IN THE SUPREME COURT OF FLORIDA

MARK D. SCHWAB,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,289

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On May 14, 1991, the grand jury in and for Brevard County returned an indictment charging Appellant with one count of first degree murder in violation of Section 782.04(1)(a)1, Florida Statutes (1989), one count of capital sexual battery in violation of Section 794.011(2), Florida Statutes (1989), and one count of kidnapping in violation of Sections 787.01(1)(a)(2) and 787.01(3)(a)(2), Florida Statutes (1989). (R4184-4186) Appellant filed an affidavit and request for a non-jury trial. (R4197-4199) The state also filed a waiver of jury trial. (R4207) This request was granted. (R20)

Appellant filed several pretrial motions to suppress evidence seized from Appellant's car and his house, statements and admissions made to law enforcement officers, and intercepted communications. (R4323-4324,4325-4327,4328-4331,4333-4334,4339-4340,4370-4371) A hearing on the motions to suppress was

conducted on February 5-7, 1992, resulting in these motions being denied. (R2154,2297-2300,2780,4379-4385) The trial court did suppress Appellant's statements to police officers immediately made upon his arrest. (R4379-4385)

Appellant filed pretrial motions in limine to prevent statements of the defendant from being presented prior to proof of the corpus delicti particularly of the sexual battery offense, a motion to sever the sexual battery offense from the other offenses, and a motion to dismiss the sexual battery charge on the grounds that the state would be unable to prove this charge. (R4255-4256,4398-4399,4400-4401,4404-4405) Following a hearing these motions were also denied. (R4008,4012) Following the state's filing of its notice of intent to admit similar fact evidence, Appellant filed a motion in limine to prevent this evidence from being admitted. (R4411-4415) Appellant also filed a motion requesting a separate judge to hear this motion in limine since the trial was to proceed before the judge only. (R4460-4461) At the hearing on these motions, the trial court ruled that there was no need for another judge and that the court would hear the evidence at the time of trial and if not relevant would not consider it. (R4024-4030)

Appellant filed a motion to recuse the state attorney's office on the grounds that Assistant State Attorney Chris White had been in a position of advising Appellant as an attorney. (R4418-4420) The trial court denied this finding no legal or ethical basis upon which to disqualify the state attorney's

office. (R3992) The Public Defender's Office filed a motion to withdraw when it became apparent that members of the office were to be called as witnesses for the purposes of admitting a highly prejudicial letter into evidence. (R4443-4444) This motion was denied. (R3962,4455)

Appellant proceeded to trial on May 18-22, 1992, before the Honorable Edward J. Richardson, Circuit Judge. (R1-2080) At the conclusion of the trial, Judge Richardson found Appellant guilty as charged on all counts. (R2079-2080,4491-4493) The penalty phase was conducted on May 23, 1992, again before Judge Richardson. (R2954-3426) Appellant filed a motion for new trial on June 1, 1992, which was later amended. (R4550-4551,4626-4627, 4630-4631) Following a hearing the trial court denied this motion. (R3682,4632) Appellant filed a motion to declare Section 921.141(5)(h), Florida Statutes (1989), unconstitutional. (R4628-4629) Following a hearing on this motion the trial court denied it. (R3630-3635)

On July 1, 1992, Appellant again appeared before Judge Richardson for sentencing. (R4073-4115) Judge Richardson first determined that there was sufficient evidence to support a probation violation and revoked Appellant's probation. (R4076-4077) Over defense objection the trial court permitted the family of the victim to make statements. (R4078-4079) However, Judge Richardson stated that in determining the penalty for first degree murder conviction he did not consider anything said or done on that day. (R4108) Judge Richardson adjudicated

Appellant guilty and sentenced him to death for the first degree murder conviction and consecutive life imprisonment with a minimum mandatory twenty-five years for the sexual battery conviction. Appellant was additionally sentenced to life consecutive to the sexual battery sentence on the kidnapping charge. With regard to the offense for which Appellant was on probation, Appellant was sentenced to life imprisonment concurrent with the sentence imposed on the kidnapping charge. (R4147-4152,4636-4642) Judge Richardson filed written findings of fact in support of the death penalty. (R4643-4668A)

Appellant filed a timely notice of appeal on July 29, 1992. (R4673-4674) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R4671-4672,4689-4690)

STATEMENT OF THE FACTS

Vicki Rios-Martinez testified that her son Junny who was born May 6, 1979, disappeared on April 18, 1991. (R318) Approximately one month earlier, Junny's picture was in the paper. (R319) On March 22, 1991, the family received a phone call from someone identifying himself as Malcolm Denemark from the Florida Today newspaper. (R338) The man said that he had seen the picture of Junny and wanted to do an article about him. (R338) After speaking with the family several times, Denemark agreed to meet them between baseball games the following day. (R340-341) On March 23, 1991, at 4:00 p.m., a man identified as Appellant came to the Martinez house. (R321,342) Appellant introduced himself as Mark Dean, an associate of Malcolm Denemark. (R342) Appellant told them that Denemark had been given an assignment and that he would be conducting the interview with Junny. (R342) Although Appellant might have been wearing a badge on his pocket, the Martinez's did not ask for any identification. (R343) Appellant had a spiral notebook which contained handwritten questions. (R343) Appellant asked all kinds of questions concerning Junny's interests, his school, and any problems he might be having. (R344-345) Junny showed Appellant his trophies and pictures after which Appellant told him that he wasn't used to working with kids like him. (R344-346) Appellant told him that he was a big brother and was used to working with delinquent children. (R346) Appellant was quite impressed with Junny and said he would like to do another story

perhaps for USA Today. (R347) Appellant told them that he would have to do a photo shoot to meet a 12:00 noon Monday deadline. (R347) Appellant accompanied the Martinez family to the baseball game but he stayed only twenty to thirty minutes. (R350-351) Mrs. Martinez suggested to Appellant that he might want to come to the beach on Sunday and get pictures of Junny playing the drums. (R352) Appellant never showed up at the beach but called that night to tell them the photo shoot for Monday was canceled and the USA Today article had been continued for approximately two weeks. (R352)

The following Monday, Appellant called the Martinez's to say that he no longer worked for Florida Today but was working for a surfing magazine entitled Surf. (R352) Shortly thereafter, Mrs. Martinez received a letter from Appellant in which he stated that he had never met a family like them and that they were special people and he saw a lot of love in their family. (R353-365) On Easter Sunday, Appellant visited with Mrs. Martinez and they discussed the letter he had written and Appellant told her about his new job. (R358,365) Appellant told Mrs. Martinez that he might be able to help Junny with his surfing and told her to have Junny get a resume and pictures together and he would take them to his contacts. (R374) On April 3, 1991, Appellant called and said that Gecko, a surfing concern, was interested in Junny. (R375) Mrs. Martinez compiled a resume and some pictures of Junny which Appellant picked up on April 5, 1991. (R376) Appellant wanted to take Junny to Daytona

Beach to meet the people from Gecko but he was unable to make the arrangements. (R376) On April 9, 1991, Appellant came over to the Martinez home and said that Gecko had accepted Junny. (R377) Appellant brought T-shirts and told Junny to pick out the colors he wanted for his surfboard. (R377)

On April 11, 1991, Appellant came to the Martinez house and presented Mrs. Martinez with a letter purported to be an acceptance letter from Gecko. (R379) Appellant also brought sponsorship contracts and a list of surfing competitions that Junny would be entering. (R382) Appellant asked again about taking Junny to Daytona Beach and it was determined that Mrs. Martinez would accompany Junny and Appellant to Daytona on Sunday, March 14, 1991. (R386-387) At 10:00 a.m. that day, Mrs. Martinez received a phone call and it was decided that they would not be going to Daytona Beach. (R388)

On Thursday, April 18, 1991, Junny woke up early and left for school at approximately 7:00 a.m. (R389-390) Junny was scheduled to return home around 3:00 p.m. but he did not. (R391) Junny had a baseball game scheduled for 6:00 p.m. that evening but when Mrs. Martinez went to the game at approximately 7:00 p.m., Junny was not there. (R392,396) Mrs. Martinez asked her husband where Junny was but he did not know. (R397) Mrs. Martinez went home looking for Junny on the way but never located him. (R397-398) Mrs. Martinez tried to call Appellant but was unable to reach him. (R398,412) Later that evening the Martinez's called the police and reported that Junny was missing.

(R413) Mrs. Martinez has not seen Junny alive since that date. (R413)

Patricia Roghelia works at Clearlake Middle School where Junny Martinez was a student. (R1330) On April 18, 1991, at approximately 2:15 p.m. she received a telephone call from a man who said he was Junny Martinez's father and wanted to leave a message for him. (R1331-1335) The message was that he wanted Junny not to go home on the bus but instead to meet him at the baseball field. (R1336) Ms. Roghelia called Junny's classroom and had him come down to the office where she gave him the message. (R1337) Junny then returned to class. (R1338)

Katie Keith, a schoolmate of Junny's, saw Junny after school on April 18, 1991, as she was walking home. (R1343-1344) Junny was walking towards the ball field so Katie waited for him so Junny could walk with her. As they walked together, Thomas Wegley, another classmate, saw them and took a picture of them. (R1351-1352) When Katie reached the street where she turns to go to her home, Junny continued towards the ball field. (R1346) Katie saw Junny jump a fence to the ball field and did not see him again after that. (R1346-1347) Thomas Wegley rode his bike to Stradley Park and saw Junny there with a tall man and they were getting out of a U-Haul truck. (R1353-1354) The man was tall, thin, and had brown hair, and was carrying a clipboard. (R1354) The man and Junny walked up to the pay phone by the ladies bathroom where the man used the phone. (R1354-1355) At this point Junny looked fine. (R1357) Wegley left the field and

when he returned the U-Haul was gone. (R1355)

Barbara Golden, another classmate of Junny Martinez, also saw him walking to the ballpark on the day he disappeared. (R1816-1817) As Junny was walking some man came out of the bushes and started to chase him. (R1817) The man was heavyset and tall and had dark hair and looked to be in his thirties. (R1817-1818) The man was approximately one car length behind Junny and after they turned a corner, Golden never saw them again. (R1818) Golden did not see Katie Keith. (R1820)

John Williams, another classmate of Junny's, saw him at the baseball field between 5:30 and 6:00 p.m. on the day he disappeared. (R1822) Williams had had baseball practice at 4:30 p.m. and saw Junny after practice was finished. (R1824) Junny was just sitting on the ground at the ball field. (R1823)

Carlos Perez, another classmate of Junny's, also saw him at the ball field on the day he disappeared. (R1937) Perez was positive that it was on the day Junny disappeared that he saw him and it was approximately 5:15 p.m. (R1937-1951) Junny was just walking around and did not appear to be in any kind of distress. (R1938) Someone was with Junny and the two of them walked into the bushes. (R1938-1939) The person with Junny came out but Junny never did. (R1938-1939) The person who was with Junny was a white male, approximately 5'10" tall wearing a white shirt and black pants. (R1946) The man had dirty blonde hair and was skinny. (R1946) Although there were other people at the park, Perez cannot say whether anyone else saw Junny. (R1950)

Perez saw no U-Haul truck at the park. (R1950)

Appellant's mother, Mary Stiffler, testified that Appellant came to live with her on March 4, 1991, after he was released from prison. (R1067) Shortly after Appellant's release from prison, he took a ten day trip to visit his relatives in Ohio. (R1071) Upon his return to Florida, Ms. Stiffler helped Appellant find a job at Honeymoon Hill Construction. (R1073) Ms. Stiffler also financed the purchase of an automobile for Appellant. (R1078) The automobile, a 1991 silver Pontiac Firebird, is registered in Ms. Stiffler's name. (R1080-1081) On Sunday, April 14, 1991, Appellant told Ms. Stiffler about a threat he had gotten the day before. (R1084) Appellant told Ms. Stiffler that he was threatened at the ABC Lounge by someone waiting outside who told him that the county was not big enough for the both of them. (R1086) This individual told Appellant that he could have Appellant back in jail within the week. (R1086) Appellant told Ms. Stiffler that he did not know this person and gave her no name. (R1087) Appellant was very frightened and thought he might go back to jail. (R1088) Ms. Stiffler told Appellant to let his probation officer know about this threat. (R1090) On the following day Appellant told his mother that he went to the probation office but his supervisor was not in. (R1092) At about 6:00 p.m. that Monday, Appellant called Ms. Stiffler at work and was very frantic. (R1093) Appellant told Ms. Stiffler that some boy had called him and said that if Appellant did not buy him a motorcycle, the boy would

call the police and say the defendant had raped him. (R1093) Appellant told his mother that he had driven past the boy's home and the police were there and therefore he was afraid that he was going to have to go back to jail. (R1093) Appellant came to his mother's office and they tried to contact the probation officer but to no avail. (R1094) Appellant went to his sex offender class that night and when he returned he said that he told the people in the class about the threats and everyone thought that he was in big trouble. (R1095) Appellant did not stay with his mother that night. (R1095) The following day, Appellant came by the house and he and his mother tried to contact an attorney. (R1097) On Wednesday, Appellant called and said he was staying at a hotel in Titusville. (R1100) Ms. Stiffler took off work and drove to Titusville where she spent the day with her son. (R1101) Appellant told his mother that he wanted to go back to Ohio. (R1101) Ms. Stiffler saw Appellant about 2:00 p.m. Thursday, April 18, 1991, for about twenty minutes. (R1108) The next time Ms. Stiffler heard from Appellant was Friday morning at about 7:30 a.m. (R1113) Ms. Stiffler told Appellant that the police were at the house asking for him with regard to a missing child. (R1116) Appellant wanted to know who it was but Ms. Stiffler only knew that the last name was Martinez. (R1117) Ms. Stiffler told Appellant that he must go and clear this up and Appellant told her that he would go to his probation officer. (R1117) Appellant called back approximately forty-five minutes later and said he was going to the probation office as soon as it

opened. (R1120) Ms. Stiffler did not hear from Appellant again. (R1121) Ms. Stiffler stated that the threat that Appellant said he received from the boy was left on the answering machine and that she had heard it. (R1125)

Beverly Kinsey, Appellant's aunt, lives in Port Washington, Ohio. (R451) She received a telephone call from Appellant on Saturday, April 20, 1991, at approximately 5:30 p.m. (R452) During this conversation Appellant described the situation which had occurred the previous two days. (R466-476) Appellant told her that he was forced by "Donald" to kidnap the child or else he would kill defendant's mother. (R469) Appellant also told Ms. Kinsey that Donald forced him at gunpoint to have sex with the child. (R476)

On Sunday, April 21, 1991, several police officers contacted Ms. Kinsey just after noon. (R477) The officers asked her about her knowledge of Appellant and his recent activities, and Ms. Kinsey told them that she spoke with Appellant the previous day. (R479) While the officers were there Appellant called again. (R480,503) The officers wanted to know who was on the phone and Ms. Kinsey told them that it was Appellant. (R482) The officers asked for permission to tape record the call and Ms. Kinsey agreed. (R484,504) In this conversation, Appellant again claimed that Donald put a gun to his head. (R566-588) Appellant told Ms. Kinsey that the child was still alive the last he had seen him. Appellant could not turn himself in until Donald was in custody because Appellant was afraid that Donald would harm

his family. (R566-588) Several times during this conversation Appellant told his aunt that he wanted this conversation to be in confidence. (R578-581) Appellant told his aunt that he would turn himself in as soon as Donald was caught. (R579-580)

After the phone call was completed, some officers asked if they could set up a tracing mechanism on the phone in the event Appellant called again. (R486) Ms. Kinsey agreed and also said they could tape again if Appellant called. (R487) At approximately 7:20 p.m. that evening, Appellant again called Ms. Kinsey. (R488) This phone conversation was also recorded and a tap and trace was conducted. (R1445,1480) During this conversation Appellant spoke of Donald again and told her that he was not sure that was his real name. (R596) Appellant told her that Donald made him touch things but that he was glad he didn't make him kill the child. (R613) Appellant also told Ms. Kinsey that Donald made him call the child's school and left a message for him to go to the baseball field after school. (R654) Donald also made Appellant go and pick up the child and bring him to the Motel 6. (R654) After approximately an hour, Ms. Kinsey could tell that Appellant was being arrested. (R489,725-726)

Appellant was arrested while he was at a pay phone at a Goshen Dairy Mart. (R1449-1451) Appellant was taken into custody without incident and placed in the FBI car. (R1453-1454) Appellant's car was then towed to a salvage company where it was searched. (R1467-1469) Sergeant Michael Blubaugh of the Cocoa Police Department met with Appellant in Ohio immediately after

his arrest. (R522-523) Blubaugh accompanied Appellant as he was taken to the detention center. (R523-524) Once they arrived at the detention center, Blubaugh arranged to get Appellant something to eat and to drink. (R524) Blubaugh then informed Appellant of his constitutional rights and had Appellant sign a waiver of rights form. (R526) Sergeant Blubaugh then conducted an interview of Appellant. During this interview, Appellant told Sergeant Blubaugh that Donald called the school and told them he was the child's father and left a message for the child to go to the baseball field after school was over. (R761-762) Appellant also told Sergeant Blubaugh that he had no idea where the child currently was but that he felt very bad about the situation. (R815) After the statement was concluded, Appellant remained at the detention center and Sergeant Blubaugh returned to his motel. (R541) On the next morning, Blubaugh again met with Appellant at the FBI office, again read Appellant his rights, and again had Appellant sign a waiver of rights form. (R542-543) A second interview was then conducted wherein Sergeant Blubaugh asked Appellant if he had any idea where Donald would have taken the child. Appellant told Sergeant Blubaugh that he was worried about his mother's safety since Donald knew where she lived.

Later that afternoon, Sergeant Blubaugh and Assistant State Attorney Chris White flew back to Orlando with Appellant. (R546-547) During the trip back to Brevard County, they stopped once at a 7-11. (R547) As they reached the last toll booth on the Bee-Line in Brevard County, Appellant indicated that he

wanted to talk about the investigation. (R548) Sergeant Blubaugh immediately read Appellant his rights and Appellant agreed to talk to him. (R548) Appellant told Blubaugh that he wanted to check a place in Merritt Island where he thought the body of the child could be found. (R548) Blubaugh took Appellant to the area but they did not locate any body. (R548-549) Appellant told them the body could be found in Canaveral Groves so they went to that area to search. (R550) After about an hour they called off the search and returned to the police department. (R551) Appellant asked for another chance to try to locate the body so they returned to Canaveral Groves. (R552) At some point, Appellant told them to stop and indicated an area where he said "Junny's over there." (R553) Once they returned to the Cocoa Police Department, Sergeant Blubaugh again read Appellant his rights and Appellant again signed a waiver of rights form. (R554-556) During this interview, Appellant told Sergeant Blubaugh that after Donald forced him to have sex with Junny, both Junny and Appellant were forced into the U-Haul truck and driven to Indian Bay on Merritt Island. (R898-899) Appellant said that Donald pointed out an area where he might dump the body. (R903) Appellant also said that Donald took him to the area where the body was found and made him walk up to that place. (R909-910)

The body of Junny Martinez was located in the Canaveral Groves section of central Brevard County. (R80-81) The body was in a footlocker which was partially open but had several pieces

of rope wrapped around it. (R84) The trunk was photographed but not otherwise disturbed. (R98-99) The trunk was taken to the Brevard County Medical Examiner's Office where it was secured for the evening. (R102) The following morning the trunk was opened at the medical examiner's office. (R104-107) The ropes were cut and the lid was flipped back exposing the entire surface area of the top of the trunk. (R107) Inside the trunk a blanket with several stains was visible. (R107) Dr. Dennis Wickham, a forensic pathologist, conducted an autopsy on the body found in the footlocker. (R243) An external examination of the body was done. (R246) Swabbings of the mouth and anus were also done and hair was collected. (R246) The cause of death was ruled to be manual asphyxia. (R250) An examination of the neck area showed no signs of ligature or bruise marks either internally or externally. (R253) Dr. Wickham testified that manual asphyxia is not a natural cause of death but can be accidental. (R259) If the death was caused by strangulation, Dr. Wickham testified that the victim would have lost consciousness in less than thirty seconds and that he would have died within minutes. (R262) If the victim was smothered he could take up to five minutes to lose consciousness. (R262) An examination of the anal area of the victim revealed an area which was darker and red. (R271) Dr. Wickham testified this could be bruising or it could just be staining as a result of the natural decomposition of the body. (R271) The blood alcohol level of the victim was .09 at the time of death. (R274-275) There were no tears in the anal area.

(R278) Dr. Wickham further testified that a manual asphyxia could have been accidental from eating a popsicle and having something lodged in the throat, or from drowning. (R280) Dr. Wickham found nothing to contradict either drowning or accidental cause of death. (R280) Dr. Wickham also stated that the death could have been caused by some type of seizure disorder. (R282) Dr. Wickham found no signs of a struggle or bruising on the body. (R282) There was no evidence of binding anywhere on the body including the ankles, wrist and neck. (R282) The victim could have been unconscious when the manual asphyxia began. (R283) Although Dr. Wickham testified that he had no opinion whether the victim was alive or dead when placed in the trunk, he had previously stated in deposition that the victim was probably dead when he was placed in the trunk. (R290,298) Dr. Wickham also found no evidence of any lubrication in the anal region of the victim. (R295) Dr. Wickham stated that if there had been bruising on the right wrist, he would have seen it, but there was none. (R296)

The footlocker and the contents were processed for fingerprints. No fingerprints were found on the footlocker. (R171) However, on some duct tape that had been wadded up in the trunk, one latent print was lifted. (R184-187) This fingerprint was compared to the known prints of Appellant and found to match. (R190-195)

On March 23, 1992, Sheila King, an employee of the Public Defender's Office, was opening the mail. (R1365-1367)

She recalls receiving a handwritten letter addressed to Brian Onek, which she opened, time-stamped, copied the letter for Mr. Russo, the head Public Defender, and put the original in a courier envelope for Mr. Onek in Titusville. (R1367) The following morning, Mr. Russo's secretary asked Ms. King about the letter and she told her that it had been sent to the Titusville office. (R1370) Ms. Estadt of the Titusville office received a phone call from the Rockledge office and was told not to touch the letter that had been sent to her. (R1395-1397) She did as she was told and waited for Investigator James Hatfield of the Public Defender's Office to retrieve the original letter. (R1412,1419) Mr. Hatfield treated the letter carefully so as not to disturb it, picked it up by the corner and put it into a manila folder. (R1420-1421) Mr. Hatfield took the letter from Titusville to Rockledge and turned it over to Norm Channel, another investigator for the Public Defender's Office. (R1421-1422,1425) Mr. Channel in turn gave the letter to the executive director Gene Stevanus. (R1427,1430) Mr. Stevanus read the letter and discussed it with attorneys including Mr. Russo. (R1431) Mr. Stevanus then dictated the letter for reproduction and put the original into an envelope. (R1432) The next morning, Stevanus gave the original letter to Agent Lee Winter. (R1436) The letter was processed and six latent prints were found. (R1704-1719) These latent prints were compared to Appellant's and found to match. (R1719-1722) A comparison of the writing on the letter to Appellant's writing samples showed

some similarities between the two. (R1757) However, it was impossible to say beyond a reasonable doubt or to a reasonable scientific certainty that the letter was written by Appellant. (R1758)

Than Meyer testified that he first met Appellant when he was thirteen years of age. (R1593) Meyer's family had a dog which they took to the humane society and was later adopted by Appellant. (R1593) Appellant came to the house to meet the family and eventually became friends with the family. (R1594) One time Appellant called and told Meyer that he had a painting job for which he was going to be paid $400.00 and that if Meyer helped him he would give him $200.00. (R1595) Meyer agreed to help and Appellant then invited him over to see his house. (R1596) As soon as they walked inside the house, Appellant stuck a knife to Meyer's throat. (R1597) Meyer started crying and Appellant told him to be quiet or else he would hurt him. (R1598) Appellant then made Meyer take his clothes off after which Appellant tied Meyer's hands behind his back with a cord and blindfolded him. (R1598) Appellant told Meyer to bend over so he could have sex with him but when that didn't work, Appellant told Meyer to lie down on the couch where he then proceeded to have anal sex with Meyer. (R1599,1612) Appellant also put his mouth on Meyer's penis. (R1612) This entire ordeal lasted several hours after which Appellant told Meyer he could not tell anyone. (R1613-1614) Appellant told Meyer if he didn't tell anyone he would put $200.00 in his mailbox the next day.

(R1514) Meyer's throat had a small cut from the knife and his arms were bruised. (R1615) After Appellant was arrested for this offense, he wrote Meyer a letter from the jail telling him he was sorry. (R1616)

Dale Livingston Marsh testified that he met Appellant in 1986 when he was a sophomore at Merritt Island High School. (R1641) As Marsh walked to school one morning he saw Appellant in the parking lot of the American Bank with the hood of his truck raised. (R1642) As Marsh passed by, Appellant asked him to start up the truck, so he did. (R1642) Appellant asked Marsh if he needed a ride to school and Marsh agreed. (R1642) Marsh assumed that Appellant was also a student at Merritt Island High School. (R1642) As Appellant drove out of the parking lot he went in a direction opposite from where the school was. (R1643) Appellant grabbed Marsh by the back of his hair and pulled his head into his lap and then put a knife to Marsh's throat and told him to be quiet and lie still, so Marsh did. (R1644) Appellant drove to Pine Island and pulled up so that the passenger door of the truck could not be opened. (R1645) Marsh asked Appellant if he was going to kill him but Appellant said no. (R1645) After stopping the truck, Appellant told Marsh to remove his shorts after which Appellant started masturbating him and then ordered Marsh to masturbate himself. (R1645) When Marsh was unable to get an erection, Appellant attempted fellatio, but after thirty to forty-five minutes this also failed so Appellant simply told Marsh to put his clothes on. (R1645) Appellant started the

truck up and headed back towards Merritt Island. (R1646) Appellant asked Marsh if he was going to tell and he said he would not. (R1646) Appellant then dropped Marsh off in the parking lot of Merritt Island High School and left. (R1646) Two days later, as Marsh was walking to school, a truck pulled up and Appellant handed Marsh $20.00 and thanked him for not telling anyone. (R1647) Marsh never told anyone until April of 1991 after seeing the Martinez case on television. (R1648)

Jamie Crowder, testified that she met Appellant the weekend before Junny Martinez disappeared. (R1146) On Saturday night, she went to Mike Schnider's house where Appellant already was. (R1147-1148) At some point during the evening Crowder called another friend, Ben Tawney, who lived in Merritt Island and asked him to come over to Schnider's to party. (R1149,1162) Appellant went to Merritt Island to pick up Tawney and brought him back. (R1149,1162-1163) Schnider, Tawney, Crowder and Appellant drank some beer, went to the store, and drove around. Appellant took Tawney home at approximately 2:10 a.m. (R1151, 1165) Once they got to Merritt Island, Appellant suggested to Tawney that they check out some party spots to which Tawney agreed. (R1166) They drove to an area where kids are known to party but no one was there. (R1175) Tawney then thought Appellant was going to take him home when all of a sudden Appellant pulled a knife on him. (R1176) Appellant grabbed Tawney by the hair and Tawney grabbed the blade of the knife and got cut. (R1177-1178) Tawney grabbed Appellant's wrist and

opened the door of the car and stuck his foot out. (R1178) Appellant held the blade about two inches from Tawney's throat. (R1179) Tawney asked what was going on and Appellant told him to close the door of the car but Tawney said no. (R1180) Tawney told Appellant to give him the knife and take him home to which Appellant replied if Tawney closed the door they could work out the problem. (R1180) An argument ensued and finally Appellant told Tawney that he would give him $1,000.00 if Tawney permitted him to commit fellatio on him. (R1181) Finally, Tawney was able to jump out of the car and Appellant left. (R1181) Tawney started walking until he got to a security guard at Gate 2 for Kennedy Space Center. (R1182,1256) It was 3:25 a.m. when Tawney arrived at the security gate. (R1257) The security guard, Andrew Bartlett, testified that Mr. Tawney was dressed casually but very well, and saw no evidence of any injuries to his hand or blood on his pants. (R1261-1266) Tawney told the guard that he and a friend were out riding around and Tawney asked the friend to pull over so he could urinate at which time the friend left him. (R1268) Tawney never made any report of any sexual assault. (R1268)

The parties stipulated that the swabbings that were taken from the victim's anal and mouth regions were tested and produced negative results for the presence of semen or any kind of lubricant. (R4488-4489) A receipt found in Appellant's car was identified as being from the K-Mart store in Cocoa and was dated April 18, 1991, reflecting the purchase of a footlocker.

(R1547-1565)

Penalty Phase

Appellant was previously convicted of sexual battery which is a felony involving violence. (R2954)

For the first eleven years of his life, Appellant lived with his parents in Ohio. (R3020) When Appellant was three, his family moved to a rural area and got involved in farming which Appellant seemed to like. (R3023) Appellant was involved in 4-H and won a blue ribbon at the county fair. (R3023-3024) When Appellant reached the age of ten, his parents began having marital difficulties. (R3016,3027) Appellant did witness physical fights between his parents. (R3030,3108) Although Appellant's father tried to keep the children out of the problem he was having with his wife, the children ended up taking sides. (R3027) Appellant seemed to take his wife's side. (R3028) Appellant's mother testified that on one occasion when she was being beaten by her husband, Appellant tried to stop him but his father threw him across the yard and continued beating her. (R3108) Once when Appellant went with his mother to the airport to pick up his father, his father got off the plane with another woman who proceeded to attack his mother in front of him. (R3115) Appellant's mother went to confront her husband at another woman's home and took her children with her. (R3116) The woman pulled a gun on them. (R3036,3116) Once when Appellant was around ten years old, he was severely burned on his legs and became very self-conscious. (R3118-3120) His father

beat him on the burns before they were completely healed. (R3140) Appellant's father beat Appellant often and treated him differently then he did his older son. (R3121-3122) When Appellant's parents separated, he became a pawn which both parents used to get back at the other. (R3126) Appellant received fairly good grades in elementary school but his grades began to deteriorate when he reached high school. (R3129-3132) Eventually, Appellant's parents divorced and Appellant went to live with his mother while his older brother stayed with his father. (R3037) Appellant moved to Florida with his mother who remarried. (R3134,3038) Appellant and his mother and step-father returned to Ohio but his mother again divorced. (R3134) An incident occurred in July before Appellant's freshman year in high school. (R3040) Apparently, Appellant's mother and her roommate were drunk and threatened Appellant. (R3040) Appellant left the house in the rain and travelled nearly seven miles and arrived at his father's house at 2:30 a.m. (R3040) Appellant's father wanted him to come live with him but Appellant said no. (R3040) Later however, when his mother was going to move back to Florida, Appellant decided he wanted to stay in Ohio with his father. (R3040,3134) Appellant's father obtained custody of him and for five months Appellant became active in school and in church. (R3041) Everything seemed to be going well when one night Appellant's father came home from work and found that Appellant was gone. (R3042) Appellant's aunt had taken Appellant to the airport and sent him back to Florida to be with

his mother. (R3084) Although Appellant's aunt and his mother stated that this was at Appellant's request, Appellant's father testified that during the time he lived with him, Appellant's aunt and grandmother laid a guilt trip on him about how much his mother needed him. (R3042,3084,3135)

Appellant returned to Florida to live with his mother who, by this time, had met Bill Stiffler and had married him. (R3138) Appellant and his stepfather did not get along and there were many arguments. (R3138) During one summer, Appellant ran away. (R3139) Appellant stayed with the family of one of his friends. (R2998-2999) One night there was a knock at the door and Appellant's stepfather came in, grabbed Appellant and hit him and knocked him down. (R3003,3139) Appellant's ear started bleeding and he was semi-conscious. (R3003,3139)

When Appellant worked at K-Mart, he was considered a very reliable employee who would come in whenever extra help was needed. (R2967) Appellant got a customer care award in September of 1985. (R2968) During the summer of 1986, Appellant told a friend's mother, Patricia Knittel, that he had been sexually abused as a child. (R3001) Ms. Knittel was taken aback by this statement and did not explore it any further. (R3001) She believes that Appellant was reaching out to her for help but unfortunately she never followed through. (R3002)

In 1987, Appellant was arrested for committing a sexual battery. While he was in county jail, Reverend John Stansell, associate pastor of First Baptist Church in Cape Canaveral, met

with him. (R2988) Reverend Stansell found that Appellant was disturbed but seemed to want help. (R2989) Appellant realized he had done something wrong and when Reverend Stansell suggested that he seek psychiatric help, he seemed to genuinely want to do this. (R2990-2992) Reverend Stansell thought that he was having some impact with Appellant but when Appellant was placed in the general prison population, rather than receiving any psychiatric help, Appellant became bitter. (R2994)

Lee Arnold, a classification officer for the Department of Corrections met Appellant when he was head of PRIDE. (R2973-2974) Appellant worked for him doing computer work and was considered a very good inmate. (R2975) Appellant received two certificates for putting in exceptional work with the technical services department. (R2978) While in prison, Appellant was accepted for the sex offender program at Northeast Florida Evaluation and Treatment Center. (R3191,3224) However, before Appellant could complete the screening process, the program was discontinued. (R3180) Appellant had requested admission and was found eligible and placed on the waiting list. At no time during his stay in prison did Appellant ever receive any treatment at all for sex offenders. Dr. Theodore Shaw who was the head of the Northeast Florida Evaluation and Treatment Center's sexual offender program testified that Appellant was likely to be a good candidate and to benefit greatly from the program with a probable successful outcome. Appellant's actions upon his release from the Department of Corrections was very typical of someone who had

no treatment.

Dr. Fred Berlin, head of the sex offender program at Johns Hopkins University, evaluated Appellant in October of 1991. In addition to his personal evaluation Dr. Berlin reviewed voluminous reports and reached a psychiatric diagnosis that Appellant suffered from a paraphiliac disorder which consisted of homosexual pedophilia and sexual sadism. A person suffering from this disorder finds young males are a powerful sexual attraction and are even more aroused if humiliation and pain are involved. This is a sexual disorder characterized by abnormal thought disorders and is also an axis-one condition of a mental illness. The defendant is not psychotic but does have a craving disorder and a distorted appreciation of his actions. This illness is a pervasive theme in his life and is not as volitional as it may appear. The cause of this disorder is not due to any voluntary decision on Appellant's part but rather is a serious psychiatric illness. Treatment is often times essential for people suffering from this disorder and Appellant would have benefitted from treatment had he received it. Dr. Berlin testified that Appellant was unable to conform his conduct to the requirements of law at the time he committed this offense, and that he committed the offense while he was under the influence of extreme mental or emotional disturbance.

Dr. Howard Bernstein, a licensed psychologist, did extensive work involving Appellant. (R3225-3228) Dr. Bernstein interviewed Appellant's mother, interviewed Appellant for 10½ to

11 hours, viewed the videotapes of two other doctors, Berlin and Shaw, before arriving at his conclusions. (R3229) Dr. Bernstein learned that apparently Appellant had been raped while he was in grade school by a father of one of his friends. (R3251) Appellant's father also played sexual games with him. (R3251) Appellant was over dependent on his mother, moody, fearful, worried, withdrawn, impulsive, and rebellious against his father. (R3260) Appellant suffers from obsessive thought content and immature judgment. (R3264) Although Appellant knows he is ill, he does not know why. (R3264) Appellant has a borderline personality disorder, is a pedophile, and a sexual sadist. (R3265) Dr. Bernstein conducted diagnostic testing on Appellant and found him to be naive, immature, yet somewhat insightful. (R3270) Appellant suffered from mild depression was sad, unsatisfied and unhappy and was suffering personal devaluation. (R3271) Appellant felt his life was unmanageable and was making inadequate adjustments to the trauma of his arrest. (R3273) Since Appellant did not receive treatment upon his arrest in 1987, he has decompensated. (R3280) He shows poor judgment and inability to profit from his past experience. (R3278) He is pathological and has poor self concepts. (R3277) Appellant is controlled by his mental illness and unable to control himself. (R3298) Dr. Bernstein feels that Appellant is a sick child with sexually disordered behavior in an adult body. (R3302) Although Appellant suffers from no major mental illness or no psychosis, he does have a major functional impairment in his life. (R3304)

Appellant's past, including the rape and abuse, did not manifest itself until Appellant reached puberty. (R3320)

Dr. William Samek, a clinical psychologist who specializes in sexual abuse, reviewed all the court records and sat in on the penalty phase of the proceedings. (R3325-3335) Dr. Samek does not believe that Appellant is a pedophile but simply has an anti-social personality and is a mentally disordered sex offender. (R3343) Although Appellant certainly was more treatable when he first entered the Department of Corrections in 1987, Dr. Samek is unable to say if he would have completed the treatment then. (R3345,3354) In Dr. Samek's opinion, it is highly unlikely that Appellant could be successfully rehabilitated and be safe without lots of controls around him. (R3368) He did admit that there is a reasonable possibility that if Appellant had received treatment in 1987, he could have been helped. (R3388) Dr. Samek believes that Appellant is not a healthy person and does have some mental disorders. (R3426)

SUMMARY OF ARGUMENTS

Point I: A conflict arose in the instant case when an assistant state attorney involved in the prosecution of Appellant also advised Appellant who asked him for his opinion as an attorney. This conflict compromised the integrity of the judicial system and was grounds for recusal of the state attorney's office.

Point II: Appellant was denied effective assistance of counsel when members of his attorney's law firm were called as witnesses against him and his attorney refused to conduct any cross examination of these witnesses.

Point III: In a criminal case the corpus delicti cannot be proven solely by a confession or admission of the accused and the admissions or confessions are not admissible until the corpus delicti is proven independently. In the instant case the trial court erroneously admitted the statements of Appellant before corpus delicti of the crimes charged was proven. The error was compounded when the trial court used the statements of Appellant to determine that the corpus delicti had been proven.

Point IV: The trial court erroneously permitted the state to present evidence of other crimes and bad acts of Appellant where such evidence served only to show criminal propensity on the part of Appellant.

Point V: The trial court erred in denying Appellant's motion to suppress his statements to police officers which were

made in derogation of his right to counsel which he unequivocally invoked.

Point VI: The death sentence imposed on Appellant cannot stand since it is based on aggravating circumstances which were not prove beyond a reasonable doubt. The trial court further failed to properly consider valid mitigating circumstances.

Point VII: Section 921.141(5)(h), Florida Statutes (1989) is unconstitutionally vague and has been applied in an arbitrary and capricious manner.

ARGUMENTS

POINT I

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO RECUSE THE STATE ATTORNEY'S OFFICE OF THE EIGHTEENTH JUDICIAL CIRCUIT FROM PROSECUTING HIM.

On April 6, 1992, Appellant filed a motion to recuse the state attorney's office of the Eighteenth Judicial Circuit from prosecuting Appellant in this cause. (R4418-4420) Appellant filed a memorandum of law in support of this motion on the same date. (R4421-4424) A hearing on this motion was conducted on May 11, 1992. (R3980-3992) Following the hearing, the court found no legal or ethical basis upon which to disqualify the state attorney's office from prosecuting Appellant and denied the motion. (R3992)

In the instant case Assistant State Attorney Chris White was actively involved in the prosecution from the very beginning. Mr. White traveled to Ohio with local law enforcement officials and participated in the investigation which led to the ultimate arrest of Appellant in Ohio. Mr. White also accompanied Appellant from Ohio back to Brevard County. During this trip, at one point Appellant spoke to Mr. White and said, "Mr. White I know you're a prosecutor but you're also an attorney. Do you think I'm doing the right thing?" (R2611) Mr. White responded to Appellant by telling him the only thing he could tell him was

that the parents of Junny Martinez would certainly appreciate it if Appellant could help find the body. A short while later, Appellant did tell the officers that he wanted to help them find the body. Appellant contended below that this statement by Mr. White to Appellant was in essence legal advice made pursuant to Appellant's request for advice from an attorney. Inasmuch as Mr. White was a integral part of the prosecution team from investigation through prosecution, Appellant sought recusal of the Eighteenth Judicial Circuit State Attorney's Office from further prosecution.

A constitutional violation exists when an accused's lawyer actively represents conflicting interests. Cuyler v. Sullivan, 446 U. S. 335 (1980). The situation in which an accused's counsel later assists in the prosecution of the accused is fraught with constitutional danger as recognized numerous times. The rules regulating the Florida Bar provide that a lawyer's ethical obligations to former clients generally require disqualification of the lawyer's entire law firm where a potential for conflict arises. R. Professional Conduct 4-1.10. However, this Court in State v. Fitzpatrick, 464 So. 2d 1185 (1985) recognized an exception to the imputed disqualification rule where the law firm is a governmental agency. This Court held:

> ... imputed disqualification of the entire state attorney's office is unnecessary when a record establishes 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.

Id. at 1188. The third district has held that the law is unequivocal and an attorney cannot participate in the prosecution of a person whom he previously defended in a criminal case. Popejoy v. State, 17 Fla. L. Weekly D292 (Fla. 3d DCA 1992). It is the appearance of participation which calls into question the integrity of the judicial system. In Castro v. State, 597 So. 2d 259 (Fla. 1992) this Court reversed Mr. Castro's death sentence and held that the trial court had erred in refusing to disqualify the Fifth Circuit State Attorney's Office from prosecuting the defendant's case where his previous attorney was now employed by the state attorney's office and was consulted with regard to certain motions filed by Mr. Castro's new counsel. In reaching this conclusion, this Court stated:

> Our judicial system is only effective when its integrity is above suspicion. Our system must not only refuse to tolerate impropriety but even the appearance of impropriety as well. "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 be a real advantage." Mackey v. State, 548 So. 2d 904 (Fla. 1st DCA 1989).

This Court then cited with approval Justice Erlich's dissent in State v. Fitzpatrick, 464 So. 2d 1185 (1985):

> All attorneys, public and private, are bound by Canon 9 [of the code of professional responsibility] to "avoid even the appearance of professional impropriety." ... [Even where] 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 communication with counsel will remain forever inviolate, no candid communication will transpire, and a guarantee of effective assistance of counsel will become meaningless. This is too high a cost for society to bear.

464 So. 2d at 1188 (Erlich, J., dissenting).

In the instant case Assistant State Attorney Chris White was an active participant in the investigation and prosecution of Appellant. While it may be true that Appellant understood Mr. White was a prosecutor, he nevertheless was asking for Mr. White's assistance as an attorney. Instead of simply telling Appellant that he was unable to advise him, Mr. White went further and exhorted Appellant to help the victim's parents by telling them where the body was. While no further conversation ensued, very shortly after this exchange, Appellant indicated his desire to assist law enforcement in finding the body of the victim. By advising Appellant to do something that was obviously not in his best interests legally, Attorney White created at worst the appearance of impropriety if not outright conflict. This conflict was properly and timely raised below and once that is done, the trial judge should have granted the motion to recuse the state attorney's office. See Reaves v. State, 574 So. 2d 105 (Fla. 1991). Failure to do so mandates a new trial.

POINT II

IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL COURT DENIED DEFENSE COUNSEL'S MOTION TO WITHDRAW ON THE BASIS OF A CONFLICT OF INTEREST WHERE MEMBERS OF THE DEFENSE COUNSEL'S LAW FIRM WERE CALLED AS WITNESSES AGAINST HIS CLIENT.

Some two months before trial, the Office of the Public Defender who was representing Appellant received a hand-written letter addressed to Brian Onek, Appellant's attorney. (R1367) This letter eventually became an item of evidence admitted by the state to convict Appellant of the crimes for which he was charged. (R1377) In order to admit this letter into evidence, the state called five members of the Public Defender's Office. When it became apparent that this was going to happen, the Public Defender's Office filed a motion to withdraw as counsel for Appellant since members of the law firm would now be witnesses against their client. (R4443-4444) The state also issued subpoenas for the members of the Public Defender's Office for trial which defense counsel then sought to quash. (R4462-4463) At the hearing on these motions, the trial court ruled that no conflict of interest appeared since the witnesses were only going to be called for chain of custody purposes. (R3846-3885,3946-3962) Defense counsel argued that he would be unable to cross-examine these witnesses and test their credibility since it created an inherent conflict of interest. (R3858) The trial

court stated that the problem could be alleviated if defense counsel would merely stipulate the letter into evidence to which defense counsel argued that they could not stipulate to the admission of damaging evidence against their client. (R3960) The trial court then simply denied the motion to withdraw and the motion to quash the subpoenas. (R3882,3960-3962) Subsequently at trial, the state did in fact call five members of the Public Defender's Office to which defense counsel objected, renewed his motion for mistrial and refused to cross-examine any of the witnesses. (R1365-1438) The court itself did cross-examine two of the witnesses but no cross-examination of the other three occurred. Appellant contends that the trial court's denial of the motion to withdraw forced defense counsel into this ethical bind which denied Appellant the effective assistance of counsel.

As this Court has stated in Foster v. State, 387 So. 2d 344 (Fla. 1980), the Sixth Amendment right to the assistance of counsel contemplates a legal representation that is effective and unimpaired by the existence of conflicting interests being represented by a single attorney. Holloway v. Arkansas, 435 U. S. 475 (1978); Glasser v. United States, 315 U. S. 60 (1942); Baker v. State, 202 So. 2d 563 (Fla. 1967). This conflict exists when counsel or members of his law firm are called as witnesses against his client. Beth S. v. Grant Associates, Inc., 426 So. 2d 1008 (Fla. 3d DCA 1983)[1]

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[1] The Public Defender's Office is considered a firm for conflict purposes under the rules regulating the Florida Bar. Turner v. State, 340 So. 2d 132 (Fla. 2d DCA 1976); Babb v.

The conflict was clear when defense counsel indicated at the motion to withdraw hearing that he would be unable to test the credibility of the members of his office in a traditional way because of his close working relationship with these people. (R3858) In a comment to Rule 4-1.7 of the Rules of Professional Conduct, the authors note that the lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. Clearly, in the instant case, that is exactly what occurred. Appellant's attorneys were placed in the unenviable position of discharging their duty of advocacy on behalf of their client at the risk of perhaps alienating those persons with whom they work on a daily basis. This conflict resulted in ineffective assistance of counsel and became even more substantial at trial when, because of the conflict of his ethical duties, defense counsel announced that he was unable to conduct any cross-examination of these witnesses. Thus, Appellant was clearly denied his right of confrontation under the Sixth and Fourteenth Amendments to the Constitution. In D.C. v. State, 400 So. 2d 825 (Fla. 1981), the court held that the right to confrontation under the Constitution may require an opportunity to develop issues of bias by way of cross-examination.

In a remarkably similar situation in Jennings v. State, 413 So. 2d 24 (Fla. 1982), this Court reversed Mr. Jennings' conviction for first degree murder where defense counsel had moved to withdraw on the grounds that a key state witness had

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Edwards, 412 So. 2d 859 (Fla. 1982).

previously been represented by him and when that was denied refused to conduct any cross-examination of this witness. This Court noted that the opportunity for full and complete cross-examination of critical witnesses is fundamental to a fair trial which in that particular case, Mr. Jennings did not receive. In the instant case, the trial court seemed to base his decision on the fact that in his opinion the witnesses from the Public Defender's Office were not critical witnesses. However, it was only through these witnesses that the state was able to admit a crucial piece of evidence, namely, the hand-written letter received by the Public Defender's Office which was tied to the defendant by scientific evidence.

Appellant recognizes that disqualification is not mandated in every case where an attorney becomes a witness in a case that he is involved in. However, where the witness' testimony is prejudicial to the client's interests, disqualification is required. Cazares v. The Church of Scientology of California, Inc., 429 So. 2d 348 (Fla. 5th DCA 1983); Williams v. Wood, 475 So. 2d 289 (Fla. 5th DCA 1985).

In summary, Appellant was denied his constitutional right to effective assistance of counsel and his full rights of confrontation when the trial court denied his counsel's motion to withdraw and subsequently refused to cross-examine five witnesses presented by the state. This violation was egregious enough to require a new trial.

POINT III

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD SUFFICIENTLY PROVEN THE CORPUS DELICTI OF THE CRIMES CHARGED SO AS TO RENDER THE APPELLANT'S STATEMENTS ADMISSIBLE AS EVIDENCE AGAINST HIM AND FURTHER IN FINDING APPELLANT GUILTY AS CHARGED WHERE THE STATE FAILED TO PROVE THE CORPUS DELICTI INDEPENDENT OF APPELLANT'S STATEMENTS.

Prior to trial, defense counsel moved in limine to prevent the state from using any of Appellant's statements concerning any sexual battery until the corpus delicti of that charge was proven. (R4404-4405) Appellant also filed a pretrial motion to dismiss the sexual battery charge on the grounds that absence Appellant's statements, the evidence was insufficient to prove the sexual battery. (R4400-4401) In a pretrial hearing on these motions the trial court denied the motion to dismiss and took no action on the motion in limine. (R4008,4036) At trial Appellant objected to the admission of these statements on the grounds that no corpus delicti had been proven. (R476,530,558, 563) At one point the court specifically overruled the objection and noted that defendant's statements to his aunt were admissible to prove the corpus of both kidnapping and sexual battery. (R536,539) At the conclusion of all the evidence, Appellant moved for a judgment of acquittal specifically on the grounds that the corpus delicti had not been proven. (R1777-1815) In response, the state pointed to the statements of Appellant as

proof of these. (Id.) The trial court denied the motion for judgment of acquittal.

In a criminal case, the corpus delicti cannot be proven solely by a confession or admission of the accused, and admissions or confessions are not admissible until the corpus delicti is proven independently of the confession. Jefferson v. State, 128 So. 2d 132 (Fla. 1961). This Court has held in State v. Allen, 335 So. 2d 823 (Fla. 1976), that the state has the burden of proving by substantial evidence that a crime was committed, and that such proof may be in the form of circumstantial evidence. However, while the proof need not be uncontradicted or overwhelming, it must at least show the existence of each element of the crime. While some commentators have recommended the abolition of the corpus delicti rule, this Court has recently reaffirmed it. Burks v. State, 18 Fla. L. Weekly S71 (Fla. January 31, 1993).

In the instant case, the state wholly failed to prove the corpus delicti of the crimes for which Appellant was on trial. As to the murder charge, the state failed to present substantial evidence to show that the death of the victim was due to the criminal agency of another. Dr. Wickham, the medical examiner who conducted the autopsy, testified that the cause of death was manual asphyxia. (R250) While this is not a natural cause of death, Dr. Wickham did state that it could be accidental. (R259,280) This could happen if the victim had something lodged in his throat, or if he accidentally drowned.

(R280) It also could have been caused by some sort of seizure disorder. (R282) Dr. Wickham stated that nothing contradicts either the drowning or accidental theories. (R280) There certainly were no signs of ligature or bruise marks on the victim's neck, either internally or externally. (R253) Simply put, while the evidence could have supported a death by strangulation or smothering, it is just as consistent with a theory of accidental death. As such, the state failed to prove by substantial evidence that the victim's death was caused by the criminal agency of another. Therefore, Appellant's statements and admissions were not admissible to prove the charge of murder.

With regard to the sexual battery charge, the only evidence from which one could conclude that a sexual battery had occurred was the statement of Appellant that it did. The medical examiner testified that he could find no evidence of a sexual assault. Dr. Wickham testified that when he conducted an examination of the anal region of the victim, there was an area which was darker red than the others. Dr. Wickham testified that this <u>could be</u> bruising or could be just staining as a result of decomposition wherein the blood escaped the vessels and stained the tissue. (R270-271) There certainly was no evidence of any tears in the anus. (R278) By stipulation, the parties agreed that the laboratory tests conducted on the anal and mouth swabs were negative for the presence of any semen or lubricant. Once again, the state failed to produce substantial evidence to show the corpus delicti for the offense of sexual battery. Therefore,

the statements and admissions of Appellant should not have been allowed into evidence.

Finally, with regard to the kidnapping charge, the evidence fails to show that the victim accompanied the person in the U-Haul against his will. Assuming that this person was Appellant, it is more than likely that Junny Martinez, with whom Appellant had established a fairly good relationship, willingly accompanied him on that afternoon. The only proof that this was in fact a kidnapping comes from Appellant's admission.

In summary, because the state failed to present substantial evidence of the corpus delicti of the crimes for which Appellant stood trial, it was error for the trial court to admit Appellant's admissions and statements which indicated that he committed the crime. Not only must Appellant's conviction be reversed, this Court must order the trial court to find Appellant not guilty and to discharge him.

POINT IV

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT EVIDENCE OF COLLATERAL OFFENSES WHERE SUCH EVIDENCE WAS IRRELEVANT AND WHICH BECAME A FEATURE OF THE TRIAL.

On November 21, 1991, the state filed its notice of intent to offer evidence of other crimes. (R4464-4468) On March 20, 1992, defense counsel filed a motion in limine to prevent the state from presenting this evidence of other crimes. (R4411-4415) Because this was a nonjury trial, defense counsel also filed a motion for a separate judge to hear the motion in limine regarding the Williams rule evidence. (R4460-4461) On May 11, 1992, the trial court denied the motion for the separate judge to hear the motion on the grounds that the court was capable of determining relevance and if not found relevant, the court assured defense counsel it would not consider the evidence. (R4030) The trial court then ruled that it would defer ruling on the motion in limine until the trial at which point the state would proffer the Williams rule testimony before the court would rule on its admissibility. At trial, the state presented evidence of other crimes through the testimony of Ben Tawney (R1159-1231), Than Meyer (R1591-1638), and Dale Marsh (R1639-1656). In each of these cases, it was shown that Appellant sexually assaulted these individuals. Defense counsel objected to the evidence on the grounds that it was irrelevant but the

trial court overruled him on each case. (R1185-1190,1619-1638,1648-1656) Appellant asserts that the trial court erred in admitting this evidence.

In Williams v. State, 110 So. 2d 654 (Fla. 1959), this Court held that similar fact evidence which tends to reveal a commission of a collateral crime is admissible if it is relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused. The Williams rule has been codified in Section 90.404(2)(a), Florida Statutes (1989), which provides:

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

In the instant case, the evidence that was offered through the three witnesses of other crimes committed by Appellant, was inadmissible. Ben Tawney testified that on the weekend before Junny Martinez disappeared, he met Appellant on a Saturday night at a friend's house. (R1160-1161) After an evening of drinking, Appellant agreed to take Tawney home and they drove to Merritt Island. (R1165-1166) At Appellant's suggestion, Tawney agreed to go with him to check out some party spots. (R1166) When they arrived no one was there so Tawney thought Appellant was going to take him home. (R1175-1176) However, according to Tawney, Appellant suddenly pulled a knife,

grabbed him by the hair and cut Appellant on his hand. (R1176-1178) Appellant then proceeded to tell Tawney that he would give him $1,000.00 to commit fellatio on him. (R1181) Tawney stated that he jumped out of the car and Appellant left the area leaving him to walk to the roadway for assistance. (R1181-1183) The evidence showed that this occurred sometime around 3:00 a.m. on Sunday morning. No sexual activity occurred. The trial court ruled that this evidence was relevant to rebut Appellant's alibi. (R1185-1190) However, since this occurred some five days prior to the offense, any connection between this evidence and Appellant's alibi is attenuated at best.

Than Meyer was permitted to testify regarding a prior sexual assault by Appellant on him. Appellant had previously pled guilty to the sexual battery and served time in prison for this. The court ruled that the evidence was admissible to show identity and to show intent and knowledge. However, it is clear that Appellant did not kill Than Meyer, so the evidence was not admissible with regard to the murder conviction. With regard to the sexual battery offense, the evidence again was inadmissible since as discussed above, there was no proof of a sexual battery against Junny Martinez. Additionally, even if one accepts the fact that a sexual battery did occur, identity was clearly not an issue since Appellant admitted this offense. Intent and knowledge were similarly not an issue in the case before the court.

Dale Marsh testified concerning a sexual assault which

he alleged occurred sometime in 1986. According to Marsh, he met Appellant as he was walking to school one morning and observed Appellant in a parking lot with the hood of his truck raised. (R1641-1642) Appellant asked Marsh to get into his truck and to start it up for him, which he did. (R1642) Appellant then asked Marsh if he needed a ride to school and Marsh said yes. (R1642) Instead of taking Marsh to school, Appellant drove to a deserted area, pulled a knife to Marsh's throat and ordered him to remove his shorts. (R1644-1645) Appellant then began to masturbate Marsh and ordered Marsh to masturbate himself. (R1645) Appellant then attempted fellatio on Marsh and when this failed, simply told Marsh to put his clothes back on. (R1645) Appellant then drove Marsh back to high school and asked him not to tell anyone. (R1646) Two days later as Marsh was walking to school, Appellant drove up to him, gave him $20.00 and thanked him for not telling anyone. (R1647) Marsh never told anyone for five years. (R1647) The trial court ruled that these events were not similar but nevertheless ruled the Marsh testimony admissible to rebut the defense of duress. Once again, Appellant asserts that this was error since Marsh was never harmed by Appellant and by the trial court's own ruling, did nothing more than show Appellant's propensity to commit sexual offenses on young males.

None of the evidence presented was relevant to any material issue at trial. Even assuming some marginal relevance, the evidence nonetheless was still so prejudicial that its probative value was negated. See Section 90.403, Fla. Stat.

(1989). This Court has held that the erroneous admission of irrelevant collateral crimes evidence is presumed harmful error because of the danger that the trier of fact will take bad character or propensity of the crime thus demonstrated as evidence of guilt of the crime charged. Castro v. State, 547 So. 2d 111 (Fla. 1989). Because of the inherent prejudice such evidence carries, defense counsel specifically asked that a different judge hear this evidence and rule on its admissibility. Because this motion was also denied and because the evidence is inadmissible, the error cannot be deemed harmless. Appellant is entitled to a new trial.

POINT V

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN SUPPRESSING APPELLANT'S STATEMENTS MADE AFTER HIS INVOCATION OF HIS RIGHT TO COUNSEL.

Appellant filed pretrial motions to suppress all of his statements given to the police. At issue were three separate taped statements given to Sergeant Blubaugh. The first two occurred after Appellant was arrested and after he was given his Miranda rights and waived them. Both of these were given in the state of Ohio. Sergeant Blubaugh and Assistant State Attorney Chris White then accompanied Appellant to Florida by plane. Once they arrived in Orlando, they got to their car and started driving to Cocoa. Shortly after they began the car trip back to Brevard County, they stopped at a 7-11 so that Appellant could go to the bathroom and Sergeant Blubaugh could check in with his superiors. (R2528-2530,2610) As Appellant and White waited in the car for Blubaugh to finish his phone call, Appellant said, "Mr. White I know you're a prosecutor, but you're an attorney. Do you think I'm doing the right thing?" (R2611) White said to Appellant that the only thing he could tell him was that the parents of Junny Martinez would certainly appreciate it if Appellant could help find the body. (R2611) This was the end of the conversation until they arrived in Brevard County. (R2531, 2611) At that point, Appellant stated that he believed he could tell them where Junny was located. (R2531) Officer Blubaugh

then advised Appellant of his rights and Appellant agreed to waive them. (R2532) Appellant eventually led the officers to the location of Martinez's body and subsequently gave another taped statement. (R2534-2551) Appellant contends that everything that occurred after his conversation with Assistant State Attorney Chris White was unlawfully obtained in derogation of Appellant's right to counsel.

When an accused is questioned in a custodial setting, he is entitled to be informed of certain constitutional rights including the right to have the advice of an attorney before agreeing to any questioning. Miranda v. Arizona, 384 U. S. 436 (1966). If a person requests an attorney during a custodial interrogation, all questioning must stop until an attorney is present, unless the defendant subsequently initiates conversation with the authorities. Edwards v. Arizona, 451 U. S. 477 (1981). These rights are also provided under the Florida Constitution. Traylor v. State, 596 So. 2d 957 (Fla. 1992). This is a rigid prophylactic rule, Smith v. Illinois, 469 U. S. 91 (1984), and courts are required to give a broad, rather than a narrow interpretation to a defendant's request for counsel. Michigan v. Jackson, 475 U. S. 625 (1986); Traylor, supra. When an accused makes an equivocal request for an attorney, the scope of the inquiry is immediately narrowed to one subject and one subject only. Further questioning thereafter must be limited to clarifying that request until it is clarified. Any statement taken by the state after the equivocal request for counsel is

made, but before it is clarified as an effective waiver of counsel, violates Miranda. Towne v. Dugger, 899 F. 2d 1104 (11th Cir. 1990).

In the instant case, and for purposes of this argument, Appellant acknowledges that he was properly given his Miranda rights and waived them on the two occasions in Ohio. However, the statement he made to Assistant State Attorney Chris White was in essence a request for counsel. Appellant contends that this was not equivocal but was an outright request as evidenced by his statement "I know you're a prosecutor but you're an attorney." At this point it certainly should have been apparent to Assistant State Attorney Chris White that Appellant was requesting counsel. Instead of informing him of his right to counsel and telling him that one would be appointed for him, White chose to respond in a manner calculated to coerce Appellant into providing the information that the police were seeking: to assist in the location of the body of Junny Martinez. While no further interrogation occurred at this point, before they arrived at Cocoa Beach, Appellant in direct response to the statement by Assistant State Attorney Chris White, agreed to help the authorities locate the body of Junny Martinez. The fact that Appellant subsequently waived his right to counsel is irrelevant since such waiver is invalid. This is so because once the right to counsel has attached and has been invoked, any subsequent waiver during a police initiated confrontation in the absence of counsel is per se invalid. Traylor v. State, 596 So. 2d at 966.

The subsequent statement given to Sergeant Blubaugh at the Cocoa Police Department should have been suppressed. The failure of the trial court to do so cannot be deemed harmless error since this statement, while in part exculpatory, nevertheless contained certain inconsistencies with Appellant's prior statements. It is to these inconsistencies that the state pointed towards an inference of guilt. Appellant is entitled to a new trial.

POINT VI

APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED AN IMPROPER AGGRAVATING CIRCUMSTANCE AND FAILED TO PROPERLY FIND CERTAIN MITIGATING CIRCUMSTANCES OFTEN BECAUSE OF ERRONEOUS FACTUAL DETERMINATIONS, THUS RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

The sentence of death imposed upon Mark Dean Schwab must be vacated. The trial court found an improper aggravating circumstance, made certain erroneous factual determinations and rejected highly relevant and appropriate mitigating circumstances. These errors render Appellant's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

A. The Trial Judge Considered the Inappropriate Aggravating Circumstance of Heinous, Atrocious or Cruel.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. Martin v. State, 420 So. 2d 583 (Fla. 1982); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The state has failed in this burden with regard to the aggravating circumstance of heinous, atrocious and cruel. The court's finding of fact based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous factual

findings, do not support this circumstance and cannot provide the basis for this sentence of death.

This Court has defined the aggravating circumstance of heinous, atrocious or cruel in State v. Dixon, supra at 9:

> It is our interpretation that heinous means extremely wicked or strikingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance apply only to crimes **especially** heinous, atrocious or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, supra at 9.

As this Court has stated in Santos v. State, 591 So. 2d 160 (Fla. 1991) and Cheshire v. State, 568 So. 2d 908 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. See, e.g., Douglas v. State, 575 So. 2d 165 (Fla. 1991) (torture murder involving heinous acts extending over several hours). In the instant case, the trial court expressed concern with the

interpretation that has been applied to the aggravating circumstance of heinous, atrocious or cruel. (R3532) However, in denying the motion to declare this statute unconstitutional, the court basically accepted the United States Supreme Court's statement in Sochor v. Florida, 112 S. Ct. 2114 (1992), that the Florida Supreme Court has consistently held that this factor applies in strangulation murders. (R3630-3635,4647) There are several problems with the trial court's analysis in this regard.

First, and foremost, it was not proven beyond a reasonable doubt that the victim died as a result of strangulation. Dr. Wickham, the medical examiner, testified that there were no signs of ligatures or any bruise marks on the neck either internally or externally. (R253) While Dr. Wickham testified that the cause of death was manual asphyxia, which could be caused by smothering or strangulation, it could also be accidental. (R250,280) Further, Dr. Wickham testified that the victim could have been unconscious when the manual asphyxia began. (R283) Dr. Wickham found no evidence whatsoever of any binding either on the ankles, wrists or neck of the victim. (R282) Dr. Wickham stated that if strangulation was the cause of death, it is likely that the victim lost consciousness in less than thirty seconds. (R262) Thus, the trial court's determination that strangulation was the cause of death is nothing more than mere conjecture since there is certainly not proof beyond a reasonable doubt that this was the cause of death.

Second, while it is true as the United States Supreme

Court stated that this Court has consistently applied the heinous, atrocious and cruel factor to strangulation murders, it has never ruled that all strangulation murders are per se heinous, atrocious and cruel. In Smith v. State, 407 So. 2d 894 (Fla. 1981), this Court affirmed a finding of heinous, atrocious and cruel involving a strangulation murder. However, in doing so, this Court noted that the heinous, atrocious and cruel aspect of the killing deals more with the manner in which the victims are strangled. In that case, the defendant described how both women struggled, shook spasmodically and looked into his eyes as he choked them. Certainly, this is not present in the instant case. In Doyle v. State, 460 So. 2d 353 (Fla. 1984), this Court again proved the finding of heinous, atrocious and cruel in a strangulation murder where the strangulation occurred over a period of up to five minutes and that prior to losing consciousness the victim was aware of the nature of the attack and had time to anticipate her death. In the instant case, Dr. Wickham testified that if strangulation was the cause of death, that the victim lost consciousness in less than thirty seconds. Thus, this was not a prolonged period of time in which the victim had time to anticipate his impending death. In Johnson v. State, 465 So. 2d 499 (Fla. 1985), this Court again approved the finding of heinous, atrocious and cruel in a strangulation death, but once again focused on the fact that the victim had a fore-knowledge of her death and suffered extreme anxiety and pain. In that case, there was evidence that Johnson began to choke the

victim and then the victim escaped from her car and that Johnson chased her, caught her again and resumed strangulation three times to make sure she was dead. Again, there is nothing in the instant case to reflect those kind of facts. Finally, in Herzog v. State, 439 So. 2d 1372 (Fla. 1983), this Court recognized that not every strangulation murder is heinous, atrocious and cruel. In that case there was evidence that the defendant had argued with the victim on the day of the homicide and had beaten her that day. In addition, eyewitnesses testified as to the manner of death. After an unsuccessful attempt at smothering the victim, the defendant wrapped a telephone cord around her neck and strangled her. Despite these facts, this Court found them insufficient to support a finding of heinous, atrocious and cruel since it was unclear whether or not the victim was fully conscious at the time the death occurred. In the instant case the medical examiner testified that the blood alcohol level of the victim at the time of death was .09 indicating the presence of alcohol in his system. The medical examiner further testified that he could not determine whether the victim was conscious or unconscious at the time of death.

Third, the trial court failed to consider that this Court has ruled that there is a causal relationship between the mitigating and aggravating circumstances. See Huckaby v. State, 343 So. 2d 29 (Fla. 1977); Miller v. State, 373 So. 2d 882 (Fla. 1979). Therefore, where the heinous nature of an offense results from a defendant's mental disturbance, the application of

heinous, atrocious and cruel is lessened. This is the situation in the instant case. The trial court found the Appellant suffers from a mental disturbance and is, in fact, a mentally disordered sex offender. This sexual dysfunction is directly related to the offense that occurred. Yet the trial court's findings with regards to heinous, atrocious and cruel totally ignores this factor.

Fourth, the trial court's findings with regards to heinous, atrocious and cruel make much of the fact that the sexual battery occurred. As noted previously, there was no physical evidence of any sexual battery. While Appellant admitted to committing a sexual battery, the physical evidence contradicts this. There was no evidence of any semen or lubricant found despite the fact that Appellant said that lubricant was used and that he ejaculated. No tears were found in the anal region of the victim and although a dark red stain was found, the medical examiner could not state that this was from a sexual battery. In fact, Dr. Wickham said that it was just as possible that this occurred as a result of decomposition where the blood escaped the vessels and stained the tissue. (R271)

Thus, there is no competent, substantial evidence showing this aggravating factor. It should therefore be stricken. The case must therefore be remanded for a new penalty phase without this aggravating factor being considered.

B. The Aggravating Factor that the Capital Crime was Committed During the Course of a Felony.

The trial court found that this aggravating factor exist by virtue of the verdicts rendered by the trial court in the guilt phase. However, as noted previously, these verdicts are suspect since the proof of these offenses were dependent upon the statements of Appellant. Since these statements were improperly admitted due to a failure of the state to prove the corpus delicti of the offenses charged, the verdicts cannot be sustained. Thus, the aggravating circumstance must also fail.

C. Mitigating Factors, Both Statutory and Nonstatutory, Are Present Which Outweigh Any Appropriate Aggravating Factors.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this Court stated the correct standard and analysis which a trial court must apply in considering mitigating evidence presented by the defendant. This Court quoted from prior federal and Florida decisions to remind courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. See Eddings v. Oklahoma, 455 U. S. 104 (1982); Rogers v. State, 511 So. 2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or nonstatutory), the court must find as mitigating that factor. Although, this Court said, the relevant weight given each factor is for the sentencer to decide, once a factor is reasonably established, it cannot be dismissed as having no weight as a mitigating circumstance. Appellant contends that the trial court's

sentencing order totally fails to meet the standard necessitated by the capital sentencing procedure. The trial court applied the wrong standard, and improperly rejected numerous mitigating circumstances. With regard to the mental mitigators found in subsection B and subsection F, all of the experts who testified concluded that Appellant does suffer some mental disorder. The trial court in refusing to find one of the mental mitigators specifically accepted the diagnosis of Dr. Samek wherein he concluded that Appellant was an antisocial rapist and murderer. Dr. Samek's diagnosis in this regard is totally irrelevant since at the time that Dr. Samek testified, Appellant in fact was a convicted rapist and a convicted murderer. His "diagnosis" is nothing more than stating the obvious. In this regard, it is important to note that of the four experts who testified, Dr. Samek is the only one who never interviewed or examined Appellant personally. Yet even Dr. Samek acknowledged that Appellant was not a healthy person and suffered from a mental disorder. In short, the evidence was overwhelming that Appellant suffered serious mental disorders which clearly affected his ability to act in a normal law abiding fashion. The trial court recognized this in finding the mental mitigator contained in subsection (f), but apparently ignored this evidence in rejecting a finding of subsection (b).

With regard to the nonstatutory mitigating evidence that was presented, the trial court found that the evidence concerning Appellant's being raped at gunpoint when he was a

child not to be a mitigating factor is clearly erroneous. The trial court in discussing this mitigating factor concludes that the only person that was ever told this was Dr. Bernstein after Appellant had been arrested for the instant offenses. This is factually incorrect. Patricia Knittel testified that during the summer of 1986, Appellant stayed at her house on numerous occasions. (R2997-3005) During the summer of 1986, Appellant told Ms. Knittel that he had been sexually abused. (R3001) Upon reflection, Ms. Knittel believes Appellant was reaching out for some help from her which unfortunately she ignored. However, despite this evidence, the trial court simply ignored it. The fact that Appellant told this to Ms. Knittel in 1986, some five years before the instant offense, clearly rebuts the trial court's conclusion that Appellant was fabricating this.

Appellant presented evidence that his father beat his mother on several occasions and was himself physically abused by his father. There was also evidence presented that Appellant's father would punish and humiliate him. However, in his findings with regards to these mitigating circumstances (numbers 7 - 10) the trial court rejected them as mitigating factors because "the evidence was in conflict." This is simply untrue. There is no evidence to contradict these findings. Appellant's father testified but was never asked by the state whether these events occurred. Appellant's father did testify that in fact Appellant did witness fights between him and his wife. The trial court's rejection of these mitigating circumstances was improper since

the evidence clearly supports them. See Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Long v. State, 464 So. 2d 1178 (Fla. 1985); Freeman v. State, 547 So. 2d 125 (Fla. 1989); and Livingston v. State, 565 So. 2d 1288 (Fla. 1980).

Appellant further presented uncontroverted evidence that he adapted well to prison life and had not received any prison disciplinary reports. He also presented evidence of his accomplishments while in prison. However, while the trial court accepted this evidence, it concluded that these were not mitigating circumstances. (R4660-4661) Once again, this improper since these factors are well recognized as being mitigating factors. See Fead v. State, 512 So. 2d 176 (Fla. 1987); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Francis v. Dugger, 514 So. 2d 1097 (Fla. 1987); Songer v. State, 544 So. 2d 1010 (Fla. 1989); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982).

Appellant presented evidence concerning his mental illness and his desire to obtain help for it. In the nonstatutory mitigating circumstances numbered 32 through 39, the trial court listed these factors yet concluded that while they were proven by the greater weight of the evidence they were not in the court's opinion mitigating circumstances. Once again this conclusion by the trial court is erroneous since these factors are recognized mitigating circumstances. Perry v. State, 522 So. 2d 817 (Fla. 1988); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Cooper v. Dugger, 527 So. 2d 900 (Fla. 1988).

Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly when it is derived from unrefuted factual evidence. Hardwick v. State, 521 So. 2d 1071 (Fla. 1988). As this Court stated in Santos v. State, 591 So. 2d at 164:

> The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, ___ U. S. ___, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.
>
> Based on the record at hand, we are not convinced that the trial court below adhered to the procedure required by Rogers and Campbell and reaffirmed in Parker.

In the instant case, it does not appear that the trial court properly adhered to these correct procedures. Although paying lip service to this Court's decision in Campbell, the trial court then proceeded to violate the very procedures it was ostensibly following. The proper mitigating factors clearly outweigh the appropriate aggravating factors. The death sentence must be vacated and the cause remanded for imposition of a life

sentence, or at the very least, sent back to the trial court for reconsideration that more fully weighs the available mitigating evidence.

POINT VII

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE SECTION 921.141(5)(h), FLORIDA STATUTES (1989) IS UNCONSTITUTIONALLY VAGUE AND APPLIED IN AN ARBITRARY AND CAPRICIOUS MANNER.

Appellant filed a motion to declare Section 921.141(5)(h), Florida Statutes (1989) unconstitutional. This statutes prescribes the aggravating circumstance of heinous, atrocious and cruel. The trial court denied this motion. (R3635) Appellant contends that this Court's inconsistent application of its heinousness circumstance results in unguided death sentencers, a class of death eligible as wide as the class of all murderers, and no rational basis for review of death sentences.

Florida's aggravating circumstance that the crime was especially heinous, atrocious or cruel on its face provides no limits or guides to imposing a death sentence. In Maynard v. Cartwright, 486 U. S. 356 (1988), the unanimous Supreme Court held unconstitutional a jury instruction using identical wording, writing that the phrase "especially heinous, atrocious or cruel," standing alone, gives no real guide to a sentencer:

> First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. The State's contention

> that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustifiable, intentional taking of human life is "especially heinous."

Id. at 363-364.

Florida cases have tried to avoid the clear teachings of Maynard in various ways. In Smalley v. State, 546 So. 2d 720 (Fla. 1989) this Court distinguished Maynard on the grounds that Florida limited the circumstance in State v. Dixon, 283 So. 2d 1, 9 (1973), cert. denied, 416 U. S. 943 (1974), noting that the Supreme Court upheld a challenge to the facial validity of the statute based on Dixon's construction in Proffitt v. Florida, 428 U. S. 242, 254-6, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) (plurality opinion). This Court wrote:

> . . . there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.
>
> This Court has narrowly construed the phrase "especially heinous, atrocious, or cruel" so that it has a more precise meaning than the same phrase has in Oklahoma...
>
> It was because of this 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, 96 S.Ct. 2960, 49 L.Ed.2d 913 (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.

546 So. 2d at 722.

The force of the foregoing dicta[2] in Smalley is significantly undermined by two more recent pronouncements from that court. In Cheshire v. State, 568 So. 2d 908 (Fla. 1990), this Court deferred ruling on the constitutionality of the circumstance. Also post-Smalley, this Court revisited the language of the heinousness circumstance in Standard Jury Instructions in Criminal Cases - 90-1, 579 So. 2d 75 (Fla. 1990). There, this Court ordered publication of the report of the Committee on Standard Jury Instructions (Criminal), with a proposed amendment to the HAC (heinous, atrocious, or cruel) instruction. The Committee stated its proposed amendment "improves the instruction and ... adequately addresses any problem the paragraph may present in light of Maynard v. Cartwright, 486 U. S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988)." Id. This Court's decision to revisit the wording of the heinousness circumstance is a recognition of "problems" in

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[2] The holding in Smalley was that Mr. Smalley's attack on the standard jury instruction was not preserved for appeal. The court enunciated the dicta set out here "[i]n order to set the issue at rest."

applying it. The dicta in Smalley is wrong for other reasons, as well.

The role of the Florida trial judge is not so clear as Smalley asserts. Under our law, the trial judge must give "great weight" to a jury's death recommendation, without knowing which circumstances were actually found by the jury or the weight given. Flaws in the jury instructions leading to flaws in the verdict necessarily lead to flawed sentencing. The Eighth Amendment requires accurate jury instruction of this circumstance in Florida sentencing proceedings. Cf. Hitchcock v. Dugger, 107 S. Ct. 1821, 1824 (1987) ("We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport" with Eighth Amendment. (E.s.)).

This Court also did not undertake the careful analysis mandated by Maynard. Oklahoma adopted the Dixon construction of its statute, but in applying that construction so expanded it as to render the circumstance overly vague. Cartwright v. Maynard, 822 F. 2d 1477, 1487-1491 (10th Cir. 1987) (en banc), affirmed, 108 S. Ct. 1853 (1988) ; see Adamson v. Ricketts, 865 F. 2d 1011, 1031-1037 (9th Cir. 1988) (en banc), cert. denied sub nom. Lewis v. Adamson, 58 U.S.L.W. 3835 (U.S. 88-1553 June 28, 1990). Study of Florida capital decisions shows that Florida's application of the circumstance suffers from the same faults found in the Oklahoma circumstance.

The sheer number of cases in which heinousness becomes a factor evidences the use of the circumstance as a catch-all.[3] See Adamson, 865 F.2d at 1031. This wide use comes about because this Court has been unable, despite its best efforts, to provide any comprehensible, consistently applied limitations on the vague wording of the statute. Indeed, the cases are so fraught with inconsistencies and irrational distinctions that analysis itself becomes difficult.[4]

One frequent statement in heinousness cases is that (1) a single gunshot or quick volley of shots (2) which causes quick death and (3) is not preceded by a lengthy period during which the victim knows of his impending doom does not amount to an especially heinous killing.[5] But this rule does not consistently narrow the circumstance and has not been consistently applied.[6]

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[3] From 1984 to 1988, the court decided 209 death cases on direct appeal from conviction and sentence or resentencing. The opinions positively reveal the trial court found the heinousness circumstance in 113 of them. The number in which the circumstance was found is higher: many opinions do not specify the circumstances found. Even so, the trial court found heinousness in at least 54% of recent Florida cases. Moreover, jury instructions including the heinous circumstance were read in many of the other cases, meaning the circumstance was a consideration in nearly all the cases.

[4] See generally Mello, Florida's "Heinous, Atrocious, or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, 13 Stetson L.Rev. 523-554 (1984).

[5] The Court cited this reason in 17 of the 20 cases between 1984 and 1988 in which it found the circumstance invalidly applied.

[6] The most glaring example of inconsistency can be seen in David Raulerson's case. In Raulerson v. State, 358 So. 2d 826, 834 (Fla.), cert. denied, 439 U. S. 959 (1978), the court held

The history of the instantaneous gunshot death rule shows hopeless confusion in the law. Sometimes, the Florida Supreme Court states that lingering on after a shooting cannot be used to find heinousness.[7] In other cases, it depends on such suffering to uphold the circumstance.[8] The awareness of impending death element produces completely contrary results in application. This Court has stated it does not require complete unawareness by the decedent,[9] yet it upheld the circumstance where the only evidence of foreknowledge was that the decedent raised his hand towards the gun at the moment of the shot. See Huff v. State, 495 So. 2d 145, 153 (Fla. 1986). Huff cannot be rationally distinguished from Parker v. State, 458 So. 2d 750, 754 (Fla. 1984), cert. denied, 470 U. S. 1088 (1985) in which the victim was taken to see her boyfriend's body and upon realizing

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that awareness of the decedent that an armed robbery was in progress justified a finding that the murder was heinous even though death came quickly from a volley of shots. After the death sentence was vacated by a federal court and reinstated after resentencing, the court overturned the trial court's heinousness finding. Raulerson v. State, 420 So. 2d 567, 571-2 (Fla. 1982), cert. denied, 463 U. S. 1229 (1983). The second opinion did not mention the opposite result in the first.

[7] Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983), cert. denied, 465 U. S. 1074 (1984); Mills v. State, 476 So. 2d 172, 178 (Fla. 1985), cert. denied, 475 U. S. 1031 (1986) ("whether the victim lingers and suffers is pure fortuity.").

[8] Phillips v. State, 476 So. 2d 194, 196-7 (Fla. 1985); Troedel v. State, 462 So. 2d 392, 398 (Fla. 1984); Squires v. State, 450 So. 2d 208, 212 (Fla.), cert. denied, 469 U. S. 892 (1984) (murder so as to cause unnecessary pain where victim wounded and then fatally shot).

[9] See, e.g., Gorham v. State, 454 So. 2d 556, 559 (Fla. 1984), cert. denied, 469 U. S. 1181 (1985).

what had happened, fell to her knees, covered her face, and then was shot. Yet, the circumstance was upheld in Huff and struck in Parker. When the victim attempts to flee, it shows awareness of death; sometimes this Court upholds the circumstance on this basis[10] and sometimes not.[11]

Even if some explanation for these inconsistent results exists, the instantaneous death by gunshot limitation on the circumstance does not save it from a vagueness challenge. With very few exceptions, a like limitation does not apply when the means of causing death is not gunshot. Stabbings are usually found to be heinous.[12] But in Demps v. State, 395 So. 2d 501 (Fla.), cert. denied, 454 U. S. 933 (1981), the court overturned a heinousness finding even though the decedent had been stabbed repeatedly, was left to die, and expired only after being taken to three hospitals. Whether a quick death limitation was applied is unclear; no reasoning accompanied this determination. Even death from a single stab wound can be heinous,[13] although the court has overturned one heinousness finding given a single stab

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[10] Phillips v. State, 476 So. 2d 194 (Fla. 1985).

[11] Amoros v. State, 531 So. 2d 1256 (Fla. 1988) (distinguishing Phillips on the grounds that Phillips reloaded his weapon during the chase).

[12] Floyd v. State, 497 So. 2d 1211, 1214 (Fla. 1986); Lusk v. State, 446 So. 2d 1038, 1043 (Fla.), cert. denied, 469 U. S. 873 (1984) (decedent stabbed three times); Morgan v. State, 415 So. 2d 6, 12 (Fla.), cert. denied, 459 U. S. 1055 (1982).

[13] See Proffitt v. State, 315 So. 2d 461 (Fla. 1975), aff'd, 428 U. S. 242 (1976), facts at Proffitt v. Wainwright, 685 F. 2d 1227, 1264 (11th Cir. 1982).

wound.[14] Beating deaths are almost always declared heinous,[15] although inexplicably, in three cases, it was not enough.[16] Strangulations are nearly per se heinous[17] unless the victim may not have been conscious when strangulation began.[18]

Thus, except in cases of death by gunshot, it is rare to see a heinousness finding overturned. Where stabbings, beating and strangulations are determined non-heinous, the principles used are completely hidden from view. The one limitation that death be nearly instantaneous, by gunshot, and with little or no foreknowledge by the decedent turns the guidance function of the circumstance on its head. Unless the defendant chooses a gun as a murder weapon, no hints can be derived from Florida case law on what constitutes a heinous crime.

Other guides appearing in opinions are applied with equal inconsistency. Sometimes, the court suggests helplessness of the decedent adds to the heinousness of the crime,[19] but it

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[14] Wilson v. State, 436 So. 2d 908, 912 (Fla. 1983).

[15] See, e.g., Cherry v. State, 544 So. 2d 184 (Fla. 1989).

[16] Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988).

[17] See, e.g., Doyle v. State, 460 So. 2d 353, 357 (Fla. 1985).

[18] Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Herzog v. State, 439 So. 2d 1372 (Fla. 1983).

[19] Kokal v. State, 492 So. 2d 1317, 1318 (Fla. 1986) (hitch-hiker robbed, begged for life then killed); Brown v. State, 473 So. 2d 1260, 1268 (Fla.), cert. denied, 474 U. S. 1038 (1985)

has also held heinousness should not be based on lack of resistance by the decedent.[20] The court has overturned a heinousness finding even though the decedent was incapacitated, heard her husband shot, and moaned after being fatally wounded.[21] The court also states evidence that the decedent fought back proves heinousness.[22] Cases suggest if the decedent is elderly, the crime is more heinous.[23] But in Clark v. State, 443 So. 2d 973, 977 (Fla.), cert. denied, 467 U. S. 1210 (1984), the age of the decedent was insufficient to find heinousness. Cases suggest where the decedent and defendant were strangers, the crime was more heinous.[24] But, the court has found heinousness partly based on blood relations between decedent and defendant.[25]

A more general way to judge heinousness might be to focus on the defendant's mental state. The court sometimes

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(heinousness partly based on victim's invalid status); Jones v. State, 411 So. 2d 165, 169 (Fla. 1982), cert. denied, 459 U. S. 891 (1985) (victim executed after pleading for life).

[20] Gorham v. State, 454 So. 2d 556, 559 (Fla. 1984), cert. denied, 469 U. S. 1181 (1985).

[21] James v. State, 453 So. 2d 786, 789, 792 (Fla.), cert. denied, 469 U. S. 1098 (1984).

[22] Roberts v. State, 510 So. 2d 885, 894 (Fla. 1987), cert. denied, 108 S. Ct. 1123 (1988) (citing cases).

[23] Chandler v. State, 534 So. 2d 701, 704 (Fla. 1988); Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988); Johnston v. State, 497 So. 2d 863, 871 (Fla. 1986).

[24] Scott v. State, 494 So. 2d 1134, 1136 (Fla. 1986); Barclay v. State, 343 So. 2d 1266, 1269 (Fla. 1977), aff'd, 463 U. S. 939 (1983), sentence vacated on other grounds, 470 So. 2d 691 (Fla. 1985).

[25] Huff v. State, 495 So. 2d 145, 153 (Fla. 1986).

focuses on that factor. Mills v. State, 476 So. 2d 172, 178 (Fla. 1985), cert. denied, 475 U. S. 1031 (1986), ("The intent and method employed by the wrongdoers is what needs to be examined."; HELD, lingering death following gunshot did not make the killing heinous because it did not reflect on the defendant's culpability). In other cases, the mental state of the defendant is one factor to consider in finding heinousness. See Card v. State, 453 So. 2d 17 (Fla.), cert. denied, 469 U. S. 989 (1984) (fact that defendant enjoyed killing one consideration). But in Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1984), this Court rejected using the defendant's mental state to show heinousness, writing: "nor is the defendant's mindset ever at issue." Most recently in Cheshire v. State, 568 So. 2d 908 (Fla. 1990), the court indicated it has always said the primary focus is the mental state of the defendant: "[t]he factor of heinous atrocious or cruel is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. State v. Dixon, 283 So. 2d 1 (Fla. 1973)."

The mindset of the decedent is another way in which the circumstance might be narrowed. The court has said that awareness of death by the decedent suffices to establish the circumstance due to the mental anguish it causes.[26] Conversely,

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[26] Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988) (killing discussed in front of victims, one of whom tried to escape); Tompkins v. State, 502 So. 2d 415, 421 (Fla.), cert.

events occurring after the decedent's death or unconsciousness cannot be used to find heinousness.[27] But inconsistencies abound in applying decedent awareness as a limitation. Comparing Brown v. State, 526 So. 2d 903 (Fla. 1988), cert. denied, 109 S. Ct. 371 (1988) and Grossman v. State, 525 So. 2d 833 (Fla. 1988) shows how meaningless this limitation has become. In Brown, the defendant jumped a police officer trying to arrest him and a codefendant. The codefendant heard a shot and then heard the officer begging Brown not to shoot him, but Brown did so. In Grossman, the officer stopped Grossman and another; Grossman attacked her and shot her with her revolver in the struggle. The Florida Supreme Court approved the heinousness circumstance in Grossman because the officer knew she was struggling for her life. 525 So. 2d at 840-841. The court disapproved its application in Brown despite a finding by the trial court that the officer had been shot in the arm and pleaded for his life. 526 So. 2d at 906-907, n.11. Even the post-death, post-unconsciousness limitation has not been consistently followed. In Jennings v. State, 453 So. 2d 1109 (Fla. 1984), vacated, 470 U. S. 1002, reversed on other grounds, 473 So. 2d 204 (1985) this Court accepted that the decedent had been unconscious during the

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denied, 107 S. Ct. 3277 (1987) (awareness during strangulation suffices); Parker v. State, 476 So. 2d 134 (Fla. 1985) (mental anguish from fear of death not negated by quick killing).

[27] See Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984), after remand, 522 So. 2d 802 (Fla. 1988), cert. denied, 109 S. Ct. 183 (1988). But see Holton v. State, 574 So. 2d 284 (Fla. 1991).

incident, writing that decedent suffering is relevant to heinousness, but adding:

> As important is the totality of the circumstances of the incident and whether they reflect that this was a conscienceless, pitiless and unnecessarily torturous crime that sets it apart from the norm of capital felonies.

Id. at 1115.

This refusal - shown in Jennings and the history detailed above - to specify any necessary findings by the sentencer matches Oklahoma's law on heinousness that the federal courts struck. The Tenth Circuit wrote in Maynard:

> Second, because the Oklahoma court has emphasized that a murder need only be heinous, atrocious or cruel, see Cartwright v. State, 695 P.2d at 544, even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard....

822 F. 2d at 1489-90. Refusal to specify any particular findings and resort to a totality of the circumstances test creates unconstitutional vagueness:

> The discretion of a sentencer who can rely upon all the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in Furman. No objective standards limit that discretion.

Id. at 1491. The unanimous Supreme Court agreed. 486 U. S. 356, 380. This Court must declare Florida's Section 921.141 unconstitutional for the failure to provide objective, consistently followed, limiting standards to the heinousness

circumstance.

CONCLUSION

WHEREFORE, based on the reasons and authorities presented herein Appellant respectfully requests this Honorable Court to grant the following relief:

As to Points I, II, IV and V, reverse and remand for a new trial;

As to Point III, reverse and remand with instructions to discharge Appellant;

As to Points VI and VII, vacate Appellant's death sentence and remand for imposition of a life sentence or in the alternative, for a new penalty phase.

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 Mr. Mark D. Schwab, #A-111129, (45-2231-A1), P.O. Box 221, Raiford, FL 32083, this 19th day of March, 1993.

Michael S. Becker

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