IN THE SUPREME COURT OF FLORIDA

RANDY SCHOENWETTER,)
)
)
Appellant,)
)
vs.) CASE NUMBER SC04-53
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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[1] ***Miranda v. Arizona***, 384 U.S. 436 (1965).

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[2] The admission of evidence is subject to an abuse of discretion standard of review. ***See Martin v. State***, 717 So.2d 462 (Fla. 1998)

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

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PRELIMINARY STATEMENT

The record on appeal comprises sixteen volumes. Volumes one and two

consist of transcripts of various pretrial hearings, the plea proceedings, and the ***Spencer*** [3] hearing. Volume three consists of the transcript of sentencing as well as various pleadings, court minutes, and orders. Volumes four and five contain various motions, court minutes, and orders. These first six volumes are numbered consecutively from page 1 through page 840.

Volumes six through nine contain the transcript of jury selection. These four volumes are numbered consecutively from page 1 through page 751. Volumes ten through sixteen contain the transcripts of the penalty phase. These seven volumes are numbered consecutively from page 1 through 1317. Counsel will refer to these first sixteen volumes by Roman numerals to designate the volume followed by the appropriate page numbers.

A supplemental record containing three volumes was filed on December 13, 2004. These three volumes are numbered consecutively volume one through volume three. The three volumes contain consecutively numbered pages from page 1 through page 339. Counsel will refer to this portion of the record using Roman numerals to designate the volumes coupled with the letters "SR" (supplemental record) followed by the appropriate pages.

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[3] ***Spencer v. State***, 615 So.2d 688 (1993)

STATEMENT OF THE CASE

On August 29, 2000, the spring term grand jury in the Eighteenth Judicial Circuit, Brevard County, returned an indictment charging Randy Schoenwetter, the appellant, with two counts of first-degree premeditated murder, one count of attempted first-degree felony murder, and one count of armed burglary of a dwelling. (III 393-95)

Early on, appellant unsuccessfully sought to disqualify the trial court. (I 115-16; III 490-94, 497) Prior to trial, appellant filed numerous motions attacking the constitutionality of Florida's death penalty statute. ***See, e.g.,*** (IV, 558-63, 569-677) Appellant also filed a motion in limine regarding gruesome photographs. (III 678-80)

On December 11, 2002, appellant filed a motion to suppress statements and admissions as well as a second motion to suppress evidence that was alleged to be a product of the illegally obtained admissions. (III 684-89) On February 27, 2003, the trial court rendered an order denying appellant's motion to suppress statements and admissions. The court also denied the accompanying motion to suppress evidence. (IV 708-726)

On March 5, 2003, appellant pleaded guilty to all pending charges as alleged in the indictment. (II 225-265)

On September 15 - 17, 2003, a jury was selected to hear the penalty phase and recommend two sentences for the two murders. (VI - IX 1-751) Penalty phase commenced on September 17, 2003. (X - XVI 1-1317) During the penalty phase, trial counsel moved to withdraw based on conflict with appellant. (XI 312) The trial court ultimately conducted a competency hearing. The court declared appellant competent to proceed. (XI 314-29, 355-99; XII 409-14)

Appellant registered an objection to the testimony of the medical examiner who did not perform the autopsy. (XI 212-15) Over defense objection, the state introduced photographs which appellant contended were unnecessarily prejudicial. (XIII 623-46; State's exhibits 71-76) During closing argument, appellant moved for a mistrial based on a misstatement of law by the prosecutor. The trial court denied the motion, but read a curative instruction. (XVI 1227-35)

After hearing evidence and argument, the jury returned advisory sentences recommending, by a majority vote, that Randy Schoenwetter should die for the murders of Virginia Friskey and Ronald Friskey. (V 768-69) The trial court ultimately followed the jury's recommendations and sentenced Randy Schoenwetter to die for his crimes. (V 788-821)

Appellant filed a notice of appeal on January 5, 2004. This brief follows.

STATEMENT OF THE FACTS

The Crime

On the evening of Friday, August 11, 2000, Hausen Friskey was home with her husband Ron and their two daughters, Theresa and Virginia. (XIII 756-58) Theresa, the eldest daughter, went out that evening after dinner. Hausen and Virginia lay on the couch watching television, while Ron Friskey sat in his recliner. The three of them fell asleep watching television in the living room. Later that night, they woke up and retired to their respective bedrooms. Theresa had returned home earlier and was in her own bedroom. (XIII 658-60)

Sometime before dawn, Hausen Friskey woke up to the sound of Virginia crying out. (XIII 660) Hausen likened the sound to one of a sick child. Hausen immediately got out of bed and walked to her open bedroom door. She could see into Virginia's bedroom down the hall. Although she could make out Virginia's figure lying in her bed, her view was blocked by the figure of a "big male" standing beside Virginia's bed. (XIII 661-62) The man appeared to be brushing Virginia's body.[4] (XIII 662)

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[4] When interviewed by law enforcement at the hospital following the attacks, Hausen described Virginia's room as "really dark." (XIII 674-75) Despite the darkness and the fact that appellant stood between her and Virginia, Hausen was certain that appellant's hands were on Virginia. (XIII 675-76)

Hausen spoke to the intruder and asked his identity. However, when excited, Hausen tended to revert to her native Korean language, as she did in this instance. (XIII 662) The man looked at Hausen,[5] and made a motion with his hand towards Virginia. Hausen heard Virginia make a "huhhhh" sound like an intake of air. (XIII 663)

Hausen did not remember much of the events that night following her discovery of the intruder. (XIII 664) She had a sense of her husband fighting with the man in Virginia's bedroom, while Hausen lay on the floor. (XIII 664-65) Hausen had a vague recollection that she was having difficulty breathing.

Theresa, the Friskey's sixteen-year-old daughter, said she woke up at 5:23 a.m. when she heard a commotion outside her bedroom. (X 84, 107) Theresa also heard Virginia, her ten-year-old sister crying. (X 108) Theresa, who kept her bedroom door locked, opened her door. She looked into her parents' room which appeared to be a mess. Theresa then went to the doorway of her little sister's room. There she could barely discern a pile of people, perhaps three, on the floor of her sister's bedroom. (X 108-13) She heard a male voice instruct her to call 911. She returned to her room, closed and locked the door, and called for help.

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[5] When the intruder turned to look at Hausen, she recognized him as Randy Schoenwetter, her son's friend. (XIII 663-64)

(X 109-13)

While waiting for the police, Theresa opened her blinds and looked out the window. She saw a man, dressed only in his underwear, staggering away from the house. (X 113-15) She subsequently realized that the man, who was covered in blood, was her father. (X 113-15)

Ronald Friskey went to the home of his next-door neighbor, Julie Blyth, where he sought help. Ms. Blyth was awakened by a loud bump at her front door. She saw a man covered with blood on her front porch. He asked Ms. Blyth to call 911. Although she initially did not recognize her neighbor, Ms. Blyth subsequently realized that the man was Ronald Friskey. Friskey told Blyth that he had been stabbed by a young white male. Friskey admitted that he did not know who his assailant was. (X 140-49)

Subsequent autopsies revealed that Ronald Friskey suffered multiple stab wounds as well as multiple incisive wounds. Cuts to Ronald Friskey's hands were consistent with defensive wounds. (XI 243-46) One wound to Ronald Friskey's upper back was life threatening. A second wound was fatal in that it penetrated his lung. This led to exsanguation, shock, and ultimately death. (XI 253-54) The wounds would have resulted in Mr. Friskey's death in five to forty minutes. (XI 255) The medical examiner determined that multiple stab wounds were the cause of

death. (XI 271) Virginia Friskey also died from multiple stab wounds. (X 1269-70) Virginia suffered wounds to her hand and wrist. (XI 264) Hausen Friskey suffered multiple stab wounds including damage to her liver, her chest, her left arm, several stab wounds in her back, on her arm, and on her thumb. (XIII 639-40) She suffered a deep stab wound to the upper abdomen that went through her liver and into the chest. (XIII 641) She had two minor stab wounds on her right arm. She suffered superficial stab wounds to the face and neck. (XIII 642) One stab wound went through the left arm and entered her chest. (XIII 643)

The Confession

Detective Butler interviewed Randy Schoenwetter at the police station. Randy admitted that he knew the Friskey family.[6] (XII 504-5) Although Randy initially denied any involvement in the crimes, he ultimately confessed. (XII 510-21) Randy explained that he entered the Friskey home through a sliding glass door. (XII 532) He picked up a knife in the kitchen.[7] (XII 532-33) Randy then wandered around the house as the occupants continued to sleep. When pressed on his intent, Randy said he went into the house just for the excitement of breaking in. (XII 525-

[6] Randy was friends with the Friskey son who had joined the military and left town. (X 91-94)

[7] Randy explained that he picked up the knife in case someone woke up. He could then used the knife as a threat to enable his escape. (XII 533)

27) He had no intent to steal or commit any other offense inside the home.

Mr. and Mrs. Friskey woke up to find an intruder in their home. (XII 522-23) As Randy stood in the hallway, Mr. Friskey came out of his bedroom and grabbed him from behind. Mrs. Friskey clawed at Randy. (XII 536-37) When Mr. Friskey tried to choke him, Randy flailed about with the knife. Mr. Friskey was behind Randy, holding his arms. (XII 530) Their momentum carried them through the doorway and onto the floor of Virginia's bedroom. The commotion work up Virginia, who started screaming. (XII 536-37) Both parents were trying to subdue Randy, who had the knife in his left hand. Randy flailed wildly with the knife.[8] (XII 536-37) Randy described the incident as just a "blur of fighting and trying to get away." (XII 537) During the altercation, Randy cut himself when his grip slipped. (XII 523-26)

He left the house the same way that he entered. (XII 539) He had parked his bicycle in the back driveway. (XII 539) Randy rode his bicycle back to his apartment. (XII 540-42) After taking a shower, Randy put the knife, his clothes, and his shoes in a bag before throwing them in the dumpster at his apartment. (XII524-25, 543)

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[8] Although he had the knife in his left hand, Randy is, in fact, right handed. (XII 538)

The Plea

Randy Schoenwetter accepted complete responsibility for his actions and pleaded guilty to all pending charges. He pleaded guilty to the first-degree premeditated murder of Virginia Friskey, as well as the first-degree premeditated murder of Ronald Friskey. Randy also pleaded guilty to one count of attempted first degree murder of Haesun Friskey and to one count of burglary of a dwelling. In pleading guilty to all pending charges, Randy Schoenwetter acted against his attorneys' advice. (II 225-65)

Appellant's Mental Condition

At the penalty phase, the defense presented extensive testimony and evidence relating to Randy's mental condition. That evidence was not significantly refuted by the state. Dr. Nona Prichard, a clinical psychologist specializing in neuropsychology and also an expert in Asperger's Syndrome and Dr. William Riebsame, a licensed psychologist, both examined Randy throughly. (XIII 722-28, XIV 837-42) Additionally, Dr. Joseph Wu, the clinical director of the brain imaging center, University of California at Irvine, and associate professor of medicine, testified as an expert in psychiatry, neuroscience, and PET scan imaging. (XIV

884-94 et.seq)[9] Dr. Wu explained in lengthy detail that the scientific community generally accepted the use of PET scans to study brain function.[10] (XIV 886-92) A PET helps corroborate a diagnosis if used in conjunction with other medical and clinical records.[11] (XIV 892-94)

All three mental health experts agreed that Randy suffers from significant mental problems. Dr. Prichard, an expert in the field, diagnosed Randy with Asperger's Syndrome. Asperger's Syndrome, a form of autism, is a neurological disorder that reflects an abnormal brain pathology. She noted that he exhibited almost every symptom. (XIV 844) People suffering from this form of autism are severely impaired in their ability to socially interact. Often times, from early childhood, they are described as social misfits. Asperger symptoms include 1) severe impairment in reciprocal social interaction; 2) lack of appreciation of social cues; 3) socially and emotionally inappropriate behavior; 4) very narrow but highly

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[9] Dr. Wu is board certified in the field of psychiatry. His primary focus is brain imaging using PET scans. Dr. Wu estimated that 90% of his time was devoted to analyzing and writing about PET images. (XIV 885-86)

[10] Dr. Wu had testified as a PET scan expert approximately thirty to forty times. (XIV 894-95) He has published over fifty peer-reviewed articles on the use of PET scans and neuropsychiatric disorders. (XIV 895) Dr. Wu had acquired and reviewed over 5,000 brain PET scans and was among the world's most prolific in that particular area. (XIV 895)

[11] Dr. Wu conducted a PET scan on Randy's brain.

focused interests; 5) imposition of their own routines and interest on other people; 6) superficially perfect expressive language; 7) misunderstanding metaphor and humor; 8) impaired ability to understand other people's feelings;[12] and 9) inflexibility. (XIV 846-54) People suffering from the disorder develop an extreme preoccupation a subject or topic. This preoccupation becomes so extreme that it is all encompassing.[13] Their entire life centers around that particular topic. In Randy's case, he became preoccupied with satanic and sexual matters. (XIII 738-41)

Dr. Prichard concluded that appellant's capacity to conform his conduct to the requirements of the law was substantially impaired that night. (XIV 854) Randy's actions that night were neither calculated nor premeditated. (XIV 855) Dr. Prichard estimated that Randy's social comprehension was equivalent to a child of eight to ten years old.

Testing revealed that appellant was not malingering nor was he exaggerating any mental problems. In fact, during Dr. Riebsame's interviews with appellant,

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[12] Dr. Prichard distinguished sociopaths/psychopaths from Asperger sufferers by pointing out that the former understand emotions and feelings, but have no empathy. Asperger sufferers have a basic lack of understanding of feelings altogether. (XIV 849)

[13] Dr. Wu gave as examples obsessions with trial parts or the history of a particular movie studio. (XIV 900)

Randy consistently minimized his mental health problems. (XIII 735-36) In discussing the criminal episode, Randy was forthright in acknowledging the fact that he stabbed all three of the victims. However, Randy never provided the doctor with a credible motive. (XIII 736-37)

Dr. Riebsame concluded that, given Randy's abnormal brain pathology, his history of attention deficit hyperactivity disorder (ADHD), and his Asperger disorder, Randy was suffering from an extreme emotional disturbance at the time of the offenses. (XIII 751, 761) Although Randy recognized that his behavior was wrong, his ability to conform his conduct to the requirements of the law was impaired as a result of his preoccupation with satanic and sexual matters. (XIII 761)

Individuals with Randy's type of neurological difficulty typically fail to ever reach emotion maturity. Dr. Riebsame estimated that, at the time of the offenses, Randy's maturity was equivalent to a pre-pubescent individual approximately eleven or twelve years old. (XIII 761-62) Three years later, at the time of his trial, Randy's emotional development was still stunted by the Asperger disorder. Dr. Riebsame estimated that, at the time of trial, Randy was coping at the maturity level of someone in their early teens. (XIII 762) As a result of his extreme immaturity at the time of the crime, Randy was unable to consider how his behavior might affect

other people. (XIII 762)]

Dr. Wu reviewed appellant's medical records and acquired appellant's PET scan on November 16, 2001. (XIV 896-97) The PET scan revealed that appellant's frontal lobe area, especially the orbital frontal and the limbic frontal areas within the temporal cortex, were clearly abnormal. (XIV 897-98) Dr. Wu concluded, to a reasonable degree of medical certainty, that appellant's PET scan pattern is consistent with a diagnosis of Asperger's Syndrome. (XIV 899)

Asperger's is an inherited, life long condition. Randy was showing symptoms of the disorder in early childhood. Dr. Wu testified that Randy certainly would have been suffering from the disorder at the time of the murders. (XIV 905-6)

Dr. Wu explained that Asperger's Syndrome can be treated with both therapy and medication. The earlier that the syndrome is diagnosed, the more successful the treatment. (XIV 942-43) Asperger's Syndrome can cause a chemical imbalance in the brain. Correcting the serotonin imbalance help the sufferer regulate some of the behavioral problems associated with Asperger's Syndrome. (XIV 943) Dr. Wu explained that it is very hard for someone with a genetic, chemical imbalance in their brain to be able to voluntarily control the symptoms associated with those illnesses without proper medication or therapy.

(XIV 943-45)

Randy's Childhood

During her pregnancy with Randy, his mother Debra Roberts, was physically abused and was without adequate nutrition during much of the pregnancy. (XIV 843) She had little prenatal care. She and Reese Ingram, Randy's biological father, lived in a trailer with no electricity. Ms. Roberts was reduced to eating bologna and peanut butter and jelly sandwiches. (XV 1056-60) Roberts gained very little weight during her pregnancy. (XV 1058) Additionally, Roberts became very ill during the pregnancy.[14] (XV 1058-59)

Mr. Ingram often yelled at Roberts, he also pushed and choked her. (XV1057) At the end of her first trimester, Mr. Ingram picked up his wife and slammed her down into the chair where she was sitting. This was done with such force that the chair broke. He then picked up his pregnant wife and threw her across the room. When she ran outside in an attempt to get away, he picked her up and slammed her down on the ground. A neighbor called the police and paramedics treated Ms. Roberts. (XV 1058)

During the final trimester, Mr. Ingram disappeared for several days as he was

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[14] Dr. Prichard theorized that these factors could have contributed to Randy's disorder. (XIV 843-44)

want to do. With no money or food, Ms. Roberts left the trailer to find her husband. She located him in a nearby bar that featured strippers. (XV 1059) When confronted, Mr. Ingram shoved Ms. Roberts with such force, that she fell backwards onto the floor. Although her baby had been very active throughout the pregnancy, after the shoving incident, the fetus stopped moving for several hours. Ms. Roberts became concerned enough to seek medical attention. (XV 1059-60)

Ms. Roberts divorced Randy's biological father when Randy was approximately one year old. She tried to make it on her own with the help of welfare. (XV 1061) This course proved to be too difficult and Randy and his mother moved in with Ms. Roberts' parents several months later. (XV 1561)

As a child, Randy was awkward and did not excel in most sports and games. Asperger children typically have much difficulty in sports involving balls. As a result, they sometimes gravitate towards swimming or martial arts.[15] (XIV 842) In addition to being awkward, he wore glasses and had poorly developed social skills. (XIV 842) He was a loner who had few friends. (XIV 986-87) "I wouldn't call him normal, ... [a] loner, a peculiar type child." (XIV 988)

Shortly after beginning his formal education, Randy came home and went

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[15] Randy began karate lessons at age six. This met with mixed results. Randy could not follow instructions and was always disruptive in class. (XIV 979-83)

directly to his room. His mother found him sitting on his bed crying. Randy explained that nobody liked him and no one wanted to play with him. (XV 1062) His mother hugged him and told him that he would find friends, but as she admitted, "[I]t seemed like he never did." (XV 1062) Other children picked on Randy unmercifully. They wrecked his bicycle, threw rocks at him, and poked him with sticks. (XV 1062-63) His mother attempted to get the school to intervene, but met with no success. (XV 1063)

Appellant's school records revealed that Randy was diagnosed with attention deficit hyperactivity disorder. The subsequent administration of Ritilan in the third grade resulted in a dramatic improvement in his scholastic achievement. A subsequent halt to the medication in the seventh grade resulted in the gradual deterioration of his academic performance.[16] (XIII 734-35, XIV 845-46, XV 1063-65)

Randy's sexual preoccupations were evident to his mother at the age of seven. He began calling pornographic services by telephone at the age of ten. He viewed adult cable television channels at age twelve or thirteen. He was viewing pornographic internet websites and downloading child pornography as a young

[16] Randy's mother allowed him to discontinue the Ritilan because his grades were better and, more importantly, the other children teased him about the medication. (XV1092-93)

teenager. (XIII 739-40)

Jeffrey Crawford, appellant's best friend in high school, described Randy as being outside the mainstream culture in school. During the first part of high school, Randy adopted the gothic style of dress. Other students tended to pick on Randy and made fun of him. Randy also wore very thick glasses, because of his poor vision. Following high school, Crawford joined the marines. Randy tried to sign up with his best friend, but Randy's vision was too poor. The military's rejection of him had a devastating effect on Randy. (XV 1013-21, 1074-75)

Thomas Schoenwetter, Randy's adoptive father, described Randy as a bookworm and a loner. Randy did not have very many friends over to the house. (XV 1043-45) Randy remains close to his fourteen-year-old sister, Megan. Even after his arrest, Megan talked to Randy by phone and visited when she was allowed. (XV 1044-48, 1076-81)

After Randy's mother divorced Schoenwetter, she met her new boyfriend, Paul Bonerito on the internet. Ms. Roberts took Randy and moved to Bonerito's home in Newport Richey. Megan, Ms. Roberts' eight-year-old daughter, did not want to leave her friends in Titusville so Ms. Roberts allowed her daughter to move

in with Thomas Schoenwetter, her ex-husband and Megan's father.[17] (XV 1067-69) Randy started the tenth grade in New Port Richey and seemed to adjust at first. He took his first job at McDonalds and enjoyed it. Soon his problems reappeared when other students started picking on him and beating him up. (XV 1068) Randy could not escape the physical abuse, even at home. His mother's new boyfriend frequently lost his temper. At one point Bonerito, grabbed Randy, slammed him into the wall, and choked him. (XV 1070-71) Randy and his mother lived with Bonerito for a year before returning to Titusville. (XV 1071)

Randy's mother had only seen him cry twice in his lifetime. When he was eight years old, Randy's hamster died and he cried then. The only other time she saw Randy cry was in jail shortly after his arrest.[18] "He was crying really hard and kept telling us that he was sorry, and he just kept saying that over and over again, and just big tears coming down his face. I could not wipe them off and he couldn't neither, because he had handcuffs on. They were just like falling off his face on the table." (XV 1088)

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[17] Even after Ms. Roberts moved back to Titusville, Megan remained with her father. (XV 1071-72)

[18] Prior to the homicides, Randy had never been arrested or been involved in the criminal justice system. (XV 1084)

Randy Schoenwetter was a Mere Eighteen Years Old at the Time of the Murders.

The defense established at the penalty phase that Randy Schoenwetter was eighteen years old at the time of the offenses. (XIII 761)

Lack of Future Dangerousness.

Peter Seigel, a lawyer with the Florida Justice Institute and an expert on Florida prison conditions, established that Randy Schoenwetter would not pose any danger whatsoever to other inmates. (XIV 830-36) Dr. Riebsame agreed with this assessment. During his three-year incarceration prior to trial, he did not act aggressively. At most, he was suicidal. He had no history of violence towards others even prior to his arrest. His only prior criminal history related to a retail theft. (XIII 758-60)

Spencer Hearing[19]

Testimony and evidence at the ***Spencer*** held on November 7, 2003, reiterated that Randy Shoenwetter was a social misfit who never seemed to fit in anywhere. Despite that fact, he was a very special boy who was loved by his family. (II 269-72, 275-83)

Pastor Arthur Dodzweit took credit for converting Randy to the Christian

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[19] ***Spencer v. State***, 615 So.2d 688 (1993)

faith. Pastor Dodzweit assured the trial judge that Randy would be very useful to other inmates in prison. Specifically, Randy could spread the gospel of which he was a devout disciple. Randy Schoenwetter was the most serious Bible scholar that Pastor Dodzweit had ever seen anywhere, in or out of prison. (II 272-75)

SUMMARY OF THE ARGUMENTS

Appellant's confession was obtained in violation of ***Miranda v. Arizona***, ***infra***. Police focused on Randy shortly after the murders. They interrogated him at his apartment, then at the police station. Authorities advised appellant of his constitutional rights only **after** he had confessed at the police station. A reasonable person in appellant's position would have understood that he was not free to leave. During questioning, the detective used sophisticated interrogation techniques that deluded appellant as to his true position. The detective promised medical help as well as leniency. The subsequent waiver of constitutional rights was ineffective under the circumstances. Additionally, the trial court erroneously concluded that appellant's guilty pleas waived any issue relating to the admissibility of the confession and the fruits thereof.

The trial court erroneously took into consideration Schoenwetter's personal wishes in ruling on the admissibility of evidence at trial. Specifically, the victim impact testimony. Appellant was frequently at odds with his trial lawyers. Decisions to object to evidence are the sole province of the lawyer, not the client.

Appellant submits that a new penalty phase is required where a doctor, other than the one who performed the autopsies, testified over objection. Since the doctor based his testimony on inadmissible hearsay, a new trial should be ordered.

A new penalty phase is also required based on the prosecutor's misstatement of law during closing argument. The prosecutor incorrectly stated that the jury could consider the contemporaneous convictions in rejecting the valid statutory mitigating factor that Schoenwetter had no significant prior criminal history. The curative instruction was insufficient. The admission of inflammatory and unduly prejudicial photographs also necessitates a new trial. Furthermore, the trial court should have granted appellant's motion to disqualification. The trial court was a former prosecutor who had vehemently denigrated the science relating to brain imaging, specifically PET scans. Since the trial court was a co-sentencer who wrote the finding of fact in support of appellant's death sentences, his disqualification was necessary.

Appellant also contends that the death sentences are disproportionate in this particular case. Randy Schoenwetter's crimes were not the most aggravated nor least mitigated. The trial court erroneously concluded that the murder of Ronald Friskey was committed to avoid arrest. Additionally, Ronald Friskey's murder was not especially heinous, atrocious or cruel. The trial court inappropriately gave little to no weight in his consideration of substantial, valid mitigating circumstances. A proper weighing of the aggravators and mitigators should result in the imposition of life imprisonment without any possibility of parole.

Appellant also challenges the constitutionality of Florida's death sentencing scheme. Under ***Ring v. Arizona***, ***infra***. appellant also contends that the standard jury instructions improperly shift the burden of persuasion once sufficient aggravating factors are established.

ARGUMENTS

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION AND THE FRUITS THEREOF WHERE THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT THE FIFTH AMENDMENT DID NOT APPLY TO THE PENALTY PHASE AND WHERE THE TOTALITY OF THE CIRCUMSTANCES REVEALED THAT APPELLANT'S CONFESSION WAS COERCED AND WITHOUT THE REQUISITE ***MIRANDA***[20] WARNINGS.

Appellant filed a motion to suppress statements and admissions as well as a second motion to suppress evidence. He contended that the clothing, knife, and other evidence, including appellant's blood that was drawn at the police department, constituted tainted fruit of the poisonous tree. (IV 684-89) Following a hearing, (SR I, II, III, 1-316), the trial court denied the motion. (V 708-26) The trial court made the following written findings of fact:

During the hearing on the defendant's motions, Detective David Butler[21] of the Titusville Police Department testified that on August 12, 2000, he became

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[20] ***Miranda v. Arizona***, 384 U.S. 436 (1965).

[21] Detective House's testimony corroborated and added slightly to Butler's testimony.

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[22] 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.[23] 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

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[22] House discovered the blood trail which appeared to have been left by a person riding a bicycle.

[23] The officers noticed that Randy walked stiffly, as if he had been in a recent fight or car accident.

the night before.[24] 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. Whey 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

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[24] During the course of the conversation with the defendant and his mother, the defendant stated that he had thrown away a pair of his shoes a few days earlier. Upon hearing this, the defendant's mother contradicted his statement by stating that she had seen the shoes the day before.

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.

(V 709-13)

Standard of Review

The question of whether a confession is voluntary presents a legal issue to an appellate court, one that is determined *de novo* under federal constitutional principles. ***See Miller v. Fenton***, 475 U.S. 104 (1985)(ultimate issue of voluntariness is legal question requiring independent federal determination); ***Ramirez v. State***, 739 So.2d 568, 575 (Fla. 1999)(legal question of voluntariness of confession determined by totality of circumstances).

A. The Trial Court Erroneously Concluded that Appellant's Plea of Guilty Waived this Issue at the Penalty Phase.

At the penalty phase defense counsel repeatedly objected to any evidence of appellant's confession or the fruits thereof. The trial court overruled the objections, repeatedly stating that this issue had been waived by appellant's guilty pleas on all charges. When appellant objected to the introduction of appellant's clothing and murder weapon which were seized from a dumpster (X 190-99; State's Exhibits 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25), the trial court stated on the record:

> The issue of the suppression was waived by your client's plea to the Court on all the charges. We had a very long discussion on that at the time.

(X 191) Subsequently, appellant renewed his objection when the state introduced photographs of the appellant taken during the interrogation. (XI 235-38) The trial court reiterated his prior ruling:

> I still rule that all these matters have been waived regarding the suppression as a result of his plea of guilty to these charges.

(XI 237) Finally, appellant renewed his motion and objections prior to the introduction and publication of the videotaped interrogation. (XII 465) In response, the trial court stated:

> THE COURT: I'll deny that request. I indicated that his plea of guilty waived his motion to suppress. I know there's some concern by the defense and is legally making some argument on appeal.
>
> MR. MOORE (defense counsel): Just on that note, Judge, if he has grounds to keep out improper evidence, he doesn't waive anything by entering a guilty plea and would still serve to exclude any evidence in the penalty phase, that they're seeking a death penalty on this illegally obtained confession and the fruits thereof.
>
> THE COURT: I understand. I'll deny your request.

(XII 465-66)

The trial court was clearly under the mistaken impression that appellant's guilty pleas waived any issue relating to the denial of appellant's motion to suppress his confession and the fruits thereof. Sec. 921.141(1), Florida Statutes (2005) provides:

> **Separate proceedings on issue of penalty.** - Upon conviction for adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant to death or life in prison... Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

> **However, this sub- section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida....**

Emphasis added.

This Court dealt with this very same issue in ***Rolling v. State***, 695 So.2d 278, 288, n.6 (Fla. 1997). In rejecting the state's argument that the issue was not properly appealable because Rolling plead guilty, this Court held:

> Rolling is not challenging the court's pretrial ruling as to the validity of his guilty plea, nor is he challenging the plea itself. To the contrary, Rolling challenges the court's pretrial denial of his motion to suppress as it pertains solely to the penalty phase proceedings. Here, Rolling's statements to Lewis and law enforcement officers were offered at the penalty phase to support three aggravating factors: in the course of a sexual battery; heinous, atrocious, or cruel; and cold, calculated, and premeditated. Rolling objected to the admission of these statements prior to opening statements and repeated his objection each time the evidence was introduced. Thus, this claim was properly preserved for our review.

Id.

As in ***Rolling***, the jury and the trial court used appellant's confession to support several of the aggravating circumstances. The trial court even quotes

portions of appellant's confession in the written findings of fact. (V 798) Because the trial court based its ruling, at least in part, on a misapprehension regarding the applicable law, this Court should reverse and remand for a new penalty phase. ***See Price v. Gray,*** 111 Fla. 1, 3-4, 149 So. 804, 805 (Fla. 1933) [new trial awarded when it appears that there has been a misapprehension of a rule of law by the trial judge].

B. The Applicable Law.

The United States and Florida Constitutions provide that an individual shall not be "compelled in any criminal matter" to be a witness against himself or herself. ***U.S. Const. Amends. V & XIV ; Art. I, §§ 9 and 16, Fla. Const*** . This constitutional guarantee "is fully applicable during a period of custodial interrogation." ***Miranda,*** 384 U.S. at 460; ***Ramirez v State,*** 739 So.2d 568, 572-73 (Fla. 1999). In ***Miranda***, the United States Supreme Court "established certain procedural safeguards designed to protect the rights of an accused, under the Fifth and Fourteenth Amendments, to be free from compelled self-incrimination during custodial interrogation." ***Fare v. Michael C.***, 442 U.S. 707, 709, (1979). Specifically, the Court set out a bright-line rule to safeguard against compulsion and the coercive nature and atmosphere of custodial interrogation and "assure that the

individual's right to choose between silence and speech remains unfettered throughout the interrogation process." ***Miranda,*** 384 U.S. at 469, 86 S.Ct. 1602. The Court said "[t]he requirement of warnings and waiver of rights is a fundamental [one] with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." ***Id.*** at 476, 86 S.Ct. 1602. The Court described "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ***Id.*** at 444, 86 S.Ct. 1602; ***see Traylor v. State,*** 596 So.2d 957, 966 n. 17 (Fla.1992) "Custody for purposes of ***Miranda*** encompasses not only formal arrest, but any restraint on freedom of movement of the degree associated with formal arrest." ***Ramirez,*** 739 So.2d at 573. Construing section 9 of the Florida Constitution, this Court has stated that "[a] person is in custody ... if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest." ***Traylor***, 596 So.2d at 966 n. 16. Whether a suspect is "in custody" presents a mixed question of fact and law. ***See Thompson v. Keohane,*** 516 U.S. 99, 106-07 (1995); ***Ramirez***, 739 So.2d at 574.

Florida courts have embraced a four-part test in determining whether a

reasonable person in the suspect's position would consider himself "in custody":

> (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.; Mansfield v. State, 758 So.2d 636, 644 (Fla.2000). For purposes of section 9 of the Florida Constitution, "[i]nterrogation takes place ... when a person is subject to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response." ***Traylor,*** 596 So.2d at 966 n. 17.

C. A Reasonable Person in Randy Schoenwetter's Position Would Have Believed That His Freedom was Curtailed to the Same Degree as an Actual Arrest.

Randy Schoenwetter was an eighteen-year-old boy who had never been arrested in his entire life.[25] He lacked exposure to the criminal justice system. Additionally, he suffers from a profound developmental disorder, namely Asperger's Syndrome, a mild form of autism.

The detectives asked Randy if he would mind accompanying them to the police station for questioning. The detectives admitted that their suspicions were

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[25] Appellant's past did include one shoplifting incident. The record is unclear exactly how far that went.

aroused when Randy admitted that he knew the family who had been attacked. Randy also admitted that he had been riding his bicycle in the neighborhood earlier that night. The detectives had previously determined that the blood trail leading from the victims' house to appellant's apartment complex appeared to have been left by a person riding a bicycle. Randy's hand was cut when he first encountered the detectives. The detectives also noticed that Randy walked stiffly, as if he had recently been in a fight or car crash. The detectives' suspicions were also aroused by Randy's visible reaction when he realized that the two men were police officers. The suspicion was compounded by the fact that Randy claimed that he had thrown away a pair of shoes and Randy's mother immediately disputed that fact.

With all this in mind, the detectives asked and Randy "agreed" to accompany them to the police station for questioning. Randy needed a ride because he did not have access to a car. Once the trio arrived at the police station, they went through a locked door. They proceeded to a small interview room where Randy was placed in a chair, such that his exit was blocked for all intents and purposes. Although the detectives never informed Randy that he was under arrest, they also never told him that he was free to leave.

Once they were in the interview room, Detective Butler began using

sophisticated interrogation techniques to extract a confession. Detective Butler confronted Randy with the evidence against him. After Randy conceded that he could have left the blood trail, since he had cut his hand and was riding his bike in the neighborhood, Detective Butler confronted Randy with his theory. Detective Butler assured Randy that the person who left the blood trail was responsible for the murders. All of this occurred prior to any warnings pursuant to ***Miranda***. This was clearly a custodial interrogation without any warnings about Randy's constitutional rights.

Ramirez v. State, 739 So.2d 568, 573 (Fla. 1999) sets out the following four factors for a court to consider in determining if a suspect is in custody:

> (1) the manner in which police summon the suspect for questioning;
>
> (2) the purpose, place, and manner of the interrogation;
>
> (3) the extent in 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.

The manner in which the police summoned Shoenwetter for questioning may appear voluntary at first blush. Detectives told Randy that he was not a suspect. They asked if he would accompanying them to the police station for questioning.

When Randy replied that he did not have a car, the officer's offered him a ride in their car. This may appear to be voluntary under the circumstances, but closer scrutiny reveals otherwise.

Although the police officers were not in a marked patrol car, Randy immediately recognized that they were law enforcement. The detectives were wearing Polo shirts with law enforcement insignia. Additionally, they wore side arms that were visible. Furthermore, they immediately informed Randy that they were detectives investigating what looked to be a triple homicide.

The officers immediately focused their attention on Randy Schoenwetter. Despite their assurances otherwise, Randy was their prime suspect at that point. This was based on Randy's visible reaction when he learned that they were law enforcement officers investigating the crime. The detectives also noticed that Randy's hand was cut and that he appeared to have been in a violent physical altercation. When Randy admitted that he had been riding his bicycle in the neighborhood earlier that evening, the detectives immediately began their investigation which was completely focused on Randy Schoenwetter.

The detectives asked Randy if he would show them his bicycle. Randy took one detective into the apartment where the detective's questioning continued.

Detective Butler asked Randy if he had a knife. Randy retrieved one which Butler seized. (SR I 46) Butler never returned the knife.

Detective Butler asked Randy to show them his clothing and shoes. When he indicated that he had thrown a pair of shoes away several days before, Randy's mother disputed that fact. Shortly thereafter, the detectives drove Randy to the police station for interrogation. All of the above occurred long before any advisement of Randy's constitutional rights pursuant to ***Miranda***.

Although the detectives still maintained that Randy was not yet a suspect, appellant submits that he was not free to leave at that point. ***See J.Y. vs. State***, 623 So.2d 1232 (Fla. 3rd DCA 1993)(police effected *de facto* arrest of juvenile at his home therefore ***Miranda*** rights should have been given.) Appellant submits that, if Randy had refused to accompany the detectives to the police station, then the officers would have more formally detained Randy. Regardless, when detectives took Randy inside the locked criminal investigation division, his custodial detention was complete.

Although the interrogation initially began at Randy's apartment complex, the questioning became more formal and coercive at the police station. The tiny 6 x 6 interrogation room without windows was designed to detain people for questioning.

(SR I 50) Detective Butler sat in a chair that blocked the exit of the minuscule room. Once Detective Butler was in the room with Randy, the custodial detention became even more formal. Although the fact was unspoken, Randy was clearly not free to leave at that point. Nor would any reasonable person have felt free to leave.

Once the pair were ensconced, Detective Butler did his best to befriend Randy and put him at ease. Then Detective Butler moved in for the kill. Without any advisement or reference to Randy's constitutional rights, Detective Butler confronted him with accusations and evidence that he was responsible for these horrific crimes. Detective Butler told Randy several times that he believed that Randy was responsible. He believed that the person who left the blood trail was the actual perpetrator. He believed that that person was Randy. For approximately fifteen minutes Randy denied the accusations.

Detective Butler then began talking to Randy about his intent. Minimizing the true impact of felony murder, Detective Butler implied that a lack of premeditation is critical to the disposition of a criminal case. Detective Butler told Randy that "with all of my heart" I believe that the person that went into the house did not mean for anybody to get hurt. Detective Butler explained that intent was a big part of the law. (SR II 134-35)

Butler then focused on another scenario that deluded Randy as to his true position. Butler asked Randy if he suffered blackouts. (SR II 135) When Randy admitted that he had a blackout in the sixth grade, Butler suggested they were making progress. (SR II 135-36) Once Butler ascertained that Randy also suffered from insomnia, Butler pounced once again. He called Randy's insomnia a medical condition and remarked, "That is huge." (SR II 136)

Detective Butler then proposed two scenarios explaining how the police department works.

> [Butler]: You are being cooperative. Now, it all comes down to how we present it....We can present it one or two ways....one is - - in your case, the boy, call you a boy, has a problem sleeping. He has a serious medical condition...he may have thought he was dreaming it, but in actuality he was doing it....Or we can present it that way, say listen, you know, the guy didn't know. And then when we started talking to him and he was honest and he was this and that, he has a medical condition that he needs help with, does not need to go to prison for the rest of his life. Do you know what I am saying? We need to help him.
>
> Or we present it - -and I'm going to be honest with you - -cold hearted career criminal. That is how we present it one way or the other.
>
> And it honestly comes down to you. You

> are one to make that call, not me. You are the one going to tell me what to say....
>
> Or we're going to say, this guy don't know nothing about nothing. And then we prove that you do know something about something, that being your blood trail, what does that make you look like?
>
> [Shoenwetter]: A liar and a murderer.
>
> [Butler]: Absolutely. Somebody that doesn't care. Somebody that doesn't have a heart. You got a heart ...I can just tell by talking to you...

(SR II 137-39) Shortly thereafter, Randy was on the verge of tears. (SR II 140) Randy finally admited that it might be possible that he blacked out while riding his bicycle, and that would explain things. (SR II 141) Randy then proceeded to explain how he would have done it if he had done it and could remember. (SR II 142-43) Butler's questioning ultimately led to Randy admitting that he committed the crimes. In response to further questioning, Randy gave more details of the events that night. (SR II 143-64) Then and only then did Detective Butler finally advise Randy of his constitutional rights pursuant to ***Miranda***.

> [Butler]: Now, since you told me what you have told me, Okay? I have to read your rights at this point.

> [Randy]: I have the right to remain silent. Anything I say can and will be used against me in a court of law.
>
> [Butler]: Let me do it. Okay? I have to do it.

(SR II 164) Butler had Randy initial the acknowledgment of rights and proceeded to elicit the confession once again.

It is clear from an examination of a totality of the circumstances that Randy Schoenwetter was the immediate focus and prime suspect in the Friskey murders. A reasonable person in his position would not have presumed that he had any choice but to answer the detectives' questions and accompany them to the police station. Considering Randy's young age, lack of sophistication, developmental disorder, and lack of familiarity with the criminal justice system, he clearly thought that he had no choice in the matter. The detectives' complete disregard for Randy's constitutional rights must result in suppression of this confession and the fruits thereof. The detectives failed to advise appellant of his constitutional rights pursuant to ***Miranda*** until after he had confessed. The second confession was irreparably tainted by the unconstitutionally obtained statement. ***Missouri v. Seibert***, 124 S.Ct. 2601 (2004)

POINT II

APPELLANT'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT WAS VIOLATED WHERE THE TRIAL COURT DENIED DEFENSE COUNSEL'S MOTION TO WITHDRAW AND BASED RULINGS ON THE APPELLANT'S PERSONAL WISHES.

Against his lawyers' advice and over their strenuous objections, Randy Schoenwetter pleaded guilty as charged to all counts Throughout the proceedings below, the trial court gave great deference to Randy Schoenwetter's personal wishes. Appellant's wishes frequently conflicted with his lawyers' objections, legal argument, and strategy. It is abundantly clear from the record that the trial court based several of its rulings, at least in part, on Randy Schoenwetter's personal wishes rather than on appellant's lawyers' argument.[26]

One particular bone of contention between Schoenwetter and his lawyers was the state's presentation of victim impact evidence. The lawyers had filed pretrial motions challenging the process. (IV 658-73) When the time came to proffer the victim impact evidence, appellant's lawyers argued strenuously against

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[26] The trial court's improper consideration of appellant's personal wishes, constituted an improper waiver of counsel. As such, appellant submits that fundamental error occurred. ***J.O. v. State***, 766 So.2d 185 (Fla. 5th DCA 1998).

its admission. (XI 272-77, 281, 307-8) Schoenwetter repeatedly interrupted his lawyers during their argument. Over the defense lawyers' objections, the trial court talked to Randy Schoenwetter to ascertain Randy's personal wishes about the state's presentation of victim impact evidence. (XI 285-90, 302-304, 308-12) The trial court ultimately allowed most of the victim impact testimony over defense counsel's continuing objection. (XII 426-41) The trial court clearly based its ruling admitting the evidence, at least in part, on Randy Schoenwetter's personal wishes that the testimony be heard by the jury. The trial court harped on a constant theme, namely the trial court's assessment of Randy Schoenwetter as a intelligent, articulate, and mature young man.

The issue became such a point of contention that defense counsel ultimately moved to withdraw from any further representation of Schoenwetter based on the continuing conflicts. (XI 312) Defense counsel pointed out that normally when a represented defendant files a pleading or seeks to represent himself in any way, the trial court points out to the defendant that he is represented by counsel. Any filings or argument by the client will normally be treated a nullity. The trial court pointed out that Florida law allows the waiver of mitigating evidence and reiterated his belief that Randy is a bright and articulate young man. (XI 314-19) Defense counsel pointed out that the waiver of mitigating evidence was distinguishable. Objections

to inflammatory and inadmissible evidence is a tactical trial decision. (XI 314, 317-19) When the trial court denied trial counsel's motion to withdraw (XI 314), appellant's lawyers moved for a competency evaluation of Mr. Schoenwetter. (XI 318-19) Although the trial court appeared ready to press on (XI 319-21, 328-29), the prosecutors suggested that a competency evaluation might be in order. (XI 328-29) Following examinations and a hearing, the trial court found Schoenwetter competent to proceed and the penalty phase continued. (XI 355-99; XII 409-14)

The record reflects that the trial court viewed the role of defense counsel as that of captive counsel, duty bound not to exercise independent judgment. In effect, the view seems to have been that appellant had a constitutional right to ineffective assistance of counsel. There is no such right: "the assistance of counsel must be effective assistance of counsel. ***Jones v. Barnes***, 463 U.S. 745, 103 S.Ct. 3308, 77 L. Ed. 2d 987 (1983)." ***Dagostino v. State***, 675 So.2d 194, 195 (Fla. 4th DCA 1996). In ***Jones v. Barnes***, 463 U.S. 745, 753, n. 6 (1983), the Supreme Court noted (partial emphasis added): The ABA Model Rules of Professional Conduct provide: " A lawyer shall abide by a client's decisions concerning the objectives of representation... and shall consult with the client as to the means by which they are to be pursued... In a criminal case, the lawyer shall abide by the

client's decision, ... as to a plea to be entered, whether to waive jury trial and whether the client will testify." Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982) (emphasis added). With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client.

Likewise, the Chief Justice wrote in his concurrence in ***Wainwright v. Sykes***, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring): "Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.[27] The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds."

Once again, the trial court misapprehended the legal standard to apply. The

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[27] Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make. See ABA Project on Standards for Criminal Justice, The Prosecution Function and Defense Function s. 5.2, pp. 237-238 (App. Draft 1971).

trial court was operating under the erroneous conclusion that Randy Schoenwetter should have a personal say in the day-to-day tactical decisions which were clearly the domain of his trial lawyers. Whether to object to the introduction of victim impact evidence was Schoenwetter's lawyers' decision, not his. He could have dismissed his lawyers and represented himself, but chose not to do so. The lawyers' objections to at least some of the victim impact evidence were based on legal grounds that the evidence did not comply with the statute and case law. (***See, e.g., XI 281***) Since the trial court based his rulings, at least in part, on a misapprehension of the law, a new penalty phase is warranted. ***See Price v. Gray***, 111 Fla. 1, 3,-4, 149 So. 804, 805 (Fla. 1933).

POINT III

IN VIOLATION OF APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO CONFRONT WITNESSES, THE TRIAL COURT ERRED IN ALLOWING A MEDICAL EXAMINER, WHO DID NOT PERFORM THE AUTOPSIES IN THIS CASE, TO TESTIFY REGARDING HIS OPINION AS TO CAUSE AND MANNER OF DEATH.

Dr. Vasallo was the medical examiner who performed the autopsies on both Virginia and Ronald Friskey. (XI 213) Dr. Vasallo was not available to testify at Appellant's trial. The State presented Dr. Sajid Qaiser in Dr. Vasallo's stead. (XI 210-19, 241-72) When Dr. Qaiser testified that he did not actually perform the autopsies, nor did he prepare the autopsy reports, defense counsel objected to "Any expert testimony . . ., because he didn't perform the autopsies."[28] (XI 212) The State contended that since Dr. Qaiser had examined the case file, he could rely on the records, reports, and photographs to give his expert opinion. (XI 213) The

[28] Appellant had also filed and argued a pretrial motion challenging the admissibility of **any** hearsay at the penalty phase. (IV 674-77; II 179-84) The motion was based on the constitutional right to confront witnesses and challenged the constitutionality of Florida's death sentencing statute, were certain hearsay is admissible at the penalty phase. The admission of exclusion of evidence as well as the qualification of experts is subject to an abuse of discretion standard of review. ***San Martin v. State***, 717 So.2d 462 (Fla. 1998); ***Brooks v. State***, 762 So.2d 879 (Fla. 2000).

trial court stated on the record:

> As I see it, we're in the penalty phase, not the guilt phase. We're in the penalty phase where your client has admitted and pled to murder, not someone who died from a natural death.
>
> I am familiar with Dr. Qaiser. He has testified previously in my courtroom on another homicide. . . . he is qualified to render an opinion as to manner and cause of death from previous experience in this courtroom and was qualified. That particular case alludes (sic) me, as to the name of the case, but he has testified here.
>
> From what I've been advised by the State, he can testify as to the cause and manner of death, the case file which is related to the deaths of Ronald and Virginia Friskey. . . . I'm going to allow it in.
>
> Mr. McCarthy (defense counsel): As to cause and manner of death?
>
> The Court: He is qualified to render an opinion and he can certainly review the case file and review the court photographs.
>
> I am familiar first hand of other doctors, medical examiners, et cetera, reviewing case files and rendering opinions along the same line.
>
> I am familiar with that firsthand, so I think this is appropriate. I'm going to overrule the objection.

(XI 213-15) The next morning the trial court reiterated its ruling and stated reliance on ***Geralds v. State***, 674 So. 2d 96 (Fla. 1996). The trial court contended that

Geralds stood for the proposition that a medical examiner, other than the one who conducted the autopsy, should be permitted to testify as to cause and manner of death. (XI 219) Initially, appellant points out that the trial court's reliance on ***Geralds*** is completely misplaced. ***Geralds*** stands for the proposition that the trial court did not abuse its discretion in denying a defense motion for continuance sought to secure the presence of an absent witness, namely the doctor who performed the autopsy. Despite the fact that the state informed defense counsel four months before the fact that the state would be calling a different doctor at trial, defense counsel waited all that time before seeking a continuance in order to "serve and call" the actual autopsy doctor.

Dr. Qaiser subsequently testified as to the injuries and cause of death of Virginia and Ronald Friskey. Dr. Qaiser blatantly admitted that he had only reviewed the records, photographs, and other documents and talked to the medical examiner who had performed the autopsy. (XI 241-42) Apparently this was the sum and substance of Dr. Qaiser's knowledge which formed the basis of his testimony at the penalty phase. From the photographs that Dr. Qaiser examined, he testified that the injuries to Ronald Friskey's hand were "consistent with the defense wounds, as when the victim tries to ward off the attack." (XI 246) Dr. Qaiser's testimony is rift with references to the hearsay on which he based his

testimony. When the prosecutor asked the doctor about one particular injury, the doctor stated:

> Let me go to the report. According to the description, this is stab wound number one.

(XI 246) The prosecutor later asked the doctor if he had reached any conclusions about internal injuries based on his "reviewing the report and other photographs in the case. (XI 247) Subsequently, the prosecutor asked:

> Can you describe - -did you learn from the information that you received in this case report the extent of the injuries to Mr. Friskey...

(XI 249) The prosecutor repeatedly referred to the doctor's "view of the report and the photographs" (XI 251, 253) and the measurements that Dr. Vasallo took of the wounds. (XI 256) Dr. Qaiser also admitted that the sum and substance of his knowledge regarding Virginia Friskey's autopsy was based on his review of the file, the photographs, other papers, and his discussion with Dr. Vasallo. (XI 258-59) Dr. Qaiser at one point refers to "the description of this wound, and the other wound on the ventral side of the hand." (XI 263) The prosecutor also asked Dr. Qaiser about the direction the knife took:

> ...in others words, was there a sharp end or dull end on these injuries that was able to be appreciated **by yourself or Dr. Vasallo**?

(XI 266)(Emphasis added.)

Appellant contends that the trial court's ruling violated the Appellant's constitutional rights to confront witnesses guaranteed by the Sixth Amendment to the United States Constitutional and Article I, section 16 of the Constitutional of the State of Florida.

The recent decision by the Supreme Court of the United States in ***Crawford v. Washington***, 541 U.S. 36 (2004) has called into question the admissibility of any hearsay where the accused is not afforded the right to confront witnesses against him. The First District Court of Appeal articulated this change in law:

> The standard of determining whether the admission of a hearsay statement against a criminal defendant violates the rule of confrontation was recently modified in ***Crawford v. Washington***, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed 2d 177 (2004). Before the ***Crawford*** decision, the issue was controlled by the holding in ***Ohio v. Roberts***, 448 U.S. 56, 66 100 S. Ct. 2531, 65 L. Ed 2d 597 (1980), that a hearsay statement could be admitted in a criminal trial without violating the right of confrontation if (1) it was shown that the declarant was unavailable, and (2) the out-of-court statement for adequate indicia of reliability. This test focused on the reliability of the statement. As the Court explained, a statement had adequate indicia of reliability if it either fell within a firmly rooted hearsay exception or if it bore "particularized guarantees of trustworthiness." Id. In ***Crawford***,

> the Supreme Court dispensed with the reliability analysis in ***Roberts*** and held the admission of a hearsay statement made by a declarant who does not testify at trial violated the Sixth Amendment if (1) the statement was testimonial, and (2) the declarant was unavailable and the defendant lacked a prior opportunity for cross-examination. The Court emphasized that if "testimonial" evidence is at issue, "The Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." ***Crawford*** 641 U.S. at _____, 124 S. Ct. at 1374.

Lopez v. State, 29 Fla. Weekly D2580, 2581 (Fla. 1st DCA November 17, 2004).

The ***Crawford*** opinion identified three kinds of statements that could be properly regarded as testimonial statements: (1) "Ex parte in-court testimony or its functional equivalent - - that is, material such as affidavits, custodial examinations, prior testimony . . . or other pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "Extrajudicial statements contained in formalized testimonial material such as affidavits, depositions, prior testimony, or confessions"; and, (3) "Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ***Crawford***, 541 U.S. at ____, 124 S. Ct. at 1364. The ***Crawford*** court did not formally define the term "testimonial". Instead, the Court gave these three examples, each of which the Court said was an acceptable

"formulation" of the concept. See ***Crawford***, 541 U.S. at _____,124 S. Ct. at 1364.

Applying the testimonial examples set forth in ***Crawford***, it is abundantly clear that the entire basis of Dr. Qaiser's testimony, i.e., the autopsy reports, notes, and conversation with the medical examiner who performed the autopsy, was testimonial in nature. Although the reports, notes, and conversations were never explicitly introduced into evidence, Dr. Qaiser's testimony was merely a regurgitation of what he had learned from the other medical examiner. Since these documents, notes, and statements form the basis of Dr. Qaiser's testimony, the essence of the hearsay evidence was admitted without any opportunity to confront the actual witness, i.e., the medical examiner who performed the autopsy.

Autopsy reports are clearly testimonial because they are statements made for the purpose of producing evidence for litigation. ***See City of Las Vegas v. Walsh***, 91 P.3d 591 (Nev. 2004)(nurses' change-of-custody affidavit concerning method of conducting and preserving blood alcohol test is testimonial); ***People v. Rogers***, 780 N.Y.S. 393 (N.Y. A.D. 3 Dept. 2004)(report of blood test is testimonial); but see ***People v. Schreck***, ____P. 3d___ 2004 WL 2137067 (Colo. App. Sept. 23, 2004)(change-of-custody document regarding DNA sample not testimonial).

Appellant maintains on appeal that he had no opportunity to confront the basis of Dr. Qaiser's testimony which was based on blatant hearsay. The admission of the testimony violated appellant's constitutional right to confront witnesses guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

POINT IV

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING APPELLANT'S TIMELY MOTION FOR MISTRIAL WHERE THE PROSECUTOR DELIBERATELY MISLED THE JURY ABOUT APPELLANT'S LACK OF SIGNIFICANT CRIMINAL HISTORY.

In discussing the mitigating factors, the prosecutor addressed the evidence as to each of the proposed factors.

> Let's go through them. Randy Lamar Schoenwetters (sic) 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.**
>
> Mr. Moore (defense counsel); Your honor, I object, that is not the law.

(XVI 1227-28) (Emphasis added.) Defense counsel pointed out that the

prosecutor's statement on the law was incorrect. Specifically, counsel pointed out that the prior criminal activity must occur before the onset of the criminal episode for which the jury is asked to recommend a sentence. (XVI 1228-29) Once the court reporter read back the offensive argument, the prosecutor conceded that his argument was improper in that it misstated the law. (XVI 1228-31) However, the prosecutor stated his belief that a mistrial was not necessary. He further contended that any misconceptions could be cleared up with an appropriate curative instruction. (XVI 1232-33) Defense counsel maintained that a curative instruction was inadequate and that a mistrial was required.

The trial court denied Appellant's motion for mistrial. (XVI 1234) The court instructed the jury:

> 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.

(XVI 1235) When asked by the court, the jury replied that they understood. (XVI 1235) That same jury subsequently recommended that Randy Schoenwetter should die for his crimes.

Standard of Review

Reversal is appropriate where objected-to improper comments are combined with additional acts of prosecutorial overreaching, with the result that the integrity of the judicial process has been compromised and the resulting conviction and sentence irreparably tainted. ***Ruiz v. State***, 743 So.2d 1, 7 (Fla. 1999).

The Inexplicable Misstatement of Law by a Seasoned Homicide Prosecutor Impermissibly Tainted the Jury's Recommendation that Randy Schoenwetter Should Die.

Since 1988, this Court has held that a "history" of prior criminal conduct cannot be established by crimes occurring contemporaneously with the capital murder. ***Scull v. State***, 533 So.2d 1137, 1143 (Fla. 1988). A prosecutor is not permitted to argue to the jury that they should reject this mitigating factor where the criminal activity did not occur prior to the commission of the capital murder. ***Lucas v. State***, 568 So.2d 18 (Fla. 1990) In light of the well-settled nature of this area of the law, it is baffling that a prosecutor as experienced as Mr. Repass would attempt to mislead the jury in this manner.

"An attorney is first an officer of the court, bound to serve the ends of justice with openness, candor and fairness to all," ***Hays v. Johnson***, 566 So.2d 260, 261 (Fla. 5th DCA 1990), ***rev. den.*** 576 So.2d 287 (Fla. 1991), and "a

prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all... It is as much his duty to refrain from improper methods calculated to produce a wrongful [result] as it is to use every legitimate means to bring about a just one." ***Craig v. State***, 685 So.2d 1224, 1229 (Fla. 1996), quoting ***Berger v. United States***, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935).

Appellant recognizes that the jury was subsequently instructed by the trial court that, contrary to the prosecutor's statement, they could not legally consider appellant's contemporaneous criminal conduct. Nevertheless, trial counsel maintained that the damage had been done and persisted in his request for a mistrial.

As trial counsel pointed out, this case involved a double homicide where the state was arguing that the evidence weighs heavily in favor of the death penalty. Where the state makes argument clearly contrary to the law, in a case like this, they are engaging in overkill. The misleading argument related to a statutory mitigating factor which has great significance in capital cases. The state's argument undoubtedly left an indelible impression on the jury that they could consider

appellant's contemporaneous convictions to negate this very important mitigating circumstance. Defense counsel contended, "A jury instruction is not going to undo that damage." (XVI 1232)

Appellant submits that the error was compounded in this case by the erroneous consideration by the jury of appellant's "crime" of possession of child pornography.[29] At trial, the state cross-examined Dr. Riebsame concerning the possession of child pornography. Specifically, the prosecutor asked the doctor if possession of child pornography constituted "significant" criminal activity. (XIII 773-74) The prosecutor was apparently attempting to refute this valid, statutory mitigator in the jury's eyes.

In reality, Randy Schoenwetter had committed no crime whatsoever. Prior to his arrest, Randy's mother became so concerned about images on the family computer, that she presented the offensive disk to the local police department. After reviewing the images, authorities determined that the disk contained absolutely no child pornography. The females depicted were clearly beyond of the age of

[29] Detective Butler had questioned Randy about viewing pornography on the internet. (XV 1053-54)

consent.[30] (XV 1049-55) The extraneous and prejudicial testimony regarding alleged child pornography further muddied the waters when it came time for the jury to consider the previously undisputed fact that Randy Schoenwetter had no significant prior criminal history. The prosecutor's improper argument during final summation warranted a mistrial.

Appellant stands fast in his position on appeal. Numerous studies have shown that jurors fail to understand most of the instructions that they hear in the course of a trial. Dorothy Easley, " 'Plain English' Jury Instructions: Why They're Still Needed and What the Appellate Community Can Do to Help," 78 Fla. Bar J. 66 (October 2004); Leonard Post, "Spelling It Out in Plain English," National Law Journal (November 10, 2004). The danger persists that the jury erroneously considered appellant's contemporaneous criminal activity in rejecting this weighty mitigating circumstance.[31] The error was compounded by the "child pornography" red herring. As a result of the improper argument, appellant's death

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[30] The issue became so distracting, defense counsel presented the testimony of the local police officer who viewed the disc that Randy's mother brought to the station. (XV 1049-55)

[31] This Court places emphasis this mitigating circumstance in conducting its proportionality review. ***See e.g. Cooper v. State***, 739 So.2d 82 (Fla. 1999) [presence of this factor a key to reduction of sentence to life even though jury recommended death and trial court found this factor but accorded it slight weight].

sentence is constitutionally in firmed. ***Amends. VIII & XIV; Art. I §§9, 16, & 17, Fla. Const.***

POINT V

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE TRIAL JUDGE IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL THUS RENDERING APPELLANT'S DEATH SENTENCES INFIRM UNDER THE EIGHTH AMENDMENT.

Standard of Review

Whether the motion to disqualify is "legally sufficient" is a question of law, and the standard of review is *de novo*. ***Barnhill v. State***, 834 So.2d 836, 843 (Fla. 2002).

Applicable Law and Facts.

Appellant's counsel first broached the subject of disqualifying the judge at a hearing in early 2001. (I 115-16) On May 29, 2001, trial counsel filed the motion to disqualify Judge Griesbaum. (III 490-94) The trial court denied the motion as legally insufficient. (III 497) Essentially, defense counsel alleged that Judge Griesbaum, who had been recently appointed to the circuit bench, had worked previously as a homicide prosecutor. Counsel alleged that Judge Griesbaum had been a member of the prosecution team in the seminal case in Florida dealing with

the PET scan brain imaging test. ***Hoskins v. State***, 702 So.2d 202 (Fla. 1997). During the lengthy litigation involving Mr. Hoskins, the prosecution team (of which Judge Griesbaum was a member), repeatedly denigrated the admissibility and reliability of brain imaging science. Specifically, the prosecutors called brain imaging "junk science" and "voodoo." (III 491) In essence, the prosecution team, including Judge Griesbaum, fought tooth and nail on the issue of the scientific validity of PET scans. That same prosecution team filed grievances against a psychologist and other defense witnesses who were aiding the defense on the issue. The state even threatened criminal prosecution of the doctor performing the PET scan in the ***Hoskins*** case. (III 491-92) Defense counsel alleged that Judge Griesbaum should be disqualified in appellant's case where appellant intended to and subsequently did present extensive evidence of a PET scan of Randy Schoenwetter's brain.

Section 38.10, Florida Statutes (2004) provides the substantive right to seek disqualification, whereas Florida Rule of Judicial Administration 2.160 (f) controls the procedural process. ***Rogers v. State***, 630 So.2d 513, 515 (Fla. 1993).

Rule 2.160, Florida Rules of Judicial Administration, governs the procedure to be followed in deciding motions to disqualify or recuse the trial judge. It provides, in part:

> (b) Parties. Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.
>
> (c) Motion. A motion to disqualify shall be in writing and specifically allege the facts and reasons relied on to show the grounds for disqualification and shall be sworn to by the party by signing the motion under oath or by a separate affidavit. The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith.
>
> (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 . . . .
>
> * * *
>
> (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.

The requirements set forth in this rule were established "to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding." ***Livingston v. State,*** 441 So.2d 1083, 1086 (Fla. 1983);

Rogers v. State, 630 So.2d 513 (Fla. 1993).

In ***State ex rel. Davis v. Parks, 194 So. 613, 615 (Fla. 1939)***, this Court noted that adherence to this rule provides the appearance of impartiality, and insures the accused is afforded due process:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice. It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

A party seeking to disqualify a judge need only show a well grounded fear that he or she will not receive a fair trial at the hands of the judge. ***Livingston v. State, supra at 1086***. The inquiry focuses on the reasonableness of the

defendant's belief that he or she will not receive a fair hearing, "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." ***Id***. at ***1087***; ***Rogers v. State***, ***supra at 515***. "It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling." ***Crosby v. State***, 97 So.2d 181, 183 (Fla. 1957). In applying the test, the function of the trial court is limited to a determination of the legal sufficiency of the affidavit, without reference to its truth and veracity. If the allegations are sufficient, the judge must retire from the case. ***Id***., ***quoting Dickenson v. Parks,*** 140 So. 459 (Fla. 1932).

The Omission of Randy Schoenwetter's Signature does not Render the Motion Legally Insufficient.

Appellant concedes that only his trial attorney signed and swore to the pertinent facts alleged in the motion to disqualify Judge Griesbaum. Trial counsel also signed and filed a separate certificate of good faith. (III 490-93) Florida courts have recognized that the failure of the party to sign a motion to disqualify may render the motion insufficient. ***See e.g., Gaines v. State***, 722 So.2d 256 (Fla. 1998) However, Florida courts have thought it inappropriate to deny a recusal motion simply because it fails to meet technical requirements. ***See, e.g., Sikes v. Seaboard Coastline R.Co.***, 429 So.2d 1216, 1224 (Fla. 1st DCA 1983). ***Sikes***

referred to this Court's opinion in ***State ex.rel. Davis v. Parks***, 141 Fla. 516, 194 So. 613, 615 (1939) which commented "The rule must be construed, however, with order and justice in view and should not be employed to perpetuate a prejudice to justify pride of opinion or to attach a value to unusual complexes that result in defeating its purpose." A technical deficiency in the motion should not rule the day especially in this case. The facts alleged in the motion were known to defense counsel from personal experience. The facts were not first-hand knowledge of Randy Schoenwetter. Additionally, this case involves a capital murder trial where a eighteen-year-old boy pleaded guilty against his lawyer's sage advice and attempted to control the trial strategy. ***See Point II.*** This Court should soberly consider this issue despite the absence of appellant's signature on the motion.

In Light of the Fact that Judge Griesbaum Was a Co-Sentencer in Condemning Randy Schoenwetter to Die, the Court's Disdain for Brain Imaging Disqualified Him.

Despite the holding by the United States Supreme Court in ***Ring v. Arizona***, 122 S.Ct. 2428 (2002), this Court has consistently concluded that Florida's death sentencing scheme remains constitutionally valid law. ***See Bottoson v. Moore***, 833 So.2d 693 (Fla. 2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002). Therefore, the trial judge remains at the very least in Florida a co-sentencer with the jury. Despite what the jury may recommend, the trial court, as it did in this case,

rendered the findings of fact on which the death penalty is based and ultimately reviewed by this Court.

The trial court's disdain for brain imaging tests and brain disorders in general is clear from the court's findings of fact. Despite the fact that the evidence and testimony presented to the jury clearly establish that Randy Schoenwetter suffers from Asperger's Syndrome as well as Attention Deficit Hyperactivity Disorder (ADHD), the trial court found this valid mitigation to be entitled to little, if any, weight. (V 805-811) The trial court discounted the evidence that appellant was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The court concluded that both of these potent statutory litigating circumstances were entitled "little weight". (V 810-11)

Judge Griesbaum recognized that Dr. Wu performed a PET scan on appellant's brain. This scan confirmed that appellant's frontal and temporal cortex were not functioning as they should. The scan of the frontal lobe area and the areas of temporal cortex was abnormal, which is consistent with Asperger's Syndrome. (V 807-808) In spite of this scientific corroboration of the diagnosis of a psychologist and a neuropsychologist, the trial court instead focused on the brief

examinations conducted by two psychiatrists who examined appellant in the middle of trial to determine his competency to proceed. (V 808) Judge Griesbaum seemed to accept the psychiatrists' testimony that these symptoms of Asperger's Syndrome were not present or recognizable from the interviews that they conducted with the defendant. (V 808) The trial court's bias as to this type of evidence is clearly revealed in his findings of fact. This is clear despite the fact that he gave lip service to the extensive evidence presented by appellant. Specifically, the trial court found, "despite the conflicts and the testimony" that the two statutory mental mitigating circumstances had been proven "by the greater weight of the evidence." (V 808, 810) Nevertheless, the trial court's bias is clear. The court never seemed to accept nor understand the diagnosis of Asperger's Syndrome.[32]

Interestingly, the trial court points out that Dr. Wu who conducted the test which prosecutor Griesbaum's office had referred to as "junk science" and "voodoo" had never interviewed the defendant. (V 808) Appellant submits that this short aside speaks volumes of the trial court's lack of respect for brain imaging science. Under the circumstances, the trial court clearly should have granted appellant's motion to disqualify. Where the trial court was responsible for

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[32] This is evident by the trial court's repeated praise of Randy as a mature, intelligent, articulate young man who exercised reasoned judgment by pleading guilty and obstructing his lawyers at almost every turn.

condemning appellant to die, the resulting death sentences are constitutionally infirm. ***Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, 9, 16, and 17, Fla. Const.***

POINT VI

THE TRIAL COURT ERRED BY ADMITTING INFLAMMATORY PHOTOGRAPHS WHICH WERE NOT RELEVANT TO ANY CONTESTED ISSUE.

Dr. Eman Imami testified at the penalty phase for the state. (XIII 633-46) Dr. Imami had no connection to the treatment of appellant's two first-degree murder victims. Dr. Imami treated Haesun Friskey, the severely wounded but surviving member of the Friskey family. Prior to the doctor's testimony, the lawyers reviewed the photographs that the state sought to introduce during the doctor's testimony. (XIII 623-32)

Over defense objection, the state introduced six photographs depicting Haesun Friskey's substantial and gruesome injuries. (XIII 639; State's Exhibits 71-76) Defense counsel pointed out that the pictures were not relevant to establish any particular aggravating circumstance. Counsel pointed out that Randy Schoenwetter had plead guilty to all pending charges. The objectionable evidence was presented at the penalty phase where the state's evidence should be limited to establishing aggravating circumstances. The state contended that the photographs depicted the severity of Ms. Friskey's injuries which went to the weight that the jury should apply to the prior violent felony conviction aggravating factor. (XIII 623-32)

Defense counsel also objected to one photograph specifically on the grounds that it depicted Ms. Friskey's bare breast. Trial counsel argued that any slight probative value was outweighed by the substantial prejudice. The photographs were especially objectionable where they depicted the substantial medical intervention that was required to save Haesun Friskey's life. Defense counsel pointed out that these wounds were not directly attributable to the appellant and could easily be modified to display only the wounds inflicted by Schoenwetter. The prosecutor disagreed and the trial court allowed the introduction of the unaltered photographs.

The admission of this evidence denied appellant due process of law guaranteed by Article I, Sections 2,9,12,16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The photographs had no relevance to any issue in the case. Any possible relevance of this evidence is outweighed by its prejudice. §90.403, Fla. Stat. (2004).

The test for the admissibility of a photo of the murder victim is relevance, not necessity. ***Ruiz v. State***, 743 So. 2d 1, 8 (Fla. 1999). The determination of the admissibility of such photos is within the sound discretion of the trial court and will not disturbed on appeal in the absence of abuse. ***Id***. In ***Ruiz***, this Court found error in the penalty phase admission of a two by three feet blow-up of a photo

showing the bloody and disfigured head and upper torso of the victim. Because the prosecutor provided no relevant basis for submitting the blow-up in the penalty phase, this Court concluded that it was offered simply to inflame the jury. ***Id***.

This Court has outlined the standard for the admission of potentially prejudicial photo:

> To be relevant, a photo of the deceased victim must be probative of an issue that is in dispute. In the present case, the medical examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. Neither of these points, however, was in dispute. Admission of the inflammatory photo thus was gratuitous.

Almeida v. State, 748 So.2d 922, 929-30 (Fla. 1999). (Emphasis in original.) (Footnote omitted.) In a footnote, this Court quoted ***McCormick on Evidence***, 773 (John Williams Strong ed., 4th Ed. 1992):

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. (Footnote omitted.)

Almeida v. State, 748 So.2d at 929 (n.17).

As argued below, the gory photographs at issue did not have any relevance

in establishing the heinous nature of the murders of Ronald or Virginia Friskey. The subject of the objectionable photographs was Haesun Friskey who survived the attack. This was a penalty phase where the jury weighed life against death. The prosecutor argued that the photographs helped establish the appropriate weight of the aggravating circumstance relating to prior violent felony convictions. This argument is tangential at best. The focus of the penalty phase should have been the murders of Virginia and Ronald Friskey. The fact that the jury was presented instead with photographs of the bloody but necessary work of the emergency room doctors impermissibly tipped the scales towards death. The testifying doctor admitted in the testimony that some of the major wounds depicted were the result of heroic medical intervention. Doctor Imami described one wound as an "extension incision." (XIII 639) The photographs speak for themselves. Their slight probative value was substantially outweighed by the prejudicial aspect.

Great care should be taken prior to waving ghastly pictures in front of lay jurors who may never have seen anything similar before in their lives. The idea of a trial is not that jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt (or in appellant's case, penalty). In this case, it is clear that Randy Schoenwetter was:

> denied a fair trial when the court allowed a gruesome, color photograph of the deceased's

> massive head wound to go to the jury. ...In this case, the photograph which was admitted could serve no purpose other than to inflame and prejudice the jury in the grossest manner.

People v. Garlick, 360 N.E. 2d 1121, 1126-27 (1977).

POINT VII

THE APPELLANT'S DEATH SENTENCES WERE IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

The sentences of death imposed upon Randy Schoenwetter, must be vacated. The trial court found improper aggravating circumstances, failed to consider (or gave little or no weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render appellant's death sentences unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Aggravating circumstances must be proven beyond a reasonable doubt to exist and review of those factors is by the competent substantial evidence test. Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Review of the weight given to mitigation is subject to the abuse-of-discretion standard. ***See Cole v. State,***

701 So.2d 845, 852 (Fla. 1997). It is submitted that this Court's proportionality review, being a question of law, is a *de novo* review.

A. The Trial Judge Considered Inappropriate Aggravating Circumstances.

I. The Witness Elimination Aggravator Does Not Apply to the Murder of Ronald Friskey.

Over objection, the trial court instructed the jury that they could consider that Appellant killed Ronald Friskey in order to avoid lawful arrest. (XV 1160-75, 1281-82) The trial court subsequently found that the murder of Ronald Friskey was committed to avoid lawful arrest. (V 800-802) Appellant contends on appeal that the evidence did not support an instruction on this particular aggravator. By so instructing the jury, the trial court violated Appellant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Furthermore, Appellant contends on appeal that the trial court's finding of fact as to this particular aggravator was not supported by substantial, competent evidence. The trial court's finding renders Appellant's death sentence infirm. ***Amends. VIII and XIV; Art. I, Sec. 9 and 16, Fla. Const.***

In finding that the evidence was sufficient to support this particular aggravator, the trial court wrote:

> 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 Appellant was not wearing any type of disguise on the night of the crimes. Under the circumstances, it is difficult to believe that the Defendant was confident that Ronald and Haesum Friskey did not recognize him. In fact, during the penalty phase, Haesum 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 Haesum 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 Haesum 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 Haesum 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 Haesum 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 Haesum Friskey as a witness. This finding is based on the nature, type, and manner of the wounds that the Defendant inflicted on Haesum 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 Haesum Friskey were unsuccessful.

This aggravating circumstance has been proven beyond all reasonable doubt.

(V 801-802)

The aggravator of killing with intent to avoid lawful arrest applies to witness elimination. ***See Consalvo v. State***, 697 So. 2d 805, 819 (Fla. 1996). In such cases, "'The mere fact of death is not enough to invoke this factor....Proof of the requisite intent to avoid arrest and detection must be very strong....' [T]he evidence must prove that the sole or dominant motive for the killing was to eliminate a witness." ***Id***. (***quoting Riley v. State***, 366 So. 2d 19, 22 (Fla. 1978);

See, e.g. Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988) (Holding that murders were committed for the purpose of lawful arrest where the murderers discussed in the victims' presence the need to kill them to avoid being identified).

This aggravating circumstance focuses on the motivation for the murder, and is usually found where the victim is a police officer. ***See, e.g., Mikenas v. State,*** 367 So.2d 606 (Fla. 1978). When the victim is not a police officer, however, in order to prove this circumstance, the evidence must prove beyond a reasonable doubt that the dominant or only motive was to eliminate the victim as a witness. ***Bell v. State***, 841 So.2d 329, 336 (Fla. 2002); ***Connor v. State***, 803 So.2d 598, 610 (Fla.2001); ***See also Alston v. State***, 723 So.2d 148, 160 (Fla.1998). "Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Likewise, the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator." ***Looney v. State***, 803 So.2d 656, 676 (Fla.2001); ***Bell v. State, supra***; ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992). The state thus must prove by "very strong," positive evidence (rather than by speculation, default, or elimination) that the dominant motive was to eliminate a witness. ***Jackson v. State***, 502 So.2d 409 (Fla. 1986); ***Connor v. State***, 803 So.2d 598 (Fla. 2001) (other motives as likely); ***Riley v. State***, 366 So.2d 19 (Fla. 1978).

The finding of this aggravator with regard to Ronald Friskey is totally speculative on the trial court's part – simply because he knew the defendant is not the strong evidence required to find this factor. ***Id.*** ***See also Amazon v. State***, 487 So.2d 8 (Fla. 1986) (evidence inconclusive where the defendant killed his next-door neighbor as she called for help during the burglary, *even where the detective said the defendant told him he killed to avoid arrest*); ***Garron v. State***, 528 So.2d 353 (Fla. 1988) (victim shot while talking on the phone asking for the police held insufficient); ***Zack v. State***, 753 So.2d 9 (Fla. 2000) (fact that defendant planned to kill victim and take her property and the victim knew and could identify defendant was insufficient to support the avoiding arrest circumstance). In fact, the record contains direct evidence that this aggravating circumstance does not apply. In his confession, Schoenwetter admitted that he killed Virginia when she recognized her. He confessed to eliminating her as a witness. However, Randy remained confident that her parents had not recognized him. There is direct evidence was correct in his assessment. Ronald Friskey's dying words to his next-door neighbor revealed that he had not recognized Randy as the intruder. Friskey told his neighbor that a white male had killed his whole family. Not only does the record not support the finding of this aggravating factor, the evidence clearly refuts it.

II. The HAC Aggravator Does Not Apply to the Murder of Ronald

Friskey.

In finding this aggravator, the trial court wrote:

The Supreme Court of Florida has defined the heinous, atrocious, or cruel aggravator as follows:

Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Hall v. State, 614 So. 2d 473, 478 (Fla. 1993). This aggravator applies to murders "that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." ***Brown v. State***, 721 So. 2d 274, 277 (Fla. 1998). This aggravator focuses on the means and manner in which the death was inflicted and the immediate circumstances surrounding the death rather than the state of mind or intent of the defendant. ***Id***.

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 appellant stated in his confession that Ronald Friskey was struggling with him throughout the attack and was trying to prevent him from leaving. After the appellant left the scene, Ronald Friskey managed to stagger 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 circumstances has been proven beyond all reasonable doubt. (V 802-804)

The Applicable Law.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in ***State v. Dixon,*** 283 So.2d 1,9(1973)

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, ***Tedder v. State***, 322 So.2d 980, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crime *especially* heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, supra at 9.

As this Court has stated in ***Santos v. State***, 591 So.2d 160, 163 (Fla. 1991), and ***Cheshire v. State***, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a *desire* to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. ***See, e.g.,*** ***Douglas v. State***, 575 So.2d 165, 166 (Fla. 1991) (torture-murder involving heinous acts extending over four hours).

The present killing happened too quickly with no substantial competent suggestion that the killer *intended* to inflict a high degree of pain or otherwise torture either of the victims. The fact that two persons are killed, even after a short confrontation, does not necessarily show that the homicides were especially heinous, atrocious or cruel. ***See Cheshire v. State, supra*** at 912 (HAC "is proper only in torturous murders – those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.").

This Court is all too aware of the depravity of those who intentionally torture and enjoy the suffering of others. It is in cases like that, and for people who intentionally do things like that, where the crimes become the most aggravated of capital crimes. ***See Schwab v. State***, 636 So.2d 3, 8 (Fla. 1994) (HAC appropriate where boy was abducted, taken to motel room, stripped naked, bound and gagged,

anally raped, and then smothered to death); ***Power v. State***, 605 So.2d 856, 863 (Fla. 1992) (HAC appropriate where 25 year old man took small 12-year-old girl prisoner, terrorized her, anally and vaginally raped her, hog-tied and gagged her, then stabbed her and left so that she slowly bled to death over period of 10 to 20 minutes). The death penalty is reserved for such defendants, who commit such crimes.

The contrast between those cases involving torture or depravity and the instant case should be clear; failure to recognize the contrast would render Florida's capital scheme unconstitutional. Here, the state has failed to prove this factor of torture or depravity beyond a reasonable doubt. The conclusion of the trial court should be rejected. Even if not rejected outright, due to the lack of evidence of torture and desire to inflict suffering, this factor should, at most, be given minimal consideration in the weighing and proportionality review process.

III. The Trial Court's Refusal to Accord Proper Weight to Valid Mitigation Renders Florida's Death Sentencing Scheme Unconstitutional.

The trial court conceded that three valid statutory mitigating factors were supported by the evidence. Specifically, the trial court found that Randy had no significant history of prior criminal activity. (V 806) The trial court also concluded that the evidence supported the finding of both statutory mental mitigators. (V 806-

11) Specifically, the court concluded that Randy suffers from Asperger's Syndrome and Attention Deficit Hyperactivity Disorder (ADHD). As a result, Randy was under the influence of extreme mental or emotional disturbance when he committed the crimes. Secondly, the trial court found that Randy's capacity to appreciate criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (V 806-11) Finally, the trial court concluded that Randy's age, eighteen at the time of the crime, was also a statutory mitigating factor. (V 811-13) However, for a variety of reasons, none of them good, the trial court concluded that all four of the statutory mitigating factors were entitled to "little weight." (V 806-13) Ironically, the prosecutor admitted at the ***Spencer*** hearing that the evidence presented by appellant's three mental health witnesses remained unrebutted by the state. (II 299)

The trial court discussed the following non-statutory circumstances:

> (1) Appellant accepted responsibility (moderate weight);
>
> (2) Appellant was bullied and picked on from an early age (**little weight**);
>
> (3) Randy was continuously and gainfully employed as a teenager and helped his mother financially. (established by the greater weight of the evidence but entitled to **no weight**)
>
> (4) Randy will not pose a danger to the general prison population (**little weight**);

> (5) Randy's neurological disorders hamper his ability to socially interact (**little weight**);
>
> (6) Appellant has had a sexual preoccupation from the age of seven (**little weight**);
>
> (7) Appellant had a developmental and emotional of twelve to thirteen at the time of the crimes (not proven);
>
> (8) Randy has a close, loving relationship with his mother and younger sister (**no weight**) and
>
> (9) Randy suffered physical and emotional abuse by his mother's boyfriend after he was forced to move to a new school district (**little weight**).

(V 813-17) (Emphasis added.)

Beginning with ***Lockett v. Ohio***, 438 U.S. 586 (1978), the United States Supreme Court has held that a trial judge cannot refuse to consider, or be precluded from considering, any relevant mitigating evidence offered by a defendant. The ***Lockett*** holding is based on the distinct peculiarity of the death penalty. An individualized decision is essential in every capital case. ***Lockett***, 438 U.S. at 604-605. The Supreme Court has consistently reiterated the ***Lockett*** holding. ***See e.g. Hitchcock v. Dugger***, 107 S.Ct. 1821 (1987); ***Skipper v. South Carolina***, 476 U.S. 1 (1986). However, the court has also stated that the trial court may give mitigating evidence whatever weight it deems fit. ***Eddings v. Oklahoma,*** 455 U.S. 104, 114-115 (1982).

In ***Campbell v. State***, 571 So.2d 415 (Fla. 1990), this Court held that trial courts could not accord no weight to a mitigating factor where the circumstance was supported by the record. This Court receded from ***Campbell*** in ***Trease v. State***, 768 So.2d 1050 (Fla. 2000), to the extent that ***Campbell*** disallowed trial courts from according no weight to a mitigating factor. It is not abundantly clear that Florida trial judges, including appellant's trial judge, are now freely disregarding valid mitigation by giving it little to no weight. Justice Pariente, in her concurrence, expressed concern about this very problem in ***Ford v. State***, 802 So.2d 1121 (Fla. 2001). Florida judges have, for the most part, reverted to a "mere presentation" standard. Florida's death penalty statute has been rendered unconstitutional as a result. ***Lockett v. Ohio***, 438 U.S. 586 (1978); ***Amends. V, VI, VIII, and XIV, U.S. Const.; Art.I, Sec. 9, 16, and 17, Fla. Const.*** An excellent analysis of this problem can be found in Waters, ***Uncontroverted Migigating Evidence in Florida Capital Sentencings***, Fla.B.J., January 1989, at 11.

POINT VIII

PLACING A *HIGHER* BURDEN OF PERSUASION ON THE DEFENSE TO PROVE THAT LIFE IMPRISONMENT SHOULD BE IMPOSED THAN IS PLACED ON THE STATE TO PERSUADE THAT CAPITAL PUNISHMENT SHOULD BE IMPOSED VIOLATES FUNDAMENTAL FAIRNESS AND DENIES DUE PROCESS.

Whether Florida's death penalty and standard jury instructions deny due process and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 16, 17 and 22 of the Florida Constitution is a pure question of law subject to *de novo* review.

Appellant moved to have §921.141, Fla. Stat., found unconstitutional because it cast on the defense a *higher* burden of persuasion to obtain a life sentence than was on the State initially to obtain a death sentence. (IV 619-23, 633-38). The issue was thus preserved. Appellant was prejudiced because his jury recommended death after receiving the standard "outweigh" jury instructions over objection and because the trial court applied the statutory mitigation outweigh the aggravation test to sentence Schoenwetter to death.

At first blush, this issue appears to have been decided in ***Arango v. State***, 411 So.2d 172, 174 (Fla. 1982), and its progeny under the generic heading of

"burden shifting." ***Arango*** is not controlling for two reasons. It does not address the ***higher*** burden of persuasion on the defendant, and the superficial analysis in ***Arango*** is otherwise incorrect. Specifically, the entire analysis of this issue in ***Arango***, at 174, states:

> In ***Dixon*** we held that the aggravating circumstances of §921.141(6) 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. (emphasis added)[33]

The test set forth in §921.141, Fla.Stat. and the standard jury instructions, given here over unsuccessful objection (V8, R1468-1472), clearly and repeatedly state that the mitigation must outweigh the aggravation. Even taken as a whole, the standard jury instructions cannot reasonably be construed otherwise:

> The State and the defendant may now present evidence relative to the

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[33] An instruction that *the state prove* the aggravation must outweigh the mitigation is not contained in the standard jury instructions, but it mirrors dicta from this Court. ***See Alvord v. State***, 322 So.2d 533, 540 (Fla.1975)("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors.")

nature of the crime and the character of the defendant. You are instructed that this evidence when considered with the evidence you have already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, *whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances*, if any.

* * *

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an *advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and <u>whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist</u>.*

* * *

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine *<u>whether mitigating circumstances exist that outweigh the aggravating circumstances</u>*.

* * *

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without parole. *Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine <u>whether mitigating circumstances exist that outweigh the aggravating circumstances</u>.*

* * *

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. *You should weigh the aggravating circumstances against the mitigating circumstances, and <u>your advisory sentence must be based on these considerations</u>*.(emphasis added)

Fla. Std. Jury Inst. (Crim.), "7.11. Penalty Proceedings, Capital Cases".

The statute and standard jury instructions create a *higher* burden on the defense because first and in the total absence of consideration of mitigation, a determination must be reached as to whether sufficient aggravating circumstances justify imposition of the death penalty. From this point forward, the State has no further burden. A presumption that death is appropriate is created. Thereafter, to negate that presumption, the defendant must prove that "*sufficient* mitigating circumstances exist which ***outweigh*** the aggravating considerations found to exist" in order to receive a sentence of life. The focus is not on whether the death penalty is justified - the presumption already created - but instead on whether the mitigation totally outweighs the aggravation. Thus, requiring that the mitigation outweigh the aggravation places the burden of persuasion on the defense, and it is a higher burden than was on the State initially to obtain the death penalty.

In practice and as applied here[34] in sentencing Schoenwetter to death, the focus is on whether mitigation "outweighs" the aggravation. ***See State v. Dixon***, 283 So.2d 1, 9 (Fla.1973) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances.") While neither the statute nor jury

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[34] The trial court sentenced Schoenwetter to death because "the mitigating circumstances are insufficient in weight to counterbalance the four aggravating factors which have been proven...". (V 817)

instructions use the term "presumption," it is clear that a presumption that death is appropriate exists in the absence of mitigation.[35] The ability of a defendant to negate that presumption does not save the statute and jury instructions, especially where the defendant's burden of persuasion to prove that a life sentence is justified (overall) is *higher* than was on the State to initially prove (in a vacuum) that the death penalty is the proper sentence.

Specifically, the initial determination made that death is appropriate is based *solely* on considering aggravating circumstances. The State has only to prove, in a vacuum, that the aggravation supports the death penalty. The presumption is created. Defendants then have the burden of proving that mitigation exists AND that the mitigation totally outweighs that aggravation. This is fundamentally unfair because defendants bear the burden of persuasion on the ultimate issue rather than having that of producing evidence.

The right to a jury trial, fundamental fairness and Due Process under the Fifth, Sixth and Fourteenth Amendments require that the State ultimately bear the burden of persuasion that imposition of capital punishment is justified:

> The Due Process Clause of the Fourteenth Amendment

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[35] ***See, e.g. Davis v. State***, 703 So.2d 1055, 1060-61 (Fla.1997); ***Elledge v. State***, 706 So.2d 1340, 1346 (Fla.1997); ***Valle v. State***, 474 So.2d 796, 806 (Fla.1985); ***Alford v. State***, 307 So.2d 433, 444 (Fla.1975).

> "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship***, 397 U.S., at 364. This "bedrock, 'axiomatic and elementary' [constitutional] principle," ***id.***, at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.

Francis v. Franklin, 105 S.Ct. 1965, 1970 (1985).

Functionally, Florida's statute and standard jury instruction mirror the procedure condemned in ***Mullaney v. Wilbur***, 421 U.S. 684 (1975), where the state had only to prove that an intentional and unlawful homicide occurred, and the defendant then bore the burden of proving "by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation" to avoid punishment for committing murder as opposed to manslaughter. ***Mullaney***, 95 S.Ct. at 1883. It is proper to cast the burden of producing evidence on the defendant to place an ultimate fact in issue but, consistent with ***In re Winship***, 397 U.S. 358 (1970), due process and the right to a jury trial, the state must bear the ultimate burden of persuasion beyond a reasonable doubt. ***Mullaney***, 95 S.Ct. 1889-1890.

The requirement that the government bear the burden of persuasion beyond a reasonable doubt is a component of fundamental fairness that serves as a

cornerstone for public acceptance of the outcome of the trial. ***Mullaney***, 95 S.Ct. at 1890. Due to the uniqueness in severity and finality of capital punishment, due process compels a heightened scrutiny of the procedures as to both the conviction and sentencing of a defendant in order to achieve the requisite reliability under the eighth amendment. ***Monge v. California***,118 S.Ct. 2246 (1998).

Over timely objection, an unconstitutional burden of persuasion was placed on this defendant contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments, United States Constitution, and Article I, §§ 2, 9, 16, 17 and 22, Florida Constitution, as explained in the holdings of ***In Re Winship***, and ***Mullaney v. Wilbur***. The death sentences erroneously imposed here must be reversed and the standard jury instructions setting forth the improper standard in § 921.141 must be ruled unconstitutional.

POINT IX

THE TRIAL COURT ERRED IN SENTENCING RANDY SCHOENWETTER TO DEATH BECAUSE SECTION 921.141, FLORIDA STATUTES, UNCONSTITUTIONALLY ALLOWS THE TRIAL COURT TO DO SO WITHOUT, AMONG OTHER THINGS, A UNANIMOUS DEATH RECOMMENDATION FROM THE JURY IN CONTRAVENTION OF THE SIXTH AMENDMENT.

Given the current state of Florida law, appellant acknowledges the futility of raising issues claiming that the United States Supreme Court's opinion in ***Ring v. Arizona***, 536 U.S. 584 (2002), and ***Apprendi v. New Jersey***, 530 U.S. 166 (2000) should give him sentencing relief. At the trial level, appellant raised the ***Ring/Apprendi*** issues completely, throughly, and repeatedly.[36] ***See, e.g.,*** (II 127-142, 155-161; IV 558-63, 569-72) The trial court specifically instructed the jury that they need not be unanimous. (XVI 1292-95)

Despite the United States Supreme Court's ruling in ***Ring v. Arizona***, 536 U.S. 584 (2002), this Court, as a court, has steadfastly refused to find the State's death penalty statute, in part or in total, in violation of the Sixth Amendment to the

[36] Prior to trial, the prosecutor stated that, in light of ***Ring***, interrogatory verdicts would certainly be necessary at the penalty phase. (II 212) This was never mentioned on the record again. Interrogatory verdicts were **not** used. (V 767-68) The verdicts recommending death were far from unanimous.

United States Constitution. ***Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002); ***Kormondy v. State***, 845 So.2d 41 (Fla. Feb. 13, 2003). Schoenwetter raises this issue, in hopes that this Court has now seen the error of its ways. Appellant is also required to raise the issue to preserve it and avoid the trap of procedural bar. Because this issue involves a pure question of law, this Court can review it *de novo*. ***See, e.g., City of Jacksonville v. Cook***, 765 So.2d 289 (Fla. 1st DCA 2000).

Appellant specifically argues that the Sixth Amendment requires Florida juries to unanimously recommend death before the trial judge can impose that sentence.[37] This Court has nevertheless concluded that it must uphold the constitutionality of Florida's statute unless and until the Unites States Supreme Court overrules ***Hildwin v. Florida***, 490 U.S. 638 (1989), and expressly applies ***Ring*** to Florida. ***See Bottoson v. Moore***, 833 So.2d 693 (Fla. 2002); ***King v. Moore***, 831 So.2d 143 (Fla. 2002).

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[37] The verdicts for death were **not** unanimous. Since interrogatory verdicts were not used, the record is silent on the jurors' decisions as to each aggravating factor. (V 767-68)

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate appellant's death sentences and remand for a new penalty phase. Alternatively, appellant asks this Court to remand for the imposition of two life sentences or to simply declare Florida's death sentencing scheme to be unconstitutional.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Charles Crist, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Randy Schoenwetter, DC#E20773, Florida State Prison, 7819 N.W. 228th St., Starke, FL 32026, this 6th day of January, 2005.

_____

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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