IN THE SUPREME COURT OF FLORIDA

#82333

ALPHONSO CAVE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S REPLY BRIEF

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FAILURE TO HOLD RESENTENCING WITHIN NINETY (90) DAYS

The State asserts that an Assistant Public Defender waived Appellant's right to speedy trial in a Motion To Continue dated November 17, 1992 (AB 3) (R37-8). It should be noted that the State had conceded at the trial level that the 90 day period had ran on October 28, 1992 (R1166). The State did not request an extension of the 90 day period before it expired.

The State asserts, "Defense counsel admitted that he was not prepared to go forward on the date of the hearing" (AB 9). A review of the record does not disclose this admission at all. The following colloquy took place:

> **THE COURT: Let's see if we can get a few more things on the record here just so that everything is clear. Using all your time period and calculations, Mr. Garland, are you making any representation that on or about October 5, 1992, the defense was ready for trial?**
>
> **MR. GARLAND: I wouldn't know that, Sir, I wasn't the counsel at that time.**
>
> **THE COURT: All right. Counsel today, are you ready for trial?**
>
> **MR. GARLAND: We haven't moved for a continuance, Your Honor.**
>
> **THE COURT: Okay, that's not the question I asked, Mr. Garland. Today are you ready for trial? Have you done everything that needs to be done? Have all the examinations taken place? Has the defendant been examined by Dr. Rifkin? I signed some transport orders. Today is the defense ready for trial?**

> MR. GARLAND: There are other things that we are doing, Your Honor.
>
> THE COURT: Okay. So that would be a no. That would be a fair statement, Mr. Garland?
>
> MR. GARLAND: Well, Your Honor, I'm saying that I am still preparing for the Court ordered court date in this case.

(R1177-78).

The State asserts that Appellant suffered no prejudice of the failure to conduct the sentencing hearing within the mandated 90 day period (AB 9). The question whether prejudice exists is a question of law properly to be addressed in the argument portion of this brief.

PSYCHOLOGICAL ISSUES

The State asserts that the trial court found that "Cave had already had two evaluations on confidential basis - one by Dr. Rifkin in the first trial, and one by Dr. Harry Krop for post-conviction purposes" (AB 7-8).

With respect to Dr. Rifkin it should be noted that the original trial attorney was found by the United States District Court to be incompetent, ineffective and delusional. *See Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992). In fact, Dr. Rifkin did not examine Cave with respect to penalty phase issues during the 1982 evaluation (R831). Although Dr. Rifkin was appointed to examine Cave as a confidential psychologist, Cave provided little information regarding the events immediately before and after the homicide (T1372). There was no evidence that Dr. Rifkin was provided with more access to the Defendant's thinking process immediately before, during and after the homicide than was Dr. Cheshire. Irrespective of the nature and extent of Dr. Rifkin's 1982 evaluation, the record establishes

that Dr. Rifkin had a conflict of interest in that he had been confidentially appointed to examine co-defendant Terry Wayne Johnson (R709-10).

The record does not reflect that Dr. Harry Krop was appointed to confidentially examine Cave. Dr. Krop evaluated Cave at the request of his attorney (R1877) and testified at the State post-conviction relief proceeding for free (Page 234 of Dr. Krop's testimony)[1]

THE RESENTENCING

The State inaccurately reports that Cave told Brenda Strachen that "They killed Ms. Slater because either Bush or Parker decided that they did not want to leave any witnesses to the robbery" (AB 16). The record reflects that Cave told Strachen that Bush and/or Parker killed the victim, and that either Bush or Parker said he didn't want to leave a witness. Strachen did not use the term "they" to include Cave either as a killer or as a person who joined in the decision to kill. (T504-12).

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[1] Although the Supreme Court ordered the Martin County Clerk to supplement the record with Dr. Krop's post-conviction relief testimony given on June 17 and 21, 1988 and submitted as State's Exhibit "3" at an April 23, 1993 hearing, the Clerk never did supplement the record with this exhibit. *See* May 18, 1994 Order of the Florida Supreme Court entered in this case. The transcript has been forwarded to the Florida Supreme Court, however, as an item of evidence. *See* transmittal memorandum from Martin County Clerk of Circuit Court to Florida Supreme Court dated June 13, 1994.

ARGUMENT

POINT I
(DISQUALIFICATION OF JUDGE)

The State submits that the disqualification motion was legally insufficient as shown by the evidence adduced by the State on this issue. The same evidence, however, having been adopted by the Defendant for the purpose of supplementing his motion (T1164), established the truth of the factual allegations set out in the motion and the appended affidavits (AB 34-6).

The evidence adduced by the State failed to establish that Judge Walsh was free from improper exposure to evidence, that he had had no contact with persons directly involved in the case, or that he was free of opinions relative to the case. Judge Walsh is the only person who could testify comprehensively on these issues. For good reason, the disqualification rule does not permit the challenged judge to contradict the allegations. The purpose of the rule is to insure respect for, and confidence in, a judiciary free of bias as well as the appearance of bias.

Bruce Colton confirmed that in 1982 the Fort Pierce felony prosecutors shared secretaries who worked in a single common area. The entire office at that time shared a single reception area, single library, and a single lunchroom (T1115). Just as alleged in the disqualification motion, Colton agreed that the practice of law is a collegial profession which involves a high degree of continuing education and consultation between attorneys. Colton agreed that less experienced attorneys were encouraged to consult with more experienced attorneys (T1116). Colton confirmed that there was no effort to screen then-prosecutor Walsh from the other prosecutors and witnesses connected with the Slater case (T1119).

Moreover, Colton was unable to testify that information and facts were not shared by witnesses, secretaries or others with then-prosecutor Walsh (T1125).

Similarly, James W. Midelis could not say whether Walsh may have developed some special knowledge of the case as a result of his proximity (T1129). Robert E. Stone was unable to say whether anyone else connected with the prosecution discussed the matter with Walsh (T1142). After admitting that Slater case meetings occurred in Fort Pierce after 5:00 p.m., Tom Ranew did not recall whether Walsh was present at the State Attorney's Office during these evening meetings, and did not know whether other persons may have discussed the prosecution with Walsh outside of his presence (T1147-48). Richard Barlow was also unable to say that Walsh had never been consulted or involved with the Slater investigation (T1163).

The likelihood of direct exposure of then-prosecutor Walsh to Slater case files, prosecuting attorneys, investigators, secretaries and witnesses constitutes a factual foundation for the Defendant's fears of prejudice and partiality. The Defendant's allegations, as supplemented by the State's evidence, are easily distinguishable from *Jernigan v. State*, 608 So.2d 569 (Fla. 1st DCA 1992) (AB 34). *Jernigan* involved broad-brush allegations that a trial judge was prejudiced against all persons charged with child abuse and that prejudice was manifested by the trial judge's rejection of a plea agreement. *Jernigan* found these general allegations to be legally insufficient for a disqualification motion. *Id.* at 570. In contrast to the generalized allegations contained in *Jernigan*, Cave has alleged specific facts from which arise a realistic and well-grounded fear of bias.

The State also suggests that the trial court's consideration of evidence does not

require automatic reversal. The State's authority, *Chastine v. Broome*[2], 629 So.2d 293 (Fla. 4th DCA 1993) and *Randolph v. State*, 626 So.2d 1006 (Fla. 2d DCA 1993), simply involved improper argument by the State against a disqualification motion. In particular, *Randolph* is distinguished by the fact that the parties agreed on appeal that the disqualification motion was legally insufficient. *Id.* at 1008. In contrast to the attorney's arguments described in *Chastine* and *Randolph*, the trial court in the case at bar conducted an extensive evidentiary hearing on issues material to the disqualification motion. *See Atkinson Dredging Company v. Henning*, 631 So.2d 1129, 1130 (Fla. 4th DCA 1994) (Judges prohibited from presiding over case in which one party's law firm is same firm representing judge in a separate, unrelated proceeding, even though the "record" may be void of actual bias or prejudice).

Canon 3C of the Code of Judicial conduct, dealing with disqualification, provided in relevant part:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding;
> > (b) he served as a lawyer . . . in the matter in controversy or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter. . .[3]

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[2] *Chastine v. Broome* involved a note passed from the trial judge to the prosecutor during a trial. The note contained a "tip". *Chastine* said, "Such conduct constitutes an impermissible *ex parte* communication at the sentencing stage of the death penalty proceedings". 629 So.2d at 295. Although Cave could not establish a "smoking gun" similar to the activities decried in *Chastine*, then-prosecutor Walsh's close association to the Slater prosecution gives rise to a justified fear of *ex parte* communications far worse than the strategy "tip" addressed in *Chastine*.

[3] Effective January 1, 1995, the Florida Supreme Court adopted new rules governing judicial conduct. *In Re: Code of Judicial Conduct,* 643 So.2d 1037 (Fla. 1994). The new rule renumbers this section as Canon 3E(1). The new rule requires disqualification.

The commentary to Canon 3C(1) provides:

> A lawyer in a government agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a government agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

Contrary to the State's suggestion, the Defendant did not premise his disqualification motion merely upon discussions with the prosecuting attorneys (AB 35). The challengeable exposure also results from contact with Slater case investigators, witnesses and secretaries, as well as other persons, including attorneys, who were not directly involved in the Slater prosecution, but communicated information regarding the prosecution to Walsh.

In contrast to *State ex rel. Shelton v. Sepe*, 254 So.2d 12 (Fla. 3d DCA 1971) (involving a judge's former employment at the Dade County State Attorney's Office), the 1982 Fort Pierce State Attorney's Office was an extremely small office indeed. Although case contamination may not be reasonably inferred simply by virtue of employment with a prosecutor's office in a law metropolitan county, fear of contamination is reasonable under the facts at bar, especially where there was no evidence of screening or the construction of a "Chinese wall" between then-prosecutor Walsh and matters relevant to the Slater prosecution. Circumstances in the case at bar markedly differ from *Shelton* where the then-prosecutor had "no dealings or contact with" the subject prosecution. *Id.* at 14. *See Reaves v. State*, 574 So.2d 105, 107 (Fla. 1991) (in the context of prosecutor disqualification, a prospective rule was announced whereby "any prosecutor who is disqualified under this rule

must be properly screened from other state-attorney personnel. Failure to do so may require the trial court, upon a proper motion and factual predicate, to disqualify the entire State Attorney's Office".; *See also Henry v. State*, 649 So.2d 1361, 1364 (Fla. 1995) (After defense moved to disqualify entire State Attorney's Office because a former defense investigator had become employed by the State Attorney's Office, trial court ordered former investigator not to discuss case and required that he be screened from the prosecution).

This Court should reverse and remand for a new and fair sentencing hearing.

POINT II
(DENIAL OF OPPORTUNITY TO EXPLORE AND PRESENT MENTAL MITIGATING EVIDENCE)

A. RETROSPECTIVE APPLICATION OF *DILLBECK'S* EMERGENCY RULE VIOLATES THE PROHIBITION AGAINST *EX POST FACTO* LAWS.

Contrary to the State's suggestion (AB 43), *Dillbeck v. State*, 643 So.2d 1027 (Fla. 1994) does not apply to the case at bar. Unlike cases interpreting, or reinterpreting, existing laws, *Dillbeck* established a new emergency rule. Retrospective application of this rule would violate the prohibition against *ex post facto* laws contained in both Article I, Section 9, Clause 3, and Article I, Section 10, Clause 1 of the United States Constitution, and Article I, Section 10 of the Florida Constitution.[4]

Numerous Florida and federal cases have held that changes in rules and statutes may not be retrospectively applied if substantive rights have been affected or the accused disadvantaged thereby. *Miller v. Florida*, 482 U.S. 423 (1987) (retrospective application of sentencing guidelines violated *ex post facto* clauses); *Weaver v. Graham*, 450 U.S. 24 (1981) (*Ex post facto* clauses prohibited retrospective application of statute reducing availability of good time or gain time); *Dugger v. Rodrick*, 584 So.2d 2 (Fla. 1991) (retrospective application of statute eliminating prisoners' eligibility for provisional credits violated *ex post facto* clauses); *Dugger v. Williams*, 593 So.2d 180 (Fla. 1991) (retrospective application of statute reducing eligibility for mandatory recommendations for executive clemency violated Florida's *ex post facto* clause).

At the time the Defendant refused to fully submit to a compelled examination, there

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[4]Article 10, Section 9 of the Florida constitution forbids the Legislature to enact a statute "affect(ing) prosecution or punishment for any offense previously committed.

was no rule or statute compelling him to so submit. While the resentencing was pending, the controlling precedent on the subject of a compelled examination, where a defense other than insanity has been raised, was *Hickson v. State*, 589 So.2d 1366 (Fla. 1st DCA 1991) and *Burns v. State*, 609 So.2d 600 (Fla. 1992).

Explaining that the State could not compel an examination, except as authorized, the First District Court said:

> Disclosure by defendant of an examining expert witness in support of the defense should not, accordingly, constitute a *per se* waiver of constitutional testimonial immunity under the Federal or Florida Constitutions.

589 So.2d at 1369.

The First District rejected the applicability of *Henry v. State*, 574 So.2d 66 (Fla. 1991) and *Parkin v. State*, 238 So.2d 817 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971). The First District in *Hickson* determined that a compelled examination, regarding the defendant's alleged battered-spouse syndrome, would violate his privilege against self-incrimination under both the Florida and Federal Constitutions. The Florida Supreme Court's decision in *State v. Hickson*, 630 So.2d 172 (Fla. 1994) was issued on October 21, 1993, well after the sentencing proceeding was concluded in the case at bar.

Burns v. State approved a procedure whereby the sequestration rule was waived to the extent of allowing mental health experts to remain in the courtroom during the entire penalty phase. The purpose of this procedure was to "enable the State to rebut the defense's evidence of mental mitigation". *Id.* at 606. *Burns* observed that "There is no rule of criminal procedure that specifically authorizes the State's expert to examine a defendant facing the death penalty when the defendant intends to establish either statutory or non-

statutory mental mitigating factors during the penalty phase of the trial". *Burns* indicated that the question of such a compelled examination was being referred to the attention of the Florida Criminal Rules Committee for consideration. *Id.* at fn 8.

Cave has maintained that a compelled examination, relative to penalty phase mental status mitigation, was both unauthorized by rule and violative of his right to remain silent. The trial court improperly employed contempt as the procedural vehicle to compel responses at a court-ordered examination. *Salem v. State*, 305 So.2d 23 (Fla. 3d DCA 1974), *cert. denied*, 315 So.2d 193 (Fla. 1975) (right to remain silent is defense against contempt, despite offer of immunity where there remained a reasonable chance of prosecution of perjury); *King v. State*, 353 So.2d 180 (Fla. 3d DCA 1977) (right to remain silent continues as a defense against contempt where the contemnor's case is on appeal); *Libertucci v. State*, 395 So.2d 1223 (Fla. 3d DCA 1981); *Maristany v. State*, 414 So.2d 206 (Fla. 3d DCA 1982); *Feldman v. Kelly*, 76 So.2d 798 (Fla. 1954); *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964).

The contempt proceedings were improperly conducted as "direct" although the contemnacious conduct, if any, occurred outside the presence of the court. Even if the exclusion of defense evidence may have been a proper penalty for direct criminal contempt, the conviction was set aside (T1544). Without the conviction, there would have been no basis for the exclusion of Dr. Krop's testimony and nearly all of Dr. Rifkin's.

The contempt conviction cannot, alternatively, be justified as "indirect", because there was no compliance with Florida Rule of Criminal Procedure 3.840. *See* Appellant's Initial Brief at 55, Note 7. The contempt was never characterized as either civil or indirect. Even if it were, the exclusion of evidence was no longer justified after Judge Walsh set aside

the contempt conviction and sentence (T1544).

The retrospective application of the *Dillbeck* emergency rule, in the manner suggested by the State, is disadvantageous to the Defendant in the following ways:

1. *Dillbeck* institutes a procedural vehicle for compelling a defendant to submit to a penalty phase mental status examination when none previously existed. The defendant relied upon the law as it existed;

2. *Dillbeck*'s emergency rule authorizes the exclusion of expert mental status evidence when the defendant refuses to submit to a court-ordered examination. This penalty was not authorized under the pre-existing law. Therefore, *Dillbeck* increases the penalty for acts occurring before the emergency rule was implemented;

3. *Dillbeck*, if applied to the case at bar, would supply an alternative to contempt as a basis for excluding evidence. *Dillbeck* and the emergency rule create substantive rights which were not pled by the State in this case. The defendant had no opportunity to respond to the emergency rule because it did not yet exist;

4. Although the right to remain silent is a defense to a contempt charge, *Dillbeck* implies that the right to remain silent is no longer a defense against a compelled examination. Therefore, the defendant would be denied a constitutional defense by the retrospective application of the rule;

5. The defendant's reliance on defects in the contempt procedure would be rendered irrelevant. Neither the defendant nor his counsel could reasonably have foreseen the retrospective application of an emergency rule which would "cure" defects in the contempt procedure; and

6. If the defendant had been aware of *Dillbeck*, he would have had an

opportunity to comply. As it is, the retrospective application of *Dillbeck* violates due process, in that there was no fair notice of the rule and the penalty, in violation of the previously cited *ex post facto* clauses of the United States Constitution, the 5th, 6th, 8th and 14th Amendments to the United States Constitution, and Article I, Sections 9, 10, 16, and 17 of the Florida Constitution.

The elements of an *ex post facto* law were reiterated in *Weaver v. Graham*:

> [O]ur decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto*: It must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it (Citations and footnotes omitted).

450 U.S. at 28-29; 101 S.Ct. at 964.

Inherent in the prohibition against *ex post facto* penal laws is the lack of notice of proscribed conduct or the prescribed penalty:

> Critical to relief under the *ex post facto* laws is not an individual's right to less punishment, but the lack of fair notice and governmental restraint. When the Legislature increases punishment beyond what was prescribed when the crime was consummated.

Weaver: 450 U.S. at 30, 101 S.Ct. at 965. *See Delk v. Department of Professional Regulation*, 595 So.2d 966, 967 (Fla. 1992) ("Conduct occurring before the effective date of the prohibition does not meet this (*ex post facto)* standard"); *Beazell v. Ohio*, 269 U.S. 167, 169 46 S.Ct. 68 (1925) (*Ex post facto* clause precludes laws which make "more burdensome the punishment for a crime, after its commission").

The prohibition against retrospective laws applies, with equal force, to disadvantageous rules of evidence. The *ex post facto* clauses prohibit:

> Every law that alters the legal rules of evidence, and receives

> less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Miller v. Florida, 482 U.S. at 430, 107 S.Ct. at 2450, *citing Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798).

To the extent that the *Dillbeck* emergency rule justifies a penalty merely for refusing to submit to a compelled examination, there has been a reduction in the evidence and procedure from the contempt employed by the trial court. This retrospective reduction in burden of proof or easing of procedure is prohibited. Compare *Dobbert v. Florida*, 432 U.S. 282 (1977) with *Dugger v. Williams*, 593 So.2d 180, 181 (Fla. 1991) (Where procedural rules have substantive effect there may be *ex post facto* violation despite general rule that the clause does not apply to purely procedural matters).

B. *DILLBECK* SHOULD NOT BE APPLIED TO "PIPELINE" CASES BECAUSE SUCH APPLICATION WOULD NOT BE FAIR OR BENEFICIAL TO THE DEFENDANT

Contrary to the State's suggestion (AB 43, n. 1), Florida does not uniformly apply new points of law to "pipeline" cases. In this case it would be unfair and an *ex post facto* clause violation to do so. However, *Dillbeck* did not establish a new "point of law": it established an emergency rule. There is nothing evolutionary or developmental in the establishment of a new rule. The State's citation to *Wournos v. State*, 644 So.2d 1000 (Fla. 1994) does not support the retrospective application of *Dillbeck*'s emergency rule.

Wournos considered whether *Castro v. State*, 597 So.2d 259 (Fla. 1992) (Doubling instruction required for pecuniary gain and murder during course of robbery factors), should be applied to pipeline cases. Finding that *Castro* was to be prospective only, the *Wournos* court explained apparent inconsistency in the rules governing retroactivity:

> We recognize that this holding may seem contrary to a portion

> of *Smith v. State*, 598 So.2d 1063, 1066 (Fla. 1992), which can be read to mean that any new rule of law announced by this court always must be given retrospective application. However, such a reading would be inconsistent with a number of cases. E.g., *Wyatt v. State*, 641 So.2d 355 (Fla. May 5, 1994); *Peterka v. State*, 640 So.2d 59 (Fla. April 21, 1994); *Elam v. State*, 636 So.2d 1312 (Fla. 1994); *Jackson v. Dugger*, 633 So.2d 1051 (Fla. 1993); *Taylor v. State*, 630 So.2d 1038 (Fla. 1993), *petition for cert. filed* (U.S. May 11, 1994) (no. 93-9068); *Valentine v. State*, 616 So.2d 971 (Fla. 1993); *Koon v. Dugger*, 619 So.2d 246 (Fla. 1993); *State v. Johans*, 613 So.2d 1319 (Fla. 1993). We read *Smith* to read that new points of law established by this court shall be deemed retrospective with respect to all non-final cases unless this court says otherwise.

Wournos, 644 So.2d at 1007-8.

The plain language of *Dillbeck estabblished* an emergency rule, thereby implying prospective force only. As Cave would not benefit from *Dillbeck*, the change in law should not be applied retrospectively against him. *See Smith v. State*, 598 So.2d at 1066 ("To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review").

Some decisions favorable to an accused have not been applied retrospectively against the State, probably due to fairness concerns. E.g., *Fenelon v. State*, 594 So.2d 292 (Fla. 1992) (flight instruction disapproved); *Campbell v. State*, 571 So.2d 415 (Fla. 1990) (trial judge required to discuss and consider mitigating circumstances); *Koon v.* Dugger, *supra* (required inquiry when defendant refuses to permit presentation of mitigation evidence against his counsel' s advice); *Huff v. State*, 622 So.2d 982 (Fla. 1993) (Collateral counsel in death penalty case must be given non-evidentiary hearing relative to post-conviction relief issues); *State v. Johans, supra.* ("Neal" inquiry required when objection made based on racially discriminatory use of preemptory challenges).

For reasons of basic fairness and notice, *Dillbeck* should not be applied retrospectively. To do so would violate the 5th, 6th, 8th and 14th Amendments to the United States Constitution, and Article I, Sections 9, 10, 16 and 17 of the Florida Constitution.

C. THE DENIAL OF A CONFIDENTIAL EXAMINATION DENIED DEFENDANT A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND EQUAL PROTECTION OF LAW

Citations to *Henry v. State*, 574 So.2d 66 (Fla. 1991) and *Parkin v. State*, 238 So.2d 817 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971) (AB 42-4) may be distinguished because they refer to the defense of insanity and the procedural rules providing for a compelled examination.

The State's suggestion that the Defendant waived use of a confidential expert (AB 45) is not supported by the record. When advised that neither Dr. Rifkin nor Dr. Krop would be appointed confidentially, the Defendant requested another mental health expert who would be confidential (T1092-96, 2500-01, 1221-1222). The trial judge denied the request. In fact, the trial judge ruled that the State could be present for any non-confidential examination. The use of a non-confidential expert was over objection.

Even without evidence of incompetency or insanity, the Defendant was entitled to the assistance of a mental health expert to assist him in evaluating mental status mitigation. *See Preston v. State*, 607 So.2d 404, 408 (Fla. 1992), *cert. denied*, 113 S.Ct. 1619 (1992) (in every respect a resentencing in an "entirely new proceeding"); *Teffeteller v. State*, 495 So.2d 744, 745 (Fla. 1986) ("The resentencing should proceed *de novo* on all issues bearing on the proper sentence which the jury recommends be imposed"); *King v. Dugger*, 555 So.2d 355, 358 (Fla. 1990). It is reversible error to deny a capital defendant the assistance of a mental

health expert. *Perri v. State*, 441 So.2d 606 (Fla. 1983). Although the number of defense experts, as well as the funds for such experts, may be limited, "an indigent defendant has a constitutional right to choose a competent psychiatrist of his or her personal choice and is entitled to receive funds to hire such an expert". *Morgan v. State*, 639 So.2d 6, 12 (Fla. 1994).[5]

If the State is suggesting that the Defendant waived his right to a confidential expert by using a non-confidential expert, then the State is guilty of forcing the election. Being indigent and without funds, the Defendant could not go out and hire an independent, confidential expert. The Defendant was forced to use and expert under the only terms available. The denial of funds for an expert under these circumstances violated the Defendant's rights to equal protection, due process and effective assistance of counsel under the 5th, 6th, 8th and 14th Amendments to the United States Constitution, and Article I, Sections 9, 10, 16 and 17 of the Florida Constitution.

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[5] According to the evidence developed in pre-trial hearing, Dr. Rifkin's evaluations of the Defendant were *per se* inadequate to evaluate the existence of statutory and non-statutory mental status mitigators. (T 1218-19; 1263-80; 1347-49; 1372-74). Implicit in *Dillbeck* was the assumption that the "defense expert" was capable of conducting an effective examination.

POINT III
(FAILING TO INSTRUCT JURY ON STATUTORY MITIGATING CIRCUMSTANCES NOT SPECIFICALLY WAIVED)

The State suggests that there was no evidence supporting the unwaived statutory mitigating circumstances (AB 47). Contrary to this assertion, the evidence showed that the Defendant was 23 years old at the time of the commission of this offense (T385-86) and suggested that he was drunk (T551). Such evidence placed the Defendant in the zone where the jury could have found the existence of the mitigating circumstances contained in Section 921.141(6)(b), (f) and (g).

Guidelines for evaluating the existence of the age circumstance were set out in *Scull v. State*, 533 So.2d 1137, 1143 (Fla. 1988):

> *Scull* was 24 years old when these murders were committed. The trial judge was in the best position to examine *Scull*'s emotional and maturity level. This Court has frequently held that a sentencing court may decline to find age as a mitigating factor in cases in which the defendants were 20-25 years old at the time their offenses were committed. However, these cases do not address the question of whether a trial judge has abused his or her discretion by finding this mitigating circumstance. *Scull*'s age of 24 alone could not establish a mitigating factor, but factors which were observable by the trial judge during the trial and sentencing proceeding support his finding that *Scull*'s emotional age was low enough to sustain this mitigating circumstance. (Citations omitted).

In the case at bar, there was a combination of evidence regarding the Defendant's age and intellectual development from which a jury may have inferred the statutory mitigating circumstance.[6] The failure to instruct the jury on this circumstance effectively removed the

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[6] During the 1982 examination, Dr. Rifkin established the defendant's full scale I.Q. at 76. The 1993 reevaluation established a full scale I.Q. of 75 (T708-709). Dr. Rifkin classified this as "borderline intellectual functioning". (T 754)

age factor from the weighing process essential to the constitutionality of Section 921.141. *Stewart v. State*, 558 So.2d 416, 420 (Fla. 1990), *cert. denied*, 114 S.Ct. 478 (1993) ("[T]rial court is required to instruct on all aggravating and mitigating circumstances 'for which evidence has been presented'. Fla. Std. Jury Inst. (Crim) at 78,80"). Although raised as an issue at the allocution hearing, the trial judge refused to consider age as a statutory mitigating factor and therefore abandoned the independent weighing process required of the trial judge. *Maxwell v. State*, 603 So.2d 490 (Fla. 1992).

It is difficult, if not impossible, to speculate what additional evidence may have been presented on mitigating circumstances 921.141(6)(b), (d), (e) and (f) because Defendant's counsel was denied the effective assistance of a confidential mental health expert. As indicated previously, Dr. Rifkin conceded that his examinations were inadequate to make a determination regarding the Defendant's mental status at the time of the offense. Even so, the evidence proffered through Dr. Rifkin and Dr. Krop would have supported the following statutory mitigating factors:

1. That the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. An effective psychological examination would have assisted in show whether the Defendant's drunkeness substantial impaired mental or emotional stability. *See Knowles v. State*, 632 So.2d 62 (Fla. 1993); *Sochor v. State*, 619 So.2d 285 (Fla. 1993), *cert. denied*, 114 S.Ct. 638 (1993); *Duncan v. State*, 619 So.2d 279 (Fla. 1993), *cert. denied*, 114 S.Ct. 453 (1993); and footnote 7, *infra.*

2. That the Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

3. That the Defendant acted under extreme duress or under the substantial

domination of another person; and

4. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.[7] As indicated above, expert testimony may have assisted in showing whether the Defendant's intoxication substantially impaired these abilities.

The State's assertion of waiver of jury instructions on the statutory mitigating factors should be rejected (AB 47-8). The "waiver" of a statutory mitigating factor is ineffective unless it is a knowing an intelligent waiver, personally agreed to by the accused. *Henry v. State*, 613 So.2d 429 (Fla. 1992), *cert. denied*, 114 S.Ct. 699 (1994); *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). Clearly, the record is devoid of evidence of the knowing and intelligent waiver of the statutory mitigating factors.

Waiver of the right to instruction on lesser, necessarily included offenses, was considered in *Harris v. State*, 438 So.2d 787 (Fla. 1983), *cert. denied*, 466 U.S. 963 (1984):

> Our decisions holding that a defendant is entitled to have the jury instructed on all necessarily included lesser offenses are consistent with the holdings of the federal courts....This procedural right to have instructions on necessarily included lesser offenses given to the jury does not mean, however, that a defendant may not waive his right just as he may expressly waive his right to a jury trial [Citations omitted]. But, for an effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant and the record must reflect that it was knowingly and intelligently made.

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[7] Apart from information supplied by Cave, the defense could independently establish facts relative to these statutory mitigating factors. For example, Parker confessed to Georgeanne Williams, "I shot her and John stabbed her" (R 2010). Parker had testified at his own trial that the four men had shared a half gallon of gin and a lot of marijuana. (R 2098-2100). Johnson's grand jury testimony confirmed the half gallon bottle of gin, that Cave told the victim she would not be hurt, and that Cave neither shot nor knifed the victim. (R 2404-09)

Harris, 438 So.2d at 796-97.

In *Jones v. State*, 484 So.2d 577, 579 (Fla. 1986), the application of the *Harris* rule was modified for a non-capital situation:

> While we acknowledged in *Harris* the fundamentality of the right to such instructions to due process in the capital context, we here decline to apply that case's requirement of an express personal waiver outside the context in which it was bound.

The vitality of the rule requiring the Defendant's personal waiver of such jury instructions in death penalty cases is illustrated by *Reed v. State*, 560 So.2d 203, 206 (Fla. 1990):

> In *Harris v. State* [Citation omitted], we held that it was necessary for the defendant knowingly and intelligently to waive the instructions on the necessarily lesser included offenses to first-degree murder. However, in *Jones v. State*, [citation omitted], we held that counsel could waive the instructions on necessarily included offenses to non-capital crimes without a showing that the defendant had knowingly and intelligently joined in the decision.[8]

The defendant submits that any waiver of a statutory mitigating factor instruction should provide for at least the level of inquiry required for either waiver of a necessarily lesser included offense instruction, or waiver of the opportunity to put on evidence of statutory mitigating factor.

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[8] In *McKinney v. State*, 579 So.2d 80, 83-84 (Fla. 1991), the failure to object to the failure to give a lesser included offense instruction was held to procedurally bar review. Since it is a death penalty case, *McKinney* may cast some doubt on the waiver rules described in *Harris* and *Reed*. A harmonizing explanation may be that the court failed to instruct on false imprisonment as a lesser offense to kidnaping. Since kidnaping is not a capital offense, the *Harris* and *Reed* personal waiver requirement may not apply. See Fla.R.Crim.Proc. 3.390(d) and *Hicks v. State*, 622 So.2d 14 (Fla 5th DCA 1993).

POINT VI
(THE COLD, CALCULATED, AND PREMEDITATED JURY INSTRUCTION IS UNCONSTITUTIONAL)

At the outset it should be noted that the State has not challenged the preservation of this error for appeal (AB 62-65).

The State argues, instead, that the error was harmless beyond a reasonable doubt. Defendant submits that such a finding in this case would not be consistent with the harmless error standard set out in *State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986):

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the State. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

The Defendant's argument that the evidence does not support the CCP factor is found in his initial brief at pages 81-83. This argument should be considered in response to the State allegation that the evidence can only be viewed consistently with the application of the CCP factor. Perhaps the best rebuttal to the State's bald assertion is the fact that CCP was not found by the trial court during the course of the 1982 trial.[9] *Cave v. State*, 476 So.2d 180 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986). *See Proposed Amendments to Jury Instructions No. 1, The Florida Bar News at 3-4* (March 15, 1995) (Proposed instruction for

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[9] Although the 1982 trial did not receive evidence of Cave's jailhouse "confession" to Michael Bryant, the resentencing judge failed to find Bryant's testimony credible. In other respects the 1982 trial had more evidence supporting the CCP factor than the resentencing.

CCP).

Applying the four part test announced in *Jackson v. State*, 648 So.2d 85 (Fla. 1994), as modified by *Fennie v. State*, 19 Fla. L.Weekly S 370, 371 (Fla. July 7, 1994) and *Walls v. State*, 641 So.2d 381,382 (Fla. 1994), there are the following weaknesses in the State's harmless error analysis:

1) The trial court rejected a finding that Cave was the actual triggerman. If the jury also rejected such a finding, the circumstantial evidence must be relied upon to establish the existence of the CCP factor. While the circumstantial evidence may be consistent with the four CCP elements, the circumstantial evidence does not exclude explanations consistent with the non-application of the CCP factor. The harmless error rule requires that the State exclude all reasonable alternatives which, under the circumstances, the State has not;

2) The evidence does not establish that the Defendant joined in the decision to kill the victim. The CCP aggravating factor should not be applied unless the evidence shows the Defendant directed or knew that the victim would be killed. *Williams v. State*, 622 So.2d 456 (Fla. 1993); *Omelus v. State*, 584 So.2d 563 (Fla. 1991); *Robertson v. State*, 611 So.2d 1228 (Fla. 1993);

3) As to Cave, the homicide was not "cold" with respect to Cave. The evidence is consistent with the Defendant's asserted claim that he did not know that the victim would be killed until just before it happened;

4) With respect to Cave, the evidence does not establish that the murder was "calculated". The circumstantial evidence does not refute the Defendant's explanation that he was not party to a careful plan or prearranged design to commit murder;

5) As to Cave, the evidence does not establish that the murder was "premeditated". While the Defendant is liable for the killing on a felony-murder theory, the circumstantial evidence fails to refute the Defendant's claim that did not intend to kill anyone or intentionally assist anyone with such an intent. Even if the evidence could establish a conscious decision to kill, a heightened level of premeditation is not established by the circumstantial evidence due to a lack of "deliberate ruthlessness";[10]

6) As to Cave, the evidence fails to establish a complete absence of "pretense of moral or legal justification". The circumstantial evidence does not conclusively rebut Cave's explanation that he intended the victim to be released unhurt in a remote location.

Because the State has failed to meet the *DiGuilio* harmless error standard, this case must be reversed for a new sentencing proceeding before a jury.

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[10] The 11th Circuit did not reverse the first degree murder conviction, even though the trial attorney was incompetent, because not "even a highly competent lawyer could have won an acquittal. His confession to robbery sealed his conviction for felony murder.." *Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992). The 11th Circuit did not find effective representation on a premeditated murder theory at the original trial.

POINT VII
(THE STATE FAILED TO COMMENCE RESENTENCING WITHIN 90 DAYS AS ORDERED BY THE UNITED STATES DISTRICT COURT AND IS AUTOMATICALLY ENTITLED TO A LIFE SENTENCE)

The State's suggestion that the Defendant waived the time requirement contained in the habeas corpus order should be rejected (AB 66-72). Although the 90 day period, by the State's admission, ran on October 28, 1992 (R1166), Judge Walsh was not designated to hear the case until October 20, 1992 (R30). The first status conference was held on October 22, 1992 and the resentencing was scheduled to commence on November 30, 1992 (R33-34). Since the 90 day period had already run, the November 17, 1992 Motion To Continue was ineffective at waiving a time period which, by the terms of the habeas corpus order, acted automatically to impose a sentence of life imprisonment.

POINT XI
(THE RECORD FAILS TO SUPPORT THE TRIAL COURT'S FINDING OF THE CCP AGGRAVATING FACTOR)

The Defendant relies upon argument made and authority cited under Point VI, *supra*, regarding the applicability of the CCP aggravating factor to the facts of this case.

POINT XII
(THE RECORD FAILS TO SUPPORT THE TRIAL COURT'S FINDING OF THE HAC AGGRAVATING FACTOR)

The State inaccurately asserts that "on the same basic facts" the HAC aggravating factor was approved in both Cave's original appeal and Parker's original appeal. *Cave v. State*, 476 So.2d 180 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986); *Parker v. State*, 476 So.2d 134 (Fla. 1985).

In Cave's original appeal, the Florida Supreme Court considered the following facts which were not established at the resentencing:

1) "[S]he was removed from the car by the four men". *Id.* at 183. At the resentencing, the evidence established that Cave assisted the victim in getting out of the backseat of a two door car (T549). After she had exited, Cave returned to the backseat (R2405-09 [introduced at allocution hearing]);

2) There were no mitigating factors established in the original appeal. *Id.* at 187. In contrast, the resentencing judge found six (6) non-statutory mitigating factors;

3) The original appeal found that the victim was in "such fear that her bladder involuntarily released". *Id.* at 188. The evidence did not establish this fact at the resentencing (T427-28);

4) The initial appeal found that there was a "defensive wound to her (the victim's) hand in attempting to avoid being stabbed". *Id.* at 188. There was no evidence of a defensive wound at the resentencing (T429); and

5) The initial appeal found that the victim was "maneuvered or controlled by grasping her by the hair". *Id.* at 188. The resentencing judge could not determine whether the victim pulled her own hair out, whether she was removed from the car by pulling her

hair, or whether the hair was removed in some other manner. (R1589-90). It should be noted that the resentencing established that only a single hair belonging to the victim was found in the car (T559-60).

Likewise, HAC was established in *Parker* by reference to the following facts not established at the Cave resentencing:

1) The initial appeal established that Parker had confessed, "I shot her and John stabbed her". *Id.* at 136. Disregarding Bryant's testimony which was rejected by Judge Walsh, there was no evidence that Cave was the triggerman;

2) Parker's initial appeal suggests that the victim was told she would be killed before the thirteen (13) mile trip. *Id.* at 139. In contrast, there was no evidence at Cave's resentencing establishing the timing when Bush or Parker so advised the victim;

3) Parker's initial appeal concluded that the victim had voided her bladder "in great fear prior to her death". *Id.* at 139-40. This fact is not established at all at Cave's resentencing (T427-28); and

4) Parker's initial appeal concluded that "the victim was forcibly removed from the car with such force that large chunks of her hair were torn out by the root". *Id.* at 136, 140. These facts were not established at Cave's resentencing.

As can be seen, the "same basic facts" did not exist in the previous cases. Even if there is a general similarity in the factual findings, Cave's resentencing was an "entirely new proceeding" which should proceed *de novo* on all issues bearing on a proper sentence. *Preston v. State, supra*; *Teffeteller v. State, supra*; *King v. Dugger, supra.*

Without definite evidence when the victim first became aware that she would be killed, the State's assertion that the victim was in extreme fear for the entire ride is mere

speculation. The fact that Cave assured the victim she would be released unhurt militates against the fear and terror bases for the HAC factor. *See Robinson v. State*, 574 So.2d 108,111-112 (Fla. 1991), *cert. denied*, 112 S.Ct. 131 (1991). The State's citations are distinguishable by their facts. *Preston v. State*, 607 So.2d 404,409-10 (Fla. 1987), *cert. denied*, 113 S.Ct. 1619 (1992) (After being driven to remote location, the victim was forced to disrobe, then forced to walk at knifepoint through a dark field. She died from from a knife wound.); *Koon v. State*, 513 So.2d 1253, 1257 (Fla. 1987), *cert. denied*, 485 U.S. 943 (1988) (While victim was quickly killed, he endured hours of terror. He was beaten so badly that an ear was torn off. He was driven to a remote location and marched into a swamp, knowing he was to be killed); *Harvey v. State*, 529 So.2d 1083, 1087 (Fla. 1988) (Elderly couple was attacked in their own home. They were told they would be killed. They were shot as they attempted to run. Harvey returned a short time later to finish off one victim who was still moaning); *Melendez v. State*, 498 So.2d 1258, 1261 (Fla. 1986) (After victim's throat was slit, he asked to be taken to hospital. He was told that no witnesses would be allowed, then shot causing instantaneous death); *Copeland v. State*, 457 So.2d 1012, 1019 (Fla. 1984) (After clerk was abducted from convenience store, she suffered an "hours-long ordeal" featuring a gang rape. Afterward, the victim was taken to a wooded area and shot).

Under the facts established at Cave's resentencing, the evidence failed to establish either torture or extreme depravity. In *Cheshire v. State*, 568 So.2d 908, 912 (Fla. 1990), it was reiterated that HAC is appropriately found:

> [O]nly in tortuous murders - those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

See Robertson v. State, 611 So.2d 1228, 1233 (Fla. 1993); *State v. Dixon* 283 So.2d 1 (Fla.

1973), *cert. denied*, 416 U.S. 943 (1974); *Green v. State*, 641 So.2d 391, 396 (Fla. 1994) (HAC not found where victim was transported a "short distance to an orange grove" with his hands tied behind his back. The victim knew Green had a gun. The victim was shot a single time in chest, but lived for a short period of time).

POINT XIII
(THE RECORD FAILS TO SUPPORT THE TRIAL COURT'S FINDING OF THE "AVOID ARREST" AGGRAVATING FACTOR)

As indicated in Point XII, *supra*, the State's citation to *Cave v. State*, *supra*, and *Parker v. State*, *supra*, is inappropriate. The evidence established in those cases differs dramatically than the evidence established at Cave's resentencing in the case at bar. *See Preston v. State*, *supra*; *Teffeteller v. State*, *supra*; *King v. Dugger*, *supra*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 21st day of April, 1995, to Sara D. Baggett, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401-2299.

Respectfully submitted,

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