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IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL
CIRCUIT IN AND FOR BREVARD
COUNTY, FLORIDA

CASE NO. 05-1991-7249-AXXX

STATE OF FLORIDA,

Plaintiff,

v.

MARK DEAN SCHWAB,

Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE OR STAY EXECUTION

This matter came before the Court upon the Defendant's Successive Motion to Vacate Sentence or Stay Execution, filed late in the afternoon on Friday, November 9, 2007. Monday, November 12 was a legal holiday, Veteran's Day. The Court held a hearing at the first possible time on the Motion on Tuesday, November 13, 2007. In attendance were Peter Cannon and Daphne Gaylord, Capital Collateral Regional Counsel for the Defendant, Ken Nunnelley and Barbara Davis, Office of the Attorney General and Wayne Holmes, Office of the State Attorney.

The Court recognizes that the death penalty is a unique sanction in the law and must be approached with great deliberation. Each crime, each victim and each defendant are unique as well, and the Court must take into account all of the legal standards that must be met before the State has established that the death penalty is appropriate. The Defendant in this case has had many opportunities over many years to present his arguments to this and to other courts as to why he should not be executed. He was

convicted and sentenced to death in 1992; the Florida Supreme Court affirmed the conviction and sentence. *Schwab v. State, 636 So.2d 3 (Fla.1994)*. He unsuccessfully sought postconviction relief, both before this Court, the Florida Supreme Court and before the federal courts. *See Schwab v. State,* 814 So.2d 402 (Fla.2002) (affirming circuit court's denial of motion for postconviction relief and denying petition for writ of habeas corpus); *Schwab v. Crosby,* 451 F.3d 1308 (11th Cir.2006) (affirming trial court's denial of federal habeas corpus relief), *cert. denied,* --- U.S. ----, 127 S.Ct. 1126, 166 L.Ed.2d 897 (2007). On November 1, 2007, the Florida Supreme Court affirmed this Court's denial of the Defendant's August 2007 Motion to Vacate. *Schwab v. State*, --- So.2d ----, 2007 WL 3196523 (Fla. 2007). With the Defendant's execution scheduled for November 15, 2007, he has filed another Motion to Vacate. The Court has carefully considered the merits of the Motion and the arguments of counsel and makes the following findings of fact and conclusions of law:

PROCEDURAL BAR TO CLAIM ONE

In order to succeed on a successive motion for post conviction relief, a defendant must first establish that the evidence he brings before the court is newly discovered. There are two requirements that must be met in order to set aside a sentence because of newly discovered evidence. First, the asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.' *Scott v. Dugger*, 604 So.2d 465, 468 (Fla.1992) (quoting *Hallman v. State*, 371 So.2d 482, 485 (Fla.1979), abrogated on other grounds by *Jones v. State*, 591 So.2d 911, 915 (Fla.1991)). Second, 'the newly discovered evidence must be of such nature that it would *probably* produce an

acquittal on retrial.' *Scott,* 604 So.2d at 468 (quoting *Jones v. State,* 591 So.2d 911, 915 (Fla.1991)). This 'standard is also applicable where the issue is whether a life or death sentence should have been imposed.' *Id.* (citing *Jones,* 591 So.2d at 915). "*Miller v. State*, 926 So.2d 1243, 1258 (Fla. 2006).

The Defendant now alleges that the new psychological evaluation by Dr. Samek, the State's expert witness at trial is such newly discovered evidence. The Court disagrees. While the evaluation and report itself were only generated in the last several weeks, the underlying information and the persons necessary to produce this report are not "new." Dr. Samek testified at the penalty phase of the trial in 1992. The Defendant offers no reason as to why he could not have allowed Dr. Samek to evaluate him at that time. Certainly, by the time of the first post-conviction motion in 1995, the Defendant could have contacted Dr. Samek concerning his diagnosis. The Defendant was given the opportunity during the initial post-conviction evidentiary hearing to present mental health evidence. He did not present Dr. Samek at that time and provides no reason for delaying until weeks before his scheduled execution.

Additionally, Dr. Samek's report cites to no newly discovered evidence. He lists the evidence which was available to him at the time of trial. He then lists as "newly discovered evidence" the decisions issued by the courts in this matter, which are not "evidence," and lists the neurological exam previously rejected by this Court and the Florida Supreme Court as not decisive. He then lists the persons to whom he most recently spoke in making his new evaluation, namely, the Defendant, his father and stepmother, and Duncan Bowen, a sexual offender treatment provider. The Defendant fails to allege that any of these persons were unknown to him at the time of trial or were

not available. Obviously, the Defendant was available for examination. Duncan Bowan was the counselor from whom the Defendant was receiving sexual offender treatment at the time of the murder (See Exhibit A, Judgment and Sentence, July 1, 1992, p. 23). The Defendant's father, Paul Schwab, testified for the Defendant during the penalty phase at trial. The Court has no knowledge of where the stepmother was at that time, but the Defendant offers no reason why these two persons could not have been interviewd by Dr. Samek at some much earlier point in these proceedings. Claim One does not present newly discovered evidence that could not have been discovered earlier through the exercise of due diligence.

IMPACT OF THE NEW EVIDENCE

Even assuming that the Court accepts the report of Dr. Samek as newly discovered evidence, it finds that the evaluation does not rise to the level required by *Jones, Id.*, namely that it be of such a nature that it would probably produce an acquittal upon retrial. *Jones* advises the trial court to consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence in making a determination as to whether the new evidence would have impacted the trial court's decision. Dr. Samek's new evaluation might be considered relevant in evaluating two statutory mitigators, namely whether the Defendant was under extreme emotional distress at the time of the crime and whether the Defendant was able to conform his conduct to the requirements of the law. The Court now looks at the likelihood of whether, had Dr. Samek's recent evaluation been available to the Court at the time of trial, the evaluation would probably have changed the outcome of the penalty phase and would have resulted in a sentence of life imprisonment rather than death.

EXTREME EMOTIONAL DISTRESS AT THE TIME OF THE CRIME

In his new report, Dr. Samek now asserts that he believes Mr. Schwab was acting under emotional distress. The Court has re-read the trial testimony of Dr. Samek and found that he never gave an opinion on this issue at trial. The issue of impulsiveness was discussed at length, but Dr. Samek was not asked and did not offer an opinion as to whether Mr. Schwab was acting under emotional distress. It is clear from Judge Richardson's order that the Court did not rely on anything Dr. Samek said in regard to this mitigator in making its finding that the mitigator was not established by the greater weight of the evidence. Judge Richardson cited the testimony of the Defendant's mother, who described her son's mental state on the morning of the murder. According to Judge Richardson, the mother testified she did not notice anything unusual about her son and that, in fact, he was a bit more relaxed than he had been because he did not think his probation would be violated.(A, pp. 8-9)

Judge Richardson also based his conclusion about Mr. Schwab's mental state on his own review of hours of taped conversations the Defendant had with various law enforcement personnel before and after his arrest. Judge Richardson found that there was no indication in these tapes that the Defendant was under the influence of any mental or emotional distress (A, pp. 8-9). The Court wonders whether Dr. Samek should now be allowed to offer an opinion on a question he was never asked at trial and a question on which the Judge Richardson did not use expert testimony to answer, instead relying on the testimony of a lay witness who knew the Defendant very well, and upon his own impressions of the evidence. The Court cannot say that this new opinion as to the

Defendant's emotional distress would probably have changed Judge Richardson's mind on this mitigator.

DEFENDANT'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW

In determining whether the Defendant had the ability to conform his behavior to the requirements of law, Judge Richardson had the opinions of the defense experts and Dr. Samek to consider. At trial, Dr. Samek discussed the issue of whether Mr. Schwab was acting under an irresistible impulse. Interestingly, he noted,

> The issue of irresistible impulse is one that is very complicated and one that in my opinion that psychology has never really gotten a good handle on. When does a desire become an impulse? When does an impulse become irresistible? I think that's really not so much a psychological determination as a personal philosophical judgment.

He went on to testify that "if there is sufficient motivation to stop. . . most people's irresistible impulses can be resisted." (Exhibit B, trial testimony pp. 411-12). In his new evaluation, he does not specifically use the term, "irresistible impulse," and does not conclude that Mr. Schwab could not have conformed his conduct. Instead, he concludes only that Mr. Schwab's ability to conform his conduct was "substantially impaired." Significantly, this is exactly what Judge Richardson concluded. Judge Richardson found that "the greater weight of the evidence does support the conclusion that the defendant's ability to conform his conduct to the requirements of law was *substantially impaired." (emphasis added).* The Court also admitted that "whether the Defendant was 'unable' or 'unwilling' to conform his conduct to the law is open for debate." (A, p. 24). Thus, Dr. Samek's "new" opinion would not have impacted the Court's conclusion as to this mitigator. The Court found that this mitigator did exist (A, p. 14).

The significant change in Dr. Samek's opinion is his diagnosis as to Mr. Schwab's mental disorder. At trial, Dr. Samek testified that he did not need to personally examine Mr. Schwab to make a diagnosis. He stated that it was not uncommon for him to make a diagnosis based on records provided to him, rather than on a face-to-face interview. (B, pp. 388-89, 434). He diagnosed Mr. Schwab as having an antisocial personality disorder, rape/murderer and mentally disordered sex offender (B, p. 397). He now recants, stating that, while he still diagnoses Mr. Schwab as a mentally disordered sex offender (MDSO), Mr. Schwab is more accurately diagnosed as a MDSO, Rape and Humiliation of Teenage Boys. He states the closest DSM-IV TR diagnosis would be Paraphilia, Sexual Sadism Type. Although Judge Richardson specifically adopted Dr. Samek's antisocial personality disorder diagnosis, (A, p. 10), the Court does not find that a change in diagnosis from antisocial to one including rape and sadism would probably have changed Judge Richardson's mind.

Dr. Samek stresses in his report that he now believes Mr. Schwab's assertions that he was raped and abused as a child. At trial, he did not testify that he did not believe the Defendant. Although he raised a question about the rape, he went on to factor the rape, as well as the alleged family violence, humiliation and abuse into his discussion of the Defendant's psychology. He told the Court that such events would be highly traumatic but that these events did not necessarily rise to a level of harm that inevitably led to the Defendant becoming a rapist and murderer (B, pp. 430, 432-33). Although interviewing the Defendant may have given him more information concerning the alleged rape and abuse, he had knowledge of these issues at the time of his original diagnosis and apparently took them into account in making his original diagnosis.

Judge Richardson only discussed the antisocial diagnosis in the context of one statutory mitigator namely, the issue of whether Mr. Schwab had the ability to conform his conduct to law. As noted above, Judge Richardson found that this mitigator did exist, so the change in diagnosis is essentially irrelevant. The Court also notes that Dr. Samek does not opine in his new evaluation that the Defendant could not have resisted his impulses or conformed his conduct, but only that his ability to do so was impaired.

Even were the Court now to conclude that the trial court might have found the existence of the statutory mitigator of emotional distress and given greater weight to the mitigator of the defendant's inability to conform his conduct, the Court still does not find that these two mitigators would have outweighed the aggravators found by the trial court. Judge Richardson wrote that any one of the three statutory aggravators (prior violent crime, murder committed during sexual battery/kidnapping, and heinous, atrocious and cruel murder) outweighed all mitigating circumstances.

Even where a court found that the mitigators of emotional distress and inability to conform were entitled to moderate weight and considerable weight, respectively, the death penalty was affirmed because of the violent nature of the crime. See *Troy v. State* 948 So.2d 635 (Fla. 2006):

> Upon review, we conclude that the circumstances of this case are similar to other cases in which this Court has upheld the death penalty. *See* Butler, 842 So.2d at 833 (holding the death sentence proportional for the first-degree murder conviction where only the HAC aggravator was found); *Singleton v. State*, 783 So.2d 970, 979 (Fla.2001) (holding the death sentence proportional for the first-degree murder conviction where the aggravators included prior violent felony conviction and HAC); *Johnston*, 863 So.2d at 278 (holding death sentence proportional for first-degree murder conviction where the court found two aggravating factors, one statutory mitigator, and twenty-six nonstatutory mitigators). Comparing the circumstances in this action to the cases cited above and other capital cases, we conclude that death is proportionate in this action.

Thus, the Court concludes that even if the new evaluation of Dr. Samek were taken into account, this "newly discovered evidence" would not have sufficiently established that any of the alleged mitigating factors would have required the court to refrain from imposition of the death penalty. Prong one of the *Jones* test was not met, as the evidence was not truly newly discovered. Prong two of the test, requiring that the evidence would likely change the outcome and resulted in a life sentence was also not met. Relief on Claim One is denied.

CLAIM TWO: INADEQUATE TRAINING OF DOC EXECUTION TEAM

The Defendant has once again raised his claim that the Department of Corrections is not yet ready to carry out lethal injections without the likelihood of error. He claims that his documentation establishes at least a 40% error rate during training sessions, demonstrating that a botched execution is all too likely. As noted in *Jones, Id.,* the Eighth Amendment does not compel the State to ensure that no suffering is involved in the extinguishment of life or even that the State guarantee an execution will proceed as planned every single time without any human error. As the Court stated in *Buenoano v. State,* 565 So. 2d 309 (Fla. 1990), following a botched electrocution, "one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections' competence." In passing, the Court notes that the "affidavit" from the quality control expert, Ms. Janine Arvizu, does not meet the statutory definition of an affidavit. Ms. Arvizu does not swear that the information is true as required by s. 92.525, Fla. Stat. but only that upon her information and belief, it is true. Ignoring the legal defect of the affidavit, the Court does not find it provides newly discovered evidence requiring a stay or vacation of the death sentence.

The Florida Supreme Court dealt extensively with the issue of DOC training in its recent opinion, *Lightbourne v. McCollum,* No. SC06-2391, November 1, 2007. As found by the Supreme Court, the Department's newest protocol requires that medically qualified team members will be responsible for the execution. A pharmacist is given the responsibility to mix the chemicals to be injected. The licensing and credentials of all these persons will be verified by the Department of Health and a back-up person is trained to step into the designated role in the event of any unforeseen contingencies. (slip op., pp. 46-47). The Court concluded that "while the lethal injection procedures do no spell out in exact detail what training each team member must have, they do provide significant guidance and clearly require that the medically qualified personnel . .. have adequate certification and training for their respective positions." (slip op., p. 52). The Court went on to state that the Court's role "is not to micromanage the executive branch in fulfilling its own duties relating to executions. We will not second-guess the DOC's personnel decisions, so long as lethal injection protocol reasonably states, as it does here, relevant qualifications for those individuals who are chosen ." *(Id.).*

The training notes submitted by the Defendant relate to training under the prior protocol, as they relate to July 2007 sessions. They are therefore not directly relevant to the current procedures adopted in August 2007. The new protocol requires that a licensed pharmacist mix the necessary chemicals. The Court sees no reason to assume that such a highly educated and professionally trained individual will not be able to perform this task correctly. The Court reiterates its adherence to the to the principle that the Department is entrusted with developing adequate protocol, revising as necessary to meet evolving societal concerns and that the mere possibility of human error in the

process of execution does not render the current protocol or the training of personnel to carry them out inadequate.

THEREFORE it is ORDERED and ADJUDGED

The Defendant's Successive Motion to Vacate Sentence or Stay Execution is DENIED.

The Clerk of the Court shall immediately transport the record of these proceedings to the Supreme Court of Florida. No Notice of Appeal shall be required.

DONE AND ORDERED in Titusville, Brevard County, Florida this 13 **day of** November **2007.**

Charles M Holcomb

CHARLES M. HOLCOMB
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was provided by facsimile to Peter Cannon and Daphne Gaylord, Capital Collateral Regional Counsel, Middle District, 3801 Corplex Drive, Suite 210, Tampa, FL 33619, fax (813) 740-3554, Wayne Holmes, Assistant State Attorney, fax (321) 617-7542, Ken Nunnelley and Barbara Davis, Office of the Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118-3951, fax (386) 226-0457 this 13 day of November 2007.

Marcia Newell

Marcia Newell
Judicial Assistant
Eighteenth Judicial Circuit
Titusville Courthouse
506 S. Palm Ave.
Titusville, FL 32796

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IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA.

STATE OF FLORIDA

v.

MARK DEAN SCHWAB

Defendant

CASE NO. 91-7249-CFA

FILED IN OPEN COURT
This 1 Day Of July A.D. 92
R. G. WINSTEAD, JR.
Clerk, County Court
By [signature] D.C.

JUDGMENT AND SENTENCE

The defendant, Mark Dean Schwab, is before the Court for sentencing.

On May 22, 1992, after hearing the evidence presented, this Court sitting as the trier of fact returned a verdict of guilty on the charges of COUNT I: FIRST DEGREE MURDER FROM A PREMEDITATED DESIGN, (section 782.04(1)(a)(1), Florida Statutes) COUNT II: SEXUAL BATTERY UPON A CHILD, (section 794.011(2), Florida Statutes) and COUNT III: KIDNAPPING CHILD UNDER THIRTEEN, (sections 787.01(1)(a)(2) and 787.01(3)(a)(2), Florida Statutes). On May 23, 1992, this Court, as the trier of fact, heard evidence on the penalty phase of this proceeding. A partial presentence investigation report was prepared by Probation and Parole Services.

The Court considered the testimony and evidence introduced at trial and at the penalty phase of these proceedings. The Court also has considered the arguments made at the sentencing hearing, and the elements of aggravation and mitigation, which are set forth in sections 921.141(5) and (6), Florida Statutes as well as nonstatutory mitigating circumstances. Having done so the Court

Exhibit "A"

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makes the following findings:

AGGRAVATING CIRCUMSTANCES
FLORIDA STATUTES 921.141(5)

(A) WHETHER THE MURDER WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

This aggravating circumstance was not present in this case. The state did not request that the Court consider this issue.

(B) THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR A FELONY INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.

This aggravating circumstance has been proven beyond all reasonable doubt. The state introduced a certified copy of the Judgment and Sentence in Case No. 87-3147-CF-A, together with the testimony of the victim, Than Meyer. This evidence showed that the defendant committed two acts of sexual battery against Than Meyer and that a knife was used in the commission of these crimes.

The defendant has stipulated that this aggravating circumstance has been proven beyond a reasonable doubt.

(C) WHETHER THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

This aggravating circumstance was not present in this case. The state did not request that the Court consider this issue.

(D) WHETHER THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING, OR ATTEMPTING TO COMMIT ANY SEXUAL BATTERY OR KIDNAPPING.

This aggravating circumstance has been proven beyond all

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reasonable doubt. The defendant has been found guilty of kidnapping a child under thirteen and of sexual battery on a child under the age of twelve. The kidnapping charge is a life felony. Section 787.01(3)(a), Florida Statutes. Section 794.011(2), Florida Statutes establishes that sexual battery upon a child under twelve is a capital felony mandating a life sentence with no chance of release for twenty-five years.

The defendant has stipulated that the aggravating circumstance was proven, based upon the Court's verdicts.

(E) WHETHER THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR AFFECTING AN ESCAPE FROM CUSTODY.

This aggravating circumstance was not proven beyond all reasonable doubt. In order to sustain its burden of proof, the state was required to prove that the only or dominant motive for killing was to eliminate a witness and avoid arrest.

Any aggravating circumstance may be proven through direct or circumstantial evidence. If circumstantial evidence is relied upon by the state, that evidence must be inconsistent with any reasonable hypotheses which negates the aggravating factor. Eutzy v. State, 458 So.2d 755, 758 (Fla.1984). The mere fact that the victim knew and could identify the defendant, without more, is legally insufficient to prove this aggravating factor beyond a reasonable doubt. Geralds v. State, 17 Fla.L.W.268 (Fla.April 30, 1992).

In the instant case, the circumstantial evidence presented was legally insufficient to negate other reasonable hypotheses why

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Junny Rios Martinez was killed.

(F) THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

This aggravating circumstance has not been proven beyond a reasonable doubt. The state has not requested that the Court consider this issue.

(G) THE CAPITAL FELONY WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTIONS OR THE ENFORCEMENT OF LAWS.

This aggravating circumstance has not been proven beyond a reasonable doubt. The state has not requested that the Court consider this issue.

(H) WHETHER THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

This aggravating circumstance has been proven beyond all reasonable doubt.

The murder of Junny Rios Martinez was accompanied by such additional acts of the defendant that set this crime apart from the norm of capital felonies, so that it can be said that this was a conscienceless and pitiless crime which was unnecessarily torturous to the victim. State v. Dixon, 283 So.2d 1 (Fla.1983).

This Court has accepted the expert opinion of the medical examiner that the homicide of Junny Rios Martinez was the result of strangulation or suffocation. Further, the medical examiner concluded that it would take approximately thirty seconds to lose consciousness once the strangulation or suffocation act began. Clearly, this type of death is not instantaneous. The victim has

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time to experience a foreknowledge of death as well as severe anxiety and fear. Capehart v. State, 583 So.2d 1009 (Fla.1991); Tompkins v. State, 502 So.2d 415, 421 (Fla.1986). In Sochor v. Florida U.S., 112 S.Ct.2114, L.Ed.2d (June 8, 1992), the United States Supreme Court acknowledged that the Florida State Supreme Court has consistently held that heinousness is properly found if the defendant strangles a conscious victim.

In the instant case, the evidence shows beyond all reasonable doubt that this child was conscious during the entire ordeal leading up to his death.

The defendant concocted a defense of duress. He contended that a man named "Donald" forced him to kidnap Junny Rios Martinez and rape him. The defendant stated that Donald ordered him out of the motel and while he was away, strangled the child with an electric razor cord. This Court has rejected this defense. Specifically, this Court has found that "Donald" does not exist in this case, and that the defendant was the sole perpetrator of the crimes charged.

Notwithstanding the "Donald" duress defense, much of the defendant's story as to how the crimes occurred is supported by indicia of reliability. This is true because the defendant assumed that law enforcement would find certain pieces of physical evidence at the scene of the crime; such as, fingerprints, footprints and body fluid samples. The defendant knew that his story must account for what he believed the physical evidence would show. Thus, truth can be found in the fiction of the "Donald" defense.

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Junny Rios Martinez left Stradley ballfield with the defendant thinking he was with a trusted friend. The defendant drove the victim in a rented U-haul truck to his motel room. Once inside the room the defendant physically overcame the child and bound his hands with duct tape and placed the tape over his mouth. The defendant then violently cut the child's clothes off with a knife, rendering him naked and terrified. At the time, Junny Rios Martinez was five feet tall and weighed approximately 76 pounds. He was eleven years old. During this crime scenario, the defendant punched the child twice in the stomach. His head was covered for part of the time with a bed sheet or mattress cover. The child continued to cry and began to physically shake. He was subjected to being raped anally by the adult defendant. The defendant admitted that this rape caused the child pain. The rape continued until the defendant climaxed.

At no time did the defendant state that this child lost consciousness. In fact the contrary is shown. The defendant said that the child continued to cry even with the duct tape on his face. By the defendant's own account, this crime sequence involved a significant amount of time. At some point after the rape, the child was either strangled or smothered to death by the defendant.

It is impossible for this Court to contemplate another crime that would be more heinous, atrocious and cruel than the death of Junny Rios Martinez. The terror of the abduction and rape followed by the slow death of strangulation or suffocation was extreme. Such conduct is in fact heinous, atrocious and cruel. **Chandler** v.

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State, 534 So.2d 701 (Fla.1988); Koon v. State, 513 So.2d 1253 (Fla.1987).

(I) WHETHER THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

This aggravating circumstance has not been proven beyond a reasonable doubt. A heightened form of premeditation is required to prove this aggravating circumstance. As interpreted by the Florida Supreme Court, this means "a degree of premeditation exceeding that necessary to support a finding of premeditated first-degree murder." Capitant v. State, 583 So.2d 1009 (Fla.1991); Geralds v. State, 17 Fla.L.W.268 (Fla.April 30, 1992); Gore v. State, 17 Fla.L.W.247 (Fla. April 16, 1992). In the instant case, the circumstantial evidence presented on this issue was legally insufficient to negate other reasonable hypotheses of the degree of premeditation to murder.

(J) THE VICTIM OF THE CAPITAL FELONY WAS A LAW ENFORCEMENT OFFICER ENGAGED IN THE PERFORMANCE OF HIS OFFICIAL DUTIES.

This aggravating circumstance has not been proven in this case. The state has not requested that the Court consider this issue.

(K) THE VICTIM OF THE CAPITAL FELONY WAS AN ELECTED OR APPOINTED PUBLIC OFFICIAL ENGAGED IN THE PERFORMANCE OF HIS OFFICIAL DUTIES IF THE MOTIVE FOR THE CAPITAL FELONY WAS RELATED, IN WHOLE OR IN PART, TO THE VICTIM'S OFFICIAL CAPACITY.

This aggravating circumstance has not been proven in this

case. The state has not requested that the Court consider this issue.

STATUTORY MITIGATING CIRCUMSTANCES
FLORIDA STATUTES 921.141(6)

(A) THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

This mitigating circumstance has not been reasonably established by the greater weight of the evidence. The defendant has been previously convicted of two counts of sexual battery upon Than Meyer in case No. 87-3147-CFA. These were crimes of violence in that the defendant used a knife to force himself on the victim. Such criminal conduct constitutes a significant history.

(B) THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

Based only upon DR. Samek's Testimony cannot say

This mitigating circumstance has not been reasonably established by the greater weight of the evidence.

The facts show that the defendant is a mentally disordered sex offender. He is antisocial and dangerous to male children. However, he was not under the influence of any extreme mental or emotional disturbance on the date of the crime. The defendant was not psychotic, schizophrenic or paranoid. He is above average in his intelligence level and was in touch with reality.

His emotional state on the day of the crime was described by his mother. Incredibly, the defendant visited with his mother on his way to kidnap Junny Rios Martinez! The defendant and his mother had a short conversation. His mother did not notice anything unusual about the defendant. In fact she indicated that

they both felt more relaxed because it did not look like the defendant's probation would be violated. The defendant told his mother that he planned to leave the state, but that he would obtain permission from his probation officer before leaving town.

This Court had the opportunity of listening to many hours of taped conversations of the defendant. These conversations involved both pre-arrest and post-arrest situations. Notwithstanding the fact that the defendant had to be under stress when these conversations occurred, there was no indication that the defendant was under the influence of any mental or emotional disturbance. The defendant was clear thinking and articulate. He was aware of the fact that the police were looking for him and that he was in serious trouble. He was able to fabricate and communicate the "Donald" defense in great detail to family and law enforcement.

Prior to the commission of the subject crimes, the defendant attended group therapy sessions with Dr. Duncan Bowen. No evidence or testimony was presented from Dr. Bowen supporting this mitigating circumstance.

The facts show that the defendant was able to relate well with people. While in prison, the defendant performed his daily tasks in a proper manner. He was able to convince the victim's family that he was a newspaper reporter and surf-magazine representative. He was able to gain the confidence and trust of the victim's family.

This Court finds that at the time the defendant murdered Junny Rios Martinez, he was not under the influence of extreme mental or

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emotional disturbance.

(C) THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

This mitigating circumstance does not apply. The defendant has not requested that the Court consider this issue.

(D) THE DEFENDANT WAS AN ACCOMPLICE IN CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR.

This mitigating circumstance has not been proven and does not apply. This Court has rejected the "Donald" defense and epecifically finds that "Donald" does not exist in this case.

(E) THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

This mitigating circumstance does not exist in this case. The Court has completely rejected the "Donald" defense.

(F) THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

There was no evidence presented that shows the defendant's ability to appreciate the criminal nature of his conduct was substantially impaired. In fact, the proof is all to the contrary. After the murder, the defendant made an effort to hide the body and flee from the State. In one taped telephone conversation with his aunt, the defendant acknowledged that he could be facing life in prison or the death penalty for these crimes. When he became aware of the fact that the police were after him, he contrived the complex "Donald made me do it" defense. These are all actions of

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a person who knows right from wrong. While in prison, the defendant sought entry into the state sponsored mentally disordered sex offender program, because he knew he had a problem. The defendant's ability to appreciate the criminality of his conduct was further established by the expert testimony.

However, the greater weight of the evidence does support the conclusion that the defendant's ability to conform his conduct to the requirements of law was substantially impaired. Having found this statutory mitigating circumstance to exist, it cannot be dismissed, and must be given some weight. However, the relative weight to be given is within the province of this Court. Campbell v. State, 577 So.2d 932 (Fla.1991).

The defendant meets the criteria for a mentally disordered sex offender. He is a person who is not insane, but who has a mental disorder and is dangerous to others because of a propensity to commit deviate sexual acts. The defendant enjoys sadism which further supports his feelings of power and control over his child victims. The use of a knife and the slow death associated with strangulation or suffocation are consistent with the defendant's sadistic disorder.

The extent to which the defendant's ability to conform his conduct to law is unclear to the Court. In the instant case, the defendant showed significant restraint. He developed and nurtured a plan to gain the trust of the victim so that he could lure him away from his home when the time was right. Over a period of several weeks, the defendant continued to relate with the victim

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and his family. He did not act upon impulse, rage or sexual frenzy. The defendant patiently bided his time and contrived his plan of attack. In the past case involving victim Than Meyer, the defendant followed much the same course of conduct.

This Court accepts the expert opinion of Dr. Samek, that if given the right stimulus, the defendant would be able to stop a sexual advance, even in the late stages of an attack.

The defendant is a predator of young male children. He clearly knows right from wrong. The defendant is manipulative and capable of gross distortions of truth. Thus, the information provided by the defendant to the examining experts is suspect.

Dr. Samek diagnosed the defendant as an antisocial rapist murderer. This Court accepts that diagnosis as fact and hereby rejects other expert opinion to the contrary. Notwithstanding the testimony of Dr. Berlin and Dr. Bernstein, the evidence indicates that the defendant may be "unwilling" rather than "unable" to control his desires. The defendant may get such enjoyment out of sadistic sex upon children, that he is willing to accept the consequences of his acts.

It is interesting to note that while the defendant was planning the subject crime, he was on probation for the Than Meyer rape. As a part of this probation, the defendant was required to participate in a sex offender program presented by Dr. Duncan Bowen. The defendant had in fact attended a group therapy session a few days before the abduction of Junny Rios Martinez. Dr. Bowen was not called as a witness. The record is void of any proof that

the defendant sought the help of Dr. Bowen to avoid the subject crimes. Clearly, the defendant knew what he was about to do. He had a professional sex therapist available to talk to. He chose to keep his secret and follow through with the plan.

(G) THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

The defendant's age at the time of the offense was twenty-two. He had moved out of his mother's house in 1987 and lived on his own until he was arrested in July 1987 for the sexual battery of Than Meyer. The defendant spent the next three years or so in an adult prison. While in prison, the defendant performed the job duties of an adult. He had no disciplinary problems in the prison system and was able to conform to the adult rules of the prison. The defendant's post-prison association with teenagers is consistent with his desire to dominate or control rather than an indication of a low level of maturity.

This mitigating circumstance has not been proven by the greater weight of the evidence.

NON-STATUTORY MITIGATING CIRCUMSTANCES

The defendant is allowed great latitude in presenting evidence which he feels constitutes non-statutory mitigating circumstances. When addressing mitigating circumstances, the trial judge must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigation nature. Rogers v. State, 511 So.2d 526 (Fla.1987); Campbell v. State, 577 So.2d 932 (Fla.1991).

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The resolution of factual conflicts is solely the responsibility and duty of the trial judge. Gunsby v. State, 574 So.2d 1085 (Fla.1991).

The defendant argues that the Court should find the following non-statutory mitigating circumstances present in this case:

1) Defendant suffers from a recognized mental illness.

The evidence and testimony presented is in conflict on this issue. This Court has resolved the conflict by finding that the defendant is a mentally disordered sex offender with an anti-social personality. To the extent that this disorder may be classified as a "mental illness" this non-statutory mitigating circumstance has been proven by the greater weight of the evidence.

2) Defendant committed the felony while under a mental or emotional disturbance.

Except as stated above, this non-statutory mitigating circumstance has not been proven by the greater weight of the evidence.

3) Defendant's ability to conform his conduct to the requirements of the law was impaired.

This non-statutory mitigating circumstance is included in the statutory mitigating circumstances listed in section 921.141(6), Florida Statutes. The Court has found that this mitigating circumstance has been proven by the greater weight of the evidence.

4) The defendant was burned severely on his legs as a small child.

The defendant established by a preponderance of the evidence

that the defendant was accidentally burned on his legs as a child. There was no evidence that this incident was the result of child abuse. Any relationship of this accident to the subject crimes is speculative at best. The Court does not consider this a mitigating circumstance.

5) The defendant was raped at gunpoint as a small child.

This alleged incident was related by the defendant to Dr. Bernstein. No independent proof or corroboration of this alleged incident was presented. The defendant is capable of significant fabrication. The defendant's father, mother and brother were totally unaware of these allegations. The defendant's school performance and general personality showed no ill effects from the alleged incident. Although many sex offenders were abused as children, this is not always the case. The alleged attacker was someone known to the defendant and others in the community. Yet no person was called to verify that the named attacker actually resided in the defendant's community. The defendant alleged that the adult attacker pointed a gun at him and forced him into a cornfield for sex. The alleged attacker was not a member of the defendant's family and yet the incident was never related by the defendant to anyone in Ohio. This entire incident appears to be another effort of the defendant to fabricate a defense. A young child who had been anally raped at gunpoint by a known person in the community would surely show physical or mental signs of injury. This Court finds that this non-statutory mitigating circumstance has not been proven by the greater weight of the evidence.

6) The defendant grew up in an unstable home environment.

This non-statutory mitigating circumstance has been proven by the greater weight of the evidence.

7) The defendant's father beat the defendant's mother and the defendant's attempts to intercede on his mother's behalf were futile as his father tossed him aside and continued the assaults on his mother.

This non-statutory mitigating circumstance has not been proven by the greater weight of the evidence. The Court has accepted the evidence presented in conflict with this mitigation.

8) The defendant was punished by his father by beating him on his burns.

This non-statutory mitigating circumstance has not been proven by the greater weight of the evidence. The Court has accepted the evidence presented in conflict with this mitigation.

9) The defendant's father would punish and humiliate the defendant by pulling down his pants and would laugh at him. The defendant's mother was not allowed to comfort her son following these incidents.

This non-statutory mitigating circumstance has not been proven by the greater weight of the evidence. The Court has accepted the evidence presented in conflict with this mitigation.

10) The defendant dressed up in his mother's clothes, the defendant's older brother held the defendant down, took his picture, and would tease the defendant with the photograph.

This non-statutory mitigating circumstance has not been proven

by the greater weight of the evidence. The Court has accepted the evidence presented in conflict with this mitigation.

11) The defendant's mother, obsessed with the belief that her husband was cheating on her, would either leave the defendant with his aunt or drag the defendant with her in her efforts to catch the defendant's father in a compromising position. As a result of this pattern of behavior by his mother, the defendant was exposed to fist fights between his mother and another woman at the airport, and to having a gun pointed at him and his mother in the middle of the night.

This non-statutory mitigating circumstance has been proven by the greater weight of the evidence.

12) The defendant was knocked out by his stepfather, Bill Stiffler, and required medical attention.

The defendant proved that he was struck by his stepfather. However, the Court does not consider this a mitigating circumstance.

13) The defendant won blue ribbons as a child for his participation in the 4-H Club in showing cows and rabbits.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance.

14) The defendant finished in second place in a local school spelling bee.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating

circumstance.

15) The defendant achieved good grades in school during the period of time his parents were together and during the period of time he stayed with his father.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance.

16) The defendant was first trumpet in the school band.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance.

17) The defendant was youth leader at his church.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

18) The defendant was a hard working and trusted employee at K-Mart. The defendant received a K-Mart achievement award.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

19) The defendant adapted well to prison and did not receive any disciplinary reports.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

20) The defendant achieved his G.E.D. during his prior prison

commitment.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

21) The defendant put his computer skills to use by volunteering and being accepted by the P.R.I.D.E. program. The defendant received several certificates of achievement for his hard work while in the prison system.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

22) The defendant has been a good and loving son.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

23) The defendant is loved by his family and friends and has shown his love and concern for them.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

24) The defendant has exhibited a love for and ability to work with animals.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

25) The defendant counselled his friend, Bill Runyan, to

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treat Bill's mother, Patricia Knittles with proper respect.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

26) The defendant counselled his younger cousin, Shirley Muhs's son, Roger Castille, to remain a law-abiding citizen.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

27) The defendant exhibited good behavior in Court.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

28) The defendant is intelligent.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance.

29) The defendant, following Chris White's statements concerning the Martinez family's desire to locate the victim, led law enforcement officials to the body.

The facts showed that the defendant led law enforcement to the body of Junny Rios Martinez. The defendant's motive for doing so is unclear. However, this mitigating circumstance has been proven by a greater weight of the evidence.

30) The defendant does not want to be mentally ill.

This non-statutory mitigating circumstance has not been proven

by the greater weight of the evidence.

31) Much of the defendant's behavior exhibited signs he was trying to be stopped prior to any harm befalling the victim.

This non-statutory mitigating circumstance has not been proven by the greater weight of the evidence.

32) The defendant in 1987 immediately confessed to law enforcement. The defendant, in his confession, sought help for his mental illness.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

33) The defendant pled guilty to the 1987 charge and the Court recommended he be treated as a mentally disordered sex offender.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance.

34) The defendant sought spiritual guidance from Reverend Stansell, who recognized and advised the defendant that his mental illness required professional assistance.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance in this case.

35) The defendant, while within the Department of Corrections voluntarily applied for the Mentally Disordered Sex Offender Program. The defendant had to confess his guilt, request help, and

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be physically, mentally and scholastically eligible to receive treatment. These actions taken by the defendant indicate a true potential for rehabilitation.

The defendant's potential for a successful rehabilitation has not been proven by a greater weight of the evidence. In fact, the contrary has been proven.

36) The defendant was accepted for the Mentally Disordered Sex Offender Program which placed him in the very small percentage of those prisoners interviewed.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance.

37) The defendant would have received intensive in-patient treatment within the prison community. However, the program was closed by the State due to a lack of funds and stopped admitting new patients six months prior to the closing.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance.

Whether the defendant would have benefitted from the Mentally Disordered Sex Offender Program is total speculation. However, what is not speculation is had the defendant remained in prison for the entire length of his sentence, Junny Rios Martinez would be alive today.

38) The defendant did not receive any treatment while in prison. As a result, the defendant decompensated significantly

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while in prison.

The defendant proved this fact by a greater weight of the evidence. However the Court does not consider this a mitigating circumstance.

39) Alternative forms of treatment are available for persons who suffer from the defendant's mental illness.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance.

40) The defendant went to Dr. Duncan Bowen's weekly sessions as required by the terms of his probation. However, the progressive nature of the defendant's mental illness could not be treated in this non-intensive out-patient setting.

The defendant did, in fact attend the sex offender program of Dr. Duncan Bowen. He was required to do so by his probation officer. However, the defendant made no effort to gain any benefit from that program. At the same time he was in therapy, he was associating with young boys and planning the abduction and rape of Junny Rios Martinez. Had the defendant confided in Dr. Bowen, action could have been taken to prevent tragedy. This non-statutory mitigating circumstance has not been proven by the greater weight of the evidence.

SUMMARY

The three statutory aggravating circumstances proven beyond every reasonable doubt are entitled to great weight by this Court. The aggravating circumstances all relate to violent crimes by the

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defendant perpetuated against children. In the case of Junny Rios Martinez, the crimes involved capital sexual battery and kidnapping of a child eleven years of age. The facts show that death was caused by strangulation or suffocation of a conscious child.

On the other hand, the one statutory mitigating circumstance and the non-statutory mitigating circumstance found to exist are entitled to little weight.

Whether the defendant is "unable" or "unwilling" to conform his conduct to law is open for debate.

Whether the defendant intended to help himself or the victim's family in leading police to the child's body is not certain.

Whether the defendant's unstable family life contributed to his sexual deviance is also in question. Experts differed on causation. Are sexual deviates made or are they born? The answer is unclear to this Court. However, for these reasons the mitigating circumstances have been given little weight by this Court.

In weighing the aggravating and mitigating circumstances, the Court finds that any one of the three aggravating circumstances outweighs all mitigating circumstances.

SENTENCE

MARK DEAN SCHWAB, having been given the opportunity to be heard and show legal cause why judgment and sentence should not now be imposed and to offer matters in mitigation, and no legal cause having been shown to preclude imposition of judgment and sentence,

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(1)

you are hereby:

ADJUDGED guilty of the crime of First Degree Murder (Count I) for the unlawful killing of Junny Rios Martinez, perpetrated by you from a premeditated design or intent to effect the death of Junny Rios Martinez. It is

(1) **THEREFORE**, the sentence of this Court that you shall be put to death in the manner and means provided by law. (Section 922.10, Florida Statutes).

You are remanded instanter and without bail to the custody of the Sheriff of Brevard County, Florida, to be delivered by him to the custody of the Department of Corrections of the State of Florida to be confined until final execution of this Judgment and Sentence pursuant to law.

MAY GOD HAVE MERCY ON YOUR SOUL.

YOU HAVE AN AUTOMATIC APPEAL TO THE SUPREME COURT OF FLORIDA FROM THIS JUDGMENT OF GUILT AND THE SENTENCE THIS COURT HAS IMPOSED.

(2) You are hereby adjudged guilty of the crime of Sexual Battery (Count II) upon a child under the age of twelve years. A capital felony crime punishable by life in prison with no chance of parole for a minimum of twenty-five years.

As a result of this crime, you are committed to the custody of the Sheriff of Brevard County, Florida, to be delivered by him to the custody of the Department of Corrections of the State of Florida to be confined for life with no release for a period of twenty-five years.

(3) You are hereby adjudged guilty of the crime of Kidnapping a child under the age of thirteen years, (Count III), life felony.

As a result of this crime, you are committed to the custody of the Sheriff of Brevard County, Florida to be delivered by him to the custody of the Department of Corrections of the State of Florida to be confined for life. Such life sentence shall be consecutive to the sentence imposed for the Sexual Battery.

IT IS YOUR RIGHT TO APPEAL WITHIN THIRTY (30) DAYS FROM THE DATE OF THE PROCEEDINGS HELD IN THIS COURT. You are entitled to the assistance of an attorney in preparing and filing your appeal. Upon a showing that you are entitled to an attorney at the expense of the state one will be appointed for you.

DIRECTIONS TO THE CLERK OF THE COURT, SHERIFF AND COURT REPORTER

The Clerk of this Court shall file and record this judgment and sentence and shall prepare four certified copies of this record of conviction and sentence of death and the Sheriff of Brevard County shall send one copy of this record to the Governor of the State of Florida. (Section 922.09, Florida Statutes). The defendant is hereby remanded to the custody of the Shariff of Brevard County, Florida, who is directed to deliver the defendant and the second certified copy of this conviction and sentence to the custody of the Department of Corrections to await issuance by the Governor of a warrant commanding the execution of this sentence of death. (Section 922.09, Florida Statutes).

The Clerk of the Court shall forthwith furnish the third

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certified copy of this judgment to the Court Reporter, who is directed as expeditiously as possible to transcribe the notes of all proceedings in this case and to certify the corrections of the notes and of the transcript thereof and to file the notes and transcript, duly certified, and two copies of such transcript with the Clerk of this Court.

This judgment of conviction and sentence of death being subject to automatic review (section 921.141(4), Florida Statutes), the Clerk of this Court is hereby directed to prepare a complete record on appeal of all parts of the entire original record, papers and exhibits, proceedings and evidence and two copies thereof, and after certification by the sentencing court, the Clerk shall transmit the entire original certified record to the Clerk of the Supreme Court of Florida for automatic review and serve one copy thereof upon the Attorney General of the State of Florida and one copy thereof upon counsel for the defendant on appeal. The Clerk of this Court shall forthwith furnish the fourth copy of this judgment to the defendant's counsel on appeal.

The defendant having been adjudged insolvent for purposes of appeal, Brevard County shall pay the costs of such transcripts and copies and the filing fee on appeal.

DONE AND ORDERED in Melbourne, Brevard County, Florida, this 1st day of July, 1992.

Edward J. Richardson
EDWARD J. RICHARDSON
CIRCUIT JUDGE

copies to:
Office of the State Attorney
Office of the Public Attorney

A. Yes, I do.

As a matter of fact, to cover some of the shows I've done are "Inside Edition," "Geraldo," the national shows as well as a lot of local shows.

MS. ALLAWAS: Your Honor, at this time the State would tender Dr. Samek as an expert in the field of sex offender diagnosis and treatment.

THE COURT: All right. Thank you.

Do you have any questions of this doctor?

MR. ONEK: Not at this time.

THE COURT: Thank You.

You may continue then.

MS. ALLAWAS: Thank you.

BY MS. ALLAWAS:

Q. Dr. Samek, were you contacted by the State of Florida to review and evaluate documentation in this particular case related to Mr. Mark Dean Schwab?

A. Yes, I was.

Q. Could you briefly explain to the Court the materials that you did review in pursuing that

evaluation?

A. Yes.

I can either go over specifically or give you an idea of the size of it. It's depositions of the primary people involved in this case, police reports, autopsy reports, letters that were written by the defendant. It's a pretty exhaustive supply of material all given to me by the State.

Q. Dr. Samek, was there --

A. In addition to which I have seen the testimony today.

Q. All right.

In the course of that evaluation, sir, were you able to reach some opinions in the diagnosis of Mr. Schwab and his treatment or treatability as it relates to this particular offense?

A. Yes, I have.

Q. Okay. Before we get to that, Dr. Samek, you watched and reviewed and listened to the testimony or the videotaping, say, of Dr. Berlin?

A. Yes, I did.

Q. Is Dr. Berlin someone that you are

trauma syndrome was accurate and I think makes sense in terms of, if the rape did occur as Mark has said -- and it may well have. It may be another self-serving story like some others that he's made up. I have no way of knowing. If it occurred exactly as he said, I would expect that it would be a very traumatic event in his life. It being more traumatic because a weapon was used. It was done by someone that he knew and presumably trusted, that it was violent and physically painful, that there were threats on his family or parts of it that make it significantly a traumatic event.

On the other side, things that make it a less serious traumatic event is that it occurred only on one occasion. I think though that one needs to be aware that most people who are traumatized by that trauma rape or even considerably more traumatic rape --

I mean I'm working with a woman now who was raped, and during the rape the guy put the gun in her mouth and said, I'm going to kill you now, and pulled the trigger. The gun misfired. He did it again. It misfired. He couldn't get the gun to work so she's still alive, but most rape

victims who are -- most rape victims are severely traumatized by being rape. Most of them do not become rapists and do not become murderers.

Q. Have you, in fact, Dr. Samek, worked with sex offenders, rapists, who have murdered?

A. Yes, I have.

Q. And viewing that in terms of what Dr. Bernstein had termed the irresistible impulse that Mark is feeling at, I believe he said, the fantasy rehearsal stage, could you comment on that assessment by Dr. Bernstein?

A. Yes. The issue of irresistible impulse is one that is very complicated and one that in my opinion that psychology has never really gotten a good handle on. When does a desire become an impulse? When does an impulse become irresistible? I think that's really not so much a psychological determination as a personal philosophical value judgment.

I suspect if Mark should be involved in one of these irresistible impulses and had kidnapped a kid and is all ready to go and somebody came up and knocked on the window and said, Mark, if you stop right now --

MR. ONEK: I'm going to object,

sir. He's saying it's a philosophical value placement. He has no expertise in philosophical values, and this testimony isn't relevant.

THE COURT: Overruled.

Go ahead.

THE WITNESS: And knocked on the window and said, Mark, if you stop what you're doing right now and go to the corner and stand on your hands, I'll give you a million dollars, Mark probably would have stopped on the spot to get the million dollars so it's a judgment call.

Many times people say I couldn't stop drinking. I couldn't stop the rape. The woman -- you know, I was in bed with a woman. I was just about to come. She said, "No." I couldn't stop.

Again, if there's sufficient motivation to stop -- if someone put a gun to your head and said, If you continue this, I'll pull the trigger, and you believed that, most people's

irresistible impulses can be resisted.

BY MS. ALLAWAS:

Q. Dr. Samek, turning to actual treatment issues, would you agree that the earlier treatment started the better off we are?

A. Absolutely.

Q. Would you agree however, sir, that as long as treatment is started, we are taking the positive steps to do that?

A. I don't understand the question.

Q. Positive steps to correct the problem.

A. Treatment is a positive thing, and I'm in favor of treatment. Yes.

Q. In this particular case you heard the testimony of how Mr. Schwab was involved in a treatment program after being released from prison?

A. That's correct.

Q. You heard reports of his reaction to being in that treatment program?

A. Yes, I have.

Q. And my recollections is that he was rejecting the treatment program, that it wasn't helping him?

A. Yes. I can't find in my notes exactly

Q. What is that, sir?

A. Antisocial personality, rape/murderer and mentally disordered sex offender.

Q. Do you have an opinion as to the likelihood of success for treatment of Mark at this time?

A. Yes, I do.

Q. What is that, sir?

A. I think it is highly unlikely that he could be successfully rehabilitated and be safe without a lot of controls around him.

Q. Could you explain to the Court briefly and in layman's terms what it is that you gleaned from these materials and from listening to the testimony today about Mark that makes you believe that his treatability is unlikely?

A. There are a number of factors. One is the speed at which he reoffended. He came out of prison, and he was reoffending very shortly there afterwards. Within six to eight weeks he committed a murder, very quickly after release.

He was in MDSO treatment at the time, and that did not have an impact on his behavior.

There was a history of multiple offenses. It was not one-time rape, murder. He

I think that her tendency to protect him and rescue him and make excuses for him and to help him and to allow herself to be victimized by him financially and many other ways, I think that that part of his upbringing was also important in developing the kind of person who thought he could get away with things, that he could do what he wanted, get what he wanted and get away with it, and I think the school grade issue reflects the fact that, while he was in Ohio, while he was near his dad, there was enough structure that he could function all right.

It was when he could get down here, he could drop out of high school and get away with it. He could kind of run away, and his mother wasn't strong enough to set limits and enforce them. That's when school behavior showed the deterioration.

Q. Dr. Samek, in reviewing all of these materials, including the letters that were written by the defendant and the various police reports and the history and listening to the testimony today, do you have a diagnosis of Mr. Schwab at this time?

A. Yes, I do.

issues we're talking about.

The lack of remorse and the minimal remorse and the maximum amount of denial that he had upon arrest and after I think is very significant in terms of the issues we're talking about.

I think the age at which he started to act out initially committing serious rapes and being in prison for it before he was twenty I think is another concern for me and a factor that makes me worried about him.

Also, the fact that he's doing these behaviors when he suffered really what is only mild to moderate child abuse. The rape was a moderate intensity rape. The sexual abuse by his father and brother was relatively mild. The physical violence in the family was relatively mild. As physical violence goes, this is not severe family violence.

I don't know if it would be helpful for the Court for me to describe some of the other kinds of cases I worked with but family violence can get --

MR. ONEK: Object. It's not relevant, the other cases he said he

a time. She didn't hire a baby-sitter. She'd go to work and leave the kid handcuffed to the bed, and then when she came home and he was crying, she would burn him with cigarette butts all over his chest and back.

This kind of abuse goes on commonly. The excessive spanking, the parents in the midst of a divorce fighting and yelling and hitting each other, that kind of behavior unfortunately goes on a whole lot in this country, and I don't think that most children who experience that level of abuse end up raping and murdering people. I think much more is going on in terms of what's causing the problem here than the explanation of just the abuse that he had.

Q. Doctor, what you're saying then is that the level of abuse to Mark, given that it was abuse --

I'm not arguing that premise.

-- the level of abuse to Mark during his childhood does not rise to the level of causing him to do these things, to rape and eventually rape and murder other young boys?

A. The abuse he's submitted -- he was exposed to as a child was horrible, and there's

I would wish that on no child. It had an effect on him, and I think it is one factor of many factors that were contributing to this as I spoke about, I think, his mom and her way of dealing with this. Also, the fact that she allowed this to continue and stayed, you know, for a significant period of time in the environment and didn't immediately call HRS and call the police and get out of there and leave the state if she had to, do what she finally did, that that wasn't done more quickly, those are also contributing factors I think of equal magnitude.

I'm saying that kids that are abused to the level that he was abused, most of them do not commit the kinds of abusive acts that he has committed.

MS. ALLAWAS: Your Honor, may I have a minute?

Your Honor, nothing further.

THE COURT: Mr. Onek?

MR. ONEK: Could I have a moment, please?

May it please the Court?

CROSS EXAMINATION

BY MR. ONEK:

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Q. Doctor, can you spell your last name for me?

A. S-a-m-e-k.

Q. Thank you.

Doctor, you have never spoken to Mark; is that correct?

A. That's correct.

Q. Does that fact make your ability to diagnose him more difficult in your opinion?

A. Not in this case.

Q. Do you normally make a diagnosis after spending time with a patient?

A. Normally I do, but it is not uncommon for me to do it by reviewing materials.

Q. Okay. How much time do you normally spend with a patient before you arrive at a diagnosis?

A. It depends what the purpose of the diagnosis is. Generally the diagnosis is not the issue at stake. Generally people don't come to me and say, "What's the diagnosis?" Generally the diagnosis is quite evident in people I see. The question usually is treatability or credibility when I'm working with children, but the diagnoses are generally commonly clearly either