IN THE SUPREME COURT OF FLORIDA

EDWARD CASTRO,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 81,731

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

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

remanded for a new penalty hearing because the trial court erred in refusing to disqualify the Fifth Circuit State Attorney's Office from prosecuting defendant's case and faulty jury instructions. Castro v. State, 597 So.2d 259 (Fla. 1992). This is the direct appeal of a death sentence imposed after the subsequent penalty phase.

In imposing this death sentence, the trial court found four statutory aggravating factors: defendant was previously convicted of another capital felony; the murder was committed while the defendant was engaged in the commission of a robbery; a cold, calculated and premeditated murder without pretense of moral or legal justification, and; an especially heinous, atrocious or cruel murder. The mitigating circumstances found by the trial judge include; a traumatic childhood caused by physical and sexual abuse; and a history of alcohol dependency. (R317-327)

FACTS CONCERNING THE MURDER

The circumstances surrounding the murder come primarily from statements Castro made to police following his apprehension on the day of the murder. Castro, alleging that he was too intoxicated to intelligently understand and/or voluntarily waive his constitutional rights, moved to suppress the statements. (R12-27) The transcript from the original motion to suppress evidentiary hearing was admitted (R16), and the motion to suppress was denied without an express finding of voluntariness. (R709). Castro's statements were introduced into evidence over objection and published in edited form to the jury. (R822;831).

In sum, viewed in a light most favorable to the state, the evidence established that Castro arrived in Ocala on January 3, 1987 to stay with friends. (R858; 860) Three or four days later the friends dropped him off at the Ocala bus depot where he went to a nearby bar to drink. (R862) A man named Gallagher took a liking to Castro and invited him to stay at his apartment. (R863) After three days of heavy drinking, he got into an argument with Gallagher and Gallagher asked Castro to leave. (R863, 64) At this time Castro decided he was going to leave Ocala and was going to take a car to do it. (R864)

Castro then observed Austin Scott (the victim) coming out of an apartment and started to talk to him. (R865) After obtaining a six-pack of beer Castro and Austin Scott went to Gallagher's apartment to drink. (R866) Castro then decides that he is going to "take this guy out." (R867) Castro told Scott that he needed to leave to get ten dollars, but instead went to neighboring apartment to get a steak knife. (R867)

When Castro returned he noticed that Scott's car was gone. (R867) Castro then observed Scott exiting the area, wherein Castro waived Scott down and convinced him to return to the apartment. (R868) After another beer, Castro grabbed Scott by the throat and squeezed hard. (R868) As Scott struggled, Castro retrieved the steak knife and stabbed Scott an unknown number of times. (R869) Castro then took Scott's car and drove to Lake City, stopping at rest areas on I-75. (R829)

Deputy Boatwright of the Columbia County Sheriff's

Department observed Castro at State Road 47 and I-75. (R980) Castro's speech was slightly slurred, his eyes were bloodshot, and the officer noted the smell of an alcoholic beverage about his breath when he spoke. (R980) When Castro became hostile towards the officers, he was arrested for disorderly intoxication. (R981) Castro's statements followed that arrest.

Scott had eleven surface wounds to the chest area and was strangled. (R742-44) His right arm had three sets of knife wounds. Scott's blood alcohol content was .22%. (R765) The strangulation could have rendered Scott unconscious prior to the stabbing. (R768) Scott received a broken hyoid bone and a fractured larynx, injuries typically inflicted during strangulation. (R743)

SUMMARY OF ARGUMENTS

POINT I: The trial court violated the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 22 of the Florida Constitution by excusing for cause one qualified juror over defense objection. Prospective jurors may not be excluded for cause "simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction citing Witherspoon, Lockhart and Gray. Although a decision to impose the death penalty was a weighty one for juror Strayer (as it should be) he never expressed an irrevocable commitment to vote for a life sentence regardless of the evidence. Rather, he expressed that his religious beliefs were an "ingrained" part of his life, but nonetheless he could follow the judge's instructions and could obviously consider a death recommendation if warranted by the evidence and the law. Granting the state's challenge for cause constituted a denial of due process under the state and federal constitutions and further rendered the death penalty and jury recommendation unreliable.

POINT II: The trial court denied eight defense challenges for cause. After exhausting peremptory challenges to remove those jurors which were not denied for cause, the defense moved for additional peremptory challenges. The trial court denied the defense's motion contrary to this Court's expressed directive in Castro v. State, 597 So.2d 259, 261 (Fla. 1992). As a result of the trial court's failure to grant additional peremptory

challenges, two biased jurors were permitted to remain on the jury panel. This constituted a denial of due process under the state and federal constitutions and further rendered the death penalty and jury recommendation unreliable.

POINT III: The trial court found Scott's murder to have been committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. In doing so, the court erroneously transferred the substantial planning and reflection involved in the underlying felony. The evidence clearly showed that Mr. Castro wanted Mr. Scott's car, and was willing to use violence to get it. The record also clearly shows that Mr. Castro was highly intoxicated, and from his own statements the actual homicide was an impulsive act derived from his altered mental state.

POINT IV: The evidence is legally insufficient to show beyond a reasonable doubt that the murder was especially heinous, atrocious or cruel. The wounds to Scott do not alone establish this factor because such testimony is offset by proof that Scott's blood alcohol content was .22 per cent and that, assuming that Scott was conscious when first attacked, the wounds would have rendered Scott unconscious within moments. Pursuant to Herzog v. State, 439 So.2d 1372 (Fla.1983), the HAC statutory aggravating factor must be disallowed.

POINT V: The jury recommendation and death sentence are invalid because they are based on the improper statutory aggravating circumstance of being previously convicted of a capital felony.

Consideration of this factor is barred by the doctrines of res judicata, law of the case, double jeopardy and fundamental fairness, notwithstanding this Court's holding in Daugherty v. State, 419 So.2d 1067 (Fla. 1982).

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

POINT VII: The trial court violated the Sixth, Eighth and Fourteenth Amendments by rejecting defense counsel's requested jury instruction concerning the consequences and appropriateness of a sentence of life imprisonment. The denial of the requested jury instruction on what was a correct and otherwise relevant statement of the law denied Mr. Castro his rights to due process, to address the evidence and the law, and to effective representation of counsel.

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

POINT IX: The trial court erred in admitting over timely and specific objection a color autopsy photograph. The graphic

picture was irrelevant and, assuming relevance, the prejudice of the picture far outweighed any probative value. The presence of this photograph made the jury recommendation unreliable under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

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

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

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

POINT I

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION BY EXCUSING FOR CAUSE ONE QUALIFIED JUROR OVER DEFENSE OBJECTION.

Introduction

The law is clear that prospective jurors may not be excluded for cause "simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968); Lockhart v. McCree, 476 U.S. 162, 176 (1986). This principle was reaffirmed by the United States Supreme Court in Gray v. Mississippi, 481 U.S. 648 (1987). There, the Court reiterated what the constitutional standard to be used to determine if a juror may be excluded for cause as being not whether the juror would have a difficult time imposing the death penalty; rather "the relevant inquiry is whether the jurors views would 'substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'." Gray v. Mississippi, 481 U.S. at 658, quoting Adams v. Texas, 448 U.S. 38, 45 (1982). See also Wainwright v. Witt, 469 U.S. 412, 424 (1985).

The constitutional basis of that standard was emphasized in Gray:

> It is necessary, however, to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments.

> Justice Rehnquist in writing for the Court, recently explained: "It is important to remember that all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases as long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176 (1986).
>
> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interests in administering constitutional capital sentencing schemes by not following their oaths." Wainwright v. Witt, 469 U.S. at 423. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack(s) the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." Witherspoon v. Illinois, 391 U.S. at 523.

Gray v. Mississippi, 481 U.S. at 658, 659.

In Adams v. Texas, 448 U.S. at 49, the Court ruled that jurors could not be excluded if they stated they would be "affected" by the possibility of the death penalty since such indication could mean "only that the potentially lethal consequences or decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally."

> Neither nervousness, emotional involvement, nor inability to deny or confirm any affect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for

> excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments.

448 U.S. at 50. The standard for limiting the exclusion of jurors was specifically approved by the court in Wainwright v. Witt, 469 U.S. at 423-424, which also reiterated that the burden of demonstrating that the challenged juror would not follow the law in accordance with his oath and that the instruction of the court is on the party seeking exclusion of the juror, i.e., the State. Id. In the present case, it is clear that prosecution did not meet its burden to establish exclusion.

Juror Strayer

It is clear that Juror Strayer had fixed religious beliefs concerning the death penalty; and recognized the serious nature of deciding such an issue. It is also clear that this was the first time that Juror Strayer had been called for jury service for a capital case and had not been subjected to capital punishment voir dire. When the Court informed Strayer that he would be questioned by the state about how he felt about the death penalty the following exchange occurred:

> STATE: Nearly everyone has some opinion about capital punishment or the death penalty. I want to find out what yours is. Do you believe there should be capital punishment in the State of Florida?
>
> STRAYER: Well, I think there is certain instances where people would like to think that that solves something. I don't see where it really solves anything.
>
> STATE: Can you envision any crimes for which you think -- that you feel that capital punishment would be appropriate?

STRAYER: Well, not really. Not according to my religious beliefs, no.

STATE: So, for you to vote and recommend the death penalty would be contrary to your religious beliefs?

STRAYER: I would have to say yes.

STATE: Could you set those religious beliefs aside and follow the law the Court gives you regarding that?

STRAYER: Well, I feel there is kind of universal laws that are higher than the laws of what other people create.

STATE: And it's all right for you to have that opinion. It's all right for you to follow that conscience. My question to you is: Even if the State proves according to the law in the State of Florida that this case and this defendant deserves the death penalty, would you ever vote for the death penalty based upon your beliefs or recommend the death penalty based on your beliefs?

STRAYER: I don't think so. I couldn't do that conscientiously. (R390, 391)

Thus far, the voir dire of Juror Strayer did not address the relevant inquiry under Witt and Witherspoon for determining impartiality to serve on a capital jury. In the above questioning by the state, Juror Strayer was not asked whether he could set aside his religious beliefs and consider the instructions of the court and follow the law as instructed. Rather, the state's question was on the collateral matter of whether "based upon" his religious beliefs could their be capital punishment. Simply demonstrating that a prospective juror's religious beliefs run contrary to capital punishment does not demonstrate that such beliefs impair their ability to serve on

demonstrate that such beliefs impair their ability to serve on the jury. The voir dire by defense counsel made the relevant Witt/Witherspoon inquiry:

> DEFENSE: Are you saying here today that if you listen to all of the evidence that was presented here, evidence of reasons why Eddie should live, evidence from the State as to why the death penalty is appropriate, that you could not go back and think about those factors and deliberate carefully and follow the law?
>
> STRAYER: I could make a decision based on what I believe to by my conscience level of what would be appropriate or what is not appropriate, or that sort of thing. Yeah.
>
> DEFENSE: But you would try to follow the law as it's set out?
>
> STRAYER: According to my knowledge of what it is. I guess that is true.
>
> DEFENSE: Let me explain this to you. The jurors don't have to go back and deliberate and guess about what the law is. The Court's function, part of the Court's function is to provide jurors with instructions and, in fact, those would be allowed to go back to the jury room. So you would be asked to consider and deliberate based on, again, the evidence that you heard in the courtroom about reasons to save Eddie's life and reasons that you may want to consider to decide whether or not the death penalty was appropriate, but you would be given direction. Do you think you could follow those guidelines, read them, and make a decision in accordance with the law?
>
> STRAYER: **According to what I was told, yeah, as far as if I'm given some kind of guidance as to what that is.** (emphasis added) (R393, 394)

The above responses to the relevant Witt\Witherspoon inquiry demonstrates that although Juror Strayer's religious belief's are against the death penalty, Juror Strayer as an individual citizen would perform his civic duty and listen to the

evidence, follow the court's instruction, and make a decision based upon the law. This was further reinforced when the State asked Juror Strayer whether he could ever make a death recommendation, wherein he replied:

> STRAYER: It's kind of -- very difficult to say, because I don't really know any of the details of anything. I mean I don't see any way of making that kind of a judgment based on what you are asking me right now. I don't have any knowledge. (R395)

Appellant contends that the above response by Juror Strayer demonstrates that after being given a short explanation of how jurors arrive at their recommendation by defense counsel, he is having difficulty applying a hypothetical to that process. Note, the response "based on what you are asking me now" refers to his newly found understanding of the capital punishment sentencing process as explained by defense counsel. Juror Strayer's reluctance to provide a hypothetical death eligible crime in no way shows that his ability to act impartially is impaired.

The trial court, although well intentioned, questioned Juror Strayer in a manner that would have Juror Strayer again express what his religious convictions demand, rather what he would do for his civic duty. The trial court prefaced the relevant Witt/Witherspoon inquiry with what at this point was very obvious: Capital Punishment is against Juror Strayer's religion:

> 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 beliefs that capital punishment is against your religion and that it should never be imposed in any case? Is that your religious belief?

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

COURT: ...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?

STRAYER: I don't believe so. (R396, 397)

The Court's question above was in reality a series of compound questions with the last question being "can you set your religious belief's aside." The appellant submits that the questioning by the Court with the emphasis on his religious beliefs, in no way discounts Strayer's statement made previously that he could follow the law. It is clear from Juror Strayer's answers that, to the day of trial, he'd never considered the issue of recommending capital punishment. He wrestled with the issue throughout voir dire. His answers made it abundantly clear that he did not know the procedure of the law, but was willing to learn to apply the law in an appropriate case. As would any reasonable person, Juror Strayer recognized that passing judgment on whether a fellow human being should die is a momentous decision, not to be taken lightly. The State and

Court seemed to read Juror Strayer's religious beliefs against the death penalty as an inability to recommend death in the appropriate case. Strayer's answers revealed the contrary. Although a decision to impose the death penalty was a weighty one for juror Strayer (as it should be) he never expressed an irrevocable commitment to vote for a life sentence regardless of the evidence. Rather, he expressed that his religious beliefs were an "ingrained" part of his life, but nonetheless he could follow the judge's instructions and could obviously consider a death recommendation if warranted by the evidence and the law.

Conclusion

The erroneous exclusion of even one juror in violation of the Adams-Witt-Gray standard is constitutional error which goes to the very integrity of the legal system and could never be written off as "harmless error". Gray v. Mississippi, supra; Davis v. Georgia, 429 U.S. 122 (1976); Chandler v. State, 442 So.2d 172 at 174-175. "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the constitution." Witherspoon, 391 U.S. 519-523.

The State is not permitted to so stack the deck against the defendant and thus deprive him of due process of law. Accordingly, the defendant was tried by an unconstitutionally seated jury. The defendant's judgments and sentences must be reversed and the case remanded for new trial before a fair and impartial jury.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO STRIKE JURORS FOR CAUSE WHERE THE JURORS WERE EXPOSED TO PREJUDICIAL PRE-TRIAL PUBLICITY, WOULD AUTOMATICALLY PRESUME THAT DEATH IS THE APPROPRIATE PENALTY AND OTHERWISE EXPRESSED THEIR DOUBT ABOUT THEIR ABILITY TO BE FAIR AND IMPARTIAL DUE TO THEIR SUPPORT OF THE DEATH PENALTY.

Prior to jury selection, it was brought to the attention of the trial court that the local newspaper ran an article the day before detailing prejudicial information about the instant case.[1] As a result, the court agreed to an individual voir dire concerning what each juror knows about the case.

The defense challenged for cause eight prospective jurors either because of their exposure to prejudicial pre-trial publicity, their expressed presumption that death was automatically the appropriate penalty, or other factors related

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[1] The article was prejudicial because it contained the following: "The killer's fate to be decided third time." Also in a box highlighted within the article it stated: "Edward Castro, 42, has twice been sentenced to die in Florida's electric chair." It reads: "Edward Castro, 42, has twice been sentenced to die in Florida's electric chair for killing Austin C. Scott during a robbery in '87, but both sentences were overturned on appeal, though his first-degree murder conviction still stands. Jury selection for the penalty phase begins at 8:30." Another article states: "The process of sentencing of convicted murderer Edward Castro for the third time will begin Monday. Castro, 42, has twice been sentenced to die in Florida's electric chair for killing Austin C. Scott during a robbery in '87. Both sentences were overturned on appeal, though his first-degree murder conviction still stands. Jury selection for the penalty phase trial starts at 8:30 a.m. Circuit Judge Thomas Sawaya."

to their support of the death penalty that raised doubt about their ability to be fair and impartial. The defense exhausted their preemptory challenges and requested additional preemptory challenges. (R653) Request for additional preemptory challenges was denied. (R654) The defense stated that had they had the opportunity, they would have used a pre-emptory challenge on Juror Milam (R653) Also, Juror Bell remained on the jury after the motion to excuse for cause was denied. (R325)

JURORS THAT SHOULD HAVE BEEN EXCUSED FOR CAUSE

Juror Sawallis

During jury selection Juror Sawallis was questioned about her knowledge of the case and the Article in particular and she remembered prejudicial information from the article:

> COURT: Did you read the paper Sunday?
>
> SAWALLIS: Yes.
>
> COURT: Tell me what you remember. Did you read the article about the case in the paper?
>
> SAWALLIS: I more or less glanced at it a little bit. There was a little block in there.
>
> COURT: Tell me what you remember from reading anything at all about the case in Sunday's paper.
>
> 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. (R37)
> .....
>
> COURT: When you got your summons, obviously you knew you were going to be coming. You read at least the headlines and some of the block portion?
>
> SAWALLIS: Right. (R38)
> .....
> COURT: Do you remember anything else about

anything at all about the article?

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. (R38)

Juror Sawallis was then questioned about her opinions concerning the death penalty. Responding from questioning from the state, Juror Sawallis admitted that she believed in the death penalty, and was ambivalent as to whether she could follow the law as the court instructed:

STATE: You may have your own criteria or your own opinions as to what kind of circumstances you would be looking for. But could you set aside your own criteria or your own circumstances and listen only to the law the Court gives you and the evidence in this courtroom to make your recommendation?

SAWALLIS: I think so, if all the information was put in front of me. (R39,40)

Upon further inquiry from the defense about her attitudes concerning the death penalty Juror Sawallis admitted:

SAWALLIS: Well, I think that in certain cases, depending on what has happened and the evidence, if there is enough evidence there and there has been what I feel a "fair trial," and all the evidence, I think that there is, you know, the case is for the death penalty. (R43)

Additionally Juror Sawallis stated that she was bothered with the appellate process involving capital cases and before she could be fair and impartial she would want an explanation as to why there was a delay from the commission of the crime in January 1987 and 1993. More troubling, concerning the sentencing procedure itself, Juror Sawallis made it clear that the defense had a burden of proving that Life is an appropriate sentence:

DEFENSE: Do you think, in a sentencing procedure such as this, that the Defense has any burden, or are we going to have to prove anything to you, prove to you that Life is appropriate or that Death is inappropriate?

SAWALLIS: What do you mean? Convince me --

DEFENSE: Right.

SAWALLIS: Well, actually, you know, I think that you would have to, you know, convince me that there was good reason. You know, give what evidence and what reasons you think.

DEFENSE: Even if the Court were to instruct you that it's the prosecutor's burden to prove beyond and to the exclusion of every reasonable doubt that the death penalty is appropriate, would you still expect us and want us to convince you, to prove to you that there is mitigation and that Life is appropriate?

SAWALLIS: Actually, I think both sides would have to be -- would have to put both sides across. You can't make a decision without hearing both sides. (R47, 48)

The state attempted to rehabilitate Juror Sawallis concerning the above attitudes she expressed, but her responses were ambivalent and uncertain to the point of being meaningless:

STATE: Very briefly, Your Honor. (to Mrs. Sawallis) You indicated that you would be concerned about what went on between the trial in which Mr. Castro was found guilty and now. If the Court asked you to disregard what has gone on between that time and now, and just consider the evidence presented in this courtroom and the law he gives you, could you do that?

SAWALLIS: I think so. You know -- I would hope so.

STATE: If the Court tells you not to be concerned about what has gone on in between, could you just not concern yourself with it?

SAWALLIS: Concern myself with this trial?

STATE: Yes.

SAWALLIS: I think so. I hope so.

The defense thereafter made a motion to strike Juror Sawallis on the grounds that Juror Sawallis stated that she wouldn't be able to put out of her mind what happened in the last five years; read the newspaper article; and would require the defense to prove that life was an appropriate sentence. Before ruling, the trial court, sua sponte, "rehabilitated" Juror Sawallis by asking her whether she could follow the court instructions and the law; which she dutifully agreed. (R52, 53)

Appellant submits that the trial court led this potential juror down the "path of impartiality." No one, in any situation, likes to admit that they could not be fair. See Williams v. Griswald, 743 F.2d 1533 no. 14 (11th Cir. 1984) The trial court asked no hard questions to probe juror Sawallis' genuine feelings. Rather, the trial court prompted juror Sawallis to agree with his statements whether she could put aside her obvious bias and follow the law. Indeed, "going through the form of obtaining the jurors' assurances of impartiality is insufficient .... " Silverthorne v. United States, 400 F. 2d 627, 638 (Fifth Cir. 1968); see also, Irvin v. Dowd, 366 U.S. 717, 728 (1961)(jurors' statements of their own impartiality to be given "little weight"). General conclusory protestations of impartiality during voir dire are not sufficient to rebut the prejudice due to pre-trial publicity. Coleman v. Kemp, 778 F.2d 1487, 1543 (11th Cir. 1985) see also, Robinson v. State, 506

So.2d 1070 (Fla. 5th DCA 1987). Under certain circumstances, a trial court commits reversible error by permitting the jurors to decide whether their ability to render an impartial verdict is impaired. United States v. Gerald, 624 F.2d 1291, 1297 (5th Cir. 1980).

JUROR WOOTEN

Juror Wooten also saw the prejudicial article in the local newspaper:

> THE COURT: Tell us anything that you remember of what you may have read about the case.
>
> WOOTEN: I read that a jury would be selected for sentencing on the -- what's the name? -- Castro. (R83,84)

Also, Juror Wooten supports the death penalty; and could not think of any circumstances where the death penalty was not appropriate for one convicted of premeditated first degree murder:

> DEFENSE: .....Can you think of a circumstance, some kind of first-degree murder circumstance, where the death penalty would not be appropriate?
>
> WOOTEN: No, not right offhand. (R86)
> .....
>
> DEFENSE: ....Let's assume that it's a planned-out first-degree premeditated murder. Two strangers. What do you think then? Can you think of a circumstance under which it may not be appropriate to sentence somebody to death?
>
> MS. WOOTEN: No, I can't. (R87)

The partiality towards the death penalty was further illustrated by Juror Wooten's belief that the death penalty is not given frequently enough, that it takes too long to carry out the death

penalty and keeping commended inmates alive is to costly to the taxpayers. Most worrisome, is Juror Wooten's admission that where one is convicted of premeditated first degree murder defense counsel would need to convince her of reasons not to recommend the death penalty:

> DEFENSE: Let's assume that the only information you have is it's proven to you that this is a premeditated first-degree murder. Okay. That's all you have, is that it's a premeditated first-degree murder and you are asked to deliberate on that alone. What would your recommendation be under those circumstances?
>
> WOOTEN: The death penalty.
>
> DEFENSE: The death penalty. If I'm understanding you correctly, then you would want us to convince you of reasons why you should not impose the death penalty. Is that correct?
>
> (Ms. Wooten nods in agreement.)
>
> DEFENSE: You are nodding your head. Does that mean --
>
> WOOTEN: Yes. (R91,92)

Defense counsel challenged Juror Wooten for cause because of her obvious preconceived bias in support of the death penalty. (R91,92) The Court denied the challenge for cause without comment. (R92)

JUROR ALDERMAN

Juror Alderman had strong preconceived opinions in support of the death penalty reasoning that "the punishment should fit the crime".

> STATE: Now, I didn't ask you, and I should have asked you first: Do you have any opinions about the death penalty, whether there should be one?

ALDERMAN: I personally feel that the punishment should fit the crime. So, if you are saying do I? Then the answer would be yes. (R121)

Juror Alderman agreed to the general notion that he could follow the court's instructions before making a recommendation.

During questioning from the defense, Juror Alderman admitted that if the most important thing in his mind in recommending capital punishment would be premeditation:

DEFENSE: Mr. Alderman, you have indicated that you -- your opinion of the death penalty, that the punishment should fit the crime?

ALDERMAN: Yes.

DEFENSE: Am I to understand that to mean that if someone is convicted of first-degree premeditated murder, they should get the death penalty?

ALDERMAN: Well, here again, depending on the circumstances surrounding them.

DEFENSE: What kind of circumstances would you look for in terms of aggravation, in terms of making it a more severe crime?

ALDERMAN: Well, if it was, you know, pre-planned, it was scheduled -- you know, the person thought about it for a length of time before committing it, then he or she set out to do it, then, yes.

DEFENSE: Can you think of other circumstances which may make it more aggravating?

ALDERMAN: Not right off.

DEFENSE: The most important thing in your mind would be the premeditation itself?

ALDERMAN: Yes. (R122, 123)

When told than Mr. Castro was convicted of First degree murder, Juror Alderman was asked whether he would recommend death. Not

surprisingly, Juror Alderman said no. Appellant contends that most people when asked whether they would recommend sentencing someone to death, while facing the commended person, would be reluctant to admit it. Rather then admit that he would recommend death for Mr. Castro, Juror Alderman stated he would first need to know the circumstances, but rejects mitigation evidence of defendant's past and childhood as irrelevant:

> DEFENSE: Okay. What kind of circumstances do you mean? Because you had talked before -- what I am getting at:Before, you talked about premeditation. I think the Court has already told you and, of course, I just related to you that he has been convicted of premeditated first-degree murder. I am trying to get at what other factors may be important to you in making that determination.
>
> ALDERMAN: Well, I think there would be various degrees in my mind as to why, how, what are the circumstances, who did it affect, and this type of thing.
>
> DEFENSE: What about Eddie's life in general, his past, his history and what happened to him as a child? Are any of those things important to you in making that determination?
>
> ALDERMAN: They are important. But, no, I don't thing so in making that determination.
>
> DEFENSE: My understanding: You would say it's basically irrelevant as to the crime?
>
> ALDERMAN: Yes. (R123,124)
> .....
>
> DEFENSE: My question is: Would you tend to give that less weight than you would to the factors of the crime itself?
>
> ALDERMAN: No. I don't think I would. I would try not to. (R125)
> .....
>
> DEFENSE: Can you think of circumstances of the crime itself that may make it less serious than

others?

ALDERMAN: No. (R126)

Despite Juror Alderman's obvious predisposition to automatically recommend the death penalty in cases of premeditated murder, there was no "red flag" raised by the trial court to determine whether Juror Alderman could set aside this bias other than the question could Juror Alderman "consider" his instructions. This point was brought to the court's attention:

> DEFENSE:...My question before, what I was trying to get at and get away from is the standard question that everybody loves to ask a juror, because the answer is so easy. Which is: Can you follow the instructions? Well, they don't know what the instructions are. It's awfully easy to say "Yeah, I can follow instructions." My concern is: When I ask that question, and I continue to ask that question, is what kind of weight they are going to give those things. Because that's really the heart of the issue.
>
> COURT: I didn't understand your question.
>
> DEFENSE: Secondly -- but the other concern that I have, Your Honor, with this particular juror is I think he has once again equivocated. I mean he is saying "Yeah, I can follow instructions." But he is also saying that he didn't think of any circumstances of a crime that would make it less serious than others. That he basically came in here thinking that if he pre-planned it and thought about it, he should automatically get the death penalty. Now he said: "Well, yeah, I could consider some mitigating factors." But, ironically, he can think of some aggravators, but he can't think of any mitigating ones. And I think that that shows a bias that, quite frankly, concerns me. I would therefore move to strike for cause.
>
> COURT: That will be denied. You know, maybe the best thing to do in this case is just to give them the jury instructions before we even begin the questioning and say: What do you think about the instructions on the law? What do you think about

this? What do you think about that?... (R127,128)

JUROR VICKERS

Juror Vickers stated that there should be a death penalty, but also stated that she could follow court instructions to consider certain factors. The defense asked why there should be a death penalty whereby Juror Vickers responded:

> VICKERS: Well, I think there ought to be a line drawn somewhere or another. Because if you don't, everybody would say, well -- I don't really exactly know how to explain it to you. But if we didn't have some guidelines or something or other, then everybody would be doing it: "Well, if we get by with prison" -- that's it. (R146)

Although Juror Vickers believed murders would "get by with prison", she stated that she could show mercy to a murdered who was thought to be insane. Defense then asked for her opinion on capital punishment:

> DEFENSE: What, basically, are those opinions?
>
> VICKERS: Well, like I say, the only discussion about it is -- well, there is a lot of it, you know, a lot of stuff going on. It seems to be getting worse. And I just have a felling that if you have strict laws and stick with them, that it's going to be less of it.
>
> DEFENSE: Do you have any feelings about whether or not the death penalty is imposed too often or too seldom in the State of Florida?
>
> VICKERS: I think it's too seldom, myself.
>
> DEFENSE: Do you have any feelings about that it takes too long to execute a person? And if you do, what are your feelings about that?
>
> VICKERS: Well, I have a feeling that sometimes it takes too long. Of course, it takes a lot of taxpayers' money and everybody else's money. I feel like that it ought to be shorter. But there again, there is a lot of things to consider on it,

I'm sure.

DEFENSE: Are you resentful of the fact that it costs a lot to do that, to get through the process?

VICKERS: Yes, I believe I am. (R147, 148)

Despite these strong preconceived opinions in support of capital punishment, the Court denied motion to strike Juror Vickers for cause because the court "trusted" Juror Vickers when he said he could follow the rules. However, appellant contends that it is hard to imagine that Juror Vickers can be impartial with ideas like: "there has to be a line drawn somewhere": "Everyone will do it if we just say life imprisonment." Appellant submits that it is difficult to conceive of a way in which Mr. Vickers could absolutely set that aside his bias and be a fair and truly impartial juror in this case, when he says "Life in prison, then everybody in the world is going to go out there and start killing people."

JUROR CORCORAN

Juror Corcoran supports capital punishment if the person is "absolutely guilty." Nonetheless, she stated that she would first make the state prove aggravating factors before recommending a death sentence. When asked whether she could weigh mitigation against the aggravating factors, Juror Corcoran equivocated:

STATE: Now, also, in the course of these proceedings there may be mitigating factors. These are factors which indicate that the death penalty is not appropriate for a particular case. The Court will instruct you that you need to weigh those mitigating factors against the aggravating factors that have been proved and make a

recommendation of the death penalty or life in prison. Can you follow the Court's instructions on that?

CORCORAN: Yes, I will. I will try to, sir. (R205)

Defense counsel subsequently asked whether Juror Corcoran would automatically vote for death if a person is convicted of premeditated first degree murder:

DEFENSE: ....But, you said that if a person is definitely guilty then you could vote for the death penalty. Right?

CORCORAN: That's correct.

DEFENSE: Is guilt really what is most important to you? If somebody has committed first-degree premeditated murder, do you think they should automatically get the death penalty? They say it's proven to you beyond any doubt whatsoever that someone has committed a first-degree --

CORCORAN: After, I made the statement before: If they are positively guilty.

DEFENSE: A first-degree premeditated murder. Then you would automatically vote for the death penalty?

CORCORAN: Yes.

DEFENSE: Do you think anyone who is guilty of that crime should get the death penalty?

CORCORAN: I believe so, if he is proven guilty, positively guilty. (R206)

In an attempt to rehabilitate Juror Corcoran, the state asked the following:

STATE: The law is: Before the death penalty can be imposed and recommend 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.

CORCORAN: Yes.

STATE: And if the State does not prove that, what the Court says the State has to prove, then what would you have to vote?

CORCORAN: If it's not proven?

STATE: Then what would you recommend?

CORCORAN: Life.

STATE: Recommend life?

CORCORAN. If it's not proven.

STATE: Okay. Along the same lines: Even if the State does prove some of these aggravating factors, there may also be presented in these proceedings what are called "mitigating factors." These are things that indicate that the death sentence may not be appropriate for this particular defendant. Would you consider those mitigating factors and weigh them against aggravating factors in making your recommendation to the Court?

CORCORAN: I would try my best to do the right thing and listen to the case and try to give the right answer. (R208,209)

There should be no doubt that Juror Corcoran would be an automatic vote for death if the state proved an aggravating factor beyond a reasonable doubt. Each time the question of considering or weighing mitigation was raised, Juror Corcoran equivocated in her answer. On the other hand she did not hesitate to say that she would recommend death if the state proved their case.

JUROR TRIPLETT:

Juror Triplett read the prejudicial article in the Sunday paper, heard an update about the case on the radio, and

vaguely recalled reports of the actual murder five years before. The Court asked Juror Triplett whether he formed any opinions about the case based upon the media exposure. Triplett responded that he had an opinion that Castro was guilty of murder, and "didn't think" that the media exposure had any other effect. The state then inquired further on Juror Triplett's media exposure and about his view on the death penalty:

> STATE: ....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 your decisions only on what you hear in this courtroom and are instructed from the Court.
>
> TRIPLETT: Yes, sir. I think I can.
>
> STATE: You can do that?
>
> TRIPLETT: Yes.
>
> STATE: In the State of Florida, not every premeditated first-degree murder case merits or deserves the death penalty. That's what the law says. Do you agree with that?
>
> TRIPLETT: No, sir.
>
> STATE: Do you believe everyone should receive the death penalty for murder?
>
> TRIPLETT: Yes. (R538)

Juror Triplett certainly has a bias in support of the death penalty and addition to his exposure to prejudicial media coverage of the trial. Nonetheless the state attempts to rehabilitate Juror Triplett:

> STATE: ...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?

TRIPLETT: Yes.

STATE: In spite of your opinions?

TRIPLETT: Yes.

STATE: Additionally, the law in the State of Florida requires that the State prove that there are certain aggravating circumstances and there are only a number of named aggravating circumstances, that the State can and is allowed to prove. The Court is going to instruct you on those. Can you restrict yourself just to those aggravating circumstances in spite of whatever opinions you may have in making your recommendation to the Court?

TRIPLETT: I thinks so.

STATE: Well, you are going to be under oath to do that. Can you do it?

TRIPLETT: Well, if I'm under oath, I'm going to do the best I can. You know, if the Court describes the circumstances and I'm held within these bounds, I will do my very best to stay within those bounds. (R539)

Juror Triplett was not successfully rehabilitated by the state because he equivocated when he answered the state's questions. The response, "I think so", or "I will do my best" does not equate to a complete renunciation of his obvious bias in support of the death. This bias was further demonstrated during questioning by the defense:

DEFENSE: Do you think that the circumstances of Eddie's life are important to you in determining what an appropriate sentence would be? What happened to him as a child, for instance.

TRIPLETT: I would have to be convinced. (R542)

.....

DEFENSE: No. What I am talking about is a situation where someone is an adult right now and may have had some terrible experiences as a child.

> Yes, as an adult, was convicted of committing premeditated first-degree murder. Can you conceive of that situation and provide mitigation for that defense? In other words, can you perceive of that childhood as somehow creating a reason for you to vote for life in prison instead of the death penalty?
>
> TRIPLETT: No, sir. (R543)

Juror Triplett ultimately admitted to defense counsel that he could not be impartial towards Mr. Castro in the sentencing proceedings:

> DEFENSE: And those opinions that you have about those sorts of things, would you not agree that it may be something that may make it difficult for you to give them proper weight if, for instance, the Court instructs you that it's something for you to consider?
>
> TRIPLETT: If the Court instructs me properly, I think I can follow the Court's instructions.
>
> DEFENSE: Again you said "think." I know you can't ever be a hundred percent sure of whether you can do anything in this world. I know I can't, anyway. But this is an extremely important situation. That's the reason I'm spending the time that I am with you in asking you these questions. Do you not think that it's possible that your ideas about the death penalty when you came in here -- not only that you thought all first-degree premeditated murders were deserving of it, but that there were some -- but you don't have much understanding of mitigating factors, and you don't believe that certain factors that may be instructed to you later are mitigating factors. You do not think that that may make it a little bit more difficult for you to follow the rules?
>
> TRIPLETT: Maybe it will. (R544, 545)

Based upon Juror Triplett's responses in voir dire he is not qualified to serve on a capital jury. Naturally, defense counsel moved to strike for cause. Amazingly, the court ruled:

> COURT: That will be denied, because the

> difference between this person and the last person was: The last person that I excused for cause was so thoroughly confused, when the appellate court reads the transcript they are going to think that, you know, this guy just is in no way going to be able to set aside his opinions. But I think in my observations of this gentleman and his answers, it was clear to me that he could follow the law. I will deny the motion for cause. (R546, 547)

JUROR ETHEREDGE & JUROR BELL

Juror Etheredge & Bell read the prejudicial newspaper article and was aware that Mr. Castro had previously been convicted of first degree murder and in the case of Juror Etheredge had his death sentence thrown out. (R603; R325) Nonetheless, they both stated that such information would not influence them in any way.

Juror Etheredge supports the death penalty, and also expressed opinions that the death penalty is used to seldom and takes too long. The defense moved to strike for cause primarily on the ground that Juror Etheredge admitted reading the complete article.

Appellant recognizes that both Juror Etheredge & Bell stated that they did not recall much of the article in voir dire, and made numerous statements that they could be impartial. Nonetheless, Appellant submits that the defense was in the unenviable position of not being able to ask the right questions to make a record of the extent of Juror Etheredge or Bell's recollection of the prejudicial article. For example, the defense could not ask "do you recall the part of the article that stated has been sentenced to death twice for this charge

already." Recognizing such constraints, in the abundance of caution the court should have granted the motion to strike for cause or in the alternative grant additional preemptory challenges.

ARGUMENT

As noted by this Court, "A jury is not impartial when one side must overcome a preconceived opinion in order to prevail." Hill v. State, 477 So.2d 553, 556 (Fla. 1985). In Singer v. State, 109 So.2d 7 (Fla. 1959), this Court established the following rule:

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

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

ability to be fair and impartial must be unequivocally asserted in the record).

Appellant submits that based upon the examples set out above, the record is replete with instances where the Court wrongfully denied cause challenges. As a result, defense counsel was put in the position of having to use peremptory challenges to remove those jurors. After exhausting his peremptory challenges, Castro's defense counsel moved for additional peremptory challenges which was denied. This Court in the last Castro opinion[2] encouraged the granting of additional peremptory challenges:

> ...[W]e caution trial judges to scutinize with care assertions that jurors cannot be fair. It is much easier to grant additional peremptory challenges when necessary than it is to retry a capital case.

Appellant submits that with the negative pre-trial publicity, this was a case where seating a jury in Marion County was going to be difficult, and the trial court should have been more sensitive to the assertions of defense cousel concerning the possible bias of the jurors.[3] Nonetheless, the trial court chose to ignore this Court cautioning with the result that the jury seated in his re-trial was biased.

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[2] 597 So.2d 259, 261 (Fla. 1992)

[3] Remember, the defense team had their hands tied in trying to questions prospective jurors about what specifically they had read in teh Sunday paper. For example, just the question did you read this part of the part of article where it states that Mr. Castro was already sentenced to death twice on this charge would poison them from further paricipation in the trial.

The bias in the jury panel is demonstrated by the presence of Juror Milam and Bell. The defense sought to strike Juror Milam. (R653) The reason for striking Milam was two-fold: First, Milam read the prejudicial article in the newspaper and saw Mr. Castro on television; secondly, Milam supports the death penalty because "Everybody should be punished for what they have done..." (R614) Additionally, without being given extra peremptory challenges, the defense could not backstrike Juror Bell after the earlier challenge for cause was denied.

It is respectfully submitted that the refusal of the trial court to strike Bell for cause and/or grant an additional peremptory challenge was a denial of due process and the right to a fair jury recommendation under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 22 of the Constitution of Florida. Further, it is respectfully submitted that the presence of Bell and Milam on the jury rendered the jury recommendation unreliable under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 17 of the Florida Constitution. This is especially true where the recommendation of death was a vote of eight to four. A change of two votes would have resulted in a life recommendation. The death sentence should accordingly be reversed and the matter remanded for a new penalty phase.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OR MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

The trial court found that this murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification based upon the following:

> The evidence in this case reveals that the Defendant had been staying in an apartment house or complex in Ocala, Florida, for approximately three or four days. While there, he started looking for a car. He met Austin Scott, who owned a car, and the Defendant decided he wanted it. He invited Austin Scott, who was intoxicated at the time, into his apartment for a beer. When the victim went with the Defendant inside the apartment, the Defendant momentarily excused himself by telling Austin Scott he had to get $10.00 from a guy named John, but this was a lie. the Defendant wanted to leave to find a knife. The Defendant had a knife the night before but couldn't find it so he entered another apartment and took a steak knife. As he was going back to the apartment, he saw that Austin Scott had left and was in his car about to leave. The Defendant went over to Austin Scott and with his "golden tongue" persuaded Austin Scott to go back to the apartment with him. Once inside, the Defendant gave Austin Scott another drink. When Austin Scott got up to once again leave, the Defendant in his taped confession described what happened:
>
> > So, anyways, so all 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 'fuck go' cause I already had the car in my mind and I knew that if I let him go, I was going to lose the car, right?
>
> The Defendant grabbed Austin Scott by the throat, threw him down on the bed and choked him until blood came out of his mouth and he turned purple,

> and then stabbed him to death with the knife.
>
> This evidence and the manner of the killing clearly reveals a heightened form of premeditation. This killing was committed in a cold, calculated, and premeditated manner in accordance with a careful plan and pre-arranged design to kill which was formed through calm and cool reflection. That plan was to murder Austin Scott, steal his car, and leave Ocala for another destination. The Defendant conceived of this crime, thought about it, and planned it in detail well in advance of the killing.
>
> As further evidence that the murder was committed from a cold, calculated, and premeditated design, the evidence reveals that the Defendant covered the body with a sheet to make it look like a drunk was sleeping it off on the floor. In addition, when the Defendant left in the victim's car, he wiped the knife off with a sock and broke it into pieces. He then threw the pieces out of the window as he drove to Lake City.
>
> The jury instruction regarding this aggravating factor included the standard instruction approved by the Florida Supreme Court and definitions of the relevant terms. These definitions were taken from prior court decisions. A copy of the jury instruction with citations of the cases from which the definitions were extracted is attached hereto as Exhibit "A".

The aggravating circumstance of murder committed in a cold and calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. Gorham v. State, 454 So.2d 556 (Fla. 1984), cert denied 105 S.Ct. 941; Rogers v. State, 511 So.2d 526 (Fla. 1987) "This aggravating factor is not to be utilized in every premeditated murder prosecution," and is reserved primarily for "those murders which are characterized as execution or contract murders or witness elimination murders.' (citation omitted)." Bates v. State, 465

So.2d 490, 493 (Fla. 1985).

There appears to be in Florida, three distinct levels of premeditation; the "slight" premeditation that has been observed to be a nonstatutory mitigating circumstance, see Wilson v. State, 493 So.2d 1019 (Fla. 1986); Ross v. State, 474 So.2d 1170 (Fla. 1985); White v. State, 403 So.2d 331, 336 (Fla. 1981); the routine premeditation which exists in all premeditated murders but which does not rise to the level of cold, calculated and premeditated without any pretense of moral or legal justification, see Amoros v. State, 531 So.2d 1256 (Fla. 1988), and; the extensive period of premeditation and planning that gives rise to the finding of this aggravating circumstance. See Buenoano v. State, 527 So.2d 194 (Fla. 1988) There has also been vacillation as to whether this aggravating circumstance applies based on the manner of killing. See Caruthers v. State, 465 So.2d 496, 498 (Fla. 1985), or the murderers' state of mind at the time of the killing. See Johnson v. State, 465 So.2d 499, 507 (Fla. 1985); Mason v. State, 438 So.2d 374 (Fla. 1983). Appellant contends that this aggravating circumstance is too vaguely worded and defined and it provides too much maneuverability to the juries, trial and appellant courts to impose/affirm the death penalty in the face of emotionally compelling facts. The evidence fails to support this aggravating circumstance under any of the prior approaches.

Specifically, the Court relied heavily upon the fact that Mr. Castro wanted Scott's car and searched for a knife after

leaving Mr. Scott in the room for a few moments to support the finding of heighten premeditation to kill. However, the fact that the underlying felony may have been fully planned does not qualify the crime for this factor if the plan did not include the commission of the murder. Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla. 1984) In the case sub judice, the evidence is uncontroverted that Mr. Castro was not thinking of killing when he got the knife. The evidence is further uncontroverted that defendant's actions were impulsive. In both statements to police, Mr. Castro speaks about how he "snapped" or "lost it" when Mr. Scott struggled with him. At one point he talks of "getting real mad" at the victim's struggling, and then pulling out the knife as a threat to get Scott's car.

To be sure, Castro intended to kill Scott, as determined by the verdict of guilt for premeditated murder. More is required to prove that the aggravating circumstance exists beyond a reasonable doubt. There is simply insufficient proof that the murders fall under the definition of this statutory aggravating factor. To the extent that the murders were "planned" to allow Castro to use the car, that aspect of the crime is already contained in the Felony murder finding. It appears more likely, however, that the murders were simply done from an impulse of some sort of mental disorder, or drug abuse. Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

POINT IV

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

In making its finding that the murder of Scott was especially heinous, atrocious or cruel murder the court stated:

> When the time came for the Defendant to complete his plan to kill the victim and steal his property, the Defendant grabbed him by the throat and choked him until blood came out of his mouth. The Defendant, in order to silence the victim so he wouldn't make any noise as he was being choked, took out his knife, showed it to the victim, and while looking at his face, told him "Hey man, you've lost. Dig it?" The Defendant then proceeded to stab the victim multiple times in the chest area around the heart.
>
> The State called the medical examiner who testified that the victim did not die even after the stab wounds, but lived a short time afterward. This was evidenced by the fact that the victim bled a quart of blood into his chest cavity. The fact that the Defendant choked the victim until blood came out of his mouth, then taunted him by showing him the knife before he stabbed him with it to accomplish the victim's death, and the fact that the victim lived and suffered long enough after he was continually stabbed clearly shows that this killing was extremely and outrageously wicked and vile, and shockingly evil. This killing was intentionally designed to inflict a high degree of pain and suffering on the victim with total indifference on the part of the Defendant to the victim's suffering, and it further evidences that the Defendant even enjoyed the suffering. The taunting of the victim before his untimely death and the wounds inflicted on him also show that this killing was consciousless, pitiless and was unnecessarily torturous to the victim.
>
> The standard jury instruction that was given to the jury regarding this aggravating factor was the instruction most recently amended and approved by the Florida Supreme Court. in Preston v. State, 607 So.2d 404 (Fla. 1992), the court specifically held that this amended instruction satisfies and cures any constitutional infirmities

> noted in Espinosa v. Florida, 112 S.Ct. 2926 (1992).

Under Florida law, aggravating circumstances "must be proved beyond a reasonable doubt." Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989). Moreover, the state must prove **each element** of the aggravating circumstance beyond a reasonable doubt. Banda v. State, 536 So.2d 221, 224 (Fla. 1988). The appellant submits that the state failed to meet its burden in this case.

This court dealt with an analogous situation as the instant case in Jackson v. State, 451 So.2d 458 (Fla. 1984). In Jackson, this court held that the facts of that case did not support a finding that the murder was especially heinous, atrocious, or cruel. Specifically, the defendant shot the victim in the back, put him in the trunk of a car while he was still alive, wrapped him in plastic bags, and subsequently shot the victim again while he was still alive. This Court held:

> When the victim becomes unconscious the circumstances of further acts contributing to his death cannot support a finding of heinousness. The record contains no evidence that [the victim] remained conscious more than a few moments after he was shot in the back the first time, and he therefore was incapable of suffering to the extent contemplated by this aggravating circumstance. Jackson at 463

The uncontroverted physical evidence presented in this case through the State's own witness, Dr. Joan Chen, was that the decedent lost consciousness very quickly, and that he was immobile at the time he suffered the fatal chest wounds. Moreover, it was uncontroverted that the decedent had been drinking heavily immediately before death. At the time of his

death, the victim had a blood alcohol level of .22 percent, more than twice of legal limit for presumed alcohol impairment. Section 316.1934, Florida Statute (1989). No doubt, this impacted on the decedent's ability to perceive the circumstances of his demise.

In Herzog v. State, 439 So.2d 1372 (Fla. 1983) the Court expressly considered the intoxication of the victim as negating a finding of heinousness by the trial court. In Herzog, the victim had been forced to ingest intoxicants by the defendant. In contrast, in the instant case, the victim became intoxicated voluntarily. Moreover, in a similar factual pattern of the case sub judice, the Court in Rhodes v. State, rejected the heinous, atrocious and cruel aggravator because of the victim's intoxication:

> The trial court found the murder was especially heinous, atrocious, or cruel because the evidence suggested the victim was manually strangled. We note, however, that in the many conflicting stories told by Rhodes, he repeatedly referred to the victim as "knocked out" or drunk. Other evidence supports Rhodes' statement that the victim may have been semiconscious at the time of her death. She was known to frequent bars and to be a heavy drinker. On the night she disappeared, she was seen drinking at a bar. In Herzog v. State, 439 So. 2d 1372 (Fla. 1983), we declined to apply this aggravating factor in a situation in which the victim, who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of this capital felony "to set it apart from the norm of capital felonies." State v. Dixon, 283 So.2d at 9. Due to the conflicting stories told by Rhodes we cannot find that the aggravating circumstance of heinous, atrocious, and

> cruel has been proven beyond a reasonable doubt. Rhodes, 547 So.2d 1201 at 1208.

It is also important to note that the Court in Rhodes rejected the trial court's finding of heinous, atrocious, or cruel as an aggravator despite the evidence that the victim's own hair was found in her clenched hands. Rhodes at 1207.

In the instant case, the victim was a heavy drinker and was highly intoxicated immediately before his death. In finding the HAC aggravator, the trial court relies upon statements made by Mr. Castro (himself highly intoxicated at the time of the murder and statement):

> The Defendant, in order to silence the victim so he wouldn't make any noise as he was being choked, **took out his knife, showed it to the victim, and while looking at his face, told him "Hey man, you've lost. Dig it?"** ..... The fact that the Defendant choked the victim until blood came out of his mouth, **then taunted him by showing him the knife before he stabbed him with it** to accomplish the victim's death, and the fact that the victim lived and suffered long enough after he was continually stabbed clearly shows that this killing was extremely and outrageously wicked and vile, and shockingly evil. (R268) (emphasis added)

Nothing in Mr. Castro's statements shed any light on whether the victim was conscious or aware that he was being stabbed. Appellant contends that the fact that appellant allegedly taunted the victim by no means proves that the victim was still conscious and understood appellant's "taunting" that allegedly occurred prior to the stabbing. Based on the State Expert testimony it was more likely that the victim lost consciousness very quickly

during the strangulation.[4]

Appellant submits that there was no testimony that the victim was aware of his impending death. Furthermore, there was no testimony that the victim suffered any pain as a result of the fatal knife wounds. Moreover, there was no physical evidence offered by the state to indicate how long the victim survived after being stabbed, and more importantly, whether he was conscious at the time. In fact, that same evidence suggests quite strongly that he was not.

"A homicide is especially heinous, atrocious or cruel when '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." Buenoano v. State, 527 So.2d 194 (Fla. 1988), quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). "Acts committed independently from the capital felony for which the offender is being sentenced are not relevant to the question of whether the capital felony itself was especially heinous, atrocious, or cruel." Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985); See Halliwell v. State, 323 So.2d 557 (Fla. 1975).

The presence of the instruction was prejudicial and confusing. This was not a situation where the jury was read verbatim all of the statutory aggravating circumstances which, if

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[4] The victim was strangulated so hard that the he suffered a fracture of the hyoid bone in the throat. (R743,744)

unobjected to, is apparently not reversible error. See Straight v. Wainwright, supra. The jury in this case received instructions on only four aggravating circumstances. Moreover, This particular aggravating circumstance, due to the subjectivity involved, violates the Eighth Amendment because it fails to adequately channel the discretion of the jury.

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge of balance the facts of the case against the standard of activity which can only be developed by involvement with the trials of numerous defendants. Thus, the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1973)(emphasis added). See Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980).

The jury in this case ought not to have had before them the consideration that the murder was especially heinous, atrocious or cruel, because clearly as a matter of law it was not. Moreover, the trial court should not have found this aggravating circumstance. Appellant submits that the trial court erred by finding beyond a reasonable doubt that the conduct of Mr. Castro was "designed to inflict a high degree of pain with indifference to the suffering of the victim." The state presented no evidence that the victim suffered any pain at all.

In anticipation of an argument by the State that the error is harmless, it is submitted that the erroneous presence of

this particular instruction led the jurors to conclude, and reasonably so, that they were entitled to consider whether in their opinion this murder was especially heinous, or cruel and to base the death recommendation on this erroneous consideration. Furthermore, the trial court relied upon this aggravating factor in determining that death was the appropriate sentence in this case. A lay person would inevitably conclude that these murders were especially heinous, atrocious or cruel. The State cannot meet its burden of showing beyond a reasonable doubt that the erroneous presence of this particular instruction in the face of a timely objection did not affect the recommendations of death by the jury. See State v. Lee, 531 So.2d 133 (Fla. 1988); Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

The death sentence must be reversed and the matter remanded for a new penalty phase with a new jury due to violations of the Fifth, Sixth, Eighth and Fourteenth Amendments. These violations were caused by the presence of an improper instruction and finding by the trial court that was wholly unsupported by the evidence. Timely and specific objections by defense counsel were overruled. The presence of that particular instruction under the facts of this case was so susceptible to confusion and misapplication by the jury that distortion of the reasoned sentencing procedure required by the Eighth Amendment as occurred; the recommendation of the jury is unreliable and flawed.

POINT V

THE JURY RECOMMENDATION AND DEATH SENTENCE ARE INVALID BECAUSE THEY ARE BASED ON AN IMPROPER STATUTORY AGGRAVATING CIRCUMSTANCE; CONSIDERATION OF THIS FACTOR IS BARRED BY THE DOCTRINES OF RES JUDICATA, LAW OF THE CASE, DOUBLE JEOPARDY AND FUNDAMENTAL FAIRNESS.

When this matter was first tried, the trial judge found that the state had proved the existence of three statutory aggravating factors, those being that the capital felony was committed while Castro was engaged in the commission of a robbery and a kidnapping; the capital felony was especially heinous, atrocious or cruel; and the capital felony was committed in a cold, calculated and premeditated manner without pretence of moral or legal justification. See Castro v. State, 547 So.2d 111 (Fla. 1989) The existence of other specifically enumerated statutory aggravating factors was not proved.[5]

The appellant recognizes this Court's holding in Daugherty v. State, 419 So.2d 1067 (Fla. 1982) wherein it was not error to permit the State to introduce in death penalty sentencing phase of capital murder prosecution defendant's prior conviction, and it was not error to find aggravating circumstance that defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though offenses occurred subsequent to capital felony for which

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[5] The state did not seek, and the trial court specifically did not find that Mr. Castro was previously convicted of a capital felony.

defendant was sentenced.[6] Florida Statutes s 921.141(5)(b). Nonetheless, the appellant contends that the legislature did not envision that a subsequent conviction would be used in a third penalty phase more than four year after the initial conviction.

After the initial conviction, on direct appeal this Court upheld the finding of three statutory aggravating factors; the state did not cross-appeal the trial court's implied rejection of other statutory aggravating factors. See Pardo v. State, 563 So.2d 77, 80 (Fla. 1990) (successful cross-appeal by state where trial court erroneously rejected statutory aggravating factor). Also, in performing its independent review, this Court did not conclude that other statutory aggravating factors applied. See Echols v. State, 484 So.2d 568, 576-577 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986) (Florida Supreme Court sua sponte applies statutory aggravating factor erroneously overlooked by trial judge).

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[6] This Court in Daugherty stated: "In Elledge v. State, 346 So.2d 998 (Fla.1977), we rejected this same argument and held that it is clear from a reading of section 921.141(5)(b), Florida Statutes (1975), that the legislature referred to "previous convictions" and not to "previous crimes." Prior conviction, we emphasized, is the important element of this aggravating circumstance. See also Lucas v. State, 376 So.2d 1149 (Fla.1979). We likewise held in King v. State, 390 So.2d 315, 320 (Fla.1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981), that "[t]he legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance." See also Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). We hold that the trial court did not err in permitting the State to introduce these prior convictions and did not err in finding the aggravating circumstance that Daugherty was previously convicted of another capital felony or a felony involving the use or threat of violence to the person." See Daugherty at 1069.

Appellant's initial conviction and death sentence in the instant case was in 1988. Mr. Castro was subsequently convicted of Capital Murder in March 1991 from a murder which occurred in Pinellas county a week before the murder in the instant case. (R808, 809) Castro's initial death sentence has been overturned again in 1992.

ARGUMENT

It is axiomatic that the failure of a party to timely contest legal rulings of a trial court results in a procedural bar to subsequent litigation through application of the doctrine of law of the case and/or res judicata, both of which apply with full force here. Greene v. Massey, 384 So.2d 24 (Fla. 1980). See Gaskins v. State, 502 So.2d 1344 (Fla. 2d DCA 1987) (law of the case doctrine precludes re-litigation of all issues necessarily ruled upon by the court, as well as all issues on which an appeal could have been taken.) See also Flinn v. Shields, 545 So.2d 452 (Fla. 3d DCA 1989); Dunham v. Brevard County School Board, 401 So.2d 888 (Fla. 5th DCA 1981).

DOUBLE JEOPARDY

In Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986), the defendants were convicted of capital murder. At sentencing, the state sought to prove two aggravating factors: that the murder was done for pecuniary gain and that it was committed in an especially heinous, cruel, or depraved manner. The trial judge found that the first factor was not meant to apply to the type of murder before him but that the

second factor was present, and sentenced both defendants to death. The Arizona Supreme Court reversed and held the defendants were entitled to a new trial. It also found there was insufficient evidence to support the finding of the second aggravating factor. On remand, the defendants were again convicted of capital murder. The state alleged the same aggravating factors and the trial judge sentenced both defendants to death after finding both factors present. The Arizona Supreme Court again struck down the finding of the second factor on the ground that the evidence was legally insufficient. It affirmed the death sentences based on the first factor. On certiorari from the Arizona Supreme Court, the United states Supreme Court held that the second imposition of the death penalty did not violate the double jeopardy clause.

The Court began its analysis with a review of two previous decisions. In Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) the Court held that a defendant who was sentenced to life in prison after his first trial and succeeded in having his conviction overturned on appeal could not be sentenced to death after being convicted at his second trial. In Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) the Court applied these principles to the Arizona sentencing scheme. In Poland, the Court concluded that under the prior cases, the relevant inquiry is whether the sentencing judge or the reviewing court has decided that the prosecution has not proved its case and hence acquitted the defendant.

Applying these principles in Poland, the Court held that at no time had any court found that the prosecution failed to prove its case. While the Arizona Supreme Court did rule that the sole aggravating factor found by the trial court at the first sentencing was not supported by competent, substantial evidence, it also ruled that the trial judge had erred as a matter of law in ruling that the other aggravating factor was not meant to apply to the murder at hand. That court specifically ruled that on retrial, the trial court could properly find this aggravating circumstance to apply.

The Eleventh Circuit Court of Appeals has ruled that these principles apply where the state attempts to seek the death penalty on additional factors not argued at a previous sentencing hearing. Godfrey v. Kemp, 836 F.2d 1557 (11th Cir. 1988) cert. dismissed Zant v. Godfrey, 487 U.S. 1264, 109 S.Ct 27, 101 L.Ed.2d 977 (1988); Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985) cert denied, 476 U.S. 1123, 106 S.Ct. 1991, 90 L.Ed.2d 672 (1986).

CONSIDERATIONS OF FUNDAMENTAL FAIRNESS

Even if this Court declines to accept the foregoing reasoning, it is respectfully submitted that consideration of fundamental fairness and the need to avoid piecemeal litigation in capital cases require that the only aggravating factors that can apply here are the statutory aggravating factors found in 1988, the ones approved on appeal and in post-conviction proceedings. As noted by the Supreme Court of New Jersey, even

though the sentencer's initial rejection of statutory aggravating factors may not constitute an "acquittal" for double jeopardy purposes, it is none-the-less fundamentally unfair for the state to present evidence of new aggravating factors after a defendant succeeds on appeal. State v. Biegenwald, 110 N.J. 521, 542 A.2d 442 (N.J. 1988).

In Biegenwald, the New Jersey Supreme Court, after noting the considerations set forth in Poland v. Arizona, 476 U.S. 147 (1986), Arizona v. Rumsey, 467 U.S. 203 (1984) and Bullington v. Missouri, 451 U.S. 430 (1981), expressly ruled that, double jeopardy considerations aside, fundamental fairness requires that the state, with all its resources, prove all of the statutory aggravating factors of which it has evidence when the matter is first tried. The state will be allowed to prove new aggravating factors "only when it proves to the court that it has discovered new evidence sufficient to establish at re-sentencing a new aggravating factor and that such evidence was unavailable and undiscoverable at trial despite the state's diligent efforts." Biegenwald, 542 A.2d at 452.

Recently, that court again addressed the propriety of permitting re-litigation of aggravating factors that were not initially provided by the state at a defendant's first trial:

> The state is not seeking here to submit new evidence of a new aggravating factor, but rather is relying on old evidence to satisfy a new aggravating factor. Fundamental fairness concerns do not dissipate in that situation. If the state knew the facts and failed to allege an aggravating factor on the basis of those facts at the first trial, it

> should not thereafter be able to submit that factor to the jury on retrial.

State v. Cote, 119 N.J. 194, 574 A.2d 957, 973-974 (N.J. 1990).

The rationale behind this is simple: there is no bona fide reason for the state not to pursue, at the time a defendant is initially sentenced, all of the statutory aggravating factors that can arguably apply to a defendant's case. This requirement avoids piecemeal litigation and the unnecessary expenditure of judicial time, labor and resources. Such considerations already play a significant role in Florida's guideline sentence. See Pope v. State, 561 So.2d 554 (Fla. 1990); State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), and Shull v. Dugger, 515 So.2d 778 (Fla. 1981). They should likewise control in capital sentencing proceedings.

It is respectfully submitted that this Court should, under Article I, Section 9 and 16 of the Florida Constitution, expressly hold that as a matter of fundamental fairness and due process, the state cannot now re-litigate whether statutory aggravating factors exist after those factors have been rejected by the sentencer when a death sentence is initially imposed and when that ruling was uncontested by the state and approved, either expressly or implicitly, by this Court on direct appeal. See Walls v. State, 580 So.2d 131, 133 (Fla. 1991).

If this Court finds that the death penalty may be proportionately applied as discussed in Point VI, infra, the instant sentence of death must be vacated and the matter remanded

for a new penalty phase to that the jury may determine whether the other statutory aggravating factors outweigh the mitigation. Such relief is appropriate because fundamental fairness requires it, the court otherwise violated principles of law of the case, res judicata, and double jeopardy.

Appellant respectfully submits, however, that based on the argument set forth in Point VI, imposition of a death sentence is disproportionate in light of the mitigation that was found by the trial court and that otherwise exists without contradiction. Accordingly, the death sentence should be vacated and the matter remanded with directions that a life sentence be imposed.

POINT VI

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

The trial court imposed a death sentence here after finding four statutory aggravating factors. (R321-32) As previously set forth, the findings of being previously convicted of a capital felony, of a cold, calculated and premeditated murder and an especially heinous, atrocious or cruel murder were improper both legally and factually. Only one statutory aggravating factor may properly be said to have been proven beyond a reasonable doubt, that being that this murder was committed during the commission of a robbery. This Court has never approved imposition of the death penalty based solely on this one statutory aggravating factor and where, as here, substantial mitigation exists, the death penalty is disproportionate to the offense. The only instances where this Court has affirmed a death sentence based on one statutory aggravating factor is where the murder was especially heinous, atrocious or cruel, in the following cases: Arrango v. State, 411 So.2d 172 (Fla. 1982); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douglas v. State, 328 So.2d 18 (Fla. 1976), and; Gardner v. State, 313 So.2d 675 (Fla. 1975). A torture murder occurred in each of the foregoing cases, with little or no mitigation. Here, there is no torture murder and substantial mitigation.

Even assuming that the previous conviction, CCP and/or the HAC statutory factor(s) apply, a death sentence is disproportionate where other defendants who committed similar

crimes received life sentences rather than death sentences. At the onset, it must be noted that the jury death recommendation is of no significance here because it is unreliable as a matter of law. The instructions were faulty not only because of vagueness, but also because of improper doubling of factors over timely objection. In that regard, comparison of this case to any cases involving death recommendations is unfair and improper. The correct standard for comparison/proportionality review is to cases where there is either a life recommendation or no recommendation at all.

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

Like Fitzpatrick, this is **not** the most aggravated and unmitigated of most serious crimes. When the facts of this crime are compared to those of the following cases where death sentences were ruled to be disproportionate, it is evident that the death sentence must be reversed and the matter remanded for imposition of a life sentence: Blakely v. State, 561 So.2d 560 (Fla.1990)(death penalty disproportionate despite finding that

murder was especially heinous, atrocious or cruel and cold, calculated, and premeditated, without pretense of moral or legal justification); Amoros v. State, 531 So.2d 1256 (Fla.1988); Garron v. State, 528 So.2d 353 (Fla.1988); Fead v. State, 512 So.2d 176 (Fla.1987), receded from on other grounds, Pentecost v. State, 545 So.2d 861, 863 n. 3 (Fla.1989); Proffitt v. State, 510 So.2d 896 (Fla.1987); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Wilson v. State, 493 So.2d 1019 (Fla.1986); Ross v. State, 474 So.2d 1170 (Fla.1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla.1983); Blair v. State, 406 So.2d 1103 (Fla.1981); Phippen v. State, 389 So.2d 991 (Fla.1980); Kampff v. State, 371 So.2d 1007 (Fla.1979); Menendez v. State, 368 So.2d 1278 (Fla.1979); Chambers v. State, 339 So.2d 204 (Fla.1976); Halliwell v. State, 323 So.2d 557 (Fla.1975).

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

POINT VII

THE TRIAL COURT VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY REJECTING DEFENSE COUNSEL'S REQUESTED JURY INSTRUCTION CONCERNING THE CONSEQUENCES AND APPROPRIATENESS OF A SENTENCE OF LIFE IMPRISONMENT.

Section 921.141(6), Florida Statutes (1991) lists seven statutory mitigating circumstances. The Florida Standard Jury Instructions provide an additional, eighth, "catch all" mitigating circumstance: "Any aspect of the defense character or record, and any other circumstance of the offense." In Lockett v. Ohio, 438 U.S. 586, 604, 57 L.Ed.2d 973, 990 (1978), the United States Supreme Court concluded that the Eighth and Fourteenth Amendments require that:

> The sentencer ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

See also Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. So. Carolina, 476 U.S. 1 (1986).

In the case sub judice, during the charge conference the defense counsel requested the following jury instruction:

> DEFENSE: I reviewed them. The only change that I would ask, I would ask, I would ask that the Court delete the Minimum Mandatory twenty-five, I would ask the court to instruct the jury that the Court can exercise its discretion and impose a consecutive sentence, which would result in the defendant being eligible for consideration of parole for fifty years or more.

COURT: Do you have any response?

STATE: I think we should leave it in, Judge.

COURT: I don't think you need to instruct them about the consecutive sentence, either. I will go with the standard. Okay.

(R 1106-1107) The ruling prevented the jury from being properly instructed on the propriety of a life sentence based upon the length of time that Castro would be confined if not executed. Further, the absence of the jury instruction could have gave the jury the impression that such a consideration by them was improper, thereby rendering the jury recommendation unreliable under the Eighth Amendment.

"[A]ny sentencing authority must predict a convicted persons probable future conduct when engaged in the process of determining what punishment to impose." Jurek v. Texas, 428 U.S. 262, 275, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

> The court has --- held that evidence that a defendant would in the future pose a danger to the community if he was not executed and may be treated as establishing an "aggravating factor" for purposes of capital sentencing. (citation omitted) Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. I/under [Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)], such evidence may not be excluded from the sentence for consideration.

Skipper v. So. Carolina, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (footnote 1 in pertinent part, states, "[I]t is also the elemental due process requirement that the defendant not be sentence to death on the basis of information which he had no

opportunity to deny or explain. Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).")

Specifically, the right to due process and effective representation of counsel demand that a defendant, through his counsel, be afforded adequate opportunity to address the appropriateness of the death sanction. Restriction by the trial court in this case of defense counsel's requested jury instruction interfered with defense counsel's ability to adequately represent a client and further rendered the advisory sentence unreliable under the Eighth Amendment. A jury recommendation is an integral part of a death sentence and it is afforded great weight by the sentencer. By restricting jury instructions concerning the appropriateness of a life sentence and the fact that Castro would have been removed from society for a period of his natural life, the judge prevented the jury from being instructed on an extremely relevant consideration to assist the jury to intelligently weigh the appropriateness of a recommendation of a life sentence in a capital felony.

This Court in Jones v. State, 569 So.2d 1234 (Fla. 1990), stated the importance of not restricting argument concerning the ability of the trial court to sentence defendant to two consecutive life sentences. Jones involved an appeal for two convictions of first degree murder and a sentence of death. During the closing argument in Jones, defense counsel was prevented from arguing that Jones could be sentenced to two consecutive minimum 25 year prison terms on the murder charges

should the jury recommend life sentences. This Court rejected the State's argument that that claim was speculative because the actual sentencing decision is clearly within the province of the court, and not the jury. This Court concluded:

> Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences in each of the two murders. The potential sentences are relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

Jones v. State, at 1240.

In the instant case, Appellant was found guilty of a two capital felonies punishable by death or life imprisonment with a minimum mandatory 25 years each **or 50 years if sentenced consecutively.** term of natural life. In requesting the jury instruction, defense counsel sought to simply insure that the jury was adequately instructed on the law concerning the appropriateness of imposition of a life sanction on Mr. Castro where the life sentence for the capital felony could be made to run consecutively to the life sentence in the subsequent capital felony conviction from Pinellas County meaning that Mr. Castro would not be eligible for parole during his natural life. Clearly such a jury instruction was relevant; clearly the restriction of that line of argument was reversible error under the Sixth, Eighth and Fourteenth Amendments.

In conclusion, the denial of the requested jury instruction on what was a correct and otherwise relevant statement of the law denied Mr. Castro his rights to due process,

to address the evidence and the law, and to effective representation of counsel. The death sentence is based on a faulty recommendation by the jury. Accordingly, a new penalty phase is required.

POINT VIII

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

Prior to the penalty phase, defense counsel moved to suppress statements Castro gave to the police shortly after his arrest. (R12-24) The motion alleged that Castro was too intoxicated at the time the statements were given to voluntarily waive his constitutional rights. The trial court entertained Castro's motion and heard evidence from defense experts establishing that in their opinion Castro was too intoxicated to voluntarily waive his rights due to the massive amount of alcohol which he consumed immediately prior to giving these statements. The trial court denied Castro's motion to suppress as follows, "Okay. All right. It will be the same ruling as before." (R710) It is respectfully submitted that the trial court's ruling does not constitute an adequate finding of voluntariness of the waiver of the defendant's right, that is, that the statement was freely and voluntarily given, and that the ruling is otherwise unsupported as a matter of law.

In Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) the Supreme Court held that a defendant has a constitutional right to a fair hearing and independent and reliable determination of the voluntariness of a confession before the confession may be allowed to be heard by a guilt determining jury. Such a hearing is constitutionally mandated

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

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

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

The waiver of a fundamental constitutional right must be knowing, voluntary and intentional. Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966). The trial court at trial suppressed the first statement given by Castro. Thus, the state bears the increased burden of showing that the subsequent statements were not the product of the prior impropriety. See Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The failure of the police to timely inform Castro of his rights before the incriminating statement was made is a factor

that must be considered in conjunction with Castro's uncontroverted state of intoxication when the voluntariness of the subsequent waiver is determined. See Thompson v. State 548 So.2d 198, 203-04 (Fla. 1989); Townsend v. Sain, 372 U.S. 293 (1963)(pre-Miranda case in which confession was suppressed when drug-addicted defendant had been administered a medication that had properties of truth serum).

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

POINT IX

CASTRO WAS DENIED A FAIR TRIAL BY THE UNNECESSARY PRESENTATION OF GRUESOME AUTOPSY PHOTOGRAPH MADE OF THE VICTIM'S ARM.

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

> This Court has long followed the rule that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance. See Bush v. State, 461 So.2d 936, 939-40 (Fla. 1984), cert. denied, 47 5 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986); Williams v. State, 228 So.2d 377, 378 (Fla. 1969). Where photographs are relevant, "then the trial judge in the first [instance] and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence." Leach v. State, 132 So.2d 329, 331-32 (Fla. 1961), cert denied, 368 U.S. 1005, 82 S.Ct. 636, 7 L.Ed.2d 543 (1962).

Czubak, 570 So.2d at 928.

In the instant case, Castro's defense counsel duly objected to presentation of the color autopsy photograph. (R758) Specific objections were made arguing that the photograph was cumulative, irrelevant, and that the inflaming effect on the jury denied Castro a fair sentencing hearing in violation of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (R549-50) State's

exhibit 16 is supposedly relevant because it better depicts the cuts on the victim's arm then the black and white pictures previously published to the jury. (R757,58) The trial court asked why that was relevant and the state replied:

> I believe it's going to become an issue, Judge. That's why I want it in.

Without doubt this picture is offensive and gruesome. The picture was wholly unnecessary and irrelevant:

> DEFENSE: It's a stab wound to what?
>
> DR. CHEN: To the arm.
>
> DEFENSE: And can you show me on your arm where that is?
>
> DR. CHEN: Yes. There is -- this one that's shown in this color photograph is this one that's right here.
>
> DEFENSE: And you can do all that without the aid of that photograph, can you not?
>
> DR. CHEN: Yes.

State's exhibit 8A, B. C, and D depicts Scott and the stab wound to the arm. Those photographs are more than enough to establish the locations of the wounds, and any competent doctor would be able to fully describe the nature of Scott's injuries by referring solely to that picture without reference to the additional color autopsy photograph.

The color photograph taken during the autopsy could in no way enhance the jury's understanding of the issues. Insofar as determining whether the murder was especially heinous, atrocious or cruel, the jury may well have been greatly influenced by the offensiveness of the autopsy photographs. Mutilation of a body

after death cannot be properly considered in establishing that statutory aggravating factor. See Halliwell v. State, 323 So.2d 557 (Fla. 1975). However, lay people may attribute weight to the HAC factor solely because of such graphic autopsy photos.

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

POINT X

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

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

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

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

Even more recently, however, the United States Supreme Court decided Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed. 2d 1 (1990) and re-affirmed the holding in Maynard v. Cartwright, 486 U.S. 356 (1988). The concurring opinion

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

> The basis for this conclusion [that the limiting construction was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, 497 U.S. 639, 644, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard) clearly fail this test; like "heinous" and atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by "'[a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Maynard v. Cartwright, supra, at 363, 100 L.Ed.2d 372, 1108 S.Ct. 1853 (quoting Godfrey v. Georgia, 446 U.S. 420, 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980)(plurality opinion))(emphasis added).

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

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

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

For instance, in Hitchcock v. State, 578 So.2d 685 (Fla. 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's." Hitchcock, 16 FLW at S26. Compare this statement to the analysis contained in Mills v. State, 476 So.2d 172, 178 (Fla. 1985):

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

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

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

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

POINT XI

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

Violation of Separation of Powers

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

As noted in the preceding point on appeal, this Court has rejected the premise that Florida's especially heinous,

atrocious and cruel statutory aggravating factor is unconstitutionally vague based on Maynard, supra, because the working definition of the terms set forth in the HAC factor are provided by this Court through a limiting construction of that factor. See Smalley v. State, 546 So.2d 720 (Fla. 1989). Other instances where the definitions of statutory aggravating factors have been provided by this Court demonstrate that the violation of the separation of powers doctrine is pervasive. See Peek v. State, 395 So.2d 492, 499 (Fla.1980)(parole and work release constitute being under sentence of imprisonment, but probation does not); Johnson v. State, 393 So.2d 1069 (Fla.1981)(more than three people required to constitute a great risk of death or injury to many persons)[7]; Banda v. State 536 So.2d 221, 225 (Fla.1988) ("We conclude that, under the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide."). The passage of such broad legislation for it to be refined, defined and given substance by the Supreme

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

Court of Florida is tantamount to a delegation of legislative power and a violation of the separation of powers doctrine of state and federal constitutions.

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

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

For instance, this Court has held that the State is permitted to establish the full details of a defendant's prior conviction for a violent felony in order to allow the jury sentencer an informed basis whereby "weight" can be meaningfully attributed to the Section 921.141(5)(b) factor. See Francois v.

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

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

FAILURE TO ADEQUATELY INSTRUCT SENTENCER ON STANDARD OF PROOF

Due process under the Fourteenth Amendment must comport with prevailing notions of fundamental fairness. California v. Trombetta, 467 U.S. 479 (1984). In order to recommend/impose the death penalty in Florida, the statute requires that statutory aggravating factors "outweigh" the mitigation. Section 921.141(2)

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

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

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

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

CONCLUSION

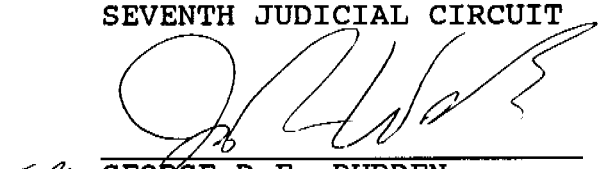
Based on the argument and authority previously set forth, this Court is respectfully asked to provide the following relief:

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

POINT VI: To vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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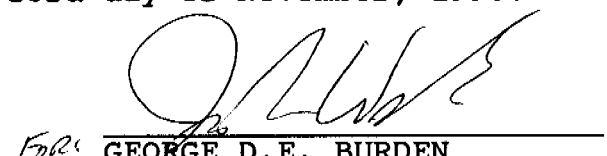
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Edward Castro, #110488 , P.O. Box 221, Raiford, FL 32083, this 23rd day of November, 1993.



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