IN THE SUPREME COURT OF FLORIDA

PAUL FITZPATRICK, :

Appellant, :

vs. : CaseSC00-2589
No.

STATE OF FLORIDA, :

Appellee. :

_____:

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Appellant will rely upon the statement of the case presented in his initial brief.

STATEMENT OF THE FACTS

One correction needs to be made to Appellee's rendition of the facts. At page 18-9 of Appellee's brief, during a summary of Appellant's testimony, it is asserted:

> Brown apologized to Menard, telling him he didn't know what was going on and that he didn't mean to be doing this.

In fact, it was Fitzpatrick who apologized to Menard and tried to make him more comfortable by lighting a cigarette and holding it for Menard to smoke (XII, T590-1). During his own testimony, Menard also stated that Fitzpatrick was apologetic and lit a cigarette for him (X, T247).

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.

Appellee argues that the action taken by the Legislature in creating §810.015, Fla. Stat. (2001) should be held to nullify the trial court's error in denying Fitzpatrick's motion for judgment of acquittal as to burglary as an underlying felony to first degree felony murder. In Appellee's view, the legislative clarification of intent as to how the "remaining in" language of the burglary statute should be interpreted by the courts means that what was error at the time of Fitzpatrick's trial is no longer error. In fact, Appellee asserts that the Legislature's directive in subsection (2) that the statutory interpretation be made retroactive to February 1, 2000 (two days before this Court's opinion in Delgado v. State, Case No. SC88638 issued and two weeks before Fitzpatrick's trial commenced) is tantamount to expunging Delgado from

Florida caselaw.

A) Legislative Intent.

Appellant does agree with Appellee that "legislative intent is the polestar that guides" this Court's interpretation of a statutory provision. McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998). With respect to the burglary statute, since 1975 the definition of burglary has included the "remaining in" language at issue. See, ch. 74-383, section 31, Laws of Florida and compare the prior burglary statute, §810.01, Fla. Stat. (1973). While the 2001 Legislature can say definitively what its intent is, it really cannot speak for the 1974 Legislature which passed the statute. As the United States Supreme Court has recognized:

> the view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive power.

Bell v. New Jersey, 461 U.S. 773, 784 (1983). Justice Barkett in her concurring in part, dissenting in part opinion to State v. Smith, 547 So. 2d 613 (Fla. 1989) wrote:

> Future statements of intent may be used

> to guide construction of prior statutes, but they may not be regarded as definitive and unrebuttable. This is only reasonable. A future legislature may simply be wrong in its assessment of what a prior legislature actually intended.

547 So. 2d at 620.

Appellee would have this Court substitute the intent of the 2001 Legislature for the construction given by the Delgado majority to the definition of burglary applicable to Fitzpatrick's trial. Relying on Lowry v. Parole and Probation Commission, 473 So. 2d 1248 (Fla. 1985), he urges this Court to accept §810.015, Fla. Stat. (2001) as "a legislative interpretation of the original law and not as a substantive change thereof". 473 So. 2d at 1250. This ignores the fact that the legislature in Lowry acted to correct an opinion of the Attorney General, rather than a decision of this Court. Furthermore, the subsequent legislation in Lowry benefited the prisoner as opposed to making it easier for the State to convict him of burglary.

Other caselaw cited by Appellee is also inapplicable to legislation which changes the type of evidence sufficient to prove an element of a crime. In State v.

Owen, 696 So. 2d 715 (Fla. 1997) the question was whether the doctrine of "law of the case" would apply to a prior decision of this Court which granted the defendant a new trial based upon a violation of his Miranda rights. Subsequent to the decision, the United States Supreme Court held in another case under similar facts no Miranda violation occurred. Rather than barring the defendant's confession from his retrial as "law of the case" would mandate, the Owen court held that an intervening decision by a higher court is the type of exceptional situation which justifies a departure from adherence to the doctrine of law of the case.

No legislative action was involved in Owen; the issue was simply whether this Court should correct its earlier view of the law which it now deemed to be error. However, in Trotter v. State, 690 So. 2d 1234 (Fla. 1996), a subsequent legislative enactment which conflicted with this Court's holding in Trotter's prior appeal [576 So. 2d 691 (Fla. 1990)] was also held to be a type of exceptional situation which warranted modification of the law of the case. The Trotter majority labeled the legislative enactment a "refinement"

rather than a substantive change to death penalty law.

At bar, one cannot deny that §810.02(1)(b), Fla. Stat. (2001), which redefines burglary for offenses committed after July 1, 2001, represents a substantive change in the law. The question is whether the expressed legislative intent that the unamended burglary statute be interpreted by Florida courts in the pre-Delgado manner can or should be given effect in Fitzpatrick's appeal.

B) Cases Where This Court Has Not Let the Legislature Nullify Its Prior Holding.

One of the issues in Booker v. State, 514 So. 2d 1079 (Fla. 1987) was whether subsequent legislation could eliminate a defendant's right to appellate review of the length of a guidelines departure sentence which this Court recognized in Albritton v. State, 476 So. 2d 158 (Fla. 1985). The Legislature had responded to Albritton with an amendment to §921.001(5), Fla. Stat. (1985) which eliminated appellate review for the extent of a departure from a guidelines sentence. See, ch. 86-273, Laws of Florida. The State argued that the amendment should be applied to all defendants whose sentences were on appeal

after its effective date, July 9, 1986, regardless of when the crimes were committed.

The Booker court observed that defendants who committed crimes before the effective date of the amended statute would lose their ability to challenge a guidelines departure sentence as an abuse of discretion by the sentencing judge if the amendment was applied retroactively. Consequently, ex post facto provisions of the Florida and Federal Constitutions meant that Florida courts would continue to review the extent of a guidelines departure sentence for all defendants whose crimes were committed prior to July 9, 1986.

Also in 1987, this Court considered in Carawan v. State, 515 So. 2d 161 (Fla. 1987) whether a defendant who was convicted of both attempted manslaughter and aggravated battery based upon shooting the victim once with a shotgun must have one of the convictions vacated. The Carawan court recognized that legislative intent controls whether multiple punishments can be imposed for one act which violates more than one criminal statute. The question was whether the presumption created by the

Blockburger[1] test, codified as §775.021(4), Fla. Stat. (1985), was the only rule of construction which the courts should apply in absence of a clear legislative intent to punish a defendant for two criminal offenses committed during one episode.

The Carawan majority held that the rule of lenity, codified as §775.021(1), Fla. Stat. (1985), comes into play as a rule of construction "when legislative intent is equivocal as to the issue of multiple punishments". 515 So. 2d at 168. Therefore, even when two criminal statutes each require proof of a fact that the other does not, two convictions are impermissible when "there is a reasonable basis for concluding that the legislature did not intend multiple punishments". 515 So. 2d at 168. The Carawan majority concluded that there was no evidence that the legislature intended to authorize multiple punishments when the separate offenses of aggravated battery and attempted manslaughter were committed by "one single underlying act" and ordered the trial court to vacate one of the convictions.

The Florida Legislature quickly reacted to the

[1]Blockburger v. United States, 284 U.S. 299 (1932).

Carawan decision. In ch. 88-131, s. 7, Laws of Florida subsection (4)(a) of section 775.021, Florida Statutes was modified and the legislature stated its intent "not to allow the principle of lenity ... to determine legislative intent" with specified exceptions. The effective date of this legislation was June 24, 1988.

The question of whether this restoration of the pre-Carawan interpretation of legislative intent would be applied retroactively arose in State v. Smith, 547 So. 2d 613 (Fla. 1989). The State argued that the legislature overrode Carawan and that the override should be retroactively applied to crimes committed before the effective date of the bill. In a plurality decision, this Court agreed that Carawan had been overridden but held that the expression of legislative intent regarding rules of construction could not be retroactively applied.

The Smith court wrote:

> First, it is a function of the judiciary to declare what the law is. 10 Fla. Jur. 2d, Constitutional Law, s. 166. Although legislative amendment of a statute may change the law so that prior judicial decisions are no longer controlling, it does not follow that court decisions interpreting a statute are rendered inapplicable by a subsequent amendment to the statute.

> Instead, the nature and effect of the court decisions and the statutory amendment must be examined to determine what law may be applicable after the amendment. See, 13 Fla. Jur. 2d, Courts and Judges, s. 140.

547 So. 2d at 616. Applying this language to the case at bar, this Court cannot simply allow nullification of Delgado; rather, "the nature and effect" of Delgado and §810.015, Fla. Stat. (2001) "must be examined to determine what law may be applicable after the amendment".

C) Retrospective Application of §810.015, Fla. Stat. (2001) to Fitzpatrick Would Violate the Ex Post Facto Provisions of the United States and Florida Constitutions.

Article I, section 10 of the Florida Constitution expressly prohibits certain laws:

> No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

The United States Constitution, Article I, section 10 similarly prohibits the states from passing ex post facto laws. In Lindsay v. Washington, 301 U.S. 397 (1937), the United States Supreme Court observed that the essence of

the ex post facto constitutional provision is to "forbid[] application of any new punitive measure to a crime already consummated to the detriment or material disadvantage to the wrongdoer". 301 U.S. at 401.

One of the recognized reasons for the constitutional ban on ex post facto legislation is to "restrict[] governmental power by restraining arbitrary and potentially vindictive legislation." Weaver v. Graham, 450 U.S. 24 at 29 (1981); Waldrup v. Dugger, 562 So. 2d 687 at 691 (Fla. 1990). It also serves to "uphold[] the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." Weaver v. Graham, 450 U.S. at 29, n.10.

At bar, Fitzpatrick would clearly be disadvantaged by applying legislation enacted after his trial, §810.015, Fla. Stat. (2001), because nullification of Delgado would have the effect of declaring the State's evidence at his trial sufficient to prove the offense of burglary when this evidence was insufficient under Delgado's interpretation of the burglary statute. As Chief Judge Schwartz of the Third District wrote in his concurring

opinion to Braggs v. State, 27 Fla. L. Weekly D379 (Fla. 3d DCA February 13, 2002):

> it seems obvious that overruling Delgado occurred or will occur only because of chapter 2001-58, Laws of Florida. In other words, if the statute had not been passed, Delgado would be applied to this case, as it was in Lyons v. State, 791 So. 2d 36 (Fla. 2d DCA 2001) and Eltaher v. State, 777 So. 2d 1203 (Fla. 4th DCA 2001), review denied, 799 So. 2d 217 (Fla. 2001).
>
> * * *
>
> To do otherwise, as a result of the later statute (no matter how the overruling opinion may be phrased), is simply to give that statute an adverse retroactive effect which, in turn, is directly forbidden by the ex post facto clause. U. S. Const. art. I, s. 10, cl.1; Dugger v. Williams, 593 So. 2d 180 (Fla. 1991).

27 Fla. L. Weekly at D381.

Although the burglary statute did not change between the time of this homicide (February 8, 1980) and the enactment of §810.015, Fla. Stat. (2001), the interpretation of the "remaining in" language of the statute was not specifically limited by this Court to "surreptitious remaining in" until the Delgado decision. In fact, as of the time of the homicide, no Florida court had construed the "remaining in" portion of the burglary

statute.[2] If the judicial construction of the burglary statute as of February 8, 1980 were to be applied to Fitzpatrick for ex post facto purposes, then this Court certainly could not hypothesize that an earlier court, if presented with the issue, would have necessarily preceded Ray v. State, 522 So. 2d 963 (Fla. 3d DCA 1988) and held that withdrawal of consent to remain in a dwelling could be proved by circumstantial evidence.

In short, the rule of lenity as applied in Delgado must also be applied to Fitzpatrick if this Court intends to consider whether the 1980 interpretation of the burglary statute should control this appeal. As the Delgado majority wrote:

> the most favorable interpretation of Florida's burglary statute is to hold that the "remaining in" language applies

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[2] See the dissenting opinion by Chief Justice Wells in Delgado:

> The law in respect to the "remaining in" part of the burglary statute has been settled in Florida since 1983 by this Court's decision in Routly v. State, 440 So. 2d 1257 (Fla. 1983), and, in respect to the withdrawal of the "remaining in" consent, since 1988 by the decision in Ray v. State, 522 So. 2d 963, 965 (Fla. 3d DCA 1988).

776 So. 2d at 242.

> only in situations where the remaining in was done surreptitiously. This interpretation is consistent with the original intention of the burglary statute. In the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent. Rather, burglary was intended to criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant.

776 So. 2d at 240. As the only evidence at bar shows that Fitzpatrick was invited into Hollinger's residence, his motion for judgment of acquittal as to felony murder on the underlying felony of burglary should have been granted and the resulting conviction must be vacated.

D) Fundamental Fairness.

In Carmell v. Texas, 529 U.S. 513 (2000), the Court described the common interests served by the Ex Post Facto Clause and the fundamental fairness provision of the Due Process Clause of the Fourteenth Amendment as follows:

> A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof .... In each instance, the

> government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.

529 U.S. at 532-3.

When Paul Fitzpatrick was tried during the week of February 14-18, 2000, he was entitled to have the judicial construction given to the burglary statute by this Court in Delgado, decided February 3, 2000, applied by the trial judge. He moved for judgment of acquittal as to burglary on the specific grounds that his entry into Hollinger's house had been consensual (XII, T561-5). The trial court ruled that while "the presence was consensual", "I think it's a reasonable assumption that the victim withdrew whatever consent that he may have given to remain in the residence and, thus, it could be found the Defendant's continued presence in the apartment could have amounted to burglary" (XII, T570). This analysis is consistent with pre-Delgado caselaw and with the retroactive expression of legislative intent.

However, at the time of Fitzpatrick's trial, it was clearly error because burglary could not be proved by the State under the Delgado construction of the burglary statute.

It would be fundamentally unfair to Fitzpatrick to ignore the error committed at his trial which allowed his jury to convict him of felony murder on a legally insupportable basis. The legislature's later expressed intent regarding the definition of burglary, even if made retroactive, cannot be applied to convert trial court error in application of the then-existing law declared by this Court into a legitimate ruling. As argued in Fitzpatrick's initial brief, the error cannot be harmless and his conviction for first degree murder must be vacated.

ISSUE II

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

In Delaware v. Van Arsdall, 475 U.S. 673 (1986), the United States Supreme Court wrote:

> We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness."[citing Davis v. Alaska, 415 U.S. 308, 318 (1974)]

475 U.S. at 680.

At bar, Appellee asserts that crossexamination as a matter of right is "limited to the subject matter of the direct examination and matters affecting the credibility of the witness". Brief of Appellee, page 44. Beyond that, the trial court has "broad discretion". Id. However, the importance of crossexamination must be recognized as central to a fair trial. The Court wrote In Chambers v. Mississippi, 410 U.S. 284 (1973):

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the

> constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.

410 U.S. at 295.

At bar, Paul Brown was not only the star prosecution witness; he was also the person accused by Appellant of having committed the murder himself. Therefore, motive is a legitimate and relevant area for crossexamination on Brown just as it is relevant evidence to be presented by the prosecution against a criminal defendant.

The State attributed a pecuniary motive to Fitzpatrick for robbing and killing Hollinger. Certainly, Paul Brown had an equal pecuniary motive because the two men were sharing their limited financial resources. Moreover, Paul Brown had a motive based upon the homosexuality of the victim which Fitzpatrick did not share. This is why defense counsel wanted to

crossexamine Brown with respect to his mental condition of post-traumatic stress syndrome, being molested by his father, and his accusation that state witness Menard had raped him when he was 16. All of these subjects were germane to Appellant's theory of defense that Brown was the actual killer and Fitzpatrick was only present in Hollinger's residence when the homicide took place.

Failure to allow this crossexamination cannot be held harmless because the jury must have considered Brown's testimony (and not simply the physical evidence) in reaching their verdict. As to the penalty phase, the prejudice is even greater. Given the evidence, the jury might have found Appellant guilty of first degree felony murder while finding that Brown also participated. Conflicting evidence on who actually killed a homicide victim is a reasonable basis for a jury to recommend a sentence of life. Cooper v. State, 581 So. 2d 49 (Fla. 1991); Pentecost v. State, 545 So. 2d 861 (Fla. 1989); Wasko v. State, 505 So. 2d 1314 (Fla. 1987).

Similarly, with a proper crossexamination, the jury could have concluded that Brown may have targeted Hollinger, just as he did Menard, because of

homosexuality. Evidence that a co-perpetrator masterminds a criminal episode has also been held a reasonable basis for a jury's life recommendation. Dolinsky v. State, 576 So. 2d 271 (Fla. 1991).

Because the State's motion in limine to restrict crossexamination of Paul Brown was granted, the jury was not given a true picture of Brown's character, tainting their assessment of his credibility as a witness. A new trial should be ordered.

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.

Appellee argues in his brief that the collateral crime evidence was properly admitted to prove A) identity, B) intent, C) motive, D) to rebut anticipated defenses, and E) to establish the entire context out of which the criminal conduct occurred. Each of these contentions will be addressed in separate subsections, following the format of Appellee's brief.

A) To prove identity.

Appellee sets forth some similarities between the Menard and Hollinger incidents, but ignores the requirement that a unique pattern be shown before collateral crime evidence may be used to prove identity. The cases cited by Appellee where this Court held the evidence admissible are readily distinguishable. For instance, in Randall v. State, 760 So. 2d 892 (Fla. 2000), the defendant choked his sexual partners during intercourse; a pattern of activity that was at least highly unusual. Similarly, in Schwab v. State, 636 So. 2d 3 (Fla. 1994) and Duckett v. State, 568 So. 2d 891 (Fla. 1990), the defendants targeted specific types of young individuals to commit sexual offenses against and followed a specific pattern to encounter their prey. Chandler v. State, 702 So. 2d 186 (Fla. 1997) involved a pattern of luring female tourists onto the defendant's boat where they were sexually assaulted. These were truly unique modii operandi.

By contrast, being invited into a person's home and then robbing that person of stereo equipment (whether it was preplanned or spontaneous) is an all-too-common

scenario which does not point to a specific defendant. E.g., Bowles v. State, 804 So. 2d 1173 (Fla. 2001); Bruno v. State, 574 So. 2d 76 (Fla. 1991). It was error to admit evidence of the Menard robbery to establish Fitzpatrick's identity as the killer of Hollinger.

B) To prove intent.

The killer's intent was never in issue. Fitzpatrick testified that Brown, not he, stabbed Hollinger to death. There was no claim of self-defense or other issue where intent would be relevant.

C) To prove motive.

The State's theory has always been that Fitzpatrick murdered Hollinger because Brown and Fitzpatrick were desperate for money. However, when Brown was asked how long the funds that he and Fitzpatrick brought from Massachusetts lasted, he testified:

> A. Well, they never really diminished because every car that we stole, we were stealing vans and people on vacation, they are leaving their stuff, their personal items in the vans themselves, and we were taking them and hocking them, bringing them to pawn shops.

(X, T313). Also, when Brown and Fitzpatrick left the Floridan Hotel, they were able to stay with Brown's

relatives for a couple of weeks. Thus, they were never destitute.

Another problem with admitting evidence of the Menard incident to prove a pecuniary motive is that the motive for terrorizing Menard and robbing him was "to teach him a lesson" (X, T300; XI, T397). Appellee does not allege that Hollinger was killed "to teach him a lesson"; therefore, the motives for the two crimes were different. Moreover, it was Brown's idea to rob Menard (X, T227-8; 244). Fitzpatrick had always worked for a living (X, T296; XI, T396).

Admittedly, the factual scenario in Heiney v. State, 447 So. 2d 210 (Fla. 1984), cited by Appellee, is similar to the case at bar. It should be noted that two justices (Boyd and McDonald) dissented from the majority opinion in Heiney on the ground that the prior crime evidence had little relevance to the murder for which the defendant was on trial and the prejudice clearly outweighed the probative value. Also, in Heiney, the murder victim's vehicle was driven cross-country and his credit cards were used over a period of weeks. At bar, both automobiles belonging to the victims were abandoned a few

hours or less from the crime scene.

D) To rebut anticipated defenses.

Appellee argues that collateral crime evidence may be admitted to rebut anticipated defenses. This may be fine when the "anticipated defense" actually materializes. However, this Court has reversed cases such as Perry v. State, 801 So. 2d 78 (Fla. 2001) and Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986) where the State presented prior bad act evidence against a defendant under the guise of "anticipatory rebuttal".

Certainly, it might be possible that Fitzpatrick's defense would develop in such a manner that it would "open the door" to use of the Menard incident as rebuttal evidence for the State. But unless the door is opened, inadmissible evidence remains inadmissible regardless of what the State might anticipate.

E) To establish the entire context out of which the criminal conduct occurred.

Appellee next asserts that "the facts and circumstances surrounding the Menard crimes occurring only days earlier were essential to understanding how and why the Hollinger murder occurred in Florida and the jury

would not likely understand the crime without the background information". Brief of Appellee, p. 63. To the contrary, the incidents were entirely separate.

While the Menard incident was the impetus for Fitzpatrick and Brown to leave Massachusetts to avoid arrest, there was no inherent reason why they had to come to Florida. They simply came to Florida for the same reason that many other tourists do in the winter or over spring break. The jury could easily understand that Fitzpatrick and Brown would come to Florida to drink and party without having to know about the crime committed against Menard.

The case most comparable to the facts at bar is Castro v. State, 547 So. 2d 111 (Fla. 1989). Several days before the defendant, Castro, stabbed the victim to death with a steak knife, he had tied up another person in the same apartment and threatened to stab him with a steak knife. This Court held that the witness who had been threatened on the prior occasion should not have been allowed to testify about the event because it only tended to show "bad character and propensity for violent behavior". 547 So. 2d at 115.

Admission of Menard's testimony about the robbery committed by Brown and Fitzpatrick was error for the same reason. This Court should vacate Fitzpatrick's conviction and order a new trial where the collateral crime evidence would not be admitted.

ISSUE IV

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

Appellant will rely upon his argument as presented in his initial brief.

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.

Appellant will rely upon his argument as presented in his initial brief.

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.

Appellee argues that Appellant did not preserve this claim for appellate review by presenting it in the trial court. To the contrary, the constitutional framework for the claim was argued by trial counsel.

Regarding the failure of the State to charge any aggravating circumstances in the Indictment, Fitzpatrick's pretrial "Motion for Statement of Aggravating Circumstances" argues:

> 3. Absent the notification of aggravating circumstances, the use of these aggravating circumstances to sentence the Defendant to death would violate the Accusation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 15(a) of the Florida Constitution.

(IV, R627). The motion goes on to contend:

> Without an indication of the specific

> aggravating circumstances the State will rely on and without a requirement that the jury be specific regarding circumstances it relied on in reaching its verdict, the sentencing process will remain arbitrary.
>
> Therefore, the Defendant requests this court to order the State to list specific aggravating circumstances it will rely upon in seeking the death penalty. Additionally, the Defendant request[s] the Court to obtain from the jury a special verdict where the jury notes the circumstances relied on in reaching its verdict.

(IV, R629).

At page 79 of Appellee's brief, he partially quotes from Appellant's in-court argument to the trial judge. In fairness, more of Appellant's presentation should have been quoted to avoid misinterpretation. Counsel argued:

> We have no way of knowing what factors the State and the jury is using to determine whether or not a life or death recommendation should be rendered. We are not only asking the State to provide us with aggravating circumstances, we are asking for a special jury verdict form that allows the jury to set forth what factors they are considering in recommendation of life as opposed to death.

(VIII, R1320).

Taken together, all of the above arguments made in the trial court were adequate to preserve Fitzpatrick's

claims under the Sixth, Eighth and Fourteenth Amendments. Accordingly, this Court should decide the merit of his claims.

CERTIFICATE OF SERVICE

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

CERTIFICATION OF FONT SIZE

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Respectfully submitted,

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