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STATEMENT OF THE CASE AND FACTS

1. Procedural Progress of the Case

On August 25, 1992, an Escambia County grand jury indicted Matthew Dale Boyett for first degree murder for the shooting death of Billy Charles Hyter and for burglary of a dwelling. (R 1-2) The murder count alleged both premeditated and/or felony murder with the burglary as the underlying felony. (R 1-2) Boyett proceeded to a jury trial commencing on February 22, 1993. (TR 1) At the conclusion of the guilt phase of the trial, the jury returned a guilty verdict for first degree premeditated murder and/or felony murder as charged in the indictment. (R 137, TR 427) The jury also found Boyett guilty of the burglary count as charged. (R 138, TR 428) Boyett had requested a verdict form requiring the jury to specify whether the finding of guilt for first degree murder was based on premeditation or felony murder theories. (TR 350) However, the court denied the request. (TR 350)

The defense presented additional evidence during the penalty phase of the case. (TR 429-557) The prosecution relied solely on the evidence presented at the guilt phase. (TR 429) The jury recommended a life sentence. (R 144, TR 603)

Circuit Judge Nickolas P. Geeker overrode the jury's life recommendation, and on May 14, 1993, sentenced Boyett to death for the murder. (R 236-237, 246, 260-267)¹ On the burglary

¹Two sentencing orders appear in the record. (R 253-259). The first one omitted paragraph number ten under the section discussing nonstatutory mitigating circumstances. (R 258). An amended order was filed on the same day to correct this mistake. (R 260-267).

conviction, the court sentenced Boyett to eight years imprisonment. (R 236-237, 247) In support of the death sentence, the court found two aggravating circumstances: (1) the homicide was committed during a burglary; and (2) the homicide was committed in a cold, calculated and premeditated manner. (R 261-262) Regarding mitigation, the court specifically rejected three statutory mitigating circumstances. (R 262-263) First, the court acknowledged Boyett's mental and emotional disturbance at the time of the crime but concluded this disturbance was not extreme and did not qualify as a statutory factor. (R 262) Second, the court found no evidence supported a claim that Boyett was under the substantial domination of another or acted under extreme duress. (R 263) Third, Boyett was eighteen years old at the time of the crime. (R 263) The court rejected age as mitigating circumstance. (R 263) In a separate section of the sentencing findings, the court noted 12 possible nonstatutory mitigating factors and found five of them established by the evidence. (R 263-265) Specifically, the court found Boyett suffered from long-term substance abuse (paragraph # 2); was sexually abused as a child (paragraph # 3); exhibited good behavior while in custody (paragraph # 4); expressed remorse for the crime (paragraph # 6); and he had an unstable, broken family life (paragraph # 10). (R 263-265)

On June 14, 1993, Boyett filed his notice of appeal. (R 271)

2. Facts -- Guilt Phase

Debra Sherwood was visiting her friend, Beverly Solomonic, who lives on Memphis Avenue in Pensacola. (Tr 228-229, 233). Ms.

Sherwood was cleaning her van in the driveway of the residence around 9:30 a.m. on August 5, 1992. (Tr 229, 233-234). At that time, she saw Bill Hyter, the neighbor who lived across the street, walking across the street leaning on a baseball bat. (Tr 230). Hyter was bleeding from his mouth and said that he had been shot. (Tr 230). He insisted he was dying. (Tr 230). Sherwood called for assistance. (Tr 230). Solomonic tried to help Hyter, but he refused to sit down, stating he could not breathe. (Tr 235). Hyter kept spitting up blood and stating that he was going to die. (Tr 235-236). He paced in the yard although he was having difficulty staying on his feet. (Tr 238). He finally sat down in the front yard. (Tr 231, 238). Hyter said that Dale Boyett had shot him (Tr 236-237), and that he had used a handgun. (Tr 232, 236-237). Hyter also said that Boyett was there in his house to rob him. (Tr 232). Stan Wehmeiter with the Escambia County Sheriff's Department arrived. (Tr 239-240). He asked Hyter who had shot him. (Tr 240). Hyter again said that Dale Boyett did it and had tried to rob him. (Tr 240). The only description Hyter gave of Boyett was that he was a white male. (Tr 241). Wehmeiter secured the scene and waited for investigators to arrive. (Tr 242).

Later on August 5th, John Larzarchick, an assistant medical examiner, performed an autopsy on Bill Hyter. (Tr 262-263). He found a single gunshot entry wound in the mid portion of the right bicep. (Tr 263). The bullet entered the right bicep, moved into the armpit, and then into the right lung cavity. (Tr 263). After the bullet deflected into the lung, it ricochet off of the backbone and reentered the lung. (Tr 265). One of the major

blood vessels in the area of the right shoulder was destroyed. (Tr 266). The pulmonary artery, which supplies the right lung, was damaged. (Tr 266-267). Hyter died from internal bleeding. (Tr 268). Based on the angle of the entry wound, the pathologist concluded that the arm was at a 45-60 degree angle and slightly downward at the time of the wound. (Tr 270-271). He estimated that Hyter was standing slightly sideways with his arm out in slightly downward position at the time of the shooting. (Tr 271). The medical examiner also concluded that the gun was probably at least 3 to 4 feet away from Hyter at the time of the shot. (Tr 272).

Deputy Jim Powell assisted in securing the crime scene and then began looking for Dale Boyett. (Tr 244-245). He found Boyett in a trailer a short distance away and took him into custody. (Tr 245). After advising Boyett of his rights under Miranda, Powell said there was something they needed to talk to him about. (Tr 246). Boyett responded, "I know what you want to talk about. The guy named Bill I shot today." (Tr 246). The investigating officer, Tom O'Neal, continued with the questioning. (Tr 246). Later, Powell accompanied Boyett back to the area around the crime scene. (Tr 246-247). Their purpose was to recover a weapon in the woods between Hyter's home and a nearby highway. (Tr 249). Powell sat with Boyett in an automobile while some of the investigators were inside the residence. (Tr 247). At that time, Boyett told Powell that Hyter had made sexual advances to him. (Tr 247). Hyter had touched him on the outside of his clothes and he was upset about it. (Tr 247). Powell noticed that Boyett seemed like there was something

else he wanted to talk about. (Tr 247). Boyett then said that he had been over there at Hyter's house on a prior occasion drinking and had passed out. (Tr 247-248). When he awoke, Hyter was on top of him performing oral sex on him. (Tr 248). A fight ensued over this involving a whiskey bottle and sword. He said during the fight with the sword and whiskey bottle, both received wounds. (Tr 251). Boyett's father, Dearma William Boyett, confirmed that about six weeks prior to the shooting, Dale had an injury on his arm. (Tr 320). Dale indicated that some people had jumped him. (Tr 320-321). Powell said that Boyett did not indicate how long before the shooting incident this occurred, but it had apparently been several weeks. (Tr 248). Powell also stated that in his initial contact with Boyett that he did not know that Hyter had died, and the first indication that Boyett had about Hyter's death was when Powell told him. (Tr 250).

Investigator Tom O'Neill took a full confession from Boyett in the afternoon of August 5. (Tr 293-319). Boyett explained that he had met Bill Hyter when a friend invited him to go to Hyter's house to smoke pot and drink alcohol. (Tr 308). Over the next six months, Boyett went to Hyter's house six or seven times. (Tr 308-309). He did not have a sexual relationship with Hyter. (Tr 304). Their visits involved talking, drinking and smoking marijuana. (Tr 308). On two occasions, Hyter made sexual advances to Boyett. (Tr 309). The first time, both of them were drunk and the confrontation ended up in a argument and a fight involving a liquor bottle and a sword. (Tr 309). Boyett said he received a cut on his arm. (Tr 318-319). Boyett realized that both of them were drunk at the time, and he went back to Hyter's

house to talk it over. (Tr 310). He said that he and Hyter agreed that they were both drunk, and the incident should not have occurred. (Tr 310). However, during the same meeting, Hyter again made sexual advances to Boyett. (Tr 310). Boyett left after Hyter refused to stop his advances. (Tr 310, 314-315).

Boyett was emotionally disturbed over the incident and over the next five to six weeks, he continued to be bothered by Hyter's behavior toward him. (Tr 314-315). Boyett said he found a .22 caliber pistol, and upon seeing the gun, he said it "clicked" that he was going to use the gun to shoot Bill Hyter. (Tr 310). He planned it out for a couple of weeks. (Tr 313). His intention was to shoot Hyter to make him miserable. (TR 311-313). He had no intent to kill Hyter. (Tr 312-313).

The night before the homicide, Boyett stayed in a motel not far from Hyter's house (Tr 304-305). On the morning of August 5, Boyett walked through a wooded area behind Hyter's house, climbed over a fence, and went through the unlocked back door of Hyter's residence. (Tr 303). Boyett held a gun on Hyter and talked to him, telling him his reasons for being there and for what he was about to do -- Hyter's aggressive sexual activity toward him. (Tr 303, 305-307). As he was talking, Hyter reached for a baseball bat. (Tr 307). Boyett told him to stop, but Hyter continued and grabbed the bat. (Tr 307). Boyett shot at Hyter's leg but missed. (Tr 307). Hyter continued toward Boyett with the bat, and Boyett shot Hyter again. (Tr 307). Hyter then fled. (Tr 307). Boyett ran back out through the back door and over the fence, discarding the pistol in the woods. (Tr 307). Boyett

continued to the motel where his truck was parked and drove to his friend's house. (Tr 307).

Crime scene investigator, Charlie Suarez, collected several items of evidence. (Tr 252-259). Because Boyett had told the officers about a second shot fired in the residence, Suarez looked around the fireplace and recovered a .22 caliber bullet which had struck the bricks in that area. (Tr 254). Boyett also led the officers to the .22 caliber revolver. (Tr 254). Suarez said the six-shot weapon had one empty chamber, two expended cartridges, and three live rounds still in the pistol. (Tr 254-255). Boyett also provided his shoes to be compared with shoe prints found in the backyard of the Hyter residence. (Tr 257). Suarez recovered the shirt Hyter was wearing. (Tr 253). Inside the residence, investigators also found a receipt where Hyter had purchased a gun, but he had not yet picked it up because of the waiting period. (Tr 257). Also found in the residence were a number of personal items, jewelry, a wallet, and other items belonging to Hyter. (Tr 259). Hyter had recently purchased some window locks. (Tr 259). Suarez took an aluminum baseball bat into evidence. (Tr 259). Twelve commercially prepared videotapes were inside the Hyter residence. (Tr 258). An evidence technician randomly selected four of the tapes, and all had explicit homosexual subject matter. (Tr 258-259).

Ed Love, an FDLE firearms' examiner, examined the pistol, bullet fragments and the shirt Hyter wore at the time of the shooting. (Tr 274-276). Based on a test firing of the pistol, he determined that gun powder residue would be deposited at a distance between 3 to 4 feet. (Tr 277). Since he did not find

any residue on the shirt, he concluded the firearm was in excess of 3 to 4 feet away at the time of the shot. (Tr 276-277). Love concluded that the projectile removed from Hyter was fired from the pistol he examined. (Tr 277-278). The bullet fragments which were collected inside the residence could not be compared to the firearm due to the condition of the fragments. (Tr 278). However, Love stated that the fragments had a copper coating similar to the other bullet recovered and the bullets from the unfired cartridges in the pistol. (Tr 279).

A friend of Boyett's, John Blackman, testified to statements Boyett made regarding the crime. (Tr 283-293). Blackman had known Dale for about three or four months prior to the homicide. (Tr 283). About one week before the murder, Boyett asked Blackman if he wanted to see the house of the man he was going to shoot. (Tr 285). As they drove by the house, Boyett told Blackman that he had had a run-in with the man earlier. (Tr 288). About six weeks before the murder, Boyett had shown Blackman a cut on his arm and stated that three black guys had jumped him. (Tr 290). Boyett did not mention anything to Blackman about the relationship he had with Bill Hyter. (Tr 291). The Monday night before the homicide occurred on Wednesday, Boyett spent the night at Blackman's residence. (Tr 287). Boyett stayed until about 5:00 or 6:00 Tuesday afternoon. (Tr 287). During this time, Boyett showed Blackman a .22 caliber revolver. (Tr 286). Boyett also asked Blackman to help him kill the man. (Tr 287). Blackman stated that Boyett specifically used the word "kill" at this time. (Tr 293). In the discussion a week earlier, Boyett had used the work "shoot" the man. (Tr 293). Blackman said that he

did not notify authorities of Boyett's comments because he did not believe Boyett was going to do it. (Tr 292). About 1:00 or 2:00 in the afternoon of the day of the homicide, Boyett spoke to Blackman. (Tr 288-289). Boyett said he went to the man's house, the man picked up a baseball bat so he shot him. (Tr 288-289). He said he shot him in the chest. (Tr 289). He also told Blackman that he threw the gun away (Tr 289), and he did not get any money. (Tr 289).

3. Penalty Phase and Sentencing

The state called no additional witnesses during the penalty phase of the trial. (Tr 429). The defense called five witnesses. Dale's mother, father, and aunt testified. (Tr 431, 474, 487). Two clinical psychologists testified to their evaluations of Dale. (Tr 493, 528).

Dale Boyett's mother, Alice Fay Prince, testified about Dale's emotional difficulties which had been present since childhood. (Tr 431). Dale was born in February of 1974. (Tr 431-432). His mother said he cried a great deal as an infant. (Tr 432). His behavioral problems became more difficult as he grew older. (Tr 432). At 2 1/2-years-old, he finally began sleeping as much as four hours at a time. (Tr 432). She and Dale's father, William Boyett, shared the responsibilities of taking care of Dale during this time. (Tr 432). She had difficulty finding a babysitter for Dale, because he was so difficult to handle, did not sleep and cried a great deal of the time. (Tr 433). When Dale was 2 1/2-years-old, his mother awoke one night to find every light in the house on and the smell of

something burning. (Tr 433-434). Dale was out of his room. (Tr 434). The kitchen area of the house was a disaster. (Tr 434). Canisters were emptied, butcher knives were sticking in potatoes in the refrigerator, Pepto-Bismol was poured all over the floor. (Tr 434). The stove's burners were on. (Tr 434). And Dale was not inside the house. (Tr 434). She finally found Dale, dressed only in a diaper, outside in the snow. (Tr 434). Ms. Prince knew Dale needed help and scheduled an appointment with a child psychologist. (Tr 434).

The psychologist told Ms. Prince that Dale's psychological problems were such that he would be unable to learn except by cause and effect. (Tr 434-435). As he explained it, Dale could only learn not to play in the street, for example, if he in fact played in the street and was hit by a car. (Tr 435).

Shortly thereafter, the family moved to Pensacola. (Tr 435). The stress of caring for Dale had stressed the marriage. (Tr 435). Additionally, Ms. Prince continued to commute to a job in Mobile, Alabama, for a period of a year-and-a-half. (Tr 435). Bill Boyett had changed jobs and was again pursuing a career in the merchant marines. (Tr 435-436). He was gone for significant periods of time. (Tr 436). When he was at home, he was a beer drinker. (Tr 436). On one occasion, he took Dale to a neighborhood bar with him. (Tr 436). Bill Boyett apparently had difficulty being a part-time father and working at sea for significant periods of time. (Tr 437). They separated, and when Dale was 6-years-old, divorced. (Tr 437-438).

Ms. Prince became involved with another man in a relationship which lasted about a year-and-a-half. (Tr 438). He

lived in Orange Beach, Alabama, and she would take Dale to his house, which was on the water, on the weekends for visits. (Tr 439). This man identified with children very well and developed an solid relationship with Dale. (Tr 439-440). Unfortunately, the relationship ended very abruptly when he broke it off with Dale's mother. (Tr 440). He never communicated with Dale about the ending of the relationship. (Tr 440-441). Dale reacted very negatively to this abandonment. (Tr 441). Dale began wetting the bed, sleeping with the lights on again, and other troubling behavior. (Tr 441). Additionally, during this relationship, Dale had been befriended by a teenage boy who lived nearby. (Tr 441). Ms. Prince was somewhat concerned about the uncommon interest the teenager took in Dale. (Tr 441-442). But, at the time she shrugged it off. (Tr 442). Later, Dale would confide in a psychologist that the teenage boy had molested him. (Tr 537).

Ms. Prince later developed a relationship with her current husband, Howard Prince. (Tr 443). However, her husband and Dale never developed a close relationship. (Tr 443-444).

Dale's school experience was difficult and marred by constant problems. (Tr 444-445). Dale's mother enrolled him in three different private schools before she put him into public school. (Tr 445). Dale did not do well in any of the schools and started running away from home. (Tr 445). Dale was about nine-years-old at the time. (Tr 445). Dale, his mother, his father, and his stepfather all went to counseling in Pensacola with child psychologist, Dr. Ron Guy. (Tr 446). He suggested a plan whereby Dale would live with his father. (Tr 446). This was difficult, since Bill Boyett was frequently at sea. (Tr 446). Dale's mother

also began going to a parental-support group for problem children called "Tough Love". (Tr 446). It's a group that tries to teach positive behaviors, support positive behaviors, and help in controlling the children. (TR 446-447). Dale stayed with his father for a short period of time, but he then moved back with his mother. (Tr 447).

Ms. Prince, at a later time, had to relocate to Jacksonville because of a job transfer. (Tr 448). She selected an area to live that had children and good school districts to try to make things easier for Dale. (Tr 448). Dale did not adjust to the change. (Tr 448). He ran from school. (Tr 448). Ms. Prince said she would drop Dale off at the front door of the school and he would walk straight through the school and leave. (Tr 448). Dale was about 13-years-old when they moved to the Jacksonville area. (Tr 450).

One morning about 2:00 a.m., a deputy brought Dale home; he had been out on the streets at night. (Tr 449). His stepfather, Howard Prince, was provoked. (Tr 449). He had confrontation with Dale and threatened him. (Tr 449). Dale reacted and gave his mother an ultimatum that either he would leave or his stepfather would have to leave. (Tr 449). Dale's mother helped Dale pack his clothes and drove him to Pensacola to live with his father. (Tr 450).

Dale began running away from his father's house as well. (Tr 450). On a Mother's Day weekend, Ms. Prince went to Pensacola to see Dale, as well as her mother who lived in the area. (Tr 450). Dale called her. (Tr 450). He asked if she would come and get him. (Tr 451). She picked Dale up. (Tr 451). This was the

longest period of time he had been gone on the run. (Tr 451). She said he was dirty, his clothes were torn, he had cut marks on his arms. (Tr 451). Dale hugged his mother, and they returned to Ms. Prince's mother's and father's home. (Tr 452). She talked to Dale about what had happened. (Tr 452). He said he was dirty because he had slept on the beach and he had been chased by some people and had to climb a fence which cut his arms and tore his clothes. (Tr 452). Ms. Prince took Dale back to Jacksonville. (Tr 453). Dale agreed to go to counseling. (Tr 453). They went to the Grant Center in Citrus, Florida, a psychiatric hospital. (Tr 453). The hospital is a secured facility designed for children. (Tr 453). Ms. Prince and her husband, Howard, went to weekly trips for counseling at the center for visitation and family therapy. (Tr 454). Dale returned home and moved into a house which the Prince's had bought in Middleburg, Florida. (Tr 454). Unfortunately, the problems with Dale continued. (Tr 455). He was still wetting the bed. They returned Dale to the Grant Center for a second time. (Tr 455). The second program did not work, and Dale left the facility. (Tr 455).

The school system recommended that Dale attend an alternative school in Green Cove Springs, called the Learning Center. (Tr 456). One of the counselors at the Center became convinced that Dale was a drug addict. (Tr 456). Ms. Prince had known of only one incident in the fifth grade when Dale was found with marijuana. (Tr 456). They were also attending Gateway, a community drug treatment program in Jacksonville. (Tr 456). Gateway was an inpatient program, and Dale completed the program. (Tr 456-457). Dale seemed to improve for awhile, but the

problems returned. (Tr 457). The bed wetting was a particularly upsetting problem for Dale since he was now a teenager. (Tr 457).

The next attempt for drug treatment for Dale came at the Koala Center in Bushnell, Florida. (Tr 458). Placing him in this program was prompted by an incident where Dale and a friend got drunk in the home and caused some destruction. (Tr 459). The Koala Center program demanded heavy family involvement. (Tr 459). The parents had to live at the program for two weeks in a very regimented program. (Tr 459-460). Ms. Prince learned that Dale had been using all sorts of drugs from crack cocaine, LSD, as well as the alcohol. (Tr 460-461). The drug usage was Dale's method of escaping from his emotional problems. (Tr 461). Dale's mother became bitter because she realized Dale was not accepting the counseling or making changes in his life. (Tr 461).

Dale's problems continued. (Tr 462). His mother put him back in the Gateway Center for a period of time. (Tr 462). Dale asked to go to a treatment facility, stating he wanted some treatment of some kind. (Tr 462-463). At this time, Dale's mother, upon the recommendation of an insurance company, admitted Dale into the psychiatric unit for children in Jacksonville, a Baptist facility. (Tr 463). Two weeks into the program, she found out that their method for dealing with behavior problems with the kids was to administer drugs and put them in straight jackets. (Tr 464). She planned to take him out of that program, but before she could, Dale ran away. (Tr 465). Dale went to South Florida, got into some trouble and finally returned home. (Tr 465-466). At this time, Dale began begging for help. (Tr 466). However, his mother was at the end of the line, and she

said no more treatment. She told him she was not going to put him into a program anymore. (Tr 466). Dale later dropped out of school; he was in a special program, The Learning Center. (Tr 467). His mother told him that she would provide a roof over his head, but that he had to get a job and begin taking care of himself if he was not going to go to school. (Tr 467).

In 1991, Dale's mother had just had surgery and had returned home. (Tr 468). When she came home, Dale ran away from home again. (Tr 468). She was really angry that he ran just as she was coming home from having surgery. (Tr 468). She basically told him to move out of the house. (Tr 468). She gave him a bus ticket to Pensacola to go back to live with his father. (Tr 468). She emptied his room and told him he could not live with her anymore. (Tr 468). She did continue to have contact with Dale frequently. (Tr 469).

The two months prior to August 5, 1992, Dale's mother knew something was wrong because she could never get him on the telephone. (Tr 469). She visited him very soon after his arrest for the murder. (Tr 471). She said Dale cried continuously while she visited him. (Tr 471). He said he was sorry. (Tr 471). He told his mother he was not using drugs at the time of the incident. (Tr 471). He told his mother he would ask Jesus to forgive him. (Tr 471).

William Boyett, Dale's father, testified. He said Dale had all kinds of behavior problems since he was born in 1974. (Tr 475). He was a hyperactive child. (Tr 475). He ran away from home a great deal. (Tr 475-476). He also said that Dale was a bed wetter and he was not sure if that problem had ever stopped

for him. (Tr 476). Boyett said that he and Dale's mother divorced when Dale was about six-years-old. (Tr 476). He attributed his drinking problems to be a factor in the marital problems. (Tr 477). He usually saw Dale on the weekends, since Dale's mother had custody. (Tr 477). Since Boyett was a boat captain, his work schedule put him at sea for three weeks at a time. (Tr 475). He did admitted that he had taken Dale to a bar with him and had given him sips of alcohol when Dale was a child. (Tr 478).

After Dale and his mother moved to Jacksonville, Boyett said he was apprised of Dale's activities and problems via telephone calls. (Tr 479). He did participate in a treatment program at the Koala Center for Dale involving week-long stay at the program (Tr 479-480). When Dale was 13, he came to live with his father in Pensacola for a short period of time. (Tr 480-481). He began to run away and ran away several times while there. (Tr 480-481). One incident where he ran away, his mother and grandfather picked him up, and Dale moved back to Jacksonville. (Tr 481).

There came a point, in March of 1991, where Dale's mother sent him to Pensacola to live with his father again. (Tr 482). Bill Boyett said that Dale lived with him for about a year-and-a-half until August of 1992. (Tr 482). During this time, Bill Boyett would still be out at sea for three weeks at a time and then home for three weeks. (Tr 482). During the time he was at sea, Dale would live with his aunt, Catherine Odom. (Tr 482-483, 487). Dale never mentioned to his father a person by the name of Bill Hyter, and he never mentioned spending any time with anybody who was a homosexual. (Tr 483-484). Dale's father said there

were some girlfriends that Dale had but no long term relationships. (Tr 484). A few days prior to the homicide on August 5, 1992, Bill Boyett and Dale had a confrontation after his father returned from sea. (Tr 484). The result was that Bill Boyett told Dale he could no longer stay at the house with him, and he could not stay at his aunt's house either. (Tr 485). Dale did not react to this statement on the part of his father. (Tr 485). Bill Boyett awakened Dale from his sleep to announce this decision. (Tr 485). He said Dale did not react, did not appear to get angry, and that was the last time he saw Dale before his arrest. (Tr 486). At this time, Dale was working off and on. (Tr 485). Bill Boyett said he kicked his son out of his house because he thought Dale was stealing things from him. (Tr 485).

Catherine Odom, Dale's aunt, testified that Dale stayed in her home while his father was at sea. (Tr 488-489). Dale shared a room with her son, Chris, who is 14-years-old. (Tr 490). She said her son and Dale had a very good relationship. (Tr 490). Dale was a big influence on Chris, especially when it came to doing his school work. (Tr 490). She said they also had a trailer in their back yard which was fenced, and sometimes, Dale would go into the trailer just to be alone. (Tr 490-491). Dale liked to draw. (Tr 491). He also said that he wished his mother and father at least lived in the same city. (Tr 491). Catherine Odom was aware that Dale had had trouble with drugs and alcohol in the past. (Tr 492). She never noticed anything regarding drinking or smoking marijuana while Dale was at her house. (Tr 492).

Clinical psychologist James D. Larson tested and evaluated Dale Boyett. (Tr 4-9-504). Larson found Boyett's I.Q. to be in the average range, with a performance I.Q. of 103 and and full-scale I.Q. of 109. (Tr 495-496). Achievement wise, Dale scored in the twelfth grade or greater in reading and spelling and at the ninth grade level in arithmetic. (Tr 496). Larson concluded that although Boyett's academic history was sporadic, he did have the ability to achieve and perform. (Tr 496). Larson also did personality testing and interviewed Dale and his mother and father. (Tr 498-504).

Larson identified several significant events in Dale's life which shaped his emotional condition and contributed to his behavior. First, Larson noted that very early in Dale's life he had abnormal development problems such as sleep disturbances, hyperactivity and later developmental problems such as bed wetting. (Tr 505-507). Second, compounding the instability in the family due to his hyperactivity was the instability in his parents' marriage. (Tr 505). His father's absence, and later divorce from his mother at an early age for Dale, was of significance. (Tr 505). This generated problems with Dale's instability, running away, and problems in school. (Tr 505). Third, at age seven, Dale had developed a relationship with his mother's boyfriend, finally, he had a strong identification with a male father-figure. (Tr 508). This relationship ended very abruptly with no communication with Dale. (Tr 508). This was devastating emotionally to him as a child of 7-years-old. (Tr 508). Compounding this problem, as a third instance, was during the same time he was having this father-like relationship with

his mother's boyfriend, a teenage boy who lived nearby was also sexually molesting Dale. (Tr 507). Fourth, Dale continued to run away, both physically and emotionally by use of drugs and alcohol. Five or six admissions to drug rehabilitation programs proved unsuccessful. (Tr 509-512). On one of the run-away instances when he was 13 or 14, Dale was again sexually abused. (Tr 511-512). An older man picked him up, gave him alcohol and sexually abused him. (Tr 511-512). This occurred at a very sensitive time for his psycho-sexual development. (Tr 512). This was a time when sexual identification develops. (Tr 512). Dale found this homosexual contact to be very disgusting. (Tr 512).

Larson explained that the symptoms of anxiety and depression Boyett's suffered is common for people who have been sexually abused as children. (Tr 513). Such a person can have so much anxiety and inner-turmoil that they self-medicate by abusing drugs. (Tr 513). Children who are sexually abused are at high risk for depression and anxiety and for psychiatric hospitalization and drug abuse. (Tr 513). Other behavioral problems and accommodations made by persons who have been sexually abused as children show up in their personality profiling. (Tr 514). There is behavior such as over-control and hostility. (Tr 514). Larson did not find any indication of violent tendencies in Boyett's personality profile. (Tr 514-515). He would not expect Boyett to be the kind of person who would be consistently involved in crimes of violence. (Tr 515).

Larson was asked his opinion regarding Boyett's qualification for mental mitigating circumstances. He concluded that Boyett did suffer from an extreme mental or emotional

disturbance at the time of the crime. Boyett depressive disorder compounded by a long history of substance abuse came into play. (Tr 516). The fact that Boyett had not had any drugs for a couple of days prior to the incident would exacerbate his depression and anxiety problems. (Tr 516). He was also under a great deal of stress since he had just been kicked out of his father's apartment and was almost out of money. (Tr 516). This compounded his instability at the time of crime. (Tr 516). Also, the homosexual advances Hyter made stirred up a lot of the unresolved feelings about homosexuality and Boyett's emotional problems with his prior sexual abuse. (Tr 517). Larson also noted a number of mitigating factors such as Boyett's long history of alcohol and substance abuse, being an adult child of an alcoholic, an unstable family background, and the diagnosis of a major depressive disorder. (Tr 517-518). Larson said that Boyett was very remorseful over this incident. (Tr 518-519). Based on his academic skills and intellectual ability, Larson thought Boyett had good rehabilitation potential. (Tr 518-519).

A second clinical psychologist, Michael DeMaria, also examined Boyett. (Tr 528-531). DeMaria's particular area of expertise is child sexual abuse. (Tr 529). The purpose of his examination of Dale was to explore the question of his sexual development and identity and the sexual abuse issue. (Tr 531-533).

DeMaria found that Dale had experienced a great deal of abandonment from his father at the time of his parent's separation at age two or three. (Tr 533-534). Over Dale's developmental years, his father was absent or was not available.

(Tr 534). When Dale did see his father, his father was not able to communicate much love and acceptance. (Tr 534). Dale's stepfather was also rather authoritarian and did not develop a supportive father/son relationship with Dale. (Tr 534-535). One close relationship Dale had with a father figure lasted about a year-and-a-half, when he was six or seven years old. (Tr 535). When the man's relationship with Dale's mother ended, the relationship with Dale also ended very abruptly. (Tr 535). This kind of abandonment was very traumatic for a child in Dale's emotional development and age. Also during this period of time, when Dale was six or seven, he was sexually molested by a teenage boy who was a neighbor of his mother's boyfriend. (Tr 536-537). DeMaria explained that children of that age have no way of placing that kind of sexual experience in context, and it disrupts their sense of self-esteem and well-being. They have no way of dealing with their negative feelings about themselves. (Tr 538). It is easy for a child to be lead astray, and the child blames themselves for what happens. They feel a great deal of self-hate and shame. (Tr 538). It is not uncommon for children not to tell their parents about what happened. (Tr 538). DeMaria explained the "sexual abuse accommodations syndrome." The child experiences does not have a place in his memory system about sexuality. He had no way of putting such experiences in context, so the child puts it away. (Tr 539). Male child sexual abuse victims, who are abused by males, also have a difficult time exploring these feelings, since there is the cultural stigma connected with homosexuality. (Tr 540). Children who are abused by an older man at a young age start to self-question their own

sexual identity. (Tr 540). DeMaria said boys are much less likely to talk about sexual abuse incidents that occurred. (Tr 540-541).

Dale was also sexually abused again as a young teenager, around age 13. (Tr 536, 541-543). This incident occurred when Dale had run away from home. (Tr 541). An older male befriended him, was nice to him, gave him beer and alcohol, gave him a place to stay and gave him food. (Tr 541). Dale became drunk. (Tr 542). The man asked him if he had ever been paid for having sex and whether or not he had ever considered it. (Tr 542). Dale was lonely, confused, and scared and here was a chance of somebody helping him financially and with shelter. (Tr 542). The man asked Dale to perform oral sex and also performed oral sex on Dale. (Tr 542).

DeMaria explained that this type of sexual abuse occurring as a young teenager is extremely significant. (Tr 542). During the developmental period, early puberty, this kind of experience is traumatizing to the child since they are in the process of developing sexual identity. (Tr 542-543).

Dale described heterosexual relationships as being sporadic. (Tr 543). He had a difficult time developing a stable relationship with a girlfriend. (Tr 543). If the relationship became sexual, he had a hard time sustaining it. He felt vulnerable and scared. (Tr 543). His lack of self-esteem and fear of rejection created difficulties for him. (Tr 543).

The relationship Dale had with Billy Hyter was a complex one. (Tr 544-546). Considering Dale's background, lack of a stable father figure, having been sexually abused by older males

twice at critical developmental points in his life, his involvement with Billy Hyter was a grasping for a father figure in many ways. (Tr 544). Dale considered Billy Hyter someone that he cared about and respected. (Tr 544). He was an older man and became almost a father figure in some respects. (Tr 544). Dale enjoyed the intellectual discussions he had with Hyter, he enjoyed his company, he enjoyed the creative side that Billy Hyter had. (Tr 544). Dale was starving for this kind of adult male attention and interaction on a intellectual level. (Tr 544). He considered Billy Hyter an older companion and friend. (Tr 544). The fact that Hyter was homosexual created conflict in the relationship. (Tr 545). Hyter would compliment Dale on his mind and intellect, but then also showed strong, clear sexual interest in Dale. (Tr 545). Dale enjoyed the companionship, but he was also uneasy with the fact that Hyter wanted something else out of the relationship. (Tr 545). Hyter had a great deal of pornographic material, heterosexual, homosexual, and child pornography. (Tr 545). The relationship was conflicted. (Tr 545-546). Hyter also supplied Dale with drugs and alcohol which paralleled the other abuse situation Dale had encountered. (Tr 546). The aggressive sexual behavior, that Hyter performed oral sex on Dale while Dale was drunk, triggered the earlier emotional trauma from the prior sexual abuse situations. (Tr 546). Dale again was filled with a great deal of self-hatred, a great deal of shame that was part of his emotional experience. (Tr 546-547).

Dale's emotional state at the time of the shooting was fueled by these prior incidents of sexual abuse and his prior emotional state. (Tr 548). He was extremely affected by these

past issues of sexual abuse and the abandonment by his father. (Tr 549). Compounding the problems on that particular day was the fact that he had recently been kicked out of his father's house. (Tr 549). Additionally, Dale had been drinking and smoking marijuana and using LSD for a period of months prior to the shooting. (Tr 549). Then within the 24-hour period prior to the shooting, he had been "cold turkey" with no drugs. (Tr 549). He was out of money, desperate emotionally, his feelings tied up with the issue of the sexual abuse trauma of the past and oral sex having triggered the shame and the self-esteem problem from the past. All of these things came together to impact him on the day of the shooting. He became extremely agitated and very emotionally unstable. (Tr 549-550).

Dale also expressed extreme remorse over the shooting of Billy Hyter. (Tr 550). He explained a number of things that he valued about Hyter, the attention he had given him, the interest he had in art and the art he had in his house. (Tr 550). Dale was very remorseful about having taken Hyter's life. (Tr 550).

At the conclusion of the defense's case, the state presented nothing in rebuttal. (Tr 557-559).

The jury recommended a life sentence. (Tr 603).

SUMMARY OF ARGUMENT

1. During jury selection, the trial judge called the lawyers to the bench where challenges to the prospective jurors were made. Boyett was present in the courtroom during this process,

but he was not at the bench conferences where challenges were actually exercised. Boyett had the right under the United States and Florida Constitutions and Fla.R.Crim.P. 3.180 to be physically present at the immediate site where peremptory challenges are exercised. Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982); Coney v. State, 653 So.2d 1009 (Fla. 1995). The record is silent as to whether Boyett was advised of his right to be present at the site where challenges were exercised; as to whether he waived that right; as to whether counsel conferred with him regarding challenges; and as to any ratification of defense counsel's actions in making peremptory challenges. This error is not subject to a harmless error review, and Boyett seeks a new trial.

2. The trial judge erroneously found that the homicide qualified for the cold, calculated and premeditated aggravating circumstance. Three necessary elements which must be proven were not supported by the evidence. First, the evidence was insufficient to prove that Boyett intended to murder. There was no plan to kill. Second, the murder was not committed in a "cold" manner. This was an emotion charged killing. Boyett was emotionally unstable at the time of the shooting and he was angry and provoked by Hyter's sexually abusive behavior. Third, at the time of the killing, Boyett was acting with a pretense of moral or legal justification. He had confronted Hyter, but Hyter had grabbed a baseball bat and moved toward Boyett at the time of the fatal shot. The CCP circumstance was not proven beyond a reasonable doubt.

3. The trial court erred in failing to find, consider and properly weigh several statutory and nonstatutory mitigating circumstances. Evidence established the statutory mitigating circumstances of Boyett's extreme mental or emotional disturbance the time of the offense and his age of eighteen-years-old. Furthermore, evidence established several nonstatutory mitigating circumstances which the court did not find or improperly considered. The sentencing process was tainted, and Boyett's death sentence has been unconstitutionally imposed.

4. The jury recommended a life sentence in this case. In overriding the recommendation, the court failed to recognize that the numerous mitigating factors present constituted a reasonable basis for the jury's decision. The override was improper and must be reversed.

5. The trial judge ordered counsel for the State and counsel for the defense to present any written sentencing memoranda by the time of the sentencing hearing before the court. During this hearing, defense counsel submitted a written memorandum to the court in compliance with the court's earlier direction. The court, at that time, sua sponte gave the State seven additional days to file any written arguments. Defense counsel filed objections to the decision giving the State additional time. The extra time gave the State an unfair advantage by having the opportunity to review the defense memorandum and specifically rebut arguments presented in it -- an advantage which simultaneous submission of memoranda would not have afforded to either party. Additionally, the State was effectively given additional preparation time not given the

defense. In allowing the State seven additional days to file a sentencing memorandum, the trial court violated Boyett's rights to due process and a fair sentencing proceeding.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN NOT INSURING BOYETT'S CONSTITUTIONAL AND RULE RIGHTS TO BE PRESENT AT THE SITE WHERE PEREMPTORY CHALLENGES TO PROSPECTIVE JURORS WERE EXERCISED.

After counsel for the parties inquired of prospective jurors, the trial judge called the lawyers to the bench where challenges to the jurors were made. (Tr 185-198). Both cause challenges and peremptory challenges were made at the bench. (Tr 185-198). The prosecutor and defense counsel asked some additional questions of certain prospective jurors in order to facilitate a decision on challenges. (Tr 189, 191, 193-194, 196-197). However, the lawyers would return to the bench to exercise cause and peremptory challenges. (Tr 185-198). Boyett was present in the courtroom during this process, but he was not at the bench conferences where challenges were made. (Tr 185-198). The record is silent as to whether Boyett was advised of his right to be present at the site where challenges were exercised; as to whether he waived that right; as to whether counsel conferred with him regarding challenges; and as to any ratification of defense counsel's actions in making peremptory challenges. (Tr 185-198).

Boyett had the right under the United States and Florida Constitutions and Fla.R.Crim.P. 3.180 to be physically present at the immediate site where peremptory challenges are exercised. Art. I Secs. 9, 16 Fla.Const.; Amend. V, VI, XIV U.S. Const.; Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934).

Florida Rule of Criminal Procedure 3.180(a)(4) specifically provides:

(a) Presence of Defendant. In all prosecutions for crime the defendant shall be present.

* * *

(4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury;...

In Turner v. State, 530 So.2d 45 (Fla. 1987), this Court further stated:

We recognized in Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982), that the defendant has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). See also, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed.2d 562 (1975).

Florida Rule of Criminal procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.

* * *

A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary. Amazon v. State, 487 So.2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986); Peede v. State, 474 so.2d 808 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Ibid. at 47-49.

Recently, this Court revisited this issue in Coney v. State, 653 So.2d 1009 (Fla. 1995). After referencing Francis and Fla.R.Crim.P. 3.180(a)(4), this Court wrote:

We conclude that the rule means just what it says: The defendant has a right to by (sic) physically present at the immediate

site where pretrial juror challenges are exercised. See Francis. Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. See State v. Melendez, 244 So.2d 137 (Fla. 1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry. Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure. Our ruling today clarifying this issue is prospective only.

Juror challenges in the present case were exercised on two occasions: first, during a brief bench conference after prospective jurors had been polled concerning their willingness to impose death, and second, during a lengthy proceeding at the conclusion of voir dire. Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his presence or ratified the strikes.

Ibid. at 1013.²

²The prospective new rule is that the trial court must certify the defendant's acquiescence of the strikes and the voluntariness of the waiver. State v. Melendez, 244 So.2d 137 (Fla. 1971) had previously held that a defendant may ratify the action of counsel and proceedings occurring in his absence, while silence will not constitute a ratification. The holding in Coney also otherwise reaffirms the legal principles of Turner and Francis.

The instant case is a pipeline case on appeal, and the announced rule in Coney that the trial court must certify the defendant's approval of the strikes proper inquiry and must certify the accused's waiver of his right to be present during the challenging of the jury must be applied in this case. The prospective rules regarding certification set forth in Coney was decided. Jarrett v. State, 20 Fla. L. Weekly D979, D980 (Fla.

Here, Boyett was not "physically present at the immediate site where pretrial juror challenges [were] made." Coney v. State, at 1013. This was error. Coney; Francis.; see, also, Waters v. State, 486 so.2d 614 (Fla. 5th DCA 1986) (the term "presence" as used within Rule 3.180(a) means that a defendant must be allowed to view and not merely hear the evidence against him). The record is silent on the questions of whether Boyett waived his right to be present, or ratified the actions of his attorney in his absence. A defendant may waive his presence, or adopt his attorney's actions during his absence, provided the waiver or acquiescence is knowingly, intelligently, and voluntarily made. Turner, 530 So.2d 45, 49. However, silence is insufficient to demonstrate a waiver of the right to be present. Ibid. An involuntary absence from the site where challenges are exercised, without waiver or subsequent ratification, is reversible error. See Francis, 413 So.2d at 1179.

This violation of Boyett's right to be physically present at the bench during this critical stage is not harmless. In Garcia v. State, 492 So.2d 360 (Fla.), cert. den., 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986), this Court noted that,

...while Rule 3.180(a) determines that the involuntary absence of the defendant is error in certain enumerated circumstances, it is the constitutional question of whether fundamental fairness has been thwarted which determines whether the error is reversible. In other words, when the defendant is

1st DCA April 21, 1995). The application of the rules is also required by Smith v. State, 598 So.2d 1063 (Fla. 1992), and State v. Brown, 20 Fla. L. Weekly S206, S207 (Fla. May 4, 1995). Consequently, the prospective portion of the rule in Coney is applicable to this pipeline case. Jarrett; Smith; Brown.

involuntarily absent during a crucial stage of adversary proceedings contrary to Rule 3.180(a), the burden is on the state to show beyond a reasonable doubt that the error (absence) was not prejudicial.

Ibid. at 364 (citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

Addressing whether the the defendant's absence from the site where peremptory challenges were exercised was harmless, this Court, in Francis, said:

The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally though irrelevant to legal proceedings or official action.....

Francis, 413 So.2d at 1178-1179.

The defendant in Francis was not physically present where his attorney exercised his peremptory challenges, and he could not actively participate. This Court was "unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised." Ibid. at 1179. Accordingly this Court concluded that Francis' "involuntary absence without waiver by consent or subsequent ratification was reversible error and that Francis is entitled to a new trial."

Ibid.; cf. Coney, 653 So.2d 1009, (supreme court finds violation of right to be present harmless where only causal challenges, not peremptory challenges, were exercised outside the defendant's immediate physical presence).

The same result should be reached here. Boyett was not physically present at the immediate site where his lawyer exercised his peremptory challenges, but rather was seated at counsel table where he could not actively participate in the "arbitrary and capricious" selection process himself. This was error. Francis; Coney. Further, the record is silent on whether Boyett waived his right to be physically present or ratified the actions of his attorney in his absence. This Court should reverse Boyett's conviction and remand his case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In his finding of fact to support the death sentence, the trial judge found as an aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 262-263) Sec. 921.141(5)(i) Fla. Stat. The court wrote,

The capital felony was committed in a cold, calculated and premeditated manner without any pretence[sic] of moral or legal justification. The evidence established beyond a reasonable doubt that the defendant devised a plan over the course of several weeks to enter the victim's home and kill him. Defendant surveilled the surrounding area, told a companion of his plan, stole the murder weapon in another burglary and admitted to law enforcement authorities shortly after the shooting that it was intentional and purposeful. Evidence is totally lacking that the shooting was impulsive or the product of sudden provocation. The Court can find no evidence or moral or legal justification for this murder and defendant in he recorded admission intended to offer none. This factor has been legally established by the evidence. Brown v. State, 565 So.2d 304, 308 (Fla. 1990); Porter v. State, 564 So.2d 1060 (Fla. 1990).

(R 262)

The premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the premeditation element for first degree murder. See, e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla 1986); Preston v. State, 444 So.2d 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove

beyond a reasonable doubt that a heightened form of pre-meditation existed--one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). There must be "...a careful plan or prearranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987). This Court recently outlined in Jackson v. State, 648 So.2d 85 (Fla. 1994), and Walls v. State, 641 So.2d 381 (Fla. 1994), the elements which must be established before the CCP circumstance is proved:

Under Jackson, there are four elements that must exist to establish cold calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." Jackson[648 So.2d at 89] ...

* * * *

Second, Jackson requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." Jackson,

* * * *

Finally, Jackson states that the murder must have "no pretense of moral or legal justification." ... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide ...

Walls, at 387-388. Contrary to the judge's findings in this case, the CCP factor was not proven beyond a reasonable doubt.

Boyett Did Not Plan To Kill

The evidence shows that Boyett did not plan to kill Hyter. There was no prearranged plan to kill. The murder was not calculated. A prearranged plan to commit some other felony besides murder does not qualify a murder for the CCP circumstance. See, e.g., Lawrence v. State, 614 So.2d 1092 (Fla. 1993); Rivera v. State, 561 So.2d 536 (Fla. 1990); Jackson v. State, 498 So.2d 536 (Fla. 1986). Evidence supports the accuracy of Boyett's confession in which he stated that he intended to shoot Bill Hyter, but he did not intend to kill him.

Although Boyett had told his friend, John Blackman, before the shooting about the plan and used both the terms "shoot" and "kill" (Tr 285, 287, 293), Boyett's actions showed his intent was to shoot -- not kill. Hyter was shot only once in the arm. (Tr 263) Boyett could have pursued Hyter and shot him again if his intent had been to kill. After the shooting, Boyett told Blackman he shot Hyter after Hyter picked up a baseball bat and came toward him. (Tr 288-289) Boyett said he first shot toward Hyter's leg, but the shot missed. (Tr 307) A mark on the brick fireplace and an expended bullet crime scene investigators found corroborate Boyett's statement. (Tr 254) The officer who arrested Boyett testified that Boyett did not know Hyter had died until he told him. (Tr 250)

The Homicide Was Not "Cold"

The shooting was not committed in a "cold" manner. This offense occurred while Boyett was impaired emotionally due to his chronic mental problems and from the stress of events prior to

the shooting. Boyett not only suffered from his long-standing mental and emotional problems and drug addiction, but prior to the shooting, a number of additional situational stressors rendered him extremely unstable emotionally. First, Boyett was angry about Hyter's sexually abusive behavior. (Tr 247-248, 314-315) This anger was fueled by Boyett's history of being sexually abused in a similar manner at different times in his childhood. (Tr 517, 545-550) Second, Boyett was homeless and had little money. His father had just kicked him out of the house because he suspected him of stealing. (Tr 485-486) Boyett was also told by his father that he could not go to his aunt's house where he had been residing while his father was at sea. (Tr 485-486) Third, the mental health experts described Boyett's drug use as a form of self-medication for his underlying mental and emotional problems. (Tr 548) Boyett was without drugs for a couple of days prior to the homicide which would have exacerbated Boyett's depression and anxiety problems. (Tr 516, 549) Boyett's mental state at the time of the shooting was not one of cool, calm reflection. He was emotionally unstable and angry. This negates the "cold" state of mind necessary for the CCP circumstance. E.g., Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992) (homicide prompted by intense emotion not CCP, even though homicide was calculated); Santos v. State, 591 So.2d 160, 162-163 (Fla. 1991) (same); Garron v. State, 528 So.2d 353, 360-361 (Fla. 1988) (killing during confrontation and aroused emotions not CCP).

A Pretense Of Moral Or Legal Justification Was Present

Dale Boyett confessed to the manner in which the killing occurred. (Tr 293-319) He denied any intent to kill Bill Hyter, and in fact, he did not know Hyter was dead until so advised by the arresting officer. (Tr 311-313) In his confession, Boyett admitted he was there to hurt Hyter. Boyett intended to shoot Hyter, as he said in the confession, to make Hyter miserable for the sexual abuse he had committed. (Tr 311-313) However, Boyett did not fire the gun until Hyter grabbed a baseball bat. (Tr 307) Even then, Boyett first fired toward Hyter's leg and missed. (Tr 307) When Hyter continued toward him with the bat, Boyett fired toward Hyter's chest area. (Tr 307) No evidence refutes Boyett's statement about how the crime occurred. There was evidence that Hyter had engaged in a violent fight with Boyett several weeks earlier because of Hyter's sexual advances. (Tr 309, 318-319) An aggressive act such as coming toward Boyett with a bat was not out of character for Hyter. Hyter had a baseball bat with him when he left his house after the shooting. (Tr 230) The fireplace revealed the expended bullet from a missed shot. (Tr 254) Boyett's statement establishes a pretense of moral or legal justification -- a colorable claim that the homicide occurred in self-defense.

This Court's decision in Cannady v. State, 427 So.2d 723 (Fla. 1983) is on point. Cannady was convicted of the kidnapping and murder of a robbery victim. In his confession, Cannady admitted he drove the victim to a remote area and shot him. However, in the confession, Cannady said he never intended to

kill the victim. He said he killed the victim because the victim "jumped at him." The trial judge did not believe Cannady's statement about why the killing occurred because the victim was a quiet minister and Cannady shot him five times. However, nothing refuted Cannady's version of the events. This Court reversed the finding of the CCP aggravating circumstance stating:

The only direct evidence of the manner in which the murder was committed was appellant's own statements. When he first began incriminating himself, he repeatedly denied that he meant to kill Carrier. During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of moral or legal justification, protecting his own life.

The trial judge expressed disbelief in appellant's statements because the victim was a quiet, unassuming minister and because appellant shot him five times. Though these factors may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

427 So.2d at 730. In Banda v. State, 536 So.2d 221 (Fla 1988), this Court reaffirmed that a evidence of pretense of moral or legal justification can be established solely on the basis of the defendant's statement when no other evidence refutes it.

Even though the trial judge chose not to believe Boyett's statement about how the crime happened, the confession is consistent with other facts in the case and it is not refuted. Contrary to Cannady's statement, Boyett's statement is corroborated and believable. The evidence proved a pretense of a legal justification -- self defense. The CCP aggravating

circumstance was not proven and should not have been considered in sentencing.

The trial judge's finding the murder qualified for the CCP aggravating circumstance is erroneous. The inclusion of this circumstance in the sentencing equation renders the death sentence unconstitutional. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U. S. Const. Boyett asks this Court to reverse his death sentence.

ISSUE III

THE TRIAL COURT ERRED IN FAILING TO FIND, CONSIDER AND PROPERLY WEIGH STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE.

The constitutionality of the death sentencing process depends, in part, upon the sentencer's complete and fair consideration of mitigating factors. Art. I, Secs. 9, 17, Fla. Const.; Amends. VIII, XIV U.S. Const.; Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978). In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court acknowledged the command of Lockett and Eddings and defined the trial judge's duty to find and consider mitigating evidence:

...we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding had been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534.

Later, in Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court clarified the trial judge's responsibility to find mitigating circumstances when supported by the evidence. This Court wrote,

When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. See, Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in natureThe court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

Campbell, at 419-420. (footnotes omitted) A short time later, this Court reiterated this point in Nibert v. State, 574 So.2d 1059 (Fla. 1990):

A mitigating circumstance must be "reasonably established by the evidence." Campbell v. State, No. 72,622, slip op. at 9 (Fla. June 14, 1990); Fla. Std. Jury Instr. (Crim) at 81; see, also, Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert., denied, 484 U.S. 1020 (1988). "[W]here uncontroverted evidence of a mitigating factor has been presented, a reasonable quantum of competent proof is required before the factor can be said to have been established." Campbell, slip op. at 9 n.5. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved....

Nibert, at 1061-1062.

In Santos v. State, 591 So.2d 160 (Fla.1991), this court reaffirmed Rogers and Campbell, adding that "Mitigating evidence must at least be weighted in the balance if the record discloses

it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." 591 So.2d at 164. This court, citing the mandate of the United States Supreme Court, indicated its willingness to examine the record to find mitigation the trial court had ignored:

The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, 111 S.Ct. 731 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.

Ibid. "[T]he trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record" Wickham v. State, 593 So.2d 191 (Fla. 1991) (citing Cheshire v. State, 568 So.2d 908 (Fla. 1990) and Rogers v. State, 511 So.2d 526 (Fla. 1987)).

The trial court failed to follow these principles when evaluating the mitigating evidence and when making decisions regarding the finding and weighing mitigating the factors. This failure has rendered Boyett's death sentence unconstitutionally imposed.

STATUTORY MITIGATING CIRCUMSTANCES

A. The Trial Court Should Have Found That Boyett Was Under The Influence Of An Extreme Mental Or Emotional Disturbance At The Time Of The Crime. Sec. 921.141(6)(b), Fla. Stat.

The two mental health experts who testified both reached the conclusion that Boyett was under the influence of an extreme mental or emotional disturbance at the time of the homicide. (Tr 515-517, 548-554) No evidence was presented by the State to rebut this testimony and the expert's conclusions. (Tr 557-559) Although this unrebutted expert testimony supported the mitigating circumstance, the trial court rejected the factor and said,

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)

(R 262) The court's rejection of this mitigating circumstance was wrong.

James Larson testified that Boyett did suffer from an extreme mental or emotional disturbance at the time of the crime. Boyett's depressive disorder compounded by a long history of substance abuse was an important variable. (Tr 516). The fact that Boyett had not had any drugs for a couple of days prior to the incident exacerbated the depression and anxiety problems.

(Tr 516). He was also under a great deal of stress since he had just been kicked out of his father's apartment and was almost out of money. (Tr 516). This compounded his emotional instability at the time of crime. (Tr 516). Finally, Larson concluded that the homosexual advances Hyter made stirred up a lot of the unresolved feelings Boyett had about homosexuality and his emotional problems with his prior sexual abuse. (Tr 517).

Michael DeMaria testified that Dale's emotional state at the time of the shooting was fueled by his childhood sexual abuse and his emotional history. (Tr 548). He was extremely affected by past issues concerning sexual abuse and abandonment by his father. (Tr 549). Compounding the problems on that particular day was the fact that he had recently been kicked out of his father's house. (Tr 549). Additionally, within the 24-hour period prior to the shooting, Boyett had been cold turkey with no drugs after he had been drinking, smoking marijuana and using LSD for a period of months prior to that time. (Tr 549). He was out of money, desperate emotionally, and his feelings were tied up with the historical issues of the sexual abuse trauma. The oral sex again triggered the shame and the self-esteem problem from the past. All of these intense emotions came together to affect him on the day of the shooting. He was extremely agitated and very emotionally unstable. (Tr 549-550).

Rejecting this mitigating circumstance, the court merely said some unidentified testimony and some unidentified witnesses refuted the experts' conclusions. (R 262) The State presented nothing to rebut the opinions of the two mental health experts.

Consequently, the trial judge could not legally reject the mitigating circumstances founded on unrefuted expert testimony. Knowles v. State, 632 So.2d 62, 67 (Fla. 1993) (trial court erred in not finding statutory mental mitigating circumstances where evidence state presented did not refute defense experts' opinions).

The statutory mitigating circumstance should have been found, weighed and considered in sentencing. Boyett now asks this Court to reverse his death sentence.

B. The Trial Court Should Have Found Boyett's Age Of Eighteen At The Time Of The Homicide As A Statutory Mitigating Circumstance. Sec. 921.141(6)(g), Fla. Stat.

The trial court rejected Boyett's age of eighteen at the time of the crime as a mitigating circumstance. (Tr 263) Reasons for the judge's rejection of this mitigating factor appeared in the sentencing order as follows:

The defendant's age at the time of the commission of the offense, eighteen years, should not be deemed a statutory mitigating factor.³ 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).

(R 263)

³ The trial judge also failed to consider Boyett's age as a nonstatutory mitigating circumstance. (R 263-265)

Dale Boyett was a few months beyond his eighteenth birthday at the time of this crime. (R 293, Tr 431-432) He was no longer legally a minor. Therefore, the trial court was not legally bound to find this statutory mitigating circumstance under this Court's decision in Ellis v. State, 622 So.2d 991 (Fla. 1993). However, in evaluating this mitigating circumstance, the court, in exercising its discretion, was bound to properly evaluate the evidence relating to Boyett's degree of maturity. In Ellis, this Court held that the age mitigating circumstance must be found for seventeen year-olds, but the trial court has discretion to assign weight to the circumstance if there is evidence of unusual maturity. In the case of eighteen-year-olds, the evidence of unusual maturity should be a test for the propriety of the sentencing court's outright rejection of age as a mitigating circumstance.

In this case, the trial court's finding that Boyett exhibited normal maturity for his age is belied by the evidence. First, the court stated, "The defendant was shown to be of normal intelligence and possessed of some education." (R 263) The evidence did show that Boyett had an IQ in the normal range and finished his GED while in jail awaiting trial. (R 264) However, his school history was extremely poor. Second, the court said, "While the defendant may have been institutionalized because of his behavior, his ability to function and rationalize on a routine basis was not substantially impaired." (R 263) This conclusion is incorrect. Boyett's mental and emotional problems dramatically interferred with his functioning. Until a few days

before the shooting, he lived with his father. His employment was sporadic. Third, the court said, "[Boyett] exhibited normal maturity for his age and displayed a good deal of independence." (R 263) The mental health experts described Boyett as extremely unstable emotionally with unresolved, deep seated issues concerning being abandoned by his father and prior sexual abuse. He suffered from a major depressive and anxiety disorder which is a common post-traumatic stress symptom resulting from his being sexually abused as a child. (Tr 494-519, 528-550) The trial court's conclusions about Boyett's maturity and ability to function as a rational adult find no foundation in the testimony presented at the penalty phase of this trial.

The evidence did not establish that Boyett possessed normal maturity or adequate functioning for his age. Conclusions the trial court reached to the contrary are unsupported. Dale Boyett's age and maturity level qualified him for the statutory mitigating circumstance. The trial court erred in not finding or considering age as either a statutory or nonstatutory mitigating circumstance.

NONSTATUTORY MITIGATING CIRCUMSTANCES

The defense presented twelve nonstatutory mitigating factors for the court's consideration. In his findings, the trial judge found five of the circumstances established by the evidence. (R 263) The court merged two factors with one or more of the five previously found to exist. (R 264) Three of the five factors the court deemed proven were given "little or no weight." (R 264-265)

The remaining nonstatutory factors were rejected. (R 262-265) Additionally, as argued above, the trial court also refused to consider Boyett's age as a nonstatutory mitigating circumstance. Regarding presented nonstatutory mitigation, the judge findings were improper in several respects::

1. Boyett's Cooperation With Law Enforcement

The court rejected Boyett's cooperation with the investigation of this offense as a mitigating circumstance:

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.

(R 263-264) This finding ignored the fact that Boyett immediately confessed to the crime, lead investigators to the gun and told them of a second shot resulting in the recovery of an expended bullet.

2. Boyett Has A Long-Term Substance Abuse Problem

Although the court acknowledged Boyetts' drug problem, the judge improperly failed to understand the connection between the problem and the offense. The court wrote,

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.

(R 264)

Dr. DeMaria described Boyett's drug usage as self-medication. (Tr 548) He used drugs to treat the depression and anxiety he had as the result of his post-traumatic stress disorder. Boyett's drug usage was a mask for his other mental and emotional problems. Because he had not been able to secure drugs for a couple of days before the shooting, Boyett's emotional instabiltiy was exacerbated. He was involuntarily off drugs -- cold-turkey. Consequently, although not taking drugs at the time of the offense, Boyett's long-term drug usage was contributing factor. (Tr 549)

The court's finding is also unclear as to whether the court found the circumstance or not. By stating the circumstance "derserved little or no weight", this could mean the factor was not found to exist. A finding of "no weight" really means the circumstance was not found to exist. However, since the court mentions this factor as found later in the order, the court must have intended to find it. This does present a further problem. As a matter of law, the court must give any found circumstance some weight. In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court clearly stated, "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." Ibid. at 420. Consequently, the "no weight" alternative is inconsistent with a finding that a mitigating factor is proved. It cannot be determined if the court properly gave the factor some weight or improperly gave the factor no weight.

3. Boyett Was Sexually Abused As A Child

The court found this mitigating circumstance. In his order, the judge wrote,

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

(R 264). In view of the court's improper findings regarding the statutory mitigating circumstance concerning Boyett's mental condition, the term "due weight" as used here leaves a question about how the court considered this factor. Furthermore, as will be discussed under the section dealing with factor number 12, infra., the trial judge actually uses Boyett's childhood sexual abuse experiences against him.

4 & 5. Boyett Exhibited Good Conduct In Jail And Completed His GED

The court stated that these factors were proven. However, since they were given "little or no weight" it is unclear whether the court properly gave the circumstances some weight as legally required. E.g., Campbell. The order reads:

4. Defendant 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.

(R 264).

6. Boyett Expressed Remorse For The Killing

The trial judge found this mitigating circumstance but decided it deserved little 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 the Court addressed this issue at sentencing hearing. Defendant's explanation and statement lacks credibility and this factor is given little weight.

(R 264).

Boyett's mother and both mental health experts testified that Dale was extremely remorseful for the death of Bill Hyter.

(Tr 471-472, 517-518, 550)

7. Boyett's Prior Mental Health Problems

Regarding this circumstance, the court stated:

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.

(R 264). Merging this factor with Boyett's substance abuse (factor #2) and sexual abuse (factor #3) history, the court created the same question about whether this factor was properly found and weighed. The court had given Boyett's substance abuse "little or no weight" and his sexual abuse "due weight."

8. The Killing Was A Reaction To The Victim's Aggressive Behavior

Rejecting this factor completely, the judge wrote:

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.

(R 264-265). The evidence produced at trial did not refute Boyett's confession regarding the victim's actions and Boyett's reaction. In Issue II, supra., the pertinent facts are discussed under the heading concerning the issue of whether a pretense of moral or legal justification existed which negated the CCP aggravating circumstance.

9. Boyett's Artistic Talent

Apparently, the court rejected Boyett's artistic talent as a mitigating circumstance. In the portion of the order where the judge summarized his findings, this numbered factor was not listed. However, the judge discusses this factor and says, "This Court accords no weight to this factor." This "no weight" wording has been used regarding other factors where the court said the factor was proven. (see, factor nos. 2, 4, 5, & 7, above). Also, during the sentencing hearing when this factor was presented to the court, the judge responded drawing parallels to Hilter's artistic talent:

THE COURT: Hitler was great artist.

* * * *

THE COURT: Let me restate it. I said Hitler was a great artist. Let me say that Hilter thought he was a great artist and it was known that he did possess some artistic ability, but what -- how does that lend itself to the Court's consideration of this circumstance as a mitigating factor?

(R 167-168) The sentencing order stated:

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.

(R 265) This finding did not consider the testimony of the psychologists that they noted Boyett had an artistic talent. (Tr 518-519, 550-553)

10. Boyett Had An Unstable, Broken Family Life

The court found this circumstance:

10. Defendant had an unstable, broken family life. This factor has been established and will be given due weight by the Court.

(R 265).

11. Boyett's Potential For Rehabilitation

Rejecting this circumstance, the court wrote:

11. 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.

(R 265). The court's discussion completely ignores the unrefuted testimony of the mental health experts regarding Boyett's potential for rehabilitation. James Larson stated that his assessment of Boyett's personality showed him not to be a person with violent tendencies. (Tr 514-515) Additionally, Boyett possessed average intellect, the ability to perform academically, and artistic talent. (Tr 518-519)

12. Boyett's Relationship To The Victim

Dr. DeMaria explained the complexities of the relationship Boyett had with Bill Hyter. (Tr 544-547) Considering Dale's background, his involvement with Billy Hyter was a grasping for a father figure. (Tr 544) Dale lacked of a stable father figure. (Tr 544). Dale considered Billy Hyter someone that he cared about and respected. (Tr 544). He was an older man and became almost the father figure in some respects. (Tr 544). Dale enjoyed the intellectual discussions he had with Hyter, he enjoyed his company, he enjoyed the creative side that Billy Hyter had. (Tr 544). Dale was starving for this kind of adult male attention and interaction on a intellectual level. (Tr 544). He considered Hyter an older companion and friend. (Tr 544). The fact that Hyter was homosexual created conflict in the relationship. (Tr 545). Hyter would compliment Dale on his mind and intellect, but then also showed strong, clear sexual interest in Dale. (Tr 545). Dale enjoyed the companionship but was also uneasy with the fact that Hyter wanted something else out of the relationship. (Tr 545). Hyter had a great deal of pornographic material, heterosexual, homosexual, and child pornography. (Tr 545). The relationship was conflicted. (Tr 545-546). Hyter also supplied Dale with drugs and alcohol which paralleled the other abuse situations Dale had encountered. (Tr 546). The aggressive sexual abuse that Hyter perpetrated on Dale, oral sex when Dale was drunk, triggered the earlier emotional trauma from the prior sexual abuse situations. (Tr 546). Having been sexually abused by older males twice at critical developmental points in his life, Dale emotions were again triggered. He was filled with a

great deal of self-hatred and a great deal of shame. (Tr 546-547)

In rejecting this factor as a mitigating circumstance, the judge wrote:

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.

(R 265)

The trial judge used the fact of Dale's prior victimization against him in rejecting this circumstance! There was no evidence of Dale having prior homosexual encounters except where older males sexually abused him when he was seven and thirteen. Amazingly, the trial judge deems prior childhood sexual abuse to be a factor which should desensitize the person from reacting when abused in similar fashion at a later time. As Dr. DeMaria's testimony demonstrates, just the opposite occurred -- Hyter's sexual abuse of Dale released some of the repressed anger and intense emotions Dale had as a result of the prior abuse.

The trial court has committed several errors concerning the evaluation, finding and weighing of the mitigation present in this case. These errors were fatal to the fairness of the sentencing process in this case. Boyett asks this Court to reverse his death sentence.

ISSUE IV

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF A SENTENCE OF LIFE IN PRISON AND IN IMPOSING A DEATH SENTENCE SINCE VALID MITIGATING CIRCUMSTANCES WERE ESTABLISHED WHICH FORMED A REASONABLE BASIS FOR THE JURY'S SENTENCING DECISION.

A jury's recommendation of life imprisonment must be given great weight, and

In order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). If mitigating evidence provides any reasonable basis upon which the jury might have relied, the trial judge must impose a life sentence in accordance with the recommendation. E.g., Morris v. State, 557 So.2d 27 (Fla. 1990); Cochran v. State, 547 So.2d 928 (Fla. 1989); Fead v. State, 512 So.2d 176, 178 (Fla. 1987); Ferry v. State, 507 So.2d 1337 (Fla. 1987). This Court has said that a trial court's sentence of death over a jury's recommendation of life will be affirmed only where the jury's decision is unreasonable. McCrae v. State, 582 So.2d 613 (Fla. 1991); Carter v. State, 560 So.2d 1166 (Fla. 1990). The fact that the sentencing judge disagrees with the jury's sentencing decision does not authorize an override and the imposition of a death sentence. Stevens v. State, 552 So.2d 1082 (Fla. 1989); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Rivers v. State, 458 So.2d 762, 765 (Fla. 1984). Only one valid aggravating circumstance was established -- the homicide occurred during the commission of a burglary. Several mitigating circumstances were established by

the evidence, and even though the sentencing judge concluded otherwise, the jury's decision was reasonably based on these circumstances.

The trial court improperly overrode the jury's life recommendation. In his sentencing order, the judge wrote his reasons for overriding the jury's recommendation:

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 circumstances or sympathy for a youthful defendant whose victim was a 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).

The court's reasoning is flawed in several respects. As presented in Issue II, supra., the CCP aggravating circumstance was improperly found. Second, in Issue III, supra., the problems with the court's findings regarding mitigating circumstances are explained. Contrary to the court's statements, more than "minor, non-statutory" mitigating circumstances exist for a foundation for the jury's recommendation. (See, Issue III, supra. for a discussion of the mitigating circumstances) As for the court's statement that a death sentence is not proportionally unwarranted, the very case the judge relied upon is easily

distinguished because the defendant in that case had a previous conviction fo first degree murder as an aggravating factor. Freeman v. State, 563 So.2d at 76-77. Several significant mitigating circumstances stand out as compelling reasons for the jury's decision to recommend a life sentence:

1. The Homicide Was Not Intentional

Dale Boyett did not intend to kill Bill Hyter. Dale's confession and actions support this position. Furthermore, the physical evidence support's Dale's confession. While there was sufficient evidence from which the jury could have found the murder was premeditated, there was also strong evidence that this was a felony murder which did not include an intentional killing. (See, Issue II, supra. for a further discussion of evidence on this point) Boyett's request for specific verdict forms during the guilt phase was denied. (Tr 350) As a result, this Court does not have the benifit of an express statement of the basis for the jury's verdict. The jury verdict form provided only one choice for guilt of first degree murder as premeditated and/or felony murder. (R 137, Tr 427) However, based on the evidence, the jury may have reasonably based its guilty verdict on a felony murder theory only.

This Court has recognized the lack of an intent to kill to be a reasonable basis for a jury's recommendation of life. In Norris v. State, 429 So.2d 688 (Fla. 1983), the State failed to prove the defendant intended to kill the victim whom he attacked during a burglary. The jury convicted Norris of felony murder

and recommended a life sentence. Reversing the judge's override of the recommendation, this Court said the lack of an intent to kill, coupled with the defendant's drug and alcohol problems, were reasonable factors for the jury to recommend life. Ibid. at 690. In Hawkins v. State, 436 So.2d 44 (Fla. 1983), the jury convicted the defendant of felony murders for the deaths of two robbery victims and recommended life. The evidence suggested that Hawkins was not the triggerman in the homicides even though present at the time of the shootings. This Court stated that the jury's verdict expressly rejecting premeditation was consistent with the jury's acceptance of this evidence which would form a reasonable basis for a life sentence. Ibid. at 47. In DuBoise v. State, 520 So.2d 260 (Fla. 1988), evidence showed that he fully participated in the robbery and sexual battery of the victim and did nothing to prevent his co-perpetrators from beating her to death. This Court first held that DuBoise was death eligible under Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). However, DuBoise's death sentence was reversed since the jury could have reasonably based its decision to recommend life on DuBoise's lack of intent to kill and his relative culpability. Ibid. at 265-266.

Intent to kill is a significant fact in determining the appropriateness of a death sentence. See, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The life recommendation was reasonably based on this fact, and the trial court erred in overriding it.

2. Boyett's Mental Impairments, Prior Childhood Sexual Abuse And Drug Addiction

This Court held that a trial judge is required to find mitigating circumstances and to place them into the sentencing equation when the evidence establishing them is unrefuted. Nibert v. State, 574 So.2d 1059, 1061-1062 (Fla. 1990); Campbell v. State, 571 So.2d 415 (Fla. 1990). The trial judge failed to follow this mandate. See, Issue III, supra. Boyett suffered from an extreme mental or emotional disburance at the time of the crime and the statutory mitigating circumstance should have been found by the court. Mitigating circumstances concerning Dale's mental impairment were present and compelling. See, Issue III, supra.

Even though the sentencing judge concluded Boyett's mental condition was insufficient to support the jury's recommendation, the jury did not ignore these viable mitigating circumstances. These factors provide a reasonable basis for the jury's life recommendation. Even if the judge had not been legally incorrect in his decision rejecting mental mitigation in this case, the jury was free to give the evidence greater weight. Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Robinson v. State, 487 So.2d 1040, 1043 (Fla. 1986). The court was not free to substitute its judgment concerning the evidence and the appropriate sentence merely because the judge disagreed with the jury. Rivers, 458 So.2d at 765. Boyett's mental and emotional impairments were a reasonable foundation for the jury's recommendation.

3. Boyett's Age At The Time Of The Offense

Dale Boyett was eighteen-years-old at the time of this homicide. This Court has held that a death sentence is constitutionally impermissible for an offender who is sixteen or younger at the time of the crime. Allen v. State, 636 So.2d 495 (Fla. 1994). Furthermore, this Court has held that an offender who is over sixteen but under eighteen is entitled, as a matter of law, to the age mitigating circumstance. Sec. 921.141(6)(g), Fla. Stat., Ellis v. State, 622 So.2d 991 (Fla. 1993). Although Boyett was eighteen and not entitled to the mitigating circumstance as a matter of law, the jury certainly could have reasonably relied upon Dale's youth in recommending a life sentence. Even though the judge's opinion concerning the mitigating factor differed, see, Issue III, supra., the jury's recommendation could have been reasonably based on this circumstance. Esty v. State, 642 So.2d 1074 (Fla. 1994) (jury's life recommendation reasonably based on defendant's age of eighteen)

4. Boyett's Conflicted Relationship With The Victim

This factor has been discussed in Issue III, supra. Although the judge chose to reject this as a mitigating factor, the jury could have reasonably relied upon this variable to justify a life recommendation.

5. Boyett's Cooperation With Law Enforcement And Remorse For The Offense

This factor has also been discussed in Issue III, supra. Again, the jury could have reasonably disagreed with the trial judge's evaluation of these factors.

Boyett has been sentenced to death over a jury's recommendation of life in violation of his constitutional rights. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. He urges this Court to reverse his death sentence with directions to impose a life sentence in accordance with the jury's sentencing recommendation.

ISSUE V

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO FILE ITS SENTENCING MEMORANDUM LATE, AFTER THE DATE SET FOR BOTH THE STATE AND THE DEFENSE TO FILE, WHICH GAVE THE STATE THE UNFAIR ADVANTAGE OF BEING ABLE TO INCLUDE RESPONSES TO THE DEFENSE MEMORADUM WHICH HAD BEEN TIMELY FILED.

At the conclusion of the penalty phase of the trial, the trial judge scheduled a sentencing hearing for March 30, 1993. (Tr 604) The court ordered a presentence investigation returnable on that date. (Tr 604) Additionally, the court stated to counsel, "I expect both sides to submit to me any written argument and sentencing memoranda concerning the sentence to be imposed." (Tr 604)

The sentencing hearing was rescheduled for March 31. (R 148-189) During this hearing, defense counsel submitted a written memorandum to the court in compliance with the court's earlier direction. (R 182) (SR 283-302) The court, at that time, sua sponte gave the State seven additional days to file any written arguments. (R 182) The following day, defense counsel filed a written objection to the additional time given the State to file its memorandum. (R 190-192) In the pleading, defense counsel complained that the additional time gave the State an unfair advantage. First, the State had the opportunity to review the defense memorandum and specifically rebut arguments presented in it -- an advantage which simultaneous submission of memoranda would not have afforded to either party. Second, the State was effectively given additional preparation time not given the defense. (R 190-192) The State filed its memoradum on April 7,

1993. (R 194-201) Defense counsel filed a response to the State's memorandum on April 8, 1993. (R 202-203)

In allowing the State seven additional days to file a sentencing memorandum, the trial court violated Boyett's rights to due process and a fair sentencing proceeding. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VIII, XIV U.S. Const. Initially, Boyett was prejudiced because the trial court's decision changed the procedures in the middle of the process. The first directive from the court was for parties to file written memoranda by the date of the sentencing hearing. The ruling giving the State more time changed the order of argument from a simultaneous submission to one where the State had the advantage of proceeding second. Boyett correctly followed the court's directive to file any written arguments by the day set for the sentencing hearing. This was done with the understanding that both parties would file memoranda at the same time. Boyett's memorandum was prepared with this understanding in mind. However, instead of simultaneous arguments, the State gained the unfair advantage of arguing second with the ability to specifically craft arguments to rebut defense positions.

Although there is no specific rule governing the order of submission of written sentencing memoranda, Fla. R. Crim. P. 3.780 is instructive. This rule provides for the order of argument in the penalty phase of a capital trial and directs that the state will present the first argument:

(c) Argument. Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument

first.
Fla. R. Crim. P. 3.780(c). The trial judge has no discretion to change the order of the arguments. Wike v. State, 648 So.2d 683, 687 (Fla. 1994). Furthermore, violations of this rule can never be deemed harmless error. Ibid. In Wike, this Court again reaffirmed the importance of the order of arguments in a capital sentencing proceedings:

That rule [Fla.R.Crim.P. 3.780] was adopted as part of the bifurcated procedure established for the presentation of evidence and rebuttal testimony in the guilt and sentencing proceedings for capital cases. See, rule 3.780(a), (b). Rule 3.780(c) makes it clear that a defendant always presents the final closing argument in the sentencing phase. In a capital sentencing hearing, a defendant is on trial for a determination of a life or death sentence, and in promulgating rule 3.780(c), this Court made a conscious policy decision that, under these circumstances, a defendant should have the procedural right of having the concluding argument before the jury. A trial judge has no discretion to change the order of the arguments under this rule, and there is no question but that the word "will" in rule 3.780(c) was intended to be mandatory.

648 So.2d at 687.

Boyett is not advocating that the trial court should have allowed the defense to file its memorandum last and required the State to file first. The trial court's directive for both parties to file at the same time was not the subject of Boyett's objection. Boyett is not asking this Court to craft a rule governing the order of written sentencing memoranda, even though such a rule based on the policy behind Fla. R. Crim. P. 3.780(c) would have merit. However, Boyett is asking to be treated fairly. He is asking that the rules not be changed in the middle

of the game. He is asking that a level playing field not be unexpectedly slanted while the ball is in play. Boyett's right to a fair sentencing procedure has been violated. Just as the violation of the order of penalty phase arguments can never be deemed harmless and therefore always reversible error, the error committed here also escapes review for prejudicial impact and must always be reversed. Boyett asks this Court to reverse his case for resentencing.

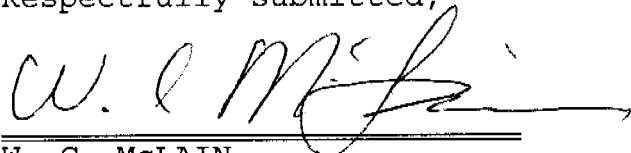
CONCLUSION

For the reason presented in Issue I, Matthew Dale Boyett asks this Court to reverse his conviction and remand his case for a new trial. Alternatively, for the reasons presented in Issues II through V, Boyett asks this Court to reverse his death sentence and remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by ^{mail (wcm)} ~~delivery~~ to Richard Martell, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Matthew Dale Boyett, on this 28 day of August, 1995.

Respectfully submitted,



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