IN THE SUPREME COURT OF FLORIDA

GHENGIS KOCAKER,

Appellant,

v. **Case No. SC10-229**
Lower Tribunal No. CRC04-19874CFANO

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On September 1, 2004, the appellant GHENGHIS KOCAKER called 911 to report the discovery of a cab driver inside a cab parked on the northeast corner of the Eckerd's parking lot at Missouri Avenue and Belleair Road in Clearwater, Florida (V26/298-299, 323; V27/412-14). Kocaker advised that the man appeared to be dead (V26/300).

Clearwater Fire Rescue arrived at the scene within a few minutes (V28/549). There was a Yellow Cab parked in a parking space on the northeast side of the store with the driver's side door slightly ajar; the door was resting shut but not latched (V26/323; V28/550). The windows of the car were completely obscured with soot, and it was impossible to see inside the car without opening the driver's door further (V26/325, 331; V28/550). Firefighter/paramedic Greg Boos opened the door and observed the cab driver, Eric Stanton, lying across the front seat, obviously deceased (V28/550; V27/478). Boos noted the odor of gasoline and had his partner call for a fire engine due to the fire hazard (V28/551-52).

The interior of the cab had been intentionally set on fire, by putting gasoline on the backseat passenger's side floorboard (V26/363, 367-68). The fire went out due to the lack of oxygen in the closed car, but not before it had consumed most of the

headliner, which had melted and was dripping down from the ceiling (V26/325, 363-64). An ineffective, dry paper "wick" was observed stuck inside the gas filler neck (V26/361-62). The backseat had been up during the initial stages of the fire, but at some point Stanton had pushed the backseat forward and climbed into the cab from the trunk, ending up in the front seat (V26/332-33, 365; V29/741). It was observed that having the backseat pushed forward for trunk access caused the rear door handles to be blocked, meaning one could only exit the cab through the front doors (V29/742). The seatbelts had been cut from the front seats and were found in the trunk, presumably having been used to tie up Stanton (V26/340). Among the items found inside the cab were a gray T-shirt stained with Stanton's blood and a gas can (V26/334, 353; V28/565; V29/742-43).

A subsequent autopsy determined that Stanton had an incised wound to his neck that was not deep and would not have bled much; he also had first and second degree burns on his face and extremities (V27/449-52). He suffered a major stab wound to his left upper back region, which fractured a rib, penetrated a lung, and caused substantial blood loss (V27/451-55). The wound would have been fatal without treatment, but the cause of death was carbon monoxide saturation caused by the fire, with the stab wound characterized as a contributing factor (V27/462-66).

Kocaker told Greg Boos at the scene that he had happened upon the scene, and called it in (V28/553). Kocaker was barefoot, wearing shorts, a T-shirt, and glasses (V28/549). Boos suggested that Kocaker stay in the area and speak to detectives, but Kocaker stated that he was on probation and needed to go, then left (V28/553).

Law enforcement officers arrived a few minutes later (V28/554). Det. James Beining secured Kocaker's phone number from the 911 call and left him a voicemail message asking to talk with him about the murder; Kocaker called back later, saying he was waiting at a bus stop on his way to work (V27/412-14). Beining met him at the bus stop and Kocaker advised that he had been walking home, going north on Missouri Avenue, and crossed in front of the Eckerd's on his way to Jefferson, a block off of Missouri, where Kocaker lived (V27/414-15). Kocaker stated that he saw change and items on the ground, which he figured the cab driver had dropped going in to the store, so he walked over and noticed a driver's license on the ground (V27/416). He noticed the door was slightly cracked open, and that he looked in through the window and saw the man laid out on the seat, possibly passed out (V27/416). He opened the door and saw that the guy was dead, his throat was "busted open," and the car was burnt up (V27/416). Kocaker stated he called 911 and

was directed to lay the body out, but when he got closer he realized the man was dead, so he didn't move the body; he felt for a pulse and snapped his fingers in front of the man's face, maybe even shaking his head (V27/416). Kocaker recalled seeing the man's picture on the driver's license, and thought maybe he had thrown the license down (V27/417).

Kocaker advised that he had not stayed at the scene because he was on probation, and identified his probation officer (V27/417). When asked about his whereabouts the night before, Kocaker said that he had been out with some people, but couldn't say where (V27/417). Kocaker agreed to return to the scene to try to find Stanton's driver's license, which had not been located; but once there, he could not explain where he threw the license (V27/417-18).

Back at the scene, Kocaker spoke to Beining and to Det. Thomas Klein, the case agent (V27/418-19; V29/751-52). He recounted his actions from the previous night: Kocaker arrived home from work about 6 or 6:30, had dinner, showered, and went to Albertsons north of the scene; Kocaker bought a small bottle of vodka and returned home (V27/419-420). Kocaker left home again around 10:00 p.m., going to a Walmart about a mile south of the scene (V27/420). He met some people there and went to an unknown location (V27/420-21). Kocaker again described his path

of travel and demonstrated, at the scene, his route to the cab (V27/420-24; V29/752). Det. Beining took Kocaker home, two blocks north of the scene (V27/425).

Video surveillance cameras revealed that, in fact, Kocaker actually walked around the back of the store coming in to the parking lot; the surveillance tape also reflects that Kocaker had his cell phone out and was making the 911 call about 30 seconds before he even reached the cab (V27/430-33; V29/758-59). Kocaker's cell phone records revealed that the 911 call was the only call made around that timeframe (V5/52; V29/760-61). On the video, Kocaker is observed to be wearing different clothes than what he had on when talking to the detectives (V27/435). Beining and Klein went to Kocaker's house to ask about the clothes, and Kocaker advised they were in the wash but he took them out and gave the wet clothes to the detectives (V27/435-36). Kocaker indicated that he had been wearing flip-flops but that he didn't know what had happened to them (V27/436).

After speaking with detectives that morning, Kocaker pawned some jewelry, a bracelet and necklace, for $100 (V29/776-77).

Det. Klein went to Kocaker's house that night, and Kocaker agreed to ride around with Klein, Det. Johnson, and Kocaker's sister, Ana, to try to identify the places Kocaker had been the night before (V29/753-55). They went to a Walmart where Kocaker

told them he had met two guys and two girls in a red convertible; he had left with them and partied all night (V29/755-56). Kocaker could not provide names for the people he met and was unable to locate where they had gone (V29/756). After driving south on Missouri a ways, Kocaker indicated that he was finished with the ride, so they took him home (V29/757).

Yellow cab records indicated that Stanton had picked up a fare at 9:32 p.m. on August 31 at the same Albertsons Kocaker had visited that night (V26/382; V29/758). There was no call in for the cab, meaning the fare had flagged Stanton down (V26/382). Stanton's meter was turned off about twenty-five minutes later, and an "out of service" code was entered a few minutes later (V26/382-83). When the company attempted to locate the cab at 8:53 a.m. on September 1st, the car's GPS did not automatically respond, indicating that the car had no power at that time (V26/384-85).

Det. Klein spoke to Kocaker's probation officer and learned that Kocaker had missed some scheduled appointments; Kocaker was arrested on a violation of probation on September 3 (V29/761-62). Kocaker had a piece of paper in his wallet with the name "Fury" and a phone number written on it (V29/763-64). The same phone number was noted in Kocaker's cell phone records, and belonged to Antoine Powell, also known as Fury (V5/51-53;

V28/584-85; V29/764-65). There were several calls between Kocaker and Fury throughout the afternoon and evening of August 29 (V5/51-53; V28/585-86; V29/767). On August 31, Kocaker called Fury at 6:29 p.m. for almost three minutes, then Kocaker called Fury again at 12:43 a.m. on September 1st (V5/51-52; V28/602-03, 605; V29/768-770). The cellular service provider, T-Mobile, identified the cell phone towers used for the calls; the call at 12:43 a.m. hit off a tower indicating that the call could have been made from the Eckerd's crime scene, but not from the Belleair Motel (V27/488-92; V29/769-70).

Witnesses Antoine Powell, Heidi Kalous, and Stephanie Brzoska were among the group of friends with Kocaker on Sunday, August 29 and Tuesday, August 31 (V28/577; V29/676, 698). Fury Powell testified that he met Kocaker, known to Fury as "Wolf," the morning of August 31 when Fury was pumping gas near Lakeview and Missouri Avenue (V28/580-81). Fury is a crack cocaine dealer, and although he was reluctant at first because he did not know Wolf, he ultimately agreed to sell Kocaker some crack; they went for a ride in Fury's car and Kocaker bought about $20 worth of crack and smoked it in the car (V28/582-83). When Kocaker got out, Fury gave him a card with Fury's phone number so they could arrange more sales later (V28/583-85). Fury spoke with Kocaker later that afternoon, and Kocaker wanted to

purchase some more crack; ultimately, Fury picked Kocaker up on Missouri Avenue and they set out to "have some fun and party" (V28/585-88). They ended up at the Belleair Motel on Clearwater-Largo Road (V28/588). Kocaker rented a room at the motel and Fury went to find some crack and girls for the party (V28/588-89). Fury went to a duplex about a block away and brought some girls -- Crissy, Heidi, Stephanie and possibly Toni -- that were interested in making some money (V28/594-97). Fury sold more crack to Kocaker and estimated he received about $150 over the course of the night (V28/588-90). Fury also stayed at the Belleair Motel that night, selling crack to Kocaker periodically throughout the night (V28/598). Kocaker wanted more crack, even after he ran out of money, so Fury fronted him about $100 worth of drugs in exchange for jewelry, a necklace and ring (V28/598-600). They agreed Fury would hold on to the jewelry until Kocaker could buy it back (V28/600).

Fury left the motel the next morning, and spoke to Kocaker again the following day, August 31 (V28/600-02). Kocaker called once to let Fury know he was going to have the money to buy back his jewelry, then called later that night, with money, ready to meet up (V28/602-03). Kocaker asked Fury to pick him up at a Walgreens located at Belleair and Missouri Avenue in fifteen minutes (V28/602-04). Fury was not sure what time this was but

estimated it was 10:30 to 11:30 p.m., and noted the Walgreens and most everything around was closed (V28/604-05). Stephanie was driving Fury's car at that point and when they pulled into the parking lot Kocaker came up to the car and got in the backseat; she thought this was sometime after midnight (V28/603-06; V29/704-05). The cell records indicate that Kocaker called Fury at 12:43 a.m. on Sept. 1 (V5/53). Fury noticed Kocaker was apprehensive and jittery, and counting cash (V28/606, 610).

Kocaker wanted a private conversation with Fury, so they went by a 24-hour laundromat a few blocks away (V28/609). Stephanie waited in the car and after they got inside, Fury noticed that Kocaker had blood on his shirt (V28/610). Kocaker asked Fury if Fury "needed any killer on his team," and Fury said he did not (V28/610). Kocaker was walking around, looking for soap in the vending machine and saying he needed to get his shirt cleaned (V28/610). Fury asked what Kocaker had done, whether he had robbed or killed someone, and Kocaker responded, "that's what I do" (V28/611). Fury said that was fine, but he didn't need killers on his team (V28/611). They went back to the car and Stephanie drove Kocaker to the Belleair Motel and dropped him off, taking Fury back to Fury's house to pick up the jewelry Kocaker had given Fury earlier (V28/607, 611).

When Stephanie and Fury returned to the Belleair, they met

Kocaker along the street; Kocaker had changed clothes and the white shirt he had been wearing was now in a brown paper bag (V28/611-14). Kocaker got in the car and they drove to a 7-11, where Stephanie went in to get Fury a cigar and Kocaker took the bag and walked between the 7-11 and a laundromat there, returning a minute later without the bag (V28/613-16). A videotape from the 7-11 shows Kocaker in a blue shirt, walking along outside the store (V5/73; V29/714). Back in the car, Fury and Kocaker exchanged the money and the jewelry and then Stephanie dropped Kocaker back off at the Belleair Motel (V28/618-619). Fury did not see Kocaker again before Kocaker's arrest (V28/619).

Stephanie's testimony corroborated Fury's recounting of the events after picking Fury up at the Walgreens, going to the laundromat, dropping Kocaker off at the motel, going by Fury's house, picking Kocaker up by the motel, Kocaker having different clothes at that point, going to the 7-11, then taking Kocaker back to the motel (V29/703-714). Stephanie saw Kocaker later that evening near where she lived, close to the motel; Kocaker was not wearing shoes, which she thought was weird (V29/714).

Heidi Kalous met Kocaker on a Sunday in August or September of 2004 (V29/678-80). Heidi's friend, Fury, a crack dealer, wanted a girl to go with him to the Belleair Motel to meet

Kocaker, so Heidi and her friend Toni went there (V29/680-82). Heidi, Toni, and Kocaker sat around talking, drinking beer, and smoking the crack Kocaker had brought (V29/683). At one point, Kocaker left to go to the store and told Heidi there was a knife under his bed, which she found disturbing (V29/684-85). She and Toni talked about leaving but waited until Kocaker got back; they left later but she returned to the motel again that night and Kocaker was with another girl, Tracy (V29/684-86).

Heidi saw Kocaker again, a couple of days later, at the motel (V29/686-87). A man named Alvin was having a party in his room with a number of other people (V29/687). Kocaker wanted to use Alvin's shower and borrow a change of clothes (V29/688). Heidi noticed that Kocaker was wearing a white shirt inside-out, with blood all over it (V29/688). Kocaker ended up getting a blue, collared, button-up shirt from Alvin, but was still looking for new pants and shoes (V29/688-89). Kocaker told them that he'd been in a bar fight and had to go to work the next morning, and wanted different clothes before the guy found him or described him to the police (V29/689-90).

Kocaker had lived with his sister in a house just a block or two north of the Eckerd's at Belleair and Missouri Avenue (V27/497-98). His sister, Ana, returned from an out-of-town business trip about 12:30 or 1:00 a.m. on September 1st

(V27/499-504). Kocaker was not home at that time and was still not home when she left to take her son to school about 7:30 a.m. (V27/504-05). However Kocaker called close to 7:30 and told her he was going to be late to work, as he had to see a doctor about getting a change in medication (V27/505). He did not mention anything about finding a cab driver or calling 911 (V29/506).

Ana bought all of Kocaker's clothes and shoes, including shirts the same size, style and color as the gray shirt found in Stanton's cab (V27/499, 506-507). When police asked, she looked in his room and through his clothes but could not find a gray T-shirt (V27/507-08). She had not bought the blue shirt and shorts which Kocaker provided to Det. Beining (V27/511-12).

Ana also observed that there was a missing gas can which was usually in front of the house; she identified a picture of one can where two cans were normally located (V27/516-17). Ana and Rhonda Fradkin, a woman that took care of the lawn work at the house Ana rented, both identified the gas can found in Stanton's cab as the very same can usually kept at Ana's house (V27/516-17; V29/668-75).

Paul Sands testified that he met Kocaker while being transported to Pinellas County jail from Orlando in November, 2004 (V29/725-27). Kocaker told Sands that he was coming to Pinellas for a violation of probation, and he was scared because

he would be going up the row for a long time (V29/727-28). Kocaker told Sands that Kocaker had “burned” someone; when Sands asked what he meant, Kocaker stated that he had to do what he had to do, and it was justified (V29/728). Sands did not take Kocaker seriously at that time but later Sands saw Kocaker at the jail and asked him what was wrong, as Kocaker was upset after using the phone (V29/729). Kocaker responded that he had just talked to his sister, saying “I wish I could kill that bitch, too,” because she was cooperating with the police and had thrown his stuff away (V29/730). Kocaker said he hoped he would not get the death penalty, and that’s when Sands realized that he had done something crazy, which shocked and bothered Sands (V29/730-31).

Kocaker testified in his own defense (V30/843-887). According to Kocaker, he was not involved in Stanton’s death (V30/844). Kocaker admitted that he had flagged down Stanton’s cab at the Albertsons but testified that he directed Stanton to take him to the Belleair Motel (V30/844-45). Kocaker claimed that, on the way to the motel, Stanton asked why Kocaker was going down there; when Kocaker said he was going to meet some girls, Stanton asked if Kocaker would introduce him and advised that he would not charge Kocaker for the fare if Kocaker introduced him to a girl (V30/848). Once they got to the motel,

Kocaker went to find his new friends (V30/848). He returned to the cab in a few minutes to let Stanton know he was still looking for the group but, according to Kocaker, Stanton was in the back of the cab with Crissy at that point (V30/848-49). Kocaker asked if they could go to the store, and Stanton did not want to be bothered, so Stanton gave Kocaker the keys and Kocaker drove the cab with Stanton and Crissy in the back (V30/848-49). They returned to the motel and Kocaker went about his business; later, he went by the cab and heard arguing (V30/849).

In rebuttal, detectives testified to inconsistencies between Kocaker's court testimony and his prior statements (V30/891-906).

The jury convicted Kocaker as charged (V3/166; V31/1027). At the penalty phase, the State presented the testimony of Kocaker's probation officer, Ryan Kranz (V32/1066-67). Kranz testified that Kocaker was sentenced to prison on January 2, 1991, and had been released on probation on June 28, 2004 (V32/1066-67).

The judgments and sentences establishing Kocaker's prior violent felony convictions were also admitted into evidence (V5/113-148; V32/1065). Kocaker pled guilty to a 1981 manslaughter and was sentenced in 1982 and pled nolo contendere

to eight armed robberies committed in 1990, for which he was sentenced in 1991 (V5/113-148).

The defense presented four witnesses. Dr. Frank Wood testified to his observations from Kocaker's PET scan (V32/1073-75). Dr. Wood testified that Kocaker's brain was abnormal and misshapen, in that the right hemisphere was smaller than the left (V32/1075, 1077-79). According to Dr. Wood, Kocaker had this condition since birth (V32/1078). Dr. Wood would expect Kocaker to have misunderstandings about social contexts, deficits in auditory processing, and inappropriate responses; he noted that his findings were fairly general and that it would be up to the other defense expert, Dr. Eisenstein, to discuss the severity and form of the damage, as well as any impact it would have on Kocaker's behavior (V32/1081-83, 1093).

Kocaker also testified at his penalty phase (V32/1098-1106). Kocaker stated that he was born and raised in Tarpon Springs, Florida, on August 4, 1963 (V32/1099). He had never left Florida except for when he was trained to be a helicopter pilot in Richmond, Virginia, and when he was sent to Vietnam on active military duty (V32/1101). He claimed that his mother cleaned offices for a living (V32/1099). Kocaker also testified that he can't see out of his right eye, due to a deformity which has been present since birth (V32/1101).

Dr. Hyman Eisenstein is a licensed psychologist and a rabbi; he initially evaluated Kocaker in February 2007, conducting a clinical interview and neuropsychological testing (V32/1108, 1111). There was a major concern over the fact that Kocaker was very insistent about being a Vietnam veteran, despite the fact that he was born in 1963 (V32/1111-12). Kocaker also advised that he was raised in Tarpon Springs and had an eye problem which had been that way since birth (V32/1113). Kocaker was also seen in March, 2007, and additional testing was conducted (V32/1114-15). Eisenstein discussed a number of test results which indicated that Kocaker had low intellectual functioning and significant cognitive impairment (V32/1115-24). Kocaker spoke to him of hearing voices and described hearing people whispering that he couldn't understand (V32/1124-25). Kocaker indicated that he had swallowed razor blades and cut himself in response to the voices, and Eisenstein was concerned about his competency (V32/1125).

Dr. Eisenstein consulted other sources and determined that Kocaker's claim of military service could not be confirmed (V32/1128-29). Kocaker's sister also did not confirm the background he related but provided a good deal of detailed historical information which was contrary to Kocaker's

description (V32/1129-32). According to the sister, Kocaker was born and raised in New York, and his mother was very bright, serving as an executive secretary at the United Nations (V32/1129). The sister also explained that Kocaker's eye had been injured in a prison accident and Eisenstein observed a picture of Kocaker around kindergarten age where Kocaker's eye appears normal (V32/1131-31). When Eisenstein confronted Kocaker with the differences as related by the sister, Kocaker responded that his sister must be tripping out on drugs, because she wasn't providing accurate information (V32/1133). Another conflict was the sister's information that Kocaker's birth father had left the country before Kocaker was born, but Kocaker denied this (V32/1133). Eisenstein reviewed reports of other doctors which indicated that they had also observed Kocaker's delusional thought process (V32/1143).

Dr. Eisenstein conducted further neuropsychological testing in March, 2008, with mixed results; some tests showed impairment and others did not (V32/1145-49). Eisenstein learned from the sister that Kocaker had two head injuries as a child, and recommended a PET scan (V32/1148-49). He had information from Kocaker and the sister about a history of alcohol abuse (V32/1150-51). After talking with Dr. Wood, Dr. Eisenstein concluded that Kocaker has brain impairment, brain

abnormalities, and neuropsychological abnormalities, all of which would result in difficulty with making decisions or coming up with alternative solutions to problems (V32/1152).

Dr. Eisenstein noted that Kocaker's clinical picture was very difficult to figure out; although everything Kocaker says is basically not true, Eisenstein felt there was validity in his test performance (V32/1153). Ultimately he diagnosed Kocaker with Dissociative Identity Disorder, which would explain Kocaker's memory gaps and loss of information about his life history (V32/1154). Kocaker presented multiple personalities and characters that fit into what he believes to be true, such as being a helicopter pilot (V32/1154). Eisenstein did not know when this condition started and noted the sister had seemed surprised by the incorrect information Kocaker was giving them; the fact that Kocaker had previously admitted to being from New York did not make any difference to Eisenstein (V32/1158). Eisenstein could not identify any information or evidence suggesting that Kocaker suffered the delusions about his background around the time of Stanton's murder, but he believed that the sister's description of Kocaker being afraid of someone in the house in August 2004 represented some break with reality (V32/1180-84).

The defense also presented the testimony of Kocaker's

sister, Ana Maria Rivas, via videotape (V32/1186-1236). Rivas confirmed that Kocaker was raised in New York and that their mother worked as an executive secretary for Texaco and then at the United Nations (V32/1189-90). Kocaker's mother died in 1996, from leukemia (V32/1189). Kocaker's birth father was from Turkey and came to this country on a government exchange through the Department of Agriculture (V32/1193). After the father married Kocaker's mother and she was pregnant with Kocaker, the father returned to Turkey (V32/1193). The mother did not want to live in Turkey, as she learned that Kocaker's father had other wives and she would only have him for six months of the year (V32/1222). The father sent letters and pictures to the family on a regular basis but when Kocaker was about eleven years old, they learned the father had been killed in an accident (V32/1220-21).

Kocaker grew up in a household consisting of his mother and Ana, his younger sister (V32/1191). The family was small but very close and loving; they ate dinner together and played board games most evenings (V32/1191, 1212). Kocaker did not like Monopoly because it took too long but he enjoyed chess, which he played very, very well, even at a young age when playing against adults (V32/1212-13). There was extended family in the area, since Kocaker's mother's parents lived in Brooklyn and the

mother also had older children from an earlier marriage (V32/1192, 1195). Kocaker and Ana attended private schools and took skiing vacations to Vermont and New Hampshire in the winter, and spending most of the summers in Puerto Rico, where the mother and her family were from (V32/1196, 1202-04).

When Kocaker was about thirteen, the family moved down to Puerto Rico (V32/1205). The mother's parents had retired there, and Ana had been in an accident and the doctors had recommended intense therapy with swimming (V32/1205). While in Puerto Rico, Kocaker spent time hanging out with older men, including an American named Don (V32/1215). Ana did not care for the way Don treated Kocaker, as he was always critical and would physically punch or jab Kocaker in the arm (V32/1218). When Kocaker was about fifteen or sixteen he and Don came to Tampa to run a business; several months later Ana and their mother came to Tampa as well (V32/1219, 1223). Once in Tampa, Kocaker was not home much and his mother was upset that he wasn't going to school (V32/1224). Kocaker had skipped a grade ahead when he was younger and should have been in high school; Ana thought he made it to the tenth grade (V32/1225). Also in Tampa, Kocaker started getting in trouble with the law (V32/1225). The family was still very close and loving, and the mother and Ana tried to be supportive of Kocaker (V32/1226-29).

Kocaker had never indicated to Ana that he believed that he grew up in Tarpon Springs, and she never heard him talk about his mother having worked in a school cafeteria; these things were not true (V32/1219). Kocaker's father never lived in Punta Gorda and Kocaker never served in the military and was definitely not a helicopter pilot (V32/1220, 1223).

In rebuttal, Det. Klein testified that when Kocaker was interviewed following his arrest for violation of probation, he stated that he had been born in New York, that his father was Turkish and left the country in 1963, and that he did not want to go back to prison; he accurately recounted his criminal history (V33/1256-64).

Following the penalty phase, the jury recommended a death sentence by a vote of eleven to one (V3/177; V33/1320). The judge conducted a hearing pursuant to Spencer v. State, 615 So. 2d 688 (Fla. 1993), on December 22, 2008 (V21-22). The defense presented Dr. Richard Carpenter, a licensed psychologist (V21/11). Dr. Carpenter had initially evaluated Kocaker for competency and found him competent to proceed (V21/12). However, Carpenter believed that Kocaker was psychotic at the time of the crime and diagnosed Kocaker with a psychotic disorder not otherwise specified and a personality disorder not otherwise specified (V21/12). After reviewing medical records

and spending more time with Kocaker, Dr. Carpenter changed the diagnosis to schizophrenia paranoid type (V21/27).

The defense incorporated testimony from Dr. Jill Poorman from the pretrial competency hearing as well as a video deposition of Kocaker's aunt, Murtha Amador (V21/31-32).

Dr. Eisenstein also presented additional testimony (V21/33-V22/34). Dr. Eisenstein had reviewed newly obtained records from the Department of Corrections for additional mitigation, and he had received additional information from Kocaker's aunt and older half-brother, which caused him to change his diagnosis (V21/36-38, 44). Particularly the DOC records demonstrated that Kocaker was more appropriately diagnosed with schizophrenia, paranoid type (V21/45). Eisenstein identified specific records relating suicidal behavior, recommendations that Kocaker be housed at a facility with a psychiatrist, and various psychological diagnoses which support his opinion (V21/46-97). Among the records Eisenstein noted an episode on March 26, 2006, where Kocaker was believed to have suffered a major psychiatric event; a CAT scan at DOC was normal but Kocaker was taken to a hospital in Jacksonville and a MRI taken there showed lesions (V21/68-78). He was given psychiatric medications and improved (V21/76). Along with the schizophrenia paranoid type Eisenstein diagnosed Kocaker with intermittent explosive disorder (V21/104-

06).

The State presented testimony from licensed psychologist Dr. Michael Gamache (V22/41-105). Dr. Gamache was not retained to evaluate Kocaker but rather to review Dr. Eisenstein's findings (V22/86). He disagreed with several test results that had been obtained by Dr. Eisenstein based on the testing Gamache conducted, and he disagreed with Eisenstein's diagnosis of paranoid schizophrenia (V22/46-51, 62-71, 80, 86).

Gamache also noted that Kocaker claimed to be taking Depakote due to hearing voices but Depakote is an anticonvulsant, used for aggressive behavior and psychiatric conditions but not for auditory hallucinations or paranoid schizophrenia (V22/53-55). With Dr. Gamache, Kocaker maintained that he grew up in Tarpon Springs with both biological parents and served in the military as a helicopter pilot (V22/60-61). Gamache was not convinced that Kocaker believed these things were true, and characterized them as made up rather than delusions (V22/62).

Dr. Gamache reviewed extensive records, including prior evaluations and Dr. Eisenstein's raw testing data, and Dr. Gamache disagreed with the diagnosis of schizophrenia paranoid type (V22/62-71). Gamache explained that Kocaker's DOC records indicated that the March, 2006 episode was caused by a B-12

deficiency, which can cause an altered mental state and characteristics of dementia and was the key abnormal finding noted (V22/71-74). There was also the possibility of encephalopathy from Kocaker's HIV, and the noted lesions in the 2006 MRI which were suspicious, but could be clinically insignificant (V22/74). Dr. Gamache concluded that Kocaker was not mentally ill but suffered a B-12 deficiency and harbored drug and alcohol issues (V22/86).

There was a noted gap in DOC medical records for Kocaker from 1991 to 2006 (V21/19, 36). These records were discovered and made available to the parties for additional review following the first Spencer hearing (V23/5). Accordingly, a second Spencer hearing was held on September 30, 2008 (V23). The additional DOC records were admitted as an exhibit and again Dr. Eisenstein testified for the defense and Dr. Gamache testified for the State (V23/7, 8-96, 98-119).

Dr. Eisenstein felt the records corroborated his earlier testimony and continued to diagnose Kocaker with schizophrenia paranoid type, dissociative identity disorder, and intermittent explosive disorder (V23/9). However, Eisenstein acknowledged that the records were also consistent with the opinion that Kocaker was malingering and antisocial (V23/14). Also, for the first time, Eisenstein opined that both statutory mental

mitigating factors applied (V23/11-12).

Dr. Eisenstein acknowledged that the DOC records concluded that Kocaker's purported suicidal behavior were acts of manipulation, and that there was no indication in the records that Kocaker had experienced any delusions or claimed to have experienced any auditory hallucinations before Stanton's murder (V23/48-49, 66-67, 72, 89). Eisenstein insisted that Kocaker's repeated instances of swallowing razor blades were authentic suicide attempts, and concluded they were not acts taken merely to gain attention or obtain a change of location within the prison system because there are much easier ways to achieve such goals (V23/74-76, 88-89). According to Eisenstein, these acts were only found to be manipulative because Kocaker did not volunteer at the time that he was acting in response to hearing voices, but since Kocaker has now explained this to Eisenstein, the behavior fits Eisenstein's diagnosis (V23/48-50). Eisenstein also admitted that the exhaustive medical records did not reflect that Kocaker had ever been diagnosed with any schizophrenia, borderline personality disorder, dissociative identity disorder, or intermittent explosive disorder (V23/89).

Dr. Gamache continued to disagree with Eisenstein's diagnosis, noting there was no support in the records of even a self-report of hallucinations, and the diagnosis requires an

individual to be preoccupied with the delusional thoughts and typically auditory hallucinations that define the illness (V23/99, 111-13). Records indicated Kocaker had been prescribed Fluoxetine and Trazodone, which according to Dr. Eisenstein were antipsychotic medications, but according to Dr. Gamache were antidepressants (V23/18-21, 118). Dr. Gamache concluded that Kocaker's behavior in swallowing razor blades was not suicidal but were acts of malingering or manipulation, which was common in prison, and consistent with the conclusion noted in the records themselves (V23/108). Gamache was familiar with peer-reviewed studies which indicated a common reason for ingestion of foreign objects, which takes place much more frequently in correctional settings, is manipulation rather than mental illness (V23/107-08). Gamache noted that Kocaker's records reflected many instances of potentially manipulative behavior, as well as a history of criminal acts and impulsive behavior, but no delusions or hallucinations (V23/105, 109, 116).

On December 18, 2009, the trial court sentenced Kocaker to death for Stanton's murder (SV3/10-26). The court found three aggravating factors, which were all given great weight: Kocaker was on felony probation; Kocaker was previously convicted of violent felonies; and Stanton's murder was heinous, atrocious and cruel (SV3/11-15). In mitigation, the court analyzed the

statutory mental mitigating factors, and determined that they had not been proven but that Kocaker's "mental health issues" would be given moderate weight as nonstatutory mitigation (SV3/15-21). The court specifically found Dr. Gamache's testimony "to be much more persuasive" (SV3/17). The court also addressed twelve nonstatutory mitigating factors: it rejected two (defendant under the influence of crack cocaine at the time of the crime and the non-unanimous nature of the jury recommendation for death); gave "very little weight" to three (defendant called 911 to report the crime; defendant suffered head injuries as a child; defendant could not focus as a child due to possible Attention Deficit Disorder); and gave "some" weight to the remaining seven factors (loving relationships with family members; history of drug and alcohol abuse; defendant under the influence of alcohol at the time of the crime; brain damage; sexually abused as a child; defendant is HIV positive; birth father was absent). The court concluded that the aggravating circumstances were "horrendous" and "greatly outweigh the comparatively insignificant mitigating factors" (SV3/25).

SUMMARY OF THE ARGUMENT

The jury's verdict finding Kocaker guilty of the first degree murder of Eric Stanton is supported by competent, substantial evidence. Kocaker testified to his theory of defense, which suggested that Fury and/or others had killed Stanton; this theory was rejected by the jury and was inconsistent with the other evidence presented at trial.

A review of factually similar cases establishes that the death sentence is proportional in this case. As the trial judge below determined, the horrendous aggravating factors clearly outweighed the minimal mitigation presented, and there is no basis to reduce the sentence imposed on proportionality grounds.

This Court has repeatedly rejected Kocaker's claims as to the constitutionality of Florida's death penalty, both as to the procedures for imposition of a capital sentence and for execution by lethal injection.

ARGUMENT

ISSUE I

WHETHER THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT THE JURY VERDICT OF FIRST DEGREE MURDER.

Kocaker's first issue challenges the sufficiency of the evidence to support his first degree murder conviction. Kocaker claims that the evidence presented below was insufficient to support the jury's verdict, and therefore the court below should have granted his motion for judgment of acquittal (V30/837-38, 907). This claim is without merit.

The standard of review for the denial of a judgment of acquittal is *de novo*. Johnston v. State, 863 So. 2d 271, 283 (Fla. 2003), cert. denied, 541 U.S. 946 (2004); Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002), cert. denied, 539 U.S. 919 (2003). A judgment of conviction carries a presumption of correctness, and an appellate court cannot reverse a conviction that is supported by competent, substantial evidence. Terry v. State, 668 So. 2d 954, 964 (Fla. 1996); Conahan v. State, 844 So. 2d 629, 634-635 (Fla.), cert. denied, 540 U.S. 895 (2003). The evidence is sufficient to sustain a conviction if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt. Floyd v. State, 913 So. 2d 564, 571 (Fla. 2005); Johnston, 863 So. 2d at 283. In this

case, a review of the record demonstrates clear support for the jury verdict, and conclusively refutes Kocaker's claim.

There are special rules that apply in cases relying exclusively on circumstantial evidence. A motion for judgment of acquittal should be granted in a circumstantial evidence case if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. However, the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, an appellate court will not reverse. Darling v. State, 808 So. 2d 145, 155 (Fla.), cert. denied, 537 U.S. 848 (2002); State v. Law, 559 So. 2d 187, 188 (Fla. 1989). In meeting its burden, the State is not required to "rebut conclusively, every possible variation of events" which could be inferred from the evidence, but must introduce competent evidence which is inconsistent with the defendant's theory of events. Once the State meets this threshold burden, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. Darling, 808 So. 2d at 156; Law, 559 So. 2d at 189.

Although Kocaker invokes the circumstantial evidence rule,

some of the facts incriminating him in this murder were established by direct rather than circumstantial evidence. This Court has described direct evidence as "that to which the witness testifies of his own knowledge as to the facts at issue." Davis v. State, 90 So. 2d 629, 631 (Fla. 1956). According to Professor Ehrhardt, direct evidence is "evidence which requires only the inference that what the witness said is true to prove a material fact." See Ehrhardt, Florida Evidence § 401.1 (2000 ed.).

Accordingly, Kocaker's statements to Paul Sands admitting to being in jail because he "burned" someone and wishing he could kill his sister, too, for cooperating with the police was direct evidence of his guilt. Pagan, 830 So. 2d at 803-04 (direct evidence includes confessions and statements to third parties explaining intent and motive); Hardwick v. State, 521 So. 2d 1071, 1075 (Fla. 1988). In addition, the 911 phone call, in context with the video showing that Kocaker was making the call and discussing finding someone in the cab before he could actually see into the cab, was direct evidence of Kocaker's guilty knowledge. Since material facts were proven by direct as well as circumstantial evidence, there is no reason to analyze whether the State's case was inconsistent with any reasonable hypothesis of innocence. Floyd, 913 So. 2d at 571 ("This case

does not rest wholly on circumstantial evidence; thus the latter standard does not apply"); Conde v. State, 860 So. 2d 930, 943 (Fla. 2003), cert. denied, 541 U.S. 977 (2004); Pagan, 830 So. 2d at 803 (special rule applies if State's evidence is "wholly" circumstantial); Davis, 90 So. 2d at 631 (special rule applies where case proven "purely" on circumstantial evidence).

At any rate, the State's burden was clearly met in this case, and fully refutes the defense theory that someone else may have committed this murder. A review of the record establishes that Kocaker's theory of defense was directly rebutted by the evidence. Kocaker testified in his own defense, suggesting that Fury and/or someone among Fury's group of friends actually killed Eric Stanton (V30/843-854). According to Kocaker, Stanton picked Kocaker up at the store when Kocaker saw Stanton in his cab and flagged him down for a ride. When Kocaker asked to go to the Belleair Motel, Stanton asked Kocaker why he was going there; when Kocaker responded he was meeting some girls, Stanton asked if Kocaker could introduce him to a girl. Kocaker testified that Stanton said he would not charge Kocaker the cost of the cab ride if Kocaker would introduce Stanton to his friends. Once they arrived at the motel, Kocaker went looking for his friends and returned a few minutes later to find Stanton and one of the girls in the back of the cab. Kocaker went by

later and heard Stanton arguing with someone, presumably the perpetrator.

Kocaker's testimony was inconsistent with the other evidence presented below. His account of the events of August 31 is contrary to the testimony provided by Fury Powell, Heidi Kalous and Stephanie Brzoska. According to Kocaker, he flagged Stanton's cab and took it to the Belleair Motel, where Stanton met up with other people (V30/844, 848-49). According to Fury and Stephanie, they picked up Kocaker across the street from where Stanton's cab was found, and Kocaker was wearing a bloody shirt and counting money he had not had before (V28/602-06, 610; V29/703-07). Kocaker's claim that Crissy had borrowed his clothes when her shirt ripped and her zipper broke was inconsistent with Heidi's testimony about Kocaker getting a shower and change of clothes from Alvin, necessitated by Kocaker's wearing a shirt with blood all over it, allegedly from a bar fight (V29/687-90; V30/852-53, 862-65). Kocaker did not remember telling Heidi that he had a knife under the mattress and denied telling Fury that he was a killer (V30/865, 886).

The account provided by Kocaker was also refuted by the objective evidence provided by phone records and video cameras. For example, the cell phone records establish that Kocaker was up in the area of the Eckerd's when he called Fury after

midnight on September 1 (V5/48-56 [St. Ex. 14]; V27/489-90, 492). The video taken by the surveillance camera at the 7-11 corroborates the testimony that Fury, Stephanie and Kocaker went by the 7-11 and Kocaker walked around back to throw away the paper bag containing his bloody shirt (V5/73-79 [St. Ex. 18, 19]; V29/713-16). The State's cross-examination of Kocaker highlights the improbable and inconsistent nature of his theory of defense (V30/866-886).

Kocaker's argument appears to accept that his testimony cannot be reconciled with the testimony given by Fury, Heidi and Stephanie, because Kocaker asserts that they "had significant credibility issues" (Appellant's Initial Brief, p. 66). As this Court has repeatedly admonished, credibility determinations are resolved by the factfinders at trial. Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) ("It is the province of the trier of fact to determine the credibility of witnesses and resolve factual conflicts"); Jones v. State, 709 So. 2d 512, 514-515 (Fla. 1998) ("this Court, as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judge's conclusion"); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (as long as the trial court's findings are supported by competent substantial evidence, Supreme Court will not

substitute its judgment for that of the trial court on questions of fact, the credibility of the witnesses, or the weight to be given to the evidence). Because these witnesses provided testimony which was inconsistent with Kocaker's theory of innocence, the evidence below satisfied the State's burden, even for a case resting on circumstantial evidence.

Kocaker also attempts to minimize the evidentiary value of the T-shirt and gas can found in Stanton's cab, suggesting that neither was conclusively linked to him (Appellant's Initial Brief, p. 67). Given the testimony that the T-shirt was identical in size, shape and color to a shirt purchased by Kocaker's sister and given to him which could not be located at his house after the murder, the State is entitled to the inference that this was Kocaker's shirt. See Darling, 808 So. 2d at 155 (in moving for acquittal, defendant admits the facts in evidence, as well as every conclusion favorable to the State that the jury might fairly and reasonably infer from the evidence); Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). In addition, however, Kocaker provided an innocent explanation for the discovery of his shirt in the cab, claiming that he had let Fury's friend, Crissy, borrow his clothes the night that Stanton was killed (V30/852-52, 862-65). And, although Kocaker could not provide any explanation for how the gas can from his house

ended up under Stanton's body, the gas can was positively identified as being the can from that residence (V29/671-73).

In conclusion, the record provides ample support for the jury verdict convicting Kocaker of Stanton's murder. Direct and circumstantial evidence established that Kocaker needed money, and was picked up the night of the murder across the street from the scene, wearing a bloody shirt and counting cash. He admitted to being a killer, to possessing a knife that night, and to "burning" Stanton. His T-shirt and a gas can from his residence were found in Stanton's cab, and his behavior upon seeing the cab the next morning was independently inculpatory. The State proved beyond any reasonable doubt that Eric Stanton was killed and that Kocaker had the motive and opportunity and was the actual perpetrator. The court below properly denied the defense motion for judgment of acquittal, and this Court must affirm Kocaker's conviction for Stanton's murder.

ISSUE II

WHETHER THE SENTENCE OF DEATH IS PROPORTIONAL.

Kocaker next asserts that his death sentence is disproportionate. This Court's *de novo* proportionality review does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). When factually similar cases are compared to the instant case, the proportionality of Kocaker's sentence is evident.

The court below found three aggravating circumstances: (1) defendant on felony probation, (2) prior violent felony convictions (manslaughter in 1981 and eight armed robberies in 1990), and (3) heinous, atrocious or cruel (SV3/11-15). Although the court did not apply the aggravating factors of pecuniary gain or murder committed during a robbery, these aggravating facts can be considered as part of this Court's proportionality review. See Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997) (noting brutality of attack in upholding proportionality of sentence, despite trial court's failure to

find HAC). The court rejected the statutory mitigating circumstances but weighed Kocaker's mental health issues and family background as nonstatutory mitigation (SV3/6-15). The court characterized the aggravating circumstances as "horrendous" and concluded that they "greatly outweigh" the mitigation presented (SV3/16). The jury recommended the death sentence by a vote of eleven to one (V3/177; V33/1230).

This Court has affirmed imposition of the death penalty in a number of similar cases. In Pace v. State, 596 So. 2d 1034, 1035-36 (Fla. 1992), the defendant killed a taxicab driver in order to obtain money. Pace was on parole at the time of the murder and had a prior violent felony conviction; the trial court also weighed the fact that the murder was committed in the course of a robbery. The mitigation presented involved the defendant's positive character traits. And in Kight v. State, 512 So. 2d 922, 924 (Fla. 1987), where the defendant and a friend killed a cab driver, the aggravating factors were (1) during the course of a robbery and (2) heinous, atrocious or cruel, based on multiple stab wounds. As in the instant case, the judge in Kight rejected both statutory mental mitigating factors, as well as the statutory mitigator that the defendant was acting under the substantial domination of another; despite Kight's low intelligence and history of an abusive childhood,

the death sentence was appropriate. See also Hayes v. State, 581 So. 2d 121, 126-127 (Fla. 1991) (defendant and a friend robbed and shot a cab driver in order to obtain money for drugs; the crime was found to be cold, calculated and premeditated and the trial court rejected statutory mitigation based on defendant's age of 18 as well as the statutory mental mitigating factors, weighing nonstatutory mitigation of low intelligence, developmentally learning disabled, and product of an abusive and deprived environment); Smith v. State, 641 So.2d 1319, 1323 (Fla. 1994) (defendant shot cab driver in the back during robbery attempt; although Smith had a prior violent felony conviction, the mitigating factor of no significant criminal history was also found, along with nonstatutory mitigation relating to Smith's background and character).

Notably, in Sinclair v. State, 657 So. 2d 1138 (Fla. 1995), where this Court reversed a death sentence imposed for the killing of a cab driver on proportionality grounds, the only aggravating factor was that the murder was committed during a felony; mitigation included Sinclair's low intelligence, emotional disturbance, cooperation with police, and lack of a father figure. Thus, reviewing similar crimes where defendants have killed cab drivers in order to obtain money, the death sentence is uniformly upheld where the defendant has at least

one prior violent felony conviction. Kocaker has multiple prior violent felony convictions, including a prior homicide. In addition, the substantially weighty factor of heinous, atrocious and cruel was also found here, whereas most cab driver murders are accomplished quickly with a firearm and with no HAC finding. Under the circumstances presented here, death is appropriate.

Kocaker claims that his case presents more compelling mitigation due to his "severe mental illness" (Appellant's Initial Brief, p. 70). The trial court's findings as to the mental health mitigation presented clearly refute Kocaker's theory that his mental deficits provided compelling mitigation. The court below extensively addressed and specifically rejected the defense claims of extreme disturbance and substantial impairment:

> II. MITIGATING FACTORS
>
> A. Statutory Factors
>
> 1. The crime for which the Defendant is to be sentenced was committed while under the influence of extreme mental or emotional disturbance. § 921.141(6)(b), Fla. Stat.
>
> Evidence was presented during the penalty phase indicating that the Defendant currently has mental health issues.
>
> Frank B. Wood, Ph.D, a neuroscientist/neuropsychologist, testified that the Defendant's brain has been abnormally shaped since birth, inasmuch as his right hemisphere is much smaller than his left hemisphere. This could cause dysfunction in understanding social context, leading

to bizarre behavior. However, on cross-examination, Dr. Wood admitted that he could not testify as to the severity or the form of the effects on behavior, if any.

Hyman Eisenstein, Ph.D, a clinical psychologist, testified that he interviewed the Defendant in 2006, 2007, and 2008. The Defendant gave Dr. Eisenstein information about his background. The Defendant stated to the doctor that he was born and grew up in Tarpon Springs. The Defendant joined the army and attended boot camp in Virginia. The Defendant was then a helicopter pilot in Vietnam.

During the penalty phase, the Defendant testified concerning his background. The Defendant stated that he was born in Tarpon Springs on August 4, 1963. The Defendant indicated that he lived with his mother and sister in Tarpon Springs. Thereafter, the Defendant moved to Naples to live with his uncle, and then moved to live with his father in Punta Gorda. The Defendant joined the military and trained in Richmond, Virginia. The Defendant became a helicopter pilot in Vietnam.

However, the Defendant's half-sister presents a different personal history for the Defendant. She testified that the Defendant was born in New York. The Defendant lived with his mother and sister in New York City, upstate New York, and Puerto Rico. The Defendant's father was from Turkey and had to move back to Turkey before the Defendant was born. According to his sister, the Defendant never joined the military.

Dr. Eisenstein testified that the Defendant's mental health diagnosis is a "difficult one to figure out," since "everything he says is usually not true." Days before the penalty phase hearing, Dr. Eisenstein concluded that the Defendant suffers from "disassociative identity disorder," which is also known as multiple personality disorder. This disorder involves a loss of memory and changes in the Defendant's personality so that he believes that this false background history is accurate information at the time. Dr. Eisenstein indicated that this disorder may have been developed as a method to avoid thinking

about bad things that happened in childhood.

The Defendant's sister indicated that her mother once told her that the Defendant was sexually abused when he was ten or eleven years old in Marine Park in Brooklyn. However, the sister also testified that she and the Defendant "had a pretty good childhood." They went to private schools. They went skiing in New Hampshire and Vermont. They spent the summers in Puerto Rico. They "really had fun" on their vacations. Their mother was loving and affectionate. The Defendant's older half-brother and grandfather were father figures for the Defendant. The Defendant was outgoing, friendly, and happy. In short, the testimony of the Defendant's sister indicates that there was not much negativity about the Defendant's childhood to cause a multiple personality disorder.

Further, in reaching his diagnosis, Dr. Eisenstein was not made aware of some very vital information. Just two weeks after the murder, the Defendant was interviewed by Detective Thomas Klein. The Defendant told Detective Klein that he was born in New York and that he and his sister had the same mother but different fathers. The Defendant indicated that his father was from Turkey and was gone in 1963, the year the Defendant was born. In short, the Defendant accurately recounted his personal history soon after the murder. Additionally, after the Spencer hearing, approximately 3000 additional pages of DOC medical records were found and were reviewed by Dr. Eisenstein and Michael Gamache, Ph.D, a clinical psychologist. Dr. Gamache testified at the second Spencer hearing that DOC records reflect that for over twenty years while incarcerated prior to the murder, the Defendant accurately reported his personal history to the DOC staff and doctors. Therefore, it can be concluded that the Defendant was not suffering from "disassociative identity disorder" at the time of the murder. If the Defendant genuinely developed this mental disease or defect, it was after he murdered Eric Stanton.

Moreover, the Defendant was able to provide intimate details about the night in question when he testified during the guilt phase. The Defendant even

tried to manipulate the facts by implying that Antoine Powell, his cocaine source, was the actual killer.

Although the Defendant testified during the guilt phase and the penalty phase, he never indicated that he was under the influence of extreme mental or emotional disturbance at the time of the murder. Numerous witnesses had contact with the Defendant shortly before and shortly after the murder, and none of them indicated that the Defendant was suffering from a mental or emotional disturbance.

At the Spencer hearing, Dr. Eisenstein advanced an entirely new theory, concluding that the Defendant also suffers from schizophrenia, paranoid type. Dr. Eisenstein relied primarily upon the Defendant's medical records from the Department of Corrections. Dr. Gamache testified that in reviewing the DOC records he did not find "any credible or consistent evidence that [the Defendant] suffers from any type of psychotic disorder, including paranoid schizophrenia or schizoaffective disorder." After the Spencer hearing, approximately 3000 additional pages of medical records were found and were reviewed by Dr. Eisenstein and Dr. Gamache. Thereafter, Dr. Eisenstein reiterated his opinion at the second Spencer hearing. Dr. Gamache presented testimony once more disputing the findings of Dr. Eisenstein. The Court finds the testimony of Dr. Gamache to be much more persuasive.

The DOC medical records indicate that the Defendant ingested razor blades numerous times while in prison. Further, when the Defendant met with Dr. Eisenstein in 2006, 2007, and 2008, long after the murder, he told the doctor that he heard voices and the voices told him to hurt himself. However, the DOC records indicate that prior to 2006, the Defendant denied ever having delusions or hallucinations. Dr. Eisenstein conceded that the Defendant's "auditory hallucinations only became apparent in 2006" after the Defendant began to report that he heard voices. Dr. Eisenstein conceded that the DOC records do not reflect that the Defendant had reported that he suffered from delusions or hallucinations prior to 2006.

Dr. Eisenstein referenced several medications taken by the Defendant while in prison prior to 2004. Dr. Eisenstein characterized these medications as "major antipsychotic medications." Dr. Gamache refuted this characterization and explained that the medications were used to treat anxiety and would not have been administered for persons having delusions or hallucinations. Prior to the murder, the Defendant was treated in prison for depression—never for psychosis. [FN2] The prison doctors determined that the ingestions of razor blades were acts of malingering and manipulation, designed to effectuate transfers to more desirable environments.

> [FN2] This Court notes that at the Spencer hearing it was disclosed that almost two years after the murder, in March 2006, the Defendant was admitted to Memorial Medical Center in Jacksonville and was prescribed antipsychotic medications. Dr. Gamache noted that there was no diagnosis of paranoid schizophrenia, but he was treated for a B12 vitamin deficiency. Dr. Gamache indicated that antipsychotic medication may be prescribed "just to get the person over the hump until they are restored to normal B12 levels" and it "is not indicative of the belief necessarily that there is an independent mental illness that accounts for the symptoms."

At the first Spencer hearing the Defendant admitted into evidence the transcript of the testimony of Jill Poorman, Ph.D., Court Psychologist for the Sixth Judicial Circuit, from the Defendant's competency hearing conducted on January 3, 2008. Her testimony supports the conclusion that the Defendant's ingestions of razor blades were acts of malingering and manipulation. In discussing these acts, she indicated that "it sounded as though it was an attention-seeking type event." Dr. Poorman further testified that the Defendant was not given an Axis I diagnosis while confined at the Pinellas County Jail. He only had been prescribed the "mood stabilizer" Depakene, also known as Depakote. She explained that this medication is used when an individual has "mood instability" or sleep disorders. Dr. Poorman stated that "[i]t's part of the treatment for what we call an

affective disorder as opposed to a thought disorder." Dr. Gamache confirmed in his testimony at the first Spencer hearing that Depakote is not an antipsychotic medication.

Defendant's sister stated that she never perceived her brother to be hearing voices. However, she related that when he was staying at her home prior to the murder there was an intense tropical storm with hard rainfall and "lots of wind blowing and stuff." She stated that her brother came to her stating that he believed someone was in the house and that he had seen someone. The police arrived to discover there was no intruder. In her testimony, Defendant's sister confirmed that there were no other instances in which her brother indicated that he saw or heard anything that was nonexistent. At the Spencer hearing, Dr. Gamache explained that this incident was not an auditory hallucination, but was more "akin to a visual hallucination which would be atypical in paranoid schizophrenia." The sister had indicated that she suspected that the incident may have been related to drug ingestion which Dr. Gamache surmised was "a pretty good hypothesis under the circumstances and consistent with the kind of paranoia that you see with the abuse of drugs, especially amphetamines."

Most significantly, the Defendant never told anyone, including Dr. Eisenstein, that he suffered from delusions or hallucinations at the time of the murder.

The Court cannot find that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the murder. However, the Court does consider the Defendant's mental health issues to be a non-statutory mitigating factor and the Court will give it moderate weight.

> 2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. § 921.141(6)(f), Fla. Stat.

The evidence established that the Defendant fully

appreciated that his conduct was criminal, inasmuch as the Defendant worked diligently to conceal his culpability.

The Defendant set the taxicab and the victim afire to conceal the robbery. The Defendant threw his shirt and his gas can into the fire to hide his involvement. The Defendant discarded his shoes. The Defendant put on a new shirt because the shirt he had been wearing became bloody when he tried to conceal the robbery and murder. The Defendant told people that he needed a shower and a change of clothes. The Defendant told people that he was bloody because he had been involved in a bar fight. The Defendant took a shower to wash away the blood. The Defendant obtained a change of clothes from a man named Alvin. The Defendant put his bloody clothes into a bag and discarded them in a trashcan in front of a 7-Eleven store. The Defendant called 911 but indicated that he could not get involved because he might get into trouble. Post-Miranda, [FN3] the Defendant denied any involvement in the crime and tried to implicate Antoine Powell.

[FN3] Miranda v. Arizona, 384 U.S. 436 (1966).

The Defendant's understanding of the criminality of his conduct continued during the trial. The Defendant recognized that he had evidentiary challenges during the guilt phase, inasmuch as the Defendant's shirt and gas can were found in the burnt taxicab. The Defendant tried to exonerate himself and implicate Antoine Powell during the guilt phase. The Defendant testified that he gave his shirt to Mr. Powell's friend, a girl named Chrissy, before the murder because her shirt was ripped. The Defendant testified that Mr. Powell dropped him off at his house before the murder, implying that Mr. Powell would have known about the Defendant's gas can. The Defendant further testified that he observed Mr. Powell arguing with the victim in the cab shortly before the murder. Accordingly, the Court cannot find that the capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired. From the very start, the Defendant knew his actions were criminal and tried to evade the consequences of his criminal

conduct.

> Dr. Hyman Eisenstein testified that his intelligence testing of the Defendant indicated an IQ of just 70. However, Dr. Michael Gamache disputes this conclusion and the Court finds the testimony of Dr. Gamache to be much more persuasive. Dr. Gamache conducted his own evaluation and determined that the Defendant's IQ was 90, which is consistent with the results from the IQ tests performed by the Department of Corrections, where the Defendant earned a G.E.D.
>
> According to the Defendant's sister, as a child the Defendant was bright enough to skip a grade in school and to challenge adults in chess, inasmuch as he was "very, very good at chess." The Court finds that the Defendant had the mental ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.
>
> Numerous witnesses had contact with the Defendant before and shortly after the murder, and none of them indicated that they observed any behavior on the behalf of the Defendant that led them to believe the Defendant's capacity to conform his conduct to the law was substantially impaired. The Defendant testified at the guilt phase and at the penalty phase of the trial and he never indicated that he was suffering from a diminished capacity at the time of the murder. The Defendant never told anyone—not even Dr. Eisenstein—that he was having delusions or hallucinations at the time of the murder.
>
> Accordingly, the Court cannot find that the Defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. However, the Court does consider the Defendant's mental health issues to be a non-statutory mitigating factor and the Court will give it moderate weight.

(SV3/15-21).

Thus, the court expressly credited Dr. Gamache's finding that Kocaker was not mentally ill. The court's mitigation

analysis is fully supported by the evidence presented, and is not even challenged on appeal. Dr. Eisenstein initially testified that Kocaker suffered from multiple personality disorder, but changed his diagnosis at the Spencer hearing, finding Kocaker to be a paranoid schizophrenic (V23/45, 104-06). However, Dr. Gamache explained that Kocaker suffered from a B-12 deficiency which had been misdiagnosed as paranoid schizophrenia (V23/62-74). Kocaker could currently be suffering deterioration of the brain due to his HIV and was found to have lesions in a 2006 MRI (V23/74). While Kocaker's proportionality argument relies on this Court finding he is severely mentally ill, the testimony to support that assertion was specifically rejected below and cannot be used as a basis for reducing Kocaker's sentence.

The cases cited by Kocaker do not compel a different result. The cases he relies upon were not as aggravated; Carter v. State, 560 So. 2d 1166 (Fla. 1990), was a jury override, and four other cases had only a single aggravating factor, see Knowles v. State, 632 So. 2d 62 (Fla. 1993), DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), White v. State, 616 So. 2d 21 (Fla. 1993), and Nibert v. State, 574 So. 2d 1059 (Fla. 1990). In the only case with three aggravating factors, Crook v. State, 813 So. 2d 68, 75 (Fla. 2002), the mental mitigation was

particularly compelling because it was directly linked to the commission of the murder, which did not happen in the instant case.

The most obvious distinction, however, lies in the fact that in the cases Kocaker cites, the trial courts either found or should have found statutory mitigation based on the defendants' mental deficits. See Crook v. State, 908 So. 2d 350, 359 (Fla. 2005) (both mental mitigating factors, along with age of 20, weighed as statutory mitigation); Hawk v. State, 718 So. 2d 159, 163 (Fla. 1998) (trial court weighed substantial impairment along with age of 19); Morgan v. State, 639 So. 2d 6, 13-14 (Fla. 1994) (trial court weighed extreme disturbance but should have also found age of 16 and substantial impairment along with other nonstatuory mitigation); Knowles, 632 So. 2d at 66-67 (trial court's rejection of statutory mental mitigation found improper on appeal); White, 616 So. 2d at 25 (trial court weighed both statutory mental mitigators); Nibert, 574 So. 2d at 1061-63 (trial court's rejection of both statutory mental mitigating factors found improper on appeal); Carter, 560 So. 2d at 1168-69 (trial court found statutory mental mitigation); and Miller v. State, 373 So. 2d 882, 883-86 (Fla. 1979) (both statutory mental mitigators weighed, with observation that the aggravating factor of heinous, atrocious or cruel was linked to

Miller's mental illness). The only exception is DeAngelo, where the trial court determined that, although the statutory mental mitigating factors were not proven, DeAngelo suffered from organic personality syndrome, organic mood disturbance, and bipolar disorder, as testified to by his defense expert, Dr. Berland. DeAngelo, 616 So. 2d at 443. That is not helpful to Kocaker, since the trial judge in his case not only rejected the statutory mental mitigation, but rejected the testimony of the defense mental health experts and found Dr. Gamache's opinion that Kocaker was not mentally ill to be credible (V22/86; SV3/17).

Kocaker's other nonstatutory mitigation is no more persuasive. The court below provided "some" weight to Kocaker's brain damage, sexual abuse as a child, and lack of father figure, but the evidence of these circumstances was not compelling. Kocaker's brain damage amounts to the fact that the right hemisphere is smaller than the left hemisphere (SV3/22-23). There was no evidence of the severity of the damage or the impact it would have upon Kocaker's mental functioning. Unlike the brain damage discussed in Crook and Miller, there was no testimony to link the damage to the commission of this crime or any of the aggravating circumstances.

Whatever "sexual abuse" Kocaker endured as a child is not

developed in the record; the total evidence as to this factor was testimony from Kocaker's sister that Kocaker's mother once mentioned to the sister that Kocaker had been sexually abused at a park near his grandparents' house in Brooklyn (V32/1213-14). From the location, the sister could offer that Kocaker would have been no more than ten or eleven years old, but since neither the sister nor Kocaker had any independent knowledge or information about the incident to share, this factor offers little reason to reduce Kocaker's moral culpability for Stanton's murder.

The lack of a birth father did not prevent Kocaker from having a "happy and privileged childhood" (SV3/23). According to Kocaker's sister, his grandfather and older half-brother were father figures for the family (V32/1195). In assessing this factor, the court noted the testimony about Kocaker's childhood: going to private schools, and vacationing in New England in the winters and Puerto Rico in the summers (SV3/23-24). Again Kocaker's childhood provides little basis to mitigate Stanton's murder.

In conclusion, the extensive analysis of the mental health testimony by the trial judge below is critical to this Court's proportionality review. The sentencing order reflects a careful and considered evaluation of the evidence presented regarding

Kocaker's mental abilities and deficiencies. When Kocaker's evidence of mitigation is viewed in the context of the trial court's findings, the mitigation is properly characterized as minimal and insignificant. Weighed against Kocaker's extensive, violent criminal history and the heinous nature of the offense, his mental and emotional shortcomings do not compel a life sentence. This Court must reject his claim of a disproportionate sentence and affirm the death penalty imposed in this case.

ISSUE III

WHETHER FLORIDA'S PROTOCOLS AND THE USE OF LETHAL INJECTION AS A METHOD OF EXECUTION VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT.

Kocaker next challenges lethal injection as a method of execution, claiming that Florida's current procedures for execution by lethal injection violate the Eighth Amendment prohibition against cruel and unusual punishment. This claim is reviewed *de novo*. Tompkins v. State, 994 So. 2d 1072, 1080-81 (Fla. 2008).

Kocaker's claim of unconstitutionality relies on Baze v. Rees, 553 U.S. 35 (2008), and the December, 2006 execution of Angel Diaz. This Court has repeatedly rejected this claim, and Kocaker offers no basis for reconsideration of the well-established law disposing of this issue. See Ventura v. State, 2 So. 3d 194, 198-201 (Fla. 2009); Schoenwetter v. State, 46 So. 3d 535, 549-51 (Fla. 2010); Darling v. State, 45 So. 3d 444, 447 (Fla. 2010); Peterson v. State, 2 So. 3d 146, 156-57 (Fla. 2009); Tompkins, 994 So. 2d at 1080-82; Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), cert. denied, 553 U.S. 1059 (2008); Schwab v. State, 969 So. 2d 318 (Fla. 2007), cert. denied, 553 U.S. 1059 (2008). This Court must deny relief.

ISSUE IV

WHETHER FLORIDA'S CAPITAL SENTENCING PROCESS IS CONSTITUTIONAL.

Kocaker's final claim disputes the validity of Florida's capital sentencing procedures. Specifically, Kocaker claims that Florida's process violates the Sixth Amendment to the United States Constitution as interpreted in Ring v. Arizona, 536 U.S. 584 (2002). This is a purely legal issue which is reviewed *de novo*.

This Court has repeatedly rejected this claim in cases where, as here, the prior violent felony conviction aggravating factor has been properly applied. McGirth v. State, 48 So. 3d 777, 796 (Fla. 2010); Miller v. State, 42 So. 3d 204, 216-19 (Fla. 2010); Peterson, 2 So. 3d at 160; Frances v. State, 970 So. 2d 806, 822 (Fla. 2007); Coday v. State, 946 So. 2d 988, 1005-1006 (Fla. 2006); State v. Steele, 921 So. 2d 538 (Fla. 2005). Kocaker has not provided any new law or argument to compel a different result. Accordingly, relief must be denied.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the conviction and sentence imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Andrea M. Norgard, Special Appointed Public Defender, P. O. Box 811, Bartow, Florida, 33831, this 18th day of February, 2011.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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