IN THE SUPREME COURT OF FLORIDA

TROY MERCK, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 83,063

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, TROY MERCK, JR., was the defendant in the trial court, and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal will be referred to by use of the symbol "R", and the trial transcript will be referred to as "T". All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Troy Merck, Jr. was charged by indictment filed November 14, 1991 with the first degree murder of James Anthony Newton (R17-18). The case went to trial on November 3-6, 1992 and ended in a hung jury (R1382,1386). After a second trial on September 1-7, 1993, before Judge Claire Luten and a jury, appellant was found guilty as charged (R2010; T1225). After the penalty phase, the jury recommended the death penalty by a vote of 9-3 (R2054; T1380). On December 10, 1993 Judge Luten sentenced appellant to death, finding two aggravating factors (HAC and previous conviction of felonies involving the use or threat of violence) and two mitigating factors (abused childhood and alcohol use on the night of the offense) (R2129-35). The trial court found that appellant's age (nineteen) was not a mitigating factor in this case (T2133).

STATEMENT OF THE FACTS

A. Trial - State's Case

The following is a summary of the evidence introduced at trial:

Katherine Sullivan was a bartender at the City Lights nightclub in Pinellas County (T409). On the night of October 11, 1991 -- while off duty -- she went to City Lights with her boyfriend Glen Sharpenstein. Ms. Sullivan was driving; her car was a blue Camaro. They arrived around 10:00 p.m. (T412,452). They were celebrating the birthday of her friend Jim Newton (T412).

The nightclub was active, but not packed. There was a fake orgasm contest, like they had every Thursday (T462). Between 10:00 and midnight, Ms. Sullivan had two or three beers and a couple of shots of a drink called Buttery Nipples (T413,456). She cut herself off from drinking at midnight, and decided she'd had too much to drink to drive home (T414,455-60). She was feeling "a little tipsy"; not drunk but not stone sober either (T457,459-60). Arrangements were made for her friend Gana to drive. A group comprised of Ms. Sullivan, Sharpenstein, Jim Newton, Don Ward, and Gana were going to go get breakfast and then go back to Gana's house and party a little bit (T415-17,457-58).

When the bar closed, around 2:00 p.m., the group gathered in the parking lot to wait for Gana until she finished working (T417, 460-61). Ms. Sullivan was inside her car talking to Glen; she was in the driver's seat and he was in the passenger's seat (T462-63). A large white car was parked next to hers, and a couple of guys

were talking to a couple of girls outside that car (T419,463-64). The taller of the two men (identified by Ms. Sullivan from a photopack as Neil Thomas) leaned on her car. She asked Glen to tell him to move. When he did so, he began apologizing sarcastically. Eventually they got off the car and stepped away. Jim Newton walked up and asked Ms. Sullivan if everything was alright. She told him there was no problem; it was all taken care of (T419,421-23,442-44,463-66,469).

Ms. Sullivan got out of her car and was standing by the driver's side door talking with Jim Newton. Meanwhile, Glen was still sitting in the passenger seat and Don Ward was standing outside. Glen was rolling Don's hand up in the window and putting lit cigarettes in it, as a joke. They were both very drunk (T421-22, 430-31,457). Ms. Sullivan congratulated Newton on his birthday. The shorter of the two men who had been standing by the white car (identified by Ms. Sullivan from a photopack and in court as appellant, Troy Merck) made a snide remark, something like congratu-fuck'n-lations (T421-22,436). Newton told him to mind his own business, he was talking to the lady. Appellant kept making comments trying to egg Newton on into a fight, calling him a "pussy". Newton was trying to ignore him, saying "Yeah, I'm a pussy. I'm not gonna fight" (T421-23).

Ms. Sullivan testified that she was sure that it was appellant who called Newton a pussy and who was trying to provoke him into a fight (T467). The taller man was bantering with appellant, but said nothing derogatory to Newton (T423-24,469).

According to Ms. Sullivan, appellant was standing by the front of his car (a red beat-up Pinto or Bobcat which was parked on the other side of where the white car -- now gone -- had been), and he asked his friend to throw him the keys (T423-24,429,432,450-51, 463). He caught the keys, unlocked the passenger side door, took off his shirt, and threw it in the back seat (T427,430). [Ms. Sullivan testified that when the taller man threw the keys, he said "Here are the keys, Troy", and appellant said "Don't call me Troy. Don't call me by my name" (T429). While she did not mention this in her deposition, she stated on cross that she thought she had told the police that she heard a name; she wasn't sure if it was Troy or Tony (T470-72)].

Ms. Sullivan testified that appellant said to his friend "I think I'm gonna teach him how to bleed." He walked back around the car, kind of strutting, and handed the keys back to his friend. He came toward the front of her car, telling Jim Newton he was going to teach him how to bleed. The taller man said "I think he might be serious. I think you might want to take off." Appellant then rushed Newton and -- while facing him -- began hitting him in the back with roundhouse punches. There was a flurry of blows, four or five with each hand, followed by some uppercuts. Ms. Sullivan saw a glint of light from some sort of blade, and saw blood spots on Newton's back. He was starting to fall to the ground (T429,433-35). She couldn't move at first; then she ran inside the bar and told them to call 911 (T435-36).

The next morning a detective showed her two photopacks. She

identified appellant as the person who stabbed Jim Newton, and she identified Neil Thomas as his friend (T439-44, R1176-77). When Ms. Sullivan gave a description to Detective Nestor of the person who did the stabbing, she said he was wearing khaki-colored baggy dress pants (T472).

In court, she described the assailant as about 5'7" or 5'8" with short light brown hair. He had droopy or "buggy" eyes, and a slight accent or drawl (T420,448-49,473). The other man was about six feet tall, lanky build, and looked to her like a surfer; he was very tan, with light blond hair, short in the front and long in the back (T420,466). The shorter man, whom she identified as appellant, was wearing a light-colored oxford dress shirt with a button-down collar and long sleeves (which were rolled up) (T425,436-38). The taller man was carrying what appeared to be a mobile phone. He was wearing dark pants and a wrinkly black lace-up shirt, which was partly open in front and untucked (T437-38). Ms. Sullivan identified State Exhibit 15 as the shirt Neil Thomas was wearing, and said she was pretty sure State Exhibit 38 (a pink dress shirt) was the one appellant had on (T437-38).

Jim Carter was in charge of security at City Lights. As the bar was closing, Kathy (Sullivan) ran inside and said Jim had been stabbed (T487-88). Carter went outside, where he saw someone slumped on the hood of Ms. Sullivan's Camaro. A little red car was pulling out of a parking space two spaces away. Carter got the tag number, which was either OWW or DWW 6306. The tag was out-of-state, with dark letters on a white background (T490-92).

After going back inside to call 911, Carter came back out to the parking lot. Jim Newton had been placed on the ground; he was coughing up blood and groaning. When the police arrived, Carter gave them the license tag number (T492).

On cross, Carter acknowledged having told somebody at closing time that he had to chug his beer before leaving (T493). Carter had no specific recollection of appellant, and did not know if appellant was the person he said that to (T493).

Detective Jeffrey Crandall was informed that a vehicle matching the suspect's car had been located in a parking area about a mile or two from City Lights (T497-99). At 3:18 a.m. on the night of the incident, Crandall arrived and saw a red Bobcat which was properly parked. There was no tag on the outside of the car (T498). He took the VIN number. When he flashed his light into the window he saw a license tag which matched the BOLO. There were clothes and books on the passenger side of the interior. A knife in a sheath, with a brown handle, was leaning against the side panel in the passenger seat. There appeared to be blood on the metal part of the handle (T498-99).

Detective Rachel Hughes put together a photopack and showed it to Katherine Sullivan on the day following the homicide. Ms. Sullivan took 1 1/2 - 2 minutes looking at photographs; then said that number 4 (a photo of appellant) looked like the suspect, but she wished she could see him in person. She put the five other photographs aside. She was crying, as she had been all day. Detective Hughes asked her to clear her eyes, look again, and "tell

me if that's him." She then stated "Yes, that's him" and pointed to photograph number 4 (T501-07, R1176).[1]

Crime scene technician Michael Pulham went to the parking lot of City Lights and photographed the area. There was blood on the left side of the blue Camaro and on the hood of the vehicle. He lifted some fingerprints from the car. A jeep which belonged to a witness was also parked in the lot. Pulham did not measure its distance from the Camaro, but he estimated in court that it was about 75 feet away (T509-12,517,520,522-26). Pulham also photographed the apartment complex parking lot where the Bobcat was found (T512-18). Later in the week, he went to the New Ranch Motel, room 211, where he collected some items and lifted some fingerprints (T519-20).

Crime scene technician William Havas obtained the clothing of the deceased. The shirt had holes roughly corresponding to the wounds on his back and chest (T529-31).

Crime scene technician Alyson Morganstein processed the Bobcat automobile for evidence, pursuant to a search warrant, on the afternoon of October 11, 1991 (T534-35,557). As Detective Nestor found and packaged the items of evidence, Morganstein photographed them (R535,545-49,557-58). A videotape was made of the search (T558). Morganstein testified that they were there collecting absolutely everything that was in the car, and that you are supposed to take everything into evidence (T558). She did not specifically know

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[1] In the record, the photograph of appellant is in the top right of the four photos on the first page of State Exhibit 6 (R1176).

what Detective Nestor collected; "he collected what he thinks is important" (T558).

A knife in a leather sheath, with bloodstains on the handle, was behind the passenger side seat (T538-39). A license plate was on the floor in the back seat (T544). A pink shirt (St. Exh. 38) was in the back seat behind the driver's seat. A black shirt (St. Exh. 15) and a pair of dark pants (St. Exh 21) were also found in the back of the car, along with some other clothes (T539-42, see T484).

Blood was found in various locations, mostly on the passenger side of the car (T536-37,548,555,559). Morganstein collected blood samples, which were sent to the FBI for analysis (T536-38). Prints were lifted from several locations in the vehicle, including what appeared to be a palmprint on the roof (T543-44, 548-50). There was some bloodstained ridge detail (likely a fingerprint) on the exterior passenger-side door handle (T550-55).

Deputy Sheriff Richard Johnson collected items of evidence from Room 211, Howard Johnson's Motor Lodge in Clearwater. Among these items was a room key (also Room 211) from the New Ranch Motel. Deputy Johnson processed the room at Howard Johnson's for fingerprints. One of the prints collected was from the base of the telephone (T562-64).

F.B.I. Agent Jack Mertens, a forensic serologist, examined samples collected by Technician Morganstein from the red Bobcat automobile. The tests were positive for the presence of human blood; the quantity was insufficient to determine blood-type or DNA

(T575-76). The pink oxford shirt (State Exh. 38) tested negative for blood (T576). There was human blood on the knife (Exh. 22) but none was found on the sheath (T577).

There was human blood on State Exh. 21 (blue pants), and Mertens was able to conduct DNA profiling of the blood on the bottom right leg of these pants. The DNA profile matched that of the known blood sample of James Newton, the stabbing victim (T577-80, 484). Mertens testified that the chance that the blood on the blue pants could have come from someone other than James Newton would be about 1 in 174 million in caucasians (T579).

On cross, Mertens testified that the only articles of clothing he tested were the blue pants, belt, and pink shirt (T581). If another pair of pants had been sent to him, he would have tested it (T582). Mertens stated that he could not tell whether the blood on the pants came directly from James Newton or whether it was transferred from another source (T583).

Latent fingerprint examiner Henry Brommelsick obtained or was provided with the known fingerprints of appellant, Neil Thomas, and James Newton (T606-07). According to Brommelsick, the print from the telephone at Howard Johnson's belonged to Neil Thomas (T608-09). Both appellant's prints and Neil Thomas' prints were on the exterior rear passenger window of the Bobcat (T610-11,620). One of appellant's prints was on the interior passenger side window; and one of Thomas' prints was on the interior rear hatch glass window (T612). Both appellant and Thomas left a print on the roof of the vehicle, on the passenger side. The one directly above the door

handle was Neil Thomas', while appellant's print was further toward the rear (T612-13,620-23). Brommelsick testified on cross:

> Q. Someone went like, "Give me the keys," on the top portion of the car, right above the passenger side where the door handle would be, trying to get into the car, who would that have been according to your fingerprints?
>
> A. It would be Neil Thomas.

(T622).

Brommelsick stated that about sixty of the latent lifts had no value, either because they were smudged or had insufficient ridge detail, or because they did not match anyone's known prints (T617-18). None of the prints which were submitted to him -- whether identifiable or unidentifiable -- were from the steering wheel or the stick shift (T619-20).

Associate medical examiner Robert Davis performed an autopsy on James Newton (T627). The cause of death was multiple stab wounds; the main fatal wound was to the neck (T628,638,640-41,647-49). There were four stab wounds to the left side of the back, one in the chest and abdominal area, one near the left ear, and some superficial cuts (characterized as defensive wounds) to the hands (T630,634-37). There were some abrasions, which could have been caused by a fist (T636-37). The stab wounds, according to Dr. Davis, were consistent with the knife obtained from the Bobcat automobile (T641-42).

The fatal neck wound went through a major artery and the jugular vein, and struck the vertebral column (T639,649). The angles of the wound indicated that the knife may have been twisted or the

victim may have moved (T638-39). According to Dr. Davis, the neck wound would have caused unconsciousness quickly, within two to five minutes, and would have caused death within five to ten minutes (T640,649).

Dr. Davis testified that James Newton (who was 5'9" and 188 pounds) had a blood alcohol level of .18 and a vitreous alcohol level of .21 (T627,644-45,648-49). These, according to Dr. Davis, are "significantly elevated levels" (T645-46). He concluded "that this particular individual was drinking in excess of two hours prior to the time of his demise. He may well have been drinking for a greater number of hours" (T645-46). Dr. Davis testified that while Newton still would have been able to experience pain, his capacity to feel pain would have been diminished (T646).

Detective Kenneth Kanoski arrested appellant on the morning of October 14, 1991. When he asked him if he was Troy Merck, appellant said no and gave a different name. Kanoski did not recall the name he gave, but the first name was something like James (T655-56). Kanoski described appellant as about 5'7" with a slender build. He did not recall seeing any scratches, bruises, or cuts on him (T657).

On cross, Kanoski testified that on the morning after the stabbing a composite of the suspect was made and a BOLO was issued. The description of the suspect was gleaned from Katherine Sullivan and other witnesses (T659-61).

Deputy sheriff Thomas Nestor, the lead detective on this case, developed information that the possible driver of the Bobcat was

Neil Thomas. A photopack was shown to Katherine Sullivan, who picked out Thomas as the driver (T665-68, R1177). [On cross, Detective Nestor acknowledged that Ms. Sullivan did not see which of the two men got into the driver's seat. Neither she nor any other witness at the scene could say that Neil Thomas was driving the vehicle, or could describe the driver (T680-82)].

Detective Nestor searched the Bobcat pursuant to a warrant. The search was photographed and videotaped. Items were obtained from the vehicle by Nestor and logged by Detective Charles Vaughn (T670-71,683,688). The articles seized included the pink oxford shirt and the knife (T671).

Nestor subsequently participated in arresting appellant. When he asked him his name, appellant said he was Doug Mathis (T672-73).

On cross, Detective Nestor stated that he interviewed Katherine Sullivan on the morning after the stabbing. He knew that she was his primary eyewitness, and he took a detailed, verbatim statement from her. Ms. Sullivan never said anything about the second individual saying anything like "Nice catch, Troy", or calling the other person by name. She didn't even mention anything like "Throw me the keys" or "Nice catch." Nestor testified that it would have been very significant if Ms. Sullivan had mentioned a name (even if she was not exactly sure what the name was), and he would have included it in his report (T677-80).

Katherine Sullivan was the only witness who gave a physical description of the stabbing suspect, so the composite and the BOLO were based solely on her statements (T682). Nestor agreed that

after talking with Ms. Sullivan, the investigators locked in to appellant as being the stabber and Neil Thomas as being the driver, and the BOLO was put out to that effect (T682-83). When Thomas was picked up, he was handcuffed and placed in the front of Nestor's unmarked police car. After he gave his story, he was released to his relatives. Nestor testified that he did not believe there was probable cause to arrest him even as an accessory after the fact (T691-93).

During the search of the Bobcat, Detective Nestor examined everything that might have evidentiary value for either the prosecution or the defense. However, he testified that it is not necessary to actually take everything into custody; "[t]here are a lot of items in there that had no evidentiary value, that were not retrieved from the vehicle that are left in the vehicle." Such items would be released whenever the vehicle was picked up by the registered owner (T684-86). Nestor was the one who made the decision what was important or not; "If I didn't collect it, then it wasn't in evidence" (T686-88).

Don Ward was one of the group of friends at the City Lights nightclub. He had had at least six to eight beers when he left the bar shortly after closing time (T712-13). [At trial he said he had been "somewhat intoxicated", though he had told Detective Kanoski he was "highly intoxicated" (T712,718-19)]. In the parking lot, Ward was standing on the passenger side of Katherine Sullivan's car "horsing around" with Glen. He did not recall exactly what they

were doing. Jim Newton (whom Ward had just met that night) was standing on the driver's side of the car talking to Katherine, who was sitting in the driver's seat (T714-15,719). Ward was not paying attention that what was going on around him (T718). He heard some shuffling of feet and saw a man jump over the fender of the hood and run up to Jim Newton. He grabbed Jim and hit him six to eight times in the midsection. Jim fell over the hood, and blood was coming from his mouth (T715). Ward heard no words between them, except that the man said happy birthday as he approached Jim (T715,717). Ward told the police that the assailant was a white male about 5'8 (T716).

Richard Holton was sitting in his Jeep in the parking lot of City Lights reading a book, while waiting to pick up his girlfriend from work (T720-21). He had not been drinking (T721,728). He saw Katherine Sullivan sitting in her car talking with a man who was standing outside the driver's door. They were about 25 feet away from where Holton was parked. Another man, who was standing in a group of three, walked around to a small red hatchback car, unbuttoning his shirt. He patted the roof of the car and said "Give me the keys." One of the other two guys threw him the keys, and he caught them (T721-23). [Holton did not hear anyone say anything like "Good catch" or "Good catch, Troy" (T729)]. The man unlocked the door, threw his shirt on the backseat floor, and reached around like he was looking for something. As he walked back toward Ms. Sullivan's car, he said "I'll show the jerk how to bleed." He approached the man standing by the door and began hitting him with

both fists, starting at the waist and working his way up to the head. The man who was getting hit looked confused and was not putting up a defense. Red spots started appearing on his shirt (T723-24). The person who had been hitting him walked back to the red car, and told one of the two guys standing there to get in the car (T724-25).

According to Holton, the driver was taller and skinner than the person who did the stabbing (T725). Holton could not identify either man (T729). He had picked two photographs out of a photopack, and he was pretty sure it was one of the two, but it turned out not to be (T729).

Holton testified on cross that Katherine Sullivan remained seated in her car while the stabbing was taking place. She got out of her car at the same time Holton got out of his Jeep, which was after the stabbing occurred (T730).

Neil Thomas testified that he met appellant in September 1991 and they became friends (T733). They traveled to appellant's hometown of Sylva, North Carolina, and spent a couple of weeks drinking and partying, and also looking for work (T734,777-78). Through appellant, Thomas met Roberta Shuler (Connor), who became his girlfriend (T734-35). In October, Thomas and appellant decided to go back to Florida to pick up some of Thomas' clothes (T735,778-79). Thomas drove the car, a Mercury Bobcat. He testified that appellant did not know how to drive, and only took the wheel one time (T735-36, 780).

They arrived in Pinellas County around October 10, and went to

Thomas' grandmother's house to pick up the clothes. Then they went to the beach. A girl came by handing out free drink passes for the City Lights nightclub, and Thomas and appellant decided to go there that night (T736,780).

They drove around looking for a motel near the nightclub, so they would not be on the road much after drinking. They ended up taking a room at the Evers Motel, and got ready to go out (T736-37,781). They went to City Lights. Thomas testified that he was driving and he kept the keys. They arrived at about 10:30 and stayed until closing at 2:00 a.m. (T739-40). They drank, played darts, shot pool, and had a "slight incident" with a waitress (T739-40,789-90). Thomas (who is 5'10" and weighs 180 pounds) had about six beers and two or three shots of liquor (T738-40,785-86). He testified that he was "buzzed pretty good" (T740). According to Thomas, appellant drank about the same amount; "I know he had a bunch of drinks. He had six beers and a couple of shots, wasn't any more than three" (T740,787). Thomas remembered appellant drinking double shots of Tequila (T787). He testified that he did not notice appellant having any trouble speaking, walking, or standing, but he acknowledged having stated in a deposition that both he and appellant were fairly drunk (T741,787-89).

[Thomas testified that he was wearing a black, baggy long-sleeved shirt (State Exhibit 15). He thought he had on a pair of jeans. His trouser size at the time was 34 or 36 (T738,767-68,776-77,781-83). He testified that appellant was wearing a pink long-sleeved shirt (St. Exh. 38)(T738,767). He initially said he didn't

remember the pants appellant was wearing (T738), but later identified State Exhibit 21 as looking like the pants appellant had on (T767). Thomas acknowledged that he had stated in a deposition a month before trial that he did not remember what appellant was wearing. It was after that that he started trying to remember things and it came back to him (T783-85)].

When they left the bar, Thomas resumed his conversation with a girl whom he had been trying to persuade to participate in the fake orgasm contest (T741-42,795). Thomas was leaning on a blue Camaro, and appellant was sitting on the trunk. A man came up and got the girl, and they walked away. At that point, a female voice from inside the Camaro said "Get off the car" (T742-44,796). Thomas ignored her, while appellant got off the car and apologized with a cocky attitude (T743). Thomas then heard a male voice saying "Why don't you do what the girl said" (T743). Thomas said "You sound like a real pussy"; the man answered back "Yeah, I'm a real pussy"; and Thomas replied "That's what a pussy would say" (T743-45,796-97). Thomas was positive that it was himself, not appellant, who was the verbal aggressor and who was trying to provoke Jim Newton (T796-98). When Newton said "Yes, I'm a pussy", he said it to Thomas, not appellant (T797).

Thomas began walking to his car. He noticed that Appellant was unbuttoning his shirt as he walked toward the Bobcat, going "Pussy. Pussy. I'll show you a pussy" (T744). Appellant got in the passenger side of the car, threw his shirt in, and started fumbling around inside the car (T745-46). Thomas did not remember

throwing him the keys, and he did not recall saying anything like "Good catch" or "Good catch, Troy" (T798-99). He testified that he was not really paying attention and was not all that interested in what was going on (T799). However, he turned and looked at the man he'd been talking to and said "You need to haul ass, because this guy here, he's pretty serious. You're gonna get messed up. You need to get in your car and leave" (T745). The man just stood there with his arms crossed (T745).

According to Thomas, appellant walked to the front of the Camaro and began punching the man with both hands. Thomas only saw him hit him in the face a few times; the car roof was blocking his view below that (T746-47). He did not recall anything being said while this was going on or immediately before (T747). Toward the end of it, Thomas saw appellant grab the man's hair and pull down. As appellant was walking away, the man was bent over the hood of the car, and the back of his shirt was shining as if it were wet (T747-48). Appellant said "Come on. Let's go." Thomas got in the driver's side, and appellant got in the passenger side. They pulled out of the parking lot and drove away (T749-51).

In the car -- it having dawned on him what happened -- Thomas asked appellant if he stabbed the guy. Appellant held up a knife[2] which had blood on it and said "I fuckin' killed him." He added "If I didn't kill him, I'll go get him in the hospital and finish what I started" (T751,799). He asked Thomas "Do you believe I'm

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[2] Thomas identified State Exhibit 22 as appellant's knife (T768,705).

crazy?", and Thomas said he did. Appellant said "1437 Glenview Road, Palm Harbor, 34683, that's your grandmother's address. If you tell on me I'll kill your grandmother" (T751-52).[3] He started "hooting and hollering" about how he'd stabbed the guy, and he described it to Thomas (T752).

They drove to an apartment complex. Thomas testified "[M]y mind shifted into evasion" (T752-53). They both changed their clothes and Thomas took the tag off the car and threw it in the back. A patrol car saw them and started to turn around. They ran and hid in some bushes; then walked to a Burger King across the highway and called a taxi. The cab dropped them off at a bowling alley by their hotel. They played a game of pool and then returned to their room (T753-54). Appellant kept describing over and over what he'd done, "like it was a lunch room fight at school and he was in a locker room telling the boys" (T754).

The next morning they took a taxi back to where they had left the car, and found that it was gone (T755). They took a bus to the Clearwater Mall, where they called Roberta and Rebecca in North Carolina. Appellant told them he had beaten up a guy real bad, and he wanted to know if there were any police around asking questions. While they were on the phone, the State Bureau of Investigation showed up at Roberta's house wanting to know if she'd heard from appellant. She told them no, and then returned to the phone conversation (T755-56). At Thomas' request, the girls wired them 80

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[3] Thomas testified that appellant had learned his grandmother's address and zip code from Thomas' ID (T779).

dollars (T756-57,766).

From there, Thomas and appellant went to another motel, the New Ranch, and rented a room. Thomas made some more calls to the girls in North Carolina to find out whether they'd heard anything, and to ask them to come down to Florida (T757,759,801). Appellant was now acting paranoid (T758). Thomas asked him why he did what he did, and his answer, according to Thomas:

> Actually was two different reasons. One of them he said somebody was breaking bad with his dog and that he didn't want anybody messing with his dog. Dog being me. That was like a road dog, is what you call your friend.

(T758)

The second reason was the way the guy was looking at him. When he threw his shirt in the car, he was just going to beat the guy up, but then he saw the knife and said "Well, screw it." He still wasn't sure if he was going to do it, "but the guy was just standing there with his arms crossed like you're not gonna do nothing, like he was tempting him." It was then, according to Thomas, that appellant decided to kill him (T758-59).

Roberta and Rebecca hitchhiked to Florida and met Thomas and appellant at Howard Johnson's (where they were now staying) (T759-60,801). After their arrival, they went to buy some food, and also bought two steak knives (T760-61). In the room, appellant once again repeatedly described the stabbing incident in detail (T760). Thomas was tired of it and did not like hearing it, but he testified that there was "only one time that I really wanted to hear the story again." He wanted appellant to tell the story in front of

Rebecca and Roberta (T800). Thomas testified "[O]nce he had said it in front of the girls what he done, and that he done it, that was my cue to leave" (T761). He explained:

> [U]p to that point nobody would know that I hadn't known that he had stabbed the man until we left the parking lot. And I didn't think anybody would believe me. Once he told the girls that yes, I didn't know that he stabbed him until after we'd left, that's when I learned that. And the fact that once he had the steak knife I was in fear.

(T761)

Thomas acknowledged that he had had earlier opportunities to leave appellant, but had chosen not to (R799-800).

Thomas called his grandmother, told her he was in trouble, and arranged to meet her at a convenience store (T762). While he was in his grandmother's car, police officers ordered him out at gun-point, handcuffed him, put him in an officer's car, and asked him where appellant was (T763,802-03). Thomas first told them he was out on Highway 60 somewhere. Detective Nestor said "If there is a time to cooperate it's right now", and Thomas then told him appellant was at the Howard Johnson's (T763). Thomas testified that he was very concerned about his contact with the police, because he felt that nobody would believe him (T764). However, the officers made it clear to him that "they had a pretty good idea what had happened", and they wanted to know his side of the story (T803). Thomas was never arrested or charged with anything in connection with this incident (T802,804).

Thomas testified on direct that he has been convicted of crimes eight times, and has four additional convictions of crimes

involving dishonesty.

B. Trial-Defense Case

Appellant, Troy Merck, testified that he was filling out job applications in his hometown in North Carolina, when his friend Neil Thomas persuaded him to come to Florida. It would be their last chance to do some "serious partying" (T814). They drove to Florida in the Mercury Bobcat (T814-15). Neil did most of the driving because appellant had trouble driving a stick shift, but appellant drove some (T818,855).[4]

Appellant identified State Exhibit 22 as the hunting knife which his brother had given him. The knife belonged to appellant, but Neil Thomas used it several times. On the day the stabbing occurred, Neil was using it to trim wire to hook up a scanner (R815-16,854).

When they arrived in Florida on October 9, they went to Neil's grandmother's house to pick up some clothes (T816).[5] That night they went to a Clearwater nightclub called M.L. Chaser's, and drank quite a bit. Appellant woke up the next morning in Polk County (T816-18). They returned to Clearwater Beach. On the beach a girl was handing out cards advertising City Lights nightclub and they

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[4] Appellant testified that he would be more likely to drive when drunk; driving sober made him nervous (T911-12).

[5] Appellant testified that he knew what street Neil's grandmother lived on, but not the address or zip code (T816,859-60).

decided to go that night. Because they didn't want to be driving drunk all over town, they found a motel close to the bar and got ready to go out (T819-20).

According to appellant, Neil Thomas was wearing tan-colored pants and either a blue or pink shirt. Appellant asked Neil if he could borrow his black shirt, but when he went to the car to get it, it smelled real bad of beer from when Neil wore it the night before. Therefore, neither Neil nor appellant wore the black shirt to City Lights (T821,857-59). Appellant wore gray pants (St. Exh. 21) and a pink shirt (St. Exh. 38) (T856-57). When they first got to the bar, appellant had on Neil's leather jacket. Appellant had the keys to the car all that night (T822-23).

Appellant (who was 19 years old at the time) is 5'8" and 144 pounds, with a size 28 to 30 waist (T825,1321). During the time he was in the bar, he had between a twelve-pack and a case of beer; most likely about 15 beers. Every time he would drink a shot of liquor, he would have a couple of beers in between. In addition to the beer, he had maybe eight to ten shots of alcohol. He had two Jack Daniels, two Jim Beams, and one Buttery Nipple. Late in the evening on the "last dollar shot special" he got four Tequilas at one time and chugged them in a row. On the way out the door at closing time, the doorman told him he couldn't take his beer outside, so he chugged that too (T823-25,860-64).

Appellant remembered going out to the parking lot. Neil was talking to a girl about the fake orgasm contest, and trying to get her to go home with him. Appellant remembered a white car, and

also a gold car somewhere. He was leaning upon a car; "I guess [it] was the blue Camaro." Somebody rolled down the window and a guy asked him to get off the car. Appellant said "Yeah, yeah. All right. No problem." He saw a girl leaning out the car window, and he walked toward the driver door of her car. The keys to the Bobcat were in his hand. Meantime, Neil was facing somebody on the other side of the car, with his hands on the fender. Appellant heard Neil say something like "This guy is a pussy", and the guy said something back (T825-29,865). At that point, appellant reached down to pick something up. He didn't remember what it was; it might have been the keys or a shot glass. He did not remember standing back up (T829,866).

The next thing he remembered he was lying against the hood of their car and Neil was hollering at him that they had to change clothes. His recollection was hazy and dreamlike. Neil was throwing clothes out the back of the car. Then Neil spotted a police car and started running, and appellant took off behind him. He did not remember where they ran to (T829-30,839,867). He recalled lying down near a Hardee's, and there were some bushes, and Neil leaving for a few minutes. He remembered getting out of a taxi by a bowling alley. "And I remember going in and shooting pool. But I don't remember Neil being there, could have been. But I don't remember seeing him. And then I guess we left, because the next thing was when I woke up the next morning" (T840).

Appellant testified that this was not the first time he had blacked out from drinking (T830). He also testified that there was

a period in his life when he was hit in the head nearly every week (T839).[6]

Appellant woke up in the motel room with a hangover. He went to get a toothbrush out of the car, but the car was not there. When he asked Neil where it was, Neil replied "Don't you know?" When Neil told him they left it, appellant thought maybe they had wrecked it or ran out of gas. Neil said "Don't you remember about last night?", and when appellant said no, Neil told him they had gotten into a fight at the bar and had to leave in a hurry (T840-42). After appellant took a shower, Neil began recounting the details of the stabbing to him (T842). Afterwards they took a cab to where Neil said they had left the car. Appellant waited on a bench, while Neil went to retrieve his wallet (which he said he had buried) and to see if the car was there. Neil returned after an hour and said the car was gone (T843-44).

They went to the Clearwater Mall, where Neil made three phone calls to Roberta in North Carolina. She wired some money to them. Neil and appellant rented a room at another motel (the New Ranch). Appellant called his family, and was told that he was wanted for a serious crime. He was worried and paranoid. They talked to the girls on the phone some more.

Roberta and Rebecca and another girl, Sandra Ledford, came down to Florida and joined Neil and appellant at their motel. (By

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[6] The trial court allowed appellant to state that he had been hit in the head, but excluded testimony that the person who hit him was his mother; despite defense counsel's protest that unless the circumstances were explained to the jury they might think he was getting in fights every week (T830-38).

now they had moved on to a third motel). Appellant told them that evidently he had killed somebody the other night at the bar. They just said "Okay", and that day they just talked about their misadventures on the road (T846-49). The next day, though, they wanted appellant to tell them all about what had happened. Appellant said "[W]hy don't I tell you what Neil told me", and he went through it for them. But he couldn't remember everything Neil had said; he would ask him and Neil would help him out or correct him a little bit (T849-51).

Appellant testified that he had six prior felony convictions (T811). He admitted that he gave a false name when he was arrested for the charged offense (T852).

The next two witnesses, Roberta Connor and Rebecca Shuler, are sisters from appellant's hometown of Sylva, North Carolina. At the time of these events, Rebecca was appellant's girlfriend and Roberta had become romantically involved with Neil Thomas (T913-14,924-25,927,966). [Both relationships had ended by the time of the trial (T914,972)]. Several days after Neil and appellant left for Florida, the girls received a phone call from Neil. He said they had gotten into some trouble and needed some money. Appellant got on the phone briefly, and said that he had hurt somebody bad. At one point while they were on the phone, the police came to the house. Roberta did not tell them where appellant and Neil were. The girls wired the money and decided to come down to Florida (T916-18,927-28,966,974-75). They brought along another girl, Sandra Ledford. They got a ride with a man, but when he made

unwanted sexual overtures they got out and hitchhiked the rest of the way (T918-19,928,967-68,975-76).

They met up with Neil and appellant at the New Ranch Motel and then switched to the Howard Johnson's, trying to avoid the police (T919-21,928-29,968-69,976). There, in the room, they heard about what had happened. Roberta testified:

> . . . Troy's a boastful person. He tries to act big and act macho. So, he would get up in the motel room and jump around saying this trying to reenact what happened. And at some point in time, as Neil would say, "No, Troy, that's not how you did it." He would then proceed to go over to Troy and show Troy like the position he was standing, or the type of movement, his hand making, anything.
>
> And even when they were talking about it, Troy would say something, and Neil said -- Neil would say, "That's not what you said. You said it this way."
>
> **Q.** Now, would Troy act?
>
> **A.** Like a like, a kid in school watching the teacher. He was just like eager to know. Like bewildered, disbelief.
>
> **Q.** Who was doing most of the talking, actually was telling most of the story?
>
> **A.** Neil was to me.

(T922)

Her sister Rebecca testified:

> It started out, Troy was just jumping across and jumping from one point in the room to another point in the room saying that he got that guy like in a headlock, or something like that. And then he would pause. And then Neil would break in and just say, yeah, you know, you cut him. And, you know, stabbed him, or whatever.
>
> And Neil made the remark it sounded like a knife going through canvas. I think that's exactly the word he used. When he would say

> that, Troy looked at him like disbelieve, like, "I'm not sure if I did that or not." But he believed Neil, and like whatever Neil said he did. And I think he actually believed that he done that.

(T969-70)

According to Rebecca, appellant couldn't always complete his sentences when he was telling what was going on, and Neil was the one who always said that "You stabbed him" or "You cut him" (T970). Appellant never fully remembered anything (T970).

Roberta asked Neil what happened to the tag.[7] Neil told her they took it off the car and threw it in the backseat with their clothes because their clothes had blood on them (T923). Neil told Roberta that appellant had threatened his grandmother (R938,941). According to Rebecca, appellant told the girls that if they told on him he would take the closest thing to them (T978). Roberta remembered such a statement being made, but wasn't sure whether it was appellant or Neil who said it (T937-41).

Roberta testified that she had been around appellant quite a few times when he got drunk. He would often black out or pass out (T914-15). This would happen more often when he drank liquor, but she had also seen it happen with beer.

Through video technician Christine Codere, the defense introduced the videotape of the search of the Mercury Bobcat (T984-87, 992,1004-08). At one point on the tape, a scanner was found and Detective Nestor said "We now have the driver for a felony" (T1001-

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[7] The tag belonged to Roberta's car; she had loaned it to them (T915-16).

02).[8]

Sergeant Wally Colcord, property supervisor for the Sheriff's Office, testified that his records of the items taken in the search of the Mercury Bobcat did not include a pair of tan or khaki dress pants (T1028-34). The decision as to what items are turned in to the property evidence section is made by the investigating officers (T1035).

C. Trial-Rebuttal

Sandra Ledford, who traveled to Florida with Roberta Connor and Rebecca Shuler, testified that while they were all in the Howard Johnson's motel room, appellant told what happened at the bar:

> He said that him and a guy got, got into it. That guy was running his mouth. I can't remember which, either the guy hit him or punched him. And he stabbed him.
>
> **Q.** Who stabbed who?
>
> **A.** Troy stabbed the guy.

(T1046)

According to Sandra, Neil Thomas was not taking part in the recounting of the incident, and appellant never said he couldn't recall what happened (T1047). However, appellant told the story in bits and pieces and was "just kind of spaced out" (R1050).

The state recalled Detective Nestor, who reiterated that in

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[8] Defense counsel pointed out to the judge that the state believed that Neil Thomas was the driver, yet he was not charged with anything (T1002).

the execution of the search warrant on the Bobcat he did not place every item into property. Items were not taken into evidence "if [they] had no evidentiary value" (T1053-53, 1055-56). Among the items he did not retain was a pair of khaki trousers (T1054,1058-59). Detective Nestor checked these pants visually for blood stains, and he did not see any (T1058). He did not send them to the FBI to be examined (T1058).

On cross, Detective Nestor stated that he was the person who took a statement from Katherine Sullivan on the night the stabbing took place (T1058):

> **MR. ZINOBER [Defense counsel]:** What color pants did Katherine Sullivan say that the individual that did the stabbing was wearing that night?
>
> **DETECTIVE NESTOR:** She said they were khaki style pants.
>
> **Q.** And you pulled those khaki style pants out of the rear of the Bobcat, didn't you?
>
> **A.** No, sir, khaki style pants, no.
>
> **Q.** You pulled --
>
> **A.** They were khaki type pair of pants, but there were no blood stains on those pants.
>
> **Q.** I didn't ask you about that. Did you pull a pair of khaki colored pants out of the rear of that vehicle?
>
> **A.** They were baggy khaki colored style pants, yes.
>
> **Q.** And Katherine Sullivan told you that night that the stabber was wearing khaki colored pants; isn't that true?
>
> **A.** That's correct.
>
> **Q.** And you lost those pants, didn't you?

A. No, I left those pants with the vehicle.

Q. But they're lost now for to us forever?

A. Yes, sir.

(T1058-59)

D. Penalty Phase

The state introduced judgments and sentences showing appellant had previously been convicted on pleas of guilty or nolo contendere of five armed robberies -- three in Lake County, one in Marion County, and one in Pasco County (T1298-1301,1360; R2034-37, 2051). These all occurred between March 15-23, 1989 (R2130). The state also put on the live testimony of three of the convenience store clerks, each of whom stated that he or she was robbed at knifepoint by a young white male with dirty blond hair (T1257-60,1262-65,1277-80). The clerk in the Pasco County case identified appellant (T1265). A Lake County police officer testified that he interviewed appellant and another juvenile suspect, and appellant admitted that they had done the three robberies there (T1268-69, 1275-76).

The state called Fawn Chastain, who testified that on January 8, 1986 she was working at a laundromat in Sylva, North Carolina. Appellant, who was 14 years old at the time, was one of a group of kids who would come in to play video games (1282-83). Around 9:00 p.m., when there were still two customers in the store, Ms. Chastain locked up for the evening. Appellant wanted to come in, but she wouldn't let him because she thought he just wanted to play

games, and this would make her later than she already was (T1283). After the two customers left, while Ms. Chastain was cleaning up, she heard a window or something rattling. She was going to check it out, but she changed her mind and went back to work. Then she saw appellant standing inside the laundromat. She told him to get out. As she started to close the door behind him, he stepped back in. She said "I thought I told you to get out of here." At that point, Ms. Chastain testified, "he stuck the rifle in my face and pulled the trigger" (T1283-85;1287).

The next thing she remembered was coming to on the floor. She reached up and locked the door, pushed the alarm button, and called an operator for assistance. She was getting dizzy and laid back down on the floor, where she remained until the police arrived (T1285-86). She identified appellant as the person who shot her (T1287-88).

Ms. Chastain was shot in the left cheek (T1285). She testified "I had to have a lot of dental work, orthodontic, ended up with my jaw broken. Was told there is part of the bullet -- all of the bullet" (T1287).

Agent Charles Hess of the North Carolina State Bureau of Investigation was called to investigate the shooting at Ted's laundromat in the town of Sylva. Hess found and photographed several pools and trails of blood inside the laundromat (T1289-91). The victim, Fawn Chastain, had been transferred to a hospital in Nashville, Tennessee, in very serious condition (T1290,1294). Hess later interviewed her and she identified appellant as her assailant

(T1293). Appellant lived within 200 yards of the laundromat, in "a trailer park located in what is called a subsidized park section of Sylva" (T1295). Hess arrested appellant for the shooting (T1294).

The prosecution moved to introduce the judgment and sentence for the North Carolina case, and two other adjudications from that state (T1301-04, R2048-50). Defense counsel said "Judge, these look to me like juvenile convictions", and the prosecutor agreed that that was true (T1304-05). Defense counsel objected to the state's use of juvenile adjudications to support an aggravating factor, and the trial judge agreed with the defense that a juvenile adjudication is not a criminal conviction under Florida law (T1305-07). She ruled the North Carolina adjudications inadmissible, but denied appellant's motion for mistrial based on the jury's having heard Fawn Chastain's testimony (T1306-11,1350-51). When defense counsel asked for a curative instruction, the judge replied "I can't think of any way to cure that one" (T1308).[9] See Issue II, infra.

After the state rested, the defense called a Department of Corrections official who testified that (under then-applicable Florida law) a sentence of life imprisonment meant the defendant would serve at least 25 years before even being considered for parole, and there was no guarantee of parole even then (T1317-18).

Appellant's sisters, Stacey France and Roberta Crow, testified

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[9] The trial judge was subsequently persuaded by the state (see R2527-35,2545,2552-54,2565) that the juvenile adjudication could be considered as "a proper aggravating factor under F.S. 921.141(5)(b)", and she found it in her order sentencing appellant to death (R2130-31).

that appellant was an unwanted child.[10] His mother denied being pregnant, and tried unsuccessfully to abort the pregnancy with medications and, on one occasion, by drinking turpentine (T1321, 1325-26). Nobody in the family was sure who appellant's father was, and there was no father present in the home when he was a child (T1326). His mother showed no love for him, or for any of them. According to Roberta Crow, she treated appellant "like she resented him for being there, because she lost Hubert [Merck], the one she married because Troy didn't belong to him. And he left her on account of that reason" (T1326-27). [Hubert could not have been the father, because he was in Vietnam when appellant was conceived (T1327)]. Stacey France testified that appellant was constantly being hit by his mother for as long as he lived there; it was never merely a "very good whipping, it was always a beating." "She would get him down on the floor and stumped on his back or chest, chest, in his head. And she beat him a lot with a belt. And she beat him with a broomstick, and anything that she could pick up that was near" (T1321-22). Roberta Crow stated that when their mother got mad "she went kind of berserk" and would hit appellant in the head, or anywhere on his body that was reachable (T1327). She attacked her other children in the same manner (T1327).

Stacey testified that appellant was born with heavy eyelids -- one worse than the other -- and this condition caused the other children to make fun of him at school (T1322). Stacey had never

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[10] Appellant chose not to be present in the courtroom during his sisters' testimony, because it would upset him too much to hear it (T1244-45,1311-14,1319).

seen appellant drunk, but Roberta had seen him drinking on several occasions, and she described him as "out of control" (T1322,1327). When appellant was a baby, the man who was living with them said he gave him alcohol to drink (T1328). Both sisters asked the jury to spare appellant's life (T1323,1328).

A presentence investigation was ordered by the trial judge after receiving the jury's recommendation but prior to sentencing (R2249A to I, see T1383-84). It states that appellant was born January 9, 1972. He has never been employed except for occasional "odd jobs", never served in the military, never been married nor fathered any children, and the highest grade he completed in school was the eighth grade (R2249 F,G,H). Appellant's biological father left his mother during her pregnancy, and appellant has never had any contact with him (R2249 G). As a young child appellant suffered from significant physical problems, including pneumonia, bronchitis, asthma, and allergies (R2249 H). At age 8 he was placed in a self-contained classroom for emotionally disturbed children. At age 10 he was sent to a children's home due to increased truancy and general disobedience. At age 11 he was placed in the Smoky Mountain Mental Health Center, and then placed in Jackson County's program for exceptional children "for assistance with his learning disability as well as his disobedience" (R2249 F,G). In January, 1986 (when he had just turned fourteen, apparently just after the shooting of Fawn Chastain) appellant was admitted to the North Carolina mental health, mental retardation and substance abuse services program (R2249 H).

SUMMARY OF THE ARGUMENT

The trial court erred in sentencing appellant to death. Appellant's age of nineteen should have been found and weighed in mitigation. This is especially true in light of the record evidence that he was a particularly immature nineteen year old, with a history of childhood abuse, emotional disturbance, learning disability, and physical illness. He had never been employed, never served in the military, never been married or fathered any children. He has a eighth grade education. Equally significant is the fact that he was intoxicated at the time of the stabbing, which occurred in the parking lot of a bar at closing time, even though he was too young to legally buy or be served a drink. [Issue I-A]

The trial court also erred in finding and instructing the jury on the "especially heinous, atrocious, or cruel" aggravator, where the evidence showed that the assault on the victim occurred suddenly; unconsciousness and death would have occurred in a matter of minutes; and -- most importantly -- both appellant and the victim were intoxicated. The medical examiner testified that the victim had a "significantly elevated" blood alcohol level, and while he would still have been able to experience pain, his capacity to do so would have been diminished. [Issue I-B].[11]

The sentence of death is disproportionate. Only a single valid aggravating factor exists, but even assuming arguendo that

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[11] In addition, the new standard jury instruction on HAC, given over objection, is unconstitutionally vague and overbroad [Issue V].

this Court upholds the second aggravator [HAC], death remains a disproportionate penalty under the totality of the circumstances of this case. The death penalty is reserved in this state for only the most aggravated and least mitigated of first degree murders. This case involves a stabbing in a nightclub parking lot at closing time, while the defendant, the victim, and a number of the witnesses were intoxicated. Appellant was nineteen years old -- too young to legally be served a drink -- and he has a physical intolerance for alcohol. His childhood was marked by rejection and physical and psychological abuse. He has a history -- documented in the PSI -- of health problems, emotional disturbance, and learning disability. The killing, while found to be premeditated, was done upon reflection (if it can be called that) of very short duration. [Issue I-C].

Appellant's death sentence is also invalid because the jury heard and the trial court expressly considered highly prejudicial testimony which did not relate to any statutory aggravating circumstance. The shooting of Fawn Chastain, which occurred in North Carolina when appellant was fourteen, resulted in an adjudication of juvenile delinquency rather than a criminal conviction. The "prior violent felony" aggravating factor requires proof of a conviction, and under both Florida and North Carolina law (statutes and caselaw) a juvenile adjudication is <u>not</u> a conviction, and may not be utilized as such. The error was extremely prejudicial, because of the emotional impact of Ms. Chastain's live testimony, and because (although there were other

felonies involving the threat of violence) this was the only prior incident in which someone was physically harmed [Issue II].

In the guilt phase, the trial court erroneously denied appellant's motion for mistrial when the lead detective, in violation of the court's order in limine, mentioned the fact that there had been a prior trial in this case. [Issue III].

Appellant's conviction must be vacated as a result of the detective's bad faith failure to preserve potentially useful evidence, which amounted to a violation of due process [Issue IV].

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE.

A. Appellant's Age (Nineteen) Should Have Been Found and Weighed in Mitigation

Appellant was nineteen years old at the time of the offense. The evidence at trial and the information in the PSI indicate that he was a very immature and impulsive nineteen year old, and that he had experienced physical and emotional abuse throughout his childhood. While the jury did not accept the defense that he was too intoxicated to form specific intent, the evidence clearly showed that he was substantially under the influence of alcohol at the time of the stabbing (even though he was too young to be legally served a drink).[12] See Fla. Stat. §§ 562.11; 562.111; 768.125; and the Rules of the City Lites Nightclub (R1199). The trial court erred in refusing to find or weigh appellant's age as a statutory mitigating circumstance (R2133).

Capital defendants older than appellant have frequently been afforded the benefit of this mitigating circumstance. See e.g. Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994) (twenty); Derrick v. State, 641 So. 2d 378, 379 (Fla. 1994) (twenty); Cannady v. State, 427 So. 2d 723, 731 (Fla. 1983) (twenty-one); Watts v. State, 593 So. 2d 198, 204 (Fla. 1992) (twenty-two); Freeman v.

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[12] The evidence regarding the extent of appellant's alcohol consumption is discussed in Part C (Proportionality).

State, 547 So. 2d 125, 129 (Fla. 1989) (twenty-two); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985) (twenty-three); Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988) (twenty-four).

Prior to Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993), the prevailing law was that "[t]here is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing." Peek v. State, 396 So. 2d 492, 498 (Fla. 1981); Mills v. State, 476 So. 2d 172, 179 (Fla. 1985). See Scull v. State, supra, 533 So. 2d at 1143 (sentencing court may find, or may decline to find, age as a mitigating factor in cases where defendant is twenty to twenty-five years old at time of commission of offense). However, in Ellis the Court wrote:

> . . . [O]n the question of young age as a mitigating factor, we are gravely troubled by inconsistencies in Florida cases involving minors who commit murder. In such cases some courts find young age a mitigating factor and others reject the factor outright, as the court did here, based on the same or highly similar facts.

The Court determined the proper approach to be:

> Whenever a murder is committed by one who at the time was a minor, the mitigating factor of age must be found and weighed, 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.

The Ellis Court also noted that the trial court may not use a finding of "unusual maturity" to reduce the weight accorded to the mitigating factor of age unless the record contains evidence to

support the finding of unusual maturity. 622 So. 2d at 1001.

The Ellis opinion refers to "minors" without specifying whether it means less than eighteen or less than twenty-one. By Florida statute, the age of majority for most purposes has been lowered from the traditional 21 to 18. Fla. Stat. S 743.07(1). Significantly, an express exception is made for the law governing the sale and consumption of alcoholic beverages. §743.07(1). The prosecutor in this case argued to the jury "He's old enough to vote. Old enough to go to war for our country. Old enough to pay taxes" (T1363). More to the point, however, given the circumstances of this case, he was not old enough to drink. In Prevatt v. McClennan, 201 So. 2d 780 (Fla. 2d DCA 1967), the plaintiff was injured by a gunshot during a fight between two underage drinkers in the defendant's tavern. Holding the defendant liable, the appellate court observed:

> Here, the statute forbidding the sale of liquor to minors was violated, and constitutes negligence per se; the statute that makes it a crime to sell intoxicants to minors was doubtless passed to prevent the harm that can come or be caused by one of immaturity by imbibing such liquors. The very atmosphere surrounding the sale should make it foreseeable to any person that trouble for someone was in the making.

In Migliore v. Crown Liquors of Broward, Inc., 448 So. 2d 978, 979-80 (Fla. 1984), this Court quoted the above passage with approval, and agreed with the holding and rationale of the Second District in Prevatt. See also Davis v. Shiappacossee, 155 So. 2d 365, 367 (Fla. 1963); Barnes v. B.K. Credit Service, Inc., 461 So. 2d 217, 219-20 (Fla. 1st DCA 1985).

The "legislature intended that youth and its potential characteristics be considered as a factor by the jury and the sentencing judge in determining whether a youthful defendant should be subject to the death penalty." LeCroy v. State, 533 So. 2d 750, 758 (Fla. 1988). The legislature has also consistently recognized that it is characteristic of people under twenty-one that they lack the maturity to drink in moderation, or to control their behavior while under the influence of alcohol.[13] The likelihood of harm or injury when a young person drinks is so foreseeable that it is the sale -- not the consumption -- which (in the civil context) is considered the proximate cause of the injury. Migliore; Prevatt. Obviously, this does not absolve appellant of criminal responsibility for his actions.[14] But, especially under the circumstances of this case, he was entitled to have his age found and weighed as a mitigating circumstance.

It is appellant's position that, consistent with the rationale of Ellis, appellant's age of nineteen is a valid mitigating factor as a matter of law. However, even assuming arguendo that Ellis

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[13] Fla. Stat § 562.111 (prohibiting possession of alcoholic beverages by persons under 21); § 768.125 (liability for injury or damage caused by furnishing alcoholic beverages to a person not of lawful drinking age); § 743.07 (exempting Beverage Law from provision otherwise lowering age of majority from 21 to 18).

[14] For purposes of the penalty issues in this appeal (I and II), undersigned counsel will assume arguendo, without conceding, that it was appellant rather than Neil Thomas who committed the offense.

applies only to sixteen and seventeen year olds,[15] and that Scull v. State, supra, allows the trial court more leeway in cases involving 20-24 year olds, then appellant's age of nineteen falls into the gray area. Arguably, the trial judge could refuse to find or weigh the mitigating factor if the record revealed that the defendant, notwithstanding his youthful age, was unusually mature. In the instant case, however, the record shows just the opposite.

The pre-sentence investigation ordered by the trial judge prior to sentencing (R2249 A to I, see T1383-84)[16] states that appellant was born January 9, 1972. He is listed as 5'7" and 125 pounds [R2249B].[17] He has never been employed except for occasional "odd jobs", never served in the military, never been married nor fathered any children, and the highest grade he completed in school was the eighth grade (R2249 F,G,H). Appellant's biological father left his mother during her pregnancy, and appellant has never had any contact with him (R2249 G). As a young child appellant suffered from significant physical problems, including pneumonia, bronchitis, asthma, and allergies (R2249 H). At age 8 he was placed in a self-contained classroom for emotionally disturbed children. At age 10 he was sent to a children's home due to

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[15] The Florida Constitution prohibits the death penalty for defendants who were under the age of sixteen at the time of the offense. Allen v. State, 636 So. 2d 494 (Fla. 1994).

[16] Information contained in a PSI may properly be considered in capital sentencing. Engle v. State, 438 So. 2d 803, 813 (Fla. 1983); Bedford v. State, 589 So. 2d 245, 253 n.4 (Fla. 1991); Farr v. State, 621 So. 2d 1368 (Fla. 1993).

[17] At trial he testified that he is 5'8", 144 pounds, with a size 28 to 30 waist (T825). Either way, he is small for his age.

increased truancy and general disobedience. At age 11 he was placed in the Smoky Mountain Mental Health Center, and then placed in Jackson County's program for exceptional children "for assistance with his learning disability as well as his disobedience" (R2249 F,G). In January, 1986 (when he had just turned fourteen, apparently just after the shooting of Fawn Chastain) appellant was admitted to the North Carolina mental health, mental retardation and substance abuse services program (R2249 H).

The PSI also states that "the defendant was found to be well oriented and rather talkative. The defendant admitted to past suicide attempts, but denied any active thoughts of suicide. The defendant obtained an IQ of 92. The defendant was characterized as being immature, hyperactive, impulsive, moody, stubborn, disobedient and displaying frequent temper outbursts. He was further classified as having psychopath features. The defendant was found to be self centered and having no regret for his misbehavior" (R2249 H). The probation officer, in recommending that appellant be put to death, mentions his violent and boastful nature, his lack of remorse, and states "The defendant displays an attitude of an extremely immature nature" (R2249 H,I).

The picture which emerges is that of an emotionally disturbed and extremely immature adolescent whose impulsivity and propensity for violence were exacerbated by excessive drinking. The very senselessness of the stabbing, and the absurdity of the liquor-soaked "motives" [he didn't want anybody messing with his "road dog" Neil; he was just going to beat the guy up, but he was stand-

ing there with his arms crossed "like you're not gonna do nothing, like he was tempting him" (T758-59)], show the same thing. Rebecca, Roberta, and Neil -- none of whom seem to be of sterling character themselves -- all paint a picture of appellant as someone whose overriding goal in life is to appear "macho", to be a big man.

Therefore, even assuming arguendo that a showing of "unusual maturity" on the part of a teenage defendant might serve as a basis for outright rejection of the age mitigator, the record in the instant case shows extreme immaturity. The trial court's stated reason for rejecting the mitigator was 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 [to] be considered 'of tender years'" (R2133). However, neither contact with the justice system nor awareness of the consequences of one's actions is the correct standard for the applicability of the age mitigating factor. Cf. Morgan v. State, 639 So. 2d 6, 13-14 (Fla. 1994); Ferguson v. State, 417 So. 2d 631, 638 (Fla. 1982). Appellant's prior record was already used to establish the "prior violent felony" aggravator and to negate the "no significant criminal history" mitigator. It does not negate his youth and immaturity. Under the circumstances of this case, the trial court's failure to find and weigh in mitigation appellant's age of nineteen violated the Eighth Amendment's requirements of individualized sentencing and reliability. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Parker v. Dugger, 498 U.S. 308 (1991). To ensure

fairness and consistency, this Court must conduct a meaningful independent review and cannot ignore evidence of mitigating circumstances. Parker, 498 U.S. at 321.

The trial court's error in failing to find and weigh the age mitigator cannot be dismissed as "harmless". The death sentence is disproportionate in this case, and the "especially heinous, atrocious, or cruel" aggravating factor was not established by the evidence. Even assuming arguendo that this Court concludes that the HAC aggravator was properly found, the state cannot show beyond a reasonable doubt that the trial court's failure to weigh the age mitigator did not affect her weighing process or her ultimate decision. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977). This is not a case with so much in aggravation and so little in mitigation that a weighing error could not have affected the result. To the contrary, it is apparent that the trial judge saw it as a close call on penalty. In a pre-trial hearing she urged both sides to consider a negotiated plea:

> . . . State versus Merck. It would seem to me, folks, that there should be some serious discussion on this case. I think the State should explain that to the family -- if that's the problem -- that you don't get the chair on a second-degree.
>
> And I think the Defense needs to revisit a plea straight-up to life, because this is one you're going to be tossing the dice on.

(R2447)

While it is true that (after the first jury was unable to reach a verdict), the second jury found appellant guilty of first

degree -- not second degree -- murder, it is also true that the killing, although found to be premeditated, was upon reflection of very short duration [see Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)] and under the influence of alcohol [Ross; Fead v. State, 512 So. 2d 176 (Fla. 1987)]. As the judge (expressing her initial uncertainty whether to even instruct the jury on HAC) recognized, the entire attack occurred suddenly, and over a very short period of time (T1341-42, 1355; R2131).

The legislature intended that the death penalty be reserved for only the most aggravated and least mitigated of first degree murders. State v. Dixon, 283 So. 2d 1, 7-8 (Fla. 1973); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); Songer v. State, 544 So. 2d 1010 (Fla. 1989). This is not such a case. Appellant's death sentence should be reduced to life imprisonment. In the alternative and at the least, the death sentence should be vacated and the case remanded to the trial court for resentencing.

B. The Judge Should Not Have Found or Instructed the Jury on the "Especially Heinous, Atrocious, or Cruel" Aggravating Factor, in View of the Suddenness of the Assault and the Intoxication of Both Appellant and the Victim.

In cases when the cause of death was multiple stab wounds, this Court has usually,[18] but not always,[19] upheld findings of the

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[18] See Atwater v. State, 626 So. 2d 1325, 1329 (Fla. 1993)(and cases cited therein); Davis v. State, __So. 2d __ (Fla. 1994) (case no. 80,972, opinion filed November 10, 1994).

[19] See Demps v. State, 395 So. 2d 501 (Fla. 1981); Brown v. State, __So. 2d __ (Fla. 1994) [19 FLW S261].

"especially heinous, atrocious, or cruel" aggravating factor. In the instant case, the evidence established a swift, unprovoked attack, in the parking lot of a nightclub at closing time, by an intoxicated defendant upon an intoxicated victim. These circumstances show that the killing, while senseless, was not "set apart from the norm of capital felonies" so as to warrant a finding that the crime was especially heinous, atrocious, or cruel. See Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989); Demps v. State, 395 So. 2d 501 (Fla. 1981); Green v. State, 641 So. 2d 391, 395-96 (Fla. 1994).

The trial judge was initially unsure whether the evidence even warranted a jury instruction on HAC, because of the suddenness and short duration of the attack (T1341-42). Although she ultimately decided to give the instruction anyway (T1355), she again noted in her sentencing order that "[t]he entire incident occurred quickly" (R2131). See Santos v. State, 591 So. 2d 160, 163 (Fla. 1991). The medical examiner testified that the fatal wound to the neck would have caused unconsciousness within two to five minutes, and death within five to ten minutes (T640,649). He further testified that the victim, James Newton, had a blood alcohol level of .18 and a vitreous alcohol level of .21 (T627,644-45,648-49). These, according to Dr. Davis, are "significantly elevated levels" (T645-46). He concluded that "this particular individual was drinking in excess of two hours prior to the time of his demise. He may well

have been drinking for a greater number of hours" (T645-46). Dr. Davis testified that while Newton still would have been able to experience pain, his capacity to feel pain would have been diminished (T646). See Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989); Herzog v. State, 439 So. 2d 1372, 1380 (Fla. 1983).

This case not only involves an intoxicated victim, but also an intoxicated defendant. In her sentencing order the trial court, while observing that the evidence was in conflict over how much alcohol appellant consumed, found his use of alcohol on the night of the crime to be a mitigating factor (R2133-34). She also noted the evidence that he has a physical intolerance for alcohol (R2133). Since a defendant's intent to inflict physical or mental torture is an important factor in establishing HAC [see e.g. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991)], appellant's intoxication -- like that of the victim -- strongly tends to negate the aggravator, or at least to create a reasonable doubt as to its existence.[20]

How intoxicated was appellant? Taking the evidence in the light most favorable to the state, Neil Thomas (a state witness) testified that he [Neil] had had about six beers and two or three shots of liquor, and appellant had about the same amount (T738-40, 785-87). According to Thomas, "I know he had a bunch of drinks. He had six beers and a couple of shots, wasn't any more than three"

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[20] An aggravating circumstance may not be weighed in imposing a death sentence unless it is proven beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Peavy v. State, 442 So. 2d 200, 202 (Fla. 1973); Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

(T740,787). Thomas remembered appellant drinking double shots of Tequila (T787). Thomas weighs 180 pounds, as compared to appellant's 144 (T738,825). Thomas stated in a deposition that both he and appellant were fairly drunk (T741,787-89). At trial he testified that he [Neil] was "buzzed pretty good" (T740). Therefore, even if we can assume that appellant didn't have any more drinks than what his drinking companion saw,[21] we know that Neil was fairly drunk, and we know that appellant's blood alcohol level must have been substantially higher than Neil's, due to his much lesser body weight.

The evidence also established that appellant and Neil had come to Florida thinking it would be their last chance to do some "serious partying" (T814). After they decided to go to City Lights, they found a motel room close to the bar to reduce the risk of getting picked up for DUI (T736-37,819). They arrived at the nightclub at 10:30 p.m. and stayed until closing at 2:00 a.m. (T739-40). There is every indication that appellant and his friend Neil went to the bar with the intention of getting drunk, and that they accomplished their purpose. Maybe appellant had as many beers and shots of liquor as he said he did (approximately 23-25), or maybe he had as few as Neil said he saw (about nine), or maybe it was

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[21] For example, Neil remembered appellant drinking double shots of Tequila. Appellant testified that late in the evening on the "last dollar shot special" he got four Tequilas at one time and chugged them (T824, 862-63). It would be unreasonable to assume that Neil was in appellant's presence the entire time they were in the bar, or that he was counting his drinks. More likely Neil spent at least some of his time scoping out the women (see T741,790,819,826-27).

somewhere in between. In any event, it is apparent that he -- like Neil (T740-41,787-89), Jim Newton (T627,644-49), Don Ward and Glen Sharpenstein (T430-31, 457, 712, 718-19) -- was intoxicated when the stabbing took place. [Consider, for example, that Don Ward -- whose hand was rolled up in the car window while Glen was putting lit cigarettes in it as a joke -- and whose condition was "very drunk" (according to Katherine Sullivan) or "highly intoxicated" (as Ward himself told Detective Kanoski) -- was drinking beer only, and had consumed just 6-8 of them (T430-31,457,712,718-19). Even if one completely disregards appellant's testimony and instead goes strictly by Neil Thomas's count, appellant had more to drink than Ward, and appellant was mixing his drinks. Moreover, as the trial judge noted in her sentencing order, appellant has a physical intolerance for alcohol (T2133)].

Because of the suddenness and short duration of the attack and the intoxicated condition of both appellant and the victim, it cannot be concluded that this crime was so set apart from the norm of capital felonies as to render it especially heinous, atrocious, or cruel within the meaning of the aggravating factor.[22] See Demps;

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[22] One additional point should be made. The trial judge in her sentencing order stated that the wound to the neck (which was the fatal wound) was consistent with the blade having been twisted, and that appellant had made statements to Neil Thomas to the effect that he had done that deliberately (R2132). This particular detail was strenuously argued by the prosecution in overcoming the judge's initial uncertainty whether to instruct on HAC (T1366-37); in its closing statement to the jury (T1367-68); and in its sentencing memorandum and argument (R2139-40,2147,2556,2559-60). Even if it had been proven that this occurred, it would not be enough to establish HAC under the totality of the circumstances set forth in this Point on Appeal. However, the evidence introduced at trial does not even support the factual finding. The medical examiner (continued)

Rhodes; Santos; Brown; Green. Since only one aggravating factor remains, and since there is substantial mitigation (including childhood abuse and parental rejection; intoxication; youth and immaturity; and a history of emotional disturbance as detailed in the PSI), the death sentence is disproportionate, and appellant's sentence should be reduced to life imprisonment.[23] See e.g. DeAngelo v. State, 616 So. 2d 440, 443-44 (Fla. 1993); White v. State, 616 So. 2d 21, 26 (Fla. 1993) (this Court has rarely affirmed death sentences supported by only one aggravating factor, and then only when there was very little or nothing in mitigation).

C. **The Death Sentence is Disproportionate**

Only a single valid aggravating circumstance exists,[24] and the death sentence is proportionally unwarranted. However, even if this Court upholds the second aggravator, death remains a disproportionate penalty under the totality of the circumstances of this

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(continued) testified that the angle of the wound was such that the knife might have been twisted or the victim might have moved (T638-39). His observations were "consistent with either one of those" possibilities (T639). Neil Thomas' testimony was not that appellant told him he'd twisted the knife; only that he looked the victim in the eye, stabbed him right through with the knife, and pulled it out (T752).

[23] In the alternative and at the least, the death sentence should be vacated and the case remanded to the trial court for resentencing before a new jury.

[24] Even this aggravator, prior violent felony convictions, is tainted by the introduction before the jury and the consideration by the trial court of the incident in which Fawn Chastain was shot and wounded. This resulted in a juvenile adjudication rather than a criminal conviction; therefore, it was neither admissible evidence nor proper aggravation under Fla.Stat §921.141(5)(b). See Issue II, infra.

case. See Kramer v. State, 619 So. 2d 274, 277-78 (Fla. 1993). The death penalty is reserved in this state for only the most aggravated and least mitigated of first degree murders. Fitzpatrick; Songer. This case involves a stabbing in a nightclub parking lot at closing time, while the defendant, the victim, and a number of the witnesses were intoxicated. Appellant was nineteen years old -- too young to legally be served a drink -- and he has a physical intolerance for alcohol (See R2133). His childhood was marked by rejection and physical and psychological abuse (T1321-22,1325-28, 830-39). He has a history -- documented in the PSI -- of health problems, emotional disturbance, and learning disabilities (R2249F, G,H). The killing, while found to be premeditated, was done upon reflection (if it can be called that) of very short duration, and under the influence of alcohol.

See e.g. Kramer v. State, 619 So. 2d 274, 277-78 (Fla. 1993); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985).

Appellant's death sentence should be reduced to life imprisonment.

ISSUE II

APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE THE JURY HEARD AND THE TRIAL COURT EXPRESSLY CONSIDERED HIGHLY PREJUDICIAL TESTIMONY WHICH DID NOT RELATE TO ANY STATUTORY AGGRAVATING CIRCUMSTANCE.

A. The North Carolina Shooting Incident, Which Resulted in a Juvenile Adjudication Rather than a Criminal Conviction, was Improperly Introduced and Considered in Aggravation

Aggravating factors are strictly limited to those enumerated by the Legislature. Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976). When a trial judge goes "beyond the proper use of statutory aggravating circumstances in his sentencing findings . . . the sentence of death cannot stand." Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985). Similarly, the introduction before the jury of evidence which does not properly relate to any statutory aggravating circumstance taints the jury's penalty recommendation. Trawick, 473 So. 2d at 1240-41; see Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990).[25]

In the instant case, the prosecution introduced evidence concerning a shooting incident which occurred when appellant was fourteen. Fawn Chastain testified that appellant came into the laun-

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[25] Other cases in which the introduction of improper evidence in aggravation has resulted in reversal for resentencing before a new jury include Colina v. State, 570 So. 2d 929 (Fla. 1990); Hill v. State, 549 So. 2d 179 (Fla. 1989); Dragovich v. State, 492 So. 2d 350 (Fla. 1986); Long v. State, 529 So. 2d 286 (Fla. 1988); Robinson v. State, 487 So. 2d 1040 (Fla. 1986); and Dougan v. State, 470 So. 2d 697 (Fla. 1985).

dromat where she was working and shot her in the face after she told him to leave (T1282-88).[26] She was taken to the hospital in very serious condition (T1290,1294, testimony of Agent Hess). Ms. Chastain told the jury "I had to have a lot of dental work, orthodontic, ended up with my jaw broken. Was told there is part of the bullet -- all of the bullet" (T1287).

The prosecution moved to introduce the judgment and sentence for the North Carolina case, and two other adjudications from that state (T1301-04, R2048-2050). Defense counsel said, "Judge, these look to me like juvenile convictions", and the prosecutor acknowledged that that was true (T1304-05). Defense counsel objected to the state's use of juvenile adjudications to support an aggravating factor, and the trial judge agreed with the defense that a juvenile adjudication is not a criminal conviction under Florida law (T1305-07). She ruled the North Carolina adjudications inadmissible, but denied appellant's motion for mistrial based on the jury's having heard Fawn Chastain's testimony (T1306-11,1350-51). When defense counsel asked for a curative instruction, the judge replied "I can't think of any way to cure that one" (T1308).

The jury returned a death recommendation. Subsequently, in its sentencing memorandum and in its argument to the trial judge, the state reasserted its contention that the juvenile adjudication could be considered in aggravation (R2141-43,2524-45,2552-54). While the prosecutor asserted that there were "absolutely no cases

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[26] Ms. Chastain's narrative of the incident, and the testimony of North Carolina State Bureau of Investigation Agent Charles Hess, are set forth in the of Statement of the Facts.

on point" (R2532, see R2525,2534), he called the court's attention to Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990) (R2142-43, 2524-25,2544). The judge, pointing out that the language in Campbell was ambiguous, said she would not rely on it (R2524-25, 2544-45). Defense counsel responded that a juvenile adjudication is not a "conviction" as needed to establish the statutory aggravator (R2526,2537-39,2543-44); that therefore the state was improperly relying on nonstatutory aggravation (R2543-45,2573-75); and that penal statutes must be strictly construed (R2538,2544).

The prosecutor also argued that, although the defense objected to the introduction of the juvenile adjudication when the state submitted it, it had waived the issue by failing to move in limine to preclude Fawn Chastain's testimony. The trial judge rejected the state's contention on this point, saying "I truly thought at that time that the child had been certified. And I don't know whether the defense thought it, but I know they were surprised. That's my gut reaction that this was a juvenile. I don't think there was any strategy of luring the state into a position" (R2533-34).

The judge reserved ruling on the merits (R2545). Prior to sentencing, the defense called the court's attention to Jones v. State, 440 So. 2d 570, 578-79 (Fla. 1983), characterizing the trial judge's reference to the defendant's juvenile record as nonstatutory aggravation (R2573-75). Nevertheless, the trial judge ruled in favor of the state. In her sentencing order, the trial court found that appellant was convicted of five convenience store robberies which occurred on March 15, 22, and 23, 1989 (R2130). The judge

wrote:

> 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.

The judge proceeded to find that:

> [i]n 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).

(R2130-31).

The trial court erred twice. First, when it became apparent that the shooting described by Fawn Chastain resulted only in a juvenile adjudication, it was not sufficient merely to preclude the introduction of the documents. The jury had heard highly prejudicial live testimony concerning the only prior act which resulted in physical injury to the victim. Once it was clear that this testimony did not relate to any statutory aggravating factor, the jury's consideration of penalty was irreparably tainted [see Trawick; Trotter], and the only effective remedy was a mistrial. As the trial court said when she declined to give a curative instruction, "I can't think of any way to cure that one" (T1308). The court's

second error occurred when -- after excluding the documents relating to the juvenile adjudication -- she reversed her field and expressly found the adjudication of delinquency to be "a proper aggravating factor under F.S. 921.141(5)(b)" (R2131).

Penal statutes, including statutory aggravating factors, "must be strictly construed in favor of the one against whom a penalty is to be imposed." Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990) (reversing for resentencing before a new jury, where trial judge and jury erroneously considered in aggravation the defendant's violation of community control).[27] The aggravating factor at issue here provides:

> (5) Aggravating circumstances shall be limited to the following:
>
> * * *
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The statutory language is clear and unambiguous. In addition, however, caselaw also makes it clear that a conviction for the violent felony is a prerequisite for the admission of evidence to establish this aggravating factor. In Odom v. State, 403 So. 2d 936, 942 (Fla. 1981) this Court wrote:

> The trial judge's written sentencing findings state that he considered appellant's prior record, including numerous arrests and charges which did not culminate in criminal convictions. This court has held that aggravating

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[27] The Trotter decision arose prior to the amendment of Fla. Stat. §921.141(5)(a), which now expressly includes community control within the "under sentence of imprisonment" aggravator.

> considerations must be limited to those provided for by the statute, and information must relate to one of the statutory aggravating circumstances in order to be considered in aggravation. Evidence of past criminality, offered by the state for the purpose of aggravating the crime, is inadmissible unless it tends to establish one of the aggravating circumstances listed in section 921.141(5).

See also Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985); Perry v. State, 395 So. 2d 170, 174-75 (Fla. 1980).[28]

Florida Statutes §39.053(4) expressly provides that "an adjudication of delinquency by a court with respect to any child who has committed a delinquent act or violation of law shall not be deemed a conviction; nor shall the child be deemed to have been found guilty or to be a criminal by reason of that adjudication; nor shall that adjudication operate to impose upon the child any of the civil disabilities ordinarily imposed by or resulting from conviction . . . ."[29]

In State v. Cain, 381 So. 2d 1361, 1363 (Fla. 1980), this Court stated that, while there is no common law right to be treated

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[28] Contrast Walton v. State, 547 So. 2d 622, 625 (Fla. 1989), holding that a conviction is not required to rebut a defendant's claim of the "no significant history of prior criminal activity" mitigator. "Once a defendant claims that this mitigating circumstance is applicable, the state may rebut this claim with direct evidence of criminal activity." 547 So. 2d at 625. See also Quince v. State, 414 So. 2d 185, 188 (Fla. 1982). In the instant case, appellant never claimed this mitigator; instead the evidence of the North Carolina shooting was submitted to the jury and considered by the trial court as an aggravating circumstance. Hence, it was inadmissible and improper. Odom.

[29] The exceptions set forth in the statute to the rule that a juvenile adjudication cannot be treated as a conviction -- motor vehicle licensing (chapter 322) and subsequent juvenile proceedings under chapter 39 -- are not applicable here.

as a juvenile delinquent instead of a criminal offender:

> Under our Florida Constitution, when authorized by law, a "child" as therein defined may be charged with a violation of law as an act of delinquency instead of a crime. Art. I, 15(b), Fla.Const. Therefore, a child has the right to be treated as a juvenile delinquent only to the extent provided by our legislature.

See also Johnson v. State, 314 So. 2d 573, 576 (Fla. 1975) ("[w]hen authorized by law, a child in Florida may be charged with a violation of law as an act of delinquency instead of a criminal act"; In Interest of Hutchins, 345 So. 2d 703 (Fla. 1977) (although Florida Juvenile law, Chapter 39, is not a penal statute a child may be found delinquent under its provisions and committed until age 21); C.L.S. v. State, 586 So. 2d 1173, 1177 n.9 (Fla. 4th DCA 1991) [". . . a Chapter 39 proceeding does not lead to an order 'adjudicating guilt'. The order entered under Chapter 39 is properly termed 'an adjudication of delinquency'. §39.053(4), Fla.Stat. (Supp. 1990)"]; D.R.W. v. State, 262 So. 2d 701 (Fla. 3d DCA 1972) (judgment of delinquency is not a conviction of a criminal offense).

Among the many decisions which, in various contexts, have recognized that an adjudication of delinquency is not a conviction, and may not be used as such, are Gahley v. State, 605 So. 2d 1309 (Fla. 1st DCA 1982) (habitual offender sentencing); Shook v. State, 603 So. 2d 617 (Fla. 1st DCA 1992) (same); In Interest of W.B., 428 So. 2d 309, 312 n.6 (Fla. 4th DCA 1983) (Rule 3.850); Love v. State, 396 So. 2d 801 (Fla. 3d DCA 1981) (speedy trial rule); In

Interest of I.S.H., 344 So. 2d 1295 (Fla. 4th DCA 1977) (impeachment of witnesses); Jackson v. State, 336 So. 2d 633, 635 (Fla. 4th DCA 1976) (same); M.W.B. v. State, 335 So. 2d 10 (Fla. 1st DCA 1976) (mandatory minimum prison sentences).[30]

Since the juvenile adjudication in the instant case was from North Carolina, it could be argued that the law of that state should apply. Section §7A-638, North Carolina Statutes provides:

> An adjudication that a juvenile is delinquent or commitment of a juvenile to the Division of Youth Services shall neither be considered conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights. (1979, C. 815, s. 1.)

The Supreme Court of North Carolina has specifically held that a defendant's prior adjudication as a youthful offender under the Alabama Youthful Offender Act could not be considered as a prior "felony conviction" under the North Carolina death penalty statute. State v. Beal, 319 SE 2d 557 (N.C. 1984). The North Carolina aggravating circumstance at issue was almost identical to Florida's:

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[30] In Hadley v. State, 546 So. 2d 769 (Fla. 3d DCA 1989), the appellate court held that juvenile delinquency adjudications could be considered for purposes of the sentencing guidelines. The court noted that §39.10(4) (now numbered 39.053(4), as revised) provides that an adjudication of delinquency is not a conviction, but also noted that Fla.R.Cr.P. 3.701(d)(5)(c) (adopted by the Legislature in 1984) states that juvenile dispositions which are the equivalent of criminal convictions, if committed within three years of the primary offense, shall be scored under prior record. The court resolved the conflict by applying the rule of construction that "where statutory provisions cannot be reconciled . . . the latest expression of legislature will be held to prevail."

In the capital sentencing context, there is no conflict. The (5)(b) aggravating factor requires a felony conviction [see Odom] and does not expressly or implicitly authorize the use of a juvenile "equivalent." Therefore §39.053(4) -- which plainly prohibits such use -- controls.

G.S. 15A - 2000(e)

Aggravating Circumstances.--Aggravating circumstances which may be considered shall be limited to the following:

* * *

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

Alabama Code §15-19-7(a) -- like the equivalent Florida and North Carolina statutes -- provides that an adjudication as a youthful offender shall not be deemed a conviction of a crime, and "[t]he Alabama courts have consistently held that a determination that the accused is a youthful offender is not a conviction. [Citations omitted]." Beal, 319 SE 2d at 562. Therefore, the North Carolina Supreme Court held "that the trial court committed prejudicial error by allowing the jury to consider defendant's prior youthful offender adjudication as a prior felony conviction." Id, at 563.

In his successful effort to persuade the trial court that the juvenile adjudication could properly be considered in aggravation, the prosecutor cited Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990)(R2142-43,2524-25,2544). The judge stated that the language in Campbell was ambiguous and she would not rely on it (R2524-25, 2544-45). That decision summarily rejects one of Campbell's contentions as follows:

> Campbell claims that the [trial] 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.

The ambiguity -- as the trial judge in the instant case recognized -- comes from the juxtaposition of "juvenile" with "conviction".[31] You can't tell on the face of the opinion whether Campbell's prior was an adjudication of delinquency, or whether he was a juvenile whose case was transferred to the circuit court for prosecution as an adult. Logically, if it had been a juvenile adjudication, it does not seem reasonable that Campbell's appellate counsel would have cited no authority in support of the position that such an adjudication cannot be treated as a "conviction", since so much authority -- statutory and caselaw -- exists. In point of fact, Campbell's prior conviction was an adult conviction.[32] Therefore, the Campbell opinion does not stand for the proposition, contrary to §39.053(4) and the caselaw discussing it,

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[31] The judge said "[T]he trick is you use precisely the language that you should not use, which is juvenile conviction. See, therein lies the problem. We think of them as juvenile convictions and they my be perceived as juvenile convictions" (R2544-45).

[32] Appellant is filing, concurrently with this brief, a Motion to Take Judicial Notice of the sentencing order in Campbell, and the Judgment in case number CT CR 83-238 in the Circuit Court of the Tenth Judicial Circuit in and for Hardee County, showing that Campbell pled nolo contendere to battery on a law enforcement officer as charged in the information and was sentenced to five years probation. This Court can take judicial notice of its own records (the sentencing order is part of the record on appeal in Campbell v. State, case no. 72,622) and those of lower courts within its jurisdiction. Fla.Stat. §90.202(6); Allstate Ins. Co. v. Greyhound Rent-a-Car, Inc., 586 So. 2d 482 (Fla. 4th DCA 1991); Glendale Fed. S.L. v. State Dept. of Ins., 485 So. 2d 1321, 1323 n.1 (Fla. 1st DCA 1986); Gulf Coast Home Health Svcs. v. H.R.S. Dept., 503 So. 2d 415 (Fla. 1st DCA 1987); see also ITT Rayonier Inc. v. U.S., 651 F.2d 343 (5th Cir. 1981).

that an adjudication of delinquency may be treated as a prior conviction.

B. The Error was Harmful and Requires Reversal for Resentencing Before a New Jury

The introduction before the jury, and the consideration by the trial judge, of evidence which does not properly relate to any statutory aggravating factor taints both the jury's recommendation and the sentence. Trawick; Trotter; Long; Dougan. Here, the state cannot meet its burden of showing beyond a reasonable doubt that the erroneous admission and consideration of the evidence as to the shooting of Fawn Chastain could not have affected the jury's recommendation or the sentence imposed by the court. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). There was substantial mitigating evidence in this case, including appellant's age of nineteen; the abuse and rejection he encountered throughout his childhood; his history of emotional disturbance, physical illness, and learning disability;[33] and his intoxication at the time of the offense. In Long v. State, 529 So. 2d 286, 293 (Fla. 1988), the state introduced evidence of a prior conviction for a Pasco County murder. The Pasco conviction was valid when introduced, but was subsequently reversed on appeal, thereby eliminating its proper use as an aggravating factor. 529 So. 2d at 293. This Court held that the elimination of the Pasco conviction required reversal for resentencing before a new jury. Even though there were other

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[33] This history was not presented to the jury, but was included in the PSI (R2249 F,G,H).

convictions of violent felonies presented during the penalty phase, the Pasco case was the only murder conviction. This court said "[W]e find we are unable to say there is no reasonable probability that the elimination of this factor would change the weighing process of either the jury or the judge, particularly in view of the mitigating circumstances." 529 So. 2d at 293. It should also be noted that, aside from the prior convictions, there were three other aggravating factors (HAC, CCP, and kidnapping) found by the trial court in Long, as compared to only one (HAC) in the instant case. The jury's death recommendation in Long was 11-1, while in the instant case it was 9-3.

While the state also introduced evidence of five convenience store robberies committed with a knife, these all occurred during a nine day period in March, 1989, and four of the five occurred on March 22nd and 23rd. More importantly, as the trial judge stated in her sentencing order "no one was injured in any of the five robberies", although each storekeeper was threatened (R2130). Therefore, while the shooting of Fawn Chastain was not the only prior offense, it was the only incident where someone was physically harmed. See Long. Moreover, the jury heard the live testimony of both the victim of the shooting and the investigating officer. Ms. Chastain described how appellant came into the laundromat after closing and, when told to leave, "stuck the rifle in my face and pulled the trigger" (T1285). Agent Hess stated that the victim was transferred to a Nashville hospital in very serious condition (T1290,1294). Ms. Chastain told the jury "I had to have a lot of

dental work, orthodontic, ended up with my jaw broken. Was told there is part of the bullet -- all of the bullet" (T1287).

In Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1984), this Court wrote:

> Although this Court has approved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial [citations omitted], the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value.

In the instant case, the shooting of Fawn Chastain was not relevant to any statutory aggravating circumstance. See Trawick; Trotter; Odom. Therefore, its legitimate probative value was zero, while the prejudicial effect was at least substantial, and possibly enormous. The evidence of the North Carolina shooting was not cumulative of other evidence in the penalty phase [see Burr v. State, 550 So. 2d 445, 446 (Fla. 1989)], and:

> We have no way to determine the weight given each witness' testimony. As the reviewing court it is not our function to weigh the credibility of each witness, but rather, it is that of the trial judge. Nor can we determine whether the one improperly admitted instance of collateral conduct was determinative of the outcome.

Burr, at 446.

See also Long v. State, supra, 529 So.2d at 293.

In Dougan v. State, supra, 470 So. 2d at 701, evidence of a charged crime for which the defendant had not yet been convicted (and which was subsequently nolle prossed) was improperly introduced in aggravation. This Court wrote, "We cannot tell how this

improper evidence and argument may have affected the jury. We therefore vacate Dougan's sentence and remand for another complete sentencing hearing before a new jury."

Contrast Jones v. State, 440 So. 2d 570, 578-79 (Fla. 1983), in which the trial court's mention of nonstatutory aggravating factors (including the defendant's juvenile record) was characterized as "surplusage" and could not have affected the sentence imposed, where (1) there were three independent valid aggravators; (2) the judge "expressly asserted in the sentenc[ing] order that the nonstatutory aggravating circumstances were mentioned merely in addition to the already established statutory aggravating factors"; and (3) there were no mitigating circumstances. See Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977) in which this Court concluded that a death sentence predicated in part upon nonstatutory aggravating circumstances can by upheld only where there are no mitigating circumstances:

> The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is indicated by our statute. Section 921.141(2)-(b) and (3)(a), Florida Statutes. State v. Dixon, 283 So. 2d 1 (Fla. 1973), teaches that:
>
> > ". . . [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

. . . " 283 So. 2d at 10.

> If this be so, then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

346 So. 2d at 1003.

In the instant case, there was substantial mitigation, and the trial judge expressly stated in her sentencing order that appellant's adjudication of delinquency for the shooting of Fawn Chastain is "a proper aggravating factor under F.S. 921.141(5)(b)" (R2131). Moreover, the jury heard the prejudicial and irrelevant testimony concerning the details of the incident. Rhodes. The state cannot show beyond a reasonable doubt that the erroneous introduction and consideration of this evidence could not have contributed to the jury's recommendation or the ensuing death sentence. DiGuilio; Long; Dougan; Burr. Appellant's death sentence must be reversed and the case remanded for a new penalty proceeding before a new jury. Trotter; Long; Dougan.

ISSUE III

> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN DETECTIVE NESTOR, IN VIOLATION OF THE COURT'S ORDER IN LIMINE, MENTIONED THE PRIOR TRIAL.

Appellant's first trial ended in a hung jury (R1382,1386). Prior to the retrial, the defense moved in limine to prohibit any reference to the fact that the case had previously been to trial.

The court granted the motion (R1890,T29). During the second trial, in cross-examining Detective Nestor, defense counsel asked if he had seen the videotape of the execution of the search warrant on the Mercury Bobcat. Since Detective Nestor had indeed seen the tape, the responsive answer would have been "Yes." Instead, he replied "No, not recently I have not." When defense counsel tried to clarify this non-response by asking "Have you ever seen it?", Nestor replied "Back before the last trial, yes" (T688-89). Defense counsel moved for a mistrial, pointing out that the comment "violated blatantly one of the motions in limine. He said the last trial. I tried the best I could" (T689). The judge said:

> I think you did a beautiful job. And he misspoke as other people that misspoke. And I think it's as good. I'm not gonna grant a motion for mistrial. He just mentioned the other hearing.

(T689-90).

Detective Nestor's non-responsive comment which gratuitously informed the jury that there had been a prior trial was highly prejudicial. It also violated the court's order in limine. See Arsis v. State, 581 So. 2d 935 (Fla. 3d DCA 1991); Brown v. State, 472 So. 2d 475 (Fla. 2d DCA 1985). The jury may have inferred (incorrectly) that appellant was convicted before, and the conviction was -- in the popular mass media vernacular -- "reversed on a technicality." See Weber v. State, 501 So. 2d 1379 (Fla. 3d DCA 1987). Even if the jury inferred correctly that the last trial ended in a hung jury, that could have made them reluctant to let this trial end the same way. In any event, the state cannot show

that this improper knowledge had no effect on the jury's verdict.[34] The motion for mistrial should have been granted. See Jackson v. State, 545 So. 2d 260, 263 (Fla. 1989); Lawson v. State, 304 So. 2d 522, 524 (Fla. 2d DCA 1974); Weber v. State, supra, 501 So. 2d at 1380-84. Contra, Wheeler v. State, 362 So. 2d 377 (Fla. 1st DCA 1978). Appellant's conviction should be reversed for a new trial.

ISSUE IV

APPELLANT'S CONVICTION MUST BE VACATED AS A RESULT OF THE STATE'S BAD FAITH FAILURE TO PRESERVE POTENTIALLY EXCULPATORY EVIDENCE.

A. The Khaki Pants

"[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); see Kelley v. State, 569 So. 2d 754 (Fla. 1990); State v. Durkee, 584 So. 2d 1080 (Fla. 5th DCA 1991). Conversely, where bad faith has been shown, the loss or destruction of such evidence requires dismissal of the charges or (depending on the level of prejudice) suppression of the state's secondary evidence. See State v. Milo, 596 So. 2d 722 (Fla. 5th DCA 1992); Louissaint v. State, 576 So. 2d 316 (Fla. 5th DCA 1991);

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[34] The very fact that appellant's first trial resulted in a hung jury supports the conclusion that the proof of guilt was not so unchallenged or overwhelming as to render the error harmless. See Brown, 472 So. 2d at 477.

United States v. Bohl, 25 F. 3d 904 (10th Cir. 1994).

In the instant case, the state's key eyewitness, Katherine Sullivan, identified appellant as the person who did the stabbing. When she was interviewed by Detective Nestor immediately after the incident, she described him as wearing khaki colored baggy dress pants (T472). She also testified that she was sure that the person who did the stabbing was the same person who called Jim Newton a "pussy" and was trying to provoke him into a fight (T467). [The state's other key witness, Neil Thomas, testified unequivocally that it was he -- not appellant -- who was verbally provoking Newton and called him a "pussy" several times (T743-45,796-98)].

Detective Nestor testified that Katherine Sullivan was the only witness who gave a description of the suspect, so the composite and the BOLO were based solely on her statements (T682). Nestor acknowledged that after talking with Ms. Sullivan, the investigators locked in to appellant as being the stabber and Neil Thomas as being the driver, and the BOLO was put out to that effect (T682-83).

During the search of the Mercury Bobcat, Detective Nestor seized a pair of blue pants (State's Exhibit 21).[35] These were sent to FBI Agent Jack Mertens for testing. He determined that there was human blood on them, and that the DNA profile matched that of the known blood sample of the stabbing victim, James Newton (T577-80). Mertens testified that the only articles of clothing he

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[35] These pants are described in various places in the record as blue, gray, or dark (but never khaki).

tested were the blue pants, belt, and pink shirt (T581). If another pair of pants had been sent to him, he would have tested it (T582). Mertens stated that he could not tell whether the blood on the pants came directly from James Newton or whether it was transferred from another source (T583).

The prosecution contended at trial that (notwithstanding Katherine Sullivan's on scene description) the dark pants introduced into evidence as State's Exhibit 21 were the ones worn by the stabber, and that person was appellant.

Appellant testified that he was indeed wearing the dark trousers, while Neil Thomas wore tan colored pants (R821,856-57). Thomas, on the other hand, testified that he didn't remember but he thought he had on a pair of jeans (T738,781). Thomas initially said he didn't recall the pants appellant was wearing, but later said he recognized State Exhibit 21 as looking like the pants appellant had on (T738,767.783-85). Thomas, at 5'10"and 180 pounds, was two inches taller than appellant and some 36 pounds heavier; his waist size was 36 (and he could fit into nothing smaller than a 34), while appellant's waist size was 28 or 30 (T738-39,767-68,776-77,825)[36] Thomas emphatically stated that there was no way he could have fit into the dark pants (T767-68, 777).

Appellant testified that after he blacked out in the parking

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[36] Interestingly, state witness Richard Holton -- the one witness who had not been drinking -- testified that the driver of the car was taller and skinnier than the person who did the stabbing (T725).

lot, the next thing he remembered was Neil Thomas hollering at him that they had to change clothes (T829-30,839,867).

Neil Thomas testified that after the stabbing occurred they drove to an apartment complex where "my mind shifted into evasion" (T752-53). They both changed their clothes, and Thomas took the tag off the car and threw it in the back (T753).

Roberta Connor testified that when she asked Neil Thomas what happened to the tag, Thomas replied that they took it off the car and threw it in the back seat with their clothes because their clothes had blood on them (T923).

Sergeant Colcord, property supervisor for the Sheriff's Office, testified that his records of the items taken in the search of the Mercury Bobcat did not include a pair of tan or khaki dress pants (T1028-34). The decision as to what items are turned in to the property evidence section is made by the investigating officers (T1035).

Detective Nestor testified that during the search of the Mercury Bobcat, he examined everything meticulously and looked through everything that might have evidentiary value for either the prosecution or the defense. However, he testified that it is not necessary to actually take everything into custody; "[t]here are a lot of items in there that had no evidentiary value, that were not retrieved from the vehicle that are left in the vehicle." Such items would be released whenever the vehicle was picked up by the registered owner (T684-86). Nestor was the one who made the decision what was important of not; "If I didn't collect it, then

it wasn't in evidence" (T686-88).

When recalled by the state on rebuttal, Detective Nestor stated that he checked the khaki trousers visually for blood stains; he did not see any (T1054,1058-59). He did not send them to the FBI to be examined (T1058). On cross, he acknowledged that he was the person who took a statement from Katherine Sullivan on the night the stabbing occurred (T1058):

> MR. ZINOBER [defense counsel]: What color pants did Katherine Sullivan say that the individual that did the stabbing was wearing that night?
>
> DETECTIVE NESTOR: She said they were khaki style pants.
>
> Q.: And you pulled those khaki style pants out of the rear of the Bobcat, didn't you?
>
> A. No, sir, khaki style pants, no.
>
> Q. You pulled --
>
> A. They were khaki type pair of pants, but there were no blood stains on those pants.
>
> Q. I didn't ask you about that. Did you pull a pair of khaki colored pants out of the rear of that vehicle?
>
> A. They were baggy khaki colored style pants, yes.
>
> Q. And Katherine Sullivan told you that night that the stabber was wearing khaki colored pants; isn't that true?
>
> A. That's correct.
>
> Q. And you lost those pants, didn't you?
>
> A. No, I left those pants with the vehicle.
>
> Q. But they're lost now for to us for ever?

A. Yes, sir.

(T1058-59).

B. <u>The Post-Trial Motions</u>.

After the trial and penalty phase, but before sentencing, the defense filed motions for a new trial and to dismiss the indictment (R2065-68,2072-76), alleging the following facts:

(a) In the trial of this cause, held on August 31, 1993, the significant issue of the case, from the defense perspective, was the identification of the alleged assailant of the victim, James Newton.

(b) The only eyewitness to the attack on James Newton who was able to describe the attacker in any detail, whatsoever, was Katherine Sullivan, upon whom the state relied . . . to prove its case. [Although Donald Ward identified the height of the assailant as 5'8", and Richard Holton described the general size of the assailant and his accomplice, only Katherine Sullivan provided any significant identification, or was able to even attempt a photo pack or in-court identification.]. The only eyewitness to the attack on James Newton, Katherine Sullivan, described the attacker as wearing a light-colored dress shirt with rolled-up sleeves and khaki-colored baggy dress pants.

(c) Troy Merck, upon taking the stand, testified that Neil Thomas was wearing a light blue dress shirt and tan or khaki-colored pants.

(d) Roberta Connors testified that Neil Thomas had informed

her, following the assault on James Newton, that both he and Troy Merck were both covered with blood, and, thus, had to change clothes and leave the same in the Mercury Bobcat which was identified in the trial of this cause.

(e) A search warrant on the Mercury Bobcat was executed the same day as the alleged homicide. From the videotape entered in evidence as Defendant's Exhibit 1, it is clear that the khaki pants worn by Neil Thomas, as well as the light colored blue dress shirt with rolled up sleeves was removed from the rear of the vehicle.

(f) The testimony and evidence at trial demonstrated that the khaki pants and blue dress shirt were never placed into property in connection with this case.

(g) Detective Nestor, the case agent, who was both the individual who interviewed Katherine Sullivan (and took the description of the attacker as wearing khaki-colored pants and light-colored dress shirt) as well as the individual who executed the search warrant, testified that the vehicle and its contents had been released to the owner.

(h) It was established, through trial, that the owner of the vehicle was the Defendant's brother and sister-in-law, Tony and Joyce Whitmire. Thus, inasmuch as Detective Nestor suggested or testified that the contents had been released to the owner, an argument was likely precluded that the Sheriff's Department did not preserve essential evidence (inasmuch as it would have been in the hands of family members of the Defendant).

(i) Detective Nestor had, earlier in the cause, been deposed

by the Defendant's prior counsel, who had pursued a different (intoxication) defense over the Defendant's objection. By the time Defendant's present counsel obtained the case, since Detective Nestor had already been deposed, present counsel was thus precluded from retaking Detective Nestor's deposition under Fla.R.Crim.P. 3.220(h)(1). In fact, Defendant's present . . . counsel deposed the only detective who was involved in the execution of the search warrant and had not yet been deposed, Detective Charles Vaughn. Detective Vaughn who did not know what had happened to any of the evidence in the car which was not specifically logged in by him to property. [See Deposition of Charles Vaughn, filed in connection with this case]. Thus, prior to trial, and the actual confrontation of Detective Nestor on the witness stand, it was not possible to discover the whereabouts of the clothing recited above.

(j) The shirt, and particularly khaki pants, as recited above, are material evidence in the case, in that, if there was any blood at all on the pants linked to the victim, James Newton, it would tend to show that Neil Thomas was the perpetrator rather than the Defendant.

(k) A critical factor in the State's presentation of its case was the fact that the victim's blood was found on the pants belonging and identified to the Defendant.

(l) The Defendant has a reasonable expectation that the examination of the khaki pants would have uncovered evidence that the victim's blood was located thereupon based upon the fact that:

(1) Katherine Sullivan testified that the stabber was

wearing khaki pants;

(2) Troy Merck testified that Neil Thomas was wearing khaki pants;

(3) Roberta Connors testified that Neil Thomas stated that they were both covered with blood;

(4) It was Neil Thomas' idea to change clothes following the stabbing; and

(5) Agent Jack Mertens testified that he would have analyzed whatever clothing was submitted to him for the presence of the victim's blood.

(m) [Appellant's trial] counsel has learned, immediately following the trial in this case, that neither the vehicle nor the contents were returned to [Tony] or Joyce Whitmire, the Defendant's brother and sister-in-law. Rather, the Whitmires (the owners of the vehicle) apparently received a telephone call from the Sheriff's Department that they would have to pay approximately $700.00 to retrieve the car from the Sheriff's Department for towing and storage. Tony and Joyce Whitmire, however, had never requested that the car either be towed or stored, which was performed at the sole discretion and direction of the Pinellas County Sheriff's Department. [See Deposition of Detective Vaughn, in which he stated that the car was not illegally parked]. Rather the vehicle was apparently released to City Wrecker in St. Petersburg, Florida. Upon inquiry at City Wrecker, [trial] counsel was informed that, due to a change of ownership in City Wrecker, they no longer have records as to the receipt and disposition of

this vehicle. However, most likely, the vehicle would have been sold for salvage and the contents discarded.

(n) Thus, through no fault of the Defendant, material, favorable evidence has been lost or destroyed.

(o) Troy Merck's due process rights have, therefore, been impaired and the indictment against him should be dismissed.[37]

(p) (from Motion to Dismiss Indictment) The denial of due process rights are considered fundamental error. See Ray v. State, 403 So. 2d 956 (Fla. 1981); Castor v. State, 365 So. 2d 701 (Fla. 1978); Sochor v. State, 580 So. 2d 595 (Fla. 1991), and the failure to object or move this Court for a dismissal prior to or during the trial does not waive such motion at this time. See, generally, Fla.R.Crim.P. 3.190; Sochor v. State, supra.

After a hearing on October 15, 1993 (R2494-2518), the trial judge denied the defense motions, while commenting "I understand where you're coming from and its going to be an interesting question for appeal" (R2518).

C. Bad Faith Failure to Preserve Evidence.

The Youngblood standard is that failure on the part of the police to preserve potentially useful evidence violates due process only when attributable to bad faith. The requisite showing has

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[37] In the Motion for New Trial, the defense requested as alternative relief "[a]t a minimum, this Court should order a new trial, during which the state should not be allowed to enter any evidence linking the pants of Troy Merck to the alleged victim in this case" (R2069).

been made here. Detective Nestor stated that he knew from the very beginning that Katherine Sullivan was his primary eyewitness, and he took a detailed statement from her on the night the stabbing took place (and prior to the search of the suspects' automobile)(T677-78,1058-59). She told him the stabber was wearing khaki pants. Yet when he conducted the search he kept only a pair of blue or dark pants, which were subsequently sent to the FBI for testing. The pair of khaki pants which Detective Nestor found in the Bobcat were visually inspected by him, and were then left in the vehicle and ultimately lost. Nestor evidently concluded that, because he saw no visible bloodstains on them, the khaki pants had no evidentiary value (see T684-88,1052-59). However, it is obvious that what Nestor meant is that they appeared to have no evidentiary value <u>to the prosecution</u>. Assuming for the sake of argument that Nestor genuninely believed that his eyeball examination of the trousers could as accurately determine the presence or absence of blood as testing by the FBI serologist could have done, then it would follow that Nestor believed there were no bloodstains on the khaki trousers. Given the fact that his own primary eyewitness said the stabber was wearing khaki trousers, the very <u>absence</u> of blood on those trousers would be exculpatory evidence. [Note that the jury was given the standard instruction that "[a] reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence <u>or the lack of evidence</u>" (T1215)]. Absence of blood on an item of evidence, like absence of fingerprints or hairs or any other physical residue that would be reason-

ably expected to be there if the prosecution's theory were true, often has great exculpatory value.

As it turned out, the state pursued the theory -- contrary to the on-scene description given by its own key witness -- that the stabber was wearing the blue or dark trousers, but Nestor could not have anticipated that at the time. Since at trial everyone agreed that appellant was wearing the dark pants, and since the defense introduced evidence that (1) Neil Thomas was wearing tan or khaki pants; (2) it was Thomas' idea to change clothes; and (3) Thomas told Roberta Connor that there was blood on both of their clothes, then -- as it turned out -- the presence of blood on the khaki trousers would have been extremely exculpatory. It would have corroborated Ms. Sullivan's description that the stabber wore khaki trousers, and since we know that appellant was wearing a pair of dark pants (State Exhibit 21) which would not have fit Neil Thomas, that leaves Thomas as the stabber in khaki pants. Adding this to the fact that Ms. Sullivan insisted that the stabber was the same person who was taunting the victim and calling him a "pussy" (and both Thomas and appellant agreed that it was Thomas -- not appellant -- who was doing that), there would have been a more than reasonable doubt of appellant's guilt.[38]

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[38] Consider also the testimony of the state's fingerprint examiner Brommelsick that it was Thomas' palmprint -- not appellant's -- which was located on the roof of the car above the passenger side door handle [where the sober witness, Holton, said the stabber patted his hand (T723)]:

> Q. [by Mr. Zinober]: Someone went like, "Give me the keys" on the top portion of the car, right above the passenger side where the

(continued)

In his motions, defense counsel referred to the deposition of Detective Charles Vaughn, who was the inventory officer during the search of the Bobcat (R1858). According to Vaughn, "[e]verything that came out of that vehicle should have come to me to be inventoried" (R1862).

> Q. [by Mr. Zinober]: And everything that you took out of the vehicle, like you would empty it out, you would stick it in property for whatever it's worth?
>
> A. I would inventory.
>
> Q. I'm sorry?
>
> A. At some point it would go to property just to show that the property that I took has been turned into property and I'm not keeping anything of evidentiary value or otherwise of personal property personally. That's against procedure.
>
> Q. Okay. So, everything that comes out of the vehicle is at one point or another supposed to be put into evidence, right?
>
> A. Correct.
>
> Q. Can you think of any situation where

(continued)

> door handle would be, trying to get into the car, who would that have been according to your fingerprints?
>
> A. It would be Neil Thomas.

(T622)

Also noteworthy is Thomas' eagerness to hear appellant tell the story of what happened in the presence of other people who could be witnesses; "[O]nce he had said it in front of the girls what he done, and that he done it, that was my cue to leave" (T761). However, Roberta and Rebecca testified that Neil Thomas was basically feeding appellant his lines. Appellant didn't seem to remember, but he believed whatever Neil said he did; "You stabbed him" or "You cut him", etc. (T922,969-70).

somebody might take something out and not put it in evidence, at least at some point?

A. No, sir.

Q. That would be against procedure?

A. Yes, sir.

Q. It's actually kind of dangerous, isn't it?

A. Yes, sir.

(R1863-64).

For Detective Nestor -- after his primary eyewitness described the stabber as wearing khaki pants -- to have left the khaki pants in the car without ever logging them into property (much less sending them to the FBI for testing, along with the blue pants). for the purported reason that they "had no evidentiary value" (R685, 1053-54) is so outrageous as to reach the level of bad faith under the Youngblood standard. Consequently, the loss of this potentially exculpatory evidence was a due process violation. Appellant's conviction should be reversed with instructions to dismiss the charge. In the alternative and at the least, this Court should order a new trial, at which the prosecution should not be allowed to present any testimony or DNA comparison regarding bloodstains on appellant's pants.

D. Due Process and Fundamental Error

Undersigned counsel cannot argue on this record that the post-trial motions filed by defense counsel were timely, or that the facts forming the basis of the motions were not known (or could not

have been known with the exercise of due diligence) prior to or during the trial. However, since the bad faith loss or destruction of potentially useful evidence amounts to a denial of due process, Youngblood, and this Court has held that "for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process", Ray v. State, 403 So. 2d 956, 960 (Fla. 1981); Castor v. State, 356 So. 2d 701, 704 n.7 (Fla. 1978), it follows that the fundamental error doctrine applies in this case. Moreover, under the totality of the evidence in this case, the violation is sufficiently egregious as to undermine confidence in the reliability of the verdict. See Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (the significant constitutional difference between the death penalty and lesser punishments demands heightened reliability in the determination of guilt as well as in sentencing). See also Fla.R.App.P. 9.140(f) (in capital cases, this Court shall review the evidence "to determine if the interest of justice requires a new trial", whether or not insufficiency of the evidence is raised as an issue).[39]

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[39] In the event that this Court disagrees with appellant's contention that the due process violation was fundamental error, and holds that the untimeliness of the defense motions waived the issue for review, any affirmance on this point should be without prejudice to a possible claim of ineffective assistance of counsel pursuant to Fla.R.Crim.P. 3.850. However, since an ineffective assistance claim will require further evidentiary development, undersigned counsel wishes to make it clear that he is not arguing "ineffective assistance on the face of the record" (the limited exception to the rule that ineffectiveness claims are cognizable only on collateral review). See Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

ISSUE V

THE TRIAL COURT ERRED IN GIVING THE JURY AN UNCONSTITUTIONALLY VAGUE AND OVERBROAD INSTRUCTION ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR.

Prior to trial, the defense moved to declare Florida's "especially heinous, atrocious, or cruel" aggravating factor unconstitutional for vagueness and overbreadth (R753-59,2414). During the penalty phase charge conference, defense counsel objected to the new[40] standard jury instruction on HAC on the same grounds (T1341, see R2084,2163). The trial court overruled these objections and gave the standard instruction as follows:

> 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 [sic], pitiless or was unnecessarily torturous to the victim.[41]

(T1376-77; see R2056).

Appellant submits that the current standard instruction

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[40] This instruction was adopted in the wake of the U.S. Supreme Court's decision in Espinosa v. Florida, 505 U.S. 112 (1992), holding the former standard instruction unconstitutional.

[41] The typed jury instructions accurately reflect the standard instruction's language "conscienceless or pitiless and was unnecessarily torturous . . ." (R2056), while the court reporter's transcript reads "consciousless, pitiless, or was unnecessarily torturous . . ." (T1377).

remains unacceptably vague and overbroad for essentially the same reasons as the previous standard instruction which was held unconstitutional in Espinosa. [Appellant recognizes that this Court has rejected similar arguments. See e.g. Hall v. State, 614 So. 2d 473, 478 (Fla. 1993); Taylor v. State, 630 So. 2d 1038, 1043 (Fla. 1993). However, to preserve the issue for further review, he urges this Court to reconsider those holdings]. The only difference between the instruction given in this case and the one held unconstitutional in Shell v. Mississippi, 498 U.S. 1 (1990) and Atwater v. State, 626 So. 2d 1325, 1328-29 (Fla. 1993), is the last sentence. (Crime "accompanied by additional acts that show that [it] was conscienceless, pitiless or was unnecessarily torturous to the victim").[42] That sentence cures nothing. With the arguable exception of so-called "mercy killings", it is nearly impossible to conceive of a first degree murder committed with pity. And what type of first degree murder could be described as anything other than "conscienceless"? Possibly the assassination of a political figure whom the perpetrator considered evil or dangerous, or the revenge killing of someone who had grievously harmed the perpetrator's family, but that would be about it. Similarly, "unnecessarily torturous" could be interpreted by the jury as applying to virtually every murder. (What kind of killing would be "necessarily" torturous?) See Tuilaepa v. California, __U.S. __(1994) [55 CrL 2244] (aggravating factor is constitutionally infirm if it

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[42] The defective instruction in Shell also included "pitiless" within the definition of "cruel."

could reasonably be interpreted as being applicable to every death-eligible defendant). Moreover, the new standard instruction (like the old one) fails to adequately define the intent element of the HAC aggravator. See e.g. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990) (state must prove that the defendant intended to torture the victim or that the killing was meant to be extraordinarily painful).

Because the jury was given an unconstitutionally vague and overbroad instruction on a critical aggravator, and because there was significant mitigating evidence, the state cannot show beyond a reasonable doubt that the error did not affect the jury's weighing process, its penalty recommendation, or the ultimate sentencing decision. See Espinosa; State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Appellant's death sentence cannot constitutionally be carried out.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests the following relief:

Reverse his conviction and remand with instructions to dismiss the charge [Issue IV].

Reverse his conviction and remand for a new trial [Issue III] [Issue IV, alternative relief].

Reverse the death sentence and remand for imposition of a sentence of life imprisonment [Issue I].

Reverse the death sentence and remand for resentencing before a new jury [Issues II and V] [Issue I, alternative relief].

Reverse the death sentence and remand for resentencing by the trial judge [Issues I and II, alternative relief].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 16th day of December, 1994.

Respectfully submitted,

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