IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,143

RIGOBERTO SANCHEZ-VELASCO,

Appellant,

vs.

THE STATE OF FLORIDA

Appellee.

FILED
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Deputy Clerk

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AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

****

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GISELLE D. LYLEN
Florida Bar No. 0508012
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohdes Building
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

<u>TABLE OF CONTENTS</u>

<u>Page</u>

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2-37

POINT ON APPEAL 38

SUMMARY OF THE ARGUMENT 39

ARGUMENT 40-72

CONCLUSION 73

CERTIFICATE OF SERVICE 73

TABLE OF CITATIONS

Cases	Page
Adams v. State, 412 So.2d 850, 857 (Fla. 1982)	66
Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)	50
Adkins v. Smith, 205 So.2d 530 (Fla. 1968)	59
Alvord v. State, 322 So.2d 533, 540 (Fla. 1975)	66
Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979)	51
Barfield v. Harris, 540 F.Supp. 451 (E.D.N.C. 1982)	53
Blanco v. State, 452 So.2d 520 (Fla. 1984)	62
Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)	44
Brown v. State, 381 So.2d 690, 694 (Fla. 1980)	52,53
Brown v. State, 526 So.2d 903 (Fla. 1988)	62
Bundy v. State, 471 So.2d 9 (Fla. 1985)	62
California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)	43
Clark v. State, 443 So.2d 973 (Fla. 1983)	62
Craig v. State, 510 So.2d 857 (Fla. 1987)	62
Darden v. Wainwright, 699 F.2d 1031, 1038 (11th Cir. 1983)	51

TABLE OF CITATIONS CONT'D

Cases	Page
Daugherty v. State, 419 So.2d 1067 (Fla. 1982)	69
Dixon v. State, 283 So.2d 1 (Fla. 1973)	63
Dorsey v. United States, 174 F.2d 899 (1949)	43
Duest v. State, 462 So.2d 446 (Fla. 1986)	60
Fleming v. State, 374 So.2d 954 (Fla. 1979)	62
Flowers v. State, 351 So.2d 764 (Fla. 3d DCA 1977)	60
Gafford v. State, 387 So.2d 333 (Fla. 1980)	53
Garron v. State, 528 So.2d 353 (Fla. 1988)	62
Gilliam v. State, 514 So.2d 1098 (Fla. 1987)	55
Hyer v. State, 462 So.2d 488 (Fla. 2d DCA 1984)	43
Jackson v. State, 366 So.2d 752 (Fla. 1978)	52/53
Jackson v. State, 451 So.2d 458 (Fla. 1984)	62
Jackson v. State, 464 So.2d 1181 (Fla. 1985)	55
Jackson v. State, 498 So.2d 906 (Fla. 1986)	62
Jackson v. State, 502 So.2d 409 (Fla. 1986)	62
Lemon v. State, 456 So.2d 885 (Fla. 1984)	63

Cases | Page

Lopez v. State,
536 So.2d 226 (Fla. 1988)........................ 69

Lucas v. State,
376 So.2d 1149 (Fla. 1979)........................ 62

Maggard v. State,
399 So.2d 973 (Fla. 1981)........................ 51,62

Maynard v. Cartwright,
484 U.S. ___, 108 S.Ct. 1853,
100 L.Ed. 2d 372 (1988)........................ 61

McCorquodale v. Balkcom,
525 F.Supp. 408, (N.D. Ga. 1981)........................ 52,54

Michigan v. Chesternut,
U.S. ___, 108 S.Ct. 1975,
100 L.Ed.2d 565 (1988)........................ 44

Middleton v. State,
426 So.2d 553 (Fla. 1982)........................ 73

Oats v. State,
446 So.2d 90 (Fla. 1984)........................ 62

Oregon v. Mathiason,
429 U.S. 492, 97 S.Ct. 711,
50 L.Ed.2d 714 (1977)........................ 43

Paramore v. State,
229 So.2d 855 (Fla. 1969)........................ 51,53

Phoenix v. State,
455 So.2d 1024 (Fla. 1984)........................ 43

Piccott v. State,
116 So.2d 626 (Fla. 1954)........................ 51

Quince v. State,
414 So.2d 185 (Fla. 1982)........................ 10,66

Randolph v. State,
463 So.2d 186 (Fla. 1984)........................ 62

TABLE OF CITATIONS CONT'D

Cases	Page

Rhodes Island v. Innis,
446 U.S. 291, 100 S.Ct. 1682,
64 L.Ed.2d 297 (1980)............................ 46

Riley v. State,
366 So.2d 19 (Fla. 1978)........................... 62

Rogers v. State,
511 So.2d 526 (Fla. 1987).......................... 68

Roman v. State,
475 So.2d 1228 (Fla. 1985)......................... 44

Singer v. State,
109 So.2d 7 (Fla. 1959)............................ 51

Scott v. State,
494 So.2d 1134 (Fla. 1986)......................... 62

Smith v. State,
378 So.2d 281 (Fla. 1979).......................... 40

Smith v. State,
407 So.2d 894 (Fla. 1981).......................... 69

Stano v. State,
460 So.2d 890 (Fla. 1984) 69

State ex rel. Dato v. Himes,
184 So.2d 244 (Fla. 1938).......................... 59

State v. Goldman,
494 So.2d 239 (Fla. 3d DCA 1986)................... 43

State v. Rizzo,
463 So.2d 1165 (Fla. 3d DCA 1984).................. 40

State v. Tamburri,
463 So.2d 489 (Fla. 26 DCA 1985)................... 43

Strawn v. State ex rel. Anderberg,
332 So.2d 601 (Fla. 1976).......................... 59

United States v. Booth,
669 F.2d 1231 (9th Cir. 1982)...................... 45

TABLE OF CITATIONS CONT'D

Cases | Page

United States v. Glen-Archila,
677 F.2d 809 (11th Cir. 1982)..................... 45

Volusia County v. Niles,
445 So.2d 1043 (Fla. 5th DCA 1984).................. 59

Williams v. State,
228 So.2d 377 (Fla. 1969........................... 53

Witherspoon v. Illinois,
391 U.S. 510, 88 S.Ct. 1770,
20 L.Ed.2d 776 (1986).............................. 49

OTHER AUTHORITIES

F.S. §775.08211 (1982)................................ 2

F.S. 921.141. 30

F.S. 921.141(5)(h) 61

INTRODUCTION

This is a direct appeal by the Defendant, **Rigoberto Sanchez-Velasco,** of a judgment of guilt and sentence of death imposed by the Honorable Allen Kornblum, Circuit Court Judge, Criminal Division, of the Eleventh Judicial Circuit, In and For Dade County, Florida.

Throughout this brief the Defendant/Appellant, **Rigoberto Sanchez-Velasco,** will be referred to as "the Defendant." The Plantiff/Appellee, **the State** of **Florida,** will be referred to as "the State." Reference to the Record on Appeal, Transcript of relevant proceedings, Defendant's Brief, and Appendix will be made by use of the symbols "R", "T ", "DB" and "A" respectively.

In those instances where a witness testified at both pretrial and trial proceedings, the complete content of that witness' testimony will be set forth in the State's discussion of pre-trial proceedings; trial testimony will be discussed only as to those matters which are in addition to or different from those things previously discussed.

STATEMENT OF THE CASE AND FACTS

On January 13, 1987, a four count Indictment was filed charging the Defendant with the first degree murder and sexual battery of Katixia ("Kathy") Encenarro December 12-13, 1986, strong-arm robbery and burglary. (R.1-3A). The Defendant was arraigned and a plea of not guilty was entered.

The State's, Motion to Order the Defendant to submit blood, hair, and saliva samples was granted by the Court and the samples were thereafter taken (R.29-30; T.1797). Pursuant to defense Motions, Dr. Norman Reichenberg and Dr. Dorita Marina, were appointed to evaluate the Defendant. (R.35, 40-41, 43). The Court also granted specially appointed counsel's additional motion to appoint psychiatric experts. (R.44-45).

The defense moved the Trial Court to declare F.S. g775.08211 (1982) unconstitutional; this motion was denied by the Court. (R.46-73). The following month, the defense filed its March 14, 1988 "Motion to Preclude Systematic use of Peremptory Challenges and Challenges For Cause to Prospective Jurors," which was denied by the Court. (R.85-86). Four days later, the Defendant filed Motions to "Suppress Oral and Written Admissions, Statements, and Alleged Confessions" and to "Preclude Death Sentence." (R.87-93, 94-96). Ruling on these Motions was deferred by the Court. (R.4, 96). The Court granted the

Defendant's Motion to Authorize Travel to Cuba, to allow discovery related to potential mitigating circumstances. (R.104-106).

On August 2, 1988, an evidentiary hearing was conducted on the Defendant's Motion to Suppress. (R.4; T.289-551). The State presented the testimony of several Hialeah Police Officers (R.4; T.321-501); the Defendant declined to testify. (R.4, T.527).

City of Hialeah Homicide Detective Ralph Garcia, was dispatched to 606 West 81st Street, apartment 321 early on December 13, 1986. Upon his arrival, he was advised that the victim was an eleven year old female, Kathy Encenarro, whose nude body had been found in her bedroom by her mother, Marta Molina, when she returned home from work. (T.321-332, 378-379, 380). That evening Marta had been late for work because she was having trouble finding a babysitter to watch Kathy. (T.332). Marta planned to send Kathy to her neighbor Maria's for the night, but Kathy first wanted to finish watching TV at home. Since the Defendant, who was staying at the apartment would be there, Marta agreed and left for work. (T.332, 1841).

During the early evening Marta received a phone call from Kathy who was upset because Marta had given away one of her toys. (T.333). The Defendant also called two or three times. (T.333-334). The first call was to see if she had gotten over an on-

the-job upset; later the Defendant called to see if she would be home at the usual time. (T.334-335).

Detective Garcia entered the apartment after talking with Marta for approximately fifteen minutes; he remained inside for nearly three hours. (T.380-381). The apartment was very neat; there were no signs it had been searched or ransacked. (T.332). The only items found missing were a fur coat, and Kathy's gold jewelry: two gold chains, a charm, and a gold identification bracelet. (T.350).

Police experts concluded that there was no evidence of forced entry, whoever locked the front door upon leaving had used a key. (T.385-386, 449-451). The front door, with two deadbolts, was the only viable exit because of the apartment's location. (T.335). When Marta left the apartment the night her daughter was killed she locked both locks. (T.335; 382). When she returned after work, only the bottom one was locked. (T.336, 382-383, 448-449). Only Marta, Kathy, and the Defendant had complete sets of keys to the front door; a family friend who no longer lived there had the key for one lock. (T.336, 382). Shortly before Kathy's death, Marta learned that the Defendant, without her permission, had taken a set of keys and made himself duplicates. (T.337, 382). The Defendant was unable to lock the top lock with his duplicate key. (T.337-382). Detective Garcia concluded that the defendant might have been the last person to see Kathy alive. (T.339).

Detective Garcia left the apartment and again spoke with Marta from whom he obtained the names and addresses of several friends the Defendant frequently spent time with. (T.339, 381). Sixto Vega of D.C. Aluminum told the police the Defendant had not been there for several days. (T.342, 381, 388-389). At the Defendant's sister's home, Rigoberto Reyes, the Defendant's nephew told Detective Garcia he hadn't seen the Defendant in months. (T.342-343, 388-389). The Officers then drove to the Mandalay Hotel on Miami Beach to see Mohammed Mian an employee of the Hotel; Mian was not there. (T.343, 390-391). The Officers also left word with Gilberto Estrada to call if the Defendant contacted him.

The Officers returned to the Mandalay Hotel at 8:30 p.m.; Mian was not there, but Detective John Rodriguez received a call from Gilberto Estrada. (T.344, 346, 391). Detective Garcia spoke with Estrada the first time he called the police to tell them the Defendant had called him. (T.345, 392). The Defendant told Estrada he had a problem and needed Estrada's help and that he would call again to tell Estrada where they could meet. (T.345, 392, 406, 432). Estrada told Detective Garcia that the Defendant had taken his stereo without his permission when he moved to Marta's and he wanted it returned.[1] (T.347-348, 402-403).

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[1] Estrada told him that the stereo was worth more than $300.00. (T.402, 452-453, 467-468).

Estrada also told Garcia that he was afraid of the Defendant who had warned him against calling the police. **(T.346, 404).**

During Estrada's second call, he told Detective Rodriguez where he and some friends would be meeting the Defendant. **(T.346, 392, 403, 409, 470).** Four Officers responded to the Pier House Hotel on Miami Beach in unmarked cars and plain clothes. **(T.349-351, 392, 409, 456, 470-471).**

Four white males were seated in Estrada's dark colored Spectrum in the hotel parking lot; the car stopped to wait for them. **(T.353, 404, 408).** The officers approached with weapons drawn, held below hip height with the barrels pointing to the ground, police identification hung on their belts. **(T.351-352, 354, 408, 409, 456, 476).** The car's occupants were asked in Spanish to 'please get out of the car;' the four men exited the vehicle and were patted down. **(T.354-355, 410-411).** When asked, the Defendant identified himself as Jose Ramirez.

Detective Garcia walked over to Estrada who was standing several feet away and asked the Defendant's name **(T.356).** Estrada told him the Defendant's real name although the Officers had recognized the Defendant from a police photograph. **(T.430).** The Defendant was arrested for grand theft, although the Officers also wanted to inquire as to his possible involvement in Kathy's murder. **(T.356, 400, 404, 416, 454).**

After the Defendant was handcuffed, Estrada told Detective Garcia that while the stereo was worth more, he was able to find receipts for only $180.00. (T.356, 402, 404, 416, 420, 480). As a result, the cuffs were removed and the Defendant was released from custody; he walked off and sat on some boards near the street. (T.357, 417, 420). Detective Rodriguez went over to where the Defendant was seated, identified himself and spoke with him. (T.358). No threats or coercion was used. (T.338). The Defendant, when asked if he would talk to them about Kathy Encenarro's case, replied that he would talk to them but only in Hialeah. (T.358).

For the trip back to Hialeah, the Defendant, without assistance, got into the back seat of one of the unmarked cars. (T.359, 361, 392). After driving three or four blocks past the Newport Hotel, the Defendant spontaneously asked if they could take him back to the Newport to retrieve some of his property because 'the least he could do was return the little girl's jewelry to her mother.'(T.359). The Defendant had not been told anything regarding the facts of the case by anyone. (T.359). The officers did not prompt a statement from the Defendant who was the only one speaking during the ride. (T.361, 427). The Defendant then directed them to the rear of the hotel near the beach by a pile of driftwood where he searched without finding anything other than his hat. (T.360, 424-426). During the

resumed ride, the Defendant again broke the silence stating that he 'wanted to be electrocuted the next day since he didn't want to rot in jail.' (T.360-361).

At the station, the Defendant was escorted to the homicide office. (T.362). The Officers did not begin conversing about the case, but discussed other matters with him in Spanish. (T.362). The Defendant was not suffering from any illness or infirmity nor did he request anything or complain about his treatment. (T.362).

The Defendant was Mirandized before anything about the case was mentioned. (R.170; T.363-365, 366, 368-369, 424). The Defendant declined representation and waived his rights. (R.170; T.367, 369). The Defendant told the Officers that he had been staying with Kathy. (T.370). After a brief conversation with her while she was in bed watching TV, he grabbed her and began to choke her, throwing her off the bed. (R.173; T.371). He twisted Kathy's t-shirt around her neck, picked her up, shook her, and put her back on the bed. (R.173-174; T.371). He raped her, took some property, and left the premises in a taxi. (T.371). He believed the little girl was dead. (T.371).

When Detective John Rodriguez arrived at the crime scene, he spoke with Marta who told him that Kathy had called her once during the evening while she was at work. (T.447-450, 460-462, 1606). She received about three other calls from the Defendant,

the last around midnight, when the Defendant told her that Kathy was "o.k." and was sleeping. **(T.450).**

Detective Rodriguez spoke with Estrada the morning of the 13th. **(T.451).** Estrada told him that when the Defendant moved out two days before, he took Estrada's stereo, some clothes, and some ceramic figurines. **(T.452, 467-469).** The Defendant left Estrada a note warning him not to tell the police. **(T.452, 469-470).** Estrada told Rodriguez the Defendant might be at an hotel on the Beach. **(T.470, 1615-1616).**

After the Defendant's arrest for grand theft, Estrada indicated he only had receipts for **$180.00** worth of stereo equipment and that he had changed his mind and no longer wished to press charges. **(T.495).** As a result, Sergeant Freeman made the decision to release the Defendant, who went of his own accord to sit on some boards by the street. **(T.454, 480, 483, 496).**

About ten minutes later, Detective Rodriguez went and sat next to him. **(T.456).** He told the Defendant they knew his real name; Rodriguez told him he was involved in an investigation about Kathy Encenarro. **(T.456, 1621).** Rodriguez asked the Defendant if he would be willing to talk with them; no other questions were asked. **(T.456, 457, 485).** The Defendant said he would talk to them, but only in Hialeah. **T.456, 485, 1621).** The Defendant, without assistance, entered the unmarked car.

(T.458). At the Defendant's request, they stopped at the Newport Hotel. (T.487).

After reviewing additional case law submitted by the parties, the Court found the Defendant had been at liberty at the time he consented to discuss the murder investigation, the police did not solicit inculpatory statements from him, and the Defendant freely and voluntarily made statements to the police prior to and upon his arrival at the station. (T.274).

The Defendant's trial commenced August 8, 1988. (R.5; T.553). Each side was permitted ten peremptory challenges with two additional challenges for the two alternate jurors. (T.559). The Court informed the parties that when twelve unchallenged jurors were left and all backstrikes had been used or waived it would have its jury. (T.557). To reduce the amount of time jury selection would entail, the Court asked preliminary qualifying questions. (T.556). The defense objected to question thirteen: "do you have any philosophical, or religious, or conscious scruples against the infliction of the death penalty in a proper case?" The defense objected to the use of the word 'philosophical.' (T.560). The Court overruled the Defendant's objection. (T.562).

During jury selection, numerous prospective jurors were excused for cause either because of their stated inability to

impose the death penalty in any case under any circumstances or because they were unable to make an impartial determination of guilty or innocence. (T.1072-1134). The Court, without defense objection, again reiterated that the parties could challenge any prospective juror until the time the panel was sworn. (T.1130). The State tendered the prospective jury and the defense accepted. (T.1132). Pursuant to its earlier rulings, the Court inquired whether there were any additional backstrikes. (T.1133). The defense objected on the grounds that the jury had been tendered. (T.1133). The Court overruled the objection and selection of the two alternate jurors began (T.1131, 1141). Over defense objection, the Court again ruled that the composition of the jury was open to challenge until the panel was sworn. (T.1147). The defense renewed its prior motions which were overruled by the Court which did, however, grant the defense's request for an additional peremptory challenge. (T.1300, 1376). The parties exhausted their remaining backstrikes, the panel was sworn in, and opening argument was presented. (R.11; T.1378, 1382-1413).

Officer Amango testified that he arrived on the crime scene at 3:41 a.m. and was the first to enter the apartment. (T.1421-1422). At Marta's direction, Officer Amango entered a bedroom and saw the body of a young female laying on the bed covered by a blanket. (T.1423-1425). Her face was swollen, covered with splotchy red marks. (T.1425). There was no pulse; Kathy was cold to the touch. (T.1425). He examined the bed and lifted the

blanket. **(T.1425-1426).** Kathy was completely naked and he noticed blood on the child's vaginal area. **(T.1426).** Officer Amango learned that Kathy had been left at home the prior evening with a sitter. **(T.1430).**

Alia Encenarro, Kathy's stepmother identified her, prior to Marta taking the stand. **(R.12; T.1433-1434, 1440-1530).** Marta testified she knew the Defendant two or three years prior to Kathy's murder; she was also a friend of the Defendant's former girlfriend, Maria Gonzalez, who lived down the hall. **(T.1444-1445, 1516).** The Defendant showed up at her apartment two days before bringing a stereo as a gift for Kathy; Marta let him stay. **(T.1446-1449, 1503).**

On the morning of December **12, 1986,** the Defendant took Kathy to school. **(T.1448).** Upon his return, he argued with Maria Gonzalez at Marta's apartment. **(T.1448-1449).** Later, Marta had sex with the Defendant, for the second time in their relationship. **(T.1447-1449).** When school ended, the Defendant picked Kathy up, ran errands, then brought her home. **(T.1449).** The Defendant went to the store while Marta prepared dinner; she told him to hurry because she had to be at work at **4:00** p.m. **(T.1450-1451).**

Marta told Kathy, who was watching television, to go to Maria Gonzalez's apartment to stay. **(T.1449-1450).** Kathy told Marta she wanted to finish watching the program and the Defendant

would stay with her. (T.1449-1450). The Defendant reassured Marta, telling her to go to work and not to worry. (T.1451). The last time Marta saw Kathy she was wearing pink shorts, a t-shirt with a collar, two gold chains, and a gold identification bracelet. (T.1458-1459).

When Marta left, the front door was closed and both deadbolts were locked. (T.1452). Both Marta and Kathy had full sets of keys; their former roommate, Marlene, had only one. (T.1445, 1460). Marta had discovered that day the Defendant had taken a set without her permission and made his own. (T.1445, 1452). He was unable to lock the top lock with his duplicate key. (T.1453).

At around 5:30 or 6:00 p.m., Kathy called Marta at work. (T.1455). Kathy was upset and hung up on her mother because Marta had given Maria's son a toy Kathy had said was for him. (T.1455). The Defendant called several times. The first time, he called to see if she was alright. (T.1456, 1457, 1495-1496). The Defendant called again around 7:OO-8:00 p.m. (T.1456, 1495-1496). She later learned her eldest daughter, Maria Bencomo, spoke with Kathy around 8:00 p.m. (T.1525). The Defendant called a third time at around 11:00-12:00 p.m. to ask her what time she was leaving work, although he knew her hours and also knew that since it was a Friday night, she would probably not get off work until after 3:00 a.m. (T.1451, 1457). He told her to finish up quickly and come home. (T.1505).

Marta asked how Kathy was, the Defendant told her Kathy had stayed home. **(T.1461-1462).** Marta asked to speak to Kathy; he said that she was sleeping. **(T.1462).** The Defendant told Marta that although the phone had rung several times, he was not answering because Kathy was sleeping. **(T.1497).** Marta never instructed either Kathy or the Defendant not to answer the phone. **(T.1461).**

Marta left work around **2:00-2:30** a.m. stopping for something to eat. **(T.1462, 1505).** When she arrived home, the only light on was in the bathroom. **(T.1463).** She did not see the Defendant in the livingroom where he normally slept. **(T.1463).** Kathy's bedroom door was half open. **(T.1464).** She forgot that Kathy was home that night and thought the Defendant was the person completely covered by the blanket. **(T.1464).** She pulled down the blanket and saw the body of her little girl. **(T.1464).** Kathy's face was swollen; she was naked and bleeding from her vagina. **(T.1464).**

Kathy's chains and identification bracelet, valued at **$300.00** and **$900.00** respectively, were gone. **(T.1466-1469, 1525).** Marta's white and grey fur coat was also missing. **(T.1466-1467).**

Maria Bencomo, Kathy's sister, testified that on the evening of December 12, 1986, she spoke with Kathy by phone. (T.1553). Kathy was unusually quiet; she seemed nervous, but when Maria asked her what was wrong, she said she was fine, that she had been asleep. (T.1553-1554, 1579). Maria asked if she was alone, Kathy said she was. (T.1554). Kathy told Maria she had to hang up; Maria did not call her back because she seemed upset. (T.1563).

Prior to Detective Rodriguez's testimony, the Court ruled that a redacted version of the Defendant's taped confession and transcript thereof would be submitted to the jury.

Detective Rodriguez testified that after being unable to contact Mohammed Mian at the Mandalay Hotel, he and three other Detectives proceeded to the Pier House Inn based upon information provided by Gilberto Estrada. (R.13; T.1614-1617).

At the Pier House Inn the plain clothes Officers approached the stopped car in which the Defendant was seated with weapons drawn, barrels down at their sides. (T.1617-1618, 1620, 1735-1736, 1742). The car's occupants were asked to exit the car; they were quickly patted down. (T.1618, 1738).

Detective Rodriguez, in Spanish, asked the Defendant his name; the Defendant told him Jose Ramirez. (T.1619, 1741).

After the Defendant was released from custody, Detective Rodriguez told the Defendant that he knew who he was and that they were investigating a case concerning Katixia Encenarro. (T.1621). Detective Rodriguez asked the Defendant if he would be willing to talk with them; the Defendant said that he was willing, but he would only talk with them in Hialeah. (T.1621, 1742, 1745, 1752). The Defendant voluntarily got in the Officers' car for the return trip to Hialeah. (T.1621, 1742-1746). Because he was not under arrest and no interrogation took place, Miranda rights were not read. (T.1746).

During the ride along Collins Avenue, the Defendant asked them to stop at the Newport Hotel saying he felt the least he could do was to return the little girl's jewelry to her mother. (T.1622, 1625, 1749, 1753-1755). The statement was volunteered and was not in response to any questioning. (T.1748-1749).

The Defendant was escorted to the homicide office when they arrived at the Hialeah Police Station. (T.1626, 1768, 1769). The Defendant never said he did not wish to be there and at no time expressed dissatisfication with the situation or his treatment. (T.1626, 1728). The Defendant was not threatened, or coerced, nor was he promised anything in return for making a statement. (T.1627, 1634, 1727).

The Defendant was fully Mirandized and executed a Miranda waiver form, indicating his intelligent waiver of each individual right. (R.13; T.1628-1633, 1759). He declined legal representation. (R.13; T.1631-1634). The Defendant was not coerced; he was not insane or under the influence of drugs or alcohol. (R.181; T.1626-1633, 1634, 1640, 1756-1757). He did not assert his right to an attorney or indicate a desire to stop. (T.1635). At the conclusion of Detective Rodriguez's testimony, the Trial Court denied the Defendant's renewed Motion to Suppress. (R. 15; T.1798-1799).

The redacted tape recording of the Defendant's formal statement was played for the jury. (R.14; 168-186; T.1652, 1657, 1680, 1707-1725). During the statement, the Defendant provided background information about himself. (R.169-170; T.1658-1660). The Defendant's rights were read and he stated that he did not want an attorney. (R. 170; T.1660-1661).

When asked about the events of Friday, December 12, 1986, the Defendant said that morning he took "the kid" to school, returning home around 8:00 a.m. (R.170-171; T.1662). Around noon Maria Gonzalez and some other company came by. (R.171; T.1662). He and Marta slept from 2:00-3:00 when he went to pick up Kathy. (R.171; T.1663). He stopped at Marta's old address to pick up the mail and at some friends of his to borrow money for gas. (R.171; T.1636, 1663).

He believed that at around 4:00 p.m. he and Marta made love. (R.171; T.1664). Marta left for work and he slept until 7:00 or 8:00 p.m. (R. 172; T.1664-1665). He woke up when Maria Bencomo called Kathy; Kathy did not tell Maria he was there. (R.172; T.1637, 1665). Kathy asked him about a missing toy and he told her Marta had given it away; Kathy called her mother about it because she was upset. (R.172; T.1637, 1665). Kathy hung up on her mother; the Defendant believed she was also angry with him. (R.172; T.1665).

The Defendant said he was thinking about looking for Maria (Gonzalez) who he believed was shameless and who he thought he would strangle. (R.172, T.1665-1666). He got up and reheated some food for Kathy who ate and then started back to her room. (R.172; T.1636, 1666). Kathy asked the Defendant if he still loved Maria and he grabbed her by the neck with both hands. (R.172-173; T.1637, 1666-1669). She fell to the bed and he pulled her T-shirt up around her neck, twisting it like a tourniquet. (R.173; T.1637-1638, 1669). Kathy fell to the floor and he stood on the bed using the twisted T-shirt to lift her back onto it. (R.174; T.1639, 1670-1671, 1720). She did not make any noise, he believed she was dead. (R.174; T.1639, 1670-1671, 1720). He took her clothes off, then his own. (R.174-175; T.1639, 1673-1675). He raped her. (R.174-175; T.1671-1675,

1722). The Defendant then took some of Kathy's jewelry[2] and other property, called a taxi and left after covering Kathy's body with a blanket (R.175-177; T.1640, 1675-1680). It was around midnight. (R.177; T.1678).

At this point, the Defendant asked the Court to excuse him and interrupted the proceedings claiming Detective Rodriguez was lying, (T.1680-1681). The jury was removed from the courtroom. (T.1681). Out of the presence of the jury the Defendant swore he never said any of those things and insisted that both Detective Rodriguez and himself submit to a lie detector test. (T.1682). The Defendant was escorted out. (T.1682).

When the Defendant was returned to the courtroom, the judge warned him that while he would be given an opportunity to make a statement if he chose to do so, he would be obliged to wait for that opportunity. (T.1685-1686). The Defendant apologized for his behavior. (T.1686). Defense counsel moved for a mistrial, on the grounds that voice identification of the Defendant had been facilitated because the jury heard the Defendant **speak.**[3] (T.1687-1689). Defense counsel, in the

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2 This included two gold chains with a charm and a gold identification on bracelet which had broken after becoming tangle in her T-shirt. (R. 176; T. 1676-1677).

3 Additional grounds were that the jury had learned the Defendant had a basic command of English and that the Defendant stood when Marta identified him.

alternative requested a continuance and a psychiatric evaluation of the Defendant's competence to stand trial. (T.1691). The Defendant had previously been evaluated by his experts Drs. Haber, Berglass, and Mutter, as well as, by Dr. Jaslow by Court appointment. (R.35, 40-41, 43; T.1692-1693). In an abundance of caution, the Court appointed Drs. Castiello and Jiminez to determine the Defendant's competency to stand trial. (R.14, 114; T.1694, 1696). The Trial Court denied the Motion for Mistrial giving a curative instruction. (R.14; T.1699).

The proceedings returned to a review of the Defendant's statement. (T.1707). The Defendant stated he took a taxi to the Mandalay Hotel to see a friend taking a bag with clothes, Marta's coat, and Kathy's jewelry. (R.178-179; T.1707-1710). He asked his friend for $20.00 to pay his taxi and asked him for a free room. (R.179-180; T.1711-1712). His friend couldn't give him the room, so the Defendant went walking by the beach. (R.180; T.1712). He thought about what he had done and did not want to believe it. (R.180; T.1713). He though of having Estrada, whose advice he wanted, call the police; he also considered running away. (R.1713-1715).

The Defendant denied drug or alcohol use; he denied having any psychiatric conditions and stated he had never received psychiatric care. (R.180-181; T.1713-1716).

The following day, the Court announced that Drs. Jiminez and Castiello had found the Defendant competent to stand trial and that the doctors would be available for examination at a later time. (T. 1792-1794).

At trial, Detective Garcia's testified primarily regarding his February 5, 1988 meeting with the Defendant to retrieve blood, saliva and hair samples which he then submitted for analysis. (T.1806). In addition to the information he testified to at the suppression hearing, Detective Garcia stated that he interviewed Mohammed Mian several days after Kathy's death and recovered the missing fur coat from him. (T.1845, 1851).

Hialeah Police Department criminal identification technician Bill Watters was one of several experts called to the scene to examine it and collect evidence. (R.15-17; T.1853-1895). Watters found no evidence of forced entry; the apartment had not been ransacked. (T.1808, 1886). From the apartment, Watters collected clothing and the sheets from Kathy's bed, as well as, hair and fiber samples from Kathy's body[4] and the bed. (R.1868-1885).

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[4] These hairs came from Kathy's back, buttocks, right hand, legs and right forearm. (T. 1872-1873, 1875, 1884, 1885).

Supervisor/Technician John P. Lazaretto testified that fingerprints of comparative value were obtained at the scene; some found on Kathy's dresser matched the Defendant's fingerprints. Technician Lazaretto also identified numerous pieces of evidence obtained from the autopsy performed by Dade County Medical Examiner, Dr. Lyvia Alvarez on December 13, 1986. (R.17; T.1901-1908), 1923-1942). This evidence consisted of microscopic slides, swabs, fingernail scrapings, hair combings, and blood vials. (T.1901-1908, 1923-1942). Technician Lazaretto's testimony, was halted so that Dr. Andreas Jiminez, one of the psychologists ordered to evaluate the Defendant, could be questioned regarding his determination that the Defendant was competent to stand trial. (R.16; T.1912).

Dr. Jiminez stated that the Defendant exhibited an acceptable degree of rational understanding and appreciated the possibility that he could receive the death penalty if convicted of the crimes of which he stood accused. (T.1914-1915). Dr. Jiminez had no doubt that the Defendant was able to maintain appropriate courtroom behavior, but that his decision to do so was completely divorced from his capacity to do *so.* (T.1918). The Defendant told Dr. Jiminez that he had not been impaired at the time of the crime. (T.1919).

Mohammed Mian, an acquaintance of the Defendant's, worked at the Mandalay Hotel. (R.17; T.1945-2000). Mian, a Pakistani

national, testified he had known the Defendant more than three years because the Defendant used to check into the hotel with his lady friends. (T.1948-1949).

Mian was working the front desk when the Defendant arrived by taxi, around 12:30-12:45 a.m. on December 13, 1986. (T.1951). The Defendant asked him for $20.00 to pay the cab; Mian gave him the money from the register, thinking the Defendant had no small bills, then replaced the money out of his own pocket. (T.1952). The Defendant had no money and asked him to let him have a room for free. (T.1953). Mian could not do this and was unwilling to let the Defendant stay with him. (T.1953).

The Defendant began watching T.V. in the lobby and made several phone calls. (T.1954-1955). He told Mian a friend was coming to bring him the money to rent a room. (T.1954-1955). The Defendant asked Mian if he wanted to buy a white fur coat he had; Mian was not interested. (T.1956). Thirty or forty minutes later he approached Mian again, this time to inquire if he was interested in purchasing one of two chains he had. (T.1956-1957). Mian identified the smaller of the two, which had a small flower pendant on it, as the same one worn by Kathy in the school photograph her stepmother had used at trial to identify her. (T.1958). The Defendant asked Mian who was not interested in purchasing the jewelry to at least try to sell the coat for him. (T.1959).

The Defendant asked if he could have the key to an empty room so he could use the bathroom. (T.1959-1960). Mian called the room about an hour later to see where the Defendant was. (T.1960-1961). The Defendant did not go to the front desk until 5:00 a.m.; he told Mian he would be back with the money for the room before Mian got off work at 8:00 a.m. (T.1961).

David Rhodes, a Metro-Dade Police Department crime lab serologist, was declared an expert witness by the Court. (T.2008). Mr. Rhodes analyzed samples taken from the victim, the Defendant, and the crime scene. (T.2010). The Defendant's blood standard revealed that he had blood type "A", and a "PGM" of 1-2-. (T.2014). "A" antigens found in the Defendant's saliva established that the Defendant was a secreter. (T.2014, 2016). Kathy's blood standard showed that she had blood type "O" and a "PGM" of 1+2+. (T.2013). Rhodes stated that Kathy would not naturally have "A" antigens in her body fluids. (T.2015). Analysis of vaginal and cervical swabs revealed the presence of sperm, "A" antigens, and other enzymes consistent with someone with blood type "A" having had sex with the child. (T.2017, 2019-2021). Kathy's was the only "PGM" present. (T.2021). This finding would be common where, as here, the sample is from an area in the body where there is a high concentration of blood to dilute the foreign fluid. (T.2021-2022). Sperm, consistent with the Defendant's blood type, was also found on the sheets of Kathy's bed. (T.2024-2025).

Mr. Rhodes also analyzed hair and fiber samples from the scene and from Kathy's body to determine their origin. (T.2028, 2035-2036). One of the hairs submitted was from a Caucasian, and was coated with a substance which tested positive as blood; the hair was consistent with the Defendant's pubic hair standards. (T.2035-2036, 2050). Significantly, nothing Mr. Rhodes found was inconsistent with the conclusion that the Defendant had raped Kathy. (T.2037).

Former Dade County Medical Examiner, Dr. Lyvia Alvarez was declared an expert witness by the Court and testified that on December 13, 1986 she first viewed Kathy's body at the scene at 6:00 a.m. prior to performing the autopsy. (R.19; T.2057-2065, 2068, 2071, 2073). Kathy's body was covered, lying face up on the bed. (T.2069-2070). She was cold and rigid to the touch with complete rigor present.[5] Lividity was present in Kathy's back and buttocks, indicating her body had been in a fixed position for more than six hours. (T.2071). Dr. Alvarez concluded that Kathy had been dead six to twelve hours, fixing the time of death between 6 p.m. and 12 a.m. (T.1270-1271).

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[5] Muscle rigidity or rigor begins from the jaw down after six to 24 hours. After 24 hours, the body once again regains flexibility. (T. 2070).

Kathy was laying with her head tilted to the left; marks were clearly visible on her neck. (T.2071). Her legs were slightly closed and there was a small amount of blood on the genital area. (T.2071). When Dr. Alvarez moved Kathy's legs, blood flowed freely from the vaginal area. (T.2072). Brown fibers, similar to the carpet were on her back and between her fingers. (T.2072-2073).

Two hours after her preliminary investigation, Dr. Alvarez performed the autopsy. (T.2074). Kathy's eyes exhibited extensive areas of hemorrhage; Petechia, covered her eyelids. (T.2074).[6] Three abrasions appeared on the right **side** of Kathy's neck, in a linear front to back pattern. (R.148-149, 152-153; T.2106). Dr. Alvarez concluded that the linear scratches were consistent with chains being caught up in a T-shirt. (R.148-149, 152-153, 158-159; T.2106-2107, 2110, 2130-2131). A contusion appeared on the left shoulder area. (T.2107-2139). The pattern of a cloth collar of a T-shirt appeared on the left side of Kathy's neck, consistent with someone taking a T-shirt up around the neck and **twisting.**[7] (T.2110) The shirt was twisted with the

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[6] Petechia are small pin-point hemorrhages that result from asphyxia. (T.2081, 2118, 2598).

[7] Although Dr. Alvarez was told Kathy had not been left home alone, and was given a brief rendition of the facts of the case by Sergeant Freeman at the scene, she did not know about the T-shirt used to strangle Kathy at the time of the autopsy. (T. 2135).

knot on the left side of Kathy's neck. (T.2110-2111, 2119, 2124, 2137-2138.

Other evidence of strangulation was apparent. Pulmonary edema was found in Kathy's lungs[8], Petechia was found in the musculature of both sides of the head, and the brain was swollen and congested with excess blood. (T.2118, 2599, 2602).

Dr. Alvarez concluded that the cause of death was strangulation and that a substantial amount of force was required for strangulation to ocur in this manner. (T.2110, 2119, 2132). She further determined that Kathy's ability to cry out would be inhibited by someone lying on top of her compressing her lungs, while twisting her T-shirt around her neck. (T.2143-2144).

From other evidence, Dr. Alvarez also concluded Kathy had been raped. (T.2087, 2121, 2111). A 6 centimeter by 4 centimeter tear was located at the entrance of her vagina extending upward to encompass nearly the full width of the vagina. (T.2084, 2506). A 5 centimeter laceration extended along the right posterior wall of the vagina. (T.2085, 2586, 2594). Another sign of injury was marked congestion on the surface of the anus. (T.2084). The urethra also evidenced

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[8] Edema, i.e. water in the lungs occurs when someone is asphyxiated because even though the lungs stop breathing, the heart continues to pump blood which deposits in the lungs.

hemorrhage inflicted internally. (T.2084-2085). Dr. Alvarez found the entire area extensively hemorrhaged both inside and surrounding the vagina. (T.2086). Additional quantities of blood were located between the vagina and rectum. (T.2086). Dr. Alvarez concluded that the vaginal injuries had been caused by blunt trauma consistent with a penis being forced into the vagina of an unsexually developed girl.[9] (T.2067, 2086-2087, 2104). Other evidence of rape was the presence of a crystaline substance, proven to be dried sperm, on Kathy's face, shoulders, and genital area. (T.2121-2122). As a result of the autopsy, and facts provided regarding the case, Dr. Alvarez was later able to further narrow the time of Kathy's death. (T.2120, 2127-2129).[10]

Because of the amount of blood, hermorrhaging and trauma, Dr. Alvarez concluded, and the defense so stipulated, that Kathy was alive at the time of the rape. (T.2088-2091, 2092).

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[9] The vaginal entrance of a prepuberal girl, is at most 1-2 centimeters; the circumference of the average adult male penis is 4-5 centimeters. (T.2087, 2586). The laceration at the entrance of Kathy's vagina was caused because the penis inserted into it was much wider than it was; the posterior wall tear was caused because the penis was longer than the vagina. (T.2087).

[10] The stomach contained partially digested food, eaten 1-2 hours prior to death. (T.2120). Marta spoke with Kathy at approximately 7:00-8:00 p.m.; she found her daughter's body at 3:30 a.m. the following morning. (T.2128-2129).

The State rested its case and the defense moved for a Judgment of Acquittal on all counts. (R.20; T.2163). After argument by counsel, the Court denied the Motion. (R.20; T.2167-2181).

An evidentiary hearing was conducted on Dr. Anastasio Castiello's findings regarding the Defendant's competency to stand trial. (R.20; T.2186-2200). Dr. Castiello concluded that the Defendant was competent and had an understanding of both his situation and its possible results. (R.20; T.2189, 2195, 2201). The fact that the Defendant exhibited poor judgment or chose to go against his counsel's advise was not indicative of mental illness. (T.2196-2197). Based upon the testimony of both Dr. Jiminez and Dr. Castiello, as well as, its own observations, the Trial Court declared the Defendant competent both at the start of trial and at all times thereafter. (R.20; T.2201).

After consulting with counsel, the Defendant decided not to testify (T.2202, 2204-2205). The Court made a determination the Defendant had freely and voluntarily decided not to testify. (T.2207). The defense then renewed its motion for Judgment of Acquittal; the Court reserved its ruling and the defense rested its case. (T.2211-2212). The Court thereafter denied the Defendant's Motion, and all renewed pretrial Motions. (T.2211-2216).

Closing arguments were presented and the Court charged the jury which retired to consider its verdict. **(R.22-23; T.2309-2503).** The Defendant was found guilty of first degree murder, sexual battery of a victim under twelve years old, and theft, a lessor included offense of grand theft. **(R.23, R.233-236; T.2507-2508.** He was found not guilty of burglary. **(R.23; T.2508).** Thereafter, the Court adjudicated the Defendant guilty of Counts I through III and acquitted him on Count IV. **(R.236; T.2512).** The Defendant addressed the court forgiving all participants in the trial. **(T.2517-2518).**

At the penalty phase, the State relied on two aggravating circumstances: the first was that Kathy's murder was especially heinous, atrocious, and cruel, the second was that the murder occurred during the commission of a sexual battery. **(T.2541).** The defense moved the Trial Court to declare F.S. **921.141** unconstitutional claiming the terms heinous, atrocious, and cruel were too vague and ambiguous to be applied. **(T.2542, 2551).** After argument, the Court overruled the Defendant's motion and advised it would instruct using the Profitt v. Florida,[11] definition that an especially heinous, atrocious, and cruel crime is one which is consciously pitiless and unnecessarily tortuous to the victim. **(T.2556, 2568).**

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11 Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 279, 49 L.Ed.2d 913, (1976).

Metro-Dade Medical Examiner, Dr. Lyvia Alvarez testified, that Kathy's death was terribly painful. (T.2577-2616). The vaginal tears she sustained would have been extremely painful given the high concentration of nerve endings in the area. (T.2587-2593). Dr. Alvarez likened it to very painful vaginal tears which can occur during childbirth without the joy which helps make the pain bearable. (T.2592-2593). Dr. Alvarez testified that Kathy would have experienced pain as a result of the compression of her neck by the twisted, tourniquet-like t-shirt. (T.2596). Worse, she would have experienced great anxiety and panic as a result of her inability to breathe. (T.2595-22596). The pattern of ligature on Kathy's neck indicated that the compression of her neck was not constant, *so* that it would loosen to allow air to enter her lungs, then tighten. (T.2596). The lacerations and other marks on her neck, indicated that Kathy's death was slow enough and her consciousness of her circumstances acute enough to allow her to struggle while the t-shirt was tightened. (T.2597).

The amount of blood and hemorrhoging in the eyes, scalp, petrous emminences of the inner ear, sphenoid sinus, eyes, vaginal area and brain also testify to the length of time it took for Kathy to die. (T.2598-2602, 2606). In cases of complete air loss such as hanging, the fastest form of asphyxiation, death results in three minutes (T.2603). It would take a child longer to die from asphyxiation because of a greater tolerance to lack

of oxygen, so that if, as was not the case here, there was a complete loss of oxygen, it would have taken Kathy at least five minutes to die. (T.2604-2605, 2607). The State rested its case. (R.25, T.2616).

The defense relied upon three mitigating circumstances: that the Defendant acted under the influence of extreme mental or emotional disturbance, that he was unable to appreciate the criminality of his conduct and conform his behavior to the requirements of the law, and that he was a product of his environment. (T.2779-2781). Defense psychologist Dr. Leonard Haber, was recognized as a court expert. (R.25; T.2616-2617, 2624, 2628, 2674). Haber was provided by the defense with a synopsis of the evidence and charges in the case, as well as, materials relating to the Defendant's prior record. (T.2626-2627, 2635-2636). He was asked to render an opinion as to the Defendant's capacity to stand trial, general capacity, capacity for rehabilitation, and the presence of any mitigating circumstances. (T.2624, 2627). He met with the Defendant twice between February and March 1988. (T.2626).

Haber testified that the Defendant had numerous tatoos which could be indicative of morbidity or a macho personality. (T.2653-2658). He found the Defendant's confession disorganized and although he conceded he did not know what the Defendant's state of mind was at the time the crime was committed, he felt

there was a possibility the Defendant might have been suffering from an emotional disturbance at the time, although it was not a major disorder. (T.2663-2665, 2686). He found the Defendant competent and fully able to meet the test of criminal responsibility. (T.2684). He was sane at the time the crime was committed. (T.2685).

Although he was told the Defendant had been hospitalized in Cuba, Haber did not know if the hospital was for psychiatric treatment. (T.2679). The Defendant denied having a drug or alcohol problem. (T.2679).

The Defendant made a statement to the jury on his own behalf. (R.25; T.2705-2745).[12] He apologized for his behavior on August 12th. (T.2705). He volunteered the fact he had previously been convicted of two minor offenses. (T.2712).

Upon his release from prison, the Defendant went to his friend Vega who told him Marta wanted him to call her. (T.2707). Marta insisted Vega bring the Defendant to her house. (T.2702, 2715). He claimed to have had numerous relationships with women who had children, similar to the relationship he had with Marta; he claimed to love children. (T.2707, 2715).

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12 The Court later had the Defendant express himself in Spanish to allow him to communicate more efficiently. (T.2323).

On the night Kathy died, Marta knew he had a date. (T.2717). He left the apartment at 7:30 p.m., met Mohammed Mian, and stayed until 3:00 a.m. when Mian called his room to tell him the police had been there looking for him regarding the murder of a girl. (T.2718). The next day, at 8:00 p.m. the Defendent said he called Estrada to tell him he needed help; Estrada told him the police were looking for him. (T.2720-2721).

At the Pier House Hotel, the Defendant claimed the Officers forced him to accompany them. (T.2721-2724). He stated the Detective lied on the stand and that he had demanded his rights. (T.2722). He denied being the person on the tape recorded confession, but also claimed to have been beaten into the confession. (T.2727, 2742). The Defendant denied ever seeing Marta's coat and asserted that a man of his age could not have inflicted the vaginal lacerations the medical examiner testified to. (T.2730, 2734-2735). Finally, he claimed he was neither under the influence of extreme mental or emotional disturbance at the time of the crime, nor was he mentally ill or unable to appreciate the criminality of his conduct. (T.2745).

The defense rested and closing argument was presented. (R.25; T.2735-2788). The jury recommended the death penalty by a vote of eight to four. (T.2803). Prior to sentencing by the Court, the defense presented the testimony of clinical psychologist Dr. Dorita Marina who was declared an expert witness

by the Court. **(T.2814-2876).** Dr. Marina learned from the Defendant he had been placed in a day care center at age four and later in boarding school. **(T.2817, 2819).** At age sixteen, he refused to serve in Angola and was hospitalized as a result. **(T.2827).** He discussed, with difficulty, the relationships he had had with women; Dr. Marina felt he exhibited some aggression towards women. **(T. 2821-2828, 2830, 2838).** She believed the Defendant was not suffering from organic brain damage, but might be out of touch with reality and possibly had a neuro-psychological dysfunction. **(T.2830-2838).** She could not be certain because the tests were incomplete. **(T.2838).** She could not be sure if the Defendant was operating under a mental or emotional disturbance at the time of the crime, but conceded she did not address his competency at that time or his ability to appreciate the criminality of his conduct. **(T.2859, 2864-2865).** She concluded he was competent at the time she interviewed him. **(T.2859).**

The Court found that two aggravating circumstances applied in this case that the murder was especially heinous, atrocious, and cruel and had resulted during the commission of a sexual battery. (R. **246; T.246, 2889).** It based its findings on the fact that the Defendant lived with and knew Kathy, that she was alive during the attack and was likely panicked by her lack of oxygen. **(R.248-249; T.2890-2891).** The Court found that her injuries were likely to cause extreme pain and that her terror

and pain were indescribeable thereby making the crime consciously pitiless and tortuous to Kathy. (R.249; T.2891). The second aggravating factor present was the fact the murder occurred during the commision of a sexual battery. (R.249; T.2891).

The Court next considered the existence of mitigating circumstances, but after considering all the evidence submitted in mitigation, found none present. (R.249; T.2892). It pointed to defense witness Dr. Haber's inability to state the Defendant was insane, under the influence of extreme mental or emotional disturbance at the time the crime was committed or unable to appreciate the criminality of his conduct or conform his behavior to acceptable standards. (R.249-250; T.2892-2893). Although it considered evidence presented about the Defendant's incarceration in Cuba and tatoos it found no evidence of nonstatutory mitigating circumstances. (R.250; T.2892-2893). In the Court's opinion, the evidence established that the Defendant had an evil mind and that, as further evidenced by his statements, he felt he was being persecuted unjustly. (R.250; T.2893-2894). Since there were two aggravating circumstances and no mitigating circumstances, the Court concurred with the jury recommendation, death being the appropriate penalty. (R.251; T.2894-2895). The Court sentenced the Defendant to death for Kathy's murder, life for the sexual battery, with a minimum mandatory sentence of twenty-five years, and five years on the theft charges, the sentences to be served consecutively. (R.252; T.2894, 2897).

The Defendant cursed the Court and the Prosecution. (T.2897). The Defendant was informed of his automatic right to appeal and the ensuing proceedings resulted. (R.253; T.2897).

POINTS ON APPEAL

I.

DID THE TRIAL COURT PROPERLY DENY THE DEFENDANT'S MOTION TO SUPPRESS?

II.

DID REVERSIBLE ERROR OCCUR DURING JURY SELECTION?

A. DID THE TRIAL COURT PROPERLY STRIKE FOR CAUSE ALL PROSPECTIVE JURORS WHO INDICATED THEY COULD NOT IMPOSE THE DEATH PENALTY IN ANY CASE UNDER ANY CIRCUMSTANCES?

B. DID THE TRIAL COURT PROPERLY PERMIT BACKSTRIKING OF PROSPECTIVE JURORS UNTIL THE PANEL WAS SWORN?

III.

DID THE TRIAL COURT PROPERLY DENY THE DEFENDANT'S MOTION FOR MISTRIAL REQUESTED BECAUSE OF THE DEFENDANT'S OWN MISCONDUCT?

IV.

DID THE TRIAL COURT PROPERLY IMPOSE THE DEATH PENALTY, WHERE TWO AGGRAVATING CIRCUMSTANCES WERE ESTABLISHED BEYOND A REASONABLE DOUBT AND NO MITIGATING CIRCUMSTANCES WERE FOUND TO EXIST AFTER ALL EVIDENCE PRESENTED IN MITIGATION WAS CONSIDERED?

SUMMARY OF THE ARGUMENT

The Trial Court properly denied the Defendant's Motion to Suppress since the initial arrest for grand theft was valid and the Defendant's statements and confession were unsolicited and voluntary. Even if the Defendant was detained, any taint therefrom was dissipated by intervening circumstances.

The Trial Court was correct in striking for cause prospective jurors who, because of their attitudes, were either unable to impose the death penalty in any case under any circumstances or who were unable to make an impartial determination of guilt. Additionally, the lower Court correctly ruled that backstriking of prospective jurors was permissible up until the time the panel was sworn.

The Trial Court's denial of the Defendant's Motion for Mistrial must be upheld on appeal since the motion was occasioned by the Defendant's own misconduct and he is unable to show he was substantially prejudiced thereby.

The Trial Court properly concurred with the jury's recommendation of the death penalty when it was established beyond a reasonable doubt that two aggravating factors were present and no mitigating factors were found to exist.

I.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS.

The Defendant alleges the Trial Court erred in failing to grant his Motion to Suppress on the grounds that: 1) his arrest for grand theft was illegal because the officers were outside their jurisdiction at the time, 2) there was no break between the illegal arrest and the Defendant's confession causing it to be inadmissibly tainted, and 3) the Defendant did not voluntarily accompany the officers back to Hialeah. However, as the ensuing argument will establish, the Trial Court was eminently correct in its ruling. Furthermore, the Trial Court's ruling comes to this Court clothed with a presumption of correctness and given the lack of merit to the Defendant's claims, it must be upheld on appeal. State v. Rizzo, 463 So.2d 1165 (Fla. 3d DCA 1984); Smith v. State, 378 So.2d 281 (Fla. 1979).

The Defendant's brief is replete with misstatements of fact regarding the circumstances of the Defendant's initial arrest, release, and subsequent confession. The Hialeah Officers in question received information from complainant Gilberto Estrada that the Defendant had stolen a stereo valued in excess of $300.00. (T.345, 347-348, 402-403, 432, 452-453, 467-469). Estrada wanted his property returned and informed the Officers

where he was going to meet the Defendant. **(T.346-348, 392, 404-405, 409, 470).** Probable cause thus existed.[13]

Four plainclothes Officers in unmarked cars proceeded to the Beach where they approached the stopped car in which the Defendant was seated and asked the occupants to please exit the car. **(T.352-355, 408-411, 453, 470, 476).** The Defendant lied about his name. **(T.356).**

The Defendant was arrested for grand theft based upon Estrada's assessment of his property's value. **(T.356, 454).** Although Estrada never used the word "prosecute," he did say he wanted his property back and provided information to facilitate this objective. **(T.346-347).** Only after the Defendant had been handcuffed did Estrada inform the police he could not substantiate his evaluation of the stereo and no longer wished to press charges. **(T.495, 509).** As a result, the Defendant was released from custody. **(T.357, 417, 420, 454, 480, 483, 496).**[14]

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[13] Probable cause to arrest for the murder was also present given the facts relating to the murder discerned prior to Defendant's arrest. State v. Irvin, **483 So.2d 461** (Fla. 5th DCA **1986).**

[14] Contrary to the Defendant's assertion, it was Sergeant Freeman's decision to release the Defendant, it was never established that the State Attorney's office or any other legal entity was contacted. **(T.420-421, 509).**

Although the Officers stated the Defendant was not free to leave following his release, he was never told he was not free to leave, rather he was given free range of movement. (T.357, 417, 420, 456). Detective Rodriguez asked the Defendant if he would talk to them about Kathy Encenarro's case and the Defendant consented to speak with them, but only in Hialeah. (T.358, 456, 485, 1621). No coercion, threats or promises were made. (T.358). The Officers decided to return to Hialeah at the Defendant's request; he voluntarily chose to accompany them. (T.359, 361, 392, 1827). Miranda was not read because no conversation took place during the trip; the Defendant, of his own accord, made unsolicited inculpatory statements. (T.359, 360-361, 427). He did not, at anytime, request anything other than to talk to the officers in Hialeah and did not complain about his treatment. (T.362). Upon his arrival at the Hialeah Police Station, the Defendant was Mirandized, waived representation, and made a full confession. (R.170; T.363-369).

The Defendant first challenges the validity of the Defendant's arrest because the Officers were outside their jurisdiction at the time. It is well settled that a private individual has the common law right to arrest a person who he has reasonable cause to believe has committed a felony which has, in fact, been committed by someone, though not in the arresting individual's presence. State v. Goldman, 494 So.2d

239 (Fla. 3d DCA 1986); Dorsey v. United States, 174 F.2d 899 (1949) cert. den., 338 U.S. 95, 70 S.Ct. 479, 94 L.Ed. 586, reh. den., 340 U.S. 878, 71 S.Ct. 116, 95 L.Ed.2d 639. Here, it is clear the Officers had a good-faith reasonable belief that the Defendant had committed grand theft based upon information provided by Estrada. The fact that the Officer's had badges, guns, and other indicia of their office does not invalid the arrest as one by private citizens. Phoenix v. State, 455 So.2d 1024, 1025-1026 (Fla. 1984); Hyer v. State, 462 So.2d 488 (Fla. 2d DCA 1984); State v. Tamburri, 463 So.2d 489 (Fla. 2d DCA 1985). Therefore the initial arrest for grand theft was valid.

The Defendant further alleges that because his initial arrest was illegal his statements and confession are tainted. Nevertheless, even if the Defendant were correct in his claim, any taint was dissipated as a result of subsequent intervening circumstances.

In determining whether a suspect is in custody, the ultimate inquiry is whether there is a formal arrest or a restraint on freedom of movement rising to the level associated with a formal arrest. California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983); Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). This inquiry is conducted from the perspective of how a reasonable person would have perceived the situation. Michigan v. Chesternut, U.S.

___, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988). This Court, in Roman v. State, 475 So.2d 1228 (Fla. 1985), stated:

> We agree that a reasonable person might be more likely to think he is not in custody if specifically told he is not under arrest. Conversely, some reasonable persons might assume they are not in custody unless told otherwise. We therefore find that this factor is one to be considered as a circumstance that has bearing on a suspect's perception of his situation, but that it, like the ... location, is not dispositive.

The Defendant ignores the fact that he was released from arrest after Estrada chose not to press charges. He was not told he could not leave nor was he prevented from walking to the street. In fact, he sat undisturbed and unattended by the street for approximately ten minutes prior to the time Detective Rodriguez approached him. (T.456). The Record is devoid of any evidence relating to the Defendant's subjective impressions as to his status; a reasonable individual who is arrested, then released, would not have felt he was in custody. Adkins v. State, 452 So.2d 529 (Fla. 1989).

In Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), the Supreme Court set forth relevant factors to determine whether statements were obtained through exploitation of an illegal arrest: (1) whether Miranda warnings were given; (2) the temporal proximity of the arrest and the

confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct." 422 U.S. at 604-604. In the instant case, several of these factors must be viewed in a light favorable to the State. The giving of Miranda warnings as described in Brown as an "important" factor. Id. at 603. Here, the warnings were given before the confession at the station. No warnings were given prior to the arrival in Hialeah since no custodial interrogation or even conversation occurred.

Miranda warnings must be given prior to custodial interrogation if the prosecution seeks to use statements stemming from the custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, not all questioning of an accused constitutes a custodial interrogation. Cases determining whether a custodial interrogation exists focus on two distinct aspects: (1) the custodial nature of the situation, which involves issues such as the duration of detention; whether the accused is free to leave; the degree of pressure; the language used by the officer; the extent to which the accused is confronted with evidence of guilt. See e.g. United States v. Booth, 669 F.2d 1231 (9th Cir. 1982); and (2) the nature of the questioning. See e.g. United States v. Glen-Archila, 677 F.2d 809 (11th Cir. 1982). Even if an accused is clearly in a custodial situation not all questioning is tantamount to a "custodial interrogation."

In Rhodes Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Supreme Court defined interrogation as "express questioning or its functional equivalent." It was further stated that "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." 100 S.Ct. at 1690.

While Innis applied to police actions other than questioning, which resulted in a defendant giving a statement, the Innis holding has been applied to direct police questioning of an accused, so that the issue becomes whether the questions of the police are "'reasonably likely to elicit an incriminating response from the suspect)" United States v. Booth, supra, 669 F.2d at 1237, quoting Innis, supra, 100 S.Ct. at 1689.

The Supreme Court, in United States v. Booth, supra, stated:

> "Many sorts of questions do not, by their very nature involve the psychological intimidation that Miranda is designed to prevent. A definition of interrogation that included any question posed by a police officer would be broader than that required to implement the policy of Miranda itself. We hold, therefore, that the custodial questioning constitutes interrogation whenever, under all the circumstances involved in a given case, the questions are reasonably likely to elicit an incriminating

response from the suspect". 669 F.2d at 1237.

In this case, it is clear that no custodial questioning occurred. No questions were asked of the Defendant other than Detective Rodriguez' initial question to see if the Defendant was willing to talk with him; in fact, no one other than the Defendant spoke during the car ride and search at the Newport. It is also apparent that this one question required only a yes or no answer and was in no way intended to elicit inculpatory statements.

Other Brown factors, such as the temporal proximity of the arrest and confession and the presence of intervening factors are also in the State's favor. The Record reflects that a significant amount of time passed between the Defendant's release from custody and his subsequent unsolicited statements an confessions. Additionally, there were numerous intervening events. Most significant were the Defendant's release from custody, his unhindered freedom of movement and his freedom to sit unattended by the street. The Court must also consider the Defendant's willingness to talk with the Officers in Hialeah, his desire to go with them, and his request to be taken to the Newport Hotel. It is clear there was no police misconduct rising to the level of "flagrancy" referred to in Brown. Here, the police at all times acted in good faith and did not coerce

or otherwise seek to elicit inculpatory statements from the Defendant.

The unrebutted evidence establishes the Defendant freely accompanied the Officers. On his arrival at the station, the Defendant was Mirandized, waived his rights and chose to refuse legal representation and to confess to Kathy's rape and murder. There is no question the Trial Court's denial of the Defendant's Motion to Suppress was appropriate under the circumstances of this case. The Trial Court correctly found the confession and statements occurred while the Defendant was at liberty, that the police did not elicit statements from him and that he freely and voluntarily confessed.

II.

NO REVERSIBLE ERROR OCCURRED DURING JURY SELECTION.

A) The Trial Court Properly Struck For Cause All Prospective **Jurors** Who Indicated They Could Not Impose The Death Penalty In Any Case Under Any Circumstances.

The Defendant claims the Trial Court violated the provisions of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1986), in excluding for cause prospective jurors who expressed their inability to impose the death penalty in any case under any circumstances.

Witherspoon bans the exclusion for cause of prospective jurors who voice general objections to the death penalty or conscientious or religious scruples against the infliction of the death penalty. This ban, however, does not prevent the prosecution from excluding for cause prospective jurors who state unequivocally that they would automatically vote against the imposition of the death penalty without regard to the evidence that might be developed at the trial of the case or that their attitude toward the death penalty would prevent them from making an impartial decision as to a defendant's guilt.

In Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the United States Supreme Court confirmed the Witherspoon rule as follows:[15]

> ". . .a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (emphasis supplied) Id. 448 U.S. at 45, 88 S.Ct. at 2526.

Neither Witherspoon and Adams provide the Trial Court with a formula or requisite colloquy for the proper excusal of prospective jurors on Witherspoon grounds. The question of competency of a challenged juror is one of mixed law and fact to be determined by the Trial Judge in his discretion, as the Trial Judge is in the best position to evaluate the prospective juror's demeanor and answers to the questions. Barfield v. Harris, 540 F.Supp. 790, (E.D. N.C. 1982); Douglas v. Wainwright, 521 F.Supp. 790, (M.D. Fla. 1981); Mason v. Balkcom,

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15 The State submits the underscored "substantially impaired" standard in Adams signals a retreat by the Supreme Court from the rigid dictates of Witherspoon, and allows the trial judge, who hs the unique opportunity of evaluating demeanor and sincerity in context of the entire voir dire examination, to assess the prospective juror's ability to perform his duty and follow the law.

487 F.Supp. 554, (M.D. Ga. 1980) rev'd other grounds 669 F.2d 222 (5th Cir. 1982). The Trial Court's determination will not be disturbed on appeal unless error is manifest. Piccott v. State, 116 So.2d 626 (Fla. 1954); Singer v. State, 109 So.2d 7 (Fla. 1959); Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979).

Furthermore, in determining whether the prospective jurors were properly excused for cause, this Court must look at the entire voir dire examination, Maggard v. State, 399 So.2d 973, 976 (Fla. 1981); Paramore v. State, 229 So.2d 855, 858 (Fla. 1969), and in scrutinizing a cold record, must not "treat the words of prospective jurors as free floating icebergs unrelated to the voir dire examination as a whole." Darden v. Wainwright, 699 F.2d 1031, 1038 (11th Cir. 1983). It is within this framework that the Defendant's claim must be considered. As in Witt the Defendant's "attempt to separate the answers from the questions misses the mark; the Trial Court ... views the questioning as a whole." Witt v. Wainwright, 470 U.S. 1039, 105 S.Ct. 1415, 84 L.Ed 2d 801 (1985).

A review of the entire voir dire examination of these prospective jurors shows that it was clear they would vote against imposing the death penalty in this case and that their attitude toward the death penalty would prevent them from making an impartial decision as to guilt, thus substantially impairing,

indeed preventing, the proper performance of their duties as jurors.[16]

Florida courts have upheld the exclusion for cause of a prospective juror when it has been shown that he would vote against the death penalty regardless of the facts presented or the instructions given. Brown v. State, 381 So.2d 690, 694 (Fla. 1980); Jackson v. State, 366 So.2d 752, 755 (Fla. 1978).[17] Florida courts have also upheld the exclusion for cause of a prospective juror whose precise statements indicated somewhat less than absolute certainty that his attitude toward capital punishment would prevent him from imposing the death penalty or

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16 Ms. Perez stated she could not put her opposition to the death penalty aside and decide the case based upon the facts and the law. (T.678). Neither Ms. Sheppard nor Ms. Bonamy could vote for the death penalty under any circumstances. (T.688, 1080, 1086). Mr. Pinkney and Mr. Hunt also stated they could never vote for the death penalty. (T.1097, 1184). Ms. Neil's feelings toward children and uncertainty about imposition of the death penalty made it impossible for her to put her personal feelings aside. (T.1102-1103). Ms. Fraser said she would "have a problem" voting for death; Ms. Johnson could not because of religious objections. (T.1184-1186, 1202, 1305). Mr. Hoyas, stated he could not be fair to the State because of his objections to the death penalty. (T.752). Ms. Lopez admitted she would never vote for the death penalty when a life sentence was an option. (T.748). Mr. Lavin would have trouble imposing the death penalty in any case. (T.784).

17 ~~See also~~ Barfield v. Harris, 540 F.2d 451, 465 (E.D.N.C. 1982) ("believes" or "thinks" or "feels"); Mason v. Balkcom, 487 F.Supp. 554, 560 (M.D. Ga. 1980) rev'd. other grounds 669 F.2d 222 (5th Cir. 1982)("I reckon so") Darden v. Wainwright, 513 F.Supp. 947, 962 (M.D. Fla. 1981), aff'd 699 F.2d 1031, 1040, n.19 (11th Cir. 1983) (rehearing en banc granted) ("I believe I would"); McCorquodale v. Balkcom, 525 F.Supp. 408, 424 (N.D. Ga. 1981) ("I don't think I could do it, I really don't").

from making an impartial decision as to the defendant's guilt. Gafford v. State, 387 So.2d 333, 335, n.2 (Fla. 1980) ("I don't believe I could do it," "I guess I know I would not," I really don't know"); Williams v. State, 228 So.2d 377, 380-381 (Fla. 1969), sentence vacated other grounds, 408 U.S. 941 (1972) ("I wouldn't know"); Brown v. State, 381 So.2d 690, 694 (Fla. 1980) ("I don't think so"); Jackson v. State, 366 So.2d 752, 755 n.2 (Fla. 1978) ("I think so;" "I'm pretty sure"); Paramore v. State, 229 So.2d 855, 858 (Fla. 1969) ("It would be a little hard;" "was afraid"). In this case, the statements from these prospective jurors certainly demonstrated a substantial basis for concluding that they would not impose the death penalty and would be prevented from impartially deciding guilt as did the jurors' statements in the foregoing cases.

The fact that the prospective jurors gave other answers which might be viewed in isolation as tending to indicate an ability to consider the question of guilt does not change the appropriate conclusion. The precise words used by the prospective jurors are not dispositive. Rather, this Court must assess the "bottom line," instead of searching the voir dire for signs of equivocation. Barfield v. Harris, 540 F.Supp. 451, 465 (E.D.N.C. 1982). Furthermore, even though prospective jurors may indicate some equivocation, it is precisely that indecision that prevents the State from determining whether the prospective juror is willing to consider all of the facts or whether his

attitude prevents him from making an impartial decision as to guilt. Williams v. State, 228 So.2d **377,** 381 (Fla. 1969), vac'd on other grounds, 408 U.S. 941 (1972). Moreover, this Court should give great deference to the Trial Court's conclusions, since the Trial Judge was actively involved in the voir dire and had the opportunity to evaluate the jurors' demeanors and answers to the questions and apparently was satisfied their opinions were unequivocal. See Barfield v. Harris, supra at 466; McCorquodale v. Balkcom, supra at 425.

The Defendant's contention that the Trial Court improperly asked whether the prospective jurors had "any philosophical, or religious, or conscious scruples against the infliction of the death penalty in a proper case," is also without merit. He bases his objection to the question on the use of the word "philosophical" in the question. (T.560). As previously stated, neither Witherspoon or Witt provide a mandatory formula with which a Court must examine a juror's attitude about and ability to impose the death penalty. The question, as asked, is in conformity with Witherspoon because it seeks to determine if any attitude they held prevent them from imposing the death penalty or reaching an impartial decision as to guilt. The Defendant, however, attempts to ignore the holding of Witherspoon and instead to rely upon that Court's use of the word philosophical in dicta to avoid the fact that the Trial Court below properly sought to determine the existence, nature

and extent of a prospective juror's opposition to imposition of the penalty.

B) The Trial Court Properly Permitted Backstriking Of Prospective Jurors Until The Panel Was Sworn.

The Defendant also alleges that the Trial Court "suddenly . . . changed the rules'' it set to choose a jury. This is clearly untrue. The Court repeatedly stated throughout jury selection that backstriking would be permitted up until the time the panel was sworn. (T.557, **1133**, 1147).[18] The term panel obviously contemplates **all** members thereof.

Irregardless of the fact the Court's policy was apparent, the Court had no authority to, had it even wished to, infringe upon the parties' right to challenge any juror at any time prior to the time the panel was sworn. Jackson v. State, 464 So.2d 1181, 1183 (Fla. 1985); See also: Gilliam v. State, 514 So.2d 1098 (Fla. 1987). Therefore, no other method of jury selection could be utilized and Defendant's claim cannot justify reversal.

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18 The jury including alternates, is typically sworn in at one time rather than by individual juror. Barrack v. State, 462 So.2d 1196 (Fla. 4th DCA 1988), dis'd, 469 So.2d 1750.

III.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL REQUESTED BECAUSE OF THE DEFENDANT'S OWN MISCONDUCT.

The Defendant challenges the Trial Court's denial of his Motion for Mistrial because he interrupted the proceedings thereby necessitating removal of the jury. (R.14; T.1678-1679). However, while the Defendant's characterization of what occurred is colorful, it clearly is not reflected in the Record. The Defendant in his brief states, among other unsupported facts, that he began to "yell" at the jury; that he "harangued" the Court, that the proceedings were "frantic" and a "shattering experience.'' (D.B. 34-35). It is clear that these terms do not correctly describe what occurred.

The Defendant's words were certainly not outrageous or prejudicial, nor does the Court's response indicate shock.

> THE DEFENDANT: Excuse me, excuse me, Your Honor.
>
> THE COURT: You want to hold it?
>
> THE DEFENDANT: Excuse me, your honor.
>
> Judge, I can't believe it.
>
> MR. HIRSCHHORN: Can we have the jury taken out, please?
>
> THE DEFENDANT: The man represents the law; can't believe a man can lie like that.

> I never told you that.
>
> THE COURT: Please take the jury to the jury room.
>
> THE DEFENDANT: I can't believe you supposed to lie--
>
> THE COURT: Would the clerk please take the jury to the jury room?
>
> THE DEFENDANT: It's impossible. He cannot lie like that, the man's supposed to represent the law.
>
> I'm sorry, I can't stay quiet, when I see people lie--
>
> THE COURT: Please take the jury out.
>
> THE DEFENDANT: I can't feel right, I'm sorry, about that. You have to understand that point.
>
> (Whereupon, the jurors were taken out of the courtroom at 2:53 p.m., ...) (T.1680-1681).

The Defendant below claimed that the Defendant was prejudiced because the jury heard his voice and because the jury learned he spoke and understood English. Nevertheless, neither argument has merit. The Defendant chose to participate in his own trial by making the above comments, he was not forced or coerced. The psychiatric experts who testified found he was legally sane and able to exhibit appropriate courtroom behavior. (R.14, 16, 114, T.1694, 1696-5, 1912). The Defendant was not prejudiced because he made these comments in English; it is

obvious he needed assistance with his less than perfect comprehension and usage of the language.

The Defendant also misrepresents the circumstances surrounding the appointment of additional psychiatric experts. He claims "the Defendant's behavior was so disconcerting to the Court, whose experience in trial observation is lengthy, that the Court immediately ordered psychiatric evaluations of the Defendant." (T.1691). This statement ignores the fact that the Trial Court appointed additional experts because the Defendant requested it and because the Court sought to ensure a fair trial for the Defendant. (T.1691).[19]

On appeal, the thrust of the Defendant's claim is apparently the disruptive effect of the Defendant's interruption. (DB. 35-36). However, this assertion is clearly unsupported by the Record since it was never raised below and is therefore not preserved on appeal. Nor is it "apparent" the jury heard any remarks made by the Defendant since no inquiry as to what, if anything, was heard by the jury, was conducted or for that matter requested by the Defendant.

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19 The Court had previously granted several defense requests for psychiatric evaluations. (R.35, 40-41, 43; T.1692-1693).

The Defendant also misconstrues defense counsel's pre-knowledge of the Defendant's interruption of the proceedings. (D.B. 36; T.1681). Defense counsel had been told by his personal trial assistant that the Defendant, during Detective Rodriguez's testimony, stated that he was "going to explode" but purposely gave his client's words no credence. (T.1689-1690). It thus seems likely that the Defendant sought to promote a mistrial based on his dissatisfaction with way the trial was progressing. The Defendant should not be permitted by this Court to build in his own error and then be benefited from it. Under the doctrine of invited error, a party cannot complain of error for which he himself is responsible. Volusia County v. Niles, 445 So.2d 1043 (Fla. 5th DCA 1984).

Although the Defendant asserts that there are some instances in which a defendant could cause his own mistrial, this case does not fall into any of the categories represented by the cases he cites. The Defendant did not improperly walk out of the courtroom during the trial, Adkins v. Smith, 205 So.2d 530 (Fla. 1968), defense counsel did not improperly address the jury, Strawn v. State ex rel. Anderberg, 332 So.2d 601 (Fla. 1976), nor did the Defendant's conduct make it impossible for the jury to **properly** decide his case. State ex rel. Dato v. Himes, 184 So.2d 244 (Fla. 1938). The Defendant has therefore failed to either cite any on-point case in support of his position or show substantial prejudice. His claim

totally ignores the fact that the granting of a mistrial in criminal proceedings is squarely within the sound discretion of the Court and will only be granted where the error complained of is *so* substantial in nature as to vitiate the entire trial. Flowers v. State, 351 So.2d **764** (Fla. 3d DCA **1977); Duest v. State, 462 So.2d **446** (Fla. **1986).** Since the Defendant has failed to meet his burden of proof, he cannot prevail on this issue.

IV

THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY, WHERE TWO AGGRAVATING CIRCUMSTANCES WERE ESTABLISHED BEYOND A REASONABLE DOUBT AND NO MITIGATING FACTORS WERE FOUND TO EXIT AFTER ALL EVIDENCE PRESENTED IN MITIGATION WAS CONSIDERED.

On appeal, the Defendant alleges that the Trial Court erred in the penalty phase claiming that a statutory aggravating circumstance it found to exist; i.e., that Kathy's murder was especially heinous, atrocious, and cruel, was not proven by a reasonable doubt. The Defendant also claims the Court improperly considered a "nonstatutory aggravating factor", and failed to weigh evidence submitted in mitigation. These contentions are, however, clearly unfounded.

The Defendant first challenges the Constitutionality of F.S. 921.141(5)(h) based upon the alleged vagueness of its terms citing to the recent Supreme Court decision in Maynard vs. Cartwright, 484 U.S. ___, 108 S.Ct. 1853, 100 L.Ed. 2d 372 (1988). (D.B. 37). Maynard has no application to Florida's sentencing scheme. The Court held in Maynard that the words especially, heinous, atrocious or cruel did not provide the jury, the actual sentencer, with enough guidance, and that this was fatal because the Oklahoma Supreme Court had not constantly applied any restrictive definition, there was no appellate check on the jury's finding of this factor. This unbridled and unchecked

discretion was the real downfall of the Oklahoma sentencing scheme.

In Florida, the Florida Supreme Court has, since Dixon v. State, 283 So.2d 1 (Fla. 1973), developed and strictly enforced limiting definitions of both aggravating factors challenged herein. The court has repeatedly set aside trials courts' finding of these two factors because the facts of the offense did not fall within the limiting definitions of Dixon and its progeny.[20] The other critical difference between Oklahoma and Florida is that here the trial court is the actual sentencer, and it certainly is aware of and bound by the limiting construction developed by the Florida Supreme Court. Hildwin v. Florida, no. 88-6066, ___ U.S. May 30, 1989 (In Florida, the "ultimate decision to impose a sentence of death, however is made by the Court after finding at least one aggravating circumstance"). The trial court must enter written factual findings which demonstrate

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20 See Jackson v. State, 451 So.2d 458 (Fla. 1984); Randolph v. State, 463 So.2d 186 (Fla. 1984); Blanco v. State, 452 So.2d 520 (Fla. 1984); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Oats v. State, 446 So.2d 90 (Fla. 1984); Maggard v. State, 399 So.2d 973 (Fla. 1981); Fleming v. State, 374 So.2d 954 (Fla. 1979); Jackson v. State, 498 So.2d 906 (Fla. 1986); Riley v. State, 366 So.2d 19 (Fla. 1978); Clark v. State, 443 So.2d 973 (Fla. 1983); Craig v. State, 510 So.2d 857 (Fla. 1987); Brown v. State, 526 So.2d 903 (Fla. 1988); Bundy v. State, 471 So.2d 9 (Fla. 1985); Scott v. State, 494 So.2d 1134 (Fla. 1986); Garron v. State, 528 So.2d 353 (Fla. 1988); Jackson v. State, 502 So.2d 409 (Fla. 1986). The above list is by no means exhaustive.

that the facts of the crime fall within that limiting construction. In sum, reliance on Maynard is totally misplaced.

As a result, the Defendant's argument that the jury was improperly instructed as to the definition of this aggravating factor must also fail. Lemon v. State, **456** So.2d **885** (Fla. **1984); ~~cert~~. d~~en.~~** 105 S.Ct. 1233, **84** L.Ed. 2d 370 **(1984).** Dixon v. State, 283 So.2d **1** (Fla. 1973), cert. den., **416** U.S. **943, 94** S.Ct. 1950, 40 L.Ed.2d 295 (1973), specifically states with regard to the definition of heinous, atrocious, or cruel that:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily tortuous to the victim. Id.. at 9. [Emphasis supplied].

The Defendant next asserts that the fact that Kathy's murder was heinous, atrocious, and cruel was not proven beyond a reasonable doubt. However, testimony presented at both the guilt and penalty phases of trial clearly establish that this crime meets that statutory requirement. The Defendant's own confession attests to the brutality of his attack on this young girl. He freely admitted grabbing Kathy by the throat with both hands and choking her, using the T-shirt she was wearing as though it were

a tourniquet to strangle her, and raping her. (R.172-174; T.1637-1638, 1669-1670).

Furthermore, the testimony of Dade County Medical Examiner, Dr. Lyvia Alvarez, provided ample evidence on which the finding of "HAC" was based. (R.19, 25; T.2057, 2060-2061, 2063-2064, 2573-2616). Severe tears at both the entrance and rear wall of the vagina and accompanying internal hemorrhage of the surrounding areas resulted because Kathy's immature, sexually undeveloped, body was forced to endure repeated thrusts of an adult penis.[21] (T.2067, 2084-2087, 2104, 2121-2122, 2506, 2586, 2594, 2602). Dr. Alvarez compared the injuries sustained to similiar tears caused by childbirth but stated in this instance the pain would be more severe. (T.2587-2593). Dr. Alvarez's testimony also established that Kathy would have experienced additional physical pain from the T-shirt twisted like a tourniquet around her neck. (T.2596). Even worse must have been the panic she experienced from oxygen deprivation and the conscious knowledge of what this trusted family friend was subjecting her to. (T.2595-2596).

The Defendant further asserts that consideration of evidence regarding the rape in the penalty phase was improper because of

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[21] Thus the second aggravating factor, the fact that the murder occurred during the commission of a second felony, the rape, was also proven.

its stipulation during the guilt phase that the rape occurred prior to strangulation. (D.B.38-39). However, the State clearly stated that its agreement did not include consideration of the penalty phase, a fact which the defense acknowledged at trial. (T.2093-2095). Furthermore, not only was the testimony and evidence necessary to adequately illustrate the injuries Kathy sustained, it certainly goes to establish the extreme pain to which she was subjected prior to her death. It clearly shows the crime was consciously pitiless, and unnecessarily tortuous to Kathy. (T.2587-2594). It was thus admissible.

The medical evidence submitted further established that Kathy was conscious during the attack; it is apparent that although her ability to cry out would have been inhibited, she struggled for her life as illustrated by the marks on her neck and the carpet fibers clutched in her hand. (R.148-149, 152-153, 158-159; T.2072-2073, 2106-2107, 2110, 2130-2131, 2143-2144, 2597).

It is also evident that she was conscious, because her air flow was not completely occluded. (T.2596). Dr. Alvarez testified that a child possesses a greater tolerance to oxygen deprivation than an adult under similar circumstances. (T.2604-2607). Therefore, if it took an adult three minutes to die by hanging, where oxygen deprivation is complete, Kathy's death would have taken at least five minutes. (T.2603-2607). The

length of time it took for Kathy to die is also attested to by the extent to which petechia, edema, and hemorrhaging was found in the body. (T.2074, 2118, 2599, 2602).

Homicides committed by strangulation have been found to be cases squarely within the parameters of this aggravating factor, particularly where, as here, the victim was conscious of her fate and struggled against it. Alvord v. State, 322 So.2d 533, 540 (Fla. 1975) cert. den. 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed. 2d 1226 (1976) ("Each of the murders was especially heinous, atrocious and cruel in that the homicides were committed through strangulation..."); Adams v. State, 412 So.2d 850, 857 (Fla. 1982) ("A frightened eight-year-old girl being strangled by an adult male should certainly be described as heinous, atrocious and cruel."); Quince v. State, 414 So.2d 185, 187 (Fla. 1982), cert. den. 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed. 2d 155 (1982), ("... . the severe ... raping, and manual strangulation ... easily qualified as heinous,"); Lemon v. State, supra, at 888, ("strangulation itself, with the victim fully aware of her impending doom ... was heinous, atrocious, or cruel..".). Therefore, it was proven beyond a reasonable doubt that Kathy's murder was, in fact, heinous, atrocious, and cruel.

The Defendant claims that the Trial Court improperly considered a "nonstatutory aggravating circumstance". (D.B.40-41). In making this assertion, the Defendant seizes, out of

context, certain statements by the Trial Court in its oral and written orders. (R.250; A.2-5; T.2893-2894). This argument is without legal basis for obvious reasons. The statement complained of, that the Defendant had an evil mind, superego, and a tendency to lash out at others, simply is not a "nonstatutory circumstance." In its Order, which was read aloud to the trial participants, the Court carefully laid out its position in three separate sections dealing with the constitutionality of the penalty, aggravating circumstances, and mitigating circumstances. (R.246-254; T.2883-2897). That portion of the Order of which the Defendant complains is clearly contained in the section relating to mitigating circumstances and is obviously included to explain the Trial Courts' finding that no mitigating factors existed. It, unlike the Courts in cases cited by Defendant, did not make a finding that Defendant's "dangerous metal state ..." either existed or necessitated a penalty designed to protect the public. (D.B.41).[22]

Finally, the Defendant alleges that the Trial Court failed to weigh mitigating factors asserted by him i.e. that at the time the crime was committed he was acting under extreme mental or

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22 See the Defendant's citation to Miller v. State, 373 So.2d 882 (Fla. 1929) and Elledge v. State, 346 So.2d 998 (Fla. 1977) which are easily distinguishable from the facts of this case on this point.

emotional distress and that he was unable to appreciate the criminality of his conduct. F.S. 921; 141 (6)(b) and (f).

In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), this Court set forth the process a trial court must utilize in determining the existence of and weight to be given mitigating circumstances.

> . . . we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

A review of the Trial Court's Order establishes that the Court complied with the requirements of this process. (A.2). The Trial Court specifically stated that it considered all evidence submitted in both aggravation and mitigation of the crime but found that the asserted mitigating factors were not

supported by the evidence. (R.246, 251; T.2889, 2894).[23] Such consideration is all that is required. The Defendant further ignores the fact that the decision of whether a particular mitigating circumstance is proven and the weight it is to be given lies with the judge and jury. Smith v. State, 407 So.2d 894 (Fla. 1981), cert. den., 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982); Lemon v. State, supra at 887. This Court has long held that in determining whether mitigating circumstances exist, it is the Trial Court's duty to resolve conflicts in the evidence and that Court's determination is final, if supported by competent substantial evidence. Reversal is not warranted merely because, as in this case, a defendant draws a different conclusion. Lopez v. State, 536 So.2d 226 (Fla. 1988); Stano v. State, 460 So.2d 890 (Fla. 1984), cert. den., 105 S.Ct. 2347 (1985); Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. den., 103 S.Ct. 1236 (1983).

This case is very similar to Smith v. State, supra, in which this Court stated:

> The trial court here did not ignore every aspect of the medical testimony regarding the appellant; rather, it found that the medical testimony simply did not compel application of a

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23 The court specifically referred to evidence submitted in mitigation, including the Defendant's background, which it felt did not rise to the level of a mitigating factor.

mitigating factor in sentencing.... the trial court did not improperly refuse to recognize certain mitigating circumstances; rather, it considered the evidence presented regarding the defendant's mental state and then made its decision, which we are not to disturb unless absolutely required to do so...

Appellant next argues that the evidence supports the existence of at least two mitigating circumstances which the trial court failed to take into consideration. Appellant contends that ... testimony proves that he was under extreme mental or emotional disturbance at the time of the commission of the offense (section 921.141(6)(b)) and could not appreciate the criminality of his conduct. (Section 921.141(6)(f)). In response, the state argues that it lies within the province of the trier of fact to weigh the evidence presented. We agree. The jury and the judge heard the testimony, and apparently concluded that the testimony should be given little or no weight in their decisions. We find nothing in the record which compels a different result.

376 So.2d at 1153-54.

In Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. den., 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), we considered a similar question 'and held:

Returning to appellant's argument that the trial judge erred in failing to find the mitigating circumstances delineated above, we respond that the jury and the judge could have resolved the evidence in favor of appellant's position, but neither was compelled to do so. We are not here dealing with a case where either the jury or the court considered matters it should not have considered. Appellant simply disagrees with the

> force and effect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing.... [T]he trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it provided a sound basis for establishment of the statutory mitigating circumstances.
>
> Clearly then, we are not warranted to disturb the trial court's findings. There was nothing improper in the conclusions reached nor in the method by which they were reached. The decision was one within the domain of the judge and jury, and a reversal thereof is not justified simply because appellant draws a different conclusion from the testimony presented than did the jury.

Dr. Haber, the Defendant's primary witness in the penalty phase, found the Defendant competent to stand trial and also found that he met the test of criminal responsibility. (T.2684-2685). While he felt that the Defendant <u>might</u> have been suffering from a personality disturbance at the time of the murder, he was sane; furthermore, any disturbance he might have experienced did <u>not</u> rise to the level of a major psychological disorder. (T.2663, 2665, 2686).

Dr. Marina's conclusions, were, by her own admission, inconclusive, and do not substantiate the Defendant's claim on appeal that he suffered extreme mental or emotional disturbance and was unable to comprehend the criminality of his actions. (T.2838). She stated she could not be positive in her finding

that the Defendant might have been under some mental or emotional disturbance; she did not discuss its precise nature or extent and conceded that she did not address the Defendant's competency at the time of the crime **or** his ability to appreciate the criminality of his conduct. Therefore the first factor was not established through her testimony[24] and the second was not considered by her.

Even the Defendant denied the existance of any mitigating factors telling Dr. Jiminez he was not impaired at the time of the crime and telling Dr. Haber he was not under the influence of alcohol or drugs. (T.1919, 2679). During his confession and trial statements, the Defendant denied having any psychological conditions or having received psychological treatment.[25] (R.181; T.1635).

Thus, the evidence did not establish an extreme mental or emotional disturbance and it did establish that Defendant could appreciate the criminality of his conduct. Therefore, the Trial Court's determination that these factors were not established must be upheld since its findings are supported by the record.

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[24] As in Sirici v. State, supra., it appears that even if the Defendant had a psychological or emotional disorder, it was at most a personality disorder which does not rise to the level of extreme disturbance required such as to justify reversal.

[25] Contrary to the Defendant's assertion on appeal, it was never established the Defendant was, in fact, in a psychiatric hospital or that he received psychiatric treatment. (T.2678).

Middleton v. State, 426 So.2d 553 (Fla. 1982), cert. den., 103 S.Ct. 3573 (1983); Stano v. State, supra.

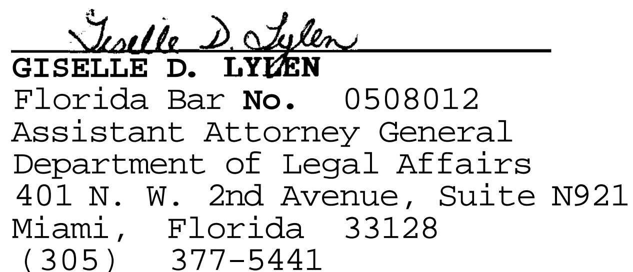
As evidenced by the foregoing, the Trial Court properly found that two aggravating circumstances and no statutory or nonstatutory mitigating circumstances existed. A proper weighing of these factors mandates the affirmance of the sentence of death imposed by the Court.

CONCLUSION

Given the foregoing analysis, and the weight of the evidence adduced at trial against the Defendant, the State of Florida respectfully requests that this Court uphold the conviction and sentence imposed below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



GISELLE D. LYLEN
Florida Bar **No.** 0508012
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **BARBARA S. LEVENSON,** Attorney for Appellant, 2400 South Dixie Highway, Suite 100, Miami, Florida 33133 on this 19th day of June, 1989.

GISELLE D. LYLEN
Assistant Attorney General

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