IN THE SUPREME COURT OF FLORIDA

EDWARD CASTRO,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 71,982
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On January 29, 1987, the grand jury in and for Marion County returned an indictment charging Appellant, EDWARD CASTRO, with first degree murder in violation of Section 782.04(1)(a), Florida Statutes (1985) and robbery with a deadly weapon in violation of Section 812.13(2)(a), Florida Statutes (1985). (R2517) Appellant filed numerous pretrial motions including a motion to suppress statements (R2597-2599) which was granted in part and denied in part (R2678), a motion for additional peremptory challenges. (R2586-2587) which was denied (R1239,2451), a motion to declare the death penalty unconstitutional (R2635-2675) which was denied (R2492-2493) and a motion for interrogatory penalty phase verdict (R2780-2782) which was denied. (R2180) Appellant proceeded to jury trial on January 19 - February 1, 1988, with the Honorable Victor J. Musleh, Circuit Judge, presiding. (R1-2221) Following deliberations, the jury returned

verdicts finding Appellant guilty as charged. (R2089-2090,2727-2728) A penalty phase was conducted resulting in a 10-2 jury recommendation that Appellant be sentenced to death. (R2130-2220,2221,2729) Appellant filed a timely motion for new trial which was denied. (R2754-2755,2799) On February 9, 1988, Appellant appeared before Judge Musleh for sentencing. (R2498-2516) Appellant was adjudicated guilty and sentenced to death for the murder conviction and a concurrent term of 5½ years for robbery. (R2512-2514,2748-2752) Judge Musleh filed findings of facts in support of the death sentence. (R2759-2763) Appellant filed a timely notice of appeal. (R2790) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him in this appeal. (R2791-2805)

STATEMENT OF THE FACTS

Guilt Phase

Around January 1, 1987, eighteen year old Robert McKnight and some friends hitchhiked from Sioux City, Iowa to Florida. (R1551-1552) At some point, McKnight's friends returned to Iowa leaving McKnight alone. (R1553) McKnight hitchhiked to Ocala arriving on January 10, 1987. (R1554) After checking in at the Salvation Army, McKnight went walking in the area of Sanchez Street where he met Appellant, Edward Castro, who introduced himself as Tony. (R1554-1555,1558) Appellant invited McKnight to have a couple of beers with him and McKnight accepted after initially refusing. (R1558) Appellant and McKnight went to apartment 11 at 226 Sanchez Street and drank some beer. (R1558,1640-1641) About 30-45 minutes later, Appellant ripped up a sheet, tied McKnight's hands, gagged him, stood over him and asked him where he wanted to be stabbed. (R1593) Appellant had a steak knife in his hand which he kept down by his side. (R1593,1597) McKnight was not harmed because Gallagher, the man who actually rented the apartment, came home and Appellant released McKnight and told him he was just testing him. (R1593,1594,1558) McKnight then moved in with Appellant and stayed for four days. (R1558,1595) Gallagher and Appellant talked about hopping a freight train and going to Detroit but McKnight was not interested so he stayed in an upstairs apartment with Dale Martin. (R1559) On that day, a Wednesday, McKnight woke up and went downstairs to Appellant's apartment to get his clothes. (R1560) There was an elderly gentleman present whom

McKnight had not seen before. (R1560) McKnight packed and left just as Appellant and the man left to get more beer. (R1560) As McKnight went upstairs Appellant came over to him and told him "this is my hit." (R1561) McKnight did not know what Appellant meant. (R1561) Appellant and the man got into a green Ford Maverick and McKnight went upstairs. (R1561) About ten minutes later as McKnight prepared to take a shower, Appellant came upstairs and invited McKnight downstairs. (r1562) McKnight got cleaned up, went back downstairs to apartment 11 an found the door locked. (R1562) McKnight knocked on the door and Appellant answered. (R1562) Once inside, McKnight noticed the elderly man was dead and Appellant was covered in blood from his fingertips to his elbows. (R1562) McKnight froze in shock as Appellant related that he had killed the man by crushing his larynx. (R1563) Appellant then told McKnight to pick up a steak knife and stab the man which McKnight did not want to do since the man was already dead. (R1563) Appellant ordered McKnight to do it or else he (McKnight) would be next. (R1564) Under this threat, McKnight picked up the knife and stabbed the man 4-5 times in the chest, after which Appellant told McKnight they were blood brothers. (R1564) Appellant and McKnight then proceeded to clean up the place using socks to wipe everything. (R1564) Before leaving, McKnight took the man's wallet and his change and Appellant took the man's two rings and his watch. (R1564-1565) Appellant removed his blood-soaked shirt and left it in the apartment. (R1565) The left side of Appellant's pants was covered in blood. (R1565) A blanket was put over the body so

that if the landlord came by it would appear that Gallagher had merely passed out. (R1565) Before leaving, Appellant stepped on the face of the man a couple of times. (R1566) Appellant opened the trunk of the man's car and found clothing, vodka and whiskey. (R1566) Appellant and McKnight got in the car and started driving to Lake City. (R1566) Appellant emptied the wallet and threw it out the window of the car. (R1568) On the way to Lake City, Appellant stopped at the rest stop where he tried to sell the rings and watch. (R1567) The steak knife was also thrown out of the car window. (R1569) As they drove to Lake City, Appellant drank both the vodka and the whiskey and by the time they arrived, Appellant was intoxicated. (R1569) Appellant pulled into a gas station to have the accelerator checked. (R1569) McKnight remained in the car while Appellant went to the restroom. (R1569) Several police cars pulled up, and Deputy Boatright approached McKnight and asked where the driver was. (R1570,1667) McKnight told the officer Appellant was in the bathroom, so the officers waited for him to come out. (R1570,1679) As Appellant returned, Deputy Hodson asked him if he was the driver of the green Maverick and Appellant replied affirmatively. (R1570,1667,1679) Appellant refused to give his name and became very belligerent, which resulted in his arrest for disorderly intoxication. (R1570,1667-1670,1680) Deputy Boatright believed that Appellant was intoxicated. (R1673) McKnight was permitted to leave and ended up taking a bus to Chicago where he was picked up by police officers. (R1571-1572) McKnight had an Ocala newspaper account of the murder of Austin Scott and told the

officers that he had information regarding the murders. (R1572) McKnight ultimately pled to the offense of accessory after the fact to murder and received five years probation in return for his agreement to testify for the state. (R1573,1583)

Appellant was taken to the Columbia County Jail about 5:00 p.m. on January 14, 1987, and placed alone in a holding cell. (R1791) Several times Officer Reich, the booking officer, had to tell Appellant to be quiet. (R1791) Officer Reich was very busy when Appellant was brought in and consequently could not begin the booking process on Appellant for approximately one hour. (R1792) During this time, Appellant hinted that he had something to tell Reich which could "put stripes on his sleeve", which Reich interpreted to mean could result in a promotion for him. (R1792) Reich got coffee and cigarettes for Appellant and noticed that Appellant's appearance was disheveled and he appeared to have blood on his pants. (R1793) As Reich finished some paperwork, he noticed Appellant tearing up little pieces of paper from his pocket and commenting that "they" would not find out who he was. (R1794) Reich and another officer went into the holding cell and searched Appellant and also retrieved the torn pieces of paper from the trash can. (R1794-1795) Reich found pieces of a social security card and a VA card as well as a 1937 World's Fair ring. (R1795) The identification cards had the names of Austin Gardner Scott and John Burns. (R1798) All of the items were given to Investigator Nydam. (R1797) Reich called Investigator Kay Gallegos who arrived and introduced herself to Appellant. (R1801-1802,1824) Gallegos read Appellant

his Miranda rights from a card and had Appellant sign a waiver of rights card which was witnessed by Reich. (R1802,1826) Reich noticed that Gallegos had put the wrong date on the waiver form, *so* he changed it from January 15, 1987 to January 14, 1987. (R1802,1803) Gallegos noticed no odor of alcohol about Appellant. (R1829) Appellant then related that he had killed a man in apartment 11 of a building located near Sanchez Street and North 3d Street in Ocala. (R1830) Appellant lured the man into the apartment because he wanted to steal his car. (R1807) When the man attempted to leave, Appellant grabbed the man and strangled him *so* hard that blood came out of his mouth. (R1813) Appellant related that the man seemed to gain more strength until a point when Appellant told him "You lose", pulled a steak knife out of his shoe and stabbed the man in the chest between five and fifteen times. (R1813) Reich claimed that as Appellant gave graphic details of the stabbing, Gallegos appeared sick and got up and left for a few minutes. (R1813) However, Gallegos denied this. (R1835)

After speaking with Appellant, Gallegos contacted Lieutenant Neal Nydam, chief of the homicide division, who came down to the jail and met with Appellant. (R1831,1814,1893-1894) Appellant was taken to Nydam's office where he was again given his rights and signed a waiver in the presence of Officer Reich and Investigator Gallegos. (R1896,1902-1903,1814-1815,1833) Once again the wrong date was put on the waiver form which Nydam changed. Prior to making a statement, Appellant requested to be kept out of general population and asked to see a psychiatrist.

(R1911) Appellant then recounted the details of the killing of Austin Scott. (R1913-1926) Nydam saw no evidence that Appellant was intoxicated. (R1906)

Investigator Howard Leary of the Ocala Police Department received a phone call from the Columbia County Sheriff's Department informing him that Appellant was in custody in the jail and that he had given a statement concerning a killing in Ocala. (R1929) Leary and Sergeant Andy Kreitmeyer went to Lake City and after speaking with Nydam, met with Appellant at 5:26 a.m. on January 15, 1987. (R1930,1944) Leary again advised Appellant of his rights after which Appellant agreed to give a statement. (R1930-1932) Although Appellant had a stale odor of alcohol about his person, he was not under the influence of alcohol. (R1932-1933,1945) Appellant again gave a statement detailing the killing of Austin Scott. (R1945,1971) After completion of the statement, Leary received the physical evidence from Nydam and returned to Ocala. (R1973) Leary went to the place described by Appellant and found the door to apartment 11 ajar. (R1973) Inside on the floor next to the bed was the body of Austin Scott, wrapped in a blanket. (R1974) On January 16, 1987, Dr. Jane Chen performed an autopsy on the body of Austin Scott. (R1690) There were deep bruises on the right and left sides of the forehead, above the forehead on the inside area of the eyes and around the neck. (R1691) There were multiple stab wounds to the left side of the chest, stab wounds to the right arm and a minor bruise to the left thigh. (R1691) The muscles in the neck were bruised and there was visible injury to the

larynx. (R1692) The left side of the hyoid was fractured as was the right side of the corner which were consistent with forceful strangulation. (R1693) There were eleven distinct stab wounds to the left chest of which seven were potentially fatal. (R1698 The strangulation occurred while Scott was alive but would have rendered him unconscious. (R1718-1720) Although the strangulation was sufficient to kill Scott, the immediate cause of death was excessive bleeding caused by the stab wounds. (R1719-1720) The stabbing was done while Scott as immobile and unconscious. (R1719,1725) Although Dr. Chen could not say for certain how long Scott survived before dying, she estimated it was possibly ten minutes. (R1729-1731)

Penalty Phase

Dr. Barbara Mara, an expert in clinical psychology, examined Appellant on January 18, 1988, at the Marion County Jail. (R2130,2136) Appellant came from a broken home and has a long history of abuse. (R2137) His father was an alcoholic and violent toward his mother. (R2138) Between the ages of 4 and 6, Appellant was the victim of sexual abuse at the hands of his babysitter and a 16 year old cousin who committed both anal sex and masturbation on him. (R2138,2139) Appellant feels guilt and remorse about this activity and has a lot of self-blame. (R2139) Beginning at age 16, Appellant became addicted to alcohol and drugs. (R2139) Although Appellant joined the military he received an undesirable discharge within a year because of alcohol and drug abuse. (R2139) Because he felt isolated

without a sense of belonging, Appellant became a bully. (R2140) Appellant was married and has two sons for whom he exhibits little concern. (R2140) Appellant has had six hospitalizations for alcohol treatment. (r2141) Appellant is subject to bouts of depression and his most expressive emotion is anger. (R2142) He fits the profile of an alcohol and drug addicted personality. (R2142) Appellant suffers from a mixed personality disorder which includes two or more of the following characteristics: Antisocial personality; schizo-type and alienated personality; poor social skills; obsessiveness; compulsiveness; self-indulgent; poor impulse control; and poor judgment. (R2143) In her opinion, Dr. Mara believes the following mitigating factors exist with regard to Appellant: 1) early history of neglect and abuse; 2) early history of incest; 3) early history of lack of belongingness and alienation; 4) lack of development of conscience; and 5) alcoholism and drug abuse. (R2143-2144)

SUMMARY OF ARGUMENTS

POINT I: Admission of other bad acts of the defendant is prohibited where the only relevance such acts have is to show bad character of the defendant or his propensity to commit crimes. The admission of irrelevant evidence which has no bearing on any material issue of fact is also error. Appellant is entitled to a new trial due to the cumulative effect of the erroneous admission of this highly prejudicial and irrelevant evidence.

POINT 11: When an accused faces trial on multiple charges, especially in a capital case the trial court abuses its discretion when it refuses to grant his request for additional peremptory challenges.

POINT 111: The trial court erred in denying Appellant's motion to suppress his statements. Where Appellant's initial statement was made in violation of Miranda it is presumed to be compelled and must be excluded from evidence. Before subsequent statements given pursuant to proper Miranda warnings may be admitted into evidence the trial court must determine the voluntariness of such statements. The failure of the trial court to do so in this case requires reversal.

POINT IV: It is reversible error for the trial court to respond to requests from the jury during its deliberations without affording the prosecutor, the defendant, or defendant's counsel

an opportunity to be present and object or request alternative courses of action.

POINT V: Defense counsel timely requested that the jury be given specific verdict forms in which they could delineate between felony murder and premeditated murder. The jury's verdict must be set aside since, although it could be supported on one ground (felony murder) it cannot be supported on the other (premeditated murder). On retrial this Court should require the special jury verdict forms to be given.

POINT VI: It is unnecessary that a jury sentence a defendant. However, Due Process requires that the jury determine the defendant's guilt or innocence of the crime for the sentence imposed. If the verdict does not include elements that define an offense, an increased sentence for that offense cannot be imposed. It is the prosecutor's burden to secure a jury verdict for all elements of the offense. Aggravating circumstances are limited solely to those specifically provided by statute. They actually define the crime of capital first-degree murder that is punishable by death. The aggravating circumstances thus become elements of the crime that must be found by the jury before the increased sanction of death may be lawfully imposed. Consequently it is error to deny timely request for special interrogatory verdicts regarding the aggravating factors.

POINT VII: In the penalty phase of a capital trial, the state is precluded from presenting irrelevant and highly prejudical evidence which has no probative value with regard with statutory aggravating circumstances or rebutting expressly relied-upon mitigating circumstances.

Where defense specifically relies upon non-statutory mitigating circumstances, it is reversible error for the trial court to refuse to instruct the jury that they may consider such evidence in mitigation. Additionally although use of the standard jury instructions is encouraged, where such instructions do not adequately inform the jury of their duties during deliberation, it is error to deny special requested instructions which correctly state the law and are particularly applicable to the facts of the case.

POINT VIII: A capital felony is not especially heinous, atrocious or cruel unless it is accompanied by such additional acts so as to set the crime apart from the norm of capital felonies. Actions which occur after the murder is complete are not to be considered in determining whether the murder was heinous, atrocious or cruel.

In order to sustain a finding that a capital murder was cold, calculated and premeditated the state is required to prove beyond a reasonable doubt something more than mere premeditation. It is insufficient to prove merely that an underlying felony was planned.

Where the only valid aggravating circumstance present is that the capital murder was committed during the commission of a felony and where valid mitigating factors exist, proportionality requires that a death sentence be vacated and the cause remanded for imposition of a life sentence.

POINT IX: Although this Court has previously rejected numerous attacks to the constitutionality of the death penalty in Florida Appellant urges reconsideration particularly in light of the evolving body of case law which in some cases has served to invalidate the very basic cases on which the death penalty was upheld in the State of Florida.

POINT I

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE MATTERS THAT HAD NO RELEVANCE BUT WERE PREJUDICIAL.

Over objection of defense counsel, the state presented the expert testimony of officer Greg Stewart concerning blood spatter evidence. (R1842-1845,1855-1868) Also, the state was permitted, over defense objection, to elicit evidence of a steak knife which was found outside the apartment where the body of Austin Scott was found. (R1651-1656) However, Judge Musleh later ruled the knife to be inadmissible when the state sought to admit it into evidence. (R1760-1761) The state was again permitted to elicit, over defense objection, evidence that prior to the killing of Scott, Appellant had tied up Robert McKnight and threatened to stab him. (R1588-1592) Appellant contends that the admission of this evidence resulted in a denial of due process and was highly prejudicial.

A. ADMISSION OF OTHER BAD ACTS

The state filed a pre-trial notice of intent to admit evidence that prior to the killing of Austin Scott, Appellant had tied up Robert McKnight and threatened to stab him. (R2614) Defense counsel filed a motion in limine to prevent introduction of this evidence. (R2633-2634) At a pre-trial hearing, the state announced its intention not to present such testimony. (R2492) However, during the testimony of Robert McKnight at

trial, the state was permitted to elicit the very evidence it previously had abandoned. (R1588-1594) The state contended such evidence was relevant to show that McKnight was afraid of Appellant. (R1588-1592)

In Williams v. State, 110 So.2d 654 (Fla. 1959) this Court held that similar fact evidence which tends to reveal the commission of a collateral crime is admissible if it is relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused. The Williams rule has been codified in Section 90.404(2)(a), Florida Statutes (1987) which provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

The evidence of the prior bad act on the part of Appellant against McKnight is clearly inadmissible as it has no relevance to any material fact in issue. The state's theory was that it was admissible to show McKnight's state of mind (i.e. his fear of Appellant). However, McKnight's state of mind was totally irrelevant. The only purpose this evidence had was to portray Appellant as a bad person which is clearly proscribed by Williams and its progeny. Additionally, Appellant questions whether the prior act actually shows McKnight's fear of Appellant. Supposedly, this prior act occurred within an hour or two of the time that Appellant and McKnight met each other. If, as the state suggests,

the prior act instilled a fear of Appellant in McKnight, one questions why McKnight would move in with Appellant. The subsequent actions of McKnight refute the state's theory. As this Court stated in Straight v. State, 397 So.2d 903, 908 (Fla. 1981):

> It is improper for a jury to base a verdict of guilty on the conclusion that because the defendant is of bad character or has a propensity to commit crime, he therefore probably committed the crime charged. See, e.g., Winstead v. State, 91 So.2d 809 (Fla. 1956); Nickels v. State, 90 Fla. 659, 106 So. 479 (1925). Therefore, evidence of criminal activity not charged is inadmissible if its sole purpose is to show bad character or propensity to crime. But evidence of criminal activity not charged is admissible if relevant to an issue of material fact. Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). If irrelevant, its admission is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.

Consequently, the evidence concerning the prior attack by Appellant on McKnight was inadmissible and highly prejudicial. Its erroneous admission, over defense objection, mandates reversal.

B. ADMISSION OF BLOOD SPATTER EVIDENCE

Officer Greg Stewart was qualified as an expert in examination and analysis of blood spatter evidence. (R1855) Stewart testified that he examined six stains from the wall of apartment 11 at 226 Sanchez Street. (R1865) However, he could not state the physical source of the stains or how long they were present on the wall. (R1868) Stewart also could not testify

whether the stains had anything at all to do with the death of Austin Scott. (R1868)

It is axiomatic that any evidence relevant to prove a fact in issue is admissible unless its admissibility is precluded by some specific rule of evidence. Section 90.401, Florida Statutes (1987) defines relevant evidence as "evidence tending to prove or disprove a material fact." Evidence should not be submitted to a jury unless it is logically and legally relevant to the issues in the case. Blanco v. State, 452 So.2d 520 (Fla. 1984).

In Watkins v. State, 121 Fla. 58, 163 So. 292 (1935) this Court held:

> The rule "res inter alios acta" forbids the introduction against an accused of evidence of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute, the reason being that such evidence would be to oppress the party affected, by compelling him to be prepared to rebut facts of which he would have no notice under the logical relevancy rule of evidence, as well as prejudicing the accused by drawing away the minds of the jurors from the point in issue.

Accord Skipper v. State, 319 So.2d 634 (Fla. 1st DCA 1975). The blood spatter evidence is just the type of evidence to which the Court in Watkins, supra was referring. According to the state's own witness, the evidence could not be tied to the killing of Austin Scott. It was "incapable of affording any reasonable presumption or inference" as to any issue at trial. However, the prejudice to the Appellant is plain: the jury was permitted to assume facts about the killing which could, in the minds of some

members, have made the difference in the degree of the murder charge. It very definitely could have affected a determination of whether the murder was especially heinous atrocious or cruel." As such, it cannot be deemed harmless.

C. ADMISSION OF TESTIMONY REGARDING A STEAK KNIFE

William Kohler, part owner of the apartment building at 226 Sanchez Street, testified that sometime after the killing of Austin Scott, he found a steak knife outside apartment 11. (R1655) He further testified that it appeared that the knife had not been there for a very long period of time. (R1656) The knife was not the murder weapon, was inconsistent with the wounds and had no traces of blood on it. The trial court realized the irrelevancy of the knife and while allowing testimony concerning its discovery, ruled against the state when it was proffered into evidence. (R1760-1761) The admission of the testimony concerning the knife allowed the jury to infer that it had some connection to the case, if not as the murder weapon, then perhaps as an instrument in another crime committed by Appellant.

D. SUMMARY

The cumulative effect of the trial court's erroneous admission of irrelevant and highly prejudicial evidence entitles Appellant to a new trial. Appellant's constitutional rights to due process and a fair trial were irreparably harmed by this prejudicial evidence. Such error is not harmless.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES.

Prior to trial, Appellant filed a motion for additional peremptory challenges. (R2586-2587) During voir dire, defense counsel exhausted his peremptory challenges and renewed his request for additional challenges which was denied by the trial court. (R1239)

Section 913.08, Florida Statutes (1985) sets the number of peremptory challenges for each side in a capital case at ten. This statute is implemented by Rule 3.350, Florida Rules of Criminal Procedure which provides in part:

> (e) If an indictment or information contains two or more counts or if two or more indictments or informations are consolidated for trial, the defendant shall be allowed the number of peremptory Challenges which would be permissible in a single case, but in the interest of justice the judge may use his judicial discretion in extenuating circumstances to grant additional challenges to the accumulate maximum based on the number of charges or cases included when it appears that there is a possibility that the State or the defendant may be prejudiced. The State and the defendant shall be allowed an equal number of challenges.

Appellant contends that the trial court abused its discretion in denying Appellant's request for additional peremptories made during voir dire after he had exhausted his ten challenges. Because he was out of peremptory challenges, Appellant was forced to accept juror White who was a first cousin to one of the state's witnesses (R386,390) and juror Waddy who indicated

that he believes that if a person is arrested, he is probably guilty of the crime for which he is arrested. (R930,937) This was not a situation like Jacobs v. State, 396 So.2d 713 (Fla. 1981) wherein the defendant was requesting a large number (40) of additional peremptories. There is nothing in the record to indicate any attempt by Appellant to unnecessarily delay the proceedings or otherwise thwart the orderly procedures. There was no objection by the state to Appellant's request. Given the seriousness of the offenses that Appellant faced, Judge Musleh abused his discretion in denying Appellant's request for additional peremptory challenges. Therefore, this Court must reverse his judgments and sentences and remand the cause for a new trial.

POINT III

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Appellant filed a motion to suppress various statements made to law enforcement officers. (R2597-2599) Following a hearing on the motion, Judge Musleh granted the motion in part and denied it in part. (R2434-2435,2495,2678) Specifically, Appellant's initial statement made to Officer Reich was ruled inadmissible as it was made in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, the subsequent statements made to Investigator Gallegos, Lieutenant Nydam and Investigator Leary were ruled admissible. (R2434-2435)

In Oregon v. Elstad, 470 U.S. 298, 318, 105 S.Ct. 1285, 84 L.Ed.2d 222, 238 (1985) The court held:

> We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings.

However, in so holding, the Court specifically adhered to its previous holding that when a statement is obtained without the required Miranda warnings, the statement is presumed compelled and must be excluded from evidence. To determine the admissibility of subsequent Statements given pursuant to proper Miranda warnings, the trier of fact must determine the voluntariness of such statements. In so doing, the trier of fact must examine the surrounding circumstances and the entire course of police conduct

with respect to the suspect. If such subsequent statements are not ruled voluntary, then exclusion from evidence is the proper remedy. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Before the subsequent statements are admissible, the trial court must determine the voluntariness of the statements. Bauza v. State, 491 So.2d 323 (Fla. 3d DCA 1986). In the instant case, the trial court failed to make any finding of voluntariness with regard to the subsequent statements. The state has failed to carry its burden of showing such statements are voluntary. Consequently, the statements were erroneously admitted into evidence. Such error cannot be deemed harmless. Appellant is entitled to a new trial.

POINT IV

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED BY CONSIDERING A REQUEST FOR ADDITIONAL TESTIMONY BY THE JURY WITHOUT CONSULTING APPELLANT OR DEFENSE COUNSEL.

After the jury began its deliberations, the bailiff told Judge Musleh that the foreman inquired about the possibility of the jury getting some lunch. (R2078) After some discussion about the mechanics of taking the jurors to lunch, the subject of the defendant's presence in the courtroom when the jury was told about going to lunch was discussed. (R2079-2082) The following agreement was reached:

> MR. TATTI: [defense counsel] Judge, we have a solution to bringing Mr. Castro up.
>
> THE COURT: All right.
>
> MR. TATTI: I talked with Mr. Moore. [prosecutor] He does not have a problem with Your Honor bringing the jury in yourself, telling them you are going to send them to lunch and there are no lawyers in the room.
>
> MS. JENKINS: [defense counsel] And then the defendant won't be missed.
>
> THE COURT: All right. Everybody leave.
>
> MS. JENKINS: Thank you, Your Honor.

(R2082) After the attorneys left, the jury was returned to the courtroom and the following transpired:

> THE COURT: All right, ladies and gentlemen, we'll go ahead and break for

lunch. I ask you, during lunch, not to discuss the case among -- even among yourselves, and the two alternates will be going to lunch with you. They'll sit at your table. Of course, they are not to discuss anything with you, either.

When we come back, let's go to Courtroom "A", because this one is going to be in use and we don't want to have a problem with two juries and so forth, plus the other one is a little bit bigger anyway.

So when you come back, you just go back in to Courtroom "A". Let me know when they come back and then they can start deliberating at that time. There's no rush. I've got something I've got to do at 1:30 that's going to last until about three or 3:30 anyway.

THE BAILIFF: The clerk is going to take care of getting the evidence transferred down?

THE COURT: The clerk will get the evidence down to the other courtroom.

All right, then, the bailiff then will take you to lunch.

THE FOREMAN: Your Honor, excuse me, I'm the foreman of the jury and we have, in our discussions -- would there be a possibility after lunch that we could have Bobby's testimony, McKnight?

THE COURT: All right, you were the Court Reporter for that, weren't you?

THE REPORTER: No.

(Noon recess.)

(R2082-2083) After returning from lunch, the trial court told the attorneys:

THE COURT: All right, as I was telling the jury about going to lunch and everyone had left, I was explaining to them not to talk about the case and such.

The foreman stated, or the gentleman who said he was the foreman stated

> that they wanted to hear the testimony of, what was his name, Robert McKnight.
>
> Now, that's all he said, so I told Jennifer to make sure she could find it. She's got a tape of his testimony.
>
> If they want to hear all of his testimony, would you prefer her to read it back or play the tape, because she said it's very clear. It's got everything but his name on the tape and, of course we could tell them what -- what was his name and address is not on the tape.

(R2083-2084) After discussing the matter, it was decided that the jury would not be permitted to review any of the testimony and were told to rely upon their memories. (R2084-2086) Appellant contends that the trial court's acceptance of the question from the jury without notifying Appellant or his counsel constitutes reversible error and entitles him to a new trial.

In Ivory v. State, 351 So.2d 26 (Fla. 1977) this Court considered whether in a criminal case a defendant is denied a fair trial and due process when the trial judge responds to a request from the jury, during the period of its deliberations, without affording the prosecutor, the defendant, or defendant's counsel an opportunity to be present and object or request alternative courses of action. This Court ruled that such procedure is reversible error per se without regard to harmless error:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.
>
> * * *
>
> We now hold that it is prejudicial error for a trial judge to respond to a

> request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on the record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

351 So.2d at 28. This Court has adhered to the per se reversible rule of Ivory, supra on numerous occasions. Curtis v. State, 480 So.2d 1277 (Fla. 1985); Williams v. State, 488 So.2d 62 (Fla. 1986); Bradley v. State, 513So.2d 112 (Fla. 1987). In Meek v. State, 487 So.2d 1058 (Fla. 1986) this Court held that neither Ivory, supra, nor Fla.R.Crim.P. 3.410 requires the defendant's presence when the judge responds to the jury's request but rather only that the judge notify the prosecutor and defense counsel of the request before responding to it. Accord Morgan v. State, 492 So.2d 1072 (Fla. 1986).

In the instant case, it is clear that Appellant, defense counsel and the prosecutor were not present when the jury asked the trial judge to rehear the testimony of Robert McKnight. While it is true that defense counsel and the state stipulated that the judge could tell the jury about the arrangements for lunch outside their presence and the presence of defendant, this stipulation did not extend to any other communication from the jury concerning the case. Further, when the jury foreman began his question, the trial court should have immediately stopped him and notified counsel. While the trial court did not actually respond to the question directly, he did inquire of the court

reporter whether such testimony could be obtained. This certainly could have given the jury the impression that the Court was willing to comply with its request. Subsequently, the parties agreed not to allow the jury to rehear the requested testimony and they were so instructed. It is impossible to determine what if any effect this had on the jury. It is just for this reason that Justice England concurred in the holding of Ivory, supra:

> The rule of law now adopted by this Court is obviously one designed to have a prophylactic effect. It is precisely for that reason that I join the majority. A "prejudice" rule would, I believe, unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent "harm", real or fancied.

A clear violation of Ivory, supra, occurred in this case, however inadvertent or unexpected it may have been. Appellant is entitled to a new trial.

POINT V

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR SPECIAL JURY VERDICTS CONCERNING FELONY MURDER AND PREMEDITATED MURDER.

Defense counsel timely requested that the jury be given specific verdict forms delineating between felony murder and premeditated murder. (R1961) This was denied.

Appellant recognizes that this Court has previously held that special verdict forms which would allow the jury to determine whether its decision to convict a person of first degree murder is based upon a finding of premeditation or upon a theory of felony murder is not constitutionally mandated. Brown v. State, 473 So.2d 1260 (Fla. 1985). However very recently the United States Supreme Court in Mills v. Maryland, slip opinion, Case No. 87-5367 (June 6, 1988) held:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See e.g., Yates v. California, 283 U.S. 359, 367-368 (1931).

In the instant case there was sufficient evidence to support a finding of guilt on a theory of felony murder. However, Appellant contends that there was insufficient evidence of premeditation upon which a jury could base a finding of guilt.

Therefore, the specific verdict forms were necessary to ensure that the verdict of guilt was properly made.

Additionally, if the jury did not find Appellant guilty of premeditated murder, the trial court's finding that the murder was cold, calculated and premeditated would have to fall since the level of premeditation needed to support this aggravating circumstances must be greater than that needed to convict of premeditated murder. Jent v. State, **408** So.2d **1024** (Fla. **1982).** Therefore the need for special verdict forms is apparent. Appellant is entitled to a new trial.

POINT VI

IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 22, OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR SPECIAL INTERROGATORY VERDICTS REGARDING THE AGGRAVATING CIRCUMSTANCES.

Appellant filed a Motion for Interrogatory Penalty Phase Verdict seeking to have the jury give the specific vote on each aggravating and mitigating factor which it found. (R2780-2782) This was denied.

This Court has recognized, as a requirement of Due Process, the necessity for a factual determination to be made by the jury to authorize imposition of a more serious sanction based on factual elements of a crime. State v. Overfelt, 457 So.2d 1385 (Fla. 1984). As stated by the Third District Court of Appeal, "It is axiomatic that a verdict which does not find everything that is necessary to enable the court to render judgment cannot support the judgment.'' Streeter v. State, 416 So.2d 1203, 1206 (Fla. 3d DCA 1982).

All aggravating circumstances in the capital context must be proved beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). This is acknowledgment of their importance as elements of the crime. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Thus the aggravating circumstances substantively define the crime of capital first-degree murder, that is, the crime of first-degree murder punishable by death.

> The aggravating circumstances of Section 921.141(6), Florida Statutes actually define those crimes, when read in conjunction with Florida Statutes 782.0412) * * * to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

State v. Dixon, 283 So.2d 1,9 (Fla. 1973)(emphasis added). This theme has consistently been adhered to by this Court, and correctly so.

> In contending that the capital felony sentencing law regulates practice and procedure; appellant relies upon Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), and Lee v. State, 294 So.2d 305 (Fla. 1974). The critical issue in those cases was the legality of applying Florida's new death penalty law to persons who had committed a murder before the law had taken effect. In holding that the law could be applied to such persons, the United States Supreme Court and this Court referred to the changes in the law as procedural. Those references concerned the manner in which defendants who had committed murder before the new law took effect should be sentenced. They were not meant to be used as shibboleths for deciding whether the new law violates article V, section 2(a) of the Florida Constitution by regulating the practice and procedure in the Florida Courts. By delineating the circumstances in which the death penalty may be imposed, the legislature has not invaded this Court's prerogative of adopting rules of practice and procedure. We find that the provisions of section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty. The appellant's contention that the statute improperly attempts to regulate practice and procedure is without merit. [Citations omitted.]

Vaught v. State, 410 So.2d 147, 149 (Fla. 1982)(emphasis added).

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the substantive elements of the crime. Patterson v. New York, 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 282, 292 (1977). A conviction of first degree murder, even first-degree premeditated murder, as held by this Court, does not contain an aggravating circumstance. If, as repeatedly held by this Court, the aggravating circumstances effectively "define" the crime for which the death penalty can be imposed, it is incumbent on the state to secure jury findings of these substantive elements. Overfelt, supra; Perkins v. Mayo, 92 So.2d 641 (Fla. 1957); Harris v. State, 53 Fla. 37, 43 So. 311 (1907); Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982); Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1965).

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to a higher voice of authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the compliant, biased, or eccentric judge.

Duncan v. Louisiana, 391 U.S. at 155-156 (emphasis added).

The increased reliability needed for Constitutional requirements of Due Process in the capital penalty context militates heavily toward a procedure whereby the jury provides as much protection against arbitrariness as is possible. The United States Supreme Court has held that jury imposition of sentence is not constitutionally mandated. Spaziano v. Florida, 468 U.S. 447 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). This is not to say, however, that the jury must not determine the elements of the offense that serve to increase the sentence that may be imposed on the defendant. See McMillan v. Pennsylvania, 477 U.S. __, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). Since the jury in this case did not determine the defendant's guilt of an offense punishable by death, the death penalty must be vacated and a sentence of life imprisonment imposed.

POINT VII

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION APPELLANT WAS DENIED DUE PROCESS BECAUSE OF THE ADMISSION OF IRRELEVANT EVIDENCE DURING THE PENALTY PHASE AND THE REFUSAL OF THE TRIAL COURT TO GIVE PROPER REQUESTED JURY INSTRUCTIONS.

During the penalty phase, Dr. Mara testified that Appellant suffered from mixed personality disorder which was quite common in victims of child sexual abuse. (R2143) On cross-examination, Dr. Mara stated that it is highly unlikely that child sexual abuse victims could grow up and not be categorized with a mixed personality disorder. (R2161) She further stated that in her practice she has never encountered any sexual abuse victim who did not develop this disorder. (R2161) Over defense objections of relevancy, the state was permitted to question Dr. Mara about her familiarity with former United States Senator Paula Hawkins who had admitted to being a victim of sexual abuse as a child. (R2161) Dr. Mara then testified that she has never examined Paula Hawkins. (R2163) Also on direct examination, Dr. Mara testified that Appellant related a childhood history of sexual abuse including forced incestuous relations with a 16 year old cousin. (R2138-2139) In relating this history, Appellant expressed self-blame, guilt and remorse according to Dr. Mara. (R2139) On cross-examination, the state began to ask Dr. Mara whether Appellant expressed any remorse about the killing of Austin Scott. (R2154) Before the question

was completed, defense counsel objected and moved for a mistrial. (R2154-2158) This motion was denied. (R2158)

The trial court also denied several specially requested jury instructions. (R2170-2173) Additionally, before the jury retired to deliberate, defense counsel informed the trial court of its failure to give the standard jury instruction regarding non-statutory mitigating evidence. (R2213-2219) However, the trial court refused to give this instruction because it was not timely requested and it would place undue emphasis upon the instruction. (R2219) Appellant asserts that the combination of these errors deprived Appellant of his constitutional right to due process and the imposition of the death penalty in light of these errors constitutes cruel and unusual punishment. Appellant is entitled to a new penalty proceeding before a newly empaneled jury.

A. Admission of Irrelevant and Highly Prejudicial Evidence

Over objection, the state was permitted to question Dr. Mara concerning the mental health of United States Senator Paula Hawkins who had admitted to being a sexual abuse victim as a child. (R2161-2163) The state also began to question Dr. Mara concerning Appellant's remorse for the killing of Austin Scott. (R2154) Although the trial judge ruled the state's question improper, Appellant's motion for mistrial was denied. (R2158)

This Court has previously held that in the penalty phase of a capital trial, the state is limited to presenting evidence which proves only the enumerated aggravating factors or

rebuts mitigating factors argued by the defense. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986); Trawick v. State, 473 So.2d 1235 (Fla. 1985); Dougan v. State, 470 So.2d 697 (Fla. 1985).

The reference to Paula Hawkins was improper because Dr. Mara's testimony was limited to those whom she had examined. Dr. Mara clearly had no knowledge of Paula Hawkins's psychological makeup. Further, whether or not Paula Hawkins suffered from a mixed personality disorder had absolutely no bearing on the fact that Appellant did suffer from such disorder. Apparently the state was implying that because Paula Hawkins had overcome the effects of sexual abuse she suffered as a child that perhaps Appellant's personality disorder was less than authentic. Such inference is baseless and highly prejudicial.

This Court in Pope v. State, 441 So.2d 1073 (Fla. 1983) held that lack of remorse is an improper consideration during the penalty phase. Further, it may not be used to prove any aggravating circumstance. While the state in the instant case never finished its question, enough was said which allowed the jury to infer the thrust of the question. Contrary to the prosecutor's assertion, defense counsel had not implied or elicited evidence that Appellant exhibited remorse with regard to the killing of Austin Scott. Rather Dr. Mara's testimony regarding Appellant's remorse was limited to his incestuous abuse by a cousin when he was 4-6 years of age. Further this statement was not purposely elicited by defense counsel. (R2138-2139) As this Court stated in Dougan, supra at 701:

We cannot tell how this improper evidence and argument may have affected the jury. We therefore vacate Dougan's sentence and remand for another complete sentencing hearing before a new jury.

B. Denial of Appellant's Special Requested Jury Instructions

Defense counsel requested numerous special jury instructions, three of which were denied. (R2766-2773) Appellant contends the trial court erred in refusing to give the requested instructions which will be discussed below:

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 4.

THE STATE MAY NOT RELY UPON A SINGLE ASPECT OF THE OFFENSE TO ESTABLISH MORE THAN A SINGLE AGGRAVATING CIRCUMSTANCE. THEREFORE, IF YOU FIND THAT TWO OR MORE OF THE AGGRAVATING CIRCUMSTANCES ARE SUPPORTED BY A SINGLE ASPECT OF THE OFFENSE, YOU MAY ONLY CONSIDER THAT AS SUPPORTING A SINGLE AGGRAVATING CIRCUMSTANCE.

This instruction correctly states the law as established by Provence v. State, 337 So.2d 738 (Fla. 1976) and its progeny. In the instant case some of the same facts could arguably be used to support a finding of heinous, atrocious and cruel and cold, calculated and premeditated. The jury should have been instructed about impermissible doubling.

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 6

ALL AGGRAVATING CIRCUMSTANCES MUST BE PROVED BEYOND A REASONABLE DOUBT BEFORE BEING CONSIDERED. ALL EVIDENCE OF MITIGATING CIRCUMSTANCES MAY BE CONSIDERED. THE PROCEDURE TO BE FOLLOWED IS NOT A MERE COUNTING PROCESS OF X NUMBER OF AGGRAVATING CIRCUMSTANCES AND Y NUMBER

OF MITIGATING CIRCUMSTANCES, BUT RATHER A REASONED JUDGMENT AS TO WHAT FACTUAL SITUATIONS REQUIRE THE IMPOSITION OF DEATH AND WHICH CAN BE SATISFIED BY LIFE IMPRISONMENT IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES PRESENT.

IN ORDER TO IMPOSE A DEATH SENTENCE, YOU MUST BE CONVINCED BEYOND A REASONABLE DOUBT THAT THE TOTALITY OF THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE TOTALITY OF THE MITIGATING CIRCUMSTANCES. IF YOU ARE NOT CONVINCED BEYOND A REASONABLE DOUBT THAT THE TOTALITY OF THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES, YOU MUST RETURN A VERDICT OF LIFE IMPRISONMENT.

This instruction is also a correct statement of the law as set forth in State v. Dixon, **283** So.2d 1 (Fla. **1973)** and its progeny. It is particularly applicable in the instant case where the state was arguing the existence of specific, discernible aggravating circumstances while the defense was arguing that these were offset by non-statutory mitigating evidence which by their very nature cannot be as easily discerned as the somewhat objective aggravating circumstances.

DEFENDANT'S SPECIAL REQUESTED JURY INSTRUCTION NO. 7

BEFORE YOU CAN FIND THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION THE FACTS MUST DEMONSTRATE, BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT, A PARTICULARLY LENGTHY, METHODIC, OR INVOLVED SERIES OF ATROCIOUS EVENTS OR A SUBSTANTIAL PERIOD OF REFLECTION AND THOUGHT BY THE PERPETRATOR. THE LEVEL OF PREMEDITATION NEEDED TO CONVICT A DEFENDANT OF FIRST DEGREE MURDER DOES NOT NECESSARILY RISE TO THE LEVEL OF PREMEDITATION REQUIRED TO PROVE THIS AGGRAVATING CIRCUMSTANCE.

Once again, the requested instruction correctly states the law in this state with regard to the cold, calculated and premeditated aggravating circumstance. Preston v. State, 444 So.2d 939, 946 (Fla. 1984). The trial court denied the requested instruction on the authority of Herring v. State, 446 So.2d 1049 (Fla. 1984) wherein this Court approved a finding of cold, calculated and premeditated based upon a second shot fired at the victim within the same time frame as the first. However, this Court has receded from Herring, supra in Rogers v. State, 511 So.2d 526, 533 (Fla. 1987) wherein this Court now adheres to the view that for this aggravating factor to be applicable it must be shown that the accused acted with a "careful plan or a prearranged design to kill" someone. This clarification makes the trial court's reliance on Herring, supra, quite prejudicial. The requested instruction was crucial as evidenced by the state's argument to the jury and the trial court's subsequent finding that the killing was cold, calculated and premeditated.

The need for adequate instructions to be given to a jury to guide its recommendation in capital cases was expressly noted by the Court in Gregg v. Georgia, 428 U.S. 153, 192-193, 96 S.Ct. 2909, 49 L.Ed.2d 859, 885-886 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents

> and fixed rules of law. See Gasoline Products Co. v. Camplin Refining Co., 283 U.S 494, 498, 75 L.Ed. 1188, 51 S.Ct. 513 (1931); Fed.Rul.Civ.Proc. 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

The information received by Appellant's jury in the form of instructions on the law to be followed in making a penalty recommendation was far from adequate to avoid the infirmities in this death sentence that inhered in death sentence imposed under the pre-Furman statute. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Appellant's death sentence rests in part on the jury's recommendation to the trial judge that the death penalty be imposed. (R2729) Leduc v. State, 365 So.2d 149 (Fla. 1978).

> C. The Failure of the Trial Court to Instruct the Jury That They May Consider Non-Statutory Mitigating Evidence in Determining the Proper Penalty Recommendation.

Before the jury retired to deliberate, defense counsel informed the trial court of its failure to give the standard jury instruction regarding non-statutory mitigating evidence. (R2213-2219) However, the trial court refused to give the instruction because he felt it was not timely requested and because he felt it would place undue emphasis upon the instruction. (R2219) The particular instruction to which defense counsel referred was the standard instruction which provides:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether

> mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:
>
> * * *
>
> 5. Any other aspect of the defendant's character or record, and any other circumstance of the offense.

The instruction given by the trial court delineated three aggravating circumstances that the jury could find. (R2209) The sole instructions regarding mitigating evidence were as follows:

> Should you find sufficient aggravating circumstances to exist, it is then your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> A mitigating circumstance need not be proved beyond a reasonable doubt. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.
>
> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these consideration. (R2210)

Although the instructions make mention of mitigating circumstances, nowhere is the jury told what kind of mitigating factors they are permitted to consider. As is clear from Dr. Mara's

testimony and the trial court's finding of facts, the defense presented evidence of non-statutory mitigating circumstances.

It is clear that the jury cannot be prevented from considering any and all relevant mitigating evidence in deciding its penalty recommendation. Hitchcock v. Dugger, 481 U.S. __, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Skipper v. South Carolina, 476 U.S. __, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Further, this Court has recognized a trial court's duty to give the standard jury instructions on all those aggravating and mitigating circumstances for which evidence has been presented. Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985). In the instant case, although the defense presented non-statutory mitigating evidence, the jury was never told that it could consider the evidence. The fact that the trial court may have considered this evidence does not render the error harmless given the importance of th jury recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975). A new sentencing hearing is required.

D. Summary

The failure of the trial court to give the standard jury instruction concerning the jury's duty to consider evidence of non-statutory mitigating circumstances is reversible error where the defendant presents such evidence. Additionally, the requested jury instructions were correct statements of the law and were not otherwise covered by the standard jury instructions.

The instructions were particularly applicable to the facts of the instant case. Coupled with the admission of irrelevant evidence which the jury was permitted to consider, the failure of the trial court to give the requested instructions denied Appellant his constitutional right to due process of law. Appellant is entitled to have his death sentence either reduced to life or to have a new penalty phase before a newly empaneled jury.

POINT VIII

THE IMPOSITION OF THE DEATH PENALTY IN THE INSTANT CASE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION BECAUSE IT IS BASED ON AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

Following the jury recommendation for death, Judge Musleh adjudicated Appellant guilty and sentenced him to death. In his findings of facts to support the death sentence, Judge Musleh found three aggravating factors: that the capital felony was committed while Appellant was engaged in the commission of robbery; that the capital felony was especially heinous, atrocious, or cruel; and that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R2774-2778) Judge Musleh found two mitigating factors, his history of sexual abuse and his recognition that he needed help. (R2777) Appellant asserts that two of the aggravating factors were not proven beyond a reasonable doubt and consequently the death sentence cannot be sustained.

A. That the Capital Felony was Especially Wicked, Evil, Atrocious, or Cruel

This Court has defined "heinous, atrocious, and cruel in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) as such:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of

> pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only apply to crimes especially heinous, atrocious and cruel. In light of this, the facts enumerated by the trial court do not support the finding of this factor.

In Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court held the evidence insufficient to prove beyond a reasonable doubt an especially heinous, atrocious, or cruel killing in a situation where the female victim had been induced by the defendant to take drugs, then gagged, placed on a bed and smothered with a pillow, and ultimately dragged into a living room where she was successfully strangled to death with a telephone cord. This Court stated:

> As to the manner by which death was imposed, we find that in this factual context the evidence is insufficient, standing alone, to justify th application of the section (5)(h) aggravating factor. We have previously stated that this factor is applicable "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Tedder v. State, 322 So.2d 908, n. 3 (Fla. 1975)- (quoting State v. Dixon, 382 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Id. at 1380 (emphasis added).

An example of the valid finding of the existence of this aggravating factor can be found in Gardner v. State, 313

So.2d 675 (Fla. 1975), where the female suffered at least one hundred bruises on her body, numerous cuts and lacerations, and severe injury to her genitals and internal organs due to a sexual battery performed with a "broom stick, bat or bottle" Id. at 676. This aggravating circumstance should be reserved for murders such as the one in Gardner, which was "accompanied by such additional acts as to set the crime apart from the norm", Herzog, supra at 1380. It ill serves the continued viability of the death penalty in Florida if the aggravating circumstance can be upheld under the facts of the instant case; the facts do not comport with a finding of an especially heinous, atrocious or cruel murder.

The evidence showed that the victim suffered numerous stab wounds to his chest and that the immediate cause of death was excessive bleeding caused by the stab wounds. (R1691,1721) However, prior to the infliction of the stab wounds, the victim was forcefully strangled until he was rendered unconscious. (R1718,1720) The strangulation was sufficient to kill the victim, which suggests that the victim would probably have died even if he had not been stabbed at all. (R1719) The medical examiner testified that the victim was immobile at the time he was stabbed, which clearly suggests he was unconscious at the time. (R1719) There is no indication that the victim actually knew he was going to be killed until he was actually strangled. The actual strangulation was swift, causing the victim to immediately lose consciousness and die within a few minutes. (R1719) While the instant murder was indeed senseless and horrible, it

does not meet the test for being especially heinous, atrocious or cruel. This factor must be stricken.

B. The Capital Felony was a Homicide and was Committed in a Cold, Calculated and Premeditated Manner Without any Pretense of Moral or Legal Justification.

In Combs v. State, 403 So.2d 418 (Fla. 1981), this Court declared that Section 921.141(5)(i), Florida Statutes (1981) authorizes a factor in aggravation for premeditated murder where the premeditation is "cold, calculated and . . . without any pretense of moral or legal justification." Id. at 421. This Court further stated that "Paragraph (i) in effect adds nothing new to the elements" of premeditated murder, but does add "limitations to those elements for use in aggravation." Id. (emphasis added . Subsequently, in Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this Court held:

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to Drove bevond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated . . . and without any pretense of moral or legal justification." (emphasis supplied).

The aggravating circumstance of murder committed in a cold calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. Gorham

v. State, 454 So.2d 556 (Fla. 1984). "This aggravating factor 'is not to be utilized in every premeditated murder prosecution,' and is reserved primarily for 'those murders which are characterized as execution or contract murders or witness elimination murders.' (citation omitted)." Bates v. State, 465 So.2d 490, 493 (Fla. 1985).

In Middleton v. State, 426 So.2d 548, 553 (Fla. 1982), this Court approved the finding of (5)(i) where according to the defendant's own confession, he sat with the shotgun in his hands for an hour, looking at th victim as she slept and thinking about killing her. In light of these facts, the Court stated:

> This is clearly the kind of intentional killing this aggravating circumstance was intended to apply to. The cold-blooded calculation of the murder went beyond mere premeditation. (emphasis supplied).

In Harris v. State, 438 So.2d 787 (Fla. 1983), this Court struck down a finding of (5)(i) where the defendant killed a seventy-three year old woman by repeatedly stabbing her and beating her with a blunt instrument. The evidence also showed that the victim tried to escape and suffered numerous defensive wounds. This Court stated:

> We must, however, agree that the state failed to establish beyond a reasonable doubt that this murder met the requirements of having been committed in a cold, calculated, and premeditated manner, as we have defined this aggravating circumstance. This aggravating circumstance was not, in our view, intended by the legislature to apply to all premeditated-murder cases. [citations omitted]. In this instance the

> state presented no evidence that this murder was planned and, in fact, the instruments of the death were all from the victim's premises.

Very recently in Garron v. State, 13 FLW 325 (Fla. May 19, 1988) this Court reaffirmed that the heightened premeditation factor was intended to apply to execution or contrast-style killings.

In the findings of fact, the trial court recounts Appellant's plan to steal the victim's car. However, this Court has consistently held that planning to commit a crime other than the murder cannot automatically be transferred to the murder for the purpose of finding the enhanced premeditation necessary to sustain this aggravating circumstance. Gorham, supra; Hardwick v. State, 461 So.2d 79 (Fla. 1984). The fact that Appellant obtained a knife in advance does not necessarily prove a calculated plan to commit the murder, since Appellant was charged with and convicted of robbery with a deadly weapon. Therefore, the use of the knife was essential to his conviction for the robbery as opposed to the murder. Additionally, as argued in Point V, supra, the trial judge's view of the sufficiency of evidence to prove this aggravating circumstance was largely based on this Court's holding in Herring v. State, 446 So.2d 1049 (Fla. 1984). (R2171-2173) However, this Court has receded from Herring, supra, in Rogers v. State, 511 So.2d 526, 533 (Fla. 1987) wherein this Court adhered to the view that for this aggravating factor to be applicable it must be shown that the accused acted with "a careful plan or a pre-arranged design to kill" someone. Quite simply, the evidence is insufficient to

prove either heightened premeditation or a calculated, pre-arranged plan to kill the victim. This aggravating factor must be stricken.

C. Summary

Two of the three aggravating circumstances must be stricken. The remaining valid aggravating factor cannot justify the imposition of the death penalty especially in light of the mitigating factors found by the trial court. This Court must vacate the death sentence and remand for imposition of a life sentence with a mandatory minimum of twenty-five years.

POINT IX

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sente cing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florida Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death

sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (Fla. 1978) cert. denied 414 U.S. 956 (1979) (emphasis added).

In two recent decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly

demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

The Florida death penalty statute discriminates against capital defendants who murder whites and against black capital defendants in violation of the Eighth and Fourteenth AMendments to the United States Constitution and Article 1, Section 17 of the Florida Constitution. McClesky v. Kemp, 481 U.S. __, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)(dissenting opinion of Brennan, Marshall, Blackman and Stevens, JJ.)

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing reasons and authority, Appellant respectfully requests this Honorable Court to grant the following relief:

As to Points I through V, reverse Appellant's judgments and sentences and remand for a new trial.

As to Points VI and VII, vacate the death sentence and remand for a new penalty phase before a newly empanelled jury.

As to Points VIII and IX, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Fla. 32399-1050, and to Mr. Edward Castro, #110488, P.O. Box 747, Starke, Fla. 32091 on this 10th day of June 1988.

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