IN THE SUPREME COURT
OF THE STATE OF FLORIDA

AUGUSTINE PEREZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 79,446
Cir. Ct. Nos. 90-2556CFAES
(Pasco) 90-2739DFAES

**REPLY BRIEF OF APPELLANT**

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## SUMMARY

The Appellant has raised numerous meritorious issues on appeal. One should specifically be brought to the Court's attention because it is clear-cut and perhaps dispositive of both the penalty and guilt phase issues before this Court.

The trial court plainly violated the procedural rule promulgated by this Court in Grossman because written findings were not filed concurrent with the oral pronouncement of sentence. The remedy for this violation is a remand to the trial court for the imposition of a life sentence.

The Grossman issue should be the first that this Court reviews. Jurisdiction in the Supreme Court is proper since the trial court imposed a death sentence overriding the jury's recommendation of life. Had the trial court followed the jury recommendation, jurisdiction would have been in the District Court of Appeal. If this Court first reviews the Grossman issue and determines there has been a rule violation, then you need go no further. The cause should be remanded to the trial court for the imposition of a life sentence and the remaining issues concerning the guilt phase be remanded to the appropriate district court for appellate review.

Discussion of the issues follows.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE STATE'S MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF BETTY FERGUSON REGARDING THE DEFENSE OF ALIBI, IN FAILING TO INQUIRE INTO WHETHER THE FAILURE TO FILE A NOTICE OF ALIBI CAUSED PREJUDICE TO THE STATE AND IN FAILING TO CONSIDER WHETHER A LESS EXTREME SANCTION SHORT OF EXCLUSION OF BETTY FERGUSON'S TESTIMONY WAS AVAILABLE.

The State, in its brief, correctly asserts that the adversary system of trial is not a poker game in which the players enjoy an absolute right to conceal their cards until played. There is no question that the State and the Defense should have ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. The State's argument overlooks the fact that on December 19, 1990, Betty Ferguson testified, under oath, in a deposition to perpetuate testimony taken before trial pursuant to court order. In addition, Ferguson was a listed State witness called at trial by the State. The State had heard the proffered testimony eleven months before trial. To suggest that the Defendant's attorney tried to hide or conceal the testimony or deceive the State is preposterous. At trial, the proffer was strictly limited to the prior deposition of Betty Ferguson to perpetuate testimony. The State is in no position to claim it was in any sense unaware of the alibi testimony.

It boggles the mind in a case such as this where the State is seeking the ultimate penalty of death to maintain that the State is prejudiced in any way by the admission at trial of exactly the

same testimony given under oath at a deposition to perpetuate testimony eleven months before the trial.

In Austin v. State, 461 So.2d 1380 (Fla. 1st DCA 1984), the appellate court made it clear that where the trial court refused to make a determination of prejudice and absent any effort to employ reasonable means short of witness exclusion to overcome such prejudice it was error to order the exclusion of the subject witnesses. In Austin, an important factor was the failure of the trial court to determine whether reasonable means could have been utilized to overcome any prejudice without resorting to the total exclusion of the witnesses. In particular, the alternative of a recess to allow further minimal investigation suggested in Austin was never considered by the trial court in the case at bar. Defendant's counsel virtually begged the trial court to address these issues at trial, but the trial court refused.

It is respectfully submitted that reversal of Defendant's judgment and sentences is mandated under these circumstances.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING DET. LAWLESS TO TESTIFY, OVER OBJECTION, THAT IN RESPONSE TO A QUESTION FROM DET. LAWLESS REGARDING WHY THE DEFENDANT PARKED HIS VAN WHERE HE DID, THE DEFENDANT "COULD NOT ANSWER THE QUESTION".

The State contends that a Defendant who voluntarily speaks after receiving Miranda warnings has not invoked his right to remain silent.

It is also the State's position that the statement made by Det. Lawless was not a comment of Perez's right to remain silent but was rather aimed at pointing out the inconsistencies in Perez's exculpatory statements.

Det. Lawless' testimony that Perez couldn't answer the question is clearly analogus to the prohibited comment in Peterson v. State, 405 So.2d 997 (Fla. 3d DCA 1981), where although Peterson told the police officer about the gloves "Peterson would not explain" the time of day. The holding in Peterson is clearly applicable to the case at bar.

The statement of Det. Lawless that Perez could not explain was on its face not a communication from Perez that he had nothing to say. Det. Lawless' argumentative assertion that Perez, when requested, was not able to explain is fairly capable of being and should be interpreted by this Court as a comment on Defendant's silence mandating reversal.

The State's fallback position on this issue is that the harmless error rule applies. As stated in State v. DiGuilo, 491 So.2d 1129 (Fla. 1986), comments on silence are high risk errors.

Just as in DiGuilo, the comment in this case that Perez "could not explain" should not be treated as harmless error.

In DiGuilo, the impermissible testimony put before the jury, the fact that the Defendant declined to offer any plausible explanation at the time of his arrest for his suspicious presence in the midst of a drug deal. In addition, in DiGuilo the court noted that at least indirectly the comment highlighted for the jury the fact Digulio was not testifying at trial and had offered no plausible explanation. Under those circumstances, the court held the comment on Defendant's right to remain silent was not harmless error.

In the case at bar, the impermissible testimony put before the jury the fact that Perez was unable to offer any plausible explanation at the time he was being questioned for his suspicious presence in the yard of the empty home. Just as in DiGuilo, Det. Lawless' comment highlighted for the jury the fact that Perez was not testifying at trial and had offered no plausible explanation. Just as in DiGuilo, the error under the circumstances was not harmless.

The error complained of unfairly prejudiced the Defendant's right to a fair trial and Defendant's judgments and sentences should be reversed.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE DEFENDANT VOLUNTARILY WAIVED HIS RIGHTS PURSUANT TO MIRANDA AND IN FINDING THAT ANY STATEMENT OF THE DEFENDANT WAS NOT THE PRODUCT OF COERCION.

Initially, the State argues that Perez could clearly understand English. There is no question that Perez could understand some basic rudimentary English. However, there was never any proof that Perez had the educational, emotional or mental ability to understand his Miranda rights. Interestingly, Perez was not asked to sign the Waiver of Rights form in the section pertaining to Miranda rights although Perez was asked to sign the section on the form regarding permission to search. Clearly the rights provided under Miranda require more than a cursory knowledge of English. The burden on the State is to show more than a Defendant merely understands some English. There was no evidence to contradict Perez's girlfriend's testimony that Perez could not understand complicated subjects in English. Perez's employer testified Perez could speak only a few words in English. While the trial court may have had a basis for finding Perez could understand some English, there was no basis upon which to conclude that Perez was able to knowingly, intelligently and voluntarily waive his Miranda rights.

In addition, this Court should keep in mind the length of the interrogation which exceeded eleven hours and during which Perez was subjected to a "tag-team" approach of interrogation whereby he was questioned by different officers at differing times during a period which Perez was without sleep and appeared tired.

The holding of Williams v. State, 441 So.2d 653 (Fla. 3d DCA 1983) that when two or more courses of conduct are employed against a Defendant, any confession may be found to be involuntary, is very important under the circumstances of this case. The failure of proof of Perez's level of understanding of English, the promise by Det. Muck to Perez that "he'll look better in my eyes if he takes me to the girl", together with the extended interrogation over an eleven hour period during which Perez was without sleep and appeared tired, cumulatively add up to a level of coercion which should not be accepted by this Court.

Defendant respectfully requests this Honorable Court reverse Defendant's judgments and sentences.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THAT THERE WAS NO STOP OF THE DEFENDANT AND DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS WHERE THE INITIAL STOP OF PEREZ WAS NOT BASED UPON A REASONABLE SUSPICION.

The actions of Dep. Griffin in pulling her patrol car behind Perez's stopped van, drawing down on Perez with her gun and commanding Perez to step away from the van and lay down on the ground while an officer walked up and put handcuffs on Perez clearly constituted a seizure of the person of Perez.

In Blanco v. State, 452 So.2d 520 (Fla. 1984) cited by the State, a description of the individual was provided giving the police an individualized description of the suspect. In the case at bar, no description regarding the individual was provided to the detaining officer. In addition, in Blanco, the suspect generally met the description of the individual described in the BOLO and the suspect was riding a bike within one and one-half miles of the crime scene within an hour of the crime. In this case, there was no testimony to the distance Perez was stopped from the scene of the crime and temporally there was a lapse of over two hours between the commission of the crime and the stop of Perez. All of the foregoing differences distinguish this case from Blanco.

State v. Chapel, 510 So.2d 1138 (Fla. 2d DCA 1987) cited by the State involved the stop of a car containing a robbery suspect. It is important to note that the car in Chapel was speeding, which clearly provided a basis for the stop of the car. The Appellate

Court in Chapel went on to say that the BOLO was insufficient to provide a constitutional basis for the existence of probable cause to arrest for an armed robbery, particularly where five to six hours had elapsed from the time of the robbery and the stop was effectuated 31 miles from the scene of the crime. The holding of State v. Chapel actually supports reversal of this cause.

The State's position regarding the factors set forth in State v. Wise, 17 F.L.W.D. 1771 (Fla. 2d DCA July 24, 1992) is without merit because the stop of Perez occurred more than two hours after the incident in Wesley Chapel and there was no testimony provided at the motion to suppress regarding the distance from the scene of the crime. The remoteness in time and lack of testimony as to the distance of the stop of Perez from the scene of the crime both differentiate the facts of the case at bar from State v. Wise.

Defendant respectfully requests this Honorable Court reverse Defendant's judgments and sentences on this issue.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS WHERE THE DETENTION OF THE DEFENDANT WAS NOT BASED UPON PROBABLE CAUSE AND WAS UNDULY INTRUSIVE.

The State correctly does not argue that probable cause to arrest Perez existed at the time Perez was stopped and detained by Dep. Griffin. The State argues there is no evidence that Perez was detained any longer than was necessary to bring the witness to the scene to identify Perez as the alleged assailant. However, after Perez was seized at gunpoint and handcuffed approximately one hour passed before Det. Muck and Mr. Frost arrived on the scene in St. Leo and Frost identified Perez (R287). This was a stop, seizure and detention of Perez without a warrant and the burden is on the State to show that a suspect's involuntary detention has not exceeded the limited restraint permitted by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Nowhere in the record is any plausible explanation offered by the State for the one hour delay before Frost was brought to St. Leo to identify Perez. The failure of the authorities to immediately get Frost in contact with Perez to try to establish probable cause for an arrest or to offer any reasonable explanation for the period of delay should result in a finding by this Court that the State failed to carry its burden that the detention in question was unduly intrusive. This Court should hold that as a result, the trial court erred in failing to grant Defendant's motion to suppress evidence and statements.

VII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS IDENTIFICATION OF DEFENDANT AS UNDULY SUGGESTIVE AND IN PERMITTING PAUL FROST TO MAKE AN IN COURT IDENTIFICATION OF DEFENDANT AT TRIAL.

There is no question as argued by the State that the immediate confrontations between a suspect and victim in some cases can permit the quick release of innocent persons. The problem is that each confrontation is different and it is up to the authorities to ensure that unecessary suggestibility is not present in any such confrontation.

Because there was a delay of over an hour from the time until Perez was taken into custody and over two hours from the time of the assaults upon the Frosts until Mr. Frost was taken to St. Leo to identify Perez there was no reason for the utilization of the suggestive procedures in this cause.

The totality of the circumstances in this cause are clearly indicative of unreliability which casts significant doubt on the accuracy of the identification in this case.

The State argues that Frost gave a very accurate description of Perez. However, this overlooks the fact that at or about the time of the assuault, Frost could provide virtually no details regarding the suspect. This is particularly troublesome where based on the description provided by Frost, the police stopped a van containing some middle-aged persons, none of whom were close to the descripton of Perez.

The description provided by Frost at the motion to suppress came after Frost was taken to the show up where Perez was handcuffed next to the van. Thus, the subsequent detailed identification provided by Frost at the motion to suppress is virtually worthless in assessing the reliability of the identification in this case.

The subsequent identification of Perez's photograph from a photopack after Mr. Frost had the opportunity to view Perez at the show up, likewise does nothing to bolster the reliability of the identification.

The trial court's finding that the out of court identification was reliable was not supported by the facts or circumstances of this case.

This Court should find the identification procedures unecessarily suggestive and should reverse the judgment and sentences of Defendant.

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING INTRODUCTION OF RECORDS OF CONVICTION OFFERED TO IMPEACH THE TESTIMONY OF STATE WITNESS TARY LYNN HUFFMAN AFTER HUFFMAN FAILED TO TESTIFY ACCURATELY REGARDING THE NUMBER OF HIS PRIOR CONVICTIONS.

In assessing the impact of the failure of the trial court to allow into evidence the judgments and sentences of Tary Lynn Huffman, it is important to keep in mind that Huffman's testimony was extremely harmful to Perez. Particularly harmful was Huffman's testimony that Perez told Huffman where Perez had dumped the victim's body.

The State argues that because Huffman did not deny being convicted of a felony eighteen times, any evidence of the convictions would not serve to impeach his testimony.

The case at bar differs substantially from Gavins v. State, 587 So.2d 487 (Fla. 1st DCA 1981), cited by the State in its brief. Gavins deals with a situation in which the witness had accurately indicated he had five prior felony convictions. Huffman did not accurately admit the number of his prior convictions on direct or on cross examination. In addition, the Prosecutor in Gavins did not attempt to offer certified copies of Gavins' convictions into evidence. In this case, Defense counsel attempted to offer said case certified copies into evidence, but said offer was rejected by the court.

The State argues because Huffman wasn't asked directly if he had eighteen prior felony convictions, there was no basis to impeach Huffman. This ignores the fact that Huffman testified he did not have any idea how many felony convictions he had, on

direct testimony. There was no objection from the State as to the questions propounded to Huffman by Defense counsel regarding the number of Huffman's prior convictions. Clearly the Defense should have been allowed to introduce the certified copies of Huffman's judgments and sentences based upon Huffman's assertion in his direct testimony that he did not have any idea how many felony convictions he had. To allow otherwise would be to subvest justice in this cause.

Defendant respectfully requests this Honorable Court reverse Defendant's judgments and sentences on this issue.

IX. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY A IN CAPITAL CASE IN PART THAT "IF YOU RETURN A VERDICT OF GUILTY IT SHOULD BE FOR THE HIGHEST OFFENSE WHICH HAS BEEN PROVED BEYOND A REASONABLE DOUBT".

Regarding this issue, the State incorrectly asserts that Appellant believes that all juries should be instructed they have the power to pardon any defendant. Appellant is not making such an argument. The trial court does not have to instruct the jury on its pardon power. This is an inherent power for a jury to do justice under the facts of a particular case which does not require any instruction. However, this power should not be impaired or hindered, particularly in a capital case, by an instruction that directs the jury not to utilize its pardon power.

The ruling in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), that a State cannot prohibit the giving of a lesser offense instruction in a death case without violating the United States' Constitution is recognition of the importance of the jury's pardon power.

The trial court should not instruct on necessarily included offenses and then in the next breath divert the jury's attention from the consideration of lesser included offenses by giving the instruction complained of in this cause.

The State is correct that the Florida Standard Jury Instruction 2.02(a) addresses lesser included offenses. The language of Florida Standard Jury Instruction 2.02(a) is written

in even-handed, unslanted language informing the jury regarding its consideration of lesser included offenses. The argumentative direction given by the trial court to the jury, in this case, that if the jury returned a verdict of guilty, it should be for the highest offense proven is substantively different from Standard Instruction 2.02(a) and unfairly prejudicial to Perez.

The non-standard instruction given by the trial court inhered in the Defendant's right to a jury pardon and the judgments and sentences of the Defendant should be reversed on this issue.

XI. THE TRIAL COURT'S FAILURE TO PROVIDE THE WRITTEN FINDINGS REQUIRED BY FLORIDA STATUTE 921.141(3) CONCURRENTLY WITH THE ORAL PRONOUNCEMENT OF THE DEATH SENTENCE MANDATES A REMAND FOR THE IMPOSITION OF A LIFE SENTENCE.

The procedural rule established by this Court in Grossman v. State, 525 So.2d 833, 841 (Fla. 1985), requires you to quash Perez's death sentence and to remand for the imposition of a life sentence. The State's brief offers no cogent reasons for this Court to rule otherwise. In fact, the law and the arguments raised by the State are erroneous.

Legally, it was erroneous to cite Van Royal v. State, 497 So.2d 625, 628 (Fla. 1986) for the emphasizing proposition that a written sentencing order may be entered after oral sentence has been pronounced, providing this is done on a timely basis before the trial court loses jurisdiction. (Answer Brief p.58) The State goes on to acknowledge Grossman, but fails to make clear that the procedural rule promulgated by the Court tacitly overrules the quoted statement from Van Royal. The State knows full well from its participation in Christopher v. State, 583 So.2d 642 (Fla. 1991), that this Court will not countenance a written sentencing order filed after the oral imposition of sentence. The jury in Christopher recommended the death penalty. Following that recommendation, the trial judge imposed the death penalty, but he did not issue his written findings until two weeks after sentencing. In a per curiam decision, this Court vacated the death sentence because Christopher's trial occurred after the

Grossman opinion and violated the rule established by this Court that "all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." (emphasis added) Christopher v. State, 583 So.2d at 646, quoting from Grossman v. State, 525 So.2d at 841. The State's reliance upon Van Royal for the legal proposition the written findings can be filed after oral pronouncement is plain wrong.

Moreover, no feat of verbal legerdemain can transform the trial court's oral dictation of findings to the court reporter into their concurrent filing in the record. Concurrently filing the written findings means that they must be completed prior to the oral pronouncement. This ensures that the sentence is the result of the reasoned weighing process of the sentencing court. The sentencing court always makes some oral pronouncements at sentencing. To allow these transcribed oral pronouncements to stand as written findings defeats the purpose of the Grossman rule, which is to ensure that the sentence is based on a reasoned judgment. Therefore, the State is once again plainly wrong when it asserts, "The written findings of the trial court sub judice were made contemporaneously with the oral pronouncement and are included in the record." (Answer Brief p.58)

The State's implicit argument that orally pronouncing an order and directing the court reporter to reduce it to writing is the functional equivalent of concurrently filing the written

findings is unpersuasive. In addition, the supportive analogy to the sentencing guidelines context is equally unavailing. In fact, the case law from that context clearly refutes the State's argument. Florida Rule of Criminal Procedure 3.701(d)(11) requires that:

> [any] sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure.

In State v. Jackson, 478 So.2d 1054 (Fla. 1985) you rejected the State's contention that a transcript of oral statements made by the trial judge at sentencing is sufficient to justify departing from the guidelines. The necessity for written reasons was analyzed by quoting from the opinion in Boynton v. State, 473 So.2d 703 (Fla. 4th DCA 1985):

> The alternative to allowing oral pronouncements to satisfy the requirement for a written statement is fraught with disadvantages which, in our judgment, compel the written reasons.
>
> First, it is very possible ... that the "reasons for departure" plucked from the record by an appellate court might not have been the reasons chosen by the trial judge were he or she required to put them in writing. Much is said at hearings by many trial judges which is intentionally discarded by them after due consideration and is deliberately omitted in their written orders.
>
> Second, an absence of written findings necessarily forces the appellate courts to delve through sometimes lengthy colloquies in expensive transcripts to search for the reasons utilized by the trial courts....
>
> Lastly, the development of the law would best be served by requiring the precise and considered reasons which would be more likely

> to occur in a written statement than those tossed out orally in a dialogue at a hectic sentencing hearing.

State v. Jackson, 478 So.2d at 1055-56. [Note: In other portions of the brief, Perez argues that the trial court orally articulated factual findings which were erroneous or unsupported in the record. Moreover, the court misstated the standard of proof necessary to find aggravating circumstances. ("The Court feels and finds that these three aggravating circumstances have been substantially shown by the evidence ...") Without commenting further on the merits of Perez's arguments to these issues and without delving further into specific examples, suffice to say that the trial court's oral pronouncement exhibits that lack of precision, as referenced in the Boynton quotation, more likely to occur when tossed out orally in a dialogue at a hectic sentencing hearing.] Since this Court has not allowed the transcription of oral findings to stand as written findings in the sentence guideline departure context, it would be inapposite to permit greater laxness in the context of the imposition of the death penalty.

A history of the development of the Grossman procedural rule in the death case context supports this conclusion. The State's contention was supported in early cases which held that dictation into the record when transcribed met the requirements of section 921.141(3). See, Thompson v. State, 328 So.2d 1 (Fla. 1976). However, in Cave v. State, the Court receded from this view, but

without specifically overruling Thompson. In Cave, the scenario was the same as in Thompson; nonetheless, in recognition of the importance of written findings, the court remanded the action so the trial judge could supplement the record with written findings. Subsequent to Cave, the holding in Grossman would seem to explicitly overrule Thompson because the Grossman rule requires a concurrent written filing which logically precludes adopting the later transcription of the oral sentencing. However, Grossman did not involve the adoption of dictated findings; rather, it was concerned with the belated filing of written findings prepared by the judge. Accordingly, Grossman did not explicitly overrule Thompson.

The final case in the developmental progression is Stewart v. State, 549 So.2d 171 (Fla. 1989). Stewart comes as close as any case in explicitly overruling Thompson. In Stewart, the trial court followed a jury recommendation of death. He dictated his findings supporting death into the record at the time of sentencing, but no separate written findings were made of record. This Court opined that, "The trial court committed error in failing to provide written findings in support of its imposition of the death penalty. Section 921.141(3), Florida Statutes (1985), requires that the court make such findings in writing." Stewart v. State, 549 So.2d at 176. The Stewart Court remanded for findings rather than to impose a life sentence because Stewart's sentence occurred prior to Grossman.

With the present case, the analysis is complete and the State's argument, approved long ago in Thompson, may be explicitly put to rest. The factual scenario herein is similar to that in Stewart; however, Perez is post-Grossman. Accordingly, a remand for the imposition of a life sentence is mandated.

The State's final argument does not change this result. Despite it being contrary to the clear and existing state of the law, the government argues that, "The procedure employed by the trial judge in the instant case comports with the requirement that this Honorable Court be afforded the opportunity to engage in meaningful review of the trial court's findings." (Answer Brief p.58-59), citing Rhodes v. State, 547 (miscited as 457) So.2d 1201 (Fla. 1989). Rhodes does not help the State since it is a pre-Grossman case. Rhodes was actually decided after Grossman; however, the Grossman procedural rule became effective thirty days after the Grossman decision became final, that is, on June 25, 1988. See Grossman v. State, 525 So.2d at 833. The sentencing in Rhodes took place on September 12, 1985. Rhodes v. State, 547 So.2d at 1203. The State's reliance on Rhodes is misplaced. If Rhodes was decided under the Grossman rule, the result would be the same as that mandated herein. A remand for a life sentence.

Although the above analysis of the controlling law clearly shows a right to a remand for life, interestingly, Perez also argued that he would be entitled to a remand for a life sentence even applying earlier decisional law. Even if it was proper to

dictate oral findings to be transcribed and adopted as the written ones, it would be incumbent upon the trial judge to insure that the transcription was prepared and personally adopted before the record was certified on appeal. This was not done. So, even applying the Van Royal standard mistakenly quoted at the beginning of the State's argument, Perez is entitled to a remand for the imposition of a life sentence. Nowhere does the Appellant blame the court reporter for the late filing. Even under Van Royal, the responsibility for insuring the findings were included in the record fell upon the judge and could not be delegated to a court reporter.

It is not necessary for this Court to rely on this fall-back position, however. The requirements of Grossman, Stewart and Christopher are clear. There must be written findings prepared prior to and filed concurrently with the oral pronouncement of sentence. Dictation for later transcription is not a concurrent filing. The procedural rule announced in Grossman was in effect at the time of Perez's sentencing and dictates the result herein. See, Bloom v. McKnight, 502 So.2d 422 (Fla. 1987). That mandated result is a remand for the imposition of a life sentence.

XII. THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR FUNDS FOR INVESTIGATION OF ACCUSED'S BACKGROUND DEPRIVED PEREZ OF HIS CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE IN MITIGATION.

The trial court abused its discretion in denying Perez the opportunity to investigate and develop mitigation evidence. The case offered by the State, Espinosa v. State, 589 So.2d 887 (Fla. 1991), reversed on other grounds, 525 U.S. _____ (1992), does not help elucidate the standard of review. In Espinosa, the defendant and his counsel knew for several months that the State would seek the death penalty. On the first day of trial the court informed Espinosa that he would promptly begin the penalty phase after the return of the verdict. Following the verdict, the defendant moved for a continuance in order to obtain mitigating testimony from witnesses in Central America. The trial judge denied the motion to continue. This denial was ruled not to be an abuse of discretion. But, neither the trial court nor this reviewing court ever reached the issue of whether a motion to bring the family to the United States, if timely made, would have been granted.

As indicated in the Initial Brief, there are two factors which made the trial court's ruling fundamentally unfair. First, the court granted the prosecution's request to photograph tattoos on Perez's person. The prosecution then utilized its superior resources to obtain an opinion as to the nature of the tattoos. The trial court then relied on these findings in his override. It was an abuse of discretion to allow such a one-sided presentation.

Second, no reference was made by the defense to Perez's Mariel background. The prosecution introduced the evidence over defense objection. The simple reference by the prosecution was solely to inject a prejudicial flavor into the proceedings. The defense then did not have the evidentiary tools to rehabilitate Perez's image.

The abuse of discretion derives from the failure to allow money for a Cuban investigation and the subsequent allowance of adverse evidence by the State to which Perez stood defenseless. Additionally, our situation is different than the case in Martin v. State, 455 So.2d 370 (Fla. 1984). The Martin trial court was extremely liberal with the appointment of experts, approving the employment of seven. This Court did not find an abuse of discretion when the Martin court balked at appointing the eighth. The refusal to grant any funds for a Cuban investigation is a far cry from denying an eighth expert.

This Court should acknowledge the difference in the request for funds to investigate and a request for experts. Perez did not seek to employ some obscure expert or to embark on some speculative investigation. He sought to interview family and to obtain school and medical records all in Cuba. Such investigations are always appropriate to prepare for a penalty proceeding. The defense alleged what it sought to investigate with as much particularity as possible under the circumstances. It was brought out that Perez had seen a psychiatrist in Cuba. Review of these psychiatric records in preparation for the penalty

phase proceeding was a sufficient reason by itself to warrant a Cuban investigation.

Finally, the notion that Perez or Ferguson could have presented heresay testimony to establish Cuban mitigation is specious. There is no evidence to suggest that Ferguson was sufficiently aware of Perez's Cuban background to provide proper testimony. Moreover, Perez should not be forced to testify himself in possible violation of his Fifth Amendment rights. Finally, Perez should not be forced to rely on less credible heresay testimony, but was entitled to offer first-hand evidence. The failure to allow Perez the opportunity to obtain and offer mitigating evidence was error.

XIII. THE IMPOSITION OF THE DEATH PENALTY OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT DOES NOT COMPLY WITH THE STANDARD ENUNCIATED IN TEDDER.

The Perez jury advised that life imprisonment was an appropriate sentence for the crimes committed herein. The trial judge hearing the same evidence determined otherwise and sentenced Perez to death. In doing so, he was explicitly acknowledging the jury's recommendation was unreasonable.

The judge did not question the reasonableness of the jury's finding of guilt, merely the remedy.

In the State's argument, the focus was on the propriety of the trial court's decision. That is, the brief outlined facts supporting the court's decision. The true test, however, should be to determine whether there is a reasonable basis for the jury's life recommendation.

The failure to prove the aggravating factors of especially heinous, atrocious and cruel and cold, calculated and premeditated form a reasonable basis for the jury's recommendation.

Moreover, mitigating factors were unquestionably established. These also support the life recommendation. The factors were not miniscule. Two aggravating factors were improper and there was substantial mitigation. The jury recommendation should have been followed.

XIV. THE TRIAL COURT IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL".

The State is careful to allege in its brief that the victim "was aware of her impending danger"; but, there is no evidence that she was aware of her impending death, that she was tortured or suffered. The case law reflects that the aggravating circumstance is appropriate where the victim is aware of impending death and hence suffers in contemplation of that event and/or is tortured prior to the killing. Where there is a kidnapping but no proof of the manner of death, as in Bundy v. State, 471 So.2d 9 (Fla. 1985), a HAC finding is erroneous. The victim herein was killed in a volley of gun shots. All other specification of events is speculation. The supported evidence is insufficient to establish the killing in this case was especially heinous, atrocious or cruel.

XV. THE TRIAL COURT IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE "COLD, CALCULATED AND PREMEDITATED".

The trial court, in its oral pronouncement of sentence, and the State, in its Answer Brief, have fashioned a scenario which is not supported by the record. Perez's preplanning activities are conjecture. Any such suggested activity does not clearly suggest a cold, calculated and premeditated design to execute the victim.

It is clear that Perez intended to kidnap the victim. This is supported by the victim's own statement overheard by witnesses that "he's trying to kidnap me." Despite being in the supposed torture vehicle for several hours, when the victim bolted from the torture vehicle, unbound by the way, she did not remark "he's trying to kill me" or "he's torturing me." It should be noted that the witnesses to the escape did not testify to any signs of bruises, welts or bleeding to suggest any physical torture had occurred. There is no evidence to suggest preplanning activity was for any purpose other than a kidnapping.

The factual scenario just as easily supports a conclusion that following the kidnapping, Perez drove in a haphazard fashion without knowing where he was going. It is an empirical fact that the distance between the location of the initial kidnapping in Hillsborough County and the location of the subsequent killing in Pasco County is less than a "several hour" drive. In addition, there was no testimony as to the circumstances which led to the victim's shooting. However, the nature of the wound does not

support a typical execution-type slaying. Finally, there is a piece of the evidence which has been mischaracterized by the trial court and the State. As mischaracterized, there is a suggestion that Perez went about the kidnapping with an ultimate intent to kill. As properly characterized, the evidence supports a more random, unplanned killing.

The evidence in question has been referred to as "stakes" brought in the van by Perez for the purpose of body disposal. The term "stake" connotes a type of finished, pointed wooden product, much like those that politicians use, in varying lengths, to secure their common yard signs. Such a depiction is a mischaracterization. In Perez's Initial Brief, the stakes were referred to as make-shift, hand-hewn affairs. The State does not address this characterization because it flies in the face of their preplanning argument. The "stakes", however, are in the evidence for you to see. (R1026, State's Exhibit #7--"Evidence That Could Be Copied") It appears obvious that the "stakes" were crafted at the disposal scene. They are concrete evidence that the killing was an unplanned event which occurred when the kidnapping went awry. The trial court's finding that the killing was cold, calculated and premeditated was erroneous.

XVII. THE AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL IS UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, BOTH IN ITS OVERALL EFFECT AND IN ITS APPLICATION TO PEREZ.

The issue raised herein, the constitutionality of the HAC statute is fundamental and is not procedurally barred. Further, as raised by Perez, this issue was not suitable to be raised before the trial court. Perez urges that 921.141(5)(l) is unconstitutional in its application due to the lack of guidance to determine when it is warranted. With all due respect, the appellate pronouncements in the recent cases cited by the State do not delimit the application of the HAC circumstances. It remains true that the HAC factor is a catch-all. The principles adopted by this Court to interpret just what is an especially heinous, atrocious or cruel killing has not served to narrow the class of death eligible cases. The HAC statute perpetuates the arbitrariness condemned in Furman. The statute should be found unconstitutional.

XVIII. SECTION 921.141(3), FLORIDA STATUTES, IS UNCONSTITUTIONAL IN ITS APPLICATION BECAUSE IT ALLOWS THE TRIAL JUDGE TO CAPRICIOUSLY AND DISCRIMINATORILY OVERRIDE A JURY RECOMMENDATION OF LIFE.

The fundamental nature of this claim precludes its procedural bar.

On the merits, the passage of time since the decision in Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), supports the conclusion that the statute as it has been applied during that period has authorized the death penalty in numerous cases for which the community at large, speaking through the jury system, has determined that some lesser penalty would be appropriate.

It is ironic that the purpose of the override as espoused in State v. Dixon, 283 So.2d 1 (1973), is to protect a defendant from the inflamed emotions of juries. This notion assumes that one person, a judge, is immune from such passions. One suspects that judicial overrides of jury death recommendations are few and far between, although the converse has not been uncommon since Spaziano.

The present statutory scheme which authorizes a judicial override of a jury life recommendation should be found unconstitutional. An eloquent rationale for this conclusion was stated by the dissent in Spaziano:

> If the State wishes to execute a citizen, it must persuade a jury of his peers that death is an appropriate punishment for his offense. If it cannot do so, then I do not believe it

> can be said with an acceptable degree of assurance that imposition of the death penalty would be consistent with the community's sense of proportionality.

Spaziano v. Florida, 468 U.S. 447, 490, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Perez's sentence was unconstitutionally disproportionate since a jury of his peers found his act unworthy of the supreme punishment.

XIX. THE JUDICIAL OVERRIDE OF THE LIFE SENTENCE SHOULD BE REVERSED BECAUSE THE TRIAL COURT ADMITTED NON-STATUTORY, VICTIM-RELATED TESTIMONY.

Despite the State's reliance on Hodges v. State, 595 So.2d 929 (Fla. 1992) rev'd on other grounds, _____ U.S. _____ (1992) and Burns v. State, 609 So.2d 600 (Fla. 1992), Perez maintains that Payne v. Tennessee, _____ U.S. _____, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) only authorizes victim impact evidence where such evidence is a permissible part of a State's statutory death penalty scheme. Section 921.141(5) exclusively lists the aggravating factors a court may consider. Until the legislature makes victim impact evidence a part of Florida's statutory scheme, it is error to allow its admission at trial. Even when the trial judge states that he or she won't listen to it.

XX. THE DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE COURT FAILED TO FOLLOW THE CORRECT STANDARD OF PROOF FOR DETERMINING THE EXISTENCE OF AGGRAVATING FACTORS.

In Henry v. State, 586 So.2d 1033 (Fla. 1991) the trial court misspoke in error on the side of the defendant. He stated that the mitigators were established beyond a reasonable doubt, although legally they do not have to be so proven.

In contrast, the trial judge in Perez made a grievous misstatement of the law when he stated that the aggravating factors had been substantially shown by the evidence. Of course, this Court is hampered in its review of this issue because the trial court did not file written findings. The oral pronouncement is a misstatement of the law and, differently than the situtation in Henry, it is an error upon which a death sentence rests.

XXI. THE IMPOSITION OF THE DEATH SENTENCE FOR PEREZ IS NOT JUSTIFIED ON PROPORTIONALITY GROUNDS.

The Appellee misses the point. The State acknowledges both Douglas v. State, 575 So.2d 165 (Fla. 1991) and Barclay v. State, 470 So.2d 691 (Fla. 1985) "were reversed because this Honorable Court found a rational basis for the jury recommendation of life." Apparently the State feels that Barclay and Douglas are clearly distinguishable because they were reversed for the above reason and not upon a proportionality review.

The Appellant's point is that the Perez case is factually indistinguishable from the facts in Barclay and Douglas. Accordingly, if there was a rational basis for life in those cases proportionality requires life in this one.

## CONCLUSION

For all of the foregoing reasons, the convictions of Defendant, Augustine Perez, on all counts should be reversed.

In any event, the trial court's imposition of the Death Sentence should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Attorney General, Westwood Center, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366, this 25th day of March, 1993.

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