IN THE SUPREME COURT OF FLORIDA

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| PAUL C. HILDWIN, | ) | |
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| Appellant, | ) | |
| | ) | |
| vs. | ) | CASE NUMBER 89,658 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| _____ | ) | |

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

**INITIAL BRIEF OF APPELLANT**

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR APPELLANT

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## STATEMENT OF THE CASE

On May 15, 1995 this Court issued a mandate affirming Appellant's conviction but vacating his death sentence and remanding for a new sentencing proceeding before a new jury. (Vol. 1, R 3-18)[1] Appellant proceeded to a new penalty phase hearing on September 23-26, 1996 with the Honorable Richard Tombrink, Jr., Circuit Judge, presiding. (Vols. 7-12) Prior to commencement of jury selection the state attorney presented his motion to admit testimony of several witnesses from a prior trial. (Vol. 2, R 216-218; Vol. 7, T 20-28) Defense counsel objected to this motion particularly to the testimony of Detective Brenzel but the trial court granted the state's motion. (Vol. 2, R 230; Vol. 7, T 27-28) After the jury was sworn defense counsel made a continuing objection to the testimony by the state pursuant to its motion to present former testimony. (Vol. 9, T 407) When the state presented the former testimony of Detective Robert Brenzel, defense counsel objected to the testimony on the grounds that he was

[1] ***Hildwin v. Dugger***, 654 So. 2d 107 (Fla. 1995)

not competent to prove the prior conviction for attempted sodomy that Appellant apparently received in New York. (Vol. 10, T 591-593) During jury deliberations, the jury returned with several questions. (Vol. 2, R 262-263; Vol. 12, T 956-957) Following deliberations, the jury returned an advisory verdict recommending by a vote of 8 to 4 that Appellant receive the death penalty. (Vol. 12, T 965; Vol. 2, R 264)

On November 15, 1996 Judge Tombrink held a sentencing hearing at which time Appellant personally testified as to matters he wished the judge to consider. (Vol. 6, T 1-53) On December 4, 1996, Appellant appeared before Judge Tombrink who imposed the death penalty finding four aggravating factors had been proven and enumerating seven mitigating factors that he considered. (Vol. 12, T 981-990) Judge Tombrink filed a written order containing his findings of fact supporting the death penalty. (Vol. 3, R 464-480) Appellant filed a timely notice of appeal on January 2, 1997. (Vol. 3, R 498) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (Vol. 3, R 514)

## STATEMENT OF THE FACTS

On Sunday September 8, 1985, Appellant, his girlfriend, and another couple went to a drive-in movie theater where they spent all of their money. (Vol. 10, T 562-563) After they left the theater, they dropped the other male at his house and then Appellant and the two women ran out of gas in front of the Lone Star Bar. (Vol. 10, T 564) They searched the area for some pop bottles which they redeemed for money and bought some gasoline. (Vol. 10, R 565) However the car would still not start so they spent the night in the car. (Vol. 10, R 566) When Appellant's girlfriend awoke at approximately 9:00 a.m., Appellant was gone. (Vol. 10, T 566) Between 9:30 and 10:00 a.m., Appellant returned to the area with cigarettes and money. (Vol. 10, T 567-568) Later that evening, Appellant showed his girlfriend a pearl ring which he said he found in the garbage. (Vol. 10, T 571)

On September 12, 1985, Bernice Moore and William Haverty filed a missing persons report with the Hernando County Sheriff's Office reporting that Vronzettie Cox, Ms. Moore's sister and Mr. Haverty's girlfriend was missing. (Vol. 9, T 490, 498) On September 13, 1985, Ms. Cox's body was found in her car which was stuck in some mud in a wooded area of Hernando County. (Vol. 9, T 423, 430, 434) An autopsy was performed the next day and revealed that the victim was five foot six inches tall and weighed eighty eight pounds and was in a markedly decomposed state. (Vol. 9, T 472) A shirt was tied and knotted around the victim's neck. (Vol. 9, T 474) There was evidence of hemorrhaging in the neck and upper regions of the victim's chest and she had a fracture of the small bone at the top of her larynx which was consistent with the pressure caused by the shirt around her neck. (Vol. 9, T 475) The cause of death was strangulation. (Vol. 9, T 476) The victim had been dead for several days. (Vol. 9, T

478) The medical examiner opined that the victim lost consciousness after no more than several minutes. (Vol. 9, T 477) The medical examiner however could not state with any reasonable certainty how tight the ligature was at the time the carotid artery was severed. (Vol. 9, T 487) He did however admit that if the ligature was wound tight enough it would be easier to cut off blood to the brain and thus cause loss of consciousness fairly quickly. (Vol. 9, T 480, 488)

Appellant forged a check on Ms. Cox's checking account for $75.00 and cashed the same at the First Savings Bank of Florida on September 9, 1985. (Vol. 9, T 540; Vol. 10, T 579) After Appellant gave the police consent to search his residence, a pearl ring and a radio belonging to Ms. Cox were found in his bedroom. (Vol. 10, T 583, 558; Vol. 9, T 493-494) The victim's purse was found approximately a quarter of a mile from Appellant's house hidden in a wooded area. (Vol. 9, T 523, 530, 495)

Investigator Robert Brenzel from New York testified in a previous proceeding that he personally arrested Appellant for rape which involved a woman that Appellant knew. (Vol. 10, T 586-587) Appellant put a knife to the victim's throat, forced her to the bedroom where he proceeded to rape her and steal her wallet. (Vol. 10, T 587) On May 28, 1979, Appellant was convicted of rape and sentenced to six years in prison. (Vol. 10, T 588) In an unrelated case also in New York State, Appellant was convicted of attempted sodomy and received a sentence of three to seven years concurrent with the sentence he received for the rape. (Vol. 10, T 593) At the time of the murder of Ms. Cox, Appellant was on parole from these New York offenses. (Vol. 9, T 507)

When Appellant was only two years old, he witnessed his mother die at she was beating his brother with the belt because his brother had not waxed the floor properly. (Vol. 10, T 687,

631) Appellant's father was extremely violent towards Appellant. (Vol. 10, T 632, 690) Immediately after the death of Appellant's mother, Appellant's father began bringing prostitutes home and Appellant was required to call these women mother. (Vol. 10, T 634-635) Appellant was mentally and physically abused by his father who especially bore the brunt of his father's anger after his older sister and brother moved out. (Vol. 10, T 636, 638, 688) Patricia Hildwin sometimes babysat Appellant and eventually married him. (Vol. 10, T 664, 676) She observed Appellant's father physically abusing him. (Vol. 10, T 64) Once when Appellant was about thirteen, his father pushed him down three flights of stairs. (Vol. 10, T 665, 673) One time when Appellant's father came to get him at Ms. Hildwin's apartment, Ms. Hildwin suggested that he stop beating Appellant but Appellant's father pulled a gun and threatened to kill Ms. Hildwin and Appellant if anyone interfered. (Vol. 10, T 665) Ms. Hildwin witnessed many instances of physical and mental abuse including hearing Appellant's father tell him he was no good and would never amount to anything. (Vol. 10, T 666) Ms. Hildwin had seven children of her own and Appellant interacted quite well with them and got along very well. (Vol. 10, T 669-670) Despite the abuse that he suffered at his father's hands, Appellant would often tell Ms. Hildwin that he wished his father would love him as much as he loved his father. (Vol. 10, T 670) When Appellant was thirteen or fourteen, he was abandoned on a mountain by his father who moved to Florida. (Vol. 10, T 619, 624) Violet and Henry Hoyt found him and took him in and cared for him for six to eight months. (Vol. 10, T 619-620, 624) Appellant was always polite and obedient while he was in the care of the Hoyts. (Vol. 10, T 620) After the Hoyts moved to Florida, they once again took Appellant in after his father had thrown him out. (Vol. 10, T 621)

Clara McGill, Appellant's half sister observed Appellant's beat him with his hand, a belt

and an electrical cord. (Vol. 10, T 642) After Appellant's father remarried, his stepmother treated Apellant very badly and once when he was ten years old Appellant's stepmother rubbed his soiled underwear in his face. (Vol. 10, T 645)

Dr. Michael Maher, a physician and psychiatrist examined Appellant and determined that he suffered from diffuse brain dysfunction. (Vol. 10, T 716-721) This brain injury effects Appellant's intellectual functions, his judgments and his relationships with people. (Vol. 10, T 723) People with defuse brain disfunction do poorly when given a lot of freedom and opportunity to make choices but do much better in a highly structured environment. (Vol. 10, T 724) This injury can be caused by a specific injury to the brain or by the brain not developing in a proper and normal way. (Vol. 10, T 726) Dr. Maher likened it to the so called "boxer syndrome" wherein boxers who are repeatedly hit on the head over a period of years suffer the same injury. (Vol. 10, T 727-728) Dr. Maher learned that Appellant was first exposed to alcohol at the age of eight and by the time he was thirteen this led to a pattern of regular use of alcohol and other intoxicants. (Vol. 10, T 731) Dr. Maher also determined that Appellant inhaled paint and petroleum fumes which also caused damage to his brain. (Vol. 10, T 732-733) By the time Appellant reached the age of twenty, his capacity to function normally was substantially impaired and the only chance for him to function reasonably well was to be kept in regimented residential treatment center. (Vol. 10, T 734-735) Dr. Maher opined that given Appellant's parents' history of mental illness, Appellant most likely inherited some of these psychological defects. (Vol. 10, T 737) Dr. Maher stated that in his opinion at the time of the murder of Ms. Cox and the weeks leading up to it, Appellant suffered from severe mental deficit which impaired his capacity to appreciate to the wrongfulness of his actions and to conform his actions to the requirements of law. (Vol. 11, T

749) It was Dr. Maher's opinion that Appellant would function reasonably well in a prison setting and while he is quite better now than he was in 1985 his brain is in no way better. (Vol. 11, T 752-753) While Appellant may not have been born with any brain damage by the age of ten he had significant brain damage. (vol. 11, T 758) The fact that Appellant may have seen many mental health personnel when he was young is quite unusual and the fact that he never got any better indicates that these prior mental health officials quite possibly misdiagnosed him. (Vol. 11, T 774-777)

Dr. Robert M. Berland, a forensic psychologist also evaluated Appellant. (Vol. 11, T 784, 794) In his many years conducting examinations of criminal defendants, Dr. Berland only found insanity or tendency towards incompetence in thirteen percent of his cases. (Vol. 11, T 794) Appellant was very credible in describing the symptoms that he suffered and these symptoms were corroborated by independent witnesses with whom Dr. Berland also spoke. (Vol. 11, T 801-804) Dr. Berland determined that Appellant had feelings of paranoia and was prone to explosive behavior and suffers thought process disturbances. (Vol. 11, T 811-813) Part of Appellant's psychosis was due to his brain injury which Dr. Berland determined occurred most significantly when he began sniffing transmission fluid. (Vol. 11, T 826-831) Even one exposure to sniffing transmission fluid is sufficient to cause permanent brain injury and psychosis. (Vol. 11, T 832) There was ample evidence that Appellant sniffed transmission fluid every day for one and a half years. (Vol. 11, T 833) Dr. Berland found no evidence that Appellant was faking any of the tests that he was being given. (Vol. 11, T 835) Evidence was submitted that Appellant attempted suicide on numerous occasions by eating razor blades, attempting to burn himself in a fire and jumping on to the back of an alligator. (Vol. 11, T 836-838; Vol. 10, T 672, 744, 640) In Dr.

Berland's opinion Appellant definitely had brain damage and was definitely under the influence of mental illness at the time the murder was committed. (Vol. 11, T 846, 855) However, Dr. Berland could not give an opinion as to the causel relationship between the mental illness and the murder. (Vol. 11, T 855) Dr. Berland also stated that Appellant was definitely under the influence of emotional disturbance at the time of the murder but he could not identify whether such disturbance was extreme. (Vol. 11, T 856-857)

Appellant testified that while he was growing up his father would tie him down and rape him repeatedly and this occurred from the time Appellant was six until he was fifteen. (Vol. 6, T 39-40)

## SUMMARY OF THE ARGUMENTS

POINT I: The trial court erred in finding that the aggravating factor of pecuniary gain was present where the evidence was insufficient to show that the sole or primary motive for the killing was to obtain monetary gain.

POINT II: The trial court erred in finding that the HAC aggravating factor was proven beyond a reasonable doubt for the record is devoid of any evidence indicating additional acts of torture necessary to set this killing apart from the norm of other killings.

POINT III: It was error to find a separate aggravating factors of prior felony and under sentence of imprisonment where under the facts of this case the two aggravating circumstances arise out of the same aspect of the case.

POINT IV: The death penalty is disproportionment and constitutes cruel and unusual punishment in the instant case.

POINT V: It was error to permit the state to present the testimony of Investigator Brenzel through his prior recorded testimony where there was no showing that the state may any effort to secure his present at the instant trial.

## ARGUMENTS

### POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF VRONZETTIE COX WAS COMMITTED FOR PECUNIARY GAIN THUS RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

The trial court found that this aggravating circumstance was proven because certain items belonging to the victim such as a pearl ring and a radio were found in the Appellant's bedroom and Appellant forged a check on the victim's account and cashed it in the amount of $75.00. (Vol. 3, R 467-470)

This aggravating factor is limited in its application to situations where the sole or primary motive for the killings is in order to obtain monetary gain. **See *Simmons v. State***, 419 So. 2d 316, 318 (Fla. 1982) The murder must have been an "integral step in obtaining some sought-after specific gain" ***Hardwick v. State***, 640 So.2d 1071, 1076 (Fla. 1988); ***Peterka v. State***, 640 So.2d 59 (Fla. 1994). If the evidence shows that the taking of the property occurred after the murder, as an afterthought, the circumstance is not applicable. ***Clark v. State***, 609 So.2d 514 (Fla. 1993); ***Hill v. State***, 549 So.2d 179 (Fla. 1989).

In the instant case, the evidence supporting this aggravating circumstance is solely circumstantial, that is, Appellant was found in possession of items belonging to the victim and was seen cashing a check that he had forged. Appellant submits that this evidence standing alone is insufficient to prove beyond a reasonable doubt that the primary motivation for the killing of

Vronzettie Cox was for pecuniary gain. This aggravating circumstance must be stricken.

## POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF VRONZETTIE COX WAS ESPECIALLY HEINOUS ATROCIOUS AND CRUEL THUS RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent substantial evidence. ***Martin v. State***, 427 So.2d 583 (Fla. 1982); ***State v. Dixon***, 283 So.2d 1 (Fla. 1973). The state has failed in this burden with regard to the aggravating circumstance of heinous atrocious and cruel. The findings by the trial court in regard to this aggravating circumstance contain factors which are irrelevant.

This has defined the aggravating circumstance of heinous atrocious and cruel in ***State v. Dixon***, ***supra at 9***;

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

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

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital

> felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

***State v. Dixon***, ***supra at 9***.

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

Appellant recognizes that the United States Supreme Court in ***Sochor v. Florida***, 504 U.S. 527 (1992) observed that this Court has consistently applied the heinous, atrocious and cruel factor to strangulation murders. However, importantly, this Court has never ruled that all strangulation murders are per se heinous, atrocious and cruel. In ***Smith v. State***, 407 So.2d 894 (Fla. 1981), this Court affirmed the finding of heinous atrocious and cruel involving a strangulation murder. However, in doing so, this Court noted that the heinous, atrocious and cruel aspect of the killing deals more with the manner in which the victim is strangled. In that case the defendant described how both women struggled, shook spasmodically and looked into his eyes as he choked them. Certainly this is not present in the instant case. In ***Doyle v. State***, 460 So.2d 353 (Fla. 1984), this Court again approved the finding of heinous, atrocious and cruel in a strangulation murder where the strangulation occurred over a period of up to five minutes and that prior to losing consciousness the victim was aware of the nature of the attack and had time to anticipate her death. In the instant case, the medical examiner testified that the victim would have lost consciousness in a matter of minutes depending upon how tightly the ligature around her neck

was bound. He could not state with any certainty just how much pressure had been applied. In ***Johnson v. State***, 465 So.2d 499 (Fla. 1985), this Court again approved the finding of heinous atrocious and cruel in a strangulation death, but once again focused on the fact the victim had a foreknowledge of her death and suffered extreme anxiety and pain. In that case, there was evidence that ***Johnson*** began to choke the victim and when the victim escaped from her car ***Johnson*** chased her, caught her again and resumed strangulation three times to make sure she was dead. There is nothing in the instant case to reflect those kind of facts. In ***Herzog v. State***, 439 So.2d 1372 (Fla. 1983), this Court recognized that not every strangulation murder is heinous, atrocious and cruel. In that case there was evidence that the defendant has argued with the victim on the day of the homicide and had beaten her that day. In addition, eyewitnesses testified as to the manner of death. After an unsuccessful attempt at smothering the victim, the defendant wrapped a telephone cord around her neck and strangled her. Despite these facts, this Court found the evidence insufficient to support a finding of heinous, atrocious and cruel since it was unclear whether or not the victim was fully conscious at the time her death occurred. Finally, in ***Rhodes v. State***, 547 So. 2d 1201 (Fla. 1989) this Court reversed a finding of heinous, atrocious and cruel where the victim was killed by manual strangulation which caused the hyoid bone in the victim's throat to fracture. Additionally, the trial court noted that the victim was found with clumps of her own hair clenched in her hands indicating the pain and anguish she suffered.

In the instant case, the evidence shows that Ms. Cox was indeed strangled with a shirt which was tied around her neck. While this was a wider ligature than a piano wire, sufficient force could have been used to tighten the shirt so as to cause almost instantaneous loss of consciousness and death. Certainly enough pressure was used to cause a fracture of the hyoid

bone at the base of the larynx. Additionally, it must be remembered that the victim was a very small person, weighing only eighty eight pounds. Thus, it is entirely probable that even the small to moderate amount of force was sufficient to cause nearly instantaneous death. In his findings of fact to support this aggravating circumstance, the trial refers to the fact that the victim was found completely nude with her legs folded up over her in the trunk of her car. While this is true, this could have occurred after the death of the victim. Acts which are committed on a person after death are not considered in determining whether the death itself was especially heinous atrocious and cruel. ***Halliwell v. State***, 323 So.2d 557, 561 (Fla. 1975)

In ***Brown v. State***, 644 So.2d 52 (Fla. 1994) this Court struck the heinous atrocious and cruel circumstance where an examination of the victim's badly decomposed body revealed three stab wounds, none of which would be immediately fatal. Similarly in ***Bundy v. State***, 471 So. 2d 9 (Fla. 1985), this Court rejected the HAC factor where the victim's body was found forty five miles from where she was abducted, her torn, bloodied and semen-stained clothes nearby, because there was no clear evidence that the victim struggled with her abductor, experienced extreme fear, or was sexually assaulted before her death. The instant case is readily analogous.

Finally, the trial court found that defendant indeed suffered mental impairment in the form of brain injury. There is a direct causal connection between the mental mitigators and the HAC aggravator. This Court has reversed some death sentences where the heinousness of the defendant's crimes was caused by his mental or emotional impairment. For example, in ***Jones v. State***, 332 So.2d 615 (Fla. 1976), ***Jones*** stabbed his murder/sexual battery victim thirty- eight times in a frenzied attack. Nevertheless, ***Jones*** received a life recommendation and a life sentence from the Supreme Court because of his undenied, long term, paranoid psychosis. **See also *Miller v. State***, 373 So.2d

882 (Fla. 1979); ***Francis v. State***, 473 So.2d 672 (Fla. 1985); ***Ferry v. State***, 507 So.2d 1337 (Fla. 1987).

In summary, while the death of Vronzettie Cox was unquestionably senseless and tragic, the evidence does not support a finding that it was accomplished in an especially heinous, atrocious or cruel manner. There certainly is no evidence of any intent on the part of Appellant to unnecessarily torture the victim or that he gained any kind of enjoyment or satisfaction from the killing. This aggravating circumstance cannot be sustained.

## POINT III

THE TRIAL COURT ERRED IN CONSIDERING THE AGGRAVATING CIRCUMSTANCES OF PRIOR VIOLENT FELONY AND UNDER SENTENCE OF IMPRISONMENT AS SEPARATE AGGRAVATING FACTORS WHERE THEY ARE DUPLICITOUS, THUS RENDERING APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

In the instant case, the state proved beyond a reasonable doubt that Appellant had previously been convicted of a felony involving the use of violence and that he was on parole at the time that the instant murder was committed. The parole was from the sentences imposed for the same prior violent felonies that were found applicable. Thus Appellant contends that under the circumstances of this case, these two aggravating circumstances merge and must be considered as a single aggravating circumstance.

This Court has held that aggravating circumstances cannot be impermissibly doubled. When one aspect of the case gives rise to two or more aggravating circumstances, only one circumstance can be considered. ***Provence v. State***, 337 So.2d 783 (Fla. 1976) Traditionally, impermissible doubling occurs where the aggravating factors of in the course of a robbery and for pecuniary gain are applied or the avoiding arrest aggravating circumstance and the aggravating circumstance that the victim was a law enforcement officer. In ***Fotopoulos v. State***, 608 So.2d 784 (Fla. 1992), this Court reiterated its holding from ***Echols v. State***, 484 So.2d 568, 575 (Fla. 1985):

> There is no reason why the facts in a given case may not support multiple aggravating factors provided the

> aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement.

Under the facts of the instant case, Appellant submits that the aggravating factors of prior violent felony and under sentence of imprisonment (parole) are indeed duplicitous since the parole arose out of the very same prior violent felonies. Thus, consideration of two discrete aggravating circumstances was improper. Resentencing is required.

## POINT IV

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As noted previously, two of the aggravating factors found by the trial court are invalid and the remaining two must be merged into a single aggravating factor thus leaving this single factor as the sole aggravating circumstance supporting the murder of Vronzettie Cox. Even assuming, though not conceding, that pecuniary gain applies, only two aggravating circumstances would apply. The trial court found a great deal of mitigation including the two statutory mental mitigating factors. When these are considered and compared to the aggravating circumstances the inescapable conclusion is that the death penalty is disproportionate.

The death penalty is so different from other punishments, "in its absolute renunciation of all that is embodied in our concept of humanity," ***Furman v. Georgia***, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." ***State v. Dixon***, 283 So. 2d 1, 17 (Fla. 1973). See also ***Coker v. Georgia***, 433 U.S. 584 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence). This Court, unlike individual trial courts, reviews "each sentence of death issued in this state," ***Fitzpatrick v. State***, 527 So. 2d 809, 811 (Fla. 1988), to "guarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," ***Dixon***, 283 So. 2d at 10, and to determine whether all the circumstances of the case at hand "warrant the imposition

of our harshest penalty." ***Fitzpatrick***, 527 So. 2d at 812. Appellant's case is neither the "most aggravated" nor is it "unmitigated." Indeed, it is one of the least aggravated and one of the most mitigated of death sentences ever to reach this Court. The "high degree of certainty in ... substantive proportionality [which] must be maintained in order to insure that the death penalty is administered even-handedly," ***Fitzpatrick***, 527 So. 2d at 811, is missing in this case, and the death penalty is plainly inappropriate on this record.

First, this case is not "the most aggravated." As argued previously, there is a single aggravating circumstance present for the murders. This Court has affirmed death sentences based on the single aggravating factor of a prior violent felony. ***Duncan v. State***, 619 So. 2d 279 (Fla. 1993); ***Ferrell v. State***, 686 So.2d 1324 (Fla. 1996). However, in each of those cases, the prior felonies were <u>murders</u> which occurred years previously, thus indicating, clearly, a failure on the defendant's part to have been rehabilitated.

In cases with one aggravating circumstance, even heinous, atrocious or cruel, as a single aggravating circumstance, cannot sustain a death sentence when the crime 'was probably upon reflection, of not long duration," and where drug addiction (alcohol) is a contributing factor to one's "difficulty controlling his emotions." ***Ross v. State***, 474 So.2d 1170, 1174 (Fla. 1985). Felony-murder as a sole aggravating circumstance is insufficient for death, ***Lloyd v. State***, 514 So.2d 396, 403 (Fla. 1988); ***Caruthers v. State***, 465 So.2d 496 (Fla. 1985), where there is at least one statutory mitigating circumstance, or evidence of drug (alcohol) abuse. ***Rembert v. State***, 445 So.2d 337, 338 (Fla. 1984); **see also** ***Proffitt v. State***, 510 So.2d 896 (Fla. 1987)

Appellant acknowledges five other cases where this Court has affirmed a death sentence based on a <u>single</u> valid aggravating circumstance. **See** ***Arango v. State***, 411 So.2d 172 (Fla. 1982);

***Armstrong v. State***, 399 So.2d 953 (Fla. 1981); ***LeDuc v. State***, 365 So.2d 149 (Fla. 1978); ***Douglas v. State***, 328 So.2d 18 (Fla. 1976); and ***Gardner v. State***, 313 So.2d 675 (Fla. 1975).

In all but one of the previously cited cases where death sentences based on a single, valid aggravating factor were affirmed, the crimes involved torture-murders. In ***Gardner***, ***Douglas***, and ***LeDuc*** nothing was found in mitigation by the trial court. In ***Arango***, the only mitigating factor was that ***Arango*** had no significant prior criminal history. In ***Armstrong*** (the only non-torturous murder), this Court upheld one valid factor in aggravation, but agreed with the trial court that there were no mitigating circumstances to weigh. Appellant's case involves substantial mitigation that was actually accepted by the trial court.

Second, this is not "the sort of 'unmitigated' case contemplated by this Court in ***Dixon***." ***Fitzpatrick***, 527 So. 2d at 812. Numerous mitigating circumstances were found by the sentencing judge and supported by abundant testimony. Other mitigation was also presented including the disproportionate treatment given to the codefendant in this case. A review of some of the cases which this Court has reversed on proportionality grounds leads to the conclusion that Appellant's death sentences cannot stand.

In ***Fitzpatrick v. State***, 527 So. 2d 809 (Fla. 1988), this Court accepted the sentencing judge's finding of five statutory aggravating circumstances, including those that showed culpable intent. Fitzpatrick had been convicted of the murder of a law enforcement officer. Fitzpatrick shot the officer while holding three other persons hostage with a pistol in an office. Fitzpatrick had also previously been convicted of violent felonies. The trial court found the existence of three statutory mitigating circumstances. Mr. Fitzpatrick's crime was significantly more aggravated then Appellant's, yet this Court found his actions to be "not those of a cold-blooded, heartless killer," since, "the

mitigation in this case is substantial." Id. at 812.

In ***Livingston v. State***, 565 So. 2d 1288 (Fla. 1988), the defendant killed a store attendant, shooting her twice with a pistol during the commission of an armed robbery. This Court found that two aggravating circumstances (prior violent felony and felony murder) when compared to two mitigating circumstances (age and unfortunate home life), "does not warrant the death penalty." Id. at 1288.

In ***Songer v. State***, 544 So. 2d 1010 (Fla. 1989), this Court reviewed a death penalty imposed by a trial judge based on one statutory aggravating factor, that the murder of a highway patrolman was committed while Songer was under the sentence of imprisonment. Due to the presence of several mitigating factors, this Court overturned the death sentence and remanded for imposition of a life sentence despite a jury recommendation of death. The reasoning of this Court is instructive:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (see, e.g., LeDuc v. State, 365 So. 2d 149 (Fla. 1978), cert. denied, 434 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979), but those involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out

> of prison but merely walked away from a work-release job. In contrast, several of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning ability was substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Id. at 1011.

In ***Penn v. State***, 574 So. 2d 1079 (Fla. 1991), this Court approved the trial court's finding that the murder was heinous, atrocious or cruel. In mitigation, the court found that Penn had no significant history of prior criminal activity and that he acted under the influence of extreme mental or emotional disturbance. This Court then concluded:

> Generally, when a trial court weighs improper aggravating factors against established mitigating factors, we remand for reweighing because we cannot know if the result would have been different absent the impermissible factors. Oats v. State, 446 So. 2d 90 (Fla. 1994), receded from on other grounds, Preston v. State, 564 So. 2d 120 (Fla. 1990). However, one of our functions "in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So. 2d 312, 315 (Fla. 1982). Under the circumstances of this case, including Penn's heavy drug use and his wife telling him that his mother stood in the way of their reconciliation, this is not one of the least mitigated and most aggravated murders. See State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Compare Smalley v. State, 546 So. 2d 720 (Fla. 1989) (heinous, atrocious, cruel in aggravation; no prior history, extreme disturbance, extreme impairment in mitigation); Songer v. State, 544 So. 2d 1010 (Fla. 1989) (under sentence of imprisonment in aggravation; extreme disturbance, substantial impairment, age in mitigation); Proffitt v. State, 510 So. 2d 896 (Fla. 1987) (felony murder in aggravation; no prior history in mitigation); Blair v. State, 406 So. 2d 1103 (Fla. 1981) (heinous, atrocious, cruel in aggravation; no prior history in mitigation). After conducting

> a proportionality review, we do not find the death sentence warranted in this case.

Id. at 1083-84. **See also** ***Mckinney v. State***, 579 So. 2d 80 (Fla. 1991) (death sentence disproportionate given only one valid aggravator, and mitigation shows that defendant had no significant criminal history, had mental deficiencies, and alcohol and drug history).

In summary, the instant case represents one of the least aggravated and most mitigated of cases that has come for review before this . When compared to other cases, the death sentence cannot be held proportionate. Appellant is entitled to resentencing to life.

## POINT V

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT THE PRIOR RECORDED TESTIMONY OF INVESTIGATOR BRENZEL.

Prior to trial, the state filed a motion to be permitted to use the prior recorded testimony of seven witnesses in lieu of live testimony. In its motion, the state alleges that it had made a diligent search to find these witnesses and was unable to locate them. Defense counsel objected on the grounds that this would deny him confrontation especially since in the prior case, this Court had specifically found that counsel had provided ineffective or incompetent representation during the penalty phase. The trial court overruled the objection and permitted the state to present the prior recorded testimony. Defense counsel sought and received a continuing objection to the presentation of the prior recorded testimony. When the state sought to present the testimony of Investigator Brenzel from New York, defense counsel specifically objected on the grounds that some of the evidence which was presented through Investigator Brenzel in the first proceeding was improper since the witness was not qualified to present such evidence. In particular, it was through Investigator Brenzel that the state presented Appellant's prior convictions from New York state for rape and attempted sodomy. Arguably Investigator Brenzel who was the investigating officer on the rape charge and had personal knowledge of Appellant's conviction was competent to present this testimony. However Appellant's alleged conviction for attempted sodomy arose out of a different jurisdiction and county in New York state and Investigator Brenzel had no personal knowledge of

the facts of this case or of Appellant's conviction. Despite this objection, the trial court permitted the state to present this prior recorded testimony and the exhibits which were originally introduced through Investigator Brenzel. Appellant asserts that this was error and that such error was prejudicial and not harmless inasmuch as it directly affected the application of an aggravating circumstance.

The use of prior testimony is allowed in certain cases. In ***Thompson v. State***, 619 So.2d 261 (Fla. 1993) this Court noted that there must be four conditions precedent to the admission of prior testimony:

> (1) The testimony was taken in the course of a judicial proceeding;
> (2) The party against whom the evidence is being offered was a party in the former proceeding;
> (3) The issues in the prior case are similar to those in the case at hand;
> (4) A substantial reason is shown why the original witness is not available.

***Id. at 265.*** Arguably, the first three criteria were met in the instant case. However, the state presented no evidence whatsoever concerning their abilities to locate Investigator Brenzel. The allegations in the motion were generalized and not made specific to each individual witness. While we know that some of the witnesses whose prior testimony was sought to be presented were indeed unavailable due to death or simply an inability to locate, the state made no mention at all concerning the circumstances of Investigator Brenzel's inability to be produced as a live witness. Thus, under ***Thompson***, the state failed to meet its burden to permit it to introduce the prior testimony. Additionally, the instant case arose from a direct ruling by this Court that prior counsel rendered ineffective and incompetent assistance to Appellant in the initial penalty phase. Investigator Brenzel was a witness in that initial penalty phase. Under these circumstances, the trial court should not have

permitted the state to use the prior testimony of Investigator Brenzel. It was through the testimony of Investigator Brenzel that the state was permitted to enter into evidence the prior judgment and sentence for the crime of attempted sodomy which was one of the prior violent crimes as well as the crime for which the Appellant was on parole at the time the instant murder was committed. Thus the importance of this evidence cannot be understated. Without it, the state simply would not have been allowed to enter these documents into evidence since there would have been no way to authenticate them.

## CONCLUSION

Based upon the reasons and authorities set forth herein, Appellant respectfully request this Honorable Court to vacate Appellant's death sentence and remand the cause for a new penalty proceeding wherein the alternative to remand the cause with instructions to impose life herein.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Mr. Paul C. Hildwin, #A1-P5212S, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 5th day of August, 1997.

_____

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER