IN THE SUPREME COURT OF FLORIDA

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CASE NO. 88,638

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JESUS DELGADO,

Appellant,

-vs.-

THE STATE OF FLORIDA,

Appellee.

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ON DIRECT APPEAL FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND OF THE FACTS

On or about August 30, 1990, Violetta and Tomas Rodriguez died. On June 19, 1996, Jesus Delgado was sentenced to death twice, and the violence continues.

The violence in Jesus Delgado's life began before he was even born in Cuba. Mercedes married Jesus' father, Juan Antonio Delgado, in 1963. Tr.1698. Reisa was born in 1964.Tr.1698. Two months pregnant with Jesus, his mother, Mercedes, was abandoned by his father--an abusive drug dealer headed for Federal prison. Tr.1699. Destitute and heartbroken, Jesus' mother moved into her parents' small apartment with Jesus' two-year old sister, Reisa. Tr.1701.

Mercedes' pregnancy with Jesus was very difficult. Tr.1699. Although Mercedes' parents did not want Mercedes to have this baby, Jesus was born in 1965 to a single mother with serious psychological problems of her own. Still suffering the devastation of being separated from her husband, Mercedes was forced to return to her parents small apartment where she, Reisa and Jesus lived for eight years in one cramped room in the dining area. R.609.

Jesus was first hospitalized, less than a month after he was born, with gastroenteritis. Tr.1700. Jesus' fetal digestive system was adversely and irreversibly affected, impacting upon his early childhood development. Tr.1703.

For nine out of the first ten months of his life, Jesus was required to remain in the hospital because of his damaged digestive system. Tr.1701. Jesus could not drink milk without developing a fever, vomiting, and suffering from diarrhea. Tr.1701. Jesus developed lactose intolerance. Tr. 1711. . Jesus vomited constantly, had diarrhea and subsequently was diagnosed with and suffered from dystrophy. For the first nine months of Jesus' life, he was failing to thrive and he became seriously dehydrated. Tr. 1711. In addition to suffering from gastroenteritis and from allergies to lactose, Jesus suffered from prolonged pneumonia where he had to be fed intravenously. R.609; Tr.1711. In addition, at this early age in Jesus' life, he was also struck with the lifelong affliction of asthma. R.609.

Jesus, already in a weakened condition and in poor physical health at the age of two, subsequently contracted life-threatening and brain-damaging meningitis. Tr.1702. Jesus fell into a coma that lasted for twenty-five days. Tr.1702. After experiencing seizures and convulsions, Jesus could not breathe without the assistance of tubes inserted into his throat for the transmission of oxygen. R.609.

This disease of meningitis dominated Jesus' physical life for fifteen years. While he took growth hormones, Jesus continued to be required to receive medical treatment that assisted him in his ability to eat, walk and talk. The diseases of youth continued to plague Jesus into adulthood; by the age of twenty, "Jesus was small, like

immature, he was like a kid." Tr. 1739.

Throughout his adolescence, Jesus was hospitalized a number of times. R.609. Because of his family's politics, Jesus received minimal care and medication for convulsions, for at least three head traumas and for an attempted suicide. R.609. Jesus suffers from depression and other disorders now identified as organic brain damage, impulse-control disorder, delusional disorder with paranoid ideations and behavior and attentional deficit disorders. R.608,1266.

When Jesus was fifteen years old, because of his family's intent to leave Cuba, his medical treatments were discontinued. R.609. The Cuban Ministry of the Interior required Jesus to attend daily psychological meetings in a day-care center and, because of his nerves and his asthma, found him to be unfit to serve in the Cuban military. R.609. Jesus' mother had remarried, but the family home was destroyed by the Cuban government and his entire family was beaten in 1980. R.609. Not only did Jesus' neighbors shun him for four years until he was allowed to leave Cuba in 1984, but Jesus also experienced severe physical and emotional abuse at the hands of those who were supposed to care for him. R.610.

Jesus' mother, while she was a single parent, worked long hours; and it was his elderly and ailing grandmother who initially took responsibility for his care. R.610. Jesus' grandmother suffered from a serious asthma condition and was in poor

physical health. R.610. When Jesus' mother did assume responsibility for his protection, she abused and tortured him. R.610; Tr. 1758 Specific incidents of these horrific events in Jesus' childhood include:

1. Jesus' mother once burned him with a hot iron after finding some coins missing from her pants pockets. R.610; Tr. 1758.

2. Jesus' mother used a stick, a belt, a shoe or anything within her reach to hit him whenever she lost her violent temper. R.610; Tr. 1758.

3. Jesus' mother had a habit of tugging on Jesus' little ears while she was screaming at him. In one incident Jesus' ear was torn from his face and his own drying blood was used to try to repair the torn flesh. R.610.

4. Jesus' mother frequently scratched Jesus so severely that he was required to wear protective clothing and cover-up these incidents of abuse by telling others that a cat had injured him. R.610.

5. Jesus' mother reported that she chased him with a bottle of alcohol, when he was approximately age 15, and sprayed him with the intent of lighting a match so that he would pay attention to her. R.610.

When Jesus was eight years old, his mother remarried. Mercedes' second husband was a doctor, but he had a drinking problem. Tr.1705. When his mother moved the family out of his grandparents' apartment into a house owned by Jesus'

stepfather, Jesus continued to be victimized by his mom, and now also by the "good doctor." Tr.1706. Jesus' alcoholic stepfather became uncontrollably violent and abusive when he drank. Tr.1706. Several times, the doctor savagely beat Jesus' mother. Tr. 1771. And when Jesus was old enough and big enough to try to protect her, that is exactly what he did. Tr.1706. Jesus repeatedly was compelled to confront his step-father and intervene for his mother. Tr.1706.

Jesus was also abused by his step-father, and when the violence seemed to be escalating, Jesus was told to go into his room and lock the door so he would not be injured by broken glass. R.610. There were times when Jesus' family had to go without food because the doctor would destroy everything he could get his hands on. R.610.

When Jesus finally escaped his step-father's abuse (when he and his mother were allowed to leave Cuba in 1984), his nightmare of torture still did not end. Jesus went to live with his father and step-mother, hoping to find a parent he could look up to. Tr. 1714. Jesus wanted to get to know and love the father who had so long ago abandoned him. Instead, Jesus was subjected to an environment corroded with criminal activity and drug dealing. Tr. 1740

Jesus' step-mother, however, never had any problems with Jesus. Tr. 1752. Jesus' sister also recognizes that Jesus was unduly victimized. Tr. 1761.

Jesus was emotionally and physically battered by his father who demanded subjugation to his domination and control. R.611. Jesus' step-mother helplessly observed this mistreatment, and told Jesus' father that she believed Jesus should seek medical treatment because he acted so immaturely for a boy his age.

Although Jesus was not able to complete high school, due to the chaos and dysfunction of his upbringing, he was able to secure jobs at a supermarket and at an auto body shop. R.612-13. When Jesus was nineteen years old, he once again was compelled to intervene for a person he cared about, his sixteen year-old girlfriend. Jesus, in order to stop a fight and protect his friend, unwisely and regrettably pointed a gun at two individuals. Tr.1623. No shots were fired and no one was injured. Tr.1623. Jesus admitted his mistake and pled guilty instead of asking for a trial. Tr.1680.

Jesus later became involved with another young woman, Barbara Lamellas Tr.1754. Barbara and Jesus planned to be married and have the kind of family life he had only dreamed of. Jesus wanted to be a legitimate businessman and not end up like his father, who in late 1989 was sentenced to thirty years in Federal prison for drug trafficking. R.611-13.

Jesus had very little contact with his mother after they left Cuba, visiting her only once in Venezuela, where she remained for six years after Jesus had made his

way to Miami. Tr.1709-10. Barbara did not want Jesus to have anything to do with his family, including Reisa and Jesus' step-mother. Tr.1730, 1752. Reisa saw Jesus only at his job and while driving in town. Tr.1763. Barbara and her father became Jesus' family.

In June of 1990, Barbara's father, Horatio Lamellas bought the Jess and Jean Dry Cleaners from Tomas and Violetta Rodriguez. The Rodriguezes agreed to help the Lamellas run the business as well as teach them how to properly operate and maintain the equipment. Tr. 537-57, 782-88, 801-16. Barbara worked in the cleaners during the day, and Jesus worked in an auto body shop and helped her out with the opening and closing. Tr.801-24. After the Rodiguezes sold the business to the Lamellas, it was plagued with broken machines and dissatisfied customers. Tr. 801-24.

One of the Lamellas' employees, Maria Hernandez, who also once worked for the Rodriguezes until they closed the business without her knowledge while she was ill, testified at trial. Tr.801. Ms. Hernandez never had problems with Jesus Delgado, never saw or heard Jesus threaten the Rodriguezes or behave in a violent manner, and never saw Jesus with a gun. Tr.815. The witness did hear Mr. Delgado complain that the Rodriguezes had used trickery is selling the dry-cleaning business and machines. Tr. 808. Ms. Hernandez testified that the only gun she knew about was the

one Violetta Rodriguez said that her husband, Tomas, had to take care of the business. Tr.816.

Marlene McField, a neighbor of the Rodriguezes, saw Violetta and Tomas going into their house at about 7:00pm on August 30, 1995. Tr.557-80. The Rodriguezes were extremely security-conscious, with double or triple locks and an alarm system on their house. Tr. 575. The front door of the house was protected by a steel gate which had to be opened to get to the door itself. Tr. 575. The next morning, Ms. McField noticed that Violetta's keys were in the gate lock. Tr. 557-80.

Ms. McField took the keys, unlocked the gate and rang the door bell, but there was no answer. Tr.567. Ms. McField testified that the Rodriguezes would not have allowed a stranger, someone they feared, or an aggressive individual inside their house. Tr.578. Concerned about the Rodiguezes, Ms. McField called 911 and summoned the police. Tr.568.

The first officer on the scene testified that when he went into the residence nothing seemed to be disturbed. The officer observed a gun and a knife on the floor, possibly a bullet casing on the floor of the utility room that leads to the garage, blood on the floor that leads to the garage, and two bodies inside the garage, a male and a female. The officer testified that he observed that this was not a normal burglary scene. Tr.580-621.

Several police detectives testified that the house was not in disarray and there was no sign of a struggle inside the house. Tr. 621-801. The wooden door which led to the garage was broken and blood was found on the floor. Tr.621-801. Evidence was gathered, including a .22 caliber semi-automatic pistol equipped with a silencer, an empty ammunition magazine, a knife, two kitchen drawers, the hood of the Rodriguezes' Volvo, telephone equipment, bullet casings, and keys. Tr. 621-801. Pictures were taken of the two bodies, of bloody footprints, and of blood drops found on the floor; fingerprints were lifted; and samples of blood found in various areas of the house and garage were extracted. Tr. 621-801. Items in the kitchen drawers were not tested for fingerprints or blood; the Volvo's glove compartment, which was open, was not tested for fingerprints. There were six expended shell casings from the pistol found at the scene, but only four projectiles were accounted for. Tr.898. The two missing projectiles were never found.

The State's forensic serologist testified that Violetta's blood, the blood of Jesus, and possibly Tomas' blood was found on the kitchen floor and on the telephone cord. Tr. 974-1131. Violetta's blood was found on the kitchen counter top; although some blood sample tests proved inconclusive, blood that was not human was found there as well. Tr. 974-1131.

Jesus' blood, which is unrebutted evidence that Jesus suffered injury in the

fray, was found in at least six different places at the Rodriguezes'. Tr. 974-1131. Jesus' blood was not found on the kitchen counter top or on the knife. Tr. 974-1131. Jesus' fingerprints were found on the telephone, and one print that does not belong to Jesus, Tomas or Violetta was found at the scene. Tr. 1281-1301. A pen register procedure was used to determine that the last call from the Rodriguezes' home was made to the Lamellas'. Tr. 782-788.

There was no direct testimony about either the sequence of events leading up to the struggle, or the sequence of injuries sustained by the Rodriguezes and Mr. Delgado. Tomas Rodriguez died as a result of multiple gunshot wounds, and Violetta died as a result of blunt force trauma and multiple stab wounds. Tr. 1138-1231. The medical examiner who conducted the autopsies of Tomas and Violetta Rodriguez made no report of defensive wounds. Tr. 1138-1231. Another medical examiner opined that some wounds depicted in the photographs were defensive; that witness also testified that Violetta would have been rendered unconscious after being struck in the head with the butt of the .22 caliber gun. Tr. 1138-1231. That medical examiner also testified that both Violetta and Tomas had been drinking. Tr. 1136-1231.

Jesus Delgado was subsequently charged with two counts of first degree murder, burglary with the intent to commit murder, and unlawful use of a firearm

during the commission of a felony. Following a suppression hearing , the case was tried before a jury starting on October 20, 1995. Tr. 1-1920.

The State's theory was that Jesus was a lazy man who was so angry at the Rodriguezes for not helping him and Barbara with the dry cleaning business that he brutally murdered them. Tr. 537-549, 1414-1468.

The defense's theory was that Jesus went to the Rodriguezes' home to meet with them peaceably, became engaged in a struggle with the Rodriguezes, and that he reacted in self-defense. The evidence put on by the defense at trial consisted of Mr. Delgado demonstrating portions of his body. Tr. 1323-41. He opened and closed his fingers to show the jury the movement of his hands; Counsel proffered that it was "to indicate that he has in fact no scars, and no disable [sic] injury to his hand [i]n direct response to the evidence . . . [that] he was potentially cut by a knife which caused blood at the scene." Tr.1323. Defendant also demonstrated a scar on his shoulder, which the defense proffered was consistent with Defendant's theory that Mr. Delgado was shot by Mr. Rodriguez, who was the aggressor. Tr.1324.

The defense argued that the Rodriguezes were known to have guns and that there was no evidence to convict Jesus of first degree murder. The defense moved for a judgment of acquittal on all counts, which was denied. Tr. 549-557, 1341, 1391-1414-1507.

Following the jury instructions on first degree premeditated and felony murder, the jury rendered a verdict of guilty on all four counts. Tr. 150743. Jesus was adjudicated guilty only the first three counts; and the State, (as it previously announced it would,) continued to seek the death penalty. Tr. 1554.

At the conclusion of Mr. Delgado's trial and upon being convicted of two counts of the first degree murder, Mr. Delgado informed his attorneys that he wanted to die. R.352. Defense counsel twice requested that Mr. Delgado be examined for competency and for neurological damage because counsel had learned that Mr. Delgado suffered from a serious bout of meningitis as a child. R. 352, 1316,1319. The trial court, without objection by the State, ordered that Mr. Delgado undergo a competency evaluation and that he also be examined by a doctor in order to determine whether Mr. Delgado suffered from organic brain damage. R.352, 1327, 1324. The trial court's order dated November 14, 1995, a week before Mr. Delgado's penalty phase hearing before a jury was scheduled to begin, specifically states that the evaluation be performed on Mr. Delgado to "rule out any type of neurological deficit or organic brain damage or any other disability that the Defendant may have suffered secondary to childhood meningitis or automobile accident." R.503.

On November 14, Dr, Julie Schwartzbard, M.D., a resident in-training at Jackson Memorial Hospital responded to a "verbal request" for a consultation to be

performed on Mr. Delgado. SR.5. 1[1]. Dr. Schwartzbard's report, faxed to the trial Court's office in the late afternoon of Thursday, November 16, 1995, did not address whether or not Mr. Delgado suffers from organic brain damage. SR.5. 1. Dr. Schwartzbard's report, in fact, did not indicate that Mr. Delgado was in any way evaluated to determine whether or not Mr. Delgado suffered from the disabilities specifically noted by the trial Court in its Order. SR.5. 1.

Defense counsel after reviewing the report received on Friday, November 17, 1995, was outraged that the trial court's Order requiring an examination was not complied with, and before Mr. Delgado's jury was re-sworn to hear penalty-phase testimony on Monday, November 20, 1995, defense counsel brought this serious matter to the trial court's attention. SR.1. 3-9. Defense counsel informed the trial court that Dr. Schwartzbard's report received on Friday, November 17, 1995, did not comply with the defense's request and the court's order that Mr. Delgado be properly examined to determine whether or not the Defendant has any organic brain damage. SR.1 6-7.

The trial court denied the defense counsel's request to conduct the evaluation

[1]Appellant has filed his Motion to Supplement Record with this and other items before the trial court below (referenced herein as "SR"), which were omitted from the original record; this Brief is respectfully filed without awaiting a ruling on that motion to prevent further delay in this appeal.

specified, and the trial court also denied defense counsel additional time to have Mr. Delgado tested by other means. SR.1. 6-9

The trial Court then proceeded with the penalty phase hearing before an uninformed jury about Mr. Delgado's neurological damage. The trial Court stated, erroneously, that the examination conducted by Dr. Schwartzbard was in compliance with the court's prior Order. The jury heard the aggravating factors evidence through victim impact testimony and no expert defense testimony. The trial court refused to read a list of non-statutory mitigating circumstances filed on November 20, 1995. SR.6. 1-2. The jury subsequently rendered an advisory verdict recommending the sentences of death. Tr. 1598-1915.

Because Mr. Delgado's life is at stake, defense counsel continued to research this issue during the penalty phase hearing and presented to the trial court on December 8, 1995, as soon as it became available, evidence and an affidavit confirming defense counsel's position that Dr. Schwartzbard, a resident in-training at JMH, did not conduct a competent exam on Mr. Delgado to determine whether or not Mr. Delgado suffers from organic brain damage or other neurological disorders. R.606.

Instead the report indicated, according to Dr. Edward L. Cagen, the Regional Director of the Dade County Medical Association, that Dr. Schwartzbard's

examination of Mr. Delgado to determine whether or not he suffers from organic brain damage was incomplete and inconclusive. R.606. Dr. Cagen, in a sworn Affidavit obtained December 6, 1995, stated that the exam conducted by Dr. Schwartzbard is "extremely limited and does not constitute a complete neurological examination." R.606.

Defense counsel, being denied an opportunity for time or resources to obtain a competent court-ordered evaluation of Mr. Delgado, independently secured a preliminary report on December 7, 1995, from Jorge Herrera reflecting that he had conducted an initial consultation regarding Mr. Delgado, determining that the results of the consultation point to the presence of symptoms of organic brain damage, and stating that further tests needed to be conducted. R. 607.

On December 7, 1995, defense counsel, in writing, renewed his objections to the adequacy of the court-ordered neurological exam of Mr. Delgado and requested that the trial court impanel a new sentencing jury to hear evidence crucial to the determination of an advisory recommendation and reliable sentence. R.601-07. On December 12, 1995, the trial court denied the defense's request, over strenuous defense objections. R.1263-95.

On May 30, 1996, the trial court conducted a sentencing hearing and was informed by Mr. Delgado that he did not want to be evaluated by doctors, and that he

did not want to present any more evidence to the court on his own behalf. R.1335-75. In addition the trial court was informed by members of Mr. Delgado's family that because Mr. Delgado adamantly objected, they too must refrain from speaking at sentencing. R.1335-75.

The trial court found aggravating circumstances warranted sentencing Jesus to death for each count of first degree murder. R.1385-1406. The trial found only one non-statutory mitigating circumstance that he assigned substantial weight, found that the State failed to prove both that CCP exists with regard to either homicide, and found that HAC only exists with regard to Violetta's death. R.1335-75. This appeal was timely filed on July 8, 1996. R.809.

## SUMMARY OF THE ARGUMENT

The Defendant's convictions for first degree murder must be reversed any of several analyses. In the alternative, his death sentences must be reversed with instructions to resentence Mr. Delgado to life imprisonment.

The first ground upon which the convictions must be reversed is that the jury instructions were hopelessly self-contradictory, in that they charged the jury that an essential element of both theories of murder--including felony murder--was intent to commit murder. However, the jury was confusingly informed that it could convict

for felony murder without any finding of an intent to kill or premeditation. Intent to kill was required because the charge of burglary which was the underlying felony was described in the indictment as a burglary committed by Defendant's entering into the Rodriguezes' residence unlawfully with the intent to commit murder while therein.

The second ground upon which the Defendant's convictions must be reversed was the State's improper closing argument. In that argument, the State improperly commented on the defendant's failure to testify and misled the jury by attempting the shift on to the Defendant the burden of proving his innocence. The trial court erred in denying Defendant's motion for mistrial on that ground.

Third, Defendant's convictions for first degree murder must be reversed because his motions for judgment of acquittal were erroneously denied. There was insufficient evidence to support a finding of premeditation beyond a reasonable doubt to support either conviction. The physical evidence and other circumstantial evidence was at least equally consistent with the defense of self-defense as it was with the State's theory of intentional homicide. Therefore, the Defendant was entitled to a judgment of acquittal.

The trial court erroneously excused for cause for prospective jurors who were death-qualified during voir dire. The applicable law forbids exclusion of jurors based

upon aversions to the death penalty unless they would automatically vote against the imposition of capital punishment without regard to the evidence, or because their attitude toward the death penalty would absolutely prevent them from making a impartial decision as to the Defendant's guilt. Four prospective jurors who were excused over Defendant's objection for cause all indicated that they could follow the law and the evidence, and they were improperly excluded for cause.

The Defendant's convictions should be reversed because he was unfairly prejudiced by introduction of several gruesome photographs of very minimal relevance which were not necessary, because other less gruesome evidence already established the material points presented thereby. There was no issue regarding identification of the victims, there was ample evidence regarding the nature and extent of their injuries, so the repeated display to the jury several large color photographs of blood and gore was unfairly prejudicial to the Defendant.

Mr. Delgado's death sentences must be reversed because he was denied a thorough evaluation by qualified experts prior to sentencing. Although Mr. Delgado was supposed to be examined by a neurological expert to rule out neurological deficit or organic brain damage, the examination was incomplete and did not address the possible brain damage. Notwithstanding several requests by defense counsel, the trial court denied a complete neurological evaluation which should have been

presented to the jury for its consideration.

Defendant should not have been sentenced to death because the trial court did not follow the procedures required where a Defendant forbids the presentation of evidence in mitigation. There was no colloquy to establish on the record Mr. Delgado's instructions to his attorneys to allow him to die, so the entire sentencing procedure was flawed and the sentences must be reversed.

The death sentences should be reversed, because the prosecutor improperly vouched for the strength of the State's case during closing argument. Arguing that it rarely seeks the death penalty and that Mr. Delgado's was one of the worst cases in which the State believed that the Defendant deserved to die, the prosecution unfairly purported to present evidence as to the strength case against Mr. Delgado, when no such actual evidence was presented.

The death sentences must be reversed because the jury instructions given during the penalty phase were incomplete, inaccurate, misleading, and otherwise legally insufficient. The jury was improperly instructed concerning the aggravating factors, mitigating circumstances, and the respective roles of the court and the jury in the sentencing process. The jury was insufficiently informed by the penalty phase instructions and Defendant's death sentences based thereon must be reversed.

The sentences should be reversed because they were based in part upon highly

prejudicial and unconstitutional "victim impact" testimony from witnesses who were not relatives of the decedents, and who knew very little Rodriguezes. Emotionally-charged testimony from two witnesses misled the jury concerning the true issues involved in the sentencing phase of the trial, and unfairly prejudiced the Defendant.

The death sentences imposed upon Mr. Delgado are disproportionate in this case, requiring reversal of the sentences. The mitigators including Mr. Delgado's history of childhood illnesses, character as a person who loves and protects others, family difficulties including little contact with his mother and drug use by his father, and Mr. Delgado's appropriate behavior, should have been weighed more heavily than those circumstances were. Although some evidence of aggravating factors was presented, that evidence of aggravation was balanced or outweighed by the mitigating circumstances in this case, and the death penalty was disproportionate under the facts.

The trial court erred in giving limited, little, or no weight to unrefuted mitigating circumstances presented by Defendant during sentencing. The trial court failed to give the weight to various mitigating factors compelled by the record compel. Factors which were unrefuted in the record but which were not found by the trial court, and other factors which were given less weight than required by the record necessitate reversal of Defendant's death sentences.

The cumulative effect of the several errors during the guilt phase and penalty

phase of the proceedings require reversal. The cumulative effect of several errors in a case which does not involve overwhelming evidence of guilt is harmfully prejudicial, even though the individual errors by themselves might not support reversal.

Defendant's death sentences must be reversed because Florida's capital sentencing statute is unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and under Article I, sections 2,9,16 and 17 of the Florida Constitution. Under the Capital Sentencing Statute Mr. Delgado and others similarly situated are exposed to infamously cruel and unusual punishment, are victims of racial and ethnic discrimination of the death sentence, and are denied due process and equal protection of the laws. The right of one's life is the most fundamental right protected under these Constitutions, and the provisions protecting that life must be read in the most liberal terms to prevent the inexcusable substitution of revenge in the place of justice.

## ARGUMENT

### I.

### APPELLANT'S CONVICTIONS FOR MURDER MUST BE REVERSED BECAUSE SUBMISSION OF THIS CASE ON THE ALTERNATIVE FELONY MURDER THEORY CREATED A HOPELESS CONFLICT IN THE JURY INSTRUCTIONS, AS AN ESSENTIAL ELEMENT OF THE UNDERLYING FELONY WAS INTENT TO COMMIT MURDER, BUT THE JURY WAS TOLD THAT INTENT TO KILL WAS UNNECESSARY

Appellant's convictions for murder must be reversed because submission of the case to the jury on the felony murder theory created an irreconcilable conflict in the jury instructions. As a matter of law, an essential element of the only underlying felony charged, and possibly proven, was intent to commit murder during a burglary. But the jury was told that a conviction for felony murder was possible without any finding that the Defendant formed an intent to kill. Thus, the jury could well have convicted Mr. Delgado without finding either premeditated murder, or without finding all the essential elements of the underlying felony on the felony murder theory.

The indictment charged the Defendant with first degree premeditated murder, or first degree felony murder. The only underlying felony charged in the indictment was burglary. The indictment specifically alleged that Jesus Delgado committed the

burglary by entering into the Rodriguezes' residence unlawfully with the intent to commit the enumerated offense of murder. Mr. Delgado was not charged with entering into the dwelling with the intent to steal, or with the intent to commit an assault, or for some other purpose.

The Defendant moved for a judgment of acquittal on the felony murder charge at the close of the State's case-in-chief, on the specific ground that the charge of felony murder inconsistently required a finding of intent to kill to establish the underlying felony. Tr.1303. That motion was denied. Defendant again moved for an acquittal on that charge at the close of all the evidence, and again the motion was denied. Tr. 1351.

Defendant at the charge conference again objected to the jury being instructed on the felony murder theory on the ground that, under the circumstances of this case, the felony murder charge and the premeditated murder charge were conflicting and inconsistent. Tr. 1382-83.

The trial court instructed the jury in no uncertain terms that it could convict the Defendant of first degree murder without making any finding that he had an intent to kill, stating: "In order to convict of first degree felony murder it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill." Tr.1505. But unless Mr. Delgado entered the Rodriguezes' house unlawfully with the

intent to kill them, he could not have been found guilty of burglary as charged in the indictment and as the jury was instructed. Therefore, the submission of the case to the jury on the felony murder theory was erroneous, as was the instruction which permitted guilty verdicts for first degree murder without either a finding of premeditation or a finding on each of the elements of an underlying felony.

The indictment would have been sufficient if it had not charged that the crime Mr. Delgado intended to commit within the Rodriguezes' home was murder, as opposed to some other crime. This Court has held that "the essential element to be alleged and proven on a charge of burglary is the intent commit an offense, not the intent to commit a specified offense therein." Toole v. State, 472 So. 2d 1174, 1175 (Fla. 1985). The specific crime which the Defendant intended to commit while within the structure "is surplusage so long as the essential element of intent to commit an offense is alleged and subsequently proven." Id. However, there are two reasons why, under the instructions as given, it was necessary for the State to establish that Mr. Delgado intended to commit murder during the burglary, as opposed to intending to commit some other crime.

First, the jury instructions required the jury to find that Mr. Delgado intended commit murder--and no other lesser crime--to find him guilty of burglary. The instructions did not inform the jury of the law that would permit it to find a burglary

based on an intent to commit an offense other than murder while within the Rodriguezes' home. The trial court instructed the jury that the offense of burglary had three elements: presence within the premises, absence of permission, and that "[a]t the time of entering or remaining in the structure the defendant had a fully-form[ed], and conscious intent to commit the offense of murder in that structure." Tr.1513. (emphasis added).

Second, there was no evidence of any intent on the part of Mr. Delgado to commit any offense while in the Rodriguezes' home, other than murder. There was no forced or surreptitious entry, nothing stolen or damaged within the home, no sexual assault suggested, nor any other evidence of intent to commit a crime other than murder. Money and jewelry was found by detectives undisturbed in the home. Tr. 642.

Even the State itself conceded that it had to demonstrate that Mr. Delgado intended to commit murder to establish that he committed burglary when he remained in the Rodriguezes' home after their consent to Mr. Delgado's presence was implicitly withdrawn. The prosecution agreed that for it to prove the underlying felony of burglary and to prevail on felony murder as charged, "[h]e would have had to have premeditated to kill at the time of the event," further explaining as follows:

> He would have to have premeditated to kill at the time of the event [to be guilty of burglary as charged]. We seem to forget the State is not proceeding under the classic burglary, breaking and entering and having the intent at that time does not form until such time as the defendant chooses to remain in [the premises without consent]. Once the obvious consent is withdrawn, and he remains in there at that time with and [sic] intent to kill them, which would obviously be the State's position. Then that is the full[y] form[ed] intent to commit murder when he remains there.
>
> Is that not correct? That is the way I see the case.

Tr.1384.

Further reflecting the need for the State to prove intent to murder during the burglary--and no other crime--to establish the underlying offense, is the trial court's deletion from the verdict form of the lesser-included offense of burglary with intent to commit an assault. See Tr.1367. That lesser-included crime was omitted from the instructions and the verdict with the State's acquiescence. Id. Thus, to find the Defendant guilty of felony murder, the underlying crime of burglary required the jury to find the intent to commit murder, and no other crime while within the dwelling.

The jury instructions as given, and the evidence adduced at trial, require reversal of Defendant's murder convictions, because the jury was misinformed that the intent to commit murder need not be proven by the State to support a conviction for felony murder. The verdict could well have been based on a finding of felony

murder without a finding of the only underlying felony upon which the jury was charged. The jury was improperly given contradictory instructions which allowed a verdict of murder without finding either the requisite mental state for premeditated murder, or the requisite mental state for the only underlying the felony murder theory.

Although in another type of case with other facts the jury's felony murder charge could permissibly have read that the jury might find burglary based on the intent to commit any offense within the home, it did not do so. And it could not have done so under the evidence here. Defendant was unfairly prejudiced by the error and his convictions for murder must be reversed.

## II.

## A MISTRIAL WAS REQUIRED BY THE STATE'S IMPROPER ARGUMENT ABOUT DEFENDANT'S FAILURE TO TESTIFY, AND THE STATE'S ATTEMPT TO SHIFT THE BURDEN OF PROOF ONTO DEFENDANT

During closing argument, the State improperly suggested that scars and marks on the Defendant' hands and arms were caused by some event which occurred after the killings involved in this case. Counsel for the State reminded the jury that Mr. Delgado was unaccounted for from the date of the deaths (August 31, 1990), until

more than two years later (December 23, 1992), as if to imply that the scars and marks were inflicted during that time period. See Tr.1455. There was no evidence that the marks and scars came about after the Rodriguezes' deaths.

The State then improperly argued that the jury could find from Defendant's failure to testify that the scars and marks were caused by some unrelated event which occurred after the Rodriguezes' deaths, asking rhetorically: "Have you seen any evidence to suggest to you what was going on during that lapse of time?" Tr.1455. The Assistant State Attorney by that question improperly commented on Defendant's failure to take the stand on his own behalf. She also thereby unfairly tried to shift the burden of proof onto Mr. Delgado to establish his innocence,

The improper argument was preserved with an objection and reservation of a motion (Tr.1455), which was recognized by the trial court. Tr.1456. The State then continued to unfairly comment on Defendant's silence and to improperly suggest that the burden was on Mr. Delgado to prove his innocence, reminding the jury of Defendant's decision to present no evidence and asking: "Have you seen or heard any presentation in this case to tell you, or even demonstrate to you in any fashion that the circumstances under which the State has presented to you are inconsistent with the guilt of the defendant[?]" Tr.1456 (emphasis added).

Immediately after the State concluded its argument, the defense moved for a

mistrial. Tr.1463. Defendant's counsel in that motion specifically referenced the State's improper comment on Defendant's right to remain silent, and the erroneous suggestion that the burden of proof was on the defense to establish innocence. Tr.1463. The motion for mistrial was denied. Tr.1465. Defendant then requested a curative instruction, and the trial court stated at sidebar that one would be given. Tr.1465. However, after breaking from sidebar, the instruction was not given. Tr.1468. Both sides completed closing arguments without the instruction being given. Tr. 1497.

The State's reference to the lack of "any presentation" by Defendant on his whereabouts for more than two years was an improper comment on Mr. Delgado's invocation of his right to remain silent and refrain from taking the witness stand. There is no need to expressly refer to the Defendant's failure to testify for such a comment to require a mistrial. This Court has "adopted a very liberal rule for determining whether a comment constitutes a comment on silence." Jackson v. State of Florida, 522 So. 2d 802, 807 (Fla. 1988), cert. denied, 488 U.S. 871, 102 L. Ed. 2d 153, 109 S. Ct. 183 (1988).

The State's argument below--that the Defendant had failed to make "any presentation" of evidence as to his whereabouts--was fairly susceptible of being interpreted as a comment on Defendant's silence. That is the test for impropriety of

such arguments: "If the comment is 'fairly susceptible' of being interpreted by the jury as a comment on the defendant's right to remain silent, it will be treated as such." Id.

The prosecution's comment in closing here was similar to that which warranted reversal in Dean v. State of Florida, 690 So. 2d 720 (Fla. 4th DCA 1997). There, the State posited that the evidence supported its theory of guilt and asked: "Is there any other reasonable explanation[?]" Id. at 724. The improper argument in Dean followed that question was this: "If there is [any other reasonable explanation] you haven't heard it in this trial." Id. The State's reference here to the lack of "any presentation" in this case was indistinguishable from the reference in Dean to the jury having heard no reasonable explanation during that trial.

In addition to being an improper comment on silence, the State's argument erroneously suggested that the Defendant bore the burden of proof on the element of justification for the homicides. Where the State in argument misleadingly indicates that the defense bears the burden of disproving an element of the crime, denial of a mistrial is reversible error. See Hayes v. State of Florida, 660 So. 2d 257 (Fla. 1995); Jackson v. State of Florida, 575 So. 2d 181 (Fla. 1991). The State's argument here was improper and reversible under two analyses, and the Defendant's convictions should, therefore, be reversed.

## III.

## THE TRIAL COURT ERRED IN DENYING A JUDGMENT OF ACQUITTAL ON THE COUNTS FOR FIRST DEGREE MURDER

### A. Introduction:

Mr. Delgado's convictions for first degree murder should be reversed because his motions for judgment of acquittal on those charges were erroneously denied. The circumstantial evidence of premeditated murder was not inconsistent with the reasonable hypothesis that he did not premeditate the deaths. There was insufficient evidence of premeditation.

"Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit reflection, and in pursuance of which an act of killing ensues." Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2257, 72 L. Ed. 2d 862 (1982). The mental state of premeditation must come about before the act of killing, and "must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result [of death] to flow from it." Id.

If the State relies on circumstantial evidence to establish premeditation, "the

evidence relied upon by the state must be inconsistent with every other reasonable inference." Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989).

It is not sufficient that the State' circumstantial evidence creates a suspicion of the guilt of the defendant; such evidence must be inconsistent with any reasonable hypothesis of innocence. Scott v. State of Florida, 581 So. 2d 887, 893 (Fla. 1991).

In this case there was ample evidence of a struggle between the Defendant and the alleged victims. No one saw who started it. There was no evidence that the Defendant owned the weapons used in the altercation, so the evidence is at least equally consistent with the hypothesis that the guns were owned by the Rodriguezes, and that they were the aggressors. Where there is evidence that a victim was shot with his own gun at close range, possibly during a struggle, that theory must be believed unless the State produces evidence showing the Defendant's theory to be false. See Pendleton v. State of Florida, 493 So. 2d 1111, 1112 (Fla. 1st DCA 1986). There was ample circumstantial evidence consistent with Defendant's self-defense theory, so it was error to submit to the jury either charge of premeditated homicide.

**B. There Was Insufficient Evidence of Premeditated Murder of Tomas Rodriguez:**

Tomas Rodriguez died from gunshot wounds to the chest. Tr.1240. There was

no evidence that Mr. Delgado took a gun to the Rodriguezes' house the night in question. A .22 caliber semi-automatic pistol with a silencer was found on the floor of the Rodriguezes' home. Tr.637. There was no evidence connecting that weapon to the Defendant. The only evidence of someone owning a gun was that Tomas Rodriguez did.

The circumstantial evidence presented at trial supports the Defendant's claim of self-defense. Absent direct evidence to the contrary, we must infer from the circumstantial evidence that the weapons found at the scene belong to the Rodriguezes, not to Mr. Delgado. The lack of evidence that Mr. Delgado brought any weapon with him to visit the Rodriguezes' home is consistent with self defense, not premeditated murder.

Mr. Delgado did not lie in wait for the Rodriguezes, attack them secretly from hiding, or otherwise demonstrate a plan to commit murder. He apparently was welcomed into the Rodriguezes' home; so his method of entry is not consistent with an intent to slay the Rodriguezes, nor with the notion that the relationship between the parties was so bad that Mr. Delgado had a reason to kill the Rodriguezes.

These circumstantial evidence supports the inference that Mr. Rodriguez shot Mr. Delgado first in the shoulder with a silencer-equipped .22 caliber automatic weapon. Two projectiles were unaccounted for by the police who looked for

evidence. The gun must be inferred to have belonged to Mr. Rodriguez. Mr. Delgado has a bullet in his shoulder, and displayed at trial his scar consistent with having been shot by that same gun. The missing slug--the jury could well find--is lodged inside Mr. Delgado's body. The pattern of bullet wounds inflicted in Mr. Rodriguez is consistent with Mr. Delgado having disarmed him after first being shot in the shoulder himself, and having retaliated in self-defense.

The gun likely came from the open glove compartment in the Rodriguezes' Volvo parked in the garage. On the other hand, the evidence is inconsistent with that large silencer-equipped weapon having somehow been brought into the Rodriguezes' home by Mr. Delgado. The safety--conscious Rodriguezes would have seen the weapon when Mr. Delgado attempted to enter their home, and likely would have denied him entry. Even if Mr. Delgado had somehow entered the home with that weapon on his person, it would have been seen soon enough that signs of a struggle would have appeared in the living room area of the home, not just in the garage.

Mr. Delgado never had threatened the Rodriguezes with any form of violence. He had no motive to kill them, because their expertise was still needed to help Mr. Delgado's girlfriend, Barbara, and her father succeed in the business at the dry cleaners they had purchased from the Rodriguezes. The deaths of the Rodriguezes certainly would have not improved the quality of the dry cleaning work which was

being performed, and Mr. Delgado's prior history as a protector of his loved ones compels the conclusion that he would have acted to help Barbara's business, not doom it to failure by killing the only people who knew how to make the business succeed.

There is no direct evidence of what happened in this case, and the only circumstantial evidence is equally consistent with self defense as it is with murder. Therefore, under the applicable law, Mr. Delgado's conviction for the death of Tomas Rodriguez must be reversed.

### C. There Was Insufficient Evidence of Premeditated Murder of Violetta:

The injury from which Violetta Rodriguez died was a stab wound which struck her aorta, resulting in her death within two to five minutes. Tr.1204-05. There was no evidence that Mr. Delgado came to the Rodriguezes' home with a knife. A knife was found on the floor of the Rodriguezes' home the day their bodies were discovered. Tr.583. The police who investigated the matter believed that someone took the knife from the Rodriguezes kitchen. Tr.750. A drawer in the kitchen containing similar knives was open when police arrived at the scene. Tr.672, 722.

The use of a knife from the Rodriguezes' kitchen is inconsistent with the State's theory that Mr. Delgado premeditated the death of Violetta and is consistent with

Defendant's self-defense explanation for her death. There is no evidence as to who took the knife from the drawer.[2] If it was Violetta, then the use of that knife as the instrument of death is more consistent with self defense than it is with the theory of homicide in any degree.

Even if it was Mr. Delgado who took the knife from the drawer, his appearance at the home without the weapon and resort to it during the struggle is consistent with self defense, and inconsistent with premeditated murder. The totality of the evidence is at least equally consistent with a provoked killing done in the heat of passion as it is with premeditated murder, even if it is assumed that Mr. Delgado took the knife from the drawer.

It is reasonable to surmise that Violetta Rodriguez attempted to come to the assistance of her husband after he had shot Mr. Delgado and was disarmed by the Defendant. After the pistol was emptied during the shootout between Tomas Rodriguez and Mr. Delgado, the Defendant attempted to defend himself from Violetta by banging her head with its handle. The act of taking the knife from Violetta's hand after disabling her in that manner, then stabbing her quickly does not compel with

[2]The State speculates it was Defendant because another drawer in the kitchen was open and the State figures that Violetta would not have had to look for a knife in her own kitchen; that theory impermissibly presumes that the person taking the knife from the drawer opened the other drawer first, rather than the other drawer already being open.

conclusion that her death was premeditated. The State failed in its burden of establishing beyond a reasonable doubt that Mr. Delgado's provocation defense was inapplicable. Therefore, Defendant was entitled to a judgement of acquittal on the first degree murder charge and the conviction for killing Violetta Rodriguez should be reversed.

## IV.

## THE TRIAL COURT ERRONEOUSLY EXCUSED FOR CAUSE QUALIFIED PROSPECTIVE JURORS CONTRARY TO WITHERSPOON v. ILLINOIS

### A. Introduction:

The trial court erroneously excused for cause four prospective jurors who were death-qualified during voir dire. There is a two-part test for excludability for cause of prospective jurors in a capital case: "(1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, 391 U.S. 510, 522 n. 21, 88 S. Ct. 1770, 1771 n. 21, 20 L. Ed. 2d 776 (1968)(emphasis altered).

This Court has held that to meet the Witherspoon test for excusal for cause based on the juror's likelihood to vote against the death penalty, "it is not enough that a prospective juror 'might go towards' life imprisonment rather than death," nor even enough that the prospective juror "probably would lean towards life rather than death" in a close case. See Chandler v. State, 442 So. 2d 171, 174 (Fla. 1983)(emphasis added). To be excludable for cause on that prong of the Witherspoon test, a juror must be "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."

When examining the possible effect that a juror's attitude toward the death penalty will have on the guilt phase of the trial, it is not enough that the juror admits a possible coloration of his or her verdict by that attitude. To be excusable for cause under Witherspoon, the prospective juror must express "unyielding conviction and rigidity of opinion" against the death penalty which would influence his or her findings on guilt. The four jurors in question were not excludable under either prong of Witherspoon.

**B. Prospective Juror Melvin Was Erroneously Stricken:**

Over Defendant's objection, the trial court struck for cause prospective juror

Melvin. Tr.325. The trial court's stated ground for striking Ms. Melvin was its "opinion that her personal and religious beliefs [about the death penalty] would substantially impair her from following the law." Tr.325. However, the record does not support a finding that Ms. Melvin's beliefs about the death penalty irrevocably committed her to ignoring the law.

Ms. Melvin stated that she was "not totally against the death penalty." Tr.318(emphasis added). Although the prosecution got Ms. Melvin to agree that she would vote for life imprisonment even though aggravating factors were present if the Defendant were repentant (Tr. 318), the hypothetical scenario discussed at that point in voir dire was too sketchy and incomplete to support the argument that Ms. Melvin would ignore the law. Ms. Melvin's response merely indicated that she would weigh the mitigating factor of repentance highly, not that she would never vote for a death sentence under any circumstances.

The only reference the record that Ms. Melvin's ability to follow the law might be substantially impaired was not from her testimony. Instead, it was only the State's gratuitous comment after the above-referenced incomplete hypothetical, as follows: "So then it would, obviously, substantially impair your ability." Tr.319. Ms. Melvin did not even express agreement with that incomplete assertion, but said in response: "I understand the law and all that stuff." Tr.319. She was then interrupted by the

State before she could say anything more on the subject. Tr.319. There was no evidence that Ms. Melvin could not or would not follow the law on either prong of the Witherspoon test. Therefore, Mr. Delgado's death sentence must be reversed.

**C. Prospective Juror Watkins Was Erroneously Stricken:**

Over Defendant's objection, the trial court struck for cause prospective juror Watkins. Tr. 335. Although she had "a problem" with the death penalty (Tr.304), and revealed her religious beliefs against the death penalty (Tr.166), Ms. Watkins unhesitatingly answered "yes" to the question in voir dire whether she could put her personal feelings aside, consider the evidence, and determine her recommended sentence based on that evidence. Tr.304-05. She also unequivocally responded "no" to the question whether her feelings about the death penalty would interfere with her decision on the guilt or innocence phase of the trial. Tr.305.

The closest Ms. Watkins came to stating that her verdict would be affected by her views was to respond "[t]hat's true" to the question whether her feelings about the death penalty were strong enough that she would not be able to "evaluate the charges in this case in a fair fashion." Tr.165. Ms. Watkins never was asked questions which would directly reveal whether she would never follow the law and the evidence as a result of her beliefs. Her doubts about her ability to fairly evaluate the charges did

not rise to the Witherspoon level of unyielding conviction or irrevocable commitment to ignore the facts and the law. Ms. Watkins was improperly stricken for cause and the death sentences must be reversed.

**D. Prospective Juror Dixon Was Erroneously Stricken:**

Prospective Juror Dixon said in voir dire that she would not have a problem with the guilt phase of the trial as a result of her feelings against the death penalty. Tr. 302-303. She did indicate that she might have a problem with the second phase because she does not believe in the death penalty. Id. However, when asked whether she would be able to follow the court's instructions and put aside personal feelings, weighing the aggravating and mitigating factors to decide the appropriate sentence, Ms. Dixon responded; "Yeah, there are cases that I could consider." Tr. 303. She again repeated that she thought that she could put her personal feelings aside and be fair in returning a verdict on the penalty phase. Tr. 304. She did not meet the Witherspoon standard for excusal for cause, and Mr. Delgado's death sentences must be reversed.

**E. Prospective Juror Seidenman Was Erroneously Excused:**

Mr. Seidenman was asked whether he was philosophically opposed to the death

penalty, and responded; "that's about as close as I can come to describing it". Tr. 288. Mr. Seidenman unequivocally responded that he would be able to follow the law and the evidence in returning a verdict on the guilt or innocence issue, without regard to his feelings toward the death penalty. Tr. 289. Mr. Seidenman would not agree with the suggestion that he would ignore the evidence and the law in his verdict on the penalty phase, and only conceded that he "would have a very difficult time not granting some . . . mitigating factors." Tr. 290.

Mr. Seidenman said that he "would not go in there [to deliberations] with [a] preconceived notion," only that he would "have a very hard time not going with" mitigating factors which were presented. Tr. 291. Although repeating that he had an inclination against imposing the death penalty, Mr. Seidenman unequivocally responded "No" to the question whether he had a problem in waiting to hear the evidence before making up his mind. Tr. 292.

During voir dire examination by the State, Mr. Seidenman stated his ability to follow the evidence and the law and returned a verdict for the death sentence, although he would be reluctant to do so. He did agree once that his feelings "would substantially impair" his ability to impose the death penalty. Tr. 310. But Mr. Seidenman established that he was not excludable under the Witherspoon test of being "irrevocably committed, before the trial has begun, to vote against the penalty

of death regardless of the facts and circumstances," stating that his opposition to the death penalty was merely at the level of "reluctance and inclination." Tr. 309. He stated: "I don't know that I could say I am categorically opposed to the death penalty." Tr. 309.

Mr. Seidenman never stated that he would vote against the penalty of death regardless of the facts and circumstances which might emerge. Mr. Seidenman's beliefs did not disqualify him under the applicable standard, and his excusal for cause entitles the Appellant to reversal of his death sentences.

## V.

## DEFENDANT WAS UNFAIRLY PREJUDICED BY THE INTRODUCTION OF GRUESOME PHOTOGRAPHS OF MINIMAL RELEVANCE, WHICH WERE UNNECESSARY BECAUSE OTHER EVIDENCE ALREADY ESTABLISHED THE MATERIAL POINTS REPRESENTED THEREBY

Mr. Delgado was irreparably prejudiced by the admission into evidence of numerous horribly gruesome photographs of the bloody decedents. Those photographs, although marginally relevant to issues such as the injuries sustained by the decedents, were so inflammatory that their probative value was far outweighed by the danger of unfair prejudice to the Defendant. It is error to admit gruesome

pictures where other, less gruesome evidence exists to establish the facts in question. See Thompson v. State of Florida, 619 So. 2d 261, 266 (Fla. 1993), cert. denied, 114 S. Ct. 445, 126 L. Ed. 2d 378 (1993).

The State introduced without objection Exhibits 4 and 5, photos which amply demonstrated the facts concerning Mr. Rodriguez' injuries and death; Exhibit 4 is a photo of the scene showing "[f]ootprints, blood and the body [of Mr. Rodriguez]" in the doorway where it was found. TR.587. Exhibit 5 depicts the body with the wounds visible. Tr.589. Defendant objected to Exhibits 6 and 7 on the ground that they depicted the same things contained in Exhibit 5, but the evidence was admitted over that objection. Tr.592.

The State initially offered three photos of Mrs. Rodriguez' body, over Defendant's objection that they depicted the same scene, and because two of them, State's Exhibits for Identification M and O were "particularly gory." Tr.595. The defense objected under Rule of Evidence 403 that the prejudicial effect of the photographs outweighed their probative value. Tr.596.

While the parties were presenting argument about the first three proffered photos of Mrs. Rodriguez, the trial court accepted the prosecution's representation that the pictures being offered depicted different things, and His Honor found that the prejudicial effect did not outweigh the photos' relevance. Tr. 598. All three photos

were admitted, as Exhibits 8, 9, and 10. Tr.599.

Much more gruesome than the crime scene photos was an autopsy photos of the decedents. Defendant objected on the grounds of gruesomeness. Tr.788.[3] The autopsy photo was admitted as Exhibit 52. Tr.789. Additionally, other gruesome photos were admitted over Defendant's objections and shown to the jury. There was no need to inflame the jury with much blood and gore, where the identities and causes of death of the decedents were not contested, and there was nothing more than an isolated fact which the State said it wanted to establish with the pictures.

It is remarkable that the cases are fewer reversing criminal convictions based on inflammatory evidence than there are civil cases on the subject. In criminal cases--especially capital cases--where lives and lifetimes of liberty are at stake, the need to protect against arousing the passions and prejudices of the jury would seem to be greater than in civil litigation over money damages, where no one is accused of intentional wrongdoing. The jury is more likely already leaning against a criminal Defendant accused of homicide, than it is likely to be favoring one party over another in a civil case.

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[3]Defendant also at first objected on the ground that the witness who laid the foundation for those photos was not the medical examiner who performed the autopsies, but was a police officer. Tr.788. Upon determining that the officer had been present during the autopsies, the latter ground for objection was withdrawn. Tr.789.

If anything, the civil cases reversing judgments based on inflammatory photographs ought to be of greater authoritative weight in criminal appeals, because the likelihood of unfair prejudice is less in a civil case, and because the consequences flowing from that prejudice are so much more severe in criminal cases. One such instructive civil case is Gomaco Corp. v. Faith, 550 So. 2d 482 (Fla. 2d DCA 1989).

In Gomaco Corp., the Plaintiff suffered an injury due to a defective product. Photographs of her nearly-severed foot were admitted over Defendant's objection, and a physician testified that the pictures would aid in his description of the surgical procedures which were required as a result of the Plaintiff's injuries. The Second District reversed the judgment for the Plaintiff, holding that the photographs were "particularly gruesome and inflammatory," and noting that they were not necessary to independently establish any fact or to corroborate any disputed element of Plaintiff's case. See id. at 483.

The pictures of the bloody victims in the present case are much more gruesome and inflammatory than could be a picture of a single partially-severed limb. The stakes are too high to permit affirmance in a capital case, but to require reversal on a lesser showing of prejudice in a civil case. Therefore, the convictions should be reversed for a new trial.

## VI.

## THE TRIAL COURT ERRED IN FAILING TO PROVIDE MR. DELGADO WITH A THOROUGH EVALUATION BY QUALIFIED EXPERTS, THEREBY DEPRIVING MR. DELGADO OF A FUNDAMENTALLY FAIR TRIAL AND RELIABLE SENTENCING IN VIOLATION OF AKE v. OKLAHOMA

At the conclusion of Mr. Delgado's guilt-phase trial where he was convicted of two counts of first degree murder, Mr. Delgado informed his attorneys that he wanted to die. R.352. Defense counsel twice requested that Mr. Delgado be examined for competency and for neurological damage because counsel had learned that Mr. Delgado suffered from a serious bout with meningitis as a child. R. 352, 1316, 1319. The trial court, without objection by the State, ordered that Mr. Delgado undergo a competency evaluation and that he also be examined by a doctor in order to determine whether Mr. Delgado suffered from organic brain damage. R.352, 1317-1324. The trial Court's Order dated November 14, 1995, a week before Mr. Delgado's penalty phase hearing before a jury was scheduled to begin, specifically states that the evaluation be performed on Mr. Delgado to "rule out any type of neurological deficit or organic brain damage or any other disability that the Defendant may have suffered secondary to childhood meningitis or automobile accident." R.503.

On November 14, Julie Schwartzbard, M.D., a resident in-training at Jackson Memorial Hospital, responded to a "verbal request" for a consultation to be performed on Mr. Delgado. SR.5. 1. Dr. Schwartzbard's report, faxed to the trial Court's office in the late afternoon of Thursday, November 16, 1995, did not address whether or not Mr. Delgado suffers from organic brain damage. SR.5 .1. Dr. Schwartzbard's report, in fact, did not indicate that Mr. Delgado was in any way evaluated to determine whether or not Mr. Delgado suffered from the disabilities specifically noted by the trial court in its Order. SR.5 .1.

Defense counsel, after reviewing the report he received on Friday, November 17, 1995, was outraged that the trial court's Order requiring an examination was not complied with, and before Mr. Delgado's jury was re-sworn to hear penalty phase testimony. On Monday, November 20, 1995, defense counsel brought this serious matter to the trial court's attention. SR.1 3-9[4]. Defense counsel informed the trial court that the copy of Dr. Schwartzbard's report received on Friday, November 17, did not comply with the court's grant of the defense's request that Mr. Delgado be properly examined to determine whether or not the Defendant has any organic brain damage. SR.1 6-7.

The trial court denied defense counsel's request to obtain an expert who was

[4]Appellant has moved to supplement the record with the subject transcript.

competent to comply with the court's Order and conduct the evaluation specified, and the trial court also denied defense counsel additional time to have Mr. Delgado tested. SR.1 6-9. The trial court then proceeded with the penalty phase hearing before a jury uninformed about Mr. Delgado's neurological damage. The trial court stated, erroneously, that the examination conducted by Dr. Schwartzbard was sufficient and stated that it was "satisfied with the neurological exam." SR.1 6.

Because Mr. Delgado's life was at stake, defense counsel continued to research this issue during the penalty phase hearing and presented to the trial court, on December 8, 1995, as soon as it became available, evidence and affidavits confirming defense counsel's claim that Dr. Schwartzbard, a resident in-training at JMH, did not conduct a competent exam on Mr. Delgado to determine whether or not Mr. Delgado suffers from organic brain damage or other neurological disorders. R.606.

Instead, the report indicated, according to Dr. Edward L. Cagen, the Regional Director of the Dade County Medical Association, that Dr. Schwartzbard's examination of Mr. Delgado to determine whether or not he suffers from organic brain damage was incomplete and inconclusive. R.606. Dr. Cagen, in a sworn Affidavit obtained December 6, 1995, stated that the exam conducted by Dr. Schwartzbard is "extremely limited and does not constitute a complete neurological examination." R.606.

Defense counsel, being denied an opportunity for time or resources to obtain a competent court-ordered evaluation of Mr. Delgado, secured a preliminary report on December 7, 1995, from Dr. Jorge Herrera indicating that he had conducted an initial consultation of Mr. Delgado's case and determined that the results of the consultation pointed to the presence of symptoms of organic brain damage and that further tests needed to be conducted. R.607. On December 7, 1995, defense counsel, in writing, renewed his objections to the adequacy of the court-ordered neurological exam of Mr. Delgado and requested that the trial court impanel a new sentencing jury to hear evidence crucial to the determination of an advisory recommendation. R.601-607. On December 12, 1995, the trial court denied defense's request, over strenuous defense objections. R.1263-1295.

Without hearing evidence of Mr. Delgado's organic brain damage and other significant mitigation that Mr. Delgado's defense attorney was prevented from admitting, Mr. Delgado's penalty phase jury recommended that he be sentenced to death for the killing of Thomas Rodriguez, voting 7-5, and recommended that he be sentenced to death for the killing of Violetta Rodriguez, voting 12-0. After the jury's recommendation, defense counsel requested that the trial court set aside the jury's recommendations and impanel a new jury to hear significant evidence of mitigation proving that Mr. Delgado suffers from organic brain damage and other serious

disorders, but the trial court denied this defense request. R.1265.

Because of the trial Court's failure to provide Mr. Delgado with a competent mental health evaluation required by the Eighth Amendment, as stated in Ake v. Oklahoma, 470 U.S. 68 (1985), his jury was unable to consider substantial mitigation evidence of organic brain damage and other disorders before rendering its advisory recommendation. Mr. Delgado's sentences of death are severely tainted and this Court must reverse the trial court's decision and allow the necessary evidence to be presented to a new jury that will render a reliable verdict.

## VII.

## THE TRIAL COURT FAILED TO FOLLOW THE PROCEDURES REQUIRED BY KOON V. DUGGER DURING MR. DELGADO'S SENTENCING PHASE, AND THEREBY DEPRIVED HIM OF A FAIR AND RELIABLE SENTENCING

At the conclusion of Mr. Delgado's trial where the jury found Mr. Delgado guilty of two counts of murder, Mr. Delgado advised his attorneys that he wanted to die. R.352. Defendant's attorneys reported Mr. Delgado's position to the trial court and requested experts to determine whether Mr. Delgado was competent to make such a decision and also whether Mr. Delgado suffers from organic brain damage. R.352.

The trial court, without further inquiry, subsequently Ordered evaluations and found Mr. Delgado competent. R.352, 1317-1324; SR.1. 10. The trial Court failed to conduct any further inquiry into Mr. Delgado's position and the penalty phase was continued.

During the penalty phase before the jury, following the testimony of the State's witnesses (including two "victim impact" witnesses not related to the deceased), defense counsel called only three family members. The defense witnesses clearly did not testify in a manner that would provide substantial mitigating evidence due to Mr. Delgado's open and on-the-record position that he did not want to put on a defense at the penalty stage of proceedings. No experts were called to testify for the defense, and no psychological reports, medical reports, or x-rays were submitted in evidence for the jury to consider. Mr. Delgado's jury subsequently recommended that he be twice sentenced to death for the deaths of Violetta and Thomas Rodriguez. R.589-590. During the sentencing hearing before the trial court, defense counsel called no witnesses, although witnesses were present and reported to the court that they would not testify, and only submitted three medical reports, one recently obtained from Cuba. R.753-778.

In Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), this Court established a rule of criminal procedure regarding a capital defendant's decision to waive the

presentation of mitigating evidence during the penalty phase.

> [W]e are concerned with the problems inherent in trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence. Accordingly, we establish the following prospective rule to be applied to in such a situation. When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the [trial] court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what the evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive the presentation of penalty phase evidence.

Id. at 250

Prior to the penalty phase in this case, Mr. Delgado's defense counsel, after investigating possible evidence to prove the existence of substantial mitigation, repeatedly informed the trial court of potential mitigation that may or may not be introduced because of the Defendant's adamant position. SR. 1-6; R.608-614. Because the trial court failed to apply the Koon procedures, both at the sentencing hearing before the jury and at the subsequent de novo hearing in front of the judge alone, an adequate record was not developed regarding Mr. Delgado's position.

The record in this case makes it clear that it was not a "strategic" decision to refrain from asking questions to the witnesses that would elicit testimony and

evidence of mitigating circumstances during the penalty phase trial. Defense counsel, from the outset, was forthcoming with facts and circumstances pertaining to Mr. Delgado's horrendous life history, and was more than open in motions, court memos and depositions in a futile attempt to persuade the State to waive the death penalty in this case.

Defense would have clearly, but-for Mr. Delgado's veto, called several expert witnesses, jail personnel and family members, who could testify to the brutal torture endured by Mr. Delgado since he was a mere child. Because this record cannot resolve the issue of whether Mr. Delgado's decision to waive a substantial amount of mitigation was "knowing and intelligent", a result of the trial court's failure to comply with the procedural requirements established by Koon, this Court must vacate Mr. Delgado's death sentences and remand for resentencing.

## VIII.

## THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT AND OPENING STATEMENT DURING THE PENALTY PHASE DEPRIVED MR. DELGADO OF A FAIR TRIAL, IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENTS VI, VIII AND XIV, AND THE FLORIDA CONSTITUTION ARTICLE I, SECTIONS 9, 16 AND 17.

The State, during its closing penalty phase argument, improperly claimed and argued that it rarely seeks the death penalty and that Mr. Delgado's case is one of the few cases that the State believed the Defendant deserves to die. Tr. 1847, 1866. The State improperly used the power and prestige of its office, along with its power to charge the Defendant with a death penalty crime, as well as its absolute power to seek the death penalty at trial, to persuade to Mr. Delgado's jury that because the State, in this so-called rare instance, made the decision to seek the death penalty in this case, the jury should recommend death.

The State had previously set the stage for that improper closing by asserting in opening statement at the penalty phase that the death penalty was reserved for "only the worst" of cases, "the really worst of them." Tr. 1612. Defendant objected (Tr. 1612), and the trial court instructed the prosecution not to make that improper "worst case" argument again in closing. Tr.1617. Notwithstanding that ruling which put the prosecution on notice that it was not to compare this case to others, the State in closing made it clear that it considered the facts of these murders more egregious than most cases, arguing that it only sought death here because this was "one of those very unique cases," unlike other cases involving homicide. See Tr.1847.

Not only was the State's argument improper and unethical as attempting to undermine the jury's role as sentencer, the State asserted this so-called fact even

though it is clearly not part of any facts in the evidence of this case. The State was vouching for its own decision to seek the death penalty and asserting that its credibility in making the decision to seek death in this case should not be challenged.[5]

It is improper for the State to make "prosecutorial expertise" arguments to the jury. In Tucker v. Kemp, 762 F.2d 1449 at 1484 (11th Cir. 1985), the Court emphasized that "it is wrong for the prosecutor to tell the jury that, out of all possible cases, he has chosen a particular case as one of the very worst. While facts of the crime can be stressed to show the seriousness of the case, the prosecutor's careful decision that this case is special is irrelevant and potentially prejudicial."

The same court in Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) found the discussion of the prosecutor's practice of seeking death only in a few cases during the past year was improper "because the jury is empowered to exercise its discretion in determining punishment, [and] it is wrong for the prosecutor to undermine that discretion by implying that he, or another higher authority, has already made the careful decision required."

Arguing before Mr. Delgado's jury, the prosecutor not only stated that "the

[5]Over defense counsel's objection, the State's prosecutor emphasized and clarified her personal role and conviction in pursuing the death penalty in her improper closing argument before the Judge at Mr. Delgado's sentencing hearing. (R. 1368-1369). The State continues to purport speak on behalf of the Legislature when it clearly is authorized to seek only justice without making political and public policy arguments.

State seeks the death penalty in fact in very few first degree murders," and that this jury was put on notice that this case was very unique. (Tr.1847), the prosecutor also invoked the authority of a higher power, so to speak. Adding insult to injury, the State shamelessly exhorted before Mr. Delgado's jury that this was the type of case the Legislature had in mind when it voted to condone the death penalty: "As far as the first to [sic] aggravating circumstances, they are the reason, calm reflection the Legislature is speaking to you, and telling you to understand the actions, not only of this particular crime, but of that particular man." Tr. 1866-1867.

Not only did the State attempt to convince the jury that the State has already pre-sentenced Mr. Delgado to death, but also the that Legislature has judged and determined that Mr. Delgado is the particular person for whom it passed the capital sentencing statute. This prosecutorial misconduct is exacerbated by the prosecutor's attempt to dilute the jury's sense of responsibility for deciding a sentence using their own discretion, when stating that the trial court will make the final decision. See Caldwell v. Mississippi, 472 U.S. 320 (1985); Brooks v. Kemp, 762 F.2d 1383 (1985).

The State's closing argument to Mr. Delgado's penalty phase jury is replete with errors, inapplicable generalizations and misstatements. The State repeatedly argued facts not in evidence contrary toHuff v. State, 437 So.2d 1087 (Fla. 1983). The State also

improperly argued that mitigating evidence is somehow supposed to excuse or justify the crimes Mr. Delgado was convicted of in order to establish a basis for recommending life sentences. Tr.1852, 1861, 1862, 1863. Over the Defendant's objection, the State repeatedly violated Mr. Delgado's Eighth Amendment rights under the United States Constitution when it gave the jury legally incorrect information.

Mitigation is not offered to serve as an excuse or a justification, but rather to give the jurors some perspective about Mr. Delgado's life journey. The State essentially instructed the jury to ignore mitigating circumstances and consider only the victim impact evidence and Mr. Delgado's convictions, contrary to law and justice.

Where the State's case is not overwhelming, as in this case where the evidence of first degree murder was entirely circumstantial and the defense, albeit unsuccessfully, argued a viable defense, it is unlawful for the prosecutor to express her personal belief that Mr. Delgado intentionally killed the Rodriguezes. Tr. 1851-1856. The only evidence of premeditation the State had in this case was evidence of their own speculation, and this was the evidence argued before the jury in violation of Mr. Delgado's Eighth and Fourteenth Amendment rights. Simply because the State does not use the terms, "I believe" or "I think" before its speculating remarks

to a jury during closing, facts not in evidence that are asserted to contradict a defendant's defense cannot be ignored as proper or constitutional. See Singletary v. State, 483 So.2d 8 (Fla.2d DCA 1985).

It has long been recognized that the State's misconduct during closing argument may be grounds for reversal. Berger v. United States, 295 U.S. 78 (1934). The State must seek justice and follow the law as a public servant rather that merely try to win at any cost. The State's influence over the jury, because of its prestige and power, cannot be underestimated. When the trial court virtually ignored Mr. Delgado's objections and motion for a mistrial made because of improper arguments, it failed to ensure that Mr. Delgado might receive a fair trial. See United States v. Young, 70 U.S. 1 (1985).

Since "death is a different kind of punishment from any other which may be imposed in this country," the State must bear the burden of staying within the bounds of the law in arguing its case before a jury. Gardner v. Florida, 430 U.S. 349 (1977). To ensure that a capital defendant receives an individual determination, the conduct of a prosecutor must be highly scrutinized under the Eighth and Fourteenth Amendments to the United States Constitution. Jurors cannot be misled or coerced into merely following the wishes and biased ideas that the prosecutor argues in its closing.

In Mr. Delgado's case, prosecutorial misconduct was so blatant and prejudicial that Mr. Delgado's was deprived of his constitutional rights and a fair trial before an impartial jury. Mr. Delgado's unlawful sentences must be vacated.

## IX.

## THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT MR. DELGADO'S PENALTY PHASE JURY AND THE DEATH SENTENCES MUST BE VACATED

### A. The Trial Court Improperly Instructed Mr. Delgado's Jury to Consider "CCP" as an Aggravating Circumstance:

While the trial court correctly did not apply the "CCP" aggravator to either conviction of first degree murder in this case, Mr. Delgado was unfairly prejudiced by the irrelevant and misleading jury instructions. Over Defendant's objection, the trial court read to the jury the State's requested instruction concerning the aggravating circumstances "CCP."[6] This instruction was irrelevant and misleading because, even as the trial court found, there was no evidence to prove beyond a reasonable doubt that this aggravator even exists. There was no evidence of heightened premeditation and no evidence of a calm and cool reflection. On the contrary, the evidence in this case points to a violent struggle that was clearly unplanned, uncalculated and

[6]Mr. Delgado objected to the "CCP" instruction not only because it did not apply, but also because it is unconstitutional. R. 444-459, 542.

unpredictable in its consequences. In addition, although the State, in its sentencing memo, asserted that evidence of heightened premeditation exists because the gun used in this case had a silencer, the trial court rejected "CCP" for both homicide because the State was unable to prove "heightened premeditation" required for this aggravating circumstance. R.1391.

It is reversible error to give instructions to the jury which are not supported by the facts of evidence. E.g., Bach v. Murray, 658 So. 2d 546 (Fla. 3d DCA 1995). In Bach, the appellate court reversed the trial court for instructing the jury in a traffic accident case concerning the requirements of a Florida Statute about the duty of motorists at intersections. In Bach, the statute "was inapplicable under the evidence and the improper instruction affected the jury's deliberations by misleading it or confusing it." Id. at 548.

The trial court erred when it instructed Mr. Delgado's jury that it was appropriate to even consider "CCP" for either homicide in this case. Because the jury is not required to reveal which aggravators it used to justify its advisory recommendation, it cannot be said that it is harmless error that the trial court gave the jury this instruction, while knowing full well beforehand the evidence in this case. The instruction concerning "CCP" did not apply, and could only serve to mislead or confuse the jury in its deliberations. "An instruction not based in the evidence is

erroneous in that introduces before the jury facts not presented thereby, and is well calculated to induce them to suppose that such a state of facts is, in the opinion of the court, possible under the evidence and may be considered by them." 55 Fla. Jur. 2d, Trial § 143 (1984) (emphasis added.)

Furthermore, the giving of aggravating factors which do not apply can result in any death sentence being reversed. Bonifay v. State, 626 So. 2d 1310 (Fla. 1993). Mr. Delgado's jury was misled to believe that this particular aggravator existed and that, because the trial court instructed them to consider it, and the State argued that they had proved its existence beyond a reasonable doubt, the jury likely improperly believed that both homicides were committed in a cold, calculated and premeditated manner.

The instructions did not quote the statute and merely say that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of a moral or legal justification. The instructions given to the jury was in the form of an assertion that Mr. Delgado was guilty of a capital felony that was committed in a cold, calculated and premeditated manner. R.1903-1915. In essence, it directed the jury to find that the aggravator existed. At the very least, Mr. Delgado's jury was erroneously instructed to consider this aggravating circumstance, and the trial court's error requires reversal.

**B. The Trial Court Improperly Instructed Mr. Delgado's Jury to Consider "HAC" as an Aggravating Circumstance:**

While the trial court correctly did not apply the "HAC" aggravator to one conviction of first degree murder in this case, Mr. Delgado was unfairly prejudiced by the irrelevant and misleading instructions on that issue. Over Defendant's objection, the trial court read to the jury the State's request instruction concerning the aggravating circumstance "HAC".[7] This instruction was irrelevant and misleading because, even as the trial court found, there was no evidence to prove beyond a reasonable doubt that the deaths of Tomas or Violetta Rodriguez were caused in an especially heinous, atrocious or cruel manner.

On the contrary, the evidence in this case supports the Defendant's position that Tomas died within moments after being shot and Violetta was unconscious when she sustained stab wounds. Furthermore, there is insufficient evidence that any wounds sustained by Violetta Rodriguez were defensive wounds, especially when one views the evidence as a whole of the multiple stab wounds obviously inflicted in an aimless and uncontrollable manner.

While knife wounds would be painful for the few moments that one survived

[7]Mr. Delgado objected to the "HAC" instruction not only because it did not apply, but also because it is unconstitutional. R.360-375, 543.

such injury, even the trial court recognizes that there is no evidence of the exact time that the victim lost consciousness. The trial court rejected "HAC" for the homicide of Tomas Rodriguez and erred in not rejecting this aggravating circumstance for the homicide of Violetta Rodriguez. (R. 1392). Nevertheless, the trial court erroneously instructed Mr. Delgado's jury to consider "HAC."

It is reversible error to give instructions to the jury which are not supported by the facts in evidence. E.g., Bach v. Murray, 658 So 2d. 546 (Fla. 3d DCA 1995). The trial court erred when it instructed Mr. Delgado's jury that it was appropriate to even consider "HAC" for either homicide case.

This is not a case in which the evidence supported the "HAC" instruction. Compare, Espinosa v. State, 626 So. 2d 165 (Fla. 1993). Because the jury is not required to reveal which aggravators it used to justify its advisory recommendation, it cannot be said that it is harmless error that the trial court gave the jury this instruction, while knowing full well beforehand the evidence in this case did not support it.

The instructions concerning "HAC" did not apply, and could only serve to mislead or confuse the jury in its deliberations. See 55 Fla. Jur. 2d Trial § 143 (1984). Furthermore, the giving of aggravating factor instructions which do not apply can result in any death sentence being reversed. Bonifay v. State, 626 So 2d. 1310 (Fla.

1993). Mr. Delgado's jury was misled to believe that this particular aggravator existed and that, because the trial court instructed them to consider it and the State argued that they had proved its existence beyond a reasonable doubt, both homicides were committed in a heinous, atrocious and cruel manner.

The instruction did not quote the statute and merely said that the capital felony was homicide and was committed in an especially heinous, atrocious and cruel manner. The instruction given to the jury was in the form of an assertion--or directed verdict-- that Mr. Delgado was guilty of a capital felony that was committed in an especially heinous, atrocious and cruel manner. R.1903-1915. Mr. Delgado's jury was therefore erroneously instructed to consider this aggravating circumstance and the trial court's error requires reversal.

**C. The Trial Court Improperly Instructed the Jury When it Failed to Tell the Jury How it Would Have Sentenced Mr. Delgado if the Jury Voted to Recommend That Mr. Delgado Be Sentenced to Life Without Parole for 25 Years for Each Conviction of First Degree Murder:**

There is no question that the trial court would have undoubtedly sentenced Mr. Delgado to two consecutive life terms if the jury voted to recommend life instead of death in this case. The trial court was requested to instruct the jury's to this inevitable fact, but over defense objections, denied the request. SR.1 31-36. While the law is clear that Mr. Delgado was entitled to argue the possibility of consecutive sentences

and that such evidence is mitigating, a mere argument does carry the weight of a lawful instruction when requested. The trial court's error in denying the Defendant's motion to give this instruction to the jury, especially in light of the other erroneous instructions given, requires reversal.

**D. The Trial Court Improperly Diminished the Sentencing Role of Mr. Delgado's Jury by Claiming That the Responsibility Rested "Solely" with the Court:**

Mr. Delgado's jury should not have been instructed, over and over again, that their recommendation was merely advisory and that their recommendation merely carried "great weight." Such an instruction was in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), which held that it is unconstitutional to suggest to a penalty phase jury that the responsibility for determining the appropriateness of a death sentence rests not with the jury but with some other person or body (in that case an appellate court). Even though Florida's standard instructions have been upheld many times, Mr. Delgado asserts that his constitutional rights have been violated and he has deprived a fair and reliable sentencing.

In light of Caldwell, Mann v. Dugger, 844 F. 2d 1446 (11th Cir. 1988), and Dugger v. Adams, 109 S. Ct. 1211 (1989) (in which relief was denied based on a procedural default), it is clear that any instruction that minimizes the jury's sense of responsibility for determining the appropriateness of death may require a new sentencing proceeding. Because this erroneous instructions dilutes the jury's sense of responsibility and denies Mr. Delgado the right to an untainted and individualized sentencing, this Court must reverse Mr. Delgado's sentences of death.

**E. The Trial Court Improperly Instructed Mr. Delgado's Jury When it Refused to Inform the Jury That Evidence of Imperfect Self-Defense Is Appropriate Mitigation Evidence to Be Considered and Weighed:**

Over defendant's objections, the trial court failed to instruct Mr. Delgado's jury that, even though it rejected self-defense in the guilt/innocence phase of the trial, it could consider as proper mitigation evidence of imperfect self-defense. The catch-all instruction that the jury was read was not sufficient because the jury must be specifically advised that the guilty verdict does not foreclose consideration of this evidence mitigation.

An instruction regarding self-defense could effectively rebut CCP and it is error to accept the State's argument that this mitigator is the same as a "lingering doubt" evidence. This is not a case like Sims v. State, 681 So. 2d 1112 (Fla. 1996), in which the trial court considered the imperfect self-defense theory as tantamount to one of lingering doubt. Even assuming Mr. Delgado was properly found guilty because his self defense theory did not meet the legal test for that defense, there was enough evidence of a two-way battle to support the issue as a mitigating factor.

Particularly in this case where the trial court specifically found CCP did not apply to either homicide, but instructed the jury to consider CCP anyway, failing to instruct the jury on imperfect self-defense was reversible error requiring a new

sentencing hearing.

**F. The Trial Court Improperly Instructed Mr. Delgado's Jury When it Failed to Give Requested Jury Instructions on the Statutory Mitigating Circumstances of Victim Participation, No Significant History of Prior Criminal Activity, the Crime for Which the Defendant is to Be Sentenced Was Committed While He Was Under The Influence of Extreme Mental or Emotional Disturbance, the Defendant Acted under Extreme Duress or under the Substantial Domination of Another Person, and the Capacity of the Defendant to Appreciate the Criminality of His Conduct or to Conform His Conduct to the Requirements of Law Was Substantially Impaired, in Violation of Florida Law and the United States Constitution, Amendments VIII and XIV:**

Over Mr. Delgado's objections, the trial court failed to instruct the jury on several statutory mitigating circumstances in violation of Florida law and the Eighth and Fourteenth Amendments of the United States constitution. The above referenced statutory mitigating circumstances should have been read to the jury for their consideration because there was evidence to support them. See Robinson v. State, 487 So 2d. 1040 (Fla. 1986); Stewart v. State, 558 So. 2d 416 (Fla. 1990).

Mr. Delgado was entitled to these statutory mitigators since the totality of the evidence concerning them, the "quantum" of the evidence, establishes them, even though an expert did not testify that in his or her opinion any mental or emotional disturbance was "extreme," or that any impediment or domination was "substantial." In fact, if Mr. Delgado would have been entitled to these mitigators even if, as

actually happened in Stewart, an expert testifies that in their opinion the disturbance, impairment or domination was not extreme or substantial.

Furthermore, even if the evidence in this case does not meet the statutory standard, it must be considered as non-statutory mitigation. See Hitchcock v. Dugger, 481 U.S. 393, 398-399, 107 S. Ct. 1821, 1824, 95 L. Ed. 2d 347 (1987).

### G. The Trial Court Improperly Instructed Mr. Delgado's Jury When it Failed to Give the Requested Jury Instruction on the Non-Statutory Mitigating Circumstances in Violation of Florida Law and the United States Constitution, Amendments VIII and XIV:

In Mr. Delgado's case, the heart of his defense consisted of non-statutory mitigation. While this Court will not reverse Mr. Delgado's sentences of death merely because the trial court failed to use its broad and unfettered discretion to simply read a list of potential non-statutory mitigating circumstances for the jury to consider, it is incumbent upon this Court, in light of the trial court's refusal to allow Mr. Delgado to establish valid statutory mitigation. (by denying Mr. Delgado an opportunity to be evaluated by a competent mental health expert), to reverse Mr. Delgado's sentences of death and remand for a new sentencing.

## X.

## THE TRIAL COURT ERRED IN ADMITTING HIGHLY PREJUDICIAL "VICTIM IMPACT" TESTIMONY BEFORE MR. DELGADO'S PENALTY PHASE JURY; THE JURY'S RECOMMENDATIONS WERE SEVERELY TAINTED AND MR. DELGADO'S DEATH SENTENCES ARE UTTERLY UNRELIABLE

There is no more highly charged, or prejudicial victim impact evidence than testimony from a witness that he or she has lost a mother. For many people this loss is as great as the loss of a child even when there is no biological relationship. The nurturing and caring that most mothers provide for children entrusted to their care is irreplaceable. The grief and anger of losing this relationship is inconsolable. And the impact of testimony before a jury who need only for a moment see their mother as a victim of a violent crime is unmistakably evidence of non-statutory aggravation and therefore unconstitutional. See Booth v. Maryland, 482 U.S. 496 (1987), overruled, Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991). Booth cogently demonstrated that the admission of such evidence renders the jury recommendation and the Defendant's subsequent sentences wholly unreliable.

Over Defendant's objection, the State called two victim impact witnesses, who were not relatives of the deceased and who clearly knew very little about the real

Rodriguezes. Tr.1686-1698. The testimony that Marlene McField was that Violetta Rodriguez was her son's babysitter, was her son's Godmother and took the place of her mother. The jury was told, without hearing any testimony from Mr. McField, that she moved out of her home because of the Rodriguezes' deaths.

Mrs. McField told the jury she relied on the Rodriquezes for emotional support. The defense, however, did and could not cross-examine Mrs. McField about her knowledge of the Rodriguezes corrupt and illegal business practices or relationships adjacent to the dry cleaning business, and any Defendant would only be prejudiced by cross-examining such a grieving "victim impact" witness. The defense did and could not cross-examine Mrs. McField about the Rodriquezes' religious practice of Santeria, in the practice of which the Rodriguezes would claim they were placing curses on people they did not like. Any Defendant would only be bitterly looked down upon for even raising such questions before an inconsolable "victim impact" witness.

And the defense did and could not cross-examine Mrs. McField about the Rodriguezes' prior history in New York, and any Defendant would only be ridiculed for bringing up matters better left as secret.

The State also called a New York resident, Denise Silver, who testified that she also considered Violetta to be a mother-like person in her life. Mrs. Silver's family

originally hired Violetta to care for her and her retarded brother, but eventually assisted the Rodriquezes with their business ventures. None of Mrs. Silver's other family members testified as to their relationship and sense of loss, and Mrs. Silver clearly did not know anything about the Rodriguezes, personal, religious or business practices that would enable her to testify about a loss to the community.

While both of these State witnesses should be allowed to testify at a Spencer hearing before the judge alone, their testimony, without any realistic opportunity for effective cross-examination or challenge, tainted the jury's recommendation and denied Mr. Delgado a fair sentencing process. Victim impact testimony, whether it is packaged as evidence showing the uniqueness of an individual or evidence demonstrating the loss to the community, undermines the reliability of the sentencing process especially when it is incomplete or inaccurate.

Not all victim impact witnesses necessarily want or seek revenge for the deaths of those who die, but without ever having to admit it, it is arguably the most damaging evidence brought before a jury considering punishment. Those witnesses who are opposed to the death penalty are prohibited from taking the stand and making their view known regardless of the love they had for the deceased.[8] If jurors are

[8]SueZann Bosler, for example, who wanted to testify that she loved and respected her deceased father, especially his wish not to have his killer executed, was prohibited from telling the truth at James Campbell's first two sentencing hearings. At Mr. Campbell's third sentencing

expected to make an evaluation of the deceased's contributions to society, they are entitled to hear the whole truth and not just evidence that, if challenged or rebutted, tilts the scale of justice in favor of the State.

In Mr. Delgado's case, his prior felony conviction was an attempt to stop violence and avert injury; not exactly the type of "crime" that cries out for death as part of this sentencing process. While the trial court instructed the jury to consider CCP and HAC aggravating circumstances, not even the judge found all of these elements proved beyond a reasonable doubt and he was unable to give all of them weight against the substantial amount of mitigation presented in this case.

Even though this Court has found victim impact evidence to be constitutional, the testimony offered in this case, standing alongside evidence of aggravating circumstances allegedly proved beyond a reasonable doubt, demonstrate that the State would not have been able to secure a recommendation of death without including such evidence in the mix. Just because the jurors are told that the victim impact testimony presented by the State should not be used in their weighing process, reminded that the loss to the State's witnesses should not influence the jury, and

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hearing, the State mocked and ridiculed Ms. Bosler, suggesting that she was emotionally unable to testify which would render her unavailable for trial and allow them the opportunity to present her prior testimony. This is an example of how desperate and unethical the State is in procuring testimony that will prejudice the jury. In Mr. Campbell's case, it was only after Ms. Bosler was asked what she did for a living that it became known to the jurors that she was working to abolish this hate crime. With limited protection, the State can only hide the truth for so long.

instructed that the jurors should not have any sympathy for those who grieve and suffer as a result of the Rodriguezes deaths, the repeated admonitions to ignore this prejudicial evidence and, to be fair and to be just without feeling any sympathy, only serve to exacerbate and accentuate this farcical attempt to appease victims and survivors who believe their testimony should make a difference at this stage of the proceedings. Allowing victim impact evidence without ruling that this testimony is lawful evidence of an aggravating circumstance is intellectual dishonesty that shamelessly dishonors both the deceased and their survivors.

This Court once held that victim impact evidence is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla.1978). Although the politics of the death penalty may change, the truth never changes. Victim impact evidence remains unconstitutional and unfair to the defendant who is put in the untenable position that Mr. Delgado was placed where he cannot even consider challenging such sensitive and emotion-filled testimony without being despised for it.

Even in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), which the State claims authorizes victim impact evidence, the United States Supreme Court notes that in some specific circumstances the evidence might be so unduly prejudicial

that its introduction in either the guilt or the penalty phase violates the Due Process Clause of the Fourteenth Amendment. Payne, 501 U.S. at 825, 111 S.Ct. at 2608.

In Mr. Delgado's case, the State presented victim impact evidence for the limited and sole purpose of creating sympathy on the part of the jurors. The State did not present any evidence about the Rodriguezes role in the community, for good reason, and did not solicit any testimony about the Rodriguezes' moral and religious practices. The victim sympathy evidence presented in Mr. Delgado's penalty phase is clearly inadmissible under Florida law. Grossman v. State, 525 So.2d 833 (Fla. 1988).

Victim sympathy evidence is not relevant to any statutory aggravating circumstance and must be excluded from the weighing process in determining a recommendation, and more specifically is not relevant to the "heinous, atrocious or cruel" aggravator. See Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986).[9] The trial court erred in admitting victim sympathy evidence, and even acknowledged in its sentencing order that the State did not prove either the CCP or HAC aggravator pertaining to Thomas Rodriguez beyond a reasonable doubt.

The State, in its closing argument, commented that it didn't need to talk about

[9]The opinion in Jackson was solely based on traditional state law relevancy grounds and not based on the United States Constitution.

the victim impact evidence because, as the prosecutor said, "I know you remember their testimony." Tr.1859. When the jury heard victim sympathy evidence regarding Violetta Rodriguez, it had no compartment to put it in except a basis for considering the HAC aggravator. Just as a jury cannot ignore a bell once it has rung, it cannot discard testimony presented to show what a heinous, atrocious and cruel deed it is to take a mother-relationship away from two young women.

Furthermore, the failure of the trial court to sufficiently guide the jury in its consideration of victim sympathy evidence presented in Mr. Delgado's penalty phase sentencing hearing before a jury deprived Mr. Delgado of an untainted sentencing recommendation and rendered his sentence unreliable.

## XI.

## THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE AND MR. DELGADO'S SENTENCES OF DEATH MUST BE VACATED

Because death is a unique punishment, this Court engages in a thoughtful, deliberate proportionality review to consider the totality of circumstances in each case where the death penalty is imposed,, and then compares it with other capital cases. Porter v. State, 564 So. 2d 1060 (Fla. 1990). Appellate scrutiny is crucial to determining uniformity of death sentences. Tilman v. State, 591 So. 2d 167 (Fla.

1991).

When the circumstances of Mr. Delgado's case are compared with those of other capital cases, the sentences of death imposed upon him are clearly disproportionate and unconstitutional. The State's argument that there is little mitigation, that there are aggravators proved beyond a reasonable doubt, and that the mitigating circumstances do not outweigh the aggravating circumstances, simply are not supported by the evidence in the record.

The mitigation in this case is formidable and overwhelming. In its Sentencing Order, even the trial court found that a number of mitigating circumstances exist. R. 1385-1406. But a number of aggravating circumstances it instructed the jury to consider do not exist. While the trial judge minimized the weight of several facts introduced in evidence or proffered , it found that Mr. Delgado suffered from a variety of serious illnesses throughout his childhood. The trial court found that Mr. Delgado never used drugs or alcohol, that he loves and protects others from violence, and that he is a person with fine qualities who has the capacity to work hard. The trial court found that Mr. Delgado had little contact with his mother after their escape from Cuba, and that Mr. Delgado's father is a drug user. The trial court also found that Mr. Delgado's courtroom behavior during his trial was appropriate.

Since Mr. Delgado instructed his attorneys and his family that he wanted to die

and accept the death penalty without establishing the relevant mitigation proffered in motions and memoranda filed with the trial court, the testimony offered during Mr. Delgado's penalty phase trial prevents this Court from rendering a competent and thorough proportionality review. The Court must not allow a defendant to default and hereby limit the presentation of relevant evidence during the penalty phase of a capital proceeding. The State has the obligation to see that mitigating circumstances are investigated, and evidence thereof produced, in order that a rational penalty decision may be made at trial and reviewed on appeal in capital cases. This court cannot perform a proportionality review without an adequate record of facts and circumstances that indicate whether the death penalty is justified.

Evidence proffered in this case offers this court a glimpse of additional mitigation which supports life sentences in Mr. Delgado's case. Although this court has repeatedly held that mitigation, found anywhere in the record, must be considered, assigned weight and used in the process of determining whether the death is justified, the trial court failed to consider relevant mitigation addressed in sentencing memos and requested jury instructions on non-statutory mitigation. See Robinson v. State, 684 So 2d 175 (Fla. 1996); Walker v. State, No. 84,113 1997 WL 539438 (Fla. 1997)(rehearing pending).

For example, Mr. Delgado did not have a significant criminal history. Mr.

Delgado had one prior conviction, the year after he escaped from the terror and violence in Cuba, for protecting his girlfriend and preventing the escalation of violence. Mr. Delgado, in fact, often played the role of protector, as the trial judge found.

In the case at bar, the jury told that the business in dispute once owned by the Rodriguez's was sold to the father of Mr. Delgado's girlfriend, Barbara. Jesus Delgado personally had no direct interest in the business. Jesus did have an interest, however, in protecting his girlfriend and her father (now deceased). Jesus had a long history of looking out for his mother, his step-mother and his sister. Jesus' involvement in this case stems from his relationship with Barbara and her family, and his actions to protect them are deeply rooted.

Prior to this tragedy, Mr. Delgado was never charged with drug use, burglary or robbery, kidnaping or sexual assault. Mr. Delgado never was accused of even attempting to rob or steal from anyone, hurt anyone or lie to anyone. Mr. Delgado was basically a law-abiding citizen who got entangled in an extraordinary web of deceit and violence.

Mr. Delgado's relationship with Barbara suffered as a result of turmoil with the business sold to her family by the Rodriguezes. While Mr. Delgado was not happy about the way they were treating Barbara and her family, and while he was very upset

that the business customers were dissatisfied, no one ever saw Jesus Delgado act or react in a violent or even a threatening manner. Yet, Jesus was not known as a person who was secretive about his feelings.

Evidence exists that Jesus was shot during the altercation between he and the Rodriguezes. At the conclusion of the State's case in the guilt/innocence phase, Jesus took his shirt off and showed the jury the bullet wound in his left arm just under his shoulder which the defense contended he received when he struggled over a gun with Tomas Rodriguez. Tr.1341. This non-testimonial evidence amounts to mitigation that not only is the bullet still lodged inside Jesus' shoulder (the bullet which accounts for the one missing in addition to those recovered from the random wounds of Tomas) but also is significant mitigating evidence that Tomas Rodriguez was participant in his own death, and subsequently in the death of Violetta. Jesus went to the Rodriguezes to talk to Tomas and did not intend to hurt, injure, or have any contact with Violetta. The fight that Tomas and Jesus engaged in clearly led to tragic results for everyone involved.

Mitigation evidence also exists that the relationship that Jesus and Barbara had with the Rodriguezes was not a purely business relationship. The Rodriguezes had introduced the religious practices of Santeria to Jesus, but Jesus rejected these practices and became fearful of the Rodriguezes.

In addition, evidence exists that Jesus's lack of maturity and experience constitutes valid statutory mitigation in this case, established in the record during the step-mother's testimony, but not given any weight by the trial court. Jesus's step-mother told the jury that Jesus was immature and he should see a doctor. While Jesus was 25 years old at the time of this incident, his immaturity and inability to appreciate the criminality of his conduct constitutes substantial mitigation.

Perhaps the most significant mitigation, however, is evidence that Jesus suffers from organic brain damage, possibly caused during his bout with meningitis as a child or from the injuries he sustained from severe and prolonged child abuse and torture. Substantial mitigation evidence exists that Jesus suffers from an extreme mental and/or emotional disturbance.

The existence of mitigation in this case far outweighs evidence of aggravation proved beyond a reasonable doubt. Jesus's prior felony conviction of protecting his girlfriend and preventing the escalation of the violence; his conviction of burglary (which was not a crime that involved pecuniary gain, kidnaping or sexual assault), and the trial court's finding that the HAC aggravator applied only to the death of Violetta Rodriguez, does not constitute sufficient aggravating circumstances that justify sentences of death.

While this Court found that the death penalty is warranted where there was

even less evidence of aggravating circumstances, seldom has there been a case in the State of Florida where more significant mitigation was presented or proffered. This Court has often found that the death penalty is unwarranted in killings where a domestic or other relationship existed and when the Defendant had a damaged brain. See DeAngelo v. State, 616 So. 2d 440 (Fla. 1993). The obvious rage associated with the violence in this case demonstrates that it was the relationship Mr. Delgado had with the Rodriguezes, and not the allegedly wicked nature of the Defendant, that is the heart of this tragedy.

Whatever significant circumstances led to the altercation between Jesus and the Rodriguezes, there was no history of violence or reason to believe that something so tragic as death could occur. What occurred at the Rodriguezes home was clearly an explosion of feelings, words and violent acts. But Jesus, who for the first 25 years of his life might be considered on any other day a protector and a peacemaker, experienced such fear and rage that Tomas was stabbed five times after he died of gunshot wounds, and Violetta was stabbed aimlessly and uncontrollably after she was presumably knocked unconscious with the butt of a gun.

While the trial court failed to consider mitigation that Mr. Delgado could receive two consecutive life sentences for his convictions, failed to consider imperfect self-defense evidence of mitigation, and failed to consider non-statutory

mitigating evidence of Mr. Delgado's history of prior criminal activity, non-statutory mitigating evidence that Mr. Delgado was under the influence of a mental or emotional disturbance, non-statutory evidence that the victim was a participant in the Defendant's conduct, non-statutory mitigating evidence that the Defendant was under duress or domination of another person, non-statutory mitigating evidence that Mr. Delgado lacked the capacity to appreciate the criminality of his conduct, and non-statutory mitigating evidence that Mr. Delgado's emotional age was a factor, this court must reverse Mr. Delgado's sentences to death because both are disproportionate and unconstitutional.

## XII.

## THE TRIAL COURT'S REFUSAL TO GIVE MORE THAN LIMITED, LITTLE OR ANY WEIGHT TO SUBSTANTIAL UNREFUTED MITIGATING CIRCUMSTANCES DEPRIVED MR. DELGADO OF A RELIABLE SENTENCING IN VIOLATION OF LOCKETT v. OHIO

The trial court's sentencing order is replete with errors where it fails to find statutory and non-statutory mitigating circumstances established in the record or where it fails to adequately assign appropriate weight to mitigation. The trial court abused its discretion in the following ways:

1. The trial court failed to address evidence of mitigation established in the record. For example, the trial court ignored evidence proffered or admitted to show that Mr. Delgado suffers from organic brain damage, that he has a bullet (fired during the altercation with the Rodriguezes) lodged in his left arm under his shoulder, that he suffers from the cruel disease of asthma which does not allow him to breathe properly, that he suffers from depression, has attempted suicide and comes from a family where close relatives are schizophrenic and have a history of psychiatric problems, that he has suffered from psychiatric problems since 1980 and has experienced a delusional disorder with paranoid ideations, that he suffered numerous life threatening diseases and illnesses as a child and had to treated throughout his adolescence, that he has a serious spine injury that he must live with, that he suffers from an impulse-control disorder, that he suffers from behavior and attentional deficiency disorders, that he, just prior to the altercation with the Rodriguezes, had devastating problems with his fiancé, Barbara, whose father owned the business bought from the Rodriguezes, that his father was sentenced to federal prison for drug trafficking, that he loves and continually attempts to protect others - even those who hurt and disappoint him, that he is a person of faith, that is has rehabilitation potential, likes to study, and was under extreme mental or emotional disturbance at the time of the altercation with the Rodriguezes. R. 608-614,1335-1374.

2. The trial court failed to grasp the importance of substantial mitigation proffered or admitted to show that Mr. Delgado has never used drugs or alcohol, that he has little family support and was virtually tortured by his family throughout his life, that his life in Cuba was tormenting and that his escape was traumatic, that his family-like relationships with the Rodriguezes and with Barbara were troubled, that he was mentally or emotionally disturbed, that he was under extreme duress or substantial domination of another person and that he failed to appreciate the criminality of his conduct. R.608-614,1335-1374.

3. The trial court failed to find all requested statutory mitigating circumstances that were proved in the record including age, where Mr. Delgado's emotional age was clearly a relevant mitigating factor in this case. R.608-614,1335-1374.

4. The trial court failed to sufficiently weigh mitigating circumstances against proven-only aggravating circumstances and instead overruled Defendant's objections to the State's argument that it rarely seeks death and that the Legislature intended Mr. Delgado to die. R.1335-1406.

Hence, although the trial court is required to consider any relevant mitigating evidence offered by a defendant according to Lockett v. Ohio, 438 U.S. 586 (1978), the trial court erroneously concluded that the aggravating circumstances it found

justified the death penalty. Even though the Supreme Court has also stated that the trial court may give mitigating evidence whatever weight it deems fit, the trial court is not authorized to ignore, or virtually ignore, relevant mitigating evidence by assigning it little, limited, some or moderate weight willy nilly if it is merely attempting to justify a sentence of death without thoroughly evaluating the totality of circumstances. The failure of the trial court to recognize valid mitigating evidence and to weigh it appropriately is a violation of Lockett. Mr. Delgado is entitled to an individualized sentencing and the trial court has a duty to recognize any relevant evidence presented anywhere in the record and then to weigh this evidence against aggravating evidence is finds proved beyond a reasonable doubt.

In addition, because the trial court failed to assign any weight to the aggravators it found, effective appellate advocacy and review is not possible. Absent clarification upon remand, there is simply no way to understand or comprehend how the trial court measured the three aggravators it found: that Mr. Delgado was once convicted of a previous felony, that Mr. Delgado was convicted of burglary in the instant charge, and that Violetta Rodriguez's death was committed in a "heinous, atrocious and cruel" manner. The policy announced in Lockett and elaborated in Hitchcock v. Dugger, 107 S.Ct. 1821, (1987), establishes a clear obligation for trial court judges to not only recognize all valid mitigating circumstances, but also to

appropriately weigh both mitigation and aggravation.

When the trial court failed to recognize formidable and compelling mitigation that substantially outweighed the aggravating circumstances that the trial court were found to be proved beyond a reasonable doubt, it deprived Mr. Delgado of an individualized sentencing and unconstitutionally imposed sentences of death.

## XIII.

## MR. DELGADO'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Mr. Delgado did not receive the fundamentally fair proceeding to which he was entitled under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See Ellis v. State, 622 So. 2d 991 (Fla. 1993); Ray v. State, 403 So. 2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991), cert. denied, 112 S. Ct. 981 (1992). It is Mr. Delgado's contention that the process itself failed him. It failed because the number and types of errors involved in his proceedings, when considered as a whole, dictated the sentence that he would receive.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), cumulative prosecutorial misconduct was the basis for a new trial.

When cumulative errors exist the issue is whether: "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991). See also Alvord v. Dugger, 541 So. 2d 598, 601 (Fla. 1989) (harmless error analysis reviewing the errors "both individually and collectively"), cert. denied, 110 S. Ct. 1834, 108 L.Ed.2d 963 (1990) Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986) ("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

The United States Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman v. Georgia, 408 U.S.238 at 287 (1972) (Brennan, J., concurring). It differs from lesser sentences "not

in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors can result in a prejudicial effect to the defendant. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the plea, verdict, and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

There were many flaws in the system that sentenced Mr. Delgado to death. They have been set forth, in part, through this direct appeal brief. While there are means for addressing each individual error, it still remains that addressing these errors on an individual basis will not necessarily afford adequate safeguards against an improperly imposed death sentence--safeguards that are required by the United States and Florida Constitutions. Repeated instances of error by the trial court significantly tainted the process. These errors were not harmless.

## XIV.

## FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL AND THIS COURT MUST DECLARE A MORATORIUM ON EXECUTIONS; ELECTROCUTION AS A PUNISHMENT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND OF OF ARTICLE I, SECTIONS 2, 9, 16 AND 17 OF THE FLORIDA CONSTITUTION

Florida's capital sentencing law, Section 921.141, Florida Statutes, is unconstitutional. The arbitrary and capricious administration of this statute renders death sentences, imposed in this case, virtually unreliable.

Florida jurors are instructed that their recommendations regarding sentencing are given "great weight." The instruction diminishes the immense importance of juror's role in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Florida is a co-sentencing state that rebuts the false notion that the juror's role is merely "advisory" and that the Court solely determines whether a person will live or die.

Jurors are asked, as part of their civic duty, to sit on cases where the death penalty may be imposed. The jurors must live for the rest of their life with the burden of knowing that they played a significant role in the determination of a capital sentencing. When jurors are instructed that their vote for life or death is a mere

"recommendation," defendants are deprived of their constitutional rights and jurors are deprived of accepting the responsibility that accompanies their task.[10] Jurors, as well as capital defendants, are left with a strong feeling a being used for political ends. It is no secret, even if no one ever talks about it or confess it, that the death penalty is primarily a political law created to keep people in fear and dependant upon crusaders pretending to fight crime.

Everyone who cares about the community, even a criminal defense lawyer, is against crime. In Florida, however, it is clear that the capital sentencing statute is itself a crime against humanity. The death penalty is in fact a hate crime that breeds contempt for the law which denigrates and diminishes every human being and every human institution it encounters.

Florida law makes aggravating circumstances into elements of a crime and allow a jurors to vote for death without reaching a consensus or unanimous verdict in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See State v. Dixon, 283 So. 2d 1 (Fla. 1973).

The trial judge is abandoned by the law when it is obligated in an ambiguous

[10]While our death penalty law is in no way an authentic reflection of the capital punishment process defined in the Hebrew Scriptures, it is an interesting to note that when a congregation voted for death, it was the congregation that was required to carry the sentence out- not some anonymous technician.

role to give great weight to a jury recommendation at the same time it is bound to a political pressures of being a sole sentencer. The trial judge is incapable of consistently applying the laws to the facts of each unique capital case because of the highly erratic and discretionary nature of this politically charged legal process. From the policed investigation to the charging process, from the quality of representation of a capital defendant to the selection of jurors who must be "death qualified" in order to serve, and from experts to the availability of evidence, the capital sentencing statute in Florida is unable to ensure that the defendants can or will receive equal treatment or due process under the law guaranteed by the Florida Constitution and the Constitution of The United States.

Few continue to argue that the death penalty is always applied in a racially non-discriminatory manner, that it is primarily reserved for anyone but the poor, and that its continuing and escalating use as a plea bargaining tool is increasing the risk of executing innocent persons. Even the Florida Council of Churches recently called for an independent nonpartisan commission consisting of persons with a wide range of perspective and experience to investigate Florida's death penalty law and procedures,[11] and joining the American Bar Association, called for a Moratorium of

[11]The Florida Council of Churches called for a Moratorium on executions in Florida on September 24th, 1997, following a discussion at their annual meeting in Leesburg, Florida.

executions in the State of Florida.

Numerous death penalty procedures require a careful and through review by this Court. For example, while the trial court is offered the opportunity to review the death penalty verdict rendered by a bare majority of a jury,[12] the trial court must blindly speculate about which aggravating and mitigating circumstances the jury found, considered and weighed during its deliberations. The jury sometimes, as in this case, instructed to consider aggravating circumstances that the Court does not even find proved beyond a reasonable doubt. As the blind leads the misinformed, defendants are denied due process rights guaranteed by the Florida and United States Constitutions.

In addition, Florida law creates a presumption of death and requires the defendant to maintain the burden of proving death is an inappropriate sentence. Because mitigating circumstances must somehow magically outweigh aggravating circumstances in order to justify a life sentence, the death penalty is arbitrarily and

[12]A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. **See Johnson v. Louisiana** 406 U.S. 356, 92 S.C. 1620, 32 L. Ed.2d 1523 (1972), and **Burch v. Louisiana,** 441 U.S. 130, 99 S.C. 1623, 60 LED.2d 96 (1979). It stands to reason that the same principle applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote. The Appellant acknowledges that the issue was addressed by this Court since **Burch. James v. State**, 453 So. 2d 786 (Fla. 1984); **Fleming v. State**, 374 So. 2d 954 (Fla. 1979). However, Appellant submits that the subsequent authority of **Burch** shows that a verdict by less than a substantial majority violates due process.

capriciously applied to individuals who are rarely able to perform the ominous task of sustaining this burden. Since much of this mitigation induces the natural response of sympathy and need to be merciful, jurors and trial courts are trapped by prohibitions and dictates pronounced by prosecutors that redefine what "following the law" means. When jurors are restricted from considering the power and validity of mitigating circumstances, such as reverse victim impact evidence, a sentence of death is wholly unreliable. See Lockett v. Ohio, 483 U.S. 586 (1978).

Furthermore, whether the State of Florida elects to use lethal injection, electrocution or a cross, the death penalty is cruel and unusual punishment in light of evolving standards of decency and civility. The death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17, of the Florida Constitution. Florida's alternative to the death penalty, life without the possibility of parole, or as in this case, life sentences without the possibility of parole for 25 years, constitute viable and suitable sentences requiring substantially less resources drained from the State's economy.

Florida's capital sentencing statute is immoral and unaffordable as children continue to be homeless, hungry and lack of health care and education which perpetuate a cycle of violence, chaos and hopelessness. It is urgent and crucial for this Court to immediately declare Florida's death penalty law unconstitutional.

## CONCLUSION

WHEREFORE, for the foregoing reasons, the Appellant's judgment of conviction and sentences should be vacated. In the alternative, the Appellant's death sentences should be vacated.

Respectfully Submitted,


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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof was served by mail, upon Fariba N. Komeily, Esquire, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this, the 21st day of October, 1997.

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