IN THE SUPREME COURT OF FLORIDA

EDWARD CASTRO,

Appellant,

v. CASE NO. 77,102

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Appellee accepts appellant's recital of the facts with the following additions:

Facts concerning the murder

Castro's taped statements (State Exhibits 6 and 7, R 2026) which were played for the jury established that the defendant had been staying in Ocala (R 599, 628). He saw an older man who had been drinking (the victim, Austin Scott) at his apartment complex. Castro thought "Hey, there's my car." He had been looking for a car, so he went up, started to talk, and convinced the older man to come inside to have a beer. Castro told the man to wait and he would be right back, then he went looking for a knife he hid the night before. He found a steak knife, but when he returned the victim was leaving. Castro felt the victim had gotten a sixth sense of survival and knew he was in trouble. With Castro's "golden tongue" he talked the victim into returning, saying he had a six-pack. The victim had let Castro drive his car to the Majik Market to get beer, and he got the idea he wanted the car. After the victim and Castro drank a beer, the victim tried to leave. Castro grabbed him by the throat, threw him on the bed and choked him. Castro had a knife in his sock which he was reaching for because the victim started scratching him. Castro thought to himself that he could lose the struggle and was scared the victim would scream because the handyman was outside, they had neighbors, and it was broad daylight. He was afraid the victim would make a noise and draw somebody there. Castro was "reaching, reaching, reaching,

reaching" and finally got the knife out. He showed the knife to the victim whom he was still choking, and told him "Hey, man, you've lost. Dig it?" He stabbed the victim so many times he lost count. He stabbed the victim as many times as he wanted to, somewhere between five and fifteen. He took the knife with him, broke it in three pieces, cleaned it with socks while he was driving and threw the pieces at various places. The victim had rings and watches, and Castro sold a ring and watch. (State Exhibit #6, R 2026).

In Castro's statement to Leary and Krietmeyer[1] he repeated the incident except in more detail. While Castro was drinking beer with the victim, he noticed two rings and a nice watch and thought the victim must have some money. Castro was holding the victim when he reached inside his boot to get the knife. The victim was fighting. Castro was trying to get the knife to the victim's face and told him he would stab him in the eyeball. The victim was trying to get the knife and Castro went for the heart when he stabbed the victim's hand. The victim was fighting too much, so Castro struck at his throat to keep him from screaming. Castro covered the body so the landlord wouldn't find it. He tried to make it look like the victim passed out on the floor. Castro sold one ring at a rest stop. Castro located the apartment on a drawing and described where the store and park were. (State Exhibit #7, R 2026).

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[1] Also spelled Credemyer in the record on appeal (R 1023).

McKnight testified that when he came into the apartment he saw the victim and was told to stab and rob him (R 841, 865). McKnight said that Castro was covered in blood from his fingertips to his elbows and on his jeans (R 868). McKnight stabbed the victim four to five times because he was under threat of death from Castro (R 866, 869). Castro threw McKnight some socks and told him to wipe down the apartment to get rid of fingerprints (R 870). Castro also had McKnight cover the body so the landlord would think the victim was drunk and passed out (R 870). The ring, watch and wallet were sold along I-75 rest stops (R 870). Castro only consumed beer in the four days before the murder. There were no drugs whatsoever (R 871). McKnight was not drinking at the time of the murder because he was epileptic (R 871). However, after the murder he began having an alcohol problem (R 881). Although Castro was "pretty well wasted" when he got to Lake City, he knew what was going on when he was arrested (R 877).

Facts concerning the arrest in Lake City

When Deputy Boatwright talked to Castro, he noticed scratch marks on him and bloodstains on his clothing (R 658, 662). He had seen Castro driving the vehicle but observed no traffic violations (R 660). There was nothing unusual about the way Castro walked (R 660). When asked for identification, Castro produced a social security card with the name Willie Crews (R 662). When asked his name, Castro could not tell the officer his name (R 662). The officer did not have probable cause to believe Castro's faculties were impaired and did not arrest him for DUI (R 663).

Medical testimony concerning cause of death

Dr. Chin conducted the autopsy on the victim (R 520). There was a hemorrhage to the left side of the neck and the hyoid bone on the left side was fractured. There was hemorrhage in the larynx. The significance of hemorrhage was that it showed the victim was alive when the bones were broken (R 525). There were eleven stab wounds in the chest, seven of which penetrated the chest plate (R 527). There were four stab wounds on the pericardium and the heart muscle itself had two wounds (R 528). Three ribs were broken. The wounds to the lungs were the fatal wounds (R 528). There was a bruise on the right forehead (R 530). There were six wounds (three pair of entrance and exit wounds) on the victim's right forearm in the wrist area (R 530, 555). These were most likely defensive wounds (R 561-62). They were not the classic type defensive wounds in which a victim tries to grab a knife but were more consistent with the victim protecting his chest (R 564). In the doctor's opinion, she would estimate the victim could have survived ten minutes in between losing consciousness from the strangling, possibly coming to, being stabbed and losing blood into the lungs (R 531-32). She said there was really no way to tell (R 532). Some of the stab wounds could have been inflicted after the victim died but not all wounds were post-mortem (R 532). All but four of the stab wounds were in the same direction (R 567). If one person committed the crime, he must have choked the person first so the victim was more or less immobilized, then stabbed him (R 569). If there were two people the other person could have been stabbing him. There was no way of knowing (R 569).

Dr. Reeves, the defense expert, testified that the injuries to the neck indicated there was a relative struggle between the victim and the assailant (R 963-964). The manual strangulation "could have" rendered the victim unconscious but was not necessarily lethal (R 963-64) and the victim lived through the interval of sustaining stab wounds. He said

> I don't believe you can say that the manual strangulation itself caused the victim to become unconscious or to kill him.

(R 964). The manual strangulation and the stabbing combined could have rendered the victim unaware in a minute or less, but it was possible it could have been longer since there is no way to determine that (R 965). On cross examination Dr. Reeves said that breaking the hyoid bone does not necessarily mean asphyxiation or unconsciousness (R 967). It is possible to apply pressure to the blood supply to the brain where someone might be losing consciousness and then ease off the pressure and the person would gain consciousness (R 969).

Proffered testimony of Dr. Reeves

Defense counsel asked the court to declare McKnight an adverse witness (R 827). The trial judge said that "you can't just say declare him an adverse witness without even hearing his testimony," and observed that a lot of the prior testimony would not even be admitted (R 828).[2] He also observed that the only testimony left was to the defense's benefit (R 828). The defense called McKnight (R 830), and wanted to impeach him with a prior

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[2] This court ruled aspects of McKnight's testimony inadmissible in Castro v. State, 547 So.2d 111 (Fla. 1989).

inconsistent statement (R 841). The defense claimed the inconsistencies in McKnight's prior statements would be important when Dr. Reeves testified (R 842). The court observed that whether the door was locked was a minor detail and the defense could voir dire McKnight on the issue (R 843). McKnight then told defense counsel that the first time he told anyone the door was locked was at the first trial, and he couldn't remember whether anyone had asked him about it before that (R 846, 853). The court expressed concern over how this was relevant to mitigation, and defense counsel asked for an in-camera hearing so the defense wouldn't have to "tip our hand." (R 848, 854). The court observed the defense could ask the witness about prior statements without making him an adverse witness (R 851-52).

Defense counsel then explained their position to the judge in-camera (R 857-62). Defense counsel wanted to present the fact of disparate treatment between co-defendants and that McKnight was more involved than the state admitted (R 860). The judge stated that he would not allow the defense to present evidence of guilt through the back door, at which point defense counsel asserted that Dr. Reeves would testify that Castro's statement was inconsistent with the scene (R 860-861). The trial judge stated that they were now in the penalty phase and were not going into whether it was McKnight who killed the victim because that was already settled (R 861). The court recognized that disparate treatment of codefendants was relevant and told counsel to ask McKnight about that (R 862). Defense counsel could also question McKnight about stabbing the body (R 863). McKnight then

continued to testify and the defense excused him (R 863-83). Defense counsel then stated that the trial court had precluded her from impeaching McKnight (R 884-85). The following ensured:

> THE COURT: You wanted me to declare him an adverse witness before he ever testified; who said --
>
> MR. BONNETT: Judge, he's already testified in this case. He was an adverse witness in --
>
> THE COURT: You're talking about the 19- -- who said you couldn't ask him about that?
>
> Did anybody say that? Because --
>
> MR. BONNETT: Yes, sir, we -- it was a surprise that --
>
> THE COURT: Hold it just a second.
>
> If it was a surprise, I would let you do the other that was a surprise. All you had to do is tell me it was a surprise and I would've let you asked him.
>
> During the trial -- during the testimony when you said well, Judge, he said before the guy was blitzed, I said go ahead and ask him about it.
>
> Why didn't you tell me that he said what you just said, and I would have told you to go ahead and ask him about it.
>
> I don't understand, you know, what you're saying.
>
> MS. JENKINS: Well, the issue that we're raising is whether or not the State had a responsibility through its Assistant, John Moore, to let the Court know, since we are not -- you told us he's not an adverse witness, you've been ruling that we can not impeach --
>
> THE COURT: I told you that before he testified. I told you that before he testified.
>
> MS. JENKINS: Right.
>
> MR. BONNETT: Yes, sir, we understand.

THE COURT: But nothing -- nobody has told me, or nobody -- I let you -- but when you brought out something, I let you ask him about it, and I was going to let you ask him about that, if you would have just asked me. All you've got to do is ask.

MR. BONNETT: I had no question with that, Judge, and you're absolutely right.

When I asked that question about the blitzed, the Court --

THE COURT: I let you do it; and then if you would have asked about this alcohol, I would let you -- if you want to grab him, I'll let you ask him now, before he leaves.

MR. BONNETT: Our problem, Judge, is not directed at that specifically; it's the Court's ruling specifically at the actions that are emanating from this side of the room.

THE COURT: Okay. You want to respond to that?

MR. RIDGEWAY: Yes, Judge, I would.

First of all, I hate to state the obvious, but the obvious is we didn't put this man on the stand, we didn't vouch for his credibility; okay?

MR. BONNETT: They didn't -- sorry.

MR. RIDGEWAY: Now, I understand Mr. Bonnett and Ms. Jenkins are frustrated because they did not get from this witness what they wanted to get from him in the form of impeachment; that's one of the reasons you don't call a witness, is so that you can prevent the other side from doing that.

So they called him, and they're disappointed with his testimony. That does not make him adverse. The rule is it has to be affirmatively harmful, not just disappointing. They're disappointed. I'm sorry. That's too bad. That's not supporting perjury by the Prosecution. We didn't put him up there. His testimony was solicited by the Defense. They're fully aware of the contradictions; if they think he's supporting perjury, then let them make any appropriate motion -- or that he's committing perjury, let them make motion with the Court to hold him in contempt, if they choose, and we can deal with that issue separately; but the question of how

this evidence is presented -- you know, they're frustrated, they're upset, they're disappointed, that's too bad, but there has been no misconduct here by the State.

THE COURT: Okay. Anything further?

What did you want to do, proffer your Doctor now?

MS. JENKINS: Okay. Go ahead and call him. Doctor Reeves.

(R 885-88).

The proffered testimony from Dr. Reeves was that some stab wounds were post-mortem, that the stab wounds were not necessarily immediately incapacitating or necessarily lethal, and there was no precise way to determine whether the strangulation rendered the victim unconscious (R 909-10, 919). Based on Castro's statement, the doctor's scenario was: the victim was grabbed by the throat and strangled but got his second wind or had a flow of adrenaline and was about to overcome the altercation at which point Castro reached for his knife, held the victim by the neck while the victim was scratching and fighting and put the knife in front of the victim (R 721-22). Dr. Reeves felt there were discrepancies in the statement since Castro said he cut the victim on his hands but there were no such cuts (R 923). One explanation for the wounds on the right arm was it was overlying the left chest when the chest wounds were inflicted (R 925). The arm wounds were "through and through wounds" (R 925).

Dr. Reeves also proffered testimony about the direction of the stab wounds and discrepancies in the autopsy report, at which point the trial court interrupted:

THE COURT: Let me interrupt a minute.

I was under the impression you were going to use him to say that the previous fellow, McNight, helped in the killing is the reason I told you you couldn't use him, because that goes to the Guilt Phase.

What are you -- what are you --

MS. JENKINS: We're also establish -- attempting to establish as to the pat, and --

THE COURT: Why didn't you tell me that when we were downstairs? That was a perfect --

MS. JENKINS: Because the most important --

THE COURT: -- time, and we wouldn't be wasting all this time.

MS. JENKINS: The most important thing the Doctor is going to establish as we told you in camera, that's what his testimony was to establish.

THE COURT: Okay. But I said --

MS. JENKINS: And I will ask him to get to it.

THE COURT: But you didn't say you were going to get into all this; I -- you can go into anything that mitigate the suffering, and so forth.

MS. JENKINS: I plan on doing that in front of the Jury, but right now we need to make a record as to the issues that we --

THE COURT: Why don't you get on to what you want to make a record of, and not go through all this other because this other stuff is going to be allowed.

MS. JENKINS: Well, the other stuff goes particularly to the issue that we're going to address; but I will have the Doctor summarize.

(R 928-30). Dr. Reeves then gave his opinion that the injuries were best explained by there being two assailants (R 930). His opinion was based on his disagreement with Dr. Chin's characterization of the arm wounds as "defensive" wounds (R 932)

and his disagreement with McKnight's statement he stabbed the body as he stood over it and the eyes were bulging (R 934-35). Stabbing in a bent over position should create a change in the stab wound (R 934). McKnight's statement about the eyes bulging was inconsistent with the autopsy photos which showed the eyes closed (R 935). Dr. Reeves didn't know what McKnight's description of "steam leaving the body" meant (R 937). There were also inconsistencies in who covered the body and whether the door was locked (R 937). In conclusion the doctor stated:

> I don't know of any evidence, physical evidence, that would contradict that there were two assailants; and I think the evidence, in fact, is consistent with that: there are two possible scenarios, obviously other things that have happened that are not described that could explain what actually happened.
>
> But, certainly, I can't say that two people weren't involved, and I don't believe anyone else can.

(R 938). The state objected to the doctor testifying to whether the door was locked since that was outside his expertise (R 940). On cross-examination Dr. Reeves said he did not argue with the fact some stab wounds were post-mortem (R 941). The bruises or abrasions on the throat could be consistent with some grabbing out by the victim himself grabbing his own neck (R 942-43). Dr. Reeves had no problem with the fact the victim could gain strength or the ability to fight Castro (R 943). It was also possible to break the bones in the throat without causing a person to pass out (R 944, 946). It would also make a difference in the doctor's theories if the victim were prone and the

assailant on top of him (R 946-947). The statements Dr. Reeves had had no specifics in regard to Castro's position (R 948). He stated it was "more probable" that if Castro grabbed the victim by the throat, threw him on the bed, choked him until he was unconscious or semi-conscious, he could then hold the victim with one hand and get the knife (R 947-48). If Castro's statement was correct that before he got the knife he had the victim on the bed and choked him, that would make a difference to the doctor (R 948).

After Dr. Reeves' proffer, the state attorney asked the judge to clarify as to what areas the doctor would be allowed to testify (R 949). Defense counsel said she would tell the court exactly what she was going to inquire (R 949). There was no objection from the state or court as to what defense counsel wanted to inquire (R 950).

Disqualification of State Attorney's Office

Anthony Tatti was co-counsel for the first trial of Castro (R 1166). Since his employment as an assistant state attorney he did not share confidential communications or work product of the Public Defender's Office with any member of the State Attorney's Office (R 1166). Mr. Tatti never discussed Dr. Mara's qualifications or why she was sought by defense counsel. He never had any conversations with anybody about Castro's case (R 1167). The week before the hearing Mr. Tatti received a call from John Moore regarding motions filed in the Freddie Lee Hall case (R 1167). Mr. Moore had received motions similar to the Hall motions and asked Mr. Tatti if he had done any research

independently. Mr. Tatti gave Mr. Moore the authorities he had received or looked up (R 1168). One of the motions was the same as that filed in Castro's first trial (R 1168). Mr. Tatti did not give Mr. Moore information from his perspective as a defense attorney in the Castro case regarding the motion or instruction (R 1168). Mr. Tatti did give him information he had gained through his research as an assistant state attorney having to deal with the same motion in either McGuire or Keebler (R 1168).

Mr. Tatti was lead counsel in three first degree murder cases: Hall, McGuire and Keebler (R 1170). In his role as lead prosecutor he dealt with certain motions, and the case cites he provided Mr. Moore were obtained during work on those cases (R 1170).

Jury instruction on premeditation

The court gave the jury the standard instruction on cold, calculated and premeditated (R 985, 1135). When the jury sent a question during deliberations regarding the legal definition and the time that must elapse before a murder is premeditated, the court consulted counsel (R 1145-49). After discussion by counsel, it was agreed the court would read the definition of "killing with premeditation" from the standard jury instruction and then additionally read the last two sentences of the defendant's special proposed jury instructions (R 1149, 1829). When the state attorney noticed the jury foreman was taking notes, the judge discussed it with the attorneys and took the note from the juror (R 1151-52). Defense counsel suggested the instruction be read again, which the judge did (R 1152-53).

SUMMARY OF ARGUMENT

Point I: Mr. Tatti did not reveal confidential communications to any member of the State Attorney's Office nor did he play a substantial role in prosecuting Castro. Castro has no basis to disqualify the entire State Attorney's Office. There was no showing of prejudice.

Point II: The trial judge did not double the aggravating circumstances of "during the commission of robbery" and "pecuniary gain" since he found they comprised one aggravating circumstance. Instructing the jury that both factors could be considered is not error under existing case law.

Point III: The trial judge did not preclude Castro from presenting any evidence in mitigation. The trial judge advised defense counsel it was not appropriate to attempt to relitigate guilt or innocence, but that presenting mitigating evidence was appropriate. The trial judge did not preclude questioning McKnight on prior statements even though he was not an adverse witness. Neither did the judge preclude evidence of disparate treatment. The trial court advised defense counsel during the proffer of Dr. Reeves' testimony that what had been presented was admissible. After the proffer defense counsel did not pursue the line of questioning regarding two assailants. Any error was waived or was harmless since both McKnight's and Castro's testimony was uncontroverted by competent evidence.

Point IV: The trial court's findings on the cold, calculated and premeditated aggravating circumstances are supported by substantial competent evidence. Castro lured the

victim to his death so that he could steal the victim's car, jewelry and wallet. Castro went to seek a murder weapon, then returned to strangle and repeatedly stab the victim who struggled for his life. Castro toyed with the victim. Castro knew he had to silence the victim because it was daytime and there were people nearby. Any error was harmless.

Point V: The trial court's findings on the heinous, atrocious and cruel aggravating circumstances are supported by substantial competent evidence. Castro choked the victim who struggled and scratched him. Castro then pinned the victim to the bed and held a knife up, taunting him with death. Castro repeatedly stabbed the victim as he tried to protect himself. The victim endured mental anguish and extreme suffering for up to ten minutes.

Point VI: This court has previously ruled that Castro's statements were voluntary, and that ruling is law-of-the-case. Castro was not intoxicated at the time he made the statements, and he voluntarily waived his Miranda rights. The trial court did not abuse its discretion in admitting the statements at the resentencing hearing.

Point VII: The photographs were relevant to show the cause of death and to explain the medical examiner's testimony. The trial judge screened the photographs and did not abuse his discretion in admitting several of the photographs.

Point VIII: This court has consistently rejected Castro's argument that the heinous, atrocious and cruel aggravating factor is unconstitutionally vague. Any objection to the instruction was waived.

Point IX: The Florida death penalty statute is constitutional on its face and as applied.

Point X: Castro's death sentence is proportional. Castro strangled, stabbed, then robbed the victim. The cases cited by Castro are inapposite since they involve domestic scenarios, overrides, or much less egregious murders.

Point XI: The trial court did not abuse its discretion in failing to provide written jury instructions on premeditation. The trial judge gave the instruction requested by defense counsel, so any objection was waived. Error, if any, was harmless.

POINT I

THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISQUALIFY THE OFFICE OF THE STATE ATTORNEY.

Castro claims Mr. Tatti "personally participated" and "actively assisted" in his resentencing since he helped Mr. Moore with responses to Castro's motions. The record shows that Mr. Tatti had no conversation about Castro's case and did not participate in resentencing. He did, however, give Mr. Moore some case cites he obtained from his research as an assistant state attorney while working on other cases. Mr. Tatti was not questioned as to which case cites he provided Mr. Moore and it was never established that the cites were even used to respond to Castro's motions. Although Castro asserts that "it cannot be doubted that Tatti actively discussed" responses the prosecution could make, the record shows he only provided case cites he used in other first degree murder cases and the trial judge specifically noted there was nothing said about tactics and strategy (R 1172). Mr. Tatti's communications with Mr. Moore did not involve confidential information. To the contrary, any exchange of information involved the standard defense motions or instructions and the state's response thereto which are public record and are certainly not confidential.

In State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985), the Fifth District Court of Appeal disqualified the entire state attorney's office on the ground that confidential communications relating to the charges against a defendant had been made by him to an attorney who was subsequently hired as an assistant state

attorney. This court quashed the district court's decision, holding that although the individual attorney should be disqualified, the entire office need not be disqualified. This court discussed Ethical Consideration 4-1 which requires preservation of confidences and secrets of a client by an attorney, and Disciplinary Rule 4-101 (b) which provides a lawyer shall not knowingly reveal a confidence or secret of his client or use the same to the disadvantage of his client. Id. at 1186. In Fitzpatrick, imputed disqualification of the entire state attorney's office was unnecessary when the record established that the disqualified attorney neither provided prejudicial information relating to the pending criminal charge nor personally assisted, in any capacity, in the prosecution of the charge. Justice Erlich dissented, stating that public confidence in the legal system mandated that attorneys should avoid even the appearance of professional impropriety. Justice Erlich urged the court to recede from Thompson v. State, 246 So.2d 760 (Fla. 1971), because Thompson shifted the burden from whether the confidential communication was "usable" against the defendant to whether it was actually "used" against him. Fitzpatrick (dissent) at 1189. However, the court in Fitzpatrick did not recede from Thompson.

Although Castro cites Fitzpatrick for the proposition that a former defense attorney cannot be involved in any capacity, this language referred to the attorney involved in that case and was not establishing a rule of law.

In Preston v. State, 528 So.2d 896 (Fla. 1988), Preston's attorney on a misdemeanor charge subsequently became a member of the state attorney's office that prosecuted him for murder. This court found that the attorney played no "substantive role" in the prosecution. The attorney testified he had not discussed any privileged communications or other matters with any members of the state attorney's office. The attorney did appear at a continuance hearing at the request of the prosecuting attorney to object to a motion to continue. The trial court found, and this court agreed, that the attorney did not participate in the prosecution nor provide any prejudicial information relating to the charges, and his presence at a motion to continue was "assistance"; however, it was not the character of assistance in the prosecution contemplated by Fitzpatrick. Preston at 899.

Fitzpatrick was followed in State v. Cote, 538 So.2d 1356 (Fla. 5th DCA 1989), in which the trial court disqualified the state attorney's office "to avoid the appearance of impropriety" and the Fifth District Court of Appeals reversed. In Cote, defense counsel discussed his pending murder case with an attorney who subsequently went to work for the state attorney. The appellate court found that the state attorney had not revealed anything he had learned through his contact with Cote's attorney, and was not in any way participating in the prosecution, and without a showing of prejudice to the defendant, the mere "appearance of impropriety" or "potential for conflict" was insufficient to require the disqualification of the entire state attorney's office. Id. at 1358 (emphasis added).

Likewise, in Meggs v. McClure, 538 So.2d 518 (Fla. 1st DCA 1989), the First District Court of Appeal stated:

> In order to disqualify a state attorney, actual prejudice must be shown. *State v. Clausell*, 474 So.2d 1189 (Fla. 1985), *approving original opinion, Clausell v. State*, 455 So.2d 1050 (Fla. 3d DCA 1984). Actual prejudice is something more than the mere appearance of impropriety. While we may agree, as the trial judge obviously concluded, that Meggs' appearance before the grand jury was not prudent, it has not been shown that it constituted actual prejudice. Disqualification is not a remedy for poor judgment; disqualification of a state attorney must be done only to prevent the accused from suffering prejudice that he otherwise would not bear. Such has not been shown to this court.
>
> Here, the entire office was disqualified because of the "appearance of impropriety." Clearly, this was erroneous. An entire office need not be disqualified because one member may have a disqualifying interest. Meggs was not the actual prosecutor in the case, and the participation of the assistant state attorney actually responsible for the prosecution has not been shown to have caused any prejudice to Wolfe whatsoever.

Id. at 519-20.

This court has recently cited Justice Erlich's comments in the Fitzpatrick dissent in Reaves v. State, 574 So.2d 105 (Fla. 1991); however, this case should be considered prospectively only. In fact, this court stated in Reaves that the newly formulated rule of disqualification would be applicable only to that case and to cases that commenced after the opinion was released. Id. at 107. Furthermore, Reaves is distinguishable

from this case. In Reaves, the state attorney actually involved in prosecuting the case had previously represented Reaves as an assistant public defender. Reaves argued that issues in his prior case - particularly mitigation factors - were similar to issues raised in the murder case. Thus, even under Preston, Cote, and McClure, the attorney would have been disqualified. In Castro's case, as in Fitzpatrick, there was no question the attorney was disqualified. The question was whether Mr. Tatti shared any confidential communications with other members of the state attorney's office which required disqualification of the entire office.

To disqualify the state attorney's office in this case for sharing information that is public record and could have been provided by any other attorney through research, would be ridiculous. As Mr. Tatti stated, the only information he gave Mr. Moore was research he had done on unrelated cases (Keebler or McGuire or Hall) since he had been at the State Attorney's Office. He specifically stated he gave no information as a result of his perspective as a defense attorney in Castro's case. Castro has not only failed to establish Mr. Tatti revealed confidential information but he has neither alleged nor proven prejudice. In fact, he has not even shown Mr. Moore used the case cited he obtained from Mr. Tatti. Absent an actual exchange of privileged information and substantive participation in the prosecution, the mere "appearance of impropriety" is not the sort of prejudice mandating reversal under Preston, Cote, and McClure.

POINT II

THE JURY RECOMMENDATION WAS NOT TAINTED AS A RESULT OF THE JURY BEING INSTRUCTED ON "DOUBLED" STATUTORY AGGRAVATING CIRCUMSTANCES.

Castro claims that Suarez v. State, 481 So.2d 1201 (Fla. 1985) is wrong, is an anachronism, and that allowing the jury to consider both "during the commission of a robbery" and "pecuniary gain" rendered their recommendation unfair and unreliable. Castro also argues that a harmless error analysis cannot be applied and the jury should make specific written findings of aggravating and mitigating circumstances.

Castro recognizes that this court has previously found such argument to be meritless. Suarez v. State, 481 So.2d 1201 (Fla. 1985). See also, Hayes v. State, 16 F.L.W. S392 (Fla. May 23, 1991); Valle v. State, 16 F.L.W. S303, 306 n.9 (Fla. May 2, 1991). The trial judge followed the law and Castro propounds no compelling reason for this court to change prior case law. The prosecutor acknowledged the two aggravating circumstances were related (R 1079). Defense counsel was welcome to argue the circumstances should be considered together. Imposition of the death penalty is a weighing and not a counting process, and the jury was instructed to weigh the aggravating and mitigating circumstances (R 1133-34). See, State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). In fact, the state attorney specifically told the jury "it's not a counting, mathematical process, it's a weighing process" (R 1076).

Castro relies on Provence v. State, 337 So.2d 783 (Fla. 1976); however, in that case the trial judge found both "robbery" and "pecuniary gain" as aggravating circumstances. Here, the trial court found that committed during a robbery and pecuniary gain were one aggravating circumstance (R 1986). See, Deaton v. State, 480 So.2d 1279 (Fla. 1985). There was no error and Castro's arguments that a harmless error analysis is not appropriate has no applicability. Castro cites Jones v. State, 569 So.2d 1234 (Fla. 1990), but Jones involved an instruction on heinous, atrocious and cruel where there was no evidentiary basis for the instruction. A harmless error analysis is appropriate even where the judge finds both aggravating circumstances. See, Cherry v. State, 544 So.2d 184 (Fla. 1989); Vaught v. State, 410 So.2d 147 (Fla. 1982); Francois v. State, 407 So.2d 885 (Fla. 1981). Castro's argument regarding specific written findings by the jury has no merit. Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055 (Fla. 1989). His argument that because the jury recommendation was eight to four it is somehow less than reliable is likewise meritless. See, Craig v. State, 510 So.2d 857, 867 (Fla. 1987).

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING CASTRO FROM RELITIGATING THE GUILT PHASE DURING THE RESENTENCING HEARING.

Castro argues the trial court was "totally foreclosed from contesting the scenario of the murder contained in his statements to the police", and the trial court denied him due process and the right to present evidence (Initial Brief at 49). He also argues the judge precluded him from discrediting his prior statement and advancing his version of what transpired through McKnight and Dr. Reeves, thus rendering the jury's recommendation and trial court findings unreliable (Initial Brief at 50). He claims he was not arguing lingering doubt of guilt but was trying to establish two persons assaulted the victim and, therefore, McKnight's sentence was disparate. Castro acknowledges evidence of lingering doubt is inadmissible. King v. State, 514 So.2d 357 (Fla. 1987).

A resentencing is not a retrial of the defendant's guilt or innocence. Both the state and the defense can present evidence at the penalty phase that might have been barred at trial because a narrow interpretation of the rules of evidence is not be to enforced. To be admissible, however, evidence must be relevant, and the admission of evidence is within the trial court's wide discretion. Chandler v. State, 534 So.2d 701 (Fla. 1988), citing King v. Dugger, 514 So.2d 354 (Fla. 1987); Teffeteller v. State, 495 So.2d 744 (Fla. 1986); State v. Dixon, 283 So.2d 1 (Fla. 1973); Alvord v. State, 322 So.2d 533 (Fla. 1975); and Muehlman

v. State, 503 So.2d 310 (Fla. 1987). The trial court did not abuse its discretion.

Castro claims the trial court limited his presentation of testimony from McKnight and Reeves.

Testimony of McKnight

Defense counsel wanted the court to declare McKnight an adverse witness and impeach him with inconsistent statements (R 841). The trial court said counsel could ask about prior statements (R 852). Defense counsel had an in-camera hearing with the judge and told him she was trying to establish disparate treatment (R 859). The judge told her it was appropriate to question McKnight about any deals with the state but defense counsel said that would be cross-examination (R 860). The trial court stated that he recognized disparate treatment as mitigation and to simply ask McKnight about his treatment (R 862). The only thing the judge didn't want to do was to get back into the guilt phase (R 862). Counsel then said they would need to proffer Dr. Reeves' testimony so the court could make a decision as to whether he could testify (R 862).

The court said counsel could ask McKnight about stabbing the body (R 863). After the in-camera hearing defense counsel told the state attorney the judge had ruled she could not go into the area of impeaching contradictory statements (R 864). McKnight testified that he stabbed the victim five times and robbed him. He was charged with accessory after the fact and received five years probation in 1987. His probation terminated two years before the hearing (R 865-67).

The trial judge did not preclude defense counsel from inquiring about McKnight's involvement or deals with the state. In fact, all this testimony was presented. The only ruling that was disputed was the denial of the motion to declare McKnight an adverse witness. The trial court's ruling was correct since McKnight did not give any testimony that was affirmatively harmful or prejudicial. §90.608(2) Fla. Stat. When confronted with McKnight's prior statements regarding whether the door was locked, the trial judge said to ask the witness the question. Counsel was not precluded from asking about prior statements. In fact, the court stated that counsel could ask about prior statements without making him an adverse witness (R 852). The defense did not ask the court to declare McKnight a court witness, which would not have been appropriate, anyway. See, Shere v. State, 16 F.L.W. S246 (Fla. April 4, 1991). There was no testimony proffered that pointed to any additional participation than that which the jury knew.

Dr. Reeves

Castro's position is that Dr. Reeves' testimony would establish McKnight was more involved than previously revealed. Dr. Reeves' testimony was substantially similar to Dr. Chin's and actually corroborated the version of events previously related by Castro and McKnight. He testified that some stab wounds were post-mortem, (consistent with the testimony of McKnight stabbing the victim after he was dead). The wounds on the right arm were consistent with the arm overlying the left chest and were "through and through" wounds. This was consistent with Dr.

Chin's testimony the wounds were not classic defensive wounds but was more consistent with the victim protecting his chest (R 561-62). During the proffer the court indicated he thought Dr. Reeves was going to say McKnight helped in the killing which was only relevant to guilt; however, all the testimony Castro had presented in the proffer was admissible and they could go into anything that mitigated (R 928-30).

Dr. Reeves then proffered his opinion that there could have been two assailants. However, on cross-examination he admitted the facts were consistent with one assailant, particularly if, as Castro said, he had pinned the victim to the bed and choked him before he reached for the knife. After the proffer, the state asked the judge to clarify what Dr. Reeves could testify about, and defense counsel told the court exactly what she would present (R 949). There was no limitation on what counsel could present. The doctor then testified about the defensive wounds, period of consciousness and location of wounds (R 961-967). Defense counsel abandoned the "two-assailant" testimony which was subject to severe impeachment and was speculation at best. Even if it had been presented, it would not have made a difference, since both Castro and McKnight testified the latter was involved only after-the-fact.

McKnight's disparate treatment <u>was</u> presented to the jury through the testimony about receiving probation. Defense counsel argued in closing that McKnight was involved more than the state admitted (R 1100-01) and that McKnight's involvement should be considered in mitigation (R 1117). In its findings of fact, the trial court considered the disparate treatment issue and found:

> The Court must also reject the defendant's contention that the death penalty will result in disparate treatment. Castro, by his own admission, strangled Scott to near death and then stabbed him five to fifteen times. McKnight had the misfortune of arriving after Scott had been brutally attacked by Castro to have Castro insist that McKnight stab the victim. Even if Scott were alive when stabbed by McKnight, Castro initiated this crime and was the dominant force behind Scott's death. There is simply no disparity.

(R 1988).

The trial court's findings are supported by case law. See, Dolinsky v. State, 576 So.2d 271 (Fla. 1991); Thompson v. State, 553 So.2d 153 (Fla. 1990); Eutzy v. State, 458 So.2d 755 (Fla. 1984); White v. State, 415 So.2d 719 (Fla. 1982); Mendyk v. State, 545 So.2d 846 (Fla. 1989); Bryan v. State, 533 So.2d 744 (Fla. 1990); Craig v. State, 510 So.2d 857 (Fla. 1989); Rogers v. State, 511 So.2d 526 (Fla. 1987); Tafero v. State, 403 So.2d 355 (Fla. 1981).

The cases cited by Castro are inapposite. In Downs v. State, 572 So.2d 895 (Fla. 1990), the defendant and various witnesses testified that he was not the triggerman. The trial court excluded testimony from Down's grandmother that the defendant was with her at the time of the murder. This court found any error to be harmless. In Castro's case, the trial judge stated several times that he was not restricting presentation of disparate treatment of McKnight or any mitigating evidence. The testimony by McKnight in no way supports Castro's assertion that McKnight was equally involved. To the contrary, the testimony shows he arrived after the murder was complete.

The only restriction the judge placed on Castro was in not declaring McKnight an adverse witness. The trial judge said defense counsel could ask McKnight about any statements he previously made. This happens to be a correct statement of the amendment to §90.608 Florida Statutes which applies to cases pending on October 1, 1990. See, Chapter 90-174, Laws of Florida. The trial court did not restrict the testimony of Dr. Reeves. The trial court told defense counsel she could go into anything in mitigation, but after the proffer, she stated she would limit the presentation. The trial judge said he recognized disparate treatment of a co-defendant as mitigation. Disparate treatment was argued to the jury. Dr. Reeves' testimony did not establish there were two assailants. In fact, when presented with the true scenario, he admitted that is what "more probably" happened. Defense counsel waived any previous objection by abandoning the two assailant testimony.

Castro also cites Colina v. State, 570 So.2d 929 (Fla. 1990); however, in that case the trial court prohibited Colina from testifying about a co-defendant's statements during the murders that showed the co-defendant knew the victims and that the co-defendant threatened him with a knife since he was the only witness. The testimony showed the co-defendant may have been the dominant actor in the murder. In the present case, there is no question Castro was the sole perpetrator. The trial court findings rejecting the mitigating evidence of disparate treatment are supported by the record. See, Hudson v. State, 538 So.2d 829 (Fla. 1989).

The trial court did not abuse its discretion in any limitation that may have occurred. Even if certain testimony should have been admitted (and Castro points to no specific testimony that was proffered and precluded) it was harmless error. See, Downs, supra.

POINT IV

THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED WAS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

Castro argues that because the trial court's findings are based on Castro's statements which he claims are unreliable, this aggravating circumstance must be stricken. Castro claims the murder did not happen as described in his statements, i.e. the arms were pinned to the victim's chest rather than the wounds being defensive and McKnight was not simply a hitchhiker. Castro's arguments are a restatement of Points III and VI which have no merit. The trial court's findings that the murder was cold, calculated and premeditated are supported by substantial competent evidence.

Castro's two statements that were admitted were voluntary. Castro has cited no case law which precludes a trial court from using a defendant's voluntary statements in finding aggravating circumstances. In fact, his statements are the best evidence since the victim is obviously unavailable and the defendant is the only remaining eyewitness to the murder. See, Nixon v. State, 572 So.2d 1336 (Fla. 1990); Brown v. State, 565 So.2d 304 (Fla. 1990); Remeta v. State, 522 So.2d 829 (Fla. 1988). Castro ignores the fact that his statements are consistent with the medical testimony. The evidence showed Castro was the sole perpetrator, but even if there had been two or three or four assailants, the murder was still cold and calculated.

In Castro's statement to officers Krietmeyer and Leary, he says McKnight had been staying with him and was in apartment number four at the time of the murder (State Exhibit #7). McKnight had passed Castro and the victim at which time Castro said "this is my hit". (R 839). McKnight went upstairs, took a shower, then went back down to Castro's apartment (R 841). Castro was covered with blood and the victim was lying on the bed with his eyes rolled back and bugged out (R 869). Castro told McKnight to stab the victim or he would be next, so McKnight stabbed the victim in the chest (R 869). Castro had McKnight wipe down the fingerprints and take the rings, watch and wallet. The jewelry was sold at the interstate rest stops (R 870).

In Castro's statement to Lieutenant Nydham, he said that when he saw the older man staggering he was "digging it" and said "Hey, there's my car." After he convinced the victim to come to his apartment, he went to look for a knife because "[i]t was on my mind already." When the victim tried to leave the apartment, the following ensued:

> CASTRO: So, anyways, so all of the sudden man, we was sitting there talking and something snapped and he jumped up and said, "Well, I got to go", and I said "f--- go" cause I already had the car in my mind and I knew that if I let him go, I was gonna loose the car, right? So, I said, "f--- go" and that's when I snapped. I grabbed him by the throat. I threw him down on the bed. I choked him and choked him and I choked him and I choked him and I was trying to take his life out by choking. I had a knife and I was choking him and choking him and I choked him so f---ing much that blood started coming out of his mouth. I'm not bragging. I'm just telling him the truth. I choked him so much man that blood started coming out of his mouth and at the same time I had him on the bed man, I'm reaching because I was losing him

because he started scratching me and ya know, like when a person is dying and their last ounce of strength comes out of them and they start grabbing and swinging and whatever they can do to get out of it. It's like a sense of survival. But anyway, I'm holding him and that's what he started doing to me man. I knew it was coming out of him. I said "Hey, this is it man. You can lose this." What I was really scared of, I wasn't scared of losing it, I was scared that he was going to scream because the man that I had talked to, the handy man was outside and we were in a little cubby hole and we had neighbors and it was broad daylight. You know what I was afraid of? I was afraid that he was going to make a noise and he was going to draw somebody there and at the same time I was reaching, reaching, reaching, reaching, reaching, reaching and I got the knife. I finally got the knife out and uh, I pulled it out and I showed it to him, still choking him and by that time he was purple. I remember looking at his face and it was purple. I told him "hey man, you've lost. Dig it?" That's when I started stabbing him.

NYDAM: Where did you stab him at?

CASTRO: In the heart.

NYDAM: How many times?

CASTRO: Oh, I don't know. Probably about...I lost count ya know, but it was more than five, no more than fifteen. Something like that, in between there. It was as many times as I wanted to.

NYDAM: Did you lose your knife in him or did you take it with you or what?

CASTRO: I took it with me.

NYDAM: Where is the knife now?

CASTRO: It's spread out. I broke it down.

(State Exhibit #6, R 2026).

In Castro's statement to Officers Krietmeyer and Leary, he talked about the landlord telling him to leave, that he decided to leave and made up his mind to take a car. When he saw the

victim he "put it together. I turn the personality up then cause you know I want this car." He then decided he was "going to take this guy out." Castro tried to figure out how to "take this guy out without him screaming or making noise so I decided I'd get a knife." He went back and decided to "take this guy out." Castro recounted the following:

> CASTRO: So well I take him back inside the (inaudible) apartment you know, and I tell him hey, you know I got to get my s--- together uh, have another beer man I say and we'll be on our way and he sits down for some odd re... he starts getting suspicious, nervous and he's wearing two rings, you got one of the rings here, the other one I sold I don't remember where, some rest area. Anyways, he's got two rings and he's got a watch, a nice watch, you know, and uh, (inaudible) this guy must have some money and for some odd...odd reason...then, then I act, I said f--- it, I'm gone and I reached and I grabbed him by the throat and then squeezing him. I squeezed, I squeezed him so hard that blood starts coming out his mouth, his face was turning purple and he's fighting me. He scratches me and he's making me real mad and oh, I stuck the knife inside my boot. I'm holding him and I reach down and I'm trying to get the knife and I'm telling him man, I said hey, you know what, you're f---ing up and uh, I'm trying to hold him, I'm trying to hold him, he's fighting me and I'm trying to get the knife, and I get the knife and I point it to his face and I tell him look man, we can make this real f---ing easy. All I want is the car. I told him that if he didn't settle the f--- down I was going to stab him. Told him I would stab him in the eyeball. And then, uh, then he fights trying to get the f---ing knife so yeah, so I cut his hand, cutting him right here too.
>
> LEARY: On the left?
>
> CASTRO: Uh, I don't know which one. I remember that I cut his hand cause he was like trying to get the knife, but I don't go for the hand, I went for the heart. I said f--- it. I said f--- it cause he kept, he was fighting too much. I said f--- it and I struck at his throat trying to keep him from not screaming and I don't think he could

> have screamed by that time anyway. And then I kept (beating on a hard surface) and I don't know how many times I stabbed him, I don't remember, I lost it.

(State Exhibit #7, R 2026).

Procuring a weapon before the murder supports the heightened premeditation required for cold, calculated and premeditated. See, Brown v. State, 565 So.2d 304 (Fla. 1990); Lamb v. State, 532 So.2d 1051 (Fla. 1988); Huff v. State, 495 So.2d 145 (Fla. 1986); Eutzy v. State, 458 So.2d 755 (Fla. 1984). Luring the victim into the apartment also supports cold, calculated and premeditated. See, Koon v. State, 513 So.2d 1253 (Fla. 1987). There is no evidence to reasonably suggest Castro had any motive other than to kill the victim. He told McKnight this was his "hit", lured the victim into his apartment, obtained a knife, choked the victim to make sure he couldn't scream, then stabbed him. See, Shere v. State, 16 F.L.W. 246 (April 4, 1991); Jones v. State, 569 So.2d 1234 (Fla. 1990); Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Cold, calculated and premeditated is established where evidence shows Castro planned the robbery, lured the victim into his apartment, brought a weapon to the scene and tried to conceal the body. See, Lamb v. State, 532 So.2d 1051 (Fla. 1988); Lambrix v. State, 494 So.2d 1143 (Fla. 1986).

Cold, calculated and premeditated is not limited to execution-style murders. Rutherford v. State, 545 So.2d 853 (Fla. 1989). This aggravating circumstance has been upheld even where there was no definite plan to kill the victim, but murder

was "considered" or the need evolved during the commission of a robbery or burglary. See, Walton v. State, 547 So.2d 622 (Fla. 1989); Brown v. State, 565 So.2d 304 (Fla. 1990). Castro told the landlord he would be leaving shortly and then located a vulnerable victim who he could eliminate and steal his car. Once he had the victim in the apartment, he noted the presence of the ring and watch and this fueled his desire to eliminate the victim for his own greed. If the only motive had been robbery, Castro could have abandoned the murder when the struggle began. Castro pursued his goal of murder and pecuniary gain notwithstanding the victim's fighting back. See, Jackson v. State, 498 So.2d 406 (Fla. 1986). He toyed with the victim by holding the knife in his face and telling him he had lost. See, Mendyk v. State, 545 So.2d 846 (Fla. 1989). The trial court's findings were supported by substantial competent evidence. See, Asay v. State, 16 F.L.W. S385 (Fla. May 16, 1991); Shere v. State, 16 F.L.W. 246 (April 4, 1991); Jones v. State, 569 So.2d 1234 (Fla. 1990); Craig v. State, 510 So.2d 857 (Fla. 1987). The record shows Castro carefully planned the murder and this aggravating circumstance is appropriate.

The cases cited by Castro are inapposite. Thompson v. State, 565 So.2d 1311 (Fla. 1990), involved a domestic situation in which the killing took place in "a deranged fit of rage." This court stated that "Rage is inconsistent with the premeditated intent to kill someone" unless there is other evidence to prove heightened premeditation. Id. at 1318. Here, Castro contemplated the victim's fate in a cold, unemotional

manner., He made a conscious decision to kill the victim when he got up to leave and pursued his goal despite the victim struggling and resisting. See, Brown, supra. Gorham v. State, 454 So.2d 556 (Fla. 1984), involved a shooting during a robbery, and there was no evidence of heightened premeditation. Here, we have Castro's statements to McKnight and law enforcement officers which is direct evidence of premeditation. Maxwell v. State, 443 So.2d 967 (Fla. 1983), involved a shooting during a robbery where the victim protested. There was no evidence the defendant contemplated murder before the robbery began. Here, Castro had decided to "take the guy out" before the events began to unfold. In Hardwick v. State, 461 So.2d 79 (Fla. 1984), like Maxwell, there was no evidence the defendant contemplated the victim's death.

Even if this aggravating circumstance were stricken, the result would be the same. See, Clemons v. Mississippi, 110 S.Ct. 1441 (1990); Sochor v. State, 16 F.L.W. S297 (Fla. May 2, 1991); Holton v. State, 573 So.2d 284 (Fla. 1991); Young v. State, 16 F.L.W. S192 (Fla. Feb. 28, 1991); Reed v. State, 560 So.2d 203 (Fla. 1990); Rivera v. State, 561 So.2d 536 (Fla. 1990); Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Jackson v. State, 530 So.2d 269 (Fla. 1988); Mitchell v. State, 527 So.2d 179 (Fla. 1988); Smith v. State, 515 So.2d 182 (Fla. 1987); Rivera v. State, 545 So.2d 846 (Fla. 1989); Rogers v. State, 511 So.2d 526 (Fla. 1987).

POINT V

THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS AND CRUEL WAS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

Castro argues the trial court cannot find heinous, atrocious and cruel based on defendant's statements which are unreliable. Castro admits he told law enforcement officers that he stabbed the victim in the hand as they struggled, but argues that because the wounds were on the right forearm in the wrist area, (R 555) the statement is unreliable. Although Dr. Chin said the forearm wounds were not classic defensive wounds, they were consistent with the victim protecting his chest. Castro said that he didn't "go for the hand, I went for the heart" (State Exhibit #7, R 2026). The statement is consistent with the medical testimony.

The medical testimony alone showed that Austin Scott died a torturous death. Dr. Chin testified he could have lived up to ten minutes. The medical testimony corroborated Castro's statements in every detail. The victim was strangled then stabbed repeatedly. Either method alone would be heinous, atrocious and cruel. Here we have both. Although Castro argues that Dr. Reeves testified the victim would have been unconscious within one minute from the beginning of the assault, this testimony is contradicted by Castro's statements and Dr. Chin's testimony. Furthermore, if, as Castro argued in Point IV, his purpose was only to steal the car, there was no reason to repeatedly stab the victim in the heart if he was unconscious. Castro described in graphic detail how the victim suffered and

how Castro toyed with the victim, showing him the knife and taunted him. The victim was conscious at the time of the stabbing.

Castro's statements were voluntary. The best evidence is listening to the tapes.

Multiple stab wound murders and strangulation murders have traditionally been considered heinous, atrocious and cruel killings. The trial court so found in the instant case based on a plethora of evidence that not only did Mr. Scott suffer from the strangulation and multiple stab wounds, but also that he was fully aware of his impending death and taunted and teased by Castro regarding his impending death. See, Francois v. State, 407 So.2d 885 (Fla. 1981).

The trial court's finding that the murder was heinous, atrocious and cruel was supported by substantial competent evidence. Randolph v. State, 562 So.2d 331 (Fla. 1990). See, also, Jackson v. State, 530 So.2d 269 (Fla. 1988) (stabbing); Quince v. State, 414 So.2d 185 (Fla. 1982) (strangulation); Lusk v. State, 446 So.2d 1038 (Fla. 1984) (stabbing); Lemon v. State, 456 So.2d 885 (Fla. 1984) (strangulation); Mitchell v. State, 527 So.2d 179 (Fla. 1988) (stabbing); Johnston v. State, 497 So.2d 863 (Fla. 1986) (stabbing); Floyd v. State, 497 So.2d 1211 (Fla. 1986) (stabbing); Dudley v. State, 545 So.2d 857 (Fla. 1989) (strangulation); Doyle v. State, 460 So.2d 353 (Fla. 1984 (strangulation); Tompkins v. State, 502 So.2d 415 (Fla. 1986) (strangulation); Johnson v. State, 465 So.2d 499 (Fla. 1985) (strangulation); Medina v. State, 466 So.2d 1046 (Fla. 1985)

(strangulation and stabbing); Brown v. State, 473 So.2d 1260 (Fla. 1985) (strangulation); Nibert v. State, 508 So.2d 1 (Fla. 1987) (stabbing); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (stabbing); and Smith v. State, 424 So.2d 726 (Fla. 1982) (stabbing).

Castro also includes an argument that heinous, atrocious and cruel is vague and arbitrarily applied. This argument has been repeatedly rejected. Smalley v. State, 546 So.2d 720 (Fla. 1989); Hitchcock v. State, 16 F.L.W. 23 (Fla. Dec. 20, 1990).

POINT VI

THE TRIAL COURT PROPERLY RULED THAT CASTRO'S STATEMENTS WERE ADMISSIBLE.

Whether Castro's statements were voluntary and whether the trial court failed to make a finding of voluntariness was raised on direct appeal and this court affirmed the trial court's rulings:

> The trial court, Castro argues, failed to find that the statements were voluntary.
>
> At the outset, we note that the trial court's decision to exclude Castro's first statement due to the state's failure to properly warn Castro of his rights did not automatically obligate the trial court to suppress Castro's three subsequent statements. In *Oregon v. Elstad,* 470 U.S. 298, 314, 105 S.Ct. 1285, 1296, 84 L.Ed.2d 222 (1985), the Court found that
>
> > absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.
>
> In determining the voluntariness of Castro's subsequent statements, the trial court was required to consider the surrounding circumstances. *See Elstad,* 470 U.S. at 318, 105 S.Ct. at 1297-98; *Bauza v. State,* 491 So.2d 323, 324 (Fla. 3d DCA 1986). Voluntariness in this context depends upon the absence of "coercive police activity," or "overreaching." *Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

> Consistent with the principles underlying *Elstad,* the trial court below held a pretrial evidentiary hearing on Castro's motion to suppress. The testimony established that officers gave Castro verbal *Miranda* warnings and that he executed written waiver forms on two of the three occasions in question. We are satisfied that the testimony was sufficient to support the conclusion that the confessions were voluntary and not influenced by Castro's previous consumption of alcohol.

Castro v. State, 547 So.2d 111, 113 (Fla. 1989) (See Point III on Direct Appeal in Case No. 71,982). This ruling is now law-of-the-case.

Castro supplemented the record with the suppression hearing from the trial (SR 1-249). The supplemental record shows that Castro was given his Miranda[3] rights before each of the statements that was admitted (SR 54, 61, 71, 168) (State's Exhibits #6 and #7), statements to Lieutenant Nydham and Officers Krietmeyer and Leary). The officers testified Castro understood his rights and was not intoxicated when he gave the statements (SR 75). At the resentencing, the booking officer testified that Castro was not intoxicated when he made the statements (R 1060). The supplemental record shows Castro was contacted at 4:45 p.m. (SR 117). He arrived at the police station around 5:00 p.m. (SR 9). The statement to Lieutenant Nydham was around 8:30 p.m. (SR 71). The statement to Officers Krietmeyer and Leary was at 5:26 a.m. (R 167). Listening to the tapes, there is no question the statements were voluntary. Since voluntariness was the issue, the trial court's denial was obviously a finding the statements were voluntary. The trial court did not abuse its discretion in

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[3] Miranda v. Arizona, 384 U.S. 436 (1966).

finding the statement was freely and voluntarily made. Hayes v. State, 16 F.L.W. S392 (Fla. May 23, 1991).

POINT VII

THE TRIAL COURT'S RULINGS ON THE ADMISSIBILITY OF PHOTOGRAPHS WAS NOT AN ABUSE OF DISCRETION.

Castro contends this case is controlled by Czubak v. State, 570 So.2d 925 (Fla. 1990), and the trial court erred in admitting photographs of the victim, specifically 5O, 5U, 5V and 5W (R 2020, 2023, 2024, 2025).

In Czubak, photographs of a badly decomposed victim whose hand and foot had been eaten by a dog were admitted. This court found that the condition of the body was a result of the length of time she had been dead and the ravages of the dogs. Thus the gruesome nature of the photographs was caused by factors apart from the crime. Id. at 929. This court also summarized the issue as follows:

> This Court has long followed the rule that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance. *See Bush v. State,* 461 So.2d 936, 939-40 (Fla. 1984), *cert. denied,* 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986); *Williams v. State,* 228 So.2d 377, 378 (Fla. 1969). Where photographs are relevant, "then the trial judge in the first [instance] and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [district] them from a fair and unimpassioned consideration of the evidence." *Leach v. State,* 132 So.2d 329, 331-32 (Fla. 1961), *cert. denied,* 368 U.S. 105, 82 S.Ct. 636, 7 L.Ed.2d 543 (1962). We have consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence. *See, e.g., Jackson v. State,* 545 So.2d 260 (Fla. 1989) (photographs of victims' charred remains admissible where relevant to prove identity and circumstances surrounding murder and to corroborate medical examiner's testimony); *Bush v. State,* 461 So.2d at 936 (photographs of blowup of

> bloody gunshot wound to victim's face admissible where relevant to assist the medical examiner in explaining his examination); *Wilson v. State,* 436 So.2d 908 (Fla. 1983) (autopsy photographs admissible where relevant to prove identity, nature and extent of victims' injuries, manner of death, nature and force of the violence, and to show premeditation); *Straight v. State,* 397 So.2d at 903 (photograph of victim's decomposed body admissible where relevant to corroborate testimony as to how death was inflicted); *Foster v. State,* 369 So.2d 928 (Fla.) (gruesome photographs admissible in guilt phase to establish identity and cause of death), *cert. denied,* 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979).

Id. at 928-29.

The cause of death was strangulation and stabbing. The medical examiner testified there were wounds to the pericardium and lungs (R 528). Three ribs were broken. The hyoid and larynx bones were also fractured and there was hemorrhaging in the neck (R 525). Not only were the photographs relevant to show cause of death, but also Castro challenged the medical examiner's testimony so they were necessary to illustrate her conclusions.

The trial court has wide latitude in the admissibility of evidence and, absent an abuse of discretion, its rulings should not be overturned. See, Burns v. State, 16 F.L.W. S389 (Fla. May 16, 1991) (color slides of autopsy photographs); Nixon v. State, 572 So.2d 1336 (Fla. 1990) (extremely gruesome photos of charred body). The trial judge screened the photos. He took out one photo (R 549) and noted that he had previously taken out others (R 540). The trial court did not abuse its discretion in ruling certain photos admissible.

POINT VIII

THE STATUTORY AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS AND CRUEL IS NOT UNCONSTITUTIONALLY VAGUE.

Castro argues that Florida's heinous, atrocious and cruel statutory aggravating factor is unconstitutionally vague. He recognizes this court's decision in Smalley v. State, 546 So.2d 720 (Fla. 1989), but argues that the Shell v. Mississippi, 111 S.Ct. 313 (1990), requires this court to re-examine its position.

Shell is based on Maynard v. Cartwright, 486 U.S. 356 (1988). Therefore, for the same reasons stated in Smalley, i.e., that the jury is the final sentencer in Oklahoma, this argument has no merit. In Mississippi, the jury is the final sentencer. See, Clemons v. Mississippi, 110 S.Ct. 1441 (1990).

This court has consistently rejected Castro's argument. Robinson v. State, 574 So.2d 108 (Fla. 1991); Trotter v. State, 576 So.2d 691 (Fla. 1990); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Freeman v. State, 563 So.2d 73 (Fla. 1990); Randolph v. State, 562 So.2d 331 (Fla. 1990); Brown v. State, 565 So.2d 304 (Fla. 1990); Smith v. Dugger, 565 So.2d 1293 (Fla. 1990); Smalley, supra. This argument has no merit and should be rejected in this case. Additionally, the trial court followed this court's guidance and gave the long instruction on heinous, atrocious and cruel which was designed to include additional language based on State v. Dixon, 283 So.2d 1 (Fla. 1973), and to address any problem the paragraph might present in light of Maynard v. Cartwright, 486 U.S. 356 (Fla. 1988). Standard Jury Instruction in Criminal Cases, 15 F.L.W. S368 (Fla. June 21,

1991) (R 1135). Defense counsel had requested this as a special jury instruction and the state also included the instruction in those to be read (R 1828, 974). Therefore, any objection to the instruction was waived. See, Smalley, supra.

POINT IX

THE FLORIDA DEATH PENALTY STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Castro raises constitutional claims that have been decided adversely to Castro's contentions and a similar result is mandated here. See, Hayes v. State, 16 F.L.W. S392 (Fla. May 23, 1991); Hitchcock v. State, 16 F.L.W. S23, S26 n.2 (Fla. Dec. 20, 1990); Sochor v. State, 16 F.L.W. S297 (Fla. May 2, 1991); Young v. State, 16 F.L.W. S192 (Fla. Feb. 28, 1991); Gunsby v. State, 574 So.2d 1085 (Fla. 1991); VanPoyck v. State, 564 So.2d 1066 (Fla. 1990).

POINT X

THE DEATH PENALTY IS PROPORTIONAL.

Castro argues that his death sentence is not proportional, citing fifteen cases: Blakely v. State, 561 So.2d 560 (Fla. 1990); Amoros v. State, 531 So.2d 1256 (Fla. 1988); Garron v. State, 528 So.2d 353 (Fla. 1988); Fead v. State, 512 So.2d 176 (Fla. 1987); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Ross v. State, 474 So.2d 1170 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1981); Blair v. State, 406 So.2d 1103 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Chambers v. State, 339 So.2d 204 (Fla. 1976); and Halliwell v. State, 323 So.2d 557 (Fla. 1975).

Proportionality review is not a comparison between the number of aggravating and mitigating circumstances. It is a thoughtful, deliberate review considering the totality of the circumstances and comparing them to other capital cases. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990).

The cases cited by Castro are not even comparable to this case. Twelve of the cases involved volatile domestic situations: Blakely, Amoros, Garron, Fead, Irizarry, Chambers, Ross, Herzog, Blair, Kampff, Phippen, and Halliwell. Five of the above cases were also overrides: Phippen, Fead, Chambers, Irizarry, and Herzog. In Proffitt, the defendant had been drinking, made no statements regarding any criminal intentions, possessed no weapon

when he entered the premises, stabbed the victim once, made no attempt to injure the victim's wife, fled immediately and surrendered to authorities. In Rembert, the defendant hit the victim once or twice on the head, there was no evidence of premeditation, the murder was not heinous, and the state conceded many people similarly situated received a less severe sentence. Menendez was not a proportionality case, but was remanded for resentencing after all but one aggravating factor was stricken.

In this case, the victim was lured to his death, strangled and repeatedly stabbed. Castro toyed with the victim, who endured extreme mental anguish and pain. The ordeal may have lasted up to ten minutes. The death penalty is appropriate in cases involving multiple stab wounds and strangulation. In this case, there are both. See, Randolph v. State, 562 So.2d 331 (Fla. 1990); Sochor v. State, 16 F.L.W. S297 (Fla. 1991); Floyd v. State, 569 So.2d 1225 (Fla. 1990); Haliburton v. State, 561 So.2d 248 (Fla. 1990); Rutherford v. State, 545 So.2d 853 (Fla. 1989); Johnston v. State, 497 So.2d 863 (Fla. 1986); Deaton v. State, 480 So.2d 1279 (Fla. 1985); Duest v. State, 462 So.2d 446 (Fla. 1985); Medina v. State, 466 So.2d 1046 (Fla. 1985); White v. State, 415 So.2d 719 (Fla. 1982); Morgan v. State, 415 So.2d 6 (Fla. 1982); Hudson v. State, 538 So.2d 829 (Fla. 1989); Muhammed v. State, 494 So.2d 969 (Fla. 1986); Jackson v. State, 530 So.2d 269 (Fla. 1988); Mitchell v. State, 527 So.2d 179 (Fla. 1988); Turner v. State, 530 So.2d 45 (Fla. 1987); Engle v. State, 510 So.2d 881 (Fla. 1987); and Kight v. State, 512 So.2d 922 (Fla. 1987). There was no question Castro was more culpable than

McKnight. See, Hayes v. State, 16 F.L.W. S392 (Fla. 1991); Downs v. State, 572 So.2d 895 (Fla. 1990).

POINT XI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION AND THE ISSUE REGARDING WRITTEN INSTRUCTIONS WAS WAIVED.

Castro argues the trial court should have provided a written instruction to the jury on cold, calculated and premeditated. He recognizes that failure to provide written jury instructions, when not objected to, is not reversible error (Initial brief at 95). The trial judge discussed sending back the definition he read which included the sentences from the defense requested instruction:

> THE COURT: I'm going to -- I can tell her they can't use that note; we'll send back the definition. We'll just send it back to them.
>
> MR. RIDGEWAY: We can't do that because we've got the whole rest of it on --
>
> MS. JENKINS: There is too much else on there. That's -- can we get a copy -- get to a copy machine and copy this?
>
> MR. RIDGEWAY: Well, it's a different size, type, and everything else, and it's undue emphasis on that part.
>
> I don't think it would be a problem to say that Jurors are not allowed to take notes; we appreciate that they're concerned, but she has to destroy the note she took while --
>
> THE COURT: I'll let her take it off the pad and give it to the Bailiff, and put it in the garbage can or whatever.
>
> MR. RIDGEWAY: Okay.
>
> MS. JENKINS: I think we can read it to them again because there's an awful lot of --
>
> THE COURT: I'll ask them if they need it again.

(R 1151-52).

The judge then retrieved the notes the one juror took and instructed the jury again (R 1153). Not only was there no objection by defense counsel, but she assisted the court in the decision not to send back a written instruction and to read the instruction again. This issue was not preserved for appellate review. See, Castor v. State, 365 So.2d 701 (Fla. 1978).

Castro also seems to argue that the trial court erred in refusing to give Defense Requested Instruction #8 regarding cold, calculated and premeditated. The trial court gave the standard jury instruction (R 1135). After the jury requested additional instruction on premeditation, the trial judge discussed it with counsel, and read the standard jury instruction on "killing with premeditation" followed by the last two sentences of defendant's Special Requested Jury Instruction #8 (R 1150-51, 1829). This is precisely what defense counsel asked the court to read (R 1149). There was no objection to the instruction and the issue is waived. See, Smalley v. State, 546 So.2d 720, 722 (Fla. 1989).

The proper inquiry regarding jury instructions is whether there is a "reasonable likelihood" the jury applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Boyde v. California, 110 S.Ct. 1191 (1990). There is no error in the cold, calculated and premeditated instruction. Brown v. State, 565 So.2d 304, 308 (Fla. 1991). The Supreme Court of Florida has approved the standard jury instructions and "a trial judge walks a fine line indeed in deciding to depart." Kelley v. State, 486 So.2d 578,

584 (Fla. 1986). See also, Bertolotti v. State, 476 So.2d 130 (Fla. 1986).

The instruction proposed by Castro was a hodgepodge of several cases. The first one half of the first sentence is the standard jury instruction and the second one half of the first sentence is from Preston, supra. The second sentence seems to be a paraphrase of Rogers v. State, 511 So.2d 526, 535 (Fla. 1987). The last sentence came from Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), as corrected by Preston v. State, 444 So.2d 939, 946 (Fla. 1984). Although Carter v. State, 560 So.2d 1166 (Fla. 1990), and Middleton v. State, 426 So.2d 548 (Fla. 1982), acted as authority on the instruction, there is such language in these cases.

The standard of review is whether the trial court abused its discretion. King v. State, 514 So.2d 354 (Fla. 1987). Castro has failed to show the trial court abused its discretion. Error, if any, was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1987).

Castro also argues the cold, calculated and premeditated aggravating factor as written is unconstitutionally vague, citing Maynard v. Cartwright, 486 U.S. 356 (1988). This argument has been rejected and should similarly be rejected in this case. Brown v. State, 565 So.2d 304, 308 (Fla. 1990).

POINT XII

THE TRIAL COURT PROPERLY REFUSED TO EXCUSE JUROR SHELLENBERGER FOR CAUSE.

Castro's final argument is that the trial judge should have stricken juror Shellenberger for cause or granted defense counsel an additional peremptory challenge.

Mr. Shellenberger stated that he could follow the law, listen to the aggravating and mitigating circumstances, wait until that point and then weigh those and make his decision (R 426).

This court has held it will pay great deference to a trial judge's finding as to juror impartiality because he, unlike a reviewing court, is in a position to observe the juror's demeanor and credibility. Lambrix v. State, 494 So.2d 1143, 1146 (Fla. 1986); Valle v. State, 474 So.2d 796, 804 (Fla. 1985). The determination of juror impartiality and the propriety of excusal of jurors for cause is a matter particularly within the trial court's broad discretion and will be disturbed on appeal only where manifest error is demonstrated. Young v. State, 16 F.L.W. 192 (Fla. Feb. 28, 1991); Jennings v. State, 512 So.2d 169 (Fla. 1987); Cook v. State, 542 So.2d 964 (Fla. 1988). The trial court did not abuse its discretion where the juror said he would wait for all the evidence and follow the law. Defense counsel's leading and confusing questions about burden of proof do not show the juror would be unable to follow the law and instructions. See, Penn v. State, 574 So.2d 1079 (Fla. 1991); Brown v. State, 565 So.2d 304 (Fla. 1990). Questioning a juror regarding burdens

of proof when he has never before sat on a jury, particularly a capital case, does not demonstrate his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." See, Randolph v. State, 562 So.2d 331 (Fla. 1990), quoting Gray v. Mississippi, 481 U.S. 648 (1987), Wainwright v. Witt, 469 U.S. 412 (1985), and Adams v. Texas, 448 U.S. 38 (1980). The trial court did not abuse its discretion.

CONCLUSION

Based on the foregoing arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by Delivery in the box at the Fifth District Court of Appeal to Larry B. Henderson, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 31 day of May, 1991.

Barbara C. Davis

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Of Counsel