IN THE SUPREME COURT OF FLORIDA

MATHEW DALE BOYETT,

Appellant,

v. Case No.: 81,971

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the lower court, will be referred to in this brief as the state. Appellant, MATHEW DALE BOYETT, the defendant in the lower court, will be referred to in this brief as Boyett. All references to the instant record on appeal will be noted by the symbol "R," and references to the transcripts by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

The state accepts Boyett's statement of the case and facts as reasonably accurate.

SUMMARY OF THE ARGUMENT

Issue I: The trial court did not err in failing to secure Boyett's presence at the physical site where counsel exercised juror challenges. Because Coney did not issue until two years after the instant trial, no error occurred as Boyett was physically present in the courtroom where counsel exercised their challenges.

Issue II: The trial court correctly found that Boyett committed the instant murder in a cold, calculated and premeditated manner. The state proved this factor beyond a reasonable doubt with evidence of Boyett's six week planning period, statements to the victim and a friend, and the manner in which the murder was committed.

Issue III: The trial court correctly considered and weighed the statutory and nonstatutory mitigating circumstances. Within its discretion, the trial court found inapplicable two statutory mitigating circumstances -- age and extreme mental or emotional disturbance -- because (1) Boyett was not a minor at the time and had no other accompanying condition, and (2) there was no evidence that Boyett suffered from any disturbance at the time he committed the murder. The trial court found five nonstatutory mitigating factors -- long term substance abuse; childhood sexual abuse; good behavior in custody;

accompanying condition, and (2) there was no evidence that Boyett suffered from any disturbance at the time he committed the murder. The trial court found five nonstatutory mitigating factors -- long term substance abuse; childhood sexual abuse; good behavior in custody; remorse; and potential for rehabilitation -- but in light of the significant aggravating factors, justifiably gave them little weight.

Issue IV: The trial court properly overrode the jury's recommendation of life imprisonment. Because the facts supporting the two aggravating circumstances were so clear and convincing that virtually no reasonable person could differ, the trial court properly imposed a sentence of death.

Issue V: The trial court properly permitted the state to file its sentencing memorandum seven days after Boyett filed his sentencing memorandum. Because Boyett was permitted to respond to the state's memorandum, Boyett can show no error, harm, or prejudice.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT ERRED IN FAILING TO SECURE BOYETT'S PRESENCE AT THE PHYSICAL SITE WHERE COUNSEL EXERCISED JUROR CHALLENGES.

Boyett claims that the trial court erred in failing to have him present at the bench where counsel exercised their cause and peremptory challenges. Initial Brief at 28. Because the ruling in Coney v. State, 653 So. 2d 1009 (Fla. 1995), did not issue until two years after Boyett's trial, the trial court committed no error on this point as Boyett was physically present in the courtroom where counsel exercised their challenges.

The record shows that Boyett was present in the courtroom during jury selection (T 6). After some questioning of the venire, the trial court asked the lawyers to come to the bench (T 185). A bench conference off the record ensued, followed by the state's exercise of a cause challenge as to Linda Mitchell (T 186).[1] The state then requested additional questioning of Ms. Allers as to her views on the death penalty (T 188). After this additional questioning, the state exercised a peremptory challenge as to Mr. Bleckwenn (T 190). Defense counsel engaged in some

[1] Mitchell worked as an intern at the Public Defender's Office (T 185).

additional questioning of jurors, and then struck peremptorily Ms. Gaines, Francis Smith, Patricia Looney, Mary Schwartz, Mr. Ford, Mr. Scully, and Mrs. Hendry (T 191-92). The state struck Ms. Cupp for cause (T 193).[2]

Defense counsel asked some additional questions of jurors (T 193-95), and then both sides tendered (T 195). As to alternate jurors, the state challenged Ms. Green for cause based on her views regarding the death penalty (T 195). The state then inquired further of jurors (T 196-97). Defense counsel exercised a challenge on Mr. Hourigan, and the state challenged Mr. Johnson for cause based on his views regarding the death penalty (T 197).

Although the record clearly shows that Boyett was in the courtroom and that the court called only the attorneys to the bench for an off-the-record conference, the record does not clearly reflect that Boyett was not present at the following bench conference concerning challenges. Under Florida law, it is Boyett's responsibility to make error apparent from the record. Conley v. State, 338 So. 2d 541, 542 n.1 (Fla. 4th DCA 1976). This he has failed to do.

In any event, Boyett cannot rely on Coney, which did not issue until January 5, 1995. The trial in this case

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[2] Cupp admitted to a second degree murder conviction, for which she served five of a twelve year sentence (T 75).

took place in February 1993. Coney itself speaks very plainly that its ruling "is prospective only." Id. at 1013. Boyett nevertheless claims that the only prospective portion of Coney is that section which requires the trial court to certify a defendant's acquiescence of the strikes and the voluntariness of the waiver. Initial Brief at 30 n.2. A complete reading of Coney belies this cursory claim, as this Court itself noted that Coney "clarified" previous case law on this point.

Boyett claims that, because his is a "pipeline case," State v. Brown, 20 Fla. L. Weekly S206 (Fla. May 4, 1995), and Smith v. State, 598 So. 2d 1063 (Fla. 1992), require this Court to apply the prospective portion of Coney to his case. Initial Brief at 30 n.2. Boyett apparently has overlooked Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), wherein this Court noted that Smith could "be read to mean that any new rule of law announced by this Court always must be given retrospective application." Id. at 1007 n.4. This Court observed that such a reading of Smith would be inconsistent with a number of intervening cases, and concluded: "We read Smith to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise." Id. at 1008 n.4 (emphasis supplied). Because Coney "says otherwise," Coney does not apply retrospectively to Boyett.

Boyett next argues that the Coney rule existed prior to Coney's issuance, namely in Turner v. State, 530 So. 2d 45 (Fla. 1987), and Francis v. State, 413 So. 2d 1175 (Fla. 1982). Initial Brief at 30 n.2. This statement is inaccurate, as this Court observed in Coney that Coney actually clarified the holding in Francis. Further, Francis involved the exercise of challenges while counsel and the judge were outside the courtroom and Francis was in the courtroom, and counsel's waiver of Francis's presence without Francis's acquiescence to such waiver. This Court held:

> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom upon selecting a jury. His silence, when his counsel and others retired to the jury room or when they returned after the selection process, did not constitute a waiver of his right.

413 So. 2d at 1178. Notably, nowhere in Francis is any reference to Francis's right to be present at the actual physical site where the challenges were exercised. Instead, the concern was that Francis, at a minimum, be in the same room as counsel for the exercise of peremptory challenges: Being in a separate room prevented Francis from ready

availability to and meaningful "consult[ation] with his counsel during the time his peremptory challenges were exercised." Id. at 1179.

Likewise, in Turner, the judge and counsel removed themselves from the courtroom for the exercise of juror challenges, and left Turner in the courtroom. Because no one informed Turner of his right to be present during challenges, this Court held that Turner had not knowingly waived this right. Id. at 49. However, this Court found Turner's absence harmless, based on his interaction with counsel before the exercise of challenges, which gave Turner "an opportunity to participate in choosing which jurors would be stricken from the panel." Id.

Thus, the only rule which existed prior to Coney was that a defendant should be present in the room where the challenges are being exercised. If a defendant were not present in the room, there should be a knowing waiver of this right on the record through proper inquiry by the trial court, or, in the alternative, a subsequent ratification of the strikes by the defendant.

In any event, Coney by its own terms renders any violation of **Fla. R. Crim. P.** 3.180 harmless as to those cause challenges exercised because of jurors' views on the death penalty. Id. These excusals "involve[] a legal issue

toward which [Boyett] would have had no basis for input." Harvey v. State, 529 So. 2d 1083, 1086 (Fla. 1988), cert. denied, 489 U.S. 1040 (1989). Thus, any error in the trial court's granting of the state's strikes of Green and Johnson was harmless.

Issue II

WHETHER THE TRIAL COURT CORRECTLY FOUND THAT BOYETT COMMITTED THE INSTANT MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

Boyett claims that the state did not prove beyond a reasonable doubt that he committed the instant murder in a cold, calculated and premeditated (CCP) manner according to the standards announced by this Court in Jackson v. State, 648 So. 2d 85 (Fla. 1994), and Walls v. State, 641 So. 2d 381 (Fla. 1994). To the contrary, the evidence presented during sentencing established this aggravating factor beyond a reasonable doubt.

Debra Sherwood testified that the victim walked across the street, leaning on a baseball bat, and told her that he had been shot (T 230). The victim was bleeding profusely from his mouth; even though the victim said he had been shot in the arm, Sherwood noticed very little blood in that area (T 230). The victim stated that Dale Boyett shot him and that Boyett was still in the victim's home for the purpose of robbing him (T 231-32). Beverly Solomonic also saw the victim crossing the street, leaning on a baseball bat, and spitting up blood (T 234). Solomonic heard the victim say that Dale Boyett had shot him (T 237).

Deputy Sheriff Wehmeiter testified that, when he arrived on the scene, he witnessed the victim bleeding from

his mouth (T 240). The victim informed Wehmeiter that Dale Boyett had shot him and tried to rob him (T 240). The victim was concerned about dying, pointing to what he perceived as pieces of his lung in blood that he spit up (T 241).

Deputy Sheriff Powell testified that Officer Tim Scherer located Boyett's truck off Chimes Way and found Boyett in a trailer off Chimes Way (T 245). Powell was present when Boyett was read his rights; Boyett appeared to understand these rights (T 246). When advised that officers needed to discuss some things with him, Boyett stated that he knew they needed to question him about "that guy named Bill I shot today" (T 246). Boyett advised Powell that the victim had made sexual advances toward him and touched him on the outside of his clothes, and that these behaviors had upset him (T 247). Boyett also advised that, on a previous occasion, he had been drinking at the victim's house, had passed out, and had awakened to find the victim performing oral sex on him (T 248). Boyett advised that he and the victim previously had had a fight with one another, one using a whiskey bottle and the other, some type of sword (T 248). Boyett helped officers retrieve the weapon Boyett used to shoot the victim (T 249, 254).

Deputy Sheriff Suarez testified that one bullet recovered from the victim's home had struck only the

fireplace; the other bullet was recovered from the victim's body (T 254). Suarez recounted that he had taken into evidence several of the victim's videotapes, all of which contained homosexual material, and some photographs with the same content (T 258-59).

Dr. Larzarchick testified that the bullet found in the victim's body travelled from the victim's right bicep into the arm pit, deflected off the bony structures in the right shoulder region, and entered the right lung cavity (T 263, 265). The bullet travelled further, ricochetting off the back bone to reenter the lung (T 265). The path of the bullet destroyed a number of major blood vessels in the right shoulder region, "thereby accounting for an extensive amount of hemorrhage into that area"; the bullet "disrupted and essentially [] cut the major blood vessels which supply blood to the lung" (T 266). Dr. Larzarchick explained that a severing of the pulmonary and bronchial arteries would cause continuous internal bleeding if not repaired, and could have caused the victim's death within minutes (T 267). In the emergency room alone, the victim lost 30-40% of his total blood volume (T 268). Dr. Larzarchick opined that Boyett was at least three to four feet away from the victim when he shot (T 272).[3]

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[3] FDLE firearms expert Ed Love testified that the gun was fired from beyond three to four feet (T 277).

John Blackmon testified that he had known Boyett for about three to four months before the murder (T 283). About a week before the murder, Boyett asked Blackmon if he wanted to see the home of the guy he was going to shoot (T 285). Boyett told Blackmon the victim was a "homo" that he was going to rob, and that he had had a "run in" with the victim (T 285, 288). A day before the murder, Boyett asked Blackmon if he wanted to help him shoot the victim and get some money (T 286); Boyett showed Blackmon a small .22 revolver and said he was going to kill the victim with it (T 286-87). Boyett returned to Blackmon's home after shooting the victim, stating that the victim picked up a baseball bat and Boyett shot him (T 289). Boyett stated that the victim had no money and that he ditched the gun (T 289). Blackmon recalled that, about a month and a half before the murder, Boyett showed him a cut on his arm and stated that three black guys had jumped him (T 290).[4]

Deputy Sheriff Tom O'Neil testified that, before giving a statement, Boyett stated that "he was under the influence of no narcotics, alcohol, marijuana, anything" (T 299). Boyett's statement recounted that Boyett entered the victim's home through an unlocked back door, told the victim that he was going to shoot him because of the victim's

[4] Boyett told his father that two black guys had jumped him and given him this injury (T 320-21).

previous homosexual activities toward Boyett,[5] and shot him with a .22 pistol (T 303-04). Boyett stated that the reason he went to the victim's house that day was to shoot him (T 304). While Boyett had the gun pointed at the victim, the victim picked up a baseball bat (T 307). Boyett told him not to do this or he would shoot him; the victim picked up the bat, and Boyett fired at the victim's leg, but missed (T 307). When the victim advanced toward Boyett, Boyett fired again, aiming at the victim's chest (T 307). The victim ran out the back door and went to the side gate; Boyett jumped over the back fence and stayed in the woods for a couple of hours (T 307).

Boyett stated that the gun was in the woods behind the victim's house (T 307). Boyett stated that he had been over to the victim's home half a dozen times or more within the previous six month period (T 309). Boyett recounted only two occasions that the victim had made advances:

> Now, the first time he made a pass at me I told him to stop, but he kept grabbing my leg and we had a fight in which I had a liquor bottle and he had a sword. And I called him the very next day because we were both drunk that night and I figured, you know, he realized he shouldn't have done it and I shouldn't have done it and all that. But the next

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[5] According to Boyett, the victim "would put his hands on [him] and grab [his] dick and stuff" on the outside of his clothes (T 307-08).

> time I went over there, he did it again and I told him to stop and if he didn't stop, that I was going to kill him. And he didn't stop. So I left, and that was the last time I saw him until today.

(T 309-10).[6] Boyett stated that it had been about six weeks between the last time he saw the victim and the day he shot him (T 310). When Boyett found the .22, it "just clicked in . . . that that would be the gun that [he] shot [the victim] with." (T 310).

Boyett contradicted his earlier statement by claiming next that "it wouldn't have mattered if [the victim] grabbed the baseball bat and [he was] not using that as self-defense of why [he] shot him. [He] fully intended on shooting him when [he] went over there." (T 311). Boyett said that he meant to shoot him in the leg and leave, but did not want to kill the victim or get hit with a baseball bat (T 311). Boyett admitted to thinking of "doing to [to the victim] many different ways because eventually [he] knew [he] was going to do it." (T 312). But, when Boyett found the gun, "it was just so much easier than all the other things that [he]'d thought of." (T 312-13). Boyett stated that none of the other things were intended to kill the victim, just "more or less to make him miserable" (T 313). Boyett stated

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[6] Boyett showed O'Neil an injury on his arm and stated that it was from his fight with the victim (T 318-19).

that he had planned it out for a couple of weeks, and the exact day did not matter (T 313).[7]

Specifically, Jackson requires, for the purpose of finding CCP as an aggravating factor, that the killing be "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification." 648 So. 2d at 89 (citations omitted; emphasis in original). The state proved each of these aspects of CCP.[8]

Boyett evidenced his plan to shoot the victim as early as six weeks before the actual shooting, when he saw the victim for the last time before he shot him. At that meeting, the victim made another homosexual advance toward Boyett, and Boyett informed the victim that, if the victim did not stop (which he did not), Boyett would kill him. When Boyett found the .22 pistol, things "clicked" that this

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[7] At this point in the guilt phase, the state rested (T 322). The state put on no additional evidence in the penalty phase (T 429).

[8] Boyett challenges only the second, third and fourth requirements of Jackson, and does not address the first, i.e., that the killing was the product of cool and calm reflection and not an act prompted by panic.

would be Boyett's weapon of choice for murder. Boyett admitted that, despite any actions by the victim, he fully intended to shoot the victim when Boyett went to his house. Boyett also admitted to considering other ways to injure the victim, and to planning the actual shooting for a couple of weeks. Boyett told his friend Blackmon a week before the murder that he intended to rob and shoot the victim. A day before the murder, Boyett told Blackmon, after showing him the .22 pistol, that he intended to kill the victim. Finally, on the day of the murder, Boyett entered the victim's home armed, without permission, fully expecting the victim to be there and fully expecting to confront him. See Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989) ("Hudson entered a home, where he knew he was not welcome and had no right to be, at night and armed with a knife, apparently expecting to find someone . . . at home. Contrary to Hudson's contention, these facts could easily be seen as demonstrating more than just slight premeditation."), cert. denied, 110 S. Ct. 212 (1990). Compare DeAngelo v. State, 616 So. 2d 440, 442 (Fla. 1993) (even a motive "grounded in passion" did not preclude finding of CCP where murder was contemplated well in advance); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) ("While Porter's motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance.").

Boyett predictably points to his statement to police officers after the murder that he did not intend to kill the victim, only to "make him miserable," to claim that he did not have a plan to kill. Common sense dictates otherwise. See Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991) (in determining whether an aggravating circumstance has been proven, a sentencing court may use a "'common-sense inference from the circumstances'") (quotation omitted). First, Boyett's statement was far from credible in supporting this argument, as Boyett contradicted himself in his statement regarding the ever-important issue of intent, claiming first that he shot the victim because the victim armed himself with a baseball bat and advanced toward him, and then claiming that he shot the victim because he had intended to do so no matter what. Compare Brown v. State, 565 So. 2d 304, 308 (Fla. 1990) ("Although Brown told the authorities that he did not intend to kill the victim, he also said that he intended to shoot her if she made any noise. Moreover, Brown took boltcutters with him to the victim's home late at night . . . and entered the victim's room armed with a handgun. The psychologist who testified on Brown's behalf at sentencing admitted that Brown made a statement to him indicating he had considered shooting the victim before going to her residence. The psychologist conceded that the homicide may well have been preplanned rather than impulsive."), cert. denied, 498 U.S. 992 (1991).

Second, Boyett had revealed his plan to rob and shoot the victim. Merely shooting the victim to "make him miserable" would leave a ready witness to report Boyett's offenses. Thus, the most logical inference from the facts is that Boyett intended both to rob and kill the victim.

Boyett's actions also showed that the murder was committed in a cold manner. Boyett's reliance on Richardson v. State, 604 So. 2d 1107 (Fla. 1992), Santos v. State, 591 So. 2d 160 (Fla. 1991), and Garron v. State, 528 So. 2d 353 (Fla. 1988), is misplaced, because those cases involved murders which were committed during ongoing domestic disputes. See Richardson, 604 So. 2d at 1009 (during an argument, Richardson shot the victim); Santos, 591 So. 2d at 163 (Santos, enraged by a domestic dispute, murdered girlfriend and child); Garron, 528 So. 2d at 354 (Garron killed his wife and stepdaughter during a heated argument with his wife). Here, although Boyett and the victim had had previous discussions and one prior physical confrontation concerning the victim's attraction to Boyett, Boyett and the victim were not engaged in a heated dispute at the time of the murder, and the victim had not made any sexual advances toward Boyett at the time of the murder.

Instead, six weeks after their last meeting, Boyett deliberately entered the victim's home without permission, and confronted the victim. Understandably, the victim armed

himself with a baseball bat. Boyett then matter-of-factly advised that victim that he was going to shoot him because of the victim's prior homosexual advances. It is hard to envision a murder more "cold."

Finally, Boyett claims that the evidence established a colorable claim of self defense. This claim does not mesh with the evidence presented at trial that Boyett illegally entered the victim's home with a pistol, confronted the victim, and shot him. Although Boyett told police officers after the murder that he did not intend to kill the victim, he told Blackmon prior to the murder that he planned to kill the victim. Boyett advised the victim that he was going to shoot him for the victim's prior sexual advances, and told police officers after the murder that, regardless of whether the victim had armed himself with the baseball bat, he fully intended to shoot him.

This is wholly different from the situation presented in Banda v. State, 536 So. 2d 221, 225 (Fla. 1988), where there was uncontroverted evidence of the victim's violent tendencies and that the victim had threatened Banda; and the state's own theory at trial was that Banda had plotted to kill the victim to prevent him the victim from killing him. The combination of these factors resulted in this Court's finding that "a colorable claim exists that this murder was motivated out of self defense, albeit in a form clearly

insufficient to reduce the degree of the crime." Id. Cannady v. State, 427 So. 2d 723 (Fla. 1983), is also inapposite. Cannady repeatedly denied that he meant to kill the victim, and stated that he had shot the victim because the victim jumped at him. Thus, this Court concluded that Cannady "had at least a pretense of a moral or legal justification, protecting his own life." Id. at 730.

Issue III

WHETHER THE TRIAL COURT PROPERLY CONSIDERED AND WEIGHED STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES.

Boyett claims that the trial court did not engage in a proper evaluation and weighing of statutory and nonstatutory mitigating circumstances. Initial Brief at 43. The record belies this claim, revealing the trial court's employment of careful consideration and a thorough weighing process.

In the penalty phase, Boyett's mother testified that he had been a difficult child, i.e., did not sleep well and cried a lot (T 432). Ms. Prince stated that, when Boyett was two and a half years old, she woke up one night to find all the lights on in the house and a burning smell (T 434). Boyett was not in his bed; when Ms. Prince went downstairs, she found a "disaster": Kitchen canister cans were all empty; all the burner eyes were on; butcher knives were sticking out of potatoes in the refrigerator; Pepto Bismol was poured over everything; and the front door was open (T 434). She found Boyett outside in the snow, wearing nothing but a diaper (T 434).

Ms. Prince took Boyett to a child psychologist who told her that Boyett had a very high IQ, but would always learn by cause and effect (T 434-35). When the family moved to Pensacola, Ms. Prince had to commute to work and marital

difficulties ensued in (T 435-36). In addition, Ms. Prince did not approve of Mr. Boyett's beer drinking in the home, taking Boyett to a neighborhood bar with him once, and allowing Boyett to have occasional sips of his beer (T 436). When Boyett was six, the Boyetts divorced (T 437). Almost immediately, Ms. Prince became involved with another man, who had "a very solid relationship" with Boyett (T 438-39). This relationship lasted for about a year and a half, when the man abruptly broke off the relationship (T 440). The man never communicated with Boyett about the break up, and Ms. Prince told Boyett that the man no longer loved them (T 440).

Ms. Prince began to notice definite changes in Boyett, i.e., bedwetting and sleeping with the light on (T 441). A neighborhood teenager began to take "an uncommon interest" in Boyett (T 441). Ms. Prince then met her current husband, whose relationship with Boyett was completely different than the other man with whom Ms. Prince had been involved (T 443). Boyett started school, and constantly required attention from teachers (T 444-45). Boyett also began running away from home (T 445). Ms. Prince allowed Boyett to live with his father for awhile, but Boyett returned when he was about 10 years old (T 446-47). When the family moved to Jacksonville, Boyett could not adjust; Boyett would not remain at school (T 448). When Boyett's stepfather

attempted to discipline him, Boyett gave his mother an ultimatum -- the stepfather or him (T 449). Ms. Prince took Boyett to his father's home (T 449).

Boyett ran away from his father's home for a time; when Ms. Prince picked him up, Boyett was filthy (T 451). Upon their return to Jacksonville, Ms. Prince took Boyett to a secure children's psychiatric hospital, where the whole family was involved in therapy (T 453-54). Boyett returned home but continued bedwetting and running away (T 455). Ms. Prince took him to the facility a second time, but Boyett left (T 455). Ms. Prince took Boyett to an alternative school and began attending a community drug program (T 456). When things deteriorated again, Ms. Prince took Boyett to a drug treatment center for families (T 458). At Boyett's request, Ms. Prince took Boyett to another treatment facility, but Boyett ran away again (T 463-64).

Boyett begged for further treatment, which Ms. Prince refused (T 466). Boyett dropped out of school by the ninth grade (T 467). In early 1991, while Ms. Prince was recovering from surgery, Boyett ran away again (T 468). When he returned, Ms. Prince kicked him out of her home (T 468). Boyett returned to Pensacola (T 469). While they continued to stay in contact with each other, Ms. Prince knew something was wrong in August 1992 when she could not reach him for some time (T 469). Since being arrested,

Boyett received his GED (T 470). Boyett told his mother that, at the time of the murder, he was not using drugs (T 471).

Dale's father testified that Boyett was hyperactive and wet the bed as a child (T 476). Mr. Boyett admitted to drinking too much, taking Boyett to a bar a time or two, and allowing Boyett to have sips of his beer when Boyett was "real small" (T 478). Mr. Boyett recalled all the treatment centers to which Boyett was taken (T 480). Mr. Boyett stated that Boyett ran away several times while Boyett lived with him (T 480). After a confrontation a few days before the murder, Mr. Boyett told Boyett that he could no longer stay with him or Mr. Boyett's sister (T 484-85). Mr. Boyett thought Boyett took things from his home while Mr. Boyett was at sea (T 485). Because Boyett had been asleep just prior to Mr. Boyett's edict, Boyett had no reaction to Mr. Boyett's news (T 485).

Boyett's aunt testified that she never had any problems with Boyett when he stayed with her (T 490). Her son and Boyett had a close relationship (T 490). Boyett told her that he wished his parents lived in the same city because he wanted to be with both of them (T 491).

Dr. Larson testified that Boyett's verbal intelligence IQ was 111, his performance IQ 103, and his full scale IQ

109, all in the average range (T 496). Boyett tested at the 12th grade level in reading and spelling, but at the 9th grade level in math (T 496). Dr. Larson related his conversations with Boyett and Boyett's family (T 504-06). Dr. Larson stated that, when Boyett was seven years old, Ms. Prince's boyfriend abruptly ending their relationship happened at a very important developmental stage: "[T]hat's when we expect there to be a good connection between father and son in terms of a role model of future adult life." (T 508).

Boyett related his substance abuse to Dr. Larson (T 509-10). Boyett also related sexual abuse to Dr. Larson, the first incident being when he was about 14 years old and had run away from home; an older man picked him up, gave him alcohol, and sexually abused him (T 511-12). Boyett felt very negatively about this experience, and found it disgusting (T 512). Age 14 was a significant age for this incident to occur, as it is

> a time when a boy should be identifying with girls and when he's very sensitive about being aware of differences between homosexuality and heterosexuality, and it can influence the direction and development, it can influence attitudes and values and beliefs and patterns of behavior that have to do with hate, bias, prejudice, and can interfere with one's sexual identification or development.

(T 512).

Dr. Larson stated that anxiety and depression could result from such an episode, and that the turmoil can cause some to self medicate (T 513). Dr. Larson concluded that, at the time of the murder, Boyett was under extreme emotional or mental duress, based on his long history of substance abuse, depression, and unresolved feelings about homosexuality (T 516-17). As far as nonstatutory mitigation, Dr. Larson found applicable Boyett's history of alcohol and substance abuse, personality disorder, status as the child of an alcoholic, unstable family background, depression, positive behavior in jail, and remorse about the incident (T 517-18). Dr. Larson opined that Boyett's potential for rehabilitation was good, based on his average intellect, artistic abilities, no history of violence, and remorse (T 518-19).

Despite Boyett's statement to Dr. Larson that his first homosexual encounter occurred when he was 14 years old, Boyett told Dr. DeMaria that his first such encounter occurred when he was about seven years old; a teenaged neighborhood boy asked Boyett if he had ever had sex and if Boyett would have sex with him (T 536-37). This boy had Boyett perform oral sex on him (T 537). Boyett also recounted the other incident to Dr. DeMaria, this one occurring in Boyett's early teenaged years, where an older

man picked him up, got him drunk, and performed oral sex on Boyett, who performed oral sex on this man (T 542). Boyett described his relationships with girls as sporadic; as soon as the relationships became sexual, Boyett became unsure of himself, and would withdraw from the relationships in fear of rejection (T 543).

Boyett told Dr. DeMaria that he initially cared for and respected the victim, "almost as a father figure (T 544). Boyett was aware that the victim was a homosexual, and the victim showed a clear sexual interest in Boyett (T 545). Boyett stated that the victim had a great deal of pornographic material -- heterosexual, homosexual, and "kiddie porn" in nature (T 545). Boyett recounted an incident when he was very drunk and the victim performed oral sex on him; Boyett was unable to maintain an erection (T 546). Dr. DeMaria found Boyett's bedwetting a significant sign of sexual abuse, but noted that this had not been explored in earlier medical reports (T 547).

Dr. DeMaria concluded that, at the time of the murder, Boyett was

> extremely affected by these past issues of sexual abuse, his issues of being abandoned by a father figure; just prior to the shooting, the question of why did he choose Billy's house to go to that day. He had just been kicked out of his father's house recently before. Here's a father figure. There's a lot of

> issues of conflicts around the homosexuality, his feelings of his relationship with Billy. He had been drinking, smoking marijuana, and also using LSD for quite some time prior to that for a period of months, and all of a sudden for the 24 hours prior to the incident, he had been cold turkey with no drugs. He was out of money. He was desperate emotionally, in my opinion, and that there was a lot of emotions and feeling tied up with this whole issue of how Billy was affecting that relationship.
>
> The oral sex goes directly to the earlier traumas. It was always with oral sex: when he was 12, 13 with that gentlemen, oral sex when he was seven. There's going to be a lot of deep-seeded emotional issues regarding that. And that it almost mirrored the acting out of those early sexual incidents of sexual abuse. So tying those all together, you have a situation where the day that occurred, in my opinion, he was in an extremely agitated, emotionally unstable state.

(T 549).

At the March 1993 sentencing hearing, the trial court heard argument from counsel and the testimony of Boyett, who expressed remorse at killing the victim, despite his prior silence (R 177). The following exchange occurred between the court and Boyett on the topic of remorse:

> [Court]: Well, you express remorse now for both Mr. Hyder's family and your own for your deeds and acts. Did you not ever think about it beforehand or have any dilemma or remorse for about what you were about to do?

[Boyett]: To tell the truth, Your Honor, no, I didn't think about it.

[Court]: Why do you have this after acquired remorse at this time? Simply because you're standing here facing a possible death sentence, is that why?

[Boyett]: The death sentence I think is because of what happened, because of why I feel remorse, if that was the case, I wouldn't have -- I wouldn't have helped law enforcement at all. I wouldn't have -- I think I have been very cooperative. No, I don't think that's it at all. I'm sorry for the fact that it led this far and that I was -- if you will, I was so blind not to have seen the whole surroundings of what was going on.

[Court]: You cooperated after your arrest?

[Boyett]: Yes, sir.

[Court]: Is that right?

[Boyett]: Yes, sir.

[Court]: Immediately after the shooting, you did not go and turn yourself in to the sheriff's department, did you?

[Boyett]: No, sir.

(R 181-83).

In its written sentencing order, the trial court made the following findings regarding mitigation:

FINDINGS OF STATUTORY MITIGATING CIRCUMSTANCES

The evidence does not support the findings of any statutory mitigating circumstances:

1. The capital felony was not committed while the defendant was under the influence of extreme mental or emotional disturbance. The Court finds that while Drs. Larson and DeMaria concluded defendant's long history of drug and sexual abuse played a role in defendant's behavioral patterns their opinions that defendant suffered from extreme mental or emotional disturbance is belied by other testimony from other witnesses who observed his behavior closer in time to commission of the offense. In sum, the Court rejects the conclusion that any mental or emotional disturbance defendant suffered from was extreme. Bruno v. State, 574 So. 2d 76, 82 (Fla. 1991).

2. The defendant did not act under extreme duress or under the substantial domination of another person. The evidence is totally lacking that defendant acted under extreme duress wrought by another person or some other external cause or acted under the substantial domination of another person. Sireci v. State, 587 So. 2d 450, 453-54 (Fla. 1991); Toole v. State, 479 So. 2d 731, 734 (Fla. 1985).

3. The defendant's age at the time of the commission of the offense, eighteen years, should not be deemed a statutory mitigating factor. The defendant was shown to be of normal intelligence and possessed of some education. While defendant may have been institutionalized because of his behavior, his ability to function and rationalize on a routine basis was not substantially impaired. He exhibited normal maturity for his age and displayed a good deal of independence.

This factor has not been established in mitigation and should not be considered. Peek v. State, 395 So. 2d 492, 498 (Fla. 1981). See also Mason v. State, 438 So. 2d 374, 379 (Fla. 1983).

FINDINGS OF NON-STATUTORY MITIGATING CIRCUMSTANCES

The Court has considered as required by Campbell v. State, 571 So. 2d 415 (Fla. 1990), corrected 16 FLW S1 (January 4, 1991), assorted testimony relative to de[fe]ndant's upbringing, family ties, healthy, intellect, personality, education and emotional development. The Court has also considered the victim's background. In reviewing each of the non-statutory factors suggested by defendant the Court concludes as to each:

1. Defendant cooperated with law enforcement. Defendant only provided after-the-fact assistance after he had been apprehended and confronted with the abundance of evidence against him. There has been no showing that this cooperation rises to such a level that it should be considered exceptional and in mitigation of punishment to be imposed.

2. Defendant suffered long-term substance abuse. This factor has been proven but it deserved little or no weight because such abuse did not contribute substantially to defendant's criminal conduct or precipitate the violent acts to be punished.

3. Defendant was sexually abused as a child. This factor has been established and will be given due weight by the Court.

4. Defendant has exhibited good behavior while in custody. This factor has been proven but it deserved little or no weight.

5. Defendant completed his G.E.D. This factor is part of the consideration given to the above factor and does not warrant separate weight.

6. Defendant expressed remorse for killing the victim. This factor was first presented by way of hearsay statements made to third parties. Defendant did not directly express remorse until this Court addressed this issue at sentencing hearing. Defendant's explanation and statements lacks credibility and this factor is given little weight.

7. Defendant has prior mental health problems. This factor has been considered earlier under the second and third factors listed and will not be given additional weight.

8. Defendant's violence was a reaction to the victim's own aggressive behavior. This factor is based upon an absurd self-serving account provided by the defendant and is controverted easily by other testimony presented. The Court rejects this factor outright.

9. Defendant has great artistic talent and ability. This factor is premised on the submission of one impromptu drawing by defendant. There has been no further showing how this talent qualifies as possessing great redeeming value to excuse or mitigate the acts committed by defendant. This Court accords no weight to this factor.

11 [sic]. Defendant has potential for rehabilitation. While defendant may have accrued a good prison record since his arrest, his continuing lapses of misconduct following institutional confinements over the past few years hardly convinces the Court defendant has potential for rehabilitation.

12. Defendant's relationship to the victim must be considered. The

> relationship between defendant and the victim was not the first homosexual encounter defendant had been engaged in and cannot serve to mitigate the violent act committed several weeks after the victim acted sexually aggressive toward defendant. This factor deserves no weight.
>
> In sum, this Court finds that only factors number[ed] 2, 3, 4, 6 and 10 have been established by the greater weight of the evidence; the remaining contentions are not borne out by the evidence and should not be considered further.
>
> Next this Court must determine as to those mitigating factors found to exist under the evidence whether they are of sufficient weight to outweigh any aggravating factors found to exist. Campbell v. State, supra; Lamb v. State, 532 So. 2d 1051, 1054 (Fla. 1988).

(R 255-59) (emphasis in original).

Statutory Mitigation

Dr. Larson concluded that, at the time of the murder, Boyett suffered from extreme emotional or mental duress, based on his long history of substance abuse, depression, and unresolved feelings about homosexuality. Dr. DeMaria concluded similarly:

> [Boyett was] extremely affected by these past issues of sexual abuse, his issues of being abandoned by a father figure; just prior to the shooting, the question of why did he choose Billy's house to go to that day. He had just been kicked out of his father's house recently before. Here's a father figure.

> There's a lot of issues of conflicts around the homosexuality, his feelings of his relationship with Billy. He had been drinking, smoking marijuana, and also using LSD for quite some time prior to that for a period of months, and all of a sudden for the 24 hours prior to the incident, he had been cold turkey with no drugs. He was out of money. He was desperate emotionally, in my opinion, and that there was a lot of emotions and feeling tied up with this whole issue of how Billy was affecting that relationship.
>
> The oral sex goes directly to the earlier traumas. It was always with oral sex: when he was 12, 13 with that gentlemen, oral sex when he was seven. There's going to be a lot of deep-seeded emotional issues regarding that. And that it almost mirrored the acting out of those early sexual incidents of sexual abuse. So tying those all together, you have a situation where [on] the day that occurred, in my opinion, he was in an extremely agitated, emotionally unstable state.

(T 549).

The trial court's written order clearly shows that the trial court, as required, considered the conclusions of these doctors, i.e., that Boyett's "long history of drug and sexual abuse played a role in [his] behavioral patterns" (R 255). The trial court simply found that any such disturbance was not extreme, and, more significantly, that other evidence, more closely connected in time to the commission of the murder, conflicted with their conclusions.

Similarly, in Preston v. State, 607 So. 2d 404 (Fla. 1992), Preston claimed that this mitigating factor was applicable based on his drug use. The trial court found that his drug use was not extreme, and that Preston was capable of deliberate thought, as shown by the circumstances of the murder, despite any drug use. This Court upheld the trial court's refusal to find this factor in mitigation, noting that reversal is not warranted simply because a defendant draws a different conclusion from the facts than the trial court. Id. at 411; see Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Bruno v. State, 574 So. 2d 76, 82 (Fla. 1991). See also Johnson v. State, 20 Fla. L. Weekly S343, S346 (Fla. July 13, 1995) (case for mental disturbance partially controverted and consistent with trial court's conclusion that it did not rise to level of statutory mitigation); Johnston v. State, 497 So. 2d 863, 872 (Fla. 1986) (because other evidence conflicted with Johnston's statement that he took LSD on the night of the murder, the trial court could properly find this mitigating factor inapplicable); Provenzano v. State, 497 So. 2d 1177, 1184 (Fla. 1986) (although several psychiatrists testified that Provenzano had some kind of emotional disturbance, trial court could properly find this mitigating factor inapplicable; Florida law requires only that the trial court consider the evidence, not necessarily find it).

As the record indicates, Dr. Larson's testimony was totally dependent on the statements of Boyett and his parents, Dr. DeMaria's on Boyett's statements and Dr. Larson's report. Significantly, neither of the doctors could point to any evidence of Boyett's precise mental state on the day of the murder, other than statements from Boyett himself. See Cook v. State, 581 So. 2d 141, 143-44 (Fla. 1991) (the trial court rejected the psychiatrist's opinion that Cook's judgment was impaired on the night in question, because it found the veracity of Cook's statements to the expert questionable), cert. denied, 520 U.S. 890 (1992); Roberts v. State, 510 So. 2d 885, 895 (Fla. 1987) (the trial court rejected the "bald assertions" of three psychiatric experts regarding extreme emotional or mental disturbance, because they could not establish whether Roberts was using drugs or alcohol during or before the murder or what Roberts's mental condition was prior, during or after the murder).

Boyett's own statements on this point did not definitively support the applicability of this mitigating factor. Although Boyett related the prior incidents of drug and sexual abuse, Boyett also candidly admitted that he had been planning to harm the victim for as long as six weeks before the murder, and that, when he went to the victim's house that day, he went with the specific intent to inflict

harm. As the trial court noted, there was compelling evidence from Blackmon, who related Boyett's plan to rob and kill the victim the day before Boyett actually killed the victim. This evidence directly contradicted any claim that Boyett was simply acting from emotional disturbance, and not with deliberate thought.

Regarding Boyett's age, the trial court concluded that, because Boyett had normal intelligence, some education, and normal maturity for his age, displayed some independence, and was able to function and rationalize, age did not apply as a statutory mitigating factor.[9] Boyett can show no abuse of discretion by the trial court on this point, as there was competent evidence supporting the trial court's conclusion. Merck v. State, 20 Fla. L. Weekly S537 (Fla. Oct. 12, 1995); Ellis v. State, 622 So. 2d 991 (Fla. 1993); Gore v. State, 599 So. 2d 978 (Fla.), cert. denied, 121 L. Ed. 2d 545 (1992); Cooper v. State, 492 So. 2d 1059 (Fla. 1986); Deaton v. State, 480 So. 2d 1279 (Fla. 1985).

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[9] Although Boyett comments that the trial court did not consider age as a nonstatutory mitigating factor, he neglects to inform this Court that he did not request that age be considered as a nonstatutory mitigating factor, and that he did ask the trial court to consider "any other aspect of the defendant's character or record and any of the circumstances of the offense that reasonably may serve as a basis for imposing a sentence less than death" (SR 297).

Nonstatutory Mitigation

The trial court properly rejected Boyett's claim that he cooperated with law enforcement. Lemon v. State, 456 So. 2d 885, 887 (Fla. 1984). Although Boyett cooperated, this cooperation only came about after police officers located Boyett's truck and then Boyett himself. Boyett did not report to police officers immediately after the crime and confess. Compare Washington v. State, 362 So. 2d 658 (Fla. 1978), cert. denied, 441 U.S. 937 (1979).

The trial court specifically found that Boyett had proven the mitigating factor of long term substance abuse, but gave it little weight because it did not precipitate the crime or contribute substantially to the crime. Again, Boyett can show no abuse of discretion in the trial court's conclusion. Boyett himself stated that he had taken no drugs on the day in question. Although there was evidence of his long term problem with drugs, running away from home, and being institutionalized, there was no evidence which tied drug use and abuse to the murder. See Hardwick v. State, 521 So. 2d 1071 (Fla. 1988), cert. denied, 488 U.S. 871 (1989); Buford v. State, 403 So. 2d 943, 953 (Fla. 1981). The trial court also found that Boyett had

established the mitigating factor that he had been abused as a child, and gave it "due weight."[10]

The trial court considered, but gave little weight to, the mitigating factors that Boyett had completed his GED and exhibited good behavior while in jail. The trial court also considered Boyett's expressed remorse for the murder. Because the trial court questioned Boyett's credibility regarding his expressions of remorse, the trial court gave this factor little weight. See Lemon, 456 So. 2d at 887; Daugherty v. State, 419 So. 2d 1067, 1071 (Fla. 1982).

The trial court correctly considered and rejected Boyett's claim that the victim's aggressive behavior caused Boyett to kill him. Although Boyett had stated that the victim had made previous sexual advances toward him, no such advances had occurred since Boyett's last encounter with the victim six weeks prior to the murder. Further, Boyett also stated that he had fought the victim off during a previous argument. Finally, on the day of the murder, Boyett admitted to entering the victim's home without permission, armed with a pistol. Upon telling the victim that he was going to shoot him for the prior unwanted sexual advances, the victim reached for a baseball bat. Even accepting this

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[10] The trial court also considered, in conjunction with these two factors, the mitigating factor of Boyett's prior mental health problems.

portion of Boyett's story as true,[11] the victim did not cause Boyett to shoot him by reaching for a baseball bat first; the victim only reached for this weapon after being confronted by the unwanted and armed intruder Boyett. Compare Lemon, 456 So. 2d at 887 (the trial court rejected "circumstances of murder" as a mitigating circumstance; circumstances were, according to Lemon's confession, that victim undressed but refused to have sex with him); Wilson v. State, 436 So. 2d 908 (Fla. 1983) (the trial court properly rejected provocation as a mitigating circumstance, where victim did not instigate murder).

The trial court properly considered and rejected Boyett's artistic abilities as a mitigating factor. Accepting this claim as true, the enigma remains, how does this fact ameliorate the enormity of the act Boyett committed?

The trial court considered, found, and gave due weight to the factor that Boyett had come from an unstable, broken family home. See Jones v. State, 20 Fla. L. Weekly S29 (Fla. Jan. 12, 1995); Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 126 L. Ed. 2d 596 (1993); Daugherty, 419 So. 2d at 1071. Although the trial court considered

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[11] Boyett contradicted himself later in his statement, recounting that, regardless of any actions taken by the victim on that day, Boyett intended to shoot him.

Boyett's potential for rehabilitation, it properly rejected same based on Boyett's continuous relapses into bad behavior despite several institutionalizations. Boyett's own mother testified that she had given Boyett many chances, had tried every type of drug and family treatment facility she could find and afford, and, despite all these efforts, Boyett always seemed to lapse back into bad behaviors, i.e., more drug use, running away from home, etc. She also stated that it was these behaviors that finally prompted her to eject Boyett permanently from her home.

Finally, the trial court fully considered Boyett's relationship with the victim. Although Boyett would have this Court focus on an inartfully worded sentence regarding his prior homosexual encounters, Boyett overlooks the context in which the trial court made this statement. In rejecting this factor, the trial court found persuasive two facts which were inextricably intertwined: Boyett's previous homosexual encounters and the fact that the murder occurred several weeks after the last such encounter. Because the prior encounters with others occurred many years before the murder, and the last such encounter with the victim occurred at least six weeks before the murder, the trial court found attenuated Boyett's claim that the victim's sexual aggressive caused him to react as he did.

Issue IV

WHETHER THE TRIAL COURT PROPERLY OVERRODE THE JURY'S RECOMMENDATION OF A LIFE SENTENCE.

Boyett claims the trial court improperly overrode the jury's life recommendation, because only one aggravating circumstance -- committed during the course of a burglary -- existed, and substantial mitigation existed. Initial Brief at 58. To the contrary, two valid aggravating factors existed, and when weighed against the minor nonstatutory mitigation found by the court, death was the appropriate sentence. Because the facts in aggravation were "so clear and convincing that virtually no reasonable person could differ," the trial court properly overrode the jury's life recommendation. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

In its written sentencing order, the trial court made the following findings in reaching its override decision:

> The Court hereby finds that the two aggravating circumstances far outweigh the five non-statutory mitigating factors noted in the preceding paragraphs and the death penalty is the appropriate sentence under Count I. The jury's recommendation of a life sentence could have been based only on minor, non-statutory mitigating circumstance[s] or sympathy for a youthful defendant whose victim was homosexual. In this case the sentence of death is so clear and convincing that virtually no reasonable person could differ, and a

> jury override in light of the standard pronounced in Tedder v. State, 322 So. 2d 908 (Fla. 1975) would be warranted. Eutzy v. State, 458 So. 2d 755 (Fla. 1984). Furthermore, the imposition of a death sentence would not be proportionally unwarranted. Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990).

(R 259).

As shown in Issue II, the presence of the CCP aggravating factor cannot be disputed.[12] Boyett planned this murder for several weeks, procured the gun ahead of time and showed it to a friend, announced his intent to kill the victim, burglarized the victim's home, and shot him. The cases relied upon by Boyett are inapposite, because they involved no proof of premeditation. In Norris v. State, 429 So. 2d 688 (Fla. 1983), Norris broke into a home, beat a woman and her mother, and stole various items; the woman's mother died a month later. This Court vacated the death sentence because the state had produced no evidence that Norris intended to kill the woman's mother, and had only proven felony murder. In Hawkins v. State, 436 So. 2d 44 (Fla. 1983), the jury found Hawkins guilty of felony murder and expressly rejected a finding of premeditated murder. In DuBoise v. State, 520 So. 2d 260 (Fla. 1988), the victim was killed during a sexual battery and robbery. Although

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[12] Boyett himself concedes the applicability of the second aggravating circumstance -- committed during the course of a burglary.

DuBoise "was a major participant in the robbery and sexual battery [and] made no effort to interfere with his companions' killing the victim," there was no proof that he intended to kill the victim. Id. at 266.

As noted in Issue III, the trial court found no statutory mitigation. Although Boyett presented the testimony of two mental health experts in support of his claim of extreme mental or emotional disturbance, the trial court found, as support by the record, that other evidence rebutted any claim that this mitigating factor applied on the day in question. Compare Thompson v. State, 553 So. 2d 153, 157 (Fla. 1989); Torres-Arbeledo v. State, 524 So. 2d 403, 413 (Fla. 1988). Further, Drs. Larson and DeMaria were hired by the defense team, expressly for the purpose of testifying regarding mitigation (T 493-94, 530, 554-55). Both doctors interviewed Boyett,[13] and reviewed the arrest reports and medical records from various facilities and doctors (T 494, 530-31).[14] Dr. Larson spoke with family members (T 504, 526), and spent about four to five hours with Boyett (T 504). Significantly, however, neither doctor reviewed witness statements or the court file. Accordingly,

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[13] While Dr. Larson performed several tests on Boyett (T 494-504), Dr. DeMaria admitted to conducting only one "test," i.e., asking Boyett to draw a person (T 532).

[14] Dr. DeMaria admitted to relying rather heavily on Dr. Larson's report (T 554).

the trial court, within its discretion, could discount the testimony of these experts. Compare Thompson, 553 So. 2d at 157.

Although Boyett claimed that his age of 18 at the time of the murder constituted mitigation, the trial court again found, within its discretion, that this factor did not apply. While Boyett was 18 years of age, he exhibited no mental deficiency, emotional immaturity, or lack of schooling. See Echols v. State, 484 So. 2d 568, 575 (Fla. 1985) (if age "is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility."). As shown in the cases cited in Issue III, the trial court was not required to find this factor in mitigation. Compare Thomas v. State, 456 So. 2d 454 (Fla. 1984). Esty v. State, 642 So. 2d 1074 (Fla. 1994), is not persuasive on this point, as this Court linked Esty's age with his lack of a criminal history, potential for rehabilitation, and the possibility that he acted in an emotional rage.

The trial court found five nonstatutory mitigating factors: (1) long term substance abuse; (2) sexual abuse as a child; (3) good behavior while in custody; (4) remorse; and (5) potential for rehabilitation. In weighing these against the two aggravating circumstances, the trial court concluded, with justification, that death was the

appropriate sentence. As noted by the court, although these factors existed, they were "minor": There had been no substance abuse on the day in question; there had been no immediate or recent episode of sexual abuse; Boyett's good behavior in custody, while considered, deserved little weight in the face of Boyett's planning; Boyett admitted that his remorse occurred due to the possibility of a death sentence; and Boyett's potential for rehabilitation, while considered, deserved little weight in the face of prior, multitudinous opportunities for drug rehabilitation, which Boyett rejected. "Even viewing this mitigation in the light most favorable to [Boyett], it pales in significance when weighed against" the aggravation. Marshall v. State, 604 So. 2d 799, 806 (Fla. 1992). Significantly, this Court has held previously that, even with the presence of valid mitigation, a jury override is not precluded. Pentecost v. State, 545 So. 2d 861, 863 n.3 (Fla. 1989); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988).

Additionally, the jury's speedy return of a recommendation of life imprisonment[15] likely was influenced improperly by defense counsel's concluding paragraph of closing argument:

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[15] One hour (T 602-03).

> Dale shows remorse for his accident -- for his involvement in this shooting, and he shows a willingness to accept responsibility for his acts. How do you know that? Again, you can look to his statement. Ladies and gentlemen, there's more than enough mitigation in this case to outweigh any statutory aggravating factors that you may find. I ask that you not compound the tragedy of what has happened in this case by recommending that Dale, the second victim, be killed, too, by the State. Dale needs to pay for his crime but not with his life. Thank you.

(T 597). The State of Florida does not kill defendants lawfully sentenced to death, and any suggestion to the contrary was highly improper. This Court has affirmed other jury overrides where the life recommendation could have been the product of inflammatory and inaccurate defense argument. See Francis v. State, 573 So. 2d 672 (Fla. 1985); Porter v. State, 429 So. 2d 293 (Fla. 1983).

Finally, although not raised by Boyett, Boyett's sentence of death is proportionate to death sentences affirmed by this Court in cases involving similar facts and a similar balance of aggravating and mitigating circumstances (two aggravating factors and five nonstatutory mitigating factors). See Cook v. State, 581 So. 2d 141 (Fla. 1991) (Cook murdered victims during late night armed robbery attempt; two aggravating factors -- prior capital felony and committed during the course of a robbery; one statutory mitigating factor -- no significant history of

prior criminal activity), cert. denied, 520 U.S. 890 (1992); Brown v. State, 565 So. 2d 304 (Fla. 1990) (Brown burglarized victim's home, armed with a gun; three aggravating circumstances -- CCP; prior violent felony conviction; and committed during a burglary; two statutory mitigating factors -- mental capacity and mental and emotional distress; two nonstatutory mitigating factors -- social and economic disadvantage and nonviolent criminal past), cert. denied, 498 U.S. 992 (1991); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (Freeman burglarized victim's home and shot him; Freeman found a short time later, down the street from victim's home; two aggravating factors -- prior violent felony convictions and committed during a burglary; four nonstatutory mitigating factors -- low intelligence; abuse by stepfather; artistic ability; and playing with children), cert. denied, 501 U.S. 1259 (1991); Hudson v. State, 538 So. 2d 829 (Fla. 1989) (Hudson burglarized victim's home at night, armed with a knife; two aggravating factors -- prior violent felony and committed during an armed burglary; three statutory mitigating factors -- extreme mental or emotional disturbance; impaired capacity; and age), cert. denied, 110 S. Ct. 212 (1990).

Issue V

WHETHER THE TRIAL COURT PROPERLY PERMITTED THE STATE TO FILE ITS SENTENCING MEMORANDUM SEVEN DAYS AFTER BOYETT FILED HIS SENTENCING MEMORANDUM.

Boyett claims that the trial court erred in granting the state a seven day extension of time in which to file its sentencing memorandum. Initial Brief at 65. Although the court gave the state seven days to file its memorandum after Boyett had filed his memorandum, the claim that the trial court granted an unwarranted extension of time is not supported by the record.

After the jury returned a recommendation of life imprisonment, the trial court set a sentencing hearing for March 30, 1993, and simply asked that counsel submit sentencing memoranda, without pronouncing a due date (T 604). At the March 31, 1993, sentencing hearing, defense counsel filed a sentencing memorandum, and the trial court gave the state seven days within which to respond (R 182). On April 1, 1993, defense counsel filed a written objection to the court's granting the state seven days to respond, stating that the memorandum was due by the March 31st hearing date and that the state unfairly was given the ability to respond to defense counsel's memorandum without defense counsel being given the same opportunity (R 190-93). The state filed its sentencing memorandum on April 7, 1995

(R 194-201), and defense counsel filed a response to same on April 8, 1995 (R 202-03). At the May 14, 1993, imposition of sentence hearing, no further mention of the state's allegedly tardy memorandum was made (R 234-35).

Thus, the record shows that there was no extension of time. Even if there were, however, Boyett's complaint below was that the state was being allowed to respond to his memorandum, but he was not permitted the same opportunity. In light of Boyett's response to the state's memorandum, Boyett's further complaints are unfounded.

Boyett's citation to Wike v. State, 648 So. 2d 683 (Fla. 1994), in support of this claim is both preposterous and misleading. That case involved the order of closing arguments presented to the jury and a specific rule of criminal procedure. See id. at 687 ("[B]ecause the trial judge erroneously denied Wike his vested procedural right to conclude the closing arguments before the jury, we find that we must reverse his sentence and again remand this cause for resentencing."). This issue does not involve matters heard by the jury or a specific rule of criminal procedure. Instead, it concerns only the submission of sentencing memoranda to the trial court for the purpose of sentence imposition. Because both parties submitted memoranda, Boyett responded to the state's response, and the court considered all memoranda, there is no error here.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Boyett's convictions and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W. C. McLAIN, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 1st day of December, 1995.

GYPSY BAILEY
Assistant Attorney General