IN THE SUPREME COURT OF FLORIDA

EDWARD CASTRO,

Appellant,

v. CASE NO. 81,731

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

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

Facts concerning the murder

Castro's taped statements which were played for the jury established that he had been staying in Ocala. Castro saw this guy and he was older and he was staggering (T 823,824). "I was digging it because you know what? I said, hey, there's my car" (T 824). Castro was looking for a car and convinced Austin to come inside an apartment (T 824). Castro gave Austin a beer and told him he would be right back because he needed to collect ten dollars from somebody (T 824). However, Castro went looking for the knife he had hid the night before, and when he could not find it, he grabbed a steak knife (T 824). When Castro returned to the apartment, Austin had already left (T 824). Austin was in his car ready to leave the complex (T 824). Castro with his "golden tongue" talked Austin into coming back up to the apartment (T 825). Castro testified that he never gets "like staggering drunk" (T 825). Austin on the other hand was staggering and slurring his speech (T 825). Austin had allowed Castro to drive to the store to get some beer (T 825). Castro then had the idea to take this car (T 825,826). All of the sudden Austin got up to go, and Castro said, "Fuck go" (T 826). Castro already had the car in his mind, and he knew if Austin left, so went the car (T 826). Castro grabbed Austin by the throat and threw him on the bed and choked him and choked him (T 826). Castro testified, "I was trying to take his life out by

choking him" (T 826). Blood started coming out of Austin's mouth (T 826). Austin was scratching Castro during this time (T 826). After pulling the knife out of his sock Castro tells Austin, "hey, man, you've lost. Dig it?" (T 827). Castro stabbed Austin somewhere between five and fifteen times (T 827). Castro broke the knife into three sections and threw the pieces out as he was driving (T 828). In response to a question concerning the victim's name, Castro said, I didn't care. I sold his watch. I sold his ring" (T 828). Castro covered Austin with a blanket to make it look like he was sleeping (T 828).

In Castro's statement to Leary and Krietmeyer he repeated the incident except in more detail. While Castro was drinking with the victim, he noticed two rings and a nice watch and thought the victim must have some money. Castro went down to another apartment and grabbed a steak knife (T 867). Austin had left by the time Castro returned (T 867). However, Castro sees Austin driving around the complex and convinces him to come back to the apartment (T 868). While they are talking Austin becomes suspicious, and Castro grabs him around the neck and squeezes him (T 868). Austin is fighting Castro as he grabs the knife and puts it in his face saying, "Look, man, we can make this real fucking easy. All I want is the car." (T 869). Castro told him, "if he didn't settle the fuck down I was going to stab him (T 869). Further, Castro told him, "I would stab him in the eyeball" (T 869). Austin fights trying to get the knife and receives cuts to his hand (T 869). At this point Castro inflicts numerous stab wounds to the chest area (T 869).

Police officer's testimony

Bobby Boatwright

Officer Boatwright is employed by the Jacksonville, North Carolina Police Department (T 979). On January 15, 1987 Officer Boatwright was with the Columbia County Sheriff's Office (T 980). When Officer Boatwright came into contact with Castro, he smelled alcohol on his breath, his speech was slurred, his eyes were bloodshot, and he was hostile towards the police officers (T 980). Officer Boatwright arrested Castro for disorderly intoxication (T 981).

Officer Boatwright observed Castro's driving which appeared to be fine (T 981). In order to smell the odor of alcohol, you would have to speak with Castro (T 982). Officer Boatwright was able to observe Castro walking and it was fine (T 982). Castro became angry when questioned about the blood stains on his pants and the scratches on his neck (T 983). Castro gave a social security card for identification to Officer Boatwright, but he could not give the name which was on the card, "Willie Kruse" (T 983).

Neal Nydam:

Deputy Nydam works for the Columbia County Sheriff's Office, and he was so employed in January of 1987 (T 811). He came into contact with Castro at the Columbia County Jail on January 14, 1987 (T 813). Deputy Nydam asked Castro if he was willing to talk concerning some information about a homicide (T 814). Castro indicated he was willing to talk, and he was mirandized (T 814). Deputy Nydam did not make any promises of

any kind, nor any threats towards Castro (T 817). Although Castro had been booked on disorderly intoxication, that was several hours before they talked, and Castro did not seem under the influence (T 818). Deputy Nydam had the opportunity to watch him walk and he was stable (T 818). Castro's speech was clear and his eyes did not seem bloodshot (T 818). Castro drank several cups of coffee during the course of the night (T 818). Castro gave a statement to Deputy Nydam (T 819).

The arresting officer thought Castro was acting in an irrational manner and appeared to be intoxicated (T 840). Castro was very coherent when he was read his rights (T 840). His speech was not slurred; his memory and his appearance; and his physical demeanor did not appear to be that of an intoxicated person (T 840). Further, he had a fairly good memory and seemed to be fairly alert (T 840).

Deputy Nydam walked with Castro from the county jail to his office, which is approximately 150 yards, and he did not appear to be under the influence of alcohol. (T 847). From eight-thirty when Deputy Nydam first came into contact with Castro, until the interview process was over, he did not appear to be intoxicated (T 848).

Howard Leary

Officer Leary is a member of the Ocala Police Department (T 851). He came into contact with Castro on January 15, 1987 (T 851). Initially Officer Leary responded to a call about midnight on January 14, 1987, trying to locate any evidence or indication of a homicide taking place in the area of Third Street and

Sanchez Northeast (T 852). After being unsuccessful in his efforts, Officer Leary went to Lake City to interview Castro (T 853). After arriving in Lake City at around one-thirty in the morning, Officer Leary waited around to five-thirty to interview Castro (T 853). Castro was given his Miranda warnings first thing before the interview (T 854). Castro did not appear to be intoxicated (T 855).

Medical testimony concerning cause of death

Dr. Chen is a pathologist practicing at Halifax Medical Center in Volusia County where she is also the medical laboratory director and chairman of the department (T 738). Dr. Chen performed an autopsy on Austin Scott, the victim on January 16, 1987 (T 741). Austin had stab wounds on the front part of the left chest, in addition he had bruises or contusions around the neck, also he had some stab wounds in the right arm and some bruising and abrasion of the skin over the right forehead (T 742). There were eleven surface wounds to the chest, and on the right arm there were three sets of knife wounds making a total of six on the right arm (T 742). Internally there is a fracture of the hyoid bone on the left side of the neck, and there is a fracture of the right superior cornu, a delicate protrusion of the thyroid (T 743). These injuries are consistent with manual strangulation (T 744). Dr. Chen found hemorrhaging in the tissue surrounding the bones in the neck area, indicating that Austin was alive when he was strangled (T 744). Approximately eleven puncture wounds to the lungs were found and approximately a liter of blood was in the thoracic cavity on the left side (T 746) The

pericardial sac had suffered four wounds (T 745). Dr. Chen's opinion as to the cause of death of Austin was multiple stab wounds to the chest with bleeding into the thoracic cavity (T 746). Austin was alive during the several minutes it would have taken for the blood to accumulate in his chest cavity (T 747,748). Austin's blood alcohol level was .22 at the time of his death (T 765). The closeness of the chest wounds indicates that Austin was not moving around very much (T 766). Dr. Chen has no idea in what sequence the chest wounds were inflicted (T 767). Austin may or may not have lost consciousness at some point because of the strangulation (T 768). Alcohol can make blood thinner, which might account for more bleeding or less clotting (T 769).

Mental Health Experts

Dr. Dee is a clinical psychologist who is testifying for appellant (T 890). Castro lived with his mother and father until they separated when he was three years old (T 899). Castro went to Tijuana, Mexico to live with a babysitter (T 900). When Castro was three and four years of age, he was given shots of liquor for the amusement of the people to watch him stumble around (T 900). Castro came back to live with his mother (T 900). They were living in very cramped quarters (T 901). Castro and his sister became the subject of sexual abuse by one of their cousins and possibly their uncle (T 901). Castro then began to abuse his sisters (T 902). Castro was steadily using alcohol by the ninth grade (T 903). Alcohol would stimulate Castro (T 904). After quitting high school, Castro joined the service and served

as a clerk typist (T 905). Castro went AWOL with another service man and they went to New York (T 906). Supposedly they did this to get into trouble in order to be sent to Vietnam as punishment (T 906). Instead they were sent to a federal prison for six months and discharged from the service (T 906). In 1985 Castro received a blow to the head by a person using a piece of iron used in reinforcing concrete (T 908). In 1974 Castro had been in an automobile accident, which left him unconscious (T 909). On all the non-verbal tests outside of the Wechsler Memory Scales test, Castro did average (T 918). Dr. Dee's opinion is that Castro would have two diagnosis, the first being Organic Affective Syndrome, which is a pattern of inexplicable acting out, rage reactions, and so forth that seem out of appropriate with the social context of what is going on (T 925). The second diagnosis is an invested syndrome, which means he has memory disorder (T 926). Castro did not remember Dr. Dee's visit in 1991 when Dr. Dee visited Castro in 1993 (T 928). Dr. Dee had to make inferences concerning the time of the murder because Castro told him that he had no recall of the event (T 934). Dr. Dee would characterize Castro's behavior as irritable and suspicious, which is consistent with withdrawal from cocaine T 934). However, Dr. Dee would not characterize his behavior as psychotic (T 934). The coffee Castro drank could have given him a "buzz" (T 937). In Dr. Dee's opinion Castro is suffering from extreme mental disorder, and a cognitive impairment called Amnestic Syndrome (T 941). Although Castro's ability to conform his conduct was substantially impaired, he could appreciate the criminality of his conduct (T 942).

Castro was able to recount events from his childhood (T 946). Dr. Dee testified that he believes the "Denman Test" was designed to be used in relation to the Wechsler test (T 947). Dr. Dee is unaware of any published study using both tests (T 948). Castro knows right from wrong (T 949).

Dr. Harry Krop

Dr. Krop is a licensed clinical psychologist in the State of Florida who is testifying for the state (T 1025). Forensic psychology is the application of psychological principles to various legal issues (T 1028). In diagnosing an organic brain disorder, the two fairly recognized neuropsychological batteries of tests are the Luria and Reitan (T 1029). For the purposes of testifying Dr. Krop mainly reviewed Dr. Dee's report and the test data upon which Dr. Dee relied (T 1031). The testing by Dr. Dee does not support a finding of neurological damage or organic brain damage (T 1031). The sixteen P.F. is a measure of different personality traits (T 1032). The M. M. P. I. is used primarily to make a determination of whether a person fits into a certain clinical diagnostic category (T 1032). Organic affective disorder is when an individual shows certain emotional traits or mood states which are abnormal and the result of an organic process (T 1033). The tests Dr. Dee conducted resulted in normal range scores by Castro (T 1034). Castro scored well on the Wechsler test, which measures I.Q., in the upper two percent of the population (T 1035). Castro scored in the average range on the Denman test which measures memory (T 1035). Dr. Dee determined that the difference in the two scores indicated that

Castro has some form of brain damage (T 1035). There is no research indicating that this a correct way of making a determination (T 1035). Dr. Krop testified that Dr. Dee also used an outdated Wechsler test from 1955, and that there was an 1981 version of Wechsler which uses an updated normative population including minority groups (T 1036,1037). Dr. Dee also only used three of the five subtests to determine a score (T 1037) Relying upon the assumption that because Castro scored this on three, he would score the same way on the other two (T 1037). However, Castro may have scored less and when comparing the Wechsler score with the Denman score there may not have been such a discrepancy (T 1037). Dr. Dee did not give the comprehensive subtest, which is a subtest under the Wechsler test (T 1038). This comprehensive subtest measures judgment (T 1038). As part of the Denman test there is a test called the facial recognition test (T 1039). Castro scored low on this test bringing down his overall score on the Denman, however, Dr. Dee also gave Castro another test called the facial recognition test, which the memory test only gives a part (T 1039). Castro scored normal according to Dr. Dee on that exam (T 1039). Dr. Krop testified that you must look at the whole pattern in determining a result (T 1039). Castro's impulsivity is a part of a general style, but not necessarily a function of any kind of organic process (T 1041).

SUMMARY OF ARGUMENT

I. Juror Strayer had strong religious beliefs concerning the death penalty that he could not separate from his oath as a juror. Juror Strayer did not believe that capital punishment accomplished anything, and that a "higher law" prevailed which held that it was wrong to kill. The trial court properly excused Juror Strayer for cause.

II. The jurors were questioned extensively in voir dire, and those who had media exposure, which not rise to the level of being per se prejudicial, stated that they had not formed opinions about the case and would determine Castro's sentence upon what they heard in the courtroom. Also those jurors who expressed opinions in favor of the death penalty stated that they would follow the law and the trial court's instructions. The trial court properly denied challenges for cause of these jurors.

III. The trial court's findings on the cold, calculated and premeditated aggravating circumstances are supported by substantial competent evidence. Castro lured the victim to his death so that he could steal the victim's car, jewelry and wallet. Castro went to seek a murder weapon, then returned to strangle and repeatedly stab the victim who struggled for his life. Castro toyed with the victim. Castro knew he had to silence the victim because it was daytime and there were people nearby. Any error was harmless.

IV. The trial court's findings on the heinous, atrocious and cruel aggravating circumstances are supported by substantial competent evidence. Castro choked the victim who struggled and

scratched him. Castro then pinned the victim to the bed and held a knife up, taunting him with death. Castro repeatedly stabbed the victim as he tried to protect himself. The victim endured mental anguish and extreme suffering for up to ten minutes.

V. The state is allowed to introduce new aggravating circumstances at a new penalty phase. The aggravating circumstance of having committed a prior capital felony was not even available in the first trial because Castro had not been convicted in his Pinnellas County murder. The trial court properly found this aggravating circumstance because there was not a violation of double jeopardy, ex post facto, law of the case, or fundamental fairness.

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

VII. The trial court did not abuse its discretion by not giving appellant's jury instruction. Appellant's counsel argued that if appellant were sentenced to life, there was the possibility that he would serve fifty years in prison. The trial court properly refused to give this instruction.

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

IX. The photograph was relevant to show the defense wounds to the victim's arm and to explain the medical examiner's testimony. The trial judge screened the photograph and did not abuse his discretion in admitting it.

X. The language in Dixon and Proffitt properly limits this statutory aggravating factor of heinous, atrocious, or cruel. This court has consistently construed the statutory language in prior cases. In the instant case the trial court gave the proper jury instruction. Under Walton the trial court is presumed to apply the correct law, and even if the trial judge is not entitled to that presumption, certainly this court is entitled.

XI. This court has the power to declare whether a legislative act is or is not unconstitutional and it is the duty of the court to effectuate the policy of the law as expressed in valid statutes. This court quite properly determined the definitions of the death penalty statute to be understood by the average man. The rest of appellant's points are meritless.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCUSED FOR CAUSE JUROR STRAYER.

Castro argues that juror Strayer was improperly excused for cause. Specifically, Castro argues that the trial court did not adequately question juror Strayer or separatae his religious beliefs from his ability to function as a juror by following the law and instructions from the judge.

Appellee would submit that the prosecutor, defense counsel, and the trial court questioned juror Strayer extensively concerning his ability to sit as a juror in this trial. Juror Strayer was unable to set aside his "religious beliefs" and follow the law and instructions. The standard for determining whether a juror is qualified to sit on a capital case in which death is a possible penalty, is whether the juror's view on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Darden v. Wainwright, 477 U.S. 165, 106 S.Ct. 2464 (1986); Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980). See also Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

The following discussion took place during voir dire:

> MR. WHITAKER: What I am doing is -- let's just take the worst scenario. Knowing what you religious and conscious beliefs are regarding capital punishment and given the worst possible situation, would you ever vote with the jury panel to recommend death?
>
> MR. STRAYER: I could just say that it would depend. I can't say any more than that. I don't see how I can answer fairly.

THE COURT: What would it depend on?

MR. STRAYER: I guess it would depend on a lot of factors. But I don't see any that would permit me to make that kind of decision based on my previous experiences.

THE COURT: If I gave you an instruction that says that there are aggravating factors that you can consider and there are mitigating factors that you can consider, and that you set aside your religious beliefs and your conscience beliefs against the death penalty, and vote in accordance with the jury instruction that I give you, and the evidence that is received in this courtroom, can you do that?

MR. STRAYER: I don't really see a separation there between a person's belief system. It would be, for myself, it would be too hard for me to make that type of a decision, to go against something that I would believe in that is ingrained in me.

THE COURT: All right, sir. Is it your religious belief -- and, you know, I don't mean to get into a person's religious beliefs; that is your business -- and you know, you have a right to carry those religious beliefs and no one can ever fault you for that.

But, for purposes of these proceedings, we need to know: is it your religious belief that capital punishment is against your religion and that it should never be imposed in any case? Is that your religious belief?

MR. STRAYER: Yeah, I guess it would, because it's a commandment. That's the way I look at it.

THE COURT: All right. Then my question to you: Can you set those religious beliefs aside -- and I'm not saying it's right or wrong; that's your religious belief, you are entitled to them, and no one here will ever fault you for that.

Can you set that aside and base your decision on the evidence that you hear in this courtroom and on the law that I instruct you, even though the law may be against your religious beliefs, or not in accordance, full accordance with your religious beliefs?

Can you set those religious beliefs aside and base your decision only on the evidence that you hear in this courtroom and the law I instruct you, regardless of whether the law is in agreement with your religious beliefs

> or not? Can you set your religious beliefs aside?
> MR. STRAYER: I don't believe so (T 397).

Juror Strayer was unable to separate his religious beliefs from his role as juror. His view on the death penalty prevented him from performing his duties as a juror in accordance with the Court's instruction and his oath. Juror Strayer would be an automatic vote for life. The standard applies to jurors who show bias both for and against the death penalty. Morgan v. Illinois, 112 S.Ct. 2222 (1992); Randolph v. State, 562 So. 2d 331 (Fla. 1990); Hill v. State, 477 So. 2d 533 (Fla. 1985).

Finally, Castro argues that the trial court did not ask the proper questions. Following is a discussion by defense counsel and juror Strayer:

> MR. MILLER: Well, I guess what I am getting at is a little bit more difficult for you to do, yet simpler to understand. That is, can you listen to the instructions as the Court instructs you and listen to the law, understand the law, and apply it to the facts of this case once you have heard all the evidence, and apply it and think about it and do the right thing in this case?
> Do the right thing in accordance with the law, even if that ultimately may mean that you end up voting for death?
> MR. STRAYER: I don't see how that would be -- I'm trying to find the right words. I don't see how one law -- I don't see how man's law would be underneath what I perceive that most people think to be a different type of law, a higher law (T 399).

Juror Strayer's "higher law" took precedence over the law which the trial court would be instructing him on concerning aggravators and mitigators and the resulting decision whether to impose life or death. Juror Strayer in candidly answering the

defense counsel's question did not see how it was possible to separate his religious beliefs from his role as a juror. This claim is meritless. The trial court properly excused juror Strayer for cause.

II. THE TRIAL COURT PROPERLY REFUSED TO STRIKE FOR CAUSE CERTAIN JURORS.

Appellee will follow appellant's listing of jurors.

Juror Sawallis

Appellant argues that juror Sawallis should have been excused for cause based on three reasons: First, juror Sawallis had read the newspaper article; Second, juror Sawallis was bothered with the appellate process involving capital cases, and she would want to know why the delay in sentencing; Third, juror Sawallis would require the defense to prove that life was an appropriate sentence.

Appellee would submit that these reasons are meritless. First, as to the article in the newspaper the trial court asked the following questions

> The Court: Tell me what you remember. Did you read the article abut the case in the paper?
> Mrs. Sawallis: I more or less glanced at it a little bit. There was a little block in there.
> The Court: Tell me what you remember from reading anything at all about the case in Sunday's paper.
> Mrs. Sawallis: The biggest thing I remember is that it was some kind of sentencing trial. That he had been, I think, convicted before. I think it was first degree.
> The Court: What else do you remember?
> Mrs. Sawallis: I really didn't pay that much attention to it. They just said they were picking a jury as of this morning.
> The Court: Do you remember anything else about anything at all about the article?
> Mrs. Sawallis: Not really. I don't remember if the article even said what he did, other than I think he was convicted of murder one time (T 37,38).

The trial court watches the demeanor of potential jurors during voir dire and makes a determination as to whether the juror is being truthful. The court believed juror Sawallis. The only thing she remembered from the article is the fact that Castro had been previously convicted. Juror Sawallis also indicated that she had not formed any opinions about the case (T 42,43). The standard is not that a juror must never have been exposed to outside material. The question the trial court must consider is not whether publicity causes a juror to remember a case, but whether the publicity has given jurors such fixed opinions that they cannot judge the defendant's guilt impartially. Bundy v. Dugger, 850 F.2d 1402,1425-29 (11th Cir. 1988)(no manifest error in trial court's conclusion that defendant failed to demonstrate actual prejudice despite poll showing 98% familiarity with defendant's name among county residents when three jurors did not know of defendant's prior conviction and all confirmed ability to follow trial court's instructions); U.S. v. De La Vega, 913 F.2d 861,865 (11th Cir. 1990)(jury not prejudiced by mere exposure to pretrial publicity and some juror knowledge of facts and issue when, with few exceptions, 330 newspaper article largely factual in nature); Bundy v. State, 471 So. 2d 9, 20 (Fla. 1985); Geralds v. State, 601 So. 2d 1157 (Fla. 1992)(trial court was not required to grant challenge for cause to jurors who had seen media coverage reporting the capital murder with which the defendant was charged; juror's responses on voir dire did not fairly suggest inability to set aside the information and render verdict based

upon evidence). Jurors do not have to be completely ignorant of the facts and issues of a case. Jurors must be able to lay aside impressions or opinions shaped by pretrial exposure to the media and render a verdict based solely on the evidence presented during trial.

Secondly, Appellant argues that the gap in time between the guilt phase and the penalty phase would prejudice Juror Sawallis. The following testimony demonstrates this is unfounded:

> Ms. Jenkins: If you were to hear that this crime was committed in January of 1987, and think about the prospect of this case going to bother you to such an extent that you would not be able to be neutral or fair and impartial?
>
> Mrs. Sawallis: I don't think so. I think it's a period of time that -- I don't have any idea what has gone on between that period of time, so I really could not make, you know, a statement. I would definitely have to hear, you know, the evidence and what has gone on before. (T 45,46)
>
> The Court: And also, if the Court instructs you that you are not to be concerned about what happened between the conviction date in '87 and these proceedings, would you be able to follow that instruction as well?
>
> Mrs. Sawallis: Yes (T 53).

This court has held it will pay great deference to a trial judge's finding as to juror impartiality because he, unlike a reviewing court, is in a position to observe the juror's demeanor and credibility. Lambrix v. State, 494 So. 2d 1143, 1146 (Fla. 1986); Valle v. State, 474 So. 2d 796, 804 (Fla. 1985). The determination of juror impartiality and propriety of excusal of jurors for cause is a matter particularly within the trial court's broad discretion and will be disturbed on appeal only

where manifest error is demonstrated. Young v. State, 579 So. 2d 721 (Fla. 1991); Jennings v. State, 512 So. 2d 169 (Fla. 1987); Cook v. State, 542 So. 2d 964 (Fla. 1988). Juror Sawallis stated that the gap in time would not affect her deliberations, and appellant has failed to show manifest error in the trial court's discretion.

Finally, appellant argues that Juror Sawallis is placing the burden on him to prove life is the appropriate sentence. The following testimony will show that this is unfounded:

> The Court: Mrs. Sawallis, let me ask you just a couple of very brief questions. If the Court instructs you that the burden in this case is on the State, and the Defense does not have the burden of proving anything, would you be able to follow that instruction?
> Mrs. Sawallis: Yes. I have been instructed before on a jury.
> The Court: You have served on a jury before?
> Mrs. Sawallis: Yes (T 52).

The trial court did not abuse its discretion where the juror said she would follow the trial court's instruction on burden of proof. Defense counsel's leading and confusing questions about burden of proof do not show the juror would be unable to follow the law and instructions. See, Penn v. State, 574 So. 2d 1079 (Fla. 1991); Brown v. State, 565 So. 2d 304 (Fla. 1990). Questioning a juror regarding burdens of proof, particularly in a capital case, does not demonstrate her views would "prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath." See, Randolph v. State, 562 So. 2d 331 (Fla. 1990), quoting Gray v. Mississippi, 481 U.S. 648 (1987), Wainwright v. Witt, 469 U.S. 412 (1985),

and Adams v. Texas, 448 U.S. 38 (1980). The trial court did not abuse its discretion.

Appellee would submit that even if the trial court erred by not removing Juror Sawallis that error is harmless. Ross v. Oklahoma, 487 U.S. 81,88 (1988)(trial court's failure to remove prejudiced prospective juror for cause harmless in capital case because juror removed by peremptory challenge and defendant failed to prove that jury as whole prejudiced by error).

JUROR WOOTEN

Appellant argues that the trial court erred by not excusing for cause Juror Wooten because she saw the article in the newspaper about the case, she supports the death penalty, and she would place the burden on the appellant to prove life is the appropriate sentence. Appellee submits that all three reasons are meritless. The following testimony was elicited concerning the newspaper article:

> The Court: Tell us anything that you remember of what you may have read about the case.
> Ms. Wooten: I read that a jury would be selected for sentencing on the -- what's the name? -- Castro.
> The Court: Do you remember reading anything else?
> Ms. Wooten: That was all I read. I never read the paper. I boycott the paper (T 84).
> Mr. Whitaker: Yes, your honor, if I may. Based upon your reading of that little blurb, did you form any opinions about this case, as to whether Mr. Castro should receive the death penalty or not?
> Ms. Wooten: No. (T 85)

The trial court believed Juror Wooten. The only thing she remembers from the article is the fact that Castro would have a

jury selected for sentencing. The court, itself, would make that information known to the jury panel. Juror Wooten also indicated that she had not formed any opinions about the case (T 84). The standard is not that a juror never have been exposed to outside material. The question the trial court must consider is not whether publicity causes a juror to remember a case, but whether the publicity has given jurors such fixed opinions that they cannot judge the defendant's guilt impartially. Bundy v. Dugger, supra. Jurors do not have to be completely ignorant of the facts and issues of a case. They must only be able to lay aside impressions or opinions shaped by pretrial exposure to the media and render a verdict based solely on the evidence presented during trial.

No manifest error has been demonstrated.

Juror Wooten testified as follows concerning the death penalty:

> Mr. Whitaker: Do you have -- Everyone has an opinion about the death penalty, I guess. Do you have an opinion as to whether or not there should be a death penalty?
> Ms. Wooten: As a general statement?
> Mr. Whitaker: Yes.
> Ms. Wooten: Yes.
> Mr. Whitaker: Do you believe that it's appropriate in all cases?
> Ms. Wooten: No.
> Mr. Whitaker: You may have your opinions what cases may be appropriate. But, if the Court instructs you that you need to set aside your opinions and follow the law he instructs you on, could you follow the law the Court instructs you on to make your recommendation?
> Ms. Wooten: Certainly.
> Mr. Whitaker: And set aside you opinions as to when the death penalty is appropriate?
> Ms. Wooten: Yes. (T 85)

> Mr. Miller: If the judge were to instruct you that only certain kinds of first-degree premeditated murders warranted the death penalty, unusual aggravated first-degree murders, does that cause a problem with you?
>
> Because the reason I'm asking you this question is because I heard you telling me before that you came in thinking we ought to show you something. That you believe in the death penalty in first-degree murder cases.
>
> If you don't hear anything from us, your normal reaction, prior to hearing any instructions, would be to impose death? Would that notion you had coming in here, would that cause you any problems following those instructions that he has to show you that it's quite the opposite -- that, in fact, you should consider life unless he proves that this is an aggravated first-degree murder?
>
> Ms. Wooten: I would go with the instructions of the judge.
>
> Mr. Miller: You don't think you would have any problems with that, regardless of whatever notions you had coming into this courtroom?
>
> (Ms. Wooten shakes her head indicating "no.") (T 92,93)

Juror Wooten testified that she would set aside her own opinions and follow the law. The standard for determining whether a juror is qualified to sit on a capital case in which death is a possible penalty, is whether the juror's view on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Darden v. Wainwright, 477 U.S. 165, 106 S.Ct. 2464 (1986); Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980). See also Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

Appellant next argues that Juror Wooten placed the burden on the appellant to prove life was the appropriate sentence. The following testimony concerns burdens:

> Mr. Miller: That the State has the burden of proof and has to prove to you that this is some kind of an aggravated crime beyond just a normal first-degree murder before you could impose death.
>
> Ms. Wooten: If I'm understanding your question: If he is supposed to be proving that, then I don't need further testimony from you. I wouldn't (T 92).

The trial court did not abuse its discretion where the juror said the burden is on the state, and the appellant does not have to do anything. Defense counsel's leading and confusing questions about burden of proof do not show the juror would be unable to follow the law and instructions. See, Penn v. State, 574 So. 2d 1079 (Fla. 1991); Brown v. State, 565 So. 2d 304 (Fla. 1990). Questioning a juror regarding burdens of proof when he has never before sat on a jury, particularly a capital case, does not demonstrate his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," in the absence of any affirmative statement by the juror imposing the burden of proof on the defendant. See, Randolph v. State, 562 So. 2d 331 (Fla. 1990), quoting Gray v. Mississippi, 481 U.S. 648 (1987), Wainwright v. Witt, 469 U.S. 412 (1985), and Adams v. Texas, 448 U.S. 38 (1980). The trial court did not abuse its discretion.

Appellee would submit that even if the trial court erred by not removing Juror Wooten that error is harmless. Ross v. Oklahoma, 487 U.S. 81,88 (1988).

JUROR ALDERMAN

Appellant argues that Juror Alderman's obvious predisposition to automatically recommend the death penalty was sufficient reason to grant his challenge for cause. Appellee submits that this claim is meritless. Juror Alderman testified that he would set aside his own opinions and follow the law (T 121,122). The standard for determining whether a juror is qualified to sit on a capital case in which death is a possible penalty, is whether the juror's view on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Darden v. Wainwright, 477 U.S. 165, 106 S.Ct. 2464 (1986); Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980). See also Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). The trial court properly denied the challenge for cause.

Appellee would submit that even if the trial court erred by not removing Juror Alderman that error is harmless. Ross v. Oklahoma, 487 U.S. 81,88 (1988).

JUROR VICKERS

Appellant argues that Juror Vickers has strong preconceived opinions in support of capital punishment, and would have difficulty setting that bias aside and being a fair and truly impartial juror. Appellee submits that the challenge for cause

was properly denied by the trial court. Juror Vickers testified as follows concerning the death penalty:

> Ms. Jenkins: All right. Can you imagine any circumstances in which you may think that a person who has been convicted for a first-degree premeditated murder, that life would be a serious enough punishment for that person?
> Mr. Vickers: Right. Could. (T 146)
> Ms. Jenkins: Can you imagine yourself ever making a decision for mercy for a person who you know has committed a first-degree murder?
> Mr. Vickers: Yes. (T 147)
> Ms. Jenkins: Do you feel you could equally weigh mitigation and aggravation?
> Mr. Vickers: Yes, I could. (T 149)
> Ms. Jenkins: Could you consider facts about Mr. Castro, about Eddie's life, as mitigation?
> Mr. Vickers: I could. Right.
> Ms. Jenkins: Could you give that type of mitigation some weight if you are reasonably convinced that these facts are true?
> Mr. Vickers: Yeah, I could consider that. (T 150)

Juror Vickers testified that he would set aside his own opinions and follow the law. The juror's view on the death penalty would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Darden v. Wainwright, 477 U.S. 165, 106 S.Ct. 2464 (1986); Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980). See also Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). The trial court properly denied Appellant's challenge for cause.

Appellee would submit that even if the trial court erred by not removing Juror Vickers that error is harmless. Ross v. Oklahoma, 487 U.S. 81,88 (1988).

JUROR CORCORAN

Appellant argues that Juror Corcoran would be an automatic vote for the death penalty if the state proved an aggravating factor. Appellee submits that this issue is meritless and the trial court properly denied appellant's challenge for cause. The following testimony concerned Juror Corcoran's understanding of a juror's role:

> Mr. Whitaker: The law is: Before the death penalty can be imposed and recommended to be imposed, the State must prove something more than that: It must be a very aggravated murder.
> So, in this courtroom the Court -- the judge is going to tell you what has to be proved.
> Ms. Corcoran: Yes.
> Mr. Whitaker: And if the State does not prove that, what the Court says the State has to prove, then what would you have to vote?
> Ms. Corcoran: If it's not proven?
> Mr. Whitaker: Then what would you recommend?
> Ms. Corcoran: Life. (T 208)
> Mr. Whitaker: ... Would you consider those mitigating factors and weigh them against aggravating factors in making your recommendation to the court?
> Ms. Corcoran: I would try my best to do the right thing and listen to the case and try to give the right answer. (T 209)
> Mr. Miller: When you were talking just a minute ago to the prosecutor and when he was asking you something, you said, you talked once again abut proof, how he really had to prove it to you or you couldn't vote for death. Right?
> Ms. Corcoran: Yes.
> Mr. Miller: Now, when you said that did you mean: Prove Mr. Castro's guilty to you?
> Ms. Corcoran: No. Prove what he should get: death penalty or life. (T 210)

Juror Corcoran indicated that the state would have to prove their case before he would recommend the death penalty. Juror

Corcoran testified that he would weigh the aggravating factors against the mitigating factors. It is clear this juror was also qualified to sit on a capital case in which death is a possible penalty, as his view on the death penalty would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Darden v. Wainwright, supra; Wainwright v. Witt, supra; Adams v. Texas, supra. See also Witherspoon v. Illinois, supra. The trial court properly denied Appellant's challenge for cause.

Appellee would again submit that even if the trial court erred by not removing Juror Corcoran that error is harmless. Ross v. Oklahoma, 487 U.S. 81,88 (1988).

JUROR TRIPLETT

Juror Triplett indicated that he had read the Castro jury selection article in the Sunday paper, heard an update about the case on the radio, and vaguely recalled reports of the actual murder five years ago. The appellant argues that Juror Triplett has a bias in support of the death penalty, and additionally has exposure to prejudicial media coverage of the trial, and as such should have been excused for cause. Appellee submits that the trial court properly denied the appellant's challenge for cause.

Juror Triplett testified as follows concerning the media coverage:

> The Court: Just tell me everything that you remember.
> Mr. Triplett: Well, the main thing I remember, they said they were going to pick a jury at 8:30 on Monday morning. I told my wife, I said, "I bet you this is one of the cases that they will have jurors for."

> The one thing I do remember is that this is a third time that they have had a penalty phase of the trial. Because the first two were thrown out for -- I don't know. I can't remember the reasons. But this is the third one, I believe. (T 536)
>
> Mr. Whitaker: ... As far as the things that you have read -- and I know the Court asked you questions similar to this. Can you put aside anything that you may remember or may have read as far as the sentencing goes and give Mr. Castro a clean slate here? Make you decisions only on what you hear in this courtroom and are instructed from the Court.
>
> Mr. Triplett: Yes, sir. I think I can.
>
> Mr. Whitaker: You can do that?
>
> Mr. Triplett: Yes. (T 538)

Juror Triplett stated that he could set aside any information he had obtained from the media, and only consider the information he received in the courtroom. The standard is not that a juror never have been exposed to outside material. The question the trial court must consider is not whether publicity causes a juror to remember a case, but whether the publicity has given jurors such fixed opinions that they cannot judge the defendant's guilt impartially. Bundy v. Dugger, supra. It is clear this juror was able to lay aside any impressions and render a verdict based solely on the evidence and instructions from the court.

The trial judge observed this juror's demeanor. There has been no abuse of discretion and the trial judge's determination shuld not be disturbed on appeal since no manifest error has been demonstrated. See, Young v. State, supra; Jennings v. State, supra; Cook v. State, supra.

Juror Triplett testified as follows concerning the death penalty:

> Mr. Whitaker: ...If the Court instructs you that the law is that not every -- not every case deserves the death penalty, can you follow the Court's law or instructions on that?
> Mr. Triplett: Yes.
> Mr. Whitaker: In spite of your opinions?
> Mr. Triplett: Yes. (T 539)
> Mr. Whitaker: I want to make sure you understand this. Right now Mr. Castro has been found guilty of first-degree murder, premeditated murder. Right now, under the laws of the State of Florida, the presumed sentence is not death. The presumed sentence is life in prison.
> Do you understand that? "presumption" means what he should get, unless something more is shown according to the law.
> Mr. Triplett: Yes, sir.
> Mr. Whitaker: And you can accept that as the law and go from there?
> Mr. Triplett: Yes, sir.
> Mr. Whitaker: You can do that?
> Mr. Triplett: Yes, sir. (T 540)
> Mr. Whitaker: It may make it more difficult, but would you still follow the Court's instructions?
> Mr. Triplett: Sure. He told me to come in here. I'm here.
> Mr. Whitaker: As far as the mitigating factors and circumstances, if the Court instructs you that if you are reasonably convinced that they exist and that you need to consider those in making your recommendation, would you consider them?
> Mr. Triplett: Yes. (T 545)

Juror Triplett stated that he would follow the trial court's instructions as well as the law in determining whether death or life were the appropriate sentence. Juror Triplett testified that he would consider and weigh the mitigating factors. His view on the death penalty would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The trial court properly denied Appellant's challenge for cause.

Appellee would submit that even if the trial court erred by not removing Juror Triplett that error is harmless. Ross v. Oklahoma 487 U.S. 81,88 (1988).

JUROR ETHEREDGE & JUROR BELL

Appellant argues that Juror Etheredge's reading of the news article tainted him from participation on the jury. The appellant also argues that his counsel was hampered in their efforts to question jurors concerning the news article. Appellant further argues that Juror Etheredge supports the death penalty. Appellee would submit that in every case where there has been pretrial publicity care must be used in questioning the prospective jurors. Additionally, the appellant failed to show how Juror Etheredge's reading of the news article prejudiced him. The following testimony concerns the news article:

> The Court: Tell me exactly what you remember reading in that article.
> Ms. Etheredge: That, you know, he had committed murder. That, I think, they were wanting to get new jurors or something because it had been thrown out or something. You know, wait and see if he is going to get the death sentence or not.
> The Court: What else do you remember reading in the newspaper?
> Ms. Etheredge: That's about it. (T 603)
> The Court: Based on what you read in the newspaper article, did that cause you to form any opinions?
> Ms. Etheredge: No.
> The Court: About the outcome of these proceedings?
> Ms. Etheredge: No.
> The Court: Do you feel that what you read in the newspaper article will have an effect on your decision in this proceeding?
> Ms. Etheredge: No. (T 604)
> Ms. Jenkins: We do appreciate you being candid with us. But, did you form any opinions about Eddie Castro from reading that

article? Were you thinking abut the kind of person he must be?
Ms. Etheredge: No. (T 607)

Juror Etheredge stated that he had not formed any opinions about the case from what he read. Juror Etheredge stated that he could set aside any information he had obtained from the media, and only consider the information he received in the courtroom. It is clear that publicity has not given this juror such fixed opinions that she could not judge the defendant's guilt impartially. See, Bundy v. Dugger, supra. Jurors do not have to be completely ignorant of the facts and issues of a case as long as they are able to lay aside impressions or opinions shaped by pretrial exposure to the media and render a verdict based solely on the evidence presented during trial.

Juror Etheredge testified as follows concerning the death penalty:

> Mr. Whitaker: ... We need to find out what your opinions are, especially about the death penalty. Do you believe there should be a death penalty or capital punishment in the State of Florida?
> Ms. Etheredge: Yes.
> Mr. Whitaker: Why do you believe that?
> Ms. Etheredge: I just believe it's justified, you know, if somebody took somebody's life. Uh-huh.
> Mr. Whitaker: You believe that that is the way it should be for every first-degree murder?
> Ms. Etheredge: No.
> Mr. Whitaker: Just for certain ones?
> Ms. Etheredge: It depends on, you know, each individual case. (T 604,605)
> Mr. Whitaker: Would you weigh the mitigating factors against the aggravating factors? And can you make a decision on that?
> Ms. Etheredge: Yes.

> Ms. Jenkins: But do you think there are factors that could lessen the impact of what the crime is or what the person has done?
> Ms. Etheredge: Yes.
> Ms. Jenkins: Do you think you could listen to those factors?
> Ms. Etheredge: Yes.
> Ms. Jenkins: And if they were factors that the Court instructs you on, but you don't really think they are that important, could you still follow the Court and consider those factors and weigh them in your deliberations?
> Ms. Etheredge: Yes. I would follow the law. (T 608)

Juror Etheredge stated that she would follow the law. She would weigh the aggravators and the mitigators. Additionally she stated that if she did not believe that something was a mitigator, she would take instructions from the trial court. It is clear this juror's view on the death penalty would not prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath. The trial court properly denied Appellant's challenge for cause.

Appellee would submit that even if the trial court erred by not removing Juror Etheredge that error is harmless. Ross v. Oklahoma, 487 U.S. 81,88 (1988).

Appellant argues that Juror Bell read the news article and as a consequence should have been excused for cause. Appellee disagrees with this assertion. Juror Bell testified as follows concerning the news article:

> The Court: All right. Would you tell us what you remember reading in the article?
> Ms. Bell: I knew you were selecting the jury today. And since I had been called for jury duty, that caught my eye. I wondered if perhaps I would be, you know, involved in that. But I did not -- I don't know anything

of the particulars except that Mr. Castro has been judged guilty. But that's all I know.

The Court: Now, it's important that you tell us everything that you remember from the article.

Ms. Bell: I did.

The Court: Is that it?

Ms. Bell: That's it.

The Court: You don't remember anything else?

Ms. Bell: Nothing about the case at all. (R 318)

Mr. Whitaker: Your formed no opinions about what you would do in this case if you were selected to be on the jury?

Ms. Bell: No. (R 319)

Mr. Miller: Would you look to more than just the crime itself and to the individual who you've got to make this decision about -- in this case, Eddie Castro here?

Would you also consider it to be fairly important what has happened to him in his life and what sort of experience he has had that led him to this stage in his life?

Ms. Bell: I would think everything would be important to consider in a situation like that. (T 363)

Juror Bell stated that she had not formed any opinions about the case from what she read. She only remembered that Castro had been previously convicted, and the trial court told all the jurors that information. Moreover, Juror Bell indicated that she would consider Castro's life experiences that led him to this point. Publicity has not given this juror such fixed opinions that she could not judge the defendant's guilt impartially. Bundy v. Dugger, 850 F.2d 1402,1425-29 (11th Cir. 1988). This juror was clearly able to lay aside impressions or opinions shaped by pretrial exposure to the media and render a verdict based solely on the evidence presented during trial.

JUROR MILAM

Appellant argues because Juror Milam saw the news article and Castro on television, and because he supports the death penalty that the trial court erred by not striking him. Appellee disagrees on both points. The following is testimony by Juror Milam on the media coverage:

> The Court: Have you read anything about this case?
> Mr. Milam: This last Sunday I read a little bit about it. Not too much of it. I was reading Sunday's paper and I read a little bit. That's the only time I ever read anything.
> The Court: Tell me what you remember in reading on that account.
> Mr. Millam: Well, it wasn't very much. I just read a couple or three lines on it. Then I just stopped.
> The Court: Do you remember anything at all of what you read?
> Mr. Millam: No, I don't. The only thing that I do remember, they was transferring him from -- I believe it was Citrus County over here, to have this trial. I believe it said something about like that in the paper. I could be wrong.
> The Court: Do you remember anything else?
> Mr. Milam: No, that's all. (T 612)
> The Court: From what you may have heard or read in the newspaper, did that cause you to form any opinions about what the outcome of this case should be?
> Mr. Milam: No, it didn't. (T 613)

The only thing Juror Milam remembers from the article was that the case had been transferred from Citrus County. Juror Milam stated that he had not formed any opinions about the case from what he read. This juror clearly had no fixed opinions to impair him from judging the defendant's guilt impartially.

Juror Milam testified as follows concerning the death penalty:

> Mr. Whitaker: Do you think the death penalty is appropriate for every first-degree murder case?
> Mr. Milam: No. I think there is a difference in the cases.
> Mr. Whitaker: So you think each case should be considered on its own?
> Mr. Milam: Well, yes, I have an idea it would be. (T 614)
> Mr. Whitaker: The Court is going to instruct you on what aggravating circumstances -- which aggravating circumstances you are to consider. You can only consider the ones the Court instructs you on and apply those instructions to the evidence, only the evidence that is presented in this courtroom. Can you do that?
> Mr. Milam: Sure.
> Mr. Whitaker: Can you likewise give consideration to any mitigating circumstances or factors that may come in? That is, factors or circumstances which indicate that this is not the appropriate case for the death penalty.
> Mr. Milam: Yes.
> Mr. Whitaker: Can you consider those as well?
> Mr. Miliam: Yes. (T 615)
> Mr. Miller: ...Now, with Mr. Castro's life, his history, how he was raised, those sorts of things, what kind of traumas he had in his lifetime, would those be important to you in making a decision as to what the appropriate penalty was?
> Mr. Milam: That's correct. (T 618)

Juror Milam stated that he would follow the law. He would weigh the aggravators and the mitigators. Additionally he stated that he did not believe that the death penalty was appropriate for every first-degree murder. His views on the death penalty would certainly not prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. See, Darden v. Wainwright, 477 U.S. 165, 106 S.Ct. 2464 (1986); Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521

(1980). See also Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). Appellant argues that if jurors Bell and Milam had been struck the sentence would have been different, since the vote was eight to four. First, there was an insufficient basis to strike these two jurors. Secondly, one would have to assume that if they had been struck, the two jurors replacing them would have voted for life, and that is a big stretch. The trial court properly denied Appellant's challenge for cause.

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

Castro argues that there was insufficient evidence to establish the cold, calculated and premeditated aggravating factor. He maintains that there was evidence of premeditated robbery, but not a preplanned murder. Appellee submits that this argument is refuted by the defendant's very own words.

In Castro's statement to Lieutenant Nydham, he said that when he saw the older man staggering he was "digging it" and said "Hey, there's my car." After he convinced the victim to come to his apartment, he went to look for a knife because "it was on my mind already." When the victim tried to leave the apartment, the following ensued:

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

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

NYDAM: Where did you stab him at?

CASTRO: In the heart.

NYDAM: How many times?

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

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

CASTRO: I took it with me.

NYDAM: Where is the knife now?

> CASTRO: It's spread out. I broke it down (T 828).

In Castro's statement to Officers Krietmeyer and Leary, he talked about the landlord telling him to leave, that he decided to leave and made up his mind to take a car. When he saw the victim he "put it together. I turn the personality up then cause you know I want this car." He then decided he was "going to take this guy out." Castro tried to figure out how to "take this guy out without him screaming or making noise so I decided I'd get a knife." He went back and decided to "take this guy out." Castro recounted the following:

> CASTRO: So well I take him back inside the apartment you know, and I tell him hey, you know I got to get my s--- together uh, have another beer man I say and we'll be on our way and he sits down for some odd re... he starts getting suspicious, nervous and he's wearing two rings, you got one of the rings here, the other one I sold I don't remember where, some rest area. Anyways, he's got two rings and he's got a watch, a nice watch, you know, and uh, this guy must have some money and for some odd...odd reason... then, then I act, I said f--- it, I'm gone and I reached and I grabbed him by the throat and then squeezing him. I squeezed, I squeezed him so hard that blood starts coming out his mouth, his face was turning purple and he's fighting me. He scratches me and he's making me real mad and oh, I stuck the knife inside my boot. I'm holding him and I reach down and I'm trying to get the knife and I'm telling him man, I said hey, you know what, you're f--- ing up and uh, I'm trying to hold him, I'm tying to hold him, he's fighting me and I'm trying to get the knife, and I get the knife and I

> point it to his face and I tell him look man, we can make this real f--- ing easy. All I want is the car. I told him that if he didn't settle the f--- down I was going to stab him. Told him I would stab him in the eyeball. And then, uh, then he fights trying to get the f---ing knife so yeah, so I cut his hand, cutting him right here too.
>
> LEARY: On the left?
>
> CASTRO: Uh, I don't know which one. I remember that I cut his hand cause he was like trying to get the knife, but I don't go for the hand, I went for the heart. I said f--- it. I said f--- it cause he kept, he was fighting too much. I said f--- it and I struck at his throat trying to keep him from not screaming and I don't think he could have screamed by that time anyway. And then I kept (beating on a hard surface) and I don't know how many times I stabbed him, I don't remember, I lost it (T 869).

Procuring a weapon before the murder supports the heightened premeditation required for cold, calculated and premeditated. See, Brown v. State, 565 So. 2d 304 (Fla. 1990); Lamb v. State, 532 So. 2d 1051 (Fla. 1988); Huff v. State, 495 So. 2d 145 (Fla. 1986); Eutzy v. State, 458 So. 2d 755 (Fla. 1984). Luring the victim into the apartment also supports cold, calculated and premeditated. See, Koon v. State, 513 So. 2d 1253 (Fla. 1987). There is no evidence to reasonably suggest Castro had any motive other than to kill the victim. He obtained a knife, choked the victim to make sure he couldn't scream, then stabbed him. See, Shere v. State, 579 So. 2d 86 (Fla. 1991); Jones v. State, 569 So. 2d 1234 (Fla. 1990); Hardwick v. State, 521 So. 2d 1071 (Fla.

1988). Cold, calculated and premeditated is established where evidence shows Castro planned the robbery, lured the victim into his apartment, brought a weapon to the scene and tried to conceal the body. See, Lamb v. State, 532 So. 2d 1051 (Fla. 1988); Lambrix v. State, 494 So. 2d 1143 (Fla. 1986).

Cold, calculated and premeditated is not limited to execution-style murders. Rutherford v. State, 545 So. 2d 853 (Fla. 1989). This aggravating circumstance has been upheld even where there was no definite plan to kill the victim, but murder was "considered" or the need evolved during the commission of a robbery or burglary. See, Walton v. State, 547 So. 2d 622 (Fla. 1989); Brown v. State, 565 So. 2d 304 (Fla. 1990). Castro told the landlord he would be leaving shortly and then located a vulnerable victim who he could eliminate and steal his car. Once he had the victim in the apartment, he noted the presence of the ring and watch and this fueled his desire to eliminate the victim for his own greed. If the only motive had been robbery, Castro could have abandoned the murder when the struggle began. Castro pursued his goal of murder and robbery notwithstanding the victim's fighting back. See, Jackson v. State, 498 So. 2d 406 (Fla. 1986). He toyed with the victim by holding the knife in his face and telling him he had lost. See, Mendyk v. State, 545 So. 2d 846 (Fla. 1989). The trial court's findings were supported by substantial competent evidence. See, Asay v. State, 580 So. 2d 610 (Fla. 1991); Shere v. State, 579 So. 2d 86 (Fla. 1991); Jones v. State, 569 So. 2d 1234 (Fla. 1990); Craig v. State, 510 So. 2d 857 (Fla. 1987). The record shows Castro

carefully planned the murder and this aggravating circumstance is appropriate.

The cases cited by Castro are inapposite. Gorham v. State, 454 So. 2d 556 (Fla. 1984), involved a shooting during a robbery, and there was no evidence of heightened premeditation. Here, we have Castro's statements to McKnight and law enforcement officers which is direct evidence of premeditation. In Hardwick v. State, 461 So. 2d 79 (Fla. 1984), there was no evidence the defendant contemplated the victim's death.

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

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

Castro argues that because the victim was intoxicated at the time of his death that he suffered no pain, and moreover that the victim was unconscious very quickly as a result of choking. Even though there was no objection to only instructing the jurors on four statutory aggravators, Castro complains that because all the statutory aggravating factors were not given to the jury, the instruction on the heinous, atrocious or cruel aggravating factor was especially prejudicial. Finally, Castro also complains that the state presented no evidence to show that the victim suffered any pain.

The medical testimony alone showed that Austin Scott died a torturous death. Dr. Chin testified he could have lived up to ten minutes. The medical testimony corroborated Castro's statements in every detail. The victim was strangled then stabbed repeatedly. Either method alone would be heinous, atrocious and cruel. Here we have both. Furthermore, if, as Castro argued in Point III, his purpose was only to steal the car, there was no reason to repeatedly stab the victim in the heart if he was unconscious. Castro described in graphic detail how the victim suffered and how Castro toyed with the victim, showing him the knife and taunting him. The victim was conscious at the time of the stabbing.

Multiple stab wound murders and strangulation murders have traditionally been considered heinous, atrocious and cruel

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

The trial court's finding that the murder was heinous, atrocious and cruel was supported by substantial competent evidence. Randolph v. State, 562 So. 2d 331 (Fla. 1990) See, also, Jackson v. State, 530 So. 2d 269 (Fla. 1988) (stabbing); Quince v. State, 414 So. 2d 185 (Fla. 1982) (strangulation); Lusk v. State, 446 So. 2d 1038 (Fla. 1984) (strangulation); Mitchell v. State, 527 So. 2d 179 (Fla. 1988) (stabbing); Johnston v. State, 497 So. 2d 863 (Fla. 1986) (stabbing); Floyd v. State, 497 So. 2d 1211 (Fla. 1986) (stabbing); Dudley v. State, 545 So. 2d 857 (Fla. 1989) (strangulation); Doyle v. State, 460 So. 2d 353 (Fla. 1984) (strangulation); Tompkins v. State, 502 So. 2d 415 (Fla. 1986) (strangulation); Johnson v. State, 465 So. 2d 499 (Fla. 1985) (strangulation); Medina v. State, 466 So. 2d 1046 (Fla. 1985)(strangulation and stabbing); Brown v. State, 473 So. 2d 1260 (Fla. 1985) (strangulation); Nibert v. State, 508 So. 2d 1 (Fla. 1987) (stabbing); Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987) (stabbing); and Smith v. State, 424 So. 2d 726 (Fla. 1982) (stabbing).

V. THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE OF HAVING BEEN PREVIOUSLY CONVICTED OF A CAPITAL FELONY.

Appellant argues the trial court improperly instructed the jury on the aggravating circumstance of having been previously convicted of a capital felony. The appellant acknowledges that Daugherty v. State, 419 So. 2d 1067 (Fla. 1982), held that it was not error to find an aggravating circumstance that the defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though the offenses occurred subsequent to the capital felony for which the defendant was sentenced. However, appellant argues that the legislature did not envision that a subsequent conviction would be used in a third penalty phase more than four years after the initial conviction. Appellant further argues that finding this aggravating circumstance is error because of the law of the case and/or res judicata. Additionally, appellant argues that finding this aggravating circumstance is a double jeopardy violation. Finally, appellant argues that in consideration of fundamental fairness that only the aggravating circumstances found in 1988 and the ones approved on appeal and in post-conviction proceedings be applied.

Appellee disagrees with each of appellant's arguments. When Castro was first convicted and sentenced in 1988, the state could not seek the aggravating circumstance that he had been previously convicted of a capital felony because Castro had not been convicted of capital murder in Pinellas county for a murder

which occurred a week before the murder in the instant case until 1991. In Preston v. State, 607 So. 2d 404 (Fla. 1992), this Court held that the double jeopardy clause did not bar the penalty phase findings contrary to the finding at the prior sentencing proceeding. In Preston, as in the instant case, the conviction stood, but this Court remanded for a new penalty phase. The trial court retried the penalty phase, however, because a juror had not accurately responded to a voir dire questionnaire, the trial court held another penalty phase. This Court summarized the facts and arguments of counsel, which are the same arguments appellant is making, as follows:

> At the first trial, the judge found that the murder was committed for pecuniary gain but determined that factor to be merged with the aggravating factor that the murder was committed in the course of a felony. The judge also found that the murder was not committed for the purpose of avoiding arrest. The State did not appeal those rulings. At resentencing, the State again submitted those aggravating factors and the resentencing judge found them to be established. Preston argues that the resentencing court is barred by principles of double jeopardy, res judicata, law of the case, and fundamental fairness from finding aggravating circumstances that were not found by the original sentencer.

Id. at 407.

This Court in Preston went through an analysis of Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed. 2d 270 (1981), where the United States Supreme Court held that a defendant sentenced to life imprisonment by a capital jury is

protected by the Double Jeopardy Clause from imposition of the death penalty when his conviction is reversed and he is retried and reconvicted. The general rule is that the slate is wiped clean when a defendant has his conviction reversed, thus if he is convicted again, he is open to any lawful punishment. Preston at 407. This rule does not apply when the conviction is reversed because of insufficient evidence. Preston at 407. In the instant case the first jury was not submitted the aggravating circumstance of having previously been convicted of a capital felony, so that factor was not found because of insufficient evidence. This Court summarized the double jeopardy issue as follows:

> The Court noted that the appropriate inquiry is whether the sentencing judge or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate. Poland, 476 U.S. at 154, 106 S.Ct. at 1754. The Court refused to view a capital-sentencing proceeding as a set of mini trials on the existence of each aggravating circumstance. The Court found that the trial court's rejection of the pecuniary gain aggravating circumstance was not an "acquittal" of that circumstance for double jeopardy purposes and did not foreclose it as reconsideration upon resentencing. Further, because the reviewing court did not find the evidence legally insufficient to justify imposition of the death penalty, there was no "acquittal" of the death penalty. Thus, the Double Jeopardy Clause "did not foreclose a second sentencing hearing and the 'clean slate' rule applied." Id. at 157, 106 S.Ct. at 1756.

Preston at 408.

Applying these principles there is no double jeopardy violation. Bullington would not be applicable because neither this Court nor the trial court found that the state had failed to prove this aggravating factor. See, King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990)(resentencing is a completely new proceeding and a resentencing judge is not obligated to find mitigating circumstances found by the first judge); Teffeteller v. State, 495 So. 2d 744 (Fla. 1986)(resentencing should proceed de nova on all issues bearing on the proper sentence). Appellant's argument that res judicata and/or the law of the case doctrine would prevent finding the aggravating circumstance is meritless. King, supra (a mitigating circumstance in one proceeding is not an "ultimate fact" that collateral estoppel or the law of the case would preclude being rejected on resentencing). Appellant's argument that fundamental fairness would require a resentencing is meritless. Both New Jersey cases appellant relies on, State v. Biegenwald, 110 N.J. 521, 542 A.2d 442 (N.J. 1988) and State v. Cote, 119 N.J. 194, 574 A.2d 957, 973-974 (N.J. 1990) hold that fundamental fairness would not allow the state to rely on old evidence in a resentencing to prove a new aggravating factor. First, New Jersey law is not binding on Florida courts. Secondly, in Florida the slate is clean, unless the state failed to prove an aggravating factor because of insufficient evidence. In the instant case the state did not have the possibility of using the Pinnellas County murder because Castro had not been convicted of that murder. The state did not rely on "old evidence" to prove a new aggravating circumstance. Appellant has

had "fundamental fairness" in that this is his third sentencing proceeding, and he should not use the sword to seek review, and then try to shield himself from any "fundamentally fair" consequences of that decision. The trial court properly found the aggravating circumstance that the appellant had previously been convicted of a capital felony.

VI. THE DEATH PENALTY IS PROPORTIONAL.

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

The cases cited by Castro are not even comparable to this case. Some of the cases involved volatile domestic situations: Blakely v. State, 561 So. 2d 560 (Fla. 1990); Amoros v. State, 531 So. 2d 1256 (Fla. 1988); Garron v. State, 528 So. 2d 353 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1981); Blair v. State, 406 So. 2d 1103 (Fla. 1981); Phippen v. State, 389 So. 2d 991 (Fla. 1980); Kampff v. State, 371 So. 2d 1007 (Fla. 1979); Menendez v. State, 368 So. 2d 1278 (Fla. 1979); Chambers v. State, 339 So. 2d 204 (Fla. 1976); and Halliwell v. State, 323 So. 2d 557 (Fla. 1975). Some of the cases were also overrides: Phippen, Fead, Chambers, Irizarry, and Herzog. In Proffitt v. State, 510 So. 2d 896 (Fla. 1987), the defendant had been drinking, made no statements regarding any criminal intentions, possessed no weapon when he entered the premises, stabbed the victim once, made no attempt to injure the victim's wife, fled immediately and surrendered to authorities. In Rembert v. State, 445 So. 2d 337 (Fla. 1984),

the defendant hit the victim once or twice on the head, there was no evidence of premeditation, the murder was not heinous, and the state conceded many people similarly situated received a less severe sentence. Menendez v. State, 368 So. 2d 1278 (Fla. 1979), was not a proportionality case, but was remanded for resentencing after all but one aggravating factor was stricken.

In this case, the victim was lured to his death, strangled and repeatedly stabbed. Castro toyed with the victim, who endured extreme mental anguish and pain. The ordeal may have lasted up to ten minutes. The death penalty is appropriate in cases involving multiple stab wounds and strangulation. In this case, there are both. See, Randolph v. State, 562 So. 2d 331 (Fla. 1990); Sochor v. State, 580 So. 2d 595 (Fla. 1991); Floyd v. State, 569 So. 2d 1225 (Fla. 1990); Haliburton v. State, 561 So. 2d 248 (Fla. 1990); Rutherford v. State, 545 So. 2d 853 (Fla. 1989); Johnston v. State, 497 So. 2d 863 (Fla. 1986); Deaton v. State, 480 So. 2d 1279 (Fla. 1982); Morgan v. State, 415 So. 2d 6 (Fla. 1982); Hudson v. State, 538 So. 2d 829 (Fla. 1989); Muhammed v. State, 494 So. 2d 969 (Fla. 1986); Jackson v. State, 530 So. 2d 269 (Fla. 1988); Mitchell v. State, 527 So. 2d 1790 (Fla. 1988); Turner v. State, 530 So. 2d 45 (Fla. 1987); Engle v. State, 510 So. 2d 881 (Fla. 1987); and Kight v. State, 512 So. 2d 922 (Fla. 1987).

VII. THE TRIAL COURT PROPERLY REJECTED DEFENSE COUNSEL'S REQUESTED JURY INSTRUCTION CONCERNING THE CONSEQUENCES AND APPROPRIATENESS OF A SENTENCE OF LIFE IMPRISONMENT.

Appellant argues that the jury was not properly instructed on nonstatutory mitigating evidence in that the trial court failed to instruct that if Castro were given life, then he would have a mandatory minimum of fifty years in prison. He further argues that his counsel was hampered in their representation of him because of this error. Appellee would submit that appellant's argument is meritless.

Appellant relies on Jones v. State, 569 So. 2d 1234 (Fla. 1990). The defendant in that case was convicted of two murders in the guilt phase. In the penalty phase counsel was prevented from arguing to the jury that if the defendant were given a life sentence on both murders, then he would have to spend a minimum mandatory of fifty years in prison. This Court found that the trial court erred by not allowing the jury to consider the potential sentence of imprisonment relying upon Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and McCleskey v. Kemp, 481 U.S. 279, 304, 107 S.Ct. 1756,1773, 95 L.Ed.2d 262 (1987).

In the instant case Castro stands convicted of one murder in the case before the jury, so factually Jones is distinguishable., The jury in this penalty phase was faced with deciding death or life with a minimum mandatory of twenty-five years. Castro has another conviction for murder in Pinnellas County where he received a life sentence with a minimum mandatory

of twenty-five years. Appellant's counsel requested the court instruct the jury that the court can exercise its discretion and impose a consecutive sentence of fifty years (T 1106,1107). The trial court declined to give such an instruction. The trial court did not interfere with counsel's right to argue the fifty years as mitigating evidence even though this jury's charge was to decide the sentence in the Ocala murder. Jones did not hold that the trial court erred by not giving an instruction, rather the court erred by not allowing argument on this point. Appellant's counsel had the opportunity to fully argue this point. Furthermore, counsel did argue to the jury as follows:

> What does that tell you about the murder that occurred in Pinellas County a few days prior to this one? Was the victim a man? Was the victim a middle-aged man? Was the victim a homosexual? What do you know about that murder? Nothing. But the people who do know about that murder, the jurors who heard all the facts, recommended life and that it should be consecutive, or to follow after the Marion County charge.

(T 1150).

Counsel further argued as follows:

> Do not be deceived in thinking that life in prison is not punishment. I suggest to you that freedom is life's greatest gift. Imagine terminal confinement. Remember the law states that after twenty-five years there is a possibility of parole. A mere possibility. And only after it has been closely reviewed by a panel of individuals in special specific circumstances. It's a mere possibility. The judge can sentence Eddie to a life

> sentence consecutive, or following his life sentence in Pinellas County. It would then be fifty years before there was a mere possibility of being eligible for review. Fifty years. Eddie is forty-three years old.

(T 1154,1155).

The trial court allowed full argument to the jury. The jury had the opportunity to consider this as a nonstatutory mitigating factor, and they rejected it. The trial court did not abuse its discretion.

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

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

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

> depends upon the absence of "coercive police activity," or "overreaching." Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).
>
> Consistent with the principles underlying Elstad, the trial court below held a pretrial evidentiary hearing on Castro's motion to suppress. The testimony established that officers gave Castro verbal Miranda warnings and that he executed written waiver forms on two of the three occasions in question. We are satisfied that the testimony was sufficient to support the conclusion that the confessions were voluntary and not influenced by Castro's previous consumption of alcohol.

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

The trial court reviewed the second penalty phase transcripts (T 1101). Officer Nydam testified in the third penalty phase that Castro understood his rights and was not intoxicated when he gave the statements (T 811,840). Also Officer Leary gave Castro his Miranda warnings before the interview and Castro did not appear to be intoxicated (T 854,855). The statement to Lieutenant Nydham was around 8:30 p.m. (T 816). The statement to Officers Krietmeyer and Leary was at 5:30 a.m. (T 853). Listening to the tapes, there is no question the statements were voluntary. Since voluntariness was the issue, the trial court's denial was obviously a finding the statements were voluntary. The trial court did not abuse its discretion in finding the statement was freely and voluntarily made. Hayes v. State, 581 So. 2d 121 (Fla. 1991).

IX. THE TRIAL COURT'S RULING ON THE ADMISSIBILITY OF THE AUTOPSY PHOTOGRAPH WAS NOT AN ABUSE OF DISCRETION.

Castro contends this case is controlled by Czubak v. State, 570 So. 2d 925 (Fla. 1990), and the trial court erred in admitting a photograph of the victim's arm (T 758).

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

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

> victims' charred remains admissible where relevant to prove identity and circumstances surrounding murder and to corroborate medical examiner's testimony); *Bush v. State*, 461 So. 2d at 936 (photographs of blowup of bloody gunshot wound to victim's face admissible where relevant to assist the medical examiner in explaining his examination); *Wilson v. State*, 436 So. 2d 908 (Fla. 1983) (autopsy photographs admissible where relevant to prove identity, nature and extent of victims' injuries, manner of death, nature and force of the violence, and to show premeditation); *Straight v. State*, 397 So. 2d at 903 (photograph of victim's decomposed body admissible where relevant to corroborate testimony as to how death was inflicted); *Foster v. State*, 369 So. 2d 928 (Fla.) (gruesome photographs admissible in guilt phase to establish identity and cause of death), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979).

Id. at 928-29.

The cause of death was strangulation and stabbing. The medical examiner testified there were wounds to the pericardium and lungs (T 742). Three ribs were broken. The hyoid and larynx bones were also fractured and there was hemorrhaging in the neck (T 743). Not only was the photograph relevant to show defense wounds, but also it was necessary to illustrate her conclusions and it was not so shocking in nature to outweigh its relevance.

The trial court has wide latitude in the admissibility of evidence and, absent an abuse of discretion, its rulings should not be overturned. See, Burns v. State, 609 So. 2d 600 (Fla. 1991) (color slides of autopsy photographs); Nixon v. State, 572

So. 2d 1336 (Fla. 1990) (extremely gruesome photos of charred body. The trial judge screened the photo. The trial court did not abuse its discretion in ruling certain photos admissible.

X. THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS CONSTITUTIONAL.

Appellant complains that the terms "extremely wicked or shockingly evil" and "outrageously wicked and vile" of the "limiting construction" condemned by the United States Supreme Court in Shell v. Mississippi, 111 S.Ct. 313 (1990), as being too vague are the precise ones used by this court to review the heinous, atrocious or cruel statutory aggravating factor. The limiting construction is alleged to be too indefinite to comport with constitutional requirements and the definitions do not provide any guidance to the jury when the factor is first weighed, to the sentencer when the factor is next weighed, and to this court when the factor is reviewed and the limiting construction is applied.

Appellant argues that the inconsistent approval of the factor by this court under the same or substantially similar factual scenarios shows that the factor remains prone to arbitrary and capricious application. As an instance of such arbitrary application appellant asks this court to compare the language of Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990), where the court stated that the HAC factor "pertains more to the victim's perception of the circumstances than to the perpetrator's" with the language employed in Mills v. State, 476 So. 2d 172, 178 (Fla. 1985), where the court indicated that it must look to the act itself that brought about the death and that "the intent and method employed by the wrongdoers is what needs to be examined." Appellant contends that it is an arbitrary

distinction to say that one murder is especially heinous because, for a matter of minutes, while being driven approximately two to three miles, a victim perceived that death may be imminent, yet say that another murder was not heinous because, where for hours after the fatal wound was inflicted, a victim suffered and waited impending death.

Appellant concludes that because the HAC statutory aggravating factor is itself vague, and because the limiting construction used by this court both facially and as applied is too vague and indefinite to comport with the Eighth and Fourteenth Amendments, the instant death sentence imposed in reliance on the HAC statutory factor must be vacated and the matter remanded for a new penalty phase before a new jury.

In Shell v. Mississippi, 111 S.Ct. 313 (1990), the United States Supreme Court held that the limiting instruction used to define the "especially heinous, atrocious, or cruel" aggravating factor for capital murder, which stated that "the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others: was unconstitutionally vague. In State v. Dixon, 283 So. 2d 1 (Fla. 1973), the Supreme Court of Florida construed the term "heinous" to mean extremely wicked or shockingly evil; "atrocious" to mean outrageously wicked and vile; and "cruel" to mean designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Contrary to appellant's assertion, however,

this court has not limited itself to these terms in reviewing the HAC aggravating factor. Appellant fails to recognize that guidance was given in Dixon and such criteria applied by this court. The Supreme Court of Florida did not stop at simply defining what heinous, atrocious, or cruel meant in Dixon but actually enunciated what was intended to be included in the class of capital crimes. It stated "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." 283 So. 2d at 9. The United States Supreme Court held early on in Proffitt v. Florida, 428 U.S. 242 (1976), that the sentencer had adequate guidance, understanding the factor to apply to the conscienceless or pitiless crime which is unnecessarily torturous to the victim," and this language permeates the decisions of this court. Where not expressly mentioned, this advice served no less as a beacon.

The existence of inconsistent and overbroad constructions has not been demonstrated by the alleged inconsistencies offered by the appellant. To attach the qualifying HAC label to the capital felony there must be a additional acts setting it apart from the norm and it must be conscienceless or pitiless crime which is unnecessarily torturous. In determining whether any given capital felony fits within that class it stands to reason that it is necessary, depending on the case, to look at the act itself and the victim's perception of the circumstances. As

Justice Souter noted in Sochor v. Florida, 112 S.Ct. 2114, 2121 (1992), "the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim." In the case of strangulation it is not necessary to beyond the act because the victim's perception can be ascertained from the act itself. Since strangling takes some amount of time it can safely be assumed the victim is in great fear and suffering emotional strain. Some acts make the capital felony almost per se heinous, atrocious, or cruel. See, Hitchcock v. State, 578 So. 2d 685,693 (Fla. 1990). Other murderous acts such as shooting with a shotgun may cause or the instruments thereof may be designed to cause immediate death and ending the analysis there would not result in a finding that the capital felony was heinous, atrocious or cruel. See, Mills v. State, 476 So. 2d 172, 179 (Fla. 1985); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983). Even in such cases, however, there may be additional acts setting the crime apart from the norm, looking at the crime from the victim's perspective, that would qualify the crime as heinous, atrocious or cruel, such as a preceding kidnapping or death march, see, Koon v. State, 513 So. 2d 1258 (Fla. 1987), or delay whereby the victim could obsess about his or her impending death or toying with the victim such as firing bullets into the extremities before administering the coup de grace. See, Swafford v. State, 533 So. 2d 270 (1988). What this court has generally looked at is whether the victim is tortured, either physically or emotionally by the killer. See, Cook v. State, 545 So. 2d 964 (Fla. 1989). There is no arbitrary and

capricious application by virtue of the fact that the court examines both the act and the victim's perception depending on the factual scenario. Such analysis is consistent with the approved Dixon definition in Proffitt and essential to determining if the crime was pitiless and unnecessarily torturous or accompanied by additional acts setting the crime apart from the norm. It is also not an arbitrary distinction to find a murder preceded by an abduction to be susceptible to an application of the HAC factor while not finding such factor applicable to a lingering death from a gunshot wound. An abduction causes great fear and emotional strain, which is different than the actual process of dying, itself, which we all ultimately undergo. Thus, pursuant to Walton v. Arizona, 497 U.S. 639 (1990), it was not error for the trial judge to weigh an aggravating factor defined by statute with impermissible vagueness, when the jury was instructed in the language approved in Proffitt and the state Supreme Court has construed the statutory language narrowly in prior cases. 110 S.Ct. at 3075,3076; the jury was instructed in the language approved in Proffitt and see, Power v. State, 605 So. 2d 856, 864 n.10 (Fla. 1992). In Espinosa v. Florida, 112 S.Ct. 2926 (1992), one of the instructions merely informed the jury that it was entitled to find as an aggravating factor that the murder of which it had found Espinosa guilty was "especially wicked, evil, atrocious or cruel." 112 S.Ct. at 2927. That is not the case here. In this case any vagueness in the statutory language was cured by a proper instruction to the jury. There was no jury error to taint

the trial judge and he is entitled to the Walton presumption that he knew and applied the law of this court. Even if the judge was not entitled to such presumption, this court certainly is (an issue not considered in Espinosa) and the decision in Smalley v. State, 1546 So. 2d 720 (Fla. 1989) is still correct.

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

Violation of Separation of Powers

Castro contends that the statutory aggravating factors as written are unconstitutionally vague and overbroad. This court has rejected the premise that Florida's especially heinous, atrocious and cruel statutory aggravating factor is unconstitutionally vague based on Maynard v. Cartwright, 486 U.S. 356 (1988), because the working definition of the terms set forth in the HAC factor are provided by this court through a limiting construction of that factor. Castro contends however, that this court does not constitutionally have the power to provide definitions of the statutory aggravating factors as pursuant to Article III, Florida Constitution (1976), the Florida Legislature is charged with the responsibility of passing substantive laws and this court cannot promulgate substantive law in violation of the separation of powers under Article II, Section 3 of the Florida Constitution. Thus, the limiting definitions provided by this court in State v. Dixon, 283 So. 2d 1 (Fla. 1973), and subsequent cases cannot be considered. Castro claims that the factors listed in that statute are open windows through which unlimited facts may be put before the sentencer to achieve a death sentence in violation of equal protection and due process under the Eighth and Fourteenth Amendments, Article I, Section 17 of the Florida Constitution and the holding in Furman v. Georgia, 408 U.S. 238 (1972). Castro complains that this court has permitted the state to establish the full details of a

defendant's prior conviction for a violent felony so that weight can be accorded the factor while at the same time recognizing that such testimony is presumptively prejudicial. He contends that this rationale applies to other statutory aggravating factors. He concludes that because the statutory aggravating factors fail to adequately channel the sentencer's discretion in imposing the death penalty, the factors are unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. These claims haave been previously rejected. See, Shere v. State, 579 So. 2d 86 (Fla. 1991).

Nowhere below did Castro ever argue that this court does not constitutionally have the power to provide limiting definitions of all the statutory aggravating factors, rather Castro simply attacked all the statutory aggravating factors as being overbroad on their face and as applied, and additionally claimed the statute establishes a fixed penalty which eliminates judicial discretion (R 52). This issue should be deemed to be waived. An appellate court should not reverse a trial court on the basis of facts or arguments which were not presented to the trial court and are not part of the record on appeal, see, Patterson v. Weathers, 476 So. 2d 1294 (Fla. 5th DCA 1985), or consider a question of constitutionality that has not been raised by the pleadings. Ellis v. State, 74 Fla. 215, 76 So. 698 (1917). In any event, the separation of governmental powers into legislative, executive, and judicial is abstract and general, and

is intended for practical purposes. State v. Coast Line Railroad Company, 56 Fla. 617, 47 So. 969 (1908). There has been no complete and definite designation of all the particular powers that appertain to each of the several branches, and perhaps there can be no absolute and complete separation of all the powers of a practical government. 10 Fla.Jur.2d., Constitutional Law section 138. There are areas in which executive, legislative, and judicial powers overlap. State ex. rel. Caldwell v. Lee, 157 Fla. 773, 27 So. 2d 84 (1946). Although the Florida Constitution defines three separate branches of power, there is no attempt to compartmentalize them. Petition of Florida State Bar Assoc. etc., 155 Fla. 710, 21 So. 2d 605 (1945). The fact that one department is clothed with inherent power does not necessarily mean that all others are excluded. The powers of one department of government have always depended on or have been aided in some way by those of another. Id. Generally, the legislature is the only branch of government authorized and empowered to make laws. Foley v. State, 50 So. 2d 179 (Fla. 1951). Generally speaking, the legislative function is to prescribe rules for the control of others as distinguished from the judicial function, which is to follow rules made by itself or some superior authority. McNealy v. Gregory, 13 Fla. 417 (1870). It is the function of the judiciary to declare what the law is and to interpret the law. Jackson Lumber Company v. Walton County, 95 Fla. 632, 116 So. 771 (1928). In the performance of this function judicial interpretation itself becomes a part of the law. Id. The Constitution does not provide a definition of judicial power any

more than it does of legislative or executive power. 16 Am.Jur.2d, Constitutional Law section 220. The question of what constitutes a judicial power is determined in the light of the common law and what such powers were considered to include at the time of the adoption of the Constitution. Petition of Florida State Bar Association, etc., 155 Fla. 710, 21 So. 2d 605 (1945). The judicial power vested in the courts includes authority in adjudicating litigated rights to determine what is the controlling law applicable to the rights being adjudged. Getzen v. Sumter County, 89 Fla. 45, 103 So. 104 (1925). This power includes the determination in litigated cases of the meaning and intent of pertinent provisions of the Constitution, as well as whether state laws accord with the Constitution. Id. The judicial power under the Constitution includes the power to declare whether a legislative act is or is not unconstitutional and it is the duty of the court to effectuate the policy of the law as expressed in valid statutes. Cotten v. Leon County, 6 Fla. 610 (1956); State ex. rel. Jonson v. Johns, 92 Fla. 187, 109 So. 228 (1926). The Supreme Court of Florida simply carried out such power in State v. Dixon, 283 So. 2d 1 (Fla. 1973), and subsequent cases in which constitutional attacks were lodged against section 921.141 Florida Statutes (1973), in determining that the definitions of the crimes intended to be included were reasonable and easily understood by the average man and interpreting the terms heinous, atrocious and cruel and stating that "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." 283 So. 2d 9. For two decades Dixon has rightfully been part of capital punishment law. The court has clearly been exercising its interpretative powers to effectuate the policy of the law and has hardly been acting in defiance of the legislature. In fact, the very constitutionality of the state's capital sentencing procedures is contingent on the Florida Supreme Court's role of reviewing each case to ensure uniformity in the imposition of the death penalty. See, Witt v. State, 387 So. 2d 922 (Fla. 1980).

It is interesting to note the absence of a hue and a cry upon reversal of an override in Tedder v. State, 322 So. 2d 908 (1975), where the Supreme Court of Florida held that the legislature intended in the choice of language used in 921.141 something especially heinous, atrocious or cruel in order to authorize the death penalty for a first-degree murder, after applying the interpretations contained in Dixon. Tedder v. State, 322 So. 2d 908, 910 n.3 (Fla. 1975). No complaint was lodged when this court interpreted the factor as only applying to torturous murders, i.e. murders that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to the enjoyment of the suffering of another. See, Williams v. State, 574 So. 2d 136 (Fla. 1991). Thus, it is clear that it is not the court's actual interpretative authority that is being challenged. Appellant merely dislikes the court's constructions in cases other than his own.

Castro next complains that Section 921.141(2) and (3), Florida Statutes (1989) require that the aggravating factors outweigh the mitigating factors but subsection (2)(b) places the burden on the defendant to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist" in violation of the Fifth and Fourteenth Amendments, Article I, Section 9 of the Florida Constitution and the holding of Mullaney v. Wilbur, 421 U.S. 684 (1975). He demands that this court declare Florida's death penalty to be unconstitutional and accused the court in the past of deviating from the clear language of the statute and promulgating substantive legislation through judicial fiat by holding in such cases as Arango v. State, 411 So. 2d 172, 174 (Fla. 1982), and Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), that the burden is on the state to prove that the aggravating factors outweigh the mitigating factors. Castro also complains that by only being required to show that the aggravation outweighs the mitigation the death penalty can be imposed by a mere preponderance of the evidence standard in violation of In re: Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975) rather than the state being required to prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. He also complains that the standard instruction requires only that the state show that the death penalty is warranted by a mere preponderance of the evidence resulting in a violation of due process under Francis v. Franklin, 471 U.S. 307 (1985) and Sandstrom v. Montana, 442 U.S. 510 (1979). This burden-shifting

claim has been previously rejected. Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991).

CONCLUSION

Based on the foregoing arguments and authorities, appellee requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by Delivery to George D. E. Burden, Assistant Public Defender, 112-A Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 28th day of February, 1994.

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