IN THE SUPREME COURT OF FLORIDA

TROY MERCK, JR.,

Appellant,

v. Case No. 83,063

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE FACTS

Appellee adds the following supplement to Merck's Statement of Facts.

Katherine Sullivan described the two men in the parking lot present during the incident which took Jim Newton's life. The shorter man was five feet seven or eight with light brown hair almost like a bowl cut; the taller man was six feet tall, light blonde hair and tan. His hair was short in front and long in the back, two different cuts (Tr 420). The shorter man took off his light-colored oxford shirt and threw it into the back seat of the car (Tr 424). There was not doubt in her mind that appellant Merck whom she identified in court was the one who attacked and killed Jim Newton (Tr 436). She also had selected his photo from a photo pack, Exhibit 6 (Tr 439, 442). The killer had a slight accent, not a very large drawl and droopy eyes; he reminded her of a friend from high school that looked very much like him (Tr 448 - 449). Additionally, she identified Exhibit 38, the pink oxford button up dress shirt worn by appellant that night, the Exhibit 15 black shirt with laces up the front worn by Merck's friend and selected Merck's companion from the Exhibit 7 photo pack (Tr 437 - 439, 443). Rachel Hughes confirmed that Sullivan had identified Merck in the photopack (Tr 503) and Detective Nestor confirmed the photo pack identification of Neil Thomas (Tr 668).

Crime scene technician Alyson Morganstein testified that among the items of evidence retrieved from the vehicle abandoned

by Merck and Thomas were the knife (Exhibit 22), the pink shirt (Exhibit 38), the black shirt (Exhibit 15), and the blue pants (Exhibit 21) (Tr 539 - 542).

Donald Ward saw the assailant start hitting the victim after saying happy birthday to him; the victim fell on the hood of the car with blood coming from his mouth. Ward gave a description of the assailant as a five foot, eight inch, white male (Tr 715 - 716). Richard Holton testified that the man threw his shirt in the car, walked back and started hitting the victim, declaring "I'll show the jerk how to bleed" (Tr 723). The assailant said, "Let's get out of here" and the taller man (who didn't do the stabbing) was the driver who had a "confused look on his face" (Tr 724 - 725).

Neil Thomas testified that at the end of the night's drinking he didn't notice any affect on Merck -- he had no trouble walking, standing or talking, no slurring of words. He gave appropriate responses when spoken to (Tr 741). After Merck stabbed Newton -- who did nothing to provoke the incident and did not fight back (Tr 750) -- he announced to Thomas in the car, "I fuck'n killed him" and "If I didn't kill him, I'll go get him in the hospital and finish what I started" (Tr 751). Afterwards, they changed their clothes and went to a bowling alley where Merck had no trouble playing pool. Merck described the killing over and over for an hour (Tr 754). Thomas identified Exhibit 15, the black shirt with criss cross laces in front and baggy sleeves as the shirt he wore and stated that Merck wore the

Exhibit 38 pink shirt -- a size 15 -- not Thomas' size (Tr 738, 767). Merck wore the Exhibit 21 pants, a size 30 medium which was too small for Thomas who wore size 36 or 38 (Tr 767 - 768).

Jack Mertens, F.B.I. agent and D.N.A. profiling and forensic serology expert, testified that human blood was found on the Exhibit 22 knife and the Exhibit 21 blue pants and belt found in the back of the car; the blood on the pants matched the D.N.A. profile of victim James Newton (Tr 576 - 579).

On cross-examination, Merck agreed he wore the Exhibit 21 pants which the FBI found blood on(TR 857). Appellant Merck claimed that he had twenty-six drinks from ten o'clock to two o'clock. He remembers having one Buttery Nipples, two rums, fifteen beers, and eleven liquor beverages, and remembered the doorman telling him he had one minute to finish his drink before closing (Tr 862 - 64), but did not remember after standing in the lot how he got in the passenger side of the car or waking up afterwards in the car (Tr 866 - 67). He denied telling the girls, "if you tell anybody, I'll take out the closest thing to you" (Tr 872).

On cross-examination defense witness Roberta Connor admitted she and Rebecca Shuler came to Florida to take Merck and Thomas back to North Carolina knowing the police were looking for them (Tr 927) and gave them money to rent a room to hide from the police (Tr 929). Appellant announced to her that, "I killed the mother-fucker" and jumped around with steak knives (Tr 930). Appellant may have mentioned that profanities had been exchanged

and that at that time Merck told Neil Thomas he'd take care of it, as if he were Neil's body guard (Tr 931). Appellant said he cut a main artery; no one was drinking alcohol at the motel room (Tr 932). The witness may have told Detective Kanoski that Merck was concerned that Neil Thomas would tell on him and may have told Kanoski Merck told her he'd take the closest thing from her (Tr 936 - 37). Appellant has called her numerous times since this incident (Tr 943). When recounting this incident appellant didn't say he didn't remember (Tr 947).

On cross-examination defense witness Rebecca Shuler admitted that she had had sex with appellant Merck, was in fact pregnant from him and still in love with him after this incident (Tr 973). She didn't tell inquiring police officers of her phone contact with Merck and Thomas and she came to Florida to help get them back to North Carolina (Tr 975).

She admitted telling the detective that appellant said he didn't give the victim a chance to hit him (Tr 977). She never mentioned any memory problem of the defendant to Kanoski. Appellant told her not to tell anyone of the incident and that if she did, he'd take the closest thing to her (Tr 978). Appellant called and wrote letters afterwards, urging once to tell authorities he woke up crying in the motel room when in fact he never did (Tr 980).

Wally Colcord testified on cross-examination that the investigating officer decides what evidence to turn over to the evidence section (Tr 1035).

Rebuttal witness Sandra Ledford also testified that if she told on him, he would take the closest thing to them, he admitted stabbing the victim, he did not maintain he could not remember the incident and appellant wanted her to falsely say that he woke up crying in the middle of the night saying he was sorry (Tr 1046 - 49).

In the penalty phase, appellant's sister Stacey France testified on cross-examination that she has not lived in the same household with the defendant for the last fourteen years (Tr 1323) and she leaves her children (aged 8 and 10) sometimes with her mother (Tr 1324) who assertedly was abusive to the defendant. Appellant's other sister, Roberta Crow, testified on cross-examination that she and her sister were also beaten but she has not been convicted of any crime of violence (Tr 1329).

SUMMARY OF THE ARGUMENT

I. The trial court did not commit error when in imposing the sentence of death it declined to find appellant's age a mitigating factor. While appellant was nineteen years of age, he has had a lengthy history of criminal activity -- including five armed robbery convictions at age seventeen -- and his unprovoked attack upon and multiple stabbing of victim James Newton cannot be chalked up to immaturity. This murder was premeditated and performed with the purpose of inflicting pain and the trial court correctly determined that appellant's experience counterbalanced any age mitigation.

II. The trial court correctly found the presence of statutory aggravating factor 5(b) which included unchallenged five prior convictions for armed robbery in Florida. Had the trial court allowed the introduction of the juvenile delinquency conviction in North Carolina into evidence, it would have been proper. Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990).

The testimony of Chastain and Hess was unobjected to contemporaneously and thus any complaint should not be considered now. Nixon v. State, 572 So. 2d 1336 (Fla. 1990), Lindsey v. State, 636 So. 2d 1327 (Fla. 1994), Mordenti v. State, 630 So.2d 1080 (Fla. 1994).

Moreover, the testimony regarding the North Carolina shooting incident constituted a proper character analysis of the defendant, see Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977), and Fitzpatrick v. State, 437 So. 2d 1072, 1078 (Fla.

1983), was permissible to rebut age as a mitigator, see Quince v. State, 414 So. 2d 185 (Fla. 1982), and the trial court's reference to it in the sentencing order was the kind of surplusage approved in Jones v. State, 440 So. 2d 470 (Fla. 1983), to confirm the validity of finding factor (5)(b) in Merck's robbery convictions.

Any error in this regard must be deemed harmless since aggravator (5)(b) is present irrespective of the North Carolina incident and the prosecutor did not urge the latter in his penalty phase argument to the jury.

III. The lower court did not err in denying a mistrial request when the witness misspoke as to a question propounded by the defense. No abuse of discretion has been demonstrated.

IV. Appellant has failed to demonstrate, as required by Arizona v. Youngblood 488 US 51, 102 L.Ed.2d 281 (1988), that Detective Nestor acted in bad faith in failing to retain a pair of khaki pants during a videotaped search of the vehicle occupied by Merck and Neil Thomas after the killing of Jim Newton. Nestor testified that he visually examined the items in the vehicle to determine if they had evidentiary value- he was looking for clothing with blood stains on them- and that if items did not appear to have any evidentiary value he did not retain them. Nestor did not act incautiously; he wore surgical gloves during the search to avoid contamination and the entire search was videotaped.

Merck's contention that Katherine Sullivan's erroneous report that the assailant wore khaki pants means that Neil Thomas was the perpetrator is meritless in light of her positive identification of Merck, rather than Thomas, as the knife-wielder- the two men do not look at all similar- the testimony that Thomas could not fit into Merck's clothing and appellant's admissions to Thomas and his North Carolina friends, and threats to them should they inform on him. Moreover, trial counsel's tactical use of the missing clothes to support his theory at trial precludes the conclusion that he was denied due process in the preparation of his case.

V. The HAC instruction given in the instant case has been approved by this Court. Appellant's failure to submit a proposed alternate should preclude relief.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE.

A. Whether age was a mitigating factor --

The trial judge determined in her sentencing order:

> "STATUTORY MITIGATING CIRCUMSTANCES
>
> One statutory mitigating circumstance was presented to the jury. The Court has considered those other statutory mitigating factors contained in F.S. 921.141(6) and finds that no other statutory mitigating factors exist.
>
> 1. F.S. 921.141(6)(g): The age of the defendant at the time of the crime.
>
> The testimony received by the jury established that the defendant TROY MERCK, JR., was nineteen years old at the time of the homicide. It is clear, however, that the defendant, by virtue of his earlier offenses, has had sufficient contact with the justice system to be aware of the consequences of his actions and is not so youthful as [sic] be considered 'of tender years'. The Court finds that the defendant's age is not a mitigating factor in this case."

(R 2132 - 33)

This Court has frequently rejected youthful age as a mitigating factor See Deaton v. State, 480 So. 2d 1279 (Fla. 1985) (defendant's age of eighteen years and ten months rejected as mitigation by the trial court and upheld by this Court); Cooper v. State, 492 So. 2d 1059 (Fla. 1986) (eighteen years of age not per se mitigation); Kokal v. State, 492 So. 2d 1317 (Fla. 1986) (age of twenty years not per se mitigating). As stated in Deaton, supra:

> [4-6] Appellant next argues the trial judge erred in failing to find appellant's age as a mitigating circumstance. With respect to that factor, the trial court found the following:
>
> > This mitigating circumstance does not apply. The Defendant's date of birth is July 26, 1964 which makes him 18 years and 10 months at the time of the offense. Jason Thomas Deaton had been living on his own for several years. His background indicates he is not of tender age but was an adult at the time and capable of understanding his act.
>
> "There is no per se rule which pinpoints a particular age as an automatic factor in mitigation." *Peek v. State*, 395 So. 2d 492, 498 (Fla. 1980), *cert. denied*, 451 US. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). We find the trial judge acted within the bounds of his discretion in rejecting appellant's age as a mitigating factor under the peculiar circumstances of this case. We conclude that, even had this mitigating factor been found, it would not have offset the three aggravating factors properly found by the trial court. *See Bassett v. State*, 449 So. 2d 803 (Fla. 1984). Appellant also argues the trial judge did not properly apply *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), because he failed to find as a mitigating circumstance the cumulative effect of appellant's age, troubled childhood, and lack of significant history of criminal history of criminal activity. This evidence was known to the trial judge and it is clear he did not believe it to be of such significance that it warranted the finding of this mitigating circumstance.
>
> (text at 1583)

Appellant is age nineteen and far from being an inexperienced naif caught up unexpectedly in the criminal justice system; Merck has used his "tender years" brutally to get what he

wants with little concern for the consequences. At age fourteen he shot Fawn Chastain in the face with the rifle (R 2131), and in 1989 committed five armed robberies of convenience store personnel, three in Lake County, one in Marion County and one in Pasco County (R 2130). He has displayed nothing to suggest that he should be given either protection or further opportunity for rehabilitation by the state.[1]

Merck cites a number of inapposite cases to support his view that he should have benefitted from an age as mitigator finding. Griffin v. State, 639 So. 2d 966 (Fla. 1994), Derrick v. State, 641 So. 2d 378 (Fla. 1994) and Watts v. State, 593 So. 2d 193 (Fla. 1992) involved trial court findings of the mitigator with no appellate issue challenging it; certainly nothing suggests such a finding was compelled or that it would have been error for the judge not to make a finding. Canady v. State, 427 So. 2d 723 (Fla. 1983), Freeman v. State, 547 So. 2d 125 (Fla. 1989) and Huddleston v. State, 475 So. 2d 204 (Fla. 1985) all involved jury overrides in which the Court concluded that it could be reasonable for a jury to predicate its life recommendation on the defendant's age. The jury sub judice recommended death by a

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[1] In Ellis v. State, 622 So. 2d 991 (Fla. 1993) decided shortly prior to appellant's sentencing, this Court declared that the proper approach for a murder committed by a minor (Ellis was 17) is to find and weigh age as a mitigating factor "but the weight can be diminished by other evidence showing unusual maturity. It is the assignment of weight that falls within the trial court's discretion in such cases." Id. at 1001. Merck, of course, is not a minor and is unusually experienced in criminal affairs.

nine to three vote (Tr 1380). Scull v. State, 533 So 2d 1137 (Fla. 1986) involved a cross-appeal by the state challenging the correctness of the trial judge's finding of age as a mitigator. This Court concluded that the trial judge was in the best position to examine the defendant's emotional and maturity level and that factors observable to the judge (aside from mere age of 24) could support his finding. None of the cases address whether a trial judge abused his discretion in failing to make such a finding.

Appellant attempts to create a new statutory mitigating circumstance, one which might pithily be titled: age of nineteen plus immoderate use of alcohol. The problem with this attempt is that the immoderate use of alcohol is, if mitigating, a nonstatutory mitigating circumstance and one which was considered and addressed by the sentencing judge in her order:

"NONSTATUTORY MITIGATING FACTORS

> The Court has considered other aspects of the Defendant's background, character or record, and any other circumstances of the offense.
>
> 1. Alcohol Use: The defense presented testimony during the guilt phase that indicated the defendant, TROY MERCK, JR., had a physical intolerance for alcohol and that on the night of the homicide had been drinking. State witnesses testified that in the bar and during the course of committing the homicide, the defendant, TROY MERCK, JR., did not appear to be impaired. While the evidence is in conflict over how much alcohol the defendant consumed and the effect which such consumption had on him, the Court is reasonably convinced that this mitigating factor has been established and has given it

> some weight in consideration of the defendant's sentence."
>
> (R 2133 - 34)

Thus, even if the Court were to accept appellant's novel contention that the lower court erred in failing to find age as a mitigating factor because of his alcohol use, such error is de minimis since the court below "has given it some weight in consideration of the defendant's sentence." (R 2134) It would make no sense for this Court to remand to the trial court with instructions to add use of alcohol to the age mitigator and to subtract it from the nonstatutory mitigating list so that the calculus remains unaffected.

Appellant next invites the Court to review the P.S.I. (R 2249 A-I) which contains biographical data about Mr. Merck which Mr. Merck himself declined to share with the jury at the penalty phase (Tr 1333).

While appellant's physical stature and work experience and childhood ailments may be interesting they do not seem particularly relevant to the issue whether appellant's mere age is a mitigating factor. If appellant is attempting to demonstrate some mitigating factor other than age, such as mental or emotional disturbance, suffice it to say that appellant declined to introduce testimony of someone like Dr. Merin regarding psychological deficits (Tr 1331, 1347, 1355).[2]

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[2] The defense contended during the colloquy on penalty phase instruction that the non-statutory use of alcohol was a mitigator along with whatever impairment resulted but that the statutory factor did not apply (Tr 1347, 1355).

If appellant is relying on the P.S.I. to demonstrate immaturity as part of the age-as-mitigating factor, the preparer of the P.S.I. report apparently was describing his 1986 visit to the North Carolina substance abuse services program, along with his recommendation that:

> "The circumstances surround this INSTANT OFFENSE are that of an extremely brutal and violent nature. While incarcerated the defendant has continued to demonstrate his violent personality by involving himself in numerous confrontations, and boasting about it."

(R 2249 H)

Merck is a serious threat to society, beyond rehabilitation and should be put to death.

Appellant now seeks to distance himself from his friends Rebecca and Roberta -- called as defense witnesses below, but now characterized by the defense on appeal as "none of whom seem to be of sterling character themselves" (Brief P. 46) -- who, Merck claims paint a picture of him as someone who wants to be a big man. But the record in this case demonstrates appellant to be vicious, scheming and manipulative. Merck made the decision to remove his shirt, retrieve the knife from the car and to attack James Newton. Merck made the decision rather than beat up his victim he would kill him because the victim seemed to be tempting him by standing there. (Tr 759) Merck decided to threaten his friends by killing the person closest to them if they talked. (Tr 7529, Tr 937, Tr 978) Another friend, Sandra Ledford, testified not only that appellant threatened to take the closest thing from

them if they told on him (Tr 1046), but also that Merck wanted her to falsely report that he woke up crying and remorseful in the motel room when in fact he had not (Tr 1049). That the killing was senseless is undisputed; that immaturity helps explain it is not. Merck's history of violence is not assuaged by attaching the label of immaturity.[3] Society need not await Merck's further ripening.[4]

Finally, appellant argues that any error in this regard cannot be deemed harmless. Appellee disagrees. This Court has previously ruled that had the trial court made a finding of age as a mitigating factor the result would not be different. Deaton v. State, supra. See also Wickham v. State, 593 So. 2d 191 (Fla. 1991) (failure of trial court to find and weigh evidence of Wickham's abusive childhood, alcoholism, extensive history of hospitalization for mental disorders including schizophrenia was harmless error). Other harmless error cases include, as enumerated in Justice Wells' dissenting opinion in Wike v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 617, 619 (Fla. 1994) Fennie

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[3] The American Heritage Dictionary definition of immature includes "not fully grown or developed; unripe."

[4] Appellant can obtain no comfort from Morgan v. State, 639 So. 2d 6 (Fla. 1994) whre the trial judge erroneously refused to find age of 16 (a true minor) to be mitigating because the defendant's I.Q. range was within the normal. That case also involved a glue-sniffing, brain-damaged individual with no history of violence, all of which factors are absent in Merck.

v. State, 19 Fla. Law Weekly S 370 (Fla. July 7, 1994) (applying harmless error analysis where trial court provided an unconstitutionally vague jury instruction for the cold, calculated, and premeditated aggravating factor); Peterka v. State, 640 So. 2d 59 (Fla. 1994) (applying harmless error analysis where trial court permitted testimony regarding an unverified prior juvenile conviction during the penalty phase); Atwater v. State, 626 So. 2d 1325 (Fla. 1993) (finding that errors in allowing evidence of lack of remorse during penalty phase and giving of erroneous instruction for the heinous, atrocious, or cruel aggravator were harmless), cert. denied, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994); Duncan v. State, 619 So. 2d 279 (Fla. 1993) (finding that introduction of gruesome photograph during penalty phase was harmless error although the prejudicial effect of the photograph outweighed its probative value), cert. denied, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993); Clark v. State, 613 So. 2d 412 (Fla. 1992) (applying harmless error analysis where trial court might have erroneously considered the felony murder and pecuniary gain aggravators separately), cert. denied, 114 S.Ct. 114, 126 L.Ed.2d 79 (1993); Randolph v. State, 562 So. 2d 331 (Fla. 1990) (finding that improper questioning of medical examiner during penalty phase constituted harmless error), cert. denied, 498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990); Chandler v. State, 534 So. 2d 701 (Fla. 1988) (applying harmless error review to prosecutor's penalty phase comment on defendant's silence), cert. denied 490 U.S. 1075, 109 S.Ct. 2089, 104 L.Ed.2d

652 (1989); Hardwick v. State, 521 So. 2d 1071 (Fla. 1988) (finding error in weighing aggravating and mitigating factors harmless), cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988); Delap v. Dugger, 513 So. 2d 659 (Fla. 1987) (applying harmless error review where trial court filed to instruct jury that it could consider nonstatutory mitigating factors).

Appellant argues that the instant case is a "close call in penalty" and cites a pretrial hearing comment by the trial judge regarding a negotiated plea (R 2447).[5] Obviously, it was not a close call at the end of the penalty phase when the jury recommended death by a 9 to 3 vote and the trial court found two valid and powerful aggravators (prior felonies involving the use or threat of violence which included five unchallenged armed robberies and that the homicide was especially heinous, atrocious or cruel, multiple stabbing with the defendant's desire to teach the victim how to bleed) and that the only mitigating evidence established was weak nonstatutory mitigation (use of alcohol and abusive childhood) (R 2129 - 2135).

The sentence of death should be affirmed.

I. B. Whether the trial court correctly found the HAC factor to be present --

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[5] In an earlier trial resulting in a hung jury that jury had asked a question about evincing, presumably related to the second degree murder definition and what should be done if there was no unanimity on first degree murder (R 1445 - 1446).

Appellant contends that this aggravator was improperly found due to the suddenness of the assault and the intoxication of both appellant and victim. A similar claim was recently considered and rejected in Whitton v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 639, 641 (Fla. 1994):

> Whitton claims that these findings of fact were not proven beyond a reasonable doubt. He contends that the evidence presented demonstrated that the murder occurred rapidly and that Mauldin's intoxication or the blows to Mauldin's head would have rendered him unconscious or semiconscious throughout the attack.
>
> We recently held a claim similar to Whitton's invalid in *Taylor v. State, 630* So. 2d 308 (Fla. 993), *cert. denied,* 115 S.Ct. 107 (1994). There, the victim was stabbed twenty times, sustained twenty-one other wounds including several blows to the head, and finally died as a result of strangulation. Although the medical examiner in that case admitted he did not know whether the victim was conscious during the attack, we concluded that the record supported a finding that the murder was heinous, atrocious, or cruel.
>
> The record in this case similarly supports the trial judge's finding that the murder was heinous, atrocious, or cruel. Although the medical examiner described the attack as a rapid event, he concluded, based on the victim's movement from the first to the final blow, that it lasted approximately thirty minutes. *Cf. Elam v. State*, 636 So. 2d 1312 (Fla. 1994) (concluding that the trial court erred in finding the heinous, atrocious, or cruel aggravating factor where the medical examiner testified that the attack took place in a period of a minute or less). In addition, the medical examiner testified that the head wounds sustained by Mauldin would have caused rapid unconsciousness. Logically, these wounds could not have come at the onset of the attack as Whitton contends. Rather, Whitton's defensive wounds

> and the trail of blood reflecting Mauldin's movement indicate that the blows to the head must have come late in the attack.
>
> The defensive wounds and blood trail also indicate that, although clearly intoxicated, Mauldin was aware of what was happening to him. The medical examiner explained that Mauldin's tolerance and his adrenaline reaction could have diminished the effect of the alcohol. Consequently, the medical examiner concluded that, despite Mauldin's intoxicated state, he would have felt pain as a result of the injuries he sustained. We therefore find that the heinous, atrocious, or cruel aggravating factor was clearly supported by the evidence and leave the trial court's determination on this aggravating factor undisturbed. *See, Perry v. State*, 522 So. 2d 817 (Fla. 1988); *Taylor*.

See also Taylor v. State, 630 So. 2d 1038, 1043 (Fla. 1994) (victim stabbed twenty times and strangled; although medical examiner did not know whether the victim was conscious during the attack, the Court concluded that HAC was established); Perry v. State, 522 So. 2d 817 (Fla. 1988).

The trial court found that appellant advised the victim "I'll show you how to bleed", went to his vehicle and obtained a knife, returned to the victim and stabbed him.

> "From the testimony presented at trial, it appears that Newton was stabbed first in the back four times; there was a stab wound to the lower chest and upper abdomen, an additional stab wound above Newton's left ear, which wound penetrated his skull and the wound which ultimately resulted in death that being a stab wound to the neck which lacerated the carotid artery and jugular vein. . . . "

(R 2131)

Dr. Davis, the associate medical examiner, testified and the trial court found (R 2132) that photos of the victim displayed defensive wounds (Tr 636), that the stab wound in the neck can occur if the knife is twisted (Tr 638) that an untreated person would die in five to ten minutes and that the victim would lose consciousness in two to five minutes (Tr 640). The victim would be able to feel pain (Tr 646).

> "Statements made by the defendant, TROY MERCK, JR., to Neal Thomas, indicate he was aware of the fact that the knife blade had been twisted and, in fact, had done that deliberately.
>
> The actions of the defendant, TROY MERCK, JR., evidenced a desire to inflict pain, as well as an indifference to the pain of Newton. The knife wound to the skull, coupled with the twisting of the blade in the neck, were unnecessarily torturous to Newton. The Court finds this aggravating factor to have been established beyond a reasonable doubt."

(R 2132)[6]

This Court has consistently upheld a finding of HAC where the victim has been killed with multiple stab wounds. See Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Nibert v. State, 508 So. 2d 1 (Fla. 1987); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Johnson v. State, 497 So. 2d 863 (Fla. 1986); Hardwick v. State, 521 So. 2d 1071 (Fla. 1988); Floyd v. State,

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[6] Defense counsel argued below that the reason Thomas could testify to the knife being twisted is that Thomas was the perpetrator (Tr 1159).

569 So. 2d 1225 (Fla. 1990); Haliburton v. State, 561 So. 2d 248 (Fla. 1990); Pittman v. State, 646 So. 2d 167 (Fla. 1994).

See also Atwater v. State, 626 So. 2d 1325 (Fla. 1993) (victim stabbed at least forty times; medical examiner testified that injuries occurred while victim was alive and that the death or unconsciousness, would not have occurred until one to two minutes after the most serious life threatening wounds to the head were inflicted); Trotter v. State, 576 So. 2d 691 (Fla. 1990) (seventy year old woman stabbed at least seven times); Davis v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 576 (Fla. 1994).[7] And in Derrick v. State, 641 So. 2d 378, 381 (Fla. 1994) this Court opined:

> [5] Regarding the heinous, atrocious, or cruel aggravating factor, the trial court's order states:
>
> > [T]he evidence indicates that the victim's body sustained thirty-three (33) knife wounds, thirty-one (31) of which were characterized as stab wounds and two (2) of which were characterized as puncture wounds. Some of the wounds noted by [the medical examiner] were characterized as defensive wounds. The scene of the crime indicated that, after the initial attack, the victim traveled approximately twenty (20) feet, trailing blood

[7] A seemingly contrary result in Brown v. State, ___ So. 2d __, 19 Fla. Law Weekly S 261 (Fla. 1994), can best be explained by the fact that the evidence did not disclose the circumstances of the homicide, i.e., whether even the victim was conscious or not when stabbed.

> along his path of travel, before falling to the ground where he ultimately died from the combination of blood loss and the collapse of his lungs. [The medical examiner] noted that many of the numerous stab wounds would have been extremely painful although [he] was unable to say exactly when the victim lost consciousness, the three defensive wounds noted by [the medical examiner] would indicate that the victim experienced a pre-death apprehension of physical pain and death while making his unsuccessful effort to defend himself. . . .
>
> This Court has consistently upheld the heinous, atrocious, or cruel aggravator where the victim was repeatedly stabbed. *Floyd v. State,* 569 So. 2d 1225, 1232 (Fla. 1990), *cert. denied,* 501 U.S. 1259, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991); *Haliburton v. State*, 561 So. 2d 248, 252 (Fla. 1990), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); *Nibert v. State,* 508 So. 2d 1, 4 (Fla. 197); *Johnston v. State*, 497 So. 2d 863, 8971 (Fla. 196). We reject Derrick's contention that the victim may have been unconscious during the attack. This claim is particularly unbelievable in light of Derrick's own confession indicating that the victim was screaming as he was being stabbed.

In the instant case, the victim did not die instantly; witness Jim Carter reported the victim was moaning after the assault which took his life (R 492). It would be absurd for the defense to contend that the knife wound which cut the carotid artery and jugular vein and the knife wound to the skull, along with the multiple other wounds, was not painful or not designed to inflict pain.

Moreover, even though the HAC factor focuses primarily on the suffering of the victim,[8] Merck's repeated intent to teach the victim "how to bleed" adds an additional dimension of the defendant's intent to cause suffering which cannot be overlooked.

I. C. Whether the death sentence is disproportionate --

Appellant contends that only a single valid aggravator exists (prior violent felony convictions) and that even if HAC were upheld death is disproportionate. Appellee responds that death is proportionately warranted even if there were only a single aggravator (and both aggravating circumstances were properly found).

Relying primarily on Kramer v. State, 619 So. 2d 274 (Fla. 1993), Merck argues that this was only a stabbing in a night club parking lot. In Kramer the Court found the factors establishing alcoholism, mental stress, severe loss of emotional control and potential for productive functioning in the structured environment of prison "dispositive". The Court described it as a fight "between a disturbed alcoholic and a man who was legally drunk". Id. at 278.

Appellee cannot discern why the blood alcohol level of the victim has any relevance to a proportionality analysis unless the victim's conduct was a participating factor in the homicide. In the instant case the evidence is uncontradicted that victim

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[8] See, e.g., Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990).

Newton's behavior was entirely innocent, offering no resistance to his assailant Troy Merck. Previously, this Court has recognized that where a murder victim has attempted to purchase cocaine prior to the murder, "the victim's efforts to buy cocaine are irrelevant to Thomas' culpability." Thomas v. State, 618 So. 2d 155, 157 (Fla. 1993); see also Bolender v. State, 422 So. 2d 833, 837 (Fla. 1992) (approving jury override even where victims were armed cocaine dealers). As in Thomas and Bolender the Court should reject the dubious contention that the victim's status should be devalued because of alcohol content in his blood when his behavior has been totally innocent.

Appellee respectfully submits that the dissenting opinion of Justice Grimes in Kramer (concurred in by Justice Harding) is the more persuasive view:

> On the other hand, the imposition of the death penalty pursuant to a jury's recommendation in this case would be consistent with many of this Court's prior decisions. *E.g., Bowden v. State*, 588 So. 2d 225 (Fla. 1991)(heinous, atrocious, or cruel and prior violent felony weighed against terrible childhood and adolescence), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992); *Hayes v. State*, 581 So. 2d 121 (Fla. 1991) (two aggravating factors weighed against minor mitigating factor of age, low intelligence, learning disabled, product of deprived environment); *Freeman v. State*, 563 So. 2d 73 (Fla. 1990) (death penalty not disproportionate where two aggravating factors weighed against mitigating evidence of low intelligence and abused childhood), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); *Kight v. State* 512 So. 2d 922 (Fla. 1987) (death penalty proportionally imposed with two aggravating factors despite evidence of mental retardation and deprived

> childhood), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988), *disapproved on other grounds, Owen v. State*, 596 So. 2d 985 (Fla. 1992). This Court has also found that the death penalty is proportional where the murder was heinous, atrocious, or cruel and the defendant had previously been convicted of a very similar crime. *Lemon v. State*, 456 So. 2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985).
>
> I do not know whether Kramer would be resentenced to death following a new penalty phase proceeding. I do know that if he were, the sentence would not be disproportionate.

(text at 279)

Moreover, Kramer is distinguishable. There was far more mitigation present in that case than here; Kramer suffered from alcoholism, severe loss of emotional control and had potential for productive functioning in the structured environment. Merck is a repeated criminal and while there was conflicting evidence on the amount of alcohol he consumed the night of the murder he did not seem to be impaired and his attack on the victim was unprovoked.

Appellant bemoans the fact that he is merely nineteen years old with a physical intolerance for alcohol -- factors which the trial judge noted in her sentencing order (R 2133). But the court also explained its minimal value: appellant has had contact with the justice by virtue of his prior serious offenses and is not so youthful to be considered "of tender years" and with respect to his use of alcohol his conduct on the night of the homicide did not appear to be impaired and should be given

only minor weight (R 2133 - 34). Significantly, unlike other cases cited by appellant, there was no expert medical testimony presented by the defense to provide additional weight for asserted mitigation. Also, the trial court did give some weight to childhood abuse (R 2134), but similarly abused siblings did not become violent criminals. Appellant also relies on the P.S.I. report (R 2249 - A - I) which describes the defendant as "self-centered and having no regret for his misbehavior" and that "while incarcerated, the defendant has continued to demonstrate his violent personality by involving himself in numerous confrontations, and boasting about it." (R 2249 H)

Other cases cited by appellant are distinguishable. Nibert v. State, 574 So. 2d 1059 (Fla. 1990) involved massive and undisputed mental health expert testimony; the instant case had none. Livingston v. State, 565 So. 2d 1288 (Fla. 1988) involved extensive mitigation including the use of cocaine and defendant was a minor at the time of the murder; Wilson v. State, 493 So. 2d 1019 (Fla. 1986) was a heated domestic killing; Ross v. State, 474 So. 2d 1170 (Fla. 1985) was a domestic dispute killing in which, according to the court, "we also find significant the fact that appellant has no prior history of violence" Id. at 1174. In contrast, in appellant's brief but violent reign of terror he shot Fawn Chastain in the face at age fourteen and at age seventeen committed five armed robberies of convenience stores.

The death penalty was enacted for Troy Merck.

ISSUE II

WHETHER THE DEATH SENTENCE IS INVALID BECAUSE THE JURY HEARD AND THE JUDGE CONSIDERED TESTIMONY REGARDING APPELLANT'S HAVING SHOT A WOMAN IN NORTH CAROLINA.

The trial court found the presence of aggravating factor F.S. 921.141(5)(b) (defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person):

> "1. F.S. 921.141(5)(b): The defendant was previously convicted of a felony involving the use or threat of violence to the person. The Court finds that this factor was established beyond and to the exclusion of every reasonable doubt. The State presented testimony that on March 15, 1989, the Defendant, TROY MERCK, JR., while armed with a knife robbed a convenience store in Marion County, Florida. On March 22, 1989, the defendant TROY MERCK, JR., while armed with a knife, robbed a convenience store in Pasco County, Florida. On March 23, 1989, the defendant, TROY MERCK, JR., while armed with a knife, robbed three separate convenience stores in Lake County, Florida. While no one was injured in any of the five robberies, the store keeper in each convenience store was threatened. The defendant was adjudicated guilty of each of the armed robberies. These are proper aggravating factors.
>
> In addition to the robberies listed above, the defendant, TROY MERCK, JR., while a juvenile, committed an offense of Assault with a Deadly Weapon, in North Carolina. On January 8, 1986, the defendant, TROY MERCK, JR., entered a laundromat operated by Fawn Chastain. When she discovered his presence, Ms. Chastain asked the defendant, TROY MERCK, JR., to leave the premises. As Ms. Chastain went to lock the door behind him, the defendant, TROY MERCK, JR., shot her in the face with a rifle, the bullet lodging in her head. There apparently was no provocation for the assault. The defendant TROY MERCK,

> JR., was convicted and adjudicated a delinquent for this offense. This is also a proper aggravating factor under F.S. 921.141(5)(b)."

(R 2130 - 31)

Supporting that finding is the testimony of armed robbery victims Elizabeth Miller (Tr 1259), Nathan Dudeck (Tr 1263 - 64), Alice Lytle (Tr 1279), police officer Randall Storey to whom appellant confessed committing three robberies (Tr 1269), Henry Brommelsick who identified appellant's fingerprints on the judgments of convictions Exhibits 1 - 4 (Tr 1269 - 1300), the judgment and sentence for robbery in Pasco County, Exhibit 7 (Tr 1360), and the testimony of Fawn Chastain and Charles Hess regarding the North Carolina shooting (Tr 1281 - 93).

With regard to the incident in North Carolina, appellee notes that when the prosecutor mentioned in opening statement of the penalty phase that North Carolina shooting victim Fawn Chastain would testify regarding the 1985 incident (Tr 1255), not only was there no defense objection, but the defense also commented that "the issue here is the character of Troy Merck" (Tr 1256). Witness Miller, Dudeck, Storey and Lytle then testified regarding appellant's armed robberies in Florida for which he was convicted (Tr 1257 - 80). Fawn Chastain next testified without defense objection (Tr 1281 - 88) that appellant shot her in the face with a rifle. Similarly, agent Hess testified without objection (except in one instance that photographs were cumulative -- Tr 1291), that Merck was

identified as the perpetrator of the Chastain shooting (Tr 1293).[9]

Since appellant interposed no contemporaneous objection to the admissibility of the Chastain-Hess testimony when offered, he may not complain of error on this appeal. See Nixon v. State, 572 So. 2d 1336 (Fla. 1990); Lindsey v. State, 636 So. 2d 1327 (Fla. 1994); Mordenti v. State, 630 So. 2d 1080 (Fla. 1994).

When the prosecutor sought to introduce the North Carolina judgment, the defense objected to the use of juvenile convictions and the trial court would not permit their introduction (Tr 1305 - 07). The court denied a mistrial request after the state argued that it was no secret -- the witnesses had been deposed -- that appellant was fourteen years old at the time of the incident (Tr 1308).[10]

Even if this Court were to accept appellant's argument, Fawn Chastain's testimony and evidence of the North Carolina shooting incident is properly admissible because it tends to negate or diminish the asserted fact of appellant's youth or tender years

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[9] There is nothing in the record suggesting that the defendant expressly waived the mitigating factor of no significant history of criminal activity at the time the state introduced the evidence regarding the North Carolina shooting incident as had been waived by the defense in Maggard v. State, 399 So. 2d 973 (Fla. 1981).

[10] The defense suggested the possibility of a curative instruction; the court commented it couldn't think of a proper instruction, and the defense offered none (Tr 1308).

as a mitigating factor. Merck is not a child caught up in a criminal justice system insensitive to his developing needs; he is a predator who uses violence as a life-style. In Quince v. State, 414 So. 2d 185, 188 (Fla. 1982), this Court opined:

> [6] Quince complains that certain additional factors should have been found in mitigation. He posits that because his record of past offenses is a juvenile record and too remote, he should have been found to have no significant prior criminal history. This Court has allowed juvenile records to dispel this mitigating circumstance when the circumstances warranted. *See Brooker v. State*, 397 So. 2d 910 (Fla. 9181). These juvenile offenses were not trivial, and included armed robbery and burglary. Quince pleads that his age of twenty years is a mitigating factor. Yet as we stated in *Peek v. State*, there is no per se rule that pinpoints an age as a mitigating factor. *Id.* at 498. *Peek* in fact upheld the rejection of the age of nineteen as a mitigating factor. Nor does the record support appellant's claim that the trial judge limited his consideration to only statutory mitigating circumstances.

Just as the non-trivial juvenile record of Quince, including armed robbery and burglary was relevant to rebutting the mitigating factor of no significant criminal history and age of twenty years, so is Merck's effort five years earlier to put a bullet in Fawn Chastain's face relevant to diminish the assertion of the age-immaturity concept urged by appellant here.

This Court has previously considered and rejected appellant's contention.[11] In Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990), this Court ruled:

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[11] Appellant seeks comfort in the fact that the North Carolina courts have held that it is error to consider a defendant's prior

> [5, 6] Campbell claims that the court erred in its findings relative to aggravating and mitigating circumstances. The court correctly found that Campbell was previously convicted of a felony involving the use or threat of violence. He cites no authority in support of his assertion that prior juvenile convictions cannot be considered in aggravation.
>
> (emphasis supplied)

If appellant is now seeking a belated rehearing of the Campbell decision, he is untimely. If appellant is contending that Campbell was incorrectly decided, appellee disagrees and, in any event, the law of the case doctrine would preclude such an attack. See Brunner Enterprises v. Department of Revenue, 452 So. 2d 550 (Fla. 1984).

Appellant ponders that it does not seem reasonable for appellate counsel in Campbell to have cited no authority in support of the position that juvenile convictions cannot be

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adjudication as a youthful offender as a prior felony conviction. State v. Beal, 319 SE.2d 557 (N.C. 1984). It may be instructive, but hardly dispositive, to consider how another state court has interpreted its own laws. In Tennessee, for example, that state supreme court has concluded that the underlying felony in a felony-murder prosecution may not be utilized as an aggravating factor in the penalty phase. State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1993). In contrast, Florida has considered and rejected that doctrine as part of its own law. See, P. Taylor v. State, 638 So.2d 30 (Fla. 1994), cert. denied, ___ U.S. ___, 130 L.Ed.2d 424 (1994). With regard to Beal, the challenged aggravator found inappropriate there was the sole aggravating factor present unlike the instant case; and this Court's decisions in Campbell permit consideration of juvenile convictions in aggravation and Jones authorizes the trial court to support a finding of prior felony convictions -- when there are other felony convictions -- by citing the additional juvenile record of such criminal activity.

treated as a conviction; but it is not unreasonable since no appellate decision by this Court has so ruled that for capital sentencing purposes they cannot be so used. Indeed, current appellate counsel for Merck has not cited any capital decision in this regard, and as stated, supra, Quince and Jones allowed it in the context of those cases.

In Jones v. State, 440 So. 2d 570 (Fla. 1983), the trial judge supported his finding of the aggravating circumstance of prior conviction of a felony involving the use or threat of violence to a person articulating:

> "On June 7, 1965, as a 15-year-old juvenile, the Defendant shot another man with a .22 caliber revolver and on June 81, 1965, was committed to the Florida School for Boys in Marianna, Florida. Even though Defendant was not convicted of a felony because he was a juvenile, such an incident involves the use of violence to an innocent person and is removed from felony classification only because of the Defendant's age."

(text at 578)

This Court opined:

> "The trial judge continued to state that while appellant's juvenile shooting offense and the resisting arrest charge were not reduced to felonies within the meaning of section 921.141(5)(b), and could not be accepted as such, these circumstances were being offered in support of the statutory aggravating circumstances found."

(text at 579)

This Court approved and affirmed the sentence of death imposed:

> "Here, there is no clear indication that the trial judge based his decision to impose the death penalty upon nonstatutory aggravating factors. In fact, the trial judge expressly asserted in the sentence order the nonstatutory aggravating circumstances were mentioned merely in addition to the already established statutory aggravating factors. We see no reason in the record to now question this assertion. The trial judge's references to appellant's juvenile record and his resisting arrest charge were, in effect, surplusage and had no conclusive bearing on the three specific and independently valid findings of statutory aggravating factors. Moreover, the trial court expressly stated that there were no mitigating circumstances present. Accordingly, there being no circumstances in mitigation to counterbalance the three existing valid aggravating factors, death was the proper sentence. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).
>
> (text at 579)[12]

Moreover, in McCrae v. State, 395 So. 2d 1145, 1154 (Fla. 1980), after citing Elledge[13] for the proposition that the

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[12] Appellee notes that Merck can hardly complain that the trial judge erred in subsequently acknowledging in the sentencing order Merck's prior North Carolina acts of violence (R 2130 - 31) when it was the defense who earlier had called the trial judge's attention to Jones v. State, 440 So. 2d 570 (Fla. 1983) (R 2573 - 74) -- a decision which upheld the trial court's use of the defendant's juvenile record as surplusage supporting other prior violent felony convictions. Having been invited by the court to rely on Jones, appellant should not be heard to complain when it did. McPhee v. State, 254 So. 2d 406 (Fla 1st DCA 1971); State v. Belien, 379 So. 2d 446 (Fla. 3d DCA 1980).

[13] Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977) (. . . the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely

capital sentencing process is to ensure a proper character analysis to determine if the ultimate sentence of death should be imposed, the court rejected the defense contention that a crime of violence disposed of by withholding adjudication should be treated differently than a plea of guilty with adjudication. The Court reasoned:

> "The fact that an adjudication of guilt is a prerequisite, as a technical element of the offense to a conviction under the habitual offender statute, is thus of no analogous value to the instant case. The word "convicted" as used in section 921.141(5) means a valid guilty plea or jury verdict for a violent felony; an adjudication of guilt is not necessary for such a "conviction" to be considered in the capital sentencing character analysis."

See also Fitzpatrick v. State, 437 So.2d 1072, 1078 (Fla. 1983) (Since the purpose of this mitigating factor [no significant history of prior criminal activity] is to help ascertain a defendant's character, we do not believe that a trial judge should be limited to looking at a defendant's adult criminal activity. A defendant's juvenile record can be just as relevant in determining the defendant's character).

Juvenile records may be taken into account for some sentencing. See Rule 3.701(d), Florida Rules of Criminal Procedure. Under the General Rules of Definitions, (d)(2)

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must be a valid consideration for the jury and the judge); Peterka v. State, 640 So. 2d 59, 70 (Fla. 1994) (no reversible error in state's presenting testimony about unverified prior juvenile convictions for impeachment).

provides that "conviction" means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended. Section (d)(5)(g) indicates that a prior record includes "all prior juvenile dispositions that are the equivalent of convictions as defined in subdivision (d)(2), occurring within three years of the commission of the prior offense and that would have been criminal if committed by an adult, shall be included in prior record."; Hadley v. State, 546 So. 2d 769 (Fla. 3 DCA 1989) (juvenile delinquency dispositions could be considered as part of an offender's prior record for sentencing purposes). Here the evidence of the North Carolina incident was proper as stated in F.S. 921.141(1) it was "any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated."

Finally, it must be noted that nowhere in the state's penalty phase closing argument was there any reference to the Fawn Chastain North Carolina shooting incident (Tr 1361 - 1370). In closing argument the prosecutor urged the jury to reject the defendant's proffered age and family background evidence as mitigation (Tr 1367 - 64), mentioned that appellant had prior felony convictions -- "We're not gonna belabor what you heard" (Tr 1365) "We do have the certified judgment and sentences for the convictions, four, five separate robberies" (Tr 1365) -- and then argued that the killing of James Newton met the HAC criteria (Tr 1366 - 69).

Appellant is not aided by reliance on Long v. State, 529 So. 2d 286 (Fla. 1988). With the reversal of the other conviction in Long that conviction could not be used as an aggravating factor (and that reversed murder conviction was the only prior murder conviction available for use in the sentencing proceeding). Merck's North Carolina adjudication has not been set aside, the jury was not told either in testimony or in argument by counsel of the North Carolina conviction, and the trial judge in the sentencing order first determined the presence of aggravating factor (5)(b) by the finding of five armed robbery convictions prior to adding the comment of the North Carolina incident as surplusage. Jones, supra.

Appellant bemoans the fact that an alleged history of emotional disturbance, physical illness and learning disability was not presented to the jury but included in the P.S.I.. The record reflects a conscious decision by the defense not to call Dr. Sidney Merin at guilt phase (Tr 1014) offered only a DOC employee and family members at penalty phase (Tr 1316 - 1329), appellant chose not to testify at penalty phase (Tr 1333) and the defense objected to the state calling Dr. Merin at penalty phase because it was not urging any medical or psychological defect (Tr 1331) [the defense had previously listed Dr. Merin on the reciprocal witness list - R 1902]. In Walls v. State, 641 So. 2d 381 (Fla. 1994), this Court explained that a judge and jury could reject the opinions of mental health experts when unsupported by the facts at hand; yet strangely appellant asks this Court to

believe there is mental mitigation when below the defense refused to present such evidence, presumably because all would see how non-mitigating it was.

Contrary to appellant's argument, the mitigating evidence proffered sub judice was weak and unsubstantial. There was no expert mental health testimony submitted, age was not rejected as a mitigator, and the trial court credited and found childhood abuse (R 2134) (" . . . has given some weight to this . . .").

In summary, the testimony of Fawn Chastain was properly admitted as it had relevance to the prior felony conviction aggravator and it rebutted the defense asserted age as a mitigator. This Court has held that juvenile adjudications qualify for consideration as aggravating factor 5(b) (Campbell, supra) and may be articulated as surplusage supporting other valid prior felony convictions (Jones, supra), it constitutes a proper character analysis of the defendant; and even if deemed error, would be harmless since this evidence was not urged by the prosecutor in closing argument and the valid aggravator is supported by five armed robbery convictions, which were unchallenged below and remain so here.

ISSUE III

WHETHER THE LOWER COURT ERRED IN DENYING A MISTRIAL REQUEST FOR DETECTIVE NESTOR'S ALLEGED VIOLATION OF THE MOTION IN LIMINE WHEN INSTIGATED BY THE DEFENSE.

During the defense counsel's cross-examination of Detective Nestor the following colloquy occurred:

> "Q. Have you seen the videotape, by the way?
>
> A. No, not recently. I have not.
>
> Q. Have you ever seen it?
>
> A. Back before the last trial, yes.
>
> Q. Is it fair -- does it fairly, accurately depict what, when you say, you talk about the last hearing that we had in this case?
>
> A. Yes, sir.
>
> Q. Does it fairly, accurately depict what went on at the time?
>
> A. Yes."

(emphasis supplied) (Tr 689)

Appellant requested a mistrial because the witness mentioned the last trial and the court commended defense counsel for asking the follow-up question (referring to the last hearing), opined that the witness misspoke and declined to grant a mistrial (Tr 690). Defense counsel added he was not urging the witness deliberately did it (Tr 690).

The trial court did not abuse its discretion in failing to grant a mistrial, since the witness simply misspoke in his answer as the trial court found and his answer was in response to the inquiry posed by defense counsel. See Breedlove v. State, 413

So. 2d 1 (Fla. 1982); Power v. State, 605 So. 2d 856 (Fla. 1992); Sireci v. State, 587 So. 2d 450 (Fla. 1991); Buenoano v. State, 527 So. 2d 194 (Fla. 1988); Marek v. State, 492 So. 2d 1055 (Fla. 1986).[14]

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[14] Appellant suggests that the instant case does not strongly demonstrate guilt since there was a prior hung jury leading to a mistrial (fn. 34 of appellant's brief). If engaging in such speculation is useful, perhaps the different results in the two trials may be explained by the fact that Neil Thomas apparently did not testify in the first trial (R 1447 - 48) or by a differing defense strategy (R 1471) which led to the appointment of subsequent trial counsel (R 1512).

ISSUE IV

WHETHER THE CONVICTION MUST BE VACATED BECAUSE OF THE ASSERTED BAD FAITH FAILURE TO PRESERVE POTENTIALLY USEFUL EVIDENCE.

In Arizona v. Youngblood, 488 U.S. 51, 102 L.Ed.2d 281 (1988), the Supreme Court held that unless a criminal defendant can show bad faith on the part of the police, the state's failure to preserve potentially useful evidence does not constitute a denial of due process of law. See also, Kelley v. State, 569 So. 2d 754 (Fla. 1990); State v. Robinson, 552 So. 2d 943 (Fla. 4th DCA 1989).

Appellant has failed to establish bad faith on the part of the police in failing to preserve potentially useful evidence. Detective Nestor testified that a videotape was made of the execution of the search warrant of the Mercury Bobcat used by Merck and Thomas (Tr 1052). Nestor reviewed the individual articles, clothing items, foreign objects that were inside the vehicle. He did not place every article into property at the technical services building for storage and explained:

> " . . . The reason being is not everything in this vehicle would have had evidentiary value. So those items that did not have any evidentiary value would have been separated, not taken into evidence. I was looking for clothing with blood stains on them. Something that could connect to the scene of the crime or the suspect. So, was not taken into evidence if it had not evidentiary value."

(Tr 1053)

He further testified that there were four or five articles that were not placed into evidence, including a bag with some underwear, socks, shorts, T-shirts, a baseball cap and a long pair of pants (baggy Khakish color). He looked at all the articles for any type of evidentiary value including stains. Additionally, there were miscellaneous tools, pair of tires, radio and other items that would be found in a vehicle that were not placed into evidence" because none of those had evidentiary value in the case either" (Tr 1054 - 55). He reiterated that the tan or khaki colored pants were not put in evidence:

> "I checked the pants for blood stains. There were no blood stains on these pants. They were not taken in evidence."

(Tr 1058)

Detective Nestor also had testified earlier (Tr 663 - 695) and explained how the search of the vehicle was conducted and the videotaping of the search (Tr 671). On cross examination, he testified that he interviewed and took a statement from Katherine Sullivan (Tr 677 - 78). When executing the search warrant of the vehicle he put on surgical gloves to avoid contaminating anything. He looked at everything (Tr 684). Nestor explained:

> ". . . what my job is to determine when I look at these things what could have evidentiary value, what does not have evidentiary value. There are a lot of items in there that had not evidentiary value, that were not retrieved from the vehicle, that are left in the vehicle."

(Tr 686)

At the hearing on appellant's motion for new trial October 15, 1993, Merck argued that Detective Nestor erroneously allowed the khaki pants to be released to the car owner, that Roberta Connor had testified Neil Thomas had stated there was blood all over them and they had changed clothes (R 2497) and that he could show the police officers acted in bad faith by reference to the deposition of Detective Vaughn (R 2504; see also R 1835 - 70). Merck interpreted the Vaughn deposition to be an indictment that "what Detective Nestor did was against police procedure and acted dangerously and certainly not what a good detective would do." (R 2506) Since deponent Vaughn had acknowledged a hypothetical of something that would be "against procedure", the defense argued, "That's the best I can come to bad faith"(R 2507).

The prosecutor responded that it "boggles my mind" that the defense could urge bad faith conduct by the sheriff's office in executing the search warrant when the entire episode was videotaped and Nestor can be seen going through the various items (R 2509). The prosecutor added:

> "He goes through these pants, kind of rolled or folded up at the bottom of the pile other clothing and items in the back, then he's going through , one by one you see him take a pair of pants out, you see virtually there are no obvious stains looking at the individual. Then you see him unroll them and look at them just like he was doing the other items in the car and put them to the side.
>
> Mr. Zinober kind of presented this evidence in an indirect manner by calling the woman who took the video tape first. After he did that, just to try to clear this matter up, we specifically recalled Detective Nestor on

rebuttal. And I asked point blank in looking at that clothing, those pants and that shirt, whether there were blood stains on them.

And he stated that there were no blood stains on them. He did not consider them to have that evidentiary value and they were not, you know, placed in a bag in evidence like -- like the items of clothing that they did find.

(R 2510)

* * *

I don't see how the officer going through on video tape making visual examination, not seeing any of these stains is going to be considered bad faith on his part. After what items they separated and from the car were taken to the sheriff's department, the vehicle was -- nobody claimed it and it was subject to forfeiture.

Now, I don't remember during the trial testimony that they released -- released it back to the owners. I'm just really kind of confused where he's getting that. I always understood that the vehicle had been forfeited. So I --

(R 2513)

After listening to argument, the lower court denied relief:

THE COURT: What sticks in my mind is that you subpoenaed the custodian of the evidence in this case, who came in here with -- I mean not only did we have everything that was in evidence in the case, but he came in here with another box full of crap, boxes, and asserted whatever, that apparently were checked for whatever reason the officers thought important, but were never utilized in this case. It -- although I didn't have the handcuffs here, they just weren't admitted so he didn't have those, he had other stuff.

And it's very hard. I mean, you looked at that vehicle on the video. And to follow through with your theory at that time that

that evidence -- that warrant is executed because the officers don't know where the case is going to go, they must preserve every piece of chewing gum paper, every pizza box, every cup from Dairy Queen, every handkerchief, everything that is in that vehicle because we don't know what the defense is going to use for a theory of defense.

And basically that's what you're saying, and to a large extent, I think they did that in this case. They went through, collected an awful lot of stuff, some of which wasn't, some of which was; and I cannot -- I have no reason to assume or presume that Nestor is not acting in good faith. The mere fact that you say that he wasn't or that I should not believe him is not sufficient for this court.

No, sir, I'm ruling.

It is not as though there was something obviously being hidden. It's all in the video. It is my feeling that they did not know who the parties were at that time, who actually committed at that point in time. They were looking for everything that they can do to made this case. And I think to say, well, they deliberately didn't take something that had evidentiary value, i.e., blood-stained pants, I find that incredulous and I just cannot find that this would possibly meet the standard.

I don't know that I can, even though there was evidence -- there was hearsay testimony by a witness who was not credible for either, said, I don't think -- saying what someone else said, who if one accepts your position is not a credible witness, either, said to her. I just don't think I can on this, although I understand where you're coming from and it's going to be an interesting question for appeal. I'm going to deny the motion for new trial and motion to dismiss in this case."

(R 2516 - 18)(emphasis supplied)

Katherine Sullivan described Merck and Neil Thomas. The shorter man was five feet seven or five feet eight in height with light brown hair, short like a bowl cut and the other was taller, about six feet, tan; his hair was short in front and long in the back (Tr 420). The shorter man wore a light colored oxford shirt with the sleeves rolled up which he took off (Tr 425). There was no doubt in her mind that appellant, whom she identified in court, killed Jim Newton (Tr 436) and she identified Exhibit 38 as the pink oxford button up dress shirt worn by Merck (Tr 438 - 439). The other man (Thomas) wore Exhibit 15, a longer black shirt untucked with laces up the front (Tr 438 - 439). She was shown two photopacks; Exhibit 6 contained a photo of the man who killed Newton, and Exhibit 7 contained a photo of the killer's companion (Tr 442 - 43). Other witnesses confirmed that the witness selected Merck's photo from Exhibit 6 (Tr 503) and Neil Thomas, number in Exhibit 7 (Tr 668). A review of these Exhibits demonstrates that Merck with his droopy eyes is easily distinguishable form the larger, long-haired Thomas (Tr 1176 - 1177).

Sullivan correctly described Merck as having a slight accent with droopy eyes (Tr 448). Merck admitted ptosis condition (Tr 853). Sullivan testified that the killer "reminded me of a friend of mine from high school that looked very much like him" (Tr 449).

Crime scene technician Alyson Morganstein identified the pink shirt (Exhibit 38), black shirt (Exhibit 15) and pants

(Exhibit 21) found in the vehicle. There were a lot of clothes in the hatch (Tr 539 - 541) and the witness explained they were looking for blood stains on the clothing and Detective Nestor "collected what he thinks is important" (Tr 558 - 559).

F.B.I. serology and DNA expert Mertens determined that there was human blood on the knife (Exhibit 22) and on the blue pants (Exhibit 21) and the pants blood matched the DNA profile of victim Newton (the chance of another individual with the same profile would be one in 174 million Caucasians) (Tr 579).

The tests were negative for the presence of blood on the pink shirt (Exhibit 38) (Tr 576).

Neil Thomas identified Exhibit 15, the long sleeve black shirt with criss cross laces on front and baggy sleeves as the shirt he wore (Tr 738) (as Sullivan had testified). And Merck wore a pink shirt with the long sleeves rolled up (Tr 738). The shirt (Exhibit 38) was a size 15, not the size 17-1/2 Thomas wore (Tr 739, 767). Thomas weighed about one hundred and eighty pounds and had a size 36 pants (Tr 739). The pants Merck wore, Exhibit 21, was a thirty medium which would not fit Thomas (Tr 767 - 68) Merck claimed that Thomas was wearing tan pants and that he wore the "gray pants" in evidence (Tr 821). Merck who is 5'8" or 5'8-1/2" and 144 pounds had a 28 - 30 inch waist (Tr 825). Merck admitted wearing the pink shirt that night and the Exhibit 21 grey slacks which the FBI found blood on. Merck

maintained that no one wore the Exhibit 15 black shirt (contrary to Sullivan's and Thomas' testimony) (Tr 858 - 859).[15]

Appellant contends that since Katherine Sullivan misreported that the assailant wore khaki-colored baggy dress pants and since Roberta Connor (who was not present at the time) stated that Neil Thomas told her they changed their clothes which had blood on them; Detective Nestor's failure to retain a pair of khaki pants found in the vehicle which appeared to him visually to contain no blood or otherwise to be of evidentiary value and which fact was known to the defense in the preparation and presentation of their case to the jury -- mandates a conclusion that the police acted in bad faith requiring reversal.[16]

As below, appellant relies on an excerpt of the Vaughn deposition (R 1863 - 64) to prove that Nestor acted in bad faith

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[15] As appellee reads the record Brommelsick testified that prints of both Thomas and Merck were on the top roof on the passenger side (Tr 623). And Holton corroborated the Katherine Sullivan testimony that the assailant said he would show the jerk how to bleed (Tr 723) and that when the assailant was finished the taller companion (which would have been Thomas) "the guy that didn't do the stabbing" had "pretty much a confused look on his face." (Tr 724 - 725).

[16] Assuming arguendo that Nestor's conduct be deemed negligent, any relief is inappropriate. There is no substantial evidence that the khaki pants contained blood on them and its presence or absence does not suggest a different result. If the pants did not have blood that confirms that Nestor exercised good judgment; if the pants did have blood, the cross-examination testimony of serology expert Mertens explains that one can't distinguish between a primary and secondary transfer of blood (Tr 585)

by his not keeping the pants which he testified appeared not to have evidentiary value. The trial court correctly ruled that simply because deponent Vaughn answered questions about what he would do for inventory procedure purposes does not mean others who might act differently would be doing so for malicious purposes[17]

Merck contends that it is "outrageous as to reach the level of bad faith under the Youngblood standard" (Brief p. 84) for Nestor not to have kept the observed item of clothing; but it is not in light of his testimony that he looked at the various items in the car to see if they appeared to have evidentiary value and those that didn't he didn't retain.

Finally, appellant mentions that his post trial motions were untimely and also that the facts forming the basis of the motions were known or could have been known with the exercise of due diligence prior to or during trial (Brief, pp. 84 - 85) Cf. State v. Matera, 266 So. 2d 661 (Fla. 1972) (defendant not entitled to an evidentiary hearing upon ground he was denied a fair trial where basis for complaint was known to the defendant at the time of trial) Both the motion for new trial and the post-trial motion to dismiss the indictment were filed September 15, 1993 (R 1065 - 71, R 1072 - 76) and the jury verdict of

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[17] Depondent Vaughn would apparently prefer to disassemble a seized vehicle (R 1863). It is hardly bad faith conduct by the police to fail to do so in every case a vehicle is seized.

guilty was returned on September 7, 1993 (Tr 1225, R 2010). Appellant is correct that the motion to dismiss indictment is untimely because Rule 3.190(c) R. Cr. P. requires a motion to dismiss the indictment to be made "either before or upon arraignment" and except for objections based on fundamental grounds, every ground not presented within the time provided "shall be taken to have been waived." Appellant is also correct that the facts underlying the claim were known at the time of the trial since the defense used the videotape at trial to urge that the khaki pants were not kept (Tr 1168, 1174) that his pretrial deposition of Vaughn revealed the alleged bad faith of Detective Nestor (R 2504 - 09) and yet appellant waited until after the verdict to seek relief from the trial court.[18]

There is no error, fundamental or otherwise, in the trial court's denial of the post-trial motions. The trial court's ruling should be affirmed.

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[18] In his verbatim quote from the motion for new trial, at page 78 of the brief, appellant reiterates trial defense counsel's assertion that he was precluded from retaking Netor's deposition under Rule 3.220(h)(1) since one had already been taken by prior counsel. This claim is disingenuous. The Rule specifically allows redeposition "by consent of the parties or by order of the court issued on good cause shown". Appellant simply chose not to attempt to do so. Appellee notes that Dr. Merin was deposed twice (Tr 1769 - 1828, R 1912 - 1933).

ISSUE V

WHETHER THE TRIAL COURT GAVE AN UNCONSTITUTIONALLY VAGUE INSTRUCTION ON THE "HAC" AGGRAVATING FACTOR.

The trial court gave the following instruction:[19]

> "The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was consciousless, pitiless or was unnecessarily torturous to the victim."

(Tr 1376 - 1377)

The instant instruction has been upheld against a vagueness challenge to it. See Hall v. State, 614 So. 2d 473 (Fla. 1993); Taylor v. State, 630 So. 2d 1038 (Fla. 1993). The instant claim is meritless.

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[19] In the lower court, at the jury instruction conference, appellant contended that the facts in evidence did not support an HAC finding. (Tr 1338 - 40). When the court asked which part of the HAC instruction should be given, the defense attorney responded that he was unclear whether the HAC instruction was vague or not so he would object "and say that as a matter of law that the hack [sic] instruction in Florida is unconstitutional, vague, and should not be applied to any death case, particularly here" (Tr 1341). The trial court noted that the present HAC instruction was not the one condemned in Espinosa (Tr 1354). The defense submitted no proposed instruction on this.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 17th day of March, 1995.

OF COUNSEL FOR APPELLEE