his conduct to the requirements of law (PP874). Appellant did know there were consequences for his actions (PP877).

Dr. Joseph Wu, M.D., was the clinical director of the Brain Imaging Center at UCI and associate professor at the College of Medicine at UCI (PP885). He was recognized as an expert in psychiatry, neuroscience and PET scan imaging (PP894). He conducted a PET scan on Appellant (PP896). The frontal lobe area was abnormal, especially in the areas called the orbital frontal, limbic frontal, and temporal cortex (PP898). Appellant had abnormalities in the frontal and temporal lobes (PP898). The frontal lobe is involved with the regulation of impulses, aggression and impairment. Frontal lobe damage can result in the inability to appropriately regulate aggression (PP 942). The

scan was consistent with autism (PP898). After reviewing the other medical records, Dr. Wu concluded Appellant had a form of autism called Asperger's syndrome (PP899). There is a high co-morbidity of ADHD with Asperger's (PP915). Dr. Wu did not evaluate Appellant and had never spoken to him (PP948). He had no idea what Appellant was thinking at the time of the murders (PP948). Appellant's actions showed conscious decision (PP951).

Appellant proffered the testimony of Peter Siegel, a lawyer for the Florida Justice Institute specializing in civil rights and prisoner's rights litigation, who had visited every major prison in Florida (PP820-821). He testified that if Appellant were sentenced to life without parole, prison would "go very badly for him for many, many years because of his size, his appearance, and his crime." (PP822). Appellant would be "fresh meat" and "viewed as somebody's boy." (PP822) It would be necessary for Appellant to fight to avoid being somebody's boy or get into a sexual relationship with an older, larger convict (PP823). In general population, Appellant would be the victim, not the perpetrator (PP826). Appellant would be protected on Death Row (PP825). The trial judge ruled the testimony inadmissible (PP826). Defense counsel requested that Mr. Siegel be allowed to testify as to Appellant's future dangerousness,

but the trial judge noted he had just met Appellant (PP826). The trial judge ruled the testimony not relevant (PP929).

Mr. Siegel was allowed to testify as an expert on prison conditions in Florida prisons (PP833). Given Appellant's size, demeanor, race and Mr. Siegel's knowledge of the prison, Appellant would not be a danger to other inmates if he were in general population or on Death Row (PP834). Appellant would have a great deal of contact with other inmates in general population, but not on Death Row (PP835).

Toni Hobbs was a friend of Appellant's mother and knew him since he was six years old (PP 979). Hobbs' daughter took martial arts. Appellant was there three afternoons a week for three years between the ages of six to nine years old (PP 980-81). Appellant was a cute little boy that "you want to just hug him." However, he didn't follow instructions and was always disruptive (PP981). When he was sparring, the kids were rougher on him than other kids (PP982). Appellant had a loving relationship with his mother (PP983). His stepfather adopted him at some point, but there was no bond between them (PP984). As a teenager, Appellant was a loner (PP986). Hobbs was at Appellant's house one evening when he was going to the prom with a cute girl. He put on a black jacket that was inappropriate (PP987). One other time, Hobbs bought a refrigerator from

Appellant's mother. Appellant and a friend helped them load the refrigerator into a truck (PP988).

Jeffrey Crawford knew Appellant through Junior and Senior high school (PP1013). The friendship disintegrated when Crawford joined the Marines. Appellant was "a little off center, like the things that weren't quite mainstream." (PP1014). He did not fit in. His attitude and appearance were different and he would dress in Goth style until the last part of high school (PP1015). In the Goth stage, Appellant wore a trench coat, dressed in black and dyed his hair black and cherry red. He wore a leather-studded collar and bracelets (PP1018). A lot of kids dressed in Goth (PP1022). Appellant was "a little weird but pretty much normal." In Junior High, kids would pick on Appellant and call him names. A couple of times he would get in fights (PP1015). Kids called Appellant "bed wetter" as a play on his last name (PP 1018). Mostly, kids made fun of his glasses. Appellant eventually got rid of the glasses. Crawford and Appellant shared interest in music, movies and books, mostly sci-fi and fantasy (PP1016, 1023). They like the same computer games (PP1017).

Appellant wanted to join the Marines. He and Crawford went to recruiting activities and Pulley meetings (PP 1019). Appellant was not accepted into the Marines because his vision

was poor. This had a devastating effect (PP1020). Appellant had girlfriends and talked about girls to Crawford (PP1025). Appellant mentioned Theresa Friskey was “hot” (PP1026). Crawford, Appellant, and Chad Friskey occasionally did things together (PP1027). Crawford had no indication Appellant had unusual sex interests. They had looked at pornography websites together (PP1028). However, it was nothing out of the ordinary for a teenage boy (PP1029). At one point, Appellant went to Tampa for a year. When he returned, he had a wider circle of friends (PP1031).

Thomas Schoenwetter adopted Appellant when he was six years old and he and Debbie Roberts had been married about a year. Thomas and Debbie were divorced when Appellant was eleven years old, but Thomas stayed in contact with Appellant. Appellant’s sister, Megan, was seven years younger than him (PP1044). Appellant was “a nice kid, a bit of a loner. He read a lot.” Kids at school gave him a hard time and he didn’t have a lot of friends. He had a couple close friends, though (PP1045). Appellant was in Cub Scouts and studied Tae Kwon Do for a few years (PP1046). Appellant and his sister were still close and talked on the phone (PP1048).

Commander Mutter, Titusville Police Department, had contact with Debbie Roberts (Appellant’s mother) when she brought in a

CD ROM disk full of pornography (PP1050). It was determined the women in the photographs were not juveniles, and no charges were brought against Appellant (PP1052). In Appellant's statement to police, he said he thought the girls were sixteen or seventeen years old (PP1054).

Deborah Roberts was married to Reese Randall Ingram when Appellant was born. When she was three months pregnant, Ingram would yell at her a lot, push her around, and choke her (PP1057). Ingram also picked Deborah up and slammed her back down, breaking the chair she was sitting in. She tried to run, but Ingram picked her up and slammed her down on the ground (PP1058). When Deborah was six or seven months pregnant, she had not gained a lot of weight because they did not have a lot of food to eat (PP1058). They were living in a trailer with no electricity. It was very cold, and she fell ill. Deborah went looking for Ingram and found him in a strip club. He shoved her to the ground. The strippers helped her up and were yelling at Ingram (PP1049). The baby did not move for a few hours after the incident (PP1060). Deborah and Ingram divorced when Appellant was a year old. When Appellant started school, they were living with Thomas Schoenwetter (PP1051).

The first time Deborah noticed something wrong with Appellant was one day after second grade when Appellant was in

his room crying. He said nobody wanted to play with him. It seemed like Appellant never found any friends (PP1062). The kids at school would pick on him and call him names (PP1062). He would come home with his bike wheel twisted, and bumps and bruises on his head from kids throwing rocks at him. Deborah talked to teachers, but it didn't do any good. By third grade, Deborah was getting calls from teachers because Appellant could not sit still or pay attention in class. They wanted him tested for hyperactivity (PP1063). Deborah had Appellant examined, and he started taking Ritalin. Appellant responded well to the Ritalin. About seventh grade Appellant stopped taking Ritalin. His grades started dropping within two to three months, but there was no "crazy" behavior (PP1064, 1092). Deborah noticed no signs of ADHD behavior (PP1093). Appellant said he wanted to stop taking Ritalin because he was doing better. He also did not like being called into the school office to take his Ritalin. The doctor agreed Appellant could discontinue the Ritalin (PP1092).

Beginning with fourth grade, Appellant refused to participate in sports or group activities. He preferred to do everything on his own or sit and read a book. About that time he became friends with Jeff Crawford, and Chad Friskey would come over because they were taking Tae Kwon Do (PP1065). Both

Ralph and Chad had cars (PP1090). They would run around the neighborhood (PP1091).

When Appellant was in tenth grade, Deborah and Thomas had divorced, so she moved to New Port Richey with a man she met on the Internet (PP1067). Appellant seemed to be doing well in school and was working at McDonald's. Soon kids started picking on him. Appellant called Deborah at work one day and said six or seven guys jumped him (PP1068). Megan was living with Thomas at the time because she didn't want to leave Brevard County. She would visit her mother on weekends (PP1069-1070). After about six months, the man with whom Deborah was living began to criticize Appellant and there was some violence (PP1070). They moved back to Titusville, but Megan continued to live with her father (PP1071).

Appellant became very interested in Deborah's computer to the extent Deborah had to put a "jammer" on the computer (PP1073). Appellant spent so much time on the computer, Deborah eventually moved it into her bedroom (PP1087). Appellant was spending a lot of time on a website involving medieval role playing. He would re-enact voices (PP1074). Appellant also liked Animay, a Japanese cartoon (PP1086). He would buy videotapes and watch them on TV (PP1089).

Being in the Marines was a major goal (PP1074). When Jeff made it and Appellant didn't, the latter was devastated. He became depressed and insisted the eye machine was wrong. Appellant left high school and went to Whispering Hills Adult Education Center because he was having to repeat the tenth grade and a counselor felt it would be better for him to get caught up (PP1075). Appellant was a month and a half away from getting his GED when he was arrested for these murders (PP1076).

Appellant always helped his mother with the chores, doing laundry and taking out the trash. He would take care of the cat and give money for food. Appellant was close to Megan (PP1076). Megan, fourteen at the time of trial and eleven when Appellant was arrested, was not testifying because it would upset her too much (PP1080, 1081). The defense admitted several family photos (PP1081-84). Deborah was not aware Appellant had committed a retail theft[4] (PP1084). At the time of the murders, Appellant had been working at Krystal's for six months (PP1089). He had several jobs in a row. He would just quit and look for another job (PP1089).

When Deborah went to visit Appellant in jail after his arrest, he was crying and kept telling them he was sorry. He

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[4] Appellant was never arrested, and the State stipulated there were no prior arrests (PP1096, 1100).

couldn’t even wipe the tears off because he was in handcuffs, so the tears just fell off his face onto the table (PP1088).

SUMMARY OF ARGUMENT

Point I. Appellant argues that, even though he entered a guilty plea, the suppression issue was preserved for the penalty phase; thus, he is entitled to a new penalty phase hearing. Even if the issue were preserved, it has no merit. Appellant was not “in custody” at the time he voluntarily accompanied the detectives to the police department. His freedom was not restrained in any way, he was free to exit the car when the detectives stopped for snacks, and he was not handcuffed. Questioning was not extended or coercive. No promises were made. When Appellant made inculpatory statements, *Miranda* rights were read. Appellant repeated the rights with the officers and waived those rights in writing.

Point II. The trial court did not err in denying the motion to withdraw when defense counsel took offense at Appellant voicing his feelings on victim impact evidence. Defense counsel was posing objections to victim impact testimony, and the trial judge was excluding parts that were not within the statute. Appellant interjected that he felt the testimony should come in.

Counsel moved to withdraw because the trial judge said he considered Appellant's statements. The trial judge later clarified that he ruled based on the statute and case law, but that he did not ignore Appellant. The trial judge ruling on the victim impact testimony is supported by case law. The motion to withdraw has no basis.

Point III. The trial court did not abuse its discretion in allowing Dr. Qaiser, Medical Examiner for Brevard County, to testify when the medical examiner who conducted the autopsy on Ronald and Virginia was unavailable. Dr. Qaiser reviewed the medical records, autopsy reports, photographs, and had discussions with the other medical examiner. Although Appellant challenges the authenticity and hearsay nature of the documents on which Dr. Qaiser relied, there was no such objection at the trial level.

Point IV. The trial judge did not abuse his discretion in denying the motion for mistrial after the prosecutor stated the contemporaneous violent felonies could be considered as to whether Appellant had no significant prior criminal history. The prosecutor admitted his mistake, and the jury was instructed to disregard the remark and that the contemporaneous felonies could not be considered as to the mitigation proposed. Jurors

are presumed to understand and follow the instructions. This comment did not vitiate the entire trial.

Point V. The trial judge did not abuse his discretion in finding the motion to disqualify legally insufficient. The allegations in the motion referred to an unrelated homicide case years earlier and to the conduct of prosecutors in the same office. There was no allegation which would have raised a well-founded fear Appellant could not receive a fair trial.

Point VI. The trial judge did not abuse his discretion in admitting photographs showing the injuries to Haesun Friskey. The photographs were relevant to the medical examiner's testimony regarding the extent of injuries and the weight to be given the prior violent felony aggravating circumstance. The jury was informed that some of the wounds were due to medical intervention.

Point VII. The trial court did not err in analyzing and assigning weight to the aggravating and mitigating circumstances. Appellant disagrees with the weight given his proposed mitigation. The weight assigned to the aggravating and mitigating circumstances is within the discretion of the trial judge. The trial court findings are supported by competent substantial evidence.

Point VIII. Appellant concedes this issue has previously been decided adversely to his position, but argues the court should reconsider twenty years of case law. The standard instructions do not shift the burden.

Point VIII. This court has repeatedly denied claims pursuant to *Ring v. Arizona.* The jury found beyond a reasonable doubt that Appellant murdered both Virginia and Ronald Friskey during a burglary and attempted to murder Haesun Friskey. Thus, aggravating circumstances of prior violent felony and during-a-felony were established.

POINT I.

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE MOTION TO SUPPRESS

The trial court's legal and factual finding in the order denying the motion to suppress included:

> During the hearing on the Defendant's motions, Detective David Butler of the Titusville Police Department testified that on August 12, 2000 he became involved in the investigation of a double homicide that occurred at a residence on Knox McRae Drive in Titusville. During the course of the investigation, he learned that there was a track of blood leading away from the scene of the crime which led to an apartment complex at 215 Knox McRae Drive. He and Detective House went to the apartment complex on August 12, 2000 in the early afternoon. While they were in the parking lot a woman and a child approached. The detectives asked the woman some questions about the apartment complex. During the conversation, the Defendant walked towards them and the woman stated that he was her son, Randy. Detective Butler testified that he noticed a visible reaction when the Defendant realized that they, were police officers. He also noticed that the Defendant had a band aid on his hand. The Detectives told the Defendant that they were working on the double homicide case and the Defendant responded that he had heard about it on the news and that he knew the family. The Defendant told them that he had been out the night before on his bike. Detective Butler asked the Defendant if he could see his bike and the Defendant showed it to him and then brought him inside his apartment to see the clothes and shoes he had been wearing the night before. The detectives asked the Defendant if he would come to the police station to talk to them about the case. The Defendant agreed and stated that he would have to be back in time to go to work later that day. He stated that he did not have a ride and the detectives agreed to give him a ride to the police station. Detective Butler testified that he wanted to question the Defendant because he was nervous, he had a cut on his hand, he was out and about on a bicycle on the night of the crime, and he

knew the victims. They drove to the station in an unmarked vehicle. On the way, they asked the Defendant if he was hungry and he stated that he was not. They then stopped at a gas station so that the detectives could get something to eat. All three exited the vehicle and the detectives went inside to get something to eat, leaving the Defendant outside alone. When they walked back outside, the Defendant got back into the car without the detectives saying anything to him. They then took him to the station and brought him into an interview room. Detective Butler was the lead interviewer and Detective House was in and out of the room. The entire interview was video recorded. He did not read the Defendant his *Miranda* rights at first because the Defendant was not in custody. After the Defendant made admissions, he was not free to go and Detective Butler stopped the interview and read *Miranda.* The interview continued after Detective Butler read the *Miranda* rights to the Defendant. During the course of the interview, Detective Butler never told the Defendant that he was free to go. However, prior to the interview, he told the Defendant that he was not a suspect. During the course of the interview, the Defendant told Detective Butler that he had placed the knife, his clothing, and his shoes inside a bag and he placed the bag in the dumpster at the apartment complex where he lived. During the interview, he also agreed to have his blood drawn.

. . . .

(Testimony of Officer House repeats that of Detective Butler)[5]

The Court viewed the videotape of the interrogation during the hearing on the Defendant's motions.

The manner in which the police summoned the Defendant for questing indicates that the Defendant was not in custody. The Defendant approached the detectives while they were taking to his mother and sister in the parking lot. They did not approach him first. They

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[5] Some sections are deleted for the sake of brevity; explanation of content is in parenthesis.

asked the Defendant if he would be willing to come to the police station to talk to them and he agreed stating that he would have to be back by 4:00 to go to work. This shows that he was under the impression that he would be returning home that afternoon. Clearly they drove the Defendant to the police station because he needed a ride, not because they wanted to restrict his movement. Furthermore, on the way to the police station they stopped at a gas station and left the Defendant alone outside the unmarked vehicle. The Court finds that these actions of law enforcement officers would give a reasonable person the belief that he or she was not in custody. In this instance, the Defendant had the clear impression that he was free to leave at any time.

The purpose of the interrogation also indicates that the Defendant was not in custody. Detective. Butler testified that he wanted to interview the Defendant because the Defendant appeared nervous, he had a cut on his hand, he was out and about on his,,bike the night before, and he knew the victims. While the detectives' suspicions were raised, they certainly did not have probable cause to arrest the Defendant at that time. The place of the interrogation, the police station, could indicate that the Defendant was in custody. However, “[t]he mere fact that an individual is questioned at the police station does not necessitate a finding that the individual is in custody.” *Ramsey v. State*, 731 So. 2d 79, 81 (Fla. 3d DCA 1999). The manner of the interrogation indicates that the Defendant was not in custody. Neither of the detectives ever raised their voices or intimidated the Defendant in any way during the interview. Nor did they restrict his movement or threaten him in any way. The detectives did not interrogate the Defendant for a long period of time before he finally confessed. The Defendant began to indicate that he may have committed the crime sixteen minutes after the interview began. The detectives provided the Defendant with water during the interview and offered him food on more than one occasion.

Detective Butler did confront the Defendant with some evidence of his guilt. He stated that there was a blood trail which led from the victims' house to his

house and that the Defendant had a cut on his hand. He also stated that the person who committed the crime left on a bike and the Defendant was riding around on a bike that night. While Detective Butler did confront the Defendant with some evidence of his guilt, this evidence was not significant enough to cause the Defendant to believe that he was not free to leave.

The detectives never informed the Defendant that he was free to leave during the interview. However, Detective Butler testified that prior to the interview, he told the Defendant that he was not a suspect. During the interview, Detective Butler asked the Defendant if anyone ever told him that he was under arrest and the Defendant responded, "no."

Based upon the above consideration of the four factors identified in *Ramirez*, the Court finds that the Defendant was not in custody at the start of the interview and the detectives were not required to read the Defendant his *Miranda* rights at that time. Once the Defendant confessed to the crime, he was no longer free to leave, and Detective Butler then read the Defendant his *Miranda* rights. The facts of this case are similar to the facts of *Ramsey v. State*, 731 So. 2d 79 (Fla. 3d DCA 1999). In *Ramsey,* the defendant and a co-defendant voluntarily event to the police station to be questioned in a murder case. The co-defendant confessed and implicated Ramsey in the crime. During the interview of Ramsey, prior to the administration, of *Miranda* warnings, the officer told Ramsey of details of the codefendant's confession. Ramsey confessed and the officer then read Ramsey his *Miranda* rights. The court held that Ramsey was not in custody prior to the administration of *Miranda* warnings, stating, "in the absence of any indicia of coercion or intimidating circumstances, police questioning about criminal conduct or activity alone, does not convert an otherwise consensual encounter into a custodial interrogation." Id. at 81.

The Defendant also claims that his statements were made involuntarily. The Defendant claims that Detective Butler made promises to him to induce him to confess to the murders. The Defendant specifically

refers to the following portion of the interview which follows a discussion about the Defendant's problem with insomnia:

. . . .
(Dialogue on insomnia)

The Court finds that the Defendant's confession was voluntary. Detective Butler did not promise the Defendant leniency if he confessed. Nor did he make any other promises to the Defendant to induce him to confess. He simply indicated to the Defendant that if he confessed, he might be able to provide an explanation for why he committed the crime. The detectives did not coerce the Defendant into confessing in any way. The interview was not extremely long. The Defendant began to indicate that he may have committed the crime just sixteen minutes into the interview. The detectives did not deprive the Defendant of food or water. Nor did they physically threaten the Defendant or raise their voices to him. The videotape statement of the Defendant clearly shows a young man who demonstrates maturity beyond his age of 18 and who is articulate and very intelligent. The Defendant was well disciplined as noted by his comments regarding his martial arts training. The Defendant appeared to be confident in the answers that he gave to the detectives and did not hesitate in his responses to the questions. The Defendant was cooperative throughout the interview and remained calm at all times. The detectives did not ask the Defendant leading questions. On several occasions the Defendant corrected Detective Butler as to the details of the crimes. For example, the Defendant was adamant throughout the interview that he did not go into the house to have sex with the little girl despite Detective Butler's repeated questions. Furthermore, just prior to the administration of the *Miranda* rights, the following dialog occurred between Detective Butler and the Defendant:

Q. Let, let, let me ask you this. Did, did you come to the station voluntarily?
A. You mean-
Q. Today?
A. Yes.

Q. Did anyone force you?
A. No.
Q. Did anyone tell you you was under arrest?
A. No.
Q. And you was willing to come down here and talk to me?
A. Yes.
Q. At any time, did anyone force you to tell me what happened?
A. No.
Q. You're doing this on your own free will?
A. Yes, sir, I am.
Q. Has anyone threatened you or anything like that?
A. No, sir.
Q. And you, and you just wanted to get this off your chest? Is that a yes or no?
A. Yes. Yes, sir.

The Defendant clearly made his admissions freely and voluntarily.

The Defendant also claims that his waiver of his *Miranda* rights was involuntary because Detective Butler diminished the importance of the rights when he read them to the Defendant. The following is the dialog which occurred between Detective Butler and the Defendant while Detective Butler was reading the Defendant his rights:

. . . .
(Dialogue on *Miranda* rights)

The Defendant claims that Detective Butler's statement that he had to read the Defendant his rights minimized the significance of the *Miranda* rights. In ***Ramirez v. State***, 739 So. 2d 568 (Fla. 1999), the Court held that the officers minimized the significance of the *Miranda* rights when one of the officers stated just prior to the administration of the *Miranda* rights, "I mean, he's already told us about going in the house and whatever. I don't think [the *Miranda* warnings are] going to change Nate's desire to cooperate with us." *Id.* at 576. Detective Butler's statement that he had to read the Defendant his rights is not comparable to the officer's statement in *Ramirez* and did not

> minimize the significance of those rights. The Defendant clearly understood his rights and voluntarily waived them. Detective Butler read each of the rights to the Defendant in a clear and understandable manner and made sure then he understood each right before moving on to the next one. Furthermore, the Defendant began to recite the *Miranda* rights before Detective Butler even began to read them, which indicates that he knew what his rights were before the interview.

(R708-727).

A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. *Rolling v. State,* 695 So. 2d 278, 291 (Fla. 1997)*; McNamara v. State,* 357 So. 2d 410, 412 (Fla. 1978).

A. Guilty plea as waiver of suppression issue in penalty phase. Relying on *Rolling*,*supra*, at 288, n.6, Appellant argues that the trial judge erred in ruling his suppression issue was waived as to the penalty phase and claims he should receive a new penalty phase. Although this Court in *Rolling* ruled the suppression issue was preserved as to the penalty phase, it found no merit to the motion to suppress and affirmed the conviction. *Id*. at 291-292. Therefore, even if the trial court incorrectly ruled the suppression issue was waived, the motion

had no merit and the outcome is the same. Appellant has not shown error on which relief can be granted.

B. Appellant was not "in custody." Appellant argues he was in custody at the police station when he was questioned; therefore, he should have been read his *Miranda* rights before the officers interviewed him. Appellant admits he agreed to accompany the officers to the police station, he was not handcuffed, he exited the car when the officers went in for a snack, he was alone outside while the officer bought snacks, and he voluntarily re-entered the car when the officers returned. However, he argues that the manner in which he was "summoned" for questioning resulted in an involuntary, custodial situation (Initial Brief at 36). The reasoning behind this is that the officers were not in a marked patrol car, but were wearing polo shirts with an insignia, a sidearm, and Appellant knew they were detectives investigating a homicide. Contrary to Appellant's assertion, all these elements lead to the conclusion Appellant was quite aware who the officers were and what they were doing at the apartment complex. The officers had asked several questions and asked to speak to Appellant further. However, Appellant was not a suspect at this point and was not in custody.

Appellant states that if he had declined the offer to go to the police station, he would have been formally detained. What "may" have happened is pure speculation. The fact is, Appellant did agree to go with the officers and he went voluntarily. He was not restrained, he exited the car and waited by the car while the officers got snacks, and he was free to leave if he wanted to.

In determining whether a suspect is in custody, the court must consider all of the circumstances of the interrogation. Then the court must determine whether a reasonable person in the same circumstances would "have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *Voorhees v. State*, 699 So. 2d 602, 608 (Fla. 1997). As the Supreme Court explained, "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': [was] there a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest." *Keohan* at 112. *see also Yarborough v. Alvarado,* 541 U.S. 652, 124 (2004); *Berkemer v. McCarty,* 468 U.S. 420, 442 (1984). As a guide for making such determination, this Court in *Ramirez v. State,* 739 So. 2d 568, 574 (Fla. 1999), identified the

following four general categories of circumstances pertinent to the inquiry:

> (1) the manner in which police summon the suspect for questioning;
>
> (2) the purpose, place, and manner of the interrogation;
>
> (3) the extent to which the suspect is confronted with evidence of his or her guilt;
>
> (4) whether the suspect is informed that he or she is free to leave the place of questioning.

Id. In applying these factors, courts determine the issue of custody, "not on the unarticulated plan of the police, but rather how a reasonable person in the suspect's position would have perceived the situation." *Davis v. State,* 698 So. 2d 1182, 1188 (Fla. 1997). The trial judge considered each factor in his lengthy order.

The trial court found that Appellant was never formally arrested or taken into custody by the police and, therefore, that warnings were not necessary. *See Correll v. State,* 523 So. 2d 562, 564 (Fla.), *cert. denied,* 488 U.S. 871 (1988). A police officer's interview of a person at the police station does not necessarily invoke the protections of *Miranda. Roman v. State,* 475 So. 2d 1228, 1231 (Fla. 1985), *cert. denied,* 475 U.S. 1090 (1986). *See also California v. Beheler*, 462 U.S. 1121, 1123 (1983)(“A person is not considered to be in custody merely

because the questioning took place at the police station or the questioned person is one whom the police suspect.”) The trial court's decision was supported by competent and substantial evidence. *See Bonifay v. State*, 626 So. 2d 1310 (Fla. 1993). The objective facts in the record support a finding that Schoenwetter was not in custody until after he made incriminating statements and was arrested.

For example, in *Taylor v. State,* 855 So. 2d 1(Fla. 2003), the defendant argued that he was under *de facto* arrest when he was taken to the police station and, therefore, his subsequent confession to the detective about the burglary was the fruit of an illegal arrest. This Court disagreed because the facts surrounding Taylor's trip to the station did not meet the custody requirement in order for him to be considered to be under arrest. This Court stated that:

> [in] order to conclude Taylor was in custody, "it must be evident that, under the totality of the circumstances, a reasonable person in the suspect's position would feel a restraint of his or her freedom of movement, fairly characterized, so that the suspect would not feel free to leave or to terminate the encounter with police." *Connor v. State,* 803 So. 2d 598, 605 (Fla. 2001).

Taylor, 855 So. 2d at 17 -18. When Taylor was asked to accompany an officer to the station, he voluntarily agreed. Moreover, although he rode in the back of the police car he was not

handcuffed during the ride. Upon arriving at the station, Taylor was handcuffed for safety reasons, but it was explained to him that he was not under arrest. This case is strikingly like Appellant's except that Appellant was never handcuffed and he was allowed to exit the car as he pleased.

In order for a court to conclude that a suspect was in custody, it must be evident that, under the totality of the circumstances, a reasonable person in the suspect's position would feel a restraint of his or her freedom of movement, fairly characterized, so that the suspect would not feel free to leave or to terminate the encounter with police. See *Voorhees v. State*, 699 So. 2d 602, 608 (Fla. 1997) (citing *Florida v. Bostick*, 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

Appellant was not "in custody" and *Miranda* warnings were not required before he was interviewed at the station. The Supreme Court has explicitly recognized that *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977)).

C. Voluntariness. Appellant argues that the confession was not voluntary. In *Davis v. State*, 859 So. 2d 465 (Fla. 2003),

this court found the trial court findings supported by the evidence. *Id*. at 472. Likewise, in the present case Appellant was alert and conversant. It was the middle of the day. He was offered food and drink. There was no pressure and no promises. In fact, at the end of the interview, the officers verified with Appellant that he had not been pressured or promised anything. In the absence of any indicia of coercion or intimidating circumstances, police questioning about criminal conduct or activity alone, does not convert an otherwise consensual encounter into a custodial interrogation. S*ee generally Florida v. Bostick,* 501 U.S. 429, 437 (1991) (finding that asking potentially incriminating questions does not convert encounter into a seizure.)

Appellant's next argument is that Detective Butler in some way coerced a confession by confronting him with the evidence (Initial Brief at 39). Appellant denied the accusations for fifteen minutes, showing he was not a weak, vulnerable victim with no resistance. There is nothing in Det. Butler's conversation with Appellant that comes close to coercion. When Det. Butler addressed the *Miranda* rights, Appellant recited them to the detective, showing a complete awareness of his rights.

Appellant's statements were made voluntarily, as he confirmed on the videotape. He was not promised anything and made the statements to "get them off his chest." The events on the videotape are a far cry from being even marginally coercive. *Compare Chavez v. State,* 832 So. 2d 730, 748-749 (Fla. 2002); *Walker v. State,* 707 So. 2d 300, 311 (Fla. 1997). If a defendant alleges that his statement was the product of coercion, the voluntariness of the confession must be "determined by an examination of the totality of the circumstances." *Traylor v. State,* 596 So. 2d 957, 964 (Fla. 1992). The trial judge made detailed findings on the motion to suppress. The testimony from the motion to suppress hearing reflects that the trial court's findings are supported by the record. The police interrogation here simply cannot be characterized as so coercive as to render the confession involuntary. The interrogation occurred during the day. The officers provided drinks upon request and allowed Appellant to use the bathroom when he wished. *See Walker v. State,* 707 So. 2d 300, 311-312 (Fla. 1997).

Appellant relies on *J.Y. v. State*, 623 So. 2d 1232 (Fla. 1993), a State appeal (treated as a petition for writ of certiorari) from a trial court order granting a motion to suppress. *J.Y.* is completely distinguishable. In that case,

the officers traced the license tag on a car from which shots were fired. The officers had a detailed physical description of the driver and passenger. Two separate patrol cars arrived at midnight at the home to which the car was traced. The car was at the residence. Two juveniles stepped out of the house to see what was going on. J.Y. matched the physical description given by witnesses. The trooper had probable to cause to arrest J.Y. at that point and would not have allowed him to leave. Rather than formally arresting J.Y., the trooper began questioning him in the driveway with two other officers present. This presents an entirely different situation from the present case. The officers did not have probable cause to arrest Appellant until after he made incriminating statements, at which point they read him *Miranda* warnings. They had no physical description of Appellant from witnesses.

D.Whether subsequent *Miranda* warnings cured *Miranda* violation. Appellant claims the second confession was tainted by the first confession, citing *Missouri v. Seibert*, 124 S.Ct. 2601 (2004). In *Seibert*, the defendant was arrested and taken to the station for questioning. She was clearly "in custody" because she was under arrest. To the contrary, in this case, Appellant was not a suspect at the time he agreed to go to the station. He only rode with the officers because he did not have

transportation. He asked them to bring him back by 4:00 p.m. so he could go to work. And he was free to walk about the car when the officers went to get snacks. In *Seibert,* the interviewing officer made a conscious decision not to give *Miranda* warnings even though the suspect was clearly in custody. *Seibert*, 124 S.Ct. at 2606. There was a department policy, espoused by police training agencies, to question first and warn the suspect later. The strategy was designed to undermine *Miranda* safeguards. *Seibert*, 124 S.Ct. at 2612.

First, the State does not agree that the first section of the confession was illegal. Second, even if this Court found that Appellant was in custody, the subsequent *Miranda* warnings "cured" any violation. The present case is strikingly similar to *Davis v. State*, 859 So. 2d 465 (Fla. 2003), in which the defendant argued the same issues presented by Appellant. The difference was that Davis was under arrest at the time the officers questioned him. Approximately ten minutes into the interview, Davis made inculpatory statements, was read *Miranda* rights, signed a written waiver, and repeated his confession then drew a map where he left the body. This Court held that, pursuant to *Oregon v. Elstad*, 470 U.S. 298, 310-11 (1985), the statement was voluntary. This Court noted that it has

previously followed *Elstad* in finding secondary confessions voluntary. *Davis,* 859 So. 2d at 471*, citing to Davis v. State*, 698 So.2d 1182, 1187-89 (Fla. 1997). This Court distinguished *Ramirez* because Ramirez was "not given a careful and thorough administration of his *Miranda warnings." Id.* at 471. Further, the officers in *Ramirez* "employed a concerted effort to downplay and minimize the significance of the *Miranda* rights, thus exploiting the statements previously made to the officers and tricking Ramirez into not exercising his rights." *Id*. at 471-72, *Citing Ramirez*, 739 So. 2d at 576. In the present case, the officers were not engaging in deliberative deception, explained the *Miranda* warnings even though Appellant recited them to the detectives when asked whether he knew about such rights, obtained a written waiver, and engaged in none of the behavior condemned in *Ramirez*. This Court held that the *Miranda* warnings "cured" the condition that rendered the unwarned statement inadmissible. *Davis*, 859 So. 2d at 472.

Last, even if the trial court erred in concluding Appellant was not in custody when he left with the police to go to the station, the error is harmless. *See State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986). The officers followed a blood trail from the house to Appellant's apartment complex. Even if the

confession were suppressed, it was only a matter of time before the detectives searched the apartment dumpster and found the bloody clothes with the victims' DNA. Under the doctrine of inevitable discovery, all evidence would have been in the State's possession even without Appellant's confession. Haesun Friskey was able to identify Appellant, and the blood trial showed Appellant's DNA.

POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW AFTER APPELLANT DISAGREED WITH THE ATTORNEY'S ABOUT VICTIM IMPACT EVIDENCE

It is not clear whether Appellant's real argument is that the trial judge erred in allowing victim impact evidence or whether the trial judge erred in denying counsels' motion to withdraw. Defense counsel moved to withdraw because he believed Appellant was interfering with their representation.

Defense counsel objected to victim impact testimony (PP273). The testimony of Janice Keith, Kenneth Lathrop, and Terry Blythe was proffered (PP277-290, 290-304, 304-307). During the proffers, Appellant stated he did not want the attorneys to object to the victim impact testimony (PP286, 288) The attorneys argued that whether to make objections was not Appellants'

choice, and the court should not consider his comments (PP289). The trial judge stated that:

> Your objection, that's why I let it go on the record, but notwithstanding that, I believe the testimony does conform to the statute.
>
> I have to disagree with you, Mr. McCarthy. I believe it does conform with the statute. I don't believe there's anything inherent here which goes beyond the statute.

(PP289-290).

The State proffered the next witness, defense counsel again objected and Appellant asked him to stop (PP299). In the meantime, the trial court excluded some of the objected-to testimony (PP 301). Appellant objected to the exclusion; however, the trial judge limited the testimony of both Lathrop and Blythe (PP 303, 312). After testimony from victim impact witnesses was proffered, Appellant asked to address the trial judge and was recognized (PP308, 309). He stated he did not see anything wrong with the testimony and he wanted it to be admitted (PP310). The trial judge ruled the victim impact evidence admissible. Defense counsel moved to withdraw due to a conflict with Appellant (PP312). The motion was denied (PP314). The judge's ruling was based on case law and statutes (PP290, 303, 312). When defense counsel asked the judge whether "any of your rulings on these three individuals were based in

any way on Mr. Schoenwetter's statements" the judge said "yes, it's all part and parcel." (PP 312). The judge clarified that the basis of his ruling on victim impact was based on the fact the evidence fell within the victim impact statute (PP319). Although the judge did not ignore what Appellant said, the basis for the ruling was because it "fell within the gamut of the statute." (PP320). The Public Defender moved to withdraw due to conflict with Appellant (PP312-313). Defense counsel stated that he wanted to withdraw because "we will not have the defense controlled by Mr. Schoenwetter." (PP314).

Defense counsel moved for a competency evaluation on Appellant (PP319). The trial judge noted that Appellant had been evaluated by Dr. Riebsame when Appellant wanted to plea (PP320). The judge had observed no behavior that would lead him to believe Appellant had become incompetent (PP320-321). Defense counsel believed Appellant showed signs of "decompensation" (PP322). Dr. Riebsame evaluated Appellant as a defense confidential expert (PP343-344). After Appellant spoke with Dr. Riebsame and the latter with defense counsel, the motion for competency evaluation was renewed (PP344). The trial judge appointed Dr. Podnos and Dr. Greenblum to examine Appellant (PP344-345). Appellant told the judge Dr. Riebsame

said he was competent, and he did not know why the attorneys insisted on testing him (PP345).

After a weekend recess, the court held a competency hearing. In Dr. Greenblum's opinion, Appellant was competent (PP361). In fact, he was extremely competent (PP362). Dr. Podnos also believed Appellant was competent to proceed (PP386). The trial judge held Appellant was competent and made findings of fact (PP413-414).

The trial judge also addressed Appellant's desire not to present mitigation (PP415). Appellant said his difficulty with defense counsel was that they wanted to say he "was not acting under my own free will, which, like I said, was untrue." (PP417). Defense counsel summarized the mitigation evidence he intended to present (PP420-423). At that point, Appellant was "keeping an open mind" about whether the evidence should be presented (PP423). Appellant did not want the evidence presented as an excuse (PP423).

Appellant argues that the trial court erred in allowing victim impact evidence and in considering Appellant's position as to that evidence. Appellant seems to argue that the trial judge allowed the victim impact evidence over objection simply because Appellant asked him to (Initial Brief at 44).

This Court has previously approved the use of victim-impact evidence in penalty-phase proceedings. *Windom v. State,* 656 So. 2d 432 (Fla. 1995). The record in this case reveals that the evidence introduced by the State fell within the purpose of section 921.141(7), Florida Statutes (2002), which allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death."

Huggins v. State, 889 So. 2d 743, 765 (Fla. 2004).

Both the case law from this Court and section 921.141(7), Florida Statutes (2000), allow for the introduction of victim impact evidence. Section 921.141(7) provides:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

In *Burns v. State,* 699 So. 2d 646, 653 (Fla. 1997), this Court rejected the argument that victim impact evidence is irrelevant under Florida's sentencing statute because it does not go to any aggravator or to rebut any mitigator. *See also*

Bonifay v. State, 680 So. 2d 413, 419 (Fla. 1996); *Windom v. State,* 656 So. 2d 432, 439 (Fla. 1995). In *Payne v. Tennessee,* 501 U.S. 808, 823, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court expressly rejected the argument that admitting such evidence violates equal protection, finding that victim impact evidence is not offered to encourage a comparison of victims but to "show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." *Kormondy v. State*, 845 So. 2d 41, 53 (Fla. 2003).

The trial judge clearly stated he did not simply base his decision on Appellant's request but, on the statute and case law. Victim impact evidence is clearly admissible and any consideration the judge gave to Appellant's requests or opinions was out of respect for the defendant. The trial judge did not cast defense counsel aside and allow Appellant to have free reign with his defense. To the contrary, the trial judge carefully listened and considered the situation and ordered a competency evaluation.

Despite the rift between Appellant's moral convictions and those of defense counsel, all the mitigation regarding Asperger's Syndrome and Appellant's life was presented in

detail. Error, if any, was harmless. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Appellant accepted the representation of defense counsel who conducted a full mitigation presentation. The trial court did not abuse its discretion in denying defense counsel's motion to withdraw. *See Trease v. State,* 768 So. 2d 1050, 1053 -1054 (Fla. 2000); *Johnston v. State*, 497 So. 2d 863, 868 (Fla.1986)("General loss of confidence or trust standing alone will not support withdrawal of counsel").

POINT III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DR. QAISER TO TESTIFY REGARDING THE AUTOPSY CONDUCTED BY DR. VASALLO

Dr. Sajid Qaiser, Medical Examiner[6] for Brevard County, reviewed the charts of the autopsies on Ronald and Virginia Friskey and discussed the case with the medical examiner who conducted the autopsies (PP241).

Dr. Qaiser, had been with the medical examiner's office for three years. He was an M.D. licensed to practice in Florida and Pennsylvania. Defense counsel objected to Dr. Qaiser giving an opinion because he did not conduct the autopsy; however, there was no objection to his qualifications. (PP212). The trial judge also noted the autopsy photos were already in evidence (PP212). Defense counsel had no objection to the photos (PP218). Dr. Qaiser reviewed the medical files in this case, the autopsy reports, the whole chart, and discussed the case with the medical examiner who conducted the autopsy (PP212, 241). Dr. Qaiser had gone through the pictures and every detail (PP241).

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[6] Dr. Vasallo performed the autopsies but was unavailable (PP213).

Appellant relies on *Geralds v. State,* 674 So. 2d 96, 100 (Fla. 1996); however, his reliance is misplaced. Appellant cites the portion of *Geralds* regarding a defense continuance and ignores the fact that this Court held that the trial judge did not err in permitting a medical expert to testify as to the victim's cause of death, despite the fact that the expert did not perform the autopsy. Dr. Qaiser testified that in reaching his conclusions he reviewed, among other things, the case file, chart, medical records the autopsy reports, photographs, and discussed the case with Dr. Vasallo. Therefore, because Dr. Qauser made independent conclusions using objective evidence, the trial court did not abuse its discretion in permitting him to testify. *See also Brennan v. State*, 754 So. 2d 1, 4-5 (Fla. 1999)(*sentence reversed on other grounds*); *Capehart v. State,* 583 So. 2d 1009, 1012 -1013 (Fla. 1991); *Terry v. State,* 668 So. 2d 954, 960-961 (Fla. 1996).

Section 90.704, Florida Statutes (1987), provides that an expert may rely on facts or data not in evidence in forming an opinion if those facts are of "a type reasonably relied upon by experts in the subject to support the opinion expressed." The record reveals that the State properly qualified Dr. Qaiser as an expert without objection, and that he formed his opinion based upon the autopsy reports, medical records, photographs,

and all other paperwork filed in the case. A proper predicate for his testimony was established and the trial court did not abuse its discretion in overruling the defense objection. *Capehart, supra.*

This case is similar to *Capehart* in that the autopsy report was not admitted into evidence. The defendant objected to another medical examiner testifying at trial "regarding the cause of death and the condition of the victim's body." *Id.* at 1012. Although there was no objection to the new medical examiner's qualifications as an expert, the defendant argued that there was not a "proper foundation" for her testimony. *Id.* This Court held that under section 90.704, there was a proper predicate for the medical examiner's testimony, even though she relied on facts or data not in evidence, because such information was of "a type reasonably relied upon by experts in the subject to support the opinion expressed." *Id.* (quoting § 90.704, Fla. Stat. (1987)). This Court observed that the expert "formed her opinion based upon the autopsy report, the toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed in the case." *Id.* at 1013. *See also Carratelli v. State,* 832 So. 2d 850, 862-863 (Fla. 4th DCA 2002).

The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error. *Ramirez v. State,* 542 So. 2d 352, 355 (Fla. 1989). An expert is permitted to express an opinion on matters in which the witness has expertise when the opinion is in response to facts disclosed to the expert at or before the trial. § 90.704, Fla.Stat. (1993); *Capehart, supra*.

Last, Appellant tries to fit this square peg into the round hole of *Crawford v. Washington*, 541 U.S. 36 (2004), by arguing the medical examiner's reports were testimonial hearsay and he did not have an opportunity to confront Dr. Vasallo. There was no objection on this basis, and this issue is waived. In any case, *Crawford* is not implicated in this case because medical records and autopsy reports are not "testimonial" and are within the business records exception to the hearsay rule. Error, if any, was harmless. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

POINT IV.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL AND GIVING A CURATIVE INSTRUCTION AFTER THE PROSECUTOR ADMITTEDLY MISSTATED THE LAW REGARDING "NO PRIOR CRIMINAL HISTORY"

During closing argument, the prosecutor stated:

> Randy Lamar Schoenwetter has no significant history of prior criminal act. Well, if you believe Dr. Riebsame about the child pornography, he said that's significant. It may be or it may not be. If you believe Dr. Riebsame about the retail theft, I don't know that it matters that much in weight, but you also need to take into consideration that he's been previously convicted or contemporaneously convicted for all these crimes that are going on in this case when you're weighing that.

(PP1228). Defense counsel objected, stating: “that is not the law.” (PP1229). After a bench conference, the prosecutor admitted his misstatement (PP1231). Defense counsel moved for a mistrial (PP1231). The parties agreed on a curative instruction, defense counsel re-affirming he was not waiving the motion for mistrial (PP1233-1234).

The motion for mistrial was denied (PP1234). The jury was instructed:

> THE COURT: The record should reflect that the jury has returned to the courtroom. Ladies and gentlemen, I'm instructing you at this time to disregard the State's last statement regarding contemporaneous criminal activity as it relates to a prior criminal activity. In thi regard, the law is that contemporaneous criminal conduct, at the same time as the criminal activity, cannot be considered by you.
>
> Did you all understand that?
>
> THE JURY: Yes, Your Honor.

(PP1235).

Appellant claims the trial judge abused its discretion in denying the motion for mistrial. He further argues that the

error was compounded by erroneous consideration of Appellant's possession of child pornography. When this issue arose, defense counsel specifically stated he was not objecting to the comments about child pornography or petit theft, it was the contemporaneous felonies he objected to (PP 1229). In fact it was the defense witness, Dr. Riebsame, who talked about Appellant's obsession with child pornography. The defense rebutted any innuendo of criminal activity by calling Commander Mutter to testify that detectives had determined there were no underage women in the photographs on Appellant's CD ROM disk and the police had not filed charges.

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *See Goodwin v. State,* 751 So. 2d 537, 546 (Fla. 1999). A motion for mistrial "should be granted only when it is necessary to ensure that the defendant receives a fair trial." *Id.* at 547 (quoting *Cole v. State,* 701 So. 2d 845, 853 (Fla. 1997). Appellate courts review a trial court's ruling on issues involving the jury's exposure to comments or evidence that was not presented in the courtroom on an abuse of discretion standard. "Trial court discretion in ruling on motions for mistrial where jurors have been exposed to outside comments about a defendant or similar offensive

references to the case or a party should not be disturbed absent an abuse of discretion." *Craig v. State,* 766 So. 2d 257, 259 (Fla. 4th DCA 2000); *cf. Doorbal v. State,* 837 So. 2d 940, 956 (Fla.) (stating that the standard of review of the trial court's denial of a motion for mistrial is abuse of discretion), *cert. denied,* 539 U.S. 962 (2003). The trial court in this case did not abuse its discretion in denying the motion for mistrial and giving a curative instruction. The prosecutor openly admitted his mistake and the judge gave a complete instruction.

Appellant last argues that jurors do not understand curative instructions, so he deserves a new penalty phase. This Court assumes that the jury understood and properly applied the instructions, and independently assessed Appellant's guilt on each count. *See Crain v. State,* 29 Fla. L. Weekly S635 (Fla. Oct. 28, 2004); *Burnette v. State*, 157 So. 2d 65, 70 (Fla. 1963) (stating that an appellate court must assume that a juror, if properly instructed, will comply with the obligations of the oath and render a true verdict according to the law and the evidence); *Sutton v. State,* 718 So. 2d 215, 216 & 216 n. 1 (Fla. 1st DCA 1998), and cases cited therein, ("applying the well-established presumption that juries follow trial court

instructions"). Error, if any, was harmless. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

POINT V.

THE TRIAL JUDGE DID NOT ERR IN DENYING THE MOTION TO DISQUALIFY HIMSELF BECAUSE HE PREVIOUSLY WORKED AS A HOMICIDE PROSECUTOR

Appellant claims the trial judge should have recused himself because he previously worked as a homicide prosecutor and argued against PET Scan technology in the case of *Hoskins v. State*, 702 So. 2d 202 (Fla. 1997). Further, since the trial judge had opposed PET scans when he was a prosecutor in 1994, he was not qualified to impose the death penalty on Appellant since evidence of a PET scan was presented during the penalty phase. Appellant admits he did not sign the motion, but argues that a motion to disqualify should not be declared legally insufficient because of a technicality. (Initial Brief at 62-63).

The actual allegations in the motion to disqualify included:

(a) Judge Griesbaum worked for several years as a prosecutor with the office which prosecuted Johnny Hoskins;

(b) The State aggressively opposed the use of PET scan testing from 1994 to 2001;

(c) The Hoskins' prosecutors referred to PET scan technology in derogatory terms;

(d) One of the prosecutors filed a grievance against Dr. Krop;

(e) The State Attorney's Office investigated Dr. Wood;

(f) Co-counsel threatened to sue the Public Defender and defense counsel for activities related to Hoskins;

(g) Although the State does not oppose PET scan testing, the judge has to make the preliminary rulings on qualifications of witnesses and scope of examination.

(R 491-492).

Section 38.10, Florida Statutes (2001), gives litigants the substantive right to seek disqualification of a judge. Rule 2.160, Florida Rules of Judicial Administration, sets forth the procedure to be followed in the disqualification process. Section 38.10, provides in pertinent part:

> Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

Similarly, rule 2.160 provides in pertinent part as follows:

> (d) Grounds. A motion to disqualify shall show:
> (1) that the party fears that he or she will not receive a fair trial or hearing because of

> specifically described prejudice or bias of the judge; or
> (2) that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to the cause.
> ....
> (f) Determination--Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

The test a trial court must use in reviewing a motion to disqualify is set forth in *MacKenzie v. Super Kids Bargain Store, Inc.,* 565 So. 2d 1332 (Fla. 1990). In *MacKenzie,* this Court held that "the standard for determining whether a motion is legally sufficient is 'whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.' " *Id.* at 1335 (quoting *Livingston v. State,* 441 So. 2d 1083, 1087 (Fla. 1983)).

This Court has repeatedly held that a motion to disqualify a judge "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy." *Jackson v. State*,

599 So. 2d 103, 107 (Fla. 1992); *Gilliam v. State*, 582 So. 2d 610, 611 (Fla. 1991); *Dragovich v. State*, 492 So. 2d 350, 352 (Fla. 1986). The motion will be found legally insufficient "if it fails to establish a well-grounded fear on the part of the movant that he will not receive a fair hearing." *Correll v. State*, 698 So. 2d 522, 524 (Fla. 1997). The fact that the judge was one of the prosecutors in 1994 on an unrelated case in which a PET Scan was an issue is hardly the type of “well-grounded fear” required. Even if a judge made adverse rulings in the past against a defendant, or had previously heard the evidence, or "allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that he judge discussed his opinion with others," are generally considered legally insufficient reasons to warrant the judge's disqualification. *Jackson v. State*, 599 So. 2d 103, 107 (Fla. 1992). *See also Kokal v. State*, 30 Fla. L. Weekly S21 (Fla. Jan. 13, 2005). The present motion contains spurious allegations that some other prosecutor filed complaints and that the trial judge was involved in an unrelated homicide case eight years earlier in which a PET Scan was ultimately admitted. The motion was completely deficient.

POINT VI.

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING PHOTOGRAPHS

Appellant claims the trial court erred in admitting six photographs of the injuries to Haesun Friskey during the penalty phase (State Exhibits 71-76). Defense counsel argued the photographs were not relevant to any aggravating circumstance and that Appellant pled to the charges. The State argued that the attempted murder of Mrs. Friskey was a contemporaneous felony which established the prior violent felony aggravating factor, and the photographs were relevant to the weight and establishment of that aggravating factor. Defense counsel was particularly adamant about one photograph which showed Mrs. Friskey's breast.

Since Appellant pled to the charges, the State was responsible for presenting all the evidence relevant to the aggravating circumstances in the penalty phase. An attempted murder can be committed by shooting at a person or mutilating to the edge of death as Appellant did Mrs. Friskey. The facts of the prior violent felony were relevant to establish the existence and weight of that aggravating circumstance. As Appellant concedes, the jury was informed that some of the wounds were attributable to medical intervention.

The trial judge ruled the photos admissible and made findings of fact (PP630-631):

> THE COURT: I reviewed the photographs and each of the photographs indicated injuries which were sustained by Ms. Friskey as a result of the actions of Mr. Schownwetter.
>
> The two photographs in question regarding the medical intervention, the Court's going to find that as part and parcel necessary or play a role in saving the life of Ms. Friskey.
>
> Additionally, the issue regarding breasts being shown, from viewing that, I don't see that as being anything which is going to be prejudicial to the jury, other than showing the medical state that these physicians were attempting to treat her.
>
> That is part and parcel, again, with the efforts made by medical personnel to save her life as a result of the injuries which were inflicted on her. I do not find that prejudicial for the purposes of the jury.

(PP630-631).

This Court has repeatedly held it will not disturb a trial court's ruling on the admissibility of a photograph absent a clear abuse of discretion. *Mansfield v. State,* 758 So. 2d 636, 648 (Fla. 2000). Photographic evidence is admissible if it is relevant to a material fact in dispute. Thus, "autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial." *Rose v. State,* 787 So. 2d 786, 794 (Fla. 2001). This Court has repeatedly upheld the admission of photographs when they are necessary to explain a medical

examiner's testimony, the manner of death, or the location of the wounds. *See, e.g., Davis v. State,* 859 So. 2d 465, 477 (Fla. 2003); *Floyd v. State,* 808 So. 2d 175, 184 (Fla. 2002); *Pope v. State,* 679 So. 2d 710, 713-14 (Fla. 1996).

The exhibits were properly admitted. None of these exhibits were unduly prejudicial and any additional wounds were explained to the jury. This Court has affirmed the admissibility of even gruesome photographs when they are "independently relevant or corroborative of other evidence." *Czubak v. State,* 570 So. 2d 925, 928 (Fla. 1990). *See Harris v. State,* 843 So. 2d 856, 865 (Fla. 2003) (crime scene photographs of the decomposed body of the victim were relevant, since they demonstrated the manner of death and assisted officer in testimony at trial about the crime scene). The trial judge carefully considered the relevance of each photo before admitting them and did not abuse his discretion in allowing the photos. *Floyd v. State,* 808 So. 2d 175, 184 (Fla. 2002); *Boyd v. State*, 30 Fla. L. Weekly S87 (Fla. Feb. 10, 2005). Error, if any, was harmless. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

POINT VII.

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN FINDING AND WEIGHING THE AGGRAVATING AND MITIGATION

CIRCUMSTANCES; THIS CASE IS PROPORTIONAL TO OTHER DEATH-SENTENCED DEFENDANTS

A. Witness elimination aggravating circumstance. Appellant claims the trial judge erred in instructing the jury on, and in finding, the aggravating circumstance that Appellant killed Ronald Friskey in order to avoid arrest. The Trial Court found:

> During the Defendant's confession, the Defendant maintained that he did not intend to kill either of the parents because they did not recognize him. However, the evidence presented during the penalty phase established that the Defendant had been close friends with the Friskey's son, Chad; the Defendant knew all of the members of the Friskey family; the Defendant slept over at the Friskey residence on about six occasions, several months before August 12, 2000; and the Defendant was not wearing any type of disguise on the night of the crimes. Under these circumstances, it is difficult to believe that the Defendant was confident that Ronald and Haesun Friskey did not recognize him. In fact during the penalty phase, Haesun Friskey identified the Defendant as the person she observed in her daughter's bedroom on August 12, 2000. The Court rejects the Defendant's statement in his confession that he believed the parents did not recognize him. The Court finds that the Defendant believed that both Ronald and Haesun Friskey recognized him when they saw him in their daughter's bedroom.
>
> Furthermore, during his confession, the Defendant in describing his struggle with the parents stated, "I was trying to get them off me, cause I didn't want them to, I didn't want to get caught or anything like that, I guess, I don't know." This statement, along with the Defendant's statements regarding his motive for killing Virginia Friskey show that once the situation went awry at the Friskey household, the dominant thought which controlled the Defendant's actions was to avoid getting caught. It should be noted that the stabbing of Ronald and Haesun Friskey

occurred after the Defendant had stabbed their daughter in their daughter's bedroom and in their presence. The viciousness of the attack on Virginia Friskey carried over to similar vicious attacks on Ronald and Haesun Friskey.

The nature of Ronald Friskey's wounds support the fact that the Defendant intended to kill Ronald Friskey and was not simply trying to get away from him. Ronald Friskey's wounds to the neck and the left middle back were very deep and the Defendant must have used an extreme amount of force to inflict these wounds. Furthermore, the fact that the Defendant stabbed Ronald Friskey in the back numerous times supports the fact that the Defendant was not simply trying to defend himself and get away. The nature of the wounds clearly establishes that the Defendant intended to kill Ronald Friskey.

The Defendant's actions and the facts presented establish that the dominant intent for the Defendant to murder Ronald Friskey was to eliminate him as a witness. This is demonstrated by the fact that the Defendant must have believed that both Ronald and Haesun Friskey had recognized him; the fact that once the situation went awry, the dominant thought that was motivating the Defendant's actions was to avoid getting caught; and the fact that the nature of Ronald Friskey's wounds shows that the Defendant intended to kill him and that the Defendant was not simply trying to break loose from him. The Court further finds that it was also the Defendant's intent to eliminate Haesun Friskey as a witness. This finding is based on the nature, type, and manner of the wounds that the Defendant inflicted on Haesun Friskey as noted in paragraph 12 herein; and her in court testimony positively identifying the Defendant as the person she saw in her daughter's bedroom on that fateful day. However, the Defendant's attempts to end the life of Haesun Friskey were unsuccessful.

This aggravating circumstance has been proven beyond all reasonable doubt.

(R800-802).

The trial court findings are supported by competent, substantial evidence. Appellant was close friends with Chad Friskey and was familiar with the entire family. In fact, Virginia Friskey asked him what he was doing in the house. Mrs. Friskey identified him at trial as the man who assaulted her. Appellant did not wear any type of disguise. In Appellant's confession, he admitted that he was fighting with the Friskeys because he did not want to get caught. As the trial court found, at that point Appellant's dominant thought was to not get caught. Appellant even admitted stabbing Virginia because she recognized him. All the Friskeys knew Appellant well and he had to eliminate the mother and father as witnesses, just as he had to eliminate the child who could identify him. As the trial court held, the nature of the wounds show that Appellant's purpose was to kill.

This aggravating factor may be proven by circumstantial evidence from which the motive for the murder may be inferred without direct evidence of the offender's thought process. ***Swafford v. State***, 533 So. 2d 270, 276 n.6 (Fla. 1988), ***cert. denied,*** 489 U.S. 1100 (1989). In ***Willacy v. State***, 696 So. 2d 693,696 (Fla. 1997), this Court held:

> Willacy contends that the court erred in finding that the murder was committed to avoid arrest. We disagree.

> When Sather surprised Willacy burglarizing her house, he bludgeoned her and tied her hands and feet. At that point, Sather posed no immediate threat to Willacy: She was incapable of thwarting his purpose or of escaping and could not summon help. There was little reason to kill her except to eliminate her as a witness since she was his next door neighbor and could identify him easily and credibly both to police and in court. *See Thompson v. State*, 648 So. 2d 692, 695 (Fla. 1994), *cert. denied*, 515 U.S. 1125, 115 S.Ct. 2283, 132 L.Ed.2d 286 (1995). The court applied the right rule of law to these facts, and competent substantial evidence supports its finding. We find no error.

Another case involving the same issue is *Preston v. State*, 607 So. 2d 404, 409 (Fla. 1992), wherein this Court stated:

> We have long held that in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness. *Perry v. State*, 522 So. 2d 817, 820 (Fla. 1988) *Bates v. State*, 465 So. 2d 490, 492 (Fla. 1985). However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes. *Swafford v. State*, 533 So. 2d 270, 276 n. 6 (Fla. 1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).

This Court has recognized that a confession is direct evidence, and that a confession that witness elimination was the reason for the murder satisfies this aggravating circumstance. *See Walls v. State,* 641 So. 2d 381, 390 (Fla. 1994); *cf. Sliney v. State,* 699 So. 2d 662, 671-72 (Fla. 1997) (holding that confession where defendant stated that he would have to kill the

victim because "[s]omebody will find out or something," was sufficient to establish avoid arrest aggravator). *See also Clark v. State,* 443 So. 2d 973 (Fla. 1984) (victim could identify defendant, knew him from past employment); *Young v. State,* 579 So. 2d 721 (Fla. 1991) (victim told son to call police and defendant knew he would be arrested when they arrived). Appellant stated he had to kill Virginia because she knew him and that he had to stab Haesun and Ronald Friskey so he would not get caught. Furthermore, he was not wearing a mask or gloves in order to conceal his identity. *See Farina v. State,* 801 So. 2d 44 (Fla. 2001); *Philmore v. State* 820 So. 2d 919, 935 (Fla. 2002). The trial court applied the right rule of law, and its determination is supported by competent substantial evidence.

B. The heinous, atrocious aggravating circumstance. Appellant argues the heinous, atrocious aggravating circumstance cannot be applied to the murder of Ronald Friskey. The trial court found:

> Ronald Friskey died an extremely tortuous death. The Defendant stabbed him at least ten times. The medical examiner testified that Ronald Friskey must have suffered extreme pain due to the wounds to so many parts of his body, his extreme loss of blood, and the difficulty he experienced breathing. There is no question that Ronald Friskey was alive and conscious throughout the attack and for a short time afterwards.

The medical examiner observed several defensive wounds on Ronald Friskey's hands. Furthermore, the Defendant stated in his confession that Ronald Friskey was struggling with him throughout the attack and was trying to prevent him from leaving. After the Defendant left the scene, Ronald Friskey managed to drag himself out of the house and over to the neighbor's front door where he called out for help. When Julie Blythe, the neighbor, opened the door, she found Ronald Friskey covered in blood, slumped on the ground. He told her that he had been stabbed and that his whole family was dead. He also told her that a young white male did it. He died in her arms when the paramedics arrived. Obviously, Ronald Friskey was conscious throughout the attack and was aware of everything that was happening. It is also clear that Ronald Friskey suffered extreme pain throughout the attack and for several minutes afterwards.

The Supreme Court of Florida has upheld the heinous, atrocious, and cruel aggravator in numerous cases where the victim received multiple stab wounds and was conscious throughout the attack. *Duest v. State*, 855 So. 2d 33 (Fla. 2003); *Francis v. State*, 808 So. 2d 110 (Fla. 2001); *Brown v. State*, 721 So. 2d 274 (Fla. 1998); *Mahn v. State*, 714 So. 2d 391 (Fla. 1998); *Nibert v. State*, 508 So. 2d 1 (Fla. 1987).

However, the Defendant tortured Ronald Friskey not only with physical pain, but with extreme emotional pain. Ronald Friskey witnessed the Defendant brutally murder his ten year old daughter and viciously attack his wife. It is clear from Ronald Friskey's statement to Julie Blythe that he believed that his whole family was dead. The mental anguish that Ronald Friskey must have experienced in witnessing this brutal attack on his ten-year-old daughter and wife is inconceivable. Ronald Friskey also must have experienced extreme fear when he awoke in the middle of the night to find a man in his house holding a knife and threatening his family.

The Supreme Court of Florida has held that a court may consider fear and emotional strain prior to the death of the victim as contributing to the heinous nature of the murder. *Francis v. State*, 808 So. 2d 110 (Fla. 2001). In *Francis*, two sisters were killed. The court

> stated that "the victim who was attacked second must have experienced extreme anguish at witnessing her sister being brutally stabbed and in contemplating and attempting to escape her inevitable fate." Id. at 135. The Court found that this further supported the trial court's finding of the existence of the heinous, atrocious, and cruel aggravator. *Id*.
>
> This aggravator has been established by the fact that Ronald Friskey experienced both extreme physical pain and extreme fear and emotional strain. Ronald Friskey experienced an unusually torturous death. While it does not appear that the Defendant intended to torture Ronald Friskey, the fact that he caused this extreme torture shows that he was utterly indifferent to the suffering of Ronald Friskey. This aggravating circumstance has been proven beyond all reasonable doubt.

(R802-804).

The trial court findings are supported by competent, substantial evidence. The findings summarize the evidence: Mr. Friskey was stabbed at least ten times while defending his wife and child. He suffered extreme pain due to the numerous penetrating wounds. He was alive and conscious and aware of his impending death. He told his daughter to call 911 and ran to a neighbor’s house. He was so covered in blood the neighbor did not recognize him. Neither did his own daughter, who described a man covered in blood wearing only his underwear running toward the neighbor’s house. Mr. Friskey died in the neighbor’s arms after he alerted her to the situation. This was an extended, arduous attack after which the victim died an excruciating death. Mr. Friskey suffered not only physical pain, but also

the extreme mental anguish of knowing his wife and child had been brutally attacked. In fact, he told the neighbor his family had been killed. This Court has upheld the heinous, atrocious aggravating circumstance in multiple stab wound cases. *Duest v. State*, 855 So. 2d 33 (Fla. 2003); *Francis v. State*, 808 So. 2d 110 (Fla. 2001); *Brown v. State*, 721 So. 2d 274 (Fla. 1998); *Mahn v. State*, 714 So. 2d 391 (Fla. 1998); *Nibert v. State*, 508 So. 2d 1 (Fla. 1987). Add to that the mental anguish of finding a butcher-knife wielding man in the house in the middle of the night and having his wife and child brutally attacked in front of him.

Appellant argues that this Court should focus on the intent of the murderer, not on the actual suffering of the victim (Initial Brief at 84). Appellant also argues that he did not intend to kill Ronald Friskey or cause him undue suffering. (Initial Brief at 85). In *Lynch v. State,* 841 So. 2d 362, 369 (Fla. 2003), this Court reiterated that, when analyzing the heinous, atrocious aggravator, the focus is not on the intent of the assailant, but on the actual suffering caused the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. *See Farina v. State,* 801 So. 2d 44,

53 (Fla. 2001); *see also Hitchcock v. State,* 578 So. 2d 685, 692 (Fla. 1990). Further, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Swafford v. State,* 533 So. 2d 270, 277 (Fla. 1988); *see also Chavez v. State,* 832 So. 2d 730, 765-66 (Fla. 2002). The HAC aggravating factor focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death. *See Barnhill v. State,* 834 So. 2d 836, 849 -850 (Fla. 2002); *Brown v. State,* 721 So. 2d 274, 277 (Fla. 1998).

Each murder was deliberately and extraordinarily painful, *Porter v. State*, 564 So. 2d 1060 (Fla. 1990), and was carried out with utter indifference to the suffering Defendant caused his helpless victims. *Bates v. State*, 750 So. 2d 6 (Fla. 1999); *Mahn v. State*, 714 So. 2d 391 (Fla. 1998). The heinousness aggravator focuses on the ordeal of the victim -- the “intent” of the defendant does not matter. *Guzman v. State*, 721 So. 2d 1155 (Fla. 1998) (no “intent element” applies to this aggravator); *Gorby v. State*, 630 So. 2d 544 (Fla. 1993).

In another double murder case in which the victims were subjected to substantial mental anguish before being shot to death, the Florida Supreme Court stated:

> We have previously upheld the application of the heinous, atrocious, or cruel aggravating factor based, in part, upon the intentional infliction of substantial mental anguish upon the victim. See, *e.g., Routly v. State,* 440 So. 2d 1257, 1265 (Fla.1983), and cases cited therein. Moreover, "[f]ear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Preston v. State,* 607 So. 2d 404, 410 (Fla.1992), *cert. denied,* 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993).

Henyard v. State, 689 So. 2d 239, 254(Fla. 1996). *See also Nibert v. State,* 508 So. 2d 1, 4 (Fla. 1987) (victim stabbed seventeen times, defensive wounds, conscious stabbing); *Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998) (nineteen stab wounds, one defensive wound, blows by force); *Duest v. State*, 855 So. 2d 33, 46 (Fla. 2003); *Finney v. State*, 660 So. 2d 674 (Fla. 1995); *Pittman v. State*, 646 So. 2d 167 (Fla. 1994).

C. Weight given to mitigating circumstances.

Appellant concedes the trial judge found four statutory mitigating circumstances: age, no prior criminal history, extreme mental or emotional disturbance, and impaired capacity to appreciate the criminality of his conduct. However, Appellant claims the trial judge assigned the improper weight to

these mitigating circumstances (Initial Brief at 86-87). The trial judge also found a litany of non-statutory mitigation, including: accepted responsibility, bullied as a child, gainfully employed, not a danger to prison population, neurological disorders hamper social interaction, sexual preoccupation since age seven, developmental age of twelve, close relationship with mother and sister, abuse from mother's boyfriend (R 813-17). Appellant does not allege the trial judge did not refuse to consider or find any specific mitigation, he merely argues with the weight assigned by the trial judge.

At the outset, it is important to note *Kearse v. State,* 770 So. 2d 1119 (Fla. 2000), wherein this Court held:

> Deciding the weight to be given a mitigating circumstance is within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard.... [T]he trial judge is in the best position to judge ... and this Court will not second-guess the judge's decision ....

Id. at 1133. Additionally, "there are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight." *Trease v. State,* 768 So. 2d 1050, 1055 (Fla. 2000).

The appellant argues that the trial court improperly assigned certain mitigating circumstances either slight or no

weight, based upon a misapplication of the law. The trial court here acted well within the bounds of its discretion in considering the proffered mitigators and assigning slight or no weight to certain of them. A "mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence." *Porter v. State,* 429 So. 2d 293, 296 (Fla. 1983) (quoting *Quince v. State,* 414 So. 2d 185, 187 (Fla. 1982)).

The trial court's holdings regarding certain of the appellant's proffered mitigators resulted from an abundance of evidence contained in the record supporting the notion that the cited mitigators are relevant to the defendant in the instant case. As the record "contains competent, substantial evidence to support the trial court's rejection of these mitigating circumstances," *Kight v. State,* 512 So. 2d 922, 933 (Fla. 1987), the trial court's refusal to grant any weight to certain mitigating evidence was not improper. *Cox v. State* 819 So. 2d 705, 722-723 (Fla. 2002).

Error, if any, was harmless. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). This case involved a double homicide. The trial judge found five aggravating circumstances as to one murder and four as to the other.

POINT VIII.

THE STANDARD JURY INSTRUCTIONS DO NOT SHIFT THE BURDEN TO THE DEFENDANT

As Appellant acknowledges, this argument has been rejected repeatedly by this Court.

This claim is a recycled *Arango* claim and has been denied repeatedly by this court. *Arango v. State,* 411 So. 2d 172 (Fla.), *cert. denied,* 457 U.S. 1140 (1982). *Stewart v. State,* 549 So. 2d 171 (Fla.1989), *cert. denied,* 497 U.S. 1032 (1990); *See also Teffeteller v. Dugger*, 734 So. 2d 1009, 1024 (Fla.1999) *San Martin v. State,* 705 So. 2d 1337, 1350 (Fla. 1997); *Lewis v. State*, 572 So. 2d 908, 912 (Fla. 1990) *Preston v. State*, 531 So. 2d 154, 160 (Fla. 1988).

In *Arango,* this Court held:

> Appellant next maintains that the instructions given to the jury impermissibly allocated the constitutionally prescribed burden of proof. At one point in the trial proceeding, the judge stated that if the jury found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." This instruction, appellant argues, violates the due process clause as interpreted in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and *State v. Dixon*, 283 So. 2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).
>
> In *Mullaney* the Supreme Court held that a Maine law requiring the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter did not comport with due

> process. Such a rule, the Court wrote, is repugnant to the fourteenth amendment guarantee that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In *Dixon* we held that the aggravating circumstances of section 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that the state must establish them.
>
> In the present case, the jury instruction, if given alone, may have conflicted with the principles of law enunciated in *Mullaney* and *Dixon*. A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed.

Arango 411 So. 2d at 174 (Fla. 1982). Appellant has offered this

Court no reason to revisit established precedent.

POINT IX.

FLORIDA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL UNDER *RING V. ARIZONA*

There are fundamental reasons why the *Apprendi/Ring* argument fails: Schoenwetter's death sentences are supported by aggravators that fall outside any interpretation of *Apprendi/Ring*;[7] and, the statute under which Schoenwetter was sentenced to death provides that, upon conviction for capital murder, the maximum possible sentence is death, unlike the statute at issue in *Ring. Ring* clarified that *Apprendi* applied to capital cases, and that *Apprendi* applied to Arizona's death penalty statute. However, *Ring* has no application to Florida's death sentencing scheme because the United States Supreme Court, while misinterpreting Arizona's capital sentencing law, did not misinterpret Florida law. The basic difference between Arizona and Florida law is dispositive of Schoenwetter's claims.

***Apprendi/Ring* does not invalidate Florida's death penalty statute.**

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[7] The contemporaneous attempted murder of Haesun Friskey and during-the-course-of-a-burglary serve as aggravating circumstances in both death sentences. The contemporaneous murders of Virginia and Ronald Friskey serve as aggravating circumstances in the death sentence of the other victim.

Schoenwetter's claim that *Apprendi/Ring* operates to invalidate Florida's long-upheld capital sentencing statute has been repeatedly rejected by the Florida Supreme Court and by the United States Supreme Court. *See Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003); *Conahan v. State*, 844 So. 2d 629 (Fla. 2003); *Butler v. State*, 842 So. 2d 817 (Fla. 2003)(relying on *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) to a *Ring* claim in a single aggravator (HAC) case); *Banks v. State*, 842 So. 2d 788 (Fla. 2003); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003); *Grim v. State*, 841 So. 2d 455 (Fla. 2003); *Cole v. State*, 841 So. 2d 409 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390 (Fla. 2003); *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003).

Schoenwetter's death sentences are supported by aggravators that fall outside any interpretation of *Apprendi/Ring*.

Under the plain language of *Apprendi*, a prior violent felony conviction is a fact which may be a basis to impose a sentence higher than that authorized by the jury's verdict without the need for additional jury findings. There is no constitutional violation (nor can there be) because the prior conviction

constitutes a jury finding which the judge may rely upon, without additional jury findings, in imposing sentence. *See Almendarez-Torrez v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under any view of the law, and even after *Ring*, the jury is not required to make a determination of the prior violent felony aggravator, and that aggravating circumstance can be found by the judge alone.

Under any interpretation of the facts, the prior violent felony convictions obviate any possible Sixth Amendment error. Those aggravating circumstances are outside of the *Apprendi/Ring* holding,[8] and, because that is so, those decisions are of no help to Schoenwetter. In the absence of any legal support, Schoenwetter's claim collapses. *Apprendi* and *Ring* do not factor into the facts of this case, and no relief is justified.

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[8] The *Apprendi* Court cited to *Jones v. United States,* 526 U.S. 227, 243 n.6 (1999), for the proposition that under the Fifth and Sixth Amendments, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 476 (2000). [emphasis added]. The Court has already clearly said that death is the maximum penalty for first degree murder, so that component of the statement has no application to Florida law. In any event, Schoenwetter's prior violent felony convictions establish an aggravator that is outside any possible (or reasonable) interpretation of *Apprendi/Ring.*

Additionally, this murder was committed during a felony and the jury returned a verdict of guilty on armed burglary.

Death is the maximum penalty for first-degree murder.

"[T]he legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law." *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981). The Court, long before *Apprendi*,[9] concluded that the maximum sentence to which a Florida capital defendant is subject following conviction for capital murder is death. *Apprendi* led to no change of any sort, by either the Legislature or the Florida Supreme Court.

In Florida, the determination of "death-eligibility" is made at the guilt phase of a capital trial, not at the penalty phase, as was the Arizona practice. The Florida Supreme Court has unequivocally said what Florida's law is, just as the Arizona Supreme Court did. The difference between the two states' capital murder statutes is clear, and controls the resolution of the claim. Because death is the maximum penalty for first-degree

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[9] The Florida Supreme Court's interpretation of Florida law is consistent with the description of Florida's capital sentencing scheme set out in *Proffitt v. Florida,* and echoed in *Barclay v. Florida,* 463 U.S. 939, 952 (1983) ("[I]f a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence."). If the defendant were not eligible for a death sentence, there would be no second proceeding.

murder in Florida (and because it is not in Arizona), Schoenwetter's *Apprendi/Ring* claim collapses because nothing triggers the *Apprendi* protections in the first place. *See, Barnes v. State,* 794 So. 2d 590 (Fla. 2001) (*Apprendi* not applicable when judicial findings did not increase maximum allowable sentence).

Ring did not eliminate the trial judge from the sentencing equation or in any fashion imply that Florida should do so. Under the Arizona capital sentencing statute, the "statutory maximum" for practical purposes is life until such time as a judge has found an aggravating circumstance to be present. An Arizona jury played no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. As the Arizona Supreme Court described Arizona law, the statutory maximum sentence permitted by the jury's conviction alone is life. *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001). Florida law is not like Arizona's. *Mills v. State,* 786 So. 2d 532 (Fla. 2001).

The distinction between a "sentencing factor" (*i.e.*: "selection factor," under Florida's statutory scheme) and an element is sharply made in *Apprendi,* where the Court stated: "One need only look to the kind, degree, or range of punishment

to which the prosecution is entitled for a given set of facts. Each fact necessary for that entitlement is an element." *Apprendi v. New Jersey,* 530 U.S. at 501. [emphasis added]. A Florida defendant is eligible for a death sentence on conviction for capital murder, and a death sentence, under Florida's scheme, is not a "sentence enhancement," nor is it an "element" of the underlying offense. *Almendarez-Torres v. United States,* 523 U.S. 224 (1998); *McMillan v. Pennsylvania,* 477 U.S. 79 (1986). *See, Hildwin v. Florida,* 490 U.S. 638, 640-41 (1989). [emphasis added].

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,
CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 410519
OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
Telephone: (386)238-4990
Facsimile: (386)226-0457
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of the Appellee has been furnished by U. S. Mail, to Chris Quarles, Office of the Public Defender, 112 Orange Avenue, Daytona Beach, Florida, 32114 on this_____day of March, 2005.

_____
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in a Courier New, 12 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

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Attorney for Appellee