IN THE SUPREME COURT OF FLORIDA

EDWARD CASTRO,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 77,102

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

In 1988, following a jury trial in the Circuit Court for Marion County, the Honorable Victor J. Musleh presiding, Edward Castro was found guilty of first-degree murder and robbery with a deadly weapon. Castro was sentenced to death on the first-degree murder conviction and to five and one-half years imprisonment on the robbery conviction. On direct appeal, this Court affirmed the convictions, reversed the death sentence and remanded for a new penalty hearing because of faulty jury instructions and the erroneous presentation of irrelevant, presumptively-prejudicial evidence of collateral crimes which rendered the jury recommendation unreliable. Castro v. State, 547 So.2d 111 (Fla. 1989). This is the direct appeal of a death sentence imposed after that new penalty phase.

In imposing this death sentence, the trial court found three statutory aggravating factors: a murder committed for pecuniary gain; a cold, calculated and premeditated murder without pretense of moral or legal justification, and; an especially heinous, atrocious or cruel murder. The mitigating circumstances found by the trial judge include; a traumatic childhood caused by poverty, neglect, abuse, sexual abuse and a dysfunctional family life; a history of alcohol and chemical dependency and emotional and mental disturbances, and; the defendant was under the influence of alcohol and drugs at the time of the homicide. (R1983-4)(Appendix A).

FACTS CONCERNING THE MURDER

The circumstances surrounding the murder come primarily from statements Castro made to police following his apprehension on the day of the murder. Castro, alleging that he was too intoxicated to intelligently understand and/or voluntarily waive his constitutional rights, moved to suppress the statements. (R1790-92) Following an evidentiary hearing (R1237-40;271-300;451-473), the motion to suppress was denied without an express finding of voluntariness. (R473). Castro's statements were introduced into evidence over objection and published in edited form to the jury. (R581;598;State's Exhibits 6 and 7).

In sum, viewed in a light most favorable to the state, the evidence established that Castro and Robert McNight spent the night of January 13, 1987, in Ocala in a room rented by a Mr. Gallagher. (R835-36) McNight, a self-confessed alcoholic who

competed in high school wrestling for three years, is 6'1" tall and at the time was 17 years old and weighed 190 pounds. (R838-39;867;880) Castro, also an alcoholic, had been drinking continuously for four days. (R876) "He always had a beer in his hand, there was always beer in the refrigerator." (R876) After obtaining a six-pack of beer on the morning of January 14, 1987, Castro, McNight and Austin Scott went to Gallagher's apartment to drink and talk. (R837;871) Castro had previously indicated to McNight that Scott was to be his "hit", which McNight took to mean that Castro "was going to hustle the guy for some money or -- being from Iowa, you know, you figure maybe a fight, that's about it." (R839).

Gallagher's landlord stopped by and complained of more than one person living in the apartment. Castro replied that he did not want any trouble and that he was leaving in a couple of hours. (R1025-29) Castro told McNight that he was going to jump on a freight train and go up north. (R839-40) McNight went upstairs to a friend's room to take a shower. (R840) When he returned the door was locked. When let into the room McNight saw Scott's body lying on the floor. (R841-42) McNight testified that "Heat was rising from him; his eyes were rolled back and bugged out of his head, and there was no breathing, movements, whatsoever." (R869) Castro, covered with blood, allegedly told McNight to stab the body and to take Scott's jewelry and wallet; McNight complied and stabbed Scott four or five times. (R865-66;868-70).

McNight and Castro then took Scott's car and drove to Lake City, stopping at rest areas on I-75 to sell Scott's belongings. (R870) While traveling Castro drank beer, whiskey and vodka found in Scott's automobile. (R872) "[Castro] drank a bottle of whiskey, and if I'm not mistaken two beers out of the six pack, and he had started in on the bottle of vodka." (R877) Castro's speech became slurred (R875); McNight described him as "pretty well wasted." (R877) Halfway to Lake City Castro told McNight to drive, stating that he was too drunk to continue driving. (R878) Castro continued to drink. (R879)

Deputy Boatwright of the Columbia County Sheriff's Department, responding to a report of a suspicious person, observed Castro exit the restroom of a gas station. (R656-658) Castro's speech was slightly slurred, his eyes were bloodshot, and the officer noted bloodstained clothing. (R658) When Castro became abusive, loud and profane during questioning, he was arrested. (R662-63) Castro's statements followed that arrest. Significantly, Castro's statement (State's Exhibit 6, R597) refers to McNight as a hitchhiker Castro picked up on the way to Lake City. Castro asserted that McNight was "Just a kid, yeah. He ain't got nothing to do with it, man. The kid ain't got nothing to do with it." (State's Exhibit 6).

Scott was stabbed eleven times in the chest and was strangled. (R525-27) His forearms received three stab wounds, described as "through and through" wounds. These were atypical of defensive wounds because they were evidently inflicted while

Scott's arms were pinned against his chest. (R531-32;962-63) The state's medical examiner testified, however, that the wounds to Scott's forearms were defensive wounds because they were to an area far from the intended target. (R562) Scott's blood alcohol content was .22%. (R965) The strangulation could have rendered Scott unconscious in less than a minute. (R963-64;529) Scott received a broken hyoid bone and a fractured larynx, injuries typically inflicted during strangulation. (R525-26;969) There were **no** wounds on Scott's hand(s). (R523;564)

FACTS CONCERNING DISQUALIFICATION OF STATE ATTORNEY'S OFFICE

In the previous trial Castro was represented by Anthony Tatti, Esq., an assistant public defender with the Fifth Circuit Public Defender's Office. (R1155-56) Tatti testified that, as Castro's appointed defense counsel, he received confidential communications from Castro. (R1165-66) However, after Castro was convicted, Tatti left the public defender's office and became a prosecutor with the Fifth Circuit State Attorney's Office. Though Tatti denied revealing to other prosecutors any of Castro's private communications (R1166), he admitted that he had been called by Castro's prosecutor, Mr. John Moore, Esq., and that he discussed with Moore responses the state could make to motions filed by Castro. (R1167-70) Castro moved to disqualify the Fifth Circuit State Attorney's Office because his prior defense counsel was now prosecuting capital cases for that state attorney's office. (R1809-11) Following the hearing where Tatti testified, the motion to disqualify was denied. (R1170)

FACTS CONCERNING EXCLUSION OF MITIGATING EVIDENCE

The trial judge would not permit Castro to introduce any testimony contrary to the scenario of the murder set forth in Castro's statements because, in his opinion, such testimony showed "lingering-doubt" of guilt and as such it was inadmissible pursuant to King v. State, 514 So.2d 357 (Fla.1987).

The ruling on this matter initially occurred when defense counsel sought to call McNight as an adverse witness and question him about his true participation in the murder. The following transpired:

> THE COURT: **We are not going to say that McNight had anything to do with this murder in this trial, because there is -- we aren't going to do it; this is a penalty phase mit -- this is mitigation, and that's all, and we're not going to say that McNight stabbed him and killed him, because that's already been settled.**
>
> DEFENSE COUNSEL: Judge, is the court saying that disparate treatment of co-defendants is not recognized.
>
> THE COURT: No, I didn't say that; you can ask him about that.
>
> DEFENSE COUNSEL: Well, then, his participation in the murder needs to be established for the jury to decide --
>
> THE COURT: **No, You're not going to get into the guilt -- you're not going to get into the guilt, and we're not going to do it; and you're not going to get it through the back door, the side door, or anywhere else; because he didn't have anything to do with it, and Castro says so in his confession.**

(R861-62)(emphasis added).

The foregoing occurred in an in camera hearing outside the presence of the prosecutor where defense counsel sought and was denied permission to show that "Bobby McNight was much more involved than the state is leading this jury to believe." (R860). When the court and defense counsel returned to the courtroom, Judge Musleh informed the prosecutor that "They (Castro's defense attorneys) wanted to go into basically -- get back -- it was my opinion they wanted to get back into the guilt phase." (R864).

Because the trial court ruled that Castro could not present evidence inconsistent with his statements, Castro proffered the testimony of Dr. Reeves, an expert forensic pathologist who had personally performed 2,000 autopsies and who had assisted in 2,000 others. (R890-98) Dr. Reeves examined the medical reports, statements, photographs, and physical evidence in the case and concluded that Scott's death was caused by manual strangulation and/or by stabbing which occurred at or about the same time. (R907) The proffer at first concentrated on the type of injuries suffered by Scott and the effect thereof. The trial judge interrupted the proffer and clarified his ruling to have been as follows:

> THE COURT: Let me interrupt a minute. I was under the impression that you were going to use [Dr. Reeves] 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 --

(R928-29).

Thereafter, defense counsel focused the proffer on the forensic pathologist's opinion that the evidence was inconsistent with Castro's statements as to how the murder occurred. (R933-9) Dr. Reeves determined that the wounds to Scott's arms were not typical defensive wounds; they instead were consistent with having been inflicted while Scott's arms were pinned against his chest over a fixed period of time. (R923-25) The angle of the wounds were 90 degrees off from typical defensive wounds. (R927-28) Had the arms been free, the hands typically would have received wounds also. (R925) It is the doctor's opinion that the injuries were more consistent with two assailants, and that the wounds were inconsistent with the statement that the body was stabbed while on the floor or bed. (R930-34).

The doctor noted that the crime scene photographs showed that the victim's eyes were closed and that any "bulging" would only have occurred while the victim was being strangled. (R935-37) That medical testimony is inconsistent with McNight's statement that the victim's eyes were "bulging" when McNight observed the body on the floor when he allegedly came into the room after the murder occurred. (R936-37) The expert further noted inconsistent evidence about whether the door to Castro's apartment could be locked as McNight claimed, and stated that a competent medical examiner would have verified whether it was physically possible for the door to be locked. (R937)

Following the proffer, Dr. Reeves was permitted to testify that the nature of the wounds would have reduced Scott's

mental awareness to a minute or less (R964), that Scott's blood alcohol content was .22 percent (R965), that the blood in Scott's nostrils was consistent with the stabbing having caused pulmonary edema (R966), and that the wounds to Scott's arms were not necessarily defensive wounds. (R962-64) The doctor was also permitted to say that the stab wounds to Scott's heart were not in and of themselves lethal wounds. (R967)

FACTS CONCERNING JURY INSTRUCTION(S) WHICH RENDERED THE DEATH RECOMMENDATION CONSTITUTIONALLY UNRELIABLE

Castro objected to instructing the jury on both statutory aggravating factors of a murder committed during the commission of a robbery and murder for pecuniary gain:

> DEFENSE: Judge, I would be objecting to the -- them including that capital felony was committed for pecuniary gain, as well as the felony murder, it includes robbery; the caselaw as I know it, it is clear that --
>
> COURT: What are you talking about, what number?
>
> DEFENSE: Number one.
>
> COURT: It was committed while the defendant was engaged in the competent (sic) commission of a robbery?
>
> DEFENSE: Uh-huh. I have caselaw that says that that's --
>
> PROSECUTOR: I have a case on it at this point, Judge, that -- If I can find it, and I would like to read that into the record.
>
> COURT: **Okay. It says you can have both of these?**
>
> PROSECUTOR: **You can argue both of these to the jury, yes sir. The court cannot**

use both of those factors in --

DEFENSE: **What?**

PROSECUTOR: **You can use both --**

DEFENSE: **No, you can't.**

PROSECUTOR: **Sure you can.**

COURT: **But it says you can put them both in there?**

PROSECUTOR: **Yes, sir. I would like to just read it into the record.**

COURT: Alright. Go ahead.

DEFENSE: Can you read it loud enough so that I can hear it all while I'm over here?

PROSECUTOR: The cite is S-u-a-r-e-z v. State, at 481 So.2d 1201, it's an 85 supreme court case. Under penalty phase it says Suarez makes claims that the trial court erred in instructing the jury in the penalty phase on aggravating circumstances, which have been held to constitute doubling. **Specifically, the trial judge instructed the jury on the aggravating circumstances that the murder occurred in the commission of a robbery and that the crime was committed for pecuniary gain, which we argued here. And in this case the murder was committed to avoid arrest, and the murder -- and committed to hinder the exercise of law enforcement. These two pairs of aggravating circumstances have been held to constitute improper doubling -- I'm citing the case law -- however, the caselaw cited regarded -- regarding improper doubling in the trial judge's sentencing order and did not relate to the instructions to the penalty phase jury. The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death or -- was the proper sentence in light of any**

mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and mitigation, and it is in the sentencing order that this is subject to review for doubling. I think that's explicitly on point, including the two that they're arguing about.

COURT: I understand.

DEFENSE: Judge?

COURT: Yes, ma'am?

DEFENSE: My objection to that would be, once again, they're going to be giving the jury additional information, they're limited to the aggravating factors, it is improper doubling, and what they're saying here is they're only advisory and it's okay if they consider more than you can, because it's only advisory.

COURT: What does this have to do with advisory?

DEFENSE: Because it has everything to do with advisory. They get to look at four aggravating factors, they're going to be giving you what they're calling an advisory recommendation, but in reality we know that you cannot override their decision unless they're -- unless there are factors given on which --

COURT: **Okay. But the Supreme Court there says this is okay, so we're going to go by what they say**.

DEFENSE: Alright, Judge.

COURT: Even though they may be wrong, they -- even -- you know, they may change it tomorrow.

DEFENSE: Hopefully, they will change it in this case, Judge.

COURT: They might.

(R1067-70).

The trial court refused to give the following written instruction which was based on Provence v. State, 337 So.2d 783, 786 (Fla. 1976):

> 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. For example, the commission of a capital felony during the course of a robbery and done for pecuniary gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.

(R1831).

Defense counsel also requested that the Court define the statutory aggravating factor of a cold, calculated and premeditated murder (the "CCP" factor) as follows:

> 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. There must be evidence beyond a reasonable doubt of careful planning or prearranged design. The level of premeditation needed to convict an accused of first-degree murder does not necessarily rise to the level of premeditation required to prove this aggravating circumstance.

(R1829-30). In charging the jury, the court did not define the term cold, calculated, or premeditated (R1135) and, while

deliberating, the jury asked for the legal definition of premeditation and how much time must elapse before a killing is considered to be premeditated murder. (R1145) The jury was returned to the courtroom and instructed as follows:

> COURT: You can be seated. Alright. I have a note here written, a note from you, premeditated, what is the legal definition, and how much time must elapse before it is considered premeditated? This is a note. Now you want me to give a definition of premeditation. Okay. Killing with premeditation: Killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. There must be evidence beyond a reasonable doubt of careful planning or prearranged design. The level of premeditation needed to convict an accused of first-degree murder does not rise to the level of heightened premeditation required to prove this aggravating circumstance. Alright? Okay.

(R1150-51) The prosecutor noticed that a juror took notes as the foregoing instruction was given, asked that the court confiscate the juror's notes, and the court complied. (R1151-53) The trial judge re-read the instruction when asked to do so. (R1153)

SUMMARY OF ARGUMENTS

POINT I: The trial court erred in refusing to disqualify the Fifth Circuit State Attorney's Office after Castro's prosecutor telephoned the prosecutor who was previously Castro's defense counsel for this same offense and consulted with him concerning the responses the state could make to motions filed by Castro's defense counsel. The active participation by Castro's ex-defense attorney provided the state with an unfair advantage, denied due process, and otherwise gave the appearance of impropriety which could chill attorney-client relationships and deny effective representation of counsel guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. The sentence must be vacated and the matter remanded for a new penalty phase with directions that the Fifth Circuit State Attorney's Office be disqualified.

POINT II: Over timely defense objection, the court instructed the jury that it could consider and give weight to both statutory aggravating factors of a murder committed for pecuniary gain and a murder committed during the course of a robbery, even though both factors pertained to the same aspect of the offense. In giving the instruction, the trial court expressly relied on Suarez v. State, 481 So.2d 1201 (Fla. 1985) and permitted the prosecutor to argue to the jury that a death recommendation should be returned based on weight attributed to both of these statutory aggravating factors.

The trial court's reliance on Suarez was erroneous, in that a recommendation from a jury which, over timely objection, improperly relies on duplicitous consideration of the same aspect of a crime to recommend a death sentence is constitutionally unreliable under the Eighth Amendment to the United States Constitution and Article 1, Section 17 of the Florida Constitution. The procedure of knowingly allowing a jury to be improperly instructed in a manner that tips the scale in favor of a sentence of death is also a denial of due process and the right to a fair hearing guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 and 16 of the Florida Constitution. Because the sentencing recommendation is unreliable, the death sentence must be reversed and, if this Court finds that a death sentence may be proportionately imposed, the matter must be remanded for a new, fair jury recommendation.

POINT III: Following his arrest, Castro told police that McNight had nothing to do with the murder, that he was just a kid, a hitchhiker Castro had picked up on his way from Ocala to Lake City. (State's Exh. 6) The trial judge would not allow Castro to present evidence to show that McNight, who ultimately received a sentence of probation pursuant to the recommendation of Castro's prosecutor, actively assisted Castro in murdering Scott. The testimony was excluded because the judge believed it only established lingering doubts of Castro's guilt. However, the testimony was relevant to discredit Castro's previous state-

ment(s) and to otherwise establish the circumstances of the crime. The exclusion of the testimony was improper and a denial of the rights to due process and to present evidence in your own behalf guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Further, the exclusion of this evidence rendered the jury's sentencing recommendation unreliable under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. This issue is controlled by Downs v. State, 572 So.2d 895 (Fla.1990). The exclusion of such evidence in Downs was error, but harmless. Here, the state cannot show beyond a reasonable doubt that the exclusion of this evidence did not affect the jury recommendation and sentencing order. The death sentence must accordingly be reversed and the matter remanded for resentencing if this Court finds that a death sentence may proportionately be imposed.

POINT IV: The trial court found Scott's murder to have been committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. In doing so, the court relied solely on the scenario of the murder set forth in State's Exhibit 6. Assuming, arguendo, that the "clear error" standard applies to appellate review of factual findings made by a trial court, State's Exhibit 6 is so facially inaccurate and unreliable that, as a matter of law, factual findings made in reliance thereon constitute "clear error."

However, the "clear error" standard for appellate review of factual findings does not apply here because the findings were made from a recorded statement that is before this Court in the same form as when the factual findings were made by the trial judge. Because the evidence is legally insufficient to establish beyond a reasonable doubt the precise scenario of the murder, this aggravating factor must be disallowed.

POINT V: The evidence is legally insufficient to show beyond a reasonable doubt that the murder was especially heinous, atrocious or cruel. As set forth in the preceding point, the scenario of the murder cannot be sufficiently established from State's Exhibit 6 and/or 7 because the statements are inconsistent with each other and the physical evidence. The wounds to Scott do not alone establish this factor because such testimony is offset by proof that Scott's blood alcohol content was .22 per cent and that, assuming that Scott was conscious when first attacked, the wounds would have rendered Scott unconscious within one minute. Pursuant to Herzog v. State, 439 So.2d 1372 (Fla.1983), the HAC statutory aggravating factor must be disallowed.

POINT VI: The trial court erred in failing to determine whether Castro's statements were voluntarily given. Denial of Castro's motion to suppress does not satisfy the requirement of an express finding of voluntariness. The evidence otherwise fails to show that Castro knowingly waived his constitutional rights to remain silent and to an attorney.

POINT VII: The trial court erred in admitting over timely and specific objection autopsy photographs. The graphic pictures were irrelevant and, assuming relevance, the prejudice of the pictures far outweighed any probative value. The presence of these photographs made the jury recommendation unreliable under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

POINT VIII: The especially heinous, atrocious or cruel statutory aggravating factor is unconstitutionally vague, in that it fails to channel the discretion of the recommending jury and/or sentencer in imposition of the death penalty. The limiting construction placed on that factor by this Court fails restrict the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

POINT IX: The death penalty is unconstitutional on its face and as applied because this Court, rather than the legislature, has provided the substance of the terms set forth in Section 921.141, thereby violating the separation of powers doctrine. Further, the statutory aggravating factors are themselves too broad to sufficiently narrow the discretion of the jury/sentencer in recommending/imposing the death penalty, in that non-statutory aggravating factors are considered under the broad umbrella of a statutory aggravating factor. Finally, the death penalty legislation in Florida is unconstitutional because it places the

burden on the defendant to prove that the mitigation outweighs the aggravation and, even when the burden shifting problem is corrected, the "outweigh" standard impermissibly dilutes the State's constitutional burden to prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted in a particular case. For those reasons, the death penalty in Florida is unconstitutional and the instant death penalty must be reversed.

POINT X: The jury recommendation is here unreliable and should be discounted. At most, only three statutory aggravating factors exist. When the circumstances of this case compare to other cases in Florida where the death penalty was held to be improper. The death sentence should be reversed because this is not the most aggravated and least mitigated of serious crimes.

POINT XI: Over timely defense objection, the trial judge failed to give the jury complete written instructions to consider when deliberating. The court failed to provide the definitions and limiting construction of the terms found in the cold, calculated or premeditated murder statutory aggravating factor, a ruling which gave the jury unfettered discretion in applying this factor which was also found to exist by the trial court. Because the error was duly objected to and because the state cannot show beyond a reasonable doubt that the absence of a complete written instruction did not contribute to the jury recommendation, the death sentence must be reversed and the matter remanded for a new penalty phase.

POINT XII: Castro sought to challenge a juror who was one hundred percent medically disabled. This juror stated that he believed in a life for a life and that he would place the burden on Castro to convince him beyond a reasonable doubt that life was the appropriate penalty. This juror further was the victim of a robbery which had occurred approximately one year earlier, and this juror could not unequivocally state that the foregoing considerations would not affect his deliberations in this matter. Castro sought to excuse this juror for cause and/or to be granted an additional peremptory challenge to excuse him after exhausting his prior peremptory challenges. The refusal of the court to strike Shellenberger for cause and/or to grant Castro an additional peremptory challenge whereby Castro could peremptorily strike Shellenberger constituted a denial of due process under the state and federal constitutions and further rendered the death penalty and jury recommendation unreliable.

POINT I

THE TRIAL COURT ERRED IN REFUSING TO DISQUALIFY THE OFFICE OF THE STATE ATTORNEY OF THE FIFTH JUDICIAL CIRCUIT WHERE, AFTER DEFENDING CASTRO ON THESE CHARGES, CASTRO'S DEFENSE COUNSEL LEFT THE PUBLIC DEFENDER'S OFFICE, BECAME A PROSECUTOR EMPLOYED BY THE FIFTH CIRCUIT STATE ATTORNEY'S OFFICE, AND PERSONALLY PARTICIPATED IN CASTRO'S RESENTENCING.

Prior to the penalty phase, Castro moved to disqualify the Fifth Judicial Circuit State Attorney's Office because, following the initial trial, Castro's defense counsel, Anthony Tatti, Esq., left the public defender's office and was hired as a prosecutor of capital crimes with the Fifth Judicial Circuit State Attorney's Office. (R1809-11). At the hearing on Castro's motion, the following testimony was presented:

> Q (Prosecutor): Would you state your name please?
>
> A. Anthony Michael Tatti.
>
> Q. And your present employment, sir?
>
> A. I am an assistant state attorney in the Fifth Circuit.
>
> Q. And how long have you been so employed?
>
> A. Since October of 1988.
>
> Q. And prior to your employment as an assistant state attorney in the Fifth Judicial Circuit, what was your employment?
>
> A. I was an assistant public defender in the Fifth Circuit.
>
> Q. And how long were you so employed?

A. I started there, I believe, August of 1985.

Q. While you were employed as an assistant public defender in the Fifth Judicial Circuit did you have any contact with the case of the State of Florida v. Edward Castro?

A. Yes, sir.

Q. And what was your involvement in that case?

A. I was co-counsel for trial.

Q. And -- excuse me. Did you participate through the trial and the subsequent penalty proceedings?

A. Yes, I did.

Q. Assumingly in the course of that representation you came into possession of confidential communications between yourself and your client?

A. Yes.

Q. And assumingly you came into possession of work product of both yourself and other members of the public defender's office?

A. Yes.

(R1165-66). Tatti represented that he did not reveal any of the confidential communications or work product to other prosecutors in the state attorney's office. (R1166) However, Tatti admitted that Castro's current prosecutor, Mr. John Moore, Esq., called and asked Tatti's opinion about responses that the state could make to motions filed by Castro's defense counsel. Tatti stated that he discussed the matter based on research done as an assistant state attorney, not as prior defense counsel:

Q: (Defense counsel) Okay. So it's your testimony here today that you have never mentioned Castro to anyone in the state attorney's office?

A: (Tatti) I believe it was last week I got a call from John Moore reference some motions that had been filed in the Freddie Lee Hall case. Apparently he had gotten a set of motions from you that were similar and may have been the same motions in form. **He asked me the style of the motions I had received, and he asked if I had done any research independently on my own as to those motions and I gave him the authorities that I had received or looked up.**

Q: Did you recognize that some of those motions and instructions that were filed by yourself and by me as defense counsel during the first trial?

A: I believe one of them.

Q: You think only one of them?

A: Yeah, that I can recall right now.

Q: Okay. And --

A: There were similar motions filed but I don't think the same motions.

Q: And you were you able to give information to Mr. Moore as a result of your perspective as a defense attorney in the Castro case regarding that motion or instruction?

A: **No. I gave him information I had gained through my research as an assistant state attorney having to deal with the same motion in a previous case.**

(R1167-68)(emphasis added). Moore was the lead prosecutor in Castro's case; Tatti was the lead prosecutor in Freddie Lee Hall's case. (R1168-70).

The foregoing establishes that Tatti actively assisted John Moore in the prosecution of Castro. The state below relied on State v. Fitzpatrick, 464 So.2d 1185 (Fla.1985) to argue that the motion to disqualify should be denied. Though Fitzpatrick is relevant, it is not controlling and this Court is respectfully invited to take this opportunity to recede from the faulty reasoning in Fitzpatrick. In Fitzpatrick, this Court held that, even where confidential communications between a defendant and an attorney who later became employed by the state attorney's office occurred, it was not necessary to disqualify the entire state attorney's office "when the record establishe[d] that the disqualified attorney has neither provided prejudicial information relating to the pending criminal charge **nor has personally assisted, in any capacity, in the prosecution of the charge**." Fitzpatrick, 464 So.2d at 1188 (emphasis added).

FITZPATRICK IS FACTUALLY DISTINGUISHABLE

The record in this case does **NOT** show that Mr. Tatti did not personally assist the state when Castro was resentenced. In fact, the record shows just the opposite. When questioned by defense counsel, Tatti admitted discussing with Castro's prosecutor (John Moore) responses the state could be made to several defense motions filed in Castro's case:

> Q: (defense counsel) Okay. So it's your testimony here today that you have never mentioned Castro to anyone in the state attorney's office?
>
> A: (Tatti) I believe it was last week I got a call from John Moore reference some motions that had been filed in the

> Freddie Lee Hall case. Apparently he had gotten a set of motions from you that were similar and may have been the same motions in form. He asked me the style of the motions I had received, indicated he had received a similar motion, and he asked if I had done any research independently on my own as to those motions and **I gave him the authorities that I had received or looked up**.
>
> * * *
>
> **I gave him information I had gained through my research as an assistant state attorney having to deal with the same motion in a previous case.**

(1167-69).

From the foregoing, it cannot be doubted that Tatti actively discussed with the "lead" prosecutor in Castro's case responses that the prosecution could make to defense motions. It is a distinction without a meaning to represent that the information Tatti provided was gleaned solely while employed in his capacity as an assistant state attorney. Tatti may well have been able to mentally isolate his mental processes, but that is not the pertinent question. Objectively, it appears that, by discussing with the prosecutor responses the state could make to motions that had been filed in Castro's case, Tatti personally assisted in the prosecution of Castro. That very fact renders the holding in Fitzpatrick factually distinguishable for, in Fitzpatrick, the record showed that the previous defense attorney did not personally assist the prosecution "in **any** capacity." Fitzpatrick at 1188. By assisting Moore and discussing responses that the state could make to Castro's motions, Tatti was affirmatively acting on behalf of the state and against Castro.

FITZPATRICK WAS WRONGLY DECIDED

At issue is the public's perception of and faith in the integrity of the judicial system. The holding in Fitzpatrick undermines confidence that whatever is told a defense attorney by a person accused of a crime will forever remain confidential and inviolate. Allowing a former defense attorney to be a member of the government team that prosecutes a citizen for the same crime that the attorney previously represented that citizen on provides the government with an unfair advantage. The chilling effect of that apparent unfair advantage results in a denial of due process and deprivation of meaningful assistance of counsel guaranteed by the Fifth, Sixth and Fourteenth Amendments and Article I, Sections 9 and 16 of the Florida Constitution.

As discussed by Justice Ehrlich in his dissent in Fitzpatrick:

> All attorneys, public and private, are bound by Canon 9 to "avoid even the appearance of impropriety." As Ethical Consideration 9-1 states: "Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system and in the legal profession." Although we are convinced that in this case no actual breach of client confidentiality has occurred or would have occurred, we are not the forum in need of convincing. To the public at large, the potential for betrayal in itself creates the appearance of evil, which in turn calls into question the integrity of the entire judicial system. When defendants no longer have absolute faith that all confidential communications with counsel will remain forever inviolate, no candid communication will transpire, and the

> guarantee of effective assistance of counsel will become meaningless. This is too high a cost for society to bear.

Fitzpatrick, 464 So.2d at 1188 (emphasis added).

The public's confidence in the integrity of the judicial system will be compromised if one side is permitted to have an unfair advantage on the other. There can be no doubt but that the potential for an unfair advantage exists if a defense attorney, privy to a defendant's innermost secrets from the defendant's own lips, is permitted to switch sides in the middle of a prosecution. A devastating source of information concerning facts, defenses, and tactics becomes, at least in the eyes of a layman, available to the party opponent. It is asking too much to have the populace rely blindly on bare claims of virtue and integrity.

When the court at the same time permits one side to employ attorneys who, **in the same matter**, initially represented one side only to switch affiliation in the middle of the litigation, the public's confidence in the fairness of the process cannot help but be undermined. In Fitzpatrick, this Court reasoned that government lawyers have different concerns than do privately retained lawyers. In light of the frailties of human nature, it is a dubious argument at best to suggest that government lawyers are unconcerned with "winning" for winning's sake and that they conduct themselves only to achieve ends of justice and goodness rather than being fueled by such mundane desires as career/political advancement or monetary gain. This

Court may well be correct in the belief that all prosecutors and public defenders are but noble minions of the state seeking truth, justice and the American way. Unfortunately, **others** do not share in that optimistic assessment.

The reasoning of this Court in Fitzpatrick will otherwise not withstand careful analysis. Any distinction that is properly made between representation of clients should not be automatically applied to all government attorneys. Prosecutors are in a totally different situation than are assistant public defenders/defense attorneys. It is a physical impossibility for a prosecutor to obtain a confidential communication from the client. State attorneys represent the state. A prosecutor must always, upon request, disclose exculpatory information to the defense. See Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 194, 10 L.Ed.2d 215 (1965)("suppression of favorable evidence to an accused upon request denies due process"). Thus, when a prosecutor leaves the office of the state attorney and becomes employed by the public defender's office or goes into private practice, there can be no perception by the public that he or she takes along confidential information that can be used to gain an unfair advantage. Even if the former prosecutor decides to represent a defendant on the same matter formerly prosecuted, the bottom line would be that the confidential information goes to establish the innocence of the accused, information that morally should not be withheld anyway.

It is essentially irrelevant whether this Court is

correct in its confidence that a defense attorney will never, ever violate a confidence obtained during representation of a defendant and that, should a former defense attorney become a prosecutor and divulge such information, a defendant will be able to adequately demonstrate that fact so that meaningful relief can thereafter be achieved. It would seem to be a truism that any prosecutor unethical enough to reveal a former-client's confidential communication will be unethical enough to deny that accusation when it is made, and who is one to then believe, the officer of the court or the convicted defendant?

The only practical way to avoid the chilling effect on effective representation by defense counsel is to demonstrate to the public that such a situation cannot exist to begin with so that those charged with offenses by the powerful few who make such decisions will feel free to fully discuss, without inhibition, his or her circumstances with an attorney, either hired or appointed, without a founded fear that some day this same defense attorney will become a prosecutor or a member of a team of prosecutors litigating the same charge. Such a ruling may not prevent the revelation of confidential communications, but it certainly would raise the level of confidence that, if improper disclosure should occur, it could be more readily detected and/or proved.

A defense lawyer has a person for a client, a person who is constitutionally entitled to due process and the effective assistance of an attorney because the government has accused him

or her of committing an offense punishable by more than six months in jail. It is essential that a defendant be secure in the knowledge that whatever is told the defense attorney can be used only by the defense. Where, as here, an assistant public defender is involved, the attorney-client relationship must first overcome the prevalent notion that **because** public defenders are paid by the same entity that pays the prosecutors, they have no real interest in the outcome of the case.

It is a given that clients of public defenders are indigent. Other than that, assistant public defenders must represent the full spectrum of the public: the guilty and innocent; the intelligent and not-so intelligent; the sane and the not-so sane. An assistant public defender does not have the luxury of selecting which defendant's will be represented, and by the same token the defendant does not have the luxury of selecting which assistant public defender will be his or her attorney. This arrangement is not conducive to immediate trust between client and attorney. Citizens of means buy the services of prominent attorneys and can be assured of the "quality" that money buys. Criminal defendants who are indigent are represented by appointed government attoneys. Clients expect to get what they pay for, and that expectation must be overcome in order to establish a meaningful attorney/client relationship.

Add to this the fear that the appointed attorney to which he or she is to bare his or her soul about what really happened may eventually be employed by the state attorneys office

which actively prosecutes the state's case and the assurance of meaningful assistance of counsel becomes an illusory wisp of esoteric constitutional promise. The paranoid client will have a demonstrable basis to support fears of a state conspiracy. Rather than being the concerned neutral forum standing as the bastion for individual rights, the court becomes a part of the conspiracy, placing its imprimatur on the practice of giving an attorney to a client to gain secrets, only to permit the attorney to switch sides in mid-prosecution.

This Court cannot cure the maladies which inhere in the appointed representation of indigent criminal defendants. However, this Court can and should be sensitive to such considerations and, when the opportunity arises, demonstrate to lay persons of **all** socio-economic classes that the constitutional guarantee of due process and meaningful assistance of counsel demands a judicial system that is above suspicion . . . a system which will not tolerate even the appearance of an impropriety.

> It should always be remembered not only that criminal proceedings must be fair, in fact, they must appear to be fair.... **An imagined advantage on one side or the other in a criminal proceeding can be as destructive of the integrity of the process as can a real advantage.**

Mackey v. State, 548 So.2d 904 (Fla. 1st DCA 1989).

The personal, active participation of Castro's prior defense counsel to assist the state in this case was a denial of due process under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9 and 22

of the Florida Constitution. The refusal of the trial judge to disqualify the State Attorney's Office of the Fifth Judicial Circuit was error which, if allowed to stand, will chill the free communication between indigent defendants and their court appointed lawyer, a consideration which violates the guarantees to equal protection of law and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and the state constitutional counterparts. The death sentence here must be reversed and the matter remanded for further proceedings following disqualification of the Office of the State Attorney of the Fifth Circuit. Further, this Court should take this opportunity to revisit the rationale set forth in Fitzpatrick.

POINT II

THIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTIONAL COUNTERPARTS BECAUSE IT IS BASED ON A JURY RECOMMENDATION TAINTED BY DUPLICITOUS CONSIDERATION OF "DOUBLED" STATUTORY AGGRAVATING FACTORS OVER TIMELY AND SPECIFIC DEFENSE OBJECTION.

During the charge conference and prior to the closing arguments, the following transpired:

> DEFENSE COUNSEL: Judge, I would be objecting to the -- them including that capital felony was committed for pecuniary gain, as well as the felony murder, it includes robbery; the caselaw as I know it, it is clear that --
>
> THE COURT: What are you talking about, what number?
>
> DEFENSE COUNSEL: Number one.
>
> THE COURT: It was committed while the defendant was engaged in the competent (sic) commission of a robbery?
>
> DEFENSE COUNSEL: Uh-huh. I have caselaw that says that that's --
>
> PROSECUTOR: I have a case on it at this point, Judge, that -- If I can find it, and I would like to read that into the record.
>
> THE COURT: Okay. It says you can have both of these?
>
> PROSECUTOR: You can argue both of these to the jury, yes sir. The court cannot use both of those factors in --
>
> DEFENSE COUNSEL: What?
>
> PROSECUTOR: You can use both --
>
> DEFENSE COUNSEL: No, you can't.
>
> PROSECUTOR: Sure you can.

THE COURT: But it says you can put them both in there?

PROSECUTOR: Yes, sir. I would like to just read it into the record.

THE COURT: Alright. Go ahead.

DEFENSE COUNSEL: Can you read it loud enough so that I can hear it all while I'm over here?

PROSECUTOR: The cite is S-u-a-r-e-z v. State, at 481 So.2d 1201, it's an '85 supreme court case. Under penalty phase it says Suarez makes claims that the trial court erred in instructing the jury in the penalty phase on aggravating circumstances, which have been held to constitute doubling. Specifically, the trial judge instructed the jury on the aggravating circumstances that the murder occurred in the commission of a robbery, and that the crime was committed for pecuniary gain, which we argued here. And in this case the murder was committed to avoid arrest, and the murder -- and committed to hinder the exercise of law enforcement. These two pairs of aggravating circumstances have been held to constitute improper doubling -- I'm citing the case law -- however, the caselaw cited regarded -- regarding improper doubling in the trial judge's sentencing order and did not relate to the instructions to the penalty phase jury. The jury instructions simply give the jurors a list of arguably, relevant aggravating factors from which to choose in making their assessment as to whether death or -- was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and mitigation, and it is in the sentencing order that this is subject to review for doubling. I think that's explicitly on point, including the two that they're arguing about.

THE COURT: I understand.

DEFENSE COUNSEL: Judge?

THE COURT: Yes, ma'am?

DEFENSE COUNSEL: My objection to that would be, once again, they're going to be giving the jury additional information, they're limited to the aggravating factors, it is improper doubling, and what they're saying here is their only advisory and it's okay if they consider more than you can, because it's only advisory.

THE COURT: What does this have to do with advisory?

DEFENSE COUNSEL: Because it has everything to do with advisory. They get to look at four aggravating factors, they're going to be giving you what they're calling an advisory recommendation, but in reality we know that you cannot override their decision unless they're -- unless there are factors given on which --

THE COURT: **Okay. But the Supreme Court there says this is okay, so we're going to go by what they say.**

DEFENSE COUNSEL: Alright, Judge.

THE COURT: Even though they may be wrong, they -- even -- you know, they may change it tomorrow.

DEFENSE COUNSEL: Hopefully they will change it in this case.

THE COURT: They might.

(R1067-70). The prosecutor argued both factors to the jury. (R1077-79) The jury was instructed that it could consider and weigh both statutory aggravating factors to decide whether death or life imprisonment was the appropriate sentence. (R1133-34)

Citing Provence v. State, 337 So.2d 783, 786 (Fla. 1976), Castro unsuccessfully requested in writing that the following instruction be given:

> 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. For example, the commission of a capital felony during the course of a robbery and done for pecuniary gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.

(R1831).

During the state's closing argument, the prosecutor urged the jury to weigh both statutory aggravating factors to determine whether a sentence of life or death was appropriate:

> Prosecutor: The first aggravating circumstance that I believe has been proved beyond every reasonable doubt is the fact that this murder was committed while Edward Castro was engaged in the commission of a robbery. I'll repeat that for you. The murder occurred while the defendant was engaged in the commission of a robbery. That's an aggravating circumstance.
>
> The Legislature has said if you go out and commit a felony such as robbery and during the course of that robbery an individual is murdered, that's aggravating, that's not another -- that's not a situation, and you can think of probably a number of situations where two individuals, for one reason or the other, have a quarrel, or a fight, or a disagreement, and one or the other

decides he's had enough of that and goes and gets a gun and kills somebody, that's not done in the commission of another felony, like a robbery.

And the law says if you do that, if you go out and commit a robbery and you murder somebody during the robbery, that's aggravating and I submit to you that's been established beyond every reasonable. (sic) You can take the testimony and you can go through it and you can just see the whole scenario laid carefully out for you, and that's what this is about.

Edward Castro wanted a car to leave Marion County, and he was going to take the car of the man he murdered; before he ended up murdering him, he saw that he had rings and watches and perhaps money that he was going to take; and in fact, after he murdered him, he took those things, he took watches, the rings, the wallet, the car that the man owned, basically everything that he owned, and he left Marion County with it, and he sold those items. So I don't think there is any question, any reasonable doubt at all, that the defendant committed the murder during the commission of a robbery.

The second and related aggravating circumstance is that the murder was committed for pecuniary gain. Do we have that in this case?

Well, you heard the defendant when talking to the police tell you that he took the rings and the watch and he went up on the rest stops on I-75 between Ocala and Lake City, and he took those items and he sold them, and he got money for them, got pecuniary gain for the car, that was a means of transportation, but certainly he took it during the course of a robbery, because he wanted the car, but he didn't really pecuniarily gain from the taking of the car, he just used that as a means to get from one place to the other.

But when he took the man's rings and watch, and he went up and sold them and he benefitted financially from the murder, then that's a pecuniary gain. I

> submit to you that's been proven beyond every reasonable doubt. There are no reasonable doubts about those two factors.

(R1076-1079). After this argument the jury was given written instructions directing that, if found to exist, the factors were to be given weight when determining whether the aggravating factors outweighed the mitigating factors. (R 1877-79) The jury recommended a death sentence. (R 1876) The court was required to follow that recommendation unless no reasonable person could agree. LeDuc v. State, 365 So.2d 1149 (Fla. 1978).

It is respectfully submitted that Suarez v. State, 481 So.2d 1201 (Fla. 1985), which allows that a trial judge, over proper and timely objection, to knowingly erroneously instruct the jury on statutory aggravating factors which have been held to constitute doubling, is wrong:

> Suarez next claims that the trial court erred in instructing the jury at the penalty phase on aggravating circumstances which have been held to constitute "doubling." Specifically, the trial judge instructed the jury on the aggravating circumstances that the murder occurred in commission of a robbery and that the crime was committed for pecuniary gain, and that the murder was committed to avoid arrest and committed to hinder the exercise of law enforcement. These two pairs of aggravating circumstances have been held to constitute improper doubling in Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977) and White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983), respectively. However, Provence and White regarded improper doubling in the trial

> judge's sentencing order, and did not relate to the instructions to the penalty phase jury. **The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling**.

Suarez, 481 So.2d at 1208 (emphasis added).

It is respectfully submitted that Suarez is an anachronism. It is patently unconstitutional to knowingly permit a procedure which unfairly tips the scale in favor of a recommendation of death. That is precisely what doubled consideration of the same criminal aspect does.

This Court has stated, "[R]egardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977)(emphasis added). By authorizing the jury to attribute weight to two statutory aggravating factors which are really but one, the scales are tipped in favor of the death penalty. A corollary is found in the limitation of what may be considered as mitigation; the result is the same:

> The jury's recommended sentence is given great weight under our bifurcated death penalty system. It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended

> sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death. Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommendation of life, **a defendant must be allowed to present all relevant mitigating evidence to the jury in his efforts to secure such a recommendation.** Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new recommendation on resentencing.

Valle v. State, 502 So.2d 1225, 1226 (Fla.1987)(emphasis added, footnote omitted). See Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987)("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.").

Allowing the jury to twice consider and weigh the same statutory aggravating factor is the converse of limiting the mitigation that can be presented: it unfairly tips the scale in favor of a recommendation of death. This is not a situation where a factor is determined on appeal not to have been supported by the evidence, or an instance where a jury received written instructions on multiple statutory aggravating factors without objection. See Straight v. Wainwright, 422 So.2d 827, 830 (Fla. 1982); Jacobs v. Wainwright, 450 So.2d 200, 202 (Fla. 1984) (permitting a trial judge to read verbatim all statutory

aggravating and mitigating factors without objection is not ineffective representation).

Here, Castro's defense counsel timely objected and, citing Provence v. State, sought an instruction that might counter the improper effect of the duplicitous instructions. The trial court clearly committed error by instructing the jury that both statutory aggravating factors could be assessed weight in determining which sentence, life imprisonment or death, was appropriate. The error was compounded when the court refused to give an instruction that properly informed the jury that such aggravating factors could not properly be twice assessed weight. Thus, the jury's death recommendation is unfair and unreliable.

HARMLESS ERROR ANALYSIS:

In a weighing state, when a reviewing court strikes one or more of the aggravating factors on which the sentencer relies, the reviewing court may, consistent with the Constitution, reweigh the remaining evidence or conduct a harmless error analysis. Clemons v. Mississippi, 494 U.S. __, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); Parker v. Dugger, 498 U.S. __, 112 L.Ed.2d 812 (1991). However, where a defendant who has been sentenced to death has been denied a fair jury recommendation to which he is entitled, no meaningful harmless error analysis or reweighing of factors can be performed by an appellate court due to the absence of specific findings by the jury.

This Court now requires a trial court to expressly address in writing how the evidence presented applies to

aggravating and mitigating factors, the reason being that doing so provides the minimum tools required for meaningful appellate review. See; Bouie v. State, 559 So.2d 1113, 1116 (Fla. 1990)("A trial judge's justifying a death sentence in writing provides 'the opportunity for meaningful review' in this Court."); Campbell v. State, 571 So.2d 342 (Fla. 1990); Nibert v. State, 508 So.2d 1 (Fla. 1987).

> Without [contemporaneous written] findings this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6) and in Tedder v. State, 322 So.2d 908 (Fla. 1975).

Van Royal v. State, 497 So.2d 625, 628 (Fla. 1986). In his specially concurring opinion in Van Royal, Justice Ehrlich observed that "it is inconceivable . . . that any meaningful weighing process can take place in the absence of written findings coincident with imposition of the sentence." Van Royal, 497 So.2d at 630 (Ehrlich, J., concurring).

Where constitutional error occurs, the burden is on the state to show beyond a reasonable doubt that the error did not contribute to the decision of the jury. Ciccarelli v. State, 531 So.2d 129 (Fla. 1988); Chapman v. California, 386 U.S. 18 (1976).

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have

supported the same result.

State v. DiGuilio, 491 So.2d 1129, 1136 (Fla. 1986). In the absence of findings by the jury other than a generic recommendation, in this case 8-4 in favor of death, it is impossible for the state to show that the additional weight the jurors may have afforded the improper-duplicitous statutory aggravating factor did not contribute to the death recommendation.

It is respectfully submitted that, because meaningful appellate review cannot be performed in the absence of specific findings by the jury, the jury's death recommendation in this case should be summarily disregarded and afforded no weight whatsoever when this Court performs its proportionality analysis of Castro's crime as set forth in the last point of this brief. Because the error was timely and specifically objected to by Castro, a new, fair recommendation must be obtained if this Court finds that the death penalty may be proportionately imposed under the circumstances of this case. This Court should in any event expressly recede from the erroneous language in Suarez which the state used to compel the trial judge to improperly instruct the jury on duplicitous statutory aggravating factors over timely, specific objection.

POINT III

THE TRIAL COURT ERRED BY PREVENTING CASTRO FROM PRESENTING ANY TESTIMONY THAT WAS INCONSISTENT WITH THE SCENARIO OF THE MURDER CONTAINED IN CASTRO'S STATEMENTS TO POLICE.

Defense counsel called Robert McNight and sought to establish the true extent of McNight's participation in the murder of Austin Scott. Defense counsel was told in no uncertain terms that any evidence that was inconsistent with the scenario of the murder contained in Castro's statements to police would not be allowed before the jury:

> DEFENSE COUNSEL: We're back in a penalty phase. We still have the trial phase that we can rely on and we can refer to, for now in sentencing. It is our responsibility to develop mitigating factors; one of the mitigating factors that we can establish, and we can establish very, very well is disparate treatment between co-defendants. Bobby McNight stabbed the guy five times and he is on the street, didn't even have to do a year of probation, at John Moore's request. We have a right to show that. We have a right to show that he got a deal, and --
>
> THE COURT: Ask him.
>
> DEFENSE COUNSEL: We can't. That's cross-examination. And we have to put our witnesses on, we have to put Reeves on, to show that there was disparate treatment, **because Bobby McNight was much more involved than the state is leading this jury to believe.**
>
> THE COURT: **No you can't get into the -- you are trying to get into the guilt through the back door, and you're not going to do it; and here's what the court said, it's one other thing the court said, the most damaging thing**

about Castro was his own confession; in his confession he admitted that McNight had nothing to do with this murder.

DEFENSE COUNSEL: Right. Well, Dr. Reeves will also testify --

THE COURT: Well, Dr. Reeves wasn't there.

DEFENSE COUNSEL: Wait. Dr. Reeves will also testify that the statement that Eddie gave is inconsistent with the physical scene.

THE COURT: That McNight stabbed somebody. I think that's outrageous for him to say that that's inconsistent, that McNight stabbed somebody is inconsistent, is that what you're saying?

DEFENSE COUNSEL: No.

THE COURT: Then what is --

DEFENSE COUNSEL: Eddie doesn't even tell them that Bobby stabbed anybody in his confession; he's saying that the scenario that Castro lays out is inconsistent with the physical scene.

THE COURT: Well, we're not getting anything through the back door. Anything about guilt; we're not going to say that --

DEFENSE COUNSEL: He would be guilty anyway. Guilty of felony murder. Judge, he's going to be --

THE COURT: We are not going to say that McNight had anything to do with this murder in this trial because there is -- we aren't going to do it; this is a penalty phase mit -- this is mitigation, and that's all, we're not going to say that McNight stabbed him and killed him, because that's already been settled.

DEFENSE COUNSEL: Judge, is the court saying that disparate treatment of co-

> defendants is not recognized?
>
> THE COURT: No, I didn't say that; you can ask him about that.
>
> DEFENSE COUNSEL: Well, then, his participation in the murder needs to be established for the jury to decide --
>
> THE COURT: **No, you're not going to get into the guilt -- you're not going to get into the guilt, and we're not going to do it; and you're not going to get it through the back door, the side door, or anywhere else; because he didn't have anything to do with it, and Castro says so in his confession.**

(R859-62)(emphasis added). On direct examination by defense counsel, McNight thereafter testified that he stabbed Scott, who was already dead, four to five times, but only because Castro told him to. (R865-66) On cross-examination, McNight explained that he complied with Castro's instructions to stab the body because Castro threatened him with death. (R868-69)

Following McNight's testimony, Castro proffered the testimony of Dr. Reeves, stipulated by the state to be an expert forensic pathologist. (R891-901) The trial court indicated that defense counsel would be able to present the witness' testimony concerning the suffering of the victim and mitigation. (R929) The doctor's opinion was that Scott was manually strangled and stabbed to death by two individuals:

> Q: (defense counsel) Doctor, based on your examination and review of the statements by both Bobby McNight and Edward Castro what in your opinion was the scenario that occurred on that day?
>
> A (Dr. Reeves): It's very interesting in that the best explanation was that

> Mr. Scott was manually strangled and stabbed to death. There are several possibilities as to what happened, but I believe the best **explanation would mean that there's -- I don't know how you would exclude the fact that he in fact was assaulted by two individuals and not one.**

(R930) The doctor went on to explain the basis of that conclusion, and in doing so the court interrupted and mildly argued with the witness as to whether what he was saying was inconsistent with what the prior medical examiner had been saying. (R931-33)

Dr. Reeves persisted that Castro's statement was inconsistent with both the physical evidence and the statements given by McNight:

> Q (Defense counsel): Okay. So basically, Doctor, it is your opinion after reviewing your statement of Edward Castro that his statement of what had occurred on January 14, 1987 has not been supported by the evaluation and review that you completed?
>
> A (Dr. Reeves): I'm saying that certain aspects of it could not be supported. I think overall there is a description of generically what happened, but it's obvious that there are inaccuracies or inconsistencies between his statement of what supposedly happened and what other people have said. He says, for example, in his statement he covered the body, Robert McNight says he covered the body. The defendant says that -- he makes the point of saying he tried to lock the door and the door wouldn't lock because it didn't work; Robert McNight specifically says when he came downstairs he couldn't come inside because the door was locked. Police investigators that were at the scene describe the door as being ajar; I don't know whether anybody

> ever tested the door to see if it was locked or not, but there [are] definite inconsistencies in the sequence of events and details like that, which I don't know how they can be ignored.

(R937-38).

The trial judge excluded this testimony, evidently because he believed that Castro was attempting to present evidence of "lingering doubt." Evidence that is relevant solely to establish a lingering doubt of guilt is inadmissible. King v. State, 514 So.2d 357 (Fla. 1987). It is respectfully submitted, however, that the exclusion of the testimony here was reversible error because the evidence was relevant to establish Castro's version of what occurred. Castro was **not** trying to show that he was innocent of the crime but instead that McNight, who substantially participated in the murder, had essentially gone free.

In Downs v. State, 572 So.2d 895 (Fla. 1990), this Court addressed a similar exclusion of evidence by a trial judge who believed that such evidence "was relevant only to the issue of guilt and not to the issue of penalty." In pertinent part, this Court stated:

> A defendant has the right in the penalty phase of a capital trial to present any evidence that is relevant to, among other things, the nature and circumstances of the offense. E.g., Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978)(plurality opinion). Evidence that Downs was not the triggerman certainly was relevant to the circumstances of his participation in the crime, and,

> if true, it would have been valid mitigation. See Section 921.141(6)(d), Fla.Stat. (1975)(minor participation in capital murder committed by another is statutory mitigating circumstance); cf. Zerquera v. State, 549 So.2d 189 (Fla. 1989)(trial court in guilt phase erred by suppressing evidence that could have cast doubt on state's allegation that defendant was the triggerman). Likewise, proof that Downs was not the triggerman would have been valid mitigation in light of the fact that his codefendants got lesser sentences or were not prosecuted at all. Campbell v. State, No. 72,622 slip op. at 9, n.6 (Fla. June 14, 1990)[15 FLW S342]("Valid nonstatutory mitigating circumstances include . . . 4) Disparate treatment of an equally culpable codefendant"); cf. Slater v. State, 316 So.2d 539 (Fla.1975)(sentence of death was disproportional punishment when "triggerman" codefendant got life sentence).
>
> In this case the evidence presented to support Down's assertion that he was not the triggerman is inextricably intertwined with evidence pertaining to the issue of guilt. We do not find that fact sufficient to bar the relevant evidence. Michael's testimony should have been admitted.

Downs, 572 So.2d at 899 (footnote omitted). See Colina v. State, 570 So.2d 929, 932 (Fla.1990)(improper exclusion of evidence showing codefendant may have been dominant figure in murder not harmless error as it pertained to penalty phase).

Though in Downs the exclusion of such evidence was deemed harmless because it was cumulative to other testimony which adequately established the defendant's version of the murder, Downs, 572 So.2d at 899, Castro was totally foreclosed from contesting the scenario of the murder contained in his

statements to police. Significantly, the jury here requested and obtained a cassette tape player whereby Castro's statements could be reviewed during deliberation. (R1143-1144) In state's exhibit 6 Castro represented that McNight was uninvolved with the murder, that he was simply a hitchhiker that Castro had picked up between Ocala and Lake City. Castro told police that McNight was "Just a kid, yeah. He ain't got nothing to do with it, man. The kid ain't got nothing to do with it. . . . Just a hitchhiker. Just a kid, man."

Castro sought to establish through his own witnesses, however, that McNight was more than simply a hitchhiker; that the circumstances surrounding the murder were not necessarily those contained in his statements to the police. The exclusion of such testimony by the trial judge was a denial of due process and the right to present evidence guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution and Article I, Sections, 6, 9, and 22 of the Florida Constitution. Further, the inability of Castro to discredit his prior statement and to advance to the jury his version of what transpired at the time of the murder through Dr. Reeves and McNight rendered the jury's recommendation and the trial court's sentencing order/findings of fact unreliable under the 8th and 14th Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

The testimony sought to be presented by Castro was not to establish a lingering doubt of guilt. Indeed, the scenario

advanced by Dr. Reeves was that two persons assaulted Scott simultaneously, one pinning Scott's arms to his chest and the other stabbing him. Castro was in no way trying to establish that he was not guilty of first-degree murder, or that the preceding jury verdict was incorrect. Instead, he was presenting relevant testimony of an expert forensic pathologist to establish his version of the circumstances of the offense so that the jury could make an informed sentencing recommendation. The state cannot show that the exclusion of this testimony was harmless. Indeed, in his written findings of fact as to the existence of aggravating and mitigating factors, the trial judge relied solely on the version of the murder contained in Castro's statement. See Appendix A, State's Exhibit 6.

Fairness and due process requires that Castro be given a meaningful opportunity to refute prior statements. Due to the constitutionally improper limitation of defense testimony, the sentence must be reversed and the matter remanded for a new penalty phase before a new jury with a new jury recommendation.

POINT IV

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SHOW THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court found that Castro killed Scott in a cold, calculated and premeditated manner without pretense of moral or legal justification:

> At the time of the homicide, the defendant was sharing a small, one bedroom efficiency with a man named "Gallagher." When the manager objected to the number of people living in the efficiency, the defendant decided to leave and began looking for a car to steal.
>
> While examining automobiles, the defendant saw Scott leave a nearby apartment and approach his car. Scott was visibly intoxicated. The defendant initiated a conversation with Scott and invited him into the efficiency for a beer. Scott accepted the invitation, but once inside the efficiency, abruptly decided to leave. The defendant stopped Scott and convinced Scott to let him drive Scott's car to a convenience store for more beer. The defendant confessed that he decided to take the car while driving Scott to the store.
>
> After returning to the efficiency the defendant began contemplating ways to take Scott's car. The defendant considered tying Scott up, but decided not to risk attracting the attention of others. Instead, the defendant left Scott alone in the efficiency under the guise of obtaining ten dollars and went to look for a knife. The defendant confessed that he continued deliberating the victim's fate as he looked for the knife. After some difficulty in locating a knife, the defendant ultimately returned, having decided "I'm gonna take this guy out."

> The defendant was met with a surprise when he returned -- Scott was driving away. The defendant with his "golden tongue" stopped Scott and again requested that he come up to the efficiency. Scott returned to the efficiency, but became visibly apprehensive. When Scott expressed a desire to leave a for a third time, the defendant "snapped" and killed him.
>
> This was simply not an "impulsive" act or a robbery that went awry as urged by the defense. The murder was the result of a coldly rational and calculated plan to obtain Scott's car. By the defendant's own admission, the intent existed at the time he went to get the knife. The homicide occurred after much deliberation and the defendant exerted great effort to repeatedly bait and lure the victim into the efficiency.
>
> The Court therefore finds that a heightened premeditation existed; the state has proven beyond a reasonable doubt that the murder was committed in a cold and calculated manner without a pretense of moral or legal justification.

(R1984-85; Appendix A).

The scenario of the murder used by the trial court to find the existence of this statutory aggravating factor comes solely from Castro's statement to police. (State's Exh. 6). As set forth in Point III, supra, the trial court refused to allow Castro to present evidence that was inconsistent with the scenario of the murder set forth in the statement. However, the proffer of that evidence casts substantial doubt as to the accuracy of Castro's statement about what happened.

For instance, the statement claims that McNight was just a kid, a mere hitchhiker picked up by Castro between Ocala

and Lake City after the murder was committed. (State's Exh. 6) However, McNight admits having been present with Castro and Scott in Gallagher's room prior to the murder:

> Q: (defense counsel): Okay. Now, when did you first come into the room that morning that the murder took place?
>
> A: (McNight) I was down there, and I'm going to take a estimate guess and say about eight o'clock, and then I went upstairs. I'm just guessing on the time period. And I went upstairs -- excuse me -- it was just right before the murder.

(R837). In this respect, Castro's statement is demonstrably inaccurate. McNight's vivid description of Scott's bulging eyes (R869) suggests that McNight was an active participant in the murder; Dr. Reeves testified that such bulging could have occurred <u>while</u> Scott was being strangled and that McNight would have to have observed the bulging eyes during the strangling:

> Q: (defense counsel) Okay. So in your opinion, again, based on Bobby McNight's testimony and what you found, what would explain Bobby McNight recognizing the bulging eyes popping out?
>
> A: (Dr. Reeves) I don't know. Since there is no evidence of the fact that he saw the body; if, in fact, the body, by his statement was already dead, the eyes were bulging, that means that at that point in time the victim would have been alive.
>
> Q: And being strangled?
>
> A: Certainly, because obviously, the eyes didn't stay bulging, so the eyes were allowed to relax during that interim.

(R936).

The proffer of Dr. Reeves aside, common sense casts doubt on the accuracy of Castro's statement. The wounds to the **front** of Scott's forearms (R923-24) do not comport with the scenario that Castro stabbed Scott while struggling with him, after attempting to strangle him to death. Instead, the nature and location of those wounds strongly suggest that Scott's arms were pinned against his chest while he was being stabbed. The state medical examiner testified as part of the state's case that there were **NO** wounds to Scott's hands. (R523;564) The lack of defensive wounds to Scott's hands is further inconsistent with there being only one assailant yet, interestingly, the trial judge, in finding the HAC aggravating factor, found that Castro "inflicted flesh wounds to Scott's hands as he attempted to fend-off the defendant." (R1986)

It is evident that the Court derived its findings solely from Castro's recorded statement(s) and not from any testimony presented at the hearing. In that respect, the trial court's findings are entitled to **no** deference by this Court, because this Court is in as good a position as was the trial judge to gauge the reliability of Castro's recorded statements. See United States v. Gilliland, 807 F.2d 899 (11th Cir. 1987) (Court of Appeals accords no deference to trial court's finding based solely on transcript of grand jury proceedings.). This is not a situation where deference must be accorded the trial court because live testimony was presented. This Court can review the same material used by the trial judge and independently determine

whether the patent inaccuracies and inconsistencies contaminate the reliability and/or trustworthiness of the statement. The precise legal question is whether Castro's statement, given to police after days of drinking beer, whiskey and vodka, presents a competent basis from which facts can be determined beyond a reasonable doubt. The "clearly erroneous" standard does **not** apply with full force here:

> The trial court's conclusion on this question will not be upset on appeal unless clearly erroneous; however, the clearly erroneous standard does not apply with full force in those instances in which the determination turns in whole or in part, not upon live testimony, but on the meaning of transcripts, depositions or other documents reviewed by the trial court, which are presented in essentially the same form to the appellate court.

Thompson v. State, 548 So.2d 198, 204, fn. 5 (Fla. 1989).

A statutory aggravating factor "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983)(footnote omitted).

> Since premeditation already is an element of capital murder in Florida, Section 921.141(5)(i) must have a different meaning; otherwise it would apply to every premeditated murder. Therefore, Section 921.141(5)(i) must apply to murders more cold blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder.

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990).

This Court has consistently held that the cold, calculated and premeditated murder aggravating factor is to be applied only in certain circumstances. Such circumstances cannot be said beyond a reasonable doubt to exist here:

> Thompson challenges the court's finding that the aggravating circumstances of a cold, calculating, and premeditated murder, is supported by the facts in this case. We agree with Thompson. Many times this Court has said that Section 921.141(5)(i) of the Florida Statutes (1987), requires proof beyond a reasonable doubt of "heightened premeditation." We adopted the phrase to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See e.g., Hamblen v. State, 527 So.2d 800, 805 (Fla.1988); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Heightened premeditation can be demonstrated by the manner of the killing, **but the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began**. Hamblen, 527 So.2d at 805; Rogers, 511 So.2d at 533. See e.g., Koon v. State, 513 So.2d 1253 (Fla.1987), cert. denied, 485 U.S. 943 (1988).

Thompson, 565 So.2d 1311, 1317-18 (Fla.1990)(emphasis added).

The speculative evidence here is legally inadequate to establish that Castro had a pre-arranged plan to murder Scott before the crime began. Assuming that Castro planned to forcefully steal Scott's automobile, it is well established that a plan to rob cannot satisfy the CCP requirement that the murder be planned in advance. See Thompson v. State, 456 So.2d 444, 446 (Fla.1984) ("No evidence was produced to set the murder apart

from the usual hold-up murder in which the assailant becomes frightened or for reasons unknown shoots the victim either before or during an attempt to make good his escape."); Gorham v. State, 454 So.2d 556, 559 (Fla. 1984)("The record bears evidence that the robbery was premeditated in a cold and calculated manner, but that premeditation cannot automatically be transferred to the murder itself."); Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983)("Here the evidence showed that Appellant killed Donald Klein intentionally and deliberately but there was no showing of any additional factor to establish that the murder was committed in a 'cold, calculated, and premeditated manner without any pretense of moral or legal justification.'").

> We cannot agree that the facts support a finding that this murder was cold, calculated and premeditated. This aggravating factor requires a degree of premeditation exceeding that necessary to support a finding of premeditated first-degree murder. Smith v. State, 424 So.2d 726 (Fla. 1982). cert. denied, __U.S.__, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). The only evidence presented or argued as to this factor was that Hardwick intended to rob the victim and that once he began to choke or smother her, it would have taken more than a minute for her to die. The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required is that the murderer fully contemplate effecting the victim's death. The fact that a robbery may have been planned is irrelevant to this issue. Gorham v. State, 427 So.2d 723 (Fla. 1983)(fact that victim was shot five times does not

> support finding that murder exhibited heightened premeditation). On the facts presented here, we cannot say this factor was proved beyond a reasonable doubt.

Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984)(emphasis added).

Castro's statement to the police too unreliable to constitute substantial, competent evidence upon which to make findings beyond and to the exclusion of every reasonable doubt. See Rogers v. State, 511 So.2d 526. 533 (Fla.1987)(CCP factor must be proved beyond a reasonable doubt.). Where, as here, the sole source of the trial court's findings come from a statement fraught with inaccuracies established by the state's own evidence, the statement alone is legally insufficient to support factual findings beyond a reasonable doubt. Due to legally insufficient evidence whereby the circumstances surrounding the murder can be reconstructed, this statutory aggravating factor must be disallowed.

POINT V

THE EVIDENCE IS LEGALLY INSUFFICIENT TO PROVE THAT SCOTT'S MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The trial court found that Scott's murder was especially heinous, atrocious or cruel as follows:

> The state has also proven beyond a reasonable doubt that the murder of Austin Scott was especially heinous, atrocious and cruel. When Scott attempted to leave, the defendant threw him to the bed and began choking him. The defendant watched as Scott's face turned purple. Scott began to struggle so violently that the defendant feared that he would get loose or scream. After substantial difficulty, the defendant was able to grasp the knife he had placed in his sock. The defendant showed the victim the knife and told the victim to "settle down", that he only wanted the car. The victim struggled more, receiving several defensive wounds in a futile effort to escape.
>
> In a brutal finale, the defendant continued choking Scott, showed Scott the knife, and told Scott, "Hey Man, you've lost. Dig-it?" and started stabbing Scott. The defendant not only brutally choked his victim, but inflicted flesh wounds to Scott's hands as he attempted to fend-off the defendant. When Scott was unable to cry out, Scott was shown the instrument of his fate, verbally toyed with, and then repeatedly stabbed.
>
> The defense cites the court to Scott's autopsy report and expert testimony showing Scott's blood alcohol level to be 0.22 and argues that Scott would not have been conscious during the more brutal moments of this crime. However, from the defendant's own confession it is apparent that Scott was conscious. Not only was Scott conscious enough to attempt to leave three times, but the defendant clearly noted the victim's awareness and apprehension throughout

> the incident. The defendant confessed that the victim struggled violently and there is evidence of defensive wounds as well as scratch marks on the defendant to collaborate (sic) the defendant's statements. The Court finds beyond a reasonable doubt that the murder was heinous, atrocious and cruel.

(R1985-86; Appendix A).

It is clear that several of the above representations of fact are expressly contradicted by the record. For instance, Judge Musleh found, "The defendant not only brutally choked his victim, but inflicted flesh wounds to Scott's hands as he attempted to fend-off the defendant." Castro did make such a statement to police. (State's Exhibit 6) However, the testimony of the state's medical examiner and the proffered testimony of the forensic pathologist established that there were **no** wounds whatsoever to Scott's hands. (R523;564) The majority of the findings are based on factual representations contained in Castro's statement which, as previously set forth, are inconsistent with the physical evidence and common sense.

For instance, the wounds to the top, outside of Scott's forearms cannot reasonably be deemed "defensive" wounds, where they are more consistent with being inflicted while the arms were pinned against the chest. Common sense is that no one would use the top of the forearm to ward off an impending blow. The state expert based her opinion that the wounds were "defensive" on the dubious observation that they were inflicted far away from the intended target area. (R562). This explanation is based on

speculation rather than any reasonable degree of medical certainty.

Assuming for the sake of argument that Florida's especially heinous, atrocious or cruel statutory aggravating factor is constitutional, it was error for the trial court to find that the factor applied under these facts. Castro respectfully submits that the trial court erred in taking the facts from Castro's statements to police after preventing Castro from presenting evidence which would have cast considerable doubt on whether the murder scenario that was contained in the statement was accurate. It was a denial of due process under the Fifth, Sixth and Fourteenth Amendments and Article I, Sections 9, 16 and 22 for the trial court to rely on that statement yet not allow Castro to controvert it.

Scott's blood alcohol content was .22%, substantially more than double the percentage required to create a legal presumption of intoxication. Section 316.1934, Florida Statute (1989). Expert testimony establishes that Scott would have been rendered unconscious within a minute from the beginning of the assault.

> Q: (Defense counsel) How about the manual strangulation and the stabbing combined. Can you form any kind of opinion on how long Mr. Scott would have been aware of the attack?
>
> A: (Dr. Reeves) Yes, you're talking about a short period of time, probably -- have been aware or been alive, that's --
>
> Q: Been aware?

> A: It could have been anywhere from a minute or less. Obviously, it's possible or the possible scenario to have been longer, but it -- there is no way to determine that. Certainly could have been less than a minute.

(R964-965). The testimony presented by the state in no way contradicted the evidence that Scott's awareness of death may have been less than one minute. The medical examiner, when asked by the state how long Scott **could have survived**, stated her best estimate would be something like ten minutes, but that would just be conjecture, she really did not know. (R532) Clearly, to find the HAC factor based on awareness of impending death, the burden is on the state to prove beyond a reasonable doubt a minimum threshold level of awareness. See Herzog v. State, 439 So.2d 1372, 1379-80 (Fla.1983)(HAC factor not established beyond reasonable doubt where intoxicated victim may have been semi-conscious when she was beaten, gagged, smothered with a pillow, then dragged into the living room and strangled with a telephone cord.).

The constitutional problem with this particular aggravating factor is that any murder can be deemed especially heinous, atrocious or cruel. The vague terms of the factor do not necessarily limit its application, which permits arbitrary imposition. See Shell v. Mississippi, 498 U.S. __, 112 L.Ed.2d 1 (1990). "An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on

the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). A factor that can be found to exist in every murder does not genuinely limit the class of persons eligible for the death penalty.

The mere fact that death was inflicted by strangulation or stabbing cannot automatically establish this aggravating factor for, if the victim was unconscious or semi-conscious, there is no rational basis to find that the murder was especially heinous, atrocious or cruel. Because the evidence is legally insufficient to establish that Scott was conscious when assaulted, the trial court erred in finding this aggravating factor. As set forth in the preceding point, the circumstances of the murder cannot satisfactorily be established from state's exhibits 6 and 7, and the trial court's reliance on these statements to find this factor was error. The HAC factor must be disapproved here due to the lack of substantial competent evidence to support it.

POINT VI

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE STATEMENTS CASTRO MADE WHILE INTOXICATED BECAUSE ANY WAIVER GIVEN BY CASTRO WHILE INTOXICATED WAS NOT KNOWING, INTELLIGENT OR VOLUNTARY.

Prior to the penalty phase, defense counsel moved to suppress statements Castro gave to the police shortly after his arrest. (R1790-92) The motion alleged that Castro was too intoxicated at the time the statements were given to voluntarily waive his constitutional rights, and that the statements were otherwise coerced by promises of psychiatric help. (R1790-91) The trial court entertained Castro's motion and heard evidence from defense experts establishing that in their opinion Castro was too intoxicated to voluntarily waive his rights due to the massive amount of alcohol which he consumed immediately prior to giving these statements. (R271-300;451-65) The trial court denied Castro's motion to suppress as follows, "Okay. The motion is denied. Anything further?" (R473) It is respectfully submitted that the trial court's ruling does not constitute an adequate finding of voluntariness of the waiver of the defendant's right, that is, that the statement was freely and voluntarily given, and that the ruling is otherwise unsupported as a matter of law.

In Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct., 1774, 12 L.Ed.2d 908 (1964) the Supreme Court held that a defendant has a constitutional right to a fair hearing and independent and

reliable determination of the voluntariness of a confession before the confession may be allowed to be heard by a guilt determining jury. Such a hearing is constitutionally mandated for any defendant who timely urges that a statement was not voluntarily given. Smith v. Estelle, 527 F.2d 430, 431 n. 3 (5th Cir. 1976). For a confession to be admissible at trial, a trial judge must determine on the record "with unmistakable clarity" that the statement was voluntarily given. See Simms v. Georgia, 385 U.S. 538, 544 (1967)(a judge's conclusion that the confession is voluntary must appear from the record with unmistakable clarity). For instance, in Graham v. State, 292 So.2d 373 (Fla. 3d DCA 1974), a trial judge denied a motion to suppress a confession without making an unequivocal and express finding of voluntariness:

> The record clearly reflects that the trial judge merely stated that the motion to suppress the confession is denied. The above statement simply does not meet the requirement that the trial judge's conclusion that the confession is voluntary appear from the record with **unmistakable clarity.** See McDole v. State, Fla. 1973, 283 So.2d 553.

Graham, 292 So.2d at 374 (emphasis in original).

The waiver of a fundamental constitutional right must be knowing, voluntary and intentional. Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966). The trial court at trial suppressed the first statement given by Castro. Thus, the state bears the increased burden of showing that the subsequent statements were not the product of the prior impropriety. See

Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The failure of the police to timely inform Castro of his rights before the incriminating statement was made is a factor that must be considered in conjunction with Castro's uncontroverted state of intoxication when the voluntariness of the subsequent waiver is determined. See Thompson v. State 548 So.2d 198, 203-04 (Fla. 1989); Townsend v. Sain, 372 U.S. 293 (1963)(pre-Miranda case in which confession was suppressed when drug-addicted defendant had been administered a medication that had properties of truth serum).

The evidence in this case fails to provide a legal basis for the trial court to conclude that Castro's subsequent statements were voluntarily made. His state of intoxication at the time was such that he was wholly unable to voluntarily waive the fundamental constitutional right to remain silent and/or to an attorney. Because the statements were involuntarily given yet admitted over timely objection, the sentence must be reversed and the matter remanded for a new penalty phase.

POINT VII

CASTRO WAS DENIED A FAIR TRIAL BY THE UNNECESSARY PRESENTATION OF GRUESOME PHOTOGRAPHS MADE DURING THE AUTOPSY OF THE VICTIM.

Consideration of this point is controlled by the recent decision of this Court in Czubak v. State, 570 So.2d 925 (Fla. 1990). In Czubak, this Court discussed the law concerning the admission of gruesome photographs in Florida:

> 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, 47 5 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 [distract] 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. 1005, 82 S.Ct. 636, 7 L.Ed.2d 543 (1962).

Czubak, 570 So.2d at 928.

In the instant case, Castro's defense counsel duly objected to presentation of the autopsy photographs. (R535-50) Specific objections were made arguing that the photographs were cumulative, irrelevant, and that the inflaming effect on the jury denied Castro a fair sentencing hearing in violation of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution. (R549-50) State's exhibit 5-U (R2023) is supposedly relevant to depict the extent of bruising to the victim's neck to show that strangulation occurred. (R538) State's exhibit 5V (R2024) is supposedly relevant to show the puncture wounds to the victims' lungs. (R538) State's exhibit 5W (R2025) is supposedly relevant to show the damage to the victim's heart. (R539) Without doubt, these pictures are offensive; they are gruesome.

The pictures are wholly unnecessary and irrelevant. State's exhibit 5-O (R2020) depicts Scott, the bruising to Scott's neck and the stab wounds to his chest. That photograph is more than enough to establish the locations of the wounds, and any competent doctor would be able to fully describe the nature of Scott's injuries by referring solely to that picture without reference to autopsy photographs. Further, that photograph would be relevant to identify Scott and to show the condition of the body when it was discovered.

The photographs taken during the autopsy could in no way enhance the jury's understanding of the issues. Insofar as determining whether the murder was especially heinous, atrocious or cruel, the jury may well have been greatly influenced by the offensiveness of the autopsy photographs. Mutilation of a body after death cannot be properly considered in establishing that statutory aggravating factor. See Halliwell v. State, 323 So.2d 557 (Fla. 1975). However, lay people may attribute weight to the HAC factor solely because of such graphic autopsy photos.

The unnecessary, prejudicial introduction of these photographs over timely objection denied Castro a fair jury recommendation in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 9, and 22 of the Florida Constitution. Further, due to the inflammatory nature of these photographs, the jury recommendation has become unreliable as being based on inflamed emotion in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Accordingly, the death sentence must be reversed and the matter remanded for a new penalty phase with a new jury recommendation.

POINT VIII

THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9,16 AND 17 OF THE FLORIDA CONSTITUTION.

In Smalley v. State, 546 So.2d 720 (Fla.1989), this Court rejected a claim that Florida's especially heinous, atrocious or cruel statutory aggravating factor ("HAC" factor) is unconstitutionally vague under the eighth and fourteenth amendments because application of that factor by the juries and trial courts is subsequently reviewed and limited on appeal:

> It was because of [the State v. Dixon] narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted). That Proffitt continues to be good law today is evident from Maynard v. Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwright. 108 S.Ct. at 1859.

Smalley v. State, 546 So.2d 720, 722 (Fla.1989).

Even more recently, however, the United States Supreme Court decided Shell v. Mississippi, 498 U.S. __, 111 S.Ct. __, 112 L.Ed. 2d 1 (1990) and re-affirmed the holding in Maynard v. Cartwright, 486 U.S. 356 (1988). The concurring opinion

explained why the limiting constructions being utilized by the various states are not up to constitutional standards:

> The basis for this conclusion [that the limiting construction was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, 497 U.S. __, __, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard) clearly fail this test; like "heinous" and atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by "'[a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Maynard v. Cartwright, supra, at 363, 100 L.Ed.2d 372, 1108 S.Ct. 1853 (quoting Godfrey v. Georgia, 446 U.S. 420, 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980)(plurality opinion))(emphasis added).

Shell v. Mississippi, 112 L.Ed.2d at 5. Significantly, the terms of the "limiting construction" condemned by the United States Supreme Court in Shell as being too vague are the precise ones used by this Court to review the HAC statutory aggravating factor.

It is respectfully submitted that the limiting construction used by this Court as to this statutory aggravating factor is too indefinite to comport with constitutional requirements. The definitions of the terms of the HAC aggravating factor do not provide any guidance to the jury when

the factor is first weighed in issuing a sentencing recommendation, by the sentencer when the factor is next weighed in conjunction with the recommendation when the sentence is imposed, and finally by this Court when the factor is reviewed and the limiting construction is applied. The inconsistent approval of that factor by this Court under the same or substantially similar factual scenarios shows that the factor remains prone to arbitrary and capricious application.

For instance, recently in Hitchcock v. State, 16 FLW S26 (Fla. Dec. 20, 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's." Hitchcock, 16 FLW at S26. Compare this statement to the analysis contained in Mills v. State, 476 So.2d 172, 178 (Fla. 1985):

> In making an analysis of whether the homicide was especially heinous, atrocious and cruel, we must of necessity look to the act itself that brought about the death. It is part of the analysis mandated by section 921.141(1), Florida Statutes which provides for a separate proceeding on the issue of the penalty to be enforced and "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." In this case the death instrumentality was a .410 shotgun fired at close range. Whether death is immediate or whether the victim lingers and suffers is pure fortuity. **The intent and method employed by the wrongdoers is what needs to be examined.** The same factual situation was presented in Teffeteller v. State, 439 So.2d 840 where this Court set aside

> the trial court's finding that the murder was heinous, atrocious and cruel.

Mills, 476 So.2d at 178 (emphasis added).

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). "What is important . . . is an **individualized** determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983). It is an arbitrary distinction to say that one murder is especially heinous because, for a matter of seconds while being strangled, a victim perceived that death may be eminent, yet say that another murder was not heinous because, for hours after the fatal wound was inflicted, a victim suffered and waited impending death.

Because the HAC statutory aggravating factor is itself vague, and because the limiting construction used by this Court both facially and as applied is too vague and indefinite to comport with the eighth and fourteenth amendments as set forth in Maynard v. Cartwright, supra, Godfrey v. Georgia, 446 U.S. 420 (1980), and Shell v. Mississippi, supra, the instant death sentence imposed in reliance on the HAC statutory factor must be vacated and the matter remanded for a new penalty phase before a new jury.

POINT IX

SECTION 921.141, FLORIDA STATUTES (1987) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Violation of Separation of Powers

It is respectfully submitted that, by attempting to define the operative terms of the statutory aggravating factors set forth in Section 921.141, this Court is promulgating substantive law in violation of the separation of powers doctrine of the United States Constitution and Article II, Section 3 of the Florida Constitution. The Florida Legislature is charged with the responsibility of passing substantive laws. Legislative power, the authority to make laws, is expressly vested in the Florida Legislature. Article III, Florida Constitution (1976). In an exercise of that power, the Florida Legislature passed Section 921.141, Fla. Stat. (1975) which purportedly established the substantive criteria authorizing imposition of the death penalty. However, the statutory aggravating factors as written are unconstitutionally vague and overbroad. See Maynard v. Cartwright, 486 U.S. 356 (1988). In actuality, the substantive legislation was authored in State v. Dixon, 283 So.2d 1 (Fla. 1973) where this Court provided the working definitions of the statutory aggravating factors ostensibly promulgated by the Florida Legislature. This Court can **not** enact laws, either directly or indirectly.

As noted in the preceding point on appeal, this Court

has rejected the premise that Florida's especially heinous, atrocious and cruel statutory aggravating factor is unconstitutionally vague based on Maynard, supra, because the working definition of the terms set forth in the HAC factor are provided by this Court through a limiting construction of that factor. See Smalley v. State, 546 So.2d 1201 (Fla. 1989). Other instances where the definitions of statutory aggravating factors have been provided by this Court demonstrate that the violation of the separation of powers doctrine is pervasive. See Peek v. State, 395 So.2d 492, 499 (Fla.1980)(parole and work release constitute being under sentence of imprisonment, but probation does not); Johnson v. State, 393 So.2d 1069 (Fla.1981)(more than three people required to constitute a great risk of death or injury to many persons)[1]; Banda v. State 536 So.2d 221, 225 (Fla.1988) ("We conclude that, under the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide."). The passage of such broad legislation

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[1] Interestingly, the initial working definition provided this statutory factor by this Court in King v. State, 390 So.2d 315 (Fla. 1980) was, after seven years of usage by juries and trial judges, categorically rejected when the King case was again reviewed by this Court. See King v. State, 514 So.2d 354, 360 (Fla. 1987) ("this case is a far cry from one where this factor could properly be found.") If King is a "far cry" from the proper case to find the "great risk to many persons" factor, how did the factor get approved in the first decision and, more importantly, why does this Court feel compelled to provide the working definitions of the substantive terms of the statutory aggravating factors?

for it to be refined, defined and given substance by the Supreme Court of Florida is tantamount to a delegation of legislative power and a violation of the separation of powers doctrine of state and federal constitutions.

FAILURE OF AGGRAVATING FACTORS TO ADEQUATELY CHANNEL THE SENTENCER'S DISCRETION TO IMPOSE THE DEATH PENALTY.

"An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Supposedly, the things that may be considered as "aggravation" by a sentencer in Florida are limited to those statutory aggravating factors expressly listed in Section 921.141(5), Florida Statutes (1989). See Brown v. State, 381 So.2d 690 (Fla. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1976); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977). It is respectfully submitted, however, that these "factors" are but open windows through which virtually unlimited facts may be put before the sentencer to achieve a death sentence, thereby providing unfettered discretion to recommend/impose a death penalty in violation of the Eighth and Fourteenth Amendments, Article I, Section 17 of the Florida Constitution and the holding of Furman v. Georgia, 408 U.S. 238 (1972).

For instance, this Court has held that the State is permitted to establish the full details of a defendant's prior conviction for a violent felony in order to allow the jury

sentencer an informed basis whereby "weight" can be meaningfully attributed to the Section 921.141(5)(b) factor. See Francois v. State, 407 So.2d 885 (Fla. 1981); Elledge v. State, 346 So.2d 998 (Fla. 1977). However, this Court has at the same time recognized that such testimony is presumptively prejudicial. See Castro v. State, 547 So.2d 111, 115 (Fla. 1989)(improper admission of irrelevant collateral crimes evidence is presumptively harmful). Allowing such prejudicial testimony to come before the jury/ sentencer under the general heading of a statutory aggravating factor permits consideration of non-statutory aggravating factors to impose the death penalty. Though the non-statutory reasons offered under this category may be constitutional in the broad sense of the word, others are unconstitutional.

The same rationale applies to other statutory aggravating factors, which are in essence but categories through which unfairly prejudicial evidence is put before the jury/sentencer. Because the statutory aggravating factors fail to adequately channel the sentencer's discretion in imposing the death penalty, the factors are unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

FAILURE TO ADEQUATELY INSTRUCT SENTENCER ON STANDARD OF PROOF

Due process under the Fourteenth Amendment must comport with prevailing notions of fundamental fairness. California v.

Trombetta, 467 U.S. 479 (1984). In order to recommend/impose the death penalty in Florida, the statute requires that statutory aggravating factors "outweigh" the mitigation. Section 921.141(2) and (3), Florida Statutes (1989). In fact, the statute places the burden on the defendant to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." Section 921.141(2)(b), Fla. Stat. (1989). This Court has recognized that the burden must be on the State to prove that the aggravating factors outweigh the mitigating factors. See Arrango v. State, 411 So.2d 172, 174 (Fla. 1982); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975)("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors.") As written, the statute places the burden of proof on the defendant in violation of the Fifth and Fourteenth Amendments, Article I, Section 9 of the Florida Constitution and the holding of Mullaney v. Wilbur, 421 U.S. 684 (1975).

Even when the statute is changed by judicial fiat to place the burden on the state to show that the statutory aggravating factors "outweigh" the mitigation, a violation of due process under the Fifth and Fourteenth Amendments and Article I, Section 9 of the Florida Constitution occurs because the bare "outweigh" standard fails to adequately apprise the jury/sentencer of what must objectively be present to determine whether imposition of the death penalty is warranted. As worded, the standard instructions dilute the requirement that the state prove beyond and to the exclusion of every reasonable doubt that

the death penalty is warranted. The standard instruction requires only that the state show that the death penalty is warranted by a mere preponderance of the evidence, thereby resulting in a violation of due process. See Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). Imposition of the death penalty based on a preponderance of the evidence is unconstitutional. In re: Winship, 397 U.S. 358 (1970). By showing that the aggravation "outweighs" the mitigation the state achieves death penalty recommendations and/or sentences by a mere preponderance standard in violation of the aforesaid cases and the constitutional requirements to due process.

For the aforesaid reasons, the death penalty in Florida is unconstitutional both on its face and as applied. It must accordingly be declared unconstitutional and the death penalty must be reversed.

POINT X

UNDER FLORIDA LAW, THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE.

The trial court imposed a death sentence here after finding three statutory aggravating factors. (R1983-1991) As previously set forth, the findings of a cold, calculated and premeditated murder and an especially heinous, atrocious or cruel murder were improper both legally and factually. Only one statutory aggravating factor may properly be said to have been proven beyond a reasonable doubt, that being that this murder was committed during the commission of a robbery. This Court has never approved imposition of the death penalty based solely on this one statutory aggravating factor and where, as here, substantial mitigation exists, the death penalty is disproportionate to the offense. The only instances where this Court has affirmed a death sentence based on one statutory aggravating factor is where the murder was especially heinous, atrocious or cruel, in the following cases: Arrango v. State, 411 So.2d 172 (Fla. 1982); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douglas v. State, 328 So.2d 18 (Fla. 1976), and; Gardner v. State, 313 So.2d 675 (Fla. 1975). A torture murder occurred in each of the foregoing cases, with little or no mitigation. Here, there is no torture murder and substantial mitigation.

Even assuming that the CCP and/or the HAC statutory factor(s) apply, a death sentence is disproportionate where other defendants who committed similar crimes received life sentences rather than death sentences. At the onset, it must be noted that the jury death recommendation is of no significance here because

it is unreliable as a matter of law. The instructions were faulty not only because of vagueness, but also because of improper doubling of factors over timely objection. In that regard, comparison of this case to any cases involving death recommendations is unfair and improper. The correct standard for comparison/proportionality review is to cases where there is either a life recommendation or no recommendation at all.

In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court noted that "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of **five** statutory aggravating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence because "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Fitzpatrick, 527 So.2d at 811.

Like Fitzpatrick, this is **not** the most aggravated and unmitigated of most serious crimes. When the facts of this crime are compared to those of the following cases where death sentences were ruled to be disproportionate, it is evident that the death sentence must be reversed and the matter remanded for imposition of a life sentence: Blakely v. State, 561 So.2d 560 (Fla.1990)(death penalty disproportionate despite finding that murder was especially heinous, atrocious or cruel and cold, calculated, and premeditated, without pretense of moral or legal justification); 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), receded from on other grounds, Pentecost v. State, 545 So.2d 861, 863 n. 3 (Fla.1989); Proffitt v. State, 510 So.2d 896 (Fla.1987); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Wilson v. State, 493 So.2d 1019 (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); Halliwell v. State, 323 So.2d 557 (Fla.1975).

Comparison of the facts of this case to those of the preceding cases shows that the death penalty is here disproportionate because other similarly culpable defendants have been sentenced to life imprisonment. Accordingly, the death sentence should be reversed and the matter remanded for imposition of a life sentence, with no possibility of parole for twenty-five years.

POINT XI

THE TRIAL COURT ERRED IN REFUSING TO PROVIDE THE JURY WITH A WRITTEN DEFINITION OF THE COLD, CALCULATED AND PREMEDITATED MURDER STATUTORY AGGRAVATING FACTOR.

Castro requested that the trial court provide a written definition of the cold, calculated and premeditated murder with no pretense of moral or legal justification statutory aggravating factor. (R1829-1830) The definition was the same used by this Court in Rogers v. State, 511 So.2d 526 (Fla. 1987); Carter v. State, 560 So.2d 1166 (Fla. 1990); Preston v. State, 444 So.2d 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981); Middleton v. State, 426 So.2d 548 (Fla. 1982); Bolender v. State, 422 So.2d 833 (Fla. 1982), and; Mann v. State, 420 So.2d 578 (Fla. 1982). (R1829-30). The failure of the trial court to adequately define this factor when the initial jury instructions were given the jury resulted in the jury requesting further guidance, and the definition was then only given orally.

Castro respectfully maintains that the statutory aggravating factor as written is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution because it is vague and overbroad; it fails to channel the jury's and/or sentencer's discretion in imposing the death penalty. Maynard v. Cartwright, 486 U.S. 356 (1988). Assuming that the vagueness could be cured by the limiting construction used by this Court, the failure of the trial judge to provide the working definition of that factor in writing to the jury upon timely request was a violation of Fla.R.Crim.P.

3.390(b) and a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 22 of the Florida Constitution. See McCaskill v. State, 344 So.2d 1276, 1278 (Fla. 1977)(failure to provide written jury instructions in capital case, when not objected to, is not reversible error).

The error is aggravated because the trial judge, at the request of the state, would not allow the jury to take notes when the working definition of this factor was given orally. (R1150-52). Thus, the only written instruction concerning this factor was the bare statutory language, which does not even define the term "premeditation." Castro was entitled here to have all of the instructions provided in writing to the jury. Fla.R.Crim.P. 3.390(b); See Simmons v. State, 541 So.2d 171 (Fla. 4th DCA 1989)(error to give jury only a portion of an instruction in writing). The refusal of the trial judge to provide the jury with complete written jury instructions upon timely request was reversible error. See State v. Jones, 377 So.2d 1163, 1164 (Fla. 1979); Vasil v. State, 374 So.2d 465. 470 (Fla. 1979).

In Henderson v. Kibbe, 431 U.S. 145, 156 (1977), the United States Supreme Court noted that "The significance of the omission of such an instruction may be evaluated by comparison with the instructions that were given." Here, initially, no instructions defining "premeditation" or the other terms of the CCP statutory aggravating factor were provided despite the timely request by defense counsel and the tender of a proposed instruction.

The jury in this case lacked sufficient guidance to apply the CCP statutory aggravating factor, and the state cannot show beyond a reasonable doubt that the refusal of the trial judge to provide the jury with the written instruction defining the operative terms of the CCP aggravating factor did not affect the recommendation given by the jury. Because the trial judge was required to follow the jury's recommendation unless no reasonable person could agree with it, LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978), Castro was prejudiced. The death sentence must be reversed due to the incomplete written jury instructions over timely and specific defense objection.

POINT XII

THE TRIAL COURT ERRED IN REFUSING TO STRIKE JUROR SHELLENBERGER FOR CAUSE WHERE THE JUROR WOULD AUTOMATICALLY PRESUME THAT DEATH IS THE APPROPRIATE PENALTY AND OTHERWISE EXPRESSED DOUBT ABOUT HIS ABILITY TO BE FAIR AND IMPARTIAL DUE TO A PRIOR INCIDENT WHERE HE WAS THE VICTIM OF A ROBBERY.

During jury selection the last juror called was juror 197, Ralph Shellenberger. (R415) Shellenberger indicated that he was 100 percent disabled from his service in the navy and that he is active in civic organizations. (R416) Shellenberger indicated that he agreed with what had been said previously, and that he was in favor of the death penalty; he believed in a life for a life. (R425;437) Shellenberger indicated that he did believe there were circumstances where a life sentence would be appropriate, but he would put the burden on the defendant to convince him that a life sentence was appropriate. (R438)

> Q: (DEFENSE COUNSEL) Do you think that if you were to be asked to go in and consider that question, whether you would go in with a presumption that death is appropriate and only after being convinced to the contrary would you vote for life?
>
> A: (SHELLENBERGER) I would have to be convinced.
>
> Q: So you would require the defendant, or in this case the defense counsel, to convince you beyond a reasonable doubt?
>
> A: Yes, ma'am.
>
> Q: Before you could ever consider life as a possible penalty?
>
> A: Pretty much so, yeah.
>
> Q: And how about the situation where --

we'll just say you went back in there and you didn't -- weren't convinced beyond a reasonable doubt that there were any aggravating factors but you still had in your mind first-degree murder and you were told that the law is if you don't find any aggravating factors you've got to impose life; would you be able to do that?

A: Yeah.

Q: But you would go in with the presumption death, and the defendant has to convince you beyond a reasonable doubt of the mitigating factors?

A: Yes, ma'am.

Q: Okay, you had indicated to the prosecutor that you had unfortunately been the victim of a robbery; how long ago was that?

A: A year ago in February.

Q: And do you happen to remember did they ever catch the person who did this?

A: No.

Q: They never did?

A: No.

Q: So you never came to court to testify, or --

A: No.

Q: I notice that your leg is obviously still bothering you.

A: Always.

Q: Always bothers you?

A: Nothing more can be done for it.

Q: Is that -- do you think you'd be distracted by the pain?

A: I hope not.

Q: You hope not, but you're not sure;

it might not?

A: I'm not sure.

Q: And how about the fact that that has happened; can you ever put that out of your mind, or the fact that you were once a victim, do you think that would play into your decisioning process?

A: It might bother me.

Q: It might bother you; it might have an effect on you?

A: Yes.

Q: And do you think that thoughts of that, combined with the existing pain, might cause you not to follow instructions, and you may be inclined to ward the harsher punishment?

A: Might.

Q: Might? Plus you were also a victim; and I'll ask you that question: do you think that your memory of that, or any of your feelings about having been a victim will in any way color your ability to make a decision?

A: No.

(R438-41)

The state accepted Shellenberger as a juror. (R441) Defense counsel had previously exhausted all of their peremptory challenges, and requested an additional challenge to excuse Shellenberger; counsel also challenged Shellenberger for cause. (R442) The motions were denied. (R443) Shellenberger sat on the jury and returned the recommendation in this case. (R1157)

As noted by this Court, "A jury is not impartial when one side must overcome a preconceived opinion in order to prevail." Hill v. State, 477 So.2d 553, 556 (Fla. 1985). In

Singer v. State, 109 So.2d 7 (Fla. 1959), this Court established the following rule:

> [I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the time he should be excused on motion of a party, or by the court on its own motion.

Singer, 109 So.2d at 2324. The foregoing rule has been consistently adhered to by this Court. See Hamilton v. State, 547 So.2d 630 (Fla. 1989)(denial of challenge for cause of juror who had preconceived opinion which would require evidence to displace was reversible error despite juror's assurance that she could hear case with open mind); Moore v. State, 525 So.2d 870 (Fla. 1988)(refusal of trial court to grant challenge for cause to juror who gave equivocal answers concerning his ability to accept insanity as defense was reversible error; Hill v. State, 477 So.2d 553 (Fla. 1985)("A jury is not impartial when one side must overcome a preconceived opinion in order to prevail."); See also Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986)(juror's ability to be fair and impartial must be unequivocally asserted in the record).

After exhausting his peremptory challenges, Castro's defense counsel moved for additional peremptory challenges whereby Shellenberger could be challenged peremptorily since the challenge for cause was denied. It is respectfully submitted that the refusal of the trial court to strike Shellenberger for cause and/or grant an additional peremptory challenge was a denial of due process and the right to a fair jury recommendation

under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 22 of the Constitution of Florida. Further, it is respectfully submitted that the presence of Shellenberger rendered the jury recommendation unreliable under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 17 of the Florida Constitution. The death sentence should accordingly be reversed and the matter remanded for a new penalty phase.

CONCLUSION

Based on the argument and authority previously set forth, this Court is respectfully asked to provide the following relief:

POINTS I - IX; XI-XII : To reverse the death sentence and to remand for a new penalty proceeding before a new jury.

POINT X: To 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 hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to *Edward Castro*, #110488, P.O. Box 747, Starke, Fla. 32091 on this 17th day of April, 1991.

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