IN THE SUPREME COURT OF FLORIDA

GHENGIS KOCAKER,

Appellant,

vs. CASE NO. SC10-229
Lower Ct.:CRC04-19874CFANO

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal consists of 30 volumes and two supplemental volumes. Volumes 1-20 contain the documents filed with the clerk and the competency hearing; these volumes will be reference in this brief by the volume number, "R" and the appropriate page number. It should be noted that the volumes are not sequentially numbered- each volume begins with page 1 and continues, so pagination in this brief will follow the page numbers per the record. The remaining volumes contain the transcripts and will be referenced by the volume number, "T", and the page number. The page numbering location is inconsistent in volumes 21-23- the page number referenced for volumes 21 and 23 is found at the top of the page; the page number referenced for volume 22 and the sentencing hearing in volume 23 is found at the bottom of the page. The Sentencing Order is contained in a supplemental volume, which will be referenced as "SR" followed by the page number.

STATEMENT OF THE CASE AND FACTS

On November 17, 2004, the grand jury for the Sixth Judicial Circuit, in and for Pinellas County, indicted the Appellant, Mr. Genghis Kocaker for the offense of first-degree murder in the death of Eric Stanton on August 31,

2004 contrary to Fla. Stat. 782.04(1)(a).(V.1,R14-15) The State filed a Notice of Intent to Seek the Death Penalty on December 7, 2005.(V.1,R39)

Competency Proceedings:

The trial court ordered competency evaluations of Mr. Kocaker in response to a defense request on October 1, 2007.(V1.,R103-106) The trial court conducted a competency hearing on January 3, 2008.(V.20,R35) The following testimony was presented:

Dr. Hyman Eisenstein testified that he is a licensed psychologist and is familiar with the competency standards.(V.20,R39) He evaluated Mr. Kocaker in February 2007 and reviewed other materials.(V.20,R41) A competency evaluation was completed.(V.20,R43) Dr. Eisenstein found Mr. Kocaker was incompetent to proceed in both his ability to disclose pertinent facts surrounding his case to counsel and to testify relevantly on his own behalf.(V.20,R48-52)

Dr. Jill Poorman testified that she works from the criminal complex with her primary duty being to conduct competency evaluations.(V.20,R71) Dr. Poorman was ordered to conduct an evaluation of Mr. Kocaker in March.(V.20,R72) Dr. Poorman met with Mr. Kocaker, reviewed some materials provided by Dr. Eisenstein, reviewed jail records, and

talked to trial counsel.(V.20,R73) Mr. Kocaker was receiving Depakote, a mood stabilizer at the time of the evaluation. The jail staff had not made an Axis I diagnosis. Dr. Poorman did not know why he was being given Depakote.(V.20,T74) Mr. Kocaker reported that he hears voices that tell him to hurt himself, but he tries to ignore them. (V.20,R80) He reported service in the Vietnam war as a helicopter pilot.(V.20,R80) Dr. Poorman believed that Mr. Kocaker truly believes he is hearing voices and is not making this up.(V.20,R81) Although Mr. Kocaker could not go through from beginning to end what happened and said he was very intoxicated at the time of the offense, Dr. Poorman felt that Mr. Kocaker was competent.(V.20,R76-78)

Dr. Richard Carpenter testified on January 7, 2008 that he evaluated Mr. Kocaker for competency on October 9, 2007.(V.20,R96) Dr. Carpenter met with Mr. Kocaker. Mr. Kocaker told him he was taking Geodon, which Dr. Carpenter knows to be an antipsychotic medication.(V.20,R97) Mr. Kocaker had an odd persona, but was cooperative.(V.20,R98) Mr. Kocaker said he took Geodon because he hears voices.(V.20,R98) Dr. Carpenter diagnosed Mr. Kocaker with Psychotic Disorder NOS and ruled out schizophrenia.(V.20,R99) Dr. Carpenter found Mr. Kocaker

to be competent.(V.20,R101)

The trial court found Mr. Kocaker to be competent.(V.20,R114)

A second evaluation by Dr. Carpenter was ordered on May 30, 2008.(V.2,R53)

The following motions were filed by the defense challenging the death penalty: Lethal Injection is Cruel and Unusual Punishment (V.2,R11-28) and a Death Sentence is Unconstitutional under Ring (V.2,R29-44).

Mr. Kocaker was tried by a jury and a verdict of guilty as charged was reached on June 12, 2008.(V.3,R166) Following a penalty phase, the jury returned an advisory verdict of 11-1 in favor of death on June 13, 2008.(V.3,R177)

The parties filed sentencing memorandums: the State on November 9, 2009 and the defense on November 16, 2009.(V.4,T48-110) The trial court imposed a sentence of death on December 18, 2009.(V.4,R111-114)

A Notice of Appeal was filed on January 14, 2010.(V.4,R167-68)

Trial Testimony:

The testimony at trial presented by the State is summarized as follows:

Ms. Ruthy Doles serves as the records custodian for the Pinellas County Emergency Communications Center.(V.26,T295) She reviewed the records of 911 calls for September 1, 2004 and obtained a recorded call advising that police were needed at Eckerd's drug store located at Missouri and Bellaire.(V.26,T299) The caller reported a man was dead inside a cab.(V.26,T299-305) It was stipulated that Eric Stanton was the deceased in the cab.(V.27,T478)

Greg Boos, formerly of the Clearwater Fire Rescue, responded to the 911 dispatch on September 1, 2004.(V.28,T548) He arrived somewhere between 7 and 8 am.(V27,T549) Mr. Boos observed a barefoot male wearing shorts, a t-shirt, and wire framed glasses when he arrived.(V28,T549) Mr. Boos saw a yellow cab in a parking space on the side of the Eckerd's store.(V.28,T550) The driver's door was ajar, the windows were shut.(V.28,T550) It was not possible to see inside the vehicle without opening the door.(V.28,T550) When Mr. Boos opened the door he saw an obviously deceased person in the car.(V.28,T550) There was a strong odor of gasoline.(V.28,T552) The man told him he came upon the cab, but was leaving because he was on probation.(V.28,T553)

Detective Thomas Klein was the case agent for this crime.(V.29,T738) He arrived at the scene and directed the investigation.(V.29,T739) The trunk of the cab contained a cut, bloodied seat belt with a knot in it.(V.29,T741) The back seat was kicked forward so someone could pass through from the trunk into the car.(V.29,T741) Mr. Stanton was found in the front seat of the cab.(V.29,T742) There was a gas can on the front seat next to the body.(V.29,T742) A grey colored t-shirt covered in blood was inside the cab.(V.29,T743) The windows of the cab were covered in soot.(V.29,T749) There were smears on the interior of the windows.(V.29,T750) It appeared from the smears that someone had been moving inside the cab.(V.29,T750)

Allen Weatherilt was the driver's service manager for Yellow Cab in September 2004.(V.26,T374) Mr. Weatherilt testified that yellow cabs have a two way communications radio system and a meter that interact together.(V.26,T375) The cabs have a GPS. All the documents related to Mr. Stanton's cab were given to the police.(V.26,T376) Mr. Stanton drove vehicle number 227.(V.26,T380) Records from the cab and computer showed that vehicle 227 was dispatched to zone 012 [downtown Clearwater] at 9:29 on August 31, 2004.(V.26,T380) At 9:32 the log indicated "meter on",

which would mean that vehicle 227 was flagged down.(V.26,T382) Twenty-five minutes later the log showed “meter off”.(V.26,T382) At 10:00 the driver “Booked a request”- which meant he had asked to go out of service for awhile.(V.26,T383) Log records showed that Mr. Stanton picked up a fare by Albertson’s grocery about one third of a mile from Eckerd’s.(V.29,T758)

On September 1, 2004, the GPS logged an outgoing message at 9:53 am looking for vehicle 227.(V.26,T384) No return message from the driver was received.(V.26,T385)

The police requested the security tapes from Eckerd’s for September 1, and those were pulled by store manager Michelle Dews.(V.26,T315) The tapes do not run twenty-four hours, but they are date and time stamped.(V.26,T320) Security tapes were also obtained from a 7-11 located at Clearwater-Largo road for September 1, 2004.(V27,T481)

CST technicians took digital photos of the crime scene, but video taping was unsuccessful.(V.26,T322-327) Still photos were admitted into evidence.(V.26,T328-343) Items of evidence were collected from the cab including a grey t-shirt with suspected blood(V.26,T342); a cut seatbelt (V.26,T340); and apparent blood samples from the trunk and other areas of the car.(V.26,T342;347) The cab

was also processed for fingerprints.(V.26,T348) Some partial prints were obtained.(V.26,T350) A gas can was collected.(V.26,T353)

The grey t-shirt tested positive for blood and DNA profiles were obtained from the t-shirt.(V.28,T563) DNA from Mr. Stanton was found on the t-shirt as a major contributor.(V.28,T565) DNA from a second individual was present from samples from the shirt identified as 18D.(V.28,T566) This “minor contributor” did not have a profile developed.(V28,T567) A DNA profile was developed from a cigarette butt found on the ground by the cab.(V.28,T567) The person whose DNA was on the cigarette butt could not be excluded as the minor contributor of DNA from the t-shirt.(V.28,T568)

Mr. Stanton’s DNA was identified from blood samples obtained from the seat belt and swabs taken from inside the vehicle.(V.28,T572-576)

Because the cab had been burned, Detective Karl Cruise, of the Pinellas County Sheriff’s arson unit, also processed the cab and crime scene to determine the origin and cause of the fire.(V.26,T356) The fire was intentionally set.(V.26,T368) Det. Cruise believed that the gasoline was the fuel for the fire.(V.26,T359;367) There

was a strong odor of gas emitting from the cab.(V.26,T361) A gas fire burns hot, at temperatures around 1879 degrees Fahrenheit.(V.26,T359) It will burn fast, consuming more oxygen.(V.26,T359) Det. Cruise observed the gas cap of the cab was opened and he was able to pry out a burnt paper wick from the gas filler neck.(V.26,T361) In most cases a wick will not work because it will be consumed by the fuel it is soaked in and if contained, will not have sufficient oxygen to burn.(V.26,T362) Det. Cruise determined that the fire most likely started in the rear floorboard area as evidenced by the burn pattern.(V.26,T363;367) A second, partially burnt wick was found on the rear passenger floorboard.(V.26,T367) The fire traveled up the seat, then out and across the headliner.(V.26,T363) When the headliner caught fire it began to melt.(V.26,T364-65) Evidence from the back seat suggested that at the time the fire started the back seat was up, then the victim came from the trunk into the back seat by pushing the seat out and ended up in the front seat.(V.26,T365) Some drippings from the headliner were found on the victim’s face and arm.(V.26,T366) The fire self-extinguished when it ran out of oxygen due to the shut doors and rolled up windows of the cab.(V.26,T368)

Dr. Noel Palma went to the crime scene on September 1, 2004 and observed the interior of the cab and Mr. Stanton's body inside.(V.27,T445) She performed an autopsy on Mr. Stanton.(V.27,T446) The exterior of the body had first and second degree burns on the face and extremities and a horizontal incised wound on the neck. (V.27,T449) The wound did not cut the trachea.(V.27,T449) There were stab wounds to the upper left back.(V.27,T451) There was a contusion to the top of the head.(V.27,T451) There was skin slippage on the finger on the right hand due to burns.(V.27,T449)

The neck wound would not produce large amounts of bleeding.(V.27,T452) The stab wounds to the back were major injuries that would produce substantial bleeding.(V.27,T453) The wound produced a fractured rib and went into the left lung.(V.27,T453) The wound caused the left lung to be ineffective- causing large bleeding and trouble breathing.(V.27,T456) Without treatment, this wound was fatal.(V27,T457) The instrument that caused this injury was likely a serrated knife.(V.27,T458-9)

First and second degree burns covered 80-85% of the body.(V27,T460) The burns were largely caused while Mr. Stanton was still alive.(V.27,T461) Soot was found in the

trachea, indicating the person was alive and breathing during the fire.(V.27,T452) The carbon monoxide in Mr. Stanton's blood was significant.(V.27,T462) The 61% rate indicated Mr. Stanton died from oxygen starvation.(V.27,T465) No determination could be made whether or not Mr. Stanton was conscious when the fire was occurring.(V.27,T468)

Officer James Beining was asked to do a neighborhood canvas of the area surrounding the Eckerd's. He also obtained the phone number from the 911 caller and left a message at that number.(V.27,T411) A man identified as "Nic" called back. Officer Beining met "Nick" at a bus stop.(V.27,T413) Off. Beining identified Mr. Kocaker as the person he found sitting on the bench.(V.27,T413) When asked how he found the cab, Mr. Kocaker said he had been coming down Bellaire Road and was late for work. Mr. Kocaker said he cut across the Eckerd parking lot and as he walked through the area he saw the cab and a bunch of change and things on the ground.(V.27,T416) Mr. Kocaker said he went up to the cab and saw a driver's license on the ground, then noticed the door was slightly open.(V.27,T416) Mr. Kocaker said he looked through the window and saw a guy laying on the seat, so he opened the

door and discovered the man appeared to be dead.(V.27,T416) Mr. Kocaker then called 911.(V.27,T416) Mr. Kocaker said he touched the body to find a pulse and snapped his fingers in front of the man's face.(V.27,T416) Mr. Kocaker said he threw the driver's license back down.(V.27,T417) Mr. Kocaker said he left the scene because he was on probation and identified his probation officer.(V.27,T417) Mr. Kocaker said he had been out with friends the night before, but could not account for his time.(V.27,T417) Off. Beining called back to the crime scene and learned that no driver's license was found on the ground.(V.27,T418) Mr. Kocaker agreed to go back to the crime scene.(V.27,T418) Off. Beining took Mr. Kocaker back to the scene in his patrol car.(V.27,T418)

Off. Beining was present while Det. Klein interviewed Mr. Kocaker at the crime scene.(V.27,T419;V.29,T751) Mr. Kocaker said he got off work on August 31 around 6-6:30 pm.(V.27,T419) He ate dinner, took a shower, and spent some time with his nephew. He left the house between 8-9:00 pm and went to Albertson's grocery store.(V.27,T420) He bought vodka and returned home. Mr. Kocaker left again around 10:00 pm and went to Walmart, which is about a mile from Eckerd's.(V.27,T420) He met some people there and

went with them back to an unknown location between a motel and a house.(V.27,T420;V.29,T755) Mr. Kocaker found the cab and victim when he cut across the parking lot on his way home the next morning.(V,27,T421)

After Mr. Kocaker was taken home, the Eckerd video was reviewed by law enforcement.(V.27,T426) The video was played to the jury.(V.27,T426) Cameras 8 and 9 from the store depicted the cab and north side of the building and the parking lot.(V27,T429;V.29,T759) The video showed Mr. Kocaker making a call.(V.27,T431) Mr. Kocaker was never shown to be walking across the parking lot.(V.26,T432) He appears to come from around the corner of the building.(V.27,T433) He pulls his phone out before he gets to the cab, which is unlike his statement that he called 911 only after he opened the door to the cab.(V.27,T433) Mr. Kocaker was wearing different clothes in the video than the clothes he was wearing when he was met at the bus stop.(V.27,T435)

Det. Cruise and Det. Beining returned to Mr. Kocaker's residence.(V.26,T369;V.27,T436) Det. Cruise had watched the Eckerd's video and observed that Mr. Kocaker was wearing different clothes when they met with him a few hours later.(V.26,T370) Mr. Kocaker said he had changed

clothes and had already washed the clothes that he had been wearing at Eckerds.(V.26,T370) The clothes were obtained from the washing machine.(V.26,T371;V.27,T436)

Cellular phone records were obtained and the cellular tower for phone number 727-488-0777 was identified.(V.27,T488-492) The phone subscriber was Coronado Martin.(V.27,T493)

The video-taped testimony of Ann Maria Rivas was played to the jury.(V.27,T495) Mr. Kocaker is Ms. Rivas' brother.(V.27,T498) Mr. Kocaker came to live with Ms. Rivas and her son in June 2004. She got him a job at PODS, where she worked.(V.27,T498) Mr. Kocaker did not have a car, but used a bus or bike to get around.(V.27,T499) Ms. Rivas purchased Mr. Kocaker some clothing, including a grey t-shirt, and shoes.(V.27,T499;507;V29,T744) Mr. Kocaker had a cell phone, whose number was 727-488-0777.(V.27,T500) On August 31 and September 1, 2004, Ms. Rivas was in Dallas on a business trip.(V.27,T501) Mr. Kocaker stayed at her home with her son.(V.27,T502) When she arrived home about 12:30 am on September 1, her son was there but Mr. Kocaker was not.(V.27,T503) Mr. Kocaker was not at home when Ms. Rivas got up around 5:30 am.(V27,T504) Mr. Kocaker called around 7:30 am as Ms. Rivas was leaving to take her son to

school.(V27,T505) Mr. Kocaker said he would be late for work because he as going to the doctor to get his medication changed.(V.27,T505) Mr. Kocaker did not mention a 911 call.(V.27,T506)

Ms. Rivas was asked by the police to look in her home for the grey shirt, but couldn't find it. (V.27,T508;V.29,T744) The grey shirt was Fruit of the Loom brand, size medium.(V.27,T514;V29,T748)

After speaking to the police, Ms. Rivas went into a bathroom and saw reddish-brown droplets in the bathtub.(V27,T509) She took pictures of the droplets and gave them to the police.(V.27,T510)

A gas can was missing from the front of the house.(V.27,T516) Ms. Rivas felt the gas can found at the crime scene matched the missing gas can. Ms. Rhonda Fradkin was in charge of mowing the grass at the home on Jefferson Street. Ms. Rivas rented the home from Ms. Fradkin's nephew and future niece.(V.29,T668) Ms. Fradkin noticed that one of the two gas cans she kept at the house was missing. It was faded and had old black paint on it.(V.29,T671) Ms. Fradkin assumed it had been stolen, but was later asked to look a photos of the gas can found at Eckerd's.(V.29,T672) The gas can in the picture was the

missing faded gas can.(V.29,T672)

Antoine “Fury” Powell testified that in September 2004 he was selling crack cocaine.(V.28,T579) He has 16 or 17 prior felony convictions and has been to prison once before.(V.28,T621) He had previous convictions for robbery.(V.28,T621) He is currently on probation for driving charges.(V.28,T620) A VOP was pending at the time of trial.(V.28,T626) Mr. Powell denied being promised anything for his testimony.(V.28,T631)

On the morning of August 31, 2004, Mr. Powell was pumping gas when he was approached by Mr. Kocaker.(V.28,T581) Mr. Kocaker said his name was “Wolf”.(V.28,T582) Eventually Mr. Powell sold Mr. Kocaker $20 of crack cocaine.(V.28,T583) They exchanged phone numbers.(V.28,T583) Mr. Powell’s number was 656-2185.(V.28,T585) A paper containing the name Fury and the above phone number was in Mr. Kocaker’s wallet at the time of his arrest.(V.29,T764) The number showed up on Mr. Kocaker’s cell phone records.(V.29,T764)

Later that afternoon Mr. Powell noticed a call on his cell phone from Mr. Kocaker.(V.28,T585) Mr. Powell returned the call and additional drug sales were arranged.(V.28,T587) Mr. Powell went and picked up Mr.

Kocaker at the Salvation Army.(V.28,T588) Mr. Kocaker wanted to find some girls who would party and exchange sex for drugs.(V.28,T588) Mr. Powell assisted him in securing this by taking Mr. Kocaker to the Bellaire Hotel.(V.28,T588) Mr. Kocaker rented a room at the Bellaire. There were more discussions about procuring drugs and women.(V.28,T589) Mr. Powell sold Mr. Kocaker crack cocaine once or twice more that evening.(V.28,T589) Mr. Powell also talked to some girls he knew that worked that area, but the business end of the deal was up to the girls.(V.28,T595) Mr. Powell took Chrissy, Toni, Stephanie, and Heidi to the motel to meet with Mr. Kocaker.(V.28,T596) Mr. Powell was in communication with Mr. Kocaker by cell phone during this time.(V.28,T597)

Mr. Kocaker stayed in room 40 and Mr. Powell spent the night in room 39.(V.28,T598) At some point in the evening Mr. Kocaker ran out of money.(V.28,T598) Mr. Kocaker still wanted crack.(V.28,T599) Mr. Kocaker offered a necklace and ring, which Mr. Powell took for drugs.(V.28,T599) Mr. Powell left the next morning with the jewelry.(V.28,T600) He gave some of the jewelry to his girlfriend.(V.28,T600)

Mr. Powell saw Mr. Kocaker leaving his room on Monday morning.(V.28,T602) Mr. Kocaker called Mr. Powell on

Tuesday and told him he would have the money to get the ring and necklace back.(V.28,T602) Mr. Kocaker called again about 11 pm to meet with him.(V.28,T603) They met at Walgreen's on Bellaire road.(V.28,T604) Stephanie drove Mr. Powell to Walgreen's, but there was no sign of Mr. Kocaker.(V.28,T605) Mr. Kocaker then appeared out of no where, got into the car, and they drove off.(V.28,T606)

Mr. Kocaker had money, he was counting it. He was very jittery.(V.28,T606) Mr. Powell didn't have the jewelry- it was at his house.(V.28,T607) They went to a 24-hr. laundromat to talk.(V.28,T609)

At the laundromat Stephanie stayed in the car while Mr. Powell and Mr. Kocaker got out.(V.28,T610) Mr. Powell then saw that there was a lot of blood on Mr. Kocaker's shirt.(V.28,T610) Mr. Kocaker began to ask Mr. Powell if he knew anyone who "wanted some killers on their team."(V.28,T610) Mr. Kocaker kept walking around saying he had to clean his shirt.(V.28,T610) Mr. Powell asked Mr. Kocaker if he had robbed or killed someone and Mr. Kocaker said "that's what he did".(V.28,T611) They got back in the car and returned to the Bellaire Motel.(V.28,T611) Mr. Kocaker was dropped off and Mr. Powell went to get the jewelry because Mr. Kocaker had money.(V.28,T611)

The trip to get the jewelry took about 20 minutes.(V.28,T612) Before they got to the motel they saw Mr. Kocaker on the street.(V.28,T612) Mr. Powell was calling Mr. Kocaker and saw his phone light up.(V.28,T613) They picked up Mr. Kocaker and went to 7-11 so Mr. Powell could get a Black & Mild.(V.28,T613) Mr. Kocaker was wearing different clothes and was carrying a plastic bag.(V.28,T613) The bag was stuffed with the clothes and shoes he had on before.(V.28,T614) The shirt Mr. Kocaker was wearing had a collar and was blue.(V.28,T614) Mr. Kocaker got out at the 7-11 and cut down an alley.(V.28,T615) He was gone a minute or so and returned without the bag.(V.28,T616) Mr. Powell and Mr. Kocaker exchanged the money for the jewelry.(V.28,T619) Mr. Powell didn't see Mr. Kocaker again.(V.28,T619)

Stephanie Brzoska, a resident of the county jail at the time of her testimony for a VOP for sale and possession of crack cocaine, testified that she had just started smoking crack in the summer of 2004.(V.29,T700) She had a valid driver's license and knew a dealer named Fury.(V.29,T701) She drove Fury around to get crack.(V.29,T703) On August 31-Spetember 1, she drove Fury to Walgreens and picked up someone who owed him

money.(V.29,T705) It was late because everything was closed.(V.29,T705) After a few minutes of waiting the man got in the car and introduced himself as “Wolf”.(V.29,T706) Ms. Brzoska identified Mr. Kocaker as Wolf.(V.29,T706)

Ms. Brzoska felt the man was weird and he kept telling her not to believe what she saw on TV.(V.29,T707) They went to a laundromat, where she stayed in the car.(V.29,T708) Then they went to the Bellaire Motel.(V.29,T709) Wolf got out and Ms. Brzoska and Fury went to Fury’s house.(V.29,T709) Fury went inside, came out, and they were heading back to the motel when they saw Wolf walking on the road.(V.29,T710) Wolf had a beer and a plastic bag. He was wearing a blue shirt instead of a white shirt.(V.29,T711) They picked him up and went to 7-11.(V.29,T712) Wolf went between the 7-11 and the other building and when he came out he didn’t have the bag.(V.29,T712) He threw something into a trash can.(V,29,T712) Ms. Brzoska viewed the video from the 7-11 and identified herself and Wolf on the video.(V.29,T714)

Later that night Wolf came to where she was living.(V.29,T715) He wanted Heidi or Chrissy, but they were sleeping, so he left.(V.29,T715)

Heidi Kalous, who was serving a prison sentence for

sale and possession of cocaine at the time of her testimony, had nine other felony convictions.(V.29,T678) She lived in Clearwater/Largo in September 2004.(V.29,T678) She was using and selling crack cocaine then.(V.29,T679) She was familiar with the Bellaire Motel.(V.29,T679) She met someone named “Wolf” through “Fury”.(V.29,T680) Fury sold crack and set her up with Wolf at the Bellaire Motel.(V.29,T680) She identified Mr. Kocaker as “Wolf”.(V.29,T681) She and Toni met Wolf in his room on a Sunday.(V.29,T683) They smoked crack, drank, and “conversated.”(V.29,T683) At one point Wolf left to get condoms and beer and told Ms. Kalous and Toni there was a knife under the bed if they needed it.(V.29,T684) When Wolf returned they took money from him to buy crack for him, but left and didn’t return.(V.29,T685) Ms. Kalous went back later that night and Mr. Kocaker was with a different prostitute named Tracy.(V.29,T686)

Ms. Kalous saw Mr. Kocaker a few days later in “Alvin’s” room at the motel.(V.29,T687) Several people were there smoking crack.(V.,29,T687) Mr. Kocaker asked Ms. Kalous and a girl named Chrissy where he could get a change of clothes.(V.29,T688) Mr. Kocaker had on a white

shirt that had blood all over it from a fight he had gotten into.(V.29,T688-9) Mr. Kocaker took a shower and borrowed a blue collared shirt from Alvin.(V.29,T688)

Paul Sands was in the Pinellas county jail in 2004.(V.29,T726) He was being transported with four other men, one named Wolf.(V.29,T726) Sands identified Mr. Kocaker as Wolf.(V.29,T727) Wolf said he was going back to Pinellas county for a VOP and he didn't want to go.(V.29,T727) He was scared he would go to the row for a long time.(V.29,T728) Wolf said he had "burned somebody" but it was "justified".(V.29,T728) He did not explain what "burned" meant.(V.29,T7;29)

Later in the jail Mr. Sands was by the phone with Mr. Kocaker.(V.29,T729) Mr. Kocaker was angry after his call and threw his lunch down.(V.29,T729) He said he wished he could kill his sister because she wanted him to cooperate and because she felt he had involved her friends and her son, and because she threw his clothes away.(V.29,T730) Mr. Kocaker said he didn't want to get the death penalty and he didn't want to go to the row for a long time.(V.29,T731)

The defense presented the following testimony:

Mr. Kocaker testified that he was 44 years old and had 15 prior felony convictions.(V.30,T843) Mr. Kocaker stated he did not kill Mr. Stanton.(V.30,T843)

Mr. Kocaker had moved in with his sister at the house on Jefferson in June 2004.(V.30,T854) Ms. Rivas was out of town when this happened and Mr. Kocaker was supposed to watch his 14 year old nephew.(V.30,T855)

Mr. Kocaker testified he flagged Mr. Stanton down and was picked up.(V.30,T844) They drove for awhile until Mr. Kocaker was dropped off at the Bellaire Motel.(V.30,T844) Mr. Kocaker wanted to go there to talk with the girls, Chrissy, Heidi, and Toni, from the night before.(V.30,T845)

Mr. Kocaker described meeting Fury [Antoine Powell] at a gas station.(V.30,T846) Mr. Kocaker was drinking and Fury asked him if he partied and then took him to the Bellaire Motel.(V.30,T846) They exchanged phone numbers.(V.30,T860) Mr. Kocaker bought drugs from Fury and Fury said he would send some girls over. Mr. Kocaker spent all his money on drugs on Sunday night.(V.30,T869) He traded jewelry for drugs the next day.(V.30,T869) Mr. Kocaker had more money at home, which he got, because he had saved money since he didn’t pay rent.(V,30,T877) Mr. Kocaker called Fury on Tuesday to say he had money to get

the jewelry back.(V.30,T879)

The girls were prostitutes, but Mr. Kocaker just wanted to talk to them.(V,30,T847) Mr. Kocaker did not recall having a knife at the hotel or telling the girls there was one under the mattress.(V,30,T865)

Mr. Kocaker stated that while he had Mr. Stanton were driving, he told Mr. Stanton about the girls. Mr. Stanton asked him if he could be introduced to a girl. Mr. Stanton said that if Mr. Kocaker “hooked him up” he wouldn’t charge for the cab ride.(V.30,T848) Mr. Kocaker got out of the cab at the Bellaire and looked around. He couldn’t find anybody, so he went back to the cab. Mr. Stanton was in the back of the cab with a girl, possibly Chrissy.(V.30,T848)

Mr. Kocaker asked to be driven to get cigarettes, but Mr. Stanton didn’t want to leave the back seat. Mr. Stanton gave Mr. Kocaker the keys to the cab and told him to be careful and not crash. Mr. Kocaker drove to the store and back while Mr. Stanton stayed in the back seat messing around with Chrissy.(V.30,T849) Mr. Kocaker parked at the motel and left. Later that night Mr. Kocaker was outside and heard an argument in the cab, but he didn’t know who was in the cab.(V.30,T849) Mr. Kocaker saw Fury

and another man, Andre Johnson around the motel that night.(V.30,T850) Mr. Kocaker did not see Mr. Stanton alive again.(V.30,T851)

The next morning Mr. Kocaker was walking home from the Bellaire motel.(V.30,T851) He was approaching the Eckerd Drugstore, cutting across the parking lot.(V.30,T852) Mr. Kocaker had found Mr. Stanton's driver's license.(V.30,T852) Mr. Kocaker saw the cab and went to it.(V.30,T852) He saw Mr. Stanton laying there, looking messed up so he called 911.(V.30,T852) Mr. Kocaker didn't want to stay because he was on probation.(V.30,T852) He didn't tell the police he knew Mr. Stanton because he didn't want to be involved.(V,30,T866)

Mr. Kocaker had looked at the Eckerd tape. He didn't understand the tape and the timing of the phone call he was making on the tape. (V.30,T876)

Mr. Kocaker had been wearing a light colored t-shirt that night.(V.30,T852) He gave his shirt to one of the girls, Chrissy, because her shirt was torn up.(V.30,T853) He also gave her his pants because the zipper on her pants was busted.(V.30,T862) There was no blood on the t-shirt when he gave it to her.(V.30,T853) Chrissy borrowed some clothes for Mr. Kocaker to wear from someone named

Alvin.(V.30,T863) Mr. Kocaker put Chrissy's ripped clothes and his shoes in a plastic bag.(V.30,T864) The shoes were hurting his feet.(V.30,T864)

Mr. Kocaker went home, changed, and went to the bus stop to go to work. He had no more contact with Fury or the girls.(V.30,T853)

Mr. Kocaker had no idea how the gas can from his sister's house got taken.(V.30,T875) Mr. Kocaker denied telling Fury he jacked or killed people.(V.30,T886)

Mr. Kocaker was arrested on a VOP on September 3, 2004.(V.30,T857)

Mr. Kocaker talked to the police on the night he was arrested, September 3, 2004, and again on September 16 and September 24, 2004.(V,30,T858) Mr. Kocaker couldn't recall when he told the police about the cab, he didn't have the police reports and couldn't remember.(V.30,T867) Mr. Kocaker told a friend on September 16 about Chrissy and the ripped shirt.(V.30,T868) Mr. Kocaker did tell the police about Fury and the girls.(V.30,T872)

The State's rebuttal evidence is summarized as follows:

Detective Keith Johnson testified that he was the assistant case agent for this case.(V.30,T892) He had a

conversation with Mr. Kocaker on September 1 at the Eckerd store where Mr. Kocaker described the path he took across the parking lot.(V.30,T892) Mr. Kocaker said he met people in a red convertible at Walmart and spent the evening with them.(V.30,T897)

Det. Johnson interviewed Mr. Kocaker again on September 3 after his arrest.(V.30,T894) Det. Johnson drew a map of the Eckerd parking lot and Mr. Kocaker marked his path on that map.(V.30,T89506) Mr. Kocaker claimed to have come around the front of the store and around the north side.(V.30,T896) Mr. Kocaker continued to adhere to the Walmart/red car story.(V.30,T897) Mr. Kocaker did not mention Fury or the prostitutes.(V.30,T898) Mr. Kocaker, when asked about the number for Antoine Powell from his cell phone, didn’t say he knew who that was.(V.30,T899)

Det. Klein testified that they did not learn of the gas can until after Mr. Kocaker had been interviewed, so he was not asked about it.(V.30,T905) Det. Klein admitted that Mr. Kocaker told him that he believed that Fury and Chrissy had killed Mr. Stanton and set him up, but it could not be confirmed.(V.30,T905)

Mr. Kocaker was convicted of first-degree murder.(V.31,T1027)

PENALTY PHASE:

The State's evidence is summarized:

The State introduced Exhibits 1-9, consisting of a prior conviction for manslaughter, and eight prior convictions for robbery with a deadly weapon.(V.32,T1065)

Mr. Ryan Kranz, a probation officer for DOC, testified that he supervised Mr. Kocaker on his probation.(V.32,T1066) Mr. Kocaker was released from prison on June 28, 2004 after an incarceration that began on January 2, 1991.(V.32,T1067) Probation was violated on September 3, 2004.(V.32,T1067)

The defense evidence is summarized:

Dr. Frank Wood, currently a professor of neuroscience in Liverpool, England, and formerly a professor at Wake Forest University School of Medicine for 34 years, is a neuroscientist, neuropsychologist, and Baptist minister. (V.32,T1069-70) Dr. Wood's area of specialty is the relationship between brain damage and behavior and the measurement of brain damage by neuroimaging techniques.(V.32,T1070) This area includes the use of PET scans. Dr. Wood was accepted as an expert by the court.(V.32,T1073)

In this case Dr. Wood met with Mr. Kocaker at the

National PET Scan Center in St. Petersburg. Mr. Kocaker was injected with a sugar based radioactive isotope that would enter his brain.(V.32,T1073) The rate of consumption of sugar in the brain would be reflected in the PET scan. (V.32,T1073) Between the injection and the scan, Mr. Kocaker was given a computer test to ensure he was awake and to measure brain activity.(V.32,T1073) After doing this test for 40 minutes Mr. Kocaker would stand up. This test standardizes his brain activity and ensures he would not fall asleep.(V.32,T1074) PET scans and a CT scan are done in order to compare the color "storms" against the brain structure.(V.32,T1075)

Dr. Wood concluded that Mr. Kocaker's brain is abnormally shaped- the right hemisphere is smaller than the left to a degree that exceeds normal limits.(V.32,T1075) There was a substantial area of hypometabolism, meaning reduced sugar consumption in the right hemisphere indicating reduced brain activity in the areas where human beings do processing of auditory information.(V.32,T1076)

Dr. Wood reviewed the deposition of Ms. Rivas and the results from Dr. Eisenstein's testing.(V.32,T1077) It was his opinion that Mr. Kocaker's brain was abnormal from birth or in utero.(V.32,T1078) The abnormality is not

slight.(V.32,T1079) An area of sugar consumption on the right side of the brain stem was so abnormal that Dr. Wood recommended a MRI to rule out the presence of a brain tumor.(V.32,T1079) An MRI ruled out a tumor, but the radiologist did feel that the ischemic stem on the parietal lobes showed infection caused by HIV.(V.32,T1080) The observed abnormalities are consistent with the diagnosis made by Dr. Eisenstein.(V.32,T1080) The brain abnormality would be consistent with a history of not understanding surrounding social context, bizarre behavior, and impaired auditory processing.(V.32,T1081) Head trauma would not have caused the great size difference between the left and right hemisphere, but would add additional strains and contributed to the unusual way Mr. Kocaker's brain functions.(V.32,T1082)

Mr. Kocaker testified that he was born in 1963 to Nora Huddleston. He was born in Tarpon Springs and never lived anywhere else as a child.(V.32,T1099) He has a sister named Ana Maria, who lived with him for awhile.(V.32,T1099) His mother cleaned offices at night.(V.32,T1099) Mr. Kocaker lived in Naples with an uncle when he was a teenager for a little while and with his father in Punta Gorda for a little while.(V.32,T1100) His father was

Greek.(V32,T1100)

Mr. Kocaker graduated from Tarpon Springs High School. He was trained as a medivac helicopter pilot in Richmond, Virginia. He was in the service and served in the Vietnam war.(V.32,T1100) On cross Mr. Kocaker maintained that he lied about his age to get into Vietnam- he was 16 but claimed to be 18. His eye injury did not affect his service.(V32,T1105) He was not in prison when he was 18, he was in Vietnam.(V.32,T1106)

He has never lived in New York City or Puerto Rico. He has never seen snow. He does not recognize a young girl and boy depicted in picture skiing- but it is not him.(V.32,T1102)

Mr. Kocaker has had an eye injury since birth called astigmatism.(V.32,T1101) He cannot see from that eye and cannot control it.(V.32,T1101) He was diagnosed with HIV while in jail in 1992.(V.32,T1102) He has a nickname, “Wolf”.(V.32,T1103)

Mr. Kocaker denied telling the police he was born in New York, he was born in Tarpon.(V.32,T1104) His father was not Turkish, but Greek.(V.32,T1105)

Mr. Kocaker denied being in prison for 24 years, he was in prison from 1983-1992, then 1992 until

2004.(V.32,T1106)

Dr. Hyman Eisenstein is a licensed psychologist in Florida with a clinical practice as well as an assessment and evaluation practice.(V.32,T1108) He is board certified in neuropsychology and an ordained rabbi.(V.32,T1108) With no objection, Dr. Eisenstein was accepted as an expert.(V.32,T1110)

Dr. Eisenstein evaluated Mr. Kocaker beginning in February 2007. At the first meeting he conducted a clinical interview and conducted some neuropsychological measures.(V.32,T1111) The initial findings were significant- Mr. Kocaker claimed to a Vietnam vet, yet could not be due to his age and the corresponding dates of the Vietnam war.(V.32,T1112) There were also issues with his eye.(V.32,T1112)

Mr. Kocaker claimed to have been born and raised in Tarpon Springs, to have gone to boot camp in Virginia, and done a tour of duty in Vietnam.(V.32,T1113) The biographical data he gave Dr. Eisenstein was consistent with his trial testimony.(V.32,T1114)

Additional testing was done in March 2007. On the Weschler Adult Intelligence Scale Mr. Kocaker had a full scale IQ of 70, a verbal scale of 74 and performance scale

of 70.(V.32,T1115) These scores are in the borderline range of intellectual functioning.(V.32,T1115) Mr. Kocaker is in the bottom 2% of the population- 98% of the general population will score higher. Mr. Kocaker was given several tests that measure right brain functioning, which he performed poorly on.(V.32,T115-6) Mr. Kocaker performed poorly on tests measuring brain efficiency.(V.32,T1120) The TOMM test which can detect malingering was lower than perfect, but still valid. He level of performance was unclear on that test.(V.32,T1119) Testing revealed red flags about overall cognitive brain ability.(V.32,T1120) In testing to detect frontal lobe functioning, Mr. Kocaker was in the brain damaged range for the area of the brain that controls decision making.(V.32,T1121) Other tests indicated immaturity and regression, depression, and significant abnormality.(V.32,T1122)

At a second interview in March 2007 Mr. Kocaker reported hearing voices while on two psychotropic medications- Geodon and Cogentin.(V.32,T1124) Mr. Kocaker had, in the past, swallowed razor blades and cut himself, indicating the voices generally have the quality of self-injury.(V.32,T1125)

Attempts were made to confirm the biographical data

Mr. Kocaker had given, but no confirmations could be obtained.(V.32,T1129) Clinical interviews were done with Ms. Rivas, the younger sister, and an older brother.(V.32,T1129) Both reported the family lived in New York City and Mr. Kocaker was raised in Manhattan, Queens, and Brooklyn.(V.32,T1129) The mother was an executive secretary at the United Nations.(V.32,T1129) The children, including Mr. Kocaker, skied in Vermont in the winter.(V.32,T1130) Mr. Kocaker was never in Vietnam and had no training as a helicopter pilot.(V.32,T1130) Mr. Kocaker did not have an eye injury since birth, he lost his eye while incarcerated after another inmate shot him with a paperclip.(V.32,T1130) When confronted with these revelations, Mr. Kocaker maintained his sister was “tripping” and this was not true.(V.32,T1133)

Ms. Rivas also advised that a brick was dropped on Mr. Kocaker’s head when he was a child and he hit his head on a metal door a few years later. The latter injury required stitches.(V.32,T1149)

A second test for malingering was administered in March 2008.(V.32,T1135) Mr. Kocaker had perfect scores, indicating no malingering.(V.32,T1137) Mr. Kocaker is also

HIV positive, which could have some dementia issues or loss of cognitive abilities.(V.32,T1149) Mr. Kocaker has a long history of alcohol abuse despite incarceration.(V.32,T1149)

Dr. Eisenstein reviewed the report of Dr. Poorman, which contained information and observations of Mr. Kocaker consistent with his own.(V.32,T1143-5)

Based on his own testing, interviews, and the findings of Dr. Wood, Dr. Eisenstein believed that Mr. Kocaker has brain impairment and abnormalities. He has neuropsychological abnormalities. His ability to make decisions is greatly impaired, as is his ability to come up with alternatives. He has some evidence of ADHD, as reported by the sister, as well as HIV and alcohol usage.(V.32,T1152) Dr. Eisenstein believed, utilizing the DMSIV that Mr. Kocaker has Dissociative Identity Disorder or multiple personality disorder based on evidence of memory gaps, auditory hallucinations, psychotic behavior that was currently being treated with psychotropic medication, and seclusion.(V.32,T1154-60;69) Mr. Kocaker has suffered mental illness his whole life, including in September 2004.(V.32,T1160)

Ms. Rivas testified via video that she is Mr. Kocaker's sister.(V.32,T1189) She and her family grew up

in New York City.(V.32,T1189) They also lived for awhile in Puerto Rico.(V.32,T1189) Their mother, Carmen Armadore, died in 1996.(V.32,T1189) Mrs. Armadore worked for the United Nations and as executive secretary for Texaco.(V.32,T1190) She and Mr. Kocaker attended Catholic school in New York.(V.32,T1191) Ms. Rivas, Mr. Kocaker and their mother were very close.(V.32,T1191;1203) They spent summers in Puerto Rico together and took many skiing vacations to Vermont.(V.32,T1203)

Mr. Kocaker took care of Ms. Rivas when she was little by helping her on the subway when they went to school. He was rambunctious and outgoing.(V.32,T1203) Mr. Kocaker would get in trouble frequently at school for doing mischievous things.(V.32,T1211) He had trouble focusing in school- his mind raced from one thing to another. Ms. Rivas suspected he was ADHD.(V.32,T1212)

They moved to upstate New York at one point and both went to public school for a year.(V.32,T1207) After Ms. Rivas was injured by a car, the family moved to Puerto Rico for a period of time.(V.32,T1204-5;1215)

Ms. Rivas recalled that once when they were playing in Brooklyn an neighbor child climbed a tree and dropped a brick on Mr. Kocaker’s head that required a trip to the

hospital and some stitches.(V.32,T1208) Mr. Kocaker was also had stitches in his head after he was caught in a large metal door.(V.32,T1209-10)

Before their mother died, Ms. Rivas asked her some questions about Mr. Kocaker, who seemed effeminate to her.(V.32,T1213) Her mother responded that Mr. Kocaker had been sexually molested in Marine Park in New York.(V.32,T1214) Because her mother was very ill with cancer, Ms. Rivas didn't press the issue and her mother died before any more information about this was given.(V.32,T1214) Marine Park was close to their grandparent's Brooklyn home, which meant Mr. Kocaker had to be under ten when this happened.(V.32,T1214)

While they were in Puerto Rico, when Mr. Kocaker was 12 or 13, he developed relationships with some older men.(V.32,T1215) Mr. Kocaker would stay with the men at their condo a lot.(V.32,T1217) Ms. Rivas saw the condo once and described it as "gaudy" and "over the top."V.32,T1217) Ms. Rivas thought the relationship between Mr. Kocaker and these men was odd.(V.32,T1218) She was not comfortable with it and thought Mr. Kocaker was mistreated.(V.32,T1218) Mr. Kocaker ended up leaving

Puerto Rico at age 16 with one of the men, Don, to help in his business.(V.32,T1219) Eventually, Ms. Rivas and her mother moved to the Tampa area.(V.32,T1219)

The family reunited in Tampa lived together, although Mr. Kocaker was seldom at their apartment.(V.32,T1224) He was supposedly working for Don.(V.32,T1224) Mr. Kocaker would not go to school, which caused problems with their mother.(V.32,T1225) Ms. Rivas believed Mr. Kocaker only completed 10th grade.(V.32,T1225)

Mr. Kocaker got in trouble with the law in Tampa when he was 16 and 17.(V.32,T1226) They tried to be supportive, but Mr. Kocaker continued to get in trouble.(V.32,T1226) Eventually Mr. Kocaker went to prison.(V32,T1227)

Ms. Rivas continued to maintain contact with Mr. Kocaker in prison.(V.32,T1228) Their mother found a way to visit until she died from cancer in 1996.(V.32,T1228) She wrote letters, sent books and magazines, she was very devoted.(V.32,T1229) The other family members stopped communication with him, but would ask about him.(V.32,T1230)

Mr. Kocaker had a hard time in prison because he was nice looking and small.(V.32,T1230) He got beat up a lot.(V.32,T1230) He would get in trouble, sometimes his

fault, sometimes not.(V.32,T1231) His eye was injured in prison and he can't see out of it.(V.32,T1232) Ms. Rivas learned from Mr. Kocaker that he was HIV positive in 1997.(V.32,T1231) She moved back to Florida from Puerto Rico when she found out.(V.32,T1232)

Ms. Rivas didn't think Mr. Kocaker's mental health was very good.(V.32,T1232) While he was living with her in 2004 during a storm he was convinced someone was in the house and made her call the police.(V.32,T1233) The police found no one and no evidence of anyone entering the house.(V.32,T1235) Ms. Rivas didn't know about him hearing voices.(V.32,T1233)

Ms. Rivas and Mr. Kocaker also had contact with a married, older half-brother during their childhood and their maternal grandparents.(V.32,T1192;1196) The children would spend the summer in Puerto Rico with their grandparents.(V.32,T1196) Their older brother was a musician and a lot of fun.(V.32,T1197)

Ms. Rivas and Mr. Kocaker have different fathers.(V.32,T1193) Mr. Kocaker's father, Nechdat Kocaker, was Turkish. He was in the United States as part of a government exchange through the Department of Agriculture.(V.32,T1191) After he and Mrs. Armadore had

married, he told her he was Muslim and had two other wives in Turkey.(V.32,T1222) He returned to Turkey while she was pregnant with Mr. Kocaker.(V.32,T1193) Ms. Armadore remained in the United States to be with her children from a prior marriage and to avoid being a third wife.(V.32,T1194;1222) Contact was only by letter, Mr. Kocaker never met his father.(V.32,T1194) The couple divorced when Mr. Kocaker was age four.(V.32,T1195) The father never lived in Punta Gorda.(V.32,T1220) Nechdat Kocaker died in an accident with Mr. Kocaker was about 11.(V.32,T1220)

Mr. Kocaker was never in the military and he never learned to fly a helicopter.(V.32,T1223)

In rebuttal the State called Detective Klein.(V.33,T1256) Det. Klein testified he interviewed Mr. Kocaker on September 13, 2004.(V.33,T1256) At that time Mr. Kocaker was in jail, but not charged with murder.(V.33,T1257) During the interview Mr. Kocaker said his father was Turkish and he was born in New York.(V.33,T1258) He said his sister was Greek- they have different fathers and the same mother.(V.33,T1259) Mr. Kocaker made other references to living in New York.(V.33,T1261) Mr. Kocaker stated he had “caught a

manslaughter charge" when he was 15 or 16 and he got charged even though there were a bunch of much older men involved.(V.33,T1262) Mr. Kocaker claimed him killed the other man in self-defense rather than let him shoot him.(V.33,T1262) Mr. Kocaker said he "ate that one".(V.33,T1262) Mr. Kocaker said he got out of prison, then got some robberies in Orlando because he kept getting pulled over for DUI.(V.33,T1263) He also mentioned some stops for DUI and not having a license.(V.33,T1263) In response to no job and the DUI charges, he started committing robberies and did nine in five days.(V.33,T1264)

The jury recommended death by a vote of 11-1. (V.33, T1320)

SPENCER HEARING:

December 22, 2008:

Dr. Richard Carpenter, a licensed psychologist, evaluated Mr. Kocaker on two occasions.(V,21,T11) In the first instance he was court-appointed to evaluate competency by the court.(V.21,T11) Dr. Carpenter found Mr. Kocaker competent to proceed and testified to his findings.(V.21,T12) The decision on competency was made without talking to family members and with no family history.(V21,T13) The decision was based on a clinical

interview and a review of the interviews conducted by Dr. Eisenstein and Dr. Poorman.(V.21,T13) After the evaluation Dr. Carpenter learned from defense counsel that the self-reported history was wrong, but that did not change his opinion on competency.(V.21,T15) Mr. Kocaker claimed that his sister was lying.(V.21,T16)

Despite finding him competent, Dr. Carpenter believed that Mr. Kocaker was psychotic at the time of the offense and diagnosed him with psychotic disorder not otherwise specified and ruled out schizophrenia paranoid type, schizoaffective disorder, alcohol dependence in institutional remission, and diagnosed an Axis II personality disorder not otherwise specified.(V.21,T12) Mr. Kocaker reported five suicide attempts, but denied being suicidal.(V.21,T20)

Despite ruling out schizophrenia, Dr. Carpenter believed there was a distinct possibility he was schizophrenic because his thinking had subtle thought disorder qualities that are hard to fake or malinger, he had illogical thinking, and he reported hearing voices. The diagnosis of psychotic disorder was the most “parsimonious” and a more conservative diagnosis. (V.21,T13;27) Dr. Carpenter, after reviewing medical

records and spending more time with Mr. Kocaker since his original diagnosis would now change his diagnosis to schizophrenia paranoid type.(V.21,T27)

Since the clinical interview for competency Dr. Carpenter had an opportunity to review some medical records and other DOC records that were previously missing.(V.21,T18) DOC records from 1991-2006 were still missing.(V.21,T19) There were suicide attempts in the early 1980’s by swallowing a razor blade-very bizarre behavior.(V.21,T18;23) He has a “flat” demeanor.(V.21,T18) Mr. Kocaker is HIV positive.(V.21,T19)

In March 2006, roughly ten days after a clinical interview with Dr. Carpenter, Mr. Kocaker was found exhibiting very odd behavior in prison and was removed for observation.(V.21,T20) He went into what medical personnel described as a catatonic state.(V.21,T21) Mr. Kocaker was transferred to a Jacksonville hospital and a CAT scan was done.(V.21,T21) The scan was positive for some brain abnormalities.(V21,T25) He remained in the hospital for 10 days.(V.21,T21) Dr. Carpenter did not believe that this was malingering.(V.21,T22) Mr. Kocaker did not magnify in other interviews when he had the chance.(V.21,22) Mr.

Kocaker reported getting better in the hospital over time.(V21,T23) This is not consistent with malingering, but was probably a psychotic break.(V.21,T23-4)

Dr. Carpenter opined that Mr. Kocaker is very disturbed with a severe personality disorder, probably of a borderline nature, that can create attention seeking behavior that appears not to be so.(V.21,T24) The disorder connotes a tenuous grip on reality.(V.21,T24) After reviewing the available medical records, Dr. Carpenter opined that a more appropriate diagnosis for Mr. Kocaker is schizophrenia paranoid type, a change from the first diagnosis.(V.21,T27)

The trial court was asked to take judicial notice of the previous testimony of Dr. Poorman from January 3, 2008 competency hearing.(V.21,T31) The court also was asked to review the August 22, 2008 video deposition of Murtha Armadore from the court file.(V.21,T32)

Dr. Eisenstein returned to the stand and testified that there has been a marked change in Mr. Kocaker's physical appearance over the past two years. A current photograph from the county jail when compared to a March 2006 DOC photo shows a downward drift in looks and functioning.(V21,T35)

Since the June penalty phase, Dr. Eisenstein had been able to review DOC medical records that had not been available.(V.21,T36) The records are voluminous, but are still not complete. There is still a gap from 1991-92 through 2006.(V.21,T36) He has also reviewed the testimony of Mr. Kocaker's aunt and spoke to Corrin Huddleston, Mr. Kocaker's older half-brother.(V.21,T38)

Mr. Huddleston reported that his father committed suicide, leaving him as somewhat of a caretaker of the family.(V21,T39) Corrin was the oldest of the three children born to Mrs. Armadore and Mr. Huddleston. Ms. Rivas and Mr. Kocaker had different fathers.(V.21,T39) Mr. Huddleston reported that Mr. Kocaker had difficulties in school and some trouble getting along with people.(V.21,T39) If he felt slighted, he would erupt.(V.21,T40) The family moved 17 times in response to Mr. Kocaker's behavior- because he was in trouble or from other issues. Mrs. Armadore's response was to move instead of dealing with Mr. Kocaker's behavioral problem.(V.21,T43) This was very significant, because treatment was avoided.(V.21,T44)

This new information led Dr. Eisenstein to make a different diagnosis than what he testified to at penalty

phase. Dr. Eisenstein believed that Mr. Kocaker has an Axis I major mental illness of schizophrenia paranoid type.(V.21,T45) The diagnosis is supported over and over in the medical records that were not available at penalty phase.(V.21,T45) These records would include:

-a March 4, 1982 record from Dr. G.R. Dolz from DOC outlining suicide attempts in 1979 and 1981 and indicates no military history. A paranoid flavor runs throughout Mr. Kocaker's earlier years as described by family members.(V.21,T47) A recommendation that Mr. Kocaker be housed a facility with a psychologist on staff is made, along with drug and alcohol counseling.(V.21,T48) This recommendation is significant.(v.21,T48)

-a July 1983 report that Mr. Kocaker swallows razor blades at age 19 contained in a psychiatric discharge summary.(V.21,T49) Mr. Kocaker spent 11 days in a psychiatric unit after he swallowed a razor blade and coins.(V.21,T49)

-a report dated July 21, 1982 from W.R. Watson, a clinical social worker, in which the mother is faulted for his upbringing and reports of suicidal behavior by cutting himself and shooting himself.(V.21,T51) Mr. Kocaker stated

he was born in New York and Puerto Rico.(V.21,T51) Mr. Kocaker was classified as a "special review case".(V.21,T52)

-a July 28, 1982 report by Dr. Jose Gonzalez of the reception medical center hospital at Lake Butler, indicating Mr. Kocaker was transferred to a facility where a psychiatrist was available.(V.21,T52) This is significant because it indicates a need for a mental health professional to observe his behavior and note immediately if it changes.(V.21,T53) A psychiatrist can deal with medical management- medication.(V.21,T54) A diagnosis is listed as aggressive conduct disorder undersocialized type- an old diagnosis based on observed behavior.(V.21,T54)

-an October 21, 1982 report from Avon Correctional Institution that indicates Mr. Kocaker must be housed at a facility with a psychiatrist.(V.21,T54)

-a September 13-23rd, 1983 hospitalization at age 20 for herpes in the right eye.(V.21,T56) Exhibit 9 documents a later injury to this eye as a result of Mr. Kocaker being struck with a metal object thrown from a sling shot by another inmate.(V.21,T58)

-a November 1983 report that Mr. Kocaker was admitted to mental health crisis stabilization unit.(V.21,T59)

-a March 8, 1985 report stating Mr. Kocaker was adjusting poorly with possible psychiatric problems.(V.21,T59)

-a February 21, 1991 report from Dr. Walker, a senior psychologist at Marion CI noting Mr. Kocaker, age 27, needs a dorm transfer due to his explosive and potentially homicidal tendencies and long history of violent acting out especially in crowded or loud situations.(V.21,T60) This report is significant because it is indicative of significant behavioral problems and significant mental health issues. There is no documented treatment.(V.21,T61)

-an October 21, 1991 report of a transfer from UCI to FSP for crisis stabilization by Dr. Infante with no record of treatment.(V.21,T61) Another indication of long term psychiatric problems.

-in a March 17, 2006 report there is a reference to a hospitalization in 2000 at RMC after a suicide attempt by swallowing razor blades.(V.21,T65) DOC claimed to have no available medical records for 2000.

There are numerous references in the DOC records to Mr. Kocaker being HIV positive.(V.21,T63) Ms. Rivas reported being told by Mr. Kocaker that he was HIV

positive.(V.21,T63) There is no record of a confirmed HIV diagnosis, but the reported diagnosis takes place in 1995 when no records are available.(V.21,T64)

-in March of 2006 DOC reported Mr. Kocaker tested on the BETA III for an IQ score of 57, a nonverbal test indicating significantly impaired.(V.21,T67) Two days later a second IQ test, the TONI, yielded a score of 77, higher but still significantly impaired.(V.21,T68)

-Mr. Kocaker indicated on March 17, 2006 that he was fine and needed no treatment. On March 24, 2006 he was observed to be wandering the compound, confused and disoriented. Two days later, on March 26, he was found crying, shaking, confused, and having a deficiency of self-care- a medical and psychiatric crisis.(V.21,T68;70) A DOC nurse observed he was flat, anxious, depressed, and sullen.(V.21,T69) There are indications of a major psychiatric event where he is decompensating rapidly.(V.21,T69) A CAT scan was done and found to be normal at DOC on March 27.(V.21,T73) Mr. Kocaker was then determined to be in a catatonic state and transferred to Jacksonville Memorial Hospital on March 28, 2006.(V.21,T70-74)

A neurological consult was done with neurologist Dr.

Gama.(V.21,T77) Mr. Kocaker was in an unresponsive, wandering state- consistent with his status at DOC.(V.21,T77) An MRI of the brain is abnormal, small lesions appear in the white matter bilaterally in both hemispheres on March 28, 2006.(V.21,T78) An EEG in a nonresponsive state on March 30 was abnormal suggesting brain abnormality in both hemispheres.(V.21,T79) An EEG when he is awake is normal.(V.21,T79)

Mr. Kocaker remained at the hospital for at least five days.(V.21,T74) The discharge findings are that he likely had a psychotic episode.(V.21,T75) His is placed on two psychiatric medications-Abilify and Geodon.(V.21,T76) Under treatment, he has improved.(V.21,T76) Mr. Kocaker is returned to DOC with a 5 Axis diagnosis- Axis I depressive disorder NOS 311; also Axis I psychotic disorder 298.9; Axis II, deferred. The GAF is 20- indicating a low level of functioning in the severely impaired category on Axis IV. He is still hearing voices and is placed on Zoloft.(V.21,T80-1)

Several days after discharge Mr. Kocaker reported he could not stand or move and feels stiff.(V.21,T81) This is a common side effect of the medications he is on.(V.21,T82) Mr. Kocaker reports hearing voices but can’t remember what

they say.(V.21,T82) After a second report of stiffness, Mr. Kocaker is given some additional medications.(V.21,T84) Geodon is held until he is seen by psychiatry.(V.21,T84)

On April 20, 2006, Mr. Kocaker is taken to the emergency room with no verbal response. He is unresponsive.(V.21,T84) A diagnosis of organic brain syndrome is made.(V.21,T85)

On May 26, 2006 a psycho-social workup is done.(V.21,T85) Four mental health professionals reach a diagnosis of Axis I, depressive disorder 311 NOS; Axis I, psychotic disorder NOS 298.9; the GAF is 20, extremely impaired.(V.21,T85) He continues to hallucinate while on psychotropic medication.(V.21,T86) He is placed on suicide watch and medication dosages are increased.(V.21,T86) By June 30, he has reduced auditory hallucinations meaning he is responding to treatment.(V.21,T87) In August 2006 his GAF is 55, he continues medication and continues to have an Axis I diagnosis of depressive disorder.(V.21,T88) By November the GAF is the same and the Axis I diagnosis is major depression with psychotic features.(V.21,T89) Mr. Kocaker continues to be monitored with little change in status or diagnosis. In January 2007 he reports auditory hallucinations.(V.21,T89) The voices are no big deal to

Mr. Kocaker, he is accustomed to them and that is now normal.(V.21,T91) He continues on medication.(V.21,T92) In February 2007 Mr. Kocaker is diagnosed with Axis I schizoaffective disorder by Dr. Rodriguez. This is a thought disorder with a mood component.(V.21,T93) It is a major mental illness.(V.21,T93) He reports auditory hallucinations, but is "okay" and continues on medication.(V.21,T93) Typical for schizophrenia is a denial of the illness.(V.21,T94) This is not malingering.(V.21,T95) In March 2008 the hallucinations are "not so bad anymore".(V.21,T97)

The day before testifying Dr. Eisenstein spent three hours with Mr. Kocaker.(V.21,T98) Mr. Kocaker has continued delusional beliefs about his eye injury and background.(V.21,T98-9) He reported hearing voices and assumes this to be normal.(V.21,T99) His affect was extremely flat.(V.21,T99) He volunteers no information. (V.21,T100) Dr. Eisenstein's diagnosis of Mr. Kocaker was Axis I, schizophrenia paranoid type 295.30 and Axis I intermittent explosive disorder 312.34 due to head injury and the brain scans.(V.21,T104-6)

The State called Dr. Michael Gamache, a licensed psychologist.(V.22,T40) Dr. Gamache met with Mr. Kocaker

on October 9, 2008, at which time he administered the VIP and SIRS tests.(V.22,T46) There was no indication of malingering.(V.22,T47) Dr. Gamache did not believe that the TOMM test administered by Dr. Eisenstein which had indicated malingering was valid.(V.22,T49) Dr. Gamache also disagreed with Dr. Eisenstein's IQ test result of 70 and believed Mr. Kocaker's IQ was more in the 89-90 range based on earlier IQ testing in the 1980's and his observation of Mr. Kocaker.(V.22,T51)

During the clinical exam, Mr. Kocaker said he was feeling good and was not paranoid.(V.22,T53) He was taking Depakote at the time of the exam, which Mr. Kocaker said was for the voices he heard.(V.22,T53) Depakote is an anticonvulsant that is used for psychiatric conditions such as bipolar disorder and aggressive acting out behavior.(V.22,T54) Dr. Gamache was not aware of Depakote being used for auditory hallucinations or paranoid schizophrenia.(V.22,T55)

Mr. Kocaker said that he had not been previously diagnosed with any mental health issues, but he did swallow razor blades in 2000 because voices told him if he hurt himself things would be better.(V.22,T56) Dr. Gamache questioned the Mr. Kocaker's belief that he now, looking

back, believed that he was hearing voices earlier on.(V.22,T56) Dr. Gamache believed there should have been more reporting of auditory hallucinations.(V.22,T57) Dr. Gamache did not feel that the auditory hallucinations described by Mr. Kocaker were of a paranoid nature because they were not persecutory.(V.22,T58) For example, the hallucination reported by Ms. Rivas would be more consistent with a visual hallucination consistent with a paranoia brought on by drugs such as methamphetamine.(V.22,T58)

In the social/family history that Mr. Kocaker gave he did not spontaneously mention military service.(V.22,T59) When asked, Mr. Kocaker said he was in the military in 1980-81.(V.22,T60) Mr. Kocaker claimed to have flown a helicopter and received an honorable discharge with the rank of lieutenant.(V.22,T60) Dr. Gamache characterized these things as “made up”, but not delusions.(V.22,T62) Dr. Gamache was not convinced Mr. Kocaker believed these things to be true.(V.22,T62)

Mr. Kocaker maintained he grew up in Tarpon Springs with his biological parents until his mother died of leukemia when he was 14.(V.22,T60-1) He identified Matthew

Kocaker as his father, reported an all right relationship with him and stated his father died of a heart attack in 1983.(V.22,T61)

Dr. Gamache reviewed police reports, depositions of family members, and prior evaluations.(V.22,T44) He also reviewed the raw testing data of Dr. Eisenstein and the records recently received from DOC.(V.22,T45) Dr. Gamache did not believe that paranoid schizophrenia was a correct diagnosis.(V.22,T62-71) Dr. Gamache believed the key finding in the March 2006 episode was a low B-12 lab finding. B-12 deficiency can cause a metabolic disorder which is the equivalent of dementia and an altered mental state.(V.22,T73) Mr. Kocaker could also have HIV encephalopathy, which occurs when the HIV begins to affect the immune system, in particular the brain and causes deterioration of the brain.(V.22,T74) While the brain lesions from the 2006 MRI were not consistent with encephalopathy, they were clearly present.(V.22,T74) The lesions were suspicious, but it was not determined what the lesions were.(V.22,T74) Dr. Gamache felt the March 2006 incident was inconsistent with a diagnosis of paranoid schizophrenia.(V.22,T78) Dr. Gamache had to agree that Mr. Kocaker was placed on two antipsychotic medications that

are used to treat paranoid schizophrenia and inpatient treatment for schizophrenia was recommended by the hospital team on his discharge.(V.22,T99-100) Dr. Gamache admitted that Mr. Kocaker had been diagnosed with schizoaffective disorder by DOC psychiatrists in 2007, but he disagreed with this diagnosis as well.(V.22,T101)

Dr. Gamache did not believe that Mr. Kocaker had multiple personalities.(V.22,T80) Dr. Gamache was not retained by the State to evaluate or diagnose Mr. Kocaker- his role was to review Dr. Eisenstein's findings.(V.22,T86) From his review, Dr. Gamache did not believe that Mr. Kocaker had mental illness, other than a B12 deficiency and some alcohol/drug issues.(V.22,T86)

Spencer Hearing Part 2

Subsequent to the Spencer hearing of December 22, 2008, DOC was able to find additional medical records, necessitating additional review and testimony.(V.23,T5) The testimony presented at a hearing held on September 30, 2009 is summarized as follows:

The defense introduced numerous exhibits, including a composite exhibit of the additional DOC records.(V.23,T7) Dr. Eisenstein was then recalled to the stand and testified that he had reviewed these records, approximately 3,000

additional pages.(V.23,T13) The review of those records has not changed his diagnosis.(V.23,T14) Dr. Eisenstein felt the records supported his diagnosis, but could also be interpreted in a manner that could be consistent with the apparent State position that Mr. Kocaker is malingering and antisocial.(V.23,T14) Dr. Eisenstein diagnosed Mr. Kocaker as a paranoid schizophrenic with dissociative identity disorder and intermittent explosive disorder.(V.23,T9) The paranoid schizophrenic diagnosis was reached based on the auditory hallucinations, the negative symptoms of withdrawal, and asocial behavior.(V.23,T10) Dr. Eisenstein opined that both statutory mental health mitigators were established.(V.23,T11) Mr. Kocaker was under an extreme mental disturbance at the time of the offense, and probably for much of his life.(V.23,T11) He further could not conform his conduct to the requirements of the law.(V.23,T12)

Dr. Eisenstein noted that a bio-psychosocial assessment prepared at Zephyrhills Correctional Institute from the years 2000-2003 indicated a primary diagnosis of major depressive disorder with psychotic features, adjustment disorder with depressed mood, and a major depressive disorder NOS.(V.23,T18-20) Mr. Kocaker was

consistently given Fluoxetine and Trazodone and had at least one psychiatric hospitalization.(V.23,T18-21) Fluoxetine and Trazodone are antipsychotic medications and would not be given for antisocial issues.(V.23,T21) The auditory hallucinations were not diagnosed, but were not investigated. There were clear indications of paranoid and flashback symptoms.(V.23,T22) These evaluations and treatment would have nothing to do with a vitamin B12 deficiency.(V.23,T24) An MMPI also indicated elevations on all major scales, indicative of major psychopathology.(V.23,T33) Several suicide attempts were reported by Mr. Kocaker that were documented with independent evidence such as an x-ray showing razor blades in his stomach.(V.23,T35;41-48;54)

The positive HIV status was further confirmed and the medication Neurotonin was prescribed for HIV symptoms. Neurotonin would have also helped to reduce psychiatric symptomology.(V.23,T30) Records indicated that no HIV treatment has been given since 2003.(V.23,T30)

The records further corroborated the eye injury occurring in prison in 1984 and not being present since birth.(V.23,T26)

Alcohol consumptions was reported since age 11,

including alcohol consumption while incarcerated. Mr. Kocaker was hospitalized while in prison after drinking "bad buck".(V.23,T31) Mr. Kocaker reported drug abuse since age 14, with daily crack cocaine usage and marijuana usage.(V.23,T31) Early drug usage is consistent with self medication for psychiatric issues.(V.23,T32)

The records indicate that in 2000 Mr. Kocaker was able to more accurately report on his life- he identified a head injury and denied military service.(V.23,T26-7) Mr. Kocaker completely decompensated in 2006- however the mental illness did not start then, it has been present since an early age.(V.23,T28)

Dr. Gamache was recalled by the State.(V.23,T98) He testified he disagreed with Dr. Eisenstein and did not believe that Mr. Kocaker met the diagnostic criteria for paranoid schizophrenia or dissociative identity disorder .(V.23,T99;111-13) Since the last hearing Dr. Gamache reviewed documents selected by the State Attorney from the newly obtained DOC records.(V.23,T102) Dr. Gamache did not review everything.(V.23,T102)

Dr. Gamache noted that an IQ test showed an 89 and Mr. Kocaker earned his GED.(V.23,T103)

There is no reference to hallucinations or delusions

in the records.(V.23,T105) Other explanations for swallowing razor blades besides voices would be due to malingering or manipulation, common in correctional setting.(V.23,T108) The records contain numerous references to potentially manipulative behavior.(V.23,T109) Dr. Gamache did not agree that Fluoxetine or the other medications were antipsychotics, but stated he believed they were antidepressants.(V.23,T118)

Dr. Gamache believed Mr. Kocaker had a history of acting criminally and impulsively, but that he could conform his conduct to the requirements of the law other than the drugs and alcohol he was abusing.(V.23,T116) The drugs could have had a considerable impact on his judgment and reasoning.(V.23,T117)

Sentencing Hearing

Mr. Kocaker was sentenced to death on December 18, 2009.(V.23,T131;150) The trial court found the following aggravating factors: The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or on felony probation; the defendant was previously convicted of violent felony; and the crime was heinous, atrocious, or cruel.(V.23,T134-40;SR11-15) Each factor was given great weight.(SR11-15)

The trial court made the following determinations as to the mitigating factors:

The court did not find that Mr. Kocaker was under the influence of extreme mental or emotional disturbance at the time of the murder.(V.23,T141;SR19) The trial court did not find that Mr. Kocaker was unable to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of the law was substantially impaired.(V.23,T141;SR21)

The trial court found that Mr. Kocaker's mental health history was nonstatutory mitigation and gave it moderate weight.(V.23,T141;SR15-21) The trial court found that Mr. Kocaker had a loving family-some weight(SR21); a history of drug and alcohol abuse-some weight(SR21); intoxicated by alcohol at the time of the crime-some weight(SR22); the defendant has brain damage-some weight(SR23); the defendant was sexually abused as a child- some weight(SR23); HIV positive- some weight(SR23); the defendant called 911 to report the crime- very little weight(SR23); absent father-some weight(SR24); head injuries as a child- very little weight(SR24); possible ADHD as a child- very little weight(SR24).

The trial court found the following mitigation was not

proved: under the influence of crack cocaine at the time of the crime (V.23,T144;SR22) and a non-unanimous jury recommendation.(V.23,T149;SR24)

SUMMARY OF THE ARGUMENT

ISSUE I: The State's case was circumstantial. The evidence at trial was insufficient to rebut the defense reasonable hypothesis of innocence that the victim was killed by a drug dealer and the prostitutes he recruited as part of his business. Mr. Kocaker denied committing the crime.

ISSUE II: The sentence of death is disproportionate. The death penalty is reserved for the most aggravated and least mitigated of first-degree murders. The mental health mitigation, brain damage, sexual abuse, and other mitigation found by the trial court demonstrate that this case is not among the least mitigated of first-degree murders.

ISSUE III: Death by lethal injection constitutes cruel and unusual punishment in violation of both the Florida and United States Constitutions.

ISSUE IV: Florida's death penalty statute is unconstitutional under Ring v. Arizona 536 U.S. 584 (2002) and because it permits a death sentence to be imposed

without a unanimous jury recommendation.

ARGUMENT

ISSUE I

THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION OF FIRST-DEGREE MURDER

In his first Issue, Mr. Kocaker argues that the circumstantial evidence in this case was insufficient to support a conviction for first-degree murder. This Court will always consider the sufficiency of the evidence, whether or not the issue is presented on appeal.

Issues of sufficiency of the evidence are reviewed under a *de novo* standard. Both the trial court and the appellate court are equally capable of determining whether or not it is proper to grant a judgment of acquittal. Pagan v. State, 830 So.2d 792 (Fla. 2002). Evidence is sufficient to support a conviction unless "there is no view of the evidence which the jury might take favorable to the opposite party that may be sustained under the law." Williams v. State, 967 So.2d 755 (Fla. 2007).

This case was a circumstantial evidence case. The State relied upon the testimony of a drug dealer and several prostitutes, who testified that Mr. Kocaker was seen on the night of the crime in bloodied clothing, that

Mr. Kocaker had money on the night of the crime, and that he made statements that he “killed for a living”. The State relied on evidence from the scene, including the presence of a generic t-shirt found in the victim’s car that was the same size worn by Mr. Kocaker and was similar to a t-shirt his sister bought him and a gas can that was identified as having come from the residence where Mr. Kocaker was staying. The State further relied on evidence that indicated that Mr. Kocaker had been on his cell phone with 911 before he reached the victim’s burnt car and had crossed the Eckerd parking lot in a different direction from that which he had told police.

There was no forensic evidence linking Mr. Kocaker to the burned car or the decedent. Mr. Kocaker made no admissions to having committed this particular crime. Mr. Kocaker testified that he had been in the cab on the night of the crime, but had left the cab after the victim had hooked up with a prostitute at the Bellaire motel. Mr. Kocaker testified he later heard an argument between the victim, the prostitute, and Fury, the drug dealer. Mr. Kocaker did not intervene. Mr. Kocaker testified he did not kill the victim, but did find the burned cab with the

victim inside as he was walking home. Mr. Kocaker testified he called 911 to report the victim appeared to be dead.

When the State relies on circumstantial evidence to prove guilt, the evidence must meet an even more stringent standard of review. Walker v. State, 957 So.2d 560, 577 (Fla. 2007); State v. Law, 559 So.2d 187 (Fla. 1989). In a circumstantial evidence case the State is not only required to offer sufficient evidence of each element of the offense, the State is also required to prove that the circumstantial evidence is not only consistent with guilt, but is also inconsistent with the defendant's reasonable hypothesis of innocence. Pagan v. State, 830 So.2d at 792. A suspicion of guilt is not enough. The trial court should grant a judgment of acquittal in a circumstantial evidence case if the State fails to present evidence from which a jury can exclude every reasonable hypothesis of innocence except that of guilt. State v. Law, 559 So.2d at 188. It is the State's burden to introduce competent, substantial evidence which is inconsistent with the defendant's reasonable hypothesis of innocence.

In State v. Lindsey, 14 So.3d 211 (Fla. 2009), this Court reversed a conviction of first-degree murder and

sentence of death where the State failed to meet this burden. Quoting from numerous prior decisions, the opinion states "…`it is the duty of the courts to ensure that the State is held to its burden of proof when someone is charged with a serious crime and live and liberty are at stake. …[When a] case is purely circumstantial, we must determine whether competent evidence is presented to support an inference of guilt 'to the exclusion of all other inferences.'" Lindsey, at 215, quoting, Crain v. State, 894 So.2d 59, 71 (Fla. 2004). Under Lindsey, the circumstances must lead to a reasonable and moral certainty that the defendant committed the crime charged. Evidence which furnishes a suspicion, even a strong suspicion, that the defendant committed a crime is not enough to sustain a conviction. The State must exclude every reasonable hypothesis of innocence.

In this case the State had to exclude the defense's reasonable hypothesis of innocence- that the victim was killed by Fury and the prostitute he was with. Clearly Fury and the prostitutes who testified had significant credibility issues- all were either in prison or facing prison at the time of their testimony. All admitted to prior convictions. All were using drugs, selling drugs,

and committing other crimes at the time of this crime. All admitted to being friends, thus supplying ample motive for them to lie for each other. All had equal motive to have killed the victim- to obtain money.

The State made much of the t-shirt found in the burned car, however the t-shirt could not be conclusively linked to Mr. Kocaker. It was tested for DNA, yet no DNA linking the shirt to Mr. Kocaker was found on the shirt. The t-shirt was not unique, it was simply a generic Fruit of the Loom t-shirt. The fact that Mr. Kocaker's sister had purchased similar t-shirts for him and one was not found in his room is not sufficient proof that this t-shirt was Mr. Kocaker's missing shirt, let alone proof that Mr. Kocaker committed this crime. Similarly, the gas can found in the car yielded no fingerprints and there was no testimony which established how long the gas can had been missing or how the gas can supposedly got from the residence to the cab. The gas can was kept outside near the fence, making is easy for anyone to steal.(V.29,T670) The gas can depicted in State's Exhibit 91 contains no visible marks of identification.

Under the legal standard which applies to

circumstantial evidence cases, the State has failed to exclude the reasonable hypothesis that the victim was killed by someone other than Mr. Kocaker.

ISSUE II

THE SENTENCE OF DEATH IS NOT PROPORTIONATE WHERE THIS CASE IS NOT AMONG THE LEAST MITIGATED OF FIRST-DEGREE MURDERS.

This Court has consistently held that due to the uniqueness and finality of death, the propriety of all death sentences must be addressed by this Court through proportionality review. Urbin v. State, 714 So.2d 411, 416-417 (Fla. 1998). Proportionality review involves a comparison of cases in which the death penalty has been imposed with this case, it is not a mere numerical comparison of the aggravating factors versus the mitigating factors. Offord v. State, 959 So.2d 187 (Fla. 2007) Proportionality review does not reweigh the aggravators and mitigators. Walker v. State, 957 So.2d 560 (Fla. 2007) A sentence of death continues to be reserved for only the most aggravated and least mitigated of first-degree murders. Green v. State, 975 So.2d 1082 (Fla. 2008).

Mr. Kocaker acknowledges that three aggravators are present in this case, including heinous, atrocious, and

cruel, or HAC. This Court has upheld death sentences with these three aggravators present. However, this case does not meet the second criteria, which requires that it be among the least mitigated. The evidence presented which details Mr. Kocaker's severe mental health issues since his incarceration at age 17, coupled with the testimony of family members about his early years places this case outside those cases in which the paucity of mitigation in light of the aggravation warrants a death sentence and those cases in which the mental health mitigation, brain damage, sexual abuse as a child, and other mitigation are not so compelling. This case is not among the least mitigated of cases.

The trial court found ten non-statutory mitigators in addition to the catch-all mental health mitigator that was used after the trial court rejected the two statutory mental health mitigators. Of those ten, two additional mitigators relate to mental health issues- the existence of brain damage and alcohol abuse at the time of the crime. In addition to these mitigators, the trial court also found that Mr. Kocaker was HIV positive, had been sexually abused as a child, grew up in a family in which his father was absent, suffered alcoholism when he was not incarcerated,

and had a family who cared for him. A closer examination of these mitigators, with particular attention to the factors that relate to mental health demonstrate that this is not among the least mitigated of crimes.

Mr. Kocaker has suffered from severe mental illness that was first diagnosed when he entered the prison system as a very young adult. Over 3,000 pages of medial records compiled from DOC were entered into evidence. The records speak to ever-present mental health issues for which treatment was often spotty, resulting in continual referrals for psychiatric care and hospitalizations within the department. Only Dr. Eisenstein reviewed all of the records provided by DOC and he concurred in the absolutely objective diagnosis reached by the mental health professionals within DOC who treated Mr. Kocaker for twenty years- ultimately that he is a paranoid schizophrenic whose mental health issues are further compromised by HIV related brain dementia. Dr. Carpenter, who had earlier evaluated Mr. Kocaker for competency and was not retained by the defense also agreed with the diagnosis of paranoid schizophrenia. The only mental health professional who disagreed with the diagnosis reached by the Department of Corrections, Dr. Eisenstein, and Dr. Carpenter was Dr.

Gamache, the state expert who only reviewed only those DOC documents that the State selectively chose for him to review. The greater weight of the evidence supports the conclusion that Mr. Kocaker has suffered from significant mental illness since 1982 that was unequivocally documented by the Department of Corrections. Major mental illness and mental health mitigators are among the most compelling mitigation. See, Morgan v. State, 639 So.2d 6, 14 (Fla. 1994); Knowles v. State, 632 So.2d 62, 67 (Fla. 1993); Carter v. State, 560 So.2d 1166, 1167-68 (Fla. 1990).

In addition to a longstanding history of documented severe mental illness, the trial court found that Mr. Kocaker has brain damage. This Court has recognized that brain damage is among the most significant mitigating factors. Crook v. State, 813 So.2d 68 (Fla. 2002).

This Court has found that a sentence of death is disproportionate where the evidence of mental health mitigation is substantial, despite the presence of significant aggravation. See, Crook v. State, 908 So.2d 350 (Fla. 2005)[death sentence disproportionate despite substantial aggravation where the mental health mitigation was overwhelming]; Hawk v. State, 718 So.2d 159, 163-64 (Fla. 1998)[death sentence was disproportionate despite

substantial aggravation which included a contemporaneous attempted murder of a second victim where the mental health mitigation was substantial]; White v. State, 616 So.2d 21 (Fla. 1993)[death sentence was disproportionate with two aggravating factors where statutory mental health mitigators were present due to defendant's consumption of drugs and alcohol preceding murder]; DeAngelo v. State, 616 So.2d 440 (Fla. 1993)[death sentence disproportionate despite substantial aggravation including CCP where defendant suffered from hallucinations, brain damage, mood disorders, and delusional paranoid beliefs]; Nibert v. State, 574 So.2d 1059 (Fla. 1990)[death sentence was disproportionate despite HAC, where the defendant had been abused as a child, had impaired capacity due to alcohol abuse, and was under an extreme mental and emotional disturbance]; Miller v. State, 373 So.2d 882, 886 (Fla. 1979)[death sentence disproportionate despite substantial aggravation including HAC, where mental mitigation was substantial and related to crime]. This case is one in which the substantial mental health mitigation coupled with the presence of brain damage, alcohol abuse, and childhood sexual abuse combine to render it among the most, not least, mitigated of cases.

The combination of these factors, plus the additional mitigation found by the trial court distinguish this case from other cases where a death sentence has been affirmed. For example, in Davis v. State, 859 So.2d 465 (Fla. 2003), the aggravators of HAC, CCP, and probationary status were found to exist. The trial court found age to be a statutory mitigator, as well as four non-statutory mitigators. No mental health mitigation was present. This Court upheld the sentence of death on proportionality grounds. In this case there is significantly more mitigation than is present in Davis. Unlike Davis, there is significant and weighty evidence of brain damage and severe mental illness. Compared to Davis, this case is not among the least mitigated of cases.

In Walker v. State, 957 So.2d 560 (Fla. 2007), the death sentence was found to be proportional where the aggravating factors were HAC, CCP, and a murder committed in the course of a felony and where the mitigation established drug use, bipolar disorder, remorse, cooperation with the police, and a co-defendant's life sentence. Mr. Kocaker's case is distinguishable on proportionality grounds from Walker due to the existence of the mental health mitigation, the presence of brain damage,

sexual abuse, and the other mitigation found by the trial court. Compared to Walker, this case is not among the least mitigated.

Likewise this case contains significantly more mitigation than was present in Connor v. State, 803 So.2d 598 (Fla. 2001), where there was some evidence of mental illness, good jail behavior, cooperation with law enforcement, and fatherhood.

This Court should determine that the death sentence is disproportionate as this case is not among the least mitigated.

ISSUE III

THE USE OF LETHAL INJECTION AS A MEANS OF EXECUTION AND THE FLORIDA PROTOCOL FOR LETHAL INJECTION VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT PROTECTIONS UNDER THE EIGHTH AMENDMENT, FOURTEENTH AMENDMENT, AND ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUION.

Mr. Kocaker filed a Motion to Bar the Imposition of Death Sentence on Grounds That Florida's Death Penalty Statute and Method of Administering Lethal Injection Are Unconstitutional.(II,R11-28) In his motion Mr. Kocaker argued that Florida fails to provide a specific protocol for execution and improperly leaves the means and protocol to be determined by the Department of Corrections. Mr.

Kocaker argued that the specific means and method utilized by DOC is unconstitutional, even in light of the finding by the United States Supreme Court that the three drug combination used in Florida is not unconstitutional.

In Baze v. Rees, 128 S.Ct. 1520 (2008), the United States Supreme Court determined that in order to constitute cruel and unusual punishment under the Eighth Amendment, an execution method must present a substantial or objectively intolerable risk of serious harm. The Court further held that a State's refusal to adopt a proffered alternative means of execution may only violate the Eighth Amendment of the alternative is feasible, readily implemented, and significantly reduces a substantial risk of severe pain. In Baze, a plurality of the justices of the Court upheld the Kentucky method and protocol for execution by lethal injection because, if performed properly, the execution method would be humane. The Court also specifically found that the failure to administer a proper dose of the first of the three drugs, sodium thiopental, would create a substantial, constitutionally unacceptable risk of suffocation from the administration of the remaining two drugs, pancuronium bromide [a paralytic] and potassium chloride. The first drug, sodium thiopental is used to

render the subject unconscious. If not properly anesthetized, the inmate will face excruciating pain from the administration of the remaining two drugs. Studies conducted by the medical journal *The Lancet* found that in 43 of the 49 bodies of executed inmates, the level of sodium pentothal in the blood failed to meet the level required for surgery and slightly less than half did not have a level sufficient to act as an anesthetic. (II,R15)

Kentucky uses the same three drug combination that is used in Florida, however the Kentucky protocol for execution differs from that used in Florida. At the time Baze was issued, Kentucky had not carried out an execution using the protocol approved. The Kentucky protocol requires that an individual with at least one year relevant professional experience insert the IV line, that the executioner precisely follow the manufacturer's package insert in the mixing and injection of the sodium thiopental, and requires the actual presence of the warden and deputy warden in the execution chamber in order to guard against IV problems and to ensure the inmate is unconscious.

On September 10, 2010, in Franklin County, Kentucky, County Circuit Judge Phillip Shepherd halted an execution

scheduled for September 16, 2010 and any other executions until the State of Kentucky addresses multiple issues with the execution protocol. [Lakeland Ledger, September 9, 2010] California has also halted executions in August 2010 due to problems with the lethal injection execution protocol.

The most current Florida execution protocol, adopted on August 1, 2007, fails to provide sufficient safeguards to ensure that the execution does not present a substantial or objectively intolerable risk of serious harm to the inmate and provides fewer safeguards that provided under the now-questioned Kentucky protocol. The Florida protocol does not require medical training for the IV insertion and does not require the presence of an observer in the death chamber throughout the execution. There is proof of a sufficiently imminent danger that an inmate in Florida will suffer a constitutionally unacceptable risk of suffocation during an execution due to the lack of medical training of the team by creating a substantial and intolerable risk that the IV will not be inserted properly into a vein as opposed to skin tissue and will be inserted quickly with a minimal number of attempts. There is a substantial likelihood that the inmate will suffer a constitutionally

unacceptable risk of suffocation due to the failure to adequately monitor the anesthetic plane to ensure that the inmate is sufficiently anesthetized prior to the injection of the second and third drugs.

The rational behind the holding in Baze is not present in Florida. Unlike Kentucky, Florida has a gruesome history of "botched" executions, notably that of Angel Diaz on December 5, 2006. The Diaz execution demonstrates that the Florida protocol remains inadequate despite revision, to meet Eighth Amendment standards.

According to testimony presented during the Governor's Commission on Lethal Injection, convened in response to the Diaz execution, errors occurred at two critical points. First, IV lines were not inserted properly, preventing the first drug from properly entering the body. As a result, Diaz was not properly sedated during his death that lasted 34 minutes. The second error occurred when the lethal injection team failed to properly monitor the consciousness of Diaz. Despite visual monitoring, Diaz continued to move and talk after the first drug was administered. DOC, in response, revised several protocols.

This Court, prior to the issuance of Baze, reviewed the current protocols in Lightbourne v. McCollum, 969 So.2d

326 (Fla. 2007). Lightbourne set forth the conclusions of the Commission and the changes made in response, as well as summarizing the testimony held during court hearings after the Diaz execution. The opinion contains a summary of the testimony of defense expert Dr. Heath regarding the necessity of ensuring proper IV insertions and the need for a proper anesthetic plane. In light of Baze and the continuing litigation in Kentucky over the lethal injection protocol, this Court should reconsider the Lightbourne holding and subsequent rulings. See, Schwab v. State, 982 So.2d 1158 (Fla. 2008).

This Court must consider the dissent of Justices Ginsburg and Souter regarding the necessity of ensuring adequate IV insertion and adequate anesthetization of the inmate. The current protocol continues to be insufficient in this regard as it requires only the warden maintain visual contact with the IV site as opposed to a member of the "medical" team, whom it might be presumed would have some training that would allow for some determination that the IV was properly inserted or to identify if problems develop.

The current Florida protocol continues to be deficient because it fails to provide adequate safeguards to ensure

the inmate reaches the proper anesthetic plane prior to the administration of the second and third drugs sufficient to ensure the inmate has reached a constitutionally acceptable level of unconsciousness. A pause between the administration of the second and third drugs is not sufficient as the Diaz execution demonstrated, where a "pause" of 24 minutes occurred.

A substantial risk of pain is present absent adequate medical training and medical monitoring of the inmate after the injection of the first drug. The level of medical training necessary would be accomplished only by a medical doctor. However, doctors are prohibited from participating in an execution by virtue of their ethical obligations. The Florida protocol provides for neither sufficient medical training nor medical monitoring. The lack of medical expertise of the warden and the lack of reliable medical procedures to monitor the inmate through blood pressure readings of with and EKG or BIS device are minimally necessary in order to dissipate the substantial or objectively intolerable risk that the inmate will be subjected to an unconstitutional level of pain. According to the Lightbourne opinion, DOC has admitted it has no set protocol which delineates what actions will be taken to

ensure the inmate is unconscious. The “eyelash” test, ostensibly administered by the warden, is insufficient to ensure the inmate is properly anesthetized, especially when the warden has admitted he has no idea what to look for in that test and has no medical training beyond a CPR class cannot provide the level of medical training necessary. There is no reasonable guarantee that the August 2007 protocol provides sufficient safeguards will be maintained.

This Court should reconsider the prior rulings which have approved the Florida lethal injection protocol as adopted by DOC as unconstitutional because that protocol fails to ensure that there is not a substantial or objectively intolerable risk that an inmate will be subjected to a constitutionally intolerable level of pain during execution.

ISSUE IV

FLORIDA’S CAPITAL SENTENCING PROCESS IS UNCONSTITUTIONAL BECAUSE A JUDGE RATHER THAN JURY DETERMINES SENTENCE AND THE JURY RECOMMENDATION NEED NOT BE UNANIMOUS IN ORDER TO IMPOSE A DEATH SENTENCE.

During the course of the lower court proceedings Mr. Kocaker attacked the constitutionality of Florida’s capital sentencing statutes under the holding of Ring v. Arizona, 536 U.S. 584 (2002).(I,R30-44) The Ring Court struck the

Arizona death penalty statute because it permitted a death sentence to be imposed by a judge who made the factual determination that an aggravating factor existed, overruling Walton v. Arizona, 497 U.S. 639 (1990). The Court held that Arizona's enumerated aggravating factors operated as the "functional equivalent of an element of a greater offense" under Apprendi v. New Jersey, 530 U.S. 466 (2000). Absent the presence of aggravating factors, a defendant in Arizona would not be exposed to the death penalty. Subsequent non-capital cases have adhered to the principle that sentencing aggravators require a specific jury determination as oppose to one performed solely by the court. Blakely v. Washington, 124 S.Ct. 2531 (2004).

Similar to Arizona, Florida is a "hybrid state" where the aggravating factors are matters of substantive law which actually "define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So.2d 146, 149 (Fla. 1982). Under Florida's statute, the jury submits a penalty recommendation, but is not required to make specific findings as to aggravating or mitigating factors. Nor is jury unanimity required as to the specific findings of aggravators and mitigators. Unanimity of the jury is not required in order for a death

sentence to be imposed.

Ultimately, in Florida, it is the judge who makes the findings as to what statutory aggravators and mitigators exist. It is the judge who weighs the aggravating factors against the mitigating factors which have been found, and then determines whether to sentence the defendant to death or life imprisonment. King v. State, 623 So.2d 486, 489 (Fla. 1993). While the jury recommendation is given great weight, this Court has said "We are not persuaded that the weight given the jury's advisory recommendation is so heavy as to make it the *de facto* sentence… Not withstanding the jury recommendation, whether it be for life imprisonment or death, the judge is required to make an *independent determination* based on the aggravating and mitigating factors." Grossman v. State, 525 So.2d 833, 840 (Fla.1988)[emphasis added].

Since, just as in Arizona, it is the Florida trial judge who makes the crucial findings of fact necessary to impose a death sentence, it logically follows that Ring applies to Florida. Mr. Kocaker acknowledges that this Court has taken a contrary position, particularly when the prior violent felony aggravator has been found to exist. See, Peterson v. State, 2 So.3d 146, 160 (Fla. 2009);

Lebron v. State, 982 So.3d 649 (Fla. 2008). However, Mr. Kocaker respectfully asserts that this position should be revisited since the Florida capital sentencing scheme does not meet constitutional requirements.

The failure of the Florida capital sentencing scheme to require a unanimous jury recommendation vitiates the reliability of the death sentence, especially when the judge is the ultimate sentencer. The lack of unanimity in the jury recommendation was specifically objected to.(II,R35-44) The jury recommendation in this case was 11-1.(V33,T1320)

As this Court recognized in State v. Steele, 921 So.2d 538 (Fla. 2005), Florida has the dubious distinction of being the only state in the country to permit a death sentence to be imposed where a jury may determine by a bare majority vote whether or not to recommend death. Despite urging from this Court, the Florida legislature has failed to address the infirmity of the Florida statute. Both Justice Pariente and former Justice Anstead recognized in the dissenting opinion in Butler v. State, 842 So.2d 817 (Fla. 2003), that a unanimous recommendation of death by the jury is necessary to meet the constitutional safeguards expressed in Ring. The reasoning of the dissent is that

"the right to a jury trial in Florida would be senselessly diminished if the jury is required to return a unanimous verdict of every fact necessary to render a defendant eligible for the death penalty with the exception of the final and irrevocable sanction of death. Butler, at 824. This Court has little choice but to ensure that constitutional rights are protected and to hold that Ring applies to Florida. The failure of the Florida capital sentencing scheme to require a unanimous recommendation of death violates constitutional guarantees of due process under the Fifth and Fourteenth Amendments to the United States Constitution, the corresponding provisions of the Florida Constitution, and the Sixth Amendment right to a jury trial under the United States Constitution and the corresponding provisions of the Florida Constitution, and the Eighth Amendment to the United States Constitution.

CONCLUSION

Based upon the forgoing arguments and citations of law and other authorities, it is respectfully requested that the sentence of death be set aside.

Respectfully submitted,

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ANDREA M. NORGARD
Special Appointed PD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief has been furnished by U.S. Mail to the Office of the Attorney General, AAG Carol Dittmar, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607 this ____ day of November, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style font used in the Initial Brief is Courier-New 12 point in compliance with Fla. R. App. P. 9.210(a)(2).

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