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IN THE SUPREME COURT OF FLORIDA

GARY RICHARD WHITTON, :

Appellant, :

v. : CASE NO. 80,536

STATE OF FLORIDA, :

Appellant. :

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR WALTON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

GARY RICHARD WHITTON,

Appellant,

v. CASE NO. 80,536

STATE OF FLORIDA,

Appellee.

______________________/

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to as appellant or by his proper name in this brief.

The record on appeal contains twelve volumes sequentially numbered at the bottom of each page and will be referred to as "R," followed by the appropriate page number in parenthesis. The supplemental record on appeal will be designated as "SR."

II STATEMENT OF THE CASE

A grand jury indictment, filed December 3, 1990, charged appellant with the first degree premeditated or felony murder of James Stallings Maulden by stabbing on October 10, 1990, and with the robbery of approximately $1,135.88 from Mr. Maulden on the same date (R 10-12).

Appellant moved to dismiss the indictment pursuant to Rule 3.190(c)(4), Fla. R. Crim. P. (R 254-260). The state filed a traverse (R 399-402) and an amended traverse (R 458-462), and the court denied the motion by written order (R 607).

Prior to trial, appellant moved to suppress all his statements made to law enforcement prior to, at the time of, or subsequent to his arrest on the grounds that the statements were initially given without benefit of any Miranda warnings and all subsequent statements were thereby tainted (SR 1). Following a hearing on July 21, 1992 (R 764-820), the motion was granted in part and denied in part (R 615-617).

Appellant proceeded to jury trial before Honorable Laura Melvin on July 27 - August 1, 1992. At the conclusion of the trial, the jury found appellant guilty of first degree murder and robbery as charged in the indictment (R 619-620).

Following a penalty proceeding on August 3, 1992, at which the state and defense each presented additional witnesses, the jury recommended by a vote of 12-0 that the trial court impose the death penalty (R 646, 2255).

Appellant's motion for new trial (R 655-656) was argued on September 10, 1992, and denied (R 2256-2269).

The trial court adjudicated Whitton guilty on both counts (R 2268) and sentenced him to death on Count I pursuant to the the jury recommendation. The court imposed a consecutive term of nine years in prison on Count II, in accordance with the permitted guidelines range, with 701 days jail credit (R 673-678, 682, 691-697, 2273-2282).

Notice of appeal was timely filed (R 698) and the Public Defender of the Second Judicial Circuit was designated to handle the appeal. This appeal follows.

III STATEMENT OF THE FACTS

A. PRETRIAL PROCEEDINGS

Two witnesses testified at the hearing on the defense's motion to suppress Whitton's statements.

Escambia County homicide investigator Allen Cotton arrived at Gary Whitton's residence in Pensacola, Florida, at 1:30 a.m. on October 11, 1990. He was accompanied by investigators from the State Attorney's Office and Walton County Sheriff's Department (R 767-768). Whitton answered the door and invited the officers inside. Cotton advised Whitton that they needed to talk to him, although Whitton was told he was not under arrest and did not have to answer their questions. Whitton agreed to talk to the investigators and stated that he spent the previous night at home. He said he owned a 1979 Buick LaSabre (R 768-769).

Cotton asked Whitton to accompany them to the sheriff's office, although he again advised Whitton that he was not under arrest and did not have to come with them. Whitton agreed to go to the sheriff's office and rode there in one of the investigator's vehicles (R 769-770). They arrived at 1:50 a.m. (R 771). Upon arriving at the sheriff's department, Cotton again advised Whitton that he was not under arrest and did not have to answer their questions. Whitton was then questioned about his residence and whereabouts the previous weekend. Whitton told Cotton that James Mauldin had spent the weekend with him, and that he [Whitton] left Mr. Mauldin in Destin on the morning of October 9 and had not seen the victim since (R 771-772).

Upon hearing the victim's name mentioned, Cotton "felt the investigation had narrowed down and focused down at that point" and "I felt I was in need to advise him of his rights" (R 772). Appellant was advised of his rights at 1:58 a.m. and signed a waiver of rights form (R 772-774). Appellant made additional statements after being advised of his rights (R 774).

Cotton testified on cross-examination that he was aware that appellant's vehicle had been seen at the motel where Mr. Mauldin was murdered on October 9. He did not initially advise Whitton of his rights, however, because Cotton was not sure if appellant was a witness or suspect (R 775). Two investigators accompanied Cotton inside Whitton's residence, but one or two other officers remained outside. They were all armed, but no one was in uniform (R 778-779). Whitton changed clothes before going to the sheriff's office since he had been in bed when the officers arrived, but Cotton was uncertain if an officer went with him to the bedroom when he changed (R 780-781).

Even though appellant had not said anything incriminating at the time, Cotton wanted to continue the interrogation at the sheriff's department (R 782).

All three investigators were present during the interrogation at the sheriff's department. They questioned Whitton for approximately eight minutes about his activities on the weekend before October 10th prior to administering Miranda warnings at 1:58 a.m. The questioning lasted until 5:15 a.m. after Miranda warnings were given. Whitton was continuously accompanied by law enforcement officers from the time they arrived at his home

until the end of the interrogation. The only break in the questioning was when Whitton was transported to the sheriff's office (R 783-787). He was not allowed to leave (R 787).

The interrogation ended at 5:15 a.m. when Whitton invoked his rights (R 789).

Gary Whitton testified on his own behalf that five people arrived at his home at 1:30 a.m. on October 11, 1990. He was in bed and in his night clothes. Cotton identified himself and indicated that he wanted to talk to Whitton about an incident in another county. Whitton invited them inside and told Cotton where he spent the previous night (R 794-795). He stated that he was never advised of his rights. He asked Cotton if he was under arrest, and Cotton replied, "Not at the present time, no" (R 796).

They talked for twenty minutes at the house when Cotton asked Whitton to come to the police station for further questioning. Whitton asked if it could wait until the morning, but Cotton said he needed to clear it up that night. He explained that, based upon his experience, he did not feel that he had a choice and felt he had to go with Cotton (R 796-797). Whitton recalled four people in the office when he was interrogated. No one ever told him he did not have to talk to them. He was repeatedly asked about his whereabouts the previous night but he was never told what the officers were investigating (R 797-798). Whitton maintained he was never advised of his rights until he changed his story and told Cotton where he actually

was that evening, at which time he invoked his right to remain silent and asked to talk to his attorney (R 799).

On cross-examination, Whitton estimated that he was first advised of his rights between 4:30 and 5:00 a.m., not 1:58 a.m. as Investigator Cotton claimed (R 800). Whitton was aware of his rights from prior arrests but still did not feel he had a choice but to talk when five officers came to his home at 1:30 in the morning (R 800-801). Although he was told he was not under arrest, he was never told he did not have to go to the sheriff's office (R 802). One officer followed him into the bedroom when he went to get dressed (R 803). He said he was questioned at the house for 15 or 20 minutes before going to the sheriff's department (R 804).

Following arguments of counsel, the trial court took the motion under advisement (R 805-818), and subsequently entered an order granting the motion with respect to appellant's statements prior to the Miranda warnings and denying it as to those statements made at the sheriff's office after Miranda warnings were given (R 615-617, 1352-1353).

B. TRIAL

The evidence at trial was as follows.

On the morning of October 9, 1990, James Mauldin withdrew $1,135.88 from his account at the First Federal Savings Bank in Sandestin. Gary Whitton accompanied Mauldin to the bank and helped him fill out the withdrawal slip. Tammy McCormick, the bank teller, identified Mr. Whitton's photograph from a photo lineup on October 11, 1990 (R 1412-1415).

James Mauldin initially wanted to withdraw $500 from his account but could not do so without his passbook. He got upset and was rude to the teller. He appeared to be intoxicated and finally decided to close out the account. Whitton remained in the background and did not come to the counter until Mauldin asked him for help filling out the form. Mauldin and Whitton appeared to be friends, according to the teller (R 1416-1420).

Later that morning, James Mauldin checked into the Sun and Sand Motel in Destin, Florida. Mauldin again had difficulty filling out the registration form, and his companion completed the form for him (R 1422-1425). Motel employee, Eric Fleming, identified the companion as Whitton from a photographic lineup (R 1466, 1468). The motel registration form was filled out in James Mauldin's name with an address at 424 Dominquez Street, Freeport, and a Florida license tag (R 1500-1501). As the two men went to the room, Fleming noticed that the vehicle Whitton was driving had an Alabama license tag and mentioned it to the motel clerk, who later went by the vehicle and recorded the correct license number on the registration form (R 1426-1427, 1465). It was subsequently determined that the Alabama tag belonged to a 1979 yellow Buick registered to Gary Whitton of Chickasaw, Alabama (R 1501). Whitton was renting a house at 800 Dominguez Street in Pensacola at the time (R 1501).

The motel clerk, Tony Maleszewski, and Eric Fleming both identified Mauldin as being the taller of the two men who came in to register. The second man never spoke to the motel clerk (R 1440, 1442, 1471). Mauldin told the clerk he had a problem

and could not fill out the registration but he did not specify the nature of his problem. He did not appear to be intoxicated (R 1441, 1472-1473).

Mr. Mauldin was assigned to room number 5 (R 1428). There were 31 units in the motel, and only one other unit, number 3, was occupied at the time. Tony Maleszewski lived in unit 8 (R 1430-1431).

Maleszewski later saw Mauldin and another man, whom he did not identify, walk across the street to a service station. Mr. Mauldin came into the office later that day to request a cab (R 1431). Approximately 10:30 that night Maleszewski saw the same yellow vehicle parked in front of unit number 9. He was asleep when he heard a car door shut and looked out of his window (R 1431-1432). He heard a door slam again at 12:20 a.m., looked outside, and saw someone sitting in the driver's seat of the vehicle. The individual got out of the car, opened the trunk, and then returned to the car. Maleszewski went back to sleep (R 1433).

At 11:00 a.m. on October 10, Maleszewski went to unit 5 to see if Mauldin would be checking out or staying another night. He knocked on the door and receiving no answer, let himself in with the master key. There was blood everywhere in the room, and a body was on the floor under a bedspead (R 1434-1435).

Maureen Fitzgerald had known James Mauldin for five years. She testified that she met Whitton through Mauldin. Whitton came to Fitzgerald's house sometime in October, 1990. He told

her that he had taken Mauldin to the bank that day and then to a motel in Destin (R 1481-1482).

According to Fitzgerald, James Mauldin's mother came by her house looking for Mauldin just prior to Whitton's visit. Fitzgerald and Whitton tried to call Mauldin's mother to tell her where Mr. Mauldin was staying (R 1489-1490).

Investigator Fred Mann, of the Walton County Sheriff's Department, arrived at the Sun and Sand Motel at 11:03 a.m. on October 10, 1990 (R 1499). He observed the body of a white male on the floor between the bed and front wall of the room. There was blood on the walls, ceiling and carpet. A watch found on the floor near the body had stopped at 12:27 (R 1500, 1506-1507). The TV was on, and the refrigerator was open (R 1557, 1567). There was diluted blood in the bathroom sink and on the toilet and floor (R 1567). The victim's pockets were turned inside out. There was no money in the pockets or in a wallet, although there were a few coins lying on the floor (R 1609).

Blood was drawn from the victim at the autopsy (R 1581), and blood and saliva samples were taken from Whitton (R 1592-1593). Mr. Mauldin was blood type A (R 1732). Appellant had ABO type O and was a secretor (R 1732-1733). According to the serology expert, type A blood accounts for 41 percent of the white population in the United States; 45 percent of the white population and 50 percent of the black population have type O blood (1744-1745). Blood swabbings from the interior of the entrance door of Mr. Mauldin's motel room, the bathroom door,

bathroom sink, top of the toilet, bathroom floor and the wall behind the north bed were determined to be type A blood, consistent with the victim's blood (R 1569-1573, 1734-1736).

Cigarette butts inside a paper bag found on top of a desk in the motel room and cigarette butts from the ashtray on the nightstand between the two beds were tested for ABO blood type. Five of the six cigarette butts in the paper bag were smoked by a type A secretor, consistent with the victim's ABO blood type. Serology tests did not reveal a blood type on the sixth butt, indicating that the person who smoked it may not have been a secretor. Four of the cigarette butts in the ashtray were also smoked by a type A secretor; the remaining four cigarettes had type O saliva, consistent with appellant's blood type (R 1574-1575, 1737-1739, 1750-1751).

Janice Johnson, an expert in bloodstain analysis (R 1704-1705), testified that the initial bloodshed in room 5 began on the pillow of the south bed and moved toward the bottom of the bed and floor between the beds and a desk area. The bloodshed ended between the north bed and north wall, where there were overlapping patterns of projected blood, indicating more than one impact occurred in that location of the room. There were blood spatters on the television, desk and door of the room, and smeared stains on the carpet (R 1709-1714). Blood stains were also found on the bottom of the victim's foot (R 1712). The victim's body was found in close proximity to the forceful bloodstain patterns on the north wall (R 1716-1718), and the

various bloodstain patterns in the room were consistent with multiple blows to the victim (R 1719).

A search warrant was executed for Whitton's house and car on October 12, 1990 (R 1502, 1504). Blue jeans seized from his residence contained human blood, but there was an insufficient quantity for further testing (R 1575-1576, 1739-1740). Janice Johnson examined appellant's boots and detected blood spatters inside them. These spatters were medium velocity and traveled from top to bottom inside the boots, suggesting that the boots were not being worn when the spatters occurred (R 1720-1722, 1724). Blood on both the outside and inside of the boots was type A (R 1743). Swabbings from the boots were sent for DNA analysis (R 1748).

Three suspected blood stains were removed from Whitton's vehicle. One was taken from the driver's seat; one from the front passenger seat and one from the rear floor-board behind the driver seat. A paper towel with suspected blood was also seized underneath the armrest between the driver and passenger seats (R 1576, 1578-1580). The paper towel and floor mat both contained human blood, but there was not enough blood present to determine the ABO blood type. The other samples contained type A blood (R 1741-1742).

Several receipts were seized from the driver's side visor of Whitton's vehicle. One was a car wash receipt dated October 10, 1990 at 2:37 a.m. (R 1503-1504, 1519-1520). Other receipts included a gas receipt in the name of Debra Sims, for 800 North Dominiguez Street, in the amount of $95.92 (R 1504, 1511), and

a Gulf Power utility bill for 800 Dominguez Street, Pensacola, in the amount of $97.97 (R 1504, 1524-1525)). The gas bill was due October 5 and had a past due amount of $77.14. It was paid in full on October 10 (R 1512-1513). The utility bill was also delinquent, with an overdue amount of $49.41 and a disconnect date of October 12. This bill was likewise paid in full in cash on October 10 (R 1525). A vehicle registration tag and tax receipt for Alabama tag number 2VR-8692, registered to Gary R. Whitton, dated October 10, 1990, was also found in the car. The tag cost $34.05 and was likewise purchased in cash (R 1478-1480, 1504-1505). None of the receipts reflected who paid for them (R 1515, 1527).

The house Whitton was renting was owned by Shirley George and had been previously occupied by Debra Sims (R 1501).

Appellant had been employed for two months at a printing business in Pensacola when he was fired October 10, 1990. He was earning $4.00 an hour and received his last full pay-check on October 4, 1990. He endorsed that check and cashed it with his employer as he did not have a local bank account (R 1529-1532). Whitton was supposed to work on October 8 and 9 but did not show for work on either day. He called his employer on the evening of Monday, October 8, and said he was in Ocala with his injured sister and would return to work on October 10. He was fired when he did not arrive for work on time that Wednesday (R 1533-1535).

Jake Ozio met Gary Whitton in the Walton County Jail after his arrest on April 4, 1992. Ozio was arrested for three bur-

glaries and confessed at the time of his arrest (R 1611-1612). While in jail, Ozio overheard two conversations between Whitton and another inmate, Kenneth Wayne McCullough. During the first conversation, Whitton said the only thing they had linking him to the crime was his bloody clothes. In the subsequent conversation, Whitton stated that the man went to the bank, withdrew money, and there was a fight. Whitton then allegedly said, "I stabbed the bastard" (R 1613).

Ozio was later taken around Fort Walton by investigators to locate pawn shops where he left various stolen items. He told the investigators at that time what he overheard in his cell. He had not yet entered a plea or been sentenced for the burglaries. Ozio subsequently was placed on five years' probation (R 1615-1616).

Ozio was 18 years old and had never been arrested prior to this. He was charged with three counts each of burglary of a dwelling and grand theft, and also possession of a short-barrel shotgun. The latter offense carried a five year minimum mandatory term (R 1617-1618). Ozio claimed he had tried to contact the captain several times to tell him what he overheard but was not able to get in touch with him. He heard Whitton's supposed confession two weeks before accompanying investigators to the pawn shops and spent an entire morning traveling to Fort Walton and trying to locate the pawn shops before ever mentioning the conversations to the captain (R 1619-1622).

Kenneth Wayne McCullough was serving a 15 year sentence at the time of trial. He first met Whitton at the Walton County

Jail in November, 1990. McCullough was in jail for 63 days on that occasion, but he returned to jail the following August and remained there until April 6, 1992. While in jail, McCullough assisted other inmates with their cases and talked to Whitton about his charge (R 1638-1639). Whitton told McCoullough in 1990 that he had been with a man in Freeport; the man took all of his money out of the bank; they checked into a motel; had a fight and the other man "kind of got the best of him" (R 1640). Whitton also said that he went home but came back later to get the money, and stabbed and killed the man (R 1640, 1642-1643).

In the first week of April, 1992, Whitton again discussed his case with McCullough. Whitton repeated the same story and told McCullough that he killed the bastard. Jack Ozio was in the same cell on the bunk above McCullough at the time of this conversation, and he could have overheard their conversation (R 1643-1645).

McCullough did not tell anyone about his conversation with Whitton until Sheriff McMillian interviewed him in prison after the sheriff talked to Jake Ozio. McCullough had already been sentenced to 15 years in prison with a three year minimum mandatory term and did not expect to benefit from his testimony (R 1645-1646).

McCullough claimed to have studied law for many years and usually got paid for helping people with their cases (R 1647). He never told anyone what Whitton told him in November, 1990. He thought Ozio had been in their cell for some time before he [McCullough] was transferred to DOC on April 6, although Ozio

was not arrested until April 4 (R 1648-1649). McCullough was close friends with the prosecutor's mother, and it was common knowledge that she visited him in the jail (R 1650). In his deposition, McCullough could not remember Whitton telling him that he stabbed the bastard (R 1651). McCullough had a motion for modification of his sentence pending (R 1652).

The autopsy on James Mauldin was conducted on October 11, 1990 (R 1508, 1662). The victim had in excess of 20 injuries on his body (R 1677). These included three stabs wounds in the chest which perforated the heart and several lacerations on the scalp. The scalp wounds were caused by a blunt object (R 1680-1681, 1683, 1694). None of these injuries would have caused death instantly, and Dr. Kielman, the medical examiner, could not tell which wounds occurred first and which wounds actually caused death. The scalp injuries, however, would have caused pain and rapid unconsciousness (R 1682, 1684-1685). The other injuries were relatively minor and not fatal and included some defensive wounds (R 1685-1693). Mr. Mauldin also had a blood alcohol level exceeding .30 at the time of death, which would have restricted his ability to defend himself (R 1678, 1691). The cause of death was due to loss of blood (R 1694). Death occurred within 24 hours of the body being found (R 1698-1699).

Law enforcement first contacted Whitton at his residence at 1:30 a.m. on October 11, 1990 (R 1754). Whitton was taken to the sheriff's department, advised of his rights and interviewed for three hours (R 1755, 1763). Over defense counsel's renewed objections (R 1756-1759), Investigator Cotton repeated

Whitton's statements during that interview. Whitton initially stated that he dropped off Mr. Mauldin at the "Sand and Motel" on Destin beach on the morning of October 9, stayed there a few minutes, went to Maureen Fitzgerald's house in Gulf Breeze, and returned to Pensacola. Whitton acknowledged that he signed in at the motel for Mauldin and helped Mauldin carry in his bags. He denied returning to the motel after that (R 1763-1764). He also mentioned that he drove Mauldin to the bank in Destin but claimed he did not know how much money Mauldin withdrew. After registering at the motel, he and Mauldin went to a convenience store across the street to purchase a bottle of wine and pack of cigarettes (R 1765). Whitton then described his activities in Pensacola the reminder of the day and until he arrived home around 8:00 p.m. He said he stayed home the rest of the night (R 1766).

On Wednesday, October 10, Whitton went to Mobile to renew his license tag. He had dinner that night with Shirley George (R 1767). He denied letting anyone borrow his car during that time frame (R 1768). Upon further questioning, Whitton admitted going inside the bank with Mr. Mauldin and helping with the bank withdrawal. He also admitted leaving a false tag number at the motel, although he emphatically denied returning to the motel on the night of the murder (R 1768).

At 4:30 a.m., Whitton changed his story and stated that he did return to the motel at midnight to tell Mauldin his mother was looking for him. He claimed that Mauldin was dead when he

arrived (R 1770). Whitton said blood seeped into the soles of his boots, and he threw his socks out of the car window on the trip home. He wiped off his boots at home. He denied killing his friend (R 1770-1771).

The questioning ended at 5:15 a.m. when, according to Mr. Cotton, "once we were getting much closer to what we felt was the truth and we were tightening down on him being at the murder scene, he [Whitton] decided he did not want to talk to us anymore" (R 1771).

The state rested (R 1775).

Defense counsel moved for a judgment of acquittal on both counts on the grounds that there was no evidence of premeditation or of a robbery. The motion was denied (R 1783-1784).

Four witnesses testified for the defense.

Public Defender investigator James Graham interviewed the motel clerk at the Sun and Sand Motel on October 31, 1990. Mr. Maleszewski stated at that time that he heard a car door slamming at approximately midnight, went back to bed, and ten or 15 minutes later, heard the car door slam again. When he looked out the window, he saw an individual in the car (R 1785-1787). Maleszewski said he saw Whitton's car (R 1788).

FDLE fingerprint expert Thomas Simmons collected various items from the motel room on October 10, 1990, to examine for fingerprints. An ice bucket from the refrigerator of room 5 contained one latent fingerprint. The print, however, did not match either appellant's or Jame Mauldin's known prints. One latent print was lifted from a Boone's Farm wine bottle found

in the bathroom of the motel room; this print likewise did not match either Whitton's or Mauldin's. The same was true of one print lifted from a sandwich wrapper found on top of the motel room bed and prints lifted from a cigarette wrapper and a paper bag recovered from the nightstand (R 1790, 1792-1798).

Whitton's fingerprints were on a paper bag located under the corner of the bed near the victim's body (R 1807-1808).

Gary Whitton testified on his own behalf that he had known James Mauldin for over a year. They met at a halfway house in Pensacola where both men were receiving alcohol treatment, and they continued to see each other at AA meetings. On October 6, 1990, Mauldin arrived at Whitton's house in a taxicab. Whitton gave him a ride to the halfway house and did not see him again until Mauldin returned to Whitton's house the following morning intoxicated. Mauldin stayed with him Sunday, October 7, and Monday, October 8. On Monday, Whitton drove Mauldin to a bank in Destin because Mauldin had lost his money, but the bank was closed. They went to visit Mauldin's mother and then returned to Whitton's house in Pensacola (R 1814-1820).

On Tuesday, Whitton and Mauldin went back to the bank in Destin. Whitton sat in the waiting area while Mauldin went up to the counter to make his withdrawal. When Mauldin was unable to make the withdrawal without a bank book, he summoned Whitton to the counter. Whitton testified that he filled out the form for Mauldin to close his account because Mauldin was already intoxicated that morning. Mauldin signed the form himself, and Whitton returned to the waiting area while the transaction was

completed. Whitton never knew how much money Mauldin withdrew that day (R 1821-1823).

After leaving the bank, Mauldin wanted to sober up and see his father, and he asked Whitton to take him to a motel on the beach in Destin. They went to the Sun and Sand Motel. Mauldin talked to the clerk about the room and inquired whether Whitton could fill out the registration form for him. Whitton said he used Mauldin's name on the registration but used a fictitious address and tag number because he did not want to be responsible if anything was missing from the room (R 1823-1825). After registering, Mauldin walked to the room; Whitton drove and carried in Mauldin's bags, including a paper bag with Mauldin's dirty clothes (R 1826). They sat in the room talking for five or ten minutes, then walked across the street to a store, where Mauldin bought a bottle of wine and cigarettes. They returned to the room and talked a few more minutes (R 1826-1828).

Whitton stopped in Gulf Breeze to see Maureen Fitzgerald on his way back to Pensacola. He knew Maureen as Mauldin's ex-girlfriend and wanted to relay something Mauldin had told him. He told Maureen where Mauldin was staying in Destin and that they had been to the bank that morning. He also tried calling Mauldin's mother from Maureen's house because he knew she had been looking for her son (R 1828-1831). Whitten spent the rest of the day in Pensacola. He tried calling Mauldin's mother all that day but was not able to reach her (R 1831-1832, 1834).

Later that night, Whitton decided to return to the motel to check on Mauldin and let him know that his mother had been

looking for him. When he arrived at the motel, another car was parked in front of Mauldin's room, and the door to the room was ajar. Whitton knocked but no one answered. He entered and saw blood everywhere. He walked into the room and found Mauldin's body on the floor under a blanket. Mauldin appeared to be dead (R 1834-1836). Whitton was scared and drove home to Pensacola. He stopped for gas in Pensacola and spent the rest of the night at home. He said his feet were wet because of the holes worn in the sides of his boots (R 1836-1839).

The next day, he went to Mobile, primarily to get away and also to renew his license tag. When he went to work later that day, he was fired because he failed to show up Monday, Tuesday, and Wednesday morning. Whitton called his employer to say that he would not be in that Monday and Tuesday because his sister was sick and he had to go to Gainesville, but he really missed work because James Mauldin had to go to Destin and had no other transportation. Whitton had intended to quit work anyway since he had another job opportunity working offshore (R 1839-1841).

Whitton paid his utility and gas bills the same day. He had been paid the previous Friday and Debra Renee Sims gave him money for her share of the bills (R 1841-1843).

Whitton never contacted the police because he was in shock and did not want to get involved. He denied killing Mauldin (R 1843).

Whitton testified on cross-examination that he had more than $200 on Sunday, October 7. Ms. Sims had given him money; he had been paid the previous Friday, and he sold his kitchen

set for $100 (R 1844-1845). Whitton lied when he called his employer on Monday night and said his sister was sick. He did it to help his friend, James Mauldin (R 1847-1848). He called Mauldin's mother, Mrs. McCoy, from Maureen Fitzgerald's house on Tuesday. He called her again from the halfway house, from his friend Cindy's house and several times from his house. He stopped calling her around 9:30 or 10:00 p.m. (R 1848-1849).

Whitton went out Sunday night with Cindy and left Mauldin asleep at his house. He knew that Mauldin wanted to go to the bank the next morning to get money (R 1857-1858). He denied knowing how much money Mauldin withdrew from the bank Tuesday morning (R 1854-1855, 1864). Whitton carried Mauldin's duffle bag and a paper bag into the motel room that morning (R 1859). When he returned that night, he walked as far as the end of the bed, looked around the room and saw the body. He picked up a corner of the blanket to see if it was Mauldin, then left the room (R 1869). He was in the room no more than a minute (R 1872). Whitton never looked to see if there was blood on his boots and never washed them. He could not explain how blood got inside his boots (R 1870-1871).

On redirect examination, Whitton stated that he only had $50 when he was arrested (R 1882).

On recross-examination, Whitton said he was in the motel room approximately thirty minutes that morning, although he told Investigator Cotton he was there a few minutes (R 1884-1885). Whitton maintained the only lie he told Cotton was that he never returned to the motel (R 1885). The prosecutor then

inquired what he said after telling Cotton he returned to the motel, reminding Whitton that he refused to talk after that (R 1885-1886).

During a break in the proceedings, defense counsel advised the court someone identifying himself as Sheriff McMillian of the Walton County Sheriff's Department contacted a defense witness, Shirley Zeigler of FDLE, the previous afternoon and asked if she was going to testify at trial the next day. The caller then advised Ms. Zeigler to "leave the lab" so she could not be served and would not testify (R 1887-1888). Zeigler reported the telephone conversation to defense counsel upon arriving at court that day. The witness believed the call was intended to prevent her appearance in court (R 1887-1888). Counsel moved for a mistrial or other sanctions pending an evidentiary hearing at a later date, and the trial court agreed to schedule a hearing (R 1887-1891).

Shirley Zeigler then testified that she was a serologist at the FDLE crime lab and was trained to perform DNA testing. She was qualified without objection as an expert in DNA analysis (R 1899-1901). Zeigler compared swabbings from Whitton's boots with Whitton's and the victim's known blood samples and concluded that the DNA from the swabbings on the boots did not match the blood of either Mr. Mauldin or Mr. Whitton (R 1903-1904, 1907).

The defense rested following this testimony (R 1910), and renewed its motion for judgment of acquittal, which motion was again denied (R 1912-1913).

The state presented one rebuttal witness. Grace McCoy, James Mauldin's mother, testified that she saw Gary Whitton and her son at her home on the Monday before Mauldin's death. The next day, October 9, she went shopping in Pensacola and drove by Maureen Fitzgerald's house to check on her son. She arrived at home around 2:30 p.m. and did not leave the house again that day (R 1916-1917). She was home all that evening and never received a telephone call from Gary Whitton (R 1917-1918).

The state rested (R 1926), and defense counsel renewed all previous motions, with the same rulings (R 1926-1927).

During the state's final summation, the prosecutor argued that Whitton "kept on and on" telling Investigator Cotton that he never went back to the motel,

> But in the last part of that interview, before the defendant says, 'I'm not talking to you anymore,' he tells him, 'I went back over there, I walked in, and I saw my friend dead, and I left.' Then he doesn't say anything else. He realizes at that point, 'Uh-oh.'

(R 1956). Defense counsel immediately objected and moved for a mistrial based on the prosecutor's impermissible comments on Whitton's silence. The state retorted that this was merely a comment on the evidence. The court implicitly sustained the objection but denied the motion for mistrial. Defense counsel declined the court's offer of a curative instruction (R 1956-1958).

Following closing arguments and instructions on the law (R 626-643, 2007-2032), the jury deliberated and returned with its verdicts finding appellant guilty as charged on both counts (R

2034-2035). The court adjudicated Whitton guilty (R 2036-2037) and continued the cause for a penalty phase proceeding.

C. PENALTY PHASE

The penalty phase commenced on August 3, 1992.

Defense counsel objected to the court instructing the jury as to both aggravating factors under Section 921.141(5)(a) and (b), arguing that both circumstances relied upon the same prior felony and therefore constituted impermissible doubling. That objection was overruled (R 2050-2052, 2104). The court agreed to instruct the jury that the crime was committed for pecuniary gain, under Section 921.141(5)(f), the state having waived an the aggravating factor under Section 921.141(5)(d) (R 2053). The court also agreed to instruct the jury on the aggravating circumstance of avoiding or preventing a lawful arrest, Section 921.141(5)(e) (R 2110), over defense objections (R 2053-2059), and following a proffer of Kenneth Wayne McCollough's testimony (R 2106-2110).

The state waived the instruction that the murder was committed in a cold, calculated and premeditated manner, Section 921.141(5)(i), Florida Statutes (R 2085).

Appellant opposed any instruction on Section 921.141(5)(h) and alternatively moved to strike the standard jury instruction on the heinous, atrocious, or cruel aggravator on the ground that the instruction was unconstitutionally vague (R 2059-2082, 2084-2085). The defense proposed the following instruction:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious

> or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.

(R 623-625). The trial court found sufficient evidence to present the aggravating factor to the jury, but limited both the evidence and arguments to events occurring before the victim's death and before he lost consciousness. The court also denied appellant's requested instruction on the heinous, atrocious and cruel aggravating factor (R 623, 2104-2105), and instructed the jury as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(R 648, 2247).

Three state witnesses testified at the penalty phase.

Kenneth McCollough testified that Whitton mentioned that he was on parole from Alabama (R 2121) and said:

> [A]fter him and the gentleman [victim] had got in a confrontation and he had come back over, he had to kill the witness, because if he didn't he would be a witness to testify against him and that they would have got in the previous confrontation and what-have-you and by doing away with the witness, that way he didn't feel like he would be caught and his parole violated.

(R 2122).

McCollough explained on cross-examination that Mr. Whitton said he and Mauldin had a confrontation at the motel earlier in the day, before Whitton returned to Pensacola, and that Mauldin was hurt. McCollough previously testified that Mauldin got the better of Whitton in the fight. McCollough had the impression that this was not a serious altercation. He said Whitton went back to rob Mauldin and after he robbed him he had to kill him (R 2122-2124).

Steven Green supervised Gary Whitton on parole in Alabama. Whitton was sentenced to ten years for robbery on November 13, 1981, and released on parole on February 23, 1987. He was on parole on October 9, 1990 (R 2125-2129).

Green supervised Whitton for a year and a half and saw him frequently during that time. Whitton conformed to the rules of parole and Green never had any problems with him. Whitton pled guilty to the robbery charge (R 2130-2132).

Dr. Kielman, the forensic pathologist, observed the blood in the motel room where the victim was found and surmised that the first injuries occurred on the south bed. Kielman opined that the initial blows did not render the victim unconscious because of the amount of blood between the bed and place were

the body was found and that the victim walked from the bed to the north wall bleeding the whole time (R 2135-2137). There were defensive wounds on the victim's palm and arm (R 2137). The blows to Mauldin's head and three stab wounds to his heart were all fatal. According to the pathologist, the head injury was probably inflicted after the victim moved from the bed to the wall and rendered him unconscious (R 2138-2139). Mauldin could not have moved very far with the heart wounds, and either the stab wounds or head injuries would have caused death rather rapidly (R 2139-2140).

Kielman stated on cross-examination that Mauldin's blood alcohol level, .340, would have a depressant effect and act as an anesthetic (R 2142-2143). Kielman said there was no way he could measure the length of time between the initial and final, fatal, blows, but estimated that if there was a struggle going on, the incident could have lasted thirty minutes at the most (R 2144-2146). He thought this was a very sudden and violent, and very rapid event (R 2146-2147).

Dr. James Larson was qualified as an expert in psychology (R 2153-2154) and testified that he evaluated Mr. Whitton twice in 1991 and administered both cognitive and personality tests. Mr. Whitton had a verbal IQ of 85, a performance IQ of 87, and a full scale IQ of 84, placing him in the low to normal range of intelligence (R 2155-2157). However, he placed lower than expected on the WRAT, or achievement tests, falling in a ninth grade reading level and scoring at a sixth grade level in spelling and arithmetic (R 2157-2158).

The MMPI indicated a personality instability, which is often associated with children who grow up in a disruptive or chaotic environment, with alcohol or drug abuse, and with occupational instability (R 2160-2161). Records obtained from a mental health facility in Pensacola confirmed that Whitton was an alcoholic, had a long history of substance abuse, and had presented himself for treatment several times. He was in a treatment program for six months in 1988, followed by three months in a halfway house. He reentered the alcohol treatment program again in January, 1990, but was discharged on September 13, 1990 for failure to make payments and noncompliance with house rules. Whitton was on antabuse following the programs. Dr. Larson diagnosed Whitton as having alcohol dependence (R 2161-2162, 2174). He said Whitton had good insight into his alcohol problem and was actively involved in his own treatment (R 2163).

Whitton had a very chaotic and abusive childhood. Both of his parents were alcoholics, and his father physically abused him and sexually abused one of his sisters. After his parents' divorce, he was moved between various homes of family members and acquaintances. His mother remarried another alcoholic (R 2164). Whitton's whole childhood, according to Dr. Larson, was inundated with physical and emotional abuse. Although Whitton did not suffer from a major mental illness, he was emotionally unstable and prone to substance abuse as a result of his childhood (R 2164-2165). His mother also consumed alcohol during

her pregnancy, which potentially contributed to the cognitive functioning and personality instability (R 2166-2167).

In his evaluations of appellant, Dr. Larson noted several non-statutory mitigating factors: limited intellectual ability; educational deprivation; cultural deprivation; emotional deprivation; neglect; physical abuse; emotional abuse; possible fetal alcohol syndrome; alcohol abuse; Whitton he was an adult child of an alcoholic; was deficient of positive role models, and he lacked a prior violent history (R 2176-2177).

The prosecutor inquired whether Larson found any applicable statutory mitigating factors, and Larson stated that he did not. The prosecutor then inquired whether the list he recited was "what we've been talking about as a catchall?" (R 2177). Defense counsel objected that the prosecutor's question implied that non-statutory mitigating factors were entitled to less weight than statutory mitigators. The prosecutor withdrew the question, and the court did not rule on the objection (R 2177-2178).

Royal Whitton, appellant's brother, testified that their parents drank daily when Gary and Royal were children. Royal's mother potty trained him by sticking his head in the toilet. They heated the house with a stove and would pulled wood off of the walls of their house to burn in the stove. Once, Gary's father caught him taking wood off the wall, picked him up by the collar and seat of his pants and threw him head first into the wall. That kind of abuse was a daily occurrence in their household (R 2181-2183). There were no bedrooms in the house

because all of the walls had been torn down, and Royal and his eight siblings slept in one room. Half of them slept on a mattress and the rest slept on the floor. The windows in the room were broken, and sometimes there would be snow on their bed (R 2184-2185).

Renee Sims and Gary Whitton had been good friends for four years. Sims trusted Whitton with the care of her children, and her children loved him and missed him. Whitton helped Ms. Sims when she separated from her husband, and he helped her children clean their rooms. Whitton voluntarily checked into a halfway house because of his drinking problems and counseled her on the dangers of alcohol abuse (R 2189-2191).

Shirley George, Renee Sims' mother, had known Whitton for four years also. Whitton was a frequent guest in her home and became a part of her family. He treated Renee like a sister, and called Mrs. George "mom." At first, the witness thought of Whitton as a lost child. George never saw him take a drink and thought he was doing well. Her five year old granddaughter was was very close to her Uncle Gary and would let him say prayers with her at night. Whitton was excellent with the children and they responded well to him. Mrs. George said she trusted him completely with her grandchildren (R 2193-2194).

Mrs. George volunteered at the Favor House, a shelter for abused women and children, and she recognized the symptoms of child abuse in Mr. Whitton (R 2196-2198). Whitton never talked to her about his family, except to express his feelings that he wished he had had a mother like Mrs. George (R 2199).

Whitton's aunt, Ruth McGuinness, testified about Whitton's childhood. Appellant and his siblings were all abused by their parents, according to McGuiness. She recalled a specific time when Whitton was four or five years old and his mother made him sit on the back steps in the snow wearing only boxer shorts and a thin T-shirt (R 2200-2201). She saw Whitton's mother hit him and pull his hair many times. Once, the children were locked in their upstairs bedroom when their mother was away from home. The single bed in the room was rotted in the middle from being wet on so much, and it smelled so badly in the room, McGuinness said, that she could hardly breathe in there. The plaster had been torn off the walls; there was plaster on the floor, on the bed and on the children (R 2202).

Whitton's mother beat the children and made them stand in the corner for hours at a time whenever they cried or disturbed her. On one occasion, she gave Whitton's brother, Bob, a slice of bread with butter for lunch and made him stand in the corner for five or six hours because he tore off the crust and threw it away (T 2202-2203). Whitton's mother even whipped Valerie, her four day old baby, for crying at night. She whipped the baby and then threw her back in the crib like a bouncing ball. She fed Valerie wine or paregoric in a baby bottle to put the infant to sleep. It was common for her to feed all her babies paregoric to make them go to sleep (R 2203).

Mrs. McGuinness spoke to her brother, appellant's father, many times about the abuse of the children but nothing came of it. Even when the police were called, nothing happened. When

the welfare agency made appointments to come investigate, the house was cleaned, the children were cleaned and there was food in the refrigerator. The children usually did not have much to eat (R 2203-2204). McGuinness said whe was afraid of Whitton's father. She tried standing up to him once when he was beating his wife, but he threatened to beat McGuinness, too (R 2204).

The final defense witness was Dorothy McGuire, who testified that she met Gary Whitton at the Lakeview Center in 1988 when Whitton was assigned as her husband's big brother in the rehabilitation program. The program lasted six months. A year after the program ended, Whitton was still concerned and trying to help McGuire and her husband (R 2208-2211).

Both parties rested (R 2229).

Following closing arguments (R 2230-2238, 2239-2245), and the court's instructions on the law (R 647-651, 2245-2253), the jury returned its unanimous death recommendation (R 646, 2255). In sentencing appellant to death, the court found five aggravating circumstances: that Whitton was under sentence of imprisonment, i.e., on parole for a 1981 robbery; that Whitton had previously been convicted of a felony involving the use or threat of violence, i.e., the 1981 robbery; that the homicide was committed for the purpose of avoiding lawful arrest; that the murder was committed for pecuniary gain, and that the crime was especially heinous, atrocious or cruel. The court also found several non-statutory mitigating factors: Whitton was mentally and physically abused by his two alcoholic parents; he had a deprived childhood and poor upbringing; he was an

alcoholic and had insight into and motivation to obtain help for his problems; he was a hard worker when he was employed; he helped others and was good with children; he had an IQ in the low average range and he performed at a sixth grade level, consistent with his alcoholism and history of child abuse, and, finally, he was a child of God and a human being (R 691-197).

IV SUMMARY OF THE ARGUMENT

Issue I. During the state's case-in-chief, Investigator Allen Cotton testified that Whitton refused to answer anymore questions after three hours of interrogation. Then, in cross-examining appellant, the state three times called attention to appellant exercising his right to remain silent after admitting that he returned to the motel on the night of the murder. The prosecutor reminded the jury of this fact again in its closing argument, boldly stating that after three hours of questioning, appellant refused to talk anymore.

This testimony and argument infringed on appellant's constitutional right to remain silent and constituted reversible error. Appellant is entitled to a new trial.

Issue II. The trial court erroneously denied appellant's motion to suppress all of his statements following his illegal arrest. The court correctly found that appellant was arrested when five officers appeared at his home, armed, at 1:30 in the morning to question him. It is abundantly clear from the evidence presented at the suppression hearing that the officers lacked probable cause to arrest appellant. Because there was no clear and unequivocal break between the illegal arrest and appellant's statements, all of the statements flowing from the unconstitutional seizure should have been suppressed.

Issue III. Appellant objected to the trial court reading the standard jury instruction on the aggravating circumstance under Section 921.141(5)(h), Florida Statutes. The reading of a vague instruction on this aggravating factor has been held to

require a new penalty phase. Espinosa v. Florida, infra. The instruction given below was more detailed than the instruction given in Espinosa but was still unconstitutionally vague in that it failed to provide adequate guidance to the jurors in their application of this aggravating circumstance. This case must be remanded for a new penalty phase with proper limiting instructions on the HAC aggravating factor.

Issue IV. Appellant contends in this issue that there was no competent, substantial evidence to support the trial court's HAC finding. The uncontroverted evidence was that Mauldin was highly intoxicated and probably in a stupor when first attacked and was semi-conscious and possibly unconscious when the final, fatal stab wounds were inflicted. The state's own witness, Dr. Kielman, opined that the whole incident was a very rapid event and that death occurred quickly. Moreover, the evidence fails to support a finding that appellant intended to inflict a high degree of pain or otherwise torture the victim. The state thus failed to prove beyond a reasonable doubt that this aggravating factor existed. Appellant's death sentence must be reversed.

Issue V. The court below gave the standard jury instruction on the avoiding lawful arrest aggravating factor, Section 921.141(5)(e), Florida Statutes. This instruction suffers the same constitutional infirmities as the jury instruction on the heinous, atrocious or cruel aggravating factor in that it fails to limit the jury's discretion in applying the avoiding arrest aggravating factor. The instruction does not advise the jury that eliminating a witness must be the sole or dominant motive

for the homicide, as required for application of this factor. The failure to give a correct and complete jury instruction on an aggravating factor is fatal to the jury's sentencing recommendation. Appellant must be given a new penatly proceeding.

Issue VI. The evidence below was legally insufficient to establish beyond a reasonable doubt that the dominant or sole motive for the murder was to avoid arrest. It was undisputed that appellant and the victim were friends and that appellant willingly and noticeably assisted Mauldin in withdrawing money from the bank and registering at the motel. It was also undisputed that the victim was highly intoxicated at the time of his death and was initially attacked while he was lying in bed with his head on the pillow. It could reasonably be inferred from the evidence that appellant intended to wait until Mauldin was either asleep or passed out and then rob him without a physical confrontation but that the victim woke up from his stupor and a deadly struggle ensued. The fact that Whitton knew the victim is not sufficient to support this aggravating factor. The trial court erred in finding this aggravating circumstance.

Issue VII. At most, three statutory aggravating factors exist in the instant case. These factors, when weighed against the substantial and compelling mitigation presented below, do not justify imposition of the death penalty. Appellant's death sentence should be vacated and the case remanded for imposition of a life sentence with no possibility of parole for 25 years.

V ARGUMENT

ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR COMMENTED ON HIS POST-ARREST SILENCE DURING CLOSING ARGUMENT, IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, FLORIDA CONSTITUTION.

It is a fundamental principle of constitutional law that a defendant in a criminal prosecution cannot be penalized for exercising his Fifth Amendment privilege against self-incrimination. U.S. Const. amends. V, XIV; Fla.Const. art. I, §9; State v. Burwick, 442 So.2d 944 (Fla.1983). Any reference at trial to an accused's post-arrest silence violates that privilege against self-incrimination. Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976)(violation of due process to cross-examine defendant about his failure to make a post-arrest statement consistent with his trial testimony after he had been given Miranda warnings, including the right to remain silent). In Miranda itself, the Court stated:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

Miranda v. Arizona, 384 U.S. 436, 468, n. 37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Three times the state violated this principle at the trial below.

The first instance occurred in the state's case-in-chief when Investigator Allen Cotton testified that appellant refused to answer anymore questions after three hours of interrogation. After describing appellant's custodial statements in detail (R 1763-1771), Cotton gratuitously advised the jury that

> at 0515 a.m. he [Whitton] decided, once we were getting much closer to what we felt was the truth and we were tightening down on him being at the murder scene, <u>he decided he did not want to talk to us anymore</u>.

(R 1771). This testimony wrongfully suggested to the jury that guilt could be inferred from Whitton's exercising his right to remain silent. The jury, however, was not allowed to make that inference.

The second comment on appellant's privilege against self-incrimination was equally blatant and a deliberate attempt by the prosecutor to attack appellant's credibility based on his silence in the face of accusation. On cross-examination, the prosecutor inquired why appellant lied to Allen Cotton about returning to the motel, and Whitton replied that he was "still scared" (R 1875). The prosecutor then returned to this theme on recross-examination, inquiring as follows:

> Q. And you were lying to him [Cotton] constantly, weren't you?
>
> A. I lied to him up to -- The only point that I lied to him was the fact that I told him at first I did not go back there.
>
> Q. And what did you do when you told him, what did you do after that when you told him you didn't go back there?

A. I told him --

Q. <u>You didn't say anymore, did you</u>?

A. Excuse me?

Q. <u>You didn't say anymore then, did you</u>?

A. No, I did tell him after awhile that I did go back there.

Q. <u>And when you told him that, then you didn't say nothing else</u>.

A. No, sir.

(R 1885-1886). Three times the prosecutor called attention to appellant exercising his right to remain silent in the face of accusation. The prosecutor's recross-examination concluded on this illicit note.

The state's questioning was clearly susceptible of being interpreted as a comment on appellant's silence, especially in light of Cotton's earlier testimony that Whitton "decided he did not want to talk to us anymore." <u>See</u> <u>David v. State</u>, 369 So.2d 943 (Fla.1979)(any evidence or testimony which is fairly susceptible of being interpreted by the jury as a comment on the defendant's exercise of his right against self-incrimination is grounds for reversal). Certainly the jury would take the discrepancies between Whitton's first and final statements and his refusal to answer more questions after admitting that he returned to the motel as inferring that his testimony was fabricated, when in fact Whitton's silence may have indicated nothing more than his desire not to communicate further with law enforcement in the absence of counsel as he had a consti-

tutional right to do. This comment on appellant's right to remain silent during cross-examination was reversible error. Doyle v. Ohio, supra; Willinsky v. State, 360 So.2d 760 (Fla. 1978)(reversible error for prosecutor to examine defendant at trial concerning the exercise of right to remain silent).

The crowning blow came in the final summation to the jury when the prosecutor argued:

> He tells Allen Cotton that he doesn't go back over there, never went back over there. He kept on and on. And sure, they question him for three hours, and they'll question the next person for that length of time. But in the last part of that interview, before the defendant says, 'I'm not talking to you anymore,' he tells him, 'I went back over there, I walked in, and I saw my friend dead and I left.' Then he doesn't say anything else. He realizes at that point, 'Uh-oh.'

(R 1956). Defense counsel promptly objected to this improper argument and moved for a mistrial (R 1956). Noting that, "I think it is a close question" (R 1957), the trial court denied appellant's motion for mistrial but offered to give a curative instruction, which the defense declined (R 1957-1958).

The prosecutor's reference to appellant's silence in his closing argument was indefensibly improper, highly prejudicial and warranted a mistrial.

As noted above, once Whitton asserted his right to remain silent, the state could not penalize him for exercising that right by informing the jury of that fact. State v. Burwick, supra. It does not matter that appellant initially waived his Fifth Amendment rights and made some statements to the police,

since it is clear that an accused may invoke his constitutional right to remain silent at any time even after he has agreed to answer questions. See Miranda v. Arizona, 384 U.S. 436, 445, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 707 ("The mere fact that [a defendant] may have answered some questions . . . does not deprive him of the right to refrain from answering any further inquiries . . ."); and State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Torrence v. State, 430 So.2d 489 (Fla. 1st DCA 1983). Accordingly, even though Whitton agreed to talk to Investigator Cotton for more than three hours, he had the right to cut off the interrogation at any time and for any reason, and the state was absolutely prohibited from mentioning it at trial.

Appellant's silence, after being informed of his right not to answer any questions, was not pertinent to any issues in the case; it could not serve to contradict any testimony by appellant and was not irrelevant to any issues that could have been properly considered by the jury. The comment served only the impermissible function of calling attention to Whitton's exercise of his constitutional right to remain silent.

State v. DiGuilio, 491 So.2d 1129 (Fla.1986), precludes application of the harmless error rule under these facts. At all times, Whitton admitted that he took James Mauldin to the bank and helped register Mauldin at the Sun and Sand Motel. In his initial statements to law enforcement, he denied returning to the motel that night, but later admitted that he went back, entered the motel room and found his friend dead on the floor. At trial, he maintained that he went back to check on Mauldin

and panicked when he found his friend dead.[1] Except by virtue of the impermissible inference arising from his silence in the face of accusation, appellant's statements at the time of his arrest were entirely exculpatory and consistent with his trial testimony.

Moreover, evidence of appellant's guilt was far from overwhelming, and it cannot be said beyond a reasonable doubt that the improper testimony and argument did not contribute to the verdict. The state's case-in-chief revolved primarily around circumstantial evidence: appellant's knowledge that the victim had withdrawn money from the bank; cigarette butts in the motel room with Type O blood, consistent with Whitton's; minute blood stains matching the victim's blood type inside appellant's car and blood spatters in his boots; appellant's alleged financial straits and the payment of two overdue bills and renewal of his car registration the day after Mauldin's murder, and, finally, appellant's belated admission that he returned to the motel on the night of the homicide. This evidence was far from conclusive of guilt. Appellant's purported jailhouse confession to Kenneth Wayne "Satan" McCollough, and overheard by Jake Ozio, did not render the state's case any more compelling. Neither McCullough nor Ozio immediately contacted law enforcement with

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[1]This testimony was consistent with appellant's statements to his friends, Renee Sims and Shirley George, shortly after his arrest. <u>See</u> Depositions of Deborah Renee Sims (R 339-341) and Shirley W. George (R 356-361).

this information, and both had much to gain by their favorable testimony for the state. While both inmates supposedly heard Whitton say he killed the bastard, neither provided any details about the crime which could corroborate the physical evidence.

In addition, there was evidence consistent with Whitton's claim of innocence. It was undisputed that Whitton and Mauldin were good friends, that Mauldin sought out Whitton after coming back on-shore, spending two nights at Whitton's house, and that Whitton missed two days of work in order to assist Mauldin, who had no other means of transportation. Moreover, Whitton made no attempts to hide his association with a visibly intoxicated Mauldin, aiding his friend in withdrawing money from the bank and registering at the motel, visiting Mauldin's ex-girlfriend to let her know where Mauldin was staying, and even attempting to call Mauldin's mother. Furthermore, Whitton explained that he had money from Ms. Sims and his last pay check and also from selling furniture in order to pay his bills, and he had another job opportunity off-shore. Although Mauldin withdrew $1,135.88 from the bank on the day of his murder, Whitton had merely $50 at the time of his arrest (R 1882), and presumably no any money was seized during the search of his home and vehicle.

Other evidence at trial was similarly ambiguous. Although the state theorized that blood spattered inside Whitton's empty boots at the time Mauldin was stabbed, FDLE serologist Shirley Zeigler determined that this blood did not match the victim's DNA. Fingerprints in the motel room and saliva on a cigarette butt in the paper bag likewise did not match either Whitton's

or the victim's prints or blood types. (Five other cigarette butts in the same bag all contained the victim's blood type.)

The fact that Whitton refused to talk further after three hours of questioning, and after finally admitting that he did return to the motel that night, had no bearing on the issues at trial, and the repeated introduction of such evidence penalized him for exercising his right to remain silent, in violation of the Fifth Amendment. The cumulative effect of these improper comments served to destroy any semblance of due process and a fair trial. Appellant is thus entitled to a new trial.

ISSUE II

THE TRIAL COURT ERRED IN DENYING IN PART APPELLANT'S MOTION TO SUPPRESS STATEMENTS BECAUSE THE STATEMENTS WERE THE PRODUCT OF AN ILLEGAL ARREST WITHOUT PROBABLE CAUSE, IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION.

Whitton moved to suppress his statements to law enforce-ent officers on the ground that the statements were initially given without benefit of Miranda warnings and his subsequent statements were tainted (SR 1-2). The trial court granted in part and denied in part the motion, ruling that appellant was in custody when five officers arrived at his home, armed, at 1:30 in the morning and questioned him. The court found that Whitton "believed and a reasonable man would have believed that his freedom of action was curtailed to a degree associated with actual arrest" (R 615). The court gave credence to Whitton's testimony that "when the law shows up with guns and tells you to come to the Sheriff's Office, you don't have no choice" (R 616), and consesegently suppressed the statements made at his home and at the Sheriff's Office prior to being advised of his Miranda warnings. The court ruled, however, that appellant's post-Miranda statements were knowingly and voluntarily made and thus admissible (R 616-617).

It is well established that Miranda warnings are required only when a suspect is in custody. Caso v. State, 524 So.2d 422 (Fla.1988). In determining whether a suspect is in custo-dy, the ultimate inquiry is whether there is a formal arrest or

restraint on freedom of movement of the degree associated with a formal arrest. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); Caso v. State, supra. The courts apply an objective test, i.e., whether, under the cicurmstances as they existed at the time, a reasonable person would have believed he was in custody, in resolving the question of custody. Drake v. State, 441 So.2d 1079 (Fla.1984).

The testimony at the suppression hearing below indicated that five officers arrived at appellant's home at 1:30 in the morning, identified themselves and asked appellant to talk to them (R 768, 777-778, 795). The officers were not not in uniform, but they were all armed (R 779). After inquiring about his whereabouts the previous night, the officers asked Whitton to come to the sheriff's office for further questioning. The purpose of asking Whitton to come to the sheriff's department, according to Investigator Cotton, was "to ask him about his whereabouts on the late evening hours of 10/9 of '90 and the early morning hours of 10/10 of '90" (R 769).

Whitton testified that he was questioned at least twenty minutes at his home when Cotton asked him to come down to the station. He stated:

> [Cotton] asked me if I would come down to the station. He said I needed to come down to the station and clear this up. And I asked him if it could wait until the next morning. He says it needed to be cleared up tonight.
>
> Q. At that time did you believe that you could refuse to go?

A. Well, it's been my experience that if, you know, more than one officer comes to your door and they show you their badges and they're carrying weapons, you ain't really got much of a choice. And there was five of them at the time. So --

Q. So you felt that you were restrained and needed to go with them?

A. Yes, sir.

(R 796-797).

Based on these facts, the court below correctly ruled that appellant was in custody when the officers first questioned him at his home on October 11 and transported him to the sheriff's office for further questioning. See Caso v. State, supra, 524 So.2d at 424 (a trial court's findings regarding whether a suspect was in custody are clothed with presumption of correctness and will not be overturned if there is competent and substantial evidence to support the decision under the correct analysis). As appellant was seized in his home without a warrant--and without probable cause--his arrest was illegal, and all of his statements should have been suppressed. U.S.Const. Amends IV, XIV; Fla.Const. Art. I, §12; Dunaway v. New York, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975).

Investigator Cotton admittedly did not have probable cause for appellant's arrest when the officers appeared at Whitton's house on October 11. Cotton testified at the suppression hearing that "I had the basic background is all I had at this point from the investigators from Walton County" (R 770). He was not even sure if Whitton was a witness or suspect at that point ["I

was not sure if he was a witness or a suspect at that point. . . . It hadn't focused on him. They weren't sure if he was an actual witness or if he was a suspect"] (R 775). Cotton knew only that Whitton had a vehicle closely matching the one seen in the area of the motel on October 9 and that Whitton was with the victim on the morning of October 9. He had no information that Whitton was at the Sun and Sand Motel anywhere near at the time of Mauldin's death (R 775-776).

Probable cause exists where the totality of the facts and circumstances within an officer's knowledge would cause a man of reasonable caution to believe that a criminal offense has been committed by the person who is to be arrested. Blanco v. State, 452 So. 2d 520 (Fla.1984); State v. Stevens, 574 So.2d 197 (Fla. 1st DCA 1991); Robinson v. State, 556 So.2d 450 (Fla. 1st DCA 1990). The information above simply did not give the police probable cause to arrest Whitton for the murder of James Mauldin.

In State v. Stevens, supra, officers found the defendant and another male working under the hood of the victim's truck four hours after the victim was reported missing. The truck was parked in front of Stevens' sister's apartment. Stevens initially gave police a false name and claimed that the truck had broken down and that the victim had just left to seek help. The victim's body was found three days later. Detectives later located Stevens at his sister's apartment and said they wanted to talk to him about giving a false name to the police officer. Stevens did not want to go to the police station for question-

ing but was under the impression that he had no choice but to accompany the detectives. Stevens was not formally arrested at that time, and it was undisputed that the officers did not have probable cause to arrest him before taking him to the sheriff's office for questioning. The trial court found that Stevens was involuntarily seized and detained for interrogation, that this seizure and detention was tantamount to an arrest, and that the police lacked probable cause for the arrest. Stevens' arrest was thus illegal, and his statements were suppressed.

Here, as in State v. Stevens, supra, it is clear that the officers' intent was strictly to pick appellant up for investigatory purposes and that the police did not possess sufficient information to justify a belief that appellant had committed a crime. Appellant's was arrest was likewise illegal.

An illegal arrest presumptively taints any subsequent confessions or statements obtained from the victim of the arrest. State v. Rogers, 427 So.2d 286 (Fla. 1st DCA 1983). To remove the taint, there must be a clear and unequivocal break in the chain of illegality. Id. As recognized by the Supreme Court in Brown v. Illinois, 422 U.S. at 602, 45 L.Ed.2d at 426, where a defendant has been illegally arrested, the Fourth Amendment requires more than simply giving Miranda warnings to attenuate the taint of an unconstitutional arrest:

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. . . . Arrests made without warrant or without

> probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived thereform could well be made admissible at trial by the simple expedient of giving Miranda warnings.

Accord Dunaway v. New York, 442 U.S. at 217, 20 L.Ed.2d at 839. To determine whether or not subsequent statements are a product of a defendant's free will, Brown requires an analysis of three factors: 1) the temporal proximity between the illegal arrest and statements; 2) the presence of any intervening events, and 3) the purpose and flagrancy of the official misconduct. 422 U.S. at 603-604, 45 L.Ed.2d at 427.

Here, there was no clear and unequivocal break between the illegal arrest and Whitton's statements. Appellant was seized in his home at 1:30 a.m., transported directly to the Sheriff's Office at 1:50 a.m., advised of his Miranda rights at 1:58 a.m. and interrogated continuously until 5:15 a.m., when he cut off the questioning (R 768, 771-773, 785). See Brown v. Illinois, supra (less than two hours between arrest and Brown's statement with no intervening events of significance insufficient to cure taint of illegal detention); Dunaway v. New York, supra (same); State v. Stevens, supra (five hours between illegal arrest and confession alone failed to purge taint of illegal arrest). As in Brown and Dunaway, there were no intervening events between the illegal arrest and appellant's statements to attenuate the connection. Appellant was in continuous police custody and unrepresented by counsel, and there was no break in the three or more hours of questioning. See State v. Stevens, supra; Talley

v. State, 581 So.2d 635 (Fla. 2d DCA 1991). Furthermore, as in Brown, Whitton's arrest without probable cause had a quality of purposefulness; it was an "expedition for evidence in the hope that something useful might turn up." 422 U.S. at 605, 45 L.Ed. 2d at 428. As conceded by Allen Cotton in the hearing below, the purpose of taking appellant to the sheriff's department was "Basically to ask him about his whereabouts on the late evening hours of 10/9 of '90 and the early morning hours of 10/10 of '90" (R 769), and once Whitton mentioned James Mauldin's name, "at that point I felt the investigation had narrowed down and focused down at that point, . . ., at that point I felt I was in need to advise him of his rights" (R 772).

Although the court below held that appellant's statements after Miranda warnings were given were voluntary for purposes of the Fifth Amendment, this was merely a threshold requirement for purposes of the Fourth Amendment violation. Dunaway v. New York, supra; see also, State v. Eubanks, 588 So.2d 322 (Fla.4th DCA 1991). It is clear under the evidence presented below that Miranda warnings alone could not cure the taint of appellant's illegal arrest. It is undeniably clear that the police lacked probable cause at the time of the arrest and that their purpose in detaining appellant was obviously for investgatory purposes. The only information known to the officers at the time was that Whitton had been with Mauldin when the victim registered at the motel and that a vehicle matching the description of Whitton's vehicle was seen at the motel again later that night. Further, there were no intervening events whatsoever in the three and a

half hours between the illegal arrest and appellant's custodial statements. Appellant's statements should have been suppressed in their entirety.

The error in admitting appellant's statements cannot be deemed harmless beyond a reasonable doubt. The circumstantial evidence below was far from overwhelming, see Issue I, supra, and the only evidence placing appellant at the scene of the crime besides his statements was the testimony of the two jail inmates, whose credibility was highly in dispute. It cannot be said that the impermissible admission of Whitton's inconsistent statements did not affect the jury verdict. State v. DiGuilio, supra. This cause must be remanded for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN GIVING THE STANDARD INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE, SINCE THE INSTRUCTION UNCONSTITUTIONALLY FAILED TO LIMIT AND GUIDE THE JURY'S CONSIDERATION OF THE EVIDENCE.

Prior to the penalty phase, the defense moved to strike the standard instruction on the heinous, atrocious or cruel aggravating factor, Section 921.141(5)(h), Florida Statutes, on the ground that the instruction was unconstitutionally vague (R 2059-2082, 2084-2085), and proposed the following instruction:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.

(R 623-625). The trial court denied the motion and refused to give appellant's requested instruction (R 623, 2104-2105), and instructed the jury as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(R 648, 2247).

Appellant submits that the instruction given by the court was unconstitutionally vague because it failed to inform the jury of the findings necessary to support the HAC aggravating circumstance and a sentence of death. Amends. VIII, XIV, U.S. Const.; Art. I §§9, 16 and 17, Fla.Const.; Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Appellant recognizes that this Court has recently approved the current standard HAC instruction in Hall v. State, 614 So.2d 473 (Fla.1993), but nonetheless urges this Court to reconsider the issue in the instant case.

In Espinosa v. Florida, supra, the United States Supreme Court held that Florida's previous heinous, atrocious or cruel standard penalty phase instruction was unconstitutional. Prior to that ruling, this Court had consistently held that Maynard v. Cartwright, supra, which struck down instructions similar to Florida's as unconstitutionally vague, did not apply to Florida since the jury was not the sentencing authority. Smalley v. State, 546 So.2d 720 (Fla.1989). However, the Espinosa Court rejected that reasoning since Florida's jury recommendation is an integral part of the sentencing process, and neither of the two-part sentencing authority is constitutionally permitted to weigh invalid aggravating circumstances. Although the standard jury instruction given below included definitions of the terms heinous, atrocious and cruel, where the instruction in Espinosa did not, the instruction here, nevertheless, suffers the same

constitutional flaw. The jury was not given adequate guidance on the legal standard to be used when evaluating whether this aggravating factor applied.

In Shell v. Mississippi, supra, the state court instructed the capital jury on Mississippi's heinous, atrocious or cruel aggravating circumstance, using the same definitions for the terms, "heinous," "atrocious" and "cruel," as Judge Melvin used in this case. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded the case to the trial court stating, "Although the trial court in this case used a limiting instruction to define the 'especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.E.2d at 4. Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Whitton's jury were likewise constitutionally inadequate. This Court recently held that the mere inclusion of the definition of the terms "heinous," "atrocious," or "cruel" does not cure the constitutional infirmity in the HAC instruction. Atwater v. State, 18 Fla.L.Weekly S496 (Fla. Sept. 16, 1993).

The remaining portion of the instruction used below reads:

> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

This addition also fails to cure the constitutional infirmities of the HAC instruction. First, the language in this portion of the instruction was taken from State v. Dixon, 283 So.2d 1, 9

(Fla.1973), and was approved as a constitutional limitation on the aggravating factor in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). However, its inclusion in the instruction does not cure the vagueness and overbreadth of the whole jury instruction. The instruction still focuses on the meaningless definitions condemned in Shell. The Court in Proffitt never approved this limiting language in conjunction with the definitions. Sochor v. Florida, ___ U.S. ___, 112 S. Ct. 2114, 2121, 119 L.Ed.2d 326 (1992). This limiting language also merely follows those definitions as an example of the type of crime the circumstance is intended to cover. Instructing the jury with this language as only an example still gives the jury the discretion to follow only the first portion of the instruction which has been disapproved. Shell v. Mississippi, supra; Atwater v. State, supra.

Second, assuming the language could be interpreted as a limit on the jury's discretion, the disjunctive wording would allow the jury to find HAC if the crime was "conscienceless," even though not "unnecessarily torturous." The word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily torturous." Actually, the wording in Dixon was different and less ambiguous: "conscienceless or pitiless crime which is unnecessarily torturous." 283 So.2d at 9.

Third, the terms "conscienceless," "pitiless," and "unnecessarily torturous" are also subject to overbroad interpretation. A jury could easily conclude that any homicide which was not instantaneous would qualify for the HAC aggravating circum-

stance. Furthermore, as this Court said in Pope v. State, 441 So.2d 1073, 1077-1078 (Fla.1983), an instruction which invites jurors to consider if the crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse.

Proper jury instructions are critical in all penalty phase proceedings, and a proper, limiting instruction on the heinous, atrocious or cruel aggravating factor was especially important here since the evidence of this aggravator was greatly in dispute. See Issue IV, infra. However, the jury instruction given below failed to apprise the jury of the limited applicability of the aggravating circumstance. Whitton was entitled to have the jury's recommendation based upon proper guidance from the court concerning the applicability of this aggravating factor. The jury should have received a specific instruction which advised it of the parameters necessary before HAC could be considered. The failure to give a proper instruction deprived appellant of his rights as guaranteed by the Eighth and Fourteenth Amendments, United States Constitution, and Article I, Sections 9, 16 and 17 of the Florida Constitution. This Court should reverse appellant's death sentence and remand for a new penalty proceeding with proper instructions.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

In its sentencing order, the trial court found that the capital felony was especially heinous, atrocious, or cruel, stating:

> The victim is considerably larger than the Defendant. The two had gotten into a fight earlier in the day and the victim had gotten the best of the Defendant. The Defendant left the motel, went to his home in Pensacola, and then late in the evening returned to the motel room for the purpose of robbing the victim. The victim was beaten to death with a multitude of blows. The first injury occurred on the south bed in the motel room; the evidence shows that the victim was not rendered unconscious by that blow because he moved from his prone position on the south bed, to a chair at the foot of that bed, around the foot of the north bed, and that he finally died as he lay between the north bed and the north wall. The Medical Examiner testified that although he could not precisely measure the duration of the beating, he would estimate it at thirty minutes. The blood throughout the room was evidence of a violent combat. There was blood on the floor, furniture, walls, and even the ceiling. There were overlays of blood splatters in several locations. The massive wounds on the neck and side of the victim's face would cause significant bleeding. There were defensive wounds on the victim's hand and arm. The victim had a blood alcohol level of .34; however, it is clear from the physical evidence that he was sufficiently aware of his impending death to put up a tremendous resistance. Even though the victim's system was depressed by alcohol, the victim felt pain and was aware of his impending death as is evidenced by the manner in which his adrenaline obviously overrode his drunkenness and allowed him to resist the Defendant even after sustaining massive blows that

> would have brought down a drunk elephant. The crime scene photgraphs are a gruesome testimony to the amount of blood in the human body and the victim's tenacity for life. This murder was extremely wicked and vile and inflicted a high degree of pain and suffering on the victim. The Defendant acted with utter indifference to the suffering of his victim. This murder was accompanied by such additional acts which sets this crime apart from the normal capital felonies. It was indeed a conscienceless, pitiless crime which was unnecessarily torturous to the victim. The aggravating factor that the capital felony was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.

(R 693-694).

In <u>State v. Dixon</u>, 283 So.2d 1, 9 (Fla.1973), this Court defined the aggravating circumstance of heinous, atrocious or cruel, Section 921.141(5)(h), Florida Statutes, and said:

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

Recognizing that all murders are heinous, <u>Tedder v. State</u>, 322 So.2d 980 (Fla.1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance applies only to crimes <u>especially</u> 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.

Id. More recently, in Cheshire v. State, 568 So.2d 908 (Fla. 1990), this Court elaborated on the definition of the heinous, atrocious or cruel aggravating factor and explained:

> The 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.

568 So.2d at 912. Accord, Robertson v. State, 611 So.2d 1228, 1233 (Fla.1993), and Santos v. State, 591 So.2d 160, 163 (Fla. 1991).

Under this definition, the instant murder was not heinous, atrocious or cruel. Furthermore, the court's findings of fact were based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt. The court's findings do not support the aggravating circumstance.

As suggested by the medical examiner, the instant homicide undoubtedly occurred during a sudden and violent struggle which in all likelihood was a very rapid event (R 2146-2147). There was no substantial or competent evidence, however, that Whitton intended to inflict a high degree of pain or otherwise torture the victim. See Bonifay v. State, 18 Fla.L.Weekly S464 (Fla. Sept. 2, 1993)(facts that victim begged for his life and there were multiple gunshots were inadequate bases to find HAC absent evidence that Bonifay intended to cause victim unnecessary and prolonged suffering). The state theorized below that appellant returned to the victim's motel room at 10:30 that night, stayed a few hours, smoking cigarettes, watching TV and waiting until

his friend was so intoxicated that he would not wake up or not know he was being robbed (R 1945-1946). The physical evidence established that the victim was indeed initially attacked while lying on the south bed with his head on the pillow, most likely passed out or asleep (R 1709). He moved a short distance with the head wound, stumbling around the foot of the bed where he was struck again (R 1711), past the adjacent bed, eventually collapsing between the north bed and north wall, where he was repeatedly stabbed in the chest (R 1935). In all likelihood, the victim was unconscious or semi-conscious when these final, fatal stab wounds were inflicted. Dr. Kielman explained that just one blow to the head might have been enough to render the victim unconscious (R 2139). He opined that the scalp wounds would have caused unconsciousness very quickly (R 1685), and the stab wounds would have resulted in a "very rapid death" (R 1682). In the expert's opinion, Mauldin might have been in a semi-conscious state as he fell between the bed and the north wall (R 2139).

While the precise events leading up the murder are subject to speculation, the evidence is entirely consistent with a very rapid murder, committed within the narrow confines of a motel room during a frenzied attack when the victim was aroused from his stupor and struggled with appellant. These facts simply do not support a finding that the murder was heinous, atrocious or cruel, i.e., unnecessarily torturous with a desire to inflict a high degree of pain or utter indifference to or enjoyment of

the suffering of another, as contemplated by Cheshire v. State, supra, and Robertson v. State, supra.

There was unrefuted evidence that the victim had a blood alcohol level of .34, more than three times the legal limit for presumed alcohol impairment. Section 316.1934(2)(c), Florida Statutes. Although Mauldin was presumably aware of the attack, as evidenced by the defensive wounds on his arms and hand, his senses would have been dulled and his ability to perceive the circumstances of his demise greatly impacted by the alcohol. Dr. Kielman conceded that such a high alcohol level would have had a depressant or anesthetic effect, to the point where the victim may have felt no pain at all (R 2142-2143). The state even acknowledged in its closing argument that the victim was in a stupor when the beating commenced (R 1946). Under these facts, the evidence was insufficient to support the finding of the heinous, atrocious or cruel aggravating factor. See Rhodes v. State, 547 So.2d 1201 (Fla.1989)(HAC struck where victim was known to be a heavy drinker and may have been semi-conscious at time of her death); Herzog v. State, 439 So.2d 1372 (Fla.1983) (HAC not applicable where the victim was under heavy influence of methaqualone prior to her death and possibly semi-conscious during entire incident). Here, as in the foregoing cases, the victim was a known alcoholic and highly inebriated at the time of his death. While it is unclear what the victim's state of consciousness was throughout the attack, it can be reasonably inferred that he was senseless during most, if not all, of the

episode, and although the victim's death was not instantaneous, unconsciousness would have occurred quickly. Thus, the state failed to prove beyond a reasonable doubt that the aggravating factor existed.

Furthermore, the trial court erroneously relied upon the medical examiner's testimony to support its finding that the beating lasted thirty minutes (R 693). Dr. Keilman expressly stated during the penalty phase that "There's no way that I can measure that [the duration from the first to the fatal blow]. . . . I have no way of measuring that in point of time" (R 2144-2145). Although Kielman suggested that the episode might have lasted 30 minutes at the most (R 2145), this testimony was pure speculation on the medical examiner's part and was inconsistent with his subsequent testimony that it was probably a very rapid event (R 2146-2147). In short, this was not competent evidence to support the trial court's findings.

Where the evidence of an aggravating circumstance is circumstantial, it cannot satisfy the burden of proof unless it is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So.2d 1157, 1163 (Fla.1992). The physical and circumstantial evidence introduced by the state is entirely consistent with the reasonable hypothesis that the victim was asleep when he was initially attacked in his bed, struggled briefly with Whitton, collapsed from his head wounds and was semi- or un-conscious when stabbed in the chest. The evidence was wholly inconsistent with either a premeditated intent to kill or a deliberate intent to inflict

a high degree of pain. Thus, while the victim might have been aware of the attack or even experienced some pain, the state failed to prove beyond a reasonable doubt that appellant acted with intent to inflict extraordinary mental or physical pain.

The trial court erred in finding this factor in sentencing appellant to death.

ISSUE V

THE TRIAL COURT ERRED IN FAILING TO GIVE LIMITING INSTRUCTIONS WITH REGARD TO THE AGGRAVATING CIRCUMSTANCE OF AVOIDING LAWFUL ARREST.

In Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the United States Supreme Court held that Florida's former standard jury instruction on the aggravating circumstance of heinous, atrocious or cruel was unconstitutionally vague so as to leave the jury without sufficient guidance for determining the presence or absence of the aggravating factor. In Hodges v. Florida, __ U.S. __, 113 S.Ct. 33, 121 L.Ed. 2d 6 (1992), the Supreme Court, in summary fashion, applied the Espinosa rationale to a Petition for Certiorari, alleging that the cold, calculated and premeditated instruction was likewise unconstitutionally vague. The same constitutional infirmities recognized by the Supreme Court in Espinosa and Hodges apply with regard to the standard jury instruction given below on the avoiding arrest aggravating factor under Section 921.141(5)(e), Florida Statutes.

The trial court instructed the jury that:

> The aggravating circumstances that you may consider are limited to any of the following that are established by evidence:
>
> * * *
>
> The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing an unlawful arrest -- I'm sorry, preventing a lawful arrest or effecting an escape from custody.

(R 2246-2247).

It is well established that in order for this aggravating circumstance to apply, the evidence must clearly show that witness elimination was the sole or dominant motive for the homicide. See Geralds v. State, 601 So.2d 1157 (Fla.1992); Scull v. State, 533 So.2d 1137 (Fla.1988); Perry v. State, 522 So.2d 817 (Fla.1988); Riley v. State, 366 So.2d 19 (Fla.1976). The standard instruction, however, fails to correctly explain the narrow circumstance under which this factor may apply and thus fails to limit the jury's discretion and understanding.

The failure to give a correct and complete instruction on the avoiding arrest aggravating factor is fatal to the jury's sentencing recommendation. There is no way to know the importance which the jury attached to this particular aggravating factor, and it cannot be said that the erroneous instruction did not contribute to the jury's recommendation. Appellant is entitled to a new penalty phase before a new jury.

ISSUE VI

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED TO AVOID ARREST.

In support of its decision to impose the death penalty, the trial court found as an aggravating factor that the crime was committed for the purpose of avoiding or preventing a lawful arrest and stated its findings as follows:

> Following the Defendant's incarceration on these charges, the Defendant told a cellmate that he killed Mr. Maulden so that he would not get caught and his parole violated, that because he was on parole he could not just rob Mr. Maulden and then leave him, and that after they got into a fight he had to kill Mr. Maulden to ensure that the victim would not be a witness against him. This aggravating circumstance was proved beyond a reasonable doubt.

(R 692).

The aggravating circumstance under Section 921.141(5)(e), Florida Statutes, is typically found in the situation where the the defendant killed a law enforcement officer in an effort to avoid arrest or effectuate his escape. See, e.g., Mikenas v. State, 367 So.2d 606 (Fla.1978). This Court has held, however, that when the victim is not a police officer, the aggravating circumstance cannot be found unless the evidence clearly shows that elimination of the witness was the sole or dominant motive for the murder. See Scull v. State, 533 So.2d 1137 (Fla.1988); Perry v. State, 522 So.2d 817 (Fla.1988); Riley v. State, 366 So.2d 19 (Fla.1976). Even where the victim may know the defendant, this factor is not applicable unless the evidence proves

that witness elimination was the only or dominant motive. See Geralds v. State, 601 So.2d 1157 (Fla.1992); Perry v. State, supra. The mere fact that the victim knew or could identify the defendant, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt. Id.

Here, there was no conclusive or even compelling evidence of appellant's motive to kill James Mauldin. The evidence at trial showed that appellant and the victim were friends; that appellant gave Mauldin two nights' shelter and missed work in order to give Mauldin needed rides; that appellant never tried to hide his association with Mauldin, making both his presence and his assistance to an intoxicated Mauldin conspicuous at the bank and the motel, and even contacted Mauldin's ex-girlfriend after leaving his friend at the motel and attempted to contact Mauldin's mother out of concern for his friend. The evidence also established that Whitton knew Mauldin had withdrawn money from the bank. According to Kenneth McCollough, appellant and Mauldin had a confrontation earlier that day, in which Mauldin had gotten the better of Whitton (R 1640, 1642). Whitton purportedly told McCollough that he returned to the motel to rob his friend and that "he had to kill the witness, because if he didn't he would be a witness to testify against him . . . and by doing away with the witness, that way he didn't feel like he would be caught and his parole violated" (R 2122).

It is not clear what transpired immediately preceding the actual killing. Apparently, the altercation earlier that day was not a serious one as appellant later returned to the motel

to socialize with Mauldin and spent two hours doing so. It is also not clear from the evidence whether appellant brought the knife to the motel or whether it belonged to the victim. There is no indication, however, that appellant returned to the motel intending kill his friend. Rather, the evidence suggests that Whitton intended to wait until his friend was too inebriated to know about or resist a robbery attempt, take the money from the prone victim and leave without a confrontation. His intentions were foiled when Mauldin caught Whitton in the act of stealing his money and attacked Whitton as he had done earlier that day. Appellant, knowing that Mauldin was larger and stronger (albeit highly intoxicated) from being beaten in their earlier dispute, struggled with his friend and inflicted the deadly blows.

This Court has previously disapproved the avoiding arrest factor in similar cases where the victim knew the defendant. See, e.g., Perry v. State, supra (defendant killed his former next-door neighbor during an attempted robbery); and Amazon v. State, 487 So.2d 8 (Fla.1986)(defendant killed his next-door neighbors during a burglary, robbery and sexual battery). In Amazon, there was similarly conflicting evidence that Amazon told a police officer that he killed to eliminate witnesses. Eliminating a witness was no more the sole or dominant reason for the homicide here than it was in Amazon.

It is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt. State v. Dixon, supra. The state failed to prove beyond a reasonable doubt that the only or dominant motive for

this murder was to eliminate a witness. It was thus error for the trial court to find this aggravating circumstance.

ISSUE VII

APPELLANT'S DEATH SENTENCE SHOULD BE REDUCED TO LIFE IMPRISONMENT ON PROPORTIONALITY GROUNDS.

Appellant has argued in Issues IV and VI that the aggravating circumstances under Sections 921.141(5)(h) and 921.141(5)(e) were not proven beyond a reasonable doubt. The only valid aggravating factors remaining are that appellant was under sentence of imprisonment, that he had previously been convicted of a felony involving the use or threat of violence, and that the murder was committed for pecuniary gain. These factors, when weighed against the substantial mitigation presented below, do not warrant the death sentence. Under Florida law, the death penalty is reserved only for the most aggravated and the least mitigated murders. Kramer v. State, 619 So.2d 274 (Fla.1993); State v. Dixon, 283 at 8 (Because death is a unique punishment, it is to be imposed only "for the most aggravated, the most indefensible of crimes."). This is not such a case.

In this case, the evidence established and the trial court found that Whitton was an adult child of two alcoholic parents, that he was physically and mentally abused by his parents, and suffered a deprived childhood and poor upbringing. The court further found in mitigation that Whitton was a hard worker when employed, was not a problem on parole, and had good insight and motivation to obtain help with his alcoholism. Whitton actively worked toward his rehabilitation and helped others with the problems associated with alcoholism. He was sensitive to the feelings of others and willing to help others in need. He was

patient and effective with children. The court found these to be mitgating factors and gave them some weight. The court also gave some weight to the facts that appellant was an alcoholic and had been in several treatment centers for the disease; that he had an IQ of 84, placing him in the low average range of intellectual functioning; that he performed at a sixth grade level, and that while he did not suffer from a major mental illness, he had an unstable personality, consistent with his alcoholism and child abuse. The court gave great weight to the fact that Mr. Whitton is a human being and child of God (R 695-696).

A troubled childhood and family background has been recognized by this Court as a significant mitigating factor in many cases, including Nibert v. State, 574 So.2d 1059 (Fla.1990); Campbell v. State, 571 So.2d 415 (Fla.1990); Livingston v. State, 565 So.2d 1288 (Fla.1989); Stevens v. State, 552 So.2d 1082 (Fla.1989); Brown v. State, 526 So.2d 903 (Fla.1989); and Holsworth v. State, 522 So.2d 348 (Fla.1988). In addition, a defendant's limited intellectual capacity may be a mitigating factor. Nibert v. State, supra (below average IQ); Freeman v. State, 547 So.2d 129 (Fla.1989)(defendant of dull-normal intelligence, scoring at approximately 4th grade performance level). Moreover, Whitton's alcoholism is clearly a mitigating factor, which must be given serious consideration. Nibert v. State, supra.

In Nibert v. State, supra, this Court held that the substantial mitigation, which included physical and psychological

abuse at the hands of Nibert's alcoholic mother during childhood and adolescence, chronic alcohol abuse, below average IQ, and potential for rehabilitation, made the death penalty disproportionate, despite the finding that the crime was heinous, atrocious or cruel. The mitigation presented and found below is qualitatively the same as that found in Nibert, the circumstances of the crimes uncannily similar, and the death penalty equally unwarranted.

Although there exist three valid aggravators in this case, that alone does not justify imposition of the death sentence. Even assuming the trial court properly found that the murder was heinous, atrocious or cruel and intended to avoid arrest, the death penalty would still be unwarranted under these facts. See Kramer v. State, supra (death penalty unwarranted despite two aggravators, prior violent felony conviction and fact that murder was heinous, atrocious or cruel, where evidence showed defendant's alcoholism, mental stress and potential for productivity in prison, and crime involved a spontaneous fight between a disturbed alcoholic and a man who was legally drunk); and Blakely v. State, 561 So.2d 560 (Fla.1990)(death sentence disproportional despite finding two aggravating circumstances: heinous, atrocious or cruel, and cold, calculated and premeditated); Livingston v. State, supra (death sentence disproportional where numerous mitigating factors outweighed only two valid aggravators: prior violent felony and in the course of a robbery); Fitzpatrick v. State, 527 So.2d 809 (Fla.1988)(death penalty disproportional where five aggravating factors found).

The mitigation in this case was substantial, and it cannot be said that this is the kind of unmitigated crime for which the death penalty is reserved. See Fitzpatrick v. State, supra; Smalley v. State, 546 So.2d 720 (Fla.1989)(entire picture of mitigation, which included seven statutory and non-statutory mitigators, and aggravation, heinous, atrocious or cruel, did not warrant death penalty).

Accordingly, the death sentence is disproportionate, and this Court should remand this cause for imposition of a life sentence.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, appellant respectfully requests, in Issues I and II, that this Court reverse his convictions and sentences and remand the cause for a new trial. Appellant requests in Issues III and V that this Court reverse his death sentence and remand the cause for a new penalty phase before a new jury. In Issues IV and VI, appellant requests that this Court reverse his death sentence and remand for a new sentencing proceeding. In Issue VII, appellant requests this Court to vacate his death sentence for imposition of a sentence of life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by delivery to Ms. Carolyn Snurkowski, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Gary Whitton, on this 13th day of January, 1994.

Paula S. Saunders
PAULA S. SAUNDERS