IN THE SUPREME COURT OF FLORIDA

EDDIE LEE SEXTON,

Appellant,

vs. CASE NO. 94,487

STATE OF FLORIDA,

Appellee.

________________________________/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee submits the following summary of the testimony of some of the major witnesses.

Judy Genetin, an attorney and employee of the Division of Human Services in Ohio, identified Exhibit 1, a chart of the family tree of Eddie Lee Sexton and testified that Appellant was the father of Shasta and Dawn, two of Estella Mae Good's children. Her third child, Skipper Lee Good, was the son of Estella Mae and Joel Good (Vol. VI, R. 353-357). She described the agency's receipt of a referral that caused the agency to open an investigation into the Sexton family in February of 1992, a court hearing in which the Department was given temporary custody of the six youngest children and placed in foster care. Five months later Kimberly and Christopher were returned to the mother, and custody of Charles (who was on the run at the time) was returned to the mother and there was a "no contact" order on Appellant (Vol. VI, R. 358-360). The witness recalled assisting Steve Zerby in a negotiating process with Appellant as he was inside the family home on Caroline Street on November 21, 1992. Appellant wanted immediate return of the three children that remained in foster care; Genetin agreed to change the family social worker and not to remove the children Christopher and Kimberly who were present with the mother at that time. On that date, November 21, 1992, there was no pickup

order in existence for the children that had been returned to Mae Sexton. Three days later there was another court hearing at which Appellant and his wife did not appear and on September 20, 1993 the court ordered permanent custody to DHS of the five youngest children; it did not include a sixth, Charles, who at that time had turned eighteen (Vol. VI, R. 361-362).

Steve Zerby described the standoff with Appellant in the fortified house along with Mrs. Sexton, three juvenile children and one adult child. The negotiations over the phone lasted from 9:00 a.m. to 8:00 p.m. Appellant said he would not allow Child Protective Services to pickup his children (he mistakenly believed there was a pickup order when in fact there was not). Appellant threatened to kill anyone from CPS or policemen that tried to take his children. After the ordeal ended a search of the house revealed a .357 revolver and 20 gauge shotgun, seventy rounds of ammunition; the house had been barricaded with chicken wire, plastic bags, canned food and water (Vol. VI, R. 363-368).

Detective Steve Ready testified that warrants issued for the arrest of Appellant and his wife in October and Ready learned of Sexton’s arrest on January 14, 1994 by the FBI and Hillsborough County authorities. He met with some of the children and relayed information to Florida authorities of reported suspicion of two homicides there. Charles Sexton pointed out where infant

Skipper Lee Good was buried on November 20th or 25th and a day later the grave of Joel Good was discovered at the Little Manatee River State Park (Vol. VI, R. 371-375).

Yale Hubbard, a ranger with the Department of Natural Resources, described the camping area of the Little Manatee River State Park and testified the Sexton family started camping there on November 16, 1993 and ended with his arrest in January (Vol. VI, R. 378-381). The Sexton camper was not parked in the normal and usual manner of pulling in that slot and you could not see the door into the camper or the license plate from the road (Vol. VI, R. 384).

Detective John King described the retrieval of the body of the infant Skipper at the Hillsborough River State Park and the body of Joel Good at Little Manatee River State Park on January 27 and 28, 1994. There was a rope tied off to two sticks secured around Good's neck (Vol. VI, R. 394-400).

The parties stipulated that Joel Good died in the Little Manatee River State Park on or between November 17, 1993 and January 14, 1994 (Vol. VI, R. 404).

Willie Lee Sexton, age twenty-seven, testified that he graduated from special education, had problems learning in school and collected Social Security disability payments. He is in jail now for the murder of Joel Good, and has been to Chattahoochee state mental hospital for a year and a half (Vol.

VI, R. 403-407). He entered into a plea agreement with the State in which he plead to second degree murder in exchange for twenty-five years in prison and agreement to testify (Vol. VII, R. 481). The witness described the standoff at the home in Ohio and Appellant's intent to shoot anyone who attempted to enter the house and take the children (Vol. VI, R. 411-413). They moved from Ohio to Oklahoma then Indiana and Appellant said they were traveling to stay away from cops because they were looking for Appellant (Vol. VI, R. 417). Appellant said when he saw HRS workers he'd take them out (kill them)(Vol. VI, R. 419-420). Appellant trained the children how to use guns and how to use the rope with sticks to turn and twist on someone's neck if the FBI surrounded the motor home. Exhibit 8 was this rope (garrote) (Vol. VI, R. 422). Joel Good refused to learn how to use a gun, did not want to be part of a standoff in Indiana and wanted to go home (Vol. VI, R. 423). Appellant did not want him to go claiming Joel would be arrested. Appellant made a video in Indiana for President Clinton and did not want the law or HRS to know where he was when on the run (Vol. VI, R. 423). Joel talked about wanting to go back to Ohio (when they were staying at Uncle Dave's in New Port Richey) to the grandparents but Appellant said no (Vol. VI, R. 426) and that he would hurt him if he mentioned it again (Vol. VI, R. 427). At the Hillsborough River State Park baby Skipper got sick and kept crying and

making noise; Appellant told Pixie (Skipper's mother) to shut the baby up before he got them caught, before people around the campground heard them. One night when the baby was crying at 4:00 a.m. Appellant told Pixie to put her hand over the baby and smother it; she asked how and he told her to put her hand over the mouth and nose and hold it. She did and there was no more crying from the baby. The next morning Willie learned the baby was dead. Pixie seemed surprised. She did not take the baby to a hospital or the doctor before because Appellant did not want her to. When Joel awoke, he was shocked by the baby's death and was crying. The infant was buried in Hillsborough River State Park. Joel stated that he wanted a real burial and Appellant said no, that they would arrest Joel and Joel would tell them where they are and they'd arrest us (Vol. VI, R. 428-433). Joel was unhappy about not taking the baby back to Ohio (Vol. VI, R. 433). They stayed in that park for about two weeks and Appellant instructed Willie to check everyday that the grave was not disturbed by animals (Vol. VI, R. 434). Appellant told Joel he could never go back to Ohio and the witness heard Appellant say -- after the burial -- he did not like snitches "because Joel was going to go back to Ohio and tell his grandparents what happened and the law..." (Vol. VI, R. 435-436). They moved to Little Manatee State Park where Willie killed Joel with the Exhibit 8 weapon Appellant taught him to use (Vol. VI, R. 436-

437). It was Appellant's idea; he told Willie he had a job for him -- to put Joel to sleep (the witness thought he only meant to put him to sleep as Appellant had done to him but without the rope)(Vol. VI, R. 438). In a second conversation Appellant reminded Willie he had to put Joel to sleep so he won't go to his grandparents because he might tell them about the baby being dead (Vol. VI, R. 440-441). Before going to the picnic Appellant told Willie's mother "Today is the day Willie is going to do it" in the camper (Vol. VI, R. 442). Appellant returned from the picnic, made up a story about Joel inspecting stolen property, and went into the woods with Willie and Joel. Appellant told Willie to take the rope out of his pocket and put it around Joel's neck and to turn it hard and fast (Vol. VI, R. 443). When blood came from the ears Willie asked what happened and Appellant said you killed him. Joel said "Eddie," Appellant kicked the body and told Willie to finish him off. Appellant and Willie buried him. Sexton told Willie to chop off Joel's hand to eliminate evidence and Willie hit it with a machete but was not able to cut it off (Vol. VI, R. 444-448). Appellant instructed that if anyone asked to tell them Joel left with the baby to the grandparents in Ohio (Vol. VI, R. 449). Willie also testified to sexual abuse by his father beginning at age nine, was told not to tell anyone and that Appellant punished him with belts or a ball bat. There were a lot of beatings and Appellant

said he was retarded. Appellant told the children he'd hurt them if they told what he did and they should call to report if any of them talked about the family. Appellant made all the family decisions and they were not allowed to visit friends. Willie believed Appellant had special powers and was afraid of Appellant when he killed Joel (Vol. VI, R. 451-460). The witness stated that Pixie never told him to kill Joel (Vol. VII, R. 497).

Matthew Sexton who was sixteen years old in 1993 -- son of Appellant -- was placed in foster care in 1992 -- then picked up by Appellant and they went to Indiana. He described beatings by his father, Appellant's power over the family and the prohibition on speaking of family matters outside the house. Appellant said "A good snitch is a dead snitch" (Vol. VII, R. 499-504). On the way from Ohio to Indiana Appellant said he had warrants out for his arrest and was not supposed to be around the kids. Appellant taught him how to use weapons in Indiana and Florida to use against anyone who came to take them back into foster care. He saw Pixie smother the baby when Appellant told her to quiet the baby (Vol. VII, R. 505-507). When the witness heard of Joel's murder, Appellant said not to say anything because Appellant and Willie would get the electric chair. Before the picnic Appellant mentioned they had to watch Joel because he might take off and give them all away because

Joel was "broke down because his baby was killed" (Vol. VII, R. 510).

Christopher Sexton Riesenberg, Appellant's youngest son (age 19) also discussed family discipline and the powers claimed by his father. When baby Skipper was killed, Joel told Appellant he wanted to go to the authorities and Appellant would not allow him (Vol. VII, R. 520-521). Appellant described Joel as a snitch. When the witness realized that Good was gone, Appellant said Joel got into a red car with a heavy-set woman and Appellant acted like nothing even happened (Vol. VII, R. 523). Hours later when he saw Willie he had a pale look (Vol. VII, R. 524).

Estella Sexton Good (Pixie), age 28, is the daughter of Appellant, the third of twelve children. She married Joel Good on February 12, 1992 -- the day was changed to an earlier date then scheduled because Appellant wanted it sooner so HRS would not take her two daughters (Dawn Marie and Shasta Marie) from her -- Appellant would not allow her to spend the wedding night with Joel (Vol. VII, R. 540-542). On the day of the murder Appellant and Willie first went off by themselves (Vol. VII, R. 546) and after lunch Joel and Willie went into the woods (Vol. VII, R. 547). Back at the camp the witness heard Joel yell "Ed." She and her sister Sherri followed the voice and saw Willie had a rope with attached wood at the end around Joel's

neck. They returned to camp; she told Appellant Willie was hurting Joel and she took him back there. Appellant kicked Joel's leg and when there was voluntary movement Appellant told Willie to finish him off and for her to return to the camper. Later he told her she'd be next if she talked about the murder. She did not know whether Willie or Appellant finished Joel off (Vol. VII, R. 556-553). Appellant told her to get rid of Joel's clothing and gave her money to buy a shovel. Appellant took the shovel back where Willie was and returned an hour to ninety minutes later when it was dark (Vol. VII, R. 554-556). Later that night she overheard Appellant tell her mother he had Willie kill him because he knew too much (Vol. VII, R. 557). She recalled three occasions in which Appellant talked of getting rid of the victim, first outside in the campsite then on two trips to Ohio to get the defendant's check. On the first trip Appellant mentioned he had to get rid of Joel because Joel told him he wanted to go back to Ohio and Sexton was concerned since he did not want anybody to know where he was and on the second trip the stated reason was Joel's desire to come back to Ohio concerning the baby. Joel was killed the next day (Vol. VII, R. 557-560). Pixie understood that Sexton had problems with the social services agency and had a standoff inside the house (Vol. VII, R. 561). Appellant made the family decisions and disciplined the children. Willie was frequently beaten (Vol.

VII, R. 563). She repeated what others said regarding Appellant's training the boys with weapons (Vol. VII, R. 565-566).

Her baby Skipper was born on January 17, 1993. Every week Appellant mentioned his concern about being followed or pursued by DHS or FBI. When the baby became sick, Sexton would not allow her to seek medical treatment for fear of being busted. One night she was unable to stop the baby from crying, and Appellant was concerned it was drawing attention. He told her to quiet him or he'd take care of it himself (Vol. VII, R. 567-569). She put her hand on his mouth and the baby was quiet. She stated that she went to sleep, the baby did not awaken and Appellant told her the baby died from crib death. Joel was upset, tired of everything going on and wanted to bring the baby back to Ohio. Appellant was angry and said no one was going back to Ohio. The witness acknowledged that she had been arrested and charged with first degree murder of Skipper, and entered into a plea bargain to manslaughter requiring her to testify truthfully (Vol. VII, R. 570-573). She told Joel that Appellant was the father of her two daughters before the death of Skipper and Joel and Appellant fought when Joel confronted him about it (Vol. VII, R. 574). Before Skipper's death when Joel mentioned a desire to return to Ohio Appellant said he would not get back to Ohio. None of them were allowed to go

back to Ohio and after the baby's death Appellant mentioned they would be killed if anyone turned him in (Vol. VII, R. 574-575). She visited a Sarasota library to get information on the baby's death and while speaking to a lady there, Appellant squeezed her shoulder to let her know not to say something (Vol. VII, R. 575). The sentence she received was twelve years, six years in prison and six years probation. She was in prison from January of 1993 to her release February 12, 1997 (Vol. VII, R. 610).

Medical examiner Dr. Marie Hermann was present at the recovery of Joel Good's body; two to three feet of leaves and debris and dirt were over the body and it was at least four feet deep. There was a ligature device, ropes and sticks around the neck. She opined that the cause of death was asphyxiation due to ligature strangulation, a homicide (Vol. VIII, R. 620-626). The back of the right hand had a linear horizontal defect a half-inch deep which would have been caused by a sharp instrument with a great amount of force like the Exhibit 16 machete. The wound was consistent with an attempted dismemberment or attempted removal of the right hand (Vol. VIII, R. 630).

The State then published to the jury the video that Appellant made to the President (Vol. VIII, R. 631-673).

Charles Sexton, the middle of the twelve children, described Appellant's discipline of Willie, the standoff in Ohio, the

travels to Oklahoma and Indiana and Florida where Appellant taught him and Willie how to use weapons including a choker (rope with sticks)(Vol. VIII, R. 674-679). The weapons were to be used on anybody that stood in the way of the family (Vol. VIII, R. 679). In Indiana Appellant started talking about wanting to get rid of, or erase, or kill or put to sleep Joel. In Florida he wanted to erase him because "a good snitch is dead snitch" (Vol. VIII, R. 680-681). Joel wanted to return to his family in Ohio and Appellant insisted he was staying there (Vol. VIII, R. 681). The witness recalled camping in the park where Joel was killed and the picnic not far from the campsite (Vol. VIII, R. 682-684). The witness claimed that he walked around in the woods and saw Appellant and Willie killing Joel. Willie had a choker around Joel's throat from behind and Joel was gasping for air. Appellant finished it off (Vol. VIII, R. 685-689). Appellant mentioned to Willie while he had the rope around the victim it's either him or it's both of you (Vol. VIII, R. 689-690). He did not tell people before about Appellant finishing it off because he was scared (Vol. VIII, R. 693).

Librarian Gail Novak taught computer use and answered questions from the reference desk at the USF campus in Sarasota. Around Thanksgiving in 1993 Appellant came into her library and requested assistance -- he wanted a new Indian name, part animal and part verb and she showed him books to assist him, Exhibit 20

(Vol. IX, R. 723-724). Other members of the family were present and she heard the names Pixie, Joel and Billy used to describe them. Pixie was hunched and withdrawn and asked for a picture of how a baby looks when it dies from crib death. Sexton approached Pixie and rammed the lower part below her waist into the edge of the table and told her in effect to get her story straight (Vol. IX, R. 726-727). She heard Billy talk to Sexton about Joel, that Joel wanted to get on a plane and go back to Ohio and Appellant replied, "Only way that boy's going back to Ohio is in a body locker" (Vol. IX, R. 729).

Dr. Eldra Solomon, a clinical psychologist with expertise in posttraumatic stress disorder and dissociative disorders, conducted a psychological assessment and of William Lee Sexton's intellectual functioning in August of 1994 (Vol. IX, R. 752-754). The school records noted that at age six he was behind developmentally, had difficulty with memory and motor coordination (Vol. IX, R. 755). These developmental lags could have been affected or influenced by social isolation. He performed poorly -- at the 1% level -- on the Wechsler IQ test and on six verbal subtests (Vol. IX, R. 756-757). The witness described Willie's isolation, severe punishment and sexual abuse by the father and testified that Willie thinks very concretely, not abstractly. He was functioning at the level of a seven or eight year old child (Vol. IX, R. 758-760). She diagnosed him

with PTSD and opined he was not capable of planning and orchestrating the murder and would have been too terrified to think of doing that without his father's okay (Vol. IX, R. 763-764). He displayed very definite physiological correlates of fear when talking about his father (Vol. IX, R. 765).

Kimberly Sexton, Appellant's fourteen year old daughter, recalled being in the camping grounds in 1993 and 1994 and recalled that the day before the picnic Appellant was speaking to her mother and Willie outside by the car near the camper and said about Joel "he has to go" to Willie (Vol. IX, R. 779-780). On the day of the picnic Pixie buried Joel's clothes after Joel Good died and on the day following the picnic Appellant told her mother that Pixie had to go (Vol. IX, R. 782-783).

The prosecutor and defense stipulated that the distance between the Hillsborough River State Park and the Little Manatee River State Park is twenty-seven miles and that the distance from the Little Manatee River State Park to the Jane Bancroft Cook Library, University of South Florida, Sarasota-New College branch is forty-eight miles (Vol. X, R. 798; Vol. III, R. 310A). The jury returned a guilty verdict (Vol. X, R. 869-871; Vol. III, R. 342).

In the penalty phase the State introduced penalty phase exhibit 1, a certified copy of a conviction for robbery by Eddie Lee Sexton in 1963 (Vol. XI, R. 889) and called two witnesses,

Teresa Boron and Asby Barrick, each of whom briefly testified as to the personal qualities and resulting loss to them by the death of nephew-victim Joel Good (Vol. XI, R. 890-897).

The defense also called Teresa Boron who recalled a conversation in the Sexton home wherein Appellant discussed buying a ranch in Montana and his idea to do a promotion with Burger King and sell toys (Vol. XI, R. 898-904). On cross-examination she stated that in the initial face-to-face meeting Appellant's inquiry as to Joel Good's financial status was odd and inappropriate (Vol. XI, R. 907-908).

Nellie Hanft, Appellant's older sister, stated she had no reason to believe Appellant's children were afraid of him (Vol. XI, R. 942), that Appellant was helpful to her family and others (Vol. XI, R. 943-946); on cross-examination she testified that she did not believe the allegations of incest or murder involving Appellant (Vol. XI, R. 947). A deposition of Caroline Rohrer was read to the jury. She was Sexton's niece and had no suspicions of physical or sexual abuse of the Sexton children (Vol. XI, R. 953), and stated that he had done favors for others (Vol. XI, R. 954).

Dr. Irving Weiner, a clinical psychologist, evaluated Appellant and testified that Sexton's IQ was in the low 80s (Vol. XI, R. 916) and did poorly in a number of tests (Vol. XI, R. 916-921). His performance was normal on the Aphasia

Screening Test (Vol. XI, R. 921-922) and largely within the normal range on the MMPI. He was hypochondriacal (Vol. XI, R. 923). He was consciously quite guarded on the Rorschach test (Vol. XI, R. 926). He showed characteristics of brain dysfunction (Vol. XI, R. 927). On cross-examination defense witness Dr. Weiner related that when he first saw Sexton he indicated that he was appointed by the court to assist in his defense and in his opinion Sexton made a conscious decision to remain guarded because he did not want to open the door on certain personality traits (Vol. XI, R. 928-930). He was <u>not</u> of the view that because of Appellant's low average intelligence he was unable to plan, orchestrate or carry out a murder. Weiner did not ask about the crimes he was alleged to have committed (Vol. XI, R. 930). Sexton had never been administered drugs to treat mental illness, and did not describe any hallucinations or delusions in his thought processes (Vol. XI, R. 932). Weiner did <u>not</u> have an opinion within reasonable bounds of certainty within the profession as to the cause of Appellant's dysfunction and acknowledged that Sexton was hypochondriacal (Vol. XI, R. 933-934). The witness did not review the videotape Sexton prepared for the President (Vol. XI, R. 934). He <u>had no opinion</u> whether Sexton could tell right from wrong or whether he could conform his behavior to the requirements of law (Vol. XI, R. 936). For the most part Sexton performed within the normal

range on the MMPI (Vol. XI, R. 936). There was no bizarre or delusional thought process as revealed by that test and Weiner saw nothing in the tests suggesting schizophrenia (Vol. XI, R. 937).

Dr. Frank Wood, a neuropsychologist, examined Appellant at the Memorial PET scan facility in Jacksonville (Vol. XI, R. 967) and testified that the limbic system was dysfunctional and not normal; it is underactive (Vol. XI, R. 977-978). Sexton did poorly on a memory test (Vol. XI, R. 979-980). The witness opined that Appellant has brain disease, he is not normally responsive to emotional situations and his emotional responsiveness is outside normal limits (Vol. XI, R. 983). He thought the ability to plan was impaired (Vol. XI, R. 985) and would obsess on a theme (Vol. XI, R. 986).

Dr. Wood testified on cross-examination that a person with a limbic system pathology would get stuck on a theme and it could include any repetitious theme -- like repeating "a good snitch is a dead snitch" (Vol. XI, R. 986-987). Dr. Wood did not know what Appellant was thinking at the time (Vol. XI, R. 988). The witness acknowledged that it is not necessarily so that Appellant's limbus system dysfunction made him do it (Vol. XI, R. 989). Dr. Wood testified that Sexton had the ability to know that killing Joel Good was wrong and the witness claimed he was not in a position to say Sexton was without any ability to

plan to kill. (Vol. XI, R. 991).

The trial court in its sentencing findings concluded that there were three aggravating factors present: prior violent felony conviction, a 1965 armed robbery in West Virginia (assigned little weight), capital felony committed for the purpose of avoiding or preventing a lawful arrest (great weight), and cold, calculated and premeditated without pretense or moral or legal justification (great weight) (Vol. III, R. 385-388). The court found a single statutory mitigator -- under extreme mental or emotional disturbance at the time (great weight) and six other non-statutory mitigators (including Willie Sexton's lesser sentence) were given some weight (Vol. III, R. 386-388). A copy of the lower court's sentencing findings is attached herewith. This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I: The instant claim relating to the admissibility of testimony about the death of Skipper Lee Good is procedurally barred for the failure to interpose a contemporaneous objection in the lower court. Alternatively, the claim is meritless as this evidence has specifically been found to be admissible in this Court's prior opinion on Sexton's last appeal and the evidence continues to be relevant as to Sexton's motive and inextricably intertwined to place the Joel Good homicide in context.

ISSUE II: The trial court made adequate inquiry as to Appellant's general complaint of disagreement with trial counsel's tactics, Appellant did not offer any specific complaint when given the opportunity at the hearing. *See* Lowe v. State, 650 So.2d 969 (Fla. 1994); Howell v. State, 707 So.2d 674 (Fla. 1998). Counsel could legitimately decide to retain closing argument because of its critical importance. *See* Birge v. State, 92 So.2d 819 (Fla. 1957); Wike v. State, 648 So.2d 683 (Fla. 1994).

ISSUE III: The trial court did not err reversibly in permitting limited, edited victim impact testimony from the victim's aunt and uncle as such testimony is permitted by statute and this Court's precedents. Windom v. State, 656 So.2d 432 (Fla. 1995). This claim should be deemed barred for

Appellant’s failure below -- after receiving notice of the content of their testimony -- to seek exclusion prior to the testimony. Additionally, the testimony of Boron and Barrick was brief and constituted a legitimate commentary on the good personal qualities of Joel Good. There was no undue prejudicial information submitted. The Court need not reconsider its prior consistent precedents upholding the use of such testimony. The trial court did not abuse its discretion in failing to permit videotaping of the victim impact evidence and this Court can provide meaningful appellate review without requiring the videotaping of all or a portion of a capital trial.

ISSUE IV: The sentence of death imposed *sub judice* is not disproportionate. The instant case involves three strong aggravators including CCP (deemed one of the most serious created by the legislature), the trial court properly considered and gave appropriate weight to mitigation proffered and the mere fact of the presence of a mental mitigator does not require a finding of disproportionality. *See* Robinson v. State, ___ So.2d ___, 24 Fla. L. Weekly S393 (Fla. 1999). Certainly Eddie Lee Sexton is most deserving of the death penalty for his use of the abused and more limited Willie Sexton as his tool to murder Joel Good to avoid detection by authorities.

ISSUE V: The provision allowing a jury death recommendation by a bare majority vote does not violate the United States

Constitution and this Court should adhere to its consistent precedents on this issue. Moreover, the jury in the instant case recommended death by a vote of eight to four, not by a bare majority and thus Appellant is entitled to no relief.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN ALLOWING UNOBJECTED-TO TESTIMONY RELATING TO THE DEATH OF SKIPPER LEE GOOD.

Appellant complains under this first point that the State impermissibly adduced testimony from Willie Sexton, Matthew Sexton, and Pixie Good about the death of Pixie and Joel Good's infant son Skipper Lee Good. The record reveals that the defense interposed no objection contemporaneously to any of the testimony of Willie Sexton (Vol. VI, R 405-460; Vol. VII, R. 464-498), or of Matthew Sexton (Vol. VII, R. 499-519), or of Pixie Good (Vol. VII, R. 539-611). Nor did Appellant even complain about such testimony non-contemporaneously prior to or during the jury selection or in the trial transcript prior to the testimony.[1] Presumably, Appellant in the lower court was satisfied with this Court's prior determination in Sexton v.

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[1]Appellant did present other motions for the court's resolution prior to opening statement and introduction of testimony (Vol. VI, R. 313-319). Defense counsel stated "That's all I have" (Vol. VI, R. 319). At a pretrial hearing on August 24, 1998, the defense announced agreement "on Willie's testimony" (Vol. XII, R. 1120) and the prosecutor announced he was not going to put in specific instances of abuse of the children (Vol. XII, R. 1122). The trial court's sentencing order recites that every effort was made by the court and the State to limit evidence of collateral bad acts to that relevant to two issues -- whether the defendant had a motive for killing the victim his son-in-law Joel Good and to what extent he could control and manipulate his son Willie Sexton, the actual killer. (Vol III, R. 384).

State, 697 So.2d 833, 837 (Fla. 1997):

> [5] With respect to the evidence that Sexton had fathered two of Pixie's children, was involved in the death of Pixie and Joel's baby, and had engaged in a standoff with Ohio police that resulted in him becoming a fugitive, we find that the trial court did not abuse its discretion in ruling this evidence relevant. We also conclude that the trial court did not abuse its discretion in performing the necessary weighing process and admitting this evidence. Because Sexton did not actually kill Joel Good, a material issue was whether Sexton had a motive for wanting Joel Good dead such that he would direct another person to commit the crime. The record shows that Joel Good, who had knowledge of all of this information, had expressed a desire to return to Ohio. Had the trial court excluded this evidence, the jury would not have understood why Sexton perceived Joel Good as a threat.

(emphasis supplied)

(1) The Instant Claim is Procedurally Barred:

Regretfully, the failure to object contemporaneously below in order to preserve the point for appellate review precludes consideration *ab initio* now. *See generally* Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Mordenti v. State, 630 So.2d 1080 (Fla. 1994); San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997)("we note that San Martin's intelligence level was never argued to the trial court as a basis for suppressing the statements. Thus, that issue is not available for appellate review."); Hazen v. State,

700 So.2d 1207, 1211 (Fla. 1997)(issue regarding admissibility of witness' statements about Hazen staring during a pre-trial hearing procedurally barred for lack of a contemporaneous objection, although asserted in motion in limine prior to witness' testimony); <u>Lindsey v. State</u>, 636 So.2d 1327, 1328 (Fla. 1994)(When the sister testified some three witnesses after the proffer of <u>Williams</u> Rule evidence, Lindsey did not object specifically to her testimony about the car accident and claim was procedurally barred. Because Lindsey failed to object to the testimony when given and on the ground now argued, he failed to preserve this issue for review.); <u>Correll v. State</u>, 523 So.2d 562, 566 (Fla. 1988)(challenge to introduction of similar fact evidence "is not properly before this Court because of defense counsel's failure to object to the testimony at trial. <u>Even when a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review</u>.")(emphasis supplied); <u>Lawrence v. State</u>, 614 So.2d 1092, 1094 (Fla. 1993)(same); <u>Norton v. State</u>, 709 So.2d 87 (Fla. 1997)(appellant's motion for mistrial at the close of the witness' testimony insufficient to preserve issue for appellate review); <u>Pomeranz v. State</u>, 703 So.2d 465, 470 (Fla. 1997)(failure to object to collateral crime evidence when it is introduced violates contemporaneous

objection rule and waives the issue for appellate review); Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994)(failure to object at time collateral crimes evidence is introduced waives issue for appellate review, even where prior motion in limine relating to that evidence has been denied); Feller v. State, 637 So.2d 911 (Fla. 1994); Harmon v. State, 527 So.2d 182 (Fla. 1988); Perez v. State, 717 So.2d 605 (Fla. 3DCA 1998)(opinion granting rehearing holding that following the Criminal Reform Act of 1996 the appellant's failure to preserve the Williams-Rule claim by contemporaneous objection precluded reversal on appeal); Chandler v. State, 702 So.2d 186, 195 (Fla. 1997)(failure to renew objection contemporaneously at the time of the testimony precludes review); Zack v. State, ___ So.2d, ___, 25 Fla. L. Weekly S19 (Fla. 1999). *See also* Goodwin v. State, ___ So.2d ___, 24 Fla. L. Weekly S583, 585 (Fla. 1999):

> Our appellate cases are filled with examples of errors that are unpreserved either because no objection was made[6] or because the objection was not specific.[7] If the error is "invited,"[8] or the defendant "opens the door" to the error, the appellate court will not consider the error a basis for reversal.[9] In addition, if it is alleged that evidence has been improperly excluded and the appellate record does not establish that a proffer has been made, the lack of an adequate record will be grounds to affirm.[10] Indeed, our case law is filled with procedural pitfalls that may preclude an error from being considered on appeal. (footnotes omitted)

(2) The Claim is Also Meritless:

Appellant contends it was error to allow Willie, Matthew and Pixie to testify about the circumstances of the death of Pixie and Joel Good's infant son Skipper Lee Good. He argues that the details of the death were not relevant to whether Mr. Sexton ordered Joel killed and that the prejudicial impact outweighed its probative value. Sexton concedes (Brief, p. 44) that in the prior appeal this Court determined that Sexton's involvement in the death of the baby was relevant but he claims the relevancy in retrial was significantly diminished and the amount of the testimony relating to the baby's death not necessary and suggests the issue be revisited. Appellant asserts that in the first trial the main issue was whether Appellant directed Willie to kill Joel Good or as the defense suggested Pixie did and that in the first trial Willie did not testify whereas in the retrial Willie testified and maintained that Sexton -- not Pixie -- directed him to put Joel to sleep. Thus, he maintains, with Willie's direct testimony the necessity was not there to establish why Sexton as opposed to Pixie had been involved in the murder. This argument is belied by the fact that defense counsel both in his opening statement and in closing argument continued to urge the refrain that Willie's testimony not be believed and that Pixie was the dominating force. (See Vol. VI,

R. 346, defense opening statement that the evidence would show "that Joel Good was killed by a wife who hated him, Estella Good and by the brother she was closest to, Willie"; Vol. X, R. 842, defense closing argument that the evidence supported the view "that Estella Sexton controlled Willie Sexton, that Estella Sexton had an equally strong motive to kill Joel Good, and that Estella Sexton egged Willie on to kill Joel Good.").

This Court has consistently held that the test of admissibility of evidence of other crimes is relevancy, not necessity, since the seminal decision of Williams v. State, 110 So.2d 654 (Fla. 1959). *See, e.g.*, Ruffin v. State, 397 So.2d 277, 279-280 (Fla. 1981); Hall v. State, 403 So.2d 1321, 1324 (Fla. 1981); Whitfield v. State, 706 So.2d 1, 4 (Fla. 1997); Chandler v. State, 702 So.2d 186, 192 (Fla. 1997); Kimbrough v. State, 700 So.2d 634, 637 (Fla. 1997); Consalvo v. State, 697 So.2d 805, 813 (Fla. 1996); Foster v. State, 679 So.2d 747, 753 (Fla. 1996); Hunter v. State, 660 So.2d 244, 251 (Fla. 1995); Pittman v. State, 646 So.2d 167, 170 (Fla. 1994); Smith v. State, 641 So.2d 1319, 1322 (Fla. 1994); Crump v. State, 622 So.2d 963, 967 (Fla. 1993). The contention that the evidence may be prejudicial is unavailing since as stated in Ashley v. State, 265 So.2d 685, 694 (Fla. 1972):

> All evidence that points to a defendant's commission of a crime is prejudicial. The

true test is relevancy.

Appellant argues that the testimony at this trial was different from that in the first as to the reasons Joel wanted to go back to Ohio; he claims that in the first trial the prosecution theory hinged on the reason for Sexton's desire to prevent Joel's return to Ohio was for his own prosecution for the death of the baby, but that in this retrial Pixie indicated that Appellant was not worried about being in trouble for the baby's death but was more concerned about the authorities locating the family and acting upon outstanding arrests. It is quite irrelevant what Appellant's recollection of the emphasis given to certain aspects of some witnesses' testimony in the first trial may be; the prosecutor may have chosen to have a witness be less expansive in the testimony by his questioning. But clearly this Court in its decision deemed it important and relevant that Sexton "was involved in the death of Pixie and Joel's baby" and "Joel Good, who had knowledge of all this information, had expressed a desire to return to Ohio." 697 So.2d at 837.

Appellant continues that in this retrial there was no testimony that Joel desired to turn in Sexton to Ohio authorities for the death of the baby. But Appellant misses the point about whether Joel Good wanted to have Sexton prosecuted

by Ohio authorities for Skipper's death (it would seem Ohio authorities would have no jurisdiction to prosecute a homicide occurring in the State of Florida). The real point is that Sexton had a legitimate concern that Joel Good if allowed to return to Ohio would disclose all he knew about Sexton's activities to grandparents and Ohio authorities -- including a mysterious death and unofficial burial of Skipper -- which would lead to Appellant's discovery and apprehension. As this Court determined in the prior appeal the evidence was relevant and for a legitimate purpose -- not merely to attack the defendant's character.

Appellant next contends that it was error to present the details of the death and burial of the infant. This too is meritless as well as being procedurally barred for the failure to object below. The testimony relating to the burial of infant Skipper was brief and factual in nature. Steve Ready briefly testified that Charles Sexton pointed out where the infant had been buried on November 20th or 25th (Vol. VI, R. 373-375) as did Detective King (Vol. VI, R. 395), Willie Sexton who described Appellant's concern of disclosure to Ohio authorities by Joel Good ("they'll arrest you and you will tell them where we are and they'll arrest us" -- Vol. VI, R. 433) briefly commented on Sexton's burial ceremony (Vol. VI, R. 434). There

was no graphic detail, no unduly emotional presentation whether by photos or words (unlike that presented in Steverson v. State, 695 So.2d 687 (Fla. 1997)).

Much as Appellant would prefer not to acknowledge the matter, the fact remains that the circumstances of the death of infant Skipper Lee Good was an integral part of the murder of Joel Good.

(1) Willie Lee Sexton testified about Appellant's concern about HRS workers, the desire to take them out since they took his kids (Vol. VI, R. 419-420), the training with guns and garrotte and Joel's desire while in Indiana to return home and again in Florida (Vol. VI, R. 423-426) when baby Skipper got sick, kept crying and making noise Appellant told Pixie to shut the baby up before the baby got them caught with his noise to surrounding campers. When the baby began crying at 4:00 in the morning Appellant told her to smother it and explained that she should put her hand over the nose and mouth and hold it ((Vol. VI, R. 428-430). The next morning when the baby was dead Joel was shocked and crying, Joel wanted a real burial and Appellant said no, that they would arrest Joel and that would lead to Appellant's arrest when Joel told of their location (Vol. VI, R. 432-433). Joel was not happy about not taking the baby back to Ohio. Appellant told Joel he could never go back to Ohio, that

Joel was a snitch for wanting to go back to Ohio and tell the grandparents and the law what happened. Thereafter Appellant told Willie of the job of putting Joel to sleep to keep Joel from telling the grandparents about the baby being dead (Vol. VI, R. 433-441). Even after the killing Appellant wanted the victim's hand cut off to eliminate evidence (Vol. VI, R. 447).

(2) Matthew Sexton also saw Pixie smother the baby when told by Appellant to quiet the baby (Vol. VII, R. 507). Before the picnic Appellant mentioned they had to watch Joel because he might take off and give them all away since Joel was "broke down" because his baby was killed (Vol. VII, R. 510).

(3) Christopher Sexton Riesenberg confirmed that when Skipper Lee was killed, Joel told Appellant he wanted to go to the authorities Appellant would not let him go, described Joel as a snitch and asserted a "good snitch is a dead snitch" (Vol. VII, R. 522).

(4) Pixie Good saw Willie with rope around Joel's neck, heard the victim yell "Ed" and Appellant told Willie to finish him off (Vol. VII, R. 545, 550, 552). She overheard Appellant tell her mother after the killing that he had Willie kill Joel because he knew too much (Vol. VII, R. 557). On three prior occasions Appellant talked of getting rid of Joel, once near the

campsite, then on two trips to Ohio to get his check. On the first trip Appellant's stated concern was Joel's desire to go back to Ohio and the fear of revealing their location; on the second trip Appellant wanted to get rid of him because Joel wanted to come back to Ohio concerning the baby -- Joel was killed the next day (Vol. VII, R. 557-560). The witness confirmed Appellant's concern that the baby's crying would draw unwanted attention and that he told her to quiet the baby -- would not allow taking the infant to the hospital and told her the baby died of crib death. Joel was upset, tired of everything going on and wanted to bring the baby back to Ohio but Appellant was angry and said nobody was going back to Ohio (Vol. VII, R. 569-572).

(5) USF librarian Gail Novak described the visit when Pixie inquired about crib death following Skipper's demise wherein Willie talked to Appellant that Joel wanted to get on an airplane and go back to Ohio and Appellant's reply that the only way that boy's going back to Ohio is in a body locker (Vol. IX, R. 729) and that Joel told her and others he had a plane reservation and wanted to go back to Ohio that day (Vol. IX, R. 746).

Appellant may not permissibly sanitize the Joel Good homicide by suggesting the bland explanation that it is merely

understandable by Sexton's desire to remain hidden from Ohio authorities because of his relationship with and treatment of the children. While that too was involved, the jury was entitled to learn that the <u>impetus</u> for, and the <u>timing</u> of, Joel Good's death was the death of infant Skipper and the likelihood of Joel's eventual return to Ohio to inform the grandparents and authorities of that death unless stopped.[2] This Court appreciated that in the last appeal when it announced such evidence was admissible:

> Because Sexton did not actually kill Joel Good, a material issue was whether Sexton had a motive for wanting Joel Good dead such that he would direct another person to commit the crime. The record shows that Joel Good, who had knowledge of all of this information, had expressed a desire to return to Ohio. Had the trial court excluded this evidence, the jury would not have understood why Sexton perceived Joel Good as a threat.

697 So.2d at 837.

See also footnote 2 at page 835 of the opinion:

> FN2. Pixie testified that the baby had been ill for weeks but Sexton would not let her take him to the doctor. One night, he would not stop crying. Sexton ordered Pixie to quiet the baby or else he would do it for her. Pixie, who already had given the baby children's Tylenol and adult Nyquil, held

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[2]To exclude evidence pertaining to infant Skipper's death would be like attempting to discuss the reasons for the start of World War I with no mention of the assassination of the Austrian archduke at Sarajevo.

> her hand over the baby's mouth until it stopped crying. The next morning the baby was dead.

During this Court's announced approval of the testimony regarding the Skipper Good testimony, the Court did not deem Steverson v. State, 695 So.2d 687 (Fla. 1997) as mandating a new trial although that decision was cited in support of the Court's ruling condemning the litany of bizarre behavior and abuse by the Sexton children. 697 So.2d at 837-838. Steverson, unlike the instant case, involved evidence of virtually every detail of the shooting of a police detective four days after the homicide being prosecuted including every emotional aspect of it and graphic and photographic description of the offense not being tried.

Appellant can receive no sustenance from the cases he relies on. In Henry v. State, 574 So.2d 73 (Fla. 1991) this Court reversed because the killing of Eugene Christian "was irrelevant to explain or illuminate defendant's wife's murder, and did not prove motive, intent..."; and while some reference to the boy's killing may have been necessary to place the events in context, it was totally unnecessary to admit abundant testimony concerning the search for the boy's body, details of the confession how he was killed and an 8 by 14 color photograph of the boy's body. Id. at 75. Significantly, after retrial (where

trial court prohibited in-depth testimony about the search for Christian's body, the autopsy photo or the manner of killing) this Court affirmed, noting:

> The facts in question relating to Eugene Christian's murder were inextricably intertwined with facts pertaining to Suzanne Henry's murder. To try to totally separate the facts of both murders would have been unwieldy and likely have led to confusion.

Henry v. State, 649 So.2d 1366, 1368 (Fla. 1994)

Long v. State, 610 So.2d 1276 (Fla. 1992) is similarly inapposite. There, the Court reversed because Long was denied the opportunity to have portions or the entirety of a CBS interview placed in evidence and improper Williams-rule evidence became a feature of the trial (four hours of testimony presented concerning the murder in issue versus three days of testimony pertaining to offenses not being tried).

In Gore v. State, 719 So.2d 1197 (Fla. 1998) this Court reversed for new trial based on the cumulative effect of a prosecutor's improper cross-examination of the defendant and improper closing argument which included personal attacks on the defendant and an entreaty to convict if the jury disbelieved the defendant. As to the cross-examination on Williams-rule evidence, the trial court had explicitly precluded the State from introducing details of what occurred after Gore left

Williams-rule victim Corolis for dead (including leaving a two-year-old child naked and locked in a burned and abandoned house in freezing temperatures). Without seeking trial court permission the prosecutor asked inflammatory questions about the mistreatment of the child. The questions asked did not serve to impeach the defendant on his paternity, any probative value was marginal and likely that the jury considered it to establish Gore's bad character. In contrast, *sub judice*, the defense interposed no objection presumably because the defense recognized the relevance and propriety of the testimony concerning Skipper Good's death.

This court's precedents clearly permit evidence of another crime or bad acts when it is relevant to show the appellant's motive for the instant crime being tried. See Jorgenson v. State, 714 So.2d 423, 427-428 (Fla. 1998) ("with respect to the evidence that Jorgenson was a drug dealer, we find that that trial court did not abuse its discretion in ruling that the evidence was relevant. A material issue in this trial was Jorgenson's motive for the alleged murder"); Chandler v. State, 702 So.2d 186, 194 (Fla. 1997)(even though collateral crimes are not exactly the same, the dissimilarity could be attributed to difference in opportunities and evidence relevant to establish defendant's motive to lure women to his boat to commit violence upon them). In Heiney v. State, 447 So.2d 210, 214 (Fla. 1984)

this court explained:

> Applying this test, we find that the collateral crime evidence was relevant and admissible. It was relevant to show motive for the subsequent crimes and to establish the "entire context" of the crimes charges. This evidence is relevant to show that Heiney's desire to avoid apprehension for the shooting in Texas motivated him to commit robbery and murder in Florida so that he could obtain money and a car in order to continue his flight from Texas. He had no transportation, no money, and was running from a possible murder. He was desperate. Because this evidence is clearly relevant and admissible, Heiney's contention that its introduction constitutes reversible error is without merit.

See also Fotopoulos v. State, 608 So.2d 784, 790 (Fla. 1992) (after sorting through a complex series of players and events including two murders this court approved denial of severance and noted that even with separate trials "evidence of each offense would have been admissible at trial of the other to show common scheme and motive, as well as the entire context out of which the criminal action occurred"); Wuornos v. State, 644 So.2d 1000, 1007 (Fla. 1994)(finding the relevance of six similar murders committed by defendant clearly outweighed the prejudice of their admission); Griffin v. State, 639 So.2d 966, 968 (Fla. 1994)(explaining that evidence of uncharged crimes which are inseparable from the crime charged or evidence which is inextricably intertwined with the crime charged is not Williams rule evidence. It is admissible under 90.402 because

"it is a relevant and inseparable part of the act which is in issue....[I]t is necessary to admit the evidence to adequately describe the deed."); Bryan v. State, 533 So.2d 744,746 (Fla. 1988)(reiterating the controlling importance of relevance); see also Zack v. State, ___ So.2d ___, 25 Fla. L. Weekly S19 (Fla. 2000)(trial court did not err in admitting evidence of other crimes during two week period prior to murder because it was relevant as part of a prolonged criminal episode demonstrating Zack's motive, intent, modus operandi and the entire context from which this murder arose; trial court correctly struck the balance in favor of admissibility because the other crimes demonstrated Zack's method of operation and helped put the present case in perspective. While undeniably prejudicial to defendant, its probative value outweighed the prejudicial effect. Additionally the evidence did not become a feature of the trial and was not excessive, unlike Steverson v. State, 695 So.2d 687 (Fla. 1997))

ISSUE II

WHETHER THE LOWER COURT ERRED REVERSIBLY IN ALLEGEDLY FAILING TO ADEQUATELY ADDRESS A REQUEST FOR NEW COUNSEL.

On August 24, 1998, Sexton's handwritten motion noting his lack of confidence in his attorneys was reviewed and filed by the lower court (SR 3-4). At the August 24 hearing the court explained -- when Sexton indicated a desire for new lawyers -- that the court was not required to just fire and hire new lawyers for it would be a never ending thing and informed the Appellant that he had the option of self-representation. Sexton replied that he didn't have the ability to represent himself and that he lacked confidence in his attorneys at that time (Vol. XII, R. 1096-1097). Sexton asserted that in February he had requested a change of attorneys and some other judge did not entertain that motion. The court added that it understood that the confidence level frequently wavers with an attorney -- sometimes there are good days and sometimes bad days and some days in between and that the court was not allowed to appoint new lawyers simply because he did not have confidence in his two lawyers (Vol. XII, R. 1099). Defense attorney Fraser and Terrana did not add anything. Mr. Terrana expressed that they were unaware of this until reading the letter this morning (Vol. XII, R. 1099).

A month earlier on July 15, 1998 at a hearing on the State's

motion suggesting a possible conflict by defense counsel Terrana, Mr. Sexton was adamant in his desire to retain Mr. Terrana as his counsel (Vol. XII, R. 1087).

In Gudinas v. State, 693 So.2d 953 (Fla. 1997) this Court determined that the trial court conducted an adequate inquiry in accord with the procedure outlined in Hardwick v. State, 521 So.2d 1071 (Fla. 1997) and noted in footnote 12 of that opinion:

> ...a *Nelson* inquiry is not warranted where, as here, the record indicates that Gudinas' claim was essentially a general complaint about defense counsel's trial strategy and no formal allegation of incompetence was made.

(text at 962)

Accord, Branch v. State, 685 So.2d 1250, 1252 (Fla. 1996)("Branch's comments seemed to be a general complaint, not a formal allegation of incompetence."); *see also* Howell v. State, 707 So.2d 674, 680 (Fla. 1998)("However, the trial judge's inquiry can only be as specific as the defendant's complaint."); Lowe v. State, 650 So.2d 969, 975 (Fla. 1994)(no error in failing to conduct *Nelson* inquiry after defendant expressed dissatisfaction with counsel when he could give no specific reason for his assertion; trial judge conducted adequate inquiry under the circumstances); Jimenez v. State, 703 So.2d 437, 439 (Fla. 1997)(no further inquiry warranted when defendant and second chair counsel declined to explain nature of the conflict).

In summary, Sexton was merely noting a disagreement with trial strategy of counsel and at the hearing before Judge Padgett on August 24, 1998 did not assert any basis to support a contention that counsel was not competent. The mere fact that counsel explained to Sexton the better tactic of preserving closing argument by opting not to present witnesses does not suggest incompetence. This Court has emphasized the critical role played in the retention of closing argument; denial of that right is treated as reversible error and not harmless. *See, e.g.*, Birge v. State, 92 So.2d 819 (Fla. 1957); Raysor v. State, 272 So.2d 867 (Fla. 4DCA 1973); Wike v. State, 648 So.2d 683 (Fla. 1994).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN THE ADMISSION OF THE VICTIM IMPACT EVIDENCE.

1. Victim Impact Evidence Was Permissible:

This Court has consistently and repeatedly upheld the admission of victim impact evidence, as permitted by F.S. 921.141(7) and Payne v. Tennessee, 501 U.S. 808, 115 L.Ed.2d 720 (1991). *See, e.g.*, Windom v. State, 656 So.2d 432, 438 (Fla. 1995); Bonifay v. State, 680 So.2d 413, 419-420 (Fla. 1996); Farina v. State, 680 So.2d 392, 399 (Fla. 1996); Damren v. State, 696 So.2d 709, 712-713, n 6 and 7 (Fla. 1997); Burns v. State, 699 So.2d 646, 652-654 (Fla. 1997); Moore v. State, 701 So.2d 545, 550-551 (Fla. 1997); Cole v. State, 701 So.2d 845, 851 (Fla. 1997); Davis v. State, 703 So.2d 1055, 1060 (Fla. 1997); Jackson v. State, 704 So.2d 500, 507 (Fla. 1997); Alston v. State, 723 So.2d 148, 160 (Fla. 1998).

In the instant case at the pretrial hearing on November 19, 1997, the prosecutor indicated that he would have one or two witnesses to provide victim impact evidence and to reduce potential problems the prosecutor would have them put their statement in writing and edit them to within the parameters of the law and provide it to counsel and the court and have the witnesses read the statements to the jury at the penalty phase. The court granted the motion to limit victim impact evidence in accord with the prosecutor's statement. (Vol. XII, R. 1064,

1069)

At the penalty phase, victim Joel Good's aunt and uncle, Teresa Boron and Asby Barrick each testified briefly -- about four pages and one page respectively (Vol. XII, R. 891-95, R. 897) -- concerning the family's loss and the personal qualities of Joel Good. It does not appear that the defense submitted any objection to the edited statements actually given prior to the testimony and simply requested a mistrial at R. 895 because witness Teresa Boron was weeping.[3]

To the extent that appellant may now be complaining about the content of the victim impact witnesses' testimony, he should be deemed procedurally barred for the failure to contemporaneously object below when the testimony was given. *See* Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Mordenti v. State, 630 So.2d 1080 (Fla. 1994). The only objection presented below for which appellant sought a mistrial was the fact that the witness and perhaps some of the jury were crying -- and that is not urged as mandating reversal here.

Even if the claim is deemed adequately preserved, however,

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[3]The defense did object and the court agreed to strike two paragraphs relating to the victim's holding his baby in heaven and not deserving to die this way. (Vol. XI, R. 881-882; Vol X, R. 873-875) The defense had seen the script of one witness in August of 1998 and the court agreed to discuss the matter if there were disagreement on the second. (Vol. XII, R. 1139) Teresa Boron's statement was provided to the defense prior to her testimony. (Vol. XI, R. 1044)

relief must be denied because it is meritless. Appellant complains that Ms. Boron characterized the killings of Joel and Skipper as being "senseless," that she referred to appellant as "sick" and that the victim Joel Good's death was "tragic and unnecessary." (Brief, p. 56) Appellee disagrees that any of the testimony of the witness was improper. Ms. Boron's testimony demonstrated the unique personal qualities of Joel Good and the effect on the surviving family. Ms. Boron described him as a special person whose life was filled with tragedy and difficulties -- orphaned at an early age when his father died of a massive heart attack when Joel was ten years old and Joel's mother died three years later from complications of diabetes. At various stages he lived with aunts and grandparents and Ms. Boron treated him as a son. Joel had learning difficulties, had difficulty in school and in social skills but would give the shirt off his back to anyone who needed it and this "goodness of his heart" led to his death. (Vol. XI, R. 891) Joel fell head over heels in love with his wife Pixie "his first and only love." Joel told the witness Pixie was pregnant and he wanted to do what his parents would have wanted -- to marry her, make her an honest woman and give the child his name. Joel couldn't wait for the birth of his child, and the last time she saw Joel he gave her a huge hug and kiss and told her to remember he would always love her. (Vol. XI, R. 892) Joel was on cloud 9

with this child; he always wanted to be a father and have a family. He loved his family and wanted to come home desperately after the death of his son. Joel filled many roles for many people: beloved son, grandson and nephew. He was one of the kindest and gentlest of human beings and the family feels the void left by his death every day in their lives. (Vol. XI, R. 893) He was only twenty-four years old. Ms. Boron's father's emphysema condition worsened over worry about Joel's being missing. Joel's brother -- since the death -- has had problems with alcohol abuse and keeping jobs and has lost all his immediate family. Ms. Boron will never get a hug or a happy birthday card from Joel. She missed the opportunity to see what he would become; it was a wound that will not heal. (Vol. XI, R. 894) Similar testimony has been approved by this Court. In Alston, *supra*, the Court rejected the contention that testimony of the victim's mother exceeded the scope allowed by Payne, and F.S. 921.141(7). 723 So.2d at 160. In Davis, *supra*, this Court permitted the victim's mother to read a statement to the jury regarding the impact of the death on friends and family. ("The statement discussed the victim' importance to her brother, sister, mother, family, and friends--clearly the type of evidence contemplated by the decisions of this Court and the United States Supreme Court." -- 703 So.2d at 1060) In Cole, *supra*, the Court approved testimony of a high school teacher

regarding the victim's scholastic abilities and personality. 701 So.2d at 851. In <u>Moore</u>, *supra*, the Court approved the testimony of a daughter that the victim was a good man who never bothered anybody, was free-hearted and loved everybody. 701 So.2d at 550. In <u>Damren</u>, *supra*, this Court approved the testimony of the victim's wife and daughter who read prepared statements to the jury which was repeated in footnotes 6 and 7 of that opinion:

> FN6. The wife testified as follows:
>
> > Don has touched many people, especially his family.
>
> Don was the only child of Virginia and Donald Miller. They moved here to be close to their son in their retirement years. Now that is gone.
>
> Don has two children; Terri, age 27 at [Don's] death and Jeff, age 23 at [Don's] death. True, they are grown, but that does not mean that they don't miss having him here to go to for advice or a laugh or a hug. Don was very proud of his kids. They were always very important to him. He loved them as only a father could. When Don was killed that also took my life as I knew it. So, in a sense they have lost not only their father but their mother too.
>
> Jeff has had a hard time dealing with his father's death. He had transferred back to Indiana to finish his college education.
>
> Terri has had to deal with a lot. Trying to be strong for them and for me.
>
> Don and I started going steady when we were 14 years old, married at 18. At the time of

his death we had been married for 28 years. Don was killed in the prime of his life. He was only 46 years old. We were planning a cruise in June of 1995, sort of the honeymoon we never had. Don was my life, he was my best friend.

The last conversation I had with him on May 1, 1994, was when he was leaving to go back to the mine. I had asked him if he would be long and he told me it didn't matter because at 7:00 that next morning he would be on vacation and he'd be home by 8:00 a.m. Don didn't get to come home.

Don worked hard all his life. Some of his co-workers had offered to take his call duty the night of May 1, 1994, because he was supposed to start vacation the next day. He wouldn't let them. He felt it was his responsibility. He was heavily involved with the Union, his main concern being safety in the work place.

He was active with an organization called A.B.A.T.E. (American Bikers Aiming Toward Education). A.B.A.T.E. is a political organization but they also put on numerous benefits for needy families. A big majority of these were held at our house. They also sponsor blood drives. He participated every year in Toys for Tots at Christmas time.

Don touched many people in the short nine years of being in Florida. He is greatly missed by friends and family.

FN7. The daughter testified as follows:

> Don Miller was more than just a case number. He was my dad. He had a family. He used to play catch with my son, Nicholas, who was seven at the time, getting him ready for his first baseball game. He never got to see that game. On the 2nd of May, the day after my father was killed, he had planned to go fishing with my son. That will never happen now.

> When my daughter, Stephanie, turned five he took her to Merle Norman at the mall to get her ears pierced. That was her "special" gift from her Papa. He told her that every year on her birthday he would take her shopping for earrings. He never got to do that either. She was still only five years old when he died.
>
> These two grandchildren were the "apple of his eye." Now he can't be there for them as they grow up like he always was for me and my brother. These kids are now six and eight and are in counseling through their school to try to learn how to deal with their grief and to understand death. A lot of their childhood has been taken away. Not only have they lost their Papa, they have also been forced to see the ugly side of life at a very young age.
>
> My dad had many friends from all walks of life. He fit in almost anywhere. I can think of 25 to 30 of his good friends off the top of my head. He was the type of person who was always willing to help you out as long as you were trying to help yourself. He had respect for other people and their feelings and he got respect in return.
>
> This whole ordeal has taken its toll on our entire family, we've all suffered such a loss. We've lost our child, husband, dad, grandpa and friend--we never got a chance to say goodbye.

In Bonifay, *supra*, this Court reiterated that the boundaries of relevance under the statute include evidence concerning the impact to family members:

> Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family

> and to the larger community outside the family. Therefore, we find this testimony relevant.

(680 So.2d at 420)

Appellant argues that the reference in the testimony to Skipper Good was improper, irrelevant and unduly prejudicial. Appellee disagrees. That there may be some emotional content in victim impact testimony should not be deemed surprising, but when we consider that the two witnesses in the instant case provided a truncated, edited version of Joel Good's life and the impact of his loss on surviving relatives and the trial court limited some of the proposed remarks of the witnesses, appellant cannot reasonably complain that reversible error is present. *Cf*. Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987)("We cannot, however, rewrite on the behalf of the defense the horrible facts of what occurred or make the slaying appear to be less reprehensible than it actually was.") Appellant offers his "assumption" at Brief pp. 57-58 that the Boron-Barrick testimony had an overwhelming impact on the jury because in the first trial, the penalty phase recommendation was 7 to 5 when that jury was exposed to the impermissible evidence which occasioned reversal whereas in the second trial with mental health testimony and victim impact evidence the recommendation was 8 to 4. The short answer to this, of course, is that two different juries were involved and one cannot compare apples to oranges.

Additionally, in this case the jury heard mental health evidence from Dr. Solomon pertaining to Willie Sexton to balance the weak defense expert testimony, and heard from a new witness, Kimberly Sexton. Perhaps the first jury vote was closer because some felt the details of the Sexton family life should be deemed mitigating. In any event, there was no prejudicial testimony by Barrick (Vol. XII, R. 897) and the edited testimony of Boron was not unduly prejudicial, as stated above.

2. Reconsideration of Allowing Victim Impact Evidence:

No persuasive reason has been advanced to cause this Court to revisit its precedents. Both the United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, 115 L.Ed.2d 720 (1991) and the legislature with the enactment of F.S. 921.141(7) have declared that it is proper for a jury to get a glimpse of the life that was extinguished and the abbreviated accounts of Teresa Boron and Asby Barrick *sub judice* should not require the Court to pause in permitting such evidence.

3. Videotaping of the Victim Impact Evidence:

Appellant candidly acknowledges that he could locate no Florida cases which authorize the practice. In any event no abuse of discretion has been demonstrated in the trial court's ruling [since reasonable persons would agree with the trial court's ruling -- Hamilton v. State, 703 So.2d 1038, 1041 (Fla. 1997); Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990)] and

obviously meaningful appellate review can be easily obtained by review of the transcript of testimony. Taken to its logical extreme, appellant’s argument would also mean that entire trials in capital cases must also be videotaped for meaningful appellate review. That certainly is not required by the current state of the law and should not be mandated following this appeal.

ISSUE IV

WHETHER THE SENTENCE OF DEATH IS DISPROPORTIONATE.

This Court recently stated in Robinson v. State, ___ So.2d ___, 24 Fla. L. Weekly S393 (Fla. 1999):

> Upon review, we find that death is the appropriate penalty in this case. In reaching this conclusion, we are mindful that this Court must consider the particular circumstances of the instant case in comparison with other capital cases and then decide if death is the appropriate penalty. *See Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997) (citing *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996), *cert. denied*, 118 S. Ct. 1079 (1998)); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988). Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. *Terry*, 668 So. 2d at 965. Following these established principles, it appears the death sentence imposed here is not a disproportionate penalty compared to other cases.[9] *See Spencer v. State*, 691 So. 2d 1062 (Fla. 1996); *Foster v. State*, 654 So. 2d 112 (Fla. 1995).

(Id. at 396)

In performing its proportionality review function the Court must "consider the totality of the circumstances in a case and ... compare it with other capital cases." Nelson v. State, ____ So.2d ____, 24 Florida Law Weekly S250, 253 (Fla. 1999); Terry v. State, 668 So.2d 954, 965 (Fla. 1996). Proportionality review requires a discrete analysis of the facts entailing a qualitative review by the Court of the underlying basis for each

aggravator and mitigator, rather than a quantitative analysis. Urbin v. State, 714 So.2d 411 (Fla. 1998); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). It is not a comparison between the number of aggravating and mitigating circumstances. The Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if death penalty is appropriate.

Appellant acknowledges the presence of three valid aggravators and does not challenge the correctness of those findings for (1) prior violent felony conviction, (2) CCP, and (3) murder to avoid arrest or detection; nevertheless, he contends that the presence of mental mitigation and other matters renders the death penalty disproportionate. Sexton first attempts to minimize the weight this Court should apply to aggravators -- having failed to do so with the judge and jury below -- by noting that the prior violent felony stemmed from a 1965 armed robbery and thus he urges that this "essentially becomes a two aggravator case" (Brief, p. 64). It is true that the trial court in its weighing process chose to assign little weight due to the passage of time (Vol. III, R. 388) but that does not mean that Appellant can blithely erase or determine that no proportionality weight be afforded to it. Certainly, if a trial court were to provide little weight to some proffered mitigation and then in its weighing analysis mention that

mitigation which had merited only substantial weight would be put in the calculus, the defense would legitimately argue that there was non-compliance with Campbell v. State, 571 So.2d 415 (Fla. 1990) and its progeny. The instant case is still a three aggravator case, but as noted in the cases cited above, proportionality is not a mere tabulating of the number of aggravators versus mitigators.

Appellee would point out that this Court has indicated in the proportionality jurisprudence the special place occupied by CCP in the hierarchy of aggravators. *See* Larkins v. State, 24 Fla.L.Weekly S379, 381 (Fla. 1999)("We also note that neither the heinous, atrocious, or cruel nor the cold, calculated, and premeditated aggravators are present in this case. These, of course, are two of the most serious aggravators set out in the statutory sentencing scheme, and, while their absence is not controlling, it is also not without some relevance to a proportionality analysis.")(emphasis supplied). *See, e.g.*, Maxwell v. State, 603 So.2d 490, 493 (Fla. 1992)(". . . the present case involves only two aggravating factors. These do not include the more serious factors of heinous, atrocious, or cruel, or cold, calculated premeditation.")(emphasis supplied). Thus, unlike Appellant who seems to characterize CCP as an aspect of the mental mitigator factor (Brief, p. 64) -- and if accepted would lead to a topsy-turvy world in which aggravators

and mitigators not only become confused but also interchangeable -- Appellee submits that this Court should, like the trial court, give great weight to CCP (Vol. III, R. 388). The lower court explained:

> 3. <u>The capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.</u>
>
> Focusing on the manner in which the crime was executed the defendant's weapon of choice was Willie Sexton. A method or process of putting a person "to sleep" by the use of a rope placed around the neck and then twisted tight with a stick was explained and demonstrated to Willie by the defendant. It was often discussed between them in the 2-3 weeks preceding the killing. The defendant was his coach and Willie demonstrated the process for the defendant and others. After encouraging Willie to believe Mr. Good to be a dangerous potential informant and threat to the Sexton family, the defendant convinced Willie that the best way to dispose of Mr. Good would be to "put him asleep." On the morning of the day of the killing the defendant told Willie that this was the day he needed to put Mr. Good "to sleep" and a spot in the nearby woods to which the victim would be enticed was suggested as the place to do it. Willie testified that, in his way of thinking, he did not associate such strangling with death and did not anticipate that it would end in Mr. Good's death. He and others testified that the defendant was actually present at the critical moment when the strangulation began to, and did, cause death, encouraging Willie to "finish him off." Willie testified that he understood that he had killed Mr. Good and that he did it simply because his father, the defendant, ordered him to do it. The evidence establishes, beyond a reasonable doubt, heightened premeditation, lengthy and careful planning

> and prearrangement and an execution-style killing. This aggravating factor was proved beyond a reasonable doubt.

(Vol. III, R. 386)

Appellant seems to argue that this aggravator should not be deemed so severe since Sexton did not spend six years prior to the homicide obtaining life insurance policies on a spousal victim as in Larzelere v. State, 676 So.2d 394 (Fla. 1996). As for the time spent, the record reflects the numerous times Appellant indicated to Willie Sexton that Joel Good be put to sleep, Sexton's ruthless use of Willie as his tool and the benefit to him of nondisclosure of Appellant's presence and whereabouts to authorities. Appellant does not seem to challenge or seek to explain away the avoid arrest aggravator finding. The trial court reasoned:

> 2. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.
>
> The defendant, it is undisputed, was an interstate fugitive from Ohio after having violated a court order in that state relating to child abuse and custody. In addition, a few days before the killing the defendant had ordered a daughter to stop her infant's crying "... or I will do it for you." The infant, Joel Good's son, died as a result and was illegally buried at a campsite. Subsequently, Joel Good began talking of returning to his home in Ohio and of taking his son's body with him. At the same time, the defendant began talking, or "obsessing" as defense witness Dr. Wood put it, about disposing of Joel Good to prevent his departure and his expected revelation of the defendant's criminal acts and his

> whereabouts in Florida. He convinced his son Willie of the necessity of disposing of Mr. Good so as to avoid arrest. This was, according to the evidence, the sole or dominant motive for the killing of Mr. Good. This aggravating factor was proved beyond a reasonable doubt.

(Vol. III, R. 385)

It was appropriately given great weight. (Vol. III, R. 388)

Appellant then turns to the mitigation prong and, citing DeAngelo v. State, 616 So.2d 440 (Fla. 1993) contends that the presence of mental mitigation should lead to a disproportionality finding. This Court rejected similar arguments in Robinson v. State, *supra*. There, the defense contended that the trial court had failed to consider or gave improper weight to the mitigating evidence especially the evidence that he suffered from brain damage and that the death penalty was disproportionate. This Court disagreed, finding no abuse of discretion by the trial court. The lower court had considered and given little weight to the existence of brain damage because of the absence of any evidence that it caused Robinson's actions on the night of the murder and the experts could not determine what caused the brain impairment. The mere fact that Robinson disagreed with the trial court conclusion did not warrant reversal. *See* James v. State, 695 So.2d 1229, 1237 (Fla. 1997). As to proportionality, the Court in Robinson approved the death penalty since his mental problems did not

prevent him from living normally within society, the doctors opined he knew what he was doing at the time of the crime, Robinson admitted bludgeoning the victim to death after deliberately waiting for her to sleep, took steps to conceal the crime by burying the victim and lied to police about who committed the crime. As in the instant case, the Robinson case had three aggravators including the avoid arrest and CCP aggravators; and unlike the present case the trial court there found the presence of two statutory mitigators (extreme emotional distress and ability to conform to the requirements of law was substantially impaired). In the instant case the trial court considered the testimony of Dr. Weiner and Dr. Wood whose testing revealed an IQ in the low 80s and scores on some tests suggesting some kind of brain dysfunction. The court accepted that Sexton had an inability to cope placed under the stress of losing his children to Ohio authorities (Vol. III, R. 387). But the defense experts' testimony must also be considered in context. Dr. Weiner admitted on cross-examination that Sexton made a conscious decision to remain guarded because he did not want to open the door on certain personality traits (Vol. XI, R. 928-930). Dr. Weiner was not of the view that Sexton was unable to plan, orchestrate or carry out a murder because of his low average intelligence (Vol. XI, R. 930). Sexton had never been administered drugs to treat mental illness and did not describe

any hallucinations or delusions in his thought processes (Vol. XI, R. 932). Dr. Weiner did not have an opinion as to the cause of Appellant's dysfunction and acknowledged that Sexton was hypochondriacal (Vol. XI, R. 933-934). He had no opinion whether he could conform to the requirements of law and for the most part Sexton performed within the normal range on the MMPI. There was no bizarre or delusional thought processes as revealed by that test and Dr. Weiner saw nothing in the tests suggesting schizophrenia (Vol. XI, R. 936-937). And Dr. Wood admitted that it was not necessarily causative that Sexton's limbus system dysfunction made him to it (Vol. XI, R. 989), that Sexton had the ability to know killing Joel Good was wrong and the witness could not opine if Sexton was without any ability to plan to kill (Vol. XI, R. 991). Other witnesses testified as to his use of Willie and Pixie to get his way. Appellant here did not have anywhere near the disorders presented in DeAngelo, *supra* (where experts testified to brain damage, hallucinations, delusional paranoid beliefs and mood disorders).[4]

Appellant contends that his case is not comparable to others. He cites Cave v. State, 727 So.2d 227 (Fla. 1998), Henyard v. State, 689 So.2d 239 (Fla. 1996) and Hildwin v. State, 727 So.2d 193 (Fla. 1998) where death sentences were upheld and claims that death is disproportionate for him when

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[4]Moreover, DeAngelo was a single aggravator case.

compared to those. Appellee disagrees. In all these cases there were multiple aggravators and mental mitigators were not deemed sufficiently overwhelming to call for reduction. Appellant argues that his case is more similar to Boyett v. State, 688 So.2d 308 (Fla. 1996) and Puccio v. State, 701 So.2d 858 (Fla. 1997). Boyett was a jury override case with all the attendant protections of Tedder v. State, 322 So.2d 908 (Fla. 1975) and its progeny. *See* Burns v. State, 699 So.2d 646, 649, n 5 (Fla. 1997)("The remainder of the cases on which Burns relies are jury override cases. Jury override cases involve a wholly different legal principle and are thus distinguishable from the instant case."). Moreover, unlike Sexton, Boyett was eighteen years old, a victim not an enforcer of prior sexual abuse with a history of drug abuse and demonstrated remorse. In Puccio, the State conceded that the defendant was not a ring leader in the crime and this Court determined that there was no competent, substantial evidence in the record that Puccio was more culpable than the co-defendants. Appellant pays lip service to this Court's decisional authority that death sentence will be approved for a defendant who instigated, masterminded and was the dominant force in planning and executing the murder than co-defendant. *See, e.g.*, Larzelere v. State, 676 So.2d 394 (Fla. 1996); Cardona v. State, 641 So.2d 361 (Fla. 1994). But he contends, amazingly, that he was not a "significantly more

culpable person . . . exercising control over another individual with limited abilities. Willie and Mr. Sexton are not markedly different in their ability to function appropriately." (Brief, p. 69) Since the entire trial demonstrated the dominance and control of Appellant over the more disadvantaged and abused son Willie, Appellee will simply refer to the trial court's sentencing findings and order:

> The state's theory of prosecution was that the defendant so totally dominated, controlled and directed every facet of Willie Sexton's life that Willie would kill at his father's direction. In addition, the evidence showed that Willie is a dull-witted, childlike person who was 22 years old at the time of the killings. Further, the state urged as a motive for the killing that Joel Good was believed by the defendant to be about to reveal to law enforcement the defendant's whereabouts (he was a fugitive from Ohio) and criminal activity (he was implicated in the death and burial of an infant and had engaged in illicit sex with his daughters).

(Vol. III, R. 384)

> PROPORTIONALITY
>
> This court is sensitive to the issue of proportionality of sentence in this case. The actual killer, Willie Sexton, has received a sentence of 25 years imprisonment after pleading guilty to the reduced charge of second-degree murder. This is not, however, merely a case of a son killing because his father wanted him to.
>
> Florida case law is clear - a defendant may not be sentenced to death if a more culpable co-defendant has been sentenced to life imprisonment or less. This reasoning probably also extends to equally culpable

> co-defendants. This court believes the defendant to be the <u>more</u> culpable of the two co-defendants.
>
> Willie Sexton had nothing to gain, and the defendant had everything to gain, from the death of Joel Good. This killing was solely the idea of the defendant however tormented his thought process was.
>
> The evidence clearly showed the dominance of the defendant over his simple-minded son achieved by a lifetime of cruel, insidious and humiliating physical, emotional and sexual abuse. As in another Hillsborough County case, <u>Witt v. State</u>, 342 So.2d 497 (1977), the co-defendant was peculiarly susceptible to domination. Willie was the son. Willie was much younger. Willie is childlike mentally and emotionally. The defendant clearly dominated the criminal episode. For these reasons and after considering the totality of the circumstances and comparing this case to other capital cases this court submits that the sentence of death is proportional.

(Vol. III, R. 388-389)

This Court has upheld death sentences on defendants that did not actually kill even when the actual killer was not sentenced to death. *See* <u>Heath v. State</u>, 648 So.2d 660, 666 (Fla. 1994):

> This Court has approved the imposition of the death sentence "when the circumstances indicate that the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime." *Marek v. State,* 492 So.2d 1055, 1058 (Fla. 1986); *see also Hayes v. State,* 581 So.2d 121, 127 (Fla.), *cert. denied,* 502 U.S. 972, 112 S.Ct. 450, 116 L.Ed.2d 468 (1991). The record in this case supports the trial court's conclusion that Heath was the more

> culpable of the two defendants. Thus, the disparate treatment is justified.

See also Antone v. State, 382 So.2d 1205 (Fla. 1980); Ferrell v. State, 686 So.2d 1324 (Fla. 1996).

Applying this Court's traditional proportionality analysis this Court should affirm. The case is similar to Hodges v. State, 595 So.2d 929 (Fla. 1992), vacated on other grounds, 506 U.S. 803 (1992)(murder committed in order to keep victim from pursuing criminal charges against Hodges for indecent exposure; aggravators included CCP and hindering law enforcement); and Fotopoulos v. State, 608 So.2d 784 (Fla. 1992)(a witness elimination case in which the victim Kevin Ramsey was murdered by Fotopoulos' girlfriend who was directed by Fotopoulos to commit the murder because the victim planned to blackmail Fotopoulos; aggravators included prior violent felony conviction, avoid arrest and CCP); Larzelere v. State, 676 So.2d 394 (Fla. 1996)(defendant hired a gunman to shoot her husband to collect life insurance benefits); Peterka v. State, 640 So.2d 59 (Fla. 1994)(homicide committed to conceal Peterka's identity because he was wanted in another state; aggravators included avoid arrest and CCP).

Should this Court have any serious doubt that appellant had control of and was more dominant over Willie Sexton, or have any inclination to accept the defense suggestion that appellant and

Willie should be deemed co-equal in terms of punishment, appellee invites the Court to review the Exhibit 18 videotape Mr. Sexton prepared to disabuse the Court of that erroneous impression.

ISSUE V

WHETHER THE PROVISION OF FLORIDA'S DEATH PENALTY STATUTE WHICH ALLOWS A DEATH RECOMMENDATION BY A BARE MAJORITY VOTE VIOLATES THE UNITED STATES CONSTITUTION.

The jury in the instant case recommended a sentence of death by an eight to four vote. (Vol. III, R 354; Vol. XI, R. 1030) Prior to the retrial Appellant filed a motion to declare F.S. 921.141 unconstitutional because it permits a recommendation of death to be made by a bare majority (Vol. II, R. 163-165) and the trial court denied the motion. (Vol. XII, R. 1076)

This Court has repeatedly and consistently rejected similar defense arguments. *See, e.g.*, Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den., 428 U.S. 923, 49 L.Ed.2d 1226 (1976); P. A. Brown v. State, 565 So.2d 304, 308 (Fla. 1990); Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); James v. State, 453 So.2d 786, 792 (Fla. 1984); Thompson v. State, 648 So.2d 692, 698 (Fla. 1994); Whitfield v. State, 706 So.2d 1, 6 (Fla. 1997); Cave v. State, 727 So.2d 227, 229, n 4 (23) and n 6 (Fla. 1998). *See also* Hunter v. State, 660 So.2d 244, 252-253 (Fla. 1995); Larzelere v. State, 676 So.2d 394, 407, n 7 (Fla. 1996).

No persuasive reason has been advanced to recede from this well-established precedent which has been reaffirmed so recently.[5]

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[5]Even if this Court were to share Appellant's unhappiness with the consequences of a bare majority recommendation, Appellant

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Andrea Norgard, Assistant Public Defender, P.O. Box 9000--Drawer PD, Bartow, Florida 33831, this _____ day of January, 2000.

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COUNSEL FOR APPELLEE

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would be entitled to no relief since Sexton received a decisive eight to four death recommendation.