IN THE SUPREME COURT OF FLORIDA

PAUL FITZPATRICK,

Appellant,

vs. Case No. SC00-2589

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

# AMENDED INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

The record on appeal consists of sixteen volumes in the record originally filed plus a two-volume "Addendum Transcript of Record on Appeal", a three-volume "Transcript of Record on Appeal" and a three-volume "Supplemental Transcript of Record on Appeal". The volumes of the original record will be designated by number only (no prefix). Volumes of the "Addendum Transcript Record on Appeal" will be designated by the prefix "ADD" and number. Volumes of the "Transcript of Record on Appeal" will be designated by the prefix "EX" and number. Volumes of the "Supplemental Transcript of Record on Appeal" will be designated by the prefix "S" and number.

The record is further divided into two sections. References to the trial transcripts (comprising volumes IX through XVI of the original record and volumes II and III of the "Supplemental Transcript of Record on Appeal") will be designated by prefix and volume number, followed by "T" and the appropriate page number. References to the remainder of the record (comprising volumes I through VIII of the original

record, the "Addendum Transcript of Record on Appeal", the "Transcript of Record on Appeal" and volume I of the "Supplemental Transcript of Record on Appeal" will be designated by prefix and volume number, followed by "R" and the appropriate page number.

The trial judge's sentencing order is attached as an appendix to the initial brief.

## STATEMENT OF THE CASE

A Pinellas County grand jury returned an indictment September 17, 1996 charging Paul John Fitzpatrick, Appellant, with first degree murder in the February 8, 1980 killing of Gerald D. Hollinger (I, R1-2). The State gave notice on October 8, 1998 of their intent to use collateral crime evidence at Fitzpatrick's trial (III, R501-3). This notice was superseded by an amended notice filed November 30, 1999 (IV, R643-6). Defense counsel filed a motion seeking to prevent the State's expert in footprint analysis from giving an expert opinion that there was a "strong possibility" that the foot impressions left at the crime scene were made by Fitzpatrick (IV, R621-2). Appellant also filed a pretrial "Motion for Statement of Aggravating Circumstances" (IV, R627-30).

At a hearing held August 2, 1999, the "Motion for Statement of Aggravating Circumstances" was heard (VIII, R1320-1) and later denied (VIII, R1282). Defense counsel argued that there was an insufficient data base on foot impressions to determine what percentage of the population shared similar

characteristics (VIII, R1301). Counsel urged that the State's witness be limited to giving an opinion that Fitzpatrick could have made the foot impressions at the crime scene (VIII, R1301). The court questioned whether a Frye hearing might be necessary to determine how the expert could qualify his opinion (VIII, R1316, 1318-9).

This Frye hearing took place December 3, 1999 (ADDI, R1378-1543). The court later granted the defense motion in an order rendered January 20, 2000 (IV, R713-26). The State witness, William Bodziak, was permitted to describe the footprint comparisons to the jury, but was barred from giving an opinion that there was a "strong possibility" that Appellant had left the foot impressions at the crime scene (IV, R726).

Also considered at the December 3, 1999 hearing was whether collateral crime evidence involving the robbery of Kenneth Menard in Massachusetts would be admissible at trial (ADDI, R1543-79). The Court deferred ruling; and later rendered an order January 20, 2000 denying the defense motion in limine and allowing the State to introduce collateral crime evidence (IV, R727-30).

Trial was held before Circuit Judge Lauren C. Laughlin and a jury on February 14 - 18, 2000 (IX-XIII, T1-801). During the guilt or innocence phase of the trial, Appellant renewed his objection to allowing testimony about the collateral crime (X, T219). Prior to crossexamination of the State's key witness, Paul Brown, the court heard the State's oral motion in limine to limit the scope of crossexamination (IX, T16-8; XI, T371-80). The judge ruled that the defense could not crossexamine Brown with respect to his mental health (XI, T373), sexual molestation by his father (XI, T374), his inpatient treatment at a VA hospital for drug and alcohol addiction (XI, T376), or whether he had previously accused Kenneth Menard of raping him (XI, T380).

At the close of the State's case, Appellant moved for judgment of acquittal (XII, T553-68). Among the grounds argued was that the State failed to prove burglary as an underlying felony for first-degree felony murder because the evidence showed that the

killer was invited into Hollinger's residence[1] (XII, T561-4). The judge, in denying the motion for judgment of acquittal, remarked that although the entry was consensual, "it's a reasonable assumption that the victim withdrew whatever consent that he may have given to remain in the residence" (XII, T570-1). After the defense case, the court denied Appellant's renewed motion for judgment of acquittal (XII, T651-2).

As rebuttal evidence, the State offered several photo exhibits, numbered 40 through 44 (XII, T659-60, 673-4). Defense counsel said that he didn't object to any of them (XII, T660, 673).[2]

During closing argument, defense counsel argued that Appellant was guilty of neither premeditated murder nor felony murder (XII, T676-9, 768-9). Counsel conceded that Fitzpatrick was guilty of theft because he admitted to helping Paul Brown carry away

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[1] Defense counsel cited several cases to support her argument but was apparently unaware of Delgado v. State, Case No. 88,638 (Fla. February 3, 2000) [25 Fla. L. Weekly S79] which had issued only days before trial.

[2] Presumably the inflammatory and prejudicial photographs referred to in defense counsel's Amended Motion for New Trial were State Exhibits #40 and #41, enlargements which graphically depicted the victim's wounds (VI, R1070; VIII, R1351, 1359-60).

Hollinger's stereo (XII, T679, 769). The prosecutor commenced by telling the jury that they could disagree about whether the State had sufficient proof for either premeditation or felony murder as long as all jurors agreed that first degree murder had been establish under one theory or the other (XIII, T707-8). In arguing that first degree felony murder was established, the prosecutor argued both robbery and burglary as the underlying felonies (XIII, T713-6). Burglary was described as remaining in Hollinger's residence to "rip off" the victim (XIII, T715-6). The prosecutor also relied substantially upon the collateral crime evidence from the Menard robbery (XIII, T720-6).

After the jury was almost two and one-half hours into their deliberations, two questions were submitted regarding whether there were fingerprints on the knife and whether Hollinger was "still alive when rolled over?" (XIII, T794-5; V, R817). In accord with counsel's request, the jury was instructed to rely upon their collective memories (XIII, T796). Three additional jury questions directed to the credibility

of Brown's testimony were also answered the same way (XIII, T796-7; V, R818).

The jury returned a verdict of guilty as charged to first degree murder (XIII, T799; V, R819).

In the subsequent penalty phase, defense counsel argued her Motion to Declare Section 921.141, Florida Statutes Unconstitutional Because Only a Bare Majority of Jurors is Sufficient to Recommend a Death Sentence (V, R870-1; XIV, T813-4). The court denied this motion as well as other defense motions attacking the constitutionality of the HAC aggravating circumstance, the pecuniary gain aggravating circumstance, and the contemporaneous felony aggravating circumstance (V, 848-51, 854-8, 872-7; XIV, T814-7). To avoid any prejudice from extraneous matters on the Massachusetts judgment, the defense and prosecution stipulated that Fitzpatrick had been convicted of robbery and the judgment itself was not entered into evidence (XIV, T826-31, 859-60, 881-2).

During penalty phase argument, the prosecutor relied upon a contemporaneous burglary as one of the aggravating circumstances based upon an implied lack of

"consent to someone remaining in your house as you are assaulted and cut and stabbed with a knife" (XV, T1107, 1111). While the prosecutor was arguing with respect to the HAC aggravating circumstance, defense counsel objected to his repeated phrases which tended to place the jury in the shoes of the victim (XV, T1115). The court acknowledged hearing some "inadvertent" comments and asked the prosecutor to "keep it in mind" (XV, T1115-6).

By a vote of 8-4, the jury recommended that a death sentence be imposed (VI, R1027; XVI, T1177).

On February 28, 2000, Appellant filed a motion for new trial (VI, R1058-9). An amended motion for new trial followed on May 31, 2000 (VI, R1067-70). This motion was heard in conjunction with the Spencer Hearing on June 9, 2000 (VIII, R1327-76).

At this hearing, Ralph Pflieger, an investigator for the Public Defender's Office, testified he tried for three years to obtain hospital records relating to Appellant's treatment for a head injury when he was 18 or 19 (VIII, R1333). The hospital is now defunct and a search of the archives was unsuccessful (VIII, R1333).

A request for medical or mental health records from the Billerica House of Corrections where Appellant was confined during the early 80s was also unproductive (VIII, R1334-5). Neither could the investigator locate several potential witnesses who could have produced evidence concerning Appellant's mental state in the early 1980s (VIII, R1341).

With respect to the motion for new trial, defense counsel brought the judge's attention to this Court's decision in Delgado v. State, which was released just prior to trial (VIII, R1345-8). He argued that the Delgado decision undercut the jury's verdict of guilt because it could have been based upon felony murder with burglary as the underlying felony (VIII, R1346-8). The prosecutor argued that there was sufficient evidence of premeditation and also sufficient evidence of felony murder based upon an underlying felony of robbery (VIII, R1361-72). According to the prosecutor, the inadequacy of the burglary theory of felony murder was harmless error (VIII, R1370-2). The judge deferred her ruling (VIII, R1375).

At a subsequent hearing held July 28, 2000, the

court denied Appellant's motion for new trial and entered a written order explaining the ruling (VII, R1184-92; ADDII, R1583). She also personally questioned Appellant about the decision to not present any further evidence in mitigation (ADDII, R1585-7). He stated that he had discussed the possibility of presenting additional psychiatric testimony with his attorneys and decided against it (ADDII, R1585-7). The court allowed the State to submit a redacted victim impact letter for consideration with respect to sentencing (ADDII, R1588-9). Both counsel agreed to submit written sentencing memoranda rather than present penalty argument in-court (ADDII, R1589-93).

On August 25, 2000, defense counsel filed her "Memorandum of Law Supporting the Finding of Mitigating Circumstances in Penalty Phase" (VII, R1195-1227). The State submitted a "Sentencing Memorandum" the same day (VII, R1228-46) and a response to Appellant's memorandum was filed August 30, 2000 (VII, R1247-50).

Paul Fitzpatrick presented an oral sworn statement to the judge at a hearing held September 6, 2000 (SI, R1767-75). He continued to profess his innocence and

asserted that Paul Brown was a "chronic liar" (SI, R1768-70, 1773-5). He also disputed the State's portrayal of him as not having a loving and caring relationship with his family (SI, R1770-3). He told the court, "I don't want to be on death row. I want to go back to Boston." (SI, R1773).

The sentencing hearing took place September 13, 2000 (ADDII, R1600-25). Judge Laughlin read her sentencing order in open court and filed it (ADDII, R1602-25). A sentence of death was imposed (ADDII, R1624; VII, R1252-6).

In her order, the judge found that three aggravating circumstances were proved by the State: 1) previous conviction of a violent felony[3]; 2) committed in the course of a robbery[4]; and 3) especially heinous, atrocious or cruel[5] (VIII, R1258-60, see Appendix). In mitigation, the judge found that three statutory mitigating circumstances were established: 1) extreme

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[3]§921.141(5)(b), Fla. Stat. (1979).

[4]§921.141(5)(d), Fla. Stat. (1979).

[5]§921.141(5)(h), Fla. Stat. (1979).

mental or emotional disturbance[6]; 2) substantially impaired capacity to conform conduct to the requirements of law[7]; and 3) age of the defendant at the time of the crime[8] (VIII, R1261-6, see Appendix). The judge rejected the proposed mitigating circumstance of being an accomplice with minor participation[9] (VIII, R1264-5, see Appendix). Modest weight was given to each of the mental mitigating factors and little weight to Appellant's age (VIII, R1263-4, 1266, see Appendix).

Labeled as "other factors in the defendant's background that would mitigate against the death penalty", the court considered evidence concerning: a) sexual abuse (rejected because of insufficient proof); b) alcohol abuse (weighed as part of the impaired capacity mitigating factor); c) drug use at an early age (weighed as part of the mental or emotional disturbance mitigating factor); d) rough environment (not reasonably established); e) abusive home life

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[6]§921.141(6)(b), Fla. Stat. (1979).

[7]§921.141(6)(f), Fla. Stat. (1979).

[8]§921.141(6)(g), Fla. Stat. (1979).

[9]§921.141(6)(d), Fla. Stat. (1979).

(given "some weight"); and, f) brain injury (weighed as part of the mental or emotional disturbance mitigating factor) (VIII, R1266-8, see Appendix).

Under the category "Non Statutory Mitigating Circumstances", the sentencing judge rejected the proposed factors "recognized his addiction and sought treatment", "continues and maintains his reading skills in jail", "parent of one child", and "other circumstances" relating to the twenty year gap between the homicide and Appellant's trial (VIII, R1268-72, see Appendix). The court found that six "non statutory mitigating circumstances were established, but gave each of them only "slight" or "little" weight: "cared for his brother Michael, his brother Jackie", "exhibited kindness toward others", "capacity to maintain close ties with family", "capacity to form close loving relationships", "friendly, outgoing, sense of humor" and "obtained his G.E.D." (VIII, R1269-71).

The sentencing judge concluded by agreeing with the jury's majority that the aggravating circumstances outweighed the mitigating circumstances (VIII, R1272, see Appendix). A sentence of death was imposed (VII,

R1252-6; VIII, R1273, see Appendix).

Appellant filed a timely notice of appeal October 11, 2000 (VIII, R1280). The Public Defender was appointed for appellate representation (VIII, R1274). This Court has jurisdiction pursuant to Article V, section 3(b)(1) of the Florida Constitution and Fla. R. App. P. 9.030(a)(1)(A)(i) to hear Paul Fitzpatrick's appeal.

## STATEMENT OF THE FACTS

A) State's Case - Guilt or Innocence Trial.

The body of Gerald Hollinger was discovered by a postman who became suspicious when Hollinger failed to retrieve the previous day's mail from his letter box. Robert Hill testified that his route in February 1980 included 529 Ponce de Leon Blvd. in Belleair (IX, T31). On February 8, he was delivering mail when he noticed that the previous day's mail had not been picked up (IX, T32). He looked through the kitchen door and saw Hollinger's body on the floor (IX, T32). The postman called the police from a neighbor's house (IX, T37).

The Belleair Police Department responded. The house was locked up so they gained entry by breaking a pane of glass in the front door (IX, T41-2). There were bloody foot impressions on several rugs in the residence (IX, T47, 58-9). Also, there were markings more consistent with shoe prints (IX, T48, 66). Stereo equipment had been removed from the residence (IX, T57, 63). A one dollar bill covered with blood was found on the floor of the hall (IX, T59).

Hollinger's body was found face down in the kitchen

(IX, T80). Blood covered 70 to 80 percent of the kitchen floor (IX, T80). The police found a butcher knife near the kick space of the kitchen cabinets (IX, T62, 80). A checkbook, wallet and credit card belonging to the victim were also on the kitchen floor (IX, T62, 80). Shoe tracks led through the kitchen door outside into the garage (IX, T81). The tracks stopped at the spot where a car might normally be parked in the garage (IX, T81).

The current Chief Medical Examiner for the Sixth Circuit, Dr. Joan Wood, testified about an autopsy which was actually performed by Dr. John Shinner on February 8, 1980[10] (X, T189-93). She reviewed photographs, the written autopsy report and all the information available about the injuries (X, T193-4). She counted 41 knife wounds on the body (X, T194). There was a wound to the right eye which would have blinded the victim (X, T196). Another wound on the side of the neck severed the jugular vein and would have caused rapid bleeding (X, T198). It was the only

[10]Dr. Shinner had died many years before this trial (X, T191).

wound that would have been certain to cause death (X, T212).

Defensive wounds were found on the left hand, right leg and left thigh (X, T199-201). The positioning of the victim's arms, his socks and the pools of blood indicated that the victim was rolled over after the attack (X, T202). Hollinger's wallet was lying on top of the blood (X, T202).

Dr. Wood noted that there was dripping blood on the counter, the stove and the refrigerator (X, T204). The struggle extended throughout the entire kitchen (X, T205). The victim was 6'4" tall, 230 pounds and in good physical condition (X, T211). He had a blood alcohol level of .06 grams percent, below that specified in the DUI statute (X, T212-3). A test of the victim's eye fluid suggested that the time of death was the morning of February 7 (X, T205-7).

Dr. Wood could not rule out the possibility that Hollinger was holding a knife in his right hand during the struggle and that the blood came from another person as well as himself (X, T210). She said that she had taken profiling courses from the FBI and consulted

with FDLE, which led her to suspect that the victim was homosexual when she viewed the crime scene (X, T213-4). The number of stab wounds involved and the surrounding circumstances were typical for homosexual homocides (X, T213-4).

Hollinger's 1979 Cadillac El Dorado was located beside the Courtney Campbell Causeway where it was abandoned on the way to Tampa (IX, T109-10, 115). At Hollinger's residence, a receipt from the Floridan Hotel in Tampa was found on the coffee table in the living room (IX, T69-70). The receipt was made out to John Murphy, room 1706, and covered the period February 2-8 (IX, T71). Numerous fingerprints were lifted from the crime scene, Hollinger's automobile and room 1706 of the Floridan Hotel (IX, T77, 85, 98, 100-01, 115-6, 135-7).

At that point, the police investigation stalled. It was not until 1994 that Detective Sergeant Michael Ring of the Pinellas County Sheriff's Office reopened the case (X, T251). He examined the social security number listed on the Floridan Hotel registration and determined that the prefix given was that for Massachu-

setts (X, T252-5). He decided to submit the fingerprints collected in the case to the Massachusetts authorities for possible identification (X, T256). A match was reported for fingerprints found in the hotel room with a person named Paul Brown in Medford Massachusetts (X, T256-7, 288).

In June 1995, Detective Ring went to Massachusetts for the purpose of interviewing Paul Brown and Appellant, who was known to have associated with him (X, T256-7). He was able to obtain a search warrant for fingerprints, footprints and hairs of both Brown and Fitzpatrick (X, T257). These were collected from both individuals (X, T258, 260-3, 266-7).

When the detective interviewed Appellant on June 25, 1995, he said that he had been to Florida but was never in the Tampa Bay area (X, T267, 272-4, 277-9). He denied having traveled to Florida with Paul Brown (X, T274). Detective Ring then confronted Fitzpatrick with a fingerprint report showing that his fingerprints were located in the hotel room, the victim's car and inside the victim's residence (X, T274-5). According to the detective, Appellant began "to sweat profusely"

(X, 276). Fitzpatrick was then released after providing samples of his fingerprints, footprints and hairs (X, T276-7).

At trial, retired PCSO latent fingerprint examiner Henry Brommelsick testified that he identified Fitzpatrick's fingerprints on a glass found on the coffee table in the living room of Hollinger's residence (IX, T162, 177-8). Fitzpatrick also left fingerprints on a glass in the bedroom and on the bathroom door in Hollinger's house (IX, T163-4, 177-8). Another of Appellant's fingerprints was left on the outside door frame on the passenger side of Hollinger's vehicle (IX, T164-5). The witness also identified fingerprints from the hotel room to Fitzpatrick (IX, T165).

Two fingerprints were identified as having been left by Paul Brown (IX, T166). Both came from the lavatory of the hotel room (IX, T166).

The bloody footprints left at the homicide scene were also the subject of expert testimony. William Bodziak, a forensic expert and former FBI special agent, testified that while he was at the FBI, three

rugs with blood stains were submitted to him (XI, T490). He was asked to compare the sock-clad impressions on these rugs with the known barefoot exemplars of four individuals (XI, T490-6). These included Paul Brown and Appellant (XI, T499).

Witness Bodziak concluded that of the four individuals, only Paul Fitzpatrick could have made the bloody foot impressions (XI, T515-6, 525-8). Regarding the shoeprints from the Converse All Star sneakers, Bodziak said that he couldn't determine a shoe size (XI, T517-8, 533-5). He couldn't tell whether the shoeprints had been made by the same person who made the sock-clad foot impressions (XI, T535). While no absolute identification was possible, there was no inconsistency between the known inked impressions taken from Appellant's feet and the bloody prints at Hollinger's residence (XI, T541-4, 547).

Over defense counsel's renewed objection, the State was permitted to present testimony about a collateral crime (X, T219). Kenneth Menard testified that prior to 1980, he formed a relationship with Paul Brown where he would give Brown money in return for sex (X, T220-

1). In January 1980, Menard agreed to let Brown live at his residence in Revere Massachusetts temporarily (X, T221-2).

On the evening of January 29, Menard received a phone call from Paul Brown asking permission to bring Paul Fitzpatrick over to Menard's house (X, T223-4). Menard agreed, and went back to bed (X, T224). About 2:15 a.m., Brown and Fitzpatrick arrived with two women (X, 224). Brown and one of the women went into the spare bedroom next to Menard's (X, T243). Menard could overhear them and thought that Brown and the woman were going to have sex (X, T243-4). Menard denied interrupting them; but said that he confronted Brown when Brown came into his bedroom and picked up Menard's car keys (X, T226, 243-4). Eventually, a taxicab was called and took the women home (X, T226-7).

Afterwards, Menard overheard Brown say to Fitzpatrick, "Do you want to rob this guy?" (X, T227-8, 244). Fitzpatrick answered, "Well, he is your uncle, isn't he?" (X, T228). Brown replied, "No, he is a fag that picked me up" (X, T228). Then, Menard heard rummaging in a kitchen drawer (X, T228). He saw

Fitzpatrick cutting the drapery cords in the living room (X, T228).

Brown and Fitzpatrick went into Menard's bedroom and started to tie him up (X, T228). When Menard struggled, Fitzpatrick put a knife to his neck and told him to stop (X, T229). Because Appellant didn't like the way that Brown had tied Menard, he gave the knife to Brown and retied Menard's hands behind his back (X, T229). Brown and Fitzpatrick went through Menard's possessions and took cash, credit cards and the keys to his car (X, T230-1). When Menard told Brown that there were other people who knew that Brown was staying at Menard's house, Fitzpatrick said, "If that guy doesn't shut up, I'm going to kill him" (X, T232).

Brown loaded up Menard's stereo equipment in Menard's car (X, T231-3). Fitzpatrick decided that he wanted Menard's slacks and took them off of him (X, T233). The slacks, waist size 32, were worn by Appellant as he left Menard's residence (X, T233, 236). Before he left, Fitzpatrick pulled the telephones out of the wall (X, T233). He and Brown drove away in Menard's 1976 Pacer which got as far as Rhode Island

before breaking down (X, T235-6).

Paul Brown was the State's star witness. He testified that
he grew up in Somerville Massachusetts, a Boston suburb, with Paul Fitzpatrick (X, T289-91). During the 1970s, he and Fitzpatrick were best friends (X, T290).

Turning to Brown's relationship with Kenneth Menard, Brown denied that he had a homosexual relationship with Menard or that he was paid for sexual favors (X, T292). On the other hand, he admitted having sexual relations with Menard and receiving financial assistance and sometimes a place to live from him (X, T292). During January 1980, Brown had no money and depended upon friends for a place to live before he was taken in by Menard (X, T293). Brown said that Fitzpatrick was not well-off, but always worked for a living (X, T296; XI, T396).

Brown testified at length about the robbery of Menard. Brown claimed that he was told by Menard that Menard would be away for the weekend so it would be all right for Fitzpatrick to come over (X, T296). Brown testified that he was surprised when Menard turned out

to be at home (X, T298). The women who were with Brown and Fitzpatrick got very upset and decided to leave (X, T298-9). Brown said that he was angry at Menard for interrupting his plans to have sex with one of the women and said that Fitzpatrick was also upset (X, T300). According to Brown, they decided to "teach him [Menard] a lesson" (X, T300; XI, T397)[11].

Brown further testified that Fitzpatrick opened a kitchen drawer and took out a knife (X, T301). They cut the drapery cords and went into Menard's bedroom (X, T300-1). While Fitzpatrick held the knife, Brown hog-tied Menard and put tape over his mouth (X, T302). Fitzpatrick removed the tape because it had covered Menard's nose (X, T302). Brown said he couldn't recall whether he had wielded the knife during the incident or whether the knife had ever been placed at Menard's throat (X, T303).

Brown and Fitzpatrick took Menard's car keys and loaded his $4000 stereo system into it (X, T303). They may have taken some other items (X, T303). They drove

[11]On crossexamination, Brown admitted that he committed "a few" other crimes to teach people lessons (XI, T397).

away in Menard's car and later sold the stereo equipment in a tavern for $400 or $500 (X, T303-4). After partying for awhile, Brown and Fitzpatrick decided to drive to Florida because they were afraid that Menard would report the robbery (X, T305). In Connecticut, they had an accident and abandoned the car (X, T306). Brown's sister-in-law drove down and took them back to her house in the Boston area (X, T306-7). After ingesting some more drugs and imbibing alcohol, Brown and Fitzpatrick bought bus tickets to Clearwater Florida (X, T308-9). Upon their arrival, they checked into the Floridan Hotel in downtown Tampa under fictitious names (X, T309-10). They occupied room 1706 (X, T311). Brown paid one week's rent for the room and was given the receipt (XI, T411, 470-1).

During this week Brown and Fitzpatrick went to Clearwater Beach every night to a club at the Tropicana Hotel, where they drank and took drugs (X, T311-2). Brown testified that he stole vehicles[12] to transport Fitzpatrick and himself between Tampa and Clearwater

[12]Brown said that Fitzpatrick didn't know how to steal vehicles (XI, T411).

Beach (X, T312; XI, T411). They would pawn items from the stolen vehicles to replenish their money (X, T313).

The two of them were together the entire time except for one night (X, T314). According to Brown, he and Fitzpatrick were partying at a hotel room with the members of a band (X, T315; XI, T414). Fitzpatrick was very intoxicated and passed out on the floor (X, T315; XI, T415). Then he got up and said he wanted to go back to the hotel (X, T315-6; XI, T415). Because Brown was interested in a woman who was with the band, he refused to leave (X, T316). Eventually, Fitzpatrick left by himself (X, T316).

Brown testified that he remained at the party for another two hours (X, 316). Then he stole a van from the parking garage and drove it to Tampa (X, T316-7; XI, T416). When he got back into the hotel room, Fitzpatrick was not there (X, T317).

Brown went to bed and was later awakened by a knock on the door (X, T317-8). When he opened the door, Appellant and another man were there (X, T318). Fitzpatrick was so drunk that he really couldn't walk (X, T318). His shoes were muddy with what appeared to

be red clay (X, T319). The shoes were of the style called "earth shoes" in the 70s; they were definitely not sneakers (XI, T418-9).

Fitzpatrick's companion was a big red-headed man wearing a tie and a camel hair coat (X, T319). There was dirt or water on the bottom of his coat (X, T319). Fitzpatrick told Brown that he promised to give the man something for giving him a ride to the hotel (X, T319-20). Brown testified at trial that he gave the man an imitation gold ring but admitted that he previously said at deposition that he gave the man a camera (X, T319-20; XI, T421).

Brown went back to bed but got up when he saw Fitzpatrick throwing his shoes out the window of their room on the 17th floor (X, T320-1). According to Brown's trial testimony, Fitzpatrick said that he had ripped one of the shoes (X, T321). Early that evening, Brown called his aunt who lived in the Tampa area and asked if she would let him and Fitzpatrick stay with her for awhile (X, T322). She agreed and one of her friends picked them up at the hotel (X, T322). Brown and Fitzpatrick left clothing, shoes and toiletry

articles behind in the hotel room (X, T322-3). These were items from the vehicles Brown stole which didn't fit either Fitzpatrick or himself (X, T322-3). There was still one night remaining of the week that the two had paid for at the Floridan (X, T324).

Brown and Fitzpatrick stayed about three more weeks in Florida before returning to Boston by bus (X, T325-7). When they returned to Massachusetts, they were arrested for the Menard robbery and were eventually given prison sentences (X, T329-30). Sometime later both were serving their sentences at the Billerica House of Corrections when there was a discussion among several inmates concerning what they would do if attacked in their cells (X, T330-1). According to Brown, Fitzpatrick exclaimed, "I'd slice his throat like I did in Florida" (X, T331). Brown testified that he later asked Fitzpatrick what he meant by this remark. Fitzpatrick replied that a homosexual had attacked him in Florida and Fitzpatrick had slit the man's throat (X, T332).

When Detective Ring interviewed Brown in June 1995, Brown admitted to having been in Florida previously,

but not during the period of the homicide (X, T335-6). When first confronted with his fingerprints from the hotel room, Brown stated that he had been at the hotel three months previously with a woman (X, T337). This was true; however, he had occupied a different room (X, T354; XI, T386-7). When Detective Ring informed him that Fitzpatrick's fingerprints were found in the same room, Brown had to admit that they were fleeing from the Menard incident (X, T339). Brown denied any knowledge about Fitzpatrick being in a fight or other trouble while in Florida (X, T340).

Brown knew that Detective Ring would be questioning Fitzpatrick also (X, T341). Around Christmas of that year, Brown was arrested for driving under the influence (X, T342). Recognizing that his prior DUI convictions meant that he might be going to prison on this charge, Brown told the arresting officer, Benoit, that he wanted to give the Florida authorities more information about the homicide (X, T344-5). He hoped that cooperation would gain him some leniency on the DUI charge (X, T345).

When interviewed by Trooper Benoit, Brown told him

that Fitzpatrick come back to the Floridan Hotel with blood on his shoes (X, T347). Brown told Trooper Benoit that Fitzpatrick had thrown his shoes across the street (X, T348). He also mentioned Fitzpatrick's alleged statement about slitting someone's throat (X, T347).

Brown was then reinterviewed by Sergeant Ring in March and September of 1996 (X, T350). Brown said he was concerned about being charged as an accessory to the homicide (X, T350). He admitted to having three prior felony convictions and described four of his prior misdemeanor convictions (X, T351-4).

On crossexamination, Brown admitted that he was very worried after Detective Ring's first interview that he was a suspect in the homicide (XI, T389-90, 393). He went on a "drinking and drugging binge" for months afterward (XI, T391). Although he probably could have located Appellant during this period, he made no effort to do so (XI, T391-2). When stopped for DUI, Brown wanted to make a deal with the Florida prosecutor to ensure that he wouldn't be charged (XI, T394).

Regarding the Menard incident, Brown said that Fitzpatrick didn't threaten to kill Menard and he didn't see him ever hold a knife to Menard's neck (XI, T405). Brown claimed that he "wouldn't mind going to prison" and that he had served another sentence only a few years earlier (XI, T407). He said that his current shoe size was 12, but that it had been 9 1/2 back in 1980 (XI, T407-8)[13]. His shoes were always larger than Fitzpatrick's (XI, T408-9).

Before Brown testified to the grand jury, he got assurances from the prosecutor that he would not be charged (XI, T422). He was not given immunity; just told that the statute of limitations had run on whatever offenses they would have been able to prosecute (XI, T422-3). But until that time, Brown was afraid that he would be charged with murder (XI, T423).

Brown first talked about Fitzpatrick's shoes when he was questioned by Trooper Benoit (XI, T425). He admitted that he told Benoit that there was blood on

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[13] Expert witness Bodziak testified "to say your foot has increased two or three sizes, I've never heard of that if it's from an adult age to another adult age" (XI, T521).

Fitzpatrick's shoes "just to get someone's attention" (XI, T426-7, 467-8). He further told Benoit that the shoes could still be found 15 years later (XI, T428-9). When Benoit suggested that the shoes could be on a roof, Brown followed up by saying he saw Fitzpatrick throw the shoes out the window (XI, T432). Brown admitted telling different stories at different times about whether Fitzpatrick was carrying his shoes or wearing them when he returned to the hotel (XI, T432-3, 440, 444-5, 450). He also lied to Trooper Benoit when he said that Fitzpatrick's companion on the morning of the homicide had blood on the rim of his coat (XI, T447, 468). He didn't want to talk to Detective Ring on tape about the shoes until he had assurances that he wouldn't be prosecuted (XI, T446).

On redirect, Brown said that he has been an alcoholic for most of his life (XI, T456-7). He also used illegal drugs, including marijuana (XI, T457). Brown testified that he has never had a memory problem despite his drug and alcohol use (XI, T457-8, 472-3).

B) Defense Case - Guilt or Innocence Trial.

Paul Fitzpatrick testified on his own behalf as the sole defense witness. He was 22 years old when the homicide took place (XII, T578). He hung around with Paul Brown from the time he was 14 until his early 20s (XII, T579). On the night of the Menard incident, Brown and he had been at a club on Revere Beach with two women (XII, T580). Menard's house, where Brown was staying, was within walking distance of the club (XII, T580). Brown told Fitzpatrick that Menard was his uncle, invited the group to the house, and let them in (XII, T580-1).

Appellant was in the parlor with one woman when he heard someone tell Brown (who was in the back bedroom with the other woman), that the girls would have to leave (XII, T581-3). Brown came out to the front visibly angry (XII, T583). Fitzpatrick offered to pay for a taxicab to take the two women home (XII, T584).

When the cab came and took the women away, Brown was still mad and embarrassed (XII, T584-5). Appellant heard rattling in a silverware drawer, then saw Brown entering one door to the bedroom (XII, T585). Appellant went into the bedroom through the other door

to find Brown standing over Menard with a knife in his hand (XII, T585-6). Brown said, "Let's kill this guy, put him up in the attic" (XII, T587).

Fitzpatrick testified that he was nervous that Brown was actually going to kill Menard (XII, T587-9). He persuaded Brown to give him the knife (XII, T587). Fitzpatrick cut the blind cords and tied up Menard to keep him in the bed (XII, T587-9). He was concerned that Menard would try to call the police (XII, T588).

Meanwhile, Brown was ransacking Menard's bedroom (XII, T590). Fitzpatrick lit a cigarette and held it for Menard while he smoked it[14] (XII, T590-1). He was trying to calm Menard and protect him (XII, T590-1). Brown took apart Menard's stereo system and asked Fitzpatrick to help him carry it out to the car (XII, T591-2). Appellant testified that he agreed because he just wanted to get out of Menard's house (XII, T592). Before they left, Fitzpatrick untied Menard's feet, then took off Menard's pants to discourage him from running after them (XII, T593).

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[14] Menard also testified about this and said that Fitzpatrick was apologetic (X, T247).

It was Brown's idea to flee to Florida (XII, T593). Fitzpatrick had never been there before, but Brown was familiar with the Tampa area (XII, T593-4). They checked into a hotel in Tampa, drinking every day and going to a disco club on Clearwater Beach every night (XII, T594-5).

On the night that Hollinger was killed, Brown and Fitzpatrick stayed at the club until closing (XII, T594-5). They were both drunk; they started walking and planned to hitch a ride to Tampa (XII, T595-6). Hollinger stopped and picked them up (XII, T596-7). When he heard that they were going to Tampa, Hollinger said, "That's a long ride. I have to stop at my house first" (XII, T597). Brown and Fitzpatrick agreed and were invited into Hollinger's house (XII, T597). Fitzpatrick remembered drinking some whiskey and listening while Hollinger and Brown were discussing the paintings in the room (XII, T597-9). Fitzpatrick then fell asleep while sitting on the couch (XII, T599).

He was awakened by "some yelling and screaming" (XII, T599). He got up and figured out that it was coming from the kitchen (XII, T599). When he went over

to the kitchen doorway, Appellant saw Paul Brown and Hollinger fighting (XII, T599). Brown had a knife in his hand and Hollinger was bleeding (XII, T600). Fitzpatrick didn't know what to do so he waited until Brown had left the kitchen (XII, T600-01). Then he went in and saw that Hollinger was dead (XII, T601). Appellant had kicked off his shoes while sleeping and went into the kitchen in his stocking feet (XII, T601). There was blood all over the kitchen floor which made it impossible to avoid stepping in it (XII, T601).

Brown washed up in the bath off the bedroom (XII, T602). Fitzpatrick walked around for awhile, then took off his socks (XII, T603). He put on the brown dress shoes which he had worn to the disco (XII, T603). Brown told him to wipe everything down, but Fitzpatrick just wanted to get out of the house (XII, T604). On their way out, Brown said, "Grab the stereo" (XII, T604). Appellant helped carry the stereo out to the car (XII, T604).

Brown drove as they headed back to Tampa (XII, T604). But they ran out of gas on the causeway and had to hitchhike with the stereo (XII, T604-5). A couple

of rides got them back to the hotel (XII, T605-6). Fitzpatrick wanted to leave immediately for Massachusetts, but Brown convinced him to stay if Brown's aunt could put them up (XII, T606).

When Brown's aunt agreed to pick them up, Brown and Fitzpatrick left the hotel a day in advance, leaving many things behind (XII, T606-7, 609). They wound up staying with a friend of the aunt's for three weeks (XII, T607). They sold the stereo and bought bus tickets back to Boston (XII, T607).

On his return to Massachusetts, Appellant learned that an arrest warrant had been issued because of the Menard incident (XII, T608). He pled and served time in prison on those charges (XII, T608). At one point, he and Brown were incarcerated together (XII, T608). However, he never made the statements which Brown attributed to him (XII, T608). In fact, Brown and he never discussed the Hollinger homicide afterwards (XII, T609). For awhile after he was released from prison, Fitzpatrick worked at the same company as Brown (XII, T609).

On crossexamination, Fitzpatrick denied that he had

put a knife to Menard's throat or threatened to kill him (XII, T613-4). He admitted that he had two prior felony convictions (XII, T614). When shown the photographs of the bloody footprints in Hollinger's residence, Fitzpatrick said that he wasn't sure if all of them were his, but knew that some of them must be (XII, T625-6). He denied turning Hollinger over to steal his wallet (XII, T627, 629). Appellant knew that he had taken his socks off at some point after Hollinger was killed, but couldn't remember where (XII, T628-9). He denied that he alone was responsible for the crime (XII, T629). Paul Brown never told him why he attacked Hollinger (XII, T634-8).

Fitzpatrick further denied that there was any discussion between Brown and he about robbing Hollinger before the incident took place (XII, T641). He denied wearing Converse sneakers on that night (XII, T644). He saw neither the beginning nor the end of Brown's fight with Hollinger (XII, T644-5).

C) Penalty Trial.

The State rested after the court read a stipulation that Appellant was convicted of robbery in Massachusetts and the indictment was entered into evidence (XIV, T881-2).

Defense counsel presented live testimony from a former Boston policeman, Fitzpatrick's mother and brother, a librarian from the county jail and a forensic psychologist. In addition, a videotape of another family member who was unable to testify in person was played, Appellant's sister testified by telephone, and letters from his eldest niece and a cousin were read to the jury.

Joseph McCain worked 31 years for the Boston Metropolitan Police force before retiring in 1988 (XIV, T883). He testified about the socioeconomic character of Somerville, Massachusetts where Fitzpatrick grew up (XIV, T885-92). McCain described Somerville as a community where organized crime and gangs controlled the streets (XIV, T885-90). Drug-related violence was prevalent (XIV, T886-91). Neighborhood youths were brought up to observe a code of silence about criminal

activity (XIV, T887-91). People who informed the police about crime were often killed and their families threatened (XIV, T890-1). Mr. McCain was not acquainted personally with Appellant nor his family, but knew the area where they lived very well (XIV, T892).

Margaret Fitzpatrick, Appellant's mother, testified that Paul Fitzpatrick was the third of her five children (XIV, T893-4). The youngest child, Michael, was born with both Down's syndrome and a heart condition (XIV, T895). As a teenager, Appellant regularly took care of Michael when his mother had to work in the variety store the family owned (XIV, T895-6).

At this point in Mrs. Fitzpatrick's testimony, a videotape of Michael Fitzpatrick, now 27 years old, was played for the jury (XIV, T897-910). Appellant always took Michael to the barber for haircuts (XIV, T898). Then they would go together for lunch and sometimes to the movies (XIV, T898-9). Paul taught Michael how to shave (XIV, T899-900). There were times when Michael couldn't walk because of problems with his legs and

Appellant would carry him to the bathroom (XIV, T901-2). On the videotape, Michael said that he still talks to Paul on the telephone, sends Polaroid photos to him, and loves him (XIV, T903-10).

Margaret Fitzpatrick went on to testify that one time when Appellant was twelve or thirteen, the two of them were robbed at gunpoint in the variety store (XIV, T910--1, 918). Paul's father died suddenly in 1978 when Paul was twenty (XIV, T916). The death affected the whole family (XIV, T916-7). Mrs. Fitzpatrick said that she was always very close to Paul and they had remained in contact since his arrest by telephone and letters (XIV, T917).

Appellant's sister, Deborah O'Neill, testified by a telephone hookup (XIV, T919-31). She and her husband have five daughters (XIV, T920). Appellant played basketball with the daughters, made breakfast for them on weekends when Mrs. O'Neill had to work, helped them with homework, and helped rake leaves in the yard (XIV, T921-2). When Paul was growing up, the neighbors all liked him because he would run errands for them or help taking out the trash (XIV, T923). Mrs. O'Neill also

described the care that Paul had provided for Michael, the brother with Down's syndrome (XIV, T924-5).

At around age 12, Appellant started drinking alcohol (XIV, T925). He battled an alcohol problem all of his life (XIV, T927-9). In 1996 he went into an inpatient Salvation Army detox center and remained sober afterwards (XIV, T926-9).

A letter from Lani Marie O'Neill, Appellant's eldest niece, was read into the record (XIV, T931-2). She expressed her appreciation for Appellant's thoughtfulness and his help in maintaining the household (XIV, T931). She said the Appellant was "a huge part" of her and her sisters' lives (XIV, T931-2).

John "Jackie" Fitzpatrick, Appellant's brother, testified that he and Paul grew up in a rough area (XIV, T937). Their father encouraged the boys to fistfight with each other and with their cousins to make them tougher (XIV, T937-8). An uncle liked Paul and gave him beer to drink from the age of nine (XIV, T939). Paul later became a habitual heavy drinker (XIV, T939). He also used illegal drugs which were available in the neighborhood from the age of 12 or 13

(XIV, T939-40).

Jackie further testified that starting about seventh grade, Paul worked in the family variety store all day seven days a week (XIV, T940). Because of this, Paul dropped out of school around the seventh grade level (XIV, T941). Paul was well-liked in the neighborhood because he helped neighbors clean their yards and with other chores (XIV, T942). Later in 1982, when Jackie was shot while trying to prevent someone from leaving an auto accident scene, Paul greatly assisted him (XIV, T942). Because Paul had experience caring for a cousin with muscular dystrophy who was confined to a wheelchair, he knew how to care for his brother when he became paralyzed (XIV, T942-3). Through the years Paul has continued to assist Jackie with his disability (XIV, T943).

A defense exhibit reflecting that Appellant received a Massachusetts high school equivalency degree in October 1982 was received into evidence (XIV, T946).

Sheriff's Office employee Carol Lewis testified that she is in charge of getting library materials for jail inmates (XIV, T948-9). During his period of

pretrial incarceration, Appellant made requests for reading material (XIV, T950).

Dr. Robert Berland, a Board-certified forensic psychologist, testified about his evaluation of Appellant. He said that lay witness interviews are important to his procedure and that Appellant's case was complicated by the refusal of many individuals from Appellant's community to give information (XV, T963-4). He administered two psychological diagnostic tests to Appellant, the MMPI and the WAIS (XV, T964).

Regarding the MMPI, Dr. Berland stated that he uses the older version of the test because he finds it more valid with respect to biologically determined forms of mental illness (XV, T966-7). In December 1998, he administered the MMPI to Fitzpatrick (XV, T977). Dr. Berland interpreted the results as indicating that Appellant had a chronic psychotic disturbance (XV, T977). There was evidence of delusional paranoid thinking and schizophrenia (XV, T978). The test showed that Fitzpatrick also had an energized condition beyond the normal range (XV, T978). Summing up, Dr. Berland called Appellant's condition "a long-standing mental

illness that involves a variety of psychotic symptoms including delusional, paranoid beliefs, and manic disturbance" (XV, T979). Dr. Berland admitted that he couldn't directly correlate the profile on the test administered in 1998 with Fitzpatrick's mental condition in 1980 (XV, T980).

Regarding the WAIS test, Dr. Berland stated that he used it to diagnose impairment from brain injury (XV, T981-2). He explained that there were two more recent versions of the WAIS, but that the original one was more useful for neuropsychological purposes (XV, T983-5). Fitzpatrick's performance on the WAIS test suggested that he had bilateral impairment (XV, T986). A brain injury was likely in addition to impaired functioning in the cortex (XV, T987).

When Dr. Berland interviewed Fitzpatrick, Fitzpatrick acknowledged that he had experienced hallucinations and maintained some delusional paranoid beliefs (XV, T991). Alcohol and drugs did not seem to be a factor with respect to the hallucinations or the paranoid beliefs (XV, T991-3). Appellant also experienced episodes of endogenous depression, periods

of extreme low energy (XV, T993-4). Manic episodes became more frequent in Fitzpatrick's early twenties (XV, T994).

Dr. Berland also interviewed some of Appellant's associates from earlier years to find out if he had shown symptoms of mental illness at that time (XV, T996-9). It was reported that Appellant often mumbled to himself - a reliable indicator of auditory hallucinations (XV, T999-1000). Appellant was also quickly angered and agitated over trivial slights; a typical paranoid response which was exacerbated when he was drinking (XV, T1000-1). Fitzpatrick's manic and depressive episodes were confirmed by other observers (XV, T1002-3).

Appellant's siblings and a close friend's sister also reported that Fitzpatrick was quite immature in his teens and early twenties (XV, T1004-5). In addition to drinking excessively, he used a variety of illicit drugs from the age of 12 or 13 (XV, T1005-7). Medical records also documented his drug and alcohol abuse (XV, T1007). Some of the means Fitzpatrick used to get high, such as sniffing lighter fluid, were

damaging to his brain (XV, T1007-9).

Another possible source of brain injury occurred when Fitzpatrick was 15 (XV, T1009). He was arrested while drunk and became belligerent with the police (XV, T1009-10). The police beat him into unconsciousness while his family watched (XV, T1010). Subsequently, he complained of severe headaches and slept excessively (XV, T1010). From that point on, Fitzpatrick was quick to anger over minor things and got into more fights (XV, T1011). Dr. Berland said that these changes were consistent with having a significant brain injury (XV, T1011-2).

Dr. Berland gave his opinion that Fitzpatrick was suffering from extreme mental or emotional disturbance from before the time of the homicide (XV, T1012). Dr. Berland also opined that Fitzpatrick suffered from substantial impairment in his capacity to conform his conduct to the requirements of law (XV, T1013).

From interviews with family members, Dr. Berland found that Appellant formed close attachments and was very loyal to his family and friends (XV, T1014-5). Since his arrest, Fitzpatrick has continued to send

letters to the family with special regard for Michael (XV, T1015). Dr. Berland also received information that Appellant had been sexually molested at age eight or nine by a neighbor (XV, T1016-7). In the year before his arrest on these charges, Appellant chose to enter an inpatient detox program for three or four weeks and followed up by working in a Salvation Army program for six months (XV, T1017).

There was further information from family members that Appellant's father had a bad temper and disciplined Paul severely (XV, T1018-20). His mother was described as an alcoholic binge drinker (XV, T1019). Dr. Berland was told that only about 2% of the people from the neighborhood where Appellant grew up ended up leading normal lives (XV, T1020). The rest ended up dead, homeless or incarcerated (XV, T1020).

Dr. Berland concluded by describing several incidents where Fitzpatrick had attempted suicide (XV, T1021-2). These occurred in 1985, 1987 and twice in 1994 (XV, T1021-2). All of them required hospitalization and involved substance abuse or mental disturbance (XV, T1021-2).

On crossexamination, the prosecutor asked Dr. Berland what Appellant had told him about the incident with Kenneth Menard (XV, T1025). Dr. Berland replied that he had not asked Fitzpatrick about this because it was not within the scope of his task (XV, T1025-6, 1028). Dr. Berland also explained his finding of manic disturbance as opposed to attention deficit disorder (XV, T1030). Dr. Berland admitted that he didn't interview Paul Brown with regard to Fitzpatrick's background (XV, T1031). He also agreed that all of the medical records he reviewed were for the period after February 1980 (XV, T1036).

On redirect, Dr. Berland said that his only information about the Menard incident came from Menard himself (XV, T1044). Menard told Sergeant Ring that after Brown and Fitzpatrick took angel dust during the encounter, complete madness took over (XV, T1044). Menard said, "I thought Fitzpatrick was out of his mind the way he was ranting and raving" (XV, T1044).

In rebuttal, Sidney Merin, Ph. D., a psychologist, testified for the State (XV, T1047-91). He stated that he had not interviewed Fitzpatrick nor reviewed any of

the medical and police reports; but he had been present during Dr. Berland's testimony and was familiar with the evidence presented in the guilt or innocence phase of the trial (XV, T1050-1). He had also reviewed the results from the tests administered by Dr. Berland (XV, T1051).

Dr. Merin criticized the original version of the MMPI used by Dr. Berland. He said that the new version was much improved and would render a more complete profile of the individual being tested (XV, T1058-9). By present standards, Fitzpatrick's profile on the MMPI administered by Dr. Berland was invalid, he claimed (XV, T1059-60).

When asked to interpret the MMPI results obtained by Berland, the witness said that Fitzpatrick had a positive attitude towards the test and probably gave honest responses (XV, T1060). Dr. Merin testified, "You would say this man behaves in a weird sort of way, strange" (XV, T1060). Fitzpatrick's profile is characterized by high scores on the sociopath scale and on the schizophrenia scale (XV, T1060-1). A high score on the sociopath scale indicates that the individual

acts impulsively and can behave aggressively (XV, T1061-2). A high score on the schizophrenia scale does not necessarily indicate schizophrenia: rather, it shows emotional alienation (XV, T1063). A person with this combination will conduct his or her life differently than others (XV, T1064).

While such individuals "behave in these strange and bizarre sorts of ways", Dr. Merin stated that they don't have a mental illness (XV, T1066). Fitzpatrick, in his opinion, has a personality disorder (XV, T1068). Dr. Merin defined this as "deeply rooted, maladaptive forms of behavior a person doesn't recognize as representing a problem" (XV, T1069). Dr. Merin gave an opinion that Fitzpatrick did not show extreme mental or emotional disturbance; it was simply "the way he always lived" (XV, T1071). The MMPI test in itself showed no evidence of an impaired capacity to conform his conduct to the requirements of law (XV, T1073-4).

Regarding the WAIS test, Dr. Merin said that it couldn't be used by itself to determine whether or not a subject's brain was impaired (XV, T1076). He used some of Fitzpatrick's answers on the comprehension sub-

test to conclude that Appellant exhibited appropriate and intelligent thinking (XV, T1077-81). Dr. Merin gave his opinion that Fitzpatrick could conform his behavior to the requirements of law if he chose to do so (XV, T1081). There was no evidence that any brain impairment affected that ability (XV, T1081).

On crossexamination, Dr. Merin agreed that until he sat in on Dr. Berland's testimony, the only information he had about the case was what the prosecutor told him (XV, T1083-4). Dr. Merin also agreed that not all mentally ill people are in hospitals (XV, T1087). A lot of people with delusional disorders are not noticed by the average person (XV, T1087-8). He said that the MMPI was an aid to determine mental illness but couldn't supplant other techniques (XV, T1089-90). He reiterated his conclusion that Fitzpatrick had a character disorder; he called this a description rather than a diagnosis (XV, T1090-1).

A letter from Kathy Coppola, Appellant's cousin, was read to the jury by defense counsel (XV, T1094-6). As youngsters, their families shared a two-family house (XV, T1094). When Appellant's family moved to another

town, holidays were still spent together (XV, T1094). She described young Paul as having a "big heart" (XV, T1095).

When Paul was a teenager, his father died (XV, T1095). His uncle (the letter writer's father) had several heart attacks and became disabled (XV, T1095). Paul spent a summer with his uncle and cousins in New Hampshire where he fixed the roof, painted the house and did yard chores (XV, T1095). His uncle became a surrogate father for Paul (XV, T1095).

Not long afterwards, the uncle died also (XV, T1096). Paul was again grief-stricken (XV, T1096). But Paul continued to be a "sharing and giving person" to his cousin's family (XV, T1096). When his elderly aunt needed her large old house painted, Paul did it for her (XV, T1096). The writer closed with a wish that the jury would recognize the good deeds and the caring nature which were part of Appellant's character (XV, T1096).

## SUMMARY OF THE ARGUMENT

Counsel did not become aware of this Court's decision in Delgado v. State, 776 So. 2d 233 (Fla. 2000) until after the trial was completed. When argued on Appellant's motion for new trial, the judge recognized that it was error for the jury to have been instructed on felony murder with burglary as the underlying felony. However, the judge ruled that the error was harmless because there was evidentiary support for a felony murder conviction based upon robbery as the underlying felony.

The trial judge should have vacated Appellant's conviction and ordered a new trial. Caselaw requires reversal when the jury is allowed to return a verdict based upon a legally inadequate theory even if there are alternative theories which are sound. The subsequent law passed by the Florida Legislature which attempts to nullify the Delgado decision is inapplicable to the case at bar because the crime took place in 1980.

Crossexamination of the State's key witness Paul Brown was impermissibly restricted to hide unsavory

facts which were relevant to Brown's possible bias or prejudice and essential for the jury to properly assess his credibility. The jury was deprived of a full testing of the State's theory that Fitzpatrick alone killed Hollinger. Had the jury credited Brown's testimony less, they might have accepted Fitzpatrick's account or decided that both participated in the homicide. If Brown were found to be equally or more culpable in the homicide, the disparity between the State's treatment of Brown and Fitzpatrick would almost certainly mandate a life sentence for Fitzpatrick.

The judge should not have allowed the State to present evidence of the robbery committed by Brown and Fitzpatrick of Kenneth Menard. Although there were some general similarities between the two offenses, this Court has required "startling similarities" which demonstrate a unique modus operandi before collateral crime evidence can be admitted to prove identity. At bar, details of the Menard robbery only showed Fitzpatrick's propensity to commit similar offenses - a forbidden ground for admission into evidence.

In sentencing Fitzpatrick to death, the judge

rejected several of Appellant's proposed mitigating factors. These factors were: a) grew up in "rough environment", b) sought treatment for alcohol and drug addiction, c) parent of a child, and d) prejudice to Appellant's ability to present records and witnesses in mitigation because 16 1/2 years passed between the offense and Fitzpatrick's indictment. All of these proposed factors were mitigating in nature and reasonably established by the evidence. The trial court should have found and weighed each of them.

Although this Court has previously rejected constitutional attacks on jury penalty recommendations returned by less than a substantial majority (9-3) of the jury, this issue should be revisited. Eighth Amendment jurisprudence holds that death sentences imposed under unreliable procedures cannot be permit-ted. When a Florida judge gives "great weight" to the jury's penalty recommendation, the recommendation itself must reliable. A jury death recommendation of 7-5 or 8-4 (as in the case at bar) is not a sufficiently reliable indication of the conscience of the community and should not play any part in penalty

determination.

In a pretrial motion, Fitzpatrick asked for a statement of the aggravating circumstances which the State would rely upon in seeking a death sentence. He attacked the indictment for failure to charge any aggravating circumstances and requested a special jury verdict on aggravating circumstances. In the subsequent case of Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court held that jury factfinding was constitutionally required whenever a sentence beyond the statutory maximum was to be imposed. Although the Apprendi court specifically declined to extend its holding to capital cases, a case currently pending [Ring v. Arizona, cert. granted, 122 S. Ct. 865 (2002)] will determine its application to death penalty procedure and may invalidate Appellant's death sentence.

## ARGUMENT

### ISSUE I

THE TRIAL JUDGE ERRED BY RULING THAT SUBMISSION OF THE CASE TO THE JURY ON FELONY MURDER WITH ALTERNATIVES OF BURGLARY OR ROBBERY AS THE UNDERLYING FELONIES WAS HARMLESS ERROR.

In Delgado v. State, 776 So. 2d 233 (Fla. 2000), this Court receded from prior decisions interpreting the burglary statute and held that consensual entry is an affirmative defense to burglary. The statutory language "remaining in a structure" was limited to exclude situations where the defendant was originally allowed into an occupied structure but his or her subsequent actions led to an implied withdrawal of permission to remain. Only when a defendant surreptitiously remains on the premises can he or she be properly convicted of burglary in addition to whatever offense the defendant commits in the structure.

The original Delgado opinion was released by this Court on February 3, 2000 and was published in Florida

Law Weekly on February 11, 2000. 25 Fla. L. Weekly S79. Fitzpatrick's trial commenced on Monday, February 14, 2000 (V, R781). Apparently defense counsel was unaware of the Delgado decision because when she moved for judgment of acquittal she argued that the evidence showed "a consensual entry into [the victim's] home" (XII, T562). It was further argued that unless there was evidence that the host withdrew consent to remain other than the occurrence of a crime, there was insufficient evidence to prove a burglary (XII, T563-5). Counsel cited caselaw to support this position including this Court's decision in Miller v. State, 733 So. 2d 955 (Fla. 1999), but not Delgado which was directly on point.

Sometime after trial, defense counsel became aware of Delgado and filed an "Amended Motion for New Trial" on May 31, 2000 which cited and quoted from Delgado (VI, R1069). At the hearing on the motion, defense counsel argued that if the jury found Appellant guilty on a felony murder theory, it was very likely that they did so on the legally insufficient charge of burglary as the underlying felony (VIII, R1347-8). The prosecu-

tor replied by arguing that there was sufficient evidence that the homicide was premeditated (VIII, R1361-2). Also, the State relied upon robbery as well as burglary to establish an underlying felony for a felony murder conviction (VIII, R1362-4). Therefore, the prosecutor concluded, both premeditated murder and felony murder with robbery as the underlying felony were proved beyond a reasonable doubt (VIII, R1367-9). He noted that this Court in Delgado only vacated the burglary conviction, not the first degree murder convictions[15].

The trial court entered an order denying Fitzpatrick's motion for new trial on July 28, 2000 (VII, R1184-92). With respect to this issue, the judge wrote:

> The Court did instruct the jury on burglary as a basis for felony murder, as well as an aggravating circumstance in the penalty phase. According to the facts presented at trial and the Delgado case, this was clearly contrary to law and error.
>
> The Court observes that, in addition to the burglary, the jury was

[15]This hearing took place before this Court granted rehearing and issued the revised opinion in Delgado v. State on August 24, 2000.

> instructed on robbery as a basis for felony murder, as well as an aggravating circumstance in the penalty phase. The facts presented at trial were sufficient to establish premeditated murder and felony murder.
>
> The evidence adduced at trial indicates that the victim was rolled over after the attack and money removed from his wallet. These facts are sufficient to support a felony murder conviction founded on the robbery charge.
>
> * * *
>
> The Court concludes that the general jury verdict rendered in this case was valid because it was legally supportable on one of the submitted grounds.

(VII, R1190-1).

Unfortunately, the judge did not have the benefit of this Court's final Delgado opinion which did not issue until August 24, 2000. In the final opinion, this Court made clear that a jury's general verdict cannot stand where one of the theories relied upon by the prosecution was legally inadequate. Quoting from Griffin v. United States, 502 U.S. 46 (1991), the Delgado court distinguished between jury consideration of factually inadequate theories for conviction and legally inadequate theories. Consideration of a

legally sound theory which is unsupported by the facts is not error because jurors can be presumed to have found the facts correctly. On the other hand, consideration of a legally inadequate theory is reversible error because jurors are bound to follow the law as it is given to them by the judge. Jurors will not detect the legal inadequacy of a charge that is submitted to them. Accord, Yates v. United States, 354 U.S. 298 (1957); Valentine v. State, 688 So. 2d 313, 317 (Fla. 1996).

Subsequently, the Second District in Lyons v. State, 791 So. 2d 36 (Fla. 2d DCA 2001) addressed a case directly on point with the case at bar. The State proceeded against Lyons on premeditated murder and felony murder based upon alternative theories of burglary and robbery. It was uncontested that the defendant was initially invited into the victim's residence and did not conceal himself therein. The jury returned a general verdict finding Lyons guilty of first degree murder.

On appeal, the Second District reversed Lyons' conviction because the jury could have relied upon "the

legally inadequate burglary theory in order to find Lyons guilty". It simply doesn't matter that there was an alternative theory of robbery which was sound or that there was sufficient evidence of premeditation. The opinion cited this Court's decision in Mackerley v. State, 777 So. 2d 969 (Fla. 2001) as precedent.

At bar, the jury could also have relied upon the legally inadequate theory of burglary in order to convict Fitzpatrick of felony murder. The prosecutor argued:

> The burglary is entering or remaining inside a residence with the intent to commit a crime therein, the crime being either a robbery or a theft or an assault. Do we have that in this case? Certainly, we do. We have ample evidence that he, the Defendant, either entered or remained in that house with the intent to do what? You know what the intent was. The Defendant admitted it. Paul Brown admitted it. They came down here to Florida. They had no jobs, no source of income, they weren't working. They needed money for drugs and alcohol. They had one intention and one intention only, and that was to rip off Mr. Hollinger. At the very least when they were inside the residence they had the intent to steal from him.

(XIII, T715-6). (Curiously, the prosecutor seems to be recognizing that Brown was a participant in the

homicide. For the significance of that, see Issue II, infra).

Accordingly, Fitzpatrick's conviction for first degree murder must be reversed because the jury may have used the erroneous definition of burglary as a basis for a felony murder conviction.

In anticipation that the State may argue that the Delgado decision has been abrogated and cannot be applied to Fitzpatrick, Appellant notes that the Third District made the following observation in Ruiz v. State, 26 Fla. L. Weekly D1532 (3rd DCA June 20, 2001):

> We are aware of the creation of section 810.015, Florida Statutes (2001) expressing the legislature's finding that Delgado v. State was decided contrary to legislative intent, and setting forth the intent to nullify Delgado. Although the legislature provided that the nullification operates retroactively, it limited that retroactivity to February 1, 2000. The instant events took place prior thereto.

footnote 1. At bar, the homicide of Hollinger took place February 8, 1980. Therefore, Delgado, as the controlling authority on the interpretation of the burglary statute for the period prior to February 1, 2000, applies to the case at bar.

## ISSUE II

THE TRIAL COURT ERRED BY LIMITING THE CROSSEXAMINATION OF PAUL BROWN.

Paul Brown suffered from post-traumatic stress syndrome, which was first diagnosed in 1978 (III, R480). It was brought on by witnessing his father tie up his sister and rape her (III, R484-6; IX, T16). Brown himself was molested by his father every day from age 10 to 12 (III, R483). Brown collected social security disability benefits for his mental disorder (III, R479). He thought that PTSD enhanced his memory and claimed, "I've never forgotten anything. Nothing" (III, R406).

Brown accused State witness Kenneth Menard of raping him in 1974, when Brown was 16 (III, R487-8; IX, T16). When he was first questioned by Florida authorities in June 1995 about this homicide, Brown was undergoing an alcohol detox program at a VA hospital (III, R422; IX, T16-7).

The jury, however, never learned any of these salient details about Paul Brown's life which were relevant to possible bias or prejudice and to his

credibility as the State's star witness. The prosecutor's oral motion in limine was heard and granted by the trial judge after the direct examination of Brown (XI, T371-80). The court ruled that Brown's mental disorder was irrelevant (XI, T373); that sexual abuse by Brown's father was also irrelevant (XI, T373-4); that Brown's hospitalization for alcohol abuse was irrelevant (XI, T374-6); and that Brown's accusation about Menard raping him would not be admissible unless the State opened the door (XI, T377-80).

Regarding the appellate standard of review, this Court has held that a trial judge has "wide discretion to impose reasonable limits on crossexamination" (Geralds v. State, 674 So. 2d 96, 100 (Fla.), cert. den., 519 U.S. 891 (1996). However, "crossexamination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief ....". Geralds, 674 So. 2d at 99 (quoting Coco v. State, 62 So. 2d 892, 895 (Fla. 1953). Moreover, "this discretionary authority ... comes into play only after

there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment". United States v. Lindstrom, 698 F. 2d 1154, 1160 (11th Cir. 1983).

The credibility of a witness is always a proper subject of crossexamination. Ehrhardt, Florida Evidence, §608.1, p. 433 (2001 ed.); Chandler v. State, 702 So. 2d 186 (Fla. 1997), cert. den., 523 U.S. 1083 (1998). In holding that the trial court abused its discretion by limiting crossexamination, the Fifth District wrote in Robinson v. State, 438 So. 2d 8 (Fla. 5th DCA), rev. den., 438 So. 2d 834 (Fla. 1983):

> It is elementary that a criminal defendant is to be afforded wide latitude when he cross-examines a witness against him and seeks to demonstrate bias or prejudice on the part of the witness. (Citations omitted) This is especially true when the cross-examination is of the key prosecution witness. Porter v. State, 386 So. 2d 1209 (Fla. 3d DCA 1980).

438 So. 2d at 10. When the proposed crossexamination relates to relevant evidence of a material fact, it is reversible error for a trial court to preclude it. Cruz-Sanchez v. State, 771 So. 2d 52 (Fla. 2d DCA 2000). Accord, United States v. Summers, 598 F. 2d

450, 460 (5th Cir. 1979) ("where the witness the accused seeks to cross-examine is the 'star' government witness, providing an essential link in the prosecutor's case, the importance of full cross-examination to disclose possible bias is necessarily increased").

At bar, Paul Brown was the star State witness and his credibility was a critical factor in the jury's finding of the facts. There were actually three possibilities of how the homicide occurred which had support from the evidence at trial: 1) Brown was not present and Fitzpatrick committed the murder by himself (the State's theory); 2) Fitzpatrick was asleep on the victim's sofa when Brown committed the murder (Fitzpatrick's testimony); and 3) both Brown and Fitzpatrick tried to rob Hollinger in the same manner as they had Menard, but one of them stabbed Hollinger to death when he resisted[16].

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[16]Some of the evidence suggesting that two men, rather than one, committed the homicide include: a) Hollinger, the victim, was 6'4", 230 lbs. and in good physical condition (X, T211). He had no defensive wounds on his right hand (X, T210) which could mean that another individual was holding his right arm during the struggle. b) Besides the bloody footprints attributed to Appellant,

The record shows that the jury was greatly concerned about Brown's credibility and the role he might have played in the homicide. During their deliberations, the questions they asked the judge to answer included 1) Was any attempt made to verify theft of vans? 2) Fingerprints on knife, 3) Was Brown ever placed in protective custody? and 4) Did they ever question the 2 other prisoners who heard Fitzpatrick say he had slit someone's throat? (V, R819; XIII, T795-7)[17]. Questions 1), 3) and 4) related directly to portions of Brown's testimony that might have been disbelieved.

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there were bloody shoeprints left by Converse sneakers (IX, T66; XI, T517, 535). The shoeprints were never sized (XI, T518, 533-5). Brown testified that Fitzpatrick was not wearing sneakers (XI, 418-9). c) The shoeprints led to the place in the garage where the driver's side door of Hollinger's car would have been (IX, T81). Fitzpatrick's fingerprint was found on the outside frame of the passenger's side door (IX, T164-5). d) Brown paid for the hotel and received the receipt which was found in Hollinger's residence (XI, T411, 470-1). Both Fitzpatrick and Brown left the hotel abruptly when they had already paid for an additional night (X, T322-4; XII, T606-7, 609). If Brown did not know what happened, why was he so eager to leave? e) Could one person have carried out all of Hollinger's stereo system in a single trip (IX, T63; EXII, R1699-1700)?

[17]With concurrence of counsel, the judge told the jury to "rely on your collective memories of the testimony and evidence presented" (XIII, T796-7).

Limiting the crossexamination of Brown deprived the jury of a full testing of his credibility and skewed the jury's consideration of the three possible scenarios toward the one presented by the State. Reasonable jurors might well have credited Brown's testimony less if the defense had been able to confront him with more evidence suggesting anger against homosexuals. Brown's testimony at deposition that his father had sexually abused him as a child and that Menard had raped him during their first encounter when Brown was 16 would support such an inference.

The evidence that the jury did hear included Menard's testimony that it was Paul Brown's idea to commit the robbery (X, T228, 244, 246). Brown referred disrespectfully to Menard at that time as "a fag that picked me up" (X, T228, 244). Moreover, Brown held a knife at Menard's throat during the incident (X, T246).

Brown told the jury that he was neither homosexual nor bisexual, but admitted to having sexual relations with Menard and receiving financial assistance from him (X, T292). He admitted to having committed crimes for the purpose of teaching people lessons (X, T300; XI,

T397). In short, Brown had previously preyed on homosexual men although he claimed to be heterosexual. He might not only have participated in the Hollinger homicide, he might well have played the leading role.

Fitzpatrick, on the other hand, was described by Menard as not "disrespectful ... about [his] sexual preferences" (X, T244) and Brown admitted that he had never heard Fitzpatrick say "anything bad about gays or homosexuals" (XI, T410). It seems questionable that he would have the motivation to inflict the extreme violence which led the medical examiner to profile this crime as typical of homosexual homicides (X, T213-4).

In Bowles v. State, 716 So. 2d 769 (Fla. 1998), the defendant was portrayed as a "hustler" who took money from homosexual men in exchange for sex. He said that he wasn't homosexual, didn't like sex with men, and blamed homosexuals for his girlfriend leaving him and aborting their child. The State argued that the defendant's motive for murdering the victim was a hatred for homosexuals.

This Court reversed Bowles' death sentence on the ground that "the State's evidence failed to demonstrate

a causal connection between Hinton's [the victim] alleged homosexuality, appellant's alleged 'hatred of homosexuals,' and the murder." 716 So. 2d at 773. Of course, it also amounted to a nonstatutory aggravating circumstance which made the jury's penalty recommendation unreliable.

If Paul Brown had been the defendant instead of the State's star witness in the case at bar, the trial court would have been correct in excluding evidence that Brown had been sexually abused by his father and had accused Menard of raping him. However, the Confrontation Clause of the Sixth Amendment requires an opportunity to explore by crossexamination a witness's possible bias or motive to testify for the prosecution. Davis v. Alaska, 415 U.S. 308 (1974). This is true even when the inquiry would reveal facts that were otherwise inadmissible. Id.

Like the State's witness in Davis v. Alaska, Paul Brown could well have been a suspect in the crime that the defendant was prosecuted for[18]. Therefore, he had a

[18]Brown was never given immunity and admitted that he was "deathly afraid" of being charged with the murder of Hollinger (XI, T422-3). See also XI, T389-90, 393.

motive to hide any participation that he might have had in the killing and to place the blame solely on Fitzpatrick. Had the jury heard more inquiry into Brown's background and attitude toward homosexuals, they may have been more likely to credit Fitzpatrick's account of the homicide, or at least conclude that Brown was a co-perpetrator. As the Court concluded in Davis v. Alaska:

> the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the key State witness'] testimony which provided 'a crucial link in the proof ...of petitioner's act.'

415 U.S. at 317.

The trial judge also erred in restricting the defense from exploring Brown's mental disorder and the extent of his alcoholism on crossexamination. In Greene v. Wainwright, 634 F. 2d 272 (5th Cir. 1981), the court stated the importance of crossexamination regarding the mental stability of a witness:

> The readily apparent principle is that the jury should, within reason, be informed of all matters affecting a witness's credibility to aid in their determination of the truth .... It is

> just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing.

634 F. 2d at 276, quoting United States v. Partin, 493 F. 2d 750, 762 (5th Cir. 1974), cert. den., 434 U.S. 946 (1977). Like the case at bar, Greene was essentially a credibility contest between the witness and the defendant. The Greene court reversed the defendant's conviction because the trial judge barred all questions about the State witness's mental condition and "certain bizarre criminal actions" he had allegedly been involved with.

Restricting Fitzpatrick from mentioning Brown's alcohol and drug treatment at the V.A. hospital may seem like a minor point since Brown readily admitted that he was an alcoholic most of his life and used illegal drugs (XI, T456-7). However, as pointed out in Smith v. Illinois, 390 U.S. 129, 131 (1968), "when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives". When

Brown was first interviewed by Detective Ring, Brown resided at the VA hospital where he was undergoing inpatient alcohol detox treatment (III, R422; IX, T16-7). After the interview, as he admitted to the jury, Brown went on a "drinking and drugging binge" which lasted for months (XI, T391. The jury should not have been deprived of part of the information (Brown's inpatient treatment at the VA hospital) needed to assess Brown's credibility accurately.

Fitzpatrick was prejudiced in the guilt or innocence phase of the trial by limiting crossexamination because the jury may have credited his testimony more and Brown's less had the hidden details of Brown's life been exposed. As to the penalty phase, the prejudice was overwhelming. Had the jury decided that Brown was equally culpable or more culpable than Fitzpatrick in the homicide of Hollinger, a life sentence for Fitzpatrick would be virtually mandated. See, Hazen v. State, 700 So. 2d 1207 (Fla. 1997); Ray v. State, 755 So. 2d 604 (Fla. 2000).

Accordingly, Fitzpatrick should be granted a new trial where he is allowed a full crossexamination of

the State's star witness, Paul Brown.

## ISSUE III

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO PRESENT COLLATERAL CRIME EVIDENCE WHICH HAD NO UNIQUE SIMILARITIES AND ONLY SHOWED APPELLANT'S PROPENSITY TO COMMIT SIMILAR OFFENSES.

The State gave notice of intent to use Appellant's participation in a robbery committed with Paul Brown in Massachusetts as collateral crime evidence in the Hollinger homicide (III, R501-3; IV, R643-6). Defense counsel responded with a motion in limine to exclude it[19]. A pretrial hearing was held December 3, 1999 on the defense motion in limine (ADDI, R1543-79).

At this hearing, the State suggested that there was a striking similarity between the robbery of Menard and the homicide of Hollinger, which "links [Fitzpatrick] to the homicide" (ADDI, R1562). Both crimes were committed against homosexual men by perpetrators who had been invited into their residences. A knife was the weapon displayed to Menard and used to kill Hollin-

[19]This motion was made part of the record on appeal by stipulation of the parties and filed with this Court. See order of the Supreme Court of Florida dated December 10, 2001.

ger. In both cases, the victim's house was ransacked, stereo equipment was taken and the perpetrators drove off in the victim's automobile.

Although the prosecutor argued that the collateral crime evidence was relevant to intent and motive as well as identity (ADDI, R1571-4), intent and motive were not material facts in issue. The only significance of the Menard incident for the prosecution was to prove identity - namely, to convince the jury that Fitzpatrick was the person who killed Hollinger.

Admission of collateral crime evidence is subject to the abuse of discretion standard of appellate review. LaMarca v. State, 785 So. 2d 1209 (Fla. 2001). However. when collateral crime evidence is admitted on the material issue of identity, this Court has held that mere general similarity between crimes will not suffice. Hayes v. State, 660 So. 2d 257 (Fla. 1995); Drake v. State, 400 So. 2d 1217 (Fla. 1981). In Chandler v. State, 702 So. 2d 186 (Fla. 1997), this Court explained:

> The common thread in our Williams rule decisions has been that startling similarities in the facts of each crime and the uniqueness of modus

> operandi will determine the admissibility of collateral crime evidence.

702 So. 2d at 192.

In her order denying Appellant's motion in limine, the trial judge found in pertinent part:

> 2. The evidence of other crimes, wrongs or acts is relevant to the issue of identity. The robbery of Kenneth Minard [sic] and Gerald Hollinger involved the use of knives; the victims' cars and stereo equipment were both stolen; the victims were both homosexuals and the crimes had a pecuniary motive; the defendant ingratiated himself and became personally acquainted with the victims; the crimes were committed within ten days of each other.
>
> 3. The most significant difference in the two crimes is that Gerald Hollinger was murdered and Kenneth Minard [sic] was not. This may be explained by the circumstance that Paul Brown was present during the Minard [sic] robbery making him a potential witness.
>
> 4. The cumulative effect of the numerous similarities establishes a unique modus operandi.

(IV, R728-9). Appellant preserved this issue for review by renewing his objection to collateral crime evidence at trial during witness Kenneth Menard's testimony (X, T219).

First, it should be pointed out that there is no evidence that Fitzpatrick "ingratiated himself and became personally acquainted with the victims". It was Paul Brown who established a personal relationship with Kenneth Menard and was living in Menard's residence. Menard had met Fitzpatrick on a prior occasion, but it can't be said that he "ingratiated himself" (X, T240-2). Moreover, according to Menard, it was Paul Brown's idea to rob him, not Fitzpatrick's (X, T227-8, 244).

Second, it is simply a matter of speculation how the killer was invited into Hollinger's residence. It is also pure speculation when the trial judge "explained" the homicide of Hollinger as opposed to the release of Menard by the fact that Paul Brown was a witness to the events.

Most importantly, none of the similarities between the two incidents are particularly compelling. Knives are often used as weapons. When crimes are committed by people without their own vehicles, it is not unusual for them to steal a victim's vehicle to leave the scene. Stereo equipment is frequently stolen during offenses which take place in the victim's residence.

Homosexuals are often robbery victims; partly because many try to pick up strangers and partly because they may be less likely to report crimes committed against them. Although the two incidents took place within ten days of each other, the geographical separation is around 1500 miles.

In short, even when the cumulative similarities are considered there is nothing even approaching "a unique modus operandi". Rather the case at bar is most similar to Holland v. State, 636 So. 2d 1289 (Fla. 1994) where the defendant's prior assault on a law enforcement officer was admitted as collateral crime evidence at his trial for murdering a police officer. This Court held that the only purpose for admitting the collateral crime was to show the defendant's propensity to struggle with a police officer when arrested. Evidence of propensity is simply inadmissible under §90.404(2)(a), Fla. Stat. (1999) regardless of whether it is relevant.

At bar, evidence of the collateral crime against Menard only showed Fitzpatrick's propensity to take advantage of homosexual men by robbing them once he had

been invited into their residences. The trial judge abused her discretion by allowing it to be heard by the jury. Admission of improper collateral crime evidence is presumed harmful. Straight v. State, 397 So. 2d 903 (Fla.), cert. den., 454 U.S. 1022 (1981). It certainly was prejudicial in Fitzpatrick's trial; accordingly, this Court should reverse his conviction and remand for a new trial.

## ISSUE IV

THE SENTENCING JUDGE ERRED BY FAILING TO FIND AND WEIGH MITIGATING CIRCUMSTANCES WHICH WERE REASONABLY ESTABLISHED BY THE EVIDENCE.

In her sentencing order, the sentencing judge rejected several of Appellant's proposed mitigating circumstances. The sentencer's failure to consider and weigh appropriate evidence in mitigation violates the individualized sentencing requirement of the Eighth Amendment, United States Constitution. Hitchcock v. Dugger, 481 U.S. 393 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982).

The appropriate standard of review was set forth by this Court in Nibert v. State, 574 So. 2d 1059 (Fla. 1990) as follows:

> A trial court may reject a defendant's claim that a mitigating circumstance has been proved ... provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances."

574 So. 2d at 1062, quoting from Kight v. State, 512 So. 2d 922, 933 (Fla. 1987), cert. den., 485 U.S. 929 (1988). Whether a proposed circumstance is truly

mitigating in nature is a question of law reviewable by this Court on a de novo basis. Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997). The trial court has discretion to assign the weight given to each mitigator and its determination is reviewable on the abuse of discretion standard. Id.

Each of the rejected factors in mitigation will be examined individually.

A) Proposed Factor of "Rough Environment".

In rejecting this factor, the judge wrote:

> Defendant was raised in a "rough" neighborhood in South Boston. It is alleged
> that most of the Defendant's peers are either in jail or are dead. The Court observes that the Defendant's siblings, Deborah, Kevin, and Jackie grew up in the same neighborhood and managed to live crime-free lives.

(VIII, R1267, see Appendix).

To start, it should be recognized that the testimony at trial showed that Appellant grew up in Somerville, Massachusetts, not South Boston. Nor was there any evidence at trial about whether Appellant's brothers and sister truly led "crime-free lives".

Even if Appellant's siblings did lead exemplary lives, it does not follow that the environment they grew up in was not a "rough" or difficult one. Nor should their achievement denigrate the truth that an adolescent surrounded by criminal influences is less likely to develop into a law-abiding adult than one raised in a more positive environment.

This Court has long recognized that abuse suffered during a defendant's formative child and adolescent years is a mitigating circumstance. E.g., Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Nibert v. State, 574 So. 2d 1059 (Fla. 1990). When the trial court in Brown v. State, 526 So. 2d 903 (Fla. 1988) rejected a disadvantaged childhood as mitigation, this Court wrote:

> Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant.

526 So. 2d at 908.

Needless to say, many people who were abused as children grow up to lead law abiding lives. This does not diminish the fact that childhood abuse can

contribute to antisocial development. It must be considered as a mitigating circumstance regardless of whether a defendant's siblings have avoided criminality.

Appellant presented convincing evidence through the testimony of retired police officer Joseph McCain that the community where Fitzpatrick was raised, Somerville Massachusetts, was controlled by organized crime and gangs. Growing up, young people learned that to inform the police about criminal activity was to risk violence or death at the hands of the gangs. Not surprisingly, many of them grew up to become involved in the same drug activity and gang-related violence.

This is relevant mitigation which should have been considered by the sentencing judge. Compare, Hitchcock v. Dugger, 481 U.S. 393 (1987) (Error not to consider defendant's upbringing in a large family whose means of support was picking cotton).

B) Proposed Factor of "Recognized his Addiction and Sought Treatment".

The sentencing judge recognized that Fitzpatrick "went into a detox center in 1996. At the time of his arrest he was continuing rehabilitation with the Salvation Army and attending Alcoholics Anonymous meetings" (VIII, R1262, see Appendix). Nonetheless, she rejected this evidence as mitigating because it was "not logically connected to any capacity for rehabilitation. In fact, the evidence establishes that, over the years, the Defendant attempted rehabilitation and failed on many occasions" (VIII, R1268, see Appendix).

This Court has previously held that participation in a drug rehabilitation program is valid mitigation. Snipes v. State, 733 So. 2d 1000, 1008 (Fla. 1999). Moreover, attempted rehabilitation, even if unsuccessful, is mitigating. See, Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994) (recognized drug problem and voluntarily sought hospital treatment three times before the murders).

Accordingly, the judge should have found and

weighed in mitigation Fitzpatrick's efforts to conquer his drug and alcohol abuse.

C) Proposed Factor "Parent of One Child".

The court acknowledged that Appellant has a sixteen year old son, but found that the lack of evidence regarding Appellant's participation in the child's life meant that mitigation had not been established (VIII, R1271, see Appendix). In Jacobs v. State, 396 So. 2d 713 (Fla. 1981), this Court held that being a mother who cared for her children was a nonstatutory mitigating circumstance. Subsequently, in Holton v. State, 573 So. 2d 284 (Fla. 1990), the fact that the defendant had fathered two children was deemed mitigating.

While evidence of Appellant's parental relationship to his son is definitely relevant to the weight to be given to the mitigating factor, parenthood in itself is mitigating. Primarily, this is because of the potentially devastating effect on the child that execution of his or her parent might cause. The sentencing judge should have found and weighed

Appellant's fatherhood as a mitigating circumstance, even though there was no evidence that Fitzpatrick contributed to the child's support.

D) Proposed Factor "Prejudice to the Defendant From the Passage of Time".

The sentencing judge rejected this proposed mitigating factor, stating:

> The Defendant suggests that the Court should consider that the Defendant was not arrested until 16 years after the murder of Gerald Hollinger. For this reason, many records and witnesses were no longer available or located. The reasons for the delay in the prosecution were not offered at trial and are not in evidence.

(VIII, R1272, see Appendix).

Among the documents which Appellant's investigator attempted to locate were hospital records relating to a head injury suffered by Fitzpatrick when he was 18 or 19 (VIII, R1333), records from his prison term in Massachusetts (VIII, R1334-5) and school records other than his G.E.D. certificate (VIII, R1334-5). Clearly, these documents had the potential to make Appellant's evidence in mitigation more compelling.

A number of potential witnesses who might have aided the defense were also unable to be located. These included former prisoners who could have impeached Paul Brown's testimony at trial (VIII, R1335-6), a neighbor who might have sexually abused Appellant while he was a child (VIII, R1338-9) and witnesses to Fitzpatrick's drug use and mental state in the time frame when the homicide was committed (VIII, R1339-41). Had these witnesses been available, their testimony might also have changed the jury's penalty recommendation.

In Scott v. State, 581 So. 2d 887 (Fla. 1991), this Court considered whether the defendant's due process rights were violated by a delay of 7 1/2 years between the homicide and his indictment. Applying the test set forth in United States v. Townley[20], 665 F. 2d 579 (5th Cir.), cert. den., 456 U.S. 1010 (1982), the Scott court found that the defendant established actual prejudice resulting from the pre-indictment delay. Scott's conviction was vacated.

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[20]Appellant recognizes that the 5th Circuit has receded from Townley in United States v. Crouch, 84 F. 3d 1497 (5th Cir. 1996), cert. den., 519 U.S. 1076 (1997).

While Appellant is not aware of any case where such a due process analysis was applied to a penalty proceeding, there is no reason why it shouldn't be. A capital defendant is entitled to due process protections in the penalty trial and sentencing phases, just as in the guilt or innocence stage. Engle v. State, 438 So. 2d 803 (Fla. 1983), cert. den., 465 U.S. 1074 (1984).

At bar, 16 1/2 years passed between the homicide and Fitzpatrick's indictment. While he may have suffered no actual prejudice with regard to the guilt or innocence phase of the trial, he was prejudiced in his ability to present documents and witnesses to substantiate mitigation which could have convinced the penalty jury to recommend a life sentence. The penalty recommendation of death was returned by an 8-4 majority; if only two jurors had changed their votes the recommendation would have been life. Accordingly, any error cannot be considered harmless.

Appellant requested the sentencing judge to weigh the prejudice stemming from the delayed prosecution as mitigating evidence rather than as a constitutional

violation of due process precluding a death sentence. Certainly he was entitled to have this factor considered by the court. The sentencing judge committed reversible error by failing to find and weigh delay in prosecution as a factor supporting a life sentence.

E) Harmless Error Analysis.

This Court has held that a sentencing judge's failure to find and weigh established mitigating evidence is subject to review for harmless error. Thomas v. State, 693 So. 2d 951 (Fla. 1997). When the mitigating factors are "minor" in nature and the evidence in aggravation is "massive", the court's failure to conduct a proper analysis of mitigating evidence may be harmless because the death penalty would have been imposed anyway. Id., 693 So. 2d at 953.

At bar, the mitigating evidence cannot be termed "minor"; nor is the evidence in aggravation "massive". Of the three aggravating circumstances found by the sentencing judge, only the HAC aggravator was

particularly weighty under the circumstances. The judge did find and weigh three statutory mitigating circumstances, Fitzpatrick's "abusive home life", and six "non statutory mitigating circumstances (VIII, R1261-72, see Appendix). Further evidence that reasonable people could differ on the appropriate penalty lies in the 8-4 split jury recommendation.

Because it is by no means certain that a reweighing which included the improperly excluded mitigating circumstances would result in another death sentence, the error is not harmless. This Court should vacate Fitzpatrick's death sentence and remand this case for proper consideration and weighing of all of the mitigating factors. Campbell v. State, 571 So. 2d 415 (Fla. 1990).

## ISSUE V

THE COURT ERRED BY DENYING APPELLANT'S MOTION TO DECLARE THE FLORIDA DEATH PENALTY STATUTE UNCONSTITUTIONAL BECAUSE IT PERMITS A JURY TO RETURN A DEATH RECOMMENDATION BY A SIMPLE MAJORITY VOTE.

Prior to the beginning of the penalty trial, defense counsel filed and argued Appellant's "Motion to Declare Section 921.141, Florida Statutes Unconstitutional Because Only a Bare Majority of Jurors is Sufficient to Recommend a Death Sentence" (V, R870-1; XIV, T813-4). The trial judge summarily denied the motion (XIV, T813-4).

At the outset, Appellant recognizes that this Court has previously held that there is no constitutional flaw in Florida's provision allowing a simple majority of the jury to return a jury recommendation of death. Brown v. State, 565 So. 2d 304 (Fla.), cert. den., 498 U.S. 992 (1990); Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. den., 428 U.S. 923 (1976). However, the evolution of capital sentencing standards in the United States Supreme Court demand that these holdings be revisited.

A) Constitutional Framework of Jury Participation in Capital Sentencing.

The jury's role in capital cases is controlled by the Sixth, Eighth and Fourteenth Amendments. In Duncan v. Louisiana, 391 U.S. 145 (1968), the United States Supreme Court held that the federal guarantee of jury trial for serious offenses provided by the Sixth Amendment is applicable to the states through the Fourteenth Amendment. In so holding, the Court observed that all of the states except Louisiana and Oregon required that jury verdicts be unanimous for offenses carrying a maximum penalty of more than one year imprisonment. 391 U.S. at 158, n. 30.

The question of whether jury unanimity was constitutionally required for non-capital verdicts was decided in the companion cases of Johnson v. Louisiana, 406 U.S.356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972). Each decided by a 5-4 vote that allowing conviction upon a 9-3 (Louisiana) or 10-2 (Oregon) substantial majority of the jury was constitutionally permissible. Justice Blackmun's concurring opinion in Johnson emphasized the conditional nature of the

approval:

> I do not hesitate to say ... that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty. As Mr. Justice White points out, ... "a substantial majority of the jury" are to be convinced. That is all that is before us in these cases.

406 U.S. at 366.

The question presented at bar is whether Justice Blackmun's proposed 75% minimum or 9-3 substantial majority of the jury should be required to return a death recommendation in a capital case. Fitzpatrick's jury vote of 8-4 for death falls below that standard. Indeed, only three of the states which impose capital punishment allow for less than unanimous jury votes in order to return a death verdict. In one of these, Alabama, Fitzpatrick's 8-4 split falls below the 10-2 substantial majority required for a death recommendation. Ala. Stat., section 13A-5-46(f). Only Florida and Delaware[21] permit a bare majority of jurors to recommend a death sentence.

[21]11 Del. C. section 4209.

B) The Eighth Amendment's Requirement of Reliability in Capital Sentencing.

In the post-Furman era, the United States Supreme Court has emphasized that the death penalty cannot be constitutionally applied unless a rational distinction can be made between those defendants for whom death is appropriate and those for whom it is not. As Justice Stewart wrote in his plurality opinion in Woodson v. North Carolina, 428 U.S. 280 (1976):

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

428 U.S. at 305. In Eddings v. Oklahoma, 455 U.S. 104 (1982), Justice O'Connor elaborated:

> this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

455 U.S. at 118.

Clearly, a unanimous jury vote that death should be imposed in a given case suggests that almost any qualified jury would also find death to be the appropriate punishment. If, on the other hand, the jury vote for death is only 7-5 or 8-4, it suggests that other qualified juries might divide 6-6 or otherwise return a recommendation for life. In short, when less than a substantial majority of the jury finds death as the appropriate sentence for the defendant, the reliability of that determination as a reflection of the conscience of the community is questionable. A different outcome is easily imaginable.

C) Application to Florida Capital Sentencing Procedure.

In Brown, this Court was still adhering to its misconception that the jury's penalty recommendation was not of constitutional significance because the trial judge, not the jury, determined the sentence[22].

[22]The Brown court cited Smalley v. State, 546 So. 2d 720 (Fla. 1989) for the proposition that an unconstitutionally vague jury instruction in the penalty phase does not require vacation of a death sentence. 565 So. 2d at 308.

Espinosa v. Florida, 505 U.S. 1079 (1992) later established that the Florida capital punishment scheme actually operates with the jury and judge acting as co-sentencers. Espinosa asserted that when a Florida penalty jury presumably weighs an invalid aggravating circumstance, the judge indirectly weighs it also by giving "great weight" to the jury's penalty recommendation. Therefore, a sentence of death imposed by the trial judge can violate the Eighth Amendment requirement that capital sentencing not be arbitrary even if there is no fault in the judge's weighing of aggravating and mitigating circumstances. It is enough that the judge gave "great weight", as Florida law requires, to a jury penalty recommendation that was potentially unreliable.

Similarly, when a sentencing judge gives "great weight" to a jury penalty recommendation that was returned by less than a substantial majority of the jurors, the judge is actually indirectly weighing a recommendation that is insufficiently reliable to pass Eighth Amendment muster. Properly, the judge should give no weight to a bare majority death recommendation,

but to do so would be contrary to Florida caselaw. See, e.g. Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988), cert. den., 489 U.S. 1071 (1989). Although the judge at bar did not specifically state that she gave the jury's 8-4 death recommendation great weight, as Espinosa points out, "we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639 (1990), and gave 'great weight' to the resultant recommendation". 505 U.S. at 1082.

Accordingly, this Court should recede from prior caselaw holding that there is no constitutional infirmity in a jury's penalty recommendation of death returned by less than a substantial majority of the jurors. Fitzpatrick's sentence of death should be vacated and this case remanded to the trial court for further proceedings.

## ISSUE VI

APPELLANT'S SENTENCES OF DEATH WERE IMPOSED IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION BECAUSE THE AGGRAVATING CIRCUMSTANCES NECESSARY TO IMPOSITION OF A DEATH SENTENCE WERE NEITHER CHARGED BY INDICTMENT NOR DETERMINED BY HIS JURY.

At the outset, Appellant acknowledges that he never cited the decision of Apprendi v. New Jersey, 530 U.S. 466 (2000) in the trial court or referred to that specific issue. The Apprendi opinion did not come out until June 26, 2000, while Appellant's trial took place February 14-22, 2000. However, he did file a pretrial "Motion for Statement of Aggravating Circumstances" (IV, R627-30) which was heard August 2, 1999 (VIII, R1320-1) and later denied (VIII, R1282). In this motion, Appellant objected to the failure of the State to charge any aggravating circumstance in the Indictment for first-degree murder (IV, R627-9). He also requested the court "to obtain from the jury a special verdict where the jury notes the circumstances relied on in reaching its verdict" (IV, R629).

Therefore, there is adequate preservation of this issue for appellate review.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court reversed a defendant's enhanced sentence under a hate crime statute because the judge alone had determined by a preponderance of the evidence that the enhancement applied. Extending the holding of Jones v. United States, 526 U.S. 227 (1999) to state statutes, the Apprendi court held:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

530 U.S. at 490.

The majority opinion specifically exempted capital sentencing procedures from this holding. Justice Stevens wrote:

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.

> [Citing Walton v. Arizona, 497 U.S. 639 (1990)].

530 U.S. at 496. On the other hand, the dissenting Justices in Apprendi asserted that Walton was clearly incongruous with the Apprendi holding and was effectively overruled. Justice Thomas observed that whether capital sentencing could be exempted from the constitutional requirement of jury factfinding was "a question for another day". 530 U.S. at 523.

That day has now arrived. On January 11, 2002, the Court granted certiorari in Ring v. Arizona, Case No. 01-488, cert. granted, 122 S. Ct. 865 (2002). The Court will decide whether judicial factfinding is still viable in the capital sentencing context. Accordingly, Fitzpatrick should be permitted to state his claims relevant to the procedure followed when his sentences of death were imposed and have them considered by this Court on his direct appeal[23]

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[23]Appellant is aware that this Court has rejected application of Apprendi to the Florida capital sentencing statute. Mills v. Moore, 786 So. 2d 532, 537-8 (Fla. 2001), cert. den., 121 S. Ct. 1752 (2001). However, this position is based at least in part on the United States Supreme Court's direction to "leav[e] to this Court the prerogative of overruling its own decisions". Agostini v. Felton, 521 U.S. 203, 207 (1997).

A) Imposition of a Death Sentence Requires Finding Facts Beyond Those Necessary to Convict an Accused of First Degree Murder.

As a matter of federal constitutional law, a defendant who is convicted of first degree murder may not be sentenced to death without an additional finding. At a minimum, at least one aggravating circumstance must be found either as a sentencing factor or as an element of the offense. Tuilaepa v. California, 512 U.S. 967 (1994); Lowenfield v. Phelps, 484 U.S. 231 (1988). The aggravating circumstance must genuinely narrow the class of defendants eligible for the death penalty. Arave v. Creech, 507 U.S. 463 (1993).

In Florida, defendants convicted of first-degree murders can only be sentenced to life imprisonment unless a separate penalty trial is held. The penalty jury hears evidence relating to the aggravating circumstances delineated in §921.141(5), Fla. Stat. and is instructed to "render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify

the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist". Std. Jury Inst. - Penalty Proceedings. The penalty jury is further instructed that "each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision". Id.

However, a Florida penalty jury does not render a verdict as to which of the aggravating circumstances it found were proven beyond a reasonable doubt. Only a recommendation as to what sentence should be imposed is returned. A simple 7-5 majority is sufficient to constitute a death recommendation; which by Florida caselaw must be given "great weight" when the judge conducts his own independent weighing. Espinosa v. Florida, 505 U.S. 1079, 1082 (1992).

One constitutional problem with this procedure is that no one can tell from the jury's penalty recommendation whether all of the aggravating circumstances submitted were found by the jury to have been proven beyond a reasonable doubt or whether only a

single aggravating circumstance was considered and weighed. It is indeed likely in any case that some of the jurors will find certain aggravators proven which other jurors reject. What this means is that a Florida judge is free to find and weigh aggravating circumstances that were rejected by a majority, or even a unanimity, of the jurors. The sole current limitation on the judge's ability to find and weigh aggravating circumstances is appellate review under the standard that the finding must be supported by competent substantial evidence. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997).

If Apprendi means anything in the capital sentencing context, it at least means that a capital defendant's Sixth Amendment right to a jury trial encompasses the right to not have a jury "acquittal" on an aggravating circumstance nullified by the sentencing judge. This is the crux of the constitutional error in Apprendi; the New Jersey judge was allowed to make a finding of fact which exposed the defendant to a sentence beyond the statutory maximum when a jury might have "acquitted" the defendant of the enhancing factor.

In Florida, whenever the penalty jury is instructed on more than one aggravating circumstance there is no way to tell whether the jury rejected one aggravator but found the remaining one[s] of sufficient weight to outweigh the mitigation.

An additional problem with the absence of any jury finding with respect to the aggravating circumstances is the potential for skewing this Court's proportionality analysis in favor of death. An integral part of this Court's review of all death sentences is proportionality review to compare the facts in the current case to similar factual situations in cases where death has previously been found a proper or improper penalty. Tillman v. State, 591 So. 2d 167 (Fla. 1991). However, when aggravating factors are contested, this Court only knows which aggravators were found by the judge; it does not know how the jury resolved the contested aggravators. Therefore, this Court could also allow aggravating factors rejected by the jury to influence proportionality review. Such a possibility cannot be reconciled with the Eighth Amendment's requirement of reliability in capital

sentencing.

As applied to the case at bar, Fitzpatrick's jury was instructed on the aggravating circumstances of conviction of prior violent felony, committed in the course of a "Robbery and/or Burglary, and especially heinous, atrocious or cruel (VI, R1024; XVI, T1171-2). Of these, only Appellant's prior conviction for robbery was undisputed and presumably found by the jury[24]. Because there is no written (or oral) jury finding on aggravating circumstances, we simply cannot tell whether a majority of the jury found that the murder of Hollinger was accompanied by either a robbery or a burglary, or both. Nor can we be certain that the jury found that HAC was proven beyond a reasonable doubt.

In short, an 8-4 majority of the jury may have relied solely on Fitzpatrick's prior conviction for robbery as an aggravating factor and determined that it was enough in itself to outweigh the mitigation. If so, the court's finding and weighing of the contemporaneous felony (robbery) aggravator and HAC

[24]This conviction was stipulated to by both prosecution and defense (XIV, T859-60, 881-2).

amounted to overrides of the jury's "acquittals" on these aggravating factors. If aggravating circumstances are properly viewed as elements of capital murder which must be proved in order to impose a death sentence in Florida, the judge at bar may have usurped the jury's constitutional prerogative under the Sixth Amendment to find the facts necessary to sanction Appellant's sentence of death.

Appellant acknowledges that his argument conflicts with earlier decisions of the United States Supreme Court such as Hildwin v. Florida, 490 U.S. 638 (1989) and Spaziano v. Florida, 468 U.S. 447 (1984). However, these decisions were predicated upon a view of Florida capital sentencing where the jury's role was strictly advisory and the judge was the actual sentencer. In Hildwin, the Court rejected the defendant's contention that a specific finding by the jury on the aggravating circumstances authorizing a sentence of death was constitutionally required by the Sixth Amendment. The Hildwin court quoted from McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986):

> there is no Sixth Amendment right to jury sentencing, even where the

> sentence turns on specific findings of fact.

490 U.S. at 640.

This language from McMillan was specifically limited by Justice Stevens' opinion in Apprendi to "cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict". 530 U.S. at 487, n. 13. As previously pointed out, a Florida jury's verdict of guilt for first-degree murder only establishes a sentence for life imprisonment without possibility of parole. Therefore, Hildwin's continued viability is certainly questionable.

Moreover, the Court's recognition in Espinosa that both jury and judge are co-sentencers under the Florida statute brings into question the other premise supporting Hildwin - that the jury's role is merely advisory and hence not constitutionally significant. Espinosa represents a clear break with the Court's prior view; as held in Lambrix v. Singletary, 520 U.S. 518, 536 (1997), it "announced a new rule".

B) Other Ramifications of Apprendi.

Apprendi further held that any fact which increases the maximum penalty for a crime must also be charged in the indictment. This holding is grounded in due process and the clause of the Sixth Amendment providing that the accused "be informed of the nature and cause of the accusation". The same language appears in Article I, section 16 of the Florida Constitution.

At bar, no aggravating circumstances were charged in the indictment. As previously mentioned, Appellant's pretrial "Motion for Statement of Aggravating Circumstances" directly attacked the State's failure to specify the aggravating circum-stances and relied upon the same constitutional grounds (IV, R627). The trial court's denial of the motion was in accord with caselaw from this Court. See, Sireci v. State, 399 So. 2d 964, 970 (Fla. 1981), cert. den., 456 U.S. 984 (1982) (failure to charge aggravating circumstances in the indictment does not deprive the trial court of jurisdiction to impose a death sentence) and Maxwell v. State, 443 So. 2d 967, 970 (Fla. 1983) (failure to give the defendant notice prior to trial of the potential aggravating circumstances is a not a

denial of due process). However, after Apprendi these holdings may no longer be good law.

It is a matter of some curiosity that in the non-capital arena, this Court has gone beyond the requirements of Apprendi with respect to jury factfinding. In State v. Harbaugh, 754 So. 2d 691 (Fla. 2000), this Court considered the bifurcated proceedings in a trial for felony DUI. The Harbaugh court held that a defendant is entitled to a jury trial on both the present DUI charge and during the separate proceeding where the State must prove three prior misdemeanor DUI convictions. Apprendi, by contrast, allows the judge to find the fact of prior convictions because such convictions (absent a waiver of jury trial) were obtained by a verdict of proof beyond a reasonable doubt returned by prior juries.

The Harbaugh decision rests on the rationale that the prior offenses are an element of the crime of felony DUI and a jury must determine guilt on every element of a charged offense. However, as Apprendi points out, the difference between "elements" of an offense and "sentencing factors" is a "constitutionally

novel and elusive distinction". 530 U.S. at 494. The appropriate distinction is whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict". Id.

Regardless of whether an aggravating circumstance in §921.141(5), Fla. Stat. is labeled a sentencing factor or an element of the offense of murder eligible for a sentence of death, it is the finding of an aggravating circumstance which "exposes the defendant to a greater punishment". As Justice Adkins recognized in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), "The aggravating circumstances ... actually define those crimes ... to which the death penalty is applicable. As such, they must be proved by a reasonable doubt before being considered by judge or jury." The only constitutional flaw in the Dixon analysis is the lack of a requirement that the jury actually return findings as to which aggravating circumstances were proved.

As explained above, this flaw is a crucial one which makes Fitzpatrick's sentence of death

unconstitutionally imposed under the Sixth and Fourteenth Amendments and constitutionally unreliable under the Eighth Amendment. Accordingly, the death sentence should be vacated and the circuit court ordered to resentence Fitzpatrick to life imprisonment.

## CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Paul Fitzpatrick, Appellant, respectfully requests this Court to grant him relief as follows:

As to Issues I-III, reversal of conviction and remand for a new trial.

As to Issues IV and V, vacation of death sentence and remand for a resentencing proceeding before the judge.

As to Issue VI, vacation of death sentence and remand for imposition of a sentence of life imprisonment.

# APPENDIX

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of September, 2003.

## CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

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