IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

DAN PATRICK HAUSER, by his next friends ZAINNA FAWNN CRAWFORD, and GREGORY C. SMITH, **Petitioner,** **vs.** **MICHAEL MOORE, Secretary, Florida Department of Corrections, JAMES CROSBY, Warden, Florida State Prison,** **Respondents.**	**EMERGENCY PETITION CAPITAL CASE EXECUTION SCHEDULED FOR AUG. 22, 2000, at 6:00 p.m.**

PETITION FOR WRITS OF HABEAS CORPUS, PROHIBITION, AND MANDAMUS, AND INVOKING THIS COURT'S ALL-WRITS JURISDICTION

I.

INTRODUCTION & STATUS OF PETITIONER

Dan Patrick Hauser is innocent of the death penalty. His conviction, based on a plea of nolo contendere, is invalid. It was accepted by the trial court after the State and defense counsel allowed Mr. Hauser to mislead the court regarding his documented history of bipolar disorder, suicidal ideation, and alcohol abuse, including alcoholic blackouts. Physical evidence contradicts Hauser's contrived statement of December

12, 1995, directed at securing a death sentence and completely refutes the finding of death eligibility. Statements of disinterested eyewitnesses, as well as reports, photographs, and notes prepared by law enforcement officers, and information known to but undisclosed by defense counsel establish that Hauser–a chronic alcoholic and manic depressive with a history of blackouts, hallucinations, and amnesia–had been drinking heavily for at least 10 hours prior to the offense and could not have formed a premeditated design to kill Melanie Rodrigues.

This is precisely the situation feared by three members of this Court when it decided Mr. Hauser's direct appeal and in *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). *See Hauser v. State*, 701 So.2d 329, 332 (Fla. 1997) (Anstead, J., concurring). Mr. Hauser is using the State of Florida as his means of committing suicide.

During the plea colloquy, defense counsel stood mute while Hauser falsely denied being diagnosed with a mental disorder and his substantial, repeated treatments for mental illness and alcoholism. Although Mr. Hauser's father had informed law enforcement officers that Mr. Hauser suffered from manic-depression, the State also stood mute while Mr. Hauser misled the court. The trial court never inquired into Hauser's knowledge of events or understanding of the elements of first degree murder.

Independent scientific evidence conclusively demonstrates that it is physically impossible for Ms. Rodrigues to have been killed in the manner described by

Hauser. From March through December 1999, Dan Hauser admitted he killed Ms. Rodrigues by suddenly grabbing her neck. To prosecutors, detectives, defense investigators and attorneys alike, Mr. Hauser expressed remorse and confusion, repeatedly asking to plead guilty and painfully describing his inability to explain or fully recall what precipitated the murder or what happened during it. Independent witnesses confirm Mr. Hauser's account of traveling all night from Wilmington, North Carolina to Ft. Walton Beach, Florida where he began drinking heavily. Hauser has a documented history of alcohol and substance abuse so severe that he has suffered hallucinations, alcoholic blackouts, and amnesia. Then, suddenly, on December 12, 1995, after researching the criterial for death-eligibility, this manic-depressive inmate with a history of suicide attempts following his arrest produced a handwritten statement purporting to describe his intent and actions on the night of the murder. This statement ***was the sole basis for finding each of the aggravating circumstances*** making this case eligible for the death penalty. For each of the three aggravating circumstances referenced in the sentencing order, the trial court relied exclusively upon Hauser's letter.[1] Examination of this statement compared to the physical evidence and eyewitness accounts conclusively establishes that it is false.

[1] The trial court wrote that the finding of pecuniary gain was based exclusively on "four separate references" in his letter, "to [Hauser's] intent to benefit financially from this crime."

Pursuant to a letter received from the Governor of State of Florida, undersigned counsel has investigated whether Mr. Hauser is in need of counsel. App. 1. Undersigned counsel has learned that the circumstances of this case involve much more than the narrow, albeit profoundly important, question of whether Dan Hauser should live or die. Several significant factual matters were not disclosed to the lower court. While the process employed in Mr. Hauser's case certainly invalidates Mr. Hauser's conviction and death sentence, it also reveals a potential systemic deficiency in the administration of the death penalty cases in Florida as a whole. As will be demonstrated *infra*, issues of great importance concerning Florida's judicial process in capital cases are presented calling into question the integrity of the system and safeguards, or lack thereof, in place to ensure that the State of Florida executes only that class of individuals who are truly deserving of the death penalty as intended by the laws of Florida and the United States Constitution.

On August 16, 2000, Petitioner filed in this Court motions seeking the appointment of a special counsel and permission for Mr. Hauser's mother, Zainna Fawnn Crawford, to proceed as next friend. Petitioner/next friend Smith and next friend Crawford renew those requests now and incorporate into this Petition all arguments and allegations from the Motion for Stay of Execution, for Permission to Initiate Belated Appeal or Other Proceedings, and for Appointment of Special Counsel,

and the Motion to Proceed as Next Friend.

II.

JURISDICTION & RELIEF SOUGHT

Pursuant to Florida Rule of Appellate Procedure 9.100(a), and article V, section 3(b), Florida Constitution, Petitioners invoke this Court's jurisdiction to issue writs of habeas corpus, prohibition and mandamus, and its jurisdiction to issue all writs necessary to the complete exercise of its jurisdiction. *See State of Florida v. Fourth District Court of Appeal*, 690 So.2d 70, 71 (Fla. 1997) ("we now hold that in addition to our appellate jurisdiction over sentences of death, we have exclusive jurisdiction to review all types of collateral proceedings in death penalty cases"); *Orange County v. Williams*, 702 So.2d 1246 (Fla. 1997) (transfer of appeal to this Court "based upon our plenary jurisdiction over death penalty cases. See art. V, § 3(b)(1), Fla. Const."). Under these extraordinary circumstances, jurisdiction is proper under the "all writs" clause. The relief sought here is necessary to the exercise of this Court's capital case jurisdiction. *Provenzano v. Moore*, Case No. 95, 973, 1999 WL 756012, 1 (Fla. Sept. 24, 1999); *Jones v. Butterworth*, 691 So.2d 481 (Fla. 1997); *see Johnston v. Singletary*, 640 So.2d 1102 (Fla. 1994).

Petitioners seek writs of prohibition directed at Respondents barring them from carrying out the execution of Dan Patrick Hauser on grounds, *inter alia*, that he is

factually and legally innocent of the death penalty and of first-degree murder. Further, Petitioners seek a writ of mandamus directed at Respondent State of Florida, representing the Circuit Court for the First Judicial Circuit, in and for Okaloosa County, Florida, requiring that further proceedings be held to correct the unconstitutional judgments entered therein. Finally, and ultimately, Petitioners seek the entry of a writ of habeas corpus vacating the judgments of conviction and the sentence of death imposed on Dan Patrick Hauser.

III.

PROCEDURAL HISTORY & STATEMENT OF THE CASE

Dan Hauser was indicted for the murder of Melanie Marie Rodrigues. The indictment charged only first degree, premeditated murder. On November 21, 1995, Hauser entered a plea of nolo contendere which was accepted by the court that same day. No inquiry was made into the factual basis of the charge, whether Hauser had formed the necessary intent, or whether he knew or understood what the State would have to prove to obtain a conviction on the indictment.

Mr. Hauser gave a total of four statements to police regarding the death Ms. Rodrigues. In the first two, made on February 12 and 14, 1995, Mr. Hauser denied any knowledge of Ms. Rodrigues. These statements were made when Mr. Hauser was in the custody of the sheriff of Washoe County, Nevada. In an apparent effort to

circumvent Fifth and Sixth Amendment protections, Florida law enforcement officials conspired with police in Wilmington, North Carolina, to arrange for a warrant to be issued from North Carolina rather than Florida, and Mr. Hauser was being detained under that warrant.

During the February 14, 1995 interview, Investigator S.B. Griggs of the Okaloosa County Sheriff threatened Mr. Hauser with the electric chair. Mr. Hauser then said, "I think we need to talk to a lawyer, if we are talking about a death sentence, we don't need to talk anymore then." Griggs did not terminate the interrogation, however. He went on haranguing Mr. Hauser about Mr. Hauser's parents, threatening to involve them in his investigation once Mr. Hauser made it clear this upset him.

On March 21, 1995, Mr. Hauser requested a meeting with Griggs. Mr. Hauser confessed to the murder of Melanie Rodrigues. During the 40 minute interrogation, Mr. Hauser repeatedly explains that his statement was compelled by an attack of conscience and pressure from his adoptive parents. App. 2 at 3 ("It's just that my conscience is killing me and my parents are going nuts"); 4-5 ("Its [sic] been driving me f***ing nuts . . . . I didn't know what to do. I called you to come clean man"); 11 ("I felt guilty"); 12 (**"I know you can't do anything and I'm not asking for anything, I'm just trying to clear my conscience some** instead of hiding everything. You don't know what I am going through here thinking about it all the time, you have no idea");

13 (“its tearing them [Hauser’s parents] up as it is”); 15 (“I know everybody’s been telling me I’m a f***g idiot for f***g copping to it, but I just can’t deal with it”).

Mr. Hauser described what he could remember of the night of December 31, 1994. Independent, extrinsic evidence explains his inability clearly to recall events and corroborates the presence of circumstances diminishing his ability to recall. First, Mr. Hauser was sleep-deprived. Witnesses report that Mr. Hauser left Wilmington, North Carolina, late on Friday, December 30, 1994. App. 3 (Affidavit of John Quinn). Mr. Hauser told police he arrived in Fort Walton Beach at approximately 3:00 p.m. on Saturday, December 31, 1995, and this is confirmed by police reports and business records from the Econolodge Hotel. App. 4 at 53 (Griggs Notes). Driving non-stop from Wilmington to Ft. Walton Beach takes approximately 15 hours. Mr. Hauser told police he drove straight through (App. 2), and based on information received from witnesses, this could be confirmed with bank records showing that Mr. Hauser used an ATM card stolen from Brad Quinn in Wilmington, somewhere in Georgia, and again in Florida between December 30 and 31, 1994. Thus, Mr. Hauser was awake, doing highway driving throughout the night preceding the murder.

It is uncontested that Mr. Hauser was awake and drinking heavily throughout December 31, 1994. Eyewitnesses confirm that Mr. Hauser was drinking first beer (App. 2), then whiskey and champaign (App. 5)(Affidavit of Marc Levi), from Friday

afternoon through the early hours of Sunday morning. Mr. Hauser was seen drinking at least as late as 2:30 am, Sunday, January 1, 1995, when he and the victim left a strip club. Medical records establish that Mr. Hauser has a history of alcoholic blackouts.

Other witness statements to law enforcement substantiate Mr. Hauser's claim that he quickly lost control when he grabbed the victim, although this information was not disclosed to the defense. John Quinn, Mr. Hauser's employer in North Carolina, and the person who last saw him there before he came to Florida, told Griggs on January 17, 1995, that Mr. Hauser had an "extremely quick temper w/ no conscious thought or build up." App. 7 at 45 (notes of S.B. Griggs). However, Mr. Quinn also informed Det. Griggs that Mr. Hauser's temper produced "[n]o physical reaction nor ranting and raving would pout and withdraw into himself." *Ibid.*

Det. Griggs's records also corroborate Mr. Hauser's confession to having agreed to pay the victim for sex. The management of Sammy's, the adult club where the victim performed and where she met Mr. Hauser, informed Det. Griggs on January 19, 1995 that "girls turned tricks" while working there.[2] App. 8. Other witnesses gave

[2] Please note that the point of this evidence is merely to demonstrate the unreliability of Mr. Hauser's claim that he approached Ms. Rodrigues because she appeared naive and new. In fact, although the victim had only worked at Sammy's for a short time, she was experienced at sexually exhibitionist performances, and was known by law enforcement to have engaged in prostitution. A person who chose these activities is not likely to have appeared naive to a drunk.

Det. Griggs information suggesting that Mr. Hauser's description of the victim as someone who appeared naive was a fabrication. Witnesses told Det. Griggs that the victim frequented a bar called Night Town, where she "always entered & usually won" a "silhouette contest." App. 8.

On direct appeal this Court affirmed the conviction and death sentence, quoting at length Mr. Hauser's December 12 statement as justification for imposition of the death penalty. *Hauser v. State*, 701 So.2d 329 (Fla. 1997)(Per Curiam) (Anstead, J. concurring with opinion in which Kogan, C.J. and Shaw, J. concurred). Rehearing was denied November 13, 1997.

On December 30, 1998, Mr. Hauser filed a Motion to Dismiss and Notice of Conflict of Interest in which he averred that he "[was] competently waiving his counsel." Post-conviction counsel responded by requesting the court to order a competency evaluation. On March 3, 1999, the lower court entered an order appointing Dr. James Larson, Ph.D. to conduct a competency evaluation. A hearing was held on March 26, 1999, at which the State submitted Dr. Larson's report into evidence over defense counsel's objection. Other than Mr. Hauser, no other evidence was proffered, argued or heard by the court.

On April 7, 1999, the lower court granted Mr. Hauser's motion. In its order the court stated: "the psychological evaluation conducted by Dr. Larson was controlling

on all relevant issues." Additionally, the court relied upon Dr. Larson's report which indicated that Mr. Hauser had no indications of psychosis, serious brain impairment or mood disorder.

No appeal was filed regarding Mr. Hauser's waiver of collateral counsel or appeals or the court's competency determination.

On August 16, 2000, undersigned counsel filed in this Court a Motion for Stay of Execution, Permission to Initiate Belated Appeal or Other Proceedings, and for Appointment of Special Counsel, and a Motion to Proceed as Next Friend. These pleadings requested that undersigned be appointed as special counsel to ensure that all relevant information necessary for a determination whether Mr. Hauser's death sentence and the Respondent Governor Bush's execution warrant may be carried out. From what follows, it is clear that further proceedings are necessary. All allegations and arguments made in the Motion for Stay, etc., are hereby incorporated into this petition by specific reference.

IV.

CLAIMS FOR RELIEF

A. DAN PATRICK HAUSER IS FACTUALLY AND LEGALLY INNOCENT OF THE DEATH PENALTY, THIS CASE IS DEMONSTRABLY LESS SERIOUS THAN OTHER HOMICIDES IN WHICH THE STATE HAS NOT SOUGHT THE DEATH PENALTY, AND RESPONDENTS ARE THEREFORE

DISENTITLED TO CARRY OUT THE EXECUTION

Dan Hauser is innocent of the death penalty. The death sentence about to be carried out is based exclusively on his statements given on December 12, 1995. No independent extrinsic evidence was introduced that corroborates any of the three aggravating circumstances. Mr. Hauser's statements were false. His exaggerations are contradicted by the physical evidence. His descriptions come from Hollywood, not reality. His "facts" were contrived or confabulated to fit a theory of aggravation which this bipolar, suicidal defendant researched and pursued in a grandiose attempt to attain State-assisted suicide. This is precisely the scenario which this Court feared in *Hamblen.* Reliance upon Mr. Hauser's demonstrably false statements would make his execution "a vehicle by which [he] could commit suicide." *Hamblen v. State*, 527 So. 2d 800, 802 (Fla. 1988).

1. Under Florida and federal law and federal law, Mr. Hauser is innocent of the death penalty

Mr. Hauser is innocent of the death penalty and the State is disentitled to execute him because the evidence refuting his contrived and confabulated statement is "of such a nature that it would *probably* produce [a sentence less than death] on retrial." *Jones v. State*, 591 So.2d 911, 915 (Fla. 1990). Additionally, the facts that went uninvestigated and undisclosed at trial are such that no reasonable fact finder would

find Mr. Hauser eligible for the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992).

In order for the death sentence to be an option, the *State* must prove beyond a reasonable doubt the existence of aggravating circumstances. Additionally, under state, federal, and international law, this case must be among "the most serious crimes" or the sentence is disproportionate. *Snipes v. State*, 733 So.2d 1000. Neither of these two conditions can be met in this case.

The imposition of the death penalty for this spontaneous, single-victim homicide committed by a drunken, manic, mentally ill man violates Article VI, Section 2 of the ICCPR, which limits the death penalty to only "the most serious crimes." The United States Supreme Court recently held that states may not adopt laws or policies that conflict with the federal government's human rights laws. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2000 WL 775550 (June 19, 2000).

a. Objective scientific evidence disproves the sole basis for the findings in support of aggravation

Mr. Hauser's December 12, 1995, statement is demonstrably false. After researching aggravating circumstances in the law library of the Okaloosa County Jail (App. 9), Mr. Hauser produced a letter contradicting his confession. In his confession, given on March 21, 1999, Mr. Hauser repeatedly explained that he was drunk on the

night of the crime and could not remember details of the murder. In particular, Mr. Hauser described his struggle to understand why he suddenly grabbed the victim by the neck, and to recall her death and the time it took to happen. App. 2. Yet, in his December letter, Mr. Hauser gives a lurid description which the trial court found established that Mr. Hauser "deliberately prolonged Melanie's death by initially applying just enough pressure on her neck so that she could not scream, then applying additional pressure until she almost lost consciousness, then allowing her to breathe, and then finally applying enough pressure to cause her death." R. 10. "Based on the Defendant's own horrible description," the trial court wrote, "it is obvious that she was conscious throughout the ordeal and surely knew of her impending doom as the Defendant meticulously tortured the life out of her." R. 10. Regrettably, because no one checked this description against the physical evidence, the victim's family have wrongly been led to believe that she died in this way. She did not!

Dr. LeRoy Riddick, State Medical Examiner, Mobile County Medical Examiner, and Laboratory Director for the full service forensic Region IV Laboratory of the Alabama Department of Forensic Sciences, has reviewed the testimony of Dr. Jodi Nielson as well as her complete file, autopsy protocol and all available photographs, statements by Mr. Hauser and law enforcement, and the decisions of this Court and the trial court. Affidavit of LeRoy Riddick, App. 11, at 1, 2-3. ***Dr. Riddick has***

concluded that it is impossible for Mr. Hauser's description of Ms. Rodrigues' death to be true. Specifically, Mr. Hauser's claim that he prolonged the victim's consciousness and suffering by modulating the amount of pressure on her neck–a description which formed the sole basis for the trial court's determination that the murder was heinous, atrocious, and cruel–is contradicted by the physical evidence in several different respects:

> Having reviewed the [] material, I have formed the opinion that the physical evidence is not consistent with the written statement provided by Mr. Hauser of 12/12/95, that is, that he put his hands around her neck, threw her on the bed coming down on top of her and then with her arms pinned under his elbows he strangled her slowly letting off the pressure to watch the fear in her eyes and then reapplying the pressure until she gave a shake and then died, but is much more consistent with that provided on 3/21/95, "It happened so fast, next think I know it was over."

1. The five or six abrasions of the left side of the neck of the victim are described in the autopsy protocol and depicted on the photographs as discrete injuries, measuring 0.2 to 0.3 cm, and have the configuration of finger marks, consistent with manual strangulation. **The definitive nature of the abrasions contradicts the defendant's statement that he applied pressure to the neck, released it and then reapplied it. During the interval of no pressure, either he or the victim and most likely both would have moved and in reapplying the pressure, the defendant could not possibly have made abrasions in the exact location as they were before the pressure was released.** This reapplication in a close but different region of the neck would have produced more smudged, non-definite abrasions rather than the well defined narrow ones depicted in the autopsy report and photographs. The discreteness of these injuries is much more consistent with the

sudden event described in the statement given on 3/12/95. **Moreover, in the written statement, the defendant stated that he both hands around her neck, yet there are marks only on the left side of the decedent's neck in the autopsy report.**

2. The statement by the medical examiner, Jodi Nielson, M.D., in her testimony that the petechial (small pinpoint) hemorrhages on the face, conjunctiva (covering of the eyes and eyelids) and mucosa of the mouth indicate that the pressure to the neck was not constant is not necessarily true. These small hemorrhages result from increased pressure in the small blood vessels (capillaries) in the tissues due to blockage of blood return and to the lack of oxygen, which causes breakdown of the lining of these small blood vessels. The blockage of blood return stems from collapse due to pressure of the internal jugular veins that run on each side of the larynx (voice box) and trachea (windpipe) in the neck. A small amount of pressure (5-6 pounds) will collapse these thin walled veins that are close to the surface. More pressure (11 pounds) is needed to compress the thinker walled carotid arteries in the deeper neck that run parallel to the jugular veins. As long as blood is pumped through these carotid arteries to the head, the capillaries will fill, but with pressure on the jugular veins the capillaries cannot empty and will rupture. These ruptures are what Dr. Nielson described. Moreover, where there has been sudden obstruction of the neck structures, enough blood will remain in the capillaries of the face and eyes to cause the petechiae even if the carotid arteries are compressed at the out set [sic]. This sudden compression is most consistent with the defendant's statement of 3/21/95.

3. The **rapidity of the compression to the neck is also indicated by the fracture of the hyoid bone**. This small horseshoe shaped bone at the tongue is pliable in young adults, particularly young females. To fracture it in young people takes a fair amount of force applied in a discrete region. Since force is related to the mass of the object and to the square of its acceleration, the more rapidly the pressure is applied to the neck, the more likely it is to produce a fracture. This rapid application of force is apparent in this case.

The **large force produced by sudden pressure to the neck would also account for the large amount of hemorrhage to the deep muscles in the neck described in the autopsy report. Slower intermittent forces would not produce as much or the same type of damage. The rapidity of the event is more consistent with the statement given on 3/21/95 than the one written on 12/12/95.**

4. The fracture of the hyoid bone indicates that there was pressure on or near the carotid body and carotid sinus, receptors in the carotid artery which regulate blood flow, pressure and oxygen levels. Pressure on the carotid sinus can cause cardiac arrest, which leads to **unconsciousness in ten seconds** and, if not corrected, death within three to five minutes. This physiological effect would be consistent with Mr. Hauser's statement on 3/21/95. In addition, although the petechial hemorrhages are present, they are not as florid as can be seen in asphyxial deaths, particularly where the pressure has been applied for a long period of time. The relative paucity of these hemorrhages with respect to those cases also is indicative of a rapid event. **The physical evidence does not support the statement of the defendant on 12/12/95 indicating that he straddled the victim and pinned her arms to the floor with his elbows. First *there are no bruises or abrasions to her arms where his elbows would have been* had he applied pressure to those regions. Second, if his elbows were pressed down on her arms, leaving only his forearms free, it would be extremely difficult for him or anyone to generate enough pressure on the neck to cause the severe hemorrhage and fractures depicted in the autopsy report. In that configuration, the arms would put the defendant in a mechanically disadvantageous position to exert the forces needed to strangle someone, and to cause the specific injuries seen in the photos and autopsy report. Third, the location of the finger marks present on Ms Rodrigues neck are inconsistent with Hauser's 12/12/95 statement. *Had he used his elbows to pin her down as he described in this statement, these finger marks would not be in the location depicted by the physical evidence.***

* * *

> 6. In conclusion, my opinion is that the physical evidence and the nature of statements are more in keeping with the statement provided by the defendant on 3/21/95 than the one on 12/12/95.

App. 11 at 3-5 (emphasis added).

Thus, photographs and the mechanics of human physiology disprove the description of events invented by Mr. Hauser and relied upon by the trial court. Mr. Hauser's tale is an impossibility, a fiction. Perhaps more importantly, the sudden, rapid, and short attack described in Mr. Hauser's March 21 confession, which he later repeated to his attorneys and investigators prior to deciding to seek a death sentence (Apps. 12, 13, 14), was not only consistent with the injuries seen on the victim, it was *necessary* to explain those injuries. While Mr. Hauser could not have known what the medical evidence would show, for example the broken hyoid bone, prior to making his confession, he had researched theories of aggravation prior to writing his December 12 statement. *Id.* Members of the defense team from trial confirm that in Mr. Hauser's initial taped statement to them "that when he grabbed Ms. Rodrigues around the throat 'it wasn't very long' before he let go." App. 13 (Affidavit of James W. Graham). *See also* App. 12 (Affidavit of James Tongue) ("Mr. Hauser told us that when he grabbed the victim's throat her death occurred very quickly"); App. 14 (Affidavit of Frank E. Martin) (Hauser "always described the crime as 'sudden' and 'quick'").

Other medical evidence also points to Mr. Hauser making up facts based on what he thinks will be aggravating. In his December 12 handwritten statement, Mr. Hauser says the victim "gave this shake and her body tensed up then went limp." Dr. Neil Kaye, a medical doctor and psychiatrist, notes that

> Strangulation with the breaking of the hyoid bone and probable activation of a carotid baroreceptor would have rendered the victim unconscious almost immediately. **The description of the body undergoing a "death spasm" is consistent with Hollywood's portrayal of a person dying but is not known to occur by medical experts in the "real world". Mr. Hauser's statements that his hands were swollen to twice their normal size is also inconsistent with medical science. That is, there is not reason for his hands to have swollen as a result of his strangulation of Melanie Rodrigues.**

App. 15 at 3 (Report of Neil Kaye, M.D.)(emphasis added).

b. Mr. Hauser's confession of March 21, 1995, which contradicts his December 12 statements, is corroborated by the physical evidence

Unknown to the trial court and this Court on direct appeal, Mr. Hauser had given a statement on March 21, 1995, in which he confessed and prior to which he told police he "want[ed] to give minute x minute account of 'strangulation.'" App. 16, at 114 (Griggs Notes). As noted in Dr. Riddick's report, in his March 21 statement, Mr. Hauser repeatedly described the attack as sudden and quick, descriptions of the attack which are not only consistent with the physical evidence but *necessary* to produce the injuries seen on the victim. This confession to a swift, inexplicable, and sudden attack

by a manic and drunk man is also corroborated by the accounts of disinterested eyewitnesses, and the documented history of alcoholism–including alcoholic blackouts–and bipolar disorder which Mr. Hauser succeeded in keeping from this Court and the trial court.

(1) Mr. Hauser's manic and drunken state

In his December 12 statement, Mr. Hauser does not mention alcohol. Yet, eyewitnesses saw him drinking whiskey and champaign continuously over at least a three-hour period from 5:00 p.m. until 8:00 p.m. App. 5 (Affidavit of Marc Levi). Mr. Hauser also earlier admitted to law enforcement officers that he had been drinking beer prior to that time. App. 2 (March 21 Statement). He had just driven through the night non-stop from Wilmington, North Carolina, to Fort Walton Beach, Florida, a trip that would have taken approximately 15 hours. App. 17 (Mapquest.com Travel Map). He left North Carolina the evening of December 30, 1994 (App. 3)(Affidavit of John Quinn), and arrived in Fort Walton Beach early in the afternoon of December 31, 1994. App. 18. After he arrived he continued drinking beer. App. 2 (March 21 Statement).

Contrary to his December 12 statement, relied upon by the court as proof that the murder was cold, calculated, and premeditated, Mr. Hauser was not in any

condition to lure the victim to his hotel room. App. 10 (December 12 Statement) ("she didn't really want to come back with me, but I put her at ease"). Another dancer from the club where the victim solicited Mr. Hauser for sex, described Mr. Hauser in his drunken state as "very vulgar and openly rude." App. 5.

The objective evidence from these witnesses and the documentary evidence, corroborates Mr. Hauser's March 21 confession, which itself contradicts his December 12 statements describing planning to find a woman to kill. Mr. Hauser described to Det. Griggs's satisfaction that he had "started out" in a place known as the Timbers where he "watched the game and [was] drinking" before he went to the club where the victim worked. App. 2. By the time he had finished his meal early in the evening he was already too drunk to know what time it was. App. 2. As noted by Shannon Stahl, a dancer at Sammy's, Mr. Hauser drank "shots of Jack Daniels and champaign" after he arrived there from Timbers. App. 5. Mr. Hauser informed Det. Griggs that he went to other bars then returned to Sammy's and stayed "drinking [until] I guess about 2:30 when they closed that night." App. 2. He did not drink only at Sammy's, however. After being up all night driving the night before, Mr. Hauser was on a peripatetic binge going to "All the bars and stuff." App. 2 at 4.

During the taped confession, Mr. Hauser admitted he "was drunk I don't remember a lot." App. 2, at 6. So Det. Griggs volunteers information which Hauser

later adopts.

> S.G.: Did you go out on the balcony?
>
> D.H.: Oh yeah...I had left the heater on when I left.
>
> S.G.: How long were you on the balcony?
>
> D.H.: I have no idea what time frame it was. I was out there a couple of times during the night, maybe twice, three times. Just long enough to cool off the room so maybe fifteen-twenty minutes I'm not sure.
>
> S.G.: See anybody while you were out there?
>
> D.H.: **I remember you said that someone had seen me out there and told me that the T.V. was too loud, but I don't remember that. I don't remember talking to any body. I don't remember seeing anybody out there. When you said somebody seen me in the car too, speeding towards the motel, I don't, I'm not saying that you lying or anything, but I don't remember. There was a cop coming down as well, they lived there.**

App. 2 at 8.

Critically, Mr. Hauser's recollection of the victim's death was unclear. His confession is marked by repeated anguished statements in which he expresses his frustration at being unable to explain his behavior. When asked why he killed the victim, Mr. Hauser said

> I don't know. I have gone over it and over it, f***ing I don't know what happened. I swear to God man I never lie. Its been driving me f***ing nuts. . . . that's why I called you man. I didn't know what to do. I called you to come clean man. I don't know why I did it, but all's I know is I did it. It just f***ing happened man. * * * I was drunk but I didn't have to

> fight her off. I don't I swear I don't know what to do, you guys can think what you want, the unemployment and everything came into my mind and boom that's when it happened.

App. 2 at 4-5. When pressed again later in the interrogation, Mr. Hauser again describes what he could remember:

> We slept there for awhile, it must have been four-thirty or five o'clock she said she had to go. And I said ok, then all of a sudden it hit me, I killed her I don't know why. It's not like I had it planned or something like that, if that's what your trying to find out. * * * I happened so fast, next thing I know it was over.

App. 2 at 12.

Detective Griggs then tried a more passive approach, agreeing with Mr. Hauser and attempting to elicit a more detailed explanation:

> S.G.: Did you have a struggle with her?
>
> D.H.: No, what kind of marks?
>
> S.G.: There was some bruises on her buttocks and legs. But it is difficult to tell when they were made. They could have been made..
>
> D.H.: There was no struggle, no nothing.
>
> S.G.: It was a clean take down?
>
> **D.H.: Yeah, I don't understand why I did it to tell the truth, that's why I called you. I don't understand it**, I just figure like you said if I come clean I might not get killed for it. Hopefully anyway.

App. 2 at 12. This last statement also sheds light on Mr. Hauser's mental state. When

he was rational and able to accept a judgment through the normal legal process, he was truthful. Only after becoming suicidal and researching a theory of aggravation did he produce the December 12, 1995, version of events. At this point, however, Mr. Hauser, was profoundly remorseful, something his defense team also saw prior to embarking on his suicide mission[3]:

> S.G.: The prosecutor will hear the tape and read the transcript and so will the defender and of course the Judge. So they will.
>
> D.H.: It's quite possible, **I know you can't do anything and I'm not asking for anything, I'm just trying to clear my conscience some instead of hiding everything.** You don't know what I am going through here thinking about it all the time, you have know [sic] idea.
>
> S.G.: Yeah I see how it eats a people. It eats at them.
>
> D.H.: Yeah you know where I come from, you know my background, my family.
>
> S.G.: **Do you feel like a weight has been lifted off?**
>
> **D.H.: No not really.**
>
> S.G.: Somewhat.
>
> **D.H.: Talking about it helps. How could I kill somebody man. You can't take that much off.**

App. 2 at 12. This glimpse into Mr. Hauser's feelings during his March interrogation,

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[3] The affidavits of James W. Graham and Frank Martin establish that when Mr. Hauser was brought back to Florida he continued to be remorseful and described the crime just as he had in March 1995.

when he provided a description of events consistent with the physical evidence and eyewitness accounts, and inconsistent with his December 12 fabrication, further undermines the trustworthiness of the December 12 statements that constitute the sole basis for the trial court's finding that the murder was cold, calculated, and premeditated.

(2) Independent evidence of Mr. Hauser's behavior on December 31, 1994

Other evidence from independent eyewitnesses belies any credible argument that Mr. Hauser was calculatingly planning a murder since the afternoon. The State's own arrest report and addendum detail the innocence of his actions. Mr. Hauser checked into the Econolodge Hotel under his own name, and provided accurate information about the (stolen) truck he was driving. App. 19 James and Debra Melton, the managers of the hotel, noted that Mr. Hauser expressed concern about the safety of the truck. Assured that it would be safest if parked by his room, Mr. Hauser parked directly beneath it. When he returned to the hotel with Ms. Rodrigues, he drove right by Mr. Melton who "waved at them to slow down," and parked directly beneath his room. App. 39 (Affidavit of James Melton). After Mr. Melton asked Mr. Hauser to turn down the loud music Ms. Rodrigues had turned on, Mr. Hauser complied, and went into his room leaving the curtains open. *Id.*

Even his choice of hotel, and his decision to go bar hopping in the area are irreconcilable with any rational plan for carrying out a murder, much less the type of heightened premeditation necessary to prove an aggravating circumstance. Mr. Hauser repeatedly acknowledged being aware of a large police presence in the area of the hotel and bars, and noted that police officers lived in plain view of where he was staying. App. 2 at 8 ("There was a cop coming down as well, they lived there."). He saw their vehicles parked right in front of him. Yet, he set out in open view of these officers.

These objective facts are far more consistent with Mr. Hauser's March 21 statement that he was looking for an area in which to go drinking, and possibly secure the services of a prostitute. Contradicting Mr. Hauser's December 12 statement indicating he picked up the victim, FDLE notes reflect that "She picked up . . . in her car and drove him to his motel room." App. 37 (Notes from FDLE file).

The consistencies between Hauser's March 21 confession, the physical evidence, and the statements of disinterested eyewitnesses, supports the conclusion that his confession to merely seeking to obtain the victim's services as a prostitute are true, and that his December 12 statements indicating he was intending to find a murder victim are not. On March 21, Mr. Hauser described how the victim came to be in his hotel room:

S.G.: Did you pay her to go there with you?

D.H.: No I...that was the intent, if not it would never have happened.

S.G.: So it was your intent to pay her for private dancing?

D.H.: And sex.

S.G.: And sex, ok. Did she ask for money?

D.H.: I offered it even before we left Sammy's. I counted it out right. I..(unable to hear)..if that's what you are trying to find out.

S.G.: Did she resist the sex.

D.H.: No.

S.G.: If I am understanding this right, she went there for the purpose of charging you to dance and charge you for sex.

D.H.: Yes.

S.G.: What where [sic] the specific terms of the conversation?

D.H.: I don't understand.

S.G.: Ok did she say I'll go to your room for blank amount of dollars.

D.H.: I told her I would give her a couple of hundred bucks, she went ooch. She came to my room and danced and that's that. * * *

App. 2 at 8-9.

As with other aspects of Mr. Hauser's March 21 confession, this account is confirmed by information that knowledgeable witnesses provided to law enforcement. A person familiar with the victim told Det. Griggs that the victim and another woman

had been seen "turning tricks up there that night." App. 20, at 18. Moreover, Hauser's claim that he approached the victim because she appeared "new" and "naive," while incredible on their face given his level of intoxication, are belied by witness statements and what was known about the victim. One witness, Ms. Rodrigues former employer reports that prostitution was "prevalent" at Sammy's, the bar where the victim danced, and notes that the victim was "independent, tough-minded," "not naive and understood the way the adult entertainment business worked, and if she went to a hotel room with a client she met at Sammy's, it would have been voluntarily." App. 37 (Affidavit of Michael Clark)

Mr. Hauser also approached Shannon Stahl at Sammy's and attempted to get her to perform acts of prostitution with him, although she does not appear naive. App. 5. People who knew the victim described her to law enforcement officers investigating her death as "very promiscuous in dress and behavior."[4] App. 21 at 17 (Griggs Notes). The notion that she would have appeared "new" to a complete stranger is finally contradicted by evidence that she frequented a bar called Night Town, where she "always entered & usually won" a "silhouette contest." App. 8.

(3) Evidence refuting pecuniary gain motivation

[4] Again, it is important to note that the issue here, as framed by Mr. Hauser, is the victim's *appearance, not her character*.

Although Mr. Hauser attempts to paint a picture of calm and an intention to steal in his impossible December 12 statements, his corroborated March 21 confession shows that he behaved much differently. In the December statement, Mr. Hauser describes himself as calmly going through the victim's jeans and car for things of value to steal. This description constitutes the sole basis for the trial court's finding that the murder was committed for the purpose of pecuniary gain.[5] The trial court specifically relied upon Mr. Hauser's claim that he "'looked through her car for anything of value and took a jacket and a camel can cooler. I put these things in my truck then went back to the room to wait until around 9:00 o'clock A.M. to check out.'" R. 120.

Irrefutable evidence and inconsistencies between the corroborated March 21 confession and the December 12 confabulation also undermine the finding that the murder was committed for pecuniary gain. Prior to learning that murder committed for pecuniary gain was an aggravating factor, Mr. Hauser never mentioned the victim having money or valuables in statements to law enforcement or his own defense team (prior to his decision to seek the death penalty). ***Although Mr. Hauser stated that he searched the victim's pockets and car for "anything things of value" to steal, FDLE evidence logs record the retrieval of "one black & gold garter with bills."*** App. 22

[5] As noted *supra*, the trial court absurdly concluded that Hauser's taking the "can cooler" demonstrated his "intent to benefit financially" from the crime.

(FDLE Evidence Log).

Moreover, photographs of the victim, and the reports of those who gathered evidence, document that the victim was found with a gold watch, silver rings, and gold rings. It is no secret that Mr. Hauser–although never before violent–lived mostly by begging, petty theft, and occasional physical labor. Again, the physical evidence and Mr. Hauser's way of life before and immediately after this crime put the lie to his December 12 claim that he was seeking pecuniary gain.

Prior to learning that "pecuniary gain" was an aggravating circumstance, Mr. Hauser gave a sworn statement contradicting his later statement. In March 1995, Mr. Hauser denied having any plan to steal from the victim. He described being "freaked out" and panicked when he realized what he had done. Here is how he described his reaction to what happened:

> **I stood, I f***ing stood there for I don't know.. I walked around and trying to figure out what the f*** I was going to do. What and why I did, why I did it. I'm f***ed man, I kept saying I f***ed man, f***ed man. I didn't know what the f*** was I was doing. I was scared as hell. [6] I have been trying even today.**

App. 2 at 15.

As with every other point of contrast between the March and December

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[6] This statement contradicts Mr. Hauser's claim in his December 12 statement that he got satisfaction from killing Ms. Rodrigues.

statements, Mr. Hauser's March description of panic and hurry is corroborated by evidence from disinterested witnesses. Mr. Hauser told Det. Griggs in March that he "was so freaked out" by what had happened that he did not know what to do. App. 2 at 9. Mr. Hauser was so panicked and shocked that he

> grabbed everything, checked out taking all my shit. **I left some shit too. F***ing hair shit in the shower. But just grabbed everything and I left.**

App. 2 at 10. Glenice Lewis, the Econolodge employee who cleaned Mr. Hauser's room, informed Det. Griggs that she found the bottle of shampoo Mr. Hauser left in the shower. App. 23.

Mr. Hauser claimed that he had stolen women's underwear from the victim "[b]ecause I felt guilty about everything it was a reminder. I don't know." App. 2 at 11. But FDLE fibers comparisons showed that the panties found with Mr. Hauser were **different** from the fibers found on the victim. App. 40 (FDLE Lab Report).

Although in his December 12 statement Mr. Hauser claimed to have taken a leather jacket from the victim's car, in his corroborated March 21 confession, Mr. Hauser was asked specifically about whether he had taken anything out of her car and replied, "No." App. 2 at 14. In fact, Mr. Hauser does not mention going to the car at all, and contradicts his later contrivance:

S.G.: Did you take anything of hers with you?

D.H.: I had all kinds of shit with..(unable to hear)...**jacket** and something **mixed in with my shit it grabbed when I left**.

* * *

S.G.: **Did you take her brown leather jacket?**

D.H.: **That was in the room.**

S.G.: Do you know where you left it?

D.H.: I got rid of it, I gave it away to somebody.

S.G.: Along the way?

D.H.: No then.

App. 2 at 10. Hauser's matter-of-fact admissions in his March statement that he grabbed the jacket in a panicked and unsuccessful attempt to remove his own things from the room, then gave the jacket away, with the added reliability of being corroborated by the physical evidence (e.g., the left shampoo bottle), dispel the illusion he created of having searched for things of value, and that "financial gain" motivated him in any way.

While the evidence discussed thus far is sufficient to establish Mr. Hauser's innocence of the death penalty, further evidence demonstrates that Mr. Hauser's December statement is untrustworthy and that he, in all likelihood was insane at the time of the offense.

c. Mr. Hauser's history of mental illness and the context in which he made his December 12, 1995, statement demonstrate that it is untrustworthy

Three mental health experts have reviewed background materials related to Mr. Hauser and his death sentence. Each one questions the trustworthiness of his statements and raises concerns about the fact that neither the trial attorney nor the court were apparently aware of Mr. Hauser's extensive history of psychiatric illness. Viewed in the context of Mr. Hauser's mental health history–taking into account his bipolar disorder, alcoholism, alcoholic blackouts, and bursts of rage accompanied by amnesia–Mr. Hauser's March 21 confession was a reliable account of Ms. Rodrigues' death, and the December 12 statements are not.

Additionally, Mr. Hauser created his December 12 statement at a time when he was suicidal. His trial attorney and investigators report, and Okaloosa County Jail records confirm that he was researching aggravating circumstances prior to writing his statement. In addition, his correspondence with counsel shows he was getting increasingly anxious during the many months he sat awaiting hearings.

(1) Mr. Hauser's psychopathology

Dorothy Otnow Lewis, M.D., a psychiatrist has reviewed Mr. Hauser's history and recent conduct and notes that, in addition to being incompetent to proceed pro se,

the evidence indicates Mr. Hauser was going through a manic phase of his illness at the time of the offense:

> Dan Hauser is a 30 year old male who has stated that he wants to be executed for the murder of Melanie Rodrigues. Medical records, statements from Mr. Hauser's family to law enforcement officers, and reports of longtime family friends show that Mr. Hauser has carried the diagnosis bipolar (manic-depressive) mood disorder since late adolescence. Contrary to Dr. Larson's report, Mr. Hauser has received psychiatric treatment as both an inpatient and an outpatient at several different psychiatric facilities. He has been treated with an antidepressant medication (i.e., Imipramine), and with a mood stabilizer, (i.e., Lithium), on more than one occasion.
>
> 6. Mr. Hauser has been suicidal in the past (see military records) and is so at this time. During depressive phases of his illness he has been dirty and disheveled and has not bathed. (See affidavits of John Quinn, Angela Cumbee, and Monica Jordan).
>
> 7. During manic phases he has been excitable, irrational, delusional, and out of control. (See nursing records of Starting Point and affidavits of acquaintances). He has thought that he was going to marry a professional woman and tour Europe. At times he has thought his parents were millionaires. At other times he has claimed they were multi-billionaires. The above are classic signs of mania.
>
> 8. **A history obtained from Mr. Hauser close to the time of his arrest indicates he was suffering from a manic episode at the time of the offense (e.g., precipitously stealing from friends with whom he had been living and working amicably, going without sleep for days, and driving long distances). These kinds of behaviors antedated and closely followed the offense in question.**
>
> 9. Mr. Hauser's determination to end his own life by fabricating evidence of heinousness, inconsistent with the facts of his case, is another example of his manic-depressive illness. Prior to deciding to end his life,

> Mr. Hauser had been working with his attorneys to obtain a sentence of life imprisonment. His decision to abandon all appeals and embellish his culpability are characteristic of the mood changes of people bipolar disorders.
>
> 10. I have had experience with several similar cases of violent offenders suffering from bipolar mood disorders who, during depressive phases, abandoned their defenses. However, when these individuals were helped to understand that their mood disorders affected their decisions, and when they were treated with appropriate mood stabilizing and anti-depressant medications (the very medications Mr. Hauser was prescribed when hospitalized), they invariably thought twice about their decisions and decided to pursued their appeals.
>
> 11. **Given the psychopathology underlying Mr. Hauser's decision, I firmly believe he should not be permitted to seek to end his appeals and die until such time as he has been properly medicated and is able to make a more rational decision. In other words, based on the materials reviewed (including psychiatric records), I believe, to a reasonable degree of medical certainty, that Mr. Hauser is not competent at this time to abandon his appeals.**

App. 24 (Declaration of Dorothy Otnow Lewis). Of course, the same psychopathology at the root of Mr. Hauser's determination not to raise post-conviction challenges to his death sentence was behind his actions in seeking it.

In addition to Dr. Lewis's conclusions, Neil S. Kaye, M.D., has reviewed Mr. Hauser's statements in light of his mental health history and records from his case to determine to what extent Mr. Hauser's psychopathology explains his differing accounts of the crime.

Although Mr. Hauser has changed his story from time, there are

certain facts about which he has never wavered and which are corroborated by witnesses. Mr. Hauser was intoxicated on the night in question and has a history of blackouts with amnestic periods when he is drinking. He was in treatment for his drug problems at least as far back as 1988. He was also treated with Lithium, a medication commonly used for the treatment of Bipolar Disorder (Manic Depression). Up until his written admission of 12/12/95, all of his statements reflect that he was intoxicated and that he did not remember exactly what happened and how he killed his victim. Even in the 12/12/95 statement, he notes he started going to bars around 4:00 PM and continued to stay in the bars until he left around 2:00-2:30 AM. Thus, he had been drinking for at least 10 hours, with only one meal noted during this time. The victim, a woman who weighed considerably less than he does, on post-mortem examination, was noted to have a blood alcohol concentration of 0.05%.

The records suggest that Mr. Hauser has had at least some degree of depression, consistent most likely with a diagnosis of Dysthymic Disorder. He admits to a psychiatric history and treatment in the records of Okaloosa County Jail. This mental illness would include feelings of hopelessness, low self esteem, low self worth and when stressed, feelings of helplessness which could lead to a Major Depression. These feelings of helplessness and "giving up" could be an important factor in his decision to seek the death sentence by failing to seek aggressive advocacy for his appeal.

Mr. Hauser has a documented history of polysubstance abuse with treatment. The medical records of Okaloosa County Jail in 3/99 reflect that he had been using "street drugs 4 years ago" which would be around the time of the crime. In the same records he notes that he last used marijuana 02/09/95.

During prior treatment, he was treated with lithium, a medication commonly used for the diagnosis of Bipolar Disorder (Manic Depression). Other reports in the record include descriptions of him making grandiose statements (eg.: claiming parents are millionaires, that he was marrying a dentist and going to Europe, claiming he was a

chef at the White House) and having erratic sleep patterns which are common to this diagnosis as well. Further, some witnesses have stated they heard Mr. Hauser make "delusional" statements. His described poor hygiene and "bizarre behavior" of covering himself with antibiotic ointment is further suggestive of serious mental illness and/or substance abuse.

Further, the records suggest that Mr. Hauser is of low intelligence and that he had problems with attention as a student.

Sleep deprivation is another factor to be countenanced. It appears that Mr. Hauser drove straight from Wilmington, NC, to Florida, and again, after the killing, drove to Beaumont, TX, with little evidence for restorative sleep during this time. It is well known that sleep deprivation can impair judgment. The ability to stay up for a prolonged period of time is a symptom of Bipolar Disorder (Manic Depression). Coupled with intoxication, it makes it even less likely that he would have been able to plan and carry out a killing of this nature.

Aggravating Factors:

A. Pecuniary Gain: In order to be an aggravating factor, the crime must be committed FOR pecuniary gain. While it is clear that Mr. Hauser took money and items belonging to his victim, it is clear that his intent was to pay her for sex and not to kill her for her money. It appears that after he killed Melanie Rodrigues, Mr. Hauser, consistent with his past behaviors, took advantage of the situation and took money in her jeans. From a psychiatric profiling perspective, Mr. Hauser's lifelong behaviors are not consistent with those of a murderer but are much more consistent with a non-violent perpetrator who would take the "easy way out" and steal primarily from friends and acquaintances. There is a critical distinction between killing someone either during a theft or in order to steal from them, and simply taking their money after they are already dead. Although Mr. Hauser may have achieved a pecuniary gain, there is no reasonable indication that it was committed FOR pecuniary gain.

B. Premeditation: **Mr. Hauser's actions were not premeditated.** I believe that the court has placed inappropriate and undue weight on his 12/12/95 statements in reaching their conclusion. **All of Mr. Hauser's statements (including the 12/12/95 confession) clearly state that his purpose had been to get a girl to come back to his room and to have sex. All of his behaviors are consistent with this goal. Further, his actions and behaviors are NOT consistent with someone planning to find a victim to kill. Person's planning to kill are much more likely to carry a weapon, to have a history of prior violent crime and especially a history of physical assault, and to take steps to avoid detection. Mr. Hauser has not displayed any of these behaviors.** In fact, he registered under his own name, parked his vehicle in front of the room, was seen by the manager on the balcony assuring easy identification and made no plans in advance to dispose of the body or to clean up after the killing. **His leaving behind personal articles and the unsophisticated manner in which he placed her body show a crime committed impulsively, without planning and in a disorganized fashion.**

These behaviors are also highly consistent with someone who was, to use his words "fucking hammered", ie: highly intoxicated at the time of the crime. It was learned from Shannon Stahl that Mr. Hauser "was real clear that he was trying to engage me for prostitution" and that "he drank heavily throughout a 3 hour period, primarily shots of Jack Daniels and champagne."

Other than his own statement, there is no evidence in the records that he had ever tried to kill anyone previously. In fact, his pattern of criminal activity suggests that he would do simple things to get money such as forge checks, bounce checks, and steal, in essence, always looking for a free and easy ride. He himself admits to this having been his modus operandi throughout his life.

The court appears to believe that he experienced some "satisfaction" in the killing. His behaviors subsequent to the killing and even his own statements do not reflect any such satisfaction. **If anything, his**

statements and behaviors reflect feelings of guilt and shame. This may be in part due to the degree of intoxication and that he really doesn't remember the killing and so could not possibly have experienced any satisfaction either during or subsequent to the crime.

C. Heinous, atrocious and cruel: Again, the court has relied on his written statement of 12/12/95 in which he says he strangled her slowly, allowing her to start to breathe again, prior to finally killing her. The medical examiner estimated that she could have been conscious a minimum of 20 seconds in this scenario. **Mr. Hauser also states "I put as much pressure as I could and held it until she gave the shake and her body tensed up and then went limp." While indeed this description is vivid, it is highly improbable as it is inconsistent with the medical description of death.**

Strangulation with the breaking of the hyoid bone and probable activation of a carotid baroreceptor would have rendered the victim unconscious almost immediately. **The description of the body undergoing a "death spasm" is consistent with Hollywood's portrayal of a person dying but is not known to occur by medical experts in the "real world". Mr. Hauser's statements that his hands were swollen to twice their normal size is also inconsistent with medical science. That is, there is no reason for his hands to have swollen as a result of his strangulating Melanie Rodrigues.** A person being strangled in this manner would lose consciousness almost immediately and die unconscious. If he really were a "sadistic killer", one would expect him to have repeated this experience multiple times, not merely once as he claims, and it would be much more likely that other sadistic acts would have been performed prior to killing her or subsequent to her death. There are no marks on the body to suggest these behaviors nor did the State's Medical Examiner proffer any such ideas.

Therefore, from a psychiatric perspective, I conclude that his description of her dying (12/12/95 statement) is confabulated solely

> **for the purpose of increasing the likelihood that the State will put him to death and that his earlier statements are more consistent with the psychiatric evidence and with his personality.** Similarly, I note that Dr. Riddick has opined that from a pathologist's perspective, "the physical evidence and the nature of statements are more in keeping with the statement provided by the defendant on 3/21/95 than the one on 12/12/95."

Dr. Kaye has concluded that reliance by the courts on the confabulations in Mr. Hauser's December 12 statement simply makes the state "the means by which this man commits suicide." App. 15.

Finally, Donald Bersoff, Ph.D., has reviewed the circumstances in which Mr. Hauser made his statements and entered his guilty plea and concluded that assessments of his mental state are unreliable. App. 25 (Affidavit of Donald Bersoff). Prior to his guilty plea, defense counsel had Mr. Hauser "evaluated" by Dr. James Larson. At the time, defense counsel was concerned that Mr. Hauser wanted to seek the death penalty, and knew that Mr. Hauser, with the support and assistance of his adoptive parents, was attempting to skew the proceedings towards death by preventing mitigating information from coming to light. App. 26 (Letter from Cynthia Hauser to James Tongue). There was also a concern that Mr. Hauser was planning to fabricate evidence in aggravation of the crime.

(2) Circumstances of unreliability

The assistant public defender who represented Mr. Hauser at trial, and the two

investigators assisting him, all saw a marked change in Mr. Hauser when he decided to seek the death penalty. ***Mr. Hauser has NOT consistently sought the death penalty***. *See, e.g.*, App. 39 (Affidavit of Samuel Williams). Initially he worked with law enforcement, then with his attorneys in the hope that his confession and cooperation would lead to a sentence less than death. App. 12 (Affidavit of James Tongue).

When Mr. Hauser's mood changed and he began working for a death sentence, his defense team became concerned that he would fabricate evidence in order to ensure his execution. *See* Apps. 12, 13, 14. That is precisely the conclusion they reached when Mr. Hauser produced his December 12 statements. *Id*.

Prior to making that statement, trial counsel explained the aggravating circumstances to Mr. Hauser. Jail records show that Mr. Hauser began going to the law library often at the time his defense team noticed his change in attitude. App . Requests Mr. Hauser wrote seeking meetings with his defense team become increasingly urgent in the months leading up to his December 12 statement. In fact, Mr. Hauser requested to see his attorney on December 6, 1995. On December 12, the day Mr. Hauser made his statement, Mr. Tongue wrote back that he could not meet with Mr. Hauser, that he was going on vacation and would not return until the new year. This timing is critical for a remorseful, depressive person like Mr. Hauser because it

spanned the time of the crime.

Finally, since the signing of his death warrant Mr. Hauser has stated in response to a question about whether he had embellished things in order to ensure a death sentence that he had "cleared away the roadblocks" to execution. These circumstances completely undermine the reliability of Mr. Hauser's December 12, 1995 statements.

2. Powerful mitigating evidence was available to be presented but was ignored and contradicted by Hauser's false statements

Mr. Hauser is innocent of the death penalty, factually and legally. The mitigating evidence that would have been presented, and was in fact rejected on the basis of Mr. Hauser's false statements of December 12, 1995, must be considered in assessing whether Mr. Hauser would probably receive a sentence less than death on retrial. *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1990). From the outset, this Court must consider the perspective of the sentencer at the time the trial court sentenced Mr. Hauser to death. *See Williams v. Taylor*, 120 S.Ct. 1495 (2000).

The sentencer in Mr. Hauser's case stated that he would have assigned substantial weight to Mr. Hauser's intoxication on the night of the crime, but Mr. Hauser's December 12 statement contradicted such a finding. The trial judge stated:

> As to the fourth mitigating factor, that the Defendant was under the influence of drugs or alcohol at the time of the commission of the crime, the Court would state that if evidence had been presented to the Court

> tending to establish this mitigating factor, to the extent to convince the Court that due to the use of drugs and/or alcohol, the Defendant was unaware of his actions or unable to control his actions, or unable to remember the events of that evening, this mitigating factor would be given substantial weight by this Court. However, the Defendant's handwritten statement and taped recorded interview would tend to indicate to the Court that the Defendant had a total recollection of very specific events throughout the course of the day, up to and including the moment of the murder. In reviewing the Defendant's detailed statement, it would appear that the Defendant's use of alcohol and/or drugs on that date did not affect his ability to remember very specific and vivid details and to perform this act in a cool, calm, calculated manner and would certainly not be sufficient to outweigh any of the aggravating factors listed herein.

(R. 122-123).

As the preceding section illustrates, Mr. Hauser's statement contradicting mitigation was false and written for the purpose of contradicting his mental health problems and alcohol impairment on the night of the crime. In fact, Mr. Hauser's intoxication and manic episode at the time of the crime are supported by independent witnesses and documentary evidence.

Specifically, evidence existed which proved that Mr. Hauser was severely intoxicated on the night of the crime. In his confession, given on March 21, 1995, Mr. Hauser admitted that on the night of the crime he "was drunk" and didn't "remember a lot". App. 2. Witnesses were available who would have corroborated Mr. Hauser's intoxication. Shannon Stahl confirmed that Mr. Hauser drank heavily on New Year's Eve: "He drank heavily throughout the three-hour period [in which I had contact with

him], primarily shots of Jack Daniels and champagne." Furthermore, even in his December 12 statement, Mr. Hauser admitted that he spent approximately ten consecutive hours in the bars on the evening prior and the early morning of the homicide.

Dr. Lewis has reviewed the available evidence related to Mr. Hauser's history of bipolar disorder, his manic and depressed episodes, and concluded that

> [d]uring manic phases he has been excitable, irrational, delusional, and out of control. (See nursing records of Starting Point and affidavits of acquaintances). He has thought that he was going to marry a professional woman and tour Europe. At times he has thought his parents were millionaires. At other times he has claimed they were multi-billionaires. The above are classic signs of mania.
>
> 8. A history obtained from Mr. Hauser close to the time of his arrest indicates he was suffering from a manic episode at the time of the offense (e.g., precipitously stealing from friends with whom he had been living and working amicably, going without sleep for days, and driving long distances). These kinds of behaviors antedated and closely followed the offense in question.
>
> 9. Mr. Hauser's determination to end his own life by fabricating evidence of heinousness, inconsistent with the facts of his case, is another example of his manic-depressive illness.

App. 24.

As to Mr. Hauser's intoxication, Dr. Kaye concluded:

> The only issue worthy of special mention is that of alcohol. Mr. Hauser was clearly drunk on the night in question. He had been drinking since that afternoon, and so had been drinking for at least 10 hours. Witness

> descriptions corroborate this fac. It is clear that as a direct result of his intoxication, that he can not really remember the events of that evening. He had gone out to get drunk (not taking his truck as he wanted to avoid an arrest for DUI, aware that he would be getting "hammered"), to watch the football game on TV and find a woman for sex. He accomplished all of these. **It is also possible that due to his degree of intoxication, that he was either unaware of his actions or unable to control his actions**.

App. 15 at 6. The trial court stated that Mr. Hauser's intoxication was entitled to substantial weight if proven. However, the court believed that Mr. Hauser's December 12 statement contradicted this mitigator because Mr. Hauser remembered "very specific and vivid details". App. 27 at 5.

Had the trial court reviewed Mr. Hauser's March 21 confession, and the substantial evidence corroborating it, he would have known that in fact Mr. Hauser did not have a vivid recollection of the events leading up to the homicide or the crime itself. Throughout Mr. Hauser's confession he repeatedly indicates that he can not remember various facts. App. 2.

Had the trial court reviewed Mr. Hauser's confession he also would have learned that many of Mr. Hauser's vivid recollections of the events were supplied to him by law enforcement. At times during the confession, law enforcement supplied Mr. Hauser with what they have learned during their investigation in order to refresh Mr. Hauser's memory. For example, during Mr. Hauser's confession, the following exchange occurred:

S.G.: You checked into the motel.

* * *

D.C.: Dan what motel did you check into in Fort Walton Beach?

D.H.: I cant' remember the name of the motel.

E.C. Ok.

D.H.: But you still have the receipts from it.

S.G.: Could it have been the Econo Lodge?

D.H.: Econo Lodge that's it. Big national chain. Where to next. After..I was drinking, the game was over. I went next door to the restaurant and ate there.

App. 2 at 3-4. At another point Mr. Hauser inability to remember "very specific and vivid details" without the assistance of the investigators:

S.G.: Did you go out on the balcony?

D.H.: Oh yeah...I had left the heater on when I left.

S.G.: How long were you on the balcony?

D.H.: I have no idea what time frame it was. I was out there a couple of times during the night, maybe twice, three times. Just long enough to cool off the room so maybe fifteen-twenty minutes I'm not sure.

S.G.: See anybody while you were out there?

D.H.: I remember you said that someone had seen me out there and told me that the T.V. was too loud, but I don't remember that. I don't remember talking to any body. I don't remember seeing anybody out

> there. When you said somebody seen me in the car too, speeding towards the motel, I don't, I'm not saying that you lying or anything, but I don't remember. There was a cop coming down as well, they lived there.

App. 2. In fact at the beginning of his confession Mr. Hauser's told the investigators: "I will follow your lead." App. 2 at 3.

Evidence was available that would have corroborated Mr. Hauser's intoxication at the time of the crime and his poor memory about the events on the night of the crime. The trial court's conclusion that due to Mr. Hauser' detailed statement on December 12, 1995, refutes Mr. Hauser's intoxication on the night of the crime is in error. Mr. Hauser could establish that he was severely intoxicated on the night of the crime and it impaired his mental functioning. The trial court believed that this mitigating circumstance was substantial. Alone and when combined with the other mitigating circumstances it would have supported a life sentence for Mr. Hauser. At a minimum, under *Jones*, it is more likely than not that Mr. Hauser would not have been sentenced to death had the judge known of the evidence supporting Mr. Hauser's intoxication and mental illness at the time of the crime.

Other mitigation was available but was not presented to the trial court. Three mental health experts who have reviewed Mr. Hauser's case concluded that in the days prior to the crime Mr. Hauser suffered symptoms commonly associated with the manic phase of his mental illness, manic depression. During period preceding the crime Mr.

Hauser did not bathe, sleep and was overly anxious. App. 41 (Affidavit of Angela Cumbee). This evidence establishes persuasive statutory mitigation which must be considered. Additionally, Mr. Hauser's history of mental health illness and treatment, which has been confirmed by witnesses and documentary evidence, is a well recognized statutory mitigating factor.

As has been documented throughout this petition, Mr. Hauser's life history contains classic mitigating evidence which was never presented in detail to the sentencer. Mr. Hauser is mentally and emotionally ill individual who has been repeatedly driven to end his own life. App. 24.

3. This death sentence is disproportionate to cases in which no death sentence was imposed or even sought in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights, and the corresponding provisions of the Florida Constitution

It is a fundamental tenet of Florida law, the Eighth Amendment, the International Convention on Civil and Political Rights, and customary international law that the death penalty may only be imposed for the most serious crimes. The state may not execute someone for a crime that is as or less aggravated than other crimes for which a sentence less than death was imposed. There can be no question that the death sentence meted out to Mr. Hauser is disproportionate to the lesser sentences–and even lesser

convictions–judged appropriate in nearly identical cases. This death sentence was arbitrarily and capriciously imposed.

As this Court has recognized, its review of each case in light of others is necessary "to protect against arbitrary imposition of the death penalty." *Longer v. State*, 544 So.2d 1010, 1011 (Fla. 1989). This review "requires a discrete analysis of the facts." *Terry v. State*, 668 So.2d 954, 965 (Fla. 1996). In Mr. Hauser's case, this Court's proportionality review consisted of the following four words: "the death sentence is proportionate." *Hauser v. State*, 701 So.2d 329, 332 (Fla. 1997). No facts or other cases were mentioned, much less compared, and on habeas review courts must assume no such comparisons were considered. *Williams v. Taylor*, 120 S. Ct. 1495, 1515 (2000); *id.*, 120 S. Ct. at 1524 (O'Connor, J., concurring); *see also Parker v. Dagger*, 498 U.S. 308, 320 (1991). Under these circumstances, "there is a sense in which the court did not review [Mr. Hauser's] sentence at all." *Parker*, 498 U.S. at 321. This violates due process and the Eighth Amendment.

There is a sense in which this Court could not have reviewed Mr. Hauser's death sentence. Given that all the available information came from Mr. Hauser's false statements, there was no accurate information before the Court upon which to base a decision. A death sentence cannot be sustained on such a paucity of information. Imposition of the death penalty based on inaccurate or wrongly omitted information

related to death eligibility or the appropriateness of the sentence for the individual case violates the Eighth Amendment and precludes meaningful proportionality analysis. *See* Claim A.3, *infra*.

In *State of Florida v. Bradley Brent Knox*, Case No. 97-04929CFANO (Fla. 6th J.D. Cir.), a case that can be distinguished from this one only because it is more aggravated, no death sentence was even sought by the State. Mr. Knox pleaded guilty to strangling a prostitute to death. Although Mr. Knox, like Mr. Hauser, wanted to plead guilty to first degree premeditated murder (as charged in an indictment virtually indistinguishable from Mr. Hauser's), the State insisted on a plea of guilty to second degree murder. App. 27 at 5. Mr. Knox recently filed a rule 3.850 motion to vacate his sentence of imprisonment for less than 25 years based on a claim that the court failed to follow the scoresheet. *Ibid.* "[T]he State disagreed with that . . . ." *Ibid.* At a recent hearing on the motion, the State noted that Mr. Knox's case had never even been approved for the death penalty by the State Attorney. *Ibid.* Moreover, the State put on the record a proffer of aggravation that shows Mr. Hauser to be a less culpable offender than Mr. Knox. Whereas the presentence investigation conducted on Mr. Hauser establishes that he has **no history of violent criminal behavior**, significant or other, Mr. Knox "does have a prior violent felony." *Ibid.*

In *Randall v. State*, 760 So.2d 892 (Fla. 2000), the defendant was convicted of

strangling *two* prostitutes to death. This Court found that Randall presented credible evidence to support his claim that he continued to strangle his multiple victims after they began to struggle because, based on prior encounters with other women, Randall believed women gained sexual gratification from this. This Court held that Randall's explanation was a "reasonable exculpatory hypothesis as to the premeditation."

As previously mentioned, the imposition of a death sentence in this single-victim, non-premeditated homicide violates Article VI, section 2 of the ICCPR, which limits the death penalty to only "the most serious crimes." By ratifying the ICCPR, the United States government adopted its provisions as the supreme law of the land as the governing standard for assessing human rights norms in all US jurisdictions.

On September 8, 1992, the United States ratified the ICCPR and thereby became a party state. The ICCPR is a treaty and as such is binding law. *See United States v Benitez*, 28 F. Supp. 2d 1361 (S.D. Fla. 1998). Additionally and independently, the ICCPR codifies the "customs and usages of civilized nations," and as such constitutes "part of our law, and must be ascertained and administered by the courts of justice." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

The prohibitions on torture, and other cruel and inhuman punishments, are recognized as *jus cogens*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and as such preempt any contrary state law. Vienna Convention on the Law of Treaties,

Article 53. The State of Florida is not free to disregard these rights as they are protected under international law, treaties of the United States, and the Eighth Amendment. *See Crosby*, *supra*; *Missouri v. Holland*, 252 U.S. 416 (1920).

The United States Supreme Court has held that an individual may assert rights under a treaty if the treaty confers rights to an individual. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989). The ICCPR confers on individuals such as Mr. Hauser the right not to be subjected to torturous, cruel, inhuman, **or** degrading treatment or punishment.

Finally, the State of Florida is bound through the Supremacy Clause of Article VI of the United States Constitution to abide by the ICCPR, customary international human rights law, and *jus cogens*. U.S. CONST. Art. VI. Treaties entered into by the United States are the law of the land. *Edve v. Robertson*, 112 U.S. 580, 598-99 (1884). Where a treaty and state law conflict, the treaty controls. *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *United States v. Pink*, 203, 230-31 (1942). As the Supreme Court recently held, states may not adopt laws or procedures that interfere with the federal government's international human rights laws. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2000 WL 775550 (June 19, 2000).

By imposing a death sentence in this case where none was imposed in more

aggravated and even multiple-victim homicides, the State of Florida has violated due process, the Eighth Amendment, and the ICCPR, and *jus cogens*.

3. The imposition of the death penalty based on Mr. Hauser's uncorroborated and demonstrably false statement violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Corresponding provisions of the Florida Constitution, the International Covenant on Civil and Political Rights and Jus Cogens

From the foregoing it is clear that Mr. Hauser's December 12, 1995 statements (1) are untrue, (2) were contradicted by the physical evidence and eyewitness accounts known at the time, (3) were made under highly suspect circumstances, and (4) were made by a defendant who was drinking heavily for at least 10 hours prior to the offense and whose history of manic-depression and alcoholic blackouts compromised his ability (a) accurately to recall relevant events and (b) rationally to decide what was in his own interests. Imposition of the death penalty under such circumstances is arbitrary and capricious.

At a minimum, there was a failure to follow procedures constitutionally necessary in a capital sentencing context. Where capital sentencing procedures create a substantial risk that the death penalty will be imposed in an arbitrary or capricious manner, the Eighth Amendment is violated. *Gregg v. Georgia*, 450 U.S. 153, 187 (1976).

Because the facts necessary for this case to be eligible for the death penalty do not exist, and certainly have not been proved beyond a reasonable doubt according the demanding due process standards of a capital sentencing proceeding, imposition of the death penalty in this case is arbitrary and capricious in violation of the Eighth Amendment and the International Covenant on Civil and Political Rights ("ICCPR"). In many jurisdictions, this death sentence would be a legal impossibility.[7]

In essence, Mr. Hauser was allowed to plead guilty to death. Just as no defendant has a constitutionally protected right to plead guilty and have that plea accepted, *Lynch v. Overholsen*, 369 U.S. 705 (1962), Mr. Hauser had no constitutional or other right to have a death sentence imposed on the basis of his wishes alone. As this Court has recognized, the *State's* interests are at stake when a death sentence may by imposed based on nothing more than the demonstrably false assertions of a mentally ill defendant. *See Hamblen v. State*, 527 So. 2d 800, 802 (Fla. 1988) (noting "society's duty to see that executions do not become a vehicle by which a person could commit suicide").

> From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is vital importance to the defendant *and to the*

[7] Even in Texas, the state with the highest number of consensual executions, a jury would have been required to hear evidence concerning whether Mr. Hauser should be put to death. Tex. Code. Crim. Pro. Art. 37.071.

> *community* that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. at 357-58. Wholly apart from Mr. Hauser's desire to die at the hands of the State, the State of Florida

> "must administer [the death] penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460. The Constitution prohibits the arbitrary or irrational imposition of the death penalty. *Id.*, at 466-67. [The Supreme Court has] emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally . . . , [and has] held specifically that the Florida Supreme Court's system of ***independent*** review of death sentences minimizes the risk of constitutional error.

Parker v. Dagger, 498 U.S. 308, 321 (1991). No independent or meaningful review could have been conducted in this case because the only source of information was Mr. Hauser's demonstrably false statement.

The Supreme Court has recognized that a man must not "be convicted on his bare confession, not corroborated by evidence of his guilt." *Von Moltke v. Gillies*, 332 U.S. 708, 719m, fn. 5 (1948). There is a

> general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by [the Supreme] Court . . . and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts. Its purpose is to prevent "errors in convictions based upon untrue confessions alone," *Warszower v. United States*, 312 U.S.[342,] 347; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires [forensic] investigations which

> extend beyond the words of the accused. * * * Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made.

Smith v. United States, 348 U.S. 147, 152-53 (1954). No one can deny that a capital sentencing proceeding is sufficiently like a trial on criminal liability so that the all the procedural safeguards necessary to guarantee a reliable outcome in the later context must be met in the former. *See, e.g.*, *Gardner v. Florida*, 430 U.S. 349 (1977); *Strickland v. Washington*, 466 U.S. 668, (1984)(capital sentencing proceeding sufficiently like a trial to require provision of effective assistance of counsel; *Ake v.Oklahoma*, 470 U.S. 68 (1985) (due process requires states to provide tools necessary to mount a defense in a capital sentencing trial). Indeed, the Supreme Court has repeatedly stressed that because of the unique severity and finality of the death penalty a heightened standard of due process applies. *Gardner v. Florida*, 430 U.S. 349, (1977). This Court has repeatedly stressed the same need for more exacting scrutiny and the highest degree of due process in capital cases. *See, e.g.*, *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000)("The United States Supreme Court has also repeatedly emphasized that the Eighth Amendment requires a heightened degree of reliability in capital cases.") *citing Woodson v. North Carolina*, 428 U.S. 280 (1976)(plurality opinion); *Swafford v. State*, 679 So. 2d 736, 740 (Fla. 1996)(Harding, J. concurring)(recognizing "the 'qualitative difference of death from all other

punishments,' our jurisprudence also embraces the concept that 'death is different' and affords a correspondingly greater degree of scrutiny to capital proceedings.")

The New Jersey Supreme Court has held that a death sentence cannot stand where no extrinsic evidence corroborates a confession which is used to make a case eligible for the death penalty. *State v. DiFrisco*, 571 A.2d 914, 278-83 (N.J. 1990). The "long history of judicial experience with confessions and . . . the realization that sound law enforcement requires police investigations which extend beyond the words of the accused," *Smith v. United States*, 348 U.S. 147, 153 (1954), compel the rule that a verdict based on an unverified, uncorroborated confession is so inherently unreliable that it cannot stand, particularly when the verdict is death. *DiFrisco*, 571 A.2d at 278, 280-81. Similarly, in *Koenig v. State*, 597 So.2d 256 (Fla. 1992), this Court vacated a conviction and death sentence because there was no basis in the record for the plea. As in this case, Koenig pleaded no contest and waived the sentencing jury.

In this case, trial counsel raised the need for corroboration in the sentencing memorandum he submitted to the lower court by letter dated March 1, 1996. Trial counsel informed the lower court: "It is well established as a fundamental principal of law that the corpus delicti must rest on independent evidence, and where none exists the defendant's statements alone are insufficient. That is exactly the situation here. . . ." Trial counsel also informed the trial court that he believed Mr. Hauser had fabricated

his December 12, 1995 statement in order to become death eligible: "I would also urge the Court to consider that the aggravating factors contained in the defendant's letter may well be fabrications that the defendant brought forth after he decided that he wishes to receive the death penalty. * * * there is a serious question concerning the motive and veracity of the defendant's letter. . . ."

Under these circumstances, the trial court had an obligation to inquire into the circumstances surrounding Mr. Hauser's letter, its veracity, and to require that counsel advise the court further. In similar circumstances, where trial courts are presented with information calling into question the reliability or fairness of the proceedings, the Constitution requires that the proceedings be stayed and an inquiry be made. For example, where the court is given cause to believe that a conflict exists, it must stop the proceedings and conduct an inquiry. *Holloway v. Arkansas*, 435 U.S. 475 (1978). When a court has grounds to believe that a defendant may be incompetent, the proceedings must stop until a reliable assessment of the defendant's competence has been made and the court has found the defendant competent to proceed. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).

As in *Holloway* and *Drope*, a capital sentencing court that is told by defense counsel–who is in the best position to know the defendant's mental state and whether there are any problems with his representation, *see Holloway* and *Drope*, *supra*–that

the defendant's statement is a fabrication intended to ensure he receives the death penalty, and that there is no independent or extrinsic corroboration of the defendant's statement, at a minimum, due process requires that the court inquire into the situation. The risk of an erroneous death sentence absent these procedures is too great.

In the capital sentencing context specifically, where procedures create "a substantial risk that [death] will be inflicted in an arbitrary and capricious manner," the Eighth Amendment is violated. *Gregg v. Georgia*, 428 U.S. at 188. The Eighth Amendment requires that capital sentencing decisions be based on information that is as complete, and more importantly, accurate as possible. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978)(plurality opinion); *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Eddings v. Oklahoma*, 455 U.S. 104, 118-119 (1982)(O'Connor, J., concurring); *Simmons v. South Carolina*, 512 U.S. 154 (1994).

The Statement of Judicial Acts to Be Reviewed filed by defense counsel listed the following as error: "Court erred in relying on Defendant's statements alone without independent evidence to find aggravating circumstances proven" (See Attachment). As the record demonstrates, the state's sentencing argument and the trial court's findings of aggravating factors completely rely upon Mr. Hauser's December 12 statement.[8]

[8] The State's Answer Brief also relies entirely upon Mr. Hauser's 12/12/95 to argue in support of aggravating factors. *See* Answer Brief at 26-27 ("express reliance upon the written statement")("was well evidenced in his written statement")("as the written statement set for . .

Appellate counsel however, completely failed to raise this issue.[9]

Appellate counsel was ineffective for failing to raise these issues before this Court. Appellate counsel's errors are of such a magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Smith v. Robbins*, 120 S. Ct. 746 (2000); *Thompson v. State*, 759 So.2d 650 (Fla. 2000).

The unreliability of this direct appeal affects the fair administration of death penalty cases as whole in Florida and this Court's duty to review death cases for proportionality not only to ensure the rights of individual defendants, but to ensure society's interest that the State of Florida only executes those individuals who fall within the narrow class of defendant's eligible for death. The integrity of Florida's death penalty jurisprudence is severely called into question if this conviction and death sentence are included within that narrow class of cases reserved for the death penalty.

B. THE PREJUDICE INHERENT IN ALLOWING THE VICTIM'S SURVIVORS TO PERSONALLY AND PUBLICLY REQUEST THAT

.)("were more than sufficiently reflected in his written statement").

[9] *See* State's Answer Brief at 29 ("The sentence is supported by three valid aggravating circumstances none of which is even attacked on appeal.")

THE ELECTED TRIAL JUDGE IMPOSE THE DEATH PENALTY REQUIRES A NEW SENTENCING PROCEEDING; MR. HAUSER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Prior to the sentencing hearing, with the knowledge and possible assistance of law enforcement, letter-sized and business card-sized fliers soliciting letters to Judge Barron in support of a death sentence were circulated in the area. App. 29. Witnesses report that these fliers and cards were circulated in the bar where the victim worked, and around the hotel where the murder took place. App. 36, 39 (Affidavits of Michael Clark and James Melton). Whether the disseminators of these appeals to influence the judge were successful is a matter requiring further investigation. *See Bracy v. Gramley*, 529 U.S. 899 (1997). Trial counsel has stated under oath that he was not aware of the appeals for letters to the judge or of whether they were successful. App. 12 (Affidavit of James Tongue).

There can be no doubt that if anyone responded to these appeals, or that if Judge Barron was aware that his constituency's living and working area had been papered with them, the conviction and sentence are invalid and must be vacated. The Sixth Amendment requires that a neutral tribunal preside over all aspects of a criminal trial and sentencing, *Tumey v. Ohio*, 273 U.S. 510 (1927), regardless of whether Mr. Hauser

can establish that bias influenced any decisions. *Waller v. Georgia*, 467 U.S. 39, 49. *See also Porter v. State*, 723 So. 2d 191 (Fla. 1998) (reversing death sentence in postconviction upon hearing new evidence that trial judge was not impartial). "[T]he floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal.' *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)." *Bracy*, *supra*, 529 U.S. at 904-05.

At the sentencing hearing in this case, the State presented the testimony of the victim's grandmother and mother. R. Vol. IV at 3-8. Each of these distraught women was asked, in the presence of reporters and other observers, whether they wanted Judge Barron to impose the death penalty. Prosecutor Grinsted asked the following of Ruth Little, the victim's grandmother:[10]

> Q: Ms. Little, what is your recommendation for the Court on the imposition of sentence?
>
> A: They don't have bad enough, death.
>
> Q: Are you recommending to this Court sentence the defendant to death?

[10] As discussed in Argument A, *supra*, the State is also disentitled to execute Dan Hauser because the prosecutor knowingly presented false evidence from Ms. Little regarding whether the victim was a prostitute. The victim's purported lack of experience and street smarts were relied upon by the State and Judge Barron in support of death sentence. Yet, Okaloosa County Sheriffs Department personnel knew that the victim was experienced at solicitation and even wrote that her family were under a false impression about her activities.

A: Yes. I wish he could get the same thing he gave Melanie. He's a monster.

R. Vol. IV, at 4-5. The prosecutor then asked, Pamela Sue Belford, the victim's mother:

Q: . . . . What is your recommendation to this Court on the imposition of sentence?

A: **I want the death penalty for him.**

* * *

Q: Do you feel that the death penalty, if in fact carried out in this case, will give your family closure as opposed to a life sentence?

A: Yes.

Id. at 7-8.

This "evidence" is irrelevant to any aggravating circumstance or other lawful sentencing matter, was patently prejudicial, did not constitute victim impact evidence of any kind, and was considered by Judge Barron prior to imposition of sentence. The defense voiced no objections to this testimony.

The following day, Judge Barron and his electoral constituency found on the front page of their morning paper, an account of this extraordinary personal request for a death sentence. App. 30. There had already been extensive media coverage of the case, and each ruling made by Judge Barron. *See*, *e.g.*, App. 31.

The evidence of circumstances tending to bias the court prior to entering judgment in this case requires that the sentence be set aside. At a minimum, this Court must remand the case to the circuit court for an evidentiary hearing.

C. THE ABSENCE OF A FACTUAL BASIS FOR A GUILTY PLEA TO FIRST-DEGREE MURDER REQUIRES REVERSAL OF MR. HAUSER'S CONVICTION; MR. HAUSER'S CONVICTION AND SENTENCE VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

On November 21, 1995, Mr. Hauser entered a written plea of *nolo contendere* to the charge of first-degree premeditated murder and stipulated to the facts contained in the arrest report (R. 32-33). On the same day, Mr. Hauser entered his plea in court. During this proceeding the State filed an addendum to the arrest report in order to establish a factual basis for Mr. Hauser's plea (R. Vo. I at 3-8). In accepting Mr. Hauser's guilty plea to first-degree premeditated murder the trial court relied entirely upon the arrest report and addendum. As will be demonstrated, the arrest report, addendum and plea colloquy do not establish a sufficient factual basis for a conviction of first-degree premeditated murder. Furthermore, the lower court was unaware of numerous objective evidence that prove that Mr. Hauser is innocent of first-degree premeditated murder.

1 Arrest Report and Addendum Lack Factual Basis For First Degree Premeditated Murder

The arrest report and addendum submitted to support Mr. Hauser's plea do not establish sufficient facts for a finding of first-degree premeditated murder. The arrest

report is merely a one page document containing no facts. While the addendum includes facts related to the prosecution's investigation of into Melanie Rodrigues homicide, it fails even to mention a basis for premeditation. The addendum describes the discovery of Ms. Rodrigues' body in a hotel room including that investigators discovered Ms. Rodrigues' body under the bed; semen was detected on her body; her body showed no signs of trauma; serveral items of her property were found with her body; her keys were missing. The addendum also noted that the victim was last seen at a strip club called Sammy's on the Island on New Year's Eve 1994.

As to Mr. Hauser, the addendum indicates that Mr. Hauser registered to the hotel room where the victim was found. He arrived on New Year's Eve in a black truck and when he checked-in he received one key. Upon check-out Mr. Hauser exchanged his room key for his deposit. The room was not occupied when Ms. Rodrigues' body was found.

The addendum also notes that in the early morning hours of New Year's Day Ms. Rodrigues' vehicle was seen approaching the motel at a high rate of speed. She parked next to Mr. Hauser's truck. Two individuals exited the vehicle and entered Mr. Hauser's room. Hotel management warned the occupants to lower the volume of their television.

The addendum describes Mr. Hauser's travels from North Carolina in a stolen

black truck. The medical examiner reported that Ms. Rodrigues' blood alcohol level measured .05% and she was strangled.

The addendum relates that Mr. Hauser was arrested in Reno, Nevada on unrelated charges and investigators interviewed Mr. Hauser on February 12th and 14th regarding his visit to Fort Walton Beach. Mr. Hauser told investigators that he checked into the hotel in Fort Walton Beach on New Year's Eve and proceeded to bar hop throughout the night. He related that he was intoxicated and could not recall meeting anyone in particular. He did not loan his hotel key to anyone.

The addendum notes that the victim's friends identified the keys and female underwear which were found in Mr. Hauser's truck, as the victim's. The keys did in fact unlock Ms. Rodrigues' car. Mr. Hauser provided blood and hair samples and identified his signature on documents.

Finally, the addendum indicated that Mr. Hauser's fingerprints were identified on a pack of cigarettes located next to Ms. Rodrigues' body.

While the addendum submitted to the trial court contained several facts, the information regarding the circumstances of Ms. Rodrigues' death did not establish first-degree premeditated murder. During the plea colloquy neither the State nor the defense added any facts to the arrest report or addendum. When the trial court accepted Mr. Hauser's plea it did not know about the statement Mr. Hauser made on

March 21, 1995. The elements of first-degree premeditated murder were not established.

In *Holton v. State*, this Court stated:

> Premeditation can be shown by circumstantial evidence. However, to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence.

Holton v. State, 573 So.2d 284 (Fla. 1991)(citations omitted). Furthermore:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned.

Holton v. State, 573 So.2d 284, 289 (Fla. 1991)(*citing Larry v. State*, 104 So.2d 353, 354 (Fla. 1958). In *Holton*, the victim had been strangled with a ligature. *Holton*, 104 So. 2d at 289. This Court held that sufficient evidence of premeditation existed because the ligature was employed as a weapon, the defendant was scratched thus suggesting a struggle, and a fire was started to destroy evidence. *Id*.

In Mr. Hauser's case the trial court only knew that the cause of death was "strangulation." No evidence existed to suggest provocation, previous difficulties

between the parties, (in fact, the judge knew that Mr. Hauser had only met the victim that evening), the use of a weapon or any wounds other than trauma to the neck. Also, the judge did not know that the injury to Ms. Rodrigues was inconsistent with a typical strangulation, i.e., that the necessarily rapid breakage of the hyoid bone produced unconsciousness. Instead, the injury was consistent and could only have been caused by a sudden rapid blow causing a fracture to the hyoid bone. None of the factors present in *Holton* are present in Mr. Hauser's case -- there is no factual basis for a first-degree premeditated murder plea, but there are facts which negate premeditated first-degree murder.

This Court's precedent regarding the failure to establish premeditated first-degree murder is factually similar to circumstances of Mr. Hauser's. For example, in *Kirkland v. State*, in order to establish premeditation, the State presented evidence that the victim suffered a severe neck wound which caused the victim to bleed to death or suffocate. 684 So. 2d 732 (Fla. 1996). The victim also suffered other blunt trauma injuries most likely caused by a knife or cane and friction existed between the victim and defendant. *Id*. This Court found that such evidence was insufficient to support a first-degree murder conviction. *Id*. This Court held:

> We find, however, that the State's evidence was insufficient in light of the strong evidence militating against a finding of premeditation. First and foremost,

> there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide. Second, there were no witnesses to the events immediately preceding the homicide. Third, there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide . . . Fourth, the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan.

Kirkland at 735. Significantly, for Mr. Hauser's case, this Court stated:

> In *Hoefert v. State*, we were unable to find evidence sufficient to support premeditation in a situation in which Hoefert had established a pattern of strangling women while raping or assaulting them. Evidence was presented in that case indicating that the homicide victim, found dead in Hoefert's dwelling, was likewise asphyxiated. Despite the pattern of strangulation, the discovery of the victim in Hoefert's dwelling, and efforts by Hoefert to conceal the crime, this Court found that premeditation was not established. **In this case, there is no evidence that Kirkland had established a pattern of extreme violence as had Hoefert. A comparison of the facts in Hoefert and the instant case requires us to find, if the law of circumstantial evidence is to be consistently and equally applied, that the record in this case is insufficient to support a finding of premeditation**.

Kirkland at 734 (emphasis added). This Court found that the evidence did support a second-degree murder conviction in Kirkland's case. Mr. Hauser's case is nearly identical to the facts presented in *Kirkland*.

Recently, in *Randall v. State*, this Court reversed Randall's two murder convictions and vacated his two death sentences. 2000 WL 422865 (Fla. April 20, 2000). The cause of death in Mr. Randall's case, like Mr. Hauser's was strangulation. Furthermore, like Mr. Randall, Mr. Hauser was not charged with any underlying enumerated felony, therefore "premeditation is the essential element that distinguishes first-degree from second-degree murder." *Id., citing Green v. State,* 715 So. 2d 940, 943 (Fla. 1998).

Randall was charged with first degree-premeditated murder for the deaths of two prostitutes. Both victims were manually strangled with fractured hyoid cartilage. *Randall* at 3. They also suffered from fractured ribs, bruises and blunt trauma. *Id*. The evidence which linked Randall to the crime consisted of dog hairs found on the bodies which were similar to those from the dog in Randall's residence, carpet fibers found on the victims which was similar to fibers in Randall's residence, saliva samples obtained from a cigarette butt found on the bodies contained DNA similar to Randall's and tire tracks near the crime scene matched Randall's car. *Id*. The prosecution also presented evidence of Randall's flight. In his defense, Randall presented evidence that he engaged in choking women for sexual satisfaction. This Court reasoned:

> We agree in this wholly circumstantial case that the

> evidence does not support premeditated murder to the exclusion of a reasonable doubt. The evidence does support second-degree murder. Ironically, the testimony by Linda Randall Graham and Terry Jo Howard as to choking during sexual activity, which we have found to be properly admissible as evidence of Randall's identity as the perpetrator of the crimes, is the evidence that makes Randall's argument compelling.

Randall at 8. Furthermore, the evidence provided "no suggestion [] that Randall exhibited, mentioned, or possessed an intent to kill the victims at any time prior to the homicides. Moreover, there was no evidence that either of the two murders was committed according to a preconceived plan." *Randall* at 8.

Similarly, in Mr. Hauser's case, at the time the trial court accepted the guilty plea there was also **no evidence** of an intent to kill and no evidence of a preconceived plan. The arrest report and addendum do not contain a single fact to establish premeditation. In fact, Mr. Hauser's confession and the evidence of his intoxication, and moreover, during Mr. Hauser's plea colloquy, the trial court never inquired about the elements of first-degree premeditated murder or the issue of intent. Accordingly, although the arrest warrant and addendum may support a second- degree murder conviction, they can not establish the necessary factual basis for first-degree premeditated murder.

Moreover, in *State v. Williams,* 316 So.2d 267 (Fla. 1975), this Court held that

Fla. R. Crim. P. 3.170(j) required a trial court to determine that a factual basis for a guilty plea exists and the elements of the offense established by information placed on the record before the defendant enters his plea. This Court indicated that the taking of a guilty plea is one of the most important tasks of a trial judge because "the sole purpose of the [rule's] provision is to determine the accuracy of the plea, thereby avoiding a mistake. The trial judge, under this provision, is to ensure that the facts of the case fit the offense with which the defendant is charged." *Williams* at 271. *See also, Koenig v. State,* 597 So.2d 256, 258 (Fla. 1992) (deficient plea because trial judge failed to inquire into the factual basis for the plea and stipulation with no factual basis in the record is insufficient).

In Mr. Hauser's case, no facts were submitted because none existed which fit the charge. The arrest report, addendum and plea colloquy lack sufficient facts to support first-degree premeditated murder.

The Florida Rules of Criminal Procedure regarding: ACCEPTANCE OF GUILTY OR NOLO CONTENDERE PLEA, Rule 3.172 (a) reads:

> Voluntariness; **Factual Basis**. Before accepting a plea of guilty or nolo contendere, the trial judge shall be satisfied that the plea is voluntarily entered **and that there is a factual basis for it. Counsel for the prosecution and the defense shall assist the trial judge in this function.**

(emphasis added). In Mr. Hauser's case the judge, prosecutor and defense attorney failed to ensure that there was a factual basis for the plea.

2. Evidence Contradicts First-Degree Premeditated Murder

Scientific evidence contradicts a finding that Mr. Hauser is guilty of first-degree premeditated murder. Mr. Hauser was charged with the first-degree premeditated murder of Ms. Rodrigues. The medical examiner ruled that the victim's death caused by asphyxiation, and Mr. Hauser confessed to suddenly and briefly grabbing the victim's neck. The physical evidence establishes that injuries seen on Ms. Rodrigues were the result of a sudden force of quick duration rather than a methodical or slow process. Ms. Rodrigues quickly lost consciousness.

Dr. LeRoy Riddick, an expert forensic pathologist, has reviewed testimony, statements, the medical examiner's file and all available photographs and opined that the injuries inflicted upon Ms. Rodrigues corroborate Mr. Hauser's confession. The objective evidence supports Mr. Hauser's initial statement made on March 21, 1995, wherein Mr. Hauser stated that he did not plan the event, did not know why he did it, and that it happened very quickly - circumstances which do not constitute first-degree premeditated murder.

During his review, Dr. Riddick discovered that the marks present on Ms.

Rodrigues's neck show that she was grabbed rapidly and forcefully with one hand.

> Having reviewed the [] material, I have formed the opinion that the physical evidence is not consistent with the written statement provided by Mr. Hauser of 12/12/95, that is, that he put his hands around her neck, threw her on the bed coming down on top of her and then with her arms pinned under his elbows he strangled her slowly letting off the pressure to watch the fear in her eyes and then reapplying the pressure until she gave a shake and then died, but is much more consistent with that provided on 3/21/95, "It happened so fast, next think I know it was over."

(Affidavit of Dr. LeRoy Riddick, App. 11).

The fact that Ms. Rodrigues's hyoid bone was broken, without evidence of any other trauma is significant. The hyoid bone in young female adults does not fracture with application of a slowly applied force. Fracturing this bone without other trauma in a strangulation case indicates a sudden and quick impact. *See* Affidavit of Dr. LeRoy Riddick, App. 11.

Additionally, the crime scene shows no signs of a struggle, and the victim's body showed no defensive wounds or evidence of a struggle. No tissue was found beneath the victim's fingernails, for example. This corroborates Mr. Hauser's confession that there was no fight and no struggle.

In fact, a review of the medical examiner's files and other investigative notes reveal that the medical examiner would not rule the death a strangulation until

toxicology tests were performed. (*See* App. 32, 33). Dr. Riddick's initial report reveals that another cause of death - cardiac arrest - is possible, and that was not ruled out by Dr. Nielson. Clearly, the crime scene and victim's body provided no signs of prolonged, violent trauma.

Also, while the medical examiner seemed to suspect that drugs may have contributed or caused the victim's death, she failed to request that the victim's blood sample be tested for the presence of several common drugs such as Phenobarbital, Butalbil, Carisoprodol, Meprobamate, Carbamazephine, Morphine or Codine. The presence of these depressants would further corroborate Mr. Hauser's March 21 confession. Initially, the cause of death was not entirely clear, possibly because of the lack of evidence to show a long and methodical strangulation. Further investigation is necessary to determine whether drug use could have contributed to the victim's death. This is particularly important because although the victim's blood alcohol level was .05 on autopsy, eye-witnesses reported that she was highly intoxicated.

Other evidence exists which contradicts the intent necessary to establish first-degree premeditated murder. For example, the curtains in the room where the crime occurred were eight to ten inches open. Also, Mr. Hauser did not attempt to conceal his identity because he registered at the motel in his own name documenting his

vehicle information. He also knew that there was a significant police presence in the area and some police around his hotel after he arrived with the victim. Furthermore, he made no effort to hide his connection with Ms. Rodrigues since he openly spent time with her at the club, was seen driving with her back to the hotel and stepped out onto the balcony of his hotel room with the victim several times during the early morning hours where he was told by hotel staff to turn down his loud music.

The trial court never heard Mr. Hauser's March 21, 1995 statement. In this statement, Mr. Hauser admitted that during the early morning hours, he suddenly grabbed the victim and choked her, but he did not plan this. Also, (although available), no evidence was presented to show that Mr. Hauser was severely intoxicated on the New Year's Eve. Finally, the court did not hear evidence of Mr. Hauser's intense feelings of confusion, guilt, remorse, and dismay.

When Mr. Hauser made his statement on March 21, 1995 until he requested the death penalty and provided another statement on December 12, 1995, he maintained that the crime "just happened" -- suddenly. Had the trial court known what evidence existed surely it would not have allowed Mr. Hauser to enter a plea to premeditated first-degree murder since the facts of the case did not fit the offense with which the Mr. Hauser was charged. *Williams* at 271. See Claim A, supra.

3. Inadequate and Misleading Plea Colloquy

During the plea colloquy, the judge inquired:

> COURT: Thank you. You've heard your attorney announce that you wish to give up your right to a jury trial and enter a plea of nolo contendere to murder in the first degree. Is that your desire?
>
> HAUSER: Yes.
>
> COURT: Your attorney's also filed with the Court a written plea agreement which sets forth that fact and also sets forth, in writing, the rights that you give up in entering this plea. This plea agreement contains your signature apparently. Did you sign the agreement?
>
> HAUSER: Yes.
>
> COURT: Did you read it before you signed it?
>
> HAUSER: Yes, I did.
>
> COURT: Did you discuss it fully with your attorney?
>
> HAUSER: Yes.
>
> COURT: Did you understand it?
>
> HAUSER: Yes.
>
> COURT: Do you have any question about it?
>
> HAUSER: No.
>
> COURT: Are you satisfied with the representation of your attorney?
>
> HAUSER: Yes.

GRINSTED: Judge, I have supplied the Court with an addendum of probable cause to establish a factual basis. I've also supplied to the defense attorney in this case, and we would submit that to the Court to establish the factual basis for the entry of the plea.

COURT: The addendum of probable cause has been submitted by the state, Mr. Tongue. Have you reviewed that addendum?

TONGUE: Yes, Your Honor, I have.

COURT: Has your client had an opportunity to review it?

TONGUE: He's had the opportunity, Your Honor.

COURT: Are there any additions or corrections that you'd like to make to that addendum?

TONGUE: No, Your Honor.

COURT: Mr. Hauser, the Court wants you to be aware, in addition to the information on the written plea agreement, that in this particular case, since it is a first degree murder case, you would be entitled to a twelve-person jury to determine, after hearing all the evidence in this case, your guilt or innocence in this matter, whether guilty or not guilty of this offense. Do you understand that you're giving up the right to a twelve-person unanimous finding in entering this plea?

HAUSER: Yes.

COURT: Do you also understand that if the Court accepts this plea, there will be a further hearing scheduled, at which time the state may present evidence of aggravating circumstances, and your attorney may present evidence of

mitigating circumstances, and it will, at that time, be with the discretion of the Court to impose the death penalty in this case? Do you understand that?

HAUSER: Yes, I do.

COURT: Mr. Tongue, in that this is a first degree murder case possibly carrying the death penalty, the Court would like to inquire as to whether or not you have had your client psychologically examined?

TONGUE: Yes, Your Honor, I have. I've had him psychologically examined on two separate occasions, and I will represent to the Court, based on my discussions with the doctor in that case and his written report from one of the sessions, he finds that Mr. Hauser suffers from no mental illness, defect or infirmity, that he is not incompetent to proceed now, nor was he insane at the time of the offense.

COURT: I see. In your own personal dealings with Mr. Hauser, have you seen any indication that he's in any was incompetent to proceed with this matter?

TONGUE: I have not, Your Honor. In fact, to the contrary, Mr. Hauser is one of the more articulate and brighter of my clients. He seems to understand very well, and in any of our discussions if he hasn't understood fully and completely, he has asked the appropriate questions and satisfied himself with my answers, I presume, that he does then have a full and complete understanding.

COURT: Mr. Hauser, are you at this time under the influence of any drugs or alcohol or mind-altering substance?

HAUSER: No.

COURT: None?

HAUSER: None.

COURT: Have you ever had a problem in the past with any kind of psychiatric or psychological disorder?

HAUSER: No.

COURT: Have you ever been treated, in other words, for any psychiatric or psychological disorder?

HAUSER: I've been to treatment, but it was nothing substantial.[11]

COURT: Have you discussed that with your attorney.

HAUSER: Oh, Yes, oh, yes.

COURT: He's aware of all of that?

HAUSER: Yes.

COURT: Are you pleading to this offense because you are guilty of first degree murder?

HAUSER: Yes.

COURT: Is there anything you'd like to say to the Court before I conclude this matter this morning?

HAUSER: No, sir.

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[11] Either Mr. Hauser was incompetent or he was lying in order to serve a death sentence. Mr. Hauser did have a mental health history of problems. *See* Apps. 6, 15, 24, 25. See also Claim A, *supra*.

> COURT: The Court finds that the plea has been entered freely and voluntarily. The Court finds that Mr. Hauser is competent, and that his counsel, through discussions with psychiatric and/or psychological experts, is satisfied of the defendant's competence. That issue, therefore, is not before this Court. The Court finds that Mr. Hauser certainly appears to understand the significance and nature of these proceedings, and the Court finds that his plea has been entered freely and voluntarily. The Court further finds that there has been no coercion or promises made to this defendant in exchange for the entry of this plea, and therefore, the Court would accept the plea, and I'm going to set this matter for sentencing hearing, gentlemen, can you be prepared for the sentencing hearing by January?

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Absolutely no inquiry regarding the requirement that Mr. Hauser made a "knowing" plea was made. The only question the trial court asked Mr. Hauser regarding the offense was:

> COURT: Are you pleading to this offense because you are guilty of first degree murder?
>
> HAUSER: Yes.

This question was conclusory and assumed that Mr. Hauser knew the distinctions between first-degree premeditated murder and second-degree murder.

In a case with such severe ramifications as Mr. Hauser's, such an assumption should not be made, particularly in light of the evidence of Mr. Hauser's extreme

feelings of guilt. Several stark inaccuracies in the record invalidate the court's acceptance of the plea:

1. Contrary to counsel's representations to the court, Mr. Tongue did have reason to question Mr. Hauser's competence and whether his waivers were knowing, intelligent, and voluntary:

    a. The defense knew Mr. Hauser had been suicidal since his arrest and that he wanted to be executed (App. 12, 13, 14)(Affidavits of James Tongue, Frank Martin, & Bill Graham). *Cf. Drope v. Missouri*, (defendant presumptively incompetent where he attempted suicide prior to sentencing);

    b. The defense knew that Mr. Hauser's parents were behind his desire to be executed. App. 26 (Letter from Cynthia Hauser to James Tongue);

    c. The defense possessed Mr. Hauser's medical records showing he had a history of alcoholism, including alcoholic blackouts, and that he experienced fleeting fits of rage accompanied by amnesia (Apps. 6, 15, 24, 25)(Affs. of Drs. Lewis & Bersoff, Rpt. of Dr. Kaye, Treatment Records from Starting Point).

2. Mr. Hauser's denial of psychiatric problems was inaccurate and both the State and the defense knew it (App. 34, 35);

3. Mr. Hauser did have a history of inpatient and outpatient psychiatric treatment and alcohol and drug treatment going back to early adolescence; these treatments were also known to the defense and the State.

The failure of defense counsel and the State to give the above information to the court constitutes a complete breakdown of judicial process. Counsel for the defense and prosecution had obligations as officers of the court and, under the Sixth Amendment and *Berger v. United States*, 295 U.S. 78, 88 (1935), respectively, to

ensure that the court's decision was based on complete and accurate information. This Court has admonished counsel to be diligent in fulfilling these responsibilities in the context of guilty-plea proceedings: "As we have stated in numerous cases, the responsibility to ensure that the proper procedural steps are followed is shared by the judge, the prosecutor, and the defense attorney." *Koenig v. State*, 597 So.2d 256, 258 (Fla. 1992).[12]

Although Mr. Hauser may feel he should die for the death of Ms. Rodrigues, under the facts of this case, the law does not allow such a result. Furthermore, it is not Mr. Hauser's choice to accept a punishment not permitted by law. To rule otherwise would be to permit "reverse" *Alford* pleas. *North Carolina v. Alford*, 400 U.S. 25 (1970). A criminal defendant does not have an absolute right under the United States Constitution to have a guilty plea accepted. *Lynch v. Overholser*, 369 U.S. 705, 719 (1962). The trial court should have rejected Mr. Hauser's plea to first-degree premeditated murder. To allow the conviction to and death sentence to stand would be an excessive punishment in violation of Article I, section 17, Florida

[12] To the extent the State may argue that this issue is not properly before the Court because it was not raised earlier, *Koenig* puts the matter to rest. This Court has already rejected the State's argument that such a complete failure to present an accurate factual basis for supporting the defendant's multiple waivers in a guilty plea can be waived. *Koenig v. State*, 597 So.2d 256, 257 n.2 (Fla. 1992)(noting many cases in which Court has considered review of voluntariness and sufficiency of record to be "automatic").

Constitution and the Fourteenth and Eighth Amendments to the United States Constitution. See Claim A, *supra*.

The United States Supreme Court stated:

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U.S. 458 , 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). **Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.'**

McCarthy v. United States, 394, U.S. 459, 466 (1969). Mr. Hauser did not knowingly and could not knowingly admit to the elements required to establish first-degree premeditaed murder.

Additionally, the Court in *McCarthy* held that a plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy*, 394 U.S. at 466. In Mr. Hauser's case the record is silent as to his understanding of the law in relation to the facts and therefore the conviction for first-degree murder must be reversed. This Court has reversed other first degree

premeditated murder convictions and death sentences due to inadequate records. *See e.g.*, *Long v. State*, 689 So. 2d 1055 (Fla. 1997); *Tilman v. State*, 591 So.2d 167 (Fla. 1992).

In *Boykin v. Alabama*, the United States Supreme Court reversed a conviction and death sentence because the Court would not presume a waiver of important federal rights on a silent record regarding a guilty plea. 395 U.S. 238 (1969). Although Mr. Hauser's record is not entirely silent regarding the guilty plea as *Boykin*, it is entirely silent regarding his knowledge of elements of the charge. Additionally, there is no reason to conclude the court would have accepted the plea had accurate information regarding Mr. Hauser's mental state and psychiatric history been disclosed. Accordingly, reversible error occurred. *Boykin*, 395 U.S. at 244 (citation omitted).

4. Policy Considerations

Some jurisdictions forbid a defendant from entering a guilty plea to an offense where death is a possible penalty. For example, the United States Code of Military Justice provides:

> A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.

U.C.M.J., 10 U.S.C.A., section 8459(b) (2000). Furthermore, the United States

Military employs a process through which guilty pleas of any kind are tested through "providency hearings". Such a process employed in Mr. Hauser's case may have provided a necessary safeguard and prevented his illegal plea and first- degree murder conviction.

The State of Louisiana has a similar provision:

> A court shall not receive an unqualified plea of guilty in a capital case. If a defendant makes such a plea, the court shall order a plea of not guilty entered for him.

LSA 2 C.Cr.P art. 557. The Official Revision Comment to this article states:

> This article retains from Art 262 of the 1928 Code of Criminal Procedure the prohibition against receiving a plea of guilty in a capital case.

New York's statute provides: "Except where the indictment charges the crime of murder in the first degree, the defendant, subject to the provisions of subdivision two, may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending." McKinney's C.P.L., section 320.10 (1). *See also*, N.Y. Const. art I, sec. 2.; N.J.Stat.Ann. section 2A:113-3 (repealed along with the death penalty).

Other state's allow pleas to a capital offenses, but have enacted other safeguards. The Washington Supreme Court precludes imposition of the death penalty once a defendant pleads guilty to first-degree premeditated murder charges:

> . . .it is clear the present death penalty statute does not prevent a defendant from exercising the right to plead guilty to any crime with which he or she is charged. It is equally clear that after pleading guilty to first degree murder, a defendant is no longer subject to the possible imposition of the death penalty under RCW 10.94.

State v. Martin, 614 P.2d 164, 166 (1980); Even in Texas, the state with the highest number of "consensual" executions, a jury must be impanelled to decide whether death should be imposed. *See also* Texas Code Crim. Pro. 37.071.

The United States Supreme Court has recognized that a man must not "be convicted on his bare confession, not corroborated by evidence of his guilt." *Von Moltke v. Gillies*, 332 U.S. 708, 719m, fn. 5 (1948). Likewise, Mr. Hauser must not be convicted when no evidence corroborates his plea.

While other jurisdictions have safeguarded the integrity of their judicial process with safeguards in a situation like Mr. Hauser, Florida has none. Mr. Hauser's case presents issues that reach beyond the issue of whether Mr. Hauser is executed. This case presents issues that directly bear upon the integrity and uniformity of Florida's judicial system, and in particular the administration of death cases. This Court must consider intervening in this case in order to preserve and promote the integrity of the judicial system.

D. A COMPLETE BREAKDOWN OF THE ADVERSARIAL SYSTEM DISENTITLES RESPONDENTS TO CARRY OUT THE SENTENCE OF DEATH UPON DAN HAUSER; HIS CONVICTION AND SENTENCE VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND JUS COGENS

Upon a cursory review of Mr. Hauser's conviction and sentence several errors are identified which undermine the reliability and require this Court to vacate his conviction for first-degree premeditated murder and his sentence of death. These issues are placed before the court in support of the prior Motion to Appoint Special Counsel to initiate further proceedings.

1. Ineffective Assistance of Trial Counsel

Mr. Hauser's trial counsel rendered ineffective assistance of counsel at the guilt phase of Mr. Hauser's capital trial by allowing Mr. Hauser to plead guilty to first-degree premeditated murder without any evidence that Mr. Hauser's conduct established the elements of the crime charged.

Trial counsel failed to investigate the State's case. Had defense counsel performed even a perfunctory investigation of the case, counsel would have known to advise Mr. Hauser that the facts and circumstances of the crime constituted no more than second-degree murder. Moreover had counsel known the true

circumstances of the case, he would have been able to confront the state with the information showing that a plea to first-degree murder was inappropriate and argued for a more appropriate plea agreement. Most importantly, had trial counsel known the true nature of the case, he could have, and would have been required to inform the trial court that Mr. Hauser's guilty plea to first degree murder was illegal. Trial counsel had an obligation under Florida Rule of Criminal Procedure 3.72 to assist the court in ensuring a proper plea. Had trial counsel known the facts described here and elsewhere in this petition, counsel could have assisted the court, as required, and the trial court would have prohibited a plea to first-degree premeditated murder.

Trial counsel failed to have an independent forensic pathologist review the autopsy report and crime scene photographs. Had trial counsel done so, he would have discovered as, undersigned has, that physical evidence including the description of the injury to Ms. Rodrigues and the crime scene photographs prove that Ms. Rodrigues was grabbed suddenly whereby her hyoid bone fractured and marks were made on her neck. No other trauma was present. Counsel also would have learned that the hyoid bone fractures only due to a sudden, rapid event. Thus the injury to the victim which caused her death was inconsistent with premeditated first-degree murder.

Had counsel minimally investigated he would have learned that the crime and

lack of trauma to the victim showed a lack of struggle. Minimal investigation such as consulting with a forensic pathologist would have illuminated the true nature of the offense.

Furthermore, had trial counsel minimally investigated, he would have learned from witnesses and friends of the victim that Mr. Hauser drank heavily on the night of the crime and was extremely intoxicated. Intoxication is an affirmative defense to first-degree murder.

Trial counsel's failure to investigate made it impossible to test the State's case or provide the trial court with evidence that negated Mr. Hauser's plea to first-degree premeditated murder. *United States v. Cronic*, 466 U.S. 648 (1988)(holding that the presumption of prejudice arises where counsel fails to subject the government's case to adversarial testing.) To the extent the State failed to disclose information, trial counsel was rendered ineffective by the State's actions.

The Sixth Amendment right to counsel which require that defense counsel investigate his case applies to a defendant who enters a guilty plea. *Von Moltke v. Gillies*, 332 U.S. 708 (1948) ("A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial . . . Prior to trial an accused is entitled to

rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered"); *see also Agan v. Dagger*, 12 F.3d 1012, 1018 (11th Cir. 1994) ("'It is true that counsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial. . .' however, counsel must still make an independent examination of the facts and circumstances and offer an informed opinion to the accused as to the best course to follow.")(internal citations omitted). In Mr. Hauser's case, trial counsel did not conduct an independent examination of the facts and thus failed to inform Mr. Hauser and/or the trial court of the illegal plea. Confidence in the outcome is undermined. A guilty plea may be attacked collaterally to establish that the defendant was not guilty of the offense as properly defined. *Bousley v. United States*, 523 U.S. 614 (1998).

In *Hill v. Lockhart*, the United State's Supreme Court extended the principles of *Strickland v. Washington* to challenges of pleas. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). The prejudice in this case, however presents a unique issue of facts and law. In *Hill*, the Supreme Court held that in cases alleging ineffective assistance of counsel challenging pleas that the "prejudice requirement, [] focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process" and "the defendant must show that there is a reasonable probability that, but for counsel's

errors, he would not have pleaded guilty . . . ." *Hill* 474 U.S. at 59. In Mr. Hauser's case however, unlike cases in which a defendant pleads to a lesser included offense, Mr. Hauser was allowed to plead to an offense, first-degree premeditated murder, which was illegal at the outset because the facts did not establish the essential elements necessary for first-degree premeditated murder. Additionally, Mr. Hauser did anything he could to plead in order to get death.[13] However, Mr. Hauser had no legal right to do so since the facts did not support the charge. Accordingly, prejudice is demonstrated because, had trial counsel rendered the effective assistance of counsel required, Mr. Hauser would have been prohibited from pleading to first-degree murder. The State's facts belie a first-degree premeditated murder conviction. Thus, counsel's ineffectiveness affected the plea process and even minimal investigation would have prevented Mr. Hauser from entering a plea to first-degree premeditate murder.

Additionally, this Court in affirming Mr. Hauser's case was never given an

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[13] The prejudice inquiry, i.e., whether counsel's errors caused defendant to plead guilty includes a determination of the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea" and whether the outcome of the trial would have changed. *Hill* at 59. We now know that Mr. Hauser initially wanted to plead in exchange for life, however, in part because of the breakdown in the attorney-client relationship and Mr. Hauser's mental illness, Mr. Hauser decided to pursue death.

The inquiry also includes assessing trial counsel's failure to inform the client of affirmative defenses to the crime charged and whether the affirmative defense likely would have succeed at trial. *Hill* at 59. The state had no evidence of premeditation at the time Mr. Hauser pleaded guilty and a trial on the State's evidence would not have resulted in a first-degree murder conviction.

adequate record upon which to assess Mr. Hauser's case due to trial and appellate counsel's failures.

Trial counsel's failure to investigate also prevented him from discovering critical information that shows that Mr. Hauser is not death eligible. As discussed in Argument I, evidence was available to defeat the aggravating factors relied upon by the state. Additionally, trial counsel failed to discover mitigating circumstances and failed to properly present mitigating circumstances to the court.

2. Conflict of Interest

In *Cuyler v. Sullivan*, the United States Supreme Court held that the Sixth Amendment right to effective assistance of counsel was violated when an attorney had a conflict of interest. 446 U.S. 335, 344 (1980).[14] In Mr. Hauser's case trial counsel labored under an actual conflict while representing Mr. Hauser. Trial counsel was in the untenable situation of having to balance Mr. Hauser's desire to die against his ethical obligation to represent his client and his duty of candor to the trial court.[15] However, trial counsel violated *Cuyler* when he failed to advise the trial court of his conflict. 446 U.S. at 346. Furthermore, under *Cuyler*, a defendant who proves his

[14] The *Cuyler* Court also held that "[a] guilty plea is open to attack on the ground that counsel did not provide the defendant with 'reasonably competent advice'." 446 U.S. at 345.

[15] *See* Fla. Rules of Prof. Conduct 4-3.3 - Candor toward the tribunal.

attorney acted while under a conflict which actually affected the adequacy of his representation need not demonstrate prejudice. *Id* at 349-350.

Mr. Hauser's trial attorney exposed his conflict during the proceedings regarding Mr. Hauser's plea and sentencing hearing. As stated in *Koenig v. State*, the court, prosecutor and defense counsel share the responsibility for ensuring a reliable plea. 597 So. 2d 256, 258 (Fla. 1992). As detailed previously in this petition, Mr. Hauser's plea is deficient because there was no "record factual information to establish the offense to which [Mr. Hauser] ha[d] entered his plea." *Id*. Trial counsel's failure to ensure a reliable (or to even allow a plea to first-degree premeditated murder) illustrates the prejudice Mr. Hauser suffered due to counsel's conflict.

Counsel repeatedly failed to advance evidence and argument that was necessary for an adequate plea and sentence because of Mr. Hauser's desire to be sentenced to death. During the plea colloquy the following exchange occurred:

> COURT: Have you ever had a problem in the past with any kind of psychiatric or psychological disorder?
>
> HAUSER: No.
>
> COURT: Have you ever been treated, in other words, for any psychiatric or psychological disorder?
>
> HAUSER: I've been to treatment, but it was nothing

substantial.

Vol. 2 at 5-6. Trial counsel failed to correct Mr. Hauser's blatant deception. Counsel was placed in situation where revealing Mr. Hauser's lengthy and significant mental health history was in opposition to Mr. Hauser's goals, yet allowing Mr. Hauser's to mislead the judge violated trial counsel's ethical duty to the court and his client.

During the sentencing proceeding, Mr. Hauser requested he be sentenced to death and he did not want trial counsel to present mitigating evidence on his behalf. Trial counsel told the court that mitigation existed, however he failed to present evidence. Trial counsel possessed medical records which proved that Mr. Hauser had been diagnosed and treated for manic depression and Mr. Hauser's military records which indicated he had a history of hallucinating. However, because his client requested a death sentence counsel failed to present substantial, relevant evidence to the court which supported a life sentence. Trial counsel possessed other evidence that is typically considered mitigating, i.e., previous drug and alcohol abuse, alcohol abuse on the evening of the crime, records regarding a serious car accident in which Mr. Hauser suffered head, neck and back trauma, and previous suicide attempts, even as recently as when Mr. Hauser was detained in Nevada for the Florida crime. None of this evidence was presented to the court.

This conflict also resulted in trial counsel's failure to inform the court about his

concerns and allowed Mr. Hauser to testify falsely. At the sentencing hearing, Mr. Hauser denied any previous diagnoses or treatment of mental illness. Trial counsel failed to correct this falsity.

Furthermore, counsel failed to attack the aggravating circumstances based entirely on Mr. Hauser's statement to Investigator Griggs on December 12, 1995. Counsel suggested to the court that the statement was a fabrication, yet he did nothing to disprove it despite the existence of information that conclusively contradicted Mr. Hauser's statement.

Given the circumstances, trial counsel should have moved to withdraw from the case or at a minimum requested the appointment of special counsel. In *Holloway v. Arkansas*, the United States Supreme Court recognized that "joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing". 435 U.S. 475, 489 (1978). In Mr. Hauser's case, trial counsel's conflicting interests caused him to be prevented from presenting evidence that would have negated a plea to first-degree murder and mitigated Mr. Hauser sentence.

Had the court been aware of trial counsel's conflict the court could have appointed special counsel to ensure that all relevant information be disclosed to the court.

3. *Ake v. Oklahoma*

Pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), an indigent defendant is entitled to a confidential mental health expert. It is trial counsel's duty in rendering effective assistance of counsel to ensure that the mental health expert is provided with a complete psychosocial history of his client and provide the mental health expert with medical and mental health records, school records, environmental circumstances and any evidence relevant to making a competent mental health assessment. Beyond trial counsel's duties, it is also the responsibility of a mental health expert to request any necessary information from the trial counsel. In Mr. Hauser's case, Mr. Hauser was seen by a mental health professional who did not have all of the necessary background information from which to perform and adequate and constitutionally sound evaluation. See App. 24, 25.

Mr. Hauser's previous, documented diagnoses and treatment for manic depression along with other facts regarding his behavior in the weeks before the crime, on the evening of the crime and pre-trial evidence an individual suffering from severe mental disturbance. None of this evidence was considered in violation of Mr. Hauser's constitutional rights and *Ake*.

4. Ineffective Assistance of Appellate Counsel

On direct appeal, appellate counsel raised one issue with three subparts: 1)

failure to properly consider mitigating evidence; 2) consideration of Hauser's 12/12/95 statement and taped interview obtained in violation of *Miranda v. Arizona*, 394 U.S. 436 (1966); and 3) imposition of a sentence of death pursuant to *Hamblen v. State*, 527 So.2d 800 (Fla. 1988) should have been receded from.

Appellate counsel failed to raise meritorious issues of constitutional magnitude that were apparent on the face of the record. No strategic reason can be ascribed to his failure to raise these issues before this Court. Consequently, this Court's opinion on direct appeal is unreliable.

Mr. Hauser's guilty plea colloquy to first degree premeditated murder was constitutionally inadequate. The trial court completely relied upon the arrest report and addendum for the factual basis for the plea to first-degree murder.[16] As discussed in Argument C.1, *supra*, these items completely failed to demonstrate a factual basis for establishing the essential elements of first degree premeditated murder. This is apparent on the record. Mr. Hauser likewise, did not offer any factual basis for first degree premeditated murder during the plea colloquy. The law is clear that a factual basis for a plea must be in the record. *See* Florida Rules of Criminal Procedure; ACCEPTANCE OF GUILTY OR NOLO CONTENDERE

[16] The State's Answer Brief on direct appeal acknowledges that the only factual basis for the plea was the addendum. See Answer Brief at 1.

PLEA, Rule 3.172 (a); *State v. Williams*, 316 So.2d 267 (Fla. 1975); *Koenig v. State*, 597 So.2d 256 (Fla. 1992).

Ensuring that a defendant is convicted only for a crime in which the evidence supports the elements is a basic tenant of appellate practice. Here, the evidence on the record did not support a conviction of first-degree premeditated murder. Nor did Mr. Hauser's version of events support first-degree premeditated murder at the time he entered his plea. The Second District of Appeal found ineffective assistance of counsel for failing to raise on direct appeal the fact that an essential element of the crime had not been proven. *Lowman v. Moore*, 744 So.2d 1210, 1211 (Fla. 1999 2d DCA).("Convicting a defendant of a crime when an essential element of the crime has not been proven and could not have been proven is fundamental error)(internal citations omitted). In Mr. Hauser's case the essential element for premeditated murder was absent. No strategic reason can be ascribed to appellate counsel's failure to raise this basic issue.

Appellate counsel also failed to raise the issue that the lower court's plea colloquy was inadequate to establish a knowing guilty plea. None of the elements of first-degree premeditated murder were discussed with Mr. Hauser. Since the arrest report and addendum thereto are completely silent as to essential elements of first-degree premeditated murder, it cannot be presumed that Mr. Hauser entered a

knowing plea to first-degree premeditated murder. Absolutely no inquiry regarding the requirement that Mr. Hauser made a "knowing" plea was made. The only question the trial court asked Mr. Hauser regarding the offense was:

> COURT: Are you pleading to this offense because you are guilty of first degree murder?
>
> HAUSER: Yes.

This question was conclusory and assumed that Mr. Hauser knew the distinctions between first-degree premeditated murder and second-degree murder. *McCarthy v. United States*, 394, U.S. 459, 466 (1969) (a plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.") *Boykin v. Alabama*, 395 U.S. 238 (1969) (waiver of important federal rights on a silent record regarding a guilty plea will not be presumed).

V.

CONCLUSION

For the foregoing reasons, this Court should stay the execution of Dan Patrick Hauser, order oral argument or such other proceedings as the Court deems necessary on the instant Petition, and issue the writ of habeas corpus, vacating the judgments of conviction and the sentence of death entered against Mr. Hauser.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition is being furnished either facsimile transmission, hand delivery, or U.S. Mail, first class postage prepaid to all counsel of record this 17th day of August, 2000.

_____

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