IN THE SUPREME COURT OF FLORIDA

ANTON J. KRAWCZUK, :

Appellant, :

vs. : Case No. 79,491

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On October 3, 1990, the Grand Jurors for the Twentieth Judicial Circuit in Lee County returned a three-count indictment against the Appellant, ANTON KRAWCZUK, for first-degree premeditated murder and first-degree felony murder in violation of section 782.04, Florida Statutes (1989) and section 777.011, Florida Statutes (1989); and for robbery in violation of section 812.13, Florida Statutes (1989) and section 777.011, Florida Statutes (1989). The crimes allegedly occurred on or about September 13, 1990. (R445-446)[1]

The Honorable James R. Thompson, Circuit Judge, heard a motion to suppress confession on July 25, 1991, and entered an order denying the motion on August 2, 1991. (R274-384, 525, 544-545) Thereafter, on September 27, 1991, the Appellant entered a plea of guilty to the charges and asked for imposition of the death penalty. (R386-424)

On February 4 and 5, 1992, after hearing testimony and argument presented by the state, (R201-269) a jury returned an advisory recommendation, 12-0, that the court impose the death penalty. (R268-269, 584) On February 13, 1992, Judge Thompson imposed a sentence of death for first-degree murder, and a sentence of 15 years in prison for robbery. (R436, 438, 587-594, 596-601)

Mr. Krawczuk now appeals.

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[1]A co-defendant, William Poirier, was charged in the same indictment. On May 22, 1992, Poirier entered a negotiated plea to second-degree murder and to robbery in exchange for a sentence of thirty-five years in prison.

STATEMENT OF THE FACTS

Motion to Suppress Confession

The state first called detective Peter Sbabori, Jr., of the Charlotte County Sheriff's Department. (R277) On the evening of September 13, 1990, Sbabori was dispatched to a wooded area off Highway 41 in south Charlotte County where a decomposing body had been found. (R278) A number of other officers were already at the location. The remains were partially covered with a sleeping bag. A length of rope was tied around the legs. A washrag covered with loosened duct tape was in the mouth. (R279)

The victim, David Staker, eventually was identified through a Lee County missing person's report and through dental records. (R280-281) Lee County advised Sbabori that property including a VCR, TV, and some weapons had been taken from Mr. Staker's residence; and that an individual had made some statements regarding the property. (R282) On September 22 or 23, 1990, Lee County also advised Sbabori that they had suspects in the case -- the Appellant, Anton Krawczuk, and co-defendant William Poirier. (R283)

Sbabori and his partner, Michael Savage, went to Lee County. (R283) Allegedly Mr. Krawczuk made statements to a third party, Gary Sigelmier, about property taken from Mr. Staker's house. Based on the information, Sbabori retrieved some of the property in Lehigh Acres. (R284)

Also on September 23, 1990, he learned where Mr. Krawczuk and Poirier lived. In the early morning hours he and four other

detectives, driving two cars, went to the house. (R285-286) Without a search or arrest warrant, and with guns drawn, they entered the house and took Mr. Krawczuk into custody. (R326-340, 342-43, 352)

Sbabori testified that upon arriving at the house, the detectives decided to knock on the door. Sbabori went around the side of the house and saw a man in the back yard. The man identified himself as William Poirier. Sbabori said he was a detective and needed to speak to him at the sheriff's office. (R287-288) He did not place Poirier under arrest at that time. (R288) Upon being asked, Poirier said the Appellant was in the house and that the detectives could go inside. (R289)

Sbabori remained outside with Poirier; although Poirier was not in custody or handcuffed, Sbabori and detective Savage transported him to the sheriff's department where he was questioned. (R289) Sbabori believed Detective Hollan took the Appellant to the sheriff's department. (R290-291)

The detectives had no arrest warrant and no search warrant. They just decided to knock on the door to gain information. (R293) The group of detectives went to the home to get information such as descriptions and locations, possibly for an affidavit for a search warrant. (R292) Before they went to the residence there was some discussion of getting a search warrant but not an arrest warrant. (R293)

Michael Savage, Sbabori's partner, described the two detectives as in secondary roles because they were outside their juris-

diction. (R301) He saw Sbabori approach Poirier and ask to speak to him. (R301) Poirier was not arrested or handcuffed, and went voluntarily to the sheriff's department where he eventually was arrested. (R302)

Savage saw Mr. Krawczuk at the front door of the house. To his knowledge the Appellant was not under arrest at that time. (R303) Later, at the sheriff's department, Savage and detective Ed Tamayo questioned Mr. Krawczuk and took his statement after they gave him Miranda warnings. Mr. Krawczuk also signed a waiver of rights form in Savage's presence. (R303-306, 573)

Savage did not tape the initial questioning of the Appellant. (R307) Mr. Krawczuk first stated he was not involved in the crime, but Savage told him to tell the truth. Savage also told him he had recovered some of Mr. Staker's property. (R307-308) After this "pre-interview," Savage took a formal taped statement from Mr. Krawczuk after again advising him of his rights under Miranda. (R308-310) Before the detectives went to the home they discussed getting a search warrant. (R311)

Jeff Hollan, an agent with the Lee County Sheriff's Office, worked with Ed Tamayo on the case, and was one of the officers who went to the residence of Mr. Krawczuk. (R312-315) Their purpose was to meet with two Charlotte County deputies, knock on the door, and ask Mr. Krawczuk and Poirier to come down to the sheriff's department to speak with them. (R316) Hollan was the officer who knocked on the front door. (R316) Hollan believed he was let into the house by Mr. Krawczuk and Ed Tamayo. (R317) Mr. Krawczuk was

not under arrest or in handcuffs, but Tamayo asked him to go to the sheriff's department, and Mr. Krawczuk agreed to go. (R317-318) The Appellant was not offered the opportunity to drive to headquarters and meet the officers there. (R320) The Appellant rode in the back seat of Tamayo's car, with Hollan sitting beside him. (R320-321)

Ed Tamayo was a detective with the Lee County Sheriff's Department. He investigated the missing person's report on Mr. Staker. (R322-325) After Mr. Staker's body was found and other officers had recovered property stolen from Mr. Staker's house, Tamayo was called to a meeting at 7:00 a.m. on September 23, 1990. (R327) He learned of the two suspects and was one of the officers who went to the Appellant's home. (R328) Tamayo was one who knocked at the front door. He then thought someone was trying to escape and went to the back of the house where he found Poirier in custody of the detectives from Charlotte County. (R329) Tamayo then told agent Hollan to go in the house. He also asked Poirier where the .22-caliber pistol was, and Poirier said it was in a duffel bag in his bedroom. (R329) Tamayo then went in the house. Mr. Krawczuk just stood as he approached. Tamayo did not place him under "physical" arrest, but asked Mr. Krawczuk to go downtown. (R331)

When asked if he intended to place Mr. Krawczuk under arrest at the time he went to his home, Tamayo responded: "I believed initially that the probable cause may have existed; however, at this point we weren't positive that they were in the home, and

basically the main reason for going there was that they were there to take them downtown voluntarily for questioning." (R323)

Tamayo also was present at the time Mr. Krawczuk was questioned and ultimately placed under arrest. (R323-324) He later obtained a search warrant for the residence for the purpose of recovering the .22-caliber pistol. (R335)

At the time Tamayo first met with the other officers on September 23, he did not discuss the possibility of getting a search warrant or an arrest warrant. (R326) When he entered the house, he and at least one other deputy had their guns drawn. He could see that Mr. Krawczuk was not armed. (R337) Tamayo and Hollan walked beside Mr. Krawczuk to the car. (R340)

The Appellant testified that on the morning of September 23, 1990, he was at home in his living room when he saw a deputy's car and other unmarked cars swing into the driveway, and police surrounded the house. (R340-341) Mr. Krawczuk heard a knock at the front door and stood near the door. At the side of the house he saw police with their guns drawn standing on either side of Poirier who had his hands behind his head. (R342, 352) Then two or three officers came in the back sliding door with their guns drawn. (R342) They asked him to identify himself, stand still, and put his hands behind his head. The guns remained drawn and he thought the officers would shoot. (R343) The request to go to headquarters was more like a demand. He felt intimidated, believed he was under arrest, and believed he had no option but to go to headquarters. (R344, 354) Once there he was taken into an interrogation room

with two detectives. He signed the waiver of rights form because he was told to. He cooperated out of fear, confusion, and the feeling of intimidation. (R345-347)

The court ruled that the officers' initial entry into the house without a warrant or proper consent was illegal, but that the Appellant's statements were admissible because they were voluntary and he waived his Miranda rights. (R544-545)

Plea

On September 27, 1991, defense counsel advised Judge Thompson that the Appellant desired to withdraw his plea of not guilty and enter an open plea of guilty to the charges, requesting the imposition of the death penalty. (R388) Mr. Krawczuk previously wrote to Judge Thompson on April 29, 1991, expressing dissatisfaction with the services of defense counsel and asking that she be dismissed. (R522-523) After hearing, (R645-649) the court denied the request by order dated May 30, 1991.(R524)

The court readdressed this issue before accepting Mr. Krawczuk's plea. (R388) Mr. Krawczuk testified that he was completely satisfied with defense counsel's representation and the actions she had taken on his behalf. (R388, 400-401)

The court then advised the Appellant that he had a right to enter a plea of guilty. As to the request for the death penalty, he was advised that the judge is obligated to weigh aggravating factors and mitigating factors in making that final decision. A request for the death penalty would probably not be an aggravating

factor and probably would not enter into the decision of whether or not to impose it. (R389-390, 417)

The court advised Mr. Krawczuk that he could only be adjudged guilty of first-degree premeditated murder or felony murder, but not both. The maximum sentence for murder is the death penalty. A plea of guilty to the robbery could result in a maximum sentence of fifteen years in prison. There were no plea agreements involved in his case. (R390-391). Mr. Krawczuk also was advised of the two phases of a murder trial and expressed a desire to also waive the right to have the jury make a sentencing recommendation. (R391-393) The court accepted the waiver, but ruled that it was not irrevocable. (R416)

The Appellant was questioned and responded as follows:

He testified he was not forced, threatened, or coerced into entering the plea. (R393) He was on medication, the anti-depressant Elavil, which calmed him and helped him get to sleep. He last took the drug the previous night at 8:00 p.m. (R393-394, 412-413) He had not previously suffered from or been treated for any kind of mental disorder or mental health problems. (R395) He went to the prison psychiatrist because he grew restless as his case neared trial; he wanted a mild sedative to sleep. (R395) The medication was not affecting him at the plea. (R412-413)

The Appellant completed high school. He served in the Marines for four years and then worked as a maintenance person for ten years. (R395) He testified he understood and was giving up his right to remain silent, the right to have his guilt or innocence

determined by a jury, the right to a jury recommendation as to his sentence, the right to confront witnesses and challenge evidence, the right to be presumed innocent until guilt was proved beyond and to the exclusion of every reasonable doubt, and the right to subpoena and call witnesses. (R395-401, 414) He talked over with his attorney, but no one else, his decision to plea. (R402)

The assistant state attorney, Mr. Bower, asked the Appellant about pending motions, and Mr. Krawczuk responded that he was waiving the right for the motions to be heard. (R402-404, 414)[2] There was no specific waiver or reservation of Appellant's motion to suppress confession which had been heard and denied by the court; introduction of the confession during the penalty phase was objected to by defense counsel. (R544-545, 89-90, 103) The brief colloquy concerning the motion to suppress confession reflected only the following questions from the assistant state attorney:

> MR. BOWER: And you're aware that there has already been a motion to suppress filed and heard in this case?
>
> THE DEFENDANT: Yes, I have, sir.
>
> MR. BOWER: And do you have any matters with regard to the suppression issue that you feel should be brought before this Court that have not already been brought before this Court?

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[2]The motions were: motion to prohibit introduction of evidence of nonstatutory aggravating circumstances and to permit evidence of nonstatutory mitigating evidence at the penalty phase [R477-481]; motion for funding for a mitigation specialist; motion for statement of aggravating circumstances [482-485]; motion to prevent juror challenge due to views on punishment not affecting judgment on issues of guilt [R508-512]; motion to dismiss indictment [R498-507]; motion to preclude challenges for cause [R513-517]; motions for jury sequestration and for individual voir dire [R495-496]; motion to prohibit the state from introducing evidence to rebut mitigating circumstances in its case in chief [R492-494]. (R402-404)

THE DEFENDANT: No, sir.

(R404)

Defense counsel advised the trial court that the Appellant was entering the plea and requesting the death penalty against her advice but that he had the constitutional right to do so. She had been commanded by Mr. Krawczuk not to call witnesses in mitigation. She had been instructed only to stand by the Appellant but not to take any action on his behalf. (R404-405, 407-408) At the request of the state and concurrence by defense counsel, the trial court accepted into the record the report of Dr. Keown who, six months earlier, had evaluated Mr. Krawczuk for competency in preparation for trial. (R405-408, 606A)

Upon questioning by the court Mr. Krawczuk advised Judge Thompson that he felt he should not be allowed to live for what he did. He had never been involved in a suicide attempt. (R409) He testified he and his co-defendant were motivated by robbery and plotted the murder for about a week. They planned how to get into the victim's house and start a physical altercation. Mr. Krawczuk strangled the victim to death. (R410-412) Mr. Krawczuk had given considerable thought to the plea and discussed it with his attorney. (R415)

The court accepted the plea, finding it to be freely and voluntarily entered with the understanding of legal rights and an effective waiver of those rights; finding the Appellant competent

to make the plea; and finding a factual basis for the plea. (R416)[3] The court ordered a pre-sentence investigation, and adjudicated Mr. Krawczuk. (R417, 420-421, 606B)

Penalty Phase

On October 29, 1991, the state posited it would not waive the penalty phase in Mr. Krawczuk's case, and the court agreed. (R654-655)

On January 13, 1992, a motion pertaining to Mr. Krawczuk's competency to be sentenced was filed by Robert R. Jacobs, counsel for the co-defendant William Poirier.[4] The Honorable James H. Seals, Circuit Judge, heard argument on February 3, 1992, that pursuant to Florida Rules of Criminal Procedure 3.210 and 3.214, the court should order a further evaluation of Mr. Krawczuk's competency. Mr. Jacobs urged that Mr. Krawczuk might be suffering suicidal ideation and the effects of the psychotropic medication Elavil, particularly in light of his determination to seek the death penalty with the assistance of counsel, and his determination not to offer any evidence of mitigation -- thus assuring affirmance of his case on appeal and using his attorney as a constitutional prop. (R662-670) Mr. Bower, the assistant state attorney, advised

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[3]The court incorporated into the factual basis for the plea the record of the motion to suppress hearing. (R412) The suppression hearing is reported at R274-384. A transcript of the taped confession is found at R103-185.

[4]Mr. Jacobs sought a ruling that Mr. Krawczuk be re-examined by a psychiatrist to determine his competency to be sentenced, any suicidal tendencies, and his competency to be a witness in the co-defendant's case. (R622-624)

the court that the plea colloquy clearly showed the Appellant was not under the influence. (R671)

> I asked him and I believe the Court had, if he was under the effects of that drug at the time he entered the plea. He said no. In fact, he said the last time he took the medication was the night before early in the evening. And he said he felt no effects from it, all it did was calm him when he did take it, anyway.

(R271-72)

The court found that it would make no ruling concerning the competency of Mr. Krawczuk to be sentenced. (R676, 682)

At the penalty phase hearing on February 4 and 5, 1992, a jury was picked by the state; defense counsel was instructed by the Appellant not to participate in voir dire and did not participate. (R694, 701, 703, 712-838) Prior to jury selection a brief colloquy occurred where the Appellant reiterated his determination to get the death penalty and put on no evidence in mitigation; that his medication sedated him and let him sleep, but he was not under the influence; that he waived the right to testify on his own behalf and the right to have his attorney cross-examine state witnesses and make closing argument; and that he was satisfied to go before the jury in his jail uniform. (R695-707)[5] The court ruled that he was sufficiently intelligent and understood the consequences of his decisions, and that he had the legal right to take the course of action he was taking. (R706)

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[5]At the plea and penalty stages the trial court was advised of case law addressing a defendant's waiver of various rights, including Pettit v. State, 591 So. 2d 618 (Fla.), cert. denied, 113 S. Ct. 110, 121 L. Ed. 2d 68 (1992); Anderson v. State, 574 So. 2d 87 (Fla.), cert. denied, 112 S. Ct. 114, 116 L. Ed 2d 83 (1991); Hamblen v. State, 527 So. 2d 800 (Fla. 1988). (R705)

The state first called Charles Staub, the roommate of the victim, David Staker. (R16-18) On September 6, 1990, Mr. Staker took Staub to the airport. (R19) Staub was leaving for a visit with his family in Pennsylvania. (R21) Mr. Staker gave him no indication that Staker was in any kind of trouble or fearful of anything. (R20) Staub found out Mr. Staker was missing about two hours before his scheduled return flight to Florida when Officer Ed Tamayo telephoned him. (R21)

The day after his return, the police let Staub into the house he shared with Mr. Staker. (R22) There were a number of items missing from the house, including a microwave, VCR, stereos, speakers, tuners, amplifiers, CD player, cassette tapes and tape decks, two televisions, a razor, five rifles, a .22-caliber pistol, and a gun rack. (R23-27) Staub did not know Mr. Krawczuk or the co-defendant, William Poirier. (R28)

Peter Sbabori, Jr., a detective with the Charlotte County Sheriff's Office, was called to the scene where Mr. Staker's body was found on September 18, 1990, at about 7:30 to 8:00 p.m. (R30-31) The location was Tropical Gulf Acres off Highway 41, a sparsely populated rural area. (R31-33) The body, badly decomposed and covered by a sleeping bag, had a wash rag in the oral cavity and a piece of duct tape partially attached to the skin. The ankles were bound with rope. (R34-35)

Sbabori worked with a partner, detective Michael Savage, in investigating the case. (R37) Through information from the Lee County Sheriff's Office, they learned that Gary Sigelmier had

provided information on property taken from Mr. Staker's residence and that Mr. Krawczuk and Poirier were possible suspects. (R38) Sbabori was present when the stolen property was located at a residence in a rural area of Lehigh Acres. (R38) He also accompanied the Lee County deputies when they went to Mr. Krawczuk's and Poirier's residence in Fort Myers. (R39) He transported Poirier to the Lee County Sheriff's Department and interviewed him there. (R40) He was not present when Mr. Krawczuk was interviewed. (R40-41)

In September 1990, Gary Sigelmier lived in North Fort Myers. (R42) Sigelmier knew both Poirier and Mr. Krawczuk, and saw them at his residence in the early morning hours of September 13, 1990. (R44) They arrived in a compact white pickup truck and asked him to buy or store some items, including a television, microwave, stereo, some rifles, a rifle rack, razor, and cassette tapes. (R44-45) He bought some of the items for $200 and agreed to store the rest of the items at his house. (R46) Mr. Krawczuk said something about having gotten enough evil out of his system to last a long time. (R47) Later, after Sigelmier suspected a death was involved and decided to go to the police, he was paranoid about having the property. He moved it to a house in Lehigh Acres where a former co-worker, John Stroud, lived. (R46-47)

On September 12, 1990, Edward Tamayo, a detective with the Lee County Sheriff's Office became involved in investigating a missing persons report on Mr. Staker. (R52-53) Tamayo went to Mr. Staker's residence and found several items missing. (R53-54) Duct tape was

found in the living room and a wallet of Mr. Staker's, containing no money, was found in a bedroom. (R54-55) A Jacuzzi on the back porch was turned on and partially uncovered. (R56)

Tamayo located Mr. Staker's roommate, Charles Staub, in Pennsylvania. (R58) He later learned that Mr. Staker's white, Nissan pickup truck had been located in the Suncoast area where Gary Sigelmier lived. However, the truck was not confiscated initially because it was not at that time connected to a crime or reported stolen, and it was parked off the roadway. (R59-60) The truck was later located in a remote area of North Fort Myers. (R59) The Charlotte County Sheriff's Department contacted Tamayo after the decomposing body was found, and eventually the body was identified as that of David Staker. (R60-61) Tamayo turned his investigation over to Charlotte County. Later, after the confessions of Mr. Krawczuk and Poirier, he learned that the murder actually occurred in Lee County. (R61-62)

Tamayo was advised by Charlotte County investigators that property taken from Mr. Staker's residence was recovered in Lehigh Acres at the residence of John Stroud, and that two suspects had been identified through Gary Sigelmier. (R62-66) Tamayo and several other detectives, including those from Charlotte County, went to the residence of Mr. Krawczuk and Poirier and transported the two men to the sheriff's department. (R67) There Mr. Krawczuk signed a rights waiver form and made taped statements in Tamayo's presence that he killed David Staker. (R67-70) Subsequently Tamayo obtained a search warrant for the residence of Mr. Krawczuk and

Poirier to recover the .22-caliber pistol, a VCR, and a television stand that had been Mr. Staker's property. (R70-72) The VCR and gun were found in Poirier's bedroom. (R72)

Dr. R. H. Imani, Charlotte County Medical Examiner, testified as an expert in forensic pathology. (R74-78) He was called to the scene where Mr. Staker's body was found on September 18, 1990, at about 10:00 to 10:45 p.m., and later performed the autopsy. (R79-81) He found a thin bone in Mr. Staker's upper neck area fractured on one side. Trauma causing hemorrhaging occurred in the cheek area. A hand towel was in the oral cavity and duct tape also was found in the mouth area. (R81) The cause of death was asphyxia, caused partially by strangulation and partially by smothering. (R82) It was possible for strangulation to take as long as five to ten minutes to cause death. (R83) The cause of death could have been manual strangulation occurring before the Draino [sic] and hand towel were put in Mr. Staker's mouth. (R84)

On September 23, 1990, Charlotte County Sheriff's Detective Michael Savage went to the residence of Mr. Krawczuk and Poirier with his partner, Peter Sbabori, and several Lee County detectives. (R93-98) He later interviewed the Appellant with Lee County detective Ed Tamayo after giving Mr. Krawczuk his Miranda warnings. (R98-99) Mr. Krawczuk was arrested for the murder of David Staker after he gave his statement. (R186/187)

Over defense objection to the confession being admitted, (R89-90, 103) the tape was published to the jury. (R103-185) The Appellant's taped statement reflected the following:

Mr. Krawczuk had known the co-defendant, William Poirier, for eight or nine years and they had been roommates for about six months. (R108-110) Mr. Krawczuk also met David Staker about six months earlier, and engaged in casual conversation with him over a period of time. (R110-111) About three months later, Mr. Staker invited the Appellant to his house. (R112) Staker offered him a drink and invited him to get in his hot tub with him. Both men got in the tub nude. (R113-114) Mr. Krawczuk did not at that time know Mr. Staker was homosexual. However, when Mr. Staker made advances to him he allowed him to manipulate him with his hand. (R114)

Over the three-month period before the crime, the Appellant visited Mr. Staker at his home about six times. (R115-117) On one of the visits he took William Poirier, and Staker performed oral sex on Poirier. (R117)

Around September 8 or 9, 1990, Mr. Krawczuk and Poirier decided they were going to kill Mr. Staker because they were insecure with homosexual men. (R118) They decided not to use weapons. (R119) They also planned to steal merchandise from Mr. Staker's house. (R172)

The Appellant called Staker to see if he would be free on the night of September 12. (R119-120) On that night he and Poirier drove to the house in the 1983 Chevy Malibu station wagon that the Appellant used. They took only a pair of gloves each, which they concealed in their waistbands. (R120-122) They left the car at an Amoco station near Mr. Staker's house, and then walked to the house. (R122-126)

The three watched television for awhile. Mr. Staker turned on the hot tub. At Mr. Krawczuk's suggestion the three went into the bedroom after about twenty minutes. (R128-130A) Eventually the three stripped and Staker began having oral sex with Poirier. (R131-134) The Appellant began to roughhouse with Staker, pushing him in the shoulder, pulling him off Poirier, pushing him on the bed and pinning him. The idea was to test how aggressive Mr. Staker would become. (R134-138) The men were interrupted by a phone call and then Mr. Staker resumed oral sex on Poirier. The Appellant pulled Staker off and began roughhousing again as a test; Poirier implied to the Appellant not to be so rough so Mr. Staker would not think anything was going on. (R138-139)

Eventually the Appellant and Poirier got dressed and put on their gloves. (R139-141) When Mr. Staker was on the bed the Appellant jumped on his back and Poirier jumped on his legs; they forced him from the bed to the floor. Staker was face up. Mr. Krawczuk kneeled on his stomach and began choking him with both hands. (R141-142) Staker resisted strongly. Mr. Krawczuk thought he choked him for five or ten minutes. Poirier helped by holding Mr. Staker's mouth closed and pinching closed his nose. Poirier also did five or six knee drops to Mr. Staker's face. (R143-144)

After five to seven minutes of choking Mr. Staker, they stopped and heard gurgling noises. At that point Poirier did a knee drop to Mr. Staker's heart area. (R145-146) The Appellant got Crystal Vanish and poured it into Mr. Staker's mouth to make sure he was dead. Poirier held the victim's mouth open while the Appel-

lant poured a mouthful of the chemical in and then poured water in to dissolve it. He then applied a second mouthful and water. (R146-148)

They both carried Mr. Staker's body from the bedroom into the bathtub in case he bled, discharged fluids, or excreted anything. Saliva and blood came out of his mouth and one of the men put a washcloth in Mr. Staker's mouth to stop the discharge. Poirier taped the cloth to his mouth. They bound his feet while he was in the tub in case he was alive and tried to get out. (R148-151, 173)

The men then gathered together items including stereo equipment, a cassette deck, microwave, televisions, a VCR, CD player, rifles, a handgun, a gun rack, and watch. They found a sleeping bag, laid Mr. Staker's body on it, wrapped it over him, and used it to carry him to the bed of his pickup truck. They then loaded the property into the truck and drove to Gary Sigelmier's. (R152-161)

Earlier Poirier had called Sigelmier to tell him they were going to acquire some items. The Appellant and Poirier unloaded everything and took it into Sigelmier's house. Sigelmier did not go near the truck or see the body. He paid the two men $200 for part of the property and said he would store the rest. (R161-163) Sigelmier then drove the two back to Mr. Krawczuk's station wagon parked at the Amoco station. The Appellant and Poirier drove back to Sigelmier's and switched the body to the station wagon, unknown to Sigelmier. Mr. Krawczuk drove the station wagon. Poirier drove Mr. Staker's truck, parked it off Suncoast drive, and then joined the Appellant in the wagon. (R163-165)

Mr. Krawczuk had earlier that night investigated the site of where they would leave the body in Charlotte County. He chose the spot randomly because it was somewhat rural. It was located off Highway 41 in Tropical Gulf Acres. (R166-169) Both men carried Mr. Staker's body to a line of trees and placed him behind a pine tree with the sleeping bag covering most of the body. (R169-170) They then returned home to Lee County. (R171)

The Appellant and Poirier kept two items taken from Mr. Staker's house -- the .22-caliber pistol and the VCR. The items were in Poirier's room. (R173-174) Mr. Krawczuk said he had watched a lot of violent murder movies, but the acts he committed were from frustration with the homosexual community which he wanted to exterminate. (R182-184)[6]

The Appellant again refused to offer anything in mitigation or allow his counsel to argue anything in mitigation, and waived closing argument. (R190-191, 218-231, 250) Defense counsel had no objections to the jury instructions or jury forms as presented by the court. (R218) The jury requested the written transcript of Mr. Krawczuk's confession to which defense counsel agreed. (R266)

Sentencing

On February 11, 1992, the state argued for imposition of the death penalty on the basis that the crime was heinous, atrocious,

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[6]Other than the taped confession, the physical evidence introduced by the state included property and photographs of property taken from Mr. Staker's house, photograph of Mr. Staker's house and the scene where the body was found, and Mr. Krawczuk's waiver of rights form. (R18, 20, 33, 57, 72, 101, 103, 192)

and cruel (R525-427); cold and calculated by heightened premeditation (R428); and took place during the commission of a robbery (R428-429). Defense counsel presented no argument or evidence at the Appellant's request. (R420)

On February 13, 1992, prior to imposition of sentence, the court announced that it had erred in instructing the jury on the heinous, atrocious, and cruel aggravator, but that the error was harmless. (R424) An order was so entered. (R585-586)

The court then found the following statutory aggravating factors: (1) the crime was committed in the course of a robbery or for pecuniary gain, which the court merged and considered as one factor; (2) the crime was especially heinous, atrocious, and cruel; (3) the crime was committed in a cold, calculated and premeditated manner with no pretense of moral or legal justification. (R434-435, 587-594) The court found one statutory mitigating factor, the lack of a significant history of prior criminal activity. (R435, 587-594) Based on the pre-sentence investigation and the earlier competency evaluation of Mr. Krawczuk, the court found no non-statutory mitigating factors. (R435, 587-594, 606A, 606B)

The psychological evaluation by Dr. Richard Keown, done approximately ten months earlier, summarized that Mr. Krawczuk then had mild depressive symptoms but medication intervention was not at that time warranted. He suffered from many feelings of insecurity and low self-esteem, caused by his father rejecting him at an early age and his mother treating him in a demanding and verbally abusive manner. He thus adopted a passive approach to life. (R606A-page 7)

He went through a period of rebellion in early adolescence. In 1976 he enlisted in the Marine Corps where he served successfully about two-and-one-half years. In 1979, he was disciplined for an unauthorized absence; and in 1980, he was referred to and evaluated by a psychiatrist who recommended administrative discharge due to a mixed personality disorder, immaturity and passive-aggressiveness. (R606A-page 2, 4)

At the time of Dr. Keown's evaluation, Mr. Krawczuk was 31 years old, divorced, and had a three-year old daughter. Dr. Keown found him competent to stand trial and sane at the time of the crime. Of the two defendants, Mr. Krawczuk was likely the more passive and was influenced by Poirier. (R606A- pages 4-7)

The presentence investigation recommended life imprisonment and no alternative recommended disposition. (R606B-page 7)

SUMMARY OF THE ARGUMENT

I. The arrest of the Appellant in his home, without a warrant or probable cause, was illegal; his subsequent stationhouse confession was tainted with no intervening circumstances attenuating the illegality. The confession was therefore inadmissible and should have been suppressed. Review of this issue is both proper and necessary under statutory and rule provisions, and federal and state case law. In death penalty cases, where the validity and voluntariness of the plea is in question, and on the basis of an insufficient plea colloquy, the Court must fully review the merits of the suppression issue and determine the voluntariness, and the factual and legal soundness, of the plea.

II. The Appellant's plea also cannot be deemed voluntary because the trial court failed to conduct a proper colloquy concerning Appellant's increased depression and use of the psychotropic medication, Elavil.

The court also failed to give attention to several factors which raised sufficient doubt of competency to mandate a more thorough court inquiry, and possible further evaluation.

These errors render the also plea involuntary.

III. The trial court erred by its own recognition in instructing the jury on the HAC factor, and the judge erred in his consideration of this factor because he also failed to apply the narrow construction required under federal and state law. The error was

not harmless because the state failed to prove by proper evidence and beyond a reasonable doubt that the victim was fully conscious.

IV. In addition to improperly finding the HAC factor, the trial court failed to consider non-statutory mitigating factors.

ARGUMENT

ISSUE I

THE APPELLANT'S CONFESSION WAS OBTAINED IN VIOLATION OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS; DENIAL OF HIS MOTION TO SUPPRESS WAS ERROR, AND THE MERITS OF THE SUPPRESSION ISSUE ARE A NECESSARY AND PROPER SUBJECT OF REVIEW IN A DEATH PENALTY CASE WHERE THE INADMISSIBLE STATEMENTS AND THE INSUFFICIENT PLEA COLLOQUY GO TO THE VALIDITY AND VOLUNTARINESS OF THE PLEA.

A. Necessity of Review

This case involves a ruling by the trial court denying Appellant's motion to suppress confession. The denial resulted in a subsequent plea, against the advice of counsel, of guilty of first-degree murder and robbery, and imposition of the death penalty. While the state is expected to contend that this Court is foreclosed from reviewing the ruling due to the entry of a guilty plea, the Appellant asserts that it is necessary and proper for this Court to fully review the suppression issue in a death penalty case.

Section 921.141(4), Florida Statutes (1991), provides that a judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida. Florida Rule of Appellate Procedure 9.140(f) provides:

> The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether

> or not insufficiency of the evidence is an issue presented for review.

These statutory and rule provisions were discussed in Anderson v. State, 420 So. 2d 574, 576 (Fla. 1982). There the petitioner entered a plea of nolo contendere to first-degree murder, attempting to preserve the right to appeal his motions to suppress confession, and was sentenced to death. On appeal he argued the suppression issue and the state claimed he should not be allowed to contest the trial court's refusal to suppress his statements because, as a matter of law, a confession may not be considered dispositive of a case when a plea of nolo contendere is entered. Anderson, 420 So. 2d at 575. This Court disagreed. Based on the statutory and rule provisions, the Court ruled:

> Anderson's decision to plead nolo contendere may well have been prompted by the court's failure to suppress his statements. Certainly, if the predicate for the judgment of conviction is substantially impaired by the inclusion of an inadmissible statement, it is proper and necessary for this Court, in a death case, to review the record and determine whether that statement was in fact inadmissible.

Anderson, 420 So. 2d at 576.

The Court then addressed the merits of the suppression issue, holding that the trial court erred in not suppressing the petitioner's statements because they were taken in violation of his Sixth Amendment rights.

Although the instant case involved a guilty plea rather than a plea of nolo contendere, this is a distinction of no consequence in a death penalty case, and the scope of review outlined in Anderson should apply. Support for this proposition can be found

in several cases. In LeDuc v. State, 365 So. 2d 149, 150 and n.3 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S. Ct. 175, 62 L. Ed. 2d 114 (1979), a death penalty case based upon a guilty plea, the Court concluded that even where a defendant's counsel does not challenge the legal sufficiency of the convictions and sentences on any basis, section 921.141(4) and Rule 9.140(f) obligate the Court to determine if the pleas are voluntary and factually sound, and the convictions legally proper. In Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979), the Court rejected an automatic general review from a guilty plea in a non-capital case. However, citing section 921.141(4), the court stated that a death penalty case does require this type of review. Most recently in Koenig v. State, 597 So. 2d 256, 257 at n.2 (Fla. 1992), the Court reiterated its position that it is required to review the judgment of conviction in death penalty cases pursuant to section 921.141(4), notwithstanding a petitioner's failure to move to withdraw his plea, whether he pled guilty or nolo contendere.[7]

In this case as in Anderson, the suppression issue goes to the validity of the plea itself. Mr. Krawczuk's decision to plead due to the denial of his motion to suppress confession, makes review of the suppression issue by this Court both proper and necessary. The validity of the plea must also be questioned on the alternative basis of the insufficient plea colloquy. Neither the judge nor the

[7]Also, a distinction between a no contest plea and a plea of guilty is arbitrary and therefore violates federal due process.

prosecutor clearly addressed the status of the motion to suppress. (R404)

A defendant must know that entry of a guilty plea constitutes a waiver of certain constitutional rights. When defenses in a proceeding are raised, such as a motion to suppress evidence, a defendant should understand that he has waived these specific defenses and their review by pleading guilty. Williams v. State, 316 So. 2d 267, 271 (Fla. 1975), citing Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

In Ashley v. State, 614 So. 2d 486 (Fla. 1993), this Court reemphasized the importance of Boykin, stating, "the United States Supreme Court noted that '[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.' A number of important federal rights are implicated in the plea process:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights. . . .

Id. 395 U.S. at 243, 89 S. Ct. at 1712 (Citations omitted). Before a trial judge can accept a plea of guilty or nolo contendere, there must be 'an affirmative showing that it was intelligent and voluntary,' id. at 242, 89 S. Ct. at 1711, for '[w]hat is at stake

for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.' Id. at 243-44, 89 S. Ct. at 1712.

In keeping with Boykin, this Court has ruled that in order for a plea to be knowing and intelligent the defendant must understand the reasonable consequences of the plea . . . " Here, the trial judge failed to conduct a colloquy at the plea hearing specifically addressing the motion to suppress confession. The assistant state attorney asked only the following questions pertaining to the motion to suppress:

> MR. BOWER: And you're aware that there has already been a motion to suppress filed and heard in this case?
>
> THE DEFENDANT: Yes, I have, sir.
>
> MR. BOWER: And do you have any matters with regard to the suppression issue that you feel should be brought before this Court that have not already been brought before this Court?
>
> THE DEFENDANT: No, sir.

(R404)

This colloquy was wholly insufficient to satisfy the requirements of Boykin, and consequently fails to satisfy the requirement of an affirmative showing that the plea was intelligent and voluntary.

Here also -- where the suppression hearing was incorporated in the court's factual basis for the plea and the taped confession later was played to the jury, over defense objection, during the penalty phase -- the validity and voluntariness of the plea must be

questioned. (R412, 89-90, 103) Further facts show that during deliberations the jury requested and was given the transcript of the confession. (R266) In imposing the death penalty the trial judge stated in his order, "The evidence of [Appellant's] guilt, as well as the existence of the statutory aggravating circumstances is from his detailed confession alone overwhelming." (R591) The trial judge also used the confession as a basis for ruling out or not considering possible non-mitigating circumstances. (R592)

Based on the foregoing authorities and facts, the merits of the suppression issue must be addressed as they go to the validity and voluntariness of the plea and subsequent sentence.

B. Merits of Motion to Suppress Confession

Involved here is the illegal arrest of the Appellant, Anton Krawczuk, who was seized from his home by Lee and Charlotte County sheriff's deputies. With guns drawn, the deputies entered the home in the early morning hours without a warrant or probable cause to arrest, seized the Appellant, and transported him to the police station for interrogation. At the station Mr. Krawczuk confessed to robbing and murdering David Staker. Upon hearing a motion to suppress confession, the trial court ruled that the seizure violated Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). However, the trial court further ruled, citing New York v. Harris, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990), that the confession was admissible because the Appellant had been given and had waived his Miranda rights, thus curing any

illegality of the arrest. (R544-545) This latter ruling by the trial court wholly fails to consider Mr. Krawczuk's Fourth Amendment and due process protections and is contrary to the law.[8]

The Fourth Amendment to the Constitution of the United States -- applicable to the States through the Fourteenth Amendment -- and Section 12, Article I of the Florida Constitution, protect the right of persons to be free from unreasonable searches and seizures. The physical entry into a home is the chief evil against which the wording of the Fourth Amendment is directed. Payton, 445 U.S. at 585-587, 601. Only if there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is constitutionally reasonable, would an arrest warrant based on probable cause give limited authority to enter a home for Fourth Amendment purposes. 445 U.S. at 602-603.

The instant case is similar to Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), and Brown v. Illinois, 422 U. S. 200, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

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[8]While a confession after proper Miranda warnings may be "voluntary" for Fifth Amendment purposes, the giving of Miranda alone does not attenuate the taint of an unconstitutional arrest for Fourth Amendment purposes. Brown v. Illinois, 422 U.S. 590, 601-602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); Dunaway v. New York, 442 U.S 200, 217, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); Taylor v. Alabama, 457 U.S. 687, 693, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982).

Additionally, New York v. Harris, 495 U.S. at 20, does not hold that the giving and waiver of Miranda rights makes a confession admissible. The Harris Court, which was sharply divided, held that where the police have probable cause to arrest, the Fourth Amendment does not bar the use of a confession made outside the home, even if the statement is taken after an arrest made in the home in violation of Payton. The distinction between the instant case and Harris is discussed later in this brief.

In Dunaway, an informant gave a police detective information which implicated the petitioner in a murder and robbery. The detective obtained some information but not enough to get a warrant for the petitioner's arrest. Nevertheless, he ordered other detectives to pick up and bring in the petitioner. Three detectives found the petitioner at a neighbor's house and took him into custody. Although not told he was under arrest, he was not free to leave. He was driven to police headquarters in a police car, placed in an interrogation room, and given Miranda warnings. He waived counsel and eventually made statements and sketches incriminating him in the crime. The trial court denied his motion to suppress the statements and sketches. 442 U. S. 203.

In Brown, the petitioner arrived home in the early evening to find two detectives, guns drawn, inside his apartment. The detectives placed the petitioner under arrest, and eventually identified themselves. They made the arrest for the purpose of questioning the petitioner in a murder investigation. They had no warrant or probable cause for arrest. The petitioner was driven by two detectives to the police station, interrogated, advised of his Miranda rights, and eventually made two statements that he and another man committed the murder. The trial court denied his motion to suppress the statements. 422 U.S. at 592-596.

On appeal to the Supreme Court, the confessions in both cases were held to be inadmissible because they were obtained through custodial interrogation after an illegal arrest, and no significant intervening events broke the causal connection between the illegal

arrest and the confession. The Court identified factors to consider in determining whether a confession has been purged of the taint of an illegal arrest, including: temporal proximity of the arrest and confession; the presence of intervening circumstances; and the purpose and flagrancy of the police misconduct. The burden of proving a confession admissible rests with the state. Dunaway, 442 U.S. at 218; Brown, 422 U. S. at 603-604.

In Dunaway, the Court found that the petitioner was admittedly seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance. 442 U.S. at 218. In Brown, the arrest also was investigatory and for questioning in the hopes that something would turn up. 422 U.S. at 605. See also, Taylor v. Alabama, 457 U.S. 687, 692-693, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982) (six hours between illegal arrest and confession did not purge the taint of the illegal arrest, nor did a five to ten minute visit with friends; the filing of an arrest warrant during interrogation did not attenuate the illegal arrest and the confession; police conduct -- effectuating investigatory arrest without probable cause based on an uncorroborated informant's tip, involuntarily transporting petitioner to the station for interrogation in the hope something would turn up, obtaining a voluntary confession, and lack of abuse did not cure the illegality or show a lack of flagrant or purposeful conduct on the part of the police). Compare, Sanchez - Velasco v. State, 570 So. 2d 908, 914 (Fla. 1990) (correction of illegal actions by police, release from custody, and subsequent voluntary travel to

the police station in police car were sufficient intervening events attenuating initial invalid arrest).

The facts of the instant case are particularly similar to those in Dunaway. Here, detectives obtained some information from an individual of unknown reliability who purportedly said he had gotten property, connected to the victim, from the Appellant and co-defendant. Based on this information, the detectives possibly discussed getting a search warrant but not an arrest warrant. (R293, 311, 326) In the early morning, five deputies from two jurisdictions, driving two cars, decided to go to the residence of Mr. Krawczuk and the co-defendant, knock on the door, and take Mr. Krawczuk and the co-defendant in to the station to get information -- such as descriptions and locations -- for an affidavit for a search warrant. (R287-288, 292, 316, 323)

At least two deputies had their guns drawn and took Mr. Krawczuk into custody. (R337, 342-343, 352) Although the detectives testified they did not place the men under "physical" arrest, Mr. Krawczuk and the co-defendant were not free to leave. (R321, 344, 354) They were escorted to a patrol car and driven downtown, each seated beside a detective. (R320-321, 340) Once at the police station Mr. Krawczuk was placed in an interrogation room, given Miranda warnings, waived counsel, first denied the crime, and then confessed after the police said they had evidence that could link him to the crime. (R308-310, 345-347)

As in Dunaway and the other cited authorities, the confession here was obtained through custodial interrogation after an illegal

seizure. The seizure was unlawful, made for investigatory purposes in hopes that something would turn up, and was the result of police misconduct. Nothing in the record shows a significant intervening event which broke the connection between the illegal arrest and the confession.

Mr. Krawczuk's constitutional rights were violated when the police arrived at his home and, without a warrant or probable cause, drew their guns, and seized him. His statements at the police station subsequent to his illegal arrest were presumptively tainted. There was no showing of a clear and unequivocal break in the chain of illegality to dissipate the taint of the illegal action. Thus, the statements obtained in violation of the Fourth and Fourteenth Amendments, and in violation of Article I, Section 12 of the Florida Constitution were inadmissible and should have been suppressed. Dunaway; Brown.

The facts also show that, as in Dunaway and Brown, Mr. Krawczuk was admittedly seized without probable cause. As noted, the detectives by their own admission did not discuss an arrest warrant and only "probably" discussed a search warrant which was not obtained. Also by their own admission they were on an information-fishing expedition. The only mention of probable cause came from Tamayo's response to the question of whether he intended to place Mr. Krawczuk under arrest at the time he went to his home and Tamayo said, "I believed initially that the probable cause may have existed; however . . . basically the main reason for going there was they were there to take them downtown voluntarily for

questioning." (R333) In other words, the seizure was without probable cause and made for investigatory purposes.[9]

In New York v. Harris, 495 U.S. 14, 21, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990), the Court held that where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the state's use of a statement made by a defendant outside his home, even though the statement is taken after an arrest made in the home in violation of Payton v. New York, 445 U.S. 573. Harris is inapplicable to the instant case, however, because there, unlike here, probable cause existed.[10]

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[9]The Dunaway Court noted factual likeness to Brown, in that there was a quality of purposefulness in the arrest, as if on an expedition for evidence. 442 U.S. at 218. As the Brown Court stated:

> The illegality . . . had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of the fact was virtually conceded by the two detectives when they repeatedly acknowledged . . . that the purpose of their action was 'for investigation' or for 'questioning.' . . .

422 U.S. at 605.

[10]There was no question that probable cause existed in Harris, and no facts concerning probable cause to arrest were presented. Four Justices -- Marshall, Brennan, Blackmun and Stevens -- joined in a sharp dissent, based on the principles of Fourth Amendment protection espoused in Payton, Dunaway, Brown, Taylor, and Wong Sun.

On remand, the New York court found that the Supreme Court's ruling did not adequately protect the search and seizure rights of the citizens of New York, and that the state constitution and right to counsel rule required that statements obtained from an accused following a Payton violation must be suppressed unless the taint resulting from the violation has been attenuated. Thus, the court ruled Harris' statement should be suppressed and a new trial ordered. New York v. Harris, 77 N.Y. 2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991).

Compare, Traylor v. State, 596 So. 2d 957, 961 (Fla. 1992) (under federalist system of government, states may place more rigorous restraints on government intrusion than the federal

(continued...)

As previously noted the instant case involves both a Payton violation and lack of probable cause. As to the lack of probable cause to arrest:

> . . . It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, . . . though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause -- evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed, . . . -- must be measured by the facts of the particular case. . . .
>
> Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. . . .
>
> The threshold question . . . is whether the officers could, on the information which impelled them to act, have procured a warrant . . .

Wong Sun v. United States, 371 U.S. 471, 479-480, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (citations omitted).

Florida courts have followed Wong Sun, Brown, and Dunaway, in addressing issues of lack of probable cause in cases where a "suspect's" connection to a crime is based on far more information, albeit conjecture, than is present here. For example, in State v. Rogers, 427 So. 2d 286 (Fla. 1st DCA 1983), a murder case, the court held the trial judge properly granted a motion to suppress two confessions. There the police lacked probable cause to arrest the defendant, and no arrest warrant was obtained. At the time of the defendant's arrest, the sheriff's department knew the identity

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[10](...continued)
charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits).

of the victim, the cause of her death, the description of the victim's car, that Rogers drove a similar car and had been dating the victim, and that the defendant tried to evade arrest. The court held that even if all the information provided to the sheriff's department were shown to be reliable, it could not have justified a belief that Rogers committed the murder. 427 So. 2d at 287.

More recently, in State v. Stevens, 574 So. 2d 197 (Fla. 1st DCA 1991), the trial court determined that Stevens' initial confession to murder and robbery was properly suppressed because the police violated the Fourth and Fourteenth Amendments when, without probable cause or a warrant, they seized the defendant at his mother's residence and transported him to the sheriff's office for interrogation. On appeal the state argued unsuccessfully that, based on the collective knowledge and information of all the officers involved in the investigation, probable cause existed for a misdemeanor arrest, and an arrest for felony grand theft and possibly for murder. 574 So. 2d at 202. The officers' information apparently consisted of knowing, among other things, that the defendant and another person were in the vicinity of the decedent's truck, the truck was parked near his sister's house, and the defendant -- when seen by an officer near the truck -- had given a false name. 574 So. 2d at 199.

In the instant case, detectives from one jurisdiction obtained some information from an individual of unknown reliability who purportedly said he had gotten property, connected to the victim,

from the Appellant and co-defendant. Based on this information alone, detectives from a second jurisdiction joined them and discussed possibly getting a search warrant but not an arrest warrant. Without a warrant, and based only on mere suspicion and conjecture that the Appellant and co-defendant might have known something, they then invaded the Appellant's home in the early morning hours with their guns drawn to "get information." (R292-293, 311, 326) The foregoing authorities and the facts of this case show that probable cause did not exist.

The police action here was patently unlawful and violated Mr. Krawczuk's federal and state constitutional rights. The state failed to show the confession was admissible on any basis. Because Mr. Krawczuk was seized in his home without a warrant or probable cause and his subsequent confession was not attenuated from the unlawful police activity, his judgment and sentence should be reversed, his confession suppressed, and a new trial ordered.

ISSUE II

THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE FAILURE OF THE TRIAL COURT TO CONDUCT A PROPER COLLOQUY OR GIVE SUFFICIENT ATTENTION TO SIGNIFICANT FACTORS WHICH, WHEN COMBINED, RAISED A SUFFICIENT DOUBT OF COMPETENCY TO REQUIRE FURTHER INQUIRY OR EVALUATION.

Also going to the validity of Mr. Krawczuk's guilty plea and the court's acceptance of it, is the question of the limited colloquy addressing the Appellant's increased depression and attendant use of psychotropic medication, and the obligation of the court to further inquire or order additional psychiatric evaluation of the Appellant. Koenig, 597 So. 2d 256; Anderson, 420 So. 2d 574; Robinson, 373 So. 2d 898; LeDuc, 365 So. 2d 149; §921.141(4), Fla. Stat. (1989); Fla. R. App. P. 9.140(f), 3.210, 3.215.

A waiver of constitutional rights must be intelligent and voluntary in order to comport with due process under the Fourteenth Amendment. Boykin v. Alabama, 395 U.S. at 242; Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). When a defendant's life is at stake, the courts must be "particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 353, 96 S. Ct. 2909, 49 L. Ed. 2d 859, 882 (1976). The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent deprives him of his due process rights. Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966), citing Bishop v. United States, 350 U.S. 961, 76 S. Ct. 440, 100 L. Ed. 835 (1956).

Pate v. Robinson involved an Illinois statute which required a trial judge on his own motion to impanel a jury and conduct a sanity hearing where there is evidence raising a "bona fide doubt" as to a defendant's competence to stand trial. The Illinois Supreme Court held that the mental alertness and understanding displayed by Robinson in his colloquies with the trial judge showed a lack of evidence to require a hearing. The Supreme Court held, however, that while Robinson's demeanor might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that issue. 383 U.S. at 385.

In Drope v. Missouri, 420 U. S. 162, 175, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975), the dispute was not about the evidence relevant to the petitioner's mental condition but the inferences to be drawn from the evidence and whether, in light of what was known, it was error to fail to make further inquiry into the petitioner's competence. There the lower courts had a psychiatric evaluation that suggested competence and cooperation but also indicated borderline mental deficiency and chronic anxiety with depression. 420 U.S. at 175-176. Later Mr. Drope shot himself to avoid trial, but the lower courts found this action suggested strongly an awareness of what was going on. 420 U. S. at 178-179. The Supreme Court reversed, holding that in the context of the evaluation and the suicide attempt, the lower courts gave insufficient attention to the indicia, and a sufficient doubt of competence was raised to require further inquiry. The Drope court also noted:

> The import of our decision in Pate v Robinson is that evidence of a defendant's irrational behavior, his

> demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. . . .

420 U.S. at 180.

> Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.

420 U.S. at 180-181.

In the instant case the Appellant was found competent in April of 1991, although suffering from mild depression not requiring medication at that time. (R606A)[11] Six months later when he entered his plea of guilty and asked for the death penalty against advice of counsel, Mr. Krawczuk's depression had increased and he had been placed on the psychotropic medication, Elavil.[12]

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[11]Depressive disorders not rising to the level of a major depressive episode, persist over a long period of time, and to meet psychiatric criteria must present at least three of the following symptoms: 1. insomnia or hypersomnia; 2. low energy level or chronic tiredness; 3. feelings of inadequacy, loss of self-esteem, or self-deprecation; 4. decreased effectiveness or productivity at school, work, or home; 5. decreased attention, concentration, or ability to think clearly; 6. social withdrawal; 7. loss of interest in or enjoyment of pleasurable activities; 8. irritability of excessive anger; 9. inability to respond with apparent pleasure to praise or rewards; 10. less active or talkative than usual, or feels slowed down or restless; 11. pessimistic attitude toward the future, brooding about past events, or feeling sorry for self; 12. tearfulness or crying; 13. recurrent thoughts of death or suicide. American Psychiatric Association, Treatments of Psychiatric Disorders, Vol. 3, 1941 (1989).

[12]Elavil, or Amitriptyline HCl, is an antidepressant with sedative effects. It stays in the system for up to 14 days. It can impair mental and physical abilities and can cause a number of reactions including confusion, poor concentration, and disorientation. The product information sheet for Elavil also warns that the (continued...)

The court made a brief colloquy concerning the medication and his mental state, accepting as patently true his statements that the Elavil only calmed him and helped him get to sleep, he had no previous mental disorders or mental health problems, and the medication was not affecting him at the plea. (R393-395) The court seemed to be of the impression that because the drug was taken at 8:00 at night, any effect was gone, as if it worked like aspirin. (R412-413)

Five months after the plea, just prior to Mr. Krawczuk's penalty phase, counsel for the co-defendant alleged Mr. Krawczuk should be further evaluated to determine his competency or suicidal ideation, (R622-624) particularly in light of his determination to seek the death penalty with the assistance of counsel, and his determination not to offer any evidence of mitigation -- thus assuring affirmance of his case on appeal and using his attorney as a constitutional prop. (R662-670) The assistant state attorney seemed to also accept the theory that the Appellant's statements at the plea colloquy were patently true and that taking Elavil was like taking aspirin. He stated the plea colloquy clearly showed the Appellant was not "under the influence." (R671)

> I asked him and I believe the Court had, if he was under the effects of that drug at the time he entered the plea. He said no. In fact, he said the last time he took the medication was the night before early in the evening. And he said he felt no effects from it, all it did was calm him when he did take it, anyway.

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[12](...continued)
possibility of suicide in depressed patients remains until significant remission occurs. (R628-629)

(R271-672)

The next day, prior to jury selection for the penalty phase, a brief colloquy occurred where the Appellant reiterated his determination to get the death penalty and put on no evidence in mitigation; that his medication sedated him and let him sleep, but he was not under the influence; that he waived the right to testify on his own behalf and the right to have his attorney cross-examine state witnesses and make closing argument; and that he was satisfied to go before the jury in his jail uniform. (R695-707)

Although the court had access to Mr. Krawczuk's earlier and only evaluation, it did not consider the fact that he had counseling as a child, and that while in the Marine Corps he was sent to a psychiatrist due to apathy, suicidal intentions, and conflicts with military life. He was diagnosed at that time not to be suicidal but to be suffering from a mixed personality disorder and passive-aggressive tendencies. (R606A-page 2) His April 1991 evaluation showed him to be passive, with low self-esteem, and mild depression. (R606A-page 7)

Despite these indicia and the fact that Mr. Krawczuk's depression grew worse and required medication, the court failed to make further inquiry or order further evaluation. The trial judge simply found the Appellant competent because "he understands the consequences of the course of action he has taken. He is sufficiently intelligent to make these decisions for himself and it's basically his legal right to do so." (R706)

As in Pate v. Robinson and Drope v. Missouri, Mr. Krawczuk's seeming mental alertness and understanding of the proceedings are not sufficient on their own to dispense with the need for further inquiry. Any one of several other factors should have keyed the court that further inquiry was necessary; certainly the other factors combined mandated further inquiry. Drope, 420 U.S. at 180-181.

The facts of this case show at a minimum the following circumstances which should have alerted the court. First, the court misunderstood the workings and effects of the psychotropic medication Elavil, and made insufficient inquiry concerning it. Second, the court apparently relied on the prior finding of competence and Mr. Krawczuk's statements and demeanor in the brief colloquies, without fully considering other factors. The same error occurred in Pate and Drope. Third, the court failed to consider that in fact Mr. Krawczuk had past psychiatric problems and a previously diagnosed mixed personality disorder, as in Drope where borderline mental deficiency and depression were involved. Fourth, the court failed to be alert to the fact that the Appellant's depression had increased and lasted over at least a ten-month period. This factor is also similar to Drope where prior and increasing depression was involved. Additionally, there was significant concern by the co-defendant's counsel that Mr. Krawczuk's due process rights should be specially protected by the court where there were non-statutory mitigators applicable to his case, he refused to present them, and he was using his attorney as

a constitutional prop to obtain the death penalty and assure losing on appeal. (R191, 622-624)

Florida law also supports the argument that further inquiry was mandated under the facts of this case. In Lane v. State, 388 So. 2d 1022, 1025 (Fla. 1980), the issue was competence to stand trial. The Court held that due process prohibits an accused from being proceeded against while incompetent; a prior determination of competency is not controlling. There, the state argued that a finding of competency made nine months earlier should control and the court rejected that position, saying the issue is a defendant's present competency. In the instant case, the finding of competency made ten months earlier does not control.

Florida Rule of Criminal Procedure 3.210 (b) provides a mandate to the court:

> . . . If, at any material stage of a criminal proceeding, the court of its own motion . . . has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition . . .

In Scott v. State, 420 So. 2d 595, 597 (Fla. 1982), the issue again was competence to stand trial. There the court emphasized that the question before a court is "whether there is reasonable ground to believe the defendant may by incompetent, not whether he is incompetent." Scott involved a number of factors, each minor in itself, but taken together they showed that a competency hearing should have been held. The factors included several requests by defense counsel for an evaluation due to communications problems,

the defendant's decision to override his attorney's recommendation of a favorable plea bargain, and the court's inattention to one prior evaluation of the defendant. The instant case also involves a number of factors which individually might not trigger the need for further inquiry, but together are significant. As in Scott, the factors here include the court's inattention to the details and prior history outlined in the evaluation of Mr. Krawczuk in addition to the Appellant's persistent refusal to let counsel act on his behalf in any way.

In Pridgen v. State, 531 So. 2d 951, 955 (Fla. 1988), although the defendant was deemed competent to stand trial, the Court held it was error not to suspend sentencing in order to have him reevaluated for competency where factors showed a reasonable ground to believe his mental condition was deteriorating. Here, as in Pridgen, there were certainly reasonable grounds to believe that Mr. Krawczuk's mental state had deteriorated as evidenced by his increasing depression and the need for psychotropic medication.

Florida courts have also recognized that a plea taken when a defendant is under medication, including psychotropic medication, and where the colloquy fails to make full inquiry, can constitute grounds to withdraw a guilty plea. Campbell v. State, 488 So. 2d 592 (Fla 2d DCA 1986).

Based on the foregoing authorities and the factors present in this case, reversal of the judgment and sentence is required because the trial court failed to sufficiently inquire or to order further evaluation of the Appellant.

ISSUE III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, AND CRUEL AND IN FINDING THE AGGRAVATOR APPLICABLE TO THIS CASE.

This case involves an error, recognized by the court, in instructing the jury. (R585-586) The trial judge entered an order recognizing the error just prior to imposition of the death penalty, concluding that the error was at worst harmless and beyond any reasonable doubt would not have affected the jury's advisory verdict. (R585-586) In pertinent part, the order states:

> . . . The error occurred in instructing on the aggravating factor found in Fla. Stat. 921.-141(5)(h) -- the capital felony was especially heinous, atrocious or cruel, the Court did not define the word heinous for the jury. The error occurred because the Court relied on and used the Florida Standard Jury Instructions as found in West Florida Criminal Laws and Rules, 1991, page 943. That pattern provides that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. The Court believes that the words wicked and evil are from an earlier statute and the Court simply did not pick up the fact that the statute had been amended to reflect what it had originally been. Since the word heinous would have been defined for the jury to mean extremely wicked or shockingly evil, the phrase actually used "especially wicked, evil," does not differ significantly in effect from the proper instruction.. . .

(R585-586)[13]

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[13]The actual jury instruction given was: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel; 'Atrocious' means outrageously wicked or shockingly evil. 'Cruel' means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless." (R579-580)

In Maynard v. Cartwright, 486 U. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the language of the Oklahoma aggravating circumstance -- "especially heinous, atrocious, or cruel" -- was deemed unconstitutionally vague under the Eighth Amendment. Such vague words give juries unchanneled discretion to find the aggravating circumstance. " To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human like is 'especially heinous.'" 486 U.S. at 364, citing Godfrey v. Georgia, 446 U. S. 420, 428-429, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980) (a person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman"; the jury had no guidance concerning the meaning of the aggravating ciscumstance's terms and its interpretation of the circumstance can only be the subject of sheer speculation).

As a result of Maynard, Florida amended its jury instruction language on the heinous, atrocious, and cruel aggravator as follows:

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

In re STANDARD JURY INSTRUCTIONS CRIMINAL CASES -- NO. 90-1, 579 So. 2d 75 (Fla. 1991).[14] See also, Shell v. Mississippi, 498 U. S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 1 (1990); Proffitt v. Florida, 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U. S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974).

Because of the judge's recognition of the error and entry of his order and the circumstance that defense counsel was commanded to merely stand by in this case, this issue cannot be deemed waived. Compare, Sochor v. Florida, 504 U. S. ___, 112 S. Ct ___, 119 L. Ed. 2d 326, 338 (1992) (claim of jury instruction error not preserved for appeal where there was no objection and there were no other indications of error). Unlike in Sochor where the trial judge is presumed, on review of the jury's recommendation, to be familiar with and apply the currently authoritative construction, in this case the court's orders show on their face that the judge did not apply the required narrowing construction.

Additionally, in the instant case the judge found the heinous, atrocious, and cruel factor based on Mr. Krawczuk's inadmissible confession.[15] (R588-589). The medical testimony in this case established that the cause of death was asphyxia, caused partially

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[14]Subsequently, in Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ___, 120 L. Ed. 2d 854 (1992), the heinous, atrocious, and cruel instruction -- wicked, evil, atrocious, or cruel -- was held to violate the Eight Amendment due to vagueness. 120 L. Ed. 2d at 858.

[15]Arguably the principle of corpus delicti should apply to findings of aggravating circumstances; i.e., a defendant's confession to a crime cannot be the sole basis for finding the aggravators -- there must be prima facie evidence of the crime charged independent of the defendant's admission. See Johnson v. State, 569 So. 2d 872, 873-874 (Fla. 2d DCA 1990); State v. Dixon, 283 So. 2d at 7.

by strangulation and partially by smothering. (R82) Although it was "possible" for the strangulation to take as long as five to ten minutes to cause death, according to the medical examiner, (R83) there was no evidence beyond the inadmissible confession that Mr. Staker was fully conscious. DeAngelo v. State, 18 Fla. L. Weekly S236, 237 (Fla. April 8, 1993) (trial court properly found that state failed to prove beyond a reasonable doubt that the victim was conscious during ordeal; victim and appellant argued and death was caused by asphyxiation due to combined manual and ligature strangulation); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989) and Herzog v. State, 439 So. 2d 1372 (Fla. 1983) (strangulation of semiconscious victim not heinous).

Based on the foregoing -- the failure to apply the narrowing construction of the law in the trial court's findings and the lack of proper evidence to support the aggravator -- the error cannot be deemed harmless. (See also Issue IV).

ISSUE IV

THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER AND FIND NON-STATUTORY MITIGATING FACTORS.

The instant case involves the finding of three statutory aggravating factors and one statutory mitigating factor. In its sentencing order the trial court attached the greatest weight to the aggravators HAC and CCP, and lesser weight to the aggravator robbery/pecuniary gain and the mitigator no significant history of prior criminal activity. The court found no non-statutory mitigating circumstances. (R588-592)

In Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992), this Court cited its decision in Hamblen v. State, 527 So. 2d 800 (Fla. 1988), for the rule that in a capital case where the presentation of mitigating evidence has been waived by the defendant, the trial judge must carefully analyze the possible statutory and nonstatutory mitigating factors against the aggravators to assure that death is appropriate.

In Pettit, the trial judge took medical testimony about the defendant's physical condition and also required physicians' testimony concerning the voluntariness of his guilty plea and the presence of mitigating circumstances. There the court also took testimony from the grandfather. The trial judge found no mitigating circumstances. On appeal counsel argued that the court failed to consider nonstatutory mitigators. This Court concluded, however, that the trial judge's concern and his hearing of testimony

indicated his full understanding that he was required to consider, and did consider, nonstatutory mitigating evidence.

In the instant case, the court was also required to consider nonstatutory mitigating circumstances and purported to do so in its order. First, it reviewed the Appellant's decision and concluded there were only two possible explanations which did not enter into the court's decision:

> . . . First, as claimed by the defendant, the sentence of life in prison is equal to or greater punishment for him as would be a death sentence or second, this is a tactic to avoid a death sentence that is made probable by the circumstances of the killing and the lack of the availability [of] any creditable defense by creating a legal situation in which there is an increased likelihood that such a sentence would be reversed on appeal. The evidence of his guilt, as well as the existence of the statutory aggravating circumstances is from his detailed confession alone overwhelming. The court is satisfied it has received the benefit of all possible material mitigating circumstance from the psychiatrist report and from the presentence investigation . . . [T]he defendant's election to proceed in this manner, as well as his personal opinion as to the appropriate sentence . . . [are circumstances that] do not enter into the court's sentencing decision.

(R591) (Emphasis added.)

Second, the court considered the part of the psychiatric report indicating the Appellant was the more passive perpetrator; but it discounted it as a consideration because the Appellant was thought to be overstating that he was the follower and because of the egregiousness of the confession. (R592)

That is the end of the trial court's discussion of its consideration of non-statutory mitigating factors.

Nonstatutory mitigating circumstances include, but are not limited to, the following: abused or deprived childhood; contribu-

tion to the community of society as evidenced by an exemplary work, military, family, or other record; remorse and potential for rehabilitation; good prison record; disparate treatment of an equally culpable co-defendant; and charitable or humanitarian deeds. Campbell v. State, 571 So. 2d 415, 419 at n. 4. (Fla. 1990). As noted in Campbell, federal law additionally states:

> [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence . . . . The sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

571 So. 2d at 419, citing Eddings v. Oklahoma, 455 U.S. 104, 114-115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982).

In this case, under the authorities cited, it was incumbent on the sentencing court to analyze any possible non-statutory mitigating factors. Here the court failed to do so. First, the court failed to inquire or seek any medical testimony about the Appellant despite his psychological history, his increasing depression, and his use of psychotropic medication.[16] Defense counsel advised the court that there were mitigation witnesses, but she had been commanded not to call them. The court made no further inquiry.

Several additional non-statutory factors not considered in mitigation were the Appellant's deprived childhood, where his

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[16]Under Florida Rules of Criminal Procedure 3.215(c)(2), an appellant is entitled, upon defense request, to a jury instruction concerning medication for a mental condition. Rosales v. State, 547 So. 2d 221, 223 (Fla. 3d DCA 1989).

Here, there was no request, possibly because counsel was commanded to stand silent.

father failed to acknowledge him and his mother was abusive; his service in the military which apparently was successful initially but shortened by some mental disturbance diagnosed as mixed personality disorder; and possible indications of remorse such as increased depression and feelings of guilt.

Also in the instant case, the pre-sentence investigation recommended life imprisonment. Subsequent to the Appellant's sentence of death, the co-defendant Poirier, who if not more culpable was at least as culpable, pled to second-degree murder and robbery for a sentence totalling thirty-five years.

Based on the authorities cited, the improper finding of an aggravating factor (Issue III), the failure to consider and find non-statutory mitigating factors, and this Court's duty of appellate review under State v. Dixon, 283 So. 2d 1, the sentence cannot stand.

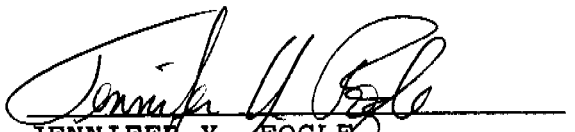
CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this honorable Court to reverse the judgment and sentence of the trial court and order a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 7th day of June, 1993.

Respectfully submitted,



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