IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC09-2016

ERIC KURT PATRICK,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

****

A CAPITAL APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY

CRIMINAL DIVISION

****

INITIAL BRIEF OF APPELLANT

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Specially Appointed Public
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Oral Argument Requested

Appellant, Eric Kurt Patrick, respectfully requests oral argument in this capital appeal.

TABLE OF CONTENTS

(IV)

WHETHER THE TRIAL COURT ERRED IN GIVING THE INVOLUNTARY INTOXICATION JURY INSTRUCTION OVER DEFENSE OBJECTION

(V)

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS TO SUPPRESS STATEMENT AND PHYSICAL EVIDENCE

(VI)

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE STATE TO INTRODUCE CERTAIN MEDICAL EXAMINER AUTOPSY PHOTOGRAPHS INTO EVIDENCE

(VII)

WHETHER DEFENDANT WAS DENIED A FAIR TRIAL AS A RESULT OF THE PROSECUTOR'S IMPROPER GUILT PHASE CLOSING ARGUMENTS

(VIII)

WHETHER THE TRIAL COURT EMPLOYED THE WRONG LEGAL STANDARD IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE COUNT OF FIRST DEGREE MURDER

(IX)

WHETHER DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS

(X)

WHETHER THE TRIAL COURT ERRED IN PENALTY PHASE JURY INSTRUCTIONS

(XI)

WHETHER DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

(XII)

WHETHER THE TRIAL COURT IMPROPERLY CURTAILED DEFENSE COUNSEL'S PENALTY PHASE CLOSING ARGUMENT

(XIII)

WHETHER THE TRIAL COURT ERRED IN LIMITING DEFENSE EXPERT'S TESTIMONY AND PRESENTATION DURING THE PENALTY PHASE

(XIV)

WHETHER THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

(XV)

WHETHER THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

TABLE OF CITATION OF AUTHORITIES

Statutes

Rules

INTRODUCTION

Appellant was the Defendant in the trial court and Appellee, the State of Florida, was the prosecution. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the record on appeal, “SR” will designate the supplemental record on appeal, and "T" will designate the pre-trial, trial and sentencing transcripts.

STATEMENT OF JURISDICTION

This Court has appeal jurisdiction in this case. Defendant was sentenced to death. Rule 9.030(a)(1)(A)(i), Florida Rules of Appellate Procedure, provides that the Florida Supreme Court has jurisdiction of final orders of courts imposing sentences of death. See also Section 921.141(4), Florida Statutes.

STATEMENT OF THE CASE

Guilt Phase

Defendant Eric Kurt Patrick was charged by Indictment with one count of first degree premeditated murder of Steven Schumacher by manual strangulation and/or blunt force trauma, in violation of Section 782.04(1), Florida Statutes [**Count I]**; one count of kidnapping with the intent to inflict bodily harm upon or to terrorize Steven Schumacher, in violation of Section 787.01, Florida Statutes [**Count II**]; and one count of robbery by taking property from the person or custody of Steven Schumacher, which property had a value of $300 or more by

the use of force, violence, assault or putting in fear, in violation of Section 812.13(1), Florida Statutes [**Count III**]. (R. 3-5). The State filed a notice of intent to seek the death penalty. (R. 22-24).

Prior to trial, the defense filed a motion to suppress statement and motion to suppress physical evidence. (R. 576-588). The trial court conducted an evidentiary hearing on this motion. The court also considered the deposition of witness Joanne Decembre. (R. 615-640). Thereafter, the court entered an order denying the motion. (R. 612-614). In addition, the defense filed a motion in limine requesting that the court prohibit the prosecution from introducing evidence of Defendant's tattoos. (R. 589-590). The court entered an order reserving ruling on this motion. (R. 641). Subsequently, the court granted the motion. (T. 13). The State argued a motion in limine seeking to prohibit the defense from eliciting testimony that the victim commonly picked up gay men in the park and took them home. (T. 15). The defense argued that the victim's pattern and practice of behavior was relevant because it showed how Defendant and the victim met, it dispelled any idea that Defendant targeted the victim, and it explained the role of the aggressor in this case. (T. 16). The court granted the State's motion, noting that such evidence would place the victim in a bad light and would unnecessarily inflame the jury. (T. 16-18). The defense filed a motion for reconsideration. (R. 659-663; T. 798-802; T. 805-806). The State repeated its arguments in favor of the motion. (T. 802-

805). The court re-affirmed its prior order granting the State's motion. (T. 806-809).

The defense filed numerous penalty phase motions. R. 57-391; R. 428-507; R. 763-768; R. 772-863). The court conducted a hearing. The court entered several orders denying most of foregoing motions. The court granted the motion for recess between guilt/penalty phases and the motion for favorable evidence. (R. 519-575; T. 2259-2337). The defense raised certain motions again prior to jury selection and the court reaffirmed its earlier rulings. (T. 24-28).

Trial commenced in the cause on February 2, 2009. (R. 642; T. 1). Prior to jury selection, the defense reiterated its requests for individual voir dire and a jury questionnaire. The court had reserved ruling on some of the motions previously but now denied the motions. (R. 411-427; R. 559-561; T. 23-24). The court began voir dire. (T. 29). The court asked the venire numerous questions, including questions on the death penalty and juror hardships. The prosecutor proceeded to question the venire, including inquiries on the jurors' feelings on the death penalty, as well as on jurors' hardships. After the prosecutor's initial questioning, the court informed the venire that it would try to get the lawyers to agree on who had to return the next day or who would be excused. (T. 268-269). At this preliminary hearing on cause challenges, the court excused various jurors for cause over defense objection. (T. 275-276; T. 278; T. 279-280; T. 280-281; T. 282-283). The

defense reiterated its objections after the jurors were excused. (T. 290). The court continued the voir dire with additional jurors. The court informed the new venire about the death penalty and inquired into juror hardships. The State inquired about the new venire's views on the death penalty, and inquired about juror hardships. The court conducted a second hearing on cause challenges. At this second hearing, the court excused additional jurors for cause over defense objection. (T. 521-522; T. 523-524; T. 525). The defense preserved its objections. (T. 532). Thereafter, the defense was permitted to question the jurors. (T. 564). A further hearing on cause challenges was conducted, at which time the court excused several jurors for cause over defense objection. (T. 763-779). Subsequently, the court entertained peremptory challenges. (T. 779-788). Voir dire continued the following day with an additional panel of jurors. After the court questioned the jurors, the court permitted the parties to question the new panel. The court entertained additional cause challenges. (T. 1046-1053; T. 1056-1060). The defense continued with voir dire the next day. The court conducted another hearing to consider any additional cause and peremptory challenges. The court granted two cause challenges over defense objection. (T. 1180-1189). A jury was ultimately selected and sworn. (R. 642; T. 1204). The defense did not accept the panel and reiterated its objections prior to the jury being sworn. (R. 642; T. 1189-1190).

The court gave the jury preliminary instructions and read the indictment. (R. 642; T. 1211-1217). The State presented an opening statement. (R. 642; T. 1217-1230). Defendant's counsel thereafter presented opening statement. (R. 642; T. 1230-1236). At trial, the State called twelve (12) witnesses in its case-in-chief. The court conducted a preliminary charge conference prior to the State resting its case. (T. 1768-1775). Following testimony of David Nicholson, the State rested its case. (R. 643; T. 1843). Defendant presented his arguments on motions for judgments of acquittal. (R. 643; T. 1845). The court denied the motions. (R. 643; T. 1846-1847). The court continued the charge conference. (R. 643; T. 1847-1849; T. 1857-1878). Defendant Patrick was asked by the defense counsel and the court if he desired to testify and Patrick stated that he did not want to testify or call any witnesses. (T. 1850-1857). The defense called Detective Terry Gattis. (R. 643; T. 1881). Thereafter, the defense rested its case. (R. 643; T. 1884). The defense had renewed his motion for judgment of acquittal prior to Det. Gattis's testimony. The court denied it. (T. 1879). Subsequently, counsel for the State presented closing argument. (R. 643; T. 1886-1913). The defense then presented closing argument. (R. 643; T. 1913-1938). Counsel for the State presented a rebuttal closing argument. (T. 1940-1966).

The court instructed the jury. (R. 643; R. 680-710; T. 1997-2022). The jury retired to deliberate. (R. 643; T. 2022). The defense renewed its previous

objections to the instructions and renewed its previous requests for special jury instructions. (T. 2019). The court entered an order sequestering the jury. (R. 711-713). During deliberations, the jury requested to see the video of Defendant's confession, the box of pictures, the crime scene video, the transcript of witness Dietz's testimony, the M.E. report and the transcript of Patrick's interview with Mr. Nicholson. (R. 714; T. 2048-2049). The court informed the jurors that the court reporter would read the testimony and record it on a digital recorder. (R. 737; T. 2052-2054).[1] The jury also requested an English dictionary. (R. 715). The court informed the jury that they were to rely on the instructions and that the law did not permit dictionaries in the jury room during deliberations. (R. 715; T. 2039-2040). The jury requested the bank records from the ATM card showing the transactions made. This request was granted. (R. 717; T. 2046-2047). The jury requested the legal definitions of robbery, kidnapping and first degree murder. The court informed the jury that the definitions were contained in the packet of instructions given to them. (R. 718; T. 2039). The jury responded that the instructions had not been received. (R. 719).[2] Thereafter, the court reconvened to

[1] The following morning, the court had the DVD statement and the crime scene video played for the jury and had the requested read-back read to the jury. (T. 2066-2117; T. 2117).

[2] During an in-court session, one of the jurors requested a list of the evidence. The court responded that there was no list, but jurors would be entitled to have any evidence they requested except those items marked biohazardous. (T. 2044-2046).

consider the jury's verdicts. Defendant was found guilty on all three (3) counts as charged in the indictment. (R. 720-722; T. 2124-2125). The jury was polled. (T. 2125-2126). Subsequently, Defendant filed a motion for new trial. (R. 753-755). The court denied the motion. (R. 884; T. 2514-2516).

Penalty Phase

Prior to the penalty phase, the defense renewed its previously filed penalty phase motions, filed objections to the standard jury instructions and filed several penalty phase instructions and advisory sentence instructions. (R. 740-752; R. 870-878; R. 879-881). Moreover, the defense filed a motion to allow introduction of expert testimony regarding the cost of imposing the death penalty v. life without possibility of parole, and a motion for reconsideration of the penalty phase admissibility of the victim's habit of seeking out younger men who are homeless and drug addicted to offer them help in exchange for sexual favors. (R. 756-759; R. 760-762). The State filed a motion in limine regarding the penalty phase listing fifteen separate areas of inquiry which it sought to prohibit. (R. 866-869). On April 17, 2009, the court ruled on the foregoing motions, renewing its prior rulings on Defendant's previously filed penalty phase motions, denying Defendant's new motions and requested instructions, overruling the defense objections to the standard jury instructions, and granting, in part, the State's motion in limine. The

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In addition, one juror, Mr. Martin, informed the court that he was suffering anxiety in the jury room. The court promised more breaks. (T. 2118-2119).

court reserved ruling on certain requests by the State. (T. 2512-2555; T. 2559-2666; T. 2666-2676).

Thereafter, the trial court conducted the penalty phase of the trial. The defense renewed its previous objections to the standard jury instructions and penalty motions. (T. 2694; T. 2715). The court gave preliminary instructions. (R. 905; T. 2730-2732). The State of Florida presented an opening statement. (R. 905; T. 2733-2741). Thereafter, counsel for Defendant presented an opening statement. (R. 905; T. 2741-2765). The State called Scott Tyson and Dawn Allford. Thereafter, the State rested its case. (R. 891; R. 905; T. 2801). The defense called several witnesses, including Defendant Eric Patrick, and rested its case. (R. 891; R. 905; T. 3149). The court conducted a charge conference. (R. 905; T. 3151-3189). The defense renewed its objections to the court's proposed instructions. (T. 3189).

The prosecution presented a penalty phase argument. (R. 905; T. 3201-3222). The defense presented its penalty phase argument. (R. 905; T. 3223-3258). The court instructed the jury. (R. 894-892; R. 905; T. 3261-3271). After deliberations, the jury returned an advisory verdict recommending a death sentence by a vote of 7-5. The jury was polled. (R. 904; R. 906; T. 3282-3285). The court ordered a pre-sentence investigation report. (T. 3291).

The Spencer Hearing and Final Order

On August 20, 2009, the court conducted the final sentencing hearing, pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993). The defense called two experts. Defendant and his mother made statements to the court. (R. 907; R. 1025-1123). The defense presented a *Spencer* Memorandum in support of a life sentence. (R. 908-951).

On October 9, 2009, the court issued its sentencing order. (R. 959-977; T. 2146-2171). The court imposed the death penalty on Count I. (R. 976; R. 981-983; T. 2169-2170). The court sentenced Defendant to a mandatory life imprisonment term on Count II as a prison releasee reoffender. The Court sentenced Defendant to 30 years, as a violent habitual felony offender, with a 15-year minimum-mandatory term, on Count III, as a prison release reoffender. The court ordered the sentence on Count II to run consecutive to the imposition of death on Count I and ordered the sentence on Count III to run concurrent with Count II, but consecutive to the imposition of death on Count I. (R. 976; R. 984-989; T. 2170-2171). Defendant filed a notice of appeal. (R. 990). This appeal follows.

STATEMENT OF THE FACTS

Guilt Phase

At trial, the State called Robert Lyon as its first witness. Mr. Lyon testified that in September, 2005, he was living with his girlfriend, Jennie Scott, at the Park

Crest Apartments. He first met Steven Schumacher in Daytona Beach in 1994. In September, 2005, Schumacher was living in the same apartment complex near Mr. Lyon and Ms. Scott. Schumacher lived alone. Lyon and Scott would see him practically every day. Schumacher's physical condition was poor due to the fact that he had fallen and had neck problems. Schumacher would drive on occasion but was not allowed to drive after dark. Lyon would take Schumacher out for grocery shopping and doctor's appointments. Lyon was authorized to take care of Schumacher's financial affairs. Lyon and Scott would help Schumacher with cooking and cleaning. (T. 1277-1282). Lyon testified that the last time he saw Schumacher alive was on Sunday evening around 5:30 or 6 o'clock, when he stopped by to offer Schumacher some food. Lyon saw that Defendant Eric Patrick was with Schumacher. Lyon had seen Patrick around for about 2 weeks prior to that Sunday evening. Patrick was staying with Schumacher. On the Sunday in question, Lyon visited Schumacher for a few minutes. Lyon recalled that the apartment was very clean, just as Schumacher always kept it. Patrick was having a beer with Schumacher. Schumacher owned a Lincoln Town car and a truck. (T. 1282-1288). Lyon testified that he did not have any further contact with Schumacher that evening. On Monday morning Schumacher did not call Scott as he normally would do. Lyon and Scott left for work. When Lyon returned home from work later that day he noticed that Schumacher's truck was missing. Lyon

did not know why it was missing, but thought that maybe Schumacher had gone off on a short trip. On Tuesday morning, Schumacher did not make his usual phone call to Scott. Lyon went to work and while at work he received a call from Scott asking him to return home (T. 1288-1291). Lyon was not allowed entry into Schumacher's apartment when he returned. (T.1300). Lyon identified photographs of Schumacher and Patrick. (T. 1291-1292).[3] Lyon also identified various photographs of Schumacher's apartment, his personal belongings and his truck. (T. 1296-1298).

Jennie Scott testified that in September, 2005, she was living with Lyon at an apartment in Oakland Park, Florida. Scott knew Steven Schumacher for about two years. Scott would assist Schumacher on occasion by taking him shopping, picking up his prescriptions, cleaning his apartment, cooking for him and helping him in his recovery after surgery. Schumacher would drive his pickup truck, but not after certain hours. Scott first met Defendant Eric Patrick about a week and half prior to Schumacher's death. She met him about three times. She tentatively identified Mr. Patrick in the courtroom. (T. 1318-1323).[4] Scott last saw Schumacher alive on Sunday when he stopped by at her apartment. (T. 1323-

[3] During his testimony, Lyon was unable to make a definitive identification of Patrick in the courtroom. He stated that Patrick was "maybe" the person sitting in the courtroom. (T. 1298-1299).

[4] Scott was unsure of her identification. However, defense counsel stipulated to identification. (T. 1323).

1324). Scott testified that she would normally get a phone call from Schumacher every day. He would tell her if he had any appointments or explain what he was going to do. The day after Schumacher stopped by her apartment, Scott testified that he did not call as usual. She went to work. That evening, Scott noticed that Schumacher's truck was not parked in the lot. Scott thought that maybe he had gone out to dinner. On Tuesday morning, Scott noticed the truck was still missing. Scott talked to her mother, who told her to call the police. Scott called the police and waited outside Schumacher's apartment. Scott opened the door to the apartment and walked in. Scott entered the bedroom, turned on the lights and noticed the bedroom was in disarray. She saw blood everywhere. At that point, Scott ran out of the apartment. The officer who had accompanied Scott into the apartment came out and told her Schumacher was dead. Scott provided the police with a description of Eric Patrick. (T. 1325-1334).

Deputy James Snell, Broward Sheriff's Office, testified that he was dispatched to an apartment complex in Broward County, Florida, on September 27, 2005, in relation to concerns expressed by a neighbor for her friend's safety. He met Scott, who entered Schumacher's apartment with her key. Scott entered while Snell waited outside. Shortly thereafter, Scott pleaded for Snell to enter. Snell entered the bedroom. Scott pulled back the comforter on the bed and she started to scream. She ran out of the apartment. Snell discovered Schumacher's body in the

bathtub just as his back-up officer arrived. Snell noticed that Schumacher was very bloody, he was tied with his hands and feet bound behind him and he had tape around his face. He was stiff and blood was pooled under his body. Snell checked for a pulse, but there was no sign of life. (T. 1342-1352). The police immediately secured the apartment and waited for the homicide detectives and crime scene to arrive. (T. 1354). Sgt. Richard Lacerra, Broward Sheriff's Office, testified that he responded as back-up for Deputy Snell. Lacerra stated that he met with Snell and entered the apartment. Lacerra noticed a lot of blood in the bedroom and saw the victim in the bathtub. Lacerra and Snell locked up the apartment and placed crime scene tape around the apartment and a nearby dumpster. (T. 1357-1361).

Sergeant Mark Suchomel, Broward Sheriff's Office, testified that he was assigned to the crime scene unit and responded to the Schumacher apartment. Sgt. Suchomel met with Deputy Snell and Sgt. Lacerra as well as Detective Bukata. Suchomel photographed and video-taped the scene.[5] Suchomel testified there were no signs of forced entry. (T. 1380-1384). Suchomel described the scene using the scene photographs. He pointed out those areas showing blood evidence. (T. 1392-1397). Suchomel testified that he discovered human teeth underneath part of the bedding, as well as suspect flesh. (T. 1397). Suchomel also described the pooling of blood in the bathtub. (T. 1398). He testified that the victim was taken out of the

[5] The video tape of the scene was shown to the jury. (T. 1389).

tub and it was determined that the material around his ankles appeared to be torn sheets from the bedding in the bedroom. (T. 1399). Altogether, three different types of material were used to bind the victim's wrists (tape, torn material and telephone cord) and two different materials were used to bind the victim's ankles (torn material and lamp cord). (T. 1400). Suchomel testified that when the victim was found he had brown tape about his head going horizontally and vertically. (T. 1401-1402). When he removed the tape from the victim's face, Suchomel discovered what appeared to be a pillow case folded up and placed over his mouth. He noted certain injuries to the victim's chin area. (T. 1402).

Suchomel testified that he participated in the search of a duffle bag located in Pompano. (T. 1403).[6] Inside the bag, Suchomel found two shoes called Ozark Trail, size 9, tan and gray in color, with suspect blood stains. The soles of the shoes also had a particular pattern. This pattern was later compared to the impressions found at the scene. In addition, Suchomel discovered a pair of Calvin Klein jeans, men's briefs and white socks, each with suspect blood stains (T. 1405-1407). Suchomel testified about the various items of evidence collected at the apartment. These items included a trash can, telephone cords, clothing, pillow cases and cover, masking tape, a paper towel, a bed comforter, human teeth, a

[6] The defense renewed its pre-trial motion to suppress physical evidence concerning the duffle bag. The court re-affirmed its earlier ruling denying the motion to suppress. (T. 1403; T. 1449; T. 1454; T. 1456-1457).

bedroom lamp, pieces of wood found under the bed and a bed sheet. (T. 1412-1423; T. 1427-1429; T. 1432-1447). Suchomel also testified about items recovered from the victim's truck and the duffle bag, including an application for vehicle vessel certification, insurance papers and receipts, the duffle bag, jeans and boots. (T. 1447-1449; T. 1453-1457).

Dr. Gertrude Juste, Medical Examiner's Office, testified that she responded to Schumacher's apartment on September 27, 2005. Dr. Juste stated she was shown the victim's body inside the bathtub. Dr. Juste noted that the victim's hands were bound behind his back and his two ankles were tied to his hands. Moreover, the victim showed signs of lividity, which is the pooling of the blood in the part of the body lying against a surface. Dr. Juste noticed that tape was put over the victim's mouth right below the nostrils and passed over the head and over the ears. The nostrils were not completely closed, but because the victim was on his belly and because his arms and legs were tied together, his ability to breathe would have been significantly reduced. (T. 1484-1489).

At the Medical Examiner's Office, Dr. Juste performed an autopsy of Mr. Schumacher.[7] The body was photographed. Dr. Juste described the autopsy with the use of photographs taken at the time.[8] She testified that Mr. Schumacher

[7] The defense stipulated to Mr. Schumacher's identity. (T. 1482).

[8] The defense had objected to certain photographs which the prosecution intended to use. The Court conducted a hearing outside the presence of the jury and

weighed 174 pounds and was in full rigor mortis. According to Dr. Juste, Schumacher's body showed signs consistent with having died within 48 hours. (T. 1490-1496). The victim was missing a finger. (T. 1497). He had multiple impact injuries to his head and neck. He had an abrasion to the left forehead and abrasions on the right side of his head. He had an abrasion to the top and lateral aspect of his eye. Moreover, the victim had an abrasion to the right eyelid and a laceration on the right cheek and right side of the nose. He also had a laceration of the left side of the scalp and another laceration on the left ear. Dr. Juste surmised that Mr. Schumacher was hit with a heavy object, crushing tissue rather than cutting it. In addition, the victim sustained a laceration to the left cheek and left side of the face at the corner of the mouth. He had lacerations to the left jaw and the right chin region. He had contusions to the upper lips. He had lost some teeth. The gum area hemorrhaged. Dr. Juste also found hemorrhages on the right and left side of the head. (T. 1497-1499). Dr. Juste explained that the bleeding, bruising and hemorrhaging were sustained while Mr. Schumacher was alive. (T. 1500).[9] Dr. Juste proceeded to describe the foregoing injuries by using photographs. (T. 1500-

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reviewed the photographs to be used. Some photographs were excluded. The defense, however, maintained that some of the photographs were overly gruesome and unnecessary for the medical examiner's testimony. The Court overruled the objections. (T. 1467-1478). The defense renewed the objection prior to the photographs' admission at trial. (T. 1492). The defense also raised the issue in its motion for new trial. (R. 753-755, ¶10).

[9] Dr. Juste conceded on cross-examination that any of the described blows could have rendered Mr. Schumacher unconscious. (T. 1529).

1506). Dr. Juste also undertook an internal examination of the victim. Her internal examination showed internal hemorrhaging in the head, subdural hemorrhage in the brain, a swollen brain, and hemorrhage in the neck and voice box. Dr. Juste opined that Mr. Schumacher's death was not caused by manual strangulation or by a ligature of any kind.[10] Rather, Dr. Juste concluded that the victim sustained compression of the neck. (T. 1507-1513). Dr. Juste testified that someone could cause that type of injury by standing on the neck. (T. 1515).[11] Dr. Juste determined that Mr. Schumacher died as a result of blunt force trauma of the head as well as strangulation. (T. 1518). Both injuries occurred about the same time. (T. 1520). Dr. Juste testified that Mr. Schumacher was probably alive when he was taped around the mouth. (T. 1523). However, Dr. Juste could not reach an opinion on how long the victim lived between the time he sustained his injuries and his death. (T. 1523). Dr. Juste could not identify any "defensive wounds" on the victim. (T. 1528).

Detective David Currie, Broward Sheriff's Office, testified that he responded to police headquarter to assist in the investigation of the Schumacher case. In particular, Det. Currie photographed the suspect, Defendant Eric Patrick,

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[10] Dr. Juste testified that the majority of the injuries sustained by the victim could have been caused with a fist. (T. 1530).

[11] Dr. Juste also testified that the neck compression could have been caused if Mr. Schumacher's neck had been pressed down on the bed's solid wood footboard. (T. 1537-1538).

and collected DNA standards. He identified Defendant in the courtroom. (T. 1539-1543).

Detective Kurt Bukata, Broward Sheriff's Office, testified he responded to a BP gas station in September, 2005, and came into contact with Defendant Eric Patrick. Bukata identified him in the courtroom. He ran Patrick's name and determined there was a warrant for his arrest. He arrested Patrick and noticed he had injuries on the knuckles of his hands. Patrick was carrying a duffle bag. Bukata asked Patrick about the injuries to his hands and Patrick stated he had been in a fight with some guys who had jumped him to steal his sneakers. Patrick had punched the guy in the head and may have clipped him in the mouth. (T. 1554-1560). At the station, Patrick changed clothes. Bukata identified the items taken from the duffle bag. (T. 1560-1562).[12]

Thomas Scott Hill, a forensic analyst employed by the Broward Sheriff's Office, was tendered and accepted as an expert in blood stain pattern analysis. (T. 1563-1569). Hill testified that he also worked in the area of shoe print impressions. Hill responded to the Schumacher apartment. He made sure everything was photographed. He put on high intensity lights to illuminate the area. Hill was able to reach an opinion about the blood stain pattern in the apartment. In the bed area, Hill determined that the majority of the blood was

[12] The defense reiterated its previous objections to the admissibility of the duffle bag and items. (T. 1550; T. 1562).

located in the headboard area. There was an excess of one thousand blood droplets in this area. (T. 1569-1576). Hill was able to form an opinion as to where the struggle occurred, causing the blood drops he saw on the headboard area. According to Hill, the blows occurred below the headboard level. Hill could only say there were at least two blows. (T. 1582-1583). Hill also examined the area of carpeting between dresser and the footboard. According to Hill, a bloody object was lying in that area for some time causing a pooling effect. Based on the linear pattern which originated from this area and spread outward, Hill reached the conclusion that the pattern could have been caused by strikes or blows. (T. 1585-1590). Lastly, Hill testified about shoes prints found in the Schumacher apartment. Hill was given a pair of boots for comparison. Based on his analysis, Hill determined that the boots made the blood shoe impression in the Schumacher apartment. (T. 1595-1604).

Martin Dietz, a sentenced prisoner, testified that in September-October, 2005, he was housed at the Broward County Jail and came into contact with Defendant Eric Patrick. Dietz explained that Patrick was moved into his room in the infirmary and stayed about a week. Dietz identified Patrick in the courtroom. According to Dietz, Patrick informed him about what he had done. Dietz decided to come forward because Patrick was not remorseful. Over the course of the week, Patrick let him know about his case. Dietz became disturbed and unsettled because

Patrick showed pleasure in what he had done. Dietz began to write down what Patrick was telling him because it was bothering Dietz. Dietz eventually informed his attorney and provided them with an affidavit explaining what Patrick had told him. Subsequently, Dietz met with the prosecutor and law enforcement officers. Dietz maintained he was not expecting anything in return for the information. According to Dietz, the way Patrick expressed how he enjoyed what he had done, showing no remorse, made Dietz sick. Dietz testified that he has placed himself at risk because other prisoners suspect he is a snitch. (T. 1651-1659).

Dietz testified Patrick told him that he met the victim at Holiday Park on September 20, 2005. They were both under a pavilion after the victim came out of the rain. Patrick mentioned that Schumacher was homosexual. He was 71 years old and an anesthesiologist. Patrick led Schumacher to believe that he was also homosexual and Schumacher invited him to lunch at a Burger King. Schumacher then invited Patrick to his home. Patrick stayed there. Schumacher helped him out. Patrick got a job as a welder a couple of days before the incident. According to Dietz, Patrick told him he had planned to take Schumacher's money and kill him from the beginning. Patrick beat the ATM pin number out of Schumacher and then beat him to death. Patrick told Dietz that he had a lunch packed in a truck and had an alibi planned out. Patrick, however, was arrested by the police at a convenience store. (T. 1659-1660). Patrick told Dietz that initially he asked Schumacher for his

pin number and when Schumacher resisted he started to beat him. Schumacher started screaming like a little girl and Patrick saw fear in his eyes, which made Patrick feel powerful and in control. Patrick liked it. According to Dietz, Patrick said that he beat Schumacher, breaking his nose and causing lacerations on his face. The beating occurred in the bedroom. Patrick taped up Schumacher's face, and taped his arms and legs behind him, in the bathtub so that it would appear that there had been a home invasion robbery. Patrick stated that Schumacher begged for his life and he enjoyed taking the man's life. (T. 1661-1662). Patrick told Dietz that after he left Schumacher's residence, he took the ATM card and used it to take money out of Schumacher's account. Patrick went back to the residence to make sure Schumacher was dead. He put Schumacher in the bathtub to keep him out of sight and so his blood would drain down the drain. He planned to return at night to clean things up but he never returned because he was stopped by the police at a convenience store. He believed that Schumacher's friends had informed on him. According to Dietz, Patrick told him he tried to throw the police off during his post-arrest statement by saying he was surprised that Schumacher was dead. Patrick also told him that he was thinking of different defenses, such as self-defense and depraved mind. Patrick also provided Dietz with a lot of personal information, including his date of birth and social security number. (T. 1662-1665). Dietz maintained he was not expecting any type of benefit from the State for his

cooperation in this case. He continued to cooperate with law enforcement on other cases. (T. 1665-1666).[13] Dietz testified that all the information he received on this case came directly from Patrick and no other source. (T. 1666-1667).

Kevin Noppinger testified he worked as a director at a private DNA firm. Noppinger was accepted as an expert in the field of DNA. (T. 1693-1695). Noppinger testified about DNA in general. (T. 1696-1701). He received certain items in this case for analysis. In particular, he received a swab kit from Defendant Patrick and samples from Mr. Schumacher. In addition, Noppinger received a swab from a piece of wood, a cut portion of material identified as a comforter, a cutting from another comforter, suspected human teeth, a footwear impression, men's briefs, jeans and swabs from boot soles. He did not test the teeth, but he tested the items for the presence of blood or other biological fluid. The swab from the right shoe sole of the boot did not test for blood. After making a determination that blood was on the items, Noppinger proceeded to do DNA testing. He obtained profiles from each of the items. At that point, Noppinger determined whether the items matched either of the two individuals in question. (T. 1701-1712). Noppinger reached the conclusion that Schumacher's DNA was on the wood, the

[13] Dietz admitted he was presently working as an informant. (T. 1668). He admitted that after he was sentenced to 20 years, the prosecutor in Patrick's case, Assistant State Attorney Shari Tate, testified at Dietz's mitigation hearing held to reduce Dietz's sentence. (T. 1670-1672).

jeans, and the footwear impression, while Patrick's DNA was found on the men's briefs and jeans. (T. 1717-1723; T. 1724-1729).

Detective David Nicholson, Broward Sheriff's Office, testified he responded to Schumacher's apartment. He was briefed by road patrol on the situation. Nicholson was assigned as the lead investigator. Nicholson did a short walk-through of the apartment while crime scene was documenting the apartment through video and photography. Witnesses Jennie Scott and Robert Lyon were interviewed. Thereafter, Defendant Eric Patrick was located. (T. 1735-1738). Det. Nicholson testified the police did an area canvass to determine if anyone saw anything unusual. In addition, the police initiated an investigation into the victim's life and history. Nicholson attended Schumacher's autopsy. He also contacted SunTrust to determine if there had been any activity on Schumacher's ATM card. Nicholson obtained the records from SunTrust. The records showed that three different bank locations were visited after Schumacher's death. Within the span of three hours after Schumacher's death, withdrawals of $876 were made. (T. 1738-1743; SR. 106). The police were able to pinpoint the bank locations were the withdrawals were made. As a result, they obtained photographic evidence on the person making the withdrawals. These photographs, showing Defendant Patrick making the withdrawals, were shown to the jury. Nicholson noticed Patrick carrying a blue duffle bag with him. (T. 1743-1748).

Detective Nicholson testified that he was informed that Defendant Patrick had been arrested. In addition, he learned that Schumacher's truck was found at the Tri-Rail Station in Boca Raton, Florida. Patrick was transported to the police station. He was placed in an interview room, equipped with audio and video taping capabilities. The audio and video were activated. Nicholson entered the room a short while later and began speaking with Patrick.[14] Patrick told the detective that he was no dummy, he knew what this was about, and he needed to get it off his chest. Nicholson read Patrick his *Miranda* rights and Patrick signed the form, waiving his rights. (T. 1748-1753; SR. 9). The video- taped statement was shown to the jury and transcripts of the statement were handed out to jurors. (T. 1758-1760; T. 1783-1784; SR. 10-86).

In the statement, Patrick informed Nicholson that Schumacher out of kindness allowed him to stay at his house. Schumacher wanted affection. Initially, Schumacher did not seek sex.[15] Schumacher bought him shoes and a belt for work. He allowed Patrick to drive his truck. On Sunday night, Schumacher came on to him "too powerful" and Patrick "freaked out." (T. 1789-1791). Patrick told

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[14] Defense counsel renewed his objections to this statement. The court noted and overruled the objection, re-affirming its previous ruling. (T. 1750; T. 1753; T. 1759; T. 1781-1782).

[15] Patrick told Nicholson that Schumacher had met him at Holiday Park. He offered him lunch and also offered him assistance. He realized Schumacher was homosexual from the beginning. He admitted Schumacher performed oral sex on him once. Schumacher liked affection. (T. 1810-1813).

Nicholson he beat Schumacher in the bedroom. He kept hitting him. He then tied him up because he did not want Schumacher "to go to the law" on him. (T. 1791). Patrick explained that he used a telephone cord to tie Schumacher up and placed tape around his face. He did not want Schumacher to scream. According to Patrick, the incident began when he gave Schumacher a message. They both drank some beers and went to bed. Schumacher tried to have anal sexual intercourse with Patrick but Patrick refused. Patrick stated that Schumacher was "riding up on me squeezing me." After Patrick told him to stop, Schumacher stopped. After a little while, however, Schumacher tried again. Patrick said that at time he had been drinking and eating pills and turned around and "cut loose on him." (T. 1791-1794). Patrick hit Schumacher with his fists. He tied him up at the base of the bed and taped his mouth. He put him in the bathtub. Patrick knew that Jenny and Robert, Schumacher's friends, would come by. Robert was Schumacher's ex-lover. Patrick left the apartment around 1 o'clock in the morning. He took Schumacher's truck and left it at the Tri-Rail Station. He left his lunch in the truck. (T. 1794-1796). Thereafter, Patrick used Schumacher's ATM card. Schumacher had let him use it before and had given him the PIN number. Patrick insisted he had the card with him. He threw it away. He knew the balance on the card was around $4,000.00. Patrick felt that Schumacher was buying him by

allowing him to use the card. (T. 1799-1803; T. 1813-1819).[16] Patrick told Nicholson that he did return to the apartment after buying some crack. He cleaned up a little bit. He checked on Schumacher and was scared he was dead. Patrick asked Nicholson if Schumacher was dead and was told that he was, in fact, dead. (T. 1803-1805).[17] Patrick explained he had to drag Schumacher to the bathtub. (T. 1805-1806). He explained that he hit Schumacher and could not stop. Schumacher asked him not to tie him up. He taped his mouth when Schumacher yelled "help real loud once." (T. 1806-1807). Patrick was positive that Schumacher was alive when he placed him in the bathtub. He was still breathing and he mumbled. He thought Schumacher's teeth were knocked out. Patrick insisted he did not use any object to hit Schumacher. (T. 1808-1810).[18]

Det. Nicholson also testified that he obtained a recording of telephone conversations between Patrick and his mother.[19] Transcripts of the calls were

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[16] Patrick admitted he took a watch from the dresser, about $100 in cash from Schumacher's wallet and the keys to Schumacher's truck (T. 1819-1821).

[17] Patrick informed Nicholson that he did not do anything to make sure Schumacher was dead. He tried to take his pulse and check on his breathing. He told Nicholson, "I didn't want that man to die…" (T. 1825-1827).

[18] Patrick admitted placing his hands around Schumacher's neck while he was on top of him on the bed. He grabbed him by the neck. (T. 1832). He subsequently told Nicholson he thinks he used a wooden box to strike Schumacher. (T. 1837-1838).

[19] The defense had previously objected to the introduction of these calls. The court had overruled the objection. (T. 1685-1689). During Nicholson's testimony, the defense renewed its objections to the admissibility of the calls. The court re-affirmed its previous ruling. (T. 1755).

handed out to the jurors. The recording was played as well. (T. 1753-1758; SR. 119-122). Det. Nicholson also testified that an inmate by the name of Martin Dietz contacted him to talk to him about Patrick. Dietz provided certain details of the case which had not been made public. Nicholson took a sworn statement from Dietz. Nicholson did not promise Dietz any assistance or benefit. (T. 1760-1762). Following Nicholson's testimony, the State rested its case. (T. 1843).

The defense called Detective Terry Gattis, who identified a photograph of Schumacher's finger. He was wearing a ring. This was documented by Detective Suchomel. (T. 1881-1884).

Penalty Phase

On June 12, 2010, the court reconvened for the penalty phase. The State introduced two stipulations in the record. The State introduced a certified copy of Defendant Patrick's conviction for armed carjacking on April 17, 1998, in which he was sentenced to 9.1 years. (T. 2766; SR. 224-230). The State also introduced a certified copy of a document from the Department of Corrections showing that Defendant Patrick was released on the aforementioned sentence on August 9, 2005, and that Patrick was in the controlled release program until February 8, 2007. (T. 2767; SR. 221-223).

The State called Scott Edward Tison. Mr. Tison testified that on November 25, 1997, he met Defendant Patrick at a bar. They went back to Tison's apartment.

Thereafter, Tison agreed to take Patrick to Patrick's place. Patrick gave Tison directions on where to drive. When Patrick asked him to stop, Tison stopped his truck. At that point, Patrick pulled out a knife and placed Tison in a headlock. Patrick demanded Tison's money and wallet. He demanded Tison's debit card. Patrick told Tison to return to his house. As Tison was driving back he noticed two police cars. Tison slammed on the breaks, elbowed Patrick and fled out of the truck. Patrick jumped in the driver's seat and took off. Tison told the officers what happened and one of the officers gave chase in an unmarked vehicle. Tison identified Patrick to the officers. (T. 2778-2786).

Dawn Allford testified that she was Steven Schumacher's daughter. Allford said she last saw her father in June, 2005, when she came to visit him after he had fallen. Allford explained that her father suffered from two fused disks, that he had trouble with his elbow and was recovering from a broken neck. She testified that her father could not move quickly. She knew Jennie Scott and Robert Lyon, who assisted her father. Allford read a statement to the jury, giving the jurors a short family history. (SR. 261-263).[20] She noted that her father suffered a heart attack and lost his thumb. Her father went back to school and eventually attended nursing school and obtained a degree. Allford told the jurors that she went on family

[20] The court redacted part of the statement prior to Allford's testimony. (T. 2700-2710). The defense renewed its motion to have victim impact heard only by the court. (T. 2787).

vacations around the country. Allford's parents divorced. After Allford got married and started a family, Steven Schumacher would re-assure her that he would always be there for her. Her father followed his grandchildren's athletic, academic and professional lives. She concluded by telling jurors that she would always be her father's little girl who wrote him love notes and left them on his pillow when he would work late. (T. 2791-2798). The State rested. (T. 2801).[21]

Dorothy Dolighan testified on behalf of the defense. She knew Defendant Patrick's family since 1969. She met Patrick's mother in Alaska. She and Defendant's mother, Ingrid, were both from Berlin, Germany. According to Dolighan, Ingrid's husband, Don Patrick, was very opinionated and she did not get along with him. Dolighan remained friends with Ingrid even after Ingrid left Alaska. She visited Ingrid in Colorado and noticed a lot of tension in the home. Defendant's father treated the children strictly. Dolighan kept in touch with Defendant even after his arrest in 2005. She loves Defendant very much. (T. 2822-2830).

Carsten Patrick, Defendant's brother, testified that the family moved around a lot because their father would get re-stationed in the army. He lived with Defendant until he was 17 years old. Their father was a sergeant major in the army. After he retired, he took a job as a mountain rescue specialist in Colorado.

[21] The State moved to re-introduce all the guilt phase evidence. The Court granted the request. The defense renewed its previous objections. (T. 2800-2801).

He was overly strict. He would beat the boys, ordering them to take their pants down, bend over a chair and beat them with a belt from the ankles to the back. He would strike them about 20 times or so per beating. Anything could trigger the beatings, such as lying, or smoking or bringing home bad grades. Sometimes, their father would slap them. They never knew what would cause him to explode. The boys were always walking on egg shells. The father was also verbally abusive. Carsten testified that his father had a major alcohol problem and his mother would ban alcohol from the house. He would go on binges. The father received residential in-patient alcohol treatment twenty-two times. Their father also hit their mother. He would hear noises from their bedroom. He would see his mother with black eyes, bruises and contusions. On more than one occasion, their mother was hospitalized as a result of the beatings. She had her jaw wired shut once and had her arm in a cast. Their father would also verbally abuse her. (T. 2834-2851). Carsten testified that his mother eventually filed for divorce. During the pendency of the divorce, their father engaged in threats and throwing rocks through windows. Defendant was about 10 at the time. After the divorce, Carsten moved in with his father. Eventually, Defendant joined him and their father. The father continued to drink and physically abuse them. Their father remarried. He remembered that the new wife was also physically abused. One time, his father beat him with his fists. Shortly thereafter, Carsten left the house and moved to

Alaska. Defendant remained behind at age 12. (T. 2852-2857). Carsten testified that he has remained in contact with Defendant over the years. He explained that Defendant is important to him because he was the only person that knows what they went through. (T. 2857-2859).

Philip Arth, an investigator with the Broward County Public Defender's Office and former Ft. Lauderdale police homicide detective, testified that he was assigned as a capital investigator in this case. Mr. Arth was asked to collect evidence and locate witnesses. Arth was unable to collect any military records on Defendant's father because the father was uncooperative. In addition, Arth was unable to find the parents' divorce records or Defendant's birth certificate. Arth did obtain some of Defendant' school and juvenile records. (T. 2867-2874).

Defendant's mother, Ingrid Franke, testified she was born in Berlin, Germany, in 1938. She lived in Germany until 1958. She went to school until the ninth grade. She met Defendant's father in Germany where he was stationed. They married shortly thereafter and she gave birth to her son Carsten. They left Germany and moved to the United States. Ms. Franke testified that they moved around a lot because her husband was transferred from place to place. Defendant was born in Alaska. At one point, they moved back to Germany and her husband was sent to Vietnam. When her husband returned, they moved around again until her husband retired. He got a job in Colorado and the family moved again. Ms.

Franke divorced her husband in 1973. She was tired of all the abuse. In particular, her husband would beat her. Out of the clear blue he would hit and slap her. One time she suffered a broken arm and she was in the hospital five days. She counted between ten and thirty times that she ended up with black and blue eyes. Her husband was more disposed to violence when he was drinking. Her husband was hospitalized for his drinking. Her husband would hit the boys with a belt. It was not normal punishment. One time he found out that Defendant, who was 10, had a pack of cigarettes and he beat him unmercifully. Shortly thereafter she filed for divorce. Her husband was also verbally abusive, calling her a bitch, a slut, a tramp and a whore, sometimes in front the children. He also verbally demeaned the boys. (T. 2887-2918). Ms Franke testified that her husband would change his moods like the wind. When he had a mood change, the boys would to go to another room in the house. In 1973, she had her husband arrested for abusing Defendant. After she filed for divorce, her husband took a large rock and threw it through the window of the house and later made threats to her, saying he would firebomb the house. She took out a restraining order, but his calls continued. Her husband frequently used racist slurs. Although the court ordered her husband to pay child support he never did and she could not support them. Defendant was a good kid. (T. 2926-2937). Ms. Franke identified various family photographs. (T. 2937-2942). At one point, Defendant moved in with his father. About two years later, Defendant ran away

from home. (T. 2943-2944). Defendant was placed in a foster home and had to be treated at a psychiatric facility. Ms. Franke never stopped loving him. Defendant has become an emotional support to her. He is a good artist. (SR. 212-213; SR. 264). Ms. Franke identified some of his drawings. She has visited him in jail and will continue to love him always. (T. 2945-2951).

Father Jerry Singleton, the pastor at St. Anthony Catholic Church, testified that part of his ministry included prison visits. Fr. Singleton had a masters in counseling, specializing in substance abuse. Fr. Singleton got involved in the prison ministry in 2003-2004 when he received a call from the jail chaplain for assistance. About three years ago, Defendant Patrick requested to see him. Fr. Singleton heard Patrick's confession. He had discussions with Patrick over a period of time. Patrick took full responsibility for his actions and expressed deep regret for what had happened. Fr. Singleton concluded that much of what had gone wrong in Patrick's life was related to drug and alcohol addiction. Patrick began a 12-step addiction program in jail. Fr. Singleton noted Patrick's spiritual progress, including receiving the sacraments on an ongoing basis. Fr. Singleton found Patrick to be very intelligent and sincere. He understood that Patrick saw alcohol abuse during his upbringing and childhood. Patrick is amenable to treatment. In fact, Fr. Singleton testified that Patrick has the ability to help others who have suffered addiction. (T. 2954-2965).

Defendant Eric Patrick testified. Patrick stated that he remembered a little about Germany. Most of his memories go back to when he lived in Alaska. Patrick remembered a lot of outdoor activities. He started school in Alaska. He looked up to his older brother, Carston. Patrick testified that he pushed a lot of the bad memories away. He remembered the beatings, when his father would make him take his pants down and strike him with a belt. Usually, the beatings were related to some type of behavior, such as getting bad grades or using cigarettes. Patrick would get marks from the beatings, from his back down to his ankles. Sometimes, Patrick would not know when a beating was about to occur. He would see the results of his mother getting beaten. He started seeing this around age 5 or 6. At times, he would hear the beating from another room. Patrick was very frightened. As he grew older, Patrick learned to avoid confrontations in the home. He would stay out of the house as much as possible. While in the home, he would remain on his best behavior. He agreed with his brother that living at home was like walking on egg shells. Patrick conceded that his father had admirable qualities and that he loved him. He did leave his mother to live with his father and brother. His father would sometimes leave Patrick and his brother in the mountains for a week by themselves. Looking back on it, he realizes that this was extremely irresponsible. His father would drink a lot. He would get more aggressive when drinking and would hit him harder or longer. His father would also verbally abuse

him. When he went to live with his father, his father would berate his mother, calling her a lot of bad things. Patrick eventually ran away being in fear of his father. He packed a duffle bag and went out the window. (T. 2985-3007). Patrick hitchhiked around. For two years he lived in foster care. He was evaluated at a psychiatric hospital. Eventually, Patrick left the foster care placement. He moved across the western United States. Sometimes he stole things to survive. (T. 3007-3009). Patrick testified that the first time he tried drugs was when he was 8 years old. He smoked marijuana. By age 11, Patrick was smoking marijuana regularly. He tried LSD and alcohol, and smoked angel dust and tried other hallucinogens. When he turned 18, Patrick started using cocaine. He was introduced to IV drug usage. Occasionally, he used heroin. He started using opiates and oxycotton. He smoked crack and tried methamphetamine and ecstasy. Drugs led him into trouble. Patrick conceded he has been convicted ten times. The first offense was in Colorado. He went to prison. He was released but returned to the use of drugs and was jailed again. (T. 3009-3019). Patrick lived with his mother for a time in the early 1980s in Florida. Later, he left for Colorado. He was jailed again. In 1985, Patrick was released. He returned to his drug life. He married his girlfriend and went from job to job. In the late 1980s, Patrick got in trouble again and went back to prison. He was released in 1996. He went back to prison in 1997 after the carjacking case involving Mr. Tyson. He was

released from prison in 2005. (T. 3020-3028). Patrick testified that he went back to doing drugs. He stated that Steven Schumacher was a good person. Patrick testified he was embarrassed and humiliated by what he had done. He announced he accepted responsibility for it. He lives with it every day. (T. 3028-3030).[22]

Dr. Christopher Fichera was called by the defense. Dr. Fichera is a licensed clinical and forensic psychologist, who has had extensive experience in capital case mitigation evaluations. (T. 3057-3063). Dr. Fichera testified that he interviewed Defendant Patrick and some family members. Dr. Fichera also reviewed police reports, a DVD of Patrick's statement to the police and medical records from Denver Children's Home and the University of Colorado Medical Center. Based on the foregoing, Dr. Fichera was able to put together a power-point presentation to illustrate mitigating factors. (T. 3063-3066).[23] Dr. Fichera explained that a psycho-social evaluation involves exploring Defendant's history and finding out pertinent pieces of information about the history for the jury's consideration during the penalty phase. Dr. Fichera read a brief family history. (T. 3068-3070). Dr. Fichera was guided by two concepts in his evaluation: moral culpability and predisposition. Moral culpability deals with blameworthiness.

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[22] On cross-examination, Patrick maintained he was under the influence of drugs when he killed Schumacher. He believed that he still had some effects of the drugs in him when he gave Det. Nicholson his statement. (T. 3033).

[23] The court granted the State's motion to remove a large section of the presentation. (T. 2972-2974). The defense objected, noting that the court had materially limited mitigation at "the 11th hour." (T. 2978-2980).

According to Dr. Fichera, the degree of blameworthiness for individuals for criminal conduct may vary depending on what factors and experience shaped or influenced the choice made by a particular person. Mitigation involved factors which may have diminished a person's self-control, what shaped the choice made, and what shaped his morality and value system. Dr. Fichera testified that the Department of Justice (DOJ) researched the question of why certain children engaged in violent behavior. The DOJ engaged numerous researchers and it was determined that certain factors (biological, psychological and sociological) present during a person's childhood and adolescence pre-disposed the person to violence. Dr. Fichera explained that everyone has risk factors and an evaluator uses scales, that is, the more damaging factors go up the more risk factors go up and moral culpability goes down. Dr. Fichera testified that he looked at certain risk factors, including community disorganization, family management problems, family conflict, parental attitudes toward substance abuse, academic failure, and association with delinquent peers. He also looked at certain protective factors, including female involvement, intelligence, and positive social interaction. (T. 3071-3075). Dr. Fichera also looked at predisposition factors, such as peer affiliation, parental involvement, structured home life, positive sex role models and multiple family transitions (moving from place to place). (T. 3076-3078).

Dr. Fichera testified about how the foregoing factors applied to Defendant Patrick. Dr. Fichera pointed out that Defendant's family moved around a lot (T. 3079-3082), Defendant had an absent father for long periods of time and, when his father was present, he was often intoxicated and abusive (T. 3082-3083; T. 3093), Defendant was exposed to domestic violence and abuse early in life (T. 3083-3084; T. 3092-3093)[24], and Defendant abused drugs (T. 3086; T. 3096). Dr. Fichera testified that Defendant's developmental history was very negative based on such factors as inadequate parental supervision, abusive father, poor parenting techniques, victim of child abuse, witnessing domestic violence, poor role models, chaotic and scary home environment, depression, and multiple foster home placements. (T. 3088-3089; T. 3094-3095).

Dr. Fichera concluded that Defendant had a psychologically damaging childhood and adolescence. By age 13, Defendant was frightened, was losing control of his behavior, and was exhibiting early adolescent depression. (T. 3098-3099). Dr. Fishera testified he believed that Defendant was very much predisposed to a variety of problems and predisposed, according to the research, for violent behaviors based on the extent of his risk factors. (T. 3101). Dr. Fichera made clear

[24] A psychological evaluation done in January, 1977, when Defendant was thirteen years old, showed that Defendant suffered from depression, poor impulse control, difficulty maintaining contact with reality, functioning at a 5 or 6 year old level and considerable anxiety. The evaluation recommended intensive long-term in-patient treatment. (T. 3084-3085; T. 3090-3092).

that the risk factors did not cause Defendant Patrick to murder Steven Schumacher; these factors predisposed him to commit the crime. (T. 3128; T. 3137).

***Spencer* Hearing**

On August 20, 2009, the court conducted the final sentencing hearing. The defense called three witnesses, including Defendant Eric Patrick. (R. 907). At this hearing, Dr. John Fichera, who had testified during the penalty phase, testified about multi-generational dysfunction. According to Dr. Fichera, he was only able to interview Patrick's mother. Patrick's maternal grandmother came from a large family. The family was relatively poor. Her parents had limited education. Her father was prone to substance abuse. He contracted syphilis and was sent to a state hospital for treatment. The paternal grandfather was a farmer and the paternal grandmother was a housewife. The family was relatively poor. Patrick's mother was an only child. She was raised in a single-parent household in Germany. Her father was a prisoner of war. She dropped out of school at the 9th grade. When her father returned he was a strict disciplinarian. (R. 1028-1034).

Dr. Fichera testified that Patrick's mother had her first child when she was 19. Many risk factors occur with teenage mothers. Usually, the children have lower emotional support and tend to run away from home. In fact, Patrick ran away from home on several occasions. Children of teenage mothers are more likely to be physically abused, abandoned or neglected, are more likely to do worse

in school and are more likely to end up in jail. Patrick was, in fact, in foster care multiple times. (R. 1034-1035). Patrick's mother was the victim of extreme domestic violence, which Patrick witnessed. (R. 1038). She was married and divorced four times, evincing her inability to choose appropriate partners. She was ill-equipped to protect her children and she was unable to properly supervise her children, including the fact that Patrick went hitchhiking around the country at 14 and 15. Dr. Fichera concluded that Patrick learned to be a survivor. He learned to survive on the streets. He was victimized when he was young. When he was 12, he was given cigarettes, marijuana and alcohol by a camp counselor. That same counselor fondled Patrick multiple times, including performing oral sex on him.[25] Patrick never confided in his father, who was often intoxicated and who often beat his mother. In fact, when Patrick ran away from home at 13, he took refuge with the same counselor, who continued his molestation. He learned a pattern where in order to obtain safe harbor he would allow the molestation. This created a lot of internal trauma because Patrick's father was extremely homophobic. (R. 1038-1046).[26]

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[25] Dr. Fichera had testified at the penalty phase, however, he did not testify about any of the sexual abuse incidents at Defendant's request. (T. 3052-3055; T. 3143-3148).

[26] Dr. Fichera also testified that Patrick was accosted when he was 10 years old by a group of teenage boys who tried to force him to perform oral sex. Patrick was able to escape. (R. 1046).

Dr. Fichera testified that the camp counselor introduced Patrick to a couple and another man who took pictures of Patrick in the nude and made him engage in acts of child pornography. (R.1047-1048). Dr. Fichera testified that Patrick informed him that when the older man in this case picked him up he realized it was another quid pro quo situation. He set down rules or boundaries. There was to be no anal sex or cuddling. When the victim began to "spoon" him (that is, cuddle behind him), Patrick told him to stop. However, the victim "spooned" him again, at which point Patrick flipped out and began to beat him. (R. 1048-1051).[27] According to Dr. Fishera, the attack on Schumacher showed that Patrick was attacking all the men who had abused him in the past. He concluded that Patrick was under the influence of an extreme mental or emotional disturbance on the night of Schumacher's death. (R. 1053-1054). Dr. Fishera made clear that while a person with the risk factors he identified would not cause someone to commit murder, when someone commits murder and they have the risk factors, one can offer an opinion that those risk factors certainly were contributory. (R. 1057-1058). Dr. Fichera made clear that even if one were take the sexual component out of the present situation, it would still be his opinion that Patrick had a pre-disposition to commit acts of violence. (R. 1062-1063).

[27] Dr. Fichera also testified that when Patrick was 15 he was the victim of two attemped sexual assaults by older men at a time Patrick was a runaway in Seattle and Arizona. (R. 1052).

Dr. Allan Ribbler, a licensed psychologist, testified he was hired by the defense to perform a neuro-psychological evaluation of Defendant Patrick. The evaluation consisted of a variety of tests of mental abilities, as well as personality testing. Dr. Ribbler also conducted Symptom Validity Testing to determine whether Patrick was doing his best and being honest on the evaluation. (R. 1063-1068). Dr. Ribbler testified that Patrick tested in the honest responding range. There was no negative or positive bias. (R. 1068-1070). In addition, Dr. Ribbler tested psychological functioning. Patrick scored in the average range for word reading. Patrick did well on the language tests but scored on the low end for memory on test drawing. Patrick did fine on the frontal lobe functioning and did average on the trail making test, which is very sensitive to the presence of brain injury. In the area of cognitive functioning, Dr. Ribbler did not find anything that would indicate real neuropsychological impairment. (R. 1072-1075). There did not appear to be any trauma to the head as a result of physical abuse. (R. 1075). Dr. Ribbler also conducted psycho-diagnostic testing , including the Personality Assessment Inventory test (PAI), which is shorter than the MMPI. According to Dr. Ribbler, the PAI assesses a person's social environment (social supports), a person's self-image, and the nature of a person's interpersonal relationships. Under this test, Patrick had a borderline score for depression, characterized by sadness, low self-esteem and an image that the world is a dark and dreary place.

He had high scores for alcohol and drug abuse. In fact, he was almost one standard deviation higher than people with serious alcohol and drug abuse problems. Patrick scored borderline on aggressive behavior. He also had a borderline score on the non-support scale, indicating little supportive relationships in life. (R. 1076-1080). Patrick scored very high on self-harm, indicative of suicidal ideation or self-destructiveness. (R. 1080-1081). Patrick score on the high side for anti-social behavior. Dr. Ribbler testified that Patrick scored on the high side for physical aggression. (R. 1081-1083). Dr. Ribbler also tested Patrick for trauma due to his reported history of abuse. Patrick had a tendency to minimize. Dr. Ribbler determined that Patrick suffered from ten specific traumas, including: motor vehicle crashes, other accidents, victim of violence, victim of threats, witnessing homicide, victim of robbery, and victim of sexual assault. Dr. Ribbler explained that the average person reported three traumas and persons experiencing more than six traumas are considered in the high range. Moreover, the test does not measure the number of times a person experienced trauma in any one category, so that a person could have experienced trauma multiple times per category and yet receive only one point under the category. (R. 1083-1084).

Dr. Ribbler testified he also subjected Patrick to the Inventory of Offender Risk Needs Strengths test, which is particularly useful for people involved in the criminal justice system. Patrick scored high on the scale of pro-criminal attitudes.

Patrick scored in the average range for irresponsibility and for manipulativeness. He had high scores on impulsivity and angry detachment. (R. 1087-1088). Patrick scored on the high side for internal conflicts and conflicts with other people. He scored high on hostility but average on aggressive behavior. He scored high on negative family influence, indicative of a very violent home life. (R. 1089-1090). Patrick also scored low on cognitive behavioral regulation, that is, an inability to think about possible outcomes of behavior. (R. 1090-1091). Patrick was low on anger regulation, which means he has trouble controlling his anger and low on education and training. Dr. Ribbler noted that should Patrick be placed in a structured environment, such as jail, he would do well. In fact, Dr. Ribbler noted that Patrick was currently a trustee at the jail. He does not have to make decisions and things are predictable in jail. He is also relatively safe. (R. 1093-1096). In conclusion, Dr. Ribbler determined that on the night of the murder, Patrick was probably exposed to triggers that reminded him of past trauma and, in conjunction with substance abuse, resulted in the loss of control. He was not able to regulate his behavior. Patrick suffered from post traumatic stress disorder with a major depression recurrent. Patrick had traits of both borderline personality disorder and anti-social personality disorder. Dr. Ribbler agreed that the sexual abuse Patrick suffered as a child impacted his actions on the evening of the murder. (R. 1096-

1098). Dr. Ribbler opined that on the night of the murder, Patrick was under the influence of extreme mental or emotional disturbance. (R. 1099; R. 1101).[28]

Eric Patrick testified that the information he had provided to the doctors about his sexual abuse as a child was true. Patrick expressed his deep sorrow for what happened to Steven Schumacher. Patrick maintained he did not mean to intentionally kill him. He explained he was on drugs at the time and lost control of himself. He noted that he probably should have testified at trial. He said he talked to Martin Dietz but he did not tell him the things he testified about. He's never been prone to violence, but rather, has always tried to step away from violence. Patrick admitted he had no excuse for what he did. On the night in question, he did not act the way he normally would act. (R. 1108-1110).

Patrick's mother addressed the court. She stated that her son had great artistic talent. She noted Patrick is a kind, loving person. She asked the court to consider giving him a life sentence. She had high hopes for Patrick. She never thought he would re-offend. She expressed great sadness that his life was gone. (R. 1114-1116).

[28] On cross-examination, the prosecutor questioned Dr. Ribbler's conclusions on grounds that he had not been given all the information on the case. (R. 1101-1106).

ISSUES PRESENTED

(I)

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCUSING JURORS FOR CAUSE WITHOUT ALLOWING DEFENSE COUNSEL AN OPPORTUNITY TO QUESTION OR REHABILATE JURORS

(II)

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING THE DEFENSE FROM ELICITING TESTIMONY CONCERNING THE VICTIM'S PRACTICE OF PICKING UP MEN FOR SEXUAL FAVORS

(III)

WHETHER THE COURT ERRED IN LIMITING DEFENSE CROSS-EXAMINATION OF WITNESS MARTIN DIETZ

(IV)

WHETHER THE TRIAL COURT ERRED IN GIVING THE INVOLUNTARY INTOXICATION JURY INSTRUCTION OVER DEFENSE OBJECTION

(V)

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS TO SUPPRESS STATEMENT AND PHYSICAL EVIDENCE

(VI)

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE STATE TO INTRODUCE CERTAIN MEDICAL EXAMINER AUTOPSY PHOTOGRAPHS INTO EVIDENCE

(VII)

WHETHER DEFENDANT WAS DENIED A FAIR TRIAL AS A RESULT OF THE PROSECUTOR'S IMPROPER GUILT PHASE CLOSING ARGUMENTS

(VIII)

WHETHER THE TRIAL COURT EMPLOYED THE WRONG LEGAL STANDARD IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE COUNT OF FIRST DEGREE MURDER

(IX)

WHETHER DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS

(X)

WHETHER THE TRIAL COURT ERRED IN PENALTY PHASE JURY INSTRUCTIONS

(XI)

WHETHER DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

(XII)

WHETHER THE TRIAL COURT IMPROPERLY CURTAILED DEFENSE COUNSEL'S PENALTY PHASE CLOSING ARGUMENT

(XIII)

WHETHER THE TRIAL COURT ERRED IN LIMITING DEFENSE EXPERT'S TESTIMONY AND PRESENTATION DURING THE PENALTY PHASE

(XIV)

WHETHER THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

(XV)

WHETHER THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

(XVI)

WHETHER CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

(XVII)

WHETHER DEFENDANT'S SENTENCE OF DEATH MUST BE VACATED DUE TO THE CUMULATIVE EFFECT OF THE PENALTY PHASE ERRORS

STANDARDS OF REVIEW

(I) A trial court's decision on whether a juror should be excused on a cause challenge is reviewed for abuse of discretion. Castro v. State, 644 So.2d 987 (Fla. 1994); Kearse v. State, 770 So.2d 1119, 1128 (Fla. 2000). **(II, III, & VI)** A trial

judge is afforded broad discretion with respect to the admissibility of evidence. Sexton v. State, 697 So.2d 833 (Fla. 1997); Cole v. State, 701 So.2d 845 (Fla. 1997); Kearse v. State, 662 So.2d 677 (Fla. 1995); Smith v. State, 28 So.3d 838 (Fla. 2009). **(IV)** A trial court's rulings on jury instructions are reviewed for abuse of discretion. Hadnot v. State, 956 So.2d 1206, 1207 (Fla. 5th DCA 2007). **(V)** Review of a motion to suppress is a mixed question of law and fact. A trial judge's application of the law to the factual findings on a motion to suppress is reviewed de novo. Jones v. State, 800 So.2d 351, 353 (Fla. 4th DCA 2001). A trial court's ruling on a motion to suppress is entitled to a presumption of correctness and the evidence and reasonable inferences derived therefrom are interpreted in a manner most favorable to sustaining the trial court's ruling. Brown v. State, 725 So.2d 1164, 1165 (Fla. 2d DCA 1998). **(VII, XI, XII)** The control of comments by counsel is within the trial court's discretion. Perez v. State, 919 So.2d 347, 363 (Fla. 2005); Goodrich v. State, 854 So.2d 863, 864 (Fla. 3d DCA 2003); Frazier v. State, 970 So.2d 929, 930 (Fla. 4th DCA 2008). An appellate court may reverse a conviction based upon improper prosecutorial comments if the comments are of such a nature as to (1) deprive the defendant of a fair trial; (2) materially contribute to his conviction; (3) to be so harmful or fundamentally tainted as to require a new trial; or (4) be so inflammatory that they might have influenced the jury to reach a more severe verdict than that which they would have reached otherwise. Lewis v.

State, 780 So.2d 125, 131 (Fla. 3d DCA 2001). The propriety of a prosecutor's closing argument may be reviewed for fundamental error. D'Ambrosio v. State, 736 So.2d 44 (Fla. 5th DCA 1999). **(VIII)** When a defendant moves for judgment of acquittal he admits the facts stated in the evidence adduced and also every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974); Pearce v. State, 880 So.2d 561, 571 (Fla. 2004). The standard of review applicable when reviewing a motion for judgment of acquittal is de novo. Maglio v. State, 918 So.2d 369, 374 (Fla. 4th DCA 2005). **(IX, XVII)** An appellate court may consider the cumulative effect of errors even where each of the trial court's asserted errors, standing alone, are insufficient to merit reversal, and an appellate court may find prejudice requiring reversal. See Parker v. State, 904 So.2d 370, 380 (Fla. 2005). **(X)** This Court reviews the propriety of penalty phase jury instructions for abuse of discretion. See Darling v. State, 808 So.2d 145, 162-63 (Fla. 2002). **(XIII)** An appellate court reviews the curtailment of the defense case during the penalty phase of capital murder case for abuse of discretion. Smith v. State, 28 So.3d 838, 868-869 (Fla. 2009). **(XIV)** To determine whether death is a proportionate penalty, this Court must consider the totality of the circumstances and compare the case with other cases. Dessaure v. State, 891 So.2d 455, 472 (Fla. 2004). **(XV)** The standard of review applicable to a trial court's finding of a capital aggravator is

whether competent, substantial evidence supports the finding. Smith v. State, supra.

SUMMARY OF ARGUMENT

(I) The trial court abused its discretion in excusing jurors for cause without allowing defense counsel an opportunity to question or rehabilitate the jurors. A trial court's refusal to allow defense counsel an opportunity to examine excluded death-scrupled jurors on voir dire is *reversible error.* A refusal to defense counsel an opportunity to question jurors on hardship issues violates due process and constitutes an abuse of discretion. **(II)** The defense should have been permitted to elicit testimony concerning Schumacher's practice of picking up men for sexual favors. Such evidence was necessary to explain the role of the aggressor in this case, to undermine testimony that the victim let Defendant stay with him only because he was always taking care of people, to counterbalance the State's targeting theory to support premeditation, and to rebut heightened premeditation under the CCP factor supporting the death penalty. **(III)** The trial court abused its discretion in prohibiting the defense from cross-examining inmate-witness Dietz as to his state of mind regarding the need to assist the government after his conviction. The court improperly limited counsel's ability to explore possible bias, motive or expectations and amounted to a denial, or significant diminution, of Defendant's constitutional right of confrontation. **(IV)** The trial court erred in

giving the voluntary intoxication instruction. The defense did not advance a defense voluntary intoxication. The trial court's relied on case law rendered inapplicable by the abolition of voluntary intoxication as a defense. The instruction, moreover, constituted judicial comment on the evidence presented and permitted the State to undermine a defense not posited. **(V)** Defendant's statements and items of evidence obtained following his arrest should have been suppressed because Defendant was not engaged in any illegal activity when questioned by the officer at the gas station. He readily agreed to leave and withdrew whatever consent he had given initially. There was no probable cause to detain Defendant. He had not committed an offense. The purpose and flagrancy of Defendant's detention was such that the taint of the illegal stop requires suppression. **(VI)** The court should not have permitted the introduction of certain autopsy photographs. Dr. Juste was able to fully explain the injuries to the victim without recourse to obviously gruesome photographs. **(VII)** During guilt phase arguments, the prosecutor improperly undermined the need for unanimity by the jurors, expanded the basis for robbery as the underlying offense, attacked Defendant's character and argued lack of remorse, appealing to the fears and prejudices of jurors. **(VIII)** The trial court erred in denying Defendant's motion for judgment of acquittal on the first degree murder count when it employed the incorrect legal standard, ruling that the issue of premeditation was exclusively a question of fact for the jury. **(IX)** The

cumulative effect of the guilt phase errors entitles Defendant to a new trial. **(X)** The trial court improperly instructed jurors in the penalty phase by denigrating the role of the jury, informing the jury that their verdict need not be unanimous as to the aggravating factors supporting a death sentence and excluding the concept of mercy from jury consideration. **(XI)** The prosecutor improperly argued at penalty phase closings by referring to the non-statutory aggravator of lack of remorse, by denigrating the role of the jury and by leaving jurors with the impression that the death penalty was required if the aggravating circumstances outweighed the mitigating circumstances. **(XII)** The defense should have been allowed to argue the reasonable inferences from the imposition of sentence of life imprisonment term without parole. Counsel should be permitted to present all legitimate arguments. **(XIII)** By excluding testimony as to multi-generational dysfunction, the court gutted Defendant's penalty phase presentation. Mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating. **(XIV)** Defendant's death sentence is disproportionate under Florida law. The defense presented evidence and testimony about Defendant's horrific upbringing and other compelling mitigating factors. Defendant was loved by family and acquaintances and his execution would have a negative impact on Defendant's family. Defendant had artistic talents and exhibited appropriate courtroom behavior. Defendant

assisted the police by admitting to the crime. The first three aggravating factors noted by the trial judge involved Defendant's prior crime of armed carjacking and the attendant offenses he committed in this case. The court's findings of HAC and CCP, challenged by the defense here, must nevertheless be viewed along with Defendant's 39 mitigating circumstances. **(XV)** The trial court committed several errors in its sentencing order which, individually and cumulatively, require reversal of Defendant's death sentence. In particular, the court erred in finding the HAC and CCP factors. There was no definitive proof that the victim was conscious during the criminal episode or that Defendant intended to torture the victim. There was no showing that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage, or that the murder was the product of a careful plan or prearranged design to commit murder, or that there was "heightened premeditation." Lastly, the trial judge also failed to give Defendant's 39 mitigating circumstances sufficient weight. **(XVI)** Defendant maintains that Florida's capital punishment statute violates the United States Supreme Court decision in Ring v. Arizona. **(XVII)** Defendant's sentence of death must be vacated due to the cumulative effect of the penalty phase errors.

ARGUMENT

(I)

THE TRIAL COURT ABUSED ITS DISCRETIONIN EXCUSING JURORS FOR CAUSE WITHOUT ALLOWING DEFENSE COUNSEL AN OPPORTUNITY TO QUESTION OR REHABILATE JURORS

During jury selection, the trial court conducted hearings on whether certain jurors should be excused for cause.[29] In the course of jury selection, the court asked the venire numerous questions, including questions on the death penalty and juror hardships.[30] The prosecutor proceeded to question the venire, including inquiries on the jurors' feelings on the death penalty and juror hardships.[31] After the prosecutor's initial questioning, the court informed the venire that it would try to get the lawyers to agree on who had to return the next day or who would be excused. (T. 268-269). At this preliminary hearing on cause challenges, the court

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[29] Prior to voir dire, the trial judge explained the procedure she would follow. (T. 20-22). In particular, the judge stated she would give the parties an opportunity to talk to the jurors on the death qualification issue. (T. 21-22). Later, the court assured defense counsel that if the defense had an objection to the people on her "short" strike list she would tell them to come back. (T. 188-189).

[30] *Death penalty*: T. 146-156; *hardships*: T. 79; T. 81; T. 83; T. 88; T. 95; T. 97; T. 98; T. 99; T. 102; T. 104; T. 106; T. 111; T. 17; T. 120; T. 121; T. 125; T. 126; T. 127; T. 129; T. 139; T. 185-186.

[31] *Death penalty*: T. 169-170; T. 173-174; T. 177-178; T. 180-181; T. 183; T. 192-193; T. 200-201; T. 209-210; T. 221-222; T. 226-229; T. 232-233; T. 235; T. 238; T. 240; T. 242-243; T. 245-246; T. 249; T. 252; T. 256-257; T. 261; T. 262; *hardships*: T. 178-179; T. 181-182; T. 201-203; T. 203-205; T. 206-207; T. T. 207-208; T. 210-211; T. 211-213; T. 215-217; T. 217-218; T. 219-221; T. 223-224; T. 224-226; T. 226; T. 230; T. 230-231; T. 236; T. 241; T. 243-244; T. 249-250; T. 258-260; T. 260-261; T. 262; T. 263.

excused various jurors for cause over defense objection. (T. 275-276; T. 278; T. 279-280; T. 280-281; T. 282-283).[32] In particular, over defense objection, the court excused prospective jurors Hughes (hardship)(T. 275-276), Fernandez (hardship)(T. 278), Souci (death penalty and hardship)(T. 279-280), Safaroff (hardship)(T. 279-280), Gregorio (hardship)(T. 280), Gravel (hardship)(T. 282-283). The defense reiterated its objections after the jurors were excused. (T. 290). The court questioned the new panel about the death penalty and juror hardships.[33] The State then inquired about the new venire's views on the death penalty and juror hardships.[34] The court conducted a second hearing on cause challenges. At this second hearing, the court excused additional jurors for cause over defense objection. (T. 521-522; T. 523-524; T. 525). In particular, over defense objection, the court excused prospective jurors Guerrero (hardship)(T. 521-522), Johnson (hardship)(T. 523-524), Mason (hardship)(T. 524-525). The defense preserved its

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[32] Defense counsel stated he wanted to make sure his client knew he had the right to have the jurors return for questioning. The court responded: "I was going to ask him anyway, but I do things a lot differently. You are trying to put me in the role of the other judges here and I'm not, I do things differently because it is more efficient, I think, for me the way I handle certain items." (T. 271).

[33] *Death penalty*: T. 396-398; *hardships*: T. 331; T. 332-333; T. 339-340; T. 341; T. 344; T. 349; T. 351-352; T. 352; T. 353; T. 355; T. 357; T. 362-363; T. 363; T. 366; T. 369-370; T. 372; T. 374; T. 376; T. 377; T. 379; T. 380; T. 381-382.

[34] *Death penalty*: T. 410; T. 413-414; T. 429; T. 435; T. 436; T. 437; T. 443; T. 450-451; T. 453-454; T. 458-459; T. 462-463; T. 468; T. 472-473; T. 475; T. 482-483; T. 489-490; T. 491-492; T. 495-496; T. 501-502; T. 505; T. 507; T. 509; T. 512-513; *hardships*: T. 411; T. 414-415; T. 426-427; T. 437; T. 438; T. 443-444; T. 463; T. 464-465; T. 469-470; T. 470-471; T. 478-479; T. 479-480; T. 484-485; T. 486; T. 492-493; T. 498-499; T. 506-507; T. 512-513; T. 514-515; T. 515-516.

objections. (T. 532). A jury was ultimately selected and sworn. (R. 642; T. 1204). The defense did not accept the panel and reiterated its objections prior to the jury being sworn. (R. 642; T. 1189-1190).[35]

The court excused prospective juror Souci on death penalty and hardship issues, without allowing defense counsel the opportunity to question or rehabilitate her. (T. 279-280). Defense counsel informed the court: "*We need to speak with her*, I think, in abundance of caution." (T. 279)(emphasis supplied). The trial judge excused Ms. Souci. The judge said that Souci had stated "death penalty probably never…" and "forget it, she said death penalty never." (T. 279). This Court has made it abundantly clear that a trial court's refusal to allow defense counsel an opportunity to examine excluded death-scrupled jurors on voir dire is *reversible error*. A refusal to allow such examination violates a defendant's due process rights. See O'Connell v. State, 480 So.2d 1284, 1286-1287 (Fla. 1986)(defendant convicted of murder and sentenced to death entitled to new trial where trial court refused to allow defense counsel to question death-scrupled jurors).[36] In Hernandez v. State, 621 So.2d 1353 (Fla. 1993), this Court vacated a

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[35] In its motion for new trial, the defense specifically raised again its objection to the manner of excusing jurors. The defense pointed out that the court erred in the excusal of jurors over defense objection where the defense had not been given the opportunity to speak to the jurors. (R. 753-755, ¶ 9).

[36] In O'Connell, this Court referred to Rule 3.300(b), Florida Rules of Criminal Procedure, which provides, in part, that "[C]ounsel for both State and defendant shall have the right to examine jurors orally on their voir dire." 480 So.2d at 1286.

death sentence where the trial court excluded a death-scrupled juror without allowing defense counsel an opportunity to question the juror. This Court concluded that by refusing counsel's request to question the excluded juror, the State may have produced a jury uncommonly willing to condemn a man to die. Id. at 1356 (citing Witherspoon v. Illinois, 391 U.S. 510, 521, 88 S.Ct. 1770, 1776, 20 L.Ed. 776 (1968)). See also Willacy v. State, 640 So.2d 1079 (Fla. 1994)(death sentence vacated where trial court erred in not affording defense counsel an opportunity to rehabilitate juror); Sanders v. State, 707 So.2d 664 (Fla. 1998)(death sentence vacated because trial court excused juror for cause without allowing defense counsel an opportunity to question the juror).

Moreover, the trial court excused various jurors for "hardship," pursuant to §40.013(6), Florida Statutes. Defense counsel was not allowed to question these jurors before they were excused. Indeed, the defense was placed in an even worse position on this issue because *the prosecution* was given leeway to extensively question jurors as to their hardships. A trial court has discretion to grant excusals for hardships, however, that discretion should be exercised after the parties have had an opportunity to question the jurors. In Wright v. State, 857 So.2d 861 (Fla. 2003), this Court considered a defendant's post-conviction claim in a death penalty case that his appellate counsel was ineffective for failing to challenge his trial counsel's absence from an off-the-record conference between the trial judge and at

least one potential juror, after which the juror was excused. In Wright, the trial judge excused a juror because he was the only available paramedic and full-time fire personnel in the community. Defense counsel made no objection to the off-the-record discussions between the juror and the judge and made no objection to the disqualification of the juror. This Court concluded that because the issue was not preserved at trial, appellate counsel was not ineffective for failing to raise the issue on appeal. Id. at 877. This Court recognized that a juror's excusal for hardship under §40.013(6), Florida Statutes, is within a trial court's discretion. However, in Wright, there was no objection to the procedure or to the disqualification. In this case, defense counsel stated he wished to question the jurors. The trial court erred in excusing the juror without allowing defense counsel an opportunity to question the jurors. Defendant is entitled to a new trial.[37]

(II)

THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING THE DEFENSE FROM ELICITING TESTIMONY CONCERNING THE VICTIM'S PRACTICE OF PICKING UP MEN FOR SEXUAL FAVORS IN BOTH THE GUILT AND PENALTY PHASES

The State argued a motion in limine seeking to prohibit the defense from eliciting testimony that the victim commonly picked up men in the park and took

[37] Subsequently, the court excused several jurors for cause over defense objection. (T. 762-779; T. 1180-1189). The defense did not accept the panel and reiterated its objections prior to the jury being sworn. (R. 642; T. 1189-1190).

them home. (T. 15). The defense argued that the victim's pattern and practice of behavior were relevant because it showed under what circumstances Defendant met the victim, it dispelled any idea that Defendant targeted the victim, and it explained the role of the aggressor in this case. (T. 16). The court granted the State's motion, noting that such evidence would place the victim in a bad light and would unnecessarily inflame the jury. (T. 16-18). The defense filed a motion for reconsideration and argued in favor of the introduction of the aforementioned evidence. (R. 659-663; T. 798-802; T. 805-806). The State repeated its arguments in favor of the motion. (T. 802-805). The court re-affirmed its prior order granting the State's motion. (T. 806-809).[38]

At trial, the State called Mr. Lyon. Mr. Lyon testified that he was very close to Mr. Schumacher. He stated that he first met Schumacher in 1994 in Daytona. (T. 1278-1279). Lyon testified that Schumacher liked to have company once in a while. (T. 1283). Lyon met Defendant Patrick a couple of weeks before Schumacher's death. (T. 1283-1284). Lyon explained that Schumacher was letting Patrick stay with him because "he was always taking care of people." (T. 1284).

[38] In the defense opening statement, defense counsel alluded to the fact that Steven Schumacher, the victim, had met Robert Lyon, a witness in the case, under circumstances similar to Defendant's meeting with Schumacher. (T. 1235). The State later informed the court that this information was provided to the jury in violation of the order on the motion in limine. The Court informed defense counsel that he would not be allowed to question Mr. Lyons about it. (T. 1248, T. 1249-1250).

Lyon had intimate knowledge of Schumacher's living conditions. (T. 1286-1287). He was in sole control of Schumacher's financial affairs. (T. 1281). At the end of Lyon's direct examination, defense counsel requested leave to question Lyon about his sexual relationship with Schumacher, pointing out that such evidence was relevant to show bias and motive. Moreover, counsel pointed out that Lyon had stated that Schumacher was always taking care of people, which opened the door to the nature of the relationship between Schumacher and Patrick. Also, Lyon's testimony that Schumacher was alone most of the time opened the door to questions about those instances where Schumacher was not alone. The court re-affirmed its earlier ruling prohibiting counsel from questioning Lyon about his sexual relationship with Schumacher, or about Schumacher's pattern of behavior with men he would pick up. (T. 1300-1303).

During a subsequent proffer of testimony outside the presence of the jury, defense counsel questioned Lyon. Lyon acknowledged that he knew Schumacher was a homosexual. (T. 1311). Lyon admitted he had sexual relations with Schumacher. (T. 1311). Lyon testified that over the years he knew that Schumacher would pick up younger men and bring them home. Schumacher would help the men. Schumacher would sometimes have sexual relations with the men. Lyon knew that Schumacher would visit gay bars in Ft. Lauderdale and a nearby park. He knew he met Patrick either at one of the bars or in the park. Lyon

did not know that Patrick and Schumacher were having sexual relations. (T. 1311-1316). During a proffer of testimony with Jennie Scott, Scott testified she knew Schumacher was a homosexual. (T. 1338). Scott knew that Schumacher would occasionally go to Ft. Lauderdale to meet young men and bring them home. (T. 1338). Scott was concerned that Patrick was just another one of the many men Schumacher brought home and who appeared to be somebody he should not be associating with. (T. 1338). Scott was aware that Schumacher would have sexual relations with some of these men. Scott was upset when Schumacher brought Patrick into the apartment. (T. 1339-1340).

In addition, prior to the testimony of Martin Dietz, the jailhouse informant, defense counsel pointed out that Dietz was going to testify about what Patrick allegedly told him in jail about Schumacher's death. In particular, counsel noted that Dietz was going to say that Patrick convinced Schumacher to take him in with the idea of killing him from the beginning. Counsel argued that there was evidence that Patrick did not target Schumacher, but rather, that Schumacher had brought Patrick home as he had done with many men in the past. The court indicated that Dietz's statement did not indicate that anyone had been targeted. (T. 1634-1635).[39]

[39] In contrast, the prosecutor had previously argued to the court that Dietz's testimony about Patrick's jailhouse statements concerning Schumacher were relevant on the issue of motive and intent. The prosecutor stated it was relevant to show motive and intent by how Patrick "*picked him*, why he went with him, his hatred for, as he puts it in quote, I hate faggots…"(T. 1623)(emphasis supplied).

Counsel reiterated the need to show the jury that Schumacher had a propensity to meet people under certain circumstances and bring them home and that to prevent the defense from doing so would deprive Defendant of a fair trial. The court rejected the argument once again. (T. 1637). Dietz subsequently testified that Patrick led Schumacher to believe that he was also homosexual and that he planned to take Schumacher for his money and kill him from the beginning. (T. 1659-1660).[40]

In the State's initial closing argument, the issue of targeting came up once again. The Assistant State Attorney made the following comments regarding premeditation:

> MS. SCHULMAN: "You can find that Steven Schumacher from the minute that Mr. Patrick met him, the defendant met him was the *target* of the events that took place on that Sunday night. And according to Martin Dietz, that's exactly what it was. He met him, he knew what he wanted and that's what he went after." (T. 1890)(emphasis supplied).

The prosecutor on rebuttal argument also made the following remarks:

> MS. TATE: "Mr. Reres just said look at the weight of the evidence that he said the defendant didn't go after Mr. Schumacher. *But the defendant talks in his statement and he said in his statement that he was with or went to the bars and he talks about the homosexual men and how nice they were* and how Detective Nicholson in his statement talks to him and

[40] In its motion for new trial, the defense specifically raised again its objection to the court's order granting the State's motion in limine regarding Schumacher's lifestyle and habit of approaching homeless and/or drug addicted men and offering to help them in exchange for sexual favors and its limitation on defense cross-examination of witness Lyon in this area. (R. 753-755, ¶ ¶11, 12).

says because he gets offended how Detective Nicholson phrased it in the beginning." (T. 1964)(emphasis supplied).[41]

The foregoing sections of the record clearly show that the State's theory of premeditation was largely premised on Defendant's targeting Mr. Schumacher. The defense should have been permitted to elicit testimony concerning Schumacher's practice of picking up men for sexual favors. Such evidence was not aimed at attacking the victim's reputation by showing his sexual proclivities, but rather, to demonstrate that the victim had not been "targeted" by Defendant. Moreover, such evidence was necessary to rebut the testimony elicited by the State that Schumacher let Patrick stay with him only because he was always taking care of people. It is undeniable that the prosecution used the targeting theory to support its claim that Defendant committed the crime with premeditation. (T. 1890; T. 1964). Defendant was unable to respond with evidence. Additionally, the court relied on Dietz's testimony that Defendant planned to kill the victim in its sentencing order finding the CCP factor for purposes of imposing the death penalty. (R. 963). Defendant's right to fully confront the evidence against him was denied by his inability to question Mr. Lyon about Schumacher's practice of picking up homeless men and providing them assistance in exchange of sexual

[41] In Defendant's statement, Det. Nicholson asked him if he had gone to the Holiday Park, where he met Schumacher, "looking for anybody…" Patrick denied it emphatically. (T. 1834-1835). Patrick denied targeting anyone. (T. 1836).

favors. In its ruling denying Defendant's motion to permit him to elicit testimony concerning Mr. Shumacher's practice, the court stated:

> "If he met the defendant that's one thing, *but just to suggest that would be like in a rape case to suggest that, you know, bringing all of the former lovers of the alleged victim to show promiscuity 794 Florida Statutes doesn't allow that to come in*." (T. 17)(emphasis supplied).

This Court in Lewis v. State, 591 So.2d 922 (Fla. 1991), considered a trial court's limitation on the defendant's right of confrontation imposed by the rape shield law. In Lewis, the trial court prohibited the defense from questioning the victim about her sexual activities with a third person, even though the defense sought to develop a theory that the victim accused the defendant in order to prevent the victim's mother from discovering that the victim had been sexually active with the third person. This Court ruled that the trial court's limitation of cross-examination effectively deprived the defendant of the opportunity to confront his accuser and present a defense. Id. at 925-926. Here, the trial court deprived Defendant of the right to cross-examine Lyon and develop a defense that the victim's pattern and practice of behavior were relevant because it showed under what circumstances Defendant met the victim, it dispelled any idea that Defendant targeted the victim, and it explained the role of the aggressor in this case. The proffered evidence was also corroborative of Defendant's own statements. See, e.g., Salgado v. United States, 278 F.2d 830 (1st Cir. 1960)(new trial granted where court excluded evidence of the witness's reputation as a homosexual which

evidence was to some degree corroborative of defendant's account of the witness's conduct).

(III)

THE COURT ERRED IN LIMITING DEFENSE CROSS-EXAMINATION OF WITNESS MARTIN DIETZ

Martin Dietz was a sentenced prisoner who testified concerning Defendant Patrick's statements to him in jail about the Schumacher incident. Prior to Dietz's testimony, defense counsel sought a ruling from the court to permit him to cross-examine Dietz in the following area:

> MR. RERES: "…*I would ask for leave of Court to inquire into whether the changing circumstances of his own case and his own conviction pushed him forward, increased his motive to assist the State*… When he initially spoke to us he thought he was going to win his case. *He testified in his own defense and was, in fact, convicted and I would just under those circumstances would ask the Court for leeway to inquire into his state of mind changing regarding the need to assist the government after that conviction*. It is say little….
> THE COURT: I'm not seeing how you going to do that, Mr. Reres. The rules apply to you the same way they apply to the State. So, why would I break the rules for you and then hold the State to the rules of evidence?
> MR. RERES: I just think it's unusual in the way this came about, that his state of mind at depo as well, I'm doing this but I don't really need to because I'm going to win my case, I'm going to win there any way, the tenner (sic) of that letter and some of the things we know he said at that point in time, versus now he's been convicted." (T. 1624-1625)(emphasis supplied).

The trial judge informed defense counsel that defense counsel would not be permitted to question Dietz about his state of mind about why he made the

statement at the time. (T. 1625). Subsequently, defense counsel sought clarification of the court's ruling. The judge stated:

> THE COURT: "*Not what he believed* that he could get because that's speculative and imaginary and forced, that's a reasonable doubt. What he got, what was promised to him, what the State did on his behalf or an agent of the State did on his behalf, those are the matters under 609 that you can get into for impeachment, *not what he was thinking he was going to have*, that's speculative and I wouldn't let you ask any other witness that. So, you can object and it is preserved but there's no rule of evidence that allows you to do what you want to do. *What did you think you were going to get, that's speculative*…" (T. 1639-1640)(emphasis supplied).[42]

The trial court's ruling impermissibly curtailed Defendant's right of confrontation under Article I, Sections 9 and 16 and the Sixth and Fourteenth Amendments, United States Constitution. The Sixth Amendment to the United States Constitution provides the "accused shall enjoy the right... to be confronted

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[42] Defense counsel noted his objection for the record, stating that the court was limiting the right to confront the witness under the confrontation clause. (T. 1639). During Dietz's cross examination, defense counsel asked Dietz if he expected to win his case. The prosecutor objected and the court sustained the objection. (T. 1675). Subsequently, defense counsel attempted to ask Dietz expectation of benefit for his continued cooperation. In particular, counsel proffered he was going to ask Dietz that based on his testimony in this case whether he expected his attorneys to seek some benefit or assistance. The court noted that more than sixty days had transpired since his sentence and that, legally, Dietz could not receive any benefit. *Counsel pointed out that what was relevant is what is in Dietz's mind not what the law would allow. The court prohibited any questions in this area*. (T. 1681-1683). During closing argument, defense counsel raised the possibility that Dietz may have thought he could get a benefit down the road. The State objected, noting that "he knows that can't happen." The court sustained the objection. (T. 1920). Defendant raised the issue of curtailment of Dietz's cross examination in his motion for new trial. (R. 753-755, ¶13).

with the witnesses against him." This right is likewise recognized under Article I, Section 16, Florida Constitution. A primary interest secured by the confrontation clause is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Evidence of a witness's interest, motives, animus, or status in relation to the proceeding is not collateral or immaterial. Peterson v. State, 24 So.3d 686, 689 (Fla. 2d DCA 2009)(citing Bryan v. State, 41 Fla. 643, 26 So. 1022 (Fla. 1899)). See also Peterson, supra (witness's plausible *ulterior motive* for testimony); Tomengo v. State, 864 So.2d 525, 530 (Fla. 5th DCA 2004) and Purcell v. State, 735 So.2d 579, 580 (Fla. 4th DCA 1999) (cross-examination even more important when it involves *key witness*); Sanders v. State, 707 So.2d 664, 667 (Fla. 1998)(trustworthiness of witness proper area); Gibson v. State, 691 So.2d 288, 291 (Fla. 1995)(citing Section 90.608(2), Florida Statutes)(witness's *state of mind* and motivation)[43]; Jones v. State, 678 So.2d 890, 892 (Fla. 4th DCA 1996)(citing Holt v. State, 378 So.2d 106, 108 (Fla. 5th DCA 1980))("*improper impetus*" for a witness's testimony); Cherry v. State, 572 So.2d 521, 522 (Fla. 1st DCA 1990)(*self-interest*); Williams v. State, 912 So.2d 66, 67 (Fla. 4th DCA 2005)(witness's *hope*). The denial of the right to full cross-examination in matters relevant to credibility may "easily constitute reversible error" Michael v. State, 884 So.2d 83, 85 (Fla. 2d DCA 2004), and is not cured

[43] The judge's reference to Section 609 was clearly misplaced. (T. 1639-1640).

simply by acknowledging that other means of impeachment were possible and permitted. McKinzy v. Wainwright, 719 F.2d 1525 (11th Cir. 1983). A defendant should be able to disprove, weaken or modify the testimony of the witness. See Coco v. State, 62 So.2d 892 (Fla. 1953). The defense was barred from cross-examining Dietz as to his state of mind regarding the need to assist the government after his conviction, and was unable to explore possible bias or motive, which amounted to a denial of Defendant's constitutional right of confrontation. The defense had a right to expose Dietz's *belief* as to any benefit for his testimony, not just what the State actually had given him. Dietz was the only witness who testified about Defendant's supposed premeditation in the commission of the murder. This element was essential *for both* a conviction on first degree murder *and* for the "heightened premeditation" for the CCP factor to support the death penalty. The State relied on Dietz's testimony precisely to support premeditation at the guilt phase and the heightened premeditation at the penalty phase. The court relied on Dietz's testimony for the CCP factor in its sentencing order. (R. 963).

(IV)

THE TRIAL COURT ERRED IN GIVING A VOLUNTARY INTOXICATION INSTRUCTION AT THE GUILT PHASE

At the State's request, the trial court agreed to give a voluntary intoxication instruction to the jury over defense objection. (T. 1769-1774; T. 1858-1859; T. 1885; T. 1994). The court subsequently instructed the jury as follows:

"Voluntary intoxication resulting from the consumption of drugs or alcohol is not a defense to any offense proscribed by law." (T. 2007).

Normally, such an instruction is given where *the defense advances* an intoxication defense at trial. See, e.g., Sochor v. State, 619 So.2d 285 (Fla. 1993). The court relied on the decision in Kramer v. State, 619 So.2d 274 (Fla. 1993), where this Court upheld the trial court's instruction on voluntary intoxication because the theory advanced by the defense should have been presented by raising the affirmative defense of voluntary intoxication, as the proper means of negating the specific intent required for premeditation. Id., at 277. However, the decision in Kramer *predates the abolition* of voluntary intoxication as a defense. See Section 775.051, Florida Statutes (2004); Smith v. State, 28 So.3d 838, 871 (Fla. 2009). The trial court's reliance on Kramer was wholly misplaced. The defense neither advanced a defense of voluntary intoxication nor argued the lack of premeditation based on intoxicants. The instruction, moreover, constituted judicial comment on the evidence presented and permitted the State to undermine a defense not posited. (T. 1910).

(V)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENT AND MOTION TO SUPPRESS PHYSICAL EVIDENCE

The defense filed a motion to suppress statement and motion to suppress physical evidence. (R. 576-588). The trial court conducted an evidentiary hearing

on this motion. The court also considered the deposition of witness Joanne Decembre. (R. 615-640). Thereafter, the court entered an order denying the motion. (R. 612-614). At the hearing, Deputy Kurt Bukata, Broward Sheriff's Office, testified that he made contact with Defendant at a BP gas station. The owner of the store requested the officer to talk to certain homeless people who were on the property. The property had a no trespass sign. Bukata confronted Defendant and told him to leave the premises. (T. 2367-2373). Defendant gave Bukata the name of Eric Patrick and provided his date of birth. He did not have identification and proceeded to give the deputy his ID number by memory. Bukata knew the numbers did not match his date of birth. Defendant said he did not want any problems and wanted to gather his things and leave. In fact, he picked up a duffle bag and started to walk away. Bukata ran Defendant's name and the teletype advised there was no record based on the information provided by Defendant. He then ran Defendant's name and received a "hit" regarding a Department of Corrections reference to Defendant. Bukata believed that Defendant was trying to conceal or be deceptive on his name or identity. (T. 2373-2377). Bukata stopped Defendant as he was walking away, told Defendant to put his duffle bag down and cuffed him, stating he was investigating a possible warrant. At that point, Bukata received confirmation that a warrant was active. Defendant said his brother had used his identification, but later he admitted to the

warrant. (T. 2378-2383). Bukata noticed injuries to Defendant's hands. (T. 2383-2384). Bukata took Defendant's duffle bag. (T. 2384-2389). Later, Bukata retrieved the bag as evidence and turned it over to the main property room. (T. 2391-2394).[44] The defense argued that the statement and the items of evidence were obtained as a direct result of the illegal detention and were the "fruit of the poisonous tree," as described in Wong Sun v. United States, 371 U.S. 407, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). (R. 576-577). The court denied the motions, ruling that Deputy Bukata was justified in arresting Defendant once Bukata located the warrant for him. (R. 612-614). At trial, the defense reiterated its previous objections to the admissibility of the duffle bag and items (T. 1403; T. 1449, T. 1454; T. 1456-1457; T. 1550; T. 1562), and renewed its objections to the statement. (T. 1750; T. 1753; T. 1759; T. 1781-1782).

Defendant was not engaged in any illegal activity when approached by Deputy Bukata. When asked to leave by Bukata, Defendant readily agreed. Bukata insisted on obtaining identification from Defendant, who provided his name and date of birth. He also gave Bukata his Florida identification number from memory. Defendant walked away. After Bukata supposedly received a "hit" from his computer that there may have been a warrant for Defendant, Bukata

[44] Defendant Patrick subsequently waived his Miranda rights, provided a statement and subjected to DNA swabs, photographs, fingerprints, and footprints. The items in his bag were seized.

stopped and detained him. There was no probable cause to detain Defendant. He had not committed an offense. When Defendant left the premises, he withdrew whatever consent he had given to the initial encounter. Bukata told Defendant he was investigating the validity of the warrant information. At that time, Bukata still did not have grounds to detain and arrest Defendant. Defendant's statement, DNA prints, photographs and the items of evidence in his bag, were obtained as a result of an illegal detention and the evidence was obtained in violation of Article I, Sections 9, 12, 16 and 21, Florida Constitution, and the 4th, 5th, 6th, 9th and 14th Amendments, U.S. Constitution. All warrantless seizures of a person must be founded on at least reasonable suspicion that the individual seized is engaged in wrongdoing. Hayward v. State, 24 So.3d 17, 34 (Fla. 2009). The inquiry is whether there has been an intrusion upon constitutionally protected rights. Id.(quoting United States v. Mendenhall, 446 U.S. 544, 553, 100 S.Ct. 1870, 65 L.Ed.2d 497 (1980)). A court must look to the totality of the circumstances to decide if the police conduct would have communicated to a reasonable person that the person was free to leave or terminate the encounter. Hayward, supra, at 34-35. In Golphin v. State, 945 So.2d 1174 (Fla. 2006), this Court noted that a police inquiry regarding an individual's identity and an accompanying request for identification has not typically constituted a seizure as long as the police have not communicated the message that compliance with their inquiries is required. Id., at

1184.). An officer cannot hinder or restrict the person's freedom to leave or freedom to refuse to answer questions. Popple v. State, 626 So.2d 185, 187-88 (Fla. 1993). Here, Bukata's conduct communicated to a reasonable person that he was not free to leave or terminate the encounter. He continued to question Defendant, demanding identification information when Defendant was unable to produce an identification card. The officer had no founded suspicion to continue the detention. Compare State v. Baez, 894 So.2d 115 (Fla. 2004)(officer had founded suspicion to run warrants check when he found defendant slumped over steering wheel of his car parked in a dimly lit warehouse area at night). The purpose and flagrancy of Defendant's detention was such that the taint of the illegal stop requires suppression.

(VI)

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO GRUESOME PHOTOGRAPHS INTRODUCED BYTHE STATE AT TRIAL

The trial court erred in overruling Defendant's objections to gruesome photographs introduced by the State at trial. Prior to the medical examiner's testimony, the court conducted a hearing to determine the admissibility of certain autopsy photographs. (T. 1467-1478). Dr. Gertrude Juste reviewed certain photographs challenged by the defense. These photographs (Exhibits #s 93-104)(SR. 135; SR. 141; SR. 145-150; SR. 153; SR. 164; SR. 175; SR. 192), were

ultimately introduced into evidence over defense objection. (T. 1491-1493; R. 753-755, ¶10). The admissibility of photographs of a victim is within the discretion of the trial court. Ruiz v. State, 743 So.2d 1 (Fla. 1999). Only photographs which are beneficial to explain medical testimony, the manner of death, or the location of the wounds are generally admissible. Davis v. State, 859 So.2d 465, 477 (Fla. 2003); Floyd v. State, 808 So.2d 175, 184 (Fla. 2002); Pope v. State, 679 So.2d 710, 713-14 (Fla. 1996). The court should not have permitted the introduction of the foregoing photographs. Dr. Juste was fully capable of explaining the injuries to the victim without recourse to obviously gruesome photographs, some of which depicted the skin of the head pulled back to reveal the victim's skull and the entire front section of the body opened to reveal the victim's upper chest area. (SR. 146; SR. 153; SR. 175). In fact, the prosecutor conceded that the photographs in the case were "disgusting." (T. 1965). The introduction of the foregoing photographs was clearly aimed at inflaming the jury and shocking them with unnecessary photographs. The defense made clear that it would not be challenging Dr. Juste's autopsy findings. (T. 1477).[45]

[45] In fact, Dr. Juste *exhaustively* described the victim's injuries *before* the photographs were even shown to him to describe the autopsy findings. (T. 1497-1499).

(VII)

DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER GUILT PHASE CLOSING ARGUMENT

Defendant was denied a fair trial by the prosecutor's improper guilt phase closing argument. During the State's initial closing argument, the prosecutor stated:

> MS. SCHULMAN: "Now, I said you can come to this finding of first degree murder either way. What does that mean? *You're going to hear that your verdict must be unanimous, meaning you all must agree to the same verdict. However, the law does not require that you reach that verdict the same way. What does that mean? You can go back there and ask who believes it is first degree murder and if all, everybody's hands go up whether some of you believe it is because of felony murder and some of you believe it is because of premeditated murder that doesn't matter, as long as you all agree that you must believe it is first degree murder*. But the underlying theory or rational [sic] does not have to be the same as long as you agree that it is first degree murder… *Either any of these circumstances would rise to the level of first degree murder whether the thought process is between you all is the same or different it doesn't matter. Because the law specifically states that the State can prove it either of those two ways and there doesn't have to be agreement among you as to which of those two ways you come to your verdict, only that you come to the same conclusion of first degree murder*. And I submit to you, Ladies and Gentlemen, that it is there under any and all of the theories put forth." (T. 1897-1898)(emphasis supplied).

The prosecutor told jurors they did not need to be unanimous in finding either premeditation or felony-murder. These comments impermissibly lessened the unanimity requirement for jurors as to guilt.

The prosecutor further argued that

MS. SCHULMAN: "…So, some of you can go back there and decide, you know what, I see premeditation, I see those bindings, I see the taping, he had a conscious decision to kill, I believe Martin Dietz, I believe that from the day they met that plan was in motion, it is premeditated. *And some of you might go back there and say, you know what, I think he was trying to kidnap him to shut him up. Or I think he wanted this man's money and this man's truck and this man's watch* and in the course of doing all that he killed him… (T. 1897)(emphasis supplied)

The foregoing argument impermissibly expanded the basis for felony murder in this case by including *Schumacher's truck* as property taken in the robbery. The State argued that robbery was the underlying felony supporting felony murder. The robbery charge, as indicted, did not include an allegation that Defendant took Schumacher's truck. (R. 3-5)(Count III).[46]

During rebuttal, the prosecutor made the following improper arguments:

MS TATE: "What sickened Martin Dietz is the delight that the defendant took in this. The absolute delight in it that *there was no remorse*. There is *no remorse* in that video tape… Not his fault, *no remorse on that man's face, no remorse in that statement, no remorse in the jail when he's bragging to Martin Dietz and the others* about how he delighted in making the old man scream like a little girl, how he beat the pin number out of Dr. Schumacher, *that's not remorse*…" (T. 1942)(emphasis supplied).

* * *

MS. TATE: "…Which think about it, Ladies and Gentlemen, while Dr. Schumacher is laying in that bathroom bound, beaten and gagged, now upside down in a bath-tub bleeding to death that man is changing clothes, he's cleaning things up, he's in the kitchen packing a lunch,

[46] The prosecutor mentioned the fact that Patrick "took Mr. Schumacher's truck" when she argued the applicability of the pecuniary gain aggravating circumstance at the close of the penalty phase. (T. 3208).

making a sandwich, packing a lunch while Dr. Schumacher is laying in a bath-tub dying, and then he leaves the truck.
MR. RERES: Objection, that's not fair comment, there's no testimony to that at all.
THE COURT: Overruled. Overruled." (T. 1952-1953).

* * *

MS. TATE: "I know these photos have been a lot to ask you to look at. *I know that they are disgusting, but unfortunately this is a disgusting side of life* and what happened was vial [sic], but it is necessary to slow [sic] you, it was necessary to show this is premeditation. (T. 1965)(emphasis supplied).

* * *

MS. TATE: "…*It was a vial [sic], horrible, disgusting act and he's guilty as charged* on all three of those counts and I ask you to return that lawful verdict." (T. 1966)(emphasis supplied).

The prosecutor unfairly attacked Defendant's character. The prosecutor improperly asked jurors to convict due to lack of remorse, which is not an element of any offense at trial. The prosecutor's impermissibly engaged in character attacks by noting the vile, horrible and disgusting acts perpetrated on Steven Schumacher. See Perez v. State, 689 So.2d 306 (Fla. 3d DCA 1997); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979). These comments appealed to the fears and prejudices of the jury. The comments injected matters outside of the proper "scope of the jury's deliberations" and "violated the prosecutor's duty to seek justice." Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). These comments invited the jury to convict Defendant for a reason other than his guilt of the crimes charged. See Northard v. State, 675 So.2d 652 (Fla. 4th DCA 1996)(citing Bass v. State,

547 So.2d 680 (Fla. 1st DCA), rev. den., 553 So.2d 1166 (Fla. 1989), and Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), rev. den., 462 So.2d 1108 (Fla. 1985)). Fundamental error may arise where the comments go to the foundation or merits of the cause of action. See Gonzalez v. State, 588 So.2d 314, 315 (Fla. 3d DCA 1991); Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996). This Court may review the record and take into consideration the context of the closing argument. See Crump v. State, 622 So.2d 963, 972 (Fla. 1993). See also Porterfield v. State, 522 So.2d 483, 487 (Fla. 1st DCA 1988)(defendant's failure to testify); Rosso v. State, 505 So.2d 611, 612-613 (Fla. 3d DCA 1987) (defendant's failure to testify and derogatory comments concerning insanity defense); Aja v. State, 658 So.2d 1168 (Fla. 5th DCA 1995)(comments on matters not introduced as evidence); Fuller v. State, 540 So.2d 182, 184-185 (Fla. 5th DCA 1989)(comments derogatory of defendant as "shrewd" and "diabolical" and attacking counsel).

(VIII)

THE TRIAL COURT EMPLOYED THE WROING LEGAL STANDARD IN DENYING DEFENDANT'S MOTION FOR JUDGMENTOF ACQUITTAL ON THE FIRST DEGREE MURDER COUNT

The trial court erred in denying Defendant’s motion for judgment of acquittal on the first degree murder count when it employed the incorrect legal standard. The defense moved for judgment of acquittal at the close of the evidence, arguing that the prosecution had failed to prove premeditation to support

the count of first degree murder and requesting the court to reduce the charge to second degree murder. (T. 1845). The trial court denied the motion, stating:

> With regard to premeditation, I will read you from the instruction, it says: The question of premeditation is a question of fact to be determined by you," and that's the jury, from the evidence. So, *because it is a question of fact, it is not a legal issue for the Court to determine*…" (T. 1846; T. 1879)(emphasis supplied).

The trial court ruled that a determination of premeditation was exclusively a question of fact and not a legal issue. This is incorrect. A defendant may move for a directed verdict on the issue of premeditation. The trial judge must then determine whether there was direct or circumstantial evidence of premeditation to allow the matter to proceed for a jury determination. See, e.g., Bigham v. State, 995 So.2d 207 (Fla. 2008)(trial court allowed premeditated murder charge to go to jury and this Court directed entry of verdict for second degree murder).

(IX)

DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS

Should this Honorable Court find that the issues raised by Defendant constitute harmless error, Defendant would tender that the cumulative effect of the guilt phase errors renders Defendant's convictions entitles Defendant to a new trial. See Jones v. State, 569 So.2d 1234 (Fla. 1990); Lusk v. State, 531 So.2d 1377 (Fla. 2d DCA 1988).

(X)

THE TRIAL COURT ERRED IN ITS PENALTY PHASE JURY INSTRUCTIONS

The trial court erred in its penalty phase jury instructions. The defense filed objections to the standard jury instructions. In addition, the defense offered several special penalty phase instructions.

Denigrating Role of Jury

The defense objected to the instructions which informed the jury that their verdict was advisory. During the preliminary instructions to the jury at the penalty phase, the trial judge instructed jurors that:

> "The final decision as to what punishment shall be imposed *rests solely with the Judge* of this Court, however the law requires that you, the jury, *render to the Court an advisory sentence* as to what punishment should be imposed upon the defendant." (T. 2731)(emphasis supplied).[47]

In the final jury instructions, the court instructed jurors as follows:

> "You must follow the law that will be now given to you and render 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." (T. 3261)(emphasis supplied).
>
> ***
>
> "As you have been told, *the final decision as to what punishment shall be imposed is my responsibility*, however the law requires that you render an

[47] The defense objected on grounds that the trial court did not instruct the jury that their recommendation must be given great weight. The court simply responded it intended to instruct them as to great weight in the final instructions and denied any request to so instruct the jurors in the preliminary instructions. (T. 2732-2733).

advisory sentence as to what punishment should be imposed upon the defendant. *I must give your recommendation great weight in determining what sentence to impose. It is only under rare circumstances that I would impose a sentence other than the sentence that you recommend*. Your *advisory sentence* should be based upon the evidence that you have heard while trying the guilt of the defendant, and evidence that has been presented to you in these proceedings." (T. 3261-3262)(emphasis supplied).

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"*Your recommendation* to the Court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed." (T. 3265)(emphasis supplied).

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"These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful *recommendation*… If you fail to follow the law *your recommendation* will be a miscarriage of justice… There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and *legal recommendation* in this matter… *Your recommendation* must be decided only upon the evidence that you have heard from the testimony of the witnesses, have seen in the form of the exhibits in evidence and these instructions. *Your recommendation* must not be based on your feeling sorry for anyone, or being angry at anyone." (T. 3267-3268)(emphasis supplied).

***

"*Your recommendation* should not be influenced by feelings of prejudice, bias or sympathy. *Your recommendation* must be based on the evidence and on the law contained in these instructions. The sentence that you *recommend* to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and *your advisory sentence* must be based on these considerations." (T. 3268)(emphasis supplied).

***

"In these proceedings it is not necessary for the *advisory sentence* of the jury to be unanimous. The fact that the determination of whether you *recommend a sentence* of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence and all of it realizing that human life is at stake and bring to bare your best judgment in reaching your *advisory sentence*." (T. 3268)(emphasis supplied).

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> "If a majority of the jury determines that Eric Patrick should be sentenced to death, *your advisory sentence* will be: A majority of the jury by a vote, and it has to be seven or more, *advise and recommend* to the Court that it impose the death penalty upon Eric Patrick… When you have reached an *advisory sentence* in conformity with these instructions that form or *recommendation* should be signed by the foreperson… But the first verdict form, *advisory verdict* form has the style…you must put your numerical numbers on those lines, by a vote of blank to blank *advises and recommends* to the Court that it impose the death penalty upon Eric Patrick." (T. 3268-3270)(emphasis supplied).

The foregoing instructions impermissibly diluted the jury's sense of responsibility for a death sentence in this case.[48] The court repeatedly admonished the jury that it was to recommend a sentence, advise a sentence, enter a recommendation for a sentence, or issue an advisory verdict. These repeated and continual instructions impressed upon the jury a diluted sense of their responsibility for voting for death.

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[48] During her opening statement, the prosecutor informed jurors that in the penalty phase "… jurors then are given evidence and the jury then goes back to deliberate yet a second time for something that's called *the recommendation* for the Court regarding the penalty where you give now what's called *a recommendation* to the Court for a sentence, an *advisory sentence* for either the death penalty or life in prison…"(T. 2734)(emphasis supplied). The prosecutor later told jurors that they were to weigh the aggravators against the mitigators and then "you each *individually* talk about 'em *and individually* can come up with *a recommendation* for the Court as to what you think the appropriate sentence in this case." (T. 2735) (emphasis supplied). Additionally, the prosecutor told the jury that they could "return *an advisory sentence* to this Court for a death sentence," and that the State would be asking them to "return that finding and that *recommendation* to the Court." (T. 2741)(emphasis supplied). The prosecutor repeatedly argued during closing argument that the jury would it would be making a "recommendation" to the Court for a death sentence. (T. 3202; T. 3203; T. 3204; T. 3211; T. 3216; T. 3222).

No need for unanimity

The defense objected to the instructions which informed the jury that their verdict need not be unanimous. The trial court instructed jurors:

> "*If a majority* of the jury determines that Eric Patrick should be sentenced to death, your advisory sentence will be: *A majority of the jury* by a vote, and it has to be *seven or more*, advise and recommend to the Court that it impose the death penalty upon Eric Patrick…(T. 3268=-3269)(emphasis supplied).

The foregoing instruction improperly lessened the need for jurors to find the aggravating circumstances by unanimous vote.[49]

Mercy

The trial court improperly excluded the concept of mercy when it instructed the jury:

> "…Your recommendation must not be based on your *feeling sorry for anyone*, or being angry at anyone." (T. 3267)(emphasis supplied).
>
> ***
>
> "Your recommendation should not be influenced by feelings of prejudice, bias *or sympathy*. Your recommendation must be based on the evidence and on the law contained in these instructions." (T. 3268)(emphasis supplied).

The foregoing instructions had the effect of dismissing, or at best, diluting the right of jurors to consider mercy in their deliberations.

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[49] The prosecutor made sure jurors understood that their "*findings aren't unanimous*. You're going to hear about things that the State has to prove. This time you're going to hear about aggravators, what does the State have to show you. The State has to in the penalty phase prove to you aggravators beyond a reasonable doubt…" (T. 2734). The prosecutor returned to this theme in closing argument, telling jurors that their verdicts "do not have to be unanimous." (T. 3203).

(XI)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

Defendant is entitled to resentencing based upon the prosecutor's improper penalty phase arguments. During her penalty phase remarks, the assistant state attorney made the following comments:

> MS. TATE:"Remember, he goes down to Hollywood, uses the ATM card all around Hollywood…using the ATM card until the access isn't there any more. Sets up that whole alibi…That's not taking full responsibility. *No remorse there*. That's cold, that's calculated, that's premeditated…" (T. 3220)(emphasis supplied).

The prosecutor improperly argued a non-statutory aggravating circumstance, that is, the lack of remorse.[50] The assistant state attorney clearly alluded to matters that were not relevant to the imposition of the death penalty.

The prosecutor also made the following comments:

> MS. TATE:"… *And I just want to make sure everyone understands that this is not something you're imposing*. This is something the defendant has done. This is something that he bares [sic] the responsibility for, *no one else*. This is a choice he made. *Not the jury, not the Judge,* these are choices he's made through his life. He's had a choice to make every step of the way." (T. 3221-3222).

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[50] Of course, these comments were made *before* defense counsel ever addressed the jury. Therefore, the comments could not be considered, in any way, fair rebuttal.

MS. TATE: “He bares [sic] the responsibility, Ladies and Gentlemen, for this. He bares [sic] it himself *and no one else*.” (T. 3222)(emphasis supplied).

The prosecutor clearly denigrated the role of the jury. The prosecutor told the jury was “not imposing” the death penalty, and that neither the jury nor the judge was responsible. The prosecutor plainly stated that the jury need not concern itself with any type of responsibility for voting for the death penalty.

The prosecutor also argued:

MS. TATE:"If the aggravating factors, even one outweigh the mitigation then you can come back into this courtroom and recommend that the appropriate sentence in this case be the death penalty.” (T. 3215-3216).

The prosecutor improperly left the jury with the firm impression that it was required to return a recommendation of the death penalty based on simple weighing of aggravating circumstances and mitigating factors. In effect, jurors were told that they had no choice but to impose the death penalty once it engaged in the simple weighing of the competing factors.

(XII)

THE TRIAL COURT IMPROPERLY CURTAILED DEFENSE COUNSEL’S PENALTY PHASE CLOSING ARGUMENT

During defense counsel’s closing argument, the following occurred:

MS. FERRARO: “…Life in prison means that for everyday from now until the day that he dies he’s going to be told when to get up, when to go to

bed, when to eat, what to eat, no choices. Maybe, maybe if he's lucky he's going to get to watch TV with…

MS. TATE: Judge, objection.

THE COURT: Sustained

MS. FERRARO: It is a harsh life. It is a stark life. There are no pleasures.

MS. TATE: Objection, again, Judge.

THE COURT: Ms. Ferraro, please stick to the facts and inferences in this case, please.

MS. FERRARO: Life without parole means that he's there forever with nothing, maybe a letter from his mother now and then or a letter from Doris. There's no perks, there's no happy side to it.

MS. TATE: Judge, objection.

THE COURT: Sustained." (T. 3241-3242).

Defense counsel's argument was improperly curtailed by the trial court. The defense should have been allowed to argue the reasonable inferences from the imposition of sentence of life imprisonment term without parole. Counsel should be permitted to present all legitimate arguments. See Thomas v. State, 748 So.2d 970 (Fla. 1999). The trial court must afford counsel wide latitude in presenting the closing argument. See Ford v. State, 802 So.2d 1121 (Fla. 2001). The trial court abused its discretion.

(XIII)

THE TRIAL COURT ERRED IN LIMITING DEFENSE EXPERT'S TESTIMONY AND PRESENTATION DURING THE PENALTY PHASE

The trial court erred in limiting defense expert's testimony and presentation during the penalty phase. The prosecutor argued that she had received a power-point presentation from Dr. Christopher Fichera for use at the penalty phase. The

State objected to part of the presentation which included photographs of the electric chair, the gurney Defendant would be strapped down to receive a lethal injection, and jail cells. Moreover, the State requested that the court take out of the presentation those sections which addressed Defendant's mother's background. (T. 2809-2811). The defense stated Dr. Fichera would be called as an expert in mitigation and the preparation of a psycho-social examination, which entails a detailed and thorough history of an individual, his family relations, the circumstances under which he grew up and the relation of those circumstances to the literature and scientific data as they pertain to mitigating circumstances. (T. 2812-2813). The defense listed Dr. Fichera many months before and the prosecution had never deposed him. (T. 2814-2815). The information about the mother's background was relevant to her ability to protect Defendant while he was growing up. The information would be relevant to poor parenting skills, the family dynamic, and the relationships of significant person in Defendant's life; classic mitigation. (T. 2816; T. 2818). The defense requested that the photographs of the jail cell and the gurney be allowed as demonstrative exhibits of the two choices facing the jury: life imprisonment or the death penalty. (T. 2819). The court excluded the photographs. (T. 2819; T. 2970; SR. 253). The court also granted the State's motion to remove a large section of the presentation, pertaining to Defendant's mother and Defendant's father. (T. 2972-2974; T. 2980-2981; T.

3050; SR. 231-240; SR. 241-251; SR. 254-260). The defense objected to the exclusion of the multi-generational dysfunction sections, noting that the court had materially limited mitigation at "the 11th hour." (T. 2978-2980). A defendant is entitled to have a finder of fact consider any aspect of Defendant's character or background at a penalty phase. By excluding testimony as to multi-generational dysfunction, the court gutted Defendant's penalty phase presentation. See State v. Larzelere, 979 So.2d 195, 206 n.8 (Fla. 2008)(multi-generational history of dysfunction a non-statutory mitigating factor). Mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may be considered by the sentencing judge and jury as mitigating. See Hoskins v. State, 965 So.2d 1, 17-18 (Fla. 2007). The Constitution requires that the sentence in capital cases must be permitted to consider any relevant mitigating factor. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).[51]

(XIV)

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

It is necessary in capital cases that this Court engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case,

[51] See also Stewart v. State, 558 So.2d 416, 421 (Fla. 1990)(advisory function of jury would be distorted if jury's advice would be preconditioned by judge's view of what they were allowed to know).

and to compare it with other capital cases. Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny. Id. The trial court wrote that the most logical interpretation of the evidence in this case established that Defendant intentionally and brutally beat and then strangled to death an elderly disabled victim. (R. 974-975). Other than pointing to two apparent aggravating circumstances in the case, the court made no further analysis. In the present case, the defense presented evidence and testimony about Defendant's horrific upbringing and other compelling mitigating factors. The record shows that Defendant had been the victim of child abuse and sexual abuse. It was shown that Defendant was loved by family and acquaintances and that his execution would have a negative impact on Defendant's family. Defendant had artistic talents. Defendant exhibited appropriate courtroom behavior. Defendant assisted the police by admitting to the crime. Moreover, Defendant's mandatory incarceration for life would keep him out of society. The aggravating factors (1-3) noted by the trial judge (R. 960-961) involved Defendant's prior crime of armed carjacking and the attendant offenses he committed in this case. Aggravating circumstance #4(pecuniary gain) merged with circumstance #3(commission of robbery). The court's findings of HAC and CCP, challenged by the defense here, must

nevertheless be viewed along with Defendant's 39 mitigating circumstances listed in Defendant's *Spencer* memorandum. (R. 923-925). Not every strangulation murder is heinous, atrocious or cruel. See, e.g., Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989); Herzog v. State, 439 So.2d 1372, 1379-80 (Fla. 1983). Under these circumstances, imposition of the death penalty would be disproportionate.

(XV)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

The trial court committed several errors in its sentencing order which, individually and cumulatively, require reversal of Defendant's death sentence and a remand for resentencing. The court considered the aggravating factors and the mitigating factors. The court gave great weight to the fact that Defendant was on prison release when he committed the crime and that he was previously convicted on the Tyson carjacking case. The court gave great weight to Defendant's convictions for robbery and kidnapping. The court merged the pecuniary gain factor with the robbery. (R. 959-962). Defendant submits that the foregoing aggravating circumstances were disproportionately weighed because the same felony conviction supported circumstances 1 and 2. Where the operative facts give rise to two aggravators, it is improper to "double" their impact. As to aggravator

#3, Defendant submits that use of the felony murder aggravator violates the prohibition against double jeopardy. Also, this aggravator operates as an impermissible automatic aggravator because it is duplicative of felony murder. In any event, the court should not have given this aggravator great weight because the prosecution already relied upon these felonies under the felony murder theory. Here, the kidnapping conviction was based on the fact that the victim was bound and gagged in one location and not transported elsewhere. The robbery offense appears to have been more of an afterthought to the killing. Of course, without a special verdict form, there is no way of knowing which, or, if any, of the jurors convicted on a premeditated or felony murder theory. As to the HAC factor, the court gave it great weight. (R. 962-963). The court noted the victim's mouth was covered with tape and that after Defendant beat, bound and gagged the victim, Defendant strangled him. (R. 962). In reality, the medical examiner did *not* testify as to the sequence of actions in this case. The court appeared to rely on the fact that the victim was conscious throughout the episode. (R. 963). Although the victim may have been *alive* throughout the beating, there was no medical testimony that the victim was, in fact, *conscious* throughout the episode. Compare Bowles v. State, 804 So.2d 1173, 1178 (Fla. 2001)(strangulation of conscious victim); Guzman v. State, 721 So.2d 1155, 1159 (Fla. 2002)(beating of conscious victim). Not every strangulation murder is heinous, atrocious or cruel. See Rhodes

v. State, supra; Herzog v. State, supra. In the present case, the weight of the evidence shows that the victim was likely unconscious as a result of the blows and/or strangulation. There was no competent, substantial evidence that Defendant intended to torture the victim or evidence to show exactly how long the episode occurred. The crime scene witness testified that the struggle apparently began in the bed, supporting Defendant's statement that he had an emotional over-reaction to the victim's sexual advance. As to the CCP factor, the court gave it great weight. The court found that Defendant had a heightened level or premeditation, relying Dietz's testimony and on certain aspects of the crime. (R. 963). The court made reference to the "fact" that Defendant turned down the thermostat to 60 degrees. The record does not show that Defendant actually did so. The CCP factor is reserved for cases showing that the murder was the product of a careful plan or prearranged design. See McWatters v. State, 36 So.3d 613, 640-41 (Fla. 2010). This aggravator normally applies where the facts show a substantial period of reflection and thought by the perpetrator. See Alston v. State, 723 So.2d 148, 161-62 (Fla. 1998). Premeditation of the type necessary to support a conviction for first degree murder is insufficient to sustain CCP. See, e.g., Smith v. State, 28 So.3d 838 (Fla. 2009)(rejecting CCP factor in strangulation murder). The CCP factor is often established with the advanced procurement of a weapon, the lack of resistance or provocation, and the appearance that the killing was committed as a

matter of course. See Davis v. State, 859 So.2d 465, 479 (Fla. 2003); Walker v. State, 957 So.2d 560, 581 (Fla. 2007). Here, there is no post-arrest statement by Defendant admitting a plan to kill the victims. See McWatters v. State, supra, at 642(striking CCP and noting that defendant did not admit to a preformed plan to kill). Compare Asay v. State, 580 So.2d 610 (Fla. 1991)(defendant's statement he planned to kill showed heightened premeditation); Zommer v. State, 31 So.3d 733 (Fla. 2010)(same). Under the totality of the circumstances in this case, there was no competent, substantial evidence that established any type of careful plan or that Defendant procured a weapon in advance. Compare Silva v. State, 60 So.3d 959 (Fla. 2011)(CCP upheld where defendant procured shotgun and shells). Rather, the evidence points to a heated or emotional rage triggered by the provocation of unwanted sexual advances. Clearly, the killing was not accomplished in an efficient manner, or as a matter of course, that would indicate the type of cool reflection which would classify it as "cold." In fact, Drs. Fichera and Ribbler opined that the killing was probably ignited by the sexual abuse Defendant had suffered as a child. Lastly, the court gave great weight to the fact that Schumacher was particularly vulnerable due to age or infirmity. (R. 964). Defendant submits that this aggravator is unconstitutional as it does not adequately narrow the category of victims for purposes of death penalty. Moreover, the evidence introduced at trial did not establish this factor beyond a reasonable doubt. The

medical examiner did not testify to any debilitating condition of the victim. The testimony showed that Schumacher would drive his truck and was fit enough to "pick up" Patrick and engage in sexual relations. At a minimum, the court should not have given this aggravator "great" weight. Age alone cannot be a constitutionally valid reason for imposition of this aggravator as individuals can and do vary greatly in terms of physical strength and abilities despite their actual ages. See Francis v. State, 808 So.2d 110, 137-139 (Fla. 2001).

The weight assigned to a death penalty mitigating circumstance is within the discretion of the trial court and is subject to the abuse of discretion standard. Spann v. State, 857 So.2d 845,859 (Fla. 2003)(quoting Elledge v. State, 706 So.2d 1340, 1347 (Fla. 1997)). In the present case, the trial judge failed to give Defendant's mitigating circumstances sufficient weight. Rejection of mitigating factor cannot be sustained unless supported by competent substantial evidence refuting existence of factor. Maxwell v. State, 603 So.2d 490 (1992). See also Knowles v. State, 632 So.2d 62 (1993). In this case, the court rejected any statutory mitigation, even though the defense presented *unrebutted* expert testimony to support the statutory mitigating circumstance that Defendant was under the influence of an extreme emotional or mental disturbance at the time of the offense, pursuant to Section 921.141(6)(b), Florida Statutes. (R. 926-927). This Court should not lose sight of the fact that the jury's vote for the death penalty was a *bare majority (7 to 5).* The

long list of mitigating circumstances (39) provided by the defense, and supported in the record, should have been accorded great weight by the trial court. Instead, the court gave no weight, or little or some weight to all the mitigating circumstances (R. 965-974). It is undeniable that Defendant was the subject of severe sexual and physical abuse from a very early age. He was abandoned by his parents, who had little or no parenting skills. While growing up, he lived "on eggshells," fearing when his father would physically attack him, his brother or his mother. He drifted away from home and became the object of adult physical and sexual abuse. All of the foregoing testimony and evidence was *uncontroverted.* See Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990)(uncontroverted evidence of physical and psychological abuse in his youth and trial court's analysis inapposite). See also State v. Larzelere, 979 So.2d 195 (Fla. 2008)(new penalty phase where counsel failed to discover substantial mitigation). The trial court simply did not give sufficient weight to the *unrebutted* mitigating circumstances, even though various witnesses, including two mental health experts, testified in support of mitigation.[52] Certainly, Defendant's case is not one of the "most aggravated and

[52] Most egregiously, the court accorded no weight to the fact that Defendant was abandoned by his parents over the course of his youth; no weight to the fact that Defendant suffered extreme negative emotional impact from the broken home; no weight to Defendant's capability to maintain good relationships; no weight to Defendant's excellent artistic talents; and no weight to Defendant's ability to function well when incarcerated and has a trustee status at the jail (taking judicial notice of Defendant's "red jumpsuit" as evidence to negate this circumstance).

least mitigated cases," warranting the death penalty. Defendant requests that this Court vacate his sentence of death and remand the case for resentencing.

(XVI)

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

Defendant recognizes that this Court has rejected constitutional challenges to Florida's capital punishment statute. See, e.g., Banks v. State, 42 So.3d 204 (Fla. 2010). Nevertheless, Defendant maintains that Florida's capital punishment statute violates the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). (R. 57-391; R. 428-507; R. 763-768; R. 772-863; T. 24-28).[53] Recently, however, Judge Jose E. Martinez of the United

[53] For the reasons listed in Defendant's penalty phase motions (R. 57-391; R. 428-507; R. 763-768; R. 772-863; T. 2259-2337), Defendant maintains that the Florida statute, and the penalty phase instructions which are given in compliance therewith, are unconstitutional because (1) only a bare majority of jurors is sufficient to recommend a death sentence; (2) the aggravating circumstances are not alleged in the indictment; (3) the standard jury instructions violate Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985), on role of the jury; (4) victim impact is permitted as evidence; (5) jury only renders advisory sentence; (6) Florida law does not permit a special verdict on theory of guilt; (7) Florida law does not permit a special verdict in the penalty phase; (8) judge alone is impermissibly allowed to assign weight to mitigating factors; (9) jury is not provided adequate guidance in finding aggravating and mitigating circumstances; (10) prior violent felony aggravating circumstance is unconstitutionally vague and overbroad; (11) pecuniary gain instruction is vague and overbroad; (12) the CCP factor is unconstitutionally vague and overbroad; (13) the Florida statute does not provide for adequate appellate review; (14) the HAC factor unconstitutionally vague and overbroad; (15) Florida law does not mandate that all of Defendant's mitigating circumstances be listed for the jury for a jury finding; (16) judge alone

States District Court for the Southern District of Florida entered an order in Evans v. McNeil, Case No. 08-14402-CIV-MARTINEZ (S.D. Fla., June 20, 2011), finding that Florida's death penalty statute was unconstitutional as applied in Mr. Evans's case. (Docket Entry 21). In Evans the court reviewed the statute in light of Ring, supra, and found that because the jury may not have reached a majority finding as to any one aggravating factor, the Florida sentencing statute leaves open the very real possibility that in substance the judge still makes the factual findings necessary for the imposition of the death penalty as opposed to the jury as required by Ring. The Evans decision supports Defendant's claim that Florida's death penalty statute is unconstitutional as applied in this case.[54]

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makes decision to impose death penalty; (17) the age and particularly vulnerable aggravating circumstance is vague and overbroad; (18) Florida's statute impermissibly imposes a burden of proof or persuasion on the defense for mitigating circumstances; (19) the felony murder aggravating circumstance is unconstitutional because it does not serve the limiting function and creates an unlawful presumption of death; (20) Florida's statute unconstitutionally require that the mitigating circumstances must outweigh the aggravating circumstances; (21) Florida's statute violates due process and cruel and unusual punishment because it fails to provide for special jury findings of which aggravating circumstance has been proven beyond a reasonable doubt; (22) the aggravating circumstance that the offense was committed under sentence of imprisonment is vague and overbroad and is applied arbitrarily.

[54] This Court has stated that a Ring claim may be rejected where one of the aggravating factors is a prior conviction. Former Chief Justice Anstead in Nelson v. State, 850 So.2d 514 (Fla. 2003), pointed out that even if one of the aggravating factors is "exempt" from Ring, the remaining aggravating factors that the judge finds alone were given great weight in imposing the death penalty, and such findings and reliance thereon would appear to violate the mandate of Ring that a death sentence may not be based upon findings made by the trial judge alone. Id.,

(XVII)

WHETHER DEFENDANT'S SENTENCE OF DEATH MUST BE VACATED DUE TO THE CUMULATIVE EFFECT OF THE PENALTY PHASE ERRORS

Defendant's sentence of death must be vacated due to the cumulative effect of the penalty phase errors.

CONCLUSION

Eric Kurt Patrick respectfully requests that this Honorable Court reverse his convictions and corresponding sentences, or alternatively, requests that this Court vacate his death sentence and remand for resentencing.

Respectfully submitted,

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FLA. BAR NO. 302007

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at 534 (Anstead, C.J., concurring in part and dissenting in part). Chief Justice Anstead's reasoning should be adopted and followed by this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Lisa Marie Lerner, Esq., Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401-3432, on this 14th day of July, 2011.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ

CERTIFICATE OF COMPLIANCE

Appellant states that the size and style of type used in his initial brief is 14 Times New Roman.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ